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PREFACE[†]

We take great pleasure in presenting this supplemental volume to the *American Journal of Comparative Law (AJCL)* containing the United States national reports to the Nineteenth International Congress of Comparative Law, to be held in Vienna, Austria, from July 20 to 26, 2014, under the auspices of the International Academy of Comparative Law. The national reports have been prepared on the topics selected by the International Academy and respond to questionnaires promulgated by the general reporters appointed for each specific topic by the International Academy.

We are pleased that we were able to enlist at least one, and sometimes two, U.S. national reporters, all experts in fields relevant to their topics, for almost all topics to be covered at the International Congress. We trust that these reports provide an interesting snapshot of U.S. law at the current time and a sound basis for comparison with other legal orders with respect to the important subjects the International Academy has chosen for study.

This 2014 Supplement marks in an especially clear way the steady growth in importance of the Internet and digitized delivery of documents. In recognition of the fact that, for better or worse, electronic delivery of these reports is far more important than hard-copy print for most of those who read and use them, this supplemental issue of the *AJCL* is being delivered only in electronic format, not in a hard-copy version. Regular subscribers to the *AJCL* will already be used to accessing the reports in this fashion, and for the convenience of all those attending the Vienna congress, it is expected that the reports will also be available during the Congress on the website for the American Society of Comparative Law.

A collection of articles like this Supplement is the product of many hands, and we have a large number of people to thank. First and foremost we thank the authors of these national reports for their hard work in producing the reports and for their cheerful patience in the face of our occasional hectoring with respect to deadlines, word limitations, and form requirements. Second we thank the two editorial assistants to the *AJCL*, Annette Gregory and Donna Collins. Annette Gregory provided editorial assistance until the end of 2013, when the editorship of the journal passed from the University of Michigan to the partnership formed by Georgetown and McGill Universities. Thereafter, Donna Collins has ably taken her place. It has been a pleasure to work with both. Finally, we thank the two sets of

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editors-in-chief with whom we have worked, Professor Mathias Reimann at Michigan and his successors, Professors James Feinerman and Franz H.G. Werro at Georgetown and Professor Helge Dedek at McGill. We appreciate their advice and especially their assistance in making Annette Gregory and Donna Collins available for editorial work on this supplement.

June, 2014

FRANKLIN A. GEVURTZ
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Perspectives on Migration and Law in the United States†

TOPIC I. A

A brief discussion of the U.S. political situation as it relates to immigration-law reform is followed by consideration of the criminalization of migrants and increasingly harsh deportation of recent decades; the U.S. versions of jus soli and jus sanguinis; reunion of families; the inadequate progress of immigration policy based on business needs and economics; protection of refugees and related categories; and two important, recent successes.

Over the last fifty years, the most important change in U.S. immigration law has been from an administrative process, welcoming most migrants and Mexicans in particular, to a mixed administrative and criminal process with its focus on the criminality of “illegal aliens,” stigmatizing and criminalizing Mexicans in particular.¹ This has occurred in three ways: use of deportation as additional punishment for crimes committed by non-citizens; use of criminal penalties and terminology, such as “felony,” for violation of immigration laws; and use of the methods and personnel of criminal-law enforcement in civil-immigration proceedings (making violations of immigration law the largest category of federal criminal prosecutions over the last dec-

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† DOI : <http://dx.doi.org/10.5131/AJCL.2013.0015>

1. See generally David Alan Sklansky, *Crime, Immigration, and Ad Hoc Instrumentalism*, 15 NEW CRIM.L.REV. 157 (2012); KEVIN R. JOHNSON & BERNARD TRUJILLO, IMMIGRATION LAW AND THE US-MEXICO BORDER: ¿SÍ SE PUEDE? (2011); Ingrid V. Eagly, *Prosecuting Immigration*, 104 NW.U.L.REV. 1281 (2010); Jennifer M. Chacón, *Managing Migration through Crime*, 109 COLUM.L.REV.SIDEBAR 135 (2009); Teresa A. Miller, *A New Look at Neo-Liberal Economic Policies and the Criminalization of Undocumented Migration*, 61 SMU L.REV. 171 (2008); Stephen H. Legomsky, *The New Path of Immigration Law: Asymmetric Incorporation of Criminal Justice Norms*, 64 WASH. & LEE L.REV. 469 (2007); Juliet P. Stumpf, *The Crimmigration Crisis: Immigrants, Crime and Sovereign Power*, 56 AM.U.L.REV. 367 (2006); Gerald Neuman, *Aliens as Outlaws: Government Services, Proposition 187, and the Structure of the Equal Protection Clause*, 42 UCLA L.REV. 1425-52 (2005); Nicholas De Genova, *The Legal Production of Mexican/Immigrant “Illegality,”* 2 LATINO STUD. 160 (2004); Daniel Kanstroom, *Criminalizing the Undocumented: Ironic Boundaries of the Post-September 11th “Pale of Law,”* 29 N.C. J.INT’L L. & COM.REG. 639 (2004).

ade). The change began in 1965, with the first quantitative restrictions on Mexican immigrants; accelerated in 1988 with the introduction of “aggravated felonies”² and in 1996 with the expansion of “crimes of moral turpitude” and many other kinds of criminalization;³ accelerated again with the focus on terrorism, real or imagined, after the destruction of the World Trade Center in 2001;⁴ and accelerated yet again as deportations increased another 5% under President Obama.⁵

In what may appear to be a contradiction, U.S. immigration law remains strongly progressive and humanitarian in many ways, such as acceptance of refugees for resettlement in the U.S., shelter from trafficking and violence and, most recently, full recognition of same-sex marriages.

This is not an introductory article, but rather assumes some knowledge of the relevant historical, political, statistical, and legal situation in the U.S.⁶ It is concerned with developments and trends much more than with exposition of the rules.⁷ Also, it is not our the-

2. Omnibus Anti-Drug Abuse Act of 1988, P.L. 100-690, 102 Stat. 4181. Many “aggravated felonies” are neither aggravated nor felonies. See Houston Putnam Lowry & Peter W. Schroth, *Survey of 2002-2003 Developments in International Law in Connecticut*, 77 CONN.B.J. 171 (2003), at nn. 94-95, http://www.brownwelsh.com/HPLowry_archive/CBJ2002-2003.htm.

3. Anti-Terrorism and Effective Death Penalty Act of 1996, P.L. 104-132, 110 Stat. 1214; Illegal Immigration Reform and Immigrant Responsibility Act of 1996, P.L. 104-208, 110 Stat. 309. See Dawn Marie Johnson, *The AEDPA and the IIRIRA: Treating Misdemeanors as Felonies for Immigration Purposes*, 27 J.LEGIS. 477 (2001); KURZBAN, *infra* note 6, at 8-10.

4. USA PATRIOT Act, P.L. 107-56, 115 Stat. 272; Intelligence Reform and Terrorism Prevention Act of 2004, P.L. 108-458, 118 Stat. 3638.

5. Compare <http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf> (389,834 removals in FY2009) to <http://www.ice.gov/removal-statistics/> (409,849 removals in FY2012). However, preliminary figures for FY2013 suggest a decrease of perhaps 10% in deportations compared to FY2012.

6. Specifically, we assume familiarity with Chris Nwachukwu Okeke & James A.R. Nafziger, *United States Migration Law: Essentials for Comparison*, 54 AM.J.COMP.L. (supp.) 531 (2006), prepared for the 2006 International Congress of Comparative Law. Other excellent, relatively brief summaries are IRA J. KURZBAN, KURZBAN’S IMMIGRATION LAW SOURCEBOOK 3-29 (13th ed. 2012) (KURZBAN); EYTAN MEYERS, INTERNATIONAL IMMIGRATION POLICY: A THEORETICAL AND COMPARATIVE ANALYSIS 27-62 (2004); and THOMAS ALEXANDER ALEINIKOFF, DAVID A. MARTIN, HIROSHI MOTOMURA & MARYELLEN FULLERTON, IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY 162-237 (7th ed. 2012), each of which is much longer than this entire article.

7. And, for the most part, with domestic U.S. law, rather than international law, in part because, as in most areas of the law, the U.S. does not emphasize international law, but primarily because our space is so limited. Given enough space, we would have discussed the Inter-American Commission and Court of Human Rights, including at least:

- Smith v. U.S., IACHR Case 12,562 (2010), <http://www.cidh.org/annualrep/2010eng/USPU12562EN.DOC>.
- Advisory Opinion OC-18/03, Legal Status and Rights of Undocumented Migrants, Inter-Am. Ct. H.R. (Sept. 17, 2003), http://www.corteidh.or.cr/docs/opiniones/seriea_18_ing.pdf. See Beth Lyon, *The Inter-American*

sis that the U.S. is failing to meet the standards set by actual practice elsewhere; on the contrary, most of the U.S. policy choices we complain of were preceded and are exceeded by those of E.U. member states.

I. LAW REVISION AND POLITICS, FEDERAL AND STATE

In the 2012 Congressional elections, Democratic candidates for the House of Representatives received a total of 59,214,910 votes, while Republican candidates received only 57,622,827. Nevertheless, 234 Republicans, but only 200 Democrats, were counted as elected, giving the minority party 53.8% of the House.⁸ The cause of this distortion is electoral districts carefully drawn by Republican-controlled state legislatures to favor election of Republican candidates.⁹ A result is giving the House Republicans the power to prevent Congress from acting on almost anything they choose. Prominent among the many areas in which legislation has been blocked is immigration.

A. Federal Law

In June 2013, an 867-page, comprehensive immigration bill—S. 744, the “Border Security, Economic Opportunity, and Immigration Modernization Act,”—was approved by the Senate, with strong support from both parties.¹⁰ This is by no means a “liberal” bill;¹¹ on the

Court of Human Rights Defines Unauthorized Migrant Workers' Rights for the Hemisphere: A Comment on Advisory Opinion 18, 28 NYU REV.L. & SOC.CHANGE 547 (2004).

Also the North American Agreement on Labor Cooperation, U.S.-Mex.-Can., Sept. 14, 1993, 32 I.L.M. 1499. See Dept. of Labor, *Status of Submissions under the NAALC*, <http://www.dol.gov/ilab/programs/nao/status.htm>; Robert Russo, *A Cooperative Conundrum? The NAALC and Mexican Migrant Workers in the United States*, 17 LAW & BUS.REV.AM. 27 (2011).

8. Karen L. Haas, *Statistics of the Presidential and Congressional Election of November 6, 2012* (Feb. 28 2013), http://clerk.house.gov/member_info/electionInfo/2012election.pdf. The figures in the text are from pages 74-76.

9. This is too complex a topic for in-depth discussion here, but the phenomenon is very widespread and, although at present it strongly favors Republicans, in some states Democrats have benefited. See generally Brennan Center for Justice, NYU School of Law, <http://www.brennancenter.org/issues/voting-rights-elections>; Justin Levitt's All about Redistricting, <http://redistricting.lls.edu/>; DOJ's Redistricting Information, <http://www.justice.gov/crt/about/vot/redistricting.php>.

10. Final text: [http://www.judiciary.senate.gov/legislation/Sponsors1\(MDM13313\).pdf](http://www.judiciary.senate.gov/legislation/Sponsors1(MDM13313).pdf). Links to all proposed amendments and their disposition: <http://www.judiciary.senate.gov/legislation/immigration/amendments.cfm>. The final vote was 68-32, with all 52 Democrats, 14 Republicans and 2 independents in favor.

11. In an interview with CNN on June 25, 2013, Senator John McCain said, regarding the “border-surge” amendment that secured passage in the Senate of S. 744:

I think that first of all the legislation concerning beefed up border security removes any validity to the argument that border security is not sufficient. I mean, this is not only sufficient, it is well over sufficient. We'll be the most militarized border since the fall of the Berlin wall, so that's why I think this amendment was very important.

contrary, a key factor in its adoption was the “border-surge amendment,” section 3(c)(2) of which requires that all of the following conditions be met before provisional immigrants may receive green cards:

- A Comprehensive Southern Border Security Strategy must be in operation, including towers, ground sensors, thermal imaging, drone aircraft systems, Blackhawk helicopters and marine vessels.¹²
- The current 18,400 Border Patrol agents must be increased by 20,000, with an agent every 1,000 feet (300 meters) along the Mexican border.
- At least 700 miles (1,127 km) of fencing must be completed along the Mexican border, doubling the current 350 miles.
- An employment verification system (E-Verify, administered by USCIS¹³) must be fully implemented for all employers throughout the U.S., intended to make it almost impossible to work without authorization.
- An electronic entry/exit system must be fully implemented at all international air and sea ports of entry where officers are currently deployed, primarily to improve identification of visa overstays.

The amendment increases the funding for border security by \$38 billion, for a total of \$46.3 billion;¹⁴ part of the eagerness of politicians to spend money fortifying the Mexican border seems to come from the eagerness of the corporations that donate to their campaigns to sell equipment or to continue private management of prisons and detention centers, particularly since the wars in Iraq and Afghanistan have wound down.¹⁵

<http://edition.cnn.com/TRANSCRIPTS/1306/25/nday.03.html>. Senator McCain clearly meant the comparison to the Berlin wall to show that the increase in border security would be a good thing. Contrast President Ronald Reagan, also a Republican:

General Secretary Gorbachev, if you seek peace, if you seek prosperity for the Soviet Union and Eastern Europe, if you seek liberalization: Come here to this gate! Mr. Gorbachev, open this gate! Mr. Gorbachev, tear down this wall!

Remarks on East-West Relations at the Brandenburg Gate in West Berlin, 12 June 1987, <http://www.reagan.utexas.edu/archives/speeches/1987/061287d.htm>.

12. Linda: “What, no alligators?” Peter: “Military contractors don’t make alligators.”

13. Abbreviations: CBP=Customs and Border Protection; DHS=Department of Homeland Security; DOJ=Department of Justice; ICE=Immigration and Customs Enforcement; USCIS=U.S. Citizenship and Immigration Services.

14. For scale: the FY2013 budget of CBP was about \$12 billion; ICE \$6 billion; and USCIS \$3 billion.

15. See Eric Lipton, *As Wars End, a Rush to Grab Dollars Spent on the Border*, N.Y. Times, 6 June 2013, describing efforts by military contractors Raytheon, Lockheed Martin, General Dynamics, Northrup Grumman, General Atomics and others to

Despite its bipartisan support, the leadership of the majority Republican party in the House refused to allow the Senate bill to be considered.¹⁶ In addition to the bipartisan “Border Security Results Act,” H.R. 1417, which had already been approved unanimously by all Republican and Democratic members of the House Homeland Security Committee, four much more controversial bills have been approved by the House Judiciary Committee, each focused on a small group of issues.¹⁷ On October 2, 2013, the day after the shutdown began, House Democrats introduced H.R. 15, which follows S. 744 in most respects, but substitutes the substance of H.R. 1417 for the “border-surge” portion of the Senate bill.

The shutdown and the budget and debt-ceiling controversies suggest that immigration reform will not occur in 2013 and can become a possibility for 2014 only if the Republican leadership of the Senate sharply changes its position.¹⁸ Nevertheless, we mention all of these bills below, because they reveal a great deal about the legal and political situation in the U.S.

B. *State Law*

Laws expressly addressing migrants are not exclusively federal: state and local legislators have often addressed such issues as migrants’ access to housing, employment, drivers’ licenses and education.¹⁹ The National Conference of State Legislatures reported that 156 statutes dealing with migrants were enacted by state legislatures during calendar 2012, a reduction from 2011, when 197 new statutes were enacted.²⁰ These are in addition to the thousands of

obtain border-security business, such as radar, long-range camera systems, reconnaissance drones and automated tracking systems. Similarly, Aubrey Pringle, *The Winners in Immigration Control: Private Prisons*, Atlantic, <http://www.theatlantic.com/national/archive/2013/08/the-winners-in-immigration-control-private-prisons/279128/>.

16. See, e.g., this statement by the Chairman of the House Judiciary Committee: Bob Goodlatte, *Re: Goodlatte Boosts the Gang of Eight?*, Nat’l Rev. Online, Sept. 25, 2013, <http://www.nationalreview.com/corner/359531/re-goodlatte-boosts-gang-eight-bob-goodlatte>.

17. At this writing, five bills on immigration (of over ninety filed) have been reported out of committee in the House: H.R. 1417, “Border Security Results Act”; H.R. 1772, “Legal Workforce Act”; H.R. 1773, “Agricultural Guestworker Act”; H.R. 2278, “SAFE Act”; and H.R. 2131, “SKILLS Visa Act.” Links to the texts: <http://www.govtrack.us/congress/bills/subjects/immigration/6206>. See <http://www.migrationpolicy.org/pubs/CIRbrief-2013House-SenateBills-Side-by-Side.pdf>.

18. We don’t rule out that possibility. See Francine Kiefer, *Is Boehner getting serious on immigration reform? New hire intrigues*, Christian Science Monitor, Dec. 4, 2013, <http://www.csmonitor.com/USA/DC-Decoder/2013/1204/Is-Boehner-getting-serious-on-immigration-reform-New-hire-intrigues.-video>.

19. AUSTIN T. FRAGOMEN, JR., CAREEN SHANNON & DANIEL MONTALVO, STATE IMMIGRATION EMPLOYMENT COMPLIANCE HANDBOOK (Fall 2013) (now semiannual) includes a state-by-state analysis of the laws of thirty-five states.

20. <http://www.ncsl.org/issues-research/immig/state-laws-related-to-immigration-and-immigrants.aspx>.

state laws dealing with migrants that existed already. Many cities, towns, counties, etc. have adopted their own local laws on such matters, which are not included in the foregoing figures.

The states and their subdivisions have limited Constitutional power to legislate in this primarily federal area. If a state law conflicts with a federal law, the state law must yield. Further, Congress can preempt state law, either expressly or by establishing a framework of regulation leaving no room for other laws. In a recent case,²¹ the Supreme Court applied these principles to a 2010 Arizona statute that made failure to comply with federal alien-registration requirements a state misdemeanor; made it a misdemeanor for an unauthorized alien to seek or engage in work in the state; authorized state and local law enforcement officers to arrest without a warrant a person “the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States”; and required that officers who conduct a stop, detention, or arrest make efforts to verify the person’s immigration status with the federal government.²² The Court held the first three provisions preempted, but declined to strike down the last, on the ground it might be interpreted by Arizona’s courts in a way that would keep it within the state’s Constitutional authority. The previous year, the Court held that Arizona’s law requiring suspension or revocation of the licenses of employers that knowingly or intentionally employ unauthorized aliens and requiring employers to use E-Verify was not preempted.²³

The most publicized state laws relating to immigration are anti-migrant, but many others are pro-migrant, and increasingly so since the *Arizona* decision. For example, five states forbid undocumented students the benefit of state-resident tuition rates at their state universities, but fourteen expressly authorize this benefit. In October 2013, California became the tenth state to authorize drivers’ licenses for undocumented migrants²⁴ and enacted seven other laws benefiting migrants, including authority for “an applicant who is not lawfully present in the United States” to be admitted to practice law in the state.²⁵

Some states have also refused to cooperate with federal action against undocumented migrants. In 2011 and 2012, Illinois, Massachusetts, New York and the District of Columbia announced they would not participate in the DHS fingerprint-sharing program called

21. *Arizona v. U.S.*, 132 S.Ct. 2492 (2012).

22. Broadly similar laws were enacted in Alabama, Georgia, Indiana, South Carolina and Utah; the federal government brought similar court challenges against all five.

23. *Chamber of Commerce v. Whiting*, 131 S.Ct. 1968 (2011).

24. Assembly Bill No. 60.

25. Assembly Bill No. 1024.

“Secure Communities,” although DHS insists they have no power to withdraw from it.²⁶ In June 2013, Connecticut limited the circumstances in which state officials may respond to requests from federal officials to detain unauthorized immigrants for removal.²⁷

II. WHAT PART OF “ILLEGAL” DON’T YOU UNDERSTAND?

A. *The Southern Border*

Real reform means stronger border security, and we can build on the progress my administration has already made—putting more boots on the southern border than at any time in our history, and reducing illegal crossings to their lowest levels in 40 years.

President Barack Obama, February 12, 2013²⁸

To a very large extent, the immigration law and policy of the U.S. is about migrants from Mexico. Although U.S. immigration law and policy is modern and progressive in many ways, policy toward migrants is driven mainly by a combination of public opinion about Mexicans and agricultural companies’ demand for workers in the Southwest. The first of these is always out of date, as can be seen in the Ligne Maginot of S. 744: \$46.3 billion dollars for still further militarization of the border, even as the most striking recent change in the demographics of U.S. migration is the flow back into Mexico.²⁹

Mexico attained independence from Spain in 1821. In the following decades, about half of what it considered to be its territory became U.S. territory, mostly by military action and partly by purchase. For many years, however, Mexicans were not only allowed but encouraged to work in the U.S., with no documentation or authorization required. When Chinese migrants were excluded, beginning in 1882,³⁰ and when that exclusion was extended to all Asians, beginning in 1917,³¹ followed by quotas for eastern and southern Europeans in 1921,³² the U.S. demand for Mexican workers—who were not subject to numerical limits—increased greatly. A combination of that demand and political and other events in Mexico led about a tenth of its entire population to move into the U.S. by 1930,

26. See http://www.huffingtonpost.com/2012/06/04/secure-communities-immigration-district-of-columbia_n_1569327.html; http://www.huffingtonpost.com/2011/06/06/massachusetts-rejects-immigration-enforcement-program_n_871970.html.

27. Connecticut Public Act No. 13-155.

28. State of the Union address as reported by N.Y. Times, Feb. 12, 2013.

29. *Infra* part II.A.

30. Chinese Exclusion Act of 1882, 22 Stat. 58, *repealed by* Act of Dec. 17, 1943, 57 Stat. 600. Chinese had already been denied naturalization, beginning in 1870.

31. Immigration Act of 1917, 39 Stat. 874, adopted over President Wilson’s veto.

32. Quota Act of 1921, 42 Stat. 5; Immigration Act of 1924, 43 Stat. 153. This system remained in effect until 1952.

but at least half a million were forced back to Mexico during the Great Depression of the 1930s, including many who had become U.S. citizens and many children who were U.S. citizens by birth. During the Second World War, however, Mexicans were welcomed again, especially, but not exclusively, as farm workers, based in part on a series of agreements between the U.S. and Mexican governments. This was the “Bracero Program,” which lasted from 1942 through 1964 and, at its peak in the mid- to late-1950s, provided over 400,000 Mexican workers to the U.S. each year. Among the causes of its end were major abuses by employers and resulting strikes.

The McCarran-Walter Act of 1952—the original Immigration and Nationality Act—established the system of immigrant and non-immigrant visas.³³ The Hart-Celler Act of 1965³⁴ eliminated all immigration quotas based on race or national origin, but established quotas of 120,000 for the Western and 170,000 for the Eastern Hemispheres.³⁵ This was the first-ever numerical restriction on immigrants from the Western Hemisphere, authorizing a hemispheric total far below the number that had been entering from Mexico alone. The new limits weighed much more heavily on Mexicans than on migrants from any other country, making a large majority of Mexican entrants unauthorized, so it is not unreasonable to think of this statute as creating the problem of “illegal aliens” in the U.S.:

Congress did discuss undocumented immigration while abolishing the bracero program in 1964. Several persons noted that because the program permitted Mexicans to work temporarily in the United States ending it would lead to an increase of undocumented persons streaming across the border. The Mexican ambassador to the United States, among others, had suggested at the time that illegal immigration might increase, and events were to prove him correct.

. . .

Thus, it was not surprising that after the last of the braceros went home, INS³⁶ found increasing numbers of Mexicans trying to cross the border. Apprehensions, for example, increased from 86,597 in 1964 to 283,557 in 1969.³⁷

33. P.L. 82-414, 66 Stat. 163.

34. P.L. 89-236, 79 Stat. 91.

35. There was an additional limit of 20,000 for each Eastern Hemisphere country, but no country limits for the Western Hemisphere.

36. The former Immigration and Naturalization Service, whose functions were divided among USCIS, ICE and CBP in 2003.

37. David M. Reimers, *Still the Golden Door: The Third World Comes to America* 207, 208 (2d ed. 1992).

Amendments in 1976³⁸ vastly multiplied the number of unauthorized Mexican migrants by adding a limit of 20,000 for each country in the Western Hemisphere, which was reduced to 18,200 in 1978;³⁹ some 1.4 million unauthorized Mexicans were then living in the U.S.⁴⁰

Undocumented seasonal migrants now find it much more difficult and expensive to re-enter the U.S., so they are much more likely simply to remain in the U.S. As a result, the number of Mexicans residing in the U.S.—as distinguished from seasonal workers—has risen very rapidly, from 575,900 in 1960, to 2,199,200 in 1980, to 9,177,500 in 2000, and 11,711,100 in 2010, according to the Census Bureau.⁴¹ That last figure approaches 10% of the entire population of Mexico, a level last seen in the 1930s, but the figure for 2011 is only 11,672,600 and immigration to Mexico, both from the U.S. and from third countries, has been growing. It is not clear whether the net flow from the U.S. toward Mexico will continue, but the rapid growth of Mexico's economy and its comprehensive reform of immigration law, which took effect at the end of 2012,⁴² amount to a major rebalancing of the migration relationship between the U.S. and Mexico, however little that may have been recognized by U.S. politicians.

For FY2013,⁴³ the per-country limit for preference immigrants⁴⁴ is 7% of the sum of 226,000 for family-sponsored and 158,466 for employment-based candidates, or 26,913.⁴⁵ Four countries are “oversubscribed,” namely China (mainland born), India, Mexico and Philippines, so that candidates from those countries must wait until a number is available. As of October 2013, numbers are available for applicants whose priority date precedes the dates in Table 1.

38. P.L. 94-571, 90 Stat. 2703.

39. P.L. 96-212, 94 Stat. 102.

40. “By 1979, an estimated 1.7 million unauthorized aliens resided in the United States, including 1.4 million from Mexico.” Marc R. Rosenblum *et al.*, *Mexican Migration to the United States: Policy and Trends* 9 (Cong.Res.Service 2012), <http://www.fas.org/sgp/crs/row/R42560.pdf> (citing an earlier study).

41. See <http://www.census.gov/prod/2012pubs/acs-19.pdf>; <http://www.census.gov/population/foreign/data/cps.html>.

42. Ley de Migración, May 25, 2011, http://dof.gob.mx/nota_detalle.php?codigo=5190774&fecha=25/05/2011.

43. The federal fiscal year begins October 1 of the preceding calendar year.

44. *I.e.*, eligible relatives other than U.S. citizens' spouses, unmarried children (under twenty-one) and parents.

45. Department of State, Visa Bulletin for October 2013, http://travel.state.gov/visa/bulletin/bulletin_6062.html.

TABLE 1: QUEUE FOR FAMILY-SPONSORED PREFERENCES AS OF OCTOBER 2013⁴⁶

	All Other Areas	China (mainland born)	India	Mexico	Philippines
F1	1 Oct. 2006	1 Oct. 2006	1 Oct. 2006	22 Sept. 1993	1 June 2001
F2A	8 Sept. 2013	8 Sept. 2013	8 Sept. 2013	1 Sept. 2013	8 Sept. 2013
F2B	1 March 2006	1 March 2006	1 March 2006	8 March 1994	8 Feb. 2003
F3	22 Jan. 2003	22 Jan. 2003	22 Jan. 2003	22 May 1993	1 Jan. 1993
F4	8 Aug. 2001	8 Aug. 2001	8 Aug. 2001	15 Oct. 1996	22 March 1990

F1 Unmarried sons and daughters (21 or older) of U.S. citizens

F2A Spouses and unmarried children (under 21) of permanent residents

F2B Unmarried sons and daughters of permanent residents

F3 Married sons and daughters of U.S. citizens

F4 Brothers and sisters of adult U.S. citizens

For example, the unmarried child, 21 or older, born in Mexico of a U.S. citizen could first be considered for a family-based immigrant visa in October 2013 if his or her application was filed with USCIS on or before September 22, 1993.⁴⁷ From September to October 2013,⁴⁸ 24 of the 25 dates advanced by less than one month, including four that did not advance at all; the exception is F4 for the Philippines, which advanced by five weeks. All but one of the queues grew longer, in most (19) cases by one or two weeks.⁴⁹

By far, the largest number of people in almost every category relating to U.S. temporary and permanent migration is Mexican.⁵⁰ As of 2010, the U.S. Census Bureau estimated⁵¹ that 29.3% of the for-

46. Source: *id.* The very short queues for F2A are anomalous and not expected to continue.

47. But under the Child Citizenship Act of 2000, P.L. 106-395, 114 Stat. 1631, a child under the age of eighteen automatically, without a separate application, may become a citizen upon his admission to the U.S. as an LPR if that child has at least one parent who is a citizen and has legal and physical custody of that child. Also, a natural or adopted child residing in the U.S. as an LPR automatically becomes a citizen if under eighteen and in the legal and physical custody of a parent when the latter is naturalized. 8 U.S.C. §320.

48. Based on comparison to Department of State, Visa Bulletin for Sept. 2013, http://travel.state.gov/visa/bulletin/bulletin_6050.html.

49. See generally Claire Bergeron, *Going to the Back of the Line: A Primer on Lines, Visa Categories, and Wait Times*, MPI Issue Brief (Mar. 2013), <http://www.migrationpolicy.org/pubs/CIRbrief-BackofLine.pdf>.

50. A key exception is asylum, for which by far the greatest number is from China. See *infra* note 145.

51. All figures for FY2012 in this and the two following sentences are based on U.S. Census Bureau, *The Foreign-Born Population in the United States: 2010*, at 2 (May 2012), <http://www.census.gov/prod/2012pubs/acs-19.pdf>. For data on the foreign born by state of residence, see Migration Policy Institute, *2011 American Community Survey and Census Data on the Foreign Born by State*, <http://www.migrationinformation.org/datahub/acscensus.cfm>, which also uses U.S. Census Bureau data. It should come as no surprise that by far the largest number was in California, with 10,195,057. The next five were New York, 4,317,715; Texas, 4,201,675; Florida, 3,702,627; New Jersey, 1,893,186; and Illinois, 1,798,815. No other state reached one million.

eign-born part of the U.S. population was born in Mexico, exceeding the 28.2% from all of Asia, and the 23.8% from all of the remainder of Latin America and the Caribbean; all of Europe totaled 12.1% and all of Africa 4.0%. The foreign-born population at that time constituted 39,956,000, or 12.9%, of the total population of 309,350,000. Of the foreign-born, 17,476,000, or 43.4%, were naturalized citizens.⁵² If the undocumented totaled around 11.5 million,⁵³ then perhaps 11 million were documented and on a path that could lead to citizenship. As of 2011, an estimated 6,800,000 (59%) of the undocumented were from Mexico; 660,000 from El Salvador; 520,000 from Guatemala; 380,000 from Honduras; 280,000 from China; and over 200,000 from each of Philippines, India, Korea and India.⁵⁴

The border-protection systems and Immigration Courts are concentrated on the Mexican border, although it is important to keep in mind that many people who enter the U.S. from Mexico are not Mexicans, as shown in Table 2. According to ICE, in FY2011, 74.5% of the total 385,091 removed persons (286,893) were from Mexico, followed by Guatemala (33,324), Honduras (23,822), El Salvador (18,870) and Brazil (3,634).⁵⁵

Of all criminal immigration cases filed in FY2012, 74% were filed in just five of the ninety-four federal court districts, namely those bordering on Mexico: the Southern District of California, the District of Arizona, the District of New Mexico, and the Southern and Western Districts of Texas.

52. General report from Census Bureau on foreign-born from all countries: Elizabeth M. Grieco *et al.*, *The Foreign-Born Population in the United States: 2010* (May 2012), <http://www.census.gov/prod/2012pubs/acs-19.pdf>.

53. See Michael Hoefler, Nancy Rytina & Bryan Baker, *Estimates of the Unauthorized Immigrant Population Residing in the United States: January 2011*, Mar. 2012, http://www.dhs.gov/sites/default/files/publications/ois_ill_pe_2011.pdf.

54. *Id.*

55. See *Removals by Country for FY 2011*, <http://www.ice.gov/doclib/foia/reports/ero-facts-and-statistics.pdf>.

TABLE 2: BORDER PATROL APPREHENSIONS AT BORDERS, FY2000-FY2012⁵⁶

	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
FROM MEXICO													
Coastal Border	14,440	11,213	10,137	10,215	6,043	3,415	3,458	4,245	4,487	4,128	3,780	2,429	1,108
Northern Border	7,362	7,444	6,095	5,947	5,495	4,081	3,789	3,809	4,244	3,676	3,766	3,145	2,306
Southwest Border	1,615,081	1,205,390	901,761	865,850	1,073,468	1,016,409	973,819	800,634	653,035	495,582	396,819	280,580	262,341
Grand Total	1,636,883	1,224,047	917,993	882,012	1,085,006	1,023,905	981,066	808,688	661,766	503,386	404,365	286,154	265,755
FROM COUNTRIES OTHER THAN MEXICO													
Coastal Border	6,211	6,945	4,877	6,120	5,111	6,921	7,063	7,441	6,408	4,242	4,440	4,123	2,577
Northern Border	4,746	4,894	4,392	4,210	4,464	3,262	2,810	2,571	3,681	3,130	3,665	2,978	1,904
Southwest Border	28,598	30,328	28,048	39,215	65,814	154,987	98,153	58,004	51,970	45,283	50,912	46,997	94,532
Grand Total	39,555	42,167	37,317	49,545	75,389	165,170	108,026	68,016	62,059	52,655	59,017	54,098	99,013

56. Sources: http://www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbpp_statistics/usbpp_fy12_stats/appr_from_mexico.ctt/appr_from_mexico.pdf, www.cbp.gov/linkhandler/cgov/border_security/border_patrol/usbpp_statistics/usbpp_fy12_stats/appr_otm.ctt/appr_otm.pdf.

B. Criminal Enforcement

1. Statistics

The U.S. strongly emphasizes criminal law and deportation as methods of managing immigration and both have increased greatly in recent years. Since the World Trade Center attack of September 11, 2001, the nonsensical⁵⁷ conflation of unauthorized entry or presence in the U.S. and terrorism has become an almost unquestioned part of the political discourse.

In FY2012, 29.5% of defendants convicted and sentenced for federal crimes of any kind were charged with immigration crimes, 31.5% with non-violent drug crimes, and only 2.8% with violent crimes.⁵⁸ The figures for FY2011 were even more extreme: immigration crimes were 34.9% and non-violent drug crimes 29.1%.⁵⁹

2. Responses to Increasing Criminalization

Recently,⁶⁰ the courts have recognized the serious implications of the shift toward treatment of migrants as criminals, taking small steps to mitigate some of its extremes.⁶¹ In 2010,⁶² the U.S. Supreme Court, noting that “importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of noncitizen offenders,” found it

“most difficult” to divorce the penalty from the conviction in the deportation contextThe severity of deportation—“the equivalent of banishment or exile”—only underscores

57. Is it enough to observe that there were no Mexicans among the 9/11 terrorists, none of the perpetrators entered from Mexico and all of them entered the U.S. lawfully?

58. Calculation based on *Southwest Border Courts Continue to Lead in Immigration Cases*, Third Branch News, May 8, 2013, <http://news.uscourts.gov/southwest-border-courts-continue-lead-immigration-cases>. Measuring instead by cases filed, for FY2012, 27% of all federal criminal cases in the U.S. were based on charges of immigration violations, while 31.5% were for non-violent drug crimes, but only 2.9% for all violent crimes taken together. See <http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2012/appendices/D05Sep12.pdf>.

59. For example, using conviction and sentencing, in FY2011, immigration crimes were 34.9% and non-violent drug crimes were 29.1%. See *Immigration Cases Continue to Surge, Says FY2011 Commission Review*, Third Branch News, Dec. 3, 2012, <http://news.uscourts.gov/immigration-cases-continue-surge-says-fy-2011-commission-review>.

60. But until quite recently, excesses by both prosecutors and some of the lower federal courts were quite common. See Katharine Brink, *Neglecting Due Process Rights of Immigrants in the Southwest United States: A Critique of Operation Streamline*, 89 U. DETROIT MERCY L.REV. 315 (2012); National Immigration Forum, *Southwest Border Security Operations*, Dec. 2010, <http://www.immigrationforum.org/images/uploads/SouthwestBorderSecurityOperations.pdf>.

61. On the other hand, H.R. 2278, the “SAFE Act,” would make it a crime for an alien to be unlawfully present and would permit states to arrest and detain people on a suspicion that they are deportable.

62. *Padilla v. Kentucky*, 130 S.Ct. 1473, 1481-86 (2010) (citations omitted).

how critical it is for counsel to inform her noncitizen client that he faces a risk of deportation.

It is our responsibility under the Constitution to ensure that no criminal defendant—whether a citizen or not—is left to the “mercies of incompetent counsel.” To satisfy this responsibility, we now hold that counsel must inform her client whether his plea carries a risk of deportation. Our longstanding Sixth Amendment precedents, the seriousness of deportation as a consequence of a criminal plea, and the concomitant impact of deportation on families living lawfully in this country demand no less.

More than twenty states have gone further, making it the judges’ responsibility to warn criminal defendants when conviction of the crime with which they are charged may lead to deportation.⁶³

Another essential mitigating factor in this harsh system is prosecutorial discretion, the authority of an agency or officer to decide what charges to bring and how to pursue a case,⁶⁴ which may be exercised at any stage of an immigration case. All agencies⁶⁵ involved in immigration, border security, and removals may grant deferred action,⁶⁶ terminate or close administratively a removal case in Immigration Court, decide whom to detain or to release on bond, seek expedited removal, issue a detainer, or issue or not issue a charging document.⁶⁷

Since June 2011, the standard for prosecutorial discretion has been pursuing those cases that meet the agency’s priorities for federal immigration enforcement generally.⁶⁸ Limited personnel, resources, and detention space have caused ICE to promote prosecutorial discretion as a method for dealing with the increased numbers of apprehended aliens and removal cases in the Immigration Courts. Humanitarian factors to consider include the alien’s

63. But some appellate courts routinely affirm convictions despite the judge’s failure to warn. *People v. Peque*, 2013 N.Y. Slip Op. 07651 (19 Nov. 2013), changed that for New York.

64. “[A]n agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.” *Heckler v. Chaney*, 470 U.S. 821, 831 (1985).

65. USCIS, ICE, and CBP, as well as DHS, the executive branch charged with enforcing the Immigration and Nationality Act.

66. *E.g.*, DACA program, discussed *infra*, part VII.B.

67. *See generally* KURZBAN, *supra* note 6, at 376-83.

68. *See* John Morton, ICE Director, *Exercising Prosecutorial Discretion Consistent with the Civil Immigration Enforcement Priorities of the Agency for the Apprehension, Detention, and Removal of Aliens*, June 17, 2011, <http://www.ice.gov/doclib/secure-communities/pdf/prosecutorial-discretion-memo.pdf>. The previous standard was whether or not a substantial federal interest was involved. *See* Doris Meissner, INS Commissioner, *Exercising Prosecutorial Discretion*, Nov. 17, 2000, <http://iwp.legalmomentum.org/reference/additional-materials/immigration/enforcement-detention-and-criminal-justice/government-documents/22092970-INS-Guidance-Memo-Prosecutorial-Discretion-Doris-Meissner-11-7-00.pdf/view>.

pursuit of education, length of stay in the United States, physical or mental health issues, ties to the community, U.S. citizen or lawful permanent resident (LPR) family, service in the military, and cooperation with law-enforcement authorities.

Although prosecutorial discretion had been a policy of the INS since 1976,⁶⁹ the emphasis on its exercise came only in August 2011, when ICE announced the establishment of a working group of officials from DHS, ICE, USCIS, CBP and DOJ,⁷⁰ “charged with identifying best practices to accelerate the apprehension and removal of high priority aliens, in part by limiting the initiation or pursuit of low-priority cases.”⁷¹ Immigration Court attorneys were ordered to review all incoming removal cases. In January 2012, DHS and DOJ initiated a pilot program to review all pending removal cases as possible candidates for prosecutorial discretion. In reaction, H.R. 2278, the “SAFE Act,” would forbid DHS to implement the prosecutorial discretion described in these memoranda.

3. Enforcement Actions

Raids of the homes of suspected undocumented aliens began in 2003 and were soon followed by workplace raids. In 2008, one of the largest-ever workplace raids took place at a kosher meat-packing plant in Postville, Iowa, population 2,300.⁷² More than 1,000 ICE agents in SWAT gear arrested 389 undocumented workers, most of whom served five months in detention before being deported. More than 1,000 other individuals who were not caught in the raid left the small town. The plant was closed and the town’s economy was shattered.

Much has changed since that time. Large-scale, armed workplace raids have been replaced by more focused, audit-based investigations, in which ICE uses E-Verify and civilian complaints to determine whether a business has hired undocumented workers.⁷³

A recent example is a June 2013 ICE investigation targeting fourteen 7-Eleven convenience-store franchises in New York and Virginia that “recruited more than 50 illegal immigrants and gave them identities stolen from American citizens, including children and dead

69. See <http://www.ice.gov/doclib/foia/prosecutorial-discretion/service-exercise-pd.pdf>.

70. Abbreviations, *supra* note 13.

71. *Next Steps in the Implementation of the Prosecutorial Discretion Memorandum and the August 18th Announcement on Immigration Enforcement Priorities*, <http://www.ice.gov/doclib/about/offices/ero/pdf/pros-discretion-next-steps.pdf>.

72. See ERIK CAMAYD-FREIXAS, US IMMIGRATION REFORM AND ITS GLOBAL IMPACT: LESSONS FROM THE POSTVILLE RAID (2013); Esther Yu-Hsi Lee, *How the Postville Immigration Raid Has Changed Deportation Proceedings*, Think Progress, May 10, 2013, <http://thinkprogress.org/immigration/2013/05/10/1993661/how-the-postville-immigration-raid-has-changed-deportation-proceedings/>.

73. Businesses are fined \$1,000.00 per worker and the employee must be fired.

people,” which were used by the franchises to evade the E-Verify requirements.⁷⁴ After an employee complaint, police and ICE audits using the 7-Elevens’ employment records uncovered evidence that alien workers were forced to live in substandard housing and to work more than 100 hours per week, but were paid for only a fraction of that time.

Home raids by ICE agents have been restricted somewhat, but continue to be directed against people subject to removal orders, although other undocumented persons are usually swept in. Until recently, early morning raids were conducted using shock, violence and intimidation, often involving entering the home without consent or a warrant.⁷⁵ After such a series of raids in 2006 and 2007,⁷⁶ fifteen victims, seven of whom were U.S. citizens, filed suit⁷⁷ in federal court, seeking damages and an order prohibiting ICE from conducting home raids until the agency develops clear guidelines to end unlawful entries. The matter ended with a settlement,⁷⁸ which approved damages of \$1 million, including \$36,000 for each of the fifteen plaintiffs, as well as an order requiring restrictions on how and when ICE agents can enter private homes.⁷⁹

4. Counter-conduct

Criminalization of undocumented entry or presence has led to counter-conduct,⁸⁰ not only by lawyers challenging governmental actions, but also by the people affected by the government’s conduct and organizations working on their behalf, for example in mass demonstrations, through mass media and by lobbying members of Congress and state legislatures. An example, among many, of challenges by lawyers: to get jobs in the U.S., many undocumented workers provide

74. See Mosi Secret & William K. Rashbaum, *U.S. Seizes 14 7-Eleven Stores in Immigration Raids*, N.Y. Times, 17 June 2013.

75. See Albert Sabaté, *An ICE Home Raid Explainer*, ABC News, Apr. 10, 2013, http://abcnews.go.com/ABC_Univision/News/ice-home-raid/story?id=18896252&singlePage=true.

76. Pursuant to “Operation Return to Sender.” See Nina Bernstein, *Immigration Raids Single Out Hispanics, Lawsuit Says*, N.Y. Times, Sept. 21, 2007.

77. *Aguilar v. Immigration & Customs Enforcement Division of Department of Homeland Security*, No. 07-Civ. 8224 (KBF), S.D.N.Y.

78. See <http://www.courthousenews.com/2013/04/05/icesett.pdf> (Stipulation and Order of Dismissal and Settlement).

79. See Kirk Semple, *U.S. Agrees to New Rules for Immigration Raids*, N.Y. Times, Apr. 4, 2013.

80. Foucault’s term (*contre-conduite*); for an English version, see MICHEL FOUCAULT, *SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÈGE DE FRANCE, 1977-1978* 201 (Graham Burchell, trans., 2007). See Jonathan Xavier Inda, *Border Zones of Enforcement: Criminalization, Workplace Raids, and Migrant Counterconducts*, in VICKI SQUIRE (ED.), *THE CONTESTED POLITICS OF MOBILITY: BORDERZONES AND IRREGULARITY* 74 (2011). The details are not the same, but large-scale counter-conduct against anti-migration laws has occurred also in, e.g., Belgium, France, Netherlands, Spain, U.K.

false Social Security numbers and some purchase counterfeit Social Security cards and alien registration cards. Many prosecutors sought to use a 2004 federal statute to treat this as “aggravated identity theft,” a felony carrying a two-year prison sentence.⁸¹ Three federal Courts of Appeals accepted this approach, while three rejected it. In 2009, the Supreme Court held unanimously that the statute required the government to show that the defendant knew that the means of identification at issue belonged to another person,⁸² which it ordinarily will be unable to do.

Demonstrations against the current Congressional inaction continue as this is written. The largest such protests to date were a response to a particularly extreme anti-immigrant bill: in December 2005, the House of Representatives passed H.R. 4437, the “Border Protection, Antiterrorism, and Illegal Immigration Control Act of 2005,” which, among other things, would have made undocumented status a felony, imposed heavy fines for hiring undocumented workers and criminalized assistance to undocumented migrants. This provoked millions of people to protest publicly in many places around the U.S. On March 25, 2006, “More than a half-million demonstrators” marched in Los Angeles, following “as many as 300,000 in Chicago on March 10, and—in between—tens of thousands in Denver, Phoenix, Milwaukee and elsewhere.”⁸³ On April 10, called by its organizers “A National Day of Action for Immigrant Justice,” there

81. 18 U.S.C. §1028A. In *Flores-Figueroa*, *infra*, the prosecutor sought to satisfy the requirement of a relationship to an enumerated felony violation by charging the defendant also with entering the U.S. without inspection, 8 U.S.C. §1325(a) (not a felony), and misusing immigration documents, 18 U.S.C. §1546(a) (a felony).

82. *Flores-Figueroa v. United States*, 556 U.S. 646 (2009). For a persuasive argument that the Supreme Court’s approach in *Flores-Figueroa*, which the author describes as applying the *mens rea* term in a statute to every subsequent element of the offense, should be applied more broadly, see Leonid (Lenny) Traps, “*Knowingly*” *Ignorant: Mens Rea Distribution in Federal Criminal Law after Flores-Figueroa*, 112 COLUM.L.REV. 628 (2012). For example, at 652-55, Mr. Traps urges that the decision of the Court of Appeals in *United States v. Flores-Garcia*, 198 F.3d 1119 (9th Cir. 2000), is inconsistent with *Flores-Figueroa* and therefore a doubtful authority. In *Flores-Garcia*, the court considered 8 U.S.C. §1327:

Any person who knowingly aids or assists any alien inadmissible under section 1182(a)(2) (insofar as an alien inadmissible under such section has been convicted of an aggravated felony) . . . to enter the United States, or who connives or conspires with any person or persons to allow, procure, or permit any such alien to enter the United States, shall be fined . . . , or imprisoned not more than 10 years, or both.

The court found that the defendant had “a complete lack of knowledge concerning the alien’s felony record,” but affirmed his conviction, finding that “the defendant’s knowledge of an alien’s prior felony conviction is not an element of section 1327.” *Flores-Garcia* at 1121.

83. Nina Bernstein, *Groundswell of Protests Back Illegal Immigrants*, N.Y. Times, March 27, 2006, noting the key role of “the Roman Catholic Church, lending organizational muscle to a spreading network of grass-roots coalitions.”

were protest marches in more than sixty U.S. cities.⁸⁴ On May 1, called by its organizers “A Day without an Immigrant,” “Hundreds of thousands of immigrants and their supporters skipped work, school and shopping . . . and marched in dozens of cities from coast to coast.”⁸⁵ The Senate did not pass H.R. 4437.

III. CITIZENSHIP BY BIRTH

Unlike the Eastern Hemisphere, which almost universally rejects citizenship by *jus soli*, the Western Hemisphere, the “New World,” almost universally grants citizenship by *jus soli*; the exceptions are Cuba, Haiti, Costa Rica and Suriname.⁸⁶ The Fourteenth Amendment to the U.S. Constitution includes a particularly strong version of citizenship by *jus soli*:⁸⁷

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

“The United States,” for this purpose, is currently defined as

the several States, the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, Swains Island, the Commonwealth of the Northern Mariana Islands, and all other territory and waters, continental and insular, subject to the jurisdiction of the United States.⁸⁸

84. Rachel L. Swarns, *Immigrants Rally in Scores of Cities for Legal Status*, N.Y. TIMES, Apr. 11, 2006.

85. Randel C. Archibold, *Immigrants Take to U.S. Streets in Show of Strength*, N.Y. TIMES, May 2, 2006.

86. See Jon Feere, *Birthright Citizenship in the United States: A Global Comparison*, Aug. 2010, <http://www.cis.org/birthright-citizenship>.

87. Although it does not approach the absolute character of its *jus soli*, the U.S. also has a strong version of *jus sanguinis* for acquisition of citizenship by birth outside the U.S. if at least one parent is a citizen. Caution: this is not a constitutional rule and Congress has amended it frequently; in general, the governing statute is that in force at the time of the would-be citizen's birth. See 8 U.S.C. §§1401(c), (d), (e), (g), (h) and 1409; 8 U.S.C. §1431 (Child Citizenship Act of 2000); see also 8 U.S.C. §1408. Note also the very generous special rules for certification of citizenship for many children under eighteen who do not satisfy the general rules. 8 U.S.C. §1433; 8 C.F.R. §322. See generally KURZBAN, *supra* note 6, at 1622-28.

88. 8 C.F.R. §215.1(e). For the history of this provision, see KURZBAN, *supra* note 6, at 1621.

The rule is absolute,⁸⁹ with the exception of the children of foreign diplomats.⁹⁰ To take the extreme case, if a pregnant woman sneaks into the territorial waters around the U.S. Virgin Islands and has her baby in a boat, the child is a citizen (although these facts may be difficult to prove). There is no requirement that either parent have any lawful status in the U.S.⁹¹ or that the child would otherwise be stateless.^{92,93} The child is a citizen even in the absence of documentation of the birth, provided it can be proved in some way, and sometimes even if it cannot: a child of unknown parentage found in the U.S. while under age five is deemed to be a citizen unless the contrary is shown before the child reaches age twenty-one.⁹⁴

A consequence is the “birth tourism” industry, in which Chinese and other mothers-to-be enter the U.S. lawfully, stay in special-service hotels, have their U.S.-citizen babies, and return home. From mainland China, the cost of the package deal—transportation, lodging and meals in Los Angeles, prenatal and nursery care, and assistance in obtaining birth documentation—is reportedly \$12,000 to \$50,000.⁹⁵

Another effect of the strong *jus soli* rule is that many children of aliens not lawfully in the U.S. are citizens. If the parents are apprehended and removed, the child has the right to stay; if the parents take the child home with them, he has the right to return to the U.S.

89. In the last two Presidential elections, “birthers” asserted that Barack Obama could not be a “natural born citizen,” U.S. Const. art. II sec. 1. See http://topics.nytimes.com/top/reference/timestopics/subjects/b/birther_movement/index.html. One result is bills introduced in Congress to limit citizenship by birth to children with at least one parent who is a citizen, LPR or active member of the armed forces.

90. The requirement “and subject to the jurisdiction thereof” excludes the U.S.-born children of foreign diplomats. *United States v. Wong Kim Ark*, 169 U.S. 649, 682 (1898).

91. Contrast, for example, the German rule, even as liberalized in 2000, requiring that at least one parent have been living in Germany for eight years and be a lawful permanent resident (“ein unbefristetes Aufenthaltsrecht . . . besitzt”). *Staatsangehörigkeitsgesetz* §4(3).

92. Contrast, for example, African Commission on Human and Peoples’ Rights, Res. 234 on the Right to Nationality (23 April 2013), which calls upon African States to recognize “that all children have the right to the nationality of the State where they were born if they would otherwise be stateless . . .” <http://www.achpr.org/sessions/53rd/resolutions/234/>.

93. The recent ruling of the Dominican Republic’s Tribunal Constitucional, *Sentencia TC-0168-13*, Sept. 27, 2013, that the appellant “si bien nació en el territorio nacional, es hija de ciudadanos extranjeros en tránsito, lo cual la priva del derecho al otorgamiento de la nacionalidad dominicana” (at 98), has been reported to render the DR-born children of illegal Haitian agricultural workers stateless, but the TC found that they are citizens of Haïti under article 11.2 of the latter’s 1983 constitution (at 77).

94. 8 U.S.C. §1401(f). This is somewhat more favorable to the child than the German rule, which does not require that non-citizenship be proved before age twenty-one. *Staatsangehörigkeitsgesetz* §4(2).

95. June Chang, *Birth Tourists: Going for the 14th Amendment*, *China Daily USA*, May 17, 2013, http://usa.chinadaily.com.cn/epaper/2013-05/17/content_16506471.htm.

Contrast the situation of non-citizen children growing up in the U.S., discussed below in part VII.B.

IV. FAMILY-BASED IMMIGRATION⁹⁶

By the usual calculations, the breakdown of persons granted LPR status in recent years (1,031,631 in FY2012) is about two-thirds based on family reunification (680,799 or 66%); 12% to 22% employment-preference (143,998 or 14%); 6% to 17% refugees and asylees (105,528 refugees and 45,086 asylees, totaling 150,614 or 14.6%); and around 45,000 “diversity” immigrants, from countries with otherwise low rates of immigration to the U.S. (40,320 or 3.9%).⁹⁷ A slightly different approach, however, would put the family-reunification share above 80%. Using FY2011 data, Kerry Abrams calculated that 80.76% of immigrants given green cards established their eligibility as family members of U.S. citizens or LPRs.⁹⁸ Using her methodology but FY2012 data, we calculate 82.06%.

The OECD puts this in perspective (using 2009-2010 data):

In the United States, there is little permanent (“green card”) labour migration, because its system, which is based on numerical limits, favours family migration.

Indeed, the United States has the largest share of family migrants in the OECD—about three out of four new permanent immigrants are in this category. Overall in OECD countries . . . family migration continued to be the main category for permanent migration in 2010, accounting for 36% of the flows. If the family members who are accompanying the labour migrant are included, this figure rises to 45%. Accompanying family of workers notably make up a large part of family migration in Australia, Canada and New Zealand.⁹⁹

96. See generally Kerry Abrams, *What Makes the Family Special?*, 80 U.CHI.L.REV. 7 (2013); Lori A. Nessel, *Families at Risk: How Errant Enforcement and Restrictionist Integration Policies Threaten the Immigrant Family in the European Union and the United States*, 36 HOFSTRA L.REV. 1271 (2008).

97. Other small categories totaled 15,900 or 1.5% in FY2012. Sources: <http://www.dhs.gov/yearbook-immigration-statistics-2012-legal-permanent-residents>; <http://www.migrationinformation.org/Feature/display.cfm?ID=973>.

98. Abrams, *supra* note 96, at 7 n. 1. Professor Abrams continues:

This number may actually undercount family-based immigrants, as the eligibility requirements for cancellation of removal include family ties, but these visas are not identified in the reported statistics as family-based, and the program for Amerasians born in Vietnam during the period when American servicemen were there exists to give preferential status to children who likely had American fathers.

99. OECD, *INTERNATIONAL MIGRATION OUTLOOK 2012* (2012) at 33; the U.S. details are 73.1% for 2009, 74.1% for 2010 (at 283), http://dx.doi.org/10.1787/migr_outlook-2012-en, which also reports Australia 54.1%, 58.0% (at 211); Canada 61.3%, 60.8% (at 219); New Zealand 60.8%, 60.0% (at 257); Russian Federation 64.4%, 52.3%

The figures are around 60% for Canada and New Zealand and somewhat lower for Australia, but in the twenties for most other OECD countries. Thus, family-based immigration is a larger share of total immigration in the U.S. than anywhere else, a far larger share than in the rest of the OECD, and currently a rising share.

Family-based immigrant visas are available to spouse, children, siblings, and parents of U.S. citizens and to spouses and unmarried children of LPRs.¹⁰⁰ For immediate relatives (unmarried children under twenty-one, parents and spouses) of U.S. citizens, there are no quotas and unauthorized employment or being out of status is not an impediment to adjustment of status. For relatives of LPRs and adult children and siblings of citizens, there are significant quota backlogs, sometimes extending to almost twenty years.

V. BUSINESS AND ECONOMICS

A. *Labor and Business*

Recruitment of highly-skilled workers remains a cornerstone of business-related immigration. U.S. high-tech businesses have retained lobbyists to secure legislation increasing visas for potential workers and reducing competing foreign companies' ability to provide workers for the U.S. market.¹⁰¹

The workhorse of skilled-worker visas is the H-1B,¹⁰² a non-immigrant-worker visa for professionals. The process is detailed and complex, convincing many smaller employers to forgo it entirely. Applications may be made only once each year, on April 1, and the competition is fierce. In FY2014, there were 124,000 applications for 65,000 visas; USCIS received sufficient applications by 5 p.m. on April 5, 2013 to close the process, leaving 60,000 applicants either to give up or to attempt the application again, against similar odds, a year later.¹⁰³ The H-1B visa permits the alien to work only for a specific employer, for term limited to six or seven years, but may be extended while application for an employer-sponsored immigrant visa (LPR) is pending.

For non-immigrant aliens who wish to invest their own money and skills in a business venture, the E visa—treaty trader/treaty investor—may be suitable.¹⁰⁴ This visa is based on a treaty of trade or

(at 266). Compare France 42.8%, 42.9% (at 231); Germany 23.9%, 24.7% (at 232); U.K. 28.6%, 26.4% (at 281).

100. See generally KURZBAN, *supra* note 6, at 967-1014.

101. See Eric Lipton & Somini Sengupta, *Latest Product from Tech Firms: An Immigration Bill*, N.Y. TIMES, May 5, 2013.

102. 8 U.S.C. §1101(a)(15)(H).

103. On the H-1B FY2014 cap season, see <http://www.ucis.gov/portal/>.

104. 8 U.S.C. §1101(a)(15)(E).

commerce between the alien's country and the U.S.¹⁰⁵ Aliens able to put their own finances at risk to invest in a new or established business may use the E visa for many years. Foreign companies seeking to expand into the U.S. may use the L visa¹⁰⁶ to transfer key executives or managers to oversee new branch offices for up to six years.

Another program helping business is CBP's Global Entry,¹⁰⁷ which allows expedited customs clearance for pre-approved, low-risk travelers. A traveler approved for the program may bypass customs and enter the U.S. using an automated kiosk at select airports. The program requires an extensive background check and personal interview and has been available to U.S. citizens, LPRs, Mexicans and some Dutch citizens. In August 2013, it was expanded to include certain citizens of South Korea, Germany, Qatar and the U.K.¹⁰⁸ Canadian citizens are eligible to use the NEXUS trusted-traveler program, while land commuters between the U.S., Canada and Mexico may use the FAST (Free and Secure Trade) program.

S. 744 would increase the H-1B annual cap of 65,000 to 110,000 and make it easier for an H-1B to transition to LPR status. Easing the ability of aliens to become LPRs enjoys broad support from technology companies, which claim they are struggling to fill STEM¹⁰⁹ positions.¹¹⁰

The current H-2B non-immigrant visa is used by an employer to fill a temporary, one-time need for up to three years or to fill a seasonal need for up to ten months.¹¹¹ The employment need not be professional. Typically, H-2B visas are used for aliens who will work as landscapers, recreational park workers, forestry workers, house-

105. While many countries have treaties based on both the trader and the investor provisions of the law, there are exceptions. For example, Israel has signed a treaty of commerce and trade for E-1 purposes, but has yet to consider legislation necessary for the E-2 treaty-investor visa. See http://dx.doi.org/10.1787/migr_outlook-2012-en.

106. 8 U.S.C. §1101(a)(15)(L).

107. For general information and applications, see <http://www.globalentry.gov>.

108. See 78 Fed.Reg. 48706 (9 Aug. 2013).

109. Science Technology Engineering Mathematics.

110. See Lipton & Sengupta, *supra* note 101; but see Hal Salzman, Daniel Kuehn & B. Lindsay Lowell, *Guestworkers in the high-skill U.S. labor market: An analysis of supply, employment, and wage trends*, Econ. Policy Inst., Apr. 24, 2013, <http://www.epi.org/files/2013/bp359-guestworkers-high-skill-labor-market-analysis.pdf>, which concludes, at 26-27:

Workers from countries with low wages and limited career opportunities will find the U.S. IT labor market attractive even when wages are too low and career opportunities too limited to increase the IT supply from domestic students and workers. In other words, the data suggest that current U.S. immigration policies that facilitate large flows of guestworkers appear to provide firms with access to labor that will be in plentiful supply at wages that are too low to induce a significantly increased supply from the domestic workforce.

111. See <http://www.foreignlaborcert.doleta.gov/h-2b.cfm>.

keepers, and meat processors.^{112,113} S. 744 would add visas for low-skilled guest workers in positions for which there is a long-term need. This new visa quota would start at 20,000 and rise to 75,000 by the fourth year, then increase or shrink based on the unemployment rate. To protect American wages, minimum pay would be the greater of the prevailing industry wage (as determined by the Department of Labor) or the actual employer wage.¹¹⁴

The House Judiciary Committee has approved three bills addressing business immigration matters. H.R. 1773, the “Agricultural Guestworker Act of 2013,” would permit an H-2C agricultural worker to remain in the U.S. for eighteen months and allow him to seek at-will employment after termination of employment with the employer who first petitioned for him. To ensure that the alien leaves at the end of his authorized stay, 10% of his wages is to be withheld and may be paid to him at a U.S. embassy or consulate in his home country.

H.R. 2131, the “SKILLS Act,”¹¹⁵ aims to increase both immigrant and non-immigrant employment-based visas. An additional 55,000 immigrant visas would be available for those with advanced degrees in STEM and the H-1B visa quota would increase from 65,000 to 155,000. Two new immigrant-visa categories would be established for venture-capital-backed entrepreneurs¹¹⁶ and for treaty investors.¹¹⁷ The increase in the employment-based immigrant visas comes at a cost, however, to the family-based immigrant visa program, in that the bill proposes to discontinue the diversity-lottery program¹¹⁸ and the fourth preference category¹¹⁹ for siblings of U.S. citizens.

112. See http://www.foreignlaborcert.doleta.gov/pdf/h_2b_temp_non_agricultural_visa.pdf.

113. See also *Comité de Apoyo a las Trabajadoras Agrícolas v. Solis*, 2:09-cv-00240-LDD (E.D.Pa. Mar. 21, 2013) (permanent injunction against continued use by Labor Department of 2008 rules for certain prevailing-wage determinations).

114. See Ashley Parker & Steven Greenhouse, *Labor and Business Reach Deal on Immigration Issue*, N.Y. TIMES, Mar. 31, 2013.

115. “Supplying Knowledge-based Immigrants and Lifting Levels of STEM Visas Act.”

116. This visa would require a \$500,000 investment and the creation of five full-time jobs for U.S. workers. The current investment-based immigrant visa requires the investment of the alien’s own funds, which must be “at risk.” 8 U.S.C. §1153(b)(5).

117. This would permit E-2 non-immigrant treaty investors who have maintained their status for ten years and created jobs for five U.S. workers to apply for permanent residence for the first time based on their investment.

118. 55,000 visas. See <http://fpc.state.gov/198409.htm>. The diversity lottery is for natives of countries with low rates of immigration to the U.S. For FY2015, for the first time, Nigeria has a sufficient immigration rate to be excluded from the list of eligible countries.

119. 65,000 visas. See <http://travel.state.gov/visa/bulletin>.

H.R. 1772, the “Legal Workforce Act,” would replace the current paper-based form I-9¹²⁰ with a completely electronic work-eligibility check, which currently is voluntary.¹²¹

B. *Economic Perspectives*

The evidence for the economic benefits of liberalized immigration to the U.S. (and several other destination countries) is strong and keeps getting stronger. A particularly important example is the relationships among immigration, offshoring of jobs and employment of natives. For some time, empirical studies in this area concentrated on the relationship between immigration and international trade, usually finding that they did not behave as substitutes.¹²² Very recently, a more sophisticated approach has considered and compared a “displacement effect,” in which offshoring (rather than international trade in general) or hiring immigrants directly reduces the demand for native workers, and a “productivity effect,” in which cost savings from hiring immigrants or offshoring increases overall efficiency, thereby indirectly increasing the demand for native workers. Most such studies have compared the two effects either as between offshoring and employment of natives or as between immigration and employment of natives. Ottaviano, Peri and Wright, whose well-publicized article has been circulating as a working paper for several years and was published in mid-2013,¹²³ studied simultaneous patterns of substitutability between native, immigrant and offshore workers, using U.S. manufacturing-sector data from 2000 to 2007. They conclude:

Despite the widely held belief that immigration and offshoring are reducing the job opportunities of US natives, we have found instead that, during our period of observation, manufacturing industries with a larger increase in global exposure (through offshoring and immigration) fared better than those with lagging exposure in terms of native employment growth.¹²⁴

120. Verification of an employee’s right to work in the United States.

121. “E-Verify,” 8 U.S.C. §1324(a).

122. *E.g.*, William J. Collins, et al., *Were Trade and Factor Mobility Substitutes in History?*, NBER Working Paper No. 6059 (1997), which took a panel-data approach to some 700 observations for 1870-1940, finding that “substitutability is soundly rejected” by the data and that “policy makers never behaved as if they viewed trade and immigration as substitutes.”

123. Gianmarco I.P. Ottaviano, Giovanni Peri & Greg C. Wright, *Immigration, Offshoring, and American Jobs*, 103 AM.ECON.REV. 1925 (2013). *See also* Tyler Cowan, *How Immigrants Create More Jobs*, N.Y. TIMES, Oct. 30, 2010; José Luis Ferreira, *The Effects of Immigration on the Labor Market* (June 17, 2013), <http://mappingignorance.org/2013/06/17/the-effects-of-immigration-on-the-labor-market>.

124. *Id.* at 1955.

Opponents of liberalization have asserted that the costs of public services provided to immigrants would exceed the benefits provided by them, such as taxes and increased productivity. On the contrary, according to a report from the non-partisan Congressional Budget Office, which estimates that an effect of S. 744 would be a net increase of 10.4 million people resident in the U.S.,

CBO and the staff of the Joint Committee on Taxation . . . estimate that enacting S. 744 would generate changes in direct spending and revenues that would decrease federal budget deficits by \$197 billion over the 2014-2023 period CBO also estimates that implementing the legislation would result in net discretionary costs of \$22 billion over the 2014-2023 period, assuming appropriation of the amounts authorized or otherwise needed to implement the legislation. Combining those figures would lead to a net savings of about \$175 billion over the 2014-2023 period from enacting S. 744.¹²⁵

At the request of a Republican Senator, the Chief Actuary of the Social Security Administration provided a table of preliminary estimates of the financial effects of S. 744 for 2014 to 2024. Among his conclusions are that the bill would create 3.22 million jobs and raise GDP by 1.63 percent.¹²⁶

As if to emphasize that positions on immigration reform do not divide neatly along traditional party lines, several organizations that are considered conservative and have usually supported Republicans released their own studies supporting S. 744 or something similar. For example, the American Enterprise Institute's study, based on Census Bureau data for 2000 to 2010, offers four main findings:

1. Immigrants with advanced degrees boost employment for U.S. natives. This effect is most dramatic for immigrants with advanced degrees from U.S. universities working in science, technology, engineering, and mathematics (STEM) fields.

125. Congressional Budget Office, *Cost Estimate: S. 744: Border Security, Economic Opportunity, and Immigration Modernization Act* (18 June 2013), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/s744.pdf>. See also Congressional Budget Office, *The Economic Impact of S. 744, the Border Security, Economic Opportunity, and Immigration Modernization Act* (June 2013), <http://www.cbo.gov/sites/default/files/cbofiles/attachments/44346-Immigration.pdf>; Lori Montgomery, *CBO: Senate immigration bill would cut deficits by \$200 billion over decade*, Wash. Post, June 18, 2013.

126. Letter from Stephen C. Goss, Chief Actuary, Social Security Administration, to Senator Marco Rubio (May 8, 2013), http://www.washingtonpost.com/r/2010-2019/WashingtonPost/2013/05/08/Editorial-Opinion/Graphics/Rubio_S744%20ImmigrationBill_Letter%20PrelimEsts%202013_0508.pdf.

2. Temporary foreign workers—both skilled and less skilled—boost U.S. employment.
3. The analysis yields no evidence that foreign-born workers, taken in the aggregate, hurt U.S. employment.
4. Highly educated immigrants pay far more in taxes than they receive in benefits.¹²⁷

As another example, in August 2013, the American Action Network issued a report asserting that S. 744 would create a minimum of 7,000 and an average of nearly 14,000 new jobs in every Congressional district in the U.S.¹²⁸

VI. REFUGEE-RESETTLEMENT AND OTHER PROTECTION

A. *Refugees*

Nearly 1.6 million¹²⁹ people are now refugees out of Syria Today, I announced that we are nearly doubling our contributions this year to the UNHCR. We are giving to the High Commission on Refugees a \$415 million commitment that brings our 2013 total to \$890 million.¹³⁰ And I'm proud to say to you that that makes the United States of America the largest single contributor in the world. We provide more aid to the UNHCR than any other country and more than the next six countries combined.¹³¹

127. American Enterprise Institute for Public Policy Research, *Immigration and American Jobs* 4 (Dec. 2011), http://www.aei.org/files/2011/12/14/-immigration-and-american-jobs_144002688962.pdf.

128. The AAN report and widget are based on Regional Economic Models, Inc., *Key Components of Immigration Reform: An Analysis of the Economic Effects of Creating a Pathway to Legal Status, Expanding High-Skilled Visas, & Reforming Lesser-Skilled Visas* (July 17, 2013), <http://www.remi.com/download/Key%20Components%20of%20Immigration%20Reform.pdf>.

129. In a press statement the same day, Mr. Kerry said, "This year, the crisis in Syria has led to more than 4.25 million Syrians being displaced internally, more than 1.5 million becoming refugees, and millions more caught up in the unspeakable violence." <http://www.state.gov/secretary/remarks/2013/06/210929.htm>. On September 3, 2013, the UNHCR announced its estimate that "the number of Syrians registered as refugees or awaiting registration as refugees had passed the 2 million mark, or about 10 per cent of the population." Press release, "UNHCR and host countries to push for greater international help on Syrian refugees," Sept. 4, 2013, <http://www.unhcr.org/522756779.html>. This is still below the estimated 2,585,600 from Afghanistan at year-end 2012, but Sudan seems on track to exceed even that by the time this is published.

130. In August and September 2013, President Obama announced additional increases of \$195 million and \$339 million in humanitarian assistance for those affected by the conflict in Syria. These bring the total U.S.-government humanitarian assistance to this group in FY2013 to about \$1.4 billion, through UNHCR and several other organizations in Syria, Lebanon, Jordan, Iraq, Turkey and Egypt. Press releases, <http://www.whitehouse.gov/the-press-office/2013/08/07/statement-president-occasion-eid-al-fitr>, <http://www.state.gov/r/pa/prs/ps/2013/09/214593.htm>.

131. The United States is the single largest donor to refugee relief efforts around the world, working to care for refugees displaced by other conflicts,

Secretary of State John Kerry, June 20, 2013¹³²

The world's most important migration-and-law topic of the last hundred years is refugees, including asylum, non-refoulement and protection from torture, trafficking and violence. The U.S. likes to think of itself as a nation of immigrants (as do Australia, Canada and New Zealand), including a great many refugees.¹³³ This is not a wholly virtuous claim, because its truth results in part from genocidal elimination of most of the aboriginal peoples, but the U.S. currently accepts around three times as many refugees for permanent resettlement each year as the rest of the world combined.¹³⁴ Further, both the government and individual citizens contribute generously to UNHCR and other refugee programs.¹³⁵ On the other hand, in contrast to the heroic assistance currently provided to Syrian refugees by Jordan, Lebanon and Turkey,¹³⁶⁻¹³⁷ there are no

including in the Central African Republic, the Democratic Republic of the Congo, Mali, and Sudan, and we have helped address protracted refugee situations around the world, including those affecting Afghans, Burmese, Colombians, and Somalis.

Id.

132. Remarks at the World Refugee Day Event, <http://www.state.gov/secretary/remarks/2013/06/210935.htm>.

133. The United States has a proud tradition of welcoming those fleeing violence and persecution, including more than 58,000 refugees from 66 countries who were resettled to the United States in fiscal year 2012 and the nearly 70,000 refugees who are expected to arrive in the United States in the coming fiscal year to rebuild their lives. Their presence makes our country more diverse, our culture richer, and our national character stronger.

John Kerry, press statement, *supra* note 129.

134. In 2012, UNHCR submitted over 74,800 refugees for resettlement, 18 per cent [fewer] than in 2011. . . . During the year, a total of 88,600 refugees were admitted by 22 resettlement countries, including the United States of America (66,300), Canada (9,600), Australia (5,900), Sweden (1,900), and Norway (1,200). This was 8,800 people more than in 2011 (79,800). The United States of America and Canada together admitted nearly nine out of ten resettled refugees in 2012.

UNHCR, *DISPLACEMENT: THE NEW 21ST CENTURY CHALLENGE* 18-19 (2013) (DISPLACEMENT), <http://www.unhcr.org/cgi-bin/texis/vtx/home/opensslPDFViewer.html?docid=51bacb0f9&query=resettlement%20statistics%202012>.

135. Dr. Schroth has contributed money to USA for UNHCR for the benefit of refugees from Syria and requests that you join him in your own way, either through <https://donate.unrefugees.org/> or through a similar organization in some other country. *See also* <http://reliefweb.int/country/syr>.

136. There are also large numbers of Syrian refugees in Iraq and there have been large numbers of Iraqi refugees in Syria, but those situations appear to be changing rapidly and are too complex to be sorted out in a footnote.

137. The even larger numbers of refugees from Afghanistan are hosted mainly by Pakistan and Iran. Sudan has only recently overtaken Somalia, whose refugees are hosted mainly by Kenya and Ethiopia, as the world's second-largest source of refugees.

refugee camps in the U.S., whose contribution is much less than theirs as a proportion to capacity.¹³⁸

Potential refugees are processed, outside the U.S., under the supervision of the Department of State (DOS), applying a system of three priorities: first, those referred by UNHCR; second, certain groups of special humanitarian concern to the U.S., such as Cubans, Iranian religious minorities and Burmese in refugee camps in Thailand; and third, family reunification cases, currently from 22 countries.¹³⁹ All are subject to further screening by USCIS's Refugee Corps, but waivers are often granted to refugees who otherwise would be inadmissible. The numbers admitted are set out by region in Table 3.

TABLE 3: REFUGEE ADMISSIONS BY REGION, FY2008 – FY2012¹⁴⁰

Fiscal Year	Africa	East Asia	Eastern Europe	Latin America & Caribbean	Near East & South Asia	Total
2008	8,935	19,489	2,343	4,277	25,147	60,191
2009	9,670	19,850	1,997	4,857	38,280	74,654
2010	13,305	17,716	1,526	4,982	35,782	73,311
2011	7,685	17,367	1,228	2,976	27,168	56,424
2012	10,608	14,366	1,129	2,078	30,057	58,238

All refugees are provided with furnished apartments, clothing and food. Working with nine non-governmental resettlement agencies and their 350 affiliates, DOS leads a large team providing interpreters, housing, specially-equipped schools, medical care, English classes, counseling, and many other services to assist resettlement. The resettlement agencies' staff salaries, office space and other resettlement-related expenses are paid for by a combination of DOS funds, private donations and volunteer workers.

DOS provides financial assistance for refugees' rent, furniture, food and clothing for the first three months. The Office of Refugee

138. This is not only a matter of lack of proximity: Germany hosts the third largest number of refugees in the world, after Pakistan and Iran, but ahead of Kenya. However,

Ten years ago, developing countries hosted on average 70% of the world's refugees; this figure now stands at 81%.

By the end of 2012, developing countries hosted 8.5 million refugees. The 49 Least Developed Countries provided asylum to 2.5 million refugees or 24% of the global total.

DISPLACEMENT, *supra* note 134 at 13.

139. See generally Andorra Bruno, *Refugee Admissions and Resettlement Policy* (Aug. 8, 2013), <http://www.hsdl.org/?view&did=743926>.

140. Source: Bruno at 11, which in turn is based on Dept. of State, Bureau of Population, Refugees and Migration.

Resettlement (Department of Health and Human Services) works with state governments and NGOs to provide longer-term assistance; Congress appropriated \$768 million for ORR refugee assistance in FY2012 and over \$1 billion for FY2013. However, refugees receive employment authorization immediately and most find jobs. After one year, all refugees whose status has not been terminated are granted green cards; after five years, they may apply for citizenship.

*B. Asylum, Withholding of Removal, Non-Refoulement, Convention against Torture, Anti-Trafficking*¹⁴¹

Asylum is a dream, a thing hoped for, that may be accomplished only once the foot is set on the American shore.¹⁴² There is no guaranty of success, and the journey—expensive, dangerous, and for many irrevocable—is only the first step. Asylum is principally an administrative process in which the alien, once entered into the U.S.,¹⁴³ requests protection from persecution based on a set of grounds, such as race, religion, national origin, political opinion, or membership in a particular social group. Applications may be affirmative, in which case the request is handled through an interview at a local asylum office; if asylum is not granted there and the government initiates removal proceedings, the matter is then referred to the Immigration Court. Asylum may also be defensive, commenced in Immigration Court as a relief to removal.

Unlike refugee status, there are generally no caps on the number of asylum requests that may be granted.¹⁴⁴ In FY2012, the total number of asylum requests made in Immigration Courts was 44,170, with 21,552 cases decided. Approximately 56% of these cases were granted, with China, the largest source of asylum-seekers,¹⁴⁵ having

141. These and related topics are covered in detail in KURZBAN, *supra* note 6, at 527-754.

142. As in Europe, migrant interdiction by border-protection agencies is a serious and increasing barrier to people who might otherwise be successful applicants for asylum and related protections. See DONALD M. KERWIN, *THE FALTERING US REFUGEE PROTECTION SYSTEM: LEGAL AND POLICY RESPONSES TO REFUGEES, ASYLUM SEEKERS, AND OTHERS IN NEED OF PROTECTION* (2011), <http://www.migrationpolicy.org/pubs/refugeeprotection-2011.pdf>.

143. Under the Canada-U.S. Safe Third Country Agreement (Dec. 29, 2004), most aliens who enter Canada to seek asylum must make their petitions in Canada instead of continuing to the U.S. and requesting relief there (and vice-versa). There are exceptions for minors; aliens with U.S. citizen, LPR or asylee relatives in the U.S.; and those who have family with pending asylum cases in the U.S., 8 C.F.R. §208.4(a)(6). See <http://www.cic.gc.ca/english/department/laws-policy/partnership/chapter1.asp>. Cf. E.U. Dublin Convention of 1990 and “Dublin II” Regulation 2003/343/CE; ECJ, *Joined Cases C-411/10 and C-493/10, N. S. v. Secretary of State for the Home & M.E. v. Refugee Applications Commissioner* (Dec. 21, 2011), ILIB 6 Jan. 2012.

144. In 1996, the Illegal Immigration Reform & Immigrant Responsibility Act, P.L. 104-208, §601, established a cap of 1,000 on asylee adjustments to LPR status of those cases based on family planning policies. In 2005, the cap was removed.

145. In FY2012, 10,985 requests for asylum from mainland China were made in Immigration Courts. <http://www.justice.gov/eoir/efoia/foiafreq.htm>.

an approval rate of 77%. The next four sources are Mexico, El Salvador, Guatemala and recently India. While Mexico,¹⁴⁶ Guatemala and El Salvador have grant rates of only 8% to 20%, India's is 47%.

The primary asylum applicant is not admitted to the U.S. in that status; unless the alien has a visa, entrance to the U.S. is often made "without inspection" (*i.e.*, illegally) or with fraudulent documents. One year after the grant of asylum, the asylee is eligible to apply for a discretionary¹⁴⁷ grant of lawful permanent residence, the first "admittance" for any asylee who did not enter the country legally. The issue of "admittance" is a critical difference between asylum and refugee status. For an alien who is facing removal for criminal activities and is seeking cancellation of removal,¹⁴⁸ relief may be available only after residence in the U.S. for seven years after admittance, not entry. For many asylum seekers, the time between entry and LPR status may be five to ten years, thus rendering many ineligible for relief that would have been available had they been admitted as refugees.

In deciding an asylum request, both the Immigration Courts and the appellate courts often are forced to judge a country's actions that, if done by the U.S., would be considered justifiable governmental action, such as retaliation against whistle-blowing or assistance to refugees. For example, if an alien whistle-blower has exposed or opposed governmental corruption and has experienced retaliation by the government, the latter's action may be considered political and a basis for asylum.¹⁴⁹ Had Edward Snowden ratted out Russian governmental corruption or illegal behavior, governmental action to imprison him could have formed a basis for an asylum request in the U.S.

A continuing problem is the wide disparity in rulings, often in seemingly similar cases, by different Immigration Judges.¹⁵⁰ This is especially notable in asylum cases, where the national average approval rate in Immigration Court is 42%. The highest approval rates were found in the New York and San Francisco Immigration Courts and the four Immigration Judges with the highest approval rates¹⁵¹

146. Since FY2008, the rate of asylum applications from Mexico has doubled, probably because of drug-cartel violence. See Brian Skoloff, *Asylum Seekers at US, Mexico Border Double*, Aug. 16, 2013, http://www.huffingtonpost.com/2013/08/17/asylum-seekers-border_n_3772734.html.

147. Approval for LPR status is mandatory for refugees, but discretionary for asylees. 8 U.S.C. §209.

148. 8 U.S.C. §240A(a).

149. *Zhang v. Gonzales*, 426 F.3d 540, 544-48 (2d Cir. 2005).

150. See General Accountability Office, *US Asylum System: Significant Variation Existed in Asylum Outcomes across Immigration Courts and Judges* (Sept. 2008), <http://www.gao.gov/new.items/d08940.pdf>; Julia Preston, *Big Disparities in Judging of Asylum Cases*, N.Y. Times, May 31, 2007. There are 54 Immigration Courts and slightly over 200 Immigration Judges.

151. Greater than 85% approval of asylum cases.

were all found in New York. In contrast, eleven judges had approval rates below 10%—including one with a 100% denial rate in 97 cases and another with a 99% denial rate in 101 cases—most of whom are in the Miami-Krome Detention Center and Texas Immigration Courts.¹⁵²

Other relief against persecution includes withholding of removal and protection under the Convention against Torture (CAT). Withholding of removal, the relief available for those aliens who made a request more than one year after entry, is mandatory if a basis is found by the Immigration Court. However, derivative relief is not available for family members and there is no conversion to LPR status.

CAT claims may be the sole avenue of relief for aliens who are ineligible for asylum or withholding because of criminal convictions. Unlike asylum or withholding, CAT protection is not limited to five enumerated grounds, but is based on the likelihood that the alien will be subject to torture by a government official.¹⁵³

The Victims of Trafficking and Violence Protection Act of 2000 and reauthorization acts of 2003, 2005 and 2008¹⁵⁴ provide the tools¹⁵⁵ for the State Department to combat trafficking in persons, both worldwide and domestically. An executive order issued by President Obama in 2012 strengthens enforcement with regard to government procurement by “the largest single purchaser of goods and services in the world.”¹⁵⁶ The DOS Office to Monitor and Combat Trafficking in Persons¹⁵⁷ and the President’s Interagency Task Force to Monitor and Combat Trafficking in Persons assist in the coordination of anti-trafficking efforts. Victims of severe trafficking¹⁵⁸ and serious crimes¹⁵⁹ may be eligible to remain in the U.S., provided they reasonably cooperate with law enforcement. These aliens and dependent family members may adjust their status to LPR.

152. For a judge-by-judge listing of each Immigration Judge’s rate for FY2008 through FY2010, see <http://trac.syr.edu/immigration/reports/240/include/denialrates.html>.

153. See 8 C.F.R. §§208.16, 1208.16.

154. P.L. 106-386, P.L. 108-193, P.L. 109-162, P.L. 110-457.

155. Diplomacy, targeted financial assistance, and partnership with foreign governments to develop counter-trafficking strategies. Recent recipients include Ecuador, India, South Africa, Indonesia, Mexico, Dominican Republic, Philippines, Nigeria, and Eastern Europe. <http://www.state.gov/j/tip/rls/reports/2012/207590.htm>.

156. Executive Order - Strengthening Protections Against Trafficking In Persons In Federal Contracts (Sept. 25, 2012), <http://www.whitehouse.gov/the-press-office/2012/09/25/executive-order-strengthening-protections-against-trafficking-persons-fe>.

157. <http://www.state.gov/j/tip/>.

158. The “T” visa. 8 U.S.C. §1101(a)(15)(T). See KURZBAN, *supra* note 6, at 946-52.

159. The “U” visa. 8 U.S.C. §1101(a)(15)(U). See KURZBAN, *supra* note 6, at 952-59.

VII. ONE AND ONE-HALF SUCCESSES WITHOUT THE HELP OF CONGRESS

A. *Same-sex marriage*

Section 3 of the Defense of Marriage Act (DOMA), adopted in 1996, provides:

In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the word “marriage” means only a legal union between one man and one woman as husband and wife, and the word “spouse” refers only to a person of the opposite sex who is a husband or a wife.¹⁶⁰

Section 3 has prevented a member of a same-sex marriage from petitioning for the other under immigration law¹⁶¹ (as did pre-DOMA judicial decisions on the point¹⁶²).

On June 26, 2013, in *United States v. Windsor*,¹⁶³ the U.S. Supreme Court held by five votes to four that Section 3 is unconstitutional under the (implicit) equal-protection component of the Fifth-Amendment Due-Process Clause.¹⁶⁴ One result was to allow Edith Windsor to claim an exemption from federal estate tax as the surviving spouse of Thea Spyer, both residents of New York, in recognition of their marriage under the law of Ontario, Canada. The Treasury Department and the Internal Revenue Service (IRS) announced they would interpret the *Windsor* decision broadly,¹⁶⁵ thus many other same-sex couples will benefit under other tax laws favoring married couples.

160. 1 U.S.C. §7. Section 2, 28 U.S.C. §1738C, provides that no state, territory or Indian tribe need recognize any other’s law recognizing same-sex marriage.

161. However, USCIS has recognized post-operative transgender marriages. See *Matter of Lovo-Lara*, I&N Dec. 746 (BIA 2005); KURZBAN, *supra* note 6, at 994-95.

162. See, e.g., *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

163. 133 S.Ct. 2675 (2013). See Ariel Levy, *The Perfect Wife: How Edith Windsor fell in love, got married, and won a landmark case for gay marriage*, NEW YORKER, Sept. 30, 2013, at 54.

164. This suggests that the numerous “mini-DOMAs” under state law are also unconstitutional, but the majority’s emphasis on federalism leaves some doubt that it would so hold.

165. *Treasury and IRS Announce That All Legal Same-Sex Marriages Will Be Recognized for Federal Tax Purposes; Ruling Provides Certainty, Benefits and Protections under Federal Tax Law for Same-Sex Married Couples*, IR-2013-72, Aug. 29, 2013, <http://www.irs.gov/uac/Newsroom/Treasury-and-IRS-Announce-That-All-Legal-Same-Sex-Marriages-Will-Be-Recognized-For-Federal-Tax-Purposes;-Ruling-Provides-Certainty,-Benefits-and-Protections-Under-Federal-Tax-Law-for-Same-Sex-Married-Couples>.

Similar rulings have been published in other areas of the law, not least immigration. Anticipating the IRS by nearly a month,¹⁶⁶ USCIS ruled that the place of celebration,¹⁶⁷ rather than the place of residence or intended residence, will govern the validity of a marriage for its purposes¹⁶⁸ and that it will “make an effort to identify and reopen cases that were denied solely because of Section 3 of DOMA, if the case was filed after February 23, 2011.”¹⁶⁹ The Department of State (DOS) announced that

Effective immediately, U.S. embassies and consulates will adjudicate visa applications that are based on a same-sex marriage in the same way that we adjudicate applications for opposite gender spouses. This means that the same sex spouse of a visa applicant coming to the U.S. for any purpose—including work, study, international exchange or as a legal immigrant—will be eligible for a derivative visa. Like-

166. USCIS had already issued at least one green card to the same-sex spouse of a U.S. citizen by the end of June. See Julia Preston, *Gay Married Man in Florida Is Approved for Green Card*, N.Y. Times, June 30, 2013.

167. When Illinois’s new law takes effect in June 2014, sixteen U.S. states, plus the District of Columbia, will recognize same-sex marriage. The sixteen are California, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, New Hampshire, New Jersey, New York, Rhode Island, Vermont and Washington. Colorado allows same-sex civil unions, but its constitution prohibits same-sex marriage. In Nevada and Oregon, domestic partnerships provide legal rights almost identical to those of marriage, while in Maine and Wisconsin, domestic partnerships provide less extensive rights (and a few other states provide benefits to domestic partnerships only in very limited circumstances). Thirty-three states expressly forbid same-sex marriages, twenty-nine of those in their constitutions; however, federal constitutional challenges are pending in some of these states. New Mexico neither expressly allows nor expressly forbids same-sex marriage. A useful summary, regularly updated, is National Conference of State Legislatures, *Defining Marriage: Defense of Marriage Acts and Same-Sex Marriage Laws*, <http://www.ncsl.org/issues-research/human-services/same-sex-marriage-overview.aspx>.

Until a statute of the Netherlands adopted in 2001, no country expressly allowed same-sex marriage. A tentative list of countries allowing same-sex marriage as of Aug. 19, 2013 (when a new law took effect in New Zealand): Argentina, Belgium, part or all of Brazil (part, going by state statutes; all, going by the notice of the ruling of the Plenário do Conselho Nacional de Justiça, May 14, 2013, <http://www.cnj.jus.br/noticias/cnj/24668-cartorios-terao-de-reconhecer-uniao-de-pessoas-do-mesmo-sexo>), Canada, Denmark, France, Iceland, part of Mexico, Netherlands, New Zealand, Norway, Portugal, South Africa, Spain, Sweden, part of U.S., Uruguay. England and Wales will join this list when the Marriage (Same Sex Couples) Act 2013 takes effect in 2014.

168. Nevertheless, some Immigration Judges in New York, whose state law recognizes marriages performed by religious officials despite the parties’ failure to obtain a marriage license, have refused to recognize such religious marriages and insisted that a civil ceremony be performed before the marriage would be recognized for purposes of immigration law.

169. USCIS, *Same Sex Marriages: Frequently Asked Questions* (Aug. 2, 2013), <http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnnextoid=2543215c310af310VgnVCM100000082ca60aRCRD&vgnnextchannel=2543215c310af310VgnVCM100000082ca60aRCRD>.

wise, stepchildren acquired through same sex marriages can also qualify as beneficiaries or for derivative status.¹⁷⁰

DOS also will apply the place-of-celebration rule:

If your marriage is valid in the jurisdiction (U.S. state or foreign country) where it took place, it is valid for immigration purposes.¹⁷¹

B. *DREAM and DACA*

Millions of foreign-born children have been brought into the U.S. by their noncitizen parents, or sometimes other relatives, without documentation. Often, these young people speak English at a native level, are at home in U.S. culture and think of themselves as Americans; indeed, many first learn of their place of birth and undocumented status when they seek employment, driver's licenses or university admission. Most have no ties to and have never visited the country of which they are citizens; many cannot speak that country's language.¹⁷²

These young people present a particularly sympathetic case for humanitarian waiver of the rules and bills to that end have been introduced in Congress repeatedly since 2001, most called "Development, Relief, and Education for Alien Minors Act" (DREAM Act). A version of the DREAM Act is §2103 of S. 744, which would allow (after satisfaction of the border-surge amendment!) adjustment of the status of a registered provisional immigrant to lawful permanent resident if the applicant was younger than sixteen when he first entered the U.S.; has a high school diploma or equivalent; has a degree from an institution of higher education or has completed at least two years in a program for a bachelor's or higher degree in the U.S. or has served in the uniformed services for at least four years and, if discharged, received an honorable discharge.

170. Department of State, *U.S. Visas for Same-Sex Spouses* (Aug. 7, 2013), http://travel.state.gov/visa/frvi/frvi_6036.html. Similarly, ICE issued a guidance memo authorizing designated school officials to issue Form I-20, "Certificate of Eligibility for Nonimmigrant Status," to the same-sex spouse of a non-immigrant student (F-1 or M-1) seeking admission as the student's dependent (F-2 or M-2), *Guidance on Form I-20 issuance subsequent to the June 26, 2013, Supreme Court ruling on the Defense of Marriage Act*, No. 1308-01, Aug. 5, 2013, http://www.ice.gov/doclib/sevis/pdf/bm1308-01_form_I-20_issuance.pdf.

171. *Id.* But see *supra* note 168.

172. A related serious problem is the diaspora of people raised in the U.S. who left or were deported because they lacked legal status and now live as foreigners in their "native" countries. See DANIEL KANSTROOM, *AFTERMATH: DEPORTATION LAW AND THE NEW AMERICAN DIASPORA* (2012). See also Christopher Sherman, *US-Raised Immigrants Remain in US Custody*, ASSOCIATED PRESS, Sept. 30, 2013, <http://abcnews.go.com/International/wireStory/us-raised-immigrants-return-border-20421525>.

Although the “DREAMers” have become a significant political force,¹⁷³ often openly declaring their “illegal” status and drawing large numbers of supporting protesters, Congress has not yet acted to help them. After demonstrations including occupation of some of President Obama’s campaign offices in the spring of 2012, an election year, the Secretary of Homeland Security on June 15 announced a program of deferred action for childhood arrivals (DACA),¹⁷⁴ based on prosecutorial discretion,¹⁷⁵ which began accepting applications on August 15: “While this process does not provide lawful status or a pathway to permanent residence or citizenship, individuals whose cases are deferred will not be removed from the United States for a two year period, subject to renewal, and may also receive employment authorization.”¹⁷⁶ The requirements of DACA resemble those of the DREAM Act, but with an easier education rule than that of S. 744.

In the first year of DACA, USCIS reported¹⁷⁷ receiving 588,725 applications, of which it accepted 567,563 for consideration; on review, 455,455 had been approved and 9,578 denied. Of those approved, 350,056 of the applicants were from Mexico, 16,950 from El Salvador, 10,719 from Honduras, 10,720 from Guatemala and 6,760 from South Korea. The Migration Policy Institute estimated in August 2013 that 1.09 million met DACA’s age and education requirements,¹⁷⁸ leaving some 520,000 who had not yet applied. One reason might be a criminal record. Another could be concern about revealing their own or family members’ undocumented status; note that DACA allows defensive applications by persons facing deportation, so some may feel there is nothing to lose by waiting.

H.R. 2278, the “SAFE Act,” would end the government’s authority to defer removals, as in DACA, by forbidding the exercise of prosecutorial discretion.

173. See generally WALTER J. NICHOLLS, *THE DREAMERS: HOW THE UNDOCUMENTED YOUTH MOVEMENT TRANSFORMED THE IMMIGRANT RIGHTS DEBATE* (2013).

174. Press release, <http://www.dhs.gov/news/2012/06/15/secretary-napolitano-announces-deferred-action-process-young-people-who-are-low>.

175. Potentially almost as important, but with a different legal basis for the discretion exercised (8 U.S.C. §§ 1182(a)(6)(A)(i), 1182(d)(5)(A), 1225(a), and 1255(a), (c)), is the announcement by USCIS that close relatives of military personnel serving on active duty or in reserves and veterans will no longer be required to leave the U.S. to wait for visas, but instead will be “paroled in place.” PM-602-0091, Nov. 15, 2013, http://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2013/2013-1115_Parole_in_Place_Memo_.pdf.

176. See <http://www.dhs.gov/blog/2012/08/15/deferred-action-childhood-arrivals-who-can-be-considered>.

177. All data in this sentence and the next are from <http://www.uscis.gov/USCIS/Resources/Reports%20and%20Studies/Immigration%20Forms%20Data/All%20Form%20Types/DACA/daca-13-9-13.pdf>.

178. Jeanne Batalova et al., *Deferred Action for Childhood Arrivals at the One-Year Mark*, <http://www.migrationpolicy.org/pubs/cirbrief-dacaatoneyear.pdf>.

CONCLUSION

In recent decades, the U.S. has come to treat migration as in large part a criminal matter. If that has done any substantial good, it is difficult to see: perhaps increased opportunities for defense contractors, private prisons and the employees of both is the best of it. But it is easy to see the harm in criminalization: to workers and their families; to the integrity of the legal and political systems; to business and the economy; to neighboring countries as well as our own. Seats in Congress made safe for the Republican party assure that the incumbent will fear challenges from the right only and dare not be "soft on crime." If, for example, data showing benefits to GDP and to employment of native citizens from increased immigration of some kinds are understood only as an excuse for granting undeserved amnesty to criminals, politicians who vote for economic rationality will expect to be punished at the polls.

Some parts of the U.S. system of migration and law are working well, but many have fallen or been pushed into disrepair. It is time again for comprehensive reform, but that demands leadership, a good in short supply in Washington in 2013.

RICHARD S. KAY*

Retroactivity and Prospectivity of Judgments in American Law†

TOPIC I. B

In every American jurisdiction, new rules of law announced by a court are presumed to have retrospective effect—that is, they are presumed to apply to events occurring before the date of judgment. There are, however, exceptions in certain cases where a court believes that such application of the new rule will upset serious and reasonable reliance on the prior state of the law. This report summarizes these exceptional cases. It shows that the proper occasions for issuing exclusively or partially prospective judgments have varied over time and that there are still substantial differences in approach according to the particular jurisdiction and the kind of law under consideration. The report concludes with a brief survey of some of the still unresolved jurisprudential and constitutional problems raised by recognition of the power of courts to issue non-retroactive judgments.

I. INTRODUCTION

Appellate decisions generally consist of two elements—the resolution of a dispute and a statement of law explaining that resolution.¹ The former can only be retroactive—a judge cannot resolve a case before it arises. Prospectivity and retroactivity only present issues with respect to the general explanatory statements of law. Because the more general statements are a court’s best explanation of the legal rules governing certain facts, they ought to apply to other cases based on the same kinds of facts arising both before and after the judgment.

To the extent that a court creates or changes a rule of law in a given case and then applies it to other cases based on past conduct, it

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1. JULIUS STONE, PRECEDENT AND LAW 188 (1985).

regulates that conduct by a retroactive rule. This raises immediate alarms. In American law, as in most law, retroactive rules are disfavored. The United States Supreme Court expressed the prevailing attitude:

Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted. For that reason, the principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal.²

Several provisions of the United States Constitution are motivated, at least in part, by concerns about the evils of retroactive law³ and American courts interpreting legislation indulge a strong presumption against retroactivity.⁴

The attitude, however, is quite the opposite when it comes to the judgments of courts. The strong presumption is that statements of law in judgments that announce new rules or overturn old ones apply to conduct predating that judgment. This seeming inconsistency derives from the “declaratory” theory of adjudication—legislatures make new law but courts only find and declare pre-existing law.⁵ Blackstone, whose influence on American law was great, understood judgments as merely “the principal and most authoritative evidence” of a law with a prior and independent existence.⁶ Courts engage in interpretive not creative acts.⁷ Joseph Story, a preeminent early American legal authority, embraced this idea with enthusiasm. Legal rules, he claimed, were “antecedent” to judicial decisions and the latter were valuable only for “their supposed conformity to those rules.”⁸ From this understanding it follows that rules announced by the legis-

2. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265-66 (1994) (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855 (Scalia, J., concurring) (citations omitted)).

3. U.S. CONST. art I, § 9, cl. 3 (federal); *id.* art. I, § 10, cl. 1 (states) (no ex post facto laws); art I, § 9, cl. 3 (federal); *id.* art. I, § 10, cl. 1 (states) (no bills of attainder); art I, § 10, cl. 1 (states) (no impairment of the obligation of contracts); amend. V (federal) (no taking of property without just compensation); amends. V (federal), XIV (states) (no deprivation of life, liberty or property without due process of law).

4. *Landgraf*, 511 U.S. at 265.

5. *See, e.g.*, *Prentis v. Atl. Coast Line Co.*, 211 U.S. 210, 226 (1908).

6. 1 WILLIAM BLACKSTONE, COMMENTARIES *69.

7. George P. Fletcher, *Paradoxes in Legal Thought*, 85 Colum. L. Rev. 1263, 1273 (1985) (Courts do not “bring new laws into being,” but provide “readings or renditions of the meaning implicit in some independently existing, external object.”).

8. Joseph Story, *Value and Importance of Legal Studies*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 503, 508 (William W. Story ed., Da Capo Press 1972) (1852).

lature have only prospective effect while those announced by judges have retroactive effect as well.⁹

Modern jurisprudence, of course, has largely debunked this view and has recognized an inevitable law-making power in courts.¹⁰ It might follow that the retroactivity of rules arising from adjudication is as worrisome as that associated with legislation. That is, we should expect cases in which people have acted in substantial and reasonable reliance on the law that preceded introduction of the “new rule” by a court. In such cases, it might make sense to apply new judicial rules, like new legislative rules, only to the future. So, when, in 1848, the Ohio Supreme Court held legislative divorces unconstitutional, it recognized that “second marriages [had] been contracted” based on such divorces and retroactive application of its decision would “bastardize” the children born of those marriages. It was enough that the court had declared the correct state of the law. It felt “confident that no department of state has any disposition to violate it, and that the evil will cease”¹¹

In the early twentieth century, as the force of the declaratory theory began to wane, this idea of limiting judgments’ effect to future transactions was increasingly proposed as a reasonable approach when courts created new legal rules and especially when they overruled established precedent. In 1921, Chief Judge (as he then was) Benjamin Cardozo noted that in some cases:

when the hardship [of the retroactive effect of judge-made law] is felt to be too great or to be unnecessary, retrospective operation is withheld. . . . It may be hard to square such a ruling with abstract dogmas and definitions. When so much else that a court does, is done with retroactive force, why draw the line here? The answer is, I think, that the line is drawn here, because the injustice and oppression of a refusal to draw it would be so great as to be intolerable.¹²

9. Similarly, the constitutional provisions that prohibit retroactive laws generally have been held inapplicable to judicial acts. *See, e.g.*, *Frank v. Mangum*, 237 U.S. 309, 344 (1915) (ex post facto laws); *Tidal Oil Co. v. Flanagan*, 263 U.S. 444 (1924) (impairment of contracts). *But see* *Gibson v. Am. Cyanamid Co.*, 719 F. Supp. 2d 1031, 1041-45 (E.D. Wis. 2010) (retroactive application of new tort liability violates due process clause of fourteenth amendment). The United States Supreme Court has sometimes attempted to restrain judicial innovation resulting in unexpected imposition of criminal liability. *See infra* Part III.A.

10. *See, e.g.*, Richard H. Fallon, Jr. & Daniel J. Meltzer, *New Law, Non-Retroactivity and Constitutional Remedies*, 104 HARV. L. REV. 1731, 1759 (1991) (“It would only be a slight exaggeration to say that there are no more Blackstonians.”)

11. *Bingham v. Miller*, 17 Ohio 445, 448-49 (1848).

12. BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS*, 146-47 (1921). By this time the practice had already been noted and defended in legal commentary. Beryl Harold Levy, *Realist Jurisprudence and Prospective Overruling*, 109 U. PA. L. REV. 1, 10 (1960).

The practice had become prominent enough by 1931 that an article in the *American Bar Association Journal* proposed that legislatures explicitly authorize courts to declare that new judge-made rules would operate only prospectively.¹³

In 1932, the constitutionality of such “prospective overruling” was challenged in the United States Supreme Court.¹⁴ The Montana Supreme Court had previously held that when the Montana Railroad Commission reversed its prior determination of freight charges’ reasonableness, shippers could recover the excess amounts paid under the earlier dispensation. The Montana court overruled that interpretation but applied the old rule to the parties before it, allowing the shipper to recover the unreasonable charges.¹⁵ The railroad argued that this deprived it of property without due process of law because it had been forced to refund the payments based on an interpretation of the statute now acknowledged to be wrong.¹⁶ In *Great Northern Railway. Co. v. Sunburst Oil & Refining Co.*, the Supreme Court rejected this argument in a unanimous decision written by now Justice Cardozo. A state court was entitled to “make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.”¹⁷ The “declaratory” understanding of adjudication was merely one of several permissible approaches:

The choice for any state may be determined by the juristic philosophy of the judges of her courts, their conceptions of law, its origin and nature. . . . [W]e may say of the earlier decision that it has not been overruled at all. It has been translated into a judgment of affirmance and recognized as law anew. Accompanying the recognition is a prophecy, which may or may not be realized in conduct, that transactions arising in the future will be governed by a different rule. . . . [W]e are not at liberty, for anything contained in the constitution of the United States, to thrust upon those courts a different conception either of the binding force of precedent or of the meaning of the judicial process.¹⁸

This decision put to rest any constitutional concerns with state courts’ prospective judgments.

13. Albert Kocourek, *Retrospective Decisions and Stare Decisis and a Proposal*, 17 A.B.A.J. 180 (1931).

14. *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358 (1932).

15. *Id.* at 360-61.

16. *Id.* at 359.

17. *Id.* at 364 (emphasis added) (citations omitted).

18. *Id.* at 365-66 (citations omitted).

The balance of this report will examine how courts have responded to this possibility and will attempt to summarize the state of the law. This attempt is complicated by the federal character of the jurisdiction. The relevant law is often different from state to state. My summary account of state law, therefore, must be more indicative than definitive. In addition, I will describe the same issues in federal law—the law of the United States. Although it will be apparent that the division is in some ways artificial, I will also divide the treatment between judgments of civil law and criminal law.

II. PROSPECTIVE JUDGMENTS IN CIVIL LAW

A. *State Courts*

Statements of law contained in a judgment are presumed to apply to events predating that judgment. The negative impact of this retroactive application of judicially created rules must be substantial before a court will consider limiting the rules to future cases. When deciding whether to depart from the default of full retroactivity, the foremost consideration is the nature and degree of likely reliance on the prior state of the law. This consideration “can hardly be overemphasized.”¹⁹ Courts view some fields of law—such as contract and property—as especially likely to induce such reliance. Apart from the injustice of erasing or devaluing rights deemed to have already “vested” in their holders,²⁰ these are fields where individuals may have actually paid attention to existing rules of law, perhaps even consulted legal advisers, before engaging in a given transaction.²¹

By contrast, new rules of tort law seldom upset significant reliance interests. “Ordinarily,” for example, “persons who drive carelessly do not do so in conscious reliance upon some rule of law.”²² The scope of tort liability, however, may affect some decisions on whether and how much insurance a party obtains, as well as the decision to investigate an incident for which it might be held liable. Therefore, courts often made their decisions eliminating tort immu-

19. *Beavers v. Johnson Controls World Servs., Inc.*, 881 P. 2d 1376, 1384 (N.M. 1994)

20. See Roger J. Traynor, *Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility* 28 HASTINGS L.J. 533, 544 (1977).

21. See *id.*; accord. Thomas S. Currier, *Time and Change in Judge-Made Law: Prospective Overruling*, 51 VA. L. REV. 201, 242 (1965); MELVIN A. EISENBERG, *THE NATURE OF THE COMMON LAW* 122 (1998).

22. Thomas E. Fairchild, *Limitation of New Judge-Made Law to Prospective Effect Only: “Prospective Overruling” or “Sunbursting,”* 51 MARQ. L. REV. 254, 261 (1967-68). The same may be true of “strict liability” torts and certain intentional torts to the person such as battery, assault or infliction of mental distress. On the other hand, intentional torts to property, such as trespass or conversion, may sometimes be the result of deliberate decision. Likewise, some instances of defamation or misrepresentation might be undertaken only after consideration of the relevant law.

nity for municipalities and charitable institutions prospective-only.²³ Notably, in calculating the reliance that justifies making judicial decisions non-retroactive, courts almost always consider *categories* of cases; not the presence or absence of reliance by the particular parties before the court.²⁴

Whenever prospective operation is suggested there are necessarily competing considerations. Retroactive application might undermine reasonable actions taken in reliance on the former law. But the new judgment, by definition, supposes the altered rule to be superior to the old one. Prospective-only operation, therefore, entails a decision to apply an inferior rule to prior transactions. In accommodating the relevant factors, many state courts have settled on some variation of a test formulated by the United States Supreme Court in its 1971 decision in *Chevron Oil Co. v. Huson*.²⁵ The test considers three factors:

- 1) whether the decision to be applied non-retroactively establishes a new principle of law, either by overruling clear past precedent or by deciding an issue of first impression;
- 2) if, in light the new rule's purpose and effect, retrospective operation would further or retard its operation; and
- 3) the extent of the inequity imposed by retroactive application, namely the injustice or hardship that would be caused by retroactive application.²⁶

A court examines these factors, it must be stressed, against the background presumption that retroactivity is "overwhelmingly the norm."²⁷ Thus a litigant seeking prospective-only application must firmly convince a court that each factor favors such a decision.

23. See, e.g., *Parker v. Port Huron Hosp.*, 105 N.W.2d 1, 14-15 (Mich. 1960); Thomas J. Dufour, Note, *The Proper Application of Judicial Decisions Overruling Established Tort Doctrines*, 65 B.U. L. Rev. 315, 331 (1985).

24. Walter V. Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. Rev. 631, 642-43 (1967). But see *Garfias-Rodriguez v. Holder*, 702 F.3d 504, 519-20 (9th Cir. 2012) (actual reliance on the old law by the party before the agency is relevant to the possible prospective application of a rule created in *administrative* adjudication). Some doubt has been expressed about how often primary conduct is influenced by consideration of the current law. Note, *Prospective Overruling and Retroactive Application in the Federal Courts*, 71 YALE L.J. 907, 946 (1962) ("Thus in many cases, the parties, because of their not uncommon ignorance of the legal principle that controls their actions, will not be able to make a *bona fide* claim of surprise.").

25. 404 U.S. 97 (1971). See, e.g., *Beavers v. Johnson Controls World Servs., Inc.*, 881 P.2d 1376, 1381-85 (N.M. 1994); *DiCenzo v. A-Best Prods. Co.*, 897 N.E.2d 132, 135-41 (Ohio 2008); *Caperton v. A.T. Massey Coal Co.*, 690 S.E.2d 322, 351-52 (W. Va. 2009). The *Chevron Oil* case is discussed further at *infra* text accompanying notes 54-62.

26. Paraphrased from *Chevron Oil*, 404 U.S. at 106-07.

27. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 535 (1991) (opinion of Souter J.).

Once we have established that a court may limit the retroactive application of its judgment, other questions arise. Such a decision might mean that the new rule is to apply only to primary conduct occurring after the date the decision is announced and to no conduct occurring before that date. While that is sometimes the case, there are other possibilities. A court might make a new norm *partly* retroactive, applying it to some but not all past events. For example, when the Connecticut Supreme Court expanded an enterprise's "slip and fall" tort liability to include injuries caused by a foreseeably unsafe "mode of operation," it applied its holding to "all future cases and, as a general rule, to all previously filed cases in which the trial has not yet commenced" ²⁸ The court apparently concluded that the costs of adjusting to the new rule would not be excessive if litigation had not yet reached the trial stage.

The simple approach of starting the rule running, at the moment of decision, has, for reasons which will become apparent, been labeled "pure prospectivity." Neither the litigant in the case announcing the new rule, nor any other person whose claim is based on prior events, will be subject to that rule. ²⁹ Since the new rule plays no role in determining the outcome of the litigation, it is technically dicta and, as such, communicates only a prediction of what the law will be. ³⁰ A court might even postpone the moment that the rule becomes applicable to some date further in the future. This variation has been called "prospective-prospective overruling." A court may reason that parties affected by the new rule need additional time to adjust their behavior. So, when the Wisconsin Supreme Court abrogated the doctrine of governmental immunity from tort liability on June 5, 1962, it held the "effective date of the abolition of the rule" would be July 15, 1962 in order "[t]o enable the various public bodies to make financial arrangements to meet the new liability." ³¹ When later, the same year, the Minnesota Supreme Court reached a similar conclusion, it expressed its "intention to overrule the doctrine . . . with respect to tort claims . . . arising after the next Minnesota Legislature adjourns, subject to any statutes which now or hereafter limit or regulate the

28. *Kelly v. Stop & Shop, Inc.*, 918 A.2d 249, 265 n.9 (Conn. 2007). *Humphrey v. Great Atl. & Pac. Tea Co.* 993 A.2d 449 (Conn. 2010) modified this formula. *See infra* note 44.

29. *James B. Beam*, 501 U.S. at 536. For a recent example see *Barnett v. First National Insurance Co. of America*, 110 Cal. Rptr. 3d 99, 104 (Cal. Ct. App. 2010) (declining to apply new rule to parties before the court).

30. *Walter V. Schaefer, Prospective Rulings: Two Perspectives*, 1982 SUP. CT. REV. 1, 22 (1982).

31. *Holytz v. City of Milwaukee*, 115 N.W.2d 618, 626 (Wis. 1962). The court presumably was thinking of the time it would take to secure adequate insurance. The next year, when the same court abolished the immunity of religious institutions, it postponed the effect of its holding for three months. *Widell v. Holy Trinity Catholic Church*, 121 N.W.2d 249, 254 (Wis. 1963). In both cases, however, the plaintiff in the case at bar was allowed to recover.

prosecution of such claims." This both allowed institutions to buy liability insurance and gave the legislature a chance to craft a different liability regime that would accommodate the special interests of the public entities.³²

"Purely" prospective judgments are relatively infrequent. Much more commonly a court applies the new rule to the litigants in the instant case but "then returns to the old one with respect to all other[] [cases] arising on facts predating the pronouncement." This course is sometimes called "selective prospectivity."³³ It is, in part, motivated by a desire to connect a judgment's statements of law to the particular controversy before the court.³⁴ More prominent is the worry that not granting the benefit of the new rule to the party arguing for it in the case in which it is announced would discourage other litigants from advancing claims that would change existing law. It would, therefore, deprive the legal system of the law-reform benefits deriving from judicial consideration of those claims.³⁵ Critics have questioned this premise. The fact that courts maintain retroactive application in the great majority of cases is enough to motivate most litigants. Some parties, moreover, will have a continuing interest in the legal rule so that even if they fail to benefit in the first case, they will profit from its adoption in future ones.³⁶

In addition to doubts about its incentive effect, critics of selective prospectivity emphasize the inevitable resulting inequity.³⁷ The best known example is the 1959 decision of the Supreme Court of Illinois in *Molitor v. Kaneland Community Unit District 302*.³⁸ The plaintiff was one of fourteen schoolchildren suffering burns and other injuries when, due to the negligence of its driver, a school bus struck a culvert and exploded.³⁹ The Supreme Court used the case to reconsider and abolish the tort immunity of school districts.⁴⁰ Since, however, retrospective application of the decision would work a hardship on school districts that may have failed to secure adequate insurance or to investigate prior accidents on the assumption they could not be held

32. *Spanel v. Mounds View Sch. Dist.* No. 621, 118 N.W.2d 795, 803-04 (Minn. 1962). See also *Smith v. State*, 473 P.2d 937, 950 (Idaho 1970) (tort liability of state would "govern all future causes of action arising on or after 60 days subsequent to the adjournment of the First Regular Session of the Forty-First Idaho State legislature unless legislation is enacted at that session with respect to the abolition of the sovereign immunity of the state.").

33. *James B. Beam*, 501 U.S. at 536-37.

34. See EISENBERG, *supra* note 21 at 131.

35. See Gil J. Ghatan, *The Incentive Problem with Prospective Overruling: A Critique of the Practice*, 45 REAL PROP. TR. & EST. L.J. 179, 180-81. See also Fletcher, *supra* note 7, at 1276.

36. See Candler S. Rogers, *Perspectives on Prospective Overruling*, 36 U. MO. KAN. CITY L. REV. 35, 49 (1968).

37. EISENBERG, *supra* note 21, at 129.

38. 163 N.E.2d 89 (Ill. 1959).

39. *Id.* at 89.

40. *Id.* at 90-98.

responsible for them, it decided that the new liability would apply only in “cases arising out of future occurrences.” It made an exception, however, for “the plaintiff in the instant case.”⁴¹ The unattractive consequences of this solution became apparent when seven other children hurt in the same accident—including three of the first plaintiff’s siblings—sought relief.⁴² The trial court, relying on the Supreme Court’s explicit exception for only “the plaintiff in the instant case,” dismissed the other complaints. The Supreme Court reversed since it “now appears the [first] appeal was treated by [all] the parties as a test case”⁴³ The facts of this litigation highlight the arbitrary quality of selective prospectivity. The Court’s second decision eliminated the inequity for those involved in the same accident but left in place the different treatment accorded every other victim of municipal negligence who was injured before the date of the first decision.⁴⁴

B. Federal Courts

Despite these concerns, most state courts maintain the option of non-retroactivity. The situation in federal courts is more complicated. After an initial period of infrequent and unreflective use of non-retroactivity, the United States Supreme Court systematized its approach in 1971 by articulating the three-factor *Chevron Oil* test cited above for deciding whether to apply a judgment non-retroactively. Then, in the early 1990s, the Supreme Court reversed course and held that federal courts must always apply their judgments retroactively. The following is a brief summary of that evolution.

A set of cases in the nineteenth century recognized—indeed, appeared to require—non-retroactive application of judge-made changes in *state law* insofar as that law was applied in federal court litigation founded on “diversity jurisdiction,” providing a federal forum where the parties to a controversy resided in different states.⁴⁵ At that time, federal judges in diversity cases developed and applied

41. *Id.* at 97-98.

42. *Molitor v. Kaneland Comty. Unit Dist.* 302, 182 N.E.2d 145, 146-47 (Ill. 1962).

43. *Id.* at 145-46.

44. See also *Humphrey v. Great Atlantic & Pacific Tea Co.*, 993 A.2d 449 (Conn. 2010), in which the Connecticut Supreme Court modified its statement in *Kelly v. Stop & Shop, Inc.*, 918 A.2d. 249, 265 n.9 (Conn. 2007)—discussed at *supra* note 28—that an expanded rule of tort liability would apply only to future cases and “previously filed cases in which trial ha[d] not commenced” on the date of decision. In *Humphrey*, the Court agreed that the new rule should also apply to cases where trial had begun and the plaintiff had raised at trial the same claim as that later adopted in *Kelly*. The Court was unwilling to sustain differences occasioned by the happenstance that one case had reached it before the other. *Humphrey*, 993 A.2d at 453.

45. U.S. CONST. art. III, § 2.

their own federal *common* law,⁴⁶ but deferred to state courts' interpretations of *enacted* state law, i.e. statutes and constitutions. In an 1847 diversity case, appealed from the federal court in Mississippi, however, the Supreme Court decided to defer only prospectively to the state court's interpretations of enacted state law.⁴⁷ The Supreme Court had previously held, in the absence of any state court interpretation on point, that a provision of the Mississippi constitution prohibiting the sale of slaves was ineffective without state implementing legislation. After the contract at issue had been made, however, the Supreme Court of Mississippi held the provision self-executing.⁴⁸ The United States Supreme Court agreed that federal courts should conform to state court interpretations "from the time they are made. But we ought not to give them a retroactive effect, and allow them to render invalid contracts entered into with citizens of other States, which in the judgment of this court were lawfully made."⁴⁹ The dissenting opinion highlighted the anomaly of such a holding, arguing that it "gives to the Constitution of Mississippi different meanings at different periods of its existence . . ."⁵⁰ The majority's approach was followed in several other federal diversity cases dealing with the validity of bonds issued by local governments under an authority that had first been confirmed by decisions of the state courts but subsequently denied under changed interpretations of state constitutions.⁵¹

The underlying concern about the unfairness of retroactive decisions evident in these cases, as well as in the state court decisions already canvassed, also surfaced in connection with federal court judgments applying federal law. On three occasions in the 1960s, perhaps influenced by its decisions refusing to apply new rules of criminal procedure retroactively,⁵² the Supreme Court gave its holdings only prospective effect.⁵³ Only in the 1971 case of *Chevron Oil Co. v. Huson*, however, did the modern Supreme Court consider the

46. See *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842). This policy was reversed in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) holding that federal courts in diversity cases must apply the common law of the state where the court sits.

47. *Rowan v. Runnels*, 46 U.S. (5 How.) 134, 139 (1847).

48. *Id.* at 134-35.

49. *Id.* at 139.

50. *Id.* at 140 (Daniel, J., dissenting).

51. See, e.g., *Gelpcke v. City of Dubuque*, 68 U.S. 175 (1863); *Douglass v. County of Pike*, 101 U.S. 677 (1879). See also *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910). See generally Barton H. Thompson Jr., *The History of the Judicial Impairment "Doctrine" and Its Lessons for the Contract Clause*, 44 STAN. L. REV. 1373 (1992).

52. See *infra* Part III.B.

53. Two cases avoided invalidating completed elections. *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969); *Allen v. State Bd. of Elections*, 393 U.S. 544, 572 (1968). The third involved a rule of federal jurisdiction where the litigants had reasonably relied on an alternative interpretation. *England v. La. State Bd. of Med. Exam'rs*, 375 U.S. 411, 422-23 (1964).

issue of prospectivity in depth.⁵⁴ The plaintiff had sustained a personal injury while at work on Chevron's off-shore drilling platform. Recovery for such claims was governed by a federal statute, the Outer Continental Shelf Land Act, which specified no statute of limitations. Most courts that had addressed the issue had held that the limitations period was controlled by the equitable doctrine of laches.⁵⁵ Then, in a 1969 decision, after Huson had filed his complaint, the Supreme Court rejected those cases and interpreted the Act to borrow the neighboring state's personal injury limitations period.⁵⁶ For Huson, that was Louisiana and its one year statute of limitations barred his claim.⁵⁷ The Court held, however, that its 1969 decision "should not be invoked to require application of the Louisiana time limitation retroactively to [Huson]."⁵⁸ It went on to elaborate the three criteria already mentioned: (i) the rule had to be genuinely new; (ii) retroactive application was not necessary to further the operation of that rule; and (iii) retroactivity "could produce substantial inequitable results."⁵⁹ In this case, each factor favored prospective-only application.⁶⁰ Eight Justices joined the opinion.⁶¹ As already noted, the *Chevron Oil* test soon became the standard way of deciding prospectivity questions in state courts.⁶²

Three decisions in the early 1990s, however, rejected the *Chevron Oil* test in federal courts. By this time, the Supreme Court, as will be discussed below, had retreated from the idea that it could limit the retroactive effect of decisions creating new constitutional rules of criminal procedure.⁶³ Each decision addressed whether taxpayers were entitled to a refund of state taxes paid under a statute later held unconstitutional. In the first, the Supreme Court held that taxpayers were not entitled to a full refund.⁶⁴ Four justices applied the *Chevron Oil* test, observing that state authorities had reasonably supposed the taxes valid when imposed and that refunds "could deplete the state treasury [and] threaten[] the State's current operation and future plans."⁶⁵ Four dissenting Justices, however, objected to the idea that courts could apply two different laws to identical controversies simply because they arose at different times.⁶⁶

54. 404 U.S. 97 (1971).

55. *Id.* at 98-99.

56. *Rodrigue v. Aetna Cas. & Sur. Co.*, 395 U.S. 352 (1969).

57. *Chevron Oil*, 404 U.S. at 99.

58. *Id.* at 100.

59. *Id.* at 106-07.

60. *Id.* at 107.

61. Justice Douglas concurred without reaching the question of retroactive effect. *Id.* at 109.

62. *See supra* text accompanying notes 25-27.

63. *See infra* text accompanying notes 137-46.

64. *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990).

65. *Id.* at 182 (opinion of O'Connor, J.).

66. *Id.* at 205-06 (Stevens, J., dissenting).

They read *Chevron Oil* narrowly, claiming that it did not “alter the principle that consummated transactions are analyzed under the best current understanding of the law at the time of decision”⁶⁷ The Court denied the refunds because the ninth judge, Justice Scalia, believed the state tax in question had been and continued to be constitutional.⁶⁸ But he made clear that he agreed with the dissenters on prospectivity. “Since the Constitution does not change from year to year; since it does not conform to our decisions, but our decisions are supposed to conform to it; the notion that our interpretation of the Constitution in a particular decision could take prospective form does not make sense.”⁶⁹

The writing was now on the wall. The next year, in the second unconstitutional state tax case, the Court issued five separate opinions, none with the support of more than three justices. But again there were five votes for the proposition that, when the Court decided a constitutional issue and applied it to the parties at bar, it must apply that holding to any other cases still open.⁷⁰ Finally, in the third case, the Court produced a single majority opinion expressing the new understanding:

When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule. . . .⁷¹

Although it expressed a view of adjudication hostile to any form of non-retroactivity, the majority opinion forbade only “selective prospectivity,” in which a court applies the new rule to the parties before it but not to other conduct predating the court’s judgment. It did not, therefore, overrule *Chevron Oil*, which was an instance of “pure prospectivity” since the plaintiff had been given the benefit of the previous limitations period.⁷² The Ninth Circuit Court of Appeals recently held that, in the absence of explicit overruling, it was still

67. *Id.* at 222.

68. *Id.* at 204-05 (Scalia, J., concurring in the judgment).

69. *Id.* at 201.

70. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 543-44 (1991) (opinion of Souter, J.), 548-49 (Scalia, J., concurring in the judgment).

71. *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993).

72. In 1995, seven justices joined an opinion stating that “*Harper* [the third tax case] overruled *Chevron Oil* insofar as the case (selectively) permitted the prospective-only application of a new rule of law.” *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995).

bound to apply new rules purely prospectively when the three *Chevron Oil* factors so required.⁷³

The Supreme Court's decisions retreating from prospective judgments show the influence of the factors already discussed that have worried courts and commentators about the practice. A central complaint was its deviation from the judicial role. This concern reflected, at some level, the Blackstonian view of adjudication. It was most explicit in the separate opinions of Justice Scalia. The judge's job, he asserted, "is to say what the law is, not to prescribe what it shall be. . . . [A prospective holding] presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is."⁷⁴ Closely related to this was possible violation of the constitutional imperative that federal courts adjudicate only real "cases or controversies."⁷⁵ It has been argued that this precludes a federal court pronouncing on a legal issue unnecessary to resolve the dispute at bar.⁷⁶ This argument is doubtful as a matter of constitutional interpretation,⁷⁷ but the Supreme Court had appeared to accept it in an earlier criminal procedure case in which it had declined to apply a new rule retroactively though it conceded that it had applied it to the parties in the case first announcing it. In that first case, however, retroactive application was an "unavoidable consequence of the necessity that constitutional adjudications not stand as mere dictum [and of] [s]ound policies of decision-making, rooted in the command of Article III of the Constitution that we resolve issues solely in concrete cases or controversies"⁷⁸

If the limits of constitutional federal jurisdiction obliged a federal court to apply a new rule to the party in the case announcing it, then the only kind of prospectivity available to it was "selective prospectivity." The Supreme Court, however, became unwilling to accept the inequity of making the applicability of a rule turn solely on which litigant happened to reach the Court first.⁷⁹ In an earlier case, Justice Harlan had protested the consequences of this policy:

73. *Nunez-Reyes v. Holder*, 646 F. 3d 684, 690-95 (9th Cir. 2011). See also Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1055, 1062 (1997).

74. *Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring in the judgment); *James B. Beam*, 501 U.S. at 549 (Scalia, J., concurring); *Harper*, 509 U.S. at 106-07 (Scalia, J., concurring). See *infra* text accompanying notes 192-96.

75. U.S. Const. art. III, § 2, cl. 1.

76. Note, *supra* note 24, at 932.

77. See Currier, *supra* note 21, at 216-20.

78. *Stovall v. Denno*, 388 U.S. 293, 300-01 (1967). See Kermit Roosevelt III, *A Little Theory Is a Dangerous Thing: The Myth of Adjudicative Retroactivity*, 31 CONN. L. REV. 1075, 1111-12 (1999).

79. See Bradley Scott Shannon, *The Retroactive and Prospective Application of Judicial Decisions*, 26 HARV. J. L. & PUB. POL'Y 811, 866 (2003).

Simply fishing one case from the stream of appellate review, using it as a vehicle for pronouncing new constitutional standards, and then permitting a stream of similar cases subsequently to flow by unaffected by that new rule constitute an indefensible departure from this model of judicial review.⁸⁰

These arguments, which had already convinced a majority of the Court in the field of criminal procedure, ultimately led to a policy of “full retroactivity” in the adjudication of federal civil cases.⁸¹

It is important to remember that the development just traced is applicable only to changes in *federal* law. As already noted, state courts applying state law retain the option of prospective-only effect when declaring new rules. Such a practice, moreover, continues to be constitutionally permissible under the rule of *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*⁸² These courts have generally rejected the reasoning of the United States Supreme Court’s post-*Chevron Oil* cases. Indeed, the *Chevron Oil* analysis remains the most common test in state jurisdictions for deciding whether to apply a new rule retroactively.⁸³ When, however, state courts apply a new judge-made rule of *federal* law, the Supremacy Clause of the federal Constitution requires that they apply it retroactively in accordance with the holdings of the United States Supreme Court.⁸⁴

C. *The Limits of Retroactivity*

There are necessary limits to the presumptive retroactive application of judicial pronouncements. Although the United States Supreme Court has said that “a rule of federal law, once announced and applied . . . must be given full retroactive effect by all courts adjudicating federal law,” it restricts that command to “cases still open on direct review.”⁸⁵ No one suggests that a new rule requires courts to re-open and re-decide every case ever litigated to which a new rule might apply. A rule’s retroactivity does not extend to cases that have proceeded to:

80. *Mackey v. United States*, 401 U.S. 667, 679 (1971) (Harlan, J., concurring and dissenting).

81. *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 97 (1993).

82. 287 U.S. 358 (1932).

83. Some recent examples are *Heritage Farms, Inc. v. Markel Ins. Co.*, 810 N.W.2d 465, 479-80 (Wis. 2012); *Beaver Excavating Co. v. Testa*, 983 N.E.2d 1317, 1328 (Ohio 2012); *Bezeau v. Palace Sports & Ent., Inc.*, 795 N.W.2d 797, 802 (Mich. 2010); *Ex parte Capstone Bldg. Corp.* 96 So. 3d 77, 90-95 (Ala. 2012).

84. *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 754 (1995); *Harper*, 509 U.S. at 100.

85. *Harper*, 509 U.S. at 96, 97.

such a degree of finality that the rights of the parties should be considered frozen. . . . [T]hat moment should be when the transaction is beyond challenge either because the statute of limitations has run or the rights of the parties have been fixed by litigation and have become *res judicata*.⁸⁶

In *Chicot County Drainage District v. Baxter State Bank*,⁸⁷ bondholders whose rights had been reduced under a federal statute subsequently declared unconstitutional sought to recover the full amount originally due. The Supreme Court noted that a 1936 District Court proceeding—in which the validity of the governing law was not raised—had confirmed the prior adjustment and had never been appealed.⁸⁸ The law’s constitutionality was thus *res judicata* and could not be raised in a collateral proceeding.⁸⁹ As the Court put it in a later case, “the *res judicata* consequences of a final, unappealed judgment on the merits [are not] altered by the fact that the judgment may have been wrong or rested on a legal principle subsequently overruled in another case.”⁹⁰

The limits of retroactivity are grounded in strong practical policy. “A contrary rule,” as one state court noted, “would produce chaos in the legal system, as judgments could be continually opened and reopened with every fluctuation in the law.”⁹¹ A nineteenth century Supreme Court decision put the matter powerfully:

[T]he maintenance of public order, the repose of society, and the quiet of families, require that what has been definitely determined by competent tribunals shall be accepted as irrefragable legal truth. So deeply is this principle implanted in [our] jurisprudence, that commentators upon it have said, that *res judicata* renders white that which is black, and straight that which is crooked.⁹²

The policy of finality in civil litigation, however, is not absolute. In rare cases, parties may collaterally attack otherwise final judgments—but only if the case is truly exceptional. Both the

86. *United States v. Estate of Donnelly*, 397 U.S. 286, 296 (1970) (Harlan, J., concurring). See also *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991) (opinion of Souter, J.).

87. 308 U.S. 371 (1940).

88. *Id.* at 372-74.

89. *Id.* at 378.

90. *Fed. Dep’t Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981).

91. *Quantum Res. Mgm’t, L.L.C. v. Pirate Lake Oil Corp.*, 112 So. 3d 209, 217 (La. 2013), *cert. denied sub nom. Haydel v. Zodiac Corp.*, 134 S. Ct. 197 (2013). The complainants had asked to re-open a 1925 tax sale on the basis of a 1983 United States Supreme Court decision. 112 So. 2d 217.

92. *Jeter v. Hewitt*, 63 U.S. (22 How.) 352, 364 (1859). The Court was commenting on the doctrine as adopted in Louisiana but, as one commentator noted, it would “apply with equal truth to any of the United States.” 2 HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS 764 (1902).

Restatement (Second) of Judgments and the Federal Rules of Civil Procedure articulate such a possibility.

Section 73(2) of the Restatement states that a judgment “may be set aside or modified if . . . “[t]here has been such a substantial change in the circumstances that giving continued effect to the judgment is unjust.” Noting that this principle has sometimes been applied to cases where a later decision changed the law applied in an earlier, unrelated judgment, however, Comment (c) to this section labels such decisions “a misinterpretation of the rule and a very unsound policy.”⁹³

Rule 60(b) of the Federal Rules of Civil Procedure specifies five grounds for “relief from a final judgment” none of which speak directly to a change in the governing law. A sixth refers to “any other reason that justifies relief.” The rare cases in which the Supreme Court has considered applying Rule 60(b)(6) in connection with a change in the law are inconclusive.⁹⁴ One judge has described Rule 60(b)(6) jurisprudence as showing “a strong current of unwillingness to reopen judgments but with some wriggle room for future arguments.”⁹⁵ Still, other lower federal courts have referred to the rule as “a grand reservoir of equitable power,”⁹⁶ and have assumed that an “intervening change of controlling law” may justify exercising it.⁹⁷ In practice, this kind of relief is very unusual. Whenever courts note the possibility of modifying a final judgment, they always stress the need to show particularly compelling reasons. Notwithstanding the occasional exception, it is fair to say that the presumptive—and in federal courts nearly compulsory—retroactive effect of civil judgments reaches back only to controversies still open to judicial resolution. At some point adjudication comes to an end and unsuccessful civil litigants are denied the solace of newer and friendlier law.

In criminal cases, where a defendant remains in custody, however, the finality of a conviction is not so unqualified. The continuing possibility of collateral attack has been critical in shaping the law of the retroactivity and prospectivity of judicial decisions. This is the subject of the next section.

93. RESTATEMENT (SECOND) OF JUDGMENTS §73(2), cmt. c.(1982).

94. *Compare* Ackermann v. United States, 340 U.S. 193, 198 (1950) *with* Polites v. United States, 364 U.S. 433 (1960).

95. *Norgaard v. DePuy Orthopaedics, Inc.*, 121 F.3d 1074, 1078 (7th Cir. 1997) (Easterbrook, Cir. J.). This decision contains an extended argument for a strict interpretation of Rule 60(b)(6) when the motion to modify a judgment is based on a subsequent change in the law.

96. *Radack v. Norwegian Am. Line Agency, Inc.*, 318 F.2d 538, 542 (2d. Cir. 1963).

97. *Marrero Pichardo v. Ashcroft*, 374 F.3d 46, 56 (2d Cir. 2004).

III. PROSPECTIVE JUDGMENTS IN CRIMINAL LAW

A. *Substantive Liability*

Discomfort with retroactive law has been most acute in connection with retroactive criminal liability. The United States Constitution explicitly prohibits all *ex post facto* criminal laws.⁹⁸ The values underlying these worries are not entirely clear. The reliance interest, so prominent in civil prospectivity jurisprudence, may play a role if an actor is likely to consult the criminal law before acting. But criminal acts, like most tortious acts, are seldom the subject of self-conscious reliance on the law.⁹⁹ The objection to *ex post facto* criminality seems premised on some more rudimentary sense of fairness.¹⁰⁰

The Supreme Court has held that the constitutional limitation on “*ex post facto* laws” refers only to legislation; not to judicial acts.¹⁰¹ This presents few problems when judicial action *contracts* the scope of criminal behavior. When a criminal statute is held unconstitutional, even a final judgment of conviction is deemed void and may be subject to collateral attack.¹⁰² More serious issues arise when courts interpret criminal law to reach acts that appeared lawful when committed. Such cases seem to raise problems identical to those underlying the ban on *ex post facto* legislation. As a result, courts have tried to find ways to apply these new interpretations only prospectively.¹⁰³ In *State v. Jones*, for example, the Supreme Court of New Mexico changed its construction of the statute forbidding lotteries.¹⁰⁴ The defendants’ previous conviction for holding a “bank night” promotion at a movie theater had been reversed by the Supreme Court that held that such events were not lotteries.¹⁰⁵ But when they were prosecuted a second time for the same offense, the Supreme Court rejected its former interpretation and held that bank nights *were* lotteries. Since, however, the defendants “did only that which this court declared, even if erroneously, to be within the law” the “plainest principles of justice” demanded that the new interpretation should be given only prospective effect. The court declared that its new view of the statute would be observed only “in cases having their origin in

98. U.S. CONST. art I, § 9, cl. 3 (federal); *id.* art. I, § 10, cl. 1 (states).

99. Harold J. Krent, *The Puzzling Boundary Between Criminal and Civil Retroactive Lawmaking*, 84 GEO. L.J. 2143, 2160-63 (1996).

100. See Traynor, *supra* note 20, at 548-49.

101. See note 9 *supra*.

102. See Traynor, *supra* note 20, at 553 n.54 (citing *Ex parte Siebold*, 100 U.S. 371, 376-77 (1879)).

103. See Rogers, *supra* note 36, at 64.

104. 107 P.2d 324 (N.M. 1940).

105. *Id.* at 325.

acts and conduct occurring subsequent to the effective date of this decision."¹⁰⁶

The Supreme Court of the United States dealt with a similar problem in *James v. United States*, a prosecution for tax evasion based on the defendant's failure to report embezzled funds as income.¹⁰⁷ An earlier case, *Commissioner v. Wilcox*, had held that embezzled funds were not income for these purposes.¹⁰⁸ Three justices thought *Wilcox* continued to be good law and would have dismissed the prosecution on that basis.¹⁰⁹ Three different justices would have overruled *Wilcox* and remanded for a new trial.¹¹⁰ A third set of three justices would have overruled *Wilcox* but also dismissed this case because the existence of the *Wilcox* holding made it impossible to attribute to the defendant the "willfulness" necessary to sustain a conviction.¹¹¹ The net result of this division was that the Court overruled *Wilcox* but did not apply its new interpretation to the case before it or to any tax returns filed before the date of the decision.¹¹²

It should be noted, however, that six justices in the *James* case rejected the idea that the Court could apply its interpretation of the criminal law prospectively only. In his separate opinion, Justice Black dismissed the idea of prospective overruling but also thought that any criminal statute so ambiguous as to be susceptible of an entirely unexpected interpretation would "raise[] serious questions of unconstitutional vagueness."¹¹³ The Court applied that reasoning in *Bouie v. City of Columbia*.¹¹⁴ The South Carolina Supreme Court had adopted a new and surprising interpretation of the state's criminal trespass law to sustain the conviction of civil rights demonstrators conducting a "sit-in" at a segregated lunch counter.¹¹⁵ The United States Supreme Court held that this "unforeseeable and retroactive judicial expansion of narrow and precise statutory language" was a "deprivation of the right of fair warning." Such an interpretation, if "applied retroactively, operates precisely like an *ex post facto* law If a state legislature is barred by the *Ex Post Facto* Clause from passing such a law, it must follow that a State Supreme Court is

106. *Id.* at 329.

107. 366 U.S. 213 (1961).

108. 327 U.S. 404, 410 (1946).

109. *James*, 366 U.S. at 248 (Whittaker, J., concurring in part and dissenting in part).

110. *Id.* at 241 (Clark, J., concurring in part and dissenting in part); *id.* (Harlan, J., concurring in part and dissenting in part).

111. *Id.* at 221-22 (opinion of Warren, C.J.).

112. *Id.* at 222.

113. *Id.* at 224-25 (Black, J., concurring in part and dissenting in part).

114. 378 U.S. 347 (1964).

115. *Id.* at 349-50.

barred by the Due Process Clause from achieving precisely the same result by judicial construction.”¹¹⁶

B. *New Constitutional Rules of Criminal Procedure*

While American courts generally apply reductions in criminal liability retroactively and enlargements of that liability only prospectively, the rules governing application of changes in criminal procedure are much more complicated. In the early 1960s, the United States Supreme Court decided a number of cases dramatically enlarging the rights of criminal defendants, including the right to counsel,¹¹⁷ to remain silent,¹¹⁸ to fair procedures in identification by witnesses,¹¹⁹ and to exclude improperly secured evidence.¹²⁰ The cumulative effect has more than once been described as a “revolution.”¹²¹ Judged under these new constitutional standards, many prior convictions would be invalid. During the same period, the Supreme Court also expanded the opportunities to attack a constitutionally defective state court conviction in federal court through a petition for a writ of habeas corpus.¹²²

These developments were ominous for a regime of thorough retroactivity. Thousands of incarcerated people were now in a position to reopen and possibly reverse their criminal convictions. One obvious solution was to hold the new rules of criminal procedure were at least partly non-retroactive. The issue came before the Supreme Court in 1965 in *Linkletter v. Walker*.¹²³ Three years before, in *Mapp v. Ohio*, the Court had held that the Fourth Amendment made improperly seized evidence inadmissible in criminal prosecutions in state

116. *Id.* at 352-54 (citing JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 61 (2d ed. 1960)). See also *Marks v. United States*, 430 U.S. 188 (1977) (reversing obscenity conviction that was unconstitutional under the First Amendment case law prevailing at the time of the trial even though the conviction might have been constitutional under a subsequently adopted standard in force at the time of the Supreme Court’s decision). The Court qualified its decision in *Bouie* in *Rogers v. Tennessee*, 532 U.S. 451 (2001) in which it upheld a conviction based on the state court’s decision to abandon the common law “year and a day” defense to homicide prosecution. The Court denied that identical limits constrained legislation and judicial interpretation. This was especially true for the application of common law rules that “presuppose[] a measure of evolution that is incompatible with stringent application of *ex post facto* principles.” *Id.* at 461-62.

117. *Gideon v. Wainwright*, 372 U.S. 335 (1963).

118. *Miranda v. Arizona*, 384 U.S. 436 (1966).

119. *United States v. Wade*, 388 U.S. 218 (1967).

120. *Mapp v. Ohio*, 367 U.S. 643 (1961).

121. See Yale Kamisar, *The Warren Court and Criminal Justice: A Quarter Century Retrospective*, 31 TULSA L.J. 1 (1995).

122. See, e.g., *Fay v. Noia*, 372 U.S. 391 (1963) (holding that failure to raise a constitutional claim in state proceedings did not preclude habeas relief in federal court). Under the current statute, habeas corpus is available for persons “in custody in violation of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254(a).

123. 381 U.S. 618 (1965).

courts.¹²⁴ Linkletter was convicted of burglary in Louisiana in 1959 based, in part, on evidence subsequently held to be illegal. The state Supreme Court affirmed his conviction in 1960. After the decision in *Mapp*, Linkletter petitioned in federal court for a writ of habeas corpus. The United States Supreme Court held that the rule of *Mapp* was not fully retroactive.¹²⁵ The Court cited some of the civil cases discussed above in Part II for the proposition that "the Constitution neither prohibits nor requires retrospective effect." "[W]e must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation."¹²⁶ Since *Mapp* was intended only as a "deterrent to lawless police action" its purpose would not be "advanced by making the rule retrospective." Past police misconduct could not be undone "by releasing the prisoners involved."¹²⁷ Moreover, states' reliance on prior law was due the same respect that private reliance was given when new rules changed civil liability.¹²⁸ Given the number of potential petitioners, retroactive application "would tax the administration of justice to the utmost."¹²⁹

The Court later rephrased the proper approach in a formula:

The criteria guiding resolution of the question implicates (a) the purpose to be served by the new standards, (b) the extent of the reliance by law enforcement authorities on the old standards, and (c) the effect on the administration of justice of a retroactive application of the new standards.¹³⁰

Linkletter itself denied retroactive application only to cases that were already final when the new rule was announced.¹³¹ In *Stovall v. Denno*, however, the Court held that a new rule, excluding evidence of a police-arranged eyewitness identification in the absence of counsel, would affect only confrontations occurring after the new rule had been announced.¹³² Thus, it would apply neither to final cases nor to some cases still open on direct review. The underlying reasons for non-retroactivity provided no basis to distinguish between final con-

124. 367 U.S. 643, 660 (1961).

125. *Linkletter*, 381 U.S. at 640.

126. *Id.* at 629.

127. *Id.* at 636-37.

128. *See id.* For a criticism of this equation, see Paul J. Mishkin, *Foreword: The High Court, the Great Writ, and the Due Process of Time and Law*, 79 HARV. L. REV. 56, 73-74 (1965).

129. *Linkletter*, 381 U.S. at 637.

130. *Stovall v. Denno*, 388 U.S. 293, 297 (1967).

131. 381 U.S. at 622.

132. 388 U.S. at 296.

victions and those still “at various stages of trial and direct review.”¹³³

In subsequent cases, the Court set various effective dates for the applicability of new rules of criminal procedure. A rule excluding a defendant’s statements made without adequate warnings about the right to counsel applied only to cases in which the trial began after the new rule was announced.¹³⁴ The holding that electronic surveillance was a “search” or “seizure” subject to the Fourth Amendment applied only to cases in which the surveillance was undertaken after the relevant judgment.¹³⁵ New rules on permissible searches incident to arrest applied only to searches occurring after the promulgation of those rules.¹³⁶

This era of prospectivity, however, was short-lived. Starting in the late 1960s, Justice Harlan, who had joined some of the early opinions, issued a series of powerful dissents to the Court’s decisions. He objected to a perceived departure from the Court’s judicial role and was especially offended by the Court’s record of what we have called “selective prospectivity.” Typically, the Court decided the constitutional question in one case, applying its new rule—necessarily retroactively—to the parties at bar. It only addressed the retroactivity question when another party raised it in a later case. Deciding the new rule was only prospective at that point resulted in an intolerable inequity.¹³⁷ Justice Harlan, therefore, advocated the full retroactivity of constitutional judgments for all cases not yet final in the sense that the defendants had exhausted all available appeals.¹³⁸

A majority of the Court adopted his arguments after Justice Harlan had left the bench. The 1982 case of *United States v. Johnson*¹³⁹ concerned the retroactivity of a 1980 decision¹⁴⁰ holding that the Fourth Amendment prohibits warrantless entry into a residence

133. *Id.* at 300.

134. *Johnson v. New Jersey*, 384 U.S. 719, 721 (1966) (concerning retroactivity of *Escobedo v. Illinois*, 378 U.S. 478 (1966), and *Miranda v. Arizona*, 384 U.S. 436 (1966)).

135. *Desist v. United States*, 394 U.S. 244, 254 (1969) (concerning retroactivity of *Katz v. United States*, 389 U.S. 347 (1967)).

136. *Williams v. United States*, 401 U.S. 646, 656 (1971) (plurality opinion) (concerning retroactivity of *Chimel v. California*, 395 U.S. 752 (1969)). For a summary of the different effective times see Julie R. O’Sullivan, Note, *United States v. Johnson: Reformulating the Retroactivity Doctrine*, 69 CORNELL L.J. 166, 174-75 (1983).

137. See the quotation from Justice Harlan’s opinion in *Mackey v. United States*, reproduced at *supra* text accompanying note 80.

138. *Mackey v. United States*, 401 U.S. 667, 690 (1971) (Harlan, J., concurring and dissenting).

139. 457 U.S. 537 (1982). By this time a substantial critical academic commentary had also developed. See James R. McCall, *A Basic Concern for Process: Commentary on Quo Vadis, Prospective Overruling*, 50 HASTINGS L.J. 805, 809 (1999) (“[D]uring the 1970s . . . scholars were having ‘a veritable field day’ with the Warren Court’s opinions on prospective overruling.”).

140. *Payton v. New York*, 445 U.S. 573 (1980).

to make a routine arrest. The Court held that its decisions should usually be “applied retroactively to all convictions that were not yet final at the time the decision was rendered.”¹⁴¹ In a significant limitation, however, the Court permitted non-retroactive application of new rules that were “clear break[s] with the past.”¹⁴² In these cases, “prospectivity [was] arguably the proper course.”¹⁴³ In 1987, however, in *Griffith v. Kentucky*,¹⁴⁴ the Court abandoned this “clear break” exception when it held that a new rule¹⁴⁵ limiting a prosecutor’s ability to use peremptory challenges based on a potential juror’s race would apply retroactively notwithstanding its admitted novelty. Current federal law on the retroactivity of new decisions on questions of criminal procedure has thus reverted to the holding of *Linkletter v. Walker*: “[A] new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final”¹⁴⁶

The key moment for cutting off the retroactive effect of judgments announcing new constitutional rules of criminal procedure, therefore, is when a state court conviction has become “final”—i.e., when there is no further opportunity for direct appellate review either in the state courts or by writ of certiorari to the United States Supreme Court. As in civil litigation, this point has been defended by the need to bring proceedings to some identifiable close. There must, Justice Harlan had argued, “be a visible end to the litigable aspect of the criminal process. . . . If law, criminal or otherwise, is worth having and enforcing, it must at some time provide a definitive answer to the question litigants present or else it never provides an answer at all.”¹⁴⁷

Historically, however, *res judicata* did not shield a final criminal judgment from challenge as fully as it would a final civil judgment. “Because of habeas corpus and similar writs, . . . [a] criminal judgment of conviction does not enjoy the same degree of finality until the defendant has been executed, died in prison, or been released.”¹⁴⁸ A habeas petition technically initiates a new civil action “for the en-

141. *Johnson*, 457 U.S. at 562. Ironically, this decision was held not to “affect those cases that would be clearly controlled by our existing retroactivity precedents,” making the restoration of the retroactivity rule non-retroactive in a substantial number of cases. *Id.*

142. *Id.* at 558.

143. *Id.* at 559 (quoting *Williams v. United States*, 401 U.S. 646, 659 (1971)).

144. 479 U.S. 314 (1987).

145. *Batson v. Kentucky*, 476 U.S. 79 (1986).

146. *Griffith*, 479 U.S. at 328.

147. *Mackey v. United States*, 401 U.S. 667, 690-91 (1971) (Harlan, J., concurring and dissenting).

148. Currier, *supra* note 21, at 258-59. See also 1 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 864 (3d ed. 2000).

forcement of the right to personal liberty”¹⁴⁹ Expressly limiting “full” retroactive application to cases still “on direct review” was, therefore, essential to avoid potentially re-opening the conviction of every defendant still in custody. Since many of the new criminal procedure rules were concededly unrelated to the merits of a prosecution, applying them retroactively to finally adjudicated convictions would result in the “wholesale release of the guilty.”¹⁵⁰ If it did nothing else, this limitation imposed a quantitative limit on the resulting disruption.¹⁵¹

Nonetheless, refusing to apply a new rule of criminal procedure to all defendants incarcerated as a result of trials in which that rule had not been observed necessarily involved some arbitrariness. It kept “all people in jail who were unfortunate enough to have had their unconstitutional convictions affirmed before June 19, 1961.”¹⁵² As the dissent was quick to point out, Linkletter had committed his offense *before* the defendant in *Mapp*, who had been released under that case’s new exclusionary rule. If the courts had not delayed in resolving *Linkletter’s* appeal, his case would have reached the Supreme Court first and *he* would have been released under the new exclusionary rule instead.¹⁵³ “Too many irrelevant considerations,” noted one commentator, “including the common cold, bear upon the rate of progress of a case through the judicial system.”¹⁵⁴

Limiting the retroactive effect of new criminal procedure rules to cases on direct review has been defended not so much as a logical feature of retroactivity but as an aspect of the restricted purpose of habeas corpus in federal courts. On this account, habeas exists not to correct errors but to ensure that state courts adhere to applicable federal standards of criminal justice. For this purpose, it generally suffices that criminal prosecutions conform to the law in effect at the time of the trial.¹⁵⁵ The Supreme Court crystallized this approach in 1988 in *Teague v. Lane*.¹⁵⁶ “The relevant frame of reference,” it em-

149. *Fay v. Noia*, 372 U.S. 391, 423 (1963). In “extraordinary” cases, moreover, even when habeas corpus is not available, a final criminal conviction may be reviewed by application in federal court for a writ of *coram nobis*. *United States v. Denedo*, 556 U.S. 904, 916 (2009).

150. *Linkletter*, 381 U.S. at 637-38. *See also* Roosevelt, *supra* note 78, at 1091.

151. *See* Fallon & Meltzer, *supra* note 10, at 1815. In this respect, however, consider Justice White’s dissent in *Shea v. Louisiana*, 470 U.S. 51, 64 n.1 (1985) (“[B]y the same token, it would be less burdensome to apply *Edwards* retroactively to all cases involving defendants whose last names begin with the letter ‘S’ than to make the decision fully retroactive.”).

152. *Linkletter*, 381 U.S. at 641 (Black, J., dissenting).

153. *Id.*

154. Schaefer, *supra* note 24, at 645. *See also* *Shea*, 470 U.S. at 63 (White, J., dissenting); Currier, *supra* note 21, at 202, 259-260; Michael B. Dashjian, *The Prospective Application of Judicial Legislation*, 24 PAC. L.J. 317, 381 n.352 (1993).

155. *See* *Mackey v. United States*, 401 U.S. 667, 684, 687, 691-92 (1971) (Harlan, J., concurring and dissenting); Roosevelt, *supra* note 78, at 1093-94.

156. 489 U.S. 288 (1989).

phasized, “is not the purpose of the new rule whose benefit the [defendant] seeks, but instead the purposes for which the writ of habeas corpus is made available.”¹⁵⁷ A rule declared only after a conviction was final could not be relied on in a subsequent collateral proceeding. There were two narrow exceptions. A dissenting Justice summarized them accurately:

Any time a federal habeas petitioner’s claim, if successful, would result in the announcement of a new rule of law, . . . it may only be adjudicated if that rule would [1] plac[e] certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe, or [2] if it would mandate new procedures without which the likelihood of an accurate conviction is seriously diminished.¹⁵⁸

Although some parts of this analysis commanded the assent of only four justices, a majority of the Court approved it the following year.¹⁵⁹ *Teague’s* rules are now treated “as the settled guidelines for determining what law applies on habeas review.”¹⁶⁰

Teague’s restriction on the use of “new rules” on collateral review has been interpreted very broadly. A new rule need not be the kind of “clean break” briefly significant under *United States v. Johnson*.¹⁶¹ “[A] case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant’s conviction became final.”¹⁶² Even though a judgment is carefully and plausibly explained as an application of existing law, it may still be a “new rule.” It qualifies, according to a later decision, so long its outcome “was susceptible to debate among reasonable minds.”¹⁶³ “[A]ny reading beyond the narrowest reasonable reading of [applicable] precedent . . . can readily be viewed as a ‘new rule.’”¹⁶⁴

This broad understanding of eligible new rules is reinforced by the Court’s parsimonious reading of *Teague’s* two exceptions. The first concerned new rules that placed “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe.”¹⁶⁵ This falls within the well-established doc-

157. *Id.* at 306 (quoting *Mackey v. United States*, 401 U.S. at 682 (Harlan, J., concurring in part and dissenting in part)).

158. *Id.* at 330 (Brennan, J., dissenting) (citations omitted) (internal quotation marks omitted).

159. *Penry v. Lynaugh*, 492 U.S. 302 (1989).

160. LA FAVE, *supra* note 148, at 880.

161. *See supra* text accompanying notes 139-43.

162. *Teague*, 489 U.S. at 301.

163. *Butler v. McKellar*, 494 U.S. 407, 415 (1990). For a recent application, see *Chaidez v. United States*, 133 S. Ct. 1103 (2013).

164. LA FAVE, *supra* note 148, at 882.

165. *Teague*, 489 U.S. at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (Harlan, J., concurring in part and dissenting in part)).

trine that decisions narrowing the scope of criminal liability should be fully retroactive.¹⁶⁶ Therefore, a court recently held that it was proper to reconsider a final unappealed conviction for gun possession after the Supreme Court found the relevant statute unconstitutional.¹⁶⁷ This exception also allows collateral review when a court reinterprets a criminal statute to exclude a petitioner's conduct.¹⁶⁸

The second exception permits a habeas court to review an otherwise final conviction if it were obtained in violation of a later-formulated "watershed rule[] of criminal procedure," non-observance of which would result in "the likelihood of an accurate conviction [being] seriously diminished."¹⁶⁹ This exception has turned out to be extremely limited in practice. Such a rule must "alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding."¹⁷⁰ The Court had already recognized that the great bulk of the new procedures mandated in the rights revolution of the 1960s did not measurably enhance the truth-finding aspects of a criminal prosecution. They were aimed only at deterring unconstitutional police or prosecutorial misconduct.¹⁷¹ The Supreme Court has, in fact, identified only one case whose rule would satisfy this criterion—*Gideon v. Wainwright*,¹⁷² which mandated legal representation at public expense for indigent defendants.¹⁷³ The Court has declined, on the other hand, to allow a death-row prisoner to challenge his execution collaterally based on a Supreme Court judgment—announced after his sentence holding that an aggravating factor essential to impose the death penalty must be determined by the jury and not the judge.¹⁷⁴

In 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act. (AEDPA)]¹⁷⁵ It restricted the right of state court defendants to challenge their convictions by collateral review in federal court, creating, among other requirements, strict time limits. It also specified that, if a particular claim had been "adjudicated on the merits in state court proceedings," a federal court could not issue a writ of habeas corpus unless the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court

166. *See supra* text accompanying note 102. *But see* *Warring v. Colpoys*, 122 F.2d 642, 647 (D.C. Cir. 1941).

167. *Magnus v. United States*, 11 A.3d 237, 243-46 (D.C. 2011). The rehearing was held to be a proper exercise of a court's power to issue a writ of error, *coram nobis*.

168. *Bousley v. United States*, 523 U.S. 614, 620-21 (1998).

169. *Teague*, 489 U.S. at 311, 313.

170. *Whorton v. Bockting*, 549 U.S. 406, 418 (2007).

171. *See e.g.* *Linkletter v. Walker*, 381 U.S. 618, 637 (1965).

172. 372 U.S. 335 (1963).

173. *Whorton*, 549 U.S. at 419.

174. *Schiro v. Summerlin*, 542 U.S. 348, 352-56 (2004).

175. Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

of the United States.”¹⁷⁶ This requirement roughly mirrors the plurality approach in *Teague* in that the “clearly established federal law” to which the state court decision must conform is the law at the time of that state court decision; not subsequently declared changes in the required procedures.¹⁷⁷

The Act and the Court’s doctrine are not, however, precisely congruent. For example, the “new rule” that may not be relied on for habeas relief under *Teague* is one announced after the petitioner’s case became final.¹⁷⁸ But the “clearly established Federal law” to which a state court decision might conform to bar such relief under the statute is that existing at the time of the relevant decision, even if the law was changed before the conviction became final—so that it might have been properly applied in reviewing the decision under *Griffith* and *Teague*.¹⁷⁹ Both sets of limitations—of *Teague* and of the Act—must be overcome before a federal district court may grant a habeas petition.¹⁸⁰

The foregoing discussion concerns only the limits of retroactive application of new constitutional rules of criminal procedure in collateral review of state criminal convictions in federal courts. State law also typically allows collateral attacks on convictions even after direct review is no longer available. State courts are free to apply new rules of criminal procedure on such review, even if a federal court could not.¹⁸¹ State courts, in fact, apply a range of approaches when deciding whether to apply such law. Many have adopted the federal approach articulated in *Teague*.¹⁸² Others have kept the three factor test adopted—and now rejected—by the United States Supreme Court in *Linkletter v. Walker* and *Stovall v. Denno*.¹⁸³

IV. THE PROBLEMS OF PROSPECTIVE ADJUDICATION

As this summary indicates, the history and current status of the once widely accepted idea that judicial pronouncements of law are thoroughly retroactive are complicated and obscure. At present, for civil cases, most state courts applying state law examine the relevant factors favoring or disfavoring prospective application on a case-by-case basis. All courts must apply new rules of federal law to all cases

176. 28 U.S.C. § 2254(d)(1)-(2).

177. *Lockyer v. Andrade*, 538 U.S. 63, 71 (2003).

178. *Teague v. Lane*, 489 U.S. 288, 310 (1989).

179. *Greene v. Fisher*, 132 S. Ct. 38, 44-45 (2011).

180. *Horn v. Banks*, 536 U.S. 266, 271(2002) (per curiam). See also LARRY W. YACKLE, *FEDERAL COURTS: HABEAS CORPUS* 183-200 (2d ed. 2010) (discussing the relationship between the statute and the case law).

181. *Danforth v. Minnesota*, 552 U.S. 264, 295 (2008).

182. See, e.g., *People v. Sanders*, 939 N.E.2d 352 (Ill. 2010); *Commonwealth v. Cunningham*, No. 38 EAP 2012, 2013 WL 5814388 (Pa. Oct. 30, 2013).

183. See, e.g., *State v. Knight*, 678 A.2d 642, 652 (N.J. 1996). On *Linkletter* and *Stovall*, see *supra* text accompanying notes 123-30.

still pending on direct review at the time that the rule is declared. Almost all courts find a way to apply a judicially-narrowed rule of criminal liability retroactively but refuse to do the same when the scope of liability has been broadened. The United States Supreme Court, after a period when it made some new constitutional rules of criminal procedure selectively prospective, has now settled on a “firm rule of retroactivity,”¹⁸⁴ binding all courts. This retroactivity, however, reaches back only to cases in which direct appeals remain available. Collateral attack of a conviction based on a subsequently announced procedural rule is permitted in federal courts only within the narrow exceptions defined in *Teague v. Lane* and the AEDPA.¹⁸⁵ State courts collaterally reviewing a judgment are not bound by *Teague* or the AEDPA and apply a variety of approaches. These divergent standards show that the retroactivity and prospectivity of judicially-created law remains profoundly controversial in American jurisprudence.

The disagreement has often been expressed in terms of the practice’s relation to the doctrine of *stare decisis*. The declaration of a genuinely new rule is, by definition, a break with the discipline of *stare decisis*. Still, its advocates have argued that *prospective* overruling is supported by that doctrine’s principal purposes. “By not applying a law-changing decision retroactively, a court respects the settled expectations that have built up around the old law.”¹⁸⁶ This argument, however, turns out to be two-edged sword. The very capacity of a prospective ruling to accommodate justified reliance may remove one of the greatest incentives to adhere to precedent:

By announcing new rules prospectively or by applying them selectively, a court may dodge the *stare decisis* bullet by avoiding the disruption of settled expectations that otherwise prevents us from disturbing our settled precedents. Because it forces us to consider the disruption that our new decisional rules cause, retroactivity combines with *stare decisis* to prevent us from altering the law each time the opportunity presents itself.¹⁸⁷

184. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 n.32 (1994).

185. *See supra* text accompanying notes 156-80.

186. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 551-52 (1991) (O’Connor, J., dissenting).

187. *James B. Beam*, 501 U.S. at 548 (opinion of Blackmun, J.). *See also id.* at 549 (Scalia, J., concurring). Prospective-only judgments are also obviously in tension with the *stare decisis* policy of equitable treatment of litigants insofar as it distinguishes parties solely on the basis of when their dispute arose. *See* Carl A. Auerbach, *A Revival of Some Ancient Learning: A Critique of Eisenberg’s The Nature of the Common Law*, 75 MINN. L. REV. 539, 571 (1991).

“Prospective decisionmaking,” according to Justice Scalia, “is the handmaid of judicial activism, and the born enemy of *stare decisis*.”¹⁸⁸

Prospective overruling, therefore, may encourage and legitimate judicial legislation.¹⁸⁹ This has been a criticism of non-retroactive judgments as long as they have been rendered in American courts.¹⁹⁰ It was also a prominent theme in the Supreme Court’s debate on the practice in the second half of the twentieth century. Justice Harlan accused those willing to apply a new rule of criminal procedure only prospectively of feeling “free to act, in effect, like a legislature, making its new constitutional rules wholly or partially retroactive or only prospective as it deems wise.”¹⁹¹

This disapproval, of course, assumes that it is improper for courts to make law. It depends, that is, on some form of the declaratory theory of adjudication. Indeed, in a concurring opinion endorsing full retroactivity, Justice Scalia quoted extensively from Blackstone.¹⁹² But this was a theory which the advocates of limited retroactivity had already rejected, in fact, ridiculed for decades.¹⁹³ Advocacy of non-retroactive judgments has, in fact, often been associated with the American legal realist critique of formalist jurisprudence. One commentator was pleased at the prospect that “the more courts begin to utilize prospective overruling the more it will become obvious that the judge is, in fact, inescapably a judicial legislator.”¹⁹⁴ And, in an unusually candid judicial recognition of the realist position, Justice O’Connor defended non-retroactive judgments by citing *Marbury v. Madison*: “[P]recisely because this Court has ‘the power to say what the law is,’ when the Court changes its mind, the law changes with it.”¹⁹⁵ By the late twentieth century, this

188. *Harper v. Va. Dep’t of Taxation*, 509 U.S. 86, 105 (1993) (Scalia, J., concurring).

189. See Rogers, *supra* note 36, at 36-37 (“[A]n exploration of this doctrine of prospective overruling is but a specialized examination of the limits of judicial lawmaking with particular regard to the element of *time* of application of the overruling decision.”).

190. See, e.g., *Gelpcke v. City of Dubuque*, 68 U.S. 175, 211 (1863) (Miller, J., dissenting) (“[The majority] . . . holds that the decision of the court makes the law, and in fact, that the same statute or constitution means one thing in 1853, and another thing in 1859.”).

191. *Mackey v. United States*, 401 U.S. 667, 677 (1971) (Harlan, J., concurring and dissenting).

192. *Harper*, 509 U.S. at 106-07 (Scalia, J., concurring). In criticizing *Linkletter*, Paul Mishkin stressed the “symbolic ideal reflected in the Blackstonian concept and . . . the emotional loyalties it commands.” Mishkin, *supra* note 128, at 66 (emphasis added).

193. See, e.g., Traynor, *supra* note 20, at 535 (deriding as “moonspinning” the idea that “judges do no more than discover the law that marvelously has always existed, awaiting only the judicial pen that would find the right words for all to heed.”).

194. See Levy, *supra* note 12, at 16.

195. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 550 (1991) (O’Connor, J., dissenting) (citations omitted) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137

was a position with which it was difficult to argue and it undermined the claim that non-retroactivity was somehow inconsistent with the nature of adjudication.¹⁹⁶

To the extent that the practice of giving judgments only prospective effect reflects modern recognition of the law-making power of judges, we might expect it to be employed differently depending on the underlying source of the law being applied. The demise of the declaratory theory led first to the conclusion that the judicial creation and modification of *common law* rules were inevitably exercises of judicial legislation. The idea that *enacted* law does not pre-exist judicial cases invoking it, however, is markedly harder to sustain. It might follow that courts could limit the applicability in time of their common law judgments but not those bottomed on statutes or constitutions.¹⁹⁷

A few cases support this intuition. The Massachusetts Supreme Judicial Court has held that “[w]here a decision does not announce new common-law rules or rights but rather construes a statute, no analysis of retroactive or prospective effect is required because at issue is the meaning of the statute since its enactment.”¹⁹⁸ For the most part, however, neither courts nor commentators have regarded the source of the law at issue as of much consequence to the temporal effect of a judgment. Cardozo thought there was no “adequate distinction” between changes of rulings concerning statutes or common law.¹⁹⁹ Likewise, when he wrote the Supreme Court’s *Sunburst* opinion, upholding the constitutionality of prospective overruling by state courts, he noted that the “alternative is the same whether the subject of the new decision is common law or statute.”²⁰⁰

In fact, some observers have noted that prospective rulings have been *more* common in the case of new statutory interpretations than

(1803). Justice Scalia later claimed that this interpretation of *Marbury* “would have struck John Marshall as an extraordinary assertion of raw power.” *Harper*, 509 U.S. at 106-07 (Scalia, J. concurring).

196. *See, e.g. Mackey v. United States*, 401 U.S. 667, 677-81 (1971) (Harlan, J., concurring and dissenting).

197. *See* Roosevelt, *supra* note 78, at 1076, 1107.

198. *In re McIntire*, 936 N.E.2d 424, 428 (Mass. 2010). Nevertheless, the Court limited the retroactivity of new interpretations of enacted law in two subsequent cases. *See Shirley Wayside Ltd. P’ship v. Bd. of Appeals*, 961 N.E.2d 1055, 1065 (Mass. 2012); *Eaton v. Fed. Nat’l Mortg. Ass’n*, 969 N.E.2d 1118, 1132-33 (Mass. 2012). *See also Kendrick v. Dist. Attorney of Phila. City*, 916 A.2d 529, 539 (Pa. 2007) (“[C]ourts should have the least flexibility where . . . the holding at issue . . . involves an interpretation of a statute.”); *State v. Cabagbag*, 277 P. 3d 1027, 1041-42 (Haw. 2012)(the state Supreme Court’s exercise of its supervisory power over lower courts may be made prospective).

199. CARDOZO, *supra* note 12, at 148-49 (citation omitted).

200. *Great N. Ry. Co. v. Sunburst Oil & Refining Co.*, 287 U.S. 358, 365 (citations omitted). On *Sunburst* see *supra* text accompanying notes 14-18.

in the case of new common law rules.²⁰¹ The justification for such a priority has never been thoroughly explained. In *Sunburst*, Justice Cardozo assumed that the decision to apply judgments retroactively or prospectively—in whatever kind of case—was an aspect of the doctrine of stare decisis, that doctrine itself was a part of the common law, and, therefore, it was within the authority of the judges.²⁰² One writer has suggested that individuals are more likely to rely on statutory or constitutional rights than common law rights and are therefore entitled to a greater degree of protection.²⁰³ A recent decision of the United States Sixth Circuit Court of Appeal addressed the “seemingly compelling” argument that a state court was without power to treat a statutory interpretation as anything but fully retroactive. The court noted that legislatures often write broad statutes, relying on courts to refine and apply them. “[T]he judicial development of the legislatively-created concept is little different from the development of judicially-announced law” so a court could properly consider whether its interpretation should applied retroactively.²⁰⁴

In sum, the current confused state of the law on the possibility of limited retroactivity of judgments demonstrates a persistent and possibly irresolvable tension in the American view of law and of the roles of legal institutions. The separation of powers, a fundamental dogma of the constitutional system, assumes that we are able to identify with some confidence what distinguishes “legislative” from “judicial” functions.²⁰⁵ The declaratory view of adjudication fit comfortably with that assumption. But that view, that the content of the law exists prior to and independent of its application by the courts, now seems irretrievably lost. Even with respect to written law, modern notions of interpretation have blurred the line between legislation and adjudication.²⁰⁶ In these circumstances, what can it mean to complain that a prospective-only ruling is inconsistent with the judicial role? The difficulty is illustrated in one of Justice Scalia’s separate opinions in the Supreme Court’s series of cases effecting the transition from limited retroactivity to a “firm rule of retroactivity”:²⁰⁷

I am not so naive (nor do I think our forebears were) as to be unaware that judges in a real sense “make” law. But they

201. See HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 604 (William N. Eskridge & Philip P. Frickey, eds. 1994); Milan M. Durgala, Note, *Prospectively Overruling the Common Law*, 14 *SYR. L. REV.* 53, 54-56 (1962-63).

202. *Sunburst*, 287 U.S. at 366.

203. See Rogers, *supra* note 36, at 54.

204. See *Volpe v. Trim*, 708 F.3d 688, 702 (6th Cir. 2013)

205. See Currier, *supra* note 21, at 221-22.

206. See Richard S. Kay, *Judicial Policy-Making and the Peculiar Function of Law*, 26 *U. QUEENSLAND L.J.* 237, 243-49 (2007).

207. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 278 n.32 (1994).

make it *as judges make it*, which is to say *as though* they were “finding” it—discerning what the law *is*, rather than decreeing what it is today *changed to*, or what it will *tomorrow* be.²⁰⁸

In his separate opinion in the case, Justice White pounced on this obscure description of the proper role of courts:

[E]ven though the Justice is not naive enough (nor does he think the Framers were naive enough) to be unaware that judges in a real sense “make” law, he suggests that judges (in an unreal sense, I suppose) should never concede that they do and must claim that they do no more than discover it, hence suggesting that there are citizens who are naive enough to believe them.²⁰⁹

There is no more contested issue in American law than the propriety of independent policy-making by courts.²¹⁰ Prospective judgments dramatically spotlight that controversy. It is not surprising that this has been a difficult and contentious issue for courts and commentators alike. It will be impossible to arrive at a coherent and generally accepted approach to the retroactive or prospective application of new judicial declarations of law until there is an equally well accepted definition of the proper allocation of lawmaking authority.

208. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 549 (1991) (Scalia, J., concurring)

209. *Id.* at 546 (White, J., concurring).

210. *See generally* Kay, *supra* note 206.

Enforcement of Foreign Arbitration Agreements and Awards: Application of the New York Convention in the United States†**

TOPIC I. C

International commercial arbitration provides customized and efficient resolution for disputes arising out of transnational commerce. When arbitration occurs in states that have ratified the New York Convention, the process also offers enforceable outcomes even in states other than the one where the arbitration occurred. The United States ratified the New York Convention in 1970, and its courts overwhelmingly enforce both arbitration agreements and arbitral awards. There are exceptions, however, and American courts require the use of certain procedures.

This Article provides a brief survey of American courts' recognition and enforcement of foreign arbitration agreements and arbitral awards. It begins by examining the extent of the reciprocity and commercial reservations made by the United States and the circumstances under which the Panama Convention preempts the New York Convention. Turning to the enforcement of arbitration agreements and clauses, the Article examines American courts' interpretations of the Convention's requirement of a signed agreement in writing and the circumstances that can make an arbitration agreement "null and void" or "incapable of being performed." The Article also summarizes courts' treatment of claims of waiver and lack of knowledge regarding the existence of arbitration clauses. Regarding American courts' enforcement of arbitral awards, the Article addresses the following

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defenses explicitly provided by the Convention: inability to present the case, lack of proper notice, lack of binding effect upon the parties, and violation of public policy. The Article also considers other defenses that arise out of application of the U.S. Constitution and federal rules of procedure: lack of personal jurisdiction and forum non conveniens. Finally, the Article distinguishes the circumstances that permit each of the following judicial dispositions: vacatur of arbitral award, enforcement or refusal to enforce arbitral award, and adjournment or stay of arbitral award.

I. IMPLEMENTATION OF THE NEW YORK CONVENTION IN THE UNITED STATES

A. *Incorporation by Reference into the Federal Arbitration Act*

The New York Convention on Recognition and Enforcement of Foreign Arbitral Awards (hereafter “The New York Convention” or “The Convention”) is a multilateral treaty that imposes dual enforcement obligations on the courts of contracting states. Specifically, these courts must enforce arbitration agreements involving international commerce and recognize and enforce arbitral awards made in other contracting states.¹

The New York Convention resulted from an international conference convened in 1958 by the United Nations Economic and Social Council (ECOSOC). The United States delegation to the conference recommended that the United States *not* become a signatory to the New York Convention due to concerns that it would require substantial changes in state, and potentially even federal, court procedures. The United States’ position changed as transnational commerce, transnational disputing and court costs increased. In 1970, the United States chose to ratify the treaty.

Congress implemented the Convention through incorporation by reference in Chapter 2 of the Federal Arbitration Act (hereafter FAA), which provides: “The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter.”²

Chapter 2 also provides that the general provisions of Chapter 1 of the FAA apply to actions and proceedings brought under Chapter 2, but only “to the extent that chapter [Chapter 1] is not in conflict with this chapter [Chapter 2] or the Convention as ratified by the United States.”³

1. New York Convention, Art. I (1), Jun. 7, 1959, 330 U.N.T.S. 38 [hereinafter New York Convention].

2. 9 U.S.C. §201 (2012).

3. 9 U.S.C. §208 (2012).

B. Dual Obligation of U.S. Courts to Recognize and Enforce Arbitration Agreements and Arbitral Awards

As noted *supra*, Articles I and II of the Convention, as incorporated by the FAA, impose dual enforcement obligations upon the courts of the United States. In *Lindo v. NCL (Bahamas), Ltd.*,⁴ The court described the procedures that parties must use to invoke these dual obligations:

To implement the Convention, Chapter 2 of the FAA provides two causes of action . . . for a party seeking to enforce arbitration agreements covered by the Convention: (1) an action to compel arbitration in accord with the terms of the agreement, 9 U.S.C. § 206, and (2) at a later stage, an action to confirm an arbitral award made pursuant to an arbitration agreement, 9 U.S.C. § 207.⁵

It is noteworthy that the FAA imposes a three-year statute of limitations upon actions to confirm arbitral awards.⁶

C. Foreign, Non-Domestic and Domestic Arbitral Awards

The New York Convention is applicable to two types of awards: “foreign” and “non-domestic” awards.⁷ Foreign awards are those in which the arbitration was conducted in a seat outside United States territory. Even if the seat of the arbitration was within the United States, however, the FAA provides for the enforcement of an award that “involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states.”⁸ Courts have interpreted the FAA to find that such awards are “non-domestic” and also governed by the Convention, even when one or both of the parties to the arbitration is domestic.⁹

4. *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2011) (citing to *Czarina, L.L.C. v. W.F. Poe Syndicate*, 358 F.3d 1286, 1290–91 (11th Cir. 2004)).

5. *Id.* at 1262-1263.

6. 9 U.S.C. §207 (2012); see *Verve Communications Pvt. Ltd. V. Software Intern., Inc.*, No. 11–1280 2011 WL 5508636 (D.N.J. Nov. 9, 2011).

7. New York Convention, *supra* note 1 at Article 1 (“This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where their recognition and enforcement are sought.”)

8. 9 U.S.C. §202 (2012).

9. See *e.g.*, *Industrial Risk Insurers v. M.A.N. Gutehoffnungshutte v. Industrial Risk Insurers*, 141 F.3d 1434, 1441 (11th Cir. 1998) (joining First, Second, Seventh and Ninth Circuits in holding that arbitration agreements and awards involving a non-domestic party are “non-domestic” even if the arbitration was conducted in the United States).

D. *Reservations Made by the United States*

Article I of the Convention provides that it "shall apply to the recognition and enforcement of arbitral awards made in the territory of the state other than the state where the recognition and enforcement of such awards are sought [.]" Article I (3), however, provides for limitations upon this broad grant of authority by allowing ratifying states to make "reciprocity" and "commercial" reservations. Specifically, a ratifying state may: ". . . on the basis of reciprocity declare that it will apply the Convention to the recognition and enforcement of awards made only in the territory of another contracting State"¹⁰ and, ". . . also declare that it will apply the Convention only to differences . . . which are considered commercial under the national law of the state making such declaration."¹¹ The United States has adopted both of these reservations.

E. *Reciprocity Reservation*

United States courts use the location of an arbitration to determine whether they must enforce the award.¹² Even if both parties are from non-contracting states, the award will be enforced within the United States as long as the arbitration was conducted in a contracting state. On the other hand, if both parties are from contracting states but the arbitration occurred in a non-contracting state, the courts in the United States will not enforce the award.¹³

F. *Commercial Reservation*

The commercial reservation allows ratifying states to limit enforcement of arbitral awards to cases involving legal relationships that are commercial. If an arbitral dispute arises out of any other relationship, then courts in states that have taken the reservation cannot grant enforcement of the award.

Courts in the United States have found that a relationship qualifies as commercial as long as it is "related to" commerce.¹⁴ Two companies' exchange of goods for payment represents a classic exam-

10. New York Convention, *supra* note 1 at Article I(3).

11. New York Convention, *supra* note 1 at Article II(2).

12. *La Societe Nationale Pour La Recherche v. Shaheen Natural Res. Co.*, 585 F. Supp 57 (S.D.N.Y. 1983); *See also E.A.S.T., Inc. of Stamford v. M/V Alaia*, 876 F.2d 1168 (5th Cir. 1989).

13. *Jugometal v. Samincorp, Inc.*, 78 F.R.D. 504 (S.D.N.Y. 1978) (court enforced an arbitration award decided in France (a member country) between a Yugoslavian party (non-member state) and a wholly-owned subsidiary of a Panamanian company); *see also Lander Co. v. MMP Invs.*, 107 F.3d 476 (7th Cir. Ill. 1997) (finding that because performance was to occur internationally, Convention also governed enforcement of arbitral award made in the U.S. and involving parties based in the U.S.).

14. *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 978 F. Supp. 266 (S.D. Tex. 1997).

ple of a commercial transaction and therefore fits squarely within the bounds of the New York Convention.¹⁵ In *Henry v. Murphy*,¹⁶ however, there was neither a formal agreement nor a contract.¹⁷ Nonetheless, the broad language of the Convention (“ . . . legal relationships, whether contractual or not, which are considered as commercial . . .”) allowed the court to consider a dispute arising out of the sale of stock to come within the terms of the New York Convention.¹⁸ In some instances, even an employer-employee relationship involving a limited fiduciary duty will be considered “commercial in nature,” and thus come within the bounds of the Convention.¹⁹ For example, courts now consider seamen’s employment contracts commercial relationships under Chapter 1 of the FAA.²⁰ In *Francisco v. M/T Stolt Achievement*, the court found that even if a plaintiff-employee’s claim lacks a tie to commerce as required by a strict interpretation of the language of the New York Convention, the plaintiff is nonetheless obligated to arbitrate his claim pursuant to an agreement in his employment contract.²¹

At this point, it does not appear that United States courts have identified any types of cases as not arbitrable under the Convention due to the limitations imposed by the commercial reservation.²²

15. *Siderius, Inc. v. Compania de Acero Del Pacifico, S. A.*, 453 F. Supp. 22, 24 (S.D.N.Y. 1978).

15. *See also* *Ledee v. Ceramiche Ragno*, 528 F. Supp. 243, 245 (D.P.R. 1981) (“The complaint shows on its face that it involves a transaction involving foreign commerce. The dispute, as the one in *Siderius v. Compania de Acero del Pacifico*, 453 F. Supp. 22 (S.D.N.Y., 1978), arose out of classical commercial relationship, one involving the purchase and sale of goods by two corporations.”).

16. *Henry v. Murphy*, 2002 U.S. Dist. LEXIS 227 (S.D.N.Y. Jan. 8, 2002).

17. *Id.*

18. *Henry v. Murphy*, 2002 U.S. Dist. LEXIS 227 (S.D.N.Y. Jan. 8, 2002), *affd.*, 2002 U.S. App. LEXIS 23199 (2d Cir. Nov. 6, 2002).

19. *Faberge Int’l Inc. v. Di Pino*, No. 23387N, 1985 N.Y. App. Div. LEXIS 45265 (N.Y. App. Div. July 2, 1985).

20. *Amizola v. Dolphin Shipowner, S.A.*, 354 F. Supp. 2d 689 (E.D. La. 2004.); *Bautista v. Star Cruises*, 286 F. Supp. 2d 1352 (S.D. Fla. 2003), *affd.*, 396 F.3d 1289 (11th Cir. 2005); *Robbins v. Princess Cruise Lines, Ltd*, CV 07-6088 GAF CTX, 2007 WL 4801296 (C.D. Cal. Nov. 5, 2007).

21. *Francisco v. M/T Stolt Achievement*, No. 00-3532 2001 U.S. Dist. LEXIS 3902 (E.D. La. Mar. 23, 2001) *affd.*, 293 F.3d 270, 273-75 (5th Cir. 2002).

22. *But see* Arthur J. Gemmell, *Commercial Arbitration in the Islamic Middle East*, 5 Santa Clara J. Int’l L. 169, 187 (2006) (asserting that matters of family or inheritance law would come within the commercial reservation and that this would be “especially important to Middle Eastern Islamic states, where such matters are reserved exclusively to domestic jurisdiction”).

II. THE PANAMA CONVENTION—AN ALTERNATIVE MEANS OF ENFORCING AN ARBITRAL AWARD

The Inter-American Convention on International Commercial Arbitration²³ (herein Panama Convention) was signed in Panama in 1975 at a special conference of the Organization of American States (herein OAS) on private international law.²⁴ Adopted by the United States and enacted through Chapter 3 of the FAA,²⁵ the Convention has seventeen signatory nations located throughout the Americas.²⁶

Unless the parties expressly agree otherwise, if a majority of the parties involved in an arbitration are citizens of Panama Convention ratifying or acceding states and these states also are OAS members, the Panama Convention will apply and, indeed, preempts the New York Convention. In all other international commercial arbitration matters, the New York Convention will apply.²⁷

III. OBJECTIONS AND DEFENSES TO THE ENFORCEMENT OF ARBITRATION AGREEMENTS

Parties may raise both jurisdictional and non-jurisdictional objections to the enforcement of an arbitration agreement or clause.

A. *Challenges to the Jurisdiction of the Arbitrators*

The doctrine of competence-competence is the general understanding by international courts that arbitrators have the authority to examine their own jurisdiction without prior court approval to do so.²⁸ In the United States, however, there is a presumption that a court will determine whether an arbitrator has jurisdiction to decide

23. The Inter-American Convention on International Commercial Arbitration, Jan. 30, 1975, 1438 U.N.T.S. 245 [hereinafter Panama Convention] available at <http://www.oas.org/juridico/english/treaties/b-35.html>.

24. Found at <http://www.oas.org/juridico/english/signs/b-35.html>.

25. 9 U.S.C. §301-307 (2012).

26. Currently, Argentina, Bolivia, Brazil, Chile, Columbia, Costa Rica, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Panama, Paraguay, Peru, the United States of America, Uruguay, and Venezuela are signatory nations. Of OAS member-states, only the Dominican Republic and Nicaragua have not signed the Panama Convention. ORGANIZATION OF AMERICAN STATES, Inter-American Convention on International Commercial Arbitration, (providing a list of signatories) available at <http://www.oas.org/juridico/english/signs/b-35.html>.

27. See 9 U.S.C. §305 (2012) (“When the requirements for application of both the Inter-American Convention and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, are met, determination as to which Convention applies shall, unless otherwise expressly agreed, be made as follows: (1) If a majority of the parties to the arbitration agreement are citizens of a State or States that have ratified or acceded to the Inter-American Convention and are member States of the Organization of American States, the Inter-American Convention shall apply. (2) In all other cases the Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall apply.”).

28. MARGARET MOSES, THE PRINCIPLES AND PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION, 91 (2008).

a controversy.²⁹ There is a further presumption in favor of finding that the arbitrator has such jurisdiction.³⁰ Once the court finds that the arbitrator possesses jurisdiction and enforces the arbitration clause, the arbitrator or arbitral panel will decide substantive issues regarding the underlying contract and allegations of waiver, delay in bringing arbitration, and other similar contentions.³¹

B. Severability of Arbitration Clause

The Supreme Court in *Buckeye Check Cashing v. Cardigna*³² determined that there are two main classes of challenges to a contract containing an arbitration agreement:³³ a challenge to the arbitration agreement itself and a challenge to the contract as a whole.

Under the FAA, arbitration clauses or agreements are “severable” from the contract as a whole.³⁴ As a result, even if one of the parties challenges the legality of the overall contract, a court may nonetheless find the arbitration agreement enforceable. Questions regarding the substance of the underlying contract will then be within the jurisdiction of the arbitrator.

This “severability doctrine” has the practical effect of limiting the scope of a court’s initial examination to the arbitration agreement itself. Even in instances in which there are allegations of fraud in the inducement of the contract, a court generally will not examine the substance of the controversy unless there is an allegation of fraud in the inducement of the arbitration clause.³⁵ Also, United States courts will decline to decide if an arbitration agreement is invalid unless the arbitration clause is specifically challenged by a party.³⁶ Only in direct challenges of the arbitration agreement will a United States court remove the controversy from the arbitrator’s discretion.

C. Requirement of Signed Agreement in Writing

In order to win enforcement of an arbitration agreement pursuant to the New York Convention, the requirements of the Convention must be met.³⁷ One such requirement is the “agreement in writing” provision of Article II (2) of the Convention: “The term ‘agreement in writing’ shall include an arbitral clause in a contract or an arbitra-

29. *First Options of Chicago v. Kaplan*, 514 U.S. 938, 946 (1995).

30. *Moses H. Cone Mem’l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24 (1983).

31. *Id.*

32. *Buckeye Check Cashing v. Cardigna*, 546 U.S.440 (2006).

33. *Id.* at 444-45.

34. *Id.* at 445.

35. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 403-404 (1967).

36. *Advance Am. Servicing of Arkansas, Inc. v. McGinnis*, 375 Ark. 24, 38 (Ark. 2008).

37. This can be understood as simply a matter of meeting statutory requirements, or as a matter of subject matter jurisdiction.

tion agreement, signed by the parties or contained in an exchange of letters or telegrams.”³⁸

In applying the requirement of a signed agreement in writing, American courts must sometimes determine the ability of signatories to bind non-signatories. This determination, in turn, can require choice of law analysis. In *InterGen N.V. v. Grina*,³⁹ the court held that an arbitration agreement was unenforceable against the parties because they were distinct corporate entities and had not signed the agreement.⁴⁰ More recently, however, an American court held that an arbitration agreement might be enforceable against a corporate non-signatory, depending upon the application of English law to the issue of piercing the corporate veil.⁴¹ The signatories had specified English law in their choice of law provision in the agreement. In *Iran Ministry of Defense of Islamic Republic of Iran v. Gould Inc.*,⁴² the Ninth Circuit also found that a federal district court had jurisdiction to enforce an arbitration award in favor of Iran against an American corporation even though there was no written arbitration agreement between the parties. The court found that the Convention’s requirement of a signed written agreement was met by the execution of the Algiers Accord on behalf of private claimants and Iran.

There is a split among the federal circuit courts on whether a contract containing an arbitration clause—in contrast to a separate arbitration agreement—must be signed by the parties in order to make the agreement to arbitrate enforceable under the Convention. (The Supreme Court has declined to grant certiorari on this point.”⁴³) Jurisdictions typically use one of three approaches to handle the signature requirement. Courts using the first approach always require the signatures of the parties regardless of whether the case involves an arbitration clause contained in a primary contract or a separate

38. *Intergen N.V. v. Grina*, 344 F.3d 134, 141 (1st Cir. 2003). (citing *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 520 n. 15 (1974)); New York Convention, *supra* note 1 at Article II(2).

39. *Id.*

40. The signatories in the *InterGen* case were corporations related to the parties, but were distinct entities. Without the signatures of the distinct entities who were parties to the dispute, the arbitration agreement was not enforceable by the parties. *See id.* at 150.

41. *See* FR 8 Singapore Pte. Ltd. V. Albacore Maritime Inc., 754 F. Supp. 2d 628 (S.D.N.Y. 2010).

42. *Iran Ministry of Def. of Islamic Rep. of Iran v. Gould Inc.*, 887 F.2d 1357 (9th Cir. 1989).

43. *See* *Nielson v. Seaboard Corp.*, 129 S. Ct. 624 (2008), *cert. denied*; *Petition for Writ of Certiorari, Nielson v. Seaboard Corp.*, 08-65 2008 WL 2773349 at i (July 14, 2008) (stating the question presented was “the proper scope and application of article II(2) of the Convention, relating to when an arbitration clause must be ‘signed by the parties or contained in an exchange of letters or telegrams’”).

arbitration agreement.⁴⁴ The second approach requires the signatures of the parties only when there is a separate arbitration agreement.⁴⁵ This approach obligates a party who never signed the primary contract containing an arbitration clause to arbitrate, regardless of whether the primary contract has been found enforceable. Courts using the third approach explicitly reconcile the Convention's "signed by the parties" writing requirement with the FAA's requirement of only a "written provision" in the contract or arbitration "agreement in writing."⁴⁶ As noted *supra*, Chapter 2 of the FAA incorporates the Convention by reference, and then specifies that the "domestic arbitration" rules of Chapter 1 also apply unless they are in conflict with the provisions of Chapter 2. The FAA's deference to the Convention indicates that Article II(2) of the Convention will control regarding the signature requirement.

UNCITRAL has recommended that states adopt Article 7 of the UNCITRAL Model Law on International Commercial Arbitration as revised, which specifically recognizes that the writing requirement for arbitration agreements may be met by electronic communications including, but not limited to, electronic mail, telegram, telex or telecopy.⁴⁷ At least one court in the United States has already found that a two-way exchange of emails meets the Convention's writing requirement.⁴⁸

D. Defense that the Agreement is Null and Void, Inoperative or Incapable of Being Performed

Article II(3) of the New York Convention provides that a court "shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." The question of whether an agreement is "null and void" has been the most frequent subject of litigation, although there has also been one case interpret-

44. See *Sarhank Grp. v. Oracle Corp.*, 404 F.3d 657, 660 n. 2 (2d Cir. 2005); *Standard Bent Glass Corp. v. Glassrobots Oy*, 333 F.3d 440, 449 (3d Cir. 2003); *Kahn Lucas Lancaster, Inc. v. Lark Int'l Ltd.*, 186 F.3d 210 (2d Cir. 1999).

45. *Sphere Drake Ins. PLC v. Marine Towing, Inc.*, 16 F.3d 666, 669 (5th Cir.1994).

46. See *Sourcing Unlimited, Inc. v. Asimco Int'l, Inc.*, 526 F.3d 38 (1st Cir. 2008); *Regent Seven Seas*, Nos. 06-22347-CIV, 06-22539-CIV 2007 WL 601992 (S.D. Fla. Feb. 21, 2007); *Sarhank*, 404 F.3d at 660; *Kahn Lucas Lancaster*, 186 F.3d 210.

47. G.A. Res. 61/33, U.N. Doc. A/RES/61/33 (Dec. 18, 2006), available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/a61-33-e.pdf>; UNCITRAL Rep. on the work of its 39th Sess., June 19-July 6, 2006, U.N. GOAR, 61st Sess., Supp. No. 17, U.N. Doc. A/61/17 at 61, available at <http://documents-dds-ny.un.org/doc/UNDOC/GEN/V06/558/15/pdf/V0655815.pdf?OpenElement> [hereinafter 2006 UNCITRAL Recommendation].

48. *Glencore Ltd. v. Degussa Engineered Carbons L.P.*, 848 F.Supp.2d 410 (S.D.N.Y. 2012) (finding that an exchange of emails going both ways was sufficient for the "agreement in writing" requirement).

ing whether an agreement was “incapable of being performed.” To date, no court in the United States has examined whether an agreement is “inoperative” under the Convention.

Even when the underlying contract contains a specific choice of law clause, courts will evaluate whether the arbitration clause is enforceable according to the law of the forum. In *Freudensprung v. Offshore Technical Services, Inc.*,⁴⁹ for example, the court ruled that American federal law applied despite the parties’ choice of Texas law. According to the *Freudensprung* court, the FAA preempted any conflicting state law contained in the choice of law provision. The court referenced *Matter of Ferrara S.p.A.*⁵⁰ which explained:

In actions arising under Chapter 1 of the Federal Arbitration Act (Act), questions concerning the enforceability of arbitration agreements are governed by federal law, even where the parties have by agreement specified the law governing the interpretation of the contract, and the place of and/or tribunal for arbitration This result is consistent in these cases with the view that enforceability of an agreement to arbitrate relates to the law of remedies and is therefore governed by the law of the forum.⁵¹

Under federal law then, the court in *Freudensprung* enforced the agreement to arbitrate due to the United States policy establishing a presumption of arbitrability.⁵²

*Apple & Eve, LLC v. Yantai N. Andre Juice Co.*⁵³ involved parties’ potential waiver of an arbitration agreement and a determination regarding whether such waiver made the agreement “null and void.” In this case, the defendants had actively attempted to avoid arbitration until the last possible moment. The question was whether the defendants had therefore impliedly waived their right to arbitration. The arbitration clause specified the country of the defendant—China—as the seat of the arbitration, but did not include a choice of law provision. The Second Circuit used its own forum law to determine whether the defendants had waived their right to arbitration. The Second Circuit had long held that arbitration agreements, like other contract rights, could be modified or waived by the parties’ actions. As such, the court found that the defendants here had waived their right to arbitration in China and therefore the agree-

49. *Freudensprung v. Offshore Technical Serv., Inc.*, 379 F. 3d 327, n. 7 (5th Cir. 2004).

50. *In re Ferrara S.p.A.*, 441 F. Supp. 778 (S.D.N.Y. 1977).

51. *Id.* at n. 2 (citations omitted).

52. *Freudensprung*, 379 F. 3d at 341.

53. *Apple & Eve, LLC v. Yantai N. Andre Juice Co.*, 610 F. Supp. 2d 226 (E.D.N.Y. 2009).

ment was considered “null and void” under the Convention. The court vacated an earlier order staying legal action pending arbitration.⁵⁴

Some courts in the United States have found that an international standard represents the law of the forum that will be used to determine whether an arbitration clause is null and void. Specifically, in *Bautistia v. Star Cruises*,⁵⁵ the court found that a contract could be found null and void under the Convention only in situations involving standard breach of contract claims “such as fraud, mistake, duress, and waiver—that can be applied neutrally on an international scale.”⁵⁶ *Bautistia* was first overturned, then later upheld by subsequent cases in the 11th Circuit.⁵⁷

In *Corcoran v. Ardra Ins. Co., Ltd.*,⁵⁸ the court dealt with whether the arbitration clause was “incapable of being performed.” In the absence of a choice of law provision and in light of the international nature of the agreement, the court concluded that the Convention applied. The court determined that the law of New York applied, and such law did not permit a liquidator who had been appointed to oversee an insolvency to participate in arbitration. Therefore, the arbitration clause was “incapable of being performed,”⁵⁹ the claims were not “capable of settlement by arbitration,”⁶⁰ and the court could not compel arbitration.⁶¹ The court noted that the “practical result” was “to relieve the parties from having to proceed through a futile arbitration in which the resulting award would be unenforceable in New York because of the Supreme Court’s exclusive jurisdiction in liquidation matters.”⁶²

54. *Id.* at 234.

55. *Bautistia v. Star Cruises*, 396 F.3d 1289 (11th Cir. 2005).

56. *Id.* at 1302 (quoting *DiMercurio v. Sphere Drake Ins. PLC*, 202 F.3d 71, 80 (1st Cir.2000)) (refusing to find agreement null and void on unconscionability grounds).

57. *See Thomas v. Carnival Corp.*, 573 F.3d 1113 (11th Cir. 2009) (refusing to enforce arbitration agreement contained in a seaman employment contract because while the NY Convention does apply, the affirmative defense of violation of public policy permitted the court to not enforce the clause; here the court determined that compelling foreign arbitration that would follow foreign law is adverse to the public policy of the United States); *Lindo v. NCL (Bahamas) Ltd.*, 652 F.3d 1257 (11th Cir. 2011) (resolving the intra-circuit split generated by *Thomas* by following the reasoning in *Bautistia* and limiting the null and void affirmative defense to bases that would be internationally recognized).

58. *Corcoran v. Ardra Ins. Co., Ltd.*, 77 N.Y.2d 225 (N.Y. 1990).

59. New York Convention, *supra* note 1, at Article II, ¶ 3.

60. New York Convention, *supra* note 1, at Article II, ¶ 1.

61. *Corcoran v. Ardra Ins. Co., Ltd.*, 77 N.Y.2d at 232-233.

62. *Id.* at 233.

E. Waiver of the Right to Arbitrate

Like many other contractual obligations, the right to arbitrate is waivable.⁶³ If a party has waived his or her right to arbitrate, the party who would have been entitled to have a dispute resolved through arbitration cannot later argue that the issue should have been decided in that forum. The party who could have argued against arbitration is in default.

A party is able to waive his or her right to arbitrate in two ways: by expressly indicating a desire to resolve the relevant claims before a United States court rather than through arbitration, or by engaging in civil litigation so that the other party will be prejudiced if the case is transferred to arbitration.⁶⁴ A court may find prejudice—and waiver of the right to arbitrate—if “the party seeking arbitration allows the opposing party to undergo the types of litigation expenses that arbitration was designed to alleviate.”⁶⁵ On the other hand, if litigation is in its early stages, it is unlikely a court will find that initiating a lawsuit is inconsistent with an intent to arbitrate.⁶⁶

F. Lack of Knowledge that an Arbitration Clause Exists

Under United States law, an arbitration provision usually is upheld and enforced even if the party disputing the clause asserts that he or she did not read the clause.⁶⁷ This is true even if the agreement would not be enforceable in the nation of the disputing party, particularly if the parties have chosen United States law to govern arbitrable disputes.⁶⁸ A party seeking to avoid enforcement of an arbitration clause must make a showing sufficient to come within one of the exceptions to the general rule that a person of ordinary understanding and competence is bound by the provisions of a contract he signed regardless of whether or not he has read such provisions.⁶⁹

63. See *Cornell & Co., Inc. v. Barber & Ross Co.*, 360 F.2d 512, 513 (D.C.Cir. 1966); see also *Apple & Eve, LLC v. Yantai N. Andre Juice Co.*, 610 F. Supp.2d 226, 228 (E.D.N.Y. 2009).

64. *Apple & Eve, LLC*, 610 F. Supp.2d at 228.

65. *Morewitz v. W. of Eng. Ship Owners Mut. Prot. & Indemnity Assoc.* (Luxembourg), 62 F.3d 1356, 1366 (11th Cir. 1995).

66. *Hodgson v. Royal Caribbean Cruises, Ltd.*, 706 F. Supp. 2d 1248, 1258 (S.D. Fla. 2009).

67. *In re Ferrara S. p. A.*, 441 F. Supp. 778, 781-782 (S.D.N.Y. 1977).

68. *Id.*

69. *Id.* at 782.

IV. OBJECTIONS AND DEFENSES TO THE ENFORCEMENT OF ARBITRAL AWARDS

A. *Distinguishing Between Vacatur and Refusal to Enforce Arbitral Awards*

Although the focus of this Article is on American courts' enforcement or refusal to enforce arbitral awards, it is important to distinguish these from vacatur. According to American courts, the state in which an arbitral award is made has "primary" jurisdiction, and a court located in that state is free to vacate, annul or set aside an award in accordance with the state's domestic scheme of arbitral law "and its full panoply of express and implied grounds of relief."⁷⁰ Thus, if an arbitration occurred in the United States—or, in some circumstances, under American law—American courts have primary jurisdiction and may apply the FAA's grounds for vacatur.⁷¹

In contrast, if an arbitral award was rendered in a foreign state, an American court has only "secondary" jurisdiction and may only decide whether to enforce, or refuse to enforce, the arbitral award. The court's review is then generally limited to the seven grounds provided in Article V of the New York Convention, *infra*.⁷²

B. *Choice of Procedural Law for Judicial Review of an Arbitral Award*

Procedural law governs the arbitration proceeding; substantive law governs the interpretation of the underlying contract.⁷³ American courts have found that an agreement specifying the place or seat of the arbitration creates a strong presumption that the procedural law of that state applies to the arbitration.⁷⁴ A party who fails to make the necessary showings will not be able to overcome such presumption.⁷⁵

Although it is possible for the seat of an arbitration to be in one state while the proceedings will be held under the arbitration law of

70. *Yusuf Ahmed Alghanim v. Toys "R" Us*, 126 F.3d 15, 23 (2d Cir. 1997); see *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Nnegara*, 364 F. 3d 274, 287-88 (5th Cir. 2004); *M&C Corp. v. Erwin Behr GmbH*, 87 F.3d 844, 849 (6th Cir. 1996).

71. See *Yusuf Ahmed*, 126 F.3d at 21-23; *Ario v. Underwriting Members of Syndicate*, 618 F.3d 277 (3d Cir. 2010).

72. See *Yusuf Ahmed*, 126 F.3d at 21-23; *Karaha Bodas Co.*, 364 F. 3d at 287-88.

73. See *M&C Corp. v. Erwin Behr GmbH*, 87 F.3d 844, 847-48 (6th Cir. 1996)

74. See *Steel Corp. of the Philippines v. International Steel Services, Inc.*, 354 Fed. Appx. 689, 692-93 (3d Cir. 2009).

75. *Karaha Bodas Co.*, 364 F. 3d at 287-88; See also *Steel Corp. of the Philippines v. Int'l Steel Services, Inc.*, 354 Fed.Appx. 689, 694-94 (3d Cir. 2009) (finding that contractual provision that "enforcement" would be governed by Philippine law, rather than specific invocation of Philippine "procedural law," was insufficient to rebut the strong presumption in favor of the application of the procedural law of the place of the arbitration).

another state, American courts have approvingly referenced authorities describing this practice as “exceptional,” “almost unknown,” and “a possibility that is more theoretical than real.”⁷⁶ American courts have also discussed concerns regarding the complexity, inconvenience and challenges to forum neutrality created by requiring the arbitral panel seated in one state to interpret and apply the procedural law of another state.⁷⁷

Some American courts have been required to grapple with application of the procedural law of individual American states rather than a national procedural law. The Third Circuit has found that parties may elect to be bound by individual American states’ *vacatur* standards, rather than those contained in the FAA,⁷⁸ because the FAA requires the enforcement of parties’ agreements to arbitrate and does not bar the enforcement of state law rules. Importantly, however, “[i]t is federal law that allows the parties to make and enforce agreements that fall under the FAA or the Convention.”⁷⁹ The Third Circuit conditioned parties’ ability to elect state law *vacatur* standards upon the expression of clear and specific intent to be bound by such standards.⁸⁰

C. *Defenses to Enforcement of Arbitral Awards, Generally*

The FAA provides that if a court has jurisdiction under Chapter 2, the court “shall confirm” an arbitral award “unless it finds one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the said [New York] Convention.”⁸¹ Article V(1) of the Convention permits a court to refuse to recognize and enforce an award if the protesting party furnishes proof that:

- (a) The parties to the agreement referred to in [A]rticle II were, under the law applicable to them, under some incapacity, or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made; or
- (b) The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of

76. See *Karaha Bodas Co.*, 364 F.3d at 291.

77. See *id.*

78. *Ario v. Underwriting Members of Syndicate*, 618 F.3d 277 (3d Cir. 2010).

79. *Id.*; See also *Hall St. Assocs., LLC v. Mattel, Inc.*, 552 U.S. 576, 590 (2008) (“The FAA is not the only way into court for parties wanting review of arbitration awards: they may contemplate enforcement under state statutory or common law, for example, where judicial review of different scope is arguable”).

80. See *Ario*, 618 F.3d at 290-95 (finding that when the arbitration provisions evidences only the parties’ intent to be bound by state law regarding the conduct of the arbitration, the complaining party had not met its burden in demonstrating a clear intent to use state law to determine enforcement of the arbitral award).

81. 9 U.S.C. §207 (2012).

the arbitration proceedings or was otherwise unable to present his case; or

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced; or

(d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place; or

(e) The award has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country in which, or under the law of which, that award was made.⁸²

In addition, Article V(2) permits a court to refuse to recognize and enforce an arbitral award if it finds that “[t]he subject matter of the difference is not capable of settlement by arbitration under the law of that country” or “[t]he recognition or enforcement of the award would be contrary to the public policy of that country.”⁸³ American courts have held that the complaining party bears a heavy burden to prove that one of the Convention’s seven defenses applies.⁸⁴

D. Inability to Present Case and Lack of Proper Notice

Article V(1)(b) of the Convention provides that a court may refuse to enforce an arbitral award if “[t]he party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case.”⁸⁵ American courts have found that the FAA’s standards also apply in this context to the extent that they are “not in conflict” with those in the Convention.⁸⁶ The FAA provides that a court may vacate an arbitral award “where the arbitrators were guilty of misconduct . . . in refusing to hear evidence pertinent and

82. New York Convention, *supra* note 1, at Art. V (1).

83. New York Convention, *supra* note 1, at Art. V (2).

84. *See e.g.*, *Telenor Mobile Commc’n v. Storm L.L.C.*, 584 F.3d 396, 405 (2d Cir. 2009).

85. New York Convention, *supra* note 1, at Article V(1)(b).

86. 9 U.S.C. §208 (2012); *Zeiler v. Deitsch*, 500 F3d 157, 164 (2d Cir. 2007).

material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.”⁸⁷

Courts in the United States have recognized that the defenses of lack of notice and inability to present the case essentially permit application of the forum state’s standards of due process and, indeed, such due process rights are entitled to full force under the Convention. In the United States, the sources of such due process standards are the Due Process Clauses contained in the Fifth and Fourteenth Amendments, which generally provide that the state (both national and local) may not deprive a person of life, liberty or property without due process of law.

As American courts review arbitral awards, they cite frequently to the seminal case of *Mathews v. Eldridge*⁸⁸ for the general rule that “the fundamental requirement of due process is the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”⁸⁹ Interestingly, and somewhat confusingly, they do not cite to the more concrete three-part balancing test also established in *Mathews* for determining whether a procedure sufficiently meets the guarantee of procedural due process.⁹⁰ American courts reviewing arbitral awards instead tend to observe only that due process requires an arbitral hearing to meet “the minimal requirements of fairness”—adequate notice, a hearing on the evidence, and an impartial decision by the arbitrator.”⁹¹

87. 9 U.S.C. §10(a)(3) (2012).

88. *Mathews v. Eldridge*, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). (involving governmental deprivation of a citizen’s benefits without first providing a pre-termination in-person proceeding and finding that under the circumstances presented, the citizen was not entitled to such pre-termination in-person proceeding); see also *Goldberg v. Kelly*, 397 U.S. 254 (1970) (interpreting Due Process Clause to require procedures to be tailored to “the capacities and circumstances of those who are to be heard”).

89. *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S.Ct. 893, 902, 47 L.Ed.2d 18 (1976), (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S.Ct. 1187, 1191, 14 L.Ed.2d 62 (1965)).

90. *Id.* at 335. This test requires a court to examine the significance of the private interest that is subject to deprivation, the governmental interest in achieving its public purposes effectively and efficiently through summary procedures, and the degree of risk that such procedures could result in erroneous deprivation. United States courts have regularly applied this test to determine the constitutionality of a wide variety of procedures involving the deprivation of life, liberty or property, while also recognizing that the right to due process does not require provision of the complete set of procedural rights guaranteed by the Federal Rules of Civil Procedure.

91. *Karaha Bodas Co.*, at 298-299 (quoting *Slaney v. Int’l Amateur Athletic Fed’n*, 244 F.3d 580, 592 (7th Cir. 2001) which was quoting *Sunshine Mining Co. v. United Steelworkers*, 823 F.2d 1289, 1295 (9th Cir. 1987); *Generica*, 125 F.3d at 1130 (quoting same). See also *Iran Aircraft Industries v. AVCO Corporation*, 980 F.2d 141 (2d Cir. 1992), where the second circuit concluded that an arbitral panel had violated due process when it met with one of the parties on an *ex parte* basis during a pre-hearing conference, directed the party to submit audited summaries of invoice information rather than the invoices themselves, and then ruled against the party for its failure to submit invoices.

Issues raised under Article V(1)(b) generally involve the unavailability of witnesses, the manner in which arbitrators heard offered evidence, and notice. When a witness was unavailable for an arbitration hearing, American courts examine whether the witness was essential, and whether the witness' testimony (or other evidence) could have been offered in other forms.⁹² Importantly, courts do not require arbitrators to hear all of the evidence offered by parties. They have noted that "the inability to produce one's witnesses before an arbitral tribunal is a risk inherent in an agreement to submit to arbitration" and that "by agreeing to arbitration, a party relinquishes his courtroom rights, included that to subpoena witnesses."⁹³ As a result, American courts rarely refuse to enforce an arbitral award due to a party's inability to present his case as he or she wished or due to insufficient notice.⁹⁴

E. Lack of Binding Effect upon the Parties

A court may refuse to enforce an arbitral award if it "has not yet become binding upon the parties."⁹⁵ The party seeking to avoid enforcement on this basis has the burden of proving that an award is not binding. Courts similarly interpret the FAA to find a presumption

92. See, e.g. *Abu Dhabi Inv. Auth. v. Citigroup*, No. 12 Civ. 283(GBD) 2013 WL789642, n. 13 (S.D.N.Y. 2013); *Tempo Shain Corp. v. Bertek, Inc.*, 120 F.3d 16 (2d Cir. 1997) (vacating district court's confirmation of arbitral award and remanding for further consideration after finding that arbitral panel had refused to hear testimony from one witness who could testify regarding facts that only he could know); *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Nnegara*, 364 F. 3d 274 (5th Cir. 2004); *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie Du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974); *Sonera Holding, B.V. v. Cukurova Holding A.S.*, No. 11 Civ. 8909 (DLC) 2012 WL 3925853 (S.D.N.Y. 2012); *Rive, S.A. v. Briggs of Cancun, Inc.*, 82 Fed. Appx. 359 (5th Cir. 2003); *Libanco v. Rep. of Turkey*; *Generica, Ltd. v. Pharmaceutical Basics, Inc.*, 125 F.3d 1123 (7th Cir. 1997).

93. See generally, *Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de L'Industrie Du Papier (RAKTA)*, 508 F.2d 969 (2d Cir. 1974); see also *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 302 (5th Cir. 2004) (constitutional guarantee of procedural due process not violated even though a witness' misleadingly non-committal answer to arbitrator's question was found to be contradicted by later discovery of evidence that arbitral panel refused to admit); but see *Iran Aircraft Industries v. AVCO Corporation*, 980 F.2d 141 (2d Cir. 1992) (arbitral panel violated due process when it met with one of the parties on an *ex parte* basis during a pre-hearing conference, directed the party to submit audited summaries of invoice information rather than invoices themselves, and then ruled against the party for its failure to submit the invoices).

94. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, provides the standard of notice, and courts generally find that notice meets this requirement. However, see *Sea Hope Navigation Inc., v. Novel Commodities, S.A.*, No. 13 Civ. 3225 2013 WL 5695955 (S.D.N.Y. Oct. 21, 2013), where the court denied a motion of default judgment after the defendant asserted insufficient notice because it was notified via a generic email address that was not actively monitored by the company.

95. *New York Convention*, *supra* note 1 at Article V, ¶¶ 1, e.

that arbitral awards are binding.⁹⁶ In order to win vacatur of an arbitral award from a reviewing court, the FAA requires the party contesting the award to bear the burden of proving that: “. . . the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.”⁹⁷

Thus, in order to be reviewable, enforceable and not subject to vacatur, the arbitral award must be both binding upon the parties and “mutual, final, and definite.” In determining reviewability, American courts generally have focused on two of these requirements—finality and whether the award is binding.⁹⁸

In applying these requirements to interim rulings, courts have generally refused to rely on the captioning of the ruling.⁹⁹ Rather, courts examine the substance and effect of the interim award. Focusing on the FAA’s finality requirement for enforceability, courts often analyze whether the ruling is “necessary to make the potential final award meaningful.”¹⁰⁰ Arbitrators’ provisional awards designed to secure the effectiveness of the arbitration process are final and thus reviewable.¹⁰¹ In *Pacific Reins. Mgmt. Corp. v. Ohio Reinsurance Corp.*¹⁰² for example, the court affirmed the lower court’s confirmation of an interim award establishing an escrow account, noting that temporary equitable awards can be “essential to preserve the integrity of that [the arbitral] process”¹⁰³ and necessary to preserve assets or compel the performance that will make a final award meaningful.¹⁰⁴ Similarly, in *Island Creek Coal Sales v. City of Gainesville*,

96. See *Chromalloy Aeroservices v. Arab Rep. of Egypt*, 939 F. Supp. 907, 910 (D.D.C. 1996); see also *Europcar Italia v. Maiellano Tours, Inc.*, 156 F.3d 310, 314 (2d Cir. 1998) (examining the effect of Italian arbitrato irrituale and distinguishing an award that is “binding on the parties” from an award that is “judicially binding”).

97. 9 U.S.C. §10(a)(4) (West 2012).

98. See *New United Motor Mfg., Inc. v. United Auto Workers Local*, 617 F.Supp.2d 948, 954 (N.D.Cal. 2008) (citing *ConnTech Dev. Co. v. Univ. of Conn. Educ. Prop., Inc.*, 102 F.3d 677, 686 (2d Cir.1996)); *Millmen Local 550, United Broth. of Carpenters and Joiners of Am., AFL-CIO v. Wells Exterior Trim*, 828 F.2d 1373 (9th Cir.1987).

99. *Publicis Commc’n v. True N. Commc’ns, Inc.*, 206 F.3d 725, 728 (7th Cir.2000); see *Pac. Reins. Mgmt. Corp. v. Ohio Rein. Corp.*, 935 F.2d 1019, 1030 (9th Cir.1991). (“finality should be judged by substance and effect, not by superficial technicalities.”).

100. *Publicis Commc’n v. True N. Commc’ns, Inc.*, 206 F.3d at 729; see also *Yasuda Fire & Marine Ins. Co. of Europe v. Continental Cas. Co.*, 37 F.3d 345 (7th Cir. 1994), *Pac. Reins. Mgmt. Corp. v. Ohio Rein. Corp.*, 935 F.2d at 1023.

101. *Certain Underwriters at Lloyd’s, London v. Argonaut Ins. Co.*, 264 F. Supp. 2d 926, 937 (N.D. Ca. 2003); *Sojitz Corp. v. Prithvi Info. Solutions Ltd.*, 921 N.Y.S.2d 14 (N.Y. App. Div. 2011) (also referencing New York statute authorizing attachment to permit securing finality of arbitral award).

102. *Pacific Reins. Mgmt. Corp. v. Ohio Reinsurance Corp.*, 935 F.2d 1019 (9th Cir. 1991).

103. *Id.* at 1023 (but vacating the confirmation as to one party).

104. *Id.*

Florida,¹⁰⁵ the appellate court affirmed the district court's refusal to vacate an interim award requiring specific performance of a contract until the final award was determined, because such performance ensured that no further harm would come to the contractual relationship if the award was upheld.¹⁰⁶ Courts have diverged in determining whether interim arbitral orders permitting class certification are sufficiently final to be subject to judicial review.¹⁰⁷

In contrast, when courts' analysis of an arbitrator's intent reveals that he did not intend an interim measure to be final or intended it to be subject to modification, courts have found that the award was not sufficiently final to be reviewable. In *Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*,¹⁰⁸ for example, an "emergency arbitrator" had issued an order providing for temporary equitable relief that required one of the parties to take certain actions within ten days. The interim order also provided, however, that it was being issued to facilitate consideration "by the full panel of conservancy" and was subject to review by "the full arbitration tribunal, once appointed, and thereafter as the tribunal may order." Finally, the rules of the arbitral organization explicitly provided for reconsideration, modification or *vacatur* of the interim award once the tribunal was constituted.¹⁰⁹ Under all of the circumstances presented, the court concluded that the order was not final. In other contexts, when an arbitrator has retained jurisdiction to make a later modification of a substantive order, United States courts have similarly focused on the arbitrator's intent to conclude that the order does not represent a final award.¹¹⁰ Generally, when arbitrators make interim rulings that do not resolve the merits of the claim submitted to them, judicial review is exceptional.¹¹¹

105. *Island Creek Coal Sales v. City of Gainesville, Fla.*, 729 F.2d 1046 (6th Cir. 1984) (abrogated on other grounds, in *Cortez Byrd Chips v. Bill Harbert Constr.*, 529 U.S. 193 (2000)).

106. *Id.* at 1049.

107. *Compare Marron v. Snap-On Tools, Co.*, No. 03-4563, 2006 U.S. Dist. LEXIS 523 (D.N.J. Jan. 9, 2006) with *Genus Credit Mgmt. Corp. v. Jones*, No. JFM-05-3028, 2006 U.S. Dist. LEXIS 16933, at 4 (D. Md. April 6, 2006).

108. *Chinmax Med. Sys. Inc. v. Alere San Diego, Inc.*, 10CV2467 WQH NLS, 2011 WL 2135350 (S.D. Cal. May 27, 2011).

109. *Id.* at 5.

110. *Orion Pictures Corp. v. Writers Guild of Am., W., Inc.*, 946 F.2d 722, 724 (9th Cir. 1991) (interpreting the Labor Management Relations Act rather than the FAA; finality requires that arbitrator must intend the arbitration award to be a "complete determination of every issue submitted").

111. *Quixtar Inc. v. Brady*, 2008 WL 5386774 at 13 (E.D. Mich. Dec. 17, 2008) (quoting *Michaels v. Mariforum Shipping, S.A.*, 624 F.2d 411, 414 (2d Cir. 1980)). Although there is no case law directly on point, it appears that advisory awards are unlikely to be entitled to judicial review. See *Hoffman La Roche v. Qiagen* 730 F.Supp.2d 318, 328 (S.D.N.Y. 2010) (reasoning that an arbitral award is entitled to deference because, "an arbitration panel's conclusions are more than advisory opinions for the federal courts—rather, they are thoughtful analyses made by adjudicators steeped in the facts and law").

F. *Violation of Public Policy*

Article V(2)(b) of the New York Convention provides that a court may refuse to enforce an arbitral award “if the competent authority in the country where recognition and enforcement is sought finds that . . . [t]he recognition or enforcement of the award would be contrary to the public policy of that country.”¹¹²

Due to the “general pro-enforcement bias informing the Convention” and international considerations of reciprocity,¹¹³ American courts have construed the public policy exception very narrowly. Specifically, courts have concluded that they should deny enforcement of an award only when such enforcement would violate the United States’ “most basic notions of morality and justice[,]”¹¹⁴ be “repugnant to fundamental notions of what is decent and just”¹¹⁵ in the United States, or “the contract as interpreted [by the arbitrators] would violate some explicit public policy that is well defined and dominant and is ascertained by reference to the laws and legal precedents and not from general consideration of supposed public interests.”¹¹⁶

The public policy exception also may preclude enforcement if the arbitral award or arbitral agreement¹¹⁷ was fraudulently obtained. This determination is distinct from the issue of whether the *primary* agreement was forged or fraudulently induced. The latter determination is to be made by the arbitral panel and cannot be re-litigated before the court during confirmation or enforcement proceedings.¹¹⁸ Specifically, American courts have held that they may refuse enforce-

112. New York Convention, *supra* note 1 at Article V(2)(b).

113. *Parsons & Whittemore Overseas v. Societe Generale De Lindustrie Du Papier* 508 F.2d at 973-74.

114. See *Fotochrome, Inc. v. Copal Co.*, 517 F.2d 512, 516 (2d Cir. 1975); *Rive v. Briggs of Cancun*, 82 Fed.Appx. 359, 364 (5th Cir. 2003); *Karaha Bodas Co., LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004); *Parsons & Whittemore Overseas v. Societe Generale De Lindustrie Du Papier*, 508 F.2d 969, 974 (2d Cir. 1974); *Agility Pub. Warehousing Co. K.S.C., Prof'l Contract Adm'rs, Inc. v. Supreme Foodservice GmbH*, 495 Fed.Appx. 149, 152 (2d Cir. 2012).

115. *Rep. of Argentina v. GB Group PLC*, 764 F. Supp.2d 21, 39 (D.C. 2011) (quoting *Ackerman v. Levine*, 788 F.2d 830, 841 (2d Cir. 1986) and *Tahan v. Hodgson*, 662 F.2d 862, 864 (D.C.Cir.1981)).

116. *Banco de Seguros del Estado v. Mut. Marine Office, Inc.*, 344 F.3d 255, 264 (2d Cir. 2003) (alteration in original) (quoting *United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29 (1987)); *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, 766 (1983); *Indus. Risk Insurers v. M.A.N. Gutehoffnungshutte v. Indus. Risk Insurers*, 141 F.3d 1434, 1445 (11th Cir. 1998); *Rep. of Argentina v. GB Grp. PLC*, 764 F. Supp.2d at 31.

117. See *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.*, 334 F.3d 274, 289-90, n. 12 (3d Cir. 2003) (because one of the parties claimed forgery of the signatures on the agreements containing arbitration clauses, Third Circuit vacated enforcement order of the district court and remanded for court to determine whether parties had reached a valid agreement to arbitrate; the court specifically expressed no opinion regarding the applicability of Article V(2)(b)).

118. See *Europcar Italia v. Maiellano Tours, Inc.*, 156 F.3d 310, 315 (2d Cir. 1998).

ment under the public policy exception if they find that the prevailing party furnished perjured evidence to the arbitral tribunal or the award was procured by fraud.¹¹⁹

The language of Article V(2)(b) makes it clear that the exception is meant to accommodate the public policy of the local forum in which enforcement is sought, rather than international public policy.¹²⁰ In a country with a federalist governmental system such as the United States, however, the language of the exception could invite use of either national public policy, or public policy as determined by individual states. American courts have generally required use of national public policy.¹²¹ *Changzhou Amec Eastern Tools*, however, reveals the complex relationship between national and state law in the United States. There, in the course of deciding whether Article V(2)(b) permitted the refusal to enforce an arbitral award, the district court found that national arbitration law required the application of California contract law regarding the defense of duress.¹²² Thus, in that instance, the court found that national public policy incorporated the law of an individual state.

G. *Lack of Personal Jurisdiction*

The New York Convention does not specifically list lack of personal jurisdiction as a valid defense to enforcement. Article III of the Convention provides that contracting states shall recognize and enforce arbitral awards “in accordance with the rules of procedure of the territory where the award is relied upon[.]”¹²³ and some commentators have suggested that the requirement of personal jurisdiction can be understood to represent such a rule of procedure.¹²⁴

119. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 364 F.3d 274, 306 (5th Cir. 2004).

120. Some commentators have derided this choice as “regrettable.” See Hans Smit, *Comment on Public Policy in International Arbitration*, 13 AM. REV. INT’L ARB. 65 (2002) (cited in Linda J. Silberman, *Civil Procedure Meets International Arbitration: A Tribute to Hans Smit*, 23 AM. REV. INT’L ARB. 439, 447 (2012)).

121. *Agility Public Warehousing Co. K.S.C., Professional Contract Administrators, Inc. v. Supreme Foodservice GMBH*, 495 Fed.Appx. 149, 152 (2d Cir. 2012) (Second Circuit found that the requirements of the Convention’s public policy exception were not met by a New York public policy requiring the dismissal of a plaintiff’s claim if the plaintiff (or a principal of the plaintiff corporation) invokes a privilege and refuses to testify; here, employees had refused to testify after recent unsealing of indictment against their employer).

122. *Changzhou Amec E. Tools and Equip. Co. v. E. Tools & Equip.*, No. EDCV 11-00354 VAP 2012 WL 3106620 at 13 (C.D. Cal. July 30, 2012).

123. New York Convention, *supra* note 1 at Article III.

124. See Ank A. Santens, *Difficulties Enforcing New York Convention Awards in the U.S. Against Non-U.S. Defendants: Is the Culprit Jurisprudence on Jurisdiction, the Three-Year Time Bar in the Federal Arbitration Act, or Both?*, Kluwer Arbitration Blog, (Dec. 23, 2009), <http://kluwerarbitrationblog.com/blog/2009/12/23/difficulties-enforcing-new-york-convention-awards-in-the-us-against-non-us-defendants-is-the-culprit-jurisprudence-on-jurisdiction-the-three-year-time-bar-in-the-federal-arbitration-act-or-bot/> (citing as analogous, but not endorsing, *Monegasque de Reassurances*

In general, though, courts in the United States have not tended to rely on the language of the Convention to permit examination of personal jurisdiction. Rather, they have turned to the individual forum state's long-arm statute¹²⁵ and the Due Process Clause described *supra*. An American court's judgment is void if the court lacks personal jurisdiction over the defendant, and the defendant did not waive this constitutional defense.

Obviously, courts may assert personal jurisdiction over a defendant who is a citizen of the state in which the court is located ("forum state") or over a defendant whose property is at issue and is located in the forum state.¹²⁶ It is also relatively straightforward that courts in the United States may assert personal jurisdiction over a defendant who was served with notice of process while in the forum state¹²⁷ or has such significant and regular contacts with the forum state that courts have "general jurisdiction" over him or her.¹²⁸ Thus, personal jurisdiction generally will not be an issue in the enforcement of foreign arbitral awards in the United States because the award debtor is likely to be located in the forum state, served while in the forum state, possess property in the forum state, or have very significant and regular contacts with the forum state. American courts also have been willing to find award debtors subject to personal jurisdiction based on the contacts that their affiliates have with the forum state,¹²⁹ but it appears that the U.S. Supreme Court is narrowing this basis for general jurisdiction.¹³⁰

S.A.M. v. NAK Naftogaz of Ukraine, 311 F.3d 488 (2d Cir. 2002) (finding that the doctrine of *forum non conveniens* was applicable as a "rule of procedure" under Article III of the New York Convention); Aristides Diaz-Pedrosa, *Shaffer's Footnote*, 109 W. VA. L. REV. 17, 24 (assuming that the due process jurisdictional requirement falls within the local "rules of procedure" in Article III); also citing as contrary authority, William W. Park & Alexander A. Yanos, *Treaty Obligations and National Law: Emerging Conflicts in International Arbitration*, 58 HASTINGS L.J. 251, 262 (Dec. 2006) (maintaining that such approach is not supported by the drafting history of the New York Convention)).

125. See *e.g.*, STX Pan Ocean Shipping Co. Ltd. v. Progress Bulk Carriers Ltd., Slip Copy, 2013 WL 1385017 (S.D.N.Y., 2013) (examining a State of New York long arm statute).

126. See *Shaffer v. Heitner*, 433 U.S. 186 (1977).

127. See *Burnham v. Sup. Ct. Cal.*, 495 U.S. 604 (1990).

128. See *e.g.*, *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437 (1952); see also *Goodyear Dunlop Tires Operations, S.A., et al. v. Brown*, 131 S.Ct. 2846 (2011) (finding that North Carolina could not assert general, or "all-purpose jurisdiction" over defendants that were foreign companies).

129. See *Sonera Holding B.V. v. Cukurova Holding A.S.*, 895 F. Supp. 2d 513, 523 (S.D.N.Y. 2012) rev'd on other grounds, ___ F.3d ___, 2014 WL 1645255 (2d Cir. 2014) (reversing for lack of personal jurisdiction).

130. See *Daimler AG v. Bauman*, 134 S.Ct. 746 (2014) (finding that defendant was not subject to general jurisdiction in forum state based on its subsidiary's contacts); *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846, 2851, 2857 (2011) (finding that foreign subsidiaries of American parent company did not have sufficient contacts for specific or general jurisdiction in forum state, but also noting that the

Personal jurisdiction becomes more problematic, however, when neither the defendant nor his property is located in the forum state—and this has occasionally been the case in the context of petitions to enforce or confirm foreign arbitral awards in the United States. Under these circumstances, it becomes more likely that it will be inconvenient, expensive and unfair for the defendant to be required to travel to the forum state to defend himself from potential deprivation. As a result, at that point, courts in the United States must determine whether the defendant has sufficient “minimum contacts” with the forum state so that the court’s assertion of personal jurisdiction will not offend “traditional notions of fair play and substantial justice.”¹³¹

H. *Forum Non Conveniens*

In the United States, even if a court has personal jurisdiction, it may decide as a matter of discretion that the case would be better heard in another state’s tribunals. The court will then dismiss the case based on *forum non conveniens*. The *forum non conveniens* doctrine requires a three-step analysis. First, the court must determine the degree of deference it will give to the petitioner’s choice of forum. Although the New York Convention specifically provides that courts may not impose “substantially more onerous conditions” on the enforcement of foreign arbitral awards than on domestic awards,¹³² some courts have explained explicitly that they extend less deference to foreign petitioners’ choice of a United States forum and use a sliding scale to determine the precise degree of deference they will apply.¹³³ Second, the court must consider whether the alternative forum proposed by the respondent is adequate to adjudicate the dispute. An alternative forum is ordinarily adequate if the defendants are amenable to service of process there and the forum permits litigation of the subject matter of the dispute.¹³⁴ The alternative fo-

respondents belatedly urged treatment of the parent and subsidiaries as a “single enterprise” or “unitary business” and thus forfeited the contention).

131. *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945); see *First Investment Corp. of the Marshall Islands v. Fujian Mawei Shipbuilding, Limited*, 703 F.3d 742, 746 (5th Cir. 2013) (relying on the Due Process Clause and the potential for significant deprivation to affirm lower court’s dismissal of an award confirmation action for lack of personal jurisdiction when the award debtor was neither present nor in possession of property in the United States).

132. See *in re Monegasque De Reassurances S.A.M. v. Nak Naftogaz of Ukraine*, 311 F.3d 488, 495 (2d Cir. 2002) (citing *Am. Dredging Co. v. Miller*, 510 U.S. 443 (1994)).

133. See *id.* at 498; *Figueiredo Ferraz E. Engenharia de Projeto Ltda. v. Rep. of Peru*, 665 F.3d 384, 390 (2d Cir. 2011) (affirming “somewhat reduced deference”); see also *Sonera Holding B.V. v. Cukurova Holding A.S.*, 895 F.Supp.2d 513, 523 (S.D.N.Y. 2012) (regarding sliding scale), *rev’d on other grounds*, *Sonera Holding B.V. v. Cukurova Holding A.S.*, ___J.3d ___, 2014 WL 1645255 (2d Cir. 2014).

134. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.25 (1981).

rum is not inadequate simply because it does not afford plaintiff the identical causes of action or relief available in the plaintiff's chosen forum.¹³⁵ Third, the court balances the public and private interests implicated in the choice of forum.¹³⁶ The private factors focus on the convenience of the litigants—e.g., the ease of access to evidence; the availability of means to compel attendance by unwilling witnesses; the cost of obtaining attendance of willing witnesses; the ability to view premises if needed; and other practical problems that are relevant to making the proceeding easy, expeditious and inexpensive for the litigants.¹³⁷ The public factors deal primarily with the administrative difficulties that the case may cause for the courts in the United States—e.g., exacerbating current court congestion; imposing jury duty upon citizens whose community has no relationship to the litigation; the local interest in resolving local disputes; and the problems of legal research and interpretation that can be implicated when a United States court is required to apply foreign law.¹³⁸

In general, a court will dismiss on the grounds of *forum non conveniens* only if the petitioner's choice of forum represents inappropriate forum shopping, an alternative forum exists and has jurisdiction to hear the matter, and proceeding in the chosen United States forum "would establish . . . oppressiveness and vexation to a [respondent] out of all proportion to [the] [petitioner's] convenience, or . . . the chosen forum is inappropriate because of considerations affecting the court's own administrative and legal problems."¹³⁹

As with the defense of personal jurisdiction, the Convention does not specifically list *forum non conveniens* as a defense to the enforcement of awards. In *Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*,¹⁴⁰ however, the Second Circuit found that the doctrine of *forum non conveniens* represented a "rule of procedure" as described in Article III and, for this and other reasons, affirmed the district court's dismissal of an enforcement action on the basis of *forum non conveniens*.¹⁴¹

135. *Norex Petroleum*, 416 F.3d. at 158.

136. *Id.* at 153.

137. *Piper Aircraft Co. v. Reyno*, 454 U.S. at n.6.

138. *Id.* *In re Monegasque de Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488, 500. (In a seminal *forum non conveniens* case, the district court listed the public factors as follows: "the administrative difficulties flowing from court congestion; the 'local interest in having localized controversies decided at home;' the interest in having the trial of a diversity case in a forum that is at home with the law that must govern the action; the avoidance of unnecessary problems in conflict of laws, or in the application of foreign law; and the unfairness of burdening citizens in an unrelated forum with jury duty.") *Piper Aircraft Co. v. Reyno*, 454 U.S. at 241 n.6.

139. *Cont'l Transfert Technique Limited v. Federal Government of Nigeria*, 697 F.Supp.2d 46, 57 (D.C. 2010).

140. *In re Monegasque De Reassurances S.A.M. v. NAK Naftogaz of Ukraine*, 311 F.3d 488.

141. *Id.* at 501.

The application of *forum non conveniens* has become rather heated recently in the United States, especially since the decision in *Figueiredo v. Republic of Peru*¹⁴² in which the court dismissed an action to enforce an arbitral award on the basis of *forum non conveniens*. In that case, Peru—which the court described as a developing country—had a statute placing a percentage cap on the amount that it could be required to pay each year to arbitral award creditors. The petitioner in *Figueiredo* acknowledged that it sought enforcement and access to the Peru’s assets in the United States as a means to avoid the long wait for full payment that would be occasioned by the cap. The court in *Figueiredo* found that Peru’s financial concerns, as expressed in its statute, should be considered a public interest and factored into the third step of the *forum non conveniens* analysis. In a very influential dissent, Judge Gerard E. Lynch urged that while Peru’s financial concerns might be relevant to a choice of law analysis, they were not among the public factors to be considered in *forum non conveniens* analysis.¹⁴³

Judge Lynch also noted that “because arbitrators have no power to enforce their judgments, international arbitration is viable only if the awards issued by arbitrators can be easily reduced to judgment in one country or another and thereby enforced against the assets of the losing party.”¹⁴⁴ The court in *Sonera Holding v. Cukurova Holding*,¹⁴⁵ quoted Judge Lynch approvingly as it explained its decision to refuse to dismiss an award enforcement case based on *forum non conveniens*.¹⁴⁶ Indeed, the *Sonera* court went on to note that the courts of New York have a public interest in “convincing the international business community of the benefits of selecting New York law and a New York forum in order to ensure fairness and predictability in their commercial relationships.”¹⁴⁷

The second Circuit recently vacated the *Sonera* Court’s judgment, reversing on personal jurisdiction grounds, and it is important to note that courts in the United States appear to use *forum non conveniens* quite sparingly as a basis for refusing to entertain actions to enforce arbitral awards.¹⁴⁸ Indeed, *Sonera* is a case in which the award debtor had *no* assets in the United States and yet the district court had refused to use the doctrine of *forum non conveniens* as a basis for dismissal.¹⁴⁹

142. *Figueiredo*, 665 F.3d 384.

143. *Figueiredo*, 665 F.3d at 407-08 (Lynch, J., dissenting).

144. *Id.* at 395.

145. *Sonera Holding*, 895 F.Supp.2d 513.

146. *Sonera Holding*, 895 F.Supp.2d at 524.

147. *Sonera Holding*, 895 F.Supp.2d at 525.

148. *TMR Energy Ltd. v. State Property Fund of Ukraine*, 411 F.3d 296, 303-04 (D.C.Cir. 2005).

149. See e.g., *Sonera Holding*, 895 F.Supp.2d 513 (concluding that *Sonera*’s failure to identify U.S. assets does not establish a lack of a good-faith basis for seeking en-

I. *Adjournment, Stay, Dismissal with and without Prejudice*

A court's refusal to recognize or enforce an arbitral award is likely to be deemed a dismissal with prejudice and thus would represent a decision on the merits that is entitled to preclusive effect.¹⁵⁰

Rather than refuse to recognize or enforce an arbitral award, a court may under certain circumstances "adjourn the decision on the enforcement" of an arbitral award under Article VI of the Convention:

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award . . .¹⁵¹

Adjournment can be understood to constitute either a "stay" or a dismissal without prejudice.¹⁵² If adjournment is understood as a stay, this decision permits the court to maintain some form of control over the enforcement proceeding even as it postpones decision-making. Dismissal without prejudice, in contrast, does not permit the court to maintain any control over the proceeding. Rather, this decision simply permits the petitioner to return to court in the future with the same request for recognition and enforcement.

The alternative of adjournment is most appropriate when a competing foreign action has been brought, especially in the originating country. On one hand, United States courts favor the prompt enforcement of arbitral awards, and adjournment represents delay. On the other hand, if the parallel proceeding is occurring in the originating country and it is possible that the award will be set aside, a United States court may be "acting improvidently"¹⁵³ if it proceeds with enforcement.¹⁵⁴ Either a stay or a dismissal without prejudice permits a

forcement in the U.S. and observing that Cukurova may acquire property in the U.S., and Sonera will have a "judgment in hand").

150. See *Telcordia Tech Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 179 (3d Cir. 2006).

151. New York Convention, *supra* note 1, at Article VI.

152. See *Telecordia Tech Inc.*, 458 F.3d at 180.

153. *Europcar Italia, S.p.A. v. Maiellano Tours, Inc.*, 156 F.3d 310, 317 (2d Cir. 1998).

154. The D.C. Circuit has approvingly cited to the Second Circuit's development of a list of six factors to be weighed by a district court to determine whether adjournment is the appropriate course of action:

- (1) the general objectives of arbitration—the expeditious resolution of disputes and the avoidance of protracted and expensive litigation; (2) the status of the foreign proceedings and the estimated time for those proceedings to be resolved; (3) whether the award sought to be enforced will receive greater scrutiny in the foreign proceedings under a less deferential standard of review; (4) the characteristics of the foreign proceedings, including (i) whether they were brought to enforce an award (which would tend to weigh in favor of a stay) or to set the award aside (which would tend to weigh in favor of en-

United States court to express “comity in the international arena,” especially if there are competing actions pending in the United States and elsewhere.¹⁵⁵

forcement); (ii) whether they were initiated before the underlying enforcement proceeding so as to raise concerns of international comity; (iii) whether they were initiated by the party now seeking to enforce the award in federal court; and (iv) whether they were initiated under circumstances indicating an intent to hinder or delay resolution of the dispute; (5) a balance of the possible hardships to each of the parties . . . ; and (6) any other [relevant] circumstances

Cont'l Transfert v. Fed. Gov't of Nigeria, 697 F.Supp.2d 46, 60 (D.D.C. 2010) (quoting *Europcar*, 156 F.3d 310 at 317-16).

155. *Telecordia Tech Inc.*, 458 F.3d at 181 (suggesting this as a benefit of dismissal without prejudice and citing to *Stonington Partners, Inc. v. Lernout & Hauspie Speech Prod. N.V.*, 310 F.3d 118, 126 (3d Cir. 2002)).

FRANK K. UPHAM*

The Internationalization of Legal Education: National Report for the United States of America†

TOPIC I. D

As is true for all jurisdictions, law in the U.S. has unique features that should be noted before addressing the specific questions in the survey distributed by the International Academy of Comparative Law. I identify and briefly describe five and hope that readers of this National Report will keep them in mind as they interpret the answers to the survey. The first three are structural aspects of the American legal profession that have existed for decades and are likely to remain in their current form for the foreseeable future. The fourth and fifth relate directly to legal education, the former to its size and diversity and the latter to recent developments that may change legal education significantly in the near future.

The U.S. is a federal jurisdiction. In this it is not markedly different from other reporting jurisdictions, but it is unusual in the number of separate sovereign jurisdictions within the U.S. Unlike, for example, Canada with ten provinces (and three non-self-governing territories), the United States has fifty states with their own independent and sovereign legal systems (and the District of Columbia, which although part of the federal system, maintains its own judiciary and bar). Each state controls the entry into the legal profession in that state, and thereby has ultimate control over legal education in the state, at least to the extent that legal education is aimed at preparing graduates to practice law locally. Legal education is further complicated by the fact that several states, such as California and New York, have substantial indirect control over legal education nationally because of their large legal markets and the desire of graduates from other states to practice there.

A second complicating factor is the nature of the structure and profession and especially of the judicial and prosecutorial branches. The American legal profession is radically unified. Unlike some civil law jurisdictions such as Japan, there are very few boundaries, for-

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mal or informal, institutional or social, among the different branches of the American legal profession. Qualified jurists shift relatively easily from the private bar, to the judiciary, to government service including as federal and local prosecutors, and to academia. Almost all fulltime permanent professors are qualified to practice, and many do, and many fulltime judges and attorneys teach regularly as adjunct professors. The permeability of the different legal roles is related to another structural characteristic that is perhaps the most distinctive aspect of American law when compared to many civilian regimes: All branches, and especially judges and prosecutors, are deeply enmeshed in partisan politics and the process of moving from one to another is usually political. While an argument can be made that all democratic legal systems are inevitably political in the sense that political controversies can become legal and arrive before a court, in the U.S. the jurists in these dramas are not only playing broadly political roles, they are themselves politicians in that they have been chosen for the role by a politicized, if not always directly partisan, process.

In a majority of states, judges are selected in partisan elections running as either Republicans or Democrats closely and formally linked to the state party machinery. In other states, the elections are non-partisan; in still others they are appointed by the state governor subject to confirmation by a separate professional or legislative institution.¹ In some states, lower court judges need not even be members of the profession.² The approximately 900 federal judges, on the other hand, are appointed by the U.S. President, typically upon the recommendation of the nominee's home state's members of Congress, and confirmed by the Senate. The appointment process has become highly politicized over the last few decades, and one of the inevitable issues in the quadrennial presidential elections is the future composition of the federal judiciary. Those selected are generally of high profes-

1. California can serve as an illustration, but should not be considered as "typical" since the variety is too great to be represented by a single jurisdiction. The justices of the state Supreme Court are appointed by the Governor, confirmed by the Commission on Judicial Appointments, then re-confirmed by the public in the next general election, and then again confirmed by the public at the end of each twelve year term. Judges on the intermediate court, known as the Court of Appeal, are appointed by the Governor and confirmed by the Commission on Judicial Appointments, and judges on the trial courts, known as the Superior Courts, are elected for six year terms on a nonpartisan ballot at a general election. See *Administrative Office of the Courts, Fact Sheet California Judicial Branch*, http://www.courts.ca.gov/documents/Calif_Judicial_Branch.pdf (last visited Sept. 10, 2013).

2. In Texas, for example, appellate court judges must be members of the bar, but judges of the 254 County Courts must only be "well informed in the law of the State" and most are not licensed to practice law. The justices of the peace below the County Courts are rarely lawyers. See TEXAS POLITICS (Sept. 22, 2013), http://texaspolitics.laits.utexas.edu/3_4_2.html; Stephanie Francis Ward, *Some Texas County Judges Not Lawyers, Yet They Preside Over Pleas* (Dec. 2, 2011), http://www.abajournal.com/news/article/some_texas_county_judges_not_lawyers_yet_they_preside_over_pleas/.

sional quality and the process does not have the directly partisan nature of state judicial elections, but it is nonetheless safe to say that an acceptable political ideology is an indispensable requirement for selection as a federal judge. State and local chief prosecutors are similarly chosen through a political process at the state level, with state Attorneys General often popularly elected and local District Attorneys invariably so and usually on openly partisan lines.³

The deeply political nature of both of these branches of the legal profession is the more specific expression of a more pervasive third distinctive factor of American law: the deep involvement of the legal profession in American politics and government. In 1840 Alexis de Tocqueville said, "There is hardly a political question in the United States which does not sooner or later turn into a judicial one."⁴ Nothing has changed. Of course, law is embedded in politics in virtually all democratic countries. Even in Japan, where the conventional wisdom about the Supreme Court in particular and the legal system in general is that they are overly passive and politically irrelevant, the courts have not only shaped fundamental social norms but have also been the loci for political battles.⁵ In the U.S., however, it is not simply that the legal system is brought into political issues; politics is a lawyers' game. Almost half of the U.S. Congress consists of lawyers and over half of the one hundred U.S. Senators are lawyers. The numbers in state legislatures have declined in recent decades but remain comparatively very high.⁶ When one also considers the prevalence of legally trained staff in federal and state legislatures and American bureaucracies more generally, it is safe to say that America is governed far more by lawyers than by any other professionally defined group.

American legal education reflects both the fact that American law schools educate future political and bureaucratic leaders and that a substantial portion of their students have political ambitions. While the debates now surrounding the reform of legal education, including the need to prepare lawyers for an international practice, are aimed at the very different issues of cost and professional training,

3. The staffs of Attorneys General and District Attorneys, on the other hand, are chosen by the chief prosecutors. See NAT'L ASS'N OF ATT'Y GENs. <http://www.naag.org/current-attorneys-general.php>, for a listing of the American Attorneys General.

4. BrainQuote, <http://www.brainyquote.com/quotes/quotes/a/alexisdeto391004.html> (last visited Sept. 10, 2013).

5. For example, the prototypical characteristic of postwar Japanese employment known as permanent employment is regularly attributed to Japanese culture, but it was created by an early postwar Supreme Court decision. Frank K. Upham, *Stealth Activism: Norm Formation by Japanese Courts*, 88 WASH. U. L. REV. 1493 (2011). Available at: <http://digitalcommons.law.wustl.edu/lawreview/vol88/iss6/5>.

6. See *How Educated Are State Legislators? The Chronicle of Higher Education* (June 12, 2011), <http://chronicle.com/article/How-Educated-Is-Your/127845/>; *Lawyers losing grip on state legislators*, CAL. BAR J., (Apr. 1999), <http://archive.calbar.ca.gov/calbar/2cbj/99apr/page1-2.htm>.

these debates take place against the background of an institutional culture that is conscious that it is forming not only a professional and technical cadre but also the core of both state and the federal governments and the politicians that direct them.

The fourth distinctive feature to keep in mind is the size and diversity of American legal education. To put it simply, there are a lot of law schools and law students, literally more than can be readily counted. To begin with the most prominent and prestigious, there are 203 law schools with over 140,000 students⁷ accredited nationally by the American Bar Association,⁸ whose graduates are generally able to take any state bar. Then there are scores of law schools accredited only by individual state bar committees and, after those, schools unaccredited by anyone, but whose graduates can still take the bar in their home states. According to the ABA's *Comprehensive Guide to Bar Admissions 2013*, 35 states do not require graduation from an ABA-accredited school, allowing instead, variously, graduation from an "approved" but not accredited school, law office study, correspondence study, and online study.⁹ As a result, law schools spring up in some jurisdictions like mushrooms after a fall rain, as California can illustrate. There are 21 ABA accredited law schools, 18 schools accredited only by the California Committee of Bar Examiners, and 23 which are merely "registered" with the CBE.¹⁰

California can illustrate the variety as well as the number of schools. Stanford Law School is generally considered one of the best law schools in the country. It is expensive, has an outstanding faculty, is extremely selective in admissions, and enjoys excellent physical, technical, and financial resources. Contrast that to a school taken, not quite at random, from the list of unaccredited law schools: The University of Honolulu School of Law (UHSL for our purposes) located, bizarrely, in Modesto, California, far from the Pacific Ocean and even farther from Honolulu, Hawaii.¹¹ UHSL is a correspondence school which is "dedicated to providing a quality and rigorous education at reasonable costs" and whose "specific objective" is to "provide students with a superior education without having to attend

7. A.B.A., http://www.americanbar.org/content/dam/aba/migrated/legaled/statistics/charts/stats_6.authcheckdam.pdf (last visited Sept. 22, 2013). In 2013 53% of the 142,922 such students were male.

8. A.B.A., http://www.americanbar.org/groups/legal_education/resources/aba_approved_law_schools.html (last visited Sept. 22, 2013).

9. *Comprehensive Guide to Bar Admission Requirements 2013*, http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf.

10. See THE STATE BAR OF CAL., <http://admissions.calbar.ca.gov/Education/LegalEducation/LawSchools.aspx> (last visited Sept. 22, 2013). The rules for the registration of unaccredited law schools can be found at <http://rules.calbar.ca.gov/LinkClick.aspx?fileticket=5LAWXeKsh6U%3d&tabid=1227>.

11. See U. OF HONOLULU SCH. OF L., <http://www.universityofhonoluluchooloflaw.net/General.html>. I chose UHSL from the 23 unaccredited California law schools because I was captivated by the idea of a University of Honolulu in inland California.

class.” Although admissions are selective in that an application is required, there is no requirement of any formal education whatsoever, and only four faculty members are listed on UHSL’s website, one of whom is neither a lawyer nor a law graduate. My point is not to praise Stanford or to condemn UHSL. Given that Stanford’s tuition is \$50,580 in 2013-14 compared to \$3,000 at UHSL (whose students need not have spent a penny on undergraduate tuition) and that graduates of both can become full members of the California bar, who is to say which is the better approach to becoming a California lawyer? My point is not normative but descriptive: it is extremely difficult to generalize about American legal education.

The fifth feature of American legal education that may distinguish at least in kind if not nature from other legal systems is less fundamental, but no less important to understand as we consider the future of comparative law in American legal academe. American legal education is in crisis,¹² or at least so say a great many authoritative voices, starting with the American President and including leading figures in the bar and professoriate. President Obama has called for a 33% decrease in the time spent in law school; the Chief Justice of the U.S. Supreme Court has ridiculed contemporary legal scholarship as useless;¹³ law professors have been criticized as unproductive, overpaid, and enjoying only a “remote relationship with the practice of law;”¹⁴ law school deans have called the economics of law schools “unsustainable;” students have filed class action suits against multiple law schools for fraud in their admissions practices; and members of the ABA’s Task Force on the Future of Legal Education claimed “almost universal agreement that the current system is broken.” The reasons for the sense of alarm are not hard to find: The last several years have witnessed a substantial drop in applications; the technological revolution that has already outsourced or eliminated myriad other white collar jobs is now eliminating and outsourcing legal work; and students often graduate with debt well over \$100,000 and cannot find legal jobs, all paradoxically as the legal needs of average Americans are going unmet.¹⁵

12. For a description of the bursting of the law school enrolment “bubble,” see Steven J. Harper, *Pop Goes the Law*, THE CHRON. OF HIGHER EDUC. (Sept. 15, 2013), <http://chronicle.com/article/Pop-Goes-the-Law/137717/>.

13. See Adam Liptak, *Keep the Briefs Brief, Literary Justices Advise*, N.Y. Times, (May 21, 2011) (“What the academy is doing, as far as I can tell, is largely of no use or interest to people who actually practice law.”). The Chief Justice’s comments are just the most conspicuous of a stream of criticism that dates from former (and present—he is now adjunct professor at NYU) legal academic Judge Harry T. Edwards’ initial article. See Harry T. Edwards, *The Growing Disjunction between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34, 38 (1992).

14. See Ethan Bronner, *A Call for Drastic Changes in Educating New Lawyers*, N.Y. Times, Feb. 10, 2013.

15. See sources in Horwitz and Bronner and the list of the twenty-two law schools with the highest level of student debt in Tamanaha at 110. One of the remarkable

A quick review of two recent books at the middle of this crisis can illustrate its dimensions. *Schools for Misrule: Legal Academia and an Overlawyered America* and *Failing Law Schools*, by Walter Olson, a libertarian social commentator, and Brian Tamanaha, an elite law professor respectively, approach the issues from distinctive but intersecting perspectives.¹⁶ Olson's argument is typical of much ideologically conservative criticism of the "cozy assumptions about the rightness of the views of members of the elite, thinking class" and "estrangement from Main Street opinion" that conservatives see permeating not only the legal academy, but also American higher education generally.¹⁷ His view of contemporary legal scholarship as "daffy, eccentric, or bonkers,"¹⁸ for example, echoes with the Chief Justice's slightly more restrained characterization. Tamanaha's critique is more structural and economic: he does not so much condemn contemporary legal education as warn that it cannot last. His problem with scholarship, for example, is not so much that it has departed from the largely doctrinal work of fifty years ago, but that approaches like quantitative empirical work are too expensive and that American law schools cannot and should not continue to ask debt-ridden students facing uncertain employment prospects to pay not only for fancy inter-disciplinary methodologies but also for reduced teaching loads for tenured faculty. Indeed, one of the commonalities of these books and approaches is the attack on tenure and the research orientation that the authors believe characterize too many American law schools.¹⁹

I hope that these five features of contemporary American legal education will alert the reader to both the limitations in the generalizations that follow and the context in which attention to international and comparative law education arises in the United States.

aspects of this list is the mix of elite and decidedly non-elite law schools represented. Tamanaha explains the reasons for this phenomenon at pp. 107-26.

16. See WALTER OLSON, *SCHOOLS FOR MISRULE: LEGAL ACADEMIA AND AN OVERLAWYERED AMERICA* (2011); BRIAN Z. TAMANAHA, *FAILING LAW SCHOOLS* (2011). For an insightful review, see Paul Horwitz, *What Ails the Law Schools?* 111 MICH. L.R. 955, 958 (2013) (Horwitz distinguishes the two books as representing cultural and economic approaches). The Tamanaha book is an entertaining and insightful description of the factors facing American legal education and is decidedly less polemical than Olson.

17. *Id.* at 966.

18. *Id.* at 965.

19. The perceptive reader may note a fundamental inconsistency between the great diversity of American law schools and both authors' focus on the unsustainability of the elite research model. Neither author seems aware or, perhaps more accurate, to take seriously the existence of schools like the University of Honolulu School of Law. Their argument applies primarily to the 200+ law schools between Stanford and UHSL, which they argue try too uniformly to be the former.

1. POLICY/NORMATIVE QUESTIONS

1.1 *Is there a perceived need for, and debate about, legal education covering jurisdictions other than your national legal system?*

The most prominent issues in current legal education debates are cost and the degree to which the typical law school prepares its students to practice more or less immediately after graduation. Stanford's \$50,580 per year tuition, which according to its website "will rise in 2014-15," substantially understates the financial issue not only because it does not include incidental expenses, living costs, and opportunity costs, but also because many students arrive at law school already encumbered by student debt from their undergraduate education. The preparation-for-practice leg of the debate cannot be stated as dramatically or simply but relates to many critics' expectation that law school graduates should enter the profession fully versed in not only the formal and intellectual, but also the informal and practical knowledge needed to provide legal services at least at the median level. With these two issues dominating, internationalization of the curriculum rarely enters the debate expressly and then at best peripherally and at worst dismissively. A few somewhat contradictory examples will illustrate. First is a quotation of the Chief Justice of the United States Supreme Court on the irrelevance of legal scholarship:

Pick up a copy of any law review that you see, and the first article is likely to be, you know, the influence of Immanuel Kant on evidentiary approaches in 18th Century Bulgaria, or something, which I'm sure was of great interest to the academic that wrote it, but isn't of much help to the bar.²⁰

Tellingly, when a law professor rose in defense of scholarship, she noted only the importance of Kantian philosophy, at worst agreeing with the frivolity of interest in Bulgaria and at best not being bold enough to argue it. But comparative law does not feature in the debate solely as an object of ridicule. As one would expect, the concern about preparation for practice can on occasion include preparation for a global practice. Dean Nicholas W. Allard of Brooklyn Law School, who was appointed dean after a long practice career and who emphasized the need for "far more practical training," clearly means something more than knowing whether the plaintiff sits on the left or the right as you face the judge:

20. See *Law Prof. Ifill Challenges Chief Justice Roberts' Take on Academic Scholarship*, A. CONST. SOC'Y (July 5, 2011), quoting Roberts, C.J. <http://www.acslaw.org/acsblog/law-prof-ifill-challenges-chief-justice-roberts%E2%80%99-take-on-academic-scholarship>.

Some international exposure is being looked at for the first time in many places. Whether you have a shingle up in Park Slope [a neighborhood of Brooklyn, NY] or in [the state of] Maine, you are going to have some need for an appreciation of international legal issues.²¹

Allard's argument carries particular weight not only as a dean chosen from and emphasizing the connection with practice, but also as dean of a highly respected but still regional school. Brooklyn certainly places graduates at top international law firms, but Allard explicitly did not reference the conventional vision of a globalized legal world but instead the fact that the most local of practices in rural America and the heart of Brooklyn have been globalized. It may not be conventional wisdom yet, but the average domestic lawyer is very likely to encounter international issues whether in a marital or inheritance dispute, an import contract, or immigration or criminal investigation.²² The same concept of the end of any purely domestic practice was the driving force behind New York University's creation of its Global Law School Program over two decades ago.

In sum, it is probably accurate to say that internationalization is not in the mainstream of the leading discussions of American legal education, but it is not entirely absent. That said, it is not so easy to characterize its presence. On one hand, attention to foreign jurisdictions can seem frivolous when law graduates cannot get jobs and Americans cannot afford legal services. Chief Justice Roberts' Bulgaria remark captures that sentiment effectively, if crudely, but the prevalence of international programs across a broad range of American law schools²³ demonstrates that Allard's approach deserves at least equal weight. Dean Christopher Edley of the University of California at Berkeley's Boalt Hall proclaimed the production of "global citizens" as one of the core tasks of a "great" law school.²⁴ If, however, the calls for a 33% reduction in the curriculum come to fruition, it is difficult to see how the coverage of international and comparative law will expand, especially in an absolute sense. No matter how important law school deans and their faculties may perceive international exposure or how much American law students may look forward to a

21. See Ethan Bronner, *supra* note 15.

22. This proposition is supported by a study cited in Adelaide Ferguson, *Mapping Study Abroad in U.S. Law Schools: The Current Landscape and New Horizons*, NAFSA: ASS'N OF INT'L EDUC., at 4-6 (2010) ("According to a 2009 study (Preparing for the Globalized Law Practice: The Need to Include International and Comparative Law in the Legal Writing Curriculum) of 10,740 active members of the Philadelphia Bar Association, 67.5 percent of the 1,050 lawyers responding reported working on a legal matter within the past year that required them to have some knowledge of foreign and/or international law.")

23. See Answers to Questions 2.8-11 below.

24. See Christopher Edley, Jr., *Fiat Flux: Evolving Purposes and Ideals of the Great American Public Law School*, 100 CALIF. L. REV. 313, 313 (2012).

semester in Aix en Provence, the future of American legal education may not be left entirely in their hands.

1.2 If so, how is the debate conducted, i.e., in what circles, fora, publications, meetings, committees, assemblies etc.? Which institutions are influential in this debate?

If we reference the larger debate, it is conducted through books, law review articles, blogs, and the popular media. If we look more narrowly at the discussion of internationalization per se, it is much more limited and appears most frequently in the media of legal academe, most typically law reviews and specialized legal education journals.²⁵ The most influential institutions are currently the law schools themselves, and to a lesser extent, the rest of the profession as the schools adjust incrementally to structural changes in the two most immediately relevant markets: the competition for students and the employment market for their graduates. If the calls for substantial reform of legal education become widely popular, however, the debate will involve politicians and government regulators as well, and the schools' autonomy may erode. One can imagine, for example, how the Chief Justice would choose if faced with a choice between an additional two credits of legal drafting versus a two-credit required comparative law course.

1.3 Can you identify and explain different "schools of thought" concerning globalization or internationalization of legal education in your jurisdiction?

There are not well developed "schools of thought" on the issue, but one dividing line relates to how readily American states should admit foreign-educated lawyers to practice. The bar authorities of New York State, one of the most attractive states for foreign lawyers to practice, recently narrowed the window for foreign lawyers in two ways. First, they required graduates of overseas programs operated by American law schools to meet a residence requirement within the U.S. Thus graduates of the joint LLM program operated by New York University School of Law and the law faculty of the National University of Singapore had to spend additional time at NYU in New York City before being eligible to take the bar. Similar programs operated by Temple and other American law schools were affected. The second restriction of access was to require foreign-lawyer LLM graduates to include basic common law courses such as contracts and torts in their LLM course of study.²⁶ Despite these recent restrictions, entry into

25. See Sabina Schiller, *A New Global Legal Order, with or without America: The Case for Accrediting Foreign Law Schools*, 26 EMORY INT'L L. REV. 411, 413 (2012) and sources cited therein.

26. See *Id.*

the American bar remains relatively open. In 2012, for example, 4,675 foreign LLM graduates took the New York State bar examination.²⁷

1.4 Are there perceived differences or disagreements between the legal profession, academy, courts, and legislators in relation to the internationalization/ globalization of legal education and training?

To the extent that these groups address internationalization specifically, it is probably safe to say that American judges are concerned primarily with competence in domestic matters, as exemplified by the Chief Justice's remarks. The profession as represented by the ABA also focuses more on technical skills defined domestically but certainly not to the exclusion of international competence. Legal academe, on the other hand, is more likely to argue for a globally conscious education as exemplified by Deans Allard and Edley. Since the legal profession is largely self-regulated through the state bar authorities, state legislatures and the federal Congress do not play a substantial role in the debate, although they certainly have the potential to do so.

1.5 Do perceived differences, between legal families (e.g., common law, Asian legal tradition, civil law) or between received and local law, play a role in the debate?

Not to any real extent if the question is whether attention should be given differentially to one legal tradition or another. Attention to foreign law tends to follow the fashion and trends in foreign trade. Thirty years ago Japanese law was hot; today it is China; tomorrow it could be Brazil. But the fact that all three of these are, more or less, civilian jurisdictions hardly registers to those involved in the debate.

If, on the other hand, the question is whether to focus on the existence, nature, and importance of different legal families rather than shifting from one particular jurisdiction or small group of legal systems as they come and go in fashion, there is a debate. Proponents of the legal families approach point to precisely the changing trends to argue that a general introduction to global legal systems and to the standard differences between the civil and common law traditions serves student needs better than a course emphasizing any one system or small group of systems. The counter-argument is less coherent but would focus on the student demand for relevance, the importance of regional/national differences (between, e.g., Nigeria and New Zea-

27. *New York Bar Exam 2012 Statistics*, http://www.nybarexam.org/ExamStats/2012_NYBarExamStatistics.pdf.

land or Paraguay and Italy), and the purported convergence of hybridization of common and civil law.

1.6 *What is the need in your jurisdiction for “global lawyers,” as opposed to local lawyers?*

See the answers to Questions 1.1 above and 2.8-11 below.

1.7 *What would the perceived attributes of a “global lawyer” be in your jurisdiction? Is the need for international training confined to particular areas of law and legal practice or perceived to be more general?*

See the answers to Questions 1.1 above and 2.8-11 below.

1.8 *Are particular areas of law, training and practice perceived as more “international” than others (e.g., corporate, finance, human rights)? Are there perceived needs for more multi-jurisdictional training in particular fields of practice or the economy?*

The premise behind Dean Allard’s comments is that all practice is at least potentially international. That said, certain fields are more global than others, and finance and human rights are two prominent examples. A third is family law because of the globalization of the population. Human rights particularly is an “international” area in the U.S. Indeed, the term “human rights” is rarely used to refer to domestic issues in American legal education or in American discourse more generally. America pursues human rights actively and enthusiastically but only in other countries: at the government level with, *inter alia*, the State Department’s Democracy, Human Rights, and Labor grant program; on the private level with myriad foundation projects to protect human rights overseas as pioneered by the Ford Foundation’s rule of law programs; and through law school programs such as Harvard Law School’s Human Rights Program and its “practice arm,” the Human Rights Clinic. None of these activities or any other “human rights” activities in American law schools that I know of relate to conditions inside the U.S. Apparently, as far as American legal education is concerned, “human rights” is a concept that the U.S. can, should, and does pursue vigorously elsewhere, but when injustices inside the country are discovered, different concepts and terminology are brought to bear.

1.9 *Are any forms of legal practice in your jurisdiction considered “purely local,” and therefore not requiring any knowledge about or skills in relation to other legal systems?*

No. The current consensus is that all forms of practice have potential global implications. See the answer to Question 1.1 above.

1.10 *To what extent is knowledge of regional or international legal norms and regimes considered important in legal education and legal culture in your jurisdiction?*

See the answers to Questions 1.1 and 1.8 above and 2.8-11 below.

1.11 *Is it mandatory for law students in your jurisdiction to learn about foreign cultures, international business, and legal cultures in various parts of the world?*

No state requires any comparative training to take the qualifying bar exam. Nor do most American law schools require international or comparative law, but see the answer to Question 2.7 below.

1.12 *Are some faculties perceived as more focused on local practice than others, and if so why?*

Yes and no. As described in the Preliminary Remarks, American law schools are radically diverse and are conventionally divided into intersecting groups based on a wide variety of factors. One such factor is whether the school primarily prepares students to practice in the particular state jurisdiction in which they are located (“local” schools), in a particular region such as New York or New England (“regional” schools), or nationally and internationally (“national” schools like Stanford). The perception is that national schools are most likely to emphasize international and comparative law in their curricula and, conversely, de-emphasize courses directed primarily at the law of their jurisdiction. While it may be true that national schools place more students in internationally oriented law firms, this perception can be very misleading. Regional and local schools not only also place graduates in large firms and offer internationally oriented courses but also often advertise that they are preparing students to “practice in a global world” or similar rhetoric. In fact when one observer surveyed study abroad programs, she found that the most prestigious schools were least likely to operate such programs.²⁸ While partly attributable to simple marketing strategy, the breadth of interest is also a response to the reality that mid-size com-

28. See Adelaide Ferguson, *Mapping Study Abroad in U.S. Law Schools: The Current Landscape and New Horizons*, NAFSA: ASS'N OF INT'L EDU, 6, available at http://nafsa.org/uploadedFiles/NAFSA_Home/Resource_Library_Assets/Networks/CCB/MappingStudyAbroadLaw.pdf (2010).

panies in mid-size American cities are inextricably enmeshed in a global economy and need legal services sensitive to this reality.

2. DESCRIPTIVE QUESTIONS

2.1 Please provide a brief description of the legal education model, including what additional requirements (such as bar examinations) there are for students with a university law degree who seek admission to the profession?

Entry into the legal profession generally requires a post-university degree and passage of a bar examination.²⁹ A law degree alone is not enough to practice in any state. Since the U.S. is a federal system, each state has its own requirements, criteria for admission, procedures, etc. Sixteen states require graduation from an ABA-accredited school [hereinafter, ABA school], but the majority does not.³⁰

The standard model is for a graduate of a four year university to complete a three year course at an ABA school ending in the Juris Doctor [JD] degree. A significant alternative is open to students with foreign law degrees including undergraduate degrees. If they acquire an LLM degree from an ABA school, they are eligible to take the bar in many states. This alternative has resulted in the paradoxical situation in which foreign graduates can become fully licensed American lawyers with as few as five years of post-secondary education, four years of university study in their home country and one year of study at an American law school, while seven is generally required of American graduates. Although the number of such students is relatively low, it is not trivial.

2.2 Are there different training tracks and models for different parts of the profession (e.g., barristers, solicitors, corporate lawyers, judges or judicial officers) in your jurisdiction? Please provide a brief description.

No. It is a unified profession, and all legal professionals, i.e., judges, government attorneys, and private attorneys, share the same training and qualifications.³¹

Qualified members of the bar are immediately qualified to play any professional role. Judges are simply private attorneys who are either elected in partisan elections for set terms, as is the practice in

29. The answer to 2.1 describes the standard manner of joining the bar. There are myriad exceptions and qualifications since each state controls its own bar admission.

30. See *supra* note 10.

31. Notaries provide an entirely separate clerical service and do not play the central role in the American legal system that they do in many civil law legal systems. The typical notary is the secretary in a law firm or other legal office.

many states, or selected in a highly politicized process, as in the federal system and some states. State prosecutors are typically elected in local (county level) partisan elections. Elected prosecutors may then hire any qualified lawyer to their professional staff. United States Attorneys, the regional federal prosecutors, are appointed by the President, subject to Senate confirmation, and then hire their own staff.

2.3 To what extent is legal training anywhere in your jurisdiction adapted to ensuring or facilitating admission in other jurisdictions (e.g. training in Australia relevant to admission in England)?

Programs that allow dual admission exist, but they are not common and they are not part of the core curriculum. Please see the answer to Questions 2.8-10 below.

2.4 Are any authorities or institutions currently examining the need for internationalization of the legal curriculum? If so, what are the parameters of this examination and the intended outcomes?

The primary institutions considering the internationalization of legal education are the individual law schools. The American Association of American Law Schools [AALS], the learned association representing 200 American law schools,³² holds conferences and panels on international and comparative law, but it is not currently actively “examining the need for internationalization of the legal curriculum” in any systematic way. For the approaches of other institutions, see the answer to Question 2.5 below.

2.5 Are any important reforms of legal education currently underway or being contemplated that are relevant to the debate about internationalization of law teaching?

As noted in the Preliminary Remarks and the answer to Question 1.1 above, the two most discussed reforms concern the high cost of American legal education and the perception that the graduates of most programs are not prepared to start legal practice immediately after graduation. Both issues have relevance to the further internationalization of law school curricula.

One of the proposed cost reforms, suggested by no less than President Obama, a lawyer and former constitutional law professor, is the

32. The AALS has 177 member schools and 23 “Fee-Paid” schools. THE ASS’N OF A. L. SCHS. http://www.aals.org/about_memberschools.php (last visited Sept.13, 2013).

shortening of legal education from three years to two.³³ Although a shortened curriculum need not necessarily mean a lessening of regard for international and comparative law, when it is considered in conjunction with the perceived need to prepare graduates for practice immediately upon graduation, the almost necessary implication is that increased attention to global issues is highly unlikely. Indeed, the reverse seems more likely, but it is important to note that neither of these proposed reforms is assured of implementation. Whatever one thinks of its merits, a 33% reduction in the time spent in law school threatens very strong vested interests within legal education and the bar itself. As for better preparation for practice, the demand for more training in day-to-day technical skills has been a leitmotif of legal education rhetoric since at least the early 1970's when clinical education was widely introduced. Law schools are now required (see answer to Question 2.6 below) only to provide the *opportunity* to take live-client clinical courses. Beyond *requiring* all students to take a live-client clinic or intensive simulation classes, both of which would be extremely expensive, it is difficult to see how the demand to make legal education more immediately relevant can be fulfilled without shifting to an apprenticeship system. Be that as it may, it is even more difficult to see either of these two reform movements contributing to an increase in the internationalization of American legal education. It is more likely that they will lead to a decrease simply by reducing the time and money available.

2.6 *To what extent does a central authority mandate the law curriculum? In other words, how much autonomy do individual faculties have to determine the nature and content of their law programs?*

Individual law schools determine their curricula and academic programs within broad guidelines set by the ABA nationally (through delegation from federal Department of Education) and locally by each state's bar authorities. Graduation from an ABA-accredited law school is required in a minority of states, but the most specific and stringent of both sets of standards relate to credit hours, qualifications of faculty, size of library, etc., leaving the schools almost complete autonomy on the curriculum per se.

The ABA's Standard 302 (Curriculum) requires that each student "receive substantial instruction" in:

33. There is no reason to believe that the President's comment is the beginning of a serious federal attempt to reform legal education, but it is indicative of the level of debate. Several schools already allow graduation within two calendar years, but they do so by providing the opportunity to continue to attend classes during the summer and generally without any reduction in credit requirements or tuition.

- (1) the substantive law generally regarded as necessary to effective and responsible participation in the legal profession;
- (2) legal analysis and reasoning, legal research, problem solving, and oral communication;
- (3) writing in a legal context, including at least one rigorous writing experience in the first year and at least one additional rigorous writing experience after the first year;
- (4) other professional skills generally regarded as necessary for effective and responsible participation in the legal profession; and
- (5) the history, goals, structure, values, rules and responsibilities of the legal profession and its members.³⁴

Standard 302 continues to require that each school provide “substantial opportunities” for:

- (1) live-client or other real-life practice experiences, appropriately supervised and designed to encourage reflection by students on their experiences and on the values and responsibilities of the legal profession, and the development of one’s ability to assess his or her performance and level of competence;
- (2) student participation in pro bono activities; and
- (3) small group work through seminars, directed research, small classes, or collaborative work.³⁵

Although one might interpret “other professional skills” to include skills related to international practice, the ABA has so far included only “trial and appellate advocacy, alternative methods of dispute resolution, counseling, interviewing, negotiating, problem solving, factual investigation, organization and management of legal work, and drafting.”³⁶ Similarly, one might imagine the requirement that each student learn “the substantive law generally regarded as necessary to effective and responsible participation in the legal profession” to mandate education in international or comparative law, but such has not been the case.

Although the ABA Standards do not in any sense stress internationalization, Standard 307 expressly allows law schools to give credit “for student participation in studies or activities in a foreign country” and sets criteria for accreditation for such programs. These programs have taken two basic configurations: study abroad pro-

34. *ABA Standards for Approval of Law Schools 2013-2014*, A.B.A., at 21-23 http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2013_2014_standards_chapter3.authcheckdam.pdf (last visited Sept. 10, 2013).

35. *Id.* at 22.

36. *Id.*

grams operated by American schools and study abroad undertaken by individual students either through an exchange or via an independently created arrangement approved and supervised by their home institution. Of the former, the most common are summer programs, which in 2009 numbered 267.

2.7 How many faculties offer foreign, comparative, or international law as compulsory elements of legal training courses? If compulsory, what is required?

Although still unusual, some law schools do require some exposure to international and/or comparative law. The Transnational Law course at the University of Michigan Law School can represent this trend. It is one of only four required courses after the first year, the others being professional responsibility, constitutional law, and a writing requirement. As the following course description indicates, it is primarily, if not exclusively, an international law rather than comparative law course:

This required course provides an introduction to the international dimensions of law. In today's world, it is essential that every lawyer understand the making and application of law beyond the domestic (American) orbit. Even though most graduates will practice law in the United States, virtually every area of law is affected by international aspects, whether through treaties regulating transnational economic relations, interactions with foreign law, and oversight by international organizations. Each area of the curriculum, from antitrust to intellectual property to civil rights to tax, is enmeshed within a complex web of international and foreign rules that the lawyer must understand.

Because the field of law outside U.S. domestic law is vast "public and private, international and foreign" the course seeks to provide students with the basic concepts and tools they can use to understand, take further courses in, and practice many specialized areas of law. Because the world lacks one authoritative legislature, executive, or judiciary, our understanding of law must consider a different range of methods for making, interpreting, and enforcing the law.

Although the specific coverage across faculty varies somewhat, the class will generally cover:

1. A basic introduction the state system
2. The making of international law, including treaty law, customary law, and "soft" law
3. The creation and evolution of states
4. International organizations, including global, regional, and functional bodies

5. Modalities of resolving transnational disputes, including diplomacy, sanctions, arbitration, and international courts
6. The role of corporations and NGOs in transnational [sic] system
7. The incorporation of international law into domestic legal systems, in particular that of the United States
8. The jurisdiction of states to make and apply law, including extraterritorial jurisdiction and immunity from jurisdiction
9. Certain selected topics of current concerns, e.g., human rights, the use of armed force, terrorism, and trade
10. The effectiveness of international law vs. domestic law.³⁷

2.8 *Is the offering of joint or collaborative courses with foreign faculties common in your jurisdiction? If so, what proportion of faculties has such programs? Can you provide a description of such programs—is there a common model?*

The exact proportion is difficult to state with precision but it is not uncommon at ABA law schools. The Global Law Faculty [GLF] program within the Hauser Global Law School at NYU and the Japanese Legal Studies Program at Michigan can illustrate.³⁸ The former began in 1994 and consists of foreign professors visiting each year for a semester. The faculty is chosen from different law schools all around the world, rather than being part of an exchange with one or two specific foreign schools. Another distinctive feature is that the GLF visit repeatedly with the twofold expectation that their level of comfort and effectiveness in teaching American JDs will increase with experience and that they will forge professional and personal bonds with NYU colleagues that will facilitate joint teaching and research. The Michigan program, on the other hand, is an exchange with Tokyo University. Each year faculty members from the two law schools teach at the other institution, usually for a period of a few weeks and as part of a course offered by a member of the receiving law school. Like NYU's, the Michigan program has been in existence since the 1990s. While NYU has the freedom to select the most appropriate GLF without reference to institutional ties and to develop long term individual relationships, the Michigan approach, which is very

37. See U. OF MICH. L., <http://www.law.umich.edu/mlawglobal/curriculum/japaneselegalstudies/Pages/default.aspx> (last visited Sept. 10, 2013).

38. For Michigan, see U. OF MICH. L., <http://www.law.umich.edu/CurrentStudents/Registration/ClassSchedule/Pages/AboutClass.aspx?term=1960&classnbr=30262> (last visited Jan. 7, 2014). For NYU, see N.Y.U., <http://www.law.nyu.edu/global/abouthauser> (last visited Sept. 10, 2013). Harvard Law School also recently revised its first year curriculum to require either international or comparative law of every student. See <http://www.law.harvard.edu/academics/degrees/jd/>.

similar to one between Columbia and Tokyo, has the potential to build institutional depth.

2.9 *Alternatively, is the offering of double degree with foreign faculties common in your jurisdiction?*

It is not common, but it does exist. Columbia Law School offers five foreign dual degree programs with European institutions. Two are four year programs with Université Paris I Panthéon-Sorbonne and the University of London that allow application to both bars. Cornell offers a similar program with Paris I. The other three Columbia opportunities are dual JD/LLM programs with British, French, and German institutions that do not allow entry into the foreign bar.³⁹ Most such programs are located in Europe, but a growing number are with other parts of the world. NYU, for example, offers dual degree, JD/JD and LLM/LLM or LLB/JD respectively, with the University of Melbourne and the National University of Singapore.⁴⁰

2.10 *What is the typical form or structure of a double or joint degree in your experience/in your jurisdiction?*

The following is the description of the NYU/U. of Melbourne dual JD/JD degree programs:

Students interested in this dual degree program must apply and be accepted to both law schools. Applicants who hold a U.S. bachelor's degree or the equivalent may apply simultaneously to both schools or may apply during their second year of study at either school. Students may elect to begin their program of study at either school and must complete years one and two at that school and then complete years three and four at the other school. Applicants who hold an undergraduate degree from Australia that required three years of study may apply to NYU School of Law during their second year at Melbourne Law School. Each institution will collect and assess applications according to its own admissions policies, standards and procedures, and admission to one institution is not an indication or guarantee of admission to the other. Each institution will, where reasonable,

39. See *J.D./LL.M. London Program*, COLUM. L. SCH., <http://web.law.columbia.edu/international-programs/study-abroad-programs/foreign-dual-degree-programs/jd-llm-london-program> (last visited Sept. 10, 2013). Cornell Law School has a similar program with Paris I. See CORNELL. L. SCH., http://www.lawschool.cornell.edu/international/study_abroad/international_dual_degrees/index.cfm (visited Sept. 13, 2013). See generally David Tobenkin, *Legal Minds: Internationalization is expanding rapidly at law schools*, INT'L EDU., Jan.-Feb. 2009, at 37.

40. For the NUS program, see N.Y.U. SCH. OF L., <http://www.law.nyu.edu/admissions/jdadmissions/dualdegreeprograms/nationaluniversityofsingapore> (last visited Sept. 13, 2013).

accept credit for courses at the other institution for the purposes of satisfying general or specific course requirements, co-requisites and pre-requisites.

NYU School of Law and the Melbourne Law School, University of Melbourne also offer the Melbourne-NYU Dual J.D./LL.M Program, where students may earn a Juris Doctor (J.D.) degree from Melbourne and a Master of Laws (LL.M.) degree from NYU. This dual degree program will consist of three and one-half years of full-time study: five semesters at Melbourne and two semesters at NYU, entitling students to receive a J.D. from Melbourne and an LL.M. from NYU. Students interested in this dual degree program will apply first to Melbourne and, once enrolled at Melbourne, may apply during their fourth semester of study to any of NYU's LL.M. degree programs offered at the New York City campus. Decisions regarding NYU admission will be made once four semesters of grades are received. Each institution will collect and assess applications according to its own admissions policies, standards and procedures, and admission to Melbourne is not an indication or guarantee of admission to NYU.

The following is the description of the curriculum for the Columbia/Paris I dual degree program:

At Columbia Law School

Students are expected to take all required Foundation courses in their first year. In the second year, students must take 31 credits of U.S. law. Since students will later have two full years of French civil and European law, their focus should be on American law topics. Generally, students are not encouraged to take clinical law or foreign and comparative law offerings.

At University of Paris 1- Pantheon Sorbonne

The French academic calendar runs roughly from the first week of October to the end of January, and then February through the end of June. In the first year of the program in Paris, students must take the following courses: Business Law I and II (with travaux dirigés), Contracts I and II (with travaux dirigés), Administrative Law I and II (with travaux dirigés), Introduction to Civil Law, Criminal Law, Constitutional Law, European Community Law, and Family Law. In the second year at Paris I, students must take Advanced Civil Law I and II and International Private Law I and II (both with travaux dirigés) and must choose between Labor Law I and II or Corporate Tax Law (each with accompanying travaux dirigés). In addition to these three subjects, six additional elective courses must be taken. Samples of elective

courses are: Banking & Securities, Labor Law, International Public Law, Law of Int'l. Commerce, Euro. Commercial Law, Commercial Law/Bankruptcy, Sureties/Guarantees, Matrimonial Law, Intellectual Property, Criminal Procedure Law and Civil Procedure, among others. In the first year in Paris, courses are those taught to French students in the first and second years of law school. In the second year in Paris, they are courses taught to French students in their third and fourth years. The curriculum at Paris focuses on private law courses, and has been organized to provide students with a solid grounding in French law and the majority of subjects covered in the Paris Bar. Courses are almost exclusively lecture-style, while the *travaux dirigés* are small seminar-type offerings.

2.11 How common are academic and student exchanges with foreign law faculties in your jurisdiction?

Study abroad programs are extremely common. Part of that is through exchanges with foreign faculties, but another large part is through programs operated by the American school itself. Adelaide Ferguson in a 2010 report on American law schools' study abroad programs found that:

The vast majority of [ABA-accredited] law schools permit their students to study abroad and apply the credits earned to their law degrees. Of the 200 ABA-accredited law schools, 114 schools sponsor 267 summer, 11 semester, 49 cooperative, and 7 short-term intersession abroad programs—a total of 334 programs.⁴¹

Ferguson went on to estimate that the 334 number significantly understates the number of opportunities available to American law students because it did not include “the large number of exchange programs and semester abroad programs hosted by foreign law schools, dual degree programs, or courses and clinics offered at the home campus with embedded short-term foreign experiences.”⁴² When the question shifts from opportunities to study abroad to the number of students actually doing so, however, the data are less clear and the numbers less impressive. Ferguson estimates that 10% of students at ABA schools study abroad. So while the opportunity to study abroad is virtually universal, only a relatively small proportion of students take advantage of it. This seeming anomaly may be ex-

41. See Adelaide Ferguson, *supra* note 28 (This report provides an excellent overview of the topic).

42. *Id.*

plained by a disjuncture between the expectations of prospective students for law school and the reality that they encounter after enrollment. In the abstract, the prospect of studying overseas is extremely attractive to individuals facing three years of professional training in, e.g., the drafting of lease agreements, but once that individual gets to law school, he or she is faced with a range of opportunity costs for that summer or semester away. Summers are prime employment times for American law students, partly because of the high tuitions at most law schools but also because summer jobs are a major channel to subsequent permanent employment. To take a semester away, on the other hand, may mean forgoing the chance to serve on a student-edited law review, enroll in a live-client clinic, or work part-time at a law office that may hire the student permanently. The result of this disjunction between opportunity and usage is that law schools feel the need to trumpet foreign opportunities in their admissions materials even when they realize that the opportunities will not be fully utilized.⁴³

As the Ferguson excerpt indicates, there is a wide variety of ways to study abroad. The most common is the exchange, of which virtually every school will have several. (For example, NYU has 11; Michigan has seven.) A second form is the independent study abroad program or ISAP, which requires the student to find and develop the program on her own. ISAPs have the academic advantage of forcing the participating student to navigate the foreign education and society somewhat on her own, including the need and opportunity to use the vernacular of the site. They also address the common fear that exchanges, especially ones that funnel students into large multi-university or open programs, are less than academically rigorous because they aim at the lowest common denominator in order to attract a critical, tuition-paying mass of students. ISAPs, however, are much more bureaucratically burdensome and if not closely monitored can lead to student personal difficulties and academic laxness.

Among the programs operated by American schools, summer programs are dominant for several reasons. First, students after their 1L year often cannot find legal employment, and spending the summer in a foreign location has obvious attractions. It may also enable them to get enough credits to lighten their upper class course load. Summer programs are also attractive to faculty. For those with overseas

43. This explanation is my own guess, but it is a guess educated by personal experience. When I was Faculty Director of NYU Global Law School Program, I proposed eliminating the vast majority of NYU's exchange programs (and replacing them with independent study abroad programs) on the ground that they were academically undemanding. The head of admissions strongly opposed the move arguing that the chance to go abroad was a huge selling point to applicants deciding between law schools. He then reassured me about the academic aspect by saying, "Don't worry. Once they get here, they won't go." His view is confirmed by Ferguson's statistics.

research interests, teaching can amount to a research grant, provide non-trivial (but not huge) additional income, give them an opportunity to renew professional relationships with foreign colleagues, and, like their students, spend time in an attractive foreign location.

The globalization goal of the programs is undercut, however, by their location: 190 of the 267 summer programs in 2010 were in Europe or North America with only six in Africa and nine in the Middle East (including Israel). The lack of geographical spread is even more extreme in semester abroad programs. Of the eleven 2010 programs, eight were in London, one in Australia/New Zealand, and one in Hong Kong, meaning that ten of eleven were in affluent, common law, English speaking jurisdictions. The only outlier was Temple Law School's Tokyo program. While a summer in London will benefit anyone (Make me an offer!), my guess is that most American students with the resources to forego summer employment and afford an overseas program, where scholarships are virtually unheard of, will have already travelled overseas, quite possibly to London. This focus on the common law, England (not even Scotland!), and the English language may be shifting, however. In January, 2014, NYU opened semester abroad programs in Shanghai, Paris, and Buenos Aires, the first two of which will stress, although not require, language ability.

2.12 What percentage of law faculty staff would have a foreign law or other degree in your jurisdiction? If you cannot answer that question precisely, can you estimate how common this is?

If the question is how many professors have their only or primary legal degree from a foreign jurisdiction, the answer would likely be less than 5%. If the question is broadened to include any law degree, for example, an LLM from a UK institution, the number would rise although probably only marginally. If the question is further broadened to include non-law degrees, the number will further increase marginally since it would then include those who came to the U.S. for legal education after receiving their university degree overseas.

2.13 Does any faculty offer law courses in any other language than the language of the jurisdiction?

Yes, but it is not common. For example, although undoubtedly not the most common language, Boston College, Harvard, Michigan, and New York University law schools have at times offered legal re-

search and translation courses that required Japanese language proficiency.⁴⁴

2.14 *Is it mandatory or strongly recommended to study a foreign language for students enrolled in a law degree or a joint degree including law?*

Requirements of foreign language study are rare, but it is required for some joint law degrees such as that of Columbia and Cornell Law Schools with Paris I. See answer to Question 2.8 above. Other schools strongly encourage foreign language study for certain students, such as NYU which offers and recommends a course in legal Chinese for students enrolling in NYU's Shanghai program.

2.15 *Do foreign students engage in practical training, internships, clerkships and the like in your jurisdiction?*

Foreign JD students routinely participate in clinical education and other forms of practical training within American law schools and in virtually all internships. The exception would be government positions and judicial clerkships where citizenship may be required.

2.16 *Do law faculties commonly offer assistance to students who want to obtain joint or additional admission in a different national jurisdiction? If so what form does it take?*

It is not common and would depend on the foreign jurisdiction.

2.17 *Do law programs in your jurisdiction commonly require courses concerning the law of other jurisdictions, e.g., an introduction to different legal families, etc.*

No. To the extent that law curricula require non-American law, it is more likely to be international law. As noted above, the University of Michigan requires a course in "Transnational Law," but that course appears to be an international law, rather than comparative law course. Similarly, NYU has introduced an international law elective into the first year, but it is not compulsory and has no coverage of comparative law, and Harvard has just introduced a requirement of either international or comparative law in the first year.

2.18 *Is it mandatory for law students to study abroad for part of their programs?*

No.

44. For a brief description of the Japanese Legal Studies program that sponsored the course at Michigan, see U. OF MICH., <http://www.law.umich.edu/mlawglobal/curriculum/japaneselegalstudies/Pages/default.aspx> (last visited Sept. 10, 2013).

2.19 *Do law faculties collaborate with other faculties to offer interdisciplinary teaching and research relevant to internationalization—e.g., with International Relations faculties?*

Interdisciplinary programs are common including ones that allow for international and comparative study. The most common is the four year MBA/JD program available at most American law schools. Because such dual degree programs have a higher percentage of required courses, the availability of international/comparative law courses and programs may be somewhat reduced, but not to a substantial degree. More specifically internationally oriented programs are also available, but not as ubiquitous. NYU, for example, has a joint program with the Woodrow Wilson School of Public and International Affairs at Princeton University. Joint law-regional studies programs leading to the JD/MA degrees are common.⁴⁵

2.20 *Do law graduates get assistance with information concerning foreign admission to practice? Is such information readily available?*

It is not common, but see the answer to Question 2.16.

2.21 *Do foreign graduates have to undertake extensive law studies to obtain local admission in your jurisdiction? Is limited admission for foreign lawyers available, and on what basis or conditions?*

Graduates of foreign law schools can take the bar examination in twenty-eight of the fifty states and the District of Columbia, but all states require them to comply with some other requirement.⁴⁶ Such requirements include an education in the common law; some additional education at an American law school, usually in the form of an LLM or other one year course; some practice experience in the applicant's home jurisdiction; or a demonstration to the bar authorities that the foreign degree is educationally equivalent to an American law degree. In New York State, the LLM requirement is augmented by residential and curricular requirements that are targeted at overseas LLM programs operated by American law schools. Graduates of Canadian schools are treated separately by a minority of states.

45. See, e.g., the JD/MA programs with the French Studies and Latin American and Caribbean Studies programs at NYU available at <http://www.law.nyu.edu/jddualdegreeprograms>.

46. See *Comprehensive Guide to Bar Admission, Chart 4 Eligibility to Take the Bar Examination: Foreign Law School Graduates*, http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf (last visited Sept. 7, 2013).

3. EXAMPLES AND OPINIONS; SUGGESTIONS

[Please note that I am interpreting Questions 3.3, 3.4, 3.6, 3.7, 3.9, and 3.10 to ask for my individual opinion, which may differ from the American consensus, including among other members of the American Society of Comparative Law.]

3.1 Please provide us with examples of law programs adopted in your jurisdiction, that are focused on teaching for global practice, and/or that are relevant to obtaining admission to practice in multiple jurisdictions. Such programs may be collaborative in nature.

Please see the answers to Questions 2.9-10 and the examples therein. Please note that although these programs may prepare students for “global practice,” that is likely not their only goal, and perhaps not even their primary one. Instead, they may be aimed at general education as opposed to professional preparation.

3.2 Could you provide us with bibliographical details of recent publications in your jurisdiction concerning internationalization, globalization, and related aspects of law teaching and the curriculum?

If one is interested in the globalization of American legal education, I recommend learning something of the current “crisis” described in the Preliminary Remarks above. The best or at least most entertaining single source is Brian Tamanaha, *Failing Law Schools*, U. of Chicago Press, 2011.

The best source for an overview of the current state of overseas study programs is Adelaide Ferguson, *Mapping Study Abroad in U.S. Law Schools: The Current Landscape and New Horizons*, NAFSA: Association of International Educators, 6 (2010). Ferguson is the former dean in charge of Temple Law School’s overseas programs. Anyone interested in the details of programs or international and comparative law curricula should go to individual law schools’ websites. If one is interested in an overall view of the situation, one should choose schools at random from the 200+ ABA accredited schools, rather than focusing on the elite schools well known outside the U.S.

The following is a list of representative articles:

1. Edelman, Diane Penneys, *Educating and Qualifying Transnational Lawyers: A U.S. Perspective*, 46.2 INT’L LAW. 635-38 (2012).
2. Cecily E. Baskir, *Crossing Borders: Creating an American Law Clinic in China*, 19 CLINICAL L. REV. 163 (2012).

3. Gregory Bowman, *The Feng Shui of Study Abroad Programs*, in WVU Law Legal Studies Research Paper No. 2012-08 (2012).
4. Simon Chesterman, *The Evolution of Legal Education: Internationalization, Transnationalization, Globalization*, 10 GERMAN L.J. 877 (2009).
5. Carole Silver, *Internationalizing U.S. Legal Education: A Report On The Education of Transnational Lawyers*, 14 CARDOZO J. INT'L & COMP. L. 143 (2006).
6. Sabina Schiller, *A New Global Legal Order, With or Without America: The Case For Accrediting Foreign Law Schools*, 26 EMORY INT'L L. REV. 411 (2012).
7. Alexander H.E. Morawa & Xiaolu Zhang, *Transnationalization of Legal Education: A Swiss (and Comparative) Perspective*, 26 PENN ST. INT'L L. REV. 811 (2008).
8. Rosa Kim, *The "Americanization" of Legal Education in South Korea: Challenges and Opportunities*, 38 BROOK. J. INT'L L. 49 (2012).
9. David S. Clark, *American Law School in the Age of Globalization: A Comparative Perspective*, 61 RUTGERS L. REV. 1037 (2009).

3.3 *Is there such a thing as a "global lawyer," and what are the characteristics of a "global lawyer" in your view?*

I believe that there are such lawyers *unless* one means by "global lawyer" someone completely comfortable in all jurisdictions and, concomitantly, not especially comfortable in any one jurisdiction. In other words, I believe that everyone is a product of their background and training, but that some go on to acquire exceptional facility with global issues and practice and hence become "global lawyers."

With that caveat, an example of a global lawyer, based on an acquaintance, might be an American specialist in international arbitration whose career began in the Soviet Union, progressed in Paris, and who now practices in Shanghai. She has experience and knowledge of areas of doctrine and practice that originate transnationally and a set of skills that are transportable from place to place. She has the cultural and professional sophistication to draw on the local and international bar in her particular geographical site and to adjust her practice to meet the formal and informal political and normative requirements of each jurisdiction.

3.4 *What does globalization mean for you and in your jurisdiction? What are the positive or negative implications of the term in our profession?*

Tough question! I here interpret globalization to mean the social impact of, first, the increasing penetration of international markets into domestic economies and, second, increasing international individual mobility at both the high and low ends of the socio-economic scale. Therefore, one thing globalization has meant over the last three to four decades in the United States is a radical change in the structure of the economy and society. This change has enriched the U.S. in aggregate terms and has benefited many individuals, including law professors, but it has also decreased the sense of security for the average person. The American economy has lost whole sectors as international competition caused domestic manufacturers to move overseas, leaving American blue collar workers without the jobs that they had expected to enjoy for a lifetime. There are many beneficial effects as well, but my immediate reaction is to think of the social dislocation caused by the disjunction between corporate international mobility and the general immobility of labor. This cost is not new or unanticipated. Although few people seem to have taken note, the United Nations long ago warned that economic growth takes a heavy toll on societies and individuals:

There is a sense in which rapid economic progress is impossible without painful adjustments. Ancient philosophies have to be scrapped; old social institutions have to disintegrate; bonds of cast, creed and race have to burst; and large numbers of persons who cannot keep up with progress have to have their expectations of a comfortable life frustrated. Very few communities are willing to pay the full price of economic progress.⁴⁷

Within the American legal profession, by contrast, the term has had a positive connotation, at least until quite recently. Since American law firms have successfully followed the spread of American corporations around the world, American lawyers have not been affected in the negative manner of other workers. Indeed, globalization has opened international opportunities to a profession historically limited largely to an American practice. In the last five to ten years, however, technological advances in areas like document review have created the possibility of international outsourcing of basic legal work. It is too early to tell whether this phenomenon will have a significant and lasting impact.

47. United Nations, Department of Social and Economic Affairs, *Measures for the Economic Development of Underdeveloped Nations*, 1951, quoted in ARTURO ESCOBAR, *THE MAKING AND UNMAKING OF THE THIRD WORLD* (1995), pg. 3.

3.5 *What, if any, are the arguments against globalization of law and law studies that are seriously advanced in your jurisdiction? Is globalization viewed critically by some or many, and if so on what basis? For instance, sometimes globalization is equated with “Americanization” in debates about merits and demerits?*

As noted in the Preliminary Remarks, the two major critiques of American legal education, cost and the teaching of practice skills, may have an indirect negative impact on the internationalization of the curriculum, especially if a significant number of schools move to two year programs. That said, there is very little criticism of internationalization per se.

As for the “Americanization” of the United States, it is too late to do anything about it at home, and as explained in the answer to Question 1.8, American lawyers welcome and indeed try to facilitate the “Americanization” of other jurisdictions, especially in the human rights field.

3.6 *Why are you interested in the issue of the internationalization of legal training and admissions?*

My interest in internationalization of legal education is not scholarly in the sense of studying the process. I am in favor of internationalization as a policy matter for my own law school and for American legal education in general for several reasons. It will produce better educated and sophisticated lawyers and citizens, whether it assists them professionally or not, but I also believe that it will produce better practitioners. Thirdly, an international student body is much more interesting and fun to teach and associate with than a purely American one. Finally and less admirably, internationalization means a large number of tuition-paying LLM students, which is a significant financial benefit to many American law schools.

3.7 *How high on our list of priorities should internationalization of the curriculum be?*

I cannot answer for any school other than my own. Once the question goes beyond the U.S., I am entirely unqualified to answer.

For NYU, the creation and development of the Hauser Global Law School Program twenty years ago transformed the school. While the American perspective on law and legal education still inevitably dominates, the openness to other perspectives is much greater than it would be without the GLSP. That said, the approach has not been to require specific courses or overseas study, but to attempt to bring global ideas, methodologies, and individuals into the quotidian life of the students and faculty. Most recently, we have introduced three se-

mester abroad programs as noted above, of which the Shanghai and Buenos Aires programs stress language proficiency and acquisition. At this point, I do not personally believe that NYU needs further internationalization, but I would oppose any diminution in the current situation.

3.8 Do lawyers in practice express a need for more globally trained lawyers, for more international curricula in law faculties, for a wider skill set in law graduates?

At least for NYU, the answer has been yes. Most American law schools have trustees or overseers that are the rough equivalent of a corporate board of directors of whom many if not most are successful alumni partners in large firms. A committee of the NYU board recently issued a report on needed curricular reforms, which included greater international sophistication, better language proficiency, and preparation for practice in foreign jurisdictions. This report contributed to the NYU faculty's decision to open the three semester abroad programs in 2014.

3.9 Please provide us with any suggestions or ideas that might be relevant to the gathering of information on our topic or to the drafting of the General Report.

The only thing that I can think of would be to canvas the opinions of employers of new graduate lawyers.

3.10 Even if it is not required to be a "global lawyer" in your jurisdiction, to what extent does every practitioner need foreign legal knowledge and/or experience?

I agree with the sentiments expressed by Deans Allard and Edley in the answer to Question 1.1 and with the philosophy of NYU's Hauser Global Law School Program. American society is permeated with internationalization of diverse sorts. The commercial aspect may be most prominent, but the percentage of Americans born in a foreign country is historically very high, meaning that cross-border legal issues will affect even the most seemingly domestic practices, such as family or criminal law. That does not mean, of course, that every domestic lawyer must know several languages and the difference between a mortgage and a hypothec, but sensitivity to the possibility of trans-border issues would enhance most lawyers' practice.

ADITI BAGCHI*

The Effects of Financial Crises on the Binding Force of Contracts: United States Report†

TOPIC II. A

This report examines the limited prospects for rescinding contracts under laws in the United States based upon the impact of the financial crisis that began in 2007.

Contract law in the United States is state law: each of the fifty states in principle has its own law. That said, each has a variation of the “common law,” which was adopted from Britain at the time of independence and has evolved, largely in parallel though not in lock-step, across the fifty states. Although there are some important differences between the states, in no state are contracts subject to rescission or revision in the event of financial crisis.

I will discuss the U.S. position on some of the particular questions raised by the General Reporter and then point out some areas in which regulation of exchange is arguably responsive to financial crisis indirectly.

In general, in the United States, mistake, misrepresentation and changed circumstance are all possible grounds for rescission of contract. However, a party may not avoid liability under a contract for mistake (either unilateral or mutual) if she assumed the risk of the fact that later surfaced. Under Restatement (Second) of Contract Section 154, a party will be deemed to have accepted a certain risk if he was allocated the risk,

he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or . . . the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

Because fluctuation in the economic environment is common, and because parties often enter into contract precisely to guard against the variability in price and inventory associated with economic cycles,

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courts are unlikely to regard a “mistake” related to the economic environment as grounds for rescission. A party would not be allowed to avoid contract on such grounds.

Parties may also rescind a contract where they relied on a material misrepresentation by the other side.¹ Some buyers of mortgage-backed securities have sued a number of large banks for misrepresenting underwriting standards and seek rescission, among other remedies.² Regardless of whether any of these claims succeed, we could not properly characterize the rescission remedy here as responsive to the financial crisis per se. Although banking practices were causally related to the crisis, and the motivation of buyers to seek rescission is clearly related to a drop in the value of their securities, plaintiffs in these suits claim (as they must) that *misleading* banking practices justify rescission, and those practices are alleged to justify rescission whether accompanied by an economic crisis or not. Because misrepresentation focuses on the conduct of the plaintiff, its successful invocation does not turn on the general economic climate.

Changed circumstance refers to a cluster of conditions under which courts will excuse a party for performance, but these doctrines are difficult to invoke successfully.³ Even a severe change in general economic circumstances is unlikely to qualify. Neither inability to pay nor a drop in the market value of a purchased good is a likely ground for excuse under impossibility, impracticability or even frustration of purpose.⁴ Because one of the purposes of contract for exchange at a fixed price is to guard against price fluctuations, the parties are expected to have incorporated the risk of an economic downturn into their price.

Distortion of the equivalence of exchange is not grounds to avoid liability but it may contribute to unconscionability, which does excuse performance. An unconscionable contract must be substantively unconscionable, in that its terms must “shock the conscience.”⁵ A highly inequitable contract may meet that standard. However, unconscionability usually also requires procedural unconscionability.⁶ Procedural unconscionability entails some defect in the process that

1. RESTATEMENT (SECOND) OF CONTRACT §164.

2. See, e.g., *Your Guide to the Massive Bank Lawsuits*, 9/5/11 BUS. INSIDER. (describing suit by Federal Housing Finance Agency against seventeen banks seeking to rescind more than \$196 billion in sales of mortgage-backed securities).

3. RESTATEMENT (SECOND) OF CONTRACTS §§ 261-72 (discussing impracticability, impossibility and frustration). See also Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 472, 472-73 (1985).

4. See *Northern Indiana Public Service Co. v. Carbon County Coal Co.*, 799 F.2d 265, 276-78 (7th Cir. 1986).

5. See *Fransmart, L.L.C. v. Freshii Dev., L.L.C.*, 768 F.Supp.2d 851, 870-71 (E.D. Va. 2011) (“The substantive terms of the contract must be so grossly inequitable that it ‘shocks the conscience.’” (citation omitted)).

6. See *Lawrence v. Beverly Manor*, 273 S.W.3d 525, 531 (Mo. 2009) (requiring both substantive and procedural unconscionability).

does not rise to the level of an independent ground for excuse. For example, highly unequal bargaining power, the absence of an opportunity to bargain, or a lack of commercial sophistication may render a contract procedurally unconscionable. A contract that suffers from an imbalance of exchange might plausibly be substantively and procedurally unconscionable, but it will likely not be deemed unconscionable if it is alleged to have become unconscionable entirely as a result of events that took place after the time of contract formation.⁷ Logically, procedural unconscionability, or defects in formation, cannot be present where the substantive unconscionability, or defects in terms, arose only after formation. Because the doctrine of unconscionability aims primarily to do equity as between the parties, rather than to redress more general unfairness that might arise in the course of contract, it is of limited utility in responding to the financial crisis.

Although these answers might make it appear there are few resources within US common law to respond to the financial crisis, there are several modes of response. Within the common law itself, there is an increasingly liberal attitude toward renegotiation. Renegotiation of an executory contract is permitted where the revision of terms is a good faith response to changed circumstance.⁸ Although changed circumstances is difficult to establish for purposes of avoiding a contract, it is more easily grounds for renegotiation. A change in economic conditions would likely be regarded as adequate grounds for private renegotiation between the parties, though there is no definitive or formal doctrine to this effect.

The more prominent legal response to the financial crisis at the level of individual contract has occurred in particular subject matter areas. First and most important, the centrality of subprime and other mortgages to the crisis focused attention on the underlying mortgage contract. Remedies that had already been available became more salient and there have been some political and judicial efforts to make borrowers' statutory rights more robust.

The Truth in Lending Act (TILA) grants borrowers who offer a security interest in their principal dwelling a limited right to rescind loan agreements where the lenders failed to make certain material disclosures.⁹ In principle, the statutes might be thought to expand the common law doctrine of misrepresentation, treating certain non-disclosures as affirmatively misleading in statutorily specified contexts. But courts have recognized that the statute was intended

7. RESTATEMENT (SECOND) OF CONTRACTS §208 ("If a contract or term thereof is unconscionable *at the time the contract is made* a court may refuse to enforce the contract.") (emphasis added).

8. RESTATEMENT (SECOND) OF CONTRACTS § 89 (on modification of an executory contract).

9. See 15 U.S.C. § 1635 (2012).

to stabilize the market for consumer credit, which seemed unduly unstable where large numbers of borrowers took out loans on terms they did not understand well. Although the statute predates the most recent financial crisis, it is emblematic of the basic policy response. Many observers view the crisis as reflecting some kind of market failure. Affording individual borrowers relief *where lenders have engaged in practices that distort the market* serves both to mitigate the human damage of financial crises as well as to prevent avoidable escalation of market bubbles.

A second area of contract in which rescission has come under focus in the aftermath of the recession is health insurance. Here, the concern has been with limiting rather than expanding rescission. The recent and controversial Patient Protection and Affordable Care Act (PPACA) banned the practice of health insurance rescission.¹⁰ The practice involved insurance companies rescinding insurance for expensive customers (those who had fallen ill and had become heavy users of insurance) based on conditions that the customer failed to disclose at the time of initial application for insurance. In some cases, these pre-existing conditions were not medically related to the “expensive” conditions that later required expensive treatment, and in some cases the patients themselves were not aware of them (because they were minor and did not require action). Like rescission under TILA, rescission in this context was formally consistent with the common law doctrine, which permits cancellation of a contract due to misrepresentation. However, unlike in ordinary contract, insurance companies systematically undertook to investigate insured applications only after claims were filed, and even innocent misrepresentations would provide grounds for rescission.

Health insurance rescission was a problem among the individually insured, and the financial crisis reduced further the percentage of Americans insured through their employers. The financial crisis thus made more acute what had been a long-standing policy problem and arguably helped bring about the political impetus to address it, albeit in large and complex health care reform legislation that intervened in the health care market in numerous other ways as well.

One final subject matter area in which rescission has been under some scrutiny has been in the securities markets. Issuers may offer preemptive rescission in order to avoid investor claims for alternative remedies. All but four states bar civil liability under state law (outside of fraud claims) if a purchaser received a written offer for rescission and did not accept it.¹¹ By contrast the federal Securities and Exchange Commission has decided that, under Section 14 of the

10. See 42 U.S.C. § 300gg-12 (2012).

11. Robert Robbins, *Regulation D Offerings and Private Placements*, SU032 ALI-ABA 577 (2013).

Securities Act of 1933 and Section 29(a) of the Securities Exchange Act of 1934, attempts to immunize oneself from civil liability by way of a preemptive rescission offer are void.¹² However, violations of Section 5 of the federal Securities Act of 1933 give the *purchaser* a one-year right to rescind implicated transactions.

Again in this context, rescission operates as a remedy against those who have engaged in some form of misrepresentation. In this context, however, the equitable dimensions of rescission arguably recede in focus as compared to the systemic implications of the remedy. That is, whether we allow investors to rescind, or allow issuers to preemptively rescind, importantly shapes the scope of liability under securities law. On the one hand, those who would see the recession as the fault of inscrutable practices and possible securities violations would decry any expansion of rescission at the expense of remedies that are more costly and possibly encourage more private oversight of company disclosures. But for others, the recession throws into relief an imperative to reduce company costs generally and ostensibly frivolous plaintiff suits in particular; a more liberal regime of rescission might reduce plaintiff suits.

The upshot of this overview is that the United States has little doctrinal response to financial crisis within the domain of common law contract itself. Some of the facts relating to the crisis may be grounds for rescission but even a severe economic downturn is not itself a fact on which the outcomes of contract doctrines will turn, from a technical standpoint. However, the United States has expanded and delimited rescission *by statute* to deal in a targeted way with specific problems, including ones exacerbated or highlighted by the recent recession. Although our regime has a rigorous commitment to the sanctity of contract, this principle co-exists with an occasionally expansive understanding of what meaningful consent entails as well as a broad view of the social implications of contract in particular areas.

12. See *Stoiber v. SEC*, 161 F.3d 745, 753 (D.C. Cir. 1998)(affirming sanctions notwithstanding defendant's rescission offer).

JONATHAN M. MILLER*

The Influence of Human Rights and Basic Rights in Private Law in the United States†

TOPIC II. A

International human rights and notions of basic rights have had little influence on private law in the United States. Constitutional rights in the United States are almost exclusively viewed in terms of the individual's relationship with the State, not individuals' relations with each other. At the same time, U.S. self-sufficiency and international power has allowed the United States to favor its parochial culture over international human rights discourse, a tendency further encouraged by legally and socially entrenched federalism. Virtually the only private law areas heavily influenced by notions of basic rights are anti-discrimination law and defamation, and both are easily distinguished exceptions in a country primarily focused on individual autonomy, parochial politics instead of international pressures, and federalism. Incorporation of international human rights and basic rights into U.S. private law will likely remain very limited for the foreseeable future.

This article was prepared for the 19th International Congress of Comparative Law to respond to the topic of *The Influence of Human Rights and Basic Rights in Private Law* from the perspective of U.S. law and practice. The issue is increasingly important, since international human rights instruments have mushroomed since World War II, and because social and economic rights form an important part of international human rights as understood by most countries of the world, especially since entry into force in 1976 of the International Covenant on Economic, Social and Cultural Rights.¹ Any country's domestic incorporation of international economic, social and cultural rights inevitably impacts private legal relationships, since it accentu-

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1. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976).

ates moving beyond a traditional focus on liberty of contract and protection of private property. International human rights law turns commonly existing practices of economic regulation into international obligations to engage in regulation for the benefit of the vulnerable;² hence one would expect the private law of most countries of the world to be affected by the expansion of international human rights, or at least expect redefinition of some existing socio-economic regulation as human rights-required practice. The United States, however, is different. While this article will analyze the impact of international human rights and basic rights on private law in the United States, as will be seen, the impact is extremely limited. Although this article will not address practices in other countries, in the context of the other contributions presented to the Congress, the United States will likely be seen as an outlier.

Compared to any other country in the world, the United States displays a unique combination of: i) liberal traditions that emphasize individual autonomy; ii) an exceptional self-sufficiency and ability to project its military and economic power that permits it to favor its parochial culture over human rights intercourse; and iii) legally and socially entrenched federalism. These three characteristics lead the United States to generally resist the application of international human rights and fundamental rights to the private law field. While many nations display one or two of the three characteristics, the unique combination of all three in the United States make it exceptionally difficult for international human rights or fundamental rights to enter the private law field, and give an atypical cast to those situations where human rights and fundamental rights do modify private law. Litigators and legislators seeking to assert the primacy of international human rights and fundamental rights in private law may enjoy isolated successes, but always against a backdrop that views their arguments as atypical.

Liberal traditions of individual autonomy, the realpolitik consequences of U.S. self-sufficiency and power, and U.S. federalism create a framework that together constrain the operation of international human rights on private relationships. They have permitted the United States to largely reject the notion that individuals may impose demands upon the State or private parties for the provision of constitutionally necessitated goods and services, and have limited constitutional protections to situations of governmental action. U.S. constitutionalism largely excludes the possibility that a private actor may violate constitutional rights. When they exist at all, U.S. consti-

2. See e.g., *id.* at art. 7 (fair remuneration, safe working conditions, limitations on hours and a right to holidays with pay); *id.* at art. 10(2) (paid leave for mothers before and after childbirth); *id.* at art. 12(2)(c) (creation of conditions for medical services), all situations likely to affect private legal relationships.

tutional protections in the private law context usually appear as limits on the possibility of individuals to call upon the courts to exercise their authority in ways that affect individual rights.³ While both the Federal and State governments have often modified private relations in ways that provide economic and social assistance to individuals, perhaps most prominently in the health care field,⁴ such assistance is rarely described in human rights or constitutional terms. The only exception to the general lack of positive human rights appears in a limited number of State constitutional provisions.⁵ Recent Supreme Court decisions if anything demonstrate a pull backwards from any notion that U.S. courts have a role in the enforcement of international human rights. Equal protection and freedom of expression are the fundamental rights areas that have most modified private law relationships, but even in the equal protection context, the arguments have been statutory, not constitutional, and in litigation, are usually presented without reference to international human rights.

Some of these ideas have already been expressed by Michael Ignatieff and his contributors in his edited book, *American Exceptionalism and Human Rights*.⁶ The impact of international human rights on private law was not a concern of that volume, but many of the features and causes of exceptionalism that Ignatieff describes are no different. Ignatieff emphasizes that no other country consistently exempts itself from as many provisions of human rights treaties, uses such markedly double standards in human rights for friends compared with enemies, and insists so much on its domestic traditions.⁷ His explanations, somewhat broader than those expressed here, consider a rights tradition in the United States that is more insistent on individual responsibility and individual freedom and more distrustful of government than in Europe, note the extent of U.S. military and economic power, and emphasize U.S. institutions and politics that involve not just strong federalism, but greater roadblocks generally

3. See *infra* note 44 and accompanying text for the example of racially restrictive real estate covenants.

4. For example, U.S. law now requires employers who employ more than fifty full-time employees to provide those employees with health insurance or face penalties. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119, 253 (2010).

5. See EMILY ZACKIN, *LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS* 3 (2013) (describes three movements in U.S. history to incorporate positive rights at the State constitutional level); see also *id.* at 71, 77-78, 83, 90 (tables showing State constitutional adoption of a right to an education or imposing an obligation on the State to establish schools); *id.* at 111 (State constitutional adoption of various protections for workers); *id.* at 151 (State constitutional adoption of the right to a healthy environment).

6. See generally *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* (Michael Ignatieff ed., 2005) [hereinafter *AMERICAN EXCEPTIONALISM*].

7. Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in *AMERICAN EXCEPTIONALISM*, *supra* note 5, at 1, 3.

than in most countries to the incorporation of international law—roadblocks in part from a strong populist, conservative element that enjoys substantial political weight and that is confident that U.S. political institutions already work well enough without outside influences.⁸ Still, the ideas expressed here are very much in the vein that Ignatieff and his collaborators lay out.

This article will begin by describing the liberal traditions, realpolitik considerations and federalism that in combination make the United States unique, and then will examine how, thanks to these factors, international human rights law and fundamental rights have severely limited scope in private law in the United States, with application primarily in the equal protection and free speech areas. Then the article will conclude with a brief examination of how recent U.S. Supreme Court decisions show that the U.S. Supreme Court is now widening the distance between U.S. law and international human rights law, and the trend is likely to continue for at least the near future.

THE BACKGROUND FACTORS LIMITING HUMAN RIGHTS INFLUENCES IN
PRIVATE LAW: LIBERAL TRADITIONS, INTERNATIONAL
HEGEMONY & FEDERALISM

The strong liberal traditions of the United States, the limited permeability of the United States to international law thanks to its international power, and the federalism of the U.S. Constitution, each limit the influence of human rights on private law in the United States. Liberal traditions cause Americans to view fundamental rights as a question governing their individual relations with the government, not their relations with each other. U.S. international power means that the United States has weaker incentives to integrate itself into International Law's human rights commitments than countries less able to use economic and military might instead of good will to accomplish international goals. Federalism, which places most of private law in the hands of State courts and legislators, increases the distance between those who make and interpret private law and international relationships, which are primarily a concern of the federal government, and hinders the domestic reach of international law.

International human rights today include entitlements that the individual can demand from the government and society that often implicitly carry with them rights in relations between individuals; however the U.S. Constitution's Framers operated from highly individualistic notions of rights.⁹ The Framers of the U.S. Constitution

8. *Id.* at 11-20.

9. See Louis Henkin, *Rights: American and Human*, 79 COLUM. L. REV. 405, 402, 418-19, 422 (1979); Cass R. Sunstein, *Why Does the American Constitution Lack So-*

were heavily influenced by liberal, Lockean notions of individual autonomy and a social contract that legitimized government yet also required the protection of individual rights from abuse by the government.¹⁰ This individualistic focus has carried two important consequences: 1) that government in the United States has no fundamental obligation to protect private parties from each other; and 2) an approach towards constitutional rights that defines them largely in terms of harmful government conduct towards the individual.

First, in the United States, the starting point for the constitutional analysis of rights in the context of private relations remains whether government regulation has improperly interfered with the liberty of individuals to make agreements with each other. While admittedly constitutional analysis today subjects government interference with the economic liberty of individuals to nothing more than a rational basis test—asking if government has a legitimate purpose and if there is a rational relationship between the regulation adopted and the government’s purpose¹¹—the analysis never goes the further step of imposing an obligation on government to protect individuals from each other. In fact, the U.S. Supreme Court has not even found an obligation of government to offer police protection to individuals from private criminal conduct, and prosecutors and the police enjoy complete discretion as to whether and how thoroughly they will investigate a crime or prosecute.¹² In the 2005 U.S. Supreme Court case of *Town of Castle Rock v. Gonzales*, the police failed to enforce a judicial restraining order that required an estranged husband to stay away from his wife and children, incompetence that resulted in the husband murdering the children in a context where an appropriate police response to the mother’s repeated calls might have prevented their deaths; yet the failure of the police to respond did not violate the plaintiff mother’s rights under the U.S. Constitution.¹³ While the Inter-American Commission on Human Rights would later rule (in an opinion that the U.S. government does not regard as binding¹⁴) that the United States had failed to protect the

cial and Economic Guarantees, in AMERICAN EXCEPTIONALISM *supra* note 6, at 90, 95-96.

10. See DAVID A. J. RICHARDS, FOUNDATIONS OF AMERICAN CONSTITUTIONALISM 78-97 (1989); see generally, LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955) (describing the major currents of U.S. history since colonial times in terms of their interaction with and subjection to a dominating philosophy of Lockean liberalism).

11. See ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES, 639-44 (4th ed., 2011) (describing the movement of the U.S. Supreme Court from heightened protection of economic liberties to the very weak rational basis analysis used in *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955)).

12. See *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 761 (2005).

13. 545 U.S. at 751-54.

14. The U.S. Government position is that decisions of the Inter-American Commission on Human Rights are merely recommendations in the case of the United States, because the United States has not ratified the American Convention on

human rights of the mother and children,¹⁵ for U.S. domestic purposes, there is no constitutional entitlement to police protection.¹⁶

Second, the U.S. Supreme Court has developed “State Action Doctrine.” Under this doctrine, constitutional rights will only be deemed violated when the wrongful conduct is that of the government, or of a private entity with such a close connection to the government that in practice the government is deemed to have acted.¹⁷ Private parties, no matter how powerful, can never be accused of violating an individual’s constitutional rights, merely of violating statutory rights. For example, while individuals and corporate entities may be barred from engaging in race, ethnic or gender discrimination in employment, in housing, and in places of public accommodation such as a hotels and restaurants,¹⁸ such obligations do not have a constitutional origin.

In short, in a context where there is no constitutional right not to be murdered by another—with a constitutional obligation neither placed on the police to protect the victim, nor on the murderer not to engage in murder—it is difficult to expect much of a fundamental rights influence in the sphere of private relations. The U.S. Supreme Court has long abandoned the natural rights approaches that were traditional in the Common Law,¹⁹ natural rights approaches that Catholic tradition, by contrast, has used to treat economic and social rights as fundamental, natural rights.²⁰ U.S. Constitutional Law is simply not developed either in terms of positive obligations of the government that might in turn affect interpersonal relations, or in terms of constitutional obligations that individuals owe each other directly.

However, aside from its Lockean traditions, thanks to its superpower status, the United States also has less of a need to assume international law obligations than smaller nations. One need not take a Realist position that economic and political power are all that matter in international relations to argue that at least at the mar-

Human Rights. Brief for the Respondent in Opposition at 29-32, *Garza v. Lappin*, 533 U.S. 924 (2001) (No. 00-10631).

15. *Lenahan v. United States*, Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011).

16. *Town of Castle Rock*, 545 U.S. at 756, 761.

17. *Brentwood Academy v. Tennessee Secondary School Athletic Assn.*, 531 U.S. 288, 296 (2001). The requirement of State Action first gets developed in *The Civil Rights Cases: United States v. Stanley*, 109 U.S. 3 (1883).

18. Discussed *infra* at notes 46-74 and accompanying text.

19. See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79 (1938) (the U.S. Supreme Court rejecting the notion of the Common Law as a “transcendental body of law”).

20. See e.g., JOHN XXIII, ENCYCLICAL LETTER MATER ET MAGISTRA (1961), available at <http://www.papalencyclicals.net/John23/j23mater.htm>); POPE FRANCIS, ENCYCLICAL LETTER EVANGELII GAUDIUM ¶¶ 52-60 (2013) available at http://www.vatican.va/holy_father/francesco/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium_en.html.

gins, superpowers that have alternatives to collaboration and coordination, and which therefore enjoy options that smaller nations lack, face a weaker set of incentives compared to smaller nations to bind themselves to international law norms that treat all nations as equals.²¹ Similarly, superpowers often face weaker incentives to accept dispute resolution mechanisms that neutralize power-based advantages.²² One might even expect that self-interested smaller nations will think twice before criticizing the United States for its international law practices, because of the value of being perceived by the United States as an ally, unless the issue directly concerns them. This is not to say that superpowers have no interest in international law. Sometimes international law may offer the means for securing a uniform regulatory mechanism or of establishing and legitimizing dominance—as is the case with present design of the United Nations Security Council and the veto enjoyed by its permanent members.²³ Nevertheless, one would expect the government of a superpower to show greater reluctance to undertake international human rights obligations that may upset domestic constituencies than would be the case with a smaller nation with fewer alternatives to collaboration in its international relationships.²⁴

Proving cause and effect is impossible, but the superpower status of the United States is at least a plausible, partial explanation for its limited domestic engagement with international human rights law. The United States is one of only three members of the United Nations not to have ratified the Convention on the Rights of the Child,²⁵ is one of only seven UN members not to ratify the Convention on the Elimination of All Forms of Discrimination Against Women,²⁶ has yet

21. Andrew Moravcsik, *The Paradox of U.S. Human Rights Policy*, in AMERICAN EXCEPTIONALISM *supra*. note 5, at 147, 150, 167-68; see generally Shirley V. Scott, *Is There Room for International Law in Realpolitik?: Accounting for the US Attitude Towards International Law*, 30 REV. INT'L STUD. 71, 73-81 (2004) (offering an overview of Realist views of how U.S. approaches towards international law have changed as its power has increased).

22. Nico Krisch, *International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order*, 16 EUR. J. INT'L L. 369, 377 (2005).

23. U.N. Charter art. 23 para. 1 and art. 27 para. 3 (creating the Security Council and voting rules giving the five permanent members a veto).

24. See Krisch, *supra* note 22 at 371, 374, 377 (describing powerful nations as using international law as a tool for regulating other nations, for pacification, as a tool for stabilizing their dominance, and as a way to legitimize their domination).

25. Convention on the Rights of the Child, *opened to signature* Nov. 20, 1989, 1577 U.N.T.S. 3 available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-11&chapter=4&lang=en. Compare *Multilateral Treaties Deposited with the Secretary-General*, ch. IV, at 389-91, U.N. Doc. ST/LEG/SER.E/26 (2009) [hereinafter *MTDSG*], with *Member States of the United Nation*, U.N., <http://www.un.org/en/members/> (last visited Jan. 19, 2014).

26. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Dec. 18, 1979, 1249 U.N.T.S. 13. Compare *MTDSG*, *supra* note 25 at 284-86, available at http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtmsg_no=IV-8&chapter=4&lang=en, with *Member States of the United*

to ratify the International Covenant on Economic, Social and Cultural Rights—though it signed the Convention in 1979,²⁷ and is one of the few nations in the Americas not to have ratified the American Convention on Human Rights.²⁸ But perhaps even more striking, when the United States ratifies an international human rights treaty, it does so in a manner designed to ensure no impact on U.S. domestic practice.²⁹ For example, in the case of the International Covenant on Civil and Political Rights, not only did the United States provide that the Covenant was to be deemed non-self-executing by U.S. Courts,³⁰ and also declared that the Covenant was never to be interpreted in a manner inconsistent with the U.S. Constitution,³¹ but extensive U.S. reservations, declarations and understandings were designed to ensure that there would be a reservation, declaration or understanding whenever an aspect of the Covenant might require a change in U.S. practice, so that no domestic changes would be needed.³² Obviously in such a context, the Covenant could hardly influence U.S. public law, let alone private law. Every few years, the U.S. Supreme Court has cited foreign or international practice for additional support for change in an area where existing U.S. practice was strikingly divergent from the international norm, such as with a State statute that criminalized sodomy,³³ death sentences for crimes committed by defendants as juveniles,³⁴ and life imprisonment of juveniles without possibility for parole for crimes other than homicide.³⁵ However the U.S. Supreme Court never uses international human rights law to indicate that the United States is bound by foreign or international practice in interpreting fundamental rights under the Constitution.

Nation, *supra* note 25. See generally Convention to the Elimination of All Forms of Discrimination Against Women, opened for signature Dec. 18, 1979, 1249 U.N.T.S. 13.

27. See *MTDSG*, *supra* note 25, at 182-84, available at http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-3&chapter=4&lang=en. See generally International Covenant on Economic, Social and Cultural Rights, opened for signature Dec. 16, 1966, 993 U.N.T.S. 3.

28. American Convention on Human Rights, Org. Am. States, available at http://www.oas.org/dil/treaties_B-32_American_Convention_on_Human_Rights_sign.htm (last visited Jan. 19, 2014). See generally American Convention on Human Rights, opened to signature Nov. 21, 1969, 1144 U.N.T.S. 143.

29. Louis Henkin, *U.S. Ratification of Human Rights Conventions: The Ghost of Senator Bricker*, 89 AM. J. INT'L L. 341, 341 (1995); see also Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 416-22 (2000).

30. S. Comm. on Foreign Relations, Report on the Int'l Covenant on Civil and Political Rights, S. Exec. Rep. No. 102-23, at 19 (1992) reprinted in I.L.M. 645, 657.

31. *Id.*

32. *Id.* at 650; see also Michelle S. Friedman, *The Uneasy U.S. Relationship with Human Rights Treaties: The Constitutional Treaty System and Nonself-Execution Declarations*, 17 FLA. J. INT'L L. 187, 219-24 (2005).

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

34. *Roper v. Simmons*, 543 U.S. 551, 575-77 (2005).

35. *Graham v. Florida*, 130 S.Ct. 2011, 2024-33 (2010).

Finally, federal systems like that of the United States, where negotiation of treaties lies with the Federal government while the formulation of most private law lies with the States, will tend to lag in the incorporation of international human rights law into private law, because the entity assuming the international human rights obligation is not the entity carrying it out. It stands to reason that State authorities who are elected with no reference to their political positions on foreign policy and whose official roles only exceptionally involve international relationships will not typically be heavily invested in incorporating international law into local law. Given the manner in which State authorities in the United States have repeatedly ignored orders by the International Court of Justice (ICJ) that they halt pending executions³⁶—in scenarios where there was no question that the ICJ enjoyed jurisdiction and that an execution would violate U.S. international obligations³⁷—it is hard to imagine most State legislators and governors feeling obligated to incorporate international human rights law into private law. There are exceptions. Sometimes a liberal municipality will adopt a resolution that takes account of an important human rights instrument,³⁸ but these limited initiatives have certainly not affected private law. Rather, a move is now underway in many conservative States to legislatively ban all citation of foreign, Islamic and/or international law by State courts.³⁹

THE EXCEPTIONS: NONDISCRIMINATION AND FREEDOM OF EXPRESSION

In spite of the forces that push against application of international human rights and fundamental rights concepts to private law in the United States, principles of nondiscrimination and protection of freedom of expression are two areas where fundamental rights

36. Angel Breard (a citizen of Paraguay executed in Virginia in 1998) and Karl Lagrand (a citizen of Germany executed in Arizona in 1999) were both executed in violation of provisional orders of the ICJ, and José Medellín (a citizen of Mexico executed in Texas in 2008) was executed in violation of a final judgment of the ICJ. Johanna Kalb, *Dynamic Federalism in Human Rights Treaty Implementation*, 84 TUL. L. REV. 1925, 1036-44 (2010); Jesse Townsend, Note, *Medellín Stands Alone: Common Law Nations Do Not Show a Shared Poststratification Understanding of the ICJ*, 34 YALE J. INT'L L. 463, 468-72 (2009); see also Anthony S. Winer, *An Escape Route from the Medellín Maze*, 25 CONN. J. INT'L L. 331, 346-53 (2010).

37. Kalb, *supra* note 36 at 1036-44; Townsend, *supra* note 36 at 468-72; Winer, *supra* note 36 at 346-53.

38. See Judith Resnik, *Law's Migration: American Exceptionalism, Silent Dialogues, and Federalism's Multiple Ports of Entry*, 115 YALE L.J. 1564, 1647-56 (2006).

39. The Brennan Center for Justice at New York University School of Law has conducted a study of the initiatives, noting five States that have now banned the use of foreign law, and many more with legislative proposals for bans. FAIZA PATEL, MATTHEW DUSS, & AMOS TOH, *FOREIGN LAW BANS: LEGAL UNCERTAINTIES AND PRACTICAL PROBLEMS* (2013) available at <http://www.brennancenter.org/sites/default/files/publications/ForeignLawBans.pdf>.

have had an important impact on private law. Both, however, are areas that to some extent prove the rule.

Nondiscrimination in private relations, unlike most situations that might apply basic rights to private law, fits Lockean principles, and also emerged in a unique foreign policy context where the U.S. faced exceptionally high costs if it failed to domestically incorporate nondiscrimination aspects of international human rights law. Nondiscrimination principles applied to private relations are consistent with John Locke's emphasis on toleration,⁴⁰ even if they move beyond his primary concern of equality under the law.⁴¹ Moreover, desegregation in the United States occurred during the Cold War, a time of ideological battle with the Soviet Union when the United States found it important to show the world that it respected human rights. While there was only a limited international element to the forces that led to the end of segregation in the United States and to the Civil Rights Act of 1964, which outlawed discrimination on the basis of race or gender in the workplace or places of public accommodation,⁴² the situation was one where U.S. foreign policy objectives required domestic change.⁴³

Without doubt, principles of nondiscrimination have become central to many aspects of private law. As will be discussed, the most important areas are nondiscrimination in housing, in the workplace, and in hotels, restaurants and other places of public accommodation, and the protections today cover discrimination on the basis of race, ethnicity, religion, gender, disability, and age, with the protections varying somewhat according to the classification. Further, many States provide for nondiscrimination on the basis of sexual orientation, and the family law field is quickly moving to accept gay marriage.

The story of the battle against private discrimination in housing in the United States begins with a constitutional decision where the U.S. Supreme Court stretched the boundaries of the requirement that the Constitution only provides protection against government action, not private conduct. In 1948, in *Shelley v. Kraemer*, the Supreme Court held that it was unconstitutional for courts to grant

40. See JOHN LOCKE, A LETTER CONCERNING TOLERATION (1689), reprinted in 35 GREAT BOOKS OF THE WESTERN WORLD 2-24 (Robert Maynard Hutchins ed., 1952)

41. See JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT ¶¶ 87-94 (Thomas P. Peardon ed., Bobbs-Merrill 1952) (1690).

42. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 2 U.S.C., 28 U.S.C., and 42 U.S.C.). Title II outlaws discrimination in places of public accommodation and Title VII outlaws discrimination in employment.

43. See generally MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY (2000) (describing the role of the Cold War in the civil rights struggle in the United States given the need for the United States to win its international ideological battle with Communism).

relief to enforce a racially restrictive covenant.⁴⁴ This decision ended the practice of homeowners maintaining the ethnic purity of their neighborhood through provisions in their deeds that excluded African Americans and other minorities from purchasing or occupying homes, since it found that for the courts to enforce such covenants involved the state in unconstitutional race discrimination and constituted state action.⁴⁵ In 1968, Congress passed the Fair Housing Act as Title VIII of the Civil Rights Act.⁴⁶ The Fair Housing Act initially prohibited discrimination in the sale or rental of real estate and the provision of related services because of race, color, religion or national origin,⁴⁷ an amendment to the Act in 1974 added gender as a protected class,⁴⁸ and a further amendment in 1988 added families with children and the disabled.⁴⁹ There is an enormous case law applying the Act,⁵⁰ and remedies include not only both injunctive relief and damages,⁵¹ but punitive damages⁵² and attorneys' fees.⁵³

Employment discrimination legislation offers an even more striking example of a far-reaching change in private legal relationships out of at least implicit human rights concerns. The primary vehicle for the prevention of employment discrimination is Title VII of the Civil Rights Act of 1964,⁵⁴ and today it applies not just to intentional discrimination,⁵⁵ but to hiring standards that have a disparate impact on protected groups.⁵⁶ The statute bars discrimination based on race, color, religion, gender or national origin,⁵⁷ and after shifting case law⁵⁸ that led to Congressional amendment,⁵⁹ today essentially

44. *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (1948).

45. *Id.* A later U.S. Supreme Court decision, *Jones v. Alfred H. Meyer Co.*, allowed the application of 42 U.S.C. §1982, from the Civil Rights Act of 1866, which bars discrimination in housing, by giving a narrow reading to *The Civil Rights Cases*, 109 U.S. 3 (1883). See 392 U.S. 409, 420 n. 25 (1968). But this provision has had far less impact than the Fair Housing Act of 1868 discussed below.

46. Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (codified at 42 U.S.C. §§3601-3619 (2014)).

47. Pub. L. No. 90-284, Title VIII, § 804, 82 Stat. 83 (1968).

48. Housing and Community Development Act of 1974, Pub. L. No. 93-383, Title VIII, § 808(b)(1), 88 Stat. 729 (codified in scattered sections of 42 U.S.C.).

49. The Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ 6(a)-(b)(2), (e), 15, 102 Stat. 1620, 1622, 1623 (codified at 42 U.S.C. §§ 3601-3169, 3631, and §§ 2341-2342 (2013)).

50. See cases and commentary in 1 RODNEY A. SMOLLA, *FEDERAL CIVIL RIGHTS ACTS* §§ 3:11-3:87 (2d ed. 2013).

51. 42 U.S.C. §3613(c)(1).

52. *Id.*

53. 42 U.S.C. §3613(c)(2).

54. Pub. L. No. 88-352, 78 Stat. 241, 253 (1964) (codified at 42 U.S.C. §2000e *et seq.*).

55. 42 U.S.C. §2000e-2(a)-(d), 2000e-3.

56. 42 U.S.C. §2000e-2(k).

57. Pub. L. No. 88-352, Title VII, §703-04, 78 Stat. 255-58.

58. Compare *Griggs v. Duke Power Co.*, 401 U.S. 424, 431-432 (1971) (ruling Title VII forbids employers from using "testing or measuring procedures" that are "artificial, arbitrary, and unnecessary barriers to employment" to discriminate against

provides that employment practices that have a disparate impact on the protected groups violate the Act unless the practice is required by a business necessity—understood as important skills, abilities and knowledge necessary for successful performance of the job.⁶⁰ Employers are also expected to eliminate workplace harassment of employees by fellow employees.⁶¹ Violations of the statute can lead to damages for “front pay” (damages for earnings that the plaintiff might have received),⁶² back pay,⁶³ injunctive relief,⁶⁴ and attorneys’ fees.⁶⁵ In addition, the Age Discrimination in Employment Act,⁶⁶ passed in 1967, prohibits discrimination based on age against persons over forty in hiring, firing and promotions,⁶⁷ in terms very similar to Title VII of the Civil Rights Act of 1964, as does the Americans with Disabilities Act of 1990⁶⁸ for those suffering physical or mental impairment, and for whom reasonable accommodation in the workplace is possible.⁶⁹

Finally, Title II of the Civil Rights Act of 1964⁷⁰ prohibits discrimination based on race, color, religion, or national origin, in places of public accommodation—such as hotels, restaurants, and places of entertainment—provided that the establishment is one “affecting interstate commerce.”⁷¹ The requirement of “affecting interstate commerce,” a clause necessitated by the limited legislative authority of the Federal government vis-à-vis the States, has been interpreted broadly, so that few, if any, hotels, restaurants and entertainment venues are not covered.⁷² The statute does not reach private clubs,⁷³

protected classes), *with* *Wards Cove Packaging Co. v. Atonio*, 490 U.S. 642, 659 (1989) (holding a legitimate employment qualification does not require the “practice be ‘essential’ or ‘indispensable’ to the employer’s business”).

59. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991).

60. *Id.* at §105 (codified at 42 U.S.C. §2000e-2(k)(1)(A)(i)).

61. *Van Zant v. KLM Royal Dutch Airlines*, 80 F.3d 708 (2d Cir. 1996).

62. *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998) (ruling front pay as falling under “other equitable relief”).

63. Pub. L. No. 88-352, Title VII, § 706(g), 78 Stat. 241, 261 (1964) (codified at 42 U.S.C. §2000e-5(g)).

64. *Id.*

65. *Id.* at §706(k) (codified at 42 U.S.C. §2000e-5(k)).

66. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634).

67. 29 U.S.C. §§ 623.

68. Pub. L. No. 101-336, 104 Stat. 328 (1990) (codified at 42 U.S.C. §§ 12101-12213).

69. 42 U.S.C. §§ 12102(1) and 12112(a)-(b).

70. Pub. L. No. 88-352, Title II, § 201, 78 Stat. 241, 243 (1964) (codified at 42 U.S.C. §2000a-2000a-6).

71. 42 U.S.C. §2000a(a)-(b).

72. *See Heart of Atlanta Motel, Inc. v. U.S.*, 379 U.S. 241, 258 (1964) (finding that a hotel affects interstate commerce); *Katzenbach v. McClung*, 379 U.S. 294, 301-303 (1964) (a restaurant serving a primarily local clientele nevertheless affects interstate commerce); *Daniel v. Paul*, 395 U.S. 298, 305 (1969) (a recreational facility with a snack bar that sold items with ingredients coming from other States was held to affect interstate commerce).

73. 42 U.S.C. §2000a(e).

but was central in ending the system of apartheid in public places that existed in the United States until the 1960's.⁷⁴

The above are only the most important nondiscrimination provisions in the Federal system in the United States, and virtually every State in the United States also has anti-discrimination legislation.⁷⁵ However the most important new area where principles of non-discrimination have come into play in recent years is in measures protecting individuals based on sexual orientation. Many States in the United States today have legislation barring many types of discrimination by businesses and individuals based on sexual orientation,⁷⁶ and over a dozen States have provided for gay marriage, whether as a result of judicial decisions or legislation.⁷⁷ Moreover, after a decision in 2013 barring discrimination against married gay couples in the provision of Federal benefits,⁷⁸ a U.S. Supreme Court decision upholding a Constitutional right to gay marriage is likely only a few years away, at most. This is also an area where it could be argued the U.S. Supreme Court has been influenced by international human rights practice, since while it has not yet cited international practice on the gay marriage issue, in 2003, it did make use of European human rights case law in its decision holding that the criminalization of sodomy was unconstitutional, in the case of a statute that specifically criminalized gay sodomy.⁷⁹

Freedom of expression is the other fundamental rights area that affects private law. The protection that Freedom of Expression receives in the United States today owes far more to John Stuart Mill than to John Locke,⁸⁰ and often varies from the Lockean scenario of

74. See Linda C. McLain, *Involuntary Servitude, Public Accommodations Laws and the Legacy of Heart of Atlanta Motel, Inc. v. United States*, 71 Md. L. REV. 83, 99-104 (2011).

75. See generally EMPLOYMENT LAW BASICS [ELT], 50-STATE SURVEY OF DISCRIMINATION LAWS <http://www.elt.com/resources/integrity-suite/discrimination-laws/> (last visited Jan. 19, 2014); West, *50 State Statutory Surveys: Employment: Private Employment, Unlawful Discrimination*, 0060 SURVEYS 25 (2012). California, for example, provides for nondiscrimination on the basis of "sex, race, color, religion, ancestry, national origin, disability, medical condition, genetic information, marital status, or sexual orientation" in all business establishments of any kind. West's Ann. Cal. Civ. Code § 51.

76. *Non-Discrimination Laws: State by State Information Map*, AMERICAN CIVIL LIBERTIES UNION (Sept. 21, 2011), <https://www.aclu.org/maps/non-discrimination-laws-state-state-information-map>.

77. See *Gay Marriage*, PROCON.ORG (Jan. 6, 2014), <http://gaymarriage.procon.org/view.resource.php?resourceID=004857> (CA, CT, IA, MA, NJ, and NM by court decision; DE, HI, IL, MN, NH, NY, RI, and VT by state legislation; ME, MD, WA by popular vote).

78. *United States v. Windsor*, 133 S.Ct. 2675 (2013).

79. *Lawrence v. Texas*, 539 U.S. 558, 560, 572-73 (2003).

80. On Mill's influence, see Jeremy J. Ofseyer, *Taking Liberties with John Stuart Mill*, 1999 ANN.SURV.AM.L. 395, 395 (1999); Vincent Blasi, *Shouting "Fire!" in a Theater and Vilifying Corn Dealers*, 39 CAP.U.L.REV. 535, 536-37 (2011); Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U.L. REV. 647, 702-03 (2013).

an individual pitted against government action. Freedom of expression directly affects private law in the areas of defamation and infliction of emotional distress. Nevertheless, the justification that leads free speech to trump traditional private law's protection of personal reputation does not lie in the notion of a fundamental right inherent in individual human needs or in self-realization, but in societal needs. Thus the landmark decision of *New York Times v. Sullivan*⁸¹ justifies enhanced protection of defendants in the defamation context not because of a fundamental right of the defendant, but because of a societal need for free debate, arguing that "[t]he constitutional safeguard . . . 'was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people.'"⁸² The value expressed is "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means."⁸³ *New York Times v. Sullivan* held that a defamation action by a public official relating to official conduct requires proof "that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not,"⁸⁴ and the standard has been further expanded to apply both to public figures generally⁸⁵ and to the tort of intentional infliction of emotional distress.⁸⁶ Clearly freedom of expression concerns have required important changes to private law, which had established liability for simply harming the reputation of an individual in the community through a negligent communication.⁸⁷ Yet even though freedom of expression is often described as a fundamental right, it is a bit of a misnomer to consider the constitutionalization of U.S. defamation law an example of fundamental rights case law that modifies private law, since the rights do not exist because of needs of the individual but because of needs of society. The individual does not have a personally endowed fundamental rights claim that prevails over the private interests of others, but rather the individual asserts a broader societal interest in free debate that affects private rights.

In the end, while there is no doubt that fundamental rights concepts have influenced the development of equal protection and free

81. *New York Times v. Sullivan*, 376 U.S. 254 (1964).

82. *Id.* at 269.

83. *Id.*

84. *Id.* at 279-80.

85. *Gertz v. Welch*, 418 U.S. 323 (1974); see also 3 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH §23:4 (2013) (Thomson Reuters West ed., 2013).

86. *Hustler Magazine v. Falwell*, 485 U.S. 46, 49 (1988); see also 5 RONALD D. ROTUNDA AND JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §20.33(f) (5th ed. 2012).

87. PROSSER AND KEETON ON TORTS, §111 (5th ed. 1984); SECOND RESTATEMENT OF TORTS §§558, 559 (1977).

speech law in the United States with a corresponding impact on private law, these are exceptional areas, and neither are developed primarily with reference to international human rights. Moreover, recent U.S. Supreme court case law points towards a diminishing, not increasing role for international human right in U.S. private law, at least in the short-term.

CONCLUSION: LITTLE CHANGE ON THE HORIZON

Until recently, while the exceptionalism described in this article undoubtedly meant that the United States lagged in the incorporation of international human rights law into its legal system, certain important U.S. Supreme Court precedents nevertheless offered some hope for the future. Under the U.S. Supreme Court decision in *Missouri v. Holland* in 1920,⁸⁸ it seemed clear that treaties were a source of Federal government authority and that Congress enjoyed virtually unlimited authority vis-à-vis the States to pass legislation implementing a treaty commitment.⁸⁹ The *Missouri v. Holland* precedent meant that Congress could at least potentially reshape domestic law in implementing international human rights treaties, even though it has never chosen to do so.⁹⁰ Moreover, in 2004 in *Sosa v. Alvarez Machain*,⁹¹ the U.S. Supreme Court permitted a limited incorporation of international human rights law into U.S. tort law when it held that under the Alien Tort Statute⁹² a foreigner bringing an action in a U.S. District Court for a tort committed in violation of the Law of Nations could use sufficiently specific and well-established norms of international law as the basis for an action—treating such norms as part of U.S. law for the purposes of such a law suit.⁹³ However, under Chief Justice John Roberts, the U.S. Supreme Court seems to be headed in a more restrictive direction.

First, it is becoming increasingly likely that the U.S. Supreme Court, out of federalism concerns, will place some limits on the ability of Congress to legislate in the implementation of treaty commitments. In 2008, in *Medellin v. Texas*,⁹⁴ the Supreme Court hinted rather broadly that Presidential power to give effect to a treaty com-

88. *Missouri v. Holland*, 252 U.S. 416 (1920).

89. *Id.* at 434; see also RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §302 cmt. C, §303 cmt. C (1987) (noting that the Treaty Power has no limits as to its subject matter and that *Missouri v. Holland* establishes that Congress may legislate by virtue of a treaty in areas that it could not legislate in the absence of a treaty).

90. See Curtis A. Bradley & Jack L. Goldsmith, *Treaties, Human Rights, and Conditional Consent*, 149 U. PA. L. REV. 399, 411-12 (2000); Ana Maria Merico-Stephens, *Of Federalism, Human Rights, and the Holland Caveat: Congressional Power to Implement Treaties*, 25 MICH J. INT'L L. 265, 267-68 (2004).

91. *Sosa v. Alvarez Machain*, 542 U.S. 692 (2004).

92. 28 U.S.C. §1350 (2013).

93. 542 U.S. at 724-25.

94. *Medellin v. Texas*, 552 U.S. 492 (2008).

mitment could be lessened when it infringes the traditional authority of the States. The decision itself held unconstitutional a memorandum issued by President George W. Bush in which he ordered State courts to comply with a decision of the International Court of Justice that required hearings for Mexicans on death row in the United States whose rights had been violated under the Vienna Convention on Consular Relations.⁹⁵ While the decision did not deal with federalism specifically, but with the extent of Presidential authority in the context of what the Court deemed a non-self-executing treaty obligation, the Court noted that it had greater concern when Presidential action in the foreign affairs area displaced State law.⁹⁶ As of January 2014, the Supreme Court has pending before it the case of *Bond v. United States*,⁹⁷ which will consider to what extent Congress may act in areas typically covered by State law in passing legislation implementing the Chemical Weapons Convention,⁹⁸ and given the Court's decision to hear the case, there is a significant possibility that the Court will place limits on the authority of Congress in implementing a treaty. Conservative figures like Texas Senator Ted Cruz have called for the Court to halt the giving away of the policy making power of the States and the autonomy of U.S. citizens to international actors.⁹⁹

Second, in 2013, in *Kiobel v. Royal Dutch Petroleum*,¹⁰⁰ in strictly limiting the application of the Alien Tort Statute where the wrongful conduct has occurred outside of the United States, the Supreme Court rejected the possibility that international human rights law, because of its universal nature, could form the basis of a cause of action before a U.S. court when the conduct has arisen outside of the United States.¹⁰¹ While the *Sosa* decision had opened the door to treating international human rights law as a type of federal common law for at least a limited range of cases involving foreigners, the *Kiobel* decision has sharply limited its scope of application. Interpretation of the Alien Tort Statute has sometimes been perceived as a culture war between progressives who wish the widest possible embrace by the United States of international human rights law, and conservatives, who fear retaliation by other nations and who emphasize U.S. values of federalism and limited government, and who therefore favor limited incorporation of international human rights

95. *Id.* at 523-32. The Memorandum appears at *id.* at 503.

96. *Id.* at 528.

97. *Bond v. United States*, 133 S.Ct. 978 (Mem) (2013) (granting cert.).

98. See Brief for the Petitioner at i-ii, *Bond v. United States*, 2013 WL 1963862 (2013) (No. 12-158) (Questions Presented).

99. Ted Cruz, *Limits on the Treaty Power*, 127 HARV. L. REV. F. 93, 93-94 (2014).

100. *Kiobel v. Royal Dutch Petroleum Co.* 133 S.Ct. 1659 (2013).

101. *Id.* at 1669.

law into U.S. law.¹⁰² At least for the moment, the progressives have lost.

Perhaps a future generation in the United States will reconsider the relative impermeability of U.S. domestic law to international human rights law and the need to consider fundamental rights as embracing more than protection of the individual from government. Unfortunately present judicial and legislative attitudes do not offer much hope. To the extent that the projection of U.S. influence depends upon encouraging the development of a shared set of values with the rest of the world, the United States will find itself hobbled if it cannot work towards the domestic incorporation of evolving understandings of international human rights.

102. See David J. Biderman, *International Law Advocacy and Its Discontents*, 2 CHI. J. INT'L L. 475, 476-89 (2001).

The Contractualization of Family Law in the United States†

TOPIC II. A

This article is the word-restricted response of the authors as the U.S. national reporter to an expansive request of the International Academy of Comparative Law (IACL) issued to the reporters of twenty-one different member nations.¹ As any U.S. report on family law requires discussion of the varied laws of the fifty U.S. states, our report necessarily contains a vast summary component with broad generalizations in order to provide the requested context for U.S. law. The authors also explore larger themes and scholarship in order to illustrate some of the important developments and theories advanced by U.S. lawyers and scholars in the areas discussed.

I. BASIC FRAMEWORK FOR U.S. FAMILY LAW

A. Family Law as a State Prerogative

The legal system of the United States is a system of separation of powers, “both vertically (along the axis of federal, state and local authority) and horizontally (along the axis of legislative, executive, and

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1. In summary, the IACL requested, *inter alia*, that the authors, within 10,000 words, situate family law within the U.S. legal system; describe the applicability of international instruments in U.S. family law; describe any general boundaries of contractual freedom in family law; describe the types of intimate partnerships legally recognized by U.S. law, the legal conditions of formation and dissolution and whether it is possible contractually to opt in or opt out of these default rules (horizontal family law); describe the parent-child relationship, if and how one might establish legal parenthood contractually, e.g. through artificial insemination (vertical family law); describe whether legal parents may contract with civil effect in regard to a host of decisions regarding children, particularly upon divorce or separation; describe which ADR-techniques apply in family law matters and how they apply; describe whether or not family law agreements need judicial approval and which conditions and standard of judicial review apply; and, describe the standard of judicial review, if any, in regard to modifying a family law agreement.

judicial authority).² Substantive family law, as understood in its narrow sense as the laws governing the entrance and exit from marriage and all related ancillary issues, e.g. marital property division, spousal support, child custody, child support, is a state prerogative.³ The Tenth Amendment to the U.S. Constitution generally secures this authority for the states.⁴ Adhering to a common law system within this framework of federalism, the states adopt statutes and procedural rules governing these areas of family law, as narrowly defined, and the highest state courts interpret and apply the resulting rules and regulations, issuing binding decisions that have precedential value upon lower state courts and in effect become the substantive family law.

B. Federal Family Law

The fact that the states exercise authority over family law generally does not mean that federal law has no role in governing the family.⁵ As just one example, there exist over a thousand federal laws in which “federal rights and benefits are conditioned upon marital or spousal status.”⁶ In the area of child support, the federal government takes an instructive role, through federal legislation requiring states to identify parents and create state child support guidelines.⁷ Further, efforts of the Uniform Law Commission to create uniform laws among the states have resulted in various draft legislation, some of which the states have adopted.

The U.S. Supreme Court has issued opinions on family law issues, addressing topics such as abortion, termination of parental rights, and state criminalization of sexual conduct.⁸ These decisions, the authors argue, deal generally with an individual’s right to privacy, an individual’s right to make decisions regarding the most intimate aspects of her life, free from intrusion by the government or

2. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 7 (3d ed. 2000).

3. *United States v. Windsor*, 133 S. Ct. 2675, 2691 (2013); *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12-13 (2004); *Rose v. Rose*, 481 U.S. 619, 625 (1987).

4. *Lavine v. Cincent*, 401 U.S. 531 (1971).

5. See David D. Meyer, *The Constitutionalization of Family Law*, 42 *FAM. L.Q.* 529, 539 (2008); See also, Ann Laquer Estin, *Family Law Federalism: Divorce and the Constitution*, 16 *WM. & MARY BILL RTS. J.* 381, 383 (2007); Libby S. Adler, *Federalism and Family*, 8 *COLUM. J. GENDER & L.* 197 (1999).

6. *Windsor*, 133 S. Ct. at 2683 (2013).

7. See, e.g., *Personal Responsibility and Work Opportunity Reconciliation Act*, Pub. L. No. 104-193, 110 Stat. 2105 (1996) (conditioning federal funding for state welfare programs on implementation of state programs to establish paternity and enforce child support payments); *Family Support Act*, Pub. L. No. 100-485, 102 Stat. 2345 (1988) (conditioning federal funding for child support enforcement on state establishment of presumptive child support guidelines.)

8. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Santosky v. Kramer*, 455 U.S. 745, 758-759 (1982); *Lawrence v. Texas*, 539 U.S. 558 (2005); see also Linda D. Elrod, *The Federalization of Family Law*, 36 *HUM. RTS.* 6 (2009).

others, a right generally carved out of the guarantees of the U.S. Constitution and the Bill of Rights.⁹

The Supreme Court recently considered same-sex marriage. In *U.S. v. Windsor*, the Court declared key provisions of the federal Defense of Marriage Act (DOMA) unconstitutional. DOMA, enacted by the U.S. Congress in 1996, before any state had legalized same-sex marriage, prevented federal recognition of any same-sex marriage lawfully granted by any U.S. state.¹⁰ By the time of this writing, thirteen of the fifty U.S. states permit same-sex marriage.

The authors assert that *U.S. v. Windsor* presents evolving U.S. jurisprudence, extending beyond the right to privacy, that people acquire a constitutionally protected public dignity and status through marriage, as do their children,¹¹ that the government cannot diminish by refusing legal recognition.¹² Logically following *Loving v. Virginia*,¹³ which commands legal recognition of interracial marriages, this jurisprudence should lead to the conclusion that no state can refuse legal recognition of valid out-of-state same-sex marriages, and, eventually, should invalidate state laws denying marriage licenses for same-sex marriages.¹⁴ These latter two developments have not yet occurred, but are surely on the horizon.

9. See James Q. Whitman, *The Two Western Cultures of Privacy: Dignity Versus Liberty*, 113 YALE L.J. 1151, 1161-62 (2004).

10. The U.S. Supreme Court this year also considered *Hollingsworth v. Perry*, 133 S. Ct. 2652 (2013) held that proponents of a state law banning same-sex marriage (Proposition 8) lacked standing to appeal a lower federal court decision that the law was unconstitutional. Although there was no substantive discussion of same-sex marriage, *Hollingsworth* effectively means that Proposition 8 is gone. Without Proposition 8, California officials are free to resume issuing marriage licenses for same sex couples, and these marriages will have full status and recognition under the laws of the state of California.

11. *Windsor*, 133 S. Ct. at 2693 (“And [DOMA] humiliates tens of thousands of children now being raised by same-sex couples. The law in question makes it even more difficult for the children to understand the integrity and closeness of their own family and its concord with other families in their community and in their daily lives.”). Macarena Saez, immediately following the issuance of the decision, commented on the prevalent use of the word “dignity” in the decision and the ways in which this prevalence perhaps represents both a transplant from foreign jurisprudence but also a newer “American” understanding of a dignity-conferring institution of marriage, oral comments at a forum following the decision, American University, Washington College of Law (June 27, 2013); see also Melissa Murray, *What’s So New About the New Illegitimacy?*, 20 AM. U. J. GENDER, SOC. POL’Y & LAW 387, 417 (2012) (decrying the reappearance of previously denounced illegitimacy as the new rationale for striking down same-sex marriage prohibitions which purportedly harm children of same-sex couples by making it impossible for their parents to be married).

12. *Windsor*, 133 S. Ct. at 2693 (“DOMA undermines both the public and private significance of state-sanctioned same-sex marriages; for it tells those couples, and all the world, that their otherwise valid marriages are unworthy of federal recognition.”).

13. *Loving v. Virginia*, 388 U.S. 1, 11 (1967); see also *Zablocki v. Redhail*, 434 U.S. 374, 384 (1978) (“The right to marry is of fundamental importance for all individuals.”).

14. See *Windsor*, 133 S. Ct. at 2709 (Scalia, J., dissenting) (foreshadowing this development); See also Jeffrey Toobin, *Adieu, DOMA!*, THE NEW YORKER (July 8, 2013) http://www.newyorker.com/talk/comment/2013/07/08/130708taco_talk_toobin.

C. *International Family Law*

International law also affects U.S. family law in disputes implicating specific international conventions to which the U.S. is a signatory.¹⁵ For example, the Hague Convention on the Civil Aspects of International Child Abduction provides procedures for the return of children unlawfully removed from or retained outside of the country of their habitual residence.¹⁶ The Hague Convention on Protection of Children and Cooperation in Respect of Intercountry Adoption regulates international adoption.¹⁷ These Conventions respectively provide procedures for the return of children unlawfully removed from or retained outside the state of their habitual residence and regulate international adoption.¹⁸ Even though these conventions are important human rights instruments, they have spurred criticism among U.S. scholars.¹⁹ These scholars have disputed the goals and implementation of the Convention on Adoption, some arguing that it should be less burdensome and encourage international adoption,²⁰ others arguing that international adoption abuses such as child-buying and coercion abound, and strict regulation is necessary and desirable in order to protect vulnerable birth parents.²¹

Finally, prominent Human Rights norms advanced by regional courts such as the European Court of Human Rights interpreting Article 8 of the ECHR famously influenced the U.S. Supreme Court

15. See D. KELLY WEISBURG & SUSAN FRELICH APPLETON, *MODERN FAMILY LAW* 857 (5th ed. 2013). See generally Anne Laquer Estin, *Families Across Borders: The Hague Children's Conventions and the Case for International Family Law in the United States*, 62 FLA. L. REV. 47, 80-84 (2010); Barbara Stark, *The Internationalization of American Family Law*, 24 J. AM. ACAD. MATRIMONIAL LAW. 467, 469 (2012); Merle H. Weiner, *Codification, Cooperation, and Concern for Children: The Internationalization of Family Law in the United States Over the Last Fifty Years*, 42 FAM. L.Q. 619, 635-37 (2008). With respect to International Human Rights instruments affecting family law, women and children, the U.S. has failed to ratify some significant human rights instruments, such as the Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 13, and the Convention on the Rights on the Child, *opened for signature* on Nov. 20, 1989, 1577 U.N.T.S. 3.

16. Implemented in the U.S. through the International Child Abduction Remedies Act (ICARA), 42 U.S.C. §§ 11601-11610, and 22 C.F.R. §§ 94.1-94.8 (2013). See Linda D. Elrod & Robert G. Spector, *Review of the Year in Family Law 2011-2012: "DOMA" Challenges Hit Federal Courts and Abduction Cases Increase*, 46 FAM. L.Q. 471 (2013).

17. Implemented in the U.S. through the Intercountry Adoption Act of 2000 (IAA), 42 U.S.C. § 14901 (2000). See Elrod & Spector, *supra* note 16.

18. See Estin, *supra* note 15, at 80-84 (quoting Brigitte M. Bodenheimer, *The Hague Draft Convention on International Child Abduction*, 14 FAM. L.Q. 99, 101-03 (1980)); see also WEISBURG & APPLETON, *supra* note 15, at 857.

19. See Barbara Stark, *When Globalization Hits Home: International Family Law Comes of Age*, 39 VAND. J. TRANSNAT'L L. 1551, 1600 (2006).

20. See Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issue*, 13 BUFF. HUM. RTS. L. REV. 115, 165 (2007).

21. See KATHRYN JOYCE, *THE CHILD CATCHERS* (2013); Johanna Oreskovic & Trish Maskew, *Red Thread or Slender Reed: Deconstructing Prof. Bartholet's Mythology of International Adoption*, 14 BUFF. HUM. RTS. L. REV. 71, 128 (2008).

decision in *Lawrence v. Texas*.²² The Inter-American Human Rights system originating out of the Organization of American States is gaining momentum among LGBT groups for interpreting the contours of sexual discrimination and gender equality.²³ The Inter-American Commission of Human Rights condemned the United States in the case Jessica Lehahan, finding that through police non-intervention in a domestic violence case, the U.S. failed to exercise its good faith duty to enforce antidiscrimination provisions for the protection of women.²⁴

II. CONTRACTING HORIZONTAL INTIMATE RELATIONSHIPS

In accordance with the framework set forth in the IACL request, this article first addresses horizontal intimate relationship contracting and then vertical intimate relationship contracting. This article then discusses the contract method of alternative dispute resolution and provides some final words on contracting permanence within family law.

A. *Marriage as Contract?*

Contracting horizontal intimate relationships concerns marriage and its alternatives, a discussion about which, the authors believe, requires discussion of the changing relationship of marriage to contract, within the U.S. Not always worthy of its occasional appellation, the so-called “marriage contract” is qualitatively different from a standard contract.²⁵ Janet Halley traces the beginnings of U.S. treatment of marriage as a contract to the early nineteenth century; Halley then notices a profound shift in the mid-nineteenth century, when contemporary thinkers began to conceive of marriage as more of a status than a contract.²⁶ This transformation corresponded with the rise of free market *laissez faire* ideology and actually pitted fam-

22. 123 S. Ct. at 2481.

23. See Atala Riffo and Daughters v. Chile, *Decisions and Judgments*, Inter-Am. Ct. H.R. (ser. C) No. 239 (Feb. 24, 2012); Rosa M. Celorio, *The Case of Karen Atala and Daughters: Toward a Better Understanding of Discrimination, Equality, and the Rights of Women*, 15 CUNY L. REV. 335, 354 (2012).

24. See Jessica Lenahan v. United States (*Gonzales*), Case 12.626, Inter-Am. Comm’n H.R., Report No. 80/11 (2011).

25. While mutual asset seems always to have been a requirement in Western marriages, the reasons why people marry have changed over time, people now expecting personal fulfillment instead of or in addition to other goals such as property control or political advantage. See STEPHANIE COONTZ, *MARRIAGE, A HISTORY: FROM OBEDIENCE TO INTIMACY; OR HOW LOVE CONQUERED MARRIAGE* 24-31 (2005); see also ANDREW J. CHERLIN, *THE MARRIAGE-GO-ROUND: THE STATE OF MARRIAGE AND THE FAMILY IN AMERICA TODAY* 87-115 (2009); JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, *INSIDE THE CASTLE: LAW AND THE FAMILY IN 20TH CENTURY AMERICA* 56-58 (2011).

26. Janet Halley, *What is Family Law: A Genealogy Part I*, 23 YALE J.L. & HUMAN. 1, 2 (2011).

ily relationships against contractual relationships within the market: “the husband, wife, and child constituted ‘the family’ and lived in an affective, sentimental, altruistic, ascriptive, and morally saturated legal and social space. The market was the family’s opposite: rational, individualistic, free, and morally neutral.”²⁷ Many regard *Maynard v. Hill* (1888) as the seminal U.S. case establishing marriage as more than a mere contract, as also a status, properly regulated by the government.²⁸

And so it is today, marriage based on the free assent of the parties immediately subjects the parties to legal rights and obligations, often without their full knowledge or consent. Further, states set the terms under which the parties may abandon the marriage. In this manner, we may describe U.S. marriage more appropriately as an institution of public status with accompanying rights and obligations created by the public will versus a form of private contract. Nevertheless, the view of marriage as more status than contract is an ongoing, fluid debate, many arguing that contract is more important in defining this relationship and the behavior of individuals within it. Notably, Martha Ertman emphasizes the view that marriage is and long has been a mix of status and contract, in varying proportions over time, with status not necessarily winning, in the past or present.²⁹

B. Contracting In and Out of Marriage Default Rules

The use of civil contracts to govern horizontal relationships between intimate partners represents an effort by private individuals to circumvent the underlying default laws of marriage. We see this form of contractualization of family law in the distinct scenarios described below.

C. No Marriage and No Contract

As it was necessary first to reflect briefly on the relationship of marriage to contract, it is now appropriate that we take another break in the discussion to make clear who we are talking about and who we are not talking about, when we discuss marriage and contractual circumvention of marriage law. Increasingly, more U.S. citizens are spending more of their adult lives outside of a marriage, whether or not they have children.³⁰ There are important class and racial dis-

27. *Id.* at 3.

28. *Maynard v. Hill*, 125 U.S. 190 (1888).

29. See Martha Ertman, *Commercializing Marriage*, 77 TEX. L. REV. 17, 66-68 (1998) [hereinafter Ertman, *Commercializing Marriage*]; Martha Ertman, *Marriage as a Trade*, 36 HARV. C.R.-C.L. L. REV. 79, 92-98 (2001) [hereinafter Ertman, *Marriage as a Trade*].

30. See Jason DeParle & Sabrina Tavernise, *For Women Under 30, Most Births Occur Outside Marriage*, N.Y. TIMES, Feb. 17, 2012, at A1; see Sabrina Tavernise,

tinctions in this overall trend. Generally speaking, the class qualities of greater education and higher income predict higher levels of marriage.³¹ As a striking racial distinction, African-Americans, in particular, after correcting for education and income, spend fewer of their adult years in marriage.³²

Generally speaking, those persons in non-marital intimate relationships have legal obligations to one another that are no different than between strangers. There are exceptions to be sure. As the most prominent, striking exception, Washington State currently allows non-married cohabitating partners participation in the state's community property regime, so that non-married, cohabitating partners may request division of assets acquired during their cohabitation upon dissolution of their relationship.³³ More generally, across more states, domestic violence statutes in many jurisdictions impose obligations and bestow rights upon persons in intimate relationships, irrespective of their marital status. Certain jurisdictions also transmute the status of cohabitating persons into the status of married persons, through common-law marriage. Some private organizations and companies also have made available benefits, such as health and retirement benefits, to the non-married domestic partners of their members and employees.

Further, certain state legislatures have created new categories of legally recognized horizontal relationships that these states statutorily deem virtually equal or very similar to the relationship of marriage, i.e. civil unions and domestic partnerships. There is reason to believe these legislative developments have been efforts of inclusion for same-sex couples who cannot marry under the laws of those states. Accordingly, as those state laws change, and same-sex couples gain the right to marry, these newer legally recognized categories for unmarried intimate partners might cease to exist.³⁴

Further, the legal effect of the *Marvin* decision, discussed below, has been the creation of equitable theories of recovery for individuals who split after years cohabitating without marriage to recover some division of the assets acquired by each other during their time together or some ongoing monetary support after they part ways. These

Married Couples Are No Longer a Majority, Census Finds, N.Y. TIMES, May 26, 2011, at A22.

31. See CHERLIN, *supra* note 25, at 114-15.

32. See RALPH RICHARD BANKS, IS MARRIAGE FOR WHITE PEOPLE: HOW THE AFRICAN AMERICAN MARRIAGE DECLINE AFFECTS EVERYONE (2011); see also Ralph Richard Banks and Su Jin Gatlin, *African American Intimacy: The Racial Gap in Marriage*, 11 MICH. J. RACE & L. 115, 122 (2005).

33. *In re Marriage of Lindsey*, 678 P.2d 328, 332 (Wash. 1984); *Connell v. Francisco*, 898 P.2d 831, 837 (Wash. 1995).

34. See, e.g., Michael Dresser & Carrie Wells, *With Same-sex Marriage Now Available, State to End Benefits for Domestic Partners*, BALT. SUN (May 3, 2013), http://articles.baltimoresun.com/2013-05-03/features/bs-md-domestic-benefits-20130502_1_domestic-partners-health-benefits-state-employees#.Uk3RAqPdmsk.email.

theories include theories of implied contracts, joint venture, constructive trust or resulting trust, and have been adopted by some but not all U.S. courts.³⁵ These theories, where accepted, allow parties to avoid marriage and the technical requirements of contract execution and still receive some of the dissolution rights associated with marriage.³⁶

Not all states have been eager to expand dissolution rights to cohabiting intimate partners who neither marry nor contract for marriage-like benefits. A few states reject the theories described above as disingenuous attempts to create contracts where none really exist in order to avoid their state laws prohibiting the recognition of common law marriages.³⁷ Some states require an express contract, whether oral or written;³⁸ others require an actual written contract.³⁹

Getting back to the subject of our inquiry regarding the contractualization of family law, do we consider those persons in intimate horizontal relationships outside of marriage who do not execute contracts to govern their relationships to be privately ordering their family lives? What if the laws of their states might grant them some equitable relief when they split?

To be sure, horizontal intimate relationships outside of marriage and contract are not necessarily completely without some form of informal private ordering. As just one example, in her work on low-income single mothers, Katherine Edin explores the ways in which

35. See, e.g., *Donovan v. Scuderi*, 443 A.2d 121, 128 (Md. App. 1982) (oral agreement); *Kinkenon v. Hue*, 301 N.W.2d 77, 81 (Neb. 1981) (oral agreement); *Knauer v. Knauer*, 470 A.2d 553, 566 (Pa. Super. 1983) (oral agreement); *Carroll v. Lee*, 712 P.2d 923 (Ariz. 1986) (implied agreement); *Kaiser v. Strong*, 735 N.E.2d 144, 149 (Ill. App. 2000) (constructive trust); *Akers v. Stamper*, 410 S.W.2d 710, 712 (Ky. 1966) (joint venture). See generally ROBERT E. OLIPHANT & NANCY VER STEEGH, *WORK OF THE FAMILY LAWYER* 707-08 (3d ed. 2012).

36. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION ANALYSIS AND RECOMMENDATIONS § 6.03 (2002). Having abandoned the contract approach to resolving cohabitation disputes, the ALI recommends the presumption of a legally cognizable domestic partnership, akin to marriage in rights upon dissolution, after three years of cohabitation.

37. See e.g., *Hewitt v. Hewitt*, 394 N.E.2d 1204, 1208-09 (Ill. 1979) ("It is said that because there are so many unmarried cohabitants today courts must confer a legal status on such relationships. This, of course, is the rationale underlying some of the decisions and commentaries . . . If this is to be the result, however, it would seem more candid to acknowledge the return of varying forms of common law marriage than to continue displaying the naivete we believe involved in the assertion that there are involved in these relationships contracts . . ."); see also *Devaney v. L'Esperance*, 949 A.2d 743, 754 (N.J. 2008) (Rivera-Soto, J., concurring) ("The vast majority of states that do not acknowledge common law marriages also have rejected a cause of action for palimony [payments akin to alimony following the dissolution of cohabitation] . . .").

38. See, e.g., *Levar v. Elkins*, 604 P.2d 602, 603 (Alaska 1980); *Dominguez v. Cruz*, 617 P.2d 1322, 1322 (N.M. Ct. App. 1980); *Monroe v. Monroe*, 413 N.E.2d 1154, 1158 (N.Y. 1980); see generally OLIPHANT & VER STEEGH, *supra* note 35, at 708.

39. See, e.g., MINN. STAT. § § 513.075, 513.076 (2008); TEX. BUS. & COM. CODE ANN. §26.01(b)(3) (West 2007). See generally OLIPHANT & VER STEEGH, *supra* note 35, at 708.

these mothers operate within well-defined informal systems of financial obligations and entitlements created and sustained by various forms of non-marital horizontal intimate relationships.⁴⁰ Many others have documented the ways in which some adults historically have formed extended kinship communities, the members of which undertake significant monetary and in-kind exchanges in order to assist one another.⁴¹

As an additional consideration, some lament the focus on marriage and approximations of marriage (perhaps contractually created) as a failure in our collective imagination to envision other institutions for providing social and economic security to individuals.⁴² This discussion regarding our collective values and priorities points to significant socio-political concerns, mostly located outside of family law, narrowly defined, but this discussion is beyond the focus of this work.

D. Cohabitation Contracts

Now that we are clear regarding who we are (and who we likely are not) talking about in the U.S. context, and now that we have acknowledged though not weighed in on an ongoing debate regarding the degree to which we should value marriage,⁴³ below is the discussion of unmarried cohabitants who legally contract for marriage-like contractual obligations and rights.

The actual tally of how many unmarried intimate partners endeavor (or would endeavor) to go through the trouble and bear the expense of executing contracts to create rights and obligations to govern their relationships is unknown, but is presumably small.⁴⁴ Surely some do. Of note, some particularly diligent same-sex couples rely

40. KATHERINE EDIN & LAURA LEIN, *MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK* (1997).

41. See Laura T. Kessler, *Transgressive Caregiving*, 33 *FLA. ST. U. L. REV.* 1, 18-19 (2005); Melissa Murray, *The Networked Family: Re-framing the Legal Understanding of Caregiving and Caregivers*, 94 *VA. L. REV.* 385, 391-92 (2008).

42. See MARTHA ALBERTSON FINEMAN, *THE NEUTERED MOTHER, THE SEXUAL FAMILY, AND OTHER TWENTIETH CENTURY TRAGEDIES* 228-36 (1995); NANCY D. POLIKOFF, *BEYOND (STRAIGHT AND GAY) MARRIAGE: VALUING ALL FAMILIES UNDER THE LAW* (2008); Katherine M. Franke, *Longing for Loving*, 76 *FORDHAM L. REV.* 2685, 2686 (2008); Melissa Murray, *Black Marriage, White People, Red Herrings*, 111 *MICH. L. REV.* 977, 995 (2013); Laura A. Rosenbury, *Friends with Benefits?*, 106 *MICH. L. REV.* 189, 209-10 (2007).

43. For further discussion in this ongoing debate, specifically in the context of marriage promotion initiatives instituted during Bush era, see Kaaryn Gustafson, *Breaking Vows: Marriage Promotion, the New Patriarchy, and the Retreat from Egalitarianism*, 5 *STAN. J. C.R. & C.L.* 269, 288 (2009); Angela Onwuachi-Willig, *The Return of the Ring: Welfare Reform's Marriage Cure as the Revival of Post-Bellum Control*, 93 *CALIF. L. REV.* 1647, 1675-78 (2005); Theodora Ooms et al., *Ctr. for Law & Soc. Policy, Beyond Marriage Licenses: Efforts in States to Strengthen Marriage and Two-Parent Families* 5-10 (2004).

44. See Ira Mark Ellman, "Contract Thinking" Was Marvin's Fatal Flaw, 76 *NOTRE DAME L. REV.* 1365, 1367 (Oct. 2011).

upon such contracts in order to provide them with the legal protections upon dissolution afforded married couples, where these same-sex couples may not marry within their state of residence.

Marvin v. Marvin is an early U.S. case regarding the enforceability of cohabitation contracts, holding, “[t]he fact that a man and a woman live together without marriage, and engage in a sexual relationship, does not in itself invalidate agreements between them relating to their earnings, property or expenses.”⁴⁵ In *Marvin*, the court addressed an alleged oral contract between unmarried persons for post-relationship support and equitable division of assets. The court took pains to distinguish this alleged contract from a contract for sexual services (prostitution), which would be against public policy and illegal.

In this decision, we therefore see approximations of the market/family divide discussed earlier in this work, as the court struggles with the notion that persons involved in a romantic relationship could execute a contract between themselves. Are the parties contracting for sex? No, the court answered, the parties are contracting *despite* the sex, and the sex doesn’t invalidate their contractual arrangements.

Though spurring academic debate and some court decisions, discussed above, regarding expanded equitable remedies for cohabitating couples to recover marriage-like benefits upon dissolution of their relationships, the *Marvin* case actually was quite limited in its legal holding; the holding firmly requires the existence of an express or implied contract for remedy. Indeed, upon remand, the trial court denied relief, finding that the parties never agreed to share interest in all property acquired during their relationship and never agreed that one partner would provide for all of the financial needs of the other for the rest of her life.⁴⁶ Further, the trial court on remand awarded the plaintiff money for the purposes of rehabilitation, but the appellate court struck down this award as an improper equitable remedy where there was no valid agreement.⁴⁷

E. Premarital Contracts

The second way in which parties circumvent the default system of marriage laws through contract is through prenuptial (or antenuptial) agreements. Although states previously maintained that prenuptial agreements specifying how spouses would divide assets and/or support one another following a divorce were void, as against

45. 557 P.2d 106, 113 (Cal. 1976), *remanded to* 176 Cal. Rpt. 555 (Ct. App. 1981).

46. *Id.* at 559; *see* OLIPHANT & VER STEEGH, *supra* note 35, at 710.

47. *Marvin*, 176 Cal. Rpt. at 559.

public policy in encouraging divorce,⁴⁸ today, prenuptial agreements in contemplation of divorce are not *per se* unenforceable.⁴⁹ To the knowledge of the authors, opposition to these contracts did *not* engage in a discussion of whether the parties' sexual relationship or future sexual relationship makes these agreements illegal, as the *Marvin* decision queried.⁵⁰

The Uniform Premarital Agreement Act (UPAA), created in 1983, adopted, in whole or in part, by half of the states, allows fiancées wide latitude in opting completely out of a state's statutory and common law scheme for division of assets and alimony upon divorce. The one blanket restriction within the UPAA concerns child support, a child's right that "may not be adversely affected by a premarital agreement."⁵¹ Parties generally also may not contract freely on issues child custody, though in less specified ways.

The rules applicable to the enforcement and interpretation of contracts generally apply to prenuptial agreements, both in states that have adopted the UPAA and the others. Both the UPAA and the specific laws of most states consider standard contract concepts of unconscionability and voluntary consent, with the specific concerns of coercion, fraud, duress, and undue influence. The extent to which these concepts and concerns prevent enforcement of prenuptial agreements that greatly disadvantage one party is all over the board, nationally. Of particular interest is a court's understanding of the relationship of the parties upon signing: how similar or different is the relationship of betrothed spouses signing a prenuptial agreement to the relationship between parties in an arms-length commercial negotiation? Are the parties in a confidential or fiduciary relationship thereby heightening the standards of their financial disclosure prior to execution?⁵²

48. See, e.g., *McCarthy v. Santangelo*, 78 A.2d 240, 241 (Conn. 1951). See generally Brian Bix, *Bargaining in the Shadow of Love: The Enforcement of Premarital Agreements and How We Think About Marriage*, 40 WM. & MARY L. REV. 145, 148-58 (1998); Premarital agreements allowing parties to set forth their wishes upon the death of a spouse generally speaking always have been enforceable.

49. See, e.g., *Van Kipnis v. Van Kipnis*, 900 N.E.2d 977, 980 (N.Y. 2008). This development was not universally heralded as progress. See generally Bix, *supra* note 48, at 148-58; Marjorie Maguire Shultz, *Contractual Ordering of Marriage: A New Model for State Policy*, 70 CALIF. L. REV. 204, 207-11 (1982); Judith T. Younger, *Lovers' Contracts in the Courts: Forsaking the Minimum Decencies*, 13 WM. & MARY J. WOMEN & L. 349, 352-59 (2007).

50. Although avoided by practitioners and policy advocates, parallels between marriage and prostitution, immensely taboo, have indeed been made by well-respected economists, such as Richard Posner, champion of the "law and economics" discipline. See Viviana A. Zelizer, *The Purchase of Intimacy*, 25 L. & SOC. INQUIRY 817, 825 (2000).

51. UNIF. PREMARITAL AGREEMENT ACT, § 3(b) (1983).

52. U.S. States answer this question somewhat differently. See, e.g., *Mallen v. Mallen*, 622 S.E.2d 812, 815 (Ga. 2005) (no confidential or fiduciary relationship prior to marriage); *Ansin v. Craven-Ansin*, 929 N.E.2d 955, 966 (Ma. 2010) (parties to a

There are a few ways in which interpretation of prenuptial agreements clearly veers from standard contract interpretation. First, when determining whether or not to enforce a prenuptial agreement, some states consider not only the circumstances surrounding execution of the agreement, but also the circumstances at the time of enforcement of the agreement. Also interesting for the authors of this work, while most states understand that the *marriage itself* may be valid and sufficient consideration for a prenuptial agreement, upon an implicit understanding that the parties would not marry but for the prenuptial agreement, the UPAA explicitly states that prenuptial agreements are enforceable *without* consideration, in contradiction of a very basic tenet of standard contract interpretation. Curiously, the UPAA also states that an amendment or revocation of a prenuptial agreement also is enforceable without consideration. Unless we consider that continuation of a marriage would qualify as consideration, this provision of the UPAA is a serious abrogation of standard contract interpretation.⁵³

At a much broader level, a distinction generally may be made between the prenuptial agreement as a “partnership agreement,” taking from the modern view of marriage as a partnership between spouses,⁵⁴ and a typical business partnership agreement, which would not concern exclusively the terms of dissolution (the exit package) but also presumably would include some discussion regarding the expectations of the partners during the course of the partnership and the terms of breach that would void or require amendment of some or all of the terms governing dissolution (termination for cause provisions). There is no legal requirement for prenuptial agreements to contain any provisions regarding the expectations of the spouses during the marriage.⁵⁵ Indeed, although many states retain their

premarital agreement are in confidential relationship with one another but not a fiduciary relationship, owing a duty of absolute fidelity to one another).

53. See generally *Whitmore v. Whitmore*, 778 N.Y.S.2d 73 (App. Div. 2004).

54. This view, for example, undergirds the modern legal shift away from title to equitable division of marital property.

55. Linda McClain, in her work, *Family Constitutions and the (New) Constitution of the Family*, 75 *FORDHAM L. REV.* 833 (2006), undertakes a thoughtful discussion of a new phenomenon of families drafting their own “family constitutions” to govern the operation of their families and compares these family constitutions to the U.S. Constitution and corporate mission statements. These family constitutions however have no legal enforceability. Martha Ertman has argued for an expanded view of the purpose and benefits of contractual bargaining in intimate relationships and proposes contracts that indeed include detailed discussions of expectations during marriage along with other unenforceable inclusions, i.e. professions of love, arguing that these inclusions help govern the behavior of the parties during the marriage, reduce the likelihood of dissolution, and the likelihood that the dissolution terms of the agreement will be accepted and not contested upon dissolution. See MARTHA M. ERTMAN, *LOVE & CONTRACTS* (forthcoming from Beacon Press 2014). Ertman, *Commercializing Marriage*, *supra* note 29, at 66-68; Ertman, *Marriage as a Trade*, *supra* note 29, at 92-98.

fault grounds for divorce (i.e. adultery, cruel and inhuman treatment, abandonment) along with their no-fault option, many prenuptial agreements do not contain any mention of this potential bad behavior during marriage as cause for modification of the terms of a prenuptial agreement. This reality exists even while some states still consider one of these cause categories—adultery—a criminal offense.⁵⁶

Of course, some good attorneys are mindful of negative potentialities and advise clients to include so-called “bad boy” clauses in prenuptial agreements for protection. But “bad boy” clauses in prenuptial agreements are neither required by law nor particularly common. On the other end of the spectrum, there is an open question as to whether positive behavior expectation terms in prenuptial agreements, terms such as the obligation to reside in the same home, provide sexual affection, or provide housekeeping labor would be enforceable, either because courts consider these terms essential obligations of marriage and therefore without consideration or because judges just do not feel comfortable enforcing these obligations, with or without a contract.⁵⁷

Of note, somewhat ironically in light of the original rationale for prohibiting certain prenuptial agreements, a newer form of premarital contract has appeared on the scene, one expressly designed to make it *harder* to divorce—the covenant marriage contract. The authors characterize the covenant marriage contract only partially as contractual private ordering, for the reasons discussed below.

Three U.S. states maintain covenant marriage contracts, Louisiana, Arkansas and Arizona.⁵⁸ The statutorily prescribed contractual terms for a covenant marriage contract in all three states include limiting divorce to situations where there are proven allegations of serious fault, including adultery, conviction of a felony, abandonment for one year, or physical or sexual abuse of a spouse or a child of one

56. See, e.g., MICH. STAT. ANN. § 750.30; N.D. STAT. ANN. § 12.1-20-09 (1991); MASS. STAT. ANN. CH. 272, § 14; GA STAT. ANN. § 16-6-19.

57. See *Michigan Trust Co. v. Chapin*, 64 N.W. 334, 334 (Mich. 1895) (“[P]romise to pay for services which the very existence of the relation made it her duty to perform, was without consideration.”); *N.C. Baptist Hosp., Inc. v. Harris*, 354 S.E.2d 471, 474 (N.C. 1987) (the law can enforce a duty of support but not a corresponding duty to render services in the home); OLIPHANT & VER STEEGH, *supra* note 35, at 510-14, 651-52.

58. LA. REV. STAT. ANN. § 9:272 (2008); ARIZ. REV. STAT. ANN. §§ 25-111, 25-312 - 314, 25-901-906 (2000 & Supp. 2005); ARK. CODE ANN. §§ 9-11-202-215; see also Kimberly Diane White, Note, *Covenant Marriage: An Unnecessary Second Attempt at Fault-Based Divorce*, 61 ALA. L. REV. 869, 872-73 (2010); see also Katherine Shaw Spaht, *Covenant Marriage: An Achievable Legal Response to the Inherent Nature of Marriage and Its Various Goods*, 4 AVE MARIA L. REV. 467, 482 (2006).

of the spouses.⁵⁹ The parties alternatively may obtain a divorce if they live separate for some period of time.⁶⁰

Different from private ordering in the context of an ordinary premarital agreement, with covenant marriage contracts, the parties do not create their own terms; instead, the contract terms *already exist* as drafted by the state legislature. The parties contract by just signing up. In this manner, it is perhaps questionable whether the covenant marriage contract really qualifies as contractual private ordering.

On the other hand, the Louisiana legislation uniquely imposes upon the parties some of the terms customarily left out of standard prenuptial agreements, marriage obligations other than dissolution rights. For example, the Louisiana statute provides that parties must agree to mutual love and respect, mutual residence, decision-making in the best interest of the family, mutual duty for household management, and the teaching of children in accordance with their “capacities, natural inclinations, and aspirations.”⁶¹

F. *Postnuptial and Separation Contracts*

The third way in which parties circumvent the default laws of marriage through contract is through postnuptial or separation agreements, agreements between married spouses. However counterintuitive the notion at first may seem, postnuptial and separation agreements are not meaningfully different as distinct legal categories. Both postnuptial and separation agreements with varying degrees set forth the terms for the continuation of the marriage (the later containing the explicit term of separate residences) as well as the agreed-upon consequences of divorce.

While courts sometimes treat these agreements similar to prenuptial agreements, postnuptial and separation agreements differ from prenuptial agreements in key ways.⁶² First, unlike prenuptial agreements, these contracts cannot have the marriage as the consideration for the agreement.⁶³ Second, there is no doubt the parties are in a confidential or fiduciary relationship with one another, necessarily heightening the requirements of full and fair disclosure before

59. LA. REV. STAT. ANN. § 9:272 (2008); ARIZ. REV. STAT. ANN. §§ 25-111, 25-312 - 314, 25-901-906 (2000 & Supp. 2005); ARK. CODE ANN. §§ 9-11-202-215; *see also* White, *supra* note 58; Spaht, *supra* note 58.

60. LA. REV. STAT. ANN. § 9:272 (2008); ARIZ. REV. STAT. ANN. §§ 25-111, 25-312 - 314, 25-901-906 (2000 & Supp. 2005); Ark. Code Ann. §§ 9-11-202-215; *see also* White, *supra* note 58; Spaht, *supra* note 58.

61. LA. REV. STAT. ANN. § 9:272 (2008); *see also* Spaht, *supra* note 58.

62. For a detailed discussion regarding the differing treatment of postnuptial agreements, *see* Barbara Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11 (2012).

63. This would be the case also with any amendment or revocation of a prenuptial agreement, a situation discussed previously in this work, *supra* note 46.

signing. Finally, as parties enter these agreements with the intention to stay married after some period of marriage and perhaps some marital discord, these contracts occasionally contain language regarding how the parties will govern themselves *during the marriage*, not just how assets will be divided and support provided upon divorce. Inclusion of terms regarding how the parties will conduct themselves during the marriage, whether or not the parties will reside in the same home, how money will be shared and assets managed during the marriage, distinguishes these agreements from prenuptial agreements in a profound way.

G. *Divorce Settlement Contracts*

The fourth and most common way in which parties contract horizontal relationships is through divorce settlement agreements, settling all matters of dispute between divorcing spouses, including matters involving the parties' children. The authors include divorce settlement agreements in our discussion of horizontal relationships, even though divorce settlement agreements also contract, in more limited fashion, vertical intimate relationships between parents and children, because these agreements originate primarily from the breakdown of the horizontal relationship and must be all-inclusive in resolving both horizontal and vertical disputes.

Somewhat different from the contracts already discussed, divorce settlement agreements do not, on the whole, represent attempts to create or veer from established family law, but instead present the results of negotiations *on the basis of* the established family law in the state with jurisdiction over the dispute. Parties executing divorce settlement agreements are not creating their own rules to govern all potential eventualities of their marriages; they are agreeing to compromise based on the situation and law existing at that time.

In their influential 1979 work, "Bargaining in the Shadow of the Law: The Case of Divorce," Robert Mnookin and Lewis Kornhauser discussed the ways in which legal rules create bargaining endowments for divorcing spouses.⁶⁴ The legal rules governing spousal and child support, child custody, and the division of marital assets give each spouse certain claims or bargaining chips in their negotiations with each other.⁶⁵ Mnookin and Kornhauser also discuss the effects that trial uncertainty, varying degrees of risk aversion, and transaction costs have on the negotiation process.⁶⁶ In what we believe is their most enduring contribution to the discussion of private ordering in family law, Mnookin and Kornhauser assert: "Discretionary stan-

64. Robert Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950 (1979).

65. *Id.*

66. *Id.*

dards can substantially affect the relative bargaining strength of the two parties, primarily because their attitudes toward risk and capacities to bear transaction costs may differ substantially.”⁶⁷

Family law practice and procedure are rife with judicial discretion, statutorily created and bolstered by the relative lack of appellate review and accompanying precedent. Legislatures intentionally create systems for adjudication of disputes over child custody and visitation, distribution of marital assets, spousal support and even (though to a somewhat lesser degree) child support that provide judges with vast amounts of discretion upon which to base their decisions after consideration of the facts presented and the character of the parties presenting those facts (character being something greater than credibility and more closely resembling the concept of “moral desert”). The standard of “best interests of the child” is just one significant example. There are equally vague and imprecise standards for spousal support (how long and for what purposes should it be awarded) and equitable division of marital assets (what is equitable).

Further, there often is a relative lack of judicial precedent. Beyond the real aversion of appellate courts generally to hearing family law cases, the costs, delays and further uncertainty involved in bringing cases up for appeal means that as a practical matter, few family law matters will reach the appellate courts for adjudication and establishment of judicial precedent. Some jurisdictions are better than others. Jurisdictions more hospitable to hearing family law appeals and having resident litigants with greater financial capacities to bring cases up for appeal have more case law, more precedent, and therefore offer a more predictive quality to negotiations. However, for the most part, one accurately may describe family law negotiations as bargaining in the shadow of the unpredictable Wild, Wild West. The virtual impossibility of predicting court outcomes causes unique challenges for adversarially-oriented spouses attempting to arrange their affairs upon divorce privately without resorting to litigation and third-party adjudication of their disputes.

When parties do resolve their divorce disputes by written settlement agreements, their agreements are subject to standard rules of contract interpretation and enforcement, without the sort of specialized contractual hurdles that may occasion premarital and post marital agreements. Absent immediate challenge by either party to the enforceability of these contracts based upon some principle of standard contract law (i.e. fraud), the parties together will present these contracts to the court for approval and incorporation into judgments of the court. Once incorporated into final judgments of the court, these contracts no longer maintain their status as mere private contract.

67. *Id.* at 980.

H. *Default Rules of Intimate Horizontal Relationships*

For context, below is a broad, general discussion of the existing law that would govern the legally recognized intimate horizontal relationship, marriage, and the newer legally recognized horizontal relationships legislatively created in some states, absent an alternative contractual arrangement. Also, included is additional general discussion regarding any substantive restrictions on contracting around the default rules described.

I. *Getting Married*

There are various state restrictions on who may marry. These state restrictions include minimum age requirements and prohibitions against the marriage of persons related to one another, bigamy, polygamy, and (in most remaining states) same-sex marriage.⁶⁸ Restrictions against marriage due to income/wealth,⁶⁹ incarceration,⁷⁰ and race⁷¹ have been struck down by the Supreme Court and no longer exist in any state.

Simply said, there is no way for private parties to contract around valid state restrictions on who may marry, nor may private parties limit the marriage prospects of others, including their sons and daughters, by contract. These contractual limitations notwithstanding, parties generally may work around existing restrictions, where state laws vary, by getting married in another state. Such marriages generally receive federal recognition and, with the exception of same-sex marriages, other state recognition.⁷²

J. *Rights and Responsibilities during Marriage*

Historically, the states imposed a “duty of necessities” upon husbands, requiring husbands to pay the necessary expenses of their wives.⁷³ By Supreme Court mandate, states now must apply this principle in a gender-neutral fashion, so that wives also would bear responsibility for their husband’s necessary expenses.⁷⁴ However, some states have abandoned this principle altogether. Where the principle still applies, with the exception of ordering payment to third

68. See *United States v. Windsor*, 133 S. Ct. 2675, 2693 (2013).

69. *Zablocki v. Redhail*, 434 U.S. 374, 391 (1978).

70. *Turner v. Safley*, 482 U.S. 78, 79 (1987).

71. *Loving v. Virginia*, 388 U.S. 1, 12 (1967).

72. See *Windsor*, 133 S. Ct. at 2693; U.S. CONSTITUTION, art. IV, §1. Unchallenged provisions of DOMA currently prevent application of full faith and credit to out-of-state same-sex marriages.

73. See Twila L. Perry, *The “Essentials of Marriage”: Reconsidering the Duty of Support and Services*, 15 YALE J.L. & FEMINISM 1 (2003); see, e.g., *N.C. Baptist Hosp., Inc. v. Harris*, 354 S.E.2d 471 (N.C. 1987).

74. *Orr v. Orr*, 440 U.S. 268 (1979).

parties to pay spousal expenses, courts have been reluctant to apply this principle and to quantify this ongoing duty during a marriage.⁷⁵

Beyond this unspecific duty of financial support, states impose no real marital duties upon spouses toward one another, to the extent that spouses would have any cause of action in court for failure to perform. As discussed below, the advent of no-fault divorce and the potential that fault may be excluded as a factor relevant to the distribution of assets and alimony, means that obligations customarily understood to accompany marriage, such as sexual fidelity and kind treatment, lose the force of law.

K. *Getting Divorced*

Some form of no-fault default divorce exists in all fifty U.S. states,⁷⁶ meaning spouses no longer must prove some element of fault in order to get a divorce. Parties generally cannot contract to limit (or expand) causes of action for divorce by contract. The one exception remains covenant marriage contracts, statutory creations of states expressly allowing parties to expand limitations on their rights to divorce.

L. *Division of Assets upon Divorce*

U.S. states generally classify assets upon divorce as either marital assets, assets acquired during the marriage, or separate assets, assets acquired before the marriage or through bequest, devise, or gift.⁷⁷ Once a court determines that certain property is separate, typically, the court will award this property to the spouse with title to the property.⁷⁸

U.S. states then employ two alternate methods of dividing property upon divorce: community property or equitable distribution. In community property states, courts generally divide marital property equally (50/50). In equitable distribution states, courts generally divide property acquired during the marriage equitably, as determined by the court. Although not usually codified by statute, people involved in litigation in equitable distribution jurisdictions sometimes conceptually begin with consideration of 50/50 division of marital assets and then move back and forth along the percentages based on some combination of factors, including contributions to the acquisi-

75. *McGuire v. McGuire*, 59 N.W.2d 336 (Neb. 1953).

76. See also OLIPHANT & VER STEEGH, *supra* note 35, at 514.

77. JOHN E.B. MYERS, *EXPERIENCING FAMILY LAW* 536 (2013).

78. There are some exceptions. In addition to alimony, which is precisely an award of separate property to the other spouse, some states authorize awards of separate property. See MASS GEN. LAWS ANN. Ch. 208, § 34 (2011); CONN. GEN. STAT. ANN. § 46B-81(a) (1978); IND. CODE ANN. § 31-15-7-4(a)(1997); *Williams v. Massa*, 728 N.E.2d 932 (2000); *Krafick v. Krafick*, 663 A.2d 365, 370 (Conn. 1995); MYERS, *supra* note 77, at 539.

tions of the assets, marital fault, and need.⁷⁹ The laws of community property and equitable distribution embody the important notion of a marriage as a “partnership,” and so property acquired through the effort or skill of either “partner” belongs to the partnership.⁸⁰

Significant fine distinctions and qualifications appear in the case law of equitable distribution and community property division, so that litigation regarding asset division upon divorce may become quite complex and expensive. As just a few examples, there are classification of asset issues, such the termination of the acquisition of marital assets, which could be the date of the divorce judgment or some date prior (when the parties ceased working together as a partnership), and the appreciation of separate assets, which could be due to the efforts of one or both of the partners and therefore arguably should be characterized as marital. There are valuation issues, prompting the use of an array of valuation experts, such as real estate appraisers and art appraisers. There are distribution issues, such as the method for dividing the value of a marital home (should the court order the parties to sell it?) and the method for dividing a closely held business between antagonistic spouses.

In addition, the state of New York has expanded notions of marital property to include future property not yet acquired. For example, New York State has well-established law on Enhanced Earning Capacity, a principle initially applied to the division of professional degrees, such as medical licenses, which enable one spouse an enhanced earning capacity, and if earned during the marriage, the principle holds, should be divided upon divorce.⁸¹ The case law then expanded the principle to apply to other certifications and then merely to any professional advancement during the marriage enabling one spouse to earn a significantly higher income than he would have without such advancement. Once enhanced earning capacity becomes a marital asset, New York courts employ a complex system for valuing this asset and then awarding an equitable portion of it to the other spouse upon divorce, in a form of payments that may resemble alimony, but instead are explicitly property division.⁸²

As before discussed, parties may displace these community property or equitable distribution regimes by prenuptial agreement, as long as the parties adhere to the governing contractual requirements. Often, the explicit goal of one of the parties initiating a prenuptial

79. See MYERS, *supra* note 77, at 536; see, e.g., *In re Dube*, 44 A.3d 556, 575 (N.H. 2012) (“[New Hampshire’s equitable distribution law] creates a presumption that equal distribution of marital property is equitable.”).

80. See generally MYERS, *supra* note 77, at 536.

81. The case that started it all was *O’Brien v. O’Brien*, 489 N.E.2d 712 (N.Y. 1985).

82. See also *Haugan v. Haugan*, 343 N.W.2d 796 (Wis. 1984) (court also attempts to compensate a spouse for the enhanced earning capacity of the other acquired during the marriage).

agreement will be to avoid the acquisition of marital assets altogether or the transmutation of separate assets into marital assets based upon appreciation during the marriage. As long as the parties respect the relevant contractual requirements, as discussed earlier in this work, this goal is acceptable; the parties may do as they please according to their own consciences.⁸³

M. *Spousal Support upon Divorce*

Alimony, also termed spousal support or spousal maintenance, is an award out of the separate estate of one spouse to the other spouse. Alimony may be periodic, over time, or lump sum (awarded in one chunk). Lifetime alimony is just that, alimony awarded periodically as long as both spouses shall live. Alimony is terminable upon the death of the receiving spouse (and usually the payor spouse) or upon the remarriage of the receiving spouse. In some cases, alimony terminates when the receiving spouse begins living with another person in a relationship akin to marriage. There is also temporary alimony otherwise known as temporary support or support *pendente lite*, payments from one spouse to another during the pendency of the divorce litigation. Some states consider awards of attorney's fees, designed to level the playing field between spouses so they both can afford equally effective counsel, part of temporary alimony.⁸⁴

Courts award alimony generally based upon the need of one spouse and the ability to pay of the other. The frequency, in addition to the length and duration of awards of spousal support, has decreased rapidly over the years. Lifetime alimony has become almost non-existent. And the rationale for awards of alimony has moved over time generally from an emphasis on an enhanced conception of duty and need characteristic of a society with few opportunities for women to earn income and a system of laws that distributed assets upon divorce according to title, to an impoverished, sex-neutral conception of need,⁸⁵ allowing either spouse (perhaps) a limited period of alimony for quick rehabilitation based upon only those perceived educational and professional sacrifices made by that spouse. Alimony awards accordingly have become "more complicated and difficult to predict."⁸⁶

Unlike property division, there are some substantive restrictions on private ordering of spousal support by prenuptial agreement. The

83. As before discussed, some jurisdictions impose contractual requirements that do indeed impose morality upon these agreements, employing principles of "unconscionability" and "unfairness based upon changed circumstances." These are contractual requirements not restrictions on contract terms, but the lines can become a little blurred.

84. See FLA. STAT. ANN. § 61.16 (West 1996); GA. CODE ANN. § 19-6-2 (West 1985).

85. *Orr v. Orr*, 440 U.S. 268 (1979) (holding that sex is not a "reliable proxy for need."); see also OLIPHANT & VER STEEGH, *supra* note 35, at 514.

86. OLIPHANT & VER STEEGH, *supra* note 35, at 510.

majority of states allow parties to waive alimony within the terms of a prenuptial agreement. However, at least four states (California, Iowa, New Mexico and South Dakota) expressly refuse to allow parties to waive their right to alimony in a premarital agreement.⁸⁷ Further, some states, even if they allow waivers of alimony, absolutely prohibit waivers of temporary alimony.

N. *Fault?*

Of particular note, although all states now have incorporated some form of no-fault divorce, states differ considerably on the issue of whether or not marital fault is relevant and admissible for purposes of determining the division of marital assets and alimony.

Some states require courts to consider the conduct of the parties in dividing assets.⁸⁸ Other states prohibit the consideration of conduct in dividing assets or awarding alimony.⁸⁹ Some states have some mixed version of allowing fault for considerations of division of marital assets but not alimony or vice versa.⁹⁰ Some states statutorily bar alimony awards to payee spouses who have committed adultery but have no similar statutory provision directing courts to increase alimony where the payor has committed adultery.⁹¹

Practically, some cunning attorneys may attempt to introduce evidence of fault, even where prohibited, as evidence otherwise relevant to financial matters, for example, the dissipation of marital assets on an extra-marital affair.⁹² Whether or not fault is relevant, and whether or not fault is likely to be introduced at trial, may give greater bargaining power to one spouse over the other, thereby dramatically affecting divorce settlement negotiations.

O. *Domestic Partnerships and Civil Unions*

Currently, seven U.S. states offer domestic partnerships and/or civil unions to citizens who wish to take on many of the rights and responsibilities of marriage, without marriage. For a same-sex couple living in a state where marriage is not yet legal for same-sex partners, a domestic partnership or civil union is the only option for establishing a legally recognized intimate horizontal relationship. In

87. Bix, *supra* note 48, at 157.

88. See OLIPHANT & VER STEEGH, *supra* note 35, at 169-170; see, e.g., R.I. GEN. LAWS. ANN. § 15-5-16.1 (West 2004); Sparks v. Sparks, 485 N.W.2d 893 (Mich. 1992).

89. See OLIPHANT & VER STEEGH, *supra* note 35, at 169-170; see, e.g., *In re Marriage of Tjaden*, 199 N.W.2d 475 (Iowa 1972); *Hartland v. Hartland*, 777 P.2d 636 (Alaska 1989); *In re Marriage of Boseman*, 107 Cal. Rptr. 232 (1973).

90. See OLIPHANT & VER STEEGH, *supra* note 35, at 169-70; see, e.g., *Chapman v. Chapman*, 498 S.W.2d 134, 137 (Ky. 1973).

91. See, e.g., GA. CODE ANN. § 19-6-1(c) (1979).

92. See Fernanda G. Nicola, *Intimate Liability: Tort Law, Family Law and the Stereotyped Narratives of Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445 (2013)

some states, the designation of domestic partnership or civil union affords the couple the same rights and obligations of marriage, without the marriage title.

For example, New Jersey's statute offering civil unions to same-sex couples provides individuals united by civil union with the same state benefits and protections afforded married persons, including dissolution rights.⁹³ Of note, the New Jersey civil union statute explicitly provides that parties in civil unions may use prenuptial agreements in the same manner as married spouses.⁹⁴

III. CONTRACTING VERTICAL INTIMATE RELATIONSHIPS

As we first tracked the various types of permissible horizontal relationship contracts before discussing the underlying default legal rules governing horizontal intimate relationships absent contracts, we now do the same for vertical relationships. Possible contracting occurs with regard to the establishment of parentage and with regard to disputes between legal parents.

A. *Contracting Parentage in Assisted Reproduction*

In recent decades, assisted reproductive technology has introduced new issues of multiple contenders for parenthood.⁹⁵ The technology has advanced much faster than the law, resulting in very different legal treatment in each state.⁹⁶ In response, the Uniform Law Commission adopted the Uniform Parentage Act of 2000 (UPA).⁹⁷ Although several states have adopted and expanded upon the UPA, jurisdictional differences abound. For this reason, below is a broad, general discussion of how individuals may contract parentage through assisted reproduction under current state laws attempting to regulate the practice and its consequences.

B. *Egg or Sperm Donation Contracts*

The enforceability of contracts pertaining to egg and sperm donation is varied and uncertain among the states' laws. This uncertainty exists against a backdrop of varied states laws governing the rights and responsibilities of the parties involved, absent a contract. As a

93. N.J. STAT. ANN. § 37:1-32 (West 2007).

94. *Id.*

95. See JUDITH AREEN ET AL., FAMILY LAW CASES AND MATERIALS 572 (6th ed. 2012) (explaining that in the case of surrogacy using in vitro fertilization, there may be easily be six contenders for parenthood: two intended parents, one sperm donor, one egg donor, a gestational surrogate and her husband).

96. See *In re F.T.R.*, 833 N.W.2d 634, 644 (Wis. 2013) ("The ability to create a family using ART has seemingly outpaced legislative responses to the legal questions it presents, especially the determination of parentage"); see also Elrod & Spector, *supra* note 16, at 624.

97. UNIF. PARENTAGE ACT, prefatory note, at 2 (2002).

threshold matter, some states establish a default rule preventing egg and sperm donors from acquiring parental rights and obligations;⁹⁸ some states do the opposite and impose parentage upon donors. Contracts providing for alternative arrangements may or may not be enforced by the courts.

For example, some states and not others enforce contracts supporting sperm donors who wish to contract *for* parental rights and responsibilities, despite statutory bars against paternity for sperm donors.⁹⁹ Another example occurs in the case of “ovum sharing,” where lesbian partners extract the egg from one partner, fertilize it and insert it into the other for gestation and birth. In contradiction of its general statutory rule that egg donors do not enjoy parental rights, at least one state appears statutorily to accept (and require) an actual written contract stating the intentions of the parties that the egg donor will assume parental rights before affording parentage to the egg donor.¹⁰⁰

C. Surrogacy Contracts

Following the widely publicized 1988 *Baby M* case,¹⁰¹ many states legislatively declared all surrogacy contracts void and unenforceable, and some states even instituted civil and criminal penalties for these contracts.¹⁰² Several of these states have since invalidated or repealed their laws prohibiting and/or criminalizing

98. See UNIF. PARENTAGE ACT, § 702 cmt. (2002) (explaining that donors may not sue to establish parentage and may not be sued to obtain support for the child); see, e.g., WIS. STAT. ANN. § 891.40 (West 2008).

99. See e.g. *In re R.C.*, 775 P.2d 27, 35 (Colo. 1989) (refusing to apply a blanket statutory bar to donor parental rights to the sperm donor in the case because he had evidence of an oral agreement with the mother to be considered the natural father of the child); see also N.H. REV. STAT. ANN. § 168-B:11 (West 2013) (stating that an agreement in writing is sufficient to privately guarantee a sperm donor's parentage); *McIntyre v. Crouch*, 780 P.2d 239 (Or. Ct. App. 1989), cert. denied 495 U.S. 905 (1990) (concluding that the blanket statutory bar to donor parental rights would violate the Due Process clause of the Fourteenth Amendment if the donor had an agreement to have rights and responsibilities as a parent). See, e.g., *Thomas S. v. Robin Y.*, 618 N.Y.S.2d 356, 362 (N.Y. App. Div. 1994) (imposing paternity on biological father despite agreement that he would be sperm donor only).

100. See, e.g. *T.M.H. v. D.M.T.*, 79 So. 3d 787, 792 (Fla. Dist. Ct. App. 2011); *In re Adoption of Sebastian*, 879 N.Y.S.2d 677 (Sur. Ct. 2009). See generally Nancy D. Polikoff, *A Mother Should Not Have to Adopt Her Own Child: Parentage Laws for Children of Lesbian Couples in the Twenty-First Century*, 5 STAN. J. C.R. & C.L. 201 (2009).

101. 537 A.2d 1227 (N.J. 1988)(concluding that the contract violates New Jersey public policy by privately arranging custody matters when the state is the ultimate arbiter of the best interests of the child in custody matters).

102. See Donald P. Myers, *7 States Prohibit Surrogacy for Pay*, L.A. TIMES (Mar. 6, 1989), http://articles.latimes.com/1989-03-06/news/vw-70_1_states-prohibit-surrogacy (explaining that in the year since *In the Matter of Baby M*, was decided, seven states had banned surrogacy and twelve additional states were considering similar legislation); See, e.g., MICH. COMP. LAWS § 722.859 (1988).

surrogacy contracts, now permitting surrogacy contracts, under strict regulations with contractual requirements.¹⁰³

While some states still will not enforce surrogacy contracts and statutorily mandate that a gestational mother is the parent,¹⁰⁴ the enforceability of surrogacy agreements with contractual requirements is the position now advocated in the Uniform Parentage Act,¹⁰⁵ and the position many states now follow.

As just a few examples of the types of contractual requirements states may impose before enforcing surrogacy contracts, some states have eligibility requirements, such as a minimum age; commissioning parent requirements, such as the gestating incapacity of the commissioning mother and her marriage; transaction requirements, such as non-mandatory surrender until expiration of a waiting period and prohibitions on “commercial surrogacy” or surrogacy for payment;¹⁰⁶ and judicial pre-authorization.¹⁰⁷

D. *Private and Open Adoption Contracts*

We outline the basics of adoption default rules in the U.S. later in this work but wanted to mention here an important development in parentage by adoption accomplished through private contract. While a small number of states outright prohibit independent or private adoption contracts,¹⁰⁸ most states permit private adoption agreements between birth and adoptive parents, negotiated outside the confines of state-run adoption agencies, though typically with

103. See, e.g., ARIZ. REV. STAT. ANN. § 25-218(a) (1989), *invalidated by* Soos v. Superior Court, 897 P.2d 1356, 1361 (Ariz. Ct. App. 1994) (declaring the law unconstitutional on equal protection grounds); Surrogacy Parenting Agreement Act of 2013, Council 32, Period Twenty (D.C. 2013) (proposing that surrogacy contracts complying with various requirements be considered presumptively valid); S.B. 4617, 236th Leg., Reg. Session (N.Y. 2013) (proposing that surrogacy contracts complying with numerous requirements be enforced through judgment of parentage).

104. See, e.g., N.D. CENT. CODE § 14-18-05. See COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 4:9 (2012).

105. UNIF. PARENTAGE ACT § 801 (2002).

106. See, e.g., KY. REV. STAT. ANN. § 199.590 (West 2005); LA. REV. STAT. ANN. § 9:2713 (1987); WASH. REV. CODE ANN. § 26.26.230 (West 1989). Scholars have criticized this altruistic rhetoric as reinforcing gender norms about motherhood and monetary motivation. See Kimberly D. Krawiec, *Altruism and Intermediation in the Market for Babies*, 66 WASH. & LEE L. REV. 203, 247 (2009); see generally RETHINKING COMMODOIFICATION: CASES AND READINGS IN LAW AND CULTURE (Martha M. Ertman and Joan C. Williams, eds., 2005).

107. See, e.g., FLA. STAT. ANN. § 742.15 (West 1993) (providing minimum age requirement of eighteen years old and requiring commissioning parents to be married); N.H. REV. STAT. ANN. § 168-B:25 (West 2013) (providing mandatory terms including a term that allows a surrogate to keep the child if she signs a written intent to keep the child and delivers the writing to the intended parents within seventy-two hours of the birth of the child); N.H. REV. STAT. ANN. § 168-B:23 (West 2013) (requiring judicial pre-authorization); VA. CODE ANN. § 20-158 (West 2000) (requiring judicial validation).

108. See COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 2:4 (2012).

state oversight and regulation.¹⁰⁹ As a more recent development, some states now also allow parties to negotiate and contract various terms of an “open” adoption, permitting a birth parent to terminate her parental rights while retaining some right to post-adoption contact with the child.¹¹⁰ As discussed later in this work, enforcement of open adoption contracts allows parties to avoid the default rule that an adoption severs completely the relationship with a birth parent.

E. Co-Parenting Contracts for Non-Legal Parents

Some non-legal parents preemptively execute co-parenting agreements with legal parents, demonstrating the desires of these adults to share parenting responsibilities for the child, even though one is not a legal parent. Co-parenting agreements may or may not be enforced, depending on the state.¹¹¹

F. Contract Resolution of Conflict between Legal Parents

Once established as legal parents, parents may resolve disputes over custody and support for their children by contract. Here, again we take another break to put our inquiry into context. The general framework of legal rights and responsibilities that attach to legal parenthood (rights of access and decision-making with obligations of care and financial support) operates with little if any judicial oversight, except in two discreet scenarios. The first is state intervention caused by alleged abuse or neglect, undertaken according to a highly complex child protection system, where the state becomes an investigator and potentially a party in litigation against a parent on behalf of a child.

The second scenario of judicial oversight of parenting, of importance for the instant work, is private family law litigation, where parties invite state intervention because they cannot get along with each other regarding their children. As just one illustration, although courts are unlikely to review, much less scrutinize the parenting actions of two married parents, upon divorce, a court may scrutinize quite heavily the actions of both parents (with granular detail) in the context of a custody trial.¹¹²

109. *See* Does 1, 2, 3, 4, 5, 6, & 7 v. State, 993 P.2d 822, 829-30 (1999) (discussing the principle that private adoption agreements must conform to state statutory requirements in order to be enforceable, making them different from other types of contracts).

110. Open adoption agreements have become more popular in the U.S. *See, e.g.,* Weinschel v. Strople, 466 A.2d 1301, 1306 (Md. Ct. Spec. App. 1983).

111. COURTNEY JOSLIN & SHANNON MINTER, LESBIAN, GAY, BISEXUAL AND TRANSGENDER FAMILY LAW § 5:31 (2012).

112. *See generally* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION ANALYSIS AND RECOMMENDATIONS § 6.03 ch.1, topic 1, overview of the current legal context (2002).

This is important because we must realize that while parents privately order their intimate vertical relationships every day, without contracts,¹¹³ and without judicial review, intraparental conflict brings legal parents (and sometimes others with interests in children, i.e. grandparents) before the courts and opens the possibility of private ordering by contract, in settlement, in order to avoid a final adjudication by the courts.

G. *Child Custody Settlement Contracts*

After a child custody matter is brought before a court in the nature of a custody action or as an ancillary issue in a divorce action, legal parents may resolve their disputes and agree upon a custodial arrangement, but not without presenting this agreement to the court for approval.¹¹⁴ Indeed, many state statutes now *require* parents to execute and present parenting plan agreements, which in many states are pre-designed forms on which the parents select between pre-designed options for custodial arrangements and sign. Parties who prefer to execute more personalized, lengthy settlement agreements regarding custody often then will reference their lengthier agreements in such required forms. Such parenting plan agreements, whether outlined in lengthier agreements or as checked boxes on a form, often cover not only the residential location of the child, but also the specific time the child shall spend with each parent, how child transfers will take place, and which parent shall make daily decisions and those more significant decisions regarding, for example, schooling and religion.

While all states require some form of court oversight of agreements regarding children, states vary in the degree to which they allow judges to set aside, or abandon, these agreements based upon the judge's discretion regarding the best interests of the children involved.¹¹⁵ In practice, unless an agreement—on its face—presents a child custody arrangement that seems clearly harmful to the children subject to the dispute, courts rarely will disturb it, as courts unlikely

113. *But see* McClain, *supra* note 55, at 845 (describing the ways that family constitutions guide daily life).

114. *See* PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION §2.06 (2002).

115. *Johnson v. Johnson*, 9 A.3d 1003 (N.J. 2010) (setting forth a system for judicial review of arbitration awards, deferring to the agreements unless a party contests the agreement as being harmful to the child, and requiring a record of all documentary evidence from the arbitration be kept for the purpose of this review.); Illinois mandates that mediated agreements regarding financial assets be upheld unless the agreements are unconscionable, but mediated agreements pertaining to children must be determined to be in the children's best interest. *See* MODEL FAMILY LAW ARBITRATION ACT (Am. Acad. Matrimonial Law. 2004); Ronald S. Granberg & Sarah A. Cavassa, *Private Ordering and Alternative Dispute Resolution*, 23 J. AM. ACAD. MATRIMONIAL LAW. 287 (2010); *see also* John Lande, *The Revolution in Family Law Dispute Resolution*, 24 J. AM. ACAD. MATRIMONIAL LAW. 411, 443 (2012).

have the information necessary to question its terms.¹¹⁶ Likewise, parties may not amend custody agreements privately (at least not if they wish the amendments to have legal effect), as amendments also require judicial approval.

H. Child Support Settlement Contracts

In the specific area of child support, court supervision over contractual terms indeed may be more taxing. The Federal government mandates that states create guidelines for child support using specific descriptive and numerical criteria,¹¹⁷ and while individual state child support guidelines vary, sometimes significantly, all state child support guidelines *explicitly* limit the terms upon which parties may agree privately regarding how they will divide the financial obligations of their children upon divorce.

Courts will require a joint showing by the parties that their agreements regarding child support conform to the child support guidelines of that jurisdiction. Agreements or awards not attaching an adequate showing of conformity often will be tossed out completely by the presiding judge, sometimes to the great frustrations of parties and their attorneys who have spent significant time negotiating those terms in the context of the overall settlement.

I. Default Rules of Intimate Vertical Relationships

For context, below is a broad, general discussion of the existing law that would govern the legally recognized intimate vertical relationship of parent and child, absent an alternative contractual arrangement, first discussing generally who qualifies as a legal parent under default rules, and then discussing generally how states divvy rights and responsibilities between legal parents and others. This discussion is by no means exhaustive, as the law of parentage is ever-evolving and far too vast for this work.

J. Legal Parentage by Biology or Marriage

Absent a contract, or some other factual scenario, such as adoption or assisted reproduction, legal parenthood in the U.S. generally is a function of biology with a marital presumption, based on a two-parent model of one legal father and one legal mother. Maternity is traditionally easy to determine based on the woman giving birth to the child, and rarely gives rise to dispute, except where complicated by assisted reproduction.

116. Mnookin & Kornhauser, *supra* note 64, at 955-56.

117. Family Support Act of 1988, 42 U.S.C.A. § 1305 (1996); see Jane C. Venohr & Tracy E. Griffith, *Child Support Guidelines: Issues and Reviews*, 43 FAM. CT. REV. 415 (2005); see also Lande, *supra* note 115, at 443.

Paternity is more typically contested, and courts have devised various sets of legal principles determining legal fatherhood. For example, courts generally presume a husband is the father of his wife's children born during the marriage, and for a short period after divorce or death.¹¹⁸ A husband may challenge this presumption in court in most states, but it is a very strong presumption to overcome.¹¹⁹ Outside the marriage context, courts usually determine paternity based on biology using genetic testing.¹²⁰

Additionally, in 1996, Congress compelled each state to adopt procedures for men to acknowledge their paternity without adjudication.¹²¹ Under the resulting state laws, men may sign standard forms voluntarily acknowledging or denying paternity, filing such forms with the state agency maintaining birth records.¹²²

K. *Legal Parentage by Adoption*

Adoption is a parent-child relationship created by the states, authorized expressly by state statutes, and regulated intensely by the states.¹²³ The adoption process typically begins with the termination of the parental rights of the birth mother, and if known, the birth father, and relinquishment of the child to a state-regulated adoption agency.

Prospective adoptive parents typically then must seek approval directly from the adoption agency, which maintains minimum eligibility requirements, often state-mandated, and conducts extensive investigations to verify the appropriateness of the placement. Following agency approval, prospective adoptive parents typically must receive judicial approval in order for the adoption to proceed.¹²⁴

The advent of step-parent and second parent adoption is particularly important to note, as an aberration of the standard adoption framework. While a typical adoption terminates the existing parent-child relationship of the birth parent and substitutes it with a new parent-child relationship with the adoptive parent, states allowing step-parent and second-parent adoption by statute or judicial precedent provide an exception to this framework, allowing adoptive parentage without destroying the parentage of the birth parent. Step-

118. See MYERS, *supra* note 77, at 143; See, e.g., COLO. REV. STAT. ANN. § 19-4-105 (West 2013).

119. See, e.g., *Strauser v. Stahr*, 726 A.2d 1052, 1053-54 (Pa. 1999) (“[T]hat a child born to a married woman is the child of the woman’s husband-has been one of the strongest presumptions known to the law.”).

120. See, e.g., *People ex rel. B.W.*, 17 P.3d 199, 201 (Colo. Ct. App. 2000) (“There is no presumption of paternity in regard to children born to unmarried parents.”).

121. 42 U.S.C. § 666(a)(5)(C) (1996).

122. *Id.* See also UNIF. PARENTAGE ACT, § 303 (2002).

123. See, e.g., CAL. FAM. CODE § 8600 (West 1992).

124. See, e.g., FLA. STAT. ANN. § 63.022 (West 2012); *Lofton v. Sec’y of Dep’t of Children & Family Serv.*, 358 F.3d 804, 809 (11th Cir. 2004).

parent adoption permits the adoption by a married adult of his spouse's child. Second parent adoption permits the adoption by an intimate partner, including a same-sex partner, of his partner's child.¹²⁵

Once a legal adoption takes place, the adoptive parents assume all of the rights and obligations of legal parenthood, including the rights and obligations of custody and child support.

L. *Child Custody*

States consider two main forms of child custody for legal parents—physical and legal custody. Physical custody refers to the right to have the child physically present with the parent. Visitation or parenting time is a part of physical custody. Legal custody refers to the right to make decisions concerning the child. Physical and legal custody do not have to be exclusive; parents may share physical and legal custody, so that the child travels between the care of the parents and both parents make decisions for the child or somehow divide decision-making authority by subject matter or according to physical custody.

States generally must make additional findings of parental unfitness before removing all forms of custody from a parent, essentially terminating his parental rights.¹²⁶ There is no longer a physical or legal custodial presumption in favor of the mother or the father.¹²⁷ Some states authorize courts to consider and sometimes defer to the wishes of the child (usually above a certain age) in determining physical custodial arrangements.

The majority of U.S. states authorize courts to use the legal standard of “best interest of the child” in making determinations about custody. While the Uniform Marriage and Divorce Act (UMDA) and various state statutes provide specific factors for courts to consider in determining the best interest of the child, this standard remains amorphous, allowing courts significant discretion in determining issues of child custody.

State laws on custody vary, and parents often litigate both the choice of law and the appropriate jurisdiction for resolving their child custody disputes, in no small part because custody jurisdiction outcomes also may limit a parent's ability to relocate across state lines with a child. The Uniform Child Custody Jurisdiction and Enforce-

125. See, e.g., Sharon S. V. Superior Court, 73 P.3d 554 (Cal. 2003) (finding that a woman intending to coparent with another adult who has agreed to adopt the child is permitted to waive the statutory benefit of “giv[ing] up all rights of custody, services, and earnings” as provided on California's official independent adoption agreement form). See generally Katherine M. Swift, *Parenting Agreements, the Potential Power of Contract, and the Limits of Family Law*, FLA. ST. U. L. REV. 913, 914 (2007).

126. See *Santosky v. Kramer*, 455 U.S. 745, 758-59 (1982).

127. See, e.g., *Ex parte Devine*, 398 So. 2d 686, 696 (Ala. 1981).

ment Act (UCCJEA), codified into the statutes of all fifty states, provides detailed, though complex, procedures for courts to determine which state's substantive law applies and which state court has jurisdiction to adjudicate a family law dispute involving child custody.¹²⁸

M. Child Support

States maintain specific child support guidelines, according to federal mandate. These guidelines vary widely from state to state in substance and specificity. Most states employ an "income sharing" model that dictates an appropriate amount of support for a child based on the combined incomes of the parents and then prorates this amount between the parents based on the percentage of income attributable to each of them. In contrast, some states maintain a "percentage-of-income" model that dictates the amount of support owed by the nonresidential parent as a state-mandated percentage of his or her income. States generally consider the number of children financially supported by the nonresidential parent in determining support. Some states, with significant variations in approach, also consider parenting time offsets for child support obligations based upon extensive physical custodial time. Parenting time offsets become particularly contested in situations where the parents share almost equal physical custody.

Some states cap the level of income that courts consider in determining child support, so that a middle-class parent may have the same child support obligation as a very wealthy parent, these states reasoning that the financial needs of children should have limits.¹²⁹ Other states do not so cap the income levels, these states reasoning that children should be able to enjoy the standard of living they would enjoy if residing with the wealthy parent.¹³⁰ Even states that cap the levels of support usually allow some form of upward deviation based on high income, and all states allow for deviations based upon the extraordinary needs of a child. States also allow for downward deviations in cases where the support payments would leave the non-residential parent without sufficient income to live above a determined poverty level.

Additionally, despite specified guidelines, and in many states, statutory child support worksheets, there is always room for contest and negotiation over the appropriate child support payments one parent should pay to the other. Of greatest importance is the method for determining parental income, as issues such as overtime pay, periodic but irregular income, and voluntary unemployment play a

128. The federal Parental Kidnapping Prevention Act (PKPA), 28 U.S.C. § 1738A (2000), also governs these issues.

129. See, e.g., GA. CODE ANN. § 19-6-15 (West 2011).

130. See, e.g., CAL. FAM. CODE § 4058 (West 1993).

significant role in child support outcomes, as they can in alimony outcomes.

As state laws on child support vary significantly, parents often litigate both the choice of law and which jurisdiction is appropriate for resolving their child support disputes, as the law and jurisdiction may have enormous impacts on the amount owed. The federal Uniform Interstate Family Support Act (UIFSA) has been codified into the state statutes and is the law of all fifty states. This uniform law creates well-defined, though complex, procedures for courts to determine which state substantive law applies and which state court has jurisdiction to adjudicate a family law disputes involving child support.

N. Non-Legal Parents

In recent years, state legislatures began creating statutory protections for third-parties, most commonly grandparents, who are not legal parents but who desire legally guaranteed rights of access to children. In 2000, the U.S. Supreme Court in *Troxel v. Granville* confirmed that only legal parents have constitutionally protected rights to children, rights that third-parties, including grandparents, generally may not infringe.¹³¹ There is still plenty of room for legally guaranteed third-party visitation and custody following the *Troxel* decision, and many third-party visitation and custody statutes remain good law.¹³²

In addition, of note, though not discussed at length in this work, *de facto* legal parentage for adults who are not legal parents but who effectively behave as parents is an important principle recognized in at least one jurisdiction in the U.S.¹³³

IV. CONTRACTING METHOD—ALTERNATIVE DISPUTE RESOLUTION

Individuals involved in disputes pertaining to legally recognized vertical and horizontal relationships may resolve their disputes through alternative dispute resolution (ADR) methods, including mediation and arbitration, as would litigants in any other civil action. In addition to typical ADR, as similar but distinctly different from mediation, collaborative family law is another ADR method.

Interestingly, although the application of civil procedure to family disputes historically has not been without vigorous debate and skepticism, leading, for example, to the specialty family law courts

131. *Troxel v. Granville*, 530 U.S. 57 (2000).

132. See OLIPHANT & VER STEEGH, *supra* note 35, at 336; see also Sonya C. Garza, *The Troxel Aftermath: A Proposed Solution for State Courts and Legislatures*, 69 LA. L. REV. 927 (2009).

133. See, e.g., D.C. CODE ANN. §§ 16-831.01 et seq. (providing that a “*de facto* parent” has standing to seek custody or visitation).

with their unique procedural rules¹³⁴ and to the many distinctive substantive rules applicable to the family, as discussed in this work, general receptiveness to the application of civil ADR to family disputes has been comparatively unremarkable.¹³⁵ Indeed, as scholar Amy Cohen documents, many indeed have presented the resolution of family disputes through ADR as the gold standard, a model for the resolution of ordinary civil matters.¹³⁶

A. *Mediation*

Mediation is a process by which parties in family law litigation resolve their disputes through the assistance of a neutral, third-party facilitator who does not have authority to impose binding decisions upon the parties; the parties ultimately must agree to any resolution.¹³⁷ In an effort to encourage the use of mediation in resolving family law disputes, many states offer dispute resolution services through the court system at a reduced rate to make mediation affordable for most litigants. Often, courts order parties to mediate before proceeding to trial.¹³⁸ Typically, mediators meet certain mandated requirements in terms of training and experience, but mediator requirements vary substantially from state to state.¹³⁹

There is a plethora of debate and scholarship, among academics, policy-makers and practitioners, regarding the appropriateness of mediation, especially court-ordered mediation, in situations where intimate partner violence exists or potentially exists, as mediation presumes parties come to the negotiation table with equal bargaining capabilities, free from the control of the other party, a situation thwarted by the presence of violence within the relationship.¹⁴⁰ This emphasis and concern are warranted.

134. See Halley, *supra* note 26; Janet Halley, *What is Family Law: A Genealogy Part II*, 23 YALE J.L. & HUMAN. 189 (2011).

135. Amy J. Cohen, *The Family, the Market, and ADR*, 2011 J. DISP. RESOL. 91 (2011).

136. *Id.*

137. See Lande, *supra* note 115, at 423; Andrew Schepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 3 (2001); see also Ann L. Milne et al., *The Evolution of Divorce and Family Mediation: An Overview*, in DIVORCE AND FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS 4-6, 10-13 (Jay Folberg et al., 2004).

138. See Nancy Ver Steegh, *Family Court Reform and ADR: Shifting Values and Expectations Transform the Divorce Process*, 42 FAM. L.Q. 659, 669-70 (2008); see also Carrie-Anne Tondo, et al., *Mediation Trends*, 39 FAM. CT. REV. 445 (2001).

139. See Ver Steegh, *supra* note 138, at 662; see also Connie J.A. Beck & Bruce D. Sales, *A Critical Reappraisal of Divorce Mediation Research and Policy*, 6 PSYCHOL. PUB. POL'Y & L. 989, 995 (2000); Jessica Pearson & Nancy Thoennes, *Divorce Mediation: Reflections on a Decade of Research*, in MEDIATION RESEARCH: THE PROCESS AND EFFECTIVENESS OF THIRD-PARTY INTERVENTION 16 (Kenneth Kressel et al. eds., (1989).

140. See, e.g., ABA COMM'N ON DOMESTIC VIOLENCE, *MEDIATION IN FAMILY LAW MATTERS WHERE DV IS PRESENT* (2008), available at http://www.americanbar.org/content/dam/abalmigrated/domviol/docs/mediation-jan-uary_2008.authcheckdam.pdf (listing of state rules); Amy Holtzworth-Munroe et al., *The Mediator's Assessment of*

What however is peculiar is the relative dearth of scholarship and debate on the impact of intimate partner violence in the contracting contexts discussed earlier in this work, i.e. cohabitation agreements, prenuptial agreements, surrogacy agreements, those that are pre-conflict but still adversarial in nature. Except for the specter of added involuntariness with respect to court-ordered mediation and, of course, the greater frequency of mediated divorce and child custody and support settlements in general versus these other agreements, there is no rational explanation for the discrepancy. Why does partner control in one contracting context matter but not in the other? Further, the concern specifically with “intimate partner violence” with its very well defined scholarship-driven definitional qualities may obscure the general concern over bargaining inequalities more broadly.¹⁴¹

B. Collaborative Law

Collaborative law differs from friendly negotiations in the mediation context or otherwise, in that parties agreeing to the collaborative process sign a pledge that prevents their attorneys from ever litigating their disputes, if the parties are unable to come to an agreement.¹⁴² Popular¹⁴³ though controversial,¹⁴⁴ collaborative law is an ADR method that must be considered; although substantively, in terms of our inquiry into the ways in which parties privately resolve their disputes, there is little substantive difference between agreements reached collaboratively and those reached through mediation or other settlement negotiations.

C. Arbitration

Alternatively, arbitration is a process whereby parties in conflict agree to the substitution of a third-party in place of the judge with jurisdiction over the subject dispute and by agreement vest this third-party with the authority to hear evidence and decide the dis-

Safety Issues and Concerns (MASIC): A Screening Interview for Intimate Partner Violence and Abuse Available in the Public Domain, 48 FAM. CT. REV. 646 (2010); Connie J. A. Beck & Chitra Raghavan, *Intimate Partner Abuse Screening in Custody Mediation: The Importance of Assessing Coercive Control*, 48 FAM. CT. REV. 555 (2010).

141. See Jana Singer, *The Privatization of Family Law*, WIS. L. REV. (1992) (discussing bargaining inequalities, generally, and in the context of ADR).

142. Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 319-21, 326-32 (2004).

143. REGINA A. DEMETEO, *HISTORY OF COLLABORATIVE DIVORCE* (2011) (reporting that The International Academy of Collaborative Professionals has over 4,000 members in 24 countries around the world and estimates that there are over 22,000 collaboratively-trained lawyers worldwide).

144. Despite the increasing popularity of collaborative law, there is considerable disagreement among family law attorneys as to its benefits.

pute, in a decision that will bind the parties.¹⁴⁵ Parties would agree to use arbitration in order to control the *timing* of their litigation and the *identity* of the decision-maker, not necessarily to control the substance of the resolution,¹⁴⁶ and in this sense arbitration is not really private ordering by the parties. However, because arbitration involves removal of the matter from state control, and placement of the matter in the hands of a non-state actor, we discuss arbitration appropriately within this work.

V. FAMILY LAW CONTRACTING PERMANENCE

Modifications of Final Judgments in Family Law

Prenuptial, postnuptial, separation and settlement agreements incorporated into final judgments are not necessarily *final*, because the judgments themselves are not necessarily final with regard to all issues—presenting somewhat of a U.S. civil procedure aberration in apparent violation of the principle of finality of judgments. Specifically, a court may modify its judgment on issues of alimony, child support, and child custody.

Generally, a party seeking to modify a final judgment regarding one or more of these issues must first prove a material change in circumstances in order to maintain the modification action, in the first instance, and then prove the underlying standards supporting her claim, i.e. best interests of the child for child custody. There usually are some restrictions on the ability of a party to seek modification, for example, a time moratorium (e.g. two years) on custody modification actions to promote stability for children, and preclusions against modification of alimony duration.

145. Lande, *supra* note 115, at 442-43 (noting the prevalence of “private judges,” usually retired judges statutorily authorized to decide family law disputes. Often these private judges are called “special masters” or “referees.” Unlike general arbitrators, these private judges are bound by consideration of the law, and their decisions are generally appealable); see also George K. Walker, Arbitrating Family Law Cases by Agreement, 18 J. AM. ACAD. MATRIMONIAL LAW. 429, 431 n.8 (2003); John W. Whittlesey, Note, *Private Judges, Public Juries: The Ohio Legislature Should Rewrite R.C. § 2701.10 to Explicitly Authorize Private Judges to Conduct Jury Trials*, 58 CASE W. RES. L. REV. 543, 543-46 (2008).

146. *Id.*

Civil Consequences of Corruption in International
Commercial Contracts†

TOPIC II. B

The United States legal system seeks to prevent and prohibit bribery and corruption through a myriad of laws, regulations and policies. Anti-corruption jurisprudence is more developed in the context of public sector contracts where the United States criminalizes bribery of public officials through 18 U.S.C. §201 (Bribery of Public Officials and Witnesses). In addition, the United States was the first country to criminalize bribery of foreign government officials in 1977 with the passage of the Foreign Corrupt Practices Act (FCPA). The FCPA has since been amended to comply with the adoption of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention). The FCPA does not have a private right of action, but FCPA investigations and convictions have led to collateral civil actions, and it is predicted that as FCPA prosecutions increase in number, such collateral FCPA actions will also continue to increase. There is no federal law prohibiting private sector bribery per se, but thirty-seven states have enacted “commercial bribery” statutes that criminalize bribery and corruption on the state level. In addition, at the federal level, there are a variety of criminal and civil statutes that allow private parties to address corruption, including, but not limited to, mail and wire fraud statutes, securities and anti-trust laws, and the Travel Act. Furthermore, federal government contracts can be voided under certain criminal conflict of interest statutes. Finally, there are contract law principles that have found utility in instances where a contract has been tainted due to actual bribery or potential breach of fiduciary duty, such as illegality, public policy, and unclean hands.

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I. INTRODUCTION

The United States legal system seeks to prevent and prohibit bribery and corruption through a myriad of laws, regulations, and policies. Anti-corruption jurisprudence is most developed in the context of public sector contracts, but there are numerous statutes and common law principles that also address private-sector bribery and corruption, and provide adequate remedies for both offenses. The United States was the first country to criminalize bribery of foreign government officials in 1977 with the passage of the Foreign Corrupt Practices Act (FCPA).¹ The FCPA was globalized through the adoption of the Organization of Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transaction (OECD Convention) that entered into force on February 15, 1999. The United States has amended the FCPA to comply with the OECD Convention.²

The FCPA was modeled on the United States law criminalizing bribery of domestic officials: 18 U.S.C. § 201 (Bribery of public officials and witnesses).³ Although there is no federal law criminalizing private-sector bribery *per se*, there are many states in the United States that criminalize commercial bribery by enacting commercial bribery statutes.⁴ At the federal level, there are a variety of criminal and civil statutes that allow private parties to address corruption, including, but not limited to, those statutes that criminalize mail and wire fraud,⁵ anti-trust behavior, conspiracy, securities fraud and racketeering (through the Travel Act),⁶ to name a few. Though the FCPA does not have a private right of action, FCPA investigations and convictions have led to collateral civil actions. It is predicted that as FCPA prosecutions increase in number, such collateral FCPA actions will also continue to increase.

II. THE UNITED STATES LEGAL FRAMEWORK

A. *Domestic Anti-Bribery Statutes*

The United States' anti-bribery statutes are part of a multifaceted, comprehensive, and complex approach to corruption that involves a myriad of statutes, regulations, and policies. This approach includes (1) the notice and comment provisions of the

1. 15 U.S.C. § 78dd-1 to 78m (1977).

2. The International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105-366, 112 Stat. 3302 (amending the Foreign Corrupt Practices Act of 1977).

3. 18 U.S.C. § 201 (2006).

4. See discussion in Section II below.

5. 18 U.S.C. §§ 1341, 43 (2006).

6. *Id.* § 1952 (2006) (governing interstate and foreign travel or transportation in aid of racketeering enterprises).

Administrative Procedures Act (APA),⁷ (2) laws relating to transparency and accountability, such as the Freedom of Information Act,⁸ and (3) measures that address proper management of public affairs and public property,⁹ integrity systems¹⁰ (such as Codes of Conduct), and asset disclosure requirements for all three branches of the government. The same approach also uses (1) criminal statutes that are applicable to the conduct of public officials set forth in Title 18 of the United States Criminal Code, FCPA, and those relating to money laundering,¹¹ (2) restrictions regarding procurement activities under Title 41,¹² (3) non-criminal statutes involving gifts and travel by federal employees,¹³ and (4) other statutes related to employment, such as anti-nepotism laws¹⁴ or whistleblowing laws.¹⁵ In addition, the False Claims Act allows any person to file a legal action, known as a *qui tam* action, in the appropriate District Court against government contractors on the basis that the contractor has committed fraud against the government.¹⁶

These laws are vigorously enforced, and it is constitutionally permissible, given the federal system, for natural persons (individuals) or legal persons (companies) to be prosecuted by *both* national and state governments. Such double prosecution does not constitute double jeopardy.¹⁷ In discussing the “civil consequences” of corruption in international commercial contracts, this Report concentrates on federal statutes that directly address domestic and foreign bribery as well as the impact of corruption or bribery on the validity and enforceability of a contract under United States contract law.

The United States criminalizes bribery of domestic public officials through 18 U.S.C. § 201 (Bribery of Public Officials and

7. 5 U.S.C. §§ 551-59 (2006).

8. Freedom of Information Act, 5 U.S.C. § 551 (2006). *See, e.g.*, Electronic Government Act, 44 U.S.C. § 101 (2006); Government in the Sunshine Act, 5 U.S.C. § 552b (2006); Federal Records Act, 44 U.S.C. § 3101 (2006).

9. *See, e.g.*, 48 C.F.R. (providing regulations concerning Federal Acquisition); 18 U.S.C. § 641 (2006) (establishing the criminal code on misuse of public money, property, and records).

10. *See, e.g.*, 18 U.S.C. § 201-19 (2006) (governing bribery and criminal and civil conflicts of interest statutes).

11. 18 U.S.C. §§ 1956, 57 (2006).

12. 41 U.S.C. § 423 (2006) (regulating procurement integrity).

13. *See, e.g.*, 5 U.S.C. § 7353 (2006) (prohibiting gifts to federal employees); 5 U.S.C. § 7351 (2006) (limiting gifts to superiors).

14. 5 U.S.C. § 3110 (2006) (Anti-Nepotism law); 28 U.S.C. § 458 (2006) (governing relatives of justice or judge).

15. Whistleblower Protection Act (WPA), 5 U.S.C. § 2302 (b) (2006) (prohibiting the taking or failing to take personnel action as a result of disclosure of information by any employee or applicant which the employee or applicant reasonably believes evidence a violation of the law. The WPA protects public sector employees. Private sector whistleblowers are protected under Sarbanes-Oxley Whistleblower Protection Provisions at 18 U.S.C. § 1514(A) (2006)); *see* Appendix A for a fuller listing of laws.

16. 31 U.S.C. § 3730 (2006).

17. *See* *Abbate v. United States*, 359 U.S. 187, 193-96 (1959).

Witnesses). Specifically, section 201(b) prohibits any person from “corruptly” giving, offering or promising “anything of value to any public official or person selected to be a public official”, or offering or promising “any public official or any person who has been selected to be a public official to give anything of value to any other person or entity,” with intent (A) to influence any official act, (B) to influence such public official to commit fraud, or (C) to induce such public official to do or omit to do any act in violation of his or her official duties. Section 201(b) imposes a fine of “not more than three times the monetary equivalent of the thing of value [offered or given] to the public official [,] or imprisonment for not more than 15 years, or both.” In addition, it provides the possibility of disqualification from holding in the future “any office of honor, trust or profit” in the United States.¹⁸ Lastly, in cases involving bribery related to U.S. government contracts, an organization or individual may be barred from doing business with the United States government generally or with specific government agencies.¹⁹ Bribery is even a predicate offense under the Money Laundering Control Act.²⁰

Currently, there is no federal statute criminalizing commercial or private-sector bribery. However, thirty-seven states have enacted “commercial bribery” statutes that criminalize bribery and corruption: Alabama, Alaska, Arizona, California, Colorado, Connecticut, Delaware, Florida, Hawaii, Illinois, Iowa, Kansas, Kentucky, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, North Carolina, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Virginia, Washington and Wisconsin.²¹ These commercial bribery statutes criminalize private-sector bribery by stating, for example, that “any employee who *solicits, accepts or agrees to accept* money or anything

18. U.S. Response to OECD Convention Phase 1 Questionnaire, ¶ 3.1 *available at* <http://www.justice.gov/criminal/fraud/fcpa/docs/response1.pdf> (last visited Dec. 12, 2013).

19. *See* Federal Acquisitions Regulation, 48 C.F.R. § 9.4 (2005).

20. Money Laundering Control Act, 18 U.S.C. § 1956(c)(7)(a) (2006).

21. *See* Ala. Code §§ 13A-11-120 to 121; Alaska Stat. §§ 11.46.660 -.670; Ariz. Rev. Stat. Ann. § 13-2605; Cal. Penal Code § 641.3; Colo. Rev. Stat. § 18-5-401; Conn. Gen. Stat. Ann. §§ 53a-160–161; Del. Code Ann. tit. 11, §§ 881–882; Fla. Stat. Ann. §§ 838.15-16; Haw. Rev. Stat. Ann. §§ 709-880; Ill. Com. Stat. Ann., ch. 720, §§ 5/29A-1, A-2; Iowa Code Ann. § 722.10; Kan. Stat. Ann. § 21-4405; Ky. Rev. Stat. Ann. §§ 518.020 -.030; La. Rev. Stat. Ann. § 14:73; Me. Rev. Stat. Ann. tit. 17-A, § 904; Mass. Ann. Laws ch. 271, § 39; Mich. Comp. Laws Ann. § 750.125; Minn. Stat. Ann. § 609.86; Miss. Code Ann. § 97-9-10; Mo. Ann. Stat. § 570.150; Neb. Rev. Stat. § 28-613; Nev. Rev. Stat. Ann. § 207.295; N.H. Rev. Stat. Ann. § 638:7; N.J. Stat. Ann. § 2C:21-10; N.Y. Penal Law §§ 180.00 -.08; N.C. Gen. Stat. § 14-353; N.D. Cent. Code § 12.1-12-08; 18 Pa. Cons. Stat. Ann. § 4108; R.I. Gen. Laws §§ 11-7-3, 4; S.C. Code Ann. § 16-17-540; S.D. Codified Laws Ann. §§ 22-43-1, -2; Tex. Penal Code Ann. § 32.43; Utah Code Ann. § 76-6-508; Va. Code Ann. § 18.2-444; Wash. Rev. Code Ann. § 9A.68.060; and Wis. Stat. Ann. § 134.05.

of value from a person . . . corruptly and without the knowledge or consent of the employer, in return for using or agreeing to use his or her position for benefit of that other person, *and* any person *who offers or gives* an employee money or anything of value . . . is guilty of commercial bribery.”²²

No state has passed a law that explicitly prohibits foreign bribery, but according to the United States government report to the OECD, the U.S. state commercial bribery statutes can be used to prosecute foreign bribery where a foreign official is viewed as an agent or employee of his or her government.²³ The FCPA is *the* federal statute that addresses foreign bribery, and it will be dealt with in some detail in Section B below. As will be discussed below, the FCPA does not have a private right of action. However, many federal and state statutes mentioned in this section can be invoked in FCPA collateral private civil actions. Such civil actions continue to increase as the number of FCPA enforcement actions also increases.

B. *Other Related Federal Statutes*

In absence of a federal statute establishing commercial or private-sector bribery as a criminal offense, there are other criminal and civil statutes that can be used to prosecute and provide remedy in case of such misconduct. In particular, commercial or private-sector bribery can be charged federally under the Travel Act.²⁴ The Travel Act criminalizes bribery as a violation of both the laws of the state in which the bribery was committed and state commercial bribery laws. In states where a commercial bribery statute does not exist, the conduct can be punished under unfair-trade-practices laws that define bribery as an improper means of gaining a competitive advantage.²⁵ Other federal statutes that are often used in the context of private- and public-sector bribery and corruption include, but are not limited to, wire²⁶ or mail fraud²⁷ (prohibit the use of interstate communications in furtherance of a scheme to defraud someone of property, such as embezzlement); anti-trust or anti-competitive causes of action, securities fraud, conspiracy, civil and criminal provisions of the

22. Cal. Pen. Code §641.3 (*emphasis added*).

23. U.S. Report on Implementation of the OECD Anti-Bribery Convention, Phase 2, ¶ 1.3 *available at* <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/1962084.pdf>.

24. 18 U.S.C. § 1952 (2006) (regulating interstate and foreign travel or transportation in aid of racketeering enterprises).

25. *USA UNCAC Self-Assessment Report*, UNITED NATIONS OFFICE ON DRUGS AND CRIME: UNITED NATIONS CONVENTION AGAINST CORRUPTION, 16 (July 10, 2010), <http://www.state.gov/documents/organization/158105.pdf> [hereinafter *USA UNCAC Self-Assessment Report*].

26. 18 U.S.C. § 1343 (2006).

27. *Id.* § 1341.

Racketeer Influenced and Corrupt Organizations Act (RICO);²⁸ the Hobbes Act (Interference with Commerce by Threats or Violence);²⁹ and the Money Laundering Act.³⁰ Section 1957 of the Money Laundering Control Act makes it an offense to conduct any monetary transaction with proceeds of more than \$10,000. This offense is punishable by a fine, imprisonment for not more than 10 years, or both.³¹

It is important to note that prosecutions have taken place under multiple statutes, for example, under both the FCPA and the Travel Act (in a case incorporating the commercial bribery law of the State of New Jersey).³² In addition, bribery of foreign public officials that is addressed by the FCPA can be a predicate offense under the civil and criminal provisions of RICO and the Money Laundering Control Act.³³

In cases where the federal government suffers a loss as a result of fraud or corruption in government contracts, the persons (individuals, corporations or other entities) who corruptly obtain public contracts are liable under the False Claims Act for three times the damages sustained by the United States due to misrepresentation or fraud, plus a civil penalty of \$5,000 or \$10,000 for each false or fraudulent claim.³⁴ Actions under the False Claim Act may be initiated by the United States (through the Attorney General or the Department of Justice) or by a private party on behalf of the United States (called a *qui tam* action). When a private individual initiates the action, the United States may pay the individual from 15-30% of the recovery as a reward for bringing the action.

C. *Conflict-of-Interest Statutes and Contract Validity*

18 U.S.C. § 218 permits the federal government to void contracts relating to a conviction under certain criminal conflict-of-interest statutes set forth in Title 18 of the United States Code.³⁵ Procedures for voiding contracts under these circumstances are set forth in Subpart 3.7 of the Federal Acquisition Regulations.³⁶ Subpart 3.2 of these regulations specifically require that government contracts per-

28. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961-1968 (1970).

29. Hobbes Act, 18 U.S.C. § 1951 (1946).

30. Money Laundering Control Act, 18 U.S.C. §§ 1956, 7 (1986) (consisting of three provisions dealing with domestic money laundering, international money laundering and undercover "sting" cases, respectively); see 18 U.S.C. §§ 1956(a)(1)-(3).

31. 18 U.S.C. § 1957 (1986).

32. *United States v. Mead*, Cr. 98-240-01 (D.N.J. 1998).

33. U.S. Report on the Implementation of the OECD Anti-Bribery Convention, Phase 1 at 17-18, available at www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf (last viewed on Dec. 12, 2013).

34. False Claims Act, 31 U.S.C. §§ 3729-3733 (2006), cited to in *USA UNCAC Self-Assessment Report*, *supra* note 25, at 171.

35. 18 U.S.C. § 218 (2006).

36. Federal Acquisition Regulations (FAR), 48 C.F.R. § 3.7 (2005).

mit termination in the event of a bribery or gratuities violation.³⁷ The federal government is also empowered to administratively bar a private firm from receiving further government contracts if it concludes that the contractor has engaged in “corrupt acts in the acquisition or performance of a government contract.”³⁸

Conflict-of-interest statutes play an important role in addressing bribery and corruption in the public sector.³⁹ Conflict-of-interest provisions are preventative, aiming at conduct that “tempts dishonor.”⁴⁰ Because these statutes prohibit the mere *potential* of a breach of fiduciary duty, they require no showing of actual loss or actual corruption or bribery.⁴¹ In both federal and state courts, a showing of a conflict of interest renders the public contract illegal, and thus void, regardless of whether corruption is established in criminal proceedings.⁴² Remedies awarded include disgorgement, restitution, and the right to avoidance. In fact, even if the superior of a government employee has condoned the conflict of interest, the government may still void the contract.⁴³ These harsh results are justified on the grounds of public interest.⁴⁴ The treatment of mitigation attempts has been inconsis-

37. *Id.* at § 3.2; *USA UNCAC Self-Assessment Report*, *supra* note 25.

38. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 88.

39. *See, e.g.*, 18 U.S.C. § 208 (2006) (describing acts affecting personal financial interest).

40. *United States v. Miss. Valley Generating Co.*, 364 U.S. 520, 550 (1961).

41. Although actual bribery and corruption are unnecessary to prove for the purposes of conflict of interest claims, criminal conviction may be used as evidence of the illegality of a contract in civil cases. This also means that parallel suits may be initiated and that civil actions are not dependent on criminal proceedings.

42. *See* Kevin E. Davis, *Civil Remedies for Corruption in Government Contract: Zero Tolerance versus Proportional Liability*, ILLJ Working Paper 2009/4, 15, <http://ssrn.com/abstract-1393326> (stating that typical findings of bribery involve violations of the specific procedures set out in this legislation. This involves illegality in performance rather than in the formation of the contract, and reflects the seriousness of public policy concerns regarding commercial bribery).

43. *Miss. Valley Generating Co.*, 364 U.S. 520, 561 (differentiating from the private context where the defense of public policy does not arise if the principal is aware of the bribery). *See* Davis, *supra* note 42, at 12-14.

44. *See* *Pan-Am. Petro. & Transp. Co. v. United States*, 273 U.S. 456, 509-10 (1927) (“The petitioners stand as wrongdoers, and no equity arises in their favor to prevent granting the relief sought by the United States. They may not insist on payment of the cost to them . . . Equity does not condition the relief here sought by the United States upon a return of the consideration.”); *S. T. Grand, Inc. v. City of New York*, 298 N.E.2d 105, 109 (N.Y. 1973) (acknowledging that the “result may be harsh, but . . . necessary . . .”); *K & R Eng’g Co. v. U. S.*, 616 F.2d 469 (Fed. Cl., 1980) (“the general principles of equity . . . will not be applied to frustrate the purposes of its laws or to thwart public policy.” (citing *Pan-Am.*, 273 U.S. at 506)); *Thomson v. Call*, 699 P.2d 316, 316 (Cal. 1985) (discussing that no person can serve two masters); *County of Essex v. First Union Nat’l Bank*, 891 A.2d 600, 607 (N.J. 2006) (“Strong remedies are necessary to combat unlawful conduct involving public officials. Disgorgement in favor of the public entity serves as a harsh remedy against those who bribe a public official to secure a public contract and provides a deterrent to such unlawful activity.”); *see also* Sheridan Strickland, *Municipality of Anchorage v. Hitachi Cable, Ltd. – Time for Adoption of a Void Contract Remedy for Alaska Public Contracting Authorities*, 6 ALASKA L. REV. 227, 238 (1989).

tent among state courts, with some courts explicitly rejecting attempts to mitigate the harsh impact in some cases, while accepting mitigation in others.⁴⁵ In contrast, federal treatment has been consistent, rejecting any consideration of mitigation efforts.

The defining conflict-of-interest case was decided in *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520 (1961), which involved a federal conflict-of-interest statute⁴⁶ and a contract for the supply of electrical energy. Here, the private entity brought suit against the government for canceling its contract for the construction of a power plant.⁴⁷ Though the government had in fact canceled the contract because the power to be generated was no longer needed, its primary defense—which the Court ultimately accepted—was that the contract was unenforceable due to a conflict of interest.⁴⁸ The finding of a conflict of interest involved neither actual corruption nor loss.⁴⁹ It was enough that the individual was acting on behalf of the government, while simultaneously holding an executive position with a contracting company that was *likely* to benefit from the award of contract.⁵⁰ The Court took into account (1) the purposes of the statute; (2) the level of connection with the government to satisfy the “government agent” criterion; and (3) the activities that constituted “direct or indirect interest in the pecuniary profits or contracts of the sponsors.”⁵¹

In *Mississippi Valley Generating Co.*, the statute did not provide the appropriate sanction. Instead, the Court permitted the government to void its contract as a matter of consistent and essential

45. See, e.g., *K & R Eng'g Co.*, 616 F.2d 469 at 477 (“There should, logically, be no difference in ultimate consequence between the case where a (contractor) has been paid under an illegal contract and the one in which payment has not yet been made.” (citing *Gerzof v. Sweeney*, 239 N.E.2d 521, 524 (N.Y. 1968)); Thomson, 699 P.2d at 316.

46. The statute at issue was 18 U.S.C. § 434, but has since been repealed. The current statute, 18 U.S.C. § 208, has the same purpose, but has expanded the prohibition to include a greater variety of conduct. “Comparison of Old and New Conflict of Interest Sections of Title 18, United States Code,” Memorandum Re the Conflict of Interest Provisions of Public Law 87-849, 76 Stat. 1119, Approved October 23, 1962, available at <http://www.gpo.gov/fdsys/pkg/USCODE-2011-title18/html/USCODE-2011-title18-partI-chap11-sec201.htm>.

47. *M.V. Generating*, 364 U.S. at 523.

48. *Id.* at 524, 566 (stating that while “the government could not avoid the contract merely because it turned out to be a bad bargain,” the issue before the Court was purely whether the government may “disaffirm a contract infected by . . . [a] conflict of interest.”).

49. *Id.* at 550.

50. *Id.* at 524.

51. The court employed a reasonable test, arguing that the executive was the key representative in crucial preliminary negotiations between the government and contracting sponsors, satisfying the government agent criteria irrespective of the fact that he had not taken oath of office, received tenure or salary, occupied a merely consultative role to the government, and been present in the final rounds of contract negotiations. The court pointed to the fact that the statute did not require employment. *Id.* at 555.

effectuation of the public policy of the statute.⁵² It reasoned that “if the Government’s sole remedy . . . is merely a criminal prosecution against its agent . . . then the public will be forced to bear the burden of complying with the very sort of contract which the statute sought to prevent.”⁵³ In light of public policy, the contract was adjudged illegal and thus void.

State courts have applied similarly harsh remedies against the wrongdoing party and relatively generous awards towards the public entities, which, in these cases, are the municipal governments. In *Thomson v. Call*, a taxpayer suit challenging a building permit award, the California Supreme Court applied strict enforcement of a conflict-of-interest statute.⁵⁴ The building permit was procured in exchange for purchase of a parcel of land owned by the city officer for the purpose of dedicating its use as a park and permanent open space for the City. This arrangement tainted the contract because the conflict-of-interest statute involved forbade city officers from being financially interested in any contract that they would make in their official capacity.⁵⁵ As the aforementioned federal statutes presented a conflict of interest, the court held that the California statute prohibited the potential for disloyalty: “Mere membership on the board or council establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the council.”⁵⁶ A showing of a conflict of interest, irrespective of whether the contract was fair or more advantageous to the public entity, rendered the contract illegal, void, and unenforceable.⁵⁷

The court acknowledged that imposing a bright-line remedy was harsh and that, theoretically, the lower court could have imposed an intermediate approach.⁵⁸ However, the court refused to consider any mitigating factors that would have formed part of such an approach⁵⁹; it held that the City was entitled not only to retain the land but also to recover the purchase price plus interest from the city officer without needing to restore the benefits under the contract. Echoing the rationale in *M.S. Generating*, the court held that the wrongdoing party was not entitled to any rights arising under the tainted contract, nor was the City’s recovery conditioned on actual loss, fraud, or dishonesty. For reasons of public policy, these seemingly harsh results were justified to “provide [] a strong disincentive

52. *Id.* at 566 (stating that “[a]lthough non-enforcement may seem harsh in a given case, we think that it is required in order to extend to the public the full protection which Congress degreed by enacting Section 434.”).

53. *Id.* at 563.

54. *Thomson v. Call*, 699 P.2d 316, 316 (Cal. 1985).

55. *Id.*

56. *Id.* at 326.

57. *Id.* at 325.

58. *Id.* at 326–27.

59. *Id.* at 326.

for those officers who might be tempted to take personal advantage of their public offices.”⁶⁰

Without exception, a showing of actual bribery or corruption is sufficient to require disgorgement irrespective of whether the contract remains valid. While some states grant equitable remedies, the primary remedies employed include denial of any restitution to the wrongdoing private entity and an award of disgorgement and avoidance for the public entity, regardless of the level of performance by the wrongdoing private entity or innocence of the third party.

In *S. T. Grand, Inc. v. City of New York*,—a case involving a public contract for reservoir-cleaning that was awarded without a competitive bidding process—the Court of Appeals of New York found that the criminal conviction of a contractor rendered the contract illegal, and thus void.⁶¹ Grand and its president were convicted of conspiracy to use interstate facilities with the intent to violate the New York state bribery laws in an illegal kickback scheme between the Commissioner of Water Supply and Grand. The court allowed the City of New York retroactive avoidance and disgorgement without restitution to the wrongdoing entity, despite the fact that the entity had already completed performance.⁶² The court distinguished this general rule of complete forfeiture in *Grand* from the equitable exception it made in *Gerzof v. Sweeney*,⁶³ wherein an equitable remedy was granted to the wrongdoing party. While the court in *Gerzof* had a “fair idea”—i.e., a reasonable estimate—of the damage suffered from the illegal agreements,⁶⁴ the court in *Grand* found that the absence of a single round of competitive bidding⁶⁵ did not allow it to compute the damages to the City of New York. Moreover, the illegality affected only the final stages of the contracting process in *Gerzof*, in contrast to *Grand* where the illegality “goes to the origin of that process.”⁶⁶ As in the federal cases, the court acknowledged its harsh ruling, but argued that it was necessary to deter violations.⁶⁷

The prohibition against bribery and corruption is unwavering, even where the third party to the public contract is an innocent vic-

60. *Id.* at 328.

61. *S. T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 303-305 (N.Y. 1973) [hereinafter *S. T. Grand, Inc.*].

62. *Id.* at 305 (“[W]e make it quite clear that courts of this State will decline to lend their aid to the fraudulent bidder who seeks recovery.”).

63. *Gerzof v. Sweeney*, 239 N.E.2d 521, 523 (N.Y. 1968).

64. *S. T. Grand, Inc.*, 32 N.Y.2d, at 306 (finding that in *Gerzof* it had a “fair idea” of the damage which the village had suffered, because “the village had already determined their aid to the new generator and there had been one round of legitimate bidding, from which there developed a responsible low bid”).

65. The City’s Commissioner of Water had invoked a public emergency exception to the bidding requirements for municipal contracts, awarding Grand the contract uncontested. *S. T. Grand, Inc.*, 32 N.Y.2d, at 302.

66. *Id.* at 306-07.

67. *Id.* at 305.

tim. The Court of Appeals of California has held that, where the contract is tainted, the public entity is entitled to recover all consideration paid to that third party and that such disgorgement is automatic.⁶⁸ In *Carson Redevelopment Agency v. Padilla*, the owners of a senior housing project paid the mayor a \$75,000 bribe to secure a buy-down agreement under which the Carson Agency made the owners a loan of \$850,000 which it agreed not to collect so long as the owners fulfilled their obligations to provide senior housing.⁶⁹ This extortion payment, which was exchanged for approval of a public contract, created an indirect financial interest for the public official, rendering the contract void.⁷⁰ Though the owners were victims of the public official's extortion, the court insisted that they ought to have reported the incident to law enforcement rather than pay the bribe. Once the payment is made and the extortion discovered, the victim could not be permitted to retain any consideration received.

The New Jersey Supreme Court awarded disgorgement⁷¹ to the County even where the contract remained valid, as in *County of Essex v. First Union National Bank*.⁷² When, in 1995, the bank's senior vice president pled guilty to falsifying records to induce the purchase and sale of municipal securities through an illegal kickback scheme, the Bank sought, in a subsequent suit, to retain the fees that were charged in connection to these bond transactions.⁷³ The court recognized that while a valid contract would not result typically in disgorgement, such an award was necessary because the corruption was committed against the general public:

Strong remedies are necessary to combat unlawful conduct involving public officials. Disgorgement in favor of the public entity serves as a harsh remedy against those who bribe a public official to secure a public contract and provides a deterrent to such unlawful activity. We hold that when a public contract is obtained by bribing a public official, the public entity is entitled to the gross profits obtained by the wrongdoer.⁷⁴

68. *Carson Redevelopment Agency v. Padilla*, 140 Cal. App. 4th 1323, 1323 (2d Dist. 2006) [hereinafter *Carson*].

69. *A Public Contract Procured by Bribery is Void, and the Person Who Paid the Bribe Must Disgorge Any Consideration for the Bribe*, 16 NO. CAL. CONSTRUCTION L. REP. 205 (July 2006).

70. *Carson*, 140 Cal. App. 4th at 1323.

71. New Jersey law allowed the award of punitive damages only where compensatory damages are awarded. However, here the jury did not find a breach of fiduciary duty nor evidence of actual loss suffered by the County; therefore, the issue was not elaborated upon in the decision. *Id.* at 605.

72. *County of Essex*, 891 A.2d at 600. (referring to the First Union National Bank as First Fidelity Bank because it was renamed between 1985 and 1991).

73. *Id.* at 604.

74. *Id.* at 607.

D. *Contract Law Principles in Cases Involving Corruption or Potential for Corruption*

1. Overview

Under U.S. common law, contracts that violate public policy are unenforceable.⁷⁵ A contract is unenforceable if legislation so provides, or if the interest in enforcement is clearly outweighed by public policy.⁷⁶ In balancing the public interest and the interest in enforcement, courts usually take into account, *inter alia*, (1) the parties' reasonable expectations, (2) the strength of a public policy that derives from a statute or the courts' own judgment of the need to protect public interest,⁷⁷ (3) the gravity of the misconduct, and (4) the relation of the contract to the public policy and misconduct involved.⁷⁸

Where there is a statute that criminalizes corruption and bribery—i.e., FCPA, 18 U.S.C. Section 201—or state laws prohibiting commercial bribery, a contract that contravenes such a statute by providing a bribe would infringe public policy, and thus, is unenforceable.⁷⁹

Additionally, where commercial or private-sector bribery is not explicitly prohibited under state law, the court will decide whether the enforcement of such contracts is against public policy. In princi-

75. Response of the United States Supplementary Questions Concerning Phase 3, OECD WORKING GROUP ON BRIBERY, 16 (May, 21, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-supp.pdf> (citing *Wong v. Tenneco, Inc.*, 39 Cal. 3d 126, 135 (1985) (“No principle of law is better settled than that a party to an illegal contract cannot come into a court of law and ask to have his illegal objects carried out.”)); *Lewis & Queen v. N.M. Ball Sons*, 308 P.2d 713, 719 (1957) (“the courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act”); *Trotter v. Nelson*, 684 N.E.2d 1150, 1153 (Ind. 1997) (“If an agreement is in direct contravention of a statute, then the court’s responsibility is to declare the contract void.”); see also *Erie Telecommunications, Inc. v. City of Erie, Pa.*, 853 F.2d 1084, 1092 (3d Cir. 1988) (“in the absence of fraud, mistake, duress, public policy violation, or agreement of the parties, the court was unable to void or rescind the contract”).

76. See, e.g., *Jackson Purchase, Etc. v. Local Union 816, Etc.*, 646 F.2d 264, 267, 270 (6th Cir. 1980); *Morrison v. Marsh & McLennan Cos.*, 439 F.3d 295, 300 (6th Cir. 2006); see also Restatement of the Law of Contracts 2d § 178 (1) (1981), [hereinafter Restatement of Contracts] (“A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms”).

77. Restatement of Contracts, § 179 (“Bases of Public Policies Against Enforcement: A public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation relevant to such a policy, or (b) the need to protect some aspect of the public welfare . . .”).

78. Restatement of Contracts, § 178 (2), (3).

79. See e.g., *Sirkin v. Fourteenth Street Store*, 124 A.D. 384, 388 (N.Y. App. Div. 1908) (“a contract made in violation of a penal statute, although not expressly prohibited or declared to be void, was prohibited, void, and unenforceable, whether executory or executed”); *KK, LLC v. United States Aviation Underwriters, Inc.*, 2005 U.S. Dist. LEXIS 8678, *16, (S.D. Ind. May 5, 2005) (quoting *Trotter v. Nelson*, *supra* note 75).

ple, contracts tending to corrupt⁸⁰ or to induce a violation of the private duty that the bribe-taker owes to the principal are considered to be against public policy, and hence, unenforceable.⁸¹

2. Public Sector Contracts

A contract may become tainted as a result of actual bribery or corruption, or as a result of violation of conflict-of-interest statutes that prohibit the *potential* of the breach of fiduciary duty. These statutes apply to public officials and require no showing of actual loss or corruption to void a contract (see Section C above). The consequences of finding a tainted contract in contracts involving local or federal government can be harsh. In public contracts, the public entity is permitted to avoid its obligations under the tainted contract and is entitled to compensatory damages and disgorgement. In such cases, the public entity relies on the defense of *illegality* for its own breach of contract in any action brought by a private entity challenging its refusal to pay. This defense consequently bars the private entity from claiming *restitution* irrespective of its completion of the task or obligation under the contract. Also used in such instances is the doctrine of unclean hands, which is based on public policy concerns. U.S. courts have consistently allowed the public entity to breach its obligations under a tainted contract, arguing that the private entity's breach terminated the public entity's contractual obligations to the private party.

Private individuals who are victims of corruption may obtain compensation by bringing private lawsuits based on: "fraud, contract, tort, or civil-rights theories."⁸² Common law permits the rescission of contracts obtained fraudulently in certain instances.⁸³

80. *Sinnar v. LeRoy*, 44 Wn.2d 728, 731 (Wash. 1954) (reaffirming the court's statement in *Goodier v. Hamilton*, 172 Wash. 60 (Wash. 1933) that "to anticipate and prevent a subversion of a proper administration of justice, the law should make it impossible for any such temptation to be carried into fruition by condemning a contract that contains the germ of possible corruption. The record not only discloses that this transaction 'contains the germ of possible corruption,' but the evidence, and all inferences which may be drawn, lead us to conclude that the parties contemplated the use of means other than legal to accomplish the end desired").

81. Restatement of Contracts, § 193 ("A promise by a fiduciary to violate his fiduciary duty or a promise that tends to induce such a violation is unenforceable on grounds of public policy"); see, e.g., *McConnell v. Commonwealth Pictures Corp.*, 7 N.Y.2d 465, 470 (N.Y. 1960) ("A seller cannot recover the price of goods sold where he has paid a commission to an agent of the purchaser; neither could the agent recover the commission, even at common law and before the enactment of section 384-r of the Penal Law [now N.Y. Penal Law § 439]).

82. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 88.

83. See, e.g., *Old Colony Trust Co. v. Dubuque Light & Traction Co.*, 89 F. 794, 809-10 (E.D.N.D. Iowa 1898) (holding that a false statement intended to induce as to a future event is a promise which authorizes rescission where it is not only unfulfilled, but where the promisor had no such intention at the time); *Barnes v. Century Savings Bank*, 128 N.W. 541, 547 (Iowa 1910) (deciding that false and willful misrepresentations is ground for rescission despite no actual damage resulting); *Herndon v.*

The United States courts have recognized the concept of “faithless agent” by stating that “no man can faithfully serve two masters whose interests are or may be in conflict.”⁸⁴ The courts have held that federal and state conflict-of-interest statutes recognize this concept when they state that an agent who is acting in a fiduciary capacity cannot also be acting for himself in his individual capacity, as such a conflict of interest may cause an agent not to be able to exercise “absolute loyalty and undivided allegiance” to the best interests of its principal.⁸⁵

An agent is an individual or entity in the employ of the principal. The agent agrees to act wholly under the control or direction of the principal. The legal relationship between an agent and a principal may be either express or implied, wherein the agent exercises a duty of loyalty to the principal. This relationship is fiduciary in nature, and therefore, a proof of faithless agent, such as through the acceptance of bribery, renders the contract voidable. The consequences of the faithless agent’s wrongdoings vary depending on the cause of action. In the strictest application of the faithless agent principle, courts have required absolute forfeiture from the wrongdoer and general liability for all compensation from the date of breach.⁸⁶ Even if the principal of the recipient of the bribe either authorizes (*ex ante*) or ratifies (*ex post*) a contract procured through bribery, the contract may still be declared voidable.⁸⁷

The defenses of illegality, public policy and unclean hands each can prevent enforcement of a tainted contract. The reasoning underpinning these defenses is that a party seeking enforcement cannot have the help of the court if it has engaged in corrupt acts, such as bribery. Remedies are determined based on the relative seriousness of both the defendant’s and plaintiff’s misconduct, as well as whether the denial of relief to the plaintiff would unjustly enrich the defendant.⁸⁸ In the private context, where neither party is entirely innocent, there is no obligation to make restitution of benefits conferred under an illegal contract unless the plaintiff can show that it

Wakefield-Moore Realty Co., 79 So. 318, 319 (La. 1918) (permitting rescission where the misrepresentation bore on a material part of the promise of sale).

84. Thomson v. Call, 699 P.2d 316, 324 (Cal. 1985).

85. *Id.*; see also Pearl Zuchlewski & Geoffrey A. Mort, “Faithless Servant” Doctrine Still Followed by Some States but Rejected as Overly Punitive by Others (2011), available at www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2011/ac2011/027.authcheckdam.pdf (discussing the evolution of the faithless servant doctrine under New York state law by citing Murray v. Beard, 102 N.Y. 505 (1886); Feinger v. Iral Jewelry, Ltd., 41 N.Y.2d 928 (1977); and William Floyd Union Free School District v. Wright, 61 A.D.3d 856, 859 (2d Dpt. 2009)).

86. Zuchlewski & Mort, *supra* note 85, at 2.

87. Davis, *supra* note 42, at 49.

88. See generally Zephyr Teachout, *The Unenforceable Corrupt Contract: Corruption and Nineteenth Century Contract Law*, 35 N.Y.U. REV. L. & SOC. CHANGE 681, 681-86 (2011).

was less culpable than the defendant. In effect, the bribe payer is entitled to restitution only if it can show that it paid under *duress* or was *mistaken* about the legality of its conduct.⁸⁹

In the context of public contracts, the courts have employed a “zero-tolerance” stance on grounds of public policy and have held that the public should not bear the burden of obligation under an illegal contract.⁹⁰ Public policy may be statutorily defined or weighed against the private interest in the enforcement of the contract. Conflict of interest statutes are based entirely on public policy so that violations generally result in denial of restitution to the wrongdoing party, irrespective of level of completion or performance.

The doctrine of “holder in due course” allows a second contract to remain voidable and not void against innocent third parties even if the underlying contract has been tainted and not enforceable. In such cases, the courts can enforce contracts and permit disgorgement in favor of an innocent third party. In *Bankers Trust Co. v. Litton Systems, Inc.*, 599 F.2d 488 (2d Ct. App. 1979), the defendant Litton entered into a contract with Bankers Trust to finance its lease of photocopiers under a leasing contract. That leasing contract was tainted as an employee of a Litton affiliate, Royal, had allegedly received bribes from Regent Leasing. In a separate contract, Regent had borrowed money from the plaintiff, Bankers Trust, to finance the leasing arrangement. The court held that the illegality defense under New York Uniform Commercial Code § 3-305(2) (b) is available only if under the applicable state law the effect of illegality is to make the obligations entirely null and void. The defense is ineffective against a holder in due course if the illegality causes the contract to be merely voidable and not void. The court states that “where an innocent third party, such as a holder in due course, is suing upon an illegal contract, the policy argument is inapplicable because the plaintiff had done no wrong for which it should be penalized.”⁹¹ The court further states the policy reasons behind the holder in due course, i.e., that it would be poor policy for courts to impose on banks and other finance companies any obligations to police those agents charged with responsibility of searching out commercial bribery committed by their assignors.

E. Transnational Bribery: FCPA

1. Overview

The FCPA was enacted in 1977,⁹² following disclosures that a significant number of American corporations had made illegal or

89. See generally Davis, *supra* note 42.

90. *Id.*

91. *Bankers Trust Co. v. Litton Systems, Inc.*, 599 F.2d 488, 492-93 (2d Cir. 1979).

92. Foreign Corrupt Practices Act, 15 U.S.C. §§ 78m, 78dd-1, 78ff (1998).

questionable payments to foreign officials, as well as illegal campaign contributions with funds that were undisclosed and falsely or inaccurately recorded on the company's books. The initial objective of the Act was to encourage accountability among publicly traded companies, or "issuers," by prohibiting falsification of corporate accounting records or false and misleading statements to auditors and by requiring an internal control system that would provide meaningful assurance that transactions were executed as authorized and properly recorded.⁹³

The FCPA requires issuers to keep accurate books and records and have a "system of internal controls sufficient to . . . provide reasonable assurances that transactions are executed and assets are accessed and accounted for in accordance with management's authorization."⁹⁴ Although these accounting provisions apply only to issuers, the issuer's books and records include those of its consolidated subsidiaries and affiliates under its control.⁹⁵

In addition to the accounting provisions, the drafters found it necessary to include a criminal provision in the FCPA⁹⁶ to prohibit the offer, payment, promise or authorization of bribes, directly or indirectly, to foreign officials to assist in obtaining or retaining business.⁹⁷ The anti-bribery prohibition applies to U.S. and foreign companies⁹⁸ listed on U.S. stock exchanges or those required to file periodic and other reports with the SEC⁹⁹ ("issuers"),¹⁰⁰ to U.S. persons and businesses (domestic concerns),¹⁰¹ and to officers, directors, employees, and agents of stockholders acting on behalf of an issuer or domestic concern. Federal jurisdiction in these cases requires the use of U.S. mails or any means or instrumentality of interstate com-

93. Report of the Securities and Exchange Commission on Questionable and Illegal Corporate Payments and Practices, U.S. Sec. & Exch. Comm'n, at 57-59, (May 1976), amending the Securities Exchange Act, 15 U.S.C. §§ 78a-78ll (1934).

94. *Spotlight on Foreign Corrupt Practices Act*, U.S. Sec. & Exch. Comm'n (last visited Nov. 30, 2013), www.sec.gov/spotlight/fcpa.shtml [hereinafter *Spotlight*].

95. *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act*, Criminal Division, U.S. Dep't of Justice & Enforcement Div., U.S. Sec. & Exch. Comm'n, 43 (2012) [hereinafter *A Resource Guide*] available at <http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>.

96. Stanley Sporkin, *The Worldwide Banning of Schmiergeld: A Look at the Foreign Corrupt Practices Act on its Twentieth Birthday*, 18 Nw. J. Int'l L. & Bus. 269, 275.

97. See 15 U.S.C. § 78dd-1(a) (1998).

98. Foreign companies with American Depository receipts listed on a U.S. exchange are also defined as issuers. *A Resource Guide*, *supra* note 95, at 11.

99. See 15 U.S.C. § 78m (describing the filing requirements).

100. *Id.* § 78dd-1(a).

101. Domestic concerns include "any individual who is a citizen, national, or resident of the United States, or any corporation, partnership, association, joint-stock company, business trust, unincorporated organization, or sole proprietorship that is organized under the laws of the United States or its states, territories, possessions, or commonwealths or that has its principal place of business in the United States." 15 U.S.C. §§ 78dd-2(h)(1)(A), 78dd-2(h)(1)(B).

merce.¹⁰² Such use is not required for the provisions to apply to certain foreign persons and businesses acting within the territory of the United States¹⁰³ and to U.S. individuals and entities for acts entirely outside the United States.¹⁰⁴

In recent years, FCPA enforcement has hit “historic highs,” involving individuals and companies from the United States and abroad for a broad scope of actions in locations around the world.¹⁰⁵ The Department of Justice (DOJ) and Securities and Exchange Commission (SEC) share enforcement authority, and often work together to bring parallel suits. The DOJ has criminal enforcement authority over issuers and their officers, directors, employees, agents, or stockholders acting on their behalf. With respect to the anti-bribery provisions, it has both criminal and civil enforcement authority over domestic concerns and certain foreign persons and businesses acting in furtherance of an FCPA violation in the territory of the United States. However, while the Department of Justice has vigorously prosecuted the FCPA and has the authority to pursue civil actions, “the DOJ has exercised the civil authority in limited circumstances over the last thirty years.”¹⁰⁶

The SEC’s Division of Enforcement has civil enforcement authority for violations of the FCPA accounting and internal controls provisions by issuers and their officers, directors, employees, agents, or stockholders acting on their behalf.

Although the FCPA has no express private right of action, “victims of corruption may obtain compensation for their losses by bringing private actions in state or federal court against the responsible persons or institutions, providing the victims can prove that they suffered damages as a result of corruption.”¹⁰⁷ These “FCPA-inspired” lawsuits may be based in common law or statute and can be premised on fraud, contract, tort, or civil-rights theories.¹⁰⁸

2. FCPA Criminal Provisions

The FCPA prohibits the offer, payment, promise to pay, or authorization of the payment of any money, or offer, gift, promise to give, or authorization of the giving of anything of value to any foreign official to influence any act of that official in his official capacity, to induce that official to act or omit any act in violation of his lawful

102. *Id.* §§ 78dd-1 (a), 78dd-2(a).

103. *A Resource Guide*, *supra* note 95, at 10.

104. *See id.* at 12 (noting that the FCPA was amended in 1988 to add “alternative jurisdiction” based on the nationality principle).

105. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 16.

106. *A Resource Guide*, *supra* note 95, at 117 n.357.

107. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 171.

108. *Id.*

duty, or to secure any improper advantage.¹⁰⁹ It is also unlawful to seek to induce a foreign official to use his influence to assist in obtaining or retaining or directing business.¹¹⁰ Perhaps one of the most contentious issues has been the government's broad interpretation of the definition of foreign official, which includes any officer or employee of a foreign government, agency or instrumentality thereof or any public international organization or any person acting in an official capacity for or on their behalf.¹¹¹

In addition to prohibiting payments to foreign officials, the prohibition extends to payments to foreign political parties, officials and candidates for the purpose of influencing that official or a foreign government or instrumentality to assist in obtaining or retaining business.¹¹²

Indirect payments through third parties, such as distributors, agents, consultants, joint-venture partners and others, who are frequent conduits for bribery, are also prohibited if there is knowledge that such payments will be used, directly or indirectly, for proscribed purposes.¹¹³ The statute's definition of "knowing" includes awareness of a high probability that such conduct is going to or will occur or that circumstances exist that make it substantially certain that such conduct will occur.¹¹⁴ Typically, the term "knowing" has been interpreted broadly.

The FCPA requires corrupt intent, applying to payments intended to wrongfully influence or induce a foreign official to use his position to help secure business for, or direct it to, any person. This requirement has been interpreted broadly, and it is the payer's corrupt intent, not the final outcome, that is relevant.¹¹⁵ However, FCPA liability will not arise for payments made in response to "true extortion" defined as demand for payment under imminent threat of physical harm.¹¹⁶ Economic extortion does not count as true extortion and does not protect the person from liability under the FCPA.

The FCPA applies only to payments intended to obtain or retain business.¹¹⁷ It provides two affirmative defenses¹¹⁸ and provides a

109. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1(a)(1)(A) (1998).

110. *Id.* § 78dd-1(a)(1)(B).

111. *Id.* § 78dd-1(f). See also *A Resource Guide*, *supra* note 95, at 19-20.

112. 15 U.S.C. § 78dd-1(a)(2).

113. *Id.* § 78dd-1(a)(3).

114. *Id.* § 78dd-1(f)(2).

115. Response of the United States to the Phase I Questionnaire, ORGANIZATION FOR ECONOMIC COOPERATION AND DEVELOPMENT, (Oct. 30, 1998), [hereinafter U.S. Response to the Phase I Questionnaire] available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response1.pdf>.

116. *A Resource Guide*, *supra* note 95, at 27.

117. U.S. Response to the Phase I Questionnaire, *supra* note 115.

118. 15 U.S.C. § 78dd-1(c).

narrow exception for facilitating payments to expedite or secure a routine governmental action.¹¹⁹

FCPA liability may also attach through parent-subsidary and successor liability.¹²⁰ Where a parent company has participated sufficiently, by direct participation in or by directing the activity of its subsidiary, the parent company may be liable.¹²¹ A company may also acquire successor liability when it merges with or acquires another company with liabilities.¹²²

3. Civil Provisions & Liability: FCPA Accounting & Internal Control Provisions

The FCPA's accounting provisions operate in tandem with the anti-bribery provisions.¹²³ They require issuers,¹²⁴ and subsidiaries and affiliates subject to their control,¹²⁵ to maintain accurate books and records and have an adequate system of internal controls. This system of internal controls must be sufficient to provide reasonable assurances that transactions are executed and assets are accessed and accounted for in accordance with management's authorization.¹²⁶ The SEC rules to implement these provisions prohibit any person from directly or indirectly falsifying an issuer's books and records, or from lying to an issuer's accountant in connection with an audit or preparation of any report filed with the SEC or to an independent auditor.¹²⁷

The books and records provisions are directed at the mischaracterization of bribes, both large and small, as legitimate payments, such as commissions, consulting fees or marketing expenses. These provisions require information in "reasonable detail" so as to effectively prevent false or off-the-books accounts that could be used to conceal bribes. "Consistent with the FCPA's approach to prohibiting bribe payments of any value that are made with a corrupt purpose, there is no materiality threshold."¹²⁸ The internal controls

119. *Id.* § 78dd-3(b); see also *A Resource Guide*, *supra* note 95, at 25.

120. *A Resource Guide*, *supra* note 95, at 27.

121. *Id.*

122. *Id.* at 28; see also Jason Prince, *A Rose by Any Other Name? Foreign Corrupt Practices Act-Inspired Civil Actions*, STOEL RIVES LLP, 21, (Mar. 2009), available at www.stoel.com/Files/09MarAprAdv.pdf.

123. *A Resource Guide*, *supra* note 95, at 38.

124. Privately held companies are not 'issuers' under the FCPA.

125. *A Resource Guide*, *supra* note 95, at 43 (discussing if parent owns 50% or less, it must only use good faith efforts to cause the sub or affiliate to adopt internal controls consistent with its own FCPA obligations).

126. 15 U.S.C. § 78m(b)(2). *Spotlight*, *supra* note 94.

127. Securities and Exchange Act Rule 13b2-1 to 13b2-2, 17 C.F.R. § 240 (1934); see also United States Review of Implementation of the Convention and 1997 Recommendation, OECD WORKING GROUP ON BRIBERY, (April 1999), [hereinafter OECD Convention Phase 1 Report on the United States] available at <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2390377.pdf>.

128. *A Resource Guide*, *supra* note 95, at 39.

provisions are designed to help ensure a controlled environment that will reduce the likelihood of bribery. While the FCPA does not specify the elements of a control environment, best-practice programs should reflect the particular operations, risk, needs and circumstances of the company.¹²⁹ SEC cases indicate that the absence of such programs may lead not only to FCPA violations, but to other misconduct, including financial fraud, commercial bribery and embezzlement by company employees.¹³⁰

4. Sarbanes Oxley Accounting Requirements

The Sarbanes Oxley Act, enacted in 2002¹³¹ in response to accounting scandals, imposes requirements on issuers that have FCPA implications. As inferred previously, provisions that require a public company to maintain accurate recordkeeping act as a deterrent against bribery, as such provisions prevent companies from concealing or mischaracterizing payments whose sole purpose would be to bribe foreign officials. Section 302 requires an issuer's senior executives, or "principal officers," to take responsibility for and certify to the integrity of financial reporting on a quarterly basis.¹³² They must also certify that there are no material misstatements or omissions, that financial statements are accurate in all material respects, that internal controls are properly designed, and that all significant internal control deficiencies have been disclosed to the issuer's audit committee.¹³³ Section 404 of the Act requires issuers to report annually on the effectiveness of the company's internal controls over financial reporting. The issuer's independent auditor must also attest to and report on its assessment of the effectiveness of these internal controls. Under the SEC rules, these internal controls apply to illegal acts and fraud, including bribery, which could result in a material misstatement of the company's financial statements.¹³⁴ The principal executive and the financial officer can be held liable for false certifications.

5. Civil Enforcement

The SEC Division of Enforcement has civil enforcement authority for violations of the FCPA accounting and internal controls provisions by issuers and their officers, directors, employees, agents,

129. *Id.* at 40.

130. *Resource Guide*, *supra* note 95, at 41.

131. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903(a)-(b), 2002 U.S.C.C.A.N. (116 Stat.) 745, 805 (codified as amended in scattered sections of 15 U.S.C., 18 U.S.C., and 28 U.S.C.).

132. 15 U.S.C. § 7241 (1998).

133. Securities and Exchange Act Rule 13a-14, 17 C.F.R. § 240 (1934).

134. *A Resource Guide*, *supra* note 95, at 114 n.242.

or stockholders acting on behalf of the issuers.¹³⁵ They can be subject to civil liability for violating, circumventing, or failing to implement¹³⁶ the accounting and internal control requirements or for aiding and abetting or causing an issuer to violate them.¹³⁷ The SEC must show by a preponderance of the evidence that the defendant more likely than not engaged in the alleged misconduct.¹³⁸ This standard is less burdensome than the “beyond reasonable doubt” standard in criminal enforcement, and there is no “knowing” requirement.

However, for companies and individuals to be held *criminally* liable for violations of the books and records and accounting provisions, there must be a willful and knowing failure to comply. Individuals found to have willfully violated the provisions may be fined up to \$1 million, imprisoned up to ten years, or both; issuers so found may be fined up to \$2.5 million.¹³⁹

In addition to civil liability for violations of the FCPA accounting and internal controls requirements, issuers may be subject to charges for failure to comply with SEC reporting obligations. “Failure to properly disclose material information about the issuer’s business, including material revenue, expenses, profits, assets, or liabilities related to bribery of foreign government officials, may give rise to anti-fraud and reporting violations under Sections 10(b) and 13(a) of the exchange Act.”¹⁴⁰

For FCPA bribery violations by individuals and enterprises, civil penalties of up to \$10,000 may be imposed in addition to criminal penalties.¹⁴¹ For violations of the FCPA accounting provisions, the SEC may obtain a civil penalty in actions filed in federal court and in administrative proceedings.¹⁴² The penalty will be the greater of (a) the gross amount of the pecuniary gain to the defendant as a result of the violations or (b) a specified dollar limitation, ranging from \$7,500 to \$150,000 for an individual and \$75,000 to \$725,000 for a company, depending on the egregiousness of the violation.¹⁴³ A company may

135. *USA UNCAC Self-Assessment Report*, *supra* note 25, at 3.

136. 15 U.S.C. § 78(b)(5).

137. Securities Exchange Act § 20(c), (1934), 15 U.S.C. § 78t(c) (2012). Exchange Act Rule 13b2-1, 17 C.F.R. § 240, (1934) (prohibiting directly or indirectly falsifying or causing to be falsified any book, record or account subject to the Act).

138. U.S. Response to the Phase I Questionnaire, *supra* note 115, at 18; *see also*, Thomas C. Newkirk & Ira L. Brandriss, SEC Staff, *SEC Speech: The Advantages of a Dual System* (Sept. 19, 1998) (citing footnote 23, *Addington v. Texas*, 441 U.S. 418 (1979), available at www.sec.gov/news/speech/speecharchive/1998/spch222.htm).

139. OECD Convention Phase 1 Report on the United States, *supra* note 127, at 18.

140. *A Resource Guide*, *supra* note 95, at 41.

141. OECD Convention Phase 1 Report on the United States, *supra* note 127, at 12.

142. *A Resource Guide*, *supra* note 95, at 69.

143. *Id.*

also be suspended or debarred from doing business with the U.S. federal government upon a civil judgment for falsification or destruction of records, making false statements or commission of another offense indicating a lack of business integrity that affects its present responsibility.¹⁴⁴

Besides civil penalties and sanctions, the SEC has pursued other actions in cases of FCPA violations, including civil injunctive actions, civil administrative actions, deferred prosecution agreements (DPA), Non-Prosecution Agreements (NPA), termination letters, and declinations. Defendants commonly agree to settle civil injunctive actions¹⁴⁵ under terms in which the defendant accepts the entry of a final judgment, without admitting or denying the SEC's allegations.¹⁴⁶ The final judgment typically orders the defendant to refrain from future violations of securities laws,¹⁴⁷ and grants the equitable relief of disgorgement of ill-gotten gains, pre-judgment interest and civil monetary penalties when a defendant has profited from a violation of law.¹⁴⁸ The SEC may bring civil or criminal contempt proceedings for violation of the injunction.¹⁴⁹ Civil contempt sanctions are remedial in nature, either compensating the party injured by the violation, or forcing compliance with the injunction.¹⁵⁰ Most recent civil injunctive settlements have included disgorgement. The SEC may also seek remedial measures or the retention of an independent compliance consultant or monitor.¹⁵¹

The SEC may also initiate an administrative proceeding against an individual or entity before an SEC administrative law judge,¹⁵² whose decision may be appealed to the SEC. A U.S. Court of Appeals may then review the SEC's decision. Administrative proceedings provide for several types of relief.¹⁵³ Actions against regulated persons and entities, such as broker-dealers and investment advisers and persons associated with them, can result in sanctions ranging from censure, limitation on activities, suspension of up to twelve months, and debarment from association or revocation of registration.¹⁵⁴ For

144. Federal Acquisition Regulations, 48 C.F.R. §§ 9.406-2, 9.407-2 (2005).

145. Joel M. Cohen & Mary Kay Dunning, *Does That Settle It? Well, Maybe Not*, NAT'L L.J., Apr. 9, 2012 [hereinafter *Does that Settle It?*] available at <http://www.gibsondunn.com/publications/Documents/CohenDunning-Doesthatsettleit.pdf>. See also *A Resource Guide*, *supra* note 95, at 76.

146. *Does that Settle It?*, *supra* note 145.

147. *Id.*

148. 17 C.F.R. § 201.600 (2011); see also S. Sec. and Exchange Comm., *Enforcement Manual* § 6.1.2 (Oct. 19, 2013), [hereinafter *Enforcement Manual*] available at www.sec.gov/divisions/enforce/enforcementmanual.pdf.

149. *A Resource Guide*, *supra* note 95, at 76.

150. *Id.*

151. *A Resource Guide*, *supra* note 95, at 76.

152. *Id.*

153. *Id.*

154. *Id.*

professionals such as attorneys and accountants, the SEC can order in Rule 102(e) proceedings that the professional be censured, suspended, or barred from practicing before the SEC.¹⁵⁵ SEC staff can seek an order from an administrative law judge requiring the respondent to cease and desist from any current or future violations of the securities laws.¹⁵⁶ In addition, the SEC can obtain disgorgement, pre-judgment interest, and civil money penalties in administrative proceedings under Section 21B of the Exchange Act, it can also obtain other equitable relief, such as enhanced remedial measures or the retention of an independent compliance consultant or monitor.¹⁵⁷

In making a determination as to whether or not to bring an FCPA enforcement action, the SEC is guided by its mission to protect investors and markets.¹⁵⁸ It also considers factors, such as how egregious the conduct and potential violations are; the resources available to pursue the investigation; the adequacy and strength of the evidence; the extent of potential investor harm absent an action; and the length of time elapsed since the underlying conduct occurred.¹⁵⁹

In 2010, the SEC launched a new initiative providing incentives to encourage individuals and companies to provide information about misconduct that would assist in the SEC's investigations and enforcement actions.¹⁶⁰ Under the initiative, the SEC would make use of tools not previously available in SEC enforcement, but widely used by the DOJ in criminal enforcement. Those tools included Cooperation Agreements, Deferred Prosecution Agreements, and Non-Prosecution Agreements. Under these formal written agreements, the SEC would provide credit for cooperation depending on (1) the extent of cooperation, (2) the importance of the underlying matter, (3) the societal interest in accountability for misconduct, and (4) the risk profile of the cooperating individual or entity.¹⁶¹

Under a DPA, the SEC would forego prosecution provided that the individual or company agreed to cooperate and comply for an agreed period with express undertakings and, under certain circumstances, admitted to or agreed not to contest underlying facts that the SEC could assert to establish a violation of the federal securities

155. *Id.*

156. *Id.*

157. *Id.*

158. Enforcement Manual, *supra* note 148, at 119.

159. *A Resource Guide*, *supra* note 95, at 77. *See also* Enforcement Manual, *supra* note 148 at 4-6.

160. Press Release, U.S. SEC. AND EXCH. COMM'N, SEC Announces Initiative to Encourage Individuals and Companies to Cooperate and Assist in Investigations, Press Release No. 2010-6 (Jan. 13, 2010), available at <http://www.sec.gov/news/press/2010/2010-6.htm>.

161. Enforcement Manual, *supra* note 148, at 119.

laws.¹⁶² Undertakings generally include continued cooperation and instituting or upgrading compliance programs, practices and training. A violation of the DPA could trigger an SEC enforcement action, using factual admissions.¹⁶³

Under an NPA, the SEC would, in limited circumstances, agree not to pursue an action in exchange for cooperation and compliance with express undertakings.¹⁶⁴ If the agreement were violated, the SEC could pursue an enforcement action.¹⁶⁵ In the SEC's first NPA, the Ralph Lauren Corporation was given credit for immediately reporting and remediating misconduct uncovered in an internal review and for providing extensive cooperation.¹⁶⁶ It agreed to pay disgorgement and prejudgment interest.

6. Recent Trends in SEC Enforcement

Recent years have seen a significant uptick in FCPA enforcement by both the SEC and DOJ. Since 2008, the SEC has brought an average of sixteen FCPA actions annually.¹⁶⁷ Although ongoing FCPA investigations are not public, it is estimated that there are 116 pending DOJ and SEC investigations.¹⁶⁸ Recent notable trends in SEC enforcement include prosecution of individuals, broad reading of "foreign official," an expanded exercise of jurisdiction and rewards for significant cooperation in investigations. In addition to numerous cases related to foreign bribery, the SEC has filed cases seeking civil penalties and disgorgement of profits based on books and records and internal control charges even with no formal bribery charge.¹⁶⁹

F. FCPA Collateral Suits

While the FCPA does not provide a private right of action,¹⁷⁰ individuals damaged by corruption may "bring private actions for

162. U.S. Securities and Exchange Commission, Enforcement Cooperation Program, available at www.sec.gov/spotlight/enfcoopinitiative.shtml (last visited Nov. 6, 2013).

163. Enforcement Manual, *supra* note 148, at 128.

164. *Id.* at 130.

165. *Id.* at 131.

166. U.S. Securities and Exchange Commission, Non-Prosecution Agreement, available at <http://www.sec.gov/news/press/2011/npa-pr2011-267-fanniemae.pdf>.

167. Chart, *FCPA Actions Brought By The SEC*, U.S. Sec. and Exchanges Comm., available at <http://www.sec.gov/spotlight/fcpa/fcpa-enf-acts-chart.pdf>. In fiscal year 2008, the SEC brought 16 FCPA actions; 13 actions in 2009, 16 actions in 2010, 20 actions in 2011, and 15 actions in 2012.

168. Shearman & Sterling LLP FCPA Digest at 434-556, available at <http://shearman.symplicity.com/files/e92/e9263053e7f0083efaddfa8a241e66df.pdf>.

169. Response of the United States to the OECD Questionnaire for Round 3 at 12-13, available at http://www.oas.org/juridico/english/mesicic3_usa_resp.pdf.

170. See *Lamb v. Philip Morris, Inc.*, 915 F.2d 1024, 1024 (6th Cir. 1990) (finding that a private right of action under the FCPA would be inconsistent with the legislative scheme).

monetary damages against the violator in state or federal court.”¹⁷¹ These collateral actions are “common-law or statutory-based and can be premised on fraud, contract, tort, or civil-rights theories.”¹⁷² They may also be based on “securities law, derivative shareholder, ERISA, employment, commercial, and bankruptcy law.”¹⁷³

In recent years, robust FCPA enforcement has led to an increase in private plaintiffs bringing collateral civil actions¹⁷⁴ against several major American multinational companies, such as Baker Hughes,¹⁷⁵ and Johnson & Johnson,¹⁷⁶ and against corporate officers and directors. The most prevalent are shareholder derivative actions and securities class action suits, usually filed following disclosure of an FCPA investigation or resolution.¹⁷⁷ *In re Wal-Mart Stores, Inc. Shareholder Derivative Litigation* was filed following a New York Times exposé of an alleged bribery scheme involving Wal-Mart’s largest subsidiary, Wal-Mex.¹⁷⁸

FCPA-related shareholder derivative actions are brought by shareholders on behalf of the corporation for harm to the company by its officers and directors as the result of a violation or oversight failure, including FCPA non-compliance. In *Freuler v. Parker*, a shareholder brought a derivative action on behalf of the corporation, against its officers and directors, alleging breach of fiduciary duties and violations of the Securities Exchange Act.¹⁷⁹ The complaint alleged that the defendants breached their fiduciary duties by “failing to maintain adequate internal controls in compliance with FCPA or its underlying directives regarding books, records, and accounting, designed to uncover the type of improper payments made.”¹⁸⁰

To pursue a claim, courts generally require shareholders to make a demand on the company to pursue the claim or demonstrate to the court why such a demand would be futile.¹⁸¹ While a high bar, where

171. USA UNCAC *Self-Assessment Report*, *supra* note 25, at 169.

172. *Id.*

173. Response of the United States Supplementary Questions Concerning Phase 3, OECD WORKING GROUP ON BRIBERY, 16 (May, 21, 2010), available at <http://www.justice.gov/criminal/fraud/fcpa/docs/response3-supp.pdf>.

174. *Id.*

175. *Baker Hughes Inc. v. Deaton*, No. 4:08-cv-01809 (S.D. Tex. June 6, 2008) (settling for \$44.1 million).

176. *Johnson & Johnson v. Coleman*, No. 3:11-cv-02511-MLC-TJB (D.N.J. May 2, 2011) (paying a \$21.4 million criminal penalty for improper payments in violation of the FCPA).

177. Samuel W. Cooper, S. Joy Dowdle, Christie A. Mathis, *Preparing for Shareholder Lawsuits When Dealing with Foreign Corrupt Practices Act Investigations*, Client Alert from Paul Hastings, September 2013, [hereinafter *Shareholder Lawsuits and FCPA Investigations*].

178. *In re Wal-Mart Stores, Inc. Shareholder Derivative*, No. 4:12-cv-4041, 2012 WL 5935340, at *1 (W.D. Ark. 2012).

179. *Freuler v. Parker*, 803 F. Supp. 2d 630, 633 (S.D. Tex. 2011).

180. *Id.* at 643.

181. *Shareholder Lawsuits and FCPA Investigations*, *supra* note 177.

the shareholder can demonstrate that the board has a conflict of interest or lacks independence to fairly consider whether to pursue the claim, the court may permit the shareholder to do so.¹⁸²

Unlike shareholder derivative suits, shareholder securities fraud actions are generally brought as class actions on behalf of the shareholders, rather than the corporation.¹⁸³ Such claims generally allege violations of federal securities laws. These include disclosure violations under Section 10(b) of the 1934 Act¹⁸⁴ and Rule 10b-5,¹⁸⁵ prohibiting false or materially misleading statements or omissions. These may be with respect to disclosures of FCPA material risks, investigations or oversight of compliance programs. In the Wal-Mart litigation against current and former directors, the plaintiffs alleged violations of Section 14(a)¹⁸⁶ of the Securities Exchange Act, by causing Wal-Mart to issue proxies “that materially misrepresented the effectiveness of the board’s supervision and oversight, and its compliance” with federal laws; and Section 29(b)¹⁸⁷ of the Securities Exchange Act, by receiving incentive compensation and fees that should be rescinded because of their violation of Section 14(a).¹⁸⁸

As with shareholder derivative actions, plaintiffs in securities fraud actions must meet a high bar to pursue a claim. Courts have required that plaintiffs demonstrate that those making misleading statements know that their statements are false. Knowledge may be inferred if defendants personally benefited, deliberately participated, or failed in their oversight duty to verify the statements.¹⁸⁸ Although plaintiffs have often been unsuccessful in meeting the court’s procedural requirement in either shareholder derivative actions or securities fraud actions, defendants have settled for significant sums.¹⁸⁹ For example, the FCPA collateral action suits against FARO Technologies, Inc.¹⁹⁰ and Syncor International¹⁹¹ settled for far more than their settlements with the DOJ and SEC.

182. *Id.*

183. *Id.*

184. Foreign Corrupt Practices Act, 15 U.S.C. § 78dd-1 (1998).

185. Securities and Exchange Act Rule 10b-5, 17 C.F.R. § 240 (2012).

186. 15 U.S.C. § 78n; *In re Wal-Mart Stores, Inc. Shareholder Derivative*, 2012 WL 5935340, at 3.

187. 15 U.S.C. § 78cc; *In re Wal-Mart Stores, Inc. Shareholder Derivative*, 2012 WL 5935340, at 3.

188. *Shareholder Lawsuits and FCPA Investigations*, *supra* note 177.

189. Amy Deen Westbrook, *Double Trouble: Collateral Shareholder Litigation Following Foreign Corrupt Practices Act Investigations*, 73 OHIO ST. L. J. 5, 1217, 1246 (2012) [hereinafter *Double Trouble*].

190. Faro entered into a \$2.92 million settlement with the DOJ and the SEC for making \$444,492 in illegal payments to employees of Chinese state-owned enterprises in order to secure sales contracts. The securities fraud class action settled for \$6.875 million. In *Milton Arbitrage Partners, LLC v. Syncor Int’l Corp.*, shareholders sued Syncor and several of its officers for misrepresenting the basis for Syncor’s overseas growth and omitting mention of illegal payments. While Syncor settled its FCPA litigation with the SEC for \$500,000, the shareholder litigation settled for \$15.5 million.

Private plaintiffs may seek monetary damages in FCPA-related cases by alleging fraud, breach of contract or RICO violations.¹⁹² FCPA-related civil suits may also be brought by foreign governments, alleging fraud, RICO and FCPA violations and they may be expected to increase.¹⁹³ For example, in 2008, Aluminum Bahrain BSC (“Alba”), the Kingdom of Bahrain’s state-controlled aluminum smelter, sued its Pennsylvania-based raw materials supplier, Alcoa, Inc., alleging RICO, fraud and conspiracy to defraud.¹⁹⁴

III. INTERNATIONAL LEGAL FRAMEWORK

The United States is signatory to the following international conventions and instruments: the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (signed and ratified in 1998), the Inter-American Convention Against Corruption adopted by the Organization of American States (signed in 1996 and ratified in 2000), the United Nations Convention against Corruption (UNCAC) (signed in 2003 and ratified in 2006), the Criminal Law Convention on Corruption adopted by the Council of Europe (signed in 2000),¹⁹⁵ and the United Nations Convention Against Transnational Organized Crime (signed in 2000 and ratified in 2005). The United States has also played a leadership role in the fight against corruption. It has included anti-corruption provisions in its free trade agreements, and contributed to and participated in the APEC Course of Action on Fighting Corruption and Ensuring Transparency.¹⁹⁶

191. Westbrook, *supra* note 189, at 1217, 1246; Jeffrey S. Johnston, Erika A. Tris-tan, *The Next FCPA Battleground: Private Civil Lawsuits Following Foreign Corrupt Practices Act Settlements with U.S. Government Authorities* (2011), available at www.velaw.com/uploadedFiles/VEsite/Resources/VELitigationNewsWinter2011.pdf.

192. *2013 Mid-Year FCPA Update*, GIBSON DUNN, (Jul. 8, 2013), available at www.gibsondunn.com/publications/pages/2013-Mid-Year-FCPA-Update.aspx.

193. Response of the United States Supplementary Questions Concerning Phase 3, OECD WORKING GROUP ON BRIBERY, 16 (May, 21, 2010), available at www.justice.gov/criminal/fraud/fcpa/docs/response3-supp.pdf.

194. *Aluminum Bahrain B.S.C. v. Alcoa Inc.*, 866 F. Supp. 2d 525, 525 (W.D. Pa. 2012).

195. Criminal Law Convention on Corruption, E.U., Jan. 27, 1999 available at <http://conventions.coe.int/Treaty/en/Treaties/Html/173.htm>.

196. 16th APEC Ministerial Meeting, Santiago, Chile (Nov. 17-18, 2004) available at www.apec.org/-/media/Files/Groups/ACT/04_amm_033rev2.pdf.

PETER HAY*

The Use and Determination of Foreign Law in Civil Litigation in the United States†

TOPIC II. B

Conflicts law is mainly state law in the United States; there is no uniform rule or approach as to when foreign law applies. When foreign law is applicable, the determination of its content is a question of procedure, governed by each state's procedural law and by a Federal Rule of Civil Procedure when the case is pending in a federal court. State procedural rules differ and even the uniform federal rule has received different interpretations in the Federal Circuits. The common-law heritage and structure of American law explain two aspects shared by all procedural rules for the determination of the content of foreign law: the court does not make the determination ex officio; instead, the parties must raise the issue that foreign law may be applicable and then assist the court in determining its content. Furthermore, the adversarial character of American litigation requires notice to the opponent, an opportunity to rebut, and perhaps even a limitation on the court to appoint experts or masters. The Article discusses the scope and application of the Federal Rule and the divergent approaches in state courts, as well as current attempts in some states to adopt legislation limiting or proscribing recourse to foreign law. An appendix provides references to all state statutes and to principal state decisions.

I. INTRODUCTION

A. *The Topic*

How the content of foreign law is determined in civil litigation involves a number of questions that are relevant for all legal systems. Initial questions concern the extent to which a legal system refers to foreign law in the first place, and if it does, whether determination of the applicable foreign law is mandatory or occurs only when invoked

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by a party (thereby seeking to displace the otherwise applicable *lex fori*). It is only at this point that the manner of determining foreign law becomes relevant, whether done by the court *ex officio*, with the aid of expert testimony commissioned by the court or by a party, or by recourse to other sources of information. Once the foreign rule has been ascertained, the question arises how much consideration and weight the forum court should give to the interpretation and application of the foreign rule by that system's courts. Finally, is the forum court's determination subject to review by appellate tribunals?

Many legal systems provide rather clear answers to the fundamental questions of when foreign law is relevant and should be considered and applied, who determines its content and how, and whether the determination is appealable. In the United States, the answers are multifaceted, can therefore be difficult even in American practice, and are certainly baffling for foreign observers. This is so because the question of how to determine foreign law may arise in a variety of different settings and therefore be subject to different rules, with perhaps different results.

B. *The American Setting*

The United States does not present a unitary legal system in private law, in private international law, or for civil procedure. How to prove foreign law in civil litigation—its content and application in foreign practice—is therefore difficult to describe and makes it necessary to recall for the foreign observer the essential structural characteristics of the American civil law system.

Private law is predominantly¹ the law of the individual states and other legislative jurisdictions² of the United States. Even when federal law-making authority exists, it might not be exercised³ or courts may defer to state law.⁴ Similarly, rules of conflicts law (private international law) are state law. In combination, these two

1. PETER HAY, *LAW OF THE UNITED STATES*, at vii, 8 n.18 (3d ed. 2010).

2. Guam, Puerto Rico, Virgin Islands, Native American Reservations ("Indian country"), Northern Mariana Islands, American Samoa.

3. See, e.g., *Bank of Am. Nat'l Trust & Sav. Ass'n v. Parnell*, 352 U.S. 29 (1956); *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1327 (5th Cir. 1985); *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994) (few areas—only those in which there is a significant conflict between federal and state policies—are appropriate for federal common law), *applied in* *Eli Lilly do Brasil, Ltda. v. Fed. Express Corp.* 502 F.3d 78, 84 (2d Cir. 2007) (air carrier's liability for lost or damaged freight).

4. See, e.g., Federal Tort Claims Act, 28 U.S.C. § 1346(b)(1); Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1603, 1605 (district court will use the law of the state in which it sits to resolve all issues except questions of jurisdiction); *Sosa v. Alvarez-Machain*, 542 U.S. 692, 759 n.6 (2004) (Ginsburg, J. joined by Breyer, J. concurring); *Richard v. United States*, 369 U.S. 1, 12-13 (1962); *Rayonier v. United States*, 352 U.S. 315 (1957); *EM Ltd. v. Republic of Arg.*, 389 F. App'x 38 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1474 (2011); *Gould Elec., Inc. v. United States*, 220 F.3d 169 (3d Cir. 2000). See also Gary Born, *A New Generation of International Adjudication*, 61 *DUKE L.J.* 775, 823-24 (2012) ("[I]t is likely that some one thousand cases

conclusions mean that “foreign” private law may be the law of a foreign country, but also of another American state (interstate conflicts cases);⁵ whether a law other than the *lex fori* will be applied also depends on the particular state’s conflicts rules. While approaches to conflicts law (just as rules of substantive private law) are often similar, differences do exist.⁶

Civil cases may also be brought in federal court when the litigants are of different state citizenship or nationality and the amount in controversy exceeds \$75,000. Since private law and conflicts law are state law, in these cases, federal courts must apply the law of the state in which they sit.⁷ However, they apply their own (federal) rules of procedure; these, in turn, contain rules for proving foreign law that may differ from those used by the state courts of the same state.

Because of the commercial prominence of New York, many international cases are brought in federal court there, particularly in the District Court for the Southern District, which includes New York City. Appeals from the lower New York federal courts are decided by the Court of Appeals for the Second Circuit. For these reasons, this Article draws heavily on cases decided by those courts.

II. DETERMINING THE RELEVANCE OF FOREIGN LAW

It is not the judge (the court) who directs the course of the proceedings in American civil litigation; it is the parties through their counsel (the “adversarial system”). Foreign law therefore must be invoked—raised by at least one of the parties—otherwise its possible applicability is not in issue and the case will proceed on the basis of forum law.⁸ This result follows directly from the common law’s historic view of foreign law as “fact,” rather than “law” (since the latter

involving claims against foreign states are pending in national courts at any given time and that some 250 new cases are filed each year.”).

5. In an early decision, the U.S. Supreme Court invoked “comity” as the basis for giving (extraterritorial) effect to the law of foreign countries and sister-states alike. *Bank of Augusta v. Earle*, 38 U.S. 519, 589 (1839). See also, *Fisher v. Fielding*, 34 A. 714, 715 (Conn. 1895) (the states of the United States are “independent and foreign sovereignties”).

6. Professor Symeon C. Symeonides prepares an annual survey of conflicts cases in American courts, with some commentary. This detailed survey appears in the *American Journal of Comparative Law*. See, e.g., Symeon C. Symeonides, *Choice of Law in the American Courts: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217 (2013).

7. *Klaxon Co. v. Stentor Elec. Mfg. Co., Inc.*, 313 U.S. 487 (1941); *Day & Zimmerman, Inc. v. Challoner*, 423 U.S. 3 (1975).

8. *Carey v. Bahama Cruise Lines*, 864 F.2d 201, 205 (1st Cir. 1988). See also *Trenwick Am. Reinsurance Corp. v. IRC, Inc.*, 764 F. Supp. 2d 274, 302-03 (D. Mass. 2011); *Leser v. U.S. Bank Nat’l Ass’n*, 2012 U.S. Dist. LEXIS 139493, at *16-17, 2012 WL 4472025, at *5-6 (E.D.N.Y. Sept. 25, 2012) (court disregarded choice-of-law clause and applied N.Y. conflicts law when parties relied only on N.Y. law during the proceedings; moreover, one party later claimed not to have assented to the clause).

could issue only from the court's own sovereign).⁹ Even with the fact approach greatly modified in modern law, the court does not, as a rule, apply foreign law *ex officio* on the basis of the forum's conflicts law.¹⁰ When foreign law is not before the court, the *lex fori* necessarily applies. In fact, judicial decisions refer to a presumption in favor of forum law.¹¹ From this also follows that gaps in foreign law are resolved by reference to forum law, and not on the basis of principles underlying the foreign law or by analogy to other principles or concepts of the foreign legal system.¹²

When a party does invoke foreign law, it will do so on the basis of the local state's conflicts law.¹³ Since conflicts rules—decisional or statutory¹⁴—are “law,” the choice-of-law decision is one for the court to make, and not for the jury, which decides questions of fact.¹⁵ Once the court decides, on the basis of forum conflicts law, that foreign law is applicable, the *content* of that law historically presented a *question of fact*. Modern approaches, to be discussed below, now consider this issue to be a question of “law,” also to be decided by the court (with

9. PETER HAY, PATRICK J. BORCHERS, SYMEON C. SYMEONIDES, CONFLICT OF LAWS § 12.15 (5th ed. 2010) [hereinafter *Hornbook*]. A classic historical and comparative overview is Arthur Nussbaum, *The Problem of Proving Foreign Law*, 50 YALE L.J. 1018 (1941). For other early comments, see Peter Hay, *Die Anwendung ausländischen Rechts im internationalen Privatrecht—Vereinigte Staaten von Amerika [Use of Foreign Law in Private International Law—United States of America]*, 10 MATERIALIEN ZUM AUSLÄNDISCHEN UND INTERNATIONALEN PRIVATRECHT [MATERIALS ON CONFLICT OF LAWS] 102 (1968); Stephen L. Sass, *Foreign Law in Civil Litigation: A Comparative Survey*, 16 AM. J. COMP. L. 332 (1968). Cf. *Pan. Processes S.A. v. Cities Serv. Co.*, 796 P.2d 276, 294 n.82 (Okla. 1990). See generally Imre Zajtay, *Die Lehre vom Tatsachencharakter und die Revisibilität ausländischen Rechts [The Doctrine of Foreign Law as Fact and Its Reviewability on Appeal]*, 10 MATERIALIEN ZUM AUSLÄNDISCHEN UND INTERNATIONALEN PRIVATRECHT 193 (1968). For a modern review of English law in comparison with Continental civil law, see Rainer Hausmann, *Pleading and Proving Foreign Law—A Comparative Analysis*, 2008 EUR. LEGAL F. I-1.

10. *But see infra* note 43, with respect to the court's freedom (and perhaps readiness) to undertake independent research, thereby going beyond the information offered by the parties.

11. See, e.g., *Curley v. AMR Corp.*, 153 F.3d 5, 14 (2d Cir. 1998); *Carey*, 864 F.2d at 205-06; *Bresnahan v. Stride*, 2012 Neb. App. LEXIS 227, at *14 (Neb. Ct. App. 2012); *C.I.T. Corp. v. Edwards*, 418 P.2d 685, 689 (Okla. 1966); *Cherokee Pub. Serv. Co. v. Harby Cragin Lumber Co.*, 49 P.2d 723, 726 (Okla. 1935). For early comment, see Nussbaum, *supra* note 9, at 1036 *et seq.* See also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 136 cmt. h (1971); Larry Kramer, *Interest Analysis and the Presumption of Forum Law*, 56 U. CHI. L. REV. 1301, 1303 (1989); Michael Steven Green, *Horizontal Erie and the Presumption of Forum Law*, 109 MICH. L. REV. 1237, 1260 n.110 (2011).

12. The result may be quite different when proof of the foreign law, determined to be applicable, fails altogether. See *infra* notes 17, 61.

13. This is so regardless of whether the suit is pending in state court or in a federal court exercising diversity jurisdiction. See *supra* note 7. For exceptions, see *supra* note 3.

14. With respect to the statutory law of Louisiana and Oregon, see *infra* note 19.

15. To the extent that factual issues determine the choice-of-law decision, their resolution is also a matter for the court. *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 562 (E.D.N.Y. 2011) (citing *Nautilus Ins. Co. v. Reuter*, 537 F.3d 733, 742-43 (7th Cir. 2008)).

the assistance of the parties), and therefore appealable. But, to repeat, characterizing the choice-of-law decision and the determination of the content of foreign law as “questions of law” (or similar thereto) does not affect the initial point that all of this does not occur *ex officio*, except in a few isolated cases,¹⁶ but only upon party initiative. It is then another question what happens when proof, the determination of foreign law, fails.¹⁷

While most of the American states follow traditional, territorially-oriented choice-of-law rules for succession and family law, fewer than a dozen have retained them in contract and tort. Instead, most states apply modern approaches to determine, for instance, the law of the state of the “most significant relationship” (the approach of the Second Restatement). A state using the Second Restatement approach is instructed to make that determination with respect to particular *issues*, rather than to the whole case (that is, to engage in *dépeçage*) and to use the “principles” of Section 6. As shown elsewhere,¹⁸ these principles give courts wide leeway in emphasizing internationality or, in contrast, forum interests. In fact, American cases do show a far greater “homeward” trend than does the decisional law of other (especially civil law) jurisdictions. Even the first two state codifications of portions of conflicts law are far more forum-oriented than newer codifications elsewhere.¹⁹

16. See, e.g., *Druck Corp. v. Marco Fund Ltd.*, 290 F. App'x 441 (2d Cir. 2008); *Aon Fin. Prods., Inc. v. Société Générale*, 476 F.3d 90 (2d Cir. 2007); *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993 (9th Cir. 2001) (court determined foreign law with respect to some issues after parties failed to comply with court's request for assistance); *Pittway Corp. v. United States*, 88 F.3d 501 (7th Cir. 1996) (translations of French law provided by parties did not match, so the court, based on its own research, cited to “the authoritative French version”).

17. In the older law, following the fact approach (*supra* note 9), the claim would be dismissed. See *Walton v. Arabiam Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956). See also *infra* note 54. In modern cases, courts may still write that a claimed aspect of foreign law has not been “proved,” or that the party has failed to convince the court, but will often reach the same result (non-acceptance of the asserted meaning of a foreign norm) after extensive analysis of their own. See, e.g., *Nana Osei Bonsu v. Holder*, 646 F. Supp. 2d 273, 276 (D. Conn. 2009) (citing *Walton*, but reaching a result with respect to Ghanaian law contrary to the government's position on the basis of its own review). For discussion of *Walton*, see William L. Reynolds, *What Happens When Parties Fail to Prove Foreign Law?*, 48 MERCER L. REV. 775 (1997). For further discussion, see *infra* notes 34, 54.

18. Peter Hay, *Flexibility versus Predictability and Uniformity in Choice of Law*, Hague Academy, 226 RECUEIL DES COURS [COLLECTED COURSES] 281, 350-85 (1991 I) [hereinafter *Flexibility*]; Hay, *supra* note 1, at 105-08 (nos. 238-44). For a sampling of the case law employing the new approaches, not a comprehensive survey, see PETER HAY, RUSSELL J. WEINTRAUB, PATRICK J. BORCHERS, *CONFLICT OF LAWS—CASES AND MATERIALS* 540-612 (14th ed. 2013) [hereinafter *Casebook*].

19. See LA. REV. STAT. ANN. § 9:6001 (2010); Symeon C. Symeonides, *The Conflicts Book of the Louisiana Civil Code*, 83 TUL. L. REV. 1041 (2009); OR. REV. STAT. §§ 81-100 – 81-135 (2002) (contracts); *id.* §§ 31-850 – 31-890 (torts). Both codifications contain mandatory rules providing for the application of forum law. See *Hornbook*, *supra* note 9, at § 2.25 nn.40 (contracts) and 49 (torts).

Legislation proposed in a number of states—thirty-three states in 2010 by one account²⁰—seeks to bar courts in their respective states from some or even all resort to foreign law. Implementation of a constitutional amendment in one state, specifically targeting Sharia-based law, was enjoined by a federal court on federal constitutional grounds.²¹ These efforts, of course, display a regrettably insular orientation. Even Greek and Roman law excluded foreign law only in litigation between local citizens: “The ‘personality principle’ applied, not the ‘territoriality principle.’”²² Today’s counterpart—the common-domicile rule²³—similarly performs a practical function (and also reflects possible party expectations), but is broader and not forum-focused. It gives litigants with a common foreign domicile the benefit of their home law.

The legislative initiatives mentioned above would bar the use of all non-forum law, other than federal law benefitting from the federal Constitution’s Supremacy Clause (the Constitution itself, federal law, and treaties). In this context, it is important to emphasize that contrary to earlier Supreme Court decisional law,²⁴ (general) public

20. David L. Nersessian, *How Legislative Bans on Foreign and International Law Obstruct the Practice and Regulation of American Lawyers*, 44 ARIZ. ST. L.J. 1647, 1653 *et seq.* (2012). For additional discussion, see *infra* note 104.

21. *Awad v. Ziriax*, 670 F.3d 1111 (10th Cir. 2012). Like many other such efforts, the Oklahoma amendment was intended, at least in major part, to guard against any influence of Sharia law. See Sarah M. Fallon, *Justice for All: American Muslims, Sharia Law, and Maintaining Comity Within American Jurisprudence*, 36 B.C. INT’L & COMP. L. REV. 153 (2013).

22. Harold J. Berman, *Is Conflict-of-Laws Becoming Passé?*, in BALANCING OF INTERESTS—LIBER AMICORUM PETER HAY 43, 47 n.15 (Hans-Eric Rasmussen-Bonne et al., eds. 2005), with further references. See also MARIO BRETONE, GESCHICHTE DES RÖMISCHEN RECHTS [HISTORY OF ROMAN LAW] 397 (German translation by Galsterer 1992).

23. For a survey of American case law, see *Hornbook*, *supra* note 9, §§ 17.39, 17.40 (to p. 898). Precursors to the European Union’s common-domicile rule (“Rome II” Regulation 864/2007, art. 4(2), 2007 J.O. (L 199/40) (EC)) can be found in a number of earlier European statutes. See *Flexibility*, *supra* note 18, at 366-67; *Casebook*, *supra* note 18, at 1143.

24. See *The Paquete Habana*, 175 U.S. 677, 700 (1900) (still cited by Justice O’Connor in her dissent in *Roper v. Simmons*, 543 U.S. 551, 604 (2005)).

international law is not part of federal law;²⁵ only self-executing provisions of treaties ratified by the United States are.²⁶

Even though most of the legislative initiatives have not been enacted, they reflect an extremely insular view of significant parts of the country. This attitude necessarily will find reflection in choice-of-law decisions that are based on the evaluation of contacts and the balancing of local as against foreign interests.²⁷ If some of these initiatives are enacted, current practice with respect to choice-of-law clauses could be affected.²⁸ Within limits,²⁹ American courts honor choice-of-law clauses,³⁰ but what if local law forbids recourse to foreign law?

Except in commercial centers of the United States and their courts, foreign law—whether by a choice-of-law clause or by choice-of-law decisions that seek the most closely connected law in an objective fashion—plays a far lesser role in the United States than in systems that couple fixed rules with a mandate for courts to determine the applicable law *ex officio*. To be sure, the bulk of litigation of international cases does take place in the commercial centers. Here as well, there may be differences in approach because of state/state and state-

25. Ghaleb Nassar Al-Bihani v. Barack Obama, 619 F.3d 1, 16 (D.C. Cir. 2010) (en banc). See also *Sosa v. Alvarez-Machain*, 542 U.S. 692, 715, 720 (2004) (even when a statute—in this case the Alien Tort Statute (28 U.S.C.A. § 1350)—refers to the “law of nations,” this is but a “modest” incorporation of international law, limited in the main to offenses recognized in 1789). But see *Filartiga v. Pena-Irala*, 630 F.2d 876, 887 (2d Cir. 1980) (“federal [subject matter] jurisdiction over cases involving international law is clear” (in this case, however, the federal Alien Tort Statute expressly referred to the law of nations)); Nersessian, *supra* note 20, at 1654 n.23 (“international law is federal law”). In view of the cases cited above, both of the foregoing assertions overstate. In the view of critics, the “idea that law must emanate from the power of a sovereign state’ . . . neglects the fact that transnational commercial contracts, for example, are usually governed by supranational customary law, the law merchant . . .” Berman, *supra* note 22, at 43 (citing Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT’L L. 487, 490, 493 *et seq.* (1995)). But see Emily Kadens, *The Myth of the Customary Law Merchant*, 90 TEX. L. REV. 1153 (2012).

26. *Ex parte Medellín*, 223 S.W.3d 315 (Tex. Crim. App. 2006), *aff’d sub nom. Medellín v. Texas*, 552 U.S. 1491 (2008).

27. It must be remembered that in more than half of the American states, judges are not civil servants, but are elected and must stand for re-election or confirmation. See Hay, *supra* note 1, at 59 (no. 117A).

28. The Kansas blocking statute already expressly extends to choice-of-law clauses. KAN. STAT. ANN. § 60-5104 (West 2012). For further discussion, see *infra* note 105.

29. Both the Uniform Commercial Code (§ 1-301)(1) and the Restatement (Second) of Conflict of Laws (§187(2)) require that the chosen law bear a reasonable relation to the transaction, with the Restatement section also contemplating another “reasonable basis.” An attempt to revise the UCC to permit the choice of an unrelated law in international transactions was abandoned in 2007.

30. For a survey, see Peter Hay, *Forum-Selection and Choice-of-Law Clauses in American Conflicts Law*, in GEDACHTNISSCHRIFT FÜR MICHAEL GRUSON [LEGAL ESSAYS IN MEMORY OF MICHAEL GRUSON] 195 (Theodor Baums and Stephan Hutter, eds. 2009).

court/federal-court divergences. As in all matters relating to civil litigation in the United States, there is no “American rule.”

III. DETERMINING THE CONTENT OF FOREIGN LAW

In the absence of an overriding mandatory norm of forum law³¹ and when foreign law seems relevant on the basis of forum conflicts law or a valid and acceptable choice-of-law agreement,³² the issue then becomes how to determine what that foreign law provides. The common law’s “fact approach” required parties to plead and prove the foreign law like any other fact. To soften the impact of the possible failure to meet that burden (e.g., dismissal), several presumptions were employed that could lead to forum law. They included that the foreign law was the same as forum law or that the foreign state had no law—that it was “uncivilized.” The identity presumption was obviously of little value when the foreign law was that of an entirely different legal system.³³ Similarly, courts were loath to consider and call another country “uncivilized.”³⁴

In modern practice—whether under the Federal Rules of Procedure in federal court or under state statutes in state courts³⁵—the parties must still invoke foreign law. A number of state court decisions still regard foreign law as “fact,” to be pleaded and proved like

31. In contrast to European conflicts law (*see, e.g.*, “Rome I” Regulation 593/2008, art. 9, 2008 O.J. (L 177/6) (EC) (Contractual Obligations); “Rome II” Regulation, *supra* note 23, at art. 16 (Non-Contractual Obligations)), American cases and commentators do not use the concept of (overriding) mandatory norms. Nonetheless, many cases can be explained on that basis. A good example is *Lilienthal v. Kaufman*, 395 P.2d 543 (Or. 1964) (with both California, the place of making and performance of the contract, and Oregon, the domicile of the defendant, favoring a *pacta sunt servanda*-policy, Oregon law, allowing trustees of people declared incompetent to avoid contracts, prevailed). A mandatory norm of forum law expresses an overriding local public policy that obviates any further inquiry into what law might (otherwise) apply. The traditional “public policy” exception provides a corrective mechanism *after* a choice of law has been made and the result proved unpalatable. *See* Peter Hay, *Comments on Public Policy in Current American Conflicts Law*, in *DIE RICHTIGE ORDNUNG—FESTSCHRIFT FÜR KROPHOLLER [THE RIGHT ORDER—FESTSCHRIFT FOR KROPHOLLER]* 89, 100-02 (Dietmar Baetge et al., eds. 2008).

32. *See, e.g.*, *supra* note 29.

33. *See* *Leary v. Gledhill*, 84 A.2d 725 (N.J. 1951); *Sonnesen v. Pan. Transp. Co.*, 82 N.E.2d 569, 571 (N.Y. 1948); *Pa. Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 811 (Iowa 2002) (a recent statement of the identity presumption).

34. *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956) illustrates both points: while, in a prior case (*Siegelman v. Cunard White Star Ltd.*, 221 F.2d 189, 196 (2d Cir. 1955)), the court had taken judicial notice of English law, it would be an “abuse of discretion” to do so, in the case of foreign law as unknown and perhaps different from American law as that of Saudi Arabia, without proof by the party relying on it. Likewise, without proof by the parties that Saudi Arabia was “uncivilized,” the court was not prepared to presume this to be the case. *See* *Reynolds*, *supra* note 17. For the role of presumptions in the post common-law era, *see* Edwin P. Carpenter, *Presumptions as to Foreign Law: How They Are Affected by Federal Rule of Civil Procedure 44.1*, 10 *WASHBURN L.J.* 296 (1970-71).

35. *Infra* notes 65 and 52 *et seq.*, respectively.

any other fact,³⁶ but “proof” usually takes the form of sufficiently “assisting” the court (whatever that means) so that it can make the determination. The court, as it were, becomes the trier of fact. With respect to sister-state law, courts will take “judicial notice” of its content. Some state statutes extend this method—a partial adaptation of the civil law’s maxim of *iura novit curia*—to foreign-country law. But even when authorized to do so, courts will rarely utilize this method when foreign country law is involved, and if they do, then only with respect to other common law jurisdictions, such as England. Overwhelmingly, the determination of the content of foreign law therefore proceeds as previously outlined.³⁷

What sources does the court consider—is it limited by what the parties present or with respect to the kind of sources it may consult, or is it free to go beyond material offered by the parties? Since it is usually the parties who assert the applicability of foreign law in the first place, they will obviously support their assertions with references to foreign law, statutory and decisional,³⁸ citation to commentaries, and foremost, expert opinions, which in turn reference and rely on the foregoing sources. Experts thus are designated by the parties, and hardly ever by the court.³⁹ An expert need not meet specific conditions to qualify as such (e.g., qualified to practice law in the foreign jurisdiction); he or she may be a foreign lawyer or academic, but also a domestic practitioner or academic who, on the basis of education, professional engagement, and experience, is acceptable to the court. Since nothing adduced by an expert binds the court,⁴⁰ the level of expertise demonstrated by a party’s expert has little influence on the party’s ability to introduce the expert’s opinion, but rather goes to the acceptance of his or her views as persuasive.

“American judges view foreign law through an American lens . . . For example, the premise that judicial opinions serve the same function in the French legal system as they do in the American legal

36. See, e.g., *Ramsey Cnty. v. Yee Lee*, 770 N.W.2d 572, 577 (Minn. Ct. App. 2009); *Haltom v. Haltom*, 2012 Neb. App. LEXIS 102, 2012 WL 1537839 (Neb. Ct. App. 2012).

37. Illinois seems to adhere to the common law fact approach, while Iowa follows a mixed approach. An Illinois appellate court stated as recently as 2002 that “in Illinois, the laws of foreign countries must be pled and proven as any other fact.” *Bianchi v. Savino Del Bene Int’l Freight Forwarders, Inc.*, 770 N.E.2d 684, 695 (Ill. App. Ct. 2002). The Iowa Supreme Court noted that, while foreign statutory law may be judicially noticed, foreign decisional law must be pled and proved, i.e., “introduc[ed] into evidence.” *Pa. Life Ins. Co. v. Simoni*, 641 N.W.2d 807, 810-11 (Iowa 2002).

38. See, e.g., *Roberts v. Locke*, 304 P.3d 116, 121 (Wyo. 2013) (party to furnish texts of foreign statutes, if necessary in English translation, and to prove decisional law by means of presenting the books containing the decisions or by parol evidence).

39. *But see infra* note 86.

40. See *Karaha Bodas Co., L.L.C. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara (“Pertamina”)*, 313 F.3d 70, 92 (2d Cir. 2002) (even foreign ministry’s *amicus* brief was only “entitled to substantial deference, but would not be taken as conclusive evidence”).

system is false.”⁴¹ Expert opinions therefore are helpful, often perhaps essential. On the other hand, expert opinions are usually proffered by a party in support of its position, so it may be necessary for the court to make allowances and to discount the expert’s “adversary spin.”⁴² For this reason, and since the Federal Rule establishes no hierarchy of sources for the determination of foreign law, it has been suggested that courts should do more on their own, such as engage in independent research or seek the assistance of others.⁴³ The latter might take the form of a court-appointed “master,” himself or herself perhaps an expert in the foreign law, who will neutrally reach an opinion on the content of the foreign law and so advise the court.⁴⁴ A court’s independent research to determine the content of foreign law resembles the *ex officio* determination by a civil-law court,⁴⁵ but it is not the same: the American court may (or may not) actively participate in determining the content of foreign law, but it is the parties who make the issue relevant in the first place (see above).

41. Philip D. Stacey, *Foreign Law: Rule 44.1*, *Bodum USA v. La Cafetiere, and the Challenge of Determining Foreign Law*, 6 SEVENTH CIRCUIT REV. 472, 494 (2011), at <http://www.kentlaw.edu/7cr/v6-2/stacey.pdf>. See also Michael L. Wells, *French and American Judicial Opinions*, 19 YALE J. INT’L L. 81 (1994). Of course, the same can be true in reverse as well, for instance, when a civil law court concludes that reciprocity in judgment recognition is not assured because the common law jurisdiction has no statute to that effect, but only case law.

42. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624, 629, 632 (7th Cir. 2010) (Posner, J., concurring).

43. *Id.* For discussion of the decision, see Stacey, *supra* note 41; Frederick Gaston Hall, Note, *Not Everything is as Easy as a French Press: The Dangerous Reasoning of the Seventh Circuit on Proof of Foreign Law and a Possible Solution*, 43 GEO. J. INT’L L. 1457 (2012). For the view that courts need not undertake an independent investigation, see *Baker v. Booz Allen Hamilton, Inc.*, 358 F. App’x 476 (4th Cir. 2009). It is probably true that the Federal Rule (*infra* Section IV(B)) does not require the court to undertake an independent investigation. The Rule establishes no “hierarchy” (see *Bodum*, 621 F.3d at 638 (Wood, J. concurring)), but gives courts “substantial discretion” (see *In re Vitamin C Antitrust Litig.*, 810 F. Supp. 2d 522, 561 (E.D.N.Y. 2011)). Hence, it does not require one form of evidence or method of procuring it or another. By like token, it does not preclude what Judge Posner advocates in *Bodum*. See also *infra* note 77. For a view, not representative of the majority approach, that a court may have an obligation to determine the content of foreign law on its own, see Aurora Bewicke, *The Court’s Duty to Conduct Independent Research Into Chinese Law: A Look At Federal Rule of Civil Procedure 44.1 And Beyond*, 1 CHINESE L. & POL’Y REV. 97 (2005). For the view that the trial court may not conduct its own research, because inconsistent with the adversarial system, see *Bianchi v. Savino Del Bene Int’l Freight Forwarders, Inc.*, 770 N.E.2d 684, 698-99 (Ill. App. Ct. 2002).

44. See Matthew J. Wilson, *Demystifying the Determination of Foreign Law in U.S. Courts: Opening the Door to a Greater Global Understanding*, 46 WAKE FOREST L. REV. 887, 932-33 (2011). With respect to court-appointed experts, see also *id.* at 927 *et seq.*; *infra* note 86.

45. For Germany, see Reinhold Geimer, INTERNATIONALES PROZESSRECHT [INTERNATIONAL CIVIL PROCEDURE] NO. 2577 ET SEQ. (6th ed. 2009); Reinhold Geimer, ZÖLLER—ZIVILPROZESSORDNUNG [CIVIL PROCEDURE] § 293, at no. 14 *et seq.* (Reinhold Geimer, et al. eds., 30th ed. 2014). Even here, the parties can be expected to assist the court even though they do not carry a “burden of proof” with attendant negative consequences for not meeting it. *Id.* at no. 2588 and § 293 no. 16, respectively.

There are no formal channels—conventions, intergovernmental cooperation, or otherwise—for the determination of the content of foreign-country law. An exception is the 2010 Memorandum of Understanding between the chief justice of the Supreme Court of New South Wales and the chief judge of the Court of Appeals of New York on “References of Questions of Law” from one court to the other.⁴⁶ On the American side, answering a reference from a foreign court may constitute rendering an advisory opinion and therefore present constitutional problems, both on the state and federal levels.⁴⁷ The New York-New South Wales arrangement therefore contemplates a panel, consisting of a member of the Court of Appeals and of each of the four appellate divisions, which functions in an unofficial capacity in answering questions referred to it.

IV. MODERN STATUTORY PRACTICE

A. *State Law*

1. “Judicial Notice” and *iura novit curia*

At common law, foreign law needed to be pleaded and proved by the party invoking it. If the “foreign law” was that of an American sister state, courts might take “judicial notice” of it; individual state statutes and later, a Uniform Act (below) required this.⁴⁸ The same practice might have applied if foreign country law was involved and that law was based on the common-law tradition.⁴⁹

What does “judicial notice” mean—then and now? Judicial notice does *not* mean—some exceptional cases apart—that the court determines on its own *what law* applies (Section II above) and then proceeds to determine the *content* of the foreign law that it found to be applicable (Section III above). As detailed earlier,⁵⁰ the party in-

46. The Memorandum of Understanding can be found at http://www.lawlink.nsw.gov.au/practice_notes/nswes_pc.nfs/pages/538. For brief description, see J. J. Spigelman, *Proof of Foreign Law by Reference to the Foreign Court*, 127 L.Q.R. 208, 215 (2011).

47. Spigelman, *supra* note 46, at 216. This issue has also arisen under the American Interstate Uniform Certification of Law Act, with state court decisions taking contrary position. *See id.* at 214 n.46.

48. *See* UNIFORM JUDICIAL NOTICE OF FOREIGN LAW ACT, 9 U.L.A. 399 (1951) (withdrawn 1966), Commissioners’ Prefatory Note, at 399-400. Section 1 of the Uniform Act, *id.* at 401, provided, “Every court of this state shall take judicial notice of the common law and statutes of every state, territory and other jurisdiction of the United States.”

49. For such a provision in current law, *see, e.g.*, MD. CODE ANN., CTS. & JUD. PROC. § 10-501 (West 1974) (“Every court of this State shall take judicial notice of the common law and statutes of every state, territory, and other jurisdiction of the United States, and of every other jurisdiction having a system of law based on the common law of England.”).

50. *See supra* note 8. A 1942 New Jersey statutory formulation makes this very clear: “Whenever . . . law of any State . . . is pleaded in an action . . . , the court shall take judicial notice thereof. In the absence of such pleading, it shall be presumed that the common law of such State . . . is the same as the common law as interpreted by the

tending to rely on it must put foreign law in issue. “Judicial notice” then deals with the *manner* of determining the content of applicable foreign law. It is the court, not the fact-finding jury, that makes the determination; the court is free—perhaps obliged—to inform itself, and the ruling is then treated as one on a question of law.⁵¹ A requirement to take “judicial notice” is thus considerably narrower than the civil law’s standard of *iura novit curia*.

2. Uniform Acts⁵²

Two uniform acts, since withdrawn, are reflected in some form in the statutory law of most states. The first, the *Uniform Judicial Notice of Foreign Law Act* (1936),⁵³ sought to assure judicial notice—in the sense discussed above—of sister state law within the United States. Its § 5 expressly excepted foreign-country law from the judicial-notice provision of § 2, but provided that it was to be “an issue for the court.” Since even sister-state law had to be put in issue by the party invoking it, the difference in determining its content and that of foreign-country law was mainly a matter of degree: the court had to be convinced, and the burden for that was on the proponent.

The successor statute, the *Uniform Interstate and International Procedure Act* (1962), drops both the reference to “judicial notice” and the distinction between sister-state and foreign-country law of its predecessor. Formal “pleading” was the historic common-law method of putting facts (and any non-local law) in issue,⁵⁴ and while not specifically mentioned in the prior uniform law, it was implicit. But then statutory changes occurred, “eliminate[ing] much of the hypertechnicality of pleading and time-consuming motion practice.”⁵⁵ In place of formal pleading (including details concerning the foreign law sought to be applied), the new uniform act required that a “party who intends to raise an issue concerning the law of any jurisdiction . . .

courts of this State.” N.J. STAT. ANN. § 2:98-28 (1942). *See also* Nussbaum, *supra* note 9, at 1021.

51. *See* Uniform Act, *supra* note 48, §§ 2-3. For a (not very helpful) definition of “judicial notice,” see *City of Aztec v. Gurule*, 228 P.3d 477, 480 (N.M. 2010).

52. So-called “uniform acts” are proposed for country-wide adoption by The National Conference of Commissioners on Uniform State Laws [<http://www.uniformlaws.org/>], but are adopted as individual statutes, with or without changes, by participating states. Interpretation and application of a uniform act by the various individual state supreme courts may therefore diverge. *See* Hay, *supra* note 1 at 9 (no. 18).

53. *Supra* note 48.

54. An insufficient statement of the applicable law could be a ground for dismissal. *See, e.g., Int'l Film Distribution Establishment v. Paramount Pictures Corp.*, 155 N.Y.S.2d 767 (N.Y. Sup. Ct. 1956).

55. *See* UNIFORM INTERSTATE AND INTERNATIONAL PROCEDURE ACT, 13 U.L.A. 459 (1980) (withdrawn in 1977), Commissioners’ Comments to § 4.01, at 495-96. On pleading as the “passive approach” for the court’s determination, see also Shaheez Lalani, *Establishing the Content of Foreign Law: A Comparative Study*, 20 MAASTRICHT JOURNAL OF EUROPEAN AND COMPARATIVE LAW 75 (2013).

outside this state shall give notice in his pleadings *or other reasonable written notice*" (§ 4.01, emphasis added). The objective was to "avoid unfair surprise" to the opponent, while recognizing that "to force a party to set forth the substance of the foreign law at the pleading stage may be an onerous burden [since development of] the operative facts [might still be at an] embryonic stage . . . [Thus] any reasonable written notice will suffice."⁵⁶

Some state laws seem to go even further. For example, Connecticut law provides that even "reports of the judicial decisions of other states and countries may be judicially noticed . . . as evidence of the common law of such states or countries and of the judicial construction of the statutes and other laws thereof."⁵⁷ But a look at Connecticut's case law shows that the provision has been applied only in sister-state (not foreign-country) cases, and moreover, that a court need not accord judicial notice "unless authoritative sources . . . are made available to the court."⁵⁸ New York similarly provides for judicial notice of foreign law, but conditions this on a party's request to that effect and on the party "furnish[ing] the court with sufficient information to comply with the request" as well as on the party's giving notice to its adversary "of its intention to request" judicial notice.⁵⁹ And in Texas, a party who intends to raise an issue of foreign country law, in addition to giving notice, must furnish copies of "any written materials or sources that the party intends to use as proof of the foreign law" to all other parties at least thirty days before trial.⁶⁰ Absent sufficient evidence,⁶¹ the court will apply forum law.⁶²

B. Federal Law

Federal courts exercising diversity jurisdiction⁶³ apply state substantive law, which includes state conflicts law.⁶⁴ However, just as in

56. Commissioners' Comment, *supra* note 55. The rule is the same in federal courts. *See, e.g.*, *DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd.*, 268 F.3d 829, 846 (9th Cir. 2001).

57. CONN. GEN. STAT. § 52-164 (2013).

58. *Reardon v. Zoning Bd. of Appeals of Darien*, 2012 Conn. Super. LEXIS 523, at *16, 2012 WL 802121, at *4 (Conn. Super. Ct. 2012). *See also* *Pagliari v. Jones*, 817 A.2d 756 (Conn. App. 2003); *Paramount Pictures*, *supra* note 54.

59. N.Y. C.P.L.R. 4511(b) (CONSOL. 2013). *See* *Butler v. Stagecoach Grp., PLC*, 900 N.Y.S.2d 541, 543 (N.Y. App. Div. 2010).

60. Tex. R. Evid. 203. *See also supra* note 37.

61. *See, e.g.*, *PennWell Corp. v. Ken Assocs.*, 123 S.W.3d 756 (Tex. App. 2003), *reh'g denied*, 2004 Tex. LEXIS 836 (Tex. Sept. 10, 2004) (notice was proper, but evidence was sufficient for only one of two issues of foreign law; even though the court could have conducted its own research, it applied Texas law to the foreign law issue for lack of sufficient evidence from the propounding party). *See also* *San Pedro Impulsora De Inmuebles Especiales, S.A. de C.V. v. Villarreal*, 330 S.W.3d 27, 35 (Tex. Ct. App. 2010).

62. The Appendix provides information about state law on a state-by-state basis.

63. *See supra* following note 6.

64. *Supra* note 7.

conflicts law generally, courts apply their own procedure. Thus, each state will have its own—though often quite similar—rules of procedure for raising and determining issues of foreign law. So do federal courts, in the form of the (nationally uniform) Federal Rules of Civil Procedure, which may differ from the state law rules of the state in which the federal court sits. Earlier, mention was made of attempts in some states to limit or preclude recourse to foreign law by their courts.⁶⁵ If successful, such legislation would indirectly bind federal courts, in the sense that it would affect or change state conflicts law itself, which contrary to procedural rules, the federal court must apply.

Federal Rule 44.1, promulgated in 1966 and amended since then, applies to the raising and determining of foreign law in federal practice. It provides:

A party who intends to raise an issue about a foreign country's law must give notice by a pleading or other writing. In determining foreign law, the court may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court's determination must be treated as a ruling on a question of law.

The language is clear and straightforward: formal pleading—as under the historic fact approach—is no longer required (only written⁶⁶ “notice” is⁶⁷), the court is free to stay within or go beyond the

65. *Supra* note 20. For further discussion, see *infra* note 102 *et seq.*

66. FED. R. CIV. P. 44.1.

67. Decisions differ as to how late a party may still give notice. The Ninth Circuit has permitted notice to be given after entry of a summary judgment when the issue related to attorneys' fees, but not when the issue concerned prejudgment interest. *Compare* APL Co. Pte. Ltd. v. UK Aerosols Ltd., 582 F.3d 947, 957 (9th Cir. 2009) with DP Aviation v. Smiths Indus. Aerospace & Def. Sys. Ltd., 268 F.3d 829, 849 (9th Cir. 2001), both critically noted by Mark T. Cramer, *Conquering Legal Xenophobia: Tips for Presenting and Proving the Laws of Foreign Countries in Federal Courts*, 1 BLOOMBERG LAW REPORTS—LITIGATION NO. 1 (2011). A suggested rule-of-thumb may be to say that notice of intent to invoke foreign law must be raised when the issue first arises (e.g., attorneys' fees after judgment has been recovered), although opinions may differ on when the issue “first arises,” could have been expected to be raised, or becomes relevant. See Cramer, *supra*. Alternative pleading of the choice-of-law issue satisfies the notice requirement of Fed. R. Civ. P. 44.1. *Rationis Enters. Inc. of Pan. v. Hyundai Mipo Dockyard Co.*, 426 F.3d 580 (2d Cir. 2005). For another liberal view of the notice requirement, see *In re Griffin Trading Co.*, 683 F.3d 819 (7th Cir.), *reh'g denied*, 2012 U.S. App. LEXIS 17019 (2012) (numerous and known foreign contacts were enough to suggest implication of foreign law), cited with approval in *SEC v. Jackson*, 908 F. Supp. 2d 834, 858 n.15 (S.D. Tex. 2012).

An unusual approach was taken in *Priyanto v. M/S Amsterdam*, 2009 U.S. Dist. LEXIS 40873 (C.D. Cal. 2009). Neither party had given notice of foreign law, but foreign law issues were raised in a motion for partial summary judgment. The court noted the presumption that when foreign law is not raised, parties are taken to have waived their right to application of any law but forum law. *Id.* at 34. See also *supra* note 8. When a party moving for summary judgment has not sustained its burden, the

material submitted by the parties, without being bound by the formal Rules of Evidence, and its ruling, “treated as a ruling on a question of law,” is appealable, as discussed further below. Foreign law has become “a mixture of fact and law. Indeed foreign law is a *tertium genus*, a third category, between fact and law.”⁶⁸ To illustrate further: even though treated as a ruling on “law” and therefore appealable, the court’s foreign-law determination is generally considered not to have precedential value.⁶⁹ Given the leeway the Rule permits, federal practice has not been uniform in how courts reach a decision on the foreign law issue.⁷⁰

Before adoption of the Federal Rule, some federal courts followed the practice of the state courts of their state under old Federal Rule 43(a), including, when appropriate, those courts’ willingness to take “judicial notice” of foreign law.⁷¹ Others followed another state ap-

litigation should ordinarily be resolved in favor of the non-moving party. *Ibid.* But under what law? The obvious answer, in light of the foregoing, would have been under forum law. However, the court declined to resolve the issue “until and unless the lawyers do their jobs.” *Id.* at 35. It dismissed the motion without prejudice, thereby affording the moving party (and its opponent) the opportunity to comply with Rule 44.1. *See also In re Tyson*, 433 B.R. 68, 78-79 (S.D.N.Y. 2010) (on appeal from bankruptcy court, reviewed *de novo* conclusions concerning English law, as well as submissions of the parties on appeal, when the parties had made no prior submissions nor offered information on applicable foreign law).

68. Stephen L. Sass, *Foreign Law in Federal Courts*, 29 AM. J. COMP. L. 97, 98 (1981), as quoted by Roger M. Michalski, *Pleading and Proving Foreign Law in the Age of Plausibility Pleading*, 59 BUFF. L. REV. 1207, 1211 n.20 (2011). For an extensive bibliography, see *id.* at 1208 n.7. For earlier comment, see also Arthur R. Miller, *Federal Rule 44.1 and the “Fact” Approach to Determining Foreign Law: Death Knell for a Die-Hard Doctrine*, 65 MICH. L. REV. 613 (1967); Zatzjaj, *supra* note 9, at 197-201; Wolfgang Lauterbach, *Diskussion*, 10 MATERIALIEN ZUM AUSLÄNDISCHEN UND INTERNATIONALEN PRIVATRECHT 214 (1968) (foreign law as “a procedural *tertium genus*,” author’s translation); John G. Sparkling & George R. Lanyi, *Pleading and Proof of Foreign Law in American Courts*, 19 STAN. J. INT’L L. 3 (1983); John R. Brown, *44.1 Ways to Prove Foreign Law*, 9 TUL. MAR. L.J. 179 (1984).

69. Sparkling & Lanyi, *supra* note 68, at 63. With regard to state law practice, they cite four California decisions that arrived at inconsistent conclusions as to whether Americans could inherit under German law for purposes of the requirement of reciprocity under California law. *Id.* at n.376. The decisions are reviewed and analyzed in an Oregon Supreme Court decision—*In re Estate of Krachler*, 263 P.2d 769 (Or. 1953)—which states that, apparently, California superior courts can “independently” rule with respect to these issues, *id.* at 472-73 and 780, respectively, so that the binding effect of California Supreme Court decisions (in the cases cited) perhaps was not in issue.

70. *Supra* at Section II. *See also* Committee on International Commercial Dispute Resolution, *Proof of Foreign Law after Four Decades with Rule 44.1 FRCP and CPLR 4511*, 61 THE RECORD OF THE ASSOCIATION OF THE BAR OF THE CITY OF N.Y. 49 (2006); Cramer, *supra* note 67; Charles R. Richey & Jerry E. Smith, *Federal Rules of Civil Procedure, Rule 44.1, Determining Foreign Law*, in 9 MOORE’S FEDERAL PRACTICE, § 44.1 (Matthew Bender 3d ed. 2013).

71. *See In re Petrol Shipping Corp.*, 37 F.R.D. 437 (1965), *aff’d*, 360 F.2d 103, *cert. denied*, 385 U.S. 931 (1966); *Hornbook*, *supra* note 9, at 119-21. For the narrow definition of “judicial notice” in this context, see *supra* note 51.

proach, exemplified by decisions like *Walton*,⁷² which required proof when judicial notice was not indicated, or perhaps when presumptions could help. However, this led to failure of the proponent's case when proof or presumption failed, basically mirroring the common-law approach. Federal Rule 44.1 introduced an independent procedure, even though it mirrors (in material respects) the parallel procedures introduced on the state level by the two Uniform Acts discussed above. The important difference is that in the interpretation and application of Rule 44.1, federal courts orient themselves by reference to federal practice—not state practice.

The parties, having indicated their intention to invoke foreign law (the question of whether foreign law may be relevant at all),⁷³ will offer material as to its content, most usually by way of expert testimony, which, “accompanied by extracts from foreign legal materials[,] has been and will likely continue to be the basic mode of proving foreign law.”⁷⁴ But there are also countervailing considerations and dissenting voices.

The Seventh Circuit has shown great reluctance to use, let alone rely upon, expert opinions. In 2010, Judge Richard A. Posner wrote in *Sunstar* (and repeated these sentiments the same year in his concurrence in *Bodum*⁷⁵) that, “relying on paid witnesses to spoon feed judges is justifiable only when the foreign law is the law of a country with such an obscure or poorly developed legal system that there are no secondary materials to which the judge could turn.”⁷⁶ A less categorical, more “holistic” approach that has the court consider all sources, rather than to “reject expert testimony too readily,” seems indeed preferable,⁷⁷ and is more in step with the non-hierarchical structure of Rule 44.1.⁷⁸

72. *Walton v. Arabian Am. Oil Co.*, 233 F.2d 541 (2d Cir.), *cert. denied*, 352 U.S. 872 (1956).

73. *See supra* Section II.

74. *Jinro Am. Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1000 (9th Cir. 2001); CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 2446 (3d ed. 2011). For an earlier statement, see Milton Pollack, *Proof of Foreign Law*, 26 AM. J. COMP. L. 470, 471 (1978).

75. *Bodum USA, Inc. v. La Cafetiere, Inc.*, 621 F.3d 624 (7th Cir. 2010).

76. *Sunstar, Inc. v. Alberto Culver Co.*, 586 F.3d 487, 496 (7th Cir.), *cert. denied*, 130 S. Ct. 3287 (2010).

77. Stacey, *supra* note 41, at 501. Circuit Judge Wood expressed the same view in her separate concurring opinion in *Bodum*, 621 F.3d at 639.

78. *Bodum, id.* (Wood, J. concurring). Stacey, *supra* note 41, at 500 n.168, also points to Federal Rule of Civil Procedure 1 in support of his criticism. That Rule mandates construction and administration of the Federal Rules in a manner designed to achieve their underlying purpose, namely, to bring about a “just, speedy, and inexpensive determination of disputes.” “[R]elying nearly exclusively on written sources . . . [may not] lead to accurate and consistent decisions in foreign law cases.” Stacey at 501. It may be too easy to say “it is not necessary for courts to master foreign law. In this area of global commerce, it is not incredibly difficult for federal courts to apply foreign law. In fact, it is much easier now than ever before given the fact of expert witnesses as well as burgeoning print and electronic materials.” Wilson, *supra* note

Moreover, courts that do consider expert testimony do not accept and follow it blindly. Increasingly, courts find that experts are not qualified or their testimony is unhelpful or irrelevant. Even though “expert opinion has been and will likely continue to be the basic mode of proving foreign law,” the 9th Circuit held in the *Jinro* case that the trial court did not commit error in not using the Korean expert’s opinion in framing instructions to the jury.⁷⁹ The decision has been followed by a court in the Sixth Circuit.⁸⁰

The last two decisions mentioned involve the extent and the manner in which the trial court’s determination is reviewable on appeal. On the one hand, Rule 44.1 confers discretion on the court as to what it may consider, thus seemingly excluding a duty to undertake independent research.⁸¹ On the other hand, the trial court’s determination is treated as one on a “question of law.” The latter means that a party’s objection to the applicability or content of foreign law does not raise an issue of “material fact,” precluding summary judgment,⁸² and by like token, that the trial court’s determination is reviewable on appeal. The review is *de novo*, so that the appellate court may now consider the same, additional, or other sources to arrive at its own determination. However, the cases do not yield easy answers to the question of what constitutes reversible error on the part of the trial court. In the *Jinro* case, mentioned above, the appellate court acknowledged that the trial court had considerable leeway, thereby softening an earlier stand in which it had considered rejection of un rebutted expert testimony to be reversible error in the absence of independent research by the court.⁸³ In yet a third case, the appellate court acknowledged that un rebutted expert conclusions may be rejected on the basis of the court’s own research. In the last case, the appellate court asserted to have undertaken, but did not elaborate upon, its own independent review on appeal.⁸⁴ An example of an ex-

44, at 894. The availability of (party-designated) expert witnesses does not solve all problems and the availability of print and electronic materials does not automatically make them understandable from an American perspective. See *supra* note 41. With respect to the possible use of special masters, see *infra* note 86.

79. *Jinro Am., Inc. v. Secure Invs., Inc.*, 266 F.3d 993, 1001-09 (9th Cir. 2001). This decision was followed in *United States v. Boyajian*, 2013 U.S. Dist. LEXIS 116492, at *44, 2013 WL 4189649, at *15 (C.D. Cal. 2013) (expert unqualified to comment on Vietnamese culture).

80. *Yeazel v. Baxter Healthcare Corp.*, 2011 U.S. Dist. LEXIS 36299, at *26 (N.D. Ohio 2011) (expert unqualified to give opinion on Chinese law).

81. See *supra* note 43.

82. See, e.g., *Banco de Credito Industrial, S.A. v. Tesoreria General de la Seguridad Social de España*, 990 F.2d 827, 838 (5th Cir. 1993), *cert. denied*, 510 U.S. 1071 (1994); *Inmobiliaria Axial, S.A. de C.V. v. Robles Int’l Servs., Inc.*, 2010 U.S. Dist. LEXIS 74042, at *10-11, 2010 WL 2900991, at * 3-4 (W.D. Tex. July 21, 2010).

83. *Universe Sales Co., Ltd. v. Silver Castle, Ltd.*, 182 F.3d 1036, 1038 (9th Cir. 1999).

84. *Pazcoguin v. Radcliffe*, 292 F.3d 1209, 1216 (9th Cir. 2001) (“Here, we have reviewed the Philippine statute at issue and have conducted our own research into

traordinarily detailed review and evaluation of foreign law is the federal appellate court's decision in *Saldana Iracheta v. Holder*, in which the court had to determine the petitioner's U.S. citizenship, a question which in turn depended on whether he had the same filial rights with respect to his American father under Mexican law as does a legitimated child.⁸⁵

One way to avoid party-biased expert testimony, and at the same time aid judges who lack the necessary background or expertise themselves, is the use of court-appointed experts⁸⁶ and "special masters," with the latter reviewing the case throughout the pretrial stage and submitting an analysis and recommendation to the court.⁸⁷ How-

Philippine law. Having considered these sources, we are satisfied that . . ."). For the main proposition (i.e., rejection of un rebutted expert conclusions on the basis of the court's independent research), see *Access Telecom, Inc. v. MCI Telecomms. Corp.*, 197 F.3d 694, 713 (5th Cir.), cert. denied, 531 U.S. 917 (2000).

85. 730 F.3d 419 (5th Cir. 2013). The case involved an appeal from an adverse decision of the Department of Homeland Security (DHS), i.e., not a matter to which Rule 44.1 technically applies, and the court did not refer to the Rule. However, as in *Paszcoquin*, supra note 84 (whether the use of marihuana constituted a criminal offense under foreign law), the court undertook the same *de novo* review of the question of foreign law as under the Rule, noting (as a single distinguishing feature) that it owed no (or less) deference to the administrative agency (the DHS) than it would to a lower court, citing to its own decision in *Bustamenta-Barrera v. Gonzales*, 447 F.3d 388, 393 (5th Cir. 2006). The court undertook a detailed analysis of the civil code of Tamaulipas, Mexico, considered Library of Congress reports on legitimacy law of Tamaulipas and of Mexican paternity law in general, and assigned controlling importance to the effect under Mexican law—for instance, for purposes of inheritance—of acknowledgment and registration of a child's birth in the official local register in Mexico. The "filial rights" under Mexican law were decisive. "[I]t is the substance that matters, not the legal label . . . [T]here is no legal or logical basis for a holding that a mere textual distinction between 'acknowledgment' and 'legitimation' in the foreign law should be controlling, when the rights granted to the children are the same No immigration purpose is advanced through such a distinction." *Saldana Iracheta*, 730 F.3d at 426.

86. See Sparkling & Lanyi, supra note 68, at 55-57. Federal Rule of Evidence 706 provides the authority for such appointments. *But see* Douglas H. Ginsburg, *Appellate Courts and Independent Experts*, 60 CASE W. RES. L. REV. 303, 314 (2010) (considering appointment of independent experts by the court to be "antithetical to the adversary process of our common law legal system").

87. See Sparkling & Lanyi, supra note 68, at 73-75. A classic example is *Corporacion Salvaderena de Calzado, S.A. v. Injection Footwear Corp.*, 533 F. Supp. 290 (S.D. Fla. 1982), noting, however, that the appointment of special masters is an exceptional practice. *Id.* at 293. In this case, the court followed the special master's recommendation, that a judgment of El Salvador be denied recognition because of lack of reciprocity on the part of that country. The authority for the appointment of special masters is Federal Rule of Civil Procedure 53, which the U.S. Supreme Court defined in the leading decision of *La Buy v. Howes Leather Co.*, 352 U.S. 249, *reh'g denied*, 352 U.S. 1019 (1957), emphasizing that the master is not to replace the court. 352 U.S. at 256. Rule 53 was revised and liberalized in 2003, no longer requiring exceptional circumstances to justify the appointment of a special master to perform any function if the parties consent. See Shira A. Scheindlin & Jonathan M. Redgrave, *Special Masters and E-Discovery: The Intersection of Two Recent Revisions to the Federal Rules of Civil Procedure*, 30 CARDOZO L. REV. 347 (2008). For historical discussion, see Linda J. Silberman, *Masters and Magistrates, Parts I and II*, 50 N.Y.U. L. REV. 1071 and 1297, respectively (1975). For discussion of the *La Buy* decision, see Silberman II at 1354. For a very early decision using a special master, see

ever, the use of court-appointed experts or special masters for the determination of issues of foreign law remains low, indeed rather exceptional. They are used in the main in complex litigation cases, such as multistate torts.⁸⁸

V. NON-USE OR REJECTION OF FOREIGN LAW

A. *Choosing Forum Law*

The content of foreign law only needs to be determined after it has been found to be applicable.⁸⁹ Choice-of-law analysis may well lead a court (state or federal⁹⁰) to conclude that forum law applies, even when foreign law has been properly put in issue. In the absence of statutory conflicts rules,⁹¹ the court's analysis will be guided by the contemporary American approaches to choice of law. Modern American choice-of-law analysis inquires whether there exists a "true conflict" between two potentially applicable laws, in the present context, between the *lex fori* and a foreign law.⁹² When, on the basis of textual or policy ("governmental interest") analysis, the court concludes that the case presents a "false conflict," it will apply forum law.⁹³ Further detailed analysis of the content of the foreign law thus becomes unnecessary. In cases of "true conflicts," modern approaches emphasize the law with the "most significant relationship" to the claim, the transaction's "center of gravity," or the "governmental interests" of the respective states in having their law applied. How a court weighs contacts and interests can make the applicability of foreign law uncertain; a weighing of interests may also well lead to forum law.⁹⁴

Heiberg v. Hasler, 45 F. Supp. 638 (E.D.N.Y. 1942) (French workers' compensation law), decided before the Supreme Court's decision in *La Buy*, and before the revision of Rule 53.

88. See, e.g., Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WID. L. SYMP. J. 235 (1997). For the view of a state court, that involvement in the determination of foreign law by the court itself (and, by definition, of experts or masters appointed by it) is incompatible with the American adversarial system of litigation, see *Bianchi v. Savino Del Bene Int'l Freight Forwarders, Inc.*, 770 N.E.2d 684, 698-99 (Ill. App. Ct. 2002). It is important to note, however, that Illinois still follows the fact approach. See *supra* note 37.

89. *Supra* following note 32.

90. *Supra* notes 2-3, 7.

91. *But see supra* note 19.

92. See, e.g., *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998); *Nat'l Oil Well Maint. Co. v. Fortune Oil & Gas Co.*, 2005 U.S. Dist. LEXIS 8896, 2005 WL 1123735 (S.D.N.Y. 2005). See also *Abdelhamid v. Altria Grp., Inc.*, 2007 U.S. Dist. LEXIS 33938, 2007 WL 1346657 (S.D.N.Y. 2007); *In re Refco Inc. Secs. Litig.*, 892 F. Supp. 2d 534 (S.D.N.Y. 2012) (true conflict with regard to Bermuda law; court considered parties' filings, testimony of Bermuda law experts, and reviewed Bermuda case law).

93. E.g., *Darby v. Societe des Hotels Meridien*, 1999 U.S. Dist. LEXIS 9744, 1999 WL 459816 (S.D.N.Y. 1999).

94. See, e.g., *Eli Lilly do Brasil LTDA v. Fed. Express Corp.*, 502 F.3d 78 (2d Cir. 2007) (deciding an international shipping contract case under federal common law, the court determined that New York had a greater interest than Brazil in the applica-

B. *Dismissing Foreign Law Cases on Forum Non Conveniens Grounds*

If the court finds that a case may call for application of foreign law, this fact may weigh substantially in its decision to grant a motion for dismissal in favor of the foreign jurisdiction on the ground of *forum non conveniens*.⁹⁵ Thus, in *Palacios v. Coca-Cola Co.*,⁹⁶ the court stated that the probable applicability of Panamanian law weighed in favor of dismissal. As the U.S. Supreme Court has pointed out, the lower court's discretion is not affected or limited by the possibility that the plaintiff will not enjoy the same procedural or remedial advantages in the foreign court that litigation in the United States would have provided.⁹⁷ The only, but necessary, predicate for a *forum non conveniens* dismissal is the availability of another forum.⁹⁸

C. *Public Policy*

“[I]nterests’ . . . drive both the choice and the rejection of a law as applicable to a case . . .”⁹⁹ and, one should now add, may also play a role in the *forum non conveniens* decision. When foreign law is clearly applicable, the traditional public policy (*ordre public*) defense may still present a bar to its use. Courts and commentators agree: recourse to the public policy objection should be limited to instances in which the applicable foreign law (or a foreign judgment presented for recognition) violates “fundamental notions of justice or prevailing concepts of good morals.”¹⁰⁰ Nonetheless, “interest” considerations

tion of its law because the latter's validation principle would better comport with party expectations).

95. For discussion of the *forum non conveniens* doctrine, see *Hornbook*, *supra* note 9, at §§ 11.8-11.13.

96. 757 F. Supp. 2d 347 (S.D.N.Y. 2010). See also *Langsam v. Vallarta Gardens*, 2009 U.S. Dist. LEXIS 52597, 2009 WL 8631353 (S.D.N.Y. 2009) (Mexican law); *In re Air Crash near Peixoto de Azeveda, Brazil*, 574 F. Supp. 2d 272 (S.D.N.Y. 2008) (Brazilian law); *BlackRock, Inc. v. Schroders PLC*, 2007 U.S. Dist. LEXIS 39279, 2007 WL 1573933 (S.D.N.Y. 2007) (Brazilian law). For true conflict cases in which the court undertook a foreign-law analysis, see also *Pegasus Aviation IV, Inc. v. Aerolineas Austral Chile, S.A.*, 2012 U.S. Dist. LEXIS 39319, 2012 WL 967301 (S.D.N.Y. 2012) (Argentine law).

97. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235 (1981), *reh'g denied*, 455 U.S. 928 (1982).

98. See, e.g., *Yao-Wen Chang v. Baxter Healthcare Corp.*, 599 F.3d 728, 736 (7th Cir. 2010). For discussion, see *Hornbook*, *supra* note 9, at § 11.10.

99. Hay, *supra* note 31, at 102-03. See also Peter Hay, *Favoring Local Interests*, in *FESTSCHRIFT VON HOFFMANN* 634, 642-45 (Herbert Kronke and Karsten Thorn, eds. 2011); Peter Hay, *Reviewing Foreign Judgments in American Practice—Conclusiveness, Public Policy, and Révision au fond*, in *FESTSCHRIFT FÜR KAISIS* 365 (Reinhold Geimer & Rolf A. Schütze, eds. 2012).

100. *Greek Orthodox Patriarchate of Jerusalem v. Christie's, Inc.*, 1999 U.S. Dist. LEXIS 13257, at *15, 1999 WL 673347, at *5 (S.D.N.Y. 1999) (quoting *Curley v. AMR Corp.*, 153 F.3d 5, 12 (2d Cir. 1998)) (no violation found), distinguished in *Bakalar v. Vavra*, 619 F.3d 136, 143-45 (2d Cir. 2010). For another decision finding no violation of forum public policy, see *Wultz v. Bank of China, Ltd.*, 811 F. Supp. 2d 841, 852-853 (S.D.N.Y. 2011).

underlie not only the determination of the applicability of foreign law in the first place, but also the potential decision to displace it on public policy grounds. The decision in *EM Ltd. v. Republic of Argentina* may serve as an example: the court held that Argentine law, applicable under the choice-of-law clause, and permitting a self-administered trust to shield assets against creditors, even when the settlor retained substantial control, violated New York's public policy.¹⁰¹ One wonders whether the court would have reached the same conclusion if the trust had been validly created under the law of an American sister-state.

D. Blocking Statutes

Earlier discussion briefly mentioned state legislative attempts to prevent courts from applying foreign law.¹⁰² On one level, the attempts merely articulate for choice of law what several decisions and the federal "SPEECH ACT" of 2010 do for judgment recognition.¹⁰³ The latter forbid the recognition of foreign judgments when the underlying law or the foreign procedures violate American federal constitutional free-speech guarantees; they are a form of *révision au fond* and for that reason regrettable. For choice of law, these statutes or legislative initiatives proscribe the use of foreign law that contravenes American constitutional standards.¹⁰⁴ As such, they seem to articulate only the obvious: local public policy proscribes violation of forum law. But if read literally, these statutes posit a "general prohibition against the application of, or contractual choice of, any foreign

101. 389 Fed. App'x 38 (2d Cir. 2010). For an American interstate decision that mixes together interest analysis for choice of law, mandatory norms of forum law, and public policy, see *Brenner v. Oppenheimer & Co., Inc.*, 44 P.3d 364 (Kan. 2006), discussed in Hay, *supra* note 31, at 100-02.

102. *Supra* note 20.

103. 28 U.S.C.S. § 4102 (Lexis 2010). For critical discussion, see Peter Hay, *Favoring Local Interests*, in *FESTSCHRIFT VON HOFFMANN* 634, 642-46 (Kronke and Thorn, eds. 2011).

104. See, e.g., LA. REV. STAT. ANN. § 9:6001(b) (2013) (courts and others "shall not enforce a foreign law if doing so would violate a right guaranteed by the constitution of this state or of the United States"). The statutory provision adopts the model language provided by the initiative "American Laws for American Courts" (ALMAC), drafted by the American Public Policy Alliance. See its website at <http://publicpolicyalliance.org/>. Language similar to the above has been introduced in many state legislatures (see Nersessian, *supra* note 20), in several of them multiple times. Statutes similar to Louisiana's, quoted above, are now in force in Arizona (ARIZ. REV. STAT. § 12-3103 (LexisNexis 2013)), Kansas (KAN. STAT. ANN. § 60-5103-5115 (2012)), and Tennessee (TENN. CODE ANN. § 20-15-102 (2013)).

An Oklahoma state constitutional amendment aimed to bar courts from considering or applying any Sharia-based law; it was held to be unconstitutional. *Supra* note 21. See Asma T. Uddin & Dave Pantzer, *A First Amendment Analysis of Anti-Sharia Initiatives*, 10 FIRST AMEND. L. REV. 363 (2012). One state, however, has adopted such a law but, by framing it more generally, has attempted to shield it against attack on constitutional grounds: "No court . . . may enforce any provisions of any religious code." S.D. CODIFIED LAWS § 19-8-7 (2012).

law that fails to provide American-style constitutional protections.”¹⁰⁵

On a broader level, however, some initiatives, so far isolated,¹⁰⁶ seek to proscribe the use of foreign law altogether (unless constitutionally mandated, e.g., when contained in a federal statute or treaty that must be applied under the Supremacy Clause). Such a state law would go beyond the invocation of forum public policy in the individual case; within constitutional limits, the use of forum law would become mandatory. Such legislation, if itself constitutional,¹⁰⁷ would affect *choice of law*, not just the procedure for its determination, and therefore bind all courts in the particular state, both state and federal.¹⁰⁸

VI. CONCLUSIONS

The historical view of foreign law as “fact” and the adversarial nature of litigation in the common law, particularly in the United States, combine to explain both the significant difference from the civil-law approach and the differences encountered across the United States. While almost all statutory changes now provide that determination of the content of foreign law is to be regarded as a “question of law,” these changes do not give foreign law normative character; they simply shift the determination from the jury to the judge, making him or her the “trier of fact.” Foreign law is indeed a *tertium genus*.¹⁰⁹ Both the underlying conflict-of-laws decision (whether foreign is law applicable at all, a true “question of law”) and the finding with respect to the content of that law are therefore appealable.

State and federal rules parallel each other. State rules are specific to each state and at times, differ considerably. While Federal

105. Spencer A. Gard, Robert C. Casad & Lumen N. Mulligan, *Annotation*, 5 KAN. LAW & PRAC. CODE OF CIV. PROC. ANNO. § 60-5101 (5th ed. 2013), emphasis added. As the authors mention, the Kansas statute also extends expressly to contractual choice-of-law clauses. See KAN. STAT. ANN. § 60-5104 (2012). They also note that such sweeping interpretation and application will be well-nigh impossible in practice when, for instance, Kansas law expressly refers to the law “of the country in which [a marriage] was contracted” to determine its validity. Gard, et al. at 3. Apparently anticipating a potentially negative impact of the statute on Kansas business interests, KAN. STAT. ANN. § 60-5108 exempts corporate entities from this law. The “exemption . . . seems rife for an equal protection challenge.” Gard, *loc. cit.*

106. States in which bills to this effect were introduced, but so far failed in legislative committees or chambers, include Arizona, Iowa, Missouri, Montana, South Dakota, Texas, and Virginia. In Idaho, the state legislature passed a resolution requesting the U.S. Congress to prohibit the use of foreign law in U.S. courts. 2010 Idaho Sess. Laws 972, H.R.C. 44 (2010).

107. Such statutes would, of course, require disregard of any party choice of foreign law. Complete exclusion of foreign law might also raise constitutional problems if the consequence is application of forum law in cases not related to the forum. See *Hornbook*, *supra* note 9, at § 3.20-3.23, 3.26-3.29. A dismissal for *forum non conveniens*, in turn, may not serve the interests of a local plaintiff when jurisdiction exists but contacts are insufficient for the application of local law.

108. *Supra* note 7.

109. *Supra* note 68.

Rule of Civil Procedure 44.1 operates country-wide, it is not uniform in application in the different Federal Circuits. Furthermore, there is virtually no unifying federal Supreme Court case law on the subject.

The adversarial nature of American litigation explains the universal insistence on notice to the other party and to the court of a party's intent to invoke foreign law. Notice is necessary to avoid surprise, but also to enable the opponent to rebut with contradictory evidence, as each party seeks to convince the trier of the "foreign-law/fact." Protection of party interests then also explains the considerable variations in the case law concerning what constitutes proper notice, especially the question of how late in the proceeding it may still be given.

The need for notice and especially for party presentation of evidence to the court (often buttressed by party-employed experts) could be avoided, or the burdens alleviated, by greater resort to court-appointed expert witnesses or special masters. Similarly, courts themselves could undertake more independent research.¹¹⁰ Critics of these solutions consider them to be incompatible with the adversarial nature of litigation. For the same reason, there are no mechanisms in place for an international exchange of information regarding specific questions of foreign law. Additionally, the injunction against advisory opinions argues against such a mechanism.¹¹¹

Courts across the country, especially state courts, of course differ in their experience with international cases. Some states have rarely had an international case and therefore had no opportunity to consider and to apply their statute in the light of experience elsewhere. Most recently, blocking statutes in some states, and repeated attempt for passage of similar legislation in other states, seek to bar courts from the application of foreign law altogether. Since this is choice-of-law legislation, even federal courts in the particular state would be bound: the procedural Federal Rule 44.1 would be irrelevant.¹¹²

The adversarial nature of litigation alone will produce different results and different nuances in the application of facially similar rules for the use and the determination of the foreign law. Changes in favor of both a more objective determination as well as defense mechanisms will develop and proceed differently in the various state jurisdictions and even within the federal system. Here, as generally true with respect to American law, the substantive law (conflicts) and procedural (manner of proof) of the particular state or federal forum need to be consulted.

110. *See supra* notes 43, 77.

111. *See supra* note 46 for the New York—New South Wales Agreement.

112. For blocking statutes, *see supra* note 102 *et seq.* Given the homeward trend in some American conflicts law, federal courts in such a state also need to apply forum law.

APPENDIX

Determining the Content of Foreign Law in State Courts

The following table provides information on the law and procedures applicable in the states of the United States for determining the content of foreign law. The uniform federal procedural rules are described in the text. In most civil cases in both federal and state courts, it is the law of the individual state that determines whether foreign law might be applicable in the first place, as a matter of conflicts law.

The table contains references to the applicable state laws, as well as citations to recent relevant decisional law in each state. Almost all states have a notice requirement, so the table contains no specific mention of this. If a judicial decision is mentioned in the main text, the relevant footnote is cited. Note that some of the cases concern sister-state and not-foreign country law; however, they are phrased so broadly as to encompass the latter. In some cases, the decisions are quite old and their continued validity is therefore uncertain.

Jurisdiction	Can court determine foreign law <i>sua sponte</i> ?	Law or Fact	Based on U.L.A.	Parallels F.R.C.P. 44.1	Statute(s)	Is there a blocking statute?	Recent Relevant Judicial Decisions
Alabama	No	Law	No	Yes	ALA. R. CIV. P. 44.1	No	Brotherhood's Relief & Compensation Fund v. Rafferty, 91 So. 3d 693 (Ala. 2011) (sister-state law).
Alaska	Yes	Law	No	No	ALASKA R. EVID. 202	No	No recent info.
Arizona	Yes	Law	No	Yes	AZ. R. CIV. P. 44.1	No	Kadota v. Hosogai, 608 P. 2d 68 (Ariz. 1980).
Arkansas	No	Law	No	Yes	ARK. R. CIV. P. 44.1	No	Greene v. State, 977 S.W.2d 192 (Ark. 1998).
California	Yes	Law ¹¹³	No	No	CAL. EVID. CODE § 450 <i>et seq.</i> (West 2013) ¹¹⁴	No	<i>In re Marriage of Nurie</i> , 98 Cal. Rptr. 3d 200 (Cal. Ct. App. 2009).
Colorado	No recent info.	Law	Yes	Yes	COLO. R. CIV. P. 44.1	No	No recent info.
Connecticut	Yes	Law	Yes	Yes	CONN. GEN. STAT. ANN. § 52-163a (West 2013), CONN. EVID. CODE § 2-2	No	Ritcher v. Childers, 478 A.2d 613 (Conn. App. Ct. 1984).

113. See CAL. EVID. CODE § 310 (West 2013).

114. Especially see § 452(f).

Jurisdiction	Can court determine foreign law <i>sua sponte</i> ?	Law or Fact	Based on U.L.A.	Parallels F.R.C.P. 44.1	Statute(s)	Is there a blocking statute?	Recent Relevant Judicial Decisions
Delaware	No	Law	No	Yes	DEL. R. CIV. P. 44.1 DEL. R. EVID. 202(e)	No	Vichi v. Koninklijke Philips Elecs. N.V., 62 A.3d 26 (Del. Ch. 2012); Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochem. Co., Inc., 866 A.2d 1 (Del. 2005), <i>cert. denied</i> , 546 U.S. 936 (Oct. 11, 2005).
District of Columbia	No	Law	No	Yes	D.C. R. CIV. P. 44.1	No	Oparaugo v. Watts, 884 A.2d 63 (D.C. 2003).
Florida	Yes ¹¹⁵	Law	Yes	No	FLA. STAT. ANN. § 90.202 (4)	No	Transportes Aereos Nacionales, S.A. v. De Brenes, 625 So. 2d 4 (Fla. Dist. Ct. App. 1993); Mills v. Barker, 664 So. 2d 1054 (Fla. Dist. Ct. App. 1995).
Georgia	No	Law	No	Yes	GA. CODE ANN. § 9-11-43 (West 2013)	No	Kensington Partners, LLC v. Beal Bank Nevada, 715 S.E.2d 491 (Ga. Ct. App. 2011) (sister-state law).
Guam	No recent info.	Law	No	Yes	GUAM R. CIV. P. 44.1	No	No recent info.
Hawaii	No	Law	No	Yes	HAW. R. CIV. P. 44.1 HAW. R. EVID. 202	No	Roxas v. Marcos, 969 P.2d 1209 (Haw. 1998).
Idaho	No	Law	No	No	IDAHO R. CIV. P. 44(d)	No	Barrett v. Barrett, 232 P.3d 799 (Idaho 2010).
Illinois	No	Hybrid ¹¹⁶	Yes	No	735 ILL. COMP. STAT. ANN. 5/8-1007 (West 2013)	No	Bianchi v. Savino Del Bene Int'l Freight Forwarders, 329 Ill. App. 3d 908 (Ill. Ct. App. 2002). ¹¹⁷
Indiana	No	Fact ¹¹⁸	Yes	Yes	IN. ST. TRIAL P. R. 44.1 IND. CODE § 34-38-4 <i>et seq.</i>	No	Suyemasa v. Myers, 420 N.E.2d 1334 (Ind. Ct. App. 1981).
Iowa	No	Fact ¹¹⁹	No	No	IOWA CODE §§ 622.59, 622.61	No	Doan Thi Hoang Anh v. Nelson, 245 N.W.2d 511 (Iowa 1976).
Kansas	No	Law	No	No	KAN. STAT. ANN. § 60-5101 <i>et seq.</i> (West 2012)	Yes	No recent info.
Kentucky	No recent information.						
Louisiana	Yes	Law	No	No	LA. CODE EVID. ANN. art. 202 (2012)	No	Ghassemi v. Ghassemi, 998 So.2d 731 (La. Ct. App. 2008).

115. See FLA. STAT. ANN. § 90.204 (1).

116. *But see supra* Section III, note 37. *See also supra* note 68.

117. *See supra* notes 37, 44, 89.

118. *But see supra* Section III. at 8-9.

119. *But see supra* Section III, note 37.

Jurisdiction	Can court determine foreign law <i>sua sponte</i> ?	Law or Fact	Based on U.L.A.	Parallels F.R.C.P. 44.1	Statute(s)	Is there a blocking statute?	Recent Relevant Judicial Decisions
Maine	No	Law	Yes	Yes	ME. R. CIV. P. 44A ME. REV. STAT. ANN. tit. 16, § 401 <i>et seq.</i> (2013)	No	<i>In re Estate of Wright</i> , 637 A.2d 106 (Me. 1994).
Maryland	Yes	Law	Yes	No	MD. CODE ANN., CTS. & JUD. PROC. § 10-501 <i>et seq.</i> (West 2013)	No	<i>Moustafa v. Moustafa</i> , 888 A.2d 1230 (Md. Ct. Spec. App. 2005).
Massachusetts	Yes	Law	No	Yes	MASS. GEN LAWS ANN. ch. 233, § 70 (West 2013) MASS. R. CIV. P. 44.1	No	<i>Berman v. Alexander</i> , 782 N.E.2d 14 (Mass. App. Ct. 2003).
Michigan	Yes	Law	No	Yes	MICH. R. EVID. 202 MICH. COMP. LAWS ANN. § 600.2114a (West 2013)	No	<i>In re Estate of Crane</i> , 2010 WL 935651, 2010 Mich. App. LEXIS 503 (Mich. Ct. App. 2010).
Minnesota	No	Law	Yes	No	2013 MINN. STAT. ANN. §§ 599.01, 599.02, 599.08, 599.11 (West)	No	<i>Ramsey Cnty. V. Yee Lee</i> , 770 N.W.2d 572 (Minn. Ct. App. 2009). ¹²⁰
Mississippi	Yes	Law	No	No	MISS. CODE ANN. § 13-1-149 (West 2013)	No	<i>Kountouris v. Varvaris</i> , 476 So.2d 599 (Miss. 1985); <i>Matter of Estate of Varvaris</i> , 528 So.2d 800 (Miss. 1988).
Missouri	No	Law	Yes	No	MO. ANN. STAT. § 490.120 (West 2013)	No	<i>James v. James</i> , 45 S.W.3d 458 (Mo. Ct. App. 2001).
Montana	Yes	Law	Yes	Yes	MONT. R. CIV. P. 44.1 MONT. R. EVID. 202(b)(8)	No	No recent info.
Nebraska	No	Law	Yes	No	NEB. REV. STAT. § 25-12, 101 <i>et seq.</i> (2012)	No	<i>Haltom v. Haltom</i> , 2012 WL 1537839, 2012 Neb. App. LEXIS 102 (Neb. Ct. App. 2012). ¹²¹
Nevada	Yes	Law	No	Yes	NEV. R. CIV. P. 44.1 NEV. REV. STAT. ANN. § 47.140 <i>et seq.</i> (West 2012)	No	<i>Dahya v. Second Judicial Dist. Court ex rel. Cnty. of Washoe</i> , 19 P.3d 239 (Nev. 2001).
New Hampshire	Yes	Law	No	No	N.H. REV. STAT. ANN. § 519:32 (2013) N.H. R. EVID. 201	No	<i>Brentwood Volunteer Fireman's Ass'n v. Musso</i> , 986 A.2d 588 (N.H. 2009).
New Jersey	Yes	Law	No	No	N.J. R. EVID. 201	No	<i>Fitzgerald v. Fitzgerald</i> , 168 A.2d 851 (N.J. Super. Ct. Ch. Div. 1961).
New Mexico	No	Law	No	Yes	N.M. R. CIV. P. 1- 044	No	<i>Bayer v. Bayer</i> , 800 P.2d 216 (N.M. Ct. App. 1990).

120. *See supra* note 36.121. *See supra* note 36.

Jurisdiction	Can court determine foreign law <i>sua sponte</i> ?	Law or Fact	Based on U.L.A.	Parallels F.R.C.P. 44.1	Statute(s)	Is there a blocking statute?	Recent Relevant Judicial Decisions
New York	Yes	Law	No	No	N.Y. C.P.L.R. 3016, 4511 (McKinney 2013)	No	Ponnambalam v. Ponnambalam, 35 A.D.3d 571 (N.Y. App. Div. 2006); Warin v. Wildenstein & Co., Inc., 746 N.Y.S.2d 282 (N.Y. App. Div. 2002).
North Carolina	Yes	Law	No	Yes	N.C. R. Civ. P. 44.1 N.C. Gen. Stat. Ann. § 8-4 (2013)	No	Speedway Motorsports Int'l, Ltd. v. Bronwen Energy Trading, Ltd., 2009 NCBC 3, 2009 NCBC LEXIS 17 (N.C. Super. Ct. 2009), <i>aff'd</i> , 706 S.E.2d 262 (N.C. Ct. App. 2009), <i>review denied</i> , 720 S.E.2d 668 (N.C. 2012).
North Dakota	No	Law	No	Yes	N.D. R. Civ. P. 44.1 N.D. CENT. CODE ANN. § 31-10-04 <i>et seq.</i> (West 2011)	No	Haggard v. First Nat'l Bank of Mandan, 8 N.W.2d 5 (N.D. 1942).
Ohio	No	Law	No	Yes	OHIO R. CIV. P. 44.1	No	EnQuip Techs. Grp. Inc. v. Tycon Technoglass S.R.I, 986 N.E.2d 469 (Ohio Ct. App. 2012); Verma v. Verma, 903 N.E.2d 343 (Ohio Ct. App. 2008).
Oklahoma	No	Law	Yes	No	12 OKLA. STAT. ANN. tit. 12, § 2201 <i>et seq.</i> (West 2013)	No	Panama Processes, S.A. v. Cities Serv. Co., 796 P.2d 276 (Okla. 1990). ¹²²
Oregon	Yes	Law	Yes	No	OR. REV. STAT. ANN. § 40.060 <i>et seq.</i> (West 2013)	No	Elliott v. Oregon Int'l Mining Co., 654 P.2d 663 (Or. Ct. App. 1982).
Pennsylvania	No	Law	Yes	No	42 PA. CONS. STAT. ANN. § 5327 (West 2013)	No	Maya v. Benefit Risk Mgt., 2013 WL 663158 (Pa. Com. Pl. 2013) (Trial Order).
Puerto Rico	No	Law	No	No	P.R. LAWS ANN. tit. 32, Ap. IV, Rule 11 (2010)	No	Marrero Reyes v. Garcia Ramirez, 105 D.P.R. 90 (P.R. 1976).
Rhode Island	No	Law	Yes	Yes	R.I. R. CIV. P. 44.1 R.I. GEN. LAWS ANN. § 9-19-3 <i>et seq.</i> (West 2013)	No	Harodite Indus., Inc. v. Warren Elec. Corp., 24 A.3d 514 (R.I. 2011); Barger v. Pratt & Whitney, 2006 WL 2988458, 2006 R.I. Super. LEXIS 138 (R.I. Super. Ct. 2006).
South Carolina	No	Law	Yes	Yes	S.C. R. CIV. P. 44.1 S.C. CODE ANN. § 19-3-110 (2012)	No	No recent info.

122. *See supra* note 11.

Jurisdiction	Can court determine foreign law <i>sua sponte</i> ?	Law or Fact	Based on U.L.A.	Parallels F.R.C.P. 44.1	Statute(s)	Is there a blocking statute?	Recent Relevant Judicial Decisions
South Dakota	No	Law	Yes	Yes	S.D. CODIFIED LAWS §§ 15-6-44.1, 19-8-1 <i>et seq.</i> (2012)	Yes	Varga v. Woods, 381 N.W.2d 247 (S.D. 1986).
Tennessee	No	Law	Yes	No	TENN. CODE ANN. § 20-15-101 <i>et seq.</i> (West 2013)	No	No recent info.
Texas	No	Law	No	No	TEX. R. EVID. 203	No	Gerdes v. Kennamer, 155 S.W.3d 541 (Tex. App. 2004).
Utah	No	Law	No	No	UTAH R. CIV. P. 44	No	Lamberth v. Lamberth, 550 P.2d 200 (Utah 1976).
Vermont	No	Law	No	Yes	Vt. R. CIV. P. 44.1	No	Fishbein v. Guerra, 309 A.2d 922 (Vt. 1973) (sister-state law).
Virgin Islands	No	Law	Yes	Yes	V.I. CODE ANN. tit. 5, § 4926 (2012)	No	Fabrica de Tejidos La Bellota S.A. v. M/V MAR, 799 F. Supp. 546 (V.I. Dist. Ct. 1992).
Virginia	Yes	No recent info.	No	No	VA. CODE ANN. § 8.01-386 (West 2013)	No	No recent info.
Washington	No	Law	Yes	Yes	WA. R. SUPER. CT. CIV. R. 9(k), 44.1	No	Mulcahy v. Farmers Ins. Co. of Washington, 95 P.3d 313 (Wash. 2004).
West Virginia	Yes	Law	No	Yes	W.V. R. CIV. P. 44.1 W.V. R. EVID. 202	No	No recent info.
Wisconsin	No	Law	Yes	No	WIS. STAT. ANN. § 902.02 (West 2013)	No	Griffin v. Mark Travel Corp., 724 N.W.2d 900 (Wis. Ct. App. 2006).
Wyoming	No	Law	Yes	Yes	WYO. R. CIV. P. 44.1 WYO. STAT. ANN. § 1-12-301 <i>et seq.</i> (West 2013)	No	Roberts v. Locke, 304 P.3d 116 (Wyo. 2013). ¹²³

123. See *supra* note 38.

STEPHEN M. SHEPPARD*

The American Legal Profession in the Twenty-First Century†

TOPIC II. C

Lawyers in the United States work in public service, private counseling, and dispute resolution, but many also work outside of traditional legal practice. The million-member American bar, second largest in the world, grows more diverse by gender, and ethnicity—and older on average. All members of this learned profession must qualify by education or examination and by proof of good character and fitness before taking an oath to serve as an attorney. Thence, there are few limitations on the form of legal practice, though many law firms require an associateship before an attorney becomes an owner of the firm. Economic pressure and technological enhancement are changing the profession: some jobs once in firms are now in-house, and some basic tasks are outsourced. Persistent critics of law practice and law schools suggest the profession will shrink. But the evidence suggests that U.S. lawyers will continue to influence large global firms, as they will influence U.S. life, and likely in even greater numbers.

INTRODUCTION: THE LAWYERS' PROFESSION IN THE UNITED STATES

The role of law in America, and of lawyers in American civic and economic life, has been significant since the birth of the nation.¹ Law-

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1. The evolving role of the American lawyer has been recurrently documented by lawyers and scholars. See JOHN DOS PASSOS, *THE AMERICAN LAWYER* (1907), ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953), ALBERT BLAUSTEIN, et al., *THE AMERICAN LAWYER* (1954), QUINTIN JOHNSTONE & DAN HOPSON, JR., *LAWYERS AND THEIR WORK* (1967), RICHARD L. ABEL, *THE SOCIOLOGY OF AMERICAN LAWYERS* (1980), RICHARD L. ABEL & PHILIP S.C. LEWIS, *LAWYERS IN SOCIETY: THE COMMON LAW WORLD* (1988), RICHARD L. ABEL, *AMERICAN LAWYERS* (1989), and David Scott Clark, *Legal Professions and Law Firms*, in *COMPARATIVE LAW AND SOCIETY* (David Scott Clark, ed., 2012).

yers have played central roles in public service: twenty-five of the forty-four presidents of the United States have been attorneys.² Such prominence of lawyers in American public affairs is of long standing: of the fifty-six signers of the Declaration of Independence, twenty-five were lawyers.³

Lawyers are active at all levels of politics. For example, on average, one out of eight of all state legislators are attorneys.⁴ Yet participation alone does not capture the centrality of law in a nation that sees its independence and constitution, indeed its individual liberties, in peculiarly legal terms. Writing of America in 1831, the French lawyer Alexis de Tocqueville famously observed, "In visiting the Americans and studying their laws, we perceive that the authority they have entrusted to members of the legal profession, and the influence that these individuals exercise in the government, are the most powerful existing security against the excesses of democracy."⁵ As in other countries, the efforts of lawyers and judges have been essential to the constitutional recognition of individual liberties and rights, which are now fundamental national values.⁶

Lawyers in the United States are essential to many facets of American public and private life, but the role of any particular lawyer is remarkably self-defined.⁷ The legal profession in the United States developed from the legal traditions of England, in which the study of law was both an entrée to a fee-generating practice in the royal courts and an acceptable prelude to the otherwise-funded life of a gentleman.⁸ The English alloy of leisurely and professional lawyers evolved in an American frontier culture, which encouraged qualified lawyers to use their talents as they chose rather than to constrain lawyers to a few tasks. Armed with knowledge of the law, with a particular authority in what the law allows or forbids, a measure of rhetorical skill, lawyers in the U.S. have persistently engaged in a

2. See NORMAN GROSS, ED., *AMERICA'S LAWYER-PRESIDENTS* (2004).

3. See NARA, *The Declaration of Independence: Signers Factsheet*, http://www.archives.gov/exhibits/charters/print_friendly.html?page=declaration_signers_factsheet_content.html&title=NARA%20-%20The%20Declaration%20of%20Independence%3A%20Signers%20Factsheet (last visited Nov. 7, 2013).

4. See National Conference of State Legislatures, *2009 State Legislator Education Data*, <http://www.ncsl.org/research/about-state-legislatures/2009-state-legislator-education-data.aspx> (last visited Nov. 23, 2013).

5. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 271 (1835) (Henry Reeve, trans.) (George Adlard, 1839). For the argument that the ideal of the noble lawyer failed to survive the nineteenth century without a pragmatic, capitalist challenge, see Michael P. Schutt, *Oliver Wendell Holmes And The Decline Of The American Lawyer: Social Engineering, Religion, And The Search For Professional Identity*, 30 *RUTGERS L.J.* 143 (1998).

6. See CHARLES R. EPP, *THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE* (1998).

7. See JOHN R. DOS PASSOS, *THE AMERICAN LAWYER: AS HE WAS-AS HE IS-AS HE CAN BE* (1907) (2008).

8. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953).

range of tasks beyond the courtroom. U.S. lawyers are, for instance, often engaged in commerce.

Lawyers are active in corporate boardrooms, and not just to counsel decision-makers; in 2010, nine chief executives of Fortune 500 corporations were lawyers.⁹ Indeed, though only one living American has become a billionaire by practicing of law, lawyers are among the extremely wealthy for other reasons.¹⁰ On a smaller plane, lawyers often fulfill non-legal roles: young people entering a family business often study the law, and many people entering finance, realty, or corporate management study law as well.

This is not to say that lawyers are held in high public esteem. Lawyers remain one of the few categories of people in the United States who are considered the appropriate objects of derisive humor in polite society.¹¹ A 2012 survey of American attitudes found only half as many adults rated the honesty and ethical standards of lawyers to be high or very high, as those adults who rated them low or very low.¹² Judges are, however, more esteemed, and roughly half of respondents consider their honesty and ethics to be high or very high, with only an eighth considering them to be low or very low. By comparison, twice as many people esteem the ethics of college professors, four times as many esteem nurses, and even bankers are more trusted than lawyers (though stockbrokers and members of Congress are less trusted yet).

Even so, lawyers remain central to American culture, and lawyer stories are a staple of American cinema, television, and fiction. This preoccupation is in part owing to a fascination with the courtroom criminal trial, with its drama of competition between embattled champions. Yet public interest in American lawyers reaches beyond the lawyer in the police procedurals and criminal trials, and narratives of civil cases, corporate law, law schools, and other lawyerly roles recurrently find an audience.¹³

Demographics

The United States has a great many lawyers. As of 2012, there were 1,268,011 people then licensed to practice law in the United

9. CEO, Esq., http://www.abajournal.com/magazine/article/ceo_esq/ (last visited Nov. 21, 2013).

10. Brian Baxter, *Revisiting the Forbes 400 and Its Deep-Pocketed Attorneys*, <http://www.americanlawyer.com/PubArticleALD.jsp?id=1202620869101&thepage=1> (last visited Nov. 22, 2013).

11. See MARC GALANTER, *LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE* (2005).

12. The poll, by the Gallup organization, found 42% of respondents thought lawyers' ethics were "average." See <http://www.gallup.com/poll/1654/honesty-ethics-professions.aspx#3>.

13. See MICHAEL ASIMOW, ED., *LAWYERS IN YOUR LIVING ROOM: LAW ON TELEVISION* (2009).

States.¹⁴ If one includes those once eligible to practice but not currently licensed, the actual number of U.S. lawyers is higher still. A conservative estimate, using the actuarial indices for the demographics of law graduates since 1950, suggests that there are 1.6 million law graduates living in the United States.¹⁵

Given a U.S. population in 2012 of roughly 313.9 million people, the ratio of licensed attorneys to the American population was roughly one lawyer for every 250 people. This may not be world's largest bar, either in raw numbers or in proportion of lawyers to population, but it is second on both scales. India is likely to have slightly greater numbers of licensed lawyers overall,¹⁶ and Israel has a higher proportion of lawyers to population.¹⁷ In all events, the very size of the U.S. lawyer population, as well as arguments over the availability of suitable employment for qualified lawyers, has been routinely controversial in the United States.¹⁸

Even so, the number of lawyers who are in fact engaged in the practice of law is just over half of those who are licensed to do so, and about two-fifths of those qualified to do so. The U.S. Bureau of Labor Statistics estimated the number of lawyers in 2012 who were engaged in employment or self-employment providing legal services was 741,920,¹⁹ with an additional 27,220 judges and magistrates,²⁰

14. "Lawyer Demographics: Number Of Licensed Lawyers - 2012: 1,268,011" at http://www.americanbar.org/content/dam/aba/administrative/market_research/lawyer_demographics_2013.authcheckdam.pdf (last visited Nov. 6, 2013).

15. See Stephen M. Sheppard, *The American Law School: What it Was, What it Is, and What it Ought to Be* (Cambridge Press, forthcoming 2014).

16. In 2011, the Indian bar reported having "nearly 1.3 million lawyers" actively practicing in India in 2011, increasing by 4% yearly. Lawyers in India by state - Legallypedia, http://www.legallyindia.com/wiki/Lawyers_in_India_by_state (last visited Nov. 25, 2013). In contrast, the local bar in China has grown significantly in recent years, but still is only about a quarter of a million. See *China has 220,000 Lawyers* —Politics—chinadaily.com.cn, http://www.chinadaily.com.cn/china/2012-11/13/content_15924473.htm (last visited Nov. 25, 2013).

17. Israel appears to have the highest national proportion of attorneys, with 52,142 lawyers in a population of 7.908 million, for a ratio of nearly one lawyer for every 150 people. See *Over 1,200 Lawyers Join Bar Association*, Israel Business, Ynetnews, <http://www.ynetnews.com/articles/0,7340,L-4325709,00.html> (last visited Nov. 6, 2013). The American and Israeli ratios are only slightly higher than some European states. The ratios in Europe range from 1 to 289 in Italy, to 1 to 341 in England, to 1 to 478 in Germany to 1 to 980 in France, to 1 to 1724 in Finland. See Jean-Paul Jean, Council of Europe, Study on 16 comparable countries http://www.coe.int/t/dghl/cooperation/cepej/evaluation/2010/2010_pays_comparables_en.pdf. The ratios in India and China are 1 to 886 and 1 to 6100, respectively.

18. Compare STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013) (The U.S. has too many lawyers) to CLIFFORD WINSTON, ET AL., *FIRST THING WE DO, LET'S DEREGULATE ALL THE LAWYERS* (Brookings Institution 2011) (The U.S. has too few lawyers owing to regulation). These arguments were old hat a century ago. See *Current Topics*, 28 ALBANY LAW JOURNAL 442 (1883) ("This cry of 'too many lawyers' has become too familiar to be alarming.")

19. Occupational Employment and Wages, May 2012, 23-1011 Lawyers, <http://www.bls.gov/oes/current/oes231011.htm#ind> (last visited Nov. 7, 2013).

14,150 administrative law judges and hearing officers,²¹ 11,200 judicial law clerks,²² 6,520 arbitrators and mediators,²³ for a total of 788,310 lawyers engaged in legal work.²⁴

The other half of the qualified attorneys, or three-fifths of the attorneys who are actively licensed, in the United States, are engaged in pursuits other than practicing or adjudicating the law. Some of these lawyers are retired, though still retaining an active license. A significant number of these lawyers are in positions in the public or private sector that are not considered positions of legal practice. Barack Obama and Joseph Biden, for instance, are public officials who qualified as attorneys but who were not, in 2012, providing legal services.²⁵ So are many corporate officers, journalists, investors, bankers, farmers, teachers, and practitioners in many other fields.²⁶

Professional Structure

Lawyers in the United States have a single, essential professional qualification—to be licensed (or have been licensed) to practice as an attorney at law. There is no distinction in the U.S. between the qualifications to serve in the role of counselor or solicitor and in the role of advocate or barrister. As a practical matter, many lawyers specialize in civil litigation or in criminal practice, and other lawyers tend not to practice in those fields. Yet, there is no technical licensure or other limitation that limits attorneys in the U.S. either to engage in courtroom practice or to refrain from it.

20. The number 741,920 is an aggregate of employed lawyers from the occupational employment statistics and self-employed lawyers from the occupational outlook statistics. See Occupational Employment and Wages, May 2012 23-1023 Judges, Magistrate Judges, and Magistrates, <http://www.bls.gov/oes/current/oes231023.htm> (last visited Nov. 7, 2013); XLS data from Employment projections data for lawyers, 2010-20, Lawyers: Occupational Outlook Handbook: U.S. Bureau of Labor Statistics, <http://www.bls.gov/ooH/Legal/Lawyers.htm#tab-6> (last visited Dec. 2, 2013).

21. Occupational Employment and Wages, May 2012, 23-1021 Administrative Law Judges, Adjudicators, and Hearing Officers, Administrative Law Judges, Adjudicators, and Hearing Officers, <http://www.bls.gov/oes/current/oes231021.htm> (last visited Nov. 7, 2013).

22. Occupational Employment and Wages, May 2012 23-1012 Judicial Law Clerks, <http://www.bls.gov/oes/current/oes231012.htm> (last visited Nov. 7, 2013).

23. Occupational Employment and Wages, May 2012, 23-1022 Arbitrators, Mediators, and Conciliators, <http://www.bls.gov/oes/current/oes231022.htm> (last visited Nov. 7, 2013).

24. Legal services employ even more non-lawyers, including an additional 276,030 paralegals and legal assistants, 18,590 court reporters, 49,390 title examiners, and 47,000 other staff. See Occupational Employment and Wages, May 2012, 23-0000 Legal Occupations, <http://www.bls.gov/oes/current/oes230000.htm> (last visited Nov. 7, 2013).

25. Of course, the lawyer who leaves the active practice of law to engage in other endeavors is a global staple of the profession. Examples are as divergent as Nelson Mandela, Mohandis Ghandi, and Vladimir Putin.

26. See GARY A. MUNNEKE, WILLIAM D. HENSLEE & ELLEN WAYNE, *NONLEGAL CAREERS FOR LAWYERS* (5th ed., 2006).

Different forms of employment may stratify lawyers, such as partners employing associates, but once a person is licensed within a jurisdiction, that person is technically allowed to engage in nearly any form of legal representation or counseling within that jurisdiction. Instead, lawyers are limited in their representation by two considerations: the general, ethical requirement of competence in any given representation, and the power of courts and agencies to determine qualifications to be admitted to practice before that court. Certain arenas of practice, such as the members of the bar before the U.S. Patent and Trademark Office,²⁷ require proof of technical expertise in their fields prior to qualification, but this is a rare exception to the general rule.

Law students may provide legal representation in certain, limited capacities under the supervision of a law professor or attorney, usually in a law school legal clinic.²⁸ In different contexts, law students may work for attorneys as paid employees, usually as “law clerks.” Or they may act as unpaid assistants for academic credit, usually as “externs” or “interns.” Yet once a law student has passed the bar examination and taken an oath as attorney, often in the year following the student’s graduation, there are no further required distinctions. U.S. lawyers do not have a period of formal or bar-managed apprenticeship, such as service as a trainee, clerk, or devil (as the Scots trainee is titled).

Lawyers in the United States populate most but not all professions and offices related to the law. Licensed members of the bar enjoy a monopoly over certain legal services, owing to state prohibitions on the unauthorized practice of law. Definitions of unauthorized practice vary among jurisdictions, but every state creates criminal or civil liability for any person who, without a valid license as an attorney at law, represents another person before a court or agency, prepares legal documents for another, or advises another person of rights or duties under law in return for payment.²⁹

As a practical matter, unauthorized practice laws are now rarely enforced. Non-lawyers increasingly represent others, for a fee, before administrative agencies.³⁰ Considerable work that was once per-

27. A person seeking to register as a member of the patent bar must meet requirements specified in 37 C.F.R. §11.7 (2013), including the possession of legal, scientific and technical qualifications, which are generally proved by proof of the study of science or engineering and passing an examination.

28. Such representation is regulated by the rules of the bar governing the law school’s jurisdiction. See Clinic Bar Rules by State Clinic Bar Rules by State—Georgetown Law, http://www.law.georgetown.edu/academics/academic-programs/clinical-programs/our-clinics/clinic_state_bar_rules/clinic_state_bar_rules.cfm (last visited Nov. 24, 2013).

29. See Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law*, 67 *FORDHAM L. REV.* 2581 (1999).

30. AMERICAN BAR ASSOCIATION COMMITTEE ON NONLAWYER PRACTICE, *NONLAWYER ACTIVITY IN LAW-RELATED SITUATIONS* (ABA, 1995).

formed by lawyers is now performed by members of other professions: work related to the sale, contracts, and deeds in the transfer of land is performed by licensed realtors, and title assurance is often performed by title examiners working in specialized corporations, known colloquially as title plants or abstract plants.³¹ Work related to the computation of taxes and tax document filing is usually performed by certified public accountants.³² Work related to the issuance of corporate bonds and to corporate equity is performed by banks and financial institutions, many of whom employ lawyers in supervising these functions. Some tasks performed typically by lawyers in other countries are not exclusive to the legal profession in the United States, particularly the role of the notary public, which is not limited to the bar in most U.S. jurisdictions.³³ Some routine functions of legal practice are performed not by lawyers but by staff members. Some are junior staff performing legal work or support, under varying levels of attorney supervision, particularly by paralegals and legal secretaries. Some are quite senior in their authority in the firm, including professional firm administrators, office managers, human resources managers, strategic development planners, senior secretaries, and marketers.³⁴

Judges and magistrates in the U.S. are drawn overwhelmingly from the profession of lawyers, though there are exceptions. Lay judges, or judges with no legal qualification, were once widely accepted in the United States and are still found in thirty states in the trial courts of limited jurisdiction, such as the courts of the justice of the peace, justice courts, municipal courts, and county courts.³⁵ These courts usually hear traffic offenses, small civil claims, enforcement of orders from other courts, and similar petty matters. If such courts determine a case in which the defendant is liable to jail or imprisonment, however, the defendant must have an appeal to a court in which the judge presiding is required to be a lawyer.³⁶ Though there is no constitutional requirement that federal judges be lawyers, the strong customary expectation is that presidential nominees are to be members of the bar.

31. See the American Land Title Association web site: <http://www.alta.org/about/index.cfm> (last visited Nov. 24, 2013).

32. As of 2012, the Bureau of Labor Statistics estimated 1,129,340 people were employed in accountancy, over 300,000 in accounting, tax preparation, and bookkeeping. <http://www.bls.gov/oes/current/oes132011.htm>

33. See National Notary Association, <http://www.nationalnotary.org/> (last visited Nov. 24, 2013). Louisiana's civilian tradition does not bar non-lawyers from serving as notaries, but many notaries are lawyers there.

34. See CAROLYN THORLOW, ED., *THE ABA GUIDE TO PROFESSIONAL MANAGERS IN THE LAW OFFICE* (1996).

35. See DORIS MARIE PROVINE, *NONLAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM* (1986).

36. *North v. Russell*, 427 U.S. 328 (1976).

I. THE LEGAL FRAMEWORK

The Constitution of the United States does not expressly provide for the recognition or status of the lawyer in the United States. It does, though, imply a necessity for lawyers, by creating significant obligations upon the federal and state governments that can only be satisfied by the work of lawyers. Indeed, a fair criminal trial in the United States requires the right to counsel by an attorney, if need be, at the expense of the prosecuting government.³⁷

Though not expressly recognizing the profession, the federal constitution does imply certain federal rights on lawyers. States are, as noted above, the governments in the United States that regulate the legal profession and recognize individuals as lawyers. From that state role arises a federal constitutional interest in the profession of law, in that a state cannot deny to an out-of-state citizen a privilege or immunity accorded to its own citizens. Thus, a state cannot forbid citizens from other states from becoming licensed in its own state, or create unreasonable barriers to licensure.³⁸ Further, a state's regulations cannot unreasonably burden the constitutional rights of lawyers as citizens, including the right to engage in commercial speech through advertisement.³⁹

Federal limits notwithstanding, the process of licensure and regulation in each state remains the source of recognition for the legal profession in the United States. Though the requirements for admission are sometimes determined in part by state legislatures, the requirements for licensure are in whole or part set by the state's highest court in every U.S. jurisdiction.⁴⁰ Further, the inherent power of the courts to regulate their officers provide each judge with a degree of authority of lawyers licensed to appear in the court of that judge; the lawyer's oath (discussed below in Part IV) is the formal basis for that authority.

The legal profession is a "learned profession" as a matter of state and federal law, though that concept provides no exemption from anti-trust laws or some other regulations of trades or professions.⁴¹ It does, however, exempt lawyers from regulation under the federal

37. *Gideon v. Wainwright*, 372 U.S. 335 (1963). Still, many people remain without adequate legal representation. See *Attorney General Eric Holder Speaks at the Justice Department's 50th Anniversary Celebration of the U.S. Supreme Court Decision in Gideon v. Wainwright*, Welcome to the United States Department of Justice, <http://www.justice.gov/iso/opa/ag/speeches/2013/ag-speech-1303151.html> (last visited Nov. 24, 2013).

38. *Barnard v. Thorstenn*, 489 U.S. 546 (1989).

39. *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977).

40. See *Comprehensive Guide to Bar Admission Requirements 2013 - CompGuide.pdf*, http://www.ncbex.org/assets/media_files/Comp-Guide/CompGuide.pdf#page=13&zoom=auto,0,747 (last visited Nov. 25, 2013).

41. *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

Fair Labor Standards Act⁴² and some state wage and hour laws. Though the legal profession is also a “liberal profession,” that designation in the United States is effectively the same as a learned profession,⁴³ and liberal profession has little independent significance in contemporary U.S. law.⁴⁴

In all states, attorneys are bound to follow the rules of professional conduct adopted by the state’s bar or the state’s highest court. Violations of these rules may lead to sanctions including disbarment. Attorney discipline is usually a process by a specialized committee or board of overseers, who report either to the state bar (in in twenty jurisdictions) or to the state courts (in thirty-one).⁴⁵

The American Bar Association, or ABA, is not a regulatory body in the sense of most national law societies; the state bar associations or state courts serve that role, as noted above. The ABA does, however, exercise significant influence as the originator of a national code of attorney regulation, versions of which have been adopted in every state.⁴⁶ This code has evolved through several iterations,⁴⁷ the current version being the *Model Rules of Professional Conduct*.

There are fifty-eight rules of the *Model Rules*, varying considerably in detail, which are organized into eight categories. These categories regulate the lawyer-client relationship, the attorney as counselor, the attorney as advocate, attorney transaction with persons other than clients, the attorney’s responsibilities in a law firm or association, the attorney’s obligation of public service, the regulation of attorney provision of information about legal services, and the attorney’s duty to maintain the integrity of the profession. The essential rule is 1.1, which requires a lawyer to “provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”⁴⁸

The rules reflect cultural differences between lawyers in the United States and other nations, though the cultural differences are

42. 29 C.F.R. § 541.300(a) (2012).

43. BRUCE A. KIMBALL, *THE “TRUE PROFESSIONAL IDEAL” IN AMERICA: A HISTORY* 102 (1995).

44. Legal work might once not have been patentable as a product of a liberal profession, though this is probably no longer true. See John L. Thomas, *The Patenting of the Liberal Professions*, 40 B.C. L.Rev. 1139 (1999).

45. See http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/current_disciplinary_agency_directory_online.authcheckdam.pdf

46. See *State Adoption of the ABA Model Rules of Professional Conduct* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Nov. 29, 2013).

47. The first ABA ethical standards were the 1908 Canons of Professional Ethics, succeeded in 1969 by the Model Code of Professional Responsibility. The current rules were enacted in 1983, and frequently amended.

48. Model R. Prof. Resp. 1.1.

usually greater than the text of the rules might indicate. Particular rules for the obligations of a lawyer in the U.S. that differ from those in some other jurisdictions include the freedom of acceptance and continuation of representation of a client, limitations on conflict of interest, fees, and advertising.

Perhaps the most significant of these is that U.S. attorneys are impliedly allowed, under the rules, to refuse to take any case or client. (Some attorneys practicing in some courts may be required to take some criminal cases to represent an indigent without counsel, but this is now rare). Further, lawyers may withdraw from representation of a client for a host of reasons, as long as the lawyer gives sufficient notice to the client and receives leave of the court if the withdrawal is in the course of litigation.⁴⁹

II. DEVELOPMENTS OF THE PAST TEN YEARS

The practice of law in the United States has undergone considerable change in the last ten years. Some of this change is, unsurprisingly, a continuation of long-standing trends, such as demographics and the increasing reliance on technology. Some respond to the particular events of the past decade, such as changes in hiring patterns in large law firms following the economic downturn of 2009. Some changes are certainly the result of long-term trends accelerated by recent changes, such as new working relationships in the workplace, including the subcontracting of legal work and the potential for sharing legal fees with non-lawyers, as well as changes in legal education and entrance to the profession.

The demographics of the U.S. lawyer have been steadily changing since the 1960s, becoming more racially diverse, more female, and older. The average age of the U.S. lawyer is increasing, with the median age now being forty-nine, a ten-year increase in age since 1980. The bar is now one-third female and two-thirds male. The portion of women licensed as U.S. attorneys has grown 300% since 1980.⁵⁰ The trend toward a more female bar will continue, as the percentage of law students who are women is over 45% and has been since 1997.⁵¹ The portion of the U.S. bar who are mainly of Northern European ancestry continues to decline. In 2000, 88.8% of the bar was “white

49. See ABA Model Rule 1.16: Declining or Terminating Representation, *online at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_16_declining_or_terminating_representation.html (last visited Dec. 7, 2013).

50. American Bar Association, *Lawyer Demographics*, at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf (last visited Nov. 23, 2013).

51. See ABA First Year and Total J.D. Enrollment by Gender, 1057-2011, http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_1yr_total_gender.authcheckdam.pdf

not Hispanic,” a proportion that had fallen by 2010 to 81%; the percentage of African ancestry had risen from 4.2% to 4.8%, of Hispanic or Latino ancestry had risen from 3.4% to 3.7%, and of Asian or Pacific ancestry from 2.2% to 3.4%.⁵² These trends are likely to continue, as minority enrollment in legal education has nearly tripled over the last twenty-five years.⁵³

Changing Relationships in the Workplace

The practice of law for major corporations has been undergoing change for some years. Many companies that outsourced the bulk of their legal work have been enlarging their in-house counsel staff, both as a means to manage better their legal affairs and as a means of cutting costs. Corporations have also been increasingly cost-conscious in placing work and accepting bills from outside counsel, relying increasingly on alternative fee arrangements, or AFAs, rather than hourly billing.⁵⁴ These changes are likely to diminish some revenue growth for law firms but increase employment and compensation for corporate counsel. Yet these changes will also reach an equilibrium in which certain work will again routinely be performed in-house and other work will be competitively placed in firms.

The largest law firms in the United States, known commonly as “Big Law,” have grown larger, more profitable, and more international, in the last decade. This has had a significant influence on the profession a whole. The greater change, however, may be the recognition of the vulnerability of Big Law to the market for legal services among financial and corporate clients.

Big Law was hurt by diminished revenue following the 2007 downturn in the U.S. economy. Some firms, particularly New York firms with a large portion of their work from banks and other financial institutions, and firms nationwide dependent on corporate work, have less work and accordingly have hired fewer new employees and paid them slightly less than in earlier years.⁵⁵ Some firms have reduced staff, including attorneys.⁵⁶ Several large law firms have dissolved into bankruptcy, most spectacularly the thousand-lawyer

52. American Bar Association, *Lawyer Demographics*, at http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2011.authcheckdam.pdf (last visited Nov. 23, 2013).

53. See *Total Minority J.D. Enrollment, 1987-2011*, at http://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/statistics/jd_enrollment_minority.authcheckdam.pdf (last visited Nov. 23, 2013).

54. See Rebekah Mintzer, *2013 Law Department Metrics Benchmarking Survey*, Corporate Counsel, <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202628882558> (last visited Dec. 1, 2013).

55. NALP, *Median First-Year Big-Law Associate Salary Slumps to \$145,000 in 2012, a Median Last Seen in 2007*, http://www.nalp.org/2012_associate_salaries?s=big%20law (last visited Nov. 10, 2013).

56. Layoff Tracker, <http://lawshucks.com/layoff-tracker/> (last visited Nov. 11, 2013).

New York firm of Dewey & LeBoeuf.⁵⁷ The bankruptcy of that firm, and some other law firm setbacks, however, are likely to be attributable more to idiosyncratic difficulties, such as the over-promised recruitment of high-billing partners, than to long-term changes in the legal marketplace.

Though there has been considerable discussion about the future of Big Law, economies of scale for certain forms of corporate and international client are likely to remain sufficient for such firms to continue to prosper. Even so, the growth of such firms in size and revenue per partner may be cyclic in echoes of the corporate economy.⁵⁸ Other influences on Big Law growth will follow from the failure of some firms to adapt to some changes in their clients' markets, allowing smaller firms to capitalize on these opportunities,⁵⁹ though the smaller firms will in turn remain targets for merger and consolidation. In 2013, the pace of mergers among law firms increased after several years of decline, with over fifty-eight mergers among large firms planned or executed.⁶⁰

One consequence of the effect on Big Law of the 2007 downturn has been a period of intense debate over the mission and size of U.S. legal education, which is discussed in greater detail in Section IV. A loud movement of disgruntled law professors and former law students sparked debate over law school cost and utility. These critics presented long-standing criticisms of the rising costs of many U.S. law schools and the seeming differences between the demands of legal education and the needs of some practitioners—charges fueled by stalled recruitment following the Big Law retrenchment from 2008 to 2013. The charges have gained some credence because of their coordination with the widely disseminated and inflated media discussion of the law hiring downturn. Cumulatively, these factors led to a drop of about a third in law school applications for admission from 2010 to 2014 and will affect many law school budgets. Demands for change in legal curricula and law school accreditation standards have been met with a degree of favor by the ABA, though the long-term effects remain unknown. Some of these claims for reform are merited, but

57. James B. Stewart, *The Collapse: How A Top Legal Firm Destroyed Itself*, THE NEW YORKER, Oct. 14, 2013; Jordan Weissmann, *The Death Spiral of America's Big Law Firms*, THE ATLANTIC, Apr. 19, 2012.

58. See Marc Galanter & William Henderson, *The Elastic Tournament: A Second Transformation of the Big Law Firm*, 60 STAN. L. REV. 1867 (2008); Larry E. Ribstein, *The Death of Big Law*, 2010 WIS. L. REV. 749, 751 (2010); Bernard A. Burk and David McGowan, *Big but Brittle: Economic Perspectives on the Future of the Law Firm in the New Economy*, 2011 COLUM. BUS. L. REV. 1, 3 (2011).

59. See Jennifer Smith, *Smaller Law Firms Grab Big Slice of Corporate Legal Work*, WALL ST. J., Oct. 22, 2013.

60. See Catherine Ho, *Law Firms Experience Big Jump In Mergers*, THE WASHINGTON POST, Oct. 29, 2013, at http://www.washingtonpost.com/business/capital-business/law-firms-experience-big-jump-in-mergers/2013/10/29/5422a4b2-40da-11e3-8b74-d89d714ca4dd_story.html (last visited Dec. 1, 2013).

more are and based less on the needs of students or clients than on exaggerated claims and poor scholarship.⁶¹

Technology and the Law

Dramatic changes in information technology have affected every profession, including the practice of law.⁶² In general, the result has been to increase the productivity of law firms and institutions, as well as to increase availability of legal information to the public. Yet it has also made possible the outsourcing of legal work from firms in high-cost markets and nations to other markets and other nations.

A great range of new computer platforms now increase the productivity of nearly every aspect of research in practice, from the ability to search global patent databases⁶³ to local tax and land records. A key example is PACER, the federal Public Access to Court Electronic Records program, which was created in 1988 for access in court libraries but which has been publicly accessible since 2001.⁶⁴ The PACER system is a powerful research tool, but it is more directly used by every litigator in every federal court in the country to file pleadings, motions, and briefs, as well as to serve them on their opponents. Even so, PACER is hardly the point of sole public access to such documents, and an array of private providers has increased its efficiency or utility. Utilities such as Recap allow access to documents from behind the government's pay wall.⁶⁵ Many PACER documents are republished by sites such as Findlaw.com, Bloomberg.com, public.resource.org, FreeCourtDockets.com and Justia.com. LexisNexis.com and westlaw.com provide access through their proprietary databases. The sum is a vastly greater access to court opinions and case documents, found through variously priced services.

Similar services affect many arenas of practice. Corporate filings are now searchable through on-line databases, such as the federal EDGAR system⁶⁶ and the many state databases. Environmental monitoring is visible in real-time.⁶⁷ Gas transport tariffs may be examined on-line.⁶⁸ The conduct of corporations and financial traders is detectable through on-line services.⁶⁹ Computer models provide graphic depictions of events subject to litigation as well as expert sys-

61. See Steve Sheppard, *The Self-Fulfilling Prophecy of Law School Crisis*, H-Law <http://h-net.msu.edu/cgi-bin/logbrowse.pl?trx=vx&list=H-Law&month=1312&week=a&msg=12TIEOJzEC/Gv7XpbxOC5g&user=&pw=> (last visited Dec. 11, 2013).

62. See Law Technology News, at <http://www.law.com/jsp/lawtechnologynews/index.jsp> (last visited Dec. 1, 2013).

63. See <http://patentscope.wipo.int/search/en/search.jsf> (last visited Dec. 1, 2013).

64. See <http://www.pacer.gov/> (last visited Dec. 1, 2013).

65. See <https://www.recapthelaw.org/> (last visited Dec. 1, 2013).

66. See <http://www.sec.gov/edgar.shtml> (last visited Dec. 1, 2013).

67. See <http://www.dec.ny.gov/chemical/8406.html> (last visited Dec. 1, 2013).

68. See <http://etariff.ferc.gov/TariffSearch.aspx> (last visited Dec. 1, 2013).

69. See <http://www.nanex.net/> (last visited Dec. 1, 2013).

tems to test theories of causation and other disputed elements in litigation and administrative controversies.⁷⁰

Each of these services, and countless others, creates not only an additional obligation for lawyers to oversee client conduct and filings and to research client risk by seeing data that might attract enforcement agency interest, but also opportunities to monitor the conduct of potential competitors or other opponents. Lawyers increasingly engage in electronic discovery (or, e-discovery) probing the communications and records of clients and opponents generated in increasingly arcane and ephemeral databases, logs, and communications sites.⁷¹

The broad changes in communication and the rise of social networking have altered the tools of client recruitment and communication.⁷² They have also changed client's perceptions and assessments of law firms. Though in many ways these novel forms of communications are merely advances on the older practice of law firm newsletters and seminars, the speed, ubiquity, and flexibility of these systems require considerable investments of lawyers' time and attention.⁷³

There is considerable pressure in the marketplace to create technologies that directly benefit the lay consumer, and technology has increasingly provided a sort of legal do-it-yourself lawyering facility that will be much more significant than books that promise their readers that they can be their own lawyers.⁷⁴ Forms for basic legal documents are now commonly available to the public on the web, offered by corporations or firms that will tailor a form to fit a particular situation, effectively providing a legal service at a discount. One illustration among many is LegalZoom, which began offering its legal services products to the public in 2001 and now has a partner entity in England. LegalZoom will create the documents essential to partnerships, corporations in various forms, leases, and even immigration applications, wills, and divorce papers, each tailored somewhat to the client's limited specifications. Still LegalZoom claims not to represent the client, only to offer certain limited products. That limitation may

70. See Stanley B. Andrews, et al., *A Comparison Of Computer Modeling To Actual Data And Video Of A Staged Rollover Collision*, ESV 09-0346 Rollover Paper.doc - 09-0346.pdf, <http://www-nrd.nhtsa.dot.gov/pdf/esv/esv21/09-0346.pdf> (last visited Dec. 1, 2013).

71. See AIIM, *What is e-Discovery?* <http://www.aiim.org/What-is-eDiscovery> (last visited Dec. 1, 2013).

72. See Robert Ambrogi, *10 Ways Technology is Rewiring Law Practice*, at <http://www.slideshare.net/ambrogi/ambrogi-firm-future2012> (last visited Dec. 1, 2013).

73. See Simon Chester and Daniel Del Gobbo, *How Should Law Firms Approach Social Media*, 38 LAW PRACTICE MAGAZINE, on line at http://www.americanbar.org/publications/law_practice_magazine/2012/january_february/how-should-law-firms-approach-social-media.html (last visited Dec. 1, 2013).

74. See PAUL BERGMAN AND SARA J. BERMAN, REPRESENT YOURSELF IN COURT: HOW TO PREPARE & TRY A WINNING CASE (2010).

not persist for much longer. There are, and have been for some years, expert systems that emulate legal analysis and rule application, which may eventually provide some legal services.

The sheer ability to move great quantities of information and to process it at low cost have also encouraged the development of the Legal Process Outsourcing Company, or LPO, which is an entity that processes some legal work for a law firm or legal department at a lower cost than the originating law firm or law department would incur.⁷⁵ Although the LPOs that have attracted the greatest interest are off-shoring work to foreign countries, LPOs may also be in different markets in the same country. It is difficult to assess the scale of LPO employment by U.S. law firms and corporate legal departments, but it appears to be a growing practice, with firms sending work both to U.S. LPOs⁷⁶ and to LPOs in India,⁷⁷ the Philippines,⁷⁸ and other English-speaking states, as well, as China,⁷⁹ and South America.⁸⁰ The work done by LPOs is also difficult reliably to determine, but it seems as of 2013 to be predominately back-office work such as data entry, transcription, and litigation documentation management, as well as some forms of sophisticated legal work including legal research, due diligence investigation, contract management, and intellectual property services.⁸¹ Such contracting raises significant ethics concerns for the sending firm, which may be one limitation on the sophistication of the work performed.⁸²

III. ACCESS TO THE LAWYERS' PROFESSION

The most common route to enter the U.S. legal profession is through attendance at one of the law schools that are nationally accredited by the Section of Legal Education and Admissions to the Bar

75. Courtney I. Schultz, *Legal Offshoring: A Cost-Benefit Analysis*, 35 J. CORP. L. 639, 640 (2010).

76. See Infosys, *Legal Process Outsourcing*, <http://www.infosysbpo.com/offerings/functions/legal-process-outsourcing/offerings/Pages/index.aspx> (last visited Dec. 1, 2013).

77. See Daisy Khanna, *Growth in the Indian LPO Industry*, <http://www.connectoal.com/resources/thoughtwares/53-growth-in-the-indian-lpo-industry.html> (last visited Dec. 1, 2013).

78. See <http://www.lpomanila.com/> (last visited Dec. 1, 2013).

79. Yun Krieger, *LPO Provider CPA Global Expands Into Mainland China And The US*, THE LAWYER, Feb. 28, 2013, at <http://www.thelawyer.com/lpo-provider-cpa-global-expands-into-mainland-china-and-the-us/3001837.article> (last visited Dec. 1, 2013).

80. See The 2013 Legal Process Outsourcing Survey, <http://www.law.com/corporatecounsel/PubArticleCC.jsp?id=1202623111585&thepage=3> (last visited Dec. 1, 2013).

81. See Legal Process Outsourcing, at <http://professional.getlegal.com/management/litigation-support/legal-process-outsourcing> (last visited Dec. 1, 2013).

82. Aaron R. Harmon, *The Ethics of Legal Process Outsourcing-Is the Practice of Law A "Noble Profession," or Is It Just Another Business?* 13 J. TECH. L. & POL'Y 41, 42 (2008).

of the American Bar Association. To enter such a school, a student has usually completed at least a university bachelor's degree and to have scored well on the Law School Aptitude Test, a national entrance examination administered by the Law School Admissions Council, a consortium of U.S. and Canadian law schools who use its products.⁸³

Most students receive the degree Juris Doctor, or J.D., upon successful completion of three years of law school study (though this is sometimes completed more quickly or slowly depending on the number of courses completed per year). The J.D., and its predecessor, the LL.B., are the most common professional law degrees in the U.S.

The functions of U.S. legal education are both to instill a comprehensive understanding of the techniques of legal analysis and criticism and to expose students to a basic understanding of legal rules across a variety of fields of law.⁸⁴ The first year is usually spent in the study of common-law reasoning and basic skills in research and legal argument, explored through basic courses, such as property, torts, criminal law, and civil procedure. The second and third years usually incorporate an assortment of introductory courses in constitutional law, administrative law, and professional legal ethics; of particular legal subjects for specialized practice, such as family law, evidence, trial practice, appellate practice, state law, oil and gas law, water law, employment law, environmental law, corporations, taxation, wills and trusts, intellectual property, and international law; advanced skills courses in research, drafting, negotiation, dispute resolution; foundations such as legal history, legal philosophy, and interdisciplinary criticisms of law; and practical applications through journal editing, moot courts, client counseling and negotiation competitions, clinics, and supervised externship placements.⁸⁵

In most U.S. states, entry to the bar is open to holders of a J.D. from an ABA-accredited school. There are a few variations: some states also allow a person to sit for the bar upon completion of a J.D. from a school accredited only in that state; some allow a person to sit for the bar on completion of an degree by correspondence or distance education; and two still allow students to become members of the bar without taking a bar exam, owing to the privilege accorded to graduates of designated law schools in that jurisdiction.⁸⁶

83. See About the LSAT, <http://www.lsac.org/jd/lsat/about-the-lsat/> (last visited Dec. 1, 2013).

84. See ROBIN WEST, *TEACHING LAW: JUSTICE, POLITICS, AND THE DEMANDS OF PROFESSIONALISM* (2013).

85. See, STEVE SHEPPARD, *THE AMERICAN LAW SCHOOL: ITS PAST, PRESENT, AND HOPEFUL FUTURE* (forthcoming Cambridge University Press, 2014).

86. This diplomate privilege, or diploma privilege, was once widely used among states, but it now is offered in only Wisconsin and New Hampshire. See, in general, James Peden, *The History of Law School Administration*, 2 *THE HISTORY OF LEGAL EDUCATION IN THE UNITED STATES: COMMENTARIES AND PRIMARY SOURCES* 1108 (Steve

A number of U.S. states allow a person with a professional or academic law degree from another country to qualify to sit for the bar examination, sometimes following the completion of a Master of Laws in that jurisdiction (or, in some states, at any ABA-accredited law school). In 2013, New York initiated a new requirement that such students demonstrate completion of several courses related to U.S. and New York practice as part of this requirement.⁸⁷

Some states also allow the admission of attorneys to their bar “on motion,” which does not require the passage of a bar examination in that state. This option is only available to attorneys who are licensed and in good standing in another U.S. jurisdiction. Indeed, in many states it is restricted only to lawyers who have been actively practicing for a given time in a jurisdiction that accords reciprocity to that state, allowing either jurisdiction to admit on motion lawyers from the other. Between 2008 and 2012, an average of 7,500 lawyers were admitted on motion nationwide.⁸⁸ Except in very rare cases, admission on motion is not a route of entry to the profession for non-lawyers or foreign lawyers.

A candidate for admission to the bar who has satisfied the educational or examination requirements for admission to the bar is not entitled to licensure. Before administering the oath of an attorney (and often before administering the exam), the licensing authority in each state must be satisfied of each applicant’s “good character and fitness” to practice law. The applicant must usually claim to have such good character and then provide a record of all previous names by which the candidate has been known, previous employers, and addresses of domicile, along with a list of individual references. The licensing office will examine the record and search for other evidence, such as court and police records.⁸⁹ Applicants must usually also be certified by the deans of their law school as having sufficient character and fitness. The licensing office will then allow a candidate to sit for the exam, and once having passed it, to seek to take the oath, though in many states, a candidate must still be sponsored by a practicing member of the bar who is willing to attest to the candidate’s fitness. A candidate whose past or current records demonstrate crimi-

Sheppard, ed., 2008). For the Wisconsin rule, see Wisconsin Supreme Court Rule 20.03 (2013), allowing admission to qualified law graduates of the University of Wisconsin and to Marquette University.

87. See Rule 520.6, at Foreign Legal Education, <http://www.nybarexam.org/Foreign/ForeignLegalEducation.htm> (last visited Dec. 1, 2013).

88. *Admissions to the Bar by Type, 2008–2012* The Bar Examiner, Volume 82, Number 1, March 2013 - 8201132012statistics.pdf, http://www.ncbex.org/assets/media_files/Bar-Examiner/articles/2013/8201132012statistics.pdf (last visited Nov. 24, 2013).

89. Some jurisdictions employ the National Conference of Bar Examiners’ Character and Fitness Investigations Service. See Character & Fitness, <http://www.ncbex.org/character-and-fitness/> (last visited Dec. 1, 2013).

nal conduct, academic malfeasance that suggests untrustworthiness, untreated mental illness, untreated substance abuse, financial irresponsibility, or a lack of candor is likely to be denied admission to the bar.⁹⁰

The final requirement for admission to practice is to take the oath of an attorney.⁹¹ No attorney can be licensed without taking the oath of an attorney before a judge to be admitted to practice before a court in that jurisdiction, and most states require admission to the highest court of that state as a condition for licensure in that state. Besides taking the oath on first admission, attorneys must take the oath again at the time that attorney is admitted to every court for the first time, including federal courts. The oath of attorney varies from state to state, and sometimes from court to court and judge to judge. A typical short form of oath is that required by the U.S. Supreme Court: "I, _____, do solemnly swear (or affirm) that as an attorney and as a counselor of this Court, I will conduct myself uprightly and according to law, and that I will support the Constitution of the United States."⁹²

Many courts require a longer form, expressing what is implied in the short form. The discretion implied in the scope of office for attorneys is broad but can be understood in sufficient detail to include both legal and moral obligations.⁹³

IV. ORGANIZATION OF THE PROFESSION

There is no national regulatory law society in the United States. The American Bar Association, as noted, is a voluntary association rather than a regulatory body. Its Section on Legal Education has regulatory authority over much but not all of the legal education in the United States. Its nearly 400,000 members support a variety of law reform initiatives in the United States and worldwide.⁹⁴

The professional organizations in each of the states, the District of Columbia, and the various possessions, territories, and trusts vary, as described above, among those that are voluntary and those whose membership is unified. As described in Part II, in some jurisdictions, attorney licensure and discipline is a function of the bar, and in

90. See Lori Shaw, *Professionalism: What Does it Take to Satisfy Character and Fitness Requirements?*, 44 SYLLABUS, at http://www.americanbar.org/publications/syllabus_home/volume_44_2012-2013/winter_2012-2013/professionalism_whatdoesitaketosatisfycharacterandfitnessrequire.html (last visited Dec. 1, 2013).

91. On the antecedents and significance of the attorney's oath, see Josiah Henry Benton, *The Lawyer's Official Oath and Office* (Boston Book Co., 1909).

92. Supreme Court of the United States, *Instructions For Admission To The Bar*, <http://www.supremecourt.gov/bar/barinstructions.pdf> (last visited Nov. 25, 2013).

93. See STEVE SHEPPARD, *I DO SOLEMNLY SWEAR: THE MORAL OBLIGATIONS OF LEGAL OFFICIALS* (2009).

94. See *About the American Bar Association*, http://www.americanbar.org/about_the_aba.html (last visited Dec. 2, 2013).

others it is in a state agency subordinate to the courts. In all cases, however, a decision by a lawyer disciplinary committee will be subject to judicial review by a state court and, if there is a claim that the disciplinary committee violated a constitutionally protected right, there is a possibility of review by civil action in a federal court.

The history of the bar associations, and their relationship to both access to the profession and professional regulation, is beyond the scope of this report, but it is in some manner essential to understand the profession. The eighteenth-century colonial American bar was, in many ways, an elite organization of lawyers trained in London, Edinburgh, and Dublin, who trained local apprentices with care into something of a professional cadre. The revolution and a wave of anti-authoritarianism diminished the role of the bars, which revived after the American civil war of the 1860s.⁹⁵ A new wave of organization in the late nineteenth century led to the creation of the American Bar Association and most of the modern state and local associations, which grew quickly from social to professional organizations, committed to developing educational and professional standards.⁹⁶

Today's bar associations provide services to the profession and to the public, as well as regulatory and licensing functions. Bar associations typically provide public outreach on matters of public concern related to law and justice. The American Bar Association, for instance, is engaged in many countries around the world, developing court systems and promoting the rule of law. In many states, the state bar encourages (and often requires) attorneys to engage in representation and advice to the poor, for no fee but *pro bono publico*.⁹⁷ In all states, the bar association encourages professional education, usually in the form of continuing legal education classes. Bar associations host an array of specialized sections, which encourage training and service in a variety of subject-specific areas of practice, such as labor law, or professional life, such as the integration of young lawyers.

Besides the ABA and the state bars, private voluntary associations abound, some of which are deeply engaged in law reform, such as the American Law Institute, which authors the respected *Restatements of the Law*,⁹⁸ and the Uniform Law Commissioners, who draft model legislation.⁹⁹ Specialized associations and bar organizations focus on particular areas of legal practice, some large and well

95. See CHARLES WARREN, *A HISTORY OF THE AMERICAN BAR* (1911).

96. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* (1953).

97. A list is maintained by the ABA. See http://www.americanbar.org/groups/bar_services/resources/state_local_bar_associations.html.

98. See ALI, <http://www.ali.org/> (last visited Dec. 2, 2013).

99. See Uniform Law Commission, <http://www.uniformlaws.org/> (last visited Dec. 2, 2013).

known, such as the Federal Bar Association¹⁰⁰ or the American Society for International Law,¹⁰¹ and many more specialized, like the Railroad Accident Trial Lawyers Association.¹⁰² Further, there are usually bar associations in each county or parish (the administrative districts in each state) and in most cities and towns, such as the Association of the Bar of the City of New York, which has over 24,000 members.¹⁰³

V. ORGANIZATION OF PRACTICE

As noted, of 1.2 million registered U.S. lawyers, just over 700 thousand practice law. These work primarily in firms, corporations and similar entities, and, of course, in the government.

An eighth of all U.S. lawyers (127,500) worked for governments, not counting judges. Only 37,300 lawyers worked for the federal government, including attorneys working for the Congress, the courts, and the various executive departments, including the Department of Defense and the Department of Justice. The other 90,200 worked for local or state governments. Among the many roles played by lawyers for government is the role of criminal prosecution. The bulk of prosecutors are employed by state and local governments.

Forty thousand more attorneys provided lawyering work within non-legal institutions. 12,400 lawyers worked in corporate management. 7,800 worked in religious, civic, or similar philanthropic entities. The largest corporate employers as a group were finance and insurance companies, which employed 20,800 attorneys in house.

The remaining three-fourths of practicing lawyers are engaged in the private practice of law, organized into law firms. Roughly half of these lawyers are solo practitioners. This proportion has remained relatively stable for thirty years. Some law firms are of two to five lawyers, and about an eighth to a tenth of the lawyers in private practice are in these small practices. About a fifth of the lawyers in private practice are in firms of between six and one hundred lawyers.¹⁰⁴

About a sixth of the lawyers in private practice work in firms of over a hundred lawyers, and among these, a significant proportion work in global colossi, employing thousands of lawyers in individual firms, each organized into many far-flung offices. Twenty-five law

100. See Federal Bar Association, <http://www.fedbar.org/> (last visited Dec. 2, 2013).

101. See <http://www.asil.org/> (last visited Dec. 2, 2013).

102. Railroad Accident Trial Lawyers Association, <http://www.rtla.org/> (last visited Dec. 2, 2013).

103. See New York City Bar Association - About Us, <http://www.nybar.org/about-us/overview-about-us> (last visited Dec. 2, 2013).

104. See Lawyer Demographics 2012, http://www.americanbar.org/content/dam/aba/migrated/marketresearch/PublicDocuments/lawyer_demographics_2012_revised.authcheckdam.pdf (last visited Dec. 6, 2013).

firms had over a thousand lawyers, and the largest five were over two thousand attorneys in 2013.¹⁰⁵ These firms of hundreds and thousands, Big Law, recruit about a third of all U.S. law graduates,¹⁰⁶ although the employment structure of the largest firms is based on the planned attrition of young attorneys.¹⁰⁷ As David Clark has noted, the United States leads the world in developing the law firm to its logical extreme.¹⁰⁸

One element of the practice that is not easily understood from the attention to size alone is the tribalism that develops between law firms and attorneys who are generally representing one form of client or another and who tend to adopt a worldview contrary to the worldview of the lawyers representing clients with adverse interests. In part, this tribalism is caused and in part it is merely reflected in ethical rules on conflict of interest that are, as written, similar to those in other common law jurisdictions, so that no lawyer may represent two parties with directly conflicting interests or represent a party after representing another party from whom information useful to the first was acquired.¹⁰⁹ Yet the rules reflect a culture in which attorneys tend to represent only one side of a recurring issue: there is a “Defense Bar” and a “Plaintiffs’ Bar;” some lawyers represent corporations and insurers and defend insured corporations, while other lawyers sue corporations and insurers and represent plaintiff claimants. Voluntary associations reinforce this division, represented by such lawyers’ clubs as the Association of Defense Trial Attorneys,¹¹⁰ DRI,¹¹¹ and the International Association of Defense Counsel,¹¹² for the defense, and the American Association for Justice for plaintiffs’ lawyers.¹¹³ There are, of course, organizations that straddle the divi-

105. The *National Law Journal* reported that the ten largest U.S. firms in 2013 ranged from (1) DLA Piper, with 4,036 lawyers, to (10) Sidley Austin with 1,636 lawyers. *Employment at Largest U.S. Law Firms Up Just 1.1 Percent Last Year, According to The National Law Journal’s 2013 NLJ 350 — ALM*, <http://www.alm.com/about/pr/releases/employment-largest-us-law-firms-just-11-percent-last-year-according-national-law> (last visited Dec. 1, 2013).

106. *NALP - The Association for Legal Career Professionals — Employment Patterns 1999-2010*, <http://www.nalp.org/employmentpatterns1999-2010> (last visited Nov. 10, 2013).

107. The ratio of partners to associates among the twenty-five largest firms in 2013 was only 1 to 1, though the average ratio for the hundred smaller firms from the top 350 was 1.75. Given the longer time a partner may practice than an associate, a ratio of 1 to 1 for a firm hiring associates annually requires considerable attrition among associates.

108. In David Scott Clark, *Legal Professions and Law Firms*, in DAVID SCOTT CLARK, ED., *COMPARATIVE LAW AND SOCIETY* 384-85 (Edward Elgar, 2012).

109. See American Bar Association, Model Rules of Professional Conduct 1.6-1.12.

110. See <http://www.adtalaw.com/>

111. See <http://www.dri.org/> DRI was formerly the Defense Research Institute.

112. See <http://www.iadclaw.org/>

113. See www.justice.org/ The AAJ was formerly the National Association of Claimants’ Compensation Attorneys (NACCA), then the Association of Trial Lawyers of America (ATLA).

sion between plaintiff and defendant, such as the National Trial Lawyers.¹¹⁴

A law firm may be organized as a partnership, a corporation, or a similar business entity. The powers to form various entities are conferred by state law, and not every jurisdiction allows all of them, nor does every jurisdiction define them in the same way. The differences among these are that the forms of corporation or entity, including options for the structure of partnerships, affect taxation, liability to third parties, and the manner in which the entity might be dissolved. Despite the attractions of various forms of organization, more firms remain organized as general partnerships than as other forms of entity.¹¹⁵

The most common forms include:

—The sole proprietorship, in which the individual lawyer owns all of the assets of a practice and is liable for all of its debts.

—The general partnership is the most traditional form of law firm, in which every partner is an owner and each partner has unlimited personal liability for all debts of the partnership, as well as an undivided share of ownership in all partnership assets.

—The limited liability partnership, or LLP, has only limited partners, any of whom may engage in management of the partnership but all of whose liability is limited to the value of their investments. In most states, LLPs have a stringent minimum requirement for professional insurance, and the extent of limitation of liability may be less than that of a corporation.

—The professional corporation, or PC, is a corporation formed of members of a single profession. Thus, a PC may be a law firm, or a doctors' firm, or an engineer's firm, but it is usually barred under state law from being a multidisciplinary firm. All shareholders of the corporation must be qualified members of the profession. A PC may be formed for only one member of the profession, and many solo practitioners are incorporated as a PC in order to limit liability.

Less common forms of law firm organization include two forms of partnership and three forms of corporation:

—Partnerships include the limited partnership, or LP, and the limited liability limited partnership, or LLLP. Each are variations on the general partnership. In the LP, one or more partners may act as general partners, capable of engaging in firm management and liable for all debts, the others having liability limited to a given investment and no management authority. An

114. See <http://www.thenationaltriallawyers.org/#>

115. See Robert W. Hillman, *Organizational Choices of Professional Service Firms: An Empirical Study*, 58 BUS. LAW. 1387 (2003).

LLLP is like a limited partnership, though the liability of the general partner is also limited. The LLLP is still quite rare.

—Corporations include the limited liability company, or LLC, the professional limited liability company, or PLLC, and the professional services corporations, or PSC. The LLC a form of business entity for professionals, which is treated for tax purposes as either a sole proprietorship or a general partnership (if there are two or more shareholders), though shareholders enjoy limited liability. In some jurisdictions, the LLC is known as the professional limited liability company, or PLLC. Likewise, the limited liability law company, or LLLC, is an informal variation on the LLC.) The PSC is a tax designation that includes all forms of professional corporation, including the PC, the LLC, and the PLLC, which often requires the payment of a higher federal tax rate than other corporations.¹¹⁶

As with all of these business forms, the power to create one or another form of entity derives from the state law in which the business is created, in these cases the law of the jurisdiction in which the attorneys maintain their main location for practice. Even so, the inherent power of the courts to regulate the profession of law allows the courts to penetrate statutory limits on individual partners' liability for law firm debts, regardless of the structure of the legal entity.¹¹⁷

In general, lawyers provide legal services through firms wholly owned by lawyers and dedicated to providing professional legal services. Such firms contract services from other professions, such as accountants, actuaries, psychologists or counselors, engineers or architects, expert witnesses, and others. Likewise, such firms provide services by contract to other professions, such as hospitals and construction firms. This division is enforced by an ethical obligation of professional independence of the lawyer, reflected in ABA model rule of professional conduct 5.4, which forbids lawyers and law firms from sharing a legal fee with a non-lawyer, except in very limited and exceptional circumstances.¹¹⁸

The limits inherent in such a division of labor are obvious, and in 1998 the ABA created a Commission on Multidisciplinary Practice,¹¹⁹ which proposed changes to Rule 5.4 in 2013, to allow lawyers to share

116. A handy overview is provided online by the U.S. Chamber of Commerce. See https://www.uschamberssmallbusinessnation.com/toolkits/guide/P12_4210

117. See *First Bank & Trust Co. v. Zagoria*, 302 S.E.2d 674 (Ga. 1983).

118. See ABA Center for Professional Responsibility, Rule 5.4: Professional Independence of a Lawyer, online at http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_5_4_professional_independence_of_a_lawyer.html (last visited Dec. 7, 2013).

119. See http://www.americanbar.org/groups/professional_responsibility/commission_multidisciplinary_practice.html

fees with entities including non-lawyer owners.¹²⁰ But that draft rule has been withdrawn from immediate consideration by the ABA House of Delegates, though it is being considered in some states. In October 2013, the ABA Standing Committee on Ethics and Professional Responsibility determined that an attorney bound in one jurisdiction by Rule 5.4 does not violate it by sharing fees with an entity owned in part by a non-lawyer in another jurisdiction that does not have such a rule.¹²¹

VI. PROFESSIONAL LIABILITY

Lawyers in the United States are subject to several distinct and overlapping regimes for enforcing standards of professional conduct. In general, lawyers are not subject to national regulation as a profession, and so there is no U.S. statute or other single source of national standard for professional liability. Rather, as with the regulation of most professions, such matters are left to the states. Thus the states enact standards of professional conduct that are the basis for attorney discipline, as discussed in part VI. Additionally, the courts, including the federal courts, retain disciplinary powers under both the rules of court and their inherent power to regulate the bar. Lastly, the market for professional insurance for lawyers, though regulated in each state, is in effect a national market, so that standards of liability and coverage in one jurisdiction may directly affect standards in others.

None of these sources of law or attorney regulation establish the basic standards of professional liability of a lawyer to a client. That is a matter of common law as applied in each jurisdiction. The common law provides for an array of theories under which claims of legal malpractice may arise. Under some facts, the claim may be brought for breach of contract. Under some facts, the claim may be brought in tort, particularly for negligence if the plaintiff can establish the lawyer owed the plaintiff a duty of professional service and acted unreasonably or failed to act reasonably, resulting in the plaintiff's harm. Numerous jurisdictions allow claims to be brought under a standard of greater care than mere reasonableness, when the lawyer is held to the standard of a fiduciary. And, some claims can be brought under more specific standards of care under theories such as quasi-contract or detrimental reliance.¹²² The doctrines a plaintiff

120. See Jamie Gorlich and Michael Traynor, *Discussion Paper on Alternative Law Practice*, http://www.americanbar.org/content/dam/aba/administrative/ethics_2020/20111202-ethics2020-discussion_draft-alps.authcheckdam.pdf (last visited Dec. 7, 2013).

121. Formal Opinion 464, at http://www.americanbar.org/content/dam/aba/publications/YourABA/fo_464.authcheckdam.pdf (last visited Dec. 7, 2013).

122. See Ray Ryden Anderson & Walter Steele Jr., *Fiduciary Duty, Tort and Contract: A Primer on the Legal Malpractice Puzzle*, 47 SMU L. REV. 235 (1994).

may select as the basis for a claim against a lawyer-defendant depends on the nature of the services being performed by the lawyer, the exact relationship between the lawyer and the plaintiff, the allegation by the plaintiff of the wrongful action or inaction by the lawyer, and the harm suffered by the plaintiff.

Adding to the possibility for confusion when a given claim of professional negligence may fall within more than one of these different theories of liability is that the claim may be, and in fact is usually, subject to different times for limitations under differing statutes of limitations or doctrines of repose, like laches, even in the same jurisdiction.¹²³ There are usually shorter limitations for actions arising in tort than in contract, shorter limits for breach of oral contracts than written contracts, and flexible standards for determining when a claim is stale under equitable doctrines. Though some jurisdictions have a statute generally establishing a shorter statute of limitations for a civil cause of action for malpractice, these statutes are not always applied to legal malpractice under various, specific facts.

Regardless of the theory of law under which claims are made, the failings by the lawyers alleged by plaintiffs against them are routinely brought, usually as private claims and then as civil litigation. The most common types of attorney misconduct alleged are failure to know or apply the proper substantive law and failure to act timely; the practice area that gives rise to the most claims is real estate.¹²⁴

A lawyer may usually not contract away a client's rights to indemnity from the lawyer for harms the client suffers through the lawyer's malpractice.¹²⁵ Model Rule of Professional Conduct 1.8 prohibits a lawyer from making an agreement that prospectively limiting the lawyer's liability to a client for malpractice, unless the client is represented by a different attorney (and not an attorney from the same firm) in the making of the agreement.¹²⁶

Most lawyers in private practice carry professional liability insurance, which assures the lawyer against the risk of loss in the event of a claim, or a successful claim. The insurer issues a policy to the insured lawyer or law firm, agreeing to defend the insured lawyers if a claim is brought and to pay a judgment or settlement if required. Some law firms maintain liability coverage through standard business insurance policies, the Commercial General Liability policy, or CGL. Other firms maintain either sole coverage or addi-

123. See Debra T. Landis, *What Statute Of Limitations Governs Damage Action Against Attorney For Malpractice*, 2 A.L.R. 4TH 284 (2013).

124. Kathleen M. Ewins & Jason T. Vail, *Profile of Legal Malpractice Claims: 2008-2011*, A.B.A. Standing Committee on Lawyers' Professional Liability (2012).

125. See Steven K. Berenson, *A Cloak For The Bare: In Support Of Allowing Prospective Malpractice Liability Waivers In Certain Pro Bono Cases*, 29 J. LEGAL PROF. 1, 3 (2004).

126. American Bar Association, Model Rule of Professional Conduct 1.8.

tional coverage for claims arising from the professional services owed or provided, which are usually excluded from the CGL. These additional policies (or riders on a CGL) are usually referred to as E&O coverage, or Errors and Omissions insurance. E&O does not cover claims arising from the ordinary course of business, such as tax deficiencies, labor & employment complaints, or premises liability. As with many forms of coverage, E&O may vary in its scope, the two most common scopes of coverage being coverage only for claims that occur during the period of the insurance coverage or only for claims made and presented to the insurer during the period of coverage, which is the more common form of coverage.¹²⁷ The cost of E&O premiums vary from place to place, as well as according to the nature of the practice areas in which the insured attorneys are engaged, the experience of the lawyers insured, the volume and value of the services performed, and the history of claims against the insured lawyers.¹²⁸

As of 2013, seven states require lawyers to disclose the status of their professional liability insurance directly to each of their clients.¹²⁹ Eighteen other states require lawyers to disclose the status of E&O insurance in their annual process of bar registration.¹³⁰ Only Oregon now requires lawyers with an active license to purchase E&O insurance.¹³¹

VII. REMUNERATION AND FEES

In general, U.S. lawyers are paid well (but not extremely well) in comparison to many other forms of employment in similar geographic markets.

127. “David A. Baugh And Ellen L. Flannigan, *Protecting the Professional: Brush up on E&O Insurance*, BUSINESS LAW TODAY (Sept./Oct. 1999), at <http://apps.americanbar.org/buslaw/blt/9-1protect.html> (last visited Dec. 8, 2013).

128. Glenda Wertz, *The Ins and Outs of Errors and Omissions Insurance*, <http://www.insurancejournal.com/magazines/features/2004/07/19/44745.htm> (last visited Dec. 8, 2013).

129. *States Weigh Disclosure of Liability Insurance Status to Clients — Litigation News — ABA Section of Litigation*, http://apps.americanbar.org/litigation/litigation-news/top_stories/professional-liability-insurance-states.html (last visited Nov. 8, 2013).

130. *States Weigh Disclosure of Liability Insurance Status to Clients — Litigation News — ABA Section of Litigation*, http://apps.americanbar.org/litigation/litigation-news/top_stories/professional-liability-insurance-states.html (last visited Nov. 8, 2013).

131. In Oregon, private practice attorneys are required to carry \$300,000 professional liability insurance per claim and \$300,000 aggregate insurance coverage through the Oregon Professional Liability Fund. *States Weigh Disclosure of Liability Insurance Status to Clients — Litigation News — ABA Section of Litigation*, http://apps.americanbar.org/litigation/litigationnews/top_stories/professional-liability-insurance-states.html (last visited Nov. 8, 2013).

Fees Charged to Clients

Legal fees and lawyer compensation are not regulated in the United States. Each lawyer or law firm sets the amount to be charged to a given client for given work, and the amount may vary according to the client's ability or willingness to pay.

Client engagement varies considerably in the setting of the fee. Sophisticated clients with large volumes of work negotiate these fees. Less sophisticated clients shop for attorneys in part based on cost. Mildly sophisticated clients either hire or do not hire a lawyer based on their ability to pay the cost quoted, and unsophisticated clients and clients with a sense of urgent need enter into legal representation without fully considering the costs or their ability to pay.

There are very distinct forms of lawyer fee common in the U.S. American lawyers may represent clients for a fee based on an hourly rate, for a fixed price for a given service, or for a portion of the recovery or award. The billable hour, the charge for time worked by an attorney at a specified rate, as well as additional charges for expenses, which became a mainstay of firm practices in the 1950s, remains the basis for most lawyer and law firm fees, despite its difficulties.¹³² Fees charged in 2012 ranged from less than \$100 per hour by many solo practitioners in smaller markets to well over \$1000 per hour by leading partners in major firms, with an average hourly rate for partners in Big Law firms of between \$500 and \$600.¹³³

The allowance of representation for a fee that is contingent on the level of success for the client, is controversial, but this "contingent fee" arrangement is allowed in the U.S. under the theory that it allows an attorney to bear the risk and costs of some cases that might not otherwise be brought, while creating sufficient risk for the attorney to discourage the pursuit of meretricious cases. Owing to the likelihood of settlement and the size of awards, there remain disputes, particularly between those in the plaintiff's bar, who favor contingent fees, and those in the defense bar, who have customarily opposed them. That said, the use of fees for a given representation of corporations in negotiations and disputes appears to be becoming less uncommon, as corporations seek to restrain their legal hourly bills.

132. See MARK A. ROBERTSON AND JAMES A. CALLOWAY WINNING ALTERNATIVES TO THE BILLABLE HOUR: STRATEGIES THAT WORK (ABA, 3d ed., 2008).

133. See Jeffrey Lowe, *Major Lindsey & Africa Partner Compensation Survey 2012*, at <http://www.mlglobal.com/partner-compensation-survey/2012/FullReport.pdf>; The 2012 Law Firm Billing Survey National Law Journal, Jan. 2, 2013, on line at http://www.law.com/jsp/lawtechnologynews/PubArticleLTN.jsp?id=1356878074938&rss=rss_ltn&slreturn=20131108135528 (last visited Dec. 8, 2013).

Fee Shifting

The default rule in the United States, known often as the American Rule of attorneys' fees, is that clients pay their own lawyers. Under this rule, even successful litigants bear the cost of their own litigation. There are, however, many exceptions that allow for fee shifting allowing a prevailing party to recover reasonable costs of litigation or alternative dispute resolution, including lawyers' fees. The most widespread source of fee shifting arises from contract clauses that specify a party may recover costs and fees incurred in an effort to enforce the contract.

Both federal and state laws allow a successful litigant or claimant in a dispute to recover attorneys' fees from the other in causes of action brought under specific theories of the law or in certain circumstances. The purposes for these statutes vary, and some are overlapping. Some statutes are intended by their drafters to encourage litigation of matters in the public interest, according to the "private attorney general" theory of litigation. Some are to ensure full compensation for an injury or harm, rather than reducing a recovery by the cost of its pursuit. Some are to punish wrongdoers. Some are intended to reduce litigation through increased risks to plaintiffs in bringing an action and to defendants in opposing it. Some are to make equal a playing field between typically wealthy litigants and typically poor litigants on either side of some recurring disputes.¹³⁴

Federal law allows fee shifting by statute for parties in a variety of actions, sometimes only for plaintiffs and sometimes for prevailing parties. The most famous of these statutes awards fees for actions in defense of civil rights, including actions based on deprivation of rights under color of state law and actions based on unlawful discrimination in employment. The mechanism for computing fees to be awarded under federal law has been developed by federal courts interpreting its statutory origin, in the Civil Rights Act Attorneys Fee Award Act of 1976, codified at 42 U.S.C. § 1988, which allows the court in its discretion to award a prevailing party, other than the United States, a "reasonable attorney's fee as part of the costs" taxed against the other party. The prevailing party must move for an award, which it must justify by demonstrating the number of hours of legal work performed, and computing an hourly rate based on a lodestar amount, which considers what an attorney of comparable skill and experience would likely for such a case, in the market in which the case is brought. The lodestar is a rough approximation of the fee that the prevailing attorney would have received if the lawyer had been representing a paying client who was billed by the hour in a

134. See Note: *State Attorney Fee Shifting Statutes: Are We Quietly Repealing The American Rule?* 47 L. & Cont. Probl. 321 (1984).

comparable case. That amount is then subject to adjustment according to the contingent nature of the work involved, the quality of the work performed, the complexity of the issues involved, and the result achieved.¹³⁵ The court will then award a fee based on a reasonable number of hours that should have been expended times the adjusted lodestar amount for each of the attorneys representing the prevailing party.¹³⁶ Other federal fee shifting statutes, usually employing the lodestar approach, include enforcement of environmental laws, workplace safety laws, actions to protect intellectual property, actions against racketeers, and class actions, among many others.¹³⁷

There is considerable variation among states in allowing fee shifting in actions subject to state procedural rules. Many provide for fee shifting for state actions similar to federal actions that provide for fee shifting. Some states have quite idiosyncratic fee-shifting rules, such as the allowance of fees to a party who enforces a contract in Arkansas.¹³⁸ There is, however, great variation among states, even when there is widespread shifting for similar causes of action. For example, though all states allow some form of fee shifting in actions for divorce from a marriage, there is great variation in the forms of shifting allowed.¹³⁹

Attorney Compensation

The median pay for all lawyers in the United States in 2010 was \$112,760 per year or about \$54 per hour for a year in which the lawyer works 2,100 hours.¹⁴⁰ This average pay is nearly four times the national average for all occupations in the United States, which was then \$33,840.¹⁴¹

The average, however, is not typical of lawyer pay in the U.S., which is bimodally distributed. The lowest ten percent earned less than \$54,130, and the top ten percent earned more than \$166,400.¹⁴² This bimodal distribution accords with salary data reported by law school graduates commencing their first jobs. Sixteen percent of the 2012 law graduates reporting data to their schools earned about \$160,000. Eleven percent reported earning about \$50,000. Overall,

135. See *Lindy Bros. Builders, Inc. of Philadelphia v. American Radiator & Standard Sanitary Corp.*, 540 F.2d 102, 117 (3d Cir. 1976).

136. *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542 (2010).

137. Justice Brennan created a useful list of 100 federal fee-shifting statutes. See *Marek v. Chesny*, 473 U.S. 1, 43 (1985) (Brennan dissenting).

138. See Ark. Code Anno. § 15-22-308 (2013).

139. See Stewart Douglas Hendrix, *"Better You Than Me:" Shifting Attorney's Fees In Divorce Actions*, 34 U. LOUISVILLE J. FAM. L. 671 (1996).

140. Lawyers: Occupational Outlook Handbook: U.S. Bureau of Labor Statistics, <http://www.bls.gov/ooh/Legal/Lawyers.htm#tab-1> (last visited Nov. 10, 2013).

141. See Lawyers: Occupational Outlook Handbook : U.S. Bureau of Labor Statistics, <http://www.bls.gov/ooh/Legal/Lawyers.htm#tab-5> (last visited Dec. 8, 2013).

142. Lawyers: Occupational Outlook Handbook : U.S. Bureau of Labor Statistics, <http://www.bls.gov/ooh/Legal/Lawyers.htm#tab-5> (last visited Dec. 8, 2013).

the mean, or average of all salaries reported by the first-year lawyers was just over \$75,000.¹⁴³

Lawyer's compensation varies most by the nature of the employment, but it also varies with location among regions in the United States and the clientele served by the lawyer or law firm.

Government lawyers are paid government rates. For instance, lawyers in the U.S. Department of Justice (DOJ) are paid according to the federal civil service rates, and a lawyer entering the DOJ immediately after law school would be designated a GS-11 and paid between \$50,000 and \$62,000, depending on location. Though advancement is usually slower, a GS-11 could advance through the grades to GS-15 within three to four years, earning a salary between \$100,000 and \$130,000, with increases possible owing to location.¹⁴⁴ State salaries tend to vary. An assistant district attorney general in Tennessee is paid between \$45,000 and \$104,000 per year, which is quite similar to the salary range for public defenders.¹⁴⁵ Likewise, salaries for first-year lawyers in the New York County District Attorney's office in 2013 were \$60,500,¹⁴⁶ though the pay scale in the office ranges to the salary of the elected district attorney, which is \$190,000.¹⁴⁷

Compensation for lawyers in private firms in urban markets is much higher. U.S. firms compete with one another for a high profit per partner, or PPP. This number, as with any law firm, is the result of the gross revenues of the firm, minus staff and associate salaries and other expenses, divided among the number of partners. It does not reflect the greater shares drawn at many firms by some partners. Yet several firms had a PPP of over \$4 million in 2012, and 68 law firms had a PPP of over \$1 million.¹⁴⁸

There is not a single model or pattern for allocating profits (or losses, claims, or debts) among law partners. Each firm has a partnership agreement or corporate bylaws that determine the rules for allocations, which are usually adjusted among the partners each year, depending on the firm's performance as a whole and each partner's contributions to it. There are many forms of partnership compensation, but among large firms, there are two models of part-

143. NALP - The Association for Legal Career Professionals—Salary Distribution Curve, <http://www.nalp.org/salarydistrib> (last visited Dec. 8, 2013).

144. See USDOJ: Legal Careers: Attorney Salaries, Promotions, and Benefits, <http://www.justice.gov/careers/legal/entry-salary.html> (last visited Dec. 9, 2013).

145. See State Employee Salary Search - Results, <https://apps.tn.gov/salary-app/results?d-16544-s=4&d-16544-o=1&d-16544-p=21> (last visited Dec. 9, 2013).

146. "Salary and Benefits" Salary and Benefits—The New York County District Attorney's Office, <http://manhattanda.org/salary-and-benefits> (last visited Dec. 9, 2013).

147. <http://a856-gbol.nyc.gov/gbolwebsite/262.html>

148. See *The Am Law 100 - 2012*, <http://www.americanlawyer.com/PubArticleTAL.jsp?id=1202597273265> (last visited Dec. 10, 2013).

ner compensation that predominate. The older model, sometimes called the lock-step plan, rewards partners a similar share of firm profits as other partners of the same years in practice, sometimes with slight modifications for the value of hours billed and the amount of work brought in the door. Thus, older partners receive roughly the same share of the profits as other older partners, and younger partners receive roughly the same share of the profits as other younger partners, but it is a smaller share than the older partners. The newer model, sometimes called the Hale & Dorr system, for the firm that introduced it in the 1940s, gives an additional portion of the profits to partners who bring business into the firm (“rainmakers”), as well as to partners who directly supervise a client’s affairs.¹⁴⁹ Other compensation schemes abound,¹⁵⁰ including a guaranteed annual minimum, which led to the downfall of Dewey & LeBoeuf.

CONCLUDING OBSERVATIONS

As true in many service sectors since the economic collapse of 2007, there have been several years of seeming trouble in the U.S. law industry. Large law firms in traditionally strong legal markets in New York and Chicago reduced their hiring in a trend that is only now abating. Further, after law schools initially saw an increase in enrollment at the start of the recession, a fall in enrollment has continued, accelerated, perhaps, by loud criticism of legal education compared to the hiring markets.¹⁵¹ A small industry of legal Cassandra arose, bemoaning the wasted lives of law students and lawyers.¹⁵²

The truth of the matter is more interesting. There is a large, powerful, and growing population of lawyers in the United States, one more diverse in gender, race, and culture than ever. There is a stable of increasingly profitable large law firms that project American law across the globe, and an engaged national bar that encourages the growth of the rule of law throughout the world. There is a large community of solo and small-firm practitioners in every jurisdiction, and although issues of access to justice remain critical in many places, there are efforts to increase governmental and professional efforts to abate them. Though U.S. legal services expands and contracts along with the economy as a whole, it is a robust and fairly

149. Michael J. Anderson, *Partner Compensation Systems In Professional Service Firms*, online at http://www.edge.ai/files/compensation.partner_compensation_systems.pdf (last visited Dec. 10, 2013).

150. See JAMES D. COTTERMAN, ED., *COMPENSATION PLANS FOR LAW FIRMS* (4th ed.) (ABA, 2004).

151. See Steve Sheppard, *The Self-Fulfilling Prophecy of Law School Crisis* H-Net Reviews, <https://www.h-net.org/reviews/showrev.php?id=39185> (last visited Dec. 10, 2013).

152. See STEVEN J. HARPER, *THE LAWYER BUBBLE: A PROFESSION IN CRISIS* (2013).

stable sector of the economy, and likely to remain so. It is a two trillion dollar sector of the U.S. economy, with a payroll of over 95 billion dollars.¹⁵³

U.S. lawyers and the courts are engaged in changes in practice driven by new technology, driven not only by curiosity and self-interest but also by the demands of clients and business sectors. Law schools and other legal institutions continue a process of change, responding not just to new technology but to changing demands from students, practitioners, and society.

Most fundamentally, the lawyers of the United States perform innumerable functions essential to the civic, social, and economic life of the nation. The profession in America holds a unique role in the recognition and protection of rights and powers in the citizen and in the state; in the management of the criminal law, in resolving the private disputes that arise among citizens and firms, in creating contracts and transferring property, in protecting standards of behavior ranging from environmental management to consumer product safety to school-child education. And yet, the influence of the lawyer is far wider, as tens of thousands of lawyers employ the methods and knowledge of the law in the corporate, financial, and institutional landscape beyond the traditional legal practice. As American society continues to change, some of these roles will surely alter, but the broad work of the profession will very likely remain central to American life.

153. Both the value added of legal services in the US GDP and legal services payrolls peaked in 2008 but had substantially recovered in 2011, from a 2008 high of \$95.9 billion in payroll and \$2.2 trillion in value added to the GDP to a mere \$95.5 billion payroll and \$2.09 trillion value added to the GDP. See "Gross-Domestic-Product-(GDP)-by-Industry Data" BEA: Gross-Domestic-Product-(GDP)-by-Industry Data, http://bea.gov/industry/gdpbyind_data.htm (last visited Dec. 10, 2013).

MARGARET ROSSO GROSSMAN*

Genetic Technology and Food Security†

TOPIC II. D

In the United States and globally, producers cultivate millions of hectares of genetically modified crops. In the United States, the USDA, EPA, and FDA govern authorization of GMOs under federal laws and agency regulations. Because food produced from GMOs is not considered materially different from conventional food, federal laws require no special labels. To address consumer concerns, states are considering label requirements. Tort remedies are available to redress damage from GMOs, but litigation has not focused on harm from GM food. GM technology is controversial, and many nations have imposed regulatory barriers or prohibitions. In the coming decades, however, GM crops may help to satisfy global demand for food and to meet the challenges of climate change.

INTRODUCTION

For decades, plant breeders have developed new plant varieties by mutation or introduction of “uncharacterized genes” into the same species or sometimes between species.¹ Genetic modification (genetic engineering), in contrast, “introduces one or a few well-characterized genes into a plant species and . . . can introduce genes from any species into a plant.”² Genetic engineering helps to “speed up a naturally occurring biochemical mechanism to more quickly and precisely breed new characters into plants and animals,” albeit sometimes in ways “unlikely to occur in nature.”³ The technology has produced crops (e.g., *Bt [bacillus thuringiensis]* corn and cotton) that resist insects, tolerate herbicides (e.g., glyphosate), and resist viruses (e.g., papaya ringspot virus). Although genetic engineering is controver-

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1. Pamela Ronald, *Plant Genetics, Sustainable Agriculture and Global Food Security*, 188 *GENETICS* 11, 12 (2011).

2. *Id.*

3. Gary Marchant et al., *Impact of the Precautionary Principle on Feeding Current and Future Generations* 11 (CAST Issue Paper No. 52, 2013).

sial, a number of scientific reports have concluded that these varieties cause no “adverse health or environmental effects” and that “the processes of genetic engineering and conventional breeding are no different in terms of unintended consequences to human health and the environment.”⁴ New crops may enhance nutrition, tolerate environmental stress, and resist plant diseases. Indeed, three scientists whose work led to development and commercialization of genetically engineered crops received the 2013 World Food Prize, which recognizes people who improve the quality, quantity, or availability of food in the world.⁵

I. GMOs, HUNGER, AND FOOD SECURITY

A. *Cultivation and Acceptance of GM Crops and Food*

1. Cultivation

Genetically modified (GM) crops are “the fastest adopted crop technology in the history of modern agriculture.”⁶ International production increased from 1.7 million hectares in 1996 to 175.2 million hectares in 2013, when the global value of GM seed was estimated at about \$15.6 million.⁷ Leading countries, with GM production on more than 10 million hectares, were the United States, Brazil, Argentina, India, and Canada. Nineteen countries, of 27 that grew GM crops, produced at least 50,000 hectares. In the European Union, Spain produced almost 137,000 hectares of GM corn.⁸

U.S. producers planted 70.1 million hectares of GM crops, primarily corn, soybeans, and cotton, in 2013. The U.S. Department of Agriculture (USDA) estimated that GM varieties were 90% of corn, 93% of soy, and 90% of cotton.⁹ U.S. farmers also planted GM canola, sugar beets, alfalfa, papaya, and squash.¹⁰ U.S. regulators have approved the most GM “events” of any country.¹¹

In 2013, for the second year, farmers in 19 developing countries grew the majority (54%) of GM crops. In China, 7.5 million farmers produced *Bt* cotton (4.5 million hectares); in India, 95% of cotton (11 million hectares) was *Bt*. Three African countries grew GM crops in

4. Ronald, *supra* note 1, at 12.

5. Andrew Pollack, *Executive at Monsanto Wins Global Food Honor*, NY TIMES, June 19, 2013.

6. Gurdev S. Khush, *Genetically Modified Crops: The Fastest Adopted Crop Technology in the History of Modern Agriculture*, 1(14) AG. & FOOD SECURITY 1, 2 (2012).

7. Clive James, ISAAA Brief 46-2013: Executive Summary, <http://www.isaaa.org/resources/publications/briefs/46/executivesummary/default.asp>.

8. *Id.* Table 1. EU producers planted 148,000 hectares of GM corn in 2013.

9. NASS, USDA, *ACREAGE 25-27* (2013).

10. James, *supra* note 7, Table 1.

11. James, *supra* note 7. GM events are approved for release into the environment, cultivation, food, and feed.

2013: South Africa (2.9 million hectares), Sudan, and Burkina Faso. Seven conducted field trials,¹² but GM cultivation remains limited in African nations.

2. Acceptance

a. Farmers

The high percentage of American farmers who cultivate GM corn, soy, and cotton indicates that producers value these crops. Farm income benefits of major GM crops (corn, soy, cotton, and canola) include cheaper and easier weed control, lower production costs, less damage from pests, and sometimes, higher yields. U.S. farmers, who were first to adopt GM technology extensively, are the “largest beneficiaries of higher incomes, realizing over \$43.6 billion in extra income between 1996 and 2011.”¹³

Despite this acceptance, concern about possible “contamination” of organic, identity-preserved, or traditional crops with GM material raises issues of coexistence. Producers want to choose the type of crop they cultivate without fear that pollen drift or admixture of GM and other seeds will affect the purity and marketability of their crop.¹⁴ Producers who use organic systems are particularly concerned about coexistence. Under the Organic Food Production Act and National Organic Program standards,¹⁵ crops labeled as organic may not use GM technology or GM inputs.¹⁶ Livestock products sold or labeled as organic must come from animals raised under organic management with organically produced feed.¹⁷ The United States does not impose a maximum threshold of GM material for foods certified and labeled as organic. Therefore organic certification does not guarantee the absence of GM material, but only that the producer did not intentionally use GM inputs.¹⁸ Nonetheless, GM material in organic crops affects marketability.

12. *Id.*

13. Graham Brookes & Peter Barfoot, *The global income and production effects of genetically modified (GM) crops 1996-2011*, 4(2) GM CROPS & FOOD: BIOTECHNOLOGY IN AGRIC. & FOOD CHAIN 74, 77 (2013). The authors acknowledge that “some incidence of weed resistance to glyphosate has occurred,” especially where glyphosate was the only weed control method. *Id.* at 75.

14. See Margaret Rosso Grossman, *The Coexistence of GM and Other Crops in the European Union*, 16 KAN. J.L. & PUB. POL’Y 324 (2007).

15. 7 U.S.C. §§ 6501-6523; 7 C.F.R. pt. 205. For current versions of U.S.C. and C.F.R., link from <http://www.gpo.gov/fdsys/>.

16. 7 C.F.R. § 205.105.

17. 7 U.S.C. § 6508; 7 C.F.R. §§ 205.236, 205.237.

18. AMS, USDA, National Organic Program, Final Rule 34 (1990), <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3004452>.

b. Consumers

In comparison with the European Union, where there is little demand for food produced from GM crops,¹⁹ consumers in the United States have expressed less concern about GM crops and their food products. American consumers often display a “dismal level of basic knowledge” about food and agriculture, and they know even less about the prevalence of GM foods in American supermarkets or the effects of GM ingredients in food.²⁰ Some consumers in the United States have expressed concerns about GMOs, however, based on moral or religious beliefs (interfering with nature or with religious dietary restrictions), the desire for freedom of choice (labeling), or GM contamination of traditional or organic crops.²¹

A 2012 representative survey of U.S. consumers indicated that “[m]ost consumers are favorable toward various benefits offered through plant and animal biotechnology, especially those that have a positive impact on their health and/or the health of the planet.”²² U.S. consumers, however, express more concern about biopharming (production of pharmaceuticals and industrial chemicals in crops)²³ and transgenic animals. Nonetheless, about 70% would buy products of transgenic animals, and 67% would buy transgenic fish if the Food and Drug Administration (FDA) approved their safety.²⁴

c. Government

The U.S. government recognized the potential of crop biotechnology in its early regulatory documents (discussed below) and has since supported biotechnology.²⁵ The United States recently emphasized the role of biotechnology in global food security by supporting the Joint Statement on Innovative Agricultural Production Technologies, Particularly Plant Biotechnologies. The statement recognized the

19. Michael Cardwell, *Public Participation in the Regulation of Genetically Modified Organisms: A Matter of Substance or Form?*, 12 ENVTL L. REV. 12, 12-13 (2010). On public protests and vandalism of GM crops in the UK and France, see *id.* at 25-35.

20. Alan McHughen, *Public Perceptions of Biotechnology*, 2 BIOTECHNOLOGY J. 1105, 1106 (2007). See also Patrick F. Byrne, *Safety and Public Acceptance of Transgenic Products*, 46 CROP SCI. 113, 113-14 (2006).

21. See, e.g., Dorothy Du, Note, *Rethinking Risks: Should Socioeconomic and Ethical Considerations Be Incorporated into the Regulation of Genetically Modified Crops?*, 26 HARV. J. L. & TECH. 375, 379-87 (2012).

22. International Food Information Council (IFIC), 2012 “Consumer Perceptions of Food Technology” Survey, Executive Summary 3 (2012).

23. See generally ECKARD REHBINDER ET AL., *Legal problems of pharming*, in PHARMING 213-89 (2009).

24. IFIC, *supra* note 22, at 6.

25. Food and Water Watch argued that the U.S. State Department followed “a concerted strategy to promote agricultural biotechnology, often over the opposition of the public and governments, to the near exclusion of other more sustainable, more appropriate agricultural policy alternatives” for developing countries. FOOD & WATER WATCH, BIOTECH AMBASSADORS: HOW THE U.S. STATE DEPARTMENT PROMOTES THE SEED INDUSTRY’S GLOBAL AGENDA 2 (2013).

global need for increased food production and that “innovative agricultural technologies . . . play a critical role in . . . contributing to increased food production in a sustainable way, and in mitigating the adverse effects of climate change.”²⁶ The statement emphasized the need for transparent science-based regulations, consistent with principles and guidelines of the Codex Alimentarius Commission, synchronization of authorizations for new products, continued research, and other cooperation.²⁷

B. Food Security

1. International

According to the UN Food and Agriculture Organization (FAO), “[f]ood security exists when all people, at all times, have physical and economic access to sufficient, safe and nutritious food to meet their dietary needs and food preferences for an active and healthy life. The four pillars of food security are availability, stability of supply, access, and utilization.”²⁸ The FAO’s 2009 Declaration on Food Security emphasized that “[t]he nutritional dimension is integral to the concept of food security.”²⁹

The FAO estimated that about 842 million people (12% of world population), most (827 million) in developing countries, were chronically undernourished in 2011-2013.³⁰ In 2009, the FAO estimated that “agricultural output will have to increase by 70 percent” between now and 2050 to feed the world population, which may exceed 9 billion.³¹ Moreover, “[c]limate change poses additional severe risks to food security and the agriculture sector. Its expected impact is particularly fraught with danger for smallholder farmers in developing countries . . . and for already vulnerable populations.”³²

The USDA defines and tracks food security both internationally and domestically. For lower income countries, USDA analysis defines food security as a situation that allows “individuals to reach a nutritional target of 2,100 calories per capita per day” from grains, root

26. Link from http://www.fas.usda.gov/itp/biotech/biotech_trade.asp. Other supporting governments are Australia, Brazil, Canada, Argentina, and Paraguay.

27. See Codex Alimentarius, Foods derived from modern biotechnology (2d ed. 2009), <ftp://ftp.fao.org/docrep/fao/011/a1554e/a1554e00.pdf>.

28. FAO, VOLUNTARY GUIDELINES TO SUPPORT THE PROGRESSIVE REALIZATION OF THE RIGHT TO ADEQUATE FOOD IN THE CONTEXT OF NATIONAL FOOD SECURITY 5, para. 15 (27th Session, FAO Council, Nov. 2004).

29. World Food Summit, Declaration of the World Summit on Food Security 1, n.1 (FAO, WSFS 2009/2, Rome, Nov. 16-18, 2009), http://www.fao.org/fileadmin/temp_lates/wsfs/Summit/Docs/Final_Declaration/WSFS09_Declaration.pdf.

30. FAO, WFP & IFAD, THE STATE OF FOOD INSECURITY IN THE WORLD 2013, at 8-9 (2013) (indicating that if declines in the number of undernourished people continue at a slightly higher rate, the Millennium Development Goal for 2015 may be within reach).

31. World Food Summit, *supra* note 29, at 2, para. 4.

32. *Id.* at 2, para. 5.

crops, and other dietary components.³³ The USDA estimated that in 2013, 707 million people (20% of the population) in 76 lower-income countries were food insecure.³⁴ By 2023, USDA expected 868 million people (21.5% of the population) to be food insecure; the increase of 161 million people is higher than the 16% expected growth in population. Sub-Saharan Africa (39 countries), where food insecurity is most intense, is expected to have increased food insecurity (254 million people in 2013; 373 million in 2023), with 34% of the population suffering from food insecurity in 2023.³⁵

To alleviate world hunger, the United States donates significant amounts of food aid to more than 150 countries.³⁶ Several long-standing food aid practices, however, are inefficient and costly: “[l]imits on the U.S. ability to support local and regional purchase of food aid, the practice of monetization, and costly cargo shipping requirements.”³⁷ Moreover, some practices are controversial. For example, in 2002, when shipments of food aid during famine in Southern Africa included GM corn, Zambia refused the corn, and other countries insisted that it be milled so that it could not be planted.³⁸ Food aid reform, proposed as part of President Obama’s 2014 budget, would make U.S. food aid programs more flexible and efficient.³⁹ Agricultural Act of 2014 reauthorized and amended U.S. food aid provisions.⁴⁰

33. BRIGIT MEADE & STACEY ROSEN, INTERNATIONAL FOOD SECURITY ASSESSMENT, 2013-2023, at 2 (USDA, GFA-24, 2013).

34. *Id.* at 1.

35. *Id.* at 3, 5. In 2023, SSA is projected to hold 27% of the population, and 43% of the food insecure.

36. USAID, The Future of Food Assistance: U.S. Food Aid Reform (Fact Sheet, 2013). See Food for Peace Act, 7 U.S.C. §§ 1691-1738r.

37. CHICAGO COUNCIL ON GLOBAL AFFAIRS, ADVANCING GLOBAL FOOD SECURITY: THE POWER OF SCIENCE, TRADE, AND BUSINESS 75 (Catherine Bertini & Dan Glickman, co-chairs, 2013).

38. See Noah Zerbe, *Feeding the Famine? American Food Aid and the GMO Debate in Southern Africa*, 29 FOOD POL’Y 593 (2004) (arguing that U.S. food aid policy was designed to promote adoption of GM crops, rather than to alleviate famine).

39. USAID, *supra* note 36.

40. In June 2013, the House rejected one proposal for food aid reform. Pete Kasperowicz, *Food aid Reforms Rejected in House Vote*, THE HILL, June 19, 2013. Title III of the Agricultural Act of 2014, Pub. L. 113-79, 128 Stat. 649 (2014), signed into law in February 2014, reauthorizes U.S. food aid statutes through 2018. The Act included amendments designed to improve nutritional quality of food aid and to prevent disruption of local markets. It also enacted a new local and regional food purchase program. RALPH M. CHITE, COORDINATOR, THE 2014 FARM BILL: A COMPARISON OF THE CONFERENCE AGREEMENT WITH THE SENATE-PASSED (S. 954) AND HOUSE-PASSED (H.R. 2642) BILLS 9-10, (CRS R43076, Feb. 5, 2014).

2. United States

For the United States, the USDA describes “ranges of severity of food insecurity.”⁴¹ High food security means no reported problems with food access. Marginal food security involves one or two indications of anxiety about food sufficiency, but without changed diet or food consumption. Low food security is indicated by reduced “quality, variety, or desirability of diet,” but with little or no indication of reduced consumption. Very low food security is characterized by “multiple indications of disrupted eating patterns and reduced food intake.” Food insecurity, an economic and social condition, is different from hunger, “an individual-level physiological condition that may result from food insecurity” and is difficult to assess accurately.⁴²

Many factors influence food insecurity. Food prices play a role, and since 2006, U.S. food prices have increased by almost 20%, significantly more than the 14% increase in the consumer price index.⁴³ Food waste and loss contribute to food insecurity when food feeds landfills instead of hungry people. In 2010, about 133 billion pounds (worth about \$161 billion) of wasted food reached landfills, and the 2013 Food Waste Challenge, initiated by the USDA and the Environmental Protection Agency (EPA), is designed to reduce food waste.⁴⁴

The USDA analyzes data from annual food security surveys conducted by the U.S. Census Bureau. In 2012, 14.5% (17.6 million) of U.S. households were food insecure, and 5.7% (7 million) had very low food security. Children and adults in 10% of households with children were food insecure. Food insecurity is associated with income; 40.9% of households with incomes below the poverty line (in 2012, \$23,283 for a family of four) were insecure, but only 6.8% with incomes over 185% of the poverty line faced food insecurity.⁴⁵ Rates of food insecurity were also higher than the national average for households headed by a single parent, households with children, and Black and Hispanic households.⁴⁶ Food assistance programs help, and 59% of households that were food insecure in 2012 participated in a federal

41. ERS, USDA, Definitions of Food Security, <http://www.ers.usda.gov/topics/food-nutrition-assistance/food-security-in-the-us/definitions-of-food-security.aspx> (last updated Sept. 4, 2013).

42. *Id.* (both quotations).

43. Richard Volpe, *Price Inflation for Food Outpacing Many Other Spending Categories*, AMBER WAVES (Aug. 2013).

44. Press Release, USDA, USDA and EPA Launch U.S. Food Waste Challenge (No. 0112.13, June 4, 2013). Food waste is an international problem. BRIAN LIPINSKI, ET AL., REDUCING FOOD LOSS & WASTE 5 (World Resources Institute Working Paper, 2013).

45. ALISHA COLEMAN-JENSEN ET AL., HOUSEHOLD FOOD SECURITY IN THE UNITED STATES IN 2012, at 4, 8, 10 (ERS, USDA, ERR 155, 2013).

46. *Id.* at 12, 14.

food and nutrition program.⁴⁷ Despite significant hunger, however, the United States remains the most food-secure nation.⁴⁸

C. Food Security and Biotechnology

Feeding the world's growing population poses challenges. By 2050, a 60-110% increase in global agricultural production may be necessary to meet demands from "increasing human population, meat and dairy consumption from growing affluence, and biofuel consumption."⁴⁹ Researchers calculated that a yield increase rate of 2.4% per year would double production by 2050, but global average yield increases for four critical crops are lower: maize, 1.6%; rice, 1%; wheat, 0.9%; and soybeans, 1.3%.⁵⁰ In many nations, yields will not meet projected food demand, and "sustainable intensification" may be necessary to ensure adequate food.⁵¹ Scientists recommend sustainably closing the yield gap (the difference between current and maximum local productivity), increasing production limits (using GM and non-GM technologies), changing to more plant-based diets, and expanding aquaculture.⁵²

1. A Role for Biotechnology?

Genetically modified crops may help to satisfy global food demands. Researchers calculated that GM crops carry significant "positive yield effects." Between 1996 and 2011, additional global production from GM varieties for soybeans was 110.2 million tons; maize, 195; cotton, 15.85; canola, 6.55.⁵³ Farmers in developing countries enjoyed significant net economic benefits (51.2% of the 2011 total of \$19.8 billion) from GM production.⁵⁴

International and U.S. policy statements accept a role for GM crops in achieving food security. For example, the 2009 World Food Summit articulated strategic objectives and principles for achieving food security. Agriculture, including biotechnology, plays a significant role:

47. *Id.* at 29. Three major programs are Supplemental Nutrition Assistance Program (formerly food stamps), National School Lunch Program, and Special Supplemental Nutrition Program for Women, Infants, and Children. *Id.* at 27.

48. Economist Intelligence Unit, Global food security index 2013, at 6 (2013). The United States, Norway, and France are the most food secure.

49. Deepak K. Ray et al., *Yield Trends Are Insufficient to Double Global Crop Production by 2050*, 8(6) PLOS/ONE 1, 1 (2013).

50. *Id.* at 2.

51. *Id.* at 6. On sustainable intensification, see T. Garnett et al., *Sustainable Intensification in Agriculture: Premises and Policies*, 341 SCIENCE 33 (July 5, 2013).

52. H. Charles J. Godfray et al., *Food Security: The Challenge of Feeding 9 Billion People*, 327 SCIENCE 812, 813-17 (Feb. 12, 2010).

53. Graham Brookes & Peter Barfoot, GM crops: global socio-economic and environmental impacts 1996-2011, at 13 (PG Economics, 2013). Economic benefits in 2011 were more than \$130/hectare. *Id.* at 9.

54. Brookes & Barfoot, *supra* note 13, at 77.

We recognize that increasing agricultural productivity is the main means to meet the increasing demand for food given the constraints on expanding land and water used for food production. We will seek to mobilize the resources needed to increase productivity, including the review, approval and adoption of biotechnology and other new technologies and innovations that are safe, effective and environmentally sustainable.⁵⁵

The Summit endorsed the L'Aquila Food Security Initiative.⁵⁶ Under this initiative, the United States works to reduce world hunger, especially in Africa, through the United States Agency for International Development (USAID) Feed the Future Program, which aims in part “to strengthen national frameworks for adoption of agricultural biotechnology.”⁵⁷ Its research strategies include “the use of advanced genomics and biotechnology to improve the resilience of crops and animals to climate stresses.”⁵⁸

As the United States employs GM technology to aid food insecure nations, some caution is in order: “There are particular issues involving new technologies, both GM and non-GM, that are targeted at helping the least-developed countries. The technologies must be directed at the needs of those communities,” and those nations should be involved in “framing, prioritization, risk assessment, and regulation of innovations.”⁵⁹

2. Climate Change

GM crops may be critical in light of difficult growing conditions in developing countries and expected changes, including drought, in global climates. Exports of U.S. crops are significant: in 2010, they were 53.2% of world exports of corn, 44.1% of soy, 27.8% of wheat, and 41.9% of cotton.⁶⁰ The 2012 drought that affected much of the United States resulted in fewer corn and soy exports, as well as lower yields, lost income for producers, and higher global food prices.⁶¹

55. World Food Summit, *supra* note 29, at 5, para. 26 (emphasis added). Little additional land is available for agriculture, because potential cropland is forest, environmentally protected, or in urban uses. FAO, FAO STATISTICAL YEARBOOK 2013: WORLD FOOD AND AGRICULTURE 10 (2013).

56. G-8, L'Aquila Joint Statement on Global Food Security (July 2009), expanded by the G-20 in Pittsburgh, Leaders' Statement: The Pittsburgh Summit, para. 39 (2009), link from <http://www.g20.org/documents/>.

57. Feed the Future, Progress Report: Boosting Harvests, Fighting Poverty 6 (2012), <http://feedthefuture.gov/resource/feed-future-progress-report-2012>.

58. *Id.* at 23.

59. Godfray et al., *supra* note 52, at 816 (noting, at 815, that GM technology “should neither be privileged nor automatically dismissed”).

60. U.S. CENSUS BUREAU, THE 2012 STATISTICAL ABSTRACT, NATIONAL DATA BOOK 548, Table 852.

61. PAUL C. WESCOTT & MICHAEL JEWISON, WEATHER EFFECTS ON EXPECTED CORN AND SOYBEAN YIELDS 9 (ERS, USDA, FDS-13g-01, 2013). See also ERS, USDA, U.S.

Drought-tolerant crops are expected to contribute significantly to food security, because drought tolerance is “the single most important constraint to increased productivity for crops worldwide.”⁶² In the Western Great Plains of the United States, Monsanto released DroughtGard GM corn in 2013.⁶³ Moreover, Monsanto and BASF donated the technology to the Water Efficient Maize for Africa (WEMA) partnership, which plans to make the maize available in Sub-Saharan Africa by 2017.⁶⁴ Increased yields are critical because corn is a staple food for 300 million people in Africa, where hunger and malnutrition are common.⁶⁵ Other GM drought-tolerant crops are under development, as are crops with tolerance to salinity, heat stress, and cold.⁶⁶

3. Enhanced Nutrition

The next generation of genetically modified foods is expected to offer nutritional advantages. A new version of Golden Rice and a nutritionally-fortified banana are in development; virus-resistant cassava and a fungal-resistant banana may enhance availability of staple foods.⁶⁷ Genetically enhanced feed crops are also expected to contribute to food security, albeit indirectly, by helping to provide “[s]ufficient, nutritious and environment-friendly feed crops” for animals.⁶⁸

D. *The Right to Food*

According to the UN Special Rapporteur on the Right to Food, “[t]he right to food is a human right recognized under international law which protects the right of all human beings to feed themselves in dignity, either by producing their food or by purchasing it.”⁶⁹ Elements include availability, accessibility (economic and physical), and adequacy (to satisfy dietary needs).

Drought 2012: Farm and Food Impacts, <http://www.ers.usda.gov/topics/in-the-news/us-drought-2012-farm-and-food-impacts.aspx> (last visited Aug. 15, 2013).

62. Clive James, ISAAA Brief 44-2012: Executive Summary, <http://www.isaaa.org/resources/publications/briefs/44/executivesummary/>.

63. Monsanto, *Genuity DroughtGard Hybrids*, <http://www.monsanto.com/products/Pages/droughtgard-hybrids.aspx>.

64. James, *supra* note 62. On WEMA, a private/public sector partnership, see <http://wema.aatf-africa.org/>.

65. See GRET O. EDMEADES, PROGRESS IN ACHIEVING AND DELIVERING DROUGHT TOLERANCE IN MAIZE—AN UPDATE (ISAAA, 2013).

66. ISAAA, Biotechnology and Climate Change, Pocket K No. 43 (2013), link from <http://www.isaaa.org/kc>. GM crops also help to mitigate climate change by decreasing emissions of greenhouse gases (lower pesticide application) and sequestering carbon (no-till farming). *Id.* at 2.

67. Daniel Cressey, *A New Breed*, NATURE 29 (May 2, 2013).

68. ISAAA, Nutritionally-Enhanced GM Feed Crops, Pocket K No. 41 (2012).

69. Olivier de Schutter, *Right to Food*, <http://www.srfood.org/en/right-to-food> (last visited Sept. 17, 2013).

In 1948, the UN Universal Declaration on Human Rights established that “[e]veryone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food.”⁷⁰ Parties to the 1966 International Covenant on Economic, Social and Cultural Rights recognized this right and agreed to take measures to improve the production, conservation, and distribution of food.⁷¹ FAO’s 1996 World Food Summit pledged to reduce hunger,⁷² and the 2000 UN Millennium Declaration committed to “halve, by the year 2015, the proportion of the world’s people . . . who suffer from hunger.”⁷³ In 2004, the FAO adopted Voluntary Guidelines to help states implement the right to food,⁷⁴ and a 2012 Fact Sheet outlines state obligations.⁷⁵

The United States supports the right to an adequate standard of living, including food, established in the Universal Declaration of Human Rights and is committed to the Millennium Development Goals. The United States, however, is not a Party to the 1966 International Covenant.⁷⁶ The objective of the United States is “to achieve a world where everyone has adequate access to food,” but the United States does not “treat the right to food as an enforceable obligation,”⁷⁷ and it is one of the few countries that has not acknowledged a right to food. Nonetheless, the U.S. government helps to feed hungry people through nutrition assistance programs, food aid, and other measures. In fact, people in the United States who meet eligibility criteria are entitled by law to receive nutrition assistance. Some argue, however, that the United States must shift its policy focus from “food assistance as charity to adequate food as a human right.”⁷⁸

70. UN General Assembly, Universal Declaration on Human Rights, art. 25(1), Dec. 10, 1948 (Doc.217 A (III)), www.un.org/en/documents/udhr.

71. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, art. 11(1),(2), Dec. 16, 1966, in force June 3, 1976, 993 U.N.T.S. 3, 7 (1976).

72. FAO, Rome Declaration on World Food Security, World Food Summit, Rome, Nov. 13-17, 1996, <http://www.fao.org/docrep/003/w3613e/w3613e00.HTM>.

73. UN General Assembly, Millennium Declaration (Doc. A/RES/55/2), New York, Sept. 18, 2000, <http://www.un.org/millennium/declaration/ares552e.pdf>.

74. FAO, VOLUNTARY GUIDELINES, *supra* note 28 (adopted by consensus).

75. UN Office of High Commissioner for Human Rights & FAO, The Right to Adequate Food (Fact Sheet No. 34, 2012)

76. President Jimmy Carter signed the Covenant, Oct. 5, 1977, but the U.S. has not ratified it.

77. U.S. Mission to the UN, Explanation of Position by the United States of America on Resolution: The Right to Food, UN Human Rights Council, 19th Session, Geneva, Switzerland, Mar. 22, 2012 (joining the consensus document, albeit with reservations).

78. INTERNATIONAL HUMAN RIGHTS CLINIC, NOURISHING CHANGE: FULFILLING THE RIGHT TO FOOD IN THE UNITED STATES 3 (NYU School of Law, 2013) (describing U.S. programs). Fifteen federal food assistance programs exist. Requirements (e.g., income thresholds) limit eligibility, and Congress must appropriate funds. *See also* Molly D. Anderson, *Beyond food security to realizing food rights in the US*, 29 J. RURAL STUD. 113, 114 (2013).

II. ADMISSION OF GMOs

A. *Legal Requirements*

Under U.S. law, GM crops and their food and feed products must be authorized, after evaluations designed to protect agriculture, the environment, and health.⁷⁹ Those who develop new varieties must comply with federal laws and regulations; developers also complete voluntary consultations with federal agencies. The 1986 Coordinated Framework for Regulation of Biotechnology⁸⁰ established U.S. policy, which relied on existing federal law, now supplemented by new laws and regulations. Under the Coordinated Framework, the Department of Agriculture (USDA) ensures that GMOs are safe to grow; the EPA ensures that they are safe for the environment; the FDA, along with EPA, ensures that they are safe to eat. Because the focus of this Article is food, the following description discusses the roles of USDA and EPA briefly, with more focus on FDA. The discussion treats food from GM plant varieties, rather than food from genetically engineered animals, which the FDA regulates as new animal drugs.⁸¹

1. USDA

USDA's Animal and Plant Health Inspection Service (APHIS) governs new GM varieties under the Plant Protection Act of 2000,⁸² which authorizes restrictions on plant pests. Because most GMOs are materials that could harbor a plant pest, they are "regulated articles," which must be evaluated and classified as "nonregulated" before they can be sold commercially.⁸³

The USDA uses a science-based regulatory framework to ensure safe development and use of GM plants. Field trials, governed by APHIS regulations, evaluate safety. Trials that pose special risks require permits, but trials for most GMOs require notification to APHIS. APHIS regulations prescribe procedures (including required data) for permit applications and notifications; performance stan-

79. This section is condensed from Margaret Rosso Grossman, *Genetically Modified Crops and their Products in the United States: A Review of the Regulatory System*, in XI JAHRBUCH DES AGRARRECHTS 69-95 (José Martínez ed., 2012).

80. Office of Science and Technology Policy, Coordinated Framework for Regulation of Biotechnology Products, 51 Fed. Reg. 23,302 (June 26, 1986).

81. FDA, Guidance for Industry 187: Regulation of Genetically Engineered Animals Containing Heritable Recombinant DNA Constructs (2011), <http://www.fda.gov/downloads/AnimalVeterinary/GuidanceComplianceEnforcement/GuidanceforIndustry/UCM113903.pdf>.

82. 7 U.S.C. §§ 7701-7772; 7 C.F.R. pt. 340. In 2008, USDA proposed regulatory amendments to expand its oversight, but by January 2014, they had not been promulgated. APHIS, Proposed Rule, 73 Fed. Reg. 60,008 (Oct. 9, 2008).

83. 7 C.F.R. § 340.1; 7 U.S.C. §§ 7702(14), 7711.

dards apply to field trials.⁸⁴ Under the National Environmental Policy Act (NEPA),⁸⁵ APHIS prepares an environmental assessment and, if necessary, an environmental impact statement.

When field trials succeed—if the new variety is not a plant pest and poses no threat to agriculture or the environment—the developer petitions for determination of nonregulated status. APHIS reviews results of field trials and detailed data about the organism; again, the agency must comply with NEPA. If APHIS concludes that the GMO can be released safely into the environment and poses no agricultural risk, the agency makes the determination of nonregulated status. Thereafter the nonregulated organism can move freely in commerce, but only if it meets EPA and FDA requirements. As of December 2013, APHIS had granted 100 petitions, with 13 applications pending.⁸⁶

2. EPA

Plant incorporated protectants (PIPs) are pesticidal substances—e.g., *bacillus thuringiensis* (*Bt*), an insecticide—produced by GM crops. The EPA regulates PIPs under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)⁸⁷ and governs food safety issues of pesticide residues in GM foods under the Food, Drug, and Cosmetic Act (FDCA).⁸⁸ Regulations establish requirements under both laws, and a guidance document sets out policy.⁸⁹

Under FIFRA, no pesticide can be sold and used in the United States until it has been registered. Registration requires a showing that the pesticide will not “cause unreasonable adverse effects on the environment.”⁹⁰ The EPA uses FIFRA’s registration system to evaluate PIPs, which are pesticides under FIFRA because they are

84. 7 C.F.R. §§ 340.4 (permits), 340.3 (notifications). USDA proposed to eliminate the notification procedure and require permits for all field trials. APHIS, *supra* note 82.

85. 42 U.S.C. §§ 4321-4370f. NEPA requires preparation of an environmental impact statement for “major Federal actions significantly affecting the quality of the human environment.” *Id.* § 4332(2)(C). APHIS’ failure to prepare environmental impact statements engendered litigation, and a case involving Monsanto’s Roundup Ready alfalfa reached the U.S. Supreme Court. *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. ___, 130 S. Ct. 2743 (2010). See Margaret Rosso Grossman, *Monsanto Co. v. Geertson Seed Farms: US Supreme Court Decides GM Alfalfa Case*, 5(4) EUR. FOOD & FEED L. REV. 216-21 (2010).

86. See statistics at APHIS, USDA, *Biotechnology*, <http://www.aphis.usda.gov/bio/technology/status.shtml> (updated daily).

87. 7 U.S.C. §§ 136-136y.

88. 21 U.S.C. §§ 301-399d, supplemented by the Food Safety Modernization Act, Pub. L. 111-353, 124 Stat. 3885 (2011), codified at 21 U.S.C. §§ 2201-2252.

89. 40 C.F.R. pts. 152 & 174; EPA, Pesticide Registration (PR) Notice 2007-2: Guidance on Small-Scale Field Testing and Low-Level Presence in Food of Plant-Incorporated Protectants (PIPs) (2007), http://www.epa.gov/PR_Notices/pr2007-2.htm.

90. 7 U.S.C. § 136a(c)(5). Unreasonable adverse effects are defined at *id.* § 136(bb).

introduced into plants as a means of “preventing, destroying, repelling, or mitigating any pest.”⁹¹ To support registration, the developer gathers data in field tests, authorized by experimental use permits.⁹² If a field test may result in a food residue, the EPA establishes a temporary food tolerance under the FDCA before issuing the permit.⁹³ The EPA can register a new GMO with pesticidal properties when the developer complies with regulatory requirements.⁹⁴

The FDCA, which governs residues of PIPs in foods,⁹⁵ prohibits adulteration and misbranding and regulates food additives.⁹⁶ Raw or processed food or feed that contains pesticide chemical residues is considered adulterated and cannot be moved in interstate commerce, unless the residue complies with an established tolerance or has been exempted from the tolerance requirement.⁹⁷ The EPA may establish a pesticide tolerance for food only if it is “safe.”⁹⁸ The EPA may grant exemptions, either temporary or permanent, from the tolerance requirement if tests indicate that the pesticidal protein is neither toxic nor allergenic, and there is “a reasonable certainty that no harm will result” from aggregate exposure.⁹⁹ By regulation, the EPA has granted exemptions to PIPs in GM crops (e.g., proteins associated with *Bt* crops).¹⁰⁰ The FDA enforces the EPA’s pesticide tolerances.

3. FDA

The FDA, which governs food and feed safety under the FDCA, articulated its policy for GM varieties and their food products in a 1992 Policy Statement.¹⁰¹ Because most new plant varieties had been

91. *Id.* § 136(u). The EPA defines PIP as “a pesticidal substance that is intended to be produced and used in a living plant, or in the produce thereof, and the genetic material necessary for [its] production.” 40 C.F.R. § 174.3.

92. 7 U.S.C. § 136c; 40 C.F.R. pt. 172. Some small-scale field tests do not require permits. 40 C.F.R. § 172.3; EPA, *supra* note 89.

93. 7 U.S.C. § 136c(b). A food tolerance is a legal limit on the maximum amount of a substance in or on a food.

94. PIPs, which are produced and used in living plants, present unique regulatory issues. The EPA planned to promulgate regulations with data requirements designed for PIPs, but those regulations had not been adopted by May 2014. EPA, Notification, 76 Fed. Reg. 14,358 (Mar. 16, 2011).

95. 21 U.S.C. § 346a.

96. Until 1996, pesticide residues were considered food additives, subject to the Delaney Clause, 21 U.S.C. § 348(c)(3)(A), that prohibited approval of substances that contain carcinogens. They are now governed separately. *Id.* § 346a.

97. *Id.* § 346a(a)(1). Scientific data must support requests for tolerances or exemptions. *See also* EPA, *supra* note 89, at 3, 6-7.

98. 21 U.S.C. § 346a(b)(2)(A)(i). Safe means “a reasonable certainty that no harm will result from aggregate exposure to the pesticide chemical residue, including all anticipated dietary exposures and all other exposures for which there is reliable information.” *Id.* § 346a(b)(2)(A)(ii).

99. *Id.* § 346a(c)(2)(A)(i),(ii).

100. 40 C.F.R. § 174.501-533.

101. FDA, Statement of Policy: Foods Derived from New Plant Varieties, 57 Fed. Reg. 22,984, 23,005 (May 29, 1992). The FDA has authority to regulate substances intended to enhance plant resistance to chemical herbicides (e.g., glyphosate).

developed safely, the FDA did not routinely conduct premarket safety reviews of new foods derived from plants, and its policy extended this approach to GM foods.¹⁰² The FDA acknowledged, however, that genetic modification could cause changes in structure, function, or composition; if necessary to protect public health, the agency requires premarket review and approval of new foods.¹⁰³ The agency emphasized that developers of new foods bear legal responsibility to evaluate food safety and to comply with the FDCA.¹⁰⁴

FDA policy focuses on the food product, rather than the process: “The regulatory status of a food . . . is dependent upon objective characteristics of the food and the intended use of the food (or its components) . . . , rather than the fact that the new methods are used.”¹⁰⁵ The agency relied on its existing regulatory system, especially FDCA provisions that prohibit misbranding and govern food additives,¹⁰⁶ to ensure the safety of GM foods and food ingredients.

FDA policy relies in part on the concept of substantial equivalence,¹⁰⁷ “an internationally recognized standard that measures whether a biotech food or crop shares similar health and nutritional characteristics with its conventional counterpart.”¹⁰⁸ A GM food product is considered substantially equivalent to its conventional counterpart if their nutritional components do not differ. The FDA requires premarket review only for foods that lack substantial equivalence—GM foods with characteristics that carry higher risk (e.g., toxin levels or a new substance).¹⁰⁹

a. Food additives

The FDCA provides that a food is adulterated if it contains, among other harmful substances, an unsafe additive.¹¹⁰ The FDA regulates food additives, including those in GM food. A food additive is considered unsafe unless it has premarket approval or an exemption from approval.¹¹¹ Approval requires the manufacturer to submit

102. *Id.* at 22,988.

103. *Id.* at 22,986-90, citing 21 U.S.C. § 342(a)(1).

104. *See* FDA, *supra* note 101, at 22,990.

105. *Id.* at 22,984-85.

106. 21 U.S.C. §§ 342, 348.

107. FDA, *supra* note 101, at 22,992 (referring to OECD and FAO/WHO documents). Substantial equivalence is a comparative approach, rather than a safety assessment.

108. Council for Biotechnology Information, *Substantial Equivalence in Food Safety Assessment 1* (2001). For criticism of substantial equivalence, see Thomas O. McGarity, *Seeds of Distrust: Federal Regulation of Genetically Modified Foods*, 35 UNIV. MICH. J.L. REFORM 403, 426-32, 484 (2002).

109. *See* FDA, *Premarket Notice Concerning Bioengineered Foods*, 66 Fed. Reg. 4706, 4711 (Jan. 18, 2001) (proposing to require notice 120 days before commercial distribution of most bioengineered foods). FDA did not enact the proposed regulation.

110. 21 U.S.C. § 342(a).

111. *Id.* § 348(a).

data showing, with “reasonable certainty . . . that the substance is not harmful under the intended conditions of use.”¹¹² If the FDA finds an additive safe, it will approve the additive by regulation; otherwise additives are considered unsafe, and the food is adulterated.¹¹³

Most non-pesticidal GM foods escape premarket review as food additives, however, because the FDA applies the GRAS concept to GM foods.¹¹⁴ Substances that are “generally recognized as safe”¹¹⁵—e.g., ingredients from natural sources and some chemical additives—are excluded from the statutory definition of food additive¹¹⁶ and are exempt from regulation as food additives.¹¹⁷ The determination that a substance is GRAS, however, requires “the same quantity and quality of scientific evidence as is required to obtain approval of a food additive regulation for the ingredient.”¹¹⁸

The FDA decided that most GM foods will be considered GRAS because most new plant foods had been accepted widely as safe.¹¹⁹ Although a lawsuit challenged this determination, the court upheld the FDA’s policy. Emphasizing that the GRAS determination must be based on technical evidence of safety, generally known and accepted in the scientific community, the court deferred to the FDA’s evaluation of scientific data within its area of expertise.¹²⁰

The characterization of GM foods as GRAS is controversial.¹²¹ Manufacturers themselves decide whether a new food substance is GRAS and not a food additive that requires approval.¹²² The FDCA does not require manufacturers to inform FDA about new GRAS substances,¹²³ but the FDA uses a notification procedure set out in a

112. 21 C.F.R. § 170.3(i). See 21 U.S.C. § 348(b),(c) (requirements for petition and approval).

113. 21 U.S.C. § 342(a)(2)(C). “The term ‘safe’ . . . has reference to the health of man or animal.” *Id.* § 321(u).

114. See FRED H. DEGNAN, *The GRAS Concept: Ensuring Food Safety and Fostering Innovation, in FDA’S CREATIVE APPLICATION OF THE LAW: NOT MERELY A COLLECTION OF WORDS 15-35* (2006).

115. 21 C.F.R. § 170.30 (defining GRAS).

116. 21 U.S.C. § 321(s) (defining food additive). The GRAS list is 21 C.F.R. pts 182, 184, and 186

117. FDA, *supra* note 101, at 22,989.

118. 21 C.F.R. § 170.30(b).

119. FDA, *supra* note 101, at 22,990.

120. *Alliance for Bio-Integrity v. Shalala*, 116 F. Supp. 2d 166, 177 (D. D.C. 2000), citing 21 C.F.R. § 170.30(a),(b).

121. See, e.g., Alison Peck, *Leveling the Playing Field in GMO Risk Assessment: Importers, Exporters and the Limits of Science*, 28 B.U. INT’L L. J. 241, 252-63 (2010).

122. See Thomas G. Neltner et al., *Conflicts of Interest in Approvals of Additives to Food Determined to Be Generally Recognized as Safe*, JAMA INTERNAL MED. (Aug. 7, 2013), doi:10.1001/jamainternmed.2013.10559 (analyzing financial conflicts of interest and questioning the independence of GRAS determinations).

123. See 21 U.S.C. § 348; McGarity, *supra* note 108, at 455.

proposed regulation.¹²⁴ The agency responds to GRAS notices with a “no questions” letter; this response does not constitute approval.¹²⁵

b. Guidance documents

FDA guidance documents, used to communicate the agency’s current views, are less formal than regulations and do not legally bind the FDA or the public. Nonetheless, FDA guidance documents govern industry consultations about new GM foods.

The FDA stated that “prudent” developers of foods using new technologies, including new plant varieties, would consult with FDA before commercial distribution of those foods.¹²⁶ The agency’s 1997 guidance document establishes procedures for initial and final “biotechnology consultations.”¹²⁷ A comprehensive data form facilitates collection of information for the final consultation, which occurs when the developer has documentation—including detailed safety and nutritional assessments—to show that its new product is safe.¹²⁸ FDA scientists meet with developers and review data to identify and resolve scientific and regulatory issues. Although biotechnology consultation is voluntary, food companies follow the practice,¹²⁹ perhaps in part to avoid possible liability triggered by unsafe foods.

The FDA also recommends that developers seek early food safety evaluation of certain new non-pesticidal proteins in GM food varieties. A 2006 guidance document encourages developers to submit food safety data early, e.g., at the time of field tests, before new proteins enter the food supply via pollen flow or commingling.¹³⁰ Early food safety evaluation occurs before the biotechnology consultation

124. FDA, Substances Generally Recognized as Safe, 62 Fed. Reg. 18,938 (Apr. 17, 1997). *See also* 75 Fed. Reg. 81,536 (Dec. 28, 2010) (reopening comment period).

125. *See* FDA, Guidance for Industry: Frequently Asked Questions about GRAS, Q 15 (2004), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/IngredientsAdditivesGRASPackaging/ucm061846.htm>. Since 1998, FDA received 490 GRAS notices. FDA, *GRAS Notice Inventory*, <http://www.fda.gov/Food/IngredientsPackagingLabeling/GRAS/NoticeInventory/default.htm> (last updated Nov. 30, 2013).

126. FDA, *supra* note 101, at 22,991.

127. FDA, Guidance on Consultation Procedures—Food Derived from New Plant Varieties (1997), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Biotechnology/ucm096126.htm>.

128. *See* FDA, Notice, Agency Information Collection Activities, 76 Fed. Reg. 9020 (Feb. 16, 2011) (availability of Form FDA 3665).

129. *See* FDA, *Completed Consultations on Bioengineered Foods* (May 2013), <http://www.accessdata.fda.gov/scripts/fcn/fcnNavigation.cfm?rpt=bioListing>.

130. FDA, Guidance for Industry: Recommendations for the Early Food Safety Evaluation of New Non-Pesticidal Proteins Produced by New Plant Varieties Intended for Food Use, pts. II, III.C. (2006), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/Biotechnology/ucm096156.htm>.

that precedes commercialization, and developers can use data from the food safety evaluation in the later consultation.¹³¹

B. Restriction of GMOs

In comparison with the European Union,¹³² few restrictions limit the cultivation and use of approved GMOs and GM food and feed in the United States. Under federal law, producers are free to cultivate GM varieties that have received USDA approval (nonregulated status).¹³³ Because the USDA, FDA, and EPA share information and coordinate approvals, GM varieties approved for cultivation can also be sold or processed as food and feed.¹³⁴

1. State Restrictions

A number of states have enacted laws that govern GM crops. Although some states regulate GM crops (e.g., by permit), state laws generally support GM technology. They provide funding for research, authorize criminal penalties or statutory damages for destruction of GM crops, preempt local government prohibitions of GM cultivation, and protect innocent farmers when GM material is found on their land.¹³⁵

After some unapproved GM varieties were discovered in farm fields or in the food chain, a few states enacted laws to govern the production of GM and traditional varieties of rice and canola.¹³⁶ The California Rice Certification Act of 2000 is designed to avoid harmful commercial impacts caused by commingling of rice varieties.¹³⁷ Similarly, the Arkansas Rice Certification Act of 2004 authorizes restrictions on sale, cultivation, or other handling of rice that may

131. *Id.* pt. III.C.3. See FDA, *Inventory of New Protein Consultations* (Mar. 2013), <http://www.fda.gov/Food/FoodScienceResearch/Biotechnology/Submissions/ucm222595.htm>.

132. See GMO-free Europe, <http://www.gmo-free-regions.org/>.

133. Seed manufacturers may impose restrictions by contract—e.g., a requirement to plant a “refuge” area of non GM plants.

134. See HHS, USDA, & EPA, Memorandum of Understanding (Document 10-2000-0058-MU, 2011), <http://www.epa.gov/opp00001/biopesticides/pips/biotech-mou.pdf>.

135. See Margaret Rosso Grossman, *Genetically Modified Crops and Food in the United States: The Federal Regulatory Framework, State Measures, and Liability in Tort*, in *THE REGULATION OF GENETICALLY MODIFIED ORGANISMS: COMPARATIVE APPROACH* 299, 317-21 (Luc Bodiguel & Michael Cardwell eds., 2010). See National Conference of State Legislatures, *State Biotech Statutes* (2011), nclsl.org/issues-research/agri/state-biotech-statutes.aspx.

136. Laws and rules that govern canola districts include Wash. Admin. Code §§ 16-326-010 to -060; Idaho Admin. Code 02.06.13, IDAHO CODE § 22-108(2); OR. REV. STAT. §§ 570.405, 570.450.

137. CAL. FOOD & AGRIC. CODE §§ 55000-55123; see § 55009 (characteristics of commercial impact); §§ 55080-55083 (commercial impact rice).

have commercial impact.¹³⁸ A Missouri law authorizes voluntary grower districts created by farmers who raise “agricultural crops for food, feed, industrial, and pharmaceutical uses.”¹³⁹ When these laws were enacted, APHIS had deregulated only two varieties of GM rice,¹⁴⁰ and concern about field trials of new varieties may have led to their enactment. Both California and Arkansas used their legislation to prevent field tests of GM rice after the accidental release of an unapproved GM variety disrupted trade.¹⁴¹

2. Local GMO Bans

Several California counties have banned the cultivation of GM crops within their borders. Mendocino County was the first to ban GM crops, followed by Trinity, Santa Cruz, and Marin counties.¹⁴² Efforts to enact bans in other California counties, including San Luis Obispo, Butte, and Sonoma, failed.¹⁴³ A few individual towns in California and elsewhere have banned, or tried to ban, cultivation of GM crops.

III. LABELING OF GM FOOD

A. Federal Law

The FDCA and FDA regulations¹⁴⁴ govern food labels. GM food must comply with labeling requirements that apply to all foods, but the FDA does not require special labels for most GM foods.¹⁴⁵ Under the FDCA, food is “misbranded” if its label is “false or misleading,”¹⁴⁶ determined in part by “the extent to which the labeling . . . fails to reveal [material] facts.”¹⁴⁷ The FDA interprets the term “material” to refer to attributes of the food product itself; methods used to develop new plant varieties, including GM food varieties, are not material facts. Because the FDA had no indication that GM foods differed meaningfully from other foods or presented any different or greater safety concerns, the agency believed that it had no basis to require

138. ARK CODE ANN. §§ 2-15-201 to -208 (2010); see § 2-15-204(b)(1). By 2008, no district had been created. On the California and Arkansas laws, see Thomas P. Redick & Donald L. Uchtmann, *Coexistence Through Contracts: Export-Oriented Stewardship in Agricultural Biotechnology vs. California's Precautionary Containment*, 13 DRAKE J. AGRIC. L. 207, 227-29, 238 (2008).

139. MO. REV. STAT. § 261.256 (2012).

140. See APHIS, *supra* note 86.

141. Redick & Uchtmann, *supra* note 138, at 229, 232-33.

142. See e.g., Marin County, Cal. Code ch. 6.92, (passed, 2004) (making cultivation of GM organisms a public nuisance).

143. Redick & Uchtmann, *supra* note 138, at 229-31.

144. 21 C.F.R. pt. 101. This discussion of labeling is adapted in part from a book chapter to be published in Italy.

145. FDA, *supra* note 101, at 22,991.

146. 21 U.S.C. § 343(a).

147. *Id.* § 321(n).

GM foods to be labeled.¹⁴⁸ Thus, food need not be labeled as GM unless the food itself differs materially from similar foods—e.g., in nutritional content or presence of an allergen. A 2000 court decision upheld the FDA's interpretation of "material" and its decision not to require labels for GM food. With no material difference between GM and other crops, the FDA lacked a legal basis to require labels.¹⁴⁹

Proponents of labeling have introduced numerous bills in the U.S. Congress and have submitted petitions to the FDA, but by May 2014, neither the Congress nor the FDA had required labels for GM food.¹⁵⁰

Because some consumers want information on GM foods, the FDA published a draft guidance document on voluntary labeling.¹⁵¹ The document helps industry ensure that voluntary labeling is truthful and does not suggest that GM foods are inferior to GM-free foods. The guidance suggests language that could be used on food labels without causing the label to be misleading and the food therefore misbranded.

Several respected scientific organizations support FDA policy. The American Medical Association found "no scientific justification for special labeling of bioengineered foods," but recommended "mandatory pre-market systematic safety assessments of bioengineered foods."¹⁵² The American Association for the Advancement of Science noted that GM varieties are the "most extensively tested crops ever added to our food supply" and pose no special risk; required labels "can only serve to mislead and falsely alarm consumers."¹⁵³

Legal scholars disagree, but in the absence of legitimate scientific concerns, one high-profile scholar argued against compulsory GM labels, in part because they may spread alarm and discourage retailers from making products available.¹⁵⁴ Consumer sentiment, too, is mixed. A nationally representative survey in 2012 indicated

148. FDA, *supra* note 101, at 22,991.

149. Alliance for Bio-Integrity, *supra* note 120, at 179.

150. E.g., Genetically Engineered Food Right-to-Know Act, S. 809 & H.R. 1699, 113th Congress. The Senate defeated a proposed amendment to its 2013 version of the Farm Bill that would have required labeling of GM foods. CHITE, *supra* note 40, at 1. See also FDA, Docket FDA-2011-P-0723-0001, <http://www.regulations.gov>.

151. FDA, Guidance for Industry: Voluntary Labeling Indicating Whether Foods Have or Have Not Been Developed Using Bioengineering; Draft Guidance (2001; not finalized by September 2013), <http://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/LabelingNutrition/ucm059098.htm>.

152. American Medical Assoc., Policy H-480.958: Bioengineered (Genetically Engineered) Crops and Foods, June 2012. *But see* American Public Health Association, *Policy Statement 2001-11, 92(3) AM. J. PUB. HEALTH 451, 463 (2002)*.

153. AAAS, Statement by the AAAS Board of Directors on Labeling of Genetically Modified Foods (2012), http://www.aaas.org/news/releases/2012/media/AAAS_GM_statement.pdf. The AAAS statement engendered controversy and disagreement.

154. Cass Sunstein, *Don't Mandate Labeling for Gene-Altered Foods*, BLOOMBERG, May 12, 2013. *But see, e.g.*, Debra M. Strauss, *The Role of Courts, Agencies, and Con-*

that two thirds of consumers “support the . . . FDA’s current labeling policy for foods produced through biotechnology.”¹⁵⁵ In a 2013 New York Times survey, however, 93% of those polled believed that foods with GM ingredients should be identified.¹⁵⁶

B. State Labeling

Only a few state laws, enacted in the early 2000s, required labeling of GM products —e.g., GM seed or GM fish and their products.¹⁵⁷ Recently, however, state focus on labeling has intensified, with both legislative action and citizen initiatives. At least twenty states have pending legislation to require labeling of GM foods or ingredients.¹⁵⁸

Two state legislatures enacted right-to-know laws that take effect only after other states enact similar laws. Connecticut’s law, enacted in June 2013, will require GE food and seed to be labeled, clearly and conspicuously, “Produced with Genetic Engineering.”¹⁵⁹ The Maine legislature enacted a disclosure law, which the became law without the governor’s signature in January 2014.¹⁶⁰ Under both laws, foods are misbranded unless the genetically engineered content is disclosed, and the term “natural” cannot be used on labels for GE food. In May 2014, Vermont enacted a labeling law that will take effect in July 2016.¹⁶¹

Citizens have proposed ballot initiatives in several states. In 2002, voters defeated an Oregon initiative, opposed by the FDA, to require GM labels.¹⁶² In November 2012, California voters narrowly (53.1 to 46.9%) defeated a hotly-contested ballot initiative opposed by biotechnology and food companies. Intended to provide information and allow freedom of choice, the proposed law would have required “clear and conspicuous” disclosure of genetically engineered food or food ingredients and restricted use of the word “natural” for GM

gress in GMOs: A Multilateral Approach to Ensuring the Safety of the Food Supply, 48 IDAHO L. REV. 267, 315 (2012).

155. IFIC, *supra* note 22, at 3.

156. Allison Kopicki, *Strong Support for Labeling Modified Foods*, NY TIMES, July 27, 2013.

157. E.g., VT. STAT. ONLINE tit. 6, sec 611(c), 644(a)(4) (seed); ALASKA STAT. § 17.20.040(a)(14) (fish). See also MAINE REV. STAT. tit 7 § 530-A (voluntary guidelines for GM-free labels).

158. Right to Know GMO, *State Map*, <http://www.righttoknow-gmo.org/states> (map with links to information about state legislation).

159. Pub. L. 13-183, <http://www.cga.ct.gov/2013/ACT/pa/pdf/2013PA-00183-R00HB-06527-PA.pdf>.

160. LD 718, 126th Maine Legislature, http://www.mainelegislature.org/legis/bills/bills_126th/billtexts/HP049001.asp.

161. Act 120, <http://www.leg.state.vt.us/database/status/textonly.cfm?Bill=H.0112&Session=2014>. In New Hampshire, legislators defeated a labeling bill (HB 660). <http://legiscan.com/NH/bill/HB660/20134>.

162. Lester M. Crawford, FDA Deputy Commissioner, Letter to Oregon Governor John A. Kitzhaber, Oct. 4, 2002, http://www.bio.org/sites/default/files/Kitzhaber_0.pdf.

foods.¹⁶³ In Washington, voters defeated a measure in the November 2013 election.¹⁶⁴ Initiatives are planned in other states.

1. Constitutional Issues

State labeling requirements raise significant legal issues.¹⁶⁵ Under the U.S. Constitution,¹⁶⁶ states enjoy sovereignty to enact laws, but other constitutional doctrines, as well as federal laws and regulations, might limit state authority to require labels on GM food.¹⁶⁷

State labeling laws are vulnerable to challenge under the Dormant Commerce Clause. Under the Commerce Clause of the U.S. Constitution, Congress has authority “to regulate commerce . . . among the several states.”¹⁶⁸ Even when Congress has not regulated, the Dormant Commerce Clause prohibits states from enacting laws that discriminate against, or unduly burden, interstate commerce. In the absence of a federal labeling requirement, state laws may burden interstate commerce, e.g., by requiring out-of-state food manufacturers to comply with the labeling law or to stop selling unlabeled GM foods. Dormant Commerce Clause doctrine is complex and nuanced, and the result of a challenge depends on the language of the state labeling law, the nature of the state interest, and the degree of burden (including economic) on interstate commerce. If the state law serves a legitimate public interest, the extent of the burden on commerce is relevant. As a leading decision indicated, “the extent of the burden that will be tolerated will . . . depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.”¹⁶⁹

The First Amendment, which protects both the freedom to speak and the right not to speak, poses another constitutional challenge.¹⁷⁰ Because the First Amendment does not fully protect commercial speech, states can regulate commercial speech if their interest in reg-

163. Proposition 37, Text of Proposed Laws 110, <http://vig.cdn.sos.ca.gov/2012/general/pdf/text-proposed-laws-v2.pdf> (2012). See CAL. CONST. art. II, § 8 (authorizing enactment of laws by ballot initiative).

164. Initiative Measure No. 522 (filed June 29, 2012), http://sos.wa.gov/_assets/elections/initiatives/FinalText_285.pdf.

165. See Margaret Rosso Grossman, *California Proposition 37: Voters Reject Mandatory Labeling of GM Food*, 8 EUR. FOOD & FEED L. REV. 73 (2013)

166. U.S. CONST. amend. X.

167. State labeling laws may affect international trade and violate WTO Agreements. See Drew L. Kershen, *Would State-Mandated Labels for Biotech Foods Violate World Trade Agreements?* (Washington Legal Foundation, 2012).

168. U.S. CONST. art. I, § 8, cl. 3.

169. *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). See John S. Harbison, *The War on GMOs: A Report from the Front* 13-16 (2004), <http://www.NationalAgLawCenter.org>.

170. U.S. CONST. amend. I. See generally Pamela A. Vesilind, *Emerging Constitutional Threats to Food Labeling Reform*, 17 NEXUS: CHAP. J. L. & POL'Y 5 (2012).

ulation is substantial and the regulation is narrowly tailored to advance that interest.¹⁷¹ States may also require disclosures to prevent deception of consumers.¹⁷² Whether state-compelled disclosure of GM ingredients prevents deception is a matter of disagreement, however, in light of FDA's conclusion that GM foods are not materially different from their conventional counterparts. The decision in a successful challenge to a state law that required labeling of dairy products from cows treated with recombinant Bovine Somatotropin (rBST) provides insight.¹⁷³ The court characterized the law as requiring "the functional equivalent of a warning about a production method that has no discernible impact on a final product," and held that "consumer curiosity alone is not a strong enough state interest to sustain the compulsion of even an accurate, factual statement."¹⁷⁴ Nonetheless, the U.S. Supreme Court noted that the "constitutionally protected interest in not providing any particular factual information . . . is minimal," especially when disclosure requirements are not unduly burdensome.¹⁷⁵

The doctrine of preemption, based on the Supremacy Clause,¹⁷⁶ may also pose challenges to state-required GM labels. The doctrine establishes the extent of federal authority to exclude states from an area of legislation; preemption normally applies when Congress has the authority to act and indicates its intention to exclude state law. Federal food laws include preemptive language. One recent analysis concluded that state laws that require labels for GM foods are likely to be preempted for meat and poultry products, but not for other GM foods.¹⁷⁷ Preemption provisions in the FDCA that affect food labels apply to specific types of label information (e.g., nutrition or health claims),¹⁷⁸ but not to GM foods, so state label requirements for most GM foods are not likely to be preempted, as long as federal law does not govern GM food labels. But preemption may prohibit state-required disclosures of GM content in foods for which the FDA has established comprehensive labeling standards.¹⁷⁹ In contrast, federal

171. States can regulate misleading commercial speech or speech that concerns unlawful activity. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980). The prohibition of claims that GE foods are natural may violate the First Amendment. See Lauren Handel, *Labeling of Genetically Engineered Foods: A Constitutional Analysis of California's Proposition 37*, at 4-8 (2012), <http://ssrn.com/abstract=2169440>.

172. *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985).

173. *International Dairy Foods Assoc. v. Amestoy*, 92 F.3d 67 (2d Cir. 1996).

174. *Id.* at 73, 74.

175. *Zauderer*, *supra* note 172, at 651. See Handel, *supra* note 171, at 8-10.

176. U.S. CONST. art. VI, cl. 2.

177. Handel, *supra* note 171, at 10-13 (analyzing preemption under FDA and USDA laws and regulations).

178. 21 U.S.C. § 343-1 (preempting some types of labeling required by *id.* § 343).

179. E.g., GM canola oil, for which FDA labeling standards exist. See *Briseno v. ConAgra Foods, Inc.*, 2011 U.S. Dist. LEXIS 154750 (C.D. Cal.) (dismissing plaintiff's demand for disclosure of GM ingredients in canola labeled "100% natural").

laws that govern labels for meat and poultry products preempt state labeling requirements in addition to, or different from, federal requirements.¹⁸⁰ Because the USDA does not require labels to disclose GM content of meat and poultry, state requirements are likely to be preempted.

2. Voluntary Labeling

In response to consumer demands, Whole Foods Market announced that by 2018, all GM foods sold in its U.S. and Canadian stores would require labels that disclose the presence of GM ingredients. It already offers about 3,300 products that meet the requirements of the Non-GMO Product Verification Program, which establishes best practices to avoid GM content and provides a seal of approval.¹⁸¹ The Non-GMO Project, the only U.S. third-party verification system, evaluates products, ingredients, and facilities for compliance with its Non-GMO Project Standard.¹⁸²

In June 2013, for the first time, USDA's Food Safety Inspection Service approved a voluntary non-GMO label for meat and liquid egg products from animals raised without GM feeds. The FSIS approved the label, which included the Non-GMO certification seal, only after investigating the Non-GMO Project's certification requirements to ensure that claims on the meat labels would be "truthful, accurate, and not misleading."¹⁸³

Similarly, some restaurants plan to eliminate GM foods or provide information to customers. For example, the Chipotle chain, which informs consumers about GM content of its foods on its website, is moving to non-GM foods.¹⁸⁴

IV. LIABILITY

The U.S. regulatory framework does not assign liability for damages that might be caused by cultivation and use of GMOs and their food products. Those who develop GMOs are obligated by provisions of federal laws and regulations that govern authorization, and failure

Use of the term "natural" (not defined by FDA) on labels of GM food products is controversial. Plaintiffs have alleged deceptive marketing when GM products are labeled as natural. E.g., *In re Wesson Oil Mktg. & Sales Practices Litig.*, 818 F. Supp. 2d 1383 (J.P.M.L. 2011) (consolidating six cases).

180. Federal Meat Inspection Act, 21 U.S.C. §§ 601-692, at § 678; Poultry Products Inspection Act, *id.* §§ 451-471, at § 467e.

181. Cookson Beecher, *Whole Foods to Require Labeling of GM Foods*, FOOD SAFETY NEWS, Mar. 15, 2013.

182. Version 10 of the Standard (2013) is at <http://www.nongmoproject.org/wp-content/uploads/2013/06/Non-GMO-Project-Standard-v10.pdf>.

183. Stephanie Strom, *U.S. Approves a Label for Meat From Animals Fed a Diet Free of Gene-Modified Products*, N.Y. TIMES, June 20, 2013.

184. Chipotle, *Ingredients Statement, GMOs*, link from <http://www.chipotle.com>.

to comply may result in penalties established by statute.¹⁸⁵ Producers who cultivate GM crops will be subject to contract obligations imposed by the crop developer, often to protect intellectual property rights. Developers enforce these rights by litigation against producers who violate contract obligations and others whose crops are found to contain patented varieties, even unintentionally.

A. *Tort Liability*

In addition to regulatory and contract obligations, GMOs may trigger liability in tort under state common-law principles or statutes. Up to now, tort liability has focused primarily on GM developers and farmers, with little discussion of liability associated with GM food. Producers or purchasers of non-GM, organic, or identity-preserved varieties may assert claims for losses caused by cross-pollination or commingling.¹⁸⁶ Pollen drift or commingling can result in contained liability, but GM developers or seed companies face catastrophic losses if GM “events” not yet approved in the United States, or approved in the United States but not by trading partners, commingle with other crops and enter the chain of commerce. Purchasers may consider those crops “contaminated,” and economic consequences follow. Courts, however, rarely allow plaintiffs to recover for “pure economic loss” (damages unrelated to injury to property or physical loss)—e.g., loss of export markets.¹⁸⁷

U.S. court decisions have recognized tort causes of action from release of unapproved GMOs.¹⁸⁸ Plaintiffs who claim damages from GM crops may sue in nuisance, trespass, negligence, or strict liability (or a combination).¹⁸⁹ In any of these causes of action, determining liability for the harm caused by GMOs requires proof of causation (e.g., the source of GM cross-pollination or commingling), which may pose difficulties. Remedies include damage awards and (less often) full or limited injunctions against the defendant’s activities.

Nuisance provides a remedy when a defendant’s activities interfere unreasonably with plaintiff’s use and enjoyment of land, injure life or health, or interfere with public rights.¹⁹⁰ The existence of a nuisance is a question of fact and often requires courts to balance the

185. This discussion does not consider cases (e.g., alfalfa, bentgrass) that allege failure of USDA to prepare an environmental impact statement under the National Environmental Policy Act. See *supra* note 85.

186. Jane Matthews Glenn, *Footloose: Civil Responsibility for GMO Gene Wandering in Canada*, 43 WASHBURN L.J. 547, 547 (2004).

187. See Grossman, *supra* note 135, at 330-31.

188. E.g., *In re StarLink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828 (N.D. Ill. 2002).

189. Grossman, *supra* note 135, at 321-31. See also Paul J. Heald & James Charles Smith, *The Problem of Social Cost in a Genetically Modified Age*, 58 HASTINGS L.J. 87 (2006).

190. RESTATEMENT (SECOND) OF TORTS § 821A cmt. b (1979).

interests of the parties. Private nuisance interferes with plaintiff's use and enjoyment of land, while public nuisance interferes with land use of a large number of persons or with public rights.¹⁹¹ Intentional nuisance requires that plaintiff suffered substantial and unreasonable interference with the use of property and that defendant have knowledge (sometimes called "civil intent") that its activities were likely to injure plaintiffs. Negligent nuisance requires proof that defendant's activities themselves were unreasonable.¹⁹² For claims of damage from authorized GMOs, plaintiffs may prefer to allege intentional nuisance because planting authorized GM crops is unlikely to constitute unreasonable behavior. The doctrine of anticipatory nuisance may be available to prevent serious, threatened harm from GMOs. Under this doctrine, the court can enjoin a defendant's proposed activity when that activity is almost certain to cause substantial damage.¹⁹³

Trespass requires an invasion of real property that interferes with the plaintiff's exclusive possession and causes damage to that property. The presence of unwanted GM pollen on neighboring land may give rise to a claim in trespass.¹⁹⁴

A claim of negligence usually requires the plaintiff to prove that the defendant had a duty to conform to a specific standard of conduct (normally, to exercise reasonable care under the circumstances), the defendant breached that duty, the plaintiff suffered harm, and the defendant's breach of duty was the proximate cause of plaintiff's injury.¹⁹⁵ The plaintiff who claims negligence must therefore prove that the defendant's actions with the GM crops were unreasonable.

Strict liability applies in situations when the defendant, even a defendant who acted with reasonable care, causes injury in the course of an activity characterized as abnormally dangerous or ultrahazardous.¹⁹⁶ Planting a fully-authorized GM variety, however, seems unlikely to constitute an ultrahazardous activity.

B. Some Examples

To foster practices that avoid commingling and prevent legal claims, the seed industry, including the American Soybean Association and the National Corn Growers Association, developed

191. *Id.* § 822 cmts. c and d.

192. ZYGMUNT J.B. PLATER ET AL., ENVIRONMENTAL LAW AND POLICY: NATURE, LAW, AND SOCIETY 75 (4th ed. 2010).

193. Margaret Rosso Grossman, *Anticipatory Nuisance and the Prevention of Environmental Harm and Economic Loss from GMOs in the United States*, 18 J. ENVTL L. & PRACTICE 107 (2008).

194. Drew L. Kershen, *Legal Liability Issues in Agricultural Biotechnology*, 10 ENVTL LIAB. 203, 205-07 (2002). *But see* Heald & Smith, *supra*, note 189, at 135.

195. *See* Kershen, *supra* note 194, at 208-10.

196. RESTATEMENT (SECOND) OF TORTS § 520 & cmt. f (1977).

stewardship programs.¹⁹⁷ But when industry stewardship fails, or harm results from the activities of developers or producers, damages and lawsuits may follow. Several accidental releases of GM varieties during recent years illustrate. Well-publicized incidents involved StarLink™ corn, ProdiGene corn, LibertyLink rice, and MON71800 wheat.

In 2000, StarLink™ corn, developed by Aventis CropScience and approved only for feed and industrial uses, was found in food products, resulting in recalls and trade disruption. In *re StarLink Corn Products Liability Litigation*,¹⁹⁸ a class action lawsuit, included common law tort claims for damages. The judge held that the case could be tried on claims of negligence and private and public nuisance. Those tort claims were not adjudicated in *StarLink*, however, because the parties settled the issues before trial. Nonetheless, the settlement and efforts to contain the GM corn cost Aventis millions of dollars.¹⁹⁹

The 2002 ProdiGene incident resulted from a field trial of a pharmaceutical corn that produced a diagnostic protein. After harvest, the field was planted with soybeans (violating USDA's requirement that the field be left fallow). Some kernels of pharma corn in the field germinated as volunteers, contaminating soybeans intended for human consumption. The USDA required destruction of the contaminated soybeans and required ProdiGene to pay \$3 million in compensation and a \$250,000 fine.²⁰⁰

LibertyLink rice (LLRice 601) is an herbicide-resistant variety developed by Bayer CropScience. Before the rice was approved for human consumption, detection of trace amounts in the U.S. rice supply disrupted trade, and rice prices declined.²⁰¹ Numerous federal lawsuits were transferred to Missouri. In the first trial, with claims in negligence and private nuisance, a jury awarded farmers and other plaintiffs more than \$2 million in compensatory damages.²⁰² Other cases followed, and by August 2010, Bayer had lost six jury trials and

197. See ASA, *Biotechnology*, <http://soygrowers.com/issues-pages/biotechnology/> (last visited Sept. 15, 2013); NCGA, *Know Before You Grow* (2013), <http://www.ncga.com/for-farmers/know-before-you-grow>.

198. 212 F. Supp. 2d 828 (N.D. Ill. 2002).

199. Aventis voluntarily cancelled the registration for StarLink. Aventis formed a corporation to monitor corn to contain the GM protein; these efforts succeeded, and monitoring ended in 2008. EPA, *White Paper Concerning Dietary Exposure to Cry9c Protein Produced by StarLink Corn and the Potential Risks Associated with Such Exposure* (2008).

200. Federation of American Scientists, *The Prodigene Incident*, link from <http://www.fas.org/biosecurity/education/dualuse-agriculture/2.-agricultural-biotechnology/prodigene-incident.html> (last visited Sept. 17, 2013).

201. The USDA deregulated the rice, but farmers and others had already suffered damages. APHIS, Notice, 71 Fed. Reg. 70,360 (Dec. 4, 2006).

202. Joe Whittington & Andrew M. Harris, *Bayer Must Pay Farmers for Contaminated Rice Crop*, BLOOMBERG, Dec. 4, 2009. The judge had granted defendant Bayer's motion for summary judgment on claims in public nuisance, negligence *per se*, and other claims, but held that the economic loss doctrine did not bar plaintiffs' tort

settled some cases.²⁰³ About 300 federal cases, with claims from 5,000 plaintiffs, were pending, and 2,000 plaintiffs sued in state courts.²⁰⁴ In July 2011, Bayer entered a \$750 million settlement with 11,000 farmers to resolve claims of contamination.²⁰⁵

No GM wheat varieties have been approved for sale in the United States. Therefore, the May 2013 discovery of volunteer GM wheat in an isolated field in Oregon slowed trade and triggered litigation. The FDA had concluded a voluntary food safety consultation for the wheat, and Monsanto had conducted field tests on the variety (MON71800). Investigation into the incident found no evidence of the GM wheat beyond one field on one farm, and its source remains uncertain.²⁰⁶ Nonetheless, lawsuits claim that Monsanto's conduct of field trials involved nuisance, negligence and strict liability.²⁰⁷

As these examples indicate, controversies about liability so far have focused on release of unauthorized varieties, rather than issues of food safety. But commentators noted that "beyond the financial losses that GM crop production could cause, one can question whether there can be liability on the part of GM producers and users should the release of this biotechnology into the environment be proven to cause injury to human health or the ecosystems."²⁰⁸ Moreover, if the federal government or states require GM foods to be labeled, those laws may raise other issues and liability claims. Failure to comply with labeling requirements may result in penalties for misbranding and claims under state or federal consumer fraud laws.²⁰⁹

claims. *In re Genetically Modified Rice Litigation*, 666 F. Supp. 2d 1004, 1015-17 (E.D. Mo. 2009) (motions for summary judgment).

203. E.g., *Ruling compensates farmers for GM rice contamination*, GREENWIRE, Feb. 8, 2010; *Jury Tells Bayer to Pay Ark. Rice Farmers \$48M*, BLOOMBERG, Apr. 15, 2010.

204. *In re Genetically Modified Rice Litigation*, 2010 WL 716190 (E.D. Mo. 2010) (memorandum and order concerning proposed trust fund).

205. Andrew Harris & David Beasley, *Bayer Agrees to Pay \$750 Million to End Lawsuits Over Gene-Modified Rice*, BLOOMBERG, July 1, 2011.

206. Press Release, USDA, Update on the Detection of Genetically Engineered (GE) Glyphosate-Resistant Wheat Plants (July 29, 2013). In September 2013, a low level of GM alfalfa was discovered in a Washington farmer's non-GM alfalfa. USDA planned no government action, calling the contamination a "commercial issue." Carey Gillam, *USDA will not take action in case of GMO alfalfa contamination*, REUTERS, Sept. 17, 2013.

207. E.g., *Center for Food Safety v. Monsanto*, No. 13-213 (E.D. Wash., filed June 5, 2013). See www.centerforfoodsafety.org.

208. Lara Khoury & Stuart Smyth, *Reasonable Foreseeability and Liability in Relation to Genetically Modified Organisms*, 27 BUL. SCI. TECH. & SOC. 215, 221 (June 2007).

209. Cases involving GM components of foods labeled "natural" have already raised the fraud issue. See note 179 above.

V. CONCLUSION

In light of expected increases in the world's population by 2050, coupled with the effects of climate change on the environment and agricultural production, sixteen well-known international scientists emphasized that GM varieties will be critical for food security in the 21st century.²¹⁰ Genetic modification, along with conventional breeding, will help “to adapt our existing food crops to increasing temperatures, decreased water availability in some places and flooding in others, rising salinity, and changing pathogen and insect threats”; GM crops can increase nitrogen uptake and efficiency to protect waterways and decrease greenhouse gas emissions.²¹¹

Moreover, an influential report insists on the relationship between biotechnology and environmental protection: “[t]he world needs a new US agenda for global food security focused on science, trade, and business,” using a concept called “sustainable intensification.”²¹² Both conventional breeding and biotechnology, as well as other tools, play a role in this new agenda. The report pleads for public investments in agricultural research, in part because “[b]iotechnology for the smallholder farmer . . . requires public involvement.”²¹³ If small farmers in developing countries lack access to technological innovations, “it may not be possible to meet future demand for food, much less do so in a way that preserves the environment and resources for generations to come.”²¹⁴

Others insist that new crop varieties—including those developed through biotechnology and traditional breeding—will be critical for feeding hungry populations in Africa and Asia. Genetic modification offers faster development than traditional breeding and the opportunity to enhance nutrients (e.g., vitamin A) through biofortification.²¹⁵ As a tool for agricultural improvement, “genetic technology, although by no means a panacea, facilitates breeding and widens the scope” of traditional breeding.²¹⁶ Indeed, as scientists recently asserted, “[e]xcluding any technology that can help people to get the food and

210. N.V. Federoff et al., *Radically Rethinking Agriculture for the 21st Century*, 327 *SCIENCE* 833 (Feb. 12, 2010).

211. *Id.* at 833.

212. CHICAGO COUNCIL, *supra* note 37, at 11 (defining sustainable intensification as agriculture that is “productive, sustainable, nutritious, and resilient to setbacks”).

213. *Id.* at 26. Private-sector biotechnology research is unlikely to develop crops that do not offer significant profit.

214. *Id.* at 5.

215. Christopher J.M. Whitty et al., *Africa and Asia need a rational debate on GM crops*, 497 *NATURE* 31, 32 (May 2, 2013). See generally Hossein Azadi & Peter Ho, *Genetically modified and organic crops in developing countries: A review of options for food security*, 28 *BIOTECHNOLOGY ADVANCES* 160, 166 (2010).

216. Sven Ove Hanson & Karin Joelsson, *Crop Biotechnology for the Environment?*, 26 *J. AGRIC. ENVTL ETHICS* 759, 767 (2013). “Therefore, today, the issue is no longer yes or no to crop biotechnology, but what direction it should take.” *Id.*

nutrition that they need should be done only for strong, rational and locally relevant reasons."²¹⁷

As the discussion in this Article indicates, U.S. science-based laws and regulations help to ensure the safety of new GM varieties for agriculture, the environment, and human health. Although GMOs have been embraced in the United States, other nations accept GM crops reluctantly or not at all, and requirements for authorization vary considerably. Regulatory barriers and asynchronous approvals of GM varieties affect trade and the ability of producers and consumers to access GMOs and their products. Although GM crops offer important benefits, and their products have been consumed for decades "without incident,"²¹⁸ controversy about these products is likely to continue. Despite this controversy, and in light of global food demand, the legal community may well agree with scientists who recommend the development of "forward-looking regulatory frameworks based on scientific evidence" that are less "complex, costly and time-intensive."²¹⁹ To eliminate hunger, these scientists insist, "we must scale up and further build on the innovative approaches already under development, and we must do so immediately."²²⁰

217. Whitty et al., *supra* note 215, at 33.

218. Federoff et al., *supra* note 210, at 833.

219. *Id.* (recommending assessment of data on GM crop safety and reevaluation of the existing regulatory framework in the United States).

220. *Id.* at 834.

FRANKLIN A. GEVURTZ*

The Protection of Minority Investors and Compensation of Their Losses†

TOPIC III. A

This report examines laws in the United States that seek to protect investors from false or misleading statements impacting the purchase or sale of securities and to compensate investors who suffer loss by virtue of such false or misleading statements. After providing some background context, first through a brief description of corporate financial structure and securities (or capital) markets in the United States and then through a brief description of securities (what other nations refer to as capital markets) regulation in the United States, the report turns to the primary focus by looking at securities fraud litigation in the United States. Following a brief overview of possible claims, the report addresses in some detail the most important basis for such claims: violation of the anti-fraud provisions contained in Section 10(b) of the Securities Exchange Act and Rule 10b-5 promulgated by the Securities Exchange Commission pursuant to Section 10(b). This includes discussing both the substantive elements of such claims as well as the procedural rules that shape the results of such actions. The report also addresses some transnational aspects of securities fraud litigation in the United States.

INTRODUCTION

Numerous laws protect minority investors in the United States; for example, corporate laws protect minority shareholders from those in control of corporations.¹ This Report, however, reflects the understanding that this topic is intended to focus largely on laws designed to protect minority investors from, and to compensate investors who fall victim to, misrepresentations by issuers of securities or someone speaking on the issuer's behalf (securities fraud).

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1. See, e.g., Franklin A. Gevurtz, CORPORATION LAW §§ 3.1.3, 3.2, 4.1-4.3, 5.1, 7.3, 7.4 (2d ed. 2010).

The United States' experience in addressing securities fraud can provide lessons for other countries, particularly with respect to class actions seeking private recovery for corporate misstatements. At first glance, the private remedy for securities fraud seems desirable both in compensating investors injured by misrepresentations and in deterring misrepresentations by increasing the prospect for liability despite inherently limited government enforcement resources.² By allowing the aggregation of claims that are uneconomical to pursue individually, the class action seemingly plays a key role in facilitating these functions of the private remedy. Consistent with this view, court decisions in the United States up through the early 1970s took a generally liberal approach toward allowing private securities fraud litigation.³

Critics, however, increasingly complained about class action plaintiffs' attorneys in the United States who, the critics asserted, seemingly followed any corporate announcement of a significant earnings drop with "cookie cutter" complaints asserting often meritless claims against the corporation in order to leverage the burdens imposed by the litigation into settlements that served primarily to benefit the attorneys bringing the lawsuits.⁴ Empirical studies have provided mixed evidence regarding this critique.⁵ Nevertheless,

2. See, e.g., John C. Coffee, Jr., *Re-forming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1542 (2006) (from 2000-2002, the total monetary damages awarded in private securities litigation, predominately in class actions, exceeded the total monetary penalties assessed in public securities law enforcement proceedings).

3. See, e.g., *Superintendent of Insurance v. Bankers Life & Casualty Co.*, 404 U.S. 6 (1971) (taking an expansive view of when fraud is in connection with the purchase or sale of a security so as to come within the federal prohibition).

4. E.g., Coffee, *supra* note 2 at 1534 ("The standard criticism from the business community, the corporate bar, and some academics has long been that securities class actions disproportionately assert "frivolous" claims and thereby reduce shareholder welfare on average.")

5. Recent statistics on securities fraud filings are available at: <http://blogs.law.harvard.edu/corpgov/2013/08/04/2013-mid-year-securities-litigation-update/>. For a thoughtful discussion of the studies see JOHN C. COFFEE, JR. & HILLARY A. SALE, *SECURITIES REGULATION: CASES AND MATERIALS* 1051-1057 (8th ed. 2009). Contrary to the critics' assertion, only a small fraction of announcements of significant earnings declines (according to one study, less than 5% of declines exceeding 10%) produce securities fraud litigation. *Id.* at 1052-53. The data is more complicated when it comes to supporting the critics' assertion that the small size of typical settlements relative to the losses suffered by the class members shows either that these actions generally lack merit (and therefore settle at nuisance value) or that class action attorneys typically sell out the class members in settling. The problem with the data lies in determining what were the actual losses suffered by the class. A comparison of total annual settlements with total annual stock declines suffered by the plaintiff classes found settlements to compensate no more than 7%, and commonly as little as 2-3% of losses. Coffee, *supra* note 2 at 1545. More sophisticated loss models suggest that settlements reflect a range of outcomes, from recoveries by class members of at least 50% of their losses (which corresponds favorably with other forms of litigation) to recoveries of below 10% (which suggests settlement at minimal value). Coffee & Sale, *supra* at 1053-54.

United States Supreme Court decisions beginning in the mid-1970s took a more negative stand regarding private actions for securities fraud,⁶ and the United States Congress responded to this critique by passing the Private Securities Litigation Reform Act (PSLRA) in 1995 with the goal of curbing perceived abuses by attorneys bringing securities fraud class actions.⁷

The problem of meritless securities fraud class actions, while important, has obscured a subtler, but potentially more fundamental, problem. In many securities fraud class actions, the plaintiffs are, in effect, suing themselves. United States law unthinkingly backed into this circularity problem. From the inception, federal securities law enabled investors to get their money back from the corporation that misled them when selling its securities.⁸ Since the effect is to unwind the transaction that motivated the misrepresentation, this both compensates the purchasers and deters misrepresentations. Without recognizing the difference, courts later transposed the private remedy from lawsuits against corporations selling securities to lawsuits against corporations making misrepresentations that impacted trading on secondary markets.⁹ Since, in secondary trading cases, the corporation did not receive the money when it made overly optimistic statements impacting the price investors paid to purchase stock from existing shareholders, the effect of recovery is not to unwind a transaction procured by fraud, but rather to decrease the worth of the corporation that the plaintiffs themselves now own and thus further decrease the value of the plaintiffs' investment.¹⁰ True, the indirect impact of recovery against the corporation is normally dispersed into lowering the value of the shares owned both by members of the plaintiff class as well by the shareholders who are not members of the plaintiff class; but such non-plaintiff shareholders typically neither profited from nor participated in the misrepresentation.¹¹ It is also

6. See text accompanying notes 108 through 109 *infra*.

7. *E.g.*, H.R. Rep. No. 369, at 31 (1995), reprinted in 1996 U.S.C.C.A.N. 730, 1103 (setting out the purposes of the Private Securities Litigation Reform Act of 1995).

8. See notes 54 through 58 and accompanying text *infra*.

9. See, *e.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224, 261 (1988) (White, J. dissenting in part)(questioning securities fraud litigation against a non-trading corporation).

10. This is not true, however, when false pessimistic statements lead shareholders to sell their stock, as in the pivotal *Basic* decision discussed later in this Report.

11. The situation may be different in other countries in which large block shareholders control corporations to a greater extent than in the United States. See Martin Gelter, *Risk Shifting through Issuer Liability and Corporate Monitoring*, available at <http://ssrn.com/abstract=2335721>. Since frequent traders are more likely both to be members of a plaintiff class and to have benefited from inflated prices upon selling their shares, the result of the recovery in secondary trading cases is to systematically transfer wealth from long-term investors to frequent traders.

the case that insurance commonly may fund much of the recovery;¹² albeit, the premiums funding insurance payments ultimately come from corporations owned by suing shareholders.¹³ Finally, while executives who have corporations make misrepresentations in an effort to obtain money for the company presumably will be deterred if the company must return the money, executives who have corporations make misrepresentations when the company is not selling securities—perhaps motivated by incentive schemes that tie their compensation to reported earnings—may have only limited concern about recovery against the corporation.¹⁴

Obsession with the meritless claims problem has led the Supreme Court to exacerbate the circularity problem. Specifically, evidently desiring to reduce the number of defendants from whom plaintiffs' attorneys can extract settlements, recent Supreme Court decisions¹⁵ have engaged in strained reasoning in order to confine liability largely to the corporation "making" a misrepresentation—which is the most useless target from a compensation or deterrence standpoint—instead of allowing recovery from third party wrongdoers who actually profited from the fraud and might be deterred by the threat of liability. For observers from other nations, the result is to provide an object lesson in how to create an irrational system by not stepping back from the more obvious issues to ask deeper questions about what the system is or is not achieving.

In any event, a case currently pending before the Supreme Court threatens to obsolete much of a quarter century of judicial and legislative efforts to address securities fraud class actions. As discussed later in this report, the court is considering overruling the doctrine under which securities fraud plaintiffs need not prove individual reliance on false statements. If the court does so, the need to prove individual reliance will largely preclude securities fraud class actions from proceeding and thereby radically alter the protection of minority investors and the compensation of their losses in the United States.

12. Anecdotal evidence suggests that insurance, in fact, covers the vast bulk of securities fraud settlements, albeit there has not been a careful study. *E.g.*, Coffee & Sale, *supra* note 5 at 1055 n.16.

13. One might argue, however, that this circularity is not fundamentally different from liability for injuries from defective products, where insurance premiums paid to fund recovery increase the price of products so that consumers are ultimately funding their own recoveries. The justification for this circularity in products liability is a combination of risk spreading (so that the loss does not fall entirely on a few injured consumers) and internalization of costs (so that the price of products sends signals to consumers as to the accident costs entailed in the use of the product). Applying these rationales to the risk of securities fraud, the questions become: (1) whether the ability of investors to diversify eliminates the need for spreading the losses from securities fraud; and (2) whether efficient capital markets impound into the pricing of securities the risk of securities fraud without the need for imposing liability on corporations.

14. Incentive compensation schemes are commonly asymmetric in their impact, rewarding earnings to a greater extent than they penalize losses.

15. See notes 115 through 118 and accompanying text *infra*.

Turning from this general observation about securities fraud litigation in the United States to the specific details, this Report will proceed as follows: Part I of the Report provides some background context, first through a brief description of corporate financial structure and securities (or capital) markets in the United States and then through a brief description of securities (what other nations refer to as capital markets) regulation in the United States. Part II turns to the primary focus by looking at securities fraud litigation in the United States. After a brief overview of possible claims, Part II will address in some detail the most important basis for such claims: violation of the anti-fraud provisions contained in Section 10(b) of the Securities Exchange Act¹⁶ and Rule 10b-5¹⁷ promulgated by the Securities Exchange Commission pursuant to Section 10(b). This includes discussing both the substantive elements of such claims as well as the procedural rules that shape the results of such actions. Part II also will address some transnational aspects of securities fraud litigation in the United States.

I. SECURITIES MARKETS AND SECURITIES REGULATION IN THE UNITED STATES

Space permits only the briefest introduction to corporate finance, securities markets and securities regulation in the United States to provide some context for a more detailed discussion of securities fraud litigation.

A. *Corporate Finance and Securities Markets in the United States*

Comparative commentary often emphasizes the lack of controlling shareholders of large corporations in the United States (the so-called Berle-Means phenomenon).¹⁸ One should be wary of exaggerating this observation, since the vast majority of corporations in the United States, including many of the larger ones, have among their shareholders a relatively few who own enough of the outstanding stock to exercise control.¹⁹ Nevertheless, the largest corporations in the United States typically have widely dispersed shareholdings without any small number of shareholders holding enough stock between them to give them effective control; which is unlike the pattern for even the largest companies in much of the world.²⁰ Scholars disagree on whether greater protection of minority investors through

16. 15 U.S.C. § 78j(b).

17. 17 CFR § 240.10b-5 (2012).

18. *E.g.*, Brian R. Cheffins, *Corporate Governance Convergence: Lessons from Australia*, 16 *TRANSNAT'L. LAW.* 13, 15-16 (2002).

19. *E.g.*, Aviv Pichhadze, *The Nature of Corporate Ownership in the USA: the Trend Towards the Market Oriented Blockholder Model*, 5 *CAPITAL MARKETS LAW JOURNAL* 63, 71-72 (2010).

20. *E.g.*, Gelter, *supra* note 11.

securities regulation contributed to, rather than resulted from, this dispersion of shares.²¹

Discussion of securities fraud litigation tends to focus on claims by defrauded shareholders. Nevertheless, corporations in the United States borrow heavily, including through the public issuance of debt (bonds),²² and bondholders have been the plaintiffs in a number of significant securities fraud cases.²³

While there are a number of smaller markets, the New York Stock Exchange and the NASDAQ dominate trading of stock in the United States and are by some measures the largest stock exchanges in the world.²⁴ There is considerable debate regarding whether U.S. securities regulation has undermined or facilitates the competitive position of these markets relative to competing markets outside the United States.²⁵

B. *Securities Regulation in the United States*

The original securities laws in the United States were state rather than federal law.²⁶ State securities laws still exist, but have been increasingly marginalized, particularly after Congress, in a 1990s amendment, preempted (precluded under federal law) state registration requirements for securities listed on the New York Stock Exchange or the national market system of the NASDAQ or that meet the private offering safe harbor exemption from registration under the federal law.²⁷

The federal securities law disclosure regime is built largely around two statutes: the 1933 Securities Act and the 1934 Securities Exchange Act. The 1933 Act has a fairly narrow focus, this being, for the most part, ensuring disclosure when companies issue securities to the public. The 1934 Act, by contrast, is concerned with what happens as securities thereafter trade in marketplace. This concern, in turn, means that the 1934 Act must deal with a variety of different

21. *E.g.*, Cheffins, *supra* note 18 at 29-32.

22. *E.g.*, Coffee & Sale, *supra* note 5 at 11 (statistics on underwriting activity show that debt offerings dwarf stock offerings).

23. *E.g.*, *In re Worldcom, Inc. Securities Litigation*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004).

24. *E.g.*, WORLD FEDERATION OF EXCHANGES, 2012 MARKET HIGHLIGHTS 6, 9 (2013), <http://www.world-exchanges.org/statistics> (NYSE Euronext and NASDAQ OMX had the largest domestic equity market capitalizations and the largest value of stock traded among stock markets in the world in 2012). Some non-U.S. exchanges, however, have more companies listed. *E.g.*, WORLD FEDERATION OF EXCHANGES, FOCUS, NUMBER OF LISTED COMPANIES, <http://www.world-exchanges.org/focus/2011-01/m-5-4.php>.

25. *E.g.*, Christopher Hung Nie Woo, *United States Securities Regulation and Foreign Private Issuers: Lessons from the Sarbanes-Oxley Act*, 48 AM. BUS. L.J. 119 (2011).

26. *E.g.*, LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 8 (1983).

27. Securities Act of 1933 § 18, 15 U.S.C. § 77r.

problems and, as a result, this statute contains a hodgepodge of provisions. This includes establishing the Securities and Exchange Commission (SEC) as the agency with primary responsibility for enforcing the federal securities laws.

Focusing our attention on disclosure, the 1933 Securities Act starts with what seems to be an all-encompassing requirement of registration prior to the offer or sale of any security, as well as requirements for the contents of any writing seeking to sell a security.²⁸ The Act, however, works its way backwards by establishing exemptions which pretty much limit the registration and writing requirements to public offerings by the issuer²⁹ or by persons distributing the securities on behalf of either the issuer or those in control of the issuer.³⁰ On the other hand, the definition of a “security”³¹ is quite broad, picking up not only stocks and debt securities, but also any sort of contracts by which persons invest in businesses operated by others.³² The contents of the registration statement required by the Act—which includes, but goes beyond, the prospectus received by purchasers—vary with the size and maturity of the issuer.³³ Unlike the state securities law in many states within the United States, the registration requirement of the 1933 Securities Act reflects a philosophy of mandating disclosure while leaving the purchasing decision to investors instead of demanding government approval of the merits of the offering.³⁴

In order to keep the flow of information current, the 1934 Securities Exchange Act requires companies with securities traded on a national securities exchange, or with over \$10 million³⁵ in assets and a class of equity securities (stock) held by 500 or more persons, to register the securities.³⁶ Companies with securities registered under the 1934 Act (as well as companies with securities registered under the 1933 Act, so long as at least 300 persons hold those securities³⁷) must file annual reports (on Form 10-K), quarterly reports (on Form 10-Q) and reports for certain significant events (on Form 8-K).³⁸ The

28. *Id.* at § 5, 15 U.S.C. § 77e.

29. *See, e.g., id.* at § 4(2), 15 U.S.C. § 77d(a)(2) (exempting non-public offerings from registration).

30. *See, e.g., id.* at §§ 2(a)(11), 4(1), 15 U.S.C. §§ 77b(a)(11), 77d(a)(1) (exempting sales by persons other than the issuer, a dealer or an underwriter from registration and defining underwriter as a person aiding in the distribution of securities by the issuer or by a person in control of the issuer).

31. *Id.* at § 2(a)(1), 15 U.S.C. § 77b(a)(1).

32. *E.g., SEC v. W.J. Howey Co.*, 328 U.S. 293 (1946).

33. *E.g., Thomas L. Hazen, THE LAW OF SECURITIES REGULATION* §§ 3.3, 3.4 (6th ed. 2009).

34. *E.g., Loss, supra* note 26 at 35.

35. As amended by the JOBS Act in 2012.

36. Securities Exchange Act of 1934 [hereinafter Exch. Act.] § 12(a), (g), 15 U.S.C. § 78l(a), (g).

37. *Id.* at § 15(d), 15 U.S.C. § 78o(d).

38. *Id.* at § 13(a), 15 U.S.C. § 78m(a); 17 CFR 249.10-K, 249.10-Q, 249.8-K.

SEC (in Regulation FD³⁹) also generally forbids disclosure only to favored parties, such as a particular analyst, without disclosing the same information broadly.

Of course, disclosure is only useful if it is accurate. There are two fundamental approaches the law can take to try to ensure accurate communications to investors. The first is to penalize inaccuracies. The 1934 Securities Exchange Act contains provisions under which the SEC can sue for an injunction⁴⁰ (or issue orders on its own⁴¹) to stop or prevent violations of the securities laws. The impact of an injunction or SEC order can go beyond simply a command to obey the law: Courts can order ancillary remedies (such as disgorging ill-gotten profits),⁴² and the adjudication can produce findings of wrongdoing binding in later private actions.⁴³ The SEC also can sue to impose monetary penalties.⁴⁴ In the event of a willful violation of the securities laws, including through knowingly false or misleading statements, the violator is subject to criminal prosecution.⁴⁵

The deterrent effect of such efforts to penalize inaccuracy depends upon the vigor of government enforcement agencies. There have been notable lapses in SEC enforcement, as for example in the Madoff affair,⁴⁶ and SEC funding vacillates with the political winds. Nevertheless, the SEC has considerable resources.⁴⁷

The alternate approach to ensuring the accuracy of disclosure is to mandate procedures, such as auditing financial statements, designed to achieve this goal. The Sarbanes-Oxley Act, which Congress enacted in 2002 in response to major securities fraud scandals, in large measure followed this alternate approach. For example, the Sarbanes-Oxley Act attempts to ensure the objectivity of accountants who audit the company's books for securities law purposes by preventing auditors from selling other services to the company and

39. 17 CFR 243.100-243.103.

40. Exch. Act § 21(d)(1), 15 U.S.C. § 78u(d)(1).

41. *Id.* at §§ 15(c)(4), 21C, 15 U.S.C. §§ 78o(b)(4), 78u-3.

42. *E.g.*, SEC v. First City Financial Corp., 890 F.2d 1215 (D.C. Cir. 1989).

43. *E.g.*, *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). The desire to avoid this impact on subsequent private litigation strongly motivates parties to settle with the SEC without admitting wrongdoing. While the SEC has commonly entered into such settlements—thereby allowing the agency to cover more potential violations with its resources—judges and others recently have questioned the practice of settlements without an admission of wrongdoing.

44. Exch. Act § 21(d)(3), 15 U.S.C. § 78u(d)(3).

45. *Id.* at § 32(a), 15 U.S.C. § 78ff(a) (prescribing up to twenty years in prison and a \$5 million fine for an individual, and up to a \$25 million fine for a corporation, violating the securities law).

46. For a discussion of SEC enforcement actions since the 2008 financial crisis, see Jean Eaglesham, *Wall Street's Top Cop Tries to Rebuild its Reputation*, WALL ST. J. A1 (Sept. 12, 2013).

47. The SEC currently has over 5000 employees and an annual budget in excess of \$1.5 billion. *E.g.*, Allgov.com, SECURITIES AND EXCHANGE COMMISSION (SEC), <http://www.allgov.com/departments/independent-agencies/securities-and-exchange-commission-sec?agencyid=7357>.

by mandating rotation of the partner(s) responsible for the audit.⁴⁸ To minimize the influence of managers over the accountants who audit management's financial reporting, the Sarbanes-Oxley Act also requires an audit committee of the board of directors, composed of independent directors, to select and communicate with the auditors.⁴⁹ In addition, the Sarbanes-Oxley Act requires companies registered under the 1934 Securities Exchange Act to establish internal controls to ensure accurate reporting of transactions and to assess and report annually on the adequacy of these internal controls.⁵⁰ Reinforcing this requirement, the Sarbanes-Oxley Act imposes personal responsibility upon the corporate chief executive officer and chief financial officer for this assessment.⁵¹

II. SECURITIES FRAUD LITIGATION IN THE UNITED STATES

A. *Overview of Possible Claims*

Historically, defrauded investors in the United States who decided to seek legal recourse would have brought an action in state courts asserting a claim for the common law tort of fraud and deceit.⁵² After federal securities law remedies became available, procedural and substantive advantages led defrauded investors often to prefer actions under federal securities laws. For a short time, the PSLRA reversed this thinking as many class action securities fraud plaintiffs (or their attorneys) sought to escape the PSLRA's strictures by filing actions once again asserting claims in state courts. Congress responded with legislation preempting state law securities fraud class actions involving most exchange-traded securities in the United States.⁵³

Federal securities laws expressly provide for private actions by defrauded investors in certain limited circumstances. Section 11 of the 1933 Securities Act⁵⁴ creates liability for misrepresentations of material fact contained in the registration statement required by the Act for a public offering. The section imposes liability upon the issuer

48. Sarbanes-Oxley Act of 2002 §§ 201, 203, 15 U.S.C. § 78j-1(g), (j).

49. *Id.* at § 301, 15 U.S.C. § 78j-1(m).

50. *Id.* at § 404, 15 U.S.C. § 5272.

51. *Id.* at § 302, 15 U.S.C. § 7241.

52. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 525, illustration 3.

53. Securities Litigation Uniform Standards Act of 1998, 15 U.S.C. § 77p. Securities fraud class actions are class actions based upon allegedly false statements or omissions of material fact, or any other sort of manipulative or deceptive devices or contrivances, in connection with the purchase or sale of securities listed for trading on the New York Stock Exchange or the National Market System of the NASDAQ Stock Market. Actions on behalf of over fifty persons, in which the common issues predominate, constitute class actions for this purpose, even if the actions were not brought as a class action. State law derivative suits on behalf of the corporation are not preempted; nor are class actions based upon shareholders' voting decisions, decisions in response to a tender offer, or decisions to exercise appraisal rights.

54. 15 U.S.C. § 77k.

of the security, persons who signed the registration statement, directors of the issuer, persons providing expert certification of any portion of the registration statement (such as auditors) and underwriter(s) of the offering. The issuer is strictly liable for any misrepresentations. The other defendants are liable unless they can establish that they were not negligent in failing to discover the error. Plaintiffs generally need not prove reliance; instead, defendants, to escape liability based upon a lack of reliance, must show the plaintiff knew the misrepresentation was false. The principal barrier to recovery under Section 11 is that plaintiffs must be able to establish that the precise securities they purchased were originally sold under the registration statement containing the misrepresentation.⁵⁵ Because of the practice of holding stock in nominee (clearinghouse) name in the United States, this is virtually impossible for anyone but the initial purchasers when the corporation has issued stock both under the misleading registration statement and through other public offerings or exempt transactions. As a result, Section 11 is usually only useful for purchasers of corporate bonds (which are traceable to their issuance).

Section 12(a)(2) of the 1933 Securities Act⁵⁶ creates a private cause of action for false or misleading statements contained in any prospectus or oral communication used to sell securities. Although the section seems to reach misrepresentations outside the registration statement,⁵⁷ it only reaches misrepresentations made by the person who sold the securities to the plaintiff.⁵⁸ This significantly limits the section's use. Similar to Section 11, it is up to the defendant to prove the defendant's lack of negligence in failing to discover the error or that the plaintiff knew the statement was false.

Section 18(a) of the 1934 Securities Exchange Act⁵⁹ creates a private cause of action for parties who read and relied upon misrepresentations contained in documents filed under the Securities Exchange Act against the person(s) who made the misrepresentations. This, of course, limits the section's utility for investors who do not read documents filed with the SEC,⁶⁰ and for cases in which the

55. *E.g.*, *Krim v. pcOrder.com, Inc.*, 402 F.3d 489 (5th Cir. 2005).

56. 15 U.S.C. § 771(a)(2).

57. The Supreme Court, however, has created some uncertainty in this regard by holding that the term prospectus for purposes of Section 12(a)(2) largely refers to the prospectus portion of the registration statement. *Gustafson v. Alloyd Company*, 513 U.S. 561 (1995).

58. A person selling the securities for purposes of Section 12, however, is not only the person who actually transfers title (or the other party to a contract of sale), but also any person soliciting the sale for the person's own financial benefit or the benefit of the person transferring title. *Pinter v. Dahl*, 486 U.S. 622 (1988).

59. 15 U.S.C. § 78r(a).

60. *E.g.*, *In re Suprema Specialities, Inc. Securities Litigation*, 334 F.Supp.2d 637, 654 (D.N.J.2004) ("A plaintiff must specifically allege that he actually read a copy of the document filed with the SEC, or relevant parts of the document reported in some

misrepresentation occurs in press releases and the like. Section 18(a) imposes the burden of proof on the defendant to show that the defendant acted in good faith and did not know of the falsity.

In addition, courts have held that there are several private actions implied within the 1934 Securities Exchange Act. Two of these involve specialized contexts beyond the scope of this Report: Shareholders injured by misrepresentations in proxy solicitations can bring an action for violating Section 14(a) of the Securities Exchange Act⁶¹ (prohibiting the solicitation of proxies to vote stock of companies registered under the 1934 Securities Exchange Act in violation of rules promulgated by the SEC) and Rule 14a-9⁶² promulgated by the SEC pursuant to Section 14(a) (prohibiting false or misleading statements in proxy solicitations).⁶³ Shareholders injured by misrepresentations in communications regarding tender offers can sue for violation of Section 14(e)⁶⁴ of the 1934 Securities Exchange Act (prohibiting fraud in tender offers).⁶⁵

Courts have also held that there is an implied private action for investors injured by violation of Rule 10b-5, which the SEC promulgated pursuant to Section 10(b) of the 1934 Securities Exchange Act.⁶⁶ Section 10(b) is a broad provision empowering the SEC to prohibit manipulative or deceptive acts in connection with the purchase or sale of securities. Rule 10b-5 is a rule prohibiting fraud and false statements in connection with the purchase or sale of securities, whose original motivation was simply to expand the securities laws' prohibition on fraud to reach misrepresentations by those seeking to purchase (as opposed just to sell) securities. From this modest beginning, Rule 10b-5 has turned into the legal basis for most securities fraud litigation in the United States.

B. Rule 10B-5 Claims

The following are the elements and issues involved in asserting a claim under Rule 10b-5 based upon a misrepresentation. The plaintiff has the burden of proof on these issues unless otherwise indicated.

1. False or Misleading Statement of Fact

The language in Rule 10b-5 prohibits fraud generally, as well as, more specifically, false statements of material fact or omissions of

other source, and was induced to act upon specific misrepresentations in the document.”).

61. 15 U.S.C. § 78n(a).

62. 17 CFR § 240.14a-9 (2012).

63. *J.I. Case Co. v. Borak*, 377 U.S. 426 (1964).

64. 15 U.S.C. § 78n(e).

65. *E.g.*, *Electronic Specialty Co. v. International Controls Corp.*, 409 F.2d 937 (2d Cir. 1969).

66. *E.g.*, *Kardon v. National Gypsum Co.*, 73 F.Supp. 798 (E.D.Pa.1947).

material fact which make statements misleading. The general prohibition on fraud in connection with the purchase or sale of securities has allowed Rule 10b-5 to serve as the primary source for the prohibition on insider trading in the United States,⁶⁷ but the Supreme Court has otherwise curbed the potential reach of the general prohibition on fraud by interpreting fraud to require some sort of false or misleading statement or silence in the face of a duty to speak as opposed simply to unfair actions by those with a fiduciary duty.⁶⁸ The explicit prohibition on false or misleading statements in connection with the purchase or sale of securities allows Rule 10b-5 to address the corporate misstatements triggering the typical securities fraud class action.

By its terms, Rule 10b-5 reaches statements which are literally true, but are misleading.

Rule 10b-5's prohibition of false or misleading statements of "fact" creates an issue when dealing with opinions or predictions. In *Virginia Bankshares, Inc. v. Sandberg*,⁶⁹ the Supreme Court held that a statement to the effect that a price was "fair" or "high" made in soliciting proxies to vote for a cash-out merger could constitute a false statement of fact when the speaker did not believe the opinion expressed and objective evidence as to value did not support it.

Suppose the complaint is about a lack of any statement at all. Rule 10b-5 expressly prohibits non-disclosure which renders statements misleading, and courts have interpreted Rule 10b-5 to prohibit non-disclosure by those trading on inside information when traders have a fiduciary duty to the corporation whose stock they trade⁷⁰ or when the trader misappropriates the information by surreptitiously trading in breach of a duty to the source of the information.⁷¹ The Supreme Court has stated, however, that Rule 10b-5 does not create a duty to disclose for a party who is not trading and who does not say anything made misleading by the non-disclosure.⁷²

In certain circumstances, however, courts have effectively created a limited duty to disclose by holding that non-disclosure can render statements misleading even though the non-disclosure did not occur simultaneously with the statement. Specifically, when a corpo-

67. See, e.g., *In re Cady, Roberts & Co.*, 40 SEC 907 (1961) (deriving the prohibition on insider trading from Rule 10b-5's prohibition of fraud).

68. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977).

69. 501 U.S. 1083 (1991)(dealing with Rule 14a-9).

70. E.g., *Chiarella v. U.S.*, 445 U.S. 222 (1980).

71. E.g., *U.S. v. O'Hagan*, 521 U.S. 642 (1997). Courts have also held that Rule 10b-5 prohibits a person, who cannot legally trade on inside information, passing on the information to another person (a so-called tippee) who will trade, in exchange for some personal benefit to the person passing on the information (the tipper). If the tippee knows this is what is going on, then the tippee also violates Rule 10b-5 by trading. E.g., *Dirks v. SEC*, 463 U.S. 646 (1983).

72. *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. __ (2011).

ration unintentionally made a statement which was false at the time the corporation made it, courts have held that the corporation's failure to issue a corrective disclosure upon learning of the mistake violates Rule 10b-5 (at least if the statement is still material to investors).⁷³ A more difficult problem occurs if the corporation's statement was correct at the time the corporation made the statement, but later events render the statement no longer accurate. Intermediate federal appellate courts disagree over whether the corporation has a duty to update the statement.⁷⁴ Corporations may also be liable when they do not correct erroneous statements by others when the statement may be attributed to the corporation (for example, if erroneous rumors came from corporate personnel,⁷⁵ or if corporate officials have involved themselves in discussions with stock analysts to such an extent that mistakes in an analyst's report concerning the corporation can be attributed to the corporation⁷⁶).

2. Materiality

False or misleading statements only violate Rule 10b-5 if they relate to material facts. The Supreme Court has held that a fact is material if there is a substantial likelihood that a reasonable investor would find the fact important in deciding whether to buy or sell a security.⁷⁷

One common issue regarding materiality arises with facts showing the possibility of a future event, when the importance of the event is clear if the event actually occurs, but, at the time the statement is made, it is not clear whether the event will occur. For example, in *Basic, Inc. v. Levinson*,⁷⁸ the Supreme Court confronted a situation in which a corporation falsely denied it was in negotiations that eventually led to a merger. The Supreme Court in *Basic* decided that the materiality of facts relating to contingent events, such as a merger under discussion, depends upon the magnitude of the event and its probability of occurring: The more impact the event will have, the less certain its occurrence need be in order for investors to find the possibility of its happening to be significant; the more likely the oc-

73. *E.g.*, *Backman v. Polaroid Corp.*, 910 F.2d 10 (1st Cir.1990).

74. *Compare* *Greenfield v. Heublein, Inc.*, 742 F.2d 751 (3d Cir.1984) *with* *Gallagher v. Abbott Laboratories*, 269 F.3d 806 (7th Cir. 2001). The different attitude among some courts toward updating versus correcting an originally false statement reflects both the concern that a duty to update could turn into a general duty to disclose (since all statements become obsolete) and the view that there is nothing misleading in not updating (because investors know that a statement only speaks to the situation at the time the statement was made).

75. *See* *State Teachers Retirement Board v. Fluor Corp.*, 654 F.2d 843 (2d Cir.1981).

76. *Elkind v. Liggett & Myers, Inc.*, 635 F.2d 156 (2d Cir.1980).

77. *E.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

78. *Id.*

currence, the less impact the event need produce in order for investors to take it into account.⁷⁹ In reaching this result, the Supreme Court rejected arguments both for a bright line test that would allow companies to tell easily when events reached the point of materiality, and for a test of materiality that would deem events not to be material when there were business reasons for their non-disclosure—neither of which, the court explained, have anything to do with whether a reasonable investor would find the fact important.

The Supreme Court's recent decision in *Matrixx Initiatives, Inc. v. Siracusano*⁸⁰ reinforces the refusal to reduce materiality to a bright line test. There, the court—noting that not even medical professionals always draw this line—rejected the argument that reports of adverse side effects from the defendant's drug were immaterial as a matter of law because the reports were too few to be statistically significant.

Many times, defendants argue that misrepresentations are not material because surrounding disclosures undercut the significance which a reasonable person would attach to the misrepresentations. This often involves projections or opinions, followed by warnings that the projection might not pan out or the opinion might be wrong, and is referred to as the “bespeaks caution” doctrine.⁸¹ To avoid the danger that parties might avoid liability through boilerplate warnings which investors often ignore, courts applying the bespeaks caution doctrine have required that the cautionary language be detailed and specific in laying out just why projections might not pan out or the opinion be wrong.⁸² In the PSLRA, Congress codified, at least in part, the bespeaks caution doctrine. Specifically, a provision in the PSLRA⁸³ limits recovery by private parties suing for misrepresentations in a forward looking statement (projections and the like). So long as meaningful cautionary language accompanies the forward looking statement, the plaintiff cannot recover unless the plaintiff proves the speaker knew that the statement was false or misleading (thereby cutting off recovery based upon recklessness).

79. *Compare* *Geltl v. Daimler AG*, E.C.J. Case C-19/11 (2012) (addressing whether to use a probability and magnitude test in determining if information about a possible event must be disclosed under the European Union Market Abuse Directive).

80. 563 U.S. __ (2011).

81. *E.g.*, *In re Donald J. Trump Casino Securities Litigation—Taj Mahal Litigation*, 7 F.3d 357 (3d Cir.1993).

82. *Id.*

83. Exch. Act § 21E, 15 U.S.C. § 78u-5.

3. Fault

a. The substantive requirement

Pointing to language in Section 10(b) that connotes intentional wrongdoing, the Supreme Court, in *Ernst & Ernst v. Hochfelder*,⁸⁴ held that there must be intent to deceive, manipulate or defraud (labeled “scienter”) in order to violate Rule 10b-5.

The Supreme Court’s opinion in *Ernst & Ernst* left open the question of whether “intent to deceive” encompasses recklessness. Lower federal court opinions, relying in part on the rules governing the tort of fraud and deceit under common law, hold that recklessness is sufficient for a violation of Rule 10b-5.⁸⁵ Lower courts, however, are divided upon what recklessness entails. Some courts have found recklessness under formulations which make recklessness sound like a worse case of negligence.⁸⁶ An interpretation more consistent with notions of intentional wrongdoing is that recklessness constitutes a disregard by the defendant of facts of which the defendant was aware and which warned the defendant of the falsity, rather than simply the careless failure to investigate before one speaks.⁸⁷

In the vast majority of cases involving Rule 10b-5 claims for misrepresentations, the issue of intent goes to the claim that the defendant believed that the erroneous statement was true, and, in this sense, did not intend to deceive (mislead) anyone. Hence, instead of intent to deceive, one can refer to knowledge of falsity (thereby explaining the term “scienter,” which refers to a defendant’s knowledge). On the other hand, can a defendant ever argue that the defendant lacked intent “to deceive,” not because the defendant lacked knowledge of falsity, but rather because the defendant did not desire to induce the action which the plaintiffs took? The answer apparently is no. In the *Basic* case discussed above, it did not seem to matter that the corporation made the misleading statements evidently to keep the merger negotiations secret rather than to get its shareholders to sell their stock. Some intermediate federal appellate court opinions have obliquely addressed the issue; albeit not under the “intent to deceive” rubric, but rather in response to the argument that statements not intended to produce purchases or sales of securities do not constitute fraud “in connection with the purchase or sale of a security.” These cases suggest that misrepresentations of material fact published in sources likely to be read by investors can violate

84. 425 U.S. 185 (1976).

85. *E.g.*, *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033 (7th Cir.1977).

86. *See, e.g.*, *Rolf v. Blyth, Eastman Dillon & Co.*, 570 F.2d 38 (2d Cir.1978).

87. *See, e.g.*, *Sundstrand Corp. v. Sun Chem. Corp.*, 553 F.2d 1033 (7th Cir.1977).

Rule 10b-5 even if the defendant did not wish investors to buy or sell securities based upon the statement.⁸⁸

b. Pleading and proof

Plaintiffs in the United States often had hoped to uncover evidence to prove the defendant's knowledge of falsity through the process of discovery (allowing litigants pre-trial access to evidence through depositions of witnesses under oath, compelled production of documents, etc.) provided by the Federal Rules of Civil Procedure. One of the primary perceived abuses of private securities fraud litigation in the United States, however, was the filing of lawsuits when corporate pronouncements turned out to be wrong with the goal of fishing around during discovery for evidence that corporate officials knew of facts suggesting the pronouncement was wrong. Not only did the cost of responding to such discovery place a burden on corporations which only had made innocent misstatements, but the concern existed that many plaintiffs' attorneys were using the burden of threatened discovery as leverage to extract unwarranted settlements of cases involving such innocent mistakes. To deal with this concern, the PSLRA requires the plaintiff in a private action under Rule 10b-5 to plead "with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind."⁸⁹ The tradeoff is that without discovery—which occurs after the filing of the complaint—plaintiffs' attorneys are relegated to the tools used by private investigators and journalists in order to uncover evidence of the defendant's knowledge sufficient to meet the pleading requirement.

The Supreme Court addressed the meaning of the PSLRA's pleading requirement in *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*⁹⁰ In *Tellabs*, plaintiffs alleged that the CEO of Tellabs made a series of statements reassuring investors that the company was continuing to enjoy strong demand for its products and was earning record revenues when the CEO "knew" these assurances were false. While this allegation would have met the normal pleading requirement in the United States to allege the basic facts entitling one to recovery, but not the evidence to prove those facts,⁹¹ the PSLRA requires plaintiffs to go beyond alleging the basic fact(s) and to allege their evidence—which is what "facts giving rise to [an] inference" of other facts are. In *Tellabs*, for example, the plaintiffs alleged refer-

88. *E.g.*, In re Carter-Wallace, Inc. Securities Litigation, 150 F.3d 153 (2d Cir.1998) (involving statements in a medical journal, evidently aimed at prescribing doctors, that were misleading about the risk of death from the company's drug).

89. Exch. Act § 21D(b)(2), 15 U.S.C. § 78u-4(b)(2).

90. 551 U.S. 308 (2007).

91. By contrast, an allegation that the CEO was "reckless" might not even be alleging a fact, since recklessness is a conclusion based upon applying a legal standard to the facts of what happened.

ences to twenty-seven confidential sources by which they hoped to prove the CEO knew his statements were false. The issue before the Supreme Court in *Tellabs* was how strong the inference had to be based upon the evidence alleged in pleadings. The court ruled that, comparing all plausible inferences from the totality of the complaint, the inference of scienter must be at least as compelling as a contrary inference. The essential point is to make it clear that courts should not follow the normal rule for assessing a complaint, under which the plaintiff is entitled to the benefit of all favorable inferences and unfavorable inferences are ignored.

In addition, the Supreme Court in *Tellabs* rejected the defendants' efforts to argue that the absence of a motive to lie dooms the plaintiffs' ability to plead or prove scienter. At the other end, intermediate appellate courts disagree on the extent to which a motive to lie is sufficient, on its own, to prove knowing falsity.⁹²

4. Reliance and Causation

a. Reliance

As in common law fraud, reliance—in other words, that the plaintiff heard, believed and acted upon the misrepresentation—is the manner in which a private plaintiff in a Rule 10b-5 case traditionally establishes a causal link between a defendant's misrepresentation and the plaintiff's injury.⁹³ The *Basic* case discussed earlier illustrates, however, that trading in impersonal markets can change the approach to reliance.

The plaintiffs in *Basic* filed a complaint on behalf of a class consisting of all persons who had sold their stock in the corporation after the company made misleading statements to the press about merger negotiations. Substantively, it is questionable how many class members actually had read or heard of *Basic*'s misstatements before selling their *Basic* shares. It was a procedural problem, however, which brought the question of reliance before the Supreme Court. If each person who sold *Basic* stock during the relevant period must prove that he or she heard, believed and acted upon the misstatements, then the burden of attempting in one trial to adjudicate all of this would make it inappropriate to have a class action. Nevertheless, the Supreme Court upheld allowing the matter to proceed as a class action based upon the so-called fraud on the market theory (or presumption).⁹⁴

92. *Compare* *Press v. Chemical Inv. Serv. Corp.*, 166 F.3d 529 (2d Cir.1999), *with* *In re Silicon Graphics Inc. Securities Litigation*, 183 F.3d 970 (9th Cir.1999).

93. *E.g.*, *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

94. This was a plurality opinion and a number of justices in the Supreme Court's recent *Amgen* decision suggested that they might be open to reconsidering the issue.

The fraud on the market theory reflects the notion that misrepresentations of material fact to the public will impact the price of stock trading in a well-developed market. The Supreme Court's opinion in *Basic* turns this into reliance by referring to the plaintiffs' reliance on the integrity of the market price. It is simpler, however, to think in terms of causation (keeping in mind that reliance is simply a mechanism by which a false statement causes harm to the plaintiff). What the fraud on the market theory shows is a mechanism by which a false statement can cause harm to a party who buys or sells in an active securities market, despite the party's never being personally aware of the false statement. A false positive statement to the public about a corporation will cause the buyer of stock to pay more than he or she would have if the truth were known, while a false negative statement to the public about a corporation (as in *Basic*) will cause the seller of stock to receive less for his or her shares than he or she would have if the truth were known.

In order to trigger the fraud on the market theory, the stock must be traded in a well-developed (or efficient) securities market, since it takes the action of numerous persons who pay attention to developments at a corporation, and who buy or sell the corporation's stock in accordance with those developments, in order for false statements to the public about a corporation to impact the price of a corporation's stock. In evaluating whether a stock is traded in a well-developed market, courts may look at the trading volume, how many stock analysts follow the stock and how many professionals make a market in the stock, how rapidly the stock price has moved in response to corporate news in the past, and the corporation's eligibility to use federal securities law registration statements adapted to more widely traded securities.⁹⁵

The Supreme Court in *Basic* held that the fraud on the market theory creates a rebuttable presumption of reliance without the need for individual proof. Defendants might rebut the presumption by showing that market makers were privy to the truth and disregarded the false statement. The Supreme Court also stated that defendants may rebut the presumption of reliance by showing that a particular plaintiff would have traded even if he or she was aware that the corporation's statement was false (perhaps because the particular plaintiff was under some compulsion to sell).⁹⁶

Recently, the Supreme Court granted review in a case presenting the question of whether the court should reverse or otherwise restrict its decision in *Basic* to adopt the fraud on the market presumption.⁹⁷

95. *E.g.*, *Freeman v. Laventhol & Horwath*, 915 F.2d 193 (6th Cir.1990).

96. It is not clear why this should be so, since a person who had no choice about selling may not be relying on a false statement, but certainly is damaged by its impact of depressing the market price.

97. *Halliburton v. Erica P. John Fund, Inc.*, 134 S.Ct. 636 (Nov. 15 2013).

A decision by the court to overturn the presumption would dramatically alter the investor protection landscape in the United States by largely eliminating prospects for securities fraud class actions under Rule 10b-5. Putting aside the merits of the fraud on the market presumption, it is difficult to reconcile reversing *Basic* with Congressional intent. After all, Congressional action to curb perceived abuses of securities fraud class actions makes no sense if Congress did not view the availability of such actions by virtue of the fraud on the market presumption to be consistent with the intent behind Section 10(b) of the Securities Exchange Act. Nevertheless, given the Supreme Court's present hostility toward securities fraud class actions, overruling *Basic* is a significant possibility. Still, proponents of such a decision should be careful what they wish for. Rejection of the fraud on the market doctrine would not only destroy securities fraud class actions, but would also throw into doubt the underpinning for a variety of actions that have made disclosure under the securities law less burdensome to issuers. Specifically, without the assumption that market prices incorporate public information about securities, it is impossible to justify various rules that dispense with timely actual delivery of fully self-contained disclosure documents to each investor in favor of constructive delivery through the SEC filing, as well as incorporation by reference under the integrated disclosure system. Moreover, the notion that securities prices incorporate information creates the intellectual underpinning for more permissive corporate law doctrine in the United States.

Cases involving direct dealings between the plaintiff and defendant can raise other problems with reliance. For example, the defendant might argue that the plaintiff was not reasonable in relying on the misrepresentation. While lower federal courts, consistent with the normal common law rule that the plaintiff's negligence is not a defense to an intentional tort, have held that a defendant in a Rule 10b-5 case who intentionally misleads the plaintiff will not avoid liability by asserting that the plaintiff negligently failed to check out the statement,⁹⁸ courts may reject the claim of a plaintiff who completely closed his or her eyes to patent warnings of the fraud.⁹⁹

Another situation in which a defendant might argue that the plaintiff with whom the defendant individually dealt cannot establish

98. *E.g.*, Dupuy v. Dupuy 551 F.2d 1005 (5th Cir.1977). Before *Ernst & Ernst*, a number of lower federal courts had assumed that negligence of the defendant was sufficient for liability under Rule 10b-5. If the defendant was only negligent in making the false statement, it may make sense to bar recovery by a plaintiff who was also negligent in not investigating the defendant's representations. This may explain some pre-*Ernst & Ernst* lower court opinions which held that the plaintiff must establish his or her due diligence in order to recover under Rule 10b-5.

99. *See, e.g.*, Kennedy v. Josephthal & Co., 814 F.2d 798 (1st Cir.1987).

reliance occurs when the purchase contract contains language disclaiming reliance on all communications prior to the contract. While courts consider such terms in determining whether a plaintiff, in fact, reasonably relied upon representations, courts also recognize that treating such terms as automatically precluding liability would circumvent Section 29(a) of the Securities Exchange Act,¹⁰⁰ which voids waivers of the Act.¹⁰¹

b. Loss causation

The discussion of reliance just completed began by pointing out that reliance is a means of establishing a causal link between a false statement and harm to the plaintiff. Since reliance on the false statement caused the plaintiff to enter a transaction (or to enter the transaction at a price) the plaintiff now regrets, courts often refer to reliance as establishing "transaction causation."¹⁰² The reason for courts to introduce this new term lies in the fact that courts have held that the plaintiff must not only prove transaction causation, the plaintiff must also prove "loss causation."¹⁰³ Loss causation does not mean simply that the plaintiff suffered a loss in the transaction which the plaintiff entered in reliance on the fraud. Rather, loss causation embodies the idea that the reason the transaction turned out to be a loser must have something to do with the substance of the misrepresentation.

The situation facing the Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo*,¹⁰⁴ provides an example of a loss causation problem. In *Dura*, the corporation made a knowing misrepresentation about expectations for Federal Drug Administration approval of the company's new medical spray device. The company's stock substantially declined after an announcement that sales and profits on the company's existing drugs would be lower than expected,¹⁰⁵ but only temporarily declined on the later announcement that the FDA disapproved the spray device. Had the false statement about the expected FDA approval of the spray device not led the plaintiffs into purchasing stock (or, under the fraud on the market theory, paying more for their stock), the plaintiffs would have suffered no (or arguably less¹⁰⁶) loss when the company's stock declined upon the news

100. 15 U.S.C. § 77cc(a).

101. *E.g.*, AES Corp. v. The Dow Chemical Co., 325 F.3d 174 (3d Cir. 2003).

102. *E.g.*, Harris v. Union Elec. Co., 787 F.2d 355 (8th Cir. 1986).

103. *E.g.*, Huddleston v. Herman & Mac-Lean, 640 F.2d 534 (5th Cir.1981).

104. 544 U.S. 336 (2005).

105. While the plaintiffs alleged that the corporation had also misrepresented its expectations for sales and profits, this claim failed because of inadequate allegation of scienter.

106. Actually, while a causal link is clear in a case in which plaintiffs claim they would not have bought the stock but for the misrepresentation, the link is less certain when plaintiffs argue they would have paid less but for the misrepresentation. This is

about sales and profits on existing drugs. Nevertheless, since the plaintiffs would have suffered the loss from the price drop following the disappointing profits and earnings on existing drugs even if the FDA had approved the spray device, it would seem fortuitous for the plaintiffs to recover for the losses on the earnings and profits news whether or not the plaintiffs establish a “but for” relationship between reliance on the false statement about the spray device and incurring the losses on earnings from existing drugs. Pointing to a provision in the PSLRA,¹⁰⁷ which states that the burden of proving causation shall be on the plaintiff, the Supreme Court held that the plaintiffs had failed to plead adequately loss causation.

5. Plaintiffs

In *Blue Chip Stamps Co. v. Manor Drug Stores*,¹⁰⁸ the Supreme Court held that, in order to bring a private action under Rule 10b-5, the plaintiff must have been a purchaser or seller of stock or other securities in reliance on the false statement, rather than a person who abstained from purchasing or selling in reliance on the false statement. This explains why not every investor in the world can sue claiming that if they knew the truth they would have bought stock in a case like *Basic* in which a corporation hides prospective good news, and shareholders who hold their stock because of false reassurances cannot sue claiming they would have sold earlier had the corporation not hidden bad news.¹⁰⁹

In holding that plaintiffs who complain about their decision not to buy (or not to sell) do not state a cause of action, the court in *Blue Chip Stamps* went beyond looking to the language of Rule 10b-5—which prohibits false statements in connection the purchase or sale (as opposed to the not purchase or sale) of a security—and indulged in a diatribe about the danger of meritless securities fraud lawsuits. The hostility toward securities fraud lawsuits reflected in this portion of court’s opinion marked an important shift in the Supreme Court’s attitude toward Rule 10b-5 cases, as mentioned in the introduction to this Report.

Lower federal courts are divided over the question of whether the limitation of standing to purchasers or sellers applies to private suits brought for injunctive relief rather than for monetary damages.¹¹⁰

because the intervening event still could have resulted in the same decline in price (even if from a lower starting point) had the plaintiffs paid less.

107. 15 U.S.C. § 78u-4(b)(4).

108. 421 U.S. 723 (1975).

109. *Blue Chips Stamps*, itself, arose out of an unusual situation in which an anti-trust consent decree required the defendant to offer the plaintiffs stock at a bargain price, but the plaintiffs failed to take advantage of the bargain allegedly because of misleading statements designed to discourage them from doing so.

110. *Compare Mutual Shares Corp. v. Genesco, Inc.*, 384 F.2d 540 (2d Cir.1967), with *Cowin v. Bresler*, 741 F.2d 410 (D.C.Cir.1984).

The rule that plaintiffs must have purchased or sold securities can raise an issue as to what is a sale.¹¹¹

Defendants sometimes argue that grounds, other than the purchaser-seller requirement, exist in the case at hand to deny a plaintiff the right to bring a private Rule 10b-5 action. For example, in *Bateman Eichler, Hill Richards, Inc. v. Berner*,¹¹² the defendant argued that the plaintiff was “in pari delicto” with the defendant, because the plaintiff illegally traded based upon the insider defendant’s erroneous tip. The Supreme Court rejected the argument.

6. Defendants

By its terms, Rule 10b-5 reaches fraud in connection with the purchase or sale of any, and not just registered, securities, and any person who makes a material misrepresentation (or otherwise commits fraud) can be liable. On the other hand, the Supreme Court has been increasingly hostile to efforts by plaintiffs to sue parties in addition to the corporation or other person to whom the misrepresentation is expressly attributed.

The Supreme Court’s hostility toward claims against parties it views to be secondary actors begins with *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*,¹¹³ in which the Supreme Court held that there is no civil liability under Rule 10b-5 for aiding and abetting another person’s misrepresentation. The aiding and abetting claim in *Central Bank* involved a failure to discover fraud by a party whose job it was to do so (this being the indenture trustee for some development bonds, who, despite warnings that the appraisal of the collateral it received from the issuer was inflated, delayed undertaking an independent appraisal of the collateral until after the issuer sold some bonds). In reaction to the *Central Bank* decision, Congress added a provision to the Securities Exchange Act allowing the SEC, as opposed to a private party, to bring civil actions against persons who aid and abet violations of the securities law.¹¹⁴

In *Stoneridge Investment Partners, LLC v. Scientific Atlanta, Inc.*,¹¹⁵ the Supreme Court took a cramped view of reliance in order to further limit suits against parties who the court viewed as secondary actors. In *Stoneridge*, executives of a cable operator named Charter Communications, Inc. decided to improve reported earnings by pretending that Charter was taking in more advertising revenue than it really was. In order to effectuate this pretense, Charter’s executives allegedly obtained the agreement of Scientific Atlanta and

111. See, e.g., *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930 (2d Cir.1984) (pledge of securities equals a sale).

112. 472 U.S. 299 (1985).

113. 511 U.S. 164 (1994).

114. Exch. Act § 20(e), 15 U.S.C. § 78t(e).

115. 552 U.S. 148 (2008).

Motorola (two companies that made equipment Charter purchased) to place ads with Charter, which ads actually would be free because Charter would turn around and pay inflated prices on the equipment it ordered from Scientific Atlanta and Motorola in order to cover the cost of the ads. To hide from Charter's auditors the fact that the ads were essentially free, Scientific Atlanta and Motorola allegedly backdated documents and misrepresented the facts as to the equipment sales.

The alleged misrepresentations by Scientific Atlanta and Motorola took the case out of the merely aiding and abetting ruling of *Central Bank*—in which the court had specifically stated that its aiding and abetting ruling did not apply to those who themselves made misrepresentations. Nevertheless, the Supreme Court rejected the plaintiffs' claim in *Stoneridge* because, according to the court, the plaintiffs had not relied upon the misrepresentations by Scientific Atlanta and Motorola. Specifically, since Charter only reported to the public its composite revenue numbers, not the all the details, let alone supporting documents, of all the transactions which produced the composite numbers, the plaintiffs (as opposed to the auditors) never saw the misrepresentations by Scientific Atlanta and Motorola.¹¹⁶

The Supreme Court even further circumscribed the range of possible defendants in *Janus Capital Group, Inc. v. First Derivative Traders*.¹¹⁷ There, the question was who made the misrepresentation (about preventing investors in the fund from engaging in market timing to the prejudice of other investors in the fund) in a mutual fund's prospectus. The plaintiff alleged that the fund's investment advisor bore liability for these statements as the advisor "caused the prospectuses to be issued and distributed" (essentially, the advisor was involved in writing and distributing the prospectus). The court, however, held that the party who makes a misrepresentation is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Moreover, the court stated that attribution of a statement to a person (such as the corporation) is strong evidence that the person to whom the statement is attributed is the person who made it.¹¹⁸

The upshot of *Stoneridge* and *Janus* is to make it difficult to hold third parties who participated in and profited from misrepresenta-

116. To the reader who detects an inconsistency between this view and the court's earlier acceptance of indirect reliance in the fraud on the market theory, the answer is yes it is inconsistent.

117. 564 U.S. __ (2011).

118. To the reader who realizes that corporations cannot determine the contents of documents, like prospectuses, attributed to the company, and that the persons, such as the directors, nominally in charge of the contents of the document may be unaware of the falsity of statements slipped into the document by executives or others, yes this seems to be a flaw in the court's approach.

tions attributed to the issuing corporation liable under Rule 10b-5. Parties engaged in financial manipulations impacting, but not specifically reported in, publicly disclosed corporate financial statements may argue a lack of reliance under *Stoneridge*, while parties composing misleading corporate communications can assert they are not the maker of the communication under *Janus*. About the only saving grace is that corporate officials (as opposed to third parties) who participated in the fraud might be held liable under Section 20(a) of the Securities Exchange Act¹¹⁹ as controlling persons of the corporation that is liable for the misrepresentation.¹²⁰

7. Remedies

The most common remedy in Rule 10b-5 cases is a damage award measured by the out-of-pocket loss—in other words, the difference between the security's actual value at the time of the fraud and either what the plaintiff paid for security (in the case of a plaintiff who purchased based upon a misrepresentation) or what the plaintiff received for the security (in the case of a plaintiff who sold based upon a misrepresentation).¹²¹ By and large, courts have refused to grant benefit-of-the-bargain damages—in other words, damages measured by the difference between what the security was worth and what the security would have been worth if the misrepresented fact had been true—in Rule 10b-5 cases.¹²²

Determining what the security was actually worth at the time of its purchase or sale is obviously a challenge. If the security trades in a well-developed market, courts have looked to the market price of the security after the true facts became public.¹²³ The PSLRA addresses the use of market valuation to measure damages by limiting damage awards measured by the market price of stock after disclosure of fraud to an amount no greater than the difference between what the plaintiff paid or received for the stock and the mean average

119. 15 U.S.C. § 78t(a).

120. *E.g.*, *Wool v. Tandem Computers Inc.*, 818 F.2d 1433 (9th Cir. 1987). In addition, shareholders often bring state law derivative suits on behalf of the corporation against directors who negligently allowed the company to become liable for a misrepresentation.

121. *E.g.*, *Harris v. Union Elec. Co.*, 787 F.2d 355 (8th Cir. 1986).

122. *E.g.*, *Madigan, Inc. v. Goodman*, 498 F.2d 233 (7th Cir. 1974). In a well-developed market subject to the fraud on the market theory, however, there should not be a gap between the out-of-pocket and benefit-of-the-bargain measures, as the plaintiff should have paid a price reflecting the value of the stock assuming the false statement was true.

123. *E.g.*, *Mitchell v. Texas Gulf Sulfur Co.*, 446 F.2d 90 (10th Cir. 1971). A problem with this approach exists if the original misrepresentation involved a fact whose ultimate significance is contingent on future events at the time of the fraud (as with the merger negotiations in *Basic*). At the time the corrective disclosure occurs (as with the announcement of the merger in *Basic*) the event may no longer be contingent; meaning that the price change is taking into account a fact of greater significance than at the time of the fraud.

market price of the stock during the period ninety days after disclosure of the fraud.¹²⁴

Given that the common law traditionally allowed victims to rescind contracts procured by fraud, as well as that Section 29 of the Securities Exchange Act¹²⁵ voids any contract made in violation of the act, it is not surprising that courts have also granted rescission—under which each side returns what it received—in Rule 10b-5 cases.¹²⁶ To limit potential unfairness, courts may deny the remedy of rescission to the plaintiff who dawdles too much to see which way the stock value will go before requesting rescission rather than out of pocket damages.¹²⁷ A recessionary remedy would seem inappropriate in the typical class action involving secondary trading on public markets because the defendant is not the other party to the trade.

Punitive damages are unavailable under the 1934 Act, including for violation of Rule 10b-5.¹²⁸

Despite the Supreme Court's effort to narrow the defendants in Rule 10b-5 cases, there still will be cases in which multiple defendants are liable. In the PSLRA, Congress altered the previous law regarding the liabilities of multiple defendants in Rule 10b-5 cases—which had followed the traditional tort law approach (joint and several liability) allowing the plaintiff to collect the entire judgment from any defendant, who then had a right to seek contribution from other persons violating Rule 10b-5.¹²⁹ A provision in the PSLRA creates a new regime of proportionate liability for defendants whose scienter is based upon recklessness rather than knowledge of falsity.¹³⁰

The plaintiffs' ability to collect on a favorable judgment is at risk if the defendant corporation goes bankrupt; which is indeed likely when the motive for the fraud is to delay public knowledge of a terminal corporate financial situation. The Section 510(b) of the Bankruptcy Code¹³¹ subordinates claims of defrauded securities

124. Exch. Act § 21D(e), 15 U.S.C. § 78u-4(e). The existence of this provision suggests that the PSLRA's placing the burden of proving causation on the plaintiff does not mean that the plaintiff loses unless the plaintiff can show precisely how much of the post disclosure price changes resulted from the disclosure versus other factors—since, if the plaintiff loses in the case of such uncertainty, there would no point to averaging to limit the effect of uncertainty.

125. 15 U.S.C. § 78cc.

126. *E.g.*, *Randall v. Loftsgaarden*, 478 U.S. 647 (1986) (holding that persons induced to invest in tax shelters by fraud were entitled to rescind and obtain return of the money they paid, without any reduction in recovery to reflect the plaintiffs' tax savings).

127. *E.g.*, *Baumel v. Rosen*, 412 F.2d 571 (4th Cir.1969).

128. *E.g.*, *Manufacturers Hanover Trust Co. v. Drysdale Sec. Corp.*, 801 F.2d 13 (2d Cir.1986).

129. *Musick, Peeler & Garrett v. Employers, Insurance of Wausau*, 508 U.S. 286 (1993).

130. Exch. Act § 21D(f), 15 U.S.C. § 78u-4(f).

131. 11 U.S.C. § 510(b).

holders to those of other claimants against the company who have priority upon payment in bankruptcy that is greater than or equal to the priority of the underlying security held by the defrauded parties (except that defrauded common stockholders get equal priority to other common stockholders).

On the other hand, defrauded investors may be able to get payment from funds established by the SEC out of penalties paid by companies violating the securities laws pursuant to authority granted the SEC under the Fair Funds for Investors provision (Section 308(a)) in the Sarbanes-Oxley Act.¹³²

C. *Procedural Aspects of Private Securities Litigation*

Securities fraud litigation illustrates the truism that procedural rules often impact prospects for liability as much as substantive rules. What follows is a brief overview of procedural rules of particular relevance to securities fraud litigation. Fortunately, we can focus on federal rules of procedure, since U.S. federal courts have exclusive jurisdiction to hear actions brought under the federal securities laws, including for violation of Rule 10b-5.¹³³

Since neither Rule 10b-5 nor the 1934 Securities Exchange Act specify the statute of limitations for implied actions under Rule 10b-5, the Supreme Court, in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*,¹³⁴ decided to borrow the statute of limitations specified by the 1934 Securities Exchange Act for the private actions expressly created by the Act. As a result, the statute of limitations for private actions under Rule 10b-5 is the earlier of one year after discovery of the fraud, or three years after the fraud took place.

As mentioned in the introduction, securities fraud claims in the United States are often brought as class actions. The Federal Rules of Civil Procedure allow class actions when: (1) the alleged class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims of the plaintiff(s) bringing the class action are typical of the claims of the class; and (4) the plaintiff(s) bringing the action will fairly and adequately protect the interests of the class.¹³⁵ The last two requirements speak more to who can bring the class action than to whether there can be a class action at all.¹³⁶ In addition, except for certain narrow situations not commonly applicable to securities fraud

132. 15 U.S.C. § 7246.

133. 15 U.S.C.A. § 78aa(a)(West 2011).

134. 501 U.S. 350 (1991).

135. FED. R. CIV. P. 23(a).

136. There is currently a split among the intermediate federal appellate courts regarding the ability of the representative plaintiff to assert claims on behalf of class members who purchased securities different than the representative plaintiff. Compare *Goldman Sachs v. NECA-IBEW Health & Welfare Fund*, 693 F.3d 145 (2d Cir.

claims, the Federal Rules of Civil Procedure require that the questions of law or fact common to class members predominate over any questions affecting only individual members.¹³⁷ As discussed earlier, this requirement presented a problem in securities fraud claims because individual proof regarding personal reliance for each class member would have swamped the common issues of false statement, materiality, and intent to deceive. The fraud on the market theory avoided this problem.

Defendants have attempted to use the prerequisites of the fraud on the market theory as a wedge for efforts to turn the class certification hearing¹³⁸ into a preliminary trial of some of the merits. So, in *Amgen, Inc. v. Connecticut Retirement Plans and Trust Funds*,¹³⁹ the defendant argued that, because the fraud on the market theory posits that stock prices move in response to material misrepresentations in well-developed markets, the plaintiff must prove materiality of the misrepresentation before the court can allow the case to proceed as a class action. Going even beyond what the defendant was willing to argue, the lower federal courts in *Erica P. John Fund, Inc. v. Halliburton Co.*,¹⁴⁰ had demanded that the plaintiff prove loss causation before the court would allow the lawsuit to proceed as a class action. The Supreme Court rejected both efforts to require plaintiffs to prove the merits of their case before being allowed to proceed as a class action, rather than individually. As the Supreme Court explained in *Amgen*, materiality is a common issue for all the class members—if one member loses on materiality, they all lose. Hence, even though materiality is a predicate for the fraud on the market theory, the whole efficiency goal of the class action calls for allowing the lawsuit to proceed as a class action and determining materiality one time for everyone. The same is even truer of loss causation; which does not have anything to do with establishing the predicates for the fraud on the market theory.¹⁴¹

The PSLRA contains provisions directed specifically at perceived problems in securities fraud class actions. A particularly important

2012), *with* *Plumbers' Union Local No. 12 Pension Fund v. Nomura Asset Acceptance Corp.*, 632 F.3d 762, 769-71 (1st Cir. 2011).

137. FED. R. CIV. P. 23(b)(3).

138. During which the trial court decides if the case meets the requirements for a class action. *Id.* at 23(c)(1).

139. 133 S. Ct. 1184 (2013).

140. 131 S. Ct. 2179 (2011).

141. Proof that the stock trades in a well-developed market is different as this is not decisive for every class member's individual claim—some class members may be able to testify that they heard, believed, and acted upon the misrepresentation and so win without the fraud on the market theory. Hence, if the court were to resolve the efficient market issue at the trial on the merits, the court would need to give all class members the opportunity to present evidence on individual reliance, which, in turn, would allow individual issues to swamp the common issues (unless perhaps one could have a class of those who concede they did not hear the statement).

provision¹⁴² addresses the selection and role of the lead plaintiff in the class action, who, subject to approval of the court, both picks the lead attorney for the class and agrees to any settlement. Before the PSLRA, courts often favored the first to file, which rewarded attorneys who could quickly toss together slapdash complaints based upon little investigation. The PSLRA presumptively¹⁴³ favors the plaintiff with the largest financial interest in the suit for the role of lead plaintiff, which not only reduces the incentives for quick filing, but also, Congress hoped, would put control over the lawsuit in the hands of a party with sufficient interest in the suit's outcome (beyond just attorney's fees) that litigation and settlement decisions would reflect the interests of the class members and not the plaintiffs' attorneys.

In any event, to protect class members, settlements of class actions require approval by the court.¹⁴⁴ Class members are entitled to notice and the opportunity to opt out of the class, but otherwise are bound by the settlement and judgment.¹⁴⁵ In the event of settlement or favorable judgment, the court will award fees to the plaintiffs' attorney out of the class recovery under formulas that commonly take into account the amount of recovery, hours spent and the like.¹⁴⁶ Normally, the attorneys for the plaintiff(s) bringing the action will not charge their client(s) fees in the event they lose, thereby turning their arrangement essentially into a contingency fee. Other than for certain court costs, the United States does not follow a loser pays rule in litigation.

D. *Transnational Litigation*

Until 2010, lower federal courts in the United States applied Rule 10b-5 to frauds involving parties and events outside the country if sufficient conduct or effect occurred within the United States.¹⁴⁷ In *Morrison v. National Australia Bank*,¹⁴⁸ however, the Supreme Court ruled that only if the plaintiff purchased or sold a security in the United States in reliance on the misrepresentation do Section 10(b) and Rule 10b-5 apply; if the purchase or sale occurred outside the United States, then these provisions do not apply. This meant that the plaintiffs in *Morrison*, who purchased stock through an Australian exchange, could not recover under Rule 10b-5 despite their argument that the fraud, which involved overvaluation of assets by

142. Exch. Act § 21D(a)(3)(B), 15 U.S.C. § 78u-4(a)(3)(B).

143. For a discussion of the limited grounds for rebutting the presumption, as well as the discretion open to the court in deciding whether to approve the lead plaintiff's choice for lead counsel, see *In re Cendant Corp. Litig.*, 264 F.3d 201 (3rd Cir. 2001).

144. FED. R. CIV. P. 23(e).

145. *Id.* at 23(c)(2), (3).

146. *E.g.*, *Williams v. MGM-Pathe Communications Co.*, 129 F.2d 1026 (9th Cir. 1997).

147. *E.g.*, *SEC v. Berger*, 322 F.3d 187 (2d Cir. 2003).

148. 130 S.Ct. 2869 (2010).

the defendant's Florida subsidiary, originated in the United States. The result of *Morrison* is a bright line test for transactions over an exchange—plaintiffs must have purchased or sold on a U.S. exchange¹⁴⁹—but can create issues in determining where a cross-border non-exchange sale takes place.¹⁵⁰ Congress responded to the *Morrison* decision by attempting to resurrect the conduct and effects test for government enforcement actions,¹⁵¹ while leaving *Morrison* in place for private actions pending further study.¹⁵²

Morrison only deals with whether the substantive prohibition in Rule 10b-5 reaches events outside the United States. While investors purchasing or selling securities outside the United States might still attempt to bring claims in courts in the United States based upon foreign or U.S. state laws, various impediments, such as the doctrine of *forum non conveniens*, will present significant, if not insurmountable, barriers.¹⁵³

149. This means that plaintiffs who purchased or sold their stock on a foreign exchange cannot recover under Rule 10b-5 even if the corporate defendant also lists stock for trading on an exchange in the United States. *In re Royal Bank of Scotland Grp. PLC Sec. Litig.*, 765 F. Supp. 2d 327 (S.D.N.Y. 2011).

150. *E.g.*, *Absolute Activist Value Master Fund, Ltd v. Ficeto*, 677 F.3d 60 (2d Cir. 2012) (looking either to the place at which the last act necessary to bind the parties occurs or where transfer of title occurs).

151. Dodd-Frank Wall Street Reform and Consumer Protection Act § 929P, 15 U.S.C.A. § 78aa(b) (granting jurisdiction to U.S. courts over government prosecutions of securities frauds in which conduct constituting a significant step in the furtherance of the fraud occurs in the United States or conduct outside the United States has a foreseeable substantial effect in the United States). The reference to “jurisdiction,” rather than to whether the acts violate Section 10(b), seems to be a mistake resulting from the quick drafting necessary to respond to *Morrison* if the provision was to make it into the Dodd-Frank Act.

152. *Id.* at § 929Y (directing the SEC to study the issue).

153. For a discussion, see Hannah L. Buxbaum, *Remedies for Foreign Investors under U.S. Federal Securities Law*, 75 L. & CONTEMP. PROB. 161, 174-83 (2012).

CHRISTOPH HENKEL*

Personal Guarantees and Sureties between
Commercial Law and Consumers
in the United States†

TOPIC III. A

Guaranties and suretyships reduce the risk of default and today remain essential arrangements in many commercial and consumer transactions. A guarantor or surety promises to pay for the debt of a third party and may become primarily liable on that debt. Despite the significance of such a promise and the resulting obligation, U.S. law does not clearly distinguish between a guarantor and surety in a consumer or commercial context. This is of particular relevance, because in a consumer context a guaranty often has a gratuitous or sentimental element and a guarantor may not always be fully aware of the risks and liabilities involved with a guarantee promise. U.S. law generally considers guaranties and suretyships simply as third-party beneficiary contracts to which common law contract principles apply. This, in turn, makes guaranties and suretyships primarily a state law concern, resulting in significant differences of suretyship laws among all U.S. jurisdictions. As such, the U.S. lacks a uniform body of law in this area and makes consumer protection in a guaranty and suretyship context perfunctory at best.

I. INTRODUCTION

Guaranties and sureties are known as some of the oldest concepts of securing a debt and are common in both civil and common-law jurisdictions.¹ Both concepts function as a security mechanism

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1. William H. Woods, *Historical Development of Suretyship from Prehistoric Custom to a Century's Experience with the Compensated Corporate Surety*, in EDWARD G. GALLAGHER, *THE LAW OF SURETYSHIP*, 3-7 (2d ed.) (2000); E. STURGES, *SURETYSHIP AND GUARANTY*, 14 ENCYC. SOC. SCI. 482-87 (1954); WILLIAM W. BUCKLAND, *THE MAIN INSTITUTIONS OF ROMAN LAW*, 320 (1931).

for creditors, giving them the right to seek satisfaction from more than one person and incidentally reducing the risk of default. In the United States, guaranty and suretyship laws have primarily evolved from common law, but are also outlined in various statutes.² Today, all U.S. States have enacted specific statutes defining the legal requirements for guaranties and sureties in their respective jurisdictions.³ Some jurisdictions distinguish between suretyships and guaranties; others have abolished any difference between them. For example, California,⁴ Texas,⁵ Pennsylvania,⁶ Georgia,⁷ Oklahoma,⁸ and South⁹ and North Dakota¹⁰ no longer distinguish between a guaranty and a surety. The same applies to the Uniform Commercial Code (U.C.C.), which stipulates that a “[s]urety” includes a guarantor or other secondary obligor.¹¹ On the other hand, the Restatement Third of Suretyship and Guaranty (Restatement 3rd),¹² as one of the most pervasive authorities in this area,¹³ maintains the distinction between guaranty and suretyship contracts.¹⁴

2. THE LAW OF GUARANTIES: A JURISDICTION-BY-JURISDICTION GUIDE TO U.S. AND CANADIAN LAW, COMMERCIAL FINANCE COMMITTEE UNIFORM COMMERCIAL CODE COMMITTEE, ABA BUSINESS LAW SECTION (Jeremy S. Friedberg, et al., eds., 2013) [hereinafter THE LAW OF GUARANTIES].

3. *Id.*

4. Cal. Civ. Code Ann. §2787 (2005) (“The distinction between sureties and guarantors is hereby abolished”).

5. Tex. Bus. & Com. Code Ann. §§34.01-34.05 (Vernon 1987) (“‘surety’ includes endorser, guarantor, drawer of draft which has been accepted, and every other form of suretyship, whether created by express contract or by operation of law”).

6. Pa. Stat. Ann. tit. 8 §1 (Purdon 1993) (“Every written agreement hereafter made by one person to answer for the default of another shall subject such person to the liabilities of suretyship, and shall confer upon him the rights incident thereto, unless such agreement shall contain in substance the words: ‘This is not intended to be a contract of suretyship,’ or unless each portion of such agreement intended to modify the rights and liabilities of suretyship shall contain in substance the words: ‘This portion of the agreement is not intended to impose the liabilities of suretyship’”).

7. O.C.G.A. §10-7-1 (2004); *See also* Equifax, Inc. v. 1600 Peachtree, LLC., 268 Ga. App. 186; 601 S.E. 2d 519.

8. 15 Okl. St. §378 (2004).

9. S. Dak. C.L. §56-2-4 (2003).

10. N.D. Cent. Code §22-03-07 (2005).

11. U.C.C. § 1-201(b)(39).

12. AMERICAN LAW INSTITUTE, RESTATEMENT OF THE LAW, THIRD, SURETYSHIP AND GUARANTY (1996) [hereinafter RESTATEMENT 3d].

13. *Id.* Ch. 1, Introductory Note, at 3.

14. RESTATEMENT 3d, *supra* note 12, §15. The Restatement defines an agreement as a guaranty:

if the parties to a contract identify one party as a “guarantor” or the contract as a “guaranty,” the party so identified is a secondary obligor and the secondary obligation is, upon default of the principal obligor on the underlying obligation, to satisfy the obligee’s claim with respect to the underlying obligation.

Id. §15(a). On the other hand, an agreement is considered a surety under the Restatement

if the parties to a contract to which the principal obligor and secondary obligor are both parties identify one party as a “surety,” or the contract as a

This approach is followed by a majority of states.¹⁵ Regardless, guaranty and suretyship law the United States lack an overall uniform body of law. While the Restatement 3rd and the U.C.C. provide the uniform framework, significant differences exist throughout all U.S. jurisdictions. For example, not all U.S. States share the same anti-deficiency statutes, recognize community property or continuing guaranties and waivers.¹⁶ It is beyond the scope of this article to analyze all of these different state laws. Reference to state laws will be made where necessary to explain specific concepts. Most importantly, it should be noted that U.S. law does not clearly distinguish between consumer and commercial guaranty or suretyship contracts.¹⁷ In the United States, a personal guaranty does not necessarily involve a consumer transaction,¹⁸ but may be more easily distinguished from an obligation *in rem*.¹⁹

II. GUARANTY AND SURETYSHIP AS DIFFERENT CONCEPTS

A broad definition of a suretyship may include a guaranty.²⁰ Guaranty and suretyship contracts involve at least three parties: the creditor, principal and surety, or guarantor.²¹ As such, all of these contracts are tripartite agreements including the promise to answer for the debt of another. Regardless of these basic similarities, a suretyship and guarantee agreement may also be distinguished.²²

“suretyship” contract, the party so identified is a secondary obligor who is subject to a secondary obligation pursuant to which the secondary obligor is jointly and severally liable with the principal obligor to perform the obligation set forth in that contract.

Id. §15(c).

15. J.P. Morgan Chase Bank, N.A. v. Earth Foods, Inc., 939 N.E.2d 455, 489 (Ill. 2010)(stating that “a suretyship differs from a guaranty”).

16. THE LAW OF GUARANTIES, *supra* note 2, at ix.

17. In the U.S., detailed statistical data is only available through membership in The Surety & Fidelity Association of America, *available at* <http://www.surety.org/?page=StatPlan> (last visited Sept. 24, 2013). The data could not be accessed and analyzed for this article.

18. A personal guarantee is most often present in a small business context in which shareholders or other owners may be asked to guarantee a principal obligation, such as a business loan by a bank or other investor. This form of transaction does not qualify as a consumer transaction, which is defined as “a transaction in which (i) an individual incurs an obligation primarily for personal, family, or household purposes, (ii) a security interest secures the obligation, and (iii) the collateral is held or acquired primarily for personal, family, or household purposes. The term includes consumer-goods transactions.” U.C.C. §9-102 (a)(26).

19. ARTHUR ADELBERT STEARNS, THE LAW OF SURETYSHIP, §3 (1903).

20. *Id.*, §1; WOODS, *supra* note 1, (arguing that a “[g]uaranty is a subdivision of suretyship”).

21. Will H. Hall & Sons, Inc. v. Capitol Indem Corp., 260 Mich. App. at 222; Kinville v. Jarvis Real Estate Holdings, LLC., 38 A.D.3d 125, 833 N.Y.S.2d 773 (4th Dep’t 2007).

22. The distinction between a guaranty and a suretyship remain. Specifically, since the *Restatement of Securities* § 82 and Cmt. g (1941) have used both terms synonymously. *See, i.e.*, Ellen A. Peters, *Suretyship Under Article 3 of the Uniform*

Specifically, a suretyship contract may provide the parties with additional rights and duties.²³

A. *Terms and Definitions*

In the United States, the law on guaranties and suretyships relies on many different terms that are often used interchangeably. It is necessary to first briefly explain the most important terms and to position them in the appropriate context. The distinction between a guaranty or suretyship agreement has already been mentioned and will be explored further below.²⁴ This section focuses on the use of terms and definitions as they relate to the parties involved in a guaranty or suretyship agreement.

The "creditor" is also referred to as the "obligee." He is the party to whom a debt or performance is owed as part of the underlying obligation. In addition, the creditor is also a party to the guaranty or suretyship agreement and benefits from the security provided by these agreements.²⁵

The "principal" is often called the "obligor," because he is the primary debtor to the creditor and is directly liable on the underlying obligation. The principal also receives the consideration for the primary obligation from the creditor and has the "primary moral and legal obligation"²⁶ to deliver the promised return performance. In addition, the principal is also referred to as the "principal obligor," the "primary obligor" or the "accommodated party."²⁷

The terms used for the "guarantor" or "surety" may be the most confusing in U.S. law. While, some U.S. jurisdictions clearly distinguish between both concepts,²⁸ the U.C.C. uses the terms "accommodating party,"²⁹ "secondary obligor,"³⁰ "indorser,"³¹ or "co-

Commercial Code, 77 YALE L.J. 833, 841 n. 41 (1967-1968); see also RESTATEMENT 3d, *supra* note 12, §1, Cmt. c.

23. RESTATEMENT 3d, *supra* note 12, §15, Cmn. d.; See also, LAURENCE P. SIMPSON, HANDBOOK ON THE LAW OF SURETYSHIP §5, at 8-9 (1950); *Schmidt v. McKenzie*, 215 Minn. 1, 9 N.W.2d 1 (1943).

24. See *supra* note 14.

25. Exceptions apply where a guaranty or surety is required by statute. See, e.g., *Lobak Partitions v. Atlas Constr. Co.*, 749 P.2d 716 (Wash. Ct. App. 1988) (noting that the lack of privity may not preclude a creditor to draw on a contractor's bond).

26. *Bradley v. Bentley*, 231 Ala. 28, 163 So. 351, 354 (1935).

27. U.C.C. § 3-103 (11) ("Principal obligor," with respect to an instrument, means the accommodated party or any other party to the instrument against whom a secondary obligor has recourse under this article").

28. See *J.P. Morgan Chase, N.A.*, 939 N.E.2d at 474.

29. U.C.C. §3-419(a) and Cmt. 1 ("(a) If an instrument is issued for value given for the benefit of a party to the instrument ('accommodated party') and another party to the instrument ('accommodation party') signs the instrument for the purpose of incurring liability on the instrument without being a direct beneficiary of the value given for the instrument, the instrument is signed by the accommodation party 'for accommodation'").

maker.”³² In short, a “guarantor” means the person who becomes secondarily liable for another’s debt or performance. A “surety,” on the other hand, is the person that becomes primarily responsible for the debt and the default of another person. To add to this confusion, some state jurisdictions define sureties as joint makers of notes, bills, bonds, or contracts for the payment of money.³³

B. Guaranty

A guaranty is a collateral promise by the guarantor to act as a secondary obligor for the principal in case of default.³⁴ As such, a guaranty is an accessorial agreement made between the creditor and a third party, which is not the principal. In other words, the guarantor acts on behalf of the principal by promising or guaranteeing that the principal obligation will be satisfied. At the same time, the guarantor is not a party to the contract creating the underlying obligation.³⁵ Rather, the agreement between the creditor and guarantor is separate or independent from the underlying obligation.³⁶ As a result, the guarantor’s liability to the creditor does not become absolute until the principal defaults³⁷ and the guaranty is only a collateral or secondary promise to secure the debt of another person.³⁸

30. See *supra* note 27; See also Restatement 3d §1 Cmt. c.(stating that “[a]lthough there are important differences between the two mechanisms [guaranties and suretyships] that should not be obscured, these differences relate to the duties contractually imposed on the secondary obligor by the secondary obligation and not to the nature of the rights inherent in suretyship status.”).

31. See *supra* note 29 (“An accommodation party will usually be a co-maker or anomalous endorser”); See also *Johnson v. AgSouth Farm Credit*, 267 Ga. App. 567, 600 (2004).

32. *Id.*

33. Code of Ala. §8-3-1 (2004).

34. *General Phoenix Corp. v. Cabot*, 300 N.Y. 87, 89 N.E.2d 238 (1949); *Nat’l Union Fire Ins. Co. v. Robert Christopher Assoc.* 257 A.D.2d 1, 691 N.Y.S.2d 35 (1st Dept. 1999).

35. RESTATEMENT 3d, *supra* note 12, §17 and Cmt. a.

36. *Williams v. Sandman*, 187 F.3d 379, 382 (4th Cir. 1999) (“[A] guaranty of payment is an obligation separate and distinct from the original note”); *McDonald v. Nat’l Enters., Inc.*, 262 Va. 184, 547 S.E. 2d 204 (2001) (noting that a “guaranty is an independent contract”).

37. *Plunkett v. Davis Sewing-Mach. Co.*, 84 Md. 529, 533, 36 A. 115 (1897).

38. See *J.P. Morgan Chase N.A.*, 939 N.E.2d at 487(stating that “A guaranty is a collateral undertaking, an obligation in the alternative to pay the debt if the principal does not”); See also *Byrd v. Estate of Nelms*, 2004 Tex. App. Lexis 10351 (Nov. 17, 2004) (noting that a guaranty creates a secondary obligation and that the guarantor is liable if the primary obligor fails to perform), *Cook v. Dykstra*, 800 S.W. 2d 556 (Tex. Ct. App. 1990), *Chiles, Heider & Co. v. Pawnee Meadows, Inc.*, 217 Neb. 315, 350 N.W. 2d. 1 (1984).

1. The Liability of a Guarantor

Under U.S. law, a guaranty is not required to be absolute and may be limited. The most common limitations of the guarantor's liability are contingent guaranties, which may include the guaranty of collection or the guaranty of payment.

a. Contingent guaranty

In general, a contingent guaranty requires the occurrence of a contingent event before a guarantor will be held liable on the guaranty.³⁹ The contingent event is typically a condition precedent that needs to be met before the liability is triggered. The most important example of such a contingent guaranty is the guaranty of collection, but may be any condition agreed upon by the parties.⁴⁰ For example, a condition may be to hold a letter of credit or to secure a second personal guaranty from a corporate officer.⁴¹ Conditions may also include certain inspection requirements for delivered goods, volumes of goods used or specific payment terms to be met.⁴² Other examples may include the requirement to provide notice to a guarantor.⁴³

b. Guaranty of collection

The guaranty of collection is the most important example of a contingent or conditional guaranty in the U.S. Under a guaranty of collection, the guarantor becomes liable only after the creditor fails to secure payment from the principal obligor.⁴⁴ In order to collect from the guarantor the creditor must not only prove "that he has taken legal action against the principal and has been unable to collect, but also that he exercised 'due diligence . . . in enforcing his legal remedies against the debtor.'"⁴⁵ A guaranty of collection does not require any specific form. It is sufficient if it states that payment will only be

39. *Lawndale Steel Co. v. Appel*, 98 Ill. App. 3D 167, 170 (1981).

40. Other examples of contingent guaranties are the so-called "springing" or "insider" guaranties. Both forms are not primarily utilized to assure payment, but cooperative behavior by the principal instead. A "springing" or "insider" guaranty include the threat to hold those who control the debtor liable on their personal guaranties. See, i.e., Marshall E. Tracht, *Insider Guaranties in Bankruptcy: A Framework for Analysis*, 54 U. MIAMI L. REV. 497 (2000).

41. See *Lawndale Steel Co.*, 98 Ill. App. 3D at 170.

42. *McKnight v. Virginia Mirror Co.*, 463 S.W.2d 428, 429 (Tex. 1971).

43. *Whitehead v. Derwinski*, 904 F.2d 1362, 1364 (9th Cir. 1990) (dealing with the interaction of federal and state laws when seeking indemnification from veterans default on certain home loans guaranteed by VA programs).

44. PAUL W. BRANDT, *THE LAW OF SURETYSHIP AND GUARANTY*, 241-49 (1905); see also *General Phoenix Corp.*, 300 N.Y. at 89 (stating that a guarantor binding himself to pay only after all attempts to obtain payment have failed becomes a guarantor of collection); *Carrier Brokers, Inc. v. Spanish Trail*, 751 P.2d 258 (Ut. Ct. App. 1988).

45. *Mullan v. Randall*, 100 A.D.2d 737, 1984 N.Y. App. Div. LEXIS 17738. *But see*, *Leaseway System Corp. v. Rushmore & Weber, Inc.*, 93 A.D.2d 318, 463 N.Y.S.2d 92 (3d Dept. 1993) (Noting that a creditor may not be required to take legal actions if they would obviously be futile).

made after reasonable attempts of collection have been made against the principal obligor.⁴⁶

c. Guaranty of payment

A guaranty of payment creates the same liability as a suretyship.⁴⁷ Conceptually, the guaranty of payment is a collateral promise, but as the suretyship it is unconditional as long as the underlying obligation involves the payment of a debt. Unlike the guaranty of collection, the guaranty of payment does not require a condition precedent to be met.⁴⁸ It is simply an obligation to pay the debt of another when due and if the principal obligor defaults.⁴⁹ As a result, a guarantor of payment is primarily liable and waives the requirement that a creditor must first take actions against the principal.⁵⁰ As with the guaranty of collection, the guaranty of payment has no specific form requirement. While it is sufficient to recite that the guaranty is a guaranty of payment, in order to be enforceable the intent of the guarantor must be clearly expressed.⁵¹

2. Time and Performance Limitations

The time of performance for any guaranty may also be limited. For example, a guaranty can be executed for a single transaction or for a predetermined period of time. The former guaranty is often defined as a temporary, the latter as a continuing guaranty.⁵² Unless clearly defined in the guaranty contract the determination of the time of performance may be difficult, however.⁵³ The clear intent of the parties is therefore the single most important factor to determine the duration of any guaranty in the United States.

46. *Cox v. Lerman*, 949 S.W.2d 527, 530 (1997) (In *Cox* the guaranty stated “If after reasonable attempts Mrs. Egan is unable or refuses, I will pay your bills for court appearances”).

47. *Homewood People’s Bank v. Hastings*, 263 Pa. 260 (1919) (finding that an instrument guaranteeing payment is a suretyship).

48. *United States v. Vahlco Corp.*, 800 F. 2d 462, 466 (1986).

49. *Ford v. Darwin*, 767 S.W.2d 851, 854 (1989); *Int’l Harvester Credit Corp. V. Leaders*, 818 F.2d 655(8th Cir. 1987) (For payment on a guaranty of payment, Iowa does not require the creditor to await a final judgment in the bankruptcy proceeding of the principal).

50. *See Mullan*, 100 A.D.2d at 737; *Rodehorst v. Gartner*, 669 N.W.2d 679 (Neb. 2003); *Kent Feeds, Inc. v. Manthei*, 646 N.W.2d 87 (Iowa 2002) (Without pursuing alternative dispute resolution against the principal obligor, mortgagee could bring suit against guarantor).

51. *General Phoenix Corp.*, 300 N.Y. at 87.

52. *Resolution Trust Corp. v. Marshall*, 939 F.2d 274, 277 (5th Cir. 1991) (Noting that “a specific guaranty applies to one particular transaction or loan, while a continuing transaction applies to the original transaction and any extensions or renewals”).

53. *Skrypek v. St. Joseph Valley Bank*, 469 N.E.2d 774, 777 (Ind. Ct. App. 1984) (Despite a clear intent, ambiguities in a contract may required to interpret a guaranty as a continuing guaranty).

a. Continuing guaranty

A continuing guaranty is not limited to one specific transaction, but instead contemplates a future course of dealings, covering a series of transactions.⁵⁴ In other words, a continuing guaranty contemplates "a succession of liabilities, for which, as they accrue, the guarantor becomes liable."⁵⁵ If the intent of the parties is unclear and ambiguities exist in the guaranty contract, a continuing guaranty is the default option.⁵⁶ The language of the guaranty and the surrounding circumstances determine intent.⁵⁷ More specifically, the guarantor is a "favorite of the law,"⁵⁸ and any uncertainty as to the meaning of his contract of guaranty should be resolved in his favor.⁵⁹ The starting point for analyzing the rights and duties of the parties is therefore the specific language of the instrument.⁶⁰ It should be noted, however, that any continuing guaranty is considered a rolling or continuously renewing offer to be accepted by the creditor for any future transaction⁶¹ and remains valid until revoked or effectively extinguished.⁶²

b. Temporary guaranty

The second performance limitation of a guaranty is a temporary guaranty, which secures only one act or single transaction.⁶³ "If by its terms [the guaranty] is confined to a single transaction, liability thereon ceases with execution of performance of that transaction."⁶⁴

54. *Vidimos Inc. v. Vidimos*, 456 N.E.2d 455, 458 (1983); *See also*, RESTATEMENT 3d, *supra* note 12, §16 ("A continuing guaranty is a contract pursuant to which a person agrees to be a secondary obligor for all future obligations of the principal obligor to the obligee").

55. *See Blount v. Westinghouse Credit Corp.*, 432 S.W.2d 549, 553.

56. *See Vidimos Inc.*, 456 N.E.2d at 458.

57. *R.N. Nason & Co. v. Kennedy*, 40 Cal. App. 159, 162 (1919); *Goldman v. Dangerfield*, 101 Cal. App. 67, 75 (1929) (The intention may be gathered from the instrument itself or from the course of dealings between the parties).

58. *Southwest Savings Association v. Dunagan*, 392 S.W. 2d 296, 297 (Tex. Civ. App. Dallas 1965).

59. *FDIC v. Woolard*, 889 F.2d 1477, 1480 (5th Cir. 1989); *But see Bartmann v. Maverick Tube Corp.*, 853 F.2d 1540, 1545 (10th Cir. 1988) ("Guaranties are most strongly construed against the guarantor").

60. *Id.*

61. *Prize Steak Prods. V. Bally Tom Foolery, Inc.*, 717 F.2d 367 (7th Cir. 1983); *See also*, RESTATEMENT 3d, *supra* note 12, §16, Cmt. a. ("[A] continuing guaranty is sometimes described as a series of offers to become a secondary obligor. . .").

62. Generally, a guarantor has the unilateral power to terminate any continuing guaranty before the creditor effectively accepts or relies on it for any subsequent transaction. *See, e.g.*, *FDIC v. Manion*, 712 F.2d 295, 298 (7th Cir. 1983) (Revocation of a continuing guaranty before the extension of the underlying obligation); *See also*, *First New Jersey Bank v. FLM Business Machines, Inc.*, 325 A.2d 843, 848-50 (1974); RESTATEMENT 3d, *supra* note 12, §16 ("A continuing guaranty is terminable . . .").

63. *Holmes v. Elder*, 170 Tenn. 257, 264 (1936) ("A guaranty may be continuing, or may be exhausted by one act").

64. *Id.*

As noted before,⁶⁵ the determination on whether the parties agreed to a temporary or continuing guarantee depends not only on the actual intention of the parties, but centers on principles of construction applied to contract law. The case law is inconsistent, some courts rely on a strict interpretation of the contract within its four corners and require an express agreement on continuity.⁶⁶ On the other hand, a number of other courts construe guaranty contracts against the guarantor and in favor of the creditor.⁶⁷

3. General and Special Guaranties

Under U.S. law, a guaranty may also be categorized as a general or special guaranty. A general guaranty is addressed to an undefined or unlimited group of persons.⁶⁸ Any creditor to whom the guaranty is presented and who relied on it, may enforce the guaranty.⁶⁹ A general guaranty may also be assigned and the assignee making advances on the guaranty may be protected.⁷⁰

A special guaranty, on the other hand, is only addressed to a particular entity or person and only the named or specifically described obligee acquires any rights under the guarantee.⁷¹ Typically, the original creditor is the sole addressee and the guaranty cannot be assigned or transferred.⁷²

4. Form Requirements and Other Rules of Construction

a. Statute of frauds

U.S. law requires that all guaranty and suretyship contracts must be in writing. Except for Louisiana,⁷³ all U.S. jurisdictions follow the Statute of Frauds and require that any agreement “to answer

65. *Supra* II.2.a. and accompanying text.

66. *Trade Bank & Trust Co. v. Goldberg*, 38 A.D.2d 405, 407(1972)(“[A]n instrument of guaranty must be construed as limited to the transaction involved unless it clearly shows a continuing liability”).

67. *Bartmann*, 853 F.2d at 1545; *Skrypeck v. St. Joseph Valley Bank*, 469 N.E.2d 774 (Ind. Ct. App. 1984).

68. *Niederer v. Ferreira*, 189 Cal. App. 3d 1485, 1501, 234 Cal. Rptr. 779 (1987).

69. *Id.*

70. *New Holland, Inc. v. Trunk*, 579 So. 2d 215, 217 (Fla. Dist. Ct. App. 1991)(“[A] general guaranty is assignable while a special guaranty is generally not assignable . . .”).

71. *Id.*

72. *Id.* See also, *FDIC v. Schumacher*, 660 F. Supp. 6 (E.D.N.Y. 1984); *Finance Am. Private Brands, Inc. v. Harvey E. Hall, Inc.*, 380 A.2d 1377 (Del. Super. 1977). Note, however, that the case law on assignability of special guaranties is not consistent. Some courts allow assignability after a cause of action has been established. See, e.g., *Stokors v. Roth*, 887 F. Supp. 265 (D. Kan. 1995). Yet, other courts make assignability dependent on party intent, see, e.g., *Sinclair Marketing, Inc. v. Siepart*, 695 P.2d 385 (Idaho 1985), or advocate a case to case approach. See, e.g., *Essex Int'l, Inc. v. Clemage*, 440 F.2d 547 (7th Cir. 1971).

73. La. Civ. Code Art. 3038 (2011) (establishing a statutory writing requirement).

for the debts, defaults or miscarriages of another"⁷⁴ must be in writing to be enforceable.⁷⁵ With the primary purpose of fraud prevention,⁷⁶ the Statute of Frauds has been the subject of much debate in the United States.⁷⁷ Yet, in context of guaranties and suretyships the Statute of Frauds serves a dual purpose. It is evidentiary and "serves the cautionary function of guarding the promisor against ill-considered action."⁷⁸

While the writing requirement for guaranty and suretyship contracts is the typical norm, a writing is not required if the guarantor has a personal, immediate and pecuniary interest in the transaction or may himself benefited from the performance.⁷⁹ This so-called "main purpose" or "leading object" rule⁸⁰ eliminates the writing requirement for contracts, because the likelihood of any imbalance between both parties is significantly reduced and the agreement lacks the gratuitous or sentimental element typically present in a guaranty.⁸¹ Moreover, it can be assumed that the guarantor will receive his own bargained for benefit from the creditor and is promising to pay his own rather than the debt of another.⁸² California explicitly exempts guaranty contracts from a writing requirement if the guaranty "is deemed an original obligation of the promisor."⁸³ The determination of whether an original obligation existed is generally a question of fact and proven if the promise to answer for the principal obligor's debt was made for new consideration directly benefiting the guarantor.⁸⁴

74. Also known as the "suretyship provision," the U.S. Statute of Frauds originates from the English Statute of Frauds under §4, 29 Charles II, Ch. 3, 1677. See also, RESTATEMENT 3d, *supra* note 12, §11.

75. AMERICAN LAW INSTITUTE, *Restatement of the Law, Second, Contracts*, §88 (1981).

76. IAN AYRES & GREGORY KLASS, *STUDIES IN CONTRACT LAW*, at 406-10 (8th ed. 2012).

77. Hugh Evander Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 429-31 (1928); Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 747 (1931).

78. RESTATEMENT 3d, *supra* note 12, §11, Cmt. b.

79. *Davis v. Patrick*, 141 U.S. 479, 487 (1891).

80. RESTATEMENT 3d, *supra* note 12, §11, Cmt. to Subsection (3)(c), k. The Restatement summarizes the rule in §11(3)(c) as follows "(3)(c) A contract that all or part of the duty of the principal obligor to the obligee shall be satisfied by the secondary obligor is not within the Statute of Frauds as a promise to answer for the duty of another if the consideration for the promise is in fact or apparently desired by the secondary obligor mainly for its own economic benefit, rather than the benefit of the principal obligor."

81. *Id.*

82. *Id.* Excluded from the main purpose rule are contracts of guaranty insurance. See, RESTATEMENT 3d, *supra* note 12, §11, Cmt. m.

83. Cal. Civ. Code §§2793-2794.

84. *Quadro v. Widemann*, 72 Cal. App. 481 (1925); *Schumm by Whyner v. Berg*, 37 Cal. 2d 174 (1951); *Farr & Stone Ins. Brokers, Inc. v. Lopez*, 61 Cal. App. 3d 618 (1976).

b. Consideration

To be enforceable, a guaranty contract must be supported by valid consideration.⁸⁵ The consideration can be part of the underlying obligation,⁸⁶ but always requires a new and distinct consideration if the guaranty is not include in the original debt instrument.⁸⁷ “Consideration is shown when the person promising to pay the debt is ‘benefited by the payment of said debt.’”⁸⁸ In certain cases a benefit to the principal obligor and a detriment to the creditor may be sufficient.⁸⁹ The delay of enforcement against the guarantor or the release of any security held for the debt may also be sufficient.⁹⁰

c. Notice

The notice requirement may be the most important issue in guaranty contracts as it relates to consumer transactions.⁹¹ Two primary notice requirements should be distinguished in guaranty contracts: the notice of acceptance of the guarantee by the creditor and the notice to the guarantor of the default of the principal obligor. In addition, some special rules exist with regard to installment contract guarantors.

i. notice of acceptance

Communication of the acceptance of an offer is one of the most fundamental tenets of construction in U.S. contract law.⁹² Unless general exceptions apply, such as in context of unilateral offers or where notice was waived,⁹³ an offeror must always have notice of acceptance before any agreement becomes enforceable.⁹⁴

When executing a guaranty, the guarantor typically does not know if the creditor will advance any funds to the principal obligor or perform on the underlying obligation. The guaranty may be just one condition precedent of performance on the underlying obligation or,

85. *Bank of Southside Va. v. Candelario*, 385 S.E.2d 601(Va. 1989). *See also*, RESTATEMENT 3d, *supra* note 12, §9(1).

86. *Amato v. Creative Confections Concepts, Inc.*, 97 F. Supp. 2d 949 (E.D. Wis. 2000); *Rheem Mfg. Co. v. Progressive Wholesale Supply Co.*, 28 S.W.3d 333 (Mo. Ct. App. 2000).

87. *Sycoc V. Holmes*, 450 S.E.2d 784, 786 (1994).

88. *Id.* (citing *Winkler v. Chesapeake & Ohio R.R. Co.*, 12 W. Va. 699, 706 (1878)).

89. *Blalock v. Central Bank of Ga.*, 170 Ga. App. 140, 316 S.E.2d 474 (1984); *Rohm & Haas Co. v. Gainsville Pant & Supply Co.*, 225 Ga. App. 441, 483 S.E.2d 888 (1997).

90. *Rudio v. Yellowstone Merchandising Corp.*, 200 Mont. 537, 543-44, 652 P.2d 1163 (Mont. 1982)(“Forbearance of a legal right is a sufficient consideration”).

91. Richard F. Dole, *Notice Requirement of Guaranty Contracts*, 62 MICH. L. REV. 57, 84-85 (1963); Peter A. Alces, *The Efficacy of Guaranty Contracts in Sophisticated Commercial Transactions*, 61 N.C. L. REV. 655 (1983).

92. JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS, 62 (6th ed., 2009).

93. *Id.*

94. *Id.*

in case of a promissory note, only become effective after it was delivered. As a result, the guarantor may not be able to reliably determine his liabilities until he receives notice from the creditor.

As a result of differing state law requirements, the case law on notice of acceptance remains inconsistent in the United States. Under *Erie Railroad Co. v. Tompkins*,⁹⁵ federal courts are required to apply substantive state law and may not prescribe any notice requirement. Some courts look toward principles of contract interpretation to determine the intent of the parties and may rely on the surrounding circumstance of formation to decide whether notice is required.⁹⁶ Others courts view notice as non-essential and reject acceptance as a condition for a guarantor's liability.⁹⁷ While a number of indicators may serve as a predictor of when notice is necessary,⁹⁸ a notice of acceptance may only be explicitly required if the guarantor and creditor agreed to such notice or reliance on notice was created by the creditor.⁹⁹

ii. notice of default

The U.S. also lacks consistent standards for a notice requirement after default.¹⁰⁰ Unless otherwise agreed, notice is not necessary for a guaranty of payment.¹⁰¹ A guaranty for payment is always unconditional and technically undistinguishable from a suretyship. The same is not true for continuing guarantee. Without any communication between the creditor and the guarantor, the latter will not be able to evaluate his level of liability accurately.¹⁰² Yet, as a guarantor is often in a personal relationship with the principal, the guarantor may have a better access to information about the principal's default and notice of default may not be necessary. In addition, the guarantor may have various defenses against the creditor, including impairment.¹⁰³

95. *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

96. *State Bank of Cologne v. Schrupp*, 408 N.E.2d 686, 688-689 (Minn. Ct. App. 1987); *Atlanta Newspapers, Inc. v. Taylor*, 104 Ga. App. 707, 709 (1961).

97. *Linares v. Banco Cent. S.A.*, 581 So. 2d 248 (Fla. Dist. Ct. App. 1991); *Upshaw v. Southern Wholesale Flooring Co.*, 197 Ga. App. 511 (Ga. Ct. App. 1990); *Westchester Fire Ins. Co. v. Campbell*, 55 F.3d. 32 (1st Cir. 1995).

98. Richard F. Dole, *Notice Requirement of Guaranty Contracts*, 62 MICH. L. REV. 57, 84-85 (1963).

99. RESTATEMENT 3d, *supra* note 12, §8, Cmt. a ("Notification is not essential to acceptance . . . unless the offer manifests a contrary intention").

100. *Seronick v. Levy*, 527, N.E.2d 746 (Mass. Ct. App. 1988); *Long v. NCNB-Texas Nat'l Bank*, 882 S.W.2d 861 (Tex. Ct. App. 1994).

101. *Dev. Co. v. Lichter*, 191 Cal. App. 3d 933 (1987).

102. *Citi-Lease Co. v. Entm't. Family Style, Inc.*, 825 F. 2d. 1497 (11th Cir. 1987).

103. Restatement 3d §§ 37-45.

iii. notice in consumer credit transactions

Despite the inconsistent case law on notice for acceptance and default, a number of mandatory notice requirements have been adopted in the United States in context of consumer credit transactions.

The first and maybe most explicit example is §3.208(1) of the Uniform Consumer Credit Code (UCCC),¹⁰⁴ which establishes that

A natural person, other than the spouse of the consumer, is not obligated as a co-signer, co-maker, guarantor, indorser, surety, or similar party with respect to a consumer credit transaction, unless before or contemporaneously with signing any separate agreement of obligation or any writing setting forth the terms of the debtor's agreement, the person receives a separate written notice that contains a completed identification of the debt he may have to pay and reasonably informs him of his obligation with respect to it.

The notice requirement in the UCCC is the direct result of a concern expressed in the 1972 Report of the National Commission on Consumer Finance.¹⁰⁵ Namely, that “persons who assist consumers in obtaining credit by lending their signatures as sureties, or otherwise, may not understand the consequences of their act.”¹⁰⁶ Under the UCCC, a guarantor of a consumer credit transaction must therefore be given a separate notice informing him of his potential liabilities.¹⁰⁷ In addition, the accommodation party must also be given a copy of the underlying obligation agreement.¹⁰⁸ However, as of fall 2013, only eleven U.S. states and Guam have enacted the UCCC.¹⁰⁹

The second example for an independent notice requirement is a rule promulgated by the Federal Trade Commission in context of consumer credit transactions, such as installment retail sales.¹¹⁰ §444.3 (2) states that it is an unfair act or practice for

a lender or retail installment seller, directly or indirectly, to obligate a cosigner unless the cosigner is informed prior to

104. Uniform Consumer Credit Code (1974) [hereinafter UCCC], *available at* <http://www.uniformlaws.org/shared/docs/Consumer%20Credit%20Code/UCCC1974.pdf> (last visited Sept. 16, 2013).

105. NATIONAL COMMISSION ON CONSUMER FINANCE, CONSUMER CREDIT IN THE UNITED STATES: THE REPORT OF THE NATIONAL COMMISSION ON CONSUMER FINANCE (WASHINGTON D.C., U.S. GOVERNMENT PRINTING OFFICE, 1972).

106. *Id.* at 39-40.

107. UCCC, Comment to §3.208.

108. *Id.*

109. The UCCC is enacted in Colorado, Idaho, Indiana, Iowa, Kansas, Maine, Oklahoma, South Carolina, Utah, Wisconsin, Wyoming, and Guam.

110. 16 C.F.R. Part 444.3; 49 Fed. Reg. 7,789 (Mar. 1, 1984).

becoming obligated, which in the case of open end credit shall mean prior to the time that the agreement creating the cosigner's liability for future charges is executed, of the nature of his or her liability as cosigner.¹¹¹

In order to prevent any unfair or deceptive act or practices the lender or installment retail seller is required to give the cosigner notice and provide him with a separate document that contains the following statement:

Notice to Cosigner

You are being asked to guarantee this debt. Think carefully before you do. If the borrower doesn't pay the debt, you will have to. Be sure you can afford to pay if you have to, and that you want to accept this responsibility.

You may have to pay up to the full amount of the debt if the borrower does not pay. You may also have to pay late fees or collection costs, which increase this amount.

The creditor can collect this debt from you without first trying to collect from the borrower. The creditor can use the same collection methods against you that can be used against the borrower, such as suing you, garnishing your wages, etc. If this debt is ever in default, that fact may become a part of your credit record.

This notice is not the contract that makes you liable for the debt.¹¹²

In addition to the abovementioned notice requirements, a number of U.S. states have implemented similar rules. Illinois and New York are just two examples.¹¹³ In Illinois, the cosigner must be provided with a copy of an installment contract and a separate cosigner statement informing him about his obligations and liabilities as a guarantor.¹¹⁴ In addition, the cosigner and guarantor are required to execute the cosigner statement in order to create an enforceable guaranty.¹¹⁵ The seller or holder must also first proceed against the primary obligor in court before being able to draw on the guaranty.¹¹⁶

111. *Id.* The FTC defines cosigners as "[a] natural person who renders himself or herself liable for the obligation of another person without compensation;" *Id.* at §444.2(k).

112. *Id.* at §444.3(c).

113. Ill. Stat. Ann. ch. 121 ½, §519 and §578; N.Y. Pers. Prop. Law §313 and §420.

114. *Ortega v. Mertit Ins. Co.*, 433 F. Supp. 135, 139-40 (W.D. Ill. 1977).

115. *Id.*

116. *American Buyers Club of Mt. Vernon, Ill., Inc. v. Zuber*, 15 Ill. Dec. 440; 373 N.E.2d 786 (App. Ct. 1978).

While not as detailed, New York law generally follows the same approach.¹¹⁷

d. Other important rules of construction

As noted, the general rules of construction for contracts apply to guaranty contracts in the United States and regardless of whether the parties are consumers. The use of the word “guaranty” is not required as long as the language of the contract clearly indicates that the guarantor’s intention is to be bound to the creditor for the debt of the principal obligor.¹¹⁸ However, not every expression or assurance may qualify as a guaranty. For example, the assertion “[y]ou may rest assured that you will get your pay for all your work”¹¹⁹ or “[y]ou can feel sure that we will live up to this agreement, even if I have to pay you personally”¹²⁰ is not sufficient and may simply be considered a gratuitous offer. Overall, the intent of the parties is the most important factor to conclude that a contract does qualify as guaranty.¹²¹

If problems arise because the terms of the guaranty are ambiguous,¹²² the parol evidence rule may apply,¹²³ but generally the courts will first try to determine the intention of the parties based on a reasonable interpretation of the terms of the agreement.¹²⁴ Considerable inconsistencies remain, however, on whether courts in the United States should always construe a guaranty in favor of the guarantor¹²⁵ or in favor of the creditor.¹²⁶

117. N.Y. Pers. Prop. Law §313 and §420. There are two possible differences when compared to Illinois law. First, New York seems to allow a guaranty of payment. *Id.* at §420(b). Second, under New York law, future or continuing guaranties are not allowed in motor vehicle installment contract and limited to two years in all others. *Id.* at §313.

118. *Brewster Transit Mix Corp. v. McLean*, 565 N.Y.S.2d 316 (App. Div. 1991); *Marine Midland Bank, N.A. v. Elshazly*, 753 F. Supp. 20 (D. Conn. 1991); *Fortmeyer v. Summit Bank*, 565 N.E.2d 1118 (1991).

119. *Switzer v. Baker*, 95 Cal. 539, 540 (1892).

120. *Keane v. Gartell*, 334 F.2d 556, 557 (D.C. Cir. 1964).

121. *Texas Commerce Bank Nat’l Ass’n v. Capital Bancshares, Inc.*, 907 F.2d 1571 (5th Cir. 1990); *Bandit Ind., Inc. v. Hobbs Int’l, Inc.*, 463 Mich. 504, 620 N.W.2d 531 (2001); *Morrilton Sec. Bank v. Keleman*, 70 Ark. App. 246, 248, 16 S.W. 3d 567, 568 (2000); *State Bank of E. Moline v. Cirivello*, 839, 386 N.E.2d 43 (1978).

122. In the United States, the determination of whether a contract is ambiguous is a question of law. *See, i.e.*, *FDIC v. Carinal Oil Well Serv. Co.*, 837 F.2d 1369 (5th Cir. 1988); *Miller Brewing Co. v. Gregg*, 389 F.2d 878 (6th Cir. 1968).

123. *C. T. Drechsler, Parol Evidence as Applied to Written Guaranty*, 33 A.L.R.2d 960; *See also*, *First Nat’l Bank in Durant v. Honey Creek Entm’t Corp.*, 54 P.3d 100, 105 (2002).

124. *Overland Park Savings & Loan Ass’n v. Miller*, 243 Kan. 730, 738 (1988).

125. *FDIC v. Neitzel*, 769 F. Supp. 346 (D. Kan. 1991); *A.D.E., Inc. v. Louis Joliet Bank & Trust Co.*, 742 F.2d 395 (7th Cir. 1984); *Nat’l Bank of Eastern Arkansas v. Collins*, 236 Ark. 822, 826 (1963) (“A guarantor, like a surety, is a favorite of the law, and his liability is not to be extended by implication beyond the express limits or terms of the instrument, or its plain intent”).

126. *AGCO Corp. v. Anglin*, 216 F.3d 589, 595 (7th Cir. 2000) (Noting that under Georgia law “ambiguity in a guaranty is construed against the maker.”); *See also*

C. Suretyship

In contrast to a guaranty, a suretyship is a “direct and original undertaking under which the surety is primarily liable with the principal obligor.”¹²⁷ Thus a surety typically becomes jointly and severally liable with the principal obligor and default by the principal is not required to trigger liability.¹²⁸ Despite the fact that the principal obligor retains the primary liability on the underlying obligation, the liability of the surety is coextensive and the creditor has an immediate remedy against both the principal and the surety.¹²⁹

Finally, U.S. law distinguishes between a real and a personal suretyship. If the suretyship includes a promise to answer for the debt of another person the suretyship is considered a personal suretyship. On the other hand, if the surety pledges property or a mortgage as collateral for the debt of another the suretyship is classified as a real suretyship.¹³⁰

1. Involuntary Suretyship

A suretyship in the United States typically includes three different express agreements: (1) the underlying obligation, which is the agreement between the principal and the creditor; (2) the suretyship agreement, which is the agreement between the creditor and the surety; and (3) the indemnity agreement between the surety and the principal. The suretyship agreement creates the unconditional secondary obligation of the surety and his promise to pay for the debt of the principal in case of default; it often takes the form of a bond.¹³¹ Under the indemnity agreement the principal promises the surety to cover any losses the surety incurred in context of the suretyship agreement. As an exception to the express suretyship agreement, a suretyship may, however, also be created by operation of law or as a result of any change in the contractual relationship between the creditor and principal.

JPMorgan Chase Bank, N.A. v. Specialty Rests., Inc., 243 P.3d 8 (Okla. 2010); Wilson v. Kellwood Co., 817 S.W.2d 313, 318 (Tenn. Ct. App. 1991) (“A guarantor in a commercial transaction is to be held to the full extent of his engagements, and the rule in construing such an instrument is that the words of the guaranty are to be taken as strongly against the guarantor as the sense will admit.”).

127. Middlebrook Tech, LLC, v. Moore, 157 Md. App. 40, 58 (2004).

128. RESTATEMENT 3d, *supra* note 12, §1, Cmt. c.

129. Middlebrook Tech, 157 Md. App. at 58 (2004); Atl. Contracting & Material Co. v. Ulico, 380 Md. 285, 844 A2d. 460, 468 (2003) (“The liability of a surety is coextensive”); General Motors Acceptance Corp. v. Daniels, 303 Md. 254, 259, 492 A2d. 1306 (1985); Gen. Builders Supply Co. v. MacArthur, 228 Md. 320, 326, 179 A2d. 868 (1962) (“Ultimately liability rests upon the principal obligor, rather than the surety, but the obligee has a remedy against both”).

130. Honey v. Davis, 930 P.2d 908 (1997).

131. Fid. & Guar. Ins. Co. v. Keystone Contractors, Inc., 2002 U.S. Dist. LEXIS 15403 (E.D. Pa. Aug. 14, 2002); *See also*, Marilyn Klinger et al., *Contract Performance Bonds*, in THE LAW OF SURETYSHIP (Edward G. Gallagher ed., 2nd ed. 2000).

a. Assumption of debt and pledges

The most common examples of involuntary suretyships include the assumption of a debt by a third party and pledges of property. If a third party assumes the debt, the third party becomes the principal and the original debtor becomes the surety.¹³² The same applies, if the third party assumes an obligation, such as a mortgage.¹³³ In the latter case, the party who assumes the mortgage becomes the principal debtor of the mortgagee and the original mortgagor will assume the suretyship.

A pledge of property is another example of an involuntary suretyship. A third party becomes a surety, if he, without assuming any personal obligation, offers or mortgages his property as collateral to secure another person's debt.¹³⁴ The pledge also includes the implied promise by the principal obligor to indemnify the surety notwithstanding the absence of any express written agreement.¹³⁵ A similar example is the pledge of a Certificate of Deposit or security when offered as a collateral to secure the debt of another person or corporation.¹³⁶ For example, corporate stockholders may decide to pledge company shares to secure the company's debt.¹³⁷

b. Co-obligors

Co-obligors are also viewed as involuntary sureties under U.S. law. The typical example involves co-makers or an anomalous indorser¹³⁸ of a negotiable instrument.¹³⁹ While each of the co-obligors or co-makers may be seen as a surety on the underlying obligation, both are also primarily liable on the obligation and not necessarily considered a secondary obligor in relation to the creditor.¹⁴⁰ Rather, co-obligors are individually liable to the creditor and principal and surety in relation to each other.¹⁴¹

132. Club Telluride Owners Ass'n, Inc. v. Mitchell, 70 P.3d 502 (2002); B.S.G. Foods, Inc. v. Multifoods Distrib. Group, Inc., 75 Ark, App. 30 (2001); Westinghouse Credit Corp. v. Wolfer, 88 Cal. Rptr. 654 (1970).

133. Waddell v. Roanoke Mut. Bldg & Loan Ass'n, 165 Va. 229, 236 (1935); Hofheimer v. Booker, 164 Va. 358, 364 (1935).

134. SIMPSON, *supra* note 23, at §18, 31.; *See also* Honey v. Davis, 131 Wn. 2d 212, 218 (1997).

135. Fluke Capital & Management Servs. Co., 106 Wn. 2d 614, 620-21 (1986).

136. Frost Nat'l Bank v. Burge, 29 S.W.3d 580 (2000); Securities and Exchange Comm'n v. H.L. Rodger & Bro., 444 F.2d 1077 (7th Cir. 1971); Mallis v. Faraclas, Md. App., 235 Md. 109 (1964).

137. *Id.*

138. U.C.C. §3-205(d); *See also* U.C.C. §3-419, Cmt. 1.

139. U.C.C. §3-11, §3-103(a)(7) and §3-205.

140. U.C.C. §3-412.

141. Beneficial Fin. Co. N.Y., Inc. v. Husner, 82 Misc. 2d 550, 552 (Sup. Ct. 1975); Rynkowski v. Seal, 2003 Del. C.P. Lexis 8, 8-9 (Jan. 3. 2003) (Suretyship generally refers to "a co-obligor or co-promisor in a joint or several obligation, along with the principal debtor, and is, therefore, bound with [the principal debtor] by the same in-

c. Other examples

A suretyship in the United States may also be based on a statutory obligation. Most often this form of suretyship is present in context of leases or the rental and operation of a car or other equipment.¹⁴² For example, a Connecticut statute¹⁴³ stipulates that

[a]ny person renting or leasing to another any motor vehicle owned by him shall be liable for any damage to any person or property caused by the operation of such motor vehicle while so rented or leased, to the same extent as the operator would have been liable if he had also been the owner.¹⁴⁴

Under this statute a surety must pay all damages, including treble damages, which have been properly assessed against the vehicle operator.¹⁴⁵

On the other hand, U.S. case law remains inconsistent on the question of whether the assignment of a real estate lease constitutes a suretyship. For example, while a Virginia state court¹⁴⁶ ruled that the assignment of a lease does not result in a suretyship, the United States Court for the Fourth Circuit of Appeals disagreed, comparing real estate leases to mortgages.¹⁴⁷

d. Enforcing involuntary suretyships

Involuntary suretyships are not considered true suretyships, because they are not based on express agreements between the parties. As a result, involuntary suretyships may raise significant enforcement problems for the creditor or may be of no value to him. Specifically, it may be necessary for a creditor to explicitly consent to involuntary suretyships or take other affirmative steps to secure enforcement of these suretyships.

An involuntary suretyship may also lack any true benefit for the creditor. As mentioned before, any involuntary suretyship has only internal effect between the co-makers of an instrument and thus may not improve the position of the creditor. This may be different in case

strument, executed at the same time, and on the same consideration.”); *See also* RESTATEMENT 3d, *supra* note 12, §15(d).

142. *Coleman v. Windham Aviation Inc.*, 2005 WL 1793907 (R.I. Super. July 18, 2005)(unpublished opinion)(liability of a lessee and operator of an aircraft); *Fredette v. Keybank, USA*, 2005 WL 1670808 (Conn. Super. June 14, 2005) (unpublished opinion) (vicarious liability on motor vehicle lessors).

143. Conn. Gen. Stat. §14-154a (2004).

144. *Id.* §14-154(a)(a).

145. *Id.*

146. *Lee Highway, LLC v. Virginia Garden Rests., LLC*, 58 Va. Cir. 178, 181 (2002).

147. *The Corner Assocs. v. W.R. Grace & Co.*, 988 F. Supp. 970 (E.D. Va. 1997), *aff'd* 173F.3d 424 (4th Cir. 1999).

of assignments or pledges. Here, the original principal is not only replaced without consent of the creditor, but may also involve a less creditworthy debtor. Conversely, the new principal may be more solvent, while the creditor may not be able to satisfy his debt against him due to lacking notice and the failure to recognize him as the new debtor by way of consent. U.S. courts have responded to this dilemma inconsistently. Most of the disagreement between U.S. courts center around the issue of consent. A number of courts have argued that, because an involuntary suretyship is created by operation of law consent is not necessary.¹⁴⁸ Other courts consider the change of positions between the new principal and the original principal as a modification of the underlying obligation, which in turn would require mutuality and express consent.¹⁴⁹ The correct answer on the need of whether or not consent is required may, however, either be found in the statutory source that prescribes the involuntary suretyship or the contractual obligation between the new and the original principal and obligor. Consent by the creditor has no effect on the contractual relationship between the new and the original principal. The latter not only remains collaterally liable to the creditor by reason of the underlying obligation, he will also have a right of indemnification against the new principal when held liable. As a result, the new principal will always be required to cover the debt.¹⁵⁰

2. The Liability of the Surety

Due to the unconditional character of a suretyship under U.S. law, the extent and duration of a surety's liability are much more important when compared to that of a guarantor. The surety is jointly and severally liable with the principal obligor and has the duty to satisfy the creditors claim with respect to the underlying obligation.¹⁵¹ Any different rights, duties or limitations involving this liability may be defined in an express agreement between the parties.¹⁵² The terms of the suretyship agreement are thus the most important factors to determine a surety's liability under U.S. law.¹⁵³

148. *Westinghouse Credit Corp. v. Wolfer*, 88 Cal. Rptr. 654, 657 (1970); *Mead v. Sanwa Bank California*, 61 Cal. App. 4th 561 (1998).

149. *Tension v. Knapp*, 64 S.W.2d 1071 (Tex. Civ. App. 1933); *Weaver v. Oliver*, 3 S.W.2d 892 (Tex. Civ. App. 1928); *A.F. Shapleigh Hardware Co. v. Wells*, 90 Tex. 10, 37 S.W. 411 (1896).

150. *Marshall E. Tracht*, 5-45 *Debtor-Creditor Law* §45.03, [3][h].

151. *RESTATEMENT* 3d, *supra* note 12, §15(c).

152. *People of the State of Illinois ex rel. Ryan v. Env'tl. Waste Resources Inc.*, 335 Ill. App. 3d 751 (2002).

153. *Angelo Iafrate Constr., LLC v. Potashnick Constr., Inc.* 370 F. 3d 715 (8th Cir. 2004); *Dadeland Station Assocs., Ltd. v. St. Paul Fire & Marine Ins. Co.*, 383 F.3d 1273 (11th Cir. 2004).

In addition, the liability of a surety may be extended through a tort claim or on the basis of bad faith.¹⁵⁴

a. Default of the principal and failure to perform

Generally, under U.S. common law a surety becomes immediately liable upon default of the principal.¹⁵⁵ The surety contracts for primary liability with the creditor, who may seek direct relief from the surety if the principal defaults on the underlying obligation.¹⁵⁶ The creditor is not required to satisfy his debt against the principal before pursuing the surety, instead he may elect to sue the surety first and before the principal's liability is established.¹⁵⁷ Some state jurisdictions in the United States have enacted different rules, however, requiring that the creditor must sue the principal first if a cause of action has accrued on the principal contract, and if the surety demands that the creditor pursue this action first.¹⁵⁸ Under New York law, on the other hand, a surety can only demand that a creditor sue the principal first if the surety and the principal have so agreed in their agreement.¹⁵⁹

b. Effect of posting of additional security

Where a creditor, in addition to a surety, has sought the posting of additional security or collateral on the underlying obligation, the creditor is prevented from suing the surety first. Rather, the creditor must proceed against the additional security first, if this can be accomplished without substantial injury.¹⁶⁰ If the creditor fails to do so, the surety is discharged to the extent of the value of the additional security.¹⁶¹ The basis for this conclusion is the fact that if the creditor misapplies collateral the surety's subrogation rights may be impaired.¹⁶² This is most obvious in cases in which the creditor either loses the collateral¹⁶³ or simply releases a security interest in the collateral.¹⁶⁴

154. This extension will not be discussed here, *but see, i.e.*, *Int'l Fid.Ins. Co. v. Delmarva Systems Corp.*, 2001 Del Super. LEXIS 165 (May 9, 2001).

155. *Koehler v. Bank of Bermuda Ltd.*, 2004 U.S. Dist. LEXIS 27366 (S.D.N.Y. Mar. 9, 2005); *Hardy v. Miller*, 2001 Tenn. App. LEXIS 898 (Dec. 10, 2001).

156. *Williams v. Blair*, 2003 Ohio 4399, 2003 Ohio App. LEXIS 3907 (2003).

157. *Rodehorst v. Gartner*, 669 N.W.2d 679 (2003); *FDIC v. Indian Creek Warehouse, J.V.*, 974 F. Supp. 746 (E.D. Mo. 1997).

158. California, Cal. Civ. Code Ann. §2845, 1982 Amendment; Ohio, Ohio Rev. Code Ann. §1341.04; Mississippi, Miss. Code Ann. §87-5-1 (2004); Illinois, Ill. Ann. Stat. ch. 132, §1, as amended by P.A. 84-546 (1985).

159. N.Y. Gen. Oblig. Law §15-701 (McKinney 1971).

160. *Washington Int'l Ins. Co. v. United States*, 138 F. Supp. 2d 1314 (2001).

161. *United States v. Cont'l Cas. Co.*, 512 F.2d 475 (5th Cir. 1975).

162. *Brown v. State Fire & Cas. Corp.*, 338 N.E.2d 427 (1975).

163. *Putney Credit Union v. King*, 286 A.2d 282 (1971) (involving a chattel mortgage); *Conversely*, see *United States v. Alphagraphics Franchising, Inc.* 973 F.2d 429 (5th Cir. 1992).

164. *Wexler v. McLucas*, 48 Cal. App. 3d Supp. 9 (1975).

c. Res judicata

The result of an action against the principal may also be *res judicata* against the surety.¹⁶⁵ This may result in either triggering the surety's liability or limiting it. The issue of *res judicata* particularly arises if the creditor chooses to sue or arbitrate a claim against the principal before involving the surety. In other words, the surety may be bound by a judgment on the merits against the principal, which he cannot attack.¹⁶⁶ Some U.S. states require that the surety must be part of any action before the principle of *res judicata* can apply, however.¹⁶⁷

The situation is different if a judgment was entered in favor of the principal. In the United States, such a judgment would be considered *res judicata* recognizing that it would be unreasonable if the creditor were allowed to seek relief against the surety after the principal's liability was denied by a court of competent jurisdiction.¹⁶⁸ This general rule may be different, however, where the surety binds himself to the creditor through an independent obligation, such as an insurance bond.¹⁶⁹

3. Form Requirements and Other Rules of Construction

With the exception of an involuntary suretyship, all suretyship agreements must comply with the Statute of Frauds and be in writing.¹⁷⁰ The requirements are the same as for a guaranty agreement.¹⁷¹ At the very minimum the surety must sign the agreement as the party charged.¹⁷² Maybe most important and because the assumption of the debt is a substantial undertaking, courts in the United States will not assume that any party agreed to such an obligation.¹⁷³ Therefore, the parties must clearly express their intention to act as a surety.¹⁷⁴ While the use of the word "surety" or any other specific term is not required, the parties must clearly manifest their intention to act as a surety.¹⁷⁵

165. *Geron v. County of Nassau*, 2004 U.S. Dist. LEXIS 5298 (S.D.N.Y. Mar. 20, 2004).

166. *Prescott v. Coppage*, 296 A.2d 150 (1972); *Directors Guild of Am., Inc. v. Millennium Television Network, Inc., Co.*, 2001 U.S. Dist. LEXIS 22914 (C.D. Cal. Nov. 5, 2001).

167. W. Va. Code §45-1-3 (2004).

168. *Kramer v. Morgan*, 85 F.2d 96 (2nd Cir. 1936).

169. *McBride v. Maryland Cas. Co.*, 23 A.2d 596 (E.&A. 1942).

170. Mich. Stat. Ann. §26.906 (1993); Cal. Civ. Code Ann. §§2793 and 2794 (1993); Ill. Ann. Stats. Ch. 9, §1 (1989); *Byrd v. Estate of Nelms*, 2004 Tex. App. LEXIS 10351 (Nov. 17, 2004).

171. *Supra*, II B. 4.

172. *Id.*

173. *Bandit Ind.*, 463 Mich. at 504, 620.

174. *Id.*

175. *United States v. Fitzgerald*, 938 F.2d 792, 795 (7th Cir. 1991)

A person entering into a suretyship agreement must also have the capacity to do so. Because suretyships are contractual in nature all common law contract rules apply. However, special problems may arise in context of juridical persons, such as corporations and limited partnerships.¹⁷⁶ As noted, a surety is a substantial undertaking under U.S. law and the capacity to enter into a suretyship agreement cannot generally be assumed. This may be of particular concern with regard to the powers of a corporate officer to enter into such an agreement.¹⁷⁷ While a natural person with general capacity to contract has the capacity to become a secondary obligor or surety,¹⁷⁸ relevant state law must be considered when determining the capacity of a corporate officer or a person other than a natural person.¹⁷⁹ In addition, some U.S. state jurisdictions require that a surety must be a resident of that state and fulfill certain capital requirements in order to have the capacity to act as a surety.¹⁸⁰ A surety may also be estopped from denying capacity when a certain level of sophistication can be assumed, such as in an insurance context.¹⁸¹

Finally, under U.S. law a suretyship agreement is generally interpreted in favor of the surety (*strictissimi juris*) as long as the surety does not gain any benefit under the suretyship or the principal agreement.¹⁸² This is not the case if the surety gets paid for his promise or is able to minimize his risk.¹⁸³ For example, if the surety is a corporation organized for the purpose of doing business as a surety and receives compensation, the rule of *strictissimi juris* is not strictly applied.¹⁸⁴

III. DEFENSES AND TERMINATION

A guarantor or surety has a number of different defenses against the creditor or the principal. The defenses include compelling performance by the principal, seeking indemnification from the principal after paying his debt, reimbursement, subrogation, and termination.

176. RESTATEMENT 3d, *supra* note 12, §10, Cmt. (b).

177. *Id.*

178. While a family member can generally act as a surety of another, this is not always the case for married women, who may be considered incompetent to be a surety in some U.S. states. *See, i.e.,* Dorman v. Carnes, 265 Ky. 361, 96 S.W.2d 869 (1936); Judson v. Duran, 231 Ga 206 (1973); Nat'l Bank of Rochester v. Meadowbrook Heights, Inc., 80 Mich. App. 777 (1978).

179. RESTATEMENT 3d, *supra* note 12, §10(1) and §10(2).

180. Ohio Rev. Code Ann. §1341.01; Ariz. Rev. Stat. §7-101 (2004); Rev. Code Wash. (ARCW) §19.72.020 (2004); Minn. Stat. §574.01 (2004).

181. Code of Ala. §27-24-7 (2005); Kan. Stat. Ann. §78-105(2003); Ky. Rev. Stat. §304.21-080 (2004); 24-A Me. Rev. Stat. §3105 (2004); Nev. Rev. Stat. §691B.030(2004); N.M. Stat. Ann. §46-6-5 (2005); S.C. Code. Ann. §38-15-70 (2004).

182. Joseph Thomas, Inc. v. Graham, 842 S.W.2d 343 (Tex. Ct. App. 1992).

183. Int'l Fid. Ins. Co. v. County of Rockland, 98 F. Supp. 2d 400, 405-06 (2000).

184. *Id.*

A. *Exoneration and Indemnification*

As between the principal and the guarantor or surety, both the guarantor and surety can seek exoneration through discharge of the underlying obligation or ask for indemnification and reimbursement as a form of restitution.¹⁸⁵

1. Exoneration

Under U.S. law, before seeking restitution, the surety has the right to compel performance by the principal on the underlying obligation. This right may be expressly included in a statute¹⁸⁶ or based on the common law principle of equity.¹⁸⁷ In other words, the surety is only secondarily liable and does not take the principal's obligation for its own.¹⁸⁸ The surety only pays on the principal's behalf; he is obligated to pay only when the obligor fails to pay the obligee in a timely manner.¹⁸⁹

2. Restitution

a. Reimbursement

If the surety is called on to pay the principal's debt, the surety has the right to recover from the principal for any payments made or when the surety's property is used to satisfy the principal's obligation.¹⁹⁰ Generally considered to be an equitable right, many U.S. jurisdictions also provide for statutory reimbursement rights.¹⁹¹ Most important, a surety can only claim reimbursement rights if he conducts a reasonable investigation of the claim before making any payments.¹⁹² Some limitations of the right also exist with regard to the reasonableness of certain expenses, such as attorney fees¹⁹³ or when the principal files for bankruptcy.¹⁹⁴

b. Indemnification

The right of reimbursement may also be part of an indemnity agreement entered into between the principal and the guarantor or

185. RESTATEMENT 3d, *supra* note 12, §18.

186. Ohio Rev. Code Ann. §1341.19 (Page 1971); Cal. Civ. Code Ann. §2846 (1974).

187. *M & T Elec. Contractors, Inc. v. Capital Lighting & Supply, Inc.*, 267 B.R. 434, 447 (2001) (implied right to performance).

188. *Id.* at 446; *See also, In re Farley Inc.*, 236 F.3d 359, 361 (7th Cir. 2000).

189. *Id.*; *See also*, RESTATEMENT 3d, *supra* note 12, §18 Cmt. a.

190. U.C.C. §3-419(e); RESTATEMENT 3d, *supra* note 12, §22.

191. Code of Ala. §8-3-5 (2004); Cal. Civ. Code Ann. §2847 (2005); La. Civ. Code Art. 3049; N.D. Cent. Code, §22-03-10 (2005).

192. *PSE Consulting Inc. v. Frank Mercede & Sons, Inc.*, 838 A.2d 135 (2004); *Bell BCI Co. v. Old Dominion Demolition Corp.*, 2003 U.S. Dist. LEXIS 22911 (E.D. Va. 2003).

193. *Pacific Indem. Co. v. Harper*, 14 Cal. 2d 379, 384 (1939).

194. Walter Downs, *A Surety's Basic Rights and Remedies*, 15 DEFENSE L. J. 139, 172 (1966).

surety, which is typically the norm. If executed, the surety may only rely on the exact terms of the indemnity agreement and common law principles do not apply.¹⁹⁵ Note, however, that the agreement may incorporate common law principles, such as good faith.¹⁹⁶

c. Subrogation

Subrogation is the surety's equitable right to claim the rights of the creditor against the principal.¹⁹⁷ Upon payment, the surety stands in the shoes of the creditor¹⁹⁸ and can assert the rights of the creditor against the principal.¹⁹⁹ Subrogation is independent and does not affect the surety's right to reimbursement from the principal.²⁰⁰ Rather, subrogation affects the priority of the surety when compared to other creditors of the principal.²⁰¹ As such, a surety is "subrogated to the rights and remedies of its principal against third parties, where those rights arise from or are closely related to the debt that the surety was required to pay under the suretyship agreement."²⁰²

B. Termination Rights

Under U.S. law, termination rights related to guaranty or suretyship agreements are considered suretyship defenses, which may result in the surety's discharge as a secondary obligor.²⁰³ While the satisfaction of the underlying obligation will generally terminate any suretyship, the same may result from actions taken by the parties involved.

1. Release of the Principal

If a creditor grants a general release to the principal, this release may also function as a release for the surety.²⁰⁴ A creditor may, however, retain his right against the surety and prevent his discharge.²⁰⁵ More specifically, in order to pursue the surety after the release of the principal the creditor must expressly reserve his right against the surety and demonstrate that he did not intend to release him as a

195. *Fireman's Ins. Co. of Newark v. Todesca Equip. Co., Inc.*, 310 F.3d 32, 37 (1st Cir. 2002).

196. *Anderson v. United States Fid. & Guar. Co.*, 600 S.E.2d 712 (2004).

197. SIMPSON, *supra* note 23, at §47.

198. *Hanover Ins. Co. v. Corpro Cos., Inc.*, 221 F.R.D. 458, 460 (E.D. Va 2004).

199. *Flojo Int'l, Inc. v. Lassleben*, 4 Cal.App.4th 713 (1992).

200. SIMPSON, *supra* note 23, at §48.

201. *Assoc. Home Equity Servs. v. Franklin Nat'l Bank*, 2002 Tenn. App. LEXIS 207, 9-10 (Mar. 26, 2002).

202. *In re Estate of Bishop*, 2004 Ohio 2197, P27 (2004).

203. *In re Murchison*, 102 B.R. 545 (Bankr. N.D. Texas 1988).

204. U.C.C. §3-605(a)(2).

205. *Id.*

secondary obligor.²⁰⁶ However, even if the surety remains liable to the creditor, the surety is discharged to “the extent of the value of the consideration for the release”²⁰⁷ of the principal. A different outcome may result if the surety was compensated, limiting any potential discharge to the extent of her injury (*pro tanto*)²⁰⁸ or the proof of prejudice.²⁰⁹

2. Modification of the Underlying Obligation

Any modification or alteration of the principal contract without the consent of the surety²¹⁰ may also operate as a release for the surety.²¹¹ Certain modifications or alterations may be considered beneficial for the surety, however.

a. Due date extension

Generally, the extension of a due date may be considered beneficial for the surety. Presumably, the principal cannot only avoid his own default on the underlying obligation; he may also avoid triggering the payment obligation of the surety. Accordingly, a surety is only “discharged to the extent that the extension would otherwise cause the [surety] a loss.”²¹² The extension may cause a loss if the financial situation of the principal deteriorates further and the surety may no longer be able to recover from the principal.²¹³ Note, that if the modification extends the time of performance for the creditor rather than the principal, the surety is discharged, unless she consents to this modification or has waived her defenses.²¹⁴

b. Material modification

A material modification is one that substantially changes the terms of the underlying obligation, such as the nature, meaning or legal effect of the contract.²¹⁵ Any such material change traditionally resulted in a general discharge of the surety under U.S. law.²¹⁶ In fact, it was irrelevant whether a material modification benefited or injured the surety as long as it constituted an essential deviation or

206. *Chicago Title Ins. Co. v. Lumbermen’s Mut. Cas. Co.*, 707 A.2d 913, 920 (1998).

207. U.C.C. §3-605(a)(3); RESTATEMENT 3d, *supra* note 12, §39.

208. *Zuni Const. Co. v. Great Am. Ins. Co.*, 86 Nev. 364, 367 (1970).

209. *Reliance Ins. Co. v. Colbert*, 365 F.2d 530, 535 (D.C. 1966).

210. *United States Fid. & Guar. Co. v. Braspetro Oil Serv. Co.*, 369 F.3d 34 (2nd Cir. 2004).

211. U.C.C. §3-605(c); RESTATEMENT 3d, *supra* note 12, §41.

212. U.C.C. §3-605(b)(2); RESTATEMENT 3d, *supra* note 12, §40.

213. U.C.C. §3-605, Cmt. 5.

214. *Rabinovici v. Solomon*, 2002 U.S. Dist. LEXIS 22260 (E.D. Pa. Nov. 4, 2002).

215. *Cont’l Bank v. Axler*, 510 A.2d 726, 729 (Pa. Super. 1986).

216. *Amerisourcebergen Drug Corp. v. Meier*, 2004 U.S. Dist. LEXIS 25243 (E.D. Pa. Dec. 14, 2004).

change of the contract terms.²¹⁷ Today, under the modern view only the proof of loss is required, resulting in discharge to the extent of that loss only.²¹⁸ However, if the modification imposes new obligations on the surety, which substantially increase risk of loss, U.S. courts may grant a general discharge.²¹⁹ Note, in some U.S. jurisdictions any changes that increase the obligations of the principal will generally result in a discharge of the surety, regardless of the impact of that change on the surety.²²⁰

3. Impairment of Collateral

Under U.S. law, a surety is further entitled to the benefit of every security, including any collateral, held by the creditor as additional security.²²¹ If the creditor impairs the collateral or releases it prematurely, the surety is discharged to the extent of the impairment.²²² The creditor has the obligation to protect the collateral and must ensure that, upon default of the principal, the collateral is properly applied to the remaining debt.²²³ By impairing the collateral the creditor "impairs the surety's ability to be made whole through subrogation if the surety is later called upon to discharge the underlying obligation."²²⁴ The surety is only limited by burden of proof. He must prove the impairment, but can do so by showing that the creditor failed to perfect or maintain the collateral or to obtain substitute collateral.²²⁵

4. Waiver

A surety may effectively waive its suretyship defenses or right to discharge through consent.²²⁶ Consent may be obtained contemporaneously or in advance of a workout and does not require any particular language.²²⁷ A waiver can be included in the suretyship or any separate agreement and may be express or implied from the circumstances.²²⁸ It is standard practice in the United States to include

217. *Cross v. Allen*, 141 U.S. 528, 540 (1891).

218. U.C.C. §3-605(c)(2).

219. *Autumn Manor, Inc. v. Jones*, 2003 U.S. Dist. LEXIS 16762 (D. Kan. Aug. 19, 2003).

220. Cal. Civ. Code §2819 (1974).

221. *St. Paul Fire & Marine Ins. Co. v. New Jersey Bank & Trust Co.*, 250 A.2d 57 (Law Div. 1969).

222. U.C.C. §3-605(d); RESTATEMENT 3d, *supra* note 12, §42; *Trust of Strand v. Wel-Co Group, Inc.*, 86 P.3d 818 (2004).

223. *Pennsylvania Nat'l Mut. Cas. Ins. Co. v. City of Pine Bluff*, 354 F.3d 945, 953 (8th Cir. 2004).

224. *Id.*

225. For additional examples, see U.C.C. §3-605(d) and RESTATEMENT 3d, *supra* note 12, §42(2)(a)-(d).

226. U.C.C. §3-605(f); RESTATEMENT 3d, *supra* note 12, §48.

227. RESTATEMENT 3d, *supra* note 12, §48, Cmt. b.

228. *Id.*; See also U.C.C. §3-605, Cmt. 9.

waivers in notes prepared by financial institutions thereby effectively foreclosing the availability of any defenses for a surety or guarantor in this context.²²⁹

IV. CONCLUSION

U.S. law does not clearly distinguish between guaranties or suretyships given by private or commercial parties. The only aspect of consumer protection is included in certain notice requirement established by the Federal Trade Commission or in some U.S. State jurisdictions. Guaranties and suretyships are simply considered third-party beneficiary contracts to which all common law contract principles apply. While the Uniform Commercial Code and the Restatement 3rd provide a framework for a uniform body of law, the differences in the codification and substantive content of suretyship laws among all U.S. States is significant. The same is true, with regard to the case law at the federal and state levels.

229. *Id.*

ARTHUR R. PINTO*

Protection of Close Corporation Minority Shareholders in the United States†

TOPIC III. A

This paper discusses the problems and legal protections of minority shareholders in close corporations in the United States. Minority shareholders in their corporation may be concerned with having voice, access to information, some control, return, and ability to exit. In addition, minority investors are often concerned that those in control will act opportunistically and take advantage of their control for personal benefit. It is important to understand how corporate law default rules deal with these issues and the extent to which the minority shareholders are protected while allowing those in control to exercise their power. While these issues can all be addressed by shareholders contracting for protection ex ante, those without contracts also have some legal protections ex post.

I. INTRODUCTION

In the United States the close corporation is a business organization that often has several characteristics: (1) legal personality, (2) limited liability for owners, (3) a small number of owners, (4) no ready market for owners' interests, (5) centralized management where owners often participate in the corporation's management, and (6) perpetual existence.¹ Historically, the corporate form operated as an alternative to the partnership form. Partnerships, unlike corporations, required no formalities to be created but generally were not considered a legal entity for most purposes and did not provide its

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1. See Margret M. Blair, *Locking in Capital: What Corporate Law Achieved For Business Organizers In The Nineteenth Century*, 51 UCLA L. REV. 387 (2003) (additionally corporations also allow for capital lock up which restrict the ability of shareholders to remove their funds).

owners with any limited liability.² In addition, a significant difference between the corporate and partnership forms is that under federal tax law, corporations are usually taxed on its profits and shareholders are taxed on any dividends paid from after tax profits. Thus, there is the concept of “double taxation.” However, partnerships are taxed only once since any profits “flow through” to the owners who pay the tax.³ Attempts to have some of the advantages of the corporate form (especially limited liability) and to avoid double taxation has led to the creation of new business forms that have corporate aspects (such as limited liability) but with partnership taxation attributes.⁴ Thus, there are limited liability companies (LLC), which have become another popular type of business organization since they have both corporate and partnership⁵ attributes but are taxed like a partnership.⁶ While LLCs have become a popular alternative to close corporations, this paper will focus on close corporations.

There are different conflicts that may be present in close corporations.⁷ The focus of this paper is how to protect minority shareholders from the actions of controlling shareholders while still allowing those in control to exercise their right to control. Because majority voting is

2. Under the revised uniform partnership act enacted in 37 states the partnership is treated as an entity for many purposes but unlimited liability remains the rule. REVISED UNIF. P'SHIP. ACT §§ 201 and 306.

3. IRC §701.

4. See generally LARRY RIBSTEIN, THE RISE OF THE UNCORPORATION 124-30 (2010) [hereinafter RIBSTEIN BOOK].

5. While there is a Revised Uniform Limited Liability Company Act (“ULLCA”), states often take different approaches to various default rules. See, e.g., 38 HARV. J. ON LEGIS. 413 (discussing different exit rules for LLCs).

6. In 2006 tax returns were filed for 1,630,161 limited liability companies, 718,756 partnerships, 432,550 limited partnerships, and 5,840,799 corporations. RIBSTEIN BOOK, *supra* note 4, at 3.

7. The major focus of corporate law is the protection of shareholders although there are some creditor protections available. The legal capital rules in state statutes are primarily designed to provide some minimal creditor protection. See generally BAYLESS MANNING & JAMES J. HANKS JR., LEGAL CAPITAL 122 (3d ed. 1990). The traditional statutes created liability for issuance of shares for inadequate consideration, for prices below par (the minimum amount required to be paid for shares), and restrictions on the payments of dividends or stock repurchases that shift funds out of the corporation to shareholders that could harm creditors. But the trend has been to view the protection of creditors as being better served by contracting or fraudulent conveyance law and bankruptcy rules and not corporate law. Thus, one no longer finds statutes that require any minimum capital. Many statutes have abandoned the concept of par and instead focus on any dividend payments made while the firm is equitably insolvent (failure to meet the debts as they mature) and a balance sheet approach. *E.g.*, MODEL.BUS. CORP. ACT (M.B.C.A.) § 6.40(c)(2). Even states that retain par allow for the creation of shares at low par or no par, which minimizes the amount that cannot be used to pay dividends. In addition under case law, the courts have developed equitable remedy for creditors that may allow piercing the corporate veil so that the shareholders may be personally liable for the corporate debts. Generally courts apply a principle of piercing the corporate veil “where there is fraud or where [it] is in fact a mere instrumentality or alter ego of the owner.” *Geyer v. Ingersoll Publ'ns Co.*, 621 A.2d 784, 793 (Del. Ch. 1992).

the norm, those who possess at least 51% of the votes have tremendous power over the corporation and there are numerous ways in which such control can be used to harm minority shareholders and benefit those in control.⁸

Shareholders in close corporations often have different goals and expectations. Some may be looking for a passive investment and are hoping for a successful business with good returns. Others may expect more participation and involvement including employment. Some investors are sophisticated while others may be motivated to invest by personal reasons. In focusing on protections for these different investors, some of the important issues for them as shareholders may be voice, information, control, return, and exit. In addition, minority shareholders are often concerned that those in control will act opportunistically and take advantage of their control for personal benefit. These issues can all be addressed by contracting *ex ante* for protection. Without a contract it is important to understand how corporate law default rules deal *ex post* with these issues.

II. FORMATION AND APPLICABLE LAW

While federal taxation is an important issue, most legal issues associated with close corporations, as well as other business forms such as the LLC, are determined by the state law where they are formed.⁹ When a corporation is formed a state is selected as the place of incorporation and its law (both statutory and case law) applies to most matters governing its internal affairs, even if there is no business presence in that state.¹⁰ Generally that choice is respected by other states.¹¹ In the context of publicly traded corporations this has

8. See F.HODGE O'NEIL & ROBERT THOMPSON, OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS (2013) [hereinafter OPPRESSION BOOK].

9. Some of the federal securities law can apply to close corporations because corporate shares are securities under that law. Offerings to sell shares in interstate commerce may require some mandated disclosure and rules on offering and selling shares and the failure to comply may create liabilities under the Securities Act of 1933. HAROLD S. BLOOMENTHAL & SAMUEL WOLFF, SECURITIES LAW HANDBOOK CHAPTER 7. PUBLIC OFFERINGS BY SMALL COMPANIES (2013). There are some exemptions for small offerings from the requirements of the law. *Id.* at Chapter 9. Exempt Offerings. Recently, the JOBS act has provided further exemptions. *Id.* at § 7:28.10. JOBS Act: Small Company Capital Formation. In addition, material misrepresentations and omissions (when there is a duty to disclose) implicate the 1934 Act Rule 10b-5, which prohibits fraud in the purchase or sale of securities in interstate commerce. The first case to find an implied private right of action under 10b-5 involved a close corporation where officers breached their fiduciary duty to selling shareholders and violated Rule 10b-5 when they purchased stock from shareholders without informing the shareholders that the stock was about to be acquired by a third party for a higher amount (i.e. insider trading). *Kardon v. National Gypsum Co.*, 73 F.Supp.798 (E.D.Pa. 1947).

10. RESTATEMENT (SECOND) OF THE CONFLICT OF LAWS § 302 (1971).

11. Some states provide for some regulation of foreign corporations (i.e., corporations incorporated in another state). For example, if a local business operates primarily in New York but incorporates in another state it would pay some New York fees, file as a foreign corporation and be subject to some of New York's rules.

led to a competition between states to attract incorporations. Such competition has been described as a “market” for corporate charters and has led to debates over whether such a market and if such competition is actually beneficial for shareholders.¹² While there appears to be no corollary market for close corporations,¹³ there are some significant variations between how different states deal with issues related to minority shareholders.

Formation of close corporations has become easy. It requires filing of a certificate of incorporation with the requisite fees.¹⁴ Such filings require only minimal information¹⁵ with no need for any governmental approval so long as the corporate name has not been used by another corporation. There is no requirement of minimal capital and usually at least one share must be issued. Upon formation, the corporation is subject to the incorporating statute which provides the rules for the internal affairs of the corporation. These rules can apply to both close corporations and publicly-traded corporations.¹⁶ Different states have approached close corporations differently. Some have adopted particular rules that only apply to close corporations¹⁷ while other states have adopted a separate statutory framework for those who elect to be a close corporation.¹⁸

N.Y.B.C.L. Article 13. See Arthur R. Pinto, *The Constitution and the Market For Corporate Control: State Takeover Statutes After CTS Corp.*, 29 WM. & MARY L. REV. 699, 754–74 (1988) (discussing the constitutional validity of such rules).

12. ARTHUR PINTO & DOUGLAS BRANSON, UNDERSTANDING CORPORATE LAW §1.09 [A] (3d ed. 2013) [hereinafter PINTO BOOK].

13. It is not clear that there is much competition for initial incorporations of smaller businesses because if incorporated in their local jurisdiction they can easily reincorporate later by merging into a corporation incorporated in another state such as Delaware if needed to attract investors. Larger business may be a different story. See Jens Dammann & Matthias Schündeln, *The Incorporation Choices of Privately Held Corporations*, 27 J.L. ECON. & ORG. 79 (2011) (empirical study showing that around 50% of firms with over 1000 employees incorporated outside their principal place of business and often selected Delaware particularly if the quality of courts and attractive law were important). If a start-up venture has global ambitions they appear more likely to initially form as a corporation and incorporate in Delaware. See Morse Startup Ltd.: Tax Planning and Initial Incorporation Location 14 FLA. TAX REV. 319 (2013). It has been suggested that competition led to the development and enactment of LLCs statutes. RIBSTEIN BOOK, *supra* note 4, at 123.

14. For example, in New York one can file online and pay fees as low as \$135. REVISED UNIF. LTD. LIAB. CO. ACT § 201 (2006).

15. For example, under New York law the certificate needs information about the shares, corporate purpose, county location, and designation for service of process. N.Y. BUS. CORP. LAW §402 (McKinney 2013).

16. State corporate law statutes also have many different rules. Mandatory rules must be applied and cannot be altered. Other rules are enabling and may be applied if the corporation chooses to do so. Still other rules are supplementary and must be used but can be altered. See Melvin Eisenberg, *The Structure of Corporation Law*, 89 COLUM. L. REV. 1461, 1480–85 (1989).

17. For example, New York requires that all shareholders of close corporations to provide for restrictions on the board of directors if provided in the certificate of incorporation. N.Y. BUS. CORP. LAW §620(b) (McKinney 2013).

18. DEL. GEN. CORP. LAW § XIV (Delaware takes a contractual approach so that in order for shareholders of a close corporation to take advantage of some of the protec-

III. DEFAULT RULES

When looking at corporate default rules and what protections minority shareholders need, the issues of voice, information, control, return, and exit are often important. Voice can be expressed at the shareholder level and management level. Shareholder voting rights are generally limited under United States law. Shareholders can vote for directors, amendments to the certificate of incorporation (requires both board and shareholder approval), the bylaws (internal rules), and significant structural changes including mergers,¹⁹ substantial asset sales, and dissolution.²⁰ Because majority shareholder vote is the norm, minority shareholders are usually unable to block measures favored by the control group.

Shareholder information rights are limited. Unlike publicly traded corporations where federal securities law mandate full disclosure,²¹ most state statutes provide limited information and notice to shareholders of meetings and voting issues.²² However, fiduciary duty does require disclosure of material information particularly when shareholders are voting and especially if the voting deals with a conflict of interest by those in control.²³ Most state statutes allow for shareholders to request a shareholder list and access to the books and records of the company.²⁴ Generally, achieving access to a shareholder list is easier²⁵ than the books and records, but in both cases there must be a proper purpose for the request.²⁶ A proper purpose to inspect books and records may be to find wrongdoing, to communicate with directors about reform, to assist shareholder litigation, or to help value the shares. In seeking corporate information there is a tension between the shareholders' legitimate right to be informed and to communicate with other shareholders and the possible harassment of managers as well as abuse of the information. Exercising

tions provided it must file as a close corporation); *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993). See text at *infra* notes 67-72.

19. In the merger context shareholders who dissent from the action may be given a statutory right to seek judicial appraisal of the fair value of their shares for cash. PINTO BOOK, *supra* note 12, at § 6.06.

20. PINTO BOOK, *supra* note 12, at § 5.05[A].

21. See *supra* note 9.

22. For example, MODEL BUS. CORP. ACT (M.B.C.A.) § 16.02, requires corporations to furnish shareholders with annual financial statements.

23. *Malone v. Brincat*, 722 A.2d 5 (Del. 1998).

24. This right often existed under the common law as a result of equitable principles and is now also codified by statute. See MODEL BUS. CORP. ACT § 16.02.

25. In seeking the shareholder list, the burden of proof is on the defendant corporation to prove improper purpose. For a request to inspect books and records, the plaintiff shareholder has the burden of proof to show proper purpose. See DEL. GEN. CORP. LAW § 220(c).

26. Under the statute, proper purpose means "a purpose reasonably relates to such person's interest as a stockholder." DEL. GEN. CORP. LAW § 220(b).

these rights often requires the willingness of a minority shareholder to bear the expenses of litigation to get information.²⁷

Minority shareholders can have a voice in management by being on the board of directors or selected as an officer. However, minority shareholders do not have a right to either unless provided for by the majority. An added benefit of being on the board of directors or being a corporate officer is greater access to information.²⁸

Shareholders usually buy shares and undertake risk for a return. Dividend payments are the means by which shareholders are usually compensated. Dividends are usually a discretionary decision for the board, which means that a majority of the board selected by those in control will determine dividend policy. The decision to pay a dividend (or not) is difficult to challenge since it is usually viewed as a business decision protected by the business judgment rule.²⁹ Courts rarely have required a corporation to pay a dividend unless a shareholder can prove “bad faith,”³⁰ “willful neglect,” “abuse of discretion,”³¹ or similar showings.³² Thus, unless there is such a showing or some contractual right or understanding that dividends should be paid, there is no right to receive a return through a dividend.

In a close corporation, another common way to receive a return is through a salaried corporate position. Similar to dividends, there is no right to a position for minority shareholders. Selection for such positions and salary are also protected by the business judgment rule.³³

In terms of exit, although shares in a corporation are freely transferable,³⁴ there is no market for the shares in closely held corporations and there may be few willing to buy into a minority interest

27. For a discussion of litigation see *infra* Part IV.

28. Directors usually have the right to inspect books and records that relate to their duties. See DEL. GEN. CORP. LAW § 220 (d).

29. See discussion in text at *infra* notes 39-40.

30. See, e.g., *Gottfried v. Gottfried*, 73 N.Y.S.2d 692 (1947) (“bad faith” and not “mere existence of adequate surplus” required before court will compel a dividend); *Schmitt v. Eagle Roller Mill Co.*, 272N.W. 277, 280 (Minn. 1937) (“the declaration of a dividend rests in [directors’] sound discretion and one will not be compelled unless they act fraudulently, oppressively, unreasonably or unjustly”); PINTO BOOK, *supra* note 12, at § 8.03.

31. *Miller v. Magline, Inc.*, 256 N.W.2d 761 (Mich. App. 1977) (holding that refusal to declare dividend was a breach by directors of fiduciary duty given the history of profit sharing bonuses for those in control).

32. See *Smith* case *infra* note 115. For a discussion of enhance fiduciary duty see *infra* Part III. B.

33. See discussion in text at *infra* note 40.

34. There are different statutory approaches to exit in LLCs. Some follow the partnership rule allowing members to exit while some provide for buyouts and others leave the issue to contracting like corporations. See Sandra Miller, *What Buy-Out rights, Fiduciary Duties, and Dissolution Remedies should Apply in the Case of the Minority Owner of a Limited Liability Company?*, 38 HARV. J. ON LEGIS. 413 (2001) (discussing different exit rules for LLCs).

in a corporation. Often the only potential buyers may be other shareholders in the corporation, but they are not obligated to buy. Thus without a contract, there is often no ready market for minority shareholders.³⁵

One concern minority investors may have is the possibility of dilution of their own ownership interest if new shares are issued to others and they are excluded.³⁶ Traditionally, preemptive rights were the default rule permitting each shareholder the right to buy an equivalent portion of new shares when issued by the corporation. For example, if new shares were issued, a 10% shareholder would have the right to buy 10% of the newly issued shares. Preemptive rights are now generally not the default rule but instead need to be provided for *ex ante*, usually in the corporate certificate.³⁷ Without preemptive rights, issuance of shares at fair prices that exclude minority investors are difficult to challenge, but if it can be shown expectations were for retaining equality in ownership, a claim is possible.³⁸

A. *Fiduciary Duty*

Claims involving breaches of fiduciary duty were often the means by which minority investors *ex post* would try to protect themselves and limit opportunistic behavior by those in control. Corporate fiduciaries are generally bound by a duty of care and duty of loyalty. The duty of care requires directors to perform their duties with the diligence of a reasonable person in similar circumstances which vary depending on the context. Directors can be liable for both their malfeasance and nonfeasance. The focus of any judicial inquiry will usually be on the decision making process, not the decision itself, with the plaintiff having the burden of proof on whether there was a breach of the duty of care.³⁹ Most decisions involving the duty of care may be protected under the business judgment rule developed by the courts since courts do not like to second guess such decisions.⁴⁰

35. *See* Donahue v. Rodd, 328 N.E.2d 505 (Mass.1975) discussed in text at *infra* notes 59-61.

36. Under American law, shares of corporations are authorized in the certificate of incorporation and the board can determine when to issue them and at what price. Often more shares are authorized than initially issued so there is no need for shareholder approval if the need arises to issue more shares. M.B.C.A §§ 601, 603, 621.

37. *See, e.g.*, MODEL BUS. CORP. ACT § 6.30(a).

38. *See* discussion of enhanced fiduciary duty *infra* Part III.B.

39. PINTO BOOK, *supra* note 12 at § 803.

40. The business judgment rule provides a presumption that in making a decision, directors were informed, acted in good faith, and honestly believed that the decision was in the best interests of the corporation. The business judgment rule is both a procedural guide and a substantive rule of law. Procedurally, it is a rule of evidence placing the initial burden of proof on the plaintiff to prove why the rule is inapplicable. If the plaintiff fails, then the business judgment rule protects the decision and the courts will not review the substance of the decision. The business judgment rule does not protect nonfeasance, lack of good faith, conflicts of interest, or an irrational or wasteful decision. PINTO BOOK, *supra* note 12 at § 803[B].

The duty of loyalty requires a fiduciary to act in the best interests of their corporation and in good faith. The traditional duty of loyalty focuses on conflicts of interest where the fiduciary's (or those associated) personal interests may be advanced over corporate interests. A lack of good faith is a duty of loyalty violation and can involve actual intent to harm the corporation, an intentional dereliction of duty, or a conscious disregard of one's responsibilities.⁴¹

Examples of duty of loyalty conflicts of interest include if the controlling shareholders are self-dealing by paying themselves excessive compensation⁴² or entering into unfair contracts with the corporation. Both the common law and state statutes⁴³ regulate these interested transactions. Under the common law, the court will scrutinize a conflict of interest transaction to determine if it is fair.⁴⁴ The court may shift the burden of proof to the directors to show fairness for both the process and substance of the decision (i.e., entire fairness). Thus, there is more judicial involvement and scrutiny with conflicts of interest under duty of loyalty than in duty of care.⁴⁵

A corporate fiduciary may also be liable if they unfairly profit from their corporate role by taking undisclosed profits when acting for the corporation, through unfair use of corporate information, or investing in an opportunity which rightfully belonged to the corporation (that is, a corporate opportunity).⁴⁶ But if a corporate opportunity is found and properly rejected by the corporation or the

41. The lack of good faith can come into play in close corporations. The Delaware Chancery Court, in *ATR-Kim Eng Fin. Corp. v. Araneta*, 2006 Del. Ch. LEXIS 215 (Dec. 21, 2006), found liability for directors of a closely held corporation who allowed the controlling shareholder to basically self-deal by transferring assets unfairly and impoverishing the company. While the controlling shareholder breached his duty of loyalty, the other directors who did nothing were found to be liable. The court described them as "stooges" with these directors having no regard for their obligations as directors.

42. Even in closely held corporations, courts do not like to second guess decisions on compensation because even those in control have the right to be compensated. In *Mlinarcik v. E.E.Wehrung Parking, Inc.*, 620 N.E.2d 181 (Ohio Ct. App. 1993), the court placed the burden on the minority to prove the unreasonableness of the compensation where there was no evidence of oppression by the majority and the minority were receiving dividends. But large compensation and no dividends can influence the court to order dividends. See *supra* note 31.

43. The state statutes take different approaches depending upon if the conflict of interest was approved with full disclosure by either a disinterested board or disinterested shareholders. Upon board approval some courts continue the common law rule, others shift the burden of proof on fairness to the plaintiff from the defendant, and others apply the business judgment rule. See PINTO BOOK, *supra* note 12 at § 9.03[B].

44. But even a fair transaction as to price may not be fair to the minority shareholder. See discussion of *Donahue*, 328 N.E.2d 505 in text at *infra* notes 59-65.

45. PINTO BOOK, *supra* note 12, at § 8.01[A].

46. While this idea seems simple, its application has resulted in differing legal tests to determine which opportunities are corporate opportunities and which opportunities the directors or officers may properly take advantage of personally. PINTO BOOK, *supra* note 12 at § 9.05[A].

corporation was unable to take the opportunity, the fiduciary may be free to then take it.⁴⁷

Cash freezeouts of minority shareholders raise the issue of the controlling shareholder's duty of loyalty because controlling shareholders are on both sides of the transaction, using their control to eliminate the ownership of the minority.⁴⁸ Some courts do not allow freezeouts without some showing of a business purpose⁴⁹ while others do not require such a showing.⁵⁰ If a court uses the business purpose test it suggests a willingness by the court to not allow the freezeout and an acceptance that shareholders' reasonable expectations may include a desire to remain in the business.⁵¹ For those courts who do not require a business purpose test and since the freezeout merger is part of the statute, the emphasis is on the expectation of shareholders and their contract and freezeouts are often allowed.⁵²

If a state allows for a freezeout there is an issue of remedy. Because the freezeout often involves a merger of the corporation, state statutes provide for an appraisal remedy for those who dissent from the merger. Appraisal is a judicial determination of the fair price. While appraisal has been modernized in many states to reflect modern valuation techniques,⁵³ minority shareholders may prefer an

47. Delaware permits corporations to renounce corporate opportunities in specified business opportunities or specified classes or categories of business opportunities by placing a provision in their articles of incorporation. DEL. GEN. CORP. L. § 122 (17). This is an example of the contractual approach to corporate law which allows the corporation to opt out of certain rules.

48. As one court indicated, a freezeout is a "manipulative use of corporate control to eliminate minority shareholders, or to reduce their share of voting power or percentage of ownership of assets, or otherwise unfairly deprive them of advantages or opportunities to which they are entitled." *Estate of Schroer v. Stamco Supply, Inc.*, 482 N.E.2d 975, 979 (Ohio Ct.App.1984). For a discussion of freezeout techniques and issues raised in publicly traded corporations, see PINTO BOOK, *supra* note 12, at § 10.03.

49. In *Alpert v. Williams St. Corp.*, 473 N.E.2d 19 (N.Y.1984), the New York court indicated "there exists a fiduciary duty to treat all shareholders equally" and "on its face, the majority's conduct would appear to breach this fiduciary obligation," holding that "in the context of a freeze-out merger" the removal of minority shareholders is permissible only "when related to the advancement of a general corporate interest" and absent such a purpose, a cash-out merger would not be allowed.

50. *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) ("we do not believe that any additional meaningful protection is afforded minority shareholders by the business purpose requirement of the trilogy of Singer, Tanzer, *Najjar* and their progeny. Accordingly, such requirement shall no longer be of any force or effect").

51. David Crago, *Fiduciary Duties and Reasonable Expectations: Cash-Out Mergers in Close Corporations*, 49 OKLA. L. REV. 1 24-28 (1996). For a discussion of reasonable expectations, see text at *infra* notes 63-65 and 84-87.

52. *Id.* at 17.

53. In *Stringer v. Car Data Systems, Inc.*, 841 P.2d 1183 (Or. 1992), the court found that the minority was limited to an appraisal, even if the majority shareholder acted arbitrarily or not in good faith. The complaint made no claim for damages apart from the fair value of the shares but allowed the use of a variety of financial valuations in determining fair price and by indicating that appraisal may not be exclusive if

action in equity to try to get greater damages.⁵⁴ Some courts have found appraisal to be the exclusive remedy while other courts may allow for relief in equity.⁵⁵ In those states that require appraisal, when valuing a share there is also the issue of whether a lack of marketability or minority discount should apply.⁵⁶

Traditional fiduciary duty can be problematic for minority shareholders. The business judgment rule protects business decisions and the duty of loyalty requires either bad faith or unfair conflicts of interests. But some actions taken by those in control can be beneficial to them but not implicate traditional fiduciary duties. For example, when a corporation bought the shares from the original founder who was part of the control group without including the minority shareholder, the minority shareholder could not sue under traditional fiduciary duty because the corporate purchase could be viewed as a business decision and the price paid was fair.⁵⁷

Minority shareholders in a close corporation have limited rights because default rules including traditional fiduciary duties are not necessarily protective of the reasonable expectations of minority shareholders. Shareholders can often optimally protect themselves by contracting *ex ante*.⁵⁸

B. *Enhanced Fiduciary Duty*

One response to the position of minority shareholders, the limits of traditional fiduciary duties, and failure to contract for protections *ex ante* has been the development of enhanced fiduciary duties in close corporations. Courts have often analogized close corporations with partnerships to provide remedies for minority shareholders. The Massachusetts courts have been instrumental in this development. In the case of *Donahue v. Rodd Electrotype Co.*,⁵⁹ two shareholders had worked at their company for many years without a shareholder

there is self-dealing, fraud, deliberate waste, misrepresentation or other unlawful conduct.

54. For example, recissory damages would allow sharing of the benefits to the acquirer that resulted from the merger. PINTO BOOK, *supra* note 12 at §10.03[C][2][a].

55. The issue of the exclusivity of appraisal as a remedy in freezeouts is not uniform. Some statutes make an exception for appraisal in control transactions or if the action is unlawful or fraudulent. Some make appraisal the only remedy in all cases. See OPPRESSION BOOK, *supra* note 8, at 5-130.

56. A minority discount reflects the fact that minority shareholder often lack corporate decision-making power while a lack of marketability discount further reduces the value of shares because no ready market exists where the shares could be sold or resold. The prospect of obtaining the minority's shares, and doing so at a discount from "fair" value, may create incentives for the majority to squeeze out the minority by one means or another. *Security State Bank, Hartley, Iowa v. Ziegeldorf*, 554 N.W.2d 884 (Ia. 1996).

57. *Donahue*, 328 N.E.2d 505; See text at *infra* notes 59-61 where a remedy was given to the minority shareholder using an enhanced fiduciary duty.

58. See discussion *infra* Part V.

59. *Donahue*, 328 N.E.2d 505.

contract. Rodd became the controlling shareholder and Donahue had a minority interest. After Donahue's death, his wife inherited his shares and no dividends were paid. When Rodd sought to be bought out by the corporation, Mrs. Donahue sued asking for an equal opportunity to sell her shares at the same price. Because the price offered for Rodd's share by the corporation appeared to be fair there was no duty of loyalty issue. However, the court discussed the problems minority shareholders faced in close corporation, such as being oppressed by those in control and the difficulty of exiting. The court held "that stockholders in the close corporation owe one another substantially the same fiduciary duty in the operation of the enterprise that partners owe to one another"—one of "utmost good faith and loyalty."⁶⁰ Thus the court found an enhanced fiduciary duty for controlling shareholders in their treatment of minority shareholders. In *Donahue* the minority shareholder should have been given the same opportunity to sell her shares to the corporation that had been given to the controlling shareholder.⁶¹

The *Donahue* duty was extended in another Massachusetts case, *Wilkes v. Springside Nursing Home, Inc.*⁶² Here, a group of investors set up a corporation without any shareholder agreement. After many years of operation, some bad blood developed between Wilkes and another shareholder. As a result, the majority did not re-elect Wilkes to the board and took away his position and salary. He sued, arguing that the *Donahue* heightened duty should apply. But here the issue was not a buyout, but instead, business decisions such as salary and positions. The court recognized the right of those in control to some "selfish ownership," but again recognized the need to protect the reasonable expectation of shareholders investors when they invested.⁶³ Given their long history, it was clear here that each shareholder expected both salary and voice. The court then went on to note that, because "the majority, concededly, have certain rights," the court must determine "whether the controlling group can demonstrate a legitimate business purpose for its action." If there was such a purpose, the minority can demonstrate a less harmful alternative to the

60. *Id.* at 593.

61. If a controlling group of shareholders uses its own funds to purchase another shareholder's shares, absent violation of a buy-sell agreement, a shareholder denied the opportunity to purchase those shares may not have a cause of action. *See, e.g., Zidell v. Zidell, Inc.*, 560 P.2d 1091 (Or. 1977). *But see Jones v. H.F. Ahmanson*, 460 P.2d 464 (Cal. 1969), where the California Supreme Court broadly imposed fiduciary duties on a controlling shareholder to provide an equal opportunity when they sold transferred their shares to another corporation to cash in on their value.

62. *Wilkes v. Springside Nursing Home, Inc.* 353 N.E.2d 657 (Mass. 1976).

63. On the issue of evolving expectations after investing, see *infra* note 86.

minority's interest.⁶⁴ Under this test the court tried to balance protection for the minority and the rights of those in control.⁶⁵

Not all states have followed the Massachusetts's approach.⁶⁶ For example, Delaware courts have indicated that minority shareholders of Delaware corporations are not entitled to such protection. In *Nixon v. Blackwell*,⁶⁷ there was a selective stock repurchase plan that, as in *Donahue*, excluded a minority shareholder. The Delaware Supreme Court in *Nixon* rejected Rodd's approach of enhanced fiduciary duty and equal opportunity. Instead, the court looked at the issue under traditional fiduciary duty standards of care and loyalty and did not adopt an enhanced fiduciary duty or partnership analogy. While recognizing the problems faced by minority shareholders the Court indicated that the issues were best dealt with through *ex ante* contracting⁶⁸ and electing to file as a close corporation under the Delaware statute which allows for contracting around standard default rules.⁶⁹ Here the selective buyout met the duty of loyalty requirement of entire fairness.⁷⁰ The dissimilar treatment of the shareholders was entirely fair because the directors, who owed their duty to the corporation, had acted in the corporation's best interest. The court rejected the notion that equal treatment towards minority shareholders was required. Thus in Delaware, close corporations controlling shareholders' fiduciary duty is to the corporation and there is

64. See generally Rene Reich-Graefe, *Symposium: Fiduciary Duties In The Closely Held Firm 35 Years After Wilkes v. Springside Nursing Home: Wilkes v. Springside Nursing Home, Inc.*, 33 W. NEW ENG. L. REV. 247 (2011) (discussing the history and legacy of *Wilkes*).

65. While *Donahue* and *Wilkes* were important judicial protections for minority shareholders, the courts are wary of the use of this enhanced fiduciary duty, especially when shareholders were also employees and had no employment contract. Since generally employees without contracts are viewed as employees at will, their dismissal raises an issue of when to apply the enhanced fiduciary duty when they are also minority shareholders. For such a dismissal to be a breach of fiduciary duty there needs to be a showing that the employment was closely connected to being a shareholder and part of the reasonable expectations of becoming a shareholder. See *Merola v. Exergen Corp* 423 Mass. 461 (Mass. 1996).

66. While Massachusetts has been described by some commentators as the majority rule, states have taken different approaches to the issue. See Mary Siegel, *Fiduciary Duty Myths In Close Corporate Law*, 29 DEL. J. CORP. L. 377 424-30 (2004) (discussing the different approaches).

67. *Nixon v. Blackwell*, 626 A.2d 1366 (Del. 1993).

68. There are potential costs of *ex post* judicial contracting by creating disincentives for the parties themselves to identify, via contract, the mix between opportunism and adaptability. A court must also consider how likely it is that it will make a mistake. Charles R. O'Kelley, Jr., *Filling Gaps in the Close Corporation Contract: A Transaction Cost Analysis*, 87 NW. U. L. REV. 216, 248 (1992) (arguing that many investors rationally prefer the statutory allocation of power favoring shareholders).

69. DEL. GEN. CORP. LAW § XIV.

70. The use of an entire fairness test would not capture some of the actions taken by controlling shareholders unless the court broadens its perspective. See Robert Ragazzo, *Toward A Delaware Common Law Of Closely Held Corporations*, 77 WASH. U. L. Q. 1099 (1999).

no enhanced duty similar to partnership law.⁷¹ According to the court, protection is best achieved through contracting. As the court said in *Nixon*, “the tools of good corporate practice are designed to give a purchasing minority stockholder the opportunity to bargain for protection before parting with consideration. It would do violence to normal corporate practice and our corporation law to fashion an ad hoc ruling which would result in a court-imposed stockholder buy-out for which the parties had not contracted.”⁷²

Often shareholders fail to contract *ex ante* for protection.⁷³ There are a variety of investors in business, ranging from friends and family to sophisticated individuals and institutions. Some investors expect participation in the business while others are looking only for a return in its success. The amount that people invest can also vary. Failing to contract may be because investors would rather build a business than pay legal costs. Investors may also not want to focus on possible problems, especially if there are personal relationships involved. In addition, some family owned businesses are not solely concerned with the business and may have other goals.⁷⁴

C. Statutory Protection for Oppression

Recognition of the difficulties in close corporations faced by minority shareholders have resulted in the enactment of a variety of state statutes designed to protect minority shareholders from oppression. Analogy to partnerships was often the rationale for such statutes since the default rule for partnerships is that dissatisfied partners can usually exit and force dissolution.⁷⁵ Historically, courts were often reluctant to order dissolution of a corporation even on the permitted statutory grounds of deadlock, dissension, or that those in control were wasting or misusing corporate assets, because dissolution was discretionary. This was especially true when the corporation was profitable⁷⁶ or the dissolution could actually harm the minority by allowing the controlling shareholders to take the dissolved busi-

71. See *Riblet Products Corp. v. Nagy*, 683 A.2d 37 (Del. 1996) (holding that *Wilkes* was not the law in Delaware).

72. *Nixon*, 626 A.2d at 1380.

73. See discussion of contracting *infra* Part V.

74. Benjamin Means, *Nonmarket Values in Family Businesses*, 54 WM. & MARY L. REV. 1185 (2013) (arguing that when conflicts arise in a family business, courts should give weight to shared family values relevant to the parties' expectations).

75. Under REVISED UNIF. P'SHIP ACT (R.U.P.A.) § 601, dissolution is defined differently than under prior Uniform Partnership Act, reducing the events which will actually dissolve the partnership. Instead, a “dissociation” may occur which will not always result in a winding up and termination such as on the death of a partner. R.U.P.A. §701 (2008).

76. *Weiss v. Gordon*, 301 N.Y.S.2d 839, 843 (N.Y. App. Div. 1d 1969) The New York legislature amended its dissolution statute in 1979 to remove the issue of profitability from being considered. N.Y. BUS. CORP. LAW § 1111(b)(3).

ness over.⁷⁷ A growing recognition of the problems facing minority shareholders led to calls for statutory remedies for minority shareholders.⁷⁸

Many legislatures responded by adding a provision to their dissolution statutes allowing dissolution for actions that are fraudulent, illegal,⁷⁹ or oppressive.⁸⁰ Oppression is often the ground used for dissolution but it was not defined by the statutes, so courts have given meaning to the concept.⁸¹ For example, the New York Court of Appeals adopted the denial of reasonable expectations⁸² test for what constituted oppression in *In re Kemp & Beatley, Inc.*⁸³ the court stated:

77. *Wollman v. Littman*, 316 N.Y.S.2d 526 (N.Y. App. Div. 1d 1970).

78. See, e.g., Allen B. Afterman, *Statutory Protection for Oppressed Minority Shareholders: A Model for Reform*, 55 VA. L. REV. 1043 (1969) (examining the oppression provisions of the English Companies Act of 1948 and the Uniform Australian Companies Act of 1961 as a potential model for the United States); J. J.A.C. Hetherington & Michael P. Dooley, *Illiquidity and Exploitation: A Proposed Statutory Solution to the Remaining Close Corporation Problem*, 63 VA. L. REV. 1 (1977) (emphasizing the problem of exploitation as related to illiquidity and requiring an exit through a buyout at the election of the minority).

79. Illegality and fraud are also grounds in most statutes for dissolution and may also frustrate a shareholder's reasonable expectations yet not be oppressive. Oppression is usually directed at a minority shareholder personally, whereas fraudulent or illegal conduct can instead be directed at "solely the shareholder's investment in the corporation. For example, misappropriation of funds within a corporation may violate a shareholder's reasonable expectations regarding the management of the company but it may not be oppressive because it is not directed specifically at a minority shareholder. Nonetheless, because such fraudulent or illegal conduct would affect the corporation, and hence the shareholder's stock interest in that corporation, such conduct would be actionable under the statute, even in the absence of oppression, because the statute is written in the disjunctive." *Brenner v. Berkowitz*, 634 A.2d 1019,1029 (N.J. 1993).

80. See, e.g., M.B.C.A. § 14.30 provides in pertinent part:

The [Superior Court, Circuit Court, or court of general jurisdiction no matter how named] may dissolve a corporation: . . .

(2) in a proceeding by a shareholder if it is established that:

(i) the directors are deadlocked in the management of the corporate affairs, the shareholders are unable to break the deadlock, and irreparable injury to the corporation is threatened or being suffered or the business and affairs of the corporation can no longer be conducted to the advantage of the shareholders generally, because of the deadlock;

(ii) the directors or those in control of the corporation have acted, are acting, or will act in a manner that is illegal, *oppressive*, or fraudulent;

(iii) the shareholders are deadlocked in voting power and have failed, for a period that includes at least two consecutive meeting dates, to elect successors to directors whose terms have expired; or

(iv) the corporate assets are being misapplied or wasted. [Emphasis added.]

81. See OPPRESSION BOOK *supra* note 8, at § 7:11 (discussing different statutory approaches to oppressions and remedies).

82. See Robert B. Thompson, *Corporate Dissolution and Shareholders' Reasonable Expectations*, 66 WASH. U. L.Q. 193 (1988) (analyzing the historical development and future implications of the reasonable expectations standard).

83. *Matter of Kemp & Beatley, Inc.*, 473 N.E.2d 1173, 1180 (N.Y. 1984). Two former employees who were shareholders of the corporation brought the dissolution proceeding because they were denied "de-facto dividends" when they were no longer

[Defining oppressive conduct] has been resolved by considering oppressive actions to refer to conduct that substantially defeats the “reasonable expectations” held by minority shareholders in committing their capital to the particular enterprise A shareholder who reasonably expected that ownership in the corporation would entitle him or her to a job, a share of corporate earnings, a place in corporate management, or some other form of security, would be oppressed in a very real sense when others in the corporation seek to defeat those expectations.⁸⁴

While both *Wilkes*⁸⁵ and *Kemp* focus on the test of reasonable expectations at the time of investment some courts have recognized that over time expectation can evolve or change.⁸⁶ Other courts have not used the reasonable expectations test because of its emphasis upon the minority’s expectations and not on the actions of the majority. Instead, a case-by-case analysis is used and supplemented by various factors which may be indicative of oppressive behavior.⁸⁷

Dissolution is one possible remedy for oppression but not the only possibility. Some dissolution statutes permit the controlling shareholders to buy out the minority⁸⁸ and if they cannot agree on a price the court can determine fair value.⁸⁹ Some statutes also permit

employed. The corporation had a policy of making payments to shareholders but not as dividends. The court in its decision indicated that the statute should not be used as a weapon against the majority by the minority.

84. *Id.* at 1179.

85. Reasonable expectations was also the basis for *Wilkes* application of enhanced fiduciary duty. See discussion in text at *supra* notes 62-65.

86. See *Meiselman v. Meiselman*, 307 S.E.2d 551 (N.C. 1983) (holding that “reasonable expectations” are to be ascertained by examining the entire history of the participants’ relationship at inception, as altered over time and through a course of dealing. To be reasonable the expectations should be known or assumed by the other shareholders).

87. *Kiriakides v. Atlas Food Sys. & Servs. Inc.*, 541 S.E.2d 257, 265 (S.C. 2001) (“we do not believe the Legislature intended a court to judicially order a corporate dissolution solely upon the basis that a party’s ‘reasonable expectations’ have been frustrated by majority shareholders. To examine the ‘reasonable expectations’ of minority shareholders would require the courts of this state to microscopically examine the dealings of closely held family corporations, the intentions of majority and minority stockholders in forming the corporation and thereafter, the history of family dealings, and the like. We do not believe the Legislature, in enacting section 33-14-300, intended such judicial interference in the business philosophies and day to day operating practices of family businesses.”); See also Douglas K. Moll, *Shareholder Oppression in Close Corporations: The Unanswered Question of Perspective*, 53 VA. L. REV. 749, 826 (April 2000) (a pure “reasonable expectations” approach overprotects the minority’s interest).

88. See, e.g., N.Y. BUS. CORP. LAW § 1118.

89. When the court orders this remedy as an alternative to ordering a dissolution, the court may be called upon to review the fairness of the price offered by one party to the other, or the share price determined by the court or a special master or appraiser. Two questions that arise are whether the court should apply, or approve application of a “minority discount” and, further, a “lack of marketability discount.” See *supra* note 56. Some courts have declined to apply any discounts, having reasoned that if

courts to order the sale by any shareholder which could allow the minority to buy out the majority.⁹⁰ Other statutory approaches focus on buy-outs and not dissolution.⁹¹ In addition, courts can sometimes use their equitable powers to grant other forms of relief short of dissolution. For example, the Supreme Court of Oregon listed ten forms of relief a court might grant, in addition to dissolution: (1) ordering dissolution at a future date, in the event the parties are unable to resolve their differences; (2) appointment of a receiver to continue operation of the corporation; (3) appointment of a "special fiscal agent" to report to the court on the corporation's operations; (4) retention by the court with jurisdiction over the case; (5) an accounting; (6) an injunction against specific acts of oppression such as ordering reduction in salaries or bonus payments; (7) affirmative relief such as a required dividend or reduction and distribution of capital; (8) court ordered buy-out of one party by the other; (9) affirmative relief that the minority owner be allowed to purchase additional shares; and (10) an award of damages for injury suffered as a result of oppression.⁹²

The statutory approach is not without its critics. Providing minority shareholders with protections for which they did not bargain for could undermine private ordering, the freedom to bargain, and the important role of contracting *ex ante* for protection and the most efficient results.⁹³ Judicial notions for what constitutes oppression and an appropriate remedy can also lead to uncertain application and encourage unnecessary litigation.

shareholders had proven the case there would have been a dissolution and if the corporation had been dissolved, each shareholder would have been entitled to the same amount per share and their pro rata share of the proceeds and there would be no discounting. Thus when a buyout takes place instead of dissolution, the minority shareholder should not have a discount applied to his pro rata share. In addition, the prospect of buying the minority's shares in lieu of dissolution and having them discounted to arrive at "fair" value, may create incentives for the majority to squeeze out the minority. PINTO BOOK *supra* note 12, at § 11.07[I].

90. *Muellenberg v. Bikon Corp.*, 669 A.2d 1382 (N.J. 1996).

91. Under Minnesota law a buy-out at fair value was the remedy and the standard used in actions where those in control are "unfairly prejudicial" to shareholders, directors, officers, or employees. *McCallum v. Rosen's Diversified Inc.*, 153 F.3d 701(8d Cir. 1998) (the shareholder was the CEO who was terminated, thus losing his voice in the corporation and subject to the statutory protection).

92. *Baker v. Commercial Body Builders, Inc.*, 507 P.2d 387, 395-97 (Or. 1973).

93. See Delaware approach in text at *supra* notes 66-72. Combining of partnership and corporate rules by courts on a case by case method leaves the law unpredictable. In addition, the statutory solution of a fair value buyout remains problematic due to how that value is determined and it may force a buyout when there was no wrongdoing. RIBSTEIN BOOK, *supra* note 4, at 110-11; "The right inquiry is always what the parties would have contracted for had transactions costs been zero, not whether closely held corporations are more similar to partnerships than to publicly held corporations." Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 300 (1986).

IV. LITIGATION

Enforcement of minority shareholders' rights is usually through litigation⁹⁴ which can be expensive.⁹⁵ When the primary harm is to the corporation it is the corporation that has the claim, but those in control of the corporation are often unwilling to pursue the claim, especially when they are the wrongdoers. Shareholders can pursue these claims in a representative capacity on a cause of action that derives from the corporation, called a derivative action. Here, the corporation is the real party in interest since it is primarily injured and therefore recovery belongs to the corporation.⁹⁶ The shareholders are simply suing on the corporation's behalf and cannot maintain actions on their own behalf to redress an injury to the corporation even if the value of their stock is impaired as a result of the injury.

When the focus of the litigation is the controlling shareholders abuse of their control of the corporation, such as unfair use of corporate assets, the action is usually a derivative suit. In order to get some form of direct recovery and avoid some of the procedural hurdles of derivative litigation,⁹⁷ shareholders need to convince the court that the actions by those in control were directly harming the share-

94. Arbitration is possible on a number of shareholder issues if provided by agreement. There are concerns that broad provisions could lead to management by the arbitrator not the board of directors and may not be enforceable. Such a provision could be allowed if the contracting parties follow the requirements of the state statutes for restricting board actions which usually requires an amendment to the certificate of incorporation. See text at *infra* note 111; See G. Richard Snell, *Arbitration And Corporate Governance*, 67 N.C.L. REV. 517, 526-35 (1989) (discussing how arbitration has been dealt with by New York courts and the possible role of Federal Arbitration Act).

95. Litigation can be expensive and can act as a disincentive to minority shareholders seeking protection. Under United States law each party usually pays their own litigation and there is no loser pays rule. A court can award attorney fees to the prevailing party but that is an exception. In a successful derivative action, because the corporation benefits litigations fees are usually paid by the corporation. In addition, attorneys are permitted to take a case on a contingency basis so that if the potential damages are considerable and success likely, the attorney could bear the litigation costs and is paid if there is a settlement or judgment.

96. Sometimes, in derivative litigation, courts will allow for a pro rata recovery to the shareholders to achieve equity. But the fact that the wrongdoers control the corporation will be insufficient on its own because that often is the case in derivative litigation. *Glenn v. Hoteltron Systems, Inc.*, 547 N.E.2d 71 (N.Y. 1995).

97. For example, in order to bring a derivative suit the plaintiff must prior to filing the action make demand to the board of directors who, after considering, could refuse the litigation. To avoid demand, plaintiffs have to demonstrate that demand is excused because it is futile. Under Delaware law it is whether, under the particularized facts alleged, a reasonable doubt is created: (1) the directors are disinterested and independent [or] (2) the challenged transaction was otherwise the product of a valid exercise of business judgment. *Aronson v. Lewis*, 473 A.2d 805 (Del. 1984). Even if demand is excused because the board is somehow tainted, a special board litigation committee could be appointed to try to stop the derivative suit. PINTO BOOK, *supra* note 12 at § 14.05.

holders.⁹⁸ These direct suits usually involve contractual or statutory rights of the shareholders, the shares themselves, or rights relating to the ownership of shares. For example, such direct suits include actions to recover dividends and to examine corporate books and records.

Some courts have allowed a direct action instead of a derivative suit in the context of a close corporation even where the harm was primarily to the corporation. In one case, a direct suit was allowed where the controlling shareholder was accused of paying excessive salaries, using corporate employees for personal use, and misappropriating corporate funds. There the court recognized that the controlling shareholder had a direct fiduciary duty to the minority shareholders to treat them fairly, honestly, and openly. In addition, such shareholder litigation will often not implicate the same policies that mandate requiring derivative suits when publicly-held corporations are involved. Thus, the court has discretion to treat an action raising clearly derivative claims in a close corporation as a direct action if it finds that it will not unfairly expose the corporation or defendant to a multiplicity of actions; not materially prejudice the interests of corporate creditors; and not interfere with a fair distribution of the recovery among all interested partners.⁹⁹

If the cause of action is brought under the enhanced fiduciary duty,¹⁰⁰ the litigation would be direct and not derivative because there the duty is from the controlling shareholder to the minority shareholders. In addition, litigation brought by minority shareholders under different oppression statutes would also be direct because the statutes were enacted to protect the shareholders.¹⁰¹

V. CONTRACTING *Ex Ante*

An important issue for close corporations is the extent to which the legal default rules reflect expectations of the parties and the extent to which the law allows for contractual modifications of corporate law rules.¹⁰² Minority shareholders in close corporations

98. Delaware courts inquire as to who suffered the harm and who would receive the recovery to decide the type of litigation. *Tooley v. Donaldson, Lufkin & Jenrette, Inc.*, 845 A.2d 1031 (Del. 2004).

99. *Barth v. Barth*, 659 N.E.2d 559 (Ind. 1995); see also A.L.I. CORP. GOV. PROJ. § 7.01(d). This approach is not universal with some states rejecting this approach. *Bagdon v. Bridgestone/Firestone, Inc.*, 916 F.2d 379, 384 (7th Cir. 1990) (applying Delaware law);

100. See discussion of duty *supra* Part III, B.

101. For a discussion of the statutes see *supra* Part III, C.

102. There has been a good deal of attention paid to this issue in the context of publicly traded corporations where the focus is on different viewpoints, between those who believe that corporations should be able to opt out of rules since a corporation is "nexus of contract" and those who believe that corporations need a set of mandatory rules that cannot be contracted around, regardless of intent. See Symposium, *Contractual Freedom in Corporate Law*, 89 COLUM. L. REV. 1395 (1989).

have no real voice, a limited right to information, control and a return, and minimal ability to exit because of the lack of any ready market for the shares. While the law has evolved and default protection of minority shareholders is available in some states, contracting *ex ante* can provide more predictable and potentially less costly protections than the unpredictability of fiduciary duty litigation.

Historically, contracting for protection was not always enforceable. Since corporate rules were applicable to both publicly traded and close corporations, some courts in the close corporation context took an inflexible approach to variations of corporate norms. This meant that minority shareholders had limited ability to protect themselves by contract. Any contractual provision had to be consistent with the statutory framework and policies. This heavily regulatory approach limited the ability of shareholders to freely contract around the rules.¹⁰³ In one early case, two unequal shareholders agreed to a unanimity provision for shareholder and board voting, yet the court found it invalid because unanimity was not authorized by the statute at that time and undercut statutory policies. According to the court, “[t]he State, granting to individuals the privilege of limiting their individual liabilities for business debts by forming themselves into an entity separate and distinct from the persons who own it, demands in turn that the entity take a prescribed form and conduct itself, procedurally, according to fixed rules.”¹⁰⁴ Other cases reflected a similar view, that corporate rules reflect legislative policy and contracts have to be authorized or consistent with the statute.

Over time the legislatures and courts have recognized possible oppression by the majority and the important need that close corporations have for contracting *ex ante* as a means of protecting shareholders. This is especially true for minority shareholders who lack liquidity and the presence of an independent board of directors to provide protection.¹⁰⁵

A minority shareholder can have a greater voice in the company if that shareholder is elected to the board where they will have a say and access to additional information. To ensure this, a minority shareholder can contract with the majority to be elected to the board.¹⁰⁶ Earlier cases were concerned that such a contract was a secret voting agreement or disguised voting trusts that did not com-

103. LLC law is generally viewed as being more contract friendly. RIBSTEIN BOOK *supra* note 4, at 37-38; See also Harwell Wells, *The Rise of the Close Corporation and the Making of Corporation Law*, 5 BERKELEY BUS. L.J. 263 (2008) (discussing the history and development of close corporation law).

104. *Benintendi v. Kenton Hotel*, 60 N.E.2d 829, 832 (N.Y. 1945).

105. The protection of independent directors is important in the context of publicly traded corporations. PINTO BOOK, *supra* note 12, at § 5.02(F).

106. In addition to a shareholders agreement there are other ways to provide for selection to the board. Such as through cumulative voting (provided in the certificate), voting trusts (an agreement that must comply with statutory requirements), or the

ply with the statutory requirements. However, today corporate statutes now recognize shareholder agreements that deal with voting on the shareholder level and provide for them to be enforced.¹⁰⁷

Another method to guarantee a greater voice as well as returns is to contract for position and salary. A return can also be provided for by contracting for mandatory dividends. Normally, in both cases those decisions are for the board of directors, but contracts among shareholders can take away the board's power to manage those issues. While some early courts found such contracts void for public policy reasons,¹⁰⁸ other courts were more open to such arrangements.¹⁰⁹ One court even upheld a contract explicitly mandating dividend payments because there were no minority shareholders or creditors harmed, no public injury, and no clear prohibition by statute.¹¹⁰ But judicial recognition of such agreements has not been universal and did not always provide clear guidance. In response, many state legislatures provided for shareholder agreements that can restrict and even eliminate the board, but often require agreement by all shareholders and amendment to the certificate.¹¹¹ But even the failure to comply with a statutory requirement for such restrictions that required a filing in the certificate of incorporation was not fatal to a shareholder agreement. A court took a realistic view and found that since the agreement met the statutory requirements (it was in writing and agreed to by all shareholders) and the only problem was failure to file, the certificate could be reformed by requiring such an amendment.¹¹²

use of different classes of shares (provided in the certificate). PINTO BOOK, *supra* note 12, at § 11.02.

107. M.B.C.A. § 7.31(b); For example a shareholder agreement to vote together for the election of the directors was found valid but the court did not specifically enforce it by requiring the shares to be voted a certain way but instead nullified the votes of the breaching shareholder. *Ringling Bros. Barnum & Bailey v. Ringling*, 53 A.2d 441 (Del. 1947). Subsequently, Delaware amended its law to make such shareholder voting agreements enforceable. DEL. GEN. CORP. LAW § 218(c).

108. *McQuade v. Stoneham*, 189 N.E. 234 (N.Y. 1934) (holding that the contract was void for public policy reasons because it precluded the board for exercising its judgment as required by the statute).

109. The same New York court that decided *McQuade*, only two years later allowed for a shareholder contract that named one of the shareholders as general manager noting that unlike *McQuade*, there were no minority shareholders and the contract allowed for his replacement. *See Clark v. Dodge*, 199 N.E. 641 (N.Y. 1936). However that same court in *Long Park v. Trenton-New Brunswick Theatres Co.*, 77 N.E.2d 633 (N.Y. 1948), voided a shareholder agreement where all the shareholders placed all management power into the hands of one of the shareholders because it violated the statutory norm of management by the board of directors.

110. *Galler v. Galler*, 203 N.E.2d 577 (Ill. 1964) (holding that creditors were protected because dividends were limited to amounts paid over a minimum earned surplus).

111. M.B.C.A. § 7.32 (also allows the provision to be in the bylaws).

112. *Adler v. Svingos*, 436 N.Y.S.2d 719 (N.Y. App. Div. 1d 1981).

In terms of control, an effective way to protect minority shareholders is through the use of a supermajority provision. While courts were once concerned with the possibility of deadlocks and harm to a profitable corporation,¹¹³ state statutes are now permissive and allow for such provisions. A supermajority can apply to both shareholder voting and to actions taken by the board of directors.¹¹⁴ For example, a 75% supermajority voting provision would protect a 30% shareholder if it applied to shareholder voting and would protect a single director if it applied to board voting with three directors. Such provisions can also mandate a supermajority quorum, meaning that if the minority is needed for the quorum and the minority does not attend a meeting, no legal actions can take place. The problem with any supermajority requirement is that it gives the minority significant power¹¹⁵ and creates the possibility of deadlock.¹¹⁶

While shareholders can freely transfer their shares, minority shareholders in close corporations face the problem that no one will buy them at a fair price. In order to provide a market for minority shares one can contract with other shareholders or the corporation to purchase the shares¹¹⁷ at the option of the shareholder or corporation. Usually this buyout is triggered by an event such as death, disability, or cessation of employment and can provide a degree of liquidity to shareholders, their heirs, or legatees.

Controlling shareholders who are concerned with the possibility of who will purchase other shareholder's stake in the company can also contract for restrictions on transfer.¹¹⁸ There are three basic types of restrictions that are often used in the context of close corporations: (1) first refusals, which prohibit a sale of shares unless the shares are first offered to the corporation, the other shareholders, or both, on the terms the third party has offered; (2) first options, which prohibit a transfer of shares unless the selling shareholder first offers the shares to the corporation, the other shareholders, or both, at a

113. See text at *supra* note 104.

114. Usually, supermajority provisions must be in the certificate and any changes must meet the same voting requirements. See M.B.C.A. § 7.27 (applies to shareholder voting).

115. In *Smith v. Atlantic Props., Inc.*, 422 N.E.2d 798 (Mass. 1981), a supermajority requirement, allowed a minority shareholder a veto power over certain transactions. The shareholder vetoed any dividend payment because of his tax bracket. The corporation was subject to tax penalties for failure to pay a dividend. The court, using the *Donahue* principle, held that the minority shareholder could not arbitrarily or unreasonably withhold his consent and that a minority shareholder can also be subject to enhanced fiduciary duty.

116. Deadlocks can lead to a court ordered dissolution. M.B.C.A. § 14.30 (a)(2).

117. Corporate stock repurchases are subject to statutory legal capital rules that apply to dividends in order to be legal. M.B.C.A. § 6.40.

118. U.C.C. § 8-204 provides in part that, "[a] restriction on transfer of a security imposed by the issuer, even if otherwise lawful, is ineffective against a person without knowledge of the restriction . . . unless the restriction is noted conspicuously on the security certificate."

price fixed under the terms of the buy-sell or similar agreement, often in accordance with a formula contained therein; and (3) consent restraints,¹¹⁹ which prohibit a transfer of shares without the permission of the corporation's board of directors or other shareholders. These restrictions can enable the shareholders to keep ownership "close," giving them the opportunity to at least limit ownership to themselves or to those whose ownership fits with their business plan.¹²⁰ Sometimes the restrictions are a means of keeping the existing shareholders from selling, or from selling other than at very disadvantageous terms, but such restrictions must be reasonable.¹²¹

A problem that arises in such buyouts is how to value the shares. There are a variety of valuations that can be used, including book value, earnings approach, an appraised value, or agreement to periodic review. The amount under book value¹²² can turn out to be very low when compared to the fair value of the shares. Generally, the mere fact that the contractual price is substantially less than fair value at the time of buyout is not in itself grounds for invalidating the agreement since courts are loath to undo any previous bargains.¹²³ But there is the possibility that some courts may use the enhanced fiduciary standard, if applicable,¹²⁴ or contract principles to undo an agreement if there are issues other than price.¹²⁵

119. Some courts have viewed shares as property and others as contract rights. Property is subject to a rule against unreasonable restraints on its alienation. Courts now usually look at whether any restraint is reasonable or not. *See Allen v. Biltmore Tissue Corp.*, 141 N.E.2d 812 (N.Y. 1957).

120. A drafting concern in this area is to be sure that the restrictions apply to different types of transfer such as property settlements in a divorce or claim by a creditor in the shares. *See F.B.I. Farms Inc. v. Linda Moore*, 798 N.E.2d 440 (Ind. 2003).

121. *Id.* at 447. In *Rafe v. Hindin*, the court found an unreasonable restraint in a consent restriction. In two shareholder corporations, a shareholder could sell only to the other shareholder or transfer to a third party only upon written permission from the other shareholder. Since there were no guarantees or promises that consent would not be unreasonably withheld, the court found that "the restriction amounts to an annihilation of property." 288 N.Y.S.2d 662, 665 (App. Div. 2d 1968).

122. Book value is derived for the balance sheet and is asset based and can be low because of conservative accounting principles such as cost based. In addition, it does not fully reflect the earnings value. *See PINTO BOOK supra* note 12, at § 4.05.

123. In *Allen*, the contract set the price for any buyout at \$5. Twenty years later, the corporation agreed to buy the stock from the shareholder's estate for \$20 (above the contract price but significantly below its fair value). According to the court, "the validity of the restriction on transfer does not rest on any abstract notion of intrinsic fairness of price. To be invalid, more than mere disparity between option price and current value of the stock must be shown. (citation omitted). Since the parties have in effect agreed on a price formula which suited them, and provision is made freeing the stock for outside sale should the corporation not make, or provide for, the purchase, the restriction is reasonable and valid." *Allen*, 141 N.E.2d at 818.

124. *See discussion supra* Part III. B.

125. One possibility is a claim for breach of the implied covenant of good faith found in every contract. That applies when the other party has acted arbitrarily or unreasonably, thereby frustrating the fruits of the bargain that the asserting party reasonably expects at the time of contracting. *Nemec v. Shrader*, 991 A.2d 1120 (Del.

Contracting Over Fiduciary Duty

While contracting for protection by minority shareholders in close corporations is an important way to protect shareholders, the issue of whether and to what extent such contracting should include fiduciary duties is hotly debated.¹²⁶ Those who support private contracting view the corporation as a “nexus of contracts” and the primary role of law to provide default rules that can be changed by contracts.¹²⁷ Others argue that the corporation is more than simply contracts and that regulation and mandatory rules have a role to play in protecting investors.¹²⁸ There are real concerns about allowing such contracting around fiduciary duties in the context of publicly-traded corporations because widely dispersed owners cannot really negotiate, and because of the existence of collective action problems.¹²⁹ In the closely held context, the concern is not with having too many shareholders, but with the reality that shareholders do not often focus on the problems they may face when investing in a corporation. This could be due to a variety of factors such as the costs associated with contracting, difficulty of predicting future behavior¹³⁰ and upsetting established relationships.¹³¹ In addition, shareholders in close corporations do not have any of the protections shareholders

2010). This is not intended to allow courts to rewrite a contract, but to deal with opportunistic behavior. By one party, sometimes someone exits the company, and under their contract, receives significantly less than they would have received if they were able to wait. *Compare* Gallagher v. Lambert, 74 N.Y.2d 562 (1989) (shareholder employee was fired just before the price under the contract would have been much higher but no breach of fiduciary duty or implied covenant of good faith since shareholder received what was bargained for and had not contractual right to remain), *with* Jordan v. Duff and Phelps, 815 F.2d 429 (7d Cir. 1987) (employee left right before a merger that he was unaware of and that would have been at a much higher price for his shares. The fact the employee could have been terminated at any time did not permit the corporation from opportunistically denying him the higher price).

126. See Symposium, *supra* note 102. Courts often look to contracts between the shareholders when faced with claims of fiduciary duty and often the contract will prevail as long as the contract did not include any overreaching. See Mary-Hunter Morris, *Only “The Punctilio” If I Say So: How Contractual Limitations on Fiduciary Duties Deny Protection To Victims of Oppressive Freeze-Outs Within Private Business Entities*, 10 DUQ. BUS. L.J. 73 99-101 (2008) (discussing Massachusetts’ court handling of contracts and oppression claims).

127. E.g., Frank H. Easterbrook & Daniel R. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425 (1993).

128. E.g., Michael Klausner, *The Contractarian Theory of Corporate Law: A Generation Later*, 31 J. CORP. L. 779 (2006).

129. See ROBERT CHARLES CLARK, *PRINCIPLES AND AGENTS: THE STRUCTURE OF BUSINESS* (Pratt & Zeckhauser eds., 1985) (discussing agency costs versus fiduciary duties).

130. Robert Raggazzo, *Toward A Delaware Common Law Of Closely Held Corporations*, 77 WASH. U. L. Q. 1099, 1129 (1999).

131. Douglas Moll, *Minority Oppression & The Limited Liability Company: Learning (Or Not) From Close Corporation History*, 40 WAKE FOREST L. REV 883, 912-15 (2005). See also *supra* note 75.

in publicly traded corporations have such as markets, independent directors, and most federal securities laws.¹³²

States statutes now allow shareholders to provide in their certificates¹³³ a provision that eliminates damages in duty of care cases, but not for duty of loyalty.¹³⁴ These statutes were enacted in the context of publicly traded corporations but also apply to those close corporations that have such provisions in their certificate.¹³⁵ Yet for other business organizations, such as LLCs, some states (notably Delaware) allow for greater contracting including limiting or eliminating duty of loyalty claims.¹³⁶ Other states limit such contracting.¹³⁷ Those who support expanded contracting think that there are ways to protect investors other than fiduciary duty that are more cost effective and less litigious.¹³⁸ Others believe that there is an important role for fiduciary duty and the courts that should not be contracted away.¹³⁹ It will be interesting to see whether the Delaware approach, allowing for complete contracting around fiduciary duties for LLCs, may eventually become the norm for close corporations.

CONCLUSION

An important issue for close corporations in the United States is the need to protect minority shareholders from controlling shareholders while allowing the controlling shareholders the right to exercise control over the business. Default corporate law rules have evolved and now provide greater protection to minority investors under both

132. PINTO BOOK, *supra* note 12, at § 5.02. Sometimes federal securities law may also apply, *see supra* note 10.

133. Such a provision can be included at the initial incorporation stage or added later by a vote of the board and shareholders. E.g. M.B.C.A. §§10.02 & 10.03.

134. *See Sutherland v Sutherland*, 2009 W.L. 857468 (Del Ch. 2008) (a certificate that attempted to remove judicial scrutiny of duty of loyalty was contrary to law and public policy).

135. *See* PINTO BOOK, *supra* note 12, at §§ 8.04-8.05 (discussing the history of Del § 102(b)(7) as a result of the case of *Smith v. Van Gorkom*). Some states like Delaware permit corporations to renounce corporate opportunities in specified business opportunities or specified classes or categories of business opportunities by placing a provision in their articles of incorporation. DEL. GEN. CORP. L. 122(17).

136. 6 Del. C. 18-1101(c), provides that “the member’s or manager’s or other person’s duties,” including fiduciary duties to the extent they are otherwise owed, “may be expanded or restricted or eliminated by provisions in the limited liability company agreement; provided, that the limited liability company agreement may not eliminate the implied contractual covenant of good faith and fair dealing.” *See supra* note 125. In 2013, Delaware clarified that if there is a failure to contract about fiduciary duty in the contract of an LLC, the default rule will be fiduciary duties. DEL. LTD. LIAB. Co. ACT. § 18-1104.

137. Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609 1623-26 (2004).

138. RIBSTEIN BOOK, *supra* note 4, at 221.

139. *See* Miller, *supra* note 137.

the common law and state statutes while balancing the needs of controlling shareholders. In addition, the law has evolved to permit and encourage private contracting to protect minority shareholders. In our federal system not all states follow the same path; there are many different common law and statutory provisions and some states view contracting as the preferred means for protection.

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Company Law and the Law of Succession Droit Commercial/Commercial Law†

TOPIC III. A

This Report explores the intersection of company law and the law of succession in the United States of America. U.S. company law features a complex variety of business entity forms, available in different U.S. states, with their own legal rules related to important issues such as the how much ownership is separated from control. The death of an owner, and the potential distribution of her rights and interests to heirs, can be a significant turning point in a business entity's life as personal succession and business succession intersect. This paper offers a structure for understanding the complexity of the U.S. system by examining some potential legal effects of the death of an owner and by identifying a set of key factors of the U.S. approach to succession issues. Significant factors include the federalist nature of the U.S. system, the importance of small and family-owned businesses, and an emphasis on freedom of choice in business entity governance. Considering why these factors are critical to understanding the U.S. approach offers general insight into the current state of U.S. law as well as possible directions the law might move in the future.

I. INTRODUCTION

Business succession is a critical issue for the economy. If businesses are the factories that manufacture growth and wealth, then succession may offer both the opportunity for factory upgrades as well as the danger of a shut down as businesses transition into a new

* Associate Professor, The University of Alabama School of Law. The author thanks his colleagues in the American Society of Comparative Law and the participants in the 2014 Congress of the International Academy of Comparative Law in Vienna, Austria for the opportunity to serve as the U.S. Reporter on company law and the law of succession and to collaborate on the exploration of this important matter. In addition, he thanks Professor Frank Gevurtz for comments on this paper. The author also thanks his colleagues at The University of Alabama School of Law and the University of Alabama Law School Foundation for their generous support of his research. He also thanks Caroline Cease and Thomas Bridges for excellent research assistance.

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era. Better understanding how different jurisdictions provide a legal infrastructure for business succession offers insight into those jurisdictions' potential to succeed and a reflection of the values and priorities of those jurisdictions.

The United States of America takes an approach to this infrastructure that may share components and differ in some respects from that of other nations. The U.S. approach to business succession is complex. In part, this reflects the variety of business entity forms that may further vary under the laws of the different U.S. states and that also may affect the treatment of succession issues. A key component of business entity law is to what extent that law provides for the separation of ownership and control of the entity. The extent of separation may be especially important as it relates to the impact on the entity of the death of one or more of its owners. Behind business entities often are real persons, who own but may or may not manage the entity.¹ Thus, personal succession may be intricately interwoven with business succession. The death of an owner, and the potential distribution of her rights and interests to heirs, can be seen as a potential, significant turning point in the business entity's life as personal succession and business succession intersect.

It would be impossible in a limited report to describe every legal issue related to business succession and the rules adopted by each relevant state and federal law-maker to address every issue. Accordingly, in reporting on the U.S. approach and dealing with such complexity, this paper's key aim is to offer a structure for understanding the complexity of the U.S. system by examining some potential legal affects of the death of an owner and further by identifying a set of key factors of the U.S. approach to succession issues. Considering why these factors are critical to understanding the U.S. approach offers general insight into the current state of U.S. law as well as possible directions the law might move in the future.

Accordingly, this Report proceeds by first looking at how the death of an owner and succession potentially triggers the intersection of rules from multiple legal subject matter areas, particularly business entity and trust and estate laws. Second, the Report explores the impact of the federalist nature of the United States and the roles assigned to states and the federal government that might affect succession. Third, the Report examines how the significance of small and family businesses in the U.S. economy might affect one's understanding of succession issues. And, fourth, the Report evaluates U.S. approaches as reflecting a more deeply embedded normative value of freedom in the U.S. legal infrastructure. Exploring in turn each of

1. Of course, entities might own other business entities as well. However, as one goes through even a complex ownership structure, one generally will find at some point real persons, even if that is several layers of ownership away.

these major facets of U.S. law related to business succession offers insight into both the current state of U.S. law as well as its potential further evolution.

II. LEGAL SUBJECT MATTER NEXUS POINT

An initial, critical characteristic of U.S. law on business and personal succession is that such law is not a single subject matter area of law standing on its own. Rather, succession situations potentially implicate numerous areas of law—and the normative values reflected in those different areas of law. Thus, the event of succession is characterized by serving as a type of nexus point between different legal subject matter areas. The term nexus derives from the Latin for “a binding together”² and circumstances of business succession may necessitate the melding of principles and rules from different areas of law. For instance, the type of business entity involved may dictate legal implications for succession and which areas of law dominate. As this paper’s title suggests, two areas of particular interest are business entity law and the law of trusts and estates. However, additional legal subject matter areas may come into play as well. Accordingly, it becomes useful to explore briefly how the individual death of an owner might have different impacts on a business under different legal circumstances.

A. *Business Entity Law*

U.S. business entity law is noteworthy for the wide range of permissible business entity forms. These may range from businesses operated by individuals as sole proprietorships to large, public corporations. Certainly, corporations may get much attention and spring to mind when one considers U.S. company law.³ The law surrounding corporations has been subjected to extensive study.⁴ Such study reveals that even when one refers to a particular business entity form such as a “corporation,” great diversity may exist leading to nuances for the law applying to different corporate entities.⁵ One can add to this the fact that there are numerous other business association forms beyond corporations such as partnerships and limited liability

2. See *Definition of Nexus in English*, OXFORD DICTIONARIES, http://oxforddictionaries.com/us/definition/american_english/nexus (last visited Oct. 1, 2013).

3. In recent times, public attention on corporate scandals may exacerbate the inclination to focus on corporations. Indeed, such scandals tend to draw both public and regulatory attention. See Kenneth M. Rosen, “*Who Killed Katie Couric?*” and *Other Tales from the World of Executive Compensation Reform*, 76 *FORDHAM L. REV.* 2907, 2908-09 (2008).

4. See generally FRANKLIN A. GEVURTZ, *CORPORATION LAW* (2d ed. 2010); ROBERT CHARLES CLARK, *CORPORATE LAW* (1986).

5. For example, closely held corporations have interesting legal issues associated with them. See GEVURTZ, *supra* note 4, at 471-550.

companies with their own subspecies and sets of rules.⁶ The narratives surrounding the emergence of different types of business entities tell the story of different mixes of legal rules to address particular concerns.⁷ Thus, to understand company law's role in succession means to first appreciate multiple sets of rules applicable to a wide range of business entities.

1. Entity Law Basics and Succession

Company law itself may define certain basic aspects of entity transitions and succession. Some business entities achieve a status equivalent to legal personhood. For instance, the law's conception of corporations as "legal persons" introduces a variety of concerns.⁸ Once an entity is itself a legal person created pursuant to company law, it becomes clear how the law of creation also may help define when such an entity ceases to exist in its current form and fades away or turns into something else. This situation illustrates a type of business succession moment governed, at least in part, by business entity law. For example, Chapter 14 of the Model Business Corporation Act provides for the dissolution of a corporation.⁹ Such dissolution might be voluntary,¹⁰ administrative,¹¹ or judicial, and has legally prescribed ramifications related to each.¹² For instance, in the case of a voluntary dissolution, corporate existence can continue for the winding up and liquidation of the entity with the possibility of transference of shares in the corporation.¹³ There are also provisions for handling claims against the corporation.¹⁴ Such provisions are important as they ultimately might affect what is left to distribute to shareholders as part of the succession moment.

Of course, there also are moments of succession, in a broader sense, at corporations that might not have reached the finality of dissolution. This broader sense of succession could include transitions of who manages and controls the corporation. Company law covering corporate governance is particularly relevant here. At the heart of traditional U.S. corporate law is a governance norm of the separation of ownership and control; in many corporations, the shareholder own-

6. See generally CHARLES R.T. O'KELLEY & ROBERT B. THOMPSON, CORPORATIONS AND OTHER BUSINESS ASSOCIATIONS 3-4 (6th ed. 2010)

7. See, e.g., Susan Pace Hamill, *The Origins Behind the Limited Liability Company*, 59 OHIO ST. L.J. 1459 (1998).

8. See CLARK, *supra* note 4, at 675-703.

9. See MODEL BUS. CORP. ACT §§14.01- 14.05 (2011). As discussed further below, the Model Business Corporation Act is not itself legally binding, but is a model statute that states may choose to use as their binding law. See Part III, *infra*.

10. MODEL BUS. CORP. ACT §§14.01-14.09 (2011).

11. *Id.* §§ 14.20-14.23.

12. *Id.* §§ 14.30-14.34.

13. See *id.* §14.05 (describing "effect of dissolution").

14. See *id.* §§14.06-14.07.

ers are not directly in charge of the management of the company, which is left to the board of directors and corporate officers.¹⁵ In addition to the corporate governance rules establishing such norms,¹⁶ company law corporate governance rules further provide for the election and dismissal of those in control of corporation's management.¹⁷ Shareholders' ability to indirectly influence the corporation's path by electing and removing directors, as further constrained by the method of elections and removal, can critically affect their true power.¹⁸ These company law based rules can affect greatly the ability to transition from one group of leaders to the next.

It is worth emphasizing at this point that not all corporations in the United States are large or publicly held ones. Some family and other corporations may be closely held by more limited numbers of shareholder owners. Such entities may be subject to special rules both under public law and under private arrangements by the owners. These entities, sometimes labeled as "close" corporations, can be defined differently in various jurisdictions.¹⁹ As a practical matter, separation of ownership and management in the governance of these entities may not be as formally separated in some of these entities as in larger, publicly held corporations.²⁰ For instance, shareholders may expect to be employees of the corporation or have other more active roles.²¹ Such entities also may trigger special concerns about

15. See O'KELLEY & THOMPSON, *supra* note 6, at 153-58 (contrasting roles of directors, officers, and shareholders).

16. See, e.g., MODEL BUS. CORP. ACT, § 8.01 (2011) ("All corporate powers shall be exercised by or under the authority of the board of directors of the corporation . . ."); Del. Gen. Corp. L. § 141 (noting authority of board of directors over major corporate matters).

17. See, e.g., MODEL BUS. CORP. ACT §§ 8.02-8.06 (governing election and terms of directors); §§ 8.07-8.09 (governing resignation and removal of directors); § 8.43 (governing resignation and removal of officers).

18. See MODEL BUSINESS CORPORATION ACT, §§ 7.01-732 (2011) (governing shareholder meetings, voting, and voting trusts, voting agreements, and shareholder agreements); see also Kenneth M. Rosen, *Mickey, Can You Spare a Dime? DisneyWar, Executive Compensation, Corporate Governance, and Business Law Pedagogy*, 105 MICH. L. REV. 1151, 1162-65 (2007) (noting views of shareholder power's importance in corporate governance debate).

19. See F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL & THOMPSON'S CLOSE CORPORATIONS AND LLCs: LAW & PRACTICE § 1:2 (3d ed. rev. 2013). While many close corporations may be smaller enterprises, size is not necessarily determinative of whether an entity falls into a close corporation regime. See *id.*, § 1:3. Even the term "close" corporation may have different meaning in different jurisdictional settings from "closely held" or similar terms and can certainly differ in aspects from similar non-corporate entities such as limited liability companies. See *id.*, §§ 1:4-1:10. It is not within the scope of this paper to delineate all of the possible variations, but rather to note that special rules may be associated with each.

20. See *id.*, §§ 1:13.

21. See *id.*

oppression of minority shareholders and attempts by the law or private agreement to protect such minority stake owners.²²

Moreover, after focusing on the law of corporations, it is important to note, if one selects a non-corporate business entity form in the United States, she also must be aware of the rules related to that particular entity that similarly might affect succession. For instance, returning to an issue discussed earlier in the corporate context, partnership law may have its own rules for dissolution. Article 8 of the Uniform Partnership Act contains provisions related to winding up a partnership form of business.²³ Interestingly, some parties might avoid or prefer using the partnership form because of its inherent volatility, as there are multiple events that may cause dissolution and winding up the business.²⁴ Among these in some instances, if steps are not taken to prevent it, is the possibility that dissociation by one partner may trigger dissolution.²⁵ Dissolution again represents a major transition of succession and rules related to the transition under partnership law. For example, as the entity is dissolved, the Uniform Partnership Act provides for settling accounts amongst partners, which may in some instances leave surplus for distribution to partners.²⁶ Interestingly, the Uniform Partnership Act specifically provides for some situations, beyond the dissolution of the entity, to situations involving the death of a partner. It makes clear that “[t]he estate of a deceased partner is liable for the partner’s obligation to contribute to the partnership.”²⁷

Of course, the end of a life of a business entity under company law can become even more complex when the succession involves transference of assets to another entity. Where an existing entity

22. See generally F. HODGE O’NEAL & ROBERT B. THOMPSON, O’NEAL & THOMPSON’S OPPRESSION OF MINORITY SHAREHOLDERS AND LLC MEMBERS (2d ed. rev. 2013). Classically, one concern is the possibility of a squeeze out of minority shareholders from their ownership interests and avoiding unfair valuation of their interests. See generally *id.*

23. See UNIF. P’SHP ACT §§ 801-807 (1997). Again, as with the Model Business Corporation Act, one must be cautious that the Uniform Partnership Act itself is not binding law but may be utilized by states. See *supra* note 9. Other types of partnerships and business entities similarly may have their own rules. See, e.g., UNIF. LTD LIAB. CO. ACT §§ 701-08 (2006) (providing for winding up and dissolution of limited liability companies); UNIF. LTD P’SHP ACT §§ 801-808 (2001) (providing for limited partnership dissolution).

24. See UNIF. P’SHP ACT § 801 (1997).

25. See UNIF. P’SHP ACT §§ 601-03; 801 (1997).

26. See UNIF. P’SHP ACT § 807 (1997). For instance:

(a) In winding up a partnership’s business, the assets of the partnership, including the contributions of the partners required by this section, must be applied to discharge its obligations to creditors, including, to the extent permitted by law, partners who are creditors. Any surplus must be applied to pay in cash the net amount distributable to partners in accordance with their rights to distributions under subsection (b).

See *id.*

27. See UNIF. P’SHP ACT § 807(e) (1997).

seeks to have assets moved to it, one might have a combination through a sale or merger in a variety of ways.²⁸ State corporation statutes can play a significant role in determining how combinations proceed as these statutes are set up to, among other things, protect shareholder interests.²⁹ Moreover, in the United States, an outgrowth of the increasingly large assortment of entity forms under state company law is the desire to better accommodate transactions involving them. These might include conversion of an entity from one business entity form to another as well as combination of entities of different forms.³⁰ From the 1980s, one saw multiple states adopt their company law to be more accommodating with, for example, Delaware permitting mergers of corporations with limited partnerships, joint-stock associations, nonprofit corporations, and partnerships and Texas “broadly [authorizing] cross-entity conversion and merger.”³¹

2. Death of an Owner, Personal Succession, and Company Law

Understanding some of these basic concepts in business succession, one can proceed to view them alongside personal succession. Having recognized that company law’s distinctive rules for different entities directly affect transitions in governance and entity succession, one can draw some specific linkages to the affect of the death of an owner. While alive, as indicated above, a strategic owner likely may choose to invest in a particular type of entity to serve specific goals. Among these may be the desire to exercise greater or lesser control over management of that entity. Some investors may choose to be passive regarding most management functions, for instance, buying shares of a large publicly held corporation and perhaps not even exercising their minimum rights to cast ballots in director elections or for other matters. To the extent these investors participate in an entity with a legally limited managerial role for shareholders, such limitations may pass forward to their heirs after death as those heirs take ownership of shares.

However, if a strategic owner chose to invest in an entity to attempt to exert greater managerial control—for instance, to secure personal employment or other influence on decision-making—when she dies, her heirs may or may not have claim to the greater manage-

28. See CLARK, *supra* note 4, at 401-61.

29. See *id.* at 414-18. Of course, applicable law may extend beyond state corporate codes to other rules such as the federal securities laws and antitrust laws. See *id.* at 413-18.

30. See Robert C. Art, *Conversion and Merger of Disparate Business Entities*, 76 WASH. L. REV. 349 (2001).

31. See *id.* at 379. When the Model Business Corporation Act initially moved into reform in this area in 1999, it interestingly chose to focus on permitting corporations to merge with “other entities,” rather directly accommodating conversions. See *id.* at 380.

rial role or privileges. This outcome may hinge on specific managerial rights associated with particular owners under different entity forms provided by public law or on how iron-clad are private agreements among the decedent and other owners on managerial participation for themselves and their heirs. For instance, during her lifetime, she might enter into a shareholder agreement with fellow owners that not only governs certain voting of shares but also provides that the agreement is binding on heirs and gives the opportunity for her heir to sign and to join the agreement after she is deceased.³²

And, the strategic owner may have different aspirations on the control issue for themselves as compared to her heirs. For instance, an owner who sought active managerial control during her lifetime might anticipate ceding such control for the next generation after her death. Various motivations might inform such a desire. For example, in a more closely held entity that restricts who may buy shares in the entity to avoid the introduction of new, unfamiliar owners, the current owner might be concerned about liquidity for her estate and the ability of her heir to transfer ownership given such transfer restrictions after her death. Thus, during their lifetimes, the owners might, for example, agree to a buyout agreement triggered by death.³³

In summary, it is clear that U.S. business entity law has an important role to play for informing business succession, and that as that entity law continues to provide for more entity types it also evolves to address what happens when entities cease to exist as they once were. However, an analysis of business succession would be far from complete without examining other areas of law at the nexus with company law during a business succession. Which area of law dominates at the nexus may vary by circumstance. For instance, the significance of those other areas of law may fluctuate with the nature of the business entity at issue and the details of coverage of succession-related issues by the company law for those entities. Another legal area with potentially large impact is U.S. trust and estate law.

32. See, e.g., O'NEAL & THOMPSON, *supra* note 19, § 1:2. Prior planning and anticipation of death can be useful for other owners as well as the decedent. All of the owners might avoid some problems if they anticipate the death of one of their number early in the entity's existence. They might consider the advantages and disadvantages of arrangements for disposing of the decedent's shares, including various alternatives such as placing shares in trust or buying insurance to allow payment of an estate for shares. See *id.*, § 2:27.

33. See *id.*, § 7:3. Another issue might arise related to death and transfer restrictions. During an entity's lifetime, especially in more closely held entities, owners might informally choose to ignore transfer restrictions otherwise present in writing to allow transfer of shares to family members or others. This leaves open the danger, at a later time of less cordial relations, for attempts to stop such an informal tradition based on the written restrictions; of course, the prior informal conduct might or might not lead a court to refuse to enforce the restriction at a later point in time. See *id.*, § 7:15.

B. *Trust and Estate Law*

Trust and estate law is an excellent example of another area of U.S. law that is relevant, because it illustrates that when thinking of other relevant areas of law, relevance may come either directly or indirectly. The more direct relevance may come from trust and estate law directly settling how assets of a business are dispersed during a business succession. But trust and estate law also may come into play indirectly as it informs the more detailed settlement of issues related to succession from other legal areas.

1. Direct Relevance

As noted above, the company law governing some business forms may contain relatively detailed instruction on certain succession issues. This was a natural result as partnership law became codified and other business entity forms were statutorily created. If one engages in a program of codification, it may make sense to cover succession-related issues where possible as part of that project. Of course, as also reflected above, details may vary for company law's coverage of different entities. And, it is important to note that many businesses may be run as sole proprietorships that largely are the alter egos of their individual owners rather than constituted in a business organization form with detailed legal constraints.³⁴ In such instances, for example, if the business owner dies, that passing may result in the business assets settling into the trust and estate legal system to determine how to proceed properly with succession.

U.S. law in this area can be quite varied in the results for specific jurisdictions.³⁵ However, as a general matter, the possibility exists for addressing numerous issues under trust and estate law. For instance, there is the possibility of a business owner's demise without a will plunging one into the trust and estate law of intestate succession.³⁶ Jurisdictions may have rules to deal with a variety of issues such as the share of the estate for surviving spouses or other relatives,³⁷ the possibility of statutory wills,³⁸ heirs' gifts,³⁹

34. See O'KELLEY & THOMPSON, *supra* note 6, at 1-2 (describing sole proprietorships). This is not to say that such businesses are unregulated. They may be subject to a host of law and rules. For example, agency law may be especially significant. See, e.g., *id.* at 20-21; see also Kenneth M. Rosen, *Financial Intermediaries as Principals and Agents*, 48 WAKE FOREST L. REV. 625 (2013) (discussing generally significance of revisiting agency law, including traditional principles developed at common law). The point is that rules for some issues related to succession, such as governance, may not be developed in the same way as they are for other business entities.

35. See *infra* Part III for additional discussion of the U.S. state by state approach.

36. See generally WILLIAM M. MCGOVERN, ET AL., *WILLS, TRUSTS AND ESTATES* 49-132 (4th ed. 2010).

37. See *id.* at 49-65. For spouses, one interesting question possibly covered by legal rules is who constitutes a spouse. See *id.* at 121-32.

38. See *id.* at 67-68 (noting promulgation of statutory wills by some states as an alternative for lay persons where boxes might be ticked to show desires rather than

advancements,⁴⁰ homicide,⁴¹ disclaimers,⁴² and children who are not from marriage,⁴³ adopted⁴⁴ or the result of using reproductive technology.⁴⁵

A sole proprietor who chooses to anticipate her death and to try to arrange for her business' succession may have a variety of legal options to give effect to her intent from simple wills to the creation of more sophisticated trusts. While freedom of choice is large,⁴⁶ constraints may exist. Some jurisdictions may limit testamentary power.⁴⁷ And, even when giving is legitimate, to successfully execute her plan, she should be mindful of the variety of legal formalities associated with wills, trusts and other conveyance vehicles; failure to observe formalities might question the legitimacy of efforts after death.⁴⁸

As different business entity forms under U.S. company law have proliferated to meet the needs of users, it is useful to note that the U.S. legal system also has evolved to provide very sophisticated vehicles for those achieving great wealth in business to see that their wealth is delivered to causes close to them. For example, the Bill and Melinda Gates Foundation formed by the Microsoft co-founder and his wife has an asset trust endowment of over \$38 billion.⁴⁹ The foundation's size makes it a significant entity in its own right, and it is not surprising that the Gates' family embarked during their lifetime on forming this enterprise separate from the Microsoft company as a way to share its wealth.

Notwithstanding the above stated significance of trust and estate law for business succession, it is useful to refer back to the previous section's discussion of company law. While trust and estate law is sophisticated and varied across the United States, that law's ability to directly control business succession again may relate to the busi-

accruing the expense of having a lawyer draft a will.) Of course, even attorneys might use statutory wills, especially more sophisticated ones being created such as the Uniform Statutory Will Act. *See id.* at 68.

39. *See id.* at 68-71 (noting use of the term heirs, even when a will is drafted, possibly drawing in interpretations from intestate succession rules).

40. *See id.* at 74-79 (noting some states making adjustments to account for certain advancements to those who end up as heirs by a decedent prior to death).

41. *See id.* at 80-88 (noting rules possibly barring taking by will, will substitute, or inheritance by possible heir who killed the decedent).

42. *See id.* at 88-96 (noting rules where an otherwise legitimate heir may decline inheritance by intestate succession for reasons such as tax consequences).

43. *See id.* at 96-107 (noting importance of rules when many children are born out of wedlock).

44. *See id.* at 107-117.

45. *See id.* at 117-121.

46. *See infra* Part V.

47. *See* MCGOVERN ET AL., *supra* note 36, at 133-96.

48. *See id.* at 197-253.

49. *See Who We Are Foundation Fact Sheet*, BILL AND MELINDA GATES FOUNDATION, <http://www.gatesfoundation.org/Who-We-Are/General-Information/Foundation-Factsheet> (last visited Oct. 2, 2013).

ness entity form at issue, causing corporation, partnership or limited liability company law, for instance, to apply more directly on numerous issues instead of laws such as intestate succession. However, this does not mean that trust and estate law might still not apply in part, albeit more indirectly.

2. Indirect Relevance

Indirect relevance of trust and estate law to succession for more sophisticated business entities might come in several forms. Accordingly, it is useful to contemplate an example. For instance, although a corporation's legal personality continues despite the death of a shareholder, what happens to the decedent's shares upon death is relevant and may be affected by trust and estate law covering those shares as part of the property of her estate.⁵⁰ Who inherits those shares pursuant to trust and estate law may affect the future of the corporation. As already discussed, shareholders—particularly shareholders with large holdings—may have power in corporate elections governed by company law that select the directors empowered under company law to control the corporation's affairs.⁵¹ Trust and estate law's ability to indirectly affect business succession, even where it does not directly control all succession issues, should make another point lucid: other areas of law also might be informative and apply in some instances, further crowding the nexus created by business succession.

3. Beyond Business Entity and Trust and Estate Law

It is useful to briefly amplify how areas of law beyond business entity and trust and estate law may become relevant by exploring some examples. First, other areas of law might enhance or substitute for business entity and trust and estate law as they affect business succession. Recent U.S. legal action regarding same-sex marriage reinforces this point. The United States Supreme Court recently made major rulings in this area including recognition of the entitlement of married same-sex couples to federal benefits.⁵² Efforts to be more inclusive in our conception of families, and more generally to adjust attitudes related to sexual orientation,⁵³ necessarily implicate concepts that arise under trust and estate law and that can accordingly affect business succession. For instance, just as same sex marriage

50. Trust and estate law may not always be independently dispositive on this issue either. For example, there may be a transfer restriction agreement in place. *See* F. HODGE O'NEAL & ROBERT B. THOMPSON, O'NEAL & THOMPSON'S CLOSE CORPORATIONS AND LLCs: LAW & PRACTICE § 7:20 (3d ed. rev. 2013).

51. *See supra* Part II.A.

52. *See* Adam Litpak, *Supreme Court Bolsters Gay Marriage with Two Major Rulings*, N.Y. TIMES, June 26, 2013.

53. *See, e.g.*, Elisabeth Bumiller, *Obama Ends 'Don't Ask, Don't Tell' Policy*, N.Y. TIMES, July 22, 2011 (noting move towards open service regardless of sexual orientation in the military).

has evolved as a legal issue, so too may concepts of who has inheritance and other rights under trust and estate law.⁵⁴ Ultimately, those issues may be settled directly in trust and estate law by altering statutes fully across the nation to more explicitly recognize rights for additional family under that law. In the interim, however, the development of new ideas in other areas of the law, like family law and employee benefits law, might buttress broader interpretations of who is eligible under business succession schemes.

Second, other areas of law may be so important as to affect which choices are made under business entity and trust and estate law that ultimately also affect business succession. Tax law illustrates this point. As already noted, tax concerns may have led to the development and uses of additional business entity forms⁵⁵ and also can affect choices about accepting a share of inheritance under trust and estate law.⁵⁶ Accordingly, the best student of U.S. business succession law will recognize that it is importantly characterized by a nexus of many types of law. She also will recognize another important characteristic: the significance of federalism.

III. FEDERALISM

Under the United States Constitution, the drafters decided not to centralize all legal authority in the federal government. Rather, much is left to state law, and this is particularly the case for business entity and trust and estate law. Accordingly, another key characteristic of law applicable to business succession is that its details vary from one state to another. Notwithstanding the large state presence, however, it also is important to recognize trends of the federal government to get involved in some of the relevant legal areas.

A. *Role of State Law*

State law plays a major role in business entity and trust and estate law. For business entity laws there can be variances between states on legal rules, such as the ones mentioned above, related to business succession. In corporate law, for instance, states codes may differ. Some have seen this diversity possible under a federalist system as particularly beneficial, allowing states to serve as laboratories for different rules as they compete to attract companies.⁵⁷ Empirically, certain states with their own company law rules such as

54. Indeed, legal disputes related to same sex relationships already have been percolating in the trust and estate legal system. See McGovern et al., *supra* note 36, at 130.

55. See Hamill, *supra* note 7.

56. See *supra* note 42.

57. See ROBERTA ROMANO, *THE GENIUS OF AMERICAN CORPORATE LAW* 4-6 (1993). Interestingly, it appears that one technique of companies that faced barriers because of the proliferation of different types of business entities to merger or to conversion

Delaware have been particularly successful at attracting business seeking to incorporate.⁵⁸ Regardless of one's view of the federal system,⁵⁹ one must recognize its significance in the United States. For business succession, for instance, the details of shareholder voting rights under a particular state's corporate law can affect their ability to effect transitions to new directors and management. Moreover, differences between state laws have led to the creation of choice of law rules for the corporate arena that can affect which state's law will apply on particular issues. The internal affairs doctrine provides that courts often look to the state of incorporation, which is not necessarily the state of the company's principal operations, for determining which law governs the inner workings of a corporation.⁶⁰

Of course state corporate law differences may naturally lessen over time as states amend statutes in response to other states' statutory innovations.⁶¹ And, other efforts may encourage rule harmonization over longer periods of time for different types of company law. The United States is home to a variety of model company related laws put out by different organizations such as the American Law Institute,⁶² the American Bar Association,⁶³ and the Uniform Law Commission.⁶⁴ However, just the presence of multiple organizations promoting visions of what the law should be shows the lack of uniform views on the details of U.S. company law. Moreover, these model acts are not legally binding themselves, and must be adopted by those with law-making authority in states. Adoption might include legislatures amending company law statutes⁶⁵ as well as judges drawing on these models, not as binding in themselves, but as representative of what those judges believe the law in their jurisdictions to be.⁶⁶

Trust and estate law, which so greatly might affect business succession, similarly can differ from state to state rendering conflict rules in this area particularly important as well.⁶⁷ While uniform laws, such as the Uniform Probate Code and Uniform Trust Code, are present in this area to promote harmonization, they may be followed

might be to go to another state with more receptive rules and to set things up so that state's receptive rules applied. *See* Art, *supra* note 30, at 379-81.

58. *See* ROMANO *supra* note 57 at 6-12.

59. *Cf.* Carey, *infra* note 71.

60. *See* GEVURTZ, *supra* note 4, at 35.

61. *See* Roberta Romano, *The State Competition Debate in Corporate Law*, 8 CARDOZO LAW REVIEW 709 (1987).

62. *See, e.g.*, PRINCIPLES OF CORP. GOVERNANCE.

63. *See, e.g.*, MODEL BUS. CORP. ACT (2011).

64. *See, e.g.*, UNIF. LTD LIAB. CO. ACT (2006); UNIF. P'SHIP ACT (1997).

65. But even when a legislature largely adopts provisions from a model law, it may also include some of its own variances from the model law provisions.

66. *See, e.g.*, *Ne. Harbor Golf Club v. Harris*, 661 A.2d 1146 (Me. 1995) (utilizing American Law Institute's Principles of Corporate Governance).

67. *See* MCGOVERN ET AL., *supra* note 36, at 27-38.

even less than certain business-related uniform laws.⁶⁸ Even rules that seem nearly universal in the different states can have a major variant in some jurisdictions. For instance:

in all states, if an individual dies without a will, the surviving spouse gets a share of the estate, but the size of that share differs. When the law of foreign countries is taken into account, the differences may become greater. Nearly all American states reject a “forced share” for children of a person who dies with a will, but most other countries provide for this.⁶⁹

Once again, to the extent that trust and estate law drives results in business succession, these nuances and variants might lead to different succession outcomes in different states.

B. *The Trend to Federalize Law*

Notwithstanding that business entity law often is driven by the states, more recently, a trend worth recognizing is the federalization of business entity law, particularly in the corporate world. Certainly, corporate scandals heighten public, and thus federal government interest, in regulation of corporations.⁷⁰ However, these concerns are not entirely new. In the 1970s, Professor William Cary famously speculated as to why so many corporations from around the United States chose to incorporate in the state of Delaware, and wrote of “the movement to the least common denominator” in corporation standards and called for consideration of a greater federal role.⁷¹

For many years, the federal government has been heavily involved in the regulation of securities.⁷² As time progressed, the United States Securities and Exchange Commission (SEC) used its statutory authority to become more involved in the regulation of corporate processes, such as proxy voting,⁷³ that might be viewed as governance issues more traditionally handled by the states. However, SEC efforts in this area were not always successful or unopposed. For instance, efforts to secure greater shareholder rights to participate in the director nomination process have extended over numerous years and encountered various hurdles.⁷⁴ While these efforts may not always yield quick implementation of federal rules, they are efforts

68. *See id.* at iii.

69. *Id.* at 27 (footnotes omitted).

70. *See Rosen, supra* note 3.

71. *See* William L. Cary, *Federalism and Corporate Law: Reflections Upon Delaware*, 83 YALE L.J. 663 (1974).

72. *See, e.g.*, Securities Exchange Act of 1934.

73. *See* THOMAS LEE HAZEN, *THE LAW OF SECURITIES REGULATION* 358-89 (5th ed. 2005).

74. *See, e.g.*, *Rosen supra* note 3, at 2940.

that need to be considered for impact on the business succession process, since the U.S. federalist system includes *both* state and federal law. Beyond considering the federalist character of U.S. law affecting business succession, ascertaining the deeper nature of the law also involves recognizing certain cultural preferences that effect the U.S. law's creation. The first of these preferences is reflected in the significant presence of small and family businesses in the U.S. economy.

IV. SMALL AND FAMILY BUSINESS COROLLARY OF THE AMERICAN DREAM

U.S. recognition of the impact of small and family businesses on the American economy is another critical characteristic of business succession law. Admittedly, not all family businesses remain small nor are all small businesses run by families. However, it is useful to group small and family businesses together since their importance to business succession links to their cultural significance in the United States. They both can be linked to notions of the "American dream" that inform and permeate U.S. legal policy. While that dream is sometimes associated with specific material accomplishments, such as the purchase of a home,⁷⁵ at a more basic level the dream is about the ability for personal success and prosperity. As they are created, family and small businesses are ways for family members or close associates to enter the economy in a small way with the hope of growing the enterprise.

There is a reality associated with this dream. In the United States, these types of businesses may be very significant to the economy. PwC's *2012/2013 Family Business Survey* offers interesting insights into at least some family businesses.⁷⁶ Even in economically difficult times, almost three-quarters of surveyed businesses experienced growth in sales.⁷⁷ Moreover, 90% of these businesses viewed themselves as significant for job creation.⁷⁸ Similarly, great emphasis has been placed on the importance of small businesses to the economy and the large percentage of workers employed by small firms.⁷⁹

The perceived significance of small and family businesses translates into special attention from policy-makers.⁸⁰ For example, the

75. See Kristen David Adams, *Homeownership: American Dream or Illusion of Empowerment?*, 60 S. C. L. REV. 573 (2009).

76. *Playing Their Hand, US Family Businesses Make Their Bid for the Future*, PwC, <http://www.pwc.com/us/en/private-company-services/publications/assets/pwc-family-business-survey-us-report.pdf> (last visited Oct. 2, 2013).

77. See *id.* at 7.

78. See *id.* at 9.

79. See Todd McCracken & Dan Danner, *Commentary: The Economy Needs Small Business*, WASH. POST, Dec. 11, 2011, available at http://articles.washingtonpost.com/2011-12-11/business/35286873_1_small-business-small-business-small-firms.

80. Some actually have noted lack of uniformity on conceptualization of what businesses are small and have questioned benefits awarded based on perceptions of

White House emphasizes its focus on supporting these entities.⁸¹ Such support includes lending activity to assist these businesses.⁸² Legislators also focus on these entities both in specialized committees⁸³ and in the work of other committees.⁸⁴ This potentially impacts business succession in various ways.

The support for and prevalence of small and family businesses are significant because such entities may focus on specific succession strategies. Family businesses in particular care about succession, although not all successions are easy or without challenges.⁸⁵ Some have identified succession for family business as “the final test of greatness.”⁸⁶ The PwC survey found that 81% of surveyed businesses were family-run for multiple generations, but that a quarter anticipated changing ownership in around five years.⁸⁷ Of the latter group, 52% hoped to pass the business onto another generation to both run and own, 24% to pass the business on to the subsequent generation to only own, and then another 16% to sell to other companies or private equity investors.⁸⁸ If the economy incentivizes and holds an important place for entities that are particularly interested in succession issues, then one can declare previous legal issues associated with succession to be only more important. In addition, these issues may be even more nuanced for small and family businesses as those entities

the significance of small business. *See, e.g.*, Mirit Eyal-Cohen, *Down-sizing the Little Guy Myth in Legal Definitions*, 98 IOWA L. REV 1041 (2013); Mirit Eyal-Cohen, *Why is Small Business the Chief Business of Congress?*, Rutgers L.J. 1 (2012). For purposes of this paper, it is important to recognize regardless of one’s views of how appropriate is the policy significance placed on small business, as a practical matter small business does draw great attention of policy-makers.

81. *See Jobs & The Economy: Putting America Back to Work, Supporting Small Businesses*, <http://www.whitehouse.gov/economy/business/small-business> (last visited Oct. 2, 2013).

82. *See id.*; *see also* FY 2014 Congressional Budget Justification and FY 2012 Annual Performance Report, U.S. SMALL BUSINESS ADMINISTRATION 1-4, <http://www.sba.gov/sites/default/files/files/1-508-Compliant-FY-2014-CBJ%20FY%202012%20APR.pdf> (describing Small Business Administration plans for assisting entities).

83. *See, e.g.*, House Committee on Small Business, <http://smallbusiness.house.gov/>; Senate Committee on Small Business & Entrepreneurship, <http://www.sbc.senate.gov/public/>.

84. For instance, the House Committee on Financial Services has paid particular attention to the passage and implementation of the JOBS Act, including its desired effect of assisting start-up businesses. *See House Passes JOBS Act Deadline Bill and Homes for Heroes Act*, Press Release, Committee on Financial Services, <http://www.sbc.senate.gov/public/> (last visited Oct. 2, 2013).

85. *See* ROGER FRITZ, WARS OF SUCCESSION, THE BLESSINGS, CURSES AND LESSONS THAT FAMILY-OWNED FIRMS OFFER ANYONE IN BUSINESS (1997). Family businesses also may use legal business planning strategies as a means to not only deal with control issues but estate planning concerns. *See, e.g.*, GEVURTZ, *infra* note 92, at 822-23 (describing freeze strategy for estate planning where elderly owners pass common stock to younger family members but keep preferred raising valuation questions.)

86. *See* CRAIG E. ARANOFF & JOHN L. WARD, FAMILY BUSINESS SUCCESSION: THE FINAL TEST OF GREATNESS (1992).

87. *See* PwC *supra* note 76, at 17.

88. *See id.*

might use law, such as governance rules, to deal with their special challenges such as the power dynamics of a small number of owners perhaps joining against the owner of a minority stake in the business. However, it is important to note that the “mom and pop” business also might be challenged to select the best legal solutions for their firms and are constrained by realities of family life in addition to the law.⁸⁹

Just as family and small businesses may affect the understanding of succession issues because of their prevalence given U.S. values, it is useful to explore the influence of another U.S. value, freedom, that is characteristic of the U.S. version of the business succession law.

V. FREEDOM

Law’s relationship with freedom is complex in that law can be a vehicle for both enhancing and limiting freedom.⁹⁰ On the enhancement side, law’s support of freedom of contract and choice in formulating legal relationships can be critical.⁹¹ In the United States, business succession law is quite open to parties ultimately modifying rules in some circumstances and choosing certain paths for the law’s application. This makes the role of legal counsel critical in the United States and has led to emphasis on business planning assisted by lawyers.⁹²

Previously discussed U.S. business entity law related to business succession reflects the prioritization of freedom in the U.S. system. Choices certainly abound. Parties can choose both their business entity form and a particular state with its own set of rules for that selected entity form. But the choices go further than selecting a form and jurisdiction.

Corporate law exemplifies this. Corporate codes may provide default rules, but they also typically provide charter options. Delaware law illustrates these options. In Section 102 of the Delaware General Corporation Law, after describing the contents of the certificate of incorporation, in subsection (b), Delaware permits the certificate to include a host of additional provisions at the option of the firm that

89. See Benjamin Means, *Nonmarket Values in Family Businesses*, 54 William & Mary L. Rev. 1185 (2013). And, in addition to ex ante contractual, legal solutions, one should not under appreciate potential judicial intervention to protect minority shareholder rights in closely held entities. See Benjamin Means, *A Contractual Approach to Shareholder Oppression Law*, 79 FORDHAM L. REV. 1161 (2010).

90. See Kenneth M. Rosen, *Freedom*, 62 ALA. L. REV. 1023 (2011).

91. See *id.* at 1026.

92. See, e.g., FRANKLIN A. GEVURTZ, BUSINESS PLANNING 1-26 (4th ed. 2008).

can dramatically alter the firm's operations.⁹³ Model laws similarly provide options.⁹⁴

In addition to the freedoms inherent in U.S. statutes that might affect businesses, additional instances of the exercise of choice as it relates to rules are noteworthy. A corporation may choose to list on a stock exchange to enhance the liquidity of trading in its shares. By making that choice, the corporation voluntarily agrees to comply with that exchange's listing standards which may include significant regulation of the firm's governance.⁹⁵

Choices made through private agreements are not limited to corporations listed on stock exchanges. Partnerships often are heavily reliant on modifying default rules through a partnership agreement. Under the Uniform Partnership Act, partners are governed by a partnership agreement, but have the Act's default rules come into play when the agreement does not cover an issue.⁹⁶ Although the partnership agreement cannot waive certain aspects of the Act,⁹⁷ it can be critical in adjusting rules related to significant issues including business succession. As previously noted, the Act contains dissociation and dissolution provisions.⁹⁸ One way to avoid dissolution upon dissociation of a partner is to provide for this eventuality in a partnership agreement. Such provision could significantly clarify how a partnership will transition by business succession to new situations as partners depart for a variety of reasons.

The importance of freedom of choice extends beyond business entity law issues to trust and estate law issues that might affect succession. The ability for individuals to create wills and trusts is about deciding how their assets, which might include businesses, will move to others after their deaths. Given this potential for freedom, it is not surprising that trust and estate law seeks to give effect to the decedent's intention.⁹⁹

Recognition of the freedoms embodied in U.S. trust and estate and business entity laws becomes crucial. Because if the freedoms are not exercised, other rules from intestate ones to company law code rules may automatically apply.

93. See Del. Gen. Corp. L. § 102. Indeed, the options have expanded over time to include items such as the elimination of certain personal liability of directors. See Rosen, *supra* note 34 at 637-39.

94. See, e.g., MODEL BUS. CORP. ACT, § 2.02(b) (2011) (noting provisions that may be in articles of incorporation).

95. See, e.g., NYSE, LISTED COMPANY MANUAL, available at <http://nysemanual.nyse.com/lcm/>.

96. See UNIF. P'SHIP ACT § 103 (1997).

97. See *id.*

98. See *supra* notes 23-26 and accompanying text.

99. See ROGER W. ANDERSEN, UNDERSTANDING TRUSTS AND ESTATES 32 (3d ed. 2003) (noting that evaluation of whether to enforce a will might hinge on issues such as the intent for a document to be a will and the intent of the document's provisions).

VI. CONCLUSION

Given the inherent complexities of U.S. business succession law, including its coexistence with personal succession rules, this paper sought to provide a framework of critical characteristics of that law to help provide a better understanding of how the law operates and to provide a basis for comparison to succession laws in other jurisdictions. The lesson of U.S. law is that succession law is characterized by a need to manage multiple sets of legal rules from different subject matter areas that converge on the nexus of a business succession. In addition, one must recognize the federalist nature of the U.S. system and its impact on the laws applicable in this area. That nature requires attention to both state and federal law. Finally, for a deeper understanding of the U.S. rules, one must appreciate the values that drive them. This includes the priority placed on small and family businesses in the U.S. economy and the devotion to free choices as businesses prepare for succession.

PETER B. MAGGS*

License Contracts, Free Software and Creative Commons in the United States†

TOPIC III. B

The United States has not enacted special provisions on Free and Open Source Software (FOSS) or other alternative software licenses, with the exception of software procurement regulations, which exist at the federal, state, and local levels. There are rather few reported cases on FOSS and other alternative licenses. Moreover, these cases differ on fundamental questions of great importance, such as the interpretation of a license provision as a condition of a right to use or distribute software or as a mere promise enforceable only by damages (which may be hard to show in the case of free software), the enforceability of express license provisions terminating licenses for particular action or inaction, and on the interpretation of licenses to favor the licensor or to favor the licensee. It is also unclear if licensee becomes an “owner” of a copy of a program entitled to privileges of an “owner” under the Copyright Act.

COPYRIGHT LAW AND LICENSING LAW

In the United States, copyright law is entirely federal law; in contrast, contract law is generally state law rather than federal law. The primary source of copyright law is the federal Copyright Act of 1976 as amended. Article 301 of this Act forbids the states to grant copyright-like protection. There only are a limited number of provisions on licensing in the federal Copyright Act; however, there are also a number of important federal judicial precedents affecting licensing. The courts apply state contract law to many licensing issues. An attempt was made to add an “Article 2B” (regulating intellectual property license agreements) to the Uniform Commercial Code. This effort failed, but resulted in legislation in several states. There is universal agreement that a mechanism is needed for modification of the Uniform Commercial Code to take account of changes in the legal and

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economic environment, for instance, the shift from paper to electronic transactions. Proposed amendments require the approval of both the American Law Institute and the Uniform Law Commission (formerly named the “National Conference of Commissioners on Uniform State Laws”). The American Law Institute rejected proposed Article 2B because it was perceived as poorly drafted and as slanted against consumers.¹ The National Conference of Commissioners on Uniform State Laws then adopted the same provisions under the title “Uniform Computer Information Transactions Act,” amending it to add more protection for consumers.² Only two states adopted this Act, and a number of states passed “bomb shelter” laws precluding the enforcement of contractual choice of law provisions pointing to the Act.³

For many purposes, license agreements are viewed as ordinary contracts governed by state contract law. Most contract law is precedent-based. Restatement (Second) of Contracts summarizes generally-accepted rules. Sales contracts are governed by Uniform Commercial Code Article 2 (effective, with some variations, in all states except Louisiana). Uniform Commercial Code provisions are often applied directly or by analogy to agreements relating to computer software. There is some federal regulation of contracts, in areas such as consumer protection law and antitrust law. Federal, state, and local governments have legislation regulating government procurement, including procurement of copyrighted materials.

LAW OF FREE AND OPEN SOURCE SOFTWARE LICENSES

The United States has not enacted special provisions on Free and Open Source Software (FOSS) or other alternative software licenses, with the exception of software procurement regulations, which exist at the federal, state, and local levels. There are rather few reported cases on FOSS and other alternative licenses. However, these cases, which will be discussed below under the appropriate headings, deal with fundamental questions of great importance.

CONTRACT OR WAIVER?

Normally some provisions of FOSS licenses will be construed as contractual covenants and some will be construed as waivers (or as waivers conditioned on certain actions by the licensee) of certain

1. The author of the present article was one of the active opponents of Article 2B in the American Law Institute.

2. [http://www.uniformlaws.org/Act.aspx?title=computer Information Transactions Act](http://www.uniformlaws.org/Act.aspx?title=computer%20Information%20Transactions%20Act) (last visited Mar. 3, 2014).

3. Sandy T. Wu, *Uniform Computer Information Transactions Act: Failed to Appease its Opponents In Light of the Newly Adopted Amendments*, 33 Sw. U. L. REV. 307 (2004).

rights of the licensor under the Copyright Act. The distinction is of great importance—under contract law, remedies are normally limited to proven monetary damages, while under copyright law injunctive relief and statutory damages are normally available even if actual monetary damages cannot be proved. The determination of whether a particular provision of a FOSS license is a covenant, i.e., a promise by the licensee, or is a condition, i.e., a ground for loss of license privileges, is partially a matter of contract drafting. Restatement (Second) of Contracts § 227 calls for interpretation, in case of doubt, of a contract provision as creating a mere duty, rather than either a condition or both a duty and a condition. Use of language such as “it shall be a condition of the exercise of the privileges under this license that the licensee do such-and-such” is more likely to result in interpretation as a condition. Even if the parties clearly stated that a particular provision is a condition of exercising privileges under a license, the courts may refuse to treat the license as terminated and so may refuse to apply the severe remedies available under the Copyright Act for infringement for failure to comply with the provision. Further, since the normal remedy for breach of contract in the United States is money damages for lost expectation, damages to the copyright-holder of FOSS software may be zero.

The various federal courts of appeals do not agree on the situations in which a license provision terminating a license for particular action or inaction will be enforced.⁴

In *Jacobsen v. Katzer*,⁵ the Federal Circuit enforced language expressly conditioning permission to distribute copies on inclusion of references to the location of source files. The Court stated:

The conditions set forth in the Artistic License are vital to enable the copyright holder to retain the ability to benefit from the work of downstream users. By requiring that users who modify or distribute the copyrighted material retain the reference to the original source files, downstream users are directed to Jacobsen’s website. Thus, downstream users know about the collaborative effort to improve and expand the SourceForge project once they learn of the “upstream” project from a ‘downstream’ distribution, and they may join in that effort.

The Court indicated that public policy strongly favored enforcement of FOSS license provisions as license conditions rather than mere contractual covenants:

4. Robert W. Gomulkiewicz, *Enforcement of Open Source Software Licenses: The MDY Trio’s Inconvenient Complications*, 14 *YALE J. L. & TECH.* 106 (2011).

5. 535 F.3d 1373 1381-82 (Fed. Cir. 2008).

These conditions govern the rights to modify and distribute the computer programs and files included in the downloadable software package. The attribution and modification transparency requirements directly serve to drive traffic to the open source incubation page and to inform downstream users of the project, which is a significant economic goal of the copyright holder that the law will enforce. Through this controlled spread of information, the copyright holder gains creative collaborators to the open source project; by requiring that changes made by downstream users be visible to the copyright holder and others, the copyright holder learns about the uses for his software and gains others' knowledge that can be used to advance future software releases.

Jacobsen was widely discussed as the first case to provide clear support to FOSS licenses.⁶

However, a series of Ninth Circuit cases suggest that the principles adopted in *Jacobsen* may not find acceptance in other circuits.⁷ *MDY Industries v. Blizzard Entertainment*⁸ involved a suit by the owner of a popular online computer game against a company that sold a "robot" program that allowed players to cheat in the game. Use of such a program was a clear violation of the license terms. However, the defendant argued that at most there was a contractual violation, not a copyright infringement. The Ninth Circuit agreed in *MDY Industries*, holding that there would be copyright infringement, "only where the licensee's action (1) exceeds the license's scope (2) in a manner that implicates one of the licensor's exclusive statutory rights." The Court stated that "for a licensee's violation of a contract to constitute copyright infringement, there must be a nexus between the condition and the licensor's exclusive rights under the 'copyright.'" The Court reasoned that the copyright-holder should not be allowed to "designate any disfavored conduct during software use as copyright infringement by purporting to condition the license on abstention from the disfavored conduct." The *MDY Industries* holding threatens to turn many clauses found in FOSS licenses into mere contractual covenants, since such common terms as distribution with warranty disclaimers and with included source code may lack the necessary "nexus" with rights under the Copyright Act.

6. A Westlaw search conducted Aug. 30, 2013 for "Jacobsen v. Katzer" in the JLR (journals and law reviews, including CLE materials) database found 134 documents.

7. Robert W. Gomulkiewicz, *Enforcement of Open Source Software Licenses: The MDY Trio's Inconvenient Complications*, 14 YALE J. L. & TECH. 106 (2011).

8. 629 F.3d 928 (9th Cir. 2010).

While a difference between the federal circuit courts on an important issue of federal law will often lead the United States Supreme Court to settle the matter, the difference between the Federal Circuit and the Ninth Circuit could be regarded as a mere difference in interpretation of state contract law and thus as not suitable for resolution by the Supreme Court.

OFFER AND ACCEPTANCE

To the extent that specific license provisions are considered to be contractual covenants, the question arises if there is a sufficient acceptance to make the terms binding. In the case of contractual covenants contained in FOSS and other alternative licenses, high-tech companies and computer programmers are generally well aware of the nature of the license terms and have extremely easy access to these terms on the Internet. Thus there normally should be no issue of sufficient communication of terms to sophisticated members of the user community. In contrast, there may be inadequate communication of terms to an ordinary end user, such as someone who buys a home computer preloaded with Linux.⁹ For instance, I bought a used Linux-based netbook on eBay for \$100. Nothing about the Linux license terms was ever brought to my attention.

It is a long-standing principle of the common law that an offeror may expressly or impliedly waive notification of acceptance of a contract. The leading common-law case is *Carlill v. Carbolic Smoke Ball Co.*¹⁰ Under this principle, the lack of communication of acceptance of the contractual covenants contained in a FOSS license would be irrelevant.

The American Law Institute's 2009 *Principles of the Law of Software Contracts* suggests that the following legal principles should apply to contract formation:¹¹

§ 2.02 Standard-Form Transfers of Generally Available Software: Enforcement of the Standard Form.

(a) This Section applies to standard-form transfers of generally available software as defined in § 1.01(l).

(b) A transferee adopts a standard form as a contract when a reasonable transferor would believe the transferee intends to be bound to the form.

9. In *Specht v. Netscape Communications Corp.*, 306 F.3d 17 (2nd Cir. 2002), the court held that a consumer who downloaded software was not bound by software license terms that were not clearly brought to the consumer's attention by the website that supplied the download.

10. [1893] 1 Q.B. 256 (C.A.) (Eng.).

11. The American Law Institute's 2009 "Principles of the Law of Software Contracts" (St. Paul, MN 2010).

(c) A transferee will be deemed to have adopted a standard form as a contract if

(1) the standard form is reasonably accessible electronically prior to initiation of the transfer at issue;

(2) upon initiating the transfer, the transferee has reasonable notice of and access to the standard form before payment or, if there is no payment, before completion of the transfer;

(3) in the case of an electronic transfer of software, the transferee signifies agreement at the end of or adjacent to the electronic standard form or in the case of a standard form printed on or attached to packaged software or separately wrapped from the software, the transferee does not exercise the opportunity to return the software unopened for a full refund within a reasonable time after the transfer; and

(4) the transferee can store and reproduce the standard form if presented electronically.

(d) Subject to § 1.10 (public policy), § 1.11 (unconscionability), and other invalidating defenses supplied by these Principles or outside law, a standard term is enforceable if reasonably comprehensible.

(e) If a transferee asserts that it did not adopt a standard form as a contract under subsection (b) or asserts a failure of the transferor to comply with subsection (c) or (d), the transferor has the burden of production and persuasion on the issue of compliance with the subsection.

CONSIDERATION

The traditional common law consideration requirement of course applies in the United States. Since typical FOSS licenses give substantial additional rights to the licensees, these additional rights would serve as consideration to bind the licensees to any promises they made by accepting the licenses. Further, the requirement of consideration is substantially mitigated by the principle that a contract may be created on the basis of reliance even in the absence of consideration. Under this principle, even if the licensees themselves made no promises, their reliance would make the FOSS license irrevocable.

This principle is found in Restatement (Second) of Contracts, § 90(1), which provides:

(1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only

by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

FORMALITIES

Each state has a “Statute of Frauds” that requires a signed writing for the enforcement of certain categories of contracts (e.g., marriage settlements, sale of land, suretyship agreements, contracts that cannot be performed within one year) do not apply to FOSS license contracts. At least one provision of GNU GPL Version 3 might require a writing signed by the licensee under the “one-year” clause of the Statute of Frauds. This is Article 6(b), which provides [emphasis added]:

6. Conveying Non-Source Forms.

You may convey a covered work in object code form under the terms of sections 4 and 5, provided that you also convey the machine-readable Corresponding Source under the terms of this License, in one of these ways:

...

b) Convey the object code in, or embodied in, a physical product (including a physical distribution medium), accompanied by *a written offer, valid for at least three years* and valid for as long as you offer spare parts or customer support for that product model, to give anyone who possesses the object code either (1) a copy of the Corresponding Source for all the software in the product that is covered by this License, on a durable physical medium customarily used for software interchange, for a price no more than your reasonable cost of physically performing this conveying of source, or (2) access to copy the Corresponding Source from a network server at no charge.

FOSS licenses, of course, normally are in writing, but normally are not signed by the licensees. Thus if Article 6(b) is interpreted as a contractual covenant rather than a license condition, it would fall under the one-year clause of the Statute of Frauds.

STANDARD TERMS AND CONDITIONS

FOSS licenses are standardized agreements. Restatement (Second) of Contracts § 211 provides:

§ 211. Standardized Agreements

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he

adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

The community of sophisticated users of FOSS licenses is well aware of the terms of these licenses. Thus, under § 211, they would be bound by the terms. With respect to end users, for instance, end users of devices with Linux operating systems, the situation is less clear. For example, a business that buys a Linux-based fire alarm system might not have assented if the business had knowledge of warranty disclaimers.

LANGUAGE

FOSS contracts are most often written in English, but FOSS finds its way around the world. In some countries there might be an issue of enforceability of a FOSS license in a language that most people could not read. This would not be an issue in the United States. Although, unlike some countries, the United States does not have an official language, English is, of course, the language used in the vast majority of contracts. It would be almost impossible to find an information technology specialist in the United States who did not know English. Consumer protection laws do exist designed to protect non-English-speakers who have negotiated a contract in a foreign language and then are presented with a contractual document written in English, however, these laws apply to narrow categories of contracts and would not be relevant to FOSS agreements.

INTERPRETING LICENSE GRANTS

There is a split among the federal circuits as to whether copyright license grants should be interpreted under state law or federal law and as to whether they should be interpreted broadly or narrowly. *Bartsch v. Metro-Goldwyn-Mayer, Inc.*,¹² held that state law applied:

A threshold issue . . . is whether this question should be determined under state or federal law. The seventeenth paragraph of Bartsch's assignment says, somewhat unhelpfully,

12. 391 F.2d 150 (2nd Cir. 1968).

that “Each and every term of this agreement shall be construed in accordance with the laws of the United States of America *and* of the State of New York.” [Emphasis supplied.] We hold that New York law governs. The development of a “federal common law” of contracts is justified only when required by a distinctive national policy and, as we found in *T. B. Harms v. Eliscu*, 339 F.2d 823, 828 (2 Cir. 1964), citing many cases, “the general interest that copyrights, like all other forms of property, should be enjoyed by their true owner is not enough to meet this * * * test.” . . . The fact that plaintiff is seeking a remedy granted by Congress to copyright owners removes any problem of federal jurisdiction but does not mean that federal principles must govern the disposition of every aspect of her claim. *Cf. DeSylva v. Ballentine*, 351 U.S. 570 (1956).

The court in *Bartsch* interpreted a license issued before the advent of broadcast television as allowing television broadcasting. In contrast, *Cohen v. Paramount Pictures Corp.*¹³ interpreted a license narrowly under federal law and held that the license had to be construed to protect the copyright holder’s rights. The court stated:

Moreover, the license must be construed in accordance with the purpose underlying federal copyright law. Courts have repeatedly stated that the Copyright Act was “intended definitively to grant valuable, enforceable rights to authors, publishers, etc., . . . ‘to afford greater encouragement to the production of literary works of lasting benefit to the world.’” *Washington Publishing Co. v. Pearson*, 306 U.S. 30, 36 (1939); *Scott v. WKJG, Inc.*, 376 F.2d 467, 469 (7th Cir.1967) (“A copyright is intended to protect authorship. The essence of a copyright protection is the protection of originality rather than novelty or invention.”) *Jondora Music Publishing Co. v. Melody Recordings, Inc.*, 506 F.2d 392, 395 (3d Cir.) (as amended), cert. denied, 421 U.S. 1012 (1975) (“The copyright law is enacted for the benefit of the composer . . .”). We would frustrate the purposes of the Act were we to construe this license-with its limiting language-as granting a right in a medium that had not been introduced to the domestic market at the time the parties entered into the agreement.

Applying this principle, the court interpreted the license as not granting rights to reproduce material on subsequently-invented videocassettes.

13. 845 F.2d 851, 854 (9th Cir. 1988).

LICENSE REVISIONS

FOSS licenses often include provision for unilateral license revisions by the licensor, with licensees given the option to remain with the old licenses or opt for the new license. Under the general principle of freedom of contract in the United States law, there appears no possible problem with application of such provisions with respect to a new version of a license as between the licensor and a direct licensee. However, to the extent that a sub-licensee obtained greater rights from a licensee under the earlier version, presumably the sub-licensee would retain these rights.

Typical are the provisions of GNU GPL 3.0 and Mozilla Public License, Version 2.0:

GNU GPL 3.0

14. Revised Versions of this License.

The Free Software Foundation may publish revised and/or new versions of the GNU General Public License from time to time. Such new versions will be similar in spirit to the present version, but may differ in detail to address new problems or concerns.

Each version is given a distinguishing version number. If the Program specifies that a certain numbered version of the GNU General Public License “or any later version” applies to it, you have the option of following the terms and conditions either of that numbered version or of any later version published by the Free Software Foundation. If the Program does not specify a version number of the GNU General Public License, you may choose any version ever published by the Free Software Foundation.

If the Program specifies that a proxy can decide which future versions of the GNU General Public License can be used, that proxy’s public statement of acceptance of a version permanently authorizes you to choose that version for the Program.

Later license versions may give you additional or different permissions. However, no additional obligations are imposed on any author or copyright holder as a result of your choosing to follow a later version.

Mozilla Public License, Version 2.0

10. Versions of the License

10.1. New Versions

Mozilla Foundation is the license steward. Except as provided in Section 10.3, no one other than the license steward has the right to modify or publish new versions of this

License. Each version will be given a distinguishing version number.

10.2. Effect of New Versions

You may distribute the Covered Software under the terms of the version of the License under which you originally received the Covered Software, or under the terms of any subsequent version published by the license steward.

10.3. Modified Versions

If you create software not governed by this License, and you want to create a new license for such software, you may create and use a modified version of this License if you rename the license and remove any references to the name of the license steward (except to note that such modified license differs from this License).

DISCLAIMERS OF WARRANTIES AND LIABILITY

Disclaimers of warranties in FOSS licenses could be expected to be upheld to prevent claims by commercial entities that knowingly adopt FOSS software. However, even assuming that a consumer had contractually agreed to a disclaimer, the disclaimer, like any disclaimer, would be subject to attack under consumer protection legislation (which varies widely from state to state). Consider the following hypothetical case. A FOSS operating system is poorly programmed and, when used on certain computers, will cause them to overheat and catch fire.¹⁴ A computer seller, several steps down in the chain of FOSS licenses, incorporates this system in computers it sells for home use. Buyer buys such a computer, which ignites, burns down buyer's house, and injures buyer. To the extent that buyer has a claim against seller and the program author, consumer protection legislation might well prevent enforcement of the warranty disclaimers even if it could be shown that buyer was aware of and accepted the disclaimer.

AUTOMATIC LICENSE TERMINATION

It is quite doubtful under the law in the United States if license terms providing for automatic license termination for failure to comply with license terms are enforceable. As indicated above, it is quite possible that many terms in a "license" will be held to be mere contractual covenants. The *MDY* case rejected license termination for violation of covenants unrelated to copyright protection. Further, Re-

14. This example is not totally fanciful. Consider the effect of the Stuxnet virus on Iranian centrifuges. <http://www.stuxnet.net/> (last visited Mar. 3, 2014).

statement (Second) of Contracts § 229 provides for excuse of a condition to avoid forfeiture:

§ 229. Excuse of a Condition to Avoid Forfeiture

To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

COPYRIGHT LAW

The statement “mere use of the program is typically excluded or not explicitly mentioned” is not true, for instance, of GNU GPL version 3, Paragraph 2 of which includes the following language, “This License explicitly affirms your unlimited permission to run the unmodified Program.” Court decisions uphold not only express, but also implied copyright licenses.¹⁵ In the context of executable code distributed under a FOSS license, a court could be expected to find an implied license even if there were no express license.

An important preliminary issue is the applicability of the “first sale” doctrine of § 109(a) of the Copyright Act and the “limitations on exclusive rights” of § 117 of the Copyright Act. If a court finds that the user is the “owner of a copy” of the program, such user has important rights even if this user has no license contract with the copyright holder. In particular, the user has the right under § 109(a) to “sell or otherwise dispose of possession of the copy” and has the following rights under § 117(a) and (b):

(a) Making of Additional Copy or Adaptation by Owner of Copy.—

Notwithstanding the provisions of section 106, it is not an infringement for the owner of a copy of a computer program to make or authorize the making of another copy or adaptation of that computer program provided:

(1) that such a new copy or adaptation is created as an essential step in the utilization of the computer program in conjunction with a machine and that it is used in no other manner, or

(2) that such new copy or adaptation is for archival purposes only and that all archival copies are destroyed in the event that continued possession of the computer program should cease to be rightful.

(b) Lease, Sale, or Other Transfer of Additional Copy or Adaptation.—

15. *E.g., Effects Associates, Inc. v. Cohen*, 908 F.2d 555 (9th Cir. 1990).

Any exact copies prepared in accordance with the provisions of this section may be leased, sold, or otherwise transferred, along with the copy from which such copies were prepared, only as part of the lease, sale, or other transfer of all rights in the program. Adaptations so prepared may be transferred only with the authorization of the copyright owner.

Several consequences flow from the rights of an “owner”. First, the owner of the copy will be bound by the terms of the license only if a contractual relation has been created between the owner and the licensor. Second, if the owner breaches any of the terms by engaging in acts permitted under §109(a) or §117(a)/(b), these breaches will be mere breaches of contract, and will not create liability for copyright infringement. For instance, if the owner transfers a copy of the program without including warranty disclaimer statements required by the FOSS license, the owner will be liable only for breach of contract, not for copyright infringement, and the new owner will take free of the warranty disclaimer (though without any of the expanded rights granted by the FOSS license). Further, if the transferee omits the warranty disclaimer in a subsequent transfer, the transferee will neither be in violation of copyright nor breach of contract. Thus it may be important to determine if a “licensee” is the “owner” of a copy.

In *Kraus v. Titleserv*,¹⁶ the court discussed the nature of “ownership”:

Several considerations militate against interpreting § 117(a) to require formal title in a program copy. First, whether a party possesses formal title will frequently be a matter of state law. See 2 Melville B. Nimmer & David Nimmer, *Nimmer on Copyright* § 8.08[B][1] (stating that copy ownership ‘arises presumably under state law’). The result would be to undermine some of the uniformity achieved by the Copyright Act. The same transaction might be deemed a sale under one state’s law and a lease under another’s. If § 117(a) required formal title, two software users, engaged in substantively identical transactions might find that one is liable for copyright infringement while the other is protected by § 117(a), depending solely on the state in which the conduct occurred. Such a result would contradict the Copyright Act’s ‘express objective of creating national, uniform copyright law by broadly preempting state statutory and common-law copyright regulation.’ *Cnty. for Creative Non-Violence v. Reid*, 490 U.S. 730, 740, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989); see also 17 U.S.C. § 301(a).

16. 402 F.3d 119 (2d Cir. 2005).

Second, it seems anomalous for a user whose degree of ownership of a copy is so complete that he may lawfully use it and keep it forever, or if so disposed, throw it in the trash, to be nonetheless unauthorized to fix it when it develops a bug, or to make an archival copy as backup security.

We conclude for these reasons that formal title in a program copy is not an absolute prerequisite to qualifying for § 117(a)'s affirmative defense. Instead, courts should inquire into whether the party exercises sufficient incidents of ownership over a copy of the program to be sensibly considered the owner of the copy for purposes of § 117(a). The presence or absence of formal title may of course be a factor in this inquiry, but the absence of formal title may be outweighed by evidence that the possessor of the copy enjoys sufficiently broad rights over it to be sensibly considered its owner.

We conclude that Titleserv owned copies of the disputed programs within the meaning of § 117(a). We reach this conclusion in consideration of the following factors: Titleserv paid Krause substantial consideration to develop the programs for its sole benefit. Krause customized the software to serve Titleserv's operations. The copies were stored on a server owned by Titleserv. Krause never reserved the right to repossess the copies used by Titleserv and agreed that Titleserv had the right to continue to possess and use the programs forever, regardless whether its relationship with Krause terminated. Titleserv was similarly free to discard or destroy the copies any time it wished. In our view, the pertinent facts in the aggregate satisfy § 117(a)'s requirement of ownership of a copy.

In *Vernor v. Autodesk*,¹⁷ defendant had resold a lawful copy of plaintiff's program in violation of a term of the EULA. If defendant had been an "owner" under § 117(a), then defendant would not have committed copyright infringement. The court held [footnote omitted]:

We hold today that a software user is a licensee rather than an owner of a copy where the copyright owner (1) specifies that the user is granted a license; (2) significantly restricts the user's ability to transfer the software; and (3) imposes notable use restrictions. Applying our holding to Autodesk's SLA, we conclude that CTA was a licensee rather than an

17. 621 F.3d 1102 (9th Cir. 2010). There is a perceptive discussion in Robert W. Gomulkiewicz, *Enforcement of Open Source Software Licenses*, *the MDY Trio*, 14 *YALE J. L. & TECH.* 106 (2011) of *Vernor v. Autodesk*, 621 F.3d 1102 (9th Cir. 2010); *MDY Industries v. Blizzard Entertainment*, 629 F.3d 928 (9th Cir. 2010); and *UMG Recordings v. Augusto*, 628 F.3d 1175 (9th Cir. 2010).

owner of copies of Release 14 and thus was not entitled to invoke the first sale doctrine or the essential step defense.

The FOSS situation appears to be more like that in *Titleserv* than that in *Autodesk*, suggesting that possessors of FOSS may be treated as “owners” of the software.

SUBLICENSES

Under the general principle of freedom of contract, a FOSS license allowing sublicensing would be enforced and a FOSS license prohibiting sublicensing would be enforced. In the absence of clear language in the FOSS license, the issue of sublicensing would be approached using the general principles of contractual interpretation.

TERMINATION

Under United States law, an author has an inalienable termination right. The provisions are highly complex, but basically, they allow an author (or certain successors to the author’s rights) to terminate an assignment or license thirty-five years after the grant. This right eventually could create problems for FOSS software.¹⁸ In order to terminate a grant, a “Notice of Termination” must be served in accordance with the provisions of § 201.10 of the Copyright Act. It obviously would be impossible to serve such a notice on everyone who had a copy of particular FOSS software. However, where the software is used by large companies, such as by the manufacturers and distributors of Android devices, it would be fairly simple to identify these manufacturers and distributors and to serve termination notices upon them.

REMUNERATION

The United States Copyright Act does not provide a right for equitable remuneration of authors. This means that collecting societies collect remuneration only by sublicensing contracts with users or by damages collected in infringement action against unlicensed users. If a user is operating under a FOSS license, it would not sign a contract with a collecting society, and would not be liable in an infringement suit by a collecting society. In contrast to the music industry, where collecting societies play a major role in reducing transaction costs and obtaining fair remuneration, such societies play no role with respect to FOSS.

18. Timothy K. Armstrong, *Shrinking the Commons: Termination of Copyright Licenses and Transfers for the Benefit of the Public*, 47 HARV. J. ON LEGIS. 359 (2010).

MORAL RIGHTS

Moral rights are limited under United States copyright law to a narrow category of artistic works. Thus any restrictions on modification or use of software must be based on express FOSS license terms. As indicated above, the courts are split on whether a restriction in a FOSS license will be treated as a basis for a suit for infringement of copyright or if such prohibition would amount merely to a breach of contract.

PATENTS

Patents present a real threat to FOSS because in general the volunteers who develop FOSS software do not have the resources to develop huge war chests of defense patents. An exception to the lack of resources is the Android system developed by Google. While Google has huge resources, it had not developed large holdings of mobile phone operating system patents at the time it released Android. As a result, Google was vulnerable when attacked on patent grounds by Apple and Microsoft, both of which hold thousands of patents.¹⁹ The attack targeted both the software and the hardware of the phones. There has even been speculation that patent problems will cause Google to abandon Android.²⁰

TRADEMARKS

At least one case has held that widespread distribution of FOSS software can serve as the basis for trademark protection of the mark under which the software was distributed.²¹ In a conflict that led to considerable comment on the Internet, Linus Torvalds and several Linux-related organizations filed a petition with the United States Patent and Trademark Office to cancel a trademark in “Linux” registered by William R. Della Croce, Jr.²² The case was settled by cancellation of the trademark. Currently use of the “Linux” trademark is subject to licensing by the Linux Mark Institute.²³

19. John D. Harkrider, *Seeing the Forest through the SEPS*, 27-SUM ANTITRUST 22 (2013).

20. Daniel Eran Dilger, *Google appears ready to ditch Android over its intellectual property issues*, Apple Insider, July 28, 2013, <http://appleinsider.com/articles/13/07/29/google-appears-ready-to-ditch-android-over-its-intellectual-property-issues> (last visited Mar. 3, 2014).

21. *Planetary Motion, Inc. v. Techsplosion, Inc. et al.*, 261 F.3d 1188 (11th Cir. 2001).

22. A copy of the petition may be found at: <http://web.archive.org/web/19970629194729/http://iplawyers.com/text/linux.htm> (last visited Mar. 3, 2014).

23. <http://www.linuxfoundation.org/programs/legal/trademark> (last visited Mar. 3, 2014).

COMPETITION LAW

In *Wallace v. International Business Machines Corp.*,²⁴ Judge Frank Easterbrook, a highly-respected scholar of law and economics, rejected a complaint that a FOSS license that required that software be made available free of charge created a price-fixing conspiracy in violation of the antitrust laws. He pointed out that low pricing created a threat to consumers only when the sellers could later raise prices after driving out competition. He noted that the terms of the FOSS license permanently prevented raising prices, and so there was no cognizable antitrust harm.

PUBLIC PROCUREMENT

There are detailed procurement regulations and the federal, state and local level. Some permit the consideration of FOSS; others require the consideration of FOSS. Generally these regulations require consideration of total lifecycle costs of support, user training, etc., rather than just the initial acquisition cost.²⁵ In particular, United States Department of Defense has issued detailed provisions on the use of FOSS software.²⁶ States have published regulations on their official websites.²⁷ A particular problem is the status of software under “Buy American” rules, such as those applicable to contractors performing foreign aid work for the United States government. They have been faced with perplexing problems, such as whether or not Linux is “Made in Finland”? U.S. Customs and Border Protection have provided guidance on the applicability of legislation on country of origin to FOSS software.²⁸

EMERGING ISSUES

There is, of course, constant discussion of what a public license should provide. However, the most basic issue is the growing opinion in academic circles and in many areas of business, that intellectual property law provides excessive protection, stifling innovation rather than encouraging it. In this situation, the copyleft movement is in an ambiguous position. It wants to provide maximum freedom for innovation, but also maximum information-sharing, but it can only do so in a situation where there is strong copyright protection, but weak patent protection.

24. 467 F.3d 1104 (7th Cir. 2006).

25. Marco Iansity, *Government IT Procurement Processes and Free Software*, 41 PUB. CONT. L.J. 197 (2012).

26. DoD Open Systems Architecture Contract Guidebook v.1.1, available at <https://acc.dau.mil/OSAGuidebook> (last visited Mar. 3, 2014).

27. *E.g.*, <http://dii.vermont.gov/sites/dii/files/pdfs/Open-Source-Software-Policy-Final.pdf> (last visited Mar. 3, 2014);

28. <http://www.dlapiper.com/files/upload/Talend-US-Customs-and-Border-Protection-decision.pdf> (last visited Mar. 3, 2014).

SHAWN MARIE BOYNE*

Whistleblowing†

TOPIC III. C

Although efforts to encourage whistleblowers in the United States to come forward date back to 1778, the country's treatment of whistleblowers has been a conflicted one. Most recently, this reluctance to brand whistleblowers as heroes may be seen in the wide range of responses to Edward Snowden's revelations about the extent of our own government's surveillance operations. While some commentators have pilloried Snowden and branded him a traitor, privacy advocates and foreign governments have praised his courage. Perhaps reflecting these conflicting sentiments, current protections in the U.S. are a patchwork collection of narrowly tailored, industry-specific legislative acts. In some cases, legislatures have implemented protections on the heels of public disclosures of industry fraud. To an increasingly extent however, lawmakers have anticipated the need for whistleblower protections with the enactment of new federal spending initiatives. This paper outlines the expansion of whistleblower protections and highlights the proliferation of protections that award whistleblowers a substantial monetary reward.

INTRODUCTION

[I]t is the duty of all persons in the service of the United States . . . to give the earliest information to Congress or any other proper authority of any misconduct, frauds or misdemeanors committed by any officers or persons in the service of these states, which may come to their knowledge. [Continental Congress-1778]¹

Amidst the widespread media coverage over the past year detailing the disclosure of top secret information by Bradley Manning and Edward Snowden, reporters chose to use the labels of “whistleblower”

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1. Stephen M. Kohn, Op-Ed., *The Whistle-Blowers of 1777*, N.Y. TIMES, June 12, 2011, <http://www.nytimes.com/2011/06/13/opinion/13kohn.html>.

and “traitor” to describe both individuals. Indeed, the oft-repeated maxim that “one man’s whistleblower is another man’s traitor” seemed to ring particularly true with respect to the media’s coverage of these particular cases. The decision regarding which label was appropriate varied depending on the speakers’ view of the proper balance between government secrecy and transparency.² While top Congressional leaders condemned both disclosures, civil liberties advocates criticized government officials and even took aim at the President³ and his Director of National Intelligence, James Clapper.⁴ In the wake of the Snowden disclosures, it became evident that Clapper had lied to Congress during his previous testimony about the scope of the data collected by National Security Agency (NSA).⁵

American’s views of Snowden himself have varied widely. While a Quinnipiac poll published on August 1st, 2013 found that fifty-five percent of the population queried believed that he was a whistleblower,⁶ fifty-three percent of individuals questioned in a July 2013 ABC News/Washington Post poll believed that the government should pursue criminal charges against Snowden.⁷ These attitudinal variations reflect the complex nature of whistle-blowing itself.

The question of whether a whistleblower will be protected or pilloried depends on the interests of those in power. In a frenetic media environment in which media outlets rush to publish “leaked information” to sell copy, government officials often leak information to gain political advantage. For example, in the months leading up to the 2012 presidential election, Administration sources leaked information concerning the Bin Laden raid, the Stuxnet attacks on Iran’s nuclear facilities, and even the President’s hands-on involvement in drone attacks on foreign soil.⁸ Of course, as the prosecution of former

2. Brendan Sasso, *Amash: Snowden is a Whistleblower*, HILL’S VIDEO (Aug. 4, 2013, 9:40 AM), <http://thehill.com/blogs/blog-briefing-room/blog-summaries/315413-rep-amash-snowden-is-a-whistleblower>.

3. Pema Levy, *NSA FISA Surveillance: Is Obama’s Latest Transparency Move A Trick?*, INT’L BUS. TIMES, Aug. 30, 2013, <http://www.ibtimes.com/nsa-fisa-surveillance-obamas-latest-transparency-move-trick-1401972>.

4. Fred Kaplan, *Fire DNI James Clapper: The Director of National Intelligence lied to Congress about NSA surveillance*, SLATE.COM (June 13, 2013, 12:44 PM), http://www.slate.com/articles/news_and_politics/war_stories/2013/06/fire_dni_james_clapper_he_lied_to_congress_about_nsa_surveillance.html.

5. Kimberly Dozier, *James Clapper: Answer On NSA Surveillance To Congress Was ‘Clearly Erroneous,’* HUFFINGTON POST (July 2, 2013, 6:33 PM), http://www.huffingtonpost.com/2013/07/02/james-clapper-nsa_n_3536483.html.

6. Quinnipiac University Poll, *Snowden Is Whistle-Blower, Not Traitor, U.S. Voters Tell Quinnipiac University National Poll* (Aug. 1, 2013), <http://www.quinnipiac.edu/images/polling/us/us08012013.pdf>.

7. ABC News/Washington Post Poll, *Attitudes Shift Against Snowden; Fewer than Half Say NSA is Unjustified* (July 24, 2013), <http://www.langerresearch.com/uploads/1150a3SnowdenandSecurity.pdf>.

8. Peter Van Buren, *Obama’s War on Whistleblowers*, MOTHER JONES (June 12, 2012, 1:30 PM), <http://www.motherjones.com/politics/2012/06/obamas-whistleblowers-stuxnet-leaks-drones>.

Vice President Dick Cheney's aide, Lewis Scooter Libby, revealed, the Obama Administration is not the first Administration to use leaks to achieve a political advantage.⁹

While the Obama Administration, like its predecessors, has selectively used leaks to gain political advantage, critics charge that the Administration's pursuit of public whistleblowers has grown vindictive.¹⁰ A key case, which illustrates the Administration's persecution of national security whistleblowers, is the FBI's investigation of *New York Times* reporter James Risen. The government has subpoenaed Risen hoping to uncover the source of the intelligence disclosures published in his 2006 book, "State of War." The government is seeking to compel Risen to finger former CIA agent, Jeffrey Sterling, as the book's prime source. Ironically, Risen's book drew the Administration's ire because, rather than revealing the Administration's national security successes, it detailed the CIA's unsuccessful efforts to funnel defective weapons blueprints to Iran.¹¹

Ironically, while many members of Congress chastised Edward Snowden for failing to work within the system to report government abuse, three career employees of the National Security Administration (NSA) employees who did just that found their lives destroyed and reputations tarnished. One recent NSA whistleblower, William Binney, described what happened when the three employees attempted to use internal channels to expose the fact that the government was illegally spying on its own citizens:

We tried to stay for the better part of seven years inside the government trying to get the government to recognize the unconstitutional, illegal activity that they were doing and openly admit that and devise certain ways that would be constitutionally and legally acceptable to achieve the ends they were really after. And that just failed totally because no one in Congress or—we couldn't get anybody in the courts, and certainly the Department of Justice and inspector general's office didn't pay any attention to it. And all of the efforts we made just produced no change whatsoever.¹²

9. *US Officials 'betrayed' CIA Agent*, BBC NEWS, July 14, 2006, <http://news.bbc.co.uk/2/hi/americas/5180906.stm>.

10. Tim Shorrock, *Obama's Crackdown on Whistleblowers*, NATION, Apr. 5, 2013, <http://www.thenation.com/article/173521/obamas-crackdown-whistleblowers#>.

11. Marc Pitzke, *War on Whistleblowers: Has Obama Scrapped the First Amendment?*, SPIEGEL ONLINE INT'L (July 24, 2013, 6:04 PM), <http://www.spiegel.de/international/world/obama-wages-war-on-whistleblowers-and-journalists-a-912852.html>.

12. Peter Eisler & Susan Page, *3 NSA Veterans Speak Out on Whistleblower: We Told You So*, USA TODAY, June 15, 2013, <http://www.usatoday.com/story/news/politics/2013/06/16/snowden-whistleblower-nsa-officials-roundtable/2428809/>.

When the trio used internal channels to complain, the Pentagon's inspector general responded, not by seeking to validate their claims, but rather by referring their names to the Department of Justice for prosecution under the Espionage Act.¹³ In the Administration's eyes, the trio's allegations that NSA had wasted millions of dollars on a "technically flawed system for sifting through digital communications" did not further the public interest.¹⁴

The U.S. government proceeded to prosecute one of the NSA whistleblowers, Thomas Drake. Drake was spared a possible life sentence when the government's case fell apart prior to trial after a federal judge ruled that the government could not proceed without publicly disclosing classified evidence. After accepting a plea offer to a misdemeanor charge, Drake received a sentence of one year of probation.¹⁵ Still, the fact that Drake received a criminal sentence, rather than an award, may dissuade future national security whistleblowers from coming forward.

Outside the national security employment sector, the breadth and depth of whistleblower protections in the United States has grown exponentially since the Watergate era. The revelations of misconduct in that era led Americans to begin to openly question the traditional wisdom of loyally serving one's superiors. Over the past three decades, a series of sector-specific crises has led Congress to attempt to fight corporate fraud and government waste by gradually introducing more comprehensive whistleblower protections.

This article will review both the overarching and sector-specific whistle-blowing legislation currently on the books on the federal level in the United States today. In Part I, I describe the context behind the introduction of multiple pieces of sector-specific legislation on the federal level and briefly identify the limitations of that legislation. Part II introduces the general whistleblower protections that apply to federal workers. In this discussion, I will introduce the two main components of whistleblower provisions. The first type, which are designed to encourage whistleblowers to come forward, are provisions that monetarily reward whistleblowers with a portion of the recovered proceeds. The second type of legislative provision focuses on specific employment-related protections aimed at combating retaliation against the whistleblowers themselves. Finally in Part III, I

13. *Id.*

14. R. Jeffrey Smith, *Classified Pentagon Report Upholds Thomas Drake's Complaints About NSA*, WASH. POST, June 22, 2011, http://www.washingtonpost.com/national/national-security/classified-pentagon-report-upholds-thomas-drakes-complaints-about-nsa/2011/06/22/AG1VHTgH_story.html.

15. Douglas Burke, *Thomas Drake Sentenced in NSA Leaks Case*, HUFFINGTON POST (July 15, 2011), http://www.huffingtonpost.com/2011/07/15/thomas-drake-nsa-leak_n_900384.html.

briefly discuss the main variations in state-level whistleblower protections.

I. SECTOR SPECIFIC LEGISLATION

A. *Introduction*

In the United States, Congress and state legislatures have adopted a piecemeal approach to establishing whistleblower protections by drafting industry-specific legislation. In some cases, these legislative efforts have followed adverse disclosures of industry fraud, while in others, legislators have tried to anticipate potential areas of need. One notable example of the later phenomenon is the Patient Protection and Affordable Care Act (PPACA).¹⁶ As the government's involvement in the health care industry expands, legislators have attempted to anticipate and prevent opportunities for increased fraudulent activity. Since it is widely acknowledged that government auditors cannot hope to ferret out every case of fraud, the legislature has sought to encourage and protect employees who may be subject to retaliation for reporting potential violations of the law's consumer protections.

At both levels of government, legislators have tried to protect employees who publicize an employer's conduct in cases where that conduct may jeopardize the public's health, safety, or other legally protected interests. While these statutes are designed to encourage whistleblowers to bring unlawful activity to the government's attention, there are also significant areas of activity where little to no protection exists. In particular, the weak protection extended to employees in the intelligence related sectors who seek to expose the government's unlawful behavior challenges the extent of the government's commitment to the rule of law.

Without a doubt, public concern about potential terrorist attacks has fueled the secret growth of the government's surveillance programs which the current prominent generation of whistleblowers has sought to expose. Ironically, while a large sector of the population currently supports the government's efforts to extend the reach of government power, the key building blocks of federal whistleblower legislation came to fruition during a period of social unrest and widespread distrust of government—notably, the post-Watergate era. In contrast to the polity's demand for increased security in the first two decades of the twenty-first century, it was the public's widespread disdain for the government's unlawful behavior during the Watergate era that spawned the initial legislative attempts to protect whistleblowers. In fact, it is unlikely that Congress would have taken

16. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C.).

up the mantle of protecting whistleblowers by enacting the Civil Service Reform Act of 1978 (CRSA) without the public bravery of several federal employees—some of whom were punished for their disclosures. While space does not permit an exhaustive list here, some of the pioneering whistleblowers of that era included:

- Ernest Fitzgerald, who while serving as the Deputy for Management Systems of the United States Air Force, informed the Senate in March 1968 about a two-billion-dollar cost overrun in the military transport program. After President Richard Nixon ordered Fitzgerald's supervisors to "get rid of the son of a bitch," the Air Force demoted him and assigned him to trivial duties.¹⁷
- Ron Ridenhour, a serviceman who participated in combat during the Vietnam War and subsequently disclosed the information regarding the execution of civilians by members of the U.S. Army at My Lai.¹⁸
- Daniel Ellsberg, a former Pentagon employee, who while working as an analyst at the RAND Corporation, disclosed "the Pentagon Papers" to the *New York Times*. The documents revealed that, early on in the Vietnam War effort, the government knew that the war could not be won.¹⁹

While those disclosures captured the public's attention, academics and consumer advocates viewed the disclosures, not as anomalies, but as symptomatic of a civil service mentality that rewarded conformity and loyalty. This theme was echoed in Senator Patrick Leahy's 1977 report to a U.S. Senate Committee entitled, "The Whistleblowers: A Report on Federal Employees Who Disclose Acts of Governmental Waste, Abuse, and Corruption."²⁰ One of the report's key findings reported that federal employees, who spotted waste or corruption and sought to fulfill their ethical obligations, faced resistance from management styles that stressed "team work and internal resolution of any concerns."²¹ As a result of this report, as well as a report by a staff lawyer employed by Ralph Nader named Robert Vaughn,²² Congress attempted to overhaul the federal civil service system by enacting the Civil Service Reform Act of 1978.²³ Coupled

17. ROBERT G. VAUGHN, *THE SUCCESSES AND FAILURES OF WHISTLEBLOWER LAWS* 60-63 (2012) [hereinafter VAUGHN].

18. *Id.* at 25.

19. Daniel Ellsberg, *Why the Pentagon Papers Matter Now*, *GUARDIAN*, June 13, 2011, <http://www.theguardian.com/commentisfree/cifamerica/2011/jun/13/pentagon-papers-daniel-ellsberg>.

20. Senate Committee on Government Affairs, 95th Cong. 2nd Session (1978).

21. *Id.* at 12, 28.

22. ROBERT G. VAUGHN & MARION WELDON BREWER, *SPOILED SYSTEM: A CALL FOR CIVIL SERVICE REFORM* (1975).

23. Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified in scattered sections of 5 U.S.C.).

with the Carter Administration's reorganization plan, the Act abolished the Civil Service Commission and created three separate agencies to implement the Act. The new agencies included the United States Merit Systems Protection Board, the Office of Personnel Management, and the Federal Labor Relations Authority. Additionally, the Act established special counsels' offices within individual federal agencies.

The Act had a key weakness. It did not grant federal employees the right to litigate their claims in federal court.²⁴ Prior to a 1994 Amendment, the Act stated that the procedures available under the Act "shall be the exclusive procedures for resolving grievances which fall within its coverage."²⁵ In 2006 however, the Supreme Court, in *Whitman v. Depart. of Transportation*, 547 U.S. 512 (2006), held that, while the CRSA blocks petitioners from using the CRSA's provisions in civil suits, it does not remove the jurisdiction that federal courts enjoy in employment matters under other statutes.

B. *False Claims Reform Act*

The one piece of federal legislation that has had the most significant impact on the protections and recoveries afforded to whistleblowers over the past two decades is the False Claims Reform Act of 1986.²⁶ The Act, as well as its subsequent amendments, has become the bedrock of whistle-blower protection. By amending the False Claim Act of 1864, it has opened the courtroom door to private citizens and entities that possess evidence of fraud involving federal programs or contracts.²⁷ Although we think of government fraud as a contemporary phenomenon associated with the country's increasing federalization, the law initially targeted Union contractors who defrauded the Lincoln Administration during the Civil War. The original FCA expressly applied to persons who filed false claims against the government and sought to punish anybody that knowingly submitted fraudulent claims to the federal government. The FCA provided that any person who knowingly submitted false claims could be held liable for double the government's damages plus a penalty of \$2,000 for each false claim. In 1986, Congress increased those penalties to treble damages and raised the penalty levels from \$2,000 to a range of \$5,000 to \$10,000. In recent years, the federal government's increased reliance on private contractors and use of economic development funds to spur the economy have opened the door to con-

24. STEPHEN MARTIN KOHN, *THE WHISTLEBLOWER'S HANDBOOK* 49 (2011).

25. The 1994 Amendment altered the language of Section 7121(a)(1) of the CRSA to state that "the [collective bargaining agreement grievance] procedures shall be the exclusive administrative procedures for resolving grievances which fall within its coverage."

26. 31 U.S.C. §§ 3729-3733 (1986).

27. *Id.*

tractors who attempt to fraudulently exploit the system. Congress has responded by continuing to expand the scope of the Act's *qui tam* provisions as well as the level of potential damages.

To succeed in recovering under the FCA, the plaintiff must show that the defendant either: knowingly submitted a false claim to the government, caused another to submit a false claim, or knowingly made a false record or statement to get the government to pay a false claim.²⁸ The Act defines the terms “knowing” and “knowingly” to mean that a person must: “(i) ha[ve] actual knowledge of the information; (ii) act(s) in deliberate ignorance of the truth or falsity of the information; or (iii) acts in reckless disregard of the truth or falsity of the information.”²⁹ In the Act's reverse false claims section, the act creates liability for those person or persons who act improperly to avoid having to pay money to the government.³⁰ It is important to recognize that not every false claim submitted to the government will trigger liability under this statute. According to § 3729(b)(1) of the Act, to violate the FCA, a person must have knowingly submitted or caused the submission of a false claim. The 1986 amendments significantly strengthened the FCA by increasing the share of the pot that whistle blowers receive, granting employment protection to employees who file *qui tam* suits, and by reducing the level of proof required to support fraud to “actual knowledge,” “deliberation ignorance, or “reckless disregard.”³¹

The FCA grants private individuals the right to file actions alleging that a contractor who is doing business with the federal government is defrauding the government. Although a private individual must initiate a *qui tam* action, if the government chooses not to join the action, the private plaintiff may proceed on their own behalf.³² Although, the private individual or relator³³ must first file suit on the government's behalf, the U.S. Attorney in that judicial district has the option to intervene. Under law, the relator must provide the government with a disclosure statement or a narrative detaining the evidence of the fraud.³⁴ The identity of the relator remains sealed for an initial sixty day period, which courts may

28. *Id.* at §§ 3729(a)(1)(A) & (B).

29. *Id.* at § 3729(b)(1).

30. *Id.* at § 3729(a)(1)(G). Individuals who conspire to violate the Act may be found liable under § 3729(a)(1)(C).

31. David L. Haron, Mercedes Varasteh Dordeski & Larry D. Lahman, *Bad Mules: A Primer on the Federal and Michigan False Claims Act Claims*, MICH. BAR J., Nov. 2009, at 22-25, available at <http://www.michbar.org/journal/pdf/pdf4article1590.pdf> [hereinafter Haron] (citing 31 U.S.C. § 3729(b)(1)).

32. 31 U.S.C. § 3730(c)(1).

33. Under the provisions of the False Claim Act and related legislation a relator is the individual with direct knowledge of the fraud who files the civil action. See 31 U.S.C. § 3729 – 3730.

34. Haron, *supra* note 31, at 24.

subsequently extend.³⁵ The government is required by law to investigate the allegations. However, the government may petition the presiding court for extensions of the seal period. Once the whistleblower files suit, the Department of Justice will review the case and decide whether to intervene in the action. On average, the federal government joins about one-quarter of the suits filed by whistleblowers.³⁶ If the government does intervene however, the whistleblower will lose a measure of control over the conduct of the case. As a Memorandum written by the U.S. Department of Justice summarizes the government's powers in a *qui tam* action:³⁷

It can dismiss the action, even over the objection of the relator, so long as the court gives the relator an opportunity for a hearing (§ 3730(c)(2)(A)) and it can settle the action even if the relator objects so long as the relator is given a hearing and the court determines that the settlement is fair. § 3730(c)(2)(B). If a relator seeks to settle or dismiss a *qui tam* action, it must obtain the consent of the government. § 3730(b)(1). When the case is proceeding, the government (§ 3730(c)(2)(C)) and the defendant (§ 3730(c)(2)(D)) can ask the court to limit the relator's participation in the litigation.³⁸

If the government elects not to proceed with the claim, the individual who initiated the claim may proceed alone.³⁹ However, the government's refusal to intervene often results in the dismissal of the action by the court.⁴⁰ Indeed, employees have a financial incentive to proceed. The amendments create significant monetary incentives for private citizens to sue companies—as private citizens may retain between fifteen and thirty percent of the total monetary recovery even if the case is settled. Once a defendant is found to be liable, courts may hold the defendant liable for an amount equivalent to three times the dollar amount that company defrauded the government in addition to civil penalties that total between \$5,000 and \$10,000 for

35. See 31 U.S.C. § 3730(b)(2).

36. Pete Yost, *False Claims Act Leads To \$5 Billion In Government Recoveries Over Past Year*, HUFFINGTON POST (Dec. 12, 2012, 2:35 PM), http://www.huffingtonpost.com/2012/12/04/false-claims-act_n_2238111.html.

37. The term “*qui tam*” stems from the common law writ that allowed a private individual who assisted in the prosecution of a case to recover damages. The phrase itself stems from a Latin phrase meaning “he who brings a case on behalf of our lord the King, as well as for himself”). See U.S. DEP'T OF JUSTICE, FALSE CLAIMS ACT CASES *available at* <https://www.doi.gov/docs/falseclaimsact.pdf>.

38. U.S. DEP'T OF JUSTICE, THE FALSE CLAIMS ACT: A PRIMER 2 (n.d.), *available at* http://www.justice.gov/civil/docs_forms/C-FRAUDS_FCA_Primer.pdf.

39. 31 U.S.C. § 3730(3)(c).

40. U.S. DEP'T OF JUSTICE, FALSE CLAIMS ACT CASES: GOVERNMENT INTERVENTION IN QUI TAM (WHISTLEBLOWER) SUITS 2 (n.d.), *available at* <http://www.justice.gov/usaof/pae/Documents/fcaprocess2.pdf>.

each false claim. If the government joins an action brought by a *qui tam* plaintiff, the plaintiff must receive a minimum of fifteen percent of the action's proceeds or settlement up to a maximum of twenty-five percent. How much money the whistleblower receives depends upon the extent of their contribution to the prosecution of the action.⁴¹

The federal government's increasing reliance on private contractors, coupled with the broadening reach of the FCA, has fueled the growth of *qui tam* actions. Because these *qui-tam* cases have successfully incentivized whistleblowing, over thirty states have enacted legislation paralleling the FCA's remedies.⁴² It also instituted whistleblower protections for employees who suffer employment discrimination as a result of their decision to participate in a *qui tam* action.⁴³ Those protections are necessary because, although the whistleblower's identity is initially kept under seal, an employer may be able to deduce the whistleblower's identity from the information revealed during the discovery stage. When the litigation reaches beyond the discovery stage, the court will unseal the complaint revealing the complainant's identity. Once an employer discerns the employee's identity, the whistleblower will inevitably face harassment on the job. The FCA however, seeks to block employers from retaliating against whistleblowers by prohibiting any subsequent discriminatory "action."⁴⁴ To make a retaliation case, the whistleblower must show that 1) he or she was engaged in activity protected by the FCA; 2) the employer knew about the *qui tam* action, and 3) the employer retaliated.⁴⁵ Although the requirements for establishing a claim of discrimination appear clear on their face, the federal courts are currently divided about the scope of whistleblower protection under Section 3730(h).

In recent decades the shortcomings of the extent of whistleblower protection under the FCA have become clearer. In particular, the FCA's provisions did not give plaintiffs a cause of action for several common forms of retaliation. The largest loopholes included: coverage for individuals who were planning to file a *qui tam* action, individuals who attempted to blow the whistle without filing an action, employees who refused to participate in the fraudulent practices, retaliation

41. 31 U.S.C. § 3730(d)(1).

42. According to the National Whistleblowers Center, the states of New York, California, and Virginia have enacted state versions of the False Claims Act which permit whistleblowers to recover a "finders' fee" for reporting fraud.

43. 31 U.S.C. § 3730(h) (stating that any employee who is discharged, demoted, harassed or otherwise discriminated against because of the employee's lawful behavior under the Act is entitled to any relief necessary to make them whole including reinstatement, double back pay, compensation for other damages including litigation costs and reasonable attorneys' fees).

44. "Any action" means demoting, suspending, terminating, or "in any other manner discriminat[ing] against [the employee] in the terms and conditions of employment . . ." *Id.*

45. 31 U.S.C. § 3730(h).

against the whistleblower's family members and colleagues, and retaliation against contractors and agents employed by the defendant who did not fall under a strict construction of the word "employee."⁴⁶ In 2009, Congress attempted to close those loopholes in the Fraud Enforcement and Recovery Act (FERA), which is discussed below. In an effort to fight any potential liability, employers still found ways to fight *qui tam* suits. One of the chief impediments to an FCA suit was the act's "Public Disclosure Bar." In cases in which some of the information contained in the suit was based on information available to the public, employers moved courts to dismiss suits by alleging that the suits did not further the public interest. The U.S. Supreme Court attempted to weigh in on this issue in *Graham County Soil and Water Conservation District v. U.S. ex rel. Wilson*, 559 U.S. 280 (2010), when the Court held that relators could not proceed with an action when that action relied in part on information available from publicly available state and local administrative reports, audits, and investigations. However, that portion of the decision was moot before it was announced as, one week prior to the Court's decision, the President signed into law the Patient Protection and Affordable Care Act. This new legislation precluded courts from dismissing future cases under this section of the FCA. Until 2010, the relator had to prove that he or she was the "original source" of the information and that the information provided by the whistleblower was not available from public sources to prevent courts from dismissing claims because they claimed to lack subject matter jurisdiction.⁴⁷

The FCA also includes statute of limitations requirements. According to the Act, plaintiffs must file a *qui tam* action either within the date established by calculating a date six years from the date of violation is committed or three years after the date when government knows or should have known about "facts material to the right of action."⁴⁸ Under no circumstances may a suit be filed ten years after the violation date.⁴⁹ To determine which time limit applies in a particular case, courts attempt to determine when the whistleblower or the government became aware of the violation. The 1986 reforms attempted to further clarify these time limits by specifying that plaintiffs may bring an action anytime up until three years after the

46. Nolan & Auerbach, *Recent False Claims Act Amendments Fully Protect Whistleblowers*, QUI TAM 101 BLOG (Aug. 9, 2010), <http://false-claims-act.net/recent-false-claims-act-amendments-fully-protect-whistleblowers-2/>.

47. Brian G. Santo, THE FALSE CLAIMS ACT: ANALYSIS OF THE RECENTLY EXPANDED LEGISLATION ON QUI TAM ACTIONS AND RELATED IMPACT ON WHISTLEBLOWERS, ABA HEALTH E-SOURCE (July 2010), https://www.americanbar.org/content/news-letter/publications/aba_health_esource_home/Volume6_SE2_Santo.html.

48. 31 U.S.C. § 3731(b). There is currently a disagreement between circuits regarding whether the tolling provision applies only to cases in which the government has decided to intervene.

49. *Id.*

date “when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act.”⁵⁰ Most courts have held that the “official” refers to the responsible official within the Department of Justice. Although courts are also split on the issue of whether a qui tam whistleblower is entitled to take advantage of the tolling provision in Section 3731(b)(2), the majority of courts have held that the tolling provision only applies to suits in which the government has elected to intervene.⁵¹

C. *Sarbanes-Oxley Act of 2002*

After the economy collapsed during the Great Depression, the federal government began to wade into the regulation of the capital markets by establishing the Securities and Exchange Commission (SEC). Although the Commission enjoys broad rule-making authority today, the original legislation which created the SEC left the responsibility for setting financial disclosure standards in the hands of accounting professionals.⁵² In the wake of the malfeasance committed by both ENRON and WORLDCOM, which was brought to the public’s attention by whistleblowers,⁵³ Congress hurriedly enacted the Sarbanes-Oxley Act of 2002.⁵⁴ The Act responded to the public’s increasing cynicism towards corporate officials and aimed to strengthen federal regulation of capital markets. The Act’s final shape reflected the concerns expressed by the whistleblowers who had suffered retaliation after reporting accounting and securities-related malfeasance.⁵⁵ The Senate Report on the bill stated that the bill’s whistleblower protections aimed to break the code of corporate silence and to encourage more individuals to report corporate wrongdoing.⁵⁶

In keeping with the nation’s largely industry-specific approach to whistleblowing, the Act’s whistleblower protections initially focused

50. *Id.*

51. See, e.g., *Manning v. Utilities Mutual Insurance Co.*, 254 F.3d 387, 397 (2d Cir. 2001) (six year limit governs private claims).

52. Jill E. Fisch, *The New Federal Regulation of Corporate Governance*, 28 HARV. J.L. & PUB. POL’Y 39, 40 (2004).

53. The initial WORLDCOM report was made by WORLDCOM vice president, Cynthia Cooper. See Nina Schichor, *Does Sarbanes-Oxley Force Whistleblowers to Sacrifice their Reputations?: An Argument for Granting Whistleblowers Non-Pecuniary Damages*, 8 U.C. DAVIS BUS. L.J. 272, 273 (2008) [hereinafter Schichor]. A key figure in the disclosures of ENRON’s irregularities was ENRON Vice-President Sheron Watkins. See Shaheen Pasha, *Enron’s Whistle Blower Details Sinking Ship*, CNNMONEY.COM (Mar. 16, 2006, 1:13 PM), <http://money.cnn.com/2006/03/15/news/newsmakers/enron/>.

54. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 15 U.S.C. & 18 U.S.C.).

55. VAUGHN, *supra* note 17, at 152.

56. Schichor, *supra* note 53, at 276 (citing S. REP. NO. 107-46, at 5, 10 (2002)).

only on employees of companies that sold stock on public exchanges or companies that were required to file certain reports with the Securities and Exchange Commission (SEC).⁵⁷ The Act required corporations to create channels that allowed whistleblowers to directly and anonymously report misconduct to the company's board of directors.⁵⁸ The Act also identified a specific type of wrongdoing reporting that would enjoy protection as it sought to protect employees who "reasonably believe[d]" that their employer had violated:

- 1) any federal criminal law prohibiting mail, wire or bank fraud;
- 2) any rule or regulation of the SEC; or
- 3) any provision of federal law related to shareholder fraud.⁵⁹

Despite problems that would later emerge with Act's application, one key goal of the Act was to provide broad whistle-blower protections across the land that would end employee's dependence on differing levels of state protection. By extending protection employees of publicly-traded companies, the Act attempted to ameliorate decades of disappointment with loophole-filled industry-specific protections.

One of the most innovative provisions of the Act was the Act's provisions that abandoned the use of administrative adjudication and appellate review as the sole reporting mechanism for whistleblowers.⁶⁰ It also criminalized retaliation against whistleblowers.⁶¹ The Act granted whistleblowers the right to a jury trial in cases in which the Secretary of Labor had failed to issue a final decision on the whistleblower's complaint within 180 days of its filing, and in which there was no showing that "such delay is due to the bad faith of the claimant."⁶² Predictably, employers responded to this provision by requiring employees to sign employment agreements, which mandated that they bring their complaints before arbitrators, rather than pursue a jury trial. In 2010, Congress declared those agreements null and void.⁶³ Employers may no longer "contractually require an employee to submit SOX retaliation claims to an arbitrator in place of a jury trial."⁶⁴

57. Amendments to the SOX enacted in 2010 extended protection to employees of a public company's subsidiary if the subsidiary's finances are consolidated into the parent company's financial statements.

58. 15 U.S.C. § 78j-1(m)(4)(A) (Supp. IV 2004).

59. 18 U.S.C. §1514A (2002).

60. VAUGHN, *supra* note 17, at 152.

61. 18 U.S.C. § 1513 (e).

62. 18 U.S.C. § 1514B(1)(b).

63. That amendment was included within the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 5 U.S.C., 12 U.S.C., 15 U.S.C. & 18 U.S.C.). See discussion *infra* Part G.

64. *What is the Sarbanes-Oxley (SOX) Act?*, KATZ, MARSHALL & BANKS BLOG (n.d.), <http://kmblegal.com/practice-areas/whistleblower-law/sarbanes-oxley/>.

By granting employees the option of a jury trial, the Act seemed to open the door to dispositions favorable to whistle-blowers. In reality, however, the administrative procedures that occur within the first 180 days following the filing of a complaint substantially narrow the number of claims that proceed. After Congress passed the Sarbanes-Oxley legislation, the Occupational Health and Safety Administration (OSHA) detailed the procedures for proceeding forward with a claim. Pursuant to those regulations, after an employee files a complaint, OSHA will then notify the respondents and the SEC of the allegation. The agency will dismiss any complaint that fails to make a prima facie showing of retaliation that: “(1) the employee engaged in protected activity; (2) the employer knew about the activity; (3) the employee suffered an unfavorable personnel action; and (4) the “circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable action.”⁶⁵ Even if the complainant survives that hurdle, OSHA may dismiss the case if the employer demonstrates, with clear and convincing evidence, that the employment action would have been taken regardless of the protected activity.⁶⁶ If the complaint clears those hurdles, OSHA will commence an investigation. Within sixty days of the complaint’s filing, OSHA must determine whether it finds reasonable cause to believe that retaliation in violation of the Act occurred and issue written findings.⁶⁷

If OSHA issues a decision in the employee’s favor, the Agency will issue a preliminary order of relief to the employee. Pursuant to 18 U.S.C. §1514C(1), “[a]n employee prevailing in any action under subsection (b)(1) shall be entitled to all relief necessary to make the employee whole.”⁶⁸ In cases where the employer demonstrates with “reasonable cause” that the employee is a security risk, OSHA may elect not to order reinstatement. Unfortunately, it is unlikely that the litigation will end at that point. Both parties have thirty days to request that an administrative law judge (ALJ) review the ruling before the initial findings become a final order.⁶⁹ If either of the parties appeals, the ALJ will conduct a *de novo* hearing. A party who seeks to challenge the ALJ ruling must do so within ten days of the

65. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM & MARY L. REV. 65, 70 (2007) [hereinafter Moberly] (citing 29 C.F.R. § 1980.104(b)(1) (2006)).

66. See 29 C.F.R. §1980.104(c) (2006).

67. Moberly, *supra* note 63, at 79 (citing 29 C.F.R. §1980.105 (2006)).

68. The Act also defines the scope of compensatory damages permitted under the legislation. Those damages include: reinstatement to a position with the same seniority that the employee would have had, back pay with interest, and “compensation for any special damages sustained as a result of the discrimination, including litigation costs, expert witness fees, and reasonable attorney fees.” See 18 U.S.C. §1514C(2)(a).

69. See 29 C.F.R. §1980.107(b).

decision.⁷⁰ The Department of Labor's Administrative Review Board sits above the ALJs and has the discretion to decline to review the ALJ's decision.⁷¹ In those cases where the ARB elects to review the ALJ's decision, it must use a "substantial evidence" standard and issue a final decision within 120 days following the hearing.⁷² The parties may then appeal that decision to the appropriate federal circuit court of appeals.⁷³

Although the Sarbanes-Oxley Act initially appeared to offer whistleblowers an easy path to recover damages, empirical evidence suggests that the path was a particularly steep one. The fact that President Bush issued an executive signing statement immediately upon signing the Act, which narrowed the Act's whistleblower provisions, undoubtedly undercut the Act's effectiveness.⁷⁴ The two Senators who were instrumental in the Act's passage—Patrick Leahy and Charles Grassley, complained to the President and alleged that his signing statement "threaten[ed] to create unnecessary confusion and to discourage whistleblowers."⁷⁵ According to data collected by Richard Moberly, during the first three years following the Act's enactment, only 3.6% of SOX whistleblowers secured relief through the Act's administrative procedures and only 6.5% of whistleblowers were victorious in the appeals process.⁷⁶

Although the new law appears straightforward on its face, employers used numerous strategies to limit their liability. Additionally, the administrative law judges who heard the majority of the cases strictly interpreted the Act's legal requirements. As one example, the judges consistently determined that the protections did not extend to employees of privately-held subsidiaries or contractors of publicly held companies. By narrowly construing the Act, both OSHA examiners and the ALJs declared that many claims failed as a matter of law. Many claimants, whose claims fell within the Act's legal parameters,

70. *Id.* § 1980.110.

71. *Id.* § 1980.110(b).

72. *Id.* § 1980.110(b)-(c).

73. *Id.* §§ 1980.112(a) & 1980.105(c).

74. Statement by President George W. Bush upon Signing H.R. 3763 (July 30, 2002), reprinted in 2002 U.S.C.C.A.N. 543 ("The legislative purpose of section 1514A . . . is to protect against company retaliation for lawful cooperation with investigations and not to define the scope of investigative authority, therefore, the executive branch shall construe section 1514A(a)(1)(B) as referring to investigations authorized by the rules of the Senate or the House of Representatives and conducted for a proper legislative purpose.").

75. See Kelly Wallace, *Senators: Bush Could Undercut Whistleblowers*, CNN, July 31, 2002 (reporting that U.S. Senators Pat Leahy (D-Vermont) and Charles Grassley (R-Iowa) sent to President Bush on July 31, 2002, a letter expressing concerns with the signing statement). See also 152 CONG. REC. S8189-90 (2006) (statement of Sen. Leahy), available at https://www.fas.org/irp/////////congress/2006_cr/s072506.html (stating that Bush's interpretation was at odds with the plain language of the statute, and the administration reluctantly relented on this view).

76. Moberly, *supra* note 63, at 67.

saw their claims fail because they failed to adequately show that their employers took action against them because of their whistleblower activities.⁷⁷ To succeed in establishing the causation element, the employee must show that the employer knew that the whistleblower was engaged in protected activity and that activity was a “contributing factor” motivating the adverse employment event.⁷⁸

Another barrier to effective enforcement lies in the fact that the Act delegates enforcement to the Department of Labor. At the time of the Act’s authorization, the department was responsible for administering twenty-five other whistle-blower or anti-retaliation provisions. In an attempt to redistribute its workload, the department delegated responsibility for investigating the claims of fourteen of these provisions to OSHA.⁷⁹ Adding to the hurdles faced by employees who blow the whistle under the Act, Moberly’s study revealed that the administrative judges found few reasons to grant claimants relief from the Act’s strict filing deadlines⁸⁰ Finally, both administrative law judges and federal judges continue to dismiss claims that appear to fall within the ambit of whistleblower activities but are not explicitly mentioned in the Act. For example, in 2010, a U.S. District Court in the State of Washington dismissed a claim filed by two former compliance auditors for the Boeing Company, Inc.⁸¹ Although the employees claimed that they had been dismissed for frequently complaining to their supervisors that Boeing was not complying with SOX, the court found that the employees were fired for leaking confidential information to the media—an act not protected by SOX.⁸² This dismissal finding illustrates the difficulties that legislators face in attempting to delineate the full spectrum of potential whistleblower activity.

*D. Consumer Products and Safety Improvement Act of 2008*⁸³

Given the significant influence that corporate interests exercise in the political process and on the race for the Presidency, it is not surprising that Presidents often appoint individuals to head regula-

77. *Id.* at 90.

78. *Id.* at 100.

79. Moberly, *supra* note 63, at 146.

80. According to 18 U.S.C. § 1514A(b)(2)(D) (Supp. IV 2004), the complaint must be filed within 90 days of the retaliation. Any appeal must be filed within 30 days of an OSHA decision. See 29 C.F.R. § 1980.105(c) (2006).

81. *Tides v. Boeing Co.*, Nos. C08-1601-JCC & C08-1736-JCC, 2010 WL 537639 (W.D. Wash. Feb. 2, 2010), *aff’d*, 644 F.3d 809 (9th Cir. 2011).

82. Stephen Shiffman & Jonathan Rotenberg, *District Court limits the Sarbanes-Oxley Act’s Whistleblower Protections*, LEXOLOGY (Feb.12, 2010), <http://www.lexology.com/library/detail.aspx?g=c9fbf3d6-ee6b-48c8-9cc2-95353d851d9c>.

83. 15 U.S.C. §§ 2051-2085 (2006) (CPSIA). The CPSIA amends the Consumer Product Safety Act of 1972, 15 U.S.C. §§2051-2089. (1972) (CPSA).

tory agencies who have ties to the regulated industries. Where industry interests are protected by the White House, the fate of whistleblower protections and the extent of government assistance extended to whistleblowers may be in jeopardy. Such was the case in 2007, when the Bush Administration's acting Chairman of the Consumer Products Safety Administration (CPSC), Nancy Nord, attempted to implement the Administration's deregulation agenda by condemning a Senate plan to increase the CPSC's budget. According to the *New York Times*, Nord objected to "provisions that would increase the maximum penalties for safety violations, make it easier for the government to make public reports of faulty products, protect industry whistleblowers and prosecute executives of companies that willfully violate laws."⁸⁴ As Stephen Labaton reported:

Some of Ms. Nord's complaints were similar to the ones that business groups and manufacturers have raised, including that the legislation would be unnecessarily burdensome. But in other areas, such as whistleblower protection for company employees, her complaints went beyond those of industry.⁸⁵

The public controversy over the CPSC's impotency prompted Congress to enact the Consumer Product Safety Improvement Act (CPSIA) in 2008. In addition to establishing product manufacturing and testing requirements, the Act created protections for industry whistleblowers. Under the Act, employees who have been the victims of discrimination or retaliation may file a complaint with the Department of Labor.⁸⁶ Employees covered by the Act must work for a "manufacturer, private labeler, distributor, or retailer."⁸⁷ According to the procedures specified in the Act, employees must file a claim within 180 days of the alleged discriminatory action.⁸⁸ Similar to other administrative review provisions, the Act requires the Secretary of Labor to initiate an investigation to determine "whether there is reasonable cause to believe that the complaint has merit."⁸⁹ The Department of Labor must then follow a prescribed procedure, first issuing preliminary, and then, final findings. The Secretary has the power to order the employer to: 1) "abate the violation;" 2) reinstate the employee to his or her former position, and to pay compensatory damages.⁹⁰ Congress also offered whistleblowers access to the federal courthouse under the Act. If the Secretary does not reach a final deci-

84. Stephen Labaton, *Strengthening of Consumer Agency Opposed by its Boss*, N.Y. TIMES, Oct. 30, 2007, http://www.nytimes.com/2007/10/30/washington/30cnd-consumer.html?_r=0.

85. *Id.*

86. *See* 15 U.S.C. §2087(b).

87. *Id.* §2087(a).

88. *Id.* §2087(b)(1).

89. *Id.* §2087(b)(2)(A).

90. *Id.* §2087(b)(3)(B).

sion within 120 days of the complaint or within 90 days of receiving a written determination, the whistleblower may “bring an action at law or equity for *de novo* review in federal district court.” At the district court stage of the action, the employee may be 1) be reinstated with the “same seniority status that the employee would have had, but for the discharge or discrimination;” 2) entitled to back pay with interest; and 3) eligible to receive compensation for special damages including litigation costs, expert witness fees, and attorney’s fees.”⁹¹

While whistleblower protections play an important regulatory role, the government agency responsible for enforcing regulatory standards must not only have adequate legal power to fulfill its mission, but also adequate resources. While Congress and President Bush signed the CIPSA’s new protection regime into law, behind the scenes, the ranks of the Commission itself were being gutted. As Scott McBride reported, although “the number of imported toys jumped by 597 percent between 1980 and 2007. . . [T]he staff of the Commission was cut by fifty-seven percent. Partially as a result of the “Reagan Revolution,” the staff of the Commission was decreased from 978 to 420 employees over a twenty-eight year period.”⁹² It was not just the staff that was decimated, but also the agency’s leadership. For almost a two-year period at the end of the Bush Administration, the agency’s five member commission was missing three members—hamstringing the Agency’s ability to issue new rules or to impose penalties.⁹³ As the history of the Consumer Product Safety Improvement Act shows, standing alone, whistleblower protections cannot guarantee good governance, especially when the federal government proceeds to decimate the ranks of the oversight agency.

E. Fraud Enforcement and Recovery Act of 2010

Two years after the Sarbanes-Oxley legislation, Congress continued both its effort to combat corporate fraud and to reduce the uncertainty of the financial markets. Following on the heels of collapse of the mortgage industry, the statute aimed to “increase accountability for the corporate and mortgage frauds that have contributed to the recent economic collapse.”⁹⁴ For purposes of this

91. *Id.* §2087(b)(4)(A)-(C).

92. Scott D. McBride, *Something Wicked This Way Comes: The United States Government’s Response to Unsafe Imported Chinese Toys and Subsidized Chinese Exports*, 45 TEX. INT’L L.J. 233, 246 (2009) (citing PUBLIC CITIZEN, CLOSING SANTA’S SWEATSHOP: HOW TO DELIVER ON OBAMA’S AND CONGRESS’ TOY-SAFETY AND FAIR TRADE PROMISES 6, 24 (2008), available at <http://www.citizen.org/documents/SantasSweatshop08.pdf>).

93. David Lazarus, *Obama needs to add consumer agency to his to-do list*, L.A. TIMES, Aug. 19, 2011, <http://articles.latimes.com/2011/aug/19/business/la-fi-lazarus-20110819>.

94. S. REP. NO. 111-10, at 2 (2009).

Article, it is important to note that through this legislation, Congress considerably strengthened the False Claim Reform Act to make it easier for whistleblowers to file successful claims.⁹⁵ Speaking to this point, Senator Patrick Leahy of Vermont, one of the Act's co-sponsors, stated that the 2010 bill aimed to improve the country's efforts to prosecute individuals who defrauded the government and harmed the U.S. economy.⁹⁶ The Senate report accompanying the Act stated that Congress intended to remedy the judiciary's attempts to limit the FCA's scope.

The effectiveness of the FCA has recently been undermined by court decisions limiting the scope of the law and allowing subcontractors and non-governmental entities to escape responsibility for proven frauds. In order to respond to these decisions, certain provisions of the FCA must be corrected and clarified in order to protect Federal assistance and relief funds expended in response to our current economic crisis.⁹⁷

The early results of these changes have been promising. As of December 2011, the Justice Department had recovered \$8.7 million in False Claims Act recoveries during the first three years of the Obama Administration.⁹⁸

The Act's key whistleblowing related sections include provisions that widen the scope of protected conduct, broaden the types of individuals covered by the FCA, and expand the statute of limitations period. In addition to protecting employees against retaliation, the Act's new provisions applied to contractors and agents who had been:

. . . discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee, contractor, or agent on behalf of the employee, contractor, or agent or associated others in furtherance of other efforts to stop 1 or more violations of this subchapter.⁹⁹

This legislation also took action to protect employees who, in addition to pursuing a *qui tam* action, attempt to remedy corporate misconduct by reporting that misconduct through internal channels. In another key provision, FERA expanded the types of behavior that

95. Fraud Enforcement and Recovery Act of 2009, Pub. L. No. 111-21, 123 Stat. 1617 (2009) (codified in scattered sections of 18 U.S.C.).

96. 155 CONG. REC. S4774, S4775 (2009) (statement of Sen. Leahy).

97. S. REP. NO. 111-10, at 10 (2009), available at http://www.nacua.org/documents/SenateJudiciaryrReport_111_10.pdf#nameddest=effectivenessFCA.

98. Press Release, Senator Patrick Leahy, Comment of Senator Patrick Leahy on False Claims Act Settlements in 2011 (Dec. 19, 2011), available at <http://www.leahy.senate.gov/press/comment-of-senator-patrick-leahy-on-false-claims-act-settlements-in-2011>.

99. 31 U.S.C. § 3730(h).

would trigger FCA liability. The list of prohibited acts now includes behavior such as conspiracy, making false statements, making or delivering a receipt that the individual knows is untrue, and buying public property from a member of the government or Armed Forces who may not lawfully sell the property.¹⁰⁰

The amendments also added language to Section 3730(h) to protect independent contractors.¹⁰¹ While the complete language of Section 3730(h) seeks to protect employees from retaliation that occurs because of lawful acts made by the employee “in furtherance” of an actual or potential *qui tam* action, in the 2009 revisions to the FCA, Congress made clear that an employee need only have taken steps towards the exposure of the false claims. In effect, the Act extended protection to individuals who had only made an internal complaint or had just begun to investigate a claim when the retaliation occurred.¹⁰²

Another key provision of the Act aimed to reverse the impact of the Supreme Court’s decision in *Allison Engine Co. v. United States ex rel. Sanders*, 553 U.S. 662 (2008) where the Court had held that the Government must prove that “a defendant must intend that the Government itself pay the claim.”¹⁰³ According to the Senate Report, the Court’s interpretation blocked liability in cases where a subcontractor knowingly submitted a false claim to the general contractor and was paid with Government funds unless the subcontractor intended to defraud the Federal Government.¹⁰⁴ In the wake of the *Allison Engine* decision, the Department of Justice reported that the decision undercut efforts to enforce violations of the act with respect to a variety of government programs including Medicaid, student loans, and federal highway funds.¹⁰⁵ By enacting these changes Congress attempted to make the False Claims Act more amenable to whistleblower claims.

Though the False Claim Act’s whistleblower provisions continue to evolve, the amount of money recovered by federal and state authorities under the FCA set a new record in 2012. In that year federal and state government authorities recovered over \$9 billion.¹⁰⁶ Approxi-

100. *Id.* § 3729(a).

101. *See id.* § 3730(h).

102. *See, e.g.*, *Guerro v. Total Renal Care, Inc.*, No. EP-11-CV-449-KC, 2012 U.S. Dist LEXIS 32615 (W.D. Tex. Mar. 12, 2012).

103. 553 U.S. 662, 669 (2008).

104. S. REP. NO. 111-10, at 10 (2009), *available at* http://www.nacua.org/documents/SenateJudiciaryrReport_111_10.pdf#nameddest=effectivenessFCA.

105. Letter from M. Faith Burton, Acting Assistant Att’y Gen., U.S. Dep’t of Justice, to Sen. Patrick J. Leahy, Chairman, Senate Judiciary Comm. (Feb. 24, 2009), *available at* http://www.nacua.org/documents/LetterToSenLeahy_DoJ_Views_on_Section4_of_FERA_2.pdf.

106. *False Claims Act Recoveries Double in One Year to \$9 Billion*, CORP. CRIME REP., Oct. 10, 2012, <http://www.corporatecrimereporter.com/news/200/falseclaimsactrecoveries10102012/>.

mately \$5 billion of that amount stemmed from recoveries related to federal legislation with \$3.3 billion of that total related to federal whistle-blower cases. The claims that led the way in fiscal year 2012 included fines collected from GlaxoSmithKline (\$3 billion), Abbot Laboratories (\$1.5 billion), Bank of America (\$1 billion), and Merck (\$950 million).¹⁰⁷ While whistleblowers do not have a smooth path to collecting damages through a *qui tam* suit, Congress continues to work on reducing the barriers to collection.

F. Patient Protection and Affordable Care Act of 2010

The health care sector stands out as one of the most significant economic sectors where *qui tam* lawsuits play a critical role in exposing industry attempts to defraud the government. Indeed a 2010 article in the *New England Journal of Medicine* asserted that *qui tam* lawsuits account for 90% of health care fraud cases.¹⁰⁸ Acknowledging the important role played by whistleblowers in the health care industry, in 2010, Congress included provisions in the Patient Protection and Affordable Care Act (PPACA)¹⁰⁹ designed to substantially strengthen whistleblower protections both within and beyond the health care sector.¹¹⁰ Most importantly, the whistleblower related provisions lowered the bar to *qui tam* suits in the health care industry. According to several commentators, the legislative changes aimed to reverse the recent judicial trend towards limiting *qui tam* actions.¹¹¹ The key changes in the Act that directly affect the feasibility of *qui tam* actions include provisions that:

- Allow the Department of Justice to object to a dismissal of the action on “public disclosure” grounds that “substantially the same allegations or transactions alleged in the action or claim were publicly disclosed.”¹¹²
- Eliminate the FCA’s “direct knowledge” requirement and replaces it with a standard that favors the whistleblower by allowing *qui tam* actions based on “knowledge that is inde-

107. *Id.*

108. Aaron Kesselheim, David Studdert, & Michelle Mello, *Whistle-Blowers’ Experiences in Fraud Litigation Against Pharmaceutical Companies*, 362 *NEW ENG. J. MED.* 1832 (2010) [*hereinafter* Kesselheim et al].

109. Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified in scattered sections of 42 U.S.C.).

110. *2010 Mid-Year False Claims Act Update*, GIBSON DUNN (July 9, 2010), <http://www.gibsondunn.com/publications/pages/2010mid-yearfalseclaimsactupdate.aspx>.

111. *See, e.g.*, U.S. Health Care Reform Legislation Significantly Expands the False Claims Act, GIBSON DUNN (Apr. 2, 2010), <http://www.gibsondunn.com/publications/pages/HealthCareReformLegislationExpandstheFalseClaimsAct.aspx>.

112. 31 U.S.C. 3730(e)(4)(A). The current version of the FCA reads “the Court shall dismiss an action or claim under this section, unless opposed by the Government, if substantially the same allegations or transactions alleged in the action or claim were publicly disclosed.”

pendent of and materially adds to the publicly disclosed allegations or transactions . . .”¹¹³

- Broadens the applicability of the FCA’s Section 3729 to include health care transactions involving any “[p]ayments made by, through or in connection with a[n] [health care] Exchange” that includes public monies.¹¹⁴

In addition to making the FCA more whistleblower friendly, the PPACA partially extended the protections for whistleblowers provided in the Fair Labor Standards Act of 1938 (FLSA). The PPACA strengthened provisions in the FLSA act that banned employers from discriminating against employees who provided information to the employer, the federal government, or a state attorney general “relating to the violation of, or any act or omission the employee reasonably believes to be a violation of, any provision of this title.”¹¹⁵ The scope of discriminatory actions addressed by the PPACA cover the employee’s “compensation, terms, conditions, or other privileges of employment.”¹¹⁶ The PPACA prohibits employers from retaliating against any employee who either objected or refused to participate in any activity that the employee “reasonably believed” to violate any provision of Title I of the PPACA or the regulations promulgated under the Act. To be protected under these whistleblower provisions, an employee need only “reasonably believe” that their employer has violated the PPACA. This “reasonable belief” standard is likely to be one of the most troublesome aspects of the protections for employers as it protects whistleblower activity that may be based on an employee’s reasonable, but inaccurate belief that the employer violated the law. This rule brings the PPACA’s pleading requirement into line with the 2011 judicial opinion in *Sylvester v. Parxel Int’l LLC*.¹¹⁷

Emblematic of complex legislation, the federal agency charged with implementing the PPACA’s whistleblower protections, the Occupational Safety and Health Administration (OSHA), issued interim rules “interpreting” the Act’s protection provisions. One interesting aspect of the interim rule sheds light on the breadth of potential retaliatory actions that employees face if they speak out in the public interest. The rule states that any employee who receives a tax or cost sharing reduction in their health care insurance under the PPACA is entitled to whistleblower protection under the Fair Labor Standards Act.¹¹⁸ This inclusion provision is designed to prevent employers who

113. *Id.* § 3730(e)(4)(B).

114. *See* PPACA §1313.

115. *See id.* §1558.

116. *Id.*

117. No. 07-123 (A.R.B. Dep’t of Labor, May 25, 2011) (holding that, according to the SOX provisions, a whistleblower does not need to show that an actual SOX violation occurred, only that she had a subjective and objective “reasonable belief” that the conduct she complained about amounted to a SOX violation).

118. 29 C.F.R. § 1984.

face a potential tax penalty for not providing health care coverage, from acting in a retaliatory manner or discriminating against their employees.¹¹⁹ Because the rule does not specify an endpoint for protection, according to one industry analyst, it is “conceivable that once an employee receives the cost sharing subsidy under section 1402 of PPACA, he or she is by virtue of that receipt in a protected class in perpetuity.”¹²⁰ In essence, this interpretation of the PPACA could protect employees throughout the length of their lifetime.

Another positive development for whistleblower actions which appeared in the interim rule allows employees to use circumstantial evidence in their cases. In addition, the employee need not prove that the protected activity was the single reason that triggered the employer’s retaliatory actions—merely that it was a motivating factor.¹²¹ Finally, pursuant to the interim rule, beginning in 2014, the protections provided by section 18C of the Act will extend “to cover retaliation with respect to an employee’s compensation, terms, conditions or other privileges of employment by health insurance issuers offering group or individual health insurance coverage regardless of whether those issuers are the employer of the person retaliated against.”¹²²

Still, the PPACA is not a complete victory for potential whistleblowers, as the Act only protects employees in one sector of the health care industry. While the employment protections cover employees who report medical care related violations relating to conventional settings such as hospitals, physician offices, and clinics, they do not protect employees in some key health care sectors. Employees who report fraud who work for entities outside those main health care access points do not enjoy the same level of protection.¹²³ Given that the whistleblower protections currently on the books often do not fully protect whistleblowers,¹²⁴ this significant loophole in the PPACA’s coverage is likely to deter potential individuals who work in

119. S. Tony Ling & Richard Joseph Zito, *Occupational Safety & Health Administration extends broad whistleblower protections to employees complaining of violations of the Patient Protection and Affordable Care Act*, LEXOLOGY, (Mar. 18, 2013), <http://www.lexology.com/library/detail.aspx?g=881218b5-4b23-4819-9b9d-45ae6aad58ea>.

120. *Id.*

121. 29 C.F.R. §1984.

122. *Id.*

123. These include that individuals who administer the expansion of the Medicare and Children’s Health Insurance (CHIP) programs; care for the elderly in nursing homes’ “innovative treatment and therapies; payments and reimbursements outside the state exchanges; prescription drugs and preventative care; house-call visits; expansion of and increasing in training for the health care workforce; and grants for the expansion of health care to under-served populations.” Mychal Schutz, *Whistleblower Protections in the Affordable Care Act*, LEXOLOGY (Apr. 20, 2010), <http://www.lexology.com/library/detail.aspx?g=e5d83cf5-6f63-4390-8ade-f338587dea98>.

124. See Kesselheim et al, *supra* note 108, at 1838.

the non-traditional sectors of the health care industry from coming forward and exposing fraud or illegal activity in those sectors.

G. Dodd-Frank Wall Street Reform and Consumer Protection Act

Congress's ongoing efforts to strengthen the FCA continued in the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010.¹²⁵ While the country's attempts to protect whistleblowers have caused employers to pause before taking action against whistleblowers, prior to Dodd-Frank, colleagues and family members of whistleblowers were often left unprotected. One key section of the Act amended Section 3730(h) of the FCA to protect the whistleblower's associates.¹²⁶ The Act also expands the whistleblower protections created by the Sarbanes-Oxley Act by widening the scope of employers covered in that legislation to include employees of non-publicly traded subsidiaries of publicly traded companies where the subsidiary's financial information is included in the parent company's consolidated financial statements.

In keeping with Congress's largely industry-specific and piecemeal approach to creating whistle-blowing protections, the whistleblower related provisions of the act apply to employees who provide information to their employers or to the government that they reasonably believe violates the Consumer Financial Protection Act of 2010 or any other provision of law subject to the jurisdiction of the Bureau of Consumer Financial Protection. A notable aspect of Dodd-Frank's provisions is that they allow whistleblowers to receive financial bounties if they report information that leads to successful securities enforcement actions. Unfortunately for whistleblowers, the legislation did not adopt the FCA's powerful *qui tam* litigation model which allows claimants to pursue litigation independent of agency action.¹²⁷ Instead, the whistleblowers' only hope of recovering monetary damages is in cases where the SEC recovers civil damages.¹²⁸ Ironically, some scholars have argued that, by failing to institute a *qui tam* system or to impose any costs on the whistleblower, the Act fails to provide an adequate screening mechanism to discourage frivolous tips.¹²⁹ In the first fiscal year after the Act's enactment, the SEC reported that more than 3,000 reports had

125. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of 5 U.S.C., 12 U.S.C., 15 U.S.C. & 18 U.S.C.).

126. 31 U.S.C. § 3730(h).

127. Geoffrey Christopher Rapp, *Mutiny by the Bounties? The Attempt to Reform Wall Street by the New Whistleblower Provisions of the Dodd-Frank Act*, 2012 BYU L. REV. 73, 76 (2012).

128. *Id.* at 78.

129. Anthony Casey & Anthony Niblett, *Noise Reduction: The Screening Value of Qui Tam*, Mar. 21, 2013, <http://ssrn.com/abstract=22376589>.

been made to its hotline.¹³⁰ During the same period, there were only 143 enforcement judgments and orders issued that qualified as eligible for an award.

Although the Act allows whistleblowers to recover between 10% and 30% of the proceeds from the enforcement action, those bounties are restricted to cases in which the monetary sanctions exceed one million dollars.¹³¹ This restriction deviates from the recovery available to whistleblowers under the FCA, as under the FCA, whistleblowers may recover their share of the bounty regardless of how much the government recovers.¹³²

The Act also significantly expands the statute of limitations that applies to cases filed directly in district court by giving whistleblowers engaged in SEC-related whistleblower conduct or other SOX-protected activity, six years from the date when the violation occurs or within three years after the date “facts material to the right of action are known or reasonably should have been known by the employee,” to file a complaint.¹³³ In a break from the anti-retaliation provisions in the SOX, a Dodd-Frank claimant, who alleges retaliation for SOX-protected whistleblower activity, may file suit directly in federal court without exhausting administrative remedies. According to the rules issued by the SEC after the Act, an individual is a whistleblower if he or she “possess[es] a reasonable belief that the information [he or she is] providing relates to a possible securities law violation.”¹³⁴

H. Other Legislation

In addition to the legislation previously discussed, several other major pieces of federal legislation contain whistleblower protection provisions within a larger piece of legislation. There other legislative acts that protect whistleblowers through narrowly tailored responses include:

- The Military Whistleblower Protection Act of 1998 (protecting members of the armed services);¹³⁵
- The Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21),¹³⁶

130. Samuel Rubinfeld, *SEC Receives 3,000 tips in Last Year*, WALL ST. J. CORRUPTION CURRENTS (Nov. 15, 2012, 4:47 PM), <http://blogs.wsj.com/corruption-currents/2012/11/15/sec-receives-3000-tips-in-the-past-year/>.

131. See Dodd-Frank Act §§ 748, 922.

132. Ben Kerschberg, *The Dodd-Frank Act's Robust Whistleblowing Incentives*, FORBES, Apr. 18, 2011, <http://www.forbes.com/sites/benkerschberg/2011/04/14/the-dodd-frank-acts-robust-whistleblowing-incentives/>.

133. 28 U.S.C. § 1658(a).

134. 17 C.F.R. § 240.21F-2(b)(1).

135. 10 U.S.C. § 1034.

136. 49 U.S.C. § 42121 (creating the Federal Aviation Whistleblower Protection Program).

- The Surface Transportation Assistance Act (STAA)(covering private sector drivers and commercial motor carriers)¹³⁷
- Consumer Product Safety Improvement Act (CPSIA) of 2008,¹³⁸
- Asbestos Hazard Emergency Response Act (AHERA);¹³⁹
- Clean Air Act;¹⁴⁰
- FDA Food Safety Modernization Act;¹⁴¹
- Energy Reorganization Act;¹⁴²
- Federal Railroad Safety Act;¹⁴³
- Moving Ahead for Progress in the 21st Century Act (MAP-21);¹⁴⁴
- National Transit Systems Security Act (NTSSA);¹⁴⁵
- Occupational Safety and Health Act (OSHA).¹⁴⁶

II. WHISTLEBLOWER PROTECTION ACT

The key piece of federal stand-alone legislation is the Whistleblower Protection Act of 1989 (WPA).¹⁴⁷ On the surface, the Whistleblower Protection Act of 1989 (WPA) effectively shields federal employees from retaliation when they disclose illegal or improper government activities. The WPA's protections extend to most federal executive branch employees with the notable exclusions of employees of the Central Intelligence Agency (CIA) and National Security Agency (NSA). Those employees, as well as all positions, which by law are excluded from the competitive federal service due their "confidential, policy-determining, policy-making, or policy-advocating character" are excluded from protection under the WPA.¹⁴⁸ Additionally, any additional positions designated by the President

137. *Id.* § 31105 (amended by The Implementing Recommendations of the 9/11 Commission Act of 2007, Pub. L. No. 110-53, 121 Stat. 266).

138. 15 U.S.C. § 2087.

139. *Id.* § 265.1.

140. 42 U.S.C. § 762. There are other whistleblower protection provisions embedded in other environmental acts, including: Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610; Federal Water Pollution Control Act, 33 U.S.C. § 1367; Safe Drinking Water Act, 42 U.S.C. §§ 300j-9(i); Solid Waste Disposal Act, 42 U.S.C. § 6971; Toxic Substances Control Act, 15 U.S.C. § 2622; and Pipeline Safety Improvement Act, 49 U.S.C. § 60129.

141. 21 U.S.C. § 391 et seq.

142. 42 U.S.C. § 5851.

143. 49 U.S.C. § 20109.

144. *Id.* § 30171.

145. 6 U.S.C. § 1142.

146. 29 U.S.C. § 660.

147. Pub. L. No. 101-12, 103 Stat. 16 (codified in scattered sections of 5 U.S.C.).

148. 5 U.S.C. § 2302(a)(2)(B)(i).

which are necessary for the good administration of government are also excluded from protection.¹⁴⁹

The statutory protections apply when “personnel action” has been taken against a “covered employee” because of a “protected disclosure.”¹⁵⁰ In addition to current employees who do not fall under the above-referenced exception, employees who merit protection also include: former employees, or applicants for employment to positions in the executive branch in both the “competitive and excepted service and positions in the Senior Executive Service.”¹⁵¹ If an employee falls within one of the protected classes, the next requirement for protection pertains to the nature of the information disclosed by the employee. Pursuant to the statute, the statute protects “any disclosure of information by an employee or applicant which the employee or applicant *reasonably believes* evidences:

- (i) any violation of any law, rule, or regulation, or
- (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. . .”¹⁵²

The WPA does not apply to disclosures that the President has specifically designated by Executive Order. The Act also applies to disclosures to the Special Counsel, the Inspector General of an agency or another employee designated by an agency head to receive such disclosures.

In order to receive the protection of the WPA, the employee must simply have a reasonable belief that the information is true. According to one commentator, this is essentially “a good faith requirement” as the information’s actual veracity does not influence a determination of protection.¹⁵³ The employee’s belief in the truth of the disclosure must be reasonable to a disinterested observer.¹⁵⁴ This makes intuitive sense as it might be too risky in some cases for any employee to disclose information if he or she believes that the disclo-

149. A full list of employees not covered by the WPA include employees of the Postal Service, Postal Rate Commission, Government Accountability Office, Federal Bureau of Investigation, Central Intelligence Agency, Defense Intelligence Agency, National Imagery and Mapping Agency, National Security Agency, and other agencies designated by the President that conduct foreign intelligence or counter-intelligence activities. See 5 U.S.C. § 2302(a)(2)(C).

150. L. PAIGE WHITAKER, CONG. RESEARCH SERV., *THE WHISTLEBLOWER PROTECTION ACT: AN OVERVIEW* 1 (2007), <http://www.fas.org/sgp/crs/natsec/RL33918.pdf> [hereinafter WHITAKER].

151. 5 U.S.C. § 2302(a)(2)(B).

152. *Id.* § 2302(a)(8)(A).

153. See WHITAKER, *supra* note 147, at 4.

154. MERIT SYS. PROTECTION BD., *WHISTLEBLOWER PROTECTIONS TO FEDERAL EMPLOYEES: A REPORT TO THE PRESIDENT AND THE CONGRESS* (2010), <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=557972&version=559604&application=ACROBAT>.

sure would be unprotected if the information turned out to be inaccurate. Although the “reasonable belief” requirement tilts in the employee’s favor, the WPA contains a key limit on the subject matter of the disclosed information. Specifically, when the disclosure applies to the mismanagement or waste of funds, that mismanagement or waste must rise to “gross” proportions. According to a Senate Committee report, which accompanied the WPA legislation, committee members voiced concern that the legislation might trigger a flood of “trivial” disclosures and they sought to limit the disclosures regarding the waste of funds to the most serious cases.¹⁵⁵ Pursuant to the WPA, employees are directed to invoke the provisions of the WPA in one of four forums which include:

(1) employee appeals to the Merit Systems Protection Board of an agency’s adverse action against an employee, known as “Chapter 77” appeals; (2) actions instituted by the Office of Special Counsel; (3) individually maintained rights of action before the Merit Systems Protection Board (known as an individual right of action, or IRA); and (4) grievances brought by the employee under negotiated grievance procedures.¹⁵⁶

The final key part of the WPA delineated the list of personnel actions that received protection under the Act. The key prohibited actions include: an appointment, a promotion, any disciplinary action, a transfer and reassignment, and a decision concerning pay, benefits or decisions regarding training and education.¹⁵⁷ Unfortunately, the Act did not protect employees who disclosed wrongdoing to a supervisor who was the wrongdoer. Nor did it protect disclosures made in the course of a whistleblower’s job duties (i.e. inspectors, auditors). While the Act sought to protect a wide range of disclosures, subsequent Circuit Court decisions narrowed the scope of the protected conduct.¹⁵⁸

In 2012, after a thirteen year effort to strengthen the employment protections available to federal workers, Congress amended the WPA through the Whistleblower Enhancement Act (WEPA).¹⁵⁹ The

155. 5 U.S.C. § 2302(c).

156. See WHITAKER, *supra* note 147, Summary.

157. 5 U.S.C. § 2302(a)(2)(A).

158. Those decisions included: (1) *Horton v. Dep’t of the Navy*, 66 F.3d 279, 282 (Fed. Cir. 1995) (holding that disclosures to the alleged wrongdoer are not protected); (2) *Willis v. Dep’t of Agric.*, 141 F.3d 1139, 1144 (Fed. Cir. 1998) (excluding from protection a disclosure made as part of an employee’s normal job duties) and (3) *Meuwissen v. Dep’t of Interior*, 234 F.3d 9, 12-13 (Fed. Cir. 2000) (holding that disclosures of information already known are not protected). For an extensive discussion of the legislative changes, see *Congress Strengthens Whistleblower Protections for Federal Employees*, ABA SECTION OF LABOR AND EMPLOYMENT LAW, FLASH (Nov.-Dec. 2012), http://www.americanbar.org/content/newsletter/groups/labor_law/ll_flash/1212_abalel_flash/lel_flash12_2012spec.html.

159. Pub. L. No. 112-199, 126 Stat. 1465 (2012).

legislation aimed to close several loopholes that managers and supervisors had exploited. It also extended protections to employees of the Transportation Safety Administration and required Inspectors General Offices to designate a whistleblower protection ombudsman to educate employees about whistleblower protections. Not only did the Act seek to reverse the tendency of Federal Circuit Court of Appeals judges to narrow the scope of the original Act's protection, the Act, for a two-year trial period, explicitly suspended the court's exclusive jurisdiction on appellate review. The court had consistently narrowed the WPA's protections. Moreover, in cases where whistleblowers lose at the administrative hearing stage, the Act gives the Office of Special Counsel the authority to appear as *amicus curiae* at the appellate stage. Although the WEPA was a step forward for federal workers, two key sections of the proposed legislation did not make it into the final bill. Those provisions would have given employees the right to pursue a jury trial to enforce their protections and extended free-speech rights to national security workers making disclosures within agency channels.¹⁶⁰

III. STATE STATUTES

On paper, all fifty states offer employees robust protection from retaliation. When one examines the extent of the protection and the prerequisites for invoking that protection, the situation is less optimistic. Indeed widespread disparities in the level and type of protection offered on the state level have led one commentator to criticize state-level protections as "murky, piecemeal, disorganized and [inconsistent] from jurisdiction to jurisdiction."¹⁶¹ Many employees, who may be more likely to first report violations using internal reporting channels, are left unprotected from retaliation in states such as Texas. Indeed, most states only protect state and public employees, leaving employees of private entities unprotected under state law.¹⁶² State whistleblower laws also vary widely with respect to the

160. Joe Davidson, *Congress Approves Stronger Whistleblower Protections*, WASH. POST, Nov. 13, 2012, http://www.washingtonpost.com/blogs/federal-eye/wp/2012/11/13/congress-approves-stronger-whistleblower-protections/?hpid=hp_hp-top-table-main-whistleblowers:live%3Ahomepage%2Ft%3Acongress-approves-stronger-whistleblower-protections%3Aclsr.

161. Miriam A. Cherry, *Whistling in the Dark? Corporate Fraud, Whistleblowers and the Implications of the Sarbanes-Oxley Act for Employment Law*, 79 WASH. L. REV. 1029, 1049 (2004).

162. Examples of states that only protect public employees include: Alabama (State Employees Protection Act, ALA. CODE § 13A-12-1); Colorado (COLO. REV. STAT. § 24-50.5-101 et seq.); and Missouri (MO. REV. STAT. § 105.055). Examples of states with more comprehensive protection that extends to private employers include: Florida (FLA. STAT. § 448.102); Nebraska (NEB. REV. STAT. §§ 48-1102 & 48-1114) (applying to all firms with more than 15 employees); and Rhode Island (R.I. GEN LAWS § 28-50-4). For a summary of state whistleblower protections, see *State Whistleblower Laws*, NAT'L CONF. OF ST. LEGISLATURES (Nov. 2010), <http://www.ncsl.org/issues-research/labor/state-whistleblower-laws.aspx>.

nature of available remedies.¹⁶³ However, in a number of states, employers who violate public policy, in the process of discharging an employee, may face common law wrongful termination claims. In a ground-breaking decision, in 1959, a California court held that an employer could not dismiss an employee for refusing to commit perjury at the employer's behest.¹⁶⁴ According to R. Scott Oswald and Michael Vogelsang, two decades after the *Petermann* decision, courts in Indiana, Illinois, Michigan, and Pennsylvania began to embrace this public policy exception to the at-will employment doctrine.¹⁶⁵

While space limits prohibit a review of state whistle-blowing legislation, it is important to note that, in some cases, there are areas of overlap between federal and state protections. In some cases, such as reports of Medicaid fraud and abuse, federal law requires state agencies to conduct preliminary investigations upon receiving a report.¹⁶⁶ The Deficit Reduction Act of 2005 (DRA) included incentives for states to enact anti-fraud legislation modeled after the FCA.¹⁶⁷ Under the provisions of the Act, states may receive an additional 10% of Medicaid recovers if the state's FCA contains provisions rewarding and facilitating qui tam actions that are similar to those in the United States Code.¹⁶⁸

IV. CONCLUSION

The current patchwork of whistleblower protection in the United States is largely the result of the confluence of recurring waves of media publicity exposing government fraud, the growth in government spending and involvement, and Congress's attempts to respond to adverse publicity concerning government fraud. The succession of public crises running from Watergate to the wasteful spending in the Iraq War, to the collapse of the financial and securities industries have demonstrated that the government needs whistleblowers to help expose fraud and waste. As successive legislative attempts to extend whistleblower protections have demonstrated, reform "is usually precipitated by some crisis or new political movement that

163. Gerald Sinzduk, Note, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CAL. L. REV. 1633, 1641-41 (2008).

164. *Petermann v. International Broth. of Teamsters, Chauffeurs, Warehousemen and Helpers of America*, Local 396, 174 Cal. App. 2d 184 (Cal. Ct. App. 1959).

165. R. Scott Oswald and Michael Vogelsang, Jr. *The ABCs of Common Law Wrongful Termination Claims In The Washington Metropolitan Region*. 3 LAB & EMBL. L. F. no. 2 (2013): 197-262, 200 (2013).

166. 42 C.F.R. § 455.14.

167. Pub. L. No. 109-171, 120 Stat. 4 (2006).

168. *Incentivizing State False Claim Acts*, NAT'L CONF. OF ST. LEGISLATURES (Mar. 7, 2013), <http://www.ncsl.org/issues-research/health/clarifying-requirements-for-a-state-false-claims-a.aspx>.

disrupts the preexisting status quo.”¹⁶⁹ Ironically, in this fight to extend protections, Congress has often found itself at odds with federal judges who have repeatedly narrowed the scope of whistleblower protections and raised numerous hurdles for whistleblowers.

169. Mary Kremer Ramirez, *Blowing the Whistle on Whistleblower Protection: A Tale of Reform Versus Power*, 76 U. CIN. L. REV. 183, 198 (2007).

JACQUES DELISLE*

Damages Remedies for Infringements of Human Rights Under U.S. Law†

TOPIC IV. A

The laws of the United States provide damages remedies for some acts—primarily but not exclusively by state actors—that infringe many internationally recognized human rights. They mostly do so without specific reference to or incorporation of international human rights law or norms. In domestic cases, U.S. law provides damages remedies for human rights violations primarily through general laws concerning civil rights, constitutional torts and tort or tort-like suits against state entities and officials. In engaging international human rights law, particularly treaties, the United States generally has claimed that domestic law meets applicable international human rights standards and is adequate to fulfill the relevant international obligations of the United States. A handful of exceptional laws—including principally the Alien Tort Statute and the Torture Victim Protection Act—provide remedies specifically for human rights violations where the case involves a transnational element, including some cases of harms committed outside the United States, by foreign defendants, or against foreign victims. Some of these civil cases have relied on a venerable but limited principle of U.S. law that provides for reception of the customary international law of human rights into federal common law. Other features of U.S. law—principally those governing state and official immunity in domestic and transnational cases, and judicial restraint in cases involving foreign affairs and political questions—limit damages remedies that might otherwise be available for infringements of human rights.

HUMAN RIGHTS CASES WITH A FOREIGN / TRANSNATIONAL ELEMENT

The Foreign Sovereign Immunities Act

In cases with a transnational element, human rights violations that can yield awards of money damages under U.S. law are often the

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product of acts of foreign states or acts attributable to foreign states. The central role of state action in international human rights law generally is more pronounced in these types of cases, which primarily involve civil and political rights or *jus cogens*. The Foreign Sovereign Immunities Act (FSIA) of 1976 opens the door for plaintiffs seeking civil damages remedies for foreign state and foreign state-linked human rights violations, providing the “sole basis for obtaining jurisdiction over a foreign state.”¹ The FSIA codified the “restrictive theory” of sovereign immunity, rejecting the long-fading, traditional theory of “absolute” sovereign immunity. Institutionally, the FSIA also moved determination of immunity in particular cases from discretionary policy choices by the executive branch to a rule-governed statutory framework interpreted and applied by the courts.

Although accepting the background principle that foreign states and their organs, political subdivisions, and “agencies and instrumentalities” (including state-owned companies) are generally immune from suit in U.S. courts, the FSIA and judicial interpretations of it have created exceptions to immunity for some state-linked defendants for some of their actions. Where those exceptions apply, these defendants face liability generally “in the same manner” as “a private individual under like circumstances.” In such cases, compensatory damage awards are available against foreign states themselves and punitive as well as compensatory damage awards against state agencies and instrumentalities.

Sovereign immunity does not extend to individuals (although heads of state and some lesser officials may retain immunity under other legal principles, as discussed below). Some U.S. courts had interpreted the FSIA to prohibit suits against individuals alleged to have acted within the scope of their power as officials—particularly high-level officials—of foreign states. In some cases, these suits have been in substance suits against the state and would require enforcement against the state, and the litigation tactic of naming a natural person as a defendant has been rejected as insufficient to evade the immunity that the FSIA confers on states. Beyond such cases, some courts had found FSIA immunity available to foreign officials, at least when acting within their scope of office. The Supreme Court rejected this approach in *Samantar v. Yousuf*, holding that individuals cannot claim immunity under the FSIA (although they may be immune under common law immunity doctrine, as is discussed below).² Sovereign immunity does not cover enterprises that are only indirectly owned by the state.³ For state and state-linked defendants that

1. 28 U.S.C. §§ 1330, 1332(a), 1391(f) and 1601-1611; *Argentine Republic v. Amerada Hess*, 488 U.S. 428 (1989).

2. *Samantar v. Yousuf*, Slip op. No. 08-1555, 560 U.S. __ (2010).

3. *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003).

generally have immunity under the FSIA, there are “type of activity”-based exceptions, four of which are relevant, or potentially relevant, to cases involving human rights violations.

First, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) amended the FSIA to create an exception to immunity for (and a later amendment explicitly provided for a cause of action for civil damages claims against) the small handful of states (currently Cuba, Iran, Sudan and Syria) that the U.S. has officially designated as state sponsors of terrorism.⁴ This exception applies to civil claims seeking money damages for “personal injury or death that was caused by an act of torture, extrajudicial killing [both as defined in the Torture Victim Protection Act, discussed below], aircraft sabotage, hostage taking,” or acts providing material support for such activities, when committed by someone acting within the scope of his or her role as a state’s “official, employee or agent.”⁵ Foreign states are designated as state sponsors of terrorism by the Secretary of State pursuant to authority, and according to criteria, set forth in other laws, including ones governing foreign trade, aid, and arms sales.⁶

Plaintiffs invoking this “terrorism exception” must be: U.S. nationals; members of the U.S. armed forces; employees of the U.S. government or of U.S. government contractors acting with the scope of their employment; or the legal representatives of someone falling within any of the first three categories.⁷ If the relevant acts occurred in the defendant state’s territory, the plaintiff must exhaust any remedy available through non-U.S. arbitration.⁸ Some courts have construed the FSIA’s “terrorism exception” as insufficient to create a cause of action, whether generally or in the context of particular cases. Where that has occurred, plaintiffs have had to conjoin this FSIA provision with another source of law that creates a right of action supporting recovery for the relevant harms.

Second, foreign states (and their agencies and instrumentalities) are not immune from some suits for money damages for “personal injury or death” caused by the “tortious act or omission of [a] foreign state or any official or employee of [a] foreign state while acting within the scope of his office or employment.”⁹ Where this exception applies, the foreign sovereign defendant faces liability under U.S. tort law generally, which permits awards of damages for a range of be-

4. Examples of cases brought under this provision include *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997); *Roeder v. Islamic Republic of Iran*, 333 F.23d 228 (D.C. Cir. 2003).

5. 28 U.S.C. § 1605A(a)(1), (a)(2)(A)(i), (h)(7).

6. 28 U.S.C. § 1605A(h)(6) (referring to Export Administration Act, Foreign Assistance Act, and Arms Export Control Act).

7. 28 U.S.C. § 1605A(a)(2)(A)(ii), (c).

8. 28 U.S.C. § 1605A(a)(2)(A)(iii).

9. 28 U.S.C. § 1605(a)(5).

haviors that violate human rights and lead to physical injury or death (as is discussed below). There are no nationality or other status requirements for plaintiffs.

This “tort exception” to immunity under the FSIA includes additional conditions that limit its utility for victims of human rights abuses. It is limited to harms “occurring in the United States”—a restriction that excludes the vast majority of torts arising from human rights violations committed by or with the authority of a foreign state, given that such violations typically occur in the state’s own territory. The “tort exception” also does not extend to several types of torts usually not associated with physical harm (malicious prosecution, abuse of process, defamation or interference with contracts) or to “any claim based upon the exercise or performance of a discretionary function regardless of whether the discretion be abused.” This “discretionary function exception” is generally understood as an effort to make foreign sovereigns liable for ordinary torts (such as automobile accidents and ministerial acts) but to insulate them from liability for policy choices and their consequences. As interpreted, it broadly tracks a similar exception in the Federal Tort Claims Act (discussed below and concerning U.S. government immunity). This provision can significantly limit remedies for foreign state-linked human rights violations.

Still, some plaintiffs have been able to bring damages claims based on human rights-violating torts occurring in the United States and attributable to foreign sovereigns. Principal examples include cases in which a foreign state, its leaders or officials have directed, set in motion, or undertaken killings of fellow nationals whom they considered political enemies or enemies of the state and who were present in the United States. In such cases, the territorial requirement of the torts exception is easily satisfied. In terms of the “discretionary function” exception, some U.S. courts have concluded that such serious human rights violations are not within the scope of the policy choices that a state has discretion to make and thus are not within the scope of FSIA-granted immunity.¹⁰

Third, a foreign state (or its agency or instrumentality) is not immune from suits based upon: “a commercial activity” that the defendant has “carried on in the United States” (provided that the activity includes “substantial contact with the United States”); “an act performed in the United States in connection with a commercial activity . . . elsewhere”; or “an act outside the territory of the United States in connection with” the defendant’s “commercial activity else-

10. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989); *Letelier v. Republic of Chile*, 488 F. Supp. 665 (D.D.C. 1980); *but cf.* *In re Terrorist Attacks on September 11, 2001*, 538 F.3d 71 (2d Cir. 2008) (torts exception not applicable to claim based on conduct addressed by terrorism exception and alleging defendants’ donations to Islamic charities that funneled funds to terrorist attackers).

where and that act causes a direct effect in the United States.” Although suits relying on this “commercial activity” exception are generally not promising paths to civil damages remedies in human rights cases, the exception could provide relief in limited circumstances. The impediment to success in such cases has been that the commercial activity that occurs, or has an effect, in the United States is not sufficiently connected to the defendant’s human rights-violating activity; or that a commercial activity that might be sufficiently connected to human rights violations does not meet the territorial requirements (of occurrence in or impact on United States territory) even though those territorial requirements are less demanding than under the torts exception; or that the acts in question have not been sufficiently commercial in character.¹¹

Fourth, a foreign sovereign can waive immunity, explicitly or by implication.¹² Explicit waiver is vanishingly rare and especially unlikely when it could expose a foreign state to a judgment that the state is responsible for human rights violations. Attempts to claim implied waiver in human rights-related cases generally have failed.¹³ Intentional waiver is most plausible in the context of human rights violations followed by discontinuous regime change, where the new government might seek to signal a clear break with the past and might welcome, or at least tolerate, transnational condemnation of its predecessor’s abuses—a pattern that seemingly has characterized some relatively successful Alien Tort Statute cases (discussed below). Courts have rejected the argument that commission of *jus cogens* or other severe human rights violations constitute implicit waivers of immunity.

Plaintiffs who avoid the barrier of FSIA immunity still must (except generally in suits under the terrorism exception) articulate a statutory or common law cause of action that would provide for liability of an ordinary, non-immune defendant—something that the FSIA itself generally has been held not to do.

Alien Tort Statute

The Alien Tort Statute (ATS)—also known as the Alien Tort Claims Act—is perhaps the most distinctive U.S. law providing dam-

11. 28 U.S.C. §§ 1605(a)(3), 1603(e). *See, e.g.*, Saudi Arabia v. Nelson, 507 U.S. 349 (1993) (commercial activity of recruiting plaintiff occurred in U.S.; torture in retaliation for plaintiff’s complaints about employer’s practices occurred in Saudi Arabia); Cicippio v. Islamic Republic of Iran, 30 F.3d 164 (D.C. Cir. 1994) (hostage taking for profit is not a commercial activity).

12. 28 U.S.C. § 1605(a)(1)

13. A rare example of (largely unintended) waiver in a case involving human rights abuses—including torture and taking of property—is *Siderman v. Republic of Argentina*, 965 F.2d 699 (9th Cir. 1992) (defendant’s appearance in related state court claim waived immunity).

ages remedies for human rights abuses.¹⁴ It also has been one of the very few aspects of relevant U.S. law that has looked explicitly to international human rights legal norms. Adopted as part of the First Judiciary Act in 1789, the ATS provides that “[t]he [federal] 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.”¹⁵

For much of the two centuries that followed, the provision lay largely dormant. In 1980, in *Filartiga v. Pena-Irala*, a court awarded damages for the torture (resulting in death) of a foreign national, outside the United States (in this case, in the victim’s home country) by a foreign defendant acting under color of state authority (in this case, a city police chief of the state of which both victim and defendant were nationals).¹⁶ In the court’s analysis, certain international human rights norms (in this case, the prohibition against torture under color of official authority) were sufficiently “universally accepted norms of the international law of human rights” that they came within the scope of evolving customary international law that was received into U.S. law (as federal common law) and formed a basis for relief under the ATS. Under *Filartiga* and cases that followed it, where such norms are violated, a plaintiff may obtain money damages under the ATS.

Post-*Filartiga* cases added to the list of covered rights recognized by some (but not all) courts: summary execution, enforced disappearance, (prolonged) arbitrary detention, slavery / forced labor, forced relocation / exile, genocide, war crimes and crimes against humanity (and some of the violent and discriminatory means—including systematic rape and killing—used in the context of genocide, war crimes and crimes against humanity), and (less clearly) non-torture forms of cruel, inhuman and degrading treatment.¹⁷ Claims invoking other human rights, even where those rights systematically or grossly vio-

14. The ATS has produced a vast and contentious body of scholarly literature. Recent examples include a large, critical body of work by Curtis A. Bradley and Jack L. Goldsmith (some of which is cited below), JEFFREY DAVIS, *JUSTICE ACROSS BORDERS* (2008), Jacques deLisle, *Human Rights, Civil Wrongs and International Politics: A ‘Sinical’ Look at the Use of U.S. Litigation to Address Abuses Abroad*, 52 DEPAUL L. REV. 473 (2003), GEORGE P. FLETCHER, *TORT LIABILITY FOR HUMAN RIGHTS ABUSES* (2008), GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING THE MONSTER: THE ALIEN TORT STATUTE OF 1789* (2003).

For overviews of the doctrinal issues addressed here, see BETH STEPHENS ET AL., *INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS* (2d ed. 2008) and CURTIS A. BRADLEY, *INTERNATIONAL LAW IN THE U.S. LEGAL SYSTEM* (2013) (especially chs. 7-8).

15. 28 USC § 1350.

16. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

17. See, e.g. *Hilao v. Estate of Marcos*, 103 F.3d 789 (9th Cir. 1996); *Forti v. Suarez-Mason*, 672 F. Supp. 1531 (N.D. Cal. 1987); *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995); *Doe v. Unocal*, 963 F.Supp. 880 (C.D.Cal.1997) *aff’d in part and rev’d in part* 395 F.3d 932 (9th Cir. 2002).

lated, have been rejected or, at most, won sporadic acceptance by lower courts.

Availability of punitive damages has varied in ATS cases and depends in part on courts' resolution of choice of law questions. Personal jurisdiction over defendants is required, but that can be achieved under U.S. law through so-called "tag jurisdiction" (serving a defendant with process when the defendant is present, even briefly, in the United States) or through satisfying the relatively low threshold of "minimum contacts" with the forum required under U.S. constitutional and statutory law (and often easily met in suits against multinational companies).

In 2013, the United States Supreme Court, in *Kiobel v. Royal Dutch Petroleum*, took a significant step (following its earlier decision in *Sosa v. Alvarez-Machain*) to limit the reach of the ATS and its expansion during the more than three decades after *Filartiga*.¹⁸ The Court unanimously rejected the ATS claim of foreign plaintiffs concerning human rights violations (in this case, torture, extrajudicial killing, crimes against humanity and other human rights violations) committed in the plaintiffs' home country by foreign defendants (in this case, multinational companies not based in the U.S.) that acted in conjunction with the country's government (in this case, on plaintiffs' account, by aiding and abetting the state's military in acts against those protesting defendant's oil extraction project). The opinion of the Court (joined by five of the nine justices) held that the general presumption against the extraterritorial reach of U.S. statutes applied to the ATS (even though the ATS is a jurisdictional law—rather than a substantive, regulatory law—and even though it explicitly addresses international matters, specifically alien plaintiffs and acts in violation of the "law of nations," long understood to mean "international law"). For the ATS to provide relief, the Court held that a case must "touch and concern the territory of the United States" with "sufficient force to displace the presumption against extraterritorial application," and that "mere corporate presence" of the defendant in the United States does not suffice.

Pending further judicial decisions or legislation, the contours of the ATS after *Kiobel* remain uncertain in several respects. First, so-called "F-cubed" cases—that is, cases that have foreign plaintiffs (as all ATS claims must), arise from foreign activities, and are brought

18. 133 S.Ct. 1659 (2013); Ingrid Wuerth, *Kiobel v. Royal Dutch Petroleum Co.: The Supreme Court and the Alien Tort Statute*, 107 AM. J. INT'L L. 601 (2013); see also the symposium issue on *Kiobel* beginning at 28 MD. J. INT'L L. 1 (2013). For sharply contrasting assessments, see Anthony J. Colangelo, *The Alien Tort Statute and the Law of Nations in Kiobel and Beyond*, 44 GEO. J. INT'L L. 1329 (2013) and Kenneth Anderson, *Kiobel v. Royal Dutch Petroleum: The Alien Tort Statute's Jurisdictional Universalism in Retreat*, 2013 CATO SUP. CT. REV. 149 (2013). *Kiobel* spawned a lively discussion among commentators in online postings such as SCOTUSblog.

against foreign defendants—are eliminated, or nearly so. The change wrought by *Kiobel* rejects aspects of *Filartiga* and many cases that followed. *Kiobel* did not specifically conclude that no F-cubed case could sufficiently “touch and concern” the territory of the United States, however. A concurrence by one member of the majority (Justice Kennedy) stressed that the Court’s decision was “careful to leave open a number of significant questions regarding the reach and interpretation” of the ATS. A concurrence joined by four justices would preserve ATS jurisdiction where a defendant’s conduct (wherever it occurred) “substantially and adversely affects an important American national interest” which might include preventing the U.S. from becoming a “safe harbor” for some types of human rights violators. But few if any F-cubed cases are likely to meet the majority’s exacting standard, and at least two members of the Court would explicitly prohibit F-cubed cases entirely.

Second, in terms of location of the relevant activity, one type of so-called “F-squared” claim (foreign plaintiff and foreign defendant) could still be viable if sufficient activity occurs in the United States. Seven justices did not join a two-justice concurrence (by Justice Alito) that would have excluded cases in which the “domestic conduct” in the U.S. is not itself “sufficient to violate” the especially well-entrenched and core international legal norms that are within the ATS’s reach. Although the Court’s opinion is clear that “mere [] presence” of a corporate defendant in the U.S. will not do, the majority and other concurrences do not adopt—and a four-justice concurrence (by Justice Breyer) rejects—the narrow reading urged by Alito.

Third, in terms of the nationality of the defendant, the other type of F-squared claim (foreign plaintiff and foreign activity) would seem to present a stronger case (as the concurrence joined by four justices found it to be) because of the U.S.’s “national interest” in regulating the behavior (including behavior abroad) of U.S. nationals (whether individual, corporate or governmental) that violates at least certain core human rights. Such claims would appear to be subject to *Kiobel*’s presumption against extraterritorial reach of the ATS and the Court’s high bar to overcoming that presumption. The question remains open which, if any, among cases of this second F-squared type might survive.

Fourth, in terms of the defendants subject to ATS claims, it appears that the ATS remains relatively unaffected, at least in principle. *Filartiga* and many other ATS cases involved defendants who clearly: were foreign state agents or others acting with, or under color of, foreign state authority to harm plaintiffs directly; or were commanding officers or state supervisory officials who knew or should have known about, and failed to stop or punish, abuses committed by subordinates. Some later ATS cases permitted suits

against other types of actors, including: the political leader of an entity that lacked status as a state under international law (specifically, the leader of a Bosnian Serb entity who was sufficiently complicit with the government of the since-defunct Yugoslav state to meet state action requirements for liability for torture, executions and other abuses committed in pursuit of “ethnic cleansing,” and who could be held liable even in the absence of state action for genocide, war crimes or crimes against humanity)¹⁹; and, more often, corporations that aided and abetted state violations of human rights (the claim in *Kiobel*), or that were so deeply entangled with the state that corporate acts constituted state action, or that engaged in one of the few types of human rights violations for which state action was not required (a principle embraced in *Kadic*)²⁰; and, after 9/11, U.S. government officials involved in detention and abuses of detainees in the context of the “war on terror.”²¹ Like some but not all of the courts that had addressed the issue, the lower court in *Kiobel* had held that ATS claims could not be brought against private actors such as multinational corporations. The Supreme Court did not accept, or address, that conclusion.

Fifth, the range of violations of human rights that fall within the scope of the ATS remains uncertain and relatively limited—and possibly is significantly more limited (and clearly is less likely to expand) than before *Kiobel* and the earlier Supreme Court ATS-related decision in *Sosa v. Alvarez-Machain*.²² *Filartiga* addressed broadly the reception of clearly accepted norms of international human rights law into U.S. federal common law as a basis for recovery under the ATS. While *Filartiga* and some cases that followed involved violations of core international human rights—and often *jus cogens*—such as torture (at issue in *Filartiga* itself) or genocide, war crimes and crimes against humanity (at issue in *Kadic*), other cases cast the net more broadly. In *Sosa*, however, the Court characterized the ATS as confined to a “very limited” range of customary international legal norms that are “definable, universal and obligatory” and are “of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms” (such as the prohibition of piracy) in existence when Congress en-

19. *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

20. See, for example, *Doe v. Unocal*, 963 F.Supp. 880 (C.D.Cal.1997); *South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009); *Sarei v. Rio Tinto*, 456 F.3d 1069 (9th Cir. 2006); *Wiwa v. Royal Dutch Petroleum*, 226 F.3d 88 (2d Cir. 2000). For contrasting scholarly analyses, see Curtis A. Bradley, *State Action and Corporate Human Rights Liability*, 85 NOTRE DAME L REV. 1823 (2010) and Judith Chomsky, *Will the Real ATS Please Stand Up?* 33 SUFFOLK TRANSNAT'L L. REV. 461 (2010).

21. See, e.g., *Rasul v. Bush*, 542 U.S. 466 (2004); Julian G. Ku, *The Third Wave: The Alien Tort Statute and the War on Terrorism*, 19 EMORY INT'L L. REV. 205 (2005).

22. 542 U.S. 692 (2004).

acted the ATS.²³ The Court broadly warned against expansive recognition of ATS claims, urging “judicial caution” and “vigilant doorkeeping,” in part lest the courts infringe on the executive branch’s foreign affairs powers or make decisions that could have adverse “implications for the foreign relations of the United States.”

As this reflects, significant limitations to the ATS’s scope in providing damages remedies for human rights abuses predate *Kiobel*. Pure “F-cubed” cases had long been on shaky ground. They were often understood as resting on an interpretation of the ATS that saw it as an exercise of universal jurisdiction—a relatively weak basis for prescriptive jurisdiction in international law, one that has not won official or judicial favor in the United States, and one that, if accepted at all, is likely limited to addressing a very narrow range of *jus cogens* or other “core” rights. From immediately after *Filartiga*, expanded use of the ATS was controversial and contested, with some critics—and judges—arguing that the ATS should be construed narrowly.²⁴ After *Sosa*, it was no longer possible to claim that the ATS created a cause of action, rather than served as a jurisdictional statute opening federal courts to causes of action rooted in other sources (whether federal common law—including that drawn from the “law of nations,” or federal statute, or treaty). Since long before *Sosa* and *Kiobel*, most ATS claims have been dismissed, and the relatively few successful ATS actions have largely been limited to those against agents of small states disfavored by U.S. foreign policy, or against those who had acted on behalf of defunct regimes. ATS suits against corporate defendants received considerable support from scholars and activists and grew sharply as a share of ATS cases, but such claims have had only limited success since plaintiffs began to bring them in the 1990s. Victory has been still more elusive for plaintiffs bringing suits against U.S. officials and agents of the U.S. government, most of which have arisen from abuses committed in the post-9/11 “war on terror.” As discussed below, several defenses (including doctrines of immunity) have been among the daunting obstacles confronting ATS plaintiffs. The Supreme Court ruled nearly a quarter century ago

23. Although acknowledging that prolonged arbitrary detention might be a covered right, the one-day legally unauthorized deprivation of liberty alleged by plaintiff did not violate such a right.

24. See, for example, Curtis A. Bradley & Jack L. Goldsmith, *Customary International Law as Federal Common Law: A Critique of the Modern Position*, 110 HARV. L. REV. 815 (1997); *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 798-823 (D.C. Cir. 1984) (Bork, J. concurring). Among the arguments to restrict the ATS were: the ATS did not provide a cause of action but was only a jurisdictional statute that opened courts to some claims for which the plaintiff could articulate an independent cause of action (a position adopted in *Sosa*); there was no federal common law claim based on violation of customary international law of human rights; covered human rights were limited to those generally recognized in 1789, when the ATS was enacted; and creation of remedies for the human rights violations asserted by ATS plaintiffs was a matter for Congress, not the courts.

that the ATS provides no basis for a claim against foreign sovereign state defendants, which could be brought only under the FSIA (discussed above).

The Torture Victim Protection Act

The Torture Victim Protection Act (TVPA) of 1991 provides that an “individual who, under actual or apparent authority, or color of law, of any foreign nation [] subjects an individual to torture . . . or extrajudicial killing shall, in a civil action, be liable for damages” to the victim (in cases of torture) or the victim’s legal representative or “any person who may be a claimant in an action for wrongful death” (in cases of extrajudicial killing).²⁵ Plaintiffs in a wrongful death action vary somewhat, with different states having different laws. But they generally include surviving spouses, children and, less commonly, others with close familial or quasi-familial relationships with the victim. In cases involving foreign plaintiffs, some courts have looked to foreign law on this issue.

The TVPA is unusual in U.S. law in specifically looking to international human rights law. Its declared purpose is “[t]o carry out obligations of the United States under the United Nations Charter and other international agreements [such as the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment] pertaining to the protection of human rights.”

Unlike the ATS, the TVPA allows actions by U.S., as well as foreign, plaintiffs. There seems to be little prospect of a *Kiobel*-like judicial construction of the TVPA as not applying extraterritorially. In a restriction that seems to assume applicability to human rights violations occurring outside the United States, the TVPA requires plaintiffs to exhaust any “adequate and available remedies in the place in which the conduct giving rise to the claim occurred.”²⁶

In terms of the scope of defendants, the TVPA’s “color of [foreign state] law” provision will rarely allow suit against U.S. (or other non-local-country) defendants. It also is generally interpreted similarly to the “color of law” provision in Section 1983 of the Civil Rights Act (discussed below). In 2012, the United States Supreme Court, in *Mohammed v. Palestinian Authority*, limited the range of TVPA defendants, holding that the statute’s use of “individual”—rather than the broader “person”—means that the TVPA permits only suits against natural persons, not organizational entities.²⁷ The unanimous decision closes off definitively some uses that plaintiffs sometimes had made of the TVPA to sue multinational corporations

25. 28 USC § 1350 note.

26. 28 USC § 1350 note § 2(b).

27. 132 S. Ct. 1702 (2012).

or foreign states.²⁸ In suits against corporations, the TVPA had been used to supplement, or substitute for, the controversial ATS as a basis for a cause of action. In suits against foreign state entities, plaintiffs had invoked the TVPA in conjunction with the FSIA's "terrorism exception" to sovereign immunity, which some courts found had not (especially before later, clarifying amendments) created a cause of action.

The Anti-Terrorism Act (ATA), adopted in 1994, offers another, broadly similar potential avenue to civil damages for human rights violations in cases with a transnational or foreign dimension. The ATA includes authorization of treble damage awards for a U.S. national "injured in his or her person, property, or business by reason of an act of international terrorism," which is defined as a violent criminal act that appears to be intended to intimidate or coerce a civilian population or influence a government policy.²⁹ Thus far, the ATA has not been very fruitful as a source of successful litigation.

Additional Limitations to Damages Relief against Foreign State and State-Linked Actors

Other aspects of U.S. law further limit the access of those suffering human rights violations to civil damages remedies in cases where the defendant is a foreign state or state-linked actor. First, official immunity often is a formidable barrier. Status-based official immunity shields some individual defendants (although not foreign states and their agencies or instrumentalities). Foreign heads of state generally enjoy this immunity, which is generally regarded as a vestige of the absolute theory of sovereign immunity or as a principle related to still-vibrant doctrines of diplomatic immunity (which accord status-based immunity to diplomats). Some—but by no means all—U.S. courts have extended this type of official immunity more broadly, for example to heads of government, cabinet ministers, ex-presidents and even presidents' close family members.³⁰

Other foreign officials lack this robust status-based immunity but still can avoid liability under doctrines of conduct-based immunity. In denying FSIA immunity to individual defendants, the Supreme Court in *Samantar* explicitly left open (but did little to clarify) the possibility that foreign official defendants might be shielded by common law doctrines of official immunity and perhaps even com-

28. See, e.g., *Baloco ex rel. Tapia v. Drummond Co.*, 640 F.3d 1338 (11th Cir. 2011); *Bauman v. Daimler Chrysler*, 579 F.3d 1088 (9th Cir. 2009); *Daliberti v. Iraq*, 146 F. Supp. 2d 19 (D.D.C. 2001); *Alejandre v. Republic of Cuba*, 996 F. Supp. 1239 (S.D. Fla. 1997).

29. 18 U.S.C. §§ 2331-2338.

30. For a recent overview of these patterns, see Joseph W. Dellapenna, *Interpreting the Foreign Sovereign Immunities Act*, 15 LEWIS & CLARK L. REV. 555, 570-82 (2011).

mon law doctrines of foreign sovereign immunity (which the FSIA has displaced for foreign state defendants but which the Court indicated might still have vitality for individual official defendants, presumably where their challenged actions arguably occurred within their scope of office). Among the uncertainties sown by *Samantar* has been the question of the extent to which the common law of foreign official immunity does, will, or should, track the doctrine of official immunity that has developed in U.S. domestic civil rights law, especially Section 1983 (discussed below).³¹ Under a Section 1983-like (or even a somewhat more “pro-defendant”) common law standard, immunity would not have insulated foreign officials in the many pre-*Samantar* cases (and *Samantar* itself) that went forward alleging significant abuses of core human rights by officials acting under color of home state law.

As the foregoing reflects, the contours of official immunity remain vague and unsettled in the context of suits involving human rights claims against foreign defendants. U.S. courts generally defer to views expressed by the executive branch on cases in which the government (ordinarily through the Department of Justice) expresses support for, or opposition to, official immunity for a foreign official. The executive branch had indicated that it did not support immunity in *Samantar*, and U.S. administrations often have taken similar positions in cases alleging serious human rights violations by foreign officials.

Second, the Act of State doctrine can pose a challenge to some plaintiffs who seek damages for transnational human rights violations in U.S. courts. Rooted in notions of sovereign equality internationally and constitutional separation of powers domestically, this judicially created doctrine provides that U.S. courts ordinarily will not sit in judgment of sovereign acts of another state taken in that state’s own territory, even if the acts violate international law. Although the doctrine has in a relatively small number of cases blocked litigation asserting human rights violations, its effect has been limited. This is to be expected, given: judicial determinations that many human rights violations are not acts of state (in part because they violate the host state’s law); the Supreme Court’s

31. Much, but not all, of the scholarly commentary has argued against common law foreign official immunity being as broad as the “qualified immunity” doctrine in domestic law and especially under Section 1983. For views at both ends of the spectrum, see Beth Stephens, *The Modern Common Law of Foreign Official Immunity*, 79 *FORDHAM L. REV.* 2669 (2011) (against broad official immunity for foreign officials) and Curtis A. Bradley & Jack L. Goldsmith, *Foreign Sovereign Immunity and Domestic Officer Suits*, 13 *GREEN BAG* 137 (2010) (immunity broader for foreign than domestic officers). See also Curtis A. Bradley & Laurence Helfer, *International Law and the U.S. Common Law of Foreign Officer Immunity*, 2011 *SUP. CT. REV.* 213 (2011); Peter B. Rutledge, *Samantar, Official Immunity and Federal Common Law*, 55 *LEWIS & CLARK L. REV.* 589 (2011).

determination that the doctrine is least appropriately applied where there is a high level of consensus on relevant international legal standards, where adjudicating the case is not likely to have a significant impact on U.S. foreign policy, or (in a lower court's gloss) where the foreign government was not acting in the public interest; and the norm and practice (embodied in the so-called "Bernstein exception") that the doctrine is not to be applied where the U.S. executive expresses lack of support for its application. The doctrine still can have an impact even where it does not fully insulate foreign state human rights violating activity from scrutiny in U.S. civil litigation. For example, in a case seeking damages for what plaintiff claimed was the politically motivated killing of her dissident journalist husband, the defendant sought to invoke the Act of State doctrine to induce the U.S. court to defer to the legal conclusion (lack of state liability) and not just accept the factual findings (which could support a finding of state liability under U.S. law) of the foreign sovereign's courts that adjudicated cases arising from the same incident.³²

Third, plaintiffs in transnational human rights cases face a cluster of obstacles rooted in concerns about the risks of court encroachment on, or undermining of, the political branches'—and especially the executive's—conduct of foreign affairs. Courts sometimes apply the political question doctrine—albeit rarely in transnational human rights cases but somewhat more often when the defendant is a U.S. government official.³³ Under this judicially created doctrine, courts are not to adjudicate a case if it involves: "a textually demonstrable commitment of the issue to a coordinate political department"; "a lack of judicially discoverable and manageable standards"; the need for a "policy determination" exercising "nonjudicial discretion"; a judicial decision that would show a lack of the "respect due" other branches; an "unusual need" for adherence to an already-made political decision; or the potential "embarrassment" of disparate pronouncements from different branches of the government.³⁴ More commonly, related concerns motivate judicial development of other doctrines that impede plaintiffs seeking damages for transnational human rights violations. In *Sosa* and *Kiobel*, for example, concerns about the impact on U.S. foreign policy, the constitutional allocation of roles in foreign affairs, and other political question-like worries appeared to shape the Court's adoption of a narrow view of what human rights are cognizable as ATS claims and to apply the

32. *Liu v. Republic of China*, 892 F.2d 1419 (9th Cir. 1989).

33. *See, e.g., Schneider v. Kissinger*, 310 F. Supp. 2d 251 (D.D.C. 2004) (dismissal, partly on political question grounds, of claim against senior U.S. official for ordering foreign official's murder). For an inventory of doctrinal bases for dismissals of cases in this general category, see DAVIS, *supra* note 14, at 92-95.

34. *Baker v. Carr*, 369 U.S. 186, 217 (1962).

presumption against the extraterritorial effect of U.S. statutes to the ATS.

For the same and similar reasons, U.S. courts often defer to executive branch views in particular cases and on particular issues where the executive argues (though formal statements of interest, amicus briefs and other mechanisms) that cases should not go forward—most often because of what the executive claims will be their effect on the foreign relations interests of the United States, for example by potentially upsetting U.S. relations with particular countries, undermining U.S. foreign economic policy, or in other ways. As the foregoing account suggests, these types of limits to judicial remedies for international human rights violations are formidable in part because they have deep roots and strong foundations in principles of separation of powers that loom large in U.S. constitutional law and jurisprudence more generally and in foreign affairs-related cases especially. But judicial deference to executive views is not unlimited in foreign-related cases, including those seeking damages for human rights violations. Courts sometimes reject executive-branch calls to dismiss cases (including human rights cases) because of asserted foreign policy interests, and courts are less deferential to the executive on questions of interpreting international law than they are on other foreign affairs-related issues.³⁵

Other doctrines that can vex plaintiffs in transnational civil litigation in U.S. courts have had relatively little impact in human rights cases. *Forum non conveniens* motions face relatively bleak prospects where they would lead to sending a plaintiff seeking redress for human rights violations back to the courts of the state where, or by which, the violations were committed.³⁶ Although some courts have indicated that plaintiffs may be required to exhaust available and adequate foreign forum remedies, plaintiffs in transnational human rights cases often can show that such remedies are unavailable or futile. Statute of limitations problems have been eased by relatively generous equitable tolling doctrines or the inclusion of long statutes of limitations in some human rights-focused statutes.

In suits against U.S. government defendants (especially ones arising from the post-9/11 war on terror), plaintiffs have faced often-daunting barriers, including: the political question doctrine (dis-

35. See, e.g., *Doe v. Liu Qi*, 349 F. Supp. 2d 1258 (N.D. Cal. 2004); see also Curtis A. Bradley, *The Costs of International Human Rights Litigation*, 2 CHI. J. INT'L L. 457 (2001), deLisle, *supra* note 14; Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 182 (2004) (contrasting views of human rights civil litigation's potential to affect adversely U.S. foreign policy interests); and Curtis A. Bradley, *Chevron Deference and Foreign Affairs*, 86 VA. L. REV. 649 (2000) (arguing for deference to executive, including its interpretations of international law).

36. A rare contrary case involved claimed environmental harms, *Aguinda v. Texaco*, 303 F.3d 470 (2d Cir. 2002).

cussed above), sovereign immunity (discussed below), specific statutory immunity (in the case of claims brought by possible “enemy combatants”),³⁷ official immunity (discussed below), and protection of state secrets (which can bring dismissal of cases where the court finds adjudicating the case would entail disclosure).

A final difficulty for plaintiffs is that judgments are often impossible to collect against foreign defendants, given the immunity of most property owned by foreign sovereigns from execution of judgments, courts’ deference to executive branch judgments that enforcement would interfere with foreign policy or treaty obligations, and the lack of resources or reachable resources held by individual and other non-sovereign defendants. These difficulties are part of what has made multinational corporations an increasingly common target of transnational human rights litigation. For some plaintiffs, slim chances for financial reward are not a major concern because their principal aims are formal vindication or public awareness.

DOMESTIC LAW: DAMAGES FOR HUMAN RIGHTS VIOLATIONS WITHOUT AN INTERNATIONAL ELEMENT

U.S. Domestic Law and International Human Rights Obligations

As the foregoing overview of U.S. law concerning transnational cases reflects, U.S. law can provide civil damages remedies to address violations of human rights committed abroad or against non-nationals and did so more broadly before recent court decisions. Human rights law is, however, an anomaly in international law in that it primarily concerns obligations that a state owes to its own citizens (or others in its territory), principally to protect them from abuse by their own state’s organs, officials and nationals. Much of the U.S. law providing damages remedies for acts that infringe international human rights focuses on such “domestic” violations.³⁸ U.S. law does this in several ways.

Human rights treaties provide a source of international legal obligation to protect human rights in the United States.³⁹ But in acceding to human rights treaties, the U.S. declares—or, still more broadly, courts interpret (sometimes at the urging of the executive)—

37. The Military Commissions Act of 2006 prohibits civil claims against U.S. defendants by non-citizen plaintiffs who were determined to be, or were in the process of being considered for determination as, “enemy combatants”—later changed to “unprivileged enemy belligerents”—and who were challenging their detention, treatment or conditions of confinement. 10 USC §§ 948a-950w.

38. To the extent that other requirements can be met—including but not limited to personal jurisdiction—these laws are available to address cases with a transnational element as well. As noted above and discussed below, some transnational human rights cases involve claims against U.S. government defendants, sometimes by U.S. citizen plaintiffs, particularly in cases arising from the “war on terror.”

39. As noted above, treaties also provide a basis—albeit an almost entirely idle one—for ATS claims.

such treaties as non-self-executing and thus dependent on domestic lawmaking to make treaty-based rights and duties enforceable through private civil actions.⁴⁰ Any treaty-based rights that enter fully into U.S. law are vulnerable to being overridden by subsequent inconsistent congressional legislation (under the so-called “last in time” rule). On rare occasion, U.S. legislation states that it is adopted to implement international human rights treaty obligations. The more common U.S. approach is to assert that existing domestic law is sufficient to satisfy the U.S.’s human rights treaty obligations. In many cases, the U.S. also adopts reservations, understandings or declarations (RUDs) stating that the U.S. limits or interprets its obligations under a treaty as consistent with U.S. law, including especially constitutional law. The constitutional law invoked in these RUDs principally concerns freedoms of speech, association and conscience (First Amendment rights), federalism, and capital punishment (including for juveniles⁴¹). This is the approach that was taken, for example, when the U.S. ratified the International Covenant on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), and the Convention on the Elimination of All Forms of Racial Discrimination (CERD), among others. (The U.S. has not acceded to the International Covenant on Economic, Social and Cultural Rights and therefore has no treaty-based obligations to implement its requirements.)

Customary international human rights law is part of the body of customary international law that U.S. courts, in principle, can look to as part of the common law to be applied in adjudicating damages-seeking suits, including those arising from actions that violate human rights.⁴² As with treaty-based law, so too with the customary law of human rights: U.S. courts do not look explicitly to international human rights norms in cases that lack a clear foreign or transnational dimension.

As this all suggests and reflects, the principal laws providing damages remedies for human rights violations committed against U.S. nationals (and some non-nationals) in the United States (and

40. See, e.g., UN HUMAN RIGHTS COUNCIL, REPORT OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW, UNITED STATES OF AMERICA, UN Doc. A/HRC/16/11 (Jan. 4, 2011); UN HUMAN RIGHTS COUNCIL, REPORT OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW, UNITED STATES OF AMERICA, ADDENDUM, UN Doc. A/HRC/16/11/Add.1 (Mar. 8, 2011). For a review of human rights-related RUDs, see Matthew J. Jowanna, *42 U.S.C. § 1983: A Legal Vehicle with No International Human Rights Treaty Passengers?* 9 U. N.H. L. REV. 31, 35-41 (2010).

41. The Supreme Court has since held unconstitutional capital punishment for crimes committed when the defendant was a minor, *Roper v. Simmons*, 543 U.S. 551 (2005).

42. This principle was established early in U.S. law, in *The Paquete Habana*, 175 U.S. 677 (1900).

primarily by U.S. defendants) are domestic laws that are characterized by little connection to international human rights law or explicit reference to human rights in any form.

Section 1983 Actions

Enacted on the basis of the post-Civil War constitutional amendments and as part of the Reconstruction Civil Rights Acts (of 1866, 1870, and 1871), 42 U.S.C. § 1983 provides for a remedy (including damages) against any “person who, under color of any” law, “custom, or usage” of any U.S. state “subjects, or causes to be subjected, any citizen of the United States” or any “other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws.”⁴³ Relatively fallow for most of the near-century preceding the Civil Rights movement of the 1960s, Section 1983 has become a principal mechanism for obtaining damage awards in cases involving violations of human rights, primarily civil and political rights.⁴⁴ As the text of the law indicates, plaintiffs can be U.S. citizens or non-citizens present in the United States when the violation occurs (although non-citizens, even when in the U.S., do not enjoy some constitutional and federal law rights—and, in turn, protection of those rights through Section 1983 litigation—that citizens do). Exhaustion of state law remedies is not a prerequisite to a Section 1983 claim.

Although the text appears to leave open the possibility that provisions in a self-executing human rights treaty are “laws” of the United States for purposes of Section 1983 (and some limited, oblique and inconsistent authority supports this reading⁴⁵), Section 1983’s focus in providing damages for human rights violations lies elsewhere, in offering redress for violations of U.S. constitutional rights and other federal rights embodied in domestic-oriented laws. Several of the federal, primarily constitutional, rights that have been common foci of section 1983 claims overlap with key internationally recognized human rights.

43. 42 U.S.C. § 1983. On Section 1983 generally, see MARTIN A. SCHWARTZ & KATHRYN R. URBONYA, SECTION 1983 LITIGATION (2d ed. 2008); HAROLD S. LEWIS JR. & ELIZABETH J. NORMAN, CIVIL RIGHTS LAW AND PRACTICE 45-273, 279-94 (2d ed. 2004); MICHAEL AVERY & DAVID RUDOVSKY, POLICE MISCONDUCT LAW AND LITIGATION (1987).

44. A seminal case was *Monroe v. Pape* (1961), in which the Supreme Court established that a claim was available under Section 1983 where the acts of state actors, broadly defined—including, city police officers who improperly entered and ransacked plaintiff’s home and took him into custody—have violated constitutional (or other federal law rights), which, in practice, can include human rights. *Monroe* held that a claim existed even when the state actors’ acts violated state law as well.

45. *Jogi v. Voges*, 480 F.3d 822 (7th Cir. 2007) (Section 1983—as well as ATS—remedy for violation of rights conferred pursuant to the Vienna Convention on Consular Relations); Carlos M. Vazquez, *Treaty-Based Rights and Remedies of Individuals*, 92 COLUM. L. REV. 1082 (1992).

Cases involving these rights fall into a few categories: violations of constitutional procedural due process when state action deprives the victim of life, liberty or property interests; violations of constitutional substantive due process, which provides protection of fundamental individual constitutional rights (including many enumerated in the Bill of Rights, and other rights discerned by the courts, such as privacy-based rights to family autonomy, reproductive / procreative freedom and freedom from unconscionable assaults on bodily integrity); violations of specific provisions of the Bill of Rights, many of which are incorporated, and thus made applicable to the states (including local government entities), by the Fourteenth Amendment (which, along with the slavery-abolishing Thirteenth Amendment, forms the principal constitutional basis for the Civil Rights Acts, including Section 1983); and violations of rights to equal protection of the laws, principally discrimination on the basis of suspect classification such as race, citizenship, and gender. The standard of “culpability” of the defendant that is required for an actionable violation differs somewhat across the relevant constitutional rights, and the requirements for a Section 1983 claim vary in tandem, generally tracking the constitutional law defining the contours of the specific type of right.

Common types of behavior by state actors that have been targets of cognizable Section 1983 claims and that overlap with violations of human rights include unconstitutional or other federal rights-violating: arrests, searches and seizures; conditions of confinement in prisons or jails; excessive use of force by police or penal system officers; retaliation against government employees or retaliatory prosecution of plaintiffs for exercises of freedom of speech or political affiliation (or complaints about rights violations); denial of a fair trial / wrongful conviction;⁴⁶ and some forms of race-based and gender-based discrimination by state actors.

There are significant limits to section 1983’s reach in providing damages remedies for human rights violations. First, most fundamentally and as the foregoing partial inventory suggests, some international human rights norms are not U.S. constitutional rights or federal law rights and thus are not bases for a Section 1983 claim. This is especially the case with social and economic human rights, but it is also true for some civil and political human rights (including, most notoriously, those imposing limitations on capital punishment)

46. The Supreme Court has limited relief in this area by barring Section 1983 claims that would have the effect of invalidating an existing, not-otherwise-invalidated state court conviction. See *Heck v. Humphrey*, 512 U.S. 477 (1994).

and some human rights that impose affirmative duties of action on states.⁴⁷

Second, the range of covered rights under Section 1983 has been rendered narrower than the statutory text might suggest. This has occurred largely by judicial construction, especially with regard to non-constitutional federal rights, and with escalating restrictions on Section 1983 remedies in recent years.⁴⁸ Federal statutes are not automatically construed to confer the legal rights required for potential protection through Section 1983 actions. A plaintiff must show that, in the asserted rights-creating federal law: the plaintiff was an intended beneficiary of the law; the asserted right is not so vague or amorphous as to be unsuitable for judicial enforcement; and the law clearly imposes a binding legal obligation on the defendant.⁴⁹ Where these requirements are met, relief under Section 1983 still will not be available if the court finds that Congress intended to foreclose such a remedy—a finding that is likely whenever the statute provides a private remedy that is less expansive than Section 1983. Moreover, with respect to some rights, where a defendant can show that it would have reached the “same decision”—for example, where plaintiff would have been fired even if retaliation for plaintiff’s exercise of First Amendment free speech rights, or discrimination that violated plaintiff’s Equal Protection clause rights had not been among the motives for defendant’s decision—the defendant will not be liable.

A diverse set of doctrines limits plaintiffs’ ability to bring Section 1983 actions in federal courts (where Section 1983 claims often are brought and access to which—as an alternative to distrusted state courts—was a key concern motivating Section 1983’s creation⁵⁰). The Supreme Court recently has tightened pleading standards in terms that likely extend to Section 1983 claims in federal court. In *Ashcroft v. Iqbal* (a *Bivens* action, discussed below), the Court held that a federal court, in deciding whether to dismiss a complaint for failure to state a claim on which relief may be granted, should not credit merely conclusory allegations by the plaintiff and must apply “its judicial ex-

47. Here, “states” refers to states in the international law sense (that is, countries or nation-states), rather than in the Section 1983 and broader U.S. law sense of states of the United States.

48. See Ivan E. Bodensteiner, *Congress Needs to Repair the Court’s Damage to § 1983* 16 TEX. J. CIV. LIB. CIV. RTS. 29 (2010); see also the symposium issue on *Enforcing Constitutional Rights in the Twenty-First Century: Section 1983 Thirty Years After Owen v. Independence*, 78 UMKC L. REV. 869 (2010); David Rudovsky, *Running in Place: The Paradox of Expanding Rights and Restricted Remedies*, 2005 U. ILL. L. REV. 1199 (2005).

49. *Blessing v. Freestone* 520 U.S. 319 (1997); see also *Gonzaga University v. Doe*, 536 U.S. 273 (2002).

50. Plaintiffs can, and sometimes do, bring Section 1983 claims in state court. Defendants can remove these cases to federal court.

perience and common sense” in determining whether the plaintiff’s complaint states a “plausible claim for relief.”⁵¹

Still other judicially created doctrines impose additional barriers to Section 1983 damages suits in federal court. For example, federal courts may abstain from adjudicating a case where going forward would interfere with an ongoing state prosecution.⁵² For another example, federal courts do not hear Section 1983 claims where granting relief would have the effect of invalidating an existing state court criminal conviction that has not otherwise been invalidated.⁵³

Such restrictions on Section 1983 claims in federal courts do not bar Section 1983 actions in state courts. But (as noted above) suits in state court against the state, its officials and those acting with its authority can be relatively unappealing for plaintiffs, and (as discussed below) other law can block Section 1983 suits in state courts. If a plaintiff does bring a claim in state court, the defendant can remove the case to federal court.

Third, the range of defendants is limited, and in some respects more limited than the statutory language of Section 1983 and the civil rights statutes might suggest and case law once allowed. In the many Section 1983 claims that assert violations of specific constitutional rights, the claim rests on the Fourteenth Amendment and thus requires that the acts for which the plaintiff seeks recovery meet a state action requirement—that is, that the acts constituting rights violations be legally attributable to the government or those acting in concert with government actors. Suits against federal government entities and officials generally are not authorized by Section 1983⁵⁴ (although they sometimes can be brought on other bases, including *Bivens* actions or the Federal Tort Claims Act, discussed below). Suits in federal court for damages against state governments themselves are barred by the Eleventh Amendment, absent state consent to suit or clear and express indication of Congress’s intent to abrogate immunity (which the courts have not found in Section 1983), and because neither the state nor officials, when sued in their official

51. *Ashcroft v. Iqbal*, 556 U.S. 662 (2009); Howard W. Wasserman, *Iqbal, Procedural Mismatches and Civil Rights Litigation*, 14 LEWIS & CLARK L. REV. 157 (2010).

52. See generally *Deakins v. Monaghan*, 484 U.S. 193 (1988) (concerning possibility of *Younger v. Harris*-like abstention in context of Section 1983 claim for damages only, not equitable relief); on abstention in Section 1983 cases more generally, see also SCHWARTZ & URBONYA, *supra* note 43, at 177-89 LEWIS & NORMAN, *supra* note 43, at 419-31.

53. See *Heck v. Humphrey*, 512 U.S. 477 (1994). Courts are divided over whether this limitation applies in all cases or only those in which *habeas corpus* relief is available.

54. This limitation usually applies because federal officials ordinarily act under color of federal law, not state law although a federal official who conspires with a state officer might be found to have acted under color of state law and thus be subject to a Section 1983 claim. See *Arar v. Ashcroft*, 585 F.3d 559, 568 (2d Cir. 2009).

capacities, are “persons” under Section 1983.⁵⁵ Suits against state officers in their official capacities cannot be for money damages because such damages would come from the state treasury, and this, in the Supreme Court’s analysis, makes such suits indistinguishable from suits against the state itself.⁵⁶ State immunity doctrines and defenses under state law (discussed below) can create additional barriers for plaintiffs seeking damages in state courts.

Damages remedies are available under Section 1983 against local government entities. But these defendants are not liable for discrete violations of relevant rights, nor are they vicariously liable—on the basis of *respondeat superior* or similar theories—for rights violations committed by their employees or agents. Local government entities are liable only where the plaintiff can show that the violation of a relevant constitutional or other federal law right followed from: an official “policy”; a decision (including ratification or delegation of authority) by a policymaker with final authority; a “custom” or “practice” of pervasive rights violations of which policymaking officials had actual or constructive knowledge; or “deliberate indifference” toward recurring rights violation as manifested, typically, in failure to screen (in hiring), train, supervise, or take corrective action.⁵⁷ Based as they are on claims about decisions by those who do not directly harm plaintiffs and claims about failures to act, suits against municipalities and similar entities can founder on plaintiffs’ difficulties in proving causation (generally under ordinary tort law standards). Only compensatory, not punitive, damages are available against local government entities. Suits against local officials in their official capacity face limitations that track those applicable to suits against local government entities.

Given these restrictions on defendants amenable to Section 1983 damages suits, it is not surprising that much Section 1983 litigation—especially that which addresses acts that would constitute human rights violations—targets officials in their individual capacities. Section 1983 actions of this type can proceed against officials who act “under color of state law,” broadly defined. This includes unlawful acts that were made possible by the defendant’s powers of office even though they may have violated the relevant government entity’s policies and rules and occurred outside the ordinary scope of the defendant’s duties.

55. See *Will v. Michigan Dept. of State Police*, 491 U.S. 58 (1989). As is discussed below, bars to suits against government officers or officials in their “official capacities” do not bar suits against them in their “personal capacities” for acts committed under “color of law,” including acts made possible by their powers of office.

56. See *Ford Motor Co. v. Department of Treasury of the State of Indiana*, 323 U.S. 459 (1945) (overruled on other grounds); cf. *Ex Parte Young* 209 U.S. 123 (1908).

57. Key cases include *Monell v. Department of Social Services*, 436 U.S. 658 (1978); *City of Canton v. Harris*, 489 U.S. 378 (1989); *Board of County Commissioners of Bryan County, Okla. v. Brown*, 520 U.S. 397 (1997).

Supervisory officials may be held liable in these types of suits, but only on standards that have generally tracked the rules for municipal liability (including a rejection of *respondeat superior* or other vicarious liability and a requirement that the supervisor have actual or constructive knowledge of pervasive or recurring abuses of rights by subordinates and have responded in so inadequate a way as to show deliberate indifference or tacit authorization). The Supreme Court's somewhat opaque but clearly critical view of supervisory liability in *Iqbal* (discussed further below) has created disagreement among courts and scholars about whether its possibly narrowing effect on supervisory liability does or should extend to Section 1983 (where, unlike the *Bivens* claim in *Iqbal*, the cause of action has a basis in an act of Congress—and one that includes specific language concerning the scope of liability).⁵⁸

In addition to compensatory damages for economic, physical and psychological harms⁵⁹ (and in some cases defamation-caused harm to reputation), punitive damages are available in Section 1983 personal capacity suits if the defendant had malicious or evil intent, or showed reckless or callous indifference to the plaintiff's federally protected rights. In personal capacity suits against individual defendants, the damage award is formally against the defendant's own assets but, in practice, the government entity often bears the burden of the award through indemnification or insurance.

Official immunity can pose formidable barriers to Section 1983 plaintiffs. Legislators, prosecutors and judges—and other officials exercising similar authority—enjoy absolute immunity for actions taken within the scope of their legislative, prosecutorial or judicial functions. Such officials when acting outside those functions and other officials enjoy lesser “qualified immunity” in damages suits. Qualified immunity applies unless the official knew, or unless it would have been clear to a reasonable official under the circumstances, that his or her relevant conduct violated a clearly established legal right (one of which a reasonable person in the official's position would be aware).⁶⁰ This test is often an insurmountable hurdle for plaintiffs although it is, of course, less relevant in cases asserting the most obvious and egregious human

58. See Rosalie B. Levinson, *Who Will Supervise the Supervisors?* 47 HARV. CIV. RTS. CIV. LIB. L. REV. 273 (2012); James E. Pfander, *Iqbal, Bivens and the Role of Judge-Made Law in Constitutional Litigation*, 114 PENN. ST. L. REV. 1387 (2010).

59. Under the Prison Litigation Reform Act, prisoners may not bring Section 1983 claims for mental or emotional injuries suffered in custody without a prior showing of physical harm. 42 U.S.C. § 1997e(e).

60. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); Michael L. Wells, *Civil Recourse, Damages-as-Redress and Constitutional Torts*, 46 GA. L. REV. 1003, 1038-42 (2012). Unlike under earlier common law qualified official immunity, subjective good faith is not the standard.

rights violations, and this particular immunity does not apply in suits against municipalities.

The “color of state law” provision in Section 1983 allows suit against some private actors (notwithstanding the constitutional “state action” requirement discussed above). Courts have characterized the requisite degree of connection between private actors or actions and the state or its laws in various ways: the existence of a symbiotic relationship between private actor and the state; pervasive entwinement of the private actor with the state; joint participation akin to a private actor’s conspiracy with, or aiding and abetting of, state officials; the private actor’s exercise or performance of a distinctively public function (such as one that was traditionally the exclusive role of the state); or the private actor’s acting sufficiently at the encouragement or direction of the state that its acts can be said to reflect the state’s choices. In such cases, official immunity generally has not been available.⁶¹

A final difficulty for Section 1983 plaintiffs (and *Bivens* plaintiffs, discussed below) is that in some cases, including some involving rights that overlap with international human rights, plaintiffs may not be able to prove significant, measurable harm. Courts sometimes insulate plaintiffs from the peril of losing despite showing a relevant rights violation by awarding nominal damages. In some cases, plaintiffs can show conventional compensable harms, but only on a modest scale. This, of course, limits compensatory damages awards⁶² and, under recent Supreme Court jurisprudence (which, outside the human rights contexts, has sometimes struck down punitive damage awards that exceed single-digit multiples of compensatory awards), low compensatory awards might be found preclude some especially large punitive damages where punitive damages are permissible under Section 1983. So far, courts often have found the “reprehensibility” of acts grounding some successful Section 1983 claims sufficient to sustain high punitive awards in cases with low compensatory awards.⁶³

61. Although the issue has not been definitively resolved, private defendants, who cannot claim the qualified immunity available to official defendants, might be able to claim “good faith” immunity, but such claims would be hard to sustain in many cases involving human rights violations.

62. It does not, however, preclude significant attorneys’ fees, which are available under Section 1983 and several of the civil rights statutes discussed below, but not in *Bivens* actions. Such fees can dwarf damage awards.

63. See generally, Wells, *supra* note 60; Caprice L. Roberts, *Ratios, (Ir)rationality and Civil Rights Punitive Awards*, 39 AKRON L. REV. 1019 (2006); Anthony DiSarro, *When a Jury Can’t Say No: Presumed Damages for Constitutional Torts*, 64 RUTGERS U. L. REV. 333 (2012).

Constitutional Torts / Bivens Actions

Named after the seminal 1971 case of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, *Bivens* actions are based on a judicially implied right of action for violations of constitutional rights by federal officials or employees. Broadly parallel to Section 1983 litigation against state and local government officials or employees in their personal capacities (discussed above), *Bivens* suits permit damage awards for violations of a range of constitutional rights that overlap with a subset of human rights, principally civil and political rights. As with section 1983 claims, *Bivens* plaintiffs need not be U.S. citizens, but suits by non-citizens are limited by broader constitutional principles that do not extend the full range of human rights-relevant constitutional rights to non-citizens. Punitive damages are available, largely on the same terms as in Section 1983 suits against state actors in their individual capacities.

Constitutional rights that have been foci of *Bivens* suits and that can overlap with human rights include many of the constitutional rights that have been at issue in Section 1983 actions. These rights include: freedom from unreasonable and warrantless searches, seizures and arrests; freedom from cruel and unusual punishment, primarily in the form of impermissible conditions of confinement or treatment in custody (in federal facilities); equal protection of the laws and thus freedom from discrimination, particularly on the basis of race or gender; and (to a lesser and increasingly uncertain extent) freedom from religious, national origin, or political viewpoint-based discrimination.

There are significant limits to *Bivens* actions as sources of damages remedies for human rights violations. First, as is the case with Section 1983 actions, many international human rights lie outside the scope of the U.S. constitutional rights that fall within the potential reach of a *Bivens* suit. Second, as with Section 1983, judicial constructions have limited the ambit of *Bivens* constitutional tort suits. Not all potentially human rights-related federal constitutional rights have been the objects of successful *Bivens* suits. After substantial growth in *Bivens* suits' reach during the first decade, the courts—and especially the Supreme Court—have rejected efforts to expand *Bivens* actions' scope during the last thirty years. Although the comparison is complicated, *Bivens* remedies are generally seen as narrower than analogous forms of redress that enjoy congressional authorization under Section 1983.⁶⁴ *Iqbal* (discussed above), which is widely regarded as calling for tighter scrutiny—and thus more fre-

64. For an overview of these issues, see James E. Pfander & David Baltmanis, *Rethinking Bivens: Legitimacy and Constitutional Adjudication*, 98 GEO. L.J. 117 (2009); Alexander A. Reinert & Lumen N. Mulligan, *Asking the First Question: Reframing Bivens after Minneci*, 90 WASH. U. L. REV. 1473 (2013).

quent dismissal—of plaintiffs' claims at the pleading stage, was a *Bivens* suit (involving alleged discriminatory detention—on the basis of religion or national origin—and in-custody abuse of a Pakistani-American Muslim in the aftermath of the 9/11 terrorist attacks).

Before *Iqbal*, the Supreme Court had foreclosed *Bivens* actions where: Congress had provided an alternative remedy that supplanted a *Bivens* action; or other “special factors” counseled hesitation in implying a cause of action.⁶⁵ Relying primarily on the “special factors” prong, courts have rebuffed several categories of *Bivens* suits that could address human rights violations, including claims of improper state takings of property, politically retaliatory firing, and conditions in privately operated federal prisons (in purely domestic contexts), and conditions of—and reasons for—confinement (in the context of the war on terror).⁶⁶ As this last point suggests, human rights-related *Bivens* actions have fared especially poorly when they have arisen from the post-9/11 war on terror; the courts have rejected even claims asserting torture by, or as a consequence of unlawful acts by, U.S. government officials, including against U.S. citizen victims.⁶⁷

“Special factors” counseling hesitation upon which the courts have relied include perceived risks that allowing a *Bivens* action would: undermine law enforcement officers in the zealous performance of their duties; prove unnecessary given the existence of federal or state law remedies that could address the same behavior; entangle the court in cases with no workable cause of action; or—especially in the war on terror-related cases—interfere in foreign affairs, national security policy, military decision-making, or the need to protect state secrets. The reasoning behind many of these judicial rejections of *Bivens* claims resonate with those underlying judicially recognized defenses in transnational human rights claims, including: political question-like concerns about each branch's proper constitutional roles and institutional competence; and foreign affairs power-linked deference to the political branches and especially the executive in matters affecting national security and international relations more generally—all the more so in the post-9/11 era.⁶⁸

65. *Carlson v. Green*, 446 U.S. 14 (1980); *see also* *Bush v. Lucas*, 462 U.S. 367 (1983) (denying *Bivens* remedy given availability of alternative remedies for federal employee claiming retaliatory demotion).

66. *See, for example*, *Wilkie v. Robbins*, 551 U.S. 537 (2007); *Bush v. Lucas*, 462 U.S. 367 (1983); *Minneci v. Pollard*, 132 S.Ct. 617 (2012); *cf.* *Davis v. Passman*, 442 U.S. 228 (1979).

67. *See, for example*, *Arar v. Ashcroft*, 585 F.3d 559 (2d Cir. 2009); *Vance v. Rumsfeld*, 653 F.3d 591 (7th Cir. 2012).

68. On these issues, especially post-9/11, *see* Pfander & Baltmanis, *supra* note 64; George D. Brown, *Counter-Counter-Terrorism via Lawsuit—The Bivens Impasse*, 82 SO. CAL. L. REV. 841 (2009); Stephen I. Vladek, *Rights without Remedies: The New-found National Security Exception to Bivens*, ABA NAT'L SEC. L. REP. July 2006, at 4-5.

Third, the range of *Bivens* defendants is limited. Suits must be against individuals who act as officials or agents of the federal government, not federal government entities. Federal supervisory and high-ranking officials may be less subject to *Bivens* actions than are their state counterparts to Section 1983 suits. Although some critics have sought, perhaps wishfully, to dismiss it as dicta or as not clearly altering preexisting law, the Supreme Court's approach to supervisory liability in *Iqbal* indicated that supervisory officials (in this case top-level federal officials, specifically the Attorney General and the Director of the Federal Bureau of Investigation) could not be held liable (in this case in a *Bivens* action) based on principles of *respondeat superior* liability or even "knowledge and acquiescence in their subordinates'" rights-violating behavior. To be liable, such a supervisory official must himself or herself have violated plaintiff's *Bivens*-covered constitutional rights. In the context of the rights at issue in *Iqbal*, this required "intent," in a sense stronger than "volition" or "awareness of consequences" and amounting to the "decision-maker's undertaking a course of action 'because of'" the constitutionally prohibited discriminatory motivation (in this case detention on the basis of religion or national origin). *Bivens* actions' potential as a means that alleged or possible "enemy combatant" detainees in the war on terror might have used was undermined by the Military Commissions Act's ban (discussed above) on such plaintiffs bringing detention-related civil actions against U.S. defendants.

Fourth, official immunity can bar *Bivens* suits, very much as it does Section 1983 claims against individual defendants. In recent *Bivens* suits arising from the war on terror, the courts also have deferred to executive branch views on immunity, extending a longstanding practice in foreign affairs-related cases to the foreign relations-related (or, perhaps more narrowly, terrorism-related) subset of *Bivens* cases.

Other Civil Rights and Related Laws

Although Section 1983 and *Bivens* actions are the most prominent federal law providing damages remedies for acts that violate human rights, some other federal laws do so as well.⁶⁹ Primarily, these laws prohibit discrimination, principally on the basis of race, national origin or, somewhat less commonly, gender. Section 1981—also part of the post-Civil War Civil Rights Acts—prohibits racially discriminatory denials of the right to make and enforce contracts (although damages claims against government actors can be brought only under Section 1983), as section 1982 does for rights to acquire,

69. 42 U.S.C. §§ 1981-1985. See generally, Drew S. Days, III "Feedback Loop: The Civil Rights Act of 1964 and Its Progeny" 49 ST. LOUIS U. L.J. 981 (2005); LEWIS & NORMAN, *supra* note 43, at 1-36, 310-38.

hold or dispose of property. Section 1985 provides civil remedies for racially and, to a limited extent, other discriminatorily motivated conspiracies to deprive victims of equal protection of the laws, including equal enjoyment of constitutional rights. In suits against state actors, the contours of the remedies provided under these laws are similar to those of section 1983.

Titles VI and VII of the 1964 Civil Rights Act and Title IX (adopted in a 1972 amendment to education laws)—and especially the latter two—have been significant sources of law offering damages remedies in cases of discrimination that can overlap with denials of human rights.⁷⁰ Title VI prohibits discrimination on the basis of race and national origin in any federally funded program (although it generally does not reach employment-related claims). Title VII prohibits discrimination on the basis of race, sex, religion or national origin in employment, including by private employers with more than a small number of employees. Title IX bars gender-based discrimination in federally funded educational programs. Other federal laws address related and overlapping issues, including the Equal Pay Act (EPA—gender discrimination in pay by employers or in employment affecting interstate commerce), the Age Discrimination in Employment Act (ADEA—discrimination against those over age forty by employers with more than a small number of employees) and the Americans with Disabilities Act (ADA—discrimination against those with disabilities).⁷¹

These anti-discrimination laws provide—by explicit text or judicial interpretation—private rights of action that include claims for money damages. The form, scope and amount of damages vary across the laws. Punitive damages, for example, are restricted to a subset of cases of “intentional” discrimination under Title VII and Title IX,⁷² are not available under Title VI, and are capped under Title VII, the ADEA and the EPA. Remedies for lost back pay and future pay are handled differently under employment-related laws. Unlike Section 1983, Titles VI, VII and IX abrogate state immunity from suit in federal court.

Although the Religious Freedom Restoration Act (RFRA) provides for claims against the U.S. government for actions that “substantially burden” a plaintiff’s “exercise of religion” unless the government’s action is “in furtherance of a compelling governmental

70. 42 U.S.C. §§ 2000d-2000d-7, 2000e-2000e-17; 20 U.S.C. §§ 1681-1688.

71. 29 U.S.C. §§ 206(d), 216(b), 621-634, 794; 42 U.S.C. §§ 12101-12117.

72. Under Title VII, courts have held that intentional discrimination is a necessary but not sufficient condition for punitive damages. Damages under Title VII are also limited where the defendant can show that the “same decision” would have been reached absent impermissible discrimination against plaintiff. Under Title IX, intentional, willful, or deliberate discrimination is required for compensatory damages as well. Some lower courts have disallowed punitive damages in Title IX claims generally.

interest” and employs the “least restrictive means available” (the standards imposed by the “strict scrutiny” test applied in constitutional law to government actions that burden fundamental rights),⁷³ federal courts in recent years have increasingly construed it as not waiving the government’s sovereign immunity from suits for money damages.⁷⁴

Other federal statutes sometimes provide a right to damages remedies for acts that can include human rights violations. As noted above, Congress’s explicit provision of an alternative remedial scheme in a substantive statute is a basis for courts to reject *Bivens* actions (and the existence of alternative remedies also has been a “special factor” weighing against allowing a *Bivens* action). Still, among the many federal laws that address behavior that can infringe human rights, few have been or will be held to provide an independent basis for a civil suit for damages. In the absence of clear affirmative evidence of legislative intent to authorize a private right of action (or in the presence of congressional creation of an alternative remedial framework), courts will not construe such laws to provide the relief plaintiffs seek. The Supreme Court has created a strong presumption against implying a private right of action in a regulatory statute.⁷⁵ Further, the Court sometimes rejects efforts by Congress to create damages remedies for acts that may violate human rights. For example, until the provision was struck down as beyond Congress’s constitutional powers to legislate, the Violence against Women Act briefly provided a damages remedy (both compensatory and punitive) for women who were injured by “a crime of violence motivated by gender.”

In the U.S.’s federal structure, individual states have their own elaborate constitutions, constitutional rights provisions and, sometimes, civil rights statutes. In some cases, these are more protective than the federal law that is the focus of the foregoing discussion. And those who seek to expand judicial protections (including damages remedies) for rights (including those overlapping with human rights) have turned—or advocated a turn—to greater reliance on state law (especially state constitutional law), particularly in the wake of the legal developments described above that have limited federal remedies. There is, however, considerable variety in relevant state law, and there are limits akin to those found in federal law (including immunity doctrines, which have their origins in common law) that

73. 42 U.S.C. §§ 2000bb-2000bb-4.

74. The Supreme Court similarly has found that sovereign immunity survives and damages in suits against state defendants are unavailable in prisoner religious liberty cases brought under the Religious Land Use and Institutionalized Persons Act. *See* *Sossamon v. Texas*, 131 S.Ct. 1651 (2011).

75. *Alexander v. Sandoval*, 532 U.S. 275 (2001); *cf.* the now-discarded standards in *Cort v. Ash*, 422 U.S. 66 (1975).

impede otherwise viable state law claims.⁷⁶ Although they are limited (and in many respects have become increasingly limited), federal law remedies such as the Civil Rights Act, federal constitutional tort suits, and so on, still loom larger than individual states' laws among the U.S. laws that are most immediately connected with protection of human rights and awarding damages for violations.

Another factor limiting constitutional and civil rights-based damages awards' role in addressing human rights violations may stem from the view—particularly in an era of widespread criticism of court “activism”—that private damages remedies are a second-best alternative to legislative remedies or, at least, state enforcement actions or injunctions. To some critics, damages remedies suggest an unsavory commodification of inalienable rights.⁷⁷

Common Law Torts and the Federal Tort Claims Act

Common law tort actions are another means for obtaining damages awards for some acts that violate human rights.⁷⁸ The United States has waived sovereign immunity for many torts, generally through the Federal Tort Claims Act (FTCA) and more narrowly in a small number of specific statutes.⁷⁹ The FTCA generally subjects the federal government (including its component agencies and organs) to claims for money damages for harms due to its employee's actions in many circumstances in which a private defendant would be liable for injury to property or person under the common law of the relevant state. Under the Westfall Act, suits against federal officials for actions taken within their scope of employment—but not for some acts in violation of the constitution or federal statutes—are regarded as FTCA claims against the government (and thereby are subject to the government's expansive defenses, including sovereign immunity).⁸⁰

76. Stephen J. Shapiro, *Suits Against State Officials for Damages for Violations of Constitutional Rights*, 23 *BALT. L. REV.* 423 (1994); Gary S. Gildin, *Redressing Deprivations of Rights Secured by State Constitutions Outside the Shadow of the Supreme Court's Constitutional Remedies Jurisprudence*, 115 *PENN ST. L. REV.* 877 (2011); Carlos M. Vazquez & Stephen I. Vladeck, *State Law, the Westfall Act and the Nature of the Bivens Question*, 161 *U. PA. L. REV.* 509 (2013); John F. Preis, *Alternative State Remedies in Constitutional Torts*, 40 *CONN. L. REV.* 723 (2008).

77. Alex Reinert, *Procedural Barriers to Civil Rights Litigation and the Illusory Promise of Equity*, 78 *UMKC L. REV.* 931 (2010); Roberts, *supra* note 63, at 2010.

78. The FSIA's tort exception, discussed above, opens the door to common law tort suits against foreign sovereigns. As also discussed above, common law torts sometimes provide the requisite cause of action in ATS and other transnational human rights cases.

79. 28 U.S.C. § 2680.

80. The legislative history of the Westfall Act indicated an intention not to shield federal employee defendants from liability for “egregious torts” by substituting the U.S. as a defendant. STEPHENS ET AL., *supra* note 14 at 291. As this suggests, *Bivens* actions can be available for some acts not covered by the Westfall Act that violate human rights.

There are significant limits to the FTCA's waiver of immunity and thus its utility for plaintiffs seeking damages for harms that stem from acts violating their human rights.⁸¹ The FTCA does not waive immunity for: intentional torts relevant to human rights violations—including assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process and defamation (but not intentional infliction of emotional distress or invasion of privacy)—unless committed by an investigative or law-enforcement official (a caveat that can be significant for human rights cases); injuries occurring outside the United States (even if some relevant tortious acts and underlying decisions occurred in the United States); or injuries occurring in combat activities. Punitive damages are not allowed. Suits for negligent supervision of tort-committing employees are sometimes allowed. The FTCA also imposes a relatively strict exhaustion of administrative remedies requirement: victims must first seek redress from the relevant federal government agency before proceeding to court. And courts have barred FTCA claims when they find that other, more specific statutes provide their own remedial schemes.

Like the FSIA's tort exception (discussed above), the FTCA's waiver of the U.S.'s immunity adopts a "discretionary function" exception that, in the FTCA context, often means defeat for plaintiffs. The exception (in effect) "reconfers" immunity where the tort claim is, in the words of a leading Supreme Court opinion, "based upon [a federal agency's or employee's] exercise or performance or failure to exercise or perform a discretionary function . . . , whether or not [that] discretion [is] abused."⁸² Subsequent Supreme Court decisions have made clear that discretionary functions include conduct that involves—in a broad sense—a mandate in the relevant law for a state actor (regardless of his or her status or office) to exercise social, economic or political policy-based choice. Where the court finds that such room for choice existed, the court adopts a "strong presumption" that the defendant made the choice based on the permissible policy considerations (and the discretionary function exception therefore applies), lest courts unduly second-guess political branches' policy decisions.⁸³

81. David W. Fuller, *Intentional Torts and Other Exceptions to the Federal Tort Claims Act*, 8 U. ST. THOMAS L.J. 375 (2011); Mark C. Niles, "Nothing but Mischief": *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275 (2002); Gwynne L. Skinner, *Roadblocks to Remedies: Recently Developed Barriers to Relief for Aliens Injured by U.S. Officials, Contrary to the Founders' Intent*, 47 U. RICH. L. REV. 555 (2012-2013); Stephen L. Nelson, *The King's Wrongs and the Federal District Courts: Understanding the Discretionary Function Exception to the Federal Tort Claims Act*, 51 S. TEX. L. REV. 259 (2009).

82. *Dalehite v. United States*, 365 U.S. 15 (1953).

83. *Berkowitz v. United States*, 486 531 (1988); *United States v. Gaubert*, 488 U.S. 391 (1991). Although this exception is generally ample and although the FTCA has not generated cases closely analogous to the FSIA cases permitting recovery in cases of politically motivated extrajudicial killings (discussed above), the FTCA's dis-

As addressed above, federal and state laws governing suits against foreign or domestic state entities and actors—including many state laws that parallel the FTCA—sometimes open the door (albeit often only a crack) to common law tort suits seeking money damages for harms that can include harms stemming from violations of human rights. And suits against non-state actors for acts that violate human rights (particularly, violations that do not require conventional state action) sometimes can be—and sometimes only can be—brought as ordinary tort claims. Many forms of human rights abuse constitute battery (the intentional infliction of a harmful or offensive touching) or assault (whether attempted battery known to the plaintiff or a threat that seeks to put, and succeeds in putting, the plaintiff in apprehension of an imminent battery). Some human rights violations can ground tort suits that claim intentional infliction of emotional distress or false imprisonment. Some plaintiffs have sought to bring claims for human rights abuses in the employment context (including forced labor) within the reach of statutory unfair business practices law.⁸⁴ Defamation actions could reach some forms of communication, such as those that incite or contribute to human rights violations, particularly those targeting racial and other groups. Where human rights violations lead to the victim's demise, surviving relatives sometimes can bring wrongful death actions for their losses due to the victim's death. When not barred by various doctrines applicable to state entities or actors (discussed above), employers and other institutions potentially can be held vicariously liable for human rights-violating acts of their employees (although tort doctrines limiting employers' responsibility for employees' acts unrelated to employment can be a significant obstacle in cases of serious human rights violations), or for their own negligence (or worse) in failing to prevent their employees' acts.

PATTERNS IN ADDRESSING HUMAN RIGHTS THROUGH DAMAGES REMEDIES IN U.S. LAW

U.S. law has been strikingly expansive in holding out the prospect of civil damages for human rights violations that include foreign actions, perpetrators or victims. While other countries' laws and international institutions sometimes have sought to reach human rights-violating behavior through criminal sanctions and other public enforcement measures, the laws and courts of the United States have been unusual in offering private law damages (albeit on relatively

cretionary function exception would have relatively little purchase in cases of the most severe and flagrant human rights abuses, but other FTCA exceptions (including the intentional torts exception) would have to be overcome as well.

84. For examples from cases involving human rights abuses committed largely abroad, see STEPHENS ET AL., *supra* note 14, at 125-26.

rare occasion), through such mechanisms as the Alien Tort Statute, the Torture Victim Protection Act, and the Foreign Sovereign Immunities Act (in conjunction with U.S. law's relatively broad rules on personal jurisdiction over defendants and tort liability).

U.S. law also offers a variety of means to obtain civil damages for purely domestic human rights violations. Although U.S. law provides mechanisms for receiving customary international law, including international human rights law, into U.S. law and although the U.S. has joined several major international human rights treaties, international legal norms and rules have had no significant or direct impact on U.S. law concerning damages remedies for purely domestic human rights violations. Such law comes from domestic sources—the federal constitution, federal statutes, state constitutions and statutes, judicial glosses thereon, and the common law of torts—that sometimes track or parallel, but do not engage or explicitly draw from, international human rights and related international law.

Both at home and abroad, U.S. law's offer of damages remedies has been much more robust for violations of civil and political human rights than for violations of economic, social or cultural human rights. This is hardly surprising, given the particular liberal political traditions that have shaped the U.S. constitution and other laws and, relatedly, the U.S.'s international practice of endorsing and promoting civil and political human rights much more than economic, social and cultural ones.

During the last ten to twenty or more years, the availability of damages remedies under U.S. law for human rights violations—both transnational and purely domestic—has been under pressure and, in some respects, in decline. This has occurred largely through judicial action, especially through statutory interpretation, the articulation of statutory and constitutional interpretive norms, and the exercise of powers of constitutional judicial review—especially by the U.S. Supreme Court. These court-centered developments have not occurred in a political vacuum. Amid sharp and deepening political polarization in the United States, clashing ideologies and policy agendas have been part of the story. Liberal preferences for expansive remedies through litigation have faced successful conservative opposition. That opposition has been coupled with a campaign for “tort reform” that portrays damage awards as excessive and out of control, and, especially during the George W. Bush administration, consistent expression by the executive branch of foreign affairs and national security-based opposition to litigation seeking damages for human rights violations occurring abroad. Conservative conceptions of the role of courts have been a major factor as well, particularly in the long-rising reluctance to imply private rights of action in statutes and regulations, a notable willingness to strike down human rights-reso-

nant rights-protecting and remedy-providing legislation as beyond Congress's constitutional powers, and a strong tendency—in human rights-related contexts and especially in foreign affairs-related human rights contexts—to defer to the government's views (which have not always been consistent over time) or interests (whether expressed by the executive or inferred by the courts).

In the post-9/11 period especially (and under both Republican and Democratic presidents), the long-running tension in U.S. foreign policy between an ameliorative or “values-based” strain that seeks to foster respect and protection for human rights, on one hand, and a more “realist” perspective that focuses on protecting traditional, narrowly defined, security-based national interests, on the other hand, has shifted notably in favor of the latter. This swing has created a less hospitable environment for legal rules and agendas that stress protection of individual rights (including human rights and especially human rights abroad) potentially at the cost of effective law enforcement, anti-terrorism efforts and so on.

As in the law of other countries, in U.S. law damages remedies are only part of a larger, complex picture of human rights-related law. They coexist with many other law-based means, including criminal prosecution, administrative enforcement, court-issued injunctions, grants of asylum to refugees, and legally mandated denials of various privileges to—or imposition of sanctions on—foreign and domestic individuals and entities that commit abuses or infringements of human rights.

NORA V. DEMLEITNER*

The State, Parents, Schools, “Culture Wars,” and
Modern Technologies: Challenges under the U.N.
Convention on the Rights of the Child†

TOPIC IV. A

This paper focuses on some of the core principles of the U.N. Convention on the Rights of the Child and their application under U.S. state and federal law. While the United States has not ratified the Convention, it is a signatory. Many of the most intractable cultural issues in the United States involve children and their rights to participation, information, and decision-making. Frequently, primary and secondary education presents a fertile battle ground for “cultural clashes” between parents, schools, and state officials. In the private context, both U.S. law and the U.N. Convention have adopted the “best interests of the child” standard. Despite the usage of identically named or similarly sounding concepts, to what extent U.S. approaches may be aligned or conflict with the Convention remains subject to question. The United States would benefit from more active participation in a global dialogue about children’s issues, especially as brain science and technological change challenge our traditional understanding of what it means to be a “child” and a “parent.”

The United States has signed but not ratified the U.N. Convention on the Rights of the Child (CRC), which makes it one of only three countries that do not fully participate in this almost universally ratified human rights treaty.¹ With its signature the U.S. govern-

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1. http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (listing signatories and ratifiers of CRC as of Oct. 14, 2013). The other two countries are Somalia, which only in 2012 re-established a national government after decades of civil war, and South Sudan, which became a member of the United Nations in July 2011. The United States has ratified two of the three additional protocols to the CR. See http://treaties.un.org/pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11-c&chapter=4&lang=en (listing signatories and ratifiers of the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography as of Oct. 14, 2013) and http://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-11-b&chapter=4&

ment has indicated not only its general support for the principles of the CRC and the protection of the human rights of children, but also signaled U.S. compliance with these norms.² In recent decades, the U.S. Senate has generally been reluctant to ratify international treaties in the human rights area for domestic reasons, including preservation of states' rights, sovereignty concerns, questions of constitutionality, rejection of international accountability, and fears of foreign interference in the U.S. legal system.³ Parental rights organizations have objected to ratification of the CRC, fearing it would empower children.⁴

This paper focuses on some of the core principles of the CRC and their application under U.S. law. As the laws of individual states rather than federal law govern many of these central issues, this can lead to distinct approaches, especially as new technologies impact family relations, including conception. Many of the most intractable cultural issues in the United States involve children or arise in the context of primary and secondary education, often pitting children against parents or against the state.

The curious role of children in the United States may be displayed nowhere better than in the criminal justice context. For the sake of children, U.S. sentencing has become ever harsher over the last thirty-five years. Enhancements have been applied to drug sellers who are offering illegal narcotics near schools;⁵ child sexual offenders and those watching child pornography on the Internet have witnessed a dramatic lengthening of their sentences and at the same time have been exposed to life-long registration and community notification statutes. They have been barred from living near schools and daycare centers and even from frequenting playgrounds.⁶

On the other hand, children have also experienced the harshness of the criminal justice process. In the late 1980's, the fear of crime became amplified because of the image of the "superpredator," the

lang=en (listing signatories and ratifiers of the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict as of Oct. 14, 2013).

2. UNICEF, *Introduction to the Convention on the Rights of Child: Definition of key terms*, available at <http://www.unicef.org/crc/files/Definitions.pdf>.

3. See, e.g., Natalie Hevener Kaufman & David Whiteman, *Opposition to Human Rights Treaties in the United States Senate: The Legacy of the Bricker Amendment*, 10 HUM. RTS. Q. 309 (1988).

4. See, e.g., parentalrights.org. For a full discussion of the arguments for and against ratification, see Congressional Research Service, Luisa Blanchfield, *The United Nations Convention on the Rights of the Child*, Apr. 1, 2013.

5. For criticism of these sentence enhancements, see, e.g., Aleks Kajstura, Peter Wagner & William Goldberg, *The Geography of Punishment: How Huge Sentencing Enhancement Zones Harm Communities, Fail to Protect Children* (July 2008), available at www.prisonpolicy.org/zones/.

6. For a critique of these developments, see Kelly K. Bonnar-Kidd, *Sexual Offender Laws and Prevention of Sexual Violence or Recidivism*, 100(3) AM. J. PUB. HEALTH 412 (2010).

adolescent, ruthless, violent offender.⁷ In response, states allowed for or even mandated the transfer of juveniles into the adult criminal justice system.⁸ Some states sentenced offenders as young as thirteen to life-without-parole. This trend has been reversed only in recent years through Supreme Court cases that barred the death penalty and mandatory life-without-parole for those who committed homicide while under age 18.⁹ It also prohibited life-without-parole for juvenile non-homicide offenders, in recognition of the mental and emotional differences between adults and children.¹⁰ The criminal justice system is indicative of the tension in which U.S. society and the U.S. legal system often find themselves with respect to the treatment and protection of children.

As the political culture in the United States values limited government and protections of the individual against the state, even the juvenile justice system extends extensive procedural protections to children. They have, however, been employed to justify harsher penalties. In general, U.S. law emphasizes rights rather than duties, an approach in which it varies, for example, dramatically from the African Charter on the Rights and Welfare of the Child.¹¹ Despite that political and legal belief structure, the common law has established duties based on special relationships, including those between husband and wife and a parental duty to reasonably protect a child. Explicit duties of children to parents appear limited to special situations. A child may owe a parent a duty of care, for example, when the child voluntarily takes custody of an ailing parent in a way that prevents others from providing care to that parent.¹²

This paper will begin with definitions of “child” and “parent” and then turn to the core concept of “best interests of the child” and its application in select contexts. Next, it looks at three areas in which the rights of parents, children, and the state have come to clash—the right to speech, to information, and to freedom of religion—especially in the public school setting. All of these issues reflect ongoing changes in technology, society, and law, situating children at the center of crucial societal conflicts in the United States.

7. Shay Bilchik, Office of Juvenile Justice and Delinquency Prevention, *Challenging the Myths*, JUVENILE JUST. BULL. (Feb. 2000), available at www.ncjrs.gov/pdffiles1/ojjdp/178993.pdf.

8. For an example, see Human Rights Watch, *No Minor Matter: Children in Maryland's Jails* (1999), available at www.hrw.org/reports/1999/maryland/.

9. *Roper v. Simmons*, 543 U.S. 551 (2005) (juvenile death penalty unconstitutional); *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) (mandatory life-without-parole sentence unconstitutional when applied to a juvenile convicted of a homicide offense).

10. *Graham v. Florida*, 560 U.S. 48 (2010).

11. Art. 31.

12. See RESTATEMENT (SECOND) OF TORTS § 314A (1965).

I. WHO IS A “CHILD”?

The authority to determine who is a child and what rights that person carries is divided between the federal and state governments. At common law, the age of majority was generally 21 years. Today the age of majority is regulated legislatively. While most people deem 18 the age of majority, the law appears more fluid.¹³ With the exception of the right to vote—which the U.S. Constitution grants at 18 years due to a constitutional change in 1971¹⁴—most of the rights of children are age-dependent and may extend beyond 18 or end before that age. State legislatures regulate the specific numerical age at which individual rights arise.¹⁵ Such regulation may accord with the CRC’s approach that increasing rights (and responsibilities) be given to children as their age and maturity increase (up to the age of 18 unless otherwise determined under a country’s law),¹⁶ though U.S. law extends this concept of maturation beyond 18 in select areas. It appears that the CRC prefers individual assessment of a child’s maturity, though in some contexts, it may accept at least a presumption of maturity or allow for a global age-based determination on efficiency grounds.

The specific age at which a child is legally considered an adult varies depending on the context. For example, the Alaska legislature set the default age of majority at 18 years. For select purposes, however, Alaska lowered that age. These include ownership of long guns (allowed at age 16, without parental consent) and consent to sexual contact (16 years, but elevated to 18 years if the child’s sexual partner “has legal authority over the child”).

On the other hand, Alaska has raised the age of majority above and beyond the general statutory age of majority for select purposes, such as possession of tobacco (19 years) and possession of alcoholic beverages (21 years). While many of these increases and decreases are specific to individual states and may be explained either by cultural differences between states or by specific incidents that have driven legislative change, others are based on federal mandates.

In all states, purchase and public possession of alcoholic beverages are allowed only at age 21, though many states permit exceptions to these general rules.¹⁷ When the federal government

13. See *Stanley v. Stanley*, 112 Ariz. 282 (1975) (“majority or minority is a status rather than a fixed or vested right and [] the legislature has full power to fix and change the age of majority.”).

14. U.S. CONST. amend. XXVI, § 1.

15. See 43 C.J.S. *Infants* § 2 (Westlaw 2013).

16. CRC art. 1.

17. National Institute on Alcohol Abuse and Alcoholism, Alcohol Policy Information System, *Underage Drinking: Possession/Consumption/Internal Possession of Alcohol*, available at http://alcoholpolicy.niaaa.nih.gov/underage_possession_consumption_internal_possession_of_alcohol.html?tab=maps (listing exceptions to rule).

tied federal highway funds to the purchase or public possession of alcohol by those under 21, over time every state changed its law so as to guarantee its receipt of federal monies.¹⁸ Even though Congress would have been barred from legislating a national drinking age, it achieved the same goal through its power of the purse.

In addition to the constitutionally based provision on voting age, other federal (and state) constitutional provisions may regulate certain aspects of the age of majority. The federal constitution's equal protection mandate, for example, bars state legislatures from declaring different ages of majority applicable to females and males, even in situations where biological and emotional maturity may differ.¹⁹

The Supreme Court has indicated increasing interest in child development concepts, especially in the sentencing area. It declared the execution of those who committed a capital offense while under the age of 18 unconstitutional, relying on child development literature, which finds children fundamentally different from adults as their judgment and emotional maturity are not yet fully developed.²⁰ The Court has recently applied this line of jurisprudence also to life-without-parole sentences.²¹ Whether this approach will carry over into other areas of the law remains an open question. At this point, it presents a welcome reprieve for some young offenders, at least at the high end of sentencing.

As the CRC defines "child," a definition generally accepted in the United States, even though with respect to some rights and obligations the specific age cut-off may vary, it fails to provide a definition of "parent." In light of modern technological changes, that definition and the implicit rights and duties have become increasingly complicated. Recently, the U.S. Department of State ruled that U.S. citizenship will transmit to a child born to a U.S. citizen mother but conceived with the egg of a non-U.S. citizen. The definition of "parent" will likely cause further questions in the years ahead and present challenges in different areas of the law. For purposes of this paper, the term will be used in its commonly understood meaning.

18. National Minimum Drinking Age Act of 1984, 23 U.S.C. § 158.

19. *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 204 (1976) (a state law allowing females who are 18 years old to purchase nonintoxicating beer, while barring purchase of such beer by males under the age of 21, constituted unconstitutional discrimination in violation of the equal protection clause); *Stanton v. Stanton*, 421 U.S. 7, 17 (1975) (in the context of child custody, no valid distinction regarding the age of majority can be made on the basis of gender).

20. *Roper v. Simmons*, 543 U.S. 551 (2005).

21. *Miller v. Alabama*, 567 U.S. ___, 132 S. Ct. 2455 (2012) (mandatory life-without-parole sentence unconstitutional when applied to a juvenile convicted of a homicide offense); *Graham v. Florida*, 560 U.S. 48 (2010) (life-without-parole unconstitutional for those who committed non-homicide offense before turning 18).

II. PARENTAL RIGHTS

Generally, the state grants parents broad leeway in educational and parenting choices for their children, including ways to punish children. Only in exceptional circumstances will parents be deprived of their rights because of abuse or neglect. Schools, however, are frequently held to a different and higher standard than parents. Societal norms, for example, have evolved with respect to corporal punishment in schools, and continue to undergo changes, though they have not yet impacted parental freedom in that area.

A. *Corporal Punishment*

The Supreme Court decided in 1977 that corporal punishment in schools does not violate the 8th Amendment prohibition on cruel and unusual punishments.²² Currently, half of the states regulate corporal punishment statutorily, with some banning it, while others allow it expressly.²³ Within the family, physical punishment of children remains permitted,²⁴ apparently under a general belief that “some” corporal punishment benefits (or at least does not harm) a child. There is no debate in the United States about the international community’s moving increasingly to a total prohibition on the physical punishment of children, including in families, under CRC Article 19.²⁵

B. *Loss of Parental Rights*

Even in the United States physical punishment is limited by considerations of the child’s best interest. Should parents violate such restrictions they may lose their parental rights. Physical harm is not the sole ground for such a decision. Under federal law, child abuse and neglect is defined as including sexual, emotional, and physical abuse, exploitation, and abandonment.²⁶ Many state statutes provide for the deprivation of parental responsibility upon a finding that a

22. See *Ingraham v. Wrights*, 430 U.S. 651, 671 (1977).

23. See *Corporal Punishment in Public Schools*, 0040 SURVEYS 7 (2007) (Westlaw).

24. See 6 AM. JUR. 2d *Assault and Battery* § 28 n.1 (“A parent, or one acting in loco parentis, does not commit an assault and battery by inflicting corporal punishment on a person subject to the person’s authority, if the parent remains within the legal limits of the exercise of that authority.”).

25. See, e.g., Elizabeth T. Gershoff, *More Harm Than Good: A Summary of Scientific Research on the Intended and Unintended Effects of Corporal Punishment on Children*, 73 LAW & CONTEMP. PROBS. 31, 54-56 (2010) (discussing social science research detailing negative effects of corporal punishment and adoption of bans on such punishment in dozens of countries around the globe).

26. Federal Child Victims’ and Child Witnesses’ Rights Act of 2009, 18 U.S.C. § 3509 (West, Westlaw through 2013) (“[T]he term ‘child abuse’ means the physical or mental injury, sexual abuse or exploitation, or negligent treatment of a child.”). See also 42 AM. JUR. 2d *Infants* § 18 (West, Westlaw through 2013).

parent is guilty of a federal or state crime against children.²⁷ The state may also terminate a parent's right to have a relationship with her child pursuant to a finding of abuse, or other event that shows that the parent is "unfit"—but the finding of unfitness must be made by at least clear and convincing evidence.²⁸ In addition, incarceration longer than 15 months may cause termination of a parent's legal responsibility for their child. Because of the negative impact of such a forced separation on parent and child, in recent years some criminal justice policies, such as drug courts, have been developed in part to keep the family unit together.²⁹

Courts and state administrative agencies, such as child protective services, may deprive a parent of parental responsibility.³⁰ A state's choice in these tools is a matter of preference, and the federal constitution only requires that the parent's procedural due process rights be honored, which means notice and an opportunity to be heard. States vary in their provision of trial by jury for proceedings involving termination of parental rights.³¹ Any of these procedural protections only apply to the permanent termination of parental rights but not to temporary removal of children from the home.

In most states, both the parent and the child have the right to an attorney, paid by the state if they cannot afford one, because of the gravity of the rights at stake in termination proceedings. In about a dozen states, however, children continue to remain unrepresented.³²

When a child has been abused or neglected, she becomes a ward of the state, which means dependent on the court. It is the task of the court to preserve the child's relationship with her parents if at all possible. This mandate aligns with CRC Article 9, which asks that states keep parents and children together unless such a separation is necessary because the parents, for example, have dissolved their rela-

27. See 59 AM. JUR. 2d *Parent and Child* § 34 (West, Westlaw through 2013). For examples of how states define child abuse and neglect, see generally U.S. Department of Health and Human Services, Administration for Children & Families, *Child Welfare Information Gateway, What Is Child Abuse and Neglect?* (2008) available at <https://www.childwelfare.gov/pubs/factsheets/whatiscan.cfm>.

28. See 53 A.L.R.3d 605 (West, Westlaw through 2013); 59 AM. JUR. 2d *Parent and Child* § 34 (West, Westlaw through 2013).

29. See, e.g., Myrna S. Raeder, *Special Issue: Making a Better World for Children of Incarcerated Parents*, 50 FAMILY CT. REV. 23, 27 (2012); *A Jailhouse Lawyer's Manual*, Chapter 33: Rights of Incarcerated Parents, COLUMBIA HUM. RTS. REV. 896 (9th ed. 2011).

30. See Child Abuse, 0080 SURVEYS 18 (2007) ("The agency to whom suspected abuse is reported is often a state child protection office that is not hindered by the same constitutional restrictions to which traditional law enforcement agencies are subject. These agencies are sometimes allowed to take custody of children prior to actually proving that abuse has occurred.")

31. See 102 A.L.R.5th 227 (2002).

32. Erin Shea McCann & Casey Trupin, Kenny A. *Does Not Live Here: Efforts in Washington State to Improve Legal Representation of Children in Foster Care*, 36 NOVA L. REV. 363 (2012).

tionship and live separately or because of abuse or neglect of the child. Under U.S. law, if preserving this relationship would lead to the continuance of abuse, neglect, or instability in the child's life, a court may provide a new permanent and stable home for the child.

As the court explores the feasibility of preserving the child-parent relationship, the two parties will initially be separated only temporarily. The state can house children for a short period of time, upon the government's further evaluation of the fitness of the parents or the home for the children, with the assumption that the child will be returned home. If the parent is abusive, s/he can be removed from the home, and through a protective order be ordered to cease contact with the child. Children may also be put in the care of another family member, a situation that can be temporary but also evolve into long-term placement. Should no suitable family member be available, children can be placed in foster care. Within a year in foster care it should be determined whether children will eventually be put up for adoption. This process has been accelerated to avoid the long-term placement of children in foster care. As domestic adoptions can be fraught with difficulties and many individuals prefer to adopt young children, many children remain in foster care until they age out of the system at eighteen. This happens currently to 11% of all children in foster care.³³

Even though the state can completely and irrevocably terminate the rights of a parent to a relationship with their child, it must prove the need for such a deprivation by clear and convincing evidence. This is a very high standard because natural parents have a "fundamental liberty interest . . . in the care, custody, and management of their child [that] does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State."³⁴ On the other hand, parents whose parental rights have been terminated do not appear to owe their former (legal) child any duties, though this may differ from state to state.

When a child's interest is at stake, including the termination of parental rights, the CRC, under Article 3, requires that state and private welfare agencies, the legislature, administrative agencies, and the judiciary make the "best interests of the child" standard their primary consideration. The next section will define the standard under U.S. law and apply it in a number of different settings. It will conclude with a critique of the application of the standard to individual situations in which the child is involved directly but a refusal to apply it when a child's welfare is at stake indirectly or when application of the standard would require societal changes.

33. Children's Rights, *Facts About Aging Out*, available at <http://www.childrensrights.org/issues-resources/foster-care/facts-about-aging-out/>.

34. *Santosky v. Kramer*, 455 U.S. 745, 753 (1982).

III. THE BEST INTERESTS OF THE CHILD STANDARD

Many of the distinctions between those below and those above the age of majority seem to be driven by considerations of the best interests of the child, a standard that originated in the United States.³⁵ As a matter of both common and statutory law, best interests of the child have been the guiding principle in many U.S. jurisdictions for more than 125 years.³⁶

A. *Best Interests Defined*

States may adopt the best interests standard either through legislation or through judicial decision-making. Today all fifty states have laws that require use of this standard in many areas of law, including child labor, education, adoption, custody, and placement of children.³⁷ Federal law also uses the concept when addressing child welfare issues under its jurisdiction. Legislative proposals to change the focus of the standard, in some cases to increase parental rights, have generally failed.³⁸

All states of the union, the District of Columbia, and several U.S. territories have statutes that direct courts to consider the best interest of the child when making important life decisions.³⁹ With respect to custody decision, many state statutes specify a number of non-exclusive factors to consider. Common among these factors are (a) the health, safety, and welfare of the child, including the petitioning parents' capacity to provide medical care, clothing, sustenance, and emotional support; (b) the existence of domestic violence in the home, and whether the party seeking custody is the perpetrator; (c) the

35. Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J. L. & FAMILY STUDIES 337 (2008).

36. See Howard Davidson, *A Model Child Protection Legal Reform Instrument: The Convention on the Rights of the Child and Its Consistency with United States Law*, 5 GEO. J. ON FIGHTING POVERTY 185, 191 (1998). Not all child-related legislation necessarily serves a child's best interest. The United States, for example, still permits recruitment of 17-year-olds (with parental consent) into its military. See *Join the Military: Eligibility Rules*, at www.military.com/join-armed-forces/eligibility-requirements. Human rights law on this issue continues to evolve.

See JONATHAN TODRES, MARK E. WOJCIK & CRIS R. REVAS, *THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD: AN ANALYSIS OF TREATY IMPLICATIONS AND OF U.S. RATIFICATION* 123 (2006) [hereinafter TODRES, WOJCIK & REVAS].

37. For a discussion of the movement toward a different standard in custody cases, see Richard A. Warshak, *Parenting By The Clock: The Best-Interest-of-the-Child Standard, Judicial Discretion, and the American Law Institute's "Approximation Rule,"* 41 BALTIMORE L. REV. 83 (2011).

38. High-profile adoption cases have questioned the rights of parents in contrast to the "best interests" of the child. See Annette R. Appell & Bruce A. Boyer, *Parental Rights vs. Best Interests of the Child: A False Dichotomy in the Context of Adoption*, 2 DUKE J. GENDER L. & POL'Y 63 (1995).

39. See U.S. Department of Health and Human Services, Administration for Children & Families, *Child Welfare Information Gateway, Determining the Best Interests of the Child* 1 (2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/best_interest.pdf.

child's relationship to the parties seeking custody; (d) the mental and physical health of the parents seeking or defending custody; (e) the present or probable future stability of the child's social environment. The last factor compares the child's greater support system in the current environment, including relationships with friends and family, with the probable state of a future support system after a given custody ruling. The test, therefore, allows for great flexibility and adaptability, which also makes it subject to criticism especially on grounds of unequal application.

Since the best interest standard is prevalent in U.S. law, commentators on the CRC have generally argued that its implementation in the United States "would require little or no adjustment in [its] long-standing history of attempting to keep the 'best interests of the child' at the forefront of judicial and legislative activity."⁴⁰ This may, however, not be true for all individual requirements under the CRC, especially as many pose novel issues. This includes the right of children to preserve their identity under CRC Article 8, which includes "nationality, name and family relations"

B. *The Right to Identity*

In light of modern reproductive technology, DNA testing, and changing family relations, the definition of "family relations" has come under pressure. Under common law, the mother's husband was assumed to be the child's biological father. Today, a child may file a paternity suit to rebut the paternity of that person and any other person claiming to be a father, or bestowed with the title of a parent by a court. In such situations, the court is free to compel a putative parent, or a person whose parental status is challenged, to submit to DNA testing.⁴¹

Children born out of wedlock are permitted to sue to establish paternity. Whether they are able to establish their relationship with a putative parent through blood and/or genetic tests depends on the nature of the procedure,⁴² as blood tests may generally be used only to exclude paternity, but not to confirm paternity status over the objection of a parent.⁴³

Legal parenthood and questions of identity may, in some situations, also pose challenges for same-sex couples. The Department of State appears to have recognized just recently the child of a lesbian couple as "born in wedlock" if the child is conceived from the egg of one woman and carried by the other. For a woman, therefore, "mother" becomes defined as being the genetic or the gestational and

40. TODRES, WOJCIK & REVAS, *supra* note 36, at 126.

41. See 41 AM. JUR. 2D *Illegitimate Children* § 31 (Westlaw 2013).

42. See 14 C.J.S. *Children Out-of-Wedlock* § 97, § 76 (Westlaw 2013).

43. See 41 AM. JUR. 2D *Illegitimate Children* § 31 (Westlaw 2013).

legal mother of the child, at least under one set of legal rules. How this will impact other legal concepts of parenthood and issues of identity remain open questions.

The right to know one's identity looks different for adopted children. In most U.S. jurisdictions, adopted children do not have a right to find out who their biological parents are as most adoptions are "closed."⁴⁴ Some jurisdictions allow an adopted child to learn identifying data about his/her biological parents upon a showing of good cause, and federal courts of appeal have upheld such legislation as constitutional. In many states, an adopted child does not have the right to discover even non-identifying data about their biological parents, including medical information or religion. Only a few states now require the inclusion of non-identifying information (medical and social histories) that can be released on request of the adopted child.⁴⁵ There is no indication of a substantial trend away from closed or near-closed adoptions.

The courts of two states, Tennessee and Oregon, notably diverge from the majority approach.⁴⁶ In those states, a child may obtain access to identifying data relating to their biological parents if disclosure is in the best interest of the child. Courts in both states have subordinated the parents' constitutional claims to a privacy interest in personally identifying data to the state's interests in the disclosure of parental identity inherent in administering adoptions.⁴⁷

Modern technological advances increase the relevance and the stakes of decisions surrounding the discoverability of one's biological parents. Perhaps not surprisingly, in cases of artificial insemination by donor (AID) disclosure of the donor's medical data as well as non-identifying data is held to a standard similar to the disclosure of the identity of the natural parent of an adopted child.⁴⁸ In most states, children conceived through AID are unable to gain access to information relating to their natural biological donor, though at least eighteen states have passed laws that allow such children to gain ac-

44. See U.S. Department of Health and Human Services, Administration for Children & Families, *Child Welfare Information Gateway, Access to Adoption Records* (June 2012), available at https://www.childwelfare.gov/systemwide/laws_policies/statutes/infoaccessap.pdf.

45. See 1 LEG. RTS. CHILD. REV. 2D § 6:12 (2d ed.) (Westlaw 2012).

46. Janet Leach Richards, *Medical Confidentiality and Disclosure of Paternity*, 48 S.D. L. REV. 409, 427–28 (2002–03).

47. See *Does 1, 2, 3, 4, 5, 6, & 7 v. State*, 164 Or. App. 543, 565 (1999) ("Because a birth mother has no fundamental right to have her child adopted, she also can have no correlative fundamental right to have her child adopted under circumstances that guarantee that her identity will not be revealed to the child."); *Doe v. Sundquist*, 2 S.W.3d 919, 926 (Tenn. 1999) (denying birth mothers' claims that Tennessee statute allowing children put up for adoption to obtain identifying data about their birth parents after attaining the age of 21 violated mothers' constitutional rights).

48. See Lucy R. Dollens, *Artificial Insemination: Right of Privacy and the Difficulty in Maintaining Donor Anonymity*, 35 IND. L. REV. 213, 217 (2001).

cess upon a showing of cause. The California Court of Appeals, for example, held that the constitutional interest in maintaining anonymity was limited and outweighed by the state's interest in preserving children's right to discover their identity.⁴⁹ Only a small number of state courts have held that biological donors have a lower constitutional privacy interest in non-identifying than in identifying data, causing the states' interest in disclosure to override the lowered privacy interest.

While modern family relations with their frequent distinctions between biological, social, and legal parent(s) may constitute the most challenging frontier of the law, wide variety exists between countries with respect to rules on children's names and name changes.⁵⁰

C. *Changing One's Name*

When a child requests change of his first, or determination or change of his last name, courts apply the best interests standard.⁵¹ When changes of the last name are considered, courts turn to the factors employed in custody cases: effect of the change on the preservation and development of the child's relationship with each parent; the identification of the child as part of the family unit; the length of time that the child has used the surname; the preference of the child if the child is of sufficient maturity to express a preference; whether the child's surname is different from the surname of the child's residential parent; the embarrassment, discomfort, or inconvenience that may result when a child bears a surname different from the residential parent; important ties to family heritage, ethnic identity, and cultural values; and parental misconduct or failure to maintain contact with and support of the child.⁵²

At the birth of a child, parents generally choose a child's first name without state interference. Should a child petition for change of name, the court considers the following issues in light of the best interests of the child: the child's preference; the effect of the change of the child's name on the preservation and development of the child's relationship with each parent; the length of time the child has borne a given name; the degree of community respect associated with the present and proposed names; the difficulties, harassment, or embarrassment that the child may experience from bearing the present or proposed name; and the existence of any parental misconduct or neglect.⁵³

49. See *Johnson v. Superior Ct.*, 95 Cal. Rptr. 2d 864, 864 (Ct. App. 2000).

50. See, e.g., *Thanks, mum: Governments find reason to regulate the names of children*, THE ECONOMIST, Jan. 14, 2012.

51. See 65 C.J.S. *Names* § 24 (Westlaw 2013).

52. See *id.*

53. See *id.*

Even though parents are left largely free in their choice of a given name for their child, a child's name change will be subject to a searching test, presumably to ascertain the child's rationale and seriousness of purpose and to avoid negative repercussions from a name change. The court's goal is clearly to protect the child's interest in these rare cases.

D. Critique

Historically, the best interest test may have hidden gender bias and continues to be applied disparately to different socio-economic, racial, ethnic, and religious groups. In addition, use of the test in some areas of the law conceals the poor treatment to which other areas of the law, such as the criminal justice system, subject children. Only recently has the U.S. Supreme Court acknowledged that children's intellectual and emotional development differs dramatically from that of adults, leading to restrictions on the most arduous and punitive sanctions imposed, including the death penalty and life-without-parole.

When children are the object of the decision-making, as in the cases outlined above or in custody situations, the best interest standard will be applied, even though perhaps not always equally. It has not been expanded, however, to the situations in which the state's decision will have a dramatic impact on the child even though the law does not exert its force upon the child directly. Two such situations involve the criminal sentencing of a parent (in criminal prosecutions unrelated to the child) and the decision to deport the non-citizen parent. In both of these cases the existence of a child or the importance of the relationship between the parent and the child are rarely considered, barring extraordinary situations, despite an increasing array of literature indicating the negative consequences of parental, and especially maternal, incarceration or deportation.

Over the last two decades, the number of prisoners who have at least one minor child has increased substantially, so that in 2010 2.3% of all minor children living in the United States had at least one incarcerated parent. Almost half of all prisoners have a minor child. Black children were 7.5 times and Hispanic children 2.5 times more likely to have a parent in prison than white children.⁵⁴ A recent study has found a substantial impact of parental imprisonment on a child's educational attainment, later unemployment, and involvement with the criminal justice system, especially following maternal incarceration. Perhaps most surprisingly, the same study found that the impact of maternal incarceration extends beyond the child to the entire community by depressing college graduation rates of young

54. Bureau of Justice Statistics, Lauren E. Glaze & Laura M. Maruschak, *Parents in Prison and Their Minor Children* (Aug. 8, 2008; rev. Mar. 30, 2010), NCJ 222984.

people educated in schools where between 10 and 20% of other children had an incarcerated parent.⁵⁵ The U.S. criminal justice system, as the legal system as a whole, is individually oriented and therefore only rarely allows for consideration of third-party interests at sentencing. The U.S. Sentencing Guidelines, for example, indicate that “family ties and responsibilities are not ordinarily relevant in determining whether a departure [from the otherwise applicable guidelines sentence, which is primarily based on the offense of conviction and the offender’s criminal history] may be warranted.”⁵⁶

A similar situation involves the deportation of non-citizen parents. As the United States subscribes to the *ius soli* (and *ius sanguinis*) principle of citizenship, even the children of undocumented migrants born in the United States automatically obtain citizenship. With the parents remaining without a legal status, however, if a removal order issues, they (and their children) face the choice between returning to the parents’ country of citizenship or separating the family, often with serious long-term emotional and financial consequences. Parental arrest and detention, in addition to ultimate removal and long-term bans on return, inflict serious psychological harm on children.⁵⁷ Only in recent months has the U.S. Immigration and Customs Enforcement issued a policy outlining enforcement priorities and prosecutorial discretion, with the goal of “not unnecessarily disrupt[ing] the parental rights of both alien parents or legal guardians of minor children.”⁵⁸ How successfully that policy has been implemented and whether it has served children well, may be too early to assess.

Failure to consider children’s interests and wellbeing when a state decision will impact them dramatically has negative effects societally and systemically. Even though the best interest standard permeates many areas of judicial and agency decision-making, it re-

55. John Hagan & Holly Foster, *Children of the American Prison Generation: Student and School Spillover Effect of Incarcerating Mothers*, 46 LAW & SOC’Y REV. 37 (2012).

56. U.S. Sentencing Commission Guidelines Manual, §5H1.6. *Family Ties and Responsibilities (Policy Statement)* (2013).

57. See, e.g., Dorsey & Whitney LLP, Report to the Urban Institute, *Severing a Lifeline: The Neglect of Citizen Children in America’s Immigration Enforcement Policy* (2009).

58. U.S. Immigration and Customs Enforcement, *11064.1: Facilitating Parental Interest in the Course of Civil Immigration Enforcement Activities* (Aug. 23, 2013). For a critique of the memorandum as failing to allow for individual consideration, see Mills Legal Clinic at Stanford Law School & Center for Justice and International Law, *Supplemental Report on Prosecutorial Discretion and Family Unity Addressing U.S. Government Policies Issued After Submission of Petitioners’ Report in support of the Public Thematic Hearing on Human Rights of Migrants and Legislative Reform in the United States before the Inter-American Commission on Human Rights (149th Period of Sessions) pursuant to Article 66 of the Rules of Procedure of the Inter-American Commission on Human Rights*, available at www.law.stanford.edu/sites/default/files/project/443312/doc/slspublic/13-10-22%20FINAL%20Supplemental%20Report.pdf.

mains inapplicable when the child's fate is not directly at issue despite it being indirectly affected.

Application of the best interest standard or direct imposition of state measures on children imply their right to provide input, though not necessarily the right to make a decision.

IV. ABORTION, CUSTODY, ADOPTION: CHILDREN'S RIGHTS TO EXPRESS THEIR VIEWS

CRC Articles 12 and 13 guarantee that a child has meaningful opportunities to express her views freely in all matters affecting her, though this does not necessarily imply decision-making authority. The First Amendment's protection of freedom of speech extends to children though children seem to possess lesser rights to expression than adults under the same circumstances, especially if the state can show a compelling state interest in restricting a child's right to express an opinion.⁵⁹

In criminal proceedings, juveniles accused of crimes are guaranteed due process during both the pretrial and trial stages under the 5th, 6th, and 14th amendments, which includes the right to be heard.⁶⁰ As victims of criminal offenses, children also have a right to participate in the criminal justice process, though the process may have to be accommodated, especially for younger children.

The weight of the child's opinion in family matters and health issues, the most frequent situations in which such right will be exercised, increases with the age and maturity of the child.⁶¹ Three areas—abortion, custody, and adoption—may be of particular importance to children, and especially older children.

A. *Abortion*

With respect to one highly charged issue—abortion, it has been hotly debated where the power to make a final decision resides and how to weigh a child's opinion. States may not impose a blanket provision requiring the consent of a parent or person standing in the position of a parent to the abortion of an unmarried minor. The Supreme Court invalidated a state statute that required minors to secure written parental consent before having an abortion.⁶² Instead

59. Congressional Research Service, Henry Cohen, *Freedom of Speech and Press: Restrictions to the First Amendment* (2009); 1 CHILDREN & THE LAW: RIGHTS AND OBLIGATIONS § 1:7 (Westlaw 2012).

60. See *Kent v. United States*, 383 U.S. 541, 554 (1966); see also *In re Gault*, 387 U.S. 1, 12-18 (1967).

61. See Virginia Mixon Swindell, *Children's Participation in Custodial and Parental Right Determinations*, 31 Hous. L. Rev. 659, 674-76 (1994).

62. See *Planned Parenthood of Cent. Missouri v. Danforth*, 428 U.S. 52, 72 (1976); Swindell, *supra* note 61, at 672-73.

the Court suggested alternative procedures if the state wishes to still restrict minors' abortions.

Pregnant minors are entitled to show that they are sufficiently mature and well informed to make the abortion decision themselves upon consultation of a doctor but without any parental consent. Should the minor be insufficiently mature to make such a decision, the court can determine independently that an abortion is (not) in the best interests of the child. The so-called judicial bypass has been established to protect minors and shield them from having to share their plans with their parents.

The decisions on a minor's right to consent to an abortion have influenced judicial guidance on other medical procedures. The Supreme Court suggested, for example, that a state's requiring a minor's written consent for other procedures besides abortion may be equally constitutional, as long as the surgery is sufficiently serious.⁶³ How the courts will react, for example, to the desire of a minor to have a sex change surgery that lacks parental support remains an open question.

The state or a third party may have less power to override a child's refusal to undergo surgery than it has regarding a child's wish to have surgery.⁶⁴ The weight given to a child's refusal is a function of the court's determination of the child's maturity and competence to make reasoned decisions. These two factors also play a determinative role in a court's assessment of a minor's views in custody situations.

B. Custody

The most common situation in which children are heard is custody cases. Many states allow a child to express a preference in custody hearings, and in most states, the District of Columbia, and Puerto Rico, the child's preferences are considered in custody rulings. In the great majority of American states, children do not need to attain a specific numerical age before being allowed to participate in custody proceedings affecting them, or before the child's stated pref-

63. See *Planned Parenthood*, 428 U.S. at 67 ("As a consequence, we see no constitutional defect in requiring it only for some types of surgery as, for example, an intracardiac procedure, or where the surgical risk is elevated above a specified mortality level, or, for that matter, for abortions.").

64. Ross Povenmire, *Do Parents Have the Legal Authority to Consent to the Surgical Amputation of Normal, Healthy Tissue from Their Infant Children?: The Practice of Circumcision in the United States*, 7 AM. U. J. GENDER SOC. POL'Y & L. 87, 102 (1999). The United States, under federal law, prohibits female genital mutilation, sometime referred to also as female circumcision, unless health considerations counsel in favor of it. 18 U.S.C. §116 (2012). Male circumcision is permitted and remains widespread in the United States, though the national rate of newborn circumcision has been dropping over the last few years. The latter, of course, precludes participation of the child in the decisionmaking.

erences be given weight in the court's best interest analysis.⁶⁵ Instead, most courts look to the "maturity" of a child—specifically whether the child has, to the court, sufficiently developed the emotional and intellectual capacity necessary to make an informed decision regarding her preferences. The weight courts assign to the preferences of a child scales with the level of maturity the judge observes.⁶⁶ Some states, however, take a hybrid approach, specifying age minimums for some purposes in child custody hearings but directing the judge to determine maturity holistically for other purposes in the same hearing.

In California, for example, children age 14 and older are permitted to address the court regarding custody and visitation, unless, pursuant to a finding on the record, the judge determines that "doing so is not in the child's best interests."⁶⁷ Children under the age of 14 may participate in custody hearings affecting them, but do not, like children over 14 years, benefit from a presumption in favor of their participation.

Notably, state courts give varying degrees of weight to the preferences of a mature child in best interest custody determinations. The first states that gave *controlling and mandatory* weight to child preference in custody determinations were four southern states: Georgia, Mississippi, Tennessee, and Texas.⁶⁸ There is some speculation that the American South's traditional allocation of more responsibility to children motivated this approach. In more recent years, however, most states have moved away from a mandatory scheme to a best interest approach that preserves judicial discretion.

Some of the states require children be "informed" before they are allowed to state a preference or before the judge can determine the weight of this preference. In child custody proceedings, a guardian *ad litem* or special attorney has the power to move discovery and get information from either of the two parents to enable the child to make an informed decision about which of the parents s/he prefers to have primary custody.⁶⁹

65. See CHILD CUSTODY PRAC. & PROC. § 4:11 (Westlaw through Mar. 2012).

66. See Barbara A. Atwood, *The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform*, 45 ARIZ. L. REV. 629, 634 (2003) (noting that 80% of Arizona judges surveyed considered the preferences of older teenagers to be "very significant" in their decisionmaking, while only 40% of judges interviewed would give similar weight to the preferences of children aged 11-13 years, and 70% of judges interviewed agreed that the preferences of very young children are given "no significance at all" in their best interest custody determinations).

67. CAL. FAM. CODE § 3042(c), (d) (West, Westlaw through 2013).

68. See Kathleen Nemechek, *Child Preference in Custody Decisions: Where We Have Been, Where We Are Now, Where We Should Go*, 83 IOWA L. REV. 437, 445 (1998).

69. CHILD CUSTODY PRAC. & PROC. § 12:13 at n. 5 (Westlaw 2012) (providing a diverse list of jurisdictions that require the appointment of an attorney who is granted the same powers of discovery as the other parties). See Andrea Khoury, *The True Voice of the Child: The Model Act Governing the Representation of Children in*

Child custody decisions may come at any point in a child's life, and the same holds true for adoptions, though the participation and decision-making role of children in the adoption process is more substantial.

C. Adoption

Adoptions generally require greater child involvement in the decision-making than custodial arrangements.

In many states, if the child being adopted is over a certain age, he or she must consent to the adoption. The age of children who must give their consent to adoption generally ranges from 10 to 14. Absence of such consent is apparently an absolute bar to adoption. The preferences of younger children may also be considered by the court, but are not binding.⁷⁰

While many adoptions occur within the United States, the United States is also involved in inter-country adoptions, as a net "importer" of children.⁷¹ Congress ratified the 1993 Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption and made national legislation applicable to all adoptions "involving United States residents"—apparently as parents or children.⁷² This legislation (and the Convention) requires that all groups that offer cross-border adoption services in connection with a United States person must satisfy certain accreditation requirements and be approved by United States accreditation entities.

Accreditation standards mandate that the agency provide the putative parents a copy of the medical records of the child in English. To protect the child, the agency must conduct a thorough background report, including a home study, of the prospective parents. The adoption service must bill on a fee-for-service basis, not a contingency fee basis. In addition, the adoption service must disclose fully its policies and practices, the disruption rates of its placements for intercountry

Abuse, Neglect, and Dependency Proceedings, 36 NOVA L. REV. 313, 317 (Spring 2012) ("There is also the same lack of uniformity within the states, regardless of statutory guidance. In one county there may be a 'lawyers for children' program, and lawyers are regularly appointed, and in another county in the same state, there is no such similar program, and courts will appoint nonlawyers or Court Appointed Special Advocates (CASAs).").

70. 1 LEG. RTS. CHILD. REV. 2D § 6:5 (2d ed.) (Westlaw 2012).

71. U.S. Department of State, Bureau of Consular Affairs, Office of Children's Issues, *FY2012 Annual Report on Intercountry Adoptions* (Jan. 2013), available at adoption.state.gov/content/pdf/fy2012_annual_report.pdf. Despite a high total number of foreign adoptees, per capita the United States ranks only in the middle of highly developed Western democracies with respect to the total number of children adopted from abroad. See Australian InterCountry Adoption Network, *International Adoption Statistics*, available at www.aican.org/statistics.php.

72. See 42 U.S.C. § 14901–54 (2000); 2 AM. JUR. 2d ADOPTION § 46 (Westlaw 2013).

adoption, and all fees charged for such adoptions. These rules have been developed to protect potential parents from exploitation and children from illicit transfer and trafficking. This is particularly important as children in intercountry adoptions tend to be younger and are often unable to participate in the adoption process. Despite the heightened protections for both sides implicit in these requirements, intercountry adoptions have created diplomatic tensions between the United States and some sender countries.⁷³

Above section has focused on the relationship between children, their parents, and the state, largely in its judicial or legislative role. Many other legal areas involving children's rights heavily implicate (public) schools.

V. SCHOOL AND WORK

Depending on state laws, schooling from an age range between 5 and 8 up to 16 to 18 is compulsory in the United States. That requirement can be fulfilled through school attendance or home schooling. Approximately three percent of American children are being home schooled. Ten percent attend private rather than public schools.

Children may take on paid work outside the home while still in school, as envisioned in CRC Article 32 para. 2 point a. Federal and state laws regulate child labor. Regulations include restrictions on the number of hours children can work, what times of day a child may work, what general occupations are fit for children, what specific tasks children can perform, and under what conditions they may perform those jobs.

Federal law mandates the minimum age for employment, without parental consent, at 16 years, except for agricultural work.⁷⁴ The federal minimum age for non-agricultural employment is 14 years, which means that even with parental consent, a child under 14 years may not work.⁷⁵ Under federal law, the hours a child can work during the week also depend on the age of the minor—14-year-olds are permitted to work significantly fewer hours than 16-year-olds. Under U.S. Department of Labor regulations, workers between the ages of 16 and 18 years are prevented from engaging in employment the department finds to be particularly hazardous or detrimental to their health or well-being.

Agricultural employment does not require a minimum age. While child labor laws do not apply to a child working on her parent's farm, they apply generally to a child working on a farm owned by someone

73. See Council of Europe Parliamentary Assembly, Written declaration 536: *Intercountry adoption: Children as hostages of international relations*, Doc. 13113 rev. (Jan. 29, 2013).

74. See 29 U.S.C. § 203(e)(4)(1) (2006).

75. See 29 C.F.R. § 570.2 (West, Westlaw through May 2013).

other than her parents. With parental consent children as young as 12 may work on such a farm, in some states for up to twelve hours and without being paid minimum wage. Children's farm work—and work in the entertainment industry—remains poorly regulated. For many American children in rural areas, therefore, agricultural work may be a regular part of their lives, leaving less time for school-related work. Rural schools and educational attainment during primary and secondary school do not seem to be measurably below those in more urban or suburban settings; college attendance rate, however, is lower.

Schools themselves have frequently been the flashpoint of children's rights, especially the right to expression and the concomitant right to information, to allow for the formation of an opinion, which can then be expressed. Both aspects are encapsulated in CRC article 13 subject to limited exceptions outlined there.

VI. ACCESS TO INFORMATION: TENSIONS BETWEEN PARENTS, SCHOOLS, AND CHILDREN

The Convention explicitly guarantees the right to information while the First Amendment only implicitly protects the right of access to information as such access is a necessary condition for the meaningful exercise of the right to free expression. Even in the case of adults, the right to information remains insufficiently developed.⁷⁶

In a case indirectly involving children, the Supreme Court struck down a federal law that had prevented the mailing of unsolicited advertisements relating to the availability of contraceptives, in part because the law denied parents information necessary to make informed decisions about birth control and discuss it with their children.⁷⁷ The law remains unsettled when the child's desire for information conflicts with her parents' wishes, however. In this case, the courts must (or should) determine the extent and nature of the child's autonomous liberty interest—as distinct from her freedom of speech—as it is closely connected to the right to information.

A child's autonomy interests inevitably conflict with constitutional principles protecting the parents' rights to control and raise their children free from (most) governmental interference.⁷⁸ Parents have a recognized liberty interest in raising their children by the methods they desire, and are given great latitude in making choices for their children—including, for example, a parent's decision to re-

76. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("It is now well established that the Constitution protects the right to receive information and ideas. 'This freedom (of speech and press) . . . necessarily protects the right to receive'"); Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 227, 230-31 (1999).

77. See *Bolger v. Young Drugs Prods. Corp.*, 463 U.S. 60, 74 (1983).

78. See *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

move her child from otherwise mandatory lower education for religious and social reasons—seemingly without consideration of the child’s wishes.⁷⁹ Minor children do not have any constitutional rights in the home that can be enforced against their parents, including the right to speech or information unless their parents give them such rights.⁸⁰

Outside the home, parents and governments may influence children’s access to information. Both government regulations and parental preferences will be less certainly enforced outside the home against a child who is considered “mature” since the child’s First Amendment rights and constitutional interest in autonomy increase with age and maturity. Courts do not employ numerical age to decide dispositively a child’s (lack of) maturity. A “mature” child’s right to information is said to be strongest when access to that information is necessary for meaningful exercise of another fundamental right, such as that of protecting a would-be mother’s decision to obtain an abortion—even if the would-be mother is legally a minor. Healthcare providers, therefore, may provide information necessary for informed consent to a medical procedure, including abortion and contraception, to minors.⁸¹

Most states allow parents to have significant control over the public school education of their children.⁸² However, they cannot prevent public schools from teaching topics that they find morally offensive.⁸³ Many of these disputes have centered on sexual education as well as the teaching of evolution in public schools. In those situations, the state must allow for parents to seek alternatives to public schooling, and cannot limit what parents teach their children.⁸⁴ On the other hand, school boards—with or without the consent of parents—have the authority, for example, to ban certain books from the curriculum and from school libraries, as long as they do not do so because they merely disagree with the content but rather because of the educational suitability of the content.⁸⁵

79. See *Wisconsin v. Yoder*, 406 U.S. 205, 224–35 (1972).

80. Both 42 U.S.C. § 1983 and U.S. CONST. Amend. XIV only prevent deprivation of civil liberties by state actors.

81. *Bellotti v. Baird*, 443 U.S. 622 (1979).

82. See Ross, *supra* note 76, at 247 n. 120 (providing a list of state statutes that allow parents to opt out or provide substitute education that they choose on controversial topics, and statutes that require the school to give notice to the parents of students if the school curriculum contains education on controversial topics).

83. See *Brown v. Hot, Sexy, and Safer Prods., Inc.*, 68 F.3d 525, 533–34 (1995).

84. See Ross, *supra* note 76, at 247.

85. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).

In public school settings, the right to freedom of expression, including the reception of information, has frequently collided with the right to religious freedom.⁸⁶

VII. RELIGION IN SCHOOL: THE "CULTURE WARS"

Among the core CRC articles is 14, which guarantees children the right to freedom of thought, conscience, and religion. Under the U.S. Constitution, freedom of religion is guaranteed though the United States perceives itself as having a religious (largely Judeo-Christian) citizenry. For that reason the U.S. Supreme Court has developed extensive jurisprudence on how to assure the separation of church and state without unduly burdening the exercise of religious practice.

Education about religion, though not religious instruction, is available in public schools, as both an obligatory and an optional subject. Instruction about world religions, for example, is perfectly acceptable though attempts to teach religion in public schools would likely lead to Establishment Clause⁸⁷ challenges because public schools are state actors. Those challenges can be overcome if the teaching activity satisfies a three-part test.⁸⁸ First, the law under scrutiny must "reflect a clearly secular legislative purpose," which has been interpreted to mean that the law's explicit *purpose* cannot be designed to advance or inhibit religion.⁸⁹ Second, the law must "have a primary *effect* that neither advances nor inhibits religion" (emphasis added). Third, the law must be religiously neutral to "avoid excessive entanglement with religion."⁹⁰ Public schools can therefore mandate that students study subject matters relating to religion, so long as the school curriculum, including religious studies, reflects a secular legislative purpose—such as to teach social studies or literature—and so long as the primary effect of the curriculum is not to inhibit or advance certain religious ideals.⁹¹ Beyond these restrictions, states are given substantial leeway—substantively and procedurally—in creating public school curricula.⁹²

86. Approximately 10% of children in the United States in pre-kindergarten through 12th grade are enrolled in private schools, with about 80% of all private schools being religiously affiliated. Council for American Private Education, *Facts and Figures*, at www.capenet.org/facts.html.

87. U.S. CONST. Amend. I ("Congress shall make no law respecting an establishment of religion . . .").

88. See *Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 772 (1973).

89. See *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

90. See, e.g., *Walz v. Tax Comm'n of City of New York*, 397 U.S. 664 (involving property tax exemptions to religious institutions).

91. See *Hall v. Bd. of Sch. Comm'rs of Conecuh Cnty.*, 656 F.2d 999, 1001-03 (5th Cir. 1981).

92. See *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 300 (1963) ("To what extent, and at what points in the curriculum, religious materials should be cited

On numerous occasions, religiously motivated school boards have attempted to weave religious ideals into mandatory school courses, for example by requiring the study of “intelligent design” or “creation science” along with evolution theory, restricting the teaching of evolution theory, or requiring abstinence-only sexual education. Courts are accustomed to applying the judicially created Establishment Clause test in such situations. The Supreme Court struck down a Louisiana law requiring that god-creation viewpoints be presented whenever evolution science was discussed in the classroom because the law served no secular purpose.⁹³

The courts also held policies in Dover, Pennsylvania, unconstitutional when a largely religiously conservative school had adopted a classroom disclaimer that specifically referenced “intelligent design” (a relabeling of “creation science”) as an alternative theory to evolution science, and later voted to change the ninth-grade biology curriculum to “make ninth grade biology students ‘aware of gaps/problems in Darwin’s theory and of other theories of evolution, including, but not limited to, intelligent design.’”⁹⁴ Such efforts by local school boards continue in religiously conservative communities throughout the United States.

Ironically, religious activists have occasionally seized onto the requirement to avoid “religious entanglement” to justify their introduction of religious views into school curricula. Some have argued that evolution science promotes atheism or the absence of god, which is “a religion,” and therefore sole presentation of this science “theory” itself violates the Establishment Clause.⁹⁵ Courts, however, have rarely permitted the presentation of religious views to balance “anti-religion.”

With the Supreme Court having closed most other doors to the promotion of religious beliefs regarding the origins of humankind, religious activists have instead attempted to find a secular purpose for “Darwin disclaimers,” which are notices provided to students that evolution science is “only a theory” to be considered among other explanations for the origins of humankind, including creation science, intelligent design, or other explanations involving a divine source. Religious activists in state legislatures have also sponsored laws that instruct local school districts to “promot[e] critical thinking skills” by listing scientific theories that are deemed by statute to be “rightly

are matters which the courts ought to entrust very largely to the experienced officials who superintend our Nation’s public schools.”)

93. See *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987). See generally Edward J. Larson, *Teaching Creation, Evolution, and the New Atheism in 21st Century America: Window on an Evolving Establishment Clause*, 82 *Miss. L.J.* 997, 1020 (2013).

94. *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp.2d 707 (M.D. Penn. 2005).

95. See Blog: Religion & American Law, *Evolution and Atheism: Is There a Connection?* (Oct. 6, 2013), available at <http://religionandamericanlaw.blogspot.com/2013/10/evolution-and-atheism-is-there.html>.

subject to critical analysis,” including “evolution, the origin of life, global warming, and human cloning.”⁹⁶ These disputes, as curious as they may appear to non-Americans, are an integral part of the American legal system where the tension between religious freedom and the avoidance of state-sponsored religions inherent in the First Amendment often plays out in the school setting.

VIII. CONCLUSION

The CRC covers broad territory. Whether U.S. law always conforms to its requirements remains questionable, especially in light of the diversity of approaches within the United States. The most difficult questions under both the CRC and the U.S. Constitution and its laws pertain undeniably to the clash of rights between parents, the state, and children, many of which occur in the public school setting.

The United States would benefit from participating in a global dialogue on these challenging issues. This is particularly true as modern technology may expand the concept and undermine the traditional notion of parent. U.S. scholars and practitioners may also gain perspective and insight from the different understanding or application of legal concepts, such as the best interest standard.

96. See Larson, *supra* note 93, at 1008-32.

ALAIN A. LEVASSEUR*

Foreign Precedents in Constitutional Litigation†

TOPIC IV. B

In the United States, academic interest in foreign and/or comparative law has never been, as a general proposition, very widely spread. Actually a lot of “comparative law” is being done, of all sorts, on “the national level” both “horizontally” between the fifty states and vertically between the states of the Union and the federal government. When it comes to taking into account foreign constitutional law, some scholars have strongly argued that looking at “other countries may provide helpful empirical information in interpreting the U.S. Constitution” (Vicki C. Jackson) or that “looking abroad simply helps do a better job at home” (Anne-Marie Slaughter). Yet, these scholars will not go as far as suggesting that foreign courts decisions interpreting foreign constitutions be adopted as “binding” precedents in the interpretation of the U.S. Constitution by American courts, the Supreme Court in particular. Actually, even the use of “Foreign Precedents in Constitutional Litigation” (General Reporter’s choice) as mere persuasive authority is very inconsistent and somewhat superficial. The reason might be that “when it comes to the Constitution, federal courts are limited to materials that derive from the American legal system” and that “the federal courts should have no recourse to foreign decisions” (Julian Ku and John Yoo)

Twenty years ago, very exactly, writing on a subject closely related to the topic of this report,¹ we wrote that:

The identification of comparative law with the study of foreign law may have become so “foreign” to the American courts that a scholar ventured to say, albeit tongue-in-cheek, that a true, authentic American would not have what it really takes to become a true comparatist: “Most of those in

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1. Alain A. Levasseur, *The Use of Comparative Law by Courts* (II), 42 AM. J. COMP. L., SUPPLEMENT, 41 (1994).

your garden are not Americans, and even those who are have wonderfully exotic names. This does not seem to be a field for the Smiths or the Joneses.”²

We wrote also that

as far as the federal and most state courts in this country are concerned, foreign law is not considered as a relevant topic for consideration and even less for study. Today, and even since the last decades of the century, these courts have shown no cultural inclination, intellectual bent or mere professional curiosity to look into comparative law (in the sense of foreign legal systems) as a possible source of legal or natural law support for their own decisions or as a means of providing a more cogent rationalization of their own rulings. And, yet, this history of the American legal system was, at one time, full of a legitimate optimism and authentic promises deeply rooted in the 19th century coexistence of the civil law and the common law.³

Roscoe Pound had already stressed that

with the advent of historical and analytical jurisprudence in American legal thought after the Civil War, there was little patience with the ideas of the seventeenth and eighteenth centuries. It became the fashion to sneer at the great law writers of the formative era of our law. Even Gray attributes the decision in *Swift v. Tyson* not to Story's conception of natural law but to fondness for generalities and restless vanity.⁴

Another much admired American legal scholar, Mary Ann Glendon, had this advice to the legal profession, in general, and to the courts, in particular, that

we can only benefit from a heightened awareness of the ways in which other nations have approached problems with which our own legal system is currently struggling. Even though legal devices developed in other countries are rarely suitable for direct transplant, they often serve the cause of law revision and reform by showing that our range of choice may be wider than we had imagined, and by alerting us to the potential drawbacks as well as the possible advantages of alternative methods of proceeding. The study of foreign

2. *Id.* at 43.

3. *Id.* at 42.

4. *Id.* at 42 (quoting ROSCOE POUND, *THE FORMATIVE ERA OF AMERICAN LAW* 24–26 (1938)).

experiences can also be a fertile source of inspiration and ideas. And even when it does not immediately move us into a new stage of thinking, it nearly always affords us a deeper understanding of, and a more balanced perspective on, our own law.⁵

The quantitative and qualitative research we conducted at that time turned out to be somewhat disappointing.⁶ Today our field of inquiry is much more restricted in this report since we are to confine ourself to “the use of foreign case law by [U.S.] constitutional judges.” Our assignment is also labeled, in French, as “Le recours aux précédents étrangers par le juge constitutionnel” or “Foreign precedents in constitutional litigation.” Our first and instinctive reaction upon reading these titles in both languages was to say that, as a U.S. or “American” common law reporter on this topic, there was nothing to write about as the use of “foreign precedents in constitutional litigation,” by the U.S. Supreme Court in particular, is an impossibility. However, a more constructive consideration of the word “precedent” which, without any adjective, would mean “binding precedent” for a common law lawyer, led us to add the adjective “persuasive” before the word precedent where there was no adjective at all in the title we were given to write about. Focusing now on the adjective “persuasive” and since we had to write the U.S. report on the topic, we turned to Black’s Law Dictionary to give us the substantive parameters of our research on the meaning of “persuasive precedents:” “persuasive precedent. (1905). A precedent that is not binding on a court, but that is entitled to respect and careful consideration. For example, if the case was decided in a neighboring jurisdiction, the court might evaluate the earlier court’s reasoning without being bound to decide the same way.”

“A neighboring jurisdiction”? What jurisdiction would U.S. constitutional courts, and the U.S. Supreme Court in particular, consider to be “a neighboring jurisdiction” in matters of constitutional litigation so as to find a justification in looking with “respect and careful consideration” at the “precedents” of that jurisdiction? This issue has divided, on the one hand, legal scholars who have engaged in very lively and even acrimonious debates and, on the other hand, judges, a few only, who were here in the majority and there in the minority in the form of dissenting opinions.

5. *Id.* at 51.

6. “American”—see *infra*, text accompanying notes 19 and 20 for the reason behind this identification.

I. DEBATES AMONG SCHOLARS

[T]he growing academic literature in America has not surprisingly taken a mixed, if not, on the whole, a hostile view to the issue, and the question is to what extent have academics and the judicial protagonists considered in depth the practice of other courts.⁷

The arguments put forward by the scholars engaged on both sides of the debate and the reasons they rely on in support of their positions are all based on the Constitution, obviously, but also on the landmark case of *Marbury v. Madison* which laid down the foundations of judicial review. Thereby, this same decision of the Supreme Court became a fertile ground in which legal scholars from a wide range of perspectives would find the roots of their “persuasive” opinions. Two major schools of thought have emerged and anchored their positions on the two diametrically opposite sides of the debate.

A. *Marbury v. Madison*.⁸

Excerpts:

The government of the United States has been emphatically termed a government of laws, not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.

If this obloquy is to be cast on the jurisprudence of our country, it must arise from the peculiar character of the case.

It is scarcely necessary for the court to disclaim all pretension to such a jurisdiction. An extravagance, so absurd and excessive, could not have been entertained for a moment. The province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion. Questions, in their nature political, or which are, by the constitution and laws, submitted to the executive, can never be made in this court.”

The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on the level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter

7. SIR BASIL MARKESINIS & DR. JÖRG FEDTKE, *JUDICIAL RECOURSE TO FOREIGN LAW* 61 (UCL Press 2006).

8. 5 U.S. (1 Cranch) 137 (1803).

part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be that an act of the legislature, repugnant to the constitution, is void.

. . . it is apparent, that the framers of the constitution contemplated that instrument, as a rule for the government of the courts, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

Why does a judge swear to discharge his duties agreeably to the constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?

If such be the real state of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.

It is also not entirely unworthy of observation, that in declaring what shall be the supreme law of the land, the constitution itself is first mentioned; and not the laws of the United States generally, but those only which shall be made in pursuance of the constitution, have that rank.

Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.

B. Two Schools of Thought

Against the background of the U.S. Constitution and this foremost decision of the Supreme Court, the two opposite schools of thought have engaged in a lively debate about the influence, and even any role, that foreign courts' decisions, or precedents, "may/should" or "cannot/should not" play in the developments of the U.S.

constitutional jurisprudence under the guidance of the U.S. Supreme Court. In the words of Angioletta Sperti,⁹

In the wide debate on the use of foreign law by American courts, some prominent American scholars support the need to study foreign legal materials and have described the benefits of comparative constitutional law. Anne-Marie Slaughter for instance observed that

“For {Supreme Court Justices}, looking abroad simply helps them do a better job at home, in the sense that they can approach a particular problem more creatively or with greater insight. Foreign authority is persuasive because it teaches them something they did not know or helps them see an issue in a different and more tractable light . . .”

Vicki C. Jackson argued that “approaches taken in other countries may provide helpful empirical information’ in interpreting the US Constitution, that “comparisons can shed light on the distinctive functioning of one’s own system” and “foreign or international legal sources may illuminate “suprapositive” dimensions of constitutional rights’ as “many modern constitutions include individual rights that protect similar values at an abstract level, often inspired by human rights texts.”

Michael Rosenfeld has justified the importance of foreign law emphasizing the need for the Supreme Court to pursue “fairness above predictability” and Mark Tushnet described the advantages of a process of judicial “bricolage.”

However, most scholars do not declare themselves entirely open to the adoption of foreign solutions in constitutional interpretation: even those who support the importance of looking abroad for the purpose of interpreting the American Constitution held that this should be done cautiously in or to avoid mistakes or erroneous interpretations [R]ecent law review articles have set the terms of the debate and described the most discussed objections to the use of foreign law. The “recurring themes” of the debate concern: a) the use of comparative materials as a threat to democracy and sovereignty; b) the “technical” difficulties arising from researching the materials and c) the risk of an improper or incorrect use of foreign law due mainly to the differences in the social, cultural or economic context.

9. Angioletta Sperti, *United States of America: First cautious attempts of judicial use of foreign precedents in the Supreme Court’s jurisprudence* in TANIA GROPPI & MARIE-CLAIRE PONTTHOREAU, *THE USE OF FOREIGN PRECEDENTS BY CONSTITUTIONAL JUDGES* 398-400 (2013).

The school of thought that argues against the use of foreign and international law, and particularly against any influence to be given to “foreign precedents,” relies heavily on the Constitution and its interpretation. According to one advocate of this school, there are

three arguments against the Supreme Court’s practice of relying on foreign and international decisions. First, we argue that non-ornamental use of foreign decisions undermines the separation of powers and violates the constitutional rules against delegation of federal authority to bodies outside the control of the national government. Second, the use of foreign decisions undermines the limited theory of judicial review, as set out in *Marbury v. Madison*. There, Chief Justice Marshall justified the federal courts’ power to ignore enacted laws that were inconsistent with the Constitution on the ground that such statutes fell outside the delegation of authority by the people to the government, as expressed in the Constitution. Relying on decisions that interpret a wholly different document runs counter to the notion that judicial review derives from the Court’s duty to enforce the Constitution. Finally, we consider the relevance of the Constitution’s Supremacy Clause and Law of Nations Clause to the Court’s emerging use of foreign and international law.¹⁰

Furthermore,

Article III vests the federal judicial power in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. This provision suggests that the federal judicial power, which includes the authority to decide cases or controversies under federal law, cannot be exercised by any other branch of the federal government, with the narrow and debatable exception of the Senate’s role in trying cases of impeachment. The logical implication is that no part of the Article III authority to decide federal cases and controversies, from which springs the judicial power to interpret the Constitution, can be delegated or transferred outside the U.S. governmentThe potential violation of separation of powers is . . . greater when the courts defer to foreign laws or courts. Transferring judicial power outside the Article III courts and the federal government would ignore the vesting of federal judicial power in the Supreme Court and undermine the accountability of the government [T]he nondelegation [sic] doctrine . . . prohibits Congress from delegating rulemaking authority to

10. JULIAN KU & JOHN YOO, TAMING GLOBALIZATION – INTERNATIONAL LAW, THE U.S. CONSTITUTION, AND THE NEW WORLD ORDER 232 (2012).

another branch unless Congress has stated intelligible standards to guide administrative discretion. This requirement ensures that the exercise of delegated power can be monitored and controlled . . . Those who make and interpret federal law, whether federal judges or agency officials, remain ultimately responsible to the American electorate. Foreign judges, by contrast, have received neither presidential nomination nor senatorial consent, and thus should not exercise significant federal power . . . We argue . . . that when it comes to the Constitution, federal courts are limited to materials that derive from the American legal system. The touchstone is the nature of judicial review under the Constitution . . .

Judicial review finds its origins in the nature of the Constitution as a manifestation of popular sovereignty, in the supremacy of constitutional law to statutory law, and the duty of every federal officer to obey that higher law when confronted with the inconsistent actions of other branches of government.

The government may exercise only the power that the people have delegated to it. A written constitution serves to specify and limit those powers"¹¹

Judicial review's roots in the constitutional text and structure explain why reliance on foreign decisions creates difficulties. Judicial review operates because the Court, in carrying out its Article III duties, must follow the higher law of the Constitution above any inconsistent federal or state statutes. When interpreting the scope and meaning of that delegation of power to the federal government, the federal courts should have no recourse to foreign decisions. Foreign courts, after all, interpret documents entirely different from the U.S. Constitution.

In addition,

[O]n its face, the Supremacy Clause appears to bar the Court from using foreign or international laws as the legal basis for its decisions.

The Constitution, and the Laws of the United States which shall be made in the Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding.

11. *Id.* at 235–37.

The Clause identifies three, and only three, kinds of supreme law within the United States: 1) the Constitution itself; (2) Acts of Congress enacted in accordance with the procedures prescribed in Article I, Section 7; and (3) treaties ratified in accordance with the procedures prescribed in Article II, Section 2, Clause 2 together with treaties preexisting the Constitution that had been ratified under the authority of the United States during the period of the Articles of Confederation. Foreign and international laws, other than treaties ratified by the United States, are not included.”¹²

From the opposite side of the “divide,” we hear that

[O]pponents of the use of foreign law sources answer yes, and base their opposition on two principal arguments. First, some scholars argue that citing to foreign law undermines judicial legitimacy by impermissibly expanding judicial discretion To overcome a threat of illegitimacy, the argument goes, the Court must adhere closely to the text and the original intent of those upon whose authority the legitimacy of the text rests Second, some argue that citing foreign law is somehow inconsistent with sovereignty. Sovereignists bristle at the idea that U.S. sovereignty may be impinged upon, and they therefore attempt to firmly locate the U.S. Constitution in peculiarly American realities and dismiss the idea that decisions from other countries may be illuminating Others have called it exceptionalism, the idea that “the United States Constitution is unique and that the experience surrounding it is unique [S]cholars who have championed comparative constitutionalism . . . recognize that foreign sources must be used with care. Justices should use foreign sources in a refined manner and be wary of cultural context¹³

Although the approaches are varied, generally at least three factors are recognized as determining the weight and applicability of foreign law. First a court must consider the historical connection between the two countries – whether ‘for a considerable time the two systems had the same sources from which they derived their legal doctrines, principles, procedures, methods and ideas.’ Second, a court should evaluate the similarity between the legal systems. Third, the court must decide whether the constitutional institutions are analogous A second criticism that Sovereignists

12. *Id.* at 240–41, 243–44.

13. Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court’s Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 650, 651, 653 (2007).

commonly proffer is that use of foreign law “surrenders U.S. sovereignty to non-U.S. decision-makers” who are not accountable to the people of the United States. As an initial matter, the argument fundamentally misconceives the nature of sovereignty. Similarly, the idea that somehow the Court is bowing to the whims of foreigners and thereby endangering sovereignty is simply untrue. That suggestion confuses the use of foreign law as an interpretative aid with presuming that foreign law is controlling. The suspicion that the Court is using foreign sources for something more than persuasive authority is sheer speculation¹⁴ . . .

Comparative constitutionalism is a hallmark of our state court system. Each of the fifty states—with their own separate judicial systems and constitutional law—extensively cite to one another when interpreting their state constitutions without any hue and cry . . . State supreme courts not only routinely cite to ‘foreign’ decisions, but actively encourage lawyers appearing before them to rely on those decisions. [T]he distinctions between the United States and other countries are often overlapped . . . Other countries have long borrowed from the U.S. system, and American constitutional precedents have been emulated or adopted abroad, which is another reason why foreign law is often not all that different . . . The real issue is not whether seeking guidance from abroad is ever inappropriate, but whether in any particular case the foreign law is persuasive . . . Our legal system is imbued with the tradition that judges must justify their holdings. In doing so, they must be candid and honest in revealing their sources, and stating the reasons, for their decisions. Transparency is important . . . If a justice used certain authority to arrive at her decision, then the public has a right to know about it . . . The citation to foreign law is not only sensible for transparency reasons, it also can serve to legitimize the Court as an institution, both within the United States and around the world . . . [T]he failure of the U.S. Supreme Court to engage more vigorously in international dialogue leaves the U.S. judiciary out-of-step and behind the times . . . More importantly, citing to persuasive authority—be it domestic or foreign—when that authority informs the Court’s decision is an integral part of what it means to be a justice when writing transparent, candid, and reasoned opinions.¹⁵

14. *Id.* at 660–61.

15. *Id.* at 669, 673, 674–77, 680.

From the point of view of two “outsiders” or non “American”¹⁶ legal scholars writing about “Judicial Recourse to Foreign Law,”

[w]here foreign law is used (or could have been used) to influence the outcome of a case, the fears that dominate the thinking of those who oppose it seem to us to be two. First, could foreign law end up being treated as having the force of binding authority? Second, could this facilitate the courts’ power to invalidate majority decisions at Federal or State level in the name of the US Constitution? To the first question the answer (. . .) is “no”; and no advocate of the comparative method has, to our knowledge, ever suggested otherwise (except in the area of public international law). The second issue has a particularly American flavour to it since it is linked to the fear of increasing judicial discretion through “interpretation”—which, in the eyes of the more “conservatively” inclined, is “bad enough” now and would get worse if the interpretation were “bastardised” through the importation of foreign notions of decency, morality, or legality. We have addressed this question, so here we merely venture the guess that to the conservative Justices of the US Supreme Court this belief is consistent with the view that restricting the sources of legal ideas and the ultimate authority of constitutional interpretation is essential in order to maintain a coherent body of law. Such a focus on limited sources and a defined structure of legal hierarchy ensure, it is believed, coherence in constitutional interpretation The threat to coherence and certainty is not the only concern that those who oppose the use of foreign law have. Coupled with it is the fear that “foreign” (one also encounters the use of the word “European” with the same sense of mistrust) values might water down the indigenous ones.¹⁷

II. U.S. COURTS, U.S. SUPREME COURT AND U.S. JUSTICES

In the United States, if academic interest in foreign law per se has been slender, judicial interest, especially in the domain of public law, has been even thinner, though some of the liberal judges of the Supreme Court appear to have recently launched a concerted campaign to prove to the world that America, politically as well as legally, does not speak with one voice when rejecting foreign law . . . [T]his attitude towards foreign law must be seen as novel given how admir-

16. See the use of “American” below, text accompanying notes 19, 20.

17. MARKESINIS & FEDTKE, *supra* note 7, at 246–47.

ing American courts and judges were, in the past, towards foreign legal cultures, especially the English. In this respect it may also differ from American unilateralism in the political sphere where this attitude has had a long history (though, as we argue below, it may now have entered a new phase). But in the legal field, the hostility towards foreign law is not simply novel; it is surprisingly recent. For, though it is closely linked to “orginalism” [sic] and can be seen as part and parcel of the rightist reaction against the liberty-enhancing decisions of the Warren Court, it did not really begin to manifest itself in the Supreme Court until after the appointment of Justice Scalia in 1986. Thus, the opposition against recourse to foreign practices in the context of the Eighth Amendment, however peripheral, did not appear until *Thompson v Oklahoma* (1988), two years after the learned justice took his seat at the Supreme Court, ending the judicial era which had begun exactly 30 years earlier with *Tropp v Dulles* . . . The hostility towards foreign law is thus not only novel; it also began confined to a narrow context. For the American judicial debate, passionate as it became, was, originally, focused on judicial review and on whether proper constitutional interpretation permits judges even to look at foreign law as a mere source of inspiration . . . The reason is clear since it becomes dependent on (indeed subordinate to) the American Constitution and American theories on “orginalism”[sic] or “textualism” and, above all, the political infighting between neo-conservatives and radical liberals.¹⁸

A. *Foreign Precedents and U.S. Courts, U.S. Supreme Court.*

1: Majority opinions and Foreign Precedents.

Hilton v. Guyot, 159 U.S.113 (1894)

Mr. Justice Gray delivered the opinion of the court.

By the law of France, settled by a series of uniform decisions of the Court of Cassation, the highest judicial tribunal, for more than half a century, no foreign judgment can be rendered executory in France without a review of the judgment *au fond*—to the bottom, including the whole merits of the cause of action on which the judgment rests. Pardessus, *Droit Commercial*, § 1488; Bard, *Précis de Droit International*, (1883) nos. 234- 239; . . . A leading case was decided by the Court of Cassation on April 19, 1819, as follows: “. . .”

18. See *Ku & Yoo*, *supra* note 10, at 220–21.

The Court of Cassation has ever since constantly affirmed the same view. In Clunet, 1894, p. 913, note, it is said to be “settled by judicial decisions—*il est de jurisprudence*—that the French courts are bound, in the absence of special diplomatic treaties, to proceed to the revision on the whole merit—*au fond*—of foreign judgments, . . . citing, among other cases, a decision of the Court of Cassation on February 2, 1892, . . . “. . . “The Belgian Court of Cassation holds that the foreign judgment may be reexamined upon the merits . . . And in a very recent case, the Civil Tribunal of Brussels held that,” . . . “In Denmark, the courts appear to require reciprocity to be shown before they will execute a foreign judgment . . . In Sweden, the principle of reciprocity has prevailed from very ancient times; the courts give no effect to foreign judgments, unless upon that principle; . . . The reasonable, if not the necessary, conclusion appears to us to be that judgments rendered in France, or in any other foreign country, by the laws of which our own judgments are reviewable upon the merits, are not entitled to full credit and conclusive effect when sued upon in this country, but are *prima facie* evidence only of the justice of the plaintiff’s claim.

Tropp v. Dulles, Secretary of State, et al., 356 U.S. 86 (1957)

Mr. Chief Justice Warren announced the judgment of the Court and delivered an opinion . . .

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations’ survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids this to be done.

In concluding as we do that the Eighth Amendment forbids Congress to punish by taking away citizenship, we are mindful of the gravity of the issue inevitably raised whenever the constitutionality of an Act of the National Legislature is challenged. No member of the Court believes that in this case the statute before us can be construed to avoid the issue of constitutionality. . .

We are oath-bound to defend the Constitution . . . The Judiciary has the duty of implementing the constitutional safeguards that protect individual rights. When the Government acts to take away the fundamental right of citizenship, the safeguards of the Constitution should be examined with special diligence.

The provisions of the Constitution are not time-worn adages or hollow shibboleths. They are vital, living principles that authorize and limit governmental powers in our Nation. They are the rules of government. When the constitutionality of an Act of Congress is challenged in this Court, we must apply those rules. If we do not, the words of the Constitution become little more than good advice . . .

We cannot push back the limits of the Constitution merely to accommodate challenged legislation.

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

Justice Kennedy delivered the opinion of the Court.

Of even more importance, almost five years before *Bowers* was decided the European Court of Human Rights considered a case with parallels to *Bowers* and to today's case. An adult male resident in Northern Ireland alleged he was a practicing homosexual who desired to engage in consensual homosexual conduct. The laws of Northern Ireland forbade him that right. He alleged that he had been questioned, his home had been searched, and he feared criminal prosecution. The court held that the laws proscribing the conduct were invalid under the European Convention on Human Rights. *Dudgeon v. United Kingdom*, 45 Eur. Ct. H.R. (1981) & ¶ 52. Authoritative in all countries that are members of the Council of Europe (21 nations then, 45 nations now), the decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.¹⁹

Padilla v. Yoo, 678 F.3d 748 (2012), U.S Court of Appeals for the Ninth Circuit

Fisher, Circuit Judge:

Ireland v. United Kingdom, 25 Eur.Ct.H.R.(ser.A) (1978), is the European Court of Human Rights' leading decision on torture. The court considered whether five interrogation

19. "On its face, the *Lawrence* opinion appears to rely heavily on foreign practice and jurisprudence; however, when read closely against its predecessor, any and all references to foreign practice, experience, or international laws are specific responses to the *Bowers* majority and concurring opinions." Traci Donovan, *Foreign Jurisprudence—To Cite or Not to Cite: Is That the Question or is it Much Ado About Nothing?*, 35 Cap. U. L. Rev. 761, 780 (2007).

techniques used by the United Kingdom to interrogate suspected members of the Irish Republican Army violated Article 3 of the European Convention of Human Rights, . . .

2: Dissenting Opinions and Foreign Precedents

Fong Ye Ting v. United States, 149 U.S. 698 (1893)

Mr. Justice Field dissenting.

The government of the United States is one of limited and delegated powers. It takes nothing from the usages or the former action of European governments, nor does it take any power by any supposed inherent sovereignty. There is a great deal of confusion in the use of the word “sovereignty” by law writers. Sovereignty or supreme power is in this country vested in the people, and only in the people. By them certain sovereign powers have been delegated to the government of the United States and other sovereign powers reserved to the States or to themselves. This is not a matter of inference and argument, but is the express declaration of the Tenth Amendment to the Constitution, passed to avoid any misinterpretation of the powers of the general government. . . .When, therefore, power is exercised by Congress, authority for it must be found in express terms in the Constitution, or in the means necessary or proper for the execution of the power expressed. If it cannot be thus found, it does not exist.

Stanford v. Kentucky, 492 U.S.361 (1989)

Mr. Justice Brennan dissenting.

Our cases recognize that objective indicators of contemporary standards of decency in the form of legislation in other countries is also of relevance to Eighth Amendment analysis. Many countries, of course—over 50, including nearly all in Western Europe—have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. Twenty-seven others do not in practice impose the penalty. *Ibid.* Within the world community, the imposition of the death penalty for juvenile crimes appears to be overwhelmingly disapproved.

Knight v. Florida, 528 U.S.990 (1999)

Mr. Justice Breyer dissenting from the denial of certiorari.

[T]his Court has long considered as relevant and informative the way in which foreign courts have applied standards roughly comparable to our own constitutional standards in

roughly comparable circumstances. In doing so, the Court has found particularly instructive opinions of former Commonwealth nations insofar as those opinions reflect a legal tradition that also underlies our own Eighth Amendment In these cases, the foreign courts I have mentioned have considered roughly comparable questions under roughly comparable legal standards. Each court has held or assumed that those standards permit application of the death penalty itself. Consequently, I believe their views are useful even though not binding.

3. References to Foreign Precedents in Footnotes

New York v. United States, 326 U.S. 572 (1946)

Opinion by: Frankfurter, J.

Footnote 4: "This method of solving a problem inherent in a federal constitutional system has been found equally inconclusive in Latin America. See Amadeo, Argentine Constitutional Law (1943) 97-103.

Smith v. Cal., 361 U.S. 147 (1959)

Mr. Justice K Frankfurter, concurring.

Footnote 1: "The publication of obscene printed matter was clearly established as a common-law offense in England in 1727 by the case of *Rex v. Curl*, 2 Str.788, which overruled *Reg. v. Read* [1708] . . ."

Miranda v. Ariz., 384 U.S. 436, (1966)

Justice Warren delivered the opinion of the Court.

Footnote 46: "The distinction and its significance has been aptly described in the opinion of a Scottish court: "In former times . . . *Chalmers v. H. M. Advocate*, [1954] Sess.Cas. 66, 78 (J.C.)

Footnote 59: "As stated by the Lord Justice General in *Chalmers* . . ."

Thompson v. Okla. 487 U.S.815, (1988)

Dissent by Justice Scalia

Footnote 4: . . . We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly other democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so "implicit in the concept of ordered liberty" that it occupies a place not merely in our mores but, text permitting, in our Constitution as well . . . But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices

of this Court may think them to be, cannot be imposed upon Americans through the Constitution . . .

Wash. v. Gluckberg, 521 U.S. 702, (1997)

Chief Justice Rehnquist delivered the opinion of the Court.

Footnote 16: “Other countries are embroiled in similar debates. The Supreme Court of Canada recently rejected a claim that the Canadian Charter of Rights and Freedoms . . . *Rodriguez v. British Columbia (Attorney General)* . . . (1993); the British House of Lords Select Committee . . .”

B: Foreign Precedents and the Justices’ Debates “Off” the Court.

Full written transcript of debates of Justices Scalia and Breyer on foreign law, American University, Jan. 13, 2005, U.S. Association of Constitutional Law Discussion on Constitutional Relevance of Foreign Court Decisions.

Excerpts:

Mr. Dorsen:

When we talk about the use of foreign court decisions in U.S. constitutional cases, what body of foreign law are we talking about? Are we limiting this to foreign constitutional law? What about cases involving international law, such as the interpretation of treaties, including treaties to which the U.S. is party?

When we talk about the use of foreign court decisions in U.S. law, do we mean them to be authority or persuasive, or rhetorical? If, for example, foreign court decisions are not understood to be precedent in U.S. constitutional cases, are they nevertheless able to strengthen the sense that U.S. assures a common moral and legal framework with the rest of the world? If this is so, is that in order to strengthen the legitimacy of a decision within the U.S., or to strengthen a decision’s legitimacy in the rest of the world?

Justice Antonin Scalia:

Well, most of those questions should be addressed to Justice Breyer because— (laughter)—because I do not use foreign law in the interpretation of the United States Constitution. Now, I will use it in the interpretation of a treaty . . .

But apart from that, if you talk about using it [in] constitutional law, . . . we don’t have the same moral and legal framework as the rest of the world, and never have . . . the framers of the Constitution . . . would have been appalled.

Justice Stephen Breyer:

There are so many ways, so many ways, in many of which Justice Scalia and I absolutely agree, so many ways in which foreign law influences law in the United States Supreme Court and the other courts as well.

Justice Scalia: If you read the Federalist Papers, it's full of discussions of the Swiss system, German system. It's full of that. It is very useful in devising a constitution. But why is it useful in interpreting one?

Now, my theory of what I do when I interpret the American Constitution is I try to understand what it meant, what was understood by the society to mean when it was adopted. And I don't think it changes since then.

Justice Breyer:

And I cited things the other way too, anything I could find. And then I think I may have made what I call a tactical error in citing a case from Zimbabwe—not the human rights capital of the world. (Laughter). But it was at an earlier time—Judge Gubei (ph) was a very good judge. So I had written this. And of course I looked—I don't think that's controlling. But I'm thinking, Well, on this kind of an issue you're asking a human question, and the Americans are human – and so is everybody else. And I don't know, it doesn't determine it, but it's an effort to reach out beyond myself to see how other people have done – though it does not control.

Now, Justice Thomas then—disagreeing— wrote another little scrib, and he said, You see? Breyer is so desperate he can't find any American precedent— (laughter)—so he has to look to Zimbabwe.

Justice Scalia:

One of the difficulties of using foreign law is that you don't understand what the surrounding jurisprudence is so that you can say, you know, "Russia follows Miranda," but you don't know that Russia doesn't have an Exclusionary rule.

But most of all, what does the opinion of a wise Zimbabwe judge or a wise member of the House of Lords law committee, what does that have to do with what Americans believe, unless you really think it's been given to YOU to make this moral judgment, a very difficult moral judgment? And so in making it for yourself and for the whole country, you consult whatever authorities you want. Unless you have that philosophy, I don't see how it's relevant at all.

Justice Breyer:

Well, it's relevant in the sense that you have a person who's a judge, who has similar training, who's trying to, let's say, apply a similar document, something like cruel and unusual or—there are different words, but they come to roughly the same thing—who has a society that's somewhat structured like ours And so one is not trying to figure out the meaning, really, of the words “cruel and unusual punishment,” one is trying to deal with their application.

So here you're trying to get a picture how other people have dealt with it. And am I influenced by that? I am at least interested in reading it. And the fact that this has gone on all over the world and people have come to roughly similar conclusions, in my opinion, was the reason for thinking it at least is the kind of issue that maybe we ought to hear in our court, because I thought our people in this country are not that much different than people in other places.

Mr. Dorsen:

The question, Justice Breyer, is a variant of something that Justice Scalia said in his opening comments, and that is, is it fair to criticize you and other members of the court who do refer to foreign sources, even though do not consider them binding, would seem to suggest in general, or seem to refer in general to cases that support the positions that you're taking?

Justice Breyer:

Yes, it's a fair criticism because we're not going to refer to as many Asian courts at the moment, though we refer to India as an Asian court, because fewer come to our attention. And that's why it's important that these things not be binding.

I would refer to the cases against me that I come across as much as for me. And the fact that somebody's come out the other way in a foreign court doesn't make it any the less interesting. Maybe it's more interesting. But this is not a major thing. It's not some kind of determinative thing in dozens of cases of constitutional law; it's simply from time to time relevant. And if it becomes more than that, I don't know how it's going to work.

Justice Scalia:

I have a decision by an intelligent man in Zimbabwe—(laughs)—or anywhere else and you put it in there and you give the citation. By God, it looks lawyerly! (Laughter). And it lends itself to manipulation. It just does.

Mr. Dorsen:

The question I have is . . . rather than thinking about these courts and cases in terms of the results to think about them in terms of persuasiveness of the opinions, . . . the cogency of the arguments, . . . the depth of . . . the logic. And if our courts look at another country's courts and they're able to find opinions that are persuasive on the merits, why couldn't that be a way of informing our judges in a positive way?

Justice Scalia:

Well, you're begging the question. I mean, your question assumes that it is up to the judge to find THE correct answer. And I deny that. I think it is up to the judge to say what the Constitution provided, even if what it provided is not the best answer, even if you think it should be amended. If that's what it says, that's what it says.

. . . on these constitutional questions, you're not going to come up with a right or wrong answer; most of them involve moral sentiments . . . what you have to ask yourself is what does American society think? And the best way, the only way to determine that is certainly not to ask a very thin segment of American society—judges, lawyers and law students—what they think but rather to look at the legislation that exists in states, democratically adopted by the American people.

Justice Breyer:

Do you think things outside the United States cannot be relevant to an understanding of how to apply the American Constitution? That's what's at issue. What is at issue is the extent to which you might learn from other places facts that would help you apply the Constitution of the United States. And in today's world, as I've said, where experiences are becoming more and more similar, I think that there is often—not a lot, not always—but in a finite number of instances there is something to learn about how to interpret this document, this document—which I don't happen to have in my pocket, but I thought I might, which would be quite dramatic. (Laughs; laughter). That's all right. But that's the document, I'm interpreting that document. And to think that one might learn from other countries in how to best apply this American Constitution is something I think—I've been reading about the Founding Fathers and I think Franklin and Hamilton and Jefferson and Madison and maybe even George Washington all would have thought that we, on occa-

sion at least, can learn something about our country and our law and our document from what happens elsewhere.

Justice Scalia:

. . . I use British law for those elements of the Constitution that were taken from Britain So to know that the Constitution meant at the time, you have to know what English law was at the time. And that isn't so for every provision of the Constitution.

So that's why I would use English law—not at all because I think we are still very much aligned legally, socially, philosophically with England. That's not the reason.

Justice Breyer:

I don't normally put these things in. Sometimes I do if I think they have some significance in my thinking and it will be useful to people. I think an opinion should be as transparent as possible. And for reasons of transparency, if I thought it was helpful I might put it in.

. . . When people think about the foreign court institutions, it's sometimes very hard for—say for Europeans, to understand why Americans sometimes react negatively, so negatively to the thought that some foreign judges would be able to tell Americans what to do. They find that hard to understand, because they're judges, after all.

. . . there is something deep in this reaction, and not entirely bad. And it comes back to our being a democracy . . .

. . . Madison . . . said the American Constitution is a document of power granted by liberty, not a document of liberty granted by power. And what he's driving at is even if we end up at the same place as many European countries, the whole theory of our country is that power originates in the people and whatever power government has is delegated by those people; while in many foreign countries, even if they ended up at the same place, it has been liberty that has initially been granted by a central power, whether it started out as a king or even a democratic government.

That changes the cast of mind, and it helps to explain why it's so deep in America to say, "But who are those people? We had no say. We had no say in them, in their position." . . . At bottom, there is reflected a very strong American belief that all power has to flow from the people and we have to maintain a check. That's a good thing.

But, of course, I don't think it stops me from looking at the foreign opinions—(laughter)—and even citing them.

(Applause).

CONCLUSION

It is neither our intent nor our desire to engage, here and in this forum, in a debate with those who wrote that “despite appearances, in the area of *contemporary* law the need for dialogue and give and take is, in some respects, stronger in the ambivalent America that denies it. For in this domain the world at large is realizing that while America is a huge storehouse of legal ideas, it no longer is the only one. To put it differently, the monopoly in military and technological superiority does not extend to legal superiority.” And the same two editors add that “the days when America could impose its constitutional model upon defeated ‘enemies’ have gone. If such ‘receptions’ (and we have difficulty using this term when force is involved) are to work, the work will have to be done in a more selective and nuanced way.”²⁰ As if these statements which appear in the “Preface” were not enough and to make sure that the reader would close the book with a “last and long lasting negative impression” from the “Conclusions,” that reader is further told that “If we (the editors differ from the general tenor of these Essays (the Ignatieff Essays) it is in the emphasis we place on what we (as ‘outsiders’) can see (more?) clearly, namely, the reality or appearance of American arrogance. We thus tentatively suggest that there are signs of ‘world-wide hegemony’ in the American air, and that this tendency can be found in all forms of human endeavor-including law.”²¹

What motivated these “outsiders” to call on a total of six Judges or Justices from “foreign countries” as contributors to their volume and not on even one single American Judge or Justice? If “arrogance” there is, where does it manifest itself? Most like a Justice Breyer or a Justice Scalia would have “willingly” offered an “American” answer to the question that these outsiders framed in these words: *e) The United States: what is the real problem?*²² An “American” answer could have been that

At bottom, there is reflected a very strong American belief that all power has to flow from the people and we have to maintain a check. That’s a good thing . . . But of course, I don’t think it stops me from looking at foreign opinions and even citing them.²³

Another answer to that same question could have been that

[W]e all have callings both individually and as a group of people, but that does not mean we should be arrogant or

20. MARKESINIS & FEDTKE, *supra* note 7, at XIV.

21. *Id.* at 258.

22. *Id.* at 245.

23. See remarks of Justice Breyer, *supra*.

dismissive of those with different callings. Fundamentally, I think the United States is not an arrogant or proud nation in the wrongful sense of the term pride. We have not sought to create an empire or to exalt our nationality over all the other nationalities of the world. We see only to spread democracy and individual rights around the world. Where is the pride in doing that?²⁴

24. Steven G. Calabresi, "A Shining City on a Hill": *American Exceptionalism and the Supreme Court's Practice of Relying on Foreign Law*, 86 B.U. L. REV. 1335, 1415 (2006). On this topic and on some Justices on the U.S. Supreme Court, see JEFFREY TOOBIN, *THE NINE* (Doubleday 2007); MARK R. LEVIN, *MEN IN BLACK* (Regnery Publishing 2005); Cody Moon, *Comparative Constitutional Analysis: Should the United States Court Join the Dialogue?*, 12 J.L. & POL'Y 229 (2003); Donovan, *supra* note 19; Lawrence Connell, *The Supreme Court, Foreign Law, and Constitutional Governance*, 11 WIDENER L. REV. 59 (2004); *Faith, Law and Democracy: Defining the limits of exceptionalism*, *THE ECONOMIST*, Feb. 16, 2008.

VED P. NANDA*

Limitations on Government Debt and Deficits in the United States†

TOPIC IV. B

Federal debt and deficit issues are of grave concern in the United States. Equally serious are State and local debt and deficit issues. The debate is ongoing over what reforms will effectively address these pressing concerns. On the federal level, the proposed solutions include a balanced budget amendment and elimination of the debt limit altogether on the one hand, and focusing on growth rather than debt and deficit on the other. On the State and municipal level, proposals range from relying on market mechanisms, imposing constitutional limits on debt, tying the debt threshold to annual revenue, and submitting issuance of bonds or other indebtedness to the electorate for approval. The debate continues.

As the United States is a federal government, this paper examines in Part I the federal budget process and limits on federal debt and deficits, and in Part II the budget process and limits on debt and deficits for States and local governments.

I. THE FEDERAL BUDGET PROCESS AND LIMITS ON FEDERAL DEBT AND DEFICITS

A. Introduction

On October 17, 2013, President Barack Obama signed a bill that temporarily suspended the debt limit of the U.S. government.¹ The

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1. Tom Cohen, Greg Botelho & Holly Yan, *Obama Signs Bill to End Partial Shutdown, Stave Off Debt Ceiling Crisis*, CNN (Oct. 17, 2013), <http://www.cnn.com/2013/10/16/politics/shutdown-showdown/>; Continuing Appropriations Act, 2014, 46 U.S.C. §§ 101-1002 (2013), <http://www.gpo.gov/fdsys/pkg/PLAW-113publ46/html/PLAW-113publ46.htm>. See generally Neil H. Buchanan & Michael C. Dorf, *How to Choose the Least Unconstitutional Option: Lessons for the President (and Others) from the Debt Ceiling Standoff*, 112 COLUM. L. REV. 1175 (2012) (in light of the debt ceiling impasse, suggesting “general criteria for political actors to choose among unconstitutional options.”).

passage of the bill came the day the United States Treasury Secretary Jacob Lew had predicted the borrowing capacity would run out;² on August 26, Lew had notified Congressional leaders that according to U.S. Treasury projections the government would no longer have the capacity to borrow beyond mid-October and would have a cash balance of only about \$50 billion to meet federal obligations.³ The down-to-the-wire debt limit suspension came as a result of attempts by a majority from the House of Representatives to use the debt limit as a bargaining tool for other demands such as delaying the implementation of the Affordable Care Act, overhaul of the tax code, construction of the Keystone oil pipeline, and an increase in energy permits for exploration, oil, and gas.⁴ In 2011, such an attempt was also made to condition raising the debt limit on cutting spending to narrow annual federal deficits.⁵

The repayment of U.S. debt is guaranteed by the Fourteenth Amendment: “The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.”⁶ During the last two years, however, the U.S. ability to pay its debts has been open to question as each of the two dominant U.S. political parties uses the debt ceiling as an opportunity to exact political concessions from the other. How did the U.S. debt, constitutionally guaranteed since the passage of the Fourteen Amendment in 1868, become so controversial? What legal mechanisms and political issues have contributed to the uncertainty surrounding the federal debt?

Section *B* provides an overview on the U.S. approach to adopting a national budget and highlights the interaction between the executive branch of government—the President and Presidential offices—and the legislative branch—the House of Representatives and the Senate. This is followed by a discussion in Section *C* of the legal limits placed on debt and the enforcement of those limits, concluding

2. *U.S. Treasury to Reach Debt Limit by Mid-October*, CNBC (Aug. 26, 2013), <http://www.cnbc.com/id/100968088>.

3. Treasury Secretary Jacob Lew, Letter to House Speaker John A. Boehner, Aug. 26, 2013: “[E]xtraordinary measures are projected to be exhausted in the middle of October. At that point, the United States will have reached the limit of its borrowing authority, and Treasury would be left to fund the government with only the cash we have on hand on any given day . . . [This] would place the United States in an unacceptable position.” <http://www.treasury.gov/initiatives/Documents/082613%20Debt%20Limit%20Letter%20to%20Congress.pdf>.

4. Jonathan Weisman, *House G.O.P. Raises Stakes in Debt-Ceiling Fight*, N.Y. TIMES (Sept. 26, 2013), http://www.nytimes.com/2013/09/27/us/politics/house-gop-leaders-list-conditions-for-raising-debt-ceiling.html?pagewanted=1&_r=0.

5. Paul Davidson, *A Primer on the Debt-Ceiling Debate*, USA TODAY (July 29, 2011), http://usatoday30.usatoday.com/news/washington/2011-07-28-debt-ceiling-questions_n.htm.

6. U.S. CONST. amend. XIV, § 4.

with a description of the Balanced Budget and Emergency Deficit Control Act of 1985 as an illustration of how Congress has enforced debt limits. Section *D* is an analysis of how U.S. political institutions have contributed to the uncertainty surrounding U.S. debt and Section *E* discusses proposed solutions to the U.S. debt situation.

*B. Process for Adopting a Budget*⁷

The preparation of the budget involves three stages: the formulation of the President's budget, Congressional action, and execution of enacted laws.⁸ The President typically begins the budget process by drafting a budget proposal of the entire government's expected income and expenditures for the following fiscal year (fiscal years begin on October 1 and end on September 30) and establishing general budget and fiscal guidelines.⁹ Additionally, the budget for the fiscal year 2014 includes the projections over the next nine years on how the proposed budget will influence future budgets.¹⁰

After the President establishes the general budget and fiscal guidelines and policies, the President, the Office of Management and Budget, and other executive officials meet with federal agencies to discuss the proposed budget's impact on the specific agency and modify the budget accordingly.¹¹ The President must submit the budget proposal to Congress between the first Monday of January and the

7. Title 2 of U.S.C. § 631 sets out the timeline of the government budget process:

On or before:	Action to be completed:
First Monday in February February 15	President submits his budget. Congressional Budget Office submits report to Budget Committees.
Not later than 6 weeks after President submits budget April 1	Committees submit views and estimates to Budget Committees. Senate Budget Committee reports concurrent resolution on the budget.
April 15	Congress completes action on concurrent resolution on the budget.
May 15	Annual appropriation bills may be considered in the House.
June 10	House Appropriations Committee reports last annual appropriation bill.
June 15	Congress completes action on reconciliation legislation.
June 30	House completes action on annual appropriation bills.
October 1	Fiscal year begins.

8. OFFICE OF MANAGEMENT AND BUDGET, FISCAL YEAR 2014: ANALYTICAL PERSPECTIVES 117 (2013), <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2014/assets/spec.pdf> [hereinafter OMB FISCAL YEAR 2014].

9. *Id.*; 31 U.S.C. §§ 1104, 1105 (2013).

10. OMB FISCAL YEAR 2014, *supra* note 8, at 117.

11. *Id.*

first Monday in February each year.¹² The proposed budget must include extensive information including information on government activities and functions, government costs, government debt, estimated expenditures and receipts, allowances for unanticipated expenditures, and information related to the consolidation or elimination of government agencies.¹³

Once the President submits his budget to Congress, programs in the budget are allocated between mandatory expenditures and discretionary expenditures. The former reflect expenditures that must be made due to permanent federal laws.¹⁴ Entitlement programs such as Social Security, Medicare, Medicaid, and unemployment insurance fall under the mandatory expenditure category and discretionary spending programs are funded on an annual basis by Congressional appropriation committees rather than by permanent legislation. The national defense budget and K-12 education are examples of discretionary funded programs.¹⁵

As Congress considers the President's budget proposals, it may approve, modify, or disapprove them by changing funding levels, eliminating programs, or adding programs not requested by the President.¹⁶ Congress does not enact a budget itself, but rather adopts a "budget resolution," an agreement on the total spending, receipts, debt limit, and the size of deficit or surplus, that provides a framework for individual Congressional committees to prepare appropriations bills and other legislation on spending and receipts.¹⁷

The Congressional process for adopting a budget resolution is governed by statute,¹⁸ which requires the permanent committees in the House of Representatives and the Senate to meet and submit a recommendation on their portions of the budget to the Budget Committee in each body.¹⁹ Based on these recommendations, each of these Budget Committees creates a report on the budget and the members of the House of Representatives and the Senate vote on budget plan, known as the budget resolution.²⁰ Subsequently, the House and the Senate are required to resolve differences between their respective versions of the Congressional budget resolution and

12. Budget Contents and Submission to Congress, 31 U.S.C. § 1105(a) (2011).

13. *See id.*, 31 U.S.C. § 1105(a)(1)-(38) (2011), for a complete list of information required in the President's budget proposal.

14. Kenneth J. Allen, *Federal Grant Practice*, § 1.6 Mandatory and Discretionary Spending (2013).

15. POLICY BASICS: INTRODUCTION TO THE FEDERAL BUDGET PROCESS: CENTER ON BUDGET AND POLICY PRIORITIES, <http://www.cbpp.org/cms/?fa=view&id=155> (2011).

16. OMB FISCAL YEAR 2014, *supra* note 8, at 118. *See generally* 2 U.S.C. § 601-645 (2011).

17. OMB FISCAL YEAR 2014, *supra* note 8, at 118.

18. Congressional Budget Act of 1974, 2 U.S.C. §§ 601-603, 623, 631-644, 651-656, 658(a)-(g), 661(a)-(f), 665(a)-(e).

19. OMB FISCAL YEAR 2014, *supra* note 8, at 118.

20. *Id.*

to adopt a unified budget resolution by April 15.²¹ Once the budget resolution is agreed, the Appropriations Committees of the House and Senate divide the allocations of budget authority and Congress enacts appropriations bills and authorizes legislation.²²

Though Congress itself does not enact a budget, it does authorize government agencies to perform certain functions and authorizes the amount appropriated to the agencies to perform those functions.²³ This authorization may expire after a predetermined number of years or be indefinite.²⁴ However, since 1977, there have only been three fiscal years where Congress has enacted appropriation bills by October 1, the beginning of the next fiscal year.²⁵ When Congress does not agree on an appropriation bill, it usually passes a “continuing resolution” as an interim appropriations bill, which allows the agency whose budget is disputed to continue functioning.²⁶ In addition to this budget process, Congress enacts “authorizing legislation,” also known as “mandatory spending,” that allows agencies to spend money without the Appropriations Committees agreeing on funding.²⁷

National spending for fiscal year 2012 included \$2.44 trillion on mandatory expenditures, or roughly 59 percent of the national budget; \$1.4 billion on discretionary expenditures, or about 35 percent of the national budget; and \$242 billion on interest on the national debt, or about 6 percent of the national budget.²⁸ It should be noted that discretionary spending goes through an appropriation process which “consists of two sequential steps: (1) enactment of an authorization measure that may create or continue an agency, program, or activity as well as authorize the subsequent enactment of appropriations; and (2) enactment of appropriations to provide funds for the authorized agency, program, or activity.”²⁹

The executive and legislative bodies of the government have competed for the power to control the federal budget over the years. While the U.S. Constitution grants Congress the spending power of the government,³⁰ it was in 1974 that Congress by legislation took the budget process into its hands. The major legislation passed during the last century includes the following statutes:

21. *Id.*

22. *Id.* at 119.

23. OMB FISCAL YEAR 2014, *supra* note 8, at 118.

24. *Id.*

25. *Id.* at 119.

26. *Id.*

27. *Id.*

28. Allen, *supra* note 14.

29. Bill Heniff, Jr., Overview of the Authorization-Appropriation Process, C.R.S. Report for Congress, RS 20371 (Nov. 26, 2012).

30. U.S. Constitution, Art. I, § 9.

(1) The 1921 Budget and Accounting Act gave the President authority to draft a national budget for the government.³¹ It provided for a centralized and consolidated form of budgeting for the country, giving the President tighter control over each executive department and agency.³² The Act also established the Bureau of the Budget to assist the President in formulating the budget, which is now known as the Office of Management and Budget and is currently the “largest component of the executive office.”³³

(2) The 1974 Congressional Budget and Impoundment Control Act shifted power over the budget process into the hands of Congress as it limited the President’s powers to impound funds, only allowing him to propose “recisions (removal of budget authority) and deferrals (delay of budget authority),” which ultimately needed Congressional approval.³⁴ The Act also established the House Budget Committee, the Senate Budget Committee, and the Congressional Budget Office.³⁵

(3) The 1985 Gramm-Rudman-Hollings Act, also known as the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), was enacted with the intent of reducing the deficit and national debt.³⁶ This Act and other Congressional legislation aimed at limiting U.S. federal debt and enforcing those limitations will be studied later.

C. Legal Limits on Debt and Deficits and the Enforcement of These Limitations

1. Legal Limits

U.S. debt is debt that is held by the public and debt held by the government’s own accounts and services.³⁷ Debt held by the public is defined as “debt held by investors outside of the Federal Government, both domestic and foreign, including U.S. State and local govern-

31. 1921 Budget and Accounting Act, 42 Stat. §§ 20-27 (1921).

32. Charles H. Koch, Jr., *Federal Practice and Procedure*, Sec. 8279: Executive Oversight Institutions (2013).

33. The Mission and Structure of the Office of Management and Budget, Office of Management and Budget, http://www.whitehouse.gov/omb/organization_mission.

34. See generally Phillip G. Joyce & Robert D. Reischauer, *Deficit Budgeting: the Federal Budget Process and Budget Reform*, 29 HARV. J. ON LEGIS. 429 (1992), for a detailed look at legislation on the federal budget process passed between 1974 and 1992.

35. See generally Charles H. Koch, Jr., *Administrative Law and Practice*, Sec. 7:22 – The Budget Process, 3 ADMINISTRATIVE LAW AND PRACTICE Sec. 722 (3d ed. 2013).

36. Overview, Congressional Budget Office, <http://www.cbo.gov/about/overview>, 433-35 [hereinafter CBO Overview].

37. D. Andrew Austin & Mindy R. Levit, Cong. Research Serv., RL 31967, *The Debt Limit: History and Recent Increases 1* (2013), <http://www.fas.org/sgp/crs/misc/RL31967.pdf> [hereinafter *The Debt Limit*].

ments and foreign governments.”³⁸ For the majority of American history, individuals and institutions within the United States held almost the entire amount of Federal debt, but beginning in the 1970s foreign holdings grew and now represent half of the outstanding debt.³⁹ Intragovernmental debt is almost entirely held in nonmarketable trust funds and other accounts held by the U.S. Treasury on behalf of other government programs.⁴⁰ The U.S. Treasury makes interest payments to these funds twice a year.⁴¹ Approximately 0.1 percent of the total federal debt is not subject to the debt limit.⁴²

Under the United States Constitution, Congress is empowered to borrow money and to pay the debts of the United States, and hence is charged with monitoring and managing deficits incurred by the national government.⁴³ The government borrows money to meet deficits. The borrowing authority of the government is contained in 31 U.S.C. §§ 3101-3113. Essentially, the U.S. Secretary of the Treasury has the authority to incur governmental debt in order to fund government programs. The Congressional Research Service states:

The total federal debt can increase in two ways. First, debt increases when the government sells debt to the public to finance budget deficits and acquire the financial resources needed to meet its obligations. This increases *debt held by the public*. Second, debt increases when the federal government issues debt to certain government accounts, such as the Social Security, Medicare, and Transportation Trust Funds, in exchange for their reported surpluses. This increases *debt held by government accounts*. The sum of *debt held by the public* and *debt held by government accounts* is

38. OMB FISCAL YEAR 2014, *supra* note 8, at 63 n.1.

39. *Id.* at 75.

40. D. Andrew Austin, Cong. Research Serv., CR 41815, Overview of the Federal Debt 5 (2011), <http://fpc.state.gov/documents/organization/168673.pdf> [hereinafter Federal Debt Overview].

41. *Id.*

42. Mindy R. Levit et al., Cong. Research Serv., RL 41633, Reaching the Debt Limit: Background and Potential Effects on Government Operations, 2 n.8 (2013), <http://www.fas.org/sgp/crs/misc/R41633.pdf> [hereinafter Reaching the Debt Limit]; OMB FISCAL YEAR 2014, *supra* note 8, at 64 (Table 5-2).

43. U.S. CONST. art. I, § 8, cl. 1: “The Congress shall have Power . . . to pay the Debts . . . of the United States”; U.S. CONST. art I, § 8, cl. 2: “The Congress shall have Power . . . [t]o borrow money on the credit of the United States”; U.S. CONST. art. I, § 9, cl. 7: “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time”; U.S. CONST. art. I, § 8, cl. 18: “The Congress shall have Power . . . [t]o make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof.”

the total federal debt. Surpluses reduce debt held by the public, while deficits raise it.⁴⁴

However, the government is limited in how much debt it can accumulate,⁴⁵ which is known as the “debt ceiling.”

To provide an historical perspective, on January 1, 1790, the United States public debt stood at \$52,788,722.03, which consisted of the debt of the Continental Congress and the funds borrowed by Secretary of the Treasury Alexander Hamilton in 1789 from New York banks to meet the new government’s first payroll.⁴⁶ Since that time, the public debt has reflected the course of history.

Congress asserts its powers through legislation, typically with either specific limits on the debt or deficits or through broad authorization subject to the U.S. Treasury discretion.⁴⁷ For example, the War Revenue Act of 1898 allowed the U.S. Treasury to issue \$100 million in “certificates of indebtedness” with maturities of less than a year and \$400 million in “longer-term notes and bonds.”⁴⁸

Gradually, however, Congress increasingly gave broad discretion to the U.S. Treasury to incur deficits, and beginning in the 1930s, Congress began to allow “aggregate constraints on federal borrowing that allowed the Treasury greater ability to respond to changing conditions.”⁴⁹ Beginning with the Second Liberty Bond Act of 1917, Congress began modifying the specific limits on U.S. debt and eventually developed a ceiling on the total amount of outstanding U.S. debt.⁵⁰ From 1940 to February 2013, Congress enacted ninety-three separate measures that changed the limit on federal debt.⁵¹

The United States Department of the Treasury issues most of the Federal debt by issuing marketable securities to the public.⁵² These securities include Treasury Bills, with less than a year maturity date, Treasury Notes, with one to ten year maturity dates, Treasury

44. The Debt Limit, *supra* note 37, at 16.

45. 31 U.S.C. § 3101 (2013).

46. Franklin Noll, The United States Public Debt, 1861 to 1975, <http://eh.net/encyclopedia/the-united-states-public-debt-1861-to-1975/>, *citing* Rafael A. Bailey, The National Loans of the United States from July 4, 1776, to June 30, 1880 (2d ed. facsimile reprint) (1970).

47. The Debt Limit, *supra* note 37, at 16.

48. The War Revenue Act was enacted June 13, 1898, *cited in id.* at 16 n. 94.

49. The Debt Limit, *supra* note 37, at 17.

50. OMB FISCAL YEAR 2014, *supra* note 8, at 73.

51. OFFICE OF MANAGEMENT AND BUDGET, HISTORICAL TABLES: BUDGET OF THE U.S. GOVERNMENT FISCAL YEAR 2010 130 (Table 7-3), <http://www.whitehouse.gov/sites/default/files/omb/budget/fy2010/assets/hist.pdf> (listing statutory changes to debt limits from June 25, 1940 to Feb. 17, 2009); The Debt Limit, *supra* note 37, at 22 (listing statutory changes to debt limits from Apr. 6, 1993 to Feb. 4, 2013).

52. OMB FISCAL YEAR 2014, *supra* note 8, at 68. *See* 31 U.S.C. § 3103 (allowing the Secretary of the Treasury to borrow on the credit of the United States “amounts necessary for expenditures authorized by law and may issue notes of the Government for the amounts borrowed and may buy, redeem, and make refunds.”).

Bonds, with ten to thirty year maturity dates, and Treasury Inflated-Protected Securities, that is, securities whose principal value is adjusted to reflect inflation.⁵³ Other government agencies, such as the Federal Housing Administration, may also issue debt, known as “agency debt.”⁵⁴

2. Enforcement of Limitations on Debt and Deficits

Congress enforces U.S. debt limitations pursuant to its constitutional authority to control spending and borrowing and, pursuant to that authority, to interact with the Executive. When the debt approaches the limit authorized by Congress, the Treasury Secretary, acting on behalf of the executive branch of the U.S. government, asks Congress to raise the limit. The debt ceiling raise in 2011 is illustrative of the process that ultimately leads to increased borrowing capacity. Beginning in January 2011, the U.S. Treasury began to warn Congress that it would reach its borrowing capacity by mid-May 2011, and on July 1, 2011, confirmed that the borrowing capacity would be exhausted by August 2, 2011.⁵⁵

The U.S. Treasury began taking measures to prolong its borrowing authority, such as suspending sale of nonmarketable debt like savings bonds, delaying sale of marketable securities, under-investing or disinvesting government funds, and exchanging Treasury securities for non-Treasury securities.⁵⁶ On May 24, 2011, the House of Representatives introduced a bill that would have raised the debt limit to \$16.7 trillion, but the bill was defeated.⁵⁷ On July 22, 2011, the Senate passed a bill that increased the debt limit to \$16.7 trillion.⁵⁸ Ultimately, however, the House and the Senate settled on the Budget Control Act of 2011 on July 25, 2011.⁵⁹ This statute raised the debt limit by \$2.4 trillion, but also contained provisions that attempted to reduce the federal deficit.⁶⁰ On February 4, 2013, Congress raised the debt limit again as the federal government reached the limit set on July 25, 2011.⁶¹ Congress raised the debt limit most recently on October 17, 2013.⁶²

53. OMB FISCAL YEAR 2014, *supra* note 8, at 68.

54. *Id.* at 63, 69.

55. The Debt Limit, *supra* note 37, at 31-32.

56. *Id.* at 32; Reaching the Debt Limit, *supra* note 42, at 3.

57. The Debt Limit, *supra* note 37, at 33.

58. *Id.*

59. *Id.*; 31 U.S.C. § 3101(b) (raising limit to \$14,294,000,000,000).

60. Reaching the Debt Limit, *supra* note 42, at 33-34.

61. PL 113-3, Feb. 4, 2013, <http://www.gpo.gov/fdsys/pkg/PLAW-113publ3/pdf/PLAW-113publ3.pdf>.

62. Continuing Appropriations Act, 2014, PL 113-46, 31 USC 3101 Note 1002, (c)(1), <http://www.gpo.gov/fdsys/pkg/BILLS-113hr2775enr/pdf/BILLS-113hr2775enr.pdf>.

There are many examples of how Congress has attempted to limit U.S. federal debt and to enforce those limitations; one example is the Balanced Budget and Emergency Deficit Control Act of 1985 (BBEDCA), which as amended, sets limits on discretionary and direct spending (also known as mandatory spending).⁶³ Essentially, the BBEDCA triggers automatic budget cuts, known as sequesters, if budget and deficit targets are not met.⁶⁴

Discretionary appropriations are expenditures that are authorized by the appropriation acts of Congress.⁶⁵ Direct spending is all other budget authority that is not authorized by appropriation acts, entitlements, or the Supplemental Nutrition Assistance Program, a program that offers nutrition assistance to low-income families and individuals.⁶⁶ The BBEDCA set discretionary limits from fiscal years 2012 to 2021 for security and nonsecurity expenses.⁶⁷ The security category includes all “discretionary appropriations associated with agency budgets for the Departments of Defense, Homeland Security, Veterans Affairs, the National Nuclear Security Administration, the intelligence community, and international affairs.”⁶⁸ The nonsecurity category includes all discretionary appropriations not included in the security category.⁶⁹

However, in 2013, the BBEDCA was revised as a result of the failure of Congress to pass a bill that would reduce the deficit by at least \$1.2 trillion.⁷⁰ The amended BBEDCA now limits the discretionary spending for fiscal years 2013 through 2021 and divides discretionary expenses into the “revised security category” and the “revised nonsecurity category.”⁷¹ Now, the revised security category includes primarily only those discretionary expenses associated with the Department of Defense.⁷² The revised nonsecurity category includes all discretionary appropriations not associated with the Department of Defense.⁷³ The BBEDCA also requires the Office of Budget Management, among other things, to keep track of the deficit reduction, to sequester nonexempt direct spending to achieve the goal of reducing the deficit by \$1.2 trillion from 2013 through 2021, and to submit reports to Congress containing information about the adjust-

63. 2 U.S.C. § 901 (as amended Jan. 2, 2013).

64. Federal Debt Overview, *supra* note 40, at 9.

65. 2 U.S.C. § 900(7).

66. 2 U.S.C. § 900(8).

67. OMB FISCAL YEAR 2014, *supra* note 8, at 120.

68. 2 U.S.C. § 900(4)(B).

69. 2 U.S.C. § 900(4)(A).

70. OMB FISCAL YEAR 2014, *supra* note 8, at 120.

71. 2 U.S.C. § 901a(1)(A)-(B); 2 U.S.C. § 901a(2)(A)-(I).

72. 2 U.S.C. § 901a(1)(A); OMB FISCAL YEAR 2014, *supra* note 8, at 120.

73. 2 U.S.C. § 901a(1)(B).

ments to discretionary spending and the reductions for nonexempt direct spending.⁷⁴

If the Office of Budget Management predicts that

the amount of discretionary budget authority provided in appropriations acts for that year exceeds the statutory limit on budget authority for that category in that year the President must issue a sequestration order cancelling budgetary resources in nonexempt accounts within that category by the amount necessary to eliminate the breach.⁷⁵

Some budget categories are expressly exempt from sequestration or are subject to special rules.⁷⁶ Under BBECDA, Congress can also impose discretionary sequestration if the appropriations for any year breach a pre-established cap.⁷⁷ “These requirements ensure that supplemental appropriations enacted during the fiscal year are subject to the budget enforcement provisions.”⁷⁸

Congress has enacted other legislation as well. For example, the 1990 Budget Enforcement Act (BEA)⁷⁹ sought to reduce the deficit and national debt through two main enforcement measures. First, the BEA set spending limits on discretionary programs, and starting in 1993 each discretionary category—defense, international, and domestic discretionary—needed to obtain its funding from a single discretionary pool of funds. Additionally, if the set spending cap is breached, a sequester is initiated on all discretionary programs. Second, the BEA requires a pay-as-you-go process for mandatory spending. This requires lawmakers to ensure that any new law affecting mandatory spending will not increase the deficit, and if this condition is not met, a sequestration affects a certain group of pre-prescribed mandatory spending programs.

The Statutory Pay-As-You-Go Act of 2010 requires that new legislation not increase projected on-budget deficits.⁸⁰ Its purpose is to “reestablish a statutory procedure to enforce a rule of budget neutrality on new revenue and direct spending legislation.”⁸¹ The Budget Control Act of 2011⁸² raised the U.S. debt ceiling in order to avoid the

74. 2 U.S.C. 901a(3)-(4), (8), (11).

75. OMB FISCAL YEAR 2014, *supra* note 8, at 121.

76. *See* 2 U.S.C. § 906(7)(A)-(C) (exempting low-income subsidies, catastrophe subsidies, and qualified individual premiums, such as payments to the states for coverage of Medicare); 2 U.S.C. § 906(b), (d) (providing special rules for student loans and Medicare).

77. OMB FISCAL YEAR 2014, *supra* note 8, at 121.

78. *Id.*

79. *See* CBO Overview, *supra* note 36, at 435-440.

80. OMB FISCAL YEAR 2014, *supra* note 8, at 121.

81. 2 U.S.C. § 931.

82. 31 U.S.C. § 3101A (2013).

government's default on its loans.⁸³ While Congress "commits" that the U.S. federal budget expenditures will not exceed the expected income for a year,⁸⁴ the commitment is often honored in the breach. When that happens, the Treasury will borrow to fund the resulting deficits.⁸⁵ While the process of increasing the debt ceiling has occurred rather regularly, the Budget Control Act received widespread attention because of the political standoff between Republicans and Democrats preceding the bill that nearly resulted in the government's default.⁸⁶ The No Budget No Pay Act of 2013,⁸⁷ which temporarily suspended the debt limit in order for the government to meet the costs of preexisting obligations, illustrates the tension that the budget process has provided in recent years. It also temporarily suspended the salaries of members of Congress until they passed the annual budget resolution for fiscal year 2014.

D. Influence of U.S. Political Institutions on the Debt Debate and Proposed Solutions to the U.S. Debt and Deficits Situation

1. Influence of U.S. Political Institutions on U.S. Debt and Deficits

The preceding discussion illustrates the importance of the institutional functions of the executive branch and legislative branch of the U.S. government. The process for creating a budget, enforcing the budget and the limits on U.S. debt and deficits, and allocating money throughout the U.S. economy necessarily involves the interaction and cooperation of these two branches of government and their offices.

On an individual level, Inman and Fitts argue that the individual choices of House and Senate members will not result in decreasing the deficit as each elected member's strategy "may be to overspend on domestic public programs; to overextend tax exemptions, credits, and deductions; and to pay for some or all with excessive current period deficits. The net effect is an overutilization of a public resource: our national wealth."⁸⁸ They argue that in legislatures that require a "minimum winning coalition of 51%,"⁸⁹ like the United States, each member wants to be in the winning coalition,⁹⁰ and hence typically tries to support the allocations of the legislators

83. Debt-Ceiling Deal: President Obama Signs Bill as Next Fight Looms, ABC News, <http://abcnews.go.com/politics/debt-ceiling-deal-president-obama-signs-bill-as-next-fight-looms/story?id=14213050> (Aug. 2, 2011).

84. 31 U.S.C. § 1103 (2013).

85. 31 U.S.C. § 3104 (2013).

86. ABC News, *supra* note 83.

87. Pub. L. 113-3, 127 Stat. 51 (Feb. 4, 2013).

88. Robert P. Inman & Michael A. Fitts, *Political Institutions and Fiscal Policy: Evidence from the U.S. Historical Record*, 6 J. L. ECON. & ORG. 79, 82 (1990).

89. *Id.* at 83.

90. *Id.* at 82.

in the majority.⁹¹ Consequently, Inman and Fitts assert that what results is an “inefficient public budget from the point of view of the legislature as a whole, spending more on local public projects and local tax favors than all members would prefer.”⁹² As they suggest, a possible solution to budget inefficiency can be the strength of political parties in centralizing authority and controlling their individual members.⁹³ However, as was evident in the most recent debate on raising the debt ceiling, the Republican Party is suffering from an ideological rift making it more difficult to negotiate on debt limits and deficit reductions.⁹⁴

A related argument, suggested by Matthew McCubbins, is that the Appropriations Committees in the House and Senate, which wield substantial influence over the budget process and allowed expenditures, provide a way for politicians to “adopt a mixture of collective (i.e., partisan) and individual (i.e., district-oriented) activities in seeking reelection.”⁹⁵ The majority-party leadership uses the committee structure “to secure the individual district-oriented benefits” to enhance the reputations of its individual members.⁹⁶

Based on the nature of committees, McCubbins posits, “the partisan contingents on the [House Appropriations] committee are agents of their parties, and that as a result the committee functions as an agent of the majority party pursuing the collective policy goals of the majority party’s membership.”⁹⁷ Therefore, whether the goals of the President and the House of Representatives are convergent or divergent will determine how the President’s budget is treated, by increasing or decreasing appropriations.⁹⁸ McCubbins found that from 1948-1985, when the President was a Democrat and Republicans controlled the House, the House Appropriations Committee cut the President’s budget requests 93 percent of the time.⁹⁹ By contrast, when the President was Republican and Democrats controlled the House, only 57 percent of requests were cut.¹⁰⁰ The insight of McCubbins’ argument is that when there is a tension between the President’s proposed budget and the House Appropriation Committee’s recommendations, a budget is unlikely to be passed at all for

91. *Id.* at 84.

92. *Id.* at 88.

93. *Id.* at 92.

94. Matt Viser, *Shutdown Fight Reveals Deeper Splits Within Republican Party*, BOSTON GLOBE (Sept. 30, 2013), <http://www.bostonglobe.com/news/politics/2013/09/29/shutdown-fight-reveals-deeper-splits-within-republican-party-despite-calls-for-united-front/VW0z8D8Z0IhBWeRt7ioUOM/story.html>.

95. Matthew D. McCubbins, Note, *Budget Policy-Making and the Appearance of Power*, 6 J. L. ECON. & ORG. 133, 143 (1990).

96. *Id.* at 144.

97. *Id.* at 147.

98. *Id.* at 148.

99. *Id.*

100. *Id.*

that fiscal year and the services of government can only continue if Congress passes continuing resolutions or authorizing legislation.

2. Potential Solutions

One proposed solution to the growing U.S. debt is to pass a balanced budget amendment. One such proposed amendment, put forth by members of the House of Representatives, would require that “total outlays for a year . . . not exceed the average annual revenue collected in the three prior years” except in emergency situations.¹⁰¹ However, those who oppose a balanced budget amendment point to several of its drawbacks. For example, Richard Schragger, who discusses the topic as it relates to States and localities, suggests that an amendment that requires a balanced budget would severely limit their ability to respond to economic changes.¹⁰² The balanced budget idea derives from an aversion to debt and taxes, and consequently restrains how the States and localities could raise and spend money.¹⁰³ Also, such an amendment would encourage creative accounting that would move expenditures “off-budget.”¹⁰⁴

Another suggestion is to eliminate the debt limit altogether. As the Congressional Budget Office (CBO) has explained that limiting its borrowing authority “is not a productive method of achieving deficit reduction Failing to raise the debt limit in a timely manner . . . only serves to make the Treasury’s job of paying the government’s bills more difficult.”¹⁰⁵ Instead, the CBO suggests that Congress should enact legislation that reduces expenses or increases revenues.¹⁰⁶

Finally, Michael Abramowicz has argued that “[t]o read the Public Debt Clause as requiring a balanced budget would be a remarkable feat of interpretive legerdemain.”¹⁰⁷ Failure to pay the U.S. debt should be considered a constitutional violation based on the underdeveloped “Public Debt Clause.” He proposes two ways that the

101. H. R. 24, 113th Cong. (2013), <http://beta.congress.gov/113/bills/hjres24/BILLS-113hjres24ih.pdf>.

102. Richard C. Schragger, *Democracy and Debt*, 121 YALE L. J. 860, 869 (2012) [hereinafter Schragger].

103. *Id.*

104. *Id.*

105. CONGRESSIONAL BUDGET OFFICE, THE ECONOMIC AND BUDGET OUTLOOK: UPDATE 54 (1995), <https://www.cbo.gov/sites/default/files/cbofiles/ftpdocs/48xx/doc4805/entirereport.pdf>.

106. *Id.*

107. Michael Abramowicz, *Train Wrecks, Budget Deficits, and the Entitlements Explosion: Exploring the Implications of the Fourteenth Amendment’s Public Debt Clause* 39 (George Washington Univ. Law Sch. Pub. Law & Legal Theory Paper No. 575), <http://papers.ssrn.com/abstract=1874746> [hereinafter Abramowicz]; U.S. CONST. amend. XIV, § 4: “The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned.”

Public Debt Clause could mitigate against default. First, a constitutional violation could be triggered when the U.S. “accumulat[es debt] so excessive that bond rating agencies downgrade U.S. debt,” or when “interest payments on the debt are increasing at a faster rate than the economy will grow.”¹⁰⁸ Second, Abramowicz argues that the Public Debt Clause could serve as a mechanism to prohibit Congress from repealing legislative schemes that secure the public debt.¹⁰⁹ While Abramowicz’s proposal does raise problematic issues of justiciability, he argues that the nature of the Public Debt Clause allows violations to be justiciable.¹¹⁰

Former U.S. Treasury Secretary and Harvard University President, Lawrence Summers, suggests that the country should focus on growth rather than debt and deficits.¹¹¹ Instead of facing the deficit, which he said is seen as “the defining challenge facing the country, he urges focusing on growth.”¹¹² In his words, “if we increase the growth rate by two-tenths of 1%, you solve the entire identified fiscal-gap problem.”¹¹³

The debate will certainly continue on how to solve the challenge of combating debt and deficits.

II. DEBT LIMITS FOR STATES AND MUNICIPALITIES

A. Introduction

In July 2013, the City of Detroit filed for the largest municipal bankruptcy in U.S. history, a move opposed by unions, retirees, and creditors.¹¹⁴ But Detroit is not alone in facing huge deficits and massive debt, as in 2011 four local governments filed for bankruptcy protection: Jefferson County, Alabama; Harrisburg, Pennsylvania; Central Falls, Rhode Island; and Boise County, Idaho.¹¹⁵ Several States and cities are facing a similar fate. There is widespread con-

108. Abramowicz, *supra* note 107, at 39-41.

109. *Id.* at 42.

110. *Id.* at 45-51.

111. Deficits, Deficits. What About Growth?—Lawrence Summers on how Washington is focusing on the wrong issue, *Wall St. J.* Nov. 25, 2013, at R11, <http://online.wsj.com/news/articles/SB10001424052702303531204579207772409136570?KEYWORDS=deficits+deficits>.

112. *Id.*

113. *Id.*

114. *See, e.g.*, Detroit—Bankruptcy or Bust, *The Economist*, Nov. 15, 2013, <http://www.economist.com/blogs/democracyinamerica/2013/11/detroit>; Nathan Bomey, et al., 10 Revealing Exchanges: How Judge Rhodes is Conducting Detroit’s Bankruptcy, *Detroit Free Press*, Nov. 23, 2013, <http://www.freep.com/article/20131124/NEWS01/311240064/judge-steven-rhodes-detroit-bankrupt>; Record Bankruptcy for Detroit, *Wall St. J.*, July 19, 2013, <http://online.wsj.com/news/articles/SB10001424127887323993804578614144173709204>.

115. Schragger, *supra* note 102, at 862 n. 2, *citing* Kelly Nolan, Largest Municipal Bankruptcy Filed, *WALL ST. J.*, Nov. 10, 2011, <http://online.wsj.com/article/SB10001424052970204224604577028491526654>.

cern about finding effective solutions to the debt and deficits crises confronting cities and municipalities.

This current budget and credit crisis States and municipalities are facing must be considered in a historical context. Richard Schragger aptly reminds us about State and local fiscal failures in the nineteenth Century, when nine States defaulted on their obligations in 1841 and 1842, and approximately 941 municipalities defaulted between 1854 and 1929, with as many as 111 in 1898.¹¹⁶ This grim situation resulted in “an effort to rein in wayward legislatures and city councils, states embrac[ing] constitutional debt limitations, balanced budget mandates, public-purpose requirements, and other restrictions on debt and spending . . . [giving rise to] the ‘fiscal constitution’ in the states.”¹¹⁷

Next, section *B* discusses States’ budgetary processes. The following section, *C*, examines limitations on the authority of States and municipalities to incur debt. Section *D* explores States’ balanced budget requirements. The concluding section in Part II, Section *E*, studies potential solutions.

B. The Federal Government’s Involvement in the States’ Budgetary Processes

Under the federal system, sovereignty in the U.S. is shared between the national government and the States, and the State and local governments enjoy limited protection from interference by the federal government. This structure is founded on the 10th Amendment to the U.S. Constitution and also the Guarantee Clause. The 10th Amendment states: “The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” The Guarantee Clause, Article IV, § 4, provides: “The United States shall guarantee to every State in this Union a Republican Form of Government.”

Thus, while the federal government may require certain acts on the part of the State in exercise of its authority under the Commerce Clause of Article I, § 8,¹¹⁸ and may condition grants of funds upon specific undertakings by the State,¹¹⁹ the federal government generally may not otherwise influence the conduct of State affairs. The

116. Schragger, *supra* note 102, at 862-863, *citing* ERIC H. MONKKONEN, *THE LOCAL STATE: PUBLIC MONEY AND AMERICAN CITIES*, 25-26 (1995).

117. Schragger, *supra* note 102, at 863, *citing* David A. Super, *Rethinking Fiscal Federalism*, 118 *HARV. L. REV.* 2544, 2549 & n. 21 (2005); Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 *RUTGERS L.J.* 907, 911-12 (2003) [hereinafter Briffault].

118. The Commerce Clause, U.S. CONST., art. I, § 8, cl. 3, reads: “The Congress shall have power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.”

119. *See* *New York v. U.S.*, 505 U.S. 144, 167 (1992).

budget-making process is entirely exempt from federal control with these extremely limited exceptions.

C. Limitations on the Authority of States and Municipalities to Incur Debt

The inherent power of States to act as independent entities carries with it the power to incur debt in furtherance of their governmental purposes, and State legislatures are entrusted with this fiscal power.

Political subdivisions of the States, such as municipal corporations, derive their powers solely from the source that created them and have no authority independent of the powers they are given by the State. Instead, in the context of its municipal relations, a municipal corporation is an agency of the State empowered to conduct its affairs on a more local level,¹²⁰ and is limited in its powers to those provided in the statute creating it.¹²¹

All the States have their own budgeting and debt processes, and “virtually every” State’s constitution expressly delegates to the State absolute control over its finances within the limits of the constitution.¹²² Further, the legislature’s plenary power to set fiscal policy is not subject to judicial scrutiny unless the policy is contrary to the State’s constitution.¹²³ One court stated the limits of its authority to review the substance of fiscal legislation thus:

This Court has no authority to consider the desirability, wisdom, or practicability of fiscal legislation. It is not our prerogative to question the sagacity of the expressed policy. Whether an act is wise or unwise, whether it is based on sound economic theory or whether it is the best means to achieve the desired result are matters for legislative determination. This Court may not, based on its perception of how the State should conduct its business dealings, direct legislative decision making.¹²⁴

120. See James A. Coniglio, *State and Local Government Debt Financing*, § 1:3, Constitutional considerations, in 1 Gelfand, *State and Local Government Debt Financing* (2d ed.) (database updated Oct. 2013) [hereinafter Gelfand].

121. For a comprehensive list of cases on this point, see *id.* at § 1:3.

122. *Louisiana Public Facilities Authority v. Foster*, 795 So. 2d 288, 2001-0009 (La. 2001); *California Assn. of Retail Tobacconists v. State of California*, 109 Cal. App. 4th 792, 135 Cal. Rptr. 2d 224 (4th Dist. 2003).

123. See Gelfand, *supra* note 120, at § 1:2, *citing* *Oklahoma Educ. Ass’n v. State ex rel. Oklahoma Legislature*, 2007 OK 30, 158 P.3d 1058 (Okla. 2007).

124. *Oklahoma Educ. Ass’n v. State ex rel. Oklahoma Legislature*, 2007 OK 30, 158 P.3d 1058, 1066 (Okla. 2007), *quoting* *Calvey v. Saxon*, 2000 OK 17, 21, 997 P.2d 164, 171 (Okla. 2000).

Beginning in the mid-1850s, States began to include debt limitations in their constitutions.¹²⁵ The debt limitations were the natural responses to “indiscriminate borrowing by governmental entities” for enormous projects such as the Erie Canal and other internal improvement projects in states like Pennsylvania, Indiana, Illinois, Michigan, Arkansas, Florida, and Mississippi.¹²⁶ In the preceding decades, States had borrowed massively from private firms to fuel their “intense interstate competition for economic development . . . [that] was marked by waste, overbuilding, and mismanagement.”¹²⁷ In fact, during this period, nine states defaulted on interest payments and four states repudiated all or part of their debts.¹²⁸

Initially, as States were amending their constitutions to limit debt, they required that spending or lending be for a “public purpose” that required public money derived from “tax revenues be expended for a public purpose.”¹²⁹ At the same time that States were attempting to cap their debt limits, municipalities were going through the same financial excesses experienced by the States.¹³⁰ Therefore, States also began amending their constitutions to restrict the borrowing capacity of municipalities.¹³¹

Constitutional limitations on debt take on a variety of forms. For example, Article 10 of Indiana’s Constitution states

No law shall authorize any debt to be contracted, on behalf of the State, except in the following cases: to meet casual deficits in the revenue; to pay the interest on the State Debt; to repel invasion, suppression of insurrection, or, if hostilities be threatened, provide for the public defense.¹³²

In the case of such limitations, any funds raised for the given purpose may only be used in furtherance of that purpose. Other common objectives of States in incurring debt may include funding for education, health-care, corrections, transportation, water, utility systems, and housing.¹³³

125. Dale F. Rubin, *Constitutional Aid Limitation Provisions and the Public Purpose Doctrine*, 12 ST. LOUIS U. PUB. L. REV. 143, 156 (1993) [hereinafter *Constitutional Aid Limitation Provisions*].

126. *Id.*

127. Briffault, *supra* note 117, at 911.

128. *Id.*

129. *Id.* at 143. The first state supreme court to recognize the “Public Purpose Doctrine” was the Supreme Court of Pennsylvania. *Sharpless v. Mayor of Philadelphia*, 21 Pa. 147, 169 (1853), stated that in determining whether a project was for a public purpose “[t]he question then is, whether the building of a railroad is a public or private affair. If it be public it makes no difference that the corporation which has it in charge is private.”

130. Briffault, *supra* note 117, at 911-12.

131. *Id.*

132. IND. CONST. art. X, § 5.

133. See Gelfand, *supra* note 120, at § 1:2, *citing* numerous examples.

Because the provisions for raising funds are so exacting, much consideration is given in State constitutions to that question, and the purposes are left to the States. Ultimately, however, the U.S. Supreme Court has stated that “local conditions are of such varying character that what is or is not a public use in a particular state is manifestly a matter respecting which local authority, legislative and judicial, has peculiar facilities for securing accurate information.”¹³⁴ For example, the Colorado Constitution provides that “[t]he state shall not contract any debt by loan in any form, except to provide for casual deficiencies of revenue, erect public buildings for the use of the state, suppress insurrection, defend the state, or, in time of war, assist in defending the United States”¹³⁵ The purposes for which States and localities can spend their funds are closely regulated. Of particular importance is the “public purpose” doctrine which limits the support allowed to be given by the public sector for private sector projects.

Some States have adopted a debt threshold that is tied to annual revenue.¹³⁶ However, the most common form of debt limitation is to prohibit debt unless it is approved “by a supermajority of the legislature, of voters in a referendum, or both.”¹³⁷ In fact, all fifty states have some form of constitutional limitation on either state debt, municipal debt, or both.¹³⁸

States have followed this pattern in the prohibition of debt for municipalities. For example, Article 13 of the Indiana constitution prohibits municipalities from incurring debt valued at more than two percent on taxable property within the municipality.¹³⁹ Article 8 of the Idaho constitution states “No . . . subdivision of the state, shall incur any indebtedness . . . without the assent of two-thirds of the qualified electors thereof.”¹⁴⁰ According to one study, forty-six of the fifty State constitutions limit the provision of assistance from the State or local government to private enterprises.¹⁴¹

It is axiomatic that local governments have the power to incur debt when and only to the extent that that power is expressly conferred by constitution, statute or charter, or when implied from express powers or essential to carry out the purposes for which they

134. *Jones v. City of Portland*, 245 U.S. 217, 221 (1917).

135. COLO. CONST. Art. XI, § 3.

136. GA. CONST. art. 7, § 4, ¶ 1(b) (“Such debt shall not exceed, in the aggregate, 5 percent of the total revenue receipts, less refunds, of the state treasury in the fiscal year immediately preceding the year in which such debt is incurred.”).

137. Briffault, *supra* note 117, at 916. For example, California’s Constitution limits the state borrowing capacity to \$300,000 unless “two-thirds vote of all the members elected to each house of the Legislature” authorize expenditures for state projects. CAL. CONST. art. XVI, §1(a).

138. See Gelfand, *supra* note 120, at Appendix 1A.

139. IND. CONST. art. XIII, § 1.

140. IDAHO CONST. art. VIII, § 3.

141. Constitutional Aid Limitation Provisions, *supra* note 125, at 143 n. 1.

are created.¹⁴² As stated by the New York Supreme Court in 1966, "It is hornbook law that the power of a municipality to contract indebtedness cannot be implied. There must be a specific grant by the Legislature."¹⁴³ Thus, whatever debt is incurred, it must be done in strict adherence to the applicable law and constitutional or statutory limitations, or it is void.¹⁴⁴

There are many vehicles for limiting the amount of debt incurred by a State or local government. Among these are assessed valuation limitations, wherein the specific governmental entity is prohibited from contracting debt beyond a percentage of the valuation of its taxable real estate, or such excess indebtedness is void.¹⁴⁵ Typically such rules permit exclusion for short-term debt in the form of bonds that will be paid in not more than one year, debt incurred in anticipation of receipt of specific revenues, or debt for a specific purpose, such as major construction of public utilities.¹⁴⁶

In order to keep a check on the financial policies of the governmental entity, many States and municipalities require the issuance of bonds or other indebtedness to be submitted to the electorate for approval.¹⁴⁷ In such cases, voter approval is required for any obligation, not incurred for ordinary and necessary purposes, that will extend beyond a single fiscal year.¹⁴⁸

A number of State constitutions employ restrictions on debt based upon the income and revenue of the State for a given year, and specifically pertain to debt that is to be paid through taxation, which has the effect of acting as a limitation on the taxing power of the State. This type of restriction commonly applies to general obligation bonds.¹⁴⁹ In *Mercantile Bank of Illinois v. School Dist. of Osceola*,¹⁵⁰ the court stated:

Article VI, section 26(a), serves the salutary purpose of prohibiting political subdivisions of this state from expending funds they do not have.

142. See Gelfand, *supra* note 120, at 1:3.

143. *Andrello v. Dulan*, 49 Misc. 2d 17, 22, 266 N.Y.S.2d 738, 744 (Sup. 1966).

144. *Id.*

145. See Gelfand, *supra* note 120, at § 1:5, discussing the example of N.Y. CONST. Art. VIII, § 4.

146. See Gelfand, *supra* note 120 at § 1:5, discussing the example of ALA. CONST. Art. XII, § 225.

147. See Gelfand, *supra* note 120, at § 1:6, n 1, collecting examples of State constitutions with this requirement.

148. See Gelfand, *supra* note 120, at § 1:6, *citing* *Montano v. Gabaldon*, 108 N.M. 94, 766 P.2d 1328 (1989): "An agreement that commits the county to make payments out of general revenues in future fiscal years, without voter approval, violates the New Mexico Constitution even if that obligation is merely an 'equitable or moral' duty." 108 N.M. at 96, 766 P.2d at 1330.

149. See Gelfand, *supra* note 120, at § 1:10.

150. *Mercantile Bank of Illinois, N.A. v. School Dist. of Osceola*, 834 S.W. 2d 737 (Mo. 1992).

The evident purpose of [section 26(a)] . . . was to abolish, in the administration of county and municipal government, the credit system and establish the cash system by limiting the amount of tax which might be imposed by a county for county purposes, and limiting the expenditures in any given year to the amount of revenue which such tax would bring into the treasury that year.¹⁵¹

D. State Balanced Budget Requirements

The National Conference of State Legislatures reports that 49 of the 50 States have balanced budget requirements, with the State of Vermont being the single exception.¹⁵² The requirement is generally found in the form of a constitutional limitation on state indebtedness and may or may not have a binding enforcement mechanism. The categories by strictness of the rules are that either the proposed budget must be balanced; the budget as enacted must be balanced; no deficit can be carried forward from one fiscal period into the next.¹⁵³ Balancing a State's budget usually pertains to the general fund which comprises almost all tax and fee collections and miscellaneous revenues, and from which most appropriations are made. It is this part of the State's budget that receives the most public attention because of its significance in the policymaking process. This rule also reflects the typical case that spending from other parts of the budget generally permits less discretion because their use is designated by their source.¹⁵⁴

E. Potential Solutions

The preceding discussion has demonstrated the concern with the ongoing State and municipal debt and deficits issues. On the topic of constitutional constraints, Richard Schragger describes the efforts made by the States to respond to the "perceived problem of overspending:" "Entrenching debt limits in constitutions, limiting the uses to which public monies could be put, and giving courts the role of enforcers were the nineteenth-century solutions. Limiting legislative authority to tax and spend by requiring extraordinary popular consent was the twentieth-century solution."¹⁵⁵

On market mechanisms, he states that

151. *Id.*, 834 S.W. 2d at 738 (Mo. 1992).

152. National Conference of State Legislatures, NCSL Fiscal Brief: Balanced Budget Provisions, Oct. 2010.

153. *Id.* at 2.

154. *Id.* at 6.

155. Schragger, *supra* note 102, at 867.

the discipline of the market only works if states and localities can and do internalize the costs and benefits of their fiscal decisions. If a locality's fiscal health is mostly a function of circumstances beyond its control or if locals can depend on higher-level governments for aid, then market discipline will have little effect. Fiscal federalists therefore disfavor bailouts.¹⁵⁶

After analyzing the impact of these two potential mechanisms of fiscal discipline—the “fiscal constitution” and the market—both of which assume that the debt problem of states and municipalities is a problem of overspending—Schragger rejects both, for he finds them equally inadequate and ineffective. Rejecting constitutional constraints, market mechanisms, bailouts, and bankruptcy as possible solutions, he finds that adequate “solutions” to State and local debt crises lie in the U.S. decentralized federal political system, under which the federal government is responsible for large-scale infrastructure and social insurance spending, and State and local taxpayers closely watch tax and spending decisions and hold elected officials accountable.

Obviously, the ongoing debate on what reforms will solve State and local debt and deficit issues is likely to continue, as is the debate on solving federal debt issues.

156. *Id.* at 868.

Social and Economic Rights as Fundamental Rights†

TOPIC IV. C

This report uses the definition of “social rights” in “The Toronto Initiative for Economic and Social Rights,” and focuses on two of these rights which have been litigated in the United States: the right to social security, at the Federal level, and the right to education, at the state level. We note that the U.S. Constitution does not expressly recognize any of the social rights listed in the introduction to this national report, and that American courts and legal scholars are generally skeptical about protecting social rights through constitutional law. The limited exceptions to this skepticism appear in the prohibition on discrimination against the indigent with respect to the exercise of “fundamental rights” like the right to travel and the guarantee of procedural rights before welfare rights may be terminated. All fifty state constitutions recognize the right to education to varying degrees, although only some deem it a fundamental right. While some state courts consider challenges to educational schemes to be non-justiciable, and defer to the legislature, others have heard such cases, most of which are based on equal protection or educational quality rationales. We conclude, however, that the United States is likely not in total compliance with the education component of the International Covenant on Economic, Social, and Cultural Rights.

INTRODUCTION

Since there is no generally accepted definition of social rights under either international or U.S. law, this report begins from the definition employed in the academic project “The Toronto Initiative for Economic and Social Rights” (TIESR).¹ This project compares the existence and enforcement of economic and social rights in constitu-

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1. See Courtney Jung, Coding Manual: A Description of the Methods and Decisions Used to Build a Cross-National Dataset of Economic and Social Rights in Developing Country Constitutions (2010), available at <http://www.tiesr.org/TIESR%20Coding%20Manual%208%20March%202011.pdf>.

tions throughout the world and has identified seventeen separate economic and social rights. In the social rights category are:

- (1) The right to social security not related to employment
- (2) The rights of children
- (3) The right to healthcare
- (4) The right of access to land
- (5) The right to housing
- (6) The right to food and water
- (7) The right to education
- (8) The right to development
- (9) The right to a safe or healthy environment
- (10) The right to state protection of the environment

These rights overlap significantly with those identified in another large-scale academic initiative, The Comparative Constitutions Project,² and is largely an elaboration of the social rights guaranteed in the International Covenant on Economic, Social, and Cultural Rights. As reported by the TIESR, these rights are not expressly guaranteed under the U.S. Constitution; only a few of them are expressly guaranteed under the constitutions of the fifty U.S. states. We have therefore decided to focus our report on two sets of rights, which have been at the heart of some of the most significant American debates in the area of social rights and which are afforded some measure of constitutional protection. At the Federal level, we examine the right to social security and the material goods necessary for subsistence, which is indirectly (and fairly minimally) protected under the Fourteenth Amendment to the U.S. Constitution. At the state level, we examine the right to education, which is recognized in all fifty state constitutions to some extent and has been the object of a significant amount of litigation in the courts.

I. SOCIAL RIGHTS IN NATIONAL LEGAL SCHOLARSHIP

How does the national legal scholarship see the question of protection of social rights?

Is the need to protect social rights questioned?

Are social rights perceived as different from other types of rights?

2. See COMPARATIVE CONSTITUTIONS PROJECT, <http://comparativeconstitutionsproject.org> (last visited Oct. 18, 2013).

Are social rights perceived as limitations or threats to the “first generation” rights?

What are the most important questions of social rights protection discussed by the national legal scholarship?

What do you consider as the most original contribution of your national legal scholarship to the study of social rights?

Although it is difficult to generalize, both because of the diverse nature of social rights and the variety of approaches that characterize American academia, American legal scholarship is on the whole skeptical of protecting social rights through constitutional law. During the 1960s and the early 1970s, there were a few prominent members of the legal academy who advocated including welfare rights in the Fourteenth Amendment, as part of the right of equal treatment and the right to government respect for “life, liberty, or property” (so-called “substantive” and “procedural” due process).³ This coincided with both the heyday of the progressive Warren Court and the height of the welfare-rights social movement. Scholarly interest in the topic, however, stalled in the 1980s and the 1990s, again in tandem with the political and legal climate of the times—this time a conservative Supreme Court and an increasingly right-leaning political culture, epitomized by the repeal in 1996 of the Aid to Families with Dependent Children Act, one of the pillars of the American welfare state. As the legal historian William Forbath put it, writing in 2001:

[L]ike Banquo’s ghost, the idea of constitutional welfare rights will not die down, but it is not exactly alive, either. No fresh or even sustained arguments on its behalf have appeared for over a decade; only nods and glancing acknowledgments. Some liberals, like Ronald Dworkin, now use the idea to affirm their steely distance from heedless activism and free-form interpretive methods; poverty has become the paradigmatic social wrong they would not dream of viewing as a constitutional wrong.⁴

Over the past decade, there has been renewed interest in the subject, at least in part because of developments in comparative constitutional law and the importance of social rights in the jurisprudence of constitutional courts in other parts of the world.⁵ In-

3. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 U. PA. L. REV. 962 (1973); see generally Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965).

4. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1825 (2001).

5. See, e.g., Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008); Robin West, *Unenumerated Duties*, 9 U.PA. J. CONST. L. 221 (2006);

terestingly, however, even scholars on the liberal end of the political spectrum have sounded a fairly cautious note when considering the arguments for social rights in American constitutional law. Important examples of this attitude can be found in two fairly recent and influential monographs by Mark Tushnet and Cass Sunstein.

In *Weak Courts, Strong Rights*, Mark Tushnet suggests that constitutional courts, including the U.S. Supreme Court, can effectively and legitimately protect social rights by pairing a strong constitutional commitment to welfare rights with a weak form of remedy for the violation of those rights.⁶ He identifies three types of so-called “weak-form review,” which contrast with the injunctive remedies traditionally associated with judicial review in American constitutional law and which accord the legislative and executive branches a substantial role in constitutional interpretation and lawmaking: a mandate to interpret statutes consistent with fundamental rights (New Zealand); a mandate to interpret statutes consistent with fundamental rights and, if not possible, to issue a declaration of “incompatibility,” leaving it to the legislative branch to decide whether to repeal the offending piece of legislation (the United Kingdom); and a “dialogue” model in which judgments of a constitutional court can be construed not as a definitive statement on the constitutionality of statutes but as an invitation to the political branches to respond with better justifications or future action. Tushnet argues that the experience of South Africa’s Constitutional Court, which has held in favor of social rights, but has allowed the political branches considerable discretion in how it designs public programs to accommodate those rights, suggests that an approach that combines welfare rights with weak-form judicial review is a productive one that warrants consideration in the United States.⁷

In *The Second Bill of Rights*, Cass Sunstein argues, based on the intellectual history and political and institutional developments of the New Deal, that social and economic rights are a fundamental part of the American political tradition.⁸ He highlights Roosevelt’s commitment to social and work-based rights, outlined most exhaustively in Roosevelt’s 1944 speech on “a second Bill of Rights,” and canvasses the various New Deal programs which gave effect to this vision and

Katharine Young, *Redemptive and Rejectionist Frames: Framing Economic, Social, and Cultural Rights for Advocacy and Mobilization in the United States*, 4 NORTH-EASTERN U. L. J. 323 (2012).

6. MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (2008); see also Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1918 (2004).

7. For a recent challenge to this position, albeit in the comparative and not American context, see David Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT’L L. J. 189 (2012).

8. CASS SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* (2004).

which have persisted, in one shape or another to this day. These rights, in particular the right to some type of social security, the right to education, and the right to be free from monopoly form part of what Sunstein calls America's "constitutive commitments."⁹ By constitutive commitment, however, Sunstein means something that falls short of a constitutional right that can be enforced by the Supreme Court. It is a form of right and duty that is recognized by popular consensus to be fundamental to the political community, and therefore cannot be eliminated by a simple legislative vote, but nevertheless cannot serve as the basis for challenging or demanding government action before the courts. They are values that should guide the democratic process, rather than explicit rights that can be invoked before the courts, at least not rights that go any further than the existing and very limited Supreme Court jurisprudence discussed in the next section. Although, like Tushnet, Sunstein writes favorably of the South African experience, he does so because of the Constitutional Court's use, in Tushnet's words, of soft-form judicial review and, at least for the time-being, he does not appear to believe that such an approach would be consonant with American constitutional culture.¹⁰

Although there are certainly many reasons for this academic caution, at least one seems to be a heightened sensitivity to the institutional limitations of the judicial branch, at least as compared to other legal cultures. There are two types of limits that figure in the scholarship. The first is a pronounced concern for what the constitutional scholar Alexander Bickel called the counter-majoritarian difficulty: the danger that the least democratic branch of government, namely the Supreme Court, will override the will of the people as expressed through popular elections and the work of the legislature.¹¹ In the realm of social rights, given the broad fiscal implications of guaranteeing certain minimum entitlements to housing, healthcare, food, and other elements of subsistence, the counter-majoritarian difficulty has loomed large and most scholars have concluded that the resource allocation decisions at the core of social welfare programs are best left to democratically elected legislatures. The second type of limit is technical. Perhaps because of the extensive powers and activism of American courts, especially during the 1960s and 1970s with court-supervised desegregation of public institutions, there is a substantial literature pointing to difficulties of making policy through litigation and to the limited capacity of courts to effect the broad and complex social change often called for in their

9. *Id.* at 99-100.

10. *Id.* at 229.

11. See generally ALEXANDER BICKEL, *THE LEAST DANGEROUS BRANCH* (1962).

decisions.¹² In these analyses, the legislative and executive branches are generally pitted as the most appropriate venues for policymaking given their ability to dedicate the resources, political will, and technical expertise often necessary to accomplish large-scale social, political, and economic change. These limitations, of course, are particularly pronounced in the area of social welfare, which is further removed from the traditional realm of courts as compared to areas such as, say, equal rights or criminal procedure, and since the success of entitlements programs is closely tied to their ability to finely calibrate basic needs, fiscal resources, and human incentives so that such programs are sustainable and politically feasible in the long-run. Both the democratic legitimacy and effectiveness concerns are evident in the recent American scholarship on social rights, including the two monographs presented earlier.¹³

II. CONSTITUTIONAL PROTECTION OF SOCIAL RIGHTS

Does the national Constitution of your country provide for protection of social rights?

What are the rights protected?

How is the subject entitled to protection defined in the Constitution? The individual, the citizen, the family, a group of persons? Which groups? Are social rights constitutionally guaranteed to non-nationals?

How is the debtor of social rights defined? Is it the State, public authorities, public bodies, private bodies?

What is the content of the rights? What are the obligations of the legislator? What are the obligations of the administration? What are the obligations of other actors?

Does the national Constitution differentiate the scope and methods of protection of social rights and other rights?

Does the normative structure of constitutional social rights vary? Is it possible to distinguish different types of constitutionally protected social rights?

Is there a constitutional mechanism of protection vis-à-vis the legislator? How does it operate? Are there any instruments that ensure protection against the inaction of the legislator?

How do you evaluate the efficiency of social rights protection offered by the Constitution and the constitutional justice?

What do you consider as the most original contribution of your national Constitution to the protection of social rights?

12. See generally GERALD N. ROSENBERG, *THE HOLLOW HOPE* (1991); DONALD L. HOROWITZ, *THE COURT AND SOCIAL POLICY* (1977).

13. See SUNSTEIN, *supra* note 8, at 210, 228; see generally TUSHNET, *STRONG COURTS*, *supra* note 6.

The U.S. Constitution does not expressly recognize any of the social rights listed in the introduction to this national report. Furthermore, even though in theory, social rights could have been recognized as a form of “liberty” under the Fourteenth (and Fifth) Amendment’s Due Process Clause, the Supreme Court has never done so. The furthest that the Court has gone is to find that in some cases, the states must afford special treatment for the indigent because the failure to do so would lead to impermissible discrimination under the Equal Protection Clause: in certain contexts the state is required to provide assistance to the poor, or at least is barred from imposing certain fee requirements, in order to enable them to exercise certain core rights connected to the right to a fair trial, voting, and the right to travel. These holdings are based on the Equal Protection Clause, given the discrimination against the poor that would result if such requirements were imposed or remedial measures refused, as well as the other fundamental right at stake in the case. These cases were mostly decided in the 1960s, by the liberal Warren Court, and many believed that they boded well for a general right to subsistence, but, by the early 1970s, the Court had become far less receptive to welfare rights, and there have been very few developments in the case law since that time.

The line of cases in the fair trial area begins with *Griffin v. Illinois*.¹⁴ That case involved an Illinois law that required defendants appealing their criminal conviction to pay for a copy of their trial transcript. The Court held that by imposing a fee, which the indigent were not in a position to pay, the state “discriminates against some convicted defendants on account of their poverty” and denies their citizens “equal justice”;¹⁵ the state, therefore, was under a duty to provide the transcript to the indigent at no cost. This was followed by *Douglas v. California*, in which the Court found, based on the right to a fair trial (“procedural” due process) and equal protection, that the indigent had a right to be provided with counsel on their first appeal from a criminal conviction.¹⁶ In 1971, the Court extended this logic to the civil context. In *Boddie v. Connecticut*,¹⁷ it held that it was a de-

14. 351 U.S. 12 (1956).

15. *Id.* at 17-19. In a number subsequent cases, the Court has required that other types of fees related to the criminal process be waived for indigent defendants seeking to appeal their convictions. *Burns v. Ohio*, 360 U.S. 252 (1959); *Douglas v. Green*, 363 U.S. 192 (1960); *Smith v. Bennett*, 365 U.S. 708 (1961); *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214 (1958); *Draper v. Washington*, 372 U.S. 487 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Long v. District Court*, 385 U.S. 192 (1966); *Gardner v. California*, 393 U.S. 367 (1969).

16. 372 U.S. 353 (1963). Some consider the Court’s famous decision in *Gideon v. Wainwright* to be part of this doctrinal trajectory. There the Court found a constitutional right to have the state pay for defense counsel in criminal trials, but the Court’s finding rested on the requirements of due process and what it considered essential to a fair trial, and not also on the Equal Protection Clause.

17. 401 U.S. 371 (1971).

nial of due process to require welfare recipients, seeking a divorce in state court, to pay fees and costs in order to obtain access to the judicial process. This holding, however, rested on the fundamental interest of marriage and the monopoly of the state courts over dissolution of marriage, and therefore it has been extended in some civil contexts¹⁸ but not others.¹⁹

The lead case in the voting rights area is *Harper v. Virginia State Bd. of Elections*.²⁰ There the Supreme Court struck a poll tax (voters were required to pay \$1.50 to cast their ballot) imposed by the State of Virginia. The holding was based both on the Equal Protection Clause and the finding that the right of suffrage in state elections was a "fundamental political right," protected under the previous case law of the Court even though nowhere expressly guaranteed in the Constitution. The Court found that the poll tax discriminated between those able to pay the fee and those unable to pay the fee and that discriminating between voters on such grounds "as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor."²¹ Several years later, this line of reasoning was used to strike state laws that imposed fees, this time not on voters but on individuals wishing to stand as candidates for office.²²

The final category of equal protection cases, attached to the right to travel, touches upon social rights more directly than either the fair trial or voting rights cases. The principal federal welfare statute of the time, the Aid to Families with Dependent Children Act, relied entirely on state implementation and many states imposed a minimum residence requirement before individuals could apply for benefits, so as not to become magnets for the poor. In *Shapiro v. Thompson*,²³ the Court held that the one-year waiting period written into the laws of a number of states was unconstitutional based on the Equal Protection Clause and the right to interstate travel, which, like the right to suffrage, was not recognized in a specific constitutional provision but was well established in the jurisprudence of the Court. In this situation, the discrimination was not between rich and poor, but between indigents that had and had not resided in the state for one year, the former of which qualified for benefits and the latter of

18. *Little v. Streater*, 452 U.S. 1 (1981) (right of indigent to have state pay for blood grouping test in paternity suit); *Lassiter v. Department of Social Services*, 452 U.S. 18 (1981) (right of indigent parent to state-appointed counsel in state proceedings seeking the termination of parental status).

19. *United States v. Kraus*, 409 U.S. 434 (1973) (no right of indigent to have filing fees waived to obtain discharge of his debts in bankruptcy court); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (no right of indigent to have filing fees waived to obtain court review of state administrative agency decision reducing or terminating public assistance).

20. 383 U.S. 663 (1966).

21. *Id.* at 668.

22. *Bullock v. Carter*, 405 U.S.134 (1972); *Lubin v. Panish*, 415 U.S. 709 (1974).

23. 394 U.S. 618 (1969).

which did not. The Court found that the policy justifications offered by the states for the discrimination, many of which were specifically designed to discourage the poor from traveling to the state so as to reduce the burden on the state budget, were constitutionally impermissible because they burdened the constitutional right to travel. On these same grounds, the Court in a later case struck a one-year residence requirement for receiving nonemergency medical care.²⁴

In the early 1970s, the Court rejected a number of attempts to extend this equal protection law to areas not associated with historically important fundamental rights, and there have been very few developments in constitutional law on social rights since then. In *Dandridge v. Williams*,²⁵ the litigants claimed that the State of Maryland's rules for administering AFDC (welfare benefits) were unconstitutional because they imposed an absolute maximum on welfare grants, thereby discriminating between children in large families and children in small families (those in large families could expect to receive lower per capita benefits under the program) and depriving them of the satisfaction of their basic needs. Absent the connection with the right to travel, however, the Supreme Court reviewed the Maryland regulation under the permissive rational basis test and found that the state's justification for the regulation was plausible and therefore the statutory maximum was permissible. In *San Antonio School District v. Rodriguez*,²⁶ the litigants challenged a state funding scheme for education based on local property taxes, which was (and is) common to most states, and which led to far higher expenditure per student in rich localities. Although the Court recognized that the state scheme did lead to unequal expenditure for students residing in different districts, it again used the rational basis test to find that the discrimination was justified by the state's goal of promoting local control over education. In doing so, it expressly declined to engage in the more searching scrutiny evident in the earlier cases because it held that there was no absolute deprivation of the benefit, since all children received some education, and that there was no fundamental right to education. In *Maher v. Roe*, the Court rejected on similar grounds a claim to state-funded abortions for indigent mothers.²⁷

To consider briefly the question of why, outside of these limited areas, the Supreme Court has been hostile to social rights, there are at least three explanations in the scholarly literature. Cass Sunstein has put forward a political explanation based on the changing composition of the Supreme Court: in the late 1960s the Court was on the

24. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

25. 397 U.S. 471 (1970).

26. 411 U.S. 1 (1973).

27. 432 U.S. 464 (1977).

verge of recognizing social and economic rights but it was stopped in its tracks by the appointment of a number of conservative justices after the election of the Republican President, Richard Nixon.²⁸ The legal historian William Forbath has suggested that the discourse of the welfare rights movement, which was responsible for bringing many of the important cases to the Supreme Court, ran counter to a longstanding (American) republican tradition of work-based citizenship, and that political and legal advocacy framed in terms of work, both opportunities to work and compensation for work, might be more successful.²⁹

Lastly, the political scientist Elizabeth Bussiere has argued that the reasons are to be found in the previous jurisprudence of the Court and the doctrinal legacy of *Lochner*.³⁰ Her thesis is as follows: As is well known, in *Lochner*, the Supreme Court found that the “life, liberty, or property” protected by the Constitution included “liberty of contract” and struck a state law regulating working time as an interference with liberty of contract. This conservative jurisprudence, however, increasingly came under political pressure during the New Deal and, in 1938, the Supreme Court reversed course and declared that it would henceforth presume that legislation impinging upon economic rights was constitutional and would engage in more exacting judicial review only in the case of rights protected by the Bill of Rights, rights affecting the integrity of the democratic process, and rights of “discrete and insular” minorities which, if unprotected, might be excluded from the democratic process.³¹ This put into place a “double-standard” of judicial review—a permissive standard of review for government action that infringed upon economic rights and a more exacting one for government action that infringed upon constitutionally enumerated rights and rights essential to the democratic process. When, in the late 1960s, the Warren Court expanded legal guarantees for welfare recipients, it did so not on the basis of a fundamental right to welfare—an economic right which it found received virtually no protection under the post-*Lochner* “double-standard”—but on a variety of alternative constitutional and statutory grounds that have proven to be unsatisfactory substitutes.

This section now turns to state constitutional law and the right to education. Although the U.S. Supreme Court has held that educa-

28. SUNSTEIN, *supra* note 8, at 162-71.

29. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1825 (2001).

30. ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION 99-101 (1997); see also Elizabeth Bussiere, *The Supreme Court and the Development of the Welfare State: Judicial Liberalism and the Problem of Welfare Rights*, in SUPREME COURT DECISION-MAKING: NEW INSTITUTIONALIST APPROACHES (Cornell W. Clayton & Howard Gillman eds., 1999).

31. U.S. v Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

tion is not a fundamental (federal) right,³² all fifty states guarantee, to some extent, the right to education in their constitutions.³³ The language of these provisions varies. At a minimum, most call for a system of “free public schools.”³⁴ Many go into more detail, adding such language as “general, suitable and efficient,”³⁵ “thorough and uniform,”³⁶ “uniform, efficient, safe, secure and high quality,”³⁷ “quality basic education,”³⁸ “free from sectarian control,” and “non-segregated and nondiscriminatory.”³⁹ The Florida constitution goes so far as to specify class size limits.⁴⁰ The state of Mississippi provides the lowest level of protection for education, making the state’s provision and funding of schools discretionary.⁴¹ In general, state courts have construed the words “thorough” and “efficient” to require basic quality and equality in the educational experience of the children of the state.⁴²

In interpreting these various constitutional provisions, some state courts have found education to be a fundamental right while others, following the Supreme Court’s lead, have declined to do so.⁴³ The states which have determined education to be a fundamental right subject any discriminatory practices in education to strict scrutiny, the highest level of scrutiny available to courts to analyze the disparate treatment of groups of similarly situated people with respect to a fundamental right. By way of contrast, many state courts construe the legislature’s power under broad plenary grants such as “to establish and maintain a system of public education” as precluding the judicial branch from intervening in the decision making process at all.⁴⁴ State constitutions which use the strongest language to protect education and which call it a fundamental right do not nec-

32. *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973) (holding that for a right to be fundamental, it must be protected either explicitly or implicitly in the text of the Constitution, and that such protection does not exist for education as a right).

33. Roger J. Levesque, *The Right to Education in the United States: Beyond the Lure and Lore of the Law*, 4 ANN. SURV. INT’L & COMP. L. 205 (1997).

34. See, e.g., ARK. CONST. art. 14, § 1; COLO. CONST. art. 9, § 2; GA. CONST. Art. 8, § 1.

35. ARK. CONST. art. 14, § 1.

36. COLO. CONST. art. 9, § 2.

37. FLA. CONST. art. 9, § 1.

38. VT. STAT. ANN. tit. 16, § 1.

39. IND. CODE. § 2-33-1-1.

40. FLA. CONST. art. 9, §1(a) (1)-(3).

41. “It shall be the duty of the Legislature to encourage by all suitable means, the promotion of intellectual . . . improvement, by establishing a uniform system of free public schools. The legislature may, in its discretion, provide for the maintenance and establishment of free public schools.” MISS. CONST. art. VIII, § 201.

42. Michael Heise, *Equal Educational Opportunity, Hollow Victories, and the Demise of School Finance Equity Theory*, 32 GA. L. REV. 543, 572-77 (1998).

43. See, e.g., *Lujan v. Colorado*, 649 P.2d 1005, 1022 (Colo. 1982).

44. Allen W. Hubsch, *The Emerging Right to Education under State Constitutional Law*, 65 TEMPLE L. REV. 1325, 1328 (1992).

essarily in practice offer greater protection for it than states which do not use this language.⁴⁵

III. PROTECTION OF SOCIAL RIGHTS UNDER OTHER CONSTITUTIONAL RULES AND PRINCIPLES

Are there other constitutional or jurisprudential principles used as tools for the protection of human rights?

Is there protection offered by the following constitutional principles:

- protection of legitimate expectations,
- protection of vested rights,
- precision of legislation,
- non-retroactivity of legislation,
- due process
- other general constitutional principles?

Probably more significant than the (federal) substantive rights described above are the (federal) procedural rights established by the Warren Court for recipients of public benefits. In *Goldberg v. Kelly*, the Court decided that welfare (AFDC) benefits, and by extension other types of social benefits, were "property" deserving of procedural protection under the Due Process Clause.⁴⁶ The Court found that once an individual establishes his or her eligibility for benefits, the government must abide by the Due Process Clause in terminating those benefits. The procedural guarantees afforded by the Due Process Clause were not absolute but depended on the "grievousness" of the loss. In a subsequent case, *Mathews v. Eldridge*, the Court said that it would weigh three different factors to determine the procedure due: "first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the government's interest, including the function involved and the fiscal and administrative burdens that the additional or substituted procedural requirement would entail"⁴⁷ These seminal cases have been followed by a number of others involving the issue of when there is a "legitimate claim of entitlement"⁴⁸ giving rise to a property interest and, once a property interest is recognized, what type of procedure is due. In the social rights arena, it is clear that once an individual has been found to qualify for a benefit, whether that be housing, medical care, subsistence payments, or food vouchers, he or

45. Roger J. Levesque, *The Right to Education in the United States: Beyond the Lure and Lore of the Law*, 4 ANN. SURV. INT'L & COMP. L. 205, 217 (1997).

46. 397 U.S. 254 (1970).

47. 424 U.S. 319, 335 (1976).

48. Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972).

she has a right to procedure before (and after) the state can terminate the benefit. The nature of that procedure, however, varies considerably: in the seminal cases, the Supreme Court decided that termination of subsistence (AFDC) benefits requires a pre-termination oral hearing at which the individual may be represented by an attorney (but not a state-funded attorney), while termination of medical disability benefits only requires the agency to build a paper record, to which the recipient has an opportunity to respond in writing, without an oral hearing. These procedural due process rights are significant, especially because they extend to most government social assistance programs.

By contrast with procedural due process, non-retroactivity is of little use to recipients of government benefits. The doctrine of non-retroactivity (sometimes spoken of in conjunction with vested rights and legitimate expectations, neither of which, however, constitute separate legal grounds) is relevant when benefits being paid are revoked. Benefits granted under a government scheme can be threatened under a number of circumstances: (1) a wrong benefit determination was made under the existing law and regulations and the government agency wishes to recoup monies already paid or to offset the amount against future payments; (2) a government agency issues a regulation that reduces or eliminates benefits in the future or with retroactive effect; (3) the legislature enacts a law that reduces or eliminates the benefit, often with retroactive effect in the sense that worker contributions were paid to a social security scheme with the expectation of a certain level of future benefits, which were then disappointed by a change in the law. In the case of an individualized agency determination (1) or a congressional law (3), non-retroactivity principles are of no assistance. Although the government statute might limit recoupment of the benefit to, say, cases of fraudulent behavior, as opposed to agency mistake, at the constitutional level, apart from the procedural due process rights discussed above, there is no right related to substantive fairness that will assist the individual.⁴⁹ In the case of legislative changes to social security programs, the Court has found that individuals that participate in such programs do not acquire a property right, but rather are recipients of “public benefits.” As a result, legislation is scrutinized under a lax standard of “arbitrariness” (which economic legislation of this nature is almost certain to satisfy) and neither substantive due process and takings law⁵⁰ nor equal protection law,⁵¹ which considers the differ-

49. See generally Marie A. Failinger, *Contract, Gift or Covenant? A Review of the Law of Overpayments*, 36 LOY. L. REV. 89 (1990).

50. *Flemming v. Nestor*, 363 U.S. 603 (1960). On the differences between the protection of property under procedural due process, substantive due process, and takings law, see generally James Y. Stern, *Property's Constitution*, 101 Cal. L. Rev. 277 (2013).

ence in treatment between different classes of beneficiaries, affords protection to individuals. Only in the case of agency regulations may constitutional concern for non-retroactivity and preserving expectations as to what is and is not owed by the federal government be of some aid to individuals. In *Bowen v. Georgetown University Hospital*⁵² the Court examined an administrative rule setting down the formula for calculating wages for purposes of calculating overall reimbursement to medical providers under the federal old-age health insurance program (Medicare). The rule applied to services that had been provided prior to the issuance of the rule and that had already been reimbursed according to a different formula. Because the rule changed the amount of the benefit, presumably requiring that medical providers repay the amounts in excess of the new benefit formula, the Court saw this as a particularly troubling form of retroactivity and found that the agency had exceeded its statutory power in promulgating the rule. The finding was based on both the terms of the congressional statute delegating rulemaking power to the agency and a canon of statutory construction containing a presumption against retroactivity. Based on *Bowen*, an agency rule retroactively reducing welfare and other forms of subsistence benefits, without strong authorizing language in the statute, would likely fail judicial review.

IV. IMPACT OF THE INTERNATIONAL PROTECTION OF SOCIAL RIGHTS

Did your state ratify international treaties that pertain to social rights? Are they directly applicable in your domestic legal order?

Do these treaties have an impact on the national legal system? Did they trigger any changes in national legislation or practice?

Does the case-law of international bodies protecting human rights impose any changes in national legislation pertaining to social rights?

In particular, did the case-law of the European Court of Human Rights and other regional human courts have an impact on national law in the field of social rights?

What are the most important social rights cases brought from your country to international rights protecting bodies?

What are the lessons you draw from the international litigation (pertaining to social rights) started by applicants from your country?

International law on social rights has very little, if any, effect on U.S. law.⁵³ The U.S. has signed, but not ratified, the International Covenant on Economic, Social, and Cultural Rights, the Convention

51. *Richardson v. Belcher*, 404 U.S. 78 (1971).

52. 488 U.S. 204 (1988).

53. See generally Young, *supra* note 5, at 336-38.

on the Rights of the Child, and the Convention on the Rights of Persons with Disabilities. As a member of the United Nations and as a party to the International Covenant on Civil and Political Rights (ICCPR), the U.S.'s record on rights is subject to review by the Human Rights Committee (the compliance body established under the ICCPR) and the Human Rights Council (responsible for the UN's Universal Periodic Review of states' human rights records). Social rights, however, have not yet been squarely addressed in these reviews, at least in part because they are only tangentially included in the ICCPR (incidental to the right of equal protection) and because the U.S. contests that the social and economic rights listed in the Universal Declaration of Human Rights are part of international customary law.

V. SOCIAL RIGHTS IN ORDINARY LEGISLATION

To which extent does the ordinary legislation in your country ensure the protection of social rights?

Is this legislation in conformity with the national Constitution and the international instruments ratified by your country?

Are there any original legislative tools or mechanisms of protection of social rights created in your country?

There are a multitude of federal statutes that protect social rights in the United States. They are generally believed to have been introduced in three waves: during the New Deal, with legislation such as the Social Security Act which provides for old-age pensions, unemployment insurance, and assistance to needy widows and children; as part of Lyndon B. Johnson's Great Society, with programs such as Medicare and Medicaid, which afford medical care to the old and the poor; and most recently, the Affordable Care Act which guarantees universal healthcare for all citizens.⁵⁴ However, given the absence of social rights in the U.S. Constitution and the U.S.'s non-ratification of international instruments guaranteeing social rights, none of these statutes are designed to give effect to such rights.⁵⁵

VI. JUSTICIABILITY OF SOCIAL RIGHTS

Are social rights considered justiciable in your country? To which extent?

What is the role of the judge?

What are the practical effects of such justiciability?

54. Lance Gable, *The Patient Protection and Affordable Care Act, Public Health, and the Elusive Target of Human Rights*, 39 J.L. MED. & ETHICS 340, 340-42 (2011).

55. Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 15, 23 (2005).

What are the most prominent examples of social rights cases successfully brought to courts by the litigants?

To address the justiciability issue, this section analyzes the right to education at the state level, which is a particularly vibrant area of social rights litigation. In both civil law and common law, to say that a right is justiciable means that an individual has a right to go to court and sue to enforce that right. A right has little meaning if it is not justiciable. Some constitutions or laws, however, may provide for "aspirational guarantees," which direct governments to implement certain measures or programs but which do not give individuals the right to sue for enforcement. Such a guarantee, for example, might appear in a treaty calling for an international right to peace and security, which does not contemplate an individual's cause of action to enforce it.⁵⁶ This is a particularly salient question in the matter of the right to education, because not all state constitutions refer to education as a right: some, as noted above, instead grant the legislature broad plenary grants over the area, such as granting them the power to "to establish and maintain a system of public education." Such language has led some state courts, also as noted above, to deem the financing of public education a matter beyond the jurisdiction of the courts; in such instances, we would say that funding discrepancies among schools is non-justiciable. Such plenary language, however, does not always lead courts to defer to legislative decision-making; many state courts have heard education funding cases even when the state constitution contains this wording.

This section examines litigation over the following issues which arise in the context of education: discriminatory school funding, the education of juveniles in detention, the rights of homeless children, the children of undocumented workers, children receiving welfare, and the rights of disabled children.

A. *Funding*

Under the U.S. Supreme Court's analysis of the Federal Constitution in *Rodriguez*, the fact that state constitutions mention education suggests that it at least potentially has the status of a fundamental right under state law. Many states, however, have rejected the *Rodriguez* "explicit or implicit" test in this context.⁵⁷ If education lacks status as a fundamental right, discrepancies in state education funding are subjected to rational basis review, which has usually resulted in the upholding of state funding schemes.⁵⁸ Other states have

56. Katharine G. Young & Julieta Lemaitre, *The Comparative Fortunes Of The Right To Health: Two Tales of Justiciability in Colombia and South Africa*, 26 HARV. HUM. RTS. J. 179, 179 n.2 (2013).

57. Hubsch, *supra* note 44, at 1331.

58. See, e.g., *Lujan v. Colorado*, 649 P.2d 1005, 1022-23 (Colo. 1982) (constitution and interpretive case law support implicit objective of local control of school financing

found education to be a fundamental right and have subjected discriminatory funding claims to strict scrutiny.

The issue of school funding has been litigated in all fifty states; some have experienced many years of litigation.⁵⁹ Many of the state cases dealing with the right to education have presented claims that school financing is unequal and discriminatory,⁶⁰ or that the state constitution requires that school funding be sufficient to provide a minimum level of educational quality for all students.⁶¹ The difficulty of defining “minimum quality,” however, has led many state supreme courts to defer to legislative decisions about what constitutes an adequate education.⁶² Other courts, however, have sustained equal protection or education quality claims and have delegated to the legislature the implementation of the judicial definition announced. The Washington Supreme Court, for example, has asserted that it has “ample power” to enforce state educational rights.⁶³

Funding issues in state education cases arise because public schools are paid for by local property taxes, which results in better schools in districts with the highest property values. Most state courts, however, have held that poverty is not a suspect classification and that these funding schemes are therefore not subject to strict scrutiny.⁶⁴ Many courts have held that education in this respect is no different from other government services such as fire and police, which are also funded through local taxation and not subject to equal protection analysis.⁶⁵

There are some notable exceptions to this trend, however: both the California and Wyoming courts have held disparate funding of

system); *Hornbeck v. Somerset County Bd. of Educ.*, 458 A.2d 758, 788 (Md. 1983) (historical financing of public schools evidenced purpose of establishing local control over such schools); *Board of Educ. v. Nyquist*, 439 N.E.2d 359, 367 (N.Y. 1982) (state public school financing system ensured local control over educational expenditures and services in community), *appeal dismissed*, 459 U.S. 1138 (1983); *Board of Educ. v. Walter*, 390 N.E.2d 813, 820-22 (Ohio 1979) (applying local taxes to school financing system satisfies purpose of local control of education) (quoting *Wright v. Council of Emporia*, 407 U.S. 451, 478 (1972) (Berger, J., dissenting), *cert. denied*, 444 U.S. 1015 (1980)); *Olsen v. State*, 554 P.2d 139, 146-48 (Or. 1976) (objective of school financing system is to ensure control by local voters); *Buse v. Smith*, 247 N.W.2d 141, 150-55 (Wis. 1976) (constitutional provision that town and city taxes will be applied to local district education system is proof of objective of local control over school system).

59. John Dayton & Anne Dupre, *School Funding Litigation: Who's Winning The War?*, 57 VAND. L. REV. 2351, 2355 (2004).

60. Hubsch, *supra* note 44, at 1325.

61. *Id.*

62. *See, e.g., McDaniel v. Thomas*, 285 S.E.2d 156, 165 (Ga. 1981).

63. *Seattle School District v. State*, 585 P.2d 71 (Wash. 1971).

64. *See, e.g., Lujan v. Colorado State Bd. of Educ.*, 649 P.2d 1005, 1019-22 (Colo. 1982) (wealth rejected as suspect classification); *Thompson v. Engelking*, 537 P.2d 635, 645-46 (Idaho 1975) (same).

65. *See, e.g., Robinson v. Cahill*, 303 A.2d 273, 283 (N.J.), *cert. denied*, 414 U.S. 976 (1973).

education to trigger strict scrutiny analysis.⁶⁶ In the landmark case of *Serrano v. Priest*,⁶⁷ the California Supreme Court ruled that the quality of a child's education must be a function of the wealth of the state as a whole, not of the wealth of the school's local community.⁶⁸ The Court held that education was a fundamental right in California, and held that strict scrutiny would apply to the state's system of public school funding.⁶⁹ It then noted that the Supreme Court had already protected the right to vote and the right to defense in criminal cases from unequal protection based on wealth, and determined that education was a right deserving of the same level of protection.⁷⁰ It concluded the state's system of education financing discriminated against people on the basis of wealth in violation of the equal protection clause of the Federal Constitution.⁷¹

Some other state courts followed suit in strengthening the right to education. In 1972, the New Jersey Supreme Court ruled that state's system of school funding was unconstitutional based on the state's education mandate.⁷² This approach became the new model for litigants pushing states to overturn unequal state funding of education.⁷³

In 1979, the West Virginia Supreme Court declared that education was a fundamental right in that state, subject to strict scrutiny, and in passing sharply criticized the holding in *Rodriguez* with respect to the Federal Constitution: it observed that even the General Assembly of the United Nations "appears to proclaim education to be a fundamental right of everyone, at least on this planet."⁷⁴

The Kentucky Supreme Court ruled in 1989 that the state's school funding system was unconstitutional because:

Without exception, [witnesses] testified that there is great disparity in the poor and the more affluent school districts with regard to classroom teachers' pay; provision of basic educational materials; student-teacher ratio; curriculum; quality of basic management; size, adequacy and condition of school physical plants; and per year expenditure per student

66. *Serrano v. Priest*, 487 P.2d 1241, 1250-55 (Cal.1971) (school financing system based on district tax collection created suspect classifications where wealth differed between districts); *Washakie County Sch. Dist. v. Herschler*, 606 P.2d 310, 334 (Wyo.) (unequal distribution of state funds to school districts on basis of wealth created unconstitutional suspect classification) (citing *Serrano*, 487 P.2d at 1250), *cert. denied*, 449 U.S. 824 (1980)).

67. 487 P.2d 1241 (Cal. 1971).

68. *Serrano*, 487 P.2d at 1244.

69. *Id.* at 1257.

70. *Id.* at 1258.

71. *Id.*

72. *Robinson v. Cahill*, 303 A.2d 273, 282 (N.J. 1973).

73. *Dayton & Dupre*, *supra* note 59, at 2365.

74. 255 S.E.2d 859, 864 n.5 (W. Va. 1979).

. . . . The quality of education in the poorer school districts is substantially less in most, if not all, of the above categories.⁷⁵

In 1993, Tennessee determined that its school funding system failed even a rational basis test. Recognizing a “direct correlation between dollars expended and the quality of education a student receives,” the state Supreme Court found that funding inequity caused educational harm to students in economically disadvantaged districts.⁷⁶

Implementing rights requires money; school funding based on local property taxes is inherently unequal. Some state courts have been willing to intervene in this issue, while others defer to the legislature.

B. Juveniles in Detention

Many institutions for juvenile offenders in the United States fail to provide even basic educational services; in others, the classes that are available meet irregularly, fail to satisfy state-mandated minimum requirements for instructional time, and follow no coherent curriculum.⁷⁷ Yet these juveniles are not exempt from coverage of state constitutional guarantees of the right to education. In fact, this population is arguably in particular need of the state’s education resources: juveniles in detention are much more likely to have learning disabilities than those in the overall population.⁷⁸ Among other things, jurisdictional confusion adds to their plight: in many states, it is unclear whether the state education agency or the department of juvenile justice has oversight of the education of children in detention.⁷⁹

Judicial decisions and state correctional facilities offer little assurance of education to incarcerated youth. For example, Pennsylvania law provides that an expelled minor under the age of seventeen has a right only to very minimal education, about five hours per week, and one older than seventeen has no right to educa-

75. *Rose v. Council for Better Ed.*, 790 S.W.2d 186, 190 (Ky. 1989).

76. *Tennessee Small School Systems v. McWherter*, 851 S.W.2d 139, 144 (Tenn. 1993).

77. HUMAN RIGHTS WATCH, *HIGH COUNTRY LOCKUP: CHILDREN IN CONFINEMENT IN COLORADO* 46 (1997) (reporting observations of Human Rights Watch visit to facility and audit conducted by Colorado Division of Youth Services).

78. Harriet R. Morrison & Beverly D. Epps, *Warehousing or Rehabilitation? Public Schooling in the Juvenile Justice System*, 71 J. NEGRO EDUC. 218, 220-21 (2002).; OPEN SOCIETY INSTITUTE, RESEARCH BRIEF NO. 2, *EDUCATION AS CRIME PREVENTION* 2-3 (1997), available at http://www.prisonpolicy.org/scans/research_brief_2.pdf.

79. See BRUCE I. WOLFORD, *JUVENILE JUSTICE EDUCATION: “WHO IS EDUCATING THE YOUTH”* 4 (2000), available at http://www.edjj.org/Publications/educating_youth.pdf; *JUVENILE JUSTICE EDUCATIONAL ENHANCEMENT PROGRAM, 2004 ANNUAL REPORT TO THE FLORIDA DEPARTMENT OF EDUCATION* 84 (2004), available at <http://www.criminologycenter.fsu.edu/jjeep/research-annual-2004.php>.

tion at all.⁸⁰ Maryland's correctional statutes make no provision for the education of youth whatsoever.⁸¹ And the Supreme Court of the State of Washington recently ruled that incarcerated children over the age of 18 have no right to basic education, holding that the state's "Basic Education Act" (requiring that all children between five and twenty-one years old have access to basic education) did not apply to incarcerated youth.⁸²

C. *Homeless Children*

The education of homeless children is another issue implicating the implementation of education as a right. Due to transportation, legal, social, bureaucratic and familial barriers, less than fifty percent of homeless children in the United States attend school.⁸³ To the extent that these barriers are part of the state apparatus, and to the extent that the state has failed to take measures to alleviate them, they implicate the state's enforcement of this right.

Legal barriers stem from state residency and documentation (for example immunization records) requirements for school attendance. Some school districts in which homeless shelters are located designate families as non-residents to prevent the children from attending school.⁸⁴

In 1987, Congress passed the McKinney-Vento Act to address the problem of homelessness; Title VII of the Act addresses the problems of homeless children in enrolling in school and receiving an education. Its intent is "to ensure that all homeless children and youth have access to the same free, appropriate public education, including a public preschool education, as provided to other children and youth."⁸⁵ The Act was re-authorized as part of the No Child Left Behind Act of 2001.⁸⁶ The Act requires that each state educational agency establish an Office of State Coordinator for the Education of Homeless Children and Youth. This office is responsible for supervising the implementation of the Act, including "providing technical

80. *Brian B. v. Commonwealth of Pennsylvania Dep't of Educ.*, 230 F.3d 582 (3d Cir. 2000) (citing 22 Pa. Code § 12.6(e)).

81. Michael Bochenek, *No Minor Matter: Children in Maryland's Jails*, HUMAN RIGHTS WATCH, <http://www.hrw.org/reports/1999/maryland/Maryland-08.htm> (last visited May 3, 2003).

82. *Tunstall v. Bergeson*, 5 P.3d 691, 697 (Wash. 2000).

83. H.R. CONF. REP. NO. 174, 100th Cong., 1st Sess. 93 (1987), reprinted in 1987 U.S.C.C.A.N. 441, 472; see also Jonathan Kozol, *A Reporter at Large, The Homeless and Their Children*, NEW YORKER, Jan. 25, 1988, at 65, 80 (asserting that the "transient existence [of homeless children] cuts them from the rolls").

84. NATIONAL COALITION FOR THE HOMELESS, *BROKEN LIVES: DENIAL OF EDUCATION TO HOMELESS CHILDREN* 5 (1987).

85. UNITED STATES DEP'T OF EDUC., *REPORT TO CONGRESS, FISCAL YEAR 2000: EDUCATION FOR HOMELESS CHILDREN AND YOUTH* 4 (2000).

86. No Child Left Behind Act, Pub. L. No. 107-110, Tit. X, §1032, 115 Stat. 1425 (2002).

assistance, resources, coordination, data collection and overseeing compliance for all local educational agencies.”⁸⁷ The Act also requires local educational agencies (school districts) to appoint staff liaisons to ensure that homeless students are properly identified, enrolled, and attending schools.⁸⁸ Problems such as lack of funding, inadequate monitoring of state compliance, and state and school district opt-out options, however, have impaired the Act’s effectiveness.⁸⁹ Moreover, “the extent of the right to sue for enforcement remains unclear.”⁹⁰ In addition, several states have adopted statutes or regulations to ensure access to education for homeless young people.⁹¹

D. *Children of Undocumented Workers*

The seminal case with respect to undocumented children is *Plyler v. Doe*,⁹² which stemmed from the fact that in May, 1975, the Texas legislature voted to withhold funds from school districts in the state which paid for the education of children “not legally admitted” into the United States and authorized local school districts to deny school enrollment to these children.⁹³ Plaintiffs, a class of school-age children of Mexican origin who could not establish that they had been legally admitted to the United States, filed suit, claiming violations of Equal Protection through the Fourteenth Amendment. In granting a permanent injunction, the U.S. Supreme Court acknowledged that education was not an enumerated fundamental right, but went on to say that neither was it “some governmental ‘benefit’ indistinguishable from other forms of other so-called social welfare legislation.”⁹⁴ The Court ascribed education’s “elevated importance” to its fundamental role in maintaining the fabric of our society and described its denial to some isolated groups of children as an “affront to one of the goals of the Equal Protection Clause: the abolition of governmental barriers to presenting unreasonable obstacles to advancement on the basis of individual merit.”⁹⁵ The *Plyler* decision established the right to an education for the children of undocumented residents. Nonetheless, since this decision, several states have tried to undermine the

87. BARBARA J. DUFFIELD ET AL., AMERICAN BAR ASSOCIATION, EDUCATING CHILDREN WITHOUT HOUSING 7-8 (Amy E. Horton-Newell et al. eds., 3rd ed. 2009).

88. *Id.* at 13.

89. Comment, *For Better or For Worse?: A Closer Look at the Federal Government’s Proposal To Provide Adequate Educational Opportunities For Homeless Children*, 51 *How. L.J.* 863, 880 (2008).

90. Clifton S. Tanabe & Ian Hippensteele Moblee, *The Forgotten Students: The Implications of Federal Homeless Education Policy For Children in Hawaii*, 2011 *B.Y.U. EDUC. & L.J.* 51, 58 (2011).

91. *See, e.g.*, Colo. Rev. Stat. §§ 22-1-102, 22-1-102.5, 22-33-103.5 (2002).

92. *Plyler v. Doe*, 457 U.S. 202, 220 (1982).

93. *Id.*

94. *Id.* at 221.

95. *Id.* at 222.

ruling and sought ways to turn these children away from public schools.⁹⁶

There are an estimated two million school age children of undocumented parents in the United States today.⁹⁷ The fight for their educational rights has consisted largely of the fight to enforce *Plyler* at the local level.⁹⁸ In 1994, for example, California voters passed Proposition 87, which, among a host of other restrictions on the lives of the undocumented, banned undocumented children from public education.⁹⁹ Although a federal judge found almost all aspects of the law unconstitutional on either *Plyler* or preemption grounds, and although the plaintiffs settled the case before the Ninth Circuit could rule on the substantive issues, Proposition 87 set off a wave of laws in several other states restricting the rights of the undocumented and their children. Many of the biggest obstacles to the right to education appear at the local school district level, because schools themselves administer the law.¹⁰⁰ Several schools, for example, have tried to require social security numbers and parents' driver's licenses as a way to uncover lack of documentation.¹⁰¹

Other approaches have been less systemic: in Illinois, for example, a school refused to enroll a student whose B-2 Tourist visa had expired;¹⁰² in 1992, INS authorities in El Paso, Texas, harassed a group of students suspected of being undocumented by "driving over the football practice field and baseball diamond, entering the football locker rooms, surveilling with binoculars from the football stadium, and using binoculars to watch flag girls practicing on campus;"¹⁰³ in 2004, administrators at a school in northern New Mexico turned three of its own students over to the Border Patrol when it found the students just beyond school grounds.¹⁰⁴

Other communities, notably those in border states, however, have supported the rights of undocumented children to go to public school. A recent survey of school personnel in six Arizona public

96. Maria L. Ontiveros & Joshua R. Drexler, *The Thirteenth Amendment and Access To Education For Children Of Undocumented Workers: A New Look at Plyler v. Doe*, 42 U.S.F. L. REV. 1045, 1046 (2008).

97. JEFFREY S. PASSEL, PEW HISPANIC CTR., *SIZE AND CHARACTERISTICS OF THE UNAUTHORIZED MIGRANT POPULATION IN THE U.S.: ESTIMATES BASED ON THE MARCH 2005 CURRENT POPULATION SURVEY (2007)* (estimating that according to the 2005 census, 1.8 million undocumented children resided in the United States).

98. Michael A. Olivas, *Immigration Related State and Local Ordinances: Preemption, Prejudice, and the Proper Role for Enforcement*, U. CHI. LEGAL F. 27, 36-45 (2007).

99. CALIFORNIA BALLOT PAMPHLET: GENERAL ELECTION NOVEMBER 8, 1994, at 92 (1994) (adding Cal Educ. Code § 48215(a)).

100. Ontiveros & Drexler, *supra* note 96, at 1055.

101. Olivas, *supra* note 98, at 39.

102. Rosalind Rossi, *State Strips Schools of \$3.5 million: District Following Law, It Claims, by Refusing to Enroll Immigrant*, CHI. SUN-TIMES, Feb. 24, 2006, at News-8.

103. *Murillo v. Musegades*, 809 F. Supp. 487, 490-96 (W.D. Tex. 1992).

104. Amy Miller, *APS Safe for Migrant Students*, ALBUQ. J., June 2, 2006, at A1.

school districts found that the vast majority with an opinion on the issue supported the law established by Plyler and believed “a law prohibiting undocumented students from attending public schools would have a negative (36%) or very negative (35%) impact on the relationship between their school and the community.”¹⁰⁵

E. Children Receiving Welfare

Many state laws make it difficult or impossible for children over a certain age who depend on welfare to complete their high school education.¹⁰⁶ New York law, for example, requires that children age sixteen or older who rely on welfare benefits be assigned to placements with the “Work Experience Program,” while the law requires that those nineteen or under who are in secondary school receive work assignments which do not interfere with their schoolwork, those over nineteen who have not finished high school receive no such accommodation.¹⁰⁷ Thus, the work assignments which are required for their receipt of benefits often take these children away from school during class times and conflict with class schedules.¹⁰⁸ Because they depend on state assistance to meet their basic needs, foregoing benefits to stay in school is not a realistic option.¹⁰⁹

The state of the law is not completely clear. In 1998, a group of high school students in New York City sued the city and the state seeking to enjoin them from assigning those who attended school work placements that interfered with their class and study requirements.¹¹⁰ Although the trial court judge granted a preliminary injunction, the Appellate Division reversed on the grounds that the plaintiffs had not exhausted their administrative remedies;¹¹¹ by the time the case made its way back to the appellate court, the plaintiffs had either dropped out of school or graduated, making the case moot.¹¹² The state Constitution, however, may limit the discretion of state officials to impose welfare requirements which interfere with the recipient’s ability to attend school.¹¹³

On the other hand, the Personal Responsibility and Work Opportunity Reconciliation Act (PRWORA) passed in 1996¹¹⁴ imposes

105. Nina Rabin et al., *Understanding Plyler’s Legacy: Voices from Border Schools*, 37 J.L. & EDUC. 15, 17 (2008).

106. See, e.g., Sarah Fleisch Bodack, *Can New York City Prevent Welfare Recipients From Finishing High School?*, 34 COLUM. J.L. & SOC. PROBS. 203 (2000).

107. N.Y. Jur. 2d Public Welfare and Old Age Assistance, § 79, Public assistance employment programs (2013).

108. See, e.g., *Matthews v. Barrios-Paoli*, 676 N.Y.S.2d 757 (Sup. Ct. 1998).

109. Bodack, *supra* note 106, at 204.

110. *Matthews*, 676 N.Y.S.2d at 757.

111. *Matthews v. Barrios-Paoli*, 270 A.D.2d 152 (N.Y. App. Div. 2000).

112. Bodack, *supra* note 106, 211 n. 69 (2000).

113. DON FRIEDMAN, AN ADVOCATE’S GUIDE TO THE WELFARE WORK RULES, EMPIRE JUSTICE CENTER (2000).

114. 42 U.S.C. § 652(k).

school attendance requirements on some at-risk groups of young people: for example, it requires teen mothers to attend school in order to receive welfare and does not impose time limits or work requirements while they are full-time students. The Act left many implementation details to the states, however, and the states vary considerably in their support of school attendance, especially for those over eighteen who have not finished high school.

F. Children with Mental and Physical Disabilities

At the Federal level, the Individuals with Disabilities Education Act (IDEA), guarantees to all disabled children (who live in states that choose to receive the associated federal funds) a right to a “free, appropriate, public education” (FAPE).¹¹⁵ The definition of a “FAPE” has been the source of considerable litigation;¹¹⁶ parents and school officials often disagree about what constitutes an “appropriate” education.¹¹⁷ The law itself defines FAPE as “special education and related services that have been provided at public expense . . . meet the standards of the state educational agency . . . include an appropriate preschool, elementary school, or secondary school education . . . and are provided in conformity with [an] individualized education program”¹¹⁸ but fails to define “appropriate.”

The terrain for the legal debate was laid out by the Supreme Court in *Board of Education of the Hendrick Hudson Central School District v. Rowley*.¹¹⁹ In *Rowley*, the Court held that the “appropriate” standard did not require a school district to offer a hearing disabled child a sign language interpreter, employing instead a minimalist interpretation of the law which required only that the disabled child receive “some educational benefit.”¹²⁰

Some courts have adhered to this minimalist interpretation. For example, the First Circuit held that a school was not required to implement a curriculum specially designed for a child with autism because the school’s regular curriculum was “adequate” in giving the child *some* educational benefit, and refused to address the parent’s claim that the specialized curriculum would better serve the child’s

115. 20 U.S.C. §§1400-1482 (2006).

116. See, e.g., Dixie Snow Huefner, *Updating the FAPE Standard Under IDEA*, 37 J.L. & EDUC. 367, 377-78 (2001).

117. David Ferster, *Broken Promises: When Does a School’s Failure To Implement an Individualized Education Program Deny a Disabled Student a Free and Appropriate Public Education*, 28 BUFF. PUB. INT. L.J. 71, 76 (2010).

118. 20 U.S.C. § 1401(9) (2006) (emphasis added).

119. 458 U.S. 176 (1982).

120. *Id.* at 200.

needs.¹²¹ This “some or adequate benefit” test has been adopted by the First, Eighth, Tenth, Eleventh and D.C. Circuits.¹²²

Other courts, however, have read the law less minimally, and have ratcheted up the FAPE standard to a “meaningful benefit” standard, under which FAPE requires “significant learning” and calls for “more than trivial educational benefit.”¹²³ In an autism case paralleling the First Circuit’s, for example, the Sixth Circuit compared the school’s curriculum for autistic children with one preferred by the parents and stated that “there is a point at which the difference in outcomes between two methods can be so great that provision of the lesser program could amount to a denial of a FAPE.”¹²⁴ The Second, Third, Fourth, Fifth, Sixth, and Ninth Circuits have adopted this interpretation.¹²⁵

While it has not expanded the definition of a FAPE since 1975, Congress has passed several amendments to IDEA and added considerably to its funding over the years; this, combined with evolving standards for special education in the years since IDEA first became law, have together led most commentators to agree that the “meaningful benefit standard” reflects the underlying meaning and purpose of the law.¹²⁶

All of these regimes conform to the requirements of the Federal Constitution; as discussed, the state constitutions often provide more protection for this right. The International Covenant on Economic, Social, and Cultural Rights, which the United States has signed but not ratified, recognizes the right of everyone to free education for the primary level and calls for “the progressive introduction of free education” for the secondary and higher levels.¹²⁷ It also calls on signatory states to take specific steps to achieve these goals, including providing free, universal and compulsory primary education, generally available and accessible secondary education, including vocational training, and accessible higher education, all of which are to be available to all without discrimination.

121. L.T. T.B. ex rel. N.B. v. Warwick School Committee, 361 F.3d 80, 86 (1st Cir. 2004).

122. Philip T.K. Daniel & Jill Meinhardt, Commentary, *Valuing the Education of Students with Disabilities: Has Government Legislation Caused a Reinterpretation of a Free Appropriate Public Education?*, 222 ED. L. REP. 515, 519 (2007) (summarizing range of approaches in the courts).

123. See e.g., Ridgewood Bd. of Educ. v. N.E. ex rel. M.E., 172 F.3d 238, 247 (3d Cir. 1999) (stating IEP must provide “meaningful benefit”); Deal v. Hamilton County Bd. of Educ., 392 F.3d 840, 861-62 (6th Cir. 2004) (“The IDEA requires an IEP to confer a ‘meaningful educational benefit’ . . . gauged in relation to the potential of the child at issue.”).

124. Deal, 392 F.3d at 862.

125. Daniel & Meinhardt, *supra* note 122, at 519 (summarizing range of approaches in the courts).

126. David Ferster, *supra* note 117, at 76, 86.

127. International Covenant on Economic, Social and Cultural Rights Art 13, §1.

The United States is not bound by the Covenant, and, as the above discussion indicates, may fail to fully to comply in certain respects. While primary education in all the states is free, compliance issues may arise with respect to the access of several disadvantaged groups to an education which, as the Covenant requires, is "directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms" and enable all persons to participate effectively in a free society, promote understanding, tolerance and friendship among all nations and all racial, ethnic or religious groups."¹²⁸ As noted above, homeless children, children of the undocumented, and those dependent on welfare may have their access to a fully effective education affirmatively impaired by state or local laws and regulations, or simply undermined by failure of local school authorities to accommodate them by identifying them, providing transportation, or by monitoring local school compliance.

VII. INSTITUTIONAL GUARANTEES OF SOCIAL RIGHTS

Which national bodies are the institutional guarantors of social rights?

Are there any specific bodies created especially for the protection of social rights? What are their powers?

How do you evaluate the effectiveness of these national bodies?

To the extent that social rights exist in U.S. law, they are mostly guaranteed by courts. Individual federal agencies responsible for administering social programs operate pursuant to elaborate procedural requirements and, like all government agencies, they have Inspector Generals who are responsible for conducting audits designed to protect both the public interest and individuals. However, in contrast with other legal systems, there are no "Ombudsmen" dedicated to protecting social rights in general or specific social rights such as the rights of the child. State law follows the same pattern as Federal law: the site for the enforcement of social rights are the courts of law.

VIII. SOCIAL RIGHTS AND COMPARATIVE LAW

Did your national legal system influence foreign legal systems in the area of social rights?

Did other foreign legal systems influence your national legal system in the area of social rights?

Can you give examples of provisions, principles or institutions (in the area of social rights) borrowed from other legal systems?

128. *Id.*

Do your domestic courts rights quote judgments or legislation from other jurisdictions when adjudicating on social rights?

The U.S.'s skeptical attitude towards social rights has influenced other jurisdictions in at least two ways. First, the feeble social rights in federal constitutional law and the U.S.'s opposition to international instruments on social and economic rights has undermined the status of social rights in international law.¹²⁹ Second, U.S. constitutional law and legal scholars have been influential in the drafting of new constitutions in democratizing nations and the lack of social rights in the U.S. constitutional template, as well as the ambivalent attitude of many legal scholars, may have discouraged some jurisdictions from including strong, or strongly enforceable, social rights.¹³⁰

129. See Philip Alston, *U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy*, 84 AM. J. INT'L L. 365 (1990).

130. See, e.g., Cass R. Sunstein, *Against Positive Rights*, in WESTERN RIGHTS?: POST-COMMUNIST APPLICATION 225, 225-32 (András Sajó ed., 1996).

JOHN C. REITZ*

Recognition of Foreign Administrative Acts†

TOPIC IV. D

The nature of the legal regime governing recognition in the United States of foreign administrative acts (administrative decisions with respect to specific individuals) varies sharply depending on whether the foreign administrative acts in question are covered by some form of international agreement requiring recognition. The most prevalent form of such agreement is the mutual recognition agreement (MRA). MRAs are bilateral and multilateral treaties that may, among other functions, commit each member nation to give effect to the assessment by the other partner nations or by private bodies authorized to make such assessments concerning the conformity with various product standards or health and safety, consumer or environmental standards for goods and services imported from those partner nations. The point is to reduce duplicative conformity assessments in international trade and international transportation. Some of these kinds of assessments constitute administrative acts in civil law countries, so MRAs in effect may require, as a matter of public international law, the recognition of foreign administrative acts involved in conformity assessment and certification. The United States has entered into numerous MRAs, and generally implements its obligations under these agreements through statutes and regulations. When there is an applicable MRA, there may therefore be a clear basis both in international law and domestic law requiring recognition. In the absence of such an international agreement and implementing legislation, recognition depends on the common law, which also provides a basis for recognition, in this case to avoid duplicative litigation. The common law rule of recognition is subject to some uncertainty but it imposes a general test of whether there was a full and fair opportunity to litigate. Where the act of state doctrine applies, it expands the range of administrative acts that will be recognized by eliminating the defense of public policy. The net effect

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of the common law of recognition is to enforce foreign administrative acts that impose an obligation to pay money, but not if the obligation to pay is a fine or penalty, and to give preclusive effect to the findings of fact underlying a foreign administrative act under the doctrine of collateral estoppel, but only if the factual issue in the United States is identical to the issue in the foreign country, a condition that appears to be fairly rare, even in the case of determinations of citizenship or family status.

The report proceeds in three main sections. Section I briefly defines key terms relevant to this topic. Section II addresses recognition under MRAs and similar international agreements. Section III sets out the common law basis for a rule of recognition that would apply to all other situations, defines the common law test and the chief defenses or exceptions that would apply, examines the somewhat surprising ways in which the act of state doctrine strengthens the common law rule of recognition, and, by way of a summary of common law recognition, describes the chief kinds of cases to which the various forms of common law recognition may apply.

I. DEFINITIONS OF KEY TERMS

A. *Federal and State Administrative Law*

The subject of recognition of foreign administrative acts raises at the outset some definitional problems. U.S. administrative law is not constructed to the same extent as administrative law in the civil law tradition on the basis of the kind of abstraction and generalization that characterizes legal science. For example, instead of defining the exercise of public power in an abstract way in order to subject all exercises of public power to standard rules of procedure, U.S. law proceeds with particularity. Reflecting the U.S. form of federalism, the chief source of generally applicable administrative law at the federal level, the federal Administrative Procedure Act (APA), applies only to “agencies” of the federal government, defined as “authorities” of the federal government, except for a specific list of exempted authorities, such as Congress, the federal courts, military courts, territorial governments, and so forth.¹ It does not apply to bodies of state or local government, which are largely subject to their own bodies of administrative law, though there are many similarities among the federal and the various different versions of state APAs. The due process clause of the federal Constitution provides a modicum of uniformity because it applies to all levels of government in the United States,²

1. 5 U.S.C. § 551(1)(2012).

2. The Fifth Amendment’s due process clause in the federal Constitution applies to the federal government, and the Fourteenth Amendment’s due process clause applies to the states.

but the APAs lay down many procedural requirements that are not clearly required by due process. Administrative law at the state level may differ in important ways from federal administrative law or the law of other states.

B. *Administrative Act*

U.S. law does not use the term “administrative act.” Nevertheless, for many purposes, we can say that the U.S. federal administrative law concept of an “order” is largely the functional equivalent of the civil law tradition’s concept of an administrative act, which I understand to refer to an action by an administrative body determining the public law rights and obligations of specific, identifiable parties in concrete situations.³

There are, however, two important ways in which the U.S. concept of an order is quite different from that of an administrative act in the civil law. First, private parties are not subject to the APA, even if they in some sense exercise public power, and due process applies to action by non-governmental bodies only in rather extreme cases.⁴

Second, administrative acts in countries that provide for *de novo* trial of the legal and factual issues upon judicial review may actually provide greater opportunities for the private parties to contest the basis for the government’s action than U.S. law does in many cases. Under U.S. federal law, an “order” is the product of “adjudication”⁵ which usually involves decision, in the first instance, by lower level officials within the administrative agencies themselves, subject to final decision by the heads of the agencies, and further subject to

3. Cf. NIGEL G. FOSTER & SATISH SULE, *GERMAN LEGAL SYSTEM AND LAWS* 259 (3d ed. 2002) (administrative act is “an order, decision or other sovereign measure . . . taken by an authority for the regulation of an individual case in the sphere of public law and directed at immediate external legal consequence.”).

The federal APA definitions may seem to suggest that an order is not similarly limited to a decision with respect to individual persons. The APA defines an order as “the whole or a part of a final disposition . . . of an agency in a matter other than rule making but including licensing,” 5 U.S.C. § 551(6) (2012), and “rule” as “the whole or a part of an agency statement of general or particular applicability and future effect . . .” *Id.* § 551(4)(emphasis added). The word “particular,” however, was added to the definition of rule only in order to accommodate the pre-APA practice of treating all rate-making proceedings as rulemakings, even if they involved setting rates for a single company. Leaving single company rate-makings aside as a historical anomaly permits us to read the definition of rule as covering normative statements of general and the opposite, order, by contrast, as covering specific addressees. See MICHAEL ASIMOW & RONALD M. LEVIN, *STATE AND FEDERAL ADMINISTRATIVE LAW* 200 (3d ed. 2009).

4. See, e.g., *Rendell-Baker v. Kohn*, 457 U.S. 830 (1982)(contract with the government to fulfill functions that the government would otherwise provide itself does not subject the private party to the strictures of the Constitution, even though it receives most of its funding from governmental sources, is subject to extensive regulation, and could be said to be performing a public function).

5. “[A]djudication’ means agency process for the formulation of an order.” 5 U.S.C. § 551 (7)(2012).

judicial review by regular courts.⁶ For many types of agency determinations, there is a statute requiring that the agency adjudication be conducted under the APA's formal level of process, and in that case, the adjudication must follow many of the essential requirements of court process.⁷ Subsequent judicial review, if any, is restricted to the record made by the agency and is moderately deferential to the agency, both with respect to the facts and, especially in cases subject to formal process, the law upon which the agency relies.⁸ If no statute requires formal process and due process does not apply, the requirements for agency process are quite minimal,⁹ but judicial review is just as restricted, with the result that private parties' opportunities to challenge the agency's view of the facts and its exercise of discretion pursuant to the law are restricted to a process in which the agency enjoys a moderately strong presumption in its favor and no new evidence can be introduced. This characteristic of U.S. administrative law means that orders issued in cases not covered by due process or formal process under the APA are not the functional equivalent of administrative acts in countries that provide for *de novo* judicial review of administrative acts. This point is relevant to understanding the common law tests for recognition and will be further discussed in Section III. C.

C. *Recognition*

The topic of this report is the "recognition" of a foreign administrative act. Recognition is here understood to have the several meanings that attach to the use of the word in connection with court judgments. The topic also clearly includes enforcement, which gives the foreign act or judgment the same preclusive effect as a judgment of a court of the state where enforcement is sought, and while it is customary to distinguish between enforcement and recognition,¹⁰ for simplicity of expression, this report will follow the usage of the title of this topic and use recognition to refer both to enforcement and the other treatments that are commonly spoken of as recognition.

6. *See id.* §§ 701-706 (2012).

7. *See id.* §§ 554, 556, 557 (2012).

8. *See id.* § 706(2)(E) ("substantial evidence" test for review of fact-finding in formal process); *Camp v. Pitts*, 411 U.S. 138 (1973) (judicial review based on agency record, not on new evidence). Moderate deference to agency interpretations of the law, especially—but not only—those imposed through formal adjudication and notice-and-comment rulemaking, is required wherever the relevant statute is ambiguous or vague or otherwise can be read as delegating policy-making discretion to the agency. *See* 5 U.S.C. § 706(2)(A) (2012) ("arbitrary and capricious" general standard for review of rationality of agency action); *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984); *United States v. Mead Corp.*, 533 U.S. 218 (2001).

9. *See, e.g., Pension Benefit Guaranty Corporation v. LTV, Inc.*, 496 U.S. 633 (1990).

10. *See* 2 ALBERT A. EHRENZWEIG & ERIK JAYME, *PRIVATE INTERNATIONAL LAW* 59-66 (1973); PETER HAY, *ET AL.*, *CONFLICT OF LAWS* 1436-39 (5th ed. 2010).

The significant forms of recognition involve preclusion, and I would argue to limit the term in that way. For enforcement, the judgment debtor has to sue on the foreign act or judgment, but the foreign decision is treated as preclusive with respect to the claims and defenses in the foreign proceeding, so the court does not permit the parties to re-litigate the underlying issues.¹¹ Recognition traditionally refers to *res judicata* or collateral estoppel. I argue that for foreign administrative acts, *res judicata* is limited to acts imposing a monetary obligation because they are the only foreign acts on which suit can be brought in U.S. courts.¹² Collateral estoppel means treating the conclusions of law or findings of fact made in the course of deciding a case or issuing an administrative act or order as binding.¹³ There is some dispute about whether to regard non-preclusive treatment of foreign court judgments or administrative acts as a form of recognition,¹⁴ and Section V will consider this issue in more detail since it appears that in many cases, foreign administrative acts are essentially regarded as mere evidence of factual issues determined in issuing the foreign act.

It is also important to distinguish the enforcement of a foreign administrative act or court decision from enforcement of a U.S. domestic administrative order. In the case of federal law, if a domestic administrative order requires or forbids specific action by a regulated party and that regulated party is not willing to comply with the agency's order, the agency must sue in federal court to enforce its order. This kind of lawsuit can provide an alternative form of judicial review, so unless a court has already provided judicial review of the order, the suit to enforce provides the same restricted opportunity to re-litigate the issues that is provided by other forms of judicial review of administrative action.¹⁵ Thus enforcement of a domestic administrative order does not normally involve giving the order preclusive effect unless there has already been judicial review whereas enforcement of a foreign administrative act means giving the foreign act preclusive effect.

11. Although there are some summary proceedings for the enforcement of sister state judgments and a form of registration of federal judgments in districts other than where it was rendered, there is no special procedure like that of *exequatur* in many civil law countries for registering judgments of foreign nations for enforcement in U.S. courts, but the provisions for summary judgment may make the U.S. procedure roughly just as expeditious. 2 EHRENZWEIG & JAYME, *supra* note 10, 59-60; HAY ET AL., *supra* note 10, at 1446.

12. See *infra* notes 89-90 and accompanying text.

13. 2 EHRENZWEIG & JAYME, *supra* note 10, 59-60; HAY ET AL., *supra* note 10, at 1436-39.

14. Compare 2 EHRENZWEIG & JAYME, *supra* note 10, at 58-66 (recognition includes non-preclusive forms) with HAY ET AL., *supra* note 10, at 1442-51 (discussing preclusion only).

15. 5 U.S.C. § 703 (2012)(last sentence). For the limits on judicial review, see text at *supra* note 8.

II. RECOGNITION OF FOREIGN ADMINISTRATIVE ACTS THROUGH MUTUAL RECOGNITION AGREEMENTS

The most straightforward and at least potentially the most important way in which foreign administrative acts can be recognized in the United States is pursuant to international agreements that obligate the United States to recognize certain foreign administrative acts. MRAs, which affect international trade, are the most common examples. MRAs may commit each participating nation to recognize, with respect to goods and services imported from partner nations under the MRA, the assessments made in the partner nations of the conformity of goods or services under various technical standards and standards concerning health, safety, and consumer or environmental standards. MRAs may thus require recognition of foreign administrative acts if the relevant conformity assessments are carried out by government personnel. However, much conformity assessment, especially under technical standards, is carried out by non-governmental conformity assessment bodies (CABs), both in the U.S. and elsewhere,¹⁶ and these CABs may also enter into agreements that may also be referred to as “MRAs” with foreign counterparts.¹⁷ While the assessments of private CABs are clearly not administrative orders under U.S. state or federal APAs and are probably also not subject to constitutional due process,¹⁸ perhaps in some other countries their assessments would be regarded as administrative acts. There are some agreements very similar to MRAs, even if they do not use that term, that appear to call for recognition of conformity assessments by foreign governmental bodies. One of the best examples concerns the Federal Aviation Administration (FAA), which has the statutory responsibility to determine the airworthiness of foreign aircraft permitted to fly into U.S. airports.¹⁹ The FAA recognizes certain foreign determinations of airworthiness through the process of concluding bilateral agreements to that effect with certain other countries. Obtaining these so-called Bilateral Aviation Safety Agreements (BASA) is an eight-step process that includes sending a diplomatic note, approval in the U.S. by the Interagency Group for

16. Mark R. Barron, Comment, *Creating Consumer Confidence or Confusion? The Role of Product Certification Marks in the Market Today*, 11 MARQ. INTELL. PROP. L. REV. 413 (2007)(detailed description of roles private conformity assessment bodies play in the United States and Europe). U.S. federal agencies are directed by OMB Circular A-119 to participate with private organizations developing standards, a process that is overseen by the Interagency Committee for Standards Policy. Office of the U.S. Trade Representative, 2011 Report on Technical Barriers to Trade 22, available at http://www.ustr.gov/sites/default/files/TBT_Report_M_2025_Master_Draft_Final.pdf - Adobe Acrobat Pro.pdf [hereinafter USTR 2011 Report].

17. See, e.g., Linda Horton, *Mutual Recognition Agreements and Harmonization*, 29 SETON HALL L. REV. 692, 717 (1998).

18. See text at *supra* note 4.

19. 49 U.S.C. § 44,704 (2006)(amended 2012).

International Aviation, further negotiation and technical assessments, and a final executive agreement. In similar fashion, the United States is party to some other international agreements that obligate the contracting parties to recognize certain foreign administrative acts in order to prevent differences in national implementation of the international agreements from undermining the international regulation in question.²⁰

A. MRAs Can Eliminate Duplicative Conformity Assessments

Refusal to recognize foreign regulation and inspections constitutes a barrier to international trade. Business leaders tend to favour the motto, “tested once, accepted everywhere.”²¹ Nations can undertake three basic kinds of actions to eliminate or minimize this kind of trade barrier.²² The first, harmonization of national regulatory standards, is a time-consuming process and often difficult to achieve for political reasons, and even if the substantive regulations are harmonized, there still will be a substantial barrier to international trade if the goods have to be re-inspected upon import. MRAs provide an alternative with greater flexibility. The obligations of an MRA may vary from the exchange of information about products, manufacturers, or services among national regulators to recognition of conformity assessments by the partner’s regulators, and the conformity assessments may be made pursuant to the host country’s regulations or the partner’s regulations. The third possibility is a unilateral decision to accept foreign regulation as the equivalent of domestic regulation. A unilateral equivalency determination does not require an international agreement or authorizing legislation, and it may range from a simple exercise of enforcement discretion by the relevant agency to monitor less closely goods and services coming

20. For the FAA’s BASA program, see Federal Aviation Admin., Generic Steps for Obtaining a Bilateral Aviation Safety Agreement—Implementation Procedure for Airworthiness, undated, available at http://www.faa.gov/aircraft/air_cert/international/bilateral_agreements/media/BASAProcess.pdf (last visited Mar. 1, 2014). For examples of other international agreements of the United States requiring recognition of foreign administrative acts, see Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, 1973, Feb. 17, 1978, art. 5 (1), 1341 U.N.T.S. 3 (requiring Parties to the agreement to accept certificates issued by any other Party attesting to measures taken with respect to a particular vessel to prevent or minimize marine pollution and accord such certificates the same validity as their own similar certificates); Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Mar. 3, 1973, arts. III, IV, V, 27 U.S.T. 1087, 993 U.N.T.S. 243 (allowing each Party to permit import of endangered species only if, among other requirements, the exporting nation has issued an export or re-export permit, thus in effect requiring recognition of exporting nation’s administrative act refusing to authorize export).

21. Horton, *supra* note 17, at 724.

22. My three categories are simply a restatement of Professor Merrill’s five. Richard A. Merrill, *FDA and Mutual Recognition Agreements: Five Models of Harmonization*, 53 FOOD & DRUG L.J. 133, 135 (1998).

from countries whose regulatory bodies the U.S. agency regards as reliable to a formal determination by the agency to accept inspection and certification by foreign conformity assessment bodies (CABs) under the regulations in their countries as the functional equivalent of domestic inspection and certification under domestic U.S. regulation. This last alternative has the same effect on recognition of foreign administrative acts as an MRA, but the U.S. does not bargain for and secure the same commitment for its own exports from the nations whose inspections and regulations it decides to accept. It has been argued however that programs of unilateral equivalency tend to adopt reciprocity requirements over time,²³ so this report will consider equivalency determinations as an informal form of MRA.

MRAs may be quite useful for reducing barriers to international trade, but they obviously require a very high level of confidence in the foreign regulators and their regulations and a significant educational effort during which the regulators from the participating countries learn about each other's methods and standards.²⁴ Where they apply, MRAs and their implementing legislation and regulation can clarify and simplify the legal basis for the recognition of foreign administrative acts in the United States. They can eliminate significant bases under conflicts of laws to refuse recognition, a lack of authority for cross-border recognition, and perhaps also real conflicts as to regulation and inspection methodologies. But it does not always work that way, and one barrier to expanding U.S. use of MRAs is the concern that some agencies have not been given appropriate statutory authorizations to accept foreign regulations or conformity assessments in place of their own, or even to share data with other national regulators.²⁵ Another concern is the way that adoption of regulations because of international commitments may undercut the legitimacy of U.S. administrative action by restricting or eliminating those aspects of U.S. administrative law procedures, like notice-and-comment rulemaking, that seek to ensure public participation in the process of

23. Tzung-bor Wei, *The Equivalence Approach to Securities Regulation*, 27 *Nw. J. INT'L L. & BUS.* 255 (2007).

24. See Linda R. Horton & Kathleen E. Hastings, *A Plan That Establishes a Framework for Achieving Mutual Recognition of Good Manufacturing Practices Inspections*, 53 *FOOD & DRUG L.J.* 527 (1998).

25. Michael T. McCarthy, Administrative Conference of the United States, *International Regulatory Cooperation, 20 Years Later: Updating ACUS Recommendation 91-1*, 19-20 (Oct. 19, 2011), available at <http://www.acus.gov/wp-content/uploads/downloads/2011/10/COR-IRC-report-10-19-11.pdf>; Administrative Conference of the United States (ACUS), *Recommendation 2011-6, International Regulatory Cooperation*, 4-5 and Recommendation 2 (Dec. 8, 2011), available at <http://www.acus.gov/sites/default/files/Recommendation-2011-6-International-Regulatory-Cooperation.pdf> [hereinafter ACUS Recommendation 2011-6]. ACUS is a federal administrative agency that functions as a law reform commission for federal administrative law.

promulgating administrative regulations.²⁶ This same pattern of international agreement and implementing legislation and regulation is used to enable U.S. regulators to implement internationally adopted regulatory standards, and these international administrative regimes may also suffer from lack of proper implementing or authorizing legislation or from legitimacy deficits.²⁷

B. *General Treaty Requirements to Enter into MRAs*

Since the U.S. is not party to an international agreement with as far-reaching requirements for integration as the EU, it is not subject to the same kind of general requirements to adopt harmonization or mutual recognition as prevail within the EU. But the U.S. is a party to the North American Free Trade Area (NAFTA) and to the World Trade Organization (WTO), and while both of these agreements are much narrower than the EU treaties, being principally focused on trade in goods with only some coverage of certain types of services, within their respective fields of international trade, they certainly encourage the negotiation of MRAs and even arguably put substantial pressure on each member state to do so.²⁸

The NAFTA and WTO agreements do this through a combination of express exhortations to negotiate MRAs, requirements for national treatment (no different standards for trading partners' goods than for domestic goods), the injunction that technical standards and safety and health requirements not be used as disguised trade barriers, and incorporation of international standards like the Codex Alimentarius. Two of the most important WTO agreements in this regard are the Technical Barriers to Trade (TBT) and the Sanitary and Phytosanitary (SPS) agreements. Both the TBT and the SPS agreements

26. See, e.g., Sidney A. Shapiro, *International Trade Agreements, Regulatory Protection, and Public Accountability*, 54 ADMIN. L. REV. 435 (2002); see also Richard A. Merrill, *The Importance and Challenges of "Mutual Recognition,"* 29 SETON HALL L. REV. 736, 746-54 (1998)(types of MRAs requiring notice-and-comment rulemaking procedures).

27. See, e.g., Maximilian L. Feldman, Note, *The Domestic Implementation of International Regulations*, 88 N.Y.U. L. REV. 401 (2013)(detailed description of domestic implementation of Basel Accords; arguing that despite international agreement, domestic U.S. notice-and-comment rulemaking procedure still meaningful). As this example shows, international regulation is largely limited to development of international norms, leaving the application of the norms to domestic regulators.

A rare example of an international administrative act is furnished by the freeze orders required by U.N. Security Council Resolution 1267, directing states "to block terrorism financing by freezing the assets of people and groups listed [on Security Council watch lists] . . .," and raising serious issues under domestic human rights protections like due process. Kim Scheppele, *Global Security Law and the Challenge to Constitutionalism after 9/11*, [2011] PUBLIC LAW 353, 370-71.

28. "[I]t can be submitted that there is at least a nucleus [in the WTO] for mutual recognition of foreign legislative and administrative acts in economic matters." Matthias Ruffert, *Recognition of Foreign Legislative and Administrative Acts*, in 8 THE MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 683, ¶ 14, at 686 (R. Wulfrum ed., 2012).

create rebuttable presumptions that national regulations adopting international standards are not trade barriers in violation of the WTO agreements. In combination with various decisions of the WTO Appellate Body invalidating certain national regulations as unlawful trade barriers, these decisions in effect impose some pressure to agree to forms of mutual recognition, especially those that involve acceptance of international standards.²⁹ NAFTA, which applies only to Canada, Mexico, and the United States, imposes a similar pressure through very similar rules,³⁰ but also has a specific provision requiring national treatment of other partner nations' CABs, a provision which in effect imposes one of the chief elements of the kind of MRA that requires recognition of administrative acts by foreign CABs.³¹

Under the rules of international trade, mutual recognition also occurs by default whenever the importing country does not object to some feature of the goods or services that are imported. Thus, for example, if imports are produced in their home countries under labor or environmental laws that are less stringent than those of the importing country, but the importation takes place without any issues being raised about labor or environmental protection, the situation is essentially equivalent to the results under an MRA in which the importing country agrees to accept the exporting country's labor or environmental standards as the functional equivalents of its own.³² Similarly, when a nation's domestic regulation is found to violate national treatment under the WTO or NAFTA because of the discriminatory impact it has on goods or services from a partner nation and the dispute resolution process finds that the regulations in question are not saved by the clause allowing member countries to derogate from national treatment for certain vital national interests, those decisions in effect require a kind of mutual recognition by default. In some cases, dispute resolution under the WTO or the GATT, for example, has invalidated domestic regulation, thereby confirming a default form of mutual recognition, and in some cases, it has recog-

29. Kalypso Nicolaidis & Gregory Shaffer, *Transnational Mutual Recognition Regimes: Governance without Global Government*, 68 L. & CONTEMP. PROBS 263, 271, 278 n.24 and text (2005)(pointing to Article 6 of the Agreement on Technical Barriers to Trade and Article 7 of the General Agreement on Trade in Services, together with decisions of the WTO Appellate Body in the *EC Meat Hormones* case and the *EC-Sardines* case and the *Codex Alimentarius*); Shapiro, *supra* note 26, at 446-49, 453 (WTO dispute process and TBT and SPS agreements force member countries to agree to MRAs); McCarthy, *supra* note 25, at 5-6 (same point for TBT).

30. Article 904.4 of NAFTA provides, "No Party may prepare, adopt, maintain or apply any standards-related measure with a view to or with the effect of creating an unnecessary obstacle to trade between the Parties." North American Free Trade Agreement, 32 I.L.M. 296 (1993), art. 904.4, at 387.

31. Article 908 says, "[E]ach Party shall accredit, approve, license, or otherwise recognize conformity assessment bodies in the territory of another Party on terms no less favourable than those accorded assessment bodies in its territory." *Id.* art. 908, at 388.

32. Nicolaidis & Shaffer, *supra* note 29, at 269.

nized the legitimacy of domestic regulation under the escape clause, thereby cutting down the sphere in which the treaties may be seen to be promoting mutual recognition.³³ The case law of the WTO Appellate Body and the predecessor dispute resolution panels under the GATT and the case law under the NAFTA arbitral panels thus collectively delineate the regulatory spheres that are exempt from the forces that foster mutual recognition, whether expressly through WTO and NAFTA requirements, or by default.

C. *General Bases in U.S. Law Promoting the Negotiation of MRAs*

In any event, whether or not required by international obligations, the United States has in fact committed itself to pursue a wide range of forms of international regulatory cooperation. These commitments are reflected in some fairly broad legal injunctions. President Barack Obama issued an executive order in 2012 recognizing the need for the expansion of regulatory cooperation with U.S. trading partners and calling upon all federal agencies to eliminate unnecessary differences in regulatory requirements between the United States and its major trading partners.³⁴

One major U.S. statute passed to implement aspects of the TBT agreement is the Trade Agreements Act (TAA) of 1979.³⁵ It prohibits federal agencies from creating unnecessary obstacles to trade, encourages them to consider using international standards in domestic rulemaking. It also “establishes the USTR [U.S. Trade Representative] as the lead agency within the federal government for coordinating and developing international trade policy related to standards-related activities, as well as in discussions and negotiations with foreign countries on standards-related matters.”³⁶ Under the TBT agreement, the National Institute of Standards and Technology (NIST) in the Department of Commerce is designated as the “inquiry point” where other nations may access regulations. NIST thus monitors the Federal Register, where notice must be given of all proposed rulemaking proceedings, the procedures used by federal

33. Nicolaidis and Shaffer give as examples the *U.S. Tuna-Dolphin* case under the GATT, holding that the U.S. was not permitted to bar tuna imports under the rule applied to its own tuna fishermen banning the sale of tuna caught with certain techniques that killed large numbers of dolphins, and the subsequent decision of the WTO Appellate Body in the *U.S. Shrimp-Turtle* case, allowing the U.S. to bar shrimp imports if caught without the use of certain devices designed to keep turtles from being caught in shrimping nets. *Id.* at 271-72.

34. Exec. Order No. 13609, 77 Fed. Reg. 26,413 (May 1, 2012). *See also* ACUS Recommendation 2011-6, *supra* note 25, at 6 (ACUS advises President to urge federal bureaucracy to expand use of “mutual recognition of tests, inspections, clinical trials, and certifications of foreign agencies”); American Bar Association, Resolution of the House of Delegates, August 6-7, 2012 (same).

35. 19 U.S.C. § 2532 (2012). *See generally* USTR 2011 Report, *supra* note 16, at 17.

36. USTR 2011 Report, *supra* note 16, at 17.

agencies to promulgate regulations. NIST transmits notice of those regulations to the WTO.³⁷ The United States is currently in the process of negotiating major new trade agreements for trade across both the Atlantic and the Pacific Oceans, and MRAs are expected to form a major part of both of these new agreements.

D. Brief Overview of the Use of MRAs by the United States

Although the United States has entered into many bilateral and multilateral MRAs,³⁸ it is difficult to determine how many there are and, more importantly for this report, how many of them would actually require recognition of foreign administrative acts. As we have seen, there are at least two reasons why MRAs may not involve recognition of foreign administrative acts: (1) The foreign CABs may be private bodies whose actions are not considered administrative acts under the law of the country where they operate, or (2) the MRA may call at most for an exchange of the data gathered by inspections, not for any recognition of the assessment the foreign regulator makes on the basis of that data.

Technical standards covered by the TBT are especially likely to have been developed by non-governmental groups, and conformity assessment with respect to such standards in many economic sectors appears to be performed chiefly by non-governmental bodies, so it may be that the vast bulk of conformity assessment under technical standards does not involve administrative acts.³⁹ The decision to recognize a private body as a CAB is no doubt itself an administrative act or the equivalent, but in some cases the United States has reserved for itself the power to determine whether to recognize a foreign assessment body as a CAB, so the process may not involve foreign administrative acts. Today, however, increasingly, U.S. and other national regulators are relying on international accreditation systems, such as the International Laboratory Accreditation Cooperation (ILAC) and the International Accreditation Forum (IAF), which establish MRAs with public and private accreditation bodies to establish international standards and procedures for accrediting certification bodies, including peer-to-peer review.⁴⁰

37. *Id.*; see also "Notify U.S.," available at <https://tsapps.nist.gov/notifyus/data/index/index.cfm>. Notify U.S. is a web-based e-mail service that offers U.S. entities a way of reviewing and commenting on proposed foreign technical standards.

38. See, e.g., CHRISTINE LESSER, DO BILATERAL AND REGIONAL APPROACHES FOR REDUCING TECHNICAL BARRIERS TO TRADE CONVERGE TOWARDS THE MULTILATERAL TRADING SYSTEM?, OECD TRADE POLICY PAPERS, No. 58, 20-21, 56-60 (OECD Publishing 2007), available at <http://dx.doi.org/10.1787/051058723767> (surveying mutual recognition of conformity assessments concerning technical standards in 82 bilateral and regional trade agreements, among which are U.S. agreements with Australia, Chile, Israel, Jordan, Morocco, and Singapore).

39. See text at *supra* note 16.

40. USTR 2011 Report, *supra* note 16, at 26.

The FDA has used MRAs extensively, but does not appear to rely as much on private CABs.⁴¹ Most MRAs relevant to FDA appear to be limited to exchange of technical information from inspections,⁴² but some appear to go further to require mutual acceptance of assessments based on inspections by regulatory counterparts.⁴³ More recently, the FDA has conducted a pilot project with European and Australian regulators to rely on each other's inspections of pharmaceutical manufacturing plants in China and other countries,⁴⁴ but it is unclear whether that project involved true recognition of foreign administrative acts or just exchanges of data from inspections. Exchange of data and assessment of conformity are so intertwined in some cases, however, that it may make more sense to view some of the agreements as resulting in recognition for foreign governmental conformity assessment, but at a lower level of recognition than the gold standard for MRAs would require. For example, the Pharmaceutical Good Manufacturing Practice Annex to the U.S.-EU MRA contemplates a series of information exchanges, joint training, and joint inspections between EU and U.S. regulators for the purpose of enabling the FDA and its counterparts in European nations to assess the equivalence of their respective regulations. The Annex provides that the FDA will "normally endorse" a report received from one of the EU CABs finding that the food or drugs intended for import into the United States satisfied U.S. standards, but the FDA retains its power to make the final decision about the conformity of foreign food and drugs with U.S. law if its own review of the inspection data undermines its confidence in the foreign regulator's assessment.⁴⁵ The Annex in effect gives to the foreign inspectors' conformity assessments a presumption of regularity that parallels the lower-level form of recognition we see in the common law doctrine of recognition, as well.⁴⁶

The Securities and Exchange Commission (SEC) has experimented with a mutual equivalency regime for stock brokers and stock exchanges regulated by the other party. Under an MRA between the SEC and the Australian Securities and Investments Commission concluded in 2008, Australian exchanges and brokers listed on those

41. Horton, *supra* note 17, at 722 (FDA had over fifty agreements with its counterparts in other countries in 1998); Shapiro, *supra* note 26, at 453-57 (overview of the equivalency process with examples from U.S. Department of Agriculture and FDA)

42. Horton, *supra* note 17 (passim); Merrill, *supra* note 26, at 740 (FDA's MRAs are "contracts for service" because mainly about providing information about conformity inspections).

43. Horton, *supra* note 17, at 722 (for over quarter century, FDA has had agreements with counterparts in Canada and Sweden providing for mutual acceptance of results of inspections for compliance with standards of good manufacturing practice).

44. McCarthy, *supra* note 25, at 20; ACUS RECOMMENDATION 2011-6, *supra* note 25, at 4.

45. Horton, *supra* note 17, at 729-32.

46. See text at *infra* notes 93-96.

exchanges are exempted from the usual SEC registration requirements on the basis that they have already been scrutinized and passed by Australian regulators. U.S. exchanges and brokers receive reciprocal treatment in Australia.⁴⁷ This example illustrates recognition of foreign administrative decisions and the adoption of foreign standards as the essential equivalent of U.S. standards, but it has proven quite difficult to expand or even sustain this kind of mutual recognition program.⁴⁸

III. THE COMMON LAW OF RECOGNITION APPLICABLE IN THE ABSENCE OF AN MRA

Outside of the cases involving MRAs and similar international agreements and their implementing legislation, the only source of law for a legal rule requiring recognition of foreign administrative acts is the common law. “[T]here is no general duty of States emanating from public international law to recognize each and every foreign . . . administrative act.”⁴⁹ Nor does the U.S. federal Constitution require recognition in this case. The only statutes concerning recognition of foreign administrative acts are those implementing MRAs or other similar international agreements. Nevertheless, there is a basis to argue for a common law rule of recognition for foreign administrative acts modelled on analogous rules of recognition for foreign court judgments and domestic administrative orders.

A. *Uncertain, Conflicting, and Scarce Authority for Recognition*

The authorities are uncertain and even somewhat contradictory. Some authorities express doubt that foreign administrative acts will generally be recognized in the United States.⁵⁰ Yet there are also a

47. Pierre-Hugues Verdier, *Mutual Recognition in International Finance*, 52 HARV. INT’L L.J. 55, 82-87 (2011); see also Wei, *supra* note 23, at 263-82 (examples of unilateral determinations of equivalence by U.S. regulators in accounting, finance, and securities law).

48. Verdier, *supra* note 47, at 88-108.

49. Ruffert, *supra* note 28, ¶6, at 685. Ruffert argues, however, for a customary international law obligation on the part of all states to respect a state’s recognition of nationality. *Id.* ¶ 8.

50. 2 EHRENZWEIG & JAYME, *supra* note 10, at 72 (leading comparative treatise of conflicts of laws states that “[a]dministrative acts of foreign governments are quite generally denied the status of ‘judgments’ for the purpose of recognition”); HAY, ET AL., *supra* note 10 (leading U.S. conflicts treatise opines that although domestic administrative orders “have been treated and recognized as judgments in the interstate setting, . . . [a]dministrative acts of foreign nations . . . have generally not been treated as judgments”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 cmt. f (1987)(foreign court judgments are entitled, as a general matter, to recognition in U.S. courts, but the “rule is less clear with regard to decisions of administrative tribunals”). The Restatements are not statutes. They are the attempt by a prestigious non-governmental body of scholars, judges, and practitioners, the American Law Institute, to state the current law in specific areas; they have the authority that the writings of well-respected legal scholars have in the U.S. legal culture.

few cases recognizing foreign administrative acts. Because there are not many cases, it is worthwhile describing two, which also illustrate the two chief modes that recognition can take.

*Regierungspraesident Land Nordrhein-Westfalen v. Rosenthal*⁵¹ is a 1962 decision of a New York trial-level court that enforced the administrative act of a German public authority administering the indemnification law adopted in Germany to provide compensation for victims of Nazi persecution. The defendant in that case had applied for and received compensation under the statute, but the agency subsequently determined that the defendant had misrepresented crucial facts, either intentionally or at least with gross negligence. Accordingly the administrative body issued a denial of the application after payment, as provided for by the statute, demanded the return of the money paid, and sued to enforce its order in New York, where the defendant was by then living. The court enforced the German administrative act even though there had been no hearing before the indemnification office issued its decision to revoke the award. It was enough, the court said, that the defendant had been given notice of his right to seek judicial review in Germany of the administrative decision and he had not done so.

In 1989 in *Petition of Breau*,⁵² the Supreme Court of New Hampshire recognized a determination of a foreign administrative body by giving its factual determinations preclusive effect through collateral estoppel. In that case a New Hampshire administrative agency, a state board of education, had revoked a teaching license on the grounds of lack of good moral character, relying on prior findings of lack of good moral character by a Canadian administrative body that revoked the teacher's license to teach in Canada. The New Hampshire Supreme Court upheld this type of recognition, noting that the teacher in this case had had two opportunities to appeal the findings against him in the Canadian proceeding and to examine the witnesses personally as the events claimed to justify the revocation of the Canadian license. It was his own choice not to pursue the opportunities to contest the findings against him in Canada.

It is difficult to find cases other than those cited in this report that both clearly involve foreign administrative acts and give them preclusive effect. It is impossible to tell whether the dearth of cases is because the instances in which parties seek to give some kind of effect to foreign administrative acts are so rare or because recognition is so widely accorded that disputes do not arise, but it seems more likely the former.

51. 232 N.Y.S. 2d 963 (N.Y. App. Div. 1962), *cited in* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 rptr's n. 5 (1987).

52. 565 A.2d 1044 (N.H. 1989), *cited in* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 cmt. b (1971).

B. The Doctrinal Basis for a Common Law Rule of Recognition for Foreign Administrative Acts

Recognition of foreign administrative acts rests on two analogous common law rules of recognition, both of which themselves appear somewhat problematic, so the uncertainty surrounding them naturally affects the extension of those two principles to foreign administrative acts. First, the trend in U.S. law has been in favor of enforcing foreign court judgments, as long as they are the product of a court system that affords litigants a reasonably fair opportunity to litigate all relevant issues. Second, U.S. courts have tended to give domestic administrative orders the same preclusive effect that decisions by domestic courts would have, at least if they are the product of administrative litigation conducted in accordance with APA rules for formal process. If foreign court judgments may be recognized in U.S. courts and domestic administrative orders, as well, as long as they are the product of a process that guarantees fair and full rights to contest the relevant facts, then it is hard to see why foreign administrative acts that are the product of a procedure that similarly protects the parties' rights to contest the issues should not be recognized.⁵³

The principle that U.S. courts will recognize foreign court judgments is fairly well established, but subject to numerous restrictions. Although it has been argued that the U.S. is more willing to enforce foreign judgments than most other countries,⁵⁴ in fact the United States has not adhered to any multilateral or bilateral treaty on the subject.⁵⁵ The full faith and credit clause of the federal Constitution requires recognition of sister state court judgments, but that clause does not apply to foreign court judgments.⁵⁶ There is a set of relevant uniform acts. The Uniform Foreign Money-Judgments Recognition Act (UFMJRA) was promulgated in 1962 and had been adopted by thirty-one states, the District of Columbia, and the U.S. Virgin Islands, but it applies only to judgments to pay money; and it specifically exempts "judgments for taxes, a fine or other penalty, or judgment for support in matrimonial or family matters."⁵⁷ The Uniform Foreign-Country Money Judgments Recognition Act (UFCMJRA) was promulgated in 2005 to revise, update, and replace

53. See, e.g., *Petition of Breau*, 565 A.2d 1044, 1049-50 (N.H. 1989)(invoking both of these analogies).

54. Juan Carlos Martinez, *Recognizing and Enforcing Foreign Nation Judgments: The United States and Europe Compared and Contrasted*, 4 J. TRANSNAT'L L. & POLICY 49, 51 (1995).

55. HAY ET AL., *supra* note 10, at 1504-05.

56. U.S. CONST. art. IV, § 1.

57. UFMJRA §§ 1(2) (1962); Yuliyza Zeynalova, *The Law on Recognition and Enforcement of Foreign Judgments: Is It Broken and How Do We Fix It?* 31 BERKELEY J. INT'L L. 150, 156-57 (2013). Current information is available on the Uniform Law Commission website, <http://www.uniformlaws.org/Default.aspx>.

the UFMJRA and it has been adopted in about twenty states, but it continues essentially unchanged the above-mentioned limitations in the UFMJRA.⁵⁸

The restatements of conflict of laws and of foreign relations law purport to set forth the common law that would apply outside of these uniform acts, and both of those restatements suggest that U.S. courts should recognize a foreign judgment without re-examining the merits if the parties had a fair and full opportunity to litigate the issues in the foreign proceeding.⁵⁹ However, at this point we can speak only of a “trend.” There still are some states that will accord recognition to foreign court judgments only on the basis of reciprocity, i.e., only for judgments of courts in jurisdictions that extend recognition on the same basis to the judgments of U.S. courts.⁶⁰

The willingness to enforce foreign judgments does not rest on customary rules or general principles of international law, but it is widely said to be based on the principle of comity.⁶¹ However, critics have asserted that comity is too malleable to be regarded as the basis for a rule,⁶² and it should be noted that the common law rule of recognition does not pay express attention to how important to the foreign country the court decision for which enforcement is sought is or how important the legal principles behind it are to the jurisdiction where it was rendered. It seems apparent that recognition of foreign court judgments rests rather on the policy of avoiding duplicative litigation where it is possible to do so without loss of fairness to the parties.⁶³ This is evident in the two modalities of recognition, *res judicata* and collateral estoppel. The policy is important, but it comes with its own

58. UFCMJRA § 3 (2005). For current information, see Uniform Law Commission website in previous footnote.

59. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98 (1971) (“[a] valid judgment rendered in a foreign nation after a fair trial in a contested proceeding will be recognized in the United States so far as the immediate parties and the underlying cause of action are concerned”); RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 481 (1987) (“a final judgment of a court of a foreign state” will be recognized); *id.*, § 482 (U.S. courts will not recognize foreign judgments “rendered under a judicial system that does not provide impartial tribunals or procedures compatible with due process of law,” judgments that are “repugnant to the public policy,” or judgments “obtained by fraud.”).

60. HAY ET AL., *supra* note 10, at 1493. *See id.* at 1492 n. 8 (cites to jurisdictions still insisting on reciprocity).

61. Joseph J. Simeone, *The Recognition and Enforceability of Foreign Country Judgments*, 37 ST. LOUIS U.L.J. 341, 346-51 (1993); Zeynalova, *supra* note 57, at 154.

62. *See, e.g.*, *Petition of Breau*, 565 A.2d 1044, 1049 (N.H. 1989) (comity is empty doctrine, just a label, not a rule capable of establishing when there should be recognition and when not); Michael D. Ramsey, *Escaping “International Comity,”* 83 IOWA L. REV. 893 (1998). For a view of just how malleable comity is, see *Sompportex Ltd. v. Philadelphia Chewing Gum Corp.*, 453 F.2d 435, 440 (3d Cir. 1971) (“Although more than mere courtesy and accommodation, comity does not achieve the force of an imperative or obligation”).

63. *See* *Petition of Breau*, 565 A.2d at 1049 (citing cases from the New Hampshire Supreme Court and the D.C. Circuit, as well as the Restatement (Third) of Foreign Relations Law).

built-in limitation: Recognition is appropriate only where the party against whom the recognition will operate had a full and fair opportunity to litigate the factual issues in the proceeding that led to the first judgment. This limitation lies at the core of the recognition rule and makes it quite complex to say whether, in a given situation, the rule applies or not. Recognition of foreign judgments is far from automatic because some differences between procedure in the United States and in other countries are differences that might be argued to deprive a party of an opportunity to litigate the issues fully, though U.S. courts seem willing to accept, as they should, that differences in civil procedure do not necessarily result in fundamental unfairness.⁶⁴

The recognition rule for domestic administrative orders is similarly subject to considerable qualification or uncertainty, but it seems fair to conclude that, at least domestically, “the distinction between judgments and administrative acts is generally losing ground”⁶⁵ For U.S. law, perhaps the strongest statement that can be made is that “[a]dministrative acts often result from quasi-judicial proceedings and, as such, have been treated and recognized as judgments in the interstate setting,” and that “[s]tate statutes establishing administrative agencies frequently give agency decisions the effect of judgments;”⁶⁶ In fact, there are many cases giving *res judicata* effect to administrative orders that result from agency adjudication, but the leading administrative law treatise cautions that “[t]he clarity and simplicity of the law of administrative *res judicata* is more apparent than real,”⁶⁷ and that while collateral estoppel based on agency adjudicatory processes is well established, it is subject to “added complexities” because of the agency context.⁶⁸ As in the case of foreign court judgments, a chief concern of the courts is determining

64. *Id.* at 1050 (“we do not necessarily equate the requirements of due process with what our prior cases have spoken of as full and fair opportunity [to litigate]”)

65. 2 EHRENZWEIG & JAYME, *supra* note 10, at 72 (quoted by HAY ET AL., *supra* note 10, at 1521).

66. HAY, ET AL., *supra* note 10, at 1520 (citing agencies dealing with worker compensation and pollution control as examples of the state statutes). *See also* RESTATEMENT (SECOND) OF CONFLICTS § 92 and cmt. (a) (1971)(recognition of agency decisions when those bodies have acted “judicially”); RESTATEMENT (SECOND) OF JUDGMENTS § 83(1), (2) and cmt. c (1982)(recognition if agency decisions result from APA formal process).

67. 2 RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW TREATISE § 13.3, at 1130 (5th ed. 2010). *See id.* at 1130-31 (citing pre-1966 Supreme Court cases that viewed agency decisions as largely made without process resembling a court hearing, Utah Construction & Mining Co., 384 U.S. 394 (1966) (initiating the modern trend to give *res judicata* effect to formal agency adjudication), and a number of post-1966 cases denying *res judicata* effect because of specific defects in the administrative litigation in question)).

68. *Id.* § 13.4, at 1145.

whether the procedures used by the agencies constituted an adequate opportunity to litigate.⁶⁹

On the basis for the foregoing discussion, it seems reasonable to conclude that the primary test for the recognition of foreign administrative acts is, as in the case of both of the underlying recognition rules, the question whether the party against whom recognition is sought has had a full and fair opportunity to litigate all relevant issues in the process which led to the decision for which recognition is sought. The court opinions in *Regierungspräsident* and *Petition of Breau*, discussed above in Section III. A, illustrate the centrality of this question. Some of the relevant authorities suggest due process as the touchstone for what counts as a fair opportunity to litigate, but it seems clear that the test is concerned with essential fairness, not slavish identity with U.S. concepts of civil procedure. The procedures used in formal administrative adjudication are often quite different from that of U.S. courts. For this reason, I argue that the best statement of the requirements is in Section 83 of the Second Restatement of Judgments, which requires simply adequate notice, the right to present evidence and legal argument and to rebut evidence and argument by opposing parties, and a rule specifying a point in the proceedings when a final decision is rendered.⁷⁰ It is also clear that a fair opportunity to litigate presupposes judicial and, if relevant, administrative litigation systems that provide impartial tribunals and are not infected with fraud.⁷¹ In addition, recognition of administrative orders in the United States depends on the assumption that the agency whose decision is to be recognized had jurisdiction over the subject matter and the persons involved.⁷² A similar rule should clearly apply to recognition of foreign administrative acts.

C. *Significance of de novo Judicial Review*

In one important respect, the decisions in *Regierungspräsident* and *Petition of Breau* articulate a much broader rule of recognition than appears warranted by the underlying common law rules of rec-

69. Cf. RESTATEMENT (SECOND) OF CONFLICTS § 92 (1971). The main reason, however, for denial of recognition in many of the cases cited in the *Pierce* treatise has to do, not with court disapproval of the procedural rules of agency litigation, but with the fact that much agency adjudication is about circumstances that may change, such as progressive diseases in disability decisions, so that a decision, for example, denying disability payments on the basis of such a disease at one time is not and should not be considered *res judicata* with respect to a later disability claim for the same disease. 2 PIERCE, *supra* note 67, § 13.3, at 1133-36. This same characteristic may disqualify many foreign administrative acts from recognition.

70. RESTATEMENT (SECOND) OF JUDGMENTS § 83(2)(a), (b), and (d)(1982).

71. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 482(1)(a)(1987); see also RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 98, cmt. d (1971)(quoting *Hilton v. Guyot*, 150 U.S. 113, 202(1895)); *id.* §§ 115, 117 (defenses of fraud and public policy, respectively).

72. See, e.g., 2 PIERCE, *supra* note 67, § 13.4, at 1145.

ognition for foreign court judgments and domestic administrative orders. In both of these cases, the courts gave recognition to the foreign administrative decision even though both were the product of an informal process that did not involve the kind of court-like fact-finding process that would apply in formal process in U.S. administrative law. As Section 83 of the Second Restatement of Judgments makes clear, this kind of formal process is what is normally required to count as a fair opportunity to litigate. Yet both cases recognized the decision of an administrative action that did not have these procedural guarantees because both were subject to judicial review where there would apparently have been an opportunity to use court process to contest the issues.

There is no doubt that the availability of judicial review is important. A Ninth Circuit Court has even held that the findings of a state administrative agency cannot have preclusive effect if they were not subject to judicial review.⁷³ But should the availability of *de novo* judicial review suffice for recognition of a foreign administrative act if the act itself was the product of a one-sided, ministerial process, as may generally be the case in many administrative proceedings in many civil law countries and as is the case in much informal adjudication in the United States? It seems clear that the U.S. domestic rule provides for recognition of domestic administrative orders only if the administrative process itself provided at least the opportunity to litigate provided by formal process under the APA.⁷⁴ But the domestic rule is shaped by the U.S. form of judicial review, which, as explained above in Section I. B, does not normally provide *de novo* determination of facts and even some legal issues. There is, however, no reason to limit recognition of foreign administrative acts that are the product of a procedure that does not limit judicial review in that way.

It could also be argued in support of this conclusion that the U.S. law for domestic agency orders does not require that the administrative process in question actually have involved all the elements of full and fair litigation, only that the administrative process used have afforded the rights to all those elements. Allowing recognition on the basis of unexercised rights in judicial review in the foreign system is consistent with that rule. At any rate, the few cases on point appear to treat the possibility of *de novo* judicial review as the equivalent of something akin to formal process in the U.S. administrative context for purposes of the recognition rule.

73. *Wehrli v. County of Orange*, 175 F.3d 692 (9th Cir. 1999)(cited in 2 PIERCE, *supra* note 67, § 13.3, at 1133).

74. RESTATEMENT (SECOND) OF JUDGMENTS § 83(2)(a), (b), and (d)(1982).

D. *Exceptions for Public Policy, Tax, and Penalties*

Recognition of foreign court judgments is universally subject to an exception for judgments that violate the enforcing state's public policy (*ordre public*), so of course the same rule should apply to recognition of foreign administrative acts. International systems of obligation for nations generally provide some kind of escape valve so that nations can protect their most vital interests. Thus the exception for public policy is necessary and reasonable as long as it is construed narrowly so that it applies only to matters that are truly so important that recognition of the foreign administrative act would effectively frustrate the host jurisdiction's protection of its most fundamental values, like basic aspects of democracy and environmental protection and other fundamental human rights. A leading conflicts treatise states that "[i]n general, it appears to be the modern trend that the public policy defense will lie only in exceptional cases."⁷⁵

Another important defense to recognition is the exception for taxes and penal law.⁷⁶ The trend may be against exceptions for penalties and taxes, both with regard to sister state and foreign court judgments,⁷⁷ but it is not clear that the matter is settled, and in fact a leading treatise on conflicts, while arguing for the enforcement of sister state money judgments for penalties under the full faith and credit clause of the Constitution, also concedes that the Supreme Court has not yet squarely decided the issue.⁷⁸ In fact, the UFMJRA and the UFCMJRA both expressly exempt penalties,⁷⁹ and there is authority in the restatements for denying recognition for administrative fines and penalties,⁸⁰ so I have to conclude that the weight of authority still favors denying recognition to administrative acts that impose fines or penalties.

E. *The Act of State Doctrine*

The recognition rule's exception for public policy (*ordre public*) is itself subject to the exception created by the Act of State doctrine. The doctrine is said not to be required by the Constitution,⁸¹ but it clearly implicates concerns of the separation of powers doctrine be-

75. HAY, ET AL., *supra* note 10, at 1517 (footnote omitted); *see also* Parsons & Whittemore Overseas Co., Inc. v. Societe Generale de l'Industrie du Papier (RAKTA), 508 F.2d 969, 974 (2d Cir. 1974) (public policy defense applies only to "forum state's most basic notions of morality and justice").

76. 2 EHRENZWEIG & JAYME, *supra* note 10, at 73; HAY, ET AL., *supra* note 10, at 1514-15 (critical of these exceptions, except for criminal law).

77. HAY, ET AL., *supra* note 10, at 1476-78, 1514-15.

78. *Id.* at 1477-78.

79. *See text at supra* notes 57-58.

80. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 483 cmt. b (1987) (agency fines and penalties also subject to exclusion for recognition or enforcement of fines or penalties).

81. *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 423 (1964).

cause it reflects “the strong sense of the Judicial Branch that its engagement in the task of passing on the validity of foreign acts of state may hinder’ the conduct of foreign affairs.”⁸² It is the executive branch, not the courts, that should have control of the conduct of relations with other countries, and the point of the doctrine is to prevent litigants from pursuing lawsuits in the United States that might hinder the executive branch in its conduct of foreign affairs. The effect of the doctrine is to remit litigants who claim to have been harmed by illegal acts by foreign governments to their remedies either in the courts of the foreign country or through the U.S. executive branch’s diplomats. The chief effect of the doctrine applied to foreign administrative acts is thus to override the public policy defense and related defenses that challenge the legality of the foreign administrative act like lack of jurisdiction or competence. If the doctrine is not a constitutional requirement, then it is a prudential limitation the federal courts have adopted as part of the federal common law, a limitation that can be changed by Congress.

Since its inception, the doctrine has been controversial. Perhaps surprisingly, given the doctrine’s underpinning in separation of powers concerns, the doctrine does not depend for its application on invocation by the executive branch, and while three Supreme Court justices indicated support for the so-called *Bernstein* exception, which would permit the executive branch to waive the act of state in particular cases, most of the justices have not.⁸³

Congress has attempted to limit the act of state doctrine in the so-called Hickenlooper or Sabbatino Amendment to the Foreign Assistance Act of 1961,⁸⁴ which applies to claims of confiscation or other takings by foreign governments. The Supreme Court has never decided whether the Amendment is constitutional,⁸⁵ but if the Amendment passes constitutional muster, then it eliminates many of the most important cases covered by the original form of the act of state doctrine, cases involving expropriation of property and asset freezes. The courts have also narrowed the scope of the doctrine,⁸⁶ so

82. *W.S. Kirkpatrick & Co., Inc. v. Environmental Tectonics Corp.*, 493 U.S. 400, 406 (1990) (quoting *Sabbatino*, 376 U.S. at 423).

83. The exception is named for the court of appeals case in which it was formulated, *Bernstein v. Van Heyghen Freres, S.A.*, 163 F.2d 246 (2d Cir. 1947). Justice Rehnquist, writing for himself and two other justices, endorsed the idea in *First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 767-68 (1972)(plurality opinion). But all six of the other justices in that case rejected the idea.

84. 22 U.S.C. § 2370(e)(1) & (2) (2012).

85. *But see Banco Nacional de Cuba v. Farr*, 388 F.2d 166 (2d Cir. 1967)(upholding constitutionality).

86. *See generally* CURTIS A. BRADLEY & JACK L. GOLDSMITH, *FOREIGN RELATIONS LAW* 109-16 (4th ed. 2011). Other statutory limitations on the act of state doctrine include the Helms-Burton Act authorizing suit against individuals or companies trafficking in property confiscated by Cuba from U.S. citizens and expressly precluding application of the act of state doctrine in those law suits. 22 U.S.C. § 6082 (a)(6)

while it is not unimportant today, it is difficult to generalize about the nature of administrative acts to which it is most likely to apply.

The somewhat quirky force of the act of state doctrine is illustrated by the case of *Riggs National Corporation v. Commissioner of Internal Revenue Service*.⁸⁷ In that case, the Federal Court of Appeals for the District of Columbia Circuit applied the doctrine to require the IRS to recognize the Brazilian Finance Minister's order requiring the Brazilian Central Bank to pay Brazilian income tax on interest paid to U.S. banks under so-called "net" loans the U.S. banks made to the Central Bank. The net loans required the borrower to pay the Brazilian income tax that was levied on the interest the lender earned on the loan, but under U.S. law, the U.S. lenders were entitled to a tax credit for the income taxes paid on their behalf for these loans. The IRS argued nevertheless that the Brazilian Central Bank was tax-exempt under the Brazilian constitution and that its tax exemption extended to cover even those taxes the Bank undertook contractually to pay for another non-tax-exempt party. There was in fact a Brazilian Supreme Court opinion to that effect concerning a different set of loans. The federal court of appeals noted that, because of the lack of stare decisis in the Brazilian legal system, the Supreme Court opinion was not binding with respect to the loan in this case. In any event, by invoking the act of state doctrine, the federal court of appeals foreclosed the inquiry into whether the Brazilian Finance Minister's administrative act was legal. As a result, U.S. courts and administrative officials were in effect required to recognize and give effect to the foreign administrative act without any inquiry into whether that act was legal under any law, whether domestic, foreign or international.

*F. The Main Fields of Application for the Common Law
Recognition of Foreign Administrative Acts in the United
States*

It is clear that the recognition that results under MRAs concerns foreign administrative acts with respect to the inspection and certification of goods and services in international trade under various health, safety, and consumer and environmental protection standards. But it is much less clear exactly what the primary fields of application of the common law of recognition are. For example, if we consider how collateral estoppel, one of the main modes of recognition, may apply, we can see that determinations made with respect to

(2012). However, the Act authorizes the President to suspend this rule for six-month terms and the presidents have repeatedly done so. BRADLEY & GOLDSMITH, *op. cit.*, at 108. There is also a statutory exclusion of the act of state doctrine for the enforcement of arbitration agreements and awards. *Id.* (citing 9 U.S.C. § 15 (2012)).

87. 163 F.3d 1363 (D.C. Cir. 1999).

the facts peculiar to a private party in the course of formulating any given administrative act in one country could be relevant to a number of different administrative proceedings involving that same party in another country, especially if both countries regulate the same subject matter in somewhat similar ways.

But the other chief modality relevant to the topic of this report, enforcement,⁸⁸ has a much more restricted application, as a practical matter. First, extraterritorial enforcement of administrative acts or orders is largely restricted to the enforcement of orders to pay money. The enforcement of most other types of administrative orders or acts are restricted to domestic forums for the simple reason that the regulatory power of the state is largely restricted to its own territory. Only the courts of the home state have jurisdiction with respect to administrative acts relating, for example, to the licensing of activity within that country. As the Third Restatement of Foreign Relations Law says, "Under international law, a state may not exercise authority to enforce law that it has no jurisdiction to prescribe."⁸⁹ Even if under international law a foreign state may properly assert regulatory authority over, for example, its own nationals operating in the United States, it will not be able to enforce its regulatory acts or orders in U.S. courts because the U.S. courts have no power to enter orders concerning the enforcement of foreign regulation except for the payment of money.⁹⁰ MRAs may solve that problem by adopting foreign regulation as U.S. regulation for the subjects to which they apply, but in the absence of legislation implementing an applicable MRA or similar international agreement, U.S. courts are closed to the enforcement of another country's public law. Courts everywhere, however, have the power to enter money judgments, which is the main and perhaps simplest way they exercise power over parties. Foreign administrative acts imposing a pecuniary obligation in effect substitute the obligation to pay money for the claims that led to that obligation, and *Regierungspräsident* demonstrates the willingness of U.S. courts to enforce administrative orders to pay money.

Second, however, in the United States, for the reasons stated above in Section III. *D*, current law appears not to favor the enforcement of foreign penalties. It is therefore likely that the only foreign acts requiring the payment of money that will be enforced in U.S. courts are, like the act enforced in *Regierungspräsident*, those that are imposed to provide compensation or restitution, and not for sanctioning a regulated party's violation of rules, whether criminal or

88. *See supra* Section I *C*.

89. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 431, cmt. a (1987).

90. For this reason, with respect to foreign administrative acts, *res judicata* is limited to acts imposing the obligation to pay money.

civil. This would seem to leave a fairly restricted field of application for the enforcement of foreign administrative orders to pay money.

Collateral estoppel is thus the more expansive form of true recognition at common law, but it applies only to those factual findings or legal issues underlying the foreign administrative act that are identical to relevant issues in the United States, as they were in *In re Breau*. Such identity of issues would seem most likely to apply in cases of status determinations, such as determinations of citizenship or family status. But although the issue has not been litigated very much, there is case authority in the United States denying preclusive effect to a foreign passport on the issue of citizenship. The result makes sense in those cases in which the issue before the U.S. administrative authority is not identical to the issues involved in the foreign country's issuance of the passport.⁹¹

With respect to family status, the issues may sometimes be identical because the issue in the United States is often simply whether or not the foreign jurisdiction has recognized the status. Foreign court judgments attesting to a valid foreign marriage or divorce are normally recognized as adequate proof of a foreign marriage or divorce, subject to the common law test for recognition (adequate opportunity for full and fair litigation of issues, etc.), and it would appear that civil registration or other administrative acts to the same effect would be treated the same, subject to the same common law test for recognition.⁹²

91. E.g., *Palavra v. INS*, 287 F.3d 690 (8th Cir. 2002)(Croatian passport is not preclusive proof of Croatian citizenship; immigration authorities must consider asylum applicants' claims that Croatian passport was granted to them on humanitarian grounds because they are ethnic Croats from Bosnia whose own country would not grant them a passport to come to the United States for emergency medical treatment); *Kinfe v. Ashcroft*, 121 Fed. Appx. 675 (8th Cir. 2005)(citing with approval but distinguishing *Palavra*); *Walker v. Ashcroft*, 112 Fed. Appx. 243 (3d Cir. 2004)(same). *But see* Ruffert, *supra* note 28, ¶ 8 (arguing that only international courts should be permitted to refuse preclusive effect to nation's determinations of citizenship of persons, corporations, vessels or aircraft).

Ruffert's position is too broad. It fails to take into account that the law of one country may, at least for some purposes, define citizenship differently from another country. A passport normally signifies that the holder is free to come back into the state of issuance. While one country may not be free under international law to deport a person to a country which refuses to grant a passport because that person is not considered a citizen, in *Palavra*, the question under U.S. law was whether U.S. officials were free to decide not to deport to Croatia because the people in question did not constitute citizens of that country for purposes of U.S. law on deportation, even though they held passports from Croatia. International law does not require the United States to deport anyone.

92. ANN LAQUER ESTIN, INTERNATIONAL FAMILY LAW DESK BOOK 39, 63 (2012)(administrative registration regimes for opposite-sex and same-sex couples in Europe (39); administrative registration of nonjudicial divorce such as Muslim *talaq* or Jewish *get* (63); *see also infra* note 96 (claim that civil register from civil law tradition is recognized in the United States). Some family law issues take us outside the common law because of the force of international treaties. *See* ESTIN, *op.cit.*, at 237-38, 245 (Hague Convention on the International Recovery of Child Support and Other Forms

No doubt the most common treatment of foreign administrative acts is, however, as mere evidence of the administrative act itself or the facts underlying the administrative act. Since there is no preclusion, one might hesitate to call this a form of recognition, but there are cases recognizing a presumption of regularity for actions and records of public officials, and that presumption “applies to the actions and records of foreign public officials, . . . While not irrebuttable, the presumption may only be rebutted through clear or specific evidence.”⁹³ This rule would seem to require a heightened standard for rebuttal. If this is meaningfully stronger than the standard that applies to mere evidence, we could say that the presumption constitutes a lower level of recognition, weaker than enforcement or collateral estoppel, but stronger than treating the foreign act as mere evidence.

In the litigation connected with the *Riggs Bank* case discussed above in connection with the act of state doctrine, the court applied this presumption, but it is hard to say whether it actually made any difference. In that case, the U.S. bank claimed a credit on its U.S. taxes for Brazilian taxes paid on its behalf by the Brazilian Central Bank in connection with loans the U.S. bank made to the Brazilian Central Bank. The U.S. bank submitted official Brazilian tax receipts to the U.S. tax authorities to prove the payments, but the U.S. tax authorities resisted the claim on the grounds that errors in the accompanying schedules or spreadsheets from the Brazilian Central Bank showing subsidies the Central Bank received for its payment of the U.S. bank’s taxes cast doubt on the accuracy of the official tax receipts. The accompanying schedules showed the Central Bank receiving a pecuniary benefit in years after the Brazilian government had ceased to provide such subsidies. The court held that the IRS failed to rebut the evidence of the official Brazilian tax receipts because the evidence of errors regarding the subsidies was not “clear and specific” enough to rebut the presumption of regularity to which the official tax receipt was entitled.⁹⁴ But it is unclear how important the presumption was in the decision because, as the court pointed out, errors regarding receipt of the subsidy for the payment of a tax

of Family Maintenance, once ratified by the United States, will require enforcement of support orders from other participating states, whether from courts or administrative bodies, but subject essentially to the same requirement for a full and fair opportunity to litigate as under the common law).

93. *Riggs National Corp. v. Commissioner*, 295 F.3d 16, 20-21 (D.C. Cir. 2002). The hearsay rule does not apply to preclude use of the documents embodying the foreign administrative act to prove (i) the administrative office’s activities, (ii) a matter observed while under a legal duty to report (but excepting matters observed by law enforcement personnel in a criminal case), and (iii) factual findings from a legally authorized investigation in a civil case or against the government in a criminal case, as long as, in all these cases, there is no evidence indicating a lack of trustworthiness on the part of these official records. Fed. R. Evid. 803 (8).

94. *Riggs National Corp.*, 295 F.3d. at 21-23.

did not necessarily show that the tax itself was not paid.⁹⁵ The evidence to refute the claim of payment was not very strong and the court may not have needed a presumption to reject it.

In the absence of a meaningful presumption, the foreign administrative act is at most treated as mere evidence. It would seem to drain the word of any significant meaning to call this treatment a kind of recognition because it does not result in treatment any different from that accorded any other piece of evidence. Treatment as mere evidence, however, may well be the most common form of treatment of foreign administrative acts under the common law.⁹⁶

95. *Id.*

96. Professors Ehrenzweig and Jayme cited the following family law cases as examples of “recognition” of foreign administrative acts and that the “civil register of civil law countries now has found recognition even in the United States”: *Sousa v. Freitas*, 10 Cal. App. 3d 660, 667, 89 Cal. Rptr. 485, 490 (Ct. App. 1970); *Caruso v. Lucius*, 448 S.W.2d 711 (Tex. Civ. App. 1970); *Johnson v. Berger*, 273 N.Y.S.2d 484 (Fam. Ct. 1966). 2 EHRENZWEIG & JAYME, *supra* note 10, at 72-73 nn.49, 52. But the authors do not restrict recognition to instances of preclusion, as I argue we should. In any event, it is difficult to tell how these courts treat the evidence because the evidence of the foreign act affecting family status was either unopposed or the status in question was not even at issue in these cases.

TRACY A. KAYE*

Taxation and Development Incentives in the United States†

TOPIC IV. E

Policy analysts continue to debate whether it is appropriate to use the tax system to encourage investment behavior. This article examines whether amending U.S. international tax rules to allow multinational corporations to retain the benefit of tax incentives offered by developing countries to attract investment is advisable. It is clear however, that any proposal to incentivize investment in developing countries cannot compete with the opportunities available currently to avoid U.S. corporate tax by using hybrid structures, tax havens, and legal fictions to shift profits offshore. This profit shifting is causing tremendous harm to developing countries as the lost tax revenues far exceed any benefit to be gained from encouraging the use of their tax incentives. This article concludes that before incentivizing investment in developing countries, the U.S. should participate fully in the Organization for Economic Cooperation and Development's effort to address the base erosion problem and make the necessary adjustments to the international tax regime that currently enable legal corporate tax avoidance.

INTRODUCTION

This article examines whether the United States uses its tax law to provide incentives for investment in developing countries and discusses whether amendments to its international tax rules to accomplish this goal are advisable. Some scholars argue that tax laws should be neutral and should not encourage or discourage economic

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behavior.¹ Others contend that a country's use of its tax laws to encourage investment behavior or to attract investment may be harmful. Policy analysts continue to debate whether it is appropriate for a country to use its tax system to encourage or discourage investment behavior or business activity.² The Stephen L. Cantor International Tax Symposium sought to address these issues in particular with respect to investment in developing countries.³ Professor Karen Brown, for example, argued for a comprehensive approach to the administration of U.S. tax laws with respect to developing countries that would include negotiation of exchange of information treaties with developing countries as well as income tax treaties.⁴ Under the auspices of the International Academy of Comparative Law, this topic is being revisited a decade later.

The United States could arrange its tax system to enable its multinational corporations (MNCs) to operate overseas on a level playing field with other companies operating in the same market by allowing U.S. MNCs to retain the benefit of any tax incentives or tax holidays offered by the developing countries to attract their investment. It could amend its tax system to provide an incentive for its multinational enterprises to invest in specified regions in order to encourage business activity in developing countries.⁵ It could also use its tax system in order to itself compete with other similarly situated countries for investment or business activity. This article will explore and critique the policy choices that have been made by the United States with respect to outward investment.

Foreign direct investment (FDI)⁶ flows to developing countries⁷ have recorded dramatic increases over the past decade. According to

1. See generally Alex Easson, *Tax Incentives for Foreign Direct Investment Part I: Recent Trends and Countertrends*, 55 BULL. FOR INT'L FISCAL DOCUMENTATION 266 (2001) (summarizing the conventional wisdom that tax incentives "cause distortions").

2. See generally STANLEY S. SURREY & PAUL R. MCDANIEL, *TAX EXPENDITURES* (1985) and resulting literature.

3. See generally Symposium, 35 GEO. WASH. INT'L L. REV. (2003) (entire symposium issue). See also *TAX, LAW AND DEVELOPMENT* (Yariv Brauner & Miranda Stewart eds., 2013) for a compendium of chapters that examine the intersection of tax, law, and development with respect to many aspects of the issue.

4. Karen Brown, *U.S. International Tax Administration & Developing Nations: Administrative Policy at the Crossroads*, 35 GEO. WASH. INT'L L. REV. 393, 397-99 (2003).

5. Yoram Margalioth, *Tax Competition, Foreign Direct Investments and Growth: Using the Tax System to Promote Developing Countries*, 23 VA. TAX REV. 161, 171 (2003-2004) (proposing to use the international tax regime to transfer tax revenues from wealthy countries to multinationals, thereby inducing them to make foreign direct investments in developing countries).

6. OECD, *OECD BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT* 48-50 (4th ed. 2008). Foreign direct investment implies a long-term relationship and a "significant degree of influence on the management" by a resident enterprise in one economy (direct investor) in an enterprise that is resident in another country. "The direct or indirect ownership of 10% or more of the voting power of an enterprise resident in one economy by an investor resident in another economy is evidence of such a

the United Nations Conference on Trade and Development (UNCTAD), World FDI inflows rose from \$735 billion in 2001⁸ to \$1.35 trillion in 2012. In 2012, FDI in developing countries reached \$703 billion, with \$326 billion of that amount going to East and South-East Asia.⁹ During this decade, the growth of FDI in East and South-East Asia far exceeded that of Africa, which only received \$50 billion.¹⁰ Thus, the expected benefits of an influx of FDI such as a growth in capital, job creation, transfer of technology, and an overall expanded economy went to the countries most likely to attract investment anyway.¹¹

U.S. MNCs invest a small proportion in developing countries when compared to investments made in developed countries. In 2012, total U.S. direct investment abroad equaled \$4.45 trillion.¹² Of this amount, 4.1% was invested in South and Central America (excluding Mexico), 1.4% was invested in Africa, and a mere .96% was invested in the Middle East.¹³ This pattern of investing in the strongest economies is not isolated to the U.S. multinationals; it is repeated worldwide by all multinational corporations. Although developing countries received 52% of the world's FDI inflows in 2012, 18.1% went to Latin America and the Caribbean, 3.7% went to Africa and only 4.4% went to nations that the United Nations has declared as having a structurally weak, vulnerable and small economy.¹⁴ Part III of this Article describes the current U.S. tax policy with respect to this U.S. investment abroad.

relationship." *Id.* at 48-49. The U. S. Department of Commerce defines direct investment as ownership or control of ten percent or more of the voting shares by a single legal entity. U.S. DEP'T OF COMMERCE, BUREAU OF ECON. ANALYSIS, FOREIGN DIRECT INVESTMENT IN THE UNITED STATES 39 (2001).

7. UNCTAD defines developed countries as "the member countries of the OECD (other than Chile, Mexico, the Republic of Korea and Turkey), plus the new European Union member countries which are not OECD members (Bulgaria, Cyprus, Latvia, Lithuania, Malta and Romania), plus Andorra, Bermuda, Liechtenstein, Monaco and San Marino;" transition economies as "South-East Europe, the Commonwealth of Independent States and Georgia;" and developing economies as "all economies not specified above." UNCTAD, WORLD INVESTMENT REPORT 2013, ii (2013), *available at* http://unctad.org/en/PublicationsLibrary/wir2013_en.pdf.

8. UNCTAD, WORLD INVESTMENT REPORT 2002, FDI inflows, by host region and economy, 1990-2001, 303 tbl. B.1 (2002).

9. UNCTAD, WORLD INVESTMENT REPORT 2013, FDI flows by region, 2010-2012, xiii tbl.1 (2013).

10. *Id.*

11. *See generally* TAX JUSTICE NETWORK-AFRICA & ACTIONAID INT'L, TAX COMPETITION IN EAST AFRICA: A RACE TO THE BOTTOM?, *available at* http://www.actionaidusa.org/sites/files/actionaid/eac_report.pdf (2012).

12. U.S. DEP'T OF COMMERCE, BUREAU OF ECON. ANALYSIS, U.S. DIRECT INVESTMENT POSITION ABROAD ON A HISTORICAL BASIS 2012, (Oct. 2013) *available at* http://www.bea.gov/iTable/index_MNC.cfm.

13. *Id.*

14. UNCTAD, WORLD INVESTMENT REPORT 2013, FDI flows by region, 2010-2012, ii, xiii tbl.1 (2013).

Part II of this article focuses on the tax incentive phenomena from the perspective of developing or low-income countries. Unfortunately, this story sounds very similar to the one described in Part I for the various American states. After discussing U.S. corporate tax avoidance and the global base erosion problem in Part IV, this article concludes that consideration of any changes to the U.S. international tax regime in order to incentivize investment in developing countries must be deferred until these problems have been confronted by U.S. tax policy makers. Tax incentives will not work when U.S. MNCs have the ability to reduce their tax rate to zero without risking their investment under the current U.S. international tax regime.

I. TAX INCENTIVES AT THE STATE AND LOCAL LEVEL

The use of tax incentives by the individual American states to attract investment has been the subject of much research.¹⁵ A review of this research can provide a useful parallel for an analysis of the efficacy of the use of tax incentives by developing countries. In *Investment Incentives and the Global Competition for Capital*, Professor Kenneth Thomas, documents how tax subsidies given to multinationals are increasing around the world.¹⁶ He estimated total U.S. state and local incentives at \$46.8 billion in 2005.¹⁷ Because the United States does not have any strict controls or procedures over the granting of such incentives by the states,¹⁸ bidding wars for incentives increase the size and number of incentives far beyond those encountered in the European Union.¹⁹

While competition to give money to companies is indeed a global problem, the problem is much worse in the United States.²⁰ For 2005, Thomas estimated that American state and local subsidies to businesses were much larger than the location subsidies found in fifteen

15. See, e.g., Tracy Kaye, *The Gentle Art of Corporate Seduction: Tax Incentives in the United States and the European Union*, 57 U. KAN. L. REV. 93 (2008). This section of the paper relies heavily on work done earlier on state aid. See also Tracy Kaye, *Corporate Blackmail: State Tax Incentives in the United States*, in STATE AID AND LAW (Alexander Rust & Claire Micheau eds., 2013).

16. KENNETH P. THOMAS, INVESTMENT INCENTIVES AND THE GLOBAL COMPETITION FOR CAPITAL 2-3 (2011). Because of the range of credits offered by U.S. states and municipalities as well as the lack of a universal data collection and recordation procedure, it is extremely difficult to achieve an accurate total of investment incentives offered throughout the United States. *Id.* at 102-06.

17. Thomas, *supra* note 16, at 106-07. Further, he estimated for 2005 total state and local subsidies to be \$64.8 billion and \$69.8 billion if the benefits of accelerated depreciation are included in the total. *Id.* David Cay Johnston, *On the Dole, Corporate Style*, 59 ST. TAX NOTES 127 (2011) (citing Thomas, *supra* note 16).

18. Thomas, *supra* note 16, at 96. State aid in the European Union is controlled through the adoption of overall regional aid guidelines. *Id.* at 96-97, 101.

19. Thomas, *supra* note 16, at 97-102.

20. Thomas, *supra* note 16, at 1. "Alabama . . . in 2002 gave Hyundai about \$117,000 per job on a present value basis . . ." *id.*

EU Member States.²¹ The United States also has markedly higher-aid intensity (the incentive amount as a percentage of the recipient's investment) and the locations granting these "investment incentives were substantially more prosperous than comparable EU regions."²² As of 2011, almost every state offered some type of tax credit or tax incentive to persuade businesses to locate, maintain, or expand their operations within the state.²³ Although interstate competition to attract economic development has raised concerns regarding the smooth functioning of the national economy,²⁴ the proliferation of tax credits and incentives has continued relatively unabated despite the dire financial condition of many of the states.²⁵

This proliferation is occurring throughout the United States despite criticism regarding the effectiveness of state tax incentives coming from a myriad of economic studies.²⁶ While "[s]tate and local governments continue to demonstrate a seemingly limitless enthusiasm for economic development incentives . . . economists deride [such incentives] as fiscally irresponsible and irrational."²⁷ At the National Economic Policy Implications of State Tax Incentive Competition Senate Subcommittee Hearing, Professor Fisher testified that the tax incentive competition engaged in by the states is, at its best, a zero-sum game because it "merely move[s] economic activity from one state to another" with no net gain on either the national or local level.²⁸ Any influx of jobs and investment "won" through incentive

21. *Id.* at 96; see also Johnston, *supra* note 17, at 127.

22. Thomas, *supra* note 16, at 98-99.

23. Mark L. Nachbar, *Credits and Incentives: Alabama Through Hawaii*, 1450-2nd Tax Mgm't, 1450.01-1450.02 (2007); see also Mark L. Nachbar et al., *Business Credits and Incentives*, Tax Mgm't Nos. 1450, 1460, 1470, and 1480 (2011).

24. See, e.g., DAVID BRUNORI, THE FUTURE OF STATE TAXATION 6 (1998) [hereinafter BRUNORI, STATE TAXATION] (stating that "[c]ommentators generally agree that incentives violate the most basic principles of sound tax policy"); David Brunori, "The Politics of State Taxation": *Thou Shalt Not Use Tax Incentives*, ST. TAX TODAY 557 (2002) [hereinafter Brunori, *Thou Shalt Not Use Tax Incentives*] (stating tax incentives violate "the cardinal rule that tax systems should be designed so that they have a minimal impact on economic activity").

25. See Brunori, *Thou Shalt Not Use Tax Incentives*, *supra* note 24, at 557 (describing States, corporations, and consultants as actively in pursuit of granting and obtaining tax breaks); see also BRUNORI, STATE TAXATION, *supra* note 24, at 6 (stating that tax incentives have increased "primarily because political leaders lack the will to reject them").

26. See Kirk J. Stark & Daniel J. Wilson, *What Do We Know About the Interstate Economic Effects of State Tax Incentives?*, 4 GEO. J.L. & PUB. POL'Y 133, 163 (2006) for an excellent introduction to the literature.

27. Nicole Stella Garnett, *The Neglected Political Economy of Eminent Domain*, 105 MICH. L. REV. 101, 140 (2006) ("A sampling of studies that have focused on individual tax incentive plans . . . found little correlation between the amount of tax benefit received and growth in employment which resulted."); see also Sherry L. Jarrell et al., *Law and Economics of Regulating Local Economic Development Incentives*, 41 WAKE FOREST L. REV. 805, 826 (2006) (citations omitted).

28. *The National Economic Policy Implications of State Tax Incentive Competition: Hearing on "Cuno and Competitiveness: Where to Draw the Line" Before the Subcomm. on Int'l Trade of the S. Comm. on Finance*, 109th Cong. 2 (2006) (statement

wars by one locality is offset by a corresponding loss. Tax incentive competition quite possibly can be a negative-sum game that produces a net loss.²⁹

Several studies described in *Unleashing Capitalism*³⁰ examine whether the benefits of these kinds of tax incentives outweigh the costs.³¹ Arguably, development incentives provide the greatest benefit to high unemployment areas, yet state governments often attract firms to areas with low unemployment.³² Although the ultimate goal of targeted incentives is to create jobs³³ and to increase economic growth, a 2001 study found no evidence of overall economic growth of in-state GDP or employment when measuring over 2,000 programs across all states.³⁴ The study by Peters and Fisher suggests that “many public officials appear to believe that they can influence the course of their state or local economies through incentives and subsidies to a degree far beyond anything supported by even the most optimistic evidence.”³⁵ If the tax incentive game at the American state level is one of inefficiency, waste, and ineffectiveness, is there any reason to think that tax incentives to attract investment will work when used to attract investment to developing countries?

II. TAX INCENTIVES OFFERED BY DEVELOPING COUNTRIES

Just like the American states, developing countries make extensive use of tax incentives such as reduced tax rates, tax holidays, investment tax credits, and accelerated depreciation to attract invest-

of Peter Fisher) (stating that a 2004 study concluded that selective incentives merely reallocate resources rather than generate real economic growth); see also Peter T. Calcano & Frank Hefner, *State Targeting of Business Investment: Does Targeting Increase Corporate Tax Revenue?*, 37 J. Regional Analysis & Pol’y 90 (2007).

29. Brief of Amicus Curiae Economics & Public Policy Professors et al. Supporting Respondents, *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006) (Nos. 04-1704, 04-1724), 2006 WL 189794 at *10.

30. UNLEASHING CAPITALISM: A PRESCRIPTION FOR ECONOMIC PROSPERITY IN SOUTH CAROLINA 129-149 (Peter T. Calcano ed., 2009).

31. See, e.g., Melvin L. Burstein & Arthur J. Rolnick, CONGRESS SHOULD END THE ECONOMIC WAR AMONG THE STATES, FED. RESERVE BANK OF MINNEAPOLIS (1995), available at http://www.minneapolisfed.org/publications_papers/pub_display.cfm?id=672; Timothy J. Bartik, *Evaluating the Impacts of Local Economic Development Policies on Local Economic Outcomes: What Has Been Done and What Is Doable?*, (W.E. Upjohn Inst. for Employment Research, Working Paper No. 03-89 (2002)).

32. Timothy J. Bartik, *Jobs, Productivity, and Local Development: What Implications does Economic Research have for the Role of Government?*, 47 NAT’L TAX J. 847 (1994).

33. A 2002 study of selective incentives in Ohio found that the number of new jobs promised by a targeted business was the major factor in determining whether or not that firm received the incentive. Todd M. Gabe & David S. Kraybill, *The Effect of State Economic Development Incentives on Employment Growth of Establishments*, 42 J. REGIONAL SCI. 703 (2002).

34. Martin Saiz, *Using Program Attributes to Measure and Evaluate State Economic Development Strategies*, 15 ECON. DEV. Q. 45 (2001).

35. Alan Peters & Peter Fisher, *The Failures of Economic Development Incentives*, 70 J. AM. PLAN. ASS’N 27, 35 (2004).

ment.³⁶ Tax incentives are the only tool available to developing countries because they do not have the resources for financial incentives or infrastructure improvements.³⁷ These countries hope that tax incentives will overcome aversion to investment in their country due to their otherwise poor investment climate because of political volatility, “dilapidated infrastructure, the high cost of doing business, macroeconomic instability, corruption, and an inefficient judiciary.”³⁸ This is so even though the economics literature is inconclusive as to the effect of inbound FDI on the growth of developing countries and the effectiveness of tax incentives in attracting such investment.³⁹ Furthermore, a United Nations report clarifies that official development assistance is much more critical than FDI for attacking the myriad of problems facing developing countries.⁴⁰ Similar to the American states, developing countries are caught in a classic prisoners’ dilemma.

If all the states would refrain from deploying location incentives for business, then they all could retain more robust tax bases to support other governmental functions. But if the other states are going to offer a widening array of tax breaks, then none can afford the costs—more political than economic—of abstaining. As a result, incentives proliferate, leaving all the states worse off.⁴¹

Developing countries were initially advised to encourage any and all foreign direct investment.⁴² It has proven to be extremely difficult to determine exactly how FDI affects the growth and welfare of devel-

36. David Holland & Richard J. Vann, *Income Tax Incentives for Investment*, in TAX LAW DESIGN AND DRAFTING 986, 986-87 (Victor Thuronyi ed., 1998). See also TAX JUSTICE NETWORK-AFRICA & ACTIONAID INT’L, *supra* note 11 (for a description of tax incentives being used in East Africa). See generally ALEX EASSON, TAX INCENTIVES FOR FOREIGN DIRECT INVESTMENT (2004).

37. EASSON, *supra* note 36, at 86.

38. TAX JUSTICE NETWORK-AFRICA & ACTIONAID INT’L, *supra* note 11 at 13. See also U.N. REPORT OF THE INTERNATIONAL CONFERENCE ON FINANCING FOR DEVELOPMENT, U.N. (2002) [hereinafter U.N. Report].

39. See, e.g., DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT? (Theodore H. Moran, Edward M. Graham & Magnus Blomström eds., 2005); see also Yariv Brauner, *A Framework for an Informed Study of the Realistic Role of Tax in the Development Agenda*, 42 U.B.C. L. REV. 275, 300 (2010).

40. U.N. Report, *supra* note 38, at 5.

41. Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377, 396 (1996).

42. Yariv Brauner, *The Future of Tax Incentives for Developing Countries* 36, in TAX, LAW AND DEVELOPMENT (Yariv Brauner & Miranda Stewart eds., 2013). The “Washington consensus” asserts that “FDI is unequivocally ‘good’ for development (as long as the investors do not pollute the environment or blatantly abuse workers).” The “Washington Consensus” summarizes the key common development advice given by the U.S. Treasury, IMF, and World Bank. Brauner, *supra* note 39, at 297 n. 85.

oping countries.⁴³ Subsequent research has detailed the negative consequences that can sometimes flow from FDI including environmental damage, inequality, displacement of local firms, and exploitation of workers.⁴⁴ Other studies have detailed the positives such as transfer of technology, higher-quality goods produced at lower prices, employment of local workers, and introduction of new industries.⁴⁵ An International Monetary Fund (IMF) report on globalization states that “the influx of foreign goods, services, and capital into a country can create incentives and demands for strengthening the education system [among other national infrastructures], as a country’s citizens recognize the competitive challenge before them.”⁴⁶

Proceeding with the assumption that on balance FDI leads to net positives, the tax incentives’ return on investment has been minimal at best.⁴⁷ Hidden costs include the increased complexity and tax administrative problems of the developing country’s tax system.⁴⁸ Tax incentives can distort competition between domestic and foreign firms, potentially harming local firms that do not receive the tax breaks.⁴⁹ Tax incentive driven FDI may be short term investment that disappears once the benefit of the tax incentive has been utilized.⁵⁰ The loss of tax revenue has been especially detrimental to

43. Theodore Moran, *Introduction and Overview 1*, in DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT? (Theodore H. Moran, Edward M. Graham & Magnus Blomström eds., 2005) (“Academic research . . . expressed skepticism about the . . . utility of foreign direct investment for development.”) Brauner, *supra* note 39, at 297 (citing Dani Rodrik, *THE NEW GLOBAL ECONOMY AND DEVELOPING COUNTRIES* 37 (1999)).

44. Nick Mabey & Richard McNally, *FOREIGN DIRECT INVESTMENT AND THE ENVIRONMENT: FROM POLLUTIONS HAVENS TO SUSTAINABLE DEVELOPMENT*, WWF-UK REPORT 3, (1999); see, e.g., Avi Nov, *Tax Incentives for Foreign Direct Investment: The Drawbacks*, 38 *TAX NOTES INT’L* 263 (Apr. 18, 2005).

45. See e.g., the studies on wage and productivity spillovers in Indonesian manufacturing. Robert Lipsey & Fredrick Sjöholm, *The Impact of Inward FDI on Host Countries: Why Such Different Answers?* 27-29, 33-35, in DOES FOREIGN DIRECT INVESTMENT PROMOTE DEVELOPMENT? (Theodore H. Moran, Edward M. Graham & Magnus Blomström eds., 2005). “FDI is an important avenue of transfer, especially for knowledge such as management techniques and blueprints.” Margalioth, *supra* note 5, at 168.

46. *Globalization: A Brief Overview*, INTERNATIONAL MONETARY FUND, <http://www.imf.org/external/np/exr/ib/2008/053008.htm> (last updated May 2008).

47. See generally OECD, *BENCHMARK DEFINITION OF FOREIGN DIRECT INVESTMENT* (3rd ed. 1996) (negative on the use of tax incentives for FDI by developing countries).

48. Holland & Vann, *supra* note 36, at 988-89 (“Tax incentives introduce complexity into the tax system, because the rules themselves are complex and because tax authorities react to the tax planning that inevitably results from their introduction by putting into place antiavoidance measures.”) *Id.* at 989.

49. IMF, OECD, U.N., & World Bank, *SUPPORTING THE DEVELOPMENT OF MORE EFFECTIVE TAX SYSTEMS* 19 (2011) [hereinafter IMF, *Effective Tax Systems*], available at <http://www.oecd.org/ctp/48993634.pdf>.

50. *Id.* at 20.

developing countries.⁵¹ Without adequate tax revenues, developing countries will not have the funds needed for “the physical and social infrastructure required for sustainable development.”⁵² For example, half of Sub-Saharan African countries still net less than seventeen percent of their GDP in tax revenues.⁵³ The United Nations has established a goal of at least twenty percent of GDP in tax revenues as being “necessary to achieve the Millennium Development Goals.”⁵⁴

Fearing the inflow of foreign capital would go to a neighboring country if they do not provide multinational corporations with enough tax incentives, developing countries compete to set the lowest tax rates or offer the longest tax holidays.⁵⁵ This action only further depletes these countries’ necessary tax revenue while the region is made collectively worse off.⁵⁶ A literature review done by Mooij and Ederveen “suggests that the influence of tax on FDI is complex and depends on a number of” factors that are difficult to measure.⁵⁷ Corporations’ investment decisions take into consideration tax burdens but also the availability of public goods that must be financed with these tax revenues.⁵⁸ A 2012 study by James and Van Parys suggests that investors react less negatively to higher corporate taxation when the extra tax revenue finances improvements in the investment climate, contributing to the productivity of capital. Thus, “in countries

51. See, e.g., TAX JUSTICE NETWORK-AFRICA & ACTIONAID INT’L, *supra* note 11; IMF, *Effective Tax Systems*, *supra* note 49, at 10. Of course, if the tax incentive attracts investments to the country that would not have been made without the incentive, no revenue has been forgone. However, this is difficult to ascertain and even if true, the next step is to verify that the benefit subsequently provided to the country outweighs the costs of obtaining that investment. Brauner, *supra* note 39, at 306.

52. IMF, *Effective Tax Systems*, *supra* note 49, at 9. In this report, a developing country was defined as one with per capita GDP below \$3,945. This corresponds “to ‘low income’ and ‘lower middle income’ countries in the World Bank classification.” *Id.* at 10 n. 4.

53. *Id.* at 8.

54. *Id.* at 8; see also *We Can End Poverty 2015: Millennium Development Goals*, UNITED NATIONS, <http://www.un.org/millenniumgoals/> (last visited Feb. 5, 2014). All of the world’s countries and leading development institutions agreed upon Millennium Development Goals (MDGs) in 2000 in order to end poverty by the year 2015. The MDGs require a great expenditure by least developed countries, so twenty percent of GDP tax revenue is advocated for these countries by the UN in order to accomplish these goals. UNDP, *WHAT WILL IT TAKE TO ACHIEVE THE MILLENNIUM DEVELOPMENT GOALS? AN INTERNATIONAL ASSESSMENT* 26, (2010), available at http://content.undp.org/go/cms-service/stream/asset/?asset_id=2620072.

55. Arthur J. Cockfield, *Introduction: The Last Battleground of Globalization*, in *GLOBALIZATION AND ITS TAX DISCONTENTS: TAX POLICY AND INTERNATIONAL INVESTMENTS: ESSAYS IN HONOUR OF ALEX EASSON* 1, 23 (Arthur J. Cockfield ed., 2010).

56. IMF, *Effective Tax Systems*, *supra* note 49, at 24.

57. OECD, *Tax Effects on Foreign Direct Investment, Recent Evidence and Policy Analysis* 11 (2007).

58. Stefan Van Parys, *The Effectiveness of Tax Incentives in Attracting Investment: Evidence from Developing Countries*, LI REFLETS ET PERSPECTIVES DE LA VIE ÉCONOMIQUE 132 (2012).

with the worst investment climate, it is possible that lowering the tax burden misses its impact.”⁵⁹

A study by Klemm and Van Parys finds that tax incentives have no significant impact on investment in Africa, probably because the investment climate “is so poor that granting tax incentives” does not sufficiently “compensate for the poor investment climate.”⁶⁰ Professor Dagan describes this scenario as “the tragic choices of tax policy in a globalized economy.”⁶¹ Poor countries competing for foreign investment results in an inability to collect the taxes needed for the redistribution of wealth.⁶² The competition among the developing countries to attract FDI resembles the same “race to the bottom” taking place among the American states.⁶³ This is unfortunate as one study by Van Parys and James shows that with respect to Sub-Saharan Africa, investors preferred more transparency and financial security to a lower tax burden.⁶⁴ Both the IMF and the World Bank have been attempting to persuade governments to minimize or eliminate special tax incentives⁶⁵ and the Organization for Economic Cooperation and Development (OECD) and others provide much guidance with respect to their careful design if such incentives continue to be used.⁶⁶

III. U.S. TAX POLICY WITH RESPECT TO INVESTMENT ABROAD

Should the United States encourage, discourage, or be neutral with respect to direct investment abroad? Early studies assumed that the U.S. corporate tax regime was an inducement for making these foreign investments. However, Robert Lipsey notes that the widespread practice of internationalization of home country enterprises suggests that “there were forces beyond any distortionary U.S. tax policies that were driving these trends.”⁶⁷ Should the United States encourage the investment in developing countries by U.S. MNCs by amending its international tax rules? If so, what form should these tax policy initiatives take? Tax scholars have discussed ideas ranging from replacing the foreign tax credit mechanism with an exemption

59. *Id.* at 136.

60. *Id.* at 137.

61. Tsilly Dagan, *The Tragic Choices of Tax Policy in a Globalized Economy* 57, 59, in TAX, LAW AND DEVELOPMENT (Yariv Brauner & Miranda Stewart eds., 2013).

62. *Id.* at 71.

63. IMF, *Effective Tax Systems*, *supra* note 49, at 10.

64. Van Parys, *supra* note 58, at 139.

65. EASSON, *supra* note 36, at 211; *see also* Brauner, *supra* note 39, at 287-88.

66. *See, e.g.*, OECD, *CORPORATE TAX INCENTIVES FOR FOREIGN DIRECT INVESTMENT* (2001); OECD, *CHECKLIST FOR FOREIGN DIRECT INVESTMENT INCENTIVE POLICIES* (2003); Holland & Vann, *supra* note 36, at 990-1004.

67. Robert E. Lipsey, *Home and Host Country Effects of FDI* 6 (Nat'l Bureau of Econ. Research, Working Paper 9293, 2002), available at <http://www.nber.org/papers/w9293>.

system for developing countries⁶⁸ to providing a deemed tax credit for the taxes foregone because of the foreign jurisdiction's tax subsidy.⁶⁹

The United States has a long history of suspicion against outward investment with fears about the effects on domestic employment and exports.⁷⁰ In general, the United States does not explicitly employ tax incentives to encourage investment in emerging or developing countries. Supposedly, the U.S. international tax system has been designed to be neutral in this regard in that U.S. corporations are taxed on their worldwide income, regardless of geographic origin.⁷¹ Thus, adopting the doctrine of capital export neutrality, U.S. corporations will be neutral as to where to invest their resources at least from the perspective of taxes. Capital export neutrality exists if the tax burden on the corporation's foreign operations is no lower than the burden on its domestic operations, and thus there is no incentive from the tax system for domestic corporations to export capital.⁷² The theory is that the U.S. multinational corporation will invest its capital based on where it will generate the highest rate of return not taking into consideration taxes, thus satisfying the economic efficiency criteria.⁷³

The United States uses the mechanism of the foreign tax credit,⁷⁴ allowance of a credit against the U.S. tax liability of any for-

68. Karen B. Brown, *Missing Africa: Should U. S. International Tax Rules Accommodate Investment in Developing Countries?*, 23 U. PA. J. INT'L. ECON. L. 45 (2002); see also Margalioth, *supra* note 5, at 193; Karen B. Brown, *Transforming the Unilateralist into the Internationalist: New Tax Treaty Policy Towards Developing Countries*, in *TAXING AMERICA* (Karen B. Brown & Mary Louise Fellows eds., 1996).

69. Paul R. McDaniel, *The U.S. Tax Treatment of Foreign Source Income Earned in Developing Countries: A Policy Analysis*, 35 GEO. WASH. INT'L L. REV. 265, 274 (2003); see also Margalioth, *supra* note 5, at 193 ("[A]pply tax sparing provisions to income generated in developing countries.").

70. Lipsey, *supra* note 67, at 7.

71. See Boris I. Bittker & Lawrence Lokken, *FUNDAMENTALS OF INTERNATIONAL TAXATION: U.S. TAXATION OF FOREIGN INCOME AND FOREIGN TAXPAYERS*, ¶ 65.1.2, at 63–65 (1998).

72. For a discussion of these issues, see STAFF OF J. COMM. ON TAX'N, 102ND CONG., *FACTORS AFFECTING THE INTERNATIONAL COMPETITIVENESS OF THE UNITED STATES* (Comm. Print 1991).

73. In contrast to the economic neutrality view, some policy makers believe that tax systems should be used to enhance the competitiveness of domestic businesses. A prime example was the foreign sales corporation provisions in U.S. tax law. See I.R.C. §§ 921–927 (CCH 1999) (prior to its repeal by the Foreign Sales Corporation Repeal and Extraterritorial Income Exclusion Act of 2000) and U.S. TREASURY DEP'T, *The Operation and Effect of the Foreign Sales Corporation Legislation* (1993). All section references are to the Internal Revenue Code of 1986, as amended.

74. I.R.C. §901(a) (2013). Section 901 is limited by the provisions set out in section 904 and allows a domestic corporation to elect to take a foreign tax credit (FTC) against the tax imposed under the Code for the taxes paid or accrued to a foreign state. Treas. Reg. §1.901-1(a) (2011). If the corporation elects to take the FTC then it cannot take a deduction for the foreign taxes paid. RICHARD L. DOERNBERG, *INTERNATIONAL TAXATION* 210 (2009).

foreign income taxes paid on foreign source income,⁷⁵ to ameliorate any double taxation. However, the foreign tax credit is limited to the amount of U.S. tax on that foreign income.⁷⁶ In effect, capital export neutrality has not been strictly adhered to because the U.S. corporation's overall tax liability on foreign source income equals the higher of either the pre-credit U.S. tax on the income or the foreign tax.⁷⁷ This foreign tax credit limit discourages U.S. MNCs from investing in countries with higher tax rates than the United States because they will end up with excess foreign tax credits.

If U.S. multinationals invest through foreign branch operations in countries with lower tax rates than the United States, they will pay a residual tax to the United States. Thus, the U.S. foreign tax credit regime obviates any benefit to the U.S. multinational that would otherwise result from developing countries providing tax holidays, tax incentives, or lower corporate tax rates and instead transfers the benefit to the U.S. Treasury.⁷⁸ However, cross-crediting is allowed, which means that excess credits from investments in high-tax countries can be used to offset the U.S. tax liability on profits from operations in low-tax jurisdictions. This is currently limited only by separating income into two baskets, one for general income (active business income) and one for passive income, and calculating a separate foreign tax credit limitation for each basket.⁷⁹ The liberalization of these separate limitation rules has increased the use of cross-crediting by U.S. multinationals.⁸⁰

Some countries with foreign tax credit regimes allow tax sparing provisions in their bilateral income tax treaties in order to solve the inability of the multinational to benefit from a tax holiday or other tax incentive offered by the developing country.⁸¹ Tax sparing involves granting a foreign tax credit for the taxes spared, those income taxes that the corporation would have paid in the absence of the tax incentives or tax holiday provided by the developing country.⁸² Gen-

75. I.R.C. §§ 861-865 (2013) provide rules as to whether a particular category of income is U.S. or foreign source. Treas. Reg. § 1.861-8 (2013) provides rules on the allocation of deductions for various expenses between the U.S. and foreign source income.

76. I.R.C. § 904(a) (2013). Thus, the allowable FTC is foreign source income divided by worldwide income, then multiplied by U.S. tax on income.

77. McDaniel, *supra* note 69, at 268-69.

78. *See id.* at 273.

79. I.R.C. § 904(d) (2013).

80. *See* Roseanne Altshuler & Harry Grubert, *Corporate Taxes in a World Economy: Reforming the Taxation of Cross-Border Income*, in *FUNDAMENTAL TAX REFORM: ISSUES, CHOICES AND IMPLICATIONS* (John W. Diamond and George Zodrow, eds., 2008).

81. *See generally* Kim Brooks, *Tax Sparing: A Needed Incentive for Foreign Investment in Low-Income Countries or an Unnecessary Revenue Sacrifice*, *QUEEN'S L. J.* 505 (2009), available at <http://www.s4tp.org/wp-content/uploads/2011/09/Tax-Sparing.pdf>.

82. OECD, *TAX SPARING: A RECONSIDERATION*, 11 (1998).

erally speaking, the United States does not explicitly employ tax incentives, either through the statute or through its bilateral income tax treaty network, to encourage investment in emerging or developing countries. Although some countries encourage investment in these types of markets through tax sparing provisions in their tax or investment treaties, the United States has refrained from including tax sparing provisions in its treaties with other countries.⁸³

In the 1950s, the United States negotiated various income tax treaties with countries such as Israel and Pakistan that included a tax sparing provision. The U.S. Senate refused to accept these tax sparing provisions and since that time, the United States has not included tax sparing articles in its ratified tax treaties.⁸⁴ Professor Surrey's testimony at the Foreign Relations Committee Hearing on the Pakistan treaty probably convinced the Senate not to accept the tax sparing provision. Surrey argued, *inter alia*, that tax sparing provisions were a distortion of the tax credit mechanism, contrary to Congressional intent to favor capital export neutrality, and not necessary in light of the fact that taxes were deferred by foreign operations conducted by a foreign subsidiary corporation.⁸⁵ The OECD also does not encourage its members to engage in tax sparing provisions because of the long-term negative effects of tax sparing.⁸⁶

Since the enactment of the corporate income tax, U.S. multinationals have demanded the ability to compete in the global

83. See generally James R. Hines, Jr., "Tax Sparing" and Direct Investment in Developing Countries (Nat'l Bureau of Econ. Research, Working Paper No. 6728, 1998), available at <http://www.nber.org/papers/w6728.pdf>. For a discussion of treaty negotiations with Brazil, see Daniel M. Berman & Victoria J. Haneman, MAKING TAX LAW 248-49 (2014). See also Jason R. Connery et al., *Current Status of U.S. Tax Treaties and International Tax Agreements*, 42 TAX MGMT. INT'L J. 485, 488 (Aug. 9, 2013).

84. See Hines, Jr. *supra* note 83, at 10. ("Despite this position, the U.S. does often agree, in an exchange of notes, to grant a tax sparing provision to countries with whom it negotiates tax treaties if it ever grants such a provision to another country in a subsequent tax treaty."). See, e.g., Brooks, *supra* note 81, at 520 ("If the United States reaches agreement on the provision of a tax sparing credit with any other country, the United States agrees to reopen negotiations with Bangladesh with a view to the conclusion of a protocol which would extend a tax sparing credit under the treaty."). Convention Between the Government of the U.S. and the Government of the People's Republic of Bangladesh for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income, U.S.—Bangl., Sept. 26, 2004, 2004 U.S.T. 207. For other examples see U.S.—The People's Republic China Income Tax Convention, U.S.—China, Apr. 30, 1984, 1984 U.S.T. 244; Tax Convention with the Republic of India, U.S.—India, Sept. 12, 1989, 1989 U.S.T. 236; Second Protocol Amending the 1975 Tax Convention with Israel, Jan. 26, 1993, 1993 U.S.T. 115. However, given that the United States has not included tax sparing provisions in any of its tax treaties, and it does not appear that it will do so in the future, including this text does not carry much value to date. Brooks, *supra* note 81, at 520.

85. Brooks, *supra* note 81, at 519-21 (citations omitted). "The Senate consented to the Treaty with Pakistan subject to a reservation that eliminated the tax sparing provision." Berman & Haneman, MAKING TAX LAW, *supra* note 83, at 248. "Pakistan agreed to the reservation" and the tax treaty "entered into force in 1959." *Id.* at n. 4.

86. See generally McDaniel, *supra* note 69.

marketplace, in other words, to benefit from investment in countries with corporate tax rates lower than those of the United States.⁸⁷ This desire is accommodated due to the application of the worldwide tax regime solely to U.S. corporations, defined as those created or organized under the laws of the United States or one of the states.⁸⁸ All other corporations are nonresident corporations and only taxable by the United States on U.S. source investment income⁸⁹ or income effectively connected with the conduct of a U.S. trade or business.⁹⁰ Thus, a U.S. multinational can form a subsidiary in a foreign country to conduct business and there will be no U.S. tax consequences until the profits are distributed to the parent corporation as dividends, rents, or royalties.⁹¹

This policy of allowing the U.S. parent to defer taxes on the income earned abroad by their foreign subsidiaries (also known as controlled foreign corporations (CFCs)) until that income is repatriated, is known as deferral.⁹² It is widely understood that if these taxes are deferred for a long enough period of time, the benefit is as good as exempting the income from tax.⁹³ Earnings of U.S. foreign affiliates were approximately \$900 billion in 2009.⁹⁴ Evidence suggests that undistributed foreign profits could total as much as \$1.7 trillion.⁹⁵ The Joint Committee on Taxation estimates that the foregone revenue from deferral of active income of CFCs for fiscal year

87. See CBO, *OPTIONS FOR TAXING U.S. MULTINATIONAL CORPORATIONS* 6 (2013) available at http://www.cbo.gov/sites/default/files/cbofiles/attachments/43764_MultinationalTaxes_rev02-28-2013.pdf. [hereinafter CBO Options].

88. I.R.C. § 7701(a)(4) (2013).

89. I.R.C. § 881(a) (2013). Sections 861-865 provide rules as to whether a particular category of income is U.S. or foreign source.

90. I.R.C. § 882(a) (2013).

91. There are limits on deferral with respect to passive income. Subpart F defines which income is not eligible for the deferral regime. See I.R.C. §§ 951-964 (2013). For example, income from the sales of foreign property to related parties is defined as subpart F income. I.R.C. § 951 (2013).

92. STAFF OF J. COMM. ON TAX'N, 113TH CONG., REPORT TO THE H. COMM. ON WAYS AND MEANS ON PRESENT LAW AND SUGGESTIONS FOR REFORM SUBMITTED TO THE TAX REFORM WORKING GROUPS (COMM. PRINT 2013); U.S. TREAS. DEPT., *THE DEFERRAL OF INCOME THROUGH U.S. CONTROLLED FOREIGN CORPORATIONS: A POLICY STUDY*, Doc. 2001-492 (Dec. 2000), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/subpartf.pdf>.

93. Assuming the host country's tax rate is lower than that of the United States, the resulting tax savings equals the amount of profits not repatriated multiplied by the rate differential adjusted by the period of deferral. This deferral benefit provides some incentive for the reinvestment of these foreign profits into foreign operations. PETER T. MUCHLINSKI, *MULTINATIONAL ENTERPRISES & THE LAW* 299 (2007). This tax deferral achieves capital import neutrality because all foreign firms pay the same tax rate until repatriation to the home country. *Id.* at 300.

94. CBO Options, *supra* note 87, at 10-11 (citing BUREAU OF ECON. ANALYSIS, *U.S. Direct Investment Abroad: Financial and Operating Data for U.S. Multinational Companies* (Nov. 19, 2012), available at <http://go.usa.gov/ftf>). This does not include foreign branch income of U.S. parent companies. *Id.*

95. *The Shifting of Profits Offshore by U.S. Multinational Corps.: Hearing before the S. Homeland Sec. and Gov't Affairs Permanent Subcomm. On Investigations,*

2013 totals \$42.4 billion and that for the period 2013-2017 totals \$265.7 billion.⁹⁶ This policy of deferral makes the U.S. international tax system territorial in some respects.⁹⁷ Furthermore, as documented by the Permanent Subcommittee on Investigations, the U.S. MNCs access these funds through short-term lending programs that avoid the rules in place to prevent such access.⁹⁸

There are restrictions on taking advantage of deferral with respect to passive or highly mobile types of income.⁹⁹ Just like today, there were serious concerns during the Kennedy Administration that U.S. MNCs were shifting operations offshore in response to the tax savings that could be achieved because of deferral. Enacted in 1962, the Subpart F regime requires current U.S. taxation on the domestic parent corporation for certain types of income earned by certain foreign corporations known as controlled foreign corporations.¹⁰⁰ A CFC is defined as a foreign corporation where U.S. shareholders own more than fifty percent of the combined voting power or total value of the stock of the corporation.¹⁰¹ For the purpose of this test, a U.S. shareholder is any person with a ten percent or greater interest.¹⁰² These U.S. shareholders of a CFC are subject to U.S. tax currently on their pro rata shares of the “subpart F income” earned by the CFC, regardless of whether the income is distributed to these shareholders.¹⁰³

(2013) (memorandum from Sen. Carl Levin, Chairman, Permanent Subcomm. on Investigations 7) [hereinafter PSI Report].

96. STAFF OF J. COMM. ON TAX’N, SCHEDULED FOR A PUB. HEARING BEFORE COMM. ON WAYS AND MEANS, BACKGROUND AND SELECTED ISSUES RELATED TO THE U.S. INTERNATIONAL TAX SYSTEM AND SYSTEMS THAT EXEMPT FOREIGN BUSINESS INCOME (2011) [hereinafter Background on the U.S. International Tax System]; STAFF OF J. COMM. ON TAX’N, PREPARED FOR H. COMM. ON WAYS AND MEANS AND S. COMM. ON FIN., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2012-2017 30, Table 1 (Comm. Print 2013) [hereinafter JCT Estimates of Federal Tax Expenditures].

97. CBO Options, *supra* note 87, at 3. Under a territorial system, a MNC’s tax liability depends on the tax rate of the host country because the home country only taxes income that is earned within its jurisdiction. *Id.* Most OECD countries use a predominately territorial approach as they exempt active foreign income from taxation. These countries also have strong anti-abuse rules (known as CFC rules) to prevent income shifting to low tax countries. *Id.* at 3–4. See Background on the U.S. International Tax System, *supra* note 85, at Part III Territorial Systems of Selected Countries, for a comparison of these rules, available at <https://www.jct.gov/publications.html?func=startdown&id=3793> (last visited June 13, 2013).

98. *Offshore Profit Shifting and the U.S. Tax Code-Part 1 (Microsoft and Hewlett-Packard): Hearing before the S. Homeland Sec. and Gov’t Affairs Permanent Subcomm. on Investigations* (2012) (Opening Statement of Sen. Carl Levin, Chairman, Permanent Subcomm. on Investigations 4–6.) Hewlett-Packard used an alternating loan program to access funds from its Belgian Coordination Center and its Compaq Caymen Holding Corp. For example, in fiscal year 2010, it borrowed between \$6 and \$9 billion from these entities throughout the first three quarters. *Id.*

99. See, e.g., the Subpart F rules at sections 951-964.

100. Background on the U.S. International Tax System, *supra* note 96, at 2.

101. I.R.C. § 957(a) (2013).

102. I.R.C. § 951(b) (2013).

103. I.R.C. § 951(a) (2013). Subpart F income comprises insurance income pursuant to § 953, international boycott income pursuant to § 952(a), and foreign base

These CFC rules are intended to prevent taxpayers from avoiding U.S. tax when shifting passive or other highly mobile income into tax havens or low-tax jurisdictions.¹⁰⁴ Deferral of U.S. tax is allowed, however, for most types of active business income earned abroad.¹⁰⁵

The Treasury Department has expressed concern that taxpayers are avoiding the Subpart F rules by using hybrid entities and hybrid instruments.¹⁰⁶ Further, the Report of the Permanent Subcommittee on Investigations (PSI) of the U.S. Senate Homeland Security and Government Affairs Committee alleges that the 1997 check-the-box regulations,¹⁰⁷ the CFC look-through rule,¹⁰⁸ and certain statutory exceptions such as the “same country exception” and the “manufacturing exception” have severely undercut the intended application of Subpart F. The same country exception excludes from Subpart F income treatment certain dividends, interest, and royalties that would otherwise be classified as Foreign Personal Holding Company Income, where the payor CFC is organized and operating in the same foreign country as the related CFC recipient.¹⁰⁹ The theory is that no tax avoidance incentive exists because both CFCs are subject to the same tax regime.¹¹⁰ Another type of Subpart F income, Foreign Base Company Sales income, captures income attributable to related party sales when the personal property is produced and sold outside CFC’s country of incorporation unless the manufacturing exception applies

company income pursuant to § 954. Foreign base company income includes many types of passive income as well as income from certain related party business transactions.

104. STAFF OF J. COMM. ON TAX’N, THE IMPACT OF INTERNATIONAL TAX REFORM: BACKGROUND AND SELECTED ISSUES RELATING TO U.S. INTERNATIONAL TAX RULES AND THE COMPETITIVENESS OF U.S. BUSINESSES (JCX-22-06), June 21, 2006, 15 [hereinafter IMPACT OF INTERNATIONAL TAX REFORM].

105. *Id.* There are some limitations on related party transactions. See, for example, the foreign base company sales income and foreign base company service rules at section 954(d)-(e).

106. *The Shifting of Profits Offshore by U.S. Multinational Corps.: Hearing before the S. Homeland Sec. and Gov’t Affairs Permanent Subcomm. On Investigations*, (2013) (written testimony of Mark Mazur, Assistant Sec’y for Tax Policy, U.S. Dep’t of the Treasury) (“Hybrid entities are entities that are classified as flow-through entities in one jurisdiction . . . and as corporations in another jurisdiction. Hybrid instruments are financial instruments that are treated as debt in one jurisdiction and as equity in another jurisdiction.”).

107. PSI Report, *supra* note 95, at 12. The check-the-box regulations enable multinational corporations to organize subsidiaries in tax havens to receive passive income yet be ignored for federal tax purposes. This allows payments between CFC subsidiaries known as “hybrid branches” to be disregarded and not constitute subpart F income. *Id.* at 13. See Apple case study for an example of this practice. *Id.* at 33-36.

108. *Id.* at 13. Section 954(c)(6) provides “look through” treatment for certain dividend, interest, rent and royal payments between related CFCs, thus granting an exclusion from Subpart F for this income. This provision has been extended through December 31, 2013. *Id.* at 14-15.

109. I.R.C. § 954(a)(2) (2013).

110. PSI Report, *supra* note 95, at 15. See Apple Case Study for example of the potential abuse. *Id.* at 37.

to allow the CFC to be considered a manufacturer.¹¹¹ Treasury regulations provide three tests to qualify for the manufacturing exception: the substantial transformation test, substantial activity test, and the substantial contribution test.¹¹² The substantial contribution test makes it very easy for a CFC to claim the manufacturing exception, “transform[ing] this exception into another possible loophole to shield offshore income from Subpart F taxation.”¹¹³

So, in reality, the current hybrid system in the U.S. for taxing international income does affect U.S. MNCs decisions about whether to invest in the United States or in countries with low taxes when they operate the business in the form of a foreign subsidiary.¹¹⁴ Stephen Shay testified that the deferral of U.S. tax on foreign earnings combined with current deductions for related expenses “is a powerful incentive to shift income offshore.”¹¹⁵ However, taxes are not the only component in making investment decisions as the regulatory environment, the quality of the labor force, infrastructure, and legal and political institutions play a major role in the decision.¹¹⁶ The OECD advises policy makers in developing countries to focus on political, fiscal, and monetary stability as well as infrastructure and labor force skills in order to attract investors.¹¹⁷

IV. U.S. CORPORATE TAX AVOIDANCE AND THE BASE EROSION PROBLEM

The bigger concern today, however, is that U.S. MNCs are taking advantage of transfer pricing rules and other techniques to shift reported income to countries with low taxes without actually changing their investment decisions.¹¹⁸ “The term ‘transfer price’ refers to the price at which one company sells goods or services to a related

111. I.R.C. § 954(d)(1) (2013).

112. STAFF OF J. COMM. ON TAX’N, PRESENT LAW AND BACKGROUND RELATED TO POSSIBLE INCOME SHIFTING AND TRANSFER PRICING 38 (JCX-37-10), July 20, 2010 [hereinafter INCOME SHIFTING AND TRANSFER PRICING].

113. PSI Report, *supra* note 95, at 16.

114. Multinationals operating through branches are taxed on the income as earned.

115. *Offshore Profit Shifting and the Internal Revenue Code: Hearing before the S. Homeland Sec. and Gov’t Affairs Permanent Subcomm. On Investigations*, (2013) (testimony of Stephen E. Shay stating that financial accounting rules allowing undistributed foreign earnings to be included in consolidated income without any reserves for future U.S. taxes, as long as the earnings are considered indefinitely reinvested abroad, magnifies the incentive to shift income offshore).

116. CBO Options, *supra* note 87, at 14.

117. See OECD, *Tax Effects on Foreign Direct Investment, Recent Evidence and Policy Analysis* 13 (2007) (“[A] number of non-tax factors are central drivers to FDI decisions.”).

118. CBO Options, *supra* note 87, at 2; see also INCOME SHIFTING AND TRANSFER PRICING, *supra* note 112, at 6-8.

affiliate in its supply chain.”¹¹⁹ The transfer pricing rules of section 482 and the accompanying Treasury regulations are intended to preserve the U.S. tax base by ensuring that taxpayers do not shift income properly attributable to the United States to a related foreign company through pricing that does not reflect an arm’s length transaction.¹²⁰ “The principal tax policy concern is that profits may be artificially inflated in low-tax countries and depressed in high-tax countries through aggressive transfer pricing that does not reflect an arm’s-length result from a related-party transaction.”¹²¹

Profit shifting allows U.S. MNCs to maintain their actual investments in high-tax countries with appropriate infrastructure and labor forces but report profits in tax havens or low-tax jurisdictions.¹²² The OECD issued a report on base erosion and profit shifting (BEPS) in February 2013 detailing “that in 2010 Barbados, Bermuda and the British Virgin Islands received more FDIs (combined 5.11% of global FDIs) than Germany (4.77%) or Japan (4.28%).”¹²³ These three countries then made outbound investments totaling 4.54%, exceeding that of Germany (4.28%).¹²⁴ The BEPS report also reviews various data and studies that indicate increased separation between the locations of the actual business activities and the reporting of profits for tax purposes.¹²⁵

The OECD followed in July 2013 with an action plan with respect to BEPS that identified fifteen steps to be taken to address profit shifting by multinationals, including the establishment of a working party on aggressive tax planning, strengthening of the CFC rules, and striving toward international coherence of corporate income taxation.¹²⁶ A key focus of the OECD BEPS Action Plan is to target harmful tax practices by requiring disclosure by taxpayers to relevant tax administrations of aggressive tax planning arrangements and the “global allocation of the income, economic activity and taxes paid among countries” as well as exchange of information by governments on rulings relating to preferential tax regimes.¹²⁷ By

119. INCOME SHIFTING AND TRANSFER PRICING, *supra* note 112, at 5; (“Section 482 authorizes the Secretary of the Treasury to allocate income, deductions, credits or allowances among related business entities when necessary to clearly reflect income or otherwise prevent tax avoidance . . . the regulations . . . adopt the arm-length standard as the method for determining whether allocations are appropriate.”) *Id.* at 18.

120. *Id.* at 18. (“Absent transfer pricing rules, the lack of external market forces would permit multinational groups to shift income in any manner they choose among group members.”).

121. *Id.* at 5.

122. CBO Options, *supra* note 87, at 14.

123. OECD, *Addressing Base Erosion and Profit Shifting* 17 (2013).

124. *Id.*

125. *Id.* at 20.

126. OECD, *Action Plan on Base Erosion and Profit Shifting* (2013) [hereinafter OECD BEPS Action Plan]; see, e.g., Actions 2-4, at 15-17.

127. *Id.* at 17-18, 22-23.

identifying actions that must be taken to address base erosion and profit shifting, the OECD BEPS Action Plan seeks to realign taxation with the relevant economic substance and ensure that taxable profits cannot be artificially shifted.¹²⁸ Analysis and recommendations for changes to domestic laws, Commentary to the OECD Model Tax Convention, and Transfer Pricing Guidelines as well as the OECD Model Tax Convention are expected over the next two years.¹²⁹ Pascal Saint-Amans, head of OECD's Center for Tax Policy and Administration, is calling this "a once-in-a-century, unique opportunity to revisit the basics of international taxation to fix these problems in a way which is effective, cost-efficient and quick."¹³⁰

The United States issued a joint statement with the Nordic countries at the G-20 Summit in St. Petersburg, Russia supporting OECD efforts on base erosion and profit shifting issues and is actively participating in the BEPS project.¹³¹ In 2013, the G-20 finance ministers unanimously endorsed the OECD BEPS Action Plan at the July 20th meeting in Moscow¹³² as did the G-20 Leaders on September 6th.¹³³ This is noteworthy as the G-20 includes countries such as China, India, Saudi Arabia, Russia, Brazil, Indonesia, South Africa, and Argentina that are not members of the OECD.¹³⁴ All G-20 countries

128. *Id.* at 13-14.

129. *Id.* at 24-25. The OECD Model Tax Convention is used as the standard for most bilateral income tax treaties. Brauner, *supra* note 39, at 315-16.

130. Rick Mitchell & Allison Bennett, *OECD's BEPS Plan Proposes New Groups On Digital Economy, Aggressive Tax Planning*, 140 DTR I-1, BLOOMBERG BNA (July 22, 2013).

131. Joint Statement by Kingdom of Den., Republic of Fin., Republic of Ice., Kingdom of Nor., Kingdom of Swed., and the U.S., WHITE HOUSE OFFICE OF THE PRESS SECRETARY (Sept. 4, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/09/04/joint-statement-kingdom-denmark-republic-finland-republic-iceland-kingdo>; see also Mark Mazur, *supra* note 106, at 7.

132. Kevin A. Bell, *G-20 Finance Ministers Meeting in Moscow Unanimously Back Anti-Evasion Action Plan*, BLOOMBERG LAW, ITM Issue No. 145 (2013) ("The G20 brings together finance ministers and central bank governors from 19 countries: Argentina, Australia, Brazil, Canada, China, France, Germany, India Indonesia Italy, Japan, the Republic of Korea, Mexico, Russia, Saudi Arabia, South Africa, Turkey, the United Kingdom, United States of America plus the European Union which is represented by the President of the European Council and by Head of the European Central Bank."); 2013 St. Petersburg, G20, https://www.g20.org/about_g20/past_summits/2013_st_petersburg (last visited Feb. 5, 2014). The G20 members represent approximately 85% of global GDP, 75% of international global-trade, and two thirds of the world's population. *G20 Members*, G20 https://www.g20.org/about_g20/g20_members (last visited Feb. 5, 2014).

133. *G20 Leaders' Declaration*, G20 (Sept. 6, 2013), available at <http://www.g20.org/news/20130906/782776427.html> ("We fully endorse the ambitious and comprehensive Action Plan-originated in the OECD-aimed at addressing base erosion and profit shifting . . . We welcome the establishment of the G20/OECD BEPS project and we encourage all interested countries to participate. Profits should be taxed where economic activities deriving the profits are performed and where value is created.")

134. Daniel Pruzin, *OECD Secretary-General See Broad G-20 Support for Tax Initiatives*, BLOOMBERG LAW, ITM Issue No. 135 (2013). All but Korea and South Africa are considered emerging market economies.

that are not members of the OECD may participate in this project as Associates with an equal footing with OECD members.¹³⁵ The OECD BEPS Action Plan also acknowledges the harm caused to developing countries because “the lack of tax revenue leads to critical underfunding of public investment that could help promote economic growth.”¹³⁶ The OECD anticipates involving certain other non-members to participate as Invitees as well as soliciting the insights of the United Nation “regarding the particular concerns of developing countries.”¹³⁷

These BEPs reports build on previous work that the OECD has done on harmful tax practices. Harmful competition focuses on drawing investment and business to the regulating country and away from the other countries. This kind of behavior is also known as “the race to the bottom” because these types of tax incentives promote inefficiency in domestic systems.¹³⁸ Rather than focusing on finding the best balance of taxes and public services for taxpayers, countries attempt to undercut each other’s tax regimes.¹³⁹ The OECD’s 1998 report entitled *Harmful Tax Competition: An Emerging Global Issue* set forth its criteria for evaluating preferential tax regimes and identifying tax havens.¹⁴⁰ These criteria focus on improving transparency and communication among nations and led to the establishment of a Model Agreement on Exchange of Information in Tax Matters in 2002.¹⁴¹ Since 2006, the OECD Global Forum on Transparency and Exchange of Information for Tax Purposes, formed to address tax compliance risks posed by tax havens, has been annually assessing the legal and administrative framework for

135. OECD BEPS Action Plan, *supra* note 126, at 25.

136. *Id.* at 8.

137. *Id.* at 25-26. The Task Force on Tax and Development as well as the OECD Global Relations Programme are additional platforms that will be used to discuss developing countries’ concerns. *Id.* at 26.

138. See, e.g., CARLO PINTO, TAX COMPETITION AND EU LAW 11 (2003).

139. See *id.* at 11-12.

140. OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 19-35 (1998), <http://www.oecd.org/tax/transparency/44430243.pdf> [hereinafter *OECD Report*]. The 1998 Report identified four main criteria for determining whether a preferential tax regime is harmful: (1) no or low taxation on the relevant income; (2) lack of transparency; (3) lack of effective exchange of information; and (4) the regime is ring-fenced from the domestic economy. *Id.*; see also OECD, 2000 PROGRESS REPORT: TOWARDS GLOBAL TAX CO-OPERATION: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICES (2000), <http://www.oecd.org/ctp/harmful/2090192.pdf>; OECD, THE OECD’S PROJECT ON HARMFUL TAX PRACTICES: 2004 PROGRESS REPORT (2004), available at <http://www.oecd.org/ctp/harmful/30901115.pdf>. In September 2006, the OECD Committee on Fiscal Affairs released its last progress report evaluating the preferential tax regimes in member countries. OECD, THE OECD’S PROJECT ON HARMFUL TAX PRACTICES: 2006 UPDATE ON PROGRESS IN MEMBER COUNTRIES 3 (2006), available at <http://www.oecd.org/ctp/harmful/37446434.pdf>.

141. This is a non-binding agreement that sets forth two models for bilateral agreements for increasing transparency among nations. OECD, AGREEMENT ON EXCHANGE OF INFORMATION ON TAX MATTERS 4, <http://www.oecd.org/ctp/exchange-of-tax-information/2082215.pdf> (last visited Aug. 14, 2013).

transparency and exchange of information of almost 100 jurisdictions including the United States.¹⁴²

The peer review process for the United States was based on the laws, regulations, and information exchange mechanisms that were in force as of February 2011.¹⁴³ The Financial Action Task Force¹⁴⁴ has rated the United States as being non-compliant with respect to providing information on legal persons and their beneficial ownership. Peer jurisdictions have complained about the inability to obtain “ownership information with respect to Delaware entities or LLCs in general.”¹⁴⁵ The Prime Minister of Luxembourg has accused the states of Delaware, Nevada, and Wyoming as functioning as tax havens because of the privacy offered as to the identity of the owners of privately held corporations.¹⁴⁶

There is a growing recognition of the harm that is caused by tax evasion and tax avoidance to developing countries.¹⁴⁷ The OECD estimates that around \$100 billion a year is lost in tax revenues, an amount that exceeds the level of aid received by developing countries.¹⁴⁸ A 2008 GAO study reported that “eighty-three of the 100

142. OECD, *Global Forum on Transparency and Exchange of Information for Tax Purposes*, <http://www.oecd.org/tax/transparency/> (last visited Oct. 16, 2013). In 2009 the Global Forum was restructured to “ensure[] the implementation of the internationally agreed standards of transparency and exchange of information in the tax area.” It currently has 120 members and has reviewed 98 jurisdictions. These peer review reports assess the tax system of the respective jurisdiction for compliance with the international standard for information exchange. See also OECD, *BETTER POLICIES FOR DEVELOPMENT: RECOMMENDATIONS FOR POLICY COHERENCE* 25 (2011), <http://www.oecd.org/pcd/48110465.pdf> (“The economic crisis and recent cross-border tax evasion scandals have heightened the political drive to ensure rapid implementation of the OECD’s tax transparency and information exchange standards, through the OECD-hosted Global Forum . . . More than 600 agreements have been signed since April 2009 and many more are under negotiation.”).

143. OECD, *PEER REVIEW REPORT-COMBINED PHASE 1 AND PHASE 2 REPORT-UNITED STATES 1* (2011) [hereinafter *Peer Review Report*].

144. FATF, *INTERNATIONAL STANDARDS ON COMBATING MONEY LAUNDERING AND THE FINANCING OF TERRORISM & PROLIFERATION: THE FATF RECOMMENDATIONS* (2013) (“The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CFT) standard.”).

145. Peer Review Report, *supra* note 143, at 39.

146. JANE G. GRAVELLE, CONG. RESEARCH. SERV., *R40623, TAX HAVENS: INTERNATIONAL TAX AVOIDANCE AND EVASION* 6 n.20 (2013), available at <http://www.fas.org/sgp/crs/misc/R40623.pdf>. But see Sheldon D. Pollack, *Delaware: Tax Haven or Scapegoat?*, 70 *STATE TAX NOTES* 53, 55 (2013) for an explanation and defense of the Delaware corporate legal regime.

147. AFRICA PROGRESS PANEL, *EQUITY IN EXTRACTIVES STEWARDING AFRICA’S NATURAL RESOURCES FOR ALL* 8-9, 19-20 (2013), available at http://www.africaprogesspanel.org/wp-content/uploads/2013/08/2013_APR_Equity_in_Extractives_25062013_ENG_HR.pdf.

148. OECD Global Forum on Development, *Domestic Resource Mobilization for Development: the Taxation Challenge* 4 (2009), available at <http://www.oecd.org/site/oecdgfd/44465017.pdf>; see also Vanessa Houlder & Javier Blas, *G20 to back moves to*

largest publicly traded U.S. corporations in terms of revenue reported having subsidiaries” in tax haven or banking secrecy jurisdictions.¹⁴⁹ Kofi Annan, former Secretary–General of the United Nations, is asking that global tax reform tackle transfer pricing issues,¹⁵⁰ enforce transparent beneficial ownership, and extend automatic information exchange to African tax authorities.¹⁵¹ Professor Shay points out that “[i]nternational corporate tax competition reduces fiscal flexibility to an even greater extent in developing than in developed countries” because the corporate tax is an important source of developing country tax revenue.¹⁵²

Due to concerns that the current U.S. tax rules encourage corporations to artificially shift reported income abroad, President Obama issued the *President’s Framework for Business Tax Reform* in 2012, stating that “empirical evidence suggests that income-shifting behavior by multinational corporations is a significant concern that should be addressed through tax reform.”¹⁵³ Studies suggest that this tax avoidance is accomplished by U.S. MNCs through transfers of intellectual property or intangibles, the allocation of debt to high-tax countries, and transfer pricing strategies with respect to goods.¹⁵⁴ The IRS estimates that it is considering income shifting issues with respect to approximately 250 taxpayers involving \$68 billion in potential income adjustments.¹⁵⁵ The President’s international tax reform proposals include a minimum tax rate for foreign earned income of subsidiaries of U.S. multinationals as well as other changes to discourage the shifting of profits offshore.¹⁵⁶

expose tax evaders, FINANCIAL TIMES (Sept. 5, 2013, 9:15 AM), <http://search.proquest.com.ezproxy.shu.edu/docview/1439557182/1412626820D64A3924B/1?accountid=13793>.

149. U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-09-157, *LARGE U.S. CORPORATIONS AND FEDERAL CONTRACTORS WITH SUBSIDIARIES IN JURISDICTIONS LISTED AS TAX HAVENS OR FINANCIAL PRIVACY JURISDICTIONS* 4 (2008).

150. Kofi Annan, *G20: how global tax reform could transform Africa’s fortunes*, THE GUARDIAN (Sept. 5, 2013, 9:23 BST), <http://www.theguardian.com/commentisfree/2013/sep/05/g20-africa-global-tax-reform> (“Between 2008 and 2010, transfer mispricing cost Africa an average \$38.4 billion every year, more than its inflows from either international aid or foreign direct investment.”).

151. *Id.*

152. Stephen E. Shay, *Foreward* x-xi, in *TAX, LAW AND DEVELOPMENT* (Yariv Brauner & Miranda Stewart eds., 2013).

153. WHITE HOUSE AND DEP’T OF THE TREASURY, *THE PRESIDENT’S FRAMEWORK FOR BUSINESS TAX REFORM* 7 (2012), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/The-Presidents-Framework-for-Business-Tax-Reform-02-22-2012.pdf>.

154. GRAVELLE, *supra* note 146, at 8.

155. *The Shifting of Profits Offshore by U.S. Multinational Corps: Hearing before the S. Comm. on Homeland Sec. and Governmental Affairs Permanent Subcomm. On Investigations* (2013) (written testimony of Samuel M. Maruca, Dir., Transfer Pricing Operations, Internal Revenue Service, at 6).

156. Mark Mazur, *supra* note 106, at 5-6.

At a hearing held on May 21, 2013, the Permanent Subcommittee on Investigations (PSI) of the U.S. Senate Homeland Security and Government Affairs Committee heard testimony on the shifting of profits offshore and between foreign countries by U.S. multinational corporations with estimates on the potential loss of revenues to the government ranging from \$10 billion to \$80 billion annually.¹⁵⁷ The PSI's report detailed how Apple Inc., a U.S. MNC, shifted billions of profits to Ireland where it "has negotiated a special corporate tax rate of less than two percent" by "transferr[ing] the economic rights to its intellectual property through a cost sharing arrangement" with its offshore subsidiaries.¹⁵⁸ A Treasury Department study has detailed how improper income shifting potential is "most acute with respect to cost sharing arrangements involving intangible assets."¹⁵⁹

The Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations recommended strengthening the transfer pricing rules with respect to intellectual property, reforming the "check-the-box" and "look-through" rules, and restricting the "same country exception" as well as the "manufacturing exception" to legitimate business situations.¹⁶⁰ Senator Levin, Chairman of this Subcommittee, reintroduced an expanded version of his legislation, the Stop Tax Haven Abuse Act on September 19, 2013, to "stop tax-avoidance schemes such as transferring valuable intellectual property and the income they generate to offshore subsidiaries and the practice of setting up offshore shell corporations . . . to claim foreign status for tax purposes."¹⁶¹ Jane Gravelle summarizes numerous policy options to address corporate profit shifting in a Congressional Research Service report on tax havens.¹⁶²

Some policy makers are recommending a move from a worldwide to a territorial system of taxation, for example, by excluding dividend income from investments abroad from the U.S. tax base.¹⁶³ The most recent and developed of these proposals is the discussion draft proposal of House Ways and Means Committee Chair David Camp that

157. *Id.* at 3.

158. PSI Report, *supra* note 95, at 17. A cost sharing agreement "is an agreement between related entities to share the cost of developing an intangible asset and a proportional share of the rights to the intellectual property that results." *Id.* at 7-8.

159. DEP'T OF THE TREASURY, REPORT TO CONGRESS ON EARNINGS STRIPPING, TRANSFER PRICING, AND U.S. INCOME TAX TREATIES (2007), available at <http://www.treasury.gov/resource-center/tax-policy/Documents/ajca2007.pdf>.

160. PSI Report, *supra* note 95, at 6.

161. *Summary of the Levin-Whitehouse-Begich-Shaheen Stop Tax Haven Abuse Act S. 1533*, U.S. SEN., <http://www.levin.senate.gov/newsroom/press/release/summary-of-the-levin-whitehouse-begich-shaheen-stop-tax-haven-abuse-act>.

162. GRAVELLE, *supra* note 146, at 24-29.

163. See, e.g., NAT'L COMM. ON FISCAL RESPONSIBILITY AND REFORM, THE MOMENT OF TRUTH (2010), available at http://www.fiscalcommission.gov/sites/fiscalcommission.gov/files/documents/TheMomentofTruth12_1_2010.pdf; Altshuler & Grubert, *supra* note 80 (comparing various options).

was published in October 2011.¹⁶⁴ This proposal allows domestic C corporations that qualify as ten percent U.S. shareholders to deduct ninety-five percent of the dividends received from CFCs that is attributable to foreign business income.¹⁶⁵ The income from foreign branches of domestic corporations receives the same treatment as each branch is deemed to be a CFC.¹⁶⁶ However, the Mooij/Ederveen study found no evidence that FDI was more tax responsive from dividend exemption countries than from dividend credit countries. It is thought that “tax-planning renders distinctions between these systems” meaningless in terms of impact on FDI.¹⁶⁷ Furthermore, a move to a territorial system would exacerbate the profit shifting and base erosion problem as taxation upon repatriation would be eliminated.¹⁶⁸

V. CONCLUSION

The United States is facing serious issues with respect to the major income shifting and base erosion problems as evidenced by the BEPS Report and the testimony given at the Hearings on Offshore Profits Shifting and the U.S. Tax Code before the Senate Homeland Security and Governmental Affairs Permanent Subcommittee on Investigations.¹⁶⁹ These issues need to be substantively addressed before any effort should be made on proposals to exempt the foreign income from developing countries or to change our international tax regime to incentivize investment in developing countries. There are no tax incentives large enough that could attract investment to these developing countries when U.S. MNCs can achieve a tax rate of zero without risking any of their investments. Any proposal to incentivize investment in developing countries cannot compete with the opportunities available currently to U.S. MNCs to avoid U.S. corporate tax by using various hybrid structures, tax havens, and legal fictions to shift profits offshore.

The United States should participate fully in the OECD’s effort to address the base erosion problem and begin making the necessary

164. See Stephen E. Shay, J. Clifton Fleming Jr., & Robert J. Peroni, *Territoriality in Search of Principles and Revenues: Camp and Enzi*, 72 TAX NOTES INT’L 155 (Oct. 13, 2013) for a thorough examination of the Camp proposal as well as S.2091 that was introduced by Senator Enzi in February 2012.

165. *Id.* at 156, citing Camp proposal, section 301(a). The 10 percent shareholder must also satisfy a greater-than-one-year holding requirement of the CFC’s stock in order to qualify for the dividend received deduction.

166. *Id.* at 157, citing Camp proposal, section 301(a).

167. *Tax Effects on Foreign Direct Investment, Recent Evidence and Policy Analysis*, *supra* note 57, at 12.

168. See GRAVELLE, *supra* note 146, at 46.

169. See *infra* notes 95, 106-115, 123-129. There was also a hearing held on September 20, 2012. See generally *Offshore Profit Shifting and the U.S. Tax Code-Part 1 (Microsoft and Hewlett-Packard): Hearing before the S. Homeland Sec. and Gov’t Affairs Permanent Subcomm. On Investigations* (2012).

adjustments to the U.S. international tax regime that currently enables U.S. MNCs to legally avoid corporate taxes. The United States has, for too long, “turned a blind eye to the publicly reported activities” of its multinational corporations.¹⁷⁰ The profit shifting of U.S. MNCs is causing tremendous harm to developing countries in the form of lost tax revenues that far exceed any benefit that can be gained from encouraging the use of developing countries’ tax incentives. The regulatory and statutory fixes needed to the U.S. international tax regime have been identified and should be adopted.

The increased emphasis on tax information exchange that is a byproduct of the war on individual tax evasion is a good initial step.¹⁷¹ The global community is moving toward automatic information exchange as evidenced by the increase in signatures to the Convention on Mutual Administrative Assistance in Tax Matters.¹⁷² The amended Multilateral Convention provides a multilateral framework for establishing an automatic transnational tax information exchange because the 2010 protocol includes the internationally accepted standards for the exchange of foreseeably relevant information regardless of bank secrecy¹⁷³ and provisions to facilitate automatic information exchange.¹⁷⁴ The next step toward greater transparency is the development of rules to require multinationals to report their global allocation among countries of the income, economic activity, and taxes paid to the relevant tax administrations, as recommended in the BEPS Action Plan.

170. See Shay, *supra* note 152, at xii.

171. See generally Tracy A. Kaye, *Innovations in the War on Tax Evasion*, 2 BYU L. REV. 363 (forthcoming 2014); Rev. Proc. 2012-24, 2012-20 I.R.B. 913 (listing 79 “countries with which the United States has in effect an income tax or other convention or bilateral agreement relating to the exchange of tax information”).

172. *Status of the Convention on Mutual Administrative Assistance in Tax Matters and Amending Protocol* (Oct. 31, 2013), http://www.oecd.org/tax/exchange-of-tax-information/Status_of_convention.pdf (last visited Mar. 18, 2014). As of December 23, 2013, nearly sixty countries had signed the Protocol to the Multilateral Convention, Council of Europe. *Id.*; see generally OECD, *Joint Council of Europe/OECD Convention on Mutual Administrative Assistance in Tax Matters*, May 27, 2010, available at http://www.oecd.org/tax/exchange-of-tax-information/Convention_On_Mutual_Administrative_Assistance_in_Tax_Matters_Report_and_Explanation.pdf [hereinafter Multilateral Convention].

173. See OECD, EXPLANATORY REPORT TO THE CONVENTION AS AMENDED BY THE PROTOCOL ¶ 194 (2010), available at http://www.oecd.org/tax/exchange-of-tax-information/Explanatory_Report_ENG_%2015_04_2010.pdf.

174. Multilateral Convention, *supra* note 172, at art. 6.

SUDHA SETTY*

Country Report on Counterterrorism:
United States of America†

TOPIC V. A

The terrorist attacks of September 11, 2001 led to profound changes in societal viewpoints, political agendas, and the legal authorization to combat terrorism. The United States continues to struggle with keeping its population safe while maintaining the principles of democracy and the rule of law essential to the nation's character. The U.S. response to terrorism has been multifaceted and expansive, reflective of the U.S. role in global security; debate over these matters will continue for the foreseeable future.

This report offers summary, analysis and critique of many aspects of counterterrorism law, including the definition of terrorism and designation of terrorist organizations; application of international law; criminal law treatment of terrorism, including financing and material support; investigative powers of intelligence and law enforcement agencies; treatment of immigrants; executive power and the CIA targeted killing program; detention and interrogation of terrorism suspects; and access to courts and the treatment of classified information.

I. INTRODUCTION

The terrorist attacks of September 11, 2001, which killed almost 3,000 civilians, led to profound changes in societal viewpoints, political agendas, and the legal authority to combat terrorism and threats of terrorism. The United States, like all other democratic nations that have suffered terrorist attacks, continues to struggle with questions of how to keep its population safe while maintaining the principles of democracy and the rule of law that are essential to the nation's character.

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In the twelve years since the attacks of September 11, Congress, the executive branch and the judicial system have reacted strongly to the need to protect against future national security threats by giving more powers to the police, military, and intelligence forces to investigate potential threats and neutralize them before another attack occurs. Some of these changes occurred in response to U.N. Security Council resolutions,¹ but many have been domestically motivated shifts that reflect the will of politicians and the polity as a whole. The expanded powers accorded to these counterterrorism programs have—in the view of many critics—allowed for government infringement on civil liberties and human rights in significant and corrosive ways, with little or no accountability for such overreaching.

In the years immediately following the attacks of September 11, the Bush administration asserted both inherent presidential authority and broad powers conferred under the Authorization for the Use of Military Force² and the USA Patriot Act.³ The government conducted warrantless wiretapping surveillance, detained thousands of individuals—almost all of whom were Muslim—who were later released based on lack of evidence of any connection to terrorism, conducted extraordinary renditions to capture and transport suspected individuals from one country to another without judicial oversight, and resorted to torture as an interrogation and control technique on some detainees.

Some of these issues were eventually resolved—through public pressure, judicial intervention and/or a change in political branches—in ways that improved the individual rights of detainees, suspects and the public. Yet robust presidential authority and extremely high levels of secrecy continue to be the norm, and the nation's policymakers still struggle with how best to maintain security, accountability, and the rule of law.

II. THE DEFINITION OF TERRORISM

Terrorism is defined in numerous ways under U.S. law, but contains several basic elements: premeditation, political or religious motivation, perpetration of violence, noncombatant targets, and ac-

1. U.N. Security Council Resolution 1373 has played a strong role worldwide in developing a concerted counterterrorism effort. The United States played a significant role in supporting the language and passage of Resolution 1373 and encouraging its worldwide mandate. See Kim Lane Scheppele, *Other People's Patriot Acts: Europe's Response to September 11*, 50 LOY. L. REV. 89, 91–92 (2004).

2. Authorization for Use of Military Force (AUMF), Pub. L. 107-40, codified at 115 Stat. 224 (Sept. 18, 2001).

3. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified as amended in scattered sections of U.S.C.) [hereinafter Patriot Act].

tors as subnational groups or clandestine agents.⁴ The United States has not made any exceptions to this definition based on the activity being expressive in character or with regard to national liberation struggles.⁵

The USA PATRIOT Act, passed in the weeks immediately following the September 11 attacks, offers both greater counterterrorism resources and more flexibility in implementation to the government, including increased surveillance powers,⁶ increased government authority to conduct intelligence-gathering operations in matters of suspected terrorism,⁷ the power of civil seizure of assets based only on probable cause,⁸ and heightened punishments for any of the underlying crimes related to the newly broadened understanding of “domestic terrorism,” which includes:

[A]cts dangerous to human life that are a violation of the criminal laws of the United States or of any State [that] appear to be intended to intimidate or coerce a civilian population; to influence the policy of a government by intimidation or coercion; or to affect the conduct of a government by mass destruction, assassination, or kidnapping; and occur primarily within the territorial jurisdiction of the United States.⁹

This definition of domestic terrorism was the result of intense pressure on Congress¹⁰ to amend various existing criminal statutes to

4. *E.g.*, 22 U.S.C.A. § 2656f(2)(d) (2) (WEST) (defining terrorism for the purpose of the State Department’s annual report to the Speaker of the House and the Senate Committee on Foreign Relations as “premeditated, politically motivated violence perpetrated against noncombatants by subnational groups or clandestine agents”); see *Third Mutual Evaluation Report on Anti-Money Laundering And Combating The Financing of Terrorism: United States of America*, (Financial Action Task Force, Paris, France) June 2006, at 40, available at <http://www.fatf-gafi.org/countries/u-z/united-states/documents/mutualevaluationoftheunitedstates.html> (offering similar elements of a definition of terrorism for the purposes of evaluation under the Immigration and Nationality Act [Title 8 USC 1182(a)(3)(B)(iv)]).

5. See Sudha Setty, *What’s in a Name: How Nations Define Terrorism Ten Years After 9/11*, 33 U. PA. J. INT’L L. 1 (2011).

6. See Patriot Act § 218 (amending the Foreign Intelligence Surveillance Act of 1978 such that electronic surveillance and physical searches need only be justified in “significant” part by the goal of obtaining foreign intelligence).

7. Patriot Act § 901.

8. Patriot Act § 806.

9. Patriot Act § 802. Critics of this broad definition have noted that such language could encompass numerous activist groups, including Greenpeace, protestors of the World Trade Organization, Operation Rescue, and protestors of bomb-testing facilities on the island of Vieques. See *How the USA PATRIOT Act redefines “Domestic Terrorism,”* AM. CIV. LIBERTIES UNION (Dec. 6, 2002), <http://www.aclu.org/national-security/how-usa-patriot-act-redefines-domesticterrorism>.

10. See LAURA K. DONOHUE, *THE COST OF COUNTERTERRORISM: POWER, POLITICS AND LIBERTY* 11 (2008) (arguing that the legislative role in safeguarding civil liberties is hampered by political imperatives).

broaden and strengthen the government's resources before another attack potentially took place.¹¹

The Patriot Act amended the definition of terrorism from 18 U.S.C. § 2331 to broaden its scope and application further,¹² but included an important sunset provision—added in part because of the haste with which the legislation was passed—that forced Congress to reexamine the legislation at intervals of several years.¹³ Although Congress debated the renewal of certain parts of the Patriot Act in 2005—none of which involved the definition of terrorism—in March 2006, Congress renewed most provisions, removed the safeguard of a sunset provision, and made the provisions permanent.¹⁴

The current Patriot Act definition of terrorism has a broad scope, and its reach exacerbates the uncertainty surrounding the application of conflicting definitions of terrorism, including the potential lack of notice to individuals as to whether they will be categorized as a terrorist and exactly what kind of conduct is prohibited.¹⁵

III. CRIMINAL LAWS AND PROSECUTIONS

A. *Criminal Law*

Terrorist acts are often prosecuted using the ordinary criminal justice system, particularly when the alleged crime occurred domestically. Statutes such as the Anti-Effective Death Penalty Act of 1996 (AEDPA)¹⁶ and the Patriot Act were enacted as specific responses to

11. See Robert O'Harrow, Jr., *Six Weeks in Autumn*, WASHINGTON POST MAGAZINE, Oct. 27, 2002, at 6, 10 (describing the pressured deliberations of Congress and the executive branch in drafting the Patriot Act).

12. See 18 U.S.C. § 2331 (including "mass destruction" as a means by which terrorists operate).

13. See 18 U.S.C. § 2510 (commenting that Section 801 of Pub. L 90-351 provided a sunset provision for various counterterrorism tools, including those related to wiretapping and surveillance).

14. See JAMES BECKMAN, COMPARATIVE LEGAL APPROACHES TO HOMELAND SECURITY AND ANTI-TERRORISM 31 (2007) (describing how sunset provisions were adopted, extended, and then removed). Only three provisions not dealing with the definition of terrorism were still kept subject to the sunset provisions. *Id.* Those provisions were extended in May 2011 until 2015. See Paul Kane & Felicia Somnez, *Patriot Act Amendments Signed into Law Despite Bipartisan Resistance from Congress*, WASHPOST.COM, May 27, 2011, http://www.washingtonpost.com/politics/patriot-act-extension-signed-into-law-despite-bipartisan-resistance-incongress/2011/05/27/AGbVlsCH_story.html (describing the extension of surveillance provisions of the Patriot Act).

15. See SUBCOMM. ON TERRORISM AND HOMELAND SEC. & HOUSE PERMANENT SELECT COMM. ON INTELLIGENCE, 107TH CONG., COUNTERTERRORISM CAPABILITIES AND PERFORMANCE PRIOR TO 9-11: A REPORT TO THE SPEAKER OF THE HOUSE OF REPRESENTATIVES AND THE MINORITY LEADER (2002), available at http://www.fas.org/irp/congress/2002_rpt/hpsci_ths0702.html (reviewing alternative ways to combat terrorism in order to prevent future attacks). The Subcommittee's recommendation that a single definition of terrorism be agreed upon by all U.S. agencies was predicated on a concern that a lack of uniform definition would lead to terrorist acts being treated identically under the law as ordinary criminal acts. *Id.*

16. Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub. L. No. 104-132, 110 Stat. 1217 (codified in scatter sections of 8, 18, and 28 U.S.C.).

terrorist acts and to enable investigation and prosecution of activities that were not previously criminalized.

A serious constitutional issue has been raised with regard to a number of U.S. statutes that criminalize speech-related conduct that supports or encourages violent acts, including terrorist acts. The federal criminal solicitation¹⁷ and sedition statutes,¹⁸ for example, authorize such prosecution. However, the most widely used statute in this area criminalizes material support of terrorism. Sections 2339A and 2339B of Title 18 of the U.S. Code prohibit knowingly or intentionally providing, attempting to provide, or conspiring to provide material support or resources to a terrorist organization, defining the term “material support or resources” to include:

any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.¹⁹

Material support charges have been used extensively to try terrorism suspects or to exert pressure toward a plea bargain, and are often successful.²⁰ Unlike other crimes often invoked to prosecute terror

17. See 18 U.S.C. § 373(a) (criminalizing solicitation of crimes). See also Letter from the Chairman of the Security Council Committee established pursuant to resolution 1373 (2001) concerning counter-terrorism addressed to the President of the Security Council, (June 15, 2006), Enclosure: Response of the United States of America to the Counter-Terrorism Committee: United States implementation of Security Council resolution 1624 (2005), at 5-6, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N06/395/24/PDF/N0639524.pdf?OpenElement> (hereinafter “U.S. CTC Response 2006”) (citing the availability of 18 U.S.C. § 2332(b) (acts of terrorism, such as murder, maiming, or kidnapping, transcending national boundaries), 18 U.S.C. § 2332f (bombings of places of public use), and 49 U.S.C. § 46502 (aircraft piracy) in prosecuting support of terrorism).

18. 18 U.S.C. § 2384 prohibits seditious conspiracy (plotting to use force to overthrow the government). 18 U.S.C. § 2385 proscribes teaching or advocating the duty or necessity of overthrowing or destroying the government of the United States by force or violence; publishing or circulating literature which so teaches or advocates; joining or organizing any group which so teaches or advocates, knowing the purposes thereof; or conspiring to do any of the foregoing. See U.S. CTC Response 2006, *supra* note 17 (discussing the availability of these statutes in the counterterrorism context); U.S. v. Rahman, 189 F.3d 88, 116-117 (2nd Cir. 1999) (upholding the solicitation conviction of Sheik Omar Amad Ali Abdel Rahman based on his exhortations for others to bomb New York City facilities and to assassinate certain persons).

19. See 18 U.S.C. §§ 2339A and 2339B.

20. See Press Release, Dep’t of Justice, Fed. Bureau of Investigation, Minneapolis, Minneapolis Man Sentenced for Conspiracy to Provide Material Support to al Qaeda, (July 9, 2009), <http://minneapolis.fbi.gov/dojpressreVpressreI09/mp070909.htm> (last visited Oct. 19, 2010) (describing the guilty plea of Mohammed Abdullah Warsame to charges of material support for al Qaeda, which resulted in a prison sentence of

suspects, such as continuing criminal enterprise²¹ and violations of the Racketeer Influenced and Corrupt Organizations Act²² which require at least some predicate act for criminal liability to attach,²³ the material support statute does not require the defendant to have had a specific intent to support a terrorist act; knowing support of a designated terrorist organization without intent is sufficient to convict.²⁴ The scope and flexibility offered by the material support statute has made it an often-used tool for prosecutors and was used to convict John Walker Lindh,²⁵ Ahmed Omar Abu Ali,²⁶ and the so-called "Lackawanna Six,"²⁷ among others.

In 2010, the U.S. Supreme Court decided that the statute does not unconstitutionally infringe on the expressive rights of individuals.²⁸ In some respects, this decision promoted additional uncertainty as to what individuals and organizations will be prosecuted under the material support statute, and on what basis.²⁹ The United States government maintains, however, that the majority of the terrorist propaganda found on the Internet today could not be prosecuted under U.S. criminal law, and that even a website advocating committing acts of terrorist violence likely lacks (at least without proof of additional facts) the potential to produce imminent lawless action that could be criminalized.³⁰

B. *Terrorism Prosecutions*

The United States has historically shied away from specialized trials for terrorist attacks, instead relying on the criminal justice sys-

ninety-two months); Philip Coorey, *Hicks Case Flawed All Along; Prosecutor*, SYDNEY MORNING HERALD (Apr. 30, 2008), <http://www.smh.com.au/Articles/2008/04/29/1209234862811.html> (last visited Oct. 19, 2010) (detailing David Hicks' guilty plea to material support charges).

21. 21 U.S.C. § 848 (2008).

22. 18 U.S.C. §§ 1961-1968 (2000).

23. See, e.g., 18 U.S.C. § 1961(5) (2008) (defining racketeering as involving at least two acts in furtherance of the illegal plan).

24. 18 U.S.C. § 2339B(a)(1) (2000).

25. *United States v. Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002) (entering guilty plea in violation of, among other things, the material support statute).

26. *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008), cert. denied, 129 S. Ct. 1312 (2009).

27. Press Release, U.S. Dep't of Justice, U.S. Attorney, W. Dist. of N.Y., United States Attorney's Office Successfully Concludes Terrorism Case With Sixth Conviction of Al Qaeda Supporter (May 19, 2003) (announcing the conviction of Muhktar al-Bakri).

28. See *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

29. See Peter Margulies, *Advising Terrorism: Hybrid Scrutiny, Safe Harbors, and Freedom of Speech* 63 *Hastings L.J.* 455, 498 (2011) (arguing that the majority opinion failed to specify how much coordination with a foreign terrorist organization would lead to a violation of the federal statute prohibiting material support to these organizations).

30. U.S. CTC Response 2006, *supra* note 17, at 4-5.

tem.³¹ In part, this policy is intended to affirm the rule of law in the United States and to maintain the United States' reputation in the international community for fairness toward criminal defendants³² regardless of the crime committed or the national origin or religion of the defendant.³³

One critique of the criminal justice system with regard to terrorism prosecutions has been the *de facto* unavailability of the entrapment defense. In evaluating an entrapment defense, most courts will consider whether the defendant was induced into illegal acts by law enforcement or had, to the contrary, a predisposition to commit the crime even if law enforcement had not intervened. In the context of a terrorism prosecution, a defendant's predisposition toward terrorist acts is often inferred from the defendant's political and religious views, or sympathies toward those of the same political bent or religious background who have engaged in terrorist activities.³⁴ In the post-9/11 context, there has not been one publicly known instance of a successful entrapment defense in a terrorism case,³⁵ despite ample evidence of law enforcement inducing defendants toward illegal activities.³⁶

Since September 2001, numerous alternative venues to criminal trials have been proposed and sometimes used. The creation of a specialized national security court has been advocated by some on the political left and right as a means to professionalize and depoliticize the process of adjudicating terrorism trials while also protecting the classification of secret documents.³⁷ However, such proposals have

31. Sudha Setty, *Comparative Perspectives on Specialized Trials for Terrorism*, 63 ME. L. REV. 131 (2010).

32. This reputation for a justice system with exceptionally strong protections for defendants is open to critique. See James Forman, Jr., *Exporting Harshness: How the War on Crime Helped Make the War on Terror Possible*, 33 N.Y.U. Rev. L & Soc. Change 331, 337 (2009) ("we hav[e] one of the most punitive systems in the world while believing we have one of the most liberal").

33. HUMAN RIGHTS FIRST, THE CASE AGAINST A SPECIAL TERRORISM COURT 3 (2009) ("Unjust detentions and trials at Guantanamo have fueled animosity toward the United States. These decisions also have undermined U.S. efforts to advance the rule of law around the world, which is critical to confronting the threat of terrorism. Creating a special terrorism court . . . would perpetuate these errors").

34. Wadie E. Said, *The Terrorist Informant*, 85 WASH. L. REV. 687, 698-711 (2010).

35. See CTR. ON LAW & SECURITY, N.Y. UNIV. SCH. OF LAW, TERRORIST TRIAL REPORT CARD: SEPTEMBER 11, 2001-SEPTEMBER 11, 2011, 26 (2011) available at <http://www.lawandsecurity.org/Portals/0/Documents/TTRC%20Ten%20Year%20Issue.pdf>.

36. See Paul Harris, *Fake terror plots, paid informants: the tactics of FBI 'entrapment' questioned*, theguardian.com, Nov. 16, 2011, available at <http://www.theguardian.com/world/2011/nov/16/fbi-entrapment-fake-terror-plots> (arguing that the FBI has concocted terrorism plots, lured and enabled individuals to participate and then arrested them in order to justify the expansion of the government's counterterrorism powers).

37. See Jack Goldsmith and Neal Katyal, *The Terrorists' Court*, nytimes.com, July 11, 2007, available at http://www.nytimes.com/2007/07/11/opinion/11katyal.html?_r=0.

been met with concern and have not been implemented. The Bush administration made a decision soon after September 2001 to use military commissions to try those who were designated by the administration as “enemy combatants.” The military commission system has been through several iterations in the intervening twelve years, but relatively few defendants have actually been tried in this system.³⁸

C. *Punishment of Terrorism*

Prior to the passage of the AEDPA in 1996, sentencing for crimes involving terrorism fell within the range dictated under ordinary criminal law, since defendants usually faced charges based on violent criminal activity, regardless of any political motivations. Upon the passage of the Patriot Act, Congress authorized enhancements to the sentencing for numerous terrorism-related crimes.³⁹ As a result, sentences for such crimes increased significantly, even in situations where there was no direct link to an act of violence, such as material support for terrorism.⁴⁰ The existence of a terrorism sentencing enhancement also serves as a statutory basis for appellate courts to overturn sentences as too lenient, as has occurred in high-profile prosecutions, such as those of Ahmad Abu Ali, Lynne Stewart, and Jose Padilla.⁴¹

IV. INVESTIGATIVE POWERS

A. *Police Powers*

The USA PATRIOT Act and other legislation in the post-9/11 context increased the powers of federal law enforcement authorities such as the Federal Bureau of Investigation (FBI). This has led to increased surveillance and investigation, as well as a significant number of arrests of alleged terrorists. The government has maintained that its efforts have prevent planned terrorist acts from occurring⁴² and has elicited valuable counterterrorism and intelligence information as part of the interrogation, negotiation, and plea bargain process.⁴³ The federal material witness statute, which em-

38. See Part IX.A, *infra*, for a discussion of the U.S. military commission system.

39. See U.S. SENTENCING GUIDELINES MANUAL, Appendix A (sentencing table) (2011).

40. The penalty for conviction is a sentence of up to fifteen years in prison, rising to life in prison if the material support results in death. 18 U.S.C. § 2339B (2006).

41. See *United States v. Stewart*, 686 F.3d 156 (2d Cir. 2012); *United States v. Abu Ali*, 528 F.3d 210 (4th Cir. 2008).

42. See, e.g., Sarah Kershaw, *Terrorist in '99 U.S. Case is Sentenced to 22 Years*, N.Y. TIMES (July 28, 2005), <http://query.nytimes.com/gstlfullpage.htrn1?res=9A07E7DCI03FF93BAI5754COA9639C8B63> (describing the detention of Ahmed Ressaym two weeks prior to the execution of his planned attack).

43. See Jeff Zeleny & Charlie Savage, *Official Says Terrorism Suspect is Cooperating*, N.Y. TIMES, Feb. 3, 2010, at A11 (noting that Umar Farouk Abdulmutallab,

powers the government to detain and question individuals without charge⁴⁴ has enhanced the ability of law enforcement to detain individuals with potentially relevant information for terrorism prosecutions, but it has also increased the potential for abuse of discretion and abuse of executive power.⁴⁵

For most⁴⁶ covert counterterrorism-related surveillance, the FBI is obligated to follow requirements under the Foreign Intelligence Surveillance Act (FISA) to seek judicial approval from the Foreign Intelligence Surveillance Court (FISC). Under FISA, law enforcement officials must meet the standard of probable cause to garner a warrant for surveillance, a standard that the government meets in almost all cases.⁴⁷ Law enforcement officers must undertake a minimization process by which they attempt to ensure that individuals and communications that are not targets of investigation are excluded from surveillance.⁴⁸ Much of the information garnered pursuant to a FISC warrant is usable in court. FISA has been amended several times since its enactment in 1978, with the most recent amendments in 2008 allowing for broader surveillance authority and immunizing telecommunications companies that work with law enforcement to enable surveillance from civil liability.⁴⁹

The FBI's police powers have also generated a high level of scrutiny of immigrant populations within the United States. The lowered due process protections accorded to immigrants allow for a more searching and a less privacy-protective approach. Lawyers cite the presence of FBI agents during immigration proceedings, Immigration and Custom Enforcement's (ICE) reliance on statements made in old FBI interviews in its decisions, and the FBI's submission of prejudi-

arrested in conjunction with his alleged attempt to use explosives on a United States-bound airline flight on December 25, 2009, cooperated with law enforcement and offered valuable information pertaining to al-Qaeda).

44. See 18 U.S.C. § 3144 (2000).

45. The government used the material witness statute broadly after the terrorist attacks of September 11, 2001, arresting hundreds of people and detaining them for up to several months. See, e.g., *al-Kidd v. Ashcroft*, 580 F.3d 949 (9th Cir. 2009); *Elmaghraby v. Ashcroft*, No. 04 CV 01809 JG SMG, 2005 WL 2375202, at *2 (E.D.N.Y. Sept. 27, 2005).

46. National Security Letters, used over 100,000 times by the Bush administration, circumvented judicial oversight altogether. Instead, they were subpoenas by the FBI seeking information on a target from third parties such as banks or employers, while implementing a gag order on the recipients of the subpoenas. See generally Shirin Sinnar, *Protecting Rights from Within? Inspectors General and National Security Oversight*, 65 STAN. L. REV. 1027 (2013).

47. See David Kravets, *Domestic Surveillance Court Approved All 1,506 Warrant Applications in 2010*, wired.com, May 6, 2011, available at <http://www.wired.com/threatlevel/2011/05/domestic-surveillance/>.

48. See, e.g., 50 U.S.C. § 1801(h) (2006) (directing the use of minimization procedures to "minimize the acquisition and retention, and prohibit the dissemination, of nonpublicly available information concerning unconsenting United States persons").

49. Foreign Intelligence Surveillance Act of 1978 Amendments Act of 2008, Pub.L. 110-261 (enacted July 10, 2008).

cial affidavits raising national security concerns without providing the basis of the allegations. FBI agents have used the structural power imbalances inherent in the immigration processes to coerce Muslim immigrants into becoming informants, or retaliate if they refuse.⁵⁰

State and local police agencies have worked on counterterrorism issues, often in conjunction with federal law enforcement agencies. Joint Terrorism Task Forces (JTTFs)⁵¹ are arrangements in which a local police department assigns a number of officers to work on a terrorism-related task force with FBI agents;⁵² federal agents offer access to powerful investigative tools, whereas police departments offer local knowledge and engagement in community policing.⁵³ Over one hundred American cities participate in JTTFs,⁵⁴ despite occasional concerns that the JTTFs engage in unconstitutional racial and religious profiling.⁵⁵ Municipalities like New York City have engaged in expansive counterterrorism work in the post-9/11 years that has raised significant concerns as the infringement of civil liberties.⁵⁶ Fusion centers are state and local entities meant to enhance the ability of the federal government to garner and synthesize information from local communities,⁵⁷ but have been criticized for undermining civil liberties and wasting taxpayer funds.⁵⁸

50. CTR. FOR HUMAN RIGHTS AND GLOBAL JUSTICE, ASIAN AM. LEGAL DEF. AND EDUC. FUND, UNDER THE RADAR: MUSLIMS DEPORTED, DETAINED, AND DENIED ON UNSUBSTANTIATED TERRORISM ALLEGATIONS 8 (2011), available at <http://aaldef.org/UndertheRadar.pdf>.

51. See Federal Bureau of Investigation, Protecting America from Terrorist Attack: Our Joint Terrorism Task Forces, [fbi.com](http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jttfs), available at http://www.fbi.gov/about-us/investigate/terrorism/terrorism_jttfs (describing the role and structure of JTTFs).

52. See Tung Yin, *Joint Terrorism Task Forces as a Window into the Security vs. Civil Liberties Debate*, 13 FLA. COASTAL L. REV. 1, 3 (2012); FED. BUREAU OF INVESTIGATION, BOSTON JOINT TERRORISM TASK FORCE MEMORANDUM OF UNDERSTANDING (2006), available at https://www.aclu.org/files/pdfs/spyfiles/ma_attachment3_attach_MSP&FBI2.pdf.

53. See James Forman, Jr., *Community Policing and Youth as Assets*, 95 J. CRIM. L. & CRIMINOLOGY 1, 9 (2004). For a cogent critique of the use of community policing in the counterterrorism context, see Sahar F. Aziz, *Policing Terrorists in the Community*, forthcoming Harvard National Security Journal (Fall 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2222083.

54. See Protecting America from Terrorist Attack, *supra* note 51.

55. See William Yardley, *Portland, Ore., Votes to Rejoin Task Force After Terrorism Scare*, [nytimes.com](http://www.nytimes.com), Apr. 30, 2011, available at http://www.nytimes.com/2011/05/01/us/01portland.html?_r=2&ref=us& (visited Sept. 27, 2013) (describing the civil liberties concerns behind the temporary refusal of Portland, Oregon to work with the FBI as part of a JTTF).

56. See generally Matt Apuzzo and Adam Goldman, ENEMIES WITHIN: INSIDE THE NYPD'S SECRET SPYING UNIT AND BIN LADEN'S FINAL PLOT AGAINST AMERICA (2013) (offering evidence of systematic religious profiling and discrimination by the New York City Police Department's counterterrorism unit).

57. See Department of Homeland Security, *State and Major Urban Area Fusion Centers*, available at <http://www.dhs.gov/state-and-major-urban-area-fusion-centers>.

58. See Senators Carl Levin and Tom Coburn, *Federal Support for and Involvement in State and Local Fusion Centers*, United States Senate Permanent

B. Intelligence Agencies

The Central Intelligence Agency (CIA) and the National Security Agency (NSA), the leading intelligence-gathering organizations for the U.S. government, have operated with much greater latitude in the post-9/11 era than previously.⁵⁹ The CIA has worked extensively to capture, detain and interrogate suspected terrorists abroad. It operated various secret detention facilities, known as “black sites,” throughout the world to accomplish this goal, prompting criticism from international and domestic groups that people were being disappeared by the CIA.⁶⁰ In 2009, the use of those black sites was curtailed by President Obama.⁶¹

In the post-9/11 era, the NSA has, among other programs, allocated tremendous energy and resources to massive data collection of electronic communications of U.S. and foreign persons.⁶² The NSA defends its collection of telephone call metadata and electronic communications based on the FISC’s interpretation of section 215 of the Patriot Act. The FISC has created a nonpublic body of law that has allowed the NSA to amass the metadata (time, location, duration, and other information not containing content) for all domestic and some international phone calls.⁶³ From June 2013 onward, as details of the breadth and depth of the NSA’s surveillance programs continue to leak to the public,⁶⁴ questions have arisen as to whether the scope of NSA’s surveillance is an unconstitutional intrusion into the privacy of U.S. citizens, whether congressional oversight of the NSA

Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs, Oct. 3, 2012.

59. The CIA is prohibited from conducting surveillance within U.S. borders. See Executive Order 12333, 46 Fed. Reg. 59941 (Dec. 4, 1981); National Security Act of 1947. However, the CIA has justified its surveillance within the U.S. by focusing its efforts on foreign targets that have contact with domestic sources, as well as assigning CIA officers on unpaid leave to work on domestic efforts. See Inspector General David B. Buckley, *Review of CIA-NYPD Relationship*, Dec. 27, 2011, available at <https://www.documentcloud.org/documents/717864-cia-nypd-ig.html>.

60. See Dafna Linzer and Julie Tate, *New Light Shed on CIA’s ‘Black Site’ Prisons*, *washpost.com*, Feb. 28, 2007, available at <http://www.washingtonpost.com/wp-dyn/content/article/2007/02/27/AR2007022702214.html> (visited Sept. 27, 2013).

61. Exec. Order No. 13,491, 74 Fed. Reg. 16,4893 (Jan. 22, 2009).

62. Timothy B. Lee, *Here’s everything we know about PRISM to date*, *washpost.com*, June 12, 2013, available at <http://www.washingtonpost.com/blogs/wonkblog/wp/2013/06/12/heres-everything-we-know-about-prism-to-date/> (visited Sept. 27, 2013).

63. Jennifer Valentino-Devries and Siobhan Gorman, *Secret Court’s Redefinition of ‘Relevant’ Empowered Vast NSA Data-Gathering*, *WALL ST. J.*, July 8, 2013, available at <http://online.wsj.com/article/SB10001424127887323873904578571893758853344.html>.

64. Former CIA contractor Edward Snowden began disclosing numerous aspects of NSA surveillance practices in June 2013. See Glenn Greenwald, *NSA collecting phone records of millions of Verizon customers daily*, *theguardian.com*, June 5, 2013, available at <http://www.theguardian.com/world/2013/jun/06/nsa-phone-records-verizon-court-order>.

must be strengthened,⁶⁵ and whether the FISC provides an effective mechanism to curb potential abuse by the NSA.⁶⁶

These debates continue to be robust, largely due to the impact of these counterterrorism programs on a vast swath of the U.S. public and because of the seeming inability of the public to understand the program and curtail it. This frustration stems from the secrecy surrounding the program, Congress's inability to disclose the extent of its knowledge to the public or exercise substantial oversight, FISC not being able to take an adversarial position with regard to government assurances of the necessity of such surveillance, and the extent of NSA access to the data stored by telecommunications companies, even without their consent.⁶⁷ In response to the public debate, task forces were convened to examine the scope and legality of the NSA's work.⁶⁸ As of early 2014, Congress and the administration continue to weigh various options for reforming both intelligence-gathering and storage policies, as well as oversight and accountability measures.⁶⁹

65. See Spencer Ackerman, *Intelligence committee withheld key file before critical NSA vote, Amash claims*, guardian.com, Aug. 12, 2013, available at <http://www.theguardian.com/world/2013/aug/12/intelligence-committee-nsa-vote-justin-amash> (noting that congressional leaders had not shared the relevant information with their colleagues prior to voting for Patriot Act reauthorization).

66. See Carol D. Leonnig, *Court: Ability to police U.S. spying program is limited*, washingtonpost.com, Aug. 15, 2013, available at http://www.washingtonpost.com/politics/court-ability-to-police-us-spying-program-limited/2013/08/15/4a8c8c44-05cd-11e3-a07f-49ddc7417125_story.html (citing U.S. district judge Reggie Walton and noting that "the court lacks the tools to independently verify how often the government's surveillance breaks the court's rules . . . [and] it also cannot check the veracity of the government's assertions that the violations its staff members report are unintentional mistakes").

67. See Nicole Perlroth, Jeff Larson and Scott Shane, *N.S.A. Able to Foil Basic Safeguards of Privacy on Web*, N.Y. Times, Sept. 6, 2013, at A1 (discussing NSA efforts to make encryption software vulnerable, and noting that much of this activity has been sanctioned by the FISC).

68. See Privacy and Civil Liberties Oversight Board, *Report on the Telephone Records Program Conducted Under Section 215 of the USA PATRIOT Act and on the Operations of the Foreign Intelligence Surveillance Court*, Jan. 23, 2014, available at <http://www.pclob.gov/SiteAssets/Pages/default/PCLOB-Report-on-the-Telephone-Records-Program.pdf> (concluding that some aspects of the NSA's surveillance program were likely illegal); President's Review Group on Intelligence and Communications Technologies, *Liberty and Security in a Changing World*, Dec. 12, 2013, available at http://www.whitehouse.gov/sites/default/files/docs/2013-12-12_rg_final_report.pdf (recommending some changes to the NSA's data collection and storage procedures).

69. President Obama has spoken out on the importance of the NSA's work in developing actionable intelligence, as well as the need to revisit the question of limitations on the NSA's collection and storage of data. See President Barack Obama, *Remarks by the President on Review of Signals Intelligence*, whitehouse.gov, Jan. 17, 2014, available at <http://www.whitehouse.gov/the-press-office/2014/01/17/remarks-president-review-signals-intelligence> (visited Feb. 26, 2014).

V. PROSCRIPTION/LISTING OF TERRORIST GROUPS/INDIVIDUALS

A. *Proscription Mechanisms*

The ability of the Secretary of State to designate “foreign terrorist organizations” (FTOs) as such for the purposes of prohibiting material support, increasing surveillance and freezing financial assets has been an important tool for U.S. counterterrorism efforts.⁷⁰ In particular, U.S. law provides that incitement to commit a terrorist act (under circumstances indicating an intention to cause death or serious bodily injury) is a basis for designating a group as either an FTO⁷¹ or as a terrorist organization for immigration purposes.⁷² Even if a group has not been formally designated as an FTO, if the requisite incitement standard is met, that automatically triggers treatment as a terrorist organization for immigration purposes.⁷³ Observers suggest that the FTOs fall into one of two categories: those that genuinely threaten the national security of the United States in a direct way, and those that challenge the foreign relations or economic interests of the United States.⁷⁴

Under the AEDPA, a specific process must be undertaken to designate an organization as an FTO.⁷⁵ It is a process that is open to critique as being insufficiently rights-protective, but also incorporates some safeguards against abuse.⁷⁶ Once the FTO designation has been made by the State Department, limited procedural safeguards are available, after which the designation is finalized.⁷⁷

70. U.S. 2006 CTC Report, *supra* note 17, at 8.

71. 8 U.S.C. § 1189.

72. 8 U.S.C. § 1182(a)(3)(B)(vi)(II) (provided that other relevant legal criteria are met).

73. 8 U.S.C. § 1182(a)(3)(B)(vi)(III).

74. Wadie E. Said, *The Material Support Prosecution and Foreign Policy*, 86 IND. L.J. 543, 568 (2011).

75. See AEDPA §§ 219(a)(1)(A)-(C), 219(a)(2)(C) (codified in 8 USC §1189(a)) (finding that anyone who interacts with FTOs is violating the statute, and authorizing the Secretary of the Treasury to freeze the assets of entities designated as FTOs); Exec. Order No. 12,947, 3 C.F.R. 319 (1995) (establishing authority for the Secretary of State and the Secretary of the Treasury to limit property rights of designated terrorists). See also Exec. Order No. 13,224, 3 C.F.R. 786 (2002) (finding it necessary to utilize financial sanctions against foreign terrorists).

76. See AEDPA § 219(a) (codified as 8 U.S.C. § 1189(a)) (establishing both the procedure used for designation as a terrorist organization as well as congressional and judicial means available to pursue designations review and revocation); see also Julie B. Shapiro, *The Politicization of the Designation of Foreign Terrorist Organizations: The Effect on Separation of Powers*, 6 CARDOZO PUB. L. POL'Y & ETHICS J. 547, 556-58 (2008) (arguing that the designation process contravenes due process guarantees).

77. Under AEDPA, the Secretary of State notifies leaders in Congress and gives notice to designees in the Federal Register. AEDPA § 302(a)(2)(A) (codified as 8 U.S.C. § 1189(a)(2)(A)). FTOs then have 30 days to challenge their designation in the U.S. Court of Appeals for the District of Columbia Court. § 302(b). Such cases, usually based on allegations of an abuse of discretion by the State Department or a lack of substantial support for the FTO designation, are largely unsuccessful. *E.g.*, *People's Mojahedin Org. of Iran v. Dep't of State*, 327 F.3d 1238, 1244 (D.C. Cir. 2003) (uphold-

Because the consequences of FTO designation can be severe, including the ability of financial intuitions to block or freeze assets of an FTO,⁷⁸ the barring of FTOs from entry into the United States,⁷⁹ and potential material support charges,⁸⁰ the procedural safeguards are even more important.⁸¹ FTO designation carries with it mandatory review and renewal process for the Secretary of State.⁸²

B. Challenges to Proscriptions and Listings

Another such safeguard in the FTO designation process is the opportunity to contest the designation proposed by the State Department. This layer of judicial review protects against arbitrariness in the designation,⁸³ and requires some disclosure of the basis upon which the State Department made its determination.⁸⁴

Designated groups may challenge their designations by seeking judicial review before the D.C. Circuit Court within thirty days of the designation being published in the Federal Register. The court may rely only on the administrative record generated by the Secretary of State and the Secretary of State may supplement this record on an *ex parte* basis with classified information used in making the designation.⁸⁵ The D.C. Circuit has the right to reverse if the designation is found to be not in accord with the procedures required by law. The FTO designation remains in force until it is revoked by either judicial or administrative review. In either case, the burden lies with the FTO to challenge its designation.

ing FTO designation based on classified evidence and emphasizing deference to the State Department in the FTO designation process).

78. 18 U.S.C. § 2339B(a)(2) (2006).

79. 8 U.S.C. §§ 1182(a)(3)(B)(i)(IV)-(V) (2006).

80. 18 U.S.C. § 2339B(a)(1) (2006). The constitutionality of the FTO designation process authorized by Executive Order No. 13,224 and various statutes was upheld by the U.S. Supreme Court in *Humanitarian Law Project v. Holder*. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

81. *See Nat'l Council of Resistance of Iran v. Dep't of State*, 251 F.3d 192, 196 (D.C. Cir. 2001) (discussing the severe impact of FTO designation).

82. 8 U.S.C. § 1189(a)(4)(C), (a)(6) (2006). If no review has been made of an FTO designation for five years, the Secretary of State must review the listing to determine whether it should be revoked due to a change in the organization's mission and actions, or a change in the national security assessment by the United States. *See id.*

83. Under the AEDPA, courts have the power to set aside the State Department designation of an FTO if it is arbitrary, capricious, and an abuse of discretion, or if it is not based on substantial evidence. AEDPA § 302(b)(3) (codified as 8 U.S.C. § 1189(c)(3)). Courts have, however, been extremely deferential to the State Department, choosing not to review classified evidence in some instances, but relying instead on State Department affirmations of substantial evidence to support its designation decision. *E.g.*, *People's Mojahedin Org. of Iran*, 327 F.3d at 1244.

84. *E.g.*, *People's Mojahedin Org. of Iran v. United States Dep't of State*, 613 F.3d 220, 231 (D.C. Cir. 2010) (holding that the government had violated due process by failing to give an FTO the opportunity to view unclassified evidence prior to making a final decision denying petition to revoke designation as an FTO).

85. *See Said, Material Support Prosecution*, *supra* note 74, at 559.

VI. REGULATION OF TERRORISM FINANCING

A. *The Regulatory Regime to Counter Terrorism Financing*

Executive Order 13224 was signed by President George W. Bush in September 2001 with the stated purpose of disrupting and destroying financial support for al-Qaeda.⁸⁶ A number of policies designed to minimize and disrupt terrorist financing have become important tools in U.S. counterterrorism strategy. These policies are implemented largely by the Treasury Department,⁸⁷ with support from the State Department and Justice Department. The Office of Intelligence and Analysis (OIA) within Treasury Department was created in 2004, making the Treasury Department the only finance ministry in the world with its own in-house intelligence unit. Separately, Treasury Department's Office of Terrorism and Financial Intelligence (TFI) members chair the U.S. delegation to the Financial Action Task Force, an intergovernmental body that develops and promotes policies to combat illicit finance.⁸⁸

Title III of the Patriot Act amended the Bank Secrecy Act to require certain financial institutions and businesses to establish anti-money laundering programs.⁸⁹ The government also sought to encourage transparency, good corporate governance and strong anti-money laundering programs through suggesting that public and media attention will cause social stigma to attach to businesses that engage with entities that are associated with criminal or terrorist activity.⁹⁰ U.S. authorities have prioritized the investigation and disruption of funding to non-profit organizations, and have used the material support statutes as an effective, if highly controversial, tool to hinder the ability of terrorist groups to maintain their finances. The robust use of material support statutes has caused such solicitation to wither or, in some cases, go further underground.⁹¹

The Department of Justice is the principal government entity responsible for overseeing the investigation and prosecution of money

86. Executive Order 13224 of Sept. 23, 2001: Blocking Property and Prohibiting Transactions With Persons Who Commit, Threaten to Commit, or Support Terrorism (citing both domestic authority and United Nations Security Council Resolution (UNSCR) 1214, UNSCR 1267, UNSCR 1333, and UNSCR 1363 as supportive authority).

87. The Treasury Department's Office of Terrorism and Financial Intelligence (TFI) coordinates these efforts. The TFI consists of four sub-groups: the Financial Crimes Enforcement Network (FinCEN), the Office of Foreign Assets Control (OFAC), the Office of Terrorist Financing and Financial Crimes (TFFC), and the Office of Intelligence and Analysis (OIA). *Third Mutual Evaluation Report on Anti-Money Laundering And Combating The Financing of Terrorism: United States of America*, (Financial Action Task Force, Paris, France) June 2006, at 15-16 [hereinafter June 2006 Financing Report] available at <http://www.fatf-gafi.org/countries/u-z/united-states/documents/mutualevaluationoftheunitedstates.html>.

88. *Id.* at 4.

89. *Id.*

90. *Id.* at 5.

91. *Id.* at 8.

laundering and terrorist financing offenses at the federal level, whereas the State Department represents the U.S. government in several multilateral institutions, including those exercising sanctions related to U.N. Security Council Resolution 1267 and Counter-Terrorism Committees.⁹²

The State Department's Office of the Coordinator for Counterterrorism leads its efforts to designate FTOs in order to freeze assets and preparing Executive Order 13224 designations to block assets and prohibit contributions of terrorists and terrorist organizations.⁹³

B. *Criminal Offences of Terrorism Financing*

The issues of what standards of knowledge and intent are necessary to sustain a conviction for material support of terrorism have been extensively litigated. The 2010 Supreme Court decision in *Holder v. Humanitarian Law Project* affirmed the constitutionality of the material support statute, thereby upholding the congressional intent to criminalize almost all support to FTOs, even if the funds were earmarked for humanitarian—not terrorism—purposes.⁹⁴

The four federal offenses deal directly with financing of terrorism or terrorist organizations and criminalize the provision of material support for the commission of certain offenses,⁹⁵ provision of material support or resources to designated FTOs,⁹⁶ provision or collection of terrorist funds,⁹⁷ and the concealment or disguise of either material support to FTOs or funds used or to be used for terrorist acts.⁹⁸

VII. IMMIGRATION MEASURES

Immigration Detention

The government is authorized to detain any person for whom it has certified that reasonable grounds exist to believe that the person has engaged in espionage,⁹⁹ opposition by violence,¹⁰⁰ or terrorist activity,¹⁰¹ or is involved with an organization that is suspected of

92. *Id.* at 17.

93. *Id.* at 19.

94. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

95. 18 USC 2339A (enacted in 1994, effective in 1996).

96. 18 USC 2339B (enacted by Congress and signed by the President in April 1996, and implemented with State Department designations of FTOs on Oct. 8 1997).

97. 18 USC 2339C(a) (enacted 25 June 2002).

98. 18 USC 2339C(c) (enacted 25 June 2002).

99. Immigration and Naturalization Act ("INA") §237(a)(4)(A)(i) (authorizing detention for those suspected of engaging in espionage, sabotage, or export control).

100. INA §237 (a)(4)(A)(iii) (authorizing detention for those expressing opposition by violence or overthrow of the U.S. government).

101. INA §212(a)(4)(B) (authorizing detention for those suspected of terrorist activity); 8 U.S.C. § 1182(a)(3)(B)(i)(III) and (iv)(I) (authorizing removal of those indicating an intention to cause death or serious bodily harm or have incited terrorist activity); 8

terrorist activity.¹⁰² The Attorney General may detain the suspect for up to seven days prior to placing the suspect in removal proceedings or charging him or her criminally.¹⁰³ If the suspect is not placed in removal proceedings or criminally charged, the Attorney General must release him or her, but if placed in proceedings, the Attorney General must detain the person even if he or she is eligible for relief or obtains relief until the Attorney General determines that there is no longer any reason to believe that the person falls under one of the bases for certification.¹⁰⁴ The Attorney General is obligated to review the certification subjecting the person to mandatory detention every six months and the detainee may request review every six months and may submit documents and other evidence in support of his or her request.¹⁰⁵ A detainee who has been ordered removed, but whose removal is unlikely in the reasonably foreseeable future, may be detained for additional six month periods only if the government believes that release will threaten national security or the safety of the community or any person.¹⁰⁶

Since September 11, 2001, the federal government has relied heavily on immigration law and policy to detain, interrogate, control and remove suspected terrorists.¹⁰⁷ With fewer checks and balances, it is much easier for the government to arrest, detain, and investigate an individual under immigration law than criminal law. Unlike the U.S. criminal justice system, where defendants have the right to an attorney, the right to a speedy trial, and the presumption of innocence until guilt is proven beyond a reasonable doubt, immigration law does not afford detainees ample protections. For example, a noncitizen is permitted to have an attorney in immigration proceedings, but counsel is not provided for the 80% of detainees in removal proceedings who are indigent. Furthermore, a non-citizen can be mandatorily detained for months, or even years, before being released or removed from the United States, and the standard for

U.S.C. § 1182(a)(3)(B)(i)(VI) (making inadmissible aliens who endorse or espouse terrorist activity or persuade others to endorse or espouse terrorist activity).

102. See 8 U.S.C. § 1182(a)(3)(B)(vi)(II) or (III). See also U.S. CTC Response 2006, *supra* note 17, at 8 (noting that “if a group is designated or treated as a terrorist organization for immigration purposes, aliens having certain associations with the group (including persons who knowingly provide material support to the group) become inadmissible to and deportable from the United States”).

103. INA §236(a)(5).

104. INA §§236(a)(2), (5).

105. INA §236A (a)(7).

106. INA §236A (a)(6).

107. In 2009, Immigration and Customs Enforcement (ICE) had over 1.6 million aliens in its scope of monitoring: in ICE detention centers, in other jails or prisons, or under a released monitoring system. See Department of Homeland Security Office of the Inspector General, *Supervision of Aliens Commensurate With Risk*, OIG 11-81 (Dec. 2011) (hereinafter DHS 2011 IG Report), at 3.

removal is that of “clear and convincing evidence,” a much lower standard than that of reasonable doubt.¹⁰⁸

These lesser protections have allowed federal officials to undertake several initiatives that have targeted immigrants, primarily those from Muslim-majority countries, in the name of national security. Muslims in the immigration system have been subjected to possibly abusive¹⁰⁹ preventive detention,¹¹⁰ exclusion based on political views, heightened surveillance and arguably unconstitutional racial profiling.¹¹¹ Detainees in the immigration system face serious hurdles in challenging the government’s case for removal due to the lower removal standard of “clear and convincing evidence” as well as the inability to access and challenge the secret evidence presented and alleged by the government.¹¹²

The government has, to some extent, conflated immigration and counterterrorism programs and has encouraged use of the immigration system as an important tool in counterterrorism efforts.¹¹³ The result has been a system that, although legal under U.S. law,¹¹⁴ arguably violates international law and norms with regard to the treatment of migrants.¹¹⁵

108. INA §240(c)(3)(A).

109. See *Ashcroft v. Iqbal*, 556 U.S. 662, 667-69 (2009).

110. Another category of detained aliens are those subject to an additional inter-agency screening called Third Agency Check. This system to screen aliens in ICE custody who are from specially designated countries (SDCs) that have “shown a tendency to promote, produce, or protect terrorist organizations or their members.” See DHS 2011 IG Report, *supra* note 105, at 5. The SDC list is largely comprised of majority Muslim nations. See *ICE List of Specially Designated Countries (SDCs) that Promote or Protect Terrorism*, publicintelligence.net, July 2, 2011, available at <http://publicintelligence.net/specially-designated-countries/> (listing the SDCs that were originally part of the DHS 2011 IG Report, but which were subsequently removed from that publication).

111. See *Under the Radar*, *supra* note 50, at 4 (discussing various programs targeting non-citizens, including Absconder Apprehension Initiative, NSEERS special registration policy, and Operation Frontline). Another controversial immigration policing program is Secure Communities, which requires state and local police to send fingerprints of arrestees to ICE so that undocumented immigrants can be identified and possibly detained, prosecuted and removed. See Immigration and Customs Enforcement, *Secure Communities*, ice.gov (describing the Secure Communities program), available at http://www.ice.gov/secure_communities/ (visited Sept. 13, 2013).

112. See *Under the Radar*, *supra* note 50, at 4.

113. See, e.g., Attorney General John Ashcroft and INS Commissioner Jim Ziglar, Announcement of INS Restructuring Plan (November 14, 2001), available at http://www.justice.gov/archive/ag/speeches/2001/agcrisisremarks11_14.htm (“The INS will also be an important part of our effort to prevent aliens who engage in or support terrorist activity from entering our country.”).

114. See DHS 2011 IG Report, *supra* note 107, at 1 (noting that immigration authorities had generally complied with applicable domestic laws).

115. See *Under the Radar*, *supra* note 50, at 18 (citing the conclusion of the U.N. Special Rapporteur on the Rights of Migrants that U.S. immigration enforcement policies violate international laws that bar arbitrary detention).

VIII. ADMINISTRATIVE/EXECUTIVE MEASURES

The AUMF and Patriot Act cemented the government's authority to determine whether information was too sensitive to disclose and then punish those who disclosed such information.¹¹⁶ More recently, Congress enacted the National Defense Authorization Act of 2012, which empowered the President to take extraordinary national security measures unilaterally and enabled further non-disclosure of information by the administration and military.¹¹⁷

One area in which the tensions between secret, unilateral executive action and the desire for a public, multi-branch course of action has been most prominent is that of targeted killings. The U.S. use of unmanned aerial vehicles ("drones") for targeted killings¹¹⁸ of suspected terrorists has expanded significantly since President Obama took office in 2009.¹¹⁹ The Obama administration has consistently emphasized the necessity, efficacy and legality of targeted killings. However, the program has prompted much debate over its existence,¹²⁰ the moral calculus¹²¹ and legal parameters and authorities for such a program,¹²² and specific questions regarding the legality of

116. See USA PATRIOT Act of 2001, Pub. L. No. 107-56, § 215, 115 Stat. 272 (codified in scattered sections of 50 U.S.C.) (disallowing the dissemination of information regarding any business records that are sought pursuant to terrorism investigations); *id.* § 223 (codified in scattered sections of 18 U.S.C.) (permitting civil liability and administrative disciplinary measures against individuals who make unauthorized disclosures of information); *id.* § 116 (prohibiting disclosure to individuals involved in suspicious activities that such activity was reported pursuant to the issuance of a National Security Letter).

117. National Defense Authorization Act for Fiscal Year 2012, Pub. L. No. 112-81, §1025 (2011) (limiting the types of information, forms of communication, and representation available to detainees).

118. Although targeted killings is not defined under international law, it is often considered to encompass "premeditated acts of lethal force employed by states in times of peace or during armed conflict to eliminate specific individuals outside their custody." See Jonathan Masters, *Targeted Killings*, Council on Foreign Relations, May 23, 2013, available at <http://www.cfr.org/counterterrorism/targeted-killings/p9627> (visited July 18, 2013). Although the governments that utilize targeted killings differentiate them from assassinations, see Harold Hongju Koh, *The Obama Administration and International Law*, Mar. 25, 2010, available at <http://www.state.gov/s/l/releases/remarks/139119.htm>, critics view them as similar actions in terms of illegality. See, e.g., Complaint, *Al-Aulaqi, et al. v. Panetta*, at ¶1, Case 1:12-cv-01192-RMC (D.D.C. July 18, 2012).

119. See New America Foundation, Drone Database, available at <http://natsec.newamerica.net/about> (visited July 18, 2013) (detailing the number of drone strikes by the United States in Yemen and Pakistan since 2004).

120. See, e.g., Philip Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions: Study on Targeted Killings*, A/HRC/14/24/Add.6, May 28, 2010 (questioning the legality of the CIA drone program).

121. See generally Samuel Isaacharoff & Richard H. Pildes, *Drones and the Dilemma of Modern Warfare*, available at <http://ssrn.com/abstract=2268596> (visited July 31, 2013) (theorizing the moral dilemma of drone use in the context of warfare in which geographic and other traditional boundaries of violence are distorted).

122. See Alston, *supra* note 118, at Add.6, May 28, 2010 (discussing international law of war principles with regard to targeted killings); e.g., Eric Holder, *Attorney General Eric Holder Speaks at Northwestern University School of Law*, Mar. 5, 2012,

its scope in terms of geographic location of the target and citizenship of the target.¹²³ The parameters and future of the targeted killings program should be considered in the context of two Obama administration positions as to the nature of the battle being fought: first, the assertion that the theater of war for U.S. counterterrorism efforts is not restricted geographically and, therefore, encompasses the entire globe;¹²⁴ and second, statements made by administration officials in early 2013 that although the country should not remain on a war footing permanently, current counterterrorism efforts will likely last another ten to twenty years.¹²⁵

The parameters of the targeted killing program remain largely shielded from public view, with limited information disclosed during President Obama's first term¹²⁶ and the leak of a classified Department of Justice memorandum detailing some of the legal bases for the program.¹²⁷ In early 2012, Attorney General Holder's public statement on drone use made clear that the administration was not bound geographically, that U.S. citizenship was no protection against being included on the list of targets for a drone strike, and that no judicial process was constitutionally necessary to target U.S. citizens so long as the administration followed its own careful procedures of determining whether to target a citizen.¹²⁸

In May 2013, President Obama gave his second¹²⁹ major national security policy speech, discussing a number of national security and foreign policy priorities, but focusing in large part on the

available at <http://www.justice.gov/iso/opa/ag/speeches/2012/ag-speech-1203051.html> (outlining the parameters used by the Obama administration to determine whether a targeted killing comports with international and domestic legal obligations).

123. See *Al-Aulaqi v. Obama*, 727 F. Supp. 2d 1 (D.D.C. 2010) (dismissing, based on standing grounds, the suit of Nasser al-Aulaqi to enjoin the U.S. government from keeping his son, U.S. citizen Anwar al-Aulaqi, on its targeted killing list).

124. Spencer Ackerman, *Spec Ops Chief Sees '10 to 20 Years' More for War Against al-Qaida*, wired.com, May 16, 2013, available at <http://www.wired.com/dangerroom/2013/05/decades-of-war/> (visited July 18, 2013) (discussing the Senate testimony of Michael Sheehan, the assistant secretary of defense for special operations and low-intensity conflict, with regard to the global theater of war).

125. *Id.* (relating the Senate testimony of Michael Sheehan, the assistant secretary of defense for special operations and low-intensity conflict, with regard to the probable duration of the U.S. counterterrorism effort against al-Qaida).

126. *E.g.*, John O. Brennan, *Remarks of John O. Brennan: Strengthening our Security by Adhering to our Values and Laws*, Sept. 16, 2011, available at <http://www.whitehouse.gov/the-press-office/2011/09/16/remarks-john-o-brennan-strengthening-our-security-adhering-our-values-an> (visited July 24, 2013); Koh, *supra* note 116.

127. Department of Justice White Paper, *Lawfulness of a Lethal Operation Directed Against a U.S. Citizen Who is a Senior Operational Leader of Al-Qa'ida or An Associated Force*, available at http://msnbcmedia.msn.com/i/msnbc/sections/news/020413_DOJ_White_Paper.pdf (visited July 24, 2013) [hereinafter DOJ White Paper].

128. See Holder, *supra* note 120.

129. President Obama gave his first major speech on national security in 2009. See Remarks by the President on National Security, May 21, 2009, available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-security-5-21-09> (hereinafter "2009 National Archives Speech").

parameters of the administration's targeted killing program.¹³⁰ In it, he argued that the use of drones to kill suspected terrorists is effective, legal and necessary, yet also acknowledged legal, foreign policy and political constraints on the program.¹³¹ Some critics were disappointed that the speech did not place additional meaningful limits on the president's authority to use drones, and that the president's promises of transparency and adequate oversight were unsupported by specific details or plans.¹³²

IX. ROLE OF MILITARY AND EXTRA-TERRITORIAL COUNTER-TERRORISM ACTIVITIES

A. *Military Courts and Detention*

The Bush administration decided immediately after the September 11 attacks to detain suspected terrorists as unlawful enemy combatants—often at the U.S. military facility in Guantanamo Bay, Cuba—and to try them, if at all, before a military commission.¹³³ Such detention would not necessarily comport with international standards, and any commissions would be administered by the executive branch and would not necessarily include the protections mandated by the Uniform Code of Military Justice for the courts martial system.¹³⁴

130. Remarks by the President at the National Defense University, May 23, 2013, available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university> (hereinafter "May 2013 NDU Speech").

131. *Id.*

132. *E.g.*, Glenn Greenwald, *Obama's speech: seeing what you want to see*, theguardian.com, May 27, 2013, available at Fred Kaplan, *Obama's Post-9/11 World*, slate.com, May 23, 2013, available at <http://www.theguardian.com/commentisfree/2013/may/27/obama-war-on-terror-speech> (visited August 12, 2013) (arguing that President Obama's speech was mostly rhetoric meant to appease critics from a variety of political perspectives); http://www.slate.com/articles/news_and_politics/war_stories/2013/05/barack_obama_national_defense_university_speech_nothing_new_about_drones.html (visited July 18, 2013) (noting that President Obama's speech outlined limits that were almost identical to those already in place and that the Justice Department had defined those limitations in ways that rendered the restrictions "meaningless"). Some politically conservative critics asserted that President Obama's speech consisted largely of rhetoric to appease liberal voters concerned about the administration's use of drones, but that Obama's substantive policy and approach to executive power was similar to that of President George W. Bush. *See, e.g.*, Benjamin Wittes, *The President's Speech: A Quick and Dirty Reaction—Part 1 (Are We At War?)*, Lawfare Blog, May 23, 2013, available at <http://www.lawfareblog.com/2013/05/the-presidents-speech-a-quick-and-dirty-reaction-part-1/>.

133. Military Order of November 13, 2001, 66 Fed. Reg. 57833 (Nov. 13, 2001).

134. *See Setty, Specialized Trials*, *supra* note 31, at 142-43 (discussing the ways in which the procedural protections offered to detainees in the military commission system deviated from the Uniform Code of Military Justice).

Detention at the Guantánamo Bay Facility

In designating the Guantánamo Bay, Cuba military facility¹³⁵ to hold detainees, the Bush Administration made an overt choice to seek to evade the domestic legal protections that would run to detainees held on U.S. soil,¹³⁶ including access to habeas corpus hearings.¹³⁷ The government further denied the applicability of international human rights and humanitarian norms and international law more generally, as applied to the detainees held at Guantánamo.¹³⁸ When the Supreme Court held that the U.S. habeas corpus statute encompassed the indefinite detention of detainees at Guantánamo,¹³⁹ the administration convinced Congress to amend that statute to deny all detainees the right to habeas corpus, even those who had already filed claims in court.¹⁴⁰ In the 2008 *Boumediene v. Bush* decision, the Supreme Court ruled that Congress and the President could not decide that detainees at Guantánamo had no access to the law.¹⁴¹ Since then, most captured detainees have been taken to other locations, such as the Bagram Air Force base in Afghanistan, where courts have held that detainees have no habeas rights.¹⁴²

Since 2002, 779 men have been taken to the naval base in Guantánamo Bay, Cuba,¹⁴³ and 155 remained there as of February 2014.¹⁴⁴ There have been consistent reports of widespread abuse, torture, and violations of the prisoners' human rights.¹⁴⁵ Almost two-thirds of the prisoners joined a months-long hunger strike in 2013,

135. For a thoughtful and detailed assessment of the role of the Guantánamo Bay military facility in U.S. history and foreign policy, see Ernesto Hernandez-Lopez, *Guantánamo as Outside and Inside the U.S.: Why is a Base a Legal Anomaly?*, 18 AM. U. J. GENDER SOC. POL'Y & L. 471 (2010).

136. See *Rasul v. Bush*, 542 U.S. 466, 497-98 (2004) (Scalia, J., dissenting).

137. David Cole, *The Taint of Torture: the Roles of Law and Policy in Our Descent to the Dark Side*, 49 HOUS. L. REV. 53, 65 (2012).

138. See Memorandum from Jack L. Goldsmith III, Assistant Attorney Gen., Office of Legal Counsel, to Alberto R. Gonzales, Counsel to the President, "*Protected Person*" Status in Occupied Iraq Under the Fourth Geneva Convention 23 (Mar. 18, 2004), available at <http://www.justice.gov/olc/2004/gc4mar18.pdf>.

139. See *Rasul v. Bush*, 542 U.S. 466, 484 (2004).

140. See Military Commissions Act of 2006, Pub. L. No. 109-366, §7, 120 Stat. 2600, 2635-36 (codified as amended at 28 U.S.C. §2241(e) (1) (2006)).

141. See *Boumediene v. Bush*, 533 U.S. 723, 785 (2008) ("The Constitution grants Congress and the President the power to acquire, dispose of, and govern territory, not the power to decide when and where its terms apply.").

142. See *Al-Maqaleh v. Gates*, 605 F.3d 84 (D.C. Cir. 2010).

143. AMNESTY INT'L, USA: 'I AM FALLEN INTO DARKNESS'. OBAIDULLAH, GUANTÁNAMO DETAINEE IN HIS 12TH YEAR WITHOUT TRIAL 1 (2013) available at <http://www.amnestyusa.org/sites/default/files/amr510512013en.pdf>.

144. See Human Rights Watch, *Facts and Figures: Military Commissions v. Federal Courts*, available at <http://www.hrw.org/features/guantanamo-facts-figures> (visited Feb. 26, 2014).

145. See, e.g., CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMANE, AND DEGRADING TREATMENT OF PRISONERS AT GUANTÁNAMO BAY, CUBA (2006) available at http://ccrjustice.org/files/Report_ReportOnTorture.pdf.

which led to military resorting to force-feeding several prisoners.¹⁴⁶ Federal district courts declined to intervene on behalf of the prisoners, despite widespread condemnation by the United Nations and international human rights groups that the force-feeding constitutes torture.¹⁴⁷ The government changed its policy in December 2013 such that it will no longer disclose to the public whether detainees are participating in hunger strikes.¹⁴⁸ President Obama recommitted to closing the Guantánamo Bay in May 2013,¹⁴⁹ after failing to fulfill the promise to do so when he took office in 2009.¹⁵⁰

Access to Justice

The United States Supreme Court, in a series of cases from 2004 to 2008,¹⁵¹ found various aspects of the administration's detention and military commission model to be unconstitutional. However, the Supreme Court consistently found that the use of military commissions instead of the ordinary criminal justice system was constitutionally acceptable.¹⁵²

Supreme Court jurisprudence set a minimum guarantee of constitutional rights to be available to detainees, such as that of habeas corpus, but curtailing certain procedural and substantive protections in a military commission system is acceptable.¹⁵³ After initially sug-

146. Ann E. Marimow, *Judge Rejects Request to Block Force-feeding of Guantánamo Bay Detainees*, WASH. POST (July 16, 2013), http://articles.washingtonpost.com/2013-07-16/national/40606715_1_hunger-strike-detainees-force-feeding.

147. See United Nations Human Rights, *IACHR, UN Working Group on Arbitrary Detention, UN Rapporteur on Torture, UN Rapporteur on Human Rights and Counter-Terrorism, and UN Rapporteur on Health reiterate need to end the indefinite detention of individuals at Guantánamo Naval Base in light of current human rights crisis*, May 1, 2013, available at <http://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=13278&LangID=E> (decrying the force-feeding of the detainees as contrary to international law).

148. See Carol Rosenberg, *Military imposes blackout on Guantánamo hunger-strike figures*, miamiherald.com, Dec. 3, 2013, available at <http://www.miamiherald.com/2013/12/03/3795285/guantanamo-ends-daily-hunger-strike.html> (visited Feb. 26, 2014).

149. See President Barack Obama, *Remarks by the President at the National Defense University* (May 23, 2013), available at <http://www.whitehouse.gov/the-press-office/2013/05/23/remarks-president-national-defense-university>.

150. See President Barack Obama, *Closure Of Guantánamo Detention Facilities* (Jan. 22, 2009), available at http://www.whitehouse.gov/the_press_office/ClosureOfGuantanamoDetentionFacilities (visited Sept. 22, 2013).

151. See *Boumediene v. Bush*, 553 U.S. 723 (2008) (demanding improved procedural protections for detainees to comport with constitutional due process requirements); *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006) (demanding congressional authorization for military commissions); *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (finding the lack of due process protections in the military commission system to be unconstitutional).

152. See *Hamdi v. Rumsfeld*, 542 U.S. 507, 538 (2004) (acknowledging “the possibility that the [due process] standards [the Supreme Court] ha[s] articulated could be met by an appropriately authorized and properly constituted military tribunal”); see also *Boumediene v. Bush*, 553 U.S. 723 (2008) (same).

153. See *Hamdi*, 542 U.S. at 538.

gesting that military commissions were not necessary to try detainees, President Obama in 2009 revived the military commission system,¹⁵⁴ citing the long history of their use and military necessity.¹⁵⁵ A July 2009 protocol noted that detainees are entitled to the presumption of trial in an ordinary criminal court, but numerous objective and subjective factors could warrant a change in venue, including strength of interest, efficiency, and “other prosecution considerations” such as the available sentence and the ability to use certain evidence in a given forum.¹⁵⁶

Under the Military Commissions Act of 2009, evidence from torture or cruel, inhuman or degrading interrogations is disallowed, the use of hearsay is limited, defendants are granted greater latitude in selecting their counsel, and protections against self-incrimination were instituted.¹⁵⁷ Nonetheless, significant deviations exist among the military commissions, the courts-martial system, and ordinary criminal courts. Defendants in military commissions are guaranteed neither the right to remain silent or the right to the exclusion of their previous coerced statements,¹⁵⁸ nor the right to a speedy trial.¹⁵⁹ Trial for ex post facto crimes is permissible in a military commission.¹⁶⁰ Guilty verdicts in non-capital cases can be rendered by two-thirds of the jury.¹⁶¹ Hearsay evidence is more easily admissible and access to classified information is significantly curtailed.¹⁶² The controversial and problematic curtailing of these due process protections

154. See David E. Sanger, *Obama After Bush: Leading by Second Thought*, N.Y. TIMES, May 15, 2009, at A3 (discussing President Obama’s changing stance on the utility of military commissions).

155. Press Release, The White House, Office of the Press Secretary, Statement of President Barack Obama on Military Commissions (May 15, 2009), http://www.whitehouse.gov/the_press_office/Statement-of-President-Barack-Obama-on-Military-Commissions/ (last visited Oct. 21, 2010).

156. See Department of Defense & Department of Justice Protocol, Determination of Guantanamo Cases Referred for Prosecution, at ¶2 (July 20, 2009).

157. See Jennifer K. Elsea, *Comparison of Rights in Military Commission Trials and Trials in Federal Criminal Court*, Congressional Research Service, Feb. 28, 2013, available at <http://www.fas.org/sgp/crs/natsec/R40932.pdf> (offering a detailed comparison of the rights guaranteed under the Military Commissions Act of 2009 and those offered in ordinary criminal courts).

158. Compare Military Commissions Act § 949a(b)(2)(c) with Unif. Code of Military Justice, art. 31, §§ (a), (b), & (d) (guaranteeing freedom from self-incrimination, and which are specifically made inapplicable to military commissions) and U.S. Const., amend. V (guaranteeing freedom from self-incrimination).

159. Military Commissions Act § 949a. A speedy trial is guaranteed in both Article III courts and courts martial. U.S. Const., amend. VI (giving the right to a speedy trial); 18 U.S.C. § 3161(d)(2) (2008) (mandating commencement of trials within seventy days of indictment or original appearance in court). Unif. Code of Military Justice, art. 10.

160. Military Commissions Act §§ 948d, 950p. Cf. U.S. Const., art. 1, § 9, cl. 3 (“No ex post facto law shall be passed.”).

161. Military Commissions Act § 949m. Cf. Fed. R. Crim. P. 31 (requiring unanimous jury verdicts for conviction).

162. Military Commissions Act §§ 949a(b)(3)(D), 949p-1- 949p-7.

is further compounded by the Obama administration's reservation of the right to continue to imprison anyone acquitted under the military commission system if security interests suggest that continued detention is necessary.¹⁶³

A number of military commission trials have taken place at the Guantánamo Bay detention facility,¹⁶⁴ despite critiques that the trials are both unnecessary given the availability of ordinary criminal courts and the courts-martial system and fundamentally unfair, and despite irregularities and setbacks. For example, Omar Khadr was first detained in 2002 at the age of fifteen, subjected to problematic interrogation, and eventually pled guilty to various terrorism-related charges.¹⁶⁵ Salim Hamdan, a driver to Osama bin Laden, was convicted of conspiracy in a military commission, a charge that was overturned by an appellate court in 2012 based on the fact that conspiracy was not considered a war crime at the time that Hamdan was detained.¹⁶⁶

Torture and Accountability

The United States has long been party to international treaties prohibiting torture as well as cruel, degrading, and inhuman treatment. Among them are the Universal Declaration of Human Rights,¹⁶⁷ the Geneva Conventions,¹⁶⁸ the International Covenant on Civil and Political Rights,¹⁶⁹ the American Convention on Human Rights,¹⁷⁰ and the Convention Against Torture.¹⁷¹ On the domestic level, the Fifth, Eighth and Fourteenth Amendments to the U.S. Con-

163. Jess Bravin, *Detainees, Even if Acquitted, Might Not Go Free*, Wall St. J. (July 8, 2009), <http://online.wsj.com/article/SB1246996803307309.html> (last visited September 21, 2013).

164. See *Military Commissions Cases*, Office of Military Commissions, available at <http://www.mc.mil/CASES/MilitaryCommissions.aspx> (visited Sept. 21, 2013).

165. See Charlie Savage, *Deal Averts Trial in Disputed Guantánamo Case*, nytimes.com, Oct. 25, 2010, available at <http://www.nytimes.com/2010/10/26/us/26gitmo.html> (visited Sept. 21, 2013).

166. See *Hamdan v. United States*, 696 F.3d 1238 (D.C. Cir. 2012).

167. Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810, at 71 (Dec. 10, 1948).

168. Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 (entered into force Oct. 21, 1950); Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 (entered into force Oct. 21, 1950).

169. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

170. American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (entered into force July 18, 1978), reprinted in *Basic Documents Pertaining to Human Rights in the Inter-American System*, OEA/Ser.L.V/II.82 doc. 6 rev.1 at 25 (1992).

171. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987) ("Convention Against Torture").

stitution have been interpreted as prohibiting torture,¹⁷² and various domestic laws codify the obligations in the Convention Against Torture: the federal Torture Statute,¹⁷³ the Torture Victim Protection Act of 1991,¹⁷⁴ the Alien Tort Claims Act,¹⁷⁵ and the Foreign Affairs Reform and Restructuring Act of 1998.¹⁷⁶

In late 2003, evidence surfaced of abuse and torture of detainees held at the Abu Ghraib prison in Iraq, at the hands of members of the U.S. military.¹⁷⁷ Similar reports surfaced from the detention facility at Guantánamo Bay.¹⁷⁸ Memos prepared by the Office of Legal Counsel in 2002 and 2003 advised the President and the military that detainees who were suspected members of Al Qaeda were not protected by international and domestic prohibitions against torture and, furthermore, that abuse of detainees would not constitute “torture” unless the interrogators intended to cause the type of pain associated with death or organ failure.¹⁷⁹ Those memos were subsequently rescinded, and several members of the military were convicted at courts-martial for detainee abuse.¹⁸⁰ Congress subsequently cemented the U.S. prohibition of the abuse and torture of detainees with the Detainee Treatment Act of 2005.¹⁸¹

In 2009, President Obama signed an executive order banning the use of enhanced interrogation techniques and limiting interrogation techniques to those permitted in the Army Field Manual.¹⁸² Such limitations were reinforced with the Military Commissions Act of 2009.¹⁸³ Despite his campaign rhetoric on the need for a full account-

172. See generally Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

173. Foreign Relations Authorization Act, Fiscal Years 1994 and 1995, Pub. L. No. 103-236, § 506, 108 Stat. 382 (codified at 18 U.S.C. §§ 2340-2340B (2006)).

174. Torture Victim Protection Act of 1991, Pub. L. No. 102-256, 106 Stat. 73 (codified at 28 U.S.C. § 1350 note (2006)).

175. Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

176. Foreign Affairs Reform and Restructuring Act of 1998, Pub. L. No. 105-277, § 2242(a), 112 Stat. 2681 (codified at 8 U.S.C. § 1231 (2006)).

177. Seymour M. Hersh, *Torture at Abu Ghraib*, THE NEW YORKER (May 10, 2004) available at www.newyorker.com/archive/2004/05/10/040510fa_fact.

178. See, e.g., CTR. FOR CONSTITUTIONAL RIGHTS, REPORT ON TORTURE AND CRUEL, INHUMANE, AND DEGRADING TREATMENT OF PRISONERS AT GUANTÁNAMO BAY, CUBA (2006) available at http://ccrjustice.org/files/Report_ReportOnTorture.pdf.

179. Memorandum for Alberto R. Gonzales, Counsel to the President, from Jay S. Bybee, Asst. Atty. General, Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002); Memorandum from Jay S. Bybee, Asst. Atty. General, regarding Standing Standards of Conduct for Interrogation Under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002).

180. Scott Shane, David Johnston and James Risen, *Secret U.S. Endorsement of Severe Interrogation*, N.Y. Times, Oct. 4, 2007, available at <http://www.nytimes.com/2007/10/04/washington/04interrogate.html?pagewanted=all>.

181. Detainee Treatment Act of 2005, Pub. L. No. 109-148 §§ 1001-06, 119 Stat. 2739 (codified at 42 U.S.C. § 2000dd (2006)).

182. Exec. Order No. 13,491, 74 Fed. Reg. 16,4893 (Jan. 22, 2009).

183. Military Commissions Act of 2009, Pub. L. No. 111-84, § 1802, 123 Stat. 2190, 2608 (codified at 10 U.S.C. § 950t(11)).

ing of torture, President Obama has not pursued prosecution and has precluded a full investigation of those who created the policies that arguably allowed torture to occur.¹⁸⁴

Non-refoulement

The non-refoulement obligation in Article 3 of the Convention Against Torture¹⁸⁵ applies to U.S. extraordinary rendition practices and the movement of detainees from the Guantánamo detention facility. With regard to the former, when Canadian-Syrian dual citizen Maher Arar was rendered to Syria, the U.S. was obligated to seek assurances that he would not be mistreated there. However, evidence suggests that Arar was subjected to prolonged abuse and torture by his captors in Syria.¹⁸⁶ With regard to Guantánamo, several detainees have been cleared for release, but under the obligation of non-refoulement, the U.S. continues to hold them because of fear of torture upon return to their countries of citizenship.¹⁸⁷

B. Extra-Territorial Terrorism Law Enforcement

Since the attacks of September 11, extraordinary rendition has been used to capture over 100 suspected terrorists in foreign countries and remove them to other nations for interrogation and control purposes. Some such detainees suffered extreme abuse and torture at the hands of their interrogators.¹⁸⁸ Several have brought suits in U.S. courts seeking compensation for their treatment. Despite substantial evidence that citizens of Canada,¹⁸⁹ Germany¹⁹⁰ and the United Kingdom,¹⁹¹ among others, were rendered by the U. S. government to other nations and were subsequently abused by the

184. Scott Shane, *No Charges Filed on Harsh Tactics Used by the C.I.A.*, nytimes.com, Aug. 30, 2012, available at <http://www.nytimes.com/2012/08/31/us/holder-rules-out-prosecutions-in-cia-interrogations.html?pagewanted=all> (visited Sept. 27, 2013).

185. Convention Against Torture, *supra* note 168, Art. 3.

186. See Human Rights Watch, *Torture and Non-Refoulement*, Jan. 29, 2004, available at <http://www.hrw.org/news/2004/01/28/torture-and-non-refoulement> (detailing Arar's situation).

187. International Committee of the Red Cross, *Persons detained by the US in relation to armed conflict and counter-terrorism—the role of the ICRC*, June 18, 2013 <http://www.icrc.org/eng/resources/documents/misc/united-states-detention.htm>.

188. See Amrit Singh, *Globalizing Torture: CIA Secret Detention and Extraordinary Rendition*, Open Society Foundations, at 13-15 (2013) (describing the history and use of extraordinary rendition).

189. See Commission of Inquiry into the Actions of Canadian Officials in Relation to Maher Arar, *Report of the Events Relating to Maher Arar: Analysis and Recommendations* (2006). See also Kent Roach, *Review and Oversight of National Security Activities and Some Reflections on Canada's Arar Inquiry*, 29 *Cardozo L. Rev.* 53 (2008).

190. See JANE MAYER, *THE DARK SIDE* 282-87 (2008) (detailing Khalid El-Masri's plight).

191. See Sudha Setty, *Judicial Formalism and the State Secrets Privilege*, 38 *WM. MITCHELL L. REV.* 1630, 1634-35 (2012) (detailing the claims of Binyam Mohamed).

security forces in the nations to which they were rendered, all such suits have been dismissed on procedural bases.¹⁹²

In 2009 the Obama administration created a task force to study the practice of extraordinary rendition with the aim of ensuring compliance with domestic and international human rights standards and legal norms.¹⁹³ Renditions are believed to be continuing under this articulated standard.¹⁹⁴

X. SECRECY AND TERRORISM

A. *Secrecy Claims and Secret Evidence*

The Classified Information Procedures Act (CIPA) is a 1980 law that established procedures for the use of classified and secret information in criminal trials.¹⁹⁵ CIPA outlines a comprehensive set of procedures for the treatment of evidence in criminal cases that implicate classified information or rely on evidence that is classified. For example, CIPA allows the government, under limited circumstances, to substitute unclassified summaries of classified evidence.¹⁹⁶ The Supreme Court in *Boumediene v. Bush* acknowledged the need to deal with classified information in a sensitive and thoughtful manner, and expressed confidence that ordinary criminal courts would be able to manage the task successfully.¹⁹⁷

B. *Secrecy in the Courtroom and Anonymous Witnesses: Secret and Classified Evidence in Civil Suits*

The state secrets privilege is a common law evidentiary privilege that enables the government to prevent disclosure of sensitive state secrets in the course of litigation. The claim of privilege by the government, if upheld by a court, can result in consequences ranging from the denial of a discovery request for a particular document to the outright dismissal of a suit. Although a balancing test for assessing claims of privilege was established in the 1950s,¹⁹⁸ a meaningful assessment has often been precluded by the judicial tendency to uphold claims of privilege without engaging in a substantial analysis of

192. *E.g.*, *Mohamed v. Jeppesen Dataplan, Inc.*, 614 F.3d 1070, 1092–93 (9th Cir. 2010) (en banc); *Arar v. Ashcroft*, 585 F.3d 559, 565 (2d Cir. 2009), *cert. denied*, 130 S. Ct. 3409 (2010); *El-Masri v. United States*, 437 F. Supp. 2d 530 (E.D. Va. 2006), *aff'd*, 479 F.3d 296 (4th Cir. 2007), *cert. denied*, 128 S. Ct. 373 (2007).

193. *See* Executive Order 13,491, *Ensuring Lawful Interrogations* at § (5)(e)(ii) (Jan. 22, 2009).

194. *See* David Johnston, *U.S. Says Rendition to Continue, But With More Oversight*, *nytimes.com*, Aug. 24, 2009, available at http://www.nytimes.com/2009/08/25/us/politics/25rendition.html?_r=0 (visited Sept. 22, 2013).

195. Classified Information Procedures Act of 1980, Pub. L. No. 96-456, 94 Stat. 2025.

196. *Id.* at 6.

197. *Boumediene v. Bush*, 553 U.S. 723, 128 S. Ct. 2229, 2276 (2008).

198. *United States v. Reynolds*, 345 U.S. 1 (1953).

the underlying evidence or of the government's claimed need for non-disclosure.¹⁹⁹ In 2009, the Obama administration promised to reform the use of the state secrets privilege to allow for greater government accountability.²⁰⁰ However, the administration's continued aggressive use of the privilege, seeking and winning dismissal of suits alleging serious government abuse such as torture,²⁰¹ suggests only continuity in the use of the privilege to prevent meaningful accountability through civil suits.

XI. CONCLUSION: ASSESSMENT OF U.S. ANTI-TERRORISM LAWS

In the last four years, U.S. counterterrorism policy has shifted in some significant ways, such as ending the use of abusive interrogation practices and accepting that international law applies to U.S. counterterrorism practices. However, the continuity between the Bush and Obama administrations in the substance of many counterterrorism programs, the assertion of high levels of presidential power and the continued high level of secrecy has created a bipartisan imprimatur of the robust counterterrorism programs that exist today, as well as the many problematic aspects of those programs. Congress, the judiciary and the public, all grateful that no large-scale terrorist attacks have occurred since 2001 and cognizant that threats still exist, have been largely acquiescent despite significant costs to human rights and civil liberties in the form of racial and religious profiling, indefinite detention, expansive and seemingly poorly controlled surveillance, extrajudicial killings, and torture and other abuses for which there has been a pronounced lack of accountability.

The government's aggressive counterterrorism stance has influenced actions and policies outside of the U.S. federal government: the work of domestic local and state-level law enforcement has been altered through federal programs mandating vertical information-sharing and coordination; the U.S. has exerted significant influence on the United Nations Security Council in shaping and promoting resolutions that have had a worldwide impact on counterterrorism programs; and the U.S. has exerted its soft power to attempt to influence other nations to shape their own counterterrorism policies in

199. See Setty, *supra* note 191.

200. See Memorandum from Eric Holder, Attorney Gen., on Policies and Procedures Governing Invocation of the State Secrets Privilege to Heads of Exec. Dep'ts & Agencies (Sept. 23, 2009), *available at* <http://legaltimes.typepad.com/files/ag-memo-re-state-secrets-dated-09-22-09.pdf> (establishing layers of internal review within the Department of Justice and including a new executive branch policy to report to Congress any invocations of the state secrets privilege).

201. See *Mohamed v. Jeppesen Dataplan*, 614 F.3d 1070 (9th Cir. 2010) (en banc) (dismissing a suit seeking compensation for extraordinary rendition and torture based on the government's invocation of the state secrets privilege).

ways that promote U.S. interests.²⁰² Furthermore, the U.S. stance on issues like foreign surveillance and the use of drones for targeted killings in areas that are not active theaters of war has set a dangerous precedent with regard to other nations attempting to develop and use the same technology.²⁰³ It may be that the muscular stance of the U.S. on such issues will promote a similar response in other nations as their technology and power develops.

Future challenges for U.S. counterterrorism law are manifold. The driving imperative will continue to be recognizing and confronting continuing threats posed by al-Qaeda, other foreign terrorist groups, domestic terrorism and cyberterrorism. However, the U.S. would do well to improve its transparency and accountability mechanisms to comport with the rule of law and maintain democratic values. Such initiatives are unlikely to stem from the executive branch, which means that the judiciary, Congress, and the public must engage more fully to insist upon open debate, accountability and further oversight and constraint.

The U.S. response to terrorism has been multifaceted and expansive, reflective of the U.S. role in global security, and is an ongoing work in progress. Branches of the federal government and the public question and redefine their obligations and roles in upholding security while safeguarding the rule of law, and the debate over the appropriate course of action on these matters will no doubt continue for the foreseeable future.

202. See, e.g., Setty, *supra* note 191, at 1643-45, 1652-53.

203. See, e.g., Andrew Erickson and Austin Strange, *China Has Drones. Now What?*, *foreignaffairs.com*, May 23, 2013, available at <http://www.foreignaffairs.com/articles/139405/andrew-erickson-and-austin-strange/china-has-drones-now-what> (raising questions as to how China will deploy its military drone capability).

JACQUELINE E. ROSS*

Undercover Policing and the Varieties of Regulatory Approaches in the United States†

TOPIC V. B

The entrapment defense remains the primary regulatory constraint on the criteria by which targets of undercover operations are selected and on the ways in which undercover investigations are planned and carried out. But the current entrapment defenses and critical commentary do not take into account empirical differences between undercover investigations that affect the nature of the distorting influences that such operations can introduce into the criminal environment in which offenses are embedded. These differ significantly, depending on whether an undercover agent stages a criminal opportunity under conditions that the government controls or whether the agent infiltrates a criminal organization and participates in crimes staged by others. The former type of investigation carries the risk that the undercover scenario may not accurately reflect what a target would do in his natural environment, while the latter type of operation carries the risk of making the undercover agent complicit in offenses whose harms he may not be able to control. Regulatory approaches must distinguish between these potential risks and distortions.

Undercover policing is a proactive investigative tactic that allows police officers and informants to infiltrate criminal organizations or to test the criminal resolve of suspected offenders, by disguising their true identities and orchestrating criminal opportunities. Undercover tactics have been examined through a rich variety of regulatory prisms, each of which captures a different feature that makes such operations vulnerable to abuse. Criminal law scholars worry about entrapment, which is an affirmative defense for targets of undercover stings who can show that government agents convinced them to commit a crime when they were not predisposed to engage in such criminal activity.¹ Criminal law scholars also consider the potential

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1. Gerald Dworkin, *The Serpent Beguiled Me and I Did Eat: Entrapment and the Creation of Crime*, 4 *LAW & PHIL.* 17 (1985); Christopher D. Moore, *The Elusive Foun-*

criminal liability of undercover agents and informants who participate in the crimes they investigate.² Criminal procedure scholars examine the impact of undercover investigations on the constitutional rights of criminal defendants, including their legitimate expectations of privacy under the Fourth Amendment and the ways in which undercover operations can compromise the privilege against compelled self-incrimination under the Fifth Amendment and the Sixth Amendment right to counsel.³

Many civil libertarians look beyond the rights of criminal defendants to the First and Fourth Amendment interests of ordinary citizens. These concerns center on covert operations that pursue intelligence rather than evidence, since such investigations are likely to affect not only criminals but anyone who belongs to religious and political organizations that the government seeks to infiltrate.⁴ Because such investigations may not be predicated on concrete suspicion of wrongdoing, they may cast a wider net, yielding information whose validity may never be tested in court; covert scrutiny of this sort may burden the exercise of freedom of speech, assembly, and religion and may compromise the privacy of confidential communications between members of targeted organizations. Finally, state bar associations and courts that interpret state ethics codes have from time to time become concerned that prosecutors who supervise undercover operations might infringe disciplinary rules that prohibit attorneys from sanctioning acts of deception, or from sponsoring direct or indirect contact with represented parties, outside the presence of their lawyers.

dation of the Entrapment Defense, 89 NW. U. L. REV. 1151 (1995); Jon Sherman, "A Person Otherwise Innocent": Policing Entrapment in Preventative, Undercover Counterterrorism Investigations, 11 U. PA. J. CONST. L. 1475 (2009); Roger Park, *The Entrapment Controversy*, 69 MINN. L. REV. 163 (1976); Louis Michael Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma* 1981 SUP. CT. REV. 111 (1981); Rebecca Roiphe, *The Serpent Beguiled Me: A History of the Entrapment Defense*, 33 SETON HALL L. REV. 257 (2003).

2. Jacqueline E. Ross, *The Place of Covert Surveillance in Democratic Societies: A Comparative Study of the United States and Germany*, 55 AM. J. COMP. L. 493, 512 (2007); Elizabeth E. Joh, *Breaking the Law to Enforce It: Undercover Police Participation in Crime*, 62 STAN. L. REV. 155 (2009).

3. Bruce Hay, *Sting Operations, Undercover Agents, and Entrapment*, 70 MO. L. REV. 387 (2005); Gary T. Marx, *Who Really Gets Stung? Some Issues Raised by the New Police Undercover Work*, 28 CRIME & DELINQUENCY 165, 169 (1982); J. Gregory Deis, *Economics, Causation, and the Entrapment Defense*, 2001 ILL. L. REV. 1207; Dru Stevenson, *Entrapment and the Problem of Deterring Police Misconduct*, 37 CONN. L. REV. 67, 73 (2004).

4. For a discussion of the ways in which government information gathering conflicts with First Amendment values, see Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 NEW YORK UNIV. L. REV. 112 (2007). For an argument for increasing scrutiny of undercover operations under the Fourth Amendment, see Katherine J. Strandburg, *Home, Home on the Web and other Fourth Amendment Implications of Technosocial Change*, 70 MARYLAND L. REV. 614 (2011).

Among this multiplicity of regulatory options, the entrapment defense remains the most significant, if only because most of the other types of challenges have proven either legally ineffectual or limited in scope. Appeals to civil liberties, in particular, have been notably less successful in the United States than in the European Union, where the European Court of Human Rights (ECtHR) has interpreted the Convention on Human Rights (ECHR) to protect the fair trial rights of criminal defendants whose convictions rest on evidence obtained undercover. Within the European Union, many national legislatures have understood the Convention's protections for privacy (set forth in Article Eight) as requiring statutory regulation of undercover operations and the enactment of a warrant procedure that ensures prior approval and continuing oversight by judicial officers.⁵ The Convention's privacy protections have been interpreted to limit the use of undercover tactics primarily to the pursuit of serious crimes, after a showing that other, less intrusive investigative tactics seem unlikely to yield evidence against highly secretive offender groups. Accordingly, European legal systems authorize undercover operations primarily for the investigation of organized crime. Statutory constraints limit both the types of crimes undercover agents can investigate and the tactics they can use, as undercover agents in many European countries risk criminal sanctions for facilitating or taking part in crimes for which undercover tactics are not authorized by law—even when such assistance or participation serves exclusively investigative purposes.⁶ The European Court of Human Rights has also sustained challenges to undercover operations on grounds of entrapment, or because of the use of secret evidence, without adequate opportunity to question undercover agents and informants at trial. Both types of challenges invoked the right to a fair trial, as guaranteed by Article Six of the ECHR.

By contrast, undercover operations in the United States are not regulated by statute and may be initiated without obtaining a warrant or establishing probable cause or even reasonable suspicion that a crime is being committed. In *Hoffa v. United States*, 385 U.S. 293 (1966), the Supreme Court held that the use of undercover agents and informants does not amount to a search, within the meaning of the Fourth Amendment, as targets waive their expectations of privacy in the information they voluntarily impart to others; in essence, suspects assume the risk of betrayal by their associates, or the risk that those with whom they commit crimes may turn out to be under-

5. UNDERCOVER: POLICE SURVEILLANCE IN COMPARATIVE PERSPECTIVE (Gary T. Marx and C. Fijnaut eds., 1995).

6. Jacqueline E. Ross, *Impediments to Transnational Cooperation in Undercover Policing: A Comparative Study of the United States and Italy*, 52 AM. J. COMP. LAW 569 (2004).

cover agents.⁷ While listening in on a target's telephone conversation is a search that infringes on a protected expectation of privacy, eliciting such a target's confidences through undercover agents or informants does not count as a search within the meaning of the Fourth Amendment. Accordingly, resort to undercover tactics, unlike the use of electronic surveillance, requires no showing that less intrusive investigative methods have been tried or are likely to fail, and no showing that the crimes being investigated are sufficiently serious to warrant the use of the undercover technique. In *Illinois v. Perkins*, 496 U.S. 292 (1990), the Supreme Court also rejected claims that undercover questioning of a custodial defendant violates his Fifth Amendment right to silence, even if he has already indicated his unwillingness to speak to the police, because the Fifth Amendment protects defendants only from compelled self-incrimination; if the defendant does not realize he is speaking to a representative of the police, the Court has reasoned, he cannot experience the conversation as an exertion of pressure by the government. Defendants have had more success challenging undercover questioning of defendants who have invoked their right to counsel. In *Massiah v. United States*, 377 U.S. 201 (1964), the Supreme Court held that once formal charges are in place, undercover questioning can violate a criminal defendant's Sixth Amendment right to counsel—but only if the questioning concerns the crimes with which he is charged, and only if he has already invoked his right to counsel. Finally, sufficiently outrageous sting operations can violate defendants' substantive Due Process rights under the Fifth and Fourteenth Amendments.⁸ But this remains largely a theoretical possibility, as very few convictions have been vacated on that basis.

In recent years, U.S. courts have also rebuffed claims that undercover policing invades their First Amendment rights of freedom of speech and assembly, though similar claims made in the 1970s and 80s resulted in consent decrees under the terms of which police de-

7. See also *United States v. White*, 401 U.S. 745 (1971).

8. In dicta, the Supreme Court has suggested that the Due Process Clause may bar a criminal prosecution when the undercover agents' conduct is sufficiently outrageous to "shock the conscience" and offend principles of fundamental fairness. *United States v. Russell*, 411 U.S. 423, 427 (1973). Outrageous conduct may be established by proof of "an intolerable degree of governmental participation in the criminal enterprise." While the Supreme Court limits this defense to defendants who can demonstrate that they lacked predisposition, some state courts and federal district courts have applied this constitutional test as a purely objective one, opining that government over-involvement in the targeted offense may be sufficiently "outrageous" to deprive a defendant of due process and warrant dismissal of the charges against him, even if he is "predisposed." *United States v. Bagnariol*, 665 F.2d 877 (9th Cir. 1981); *United States v. Fekri*, 650 F.2d 1044 (9th Cir. 1981); *United States v. Wylie*, 625 F.2d 1371 (9th Cir. 1980); *United States v. Borum*, 584 F.2d 424 (D.C.Cir. 1978); *United States v. Prairie*, 572 F.2d 1316 (9th Cir. 1978); and *United States v. Leja*, 563 F.2d 244 (6th Cir. 1977).

partments for cities like Los Angeles and New York agreed to refrain from surveillance of political and religious organizations absent any concrete evidence of ongoing or incipient criminal conduct.⁹ These consent decrees were quietly abandoned in the wake of the September 11 attacks, and the FBI, too, has modified the internal guidelines that restricted domestic intelligence agencies absent evidence of a criminal threat.¹⁰

If American courts have rarely sustained legal challenges that are framed in the language of rights, and if American legislatures have never enacted a statutory warrant requirement, they have also avoided the regulatory path taken by most European legal systems before undercover tactics came to be regulated by a statutory warrant requirement: that of restraining undercover tactics through the threat of criminal sanctions for undercover agents or informants who take part in the crimes they investigate. Courts have taken the position that “[c]riminal prohibitions do not generally apply to reasonable enforcement actions by officers of the law,” *Brogan v. United States*, 522 U.S. 398 (1998).¹¹ And state legislatures have enacted broad immunities for undercover agents, through the so-called “public authority” defense, which protects law enforcement officers generally from criminal liability for enforcement actions that were duly authorized by their superiors.¹² Unlike French and Italian immunities, which spell out the undercover tactics in which undercover agents and informants may lawfully engage, the American defense makes no effort to enumerate the enforcement actions—undercover or otherwise—for which the defense is designed.

9. Stipulated Consent Decree and Judgment, Coalition Against Police Abuse v. Bd. of Police Comm’rs, No. 243-458 (L.A. County Ct. Feb. 22, 1984); see also *Handschu v. Special Serv. Div.*, 605 F. Supp. 1384 (S.D.N.Y.1985). (approving a consent decree for the NYPD in the context of investigations of political groups).

10. Jerrold L. Steigman, *Reversing Reform: The Handschu Settlement in Post-September 11 New York City*, 11 J.L. & POL’Y 745, 765-70 (2003); Samuel J. Rascoff, *Domesticating Intelligence*, 83 S. CAL. L. REV. 575 (2010).

11. See also WAYNE R. LAFAVE, 2 SUBSTANTIVE CRIMINAL LAW, Section 10.7 (2d ed. 1986) (“in certain . . . circumstances the otherwise criminal conduct of a police officer, or a private person acting on behalf of an officer, may be privileged because the person was pursuing law enforcement purposes at the time”). The Seventh Circuit has likewise reasoned that “[i]n the pursuit of crime the Government is not confined to behavior suitable for the drawing room. It may use decoys, and provide the essential tools of the offense. The creation of opportunities for crime is nasty but necessary business.” *United States v. Murphy*, 768 F.2d 1518, 1528-29 (7th Cir. 1985). The U.S. Supreme Court has explicitly recognized undercover participation in unlawful activity as “a recognized and permissible means of investigation.” *United States v. Russell*, 411 U.S. 423, 423 (1973); *Lewis v. United States*, 385 U.S. 206 (1966).

12. 2 P. ROBINSON, CRIMINAL LAW DEFENSES, Section 142(a), p. 121 (1984). See, e.g., N.Y. Penal Law Section 35.05(1) (McKinney 1998).

UNDERCOVER POLICING AND ENTRAPMENT

Accordingly, the entrapment defense remains the primary regulatory constraint on the criteria by which targets of undercover operations are selected and on the ways in which undercover investigations are planned and carried out. But there is an ambiguity at the heart of the entrapment defense, which accounts for the divergent ways in which it has been codified and discussed. Does the rationale for the defense rest on the view that targets do not deserve to be punished if they would have been unlikely to commit the charged offense without the criminal opportunity they were offered by government? Or does the entrapment defense exist primarily to reorient investigators away from targets of opportunity to "real" criminals, to whom the government merely tenders a convenient occasion to commit acts in which they would otherwise engage undetected?

The so-called objective test accords with the latter rationale, as it concerns itself with the nature and strength of the inducement employed by the government instead of the predisposition of offenders. While a particular defendant may well have been predisposed to commit the crime with which he is charged, an excessively appealing inducement may nonetheless amount to entrapment if it has a tendency to overcome the resistance of the average law-abiding citizen. Only a minority of jurisdictions, such as California and Alaska, have embraced this version of the entrapment defense.¹³ By contrast, the subjective variant of the entrapment defense accords with the former rationale, as it makes the defense available only to those offenders who were not predisposed to commit the crime they were eventually encouraged or persuaded to commit.¹⁴ A third, hybrid variant, makes the defense available only if the defendant can establish both that he was not predisposed to commit the crime *and* that the government's tactics were unfair, meaning that the pressures and inducements it used were excessive. This is the most restrictive variant of the entrapment defense, as a purely subjective test would sustain a defense of entrapment even when the government offered a target otherwise reasonable inducements, so long as the targeted offender could establish a lack of predisposition.

In *Sherman v. United States*, 356 U.S. 369, 372 (1958), the Supreme Court embraced this hybrid version of the test by asking whether the inducement was objectively excessive and whether the

13. Decisions adopting an objective approach include *People v. Barraza*, 591 P.2d 947 (California, 1979); *Pascu v. State*, 577 P.2d 1064, 1064 (Alaska, 1978). The Model Penal Code has also adopted an objective test of entrapment. (M.P.C. Section 2.13 (Proposed Official Draft, 1962).

14. *Sorrells v. United States*, 287 U.S. 435, 448 (1932). "Under a subjective test . . . the outcome varies with each individual defendant's state of mind; no general standards governing the permissibility of police conduct are set." *Bailey v. The People*, 630 P.2d 1062, n. 5 (Colo. 1981).

government's tactics in fact implanted the idea for the crime in the mind of an "unwary innocent," reasoning that the legislature that defined the criminal offense could not have intended the criminal prohibition to apply to those who would not have committed such a crime without encouragement by undercover agents or informants. Critics of the subjective entrapment defense and its hybrid variant have pointed out that any claim that targets who lack predisposition do not deserve criminal punishment must explain the unavailability of any similar defense to those "unwary innocents" who were led astray by their friends rather than government agents or informants.¹⁵

Critics of all three variants of the entrapment defense point out that all current versions of the test assume that one can meaningfully distinguish "true criminals" from "unwary innocents." These critics contend that almost anyone can be induced to commit a crime if the "criminal offer" is sufficiently tempting, so that the distinction between deserving and undeserving targets is at best a fluid one.¹⁶ The true question, for many reformers, is what level of inducement is considered reasonable, with some commentators using a market framework to argue that so-called "above-market offers" should be prohibited, because they may ensnare at least some targets who would be unlikely to commit crimes under "normal market conditions," meaning that they would be unlikely to take advantage of the ordinary of criminal opportunities they are likely to encounter in the their normal surroundings.¹⁷

Legal scholars who would prohibit the government from offering targets more than the "market price" as inducements to commit a crime have often been vague about what constitutes an excessive inducement, as they have generally not examined or systematized the variety of government sting operations that might give rise to a defense of entrapment. In the realm of sociology, however, Gary Marx's path-breaking study, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* (1988), has identified a wide range of ways in which infiltration can alter a target's conduct or environment, along with a large number of factors that can distort the "naturalism" of an undercover operation. Marx points out that undercover operations can alter not only the opportunity structure for criminal conduct but also the motives, rewards, markets, or resources that shape targets' decisions about whether to offend and how. And among types of

15. See, e.g., Gideon Yaffe, "The Government Beguiled Me": *The Entrapment Defense and the Problem of Private Entrapment*, 1 J. ETHICS & SOC. PHIL. 2, 5 (2005).

16. GARY T. MARX, *UNDERCOVER: POLICE SURVEILLANCE IN AMERICA* (1988); Richard McAdams, *The Political Economy of Entrapment*, 96 J. CRIM. L. & CRIMINOLOGY 107 (2005).

17. Ronald J. Allen, Melissa Luttrell, Anne Kreeger, *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407 (1999).

undercover operations, those in which an operative investigates past crimes are less likely to shape criminal conduct than anticipatory investigations that seek to prevent or facilitate future offenses. Investigations that offer criminal opportunities randomly will pose different risks of abuse than sting operations undertaken in response to prior intelligence about specific targets. Even if efforts to avoid concerns about entrapment lead investigators to emulate the natural criminal environment in their design of a criminal opportunity, too much realism may also overbear a target's autonomy, since "[i]n genuine criminal encounters, one party may coerce or threaten another party into participating," or may offer sex or drugs as an inducement.¹⁸

THE VARIETIES OF GOVERNMENT INFLUENCE IN UNDERCOVER STING OPERATIONS

The distortions that can be created by undercover operations may be compared to those inherent in either cognitive science or anthropology. In cognitive science, an experimental design may not correlate well with the real-life setting it seeks to emulate, if the experimental scenario is overly artificial. In the same way, an undercover agent may, perhaps unwittingly, offer a target a criminal opportunity that may be a poor substitute, or proxy, for the types of offenses that a target commits on his own, independently of the government.¹⁹ This may be a particularly salient risk for transactional undercover investigations, in which the undercover agent may agree to buy a much larger quantity of contraband from a suspected dealer than the target ordinarily sells to others. (American courts call this phenomenon "sentencing entrapment," if the investigator's aim is to increase the level of offending for the purpose of triggering a mandatory minimum prison term, or some other sentence enhancement.)²⁰

But some undercover investigations may more profitably be compared to ethnography, anthropology, or undercover sociology, rather than the experimental designs of cognitive science. If an undercover agent infiltrates a criminal organization, learning about kinship patterns and power hierarchies, his presence as a facilitator or co-

18. Gary T. Marx, *UNDERCOVER IN AMERICA*, *supra*, note 16.

19. Jacqueline E. Ross, *Valuing Inside Knowledge: Police Infiltration as a Problem for the Law of Evidence*, 79 CHI.KENT L. REV. 1111, 1118 (2004); *see also* Richard McAdams, *The Political Economy of Entrapment*, 96 J.CRIM.L. & CRIMINOLOGY 107 (2005).

20. *United States v. Turner*, 569 F.3d 637, 641 (7th Cir. 2009) (citing *United States v. Garcia*, 79 F.3d 74, 75 (7th Cir. 1996)). *See also* Eda Katharine Tinto, *Undercover Policing, Overstated Culpability*, 34 CARDOZO L. REV. 1401 (2013); Marcia G. Shein, *Sentencing Manipulation and Entrapment*, 10 CRIM. JUST. 25, 25-28 (1995); and Amy Levin Weil, *In Partial Defense of Sentencing Entrapment*, 7 FED. SENT'G REP. 172, 173 (1995).

conspirator can reshape some of the internal dynamics of the organization, or help the organization to branch out into new territories or to take advantage of emerging criminal opportunities. In this, agents may resemble anthropologists, ethnographers, or sociologists, who become part of a community they are studying and in the process may influence and alter the social environment, for example, by bringing with them weapons and tools that lead natives to abandon their own technologies, or by helping native communities patent their knowledge of the therapeutic effects of local plants and herbs. If undercover agents participate in the organization's crimes, instead of proffering criminal opportunities that the government can control, the agents may not only help reshuffle established hierarchies but may reshape at least some of the organization's criminal activities. Agents may also become entangled with and perhaps complicitous in the commission of crimes against innocent third parties or in retaliatory violence against unwitting informants (who may vouch for undercover agents without knowing their true identity.)

Most American undercover investigations can be grouped along a continuum one end of which resembles the artificial, experimental scenarios through which cognitive scientists seek to reproduce natural occurrences under controlled conditions, while the other end of the spectrum features true infiltration of a natural environment which may, however, be altered by presence of an outside observer. If undercover narcotics buys are closest to controlled experiments, other analogues to cognitive science experiments include the whole range of "honeypot" operations in which the police offer a criminal opportunity to targets who self-select by taking agents up on their criminal offers. Such investigations include random integrity testing of bank tellers, the establishment of storefront fencing operations, the positioning of bait cars filled with tempting merchandise, or the deployment of decoy officers posing as prostitutes on the street or as underage girls on the Internet. At the other end of the spectrum, undercover agents, sociologists and journalists have infiltrated mental hospitals, supermarket chains, religious cults, and extremist political parties, much as long-term moles have infiltrated the Cosa Nostra, the Hell's Angels, and the Klu Klux Klan.

To be sure, all undercover operations allow the government secretly to influence the crimes it investigates. But the concerns such influence might raise will be different when the government orchestrates an offense as a provable proxy for other, secret criminal activity, than when it allows its agents to take part in and perhaps even steer offenses that are orchestrated by others, in settings and with consequences that the government may either not be able to control, or may be able to steer only at the cost of making the organization's true ambitions and capabilities difficult to disentangle from

the government's own contribution. Sting operations that function as a "vital test" of a target's willingness to offend under controlled conditions may ensnare opportunistic offenders who might rarely encounter comparable opportunities under normal conditions. Such undercover operations focus on targets as threats—that is, as potential offenders—even when it may be unclear whether they would ever find themselves in a position to realize their latent inclinations. This was the concern which the Seventh Circuit relied on in vacating the defendant's conviction in *United States v. Hollingsworth*, in which they could find it extremely unlikely that the aspiring money launderers who were ensnared by a sting operation truly possessed sufficient knowledge of banking to have persuaded anyone other than a government agent to launder funds with them. By contrast, more anthropological operations in which the police infiltrate established criminal organizations raise greater concerns about government complicity in the crimes they facilitate and their shared responsibility or resulting harms, if undercover agents contribute not to contrived offenses with containable harms but to crimes that inflict real losses on third parties.

Neither objective nor subjective tests for entrapment are currently able to distinguish among these types of influence in assessing targets' criminal responsibility for crimes to which government operatives contribute in an undercover capacity. And to the extent that entrapment tests focus only on undercover agents' effects on their targets, they entirely miss the impact of undercover operations on others.²¹ That the entrapment doctrine functions as an affirmative defense also makes it difficult to treat government influences as a matter of degree. Because Italy and Germany treat entrapment as a scalar concept, by making the doctrine available as a mitigating factor at sentencing, targets' penalties may be adjusted for the degree of government influence on targets' criminal activities. In this way, punishment may correspond to the nature and severity of the offenses that targets would have committed on their own. By contrast, the American doctrine of sentencing entrapment is rarely successful in reducing punishment to reflect government influence on the severity of a target's offense, as it is invoked only in truly exceptional cases. Compared with many of the member states of the European Union, the United States remains unusual in resisting both *ex ante*

21. Third parties may, however, bring tort actions against the government, in order to obtain compensation for harms to which the government's investigative efforts contributed. Possible causes of action include lawsuits brought under the Federal Tort Claims Act, 28 U.S.C. 2401 and 2675 (for damage to third parties and their property), and under *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971) (for constitutional violations, such as illegal searches and seizures, which undercover agents commit when they intrude into private areas in ways that exceed the scope of their targets' consent.).

forms of regulation such as statutory rules and warrant requirements, and many *ex post* solutions such as sentencing entrapment or potential criminal liability for overzealous undercover agents, recognizing *ex post* remedies through acquittals for entrapment in only the most egregious cases of distorting government influence.²²

22. Jacqueline E. Ross, *Undercover Policing and the Shifting Terms of Scholarly Debate: The United States and Europe in Counterpoint*, 4 ANNUAL REVIEW OF LAW AND THE SOCIAL SCIENCES, 17.1-17.35 (2008).

SALIL K. MEHRA* AND MARKETA TRIMBLE**

Secondary Liability, ISP Immunity, and Incumbent Entrenchment†

TOPIC VI

More than fifteen years have passed since the two major U.S. statutes concerning the secondary liability of Internet service providers were adopted—the Communications Decency Act and the Digital Millennium Copyright Act. The statutes have been criticized; however, very little of the criticism has come from Internet service providers, who have enjoyed the benefits of generous safe harbors and immunity from suit guaranteed by these statutes. This Article raises the question of whether these statutes contribute to incumbent entrenchment—solidifying the position of the existing Internet service providers to the detriment of potential new entrants. The current laws and industry self-regulation may hamper the entry of new service providers into the market and thereby retard the technological progress that best serves society.

INTRODUCTION

Critics often view law as lagging behind technology, thereby hampering technological development and innovation. Innovators grumble that the law does not facilitate technological development—not only does it fail to anticipate future technological development, but it often is not even able to respond rapidly enough to address current developments. When innovators complain about the existing state of the law, however, their complaints might actually be a positive sign in one respect—the complaints indicate that the types of technological development are occurring that society hopes to encourage—developments that were not anticipated when the laws were drafted. If innovators are silent about or satisfied with the cur-

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rent state of the law, then questions should be raised about the innovators' contributions to technological development. Technological development might not be sufficiently progressive if it corresponds exactly to what was anticipated at the time of a law's drafting by a legislature, since legislatures are bodies not typically endowed with particular technical expertise, visionary abilities, or imagination.¹

The extremely swift development of the Internet shows how a revolutionary technology can move ahead of the law. When the new 1976 Copyright Act was enacted, only a few visionaries could have predicted the Internet's existence,² and even in 1996 and 1998, when Congress enacted Section 230 of the Communications Decency Act (CDA)³ and the Digital Millennium Copyright Act (DMCA),⁴ statutes that included Internet-related provisions, few could have imagined all the roles that the Internet would play and the range of legal issues that the Internet would generate in just a few years.⁵ One would expect the Internet-related provisions of the CDA and the DMCA to be primary examples of how a law can lag behind technology and result in complaints by major innovators in the field about the outdated state of the law.

However, the provisions of the CDA and the DMCA that address the liability of Internet service providers (ISPs) for content posted on the Internet by third parties⁶ appear to enjoy the support of ISPs,⁷ which are the very same entities that society perceives to be the ma-

1. A legislature may purposefully decide not to legislate for new technologies and to delay legislating for such technologies until they are fully developed. See Yvette Joy Liebesman, *The Wisdom of Legislating for Anticipated Technological Advancements*, 10 J. MARSHALL REV. INTELL. PROP. L. 154, 157 (2010) ("[W]e should proceed with caution in allowing the potential effects of either technology in its infancy or future unrealized technology to influence our policy decisions before the science has had a chance to mature and develop, and its effects on society better determined." *Id.*). Of course, it might be difficult to determine when a technology has reached a proper point of maturation for a legislature to act.

2. *E.g.*, Paul Baran, *On Distributed Communications: I. Introduction to Distributed Communications Networks*, THE RAND CORPORATION (Aug. 1964), http://www.rand.org/pubs/research_memoranda/2006/RM3420.pdf. On the creation and beginnings of the Internet generally, see, *e.g.*, JANET ABBATE, *INVENTING THE INTERNET* (2000); JONATHAN ZITTRAIN, *THE FUTURE OF THE INTERNET—AND HOW TO STOP IT* 28-35 (2008).

3. 47 U.S.C. § 230 (2006).

4. This article concerns only one set of the provisions of the DMCA—section 512—the Online Copyright Infringement Liability Limitation Act. 17 U.S.C. § 512 (2012).

5. See, *e.g.*, *In re Verizon Internet Services, Inc.*, 240 F.Supp.2d 24, 38 (D.D.C. 2003) ("[P]eer-to-peer (P2P) software and 'bots,' a software tool used by copyright owners to monitor the Internet and detect unauthorized distribution of copyrighted material—were 'not even a glimmer in anyone's eye when the DMCA was enacted' by Congress in 1998." *Id.*).

6. 17 U.S.C. § 512 (2012).

7. See *infra* note 16 and note 103 and the accompanying text for the scope of the term "Internet service providers" under the DMCA and the CDA.

for innovators of the Internet.⁸ The CDA and the DMCA are two of the three U.S. federal acts that limit the liability of ISPs⁹—persons or entities that facilitate Internet connections and a wide variety of other Internet-related services, such as search functions (e.g., Google) and platforms for posting of content created by others (e.g., YouTube). The provisions of the acts immunize ISPs from suit and create safe harbors from some types of remedies in cases where ISP liability would or does arise because of acts by users employing ISP services—acts that are facilitated by the ISP services and that involve illegal conduct, such as defamation or copyright infringement.¹⁰

The fact that ISPs appear to be satisfied with the CDA and the DMCA as they have existed since 1996 and 1998 does not automatically mean that ISPs do not innovate at all, or do not innovate sufficiently in the technology that the CDA and the DMCA affect; good examples exist of innovation by some ISPs in technological aspects that are affected by the CDA and the DMCA.¹¹ But ISP satisfaction with the law might also suggest that the law does not adequately incentivize ISPs to innovate in particular aspects of technology, and in the worst case scenario, the law could actually incentivize ISPs to slow their innovation in technology, or constantly understate the outcomes of their innovation in particular technologies that are implicated by the CDA and the DMCA.

The CDA and the DMCA were designed to support the development of a new and promising industry,¹² and the immunity provided

8. *E.g.*, Fred von Lohmann, senior copyright counsel at Google, recently said on behalf of Google that “[w]e believe that the time-tested [DMCA] ‘notice-and-takedown’ process for copyright strikes the right balance between the needs of copyright owners, the interests of users and our efforts to provide a useful Google Search experience.” David Goldman, *Google Kills 250,000 Search Links A Week*, CNN MONEY (Sept. 9, 2013), <http://money.cnn.com/2012/05/24/technology/google-search-copyright>. On criticism of the DMCA by users, free speech advocates, and copyright owners see, *e.g.*, Jennifer M. Urban & Laura Quilter, *Efficient Process or “Chilling Effects”? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 631–36 (2006); Rebecca Tushnet, *Power Without Responsibility: Intermediaries and the First Amendment*, 76 GEO. WASH. L. REV. 986, 1002–05 (2008); Wendy Seltzer, *Free Speech Unmoored in Copyright’s Safe Harbor: Chilling Effects of the DMCA on the First Amendment*, 24 HARV. J.L. & TECH. 171 (2010); CHILLING EFFECTS, <http://www.chillingeffects.org> (last visited Sept. 20, 2013).

9. The third (less known) act is the Lanham Act. 15 U.S.C. § 1114(2)(B), (C) (2006).

10. For the scopes of the safe harbor and immunization provisions see *infra* note 15 and the accompanying text and notes 92, 104, 105, and the accompanying texts.

11. See *infra* for examples of technologies deployed by ISPs to enhance copyright enforcement. Innovation in the technologies may be conducted by entities other than ISPs—by third-party suppliers of the technologies, for example. ISP demand for such technologies plays an important role in incentivizing suppliers to innovate, and ISP demand can be propelled by legal requirements. For simplification this article identifies ISPs as the primary innovators with the understanding that innovation may be outsourced to third-party suppliers.

12. “The history of online gatekeeping is . . . also one of policy judgment in the judicial as well as legislative spheres that generative technologies ought to be given

by CDA's Section 230 and the safe harbor provided by the DMCA to internet service providers were critical to the early development of the Internet. However, the CDA and the DMCA may also be contributing to some ossification in the forms that subsequent Internet services may take. Additionally, the newly-implemented Copyright Alert System (also known as "six strikes") may, through self-regulation, provide incumbent firms with advantages that will burden insurgent innovators.

I. THE DIGITAL MILLENNIUM COPYRIGHT ACT

The status of ISPs and their potential liability for content posted on the Internet by third parties, particularly for defamatory and copyright infringing content, has been contested in courts since the early days of the Internet, and as courts reached different results on the status of ISPs,¹³ an urgent need for legal certainty led Congress to enact first Section 230 of the CDA, and later the DMCA, which filled the gap that the CDA purposefully left in the copyright law area. The DMCA reflected a pushback by copyright owners, who demanded that ISPs be required to meet certain conditions to benefit from a limitation on ISP liability, and that a mechanism be created for takedowns of copyright infringing material.¹⁴ The DMCA's safe harbor provisions concern liability for copyright infringement that may arise under the U.S. Copyright Act,¹⁵ and provide specifically defined ISPs only a safe harbor from damages, not complete immunity from suit.¹⁶

wide latitude to find a variety of uses . . ." Jonathan Zittrain, *A History of Online Gatekeeping*, 19 HARV. J. L. & TECH. 253, 298 (2006). See also 144 Cong. Rec. S8729 (daily ed. Sept. 3, 1997) (statement of Sen. Ashcroft) ("We cannot make the Internet too costly to operate.").

13. *E.g.*, *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, (S.D.N.Y. 1991); *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

14. *In re Verizon Internet Services, Inc.*, 240 F.Supp.2d 24, 36 (D.D.C. 2003) ("The legislative history makes clear that in enacting the DMCA, Congress attempted to balance the liability protections for service providers with the need for broad protection of copyrights on the Internet." *Id.*).

15. 17 U.S.C. § 512 (2012). Courts disagree on whether the DMCA extends to secondary liability that may arise under state copyright laws. See *Capitol Records, Inc. v. MP3tunes, LLC*, 821 F. Supp. 2d 627 (S.D.N.Y. 2011); *UMG Recordings, Inc. v. Escape Media Grp., Inc.*, 964 N.Y.S.2d 106 (2013). See also *Federal Copyright Protection for Pre-1972 Sound Recordings, A Report of the Register of Copyrights, December 2011*, U.S. COPYRIGHT OFFICE, <http://www.copyright.gov/docs/sound/pre-72-report.pdf> (last visited Aug. 22, 2013). It is also questionable whether the DMCA covers secondary liability if such liability arises under anti-circumvention provisions of the U.S. Copyright Act. See 17 U.S.C. § 1201 (2006). It is disputed whether the provision creates secondary liability. Mark A. Lemley, *Rationalizing Internet Safe Harbors*, 6 J. TELECOMM. & HIGH TECH. L. 101, 107 (2007).

16. The safe harbor provisions of the DMCA are limited to service providers of "digital online communications" and providers "of online services or network access, or the operator of facilities thereof" who fall into one of four categories. 17 U.S.C. § 512(k)(1)(A) and (B) (2012). For the individual categories see 17 U.S.C. § 512(a), (b),

Among the requirements that ISPs must fulfill to benefit from the DMCA safe harbor is, for some categories of ISPs,¹⁷ compliance with a mechanism for taking down allegedly copyright infringing material. The DMCA outlines the mechanism in great detail; it specifies the content for notifications that copyright owners must submit to ISPs if the copyright owners want the ISPs to take down allegedly infringing material,¹⁸ it details the counter-notifications that users may file to defend material that they upload,¹⁹ and it outlines ISP takedown and reinstatement actions.²⁰ The mechanism operates on two premises: first, that ISPs do not have the technical means to police content that third parties upload to the Internet and that the ISPs host or link to, and second, that even if ISPs have those means, the ISPs are not able to assess whether or not particular material is copyright infringing because they lack basic information necessary for such an assessment, including information about the current copyright owner of the material and any licensing arrangements into which the copyright owner might have entered.

The same two premises that underlie the takedown mechanism also underlie another requirement—the absence of a certain degree of knowledge about infringing activity. If an ISP has such knowledge, the ISP will not benefit from the DMCA safe harbor.²¹ Much DMCA-related litigation²² has focused on the gap between 1) the knowledge

(c), and (d). *See also* Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102 (9th Cir. 2007); Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19 (2d Cir. 2012); UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006 (9th Cir. 2013); Columbia Pictures Indus., Inc. v. Fung, 710 F.3d 1020 (9th Cir. 2013) (deciding that BitTorrent sites were not covered by 17 U.S.C. §512(a), (b) and (d)). The DMCA also has a special provision for nonprofit educational institutions acting as service providers. 17 U.S.C. §512(e) (2012).

17. 17 U.S.C. §512(c) and (d) (2012).

18. 17 U.S.C. §512(c)(3) (2012).

19. 17 U.S.C. §512(g)(3) (2012).

20. 17 U.S.C. §512(g)(2) (2012).

21. The absence of knowledge requirement also concerns only ISPs under 17 U.S.C. § 512(c) and (d).

[T]he service provider . . . (A)

(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material; . . .

17 U.S.C. § 512(c)(1)(A) (2012).

22. In addition to the issues related to the actual knowledge requirement and the “right and ability to control” infringing activity, DMCA-related litigation has concerned issues such as compliance with the definition of ISPs covered by the DMCA, the requirements for the repeat infringer policy, and personal jurisdiction over a copyright owner based on the filing of a DMCA notification. *See* cases listed *supra* in note 16; Perfect 10, Inc. v. CCBill LLC, 488 F.3d 1102, 1109-15 (9th Cir. 2007); Dudnikov v. Chalk & Vermilion Fine Arts, Inc., 514 F.3d 1063 (10th Cir. 2008).

that the DMCA requires the ISP not to have,²³ and 2) the knowledge that the ISP undeniably has once it receives a DMCA notification from a copyright owner. ISPs, understandably, want no gap to exist between the two; for ISPs the ideal situation is one in which no actual or “red flag” knowledge is imputed to them unless they receive a DMCA notification from a copyright owner containing all the information that the law requires.²⁴ Copyright owners, however, want not only for a gap to exist, but that the gap be as wide as possible; a level of knowledge much lower than knowledge based on a DMCA notification should suffice, according to them, for ISPs to be presumed to have sufficient knowledge of infringement, be outside of the DMCA safe harbor, and be fully liable for secondary copyright infringement.²⁵ Discussions continue to surface about the state of technology that is available to ISPs and the potential ability of ISPs to identify allegedly infringing material without a DMCA notification from a copyright owner.

The availability of technology that might assist ISPs in identifying potentially infringing material has been the subject of debate since the DMCA was drafted.²⁶ Other arguments as to why ISPs are ill-suited to identify and remove content that allegedly infringes copyright have also appeared in the debates—lack of sufficient information, privacy concerns, the danger of over-enforcement,²⁷ and technological limitations have all been argued. The legislative history of the DMCA shows that in the legislative process ISPs emphasized their technological limitations, which they said prevented them from monitoring content for allegedly copyright infringing material. In a Senate committee hearing, an AOL executive, for example, argued that an ISP’s “duty to act, and to be liable, should be triggered only when it has actual knowledge of the infringement, and where it is *technically and legally feasible and economically reasonable*, to remove or stop it.”²⁸ He warned that although technological means were in development, they were “still in their nascent development stage” and “not likely to be ready for deployment for several years.”²⁹

A concern that surfaced even in the legislative process was that by following the then-current state of technology the DMCA would

23. *Supra* note 21.

24. *Supra* note 18. *See, e.g.*, *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020, 1043 (9th Cir. 2013).

25. *See, e.g.*, *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 31 (2d Cir. 2012); *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1022 (9th Cir. 2013).

26. 144 Cong. Rec. S8729 (daily ed. Sept. 3, 1997) (statement of Sen. Ashcroft) (discussing “the capabilities and limits of current technology”).

27. *E.g.*, *Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1145 Before the S. Comm. on the Judiciary*, 105th Cong. 32 (1997) (statement of Roy Neel, Pres. and CEO of the U.S. Telephone Association).

28. *Id.* at 27 (statement of George Vradenburg, III) (emphasis added).

29. *Id.* at 87 (responses of George Vradenburg, III to questions from Sen. Leahy).

not provide sufficient incentives for ISPs to 1) innovate in the detection of allegedly copyright infringing material, and 2) deploy such technology once it was developed. Although copyright owners agreed with the ISPs that combating copyright infringement online would need to be a team effort by ISPs and copyright owners, they wanted more responsibility to be shifted to ISPs and the legislation to incentivize ISPs to innovate.³⁰ During a Senate committee hearing the General Counsel of the Recording Industry Association of America referred to technological solutions as the achievable “holy grail”³¹ and questioned the wisdom of limiting ISP liability: “[I]f the [ISPs] got their way and got [the] exemption from liability, then what would be their incentive to deploy the technology?”³² “The more . . . ISPs are insulated from copyright liability,” an attorney representing the Motion Picture Association of America warned, “the less incentive they will have to cooperate with copyright owners to protect their works.”³³ ISPs countered by declaring their commitment to innovation; they argued that because the legislation focused on defining the absence of knowledge requirement rather than on introducing a technology-specific standard, the legislation would grow with technological development and not hamper industry development.³⁴

The effects of the DMCA safe harbor provisions on ISP innovation have not been as grim as some copyright owners feared; ISPs have not stopped innovating in the area of content identification, and some have taken steps to assist in fighting copyright infringement on the Internet that have gone beyond the letter of the DMCA. Some ISPs have provided content identification tools to copyright owners to enable them to enhance the copyright owners’ ability to identify allegedly infringing materials in order to file DMCA notifications. For example, YouTube has provided copyright holders with “Content ID”—a tool that copyright holders can use to identify and manage potential copyright infringements.³⁵ The tool compares videos uploaded to YouTube “against a database of files that have been submitted to [YouTube] by content owners,” and “[w]hen Content ID identifies a match between [a right holder’s] video and a file in this

30. *Id.* at 67 (responses of Fritz Attaway to questions from Sen. Hatch) (“Technology will likely provide the tools by which . . . ISPs and content owners, working together, develop and implement efficient and effective method to discover and eliminate infringing activities.”).

31. *Id.* at 40 (statement of Cary H. Sherman, Senior Executive Vice President and General Counsel of the RIAA).

32. *Id.*

33. *Id.* at 68 (responses of Fritz Attaway to questions from Sen. Hatch).

34. *Id.* at 87 (responses of George Vradenburg, III to questions from Sen. Leahy).

35. *How Content ID Works*, YOUTUBE, https://support.google.com/youtube/answer/2797370?p=cid_what_is&rd=1 (last visited Sept. 23, 2013). For criticism of YouTube’s delaying the deployment of the technology see Opening Brief for Plaintiffs-Appellants at 13, 37, 45, *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2nd Cir. 2012) (No. 10-3270), 2010 WL 4930315.

database, it applies the policy chosen by the content owner.”³⁶ Other ISPs have deployed tools that are designed to identify and remove potentially copyright infringing material. For example, Veoh introduced “hash filtering” software, which identifies videos that are identical to any videos that have already been taken down as allegedly copyright infringing and blocks any duplicates that users may attempt to upload.³⁷ Veoh has also utilized “fingerprinting” technology by a third-party supplier, Audible Magic, to identify potentially copyright infringing content that Veoh either removes or refuses to post.³⁸

What has propelled the development of the technologies if the law provides no incentives to innovate in the technologies? As some predicted, the need to maintain good relations with content providers has driven ISPs to cooperate voluntarily with copyright owners.³⁹ The technologies may also serve copyright owners indirectly because information about patterns of copyright infringement on the Internet can be helpful to content providers that seek to identify material that is in demand and therefore attractive for companies to offer to users legally.⁴⁰ Reasons other than detecting copyright infringement also generate interest in the development of content identification technologies,⁴¹ and copyright owners’ lawsuits against and financial investments in ISPs also prompt a more widespread adoption of the technologies.⁴²

It is important for the development of the technologies that courts have not penalized ISPs for their voluntary implementation of

36. *Id.* The policies that the copyright owner may choose are labeled as “monetize,” “block,” and “track.” *Id.*

37. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1012 (9th Cir. 2013).

38. *Id.*, pp. 1012-13. See Audible Magic, <http://audiblemagic.com/> (last visited Sept. 23, 2013). “This filtering occurs even if Veoh never received a DMCA notice regarding the video.” Brief of Appellee Veoh Networks at 13, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (Nos. 09-55902, 09-56777, 10-55732), 2010 WL 3706519. Veoh was criticized because it had not deployed the available technologies earlier. See Appellants’ Brief at 63-64, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (Nos. 09-55902, 09-56777, 10-55732), 2010 WL 3706518.

39. *Copyright Infringement Liability of Online and Internet Service Providers: Hearing on S. 1145 Before the S. Comm. on the Judiciary*, 105th Cong. 87 (1997) (responses of George Vradenburg, III to questions from Sen. Leahy).

40. Mark Leiser, *Netflix Admits Using Pirate Sites to Determine What Content to License*, THE DRUM (Sept. 14, 2013), available at <http://www.thedrum.com/news/2013/09/14/netflix-admits-using-pirate-sites-determine-what-content-license>.

41. See, e.g., Gracenote MusicID®, <http://www.gracenote.com/music/recognition/> (last visited Sept. 26, 2013); Jason Papanicholas, *Top 5 Apps for Identifying Songs*, EVOLVER.FM (Oct. 12, 2012), <http://evolver.fm/2012/10/10/top-5-apps-for-identifying-songs>.

42. See Reply Brief of Appellants at 12, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (Nos. 09-55902, 09-56777, 10-55732), 2010 WL 3708631 (Veoh “only started screening [content] when a later investor, Time Warner, insisted that this be done as a condition of its investment.”).

content identification technologies. For example, courts have not imputed actual or “red flag” knowledge to ISPs simply because the ISPs have used the technologies, or have had the technologies available and chose not to use them. In a case involving Veoh, the U.S. Court of Appeals for the Ninth Circuit refused to impute such knowledge to Veoh, reiterating that “the DMCA recognizes that service providers who do not locate and remove infringing materials they do not *specifically* know of should not suffer the loss of safe harbor protection.”⁴³ As the U.S. Court of Appeals for the Second Circuit stated in a case involving YouTube, “the nature of the removal obligation itself contemplates knowledge or awareness of specific infringing material.”⁴⁴ Courts have also required “something more than the ability to remove or block access to materials posted on a service provider’s website”⁴⁵ for a finding of the “right and ability to control”⁴⁶ that, combined with “a financial benefit directly attributable to the infringing activity,”⁴⁷ would also make ISPs ineligible for the DMCA safe harbor. In the Veoh case the Ninth Circuit Court confirmed that Veoh’s use of technologies to identify and remove allegedly copyright infringing material was “not equivalent to the activities found to constitute substantial influence”⁴⁸ on users’ activities, and therefore the use of the technologies did not constitute a “right and ability to control” infringing activities.⁴⁹ Therefore the fact, by itself, that technology was available to an ISP to identify allegedly infringing material did not take the ISP outside the DMCA safe harbor—even when the ISP failed to use the technology (or failed to use it sufficiently).

Of course, copyright owners have campaigned for greater ISP responsibility in combating copyright infringements and a requirement for increased ISP use of technologies to identify and remove copyright infringing content—technologies that copyright owners insist have been available for some time.⁵⁰ Copyright owners have accused ISPs of purposefully avoiding or delaying the deployment of technologies in order to make their services more appealing by making them avail-

43. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1020 (9th Cir. 2013) (emphasis added).

44. *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19, 30 (2d Cir. 2012).

45. *Id.* at 38.

46. 17 U.S.C. § 512(c)(1)(C) and (d)(2) (2012).

47. *Id.*

48. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006, 1030 (9th Cir. 2013).

49. *Id.*

50. *E.g.*, Brief of Appellants at 20-21, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (Nos. 09-55902, 09-56777, 10-55732), 2010 WL 3708623; Appellants’ Brief at 21, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (Nos. 09-55902, 09-56777, 10-55732), 2010 WL 3706518.

able for copyright infringing activities.⁵¹ Further, copyright owners have argued that because technologies have been available, ISPs “could have identified [copyright infringing] material by filtering or otherwise searching [their] system[s],”⁵² and because ISPs have had the capability to remove such material, they should have been held to have had sufficient “red flag” knowledge and the “right and ability to control” the infringing activities of their users.

Courts have not agreed with copyright owners’ calls for greater ISP responsibility in combating online copyright infringements and have not required ISPs to use available technologies to enhance copyright enforcement on the Internet. However, courts have adopted an approach to the absence of knowledge requirement and to the absence of the “right and ability to control” requirement that will not motivate ISPs to discontinue innovating various technologies that would help combat copyright infringements. Consider the potential outcome if courts were to adopt the opposite approach, i.e. if courts decided that the mere availability of a technology capable of identifying allegedly infringing content would be enough to cause ISPs to have a sufficient level of “red flag” knowledge and/or the “right and ability to control” infringing activity. In such a case the existence of the knowledge or the “right and ability to control” would take ISPs out of the DMCA safe harbor and therefore make it unappealing for ISPs to develop and utilize new technologies. Courts have avoided this undesirable result that commentators had feared would occur because the DMCA’s absence of knowledge requirement indeed appeared to be rewarding ISPs who are not deploying technologies that would assist in identifying infringing material.⁵³

Although case law developed so that the law does not *penalize* ISPs for deploying the technologies, the statute and case law do nothing to *prompt* ISPs to innovate. The DMCA includes a requirement that ISPs “accommodate[. . .] and do[. . .] not interfere with standard technical measures,”⁵⁴ but it does not require ISPs to actively seek technologies that would assist in combating copyright infringe-

51. *E.g.*, Opening Brief for Plaintiffs-Appellants at 13, 37, 45, *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2nd Cir. 2012) (No. 10-3270), 2010 WL 4930315; Brief of Plaintiffs-Appellees at 14, *Columbia Pictures Indus., Inc. v. Fung*, 710 F.3d 1020 (9th Cir. 2013) (No. 10-55946), 2011 WL 2191541 (pointing out that the defendants did not use the available technologies to identify and remove copyright infringing content although they did use the technologies to eliminate pornography); Brief of Appellants at 21, 49, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (Nos. 09-55902, 09-56777, 10-55732), 2010 WL 3708623.

52. Appellants’ Brief at 67, *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013) (Nos. 09-55902, 09-56777, 10-55732), 2010 WL 3706518.

53. Zittrain, *supra* note 12, at 292.

54. 17 U.S.C. § 512(i)(1)(B) (2012).

ments.⁵⁵ Currently, copyright owners are not lobbying for changes in the statute that would place greater responsibility on ISPs and create incentives for ISP innovation in copyright enforcement-related technologies. Given the highly negative public reactions to recent enforcement campaigns by large copyright owners and also to legislative attempts to enhance copyright enforcement on the Internet,⁵⁶ it is not surprising that copyright owners have made a strategic decision to emphasize the need for more voluntary initiatives by ISPs rather than to push for changes to ISP legal obligations under the DMCA.⁵⁷

The situation in the United States is interesting from a comparative perspective.⁵⁸ Other countries have adopted various versions of limitations of ISP liability, even though no agreement on the parameters of the limitations has ever been reached at the international level.⁵⁹ Countries attempted and failed to agree on the parameters, so it is likely that they will return to negotiations of conditions of ISP liability in the near future.⁶⁰ For now, countries' laws differ in the details of their approaches to ISP liability; other countries' statutes are far less detailed regarding the parameters of ISP liability than the DMCA is in the United States. For example, the European Union's E-Commerce Directive includes four articles on ISP liability⁶¹ but does not go into the level of detail that the DMCA does.

55. The DMCA includes a provision that states that “[n]othing in [section 512] shall be construed to condition the applicability of subsections (a) through (d) on . . . a service provider monitoring its service or affirmatively seeking facts indicating infringing activity . . .” 17 U.S.C. § 512(m) (2012).

56. See, e.g., Stop Online Piracy Act, H.R. 3261, 112th Cong. § 102(c)(4)(A)(ii) (2011). See also the reactions to the negotiations of the Anti-Counterfeiting Trade Agreement, May 2011, http://www.mofa.go.jp/policy/economy/i_property/pdfs/acta1105_en.pdf (last visited Sept. 24, 2013).

57. *RIAA CEO to Tout Voluntary Anti-Piracy Initiatives as Way Forward, Calls on Search Engines to Join the Effort Asks Congress to Facilitate Discussion on DMCA in Testimony Before House Panel*, RIAA (Sept. 18, 2013), https://www.riaa.com/news/item.php?content_selector=newsandviews&news_month_filter=9&news_year_filter=2013&id=B6D2A187-624C-2A95-F8D2-70D07F0B10FA.

58. For a recent comparative discussion of the DMCA see, e.g., Dennis S. Karjala, *International Convergence on the Need for Third Parties to Become Internet Copyright Police (But Why?)*, 12 RICH. J. GLOBAL L. & BUS. 189 (2013).

59. Cf. Agreed Statements Concerning the WIPO Copyright Treaty, Dec. 20, 1996, Concerning Article 8. See also Internet Intermediaries and Creative Content, WIPO, http://www.wipo.int/copyright/en/Internet_intermediaries/ (last visited Sept. 23, 2013).

60. Choice of law issues on the Internet and the resulting uncertainty about which country's laws govern ISP secondary liability may make an agreement about an internationally harmonized standard for ISP liability particularly pressing. See, e.g., Graeme B. Dinwoodie, Rochelle Dreyfuss & Annette Kur, *The Law Applicable to Secondary Liability in Intellectual Property Cases*, 42 N.Y.U. INT'L L. & POL. 201 (2009).

61. Directive 2000/31 of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (“E-Commerce Directive”), art. 12-15, 2000 O.J. (L 178) (EC).

Although the Directive sets out an obligation for ISPs to remove or disable access to certain material upon obtaining actual knowledge of certain facts,⁶² it does not include provisions on the required level of knowledge and does not outline a mechanism for a takedown procedure. The lack of details in national implementing provisions has frustrated ISPs; some ISPs have litigated cases filed against them in individual countries in order to obtain more guidance regarding ISP obligations under a country's laws.⁶³

Recent decisions by the German Supreme Court have shed light on the implementation of ISP liability provisions in Germany and the requirements that German law imposes on ISPs if they want to be shielded from liability for user content. The decisions arose from two cases that concerned RapidShare, an online file storage provider, and raised the question of how much monitoring, if any, an ISP should be required to conduct in order to be shielded from liability for user content. Similarly to the DMCA,⁶⁴ the E-Commerce Directive prohibits European Union member states from "impos[ing] a general obligation on [ISPs] to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity."⁶⁵ The Court of Justice of the European Union has reiterated and clarified the prohibition of general monitoring in its recent decisions, in which the Court held court-imposed, time-unlimited, general filtering to be in violation of the European Union Charter of Fundamental Rights and other EU legislation, including the E-Commerce Directive.⁶⁶ However, the Directive leaves room for member states to specify in their national law a requirement for ISPs to "apply duties of care, which can reasonably be expected from [ISPs] . . . , in order to detect and prevent certain types of illegal activities."⁶⁷ It was the nationally imposed "duty of care" that was contested in the RapidShare cases; RapidShare insisted that it was unable to identify potentially copyright infringing content and there-

62. *Id.*, Articles 13(1)(e) and 14(1)(b).

63. *E.g.*, Landgericht Hamburg [LG Hamburg] [District Court of Hamburg] Apr. 20, 2012, 310 O 461/10, 2012 (Ger.). *See also* Rita Matulionyte, Sylvie Nerisson, *The French Route to an ISP Safe Harbour, Compared to German and U.S. Ways*, 42 IIC 55, 63 (2011) (discussing differences among ISP liability standards in European Union's member states). Eventually courts will also have to address difficult choice of law issues concerning ISP liability. For discussions of choice of law and ISP liability see *supra* note 60. *See also* proposals for resolving the choice of law issues in AM. LAW INST., INTELLECTUAL PROP.: PRINCIPLES GOVERNING JURISDICTION, CHOICE OF LAW, AND JUDGMENTS IN TRANSNATIONAL DISPUTES (2008); CONFLICT OF LAWS IN INTELLECTUAL PROPERTY: THE CLIP PRINCIPLES AND COMMENTARY (2013).

64. 17 U.S.C. § 512(m) (2012).

65. E-Commerce Directive, *supra* note 61, Article 15(1).

66. Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)*, 2011 E.C.R. I-11959; Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers (SABAM) v. Netlog NV*, 2012 ECJ EUR-Lex LEXIS 277 (Feb. 16, 2012).

67. E-Commerce Directive, *supra* note 61, recital 48.

fore could not be required to monitor content that its users uploaded to its service.⁶⁸

In RapidShare's first litigation the appellate court, the Düsseldorf Oberlandesgericht, recognized that the ISP was obligated to take down material once the ISP was notified by a right owner that particular material was infringing the right,⁶⁹ and also to take reasonable measures to prevent future infringements.⁷⁰ However, the court rejected the argument that the ISP could have any obligation to monitor content generally, without a notification from a right holder about specific infringing material. The court pointed out the technical inability of the ISP to automate such monitoring, including the inability of ISPs to review encrypted content,⁷¹ and the potential intensity of resource use if monitoring were conducted manually.⁷² But the German Supreme Court disagreed with the appellate court;⁷³ it emphasized that while an obligation cannot be imposed to monitor content generally, ISPs have an obligation to monitor content in "specific cases"⁷⁴ once a right owner notifies them of infringement,⁷⁵ which includes monitoring of future infringements of the same content.⁷⁶ The court held that an ISP will be liable if the ISP receives such a notification and does not do "everything that is for the ISP technically and economically reasonable to prevent further infringements."⁷⁷

In the second RapidShare decision the Supreme Court was even stricter than it was in the first case;⁷⁸ the Court explained that the monitoring role of an ISP might be even greater if the ISP promotes

68. Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] Dec. 21, 2010, I-20 U 59/10, 2010 (Ger.). The liability at issue was the so-called "Störerhaftung." See Jan Bernd Nordemann, *Internet Copyright Infringement: Remedies Against Intermediaries—The European Perspective on Host and Access Providers*, 59 J. COPYRIGHT Soc'y U.S.A. 773, 782-84 (2012). See also Case C-324/09, Opinion of Advocate General Jääskinen, *L'Oréal v. eBay*, 2011 E.C.R. I-06011, at par. 56 and fn. 31.

69. Oberlandesgericht Düsseldorf, I-20 U 59/10, Dec. 21, 2010, par. 24, quoting Oberlandesgericht Düsseldorf, I-20 U 166/09, Apr. 27, 2010.

70. *Id.* at par. 24, quoting Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] Apr. 27, 2010, I-20 U 166/09, 2010 (Ger.).

71. *Id.* at par. 34, quoting Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] Apr. 27, 2010, I-20 U 166/09, 2010 (Ger.).

72. *Id.* at par. 30, quoting Oberlandesgericht Düsseldorf [OLG] [Düsseldorf Court of Appeals] Apr. 27, 2010, I-20 U 166/09, 2010 (Ger.).

73. Bundesgerichtshof [BGH] [Federal Court of Justice] July 12, 2012, I ZR 18/11, 2012 (Ger.).

74. *Id.* at par. 19.

75. *Id.* at par. 28.

76. On the need to achieve "takedowns that don't automatically repopulate" see Cary H. Sherman, Senior Executive Vice President and General Counsel of the RIAA, Hearing before the Committee on the Judiciary (Sept. 18, 2013), <http://www.ustream.tv/recorded/38936315> (last visited Sept. 25, 2013), at 50:26 and ff.

77. Bundesgerichtshof [BGH] [Federal Court of Justice] July 12, 2012, I ZR 18/11, 2012 (Ger.) at par. 31.

78. Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 15, 2013, I ZR 80/12, 2013 (Ger.).

copyright infringement by its users.⁷⁹ Because the lower court had established in the second case that RapidShare did promote infringements by its users and benefited financially from the influx of users seeking to use its services in copyright infringing manners, the Court held that RapidShare was required to monitor content uploaded by its users.⁸⁰ The Court did not consider the “general organizational measures”⁸¹ that the defendant introduced to be sufficient,⁸² and affirmed the lower court decision imposing a “general ‘market watching obligation,’”⁸³ which the Court deemed appropriate given the nature of the defendant’s business model.⁸⁴

The difference between the results in the two German cases and the situation under the DMCA is remarkable. Under the DMCA, RapidShare would probably benefit from the safe harbor⁸⁵ and therefore not be required to monitor user content. Of course an ISP’s promotion of infringing activity might lead to a finding of inducement of copyright infringement in the United States. But the DMCA alone would not require an ISP to introduce technologies to identify any content that was potentially copyright infringing, and to avoid inducement, an ISP would also not have to introduce any monitoring. In this sense German law appears to incentivize ISP innovation more than U.S. law does because the German Supreme Court requires more technology from ISPs than U.S. courts do.⁸⁶ Less legislative guidance in Germany seems to allow German courts to adjust technology requirements based on the current state of technology and respond to the development of technology and business models. This result is an interesting example that defies some key comparative law stereotypes: Typically, the statute of a civil law country would be expected to be more detailed than the statute of a common law country, and

79. *Id.* at par. 36.

80. *Id.* at par. 39.

81. *Id.* at par. 50.

82. These measures included the creation of a special “Abuse Team” to monitor potential infringements, introduction of a new provision in the user agreement to warn users that copyright infringements were not permitted, deployment of MD5 filters, and providing copyright owners with an interface to locate potentially infringing material. *Id.*, par. 51-54.

83. *Id.* at par. 60.

84. *Id.* at par. 62.

85. In *Perfect 10 v. RapidShare*, 3:09-cv-02596-H-WMC (S.D. Cal. May 18, 2010), the court concluded that “RapidShare [was] not likely to succeed on its DMCA affirmative defense” but the reason in this case was that RapidShare did not designate an agent with the U.S. Copyright Office as required by the DMCA and thus did not meet the requirements of the DMCA safe harbor. 17 U.S.C. § 512(c)(2). Since RapidShare remedied this omission it could probably benefit from the DMCA safe harbor. See *DMCA Agent*, RAPIDSHARE, <https://rapidshare.com/help/dmca> (last visited Sept. 25, 2013).

86. See also Karjala, *supra* note 58, at 210 (“[T]he obligation [imposed by the German Supreme Court] is more than has been required of ISP under section 512 by the U.S. courts.”).

civil law courts would be expected to be less engaged in “legislating” than common law courts when interpreting and applying statutes.

The effects of the two German Supreme Court decisions have yet to be assessed. The effects should transcend the original litigation, because although the decisions of the Supreme Court are without precedential power *de jure*, *de facto* they provide guidance for lower courts and thus also *de facto* case law for the norms that govern ISPs. It is possible that the second holding will be understood to be limited to ISPs who actively promote infringements by their users, but it is also possible that German courts will begin to examine ISP deployment of content identification technologies (short of general monitoring) as one factor in assessing whether ISPs should be held liable for user content.

There is no doubt that the DMCA has played an important role in the development of the Internet industry and that it has helped to create an environment that generates a great deal of Internet-related innovation; some technologies and business models might have not have been developed without the DMCA. However, the DMCA provides no incentives for ISPs to discover particular instances of infringements; although the DMCA, as it has been applied in courts, does not discourage ISPs from developing technologies that can assist in identifying infringing material, it provides no incentives for ISPs to do so.⁸⁷ Of course it might be difficult to adjust the DMCA or court interpretations of the statute to create such incentives; the approach taken by the German Supreme Court has yet to be tested. Voluntary initiatives by ISPs who strive to assist copyright owners in combating copyright infringements are commendable; the question is whether the technological developments that the initiatives represent are sufficient and sustainable. Missed developments in new technologies may be troubling for other reasons in addition to the need for copyright enforcement;⁸⁸ the same technologies could help create and support the functioning of what has been referred to as the “celestial jukebox”—an on-demand service securing access to all copyrighted works from anywhere in the world for a fee; this service would be the ultimate solution to the problems of transaction costs and potential underutilization of copyrighted works.⁸⁹

87. Zittrain, *supra* note 12, p. 292.

88. See Brief of Amici Curiae Stuart N. Brotman, Ronald A. Cass, and Raymond T. Nimmer in Support of Plaintiffs-Appellants at 18-21, *Viacom Int’l, Inc. v. YouTube, Inc.*, 676 F.3d 19 (2nd Cir. 2012) (No. 10-3270), 2010 WL 5167429 (explaining that an ISP, such as YouTube, is in the best position to locate and remove copyright infringing material); Nicholas W. Bramble, *Safe Harbors and the National Information Infrastructure*, 64 HASTINGS L.J. 325, 351-54 (2013) (discussing why technological solutions implemented by ISPs would be beneficial).

89. Paul Goldstein, *COPYRIGHT’S HIGHWAY: FROM GUTENBERG TO THE CELESTIAL JUKEBOX* 28-29 (1994). Paul Goldstein has claimed no credit for the celestial jukebox metaphor.

II. SECTION 230 OF THE COMMUNICATIONS DECENCY ACT

Section 230 of the Communications Decency Act is often celebrated as one of the most valuable tools for protecting freedom of expression and innovation on the Internet. Certainly, Section 230 has created a liability shield that has allowed for YouTube and Vimeo users to upload their own videos, Amazon and Yelp to provide massive numbers of (often scathing) user reviews, and Facebook and Twitter to offer social networking services to a large portion of the world's population. And the fact that Canada, Japan, and many European nations do not have exactly equivalent statutes⁹⁰ helps explain in part why most prominent online services are based in the United States. Nonetheless, as will be explained, like the DMCA, the CDA may in fact play a role in ossifying the structure of Internet services.

Admittedly, the immunity that the CDA provided to ISPs and other service providers was important to their development. Section 230 was enacted in order to provide legal certainty to ISPs that they would not have to engage in onerous supervision of their customers' content or else face liability; the fact that this proposition was not previously free from doubt threatened to inhibit nascent Internet-based firms.⁹¹ Section 230 immunizes or provides safe harbors to Internet service providers from liability for the conduct of others.⁹² In 1996 the CDA codified an approach to secondary liability that courts had established prior to the enactment of the CDA; the approach held that conduits were not secondarily liable for defamatory statements, and distributors were secondarily liable only under certain circumstances.⁹³ Court decisions established that conduits are not liable for the content they transmit,⁹⁴ that distributors are not liable for defamatory statements in the absence of knowledge of the defamatory statements,⁹⁵ and that distributors have no duty to monitor the content of publications.⁹⁶ Courts did not seem to agree on whether and how the rules should apply to Internet service providers; in one case a court held that a service provider was a distributor,⁹⁷ and in another,

90. Some have however, addressed this issue subsequently in slightly different ways. See, e.g., the discussion of the EU E-Commerce Directive, *supra*.

91. See *Stratton Oakmont v. Prodigy Servs. Co.*, 1995 N.Y. Misc. LEXIS 712 (N.Y. Sup. Ct. 1995).

92. 47 U.S.C. §230 (2006).

93. Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 310 (2011); see also, e.g., *Lerman v. Flynt Distributing Co.*, 745 F.2d 123 (2d Cir. 1984).

94. Wu, *supra* note 93, at 310; David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 398-401 (2010).

95. RESTATEMENT (SECOND) OF TORTS § 581 (1965); Ardia, *supra* note 94, at 397, 398.

96. *Lerman v. Flynt Distrib. Co.*, 745 F.2d 123, 139 (2d Cir. 1984).

97. *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135, (S.D.N.Y. 1991).

a court decided that a service provider was more a publisher than a distributor because of the content control that the service provider exerted.⁹⁸ The CDA responded to the court decisions by providing immunity from liability under defamation law and also under a wide variety of other laws.

The importance of Section 230 was quickly confirmed in case law. A key early case clarified that the CDA immunizes service providers from secondary liability, whether they act as publishers or distributors:

By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service. Specifically, § 230 precludes courts from entertaining claims that would place a computer service provider in a publisher's role. Thus, lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred.⁹⁹

The court in that case later explained that the reason this law was passed was to prevent a chilling of speech and because of the extreme burden that providers would face if this law had not been passed.¹⁰⁰ Notably, the court grounded its conclusion in part on the claim that the law promotes self-regulation.¹⁰¹ Indeed, the Copyright Alert System described *infra* was negotiated in the shadow of Section 230, and adopted with the specific intent to shape a set of industry norms to the contours of the immunities provided by Section 230 as well as DMCA.¹⁰²

Importantly, Section 230's coverage has been construed rather broadly. First, the immunity goes beyond traditional ISPs and additionally covers "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."¹⁰³ Entities that have

98. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

99. *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir., 1997).

100. *Id.* at 331.

101. *Id.* See also *Doe v. Myspace, Inc.*, 474 F. Supp. 2d 843, 850 (W.D. Tex. 2007) ("This section reflects [. . .] the potential for liability attendant to implementing safety features and policies created a disincentive for [. . .] services to implement any safety features or policies at all").

102. Although Section 230 does not by its terms specify preemption of intellectual property infringement claims (such as copyright), and contains an IP savings clause in § 230(e)(2), it has been held to preempt federal intellectual property claims. *Perfect 10, Inc. v. CCBill LLC*, 488 F.3d 1102 (9th Cir. 2007).

103. 47 U.S.C. §230(f)(2) (2006).

benefited from this immunity include Facebook, Google and Yahoo! (as an email provider). Second, although it is often argued that Section 230 immunizes service providers only for actions in which they assume the role of a publisher or speaker, courts have applied the immunity even in cases where the service provider arguably did not act in that role.¹⁰⁴ Finally, Section 230 also immunizes service providers from civil liability that may be based on the provider's restricting access to certain types of material or on the provider's providing to others the technical means to restrict access to certain types of material.¹⁰⁵

While the benefits of the CDA to ISPs and other providers of services on the Internet seem clear, there are costs, though these are not very visible. First, by providing immunity to service providers that merely convey others content, they have encouraged the spread and imitation of a particular form of Internet enterprise. There might be positives to Internet enterprises that both generated and published their own content with a higher degree of reliability, or that exercised more of a curatorial function over the content of others that they convey. However, Section 230 provides a relatively stark advantage to those Internet firms that hew to its conditions; all else being equal, this disadvantages the Internet enterprises that might have chosen a different tack. If new enterprises are influenced to choose structures that have already succeeded, that may bolster this effect. Second, and relatedly, by providing a clear roadmap for avoiding liability, the aid that Section 230 has given to the early development of Internet services may ironically be slowing its subsequent: immunity from civil liability comes at a cost to those whose otherwise valid claims are barred; to the extent that technological fixes might have avoided or reduced the harms that give rise to those claims, there is reduced incentive to develop such fixes in light of Section 230 immunity.

On balance, Section 230 is almost certainly a net positive over the history of the development of Internet services in the United States. However, going forward, there may be reason to ask whether its helping hand is turning into a crutch.

III. SELF-REGULATION: THE NEW COPYRIGHT ALERT SYSTEM

The Copyright Alert System (CAS, also known as "six strikes") is an American attempt at implementing through private industry cooperation a "graduated response" system of the kind other nations have created through explicit legislation. While self-regulation may have important benefits, the creation of such a system without active participation by user representatives has drawn criticism. Indeed,

104. *Doe v. MySpace*, 528 F.3d 413 (5th Cir. 2008). *See also* Wu, *supra* note 93, at 327, 328.

105. 47 U.S.C. §230(c)(2) (2006).

the creation of a system impacting users' rights through the cooperation of competitors and industry partners creates concern that the interests of consumers and of nascent competitors may be subordinated via this system to the interests of incumbent ISPs. Both of these concerns may tend to entrench incumbent ISPs, by foreclosing users' challenges to their policies and by producing industry coordination that may create barriers to new entrants to the industry.

The CAS framework was implemented starting in February 2013, just six months prior to the time of this writing, and was devised through the negotiation and cooperation of several major industries and firms, notably the industry associations the Independent Film and Television Alliance (IFTA) and the American Association of Independent Musicians (A2IM); Recording Industry Association of America members Universal Music Group, Warner Music Group, Sony Music Entertainment, and EMI Music; Motion Picture Association of America members Walt Disney Studios Motion Pictures, Paramount Pictures, Sony Pictures Entertainment, Twentieth Century Fox Film Corporation, Universal Studios, and Warner Brothers Entertainment; and the ISPs AT&T, Cablevision, Comcast, Time Warner Cable, and Verizon.

Though presented as a form of self-regulation, the CAS seems in part a product of informal guidance by government officials. The Governor of New York, Andrew Cuomo, facilitated the negotiations, and the Obama Administration endorsed the plan, reportedly after Justice Department officials informally vetted the program.¹⁰⁶ Notably, although the Justice Department (and the FTC as well) provides formal guidance through its business review letter program, the firms involved did not seek such formal review. Certainly, the level of government involvement did not reach the level of formality—including statutory language—that has been seen in other nations that have adopted versions of graduated response (e.g., HADOPI in France). However, because the CAS was implemented through closed-door negotiations, some observers allege that the government may have been able to “cloak its own agenda” as part of a putatively private agreement.¹⁰⁷

As a result of this development process, the CAS is built on a six-step process of notification to users. The first and second alerts notify ISP subscribers that their Internet account has allegedly been used for copyright infringement and provide an explanation of how to avoid future offenses. If the allegedly infringing behaviors continue, the third and fourth alerts are sent, and ask the subscriber to ac-

106. Timothy Lee, *What the 1930s Fashion Industry Tells Us About Big Content's "Six Strikes" Plan*, ARS TECHNICA (July 28, 2011), <http://arstechnica.com/tech-policy/2011/07/what-the-1930s-fashion-industry-means-for-big-contents-six-strikes-plan>.

107. Derek Bambauer, *The New American Way of Censorship*, 49-MAR. ARIZ. ATT'Y 32, 36 (2013).

knowledge their receipt. Should the behavior persist, a fifth alert is sent and ISPs are then allowed to take “mitigation measures” to stop further infringement. These mitigation measures include “temporary reductions of Internet speeds, redirection to a landing page until the subscriber contacts the ISP to discuss the matter or reviews and responses to some educational information about copyright, or other measures that the ISP may deem necessary.”¹⁰⁸ Finally, if the behavior continues, and the ISP did not institute a mitigation measure after the fifth alert, it must send a sixth alert and implement such a measure. A user who disagrees with the CAS allegations may, at some expense, seek a hearing before American Arbitration Association (AAA) affiliated reviewers; users may only challenge a determination based on one of six pre-defined grounds, including unauthorized use, fair use and public domain due to publication prior to 1923. Given repeat player effects and the fact that AAA works for the operator of the CAS, the Center for Copyright Information (CCI), which was founded for the benefit of copyright holders, the review does not seem likely to guarantee impartiality.¹⁰⁹

A major criticism of the CAS is that it represents private governance without the voice of the governed; some NGO groups, including the Electronic Frontier Foundation, have criticized the process that implemented and operates the CAS as lacking direct representation of user/consumer interests. While the CAS may evolve, by its structure and the nature of the industry players operating and participating in it, it is not likely to change in ways that directly reflect user demands. The governance structure of the CCI does not offer a strong role for user voices, and the monitoring of user activity for alleged infringement is outsourced to a private firm with little reason to provide avenues for users to voice challenges to the process or system. As a result, the industry players have effectively negotiated a joint constraint on user demands for change in the way alleged infringement is treated.

Another major concern with the CAS is that it tends to foreclose competition among ISPs over their policies balancing user rights with the concerns of copyright holders. In particular, an agreement among competing ISPs to effectively shift the burden of proof in infringement actions to the user effects a *de facto* significant change in users’ substantive rights. Such an agreement benefits copyright holders at a cost to users, and it does so through competitors’ collusion rather than by legislative action. To the extent that the CAS becomes an industry standard, it may effectively raise barriers against new en-

108. Center for Copyright Information FAQs, CENTER FOR COPYRIGHT INFORMATION, <http://www.copyrightinformation.com/faq> (last visited Sept. 25, 2013).

109. Annemarie Bridy, *Graduated Response American Style: Six Strikes Measured Against Five Norms*, 25 FORDHAM INTELL. PROP. MEDIA & ENT. L. J. 1 (2012).

trants seeking to provide Internet services. By including the copyright industry in the deal, it may have ensured that that industry's members will not license content to ISPs who do not adopt the new model.¹¹⁰ As a result, the CAS may tend to form a barrier to entry, and possibly, to the innovation of insurgent firms.

CONCLUSION

The DMCA, the CDA and the CAS are not without their benefits. However, an under-appreciated aspect of these three regimes is the degree to which they may tend to benefit incumbent firms and ossify the development of Internet services. As a result, future policymaking should seek to avoid hindering technological development, and instead should create rules, standards and self-governance that incorporate dynamic change in its statutory language, institutions and application.

110. This may be a classic case of an arrangement in which vertical agreements are a means to help accomplish horizontal agreements' ends. *See, e.g.*, *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1938); *United States v. Apple*, No. 12 Civ. 2826(DLC), 2013 WL 4829312 (S.D.N.Y. 2013).

