PHOENIX
LAW REVIEW

VOLUME 5 FALL 2011 NUMBER 1

PHOENIX
SCHOOL OF LAW

Published by
Phoenix School of Law
Phoenix, Arizona 85004

Published by *Phoenix Law Review*, Phoenix School of Law, 1 North Central Avenue, Phoenix, Arizona 85004.

Phoenix Law Review welcomes the submission of manuscripts on any legal topic and from all members of the legal community. Submissions can be made via ExpressO at http://law.bepress.com/expresso, via e-mail to PhoenixLawReview@phoenixlaw.edu, or via postal service to:

Submissions Editor
Phoenix Law Review
Phoenix School of Law
1 North Central Avenue
Phoenix, Arizona 85004

We regret that manuscripts cannot be returned. All submissions should conform to the rules of citation contained in the most recent edition of *The Bluebook: A Uniform System of Citations*, published by the Harvard Law Review Association.

Phoenix Law Review is published twice each year by the Phoenix School of Law. Subscription rates are $50.00 per year for United States addresses and $64.00 per year for addresses in other countries. Subscriptions are renewed automatically unless notice to cancel is received. Subscriptions may be discontinued only at the expiration of the current volume. Direct all communications to the Administrative Editor at the address given above.

Cite as:
5 PHOENIX L. REV. __ (2011).

PHOENIX LAW REVIEW ORDER FORM

MAIL
PHOENIX LAW REVIEW
Attn: Administrative Editor
1 N. Central Ave.
Phoenix, Arizona 85004

FAX
PHOENIX LAW REVIEW
Attn: Administrative Editor
(602) 682-6865 (voice)
(602) 682-6999 (fax)

E-mail: PhoenixLawReview@phoenixlaw.edu

Quantity **Please place my order for:**

_____ Subscription(s) to the *Phoenix Law Review* at $50.00 per subscription for U.S. addresses.

_____ Subscription(s) to the *Phoenix Law Review* at $64.00 per subscription for non-U.S. addresses.

_____ Single (previously published) issues at $25.00 each. Current or new subscribers may order single issues at $20.00 per book. Please include volume _____ and number _____.

_____ Payment enclosed _____Bill me

_____
Name

_____
Firm/Institution

_____
Address

_____
City State Zip

Signature _____Tel.(_____)_____

E-mail _____

PHOENIX LAW REVIEW

CONTENTS

PHOENIX LAW REVIEW

VOLUME 5 FALL 2011 NUMBER 1

PHOENIX LAW REVIEW

VOLUME 5 FALL 2011 NUMBER 1

PHOENIX LAW REVIEW

VOLUME 5 FALL 2011 NUMBER 1

PHOENIX SCHOOL OF LAW

FACULTY

Shirley Mays, B.A., J.D., Dean and Professor of Law
Hon. Penny Willrich (Ret.), B.A., J.D., M.S., Associate Dean for Academic Affairs and Professor of Law
Placido Gomez, B.A., M.A., J.D., LL.M., Associate Dean of Faculty Research and Development and Professor of Law
Ann E. Woodley, B.A., J.D., Associate Dean of Teaching and Learning and Professor of Law
Keith Swisher, B.S., J.D., LL.M., Associate Dean of Faculty Development and Assistant Professor of Law
Maria L. Bahr, B.A., J.D., Assistant Professor of La
Francine Banner, B.A., J.D., Ph.D., Assistant Professor of Law
Lisa Bliss, J.D., Assistant Professor of Law
McKay Cunningham, B.A., J.D., Assistant Professor of Law
Jeff Danzig, B.A., J.D., Assistant Professor of Law
Suzanne Dohrer, B.A., J.D., Visiting Professor of Law
Stacey Dowdell, B.A., J.D., Assistant Professor of Law
Sandra Durant, B.A., J.D., Assistant Professor of Law
Daniel J. Dye, B.S., J.D., Assistant Professor of Law
Mitchell Fleischmann, B.S., J.D., Coordinatorof Lawyering Process Program and Assistant Professor of Law
Brigham Fordham, B.A., J.D., Assistant Professor of Law
Hon. Stephen A. Gerst (Ret.), B.A., J.D., Associate Professor of Law and Program Director of General Practice Skills
Steven Gonzales, B.A., J.D., Associate Professor of Law and Director of Experiential Learning
Mary Dolores Guerra, B.A., J.D., Assistant Professor of Law
Kara K. Hatfield, B.A., J.D., Assistant Professor of Law
Ilya A. Iussa, B.A., J.D., Assistant Professor of Law
Jalila Jefferson-Bullock, B.A., J.D., Assistant Professor of Law
Joshua Jay Kanassatega, J.D., Assistant Professor of Law
Diana Lopez-Jones, B.A., J.D., Assistant Professor of Law
Nancy Millar, B.S., J.D., Assistant Professor of Law
Lori Roback Miller, B.A., J.D., LL.M., Assistant Professor of Law
Warren Miller, B.A., J.D. Assistant Professor of Law
Michael P. O'Connor, B.A., J.D., Associate Professor of Law
Claudine Pease-Wingenter, B.A., J.D., LL.M., Assistant Professor of Law
Tom Raine, B.A., J.D., Assistant Professor of Law
Christine Ritland, B.A., J.D., Assistant Professor of Law
Celia Rumann, B.A., J.D., Associate Professor of Law
Siera Russell, J.D., EDM, Assistant Professor of Law
Marren Sanders, B.A., J.D., LL.M., S.J.D., Assistant Professor of Law
Shandrea Solomon, B.A., J.D., Associate Professor of Law
Glenys Spence, B.A., J.D., Assistant Professor of Law
Jennifer E. Spreng, B.A., J.D., Assistant Professor of Law
Riaz Tejani, J.D., Ph.D., Assistant Professor of Law
Jalae Ulicki, B.S., J.D., Assistant Professor of Law

PHOENIX SCHOOL OF LAW

ADJUNCT FACULTY

Thomas P. Alongi, B.A., J.D., Adjunct Professor
Jocquese Blackwell, B.S., J.D., Adjunct Professor
Barbara M. Burke, B.A., J.D., Adjunct Professor
Joseph William Davids, B.A., J.D., LL.M., Adjunct Professor
Diane Drain, B.A., J.D., Adjunct Professor
James A. Fassold, B.A., M.A., J.D., Adjunct Professor
Ann Hobart, B.A., M.A.T., J.D., Ph.D., Adjunct Professor
Mark E. House, B.S.B.A., J.D., Adjunct Professor
Hon. Michael D. Jones, B.A., J.D., Adjunct Professor
Alan C. Kuffner, B.S., J.D., CPA, Adjunct Professor
Kelly LoCascio, B.A., J.D., Adjunct Professor
Hon. Michael R. McVey, B.S., J.D., Adjunct Professor
Hon. Wendy Morton, J.D., Adjunct Professor
Gregory J. Navazo, B.A., J.D., Adjunct Professor
Doug Passon, B.A., J.D., Adjunct Professor
Afshan Peimani, B.A., M.P.H., J.D., Adjunct Professor
Reid Pixler, B.A., J.D., Adjunct Professor
Brian Quarles, B.A., J.D., Adjunct Professor
Kristine Reich, B.A., J.D., Adjunct Professor
David Rose, B.A., J.D., Adjunct Professor
Maria Salapska, B.A., M.A., J.D., Adjunct Professor
Monika, Sud-Devaraj, B.A., J.D., Adjunct Professor
Raya Tahan, B.A., J.D., Adjunct Professor
Nina Targovnik, J.D., M.S., M.Ed., Adjunct Professor
Richard Trujillo, J.D., Adjunct Professor
LeBertha Umbreit, B.A., J.D., Adjunct Professor
Hon. Chris Whitten, B.A., J.D., Adjunct Professor
Monique Wilhite, B.A., J.D., Adjunct Professor

TOWARDS A CULTURE FOR ACCOUNTABILITY: A NEW DAWN FOR EGYPT*

Mohamed A. 'Arafa**

* I want to thank and express my sincere appreciation to Prof. James Nehf, Professor of Law and Associate Dean for Graduate Studies; Prof. Dr. Frank Emmert, John S. Grimes Professor of Law and Executive Director, Center for International and Comparative Law at Indiana University, Robert H. McKinney, School of Law; Nathan Schwartzman, my editor; and the Office of International Affairs, especially the Committee on African and African American Studies, for giving me the chance to participate in a forum on the Revolution 25 January. The preliminary draft of this article was presented there on April 4, 2011. Special gratitude is due to Prof. Peter J. Henning, Professor of Law, Wayne State University Law School; Prof. Dr. Nader M. Ibrahim, Professor of Commercial and Maritime Law and Associate Dean for Graduate Studies, The Arab Academy for Science, Technology, and Maritime Transport (College of Business Management); Prof. Ahmad A. Alshorbagy, LL.B. Alexandria University School of Law, LL.M. University of Virginia School of Law, S.J.D. candidate at University of Virginia School of Law, and Lecturer in Law, Alexandria University School of Law, Egypt; and Prof. Ahmad E. Eldakak, LL.B. Alexandria University School of Law, LL.M. Case Western Reserve University School of Law, S.J.D. candidate at Washington University in St. Louis School of Law, and Lecturer in Law, Alexandria University School of Law, Egypt for their invaluable comments. Further, I am grateful to my friends Dustin Purvis and Ibrahim Garba and the *Phoenix Law Review*'s editorial staff for the great effort they made to review and edit my article, especially Chrystal K. Dickinson for her useful suggestions.

** Professor 'Arafa earned his LL.B. from The Alexandria University School of Law (Egypt) in 2006 and his LL.M. from The University of Connecticut School of Law (U.S.A.) in 2008. Prof. 'Arafa joined the Alexandria University School of Law's Faculty in 2007 in the Department of Criminal Law and Criminal Justice Systems. He joined the Indiana University, Robert H. McKinney, School of Law Community in 2009 as a candidate for Doctor of Juridical Science (S.J.D.). He is researching and writing his dissertation on "International Bribery Offenses of Foreign Public Officials in International Business Transactions: Study and Comparative Analysis Between American Criminal Law, Egyptian Criminal Law, and Islamic Criminal *Shari'a* Law Rules" under the supervision of Prof. Dr. Frank Emmert, Prof. Peter Henning, and Prof. Dr. M. Cherif Bassiouni. Of course, all errors remain the author's. For any comments or questions, please contact the author at marafa@iupui.edu or arafadr_mohamed@yahoo.com.

If anyone travels on a road in search of knowledge, Allah will cause him to travel on one of the roads of Paradise.[1]

Knowledge is a treasure, but practice is the key to it.[2]

I. INTRODUCTION

The Arab Republic of Egypt, a prominent North African Arab country and a key power in the Middle East, witnessed an unprecedented and monumental change beginning the twenty-fifth of January, 2011, after nearly thirty years of autocratic dictatorship under former President Mohammad Hosni Mubarak.[3] "[A] spontaneous popular and peaceful

---

[1] Quote of The Prophet Mohammad Ibn 'Abdullah (570-632). SAHIH BUKHARI, KNOWLEDGE, no. 356, 311, Vol. 1, bk. 3, *translated in* Univ. So. Calif., Center for Muslim-Jewish Engagement, http://cmje.org/.

[2] Quote of Ibn Khaldoun, Al-Muqaddima, scholar and statesman (1332-1406). AL-MUQADDIMAH IBN KHALDOUN, [THE INTRODUCTION OR PROLEGOMENON] 21 (Dar AlShaab: 1959, Arabic Source). Ibn Khaldoun was a lawyer, sociologist, economist, and Muslim jurist. He wrote his masterpiece, "Muqaddimah or Prolegomenon," in 1377 A.D. It is the first of seven volumes of "Kitab Al-'Ibar." *See* IBN KHALDOUN, THE MUQADDIMAH: AN INTRODUCTION TO HISTORY (N. J. Dawood ed., Franz Rosenthal trans., Princeton Univ. Press 1958) (providing an English translation).

[3] Mohammad Hosni El-Sayed Mubarak became head of Egypt's semi-presidential republic government following the 1981 assassination of President Mohammad Anwar Al-Sadat; it was generally believed that late President Sadat was killed because he negotiated and signed a peace treaty between 1976 and 1979 with Israel, brokered by then U.S. President Jimmy Carter. Former President Hosni Mubarak ruled Egypt with red hot, iron fisted and clad brutality until he was forced out of power on February 11, 2011. Mubarak's thirty year reign made him the longest serving president in Egypt's history, with his National Democratic Party ("NDP") government maintaining one-party rule under a continuous state of emergency. Mubarak's government earned the support of the West and a continuation of annual aid from the United States by maintaining policies of suppression towards Islamic militants and peace with Israel. Hosni Mubarak was often compared to an "*Egyptian Pharaoh*" by the media and by some of his critics due to his authoritarian rule. Timothy M. Phelps, *Revolution Might Not Be a Cure for Egypt's Extreme Poverty*, L.A.

revolution" arose out of a civil society, without a charismatic leader to shepherd it, nor any noticeable centralized direction.[4] If not for the violent provocations of pro-regime hired thugs (Arabic: ةيجطلبلا pronounced *Baltageyia*), "it would have been one of the most significant, peaceful manifestations of a people's desire for change" in modern history.[5]

"The fact that Egyptian civil society, cutting across generational, religious, gender, and economic lines without a charismatic leader, has been able to organize itself at the grassroots level . . . in the face of a strong [r]egime, evidences people-power."[6] The vast array of people "all standing up for the same values and principles" attests the social and political transformation in Egypt and other areas of the Arab world.[7] The protesting crowd consisted of women—with and without *hijab*—next

---

TIMES, Feb. 20, 2011, http://www.latimes.com/news/nationworld/world/la-fg-egypt-return-20110220,0,2291595.story; *see also Egypt: A Nation in Waiting*, DOCUMENTARYSTORM http://documentarystorm.com/politics/a-nation-in-waiting/ (last visited Oct. 2, 2011).

[4] M. Cherif Bassiouni, *The Fight for Democracy in Egypt's Liberation Square: Background Paper*, CHI. COUNCIL ON GLOBAL AFF., 1 (Feb. 10, 2011), http://www.thechicagocouncil.org/UserFiles/File/Events/FY%2011%20Events/02_February_11/EgyptBackgroundPEgyp110207.pdf [hereinafter Bassiouni, *Fight for Democracy*].

In Egypt and the wider Arab world, the protests and subsequent changes in the government have generally been referred to as the Revolution 25 January (*Thawrat 25 Yanâyir*), Freedom Revolution (*Thawrat Al-Horeya*), or Rage Revolution (*Thawratt Al-Ghadb*), and less frequently, the Revolution of the Youth (*Thawrat Al-Shabâb*), Lotus Revolution, or White Revolution (*Al-Thawrah Al-Baydâ*). Hereinafter referred to as the "Revolution 25 January." *See Egyptian Panel Lifts Death Toll in Protests,* WALL ST. J., April 20, 2011, http://online.wsj.com/article/SB10001424052748704740204576273071880564288.html?mod=fox_australian; *see also* CNN Wire Staff*, Egyptian-American Leaders Call for U.S. Support of* '*Lotus Revolution*', CNN WORLD, Jan. 28, 2011, http://articles.cnn.com/2011-01-28/world/egypt.press.club_1_saad-eddin-ibrahim-egyptian-american-egyptian-people?_s=PM:WORLD; *Investors See White Revolution in Egypt*, GULF DAILY NEWS (Feb. 13, 2011), http://www.gulf-daily-news.com/NewsDetails.aspx?storyid=299386.

[5] Bassiouni, *Fight for Democracy*, *supra* note 4. The first few days in Tahrir (Liberation) Square "*Miedan Al-Tahrir*" and "the million person gathering" paralleled historic civil uprisings, including the Indian Non-violent Independence Movement led by Gandhi, the American Civil Rights movement led by Martin Luther King, and the Anti-apartheid movement in South Africa, led by Nelson Mandela." *Id*.; *see also The 25 January Revolution*, AL-AHRAM WKLY. ONLINE (Feb. 10-16, 2011), http://weekly.ahram.org.eg/2011/1034/special.htm.

[6] Bassiouni, *Fight for Democracy*, *supra* note 4; *see also* Cairo AlArabiya.net Agencies, *ElBaradei Back to "Politically Support" Egypt's Change*, AL ARABIYA NEWS (Jan. 27, 2011), http://www.alarabiya.net/articles/2011/01/27/135207.html (noting ElBaradei's arrival to joining with the Egyptian people in a growing wave of protests against Mubarak) (video removed).

[7] Bassiouni, *Fight for Democracy*, *supra* note 4.

to men, young and old, intellectuals beside blue-collar laborers, and the rich alongside the poor.[8]

Furthermore, the National Democratic Party ("NDP"), the ruling party at that time, appears to have organized both the pro-government provocations and the foreign media attacks at Tahrir (Liberation) Square.[9] Young men dominated the clashes with security forces and the battles between protestors and pro-government forces, although women were active participants in many cases. The disparate elements of the crowd largely outshone the cast of expected opposition organizations. The more severe violence, however, took place elsewhere, "evidencing the deep frustration of the disaffected people throughout the country."[10] Protestors in Cairo attacked, looted, and even burned police stations.[11] Looters ran rampant in Alexandria, Cairo, Suez, Port Sa'id, and Bani-Suweif (in the south), destroying public and private property by robbing and setting fires.[12]

Significantly, Egyptians see this as a regime-change, not a regime-succession.[13] On the other hand, the regime sees this as a "transition from the old guard to new cadres of the military and civilians who are a continuation of a [r]egime that started in 1952."[14] It has been a test of wills since January 25, 2011; the regime has been interfering with those seeking to make real change by counter offering reform.[15] But, it is too little too late, and "[t]he revolutionary movement *is* pressing forward."[16]

---

[8] *Id.* Images and footage from the early days of the protests suggested the crowds who flocked to the streets of Cairo, Alexandria, Suez, Mansoura, Damietta, and other major Egyptian cities represented a broad and unexpected cross-section of the Egyptian community. While most of the protestors were young men, media accounts showed a significant number of women, children, and older Egyptians, who appeared to represent various social classes joining in their demand for President Mubarak's ouster. The egalitarian nature of the movement, with an active participation amongst women, diverse social and economic classes, and without a charismatic leader, appears—from the author's ('Arafa) view—to be the revolution's greatest virtue. *Estimated 2 Million People Protest in Around Tahrir Square in Cairo Egypt.mp4,* CNEWS WORLD.COM, http://www.cnewsworld.com/world-news/middle-east-world-news/estimated-2-million-people-protest-in-_-around-tahrir-square-in-cairo-egypt-mp4/ (last visited Oct. 3, 2011) (reposting of an episode of MSNBC's The Daily Rundown).

[9] Bassiouni, *Fight for Democracy*, *supra* note 4.

[10] *Id.*

[11] *Id.*

[12] *See Looting Spreads in Egyptian Cities*, ALJAZEERA (Jan. 29, 2011), http://english.aljazeera.net/news/middleeast/2011/01/201112917592626652l.html.

[13] Bassiouni, *Fight for Democracy*, *supra* note 4.

[14] *Id.*

[15] *Id.*

[16] *Id.*

The effects of a regime-change are not limited to Egypt. The United States in particular has noted the significance. A few weeks after the Revolution 25 January, Jeremy Sharp, a U.S. specialist in Middle Eastern Affairs, stated in a U.S. congressional report that

> [f]or the first time in the history of the modern Middle East, an Arab ruler has been overthrown by a popular, peaceful revolution that represented a wide swath of society, religiously and socio-economically. How Egypt transitions from [twenty-nine] years of rule by Hosni Mubarak into something more liberal and democratic may have major implications for U.S. foreign policy. The U.S.-Egyptian relationship has long helped guarantee regional peace in the Middle East, but has now entered a period of profound uncertainty.[17]

On February 3, 2011, U.S. Senate Resolution 44 was introduced to echo President of the United States Barack Obama's concerns and calls for

> President Mubarak to immediately begin an orderly and peaceful transition to a democratic political system, including the transfer of power to an inclusive interim caretaker government, in coordination with leaders from Egypt's opposition, civil society, and military, to enact the necessary reforms to hold free, fair, and internationally credible elections this year.[18]

Lawmakers in the United States had many present and future concerns regarding the revolution in Egypt.[19] Politically, there are concerns about the "potential implications of an immediate resignation by President Hosni Mubarak" and "[t]he reform of the Egyptian political system into a more democratic space with free and fair elections" with transparency.[20] There is concern for "[t]he safety and security of American

---

[17] Jeremy M. Sharp, *Egypt: The January 25 Revolution and Implications for U.S. Foreign Policy,* CONG. RES. SERVICE, 1 (Feb. 11, 2011), http://fpc.state.gov/documents/organization/157112.pdf.

[18] S. Res. 44, 112th Cong. (2011).

[19] Sharp, *supra* note 17, at 1-2.

[20] *Id*. At that time, the potential civilian candidates for the Presidency and whose names are presently advanced are Prof. Dr. Mohammad ElBaradei, who is the Former Director-General of the International Agency for Atomic Power ("IAEA") and 'Amr Moussa, who is the Former Secretary-General of the Arab League and a Former Egyptian Foreign Minister. ElBaradei's following consists of intellectuals and upper middle class Egyptians, as well as a portion of the Tahrir youth. He is not particularly well known to the

citizens in Egypt," as well as the best method for the United States to evacuate those that want to leave during the revolution.[21] Additionally, people have expressed unease about the "Egyptian government's respect for human rights" and dignity, amidst reports of the treatment civilian protestors received at the hands of security forces.[22] Financially, U.S. lawmakers voiced fear of "possible misuse of U.S.-supplied military equipment to the Egyptian army if soldiers should fire upon peaceful demonstrators."[23] Other troubling factors included the "role of the Muslim Brotherhood in Egyptian politics" and the respect and commitment any new Egyptian government would give to Egypt's 1979 International Peace Treaty with Israel, the Suez Canal as an international waterway, and "military and counterterrorism cooperation with the United States."[24]

It is evident that not only do Egyptians see this as a regime-change, but so do other countries' governments. To further illustrate the far-reaching effects of the Revolution 25 January, this article consists of three parts. Part II provides a succinct backdrop, establishing the conceptual and ethical groundwork. Then, Part III discusses and enumerates a potential draft-agenda for transition, alteration, and changeover in Egypt. The Revolution 25 January should create *a new Egypt by reform*, including political, economic, and, most considerably, culture and information reforms. This article concludes in Part IV by arguing that as Egypt is the mother of the Arab world, and indeed of the world, as one popular old Arabic saying goes, whatever the eventual outcome is in Egypt will cause

---

Egyptian masses since he spent most of his life outside Egypt and did not serve in the military. During the Egyptian crisis, he has acted with honor and dignity. The U.S. media views him as a likely candidate to be democratically elected as President. 'Amr Moussa is popular with the Egyptian people, but disliked by the United States and Israel, which makes him a popular candidate among the masses. In addition, there are numerous public figures who, despite being officially unaffiliated to any particular political group, are identified as having Islamist leanings. Among them and of the leading probable presidential candidates is Prof. Dr. Mohamed Selim El-'Awa. Also, Judge Hisham El-Bastawisi has expressed presidential ambitions.

[21] *Id.*

[22] *Id.*; *see also Protests in Egypt and Unrest in Middle East as it Happened*, THE GUARDIAN (Jan. 25, 2011), http://www.guardian.co.uk/global/blog/2011/jan/25/middleeast-tunisia#block-32 (providing detailed accounts of the activities in Egypt that day via blog posts, tweets, videos, and other electronic outlets).

[23] Sharp, *supra* note 17. Jeremy Sharp additionally noted U.S. Senator Patrick J. Leahy's statement: "the fact of the matter is, there's not going to be further foreign aid to Egypt until this gets settled . . . . Certainly I do not intend to bring it through my committee." *Id.*

[24] Sharp, *supra* note 17, at 2.

ripples and resonate throughout the Middle East and the rest of the world.

II. BACKDROP OF EGYPT

A. Historical Background

Egypt has a history dating back 5,000 years to the pharaohs. The people of Egypt are naturally non-violent, patient, and tolerant.[25] Though a majority is Muslim, Egypt enjoys freedom of religion and is fundamentally non-ideological and secular. About 80-90% of the population is Muslim, while the remainder is Christian.[26] Historically, the Christians have enjoyed freedom of religion, yet they have not always received full equality. In fact, Coptic Christians feel particularly besieged and discriminated against.[27] Still, as a whole, the majority of "Egyptians consider themselves Arab, Muslim (for those who are), and Egyptians all at once."[28] Despite each person uniquely ranking these identity categories, most will declare he or she is an Egyptian first. This identification with nationality first supports the belief that ideological religious radicalism is not likely to take over in the near future.[29]

The Revolution 25 January is not without precedent. In 40 C.E., the Coptic Christians, followers of St. Marc, originated the first Christian church in Egypt.[30] Then in 742 C.E., the first revolution in Egypt's history occurred when the Coptic Christians called on Arab Muslims to assist them in rebelling against the Byzantine Empire, which resulted in the expulsion of the Byzantines from Egypt.[31] The next two major revolts occurred within a hundred years of each other; Egyptians first

---

[25] *See* Bassiouni, *Fight for Democracy*, *supra* note 4, at 2.

[26] *See* Bureau of Near Eastern Affairs, *Background Note: Egypt*, U.S. DEPARTMENT ST. (Nov. 10, 2010), http://www.state.gov/r/pa/ei/bgn/5309.htm#history; *see generally* WILLIAM SULEIMAN KALLADH, MABD'A AL-MAWATNA: DERASSAT WA MAKALLAT [THE PRINCIPLE OF CITIZENSHIP: STUDIES AND ARTICLES] (1999).

[27] AHMAD MAGDY HAGAZY, AL-MOWATNA WA HAKUK AL-INSAAN FI AL-MOTAGHERIAT AL-DWALIYAH AL-RAHANA [CITIZENSHIP AND HUMAN RIGHTS WITHIN THE CURRENT INTERNATIONAL DEVELOPMENTS] (2010).

[28] Bassiouni, *Fight for Democracy*, *supra* note 4, at 2.

[29] KAJSA AHLSTRAND & GORAN GUNNER, NON-MUSLIMS IN MUSLIM MAJORITY SOCIETIES WITH FOCUS ON THE MIDDLE EAST AND PAKISTAN (2009); *see also* Bassiouni, *Fight for Democracy*, *supra* note 4, at 2 (discussing the historical characteristics of Egyptians).

[30] *See* E.G. Turner, *Oxyrhynchus and Rome*, 79 HARV. STUD. CLASSICAL PHILOLOGY 3 (1975).

[31] *See id.*; *see also* NAPHTALI LEWIS, *Greco-Roman Egypt: Fact or Fiction? in* ON GOVERNMENT AND LAW IN ROMAN EGYPT: COLLECTED PAPERS OF NAPHTALI LEWIS 145 (Scholars Press 1995); Richard Alston, *Philo's In Flaccum: Ethnicity and Social Space in Roman Alexandria*, GREECE & ROME, Second Series Vol. 44, No. 2, 165 (Oct. 1997); Alan

rebelled against Napoleon's occupation in 1798 and then Britain's occupation in 1882.[32] Egypt's move to independence started in 1919 with Muslims and Christians joining forces to instigate a popular uprising.[33] This uprising resulted in nominal independence for Egypt in 1922, which was followed by the first post-independence constitution in 1923.[34] This new era established democratic institutions, which included a parliament with both a lower and upper house, a political system based on parliamentary democracy, and a government reflecting the parliamentary political forces.[35] Abuses by the monarchy and the corrupt, ruling elite led to the *Free Officers' Revolution* or *Revolution 23 July* of 1952.[36] Although a military coup *d'état*, the people strongly supported the revolution, and it ultimately led to the succession of the Mubarak Regime.[37]

A military dictatorship has ruled Egypt since 1952. The first leader was Lieutenant Colonel Gamal 'Abd Al-Nasser; who was followed by Colonel Anwar Al-Sadat and Major General Hosni Mubarak.[38] This military regime protected a corrupt class of profiteers who became an oligarchy.[39] This corruption attained extraordinary levels within the last twenty years. The result is that just 200 families, all enabled and protected by the government, hold approximately 90% of all Egypt's wealth.[40]

In 1907, Egypt's first political party, The Nation Party (Arabic: بزح ةمألا pronounced *Hezb Al-Ummah*), was founded, with other parties to be formed later.[41] For half a century after this first political party was established, Egyptians struggled for their independence and democracy, leading to the 1952 coup *d'état* by the Army.[42] The Revolution 25 January could be seen as an extension of this original struggle. Many view Egypt as being in a post-colonial revolution in opposition to a military

---

K. Bowman & Dominic Rathbone, *Cities and Administration in Roman Egypt*, 82 J. ROMAN STUD. 107 (1992).

[32] M.W. Daly, *The British Occupation, 1882-1922, in* 2 THE CAMBRIDGE HISTORY OF EGYPT (1998); *see also* P.J. VATIKIOTIS, THE HISTORY OF MODERN EGYPT (4th ed. 1992).

[33] JAMES P. JANKOWSKI, EGYPT: A SHORT HISTORY (2000).

[34] *Id.* It should be kept in mind that the Revolution 25 January is a historic link to Egypt's 1919 Revolution against British Colonialism and a continuation of the effort exerted between 1919 and 1952.

[35] *Id.*, Bassiouni, *Fight for Democracy*, *supra* note 4, at 2.

[36] JANKOWSKI, *supra* note 33.

[37] *Id.*

[38] *See generally* SELMA BOTMAN, EGYPT FROM INDEPENDENCE TO REVOLUTION, 1919-1952 (1991).

[39] Bassiouni, *Fight for Democracy*, *supra* note 4, at 2.

[40] *Id.*

[41] *Id.*

[42] *See generally* BOTMAN, *supra* note 38.

regime. Unfortunately, this revolution, initially intended to liberate the people from monarchial abuses, has transformed itself into a regime as brutal and exploitative as the monarchy it replaced.[43] Though never achieved, democracy is not a new concept to Egyptians; however, the present situation is in disarray and needs time to resolve into a democratic state.[44]

B. The Corrupt Police Power and Security Issues: Subjecting the Police to the Rule of Law is Indispensible

Since 1971—when Anwar Al-Sadat took power—the regime has used the police to preserve and extend its grasp over the country and to support a corrupt oligarchy.[45] Hence, the police are the oligarchy's *de facto* private security organization and a visible oppressor of Egyptians.

Over time, police abuses have become rampant and increasingly blatant. The effect is that corruption is no longer a taboo, and the public is fully aware of the costs of corruption for the country's political stability and the threat it poses to its sustainable economic and social development. Furthermore, corruption has actually become a ruling social law and a hidden behavior that rules the various aspects of the Egyptian life. For example, political corruption is the basis for the political crimes and police abuses that continued for two and a half decades, the ruling period of the past massive regime.[46] This basis allowed police to suppress social freedoms, practice torture, construct detention camps, commit security abuse, and destroy institutions in a clear violation of the basic human rights of Egyptian nationals.[47] In fact, both Egyptian and international human rights organizations have reported such police abuses occurring in Egypt, not to mention similar reports by foreign governments and the United Nations.[48] Yet, there has been little pressure for reform—other

---

[43] VATIKIOTIS, *supra* note 32; *see also* JANKOWSKI, *supra* note 33.

[44] *See* THOMAS W. LIPPMAN, EGYPT AFTER NASSER: SADAT, PEACE, AND THE MIRAGE OF PROSPERITY (1989); s*ee also* RAYMOND FLOWER, NAPOLEON TO NASSER: THE STORY OF MODERN EGYPT (2002).

[45] Bassiouni, *Fight for Democracy*, *supra* note 4, at 3.

[46] *See Work on Him Until He Confesses: Impunity for Torture in Egypt*, HUMAN RIGHTS WATCH (Jan. 30, 2011) http://www.hrw.org/reports/2011/01/30/work-him-until-he-confesses-0.

[47] These harms also emphasize the state of emergency Egypt has been in for the past 30 years. Additionally, the economic corruption was the cause of wasting several development opportunities in Egypt during those years.

[48] One should bear in mind that Egypt is a party to the United Nations Anti-Torture Convention, as is the United States, and has adopted national implementing legislation since 1985, making it a crime under Egyptian Law for anyone to engage in torture. The

than denunciatory statements—from either the United States or other nations' governments, both of whom are very much aware of the situation.[49] Thus, the regime understood these governments to be toothless and continued its human rights abuses.[50] In the past two decades, public safety has been on a downward slope. There has been a steady increase in the crime rate and other modes of abuse of power by individuals, such

---

treaty resulting from this Convention took effect in 1987. By endorsing this Convention through the Egyptian People's Assembly, the provisions of this Convention have become an integral part of the Egyptian legal system. According to Article 151 of Egypt's abrogated constitution, "[t]he President of the Republic shall conclude international treaties and forward them to the People's Assembly with necessary explanations. The treaties shall have the force of law after their conclusion, ratification, and publication in accordance with the established procedure." It follows that this Convention acquired the binding legal force that requires State implementation of the provisions of the agreement, in particular on the procedural level and the level of prevention policies. CONSTITUTION OF THE ARAB REPUBLIC OF EGYPT, 11 Sept. 1971, *as amended*, May 22, 1980, May 25, 2005, March 26, 2007, *as abrogated* March 30, 2011 [hereinafter ABROGATED EGYPT CONSTITUTION]; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *opened for signature* Dec. 10, 1984, 1465 U.N.T.S. 85 (entered into force June 26, 1987), *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

See generally 'ALI 'ABDELKADER AL-KAHWAJI, AL-MO'AHADAT AL-DAWLIYA AMAM AL-QADI AL-JINA'AI [The International Conventions Before the Criminal Judge] 7-40 (1997).

Additionally, the temporal Constitutional Declaration issued on March 30, 2011 by the Supreme Counsel of the Armed Forces replaced the Constitution of 1971 until Egypt has a new constitution. Article 56 of this declaration states "[t]he Supreme Council of the Armed Forces deals with the administration of the affairs of the country. To achieve this, it has directly the following authorities: . . . Represent the state domestically and abroad, sign international treaties and agreements, and be considered a part of the legal system of the state." Moreover, Egypt is to be bound by its international obligations in accordance with the United Nations International Convention on Civil and Political Rights ("ICCPR"), in particular Article 14, which addresses due process. CONSTITUTIONAL DECLARATION OF THE ARAB REPUBLIC OF EGYPT, 30 March 2011, art. 56 [hereinafter EGYPT TEMPORAL CONSTITUTIONAL DECLARATION], *available at* http://www.egypt.gov.eg/english/laws/constitution; International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force March 23, 1976), *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en.

[49] Bassiouni, *Fight for Democracy*, *supra* note 4, at 3.

[50] "The torture affects political prisoners as well as ordinary citizens due to the deterioration of police professional standards and the absence of legal accountability. Abuses and excesses are such that there is absolutely no trust in the police which most Egyptians consider their enemy as opposed to their protectors." *Id.*; *see* David D. Kirkpatrick, *Egypt's Military Censors Critics as It Faces More Scrutiny*, N.Y. TIMES, June 1, 2011, at A3, *available at* http://www.nytimes.com/2011/06/01/world/middleeast/01egypt.html?pagewanted=all; *see also* Kristen Chick, *Egypt Shifts to Military Justice for Civilians in Post-Mubarak Era*, CHRISTIAN SCI. MONITOR (May 18, 2011), http://www.csmonitor.com/World/Middle-East/2011/0518/Egypt-shifts-to-military-justice-for-civilians-in-post-Mubarak-era.

as police leaving delinquency of thugs and small criminal bands fairly unchecked.[51]

During the revolution, reported estimates state the police killed from 140 to 600 persons. These estimates did not include prisoners killed while escaping; an unknown number of the some 4,000 to 5,000 prisoners believed to have escaped—from which no escape had ever been—during the revolution. Reports revealed there have been as many as 5,000 people detained in prison, some for up to ten years, without being charged with a criminal offense and without the knowledge of the judiciary.[52] This culminated in Minister of Interior, General Habib Al-'Adli, whose brutality and mistreatment of prisoners was unprecedented, being fired by President Mubarak.[53]

Public order, security, and stability remain in an unprecedented state of danger.[54] The rate of criminality has increased significantly, partly because of the thousands of criminals who escaped from Egyptian prisons. The escapees, along with others, are now on the streets actively engaging in various forms of individual and organized criminal activi-

---

[51] Bassiouni, *Fight for Democracy*, *supra* note 4, at 3.

[52] *See id.*; *Egypt: Military Trials Usurp Justice System*, HUM. RTS. WATCH (April 29, 2011), http://www.hrw.org/news/2011/04/29/egypt-military-trials-usurp-justice-system.

[53] Habib Ibrahim Al-'Adli is a former Egyptian politician and served as the Egyptian Minister of Interior from 1997 to 2011. He graduated from the police academy in 1961. After working in various investigation departments, he was employed with the Foreign Ministry from 1982 to 1984. He then investigated state security matters, and became Assistant Interior Minister in 1993. He replaced General Hassan Al-Alfi as interior minister after the November 1997 Luxor massacre. Mahmmoud Wagdi replaced him on January 31, 2011, as part of a cabinet reshuffle aimed at appeasing the mass protests during the Revolution 25 January. Al-'Adli now faces charges of murder, attempted murder, profiteering, fraud, and money laundering. He has been convicted in one case so far and given a twelve-year imprisonment, regarding the corruption charges and another five years with regard to misappropriation of public funds. Furthermore, he still has pending criminal investigations with former President Mubarak and his two sons, 'Alaa and Gamal, facing the crimes of murder and attempted murder by aiding and instigating against the civilian protestors during the Revolution 25 January. *See Egypt Ex-Minister Habib Al-Adly Jailed for 12 Years*, BBC NEWS AFR. (May 5, 2011), http://www.bbc.co.uk/news/world-africa-13292322.

[54] KALLADH, *supra* note 26; *see also* AHLSTRAND & GUNNER, *supra* note 29; HAGAZY, *supra* note 27. It should be noted that generally, there is no *Sectarian Strife* in Egypt. A number of attacks on Coptic Churches lead to violent conflict between Muslims and Copts. The Muslim religious establishment—especially *Al'Azhar Al-Sharif's* Institution and the Egyptian *Mufti* Prof. Dr. 'Ali Gom'aa—has unequivocally denounced these acts of extremism, but this is not enough. As a matter of internal security, there are more needs and awareness to be done and addressed by the transitional government.

ties.[55] That which started as security breaches (Arabic: تالفنإ نمأ pronounced *Inflat Amni*) now borders on a public security void.[56]

The results of this increased criminality aspect are likely to be quite harmful and negative to Egypt and its people. There are many possible situational outcomes, which are beyond prediction, but of greatest concern is if Egypt becomes a failed state or is commandeered by the military.[57] Neither of these possibilities would be in the best interest of the country or likely to produce a positive transition: moving towards democracy, improving the rule of law, and protecting basic human rights.[58]

C. Economic Corruption and Massive Fraud

Based on current estimates, high inflation in the last two years has nearly put the cost of food outside the grasp of half the Egyptian population.[59] This is partly the result of the regime acquiring wealth, taking a considerable portion of that wealth out of Egypt.[60] Thus, the economic

---

[55] Examples of such activities are thefts, robberies, and extortions. Nearly 100 police stations, 4,000 police cars, courts, and public and private property have been destroyed and looted by demonstrators and criminal elements since the Revolution 25 January. M. Cherif Bassiouni, *Egypt Update No. 7*, CHI. COUNCIL ON GLOBAL AFF., 7 (May 31, 2011), http://www.thechicagocouncil.org/userfiles/file/events/FY%2011%20Events/02_February_11/Egypt_Update_Seven.pdf [hereinafter Bassiouni, *Update No. 7*].

[56] *Id.* at 7-8.

[57] *Id.* at 8.

[58] *Id.*

[59] Bassiouni, *Fight for Democracy*, *supra* note 4, at 4. An estimated forty million people are living at or below the poverty level out of Egypt's total population of eighty-four million. Those falling at or below the poverty level individually earn between $2 and $5 a day. *Id.* at 3.

[60] *Id.* at 4. One example is Ahmad Ezz; the former NDP organization secretary and former political power broker holds a monopoly on Egypt's steel industry, holding more than 60% of the market share. It has been estimated that Ahmad Ezz's wealth is eighteen billion Egyptian pounds, which is over three billion U.S. dollars. After the Revolution 25 January, he is facing numerous criminal investigations for acts of corruption, bribery, and money laundering. Chancellor Dr. 'Abdelmagied Mahmmoud, the Egyptian Attorney General, has taken a crucial step to prevent any manipulation during the investigations and trials by ordering Mr. Ezz's arrest and freezing his assets and any assets which can be reasonably attributed to his dealings, including real estate, movable property, or liquid assets of Mr. Ezz, his wife, and his adult and minor children. Recently, an Egyptian Criminal Court sentenced Mr. Ezz to ten years in prison and fined him the equivalent of about $11 million for economic corruption. *See* Carnegie Endowment for Int'l Peace, *Profile of Ahmed Ezz*, CARNEGIE GUIDE TO EGYPT'S ELECTIONS, http://egyptelections.carnegieendowment.org/2010/09/06/profile-of-ahmed-ezz (last visited Oct. 26, 2011); *Inside Story: How Did Egypt Become So Corrupt?* (AlJazeera English television broadcast Feb. 7, 2011), *available at* http://english.aljazeera.net/programmes/insidestory/2011/02/201128111236245847.html.

crisis may swell when people realize the oligarchy, with the involvement of government officials, has removed the people's assets from Egypt while the oligarchy hangs onto ownership of various industries, businesses, and inflated investment projects.[61] The perceptions of fiscal corruption and the fact its beneficiaries are limited to businessmen with ties to the NDP have created a picture "where wealth fuels political power and political power buys wealth."[62]

---

[61] Bassiouni, *Fight for Democracy*, *supra* note 4, at 4. The oligarch accomplished this by "borrowing [loans] from banks controlled or directed by government appointees" and foreign banks. *Id.* Then they substituted "public funds and the assets of ordinary depositors, for their own assets. . . . The Mubarak [r]egime covered up this scheme by making the Central Bank the guarantors of private banks' investment loans. This is estimated to be in the billions of dollars." *Id.*

[62] *Inside Story: How Did Egypt Become So Corrupt?*, ALJAZEERA, http://english.aljazeera.net/programmes/insidestory/2011/02/201128111236245847.html (last modified Feb. 8, 2011, 15:12 GMT).

This corruption fueled the deep desire in Egyptians for a valid system of democratic accountability. "Egyptian law already prohibited financial corruption of public officials, but Mubarak's presidential powers effectively insulated himself and others from the reach of Egypt's otherwise broad set of anti-corruption laws. Mubarak and his regime were seen as both corrupt as well as flaunting their immunity." Mohammad Fadel, *Public Corruption and the Egyptian Revolution of January 25: Can Emerging International Anti-Corruption Norms Assist Egypt Recover Misappropriated Public Funds?,* 52 HARV. INT'L L.J. ONLINE 292, 293 (2011) http://www.harvardilj.org/wp-content/uploads/2011/04/HILJ-Online_52_Fadel.pdf; s*ee, e.g.*, Law No. 58 of 1937 (Criminal Code of 1937, reformed in 1952), *Al-Jarida Al-Rasmiyya*, August 1937, arts. 103-32, 206-27 (Egypt) (Articles 103-32 are concerning crimes against public interest and duty such as bribery, embezzlement, trading in influence, profiteering, and misappropriation of public funds. Articles 206-227 are regarding forgery of the official documents); Law No. 62 of 1975 (Illegal Profit-Making) *Al-Jarida Al-Rasmiyya*, 7 July 1975 (Egypt); Law No. 80 of 2002 (Anti-Money Laundering, as amended by Law No. 78 of 2003) *Al-Jarida Al-Rasmiyya*, May 2002 (Egypt).

A few years ago, a law concerning illegal profit-making was challenged before the Supreme Court (Court of Cassation), which held it was suspected of being unconstitutional because it reverses the presumption of innocence which is protected by the 1971 abrogated constitution and by the United Nations ICCPR. ABROGATED EGYPT CONSTITUTION, *supra* note 48; International Covenant on Civil and Political Rights, *supra* note 48; *see also* Law No. 62 of 1975 (Illegal Profit-Making) *Al-Jarida Al-Rasmiyya*, 7 July 1975 (Egypt). The Court of Cassation remanded the case to the Supreme Constitutional Court for its decision. That court has been sitting on the case for years, and has yet to schedule a hearing on it. It is possible that the Supreme Constitutional Court will not hear the case until after a wave of convictions have been made during this transitional period. Then, sometime in 2012, when a new President is in place and a new government is functioning, the Supreme Constitutional Court can declare the law on ill-gotten gains unconstitutional. At that time, all of those convicted under this law, including the Mubaraks, could be released. It may be expected that by then the public's anger against the Mubarak regime will have abated and the economic problems will likely divert the public's attention away from the corruption of the previous regime. On the other hand, this Pro-Mubarak regime scenario may not play out, and the country may demand a retrial of all the persons convicted of

Ranging from five hundred billion dollars to a trillion dollars, the Central Bank has not disclosed how many suspect loans it has guaranteed.[63] Consequently, the Egyptian Central Bank's *contingent* liability should be addressed, as it will soon become an *actual* liability. This problem is going to create a serious economic or financial crisis—which will not go away—and Egypt will have to face it. When the Central Bank's full potential liability becomes known, Egypt's currency will be affected. Additionally, the foreign currency reserve continues to decrease, and thus most Egyptians are converting their savings from pounds to foreign currencies. Overall, this will also affect the Central Bank's standing at the International Monetary Fund and the World Bank, not to speak of pri-

---

corruption. *See, e.g.*, Law No. 62 of 1975 (Illegal Profit-Making), art.2 *Al-Jarida Al-Rasmiyya*, 7 July 1975 (Egypt).

However, a retrial would not be possible as it contradicts the general rule of criminal procedure, which embodies the presumption of innocence and places the initial burden of proof on the public prosecution and then shifts it to the accused. Compare ABROGATED EGYPT CONSTITUTION, *supra* note 48, at art. 67 ("Any defendant is innocent until he is proved guilty before a legal court, in which he is granted the right to defend himself. Every person accused of a crime must be provided with counsel for his defense."), with EGYPT TEMPORAL CONSTITUTIONAL DECLARATION, *supra* note 48, at art. 20 ("The accused is innocent until proven guilty in a court of law that guarantees for him/her defense. Every accused in a crime is required to have an attorney to defend him/her."). This is why the Office of the Attorney General appears to be going in the direction of relying on a form of Plea-Bargaining—which officially does not exist in Egypt—with certain individuals presently under investigation for or accused of corruption, including the Mubarak family, in order to obtain voluntary restitution of some of these funds. This approach will obviously leave the accused in control of the situation, as only he or she knows what has been laundered abroad, and where and how it was laundered. In this sense, Egyptian Criminal Procedural Law singles out the *Parquet*—Public Prosecution Authorities—as the sole body responsible for setting criminal actions in motion and for the pursuit thereof. The first Article of the Egyptian Criminal Procedural Law (No.150/1950) and its recent amendments states: "The Public Prosecutor is the only competent authority and no other power initiates the criminal procedural action except by the virtue of law or within the circumstances prescribed by law." Law No. 150 of 1950 (Egyptian Criminal Procedural Law, as amended by Law No. 95 of 2003 and Law No. 145 of 2006), *Al-Jarida Al-Rasmiyya*, September 1950, at art. 1 (Egypt).

[63] M. Cherif Bassiouni, *Sixth Egypt Update*, CHI. COUNCIL ON GLOBAL AFF., 3 (Mar. 15, 2011), http://www.thechicagocouncil.org/userfiles/file/events/FY%2011%20Events/02_February_11/Egypt_Update_Sixth_110315.pdf. Recently what has appeared is a form of corruption related to businessmen receiving loans from banks. This forced Egyptians to ask about who is responsible. Is the responsible party the bank officials who allowed businessmen to take loans without enough commercial guarantees amid conditions where the first party lacked honesty? Or is the one responsible the businessman who deceived the bank and offered imaginary guarantees? Or is the government the one responsible as it did not discover the problem since the beginning, tackling it only in the proper time to achieve some political gains? Or maybe the absence of transparency and interrogation was responsible?

vate markets. This could lead to the economic collapse of Egypt, perhaps necessitating an emergency fiscal aid package.[64]

D. The Muslim Brotherhood (The Islamicist Factor)[65]

In 1928, the Muslim Brotherhood (Arabic: المسلمين الإخوان pronounced *Al-Ikhwan Al-Muslimeen*) established itself in Egypt as a secular

---

[64] As a result of the deteriorating economic situation, the prices of foodstuffs and commodities have continued to rise, liquidity in the banks is very limited, and commercial loans are nearly impossible to obtain. Further, the commercial banks retain the added liability of these loans. *See* Ahmed Feteha*, Aboul Naga Aide Says She was Misquoted, World Bank Denies Cancellation of Loan to Egypt*, AHRAM ONLINE (June 22, 2011). http://english.ahram.org.eg/NewsContent/3/12/14780/Business/Economy/Aboul-Naga-aide-says-she-was-misquoted,-World-Bank.aspx; *Inside Story*, *supra* note 62.

The Mubarak regime, like its predecessors—the Nasr and Sadat regimes—had a *military and political establishment*. Under Mubarak, *no one* knows exactly how much the regime grew because its operations, budgets, and profits were secret. This entire sector of the economy was not only beyond civilian control, it was secret and not taxed. The military establishment distributed the undisclosed profits as the senior leadership saw fit. It lies outside any type of accountability and is not subject to any operational control, enjoying freedom from import and export duties. Even the public does not know that many of their consumer goods originate from the military.

[65] The term *Islamicist* denotes organizations or groups whose objectives include the establishment of a system of government based on Islamic Law, irrespective of the diversity of such organizations, groups' definitions of such a goal, or the strategies they pursue to obtain it. The term *Islamic Law* generally is used in reference to the entire system of law and jurisprudence associated with the religion of Islam, including the primary sources of law, *Shari'a*, the subordinate sources of law, and the methodology used to deduce and apply the law, Islamic jurisprudence ("*Fiqh"* in Arabic). The Islamic *Shari'a* Law is based on two sources: the *Qur'an,* which is the Holy Book of Muslims, and the *Sunnah*, which is the sayings and the authentic deeds or traditions of the Prophet Muhammad (PBUH). The *Qur'an* is the principal source of the *Shari'a*, which is supplemented by the *Sunnah.* While the *Qur'an* is the controlling source, both constitute the primary sources of Islamic Law. On the other hand, the secondary sources include *Ijma'* (consensus of opinion of the learned scholars), *Qiyyas* (analogy by reference to the *Qur'an* and the *Sunnah*), *Istislah* or *Maslaha Mursallah* (consideration of the public good or interest), *Istihsan* (reasoning based on the best outcome, or equity), *'Urf* (custom and usage, subdivided between general and special), the practices of the first four "Wise Caliphs" (a form of authoritative precedent), *Ijtihad* (unprecedented doctrinal development), treaties and pacts, contracts (the *Shari'a* considers a contract the binding law between the parties, so long as it does not violate the *Shari'a*), and the jurisprudence of judges. It is noteworthy in this respect, that Islamic Law is divided into two parts: Worship (*'Ibadat*), in which rules govern the relationship between an individual and God (Allah), which is *not* secular but purely divine, and Transactions (*Mo'amalat*), in which rules govern the relationship between individuals and societal norms and which are *not* stable but changeable according to time and place.

Unlike the American legal system, the Islamic legal system has its origins in religious doctrine. Yet like other world legal systems, Islamic (*Shari'a*) law has its own distinctive processes of identifying and formulating legal norms. The role of jurists in framing rules of

movement.[66] Since then, the Muslim Brotherhood has never evolved into a clerical movement, and always remained a secular movement.[67] Considerable misconceptions about the Muslim Brotherhood exist in the United States and other western countries.[68] Observers in the west are afraid that Egypt will become another Iran, but there is no basis to substantiate this speculated outcome.[69] There is a tendency for outsiders to obscure the line between Egyptians' spiritual beliefs and support for the Brotherhood.[70] Yet, the Brotherhood only has an Egyptian following of approximately 20% of the population, and its numbers have been further reduced by decades of repression, imprisonment, torture, and other abuses.[71] Therefore, there is no probable scenario resulting in either a

---

law is peculiar to Islamic law, in large part because it is both a religion and a means toward establishing a legal and social order. As such, it comprises rules concerning devotional obligations as well as rules that create a comprehensive and integrated guide to all aspects of political, economic, national, and even international affairs. Islamic law is one of the oldest systems of law in the contemporary age. It has evoked a lot of interest both academically as well as in the present global political arena. There are over 1.4 billion Muslims today worldwide, over 20% of the world's population. There are thirty-five nations with population over 50% Muslim and another twenty-one nations that have significant Muslim populations. There are approximately nineteen nations that have declared Islamic law as part of their respective constitutions. Also, it is important to take into consideration that Islam guarantees five essential things (*Makasid Al-Shari'a Al-Islamia*) to all individuals and prevents unwarranted transgression and violation of them by the state. These include: (1) religion, (2) life, (3) mind, (4) posterity, and (5) property.

[66] *See generally* RICHARD P. MITCHELL, THE SOCIETY OF THE MUSLIM BROTHERS (1993); CARRIE ROSEFSKY WICKHAM, MOBILIZING ISLAM: RELIGION, ACTIVISM, AND POLITICAL CHANGE IN EGYPT (2002).

[67] *See generally* MITCHELL, *supra* note 66; WICKHAM, *supra* note 66.

[68] *See generally* STEVEN MERLEY, THE MUSLIM BROTHERHOOD IN THE UNITED STATES 3 (2009), *available at* http://www.currenttrends.org/docLib/20090411_Merley.USBROTHERHOOD.pdf.

[69] Bassiouni, *Fight for Democracy*, *supra* note 4, at 7.

[70] *Id.*; *see* JEFFREY HERF, NAZI PROPAGANDA FOR THE ARAB WORLD (2009), IAN JOHNSON, A MOSQUE IN MUNICH: NAZIS, THE CIA AND THE RISE OF THE MUSLIM BROTHERHOOD IN THE WEST (2010), MATTHIAS KÜNTZEL, JIHAD AND JEW-HATRED; ISLAMISM, NAZISM, AND THE ROOTS OF 9/11 (2007).

[71] Bassiouni, *Fight for Democracy*, *supra* note 4, at 7. Although during the Mubarak era, the repression decreased because of the extreme measures taken against its members and supporters, such as extrajudicial executions, disappearances, torture, arbitrary arrests, and detention, and of the secret political deal making.

> More importantly, [the Muslim Brotherhood's] leadership is divided into three groups along generational lines. The oldest of these three groups consists of those in their late 60s and 70s, who are usually more ideological and less willing to become an active political party. Those in their 50s and early 60s, the second generational group, are also strongly ideological, but more willing to engage in public life. The third group, which is in their 40s and early 50s, are less ideological and more willing to share power with the secularists. This has been

takeover by Muslim ideologues or a repeat of the scenario in Iran.[72] Such a proposed result is merely "a fabrication by extreme pro-Israel supporters who do not want peace and stability in the region," as it would benefit the activists in Israel, who would then go on to seize possession of more territory in the West Bank.[73] Moreover, it seems raising the boogieman, Egypt's Muslim Brotherhood, fosters the Islamophobic campaign of the extreme right in the United States and their allies, who are encouraging a radical pro-Israel agenda.[74]

E. The Military Authority and the Transition to Democracy

The people of Egypt hold their army in high regard because in the last thirty years the army has never acted against them.[75] Egyptians see the military generals as honorable, patriotic, and honest. The generals employ military methods to achieve their goals, and military priorities are to preserve order, stability, and national security—not democracy and justice.[76] Nevertheless, the Egyptian Army—as a good neighbor policy—will assist in ensuring a transition to a democratic civilian state by moving to fill any political vacuum.[77]

After President Mubarak's resignation from the Office of the Republic, it was announced, as read by Vice President (General) 'Omar Suleiman, that the Supreme Council of the Armed Forces ("SCAF"),[78] chaired by Field Marshall (General) Mohammad Hussein Tantawi, will be

---

> demonstrated in an amendment to the [Abrogated] Constitution that was adopted two years ago when the 88 members of parliament who represent the Brotherhood, agreed that the Egyptian political system should be based on the concept of Egyptianhood, which by implication is secular. The latter group may assume leadership during this phase if the Brotherhood decides to engage in this transitional phase. The older guard, however, wants to sit out this phase. A split between the old guard and the new is a possibility. If that occurs, secularism would be irreversible.

Id.

[72] *Id.*; MITCHELL, *supra* note 66; *see also* MERLEY, *supra* note 68.

[73] Bassiouni, *Fight for Democracy*, *supra* note 4, at 7.

[74] *Id.* In the United States Islamophobia is alive and well. It has progressed because the public has little knowledge of Islam, Egypt, or the Brotherhood. "[I]t should be noted that al-Qaeda does not exist or operate in Egypt, even though there are Muslim extremists in the country. The repression that the extremists have been subjected to since the 1980s has decimated them, and they do not represent a domestic threat at this time." *Id.* at 7-8.

[75] *Id.* at 5.

[76] *Id.*

[77] *Id.*

[78] SCAF, *Al-Majlis Al-A'la Lil-Quwwat Al-Musallaha,* is equivalent in the United States to an enlarged Joint Chiefs of Staff.

responsible for national security. Following that, the next battle is whether those in office follow the now abrogated constitution. That would require having Professor Dr. Ahmad Fathi Sorour,[79] the Parliament's Speaker for nearly thirty years and viewed by the public as one of the symbols of the regime, assume the role of acting President for sixty days pursuant to Article 84 of the *de facto* Abrogated Constitution.[80] The other option would be for an entirely new path to develop, derived from the *legitimacy* of the Revolution 25 January and with an entirely new structure for the transition.[81] To complicate matters further, the form,

---

[79] Dr. Ahmad Fathi Sorour is a Professor of Criminal Law at the Faculty of Law, Cairo University and an Egyptian former politician. Dr. Sorour was first elected to the People's Assembly in April 1989 and elected Speaker in November 1990. He served as President of the Union of African Parliaments from 1990 to 1991 and was President of the Council of the Inter-Parliamentary Union from 1994 to 1997. Since his election to the position, he has continued to be the Speaker of the People's Assembly, until the Revolution 25 January. According to Article 84 of the Abrogated Egyptian Constitution, Dr. Sorour, as speaker of the People's Assembly, was first in the order of succession to become President of Egypt if the president died, became incapacitated, or resigned. *See* ABROGATED EGYPT CONSTITUTION, *supra* note 48, at art. 84. Upon the resignation of Hosni Mubarak in 2011, however, the military, headed by Mohamed Hussein Tantawi, assumed control of the state. Recently, Dr. Sorour was referred to the public prosecution by the *Tora* prison's administration on suspicion of smuggling money into jail—in which prison regulations prohibit prisoners from possessing money or personal belongings—while in prison. Dr. Sorour is currently being tried on criminal charges of killing protesters during the Egyptian revolution in what has become known in the media as the *Battle of the Camel*. *Egypt Speaker 'Plotted Battle of the Camel*,' ALJAZEERA, http://english.aljazeera.net/news/middleeast/2011/07/201171417215627796 4.html (last modified July 14, 2011).

[80] ABROGATED EGYPT CONSTITUTION, *supra* note 48, at art. 84 ("In case of the vacancy of the Presidential Office or the permanent disability of the President of the Republic, the President of the People's Assembly . . . shall take over the Presidency . . . [and] [t]he People's Assembly shall then proclaim the vacancy of the office of President.").

[81] It should be noted in this context, the self-selection of the SCAF as the repository of all powers in the country lacks any basis in constitutional legitimacy. Although some political commentators have referred to this as a concept of *Revolutionary Legitimacy*, which would have applied to a revolutionary decision, it is actually an establishment decision. However, it did receive the support of those in the revolution, and thus it presumably acquired revolutionary legitimacy. *See* Chibli Mallat, *Revising Egypt's Constitution: A Contribution to The Constitutional Amendment Debate,* 52 HARV. INT'L L.J. ONLINE 182 (2011), http://www.harvardilj.org/wp-content/uploads/2011/02/HILJ-Online_52_Mallat1.pdf (describing the aftermath of Egypt's February 2011 Revolution and the possibilities for legal and constitutional reform). *See generally* Hany Besada, *Egypt's Constitutional Test: Averting the March Toward Islamic Fundamentalism* (Ctr. for Int'l Governance Innovation, Working Paper No. 28, 2007), *available at* http://cigionline.cigiprojects.org/publications/2007/8/egypts-constitutional-test-averting-march-toward-islamic-fundamentalism.

structure, and substance of the latest proclamation in Egypt was borrowed—almost entirely—from the 1971 Constitution.[82]

SCAF has taken it upon itself to issue communiqués (Arabic: ناﻳﺒﻟا pronounced *Bayan*), with the most important being the fifth one—limiting SCAF's authority to a period of six months, but longer than that if necessary.[83] Further, the communiqués suspended the 1971 Constitution and dissolved the two Houses of Parliament, the People's Assembly and the Shoura Council.[84] A retired justice of the Court of Cassation, Egypt's Supreme Court, was appointed by SCAF to draft amendments to the 1971 Constitution.[85] A public referendum will then evaluate the amendments for a vote, although no timetable has been established for the elec-

---

[82] Indeed, the proclamation maintained various aspects of the document that had drawn criticism from different political circles, such as the provision requiring that 50% of the members of the legislature be peasants and workers, the almost absolute powers of the presidency, and the article stating that the Islamic *Shari'a* was the principal source of the legislation.

[83] M. Cherif Bassiouni, *Third Amended Egypt Update*, CHI. COUNCIL ON GLOBAL AFF., 1 (Feb. 15, 2011), http://www.thechicagocouncil.org/UserFiles/File/Events/FY%2011%20Events/02_February_11/Egypt%20UpdateThird%20Feb%2015.pdf [hereinafter Bassiouni, *Third Update*].

[84] *Id.*

[85] *Id.* SCAF appointed a constitutional committee, consisting of eight members: Judge Tarek El-Beshry, former First Deputy President of the State Council (*Conseil d'Etat / Majlis Al-Dawla*); Prof. Dr. 'Atef Al-Banna, a Constitutional Law professor at Cairo University; Prof. Dr. Hassanain 'Abdel-'All, another Constitutional Law professor at Cairo University; Prof. Dr. Mohammad Bahy AbouYounis, a Constitutional Law professor at Alexandria University; Mr. Sobhy Saleh, a lawyer and member of the Muslim Brotherhood; and Justice Maher Samy, Justice Hassan Al-Badrawy, and Justice Hatem Begato, who are all Vice Presidents of the Supreme Constitutional Court. The committee's responsibilities were to make proposals for constitutional amendments to the 1971 Constitution, last amended in 2007, and to minimize judicial oversight of the elections, while also eliminating any opportunity for real competition. These amendments were limited to address specific provisions:

> a) the conditions required for the candidates to the presidency, eliminating those with dual nationality and those married to non-Egyptians, and reducing other requirements for presidential candidacies [Article 76]; b) limiting presidential candidates to a total of two consecutive terms of office [Article 77]; c) the restoration of the judicial oversight over the elections [Article 88]; d) entrusting the Court of Cassation with the competence to decide disputed electoral results and the validity of membership of Members of Parliament (MP's) [Article 93]; e) requiring the President to choose a Vice President to be appointed within sixty days of the President taking office [Article 139]; f) requiring the new 2011 Parliament to elect a committee to draft a new constitution within sixty days of its conveying; g) imposing restrictions on the declaration and duration of a state of emergency [Article 148]; and, h) abrogating Article 179 which gives the President the power to refer civilians to military courts for terrorism-related cases.

tions.[86] Moreover, the communiqués confirm Egypt's international commitments will remain in place, including the 1979 International Peace Convention between Israel and Egypt, which should reassure Israel and the United States.[87]

On March 30, a Temporal Constitutional Declaration of 63 provisions, which included eight amended constitutional provisions approved by referendum on March 19, was issued by SCAF, replacing the 1971

Bassiouni, *Update No. 7*, *supra* note 55, at 4; s*ee, e.g.*, ABROGATED EGYPT CONSTITUTION, *supra* note 48, at arts. 76, 77, 88, 93, 139, 148, 179; EGYPT TEMPORAL CONSTITUTIONAL DECLARATION, *supra* note 48, at arts. 26, 27, 29, 31, 39, 40, 59. These constitutional amendments should empathize with the secular nature of the nation, establish equality of rights without discrimination based on race, gender, religion, or other factors, highlight the supremacy of international treaties' obligations and their justiciability in Egyptian courts, and facilitate ways to challenge the constitutionality of laws and administrative measures before the Supreme Constitutional Court.

[86] Bassiouni, *Third Update*, *supra* note 83. An early parliamentary election will be held in Egypt from November 2011 onwards, following the revolution, which ousted President Mubarak, and after the SCAF dissolved the parliament of Egypt. Originally, the election was assumed to be held in September, but this was postponed; the reason for the postponement is unknown. The election is now scheduled to take place on the following dates, starting in 2011: First Stage: November 28, run-off on December 5; Second Stage: December 14, run-off on December 21; and Third Stage: January 3, run-off on January 10. Zeinab El Gundy, *SCAF Finally Reveals Parliamentary Election Dates and Roadmap*, AHRAM ONLINE (Sept. 27, 2011), http://english.ahram.org.eg/NewsContent/1/64/22697/Egypt/Politics-/SCAF-finally-reveals-parliamentary-elections-dates.aspx. On the other hand, the Shoura Council elections are to follow on January 22, 2012. *Id.*

There were previously concerns that a change to the electoral system would be required, as the current district-based First-Past-The-Post ("FPTP") voting system would favor the National Democratic Party. The NDP, however, was dissolved in April. The draft law for the electoral system to be used was revealed on May 30, 2011; controversially, it retained FPTP voting for two thirds of the seats, with only one third of the seats elected by proportional representation. On July 7, 2011, the caretaker government approved the new electoral law. It foresees a 50/50 division between proportional seats and FPTP seats; the minimum age limit for candidates is also to be reduced from 30 to 25. On July 21, 2011, the SCAF announced that the election, for both the People's Assembly and the Shoura Council, would be held in three rounds in October, with 15-day intervals in-between. It also stated that half the seats would be reserved for workers and farmers and that the women's quota introduced under Mubarak would be abolished. In late September 2011, it was announced that only one third of the seats would be elected by plurality vote. However, these directly elected MP's could only be independents and not members of political parties; this restriction led to threats of boycotting the election by a wide swath of the political parties, which intended to contest the election. The parties stated that their demands for a change in the electoral law would have to be met by October 2, else they would boycott the election. After a meeting with political party leaders on October 1, 2011, the SCAF agreed to allow party members to run for the directly elected seats, set a clear schedule for the transition to civilian authority, and considered the possibility of abolishing military trials for civilians.

[87] *Id.* at 2.

Constitution.[88] It will remain in effect until the drafting and promulgation of a new constitution is completed.[89] Despite heated debates and fundamentalist groups' threats, the declaration left untouched a former constitutional provision, which provides that the principles of Islamic *Shari'a* (Arabic: ةعيرش) are the primary source of legislation.[90]

---

[88] Bassiouni, *Update No. 7*, *supra* note 55, at 4 ("The proposal was . . . submitted to a referendum on March 19, which resulted in 77.27% of the voters in favor."). In this respect, it is highly recommended—as a number of legislative reforms are urgently needed—to update some of Egypt's current laws: modification of the Assembly Law of 1914, which requires any gathering for more than five persons to obtain a permit; modification of 1923 Assembly and Meetings Law, requiring a permit before holding a public demonstration; revocation of the State of Emergency Law (No. 162 of 1958); and modification of the Association Law to allow Non-governmental Organizations ("NGOs") to organize without the cumbersome approval procedures of the Ministry of Social Affairs or obtaining security clearances.

[89] *Id.* A process estimated to take a year and a half, according to a schedule prepared by the SCAF. Furthermore, the declaration identifies the legislative and executive powers of the SCAF during the transitional period. It is silent, though, on the issue of the succession of the President in the case of his death or his inability to perform his duties for any reason, leaving a legal gap. While an answer to this situation is found in the 1971 Constitution, the constitutional declaration that followed the constitutional amendments supersedes and replaces it.

[90] *Id.* at 5. The SCAF kept this provision as the Second Article, as it has always been known since its addition to the Constitution in 1981, to avoid any doubt or confusion about a subject matter that is so dear to Islamicists. This Article states that "Islam is the religion of the state, and the Arabic language is its official language. The principles of Islamic law [*Shari'a*] are the chief source of legislation." EGYPT TEMPORAL CONSTITUTIONAL DECLARATION, *supra* note 48, at art. 2; *see* ABROGATED EGYPT CONSTITUTION, *supra* note 48, at art. 2. It should be noted that Islamic law, as a *comprehensive* legal system, is not typically used today in any Muslim country except Saudi Arabia. Many countries of the Middle East—including Egypt, Syria, United Arab of Emirates, and Iraq—adapted most of their laws from European civil law systems. Except for Saudi Arabia, Islamic law is generally applicable only to family and inheritance issues throughout most of the Middle East. Nevertheless, Islamic law is relevant in contemporary legal applications because it influences the application of civil and criminal law and is a principal originating source of legislation in United Arab of Emirates, Bahrain, Iran, Egypt, and many other countries. *See, e.g.*, CONSTITUTION OF THE KINGDOM OF BAHRAIN, Feb. 14, 2002, art. 2 (implementing Islamic law as the *main source* of law in Bahrain); ISLAHAT VA TAQYYRATI VA TATMIMAH QANUNI ASSASSI [AMENDMENT TO THE CONSTITUTION] 1989, arts. 4, 12 (Iran) (providing that "[t]he official religion of Iran is Islam and the Twelver *Ja'fari* [*Shi'aa*] school" and that "[a]ll civil, penal financial, economic, administrative, cultural, military, political, and other laws and regulations must be based on Islamic criteria"); THE CONSTITUTION OF THE HASHEMITE KINGDOM OF JORDAN, Jan. 1, 1952, art. 2. (providing that "Islam is the religion of the State"); Constitution of the United Arab Emirates, Dec. 2, 1971, art. 7 (providing that "[t]he Islamic Tiara's shall be a main source of legislation"). There are a number of resources providing further elaboration and discussion about Islamic Law. *See, e.g.*, M. CHERIF BASSIOUNI, THE ISLAMIC CRIMINAL JUSTICE SYSTEM (1982); Irshad, Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, 7 J. ISLAMIC L. & CULTURE 27 (2002) (reprinted with author's permission); M. Cherif Bassiouni, & Gamal M. Badr, *The*

F. Regional Implications

The Revolution 25 January presents a list of fundamental lessons to leaders all over the world, including regime change, democracy, socio-economic and distributive justice, human and civil rights guarantees, and applying the rule of law equally to all citizens.[91]

A regime change in Egypt may have a domino effect in the rest of the Arab world. The U.S. media, and presumably the Obama administration, has greatly discussed the implication of the changes in Egypt, the effect on Israel relations—especially the diplomatic ties—and regional stability.[92] This is because of U.S. foreign policy in the region, but also because of how out of touch many westerners are with the situation in Egypt. "Peace with Israel is not at issue, nor is it something that is of particular interest to the Egyptians at this point in time."[93] No one among the opposing forces or the masses is discussing Israel or the 1979 International Peace Agreement.[94] Ignorance of this by the United States, Israel, and the western world may lead to miscalculations with significant implications effecting future relations between Arab and Muslim countries and the West.[95] The United States, Israel, and the western world need to acquire a better understanding of these and other numerous national characteristics of Arab states to ensure peace and stability in the region and in the world.[96]

Furthermore, the most important lesson for all African countries is that no condition is permanent. Unlike the past, a present-day dictator

---

Shari'ah: Sources, Interpretation, and Rule-Making, 1 UCLA J. ISLAMIC & NEAR E.L. 135 (2002); Khizr Muazzam Khan, *Juristic Classification Of Islamic Law*, 6 HOUS. J. INT'L L. 23 (1983-1984).

[91] It should be pointed out in this respect that the President of the United States, Barack Obama, in his recent speech held on May 19, 2011, focused on the recent developments and changes in the middle east and mideast policy, which included freedom of speech, freedom of religion, freedom to choose a leader, the idea that people should govern themselves, and equality between men and women before the rule of law. Further, he addressed the Arab Spring and promised support for democratic reforms, both moral and financial. Press Release, The White House, Remarks by the President on the Middle East and North Africa (May 19, 2011), *available at* http://www.whitehouse.gov/the-press-office/2011/05/19/remarks-president-middle-east-and-north-africa; *see also*, *Mideast Students Analyze Obama's Speech, Region's Future*, WORLD LEARNING (June 6, 2011), http://www.worldlearning.org/21641.htm (providing the author's and others' opinions on President Barack Obama's speech).

[92] Bassiouni, *Fight for Democracy*, *supra* note 4, at 8.

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

cannot suppress a determined people for long due to the mass availability of information, news, and ideas, which are potent.[97] In any nation, people's rights and justice are safeguarded by the vital concepts of political consciousness and awareness.[98] Therefore, the first goal of any oppressed people in moving towards true emancipation is educating the masses and abolishing illiteracy.[99]

The power of education and modern technology, specifically through internet sites such as Facebook, Twitter, and YouTube, makes it easy for people to communicate, organize, and mobilize.[100] The organizers of the Revolution 25 January were mostly younger people, under the age of thirty-five, with university graduate degrees. The organizers' use of technology, including Facebook, Twitter, YouTube, and cell phones services, helped opposition groups at the national and local levels communicate with one another and disseminate information. Thus, the free flow of information ensured people were well informed of what was happening around the globe.[101] This was an important factor in maintaining the anti-government groups' momentum as the regime failed, due in part to not knowing how to deal with this new technological phenomenon. The free flow of information also highlights the necessity for leaders to not overstay their time in office, gauge the mood of the people they govern, and respect the people's wishes and legitimate aspirations.[102]

III. A Revolution of Reform? A Possible Draft-Agenda for Transition in Egypt

Whether there will be a better Egypt, which is where the new optimism is realized, remains to be seen. Much will depend upon how Egyptians take possession of the transition, define a common set of objectives for sustained reform, and maintain the impetus to get there. Besides a conciseness of themselves and momentum, they have one crucial advantage—the rulership has had to re-evaluate itself.[103]

---

[97] *A People United Shall Never Be Defeated! Hubert and Wireless Gats To Go!!!,* Bah. Press (Feb. 28, 2011), http://bahamaspress.com/2011/02/28/a-people-united-shall-never-be-defated-hubert-and-wireless-gats-to-go/.

[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] Aware of the population's expectations, self-confidence, and patience, the military has been thrust into unfamiliar roles as rulers without a political front man. Even if the military remains in charge or in power, they will not stay the same.

Additionally, in every aspect of life the Egyptian people need to take responsibility for both changing their ways and becoming socially accountable.[104] This will entail a change in the prevalent culture, "which has been in place for the entire period of the military rule regime in Egypt."[105] All parties involved are aware that this and other problems facing Egypt and its community may require decades to overcome, presuming a counter-revolution does not occur.[106]

Before we dream about agendas for reform, we should worry whether it is realistic to expect much to change. Millions of people believe things have changed. This is the key point in which the collective self-perception of an enormous number of Egyptians has been transformed, from the secular elites to the traditional opposition and from the bourgeoisie to the unemployed laborer.

The question remains, what should Egypt switch or transition to? In this respect, we should take our paradigm from the revolutionaries' demands of *bring the system down*. A government and institutional economy should replace the current system, rather than individuals within an open political and social culture. It ought to be a justifiable and fair economic development strategy, well designed to create growth and progress.

The Revolution 25 January is rooted in the ambition and aspiration of the Egyptian people for dignity, participation, and economic opportunity.[107] Realizing such purposes will require more than constitutional reform, elections, or new leadership. Because of the immaturity of Egyptian civil society in the political sphere, these purposes cannot be generated by schemes of transitional justice or even the prosecution of those responsible for thirty years of immobile political and economic life.[108] Completing the revolution will require a new economic and social bargain reinforced by the creation of an open and responsible political cul-

---

104 Bassiouni, *Update No.* 7, *supra* note 55, at 1.

105 *Id.*

106 *Id*.

107 Those who participated shared a common hunger for the respect that comes from economic and social potential for oneself and one's family and freedom from arbitrary power in everyday life.

108 Polling data prior to the Revolution 25 January indicated that although 88% of Egyptians believed that democracy would help Egypt progress, only 4% of Egyptians actually had voiced an opinion to a public official, the lowest figure in the world. ABU DHABI GALLUP CTR., EGYPT: THE ARITHMETIC OF REVOLUTION, AN EMPIRICAL ANALYSIS OF SOCIAL AND ECONOMIC CONDITIONS IN THE MONTHS BEFORE THE JANUARY 25 UPRISING 7 (2011), http://www.abudhabigallupcenter.com/146888/BRIEF-Egypt-Arithmetic-Revolution.aspx (follow link to download PDF).

ture, and an institutional structure capable of sustaining a sensible economic development strategy. Furthermore, a foundation of social and institutional conditions capable of ensuring a dynamic culture of moral and ethical responsibility, open debate, transparency, integrity, and accountability, as well as religious freedom, will be necessary.

After the Parliamentary and Presidential elections have taken place and a new government takes office, whether composed of technocrats or a range of movements and parties, Egypt will face three large sets of issues on its desk: political reform, economic reform, and the reform of information and cultural policy. A meaningful *transition process*—completing the revolution—will require sustained and continual effort and work in each area.

A. Political Reform

There seems to be no Egyptian Mandela and no obvious replacement for Mubarak; this creates a chance for a contender to emerge, though it will be difficult and complicated for him or her to realize that chance. Breaking from the old regime, freeing political prisoners, lifting the emergency law,[109] scrapping the current law, restricting the formation of political parties, establishing constitutional rules for selecting a new government, and laying the basis for a new relationship between the government and the citizenry will ensure a new Egypt.

We will certainly learn something from the constitutional amendments followed by the (63) Provision's Temporal Constitutional Declaration.[110] The amendments will hint where the leaders and elites believe Egypt is headed. Despite being essential, constitutional reforms and elections are not the main story in that regard. However, the stagnant politics of crony-capitalism[111] are compatible with an extremely wide range of

---

[109] The Emergency Law (*Qanun Al-Tawaar'e* in Arabic) in Egypt was established by Law No. 162 of 1958. During the 1967 Arab-Israeli War, the emergency status was imposed. It has remained in effect, except for an 18-month break in 1980 where it was reimposed following the assassination of President Sadat. This law empowers the police to undertake many actions that remain questionable, which includes putting individuals in jail while bypassing the court. The law allows imprisonment of individuals for indefinite periods and restriction of their civil rights and liberties for virtually no reason, thus keeping them in prison without trial. Law No. 162 of 1958 (Emergency Law), *Al-Jarida Al-Rasmiyya* (Egypt), *available at* http://www.emerglobal.com/lex/law-1958-162; *see also* Daniel Williams, *Egypt Extends 25-Year-Old Emergency Law*, WASH. POST (May 1, 2006), http://www.washingtonpost.com/wp-dyn/content/article/2006/04/30/AR2006043001039.html.

[110] *See generally* Besada, *supra* note 81.

[111] Parasite capitalism appeared suddenly with no work or effort, and it became obvious in seizing bank money and smuggling it abroad. Amid an increasing monopoly of power, economic activities decreased, which destroyed the new producers and small and medium

constitutional arrangements that survive across the developing world in the shadow of myriad legislative statements and electoral practices. Even putting social and economic justice conspicuously into a constitutional text is insufficient to rebuild the economic, political, and legal arrangements, which have stifled growth and development.

The revolution was a convergence of a wide array of distinct social, economic, and political forces, sharing bitter experiences at the hands of the regime. On the other hand, the institutions that can build an open political culture among these groups will be created and sustained only if economic, informational, and cultural reforms succeed. In this sense, political reform may best be approached indirectly through economic reform and cultural change.

B. The Economic Reform

Serious economic reform would mean disassembling the crony-capitalism of the rentier state and replacing it with dynamic and equitable national economic development. What is often difficult to remember is that economic reform is not the same thing as adopting the neo-liberal policies of privatization,[112] deregulation,[113] or free trade.[114] Unfortu-

---

enterprisers as people of power and influence close to the regime controlled the whole market. In addition to the inflated profits, a corrupt class appeared consequently, consisting of parasite capitalists and a number of ministers. *See* Yosuke Kawakami, *Capital Markets in Egypt: Some Personal Thoughts*, www.oecd.org/dataoecd/4/42/36785286.ppt (last visited Oct. 4, 2011).

[112] *See generally*, EDWARD ELGAR, INTERNATIONAL HANDBOOK ON PRIVATIZATION 87 (David Parker & David Saal eds., 2005); PRIVATIZATION: THE PROVISION OF PUBLIC SERVICES BY THE PRIVATE SECTOR 60 (Roger L. Kemp ed. 1991). Privatization is the incidence or process of transferring ownership of a business, enterprise, agency, or public service from the public sector (the state or government) to the private sector (businesses that operate for a private profit) or to a private non-profit organization. In a broader sense, privatization refers to transfer of any government function to the private sector, including governmental functions like revenue collection and law enforcement.

[113] *See generally* MARTHA DERTHICK & PAUL J. QUIRK, THE POLITICS OF DEREGULATION 58 (The Brookings Inst. 1985). Deregulation is the removal or simplification of government rules and regulations that constrain the operation of market forces. Deregulation does not mean elimination of laws against fraud or property rights but eliminating or reducing government control of how business is done, thereby moving toward a more laissez-faire, free market economy. It is different from *liberalization*, where more players enter in the market, but continues the regulation and guarantee of consumer rights and maximum and minimum prices. A better example of deregulation would be *financial deregulation*.

[114] *See generally* JAGDISH BHAGWATI, FREE TRADE TODAY 76 (Princeton Univ. Press 2002); DAVID RICARDO, ON THE PRINCIPLES OF POLITICAL ECONOMY AND TAXATION 89 (Prometheus Books 1996); Anup Shah, *Free Trade and Globalization*, GLOBAL ISSUES, http://www.globalissues.org/issue/38/free-trade-and-globalization (last updated Nov. 28,

nately, more than two decades after the exuberant, one-size-fits-all development models of the Washington Consensus[115] were humiliated everywhere, many remain primed to judge economic reform in Egypt by the obsolete metric of *openness,* as measured by the Washington Consensus.[116] Concentration on opening the economy in this regard ignores the more pressing social demand for equitable distribution of national wealth. The Substitution Industrialization Project of the Nasser regime[117] made a social promise in which the improvements and gains from industrial development would be distributed to the working class as wages, salaries, and subsidies.[118]

Egypt's economy is far more dependent upon its role in the global economy, together with its natural resources and strategic position, than upon its industrial production.[119] Accordingly, a new social deal will need to be struck. In the beginning of the 1970s, the Nasser-era's social promise was dismantled as the economy moved to depend far more on what might be termed *Public Rents*.[120] These rents originate from extractive industries, Suez Canal fees, foreign aid such as United States Agency

---

2010). Free trade is a system of trade policy that allows traders and merchants to trade across national boundaries without interference from the respective governments. According to the law of comparative advantage, the policy permits trading partners' mutual gains from trade of goods and services. Interventions include subsidies, taxes and tariffs, non-tariff barriers, such as regulatory legislation and quotas, and even inter-government managed trade agreements, such as the North American Free Trade Agreement ("NAFTA") and the Central America Free Trade Agreement ("CAFTA")—contrary to their formal titles—and any governmental market intervention resulting in artificial prices.

115 Yves Smith, *The IMF's Epic Fail on Egypt*, NAKED CAPITALISM (Feb. 7, 2011, 4:15 AM), http://www.nakedcapitalism.com/2011/02/the-imfs-epic-fail-on-egypt.html.

116 Egypt instituted its privatization program as part of a U.S.-sponsored model of development, the so-called "Washington Consensus" ("WC"), which in its essence encouraged developing countries to cut subsidies supporting the most vulnerable groups in their society, reduce import tariffs, encourage foreign investment, and sell state-owned enterprise; this regime was enforced by the International Monetary Fund that was at best indifferent to crony-capitalism and poverty, or believed they were completely irrelevant to its primary concern—macro-economic stability. *Washington Consensus*, HARVARD UNIV., CTR. FOR INT'L DEV., http://www.cid.harvard.edu/cidtrade/issues/washington.html (last updated April 2003).

117 *See* MARK N. COOPER, THE TRANSFORMATION OF EGYPT 91 (The John Hopkins Univ. Press 1982).

118 *Id*. Subsidies have been replaced by micro-credit, enforced in ways that have extended the experience of vulnerability to arbitrary police power across the nation's poor.

119 *Id.*; *see* LIPPMAN, *supra* note 44; *see also* FLOWER, *supra* note 44.

120 COOPER, *supra* note 117. These *public rents* have been distributed to Egyptian and foreign entities close to the regime while the condition for a social wage has been dismantled. The result has been the progressive pauperization of the vast majority of the Egyptian people.

for International Development ("USAID") Grants, and the different fees and taxes removed from state-controlled sectors, most critically tourism.[121] Campaigns to *reform* or *open* the economy have been part of the problem, as subsidies have been withdrawn, wages have fallen, and social welfare has transferred from a national responsibility to a burden carried by families and local or religious communities.[122]

Completing the revolution will require strong economic development linked to new modes of social welfare. Important substitution industries now compete with foreign production and are, in any event, no longer a large enough component of the economy for industrial wages to be a sufficient social welfare cushion. Wages and salaries will need to rise throughout the economy. Additionally, subsidies for basic commodities will need to be replaced by support for human capital development in education and health, as well as credit and other support, such as corporate social responsibility and code of ethics or conducts[123] for small and medium-sized enterprises.[124]

In Egypt, as elsewhere, privatization has been an integral part of crony-capitalism. Family and friends of the leadership have embedded themselves in the private sector.[125] Today, de-concentrating the economy will require the careful management of industrial, anti-trust, and credit policy oriented to the establishment of new firms in numerous sectors and

---

[121] *Id.*; *see* LIPPMAN, *supra* note 44; *see also* FLOWER, *supra* note 44. What USAID needs to do in order to assist Egypt, and for that matter to be effective in other countries, is to overhaul its grant procedures. More importantly, it needs to engage panels from outside experts on different countries and on various subjects to review the projects for which funding is made available, and also to review the applications. Additionally, it is necessary that USAID departs from the policy of giving large grants that large corporate entities are more likely to obtain, and focus instead on smaller grants that small entities are more likely to obtain in order to have a more beneficial, in-country impact. Understandably, Egypt is concerned about interference with its sovereignty, but in this case, the United States should also be concerned about the effectiveness of such funding, particularly about how such funding can achieve its higher goals, which are not intended to intervene with Egyptian sovereignty.

[122] COOPER, *supra* note 117; *see also* WILTON WYNN, NASSER OF EGYPT: THE SEARCH FOR DIGNITY 203 (1959).

[123] *See generally* Mohamed 'Arafa, *Battling Corruption Within a Corporate Social Responsibility Strategy*, 21 IND. INT'L & COMP. L. REV. 3 (Fall 2011) (providing further elaboration concerning the code of ethics and corporate social responsibility). This article was presented at the Indiana International & Comparative Law Review Biennial Symposium: "Key Aspects of Corporate Social Responsibility and its Effect—Prospects and Progress—on Multinational Business" on March 26, 2010.

[124] *Id*.

[125] *Id*. (arguing privatization transactions could well offer more of the same, entrenching interests who will have the motive and capability—even the legal entitlement—to frustrate a future development policy).

fields. This must be more wide-ranging than further privatization of public enterprises.[126]

Much of Egypt's economy flows through the regime, including fees from the Suez Canal, receipts from natural gas, foreign aid, and returns from taxes, tariffs, and fees. At present, much of the state income is not reported in the state budget but has been managed directly by the President without any parliamentary control or oversight. Transparent budgeting in the hands of an accountable development agency or bank would be a fundamental first step. The Central Agency for Accountancy ("CAA"), reporting to a newly independent Parliament, could play an essential role. A truly professional and independent development agency or bank should aim to ensure that economic activity generating public rents—including tourism, energy, and telecommunications monies—and disbursement of those rents—in areas such as housing or construction—all have strong forward and backward linkages to the rest of the Egyptian economy. The economic activity should support a decent minimum wage[127] and be characterized by transparent and accountable contracting procedures. Egypt will need to retain the national economic freedom of action to carry out such reforms.[128]

On the other hand, efforts to reduce corruption may largely be sound. The discord may be a result of the fury of politics rather than economic implications, as people settle scores and jockey for a position in the new political and economic landscape.[129] A comparative study of anti-corruption agencies and commissions[130] demonstrates how routine investigations by private or political interests have become a form of corruption by

---

[126] *Id*. (stating that the economic life sustained in the wake of these rents is vigorous and competitive).

[127] *See* Dan Murphy, *Egypt's Economic Reform Meets Unprecedented Wave of Labor Resistance*, CHRISTIAN SCI. MONITOR (Dec. 7, 2007), www.csmonitor.com/2007/1207/p25s05-wome.html; *see also* 'Ali El-Sawi, Ahmed Ghoneim, & Maha Kamel, *The Main Actors in the Law Making Process for Economic Reform: An Assessment of their Strengths & Weaknesses to Participate in the Law-Making Process,* U. BONN CENTER FOR DEV. RES., (2005), http://www.zef.de/fileadmin/webfiles/downloads/projects/politicalreform/The_main_actors.pdf.

[128] Murphy, *supra* note 127; *see also* El-Sawi, Ghoneim, & Kamel, *supra* note 127.

[129] *See supra* note **. This part is based on a portion of the author's Doctoral Dissertation Thesis at the Indiana University, Robert H. McKinney, School of Law under the supervision of Prof. Dr. Frank Emmert (2012-2013).

[130] For instance, the Central Auditing Organization ("CAO"), the Administrative Control Authority ("ACA"), the Administrative Prosecution Authority ("APA"), Illegal Profiting Apparatus ("IPA"), and the Money Laundering Combating Unit ("MLCU") are the most important anti-corruption agencies in Egypt. *See Anti-Corruption Profile - Egypt*, TRUSTLAW, http://www.trust.org/trustlaw/country-profiles/good-governance.dot?id=8e1e1d1c-acfb-47ca-99f4-5e2b6af183fb (last visited Oct. 5, 2011).

other means.[131] Indeed, misguided anti-corruption prosecutions can set back the long-term effort to build an open and productive economic culture. Egypt must achieve realistic civil service wage structures and open procurement procedures, both institutionally and culturally.[132]

It is important to recognize that pathways, economic habits, and social relationships will fuel new economic activities. We also must realize the social relations forged under crony-capitalism will remain vital as new forms of investment and new economic opportunities emerge. Economic opportunities will need to be conditioned on performance rather than cronyism and patronage.[133] Accordingly, creation of a new economic and strategic basis is essential for the maintenance of the public order, namely a sufficient distribution of public rents to ensure professionalism.[134]

---

[131] *See Public Prosecution Offices - National Report of Egypt*, UNITED NATIONS DEV. PROGRAM: PROGRAM ON GOVERNANCE ARAB REGION (2004) *available at* http://www.pogar.org/activities/marrakech04/egypt-rep-e.pdf; *see also* Monique Nardi Roquette & Mamadi Kourouma, *Governance Profile of Egypt: Measuring and Monitoring Progress Towards Good Governance in Africa*, ECON. COMMISSION FOR AFR. (2007). In practice, several anti-corruption agencies have been proven to be efficient in undertaking their role in fighting corruption. However, regardless of the effectiveness of these agencies, they still suffer from their subordination to the executive branch. It is highly recommended to shield these agencies from political interference by enhancing their independence and ensuring that no political interference takes place in their decisions, as has been the case in several incidents. The neutrality in presenting the findings of these agencies adds to their credibility and impartiality.

[132] *See* Fadel, *supra* note 62 ("The spread of corruption and torture represented the grossest and most palpable failures of the regime to live up to the aspirations of the Egyptian state: Egyptian law prohibited both fiscal corruption and torture, yet Mubarak used his powers under the [Abrogated] Constitution of 1971 to subvert the enforcement of Egyptian law in order to benefit himself, his family, and their allies."); *see, e.g.,* Law No. 38 of 1972 (The People's Assembly, as amended by Law No. 175 of 2005) *Al-Jarida Al-Rasmiyya*, 28 Sept. 1972 (Egypt), arts. 23-24; *see also National Integrity System Study: Egypt 2009*, TRANSPARENCY INT'L, 40-43, 54-56 (2009), http://www.transparency.org/content/download/50747/812368 (providing a detailed overview of Egyptian law's extensive prohibitions against public official corruption).

[133] The police, for example, will need to return to the streets, but with sufficient tools, salaries, and technology to guarantee a new public order. Unaccountable and unpredictable abuse at the hands of public authority was not only a tool of political power, but also it was an economic order, enabling individuals within the police establishment to collect fees from those it could abuse. *See generally* Fadel, *supra* note 62.

[134] *Id*.

Because Egypt does not have enough experience concerning the area of freezing assets from corruption acts, it is highly recommended to appoint an inter-agency task force including experts from the Ministry of Justice, Ministry of Interior, the Central Bank, the Ministry of Finance, the Prosecutor's General Office, the private banking sector, and others. This is to secure external consultants and investigators to track assets abroad, since

Egypt cannot abolish this sort of capitalism in a day because to do so would also eliminate economic life.[135] Closing an inefficient enterprise is only helpful if someone is also able to switch its people and assets to uses that are more productive.[136] Swift deregulation of financial services may increase the penetration of the local banking sector by foreign firms, but that is not the same as ensuring the availability of credit for small and medium-sized enterprises in the economic evolution, nor does it bring the unbanked poor into the nation's monetary system.[137]

Accomplishing such a sustainable economic renaissance requires trust and collaboration, for it will create losers as often as it opens new opportunities. Economic arrangements will need to remain flexible, attached to a national capacity for making and remaking opportunities for productive economic activity. Therefore, the keys will be institutional and cultural. It is important to look for changes in numerous arenas: attitudes towards grand and petty bribery;[138] institutional regularization of army

---

Egypt does not have enough experts to address this question. This task force should begin by training government lawyers in key areas:

1) Laws of the countries where funds are suspected of having been diverted to, such as Austria, Switzerland, Italy, France, the United Kingdom, and the United States;
2) Understanding of corporate laws of tax haven countries;
3) How trusts operate in certain countries;
4) Money laundering laws of the aforementioned countries ;
5) International conventions, such as the Anti-Money Laundering Convention and the Organized Crime Convention;
6) International mutual legal assistance practices and the laws of the countries whose assistance is to be sought; and
7) The techniques of investigating corporate and banking finance flows.

In addition, Egypt should establish accelerated procedures for communications between such a task force and foreign governmental and banking authorities. If all of these actions were undertaken, Egypt could recover substantial sums from abroad.

135 *Id.*

136 Opening the domestic market to free trade, as was done in the early days of the *Iraq Occupation*, may put unproductive local firms—long protected by the strengths of the rentier state—out of business by allowing imports to flood the market.

137 The notion is to strategize about *how* one engages the global economy where there are opportunities for local firms and industries to capture and reinvest rents from trade.

138 *See generally* Ariane Lambert-Mogiliansky, Mukul Majudar & Roy Radner, *Petty Corruption: A Game-Theoretic Approach*, 4 INT'L J. OF ECON. THEORY 273 (2008); George Moody-Stuart, *The Costs of Grand Corruption*, 4 ECON. REFORM TODAY (1996), *available at* www.cipe.org/publications/ert/e22/E22_05.pdf.

Grand corruption involves complicated network operations, both arrangements and measures, which are difficult to unveil. It usually includes the senior officials in the developing state and may be the president himself, who is being characterized with secrecy. In addition, this sort of corruption is also found in companies, like the money investment ones

and government procurement; realistic civil service and military salary structures; and an increased transparency in the distribution of rents, licenses, and contracts.[139]

More important than anti-corruption[140] or transitional justice equipment will be the creation of a transparent and clear state budget, the independence of a professional national development agency or bank, the emergence of competitive national firms, a realistic minimum wage, and the establishment of an independent institution to manage industrial and developmental policy. These objectives are not enigmatic; they have all been achieved elsewhere, reinforced by cultural traditions and customs. Apart from that, accountability and integrity for administrative and economic actors require behaviors of monitoring and adjustment, which must be embedded and implanted in institutions and supported by cultural confidence in the direction of economic transformation.

C. The Culture and Information Reform Perspective

A key request of the opposition is the development of an open and autonomous space as well as changing habits of secrecy at the top. The

---

where some former state officials contributed to its growth and earned much through labor laws and creation of chances for these corporations to earn millions, smuggling most of it abroad. The Egyptian government seemed to have suddenly discovered the spread of corruption among these companies, which included tax evasion, illegal positions, continuous violations, questioned practices, and non-guaranteed depositor's rights.

One such example is a famous scandal in Egypt's economy. A long time ago, the owners of *Al-Rayaan* Corporation mocked the government, which resorted to them in opening a credit line and importing a cargo of sweet corn. This action created a disaster when *Al-Rayaan* and *Al-Sa'ad* Companies decided to merge in May 1988, after a loss of $350 million as they speculated on gold and the German mark. This awakened the *Sleeping Cat*, the Egyptian Government, at the ferocity of the *Greedy Lion*, the money investment companies, for fear of controlling its prey. The court, in Case No. 19 of the year 1981, said that a Criminal Financial Investigation on Public Funds unveiled that the owners of the two biggest companies, *Al-Rayaan* and *Al-Sa'ad*, traded in foreign currency and seized from one of the investment banks 1,850,000 pounds.

139 Hanaa Kheir-El-Din & Heba El-Laithy, *An Assessment of Growth, Distribution and Poverty in Egypt: 1990/91–2004/05* 13 (Egyptian Ctr. for Econ. Studies, Working Paper No. 115, 2006), *available at* https://juristec.phoenixlaw.edu/sites/lawreview/Volume%20V%20Staff/International%20issue/Arafa/Authority%20Binder/An%20Assessment%20of%20Growth,%20Distribution,%20and%20Poverty%20in%20Egypt_1990-91–2004-05%20(working%20paper).pdf.

140 Egypt had established public corruption laws, but "the main obstacle to addressing corruption in Egypt was not the substantive law, but rather the inadequate procedures for monitoring, exposing, and punishing public corruption." The structural weakness of Egypt's anti-corruption laws mainly resided in the fact that "the executive branch, i.e., former President Mubarak, had the discretion to intervene and prevent investigations," particularly the criminal ones. Fadel, *supra* note 62, at 299.

workings of the old economy were always transparent to someone in the government but never to outsiders. It is important to take into consideration that this is a matter of constitutional protection for freedom of speech and assembly on the one hand, and for deregulation in the telecommunications and internet space on the other. Reformation of the cultural perspective is necessary to sustain a meaningful, expressive economic and political movement, which would complete the revolution, but something more will be needed.[141]

A culture of social and moral solidarity and economic accountability cannot be resolved into existence any more than it can be legislated. A social and cultural project to develop a society's commitment to rights may be useful, but it can also generate acts of individual complaint and entitlement rather than sustaining the collaborative effort necessary to achieve social justice over time. Moreover, it can restrict the prospects for economic and institutional reform.[142]

As a result, political and social life will need a sense of collective engagement. This would encourage an ongoing collective discussion and an open dialogue about the nation's direction, remaining open to innovation and experimentation.[143] Like other revolutionary moments, the terms for future ideological debate and social mobilization in Egypt are open. Completing this movement will require a tacit alliance among technocrats and the arising professional and middle class, alongside the traditional social, religious, labor, and industrial groups.[144]

By the same token, civil society, media, spontaneous revolutionary clusters, and neighborhood committees, which have recently sprung up, as well as the traditional opposition, including trade unions, labor associations, and the civil service organizations, all have an ultimate role to play and an obligation to execute change in Egypt. Among these categories, women have taken on new authority and their leadership will be crucial

---

141 It should be noted that enriching social and political rights in the constitution is quite different from rebuilding the conditions of economic and social possibility. *See* Robyn Creswell, *Egypt: The Cultural Revolution,* N.Y. TIMES, Feb. 20, 2011, at BR27, *available at* http://www.nytimes.com/2011/02/20/books/review/Creswell-t.html?pagewanted=all.

142 Kheir-El-Din & El-Laithy, *supra* note 139.

143 Rania Khallaf, *Cultural Visions for a New Egypt*, AL-AHRAM WKLY. ONLINE (Feb. 24-Mar. 2, 2011), weekly.ahram.org.eg/2011/1036/cu222.htm. In such an atmosphere, for example, the current transformations of the nation's political and economic life necessary for a strong economic development could exist without settling into a new strategy of self-dealing and cronyism.

144 For example, a regular national television show bringing individuals from these and other backgrounds into a common conversation about the country's future may lead to careful election monitoring or sound administrative rules for sharing and participating in the electoral process.

in achieving women's rights within Egypt.[145] Of course, the new Egypt will need to build from the old institutions. The judiciary,[146] for example, could play a central role. Although in large part a professional and independent institution,[147] the judiciary still suffers from political pressure, low salaries, and complicated working conditions. It will need serious work and repair before it can help midwife a revolution of reforms. The cultural and institutional objective is to model and prepare new forms of political and social collaboration and new attitudes towards economic and political participation that are not just a matter of new hands obtaining the rents, but new forms of social and economic cooperation.[148] People will have to learn to do business with anyone and to carry on politics with

---

[145] *See* The Camelhouse, *Nadje Al-Ali on What the Revolution Means for Egyptian Women*, U. CAL. PRESS BLOG (Feb. 15, 2011), http://www.ucpress.edu/blog/12747/nadje-al-ali-on-what-the-revolution-means-for-egyptian-women/.

[146] During the former regime, Mubarak always sought to make the judicial authority void of its capabilities, which throws it into a difficult test. It is noteworthy that judges are asking for judicial independence from government control in addition to full judicial supervision of the parliamentary and presidential elections. The Minister of Justice is not a member of the judicial staff and enjoys no independence concerning his judicial decisions, but he is one of the executive authority members as he is subject to the cabinet. He occupies a political job while judges are banned from this type of job when they are active judges. In other words, the Minister of Justice is not an active judge, and though there is nothing wrong with having such a position—it exists in most countries—there is an issue as to whether the office serves judges or the ruling regime. All of that lies in a constitutional conflict. Most significantly, the judicial reform is considered a main condition for the reform of independence, democracy, dignity, and political neutrality.

[147] *See, e.g.*, ABROGATED EGYPT CONSTITUTION, *supra* note 48, at arts. 165-67; *see also* Carnegie Endowment for Int'l Peace, *Supreme Council of the Armed Forces Constitutional Declaration*, CARNEGIE GUIDE TO EGYPT'S TRANSITION, http://egyptelections.carnegieendowment.org/2011/04/01/supreme-council-of-the-armed-forces-constitutional-announcement (last visited Oct. 26, 2011).

Amended articles forty-six through fifty-two illustrate that the Judiciary authority shall be "independent and invested in courts of different varieties and degrees." Courts of justice of different sorts and competences shall exercise this authority. Judges shall issue their judgments and rulings in accordance with the law. Judges shall be independent, subject to no other authority except the law and not subject to removal. The law also regulates the disciplinary actions against them. No other authority may intervene in judiciary cases or in the affairs of justice. The law shall determine the judiciary organization and their competences and shall organize the way of their formation and prescribe the conditions and measures for the appointment and transfer of their members. ABROGATED EGYPT CONSTITUTION, *supra* note 48, at arts. 165-67.

[148] *See* ABROGATED EGYPT CONSTITUTION, *supra* note 48, at arts. 165-67; *see also Report on AFAC's Visit to Egypt From 15 to 22 May 2011*, ARAB CULTURE FUND, *available at* http://en.arabculturefund.org/sites/default/files/Egypt%20report%20-%20English.pdf.

everyone.[149] In this way, only the revolutionary renovation in collective consciousness becomes the driveshaft for meaningful political and economic reform.[150]

IV. Conclusion and Policy Recommendations

Revolutions are usually the beginning of a historical process, a much longer evolutionary process. Even after this rather extraordinary, peaceful revolution, the outcomes for this and any democratic, stable regime will require at least a decade to settle. From a historical perspective, democracy and the rule of law are goals achieved over time.[151]

---

[149] *See* Fadel, *supra* note 62 ("The January 25 Revolution therefore affirmed the centrality of democracy to the Egyptian national movement, not just as a utopian goal—one whose practical implementation would be indefinitely deferred—but rather as the foundation for a modern, independent, and prosperous Egypt.").

[150] It should be noted that to some the cultural displays viewed during the Revolution 25 January indicate the retreat and deconstruction of Islamic values and traditions in Muslim societies in today's world. Yet to the contrary, an essential role was played by Islam, and more particularly *Shari'a*, embodying its own set of values and normative commitments, in promoting and engineering the Revolution 25 January. Additionally, all indications point to the fact Islam will continue its support in the future. "To the extent that this dynamic seems to be fundamentally paradoxical to many in the West, the Revolution [25 January] serves as an important indicator that we need a complete paradigm shift in the way we view religion and society, and religion and politics." Particular attention should be paid to the role of *Shari 'a* in the current Arab revolutions, as the complex role *Shari'a* played in the Revolution 25 January was simultaneously evident and subtle. Khaled Abou El Fadl, *The Language of the Age: Shari'a and Natural Justice in the Egyptian Revolution*, 52 Harv. Int'l L.J. Online 311, 312, 315 (April 2011), http://www.harvardilj.org/wp-content/uploads/2011/04/HILJ-Online_52_El-Fadl.pdf.

[151] Egypt has already begun to make strides in the movement towards democracy, as shown by the event on August 3, 2011, when the unthinkable happened. "The deposed pharaoh who had ruled Egypt with an iron fist for thirty years was wheeled into a courtroom and placed in the defendant's cage." M. Cherif Bassiouni, *Egypt Update 10*, 11 (Sept. 9, 2011), https://docs.google.com/viewer?a=v&pid=explorer&chrome=true&srcid=0B5DG_keKEp61NDRlZTU1YzQtMGUxYy00NGVhLTljYWEtNDU1YmFmMTA0YTQ4&hl=en_US. Mubarak appeared in "a normal criminal court, namely the Fifth Felonies Circuit of the Cairo Court of Appeals." *Id.* at 12. The court was presided over by a civilian natural judge, Justice Ahmad Refa'at, which ensures, or at least gives a *prima facie* showing, that the former President will enjoy basic due process guarantees. *See id.* Egypt is to be credited for following this typical criminal trial procedure, "especially when compared to other revolutionary settings where Heads of State were deposed and summarily tried and executed, as was the case in Czrist Russia, Iraq after the 1958 coup *d'état*, and Romania after the fall of Nicolae Ceausescu in 1989." *Id.* The public prosecutor charged Mubarak with killing protestors during the Revolution 25 January and financial corruption, and Mubarak plead *not guilty* to the charges against him. One of the most important concerns over the nature of Mubarak's corruption charges is the limitation on the charges; the charges only concern the profiteering through facilitating the unjust enrichment of his close friend, business tycoon Hussein Salem. *Id.* It is alleged that Salem gave the Mubarak

When revolutions are violent, the successive process takes longer, as in the cases of the French Revolution of 1789 and the Russian Revolution of 1917. The American Revolution, although involving violence against a colonial power rather than an internal struggle, still took many years to mature and required a very costly civil war to complete. In Egypt, the Revolution 25 January is the fourth revolution Egypt has seen in the last 130 years, throughout which the contemporary Egyptian national movement has maintained the same goals.[152]

---

family five villas in *Sharm El-Sheikh*, which was "in return for the former president's facilitating Salem's acquisition of large tracts of state-owned land in prime sea-side locations in *Sharm El-Sheikh*." *Id.* As follows, Salem was arrested in Spain. As a result of the public diplomacy delegation efforts, it is noteworthy in that domain, the Spanish Foreign Affairs stated the Spanish Cabinet had decided in its meetings to hand over Hussein Salem—seeking his extradition—to the Egyptian authorities. Spanish charges of money laundering, fraud, bribery, and corruption are related to the use of money Salem is accused of obtaining illegally in Egypt.

Many scholars have noted other concerns regarding the charges against Mubarak, such as the current charges are only a fraction of the corruption charges attributable to Mubarak and his family. *Id.* In particular, his sons, 'Alaa and Gamal, "were known to have extensive business interests that were rumored to have been wholly dependent on the power and influence of their father." *Id.* Another point of concern is the evidence the prosecution has against Mubarak, which may be insufficient to hold Mubarak criminally accountable for the killing of demonstrators and could result in Mubarak being found guilty of only criminal negligence. *Id.* Also, many think Mubarak should face charges for the numerous human rights violations his security forces committed: "thousands of political detainees who were held incommunicado for many years, the systematic torture of political opposition, and systemic police brutality that Egyptians regularly experienced." *Id.* Finally, several scholars think Mubarak should be liable for the political corruption as well. *Id.* The political corruption during his reign in Egypt, which began in 1981 when he took office, "took many forms, including preparing the ground for his son Gamal to inherit power from him, and stifling political dissent." *Id.*

Not to be overlooked, Mubarak's trial will have significant physiological and sociological effects "on the Egyptian people and Arabs throughout the region." *Id.* Historically, Mubarak and his predecessors were regarded as untouchable and irreproachable pharaohs who governed the country with absolute powers. *Id.* Yet, this mode of governance, which has existed in Egypt and the Arab world thus far, could end with the outcome of Mubarak's trial. *Id.* "It is unclear what the social impact of this trial will be, but it is [likely] that it will contribute to a shift in the Egyptian and Arab psyche that had always revered authority, shunned dissent, and rejected the questioning or criticism of those elders who wielded power." *Id.* at 12-13; *see also* M. Cherif Bassiouni, TWITTER, http://twitter.com/#!/cherifbassiouni (last visited Oct. 19, 2011) (providing periodic updates on the events in Egypt regarding the Revolution 25 January).

[152] *See* Fadel, *supra* note 62, at 292.

There are three main goals for the contemporary Egyptian national movement. The first goal is to obtain self-government, in other words allowing Egyptians to be in charge of public offices. Second, independence in the international community and effective domestic sovereignty is sought, particularly in regards to the local economy and the ability to

In the right spirit, political, economic, and cultural reforms—cultural being the greatest—strengthen one another. As a consequence, the most important reform priority and the ground on which a *new Egypt* will or will not be built is cultural. Indeed, the most significant issues are how the Egyptian people will come to metabolize what has happened and whether they are able to consolidate their revolution into habits of engagement and debate, the right to know, and routines of tolerance and freedom. Only then can we expect a development policy to remake economic life or a rearrangement of constitutional powers to re-create the culture of Egyptian politics. Only then will the revolution have been won by reform.

Last but not least, Egypt must find the strength to face any potential dangers and threats, some of which may be prevented or mitigated. But this depends on whether SCAF and the transitional government have a plan to make the country ready to face certain crises and whether they can address these crises effectively, rather than be taken by surprise and become overwhelmed by events. Revolutions are harder to lead to fruition than to start. As an old English expression goes, between the cup and the lip there is many a slip. And the rest of Egypt's story is not well known, because events are still unfolding.

---

secure a more equitable distribution of national wealth and income. Lastly, the third goal is overall government accountability to the people of Egypt. *Id.*

One the other hand, the five main concerns and goals of the Egyptian people are regime-change, democracy, justice (including socio-economic justice), human and civil rights, and the rule of law applicable equally to all citizens. During the revolution, the peoples' slogans are "*Enough is Enough*: *Kefaya*", "*Public Wants Regime Falling Down*: *Al-Sh'aab Youreed Isqat Al-Nizam*", and "*No More Nickel, No More Dime, No More Money for Mubarak's Crimes*." The Egyptian people have been influenced by American and Western ideals and values reflected in the U.S. Constitution, but they are particularly affected by similar Islamic values and principles, which are reflected in this drive for change. The Mubarak Ex-Regime understands that these popular goals must be met.

A Review of the Concurrent Debates About the Legal Recognition of Same-Sex Relationships in the Council of Europe and the United States

Sarah Lucy Cooper (*Barrister*)*

I. Introduction

At the end of the first decade of the new millennium, the question whether same-sex couples should be able to enter into a legal marriage was (and still is) at the forefront of legal discourse in both the United States and the Council of Europe ("CoE"). On June 24, 2010, in *Schalk and Kopf v. Austria*, the European Court of Human Rights ("ECtHR") held that Article 12 of the European Convention of Human Rights ("the

* Senior Lecturer in Law and Associate Director of the Center for American Legal Studies, Birmingham City University, School of Law, United Kingdom. I would like to thank Jonathan Simon at Phoenix School of Law and Alice Storey at Birmingham City University for their excellent research projects and my good friend, Susan Shapcott, for her very helpful edits.

Convention") did not mandate the provision of same-sex marriage.[1] This was the first opportunity the ECtHR had to determine the issue. Conversely, on August 4, 2010, in the United States the federal court for the Northern District of California held, in *Perry v. Schwarzenegger*, that the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the U.S. Constitution required that same-sex couples be allowed to marry.[2] In doing so, the *Perry* Court struck down a California constitutional amendment ("Proposition 8") that banned same-sex marriage and became the first federal court to make findings of fact regarding same-sex marriage.

Schalk and *Perry* followed and preceded a steady increase in support for legally recognizing same-sex relationships in their respective territories. Between 2000 and 2011, the number of states in both jurisdictions to legally recognize same-sex relationships increased incrementally. At present, six U.S. states (Massachusetts, Connecticut, Iowa, Vermont, New Hampshire, and New York) and the District of Columbia issue marriage licences to same-sex couples.[3] Nine states provide the equivalent of state-level spousal rights via an alternative registration system, and three states (Maine, Colorado, and Wisconsin) provide restricted spousal rights.[4] The picture is similar in the CoE. There, seven member states (Belgium, Iceland, the Netherlands, Norway, Portugal, Spain, and Sweden) allow same-sex marriage, and thirteen states provide an alternative registration system.[5] In addition, Croatia provides rights for cohabiting same-sex couples, and Liechtenstein's Parliament recently approved a Registered Partnership Bill.[6]

In addition to the activity of individual states, key political institutions in both jurisdictions have voiced support for legally recognizing same-sex relationships. For example, in 2010 the Council of Ministers of

---

[1] Schalk & Kopf v. Austria, Eur. Ct. H.R. (June 24, 2010), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=870457&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 [hereinafter Schalk & Kopf].

[2] Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

[3] *Marriage Equality & Other Relationship Recognition Laws*, HUM. RTS. CAMPAIGN, http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map(1).pdf (last updated July 6, 2011).

[4] *Id.*

[5] COUNCIL OF EUR., DISCRIMINATION ON THE GROUNDS OF SEXUAL ORIENTATION AND GENDER IDENTITY IN EUROPE 91 (2011), *available at* http://www.coe.int/t/commissioner/source/LGBT/LGBTStudy2011_en.pdf. Those member states providing an alternative registration system are Andorra, Austria, the Czech Republic, Denmark, Finland, France, Germany, Hungary, Ireland, Luxembourg, Slovenia, Switzerland, and the United Kingdom. *Id.*

[6] *Id.*

the CoE adopted a unique recommendation that invites member states to provide same-sex couples with legal means to protect their relationships.[7] In 2011, the Office of the CoE's Commissioner for Human Rights recommended that same-sex couples be granted the same rights and benefits as their heterosexual counterparts.[8] In the United States, the Obama Administration announced in February 2011[9] that the Department of Justice would no longer defend the constitutionality of section 3 of the Defense of Marriage Act ("DOMA").[10] Section 3 defines marriage as between one man and one woman for federal purposes.[11] Soon after, in March 2011, uniform bills proposing the Respect for Marriage Act ("RMA"), which would repeal DOMA, were introduced in the House of Representatives[12] and the Senate.[13] The Senate Judiciary Committee ("SJC") heard its first testimony concerning the RMA on July 20, 2011.[14] On October 14, 2011 the SJC announced that it will debate and vote on the RMA in November 2011.[15]

For the time being, the question of whether same-sex couples have the right to marry has been settled by the Council of Europe. The applicants' request for a referral to the Grand Chamber in *Schalk* was

---

7 Comm. of Ministers, *Recommendation CM/Rec(2010)5 of the Committee of Ministers to Member States on Measures to Combat Discrimination on Grounds of Sexual Orientation or Gender Identity*, Council Eur. (Mar. 31, 2010), https://wcd.coe.int/wcd/ViewDoc.jsp?id=1606669. The Committee of Ministers claims that this recommendation is the only instrument of its kind in the world. *See* Press Release, Council of Eur., Council of Europe to Advance Human Rights for Lesbian, Gay, Bisexual and Transgender Persons, No. 277 (Jan. 4, 2010), *available at* https://wcd.coe.int/wcd/ViewDoc.jsp?id=1607163&Site=cm&BackColorInternet=C3C3C3&BackColorIntranet=EDB021&BackColorLogged=F5D383.

8 COUNCIL OF EUR., *supra* note 5, at 13.

9 Press Release, U.S. Dep't of Justice, Statement of the Attorney General on Litigation Involving the Defense of Marriage Act (Feb. 23, 2011), *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-222.html. The statement implies, however, that reasonable arguments can be made that section 3 of DOMA satisfies rational-basis review. *Id.* It also states that section 3 will remain in effect unless Congress repeals it or there is a final judicial finding that strikes it down. *Id.* Until that time, the law will continue to be enforced. *Id.*

10 Defense of Marriage Act §§ 2(a), 3(a), 1 U.S.C. § 7, 28 U.S.C. § 1738C (2006).

11 Defense of Marriage Act § 3(a) (adding the definition of marriage to the U.S. Code). It should be noted that DOMA also prevents the federal government from recognizing same-sex marriages legally entered in other jurisdictions. Defense of Marriage Act § 2(a).

12 Respect for Marriage Act, H.R. 1116, 112th Cong. (1st Sess. 2011).

13 Respect for Marriage Act of 2011, S. 598, 112th Cong. (1st Sess. 2011).

14 *S. 598*, *The Respect for Marriage Act: Assessing the Impact of DOMA on American Families: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. (2011).

15 Press Release, Senator Patrick Leahy, Leahy Announces Plans to Schedule Committee Consideration of DOMA Repeal Bill (Oct. 14, 2011), *available at* http://leahy.senate.gov/press/press_releases/release/?id=1578A17C-B51D-4270-9A50-132D486057E4.

denied.[16] *Perry*, on the other hand, still awaits final determination after an appeal to the Ninth Circuit triggered various merit and procedure based hearings.[17]

The ECtHR's decision in *Schalk* has impacted, and will likely continue to impact, the debate in *Perry*. On appeal to the Ninth Circuit, proponents of Proposition 8 relied on *Schalk* to argue that the *Perry* Court's ruling improperly short-circuited current debates about "redefining marriage."[18] What this argument ignores, however, is that *Schalk* added positively to a set of legal principles that favor recognizing the relationships LGBT[19] persons share. These principles are: (1) to be compliant with the Convention, member states must show why laws that provide for blanket exclusions on the basis of sexual orientation are necessary, not merely legitimate in purpose;[20] (2) the right to marry is not confined to the traditional union of a man and a woman who are able to procreate[21] or to opposite-sex couples in all circumstances;[22] (3) same-sex couples share a family life;[23] (4) there is an emerging European consensus in favor of the legal recognition of same-sex relationships;[24] and (5) the topic of legal recognition for same-sex relationships is one of evolving rights.[25] These principles strongly suggest that it is inevitable that the

---

16 Loveday Hodson, *A Marriage by Any Other Name? Schalk and Kopf v Austria*, 11 HUM. RTS. L. REV. 170, 170 (2011).

17 In early 2011, the Ninth Circuit held to certify a question of law, regarding *Perry*, to the California Supreme Court. Perry v. Schwarzenegger, 628 F.3d 1191 (9th Cir. 2011). The California Supreme Court heard arguments on September 6, 2011, on whether, under California law, defendants-interveners have legal standing to appeal when the actual defendants in a case refuse to defend a ballot measure. A decision is expected in December 2011. Federal Judge James Ware heard arguments in June 2011 on whether District Court Judge Vaughn Walker, who presided over the *Perry* case in the lower court, was biased in his decision because he is gay and, thus, whether the decision should be thrown out. Perry v. Schwarzenegger, 2011 WL 2321440 (N.D. Cal. 2011). Judge Ware determined Judge Walker was not biased. *Id.* ProtectMarriage.com has indicated that they will appeal this decision. *See* PROTECTMARRIAGE.COM, http://protectmarriage.com/ (last visited Oct. 16, 2011). After a hearing was held, it was ordered that the videotapes from the *Perry* trial should be released. John Schwartz, *Proposition 8 Hearing Video Is Ordered Released by Judge*, N.Y. TIMES, Sept. 20, 2011, at A20, *available at* http://www.nytimes.com/2011/09/20/us/judge-orders-release-of-video-of-proposition-8-hearing.html?_r=1.

18 Brief for Defendant-Intervenors-Appellants at 103-04, Perry v. Schwarzenegger, 628 F.3d 1191 (9th Cir. 2011) (No. 10-16696).

19 I use this phrase to refer to lesbian, gay, bisexual, and transgender persons.

20 Karner v. Austria, 2003-IX Eur. Ct. H.R.

21 Christine Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R.

22 Schalk & Kopf, *supra* note 1, at 61.

23 *Id.* at 94.

24 *Id.* at 105.

25 *Id.*

Convention will be interpreted to require member states to provide a way for same-sex couples to legally recognize their relationships.

Part II of this article considers the use of international law as a tool for interpreting the U.S. Constitution. Part III explores the boundaries of the Convention provisions engaged by claims related to recognizing the relationships shared by LGBT persons, namely Articles 14,[26] 12,[27] and 8.[28] With reference to the *Perry* Court's opinion, Part IV examines the ECtHR's evolving jurisprudence in relation to Articles 8, 12, and 14 to demonstrate how the ECtHR has derived principles (1) through (5) above from Articles 8, 12, and 14, and how similar arguments have been confronted in the United States. Part V concludes that over the last thirty years a jurisprudential evolution has taken place in the ECtHR, which will inevitably culminate in same-sex couples being given a right to legally protect their relationships under the Convention. This conclusion can, and likely will, impact comparable debates in the United States.[29]

II. The Use of International Law to Interpret the United States Constitution

In the late eighteenth century, the framers of the U.S. Constitution intended for their new nation to be able to avail itself of the benefits of international law.[30] Despite this, questions measuring to what extent, if

---

[26] Convention for the Protection of Human Rights and Fundamental Freedoms art. 14, Nov. 4, 1950, 213 U.N.T.S. 221. "The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status." *Id.*

[27] *Id.* at art. 12. "Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right." *Id.*

[28] *Id.* at art. 8.

> (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

Id.

[29] *See, e.g.*, Graham v. Florida, 130 S. Ct. 2011 (2010); Roper v. Simmons, 543 U.S. 551 (2005); Lawrence v. Texas, 539 U.S. 558 (2003). These cases will be discussed in Part II.

[30] Paul R. Dubinsky, *International Law in the Legal System of the United States*, 58 Am. J. Comp. L. 455, 457 (2010).

any, international human rights law should influence the interpretation of the U.S. Constitution are considered *thorny*.[31]

The United States has gained a reputation for being isolated from international human rights law.[32] The United States has refused to join the International Criminal Court, and the United States Supreme Court ("Supreme Court") has rejected the idea that American courts are bound by decisions emanating from the International Court of Justice.[33] It is also well known that the more conservative members of the Supreme Court, including Chief Justice Roberts and Justices Alito, Scalia and Thomas oppose citation of international law in constitutional cases.[34]

Still, as Paul Dubinsky observes, American courts have *freely* referred to international law since the nineteenth century.[35] American courts frequently look to international legal sources to shed light on domestic legal issues.[36] The Supreme Court has not exiled itself from this practice. Between 2000 and 2010 the Supreme Court, championed by Justice Kennedy, used international law to shape some of the most significant and controversial constitutional issues of recent times.

In the 2003 case of *Lawrence v. Texas*, the Supreme Court held, by a 6-3 majority, that a Texas statute criminalizing consensual homosexual sodomy was unconstitutional.[37] It was a landmark victory for same-sex couples.[38] The decision overruled *Bowers v. Hardwick,* which was partially premised on the view that homosexual sodomy was a widely condemned practice throughout the history of Western civilization.[39] To untie this reasoning, Justice Kennedy relied heavily upon the jurisprudence of the ECtHR:

---

[31] Daniel Smith, Comment and Casenote, *Continental Drift: The European Court of Human Rights and the Abolition of Anti-sodomy Laws in Lawrence v. Texas*, 72 U. CIN. L. REV. 1799, 1799 (2004).

[32] Anthony Lester, *The Overseas Trade in the American Bill of Rights*, 88 COLUM. L. REV. 537, 561 (1988).

[33] Medellin v. Texas, 552 U.S. 491, 508, 518 (2008).

[34] Adam Liptak, *Ginsburg Shares Views on Influence of Foreign Law on Her Court, and Vice Versa*, N.Y. TIMES, April 12, 2009, at A14, *available at* http://www.nytimes.com/2009/04/12/us/12ginsburg.html.

[35] Dubinsky, *supra* note 30, at 475.

[36] *Id.*

[37] Lawrence v. Texas, 539 U.S. 558, 561, 585 (2003).

[38] Chase D. Anderson, *A Quest for Fair and Balanced: The Supreme Court, State Courts, and the Future of Same-Sex Marriage Review After* Perry, 60 DUKE L.J. 1413, 1416 (2011).

[39] Bowers v. Hardwick, 478 U.S. 186, 196 (1986), *overruled by Lawrence*, 539 U.S. 558. In *Bowers*, the Supreme Court upheld a Georgia statute that criminalized sodomy even in the privacy of one's home. *Id.*

> 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. . . . The court held that the laws proscribing [homosexual sodomy] were invalid under the European Convention on Human Rights. . . . [T]he decision is at odds with the premise in *Bowers* that the claim put forward was insubstantial in our Western civilization.
>
> . . . .
>
> To the extent *Bowers* relied on values we share with a wider civilization, it should be noted that the reasoning and holding in *Bowers* have been rejected elsewhere. The European Court of Human Rights has followed not *Bowers* but its own decision. . . . The right the petitioners seek in this case has been accepted as an integral part of human freedom in many other countries. There has been no showing that in this country the governmental interest in circumscribing personal choice is somehow more legitimate or urgent.[40]

Although strongly worded, Justice Kennedy's references to the ECtHR were brief. They were also met with silence in Justice O'Connor's concurring opinion and in a spirited dissent by Justice Scalia. Justice Scalia described the use of foreign views as "meaningless" and "dangerous" dicta,[41] because the Supreme Court "should not impose foreign moods, fads, or fashions on Americans."[42]

Undeterred, Justice Kennedy cited to international law again in the 2005 case of *Roper v. Simmons*.[43] In support of invalidating the application of the death penalty to juveniles, Justice Kennedy noted that the United States was one of only eight countries in the world that has executed a juvenile since 1990.[44] By pointing out that all of these countries, except for the United States, had either abolished the death penalty for juveniles or publicly rejected the practice by 2005, Justice Kennedy illustrated that the United States stood alone in legalizing the execution of juveniles.[45] Again, Justice Scalia filed a hearty dissent, arguing that the meaning of the U.S. Constitution should not be determined by "like-

---

[40] *Lawrence*, 539 U.S. at 573, 576-77 (citation omitted).
[41] *Id.* at 598 (Scalia, J., dissenting).
[42] *Id.* (quoting Foster v. Florida, 537 U.S. 990, n.* (2002)).
[43] Roper v. Simmons, 543 U.S. 551, 575-78 (2005).
[44] *See id*. at 577.
[45] *See id*.

minded foreigners."[46] Nonetheless, by a 5-4 majority, the Supreme Court abrogated another long-time precedent[47] and held it was unconstitutional to execute individuals who were juveniles at the time of their capital crimes.[48]

Similarly, in the 2010 case of *Graham v. Florida*, Justice Kennedy (writing for the majority) used international law to support the conclusion that imposing a life-without-parole sentence on a juvenile who had not committed a homicide was unconstitutional.[49] Justice Kennedy acknowledged that the judgments of other nations and the international community did not "control" the meaning of the U.S. Constitution[50] but argued that "the United States adheres to a sentencing practice" that has been "rejected the world over."[51] As such, Justice Kennedy concluded, "'[t]he climate of international opinion' . . . is also 'not irrelevant.'"[52] Justice Thomas firmly rejected this reasoning, arguing that foreign law is "irrelevant" to the meaning of the U.S. Constitution and to the "discernment of any longstanding tradition in *this* Nation."[53] Still, the argument underpinned by international law succeeded.[54]

Lawrence, *Roper*, and *Graham* demonstrate a trend,[55] albeit a contentious one, in the Supreme Court towards incorporating international standards into domestic debates.[56] This is similar to how scholars look to the experiences of European states that have adopted same-sex marriage to lend credibility to their recommendations for optimal political and social change strategies.[57] Of course, there is no certainty whether international law, or more specifically the jurisprudence of the ECtHR, will be referred to when the Supreme Court determines the constitutionality of same-sex marriage. However, there is a significant chance it will. First,

---

[46] *Id*. at 608 (Scalia, J., dissenting).

[47] Stanford v. Kentucky, 492 U.S. 361 (1989), *abrogated by Roper*, 543 U.S. 551.

[48] *Roper*, 543 U.S. at 574, 575, 578-79.

[49] Graham v. Florida, 130 S. Ct. 2011, 2034 (2010). Note, however, that this decision does not forbid sentencing someone younger than eighteen years old to life in prison. The decision requires the state to provide him or her with "some meaningful opportunity" to obtain release before the end of that term. *Id.* at 2016.

[50] *Id*. at 2033.

[51] *Id*.

[52] *See id.* (citation omitted).

[53] *Id*. at 2053 n.12 (Thomas, J., dissenting).

[54] *See id.* at 2034 (majority opinion).

[55] This trend is not new. *See generally* Washington v. Glucksberg, 521 U.S. 702 (1997); Miranda v. Arizona, 384 U.S. 436 (1966); Trop v. Dulles, 356 U.S. 86 (1958).

[56] R. L. Gottsfield, *International Courts to Know*, ARIZ. ATT'Y, Mar. 2010, at 16.

[57] Erez Aloni, *Incrementalism, Civil Unions, and the Possibility of Predicting Legal Recognition of Same-Sex Marriage*, 18 DUKE J. GENDER L. & POL'Y 105 (2010).

same-sex marriage, like homosexual sodomy and the death penalty, is an issue to which the norms of the international community can be (and have been) instructive. Second, it is inevitable that *Lawrence* will play a role in shaping the constitutionality of same-sex marriage. Although the majority stated that the *Lawrence* decision did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter,"[58] the decision is a crucial landmark in the Supreme Court's evolving acceptance of same-sex relationships.[59] Thus, its foreign underpinnings will impact the same-sex marriage debate. Third, in addition to Justice Kennedy, Justices Ginsburg,[60] Sotomayor,[61] and Kagan[62] have all voiced their support for using international law to inform the interpretation of the U.S. Constitution.

---

[58] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[59] Anderson, *supra* note 38.

[60] Gottsfield, *supra* note 56, at 17.

> At a symposium at the Moritz College of Law at Ohio State University on April 12, 2009, honoring her 15 years on the Court, Justice Ruth Bader Ginsburg acknowledged that the more conservative members (Chief Justice Roberts and Justices Alito, Scalia, and Thomas) oppose the citation of foreign law in constitutional cases. However, she saw nothing wrong with it as long as it is clear the Court is not saying it is bound by foreign law as opposed to merely being influenced by such power as its reasoning holds.

Id.

[61] *See* DANIEL TERRIS, CESARE P. R. ROMANO, & LEIGH SWIGART, THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES ix-x (2007) (Justice Sotomayor's preface to this book suggests that she also feels that international law can influence the interpretation of the U.S. Constitution).

[62] *See* Emma Finney, *Shifting Towards a European Roe v. Wade: Should Judicial Activism Create an International Right to Abortion with A., B. and C. v. Ireland?*, 72 U. PITT. L. REV. 389, 393 n.14 (2010).

> The confirmation of Elena Kagan only increases the expectancy that the Supreme Court will continue to rely on international law as in her confirmation hearings she stated that "[t]here are some cases in which the citation of foreign law, or international law, might be appropriate," in response to a question from Sen. Chuck Grassley. Grassley continued: "If confirmed, would you rely on or cite international foreign law when you decide cases?" She added that she is "in favor of good ideas coming from wherever you can get them" and said "there are a number of circumstances" when foreign law might be appropriate.

Id. (internal citations omitted).

III. The Relevant Provisions of the European Convention of Human Rights

After the atrocities of World War II, the Council of Europe was created in 1949 with the aim of ensuring respect for fundamental human rights and freedoms across the continent.[63] In 1950, the CoE enumerated these rights and freedoms in the European Convention of Human Rights. The Convention came into force in 1953 and is now binding on all forty-seven member states of the CoE.[64] The United States has had Observer Status in the CoE since 1995.[65] The function of the European Court of Human Rights is to ensure that member states observe the Convention rights of its citizens.[66] The ECtHR has emerged as "the world's most effective international rights tribunal"[67] and has developed an American-style body of constitutional law which has earned it the title of "the Supreme Court of Europe."[68]

The ECtHR has developed a body of law relevant to recognizing the relationships of LGBT persons under Articles 8, 12, and 14 of the Convention. These provisions were not drafted with the rights of LGBT persons in mind, however. For instance, Article 12 provides that "[m]en and women of marriageable age have the right to marry and to found a family."[69] By connecting marriage with procreation, Article 12 conforms to the conventional binary construction of marriage as the foundation of the traditional family. This strongly suggests that the right to marry, under the Convention, is a heterosexual institution. Similarly, Article 8, which provides that "[e]veryone has the right to respect for his private and family life" and "his home,"[70] was designed to protect the traditional family.

---

[63] Statute of the Council of Europe, May 5, 1949, 87 U.N.T.S. 103.

[64] *See* Council Eur., http://www.coe.int/lportal/web/coe-portal/home (last visited Oct. 16, 2011) (containing a list of the forty-seven member states).

[65] Eur. Parl. Ass., *Comm. of Ministers Resolution (95) 37 On Observer Status for the United States of America with the Council of Europe*, 98th Sess. (1995). Observer States are allowed to send observers to certain Council of Europe committees and, when expressly invited, may be represented in the Council of Europe's Committee of Ministers and/or Parliamentary Assembly. Eur. Parl. Ass., *Committee of Ministers Statutory Resolution (93) 26 on Observer Status*, 92nd Sess. (1993).

[66] *See* Michael D. Goldhaber, A People's History of the European Court of Human Rights 1-3 (2007).

[67] Laurence R. Helfer, *Redesigning the European Court of Human Rights: Embeddedness as a Deep Structural Principle of the European Human Rights Regime*, 19 Eur. J. Int'l L. 125, 126 (2008).

[68] Goldhaber, *supra* note 66, at 1.

[69] Convention for the Protection of Human Rights and Fundamental Freedoms, s*upra* note 26, at art. 12.

[70] *Id.* at art. 8.

This is because the Drafters of the Convention intended for "family rights" to be represented by, *inter alia,* "the right to marry and to found a family."[71] Furthermore, Article 14, which safeguards individuals from discrimination in their enjoyment of the Convention's rights and freedoms,[72] does not include "sexual orientation" as an expressly prohibited ground of discrimination, and there is no suggestion that it was ever intended to be.[73]

Nonetheless, the ECtHR has stretched Articles 8, 12, and 14 beyond their original boundaries in favor of safeguarding same-sex relationships. Article 12 is no longer confined to opposite-sex couples in "all circumstances,"[74] and the inability to procreate does not remove the right to marry.[75] Same-sex couples now fall squarely within the concept of family life under Article 8.[76] Furthermore, it is widely accepted that discrimination on the basis of sexual orientation constitutes discrimination on the grounds of *sex*, which is expressly prohibited under Article 14.[77] In addition, such laws are monitored by a heightened scrutiny. The ECtHR's mildest form of review demands that a domestic law providing for a difference in treatment must have a legitimate aim, which is achieved by rational and proportional means.[78] Now, however, member states must show why laws that provide for a blanket difference in treatment based on sexual orientation are necessary.[79] Part IV will explore how this current state of affairs has developed.

The ECtHR has evolved the interpretation of these provisions by actively employing the principle that the Convention is a "living instru-

---

[71] Council of Eur., Preparatory Work on Article 8 of the European Convention on Human Rights, 2-3, 9 (Aug. 9, 1956), *available at* http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART8-DH(56)12-EN1674980.pdf.

[72] Convention for the Protection of Human Rights and Fundamental Freedoms, s*upra* note 26. As Article 14 is not freestanding, it cannot be applied unless a case falls within the ambit of one or more of the other substantive convention rights. The substantive rights invoked by marriage and family life are contained in Articles 12 and 8 respectively. *Id.*

[73] *See* Council of Eur., Preparatory Work on Article 14 of the European Convention on Human Rights (May 9, 1967), *available at* http://www.echr.coe.int/library/DIGDOC/Travaux/ECHRTravaux-ART14-CDH(67)3-BIL1338901.pdf.

[74] Schalk & Kopf, *supra* note 1, at 61.

[75] Christine Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R.

[76] Schalk & Kopf, *supra* note 1, at 94.

[77] Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 26.

[78] Karner v. Austria, 2003-IX Eur. Ct. H.R., at 37.

[79] *Id.* at 41. A distinction will only be discriminatory if it has no objective and reasonable justification, *i.e.,* if it does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realized. *Id.* at 37.

ment," which must be interpreted in the light of contemporary society and present day conditions.[80] Notably, a similar principle is employed with regards to the U.S. Constitution. Although subject to criticism, the notion that the U.S. Constitution is a living document that should be interpreted to reflect modern day standards[81] is well established.[82] This approach is evident in some American courts' evolving treatment of LGBT rights under the U.S. Constitution.[83] The *Perry* decision is a prime example of this.

IV. The Development of the Existing Legal Framework: The Jurisprudence of the European Court of Human Rights

The cases concerning the recognition of LGBT relationships in the ECtHR fall into two categories. The first is based on a breach of Article 12 alone or in conjunction with Article 14 (category one cases). The second is based on a breach of Article 8 in conjunction with Article 14 (category two cases).

A. Category One Cases: Breaches of Article 12[84]

Between 1986 and 2003, the ECtHR addressed four cases in which post-operative transsexuals complained that the United Kingdom's refusal to alter the birth register to detail their newly assigned sex breached Article 12. Until their new genders were legally recognized, the applicants could not marry because U.K. law prohibited marriage between individuals of the same sex. For the purposes of marriage, an individual's sex was long determined by his or her biological make-up. These four cases demonstrate the ECtHR's incremental retreat from the

---

[80] Tyrer v. United Kingdom, 26 Eur. Ct. H.R. (ser. A) at 31 (1978).

[81] Bruce Ackerman, *Constitutional Politics/Constitutional Law*, 99 Yale L.J. 453, 526 (1989).

[82] W. Sherman Rogers, *The Constitutionality of the Defense of Marriage Act and State Bans on Same-Sex Marriage: Why They Won't Survive*, 54 How. L.J. 125, 168 (2010).

[83] *See generally In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) *superseded by Constitutional Amendment*, Cal. Const. art. I, § 7.5 (amended 2008) (sexual orientation is a suspect class); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (holding that sexual orientation is a quasi-suspect class); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (holding that sexual orientation receives heightened scrutiny, but not reaching the decision of suspect or quasi-suspect classification).

[84] These breaches occur either alone or in conjunction with Article 14. In the cases listed, Article 14 was technically involved but drew no substantial discussion for the purposes of this article.

notion that Article 12 is a gender specific institution, reserved solely for traditional marriage.

In the 1986 case of *Rees v. United Kingdom,* the ECtHR unanimously rejected the applicant's claim in two sentences.[85] The ECtHR determined that Article 12 referred to the traditional marriage between persons of opposite biological sex.[86] From the ECtHR's perspective, the wording of Article 12 made it clear that it was "mainly concerned to protect marriage as the basis of the family."[87]

The same reasoning was employed four years later in *Cossey v. United Kingdom.*[88] The majority argued that Europe's "attachment" to the traditional concept of marriage provided sufficient reason for the continued adoption of biological criteria for determining a person's sex.[89] As there was little "common ground" amongst member states regarding transexualism, member states had wide discretion to deal with the issue.[90] However, the *Cossey* decision was not unanimous.[91] Eight judges dissented in four dissenting opinions.[92] In his dissenting opinion, Judge Martens, speaking of the link that the *Rees* Court and the *Cossey* majority had made between Article 12 and the preservation of the traditional family, argued:

> [I]t is hardly compatible with the modern, open and pragmatic construction of the concept of "family life" which has evolved . . . to base the interpretation of Article 12 . . . merely on the traditional view according to which marriage was the pivot of a closed system of family law. On the contrary, that evolution calls for a more functional approach to Article 12 . . . as well, an approach which takes into consideration the factual conditions of modern life.[93]

He further rejected the notion that it could be maintained that "'tradition' implies that 'sex' in this context can only mean 'the biological sex which the individuals had at the time of their birth.'"[94] In addition, Judge

---

[85] Rees v. United Kingdom, 106 Eur. Ct. H.R. (ser. A) (1986).
[86] *Id*. at 49.
[87] *Id*.
[88] Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) (1990).
[89] *Id*. at 46.
[90] *Id*. at 40.
[91] *See id.*
[92] *Id.*
[93] *Id.* at 4.4.3 (Martens, J., dissenting).
[94] *Id.* at 4.5.1.

Martens distanced marriage from procreation and described it in gender neutral terms:

> [M]arriage is far more than a union which legitimates sexual intercourse and aims at procreating: it is a legal institution which creates a fixed legal relationship between both the partners and third parties . . . ; it is a societal bond, in that married people . . . "represent to the world that theirs is a relationship based on strong human emotions, exclusive commitment to each other and permanence"; it is, moreover, a species of togetherness in which intellectual, spiritual and emotional bonds are at least as essential as the physical one.[95]

As a result, Judge Martens was not convinced that Article 12 referred only to traditional marriage between persons of opposite biological sex.[96] Consequently, Judge Martens demonstrated the first retreat from a long-time restrictive interpretation of Article 12.

Despite this, the same claim was rejected again in the 1998 case *Sheffield and Horsham v. United Kingdom.*[97] Still, a number of judges continued to voice concerns about the majority's restrictive approach to Article 12.[98] More importantly, it was expressly acknowledged for the first time that this approach was detrimental to same-sex couples.[99] In his dissenting opinion, Judge Van Dijk appeared frustrated by the reservation of Article 12 for heterosexuals:

> Therefore, even if one starts from the presumption that Article 12 *has to be* considered to refer to marriages between persons of the opposite sex—a presumption which *still seems to be justified* in view of the clear wording of the provision, although it has the *unsatisfactory consequence* that it denies to, or at least makes illusive for, homosexuals a right laid down in the Convention.[100]

---

[95] *Id.* at 4.5.2.

[96] *Id*. at 4.6. Judge Martens' dissent is conducive with the idea that an individual's *sex* is not immutable. *See* Terry S. Kogan, *Transsexuals, Intersexuals, and Same-Sex Marriage,* 18 BYU J. PUB. L. 371, 375 n.12 (2004).

[97] *See* Sheffield & Horsham v. United Kingdom, 1998-V Eur. Ct. H.R.

[98] *See id*. (Van Dijk, J., dissenting) (Wildhaber, J., dissenting).

[99] *Id.* (Van Dijk, J., dissenting).

[100] *Id.* (emphasis added).

Five years later, the ECtHR made its first definitive shift away from its restrictive interpretation of Article 12.[101] In *Christine Goodwin v. United Kingdom*, the ECtHR unanimously accepted that Article 12 guaranteed post-operative transsexuals the right to marry a person of the opposite sex.[102] The ECtHR signalled that it was developing a more liberalized view of same-sex relationships and individual sexuality. First, it found that "the inability of any couple to conceive or parent a child could not be regarded as *per se* removing their right to [marry]."[103] Second, it recognized purely biological criteria was no longer appropriate to determine a person's sex for the purposes of marriage, as "major social changes" had taken place since the Convention had been adopted.[104] Third, the ECtHR acknowledged that transsexuals "live[ ] in an unsatisfactory situation" that is "no longer sustainable"[105] and that an individual should be able to "live in dignity and worth in accordance with the sexual identity chosen by them."[106] Finally, the ECtHR noted that the European Union's newly adopted Charter of Fundamental Human Rights had "no doubt deliberately" departed from the terminology of Article 12.[107] The Charter's provision containing the right to marry is genderless.[108]

Thus, the ECtHR disconnected marriage and procreation, loosened the eligibility criteria for Article 12, and acknowledged a European shift towards not defining marriage by gender.[109] As a result, the ECtHR strongly suggested that Article 12 can be associated with units other than the traditional family.[110] Same-sex couples are one such unit.[111]

Schalk was the next opportunity for the ECtHR to further extend Article 12 in favor of same-sex couples.[112] The ECtHR unanimously declined the offer.[113] Nonetheless, the judgment was not an indictment of same-sex marriage.[114] On the contrary, *Schalk* further solidified the notion that Article 12 can be associated with untraditional family units,

---

101 *See* Christine Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R.
102 *Id.*
103 *Id.* at 98.
104 *Id.* at 100.
105 *Id.* at 90.
106 *Id.* at 91.
107 *Id*. at 100.
108 *Id*. at 58, 100.
109 *Id*. at 100.
110 *Id*.
111 *Id*. at 100-01.
112 *See* Schalk & Kopf, *supra* note 1.
113 *Id.*
114 *See id.* at 56.

and suggests that the ECtHR may ultimately interpret the Convention to provide for same-sex marriage.[115]

This argument is premised on a number of statements in *Schalk*. First, the ECtHR acknowledged that Article 12 "might be interpreted so as not to exclude the marriage between two men or two women."[116] Second, the ECtHR stated that it no longer considered that Article 12 must apply to opposite-sex couples "in all circumstances,"[117] and therefore the provision was not inapplicable to same-sex couples.[118] Third, after (rightly) concluding that there is no consensus on same-sex marriage in the CoE, the ECtHR stated that "as matters stand, the question whether or not to allow same-sex marriage" is within the discretion of member states.[119] The ECtHR then opined that it "must not rush to substitute its own judgment" in place of each member states' judgment.[120]

Although Judges Malinverni and Kolver rejected their colleagues' statements,[121] as set out in points one and two, the terminology of the overall judgment implies that the ECtHR believed it would have been acting prematurely, not illegitimately, if it had interpreted Article 12 to provide for same-sex marriage in *Schalk*.[122] Therefore, based on the judgment's wording alone, it is arguable that same-sex marriage is a future possibility under the Convention. Other factors also suggest this conclusion.[123] First, the decision excluded a particular group (namely same-sex couples) from the ambit of Article 12 despite acknowledging it is not exclusively a heterosexual institution.[124] This requires an explanation.[125] Second, the traditional heterosexist and binary construction of Article 12 that *Schalk* preserves is being increasingly challenged.[126]

---

115 *See id.* at 58.
116 *Id.* at 55.
117 *Id*. at 61.
118 *Id*.
119 *Id*.
120 *Id*. at 62.
121 *Id.* (Malinverni, J., concurring).
122 *Id.* at 61.
123 *Id.* at 61-62.
124 *Id.* at 25.
125 Hodson, *supra* note 16, at 173.
126 Michele Grigolo, *Sexualities and the ECHR: Introducing The Universal Sexual Legal Subject*, 14 EUR. J. INT'L L. 1023, 1025-26 (2003).

> [I]t is necessary to contest the poles and problematize the binary construction of gender and sexuality. Instead of taking categories such as 'sex' or 'homosexual' as fixed and given, post-modern 'queer' theorists have stressed their artificiality and their role in reproducing a system of domination. [Another author] has undermined the very naturalness of the category of 'sex.' In the realm of sexual-

1. Comparable Issues in *Perry v. Schwarzenegger*

The issues addressed by the *Perry* Court bear some similarities to the issues tackled by the ECtHR in its consideration of Article 12.[127] The *Perry* Court found that the traditional concept of marriage was founded, *inter alia*, on the premise that men and women fulfil specific gender roles.[128] The *Perry* Court's ruling wholly rejected this foundation.[129] It held that the fundamental right to marry protected an individual's choice of marital partner regardless of gender.[130]

The *Perry* Court agreed with the ECtHR's position that marriage was not restricted by the ability to procreate.[131] However, unlike the ECtHR to date, the *Perry* Court ruled that the right to marry was gender neutral:

> Marriage requires two parties to give their free consent to form a relationship, which then forms the foundation of a household. The spouses must consent to support each other and any dependents. The state respects an individual's choice to build a family with another and protects the relationship because it is so central a part of an individual's life.[132]

The *Perry* Court concluded that the institution of marriage had moved towards being an "institution free from state-mandated gender roles."[133] The exclusion of same-sex couples from marriage existed only as an "artifact of a time when the genders were seen as having distinct roles in society and in marriage."[134] Unlike the ECtHR, the *Perry* Court appeared unconcerned that its ruling would conflict with the lack of con-

---

> ity, bisexuals have asserted their own specificity. The emergence of transgenderism and transsexualism as identitarian and political phenomena has demonstrated the apparent paradox of building (fixed) identity upon the impossibility of any (fixed) identity. And it has become clear that sexual borders and roles can themselves be perceived and experienced in different ways along other identitarian axes such as class, ethnicity, nationality, age and disability.

Id. (internal citations omitted).

127 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

128 *Id.* at 998.

129 *Id*.

130 *Id*. at 991-93.

131 *Id*. at 992. "Never has the state inquired into procreative capacity or intent before issuing a marriage license; indeed, a marriage license is more than a license to have procreative sexual intercourse." *Id.*

132 *Id*. at 992 (citations omitted).

133 *Id*. at 993.

134 *Id*.

sensus amongst U.S. states regarding the provision of same-sex marriage.[135]

B. Category Two Cases: Breaches of Article 8 in Conjunction with Article 14

Over the last three decades, applicants in (or previously in) a same-sex relationship used Articles 8 and 14 to argue that a member state's failure to provide them with certain rights on the basis of their sexual orientation amounts to an unlawful interference with their right to respect for their private life, family life, and/or home.[136] The ECtHR

---

[135] Although there is evidence that the ECtHR engages in inconsistent interpretative techniques. *Compare* Christine Goodwin v. United Kingdom, 2002-VI Eur. Ct. H.R., *with* Schalk & Kopf, *supra* note 1.

[136] Sarah Lucy Cooper, *Marriage, Family, Discrimination & Contradiction: An Evaluation of the Legacy and Future of the European Court of Human Rights' Jurisprudence on LGBT Rights*, 12 GERMAN L. J. 1746, 1755-56 (2011).

> [T]he applicants in *Rees*, *Cossey*, *Sheffield* and *Goodwin* also framed their claims in the context of Article 8. They claimed that the UK's legal regime illegitimately interfered with their "private life," because it exposed them to potentially distressing and embarrassing situations where they would have to disclose their birth gender. The ECtHR's view on this claim evolved similarly to its view on Article 12. In *Rees*, the ECtHR held by 12 votes to 3 that Article 8 did not impose a direct obligation on Member States to recognize post-operative transgender persons. The ECtHR reaffirmed this decision in *Cossey*, but by a narrower majority of 10 votes to 8. The majority argued that there had been certain legal developments but no emergence of a "common ground" in Europe on the recognition of gender reassignment. The ECtHR later reaffirmed these decisions in *Sheffield* by a majority of 11 votes to 9. This time the majority argued that (1) there was no common legal approach to the problems created by the recognition of gender reassignment; (2) there had not been sufficient social or legal developments to warrant a departure from its earlier decisions; and (3) the detriment suffered by the applicant was not sufficiently serious to override Member States' margin of appreciation. Members of the *Sheffield* dissent however, argued that there had been a steady "evolution of attitudes" both legally and socially with regards to transexualism and the recognition of gender reassignment. They further argued that the majority's decision endorsed a logically inconsistent system, in that the UK's system provided medical and monetary resources for transsexuals to have gender reassignment surgery, but then refused to legally recognize that new gender when the transition was complete. In *Goodwin*, the contradictory nature of the ECtHR's previous decisions came to a climax and the ECtHR unanimously held that the UK regime violated Article 8. In so holding, the ECtHR noted that there had been a "wide" international trend towards the increased social and legal acceptance of transsexuals, and that a lack of a common approach to gender reassignment was unsurprising, given the number and diversity of Member States.

Id. (internal citations omitted).

cases below demonstrate that until very recently the ECtHR, and previously the European Commission of Human Rights ("the Commission"),[137] were reluctant to accept that same-sex couples shared a family life under Article 8. Instead, both bodies confined same-sex relationships to the more socially limited private life and home spheres of Article 8.[138] Further, the ECtHR and the Commission legitimized laws that provided for differential treatment based on sexual orientation by labelling these laws as appropriate safeguards of the traditional family.[139] However, a new viewpoint has emerged. Since 2003, the ECtHR has begun untying its historical attachments to the traditional family and is gradually solidifying a heightened protection for same-sex couples under the Convention.[140] In the 1983 case of *X. and Y. v. United Kingdom,* the applicant challenged the U.K.'s refusal to grant his same-sex partner residence in the U.K.[141] The Commission rejected the claim and ruled that same-sex relationships did not fall within the scope of family life.[142] The Commission accepted, however, that restraints on same-sex relationships *could* interfere with a homosexual's private life.[143]

Three years later in *S. v. United Kingdom,* the surviving partner of a lesbian couple challenged the U.K.'s refusal to allow her succession in tenancy of the couple's common residence.[144] The Commission ruled that any interference was restricted to a consideration of the applicant's home. The Commission further affirmed that discrimination based on the fact the couple were the same sex was legitimate because the traditional family merited special protection. The Commission rejected the applicant's claim.

---

[137] From 1953 to 1998, individuals did not have direct access to the European Court of Human Rights. *Council of Europe: European Commission on Human Rights*, REFWORLD, http://www.unhcr.org/refworld/publisher/COECOMMHR.html (last visited Oct. 17, 2011). Instead, a person would apply to the European Commission on Human Rights, which would examine the case. *Id.* If the Commission found the case to be well-founded, it would launch a case in the Court on the individual's behalf. *Id.* In 1998, the European Court of Human Rights was restructured, and individuals may now take cases directly to the Court. *Id.*

[138] *See* Paul Johnson, '*An Essentially Private Manifestation of Human Personality': Constructions of Homosexuality in the European Court of Human Rights*, 10 HUM. RTS. L. REV. 67 (2010).

[139] *See id.* at 80.

[140] *See id*. at 80-82.

[141] X. & Y. v. United Kingdom, App. No. 9369/81, 32 Eur. Comm'n H.R. Dec. & Rep. 220, 220-21 (1983).

[142] *Id.* at 221.

[143] *Id.*

[144] S. v. United Kingdom, App. No. 11716/85, 47 Eur. Comm'n H.R. Dec. & Rep. 274 (1986).

This hostility towards the idea that same-sex couples share a family life continued two decades later in *Mata Estevez v. Spain.*[145] In *Mata Estevez*, the applicant lived in a mutually supportive same-sex relationship with G. for ten years.[146] The couple pooled resources and shared responsibilities.[147] Spanish law at that time did not permit the couple to marry or enter into a civil partnership.[148] G. died and the National Institute of Social Security ("INSS") refused the applicant a survivor's pension because marriage was a pre-condition of eligibility.[149] The applicant argued that the INSS's decision illegitimately interfered with his right of respect for his private and family life and that differential treatment between same-sex and married (opposite-sex) couples contravened Articles 8 and 14.[150] The ECtHR rejected the applicant's claim and ruled that his relationship with G. did not fall within the ambit of family life.[151] The ECtHR acknowledged that the applicant's emotional and sexual relationship with G. might relate to his private life, but ruled that any interference was justified because the Spanish law pursued the legitimate aim of protecting the family based on marriage bonds.[152]

The cases of *X. and Y.*, *S.,* and *Mata Estevez* all demonstrate a very narrow approach towards the concept of family life. They also represent the mildest form of scrutiny being applied to sexual orientation based classifications. Homosexuals were not viewed as a *suspect class*, and thus laws that were adverse to them were not subject to stricter scrutiny. The protection of the traditional family served a legitimate aim of the state. The exclusion of same-sex couples from numerous family-based rights was a rational and proportional method of achieving that aim.

This practice shifted in the 2003 case of *Karner v. Austria.*[153] After the death of his male partner, Karner claimed that he had the right to succeed the tenancy of the residence they shared in his partner's name.[154] Under Austrian law, a "life companion" could succeed to tenancy, but this did not include same-sex partners.[155] Karner argued that this differential treatment breached "his right to respect for his home" under Arti-

---

145 Mata Estevez v. Spain, 2001-VI Eur. Ct. H.R.
146 *Id.*
147 *Id.*
148 *Id.*
149 *Id.*
150 *Id.*
151 *Id.*
152 *Id.*
153 Karner v. Austria, 2003-IX Eur. Ct. H.R.
154 *Id.* at 3.
155 *Id.* at 19.

cle 8, and the treatment was discriminatory on the basis of his sexual orientation.[156] The ECtHR departed from its previous case-law and ruled in favor of Karner.[157] In its holding, the ECtHR stated that differences based on sexual orientation required "particularly serious reasons by way of justification,"[158] and Austria had failed to show why it was *necessary* to exclude same-sex couples from the scope of "life companion."[159] The ECtHR further found that the aim of protecting the traditional family was "rather abstract" because there was a plethora of other ways to achieve that aim.[160]

The *Karner* holding draws a number of observations. First, *Karner* suggests that the ECtHR is less amenable to the preservation of the traditional family argument commonly employed by member states to legitimize discrimination on the basis of sexual orientation. Second, the ECtHR gave greater protection to same-sex couples because it increased the threshold of review on laws that discriminate based on sexual orientation. States must now comply with the higher threshold to conform with the Convention. The fact that the ECtHR afforded this level of protection in the context of a family based right, namely succession, also suggested that the ECtHR was becoming less inimical to the idea that same-sex couples shared a family life for the purposes of Article 8.

The case of *Burden v. United Kingdom* added positively, albeit contentiously, to this emerging framework.[161] In *Burden*, the applicants were sisters who had lived in a "stable, committed and mutually supportive relationship all their lives."[162] The sisters argued that their rights under Article 1 of Protocol 1[163] and Article 14 were violated because the U.K. inheritance tax exemption only applied to a surviving spouse or civil

---

156 *Id.* at 33.

157 *See id*.

158 *Id.* at 37.

159 *Id.* at 41.

160 *Id*.

161 Burden v. United Kingdom, Eur. Ct. H.R. (Apr. 29, 2008), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=834892&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 [hereinafter Burden].

162 *Id.* at 10.

163 Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 26, at Protocol, art. 1.

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in

partner.[164] The ECtHR rejected the applicants' claim.[165] At the time it was settled law that in order for an issue to arise under Article 14, there had to be a difference in the treatment of persons in "relevantly similar situations."[166] With that in mind, the ECtHR opined:

> [T]he relationship between siblings is qualitatively of a different nature to that between married couples and homosexual civil partners . . . . The very essence of the connection between siblings is consanguinity, whereas one of the defining characteristics of a marriage or Civil Partnership Act union is that it is forbidden to close family members. The fact that the applicants have chosen to live together all their adult lives, as do many married and Civil Partnership Act couples, does not alter this essential difference between the two types of relationship.[167]

Additionally, the ECtHR found that, "as with marriage," the "expressly and deliberately" incurred legal consequences of a civil partnership "set these types of relationship apart from other forms of co-habitation."[168] Thus, the ECtHR suggested that to a certain extent, opposite-sex and same-sex relationships were on an equal footing both qualitatively and legally.[169] Such expressions of parity were unprecedented.

However, the *Burden* decision was not clean-cut. Judges Zupanèiè and Borrego vigorously dissented.[170] Judge Zupanèiè described the

---

accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Id. The terms of the Article indicate that it only applies to acquired property rights, *i.e.*, those an individual already possesses, and does not guarantee a person a right to acquire property.

164 Burden, *supra* note 161, at 3.

165 *Id.* at 4.

166 *Id.* at 60.

167 *Id*. at 62 (citation omitted).

168 *Id*. at 65.

169 *Id*.

> Just as there can be no analogy between married and Civil Partnership Act couples, on one hand, and heterosexual or homosexual couples who choose to live together but not to become husband and wife or civil partners, on the other hand, the absence of such a legally binding agreement between the applicants renders their relationship of co-habitation, despite its long duration, fundamentally different to that of a married or civil partnership couple.

Id.

170 *Id.* (Borrego, J., dissenting) (Zupanèiè, J., dissenting).

majority's decision as "logically inconsistent."[171] Judge Zupanèiè argued that "making consanguinity an impediment" to the tax exemption was "arbitrary," as the only apparent qualitative difference between the sisters' relationship and that shared between civil partners was a sexual relationship.[172] Judge Zupanèiè questioned, "Is it having sex with one another that provides the rational relationship to a legitimate government interest?"[173] Judge Borrego implied that the majority had merely made a "politically correct" decision.[174] Judge Borrego stated that the majority decision filled him "with shame."[175]

The negativity surrounding the *Burden* decision arguably disrupted the ECtHR's increasingly liberal jurisprudence in favor of same-sex couples.[176] In *Courten v. United Kingdom,* the applicant and his partner lived in a committed relationship for over twenty-five years.[177] The applicant's partner died suddenly, shortly after the U.K. legalized civil partnership.[178] Without a civil partnership, the applicant was ineligible for an inheritance tax exemption.[179] The applicant argued that he should be treated as a spouse or civil partner.[180] The ECtHR declared his claim inadmissible because cohabiting same-sex couples were not analogous to married couples or civil partners.[181] This reasoning means that if a member state provides no means of legally recognizing same-sex relationships, then same-sex couples cannot use Article 14 to complain of a discriminatory difference in treatment compared to heterosexual couples. Same-sex couples in this respect are not analogous to heterosexual couples. This ruling conflicts with the rhetoric of *Burden* because *Burden* supports the idea that same-sex and opposite-sex relationships are analogous.

---

171 *Id.* (Zupanèiè, J., dissenting).

172 *Id.*

173 *Id.*

174 *Id*. (Borrego, J., dissenting).

175 *Id*.

176 The *Burden* decision, and same-sex couples, received some negative press. *See, e.g.*, Richard Savill, *Sisters Cannot Inherit House They Have Lived in Since Birth, European Court Rules*, TELEGRAPH (London), Apr. 29, 2008, http://www.telegraph.co.uk/news/1906767/Sisters-cannot-inherit-house-they-have-lived-in-since-birth-European-Court-rules.html.

177 Courten v. United Kingdom, Eur. Ct. H.R. (Nov. 4, 2008), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=843727&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

On the other hand, the 2009 case of *Korelc v. Slovenia* solidified the holding in *Burden*.[182] In *Korelc*, the applicant lived with A.Z. in a platonic relationship.[183] When A.Z. died, the applicant unsuccessfully applied to succeed the tenancy.[184] Domestic law provided that only married or unmarried opposite-sex partners, same-sex civil partnerships, or close family members could succeed a tenancy after the death of its holder.[185] The applicant argued that the law contravened his rights under Articles 8 and 14 because it unjustly discriminated against him on the grounds of his sex.[186] The ECtHR rejected his claim.[187] The ECtHR found that the applicant's relationship was neither comparable to that of an opposite-sex nor a same-sex relationship.[188] Consequently, the ECtHR maintained the principle in *Burden* that same-sex couples shared a relationship that was qualitatively akin to an opposite-sex relationship and not that of cohabiting same-sex relatives, acquaintances, or friends.[189]

This momentum in favoring same-sex couples continued a year later in *Kozak v. Poland,* which mimicked the facts of *Karner*.[190] Polish law provided that a person in a "*de facto* marital cohabitation" could succeed to a tenancy, but this excluded same-sex partners like the applicant.[191] Poland argued that the law aimed to protect the traditional family.[192] The ECtHR rejected Poland's argument and ruled in favor of the applicant.[193]

Kozak is a landmark ruling for a number of reasons. First, although the ECtHR acknowledged that the preservation of the traditional family was "in principle" a legitimate state aim, the ECtHR's overall decision reinforced the notion (as conceived in *Karner*) that same-sex couples can-

---

182 Korelc v. Slovenia, Eur. Ct. H.R. (May 12, 2009), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=850286&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649.

183 *Id*. at 8.

184 *Id*. at 13, 19.

185 *Id*. at 43-45.

186 *Id*. at 47.

187 *Id*. at 95.

188 *Id*. at 89-91.

189 *Id*. at 90, 92-93.

190 Kozak v. Poland, Eur. Ct. H.R. (Mar. 2, 2010), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=863720&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 [hereinafter Kozak]; *see* Karner v. Austria, 2003-IX Eur. Ct. H.R.

191 Kozak, *supra* note 190, at 34.

192 *Id*. at 38.

193 *Id.* at 99.

not be used as scape-goats for achieving that state aim.[194] Second, the ECtHR found that Poland's blanket exclusion of same-sex couples was not necessary for the protection of the traditional family.[195] This solidified the approach taken in *Karner* that laws differentiating on the basis of sexual orientation are subject to stricter scrutiny. Third, the ECtHR stated:

> [G]iven that the Convention is a living instrument, to be interpreted in the light of present-day conditions, the State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice in the sphere of leading and living one's family or private life.[196]

This statement was significant because, for the first time, the ECtHR hinted that same-sex couples might fall within the ambit of family life under Article 8. Furthermore, the ECtHR chose to engage in that reasoning of its own accord. The applicant had framed his claim in the context of his private life and the ECtHR quickly determined the claim came within his home, but still the ECtHR chose to reference family life in its decision.[197] As such, *Kozak* represented the ECtHR's first significant departure from its long-time view that same-sex couples did not share a family life.[198]

This shift clearly (and quickly) manifested in *Schalk* where the ECtHR held that it was "artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy 'family life' for the purposes of Article 8."[199] In so holding, the ECtHR observed "that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships" and "are in a relevantly similar situation to a different-sex couple" with regards to their need to legally recognize and protect their relationship.[200]

---

194 *Id*. at 98.

195 *Id*. at 99.

196 *Id.* at 98 (citation omitted).

197 *Id*.

198 *Id.* at 98-99.

199 Schalk & Kopf, *supra* note 1, at 94.

200 *Id.* at 99.

As a result, the ECtHR had to determine whether depriving a same-sex partner of a way to legally recognize his relationship by an alternative registration system amounted to an unlawful interference with his family life on the grounds of his sexual orientation.[201] The majority decided that it did not.[202] On the basis that there is no established consensus among member states with regards to the recognition of same-sex relationships,[203] the ECtHR opined that member states enjoy discretion "in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment."[204] The applicants in *Schalk* could therefore not derive a right from Articles 8 and 14 to have their relationship legally protected.[205]

Consequently, member states have no obligation under the Convention to legally recognize or protect same-sex relationships to any extent, despite the fact that same-sex couples now categorically share a family life, which is a protected status under the Convention.[206]

There are several reasons to believe that this interpretation of Articles 8 and 14 will not remain static. First, three of the seven judges dissented from the majority's ruling.[207] Judges Rozakis, Spielmann, and Jebens argued that the majority should have drawn inferences from its finding that same-sex relationships constitute a family life.[208] The dissenters further argued that the majority endorsed "the legal vacuum at stake" by failing to impose on member states any positive obligation to provide a satisfactory framework that offered same-sex couples the protection "any family should enjoy."[209] This demonstrates unease about the ECtHR's ruling.

Second, the decision contradicts the established principle that Article 8 imposes a positive obligation on member states to establish frameworks enabling "family life" to be enjoyed.[210] The decision is oxymoronic. The only adequate way of resolving this is to mandate the legal protection of same-sex relationships under the Convention. Third, this problem has been made more emergent by subsequent cases that appear to have solid-

---

201 *Id.* at 107-09.
202 *Id.* at 110.
203 *Id*. at 105.
204 *Id.* at 96.
205 *Id.* at 108, 110.
206 *Id.* at 108-09.
207 *See id.*
208 *Id*. at 4.
209 *Id*.
210 Kozak, *supra* note 190, at 98.

ified the ECtHR's finding that same-sex couples share a family life.[211] Fourth, the majority noted that there is an "emerging European consensus" towards the recognition of same-sex couples, and the legal recognition of same-sex relationships is one of "evolving rights."[212] As with the Article 12 jurisprudence, this language suggests that mandating legal protection under Articles 8 and 14 would be premature, not illegitimate. Approximately forty-seven percent of the CoE's member states recognize same-sex relationships in some way. Thus, there is much reason to believe that this situation will change in favor of same-sex couples.

Ironically, the situation did change in Austria. Subsequent to the applicants in *Schalk* filing their initial complaint, Austria enacted a Registered Partnership Act in January 2010.[213] This Act provides same-sex couples with the opportunity to recognize their relationship and to receive a number of the benefits that marriage bestows.[214] The applicants argued that the new Austrian law was discriminatory because registered partnerships did not correspond to marriage in "each and every respect."[215] The ECtHR rejected this argument, finding that it was within the discretion of member states to determine what status an alternative registration system confers.[216]

1. Comparable Issues in *Perry v. Schwarzenegger*

The *Perry* Court considered a number of issues akin to those the ECtHR tackled in its consideration of Articles 8 and 14.[217] These include: (1) the adequacy of an alternative registration system and (2)

---

211 J.M. v. United Kingdom, Eur. Ct. H.R. (Dec. 28, 2010), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=874587&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649 [hereinafter J.M.] (noting, in particular, the concurring judgment of Judges Garlicki, Hirvelä, and Vuèiniæ); P.B. & J.S. v. Austria, Eur. Ct. H.R. (Oct. 22, 2010), http://cmiskp.echr.coe.int/tkp197/view.asp?action=html&documentId=871551&portal=hbkm&source=externalbydocnumber&table=F69A27FD8FB86142BF01C1166DEA398649. In J.M., the ECtHR did not expressly reaffirm the position that same-sex couples fall within the ambit of Article 8's "family life." J.M., *supra*. However, note the concurring judgment of Judges Garlicki, Hirvelä, and Vuèiniæ. *Id.* The judges opine that "the Court's position as to the question how this case is situated within the ambit of Article 8 has not been expressed in sufficiently clear terms." *Id.* Further, the court "should not have refrained from unequivocal confirmation that today, in 2010, the notion of family life can no longer be restricted to heterosexual couples alone." *Id.*

212 Schalk & Kopf, *supra* note 1, at 105.

213 *Id.* at 17.

214 *Id.* at 16-23.

215 *Id.* at 108.

216 *Id.*

217 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 993-94 (N.D. Cal. 2010).

the appropriate level of scrutiny for classifications based on sexual orientation.[218]

a. Alternative registration systems

Like Austria, California provides same-sex couples with the opportunity to recognize their relationships via a registered domestic partnership.[219] In *Perry*, the court found that this alternative registration system (as well as all other alternative registration systems, regardless of whether they provide the exact same benefits as marriage) was constitutionally inadequate.[220] California did not satisfy its obligation to allow individuals in same-sex relationships to marry.[221] The *Perry* Court premised this finding on its conclusion that California created domestic partnerships to explicitly withhold marriage from same-sex couples.[222] The *Perry* Court opined that marriage is "culturally superior" to a domestic partnership.[223]

This view is not shared by the ECtHR's recent jurisprudence, namely the cases of *Courten* and *Schalk*. If alternative registration systems become mandatory under the Convention and the *Perry* decision ultimately survives in the United States, the level of recognition mandated under the Convention will be arguably less than that demanded by the U.S. Constitution.[224]

b. The appropriate level of scrutiny for classifications based on sexual orientation as a class

The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution guarantees equal protection of the law from the states.[225] "Traditionally, equal protection analysis requires the showing of a classification, identification of the corresponding level of scrutiny, and a review of the government action to see if it meets the appropriate level of scrutiny."[226] As such, the clause resembles the function and application of Article 14 of the Convention.

---

218 *Id.*

219 *Id.* at 994.

220 *Id.* at 993-94.

221 *Id.* at 994.

222 *Id*. at 993-94.

223 *Id*.

224 This would undoubtedly spark many interesting questions.

225 U.S. CONST. amend. XIV, § 1.

226 Sonja Seehusen, *Same Sex Marriage: Does the Constitution or State Constitution Support Same-Sex Marriages?*, 14 UDC/DCSL L. REV. 133, 135 (2011).

There are three levels of scrutiny: (1) strict scrutiny; (2) intermediate scrutiny; and (3) rational basis.[227] Classifications based on race, national origin, and alienage are suspect classes to which strict scrutiny is automatically applied.[228] Gender and birth status classifications face intermediate scrutiny as they are quasi-suspect classes.[229] American courts apply different tests to determine whether a class is "suspect."[230] Non-suspect classifications are subject to rational basis review—the mildest form of scrutiny.[231]

Laws differentiating on the basis of sexual orientation have long been subject to (and able to satisfy) rational basis review (i.e., states have been able to show such laws are rationally related to a legitimate state interest).[232] As with cases in the ECtHR, this interest has commonly been related to preservation of the traditional family.[233] In the United States, the Supreme Court has yet to opine on whether such classifications are "suspect," but the majority of U.S. Circuit Courts of Appeals have found that rational basis review is the correct standard.[234] Nevertheless, a few courts have departed from this view,[235] including the *Perry* Court.[236] While the *Perry* Court did not fully assess the "strict scrutiny question" because it concluded that Proposition 8 could not even satisfy rational basis review, Judge Walker opined that "gays and lesbians are the type of minority strict scrutiny was designed to protect."[237] He concluded that "[t]he trial record shows that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation."[238]

Thus, there is an emerging practice by American courts to afford heightened scrutiny to laws that discriminate on the grounds of sexual orientation. This complements the approach taken by the ECtHR in *Karner* and *Kozak*.

---

227 *Id*.
228 *Id*. at 136.
229 *Id*.
230 *Id*.
231 *Id*.
232 *Id.* at 140.
233 *Id.* at 157.
234 *Id*. at 140.
235 *See* cases cited *supra* note 83.
236 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 997 (N.D. Cal. 2010).
237 *Id.*
238 *Id*.

Furthermore, the *Perry* Court found that there was "no evidence" that same-sex marriage harmed the institution of marriage or society.[239] In other words, banning same-sex marriage was not rationally related to California's interest in preserving the traditional family. In so holding, the *Perry* Court wholly rejected the preservation of the traditional family argument. This ruling is conducive with the rulings in *Karner* and *Kozak*, but demonstrates a very different approach. The ECtHR has been far more equivocal when rejecting this argument.

V. Conclusion

Over the last decade, the United States and the Council of Europe have shared a number of similar experiences with regard to the recognition of same-sex relationships. In both jurisdictions, an increasing number of states have implemented recognition laws and key political bodies have expressed their support for enabling same-sex couples to have access to more legal benefits.

The rulings in *Schalk* and *Perry* represent two very significant legal milestones in the Council of Europe and United States respectively. The subsequent interaction of these two cases has sparked interest in what role international law may or may not play in determining the constitutionality of same-sex marriage in the United States. However, landmark constitutional cases in the Supreme Court, particularly between 2000 and 2010, suggest that international law (and specifically the jurisprudence of the ECtHR) will at least serve as a point of reference for some members of the Supreme Court.

Consequently, it is important for American courts and litigants to engage with the wider legal framework emanating from the ECtHR in this arena. Over the last thirty years, the ECtHR has: (1) stretched the concepts of marriage and family life in favor of same-sex couples; (2) started to solidify a heightened standard of scrutiny for laws that provide for a difference in treatment on the basis of sexual orientation; (3) acknowledged that there is an emerging European consensus in favor of the legal recognition of same-sex relationships; and (4) acknowledged that the topic of legal recognition is one of evolving rights. These principles strongly suggest that the ECtHR will inevitably interpret the Convention to mandate the legal recognition of same-sex relationships in the Council of Europe. This recognition may take two forms: marriage under Article 12 and/or an alternative registration system as derived from Articles 8 and 14.

---

239 *Id.*

Schalk contributed significantly to this legal framework. Amongst other things, the ECtHR's decision clearly suggested that Article 12 can apply to same-sex couples, expressly held that same-sex couples share a family life, and acknowledged a European shift towards legally recognizing same-sex relationships. Thus, *Schalk* does not wholly support the contention that the *Perry* Court short circuited current debates about redefining marriage. It appears that the *Perry* Court merely took a more aggressive approach towards legally validating same-sex relationships than the ECtHR has done so far. American commentators suggest that the time has come for this approach to be taken in the United States.[240] This time will come in the Council of Europe.

[240] *See* Gottsfield, *supra* note 56.

Relating Diagnosis-Related Groups: What Germany and the United States Can Learn from Each Other About Acute-Care Payment Systems

Timothy D. Martin*

I. Introduction

[T]he mania for giving the Government power to meddle with the private affairs of cities or citizens is likely to cause endless trouble . . . and there is great danger that our people will lose that independence of thought and action which is the cause of much of our greatness, and sink into

* LL.M., SMU Dedman School of Law, May 2011, and J.D., SMU Dedman School of Law, December 2010, tmartin@smu.edu. Mr. Martin formerly served as a founder and Chief System Architect for Innovative Managed Care Systems, LLC and Chief Technical Officer of Claimshop, Inc. (both now known as MedAssets, Inc.). Mr. Martin thanks Belinda Sloan-Sanchez for her help with German translation and sifting through German-language documents. And as always, he thanks his long-suffering wife Christi for her constant love and encouragement. This work is dedicated to the memory of Steve Baird, whose incorrigible mischief always made the worst of times bearable: "I have been and ever shall be your friend." Star Trek III: The Search for Spock (Paramount Pictures 1984).

> *the helplessness of the Frenchman or German who expects his government to feed him when hungry, clothe him when naked, to prescribe when his child may be born and when he may die, and, in fine, to regulate every act of humanity from the cradle to the tomb, including the manner in which he may seek future admission to paradise.*[1]

Samuel Clemens could not possibly have envisaged the upheavals the world has experienced since he wrote those words almost 150 years ago. Advancement in health sciences and healthcare delivery depends on interconnected systems that employ complex standards and require detailed coordination between private entities and government. Healthcare payment systems greatly influence treatment patterns, quality of care, patient access, and overall cost. The payment systems that worked in the nineteenth century no longer work today, and countries can learn lessons from each other in this regard. This is especially true in the area of healthcare finance. Each country's struggle to reduce costs and improve access and quality is a source of valuable information other countries can put to good use. This is evidenced by their adoption of similar public payment systems for acute-inpatient medical care.[2] In the last two decades, at least nine European countries, including Germany, have instituted payment systems for inpatient hospital care that are very similar to the U.S. Medicare inpatient prospective-payment system ("IPPS").[3] The development of prospective-payment systems follows a substantial history of using other payment models.[4] Both the United States and Germany have tried the typical payment models, including (1) salaries, (2) fee-for-service, (3) capitation, (4) per-diem, and (5) hard budgets in combination with another payment method.[5]

But each of these models has significant drawbacks. The World Health Organization ("WHO") asserts that salaried providers are generally associated with low motivation, low productivity, and low quality ser-

---

[1] Mark Twain, Op-Ed., *Official Physic*, SUNDAY MERCURY (N.Y.), Apr. 21, 1867, http:/twainquotes.com/mercury/OfficialPhysic.html.

[2] *See* Jonas Schreyögg et al., *Methods to Determine Reimbursement Rates for Diagnosis Related Groups (DRG): A Comparison of Nine European Countries*, 9 HEALTH CARE MGMT. SCI. 215, 215 (2006) (noting that nine European countries have adopted payment systems based on diagnosis-related groups).

[3] *Id.* at 215-16.

[4] *See generally* M. Park, et al., *Provider Payments and Cost-Containment Lessons from OECD Countries*, 2 TECHNICAL BRIEFS FOR POL'Y-MAKERS 1 (2007) [hereinafter TECHNICAL BRIEFS FOR POLICY-MAKERS], *available at* http://www.who.int/health_financing/documents/pb_e_07_2-provider_payments.pdf.

[5] *Id.*

vice.[6] Fee-for-service—individual payments for each service a provider renders—tends to create a strong incentive to provide more and higher-cost services than necessary.[7] Capitation—payment of a fixed amount for each patient in a closed service group—tends to motivate providers to provide too little care.[8] Per-diem—a fixed amount paid to providers for each day a patient is in the hospital and represents payment in full for all services rendered on each day[9]—creates incentives to keep patients in a hospital for as long as possible, which increases costs.[10] Hard budgets create incentives to control costs, but also suffer similar disadvantages as capitation systems, which may cause providers to give too little treatment.[11] In the past, both Germany and the United States used one or more of these payment models, and because of a desire to better control costs and utilization, both countries searched for a different way to pay providers that would be cost effective and yet support high-quality care.[12] Before 1983, the Medicare system paid hospitals for inpatient care on a fee-for-service model[13] and before 2004, Germany paid hospitals a per-diem rate negotiated with insurance bodies.[14] Since then, both countries have moved to a system that pays hospitals a prospective amount for the entire hospital visit based on the type of visit and the intensity of

---

[6] *Id.* at 2.

[7] *Id.* at 2-3; *see also* Randall R. Bovbjerg, Charles C. Griffin, & Caitlin E. Carroll, *U.S. Health Care Coverage and Costs: Historical Development and Choices for the 1990s*, 21 J.L. MED. & ETHICS 141, 141 (1993).

[8] TECHNICAL BRIEFS FOR POLICY-MAKERS, *supra* note 4, at 2; U.S. Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 591 (1st Cir. 1993). Capitated payment is also called a *per-member per-month* or *PMPM* payment. *See, e.g.*, *HMO Definitions*, TEX. DEPARTMENT INS., http://www.tdi.state.tx.us/hmo/profiles/defintns.html (last updated Aug. 3, 2007).

[9] ROBERT BONNEY & ROBERT SMITH, CONTRACTING IN A MANAGED CARE ENVIRONMENT: MARKET-BASED APPROACHES 18-19 (2001); PETER R. KONGSTVEDT, ESSENTIALS OF MANAGED HEALTH CARE 147 (5th ed. 2007); MICHAEL NOWICKI, THE FINANCIAL MANAGEMENT OF HOSPITALS AND HEALTHCARE ORGANIZATIONS 76-77 (3d ed. 2004).

[10] NOWICKI, *supra* note 9, at 77; TECHNICAL BRIEFS FOR POLICY-MAKERS, *supra* note 4, at 2.

[11] TECHNICAL BRIEFS FOR POLICY-MAKERS, *supra* note 4, at 2-3.

[12] *Id.*; Uwe E. Reinhardt, *A More Rational Approach to Hospital Pricing*, *Economix Blog*, N.Y. TIMES (Jan. 30, 2009, 6:45 AM), http://economix.blogs.nytimes.com/2009/01/30/a-more-rational-approach-to-hospital-pricing [hereinafter Reinhardt, *Hospital Pricing*].

[13] Bovbjerg, Griffin, & Carroll, *supra* note 7, at 148.

[14] Colin Dunn & Suzanne Tracey, *Payment by Results—German Lessons?*, CHARTERED INST. PUB. FIN. & ACCT., at 5, http://www.cipfa.org.uk/panels/health/download/payment_by_results_german_lessons.pdf (last visited Oct. 27, 2011); TECHNICAL BRIEFS FOR POLICY-MAKERS, *supra* note 4, at 2.

resources that visit requires.[15] Under this type of payment system, a provider or payer classifies each episode of care into a group called a diagnosis-related group ("DRG"), which depends largely on a patient's major diagnosis.[16] Part II explains how the Medicare DRG and German DRG ("G-DRG") systems operate, and Part III compares the two systems.

No payment system perfectly balances the competing goals of high-quality and low-cost healthcare, and DRG payment systems are no exception. Because DRG payment systems pay a fixed amount without regard to how much treatment a patient receives, some experts criticize it as a *dumb* system that encourages early discharge—derisively called "quicker but sicker" discharge.[17] But many experts laud the Medicare DRG system as having at least slowed rising healthcare costs and attribute other countries' widespread adoption of DRG to its success in the United States.[18]

To alleviate some of these problems, both the U.S. and German DRG payment systems make additional payments for complex cases (so-called *outliers*) and new technologies they have not yet factored into their systems.[19] Although substantial problems remain in both DRG systems, the results from each system (and the variations between them) provide an opportunity to explore what is good and bad about each system and how each system can benefit from the experience of the other.

Part IV explores these potential benefits. First, in Germany's quest to reduce the length of patients' hospital visits, it should proceed with caution. Some studies attribute a significant part of the rise in private health insurance premiums in the United States to low reimbursements from public payers.[20] Germany mandates the same payment system for both public and private payers. Germany cannot rely on cost shifting,

---

[15] Jonathan Cylus & Rachel Irwin, *The Challenges of Hospital Payment Systems*, 12 EURO OBSERVER 1, 1 (2010); Wilm Quentin et al., *DRG-Type Hospital Payment in Germany: The G-DRG System*, 12 EURO OBSERVER 4, 4 (2010).

[16] RICHARD F. AVERILL ET AL., THE EVOLUTION OF CASEMIX MEASUREMENT USING DIAGNOSIS RELATED GROUPS (DRGs) 1 (1998) [hereinafter EVOLUTION OF CASEMIX MEASUREMENT], *available at* http://portalcodgdh.min-saude.pt/images/1/1b/Evolution_CMX_Measurement_Using_DRGs.pdf.

[17] TECHNICAL BRIEFS FOR POLICY-MAKERS, *supra* note 4, at 2-3; Uwe E. Reinhardt, *How Do Hospitals Get Paid? A Primer*, *Economix Blog*, N.Y. TIMES (Jan. 23, 2009, 6:40 AM), http://economix.blogs.nytimes.com/2009/01/23/how-do-hospitals-get-paid-a-primer [hereinafter Reinhardt, *How Do Hospitals Get Paid*].

[18] Reinhardt, *How do Hospitals Get Paid*, *supra* note 17.

[19] Dunn & Tracey, *supra* note 14; Quentin et al., *supra* note 15, at 5; Reinhardt, *How do Hospitals Get Paid*, *supra* note 17.

[20] Dan Bowman, *Consumers and Employers Paying Almost $90 Billion Due to Under-Payments to Hospitals and Physicians by Medicare and Medicaid*, FIERCEHEALTHCARE

since inadequate payment could lead to inadequate delivery and lower-quality care. Second, both systems struggle with incorporating new treatments and technologies into their payment systems. The German system requires case-by-case negotiation for a new technology or service and Medicare's system requires notice-and-comment rulemaking, a more global approach.[21] Third, although both systems have some mechanisms for public quality reporting, they both have weaknesses that each country could address using readily available technology. Germany could learn from the U.S. system about how to incentivize higher-quality care.[22] Fourth, both countries could enjoy long-term benefits by increasing their payment systems' sensitivity to high-value services and treatments, instead of focusing only on resource usage and complexity.[23] Medicare is attempting to address this with shared-savings initiatives, which are part of recent U.S. health-reform measures.[24] Fifth, DRG systems give providers an opportunity to implement revenue-cycle management techniques to better control costs, reduce waste, and improve care.[25] Utilizing these techniques would require providers to increase their financial management sophistication, but it is unlikely they would need to embrace the overly complicated U.S. system.[26] And sixth, Medicare uses a methodology to pay for unusually high-cost cases that has many of the same problems as fee-for-service payment systems.[27] Medicare could take an example from Germany and adopt a system that is less prone to escalating charges.

Any sort of comparison between the Medicare DRG system and the G-DRG system must account for the structural differences of each. Medicare pays for services rendered to Medicare beneficiaries—the elderly, the disabled who qualify for disability payments from Social Security or railroad retirement, and those who qualify for services under the end-

---

(Dec. 10, 2008, 12:32 PM), http://www.fiercehealthcare.com/press-releases/consumers-and-employers-paying-almost-90-billion-due-under-payments-hospitals-and-phy.

21 42 U.S.C. § 1395ww (d)(5)(K)(viii) (2006); Krankenhausentgeltgesetz [KHEntgG] [Hospital Remuneration Act], April 23, 2002, BUNDESGESETZBLATT, Teil I [BGBL. I] at 1412, as amended, July 28, 2011, BGBL. I at 1622, art. 5 (Ger.), *available at* http://www.gesetze-im-internet.de/khentgg/BJNR142200002.html.

22 *See infra* Part IV (discussing public quality data reporting).

23 *See infra* Part IV (discussing value-based insurance design).

24 Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 3022, 124 Stat. 119, 395-99 (codified at 42 U.S.C.A. § 1395jjj (2011)).

25 *See infra* Part IV (discussing fraud and abuse).

26 *See* 42 U.S.C.A. § 1395jjj (2011) (discussing coding, cost accounting, denial management, and retrospective auditing).

27 *See infra* Parts III-IV (discussing Medicare outlier payments).

stage renal disease program.[28] But the German system applies to all patients—even if they have private insurance—with the exception of psychiatric services.[29] Further, Medicare is not the only payment system in the United States.[30] The Centers for Medicare & Medicaid Services ("CMS"), however, expects that U.S. public healthcare spending will overtake private spending in 2011, and private payers in the United States generally follow the government's lead, so Medicare's payment systems are very influential.[31] Because most German doctors work as full-time employees in German hospitals, any German hospital reimbursement mechanism must necessarily include payment for physician services.[32] The Medicare DRG system pays only for hospital inpatient services—it pays for physician and outpatient services using other methods.[33] But the health reform bill Congress passed in 2010 creates new incentives for U.S. providers to become more vertically integrated, which is more organizationally similar to German providers.[34]

Despite these difficulties, one can still make useful comparisons and find areas where each system may be able to instruct the other. The United States has a much longer history in dealing with issues related to provider and patient satisfaction, administration, fraud, abuse, and quality.[35] But Germany had the advantage of observing DRG implementation in other countries before embarking on its journey.[36]

---

[28] AM. HEALTH INFO. MGMT. ASS'N, REIMBURSEMENT METHODOLOGIES FOR HEALTHCARE SERVICES xxiii (Lolita M. Jones ed., 2001) [hereinafter REIMBURSEMENT METHODOLOGIES].

[29] *See* SOZIALGESETZBUCH V GESETZLICHE KRANKENVERSICHERUNG [SGB V] [SOCIAL CODE V, PUBLIC HEALTH INSURANCE], Dec. 20, 1988, BGBL. I at 2477 (Ger.), *available at* http://www.gesetze-im-internet.de/sgb_5.

[30] *Id.*; Reinhardt, *Hospital Pricing*, *supra* note 12.

[31] Peter Landers, *Public Health Tab to Hit Milestone*, WALL ST. J., Feb. 4, 2010, http://online.wsj.com/article/SB10001424052748703575004575043490639289022.html.

[32] Norbert Roeder, *Building a Star Alliance: Australian and German DRGs*, 24 AUSTRALIAN HEALTH REV. 29, 30 (2001).

[33] *Medicare Program—General Information: Overview*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/MedicareGenInfo/ (last modified Dec. 14, 2005).

[34] *See* Patient Protection and Affordable Care Act, § 10307 (creating demonstration projects for accountable-care organizations, which create collective, global bonus payments for doctors and hospitals).

[35] *See infra* Part IV (discussing fraud and abuse).

[36] *See generally* Roeder, *supra* note 32 (describing Germany's selection of the Australian DRG system as the basis for its DRG system).

II. Diagnosis-Related Groups Demystified

Researchers at Yale University developed DRGs in the 1960s to relate a hospital's workload to its costs—both on a case-by-case basis and on a global hospital level.[37] DRGs, represented by a set of codes, generally comprise hundreds of patient treatment classifications for an entire inpatient episode of care.[38] Each DRG code maps to a relative weight based on the average cost of services.[39] For example, a DRG with a weight of 1.0 represents a treatment that has the same cost as the average cost of *all* services within the DRG system's coverage area.[40] Thus, DRGs for higher-cost treatments have higher relative weights than DRGs for lower-cost treatments.[41] For example, in 2010 the highest G-DRG relative weight was 74.0 (liver transplant) and the lowest was 0.13 (uterine contractions without a delivery).[42]

Using relative weights, one can gauge the overall amount of work a provider does in a given period simply by totaling the relative weights for all patient discharges in that period.[43] This is called a *case-mix* value.[44] Then one can determine the average resources a provider expends per case—a *case-mix index*—simply by dividing the case-mix value by the number of discharges in the sample set.[45] Case-mix values and indexes allow policymakers to allocate resources and monitor resource usage among providers more effectively and efficiently—a distinct advantage that DRGs have over other systems.[46]

The basic theory underlying fixed-payment prospective-payment systems ("PPSs"), like DRG payment, is that providers will have an incentive to control costs because they stand to make more money if a service winds up costing less than the fixed payment.[47] Policymakers also expect a number of other benefits in using a DRG-based payment system.[48]

---

[37] Evolution of Casemix Measurement, *supra* note 16; Schreyögg et al., *supra* note 2, at 216.

[38] Evolution of Casemix Measurement, *supra* note 16; Quentin et al., *supra* note 15, at 4-5.

[39] Quentin et al., *supra* note 15, at 6; Reinhardt, *Hospital Pricing*, *supra* note 12.

[40] Quentin et al., *supra* note 15, at 5; Schreyögg et al., *supra* note 2, at 219.

[41] Quentin et al., *supra* note 15, at 5.

[42] *Id.*

[43] *Id.* at 6.

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] Anne B. Casto & Elizabeth Layman, Principles of Healthcare Reimbursement 102 (3rd ed. 2011).

[48] *See* Lars Chr. Kyburg & Hubert Stüker, Feasibility Study - "DRG System as Cost Containment Method" - Medical Insurance Scheme in China 33 (2007),

These include (1) increased transparency of hospital performance through a data-driven approach, improved cost accounting, and external benchmarking; (2) decreases in average length of stay and reductions in the number of hospital beds required to treat a given population; and (3) identification and use of potential efficiencies—the transfer of risk from patients to hospitals, increases in competition between hospitals, and decreases in hospital expenditures.[49]

But there could also be negative effects including (1) a decrease in quality of care; (2) shifting expenditures to other healthcare sectors (e.g., outpatient and rehabilitation services); (3) *upcoding* cases (manipulating case reporting to get higher reimbursements); and (4) case-splitting (early discharge and re-admission).[50] After weighing the benefits and drawbacks, the United States and Germany both decided to press forward with DRG payment systems.

A. The United States Adopts DRG Payment for Medicare Part A Inpatient Coverage

In 1965, Congress enacted legislation that provided health insurance to the elderly and the poor.[51] The Medicare program, as part of that legislation, created health coverage for Americans over the age of sixty-five.[52] Congress has since expanded it to cover those on Social Security disability and patients with end-stage renal disease.[53] Medicare Part A covers hospital inpatient services and was originally based on a fee-for-service payment system.[54] Since 1977, CMS (formerly the Health Care Financing Administration) has administered Medicare.[55]

In the early 1970s, motivated by rising costs in Medicare's retrospective fee-for-service payment system, Congress asked the Department of Health, Education, and Welfare (now the Department of Health and

---

available at http://www.eucss.org.cn/fileadmin/research_papers/policy/Medical_insurance/Feasibility_DRG_Final_maintext_20071126.pdf.

[49] *Id.*

[50] *Id.*

[51] Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 286 (1965) (codified as amended in scattered sections of 42 U.S.C.).

[52] REIMBURSEMENT METHODOLOGIES, *supra* note 28.

[53] *Id.*

[54] *Id.*

[55] Ctrs. for Medicare & Medicaid Servs., *Key Milestones in Medicare and Medicaid History, Selected Years: 1965-2003*, 27 HEALTH CARE FINANCING REV. 1, 3 (2005), *available at* https://www.cms.gov/HealthCareFinancingReview/downloads/05-06Winpg1.pdf.

Human Services, or "HHS") to devise a PPS for Medicare.[56] In 1983, after observing promising results in a statewide test of a DRG-based payment system in New Jersey, Congress adopted a DRG-based method as the PPS for Medicare inpatient treatment.[57]

In the mid-1980s, the National Association of Children's Hospital and Related Institutions created Pediatric Modified Diagnosis-Related Groups to classify pediatric and neonatal patients.[58] In 1987, the New York Department of Health added classifications for patients with HIV infections and other conditions to that system and created another DRG variation called All Patient Diagnosis-Related Groups ("AP-DRGs").[59] A number of Medicaid programs and private payers have used AP-DRGs in their payment systems.[60]

But the healthcare sector needed a classification system that went beyond classifying patients according to hospital resource usage.[61] So the 3M™ Health Information Systems Group researched and developed All Patient Refined Diagnosis-Related Groups ("APR-DRGs") to account for severity of illness and risk of mortality in addition to resource intensity.[62] Many hospitals, payers, and state agencies use APR-DRGs for analysis, reporting, and payment.[63]

In 2007, because the existing DRG system failed to "adequately reimburse a facility for the more complex and resource intensive cases" and based on the work done with APR-DRGs, CMS enhanced its DRG payment system to account for complications and co-morbidities, which are additional medical conditions that exist when a hospital admits a patient.[64] CMS calls the new system the Medicare-Severity DRG ("MS-

---

[56] Social Security Amendments of 1972, Pub. L. No. 92-603, § 222, 86 Stat. 1329, 1330 (1972) (codified in scattered sections of 42 U.S.C.); William J. Scanlon, *The Future of Medicare Hospital Payment*, 25 HEALTH AFF. 70, 71 (2006).

[57] Social Security Amendments of 1983, Pub. L. No. 98-21, § 601, 97 Stat. 65, 149-56 (codified at 42 U.S.C. § 1395ww (2006); William C. Hsiao et al., *Lessons of the New Jersey DRG Payment System*, 5 HEALTH AFF. 32, 33 (1986).

[58] John H. Muldoon, *Structure and Performance of Different DRG Classification Systems for Neonatal Medicine*, 103 PEDIATRICS 302, 303 (1999).

[59] RICHARD F. AVERILL ET AL., 3M™ APR DRG CLASSIFICATION SYSTEM: METHODOLOGY OVERVIEW 13 (2010) [hereinafter APR DRG CLASSIFICATION SYSTEM], *available at* http://st2c2m3m02.connectria.com/AprGrouper/grp041_aprdrg_meth_ovrview.pdf.

[60] Muldoon, *supra* note 58, at 304.

[61] APR DRG CLASSIFICATION SYSTEM, *supra* note 59, at 23.

[62] *Id.* at 23-24.

[63] AGENCY FOR HEALTHCARE RESEARCH & QUALITY, AHRQ QUALITY INDICATORS: UNDERSTANDING THE 3M™ ALL PATIENT REFINED DRGS (APR DRGS) 1 (on file with Phoenix Law Review); Muldoon, *supra* note 58, at 304.

[64] CASTO & LAYMAN, *supra* note 47, at 105; MARIANNE F. FAZEN, MANAGED CARE DESK REFERENCE 54 (1994).

DRG") system.[65] Ultimately, Germany also opted to use a DRG system that accounts for severity of illness.

B. Germany Adopts DRG Payment for its Universal Healthcare System

Although Germany's commitment to universal healthcare dates to the nineteenth century, the foundation for their current system began with the German Parliament's enactment of Title V of the Social Code ("SGB V") in 1988.[66] SGB V created a statutory health insurance ("SHI") program, which comprised sickness funds, provided comprehensive medical care to all members, established premiums as a percentage of income, and required that citizens earning an amount below a specific threshold join the sickness funds.[67] Around 90% of the population participates in the universal system, and roughly 10% have private insurance.[68] Regional and national sickness funds, as well as physician associations, govern the German universal healthcare system.[69] The SHI program directly involves both public and private actors, which include the federal sickness funds, various provider associations, and independent quality committees.[70]

The higher growth rate of healthcare costs compared to aggregate income motivated Organization for Economic Cooperation Development member countries, including Germany, to search for alternative payment systems.[71] These countries have tried patient cost-sharing (copayments and coinsurance), clinical guidelines, clinical-pathway management, and evidence-based treatments—but most efforts have focused on monetary incentives for providers.[72] Some of these experiments have not gone well.[73] In 2007, German doctors went on strike against hospitals because

---

[65] Changes to the Hospital Inpatient Prospective Payment Systems and Fiscal Year 2008 Rates, 72 Fed. Reg. 47,130, 47,136 (Aug. 22, 2007).

[66] SOZIALGESETZBUCH V GESETZLICHE KRANKENVERSICHERUNG [SGB V] [SOCIAL CODE V, PUBLIC HEALTH INSURANCE], Dec. 20, 1988, BGBL. I at 2477 (Ger.).

[67] *Id.*; *see also* Ursula Weide, *Law and the German Universal Healthcare System: A Brief Contemporary Overview*, 6 GERMAN L.J. 1143, 1147-50 (2005).

[68] Weide, *supra* note 67, at 1149.

[69] *Id.* at 1148.

[70] Reinhard Busse et al., *Measuring, Monitoring, and Managing Quality in Germany's Hospitals*, 27 HEALTH AFF. w294, w295 (2009).

[71] TECHNICAL BRIEFS FOR POLICY-MAKERS, *supra* note 4, at 1.

[72] *Id.* at 2.

[73] Anne Marije van Essen, *New Hospital Payment Systems: Comparing Medical Strategies in The Netherlands, Germany and England*, 23 J. HEALTH ORG. & MGMT. 304, 310 (2009).

of low wages.[74] And in recent years, Germans have expressed unhappiness with rising premiums and the quality of care.[75]

Before 2004, Germany reimbursed hospitals according to per-diem payments.[76] Because that payment system motivated providers to keep patients in the hospital for as long as possible, causing costs to rise, Germany searched for another reimbursement system.[77]

In May 2000, Germany passed the Statutory Health Insurance Reform Act of 2000, which instituted a DRG-based reimbursement system for acute-care hospital treatment.[78] Early on, the actors involved decided to base the G-DRG system on the Australian DRG system.[79] Australia first adopted a DRG system in 1992 based on the AP-DRG and APR-DRG systems developed in the United States.[80] Initially, the German government tasked a consortium of self-governing bodies, including the federal associations of sickness funds, the Association of Private Health Insurance, and the German Hospital Federation, with developing the G-DRG system.[81]

In 2002, Germany passed the DRG Law, which specified timetables and rules for converting to the G-DRG system.[82] But early negotiations regarding code sets, rules for assigning DRGs to treatment episodes, and calculation of relative weights proved to be difficult and the government postponed implementation.[83] After fits and starts, the German government turned to the German Institute for the Hospital Remuneration System ("InEK"), an organization comprising various industry and government players, to define the G-DRG system.[84] InEK's responsibilities include (1) refining, maintaining, and adjusting the G-DRG grouping

---

[74] *Id.*

[75] Weide, *supra* note 67, at 1162-63.

[76] TECHNICAL BRIEFS FOR POLICY-MAKERS, *supra* note 4, at 2.

[77] *Id.*; Roeder, *supra* note 32, at 29.

[78] Gesundheitsreformgesetz 2000 [GKV 2000] [Health Reform Act of 2000], Dec. 22, 1999, BGBL. I at 2626, § 17b (Ger.); Norbert Roeder, Bernhard Rochell, & Don Hindle, *Per Case Payment in Germany: All in a Mess,* 25 AUSTRALIAN HEALTH REV. 233, 233 (2002).

[79] Quentin et al., *supra* note 15; Roeder, Rochell, & Hindle, *supra* note 78.

[80] KYBURG & STÜKE, *supra* note 48, at 32; Schreyögg et al., *supra* note 2, at 216; *Australian Refined Diagnosis Related Groups (AR-DRGs)*, DEPARTMENT HEALTH & AGEING, http://www.health.gov.au/internet/main/publishing.nsf/content/health-casemix-ardrg1.htm (last modified July 1, 2010) [hereinafter *AR-DRGs*].

[81] Quentin et al., *supra* note 15.

[82] Fallpauschalengesetz 2002 [FPG 2002] [DRG Law of 2002], Apr. 29, 2002, BGBL. I at 27, 1412 (Ger.).

[83] Roeder, Rochell, & Hindle, *supra* note 78, at 234.

[84] *Id.* at 235; *About Us*, INST. FOR HOSP. REMUNERATION SYS. (InEK), http://www.g-drg.de/cms/Das_Institut/Wir_ueber_uns (last visited Oct. 12, 2011).

based on severity; (2) researching coding standards; and (3) determining relative weights.[85] The Hospital Financing Act ("KHG") mandates a performance-based flat-rate reimbursement system based on the G-DRG system for hospitals and authorizes InEK to administer that system.[86] It further requires InEK to take complexities and comorbidities into account in the G-DRG system.[87]

One of the great difficulties in adapting the Australian system was mapping procedure and diagnosis codes to German procedure and diagnosis codes.[88] And deciding on the proper weight for a given G-DRG code was also problematic—Germany could not directly adopt the Australian weights because of significant differences in the two countries' patient populations, economies, and healthcare-delivery practices.[89] To come up with the initial set of relative weights for G-DRGs, InEK relied on a sampling of German hospitals combined with research data from other sources, rather than compiling cost data for all hospitals in the German healthcare system.[90] This was not a popular move with German hospitals and created even more difficulties in getting the G-DRG system off the ground.[91] But, after a year of optional hospital participation in 2003, the G-DRG system began a four-year transition period, from 2005 to 2009, that required all German hospitals and payers to participate.[92]

III. DRG Payment under the Medicare and G-DRG Systems

DRG payment systems involve a number of complex pieces that must fit together snugly. First, providers must communicate to payers the reasons for and nature of the services they deliver.[93] That involves turning narratives of medical diagnoses and procedures into coded information, which "[i]n its simplest form, . . . is the transformation of verbal descrip-

---

[85] *About Us*, *supra* note 84.

[86] Krankenhausfinanzierungsgesetz [KHG] [Hospital Financing Act], Mar. 17, 2009, BGBl. I at § 17b, 534 (Ger.).

[87] Hospital Financing Act, BGBl. I at § 17b, 534, para. 1.

[88] Roeder, Rochell, & Hindle, *supra* note 78, at 235; *see also infra* Part III (describing procedure and diagnosis codes).

[89] Roeder, Rochell, & Hindle, *supra* note 78, at 235.

[90] *Id.*

[91] *Id.*

[92] Quentin et al., *supra* note 15, at 6.

[93] Bonney & Smith, *supra* note 9, at 34; Casto & Layman, *supra* note 47, at 21; Deborah L. Walker et al., The Physician Billing Process: Avoiding Potholes in the Road to Getting Paid 4 (2004).

tions into numbers."[94] Both German and American providers must adhere to strict coding rules or risk underpayment or penalties.[95] Second, providers and payers must assign an appropriate DRG code to episodes of care based on that coded information and patient demographic data.[96] And third, they must calculate a payment, along with additional amounts for such things as high-cost cases, education expenses, and new technologies and services.

A. Diagnosis and Procedure Codes

The International Classification of Diseases ("ICD") is the most recognizable code set for cataloguing medical diagnoses.[97] In 1948, the WHO took on the primary responsibility for revising and maintaining the ICD.[98] Countries that have adopted the ICD code set have applied their own modifications to it through the years.[99] When Germany adopted and adapted the Australian DRG system as its own, Australia had just moved from ICD version 9 ("ICD-9") to ICD version 10 ("ICD-10").[100] Before 1986, coded data about diagnoses and procedures were generally not available in Germany.[101] In 1986, German hospitals began to use ICD-9

---

[94] LOU ANN SCHRAFFENBERGER, BASIC ICD-9-CM CODING 1 (14th ed. 2006), *available at* http://library.ahima.org/xpedio/groups/public/documents/ahima/bok1_015845.pdf; *Medical Coding*, AM. HEALTH INFO. MGMT. ASS'N, http://www.ahima.org/coding/default.aspx (last visited Oct. 13, 2011).

[95] Busse et al., *supra* note 70, at w297; *see also AHA Online Store: AHA Coding Clinic For ICD-9-CM Annual Subscription*, AM. HOSP. ASS'N, http://amstest.aha.org/EWEB/StartPage.aspx?Site=AHA&WebKey=08732a26-fea4-4534-8d9c-e112c09cd4e0 (search for "*AHA Coding Clinic For ICD-9-CM*") (last visited Oct. 27, 2011) [hereinafter *Coding Clinic*].

[96] DRG Classification and Weighting Factors, 42 C.F.R. § 412.60 (2009); 42 C.F.R. § 412.60 (c)(1)-(2) (2010); INST. FOR THE HOSP. REMUNERATION SYS. (INEK), DRG CATALOG (2010); Quentin et al., *supra* note 15, at 5; *Steps in Determining a PPS Payment*, CENTERS FOR MEDICARE & MEDICAID SERVICES, http://search.cms.hhs.gov/search?q=cache:ENBPstFiYdwJ:www.cms.gov/AcuteInpatientPPS/02_stepspps.asp+Steps+in+Determining+a+PPS+Payment&site=cms_collection&output=xml_no_dtd&client=cms_frontend&proxystylesheet=cms_frontend&ie=UTF-8&access=p&oe=ISO-8859-1 (last modified Sept. 9, 2010).

[97] *International Classification of Diseases (ICD)*, WORLD HEALTH ORG., http://www.who.int/classifications/icd/en/ (last visited Oct. 27, 2011).

[98] *Id.*

[99] Medical Data Code Sets, 45 C.F.R. § 162.1002 (2009); *AR-DRGs*, *supra* note 80; *DIMDI—Medical Knowledge Online*, GERMAN INST. MED. DOCUMENTATION & INFO., http://www.dimdi.de/static/en/index.html (last visited Oct. 27, 2011) [hereinafter DIMDI Homepage].

[100] Roeder, Rochell, & Hindle, *supra* note 78; *AR-DRGs*, *supra* note 80.

[101] Busse et al., *supra* note 70, at w 297.

codes for diagnoses, but switched to ICD-10 codes in 2000.[102] The German Institute of Medical Documentation and Information (Deutsche Institut für Medizinische Dokumentation und Information or "DIMDI") is in charge of publishing official code sets German providers use to get reimbursed.[103] It maintains the ICD-10-GM, which is the German modification to the ICD-10 code set.[104]

Currently, U.S. law requires providers to use the clinical modification to the ICD-9 code set, the ICD-9-CM.[105] The Centers for Disease Control and Prevention and the National Center for Health Statistics ("NCHS"), together with CMS, comprise the ICD-9-CM Coordination and Maintenance Committee, which maintains the ICD-9-CM code set.[106] The American Hospital Association publishes the official guidelines for ICD-9-CM—the *Coding Clinic for ICD-9-CM*.[107] ICD-9-CM diagnosis codes employ three, four, or five digits; the fourth and fifth digits, if present, generally represent a sub-classification.[108] For instance, code 410 represents acute myocardial infarction, and code 410.2 denotes a sub-classification—an infarction of the inferolateral wall.[109]

German providers have a distinct advantage over U.S. providers when it comes to the ICD diagnosis code set because they have used a version of the ICD-10 for over a decade. Currently, U.S. providers are scrambling to convert their internal processes and systems from the ICD-9-CM code set to the ICD-10 clinical modification ("ICD-10-CM") code set, which must be completed by October 1, 2013.[110] The new code set is substantially different. And although it will require few changes to the way practitioners document medical services, the professional medical-

---

[102] *Id.*

[103] SOZIALGESETZBUCH V GESETZLICHE KRANKENVERSICHERUNG [SGB V] [SOCIAL CODE V, PUBLIC HEALTH INSURANCE], July 21, 2004, BGBL. I at 1791, as amended, § 301, para. 2 (Ger.); DIMDI Homepage, *supra* note 99.

[104] SOCIAL CODE V, PUBLIC HEALTH INSURANCE, BGBL. I at 1791, as amended, § 301, para. 2 (Ger.); DIMDI Homepage, *supra* note 99.

[105] 42 U.S.C. § 1320d-2(c)(1) (2006); Medical Data Code Sets, 45 C.F.R. § 162.1002 (2009).

[106] *ICD-9-CM Coordination and Maintenance Committee*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/nchs/icd/icd9cm_maintenance.htm (last updated Oct. 6, 2011).

[107] *Coding Clinic*, *supra* note 95.

[108] CTRS. FOR MEDICARE & MEDICAID SERVS. & NAT'L CTR. FOR HEALTH STATISTICS, ICD-9-CM OFFICIAL GUIDELINES FOR CODING AND REPORTING 9 (2010) [hereinafter ICD-9-CM OFFICIAL GUIDELINES], *available at* http://www.cdc.gov/nchs/data/icd9/icdguide10.pdf.

[109] *Id.*

[110] 45 C.F.R. § 162.1002 (c)(2)-(3) (2006).

coding staff will have to be significantly reeducated.[111] CMS has created General Equivalence Mappings ("GEMs") to aid in conversion and ensure consistency.[112] But there is not always a direct correlation between an ICD-9-CM code and a similar ICD-10-CM code, so hospitals must plan carefully, budget accordingly, pay special attention to accuracy and quality, provide for additional staff training, and engage in the conversion of internal processes and information technology systems.[113] Because Germany already converted from ICD-9 to ICD-10, it may be helpful for U.S. providers to examine Germany's experience.

To document procedures, German providers must use a Germany-specific code set, the German Procedure Classification (Operationen und Prozedurenschlüssel or "OPS").[114] German law charges DIMDI with maintaining and publishing the OPS procedure code set in addition to the ICD-10-GM diagnosis code set.[115] DIMDI divides OPS codes into six chapters that document procedures for (1) diagnostic measures, (2) diagnostic imaging, (3) operations, (4) medication, (5) therapeutic non-operating activities, and (6) complementary measures.[116] The OPS code format comprises the chapter number with a three-digit general procedure classification, optionally followed by a two-digit sub-classification. For example, code 5-010.02 represents a bifrontal craniotomy, and code 5-010.03 represents a temporal craniotomy.[117]

U.S. providers and payers are, once again, at a disadvantage compared to their German counterparts when using coding procedures because they must use several different code sets. U.S. providers must use ICD-9-CM procedure codes for inpatient visits.[118] ICD-9-CM proce-

---

111 *ICD-9 and ICD-10 FAQ*, *Clinical & Practice Management*, AM. C. EMERGENCY PHYSICIANS, http://www.acep.org/practres.aspx?id=30476 (last visited Oct. 13, 2011).

112 CTRS. FOR MEDICARE & MEDICAID SERVS., SECOND IN SERIES,GENERAL EQUIVALENCE MAPPINGS: ICD-9-CM TO AND FROM ICD-10-CM AND ICD-10-PCS (2010), *available at* https://www.cms.gov/ICD10/Downloads/GEMs-CrosswalksBasicFAQ.pdf.

113 Alan F. Dowling & Theresa A. Wisdom, *The ICD-10 2011 To-Do List*, 81 J. AHIMA 21 (Sept. 2010).

114 DIMDI Homepage, *supra* note 99.

115 SOZIALGESETZBUCH V GESETZLICHE KRANKENVERSICHERUNG [SGB V] [SOCIAL CODE V, PUBLIC HEALTH INSURANCE], July 21, 2004, BGBL. I at 1791, as amended, § 301, para. 2 (Ger.).

116 *German Procedure Classification OPS*, GERMAN INST. MED. DOCUMENTATION & INFO., http://www.dimdi.de/static/en/klassi/prozeduren/ops301/index.htm (last visited Oct. 13, 2011).

117 *OPS Version 2011: Chapter 5 Surgery*, GERMAN INST. MED. DOCUMENTATION & INFO., http://www.dimdi.de/static/de/klassi/prozeduren/ops301/opshtml2011/block-5-01. . .5-05.htm (last visited Oct. 13, 2011).

118 NAT'L UNIF. BILLING COMM., OFFICIAL UB-04 DATA SPECIFICATIONS MANUAL 101 (2011).

dure codes are three or four digits, with a decimal point after the second digit that allows for sub-classification.[119] ICD-9-CM procedure codes are divided into seventeen clinical categories that include operations on the nervous system, operations on the endocrine system, operations on the eye, and other categories.[120] For outpatient hospital claims, U.S. providers must use the Healthcare Common Procedural Coding System ("HCPCS"—often pronounced *hick-picks*) code set to identify medical services, procedures, supplies, and other articles physicians and other practitioners use in treatment.[121] The United States might be able to reduce its coding complexity by standardizing a single code set as Germany has done.

Because medical coding is so complex in the United States, providers universally employ specially trained coding professionals. The American Health Information Management Association offers various certifications for medical-coding professionals.[122] But in Germany, doctors do the coding.[123] Some authorities acknowledge that it has become increasingly difficult for doctors to learn all the ins and outs of diagnosis and procedure coding.[124] And it becomes even more difficult when doctors of one specialty must handle coding for cases that require multidisciplinary treatment.[125] Correct coding is essential to proper payment because assigning the right DRG code to an admission utterly depends on it. German providers should consider using specially trained professionals to increase coding accuracy.

B. DRG Code Assignment (Grouping)

Assignment of G-DRG codes to a hospital visit under the German system and assignment of MS-DRG codes to a hospital visit under the Medicare system employ very similar methods. Determining the proper

---

119 ICD-9-CM OFFICIAL GUIDELINES, *supra* note 108, at 10.

120 MARY JO BOWIE & REGINA M. SCHAFFER, UNDERSTANDING ICD-9-CM CODING 23 (2010).

121 *HCPCS—General Information: Overview*, CENTERS FOR MEDICARE & MEDICAID SERVICES, http://www.cms.gov/medhcpcsgeninfo/ (last modified Oct. 13, 2011).

122 *Medical Coding Profession*, AM. HEALTH INFO. MGMT. ASS'N, http://www.ahima.org/coding/profession.aspx (last visited Oct. 13, 2011).

123 Dunn & Tracey, *supra* note 14, at 6-7; Roeder, Rochell, & Hindle, *supra* note 78, at 29.

124 Dunn & Tracey, *supra* note 14, at 6-7; Roeder, Rochell, & Hindle, *supra* note 78, at 29.

125 Roeder, Rochell, & Hindle, *supra* note 78, at 30-31.

DRG for a visit is typically referred to as *grouping* or *pricing* and is usually accomplished by software called a *grouper* or a *pricer*.[126]

InEK publishes a Definition Guide that defines procedures for determining a G-DRG code for a particular hospital visit.[127] InEK divides G-DRG codes into twenty-five Major Diagnostic Categories ("MDCs"). Initially, the G-DRG system employed close to 650 G-DRG codes, but now it uses more than 1,200.[128] Unusually high-cost cases, such as transplants or extended intensive-care episodes, map directly to a particular G-DRG through a process called pre-MDC assignment.[129] Other cases map to a G-DRG, after assignment to an MDC, based on major diagnosis, primary and secondary procedures, secondary diagnoses, age, sex, and other factors such as newborn weight.[130] G-DRGs are four-character alpha-numeric codes where the first letter identifies the MDC.[131] For example, G-DRG code B02A represents a craniotomy or complex spine surgery with radiation therapy—the "B" indicates the code belongs to MDC 01, diseases and disorders of the nervous system.[132] Note that G-DRG codes that begin with "A" belong to the pre-MDC assignment category.[133]

The MS-DRG system also divides DRGs into twenty-five MDCs and assigns high-cost or complex cases, such as transplants, to a particular MS-DRG code using pre-MDC assignment.[134] It then takes complications and comorbidities into account along with a patient's age, sex, medical or surgical status, and discharge status to make a final MS-DRG assignment.[135] Medicare originally used 467 DRGs, but CMS has since expanded the system to use 738 DRG codes.[136]

---

126 *E.g.*, *DRG FAQ*, DRGGROUPERS.COM, http://www.drggroupers.com/drgs.html (last visited Oct. 13, 2011); *Groupers and Pricers*, INNOVATIVE RESOURCES FOR PAYORS, http://www.irp.com/solutions/groupers.html (last visited Oct. 13, 2011); *Inpatient PPS PC Pricer*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/PCPricer/03_inpatient.asp (last modified Sept. 7, 2011).

127 INST. FOR THE HOSP. REMUNERATION SYS. (INEK), G-DRG GERMAN DIAGNOSIS RELATED GROUPS VERSION 2011 DEFINITION GUIDE COMPACT VERSION xi (2010) [hereinafter G-DRG DEFINITION GUIDE].

128 Quentin et al., *supra* note 15.

129 G-DRG DEFINITION GUIDE, *supra* note 127, at 7; Quentin et al., *supra* note 15, at 4-5.

130 G-DRG DEFINITION GUIDE, *supra* note 127, at 6; Quentin et al., *supra* note 15, at 5.

131 G-DRG DEFINITION GUIDE, *supra* note 127, at 3.

132 *Id.* at 17.

133 *Id.*

134 CASTO & LAYMAN, *supra* note 47, at 108-09.

135 *Id.*

136 *See* OFFICE OF TECH. ASSESSMENT, DIAGNOSIS RELATED GROUPS (DRGS) AND THE MEDICARE PROGRAM: IMPLICATIONS FOR MEDICAL TECHNOLOGY 15 (1983), *available at*

Unfortunately, neither the G-DRG system nor the MS-DRG system factor *value* into the DRG assignment equation—both systems look only to resource consumption and complexity. This is a common problem with bundled-payment systems, such as DRG payment systems, that make a single payment for all services related to a treatment or condition.[137] Both countries could address this issue by adding weight for additional treatments that may prevent future illness and hospitalization.

C. Determining Relative DRG Weights

One of the most difficult and complex aspects of operating a DRG payment system is determining the relative weights for each DRG code. In general, DRG systems base weights on the relative average cost of each service.[138] Difficulties arise in gathering and analyzing cost information. Initially, the German government used a variety of sources to determine relative costs—a measure that was not popular with German hospitals.[139] But later, the KHG authorized InEK to pay small bonuses to approximately 250 hospitals that supplied detailed cost reports.[140] InEK, in conjunction with independent data-processing contractors, uses these data to calculate individual G-DRG relative weights.[141] There is a two-year time lag between when InEK receives cost data and the time it factors the data into the relative weights.[142] InEK publishes a table of all G-DRGs, their relative weights, mean lengths of stay, and other information needed to calculate a payment amount.[143] For instance, the B02A code for craniotomy or complex spine surgery with radiation therapy has a relative weight of 9.007.[144]

---

http://www.princeton.edu/~ota/disk3/1983/8306/8306.PDF; *FY 2011 IPPS Proposed Rule Home Page: AOR/BOR File*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/acuteinpatientpps/ipps2010/itemdetail.asp?itemid=cmS1234680 (follow zip file AOR/BOR File) (listing 738 DRG codes) (last modified Apr. 7, 2011).

137 *Bundled Payments for Care Improvement*, CENTERS FOR MEDICARE & MEDICAID INNOVATION, http://innovations.cms.gov/areas-of-focus/patient-care-models/bundled-payments-for-care-improvement.html (last visited Oct. 13, 2011).

138 Reinhardt, *Hospital Pricing*, *supra* note 12.

139 Roeder, Rochell, & Hindle, *supra* note 78.

140 Krankenhausfinanzierungsgesetz [KHG] [Hospital Financing Act], Mar. 17, 2009, BGBL. I at 886, as amended, § 17a, 534, para. 5 (Ger.); Quentin et al., *supra* note 15, at 5.

141 *See generally* INST. FOR THE HOSP. REMUNERATION SYS. (INEK), CALCULATION OF COSTS FALL: MANUAL FOR USE IN HOSPITALS (2007) (describing the procedure for calculating G-DRG relative weights).

142 Quentin et al., *supra* note 15, at 5.

143 INST. FOR THE HOSP. REMUNERATION SYS. (INEK), DRG CATALOG (2010).

144 *Id.* at 6.

Unlike the German sampling approach, Medicare requires every participating hospital (which includes almost every hospital in the United States) to file annual cost reports that include the hospital's financial data.[145] Medicare uses this cost data not only for determining relative weights but also for determining what it calls "market basket updates" to the overall MS-DRG pricing system and cost-to-charge ratios for individual hospitals.[146] Similar to the German system, there is a two-year lag between when Medicare receives cost data from hospitals and the time it takes to factor that data into various parts of its payment system.[147]

D. Basic DRG Payment Methodologies

In its basic form, a DRG payment system simply multiplies a relative weight by a base rate or base price to arrive at a payment amount for a particular hospital visit.[148] This would seem to make negotiating payment rates very simple because providers need negotiate only the price for relative weight 1.0.[149] But the U.S. system is much more complex than that, and, during the current transition period, the German system is not quite so simple either.

As defined on the surface, the G-DRG system does indeed employ the simple method of multiplying a G-DRG's relative weight by a base price to get a payment amount.[150] But during the transition period from 2005 to 2009, each hospital started with an individually negotiated base rate incrementally adjusted toward a *statewide* base rate (negotiated for each of Germany's sixteen states) each year until it converged to the statewide rate in the final transition year.[151] Hospitals that had base rates lower than the applicable state rate benefitted by seeing their reimbursements increase each year, and hospitals with base rates higher than the state base rate saw reimbursements drop each year during the transition.[152] The Hospital Benefits Act of 2010 provides for a similar transi-

---

145 42 U.S.C. § 1395g (2010); 42 C.F.R. § 413.20(b) (2010).

146 *Market Basket Definitions and General Information*, CENTERS FOR MEDICARE & MEDICAID SERVICES, 4, https://www.cms.gov/MedicareProgramRatesStats/downloads/info.pdf (last visited Oct. 13, 2011).

147 *Medicare Final Rule on Cost Outlier Payments Summary*, WIS. HOSP. ASS'N, INC., http://www.wha.org/financeAndData/pdf/outliersum6-03.pdf (last visited Oct. 13, 2011).

148 Reinhardt, *Hospital Pricing*, *supra* note 12.

149 Schreyögg et al., *supra* note 2, at 216.

150 *See* Verordnung zum DRG-System [KFPV] [Ordinance to the DRG System], Oct. 13, 2004, BGBL. I at 1995 (Ger.) (describing hospital payment as the appropriately weighted base rate); Quentin et al., *supra* note 15, at 5.

151 Quentin et al., *supra* note 15, at 5-6.

152 *Id.*

tion between 2010 and 2014.[153] During that period, the various statewide base rates will incrementally transition to a single, national base rate.[154] Global budgets also confine G-DRG reimbursement; if a hospital exceeds its yearly budget, insurers will pay only 35% of the excess and hospitals must repay 60% of any under-budget amount.[155] Recent health-reform initiatives in the United States have created a similar mechanism, through Accountable Care Organizations, that requires participating providers to take on some risk but allows them to capture part of any savings as measured against an expenditure benchmark.[156]

Calculating reimbursement under the MS-DRG system for Medicare is a far more complicated affair than it is in the G-DRG system. First, Medicare separates its base rate into two components—an operating base-payment rate and a capital base-payment rate.[157] It then further divides the operating base-payment rate into a labor-related portion and a non-labor-related portion.[158] Medicare then adjusts these amounts depending on a hospital's wage index and whether the hospital complies with quality-data reporting requirements.[159] Medicare adds the adjusted labor-related portion to the adjusted non-labor-related portion to arrive at the adjusted operating base-payment rate.[160] Medicare also adjusts the capital base-payment rate according to a hospital's capital geographic adjustment factor.[161] Finally, Medicare adds the adjusted operating base-payment rate to the adjusted capital base-payment rate and multiplies the result by the appropriate MS-DRG weight to arrive at the MS-DRG payment for an episode of care.[162] But this is not the end of the DRG-payment labyrinth in either Germany or the United States.

---

153 Krankenhausentgeltgesetz 2010 [KHEntgG 2010] [Hospital Remuneration Act], Dec. 22, 2010, BGBL. I at 2309, as amended, at § 9, para. 8 (Ger.).

154 *Id.*

155 Dunn & Tracey, *supra* note 14; TECHNICAL BRIEFS FOR POLICY-MAKERS, *supra* note 4.

156 Medicare Shared Savings Program: Accountable Care Organizations, 76 Fed. Reg. 19,528, 19,530 (Apr. 7, 2011) (to be codified 42 C.F.R. pt. 425).

157 *See generally Acute Care Hospital Inpatient Prospective Payment System*, CENTERS FOR MEDICARE & MEDICAID SERVICES (2010), http://www.cms.gov/MLNProducts/downloads/AcutePaymtSysfctsht.pdf [hereinafter CMS IPPS] (describing the Medicare IPPS elements).

158 Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long Term Care Hospital Prospective Payment System Changes and FY2011 Rates; Final Rule, 75 Fed. Reg. 50,041, 50,451 (Aug. 16, 2010).

159 *Id.*

160 *Id.* at 50,433.

161 Payment Based on the Federal Rate, 42 C.F.R. § 412.312 (2009).

162 § 412.312(a); 75 Fed. Reg. 50,433.

E. Outlier Payments for Complex or High-Cost Cases

Critics of DRG payment systems have charged that DRGs fail to take into account all the variation in costs for comparable hospital stays.[163] To mitigate these effects, both the G-DRG and MS-DRG systems provide outlier payments for complex or high-cost cases, but the two systems use very different methods to arrive at the payment amounts.[164] The G-DRG system recognizes outliers for cases when patients remain in the hospital for a period longer than a standard length of time calculated for the patient's G-DRG or when a hospital discharges patients before a lower standard length of time.[165] These two points are called high- and low-trim points, respectively.[166] The high-trim point is the smaller of the average length of stay plus seventeen days or the average length of stay plus two standard deviations.[167] A hospital receives a G-DRG-specific add-on payment for every additional day a patient stays in the hospital above the high-trim point.[168] And if a hospital discharges a patient before the patient's length of stay reaches the low-trim point, payment is reduced by a per-diem based amount.[169]

Under Medicare, CMS makes an outlier payment when the hospital's cost for a patient visit exceeds a fixed-loss cost threshold, which is the MS-DRG payment, including any additional payments for medical education and new technologies, plus an outlier threshold amount.[170] CMS estimates the cost of a hospital visit by multiplying the amount the hospital charges for the visit by the hospital's operating cost-to-charge ratio ("operating CCR") plus the hospital's capital cost-to-charge ratio ("capital CCR").[171] A hospital's CCRs either come directly from cost reports the hospital filed with CMS for previous years or, under certain circumstances, from applicable statewide average CCRs.[172] The final outlier

---

163 Scanlon, *supra* note 56, at 76.

164 Reinhardt, *Hospital Pricing*, *supra* note 12.

165 Quentin et al., *supra* note 15; Schreyögg et al., *supra* note 2, at 218-19.

166 Quentin et al., *supra* note 15; Schreyögg et al., *supra* note 2, at 218-19.

167 Schreyögg et al., *supra* note 2, at 219.

168 Quentin et al., *supra* note 15, at 5.

169 *Id.*

170 Outlier Cases: General Provisions, 42 C.F.R. § 412.80 (2009).

171 § 412.80(a)(1)(ii), (3).

172 42 C.F.R. § 412.84 (i)(3) (2009); Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long Term Care Hospital Prospective Payment System Changes and FY2011 Rates; Final Rule, 75 Fed. Reg. 50,041, 50,430-31, 50,590-92 (Aug. 16, 2010); *Internet Only Manuals (IOMs)*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/manuals/iom/itemdetail.asp?itemid=cmS018912 (follow "Chapter 3 – Inpatient Hospital Billing" hyperlink) (last modified Aug. 29, 2011).

payment is the estimated cost less the fixed-loss cost threshold multiplied by a marginal cost factor (80% since 1995).[173]

The Medicare outlier payment methodology creates many of the same problems fee-for-service payment systems create. Because it is based on a ratio between outdated costs and current charges, providers have incentives to continually increase charges to garner more outlier payments. Medicare should reexamine its outlier payment methodology and implement one that has fewer tendencies to create perverse incentives. The German outlier payment methodology may well be the right formula.

F. Other Additional Payments

Both the German and Medicare payment systems make additional payments for certain activities and circumstances that include variations in patient demographics, use of new technologies, and provision of medical education. The German system makes payment adjustments for hospitals in densely populated urban areas and may make payment adjustments based on local wage indexes.[174] It may also make additional payments for new technologies or procedures that have proved beneficial.[175] But these new technology add-on payments may be difficult for hospitals to obtain because hospitals must negotiate them individually on a case-by-case basis.[176] The G-DRG system typically makes these new-technology payments using a fee-for-service methodology.[177] Further, the KHG authorizes additional payment to hospitals for professional training and medical education at teaching hospitals.[178] But hospitals must supply quality-reporting data and adopt quality-control measures or suffer payment reductions.[179] In this regard, hospitals must submit quality data for at least 80% of cases to avoid payment cuts of 150 euro per case.[180]

---

173 § 412.84 (k).

174 Wilm Quentin, Presentation at LSE/NHS Confederation Seminar Series 2010: Hospital Financing in Germany: The G-DRG System (May 25, 2010) (on file with *Phoenix Law Review*).

175 Krankenhausentgeltgesetz 2010 [KHEntgG 2010] [Hospital Remuneration Act], Dec. 22, 2010, BGBL. I at 2309, as amended, at § 6, (Ger.).

176 Hospital Remuneration Act, BGBL. I at § 11.

177 Schreyögg et al., *supra* note 2, at 222.

178 Krankenhausfinanzierungsgesetz [KHG] [Hospital Financing Act], Mar. 17, 2009, BGBL. I at § 17a, 534 (Ger.).

179 Hospital Financing Act, BGBL. I at § 17b.

180 Busse et al., *supra* note 70, at w296.

In 2000, Congress authorized Medicare to make additional payments for the use of new medical services or technology.[181] The service or technology must be (1) new—not "substantially similar" to any current service or technology; (2) paid inadequately by Medicare; (3) something that "substantially improves" treatment or diagnosis; and (4) one that causes a case's cost to exceed normal payment.[182] Unlike the German system, where each hospital must negotiate new technology payments, Medicare employs notice-and-comment rulemaking.[183] While this approach may be more thorough and create smaller burdens for individual providers, it is time consuming and focuses less on costs that vary across providers. Both countries could benefit from a middle-ground approach where hospitals can negotiate an interim payment while the system pursues more thorough regulatory procedures.

Medicare also makes additional payments, according to a complex formula, when a hospital engages in direct-graduate-medical education and indirect-medical education.[184] Calculating indirect-medical education payments involves making further adjustments to a hospital's base-payment and capital-payment rates based on exponential formulas—one of which uses the transcendental number *e*.[185]

Finally, Medicare makes additional payments, according to yet another complex formula, to hospitals that treat a disproportionately large number of indigent patients.[186] This complex calculation also involves an exponential formula involving the transcendental number *e*.[187] The complexity of Medicare add-on payment calculations often prevents providers from anticipating and booking expected payments and

---

181 Medicare, Medicaid, and SCHIP Benefits Improvement and Protection Act of 2000, Pub. L. No. 106-554, 114 Stat. 2763A-463 (codified as amended in scattered sections of 42 U.S.C.).

182 42 C.F.R. §§ 412.87(b), 412.88(b)(2) (2009); Medicare Program; Hospital Inpatient Prospective Payment Systems for Acute Care Hospitals and the Long Term Care Hospital Prospective Payment System Changes and FY2011 Rates; Final Rule, 75 Fed. Reg. 50,041, 50,137 (Aug. 16, 2010).

183 42 U.S.C.A. § 1395ww (d)(5)(K)(viii) (2011).

184 Special Treatment: Hospitals the Incur Indirect Costs for Graduate Medical Education Programs, 42 C.F.R. § 412.105 (2009); Indirect Medical Education Adjustment Factor, 42 C.F.R. § 412.322 (2009); CMS IPPS, *supra* note 157.

185 §§ 412.105(e)(1), 412.312 (a).

186 Payments to Hospitals for Inpatient Hospital Services, 42 U.S.C.A. § 1395ww (2011); Special Treatment: Hospitals that Serve a Disproportionate Share of Low-Income Patients, 42 C.F.R. § 412.106 (2010); Disproportionate Share Adjustment Factor, 42 C.F.R. § 412.320 (2010).

187 § 412.320.

creates an impediment to efficient financial management.[188] The United States could, perhaps, learn from Germany that such complexity is unnecessary.

IV. Lessons and Opportunities for Improvement

The experience of both countries with DRG payment systems sheds light on important issues. Patient and provider satisfaction with the systems gets mixed reviews on both sides of the pond. Quality issues loom large, and both systems could do more to improve the quality of care and, therefore, the satisfaction levels of both patients and providers. Both systems need to address fraud and abuse more comprehensively. Finally, both systems have issues with administration; Germany has administration issues because it fails to adequately address the implicit complexities of DRG systems, and the American system has administration issues because it has created too much complexity.

If the G-DRG system's goal was to reduce the number of hospitals and beds in Germany by reducing the aggregate number of days patients stayed in hospitals, it seems to have succeeded. In 1991, Germany had 2,411 acute-care hospitals and 665,565 beds.[189] By 2009, Germany had 2,084 hospitals (a reduction of 13.6%) and 503,341 beds (a reduction of 24.4%).[190] To an American, whose country has 5,795 acute-care hospitals and a population over 310 million, 2,083 hospitals serving a population of 82 million would seem like a high saturation level (Germany has 36% as many hospitals serving 26% of the U.S. population).[191] This indicates

---

188 David M. Frankford, *The Complexity of Medicare's Hospital Reimbursement System: Paradoxes of Averaging*, 78 Iowa L. Rev. 517, 524-25 (1993).

189 Kyburg & Stüker , *supra* note 48, at 35.

190 Hospitals and Prevention or Rehabilitation Facilities (number and per 100,000 inhabitants) as well as Stays (number of stays, occupancy/billing days and length of stay), Fed. Health Monitoring Sys. (Gesundheitsberichterstattung des Bundes), http://www.gbe-bund.de/oowa921-install/servlet/oowa/aw92/dboowasys921.xwdevkit/xwd_init?gbe.isgbetol/xs_start_neu/&p_aid=i&p_aid=64014170&nummer=519&p_sprache=E&p_indsp=-&p_aid=76888249 (last visited Oct. 14, 2011) (Ger.); *Installed Beds in Hospitals and Prevention or Rehabilitation Facilities (number and per 100,000 inhabitants, degree of utilization and number of cases per bed)*, Fed. Health Monitoring Sys. (Gesundheitsberichterstattung des Bundes), http://www.gbe-bund.de/oowa921-install/servlet/oowa/aw92/dboowasys921.xwdevkit/xwd_init?gbe.isgbetol/xs_start_neu/&p_aid=3&p_aid=35479989&nummer=529&p_sprache=E&p_indsp=-&p_aid=83099527 (last visited Oct. 14, 2011) (Ger.).

191 *Fast Facts on U.S. Hospitals*, Am. Hosp. Ass'n, http://www.aha.org/aha/content/2010/pdf/101207fastfacts.pdf (last updated Dec. 6, 2010); *The World Factbook* , Cent. Intelligence Agency, https://www.cia.gov/library/publications/the-world-factbook/geos/gm.html (last updated Oct. 6, 2011); *U.S. & World Population Clocks*, U.S. Census Bureau, http://www.census.gov/main/www/popclock.html (last visited Oct. 14, 2011).

that Germany still may have some distance to go before it reaches an optimal per-capita bed count.

Even though the number of hospitals dropped during InEK's first survey period, patient satisfaction seems to have improved slightly, and the decrease in hospitals does not seem to have affected access to treatment.[192] But Germany should proceed with caution because a reduction in bed count could be a contributing factor to German physicians, nurses, and hospital employees overwhelmingly reporting a negative effect on motivation and job satisfaction as a result of the implementation of the G-DRG system.[193] Still, hospitals and stakeholders viewed the introduction of G-DRGs "positively in terms of further advancement of the system."[194]

Both the U.S. and German systems suffer from difficulty in recognizing, adopting, and adequately paying for new treatment; this could have a negative effect on provider satisfaction, quality of care, and innovation.[195] "DRGs are really risk-adjusted per diems and therefore safer but not more popular among hospitals, for they are often accused of adjusting too slowly to new technologies."[196] German hospitals must negotiate payments for new technologies or services on a case-by-case basis.[197] But Medicare requires providers to go through a lengthy notice-and-comment rulemaking procedure.[198] Both countries should reexamine their procedures for handling payment for new services and technologies and streamline those procedures while leaving adequate safeguards in place. A hybrid approach where hospitals may seek individually negotiated interim payments in lieu of a more permanent solution might work.

Quality has long been a concern of both countries. After Germany implemented the G-DRG system, quality, according to some measures,

---

192 INST. FOR THE HOSP. REMUNERATION SYS. (INEK), G-DRG-IMPACT EVALUATION ACCORDING TO SEC. 17B PARA. 8 HOSPITAL FINANCE ACT: FINAL REPORT OF THE FIRST RESEARCH CYCLE (2004 TO 2006) 7, 9-10 (2010) [hereinafter REPORT OF THE FIRST RESEARCH CYCLE].

193 *Id.* at 5.

194 *Id.* at 11.

195 Tom Keesling, *If Mount Olympus Was Subject to Medicare DRG Reimbursement, Would Zeus Have Been So Innovative With Eternal Damnation?*, MED. TOURISM REV. (May 13, 2009), http://medicaltourismreview.blogspot.com/2009/05/had-zeus-know-about-medicare-drg.html.

196 Len M. Nichols & Ann. S. O'Malley, *Hospital Payment Systems: Will Payers Like the Future Better Than The Past?*, 25 HEALTH AFF 81, 83 (2006).

197 Krankenhausentgeltgesetz 2010 [KHEntgG 2010] [Hospital Remuneration Act], Dec. 22, 2010, BGBL. I at 2309, as amended, at § 6 (Ger.).

198 42 U.S.C.A. § 1395ww (d)(5)(K)(viii) (2011).

remained stable or slightly improved.[199] But that is no cause for celebration. Some estimates claim that between 5.7% and 6.7% of German hospital patients suffer hospital-acquired infections.[200] Those estimates put the total number of hospital-acquired infections in Germany between 600,000 and 700,000 per year.[201] Further, it may be that 1% of those infections actually cause death and between 3% and 4% contribute significantly to it.[202] Other estimates report a somewhat lower figure of 500,000 annual hospital infections in Germany, but that is still far too high.[203] The United States has not done much better; some estimates claim 4.5% of U.S. patients (1.7 million people) get hospital-acquired infections.[204]

Germany currently makes standardized quality reports on all German hospitals available to consumers online, but some have criticized those reports because they lack outcome data.[205] Germany should take measures to correct this issue because the nature of its universal health system and the new data available under G-DRG allows Germany to do almost complete follow-up on every patient.[206] The United States is at a disadvantage when it comes to online quality reporting because its healthcare system is so fractured. While some online reporting systems are available to consumers, they lack standardization or do not track the entire spectrum of patient demographics (e.g., the HHS Hospital Compare site has data only for Medicare patients).[207]

In 2005, Congress began to aggressively examine the causes of hospital infections, other hospital-acquired conditions, and never events. Hospitals must now report a present-on-admission indicator for each

---

199 REPORT OF THE FIRST RESEARCH CYCLE, *supra* note 192, at 9.

200 MEDISOL, CONSISTENT INFECTION CONTROL NEEDS HYGIENIC IT-SOLUTIONS 4 (2008).

201 *Id.*

202 *Id.*

203 FROST & SULLIVAN, HOSPITAL-ACQUIRED INFECTIONS—TRENDS ACROSS EUROPE (2010), *available at* http://www.sicherheitimop.com/documents/FrostSullivanHospitalInfectionsTrendsacrossEuropeJuni2010.pdf.

204 R. DOUGLAS SCOTT II, THE DIRECT MEDICAL COSTS OF HEALTHCARE-ASSOCIATED INFECTIONS IN U.S. HOSPITALS AND THE BENEFITS OF PREVENTION 1 (2009), *available at* http://www.cdc.gov/ncidod/dhqp/pdf/scott_costpaper.pdf.

205 Busse et al., *supra* note 70, at w302.

206 Busse et al., *supra* note 70, at w301-02.

207 Carolyn M. Clancy, *Do Your Homework Before You Choose a Hospital*, AGENCY FOR HEALTHCARE RES. & QUALITY (June 17, 2008), http://www.ahrq.gov/consumer/cc/cc061708.htm; *Hospital Compare*, U.S. DEPARTMENT OF HEALTH & HUMAN SERVICES, http://www.hospitalcompare.hhs.gov/hospital-search.aspx (last updated Oct. 13, 2011); *Quality Check®—What Can This Site Do for Me?*, JOINT COMMISION, http://www.qualitycheck.org/help_qc_what.aspx (last visited Oct. 14, 2011).

diagnosis.[208] CMS will not use certain medical conditions to select higher-paying MS-DRGs unless providers diagnose those conditions upon admission.[209] These conditions include foreign objects retained after surgery, air embolisms, blood incompatibilities, falls and trauma, and certain urinary-tract and surgical-site infections, among others.[210] Germany could use similar incentives to reduce the occurrence of preventable infections and conditions.

Further, both countries could benefit from applying value-based insurance design principles to their respective DRG systems. Value-based insurance design encourages use of high-value services and effective preventive services.[211] Recent U.S. health reform laws have started to move things in this direction but still fail to address the issue at the DRG level and, instead, wrap value-based initiatives around the MS-DRG reimbursement system.[212] G-DRG and MS-DRG could be adjusted to reward providers who frequently use high-value services and treatments and thereby reduce costs over the long term.

Finally, both the United States and Germany struggle with fraud and abuse. According to Transparency International, between 3% and 10% of healthcare dollars in Europe are lost to fraud.[213] According to stories published in 2008, "Medicare and Medicaid lose an estimated $60 billion or more annually to fraud," which is roughly 6.8% of expenditures.[214] The U.S. Congress recently passed new legislation to strengthen enforce-

---

[208] Deficit Reduction Act of 2005, Pub. L. No. 109-171, § 5001(c), 120 Stat. 4, 30 (codified at 42 U.S.C. § 1395ww (2006); CTRS. FOR MEDICARE & MEDICAID SERVS., PUB 100-04 MEDICARE CLAIMS PROCESSING, TRANSMITTAL 1240, at 2 (2007) [hereinafter TRANSMITTAL 1240].

[209] TRANSMITTAL 1240, *supra* note 208.

[210] *Hospital-Acquired Conditions*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/HospitalAcqCond/06_Hospital-Acquired_Conditions.asp#TopOfPage (last modified Oct. 7, 2011).

[211] A. Mark Fendrick & Michael E. Chernew, *Value-Based Insurance Design: A "Clinically Sensitive" Approach to Preserve Quality of Care and Contain Costs*, 12 AM. J. MANAGED CARE 18, 19 (2006).

[212] Medicare Shared Savings Program: Accountable Care Organizations, 76 Fed. Reg. 19,527, 19,530 (proposed Apr. 7, 2011) (to be codified at 42 C.F.R. pt. 425).

[213] *TI: Corruption and Fraud in the German Healthcare System*, EUROPEAN HOSP. (June 25, 2008), http://www.european-hospital.com/en/article/3769.html.

[214] *Go Figure: Fraud Data*, COALITION AGAINST INS. FRAUD, http://www.insurancefraud.org/medicarefraud.htm (last visited Oct. 14, 2011); *NHE Fact Sheet*, CENTERS FOR MEDICARE & MEDICAID SERVICES, https://www.cms.gov/NationalHealthExpendData/25_NHE_Fact_Sheet.asp (last modified June 14, 2011).

ment against fraud and abuse.[215] But Germany could do more about fraud and abuse without passing any new laws. Important steps could include adopting certain U.S. revenue-cycle management principles including (1) use of trained coders instead of doctors to record diagnosis and procedure codes; (2) detailed cost accounting—now enabled in Germany because of the improved data gathering and recording that accompanies implementing a DRG system; (3) denial management; and (4) retrospective auditing. A main source of fraud in the Medicare system is abuse of outlier payments. CMS should take a serious look at the German outlier payment model and consider moving away from an easily manipulated charge-based outlier system.

V. Conclusion

The United States could learn from the German system about reducing the complexity of its own healthcare administration by simplifying the inner workings of the Medicare payment system instead of continuing to pile complexity upon complexity. It is hard to fathom why payments to hospitals for indirect-medical education need to involve the transcendental number *e* raised to a complex quotient.[216] By studying the U.S. system, Germany could learn how to monitor and account for payments. German doctors should be left to treat patients—not fiddle with complex and ever changing coding systems. And U.S. administrators should be left to discover innovative ways to create efficiencies in their healthcare operations—not burn the midnight oil over stacks of complicated documents.

---

[215] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 6402(a), 124 Stat. 119, 755 (codified at 42 U.S.C.A. § 1320a-7k (2011); Fraud Enforcement and Recovery Act of 2009 (FERA), Pub. L. No. 111-21, 123 Stat. 1617 (2009).

[216] Indirect Medical Education Adjustment Factor, 42 C.F.R. § 412.322 (2009).

The International Criminal Court and Domestic Military Justice

LT Aaron M. Riggio,* JAGC, USN & Honorable Jack Nevin**

---

* J.D., Seattle University School of Law, 2010; B.A., University of Washington, 2002. This article was submitted pursuant to participation in the Military Law seminar at Seattle University School of Law. LT Riggio's opinions in no way represent the opinions of the Navy, Department of Defense, or the U.S. Government.

** J.D., M.S., M.B.A., Gonzaga University; B.A., Washington State University; Pierce County, Washington District Court Judge 1997-Present; Adjunct Professor, Comprehensive Trial Advocacy and Military Law, Seattle University School of Law; Adjunct Professor, Kessler Edison Trial Techniques Program, Emory University School of Law; Lecturer, U.S. Department of State, U.S. Department of Justice; American Bar Association Latin American Initiative; Lecturer, Humanitarian Law, Catholic University of Lublin, Lublin, Poland; Brigadier General Ret. U.S. Army Reserve Judge Advocate General's Corps.

This article is based upon a paper submitted by LT Riggio, in satisfaction of the requirements of the Military Law seminar, taught by Judge Nevin. LT Riggio deserves complete credit for the thesis and content of this article. Judge Nevin in his role as professor has facilitated both the editorial and publication phases of this project. Both LT Riggio and Judge Nevin extend their sincere appreciation and thanks for the significant editorial assistance of both Phoenix L. Rev. Editor in Chief Jason Holmes and Managing Editor Chrystal Dickinson without whose assistance this project could not have reached completion.

I. Introduction

On July 17, 1998, 120 nations represented at the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court ("ICC") voted to approve the treaty establishing the ICC.[1] In April 2002, the treaty, known as the Rome Statute,[2] reached its sixtieth nation ratification, triggering the treaty into effect as of July 1, 2002.[3] As of October 2011, 119 nations have ratified the treaty and are state parties to the ICC; an additional twenty nations are signatories to the treaty but have yet to ratify it.[4]

In one respect, the drafting and subsequent ratification of the Rome Statute moved with relative rapidity. The United Nations ("U.N.") first created a Preparatory Committee on the Establishment of the ICC in 1996 to draft an encompassing statute.[5] The resulting treaty was in effect a mere six years later. In another respect, the formation of the ICC was the culmination of a process that started when the United Nations General Assembly adopted the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.[6] At this convention, the U.N. General Assembly explicitly contemplated the establishment of an international tribunal to handle genocide trials.[7] Nevertheless, it was not until worldwide attention was brought on controversial events in the Balkans and Africa during the second half of the twentieth century that the international community finally concluded that the ICC was necessary to enforce the protection of basic human rights around the globe.

---

[1] *History of the ICC*, Coalition for Int'l Crim. Ct., http://www.iccnow.org/?mod=icchistory (last visited Oct. 23, 2011).

[2] Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[3] *History of the ICC*, *supra* note 1.

[4] *Status of Chapter XVIII § 10 Rome Statute of the International Criminal Court*, United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10&chapter=18&lang=en (last visited Oct. 23, 2011); *see also* Coalition for Int'l Crim. Ct., FactSheet: The Rome Statute in the World (2009), http://www.iccnow.org/documents/Signatures-Non_Signatures_and_Ratifications_of_the_RS_in_the_World_November_2009.pdf. The United States is included on the Coalition's factsheet as a signatory to the treaty although, as will be discussed *infra*, this fact is disputed within international law circles.

[5] *History of the ICC*, *supra* note 1.

[6] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

[7] *Id.* Some argue that the impetus for the ICC extends far beyond the Genocide Convention of 1948, to one of the founders of the International Committee of the Red Cross who advocated for establishment of such a court in 1872 to deal with atrocities committed in the Franco-Prussian War. *See History of the ICC, supra* note 1.

The ICC is a fascinating creation of the late twentieth century, a creation that has human rights activists very hopeful. The role of the United States in relation to the ICC, however, has led to significant disappointment throughout the world. The United States is a long time champion of international criminal justice; from direct involvement with the trials at Nuremberg and Tokyo to active support of the *ad hoc* tribunals of the former Yugoslavia and Rwanda, the United States has worked with the international community to protect human rights. The U.S. stance towards the ICC, however, has been one of almost constant opposition. Many commentators within the United States feel that the nation is currently on the wrong side of history in the battle to protect human rights and halt atrocities. These commentators are concerned with the list of nations that aligned with the United States at the end of the Rome Conference and that voted against the treaty—China, Israel, Algeria, Qatar, Libya, and Yemen—none with particularly stunning human rights records.[8]

Those within the United States that oppose the ICC focus on several areas of the Rome Statute: jurisdiction, defendant's rights, and the role of the Prosecutor. One primary concern is the potential for senior government officials and military members to be hauled before the court for politically inspired charges of war crimes or crimes of aggression. The United States has thus far succeeded in protecting citizens from ICC jurisdiction through diplomatic agreements. This article examines what the potential consequences would be for U.S. servicemembers were the United States to join the ICC, and concludes that active opposition to the court justifiably protects the U.S. military from spurious and dangerous prosecution.

This article will briefly examine the history of the ICC in Part II. Part III will examine the jurisdictional requirements within the Rome Statute to allow prosecution before the ICC. Part IV will outline some of the most common arguments against the ICC, and Part V will detail the active opposition of the United States towards the court. Lastly, Part VI will consider what the consequences could be for U.S. service members were the United States to ratify the Rome Statute.

II. HISTORY AND FORMATION OF THE ICC

The lack of a permanent tribunal, the political question doctrine, post-conflict amnesty agreements, and the desire to rapidly move from

---

[8] Lilian V. Faulhaber, *American Servicemembers' Protection Act of 2002*, 40 HARV. J. ON LEGIS. 537, 538 (2003).

conflict to rebuilding has led to a notion of international criminal law that is tenuous at best. The dearth of precedent for prosecuting war criminals caused Jose Ayala Lasso, the former U.N. High Commissioner for Human Rights, to state, "[w]e must rid this planet of the obscenity that a person stands a better chance of being tried and judged for killing one human being than for killing one hundred thousand."[9]

The experiences of the late twentieth century invigorated discussion in the international community for a permanently situated criminal court to try the most serious international offenses. The war tribunals of Nuremberg and Tokyo detailed the horrors of the Nazi regime across Europe and the numerous atrocities committed by Japanese soldiers throughout the Pacific. During the 1990s, the international community, through the U.N. Security Council, was once again called to address human rights atrocities in Rwanda and the former Yugoslavia.[10] The experience of creating and implementing these *ad hoc* tribunals exhibited two lessons: justice meted by an international tribunal could be legitimate and effective; and a more permanent tribunal was required to unequivocally address the most heinous crimes worldwide.[11]

In 1989, several Latin American and Caribbean countries initiated the modern call for an international criminal court as a means of dealing with international narcotics smugglers.[12] This impetus, combined with the lessons learned in Nuremberg, the International Criminal Tribunal for the Former Yugoslavia ("ICTY"),[13] and the International Criminal Tribunal for Rwanda ("ICTR"),[14] focused international efforts on establishing a permanent court.[15] A preparatory committee was formed in 1996 to

---

[9] Anne L. Quintal, *Rule 61: The "Voice of the Victims" Screams Out for Justice*, 36 COLUM. J. TRANSNAT'L L. 723, 759 (1998) (quoting Jose Ayala Lasso).

[10] Eric M. Meyer, *International Law: The Compatibility of the Rome Statute of the International Criminal Court with the U.S. Bilateral Immunity Agreements Included in the American Servicemembers' Protection Act*, 58 OKLA. L. REV. 97, 101-02 (2005).

[11] *Id*.

[12] G.A. Res. 44/39, U.N. Doc. A/RES/47/1 (Dec. 4, 1989).

[13] The ICTY is "a United Nations court of law dealing with war crimes that took place during the conflicts in the Balkans in the 1990's [sic]." *About the ICTY*, THE INT'L CRIM. TRIB. FOR FORMER YUGOSLAVIA, http://www.icty.org/sections/AbouttheICTY (last visited Oct. 23, 2011).

[14] The ICTR was created by the Security Council of the United Nations to prosecute people responsible for genocide and other serious crimes. *General Information*, INT'L CRIM. TRIB. FOR RWANDA, http://www.unictr.org/AboutICTR/GeneralInformation/tabid/101/Default.aspx (last visited Oct. 23, 2011).

[15] Jimmy Gurulé, *United States Opposition to the 1998 Rome Statute Establishing an International Criminal Court: Is the Court's Jurisdiction Truly Complementary to National Criminal Jurisdictions?*, 35 CORNELL INT'L L.J. 1, 3 (2002).

draft a statute that would institute a permanent international court situated in The Hague, Netherlands.[16] In July 1998, 160 nations and over 200 Non-Governmental Organizations ("NGOs") gathered in Rome to debate the draft statute. At the end of the conference, 120 nations voted to affirm the Rome Statute of the International Criminal Court ("Rome Statute"), seven voted against, and twenty-one abstained.[17] The treaty was triggered into effect, establishing the ICC, in July 2002.[18]

Throughout the discussions at the Rome Conference, and during the open signature period that followed, the United States expressed concerns over several facets of the Rome Statute. Nonetheless, on December 31, 2000, the final day the treaty was open for signature, President Clinton signed the Rome Statute.[19] Signing the treaty effectively signaled the intent of the United States to eventually ratify the treaty, and obliged the United States not to take steps that would frustrate the objectives of the treaty.[20] However, in May 2002, at the direction of President Bush, John Bolton addressed a letter to U.N. Secretary-General Kofi Annan announcing the U.S. official opposition to the Rome Statute, and disavowing any legal effect of President Clinton's 2000 signature.[21] This action has since been referred to as the 'unsigning' of the Rome Statute,[22] and it marks the beginning of active U.S. opposition towards the ICC.[23]

III. Jurisdictional Requirements of the ICC

Despite the voiced opposition from the United States, the ratification of the Rome Statute officially established the rules and procedures used to implement the ICC. The formation of any tribunal necessarily requires the threshold issue of jurisdiction. An international court exercises jurisdiction in ways that can be less intuitive than those for domestic courts. For instance, even after personal jurisdiction is established over a defendant or plaintiff, an international court must be able to establish territorial jurisdiction without somehow impinging on the sovereignty of nation states. This latter issue arises with the concept of complementarity—that an international tribunal may coexist with the various domestic courts

---

16 *History of the ICC*, *supra* note 1.

17 *Id*.

18 *Id*.

19 Meyer, *supra* note 10, at 104.

20 *Id*. at 105; *see also* Vienna Convention on the Law of Treaties art. 18, May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980) (prescribing the legal effect of signature on treaties that are not yet binding).

21 Meyer, *supra* note 10, at 104.

22 *Id*.

23 *See infra* Part V.

throughout the world as a complementary venue for prosecution rather than a primary one. Each aspect of the ICC's jurisdiction—the substantive crimes included in the Rome Statute, the procedural requirements to invoke jurisdiction, and the notion of complementarity—individually provides arguments for those that oppose the ICC within the United States.

A. Substantive Crimes Under the Rome Statute

The ICC was formed as a tribunal to try the most egregious criminal acts. The fact that "millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity,"[24] expressed the need for the international community to resolve to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[25] On July 17, 1998:

> [a]midst cheers and hugs, there was a widespread feeling that something historic just occurred . . . [because] over time the Court offers real promise for ending the cycle of impunity for the worst human rights atrocities and increasing deterrence of these horrible crimes. Coming at the end of a century that witnessed the Holocaust, and with the images of ethnic cleansing in Bosnia and genocide in Rwanda still fresh, the importance to humanity of this promise is immense.[26]

To meet this end, the Rome Statute considers only the most serious of international offenses: genocide, crimes against humanity, war crimes, and crimes of aggression.[27]

There is little honest disagreement with the Rome Statute's definition of genocide;[28] the international community uniformly addressed this issue previously when enacting the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.[29] Of course, within international legal circles and before other tribunals such as the ICTY and ICTR, the application of this definition to specific acts would be difficult to maneu-

---

[24] Rome Statute, *supra* note 2, at Preamble.

[25] *Id*.

[26] Jerry Fowler, *The Rome Treaty for an International Criminal Court: A Framework of International Justice for Future Generations*, 6 HUM. RTS. BRIEF 1 (1998).

[27] Rome Statute, *supra* note 2, art. 5.

[28] *Id.*

[29] Genocide Convention, *supra* note 6.

ver.[30] Similar statements may be made regarding the definitions of crimes against humanity[31] and war crimes.[32] Although each defendant will likely argue about the statute's interpretation as it applies to the facts of the allegations, the definition of crime is largely settled through time and practice.

The Rome Statute recently incorporated the definition of "crime of aggression" into the ICC's realm of jurisdiction.[33] This amendment provides that the determination of a crime of aggression requires a two-step process: first, that a State action of aggression has occurred (likely based upon determination of the U.N. Security Council); and second, that the act of aggression is a manifest violation of the U.N. Charter.[34]

This analysis emphasizes the relationship between the actions of a State and the actions of an individual defendant; the two are separate yet intricately related.[35] The correlation between State and individual action leads some scholars to speculate on whether certain uses of force could qualify as aggression under the Rome Statute amendment.[36] Even though the ICC has yet to consider a charge of aggression, some arguments against the court have already been raised based on the potential pitfalls of criminal definitions.[37]

B. Procedural Requirements to Invoke Jurisdiction

Having established the substantive crimes to be considered by the court, the Rome Statute next addresses the preconditions necessary to trigger the court's jurisdiction. These procedural requirements involve

---

[30] *See, e.g.*, Prosecutor v. Akayesu, Case No. ICTR-96-4-T, Judgment, ¶¶ 128-29, 170-71 (Sept. 2, 1998) (concerning limits on the identity of the group intended to be "destroyed"); Prosecutor v. Jelisic, Case No. IT-95-10-T, Judgment, ¶¶ 79-83, 170-71 (Dec. 14, 1999) (concerning intent requirement for crime of genocide).

[31] Rome Statute, *supra* note 2, art. 7.

[32] *Id.* art. 8.

[33] Rome Statute, Annex I art. 8 *bis*, June 11, 2010, 49 I.L.M. 1325, 1334-35 [hereinafter Rome Statute, Annex I], *available at* http://www.icc-cpi.int/iccdocs/asp_docs/Resolutions/RC-Res.6-eng/pdf.

[34] Keith A. Petty, *Criminalizing Force: Resolving the Threshold Question for the Crime of Aggression in the Context of Modern Conflict*, 33 SEATTLE U. L. REV. 105, 112 (2009).

[35] *Id.* at 113.

[36] *Id.* at 119-42. Mr. Petty applies the draft definition specifically to instances of humanitarian intervention and actions against terrorism, finding that both instances might fall under the Statute's definition, even if actual prosecution is unlikely (at least for humanitarian intervention or actions of self-defense as opposed to preemptive strikes against terrorists). *Id.* The authors are also initially applying the draft definition, which has subsequently been adopted. *See infra* Part IV.A.

[37] *See infra* Part IV.

matters of personal and territorial jurisdiction, as well as the interaction between the ICC and domestic criminal jurisdictions.[38] Debate over these points proved to be quite contentious, perhaps underscoring future arguments against acknowledging the court's powers.

Before addressing the preconditions for the ICC to invoke jurisdiction, it is important to understand the sources of referral to the court. There are essentially three possible sources of referral for international crimes: the State Parties to the treaty, the ICC Prosecutor, or the U.N. Security Council.[39] The Rome Statute allows for referral from any of these with varying procedural ramifications.[40] The role of the Security Council proved the most contentious for many nations, while the independent power of the Prosecutor remains a source of contention within the United States.[41] The Security Council may refer any action to the ICC when acting under the authority of Chapter VII of the U.N. Charter, provided that the territory or nationals concerned belong to any state that is a party to the United Nations.[42] This places broad authority in the hands of the Security Council to refer matters to the court.

Conversely, referrals that originate from a State Party or the Prosecutor must meet additional jurisdictional requirements.[43] For these referrals, one of the following must be met: the alleged events occurred in the territory of a State that is party to the Rome Statute; or the accused is a national of a State that is a party to the Rome Statute.[44] Furthermore, when the Prosecutor initiates an investigation *ex proprio motu*[45] the Rome Statute requires a panel of judges to find a "reasonable basis to proceed with an investigation, and that the case appears to fall within the jurisdiction of the Court."[46]

The result of this structure, observed one scholar, is that

> [m]any, if not most, of the nations on whose territories the crimes subject to the Court's jurisdiction are likely to be committed or whose nationals are likely to be responsible for such crimes, will not be among early signatories . . . The preconditions of territory and nationality, there-

---

38 Rome Statute, *supra* note 2, arts. 5, 13(b), 14-15.
39 *Id*.
40 *Id*.
41 Fowler, *supra* note 26.
42 Rome Statute, *supra* note 2, art. 13(b).
43 *Id.* arts. 14-5.
44 *Id.* art. 12 ¶ 2.
45 "Of one's own accord." BLACK'S LAW DICTIONARY 621 (8th ed. 2004).
46 *Rome Statute*, *supra* note 2, art. 15.

> fore, mean that for many years the ICC will primarily be a Security Council court.[47]

This perception of the court is amplified by the fact that proposals to allow referral from states that retain custody of a suspect or the state of a victim's nationality were defeated during the Rome Conference.[48] Even though human rights advocates hoped to establish a tribunal with universal jurisdiction,[49] the resulting jurisdictional structure of the ICC, while "reflect[ing] a substantial retreat from universal jurisdiction,"[50] still proved controversial among potential signatories.

For referrals from State Parties or the Prosecutor, the first precondition to be met is the *who* and *where* of the court's jurisdiction—personal and territorial jurisdiction. With the international tribunals that preceded the ICC, the territorial aspect of jurisdiction is simple; for the ICC, this issue proves troublesome because the tribunal is not formed *ad hoc* to address specific past events. Additionally, questions arise concerning the nationality of potential defendants and whether or not the defendants' nations were members to the treaty. The concern over the nationality of defendants is partially addressed by the notion of complementarity.

C. Complementarity

Both the ICTY and ICTR charters granted those tribunals primary jurisdiction over national courts.[51] Some states argued that the ICC, which was designed to prosecute cases of the worst kind, should carry similar primacy in order to effectively combat human rights atrocities.[52] In the end, the Rome Statute invokes complementarity, choosing to recognize the sovereignty of nations to prosecute persons located in their territory accused of serious international offenses.[53]

---

47 Fowler, *supra* note 26.

48 *Id*.

49 Universal jurisdiction is the principle that any state may prosecute the perpetrators of crimes of grave international concern, such as piracy, slave trade, genocide, crimes against humanity, and war crimes, without any connection of territory or nationality. "Universal Jurisdiction," 44B AM. JUR. 2D *International Law* § 70 (2010).

50 Fowler, *supra* note 26, at 10.

51 *See* International Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess. 3453d mtg., art. 8(2), U.N. Doc. S/Res/955 (1994); Statute of the International Criminal Tribunal for Former Yugoslavia, S.C. Res. 827, U.N. SCOR, 48th Sess. 3217th mtg. art. 9(2), U.N. Doc S/Res/827 (1993).

52 Petty, *supra* note 34, at 123-25.

53 *Rome Statute*, *supra* note 2 ("Emphasizing that the International Criminal Court established under the Statute shall be complementary to national criminal jurisdictions[.]").

Complementarity means that the role of the ICC is to fill a void when national courts fail to adequately address human rights atrocities. Nation states are obligated under international custom and treaty to prosecute most of the crimes contained in the Rome Statute.[54] In embracing complementarity, the drafters of the Rome Statute

> would reinforce the primary obligation of States to prevent and prosecute genocide, crimes against humanity and war crimes—obligations which existed for all States under conventional and customary international law. At the same time, the system would create a mechanism . . . to fill the gap where States could not or failed to comply with those obligations.[55]

Therefore, the ICC must defer to State prosecutions unless the State proves "unwilling" or "unable" to proceed.[56] Although the Rome Statute does not define "unwilling" and "unable," it is clear that sham proceedings—instituted in an effort to shield the defendant from international prosecution—will allow intervention by the ICC.[57]

Just as human rights activists hoped for a court with universal jurisdiction, so too would they prefer to see a court with primary jurisdiction; the ICC only gets the second chance to prosecute. Nonetheless, even with the complementarity principle that is enacted in the Rome Statute, opponents of the ICC question exactly how complementary the ICC's jurisdiction is when a State conducts an investigation and decides not to prosecute. Whether the ICC could then invoke jurisdiction is an open question and one that disturbs critics of the court.

IV. U.S. Opposition to Ratification

"[T]he individuals that served at Nuremberg and have worked to promote and preserve the Nuremberg legacy are 'heroes of the law' for what they accomplished sixty years ago, and what they have done ever since."[58] Ever since the end of World War II, the United States has been viewed as one of the strongest proponents of international criminal jus-

---

[54] Gurulé, *supra* note 15, at 6 n.19.

[55] John T. Holmes, *The Principle of Complementarity*, *in* Introduction to the International Criminal Court: The Making of the Rome Statute 73-74 (Roy S. Lee ed., 1999).

[56] *Rome Statute*, *supra* note 2, art. 17.

[57] *Id.* art. 15; Gurulé, *supra* note 15, at 78.

[58] Leila Nadya Sadat, *Judgment at Nuremberg: Foreword to the Symposium*, 6 Wash. U. Glob. Stud. L. Rev. 491, 493 (2007).

tice. When the modern human rights atrocities of the former Yugoslavia and Rwanda were revealed, the United States actively participated in forming and legitimizing the international tribunals that followed.[59] For this reason, proponents of the ICC hoped that the United States would be as staunchly supportive of the ICC as it had been of the ICTY and ICTR.

The commentators that oppose ratification of the Rome Statute come from different backgrounds and represent different interests. I believe that underlying each argument against joining the ICC is a fundamental wariness to allow a foreign judicial body to pass judgment upon a U.S. citizen.[60] This fear of *international justice* must be based on feelings of superiority regarding the U.S. criminal justice system; any other system, even if substantially similar, will be presumed deficient. Setting aside that inherently skeptical view of the ICC, for the time being, I will focus on three explicit objections. The first set of arguments concerns perceived constitutional deficiencies. The second set of arguments concerns the broadly independent powers granted to the Prosecutor in relation to the role of the Security Council. Lastly, the third set of arguments concerns a two-fold objection to the deterrent effect of the court.

A. Constitutional Concerns

Several scholars have levied arguments against the Rome Statute for failing to satisfy the same constitutional protections afforded to U.S. citizens. Arguments of this nature attack either the substantive definition of crimes included under the jurisdiction of the ICC, or they attack the procedural protections guaranteed to defendants. Interestingly, these arguments are formulaic and somewhat easy to overcome. Unless these critics have latched onto these objections to the Rome Statute as an avenue to voice general disapproval of the ICC, the perceived deficiencies and ultimately the critics' objections could easily be fixed by future amendments, such as the amendments adopted in Kampala, Uganda at the Review Conference of the Rome Statute in June, 2010.[61]

---

[59] Meyer, *supra* note 10.

[60] This can be seen outside of the context of international tribunals or military defendants. There was substantial coverage of the Amanda Knox murder trial in Perugia, Italy during 2009, and a general feeling in the Seattle area that Ms. Knox's trial lacked the same fundamental protections that a domestic trial would afford. *See* Jonathan Martin, *Broad Support Network Grows for Amanda Knox*, SEATTLE TIMES, Dec. 5, 2009, http://seattletimes.nwsource.com/html/localnews/2010429571_knoxfriends05m.html.

[61] *Review Conference of the Rome Statute*, COALITION FOR INT'L CRIM. CT., http://www.iccnow.org/?mod=review (last visited Oct. 23, 2011).

The strongest critique of the substantive crimes contained within the Rome Statute is that the definition of crimes of aggression lacks the specificity necessary to satisfy the doctrine of *nullum crimen sine lege*.[62] In February 2009, a special working group convened in accordance with the Rome Statute and reached agreement on a draft definition for the crime of aggression.[63] One scholar noted the difficulty in the task of developing a definition for the crime of aggression:

> Repeated efforts to define aggression foundered throughout the twentieth century as continuing political and cultural differences among states have prevented the formation of a consensus. Strong and weak states have long been sharply divided over when the use of force is appropriate and whether their own military and political leaders ought to be prosecuted for such an offense. The high level of specificity needed to impose individual criminal liability—as opposed merely to guide state conduct—has therefore proven unattainable.[64]

Echoing the difficulties described above, another scholar notes "[w]hile traditional wars between two sovereign States are limited by the U.N. Charter and customary international law, uncertainty surrounds the legal nature of humanitarian intervention, preemptive self-defense, and actions against non-State actors. When, if ever, do these contemporary applications of military force cross the threshold of unlawful aggression?"[65] The concern is that the proposed draft definition, which was later accepted, failed to provide the answer to that question.

Nonetheless, on June 11, 2010, the Review Conference of Rome Statute adopted a definition of the crime of aggression. However, the ICC is not permitted to exercise its jurisdiction over the crime of aggression until

---

[62] *Nullum crimen sine lege* translates to "no crime without law," the basic premise of prohibiting retroactive criminal law legislation. Arguing against the creation of crimes against peace and against humanity charges, *nullum crimen sine lege* was a central defense during the Nuremberg tribunals. The tribunal dismissed this defense, addressing only the crimes against peace charge. *See* Judicial Decisions, International Military Tribunal (Nuremberg), Judgment and Sentences, October 1, 1946, 41 AM. J. INT'L L. 172 (1947).

[63] Michael J. Glennon, *The Blank-Prose Crime of Aggression*, 35 YALE J. INT'L L. 71, 72 (2010).

[64] *Id.*

[65] Petty, *supra* note 34, at 105.

January 1, 2017.[66] The adopted definition, which is identical to the draft version, states:

> "crime of aggression" means the planning, preparation, initiation or execution, by a person in a position effectively to exercise control over or to direct the political or military action of a State, of an act of aggression which, by its character, gravity and scale, constitutes a manifest violation of the Charter of the United Nations.[67]

Another amendment to the Rome Statute states, "[t]he Court shall exercise jurisdiction over the crime of aggression in accordance with this article, subject to a decision to be taken after January 1, 2017, by the same majority States Parties as is required for the adoption of an amendment to the Statute."[68]

The amendment goes on to list several examples of acts that qualify as "acts of aggression."[69] This definition arguably violates the principle of *nullum crimen sine lege* because it does not provide sufficient notice to potential defendants as to what actions are prohibited.[70] Even though the United States is not a party to the Rome Statute, and despite robust efforts to protect U.S. citizens from ICC jurisdiction,[71] the possibility of prosecution under the crime of aggression has sufficiently motivated some to further object to the Statute.[72]

Others object to perceived deficiencies in the Rome Statute regarding due process protections for the accused. The possibility that a U.S. citizen could be tried for a crime without the same guarantees of the Bill of Rights prevents some from fully supporting the ICC.[73] Among the differences between the procedural protections offered by the U.S. Constitution and those offered by the Rome Statute are: the right to trial by jury rather than a three judge panel; speedy trial provisions rather than a vague prohibition of undue delay; no explicit protection from unreasonable search or seizure; no guaranteed right to confront hostile witnesses; and the protection from double jeopardy rather than the ability to appeal

---

[66] *The Crime of Aggression*, COALITION FOR INT'L CRIM. CT., http://www.iccnow.org/?mod=aggression (last visited Oct. 14, 2011).

[67] Rome Statute, Annex I, *supra* note 33.

[68] *Id*. at 20 Article 15, #3 of the Rome Statute.

[69] Glennon, *supra* note 63, at 81.

[70] *Id.* at 88-102.

[71] Discussed *infra* Part V.

[72] Glennon*, supra* note 63 at 73.

[73] Lauren Fielder Redman, *United States Implementation of the International Criminal Court: Toward the Federalism of Free Nations*, 17 J. TRANSNAT'L L. & POL'Y 35, 41 (2007).

acquittals.[74] For ICC supporters, these differences do not rise to constitutional infirmity, but rather are variations of the same procedural protections offered within U.S. courts.[75] Yet for others, the differences are sufficient enough to withhold U.S. membership from the treaty.[76]

As stated above, these perceived due process deficiencies could be easily resolved through amendment. The remaining arguments against the Rome Statute, however, strike at the heart of the structure of the court or the inherent nature of a permanent international tribunal, and could not easily be fixed to satisfy the critics' concerns. Although that fact may appear to lend more weight to the following arguments than the constitutional concerns, I believe that the preceding objections present the strongest arguments against the Rome Statute, while the remaining objections are speculative and ancillary to the procedural problems.

B. Prosecutorial Power

In a draft presidential speech regarding the Rome Statute, John Bolton stated, "our country's top civilian and military leaders . . . are the real potential targets of the ICC's politically unaccountable prosecutor . . . . [The court and the prosecutor] are effectively accountable to no one. The prosecutor will answer to no superior executive power, elected or unelected. Nor is there any legislature anywhere in sight . . . ."[77] This reaction summarizes the United States' position regarding prosecutorial discretion throughout the Rome Conference. Indeed, the authority of the prosecutor proved to be one of the most contentious topics.[78]

The crux of the argument revolves around the Prosecutor's *proprio motu* powers to initiate investigations. This primary objection must be viewed as an argument against independence from the Security Council. Those that wanted a strongly independent Prosecutor believed that relying on Security Council referrals would severely weaken the court's credibility, limit its enforcement role, and subject the process to political

---

[74] *Id.* at 41-43.

[75] *See* David Scheffer & Ashley Cox, *The Consitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983 (2008). Mr. Scheffer is the former head of the U.S. delegation to the Rome Conference, and has become one of the court's strongest supporters.

[76] Mariano-Florentino Cuéllar, *The International Criminal Court and the Political Economy of Antitreaty Discourse*, 55 STAN. L. REV. 1597, 1606-08 (2003).

[77] John Bolton, *Speech Two: Reject and Oppose the International Criminal Court*, *in* TOWARD AN INTERNATIONAL CRIMINAL COURT? 37, 43-44 (1999).

[78] Alexander K. A. Greenawalt, *Justice Without Politics? Prosecutorial Discretion and the International Criminal Court*, 39 N.Y.U. J. INT'L L. & POL. 583, 591 (2007).

influence.[79] While not dismissing the apolitical aspiration of the Prosecutor's office, the United States argued for Security Council oversight as a means of ensuring efficiency and utility;[80] underlying the United States' position is the power to veto an investigation into a U.S. citizen, which Mr. Bolton alluded to.

In the end, the parties attempted compromise by allowing Security Council referrals in accordance with powers delineated through the U.N. Charter, and by invoking enhanced procedural precautions for *proprio motu* investigations. This upset both sides of the table. Nations such as India, Iraq, and Libya—outspoken critics of the Security Council—refused to support the Rome Statute because it granted too much power to the Security Council.[81] Simultaneously, the United States stalled signature of and refused ratification of the treaty due to the lack of veto power.[82]

Aside from protecting the interests of U.S. citizens, providing a check on the Prosecutor's ability to initiate and pursue investigations could also impact non-judicial peacemaking efforts. As an alternative to prosecution, which is often viewed as victor's justice in situations where both sides can be guilty of committing atrocities, some nations have implemented amnesty programs to help transition to more stable governments and societies.[83] Because the Rome Statute is silent on the Prosecutor's authority when amnesty agreements are in place, there is an unresolved ambiguity whether the Prosecutor may continue investigation.[84] Ultimately, it may rest on the individual leanings of the Prosecutor, after balancing the interests of the governments that grant amnesty against the ICC's mission to end the impunity associated with human rights atroci-

---

[79] *Id.* at 591-92.

[80] *Id*. at 592.

[81] Fowler, *supra* note 26.

[82] Leila Nadya Sadat, *The Nuremburg Paradox*, 58 AM. J. COMP. L. 151, 156 (2010). "Even prior to the Treaty's conclusion, the late Senator Jesse Helms, Chair of the Senate Foreign Relations Committee . . . announced that the International Criminal Court would be 'dead on arrival' if the United States did not have veto power over which cases could be brought." *Id*.

[83] Greenawalt, *supra* note 78, at 614-15. These programs can be either blanket amnesty agreements, or a truth and reconciliation commission. Notable examples include South Africa, Chile, El Salvador, and most recently Kenya. *Id.* at 615.

[84] This ambiguity is currently playing out in the ICC regarding the situation in Uganda. Self-referred to the ICC, the conflict in Uganda witnessed a cease-fire pending amnesty arrangements with rebel leaders. The ICC had already issued five arrest warrants, which the Prosecutor believed should be executed regardless of any amnesty arrangement. The existence of the outstanding warrants apparently posed a stumbling block to amnesty arrangements. *Id.* at 619.

ties. Such individual discretion is precisely what opponents disfavor about the Rome Statute.

C. The Deterrence Factor

The likelihood of the existence of the ICC deterring the worst crimes known to humanity can be debated; on the other hand, membership to the ICC may have a deterrent effect on nations for undertaking humanitarian interventions. This dual view of deterrence not only questions the court's legitimacy, but also provides additional firepower for arguments against joining the ICC.

One of the stated goals of the ICC is political transformation; in addition to the standard rationales for punishing criminals, advocates hope to cause social alterations to help prevent the commission of international crimes.[85] One way to encourage that goal is through general deterrence. "By this logic, the ICC's prosecution of war crimes committed in a state like the Democratic Republic of Congo or Sudan will not only help rehabilitate those societies, but will also deter prospective perpetrators in entirely different contexts."[86] However, general deterrence resulting from an international tribunal is anything but guaranteed because the court's power must be perceived from the viewpoint of an official contemplating a terrible act.

The first problem is structural: the court lacks any enforcement mechanism. From infancy (by complementary jurisdiction) to enforcement, any given trial will rely heavily on political commitment from member nations.[87] This is particularly true when the court's jurisdiction is limited in "reach to systematic crimes that are generally sponsored by states or other quasi-state actors (such as rebel forces)."[88] Political commitment from interested but foreign nations is never guaranteed; rarely will a nation refer its own situation to the court.[89]

The second problem is psychological: deterrence only works on rational humans who make rational decisions. Speaking at the Nuremberg Tribunal:

---

[85] *Id.* at 601.

[86] *Id.* at 605.

[87] *Id*.

[88] *Id*. at 606.

[89] Although this remains true from the perspective of well-established nations, it has not proven accurate in territories that have experienced excessive or repeated political upheaval and turmoil. Currently, the situations in Uganda, the Democratic Republic of Congo, and the Central African Republic have been self-referred to the ICC. *See Situations and Cases*, INT'L CRIM. CT., http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/ (last visited Oct. 14, 2011).

> Justice Jackson similarly recognized that "[w]ars are started only on the theory and in the confidence that they can be won" and "[p]ersonal punishment, to be suffered only in the event the war is lost, will probably not be a sufficient deterrent to prevent a war where the warmakers feel the chances of defeat to be negligible."[90]

Additionally, the prospect of punishment from the ICC may in fact have a perverse deterrent effect. In dealing with crimes of the magnitude considered by the Rome Statute, intervention often takes the form of regime change, and the alternative to incarceration by the ICC may be summary execution or a domestic court with the death penalty.[91]

If the existence of the ICC may not deter would-be war criminals, could it nevertheless deter nations from partaking in peacekeeping or humanitarian missions? Arising particularly in the context of crimes of aggression one commentator suggests that there could be a chilling effect on humanitarian missions.[92] Furthermore, there could be an even stronger deterrent effect on actions of preemptive self-defense, which, unlike humanitarian intervention, are disfavored internationally.[93] Without an exception for humanitarian intervention, or a strict *mens rea* requirement for the threshold finding of criminal aggression, states may be limited in their ability to preemptively or reactively act to prevent large-scale atrocities from occurring. This runs counter to the overall goal of the ICC—to curtail the worst human atrocities.

V. Active U.S. Opposition

Relying on the arguments discussed above, the United States has taken what has been described as "[a] sometimes bruising opposition to the International Criminal Court, an opposition that has baffled American allies as well as many U.S. citizens alike."[94] The United States' failure to ratify the Rome Statute is the most obvious way to shield its citizens from prosecution. Perhaps even more telling than the failure to ratify the treaty, an act that falls to Congress, is the fact that the United States was so late to sign the treaty at all; U.S. opposition to the ICC is most clearly evident in President Bush's 'unsigning' of the treaty in 2006.

---

[90] Greenawalt, *supra* note 78, at 606-07.

[91] *Id.* at 607.

[92] Petty, *supra* note 34, at 143-44.

[93] *Id.* at 144.

[94] Sadat, *supra* note 82, at 154.

Even more active opposition has taken form through subsequent national legislation and diplomatic affairs.

In August 2002, Congress passed the American Servicemembers' Protection Act ("ASPA").[95] The ASPA addressed the primary concern of the potential for senior military and government officials to be subject to politically motivated prosecutions.[96] The goal of the ASPA is evident—active frustration of the ICC with respect to U.S. citizens.[97] Among its provisions, the ASPA forbids any federal, state, or local government agency from supporting the ICC through arrest, extradition, service of warrants, seizure of assets, or any comparable action.[98] Further, the ASPA prohibits direct military aid by the United States to any country that is a party to the Rome Statute.[99] Additionally, the United States may not participate in United Nations peacekeeping efforts without specific protections guaranteed by the Security Council.[100] The prohibition on military aid has several exceptions: the President may waive the restriction in the interest of national security; NATO and non-NATO major allies, including Taiwan, are exempt; and the territorial nation may enter into a Bilateral Immunity Agreement ("BIA") with the United States.[101] Lastly, the President is authorized under the ASPA to "use all means necessary and appropriate to bring about the release of any [U.S. citizen] . . . who is being detained or imprisoned by, on behalf of, or at the request of the International Criminal Court."[102]

After the passage of the ASPA, the United States began negotiating and entering into BIAs, also known as Article 98 agreements. These agreements provide that no current or former government officials, military members, or U.S. nationals may be turned over to the ICC without the United States' consent.[103] The United States relies on Article 98 of the Rome Statute, which provides that the ICC "may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a

---

95 The American Servicemembers' Protection Act of 2002, 22 U.S.C. §§ 7421-33 (2002).

96 Meyer, *supra* note 10, at 112-13.

97 *See* Stuart W. Risch, *Hostile Outsider or Influential Insider? The United States and the International Criminal Court*, 2009 ARMY LAW. 61, 80; *see also* Faulhaber, *supra* note 8, at 545-46.

98 The American Servicemembers' Protection Act of 2002, 22 U.S.C. §§ 7421-33 (2002).

99 *Id.*

100 *Id.*

101 *Id.*

102 *Id.*

103 *See* Faulhaber, *supra* note 8, at 547.

person of that State to the Court."[104] The State Department has insisted that BIAs comply with the Rome Statute in that Article 98 explicitly contemplates such agreements.[105] Internationally, BIAs are viewed with skepticism, and some condemn the U.S. negotiation tactics in obtaining them; nonetheless, they are powerful tools for the United States.[106]

One result of the ASPA is that nations that have refused to sign BIAs with the United States are cut off from either direct military aid or financial military aid.[107] This has had a significant impact on Latin American countries that traditionally rely on U.S. financial aid. This aid has multiple characterizations and intents:

> According to the State Department, [International Military Education and Training aid] is primarily used for providing professional military education, improving civil-military relations, resource management and democratic institution-building. The State Department characterizes [Foreign Military Financing] as aid intended to provide equipment, training assistance and sustaining operations. The U.S. government utilizes both types of military aid for what it characterizes as "counter-terrorism efforts."[108]

The resultant loss of aid for neighboring countries in the Western Hemisphere has alienated allies and weakened military relationships, causing concern among senior military and congressional leaders.[109]

One situation stands in stark contrast to these actions that have clearly intended to frustrate the ICC: the role the United States played in referring the situation in the Sudan to the ICC Prosecutor. There remain "extraordinary similarities" between U.S. and ICC criminal law, "including a sense of commitment to the rule of law, democracy and benign gov-

---

104 Rome Statute, *supra* note 2, art. 98.

105 Meyer, *supra* note 10, at 116.

106 *Id.* at 115-16. As of December 2006, the State Department reported 102 BIAs in effect, with 46 of those agreements with nations that are parties to the Rome Statute. *See* COALITION FOR INT'L CRIM. CT., FACTSHEET: STATUS OF US BILATERAL IMMUNITY AGREEMENTS (BIAs) (2006), http://www.iccnow.org/documents/CICCFS_BIAstatus_current.pdf.

107 *See Unintended Consequences of the U.S. Bilateral Immunity Agreement Policy*, CITIZENS FOR GLOBAL SOLUTIONS, http://globalsolutions.org/ (In "Search This Site:" type in Unintended Consequences of the U.S. Bilateral Immunity Agreement) (last visited Oct. 23, 2011).

108 *See id*.

109 *See id*.

ernment, and human rights."[110] Perhaps due to these similarities, the United States refrained from vetoing the Security Council Resolution authorizing the referral of the situation in Darfur to the ICC in 2005.[111] Previously, President Bush had been the first acting U.S. politician to label an ongoing genocide, an action that required some action to stop the atrocity.[112] Abstaining from the Security Council vote, the United States allowed the referral to proceed, "even if the Bush administration had no appetite to support the referral either financially or with the promise of military assistance to bring suspected *génocidiaires* to book."[113]

VI. Potential Effects of Joining the ICC

The opposition within the United States is not unanimous, and in fact it does not seem widespread. The majority of commentators in the legal field seem to dismiss the U.S. complaints about the Rome Statute and attribute them to pretextual desires to flaunt an image of U.S. superiority. Despite the clear misgivings about the Rome Statute within the Clinton administration, strong opposition to the court is largely attributed to President Bush and is occasionally lumped together with broader Bush administration policies that reflected isolationist positions. Because the criticisms of the ICC have been given this political tag, it is possible that future administrations may change course and encourage ratification of the Rome Statute. If the United States were to join the ICC, what effects might that have on military justice?

The first analysis might be how the substantive charges facing servicemembers would be different under the Rome Statute than under the Uniform Code of Military Justice ("UCMJ"). The UCMJ already incorporates by reference international laws and treaties as substantive offenses.[114] It is perhaps axiomatic, then, to conclude that the substantive

---

110 Sadat, *supra* note 82, at 203.

111 *See* Press Release, Secretary General, Secretary-General Welcomes Adoption of Security Council Resolution Referring Situation in Darfur, Sudan, to International Criminal Court Prosecutor, U.N. Press Release SG/SM/9797/AFR 1132 (Mar. 31, 2005), http://www.un.org/News/Press/docs/2005/sgsm9797.doc.htm.

112 *See* Press Release, Former President George W. Bush, President Bush Discusses Genocide in Darfur, Imposes Sanctions (May 29, 2007), http://georgewbush-whitehouse.archives.gov/news/releases/2007/05/20070529.html. "My administration has called these actions by their rightful name: genocide. The world has a responsibility to help put an end to it." *Id.*

113 Sadat, *supra* note 82, at 203.

114 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 602 (2006) (stating that UCMJ Article 21 explicitly incorporates international law).

crimes of the Rome Statute would apply to servicemembers in regular courts-martial through this incorporation if the United States signed the treaty. However, regardless of the status of the Rome Statute, I believe that the substantive crimes before the ICC are substantially similar to already existing mechanisms.

The United States is a signatory to the Genocide Convention, which provides the same definition of the crime of genocide as the Rome Statute. Recognized international law or standard putative articles of the UCMJ sufficiently cover crimes against humanity. All U.S. citizens, military members included, are subject to the War Crimes Act of 1996, which provides a definition of war crimes that substantially resembles that of the Rome Statute.[115] While the prosecution of war crimes requires interpretation of the proportional use of force or appropriate targeting, the substance of the crime remains the same. Furthermore, both the UCMJ and the War Crimes Act of 1996 extend beyond U.S. territory, applying to U.S. citizens worldwide. Therefore, with the exception of crimes of aggression, ratification of the Rome Statute will not create criminal culpability for U.S. servicemembers for any crimes that are not already codified.

The same cannot be said for the procedural differences between the rules for court-martial and the procedures of the Rome Statute. As discussed above, the constitutional due process concerns of ICC opponents expose substantial differences with the protections afforded to the accused under the UCMJ. The role of the Prosecutor must also be considered, although the potential political motivations for the ICC's Prosecutor may not be substantially different than those of a military prosecutor tasked with prosecuting a war crime. The main difference regarding the prosecutors then is nationality; unlike in a court-martial, the accused will be tried by a foreign national who may be making a statement on broad U.S. policies or military actions rather than reflecting pressure to bring a particular individual to justice.

It appears that the scenario that could put a U.S. servicemember on trial in front of the ICC is within a narrow set of circumstances. Due to the complementary jurisdictional regime, the United States would have to be unwilling or unable to try the perpetrator by court-martial or in federal court. Therefore, the scenario would not be a My Lai[116] or

---

115 *Compare* War Crimes Act of 1996, 18 U.S.C. § 2441 (2006), *with* Rome Statute, *supra* note 2, art. 8.

116 *See generally* United States v. Calley, 22 U.S.C.M.A. 534 (1973) (discussing the United States' investigation of First Lieutentant Calley for the premeditated murder of 22 infants, woman, children, and old men in My Lai, Vietnam).

Haditha,[117] where the United States has shown willingness to investigate and prosecute clear violations of international humanitarian law. Nor would the scenario be the total collapse of domestic U.S. courts, resulting in an inability to prosecute war criminals.

The potential scenario looks much more like the NATO-led bombing of Radio Television Serbia studios in April 1999.[118] Although the ICTY Prosecutor investigated the bombing, no charges were brought against NATO forces.[119] The decision of whether to characterize the bombing as a war crime hinged on political evaluations of appropriate military targets and acceptable civilian casualties rather than strictly legal criteria. This type of judgment could easily have gone the other way; both Amnesty International and Human Rights Watch considered the bombing a war crime.[120] This is one example, therefore, where a politically motivated Prosecutor could pursue war crime or aggression charges for an action that the U.S. government (or allied commands like NATO) considers a valid military objective.

Even in the extreme cases like My Lai or Haditha, where the United States will try suspected war criminals by court-martial, the complementarity principle will introduce international scrutiny on the UCMJ.[121] There are many suggestions for military justice system reforms, typically from the viewpoint of improving due process protections for the accused.[122] From an international law perspective, the focus will likely be on ensuring the integrity and adequacy of the proceedings rather than the defendant's rights. One commentator states:

> If the [United States] invokes complementarity to block an ICC prosecution, it must be prepared to defend the UCMJ before a world body likely to be skeptical of mili-

---

[117] *See* Laura A. Dickinson, *Military Lawyers on the Battlefield: An Empirical Account of International Law Compliance*, 104 AM. J. INT'L L. 1, 26 (2010) (discussing the appropriate role of Judge Advocate Generals in investigating misconduct, as well as the subsequent court-martial proceedings for the incident and cover-up).

[118] Anthony J. Colangelo, *The New Universal Jurisdiction: In Absentia Signaling Over Clearly Defined Crimes*, 36 GEO. J. INT'L L. 537, 588-90 (2005).

[119] *Id.*

[120] Robert M. Hayden, *Biased "Justice:" Humanrightsism and the International Criminal Tribunal for the Former Yugoslavia*, 47 CLEV. ST. L. REV. 549, 557 (1999).

[121] *See* Allen J. Dickerson, *Who's in Charge Here?—International Criminal Court Complementarity and the Commander's Role in Courts-Martial*, 54 NAVAL L. REV. 141, 143 (2007).

[122] VICTOR M. HANSEN & ELIZABETH L. HILLMAN, REPORT OF THE COMMISSION ON MILITARY JUSTICE (2009), http://www.wcl.american.edu/nimj/documents/CoxCommissionFinalReport.pdf?rd=1 (outlining seven recommendations for changes to the military justice system "to advance principles of justice, equity, and fairness").

> tary justice generally and the United States' version in particular. Exhibit A in the international court's analysis will be the effectiveness of the U.S. court-martial system and the extent to which it is viewed as willing to prosecute Americans for atrocities. And a major component will be the influence those in the accused's chain of command—and therefore those potentially implicated in their crimes under the doctrine of command responsibility—have over the selection of charges, conduct of trials, and punishment of the convicted.[123]

As noted above, scrutiny will be the highest in instances where Article 32 hearings result in dropped charges, or the Convening Authority takes action favorable to the accused during post-sentencing review. Even if changes to the UCMJ are warranted, particularly regarding the unique role of the Convening Authority, such changes carry greater legitimacy and authority if they originate from within the United States as opposed to in response to international criticism.

There are considerations that counterbalance the effects on the military of joining the ICC; a broader consideration than the effect on military justice is the potential effect on military operations. This factor is intricately tied to the diplomatic actions of the United States in attempting to frustrate the ICC. As discussed above, the ICC has a potential deterrent effect on participating in humanitarian interventions.[124] The U.S. approach thus far—executing BIAs with other nations—would no longer be a viable option were the United States to join the ICC.[125] It is difficult to say if ratifying the Rome Statute would actually increase or decrease the United States' willingness to join humanitarian operations; the ICC exists either way, and ratifying the treaty signals that the United States is prepared to surrender citizens to the court if necessary, no matter what the cause of the operation. Therefore, the territory of the conflict will not matter, since the ICC could exercise personal jurisdiction over a U.S. citizen worldwide. The inability to shield a citizen through a

---

123 *See* Dickerson, *supra* note 121.

124 *Supra* Part IV.C.

125 A party to the Rome Statute would be prohibited from executing a BIA because BIAs explicitly frustrate the authority of the ICC. This does not explain the fact that the United States currently has entered into BIAs with at least forty nations that are parties to the treaty. However, it is safe to assume that the United States would not be allowed to continue such practice as a party to the treaty. Coincidentally, discussion of the United States' joining the ICC also assumes revocation of the ASPA, further reducing the need for BIAs in order to participate in humanitarian interventions.

BIA or through a cursory investigation (due to the international attention on our military justice system) may continue to deter the United States from entering the fray when the potential for civilian casualties is high or without unanimous international support.

VII. Conclusion

There are many positive results should the United States ratify the Rome Statute and join the ICC. The elimination of BIAs, and the strong-arm diplomatic measures used to enact them would bolster the image of the United States and strengthen our political allies in the Western hemisphere. International scrutiny on the UCMJ may force changes that many commentators have urged for years, notably, a reduction in the role of the Convening Authority in pre-trial influence and post-sentencing review. Lastly, the United States could regain the mantle of champion for human rights; the "heroes of Nuremberg" could once again stand proud on the U.S. tradition of defending those who need it most throughout the world.

That being said, ratification of the Rome Statute could potentially subject U.S. military members to prosecution before the ICC under undesirable circumstances. The potential exists for servicemembers to be prosecuted for war crimes or crimes of aggression when carrying out official duties, designing military objectives with justifiable legal or political grounds, and implementing the policies of the Executive branch. Considering the possibility, however slight, that a politically motivated Prosecutor could prosecute an unpopular war, and given the constitutional concerns in the structure of the court, that risk is too great. Perhaps the Rome Statute will be amended to address some of the U.S. concerns; in its current form, the treaty is a substantial risk to U.S. servicemembers worldwide.

The very existence of the ICC, at least without Security Council veto power for referrals, presents a potential deterrence for engaging in humanitarian operations. From the narrow perspective of aiming to enable foreign intervention for humanitarian crises, any active opposition to the ICC that thereby weakens the court's influence is a positive step. This viewpoint, albeit a small piece of the overall picture, presents not only a substantive objection to the Rome Statute but also support for ICC opponents whose underlying distrust of *international justice* otherwise lacks legal foundation. Whether or not the United States eventually ratifies the Rome Statute, this potential to deter humanitarian intervention must be addressed when finally implementing the recent adoption of the definition of crimes of aggression.

Market Solutions to Global Narcotics Trafficking and Addiction

Michael P. O'Connor* & Celia M. Rumann**

I. Introduction

> *The global war on drugs has failed, with devastating consequences for individuals and societies around the world. Fifty years after the initiation of the UN Single Convention on Narcotic Drugs, and 40 years after President Nixon launched the U.S. government's war on drugs, fundamental reforms in national and global drug control policies are urgently needed.*[1]

This blunt assessment of the War on Drugs[2] begins the recently released report of the Global Commission on Drug Policy ("GCDP").

* Michael P. O'Connor, Professor of Law, Phoenix School of Law.
** Celia M. Rumann, Professor of Law, Phoenix School of Law.

[1] Global Comm'n on Drug Policy, War on Drugs: Report of the Global Commision on Drug Policy 2 (2011), http://www.globalcommissionondrugs.org/Report (follow "Global Commission on Drug Policy Report (English)" hyperlink).

[2] The national policy focusing on controlling the illegal drug trade that became known as the *war on drugs* is widely accepted to have begun in July 1969, with President Nixon's speech to Congress about controlling narcotics and dangerous drugs. Richard Nixon, *266* -

This report, prepared by a blue-ribbon panel including former heads of state, public intellectuals, and health and security officials from every continent, provides some long-needed support for ending one of the most disastrous public policy fiascos in modern history.[3] The GCDP's report

---

Special Message to the Congress on Control of Narcotics and Dangerous Drugs, AM. PRESIDENCY PROJECT (July 14, 1969), http://www.presidency.ucsb.edu/ws/index.php?pid=2126&st=&st1=#axzz1WdyxaeRW. In June 1971, President Richard Nixon first used the *war* language in referring to a strategy to combat illegal drug addiction and trafficking. "To wage an effective war against heroin addiction, we must have international cooperation." Richard Nixon, *203 - Special Message to the Congress on Drug Abuse Prevention and Control*, AM. PRESIDENCY PROJECT (June 17, 1971), http://www.presidency.ucsb.edu/ws/index.php?pid=3048&st=&st1=#axzz1WdyxaeRW; *see also Timeline: America's War on Drugs*, NPR (April 2, 2007), http://www.npr.org/templates/story/story.php?storyId=9252490 (providing a timeline of the *war on drugs*). Since the first coining of the phrase it has been used by every successive administration to characterize its drug control policy. *See, e.g.*, Barack Obama, *491-Remarks at a Question-and-Answer Session With Twitter Participants*, AM. PRESIDENCY PROJECT (July 6, 2011), http://www.presidency.ucsb.edu/ws/index.php?pid=90592&st=war+on+drugs&st1=#axzz1WdyxaeRW ("I think with respect to the *war on drugs*, what we've always said is that investing in prevention, reducing demand, is going to be the most cost-effective thing that we can do."); Ronald Reagan, *Radio Address to the Nation on the Drug Abuse*, AM. PRESIDENCY PROJECT (Oct 6, 1984), http://www.presidency.ucsb.edu/ws/index.php?pid=39198&st=war+on+drugs&st1=#axzz1WdyxaeRW ("And under [Vice President George H. W. Bush's] direction, nearly two dozen Federal agencies have been brought into the *war on drugs*."); Gerald Ford, *128-Statement on Drug Abuse*, AM. PRESIDENCY PROJECT (Feb 23, 1976), http://www.presidency.ucsb.edu/ws/index.php?pid=5609&st=war+on+drugs&st1=#axzz1WdyxaeRW ("[I]f we are to win the *war on drugs*, these merchants of tragedy and death must be stopped.").

[3] Among the commissioners issuing the GCDP's report, the following are included:

> Asma Jahangir, human rights activist, former UN Special Rapporteur on Arbitrary, Extrajudicial, and Summary Executions, Pakistan; Carlos Fuentes, writer and public intellectual, Mexico; César Gaviria, former President of Colombia; Ernesto Zedillo, former President of Mexico; Fernando Henrique Cardoso, former President of Brazil (chair); George Papandreou, Prime Minister of Greece; George P. Shultz, former Secretary of State, United States (honorary chair); Javier Solana, former European Union High Representative for the Common Foreign and Security Policy, Spain; John Whitehead, banker and civil servant, chair of the World Trade Center Memorial Foundation, United States; Kofi Annan, former Secretary General of the United Nations, Ghana; Louise Arbour, former UN High Commissioner for Human Rights, President of the International Crisis Group, Canada; Maria Cattaui, Petroplus Holdings Board member, former Secretary-General of the International Chamber of Commerce, Switzerland; Mario Vargas Llosa, writer and public intellectual, Peru; Marion Caspers-Merk, former State Secretary at the German Federal Ministry of Health; Michel Kazatchkine, executive director of the Global Fund to Fight AIDS, Tuberculosis and Malaria, France; Paul Volcker, former Chairman of the United States Federal Reserve and of the Economic Recovery Board; Richard Branson, entrepreneur, advocate for social causes, founder of the Virgin Group, co-founder of The Elders, United Kingdom; Ruth Dreifuss, former President of Switzerland and

unambiguously condemns criminalization and militarization of drug problems and strongly urges that human rights and public health principles be the guides for determining drug policies.[4] In addition, the GCDP's report calls for revising international treaties to allow for "robust experimentation with harm reduction, decriminalization and legal regulatory policies."[5] Unfortunately, the recommendations of the GCDP do not go far enough.

The GCDP's report articulates four principles[6] and eleven recommendations.[7] The eleventh and final recommendation of the GCDP's report provides an indictment of some of the more moderate recommendations that precede it: "[a]ct urgently: the war on drugs has failed, and policies need to change now."[8] The other recommendations only "[e]ncourage experimentation by governments with models of legal regulation of drugs" and explicitly suggest differentiating among drugs in determining whether to continue their criminalization.[9] Given the enormous costs associated with this failed war, particularly the ongoing waste of human resources, there is no longer time to encourage the half-measures of selective decriminalization and experimentation with a patchwork of differing regulatory policies for different drugs in different parts

---

Minister of Home Affairs; [and] Thorvald Stoltenberg, former Minister of Foreign Affairs and UN High Commissioner for Refugees, Norway.

GLOBAL COMM'N ON DRUG POLICY, *supra* note 1, at 1. It would be difficult to convene a more noteworthy, diverse, and credible group of commissioners.

[4] *Id.* at 2-3.

[5] *Id.* at 3, 5, 9-17 (providing a more in-depth discussion and greater detail on this point).

[6] The four principles articulated in the GCDP's report provide for a paradigmatic shift in how world drug policy should be formulated. The principles advocate global solutions, involving a comprehensive set of stakeholders, that use human rights and public health criteria to determine the policies that provide the greatest reduction of harm to the individual and society at large. *See id.* at 5-9.

[7] The eleven recommendations are a mixture of laudable, pragmatic ideas and other half-measures that are inconsistent with the overall tenor of the GCDP's report that calls for immediate and more radical change. *Id.* at 10-11, 13-17.

[8] *Id.* at 17.

[9] *Id.* at 11. In particular, this recommendation suggests that cannabis be treated differently than other drugs when considering possible decriminalization. Recent studies strongly suggest that the shifting of law enforcement priorities from one drug to another will in no way reduce criminal violence associated with trafficking. *See* INT'L CTR. FOR SCI. IN DRUG POLICY, EFFECT OF DRUG LAW ENFORCEMENT ON DRUG-RELATED VIOLENCE: EVIDENCE FROM A SCIENTIFIC REVIEW (2010), http://www.icsdp.org/Libraries/doc1/ICSDP-1_-_FINAL_1.sflb.ashx.

of the world.[10] Nothing short of a global treaty authorizing the decriminalization of drug usage and the harnessing of market forces to eradicate the ills of drug addiction will begin to reverse the dismal tide of the drug war's failures.

This article examines the efficacy of present models of drug addiction prevention and intervention.[11] It begins with an overview of the drug problem. This article then examines current methods of attacking drug addiction and trafficking and considers the economic realities of the drug trade. This article concludes by proposing a multinational treaty decriminalizing the drug trade and using market strategies to control drug trade usage and movement, tax its profits, and use those revenues to fight addiction and promote alternatives for drug producers. It is through such a system that true progress can be made in this seemingly intractable problem.

II. Overview of the Problem

Drug addiction[12] and its attendant problems are not new.[13] The costs of addiction affect society overall at many levels. Addiction causes immeasurable pain for the addicts, for those who love them, and all others they directly or indirectly harm. The incapacity of one addict is

---

[10] A similar patchwork policy is being proposed in the U.S. Congress by Representatives Barney Frank (D-Mass) and Ron Paul (R-Tex), concerning the legalization of marijuana throughout the United States. *See* H.R. 2306, 112th Cong. (2011). The bill would remove marijuana from the list of federally-controlled substances and allow each state to determine whether to legalize possession and production of marijuana. *Id*. Federal law would still govern interstate transportation of marijuana. *Id.*

[11] It is not the authors' intent to provide an in-depth analysis of the many issues presented in the complex area of addiction and narcotics trafficking. It would take volumes of information to present such a picture. Rather, it is the authors' intent to identify problems presented in the current system, raise questions about whether there are other ways to consider the issue, and propose an alternate way of considering strategies to combat the problems of addiction and narcotics trafficking by viewing them through a new economics-based paradigmatic lens.

[12] Al-Biruni's (973-1048 A.D.) observations of opiate use in Mecca provide one of the clearest early descriptions of the progression of drug use, tolerance, and addiction. *See* Sami Hamarneh, *Pharmacy in Medieval Islam and the History of Drug Addiction*, 16 Med. Hist. 226, 230-31 (1972), *available at* http://www.ncbi.nlm.nih.gov/pmc/articles/PMC1034978/pdf/medhist00126-0026.pdf.

[13] "[T]he first century of drug control[began] in Shanghai in 1909." United Nations Office on Drugs & Crime, World Drug Report 2009, at 1, http://www.unodc.org/documents/wdr/WDR_2009/WDR2009_eng_web.pdf [hereinafter UNODC, World Drug Report 2009]. "[T]he Chinese opium epidemic in the early twentieth century spurred concerted international action, chiefly in the form of a series of treaties passed over several decades." *Id.* at 5.

felt by a much broader audience than just those individulas who know and depend upon the addict. There are additional costs to society that stem directly from an addict's loss of productivity.[14] The United States government analyzes a complex combination of factors to determine overall loss of productivity due to drug addiction.[15] These factors include "labor participation, specialty drug treatment, hospitalization, incarceration, and premature mortality attributable to illicit drug use."[16] The various calculations for productivity loss based upon each factor can be found in *The Economic Impact of Illicit Drug Use on Society*, a report by the U.S. Department of Justice which measures the Total Productivity Value ("TPV")[17] associated with each factor.[18] The TPV loss for 2007 attributable to loss of participation in the labor market alone was estimated at approximately $49.23 billion.[19] Additionally the TPV loss attributable to incarceration alone was approximately $48.12 billion.[20] These loss of productivity costs are staggeringly high by any measure.

Not only does the loss of productivity and human potential cause ripple effects throughout our society, other costs of addiction are borne by a far broader array than just those who are in the immediate circle of the addicts themselves. These broadly felt additional costs include medical treatment for addiction-related diseases[21] and greatly increased levels of crime in society.[22] Addiction also causes an increased number of homeless individuals and families.[23] Closely related to the problems of addic-

---

[14] U.S. DEP'T OF JUSTICE NAT'L DRUG INTELLIGENCE CTR., THE ECONOMIC IMPACT OF ILLICIT DRUG USE ON AMERICAN SOCIETY 1, 29 (2011), http://www.justice.gov/ndic/pubs44/44731/44731p.pdf [hereinafter THE ECONOMIC IMPACT].

[15] *Id.* at 29.

[16] *Id.*

[17] TPV costs are the sum of Market Productivity Value and Household Productivity Value estimates. *Id.* at 15.

[18] *See id.* at ix.

[19] *Id.* at 31.

[20] THE ECONOMIC IMPACT, *supra* note 14, at 37.

[21] *Id.* at 38-43.

[22] *See, e.g.*, National Drug Intelligence Center, *National Drug Threat Assessment 2010*, U.S. DEPARTMENT JUST. (Feb. 2010), http://www.justice.gov/ndic/pubs38/38661/drugImpact.htm.

[23] Samuel A. Ball et al., *Substance Abuse and Personality Disorders in Homeless Drop-in Center Clients: Symptom Severity and Psychotherapy Retention in a Randomized Clinical Trial*, 46 COMPREHENSIVE PSYCHIATRY 371, 371 (2005), *available at* http://www.ncsinc.org/images/pdfs/JrnlCompPsych.pdf (noting a 10-40% rate of drug abuse diagnosis among homeless populations).

tion and criminality are the public health and criminal justice crises that they help create.[24]

The problems that are directly attributable to drug addiction represent some of the most significant problems societies around the world have faced. The global nature of these problems is evident from the nature of drug trafficking.[25] Demand for particular drugs varies throughout the world, as does production capability.[26] These facts necessitate transnational shipment of drugs throughout the world.[27] Drug trafficking and the enormous profits associated with it bring staggering levels of violence, official corruption, arms dealing, and even terrorism.[28] In some regions, terrorist organizations reap profits from the illegal drug trade to fund their campaigns of terror,[29] while traffickers in other parts of the world engage in terrorist behavior to control these highly profitable enterprises.[30] Drug traffickers can destabilize governments and undermine national and global security regimes.[31] The problems associated with addiction even include global stability issues. It is hard to underestimate the true extent of the worldwide drug problem.

In response to the myriad of problems associated with addiction and trafficking, communities worldwide have taken various approaches in an attempt to stem the tide of drug use. Most prevalent among these approaches is the law enforcement model, including militarization of efforts to eradicate crops and interdict drug shipments.[32] Despite decades of effort, and many billions of dollars spent, there is little doubt that the present approach is not successful in stemming the tide of addiction and the attendant problems of drug trafficking. This is particularly

---

[24] *See, e.g.*, R. Gil Kerilkowske, U.S. Dir., Nat'l Drug Control Policy, Opening Statement at the 53rd UN Commission on Narcotic Drugs (March 8, 2010) (on file with *Phoenix Law Review*) (calling for a "smarter" approach to complex legal and public health challenges).

[25] *See* UNODC, WORLD DRUG REPORT 2009, *supra* note 13, at 286-88.

[26] *See generally id.*

[27] *See generally id.*

[28] *See, e.g.*, Anatol Lieven & Maleeha Lodhi, Op-Ed, *Bring in the Taliban*, N.Y. TIMES, April 22, 2011, http://www.nytimes.com/2011/04/23/opinion/23iht-edlieven23.html; *see also* Rod Nordland, *U.S. Turns a Blind Eye to Opium in Afghan Town*, N.Y. TIMES, March 21, 2010, at A1, *available at* http://www.nytimes.com/2010/03/21/world/asia/21marja.html?scp=3&sq=poppies&st=cse.

[29] *See, e.g.*, Lieven & Lodhi, *supra* note 28; *see also* Nordland, *supra* note 28.

[30] *See, e.g.*, Oscar Hidalgo, *Mexican Drug Trafficking*, N.Y. TIMES, http://topics.nytimes.com/top/news/international/countriesandterritories/mexico/drug_trafficking/index.html (last updated Aug. 3, 2011).

[31] *Id.*; *see also* Lieven & Lodhi, *supra* note 28.

[32] *See generally* UNODC, WORLD DRUG REPORT 2009, *supra* note 13, at 163-86.

evident in the United States, despite the much-vaunted war on drugs that has been waged for decades. Repeated studies, including the most recent report by the GCDP, unambiguously conclude that the war on drugs model has been an unmitigated failure.[33] In fact, much of the violence that accompanies drug trafficking is related to drug prohibition policies.[34] These conclusions, however, beg the question of what can be done to combat the serious problems associated with drugs if we switch from the law enforcement approach. In the following parts, the authors examine how the massive scope of these problems dictate what may be our only hope for addressing them.

III. Measuring the Drug Problem

The worldwide drug problem is not measured simply in terms of the number of people addicted to various drugs. However, that is a logical place to start in any discussion, for it is the relatively inelastic demand that fuels all others aspects of the trade in drugs. Unfortunately, it is difficult to accurately determine the number of drug addicts. As the International Narcotics Control Board ("INCB") recently noted, "[i]t is challenging to generate reliable information on the nature and extent of the drug use situation."[35] The United Nations Office of Drug Control ("UNODC"), World Drug Report 2009, discusses the difficulties in obtaining accurate numbers on drug usage and addiction, noting that the data on drug use is limited.[36] "Data are sparse, particularly in the developing world, and the level of uncertainty in many matters is high."[37] Furthermore, "[d]ata on drug use comes from surveys and treatment information, but a limited number of countries collect this information."[38] The uncertainty level about drug use varies greatly, both across drug types and across regions.[39] To some extent, this uncertainty accounts for the range articulated by the UNODC World Drug Report

---

[33] *See* Global Comm'n on Drug Policy, *supra* note 1.

[34] *See generally* B.C. Ctr. for Excellence In HIV/AIDS, Effect of Drug Law Enforcement on Drug-Related Violence: Evidence from a Scientific Review (2010), http://uhri.cfenet.ubc.ca/images/Documents/violence-eng.pdf.

[35] Rep. of the Int'l Narcotics Control Bd., 2, U.N. Doc. E/INCB/2009/1 (Feb. 24, 2010), *available at* http://www.incb.org/pdf/annual-report/2009/en/AR_09_English.pdf.

[36] UNODC, World Drug Report 2009, *supra* note 13, at 9.

[37] *Id.*

[38] *Id.*

[39] *Id.*

2009, estimating between 172 million and 250 million persons in the world used a drug in 2007.[40]

The UNODC arrives at these numbers by looking at data regarding usage and data regarding production to determine the status of the drug trade.[41] This data provides a more complex picture than many admit when discussing drug policies. According to the 2009 World Drug Report of the UNODC, usage of some drugs is decreasing in some regions[42] and stabilizing in other regions,[43] but usage of other drugs appears to be generally increasing worldwide.[44] The extent of the problem of addiction, the related public health crises, and the perceived successes in addressing these problems by the current prohibition policy are at best unclear. For example, the UNODC touts the decrease in opium poppy cultivation from 2008-2009, noting that it is "mainly due to a large decrease [of production] in Afghanistan."[45] However, given the foreign military occupation of much of war-torn Afghanistan,[46] this can hardly be identified as either a trend or a replicable model for future success.

---

[40] *Id.* at 15; *see also* Rep. of the Int'l Narcotics Control Bd., *supra* note 35. Of course, even this figure is easily disputed, as the definitions of such basic terms as *drug* and *use* are often subjects of disagreement.

[41] *See generally* UNODC, WORLD DRUG REPORT 2009, *supra* note 13.

[42] *Id.* at 9 (noting that usage of cannabis appears to be declining in places such as Western Europe, North America, and Oceana). This conclusion concerning cannabis usage in the United States has been greatly disputed. NAT'L CTR. FOR HEALTH STATISTICS, HEALTH, UNITED STATES, 2010: WITH SPECIAL FEATURE ON DEATH AND DYING 235-37 (2011). In its most recent reports, the United States based Centers for Disease Control and Prevention has documented a rise in cannabis usage for those 12 years of age and older. *Id.* The percentage of marijuana users rose from 5.8% in 2007 to 6.1% in 2008. *Id.* This percentage rose again to 6.6% in 2009, the last year for which statistics are available. *See id.* These statistics certainly underestimate the true prevalence of marijuana use in the United States as they exclude all incarcerated persons. *See id.*

[43] UNODC, WORLD DRUG REPORT 2009, *supra* note 13, at 9 (noting that cocaine use appears to be stabilizing in Europe). The stabilization of cocaine usage in Europe appears to be countered by the fact that "drug consumption continue[s] to grow in Latin America." LATIN AM. COMM'N ON DRUGS & DEMOCRACY, DRUGS & DEMOCRACY: TOWARD A PARADIGM SHIFT 7 (2009) [hereinafter PARADIGM SHIFT].

[44] UNODC, WORLD DRUG REPORT 2009, *supra* note 13, at 9 (noting that "the global problem with amphetamine-type stimulants (ATS) is worsening").

[45] *Id.* at 10.

[46] *See, e.g.*, Nordland, *supra* note 28 ("Opium is the main livelihood of 60 to 70 percent of the farmers in Marja, which was seized from Taliban rebels in a major offensive [in February 2010]. American Marines occupying the area are under orders to leave the farmers' fields alone.").

The devastating effects of drug addiction have destabilized countries and continue to threaten entire regions of the world.[47] According to the UNODC, in some parts of the world, illegal drugs injected through contaminated needles is the "main cause of HIV infection."[48] The increased incidence of medical problems, including HIV/AIDs, has given rise to global security concerns.[49] "The HIV/AIDS pandemic is exacerbated by conditions of violence and instability, which increase the risk of exposure to the disease through large movements of people, widespread uncertainty over conditions, and reduced access to medical care . . . . If unchecked, the HIV/AIDS pandemic may pose a risk to stability and security."[50] The impact of this health crisis on international stability has become increasingly clear. "The national security dimension of the virus is plain: it can undermine economic growth, exacerbate social tensions, diminish military preparedness, create huge social welfare costs, and further weaken already beleaguered states."[51] That said, HIV, albeit one of the most serious medical complications from drug abuse, is hardly the only public health crisis related to addiction.

Another serious medical condition associated with drug usage is Hepatitis C.[52] According to the Director of the United States National Institutes of Health, National Institute on Drug Abuse, "epidemiologic studies show that HCV [hepatitis C] is now endemic among injection drug users."[53] These major medical consequences are two of the most serious, but they fail to account for the daily medical toll that illegal drug use takes on users. It is beyond dispute that drug usage can have negative medical consequences on virtually every bodily system including cardio-

---

[47] At this point, we are discussing the primary and secondary impact from drug usage itself, not the violently destabilizing influence of drug trafficking.

[48] UNAIDS, 2008 REPORT ON THE GLOBAL AIDS EPIDEMIC 43 (2008), http://data.unaids.org/pub/GlobalReport/2008/jc1510_2008_global_report_pp29_62_en.pdf.

[49] UNAIDS, FACTSHEET: HIV/AIDS AND SECURITY (2003), http://data.unaids.org/Topics/Security/fs_security_en.pdf.

[50] *Id.* (quoting S.C. Res. 1308, U.N. Doc. S/RES/1308 (July 17, 2000)).

[51] Andrew Thompson, *International Security Challenges Posed by HIV/AIDS: Implications for China*, 2 CHINA: INT'L J., 287, 288 (2004).

[52] *See, e.g.*, S.L. Jowett et al., *Managing Chronic Hepatitis C Acquired Through Intravenous Drug Use*, 94 QJM: INT'L J. MED. 153 (2001), *available at* http://qjmed.oxfordjournals.org/cgi/content/full/94/3/153.

[53] Letter from Alan I. Leshner, Dir., Nat'l Inst. on Drug Abuse, to Colleague (May 2000), *available at* http://www.drugabuse.gov/HepatitisAlert/HepatitisAlert.html. Hepatitis C, while potentially fatal, is treatable. However, the treatment is often expensive and may include a liver transplant. *See, e.g.*, Mayo Clinic Staff, *Hepatitis C: Treatment and Drugs*, MAYO CLINIC (May 24, 2011), http://www.mayoclinic.com/health/hepatitis-c/DS00097/DSECTION=treatments-and-drugs.

vascular, respiratory, gastrointestinal, musculoskeletal, kidney, liver, neurological, hormonal, and can lead to cancer, and mental health conditions.[54]

Were the consequences of the drug trade limited to the harmful medical consequences borne solely by those who use such drugs, the need to ensure an effective system might not be so clearly a pressing global issue.[55] However, the drug trade has many other dire consequences.

Criminal violence associated with the drug trade has increasingly far reaching and grave consequences. For example, drug-related violence in Mexico appears to be increasing in frequency and intensity.[56] Reports indicate that "nearly 19,000 people have been killed in drug related crimes in Mexico over the last four years and the violence continues to escalate."[57] Moreover, the brazenness of the drug cartels appears to be growing. It is believed that drug cartels are responsible for the 2010 murder of U.S. consular officials in Ciudad Juarez, Mexico.[58]

The confluence of criminal violence and terrorist organizations and tactics represent grave challenges for global security. Some evidence suggests that terrorist organizations are increasingly funding themselves through drug trafficking.[59] There is little room to question that the Taliban has become increasingly reliant upon opium production in Afghanistan.[60] Given the global implications of increased instability, ter-

---

[54] *See Medical Consequences of Drug Abuse*, NAT'L INST. ON DRUG ABUSE, http://www.drugabuse.gov/consequences/index.html (last visited Oct. 6, 2011).

[55] The authors recognize that the medical effects of drug abuse are shared. Indeed, one of the reasons for the global HIV epidemic is that once an intravenous drug abuser contracts HIV they have the remainder of their life to share that disease with loved ones through intimate contact.

[56] *See, e.g.*, *American Diplomats Targeted in Mexico Drug Violence*, CBS NEWS (posted online on Mar. 16, 2010, 12:47 AM), http://www.cbsnews.com/video/watch/?id=6302879n.

[57] *Id.*

[58] *See* Marc Lacey & Ginger Thompson, *Two Drug Slayings in Mexico Rock U.S. Consulate*, N.Y. TIMES, Mar. 15, 2010, at A1, *available at* http://www.nytimes.com/2010/03/15/world/americas/15juarez.html ("The killings followed threats against American diplomats along the Mexican border and complaints from consulate workers that drug-related violence was growing untenable, American officials said.").

[59] FED. RESEARCH DIV., LIBRARY OF CONG., A GLOBAL OVERVIEW OF NARCOTICS-FUNDED TERRORISTS AND OTHER EXTREMIST GROUPS 1 (2002), http://www.loc.gov/rr/frd/pdf-files/NarcsFundedTerrs_Extrems.pdf ("As a result of the significant decline in funding of guerilla and terrorist groups by ideologically motivated state sponsors since the end of the Cold War, these groups have become increasingly reliant on drug trafficking as a principal funding source.").

[60] Press Release, United Nations Office on Drugs & Crime, Drugs Finance Taliban War Machine, Says UN Drug Tsar (Nov. 27, 2008), *available at* http://www.unodc.org/unodc/en/press/releases/2008-11-27.html.

rorism, and war, it is important that the global community continue to look for evidence of strategies that are effective at combating addiction and drug trafficking.

IV. Current Methods of Attacking Addiction and Trafficking

"Drug control has been on the global agenda for more than a century."[61] Criminalization has been the main framework for drug policy and has defined the methods chosen to eradicate drug addiction and trafficking. To effectuate this policy, the international community has entered into a series of treaties that define the global response to the drug trade. The main treaties are the 1961 Single Convention on Narcotic Drugs,[62] the 1971 Convention on Psychotropic Substances,[63] and the 1988 Convention against the Illicit Traffic in Narcotic Drugs and Psychotropic Substances.[64] Under these treaties, signatories are required to criminalize designated offenses relating to drug usage and trafficking.[65] However, this framework is not working and appears to be fundamentally flawed.

The failures of the present law enforcement and criminalization model of drug control have been recognized for decades.[66] "[P]ast scientific research has demonstrated that the proposed counter-narcotics efforts have consistently yielded negligible effects on the availability, price, or purity of the targeted substance."[67] Studies from very diverse regions of the world continue to demonstrate that over reliance on drug law enforcement interventions as the major anti-drug strategy are "inef-

---

[61] UNODC, World Drug Report 2009, *supra* note 13, at 5.

[62] Single Convention on Narcotic Drugs, 1961, Mar. 25, 1972, 26 U.S.T. 1439, *available at* http://www.incb.org/pdf/e/conv/convention_1961_en.pdf (as amended by the 1972 Protocol).

[63] Convention on Psychotropic Substances, 1971, Feb. 21, 1971, 32 U.S.T. 543, *available at* http://www.unodc.org/unodc/en/treaties/psychotropics.html.

[64] United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, Dec. 20, 1988, 28 I.L.M. 493, *available at* http://www.unodc.org/pdf/convention_1988_en.pdf.

[65] *See id.;* Convention on Psychotropic Substances, 1971, *supra* note 63; Single Convention on Narcotic Drugs, 1961, *supra* note 62.

[66] *See, e.g.*, Herbert L. Packer, The Limits of the Criminal Sanction 332-33 (1968) (noting the effects of such policy including such things as "[a]n immensely profitable illegal traffic in narcotic and other forbidden drugs has developed" and "a disturbingly large number of undesirable police practices . . . have become habitual," concluding that "[a] clearer case of misapplication of the criminal sanction would be difficult to imagine.").

[67] Daniel Werb, et al., *The Need for an Evidence-Based Approach to Controlling Opium Production in Afghanistan*, 29 J. Pub. Health Pol'y, 440, 442 (2008).

fective in reducing drug-related harm."[68] These studies come from countries that have historically been drug-producing and/or drug-consuming countries.[69] Nevertheless, current policy favored by the UNODC continues to misguidedly assert that while some tinkering with the system may be in order, the present arrangement of drug control is an effective model that should continue to be utilized.[70]

The authors of this article respectfully disagree with this analysis, as do the members of the GCDP. Regional studies have asserted that "[t]he UNODC report underestimates what it calls unexpected consequences" such as increasing levels of violence.[71] As the Latin American Commission on Drugs and Democracy noted, "acknowledging the failure of current policies and their consequences is the inescapable prerequisite for opening up the discussion about a new paradigm leading to safer, more efficient and humane drug policies."[72] The GCDP and other prominent leaders have begun the task of opening up for discussion a new paradigm of drug policy.[73] Former President Jimmy Carter recently wrote in the New York Times to support the GCDP's call to end the "war on drugs."[74]

An example of the need for an international reassessment of the present prevailing drug control strategy is demonstrated by the recent increase of narcotic traffickers' violent activities in Mexico.[75] These

---

[68] Kora DeBeck, et al., *Canada's New Federal 'National Anti-Drug Strategy': An Informal Audit of Reported Funding Allocation*, 20 INT'L J. DRUG POL'Y 188, 188 (2009).

[69] See *id.*; Werb et al., *supra* note 67; *see also* PARADIGM SHIFT, *supra* note 43 ("Prohibitionist policies based on the eradication of production and on the disruption of drug flows as well as on the criminalization of consumption have not yielded the expected results. We are farther than ever from the announced goal of eradicating drugs.").

[70] UNODC, WORLD DRUG REPORT 2009, *supra* note 13.

[71] PARADIGM SHIFT, *supra* note 43, at 20.

[72] *Id.* at 8.

[73] *See* GLOBAL COMM'N ON DRUG POLICY, *supra* note 1; *see also* Jimmy Carter, Op-Ed., *Call Off the Global Drug War*, N.Y. TIMES, June 17, 2011, at A35, *available at* http://www.nytimes.com/2011/06/17/opinion/17carter.html?scp=2&sq=jimmy%20carter&st=cse.

[74] *See* Jimmy Carter, *supra* note 73.

[75] Numerous media outlets have written articles about the increasing drug trafficking related violence. *See, e.g.*, *Congress Discusses Increasing Drug Violence in Mexico*, VOICE AM. (Mar.11, 2009), http://www.voanews.com/english/news/a-13-2009-03-11-voa25-68726827.html ("U.S. lawmakers are expressing concern over the mounting drug-related violence in Mexico and the spillover into the United States."); *Drugs and Violence: Mexico's Addiction*, BBC (Sep. 3, 2010, 14:44 ET), http://www.bbc.co.uk/news/world-latin-america-11174174 ("Drug-related violence in Mexico has killed nearly 30,000 people in the first [forty-five] months of the current government, and its fast increase has been unstoppable."); Sevil Omer, *More Will Die: Mexico Drug Wars Claim U.S. Lives* (Apr. 22, 2011, 10:29 AM ET), http://www.msnbc.msn.com/id/42232161/ns/us_news-crime_and_courts/t/more-will-die-mexico-drug-wars-claim-us-lives/ ("No one can say for certain how many Americans have been killed in the escalating Mexican drug violence . . . .").

increasing levels of violence associated with the drug trade in Mexico raise the issue of whether Mexico is "well positioned to ask the government and institutions of American society to engage in a dialogue about the policies currently pursued by the [United States] as well as to call upon the countries of the European Union to undertake a greater effort aimed at reducing domestic drug consumption."[76]

Various countries are beginning to attempt to change this system. For example, in October 2007, the Canadian Federal government launched a new $64 million dollar "'National Anti-Drug Strategy' in which two-thirds of the new monies was reportedly directed towards drug prevention and treatment initiatives."[77] However, in spite of this announced strategic reallocation of funds, a recent study showed that "law enforcement initiatives continue to receive the overwhelming majority of drug strategy funding (70%) while prevention (4%), treatment (17%), and harm reduction (2%) combined continue to receive less than a quarter of the overall funding."[78]

The Latin American Commission on Drugs and Democracy has proposed "a new paradigm based on three main directives:

- Treating drug users as a matter of public health.
- Reducing drug consumption through information, education and prevention.
- Focusing repression on organized crime."[79]

However, "decriminalizing drugs as an isolated measure, disconnected from a strong investment in information and education to reduce consumption, could have the contrary effect of worsening the problems of drug addiction."[80] This essential concern was also shared by the GCDP, which recommended the comprehensive involvement of all relevant segments of society in adopting drug policy.[81] The Latin American Commission on Drugs and Democracy specifically identified the role that markets play in any coherent drug policy.

> Eradication efforts must be combined with the adoption of strongly financed alternative development programs

---

[76] PARADIGM SHIFT, *supra* note 43, at 9.

[77] DeBeck, et al., *supra* note 68.

[78] *Id.*

[79] PARADIGM SHIFT, *supra* note 43, at 11.

[80] *Id.* at 12.

[81] *See* GLOBAL COMM'N ON DRUG POLICY, *supra* note 1, at 9 ("Drug policies must be pursued in a comprehensive manner, involving families, schools, public health specialists, development practitioners and civil society leaders, in partnership with law enforcement agencies and other relevant governmental bodies.").

> adapted to local realities in terms of viable products and conditions for their competitive access to markets. It is important to speak not only of alternative cultivation but to envision a wide range of options, including the social development of alternative forms of work, democratic education and the search for solutions in the participatory context. Such initiatives must also take into account the legal uses of plants, such as the coca leaf, in countries with a long-standing tradition of ancestral use previous to the phenomenon of their exploitation as an input for drug production. Accordingly measures must be taken to strictly adjust production to this kind of ancestral use.[82]

As important as these calls for a new paradigm are to any hopes of relinquishing our global reliance upon military and criminal mechanisms to combat drug abuse, these calls for change fall short of what is necessary to effectuate a true reduction in the most serious aspects of drug addiction and trafficking. It is because of the recognized complexity of this issue, that the authors of this article propose a different paradigm for attempting to address the problems of the drug trade. Recognizing that "[i]llegal drug markets represent a significant proportion of the economy in producer countries,"[83] the authors propose a paradigm based on the economic realities of the drug trade, capitalizing on the recognition that evidence of failing strategies must not be ignored and innovative and successful strategies must be adopted.

V. Economics and the Persistence of Drug Trafficking

As discussed previously in this article, the drug problems faced throughout societies today are complex and multi-dimensional. While regional and cultural differences are important to understand in contemplating drug policies,[84] many commonalities exist wherever the illegal drug trade can be found. We must be willing to consider alternatives to the policies that have repeatedly failed in the past if we are to make inroads into combating these serious social ills.

---

[82] Paradigm Shift, *supra* note 43, at 13.

[83] *Id.* at 25.

[84] *See, e.g.*, Cameron Ming, *Zero Coca, Zero Culture: Bolivia's Struggle to Balance Cultural Identity and the Need for Economic Stability in the Midst of the Expiring Andean Trade Promotion and Drug Eradication Act*, 14 Tulsa J. Comp. & Int'l L. 375 (2007).

A. Problems With the Prohibitionist Approach

At its core, drug trafficking is a commercial activity that is governed in many respects by the same rules of supply and demand that govern other commercial efforts. This remarkable fact has long been recognized by scholars studying the problems associated with the trade in drugs, by governments, and by the traffickers themselves.[85] Consequently, efforts to eliminate drug trafficking often focus on some combination of attacking the demand for drugs and interrupting or eliminating the supply of illegal drugs made available by drug traffickers.[86] However, factors peculiar to illegal drug markets have made those markets stubbornly resistant to traditional economic-model-based initiatives designed to combat drug trafficking.

The incentive for traffickers to engage in the drug business is clear. In 1996, the estimated annual market for the world drug trade was $750 billion, dwarfing the combined budgets of all enforcement agencies worldwide.[87] While a precise figure for the total drug trade is hard to identify, UNODC reports quantify the trade at a much lower $322 billion per year, nevertheless, estimate that the illegal drug trade represents approximately 8% of total international trade.[88] British sources estimate that somewhere between 26% and 58% of the total amount of drug trade can be classified as pure profit.[89] At the most conservative estimate, therefore, the profit gained from illegal drug trafficking in 2006 was

---

[85] *See, e.g.*, KATHRYN MEYER & TERRY PARSSINEN, WEBS OF SMOKE: SMUGGLERS, WARLORDS, SPIES, AND THE HISTORY OF THE INTERNATIONAL DRUG TRADE (1998); *see also* H. Entorf & P. Winker, *Investigating the Drugs—Crime Channel in Economics of Crime Models Empirical Evidence from Panel Data of the German States*, 28 INT'L REV. L. & ECON. 8 (2008).

[86] Virtually all government policies to combat drug abuse involve attempts to suppress supply or demand and thereby implicate the basic macro-economic market model. *See, e.g.*, THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 31 (2004), http://www.state.gov/documents/organization/30228.pdf (describing the Bush Administration policy of attacking the "economic basis of the drug trade"); *see also* Kerilkowske, *supra* note 24 (describing a muti-faceted approach aimed at reducing demand and interrupting supply).

[87] *See* MARTIN BOOTH, OPIUM: A HISTORY 352 (1996) (noting that this figure is "infinitely greater" than the combined budgets of all worldwide drug enforcement agencies).

[88] This percentage is based upon the UNODC's much lower estimate of the size of the drug trade. *See, e.g.*, Sheryl Ubelacker, *$322-Billion Illicit Drug Trade Fueling HIV Infections Around World*, CANADIAN PRESS, Aug. 15, 2006, *www.unodc.org/pdf/brazil/word_midia/15082006cbc.doc.* Even with these lower estimates of the size of the illegal drug trade, the estimate that this market accounts for 8% of all international trade is astonishing. If the higher figure noted by Booth is correct, the international trade market share for illegal drugs would easily exceed 15%. *See* BOOTH, *supra* note 87.

[89] *See, e.g.*, Ubelacker, supra note 88.

approximately $83.72 billion.[90] To place this astronomical figure in perspective, that same year ExxonMobil reported the highest profit of any corporation in history at $39.5 billion.[91] The most conservative estimate of illegal drug trade profits in 2006 dwarfed the combined profits for the two largest oil companies in the world that year, ExxonMobil and Royal Dutch Shell, which also reported a record profit of $25.44 billion.[92]

More recent estimates show that profits have only continued to grow despite strict domestic and international efforts to combat traffickers and eliminate demand.

> Drug Trafficking is a global enterprise that, according to the U.N. Office on Drugs and Crime, generates approximately $394 billion per year. This figure dwarfs the proceeds from other forms of organized criminal activity and provides a revenue stream for insurgents, terrorists, and other nefarious activity. To put this sum in perspective, the proceeds of the global drug trade exceed the gross domestic product of many national governments and provide ample motivation to those who peddle poison for profit.[93]

Traditional economic models predict that the more costs or barriers to entry that are associated with any trade, the less people will be willing to engage in that trade. Indeed, it is this philosophy that appears to have been the defining principle in the current model of drug control.[94] Government regulation is typically one cost that prevents entry into a particular market. However, criminalization exerts a tremendous upward pressure on the cost of drugs, driving profits from this market ever

---

[90] *See* BOOTH, *supra* note 87; Ubelacker, supra note 88.

[91] *See, e.g.*, Clifford Krauss, *Exxon and Shell Report Record Profits for 2006,* N.Y. TIMES, Feb. 2, 2007, http://www.nytimes.com/2007/02/02/business/02oil.html.

[92] *Id.* Even if one added in the profits of the next largest U.S. oil company, Chevron, at $17.1 billion, the illegal drug profits easily exceeded the combined profits of these three oil giants. *See, e.g.*, Bill Van Auken, *Big Oil Companies Post Record Profits for 2006*, WORLD SOCIALIST WEB SITE, Feb. 3, 2007, http://www.wsws.org/articles/2007/feb2007/oil-f03.shtml.

[93] *Transnational Drug Enterprises (Part II): Threats to Global Stability and U.S. Policy Responses Before the Subcomm. on Nat'l Sec. & Foreign Affairs, Comm. on Oversight & Gov't Reform*, 11th Cong. 1-2 (2010), http://www.justice.gov/dea/pubs/cngrtest/ct030310.pdf [hereinafter *Transnational Drug Enterprises (Part II)*] (statement of Anthony P. Placido, Assistant Admistrator for Intelligence Drug Enforcement Administration).

[94] *See* Sandi R. Murphy, *Drug Diplomacy and the Supply-Side Strategy: A Survey of United States Practice*, 43 VAND. L. REV. 1259, 1262-63 (1990).

higher.[95] The profit incentive created by an illegal market of this size overwhelms any entry costs associated with trafficking.[96] Despite U.S. efforts to eradicate crops and increased interdiction enforcement, accompanied by ever lengthening prison sentences for those arrested for narcotics offenses, unprecedented profits create an inexhaustible supply of willing traffickers.[97] Studies strongly support the conclusion that, far from suppressing trafficking, U.S. interdiction and eradication efforts provide additional incentive to enter the drug trade because they force the price of drugs higher, resulting in greater profits.[98]

Not even a substantial risk of death deters traffickers from entering the trade. Numerous examples of this phenomenon can be cited, whether it involves the use of the death penalty for drug traffickers, the risk of death from other traffickers, or the real possibility of being killed by law enforcement efforts.[99] None of these impediments seem to have any appreciable impact in the willingness of individuals to engage in drug trafficking.[100] In fact, recent studies show that interdiction efforts do little to intimidate traffickers and actually make them more violent, not less.[101]

The deaths of notorious drug cartel kingpins in Columbia provide perhaps the most well-known examples of how limited the impact of even the most severe operational costs can be on the willingness of people to engage in the drug trade. The Medellin cartel dominated Columbian cocaine trafficking during the 1980s.[102] Pablo Escobar rose from a childhood of abject poverty to become one of the wealthiest men in the world,

---

[95] *Id.* at 1305.

[96] *See id.*

[97] *See id*. at 1270-1304.

[98] *See, e.g.*, *id.* at 1305. One British study found that even during a high profile crackdown on drug sellers in a region, over two-thirds of the drug users, who lived in that region, did not notice any major change in the price or availability of the drug supply, which included heroin, crack cocaine, and cannabis, during the operation. David Best et al., *Assessment of a Concentrated, High-Profile Police Operation. No Discernible Impact on Drug Availability, Price or Purity*, 41 BRIT. J. CRIMINOLOGY 738, 743 (2001). Thus, at best it appears that such efforts do not decrease the availability or use of illicit drugs.

[99] *E.g.*, *Man Gets Death Penalty for Drug Trafficking*, CHINA DAILY USA (June 15, 2011, 16:56), http://usa.chinadaily.com.cn/china/2011-06/15/content_12706321.htm; Hidalgo, *supra* note 30; Josh White, *Triggerman Details Killing of Drug Dealer*, WASH. POST (July 12, 2011), http://www.washingtonpost.com/local/triggerman-details-killing-of-drug-dealer/2011/07/12/gIQAUUbZBI_story.html.

[100] *See generally* B.C. CTR. FOR EXCELLENCE IN HIV/AIDS, *supra* note 34.

[101] *See id.*

[102] *Drug Wars: The Columbian Cartels*, *Frontline*, PBS, http://www.pbs.org/wgbh/pages/frontline/shows/drugs/business/inside/colombian.html (last visited Oct. 7, 2011).

with an estimated personal wealth of $25 billion.[103] He was killed by Columbian authorities in 1993.[104] Almost immediately, the Medellin Cartel was replaced by the Cali Cartel, whose leaders were either killed or captured in the 1990s.[105] Neither of these law enforcement successes reduced the flow of cocaine from Columbia to other parts of the world.[106] The profits are simply too great to allow even death to create a realistic entry barrier to resourceful individuals for whom the path of drug trafficking represents the best opportunity to obtain wealth and power.[107]

The enormous profits that allow individuals like Pablo Escobar to rise from poverty to extreme wealth feed into a culture of corruption that permeates governments worldwide. As the UNODC has stated, "bribery, dishonesty and corruption are the lubricants of the drug machinery."[108] The present law enforcement model fails to account for these realities, thus it is doomed to fail. More accurately, it already has proven to be an abject failure as the GCDP and others have begun to recognize.

A new approach is necessary. This approach must recognize the extreme economic incentive inherent in a prohibitionist model. Additionally, it is critical that any new approach be an internationally coordinated effort. Recently, in the United States, a patchwork of state initiatives have attempted to decriminalize or legalize certain drugs, sometimes for limited medicinal uses and sometimes for general recreational use. Currently, the legislatures of sixteen states and the District of

---

103 *Pablo Escobar: Biography*, BIO, http://www.biography.com/people/pablo-escobar-9542497 (last visited Oct. 7, 2011); *World's Most Notorious Drug Kingpens*, N.Y. DAILY NEWS (May 30, 2011 4:00), http://www.nydailynews.com/money/galleries/worlds_most_notorious_drug_kingpens/worlds_most_notorious_drug_kingpens.html.

104 *Pablo Escobar: Biography*, *supra* note 103.

105 *Drug Wars: The Columbian Cartels*, *supra* note 102.

106 *Id.*

107 *See id.* Examining the current situation in Mexico provides additional compelling evidence that threats of death are poor deterrents to the drug trade. "Since President Calderon took office in December 2006 and immediately set out to break the power and impunity of these cartels, his government has deployed more than 45,000 military troops to assist police in combating cartel influence and related violence. Despite these heroic efforts, there have still been approximately 17,900 drug-related murders in that country since President Calderon began his counter offensive against the cartels in 2007." *Transnational Drug Enterprises (Part II)*, *supra* note 93. No one can credibly suggest that these efforts have prevented drugs from either being distributed in Mexico or moving through that country to the United States or other regions.

108 Antonio Maria Costa, United Nations Office on Drugs & Crime Exec. Dir., Remarks on Drugs and Insecurity in Afghanistan: No Quick Fix (Jan. 18, 2008), http://www.unodc.org/unodc/en/about-unodc/speeches/2008-01-17.html.

Columbia have approved medicinal use of marijuana.[109] Some elimination of criminal penalties on small amounts of marijuana have passed in thirteen additional states.[110] At the same time, federal prohibitions on marijuana remain in effect.[111] The U.S. policy toward marijuana is incoherent at best. At worst, it makes criminals of ordinary citizens with health problems and creates opportunities for organized criminals to amass great wealth, corrupt governments, and promote disrespect for the law.

The myriad of different approaches to the drug problem throughout the world provide opportunities for inventive and wealthy traffickers. Where laws are lax in one nation or region, that region is often used as a conduit to traffic drugs to other regions. Without a uniform approach to coordinate and control the drug markets, opportunistic traffickers will continue to succeed.

B. Inelastic Demand Resists the Most Draconian Measures

Another reality of the drug trade that is inadequately accounted for in the present model is that demand for drugs by those addicted to them cannot simply be eradicated by prohibition. Efforts to control drug trafficking are greatly hampered by the relatively inelastic demand caused by addiction. Despite decades of strict enforcement of narcotics laws in the United States and the concomitant explosion in U.S. prison populations, the demand for illegal drugs remains high. In 2002, approximately 25% of all jail inmates in the United States were incarcerated for drug offenses.[112] In 2007, an estimated 14 million arrests occurred in the

---

[109] *See, e.g.*, Associated Press, *Experts Tell Indiana Panel: Ban on Marijuana has Failed*, CHI. TRIB. MOBILE (July 28, 2011 2:57 PM), http://mobile.chicagotribune.com/s.p?sId=54&p=WGTlhhZJ4FIj (search for "Experts Tell Indiana Panel").

[110] *Id.*

[111] *See, e.g.*, *Marijuana News Releases*, U.S. DRUG ENFORCEMENT ADMIN., http://www.justice.gov/dea/pubs/pressrel/marijuana_index.html (last visited Oct. 7, 2011).

[112] *See, e.g.*, *Drug Related Crime*, NAT'L CENTER FOR VICTIMS CRIME, http://www.ncvc.org/ncvc/main.aspx?dbName=DocumentViewer&DocumentID=32348 (last visited Oct. 10, 2011) ("In the 2004 Survey of Inmates in State and Federal Correction Facilities, 32% of State prisoners and 26% of Federal prisoners said they had committed their current offense while under the influence of drugs. Among State prisoners, drug offenders (44%) and property offenders (39%) reported the highest incidence of drug use at the time of the offense."); *see also,* U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 2007 STATISTICAL TABLES, Table 32 (2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/cvus0702.pdf (providing "percent distribution of victimizations by perceived drug or alcohol use by offender").

United States for all criminal offenses (excluding traffic violations).[113] The most arrests, by far, for any single category of offense was the approximate 1,841,200 arrests for drug abuse violations.[114] As staggering as this figure may be, it under represents the true nature of the drug abuse problem because the next largest categories of arrests were for driving under the influence (1.4 million), followed by simple assaults (1.3 million), and larceny-thefts (1.2 million).[115] A wealth of literature establishes significant correlation between this variety of property crimes and drug abuse.[116]

Of the 1.8 million drug-related arrests, simple possession of marijuana was by far the largest specific category of arrests, representing more than 42% of the total arrests.[117] Simple possession of any illegal drug accounted for 85% of total drug arrests, with 15% of arrests involving sales or trafficking.[118]

More Americans are being sentenced to prison for drug offenses than ever before, yet demand for drugs remains extremely high.[119] Between 1995 and 2005, the number of state prison inmates incarcerated for drug offenses increased by 40,500 prisoners or 19%.[120] The total number of state prisoners incarcerated for drug offenses in 2005 was approximately 253,000.[121] An additional 155,900 drug offenders were incarcerated in local jails in the last reported figures in 2002, which is an increase from the 114,000 measured in 1996.[122] Moreover, the 95,446 federal inmates incarcerated for drug crimes represents 53% of all inmates incarcerated

---

113 TINA L. DORSEY & PRISCILLA MIDDLETON, BUREAU OF JUSTICE STATISTICS, DRUG AND CRIME FACTS, 18-21 (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/dcf.pdf. The Bureau of Justice Statistics has stated that drug arrests are continuing to increase as a percentage of all arrests in the United States. *Id.* In 1987, approximately 7.4% of all arrests were for drug crimes. *Id.* In 2007, that figure hit 13%. *Id.; see* Bureau of Justice Statistics, *Drugs and Crime Facts: Enforcement*, OFF. JUST. PROGRAMS, http://bjs.ojp.usdoj.gov/content/dcf/enforce.cfm (last revised Oct. 21, 2011) [hereinafter *Drugs and Crime Facts: Enforcement*].

114 DORSEY & MIDDLETON, *supra* note 113, at 18.

115 *Id.*

116 *See* STEVEN B. DUKE & ALBERT C. GROSS, AMERICA'S LONGEST WAR: RETHINKING OUR TRAGIC CRUSADE AGAINST DRUGS 43-77 (1993) (indicating that one-third of inmates incarcerated for robberies and burglaries committed their crimes to obtain drugs).

117 *Drugs and Crime Facts: Enforcement*, *supra* note 113.

118 *Id.*

119 *See* Bureau of Justice Statistics, *Drugs and Crime Facts: Correctional Populations and Facilities*, OFF. JUST. PROGRAMS, http://bjs.ojp.usdoj.gov/content/dcf/correct.cfm (last revised Oct. 21, 2011).

120 *Id.*

121 *Id.*

122 *Id.*

in United States' federal custody.[123] When counting local, state, and federal inmates, the United States currently incarcerates more than 500,000 people for drug offenses.[124] While this represents just a fraction of all individuals incarcerated in the United States for crimes *related to drugs or efforts to obtain drugs*, the costs of housing one-half million people in 2004 exceeded $11.5 billion annually.[125]

As incarceration rates for drug offenses have dramatically increased in the United States during the past thirty years, there has been no appreciable impact upon demand. Released drug defendants have the highest rate of re-arrest.[126] Traffickers can count on an artificial floor on the demand side of the market due to addicts' overwhelming need to obtain drugs. Where inelastic demand exists, price hikes will not impact the market. Trafficking offenses, some punishable by death in the United States, China, and elsewhere, continue virtually unabated.[127]

C. The Costs of the War on Drugs are not Sustainable

The financial costs involved in continuing the war on drugs are unsustainable in the world economy.[128] Using the example of the U.S. government alone, this becomes clear. The U.S. federal budget in 2010 devoted solely to efforts aimed at reducing illegal drug use exceeded $15 bil-

---

123 *Id.*

124 *Id.*

125 *See* The Third Branch, *Costs of Incarceration and Supervision*, U.S. CTS. (May 2004), http://www.uscourts.gov/News/TheThirdBranch/05-05-01/Costs_of_Incarceration_and_Supervision.aspx. Tragically, Department of Justice Studies indicate that more than half of all persons incarcerated in the United States have mental health problems, with significant percentages of the mentally ill being incarcerated for drug offenses. *See* DORIS J. JAMES & LAURA E. GLAZE, BUREAU OF JUSTICE STATISTICS, MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES (2006), http://bjs.ojp.usdoj.gov/content/pub/pdf/mhppji.pdf; *see also* DORSEY & MIDDLETON, *supra* note 113.

126 DORSEY & MIDDLETON, *supra* note 113, at 28.

127 *See supra* notes 98-100.

128 There are those, including the director of the UNODC, who erroneously assert that those who call for decriminalization based on economic arguments are "un-ethical and uneconomical." UNODC, WORLD DRUG REPORT 2009, *supra* note 13. These assertions refuse to recognize the failure of the present system to address the drug trade problem—leaving millions addicted, their attendant health problems untreated, and the international instability borne of this problem un-redressed. The authors are not suggesting economics alone are the basis to scrap the present system. However, any fair assessment of the effectiveness of the present model must consider the economic realities and the costs of maintaining this failed system.

lion.[129] The Obama Administration's projected budget for 2011 will spend approximately $10 billion on reducing supply alone, with another $5.5 billion devoted to demand reduction.[130]

These figures do not include any costs associated with the criminal justice system, incarceration costs, or indirect military expenditures.[131] Nor do the figures account for the truly astronomical costs associated with the use of drugs and the crimes generated to purchase illegal drugs. A 1979 study of a paltry 356 heroin users in Miami, Florida found that they committed nearly 120,000 crimes in a single year, for an average of 332 crimes per addict in that single year.[132] The data indicates that approximately 75% of all robberies, burglaries, thefts, and assaults committed in relation to these offenses, are committed by drug abusers.[133] Other studies have replicated these findings.[134] While a significant percentage of these crimes would be committed without regard to drug prohibition, scholars who have studied this problem estimate as many as one-half of all burglaries, robberies, and thefts in the United States are directly attributable to the inflated cost of drugs due to prohibition.[135] In addition to these crimes committed by individuals, drug prohibition fuels

---

129 Bureau of Justice Statistics, *Drugs and Crime Facts: Drug Control Budget, Federal*, OFF. JUST. PROGRAMS, http://bjs.ojp.usdoj.gov/content/dcf/dcb.cfm#Fedbudget (last revised Oct. 21, 2011).

130 EXEC. OFFICE OF THE PRESIDENT OF THE U.S., National Drug Control Strategy: FY 2011 Budget Summary 15 (2010), http://www.whitehouse.gov/sites/default/files/ondcp/policy-and-research/fy11budget.pdf [hereinafter NATIONAL DRUG CONTROL STRATEGY: FY 2011].

131 *See, e.g.*, *id.* at 23-29. The detailed breakdown of the annual budget provides for specific Department of Defense programs, but costs for personnel, training, supplies, etc. remain hidden. *See id.* The manner in which military costs can be hidden is easily seen by examining the role of the military in interdicting opiates originating in Afghanistan. The costs for sending an additional 30,000 troops to Afghanistan was estimated by the New York Times to be an additional $30 billion for one year. Sheryl Gay Stolberg & Helene Cooper, *Obama Adds Troops, but Maps Exit Plan*, N.Y. TIMES, Dec. 2, 2009, at A1, *available at* http://www.nytimes.com/2009/12/02/world/asia/02prexy.html?pagewanted=all. How much of that cost is actually devoted to drug interdiction is *hidden*. In addition, the sole allocation for the Bureau of Prisons is for rehabilitation programs while in prison. NATIONAL DRUG CONTROL STRATEGY: FY 2011, *supra* note 130, at 115-19. Nothing is allocated for the costs of building new cells, housing inmates, security or maintenance at any facility. *See id.*

132 *See* Steven B. Duke, *Drug Prohibition: An Unnatural Disaster*, 27 CONN. L. REV. 571, 576-77 (1995) (*citing* James A. Inciardi, *Heroin Use and Street Crime*, 25 CRIME & DELINQ. 335, 342-43 (1979)).

133 *Id.*

134 *See id.*

135 *Id.* at 577.

criminal gangs that control many of our nation's inner cities and promotes a culture of lawlessness.

The costs associated with treating addiction as a crime and not as a public health crisis are incalculable. Persons incarcerated for drug offenses are more likely than other prisoners to be the parent of minor children.[136] Incarcerated parents are also more likely to have a history of illegal drug use.[137] Eighty-five percent of incarcerated parents admitted to a history of illegal drug use, with 55% acknowledging use in the month prior to their arrest.[138] In 2007, 1.7 million American children under the age of eighteen had at least one parent in prison.[139] More than 50% of all incarcerated parents were the primary source of financial support for their children before their arrest.[140] Eighty percent of incarcerated parents who were supporting their children were employed in the month prior to their arrest.[141]

It is truly impossible to quantify the losses suffered by these families and greater society due to the incarceration of parents with drug abuse problems. The increased numbers of families requiring government assistance due to the incarceration of parents can be measured, but the impact of destroyed families, stigmatized children, and the loss of human potential caused by treating the problem of drug abuse as a crime rather than as a global public health emergency is immeasurable.

Given these realities, it is impossible to accurately measure the real costs of the problems associated with the drug trade.[142] What is clear, however, is that the current model of attempting to combat this problem is not working and is, in fact, only adding to the human and capital costs of the current prohibitionist model. Thus, the authors propose a true reassessment and call for changes that take account of the failures of the present system.

---

136 LAUREN E. GLAZE & LAURA M. MARUSCHAK, BUREAU OF JUSTICE STATISTICS, PARENTS IN PRISON AND THEIR MINOR CHILDREN (2008), http://bjs.ojp.usdoj.gov/content/pub/pdf/pptmc.pdf.

137 *See id.*

138 DORSEY & MIDDLETON, *supra* note 113, at 15.

139 GLAZE & MARUSCHAK, *supra* note 136, at 1-2.

140 *Id.* at 6.

141 *Id.* at 5-6.

142 One question raised by the institutional costs of revamping this system is the political clout of those who profit from the present system. In the United States, this includes not only such groups as private-for-profit prisons that have exploded during the war on drugs but also the millions of people who rely on the present system for their employment—be they lawyers, judges, prison guards, or parole officers.

VI. Proposal for Decriminalization and Market Regulation

The authors respectfully offer the possibility that the world's nations need to reconsider the current policies of criminalization of drugs and their calamitous effects, using evidence based methods, rather than reactive approaches. This cannot be considered a *pro-drug* approach. To the contrary, what this proposal necessarily envisions is the most aggressive coordinated effort to reduce drug addiction and its related ills that has ever been undertaken. Nothing less will work. Certainly we know that current policies have failed.[143] If they had not, luminaries such as the GCDP would not be castigating the war on drugs and its global impact.

The authors propose that under the auspices of the UNODC, a treaty for the phased, uniform legalization and control of drug markets and consumption be negotiated and implemented. International cooperation on this issue is essential.[144] The UNODC has long recognized the need for global coordination and the GCDP has firmly echoed the call for a coordinated strategy.

> The development and implementation of drug policies should be a global shared responsibility, but also needs to take into consideration diverse political, social and cultural realities. Policies should respect the rights and needs of people affected by production, trafficking and consumption, as explicitly acknowledged in the 1988 Convention on Drug Trafficking.[145]

This treaty should be premised upon not only the economic realities of the drug trade, but also on the fact that drug addiction is one of the world's primary public health emergencies. The treaty must also recognize, however, that criminalization exacerbates every problem associated with addiction and causes many other crime and corruption related ills previously identified.

---

[143] Jose de Cordoba, *Latin American Panel Calls U.S. Drug War a Failure*, Wall St. J., Feb. 12, 2009, at A9, *available at* http://online.wsj.com/article/SB123439889394275215.html ("'The available evidence indicates that the war on drugs is a failed war,' said former Brazilian President Fernando Henrique Cardoso, in a conference call with reporters from Rio de Janeiro.").

[144] Convention on Psychotropic Substances, 1971, preamble, *opened for signature* Feb. 21, 1971, 1019 U.N.T.S. 175 ("[E]ffective measures against abuse of such substances requires co-ordination and universal action.").

[145] Global Comm'n on Drug Policy, *supra* note 1, at 8.

Under this international treaty, the drug markets should be heavily regulated and taxed.[146] The initial primary use of tax revenues should be to treat addiction throughout the globe, with treatment on demand made a right of all persons. Under this system, poorer nations should receive priority for these tax revenues, as wealthier nations will be receiving additional windfalls from the elimination of budgetary items made necessary only by the criminalization of drugs. The price of drugs to consumers should be high enough to discourage new users, but low enough to prevent development of alternative black markets. Public health officials in each nation could treat addicts with prescribed doses of drugs, eliminating the need for even the most severely addicted to resort to crime to feed that addiction.

In addition to rehabilitation, education concerning the ills of addiction should be supported through tax revenues. Evidence relating to such presently legal, yet addictive, substances, such as tobacco, demonstrates that educational programs are effective.[147] Through such education programs, the social stigma associated with addiction can be maintained, further impeding new users.

As the demand floor is lowered through increased rehabilitation and education, market forces will dictate that less supply will be needed. Taxation revenue streams can then shift to encompass programs designed to provide alternative uses for farmers and nations previously producing drug crops. Some drug crop lands will be maintained to meet the decreased demand of the market and other legitimate cultural and pharmacological uses. Development aid will be necessary to help others engaged in production of drug crops to transition to new crops and new markets.

It is the authors' position that only through honest and comprehensive overhaul of the system can the international community address this intransigent problem.

---

[146] The revenues available through taxation of drugs would be enormous. One recent estimate of the taxes available to one Midwestern U.S. state, Indiana, taxing one drug, marijuana, was placed at $44 million in revenue from sales taxes alone. *See* Associated Press, *supra* note 109. This revenue, of course, does not factor in the much greater benefit to the state treasury that would be created by the decrease in expenditures used to support the *war* on marijuana and other drugs.

[147] *See generally* U.S. DEP'T OF HEALTH & HUMAN SERVS., CTR. FOR DISEASE CONTROL & PREVENTION, BEST PRACTICES FOR COMPREHENSIVE TOBACCO CONTROL PROGRAMS (1999), http://tobaccofree.mt.gov/publications/cdcbestpractices.pdf.

VII. Conclusion

> *The prestige of government has undoubtedly been lowered considerably by the Prohibition law. For nothing is more destructive of respect for the government and the law of the land than passing laws which cannot be enforced. It is an open secret that the dangerous increase of crime in this country is closely connected with this.*[148]

What Albert Einstein recognized with his first impression of the prohibition of alcohol, we as a nation have been unable to recognize through decades of loss of immeasurable human capital and economic treasure. The time has come to recognize that tinkering around the margins of the present system of drug prohibition is destructive and untenable. As the report by the 2011 Global Commission on Drug Policy makes clear, the problems created by the war on drugs are now being recognized by the current generation of leading world figures, who have called for a paradigmatic shift in the methods of combating addiction and related drug problems. Former Presidents of Brazil, Columbia, Mexico and the United States have all called for an end to the war on drugs—a war they previously supported and enforced.[149] For the reasons expressed earlier in this article, we believe their calls to end the *war* do not go far enough.

One needs look no further than the U.S. experience with alcohol prohibition to see both the importance of ending prohibition and the dangers inherent in half-measures that do not account for the impact upon drug users. The so-called *noble experiment* of alcohol prohibition is widely regarded as a disaster today,[150] for many of the same reasons that were identified by Albert Einstein in 1921. Gangland turf wars are not fought over control of alcohol markets and corruption of public officials is no longer associated with the distribution of intoxicating liquor.[151] Yet, few would argue that the United States does not suffer greatly from ills associated with the abuse of alcohol. In part, this is due to the failure of the various states to reach consensus on how to treat alcohol consumption

---

[148] Int'l Ctr. for Sci. in Drug Policy, *supra* note 9, at 22 (quoting Albert Einstein, *My First Impression of the USA*, 1921).

[149] *See, e.g.*, Conor Friedersdorf, *Former Presidents: End the Drug War; Legalize Marijuana*, Atlantic (June 2, 2011 5:30 PM), http://www.theatlantic.com/politics/archive/2011/06/former-presidents-end-the-drug-war-legalize-marijuana/239852/.

[150] *See, e.g.*, Seth Harp, *Globalization of the U.S. Black Market: Prohibition, the War on Drugs, and the Case of Mexico*, 85 N.Y.U. L. Rev. 1661 (2010).

[151] *See, e.g.*, Nora V. Demleitner, *Organized Crime and Prohibition: What Difference Does Legalization Make?*, 15 Whittier L. Rev. 613, 617 (1994).

under legal and public health regimes following the repeal of nationwide prohibition in 1933. It took thirty years to reach some form of legal consensus eliminating state laws prohibiting sales and distribution of alcohol. But, even to this day, no consensus exists on how to treat the public health consequences of alcohol abuse.[152] Without that consensus, the ills of addiction continue even after prohibition ends.

It is time for the international community to commit to a meaningful reassessment of drug control policies and adoption of measures that evidence suggests have a chance to address the scope and nature of the world's drug problems. Negotiations must begin to reach a global treaty to legalize and control the markets for drugs, with agreed upon public health and economic development goals. Distribution of profits from this market must be carefully controlled and used to achieve these public health and economic development objectives. With global economies on the precipice, critical resources can no longer be wasted on a misguided and catastrophic war. The definition of *victory* in this war must be redefined to ensure our public health and economic welfare. Failure is not an option the world can afford.

[152] Micah L. Berman, *From Health Care Reform to Public Health Reform*, 39 J.L. MED. & ETHICS 328, 334 (2011).

The Sex Less Scrutinized: The Case for Suspect Classification for Sexual Orientation

Andrea L. Claus*

> *Our constitution . . . neither knows nor tolerates classes among citizens.*[1]

I. Introduction

The United States Supreme Court has not definitively stated whether gays and lesbians[2] are a suspect class. Without direct address from the Supreme Court, the gay and lesbian community, regularly targeted by the initiative process,[3] remains susceptible to the nation's voting majority.[4]

---

* J.D. Candidate, Phoenix School of Law, May 2012. I would like to thank my family and Kristina Morrison for their unwavering support, Professor Scott Taylor for his constant encouragement, and Professor McKay Cunningham for his time and insightful guidance.

[1] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

[2] The terms "gays and lesbians" or "gay persons" are used in the article because the terms are preferred to "homosexuals" in the LGBT (Lesbian, Gay, Bisexual, and Transgender) community. "Gay persons" is used to describe gays and lesbians conjunctively.

[3] The initiative process varies from state to state but generally gives voters direct legislative power to enact new laws, change existing laws, and amend state constitutions.

[4] *See* Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 Mich. St. L. Rev. 293, 297 (2007) (noting that minorities are frequent targets of the initiative process, including sexual orientation minorities). Twenty-four states use voter-initiative ballot measures to check state legislation. Additionally, most states require that proposed constitutional amendments are subject to popular vote. In almost all states where voters have been able to use the initiative process to stunt gay rights, they have attempted to do so. Ellen Ann Andersen, Out of the Closets & Into the Courts 149 (2006); *see id.* at 143-174 (providing a complete analysis of the form and scope of anti-gay ballot measures in the chapter entitled *The Law and Politics of Antigay Initiatives*).

The Supreme Court's opinion in *Christian Legal Society v. Martinez*[5] suggests the Court is ready to address sexual orientation not merely as a behavioral pattern or lifestyle, but as a defined class.[6] When the Court deemed the University of California Hastings College of Law's ("Hastings") "recognized student organization status" policy not violative of freedom of speech or religion,[7] the Court may have unlocked the door to eventual recognition of sexual orientation as a suspect class. The Court must find political, statutory, and judicial acts targeting one's sexual orientation unconstitutional if sexual orientation is not just a lifestyle or a behavioral pattern, but rather a suspect class subject to disparate and discriminatory treatment.[8]

The Supreme Court has historically considered only a few discrete justifications for suspect classification. Although many state and federal courts have applied slightly deviated criteria,[9] the Supreme Court has routinely categorized a suspect class according to four factors illustrated in *Frontiero v. Richardson*.[10] First, the Court considers whether the

---

[5] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

[6] Debra Cassens Weiss, *Gay Rights Advocates Seize on Justice Ginsburg's "Timebomb,"* ABA JOURNAL (July 20, 2010, 9:15 AM), http://www.abajournal.com/news/article/gay-rights_advocates_seize_on_justice_ginsburgs_time_bomb/.

[7] *Christian Legal Soc'y*, 130 S. Ct. at 2995.

[8] This article focuses on the suspect classification strand of equal protection jurisprudence because gay rights litigation since *Bowers v. Hardwick*, 478 U.S. 186 (1986), has shifted in that direction. *See* Nancy C. Marcus, *Beyond Romer and Lawrence: The Right to Privacy Comes Out of the Closet*, 15 COLUM. J. GENDER & L. 355 (2006) (providing a discussion of Fourteenth Amendment privacy rights and substantive due process as to gay rights litigation and jurisprudence).

[9] *See, e.g.*, Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (Norris, J., concurring) (substituting a "central to one's identity" analysis in place of immutability), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (same); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (same).

[10] Frontiero v. Richardson, 411 U.S. 677 (1973). Sharron Frontiero was a U.S. Air Force officer who was denied additional military fringe benefits because she could not prove her husband was dependant on her for more than one-half of his support. Male members of the force, however, could claim their wives as dependents (thereby accessing the additional benefits) by simply producing a marriage certificate. Frontiero sued the Air Force alleging the disparate treatment was unconstitutional under the Fifth Amendment's Due Process Clause. The majority held that the law violated the Due Process Clause, but could not settle on the applicable standard of review for allegations of gender discrimination. Justice Brennan, writing for a four justice plurality, concluded that gender is a suspect classification. This was a turn from the Court's previous application of rational basis review for allegations of gender discrimination, as in *Reed v. Reed*, 404 U.S. 71 (1971).

Because suspect classification for gender was not endorsed by the majority, *Frontiero* did not establish a strict scrutiny requirement for allegations of gender discrimination. The Court did not agree on a standard for gender discrimination until three years later, in *Craig v. Boren*, 429 U.S. 190 (1976), when an "intermediate scrutiny" standard was adopted. *But*

group suffers a history of purposeful discrimination.[11] Second, the Court considers whether the class is the object of such deep-seated prejudice that often leads to inaccurate and socially disabling stereotypes that have no bearing on the ability to perform or contribute to society.[12] Third, the Court looks to whether the group is a historically politically powerless minority.[13] Finally, the Court considers whether a class has an immutable characteristic "determined solely by accident of birth."[14] This last factor seeks to ensure that discrimination against such a class potentially violates the notion "that legal burdens should bear some relationship to individual responsibility."[15] Historically, when the Court has deemed a class suspect, or has applied heightened scrutiny, the practical consequence has been the growth of civil rights for the affected class.[16]

Sexual orientation is not afforded suspect classification, in part because of discord concerning the immutability prong. Some argue that sexual orientation is a biological variance, while others maintain that sexual orientation is a choice, and therefore not appropriately immutable.[17] Because courts do not classify sexual orientation as suspect, they do not apply heightened scrutiny to claims arising from sexual orientation discrimination and instead review such claims under the lenient rational basis analysis.[18] However, the frequency with which anti-gay initiatives are legislatively introduced and passed indicates both an anti-gay bias within society and the need for a heightened standard of review. The need for heightened scrutiny is further buttressed by the fact that many pieces of legislation have not passed constitutional muster under the lenient rational basis test.[19]

---

see City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (rejecting higher scrutiny for the mentally disabled using other justifications).

[11] *Frontiero*, 411 U.S. at 689.

[12] *Id.* at 686.

[13] *Id.*

[14] *Id.*

[15] *Id.*

[16] M.K.B. Darmer & Tiffany Chang, *Moving Beyond the "Immutability Debate" in the Fight for Equality After Proposition 8*, 12 SCHOLAR 1, 13 (2009) (citing expansion of rights after application of heightened scrutiny as to gender and race in *Craig v. Boren*, 429 U.S. 190, 197 (1976), and *Loving v. Virginia*, 388 U.S. 1, 8-9 (1967), respectively).

[17] Geoffrey N. Stark, *State Constitutional Law—Equal Protection and Fundamental Rights—Analogizing Same-Sex Marriage Exclusions and Anti-Miscegenation Laws: California Offers a Model for Subjecting Same-Sex Marriage Exclusions to Strict Scrutiny*, 40 RUTGERS L.J. 1031, 1059 (2008).

[18] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) (explaining that state legislation is presumed valid).

[19] *See, e.g.*, Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

Gay rights are at a judicial tipping point. Lower federal courts appear ready to extend class based protection for gay and lesbian Americans, even if the Supreme Court is not. For instance, on the heels of district court rulings striking down as unconstitutional key parts of the anti-gay Defense of Marriage Act ("DOMA"),[20] came another lower court decision that California's Proposition 8 violates the Equal Protection Clause of the Fourteenth Amendment.[21] With both cases possibly advancing to the U.S. Supreme Court, the June 28, 2010, decision in *Christian Legal Society v. Martinez*[22] contains a subtle forecast of how the majority might rule. *Christian Legal Society* affirms the Court's view that sexual orientation is not merely behavioral and announces the majority is receptive to claims for gay rights.[23]

With *Gill v. Office of Personnel Management*[24] and *Perry v. Schwarzenegger*[25] positioned to move forward to the U.S. Supreme Court, more than same-sex marriage is at issue. The extension of heightened scrutiny to sexual orientation and changes to the immutability prong of suspect classifications are also at issue.[26] One state supreme court held that sexual orientation is a suspect classification.[27] This finding may provide a framework for federal courts and has the potential to shape the jurisprudential debate surrounding equal protection with respect to sexual orientation. Most recently, the Department of Justice ("DOJ") announced it will no longer defend section 3 of DOMA.[28] Importantly, the DOJ called for the application of heightened scrutiny for classifications based on sexual orientation.[29] Under this proposed standard of review, the DOJ concludes that section 3 of DOMA, "as applied to same-

---

[20] Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374 (D. Mass. 2010); Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234 (D. Mass. 2010).

[21] *Perry*, 704 F. Supp. 2d 921.

[22] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

[23] *Id.* at 2990.

[24] *Gill*, 699 F. Supp. 2d 374.

[25] *Perry*, 704 F. Supp. 2d 921.

[26] Darmer & Chang, *supra* note 16.

[27] *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5, as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (Because neither Proposition 8 nor *Strauss* (recognizing its validity) address *Marriage Cases* holding that discrimination based on sexual orientation is subject to heightened scrutiny, the supersession was only partial).

[28] Letter from Eric H. Holder, Jr., Attorney Gen., to John A. Boehner, Speaker, U.S. House of Representatives, (February 23, 2011) [hereinafter Holder Letter], *available at* http://www.justice.gov/opa/pr/2011/February/11-ag-223.html.

[29] *Id.*

sex couples who are legally married under state law, violates the equal protection component of the Fifth Amendment."[30]

This article begins with a brief discussion of gay rights legislation and jurisprudence.[31] Part II addresses the progression of gay rights, specifically legal and societal progression, as well as the vulnerability of the Lesbian, Gay, Bisexual, and Transgender ("LGBT") community in the initiative process. Part III discusses factors the Supreme Court has developed in categorizing suspect and quasi-suspect classification. Moreover, this part focuses on the immutability prong and argues that the irrelevance and inconsistent application of the prong warrants its de-emphasis or abandonment from the factor test. Part IV discusses the likely future progression of gay rights litigation and jurisprudence, as well as the shifting legal and cultural frames surrounding gay rights, as litigation on behalf of marriage equality continues to impact political debate. Finally, this part turns to the prospect of suspect classification for sexual orientation in light of the changing climate of the U.S. Supreme Court.

II. Progression of Gay Rights

A. Legal Progression

Gay rights have a short but highly publicized position in modern jurisprudence. Although the Supreme Court has more than fifty years of Equal Protection jurisprudence, the first Supreme Court ruling to address gay rights did not occur until 1986.[32] While the first ruling constituted a major setback to the gay and lesbian civil rights movement, the lasting legal and political impact of each judicial outcome has since paved the way for the question of same-sex marriage the Court will soon likely face.

In *Bowers v. Hardwick*,[33] the Court upheld a Georgia statute criminalizing sodomy. Police arrested Hardwick and his adult male partner for engaging in consensual sex within Hardwick's own home.[34] The

---

[30] *Id.*

[31] There are many topics crucial to the framework of gay rights litigation. This article does not seek to address all topics. Child custody, visitation, adoption, and other familial issues are outside the scope of the article. *See* Carlos A. Ball, From the Closet to the Courtroom (Michael Bronski ed., 2010) (providing a discussion of pivotal decisions in gay rights jurisprudence as to family, harassment, discrimination, marriage, and sex); Daniel R. Pinello, Gay Rights and American Law (2003) (providing an extensive analysis of all appellate level gay rights litigation from 1980-2000).

[32] Bowers v. Hardwick, 478 U.S. 186 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558 (2003).

[33] *Id.*

[34] *Id.* at 187-88.

Court rationalized that the electorate's moral disapproval of homosexuality was a legitimate reason to uphold the statute.[35] Justice White, writing for the majority, reasoned it was inconsistent to deem voluntary homosexual conduct between consenting adults lawful, while adultery, incest, and other sexual crimes remained criminal.[36] The Court stressed, "[w]e are unwilling to start down that road."[37] In reaching its conclusion, the Court noted proscriptions against homosexual conduct have ancient roots.[38] The Court further reasoned there is no fundamental right for homosexuals to engage in sodomy and, therefore, the law did not violate the right of privacy guaranteed under due process.[39] The concurring opinion went on to quote commentary referring to homosexuality as "the infamous '*crime against nature,*'" calling homosexuality "an offense of 'deeper malignity' than rape."[40]

Bowers brought to light both society's long standing moral disapproval of gays and lesbians, and the need for suspect classification for sexual orientation. Without classification, gay rights are left to the will of a majority that demonstrates moral disapproval through the legislative process.[41] The absence of a heightened standard of judicial review allows the Court to defer to the state's majority.[42] Although *Bowers* was decided on due process grounds, state and federal courts cite to it when

---

[35] *Id.* at 196.
[36] *Id*. at 195-96.
[37] *Id.* at 196.
[38] *Id.* at 192.
[39] *Id.* at 196 (Burger, J., concurring).
[40] *Id.* at 197.
[41] Same-sex marriage analysts have likened the moral disapproval to anti-miscegenation laws. *See, e.g.*, Stark, *supra* note 17. Further, in *Goodridge v. Department of Public Health*, 798 N.E.2d 941, 957 (Mass. 2003), the court applied *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (holding a statutory bar to interracial marriage violated the Fourteenth Amendment) to validate same-sex marriage. Most recently, *Massachusetts v. United States Department of Health and Human Services*, 698 F. Supp. 2d 234, 238 (D. Mass. 2010) utilized anti-miscegenation analogy in declaring section 3 of DOMA unconstitutional.
[42] *Bowers*, 478 U.S. 186.

denying the claims of gays in many areas of law,[43] including foster care,[44] adoption,[45] and employment discrimination.[46]

The first Supreme Court victory for gay rights came ten years after *Bowers*.[47] In *Romer,* the Supreme Court struck down a Colorado constitutional amendment that proscribed government protection of sexual orientation.[48] Although the *Romer* Court found that Colorado's Amendment 2 violated the Equal Protection Clause, it did not adopt the lower court's use of strict scrutiny to reach its conclusion.[49] The impetus for the Colorado Amendment came from several Colorado municipalities passing ordinances banning sexual orientation discrimination in housing, employment, education, public accommodations, and health and welfare services.[50] In declaring Amendment 2 unconstitutional,[51] "the Supreme Court implicitly held that state antidiscrimination statutes may include sexual orientation as a protected class," but only did so using the less stringent rational basis review.[52] Following *Romer*, several states amended their anti-discrimination statutes and added sexual orientation

---

[43] Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir. 1987) (reasoning that *Bowers* forecloses suspect classification for sexual orientation); s*ee also* Peter M. Cicchino et al., *Sex, Lies and Civil Rights: A Critical History of the Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 553 (1991).

[44] *See, e.g.*, *In re* Op. of the Justices, 530 A.2d 21 (1987) (upholding a statute that barred all gay and lesbian people from serving as foster or adoptive parents).

[45] *See, e.g.*, Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 816 (11th Cir. 2004) (using rational basis review to uphold a Florida statute barring gay persons from adoption).

[46] Jantz v. Mucci, 976 F.2d 623, 629-30 (10th Cir. 1992) (upholding administrator's qualified immunity from sexual orientation discrimination in an equal protection claim, relying on Bowers); Ben-Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir. 1989) (upholding Army Reserve regulation barring re-enlistment for openly gay service persons: "If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes.").

[47] Romer v. Evans, 517 U.S. 620 (1996).

[48] *Id.*

[49] *Id.* at 632-33 (applying rational basis review).

[50] *Id.* at 623-24.

[51] *Id.* at 635.

[52] Elizabeth R. Clayton, *Equal Access to Health Care: Sexual Orientation and State Public Accommodation Antidiscrimination Statutes*, 19 LAW & SEXUALITY 193, 199 (2010).

as a protected class,[53] arguably because the Court treated gay and lesbian individuals as a class for equal protection purposes.[54]

Although *Romer* left *Bowers* intact, the Court eventually overruled *Bowers* in *Lawrence v. Texas*.[55] *Lawrence* addressed a Texas statute outlawing same-sex sexual contact or intercourse.[56] In *Lawrence*, police arrested two adult men for having consensual sex after entering one of the men's homes pursuant to a reported weapons disturbance.[57] After arresting them, the state held the men in custody overnight and convicted them before a Justice of the Peace of "deviate sexual intercourse" in violation of the Texas statute.[58] Mr. Lawrence challenged his conviction and the Court resolved the case under a due process analysis.[59] In doing so, the Court reconsidered *Bowers*.[60] Writing for the majority, Justice Kennedy noted,"[t]o say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse."[61]

Lawrence marked the first ruling to indicate the Court's willingness to address gay persons as more than their sexual conduct; gays and lesbians were now arguably defined as being an identifiable class of citizens.[62] Although this case stands as a major victory for gay rights, it does not address suspect classification under the Equal Protection Clause; the *Lawrence* Court instead overturned the convictions on due process grounds.[63] According to the Court, "[w]ere we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct

---

[53] *Id.* The District of Columbia, as well as California, Colorado, Connecticut, Hawaii, Illinois, Iowa, Maine, Massachusetts, Maryland, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Washington, Wisconsin, and Vermont all have public accommodation anti-discrimination statutes that include sexual orientation as a protected class. *Quick Facts*, LAMBDALEGAL, http://www.lambdalegal.org/news/quick-facts.html (last visited Oct. 30, 2011).

[54] *See Romer*, 517 U.S. 620.

[55] Lawrence v. Texas, 539 U.S. 558 (2003).

[56] *Id*.

[57] *Id.* at 562-63.

[58] *Id.* at 563.

[59] *Id*. at 564.

[60] *Id*.

[61] *Id.* at 567.

[62] Although *Romer* recognizes gay persons as a class ("A State cannot so deem a *class* of persons a stranger to its laws." Romer v. Evans, 517 U.S. 620, 635 (1996) (emphasis added)), the *Romer* majority did not specifically address the conduct/orientation issue.

[63] *Lawrence*, 539 U.S. 558.

both between same-sex and different-sex participants."[64] Finding the statute invalid under the Equal Protection Clause would have left *Bowers* intact; thus, permitting enforcement of discriminatory statutes so long as the statutes applied to different-sex couples as well as to same-sex couples.[65] Although Justice O'Connor's concurrence was based on Fourteenth Amendment Equal Protection grounds, and would have left *Bowers* intact, her concurrence noted that, "some objectives, such as 'a bare . . . desire to harm a politically unpopular group,' are not legitimate state interests."[66] Justice O'Connor further noted that, "[w]hile it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual. Under such circumstances, Texas' sodomy law is targeted at more than conduct. It is instead directed toward gay persons as a class."[67] Justice O'Connor's concurring statements were instrumental in a recent Supreme Court opinion where the Court's majority asserted that gays and lesbians are an identifiable class.[68]

The Supreme Court cited Justice O'Connor's *Lawrence*[69] concurrence in *Christian Legal Society v. Martinez*, a case that implicated First Amendment issues regarding student religious groups on public university campuses.[70] In *Christian Legal Society*, the court addressed whether a public law school could condition its recognition of official student groups on the group's agreement to an open, non-discriminatory membership eligibility policy.[71] Hastings extends official recognition to student groups through a Registered Student Organization program.[72] A Registered Student Organization's benefits include financial assistance, use of school communication channels, use of the school name and logo, and use of school facilities for meetings and office space.[73] To qualify as a Registered Student Organization, a group must comply with several of Hastings' bylaws, including a policy of non-discrimination based on sexual orientation.[74] The Christian Legal Society ("CLS") was the first student organization at Hastings to seek exemption from the non-

---

64 *Id.* at 575.
65 *See id.*
66 *Id.* at 579-80 (O'Connor, J., concurring).
67 *Id.* at 583.
68 *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2990 (2010).
69 *Lawrence,* 539 U.S. at 583.
70 *Christian Legal Soc'y*, 130 S. Ct. at 2978, 2990.
71 *Id.* at 2978.
72 *Id.* at 2979.
73 *Id.*
74 *Id.*

discrimination policy; CLS sought exemption because the organization's bylaws exclude students who hold religious convictions different from its own, and because the organization's bylaws exclude students who engage in "unrepentant homosexual conduct."[75] Hastings declined to grant exemption from the non-discrimination policy, but informed the group that it could operate outside the Registered Student Organization program.[76] Hastings further stated CLS was free to use Hastings' facilities for meetings and activities.[77] After operating independently for one year, CLS sued Hastings, alleging violations of the group's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion.[78] CLS contended that "it d[id] not exclude individuals because of sexual orientation, but rather 'on the basis of a conjunction of conduct and the belief that the conduct is not wrong.'"[79]

While the First Amendment issue addressed in *Christian Legal Society* is outside the scope of this article, the opinion's statement regarding sexual orientation as a status is relevant to the question of suspect classification for sexual orientation. The Court noted, "[o]ur decisions have declined to distinguish between status and conduct in this context."[80] This language, which built upon Justice O'Connor's recognition of gay persons as a class in her *Lawrence* concurrence,[81] recognized gay persons as a status/class, rather than defining them by sexual conduct.[82] Such recognition is crucial to potential suspect classification because before a class can be deemed suspect, it needs to be, in fact, a *class*. Additionally, *Christian Legal Society's* analytical tone could prove important to the same-sex marriage analysis the Court may soon confront.[83]

B. Societal Progression

Societal struggles of the gay community have spawned lawsuits that have propelled the gay rights movement forward.[84] Societal views of gay

---

[75] *Id.* at 2980.
[76] *Id.* at 2980-81.
[77] *Id.* at 2981.
[78] *Id.*
[79] *Id.* at 2990 (quoting the Brief for Petitioner 35-36).
[80] *Id.* at 2990.
[81] *Id.*
[82] *Id.*
[83] Weiss, *supra* note 6. For example, immediately after the opinion's release, lawyers challenging California's Proposition 8 noted Ginsburg's language in a court filing. Letter from Theodore J. Boutrous, Jr., Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010) (No. C-09-2292), Doc. No. 695.
[84] *See* ANDERSEN, *supra* note 4, at 213.

persons seem to use a shifting lens that vaguely tracks the jurisprudential progression of gay rights.[85] For instance, the *Bowers* holding and language reflected the then strong societal disapproval of homosexuality.[86] The *Romer* and *Lawrence* opinions represented a shift in societal views—arguably *political correctness*.[87] With gay persons' enhanced visibility in politics, the workforce, and pop culture, overt disdain for what some still consider a *lifestyle* is less acceptable today. In rejecting sexual orientation as mere conduct, the *Christian Legal Society* Court has moved gay persons closer to the Court's own definition of what constitutes a suspect class.[88] *Christian Legal Society* signals the Court's readiness to acknowledge and address the pattern and practice of sexual orientation discrimination.[89]

Despite strides made in the societal progression of gay rights, popular referendums counter those strides.[90] Additionally, the initiative process allows those who disagree with same-sex marriage, or any protection against sexual orientation discrimination, to express moral disapproval through the privacy of a ballot.[91] An account of the lack of gay rights elucidates the need for the protection that suspect classification will provide. For example, most states do not protect gay persons in the employment, housing, or public accommodation context.[92] "Employment discrimination against gay, lesbian, and bisexual persons has a long his-

---

[85] *See id.*

[86] *See id.* at 119-20 ("[T]he cultural framing of homosexuality in the *Bowers* era emphasized lgb people, especially gay men, as 'others'—promiscuous vectors of contagion existing in opposition to the sphere of hearth, home, and family."); *see also* Bowers v. Hardwick, 478 U.S. 186, 194 (1986) (stating, after analyzing state criminal penalties for sodomy, "to claim that a right to engage in such conduct is 'deeply rooted in the Nation's history and tradition' or 'implicit in the concept of ordered liberty' is, at best, facetious.").

[87] Lawrence v. Texas, 539 U.S. 558 (2003); Romer v. Evans, 517 U.S. 620 (1996).

[88] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2991 (2010).

[89] *See id.*

[90] ANDERSEN, *supra* note 4, at 147.

[91] *See id.*

[92] *See* Martha Chamallas, *Discrimination and Outrage: The Migration from Civil Rights to Tort Law*, 48 WM. & MARY L. REV. 2115, 2117-78 (2007) (sexual orientation is not a protected trait under Title VII); Anthony Varona & Jeffrey Monds, *En/Gendering Equality: Seeking Relief Under Title VII Against Employer Discrimination Based on Sexual Orientation*, 7 WM. & MARY J. WOMEN & L. 67, 69 (2000) (sexual orientation is not a protected trait under Title VII); Robin Cheryl Miller, Annotation, *Validity, Construction, and Application of State Enactment, Order, or Regulation Expressly Prohibiting Sexual Orientation Discrimination,* 82 A.L.R. 5TH 1 (2000).

tory of acceptance."[93] "In particular, many agencies of the Federal Government, including the Civil Service Commission, the Federal Bureau of Investigation, and the military branches have, at least in the past, expressly precluded the employment of homosexuals."[94] Absent the benefit of heightened scrutiny, gay litigants challenging employment discrimination most often lose their equal protection claims.[95] Furthermore, Congress has failed to extend statutory employment protection to include sexual orientation discrimination, although such legislation has been proposed in almost every session since 1975.[96]

Nevertheless, courts have been more willing to scrutinize sexual orientation discrimination under various constitutional theories.[97] Addi-

---

[93] Robin Cheryl Miller, Annotation, *Federal and State Constitutional Provisions as Prohibiting Discrimination in Employment on Basis of Gay, Lesbian, or Bisexual Sexual Orientation or Conduct*, 96 A.L.R. 5TH 391 (2002).

[94] *Id.* at 10-12.; *see, e.g.*, Padula v. Webster, 822 F.2d 97, 102-04 (D.C. Cir. 1987) (upholding the Federal Bureau of Investigation's policy of categorical rejection of gay persons' employment applications, and finding that the policy is not subject to heightened scrutiny).

It should be noted that in a historic victory for gay rights the well-known policy Don't Ask, Don't Tell ("DADT") was repealed by the Don't Ask, Don't Tell Repeal Act of 2010, Pub. Law No. 111-321, 124 Stat. 3515. The House passed the repeal on December 15, 2010, by a vote of 250 to 175, and the Senate passed the repeal on December 18, 2010, by a vote of 65 to 31. The repeal, allowing gay persons to serve openly in the armed forces, was signed by President Obama on December 22, 2010.

[95] *See, e.g.*, Richenberg v. Perry, 97 F.3d 256, 261 (8th Cir. 1996) (holding that DADT withstood rational basis review because of judicial deference to the military); Thomasson v. Perry, 80 F.3d 915, 928-29 (4th Cir. 1996) (holding that DADT was rationally related to the legitimate military purposes of morale, good order, discipline, and unit cohesion); Ben-Shalom v. Marsh, 881 F.2d 454, 465 (7th Cir. 1989) (holding that an Army regulation barring a reserve sergeant from reenlistment because she was lesbian was rationally related to the legitimate government interest of military discipline); Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (holding that the Navy's policy of dismissing those who engage in homosexual conduct was rationally related to the legitimate state interests of recruiting and retaining naval service members, preventing breaches of security, and maintaining discipline, order, morale, and mutual trust); *Padula*, 822 F.2d at 104 (holding that the FBI's consideration of homosexual conduct when hiring was rationally related to the legitimate interests of the FBI's law enforcement credibility and of national security). *But see* Pruitt v. Cheney, 963 F.2d 1160, 1166-67 (9th Cir. 1991) (refusing under an active rational basis review, to uphold the dismissal of an equal protection complaint against the Army when there was nothing in the record to support a rational basis for the Army's required dismissal of openly gay service members).

[96] Cicchino et al., *supra* note 43, at 556.

[97] *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384, 442 (Cal. 2008), *superseded in part by constitutional amendment*, CAL. CONST. art. I, § 7.5, as recognized in Strauss v. Horton, 207 P.3d 48, 59 (Cal. 2009) (holding that discrimination based on sexual orientation is subject to strict scrutiny); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 477 (Conn. 2008) (legalizing same-sex marriage in Connecticut by holding that the state restriction on same-

tionally, states now more commonly enact legislation and administrative regulations that expressly prohibit sexual orientation discrimination.[98] However, even in the wake of *Romer*, there are many obstacles to enacting successful state sexual orientation anti-discrimination statutes.[99] Provisions prohibiting sexual orientation discrimination are continually challenged on a variety of bases, particularly free speech and free exercise of religion.[100] For example, *Christian Legal Society* challenged administrative regulations on these grounds.[101] While groundbreaking in its prohibition of sexual orientation discrimination in a public university, *Christian Legal Society* did not affect several previous decisions regarding public accommodation anti-discrimination laws.[102]

For instance, perhaps the most widely recognized expressive association case is *Boy Scouts of America v. Dale*.[103] The plaintiff in *Dale* was an adult scout member who lost his membership when the organization dis-

sex marriage does not pass constitutional muster under intermediate scrutiny); Varnum v. Brien, 763 N.W.2d 862, 904 (Iowa 2009) (legalizing same-sex marriage in Iowa by holding that the Iowa marriage statute violates the state's equal protection clause because it substantially furthers no important government interest); Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 447 (Or. Ct. App. 1998) (holding that a class of unmarried gay couples is a suspect class); *cf.* Philips v. Perry, 106 F.3d 1420, 1425 (9th Cir. 1997) (holding governmental classifications based on sexual orientation are subject only to rational basis review); *Thomasson*, 80 F.3d at 928-29 (holding governmental classifications based on sexual orientation are subject only to rational basis review).

98 Anti-discrimination laws in twenty states and the District of Columbia prohibit sexual orientation discrimination. *See* CAL. GOV'T CODE § 12,920 (West 2011); COLO. REV. STAT. § 24-34-402(1)(a) (2010); CONN. GEN. STAT. ANN. § 46a-81c (West 2011); D.C. CODE § 2-1402.11 (2011); HAW. REV. STAT. ANN. § 378-2 (LexisNexis 2011); 775 ILL. COMP. STAT. ANN. 5/1-102(A) (West 2010); IOWA CODE ANN. § 216.6(1)(a) (West 2011); ME. REV. STAT. ANN. tit. 5, § 4572(1)(A) (2011); MD. CODE ANN., State Gov't § 20-606 (West 2011); MASS. GEN. LAWS ANN. ch. 151B § 4(1) (West 2010); MINN. STAT. ANN. § 363A.08 (West 2011); NEV. REV. STAT. ANN. § 613.330 (LexisNexis 2011); N.H. REV. STAT. ANN. § 354-A:7 (2011); N.J. STAT. ANN. § 10:5-4 (West 2007); N.M. STAT. ANN. § 28-1-7 (West 2011); N.Y. EXEC. LAW § 296 (McKinney 2010); OR. REV. STAT. § 659A.030 (2009); R.I. GEN. LAWS § 28-5-7 (2011); VT. STAT. ANN. tit. 21, § 495(a) (2011); WASH. REV. CODE ANN. § 49.60.180 (West 2011); WIS. STAT. ANN. § 111.36(1)(d) (West 2011).

99 Miller, *supra* note 93, at 10.

100 *Id.*

101 Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978 (2010).

102 *See generally* Boy Scouts of Am. v. Dale, 530 U.S. 640, 659 (2000).

103 *Id.* (holding that the statutory prohibition of sexual orientation discrimination was pre-empted by a private organization's free expression rights). *Dale* was distinguished by *Christian Legal Society*'s majority and concurring opinions, and it was also cited in the dissenting opinion. The majority asserted that application of the limited-public-forum analysis was a better fit for the facts; the Court noted that its expressive-association decisions involved regulations that *compelled* a group to include unwanted members, with no choice to opt out. *Christian Legal Soc'y*, 130 S. Ct. at 2975.

covered his sexual orientation and his participation in gay rights activism.[104] The Boy Scouts organization argued that homosexual conduct was inconsistent with the organization's values.[105] After granting certiorari, the Supreme Court held New Jersey's public accommodations law, which required the scouting organization to admit the gay plaintiff, violated the organization's First Amendment right of expressive association.[106] *Dale*, in effect, held that "private nonprofit organizations are free to pick and choose their members without having to conform to state public accommodation [antidiscrimination] laws."[107]

Judicial rulings have consistently found that laws refusing gay domestic partners the benefits and services offered to married persons do not constitute sexual orientation discrimination.[108] The judicial reasoning is that these laws treat gay domestic partners, who are unmarried same-sex couples, the same as unmarried different-sex couples.[109] This reasoning is flawed, however, because there is a disparate impact on same-sex couples in the forty states that prohibit same-sex marriage. Given the frequency that individual states have passed Defense of Marriage laws, consistent state-level change is unlikely absent a protected class status for sexual orientation discrimination.[110]

Gays and lesbians are vulnerable in the initiative process on a state level[111] and in the legislative process on a federal level.[112] This vulnerability results in part from a lack of suspect classification. Anti-gay rights activists' abilities to roll back gay rights through the initiative process and popular referendum suggests that anti-gay rights activists are more powerful in the political arena than are gay rights advocates.[113] Gay rights advocates have sought to mitigate this anti-gay rights advantage, often through the judiciary.[114] Yet, without federal protection against discrimination and without the application of heightened scrutiny, the localized gay rights victories are subject to significant limitations not found in the

---

104 *Boy Scouts of Am.*, 530 U.S. at 643.

105 *Id.*

106 *Id.* at 644.

107 Clayton, *supra* note 52, at 201.

108 Miller, *supra* note 93, at 10.

109 *Id.*

110 *Marriage Equality and Other Relationship Recognition Law*, HUM. RTS. CAMPAIGN, http://www.hrc.org/files/assets/resources/Relationship_Recognition_Laws_Map(1).pdf (last updated July 6, 2011).

111 ANDERSEN, *supra* note 4, at 143.

112 *See* Cicchino et al., *supra* note 43, at 554-55.

113 ANDERSEN, *supra* note 4, at 146.

114 *Id.* (noting gay rights activists legal challenges of anti-gay ballot measures in California, Colorado, Florida, Ohio, and Oregon).

federal arena.[115] State victories are limited in their geographic impact, and many victories are subject to repeal by popular referendum.[116] The backlash against *Goodridge v. Dept. of Public Health*[117] is a prime example of a judicial gay rights victory igniting the anti-gay movement's use of the legislative process to demonstrate disapproval.[118]

The effects of *Goodridge*,[119] the case that legalized same-sex marriage in Massachusetts, "reverberated far beyond the state's borders."[120] *Goodridge* arguably catalyzed national mobilization to legislatively reframe the cultural and legal meaning of marriage.[121] After the *Goodridge* ruling, legislators and citizens across the nation initiated amendment processes to limit marriage to opposite-sex couples and to insulate their states from *Goodridge*'s Full Faith and Credit implications.[122] Some view *Goodridge* as advancing gay rights in one state at the cost of damaging advancement in other states.[123] Without application of heightened scrutiny, cases such as *Goodridge*,[124] *Kerrigan,*[125] and *Varnum*[126] will continue to be pyrrhic victories.[127]

Prior to *Goodridge*, a Hawaii Supreme Court case was the catalyst for a presently valid section of anti-gay federal legislation.[128] In *Baehr v. Lewin*,[129] the Hawaii Supreme Court indicated that Hawaii's Constitution might permit same-sex couples to marry.[130] The federal response to this small gain in gay rights was DOMA, which was signed into law in

---

115 Cicchino et al., *supra* note 43, at 557-58.

116 *Id.*

117 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 957 (Mass. 2003).

118 ANDERSEN, *supra* note 4, at 232.

119 *Goodridge*, 798 N.E.2d 941.

120 ANDERSEN, *supra* note 4, at 232.

121 *Id.* at 149.

122 *Id.* at 232-33.

123 *Id.* at 235.

124 Goodridge, 798 N.E.2d 941 (legalizing same-sex marriage in Massachusetts by holding that the state same-sex marriage ban cannot survive even rational basis review).

125 Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (legalizing same-sex marriage in Connecticut by holding that the state restriction on same-sex marriage does not pass constitutional muster under intermediate scrutiny).

126 Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (legalizing same-sex marriage in Iowa by holding that the Iowa marriage statute violates the state's equal protection clause because it substantially furthers no important government interest).

127 ANDERSEN, *supra* note 4, at 235.

128 *Id.* at 180.

129 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

130 *See id.* at 57; ANDERSEN, *supra* note 4, at 178. The *Baehr* decision did not ultimately legalize same-sex marriage as Congress feared. Rather, Hawaii amended its constitution to permit the state legislature to limit marriage to opposite-sex couples.

1996.[131] In referencing *Baehr*, the House Judiciary Committee's DOMA Report expressed concern over the "orchestrated legal assault being waged against traditional heterosexual marriage."[132]

Scholars are divided as to the strongest argument against DOMA. Some scholars advocate that DOMA discourages states from validating same-sex marriage and, because such state action is a violation of the Full Faith and Credit Clause, is unconstitutional.[133] Others argue that DOMA shares the same equal protection issues with the rejected constitutional amendment in *Romer*.[134] The *Goodridge* court, for instance, took notice that the Massachusetts DOMA shares characteristics with Amendment 2; the court partly relied on *Romer* when rejecting the Massachusetts same-sex marriage ban.[135]

In addition, the DOJ and President Obama determined that Section 3 of DOMA "violates the equal protection component of the Fifth Amendment."[136] The DOJ called for courts to apply a heightened standard of review to classifications based on sexual orientation.[137] Under this schema, the DOJ says it is unable to "advanc[e] hypothetical rationales,

---

131 Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified as amended in 1 U.S.C. § 7 (2006); 28 U.S.C. § 1738C (2006)).

132 Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 377 (D. Mass. 2010) (quoting H.R. REP. NO. 104-664, at 2-3 (1996) (affidavit of Gary D. Buseck)).

133 *See* 142 CONG. REC. S5932 (daily ed. June 6, 1996) (Professor Laurence H. Tribe's letter to Senator Kennedy) ("Congress possesses no power under any provision of the Constitution to legislate any such categorical exemption from the Full Faith and Credit Clause of Article IV."); *see also* Scott Rusday-Kidd, *The Defense of Marriage Act and the Overextension of Congressional Authority*, 97 COLUM. L. REV. 1435 (1997) (taking the position that Congress had no power to enact DOMA under the Full Faith and Credit Clause and principles of federalism).

134 *See, e.g.*, Barbara A. Robb, *The Constitutionality of the Defense of Marriage Act in the Wake of Romer v. Evans*, 32 NEW ENG. L. REV. 263 (1997) (asserting that DOMA violates the equal protection component of the Fifth Amendment).

135 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 962 (Mass. 2003) (referencing Romer v. Evans, 517 U.S. 620 (1996) (stating that the same-sex marriage ban "confers an official stamp of approval on the destructive stereotype that same-sex relationships are inherently unstable and inferior to opposite-sex relationships and are not worthy of respect."). In building its Fourteenth Amendment argument, the *Goodridge* court also referenced the California Supreme Court decision, *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948) (holding that a legislative prohibition against interracial marriage violated the due process and equality guarantees of the Fourteenth Amendment) and the U.S. Supreme Court decision, *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that a statutory bar to interracial marriage violated the Fourteenth Amendment). *Id.* at 958. The *Goodridge* court noted, "[a]s it did in *Perez and Loving,* history must yield to a more fully developed understanding of the invidious quality of the discrimination." *Id.*

136 Holder Letter, *supra* note 28.

137 *Id.*

independent of the legislative record, as it has done in circuits where precedent mandates application of rational basis review."[138] DOMA's legislative record is replete with justifications based on moral disapproval.[139] Congress' disapproval is justification for DOMA, and such disapproval is insufficient to establish that the classification is "substantially related to achievement of [important governmental] objectives."[140]

The majority of campaigns that seek, through the initiative process, to stem the progress of gay rights have developed in response to perceived gains by the gay rights movement. This means that in the advent of *Gill* and *Perry*,[141] protection is now mandated more than ever before. Furthermore, the DOJ's refusal to defend DOMA could potentially fuel the anti-gay sentiment that is present in Congress[142] and the public. Without federal protection or judicial intervention through heightened scrutiny, anti-gay initiatives will likely continue, as will the passage of anti-gay legislation.

Title VII does not recognize sexual orientation as a protected class.[143] As noted, DOMA explicitly discriminates against gays and lesbians.[144] The only federal law that unequivocally protects the rights of gays and

---

138 *Id.*

139 1 U.S.C. § 7 (2006); Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010); Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 377, 397 (D. Mass. 2010) (quoting Aff. of Gary D. Buseck, Ex. D, H.R. REP. NO. 104-664 at 2-3 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906-07). *See* discussion *infra* pp. 31-32 and notes 218-19.

140 *See, e.g.*, Craig v. Boren, 429 U.S. 190, 197 (1976) (articulating the heightened scrutiny test).

141 *See Perry*, 704 F. Supp. 2d 921 (significant gay rights victories that carry the potential to progress to the Supreme Court); *Gill*, 699 F. Supp. 2d at 374.

142 *See* sources cited *supra* note 139.

143 *See* 42 U.S.C. § 2000e-2(a) (2006) (prohibiting discrimination based on race, color, religion, sex, or national origin); *see also* Zachary A. Kramer, *Heterosexuality and Title VII*, 103 NW. U. L. REV. 205 (2009) (providing an interesting perspective on the judiciary's history to perceive Title VII discrimination claims based on gender non-conformity as attempts to "bootstrap" protection for sexual orientation into Title VII). Professor Kramer contends that heterosexuality and homosexuality are not similarly situated under Title VII because gay persons frequently lose their discrimination claims based on their sexual orientation, while courts rarely acknowledge that heterosexual employees have a sexual orientation. Professor Kramer proffers a different approach to Title VII claims, suggesting that sexual orientation is no different from any other protected trait under Title VII. *Id.* at 246-47.

144 1 U.S.C. § 7 (2006) ("'[M]arriage' means only a legal union between one man and one woman as husband and wife . . . ."); 28 U.S.C. § 1738C (2006) (permitting states, territories, and tribes to deny recognition of same-sex marriages that are legally valid in other jurisdictions).

lesbians is the federal hate crime statute.[145] The Hate Crimes Protection Act[146] victory, with DOMA remaining federal law, illustrates the conflicting congressional posture regarding gay rights protection.[147] Without judicial address, the moral disapproval pattern, which has been given a voice through popular referendum and federal legislation, will continue to stunt gay rights progression.

III. Suspect Classification

The gay community's legal and societal struggles have played a large part in propelling the gay rights movement forward. These struggles underscore the need for heightened scrutiny. Although many state and federal courts have applied slightly deviated criteria,[148] the Supreme Court has categorized a suspect class, for the purposes of equal protection analysis, according to four factors illustrated in *Frontiero v. Richardson*.[149] With respect to those factors regarding sexual orientation classification, all but the immutability factor seems satisfied. Gays have a well-documented history of purposeful discrimination that numerous courts have recognized.[150] Gays have also been the object of deep-seated prejudice having no bearing on the ability to contribute to society.[151] Finally, confirmation of gays as a historically politically powerless minority is evidenced by the passage and enforcement of statutes and policies

---

145 Matthew Shepard and James Byrd, Jr. Hate Crimes Prevention Act, Pub. L. No. 111-84, § 4707(a), 123 Stat. 2190, 4107 (2009) (to be codified at 18 U.S.C. § 245).

146 *Id.*

147 *See* Cicchino et al., *supra* note 43, at 551 (stating the same proposition regarding the Americans with Disabilities Act and the Hate Crime Statistics Act of 1990).

148 *See, e.g.*, Watkins v. U.S. Army, 875 F.2d 699 (9th Cir. 1989) (Norris, J., concurring) (substituting a 'central to one's identity' analysis in place of immutability); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (same); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (same).

149 Frontiero v. Richardson, 411 U.S. 677 (1973). *But see* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (rejecting higher scrutiny for the mentally disabled using other justifications).

150 *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571 (2003) ("[f]or centuries there have been powerful voices to condemn homosexual conduct as immoral"); *Kerrigan*, 957 A.2d at 434 ("[g]ay persons historically have been, and continue to be, the target of purposeful and pernicious discrimination due solely to their sexual orientation").

151 *See, e.g.*, Boutilier v. Immigration & Naturalization Serv., 387 U.S. 118, 122 (1967) (upholding the deportation of a gay Canadian because his sexual orientation constituted a "psychopathic personality" rendering him excludable under § 212 (a)(4) of the Immigration and Nationality Act of 1952, 66 Stat. 182, 8 U.S.C. § 1182 (a)(4) (2010)). The court "conclude[d] that the Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts . . . ." *Id.*

such as DADT, DOMA, and a host of state-level defense of marriage statutes.[152]

Watkins v. United States Army,[153] a Ninth Circuit case, offers an analysis of each of the heightened scrutiny factors.[154] Judge Norris's concurring opinion noted that sexual orientation has "no relevance to a person's 'ability to perform or contribute to society'" and that such irrelevance suggests that sexual orientation classifications "reflect prejudice and inaccurate stereotypes."[155] Judge Norris further noted, "discrimination faced by homosexuals is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes."[156] In addressing the immutability factor, Judge Norris asserted that requiring gays to change a central aspect of their identity violates "the constitutional ideal of equal protection of the laws."[157] Furthermore, when addressing political powerlessness, Judge Norris stated, "[t]he very fact that homosexuals have historically been underrepresented in and victimized by political bodies is itself strong evidence that they lack the political power necessary to ensure fair treatment at the hands of government."[158] Judge Norris observed that, "at the national level . . . homosexuals have been wholly unsuccessful in getting legislation passed that protects them from discrimination."[159]

Watkins is one example of the heightened scrutiny applied to sexual orientation unaffected by the question of immutability.[160] The controversy regarding whether sexual orientation is biologically determined (immutable) or choice-driven (mutable) need not foreclose suspect classification. The Supreme Court's application of strict immutability has not

---

[152] 1 U.S.C. § 7 (2006); Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; *State Defense of Marriage Acts (DOMA)*, MARRIAGEWATCH.ORG, http://marriagelaw.cua.edu/Law/states/doma.cfm (last updated June 27, 2005).

[153] *Watkins*, 875 F.2d 699.

[154] There is no U.S. Supreme Court decision that has addressed, much less analyzed, all factors relevant to suspect classification with respect to sexual orientation.

[155] *Watkins*, 875 F.2d at 725.

[156] *Id.* at 724.

[157] *Id.* at 726.

[158] *Id.* at 727.

[159] *Id.* at n.30.

[160] It should be noted that the Ninth Circuit has visited the issue and, although suspect classification for sexual orientation was not granted, two judges affirmed the immutability of sexual orientation. *See* High Tech Gays v. Def. Indus. Sec. Clearance Office, 909 F.2d 375, 378 (9th Cir. 1990) (Canby, J., dissenting from denial of rehearing en banc) ("For practical and constitutional purposes, then, homosexuality is an immutable characteristic . . . . Preventing such unfair discrimination is what the equal protection clause is all about.").

required that class members must be physically unable to alter or hide the trait defining their class.[161] As the *Watkins*' concurrence noted, people can alter their sex by operation, religious affiliation can change, aliens can become naturalized, and lighter skinned blacks can sometimes *pass* for white.[162]

Strict adherence to the immutability prong is damaging to civil rights in general; such tests to determine what constitutes a protected trait undermine civil rights insofar as people *cover* aspects of themselves that courts discharge as voluntary choices, such as acting *too black* or *too gay*.[163] The idea that sexual orientation is mutable encourages gays and lesbians to *cover* to avoid society's potential moral disapproval. Furthermore, the DOJ has recognized "it is undoubtedly unfair to require sexual orientation to be hidden from view to avoid discrimination."[164]

An immutability requirement suggests that social hierarchy is biologically based. For instance, if women could readily become men, the immutability requirement suggests that discrimination against women who declined the honor of becoming men would be constitutionally acceptable.[165] Whether a person can choose to *cover* or change an *undesirable* characteristic is not the most relevant question in suspect classification analysis. The key to suspectness is not the immutability of a trait, but rather the crucial role that the trait plays in self and public identification.[166]

Beyond the negative personal implications of the immutability requirement, scholars and courts demonstrate uncertainty as to the meaning of immutability; this uncertainty leads to inconsistent application of

---

161 *Watkins*, 875 F.2d at 726.

162 *Id.*

163 Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & an Argument for Inclusion*, 24 BERKLEY J. GENDER L. & JUST. 166, 196 (2009).

164 Holder Letter, *supra* note 28 (citing Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515).

165 CATHARINE A. MACKINNON, SEX EQUALITY: LESBIAN AND GAY RIGHTS 1123 (2003). Judge Norris made a similar observation regarding the irrelevance of immutability: "Racial discrimination, for example, would not suddenly become constitutional if medical science developed an easy, cheap, and painless method of changing one's skin pigment." *Watkins*, 847 F.2d at 1347.

166 Harvard Law Review Ass'n, *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, 98 HARV. L. REV. 1285, 1303 (1985); *see also* Natsu Taylor Saito, *Alien and Non-Alien Alike: Citizenship, "Foreignness," and Racial Hierarchy in American Law*, 76 OR. L. REV. 261, 266 (1997) ("Many scholars agree that what we call 'race' reflects socially constructed classifications rather than biological realities. Yet race is a construct that has powerfully shaped individual and group identities.").

immutability.[167] There is discord concerning whether an immutable trait is a trait not chosen, an unchangeable trait, or a trait that a person should not be required to change.[168] Therefore, there is disagreement between scientists and scholars regarding the source of sexual orientation; they disagree whether the source is biological or chosen.[169] There is also a significant body of legal theory contending that legal arguments based on scientific theories of sexual orientation immutability are divisive, as well as ineffective in equal protection claims.[170] There may be reason not to rest on a scientifically based immutability argument—studies are largely contradictory and inconclusive as to the immutability of biological factors.[171]

A strict evaluation of sexual orientation immutability is not necessary to reach a designation of heightened scrutiny.[172] Several courts, including

---

[167] *See, e.g.*, Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989) ("Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. [Suspect classes] exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature."); *see also* Steffan v. Cheny, 780 F. Supp 1, 6 n.12 (D.D.C. 1991) ("The Court is, however, convinced that homosexual orientation is neither conclusively mutable nor immutable since the scientific community is still quite at sea on the causes of homosexuality, its permanence, its prevalence, and its definition . . . . Without a definitive answer at hand, yet confident that *some* people exercise *some* choice in their own sexual orientation, the Court does not regard homosexuality as being an immutable characteristic."); *aff'd sub nom en banc*, Steffan v. Perry, 41 F.3d 677 (D.C. Cir. 1994), (rejecting the suggestion that sexual minorities are a suspect class without addressing immutability). *But see* Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 438 (Conn. 2008) (finding that sexual orientation is so "central to one's identity" as to render it effectively immutable); Varnum v. Brien, 763 N.W.2d 862, 893 (Iowa 2009) (same).

[168] *See generally* Michael A. Helfand, *The Usual Suspect Classifications: Criminal, Aliens, and the Future of Same-Sex Marriage*, 12 U. PA. J. CONST. L. 1 (2009).

[169] *See generally* Lynn D. Wardle, *The Biological Causes and Consequences of Homosexual Behavior and Their Relevance for Family Law Policies*, 56 DEPAUL L. REV. 997, 998-1014 (2007) (noting that while it is accepted by many that sexual orientation is pre-determined, the biological causes of sexual orientation are unclear and inconclusive).

[170] *See, e.g.*, Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) (reviewing three scientific theories supporting the immutability of sexual orientation and arguing the potential harm to gay rights claims); *see also* Edward Stein, *Born That Way? Not a Choice?: Problems with Biological and Psychological Arguments for Gay Rights* (Cardozo Legal Studies Research Paper No. 223, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1104538 (reasoning that using scientific arguments, especially those focusing on immutability, are detrimental to gay-rights advocacy).

[171] *See, e.g.*, Halley, *supra* note 170 (discussing the varying conclusions of several studies performed in an effort to determine the cause of sexual orientation).

[172] *See In re* Marriage Cases, 183 P.3d 384 (Cal. 2008); *Kerrigan*, 957 A.2d at 438; *Varnum*, 763 N.W.2d 862. One federal district court has observed that the Supreme Court does not always list immutability as a necessary characteristic of a suspect class. Jantz v. Muci, 759 F. Supp. 1543, 1548 n.5 (D. Kan. 1991) ("In listing the factors relevant to the

Watkins, have found that sexual orientation is such an integral part of a person that one should not be forced to change it to avoid discrimination.[173] An Oregon Court of Appeals' domestic partner benefits case illustrates the approach that immutability is an unnecessary inquiry, stating that "the focus of suspect class definition is not necessarily the immutability of the common, class defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice."[174]

Similarly, in *Kerrigan v. Commissioner of Public Health*, the Connecticut Supreme Court advanced an *identity* argument that dismissed the need to satisfy the immutability factor.[175] *Kerrigan* invalidated laws restricting marriage to heterosexual couples and found sexual orientation to be a quasi-suspect classification.[176] The Connecticut Supreme Court found that sexual orientation classifications should receive heightened scrutiny "[i]n view of the central role that sexual orientation plays in a person's fundamental right to self determination."[177]

In line with the *identity* arguments advanced in *Watkins* and *Kerrigan*, the Iowa Supreme Court held that "the immutability prong of the suspectness inquiry surely is satisfied when . . . the identifying trait is 'so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it].'"[178] The Iowa Supreme Court held that a trait that is as central to an individual's identity as sexual orientation is immutable for the purposes of suspect classification.[179] Therefore, *Varnum* differed slightly from *Kerrigan* because *Varnum* used "centrality to identity" to satisfy, not to abrogate, immutability.[180]

In re Marriage Cases took a different approach. *Marriage Cases* invalidated California's ban on same-sex marriage as a violation of the

---

determination that a governmental classification is suspect, the Supreme Court has omitted citing immutability as a requirement on several occasions.") (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-41 (1985); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976); San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 28 (1973), *rev'd on other grounds*, 976 F.2d 623 (10th Cir. 1992)).

173 *See* Able v. United States, 968 F. Supp. 850 (E.D.N.Y. 1997) (reasoning that, whether or not sexual orientation is immutable, it forms a significant part of a person's identity); *In re Marriage Cases*, 183 P.3d 384; *Kerrigan*, 957 A.2d at 438; *Varnum*, 763 N.W.2d 862.

174 Tanner v. Or. Health Scis. Univ., 971 P.2d 435, 446 (Or. Ct. App. 1998).

175 *Kerrigan*, 957 A.2d 407.

176 *Id.* at 438.

177 *Id.*

178 *Varnum*, 763 N.W.2d at 893 (quoting *Kerrigan*, 957 A.2d at 438).

179 Helfand, *supra* note 168, at 7.

180 *Id.*

state's equal protection doctrine.[181] Although this portion of the *Marriage Cases* ruling was overturned,[182] the same-sex marriage aspect is not what makes *Marriage Cases* such a landmark gay rights victory. While other courts have found legislation classifying on the basis of sexual orientation deserving of heightened scrutiny, *Marriage Cases* ushered in the first state supreme court ruling designating sexual orientation as a suspect classification.[183] The court concluded that an immutable trait was not necessary for suspect classification, and found strict scrutiny appropriate due to the protracted history of widespread, arbitrary, and invidious hostility toward gays and lesbians.[184] The California Supreme Court also refuted the claim that the issue was under the sole purview of the legislature because the same-sex marriage ban was passed as a ballot initiative.[185] The court maintained that while the initiative may reflect the will of the majority, the state constitution itself is the "ultimate expression of the people's will," thus justifying review of the statute.[186]

Although the courts mentioned have found sexual orientation to be either suspect or entitled to heightened scrutiny, there are many more courts that have not.[187] For instance, *Andersen v. King County*[188] held Washington State's 1998 Defense of Marriage Act to be constitutional. The Washington Supreme Court expressly rejected the plaintiffs' claim of suspect classification for sexual orientation, notably resting on the immutability factor.[189] As to the issue of suspect classification, the court held:

> [t]he plaintiffs do not cite . . . authority . . . or studies in support of the conclusion that homosexuality is an immutable characteristic. They focus instead on the lack of any relation between homosexuality and ability to perform or

---

181 *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008).

182 CAL CONST. art. I, § 7.5 as recognized in *Strauss v. Horton*, 207 P.3d 48 (Cal. 2009) (recognizing legal marriage as between one man and one woman).

183 Three other states have prohibited bans on same-sex marriage through the judiciary. *See, e.g.*, *Kerrigan*, 957 A.2d 407 (applying intermediate scrutiny); *Varnum*, 763 N.W.2d 862 (using heightened scrutiny); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (applying a rational basis review).

184 *In re Marriage Cases*, 183 P.3d at 442-43.

185 *Id.* at 450.

186 *Id.*

187 This article focuses on the suspect classification strand of equal protection jurisprudence because gay rights litigation since *Bowers v. Hardwick* has shifted in that direction. *See* Marcus, *supra* note 8 (providing a discussion of Fourteenth Amendment privacy rights and substantive due process as to gay rights litigation and jurisprudence).

188 Andersen v. King Cnty., 138 P.3d 963, 964 (Wash. 2006).

189 *Id.* at 974.

> contribute to society. But plaintiffs must make a showing of immutability, and they have not done so in this case.[190]

The court went on to justify its position by enumerating other courts' denials of suspect classification for sexual orientation.[191] *Andersen* is an example of inconsistent application of suspect classification factors, in particular, the immutability factor. Recent language from the current U.S. Supreme Court majority suggests that when the subject of suspect classification for sexual orientation reaches the court, immutability will not be a factor considered.[192]

Although sexual orientation has received a judicial designation of heightened scrutiny in several states[193] and although the DOJ has called for heightened scrutiny for classifications based on sexual orientation,[194] without a designation of heightened scrutiny from the U.S. Supreme Court, gays and lesbians will continue to suffer discrimination in employment, housing, and public accommodations. Exclusive of direct address, lower courts are free to continue to interpret the Supreme Court's gay rights jurisprudence through dissents and dicta.[195]

---

[190] *Id.*

[191] *See id* at 975. The court noted: "Our conclusion here, that plaintiffs have not established that they are members of a suspect class, accords with the decisions of the overwhelming majority of courts, which find that gay and lesbian persons do not constitute a suspect class." *See* Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 818, 818 n.4 (11th Cir. 2004), *cert. denied,* 543 U.S. 1081 (2005) (concluding that gay and lesbian persons are not a suspect class and citing cases from the 4th, 5th, 6th, 7th, 9th, and 10th Circuits that have reached the same conclusion). The Second and Eighth Circuits have reached the same conclusion. Able v. United States, 155 F.3d 628, 632 (2d Cir. 1998); Richenberg v. Perry, 97 F.3d 256, 260 (8th Cir. 1996). The Court of Appeals held in *Singer v. Hara*, 522 P.2d 1187 (1974), that gay and lesbian persons do not constitute a suspect class. And even two state courts deciding that same-sex couples have a right to a civil union or marriage did not find a suspect class. Goodridge v. Dep't of Pub. Health, 440 Mass. 309, 798 N.E.2d 941 (2003) (denial of civil marriage to same-sex couples violates state equal protection principles); Baker v. State, 744 A.2d 864 (1999) (under the state constitution's common benefits clause, plaintiffs seeking same-sex marriage are entitled to benefits and obligations like those accompanying marriage).

[192] *See* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2990 (2010) (With the Court majority declining "to distinguish between status and conduct" with respect to sexual orientation, the issue of immutability (and the argument that gay is defined by sexual conduct and is a lifestyle choice) loses its force).

[193] *See, e.g.*, Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407 (Conn. 2008) (using intermediate scrutiny to invalidate a same-sex marriage ban); Varnum v. Brien, 763 N.W.2d 862 (Iowa 2009) (using heightened scrutiny).

[194] *See* Holder Letter, *supra* note 28. It should also be noted that the Obama administration has not abandoned enforcement of DOMA, only legal defense of it.

[195] *See, e.g.*, *Lofton*, 358 F.3d at 816 (11th Cir. 2004) (quoting Justice Scalia's *Lawrence* dissent in determining the standard of review, ultimately using rational basis review to

Further, the application of strict scrutiny as to statutory discrimination represents an overt warning to the legislature, not merely a description of the quality of review.[196] Though protected status would not eradicate all forms of discrimination against gays and lesbians, it could provide a comprehensive doctrinal framework for addressing the historic targeting of homosexuals through popular referendum.[197]

IV. NEXT STEP IN THE PROGRESSION; AIMING FOR THE HIGH COURT

The Supreme Court plays a powerful role in creating social change and has the power to compel society to take seriously the gay community's right to equal protection under the law. The focus of gay rights jurisprudence has most recently shifted to same-sex marriage. With the shift have come questions on the limits of legal mobilization as a tactic for achieving social reform.[198] The Supreme Court may not be able to avoid addressing gay rights within the framework of same-sex marriage much longer.[199]

In August 2010, the initiative adopted in response to *Marriage Cases*[200] did not survive constitutional challenge. The U.S. District Court for the Northern District of California, in *Perry v. Schwarzenegger*, declared Proposition 8, the ballot initiative banning same-sex marriages, unconstitutional under both Due Process and Equal Protection analy-

---

uphold a Florida statute barring gay persons from adoption). *See also* Christopher R. Leslie, *Exorcizing the Ghosts of Bowers v. Hardwick: Uprooting Invalid Precedents*, 84 CHI.-KENT L. REV. 519 (2009) (providing a discussion regarding the negative effects of *Bowers* and *Lawrence* to gay-rights litigation).

196 Harvard Law Review Ass'n, *supra* note 166, at 1297 n.67.

197 *Id.* at 1297.

198 ANDERSEN, *supra* note 4 (noting that litigation wins sometimes result in reversing political losses, while litigation losses may sometimes result in advancing political ends).

199 There are many topics crucial to the framework of gay rights litigation. This article does not seek to address all topics. Child custody, visitation, adoption, and other familial issues are outside the scope of the article. *See* BALL, *supra* note 31, (providing a discussion of pivotal decisions in gay rights jurisprudence as to family, harassment, discrimination, marriage, and sex); PINELLO, *supra* note 31 (providing an extensive analysis of all appellate level gay rights litigation from 1980-2000).

200 *See, e.g.*, *In re* Marriage Cases, 183 P.3d 384 (Cal. 2008) (holding that all California counties were required to issue marriage licenses to same-sex couples); Strauss v. Horton, 207 P.3d 48 (Cal. 2009) (From June 2008 until November 2008, when Proposition 8 was passed, around 18,000 marriage licenses were issued to same-sex couples. Opponents of Proposition 8 brought suit challenging it on grounds regarding the validity of the amendment procedure. The California Supreme Court upheld the proposition in *Strauss*. Moreover, *Strauss* left roughly 18,000 same-sex marriages, performed between *Marriage Cases* and the passage of Proposition 8, untouched).

ses.[201] Notably, *Perry* recognized classifications based on sexual orientation as suspect.[202]

The court in *Perry* found strict scrutiny appropriate, but not needed; Proposition 8 could not withstand even rational basis review.[203] The inquiry in to the purpose of the initiative led the court to an examination of the ballot argument submitted to voters in support of Proposition 8 and to the Proposition 8 advertisements leading up to the elections.[204] The court in *Perry* divined that "[t]he advertisements [and messages] conveyed to voters that same-sex relationships are inferior to opposite-sex relationships and dangerous to children."[205] The *Perry* court also noted several key premises on which Proposition 8 was presented to the voters:

> 1. Denial of marriage to same-sex couples preserves marriage;
> 2. Denial of marriage to same-sex couples allows gays and lesbians to live privately without requiring others, including (perhaps especially) children, to recognize or acknowledge the existence of same-sex couples;
> 3. Denial of marriage to same-sex couples protects children;
> 4. The ideal child-rearing environment requires one male parent and one female parent;
> 5. Marriage is different in nature depending on the sex of the spouses, and an opposite-sex couple's marriage is superior to a same-sex couple's marriage; and
> 6. Same-sex couples' marriages redefine opposite-sex couples' marriages.[206]

---

201 Perry v. Schwarzenegger, 704 F. Supp. 2d 921 (N.D. Cal. 2010).

202 *Perry* uses considerable analysis to equate sexual orientation discrimination with sex discrimination before moving on the appropriate standard of review. In addressing the standard, Judge Walker wrote: "[T]he Equal Protection Clause renders Proposition 8 unconstitutional under any standard of review. Accordingly, the court need not address the question whether laws classifying on the basis of sexual orientation should be subject to a heightened standard of review." *Id.* at 997. However, Judge Walker also wrote, "[t]he evidence presented at trial shows that gays and lesbians are the type of minority strict scrutiny was designed to protect." *Id. Perry* also cites the trial court's finding that strict scrutiny is the appropriate standard of review to apply to legislative classifications based on sexual orientation. *Id.*

203 *Id.*

204 *Id.* at 930.

205 *Id.*

206 *Id.*

The reasons proffered for the advancement of Proposition 8 changed within the trial context; proponents abandoned the superiority arguments advanced during campaign, instead arguing that Proposition 8:

> 1. Maintains California's definition of marriage as excluding same-sex couples;
> 2. Affirms the will of California citizens to exclude same-sex couples from marriage;
> 3. Promotes stability in relationships between a man and a woman because they naturally (and at times unintentionally) produce children; and
> 4. Promotes "statistically optimal" child-rearing households; that is, households in which children are raised by a man and a woman married to each other.[207]

This is likely because proponents of Proposition 8 realized that a secular purpose must be advanced in order for the proposition to be constitutional.[208] After dismissing the arguments intended to buoy Proposition 8 past an Equal Protection challenge, Chief Judge Walker took note of what the legislation appeared to be based on.

> In the absence of a rational basis, what remains of proponents' case is an inference . . . that Proposition 8 was premised on the belief that same-sex couples simply are not as good as opposite-sex couples. Whether that belief is based on moral disapproval of homosexuality, animus towards gays and lesbians or simply a belief that a relationship between a man and a woman is inherently better than a relationship between two men or two women, this belief is not a proper basis on which to legislate.[209]

Perry acknowledged that the will of the voters given voice through adoption of an initiative *deserves* respect.[210] However, when challenged, the voters' determinations must find some support in evidence, not moral disapproval.[211] Disapprobation of an entire class through legislation is not appropriate or constitutional, "no matter how large the majority that shares that view."[212]

---

207 *Id.* at 931.
208 *Id.*
209 *Id.* at 1002.
210 *Id.* at 938.
211 *Id.*
212 *Id.*

Another summer 2010 decision addressed anti-gay legislation enacted in response to a judicial gay rights victory. On July 8, 2010, the U.S. District Court for the District of Massachusetts ruled Section 3 of DOMA[213] unconstitutional because it interferes with a state's right to define marriage and denies married gay couples an array of federal benefits given to heterosexual married couples.[214] In evaluating legislative intent, the court examined passages from the House Judiciary Committee's Report on DOMA ("House Report") that demonstrate moral disapproval of the *lifestyle* that the Committee felt was a direct threat to the nationally recognized sanctity of marriage.[215] In the House Report, the *Baehr* decision is referenced as the beginning of an "orchestrated legal assault being waged against traditional heterosexual marriage."[216] The House Report justified enactment of DOMA as encouraging "responsible procreation and child-rearing," and as a means to conserve scarce resources.[217] Enactment was further justified as "reflecting Congress' 'moral disapproval of homosexuality, and a moral conviction that heterosexuality better comports with traditional (especially Judeo-Christian) morality.'"[218] The *Gill* court also took note that during floor debate, "members of Congress repeatedly voiced their disapproval of homosexuality, calling it 'immoral,' 'depraved,' 'unnatural,' 'based on perversion' and 'an attack upon God's principles.'"[219]

The *Gill* plaintiffs[220] were denied or were deemed ineligible to receive federal benefits because the federal government would not recog-

---

213 1 U.S.C. § 7 (2006).

214 Gill v. Office of Pers. Mgmt., 699 F. Supp. 2d 374, 397 (D. Mass. 2010).

215 *Id.* at 379.

216 *Id.* at 377 (quoting Aff. of Gary D. Buseck, Ex. D, H.R. Rep. No. 104-664 at 2-3 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906-07).

217 *Id.* at 378 (quoting Aff. of Gary D. Buseck, Ex. D, H.R. Rep. No. 104-664 at 13, 18 (1996), reprinted in 1996 U.S.C.C.A.N. 2905, 2906-07).

218 *Id.*

219 *Id.* (quoting 142 CONG. REC. H7444 (daily ed. July 12, 1996)).

220 *See id.* at 378. One of the plaintiffs was the widower of Representative Gerry Studds (D. Mass.), who was denied both health insurance and the requisite survivor annuity upon his husband's death. *Id.* at 380. Plaintiff Hara is the only surviving spouse of a member of Congress who is denied those federal benefits. Other plaintiffs include an employee of the U.S. Postal Service who seeks to add her wife as a beneficiary, and to use her flexible spending account to pay for her wife's medical expenses. *Id.* at 379-80. Another plaintiff is a former employee of the Social Security Administration who sought to change his enrollment from "self only" to "self and family" to provide coverage for his husband. *Id.* A number of plaintiffs sought to include a spouse in Social Security benefits, lump sum death benefits, or widower's insurance benefits. *Id.* at 382-83. Finally, a number of plaintiffs sought the ability to file federal income taxes jointly. *Id.* at 383; *see also* Andrew Koppelman, *DOMA, Romer, and Rationality*, 58 DRAKE L. REV. 923, 925 (2010).

nize their same-sex marriages as marriages for purposes of federal programs.[221] In denying access to federal benefits made available to married individuals, the agencies responsible for administering the pertinent programs all cited DOMA's mandate that the federal government recognize only those marriages between one man and one woman.[222]

In a twin ruling decided the same day as *Gill*, the U.S. District Court for the District of Massachusetts again found that the federal government, by enacting and enforcing Section 3 of DOMA, encroached upon the province of the state in violation of the Tenth Amendment.[223] *Commonwealth of Massachusetts v. United States Department of Health and Human Services* addressed Massachusetts' challenge to Section 3 of DOMA alleging that the statute had a significant negative impact on the operation of several state programs.[224] Specifically, the state of Massa-

[221] The health benefits programs examined for purposes of the action are the Federal Employees Health Benefits Program, the Federal Employees Dental and Vision Insurance Program and the federal Flexible Spending Arrangement program. *Gill*, 699 F. Supp. 2d at 380-81.

[222] *Id.* at 380.

[223] Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d 234, 253 (D. Mass. 2010).

[224] *Id.* at 239.

chusetts cited issues with the State Cemetery Grants Program,[225] Mass Health,[226] and Medicare Tax.[227]

Before concluding that DOMA represents an invalid exercise of congressional authority under the Constitution, the *Massachusetts* court looked to the history of marital status determinations in the United

---

[225] The U.S. Department of Veteran's Affairs ("VA") gave federal funding to the Massachusetts Department of Veteran's Services ("DVS") pursuant to the State Cemetery Grants Program, which aims to make veteran's cemeteries available within seventy-five miles of 90% of veterans nationwide. *Id.* at 239-40. VA regulations require that burial in veterans' cemeteries are "solely for the interment of veterans, their spouses, surviving spouses and [certain of their] children." *Id.* at 240. Because DOMA provides that a same-sex spouse does not qualify as a "spouse" under federal law, DVS requested clarification due to the state's recognition of same-sex marriages. *Id.* The VA informed DVS that the VA would be entitled to retrieve funding the state was awarded if the state should decide to bury the same-sex spouse of a veteran in one of the veteran cemeteries. *Id.* Darrel Hopkins is a retired veteran with over twenty years of active service. Although Hopkins' same-sex marriage is not valid for federal purposes, DVS sought to honor Hopkins' wish to have his husband buried in the veteran's cemetery. *Id.* at 241. DVS approved the Hopkins' application and intends to bury the couple together. *Id.* at 241. The VA informed DVS by letter that the federal government was entitled to recapture millions of dollars in federal grants if DVS insisted on burying an otherwise ineligible same-sex spouse of a veteran in one of the veterans' cemeteries. *Id.* at 245.

[226] MassHealth provides comprehensive health insurance or aid in paying for private health insurance to around one million Massachusetts residents. *Id.* at 241. The U.S. Department of Health and Human Services ("HHS") reimburses MassHealth for about half of its Medicare costs, totaling billions of dollars in federal funding. *Id.* Marital status is a consideration in eligibility for MassHealth coverage. *Id.* Because DOMA, MassHealth assesses the eligibility of same-sex spouses as though each were single, resulting in greater costs to the state. *Id.* at 242. Additionally, Massachusetts cannot obtain federal dollars for costs incurred for coverage provided to same-sex couples who do not qualify for Medicaid when assessed as single, even though they would qualify if assessed as married. *Id.* Massachusetts became responsible for the full cost of administration of the portion of the program mandated the MassHealth Equality Act, which prohibits benefit denial based on DOMA. The state estimates that the denial of federal funding to individuals in same-sex marriages has resulted in $640,661 in additional costs and as much as $2,224,018 in lost federal funding. *Id.* at 243.

[227] Under federal law, health care benefits for a same-sex spouse are included in an employee's taxable income. For opposite sex spouses, the value is excluded. *Id.* at 243. Massachusetts is required to pay a Medicare tax on all state employees. Because health benefits for same-sex spouses of Massachusetts employees are considered to be taxable income, the state pays a surplus Medicare tax for the value of the health benefits provided to same-sex spouses. *Id.* at 244. Massachusetts estimates payment of $122,607.69 in additional Medicare tax. *Id.* Further, compliance with DOMA necessitated creation and implementation of systems to identify those who provide healthcare coverage to their same-sex spouses, and to calculate the imputed income for each insurance enrollee. *Id.* Massachusetts estimates the systems cost $47,000 to implement. *Id.* Additionally, the state continues to incur costs on a monthly basis for system maintenance to remain compliant with DOMA. *Id.*

States.[228] The *Massachusetts* court reiterated that control of marital status and regulation has traditionally been held by the states.[229] The *Massachusetts* court further detailed past attempts to adopt a national definition of marriage, either through federal legislation or constitutional amendment.[230] All attempts failed because "few members of Congress were willing to supersede their own states' power over marriage and divorce."[231]

Massachusetts builds on the historical perspective of marriage by including history of the tension that previously surrounded interracial marriage. The court analogized the states' history of restrictions on interracial marriage with state-level bans on same-sex marriage. Reflecting on the restrictions on interracial marriage, the *Massachusetts* court observed a correlation between the strength of state limitations and changes in the social and political climate.[232] DOMA came to the legislative fore after a single decision (that turned out to be a very small victory for gay rights),[233] just as a single high-profile interracial marriage brought anti-miscegenation panic to legislatures in the early twentieth century.[234] Throughout the nation's history of patchwork marriage statutes during times of racial strife and inequality, "the federal government consistently relied on state determinations with regard to marriage, when they were relevant to federal law."[235] It took the level of animus toward homosexuals, evidenced in DOMA's legislative history, to prompt a national definition of marriage.

DOMA was born of moral disapproval, was enacted through Congress, and signed into law by the President.[236] That it remains good law to this point indicates a need for sexual orientation to receive protected status.[237] An argument can be advanced that the legislature is the proper place for change on this front. History, however, has shown that without

---

228 *Id.* at 236-40.
229 *Id.* at 236-37.
230 *Id.* at 237.
231 *Id.*
232 *Id.* at 238.
233 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993). The *Baehr* decision did not ultimately legalize same-sex marriage as Congress feared. Rather, Hawaii amended its constitution to permit the state legislature to limit marriage to opposite-sex couples.
234 In response to African-American boxer Jack Johnson's marriage to a white woman, law-makers in fourteen states introduced bills to implement or reinforce prohibitions on interracial marriage. Massachusetts v. U.S. Dep't of Health & Human Servs., 698 F. Supp. 2d at 238.
235 *Id.* at 239.
236 Perry v. Schwarzenegger, 704 F. Supp. 2d 921, 938 (N.D. Cal. 2010).
237 *Id.* at 971.

protection in the form of heightened judicial scrutiny, the gay community will continue to be subject to discrimination in many forms, most notably through the legislative process itself.

Although the Supreme Court's current composition is more conservative than in years past, the majority has proved receptive to claims for gay rights. Justices Stevens, Kennedy, Ginsberg, Breyer, and Sotomayor comprised the majority in *Christian Legal Society*,[238] which subtly built on the Court's previous gay rights jurisprudence. Justice Stevens has since retired and been replaced with Obama-appointee Justice Kagan. The most important vote cast in *Christian Legal Society* is that of *Lawrence v. Texas*[239] author, Justice Kennedy. Justice Kennedy's swing-vote suggests that there is currently a five to four split on the court that slants slightly in favor of gay rights.

V. Conclusion

From *Baehr*[240] to *Goodridge*,[241] gay rights gains have produced backlash in the form of anti-gay legislation. *Baehr*[242] merely suggested that marriage *might* be open to same-sex couples, and the decision sparked thirty-five states and the federal government to pass defense of marriage laws. With the issue of same-sex marriage likely to advance to the Supreme Court in the coming years, there is more than marriage equality at issue. The extension of heightened scrutiny and direct address regarding the immutability prong of suspect classification are also at issue. Suspect classification for sexual orientation would do more than prescribe an appropriate standard of review; it would send an overt warning to legislatures.[243]

Suspect classification for sexual minorities is warranted. Generally, stigma or deep-seated prejudice toward a particular group is the most fundamental criterion of a suspect class.[244] History has shown that gays and lesbians, as a class, have been victims of invidious discrimination. This discrimination, which continues most publicly in the initiative process, can be countered by subjecting legislation that classifies on the basis of sexual orientation to heightened judicial scrutiny.

---

238 Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010).

239 Lawrence v. Texas, 539 U.S. 558 (2003).

240 Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

241 Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

242 *Baehr*, 852 P.2d 44.

243 Harvard Law Review Ass'n, *supra* note 166, at 1297 n.67 (1985).

244 *See, e.g.*, Matthews v. Lucas, 427 U.S. 495, 506 (1976) (holding illegitimacy not subject to strict scrutiny because the discrimination suffered was not as severe or pervasive as the discrimination suffered by women and blacks).

Religious Organizations and Employment Decisions Based on Religion: A Principled Pluralist Critique

Mark Jansen*

* J.D. Candidate 2012, Phoenix School of Law; M.M., 2007, Arizona State University; B.A., 2004, Dordt College. First and foremost, thank you to Professor Jennifer Spreng, whose tireless and graceful critique sharpened my understanding at every turn of writing this article. Thank you my dear wife for your love, support, and much-needed humor. Thank you grandpa, mom and dad, brothers (and families) for your faithful encouragement. Thank you Dordt College professors for teaching me how to think about the universe and everyone associated with the Center for Public Justice for transmitting sorely-needed knowledge. In attempting to apply a principled pluralist critique, I must stress that the opinions of this article are my own and do not necessarily reflect the opinions of others within the principled pluralist community.

I. Introduction

In 1972, Congress amended § 2000e-1 of the Civil Rights Act of 1964, which allows religious corporations, associations, educational institutions, or societies to make hiring, firing, and other employment decisions on the basis of religion.[1] Over a decade later the U.S. Supreme Court held the 702 exemption[2] was constitutional, but it did not decide how courts should determine if a group is a religious corporation, association, educa-

[1] *See* Equal Employment Opportunity Act of 1972, Pub. L. 92-261, §3, 86 Stat. 103, 104 (codified as 42 U.S.C. § 2000e-1 (2006)) ("This title shall not apply to . . . a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities."). In addition to this exemption, 42 U.S.C. § 2000e-2(e)(2) allows any employer to make employment decisions on the basis of religion when religion is a bona fide occupational qualification. For instance, this may allow a school with a religious tradition to hire teachers on the basis of religion when the school is not considered pervasively religious enough to qualify under the 702 exemption as a religious educational institution. *See* Pime v. Loyola Univ. of Chi., 803 F.2d 351 (7th Cir. 1986). Also, due to Free Exercise concerns, courts have carved out a ministerial exception, which allows churches to discriminate on any basis when hiring, firing, promoting, etc. a minister. *See, e.g.*, Werft v. Desert Sw. Annual Conference of the United Methodist Church, 377 F.3d 1099, 1103 (9th Cir. 2004). This article focuses on 42 U.S.C. § 2000e-1.

[2] This article will use the common name for the § 2000e-1 exemption: 702 exemption.

tional institution, or society.[3] The Ninth Circuit's most recent attempt to answer this question was *Spencer v. World Vision*, which held in an amended opinion[4] that an organization is eligible for the 702 exemption if

> (1) it is organized for a religious purpose, (2) is engaged primarily in carrying out that religious purpose, (3) holds itself out to the public as an entity for carrying out that religious purpose, and (4) does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.[5]

In the initial *Spencer* opinion, the three-judge panel arrived at three distinct tests. The majority test in the amended opinion was first formulated by Judge Kleinfeld. Before joining in Judge Kleinfeld's test, Judge O'Scannlain originally offered the following:

> [A] nonprofit entity qualifies for the [702] exemption if it establishes that it 1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious.[6]

Judge Berzon would have followed previous Ninth Circuit case law,[7] which—like the Third Circuit[8]—used a multifactor approach to identifying a religious association, corporation, educational institution, or society. The eventual majority rejected this multifactor approach.[9]

---

[3] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 330 (1987) (reversing, on direct appeal, the District's Court holding that the exemption violated the Establishment Clause).

[4] Spencer v. World Vision, Inc., 633 F.3d 723 (9th Cir. 2011) [hereinafter *Spencer II*], *amending and denying en banc review of* 619 F.3d 1109 (9th Cir. 2010) [hereinafter *Spencer I*], *cert. denied*, No. 10-1316, 2011 WL 4530150 (Oct. 3, 2011). As discussed *infra* Part IV.B.3., the amended opinion, *Spencer II*, retains the three original opinions from *Spencer I*, only briefly stating that Judge O'Scannlain and Judge Kleinfeld concur in Judge Kleinfeld's original test. Accordingly, this article will refer primarily to *Spencer I* when citing each judge's opinion.

[5] *Id.* at 724.

[6] *Spencer I,* 619 F.3d at 1119.

[7] *Id.* at 1135, 1137 (Berzon, J., dissenting) (rejecting the tests in EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618-19 (9th Cir. 1988) and EEOC v. Kamehameha Schs./ Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993)).

[8] LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n., 503 F.3d 217, 226 (3d Cir. 2007).

[9] *Spencer I*, 619 F.3d at 1126 ("[O]ur caselaw does not compel us to march down a checklist of considerations . . . . Rigid adherence to the *LeBoon* factors is also unwar-

These divergent positions will continue to be articulated in the federal courts as religious groups apply their worldviews to ever-increasing activities in institutions outside houses of worship. Without clarification, these groups lack sufficient assurance that they may hire and retain staff committed to the religious or philosophical perspectives of their organizations.[10] If religious believers are unsure how to qualify for the 702 exemption, they may avoid creating religious organizations outside of churches and schools, to the detriment of personal convictions and wider society.[11] An overly narrow definition of religious corporation, association, educational institution, or society creates similar disincentives and may prevent otherwise legitimate religious organizations from maintaining a common purpose and trust amongst their members. Conversely, if the courts define such religious organizations too broadly, then employers may be given the power to discriminate on the basis of religion in organizations where religious cohesion is not central to that organization's mission.

Each judge's approach in *Spencer* sought to strike the right balance between individuals' interests to make a livelihood without unnecessary religious discrimination, religious organizations' interests in carrying out deeply held beliefs, as well as the government's interest in protecting the first two interests and the ultimate cause of religious and institutional diversity.[12] Unfortunately, none of the three tests developed properly achieve that goal.

This article will bring a fresh look to the problem created by the 702 exemption by analyzing it through the philosophy known as principled pluralism. This philosophy places a premium on both religious and institutional diversity—referred to as confessional and structural pluralism—

---

ranted." (O'Scannlain, J.) "All three of us agree that a multifactor test does not work well because it is inherently too indeterminate and subjective . . . ." (Kleinfeld, J., concurring)).

[10] Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 342 (1987) (Brennan, J., concurring) ("Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.").

[11] *Id.* at 336, 343-44 ("Nonetheless, it is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. . . . While a church may regard the conduct of certain functions as integral to its mission, a court may disagree. A religious organization therefore would have an incentive to characterize as religious only those activities about which there likely would be no dispute, even if it genuinely believed that religious commitment was important in performing other tasks as well. As a result, the community's process of self-definition would be shaped in part by the prospects of litigation.").

[12] *See Spencer I*, 619 F.3d 1109.

and offers a better understanding of how government should exercise its unique authority to safeguard both forms of pluralism through the principle of public justice. While several thinkers and writers have articulated these underlying principles, this article seeks to demonstrate how principled pluralism can apply to a specific legal problem. A principled pluralist solution to the 702 exemption requires a combination of Judge O'Scannlain's and Judge Kleinfeld's tests: To decide whether an organization is a religious corporation, association, or society for purposes of the 702 exemption, courts should determine whether it (1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), (2) is primarily engaged in activity consistent with, and in furtherance of, those religious purposes, (3) holds itself out to the public as an entity for carrying out a religious purpose, and (4) does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.

Part II will introduce the history and ideas behind principled pluralism. Part III will navigate relevant precedent regarding the 702 exemption and how federal courts determine whether a group is a religious corporation, association, or society. Part IV will use principled pluralism to critique the tests from *Spencer* and conclude that the hybrid Kleinfeld-O'Scannlain test comports best with principled pluralism.

II. THE FRAMEWORK AND HISTORICAL ROOTS OF PRINCIPLED PLURALISM

The core of principled pluralism is the idea that government should recognize and uphold both structural pluralism and confessional pluralism.[13] Structural pluralism refers to the diversity of societal institutions and their distinct, respective purposes.[14] Confessional pluralism refers to

---

[13] *See* JAMES W. SKILLEN, RECHARGING THE AMERICAN EXPERIMENT: PRINCIPLED PLURALISM FOR GENUINE CIVIC COMMUNITY 83-84 (1994) [hereinafter SKILLEN, RECHARGING THE AMERICAN EXPERIMENT].

[14] *See id.* at 83. The word institution is used here in a sociological sense of a social activity or practice that is a fundamental part of human culture. Thus, the most general types of societal institutions are government, family, business, education, religious organizations, social-service organizations, and perhaps political organizations. Subtypes may also exist, especially within the last three (e.g., houses of worship and church denominations are both religious organizations; hospitals and charities are both social-service organizations; political parties, special-interest groups, and political think tanks are all political organizations). *But see* ROY A. CLOUSER, THE MYTH OF RELIGIOUS NEUTRALITY: AN ESSAY ON THE HIDDEN ROLE OF RELIGIOUS BELIEF IN THEORIES 228-29 (1991). Clouser only calls marriage, family, state, and religious communities such as churches "institutions" because they are "the strongest sort of social community" with three characteristics: "(1)

the diversity of religions or worldviews held by members of society.[15] As part of its obligation to do justice, government must create laws and policies that recognize and protect all of society's institutions and give equal treatment to individuals and communities with different worldviews.[16] Part II.A. will explain the concepts of structural and confessional pluralism in greater detail. Then, because the concept of principled pluralism is relatively uncommon within American legal scholarship,[17] Part II.B. will introduce principled pluralism's roots in Abraham Kuyper's theory of sphere sovereignty and Herman Dooyeweerd's theories of modalities and the religious root of thought. This historical excursion will further elucidate the meaning behind structural and confessional pluralism and lay the basis for exploring how government upholds each type of pluralism through its unique authority to pursue public justice. Part II.C. will conclude with a fuller description of public justice.

A. Government's Obligation to Protect Structural Pluralism and Confessional Pluralism

Within the context of political governance, pluralism is broadly defined as "a state of society in which members of diverse ethnic, racial, religious, or social groups maintain an autonomous participation in and development of their traditional culture or special interest within the confines of a common civilization."[18] Principled pluralism promotes such a state of society by advocating government's obligation to protect both the

---

their members are united to an intensive degree; (2) membership carries the intention of being life-long; [and] (3) membership is (at least partly) independent of the member's will." *Id.* Clouser labels businesses, hospitals, labor unions, political parties, and schools as "organizations" because they are less intense and permanent as "membership is not intended to be life-long and their members are free to come and go more easily." *Id.* This article will use institution broadly and not distinguish it between an organization.

15 *See id.* at 84.

16 *Id.* at 83-84; *see also What Distinguishes the Center for Public Justice?*, CENTER FOR PUB. JUST., http://www.cpjustice.org/content/what-distinguishes-center-public-justice (last visited Oct. 26, 2011).

17 A search in Westlaw for "principled pluralism" within all Journals and Law Reviews returns only nineteen results. Additionally, principled pluralism's nineteenth century Dutch roots and its explicitly Christian underpinnings distance it from American legal scholarship.

18 MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/pluralism (last visited Oct. 26, 2011).

diversity of societal institutions and the diversity of citizens' worldviews.[19] These two concepts are structural pluralism and confessional pluralism.[20]

Government's obligation to uphold structural pluralism means it should recognize and protect the unique purposes of all of society's institutions.[21] Modern society comprises a multitude of social activities that humans engage in: politics, education, family life, business, art, science, charity, and religious activities.[22] Each activity, in its historically differentiated form,[23] has unique "qualities that cannot be accounted for by reference merely to individual autonomy or to a single collectivity."[24] Thus, principled pluralism rejects both individualism and collectivism that define justice, respectively, as only the preservation of individuals or of the collective.[25] Instead, government is obligated to protect not only individuals as citizens but also the existence and integrity of "all nongovernmental institutions and relationships through which people constitute their lives."[26] In this view, each social institution has limited authority, and no one institution should be supreme over all the rest.[27] One of government's primary responsibilities, therefore, is to recognize the plurality of institutions and protect each institution's unique and limited authority through the making of governmental law and policy.

---

[19] This article uses worldview and confession in the broadest sense to include religions, philosophies, or any other system that directs individuals' beliefs and actions.

[20] SKILLEN, RECHARGING THE AMERICAN EXPERIMENT, *supra* note 13.

[21] *Id.*

[22] *Id.* at 83.

[23] The word differentiation refers here to a historical process of unfolding where a particular social activity becomes clearly demarcated from that of others. *See* JAMES W. SKILLEN, IN PURSUIT OF JUSTICE, CHRISTIAN-DEMOCRATIC EXPLORATIONS 47-48 (2004) [hereinafter SKILLEN, IN PURSUIT OF JUSTICE]. For example, a young society might first educate children directly through parents or other family members, but the formation of schools and colleges would mark the *differentiation* of education from family life, centering education within a new type of institution that is unique in its focus on learning.

[24] SKILLEN, RECHARGING THE AMERICAN EXPERIMENT, *supra* note 13, at 83.

[25] CLOUSER, *supra* note 14, at 242-43. Clouser argues that the view of Plato, Aristotle, and Marx "sees human rights as nothing more than whatever freedoms it is in the state's interest to grant," while the individualist theory of Locke holds individuals possess "'natural' moral and legal rights" that "may be justly lost . . . if individuals voluntarily agree to surrender them to the state." *Id.*; *see also* SKILLEN, IN PURSUIT OF JUSTICE, *supra* note 23, at 11 ("If socialists err by trying to reduce persons to their role or function in the economy or the state, then liberals err by trying to reduce the full panoply of social life to individual freedom. Both reductionisms fail, because human persons, created in the image of God, are neither autonomous individuals nor mere extensions of families, clans, nations, corporations, or states.").

[26] SKILLEN, RECHARGING THE AMERICAN EXPERIMENT, *supra* note 13, at 84.

[27] CLOUSER, *supra* note 14, at 257.

Confessional pluralism recognizes the diversity of individual confessions or worldviews in society.[28] Just as government is obligated to protect the diversity of societal institutions, it also must fairly and equitably protect the diversity of citizens' worldviews.[29] Government's obligation of fair and equitable protection is not based on the assumption that all worldviews are necessarily true, but that government lacks authority to dictate citizens' worldviews.[30] In other words, government acts outside its authority if it declares a particular religion to be the only true religion or if it gives special treatment to adherents of one worldview over another.

Principled pluralism stresses that the distinction between structural and confessional pluralism should not be confounded or ignored.[31] Rather, government must work to clearly recognize the distinct rights, responsibilities, and scope of authority for each societal institution.[32] Confounding occurs when the "*structural* distinction between two institutions . . . is thought to explain and exhaust the meaning of *confessional* pluralism."[33] For instance, this happens when religious freedom is interpreted to mean that members of a worldview are confined to live out beliefs only as they relate to houses of worship like a church, synagogue, temple, or even an atheist or humanist club.[34] In other words, the unique function that a house of worship plays in the life of a religious believer does not mean that a person's freedom to live out his or her beliefs must necessarily end when those beliefs direct a specific kind of participation in another institution, such as family, school, business, or government. Confining religious activity to church or church-like activities simultaneously ignores the full diversity of beliefs in society because many, if not most, worldviews and religions call for their members to act in specific ways within other institutions.[35]

Protecting confessional pluralism does not mean, however, that a person is permitted to do anything just because it is based on a religious belief. If that were the case, government would ignore its obligation to

---

[28] SKILLEN, RECHARGING THE AMERICAN EXPERIMENT, *supra* note 13, at 85.

[29] *Id.*

[30] *Id.* at 84.

[31] *Id.*

[32] *Id.* at 85.

[33] *Id.* at 84 (emphasis in original).

[34] *Id.* at 86 ("For government to confound confessional and structural pluralism is to restrict religious freedom to church life and private conscience—a restriction that actually violates the religions of many people.").

[35] *Id.* ("[T]he often overlooked fact is that religions also express themselves outside the walls of churches.").

uphold structural pluralism, which recognizes that people are always confined by various institutional authorities, whether it is parents in family life, teachers and administrators in schools, superiors in the workplace, or government authority in political life.[36] This diversity of institutional authority, in turn, begs the question of whether and to what extent government may exert its power to either limit or empower other institutions. Principled pluralism holds that government's authority is limited to pursuing public justice, which—depending on the situation—may result in protecting individuals from each other or other institutions, and may result in protecting institutions from individuals.[37] Exploring principled pluralism's historical roots in Abraham Kuyper and Herman Dooyeweerd will shine a brighter light on structural and confessional pluralism and lay the groundwork for defining public justice.

B. Historical Roots of Principled Pluralism

Dutch theologian and statesman Abraham Kuyper (1837-1920)[38] and Dutch philosopher Herman Dooyeweerd (1894-1977)[39] laid the specific groundwork for principled pluralism. Kuyper's concept of sphere sovereignty—later refined by Dooyeweerd—adheres to a non-hierarchal view of social institutions,[40] which forms the basis for structural pluralism. Part II.B.1. explores sphere sovereignty and its relationship to structural pluralism. Dooyeweerd refined the concept of sphere sovereignty into an entire metaphysical system of fifteen irreducible modes of existence, attacking the Enlightenment claim that theoretical thought can be religiously neutral.[41] By showing that all thought has a religious root, Dooyeweerd's theory creates a substantial basis for promoting government's fair and equitable treatment of all citizens' worldviews. Part II.B.2. explores Dooyeweerd's theory of modalities and its relation to confessional pluralism.

---

[36] *See generally* SKILLEN, IN PURSUIT OF JUSTICE, *supra* note 23, at 47-49.

[37] *See infra* Part II.C.

[38] *See* FRANK VANDENBERG, ABRAHAM KUYPER (1960) (providing a popular English language biography of Abraham Kuyper).

[39] *See A Brief Biography of Herman Dooyeweerd 7th October 1894 – 12th February 1977*, ROOTS W. CULTURE, http://rowc.blogsome.com/dooyeweerd-biography/ (last visited Oct. 24, 2011).

[40] DAVID T. KOYZIS, POLITICAL VISIONS AND ILLUSIONS 229-34 (2003).

[41] *Id.* at 234-35; *see infra* notes 72-73 and accompanying text.

1. Structural Pluralism's Basis in Abraham Kuyper's Theory of Sphere Sovereignty

Kuyper's theory of sphere-sovereignty is analogous to structural pluralism because it recognizes multiple social realms of human existence, such as family, education, business, and church.[42] Each sphere derives its unique and limited authority directly from God as opposed to another institution like the state.[43] For Kuyper, the government should use its power to enforce the boundary lines between spheres and defend individuals within a sphere when that sphere abuses its authority.[44]

Kuyper derived the concept of sphere sovereignty from John Calvin's two-powers perspective of church.[45] Calvin thought church and state, despite their autonomy, have a "close and mutually interdependent relationship" where each "has a responsibility to defend the other."[46] Accordingly, Calvin confounded the roles of church and state and believed that the state should not only provide for the safety of church members but even punish heresy.[47] Nonetheless, Kuyper incorporated Calvin's view of God's sovereign rule over all of life into the idea of multiple societal spheres, each deriving their unique purpose and authority from God.[48]

---

[42] *See* PETER S. HESLAM, CREATING A CHRISTIAN WORLDVIEW: ABRHAM KUYPER'S LECTURES ON CALVINISM 159 (1998). Heslam identifies a secondary meaning of sphere sovereignty: "confessional or ideological groups in society [are] free to organize their own autonomous institutions." *Id.* However, Dooyeweerd noted that if spheres are grounded in the creational order, it makes no sense to say that confessional groups of humans were grounded in the creational order. *Id.* at 160. Accordingly, Dooyeweerd sought to develop sphere sovereignty into a more precise philosophy that is discussed below.

[43] *Id.* at 154. Thus, to violate another sphere's unique and divinely instated sovereignty is to clash with God's created order for the universe. This would happen, for example, if the sphere of economics, through businesses, completely controls government policy, or if government usurps the sovereignty of the economic sphere and completely controls businesses. This also means that lesser degrees of violations are possible if government doesn't completely control business decisions, but controls an aspect of business that is properly left to business (e.g., prohibiting a company from firing any workers for legitimate business reasons).

[44] *Id.* at 158.

[45] Corwin Schmidt, *The Principled Pluralism Perspective*, *in* CHURCH, STATE AND PUBLIC JUSTICE: FIVE VIEWS 127, 134-36 (P.C. Kemeny ed., 2007).

[46] *Id.* at 134.

[47] *Id.*

[48] *Id.* at 138. In an effort to distinguish himself from the theocratic and aristocratic tendencies in Calvin's worldview, Kuyper preferred to be labeled a *neo-Calvinist. See* HESLAM, *supra* note 42, at 147 (noting also that "Kuyper repeatedly rejected, indeed, any suggestion that theocracy was a legitimate form of government.").

While Kuyper never solidified a list of spheres, he believed each sphere owed its existence to God, not to the State.[49] It is not surprising, then, that the historical provocation for Kuyper's social philosophy dates back to nineteenth century Netherlands when Enlightenment liberals, motivated by the idea that schools were a nation-forming institution, desired to force all children to attend government-funded public schools.[50] To Kuyper and his followers, the liberals sought to abuse the sphere of government by violating the sovereignty of the sphere of education.

The Dutch liberals never forced all students into public schools, but they passed a law in 1878 that required new standards for all schools while restricting government subsidization to meet those standards to only public schools.[51] Kuyper's Orthodox Reformed Church and Catholic groups reacted strongly and produced a formidable political alliance.[52] Kuyper's predecessor, Groen van Prinsterer, initially led the Anti-Revolutionary movement[53] while Kuyper entered Netherland's parliament in 1874,[54] formed the Anti-Revolutionary Party (ARP) in 1879,[55] and became Prime Minister in 1901.[56] The ARP, along with its Catholic alliance, eventually enshrined their concept of neutral, equally funded education in the 1917 Dutch Constitution, whereby both religious and public schools share equally in public funding.[57]

Principled pluralism's disavowal of individualist and collectivist ideologies[58] is also shared by Kuyper. In fact, the name of Kuyper's political party, Anti-Revolutionary, meant opposition to the French Revolution's credo of popular sovereignty.[59] For Kuyper, popular sovereignty was rooted in Thomas Hobbes' and John Locke's idea of individual sovereignty and extended by Jacques Rousseau and Francois-Marie Voltaire

---

[49] Ray Pennings & James Brinks, *Sphere Sovereignty 101*, CARDUS: COMMENT (Mar. 1, 2004), http://www.cardus.ca/comment/article/202/ (quoting Kuyper from his Lectures on Calvinism).

[50] STEPHEN V. MONSMA & J. CHRISTOPHER SOPER, THE CHALLENGE OF PLURALISM: CHURCH AND STATE IN FIVE DEMOCRACIES 55-56 (2nd ed. 2009). Like early American liberals, Dutch liberals did not discard religion and morals, but hoped to utilize broad religious and moral themes to "produce national unity and responsible citizens." *Id.* at 56.

[51] *Id.* at 56-57.

[52] *Id.* at 57.

[53] HESLAM, *supra* note 42, at 45.

[54] *Id.*

[55] *Id.*

[56] *Id.* at 9.

[57] MONSMA & SOPER, *supra* note 50, at 57.

[58] *Supra* note 25 and accompanying text.

[59] HESLAM, *supra* note 42, at 37, 148-51.

into the more statist and collectivist idea that the general will of society was sovereign and infallible.[60] Kuyper's philosophy equally opposes Karl Marx's idea of state sovereignty as embodied in socialism.[61] Marx's socialism was a modification of G. W. F. Hegel's philosophy that insisted the state, not the individual, was the actualization of freedom and that individuals should revere the state as a secular deity possessing a sovereign will.[62] Accordingly, Kuyper rejected both popular and state sovereignty, insisting that Calvin's idea of God's absolute sovereignty should extend equally to all societal spheres, avoiding the trappings of both individualism and collectivism.[63]

Therefore, Kuyper's theory of sphere sovereignty forms the basis for structural pluralism because it shares a conviction in both the rejection of individualism and collectivism and seeks to fully recognize the unique, but limited, role of distinct social spheres. Modern day political theorists in this tradition stress, however, that sphere sovereignty should not be reduced to merely a doctrine of the limited state, emphasizing the boundaries between spheres and entitlement to legal protection against intrusion.[64] Rather, the limited authority of each sphere "must go hand in hand with a recognition of their interdependency."[65] Therefore, a full application of sphere sovereignty to determine the distinct role and mutual obligation of a given social sphere involves identifying two things: the "irreducible, irreplaceable human social purpose[ ]" that the social sphere "fulfil[ls] towards the realization of a truly human society" and the form of interconnectedness that a community needs in order to fulfill its unique social role.[66]

For purposes of analyzing *Spencer*, a wide range of spheres must be examined to conclude what test best protects both the distinctness and interconnectedness of societal spheres. Hermann Dooyeweerd more fully developed the idea of sphere sovereignty into an entire philosophy

---

[60] *Id.* at 148-51. Although Kuyper rejected both forms as improperly locating ultimate sovereignty in humanity, Dutch liberalism embodied the individualist variant, making it Kuyper's enemy number-one. *Id.* at 149. However, Dutch liberalism was not as antagonistic to religion on a whole as compared to the rigid anti-theism of Rousseau and his followers. *Id.* at 150-51.

[61] *Id.* at 152-54.

[62] *Id.* at 152-53.

[63] *Id.* at 154.

[64] *See* Jonathan Chaplin, *Sphere Sovereignty and Canadian Public Life*, CARDUS: POL'Y PUB. (Winter Issue 2010), http://www.cardus.ca/policy/article/2370/ [hereinafter Chaplin, *Sphere Sovereignty*] (noting that "[s]phere sovereignty has in the minds of some North Americans . . . been reduced merely to a doctrine of the limited state.").

[65] *Id.*

[66] *Id.*

that will help examine social spheres/institutions and aid in understanding the basis for fair and equitable treatment of all religions and worldviews.

2. Confessional Pluralism's Basis in Herman Dooyeweerd's Theory of Modalities and the Religious Root of Thought

Herman Dooyeweerd[67] proposed a systemic philosophy[68] which postulates, among many other things, that the universe is comprised of numerous irreducible modes of existence[69] and that all theoretical thought has religious roots and underpinnings.[70] Dooyeweerd's theory of modalities better explains the nature of institutions, and thus adds to the understanding of sphere sovereignty. His argument that all theoretical thought has religious roots clearly identifies the religious nature of humanity, which forms the basis for government's fair and equitable protection of all religions and worldviews.

Although a proponent of sphere sovereignty, Dooyeweerd criticized Kuyper's inability to define and enumerate the spheres, arguing this confusion prevented Kuyper from forming a coherent social and political theory.[71] Nonetheless, Dooyeweerd's theory of modalities bears fascinating similarities to Kuyper's theory of sphere sovereignty. Whereas Kuyper's spheres, as realms of human existence with institutional counterparts,

---

[67] Like Kuyper, Dooyeweerd (1894-1977) grew up in the Reformed Christian community in the Netherlands. In 1917 he earned a doctorate in law from the free University and taught there from 1926-1965. KOYZIS, *supra* note 40, at 234.

[68] The most literal translation of the philosophy's name is "'philosophy of the law-idea,' though it is sometimes rendered . . . as 'philosophy of the cosmonomic idea,' the word *cosmonomic* being chosen to emphasize that the *law* at issue is not a positive legal code but the very law by which God upholds the cosmos." *Id.* at 234 n.34.

[69] This article will use the term modality as synonymous with mode of existence. A mode of existence is both a way that something exists and a way to perceive it. *See generally* HERMAN DOOYEWEERD, ENCYCLOPEDIA OF THE SCIENCE OF LAW 94-112 (Alan M. Cameron ed., Robert N. Knudsen trans., 2002) [hereinafter ENCYCLOPEDIA].

[70] *Id.* at 85 (stating that "the science of law cannot proceed as a special science without philosophical presuppositions," and that philosophy, in turn, "cannot operate . . . without supra-theoretical presuppositions."); *see also* KOYZIS, *supra* note 40, at 234-35 (stating that Dooyeweerd's philosophy is "rooted in the conviction that all theoretical thought has pre-theoretical and nonfalsifiable religious underpinnings," meaning faith and reason are not "dialectical polarities," but rather "two aspects of a much richer and fuller human experience.").

[71] HESLAM, *supra* note 42, at 160. Heslam contends that Kuyper had two irreconcilable usages of the idea of sphere sovereignty, "creational" and "socio-ideological", which led to the controversial "pillarization" in Dutch society whereby each confessional group developed its own social and political institutions, such as schools, news agencies, churches, political parties, etc. *Id.* at 2-3.

indicate an anthropological focus, Dooyeweerd's modalities, as ways in which all things in the universe exist, describe an ontology (i.e. a theory of existence). In his lifetime, Dooyeweerd identified fifteen modes of existence: "arithmetic (number), spatial, kinematic (extensive movement), physical (energy), biotic (organic life), psychic (feeling, sensation), logical, historical (cultural, formative), lingual (symbolic), social, economic, aesthetic, jural (justice, retribution), ethical (temporal love, loyalty) and pistical (faith)."[72] Just as Kuyper's spheres are irreducible to one another, so are Dooyeweerd's modalities.[73] Also, just as a person's identity is not exhausted by any one sphere, an entity's existence is not exhausted by or explainable only in terms of one mode of existence.[74] Finally, just as each person maintains some kind of relation to each social sphere, every entity exists in some way through each modality.

Dooyeweerd's theory that all entities exist in every mode points to the interconnectedness of reality, including human institutions, which Kuyper already noted in his theory of sphere sovereignty and the fact humans interact within all spheres. However, Dooyeweerd's theory better accounts for the uniqueness of entities, including human institutions, through a complete modal analysis. A full modal analysis shows that artifacts, that is, entities created by humans such as institutions, have both a *foundational* function and a *leading* function, which are respectively grounded in different modes, depending on the entity analyzed.[75] A foundational function is "the [mode] whose laws *govern the process of change* by which humans produced an artifact."[76] A leading function is "the [mode] whose laws *govern the plan or purpose* which guided the pro-

---

[72] KOYZIS, *supra* note 40, at 235; *see also* CLOUSER, *supra* note 14, at 57, 205 (stating that this list is not dogmatic, but open to debate).

[73] For example, under sphere sovereignty, the economic sphere is not reducible to a function of another sphere like the state or vice versa. Likewise, with the theory of modalities, the economic mode of existence is not reducible to or merely a function of another mode, like the juridical or social modes, or vice versa.

[74] For example, under sphere sovereignty, a person's identity is not explainable only in terms of their interaction within one sphere, whether it is the family, business, church, arts, government, etc. Likewise, under the theory of modalities, an entity, like a piece of clothing, cannot be fully explained through the lens of a single mode of existence. While a shirt may be explained in terms of its social use among people, its full meaning must take into account all of the modes, such as the fact it exists as a certain quantity of physical things with a particular shape in space, its formation by living, biotic things (as in cotton coming from plants), how it evokes certain feelings when seen by people, where the shirt stands within the history of shirts in culture, its economic value, its aesthetic meaning, etc.

[75] CLOUSER, *supra* note 14, at 222-26.

[76] *Id.* at 226 (emphasis added).

cess by which humans produced an artifact."[77] Therefore, the institutions of business, state, and church all have a historical foundational function because they are "brought into being through the processes of cultural formation," and "shaped by cultural formative *power* of some sort."[78] However, businesses have an economic leading function because of their express economic purpose, whether it is manufacturing a good or providing a service.[79] Governments have a juridical leading function because their plan or purpose is to administer justice. Furthermore, houses of worship like churches, synagogues, or temples, have a pistical (faith) or confessional leading function because of their distinct purposes. In this regard, entities, such as human institutions, are distinguishable based on founding and leading functions while recognizing they fully exist within each modality.

Dooyeweerd recognized the tendency of nontheistic worldviews to reduce all of reality to one or more modalities, which equates to a deification of that modality by assuming it alone "provides the key to understanding the world in its totality."[80] This means that philosophies which claim to be *secular*, or having no basis in religious belief, are incorrect. For example, a reductionist interpretation of theories about humanity is particularly tempting when humans are viewed only in terms of their existence within one modality. An economist might define all human actions and motivations in terms of economic incentives, while a biologist might reduce humans to the biotic mode and argue that all actions and motivations are merely a function of biological instincts. In doing so, all other modes of existence are neglected for the sake of assuming that either the economic or biotic aspect fully explains human actions and motivations. Accordingly, these types of assumptions are a form of religious belief because reality is held subservient to one or more modes of existence, which are effectively deified. Therefore, the other modalities are sacrificed when engaging in thought, arriving at conclusions, and advocating how humans should live and structure society.

---

[77] *Id.* (emphasis added) (noting that "the concept of purpose used here does not mean any subjective whim about the use of an artifact once it is formed. We all know a teacup can be used as an ashtray, or a chair as a stepladder. We refer instead to the leading function of the plan by which the artifact was formed, which is embodied in its structure . . . .").

[78] KOYZIS, *supra* note 40, at 240-41 (emphasis in original); *see also* CLOUSER, *supra* note 14, at 260 (figure indicating the state's historical foundational function).

[79] KOYZIS, *supra* note 40, at 242; *see also* CLOUSER, *supra* note 14, at 260 (figure indicating business's economic foundational function).

[80] KOYZIS, *supra* note 40, at 235-236.

So, while a Dooyeweerdian critique of an ideology's religious character looks for the effect of beliefs in explicitly theistic gods and any sacred writings that accompany the belief-system, it also asks whether and to what degree an ideology reduces all of reality or a set of modalities to another mode. For example, author David Koyzis notes that conservatism tends to commit a historical reduction by "emphasiz[ing] the place of the historical process and the value of that which has emerged within it."[81] Socialism, particularly the Marxist variant, commits an economic reduction whereby "[m]an is . . . motivated in all his activities by economic factors rooted in one's relationship to the means of production, or class."[82] Variants of nationalism amount to either a biological reduction, when "the national community is viewed as a large family," or a historical reduction, when a "nation is seen to be based in a seminal act of foundation."[83] Finally, liberalism commits a logical reduction[84] by "mistak[ing] the analytical enterprise for reality itself, rather than seeing it as enriching our understanding of reality as we experience it."[85] In other words, liberalism takes the nature of logic—which is "to break things down into their components for purposes of analysis"—and assumes that "[t]his theoretical division of the object of study" explains the nature of reality, rather than recognizing that the very act of logical analysis "alter[s] the integral character of reality itself as we experience it at a pre-theoretical level."[86]

By showing the religious root of thought, Dooyeweerd's philosophy holds that as a necessity of being human each person ascribes to pre-

---

[81] *Id.* at 236.

[82] *Id.* at 172, 236.

[83] *Id.* at 236.

[84] Dooyeweerd pointed out the logical reduction in Immanuel Kant's philosophy. *See* ENCYCLOPEDIA, *supra* note 69, at 37-44. "In modern times, it was Immanuel Kant who, following the path of critical self-reflection, thought he could discover an Archimedean point within the logical aspect of theoretical thought itself, which would be elevated above the diversity of the synthetic points of view of the special sciences." *Id.* at 37.

[85] KOYZIS, *supra* note 40, at 236.

[86] *Id.* "It is only in the scientific, theoretical attitude of knowing whereby the aspects [or modes] of reality are individually analyzed and distinguished from each other . . . ." ENCYCLOPEDIA, *supra* note 69, at 23. Therefore, those working in the special sciences, including law, should be aware that when they appeal to "reality, . . . they are appealing to a coherence of reality which they have already broken up into its aspects in order, subsequently, to investigate it in a scientific fashion within one of these theoretically distinguished aspects." *Id.* at 24. Thus, "the reality which has been theoretically analyzed in this fashion is no longer the reality which presents itself to them in ordinary experiencing, but is, on the contrary, a theoretical view of reality." *Id.* Accordingly, a true view of reality "cannot limit itself to theoretical insight into a particular aspect; it must always be a view of reality within the structure of the mutual interrelationships of its aspects." *Id.*

theoretical religious beliefs, and that it is philosophically impossible for a person or ideology to claim religious neutrality in its worldview.[87] The overall implication is not that every worldview is necessarily true or correct, but the political implication is that government is incompetent to decide which religion is true. Thus, if government provides assistance to religious people or institutions, whether it is access to public utilities, public safety (e.g., police and fire control), courts or the political process, (voting or party formation), or public funds for education or charity,[88] government should give people of all worldviews fair and equitable access to its public services. Accordingly, Dooyeweerd's philosophy forms the basis for principled pluralism's convictions regarding confessional pluralism.[89] Having shown the historical roots for both structural pluralism and confessional pluralism, the institution of government can be examined more closely.

C. Government's Obligation to do Public Justice Within a Pluralistic Society

Principled pluralists argue that the government, as one of society's key institutions, is tasked to protect structural and confessional pluralism through its unique authority to do public justice.[90] In other words, the government's unique and irreducible structural purpose[91] "is to administer just interrelationships among persons and spheres, insofar as these fall within the public realm—to promote 'public justice.'"[92] Part II.C.1. will

---

[87] *See* ENCYCLOPEDIA, *supra* note 69, at 46.

> Every elevation of a theoretically isolated aspect to the root-unity of all the others, . . . is in truth a religious choice of position of the human ego over against the absolute origin . . . . In such an absolutization there is revealed the ineradicable inner religious tendency of the human heart toward the origin, which . . . does not rest until it has referred everything relative to an absolute ground.

Id.

[88] *See* SKILLEN, IN PURSUIT OF JUSTICE, *supra* note 23, at 59-76, 93-110 (providing an in-depth principled pluralist defense of equal access to funds for charitable choice and education).

[89] *See supra* notes 15-16, 28-30 and accompanying text.

[90] *See* CLOUSER, *supra* note 14, at 266 (stating that the purpose of government is "the promotion and achievement of public justice for the entire society living in the territory it governs.") "The small-scale injustices that may pass between individuals or within communities cannot and should not all be handled by public law" because the government's "duty extends only to those issues which affect the entire body politic in principle." *Id.* at 275.

[91] *See supra* note 66 and accompanying text.

[92] Chaplin, *Sphere Sovereignty*, *supra* note 64.

further explore the meaning of justice while sub-part 2 will examine the meaning of public.

1. The Meaning of Political Justice: Retributive and Social Justice and Distribution of Authority

The political meaning of justice refers to two things: retributive and social justice, and the just distribution of authority throughout society.[93] Justice is often taken to mean retribution, via criminal and civil laws that punish and/or compensate victims of injustice.[94] Laws with a retributive function also create disincentives to violate structural and confessional pluralism.[95] Justice also contains elements of what is known as social justice, whereby laws and policies either directly satisfy basic material needs or create incentives for other institutions to do likewise.[96] The creation of laws or policies that target either retributive or social forms of justice must involve careful consideration of the affect on structural and confessional pluralism. Accordingly, laws may themselves be unjust if they fail to protect religious freedom or constrain other social spheres from carrying out their distinct purposes.[97]

Principled pluralism further defines justice as the just distribution "of power and authority across many cent[ers] of society" which "helps preempt illicit and oppressive concentrations of power in any one center."[98]

---

[93] Jonathan Chaplin, *Defining "Public Justice" in a Pluralistic Society: Probing a Key Neo-Calvinist Insight*, PRO REGE (Dordt C., Sioux Center, Iowa), Mar. 2004, at 2 [hereinafter Chaplin, *Defining Public Justice*], *available at* http://www.dordt.edu/publications/pro_rege/crcpi/115667.pdf.

[94] *See id.*

[95] By no means is it clear precisely which criminal and civil laws are needed in a given society to protect both forms of pluralism. However, any attempt to create a law should always consider its far-reaching affect on structural and confessional pluralism.

[96] *See* Chaplin, *Defining Public Justice*, *supra* note 93, at 5; *see also* CLOUSER, *supra* note 14, at 268 (stating more broadly that "[i]n its positive direction the task of the state is to engender peace and harmony among people and among communities."). Just like retributive laws, creating laws aimed towards social justice involves extremely careful consideration of their affects on both structural and confessional pluralism. Examples of social justice include welfare assistance, funding for various charitable activities such as drug rehabilitation or job training, or tax policies that allow greater funds to go to or stay with other institutions that provide charity.

[97] At the same time, within Dooyeweerd's philosophy, an *unjust* law still has a *juridical* character and exists in that modality. *See* CLOUSER, *supra* note 14, at 236 ("A state may act illegally, but it will still have a legal structural purpose led by the norm of justice.").

[98] Chaplin, *Defining Public Justice*, *supra* note 93, at 4 (commenting that Western societies have concentrated power especially in economic and governmental spheres while traditional societies often focused authority in the family, tribe, or religious communities). For example, laws that limit a government's ability to direct the economic sphere are nec-

Additionally, principled pluralism recognizes a hierarchy of authority within each social sphere.[99] This means that authority figures, from the president of a country to the parents of a family, are "limited by the nature of [their respective] authoritative office, which is further limited by institutional context."[100]

2. The Meaning of Public

Public refers to the public realm, which is "the social space within which individuals and communities or associations interact with each other in ways that transcend their own unique rights and responsibilities."[101] The public realm is "that which falls outside . . . the internal spheres of all the multiple communities and associations that make up the plural structure of society, as well as outside the sphere of individual freedom."[102] In this sense, the private sphere is not reduced to just the individual because it acknowledges individuals' interactions within other non-governmental social spheres, such as families, businesses, and churches.[103] Simultaneously, the public realm is not reduced to "what is left over after we take away the rights of individuals and communities; it also implies a positive task of establishing an enabling environment that other social bodies cannot supply."[104] Accordingly, government's authority is limited to justice within the public realm.[105] This means that many injustices occurring in personal relationships (e.g., a friendship) or within communities and associations (e.g., a church, business, political party, etc.) are best handled by the people affected, without the aid of govern-

essary to prevent a government from usurping the authority of business enterprises, which need sufficient independence to thrive. At the same time, governments need laws and policies that prevent businesses, especially those with large amounts of economic power, from dictating laws that benefit only certain businesses at the expense of others.

[99] KOYZIS, *supra* note 40, at 237 (contrasting principled pluralism with the Catholic concept of subsidiarity, which expresses an "ontological hierarchy, that is, one based on a chain of being in which God himself can be located").

[100] *Id.* For example, while the authoritative office of the U.S. President gives the President power to veto bills, his power to make parental decisions, such as where to send his child to school, is limited to his own family. Regarding institutional context, if a parent physically abuses his child, the government agents tasked with the authority to punish that action may do so.

[101] Chaplin, *Defining Public Justice*, *supra* note 93, at 4-5.

[102] *Id.* at 5.

[103] *See id.* In other words, an individual's interactions within a non-governmental organization may still be within the public realm.

[104] *Id.*

[105] *Id.* at 6 (stating the public realm "does not envelope the unique 'spheres of justice' of individuals or . . . various social bodies, but embraces only one specific dimension—the public dimension—of such activities.")

ment.[106] However, those injustices that involve a public dimension require government intervention.[107]

Thus, government acts legitimately when it confines retribution, support, and the distribution of power to matters affecting the public realm.[108] In this way, public justice is the "guiding principle, whether . . . deliberating on welfare reform, monetary policy, environmental pollution, . . . strategic defence [sic]," criminal law, or of course, the degree of freedom religious organizations should have to make employment decisions based on religion.[109] Having established the basic contours of principled pluralism to guide Part IV's analysis of the 702 exemption, we turn now to the exemption itself and the struggle of the federal courts to establish a test for identifying religious corporations, associations, and societies.

III. Federal Courts' Solutions to the 702 Exemption

From the perspective of principled pluralism, the Civil Rights Act of 1964[110] was a government exercise of legitimate authority to address widespread injustices affecting the relationship of individuals to numerous societal institutions. Within Title VII of the Act, Congress sought to

---

[106] *Id.* at 4. For example, if a person feels that a friend or spouse has neglected spending time together, they should work it out amongst themselves. Or, if a company knows an employee is not meeting reasonable expectations, the employer should be free to discipline or possibly fire that employee.

[107] *Id.* at 6. For example, if a person steals money from a friend, the government should act, because punishment protects not only the individual harmed but deters the criminal and other potential criminals from future harm to the public. Or, if a company fires an employee for their race, the government should act because punishment or legal damages protects the employee harmed and deters the employer and others from future discriminatory firing that harms the public.

[108] Jonathan Chaplin brings into focus the public aspect by stating public justice involves various kinds of activities:

> first, policing the boundaries between spheres to prevent one from inadvertently undermining or intentionally dominating another; second, supporting social spheres, such as marriage and family, whose failure to fulfil[l] a unique function could seriously damage the fabric of public life . . . ; third, stimulating, or if necessary directly providing, the complex infrastructure needed to sustain and enhance cooperative and just public interactions—anything from transit systems to a stable currency to immunization programs to market regulation.

Chaplin, *Sphere Sovereignty*, *supra* note 64.

[109] Chaplin, *Defining Public Justice*, *supra* note 93*,* at 5.

[110] Civil Rights Act of 1964, tit. VII, Pub. L. No. 88-352, 78 Stat. 241 (1964) (codified as 42 U.S.C. § 2000e (2006)). The Civil Rights Act is referred to as Title VII because it comes from Title VII of the original public law. Likewise, 42 U.S.C. § 2000e-1 is called the 702 exemption because it was section 702 of the original public law.

generally prohibit the use of race, color, religion, sex, or national origin as a basis for hiring, firing, promotion, or other workplace practices.[111] However, if this prohibition established an absolute individual right, then churches and other religious institutions would be forced to hire, retain, or promote an individual with divergent religious beliefs, even in circumstances where conflicting beliefs hamper or prevent the institution from carrying out its self-identified religious goals. Thus, Congress attempted to balance the interests of individuals and religious institutions when it exempted "religious corporation[s], association[s] . . . or societ[ies]" from liability under Title VII in what is known as the 702 exemption.[112]

Unfortunately, the law failed to define religious corporation, association, or society, which left the federal courts to determine the exact types of religious institutions that qualify for the exemption. Deciding this issue was precisely the Ninth Circuit's challenge in *Spencer v. World Vision*. This part will first examine the language and constitutionality of the 702 exemption along with the pre-*Spencer* attempts to define religious corporations, associations, and societies. Then, it will identify and analyze the problem faced in *Spencer* and the three separate solutions posed by its judges.

A. Language and Constitutionality of the 702 Exemption

1. Enactment of and Amendment to the 702 Exemption

In the original 1964 Civil Rights Act, the 702 exemption read:

> This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a *religious corporation, association, or society* with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, or society of its *religious activities* or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution.[113]

Even though the exemption did not define religious corporation, association, or society, its application was limited to employees whose work related to religious activities, an equally undefined concept with the

---

111 *See* 42 U.S.C. § 2000e-2 (2006).

112 *See* § 2000e-1(a).

113 Civil Rights Act of 1964 §702 (emphasis added).

potential to confuse the judiciary.[114] Nonetheless, Congress could have limited the exemption's reach more precisely to churches, synagogues, mosques, or similar organizations, or required the religious organizations to have some relationship with houses of worship, like churches. Instead, it chose the broad description of corporation, association, or society and required only that they be religious.

Congress changed the 702 exemption in its 1972 amendment of the Civil Rights Act:

> This title shall not apply to an employer with respect to the employment of aliens outside any State, or to a religious corporation, association, **educational institution,** or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, **educational institution,** or society of its ~~religious~~ activities ~~or to an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution~~.[115]

By removing the word religious before activities, Congress overtly expanded the exemption to cover not only religious activities, but all

---

[114] Additionally, Title VII only applied to employers with 25 employees, later decreased to fifteen in March 1973. King's Garden, Inc., 38 F.C.C.2d 339, 340 n.2. Furthermore, although the plain language of the text indicated all forms of discrimination mentioned are exempted ("this title shall not apply"), courts held the law only exempted religious institutions from *religious* based discrimination and not sex, race, color, or national origin-based. McClure v. Salvation Army, 460 F.2d 553 (5th Cir. 1972). Even if Congress did not originally intend this, Congress passed up the chance to clarify or change the types of exemptions when it amended the Civil Rights Act in 1974, two years after *McClure*. *See* Thomas M. Messner, *Can Parachurch Organizations Hire and Fire on the Basis of Religion Without Violating Title VII?*, 17 U. FLA. J.L. & PUB. POL'Y 63, 79, nn.114-15 (2006). However, beginning with *McClure*, several courts have applied the "minister exception," which holds that the Free Exercise Clause prohibits the application of Title VII to the employment relationship between a minister and church. Thus, in addition to religion, a church may use race, gender, and national origin as a basis for hiring, firing, and promoting a minister. *See id.* at 84. Ironically, the ministerial exception suffers from a similar problem faced in *Spencer*, only the problem is how to define *minister* rather than *religious institution*. The U.S. Supreme Court will soon rule on this in EEOC v. Hosanna-Tabor Evangelical Lutheran Church & Sch., 597 F.3d 769 (6th Cir. 2010), *cert. granted*, 131 S. Ct. 1783 (2011).

[115] Equal Employment Opportunity Act of 1972, Pub. L. 92-261, § 3, 86 Stat. 103, 104 (codified as 42 U.S.C. § 2000e-1 (2006)) (**bold** and strikethroughs added to indicate Congress's additions and deletions). Congress also amended § 2000e-1 in 1991, where it simply labeled the 1972 amendment as subsection (a) and added subsections (b) and (c), which contain other exemptions unrelated to religious institutions and outside the scope of this article.

activities of a religious employer.[116] Congress also discarded the requirement that religious employers can make employment decisions based on religion only when the affected employee "perform[s] work connected with the religious activities" of the organization. However, Congress retained the problematic language of religious corporation, association, educational institution, or society, thus setting the stage for the ensuing judicial struggle, which peaked in *Spencer*. Part of that struggle involved defining religious corporation, association, or society, in a way that does not violate First Amendment Establishment Clause decisions. Thus, subpart 2 will discuss the failed constitutional challenge to the 702 exemption.

2. Constitutionality of the 702 Exemption

King's Garden, Inc. v. FCC was the first court of appeals case to construe the 702 exemption after the 1972 amendment, and the first case to comment on Establishment Clause concerns arising from the exemption. The FCC received a complaint from Mr. Anderson who claimed that a Washington state radio station asked him questions during an interview that implied he must be Christian to be considered for employment.[117] The FCC held that the station discriminated on the basis of religion in violation of FCC rules, despite the existence of the 1964 702 exemption.[118] The D.C. Circuit upheld the FCC's decision, stating the 702 exemption did not control the FCC's public interest mandate under its enabling statute, the Communications Act.[119] Thus, the FCC was free to

---

116 *King's Garden, Inc.*, 38 F.C.C.2d at 340 (citing Joint Explanatory Statement of Managers at the Conference (on P.L. 92-261), 1972 US. Code Congressional and Administrative News, 1047, 1048). Additionally, King's Garden, Inc. v. FCC, 498 F.2d 51 (D.C. Cir. 1974) discusses the legislative history and intent behind the Equal Opportunity Act of 1972. "This amendment broadened the exemption as to religious educational institutions—but also, of course, as to *all other* religious organizations listed in the exemption. In giving concrete examples of the workings of their amendment, however, both Senator Allen and Senator Ervin invariably adverted to its effect on religious educational institutions." *Id.* at 55 n.6. Nonetheless, Senator Ervin stated that "[o]ur amendment would strike out the word 'religious' and remove religious institutions in all respects from the subjugation to the EEOC." *Id.*

117 *King's Garden, Inc.*, 34 F.C.C.2d at 937.

118 *Id.* at 938, *aff'd*, 38 F.C.C.2d 339.

119 *King's Garden, Inc.*, 498 F.2d at 53-54 ("[C]ongress has given absolutely no indication that it wished to impose the [1972] exemption upon the FCC."); *King's Garden, Inc.*, 38 F.C.C.2d at 340 ("The Civil Rights Act and amendments to it are not part of our enabling statute, and the former does not encompass the whole or the public interest standard imposed on us by the latter.").

revoke the religious radio broadcaster's license when that broadcaster discriminated on the basis of religion as to all its personnel.[120]

The *King's Garden v. FCC* Court avoided analyzing whether the defendant qualified for the 702 exemption.[121] Instead, the court found the FCC's limited exemption in its own anti-bias rules applied, which Congress did not intend the 702 exemption to replace.[122] By analyzing the case under a separate rule, the court also avoided ruling on the constitutionality of the 702 exemption altogether.[123] Nonetheless, the court was extremely skeptical of the constitutionality of the 702 exemption.[124] The court stated that the 702 exemption likely violated *Lemon v. Kurtzman*[125] because it lacked a conceivable secular purpose and the primary effect was to advance religious groups by allowing them, and only them, to hire, fire, and promote based on religion.[126]

When the Supreme Court finally decided whether the 702 exemption violated the Establishment Clause, it rejected the *King's Garden* position.[127] In *Corporation of the Presiding Bishop v. Amos,* the Court applied the test articulated in *Lemon v. Kurtzman* to the 702 exemption and held (1) the exemption's valid secular purpose is to limit the government's interference in the decision-making process in religions; (2) the primary effect of the exemption does not result in the government itself advancing religion through sponsorship, financial support, or active involvement in religious activity; and (3) the exemption does not imper-

---

120 *King's Garden, Inc.*, 498 F.2d at 58.

121 *Id.* at 53-54.

122 *Id.*

123 *Id.* at 51, 55 (noting that, at that time, the Supreme Court was preoccupied with Establishment Clause challenges to state subsidies and tax preferences for religious groups.).

124 *Id.* at 53, 55, 57 ("The 1972 exemption is of very doubtful constitutionality"; "[i]n creating . . . the rules facing religious and non-religious entrepreneurs, Congress placed itself on collision course with the Establishment Clause." "In addition to being vulnerable on First Amendment grounds, the 1972 exemption appears unconstitutional on Fifth Amendment grounds as well.").

125 In *Lemon v. Kurtzman*, the Supreme Court held that where a law does not discriminate among religions, the law would be valid if (1) it has a secular legislative purpose, (2) its principal or primary effect is one that neither advances nor inhibits religion, and (3) the statute does not foster excessive government entanglement with religion. Lemon v. Kurtzman*,* 403 U.S. 602, 612-13 (1971). To determine excessive government entanglement, the court "must [1] examine the character and purposes of the institutions that are benefited, [2] the nature of the aid that the State provides, and [3] the resulting relationship between the government and the religious authority." *Id.* at 615.

126 *King's Garden, Inc.*, 498 F.2d at 55.

127 Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos*,* 483 U.S. 327, 339 (1987).

missibly entangle church and state because it restricts the government's ability to intrusively inquire into a religious group's beliefs concerning what constitutes religious activity.[128] Accordingly, the Court held that the defendants, two corporations of the Mormon Church and a nonprofit gymnasium run by them, were not liable under Title VII for firing a building engineer who failed to qualify as a member of the Church.[129]

From a principled pluralist viewpoint, there are several notable aspects concerning the *Lemon* test and the Court's holding in *Amos*. First, *Lemon's* concept of a secular purpose is troubling because it assumes that human activities are divisible into religious and secular types. Principled pluralists who think Dooyeweerd's philosophy debunked the notion that a person's or institution's actions and intentions are completely inseparable from religious underpinnings (i.e. pre-theoretical thought) reject this dichotomy.[130] Despite the shortcomings of a secular-religious dichotomy, *Amos* managed to affirm structural pluralism partially by recognizing government has limited authority to make decisions for religious institutions.[131] However, the Court did not identify the scope of the government's authority, and the 702 exemption's allowance for the government to prohibit religious institutions from discriminating based on race, gender, and national origin contradicts the idea that government can never claim authority over unjust decisions by religious institutions. Accordingly, while the Court's deference to religious institutions' decision-making takes into account confessional pluralism by allowing religious groups to maintain religious unity amongst their members, it fails to articulate that the government may, under structural pluralism, interfere with a religious institution's decisions if that institution attempts to violate structural pluralism and public justice through discriminatory practices based on race, gender, or national origin.

---

[128] *Id.* at 335-37, 339. Furthermore, the Court found that Congress was entitled to deference in its determination that the original exemption was too narrow, and the Court explicitly recognized that the exemption extended beyond merely "religious activities" of religious employers to "all activities" of religious organizations. *Id.* at 334 n.9, 338.

[129] *Id.* at 329-30.

[130] *See* SKILLEN, IN PURSUIT OF JUSTICE, *supra* note 23, at 68-69 ("The effort to force a private, 'sectarian' confinement on religious ways of life is itself a form of religious imperialism. The Enlightenment's dichotomy of a secular public on the one hand and religious privacy on the other arises from a religiously deep and all-encompassing worldview . . . . Thus, from the new pluralist point of view, it is not possible to speak of the 'religious' and the 'secular' in modern, Enlightenment terms.").

[131] *See Amos*, 483 U.S. at 335-36 (stating that the Court agreed with the District Court's detailed examination of the legislative history of the 702 exemption in determining that government noninterference in religious groups' decision-making process equated to a secular purpose).

Next, by limiting impermissible government advancement of religion to direct sponsorship, financial support, or active involvement, *Amos* held that "a law is not unconstitutional simply because it *allows* churches to advance religion."[132] Furthermore, the *Amos* Court said the 702 exemption lifted a burden on the exercise of religion by ensuring religious groups may hire, fire, and promote based on religion and that there was "no reason to require that the exemption comes packaged with benefits to secular entities."[133] However, principled pluralism's broader understanding of the role religious belief plays in all worldviews and theories means it offers greater protection to what the Court deems secular entities. Confessional pluralism recognizes all worldviews, not just theistic ones, deserve protection.[134] Therefore, interpreting the 702 exemption to apply only to theistic worldviews arguably discriminates against non-theistic worldviews.[135]

Finally, *Amos* reasoned that the 702 exemption prevents entanglement by preventing "intrusive inquiry into religious belief."[136] On one hand, the *Lemon* test's entanglement prong prevents confounding church and state, but on the other hand, the idea of entanglement suffers from the same lack of precision in determining whether something is secular or religious. Principled pluralism recognizes that all institutions, including church and state, are interrelated and have mutual obligations. Thus, *entanglement* fails to identify the precise types of interactions between church and state that constitute literal establishment of a religion.[137] Accordingly, this prong fails to adequately protect structural pluralism

---

[132] *Id.* at 337.

[133] *Id.* at 338.

[134] *See* SKILLEN, RECHARGING THE AMERICAN EXPERIMENT, *supra* note 13, at 84.

[135] Accordingly, principled pluralists would perhaps partially agree with the Appellee who argued the 702 exemption violates equal protection principles "by giving less protection to the employees of religious employers than to the employees of secular employers." *Amos*, 483 U.S. at 338. However, principled pluralists would discard the religious/secular dichotomy and hold that a non-theistic organization, such as an atheist or humanist organization, should be able to make employment decisions based on confession just like explicitly theistic religious organizations.

[136] *Id.* at 339 (scolding the District Court for engaging in such an inquiry).

[137] In determining entanglement, *Lemon* first directs courts to "examine the character and purposes of the institutions that are benefitted," Lemon v. Kurtzman, 403 U.S. 602, 615 (1971), but this helps little. For example, why is it not entanglement for governments to provide access to basic services, like utilities, to religious organizations? If the court defines these as valid secular purposes, then *Lemon's* entanglement prong suffers from the same problem as the first prong, which seeks to find a secular legislative purpose. And while "the nature of the aid that the State provides" and "the resulting relationship between the government and the religious authority" may help determine the quantity of aid and the impact, this fails to account for why either of those are a problem if individuals

regarding church and state. While the *Amos* Court perceived entanglement as an issue of *inquiry into belief*, even this narrow focus failed to prevent the eventual difficulties lower courts would have in defining what constitutes a religious corporation, association, or society.

In spite of the *Amos* holding that the 702 exemption does not violate the Establishment Clause, the appellees did not contest whether the appellants qualified as a religious corporation, association, or society.[138] This left the lower courts with little guidance and set the stage for a slow-moving but growing struggle among the Courts of Appeal.

B. The Federal Courts' Attempts to Determine if an Organization is a Religious Corporation, Association, or Society

While the courts have little trouble deciding if a church or an organization with extremely close ties to a church qualifies for the 702 exemption,[139] *Spencer v. World Vision* deals with the situation "where the religious or nonreligious nature of a particular activity or purpose is in dispute."[140] The *Spencer* court looked primarily to *EEOC v. Townley Engineering & Manufacturing Co.* and *EEOC v. Kamehameha*, both Ninth Circuit cases, and *LeBoon v. Lancaster Jewish Community Center Ass'n*, from the Third Circuit.[141]

1. Pre-Spencer: The Ninth Circuit's *Townley-Kamehameha* Test

In *Townley*, the court held that any inquiry regarding the 702 exemption required determining "whether the 'general picture' of [an] institution is primarily religious or secular"[142] and that "[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious."[143] Thus, institutions "merely 'affiliated' with a religious organization" would not

---

of all worldviews have equal access to whatever benefits or services the government offers. *Id.*

138 *Amos*, 483 U.S. at 330 n.3.

139 *See Spencer I*, 619 F.3d 1109, 1112 (9th Cir. 2010) ("[T]he central function of section 702 has been to exempt churches, synagogues, and the like, and organizations closely affiliated with those entities." (citing EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 617-18 (9th Cir. 1988)).

140 *Id.* at 1119.

141 *Id.* at 1112.

142 *Townley*, 859 F.2d at 618 n.14.

143 *Id.* at 618.

qualify for the 702 exemption.[144] Accordingly, when a machinist working for a mining equipment manufacturer brought a religious discrimination suit against his employer, the *Townley* court found the company, which forced its employees to attend Bible study, was not a religious corporation despite the owners' claim that they could not separate God from their business.[145]

When the Ninth Circuit reaffirmed *Townley* in *Kamehameha*, the court stated the 702 exemption would be construed narrowly, echoing the *Townley* court's view that "Congress's conception of the scope of [the 702 exemption] was not a broad one," that "[a]ll assumed that only those institutions with extremely close ties to organized religion would be covered," and that "[c]hurches, and entities similar to churches, were the paradigm."[146] *Kamehameha* involved a school that, due to the stipulations of its creator's will, only hired teachers of the Protestant religion.[147] In this case, a teacher applied for a job at a school and filed a charge with the EEOC for religious discrimination when the school informed her it only hired Protestants.[148] The court held the school had a primarily secular orientation and thus did not qualify as a religious educational institution under the 702 exemption.[149] In weighing the secular and religious characteristics of the school, the court specifically referenced its (1) ownership and affiliation, (2) purpose, (3) faculty, (4) student body, (5) student activities, and (6) curriculum, all which the court deemed to be primarily secular.[150]

2. The Third Circuit's *LeBoon* Test

Until the Eastern District of Pennsylvania ruling in *LeBoon*,[151] every federal case that found an organization qualified as a religious corporation, association, educational institution, or society under the 702 exemp-

---

144 *Id.* at 617. The court further speculated that when Congress enacted the 702 exemption, it "assumed that only those institutions with extremely close ties to organized religion would be covered. Churches, and entities similar to churches, were the paradigm." Id. at 618.

145 *Id.* at 611-12, 616, 619.

146 EEOC v. Kamehameha, 990 F.2d 458, 460 (9th Cir. 1993) (quoting *Townley*, 859 F.2d at 618).

147 *Id.* at 459.

148 *Id.*

149 *Id.* at 459-61.

150 *Id.* at 461-63.

151 LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, No. 04-430, 2005 U.S. Dist. LEXIS 2275 (E.D. Pa. Feb. 17, 2005).

tion involved organizations with close ties to an established church.[152] When the Third Circuit affirmed *LeBoon*, it identified nine factors involving religious and secular characteristics, and held that the court must weigh each factor to determine whether a corporation's purpose and character are primarily religious:

> (1) whether the entity operates for a profit, (2) whether it produces a secular product, (3) whether the entity's articles of incorporation or other pertinent documents state a religious purpose, (4) whether it is owned, affiliated with[,] or financially supported by a formally religious entity such as a church or synagogue, (5) whether a formally religious entity participates in the management, for instance by having representatives on the board of trustees, (6) whether the entity holds itself out to the public as secular or sectarian, (7) whether the entity regularly includes prayer or other forms of worship in its activities, (8) whether it includes religious instruction in its curriculum, to the extent it is an educational institution, and (9) whether its membership is made up by coreligionists.[153]

The Third Circuit noted that "not all factors will be relevant in all cases, and the weight given each factor may vary from case to case."[154]

In *LeBoon*, a nonprofit corporation with a mission to promote Jewish culture terminated an evangelical Christian it employed as a bookkeeper for approximately four years.[155] The corporation operated numerous programs such as a summer camp and preschool, published a newspaper, and organized events for Jewish holidays.[156] It had a stated mission "to 'enhance and promote Jewish life, identity, and continuity.'"[157] While financially independent from the local synagogues, it received financial support from the synagogues and Jewish organizations.[158] Rabbis from three local synagogues advised the corporation's management, and the corporation maintained active ties with other Jewish organizations, such as those synagogues.[159] The court found Jewish religious belief played a

---

[152] *See* Messner, *supra* note 114, at 86-97 (providing an in-depth analysis of these cases, as well as cases where defendants did not qualify for the 702 exemption).

[153] LeBoon v. Lancaster Jewish Cmty. Ctr. Ass'n, 503 F.3d 217, 226 (3d Cir. 2007).

[154] *Id.* at 227.

[155] *Id.* at 221.

[156] *Id.*

[157] *Id.* at 231.

[158] *Id.* at 221, 227.

[159] *Id.* at 227.

significant role in the life of the organization through the use of Jewish ceremonial traditions, the observance of the Sabbath and the Jewish religious calendar in scheduling activities, and the keeping of an on-site kosher kitchen.[160] Additionally, Judaic curriculum and programming were available for children and adults.[161]

Stating that it was not persuaded by the Ninth Circuit's suggestion that the 702 exemption "should be understood to cover little more than formal houses of worship," the court held the nonprofit's primary purpose was religious and thus the exemption applied.[162] In response to *LeBoon's* arguments, the Third Circuit also noted that a religious organization, without losing the protection of the 702 exemption, may engage in secular activities, not adhere absolutely to the strictest tenets of its faith, declare its intention not to discriminate (e.g., in its employee handbook), and not enforce an across-the-board policy of hiring only coreligionists.[163]

3. The Ninth Circuit's *Spencer* Tests

In *Spencer*, World Vision, Inc. terminated three employees because of their religious beliefs.[164] Two of the employees worked for World Vision for roughly ten years: one maintained technology and facilities, the other performed various office tasks such as answering phones and scheduling.[165] A third employee, who worked at World Vision for two years, coordinated shipping and facilities as well as scheduling.[166] World Vision fired the employees when it discovered they denied the deity of Jesus Christ and the doctrine of the Trinity.[167] Therefore, their termination was permissible only if World Vision was a "religious corporation, association, . . . or society" under the 702 exemption.[168]

Of the three-judge panel, Judge O'Scannlain and Judge Kleinfeld agreed that the defendant corporation, World Vision, Inc., was a religious organization for purposes of the 702 exemption and the exemption shielded it from firing employees for religious reasons.[169] At first, Judge O'Scannlain and Judge Kleinfeld disagreed,[170] but in an amended opin-

---

160 *Id.* at 228.
161 *Id.* at 228-29.
162 *Id.* at 230-31.
163 *Id.* at 229-30.
164 *Spencer I*, 619 F.3d 1109, 1110-11 (9th Cir. 2010).
165 *Id.*
166 *Id.* at 1111.
167 *Id.*
168 *Id.*
169 *Id.* at 1126.
170 *Id.* at 1126 (Kleinfeld, J., concurring).

ion, both agreed to apply Judge Kleinfeld's test.[171] The dissenting judge, Berzon, believed another test applied under which World Vision did not qualify for the exemption.[172]

a. Judge O'Scannlain's Test

Judge O'Scannlain initially offered the following test:

> [A] nonprofit entity qualifies for the [702] exemption if it establishes that it 1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents), 2) is engaged in activity consistent with, and in furtherance of, those religious purposes, and 3) holds itself out to the public as religious.[173]

In addition, Judge O'Scannlain felt obligated to follow *Townley's* and *Kamehameha's affiliation factor*, which weighs an organization's association with other religious entities when determining if it is a religious organization.[174] Regarding this factor, Judge O'Scannlain found *Townley* and *Kamehameha* did not narrowly limit the 702 exemption to cover only churches and entities similar to churches.[175] First, *Townley* and *Kamehameha* suggested the limitation is found in the legislative history, which the cases ultimately did not depend on.[176] Second, the language of the 702 exemption does not expressly indicate that limitation.[177] Third, Judge O'Scannlain worried that narrowly interpreting the 702 exemption to cover only churches or groups with close ties to churches would violate the canon of constitutional avoidance.[178] Such a narrow interpretation could prohibit the free exercise of religion in non-church related organizations and possibly violate the Establishment Clause by discriminating

---

171 *Spencer II*, 633 F.3d 723, 724 (9th Cir. 2011). The amended opinion retains the three original opinions.

172 *Spencer I*, 619 F.3d at 1148-50 (Berzon, J., dissenting).

173 *Id.* at 1119 (majority opinion).

174 *Id.* at 1119, 1125 (stating, however, "to the extent we are required to consider [the affiliation factor], we are disinclined to afford it much weight in light of potential it presents for discrimination amongst religious institutions.").

175 *Id.* at 1113.

176 *Id.* ("In any event, the test the court adopted in *Townley* does not depend on an analysis of the legislative history." (citing EEOC v. Kamehameha, 990 F.2d 458, 460 n.5 (9th Cir. 1993)).

177 *Id*. (commenting further that if Congress wanted to explicitly limit the 702 exemption to churches and similar entities, it would have done so).

178 *Id.* at 1114.

against religious groups that believe they cannot form religious organizations other than houses of worship.[179]

Judge O'Scannlain was also unsatisfied with *LeBoon's* test, finding it a "hodgepodge of constitutionally questionable inquiries," which forces the judiciary, a secular court, to determine the religious or secular nature of an organization's purpose, services, employee responsibilities, and affiliation with other organizations and funding sources.[180] Judge O'Scannlain reasoned that such inquiry ran afoul of Justice Brennan's warning in *Amos* that "determining whether an activity is religious or secular requires a searching case-by-case analysis" which "results in considerable ongoing government entanglement in religious affairs . . . [and] raises concern that a religious organization may be chilled in its free exercise activity."[181]

Judge O'Scannlain read *Townley* and *Kamehameha* to require this type of inappropriate examination of an organization's activities, in spite of the constitutional concerns.[182] Accordingly, he opted for his new test, seeking *neutral* elements.[183] First, looking again to Justice Brennan's concurrence in *Amos*, Judge O'Scannlain believes that a nonprofit status "makes colorable a claim that it is not purely secular in orientation."[184] Next, his prong requiring an organization to self-identify its religious purpose and the court to find its activities are consistent with, and in furtherance of that purpose, prevent the court from inappropriately deciding what is religious or secular.[185] Finally, requiring an organization to hold itself out as religious serves as a market check on institutions that falsely identify themselves as religious merely to obtain a 702 exemption.[186]

Judge O'Scannlain held that World Vision, Inc. passed his test and the 702 exemption protected it from a discrimination claim.[187] World Vision was a nonprofit corporation and to deny it the 702 exemption because it was an international humanitarian relief organization, as opposed to the

---

179 *Id.*

180 *Id.* at 1115-17, 1119.

181 *Id.* at 1116 (quoting Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 343-44 (1987) (Brennan, J., concurring)).

182 *Id.* at 1118.

183 *Id.* at 1119.

184 *Id.* at 1120 (quoting *Amos*, 483 U.S. at 344 (Brennan, J., concurring)). Judge O'Scannlain thus identifies "secular" with at least "pecuniary gain." *Id.* at 1119 ("[A]n organization's status as a nonprofit bolsters a claim that its purpose is nonpecuniary.").

185 *Id.* at 1119.

186 *Id.* at 1120 (citing Univ. of Great Falls v. NLRB, 278 F.3d 1335, 1344 (D.C. Cir. 2002)).

187 *Id.* at 1126.

local Jewish community center in *LeBoon*, would penalize it "for doing 'too much' humanitarian work."[188] As to the first prong, World Vision organized itself for a self-identified religious purpose, as evidenced by a "cursory review of World Vision's Articles of Incorporation, bylaws, core values, and mission statement," all which explicitly acknowledged the Christian beliefs motivating it.[189] Regarding the second prong, World Vision's activities were in furtherance of its stated religious purpose because practically all its activities constituted "conducting 'Christian religious and missionary services' and 'render[ing] Christian service, both material and spiritual to the sick, the aged, the homeless[,] and the needy.'"[190] Regarding the third prong, World Vision explicitly held itself out as a religious organization through the use of the Christian cross in its logo, the dissemination of "Christian Messaging Guidelines" to its employees, the presentation of its Christian purpose on its webpage for job applicants, the requirement that applicants describe their relationship with Jesus Christ, the requirement that employees subscribe to World Vision's overtly Christian purpose and mission statement, and the presentation of a Bible verse on offers of employment.[191] Finally, Judge O'Scannlain *reluctantly* employed *Townley's* and *Kamehameha's* affiliation factor to find "eighty-four percent of World Vision's cash contributions have come from churches and coreligionists," ten of its Board of Directors come from "church and ministry leadership," and it is associated with World Vision International, an organization classified as a "church" with the IRS.[192] Thus, under every part of this test, World Vision was a religious corporation, association, or society for purposes of the 702 exemption.[193]

b. Judge Kleinfeld's Test

Judge Kleinfeld agreed that the court needed a new test for the 702 exemption because a multifactor test "is inherently too indeterminate and

---

188 *Id.* at 1120.

189 *Id.* at 1121.

190 *Id.* at 1123 (quoting World Vision's Articles of Incorporation, as amended in 1980). Judge O'Scannlain rejected the employees' argument that World Vision acted inconsistently with its mission because it provided its services to people of all worldviews. *Id.* at 1123. First, he found World Vision claimed not doing so was contrary to its theology and, second, such a requirement is generally absurd in light of the fact many religious organizations, especially obvious ones like churches and synagogues, open their doors to all people. *Id.*

191 *Id.* at 1123-25.

192 *Id.* at 1125.

193 *Id.* at 1126.

subjective."[194] However, he worried that Judge O'Scannlain's test enables discrimination "outside the context of religious exercise by means of mere corporate paperwork."[195] Thus, Judge Kleinfeld advanced a reformulation of Judge O'Scannlain's test and also concluded the 702 exemption protected World Vision:

> To determine whether an entity is a "religious corporation, association, or society," [the court should] determine whether it [1] is organized for a religious purpose, [2] is engaged primarily in carrying out that religious purpose, [3] holds itself out to the public as an entity for carrying out that religious purpose, and [4] does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.[196]

Judge Kleinfeld was especially worried with Judge O'Scannlain's nonprofit corporate requirement.[197] He reasoned that some religious groups might not incorporate in any form yet still want to hire workers of the same religious faith to further the group's purpose.[198] Despite this narrowness, the nonprofit requirement is also broad because "it would allow nonprofit institutions with church affiliations to use their affiliations as a cover for religious discrimination in secular employment."[199] Thus, Judge Kleinfeld agrees with Judge Berzon that under Judge O'Scannlain's test, "the mining equipment company in *Townley* could discriminate by religion simply by incorporating itself as a nonprofit and getting 501(c)(3) status."[200]

---

194 *Id.* (Kleinfeld, J., concurring).

195 *Id.* at 1127.

196 *Id.* at 1133 (noting that "[u]nder that test, World Vision is a religious corporation, so I would affirm.").

197 *Id.* at 1130.

198 *Id.* (stating this might especially occur when "congregations are small, such as a few Jews, Quakers, or Unitarians in a small town.").

199 *Id.*

200 *Id.* at 1130-31.

> Any enterprise can be operated as a 501(c)(3) nonprofit if its stated purpose is "religious, charitable, scientific, testing for public safety, literary, or educational purposes, or to foster national or international amateur sports competition (but only if no part of its activities involve the provision of athletic facilities or equipment), or for the prevention of cruelty to children or animals."

Id. at 1130 n.15 (quoting 26 U.S.C. § 501(c)(3) (2006)). "The Townley Manufacturing Company could, if it chose, be organized for a self-identified religious purpose as a nonprofit as evidenced by its articles of incorporation, engage in its regular religious devotions, and hold itself out as a Christian mining equipment manufacturer . . . ." *Id.* at 1130-31.

Furthermore, Judge Kleinfeld states "'[f]or profit' and 'nonprofit' have nothing to do with making money,"[201] so nonprofit status does little to prove an organization has a nonpecuniary purpose, much less a religious one.[202] Judge Kleinfeld would thus objectively distinguish religious organizations on the basis of *how they charge*, pointing to the difference of a nonprofit hospital, which "gets money by exchanging valuable services for their market value in cash" versus the Salvation Army, which "gives its homeless shelter and soup kitchen services away, or charges nominal fees, perhaps eight dollars a night for a bed worth fifty dollars a night."[203] Instead of requiring nonprofit status, Judge Kleinfeld requires—in his fourth prong—that an organization "does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts."[204] Regarding this prong, he finds from the record that World Vision does not charge at all for its services.[205]

The first, second, and third prongs are similar to Judge O'Scannlain's test,[206] but ultimately have significant differences, which Judge Kleinfeld does not explain.[207] Judge Kleinfeld's first prong is different from Judge O'Scannlain's first prong because it endorses an objective test to determine if a group's organization is for religious purposes, not whether the group subjectively *self-identifies* a religious purpose. Presumably, Judge O'Scannlian's constitutional concerns do not persuade Judge Kleinfield.[208] Ultimately, Judge Kleinfeld determines that "World Vision ministers to people to serve a religious purpose," not simply because it engages in activity consistent with what it thinks its religious purpose is, but because objectively World Vision's activities consist of large-scale missionary and service work—tasks many small churches are not able to do on their own.[209]

Judge Kleinfeld's second prong differs from Judge O'Scannlain's second prong in a subtle way. Judge Kleinfeld's second prong demands that

---

[201] *Id.* at 1131 (stating that nonprofit status is sought for tax exemption purposes and only requires that the corporation "pay out the surplus of revenue over other expenses as salaries instead of as dividends").

[202] *Id.*

[203] *Id.* at 1132 ("If money is not available as an incentive, that is strong evidence, in the purportedly religious institution, that exercise of religion is the objective.").

[204] *Id.* at 1133.

[205] *Id.* at 1132.

[206] *Id.* at 1119 (majority opinion).

[207] *Id.* at 1133 (Kleinfled, J., concurring).

[208] *Id.* at 1119 (majority opinion).

[209] *Id.* at 1132 (Kleinfled, J., concurring). Even more so, Kleinfeld determines that World Vision shows its religion "by example, rather than by express proselytizing." *Id.*

a religious organization engage *primarily* in carrying out its purposes.[210] Judge O'Scannlain's second prong lacks the term *primarily*, only requiring an organization's activities be "consistent with, and in furtherance of" its self-identified religious purposes.[211] Judge Kleinfeld neither explains the difference in language nor bases the difference on the facts arising in *Spencer*. Perhaps the difference is one of quantity, and Judge Kleinfeld feels the largest portion of an organization's activities should be devoted to its religious purpose. If so, Judge Kleinfeld again seems unconcerned with Judge O'Scannlain's concern that prying into such matters discriminates against and chills certain religious groups who are worried what the judiciary will think of their religious views. Even so, World Vision seems to meet this standard as its activities are largely providing physical aid consistent with and in furtherance of its religious motivation.

Finally, the difference between Judge Kleinfeld's third prong and Judge O'Scannlain's third prong is significant. Judge Kleinfeld's third prong requires that an entity hold itself out to the public as an entity for carrying out the judicially determined religious purpose.[212] This contrasts with Judge O'Scannlain's third prong, which only requires an entity hold itself *as being religious*.[213] Again, Judge Kleinfeld neither explains the divergence from Judge O'Scannlain's reasoning, nor analyzes the difference in light of *Spencer*. But given Judge Kleinfeld's inclination for objective tests, it is consistent with the other prongs by encompassing the judicially determined religious purpose from the first prong. Furthermore, Judge Kleinfeld does not mention or analyze the facts with the affiliation factor that Judge O'Scannlain felt obligated to utilize based on past precedent.

c. Judge Berzon's Test

Judge Berzon stated that both Judge O'Scannlain's and Judge Kleinfeld's tests "would allow a broad range of organizations to refuse to hire and to fire any employee on the basis of religious belief, including organizations that lack any ties to organized religion and perform daily operations entirely secular in nature."[214] She reasons the court "must . . . assume that Congress used the terms 'religious corporation, association . . . or society' as they were commonly understood: to describe a church or other group organized for worship, religious study, or the dissemina-

---

[210] *Id.* at 1133.
[211] *Id.* at 1119 (majority opinion).
[212] *Id.* at 1133 (Kleinfled, J., concurring).
[213] *Id.* at 1119 (majority opinion).
[214] *Id.* at 1134 (Berzon, J., dissenting).

tion of religious doctrine."[215] Therefore, Judge Berzon would continue to apply the *Townley-Kamehameha* test, which involves a case-by-case analysis of whether an organization is primarily religious, and apply the exemption "to cover entities that, like churches, exist for the purpose of prayer and religious instruction."[216]

Judge Berzon analyzed the markers of World Vision's religious purpose and found that its "Christian beliefs are strongly evident in its articles of incorporation, operational policy, and other foundational documents," and that it "hires only co-religionists and provides religious services" to staff.[217] However, it "is not managed, controlled, nor operated by, or affiliated with, any particular church."[218] Furthermore, Judge Berzon found that World Vision "points to nothing besides the conclusory statements of World Vision officers" that "84% of its private cash contributions come from churches or individual coreligionists that share its faith."[219] "Moreover, cash contributions account for less than half of World Vision's revenue, with the remainder coming from government grants and gifts-in-kind."[220] Most important to Judge Berzon was her view that "the vast majority of World Vision's work consists of humanitarian relief,"[221] which she ultimately labeled as secular despite World Vision's position that its activities fulfill its own religious purpose.[222]

---

[215] *Id.* at 1138.

[216] *Id.* at 1135. "Taken together, *Townley* and *Kamehameha Schools* direct us to consider whether an organization may avail itself of [the 702] exemption by applying two broad, interwoven principles. First, '[a]ll significant religious and secular characteristics must be weighed to determine whether the corporation's purpose and character are primarily religious.'" *Id.* (quoting EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 618 (9th Cir. 1988)). "Second, '[w]e construe the statutory exemption[ ] narrowly,' with the understanding that 'only those institutions with extremely close ties to organized religion [are] covered.'" *Id.* (quoting EEOC v. Kamehameha Sch./Bishop Estate, 990 F.2d 458, 460 (9th Cir. 1993)).

[217] *Id.* at 1148.

[218] *Id.*

[219] *Id.*

[220] *Id.* at 1148-49.

[221] *Id.* at 1149. This includes

> "provid[ing] school supplies, clothes, toys, household goods and building supplies," to U.S. citizens and providing potable water, emergency medical care, and vocational training to refugees and vulnerable populations throughout the world, distributing condoms to reduce the spread of HIV among sex workers, improving the transparency and responsiveness of legislative bodies, improving child and maternal health, and preventing HIV infection.

Id.

[222] *Id.*

d. Conclusion

Comparing the three proffered tests, Judge O'Scannlain's test is the broadest interpretation of the 702 exemption. While it requires courts objectively find the organization in question to be a nonprofit organization and hold itself out regarding its religiousness, the organization itself need only self-identify any religious purpose, and only act consistently with or in furtherance of that purpose, with no apparent limitation on degree. Judge Berzon's test is the most restrictive interpretation of the 702 exemption, resulting in exempting only houses of worship and other pervasively religious entities with an intense focus on prayer and religious instruction. Finally, Judge Kleinfeld's test is significantly less restrictive than Judge Berzon, but falls short of the openness of Judge O'Scannlain because it focuses on objective elements. Namely, it requires the court to identify an organization's religious purpose, find it primarily engaged in fulfilling that purpose, hold itself out for that purpose, and find that it does not engage primarily in the exchange of goods or services for significant amounts of money. Understanding the differences between each test, this article will now analyze them from a principled pluralist perspective and conclude which test, or what elements of each test, will best promote the principles laid out in Part II.

IV. A Principled Pluralist Solution to the 702 Exemption

A principled pluralist solution to the 702 exemption analyzes the exemption from the perspective of both structural and confessional pluralism, along with government's duty of public justice. In light of the previous analysis, a principled pluralist solution will combine elements of both Judge O'Scannlain's and Judge Kleinfeld's tests. Therefore, deciding whether an organization is a religious corporation, association, or society for purposes of the 702 exemption, courts should determine whether it (1) is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents),[223] (2) is primarily engaged in activity consistent with, and in furtherance of, those religious purposes,[224] (3) holds itself out to the public as an entity for carrying out a religious purpose,[225] and (4) does not engage primarily or substantially in the exchange of goods or services for money beyond nominal amounts.[226] This test adequately protects confes-

[223] *See infra* Part IV.C.
[224] *See infra* Part IV.D.
[225] *See infra* Part IV.E.
[226] *See infra* Part IV.F.

sional pluralism by minimizing the government's inquiry into organizations' religiosity. It also adequately protects structural pluralism by ensuring that the primarily economic purpose of businesses is unhindered by religious discrimination.

To be clear, this test specifically gears itself toward entities whose religious or faith-based identities are questionable. The 702 exemption clearly covers houses of worship, like churches, synagogues, and mosques.[227] Thus, the test centers on religious groups wanting to form numerous other institutions with the protection of the 702 exemption; this includes, but is not limited to, educational institutions, political advocacy groups (including political parties), performing arts groups, amateur sports, charities for the prevention or relief of poverty, and advocates for human rights, environmental stewardship, or animal welfare. In addition, as *Townley* demonstrates, some religious people desire the protection of the 702 exemption in the ordinary course of business.[228]

A. The Advantages of Principled Pluralism

Principled pluralism allows us to traverse each of the above listed organizations without getting bogged down by the inadequate theory that life can be neatly divided into *sacred* and *secular* parts.[229] The sacred/secular dichotomy results in two major problems. First, from the perspective of structural pluralism, it unduly focuses on one institution, church (or other houses of worship), and singles it out as the only institution which needs common religious beliefs amongst its members in order to fulfill its purpose.[230] The assumption is that in any other institution, members of a faith simply want to maintain company with coreligionists, as if it is only a social preference. While some religious people may have such shallow motivations, others seek to provide services in ways that are a genuine and unique working out of their common worldviews.[231] Society is enriched not just by individuals' differences of opinion but also by

---

227 *See Spencer I*, 619 F.3d 1109, 1112 (9th Cir. 2010).

228 EEOC v. Townley Eng'g & Mfg. Co., 859 F.2d 610, 611-12, 616-19 (9th Cir. 1988).

229 *See supra* text accompanying note 70.

230 *See* SKILLEN, RECHARGING THE AMERICAN EXPERIMENT, *supra,* note 1 at 86 ("[T]he often overlooked fact is that religions also express themselves outside the walls of churches.").

231 It is not difficult to imagine this in many cases. A political, human rights, or environmental advocacy group with Christian members will potentially advocate different policies than similar Jewish, Muslim, humanist, or atheist groups, because each will base their policies on an understanding of concepts, like justice, which are deeply rooted in ultimate questions of theology and philosophy. Even within each of these groups, differences of opinion will result in advocating different policies and undertaking different actions.

their ability to band together with similar minds and, based on internal cohesion and trust, efficiently and meaningfully accomplish in institutional settings what they could never accomplish as individuals.[232] Accordingly, government violates its duty of public justice if it so prevents this kind of interaction that entire institutional areas are neglected by the full plurality of worldviews.

Second, the sacred/secular dichotomy is inconsistent with confessional pluralism.[233] If the law discourages or prevents a plurality of worldviews from making their genuine and unique contribution to areas outside houses of worship, then government is effectively favoring one type of worldview over another: namely, the worldview that religion, especially the theistic kind, belongs exclusively in a so-called private realm, with no bearing on the supposedly secular public realm.[234] Government recognition of different worldviews is not enough. Government actually needs to create an environment where people of all worldviews can advocate for their views in both word and deed, subject to protecting structural pluralism and public justice.[235] Therefore, preventing coreligionists from working out their beliefs in many institutions violates confessional pluralism.

Moreover, principled pluralism sufficiently accounts for the nature of civic society by avoiding the equally inadequate individualist and collectivist ideologies.[236] Each ideology fails to account for *both* the individual and social nature of humans. Principled pluralism affirms the person in both capacities as individual and member of multiple communities,[237] just

---

[232] Note, however, that principled pluralists recognize

> [s]ome faith-based organizations consider religion when they hire for all positions in the organization, top to bottom; other groups insist on the same faith only for some job positions, such as the top leadership, chaplains, and specific other positions. And while sometimes the organization really is seeking job candidates of the same denomination. . .[,] sometimes the goal is even just a candidate who, whatever their faith, is spiritually alert and deeply empathetic with the goals and standards of the organization.

Religious Hiring by Faith-Based Organizations is Not Illegal Job Discrimination, INSTITUTIONAL RELIGIOUS FREEDOM ALLIANCE, http://www.irfalliance.org/religious-hiring.html (last visited Oct. 26, 2011).

[233] *See* Part II.A.

[234] *See supra* note 130 and accompanying text.

[235] Indeed, with regard to the 702 exemption, a principled pluralist approach offers better protection to nontheistic worldviews which it holds as equally *religious* and worthy of government's fair and equitable treatment.

[236] *See supra* note 25 and accompanying text.

[237] *See supra* Part II.B.1.

as Dooyeweerd accounted for both the diversity and unity of reality.[238] The government's guiding task of public justice enables it to best discern the balancing of individual and institutional rights.[239] With these principles in mind, we can analyze the approaches taken in *Spencer* and advocate a test, which comports with principled pluralism.

B. Berzon's Test Violates Structural and Confessional Pluralism

Judge Berzon's test, just like the multifactor tests from *LeBoon* and *Kamehameha,* fails to adequately protect both structural and confessional pluralism. The test confounds structural and confessional pluralism by asking whether an organization is *primarily religious* and proscribing that only churches and groups similar to churches meet that definition.[240] In other words, Judge Berzon looks at the structural distinction between churches and all other institutions and infers that the church's unique emphasis on religious worship and teaching means that religious activity is only, or primarily, expressed through the activities of houses of worship. Therefore, in her view, it makes sense to focus on narrow factors that probe whether an organization sufficiently performs what she believes a house of worship does. The problem with this view is that numerous religious institutions, such as those advocating political, humanitarian, or environmental policies, require the 702 exemption's freedom to hire based on religion in carrying out specific worldviews. If government prevents this, it is not doing justice to much of the public realm.

C. First Prong: The Importance of Self-Identification

The first prong of the proposed test derives from Judge O'Scannlain test and requires the court determine whether the entity is organized for a self-identified religious purpose (as evidenced by Articles of Incorporation or similar foundational documents).[241] While this prong may seem to give too much deference to the organization, it is only one element and is important to the principled pluralist perspective because it comports with the confessional pluralism principle that government is incompetent to determine a citizen's religion.[242] It is a shame that Judge O'Scannlain

---

[238] *See supra* Part II.B.2.

[239] *See supra* Part II.C.

[240] *Spencer* I, 619 F.3d 1109, 1135 (Berzon, J., dissenting).

[241] *Id.* at 1119 (majority opinion).

[242] *See* SKILLEN, RECHARGING THE AMERICAN EXPERIMENT, *supra* notes 13, at 84-85, 87.

conceded this element in the amended opinion of *Spencer* because his original opinion persuasively argued that the courts should not troll through an organization's beliefs to determine whether it is religious enough to avoid government intrusion in employment decisions.[243] In addition to stifling groups from living out their beliefs in communal ways outside of houses of worship, for the government to determine what purposes are religious versus secular is philosophically and constitutionally troubling.

Judge O'Scannlain's requirement that courts objectively determine an organization's religious purpose based on its founding and similar documents cures any fear of subjectivity.[244] While this prong may discriminate against less sophisticated parties who lack such documentation or ability to make the documents, it satisfies the basic need for objectivity in the courts and places a modest burden on organizations to identify themselves with a religious purpose should they seek the protection against otherwise valid anti-discrimination laws.

D. The Second Prong: Not Just Religious in Name

The second prong asks the court to determine if an entity is primarily engaged in activity consistent with, and in furtherance of its self-identified religious purposes.[245] This prong furthers the confessional pluralism concerns mentioned in the first prong[246] by incorporating the *self*-identified language. Taken together with the fourth prong, however, it advances structural pluralism by ensuring organizations cannot obtain the 702 exemption by furthering their religious purpose in only a small part of their activities while simultaneously operating a for-profit business.[247] The use of the word primarily in this test is also appropriate because it does not ask the court to believe in the religious purpose sought; rather, the court need only comprehend the purpose and the degree to which the organization self-identifies. Moreover, an organization, which *primarily* furthers its religious purpose will more likely hold itself out to the public for that purpose, thus aiding the third prong.[248]

---

243 *Supra* notes 180-81 and accompanying text.

244 *Spencer I*, 619 F.3d at 1119.

245 This formulation comes primarily from Judge Kleinfeld's second prong. *Id.* at 1131 (Kleinfeld, J., concurring). But adds the "self-identified" language from Judge O'Scannlain's first prong. *Id.* at 1119 (majority opinion).

246 *See supra* note 242 and accompanying text.

247 *See infra* Part IV.F. (arguing that the unique purpose of business entities is generally not furthered by religious discrimination).

248 *See infra* Part IV.E.

Opponents may argue that this prong is simply the converse of the fourth prong, which requires an organization *not* engage primarily in the exchange of goods or services for nominal amounts of money, and that the second prong is unnecessary. Without the second prong, however, an organization could conceivably engage only in the exchange of goods or services for nominal amounts of money, be satisfied with little profit, but nonetheless have the protection of the 702 exemption without really believing in and acting upon a stated religious purpose. Therefore, the second prong is essential.

E. The Third Prong: Prevent Ambushes on Employees

The third prong asks the court to determine if an entity holds itself out to the public as an entity for carrying out its self-identified religious purpose.[249] This prong ensures that employees of an organization know they are part of a self-identified religious organization. If this prong were absent, an entity with no overarching goal of religious hiring could meet all the other requirements, yet still use the 702 exemption to discriminate against an employee based on religion. The employees may have no idea, and only find out later that the organization hid from them major indicators that the employer is a religious organization with a 702 exemption. Accordingly, this prong serves as a "market check," as Judge O'Scannlain puts it,[250] from such nefariousness by ensuring potential employees know they are working for a religious employer.

While courts may, over time, decide the contours of what constitutes adequate holding out, the legislature may even require religious employers inform applicants and employees that the employer believes it is covered by the 702 exemption. Whatever the case, this prong protects public justice by ensuring individuals are not unduly ambushed by nefarious employers. Furthermore, by ensuring the 702 exemption benefits the intended religious employers, the prong furthers the fourth prong's protections of structural pluralism by preventing religious discrimination in inappropriate contexts, namely business institutions.

---

[249] This formulation comes primarily from Judge Kleinfeld's third prong. *Spencer I*, 619 F.3d at 1131 (Kleinfeld, J., concurring). But adds the "self-identified" language from Judge O'Scannlain's first prong. *Id.* at 1119 (majority opinion).

[250] *Spencer I*, 619 F.3d at 1120.

F. The Fourth Prong: Protecting Individuals and Furthering Business Institutions

The fourth prong, taken from Judge Kleinfeld, requires courts to determine if an entity engages primarily or substantially in the exchange of goods or services for money beyond nominal amounts.[251] Because government's duty to protect and encourage religious diversity is subject to its obligation towards institutional diversity,[252] the fourth prong serves as a check on institutions that might use the 702 exemption when it is unnecessary to the legitimate operation of that institution. Thus, the fourth prong protects structural pluralism by ensuring that businesses, as unique institutions engaged in the exchange of goods or services for more than nominal amounts of money, are geared towards that purpose, which does not require religious discrimination.[253]

While principled pluralism does not deny the religiosity of all of life, including business and religious motives behind economic activity, its adherence to structural pluralism allows it to demarcate institutions, like businesses, based on their "irreducible, irreplaceable human social purpose."[254] The irreducible purpose of businesses is economic stewardship and prosperity,[255] and this unique social role does not require businesses to make hiring decisions based on religion in the way other institutions do.

Despite its advantages, this prong raises several issues. The first concerns entities that do not maintain nonprofit status. Judge Kleinfeld properly rejected Judge O'Scannlain's nonprofit requirement, noting that a nonprofit requirement prevents unincorporated religious groups from obtaining the protection of the 702 exemption.[256] Specifically, a nonprofit requirement harms small churches or other religious operations that do not incorporate.[257]

An additional concern is the test's application to religious groups that exchange goods or services for any amount of money, nominal or signifi-

---

251 *Id.* at 1133 (Kleinfeld, J., concurring).

252 SKILLEN, RECHARGING THE AMERICAN EXPERIMENT *supra* note 13, at 85.

253 *See Id.* at 102 ("To the extent that an industrial or commercial enterprise exists for the purpose of competing in an open market for its market share of product sales or service, it will be justified in using hiring practices that exclude those unqualified to perform the work required. But an enterprise of this sort typically has no reason (nor should it have any public-legal grant of right) to exclude or fire people for reasons unrelated to the business' purpose and qualifications.").

254 Chaplin, *Sphere Sovereignty*, *supra* note 64.

255 *See supra* note 79 and accompanying text.

256 *Spencer I*, 619 F.3d at 1130 (Kleinfeld, J., concurring).

257 *Id.*

cant. Here, Judge Kleinfeld notes the difference between a hospital and the Salvation Army, which are both nonprofit organizations and receive charitable donations.[258] The difference between the two is that a hospital "gets money by exchanging valuable services for their market value in cash" while "[t]he Salvation Army gives its homeless shelter and soup kitchen services away, or charges nominal fees, perhaps eight dollars a night for a bed worth fifty dollars a night."[259] Again, principled pluralism does not deny the religiosity of all of life and the religious motivations behind medical services; but the overwhelming purposes of a hospital falls within the economic sphere of exchanging a service for valuable consideration. This contrasts to charitable organizations whose donors and employees are motivated primarily by their religious views to provide goods or services at little or no cost rather than reap a profit.

Related to the concern of exchanges of goods or services is how courts should determine whether an exchange is *nominal*. The Salvation Army and other charities perform nominal exchanges of goods for money because of the small sum of money gained on a single transaction. However, nominal exchanges should also include those exchanges where religious organizations exchange a good or service at or near fair market value, but only during infrequent periods. Thus, a church or charity holding a bake sale, yard sale, or a similar event will still fall within the meaning of a nominal exchange.

A final concern is that some organizations will not satisfy the fourth prong yet still need to hire a single or small amount of employees based on religion, such as a chaplain. Title VII, however, protects these employers when religion is a bona fide occupational qualification for a position.[260]

V. Conclusion

This article has sought to demonstrate how the 702 exemption can be analyzed from the perspective of principled pluralism, and determine what test is most consistent with principled pluralism. The proffered test comports with principled pluralism because it enables people of numerous worldviews to live out their faiths in multiple institutions, not just churches, which need the benefits of the 702 exception. Although a relatively new perspective within the United States for conducting specific legal analysis, principled pluralism offers a better understanding of both

---

[258] *Id.* at 1131-32.

[259] *Id* at 1132.

[260] 42 U.S.C. § 2000e-2(e)(1) (2006).

human nature and society. Accordingly, it can enable both legislatures and courts to better mediate competing interests and ultimately fulfill their duty of public justice. For this reason, legal scholars should continue to explore principled pluralism, especially its import to issues of religious freedom, and offer coherent solutions that do justice to all worldviews and institutions.

Don't Give Us Your Sick: Inadequate Medical Care in Immigration Detention Centers and How It Violates International Human Rights Law

Allyson Zivec*

If access to health care is considered a human right, who is considered human enough to have that right?[1]

---

* Allyson Zivec is a 2012 J.D. candidate at Phoenix School of Law; B.S., W.P. Carey School of Business at Arizona State University, 2007. Ms. Zivec was a legal intern for the American Civil Liberties Union of Arizona during Spring 2011.

[1] Paul Farmer, Pathologies of Power: Health, Human Rights, and the New War on the Poor 206 (2005). Dr. Paul Farmer is an American doctor, anthropologist,

I. INTRODUCTION

The United States is a nation of immigrants founded on the principle that this country is a "beacon of hope."[2] There are many reasons individuals migrate to the United States: for educational opportunities, to improve their economic situation, to flee from torture, or to escape from armed conflict.[3] Whatever the reason, hundreds of thousands of immigrants arrive in the United States every year in hopes of bettering their situations.[4]

Unfortunately, not all immigrants seeking the American Dream follow the proper legal path when entering or remaining in the country. When the immigration process is violated, the U.S. Government has the right to assess the situation and determine whether the individual needs to be deported or has a valid claim to remain in the country.[5] Although U.S. immigration violations are civil infractions and not crimes, the individual is often detained until an immigration status assessment is completed.[6]

When an individual must be detained, the government has an international obligation to protect the individual's human rights throughout the detention process.[7] Access to proper healthcare is recognized as a universal human right.[8] Under the International Covenant on Civil and Political Rights ("ICCPR") and the Convention Against Torture and

---

and the co-founder of Partners in Health. Press Release, Global Exch., Global Exchange Human Rights Awards Ceremony to be Held on May 12 in San Francisco (May 10, 2005), *available at* http://www.commondreams.org/news2005/0510-13.htm. He is also the winner of the 2005 Global Exchange Human Rights Award. *Id.*

2 Vincent Fox & Rob Allyn, *The American Dream: A Beacon of Hope, Not Walls of Fear*, CHRON.COM (Nov. 11, 2007, 6:30 AM), http://www.chron.com/opinion/outlook/article/The-American-dream-A-beacon-of-hope-not-walls-1584741.php.

3 AMNESTY INT'L, JAILED WITHOUT JUSTICE: IMMIGRATION DETENTION IN THE USA 3 (2009).

4 MIGRATION POLICY INST., ANNUAL IMMIGRATION TO THE UNITED STATES: THE REAL NUMBERS 2 (2007), *available at* http://www.migrationpolicy.org/pubs/FS16_USImmigration_051807.pdf.

5 8 C.F.R. § 236.1 (2011).

6 *Id.*; *see also* AMNESTY INT'L, *supra* note 3, at 4.

7 General Comment No. 15: The position of aliens under the Covenant, U.N. Human Rights Comm., 27th Sess., Apr. 11, 1986, U.N. Doc. HRI/GEN/1/Rev.1 at 19 [hereinafter General Comment No. 15] ("It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise."); *see also* AMNESTY INT'L, *supra* note 3, at 6.

8 Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 71 (Dec. 10, 1948).

Other Cruel, Inhumane or Degrading Treatment or Punishment ("CAT"), the United States is required to provide adequate medical care to detainees because failure to do so amounts to degrading treatment.[9] Access to adequate medical care is especially important for detained individuals because they are in a vulnerable situation. Detained individuals cannot utilize their own doctors or medicine if the detention center denies them access to medical care, even if those detained were willing and able to pay for it.[10]

Unfortunately, reports show that the United States is frequently violating its obligation to provide adequate medical care in its immigration detention centers.[11] This article will explore the medical issues detainees face when the government fails to provide proper medical care to them. Part II of this article will discuss the U.S. obligation to provide adequate medical care based on ratified international treaties and how these obligations are being carried out. Part III will provide examples of the U.S. failure to provide adequate medical care to detainees and analyze problems within the immigration system that have lead to these failures. Part IV will compare the treatment of detainees in Sweden with the treatment of detainees in the United States, providing a model for the United States to follow to honor its international human rights obligations for humane treatment of immigrant detainees. Part V will present promising solutions for improving the immigration system that will allow the United States to provide proper medical care to detainees that satisfies its international obligations. The article concludes that the United States has an obligation based on the ratifications of the ICCPR and CAT treaties to provide a higher quality of medical care than what is currently available in many detention centers, and the United States must utilize alternatives to detention and enact enforceable legislation in order to be in compliance with these treaties.

---

[9] U.N. Human Rights Comm., Pinto v. Trinidad and Tobago, Communication No. 232/1987, U.N. Doc. CCPR/C/39/D/232/1987, at 69 (July 20, 1990).

[10] Laura Rótolo, Op-Ed., *For Immigrants, Illness Can Bring a Death Sentence*, BOS. GLOBE, Nov. 5, 2009, http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2009/11/05/for_immigrants_illness_can_bring_a_death_sentence/.

[11] *See generally* ACLU OF MASS., DETENTION AND DEPORTATION IN THE AGE OF ICE: IMMIGRANTS AND HUMAN RIGHTS IN MASSACHUSETTS (2008); AMNESTY INT'L, *supra* note 3; KAREN TUMLIN ET AL., A BROKEN SYSTEM: CONFIDENTIAL REPORTS REVEAL FAILURES IN U.S. IMMIGRANT DETENTION CENTERS (2009), *available at* http://www.nilc.org/immlawpolicy/arrestdet/A-Broken-System-2009-07.pdf.

II. U.S. Obligation to Provide Care Under International Treaties

The Supremacy Clause of the U.S. Constitution provides that ratified treaties, along with the U.S. Constitution and federal statutes, are the "supreme Law of the Land."[12] The United States has ratified two human rights treaties in recent decades; CAT was ratified in 1994 and the ICCPR was ratified in 1992.[13]

CAT requires that "[e]ach State Party shall undertake to prevent . . . other acts of cruel, inhuman or degrading treatment or punishment . . . when such acts are committed by . . . or with the consent or acquiescence of a public official or other person acting in an official capacity."[14] Similarly, the ICCPR provides "[n]o one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."[15] It also states "[a]ll persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person."[16]

The United Nations Human Rights Committee has affirmed on a number of occasions that there is an obligation to provide adequate medical care during detention under Article 10 of the ICCPR.[17] The United Nations ("UN") has also expressed that inadequate healthcare can lead to inhuman treatment and has therefore created a set of standards and principles for personnel in charge of detainees.[18] The Office of the United Nations High Commissioner for Human Rights created *Principles*

---

[12] U.S. Const. art. VI, cl. 2.

[13] *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-9&chapter=4&lang=en (last visited Oct. 7, 2011) [hereinafter *CAT-Signing Nations*]; *International Covenant on Civil and Political Rights*, United Nations Treaty Collection, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-4&chapter=4&lang=en (last visited Oct. 7, 2011) [hereinafter *ICCPR-Signing Nations*].

[14] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

[15] The International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171.

[16] *Id.*

[17] *See* Vahan Bournazian et al., Human Rights in Patient Care: A Practitioner Guide, Armenia 35-36 (2010) (citing General Comment No. 21, U.N. Human Rights Comm., 27th Sess., Apr. 10, 1992, U.N. Doc. HRI/GEN/1/Rev.1 at 33 (1992)).

[18] *See* Principles of Medical Ethics Relevant to the Role of Health Personnel, Particularly Physicians, in the Protection of Prisoners and Detainees against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 37/194, U.N. Doc. A/RES/37/194 (Dec. 18, 1982) [hereinafter Principles of Medical Ethics], *available at* http://www2.ohchr.org/english/law/medicalethics.htm; *see also* Standard Minimum Rules for the Treatment of Prisoners, E.S.C. Res. 663C (XXIV), U.N. ESCOR, 24th Sess., Supp. No. 1,

of Medical Ethics to guide health personnel in charge of detainees.[19] The first principle is that the health personnel "[h]ave a duty to provide them [detainees] with protection of their physical and mental health and treatment of disease of the same quality and standard as is afforded to those who are not imprisoned or detained."[20] The UN also requires all detainees be given a medical exam upon their admission and that a medical officer shall visit all sick detainees and detainees complaining of illness on a daily basis.[21]

While it is clear the United States has an obligation under the ICCPR and CAT to provide adequate medical care to detainees, the enforceability of that obligation is not as clear. Although ratified treaties are the "supreme Law of the Land,"[22] there has been a refusal to recognize individual claims under international human rights treaties in domestic courts due to the "non-self-executing treaty doctrine."[23] The "non-self-executing treaty doctrine" states that the treaty itself must require that it be enforceable without additional domestic legislation that implements the treaty.[24] Otherwise, specific legislation is required to adopt the treaty as enforceable law in the United States.[25]

However, Congress has enacted CAT referencing guidelines by passing the Detainee Treatment Act of 2005.[26] Section 1003 of this Act prohibits cruel, inhuman, or degrading treatment or punishment of persons under the custody or control of the United States.[27] The Alien Tort Claims Act ("ATCA") grants federal district courts "original jurisdiction of any civil action by an alien for a tort only, committed in violation of

---

at 11, U.N. Doc. E/3048 (Aug. 30, 1957) (amended 1977) [hereinafter Standard Minimum Rules].

19 Principles of Medical Ethics, *supra* note 18.

20 *Id*.

21 Standard Minimum Rules, *supra* note 18.

22 U.S. CONST. art. VI, cl. 2.

23 *See, e.g.*, Ralk v. Lincoln Cnty., 81 F. Supp. 2d 1372, 1381 (S.D. Ga. 2000) (holding the ICCPR not self-executing and did not give rise to a private right of action); Calderon v. Reno, 39 F. Supp. 2d 943, 956 (N.D. Ill. 1998) (holding the CAT not self-executing); White v. Paulsen, 997 F. Supp. 1380, 1387 (E.D. Wash. 1998) (holding that neither the ICCPR nor the CAT was a self-executing treaty giving rise to private actions).

24 *See* Foster v. Neilson, 27 U.S. 253, 314 (1829) (explaining that courts must regard a treaty "as equivalent to an act of the legislature, whenever it operates of itself without the aid of any legislative provision," but that "the legislature must execute the contract [imported by a treaty] before [such a contract] can become a rule for the Court").

25 *See id.*

26 Detainee Treatment Act of 2005, Pub. L. No. 109-148, §§ 1001-1006, 119 Stat. 2680, 2739 (2005) (codified at 42 U.S.C. § 200dd(a)).

27 *Id*.

the law of nations or a treaty of the United States."[28] Therefore, in theory a detainee could bring suit under the ATCA for violations of CAT and the Detainee Treatment Act of 2005. However, the Supreme Court has not yet addressed whether gross medical negligence can amount to cruel, inhuman, or degrading treatment or punishment.[29]

Immigrant detainees have also been granted constitutional protections that should provide a means of enforcing their internationally recognized right to medical care.[30] Since immigrant detainees have only committed civil infractions, they are protected by the Fifth Amendment against "conditions that amount to punishment without due process of law."[31] The Eighth Amendment of the U.S. Constitution protects prisoners against "cruel and unusual punishment."[32] A convicted prisoner claiming that the denial of proper medical care is in violation of the Eighth Amendment must prove there was a "deliberate indifference to serious medical needs."[33] However, courts have held that immigration detainees should actually receive a higher level of protection than criminal inmates because of their status as civil detainees.[34]

Given that immigration detainees are owed a higher level of protection than criminal inmates, it should be easier for detainees to prove that denial of proper medical care violates their Fifth Amendment rights than it is for inmates to prove a violation of their Eighth Amendment rights. In practice, the high legal standard of "deliberate indifference"[35] still

---

[28] Alien Tort Claims Act, 28 U.S.C. § 1350 (2006).

[29] *See* West v. Atkins, 487 U.S. 42, 49 (1988).

[30] U.S. CONST. amend. V.

[31] Cadence M. Moore, *The Immigration Oversight and Fairness Act: Ending the Violation and Abuse of Immigrant Health*, 26 J. CONTEMP. HEALTH L. & POL'Y 148, 181 (2009); *see* U.S. CONST. amend V.; Wong Wing v. United States, 163 U.S. 228 (1896) (holding that aliens are constitutionally protected under the Fifth Amendment); *see also* 3B AM. JUR. 2D *Aliens and Citizens* § 1851 (2011).

[32] U.S. CONST. amend. VIII; *see also* Moore, *supra* note 31.

[33] Moore, *supra* note 31; *see also* U.S. CONST. amend. VIII; Farmer v. Brennan, 511 U.S. 825, 837 (1994) (holding deliberate indifference in the medical context may be shown by a purposeful act or failure to respond to a prisoner's pain or possible medical need and harm caused by the indifference); Estelle v. Gamble, 429 U.S. 97, 104-05 (1976); Jett v. Penner, 439 F.3d 1091, 1096 (9th Cir. 2006) (holding deliberate indifference may also be shown when a prison official intentionally denies, delays, or interferes with medical treatment or by the way prison doctors respond to the prisoner's medical needs); Toguchi v. Chung, 391 F.3d 1051, 1060 (9th Cir. 2004) (holding that to act with deliberate indifference, a prison official must both know of and disregard an excessive risk to inmate health, meaning the official must both be aware of facts from which the inference could be drawn that a substantial risk of serious harm exists, and he must also draw the inference).

[34] *See* sources cited *id.*

[35] *See* Cesar v. Achim, 542 F. Supp. 2d 897, 907 (E.D. Wis. 2008).

applies to Fifth Amendment claims, and courts have held that even gross medical negligence is not enough to sustain a claim.[36]

The Supreme Court has not yet affirmatively stated that inadequate medical care constitutes cruel and unusual punishment under the Detainee Treatment Act of 2005. It also has not held that protection from grossly negligent medical care is a due process right provided by the Fifth Amendment. Consequently, aggrieved detainees in the United States often do not have adequate redress for inhumane medical care in violation of the ICCPR and CAT. Therefore, legislation is needed that clearly states the requirements of detention center authorities in order to protect the health of detainees. By passing this type of legislation, Congress would be granting detainees the protection they should already enjoy under the U.S. Constitution and ratified human rights treaties. Sadly, in the absence of clear and enforceable standards, deaths and medical mistreatment in detention centers continues to occur.

III. U.S. VIOLATIONS OF THE ICCPR AND THE CAT

Although the United States has the duty to provide detainees with proper medical care under the ICCPR and CAT, there have been many documented occurrences of medical neglect in detention centers in recent years. Yusif Osman, Hiu Lui Ng, and Franscisco Castañeda are only three of over one hundred immigrants who have died due to medical mistreatment since 2003.[37] This part includes stories of the events leading to their deaths. This part also explores the causes of medical neglect in detention, including noncompliance with Immigration and Customs Enforcement ("ICE") standards, overcrowding, limited access to attorneys and grievance systems, and lack of transparency.

A. Growing Number of Deaths and Cases of Medical Neglect in Detention

Since the ICCPR and CAT requirement for proper medical care for detainees is not currently enforceable in the United States, the government has been allowed to violate this requirement in many of its detention centers without repercussion.[38] Over one hundred immigrants have

---

[36] *See id.*

[37] Rótolo, *supra* note 10.

[38] *See, e.g.*, Ralk v. Lincoln Cnty., 81 F. Supp. 2d 1372 (S.D. Ga. 2000); Calderon v. Reno, 39 F. Supp. 2d 943 (N.D. Ill. 1998); White v. Paulsen, 997 F. Supp. 1380 (E.D. Wash. 1998).

died while in the custody of ICE since 2003.[39] Many of these deaths can be at least partially attributed to the lack of proper medical care in immigration detention centers.[40] Medical negligence forces a greater number of detainees to endure needless pain and suffering.[41] As a result, medical care concerns are one of the most common reasons detainees file a complaint.[42]

In response to public concern, ICE set national detention center standards in 2000, and updated the standards in 2008.[43] The expected outcomes for detainees from these standards include: timely and efficient medical care; twenty-four hour access to emergency services; access to a grievance system; timely response to complaints; freedom from harassment or retaliation for filing complaints; and access to legal assistance groups, legal materials, and legal counsel.[44] However, like ICCPR and CAT requirements, the ICE detention center standards are not legally enforceable in the United States.[45] Due to this lack of enforceability, ICE repeatedly fails to adhere to its own minimum standards.[46] These failures include delayed or no medical screening during admission, delayed or inadequate response to medical emergencies, and delayed or denied examination by independent physicians.[47] Detention center medical providers often fail to meet even minimum standards such as transferring medications and medical records when a detainee is moved to a different facility.[48] Failure to meet any of these standards can have serious and deadly consequences for a detainee.[49]

Failure of a federal governmental agency to adhere to its own regulations can give rise to liability under the Federal Tort Claims Act

---

[39] Rótolo, *supra* note 10. This statistic was current as of 2009.

[40] *See id.*

[41] *See* ALLISON SISKIN, CONG. RESEARCH SERV., RL 34556, HEALTH CARE FOR NONCITIZENS IN IMMIGRATION DETENTION (2008).

[42] *Id.* at 2. While detainees can submit formal written grievances "directly to medical personnel designated to receive and respond to medical grievances at the facility," detainees can also file complaints directly to the Department of Homeland Security Inspector General for complaints about staff misconduct, physical or sexual abuse, or civil rights violations. *2008 Operations Manual ICE Performance Based National Detention Standards (PBNDS)*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/detention-standards/2008/ (last visited Oct. 29, 2011) (expand "Part 6 – Justice" and select "DOC" or "PDF" next to "35 Grievance System") [hereinafter *Operations Manual*].

[43] *Id.*

[44] *Id.*

[45] ACLU OF MASS., *supra* note 11; TUMLIN ET AL., *supra* note 11.

[46] TUMLIN ET AL., *supra* note 11.

[47] *Id.*

[48] *Id.*

[49] *Id.*

("FTCA").[50] However, many plaintiffs are barred from recovery under the FTCA due to its discretionary function exception.[51] The discretionary function exception clause states that the tort claims procedure does not apply to "any claim . . . based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused."[52] Therefore, many governmental agencies avoid FTCA liability by claiming that the violated regulatory guideline was discretionary.[53] However, the Ninth Circuit held that:

> [w]hile the government has discretion to decide how to carry out its responsibility to maintain safe and healthy premises, it does not have discretion to abdicate its responsibility in this regard. When it does so, the discretionary function exception cannot shield the government from FTCA liability for its negligent conduct.[54]

Despite this ruling, ICE has successfully avoided liability for failing to adhere to its own standards.[55] As a result, many immigrant detainees suffer the consequences.[56] The individual stories of inhumane treatment to which detainees are subjected are unimaginable. The following stories are not isolated incidents.[57] They are just samples of human rights violations that are occurring in detention centers throughout the country.[58]

1. Yusif Osman's Story

Yusif Osman was thirty-four years old and a U.S. legal resident from Ghana.[59] He had been living in Los Angeles for five years when he was detained in 2006.[60] He landed in immigration detention after his travel-

---

[50] D. Scott Barash, *The Discretionary Function Exception and Mandatory Regulations*, 54 U. CHI. L. REV. 1300, 1301 (1987).

[51] *Id.*

[52] 28 U.S.C. § 2680(a) (1982).

[53] Barash, *supra* note 50 (explaining that due to the discretionary function exception to the FTCA, the Federal Aviation Administration was not liable in *United States v. Varig Airlines*, 467 U.S. 797 (1984), for failing to follow its own aircraft inspection procedures).

[54] Whisnant v. United States, 400 F.3d 1177, 1185 (9th Cir. 2005).

[55] *See* TUMLIN ET AL., *supra* note 11.

[56] *Id.*

[57] *Id.*

[58] Dana Priest & Amy Goldstein, *System of Neglect*, WASH. POST, May 11, 2008, at A1, *available at* http://www.washingtonpost.com/wp-srv/nation/specials/immigration/cwc_d1p1.html.

[59] *Id.*

[60] *Id.*

ing companion was found carrying false identification.[61] Osman faced deportation for a smuggling allegation, which he denied.[62]

During Osman's initial medical screening, the nurse mistakenly closed his computerized medical file even though it contained no information.[63] Three months later, Osman collapsed in his cell at the Otay Detention Center near San Diego, California.[64] His cellmate hit the intercom button and yelled to guards that Osman was on the floor, suffering from chest pain.[65] The guard saw Osman on the ground, but did not enter the cell.[66] Instead, the guard called a clinic nurse to find out if Osman had any medical problems.[67]

Due to the error that occurred during initial screening, Osman's file was blank.[68] The nurse decided there was no emergency because the file showed no medical history.[69] The nurse told the guard that Osman would need to fill out a sick call request.[70] When Osman's cellmate yelled again, another guard called the nurse.[71] This time, the nurse decided that Osman should be taken to the clinic.[72] However, forty minutes passed before guards brought a wheelchair to Osman's cell to transport him.[73] It was too late.[74] Osman was barely alive when paramedics finally reached him; he died shortly after.[75] An autopsy by the San Diego County Medical Examiner revealed that Osman died from a blood clot to one of the small vessels that fed his heart and that he had underlying inflammation of his coronary vessels.[76]

Two physicians reviewed Osman's case.[77] The reviewers believed that with timely treatment, perhaps something as simple as an aspirin, Osman may have lived.[78] Otay's medical staff also acknowledged that

---

61 *Id.*
62 *Id.*
63 *Id.*
64 *Id.*
65 *Id.*
66 *Id.*
67 *Id.*
68 *Id.*
69 *Id.*
70 *Id.*
71 *Id.*
72 *Id.*
73 *Id.*
74 *Id.*
75 *Id.*
76 OFFICE OF THE MED. EXAM'R, CNTY. OF SAN DIEGO, CAL., INVESTIGATIVE REPORT: YUSIF OSMAN (2009).
77 Priest & Goldstein, *supra* note 58.
78 *Id.*

Osman's care was deficient.[79] The medical director wrote in an internal review of the death that Osman had not received "appropriate and adequate health care consistent with community standards during [his] detention."[80]

2. Hiu Lui Ng's Story

Hiu Lui Ng lawfully entered the United States in 1992 on a tourist visa from Hong Kong at the age of seventeen.[81] In 2001, Immigration and Naturalization Service ("INS") sent Ng a notice to appear at a hearing regarding his immigration status.[82] However, INS mistakenly sent the notice to a non-existent address and Ng never received it.[83] At the hearing, Ng's deportation was ordered in his absence and without his knowledge.[84] As a result, Ng ended up in Rhode Island's Wyatt Detention Facility.[85]

Once in detention, Ng complained for months to prison officials that he was in excruciating pain.[86] Despite observing his inability to walk, guards and medical personnel continually accused him of faking illness.[87] Officials repeatedly denied him use of a wheelchair, even when Ng's attorney sought to visit him.[88]

A week before his death, Ng was forced to travel to another facility in Hartford, Connecticut "where he was pressured to withdraw all pending appeals of his case and accept deportation."[89] In order to transport him to the Connecticut facility, guards forced Ng out of his cell and shackled

---

[79] *Id.*

[80] *Id.*

[81] *Rhode Island ACLU Files Lawsuit On Behalf Of Family Of Wyatt Center Detainee Who Died In Custody*, AM. CIV. LIBERTIES UNION (Feb. 9, 2009), http://www.aclu.org/prisoners-rights/rhode-island-aclu-files-lawsuit-behalf-family-wyatt-center-detainee-who-died-custod [hereinafter *Rhode Island ACLU*]; *see also Vietnamese Detainee Dies in ICE Custody After Denied Urgently Needed Medical Care*, NAT'L NETWORK FOR IMMIGRANT & REFUGEE RTS. (Aug. 6, 2008), http://nnirr.org/hurricane/HiuLuiNg.pdf [hereinafter *Vietnamese Detainee*].

[82] *Rhode Island ACLU*, *supra* note 81; *see also Vietnamese Detainee*, *supra* note 81. The INS was dissolved by ICE in 2003 and replaced by ICE. *See infra* text accompanying notes 119-21.

[83] *Rhode Island ACLU*, *supra* note 81; *see also Vietnamese Detainee*, *supra* note 81.

[84] *Rhode Island ACLU*, *supra* note 81.

[85] *Id.*

[86] *Id.*; *see also Vietnamese Detainee*, *supra* note 81.

[87] *Rhode Island ACLU*, *supra* note 81.

[88] *Id.*

[89] *Vietnamese Detainee*, *supra* note 81.

his hands, feet, and waist.[90] They dragged Ng to the transport van.[91] Ng screamed in pain the entire time, but guards ignored his cries.[92] A few days later, Ng was finally diagnosed with a broken spine and terminal liver cancer.[93] He died later that same week, at the age of thirty-four.[94]

Ng's wife and two sons, ages two and four, survived him.[95] Ng's widow later filed a lawsuit against ICE, and the officials and employees of Wyatt Detention Facility.[96] Rhode Island ACLU Executive Director Steven Brown, commented:

> Mr. Ng committed no crime, yet was treated worse than most criminals. If the abuse and substandard medical treatment that Mr. Ng received were an isolated incident, it would be bad enough. Unfortunately, too many detainees just like Mr. Ng are placed into a system that shows little concern or compassion for their well-being.[97]

3. Franscisco Castañeda's Story

Francisco Castañeda's story is one of the most horrific cases of medical negligence in immigration detention to date.[98] Francisco Castañeda arrived in the United States at the age of ten after fleeing civil war in El Salvador.[99] In 2006, he was placed in a San Diego immigration center after serving a four-month state sentence for a drug conviction.[100]

At the start of his detention, Castañeda suffered from a penile lesion and a lump in his groin.[101] Despite numerous doctors' requests for a

---

[90] *Rhode Island ACLU*, *supra* note 81.

[91] *Id.*

[92] *Id.*

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] Hui v. Castañeda, 130 S. Ct. 1845 (2010). Castañeda brought suit against the physician who was in charge of his medical care during his detention. The Supreme Court found in favor of the physician and held that individual employees or officers working for U.S. Public Health Services could not be held personally liable for constitutional violations that occurred while they were acting within the scope of their employment.

[99] Gabriel Eber, *Remembering Francisco Castañeda*, AM. CIV. LIBERTIES UNION BLOG RTS. (May 5, 2010, 5:17 PM), http://www.aclu.org/blog/immigrants-rights-prisoners-rights/remembering-francisco-castaneda; *see also Hui*, 130 S. Ct. 1845.

[100] *Id.*

[101] *Id.*

biopsy, the Division of Immigration Health Services ("DIHS")[102] refused to approve the procedure claiming it was "elective in nature."[103] Despite the fact that Castañeda was experiencing excruciating pain, the only treatment he received was ibuprofen, antibiotics, and extra boxer shorts.[104]

It took ten months, a fourth recommendation for treatment, and intervention by the American Civil Liberties Union ("ACLU") before the biopsy was finally authorized.[105] However, shortly before the biopsy was performed, ICE released Castañeda from custody.[106] Castañeda was forced to arrange his own biopsy one week after release.[107] At this point, he was diagnosed with penile cancer.[108] The next day, Castañeda underwent surgery to have his penis amputated.[109] Despite subsequent chemotherapy treatments, Castañeda's cancer spread to his groin and he died in February 2008 at the age of thirty-six.[110]

Castañeda used the last year of his life to testify before Congress, asking for the enactment of legislation to fix systemic failures in medical care at immigration detention centers.[111] He testified:

> [i]t was routine for detainees to have to wait weeks or months to get even basic care. Who knows how many tragic endings can be avoided if ICE will only remember that, regardless of why a person is in detention . . . they are still human and deserve basic, humane medical care.[112]

B. Causes of Inadequate Medical Care for Detainees

This part discusses causes of U.S. violations of international human rights law with regard to proper medical care for detainees. Failure to comply with set ICE standards is a common contributor to these violations.[113] ICE has created a number of basic standards for detention that

---

102 DIHS is now known as ICE Health Service Corps. *See infra* note 119.
103 Eber, *supra* note 99.
104 *Id.*
105 *Id.*
106 *Id.*
107 *Id.*
108 *Id.*
109 *Id.*
110 *Id.*
111 *Id.*
112 *Id.*
113 *See* TUMLIN ET AL., *supra* note 11.

would be helpful in protecting detainees from receiving inadequate medical care.[114] However, these standards are not legally binding, do not include oversight and management mechanisms, and do not include penalties for noncompliance.[115] This has led to overwhelming failure by detention facilities to follow the set standards.[116]

Noncompliance is one of the main causes of inadequate medical care for detainees.[117] However, failure to comply with ICE standards is not the only cause of this growing problem.[118] Overcrowding, limited access to attorneys, and lack of transparency are also contributors.[119]

1. Overcrowding of Detention Centers Due to Stricter Immigration Policies

In March 2003, ICE was created to replace INS as the agency in charge of enforcing U.S. immigration policies.[120] ICE was created pursuant to the Homeland Security Act of 2002, which was enacted as a result of the terrorist attacks of September 11, 2001.[121] Whereas INS was part of the U.S. Department of Justice, ICE was established under the newly created Department of Homeland Security ("DHS").[122]

This restructuring signified a dramatic change in the U.S. approach to immigration.[123] Immigration is now viewed as a threat to the security of the country.[124] This new approach has resulted in more stringent immigration policies and enforcement, including large-scale detention.[125]

These strict immigration policies have led to a greater number of immigrants being held in detention centers.[126] The number of immigrants detained has increased every year since the creation of ICE, and

---

114 *Operations Manual*, *supra* note 42.

115 *See* TUMLIN ET AL., *supra* note 11.

116 *See id.*

117 *See id.*

118 *See id.*

119 ACLU OF MASS., *supra* note 11.

120 *ICE Overview*, U.S. IMMIGR. & CUSTOMS ENFORCEMENT, http://www.ice.gov/about/overview/ (last visited Oct. 29, 2011).

121 Homeland Security Act of 2002, Pub. L. No. 107-296, 116 Stat. 2135.

122 ACLU OF MASS., *supra* note 11.

123 *Id.*

124 *Id.*; *see also* Noël L. Griswold, *Forgetting the Melting Pot: An Analysis of the Department of Homeland Security Takeover of the INS*, 39 SUFFOLK U. L. REV. 207, 227 (2005).

125 ACLU OF MASS., *supra* note 11.

126 *Id.*

ICE currently detains an average of 32,000 individuals every day.[127] A large percentage of immigrants are now subject to mandatory detention.[128] The susceptible immigrants include: those seeking asylum but arriving without travel documents; those inadmissible or deportable on criminal grounds; and those deportable due to final orders of deportation.[129] Sixty-six percent of the immigrants detained as of September 1, 2009 were subject to mandatory detention.[130] Immigrants not subject to mandatory detention can still be detained, or can be released on parole or bond.[131] The continuous increase in detainees has led to tremendous issues with detention center overcrowding.[132]

In particular, overcrowding has strained medical resources in detention centers.[133] ICE Health Service Corps, the agency in charge of providing medical care in all ICE-owned (and contracted private) detention centers, has complained that they are understaffed.[134] Without enough medical personnel to respond to the needs of the growing population, detainees experience long wait times or are completely denied access to a doctor.[135] Additionally, until a recent legal settlement, ICE's policy was to deny anything that they deemed *non-emergency* care, including heart surgeries and cancer biopsies.[136]

---

127 *Id.; see also* DEP'T OF HOMELAND SEC., THE U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT PROCESS FOR AUTHORIZING MEDICAL CARE FOR IMMIGRATION DETAINEES (2009) [hereinafter AUTHORIZING MEDICAL CARE].

128 ALISON SISKIN, CONG. RESEARCH SERV., RL 32369, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2004) [hereinafter IMMIGRATION-RELATED DETENTION].

129 *Id.*

130 DR. DORA SCHRIRO, DEP'T OF HOMELAND SEC., IMMIGRATION DETENTION OVERVIEW AND RECOMMENDATIONS (2009).

131 IMMIGRATION-RELATED DETENTION, *supra* note 128.

132 ACLU OF MASS., *supra* note 11.

133 *See* AUTHORIZING MEDICAL CARE, *supra* note 127, at 9. "ICE Health Service Corps provides direct care to approximately 15,000 detainees housed at 24 designated facilities throughout the nation. It oversees medical care provided to an additional 17,000 detainees housed at non-ICE Health Service Corps staffed detention facilities across the country. When necessary, it authorizes and pays for off-site specialty and emergency care, consultations and case management." Dep't of Homeland Sec., *ICE Health Service Corps*, ICEHEALTH.ORG, http://www.icehealth.org (last visited Oct. 29, 2011).

134 *See id.*

135 ACLU OF MASS., *supra* note 11, at 49 ("In our interviews throughout [Massachusetts], the most common complaint about medical care was the long wait-time to see a doctor . . . . Immigrants detained at Plymouth, Suffolk and Bristol reported waiting several weeks between the time they asked to see a doctor and the time they were called by the medical staff. Some reported that they made requests and were never seen.").

136 *ICE Agrees to Improve Health Care Provided to Immigration Detainees as Part of Settlement of ACLU Lawsuit*, ACLU SAN DIEGO (Dec. 16, 2010), http://www.aclusandiego.

2. Limited Access to Attorneys and Grievance Systems

Currently, indigent detainees do not have access to government-funded legal aid for representation in immigration removal proceedings. This is because the Supreme Court has held that immigration proceedings are civil, rather than criminal in nature.[137] Thus, a non-citizen in a deportation proceeding is deprived of the constitutional protections afforded criminal defendants, including the Sixth Amendment right to counsel.[138] Consequently, a detainee must pay for his own legal counsel.[139] If the detainee cannot afford an attorney, the only way he can receive legal counsel is to find a non-profit agency willing to represent him.[140]

Under ICE standards, detention facilities are required to make available to detainees lists of such non-profit agencies.[141] However, a 2007 study conducted by the ACLU indicates that 60 facilities failed to comply with this requirement.[142] As a result, eighty-four percent of detained immigrants lack legal representation.[143] Without legal representation, a detainee is not only severely limited in presenting his legal defense but is also limited in his ability to advocate for himself when problems arise in the detention setting, including when his right to proper medical care is being violated.

In most cases, a detainee's only chance of being heard is through the detention center's internal medical request and grievance system.

---

org/news_item.php?cat_id_sel=002&sub_cat_id_sel=000014&article_id=001095. ICE settled an ACLU lawsuit alleging that the lack of medical and mental healthcare in their facilities led to unnecessary suffering and death. *Id.* As part of the settlement, ICE agreed to change its policy and "committed to providing all necessary health care to immigration detainees beyond just emergency care." *Id.* (quoting Elizabeth Alexander, former Director of the ACLU National Prison Project and lead counsel on the case). However, this policy change still has not been incorporated into legally binding legislation.

137 *See* INS v. Lopez-Mendoza, 468 U.S. 1032, 1038 (1984).

138 *See* U.S. CONST. amend. VI.

139 Thomas Herman et al., *World Detention Practices*, JESUIT REFUGEE SERV., http://www.jrsusa.org/research?LID=172 (select "United States" tab) (last visited Oct. 30, 2011) ("If the immigrant is schedule [sic] for a hearing before a judge and is able to contact an attorney before or during the adjudicative process, he or she must pay for legal counsel, unless a non-profit agency can be found.").

140 *Id.*

141 *See* TUMLIN ET AL., *supra* note 11.

142 *Id.*

143 AMNESTY INT'L, *supra* note 3, at 51 n.116 ("According to the EOIR, between [October 1,] 2006 and [September 20,] 2007, approximately [eight-four percent] of completed detained immigration court proceedings involved unrepresented individuals.") (citing NINA SIULC ET AL., VERA INST. OF JUSTICE, IMPROVING EFFICIENCY AND PROMOTING JUSTICE IN THE IMMIGRATION SYSTEM: LESSONS FROM THE LEGAL ORIENTATION PROGRAM, REPORT SUMMARY (May 2008)).

Detainees can file complaints of staff misconduct and medical grievances pursuant to a grievance procedure implemented by ICE.[144] Uninvolved officers must resolve detainee complaints and grievances in a timely manner and cannot cause a detainee to fear retaliation or harassment.[145] However, the grievance procedure is inadequate in practice.[146]

Detainees are often not even informed about their right to access a grievance system.[147] Moreover, the grievance system may not even help detainees who know about the system and courageously file complaints because the filed grievances are frequently not responded to in a timely manner, if at all.[148] Additionally, detainees who are aware of the system do not file complaints due to fear of reprisal by the detention center staff.[149]

Without attorney representation or an adequate grievance system, a detainee who is denied adequate medical care has no recourse. The only people a detainee can speak to are the same staff members who deny medical requests made by detainees. This inadequate system leaves the detainee without a voice.[150]

3. Lack of Transparency

ICE standards provide nongovernmental agencies ("NGOs") and members of the media with access to detention centers.[151] "This allows NGOs to provide know-your-rights presentations and members of the media to highlight cases of interest to the public."[152] It also creates trans-

---

144 *See Operations Manual, supra* note 42.

145 *Id.*

146 *See* TUMLIN ET AL., *supra* note 11, at xi ("ICE reviews revealed widespread levels of noncompliance with the grievance standard.").

147 *See id* ("[D]etention facilities did a dismal job informing detainees that they have a right to file a grievance. Our review found that 40 facilities either failed to include any mention of the grievance policy in their facility handbooks or omitted key portions of this policy."); *see also* Herman et al., s*upra* note 139 ("Conditions for many immigrants in detention are poor, and despite the existence of a grievance system in place, few detainees lodge complaints for either lack of knowledge of such a system or fear of reprisal by detention center staff.").

148 *See* TUMLIN ET AL., *supra* note 11, at xii.

149 Herman et al., s*upra* note 139.

150 For this reason, along with other procedural concerns, it can be argued that due process requires that detainees be appointed counsel. *See* Michael Kaufman, *Detention, Due Process, and the Right to Counsel in Removal Proceedings*, 4 STAN. J. C.R. & C.L. 113, 116 (2008) ("[T]o protect against unlawful detention and the risk of erroneous deportation, due process requires that detained lawful permanent residents be appointed counsel.").

151 *Operations Manual*, *supra* note 42 (expand "Part 7 – Administration and Management" and select "DOC" or "PDF" next to "39 News Media Interviews and Tours").

152 TUMLIN ET AL., *supra* note 11, at 16.

parency in detention facilities because visitors can share information with the press and NGOs can make recommendations to ICE regarding detention conditions.

Many detention facilities, however, violate this standard.[153] NGOs and members of the media are often denied access to detention facilities or are forbidden from interviewing detainees. When representatives from the Women's Refugee Commission ("WRC") visited the Central Arizona Detention Center in 2010, they were prohibited from meeting with female detainees who had previously asked to speak with the WRC.[154] Similarly in May 2007, a United Nations Special Rapporteur on the Human Rights of Migrants was denied access to the T. Don Hutto Residential Center, an immigration detention facility in Taylor, Texas.[155]

Two independent agencies, the American Bar Association and the UN High Commission for Refugees, have been granted access to detention facilities to evaluate facility compliance with ICE standards of detention.[156] These agencies can access facilities on the condition, however, that their reports can only be shared with ICE.[157] Although ICE began conducting its own annual audits of detention facilities in 2002, it does not allow anyone outside of the agency to view these audits and refuses to make these audits public.[158]

Violations of the standard requiring NGO and media access, along with the refusal to make assessment reports publicly available, create the perception that ICE hides abusive practices in its detention centers. Granting access to NGOs and members of the media is necessary to ensure transparency. Transparency creates a monitoring system whereby independent organizations can ensure that no abusive practices are occurring and can also make reports and recommendations to improve the process. For these reports to truly be effective, the public must know about

---

153 *See id*.

154 Katharina Obser, *A Closer Look Inside Arizona Detention Centers: Calling for More Access and Oversight*, HUFFINGTON POST (Aug. 27, 2010, 1:06 PM), http://www.huffingtonpost.com/katharina-obser/a-closer-look-inside-ariz_b_697085.html.

155 *U.N. Independent Expert Denied Access to Hutto Detention Center*, AM. CIV. LIBERTIES UNION (May 4, 2007), http://www.aclu.org/immigrants-rights/un-independent-expert-denied-access-hutto-detention-center. As an independent expert appointed by the U.N. Human Rights Council, the mandate of a Special Rapporteur is to monitor, advise, and publicly report on human rights situations in specific countries and on human rights violations worldwide. *Id*. In this case, the Special Rapporteur was conducting a three-week fact finding mission at the request of the United States. The tour of Hutto was considered a major part of the Special Rapporteur's mission. *Id*.

156 *See* TUMLIN ET AL., *supra* note 11, at 1.

157 *Id*.

158 *Id*.

them so that ICE is under pressure to adopt the recommendations in a timely manner.

IV. Sweden as a Model for Detention Practices

Sweden also ratified the ICCPR and CAT in 1971[159] and 1986, respectively.[160] While the United States violates these treaties with its inadequate medical treatment of immigrant detainees, Sweden is meeting its obligations. Sweden has codified its standards under the Aliens Act of 2005.[161] In contrast to ICE's self-regulated standards, the Aliens Act of 2005 gives legal enforcement to Swedish standards. As a result, Sweden's Aliens Act of 2005 offers more protection than what is required under international agreements.[162]

No perfect system exists for immigration detention; however, Sweden's detention practices are often hailed as the most humane.[163] Sweden should serve as a model for the United States on how to raise the level of care for detainees and on how to meet its obligations under human rights treaties. The following part provides examples of how Sweden has successfully addressed the issues currently plaguing the United States.

A. Medical Care Policies

Sweden ensures that all detainees receive a thorough medical screening upon placement in detention.[164] This screening enables the medical staff to promptly treat any medical condition existing at the time of detention.[165] Sweden also provides its detainees with the same rights to universal health care benefits that Swedish citizens enjoy.[166] During business hours, the medical staff is available for regular checkups. Outside of normal business hours, the medical staff is available as needed.[167] Gen-

---

159 *ICCPR-Signing Nations*, *supra* note 13.

160 *CAT-Signing Nations*, *supra* note 13.

161 Utlänningslag [Aliens Act] 2005:716, ch. 8 § 12 ¶ 3 (Swed.) (2006).

162 *Asylum*, Sweden.gov, http://www.sweden.gov.se/sb/d/11901 (last updated Mar. 4, 2011).

163 *Sweden Detention Profile*, Global Detention Project, http://www.globaldetentionproject.org/countries/europe/sweden/introduction.html (last updated Dec. 2009).

164 Human Rights Comm., *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant: Sweden*, ¶ 13, U.N. Doc. CCPR/C/SWE/CO/6/Add.1 (Mar. 18, 2010) (information received from Sweden on the implementation of the concluding observations of the Human Rights Committee).

165 *Id.*

166 *Id.*

167 *Id.*

eral physicians refer detainees to specialists as necessary; physician referrals, however, are not required for medical emergencies.[168] Additionally, all detention center staff members are trained in how to deal with emergencies.[169]

ICE has created similar medical care policies, but reports show that facilities are consistently failing to adhere to them.[170] In contrast, because Sweden's policies are enforceable under the Aliens Act of 2005, there have been no reports that Sweden is failing to follow these policies. In fact, Sweden received a positive report from the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment regarding its detention infrastructure in 2009, and has been characterized "as a European role model."[171]

B. Alternatives to Detention

In Sweden, detention is primarily used temporarily and only for identity and health checks.[172] Generally, asylum seekers are not detained in Sweden.[173] They may choose to reside in open centers for asylum seekers or with family and friends.[174] This is contrary to the U.S. policy, which favors mandatory detention pending review of the asylum application.[175]

---

168 *Id.*

169 *Id.*

170 Problems related to conditions of detention have been documented by U.S. government agencies, including the Department of Homeland Security's Office of Inspector General, and the U.S. Gov't Accountability Office. *See* DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., ICE POLICIES RELATED TO DETAINEE DEATHS AND THE OVERSIGHT OF IMMIGRATION DETENTION FACILITIES, (June 2008), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_08-52_Jun08.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, ALIEN DETENTION STANDARDS, (July 2007), *available at* http://www.gao.gov/new.items/d07875.pdf; DAVID M. ZAVADA, DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., TREATMENT OF IMMIGRATION DETAINEES HOUSED AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES, (Dec. 2006), *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-01_Dec06.pdf.

171 *Sweden Detention Profile*, *supra* note 163.

172 Petra Weber, *Alternatives to Mandatory Detention – A Summary*, REFUGEE ACTION COMMITTEE, http://www.refugeeaction.org/policy/summary.htm (last modified Apr. 26, 2003).

173 *World Detention Practices*, JESUIT REFUGEE SERV., http://www.jrsusa.org/research?LID=172 (select "Sweden" tab) (last visited Oct. 8, 2011) [hereinafter *Sweden Detention Overview*].

174 *Id.*

175 ACLU OF MASS., *supra* note 11, at 17; *see also* AUTHORIZING MEDICAL CARE, *supra* note 127; IMMIGRATION-RELATED DETENTION, *supra* note 128; U.N. High Comm'r for Refugees, UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers (Feb. 26, 1999), *available at* http://www.unhcr.org.au/pdfs/detentionguidelines.pdf ("The detention of asylum-seekers is, in the view of UNHCR,

Sweden's Aliens Act of 2005 provides that aliens may be detained if their identity is unclear and further investigation is needed to determine their right to enter or remain in Sweden.[176] Otherwise, an alien may only be detained if there is reason to believe that he will go into hiding or pursue criminal activities in Sweden, based on the individual's specific personal situation or circumstances.[177] If the individual poses no such risks, he may avoid detention by being placed under *supervision*.[178] While under supervision, an alien must periodically report to the police authority or the Swedish Migration Board.[179] Additionally, an alien under supervision may also be required to hand over any travel or identification documents while his case is pending.[180]

C. Access to Attorneys/Grievance System

Detainees are provided with limited government-funded legal aid.[181] Free government-funded legal aid is available during the standard asylum determination procedure.[182] Additionally, the government always provides legal aid for appeals.[183] Asylum seekers can also obtain free legal

---

inherently undesirable. This is even more so in the case of vulnerable groups such as single women, children, un-accompanied minors and those with special medical or psychological needs.").

176 UTLÄNNINGSLAG [Aliens Act] 2005:716, ch. 10 § 1 (Swed.) (2006).

177 *Id*.

178 *Id*. at ch. 8 § 12, ¶ 3.

179 *Id*. at ch. 10 § 8. The Swedish Migration Board is a government body that works under the orders of the Swedish Parliament and Government and answers to the Ministry of Justice and the Ministry of Employment. The Swedish Migration Board's mandate is "[t]o ensure a sustainable policy which protects the right to asylum and, within the framework of regulated immigration, facilitates freedom of movement across borders, promotes needs-based labour immigration, considers and makes the most of the development effects of migration as well as expanding European and international cooperation." *Our Vision and Mandate*, MIGRATIONSVERKET (Jan. 19, 2011), http://www.migrationsverket.se/info/208_en.html.

180 UTLÄNNINGSLAG [Aliens Act] 2005:716, ch. 10 § 8 (Swed.) (2006).

181 LAWYERS COMM. FOR HUMAN RIGHTS, REVIEW OF STATES' PROCEDURES AND PRACTICES RELATING TO DETENTION OF ASYLUM SEEKERS 107 (Debevoise & Plimpton, 2002).

182 *Id*. An asylum seeker will not be provided with an attorney if he clearly meets the necessary criteria for obtaining asylum since refugee status will be granted. Also, if the applicant will be deported to a third country, a country other than his origin country, an attorney will not be provided to him. However, an attorney is provided in all cases where the applicant would be deported to his country of origin. U.N. High Comm'r for Refugees, *Reception Standards for Asylum Seekers in the European Union*, REFWORLD, 159 (July 2000), http://www.unhcr.org/refworld/docid/3ae6b3440.html.

183 LAWYERS COMM. FOR HUMAN RIGHTS, *supra* note 181.

services from the Swedish Refugee Advice Centre.[184] The Swedish Refugee Advice Centre is partially funded by the Swedish government, but most of its funding is provided by a number of NGOs.[185]

D. Monitoring by Non-Governmental Agencies

The Migration Board in Sweden is working towards transparent management of its detention centers.[186] To aid transparency, media members are allowed inside of the detention centers, and the detainees can speak with them if they wish.[187] Additionally, NGOs are given unrestricted access to the detention centers.[188] NGOs regularly visit and even work with the immigration department to consult with them on problematic aspects of the centers.[189]

NGOs also investigate and publish their findings on human rights issues in the detention centers, and the Swedish government is generally responsive to their views.[190] As an example, the Swedish Red Cross earned a grant from the Migration Board to assess whether the human rights of the detainees were being respected.[191] The Red Cross members visit the detention centers weekly and visit every detained individual.[192] Another NGO, the UN Human Rights Committee, noted that, "Sweden considers the monitoring procedure to be an important tool in following up the measures taken to promote and protect human rights in the world . . . Sweden appreciates a continued dialogue and exchange of information and views regarding the protection of human rights in Sweden."[193]

V. Solutions to Help the United States Meet Its Obligations Under the Treaties

In order for the United States to meet its obligations under the ICCPR and CAT treaties, it needs to emulate some of Sweden's effective detention practices. One of these practices is to utilize alternatives to

---

184 U.N. High Comm'r for Refugees, *supra* note 182.

185 *Id.*

186 *Id.*

187 *Id.*

188 Grant Mitchell, *The Swedish Model of Detention*, Project SafeCom Inc. (Nov. 28, 2000), http://www.safecom.org.au/sweden.htm.

189 *Id.*

190 U.S. Dep't of State Bureau of Democracy, Human Rights, and Labor, 2009 Human Rights Report: Sweden (2010), *available at* http://www.state.gov/g/drl/rls/hrrpt/2009/eur/136060.htm.

191 *Sweden Detention Profile*, *supra* note 163.

192 *Id.*

193 Human Rights Comm., *supra* note 164.

detention for as many individuals as possible. Another solution is to pass enforceable legislation, similar to Sweden's Aliens Act of 2005. The Safe Treatment, Avoiding Needless Deaths, and Abuse Reduction in the Detention System Act ("Strong STANDARDS Act," or "the Act"), a promising bill that has been introduced to Congress may be the answer. This part will explore how these solutions can help the United States consistently provide proper medical care that is in compliance with human rights requirements.

A. Utilize Alternatives to Detention

One of the reasons detainees receive inadequate medical care is the overcrowding of detention centers due to the current mandatory detention practices.[194] While there is some use of alternatives to detention in the United States, the overall policy is the opposite of Sweden's; while detention is the last resort in Sweden, it is the first resort in the United States. "Alternatives to detention, such as conditional release, reporting requirements, bond, or financial deposits, should always be considered before resorting to immigration detention."[195]

Parole and bonds are two options available for immigrants not subject to mandatory detention. These alternatives are underutilized. Parole is only available to immigrants with serious medical conditions, pregnant women, juveniles who will be witnesses, and on a case-by-case basis for others whose detention is not in the public interest.[196] Immigrants can also be released on bonds, which have minimums set at $1,500.[197] "To be released on bond, the alien must prove that he is not a threat to people or property, and will appear at all future immigration proceedings."[198]

Although these options are technically available, an ICE Field Office Director initially decides whether the immigrant will be released on bond or parole.[199] A detainee can ask for review by an immigration judge, but without legal representation many detainees are not aware that the option for a review exists.[200] Even if they do seek a judicial review, they are often denied or the bond is set at an exorbitant amount.[201] The aver-

---

194 *See* ACLU OF MASS., *supra* note 11.

195 AMNESTY INT'L, *supra* note 3, at 27.

196 Immigration and Nationality Act, Pub. L. No. 82-414, § 212, 66 Stat. 163, 182-88 (1952) (codified in scattered sections of 8 U.S.C.).

197 8 U.S.C. § 1226.

198 IMMIGRATION-RELATED DETENTION, *supra* note 128.

199 AMNESTY INT'L, *supra* note 3, at 16.

200 *Id.*

201 *Id.* at 17.

age immigration bond in the United States is set at $5,941. This amount is out of reach to most immigrants who come to the United States with little to no assets and often work for very low wages.[202]

In addition to bonds and parole, ICE also manages two supervision programs: the Intensive Supervision Appearance Program ("ISAP") and the Enhanced Supervision/Reporting ("ESR") Program.[203] The ISAP uses electronic bracelet monitoring, telephone check-ins, home visits, and restrictions on movement to ensure that the individual shows up for his court proceedings.[204] ESR is a similar program and utilizes several of the same procedures as the ISAP, but it also has additional supervisory tools, such as unannounced home visits.[205] These programs are a great step in the right direction. However, the ISAP and the ESR are only currently able to supervise 13,000 individuals combined.[206] This is only about five percent of the population that ICE places in detention.[207] ICE has also created an "electronic monitoring only" alternative to detention, which it claims has no enrollment limit.[208] However, only 5,400 individuals were enrolled in the program as of 2009.[209]

Many more immigrants awaiting processing or adjudication of their immigration status should be able to utilize alternatives to detention. Detention should only be resorted to if the individual poses a serious flight risk or a threat to society. As of January 2009, more than half of all detained immigrants had no criminal record.[210] Additionally, torture survivors, human trafficking victims, and other asylum-seekers are subject to mandatory detention unless they have proper travel papers.[211] Victims, survivors, and individuals without criminal records should all be eligible for alternative detention programs like the ISAP and ESR.

---

202 *See id.*

203 ICE, *ICE Fact Sheet: Alternatives to Detention for ICE Detainees*, KOLKEN & KOLKEN (Nov. 6, 2009), http://www.kolkenandkolken.com/index.php?src=news&srctype=detail&category=Immigration%20Publications&refno=2488; *see also* AMNESTY INT'L, *supra* note 3.

204 *See* ICE, *supra* note 203.

205 *Id.*

206 *Id.*

207 AMNESTY INT'L, *supra* note 3.

208 *Id.*

209 *Id.*

210 Michelle Roberts, *Most Immigrants in Detention Did Not Have Criminal Record*, HUFFINGTON POST (March 15, 2009, 11:13 PM), http://www.huffingtonpost.com/2009/03/15/most-immigrants-in-detent_n_175118.html.

211 *See About the U.S. Detention and Deportation System*, DETENTION WATCH NETWORK, http://www.detentionwatchnetwork.org/aboutdetention (last visited Oct. 29, 2011); *see also* IMMIGRATION-RELATED DETENTION, *supra* note 128.

Alternatives to detention are less expensive than detention and are highly effective.[212] In 1996, INS asked the Vera Institute of Justice ("Vera") to create an experimental detention alternative program.[213] Vera created and ran the Appearance Assistance Program ("AAP") for a three-year study.[214] The AAP utilized community supervision.[215] Community supervision is similar to the ISAP and ESR, except that it does not use bracelet monitoring.[216] Instead, candidates must go through a screening process before they can be approved for the program.[217]

The screening included an evaluation of the strength of community and family ties, criminal record, and verification of address and contact information.[218] Additionally, community supervision required that the participant enlist a guarantor to encourage compliance.[219] The guarantor was usually a relative and was someone who had a great deal of influence over the participant's decision making.[220] The guarantor was morally (not legally or financially) responsible for ensuring that the participant fulfilled all obligations.[221]

Once in the program, the participants maintained contact with the AAP through supervision and field staff.[222] The AAP staff helped the participants navigate through the court process and made sure that they understood the consequences of noncompliance.[223] The community supervision program proved to be successful, with results showing that ninety-one percent of the participants attended all required immigration hearings.[224] The AAP was also more cost-effective, costing up to fifty-five percent less than detention.[225]

Alternatives to detention help protect immigrants from the human rights violation of inadequate medical care. Since alternatives to detention are very effective, they should be available for more individuals to

---

212 *See About the U.S. Detention and Deportation System*, *supra* note 211.

213 EILEEN SULLIVAN, PH.D., ET AL., VERA INST. OF JUSTICE, TESTING COMMUNITY SUPERVISION FOR THE INS: AN EVALUATION OF THE APPEARANCE ASSISTANCE PROGRAM (2000).

214 *Id.* This pilot program began in February 1997 and ended in March 2000. *Id.*

215 *Id.*

216 *Id.*

217 *Id.* at 13.

218 *Id.*

219 *Id.*

220 *Id.*

221 *Id.*

222 *Id.*

223 *Id.* at 14.

224 *Id.*

225 *Id.*

avoid issues with overcrowding. Consequently, reducing the number of individuals in detention centers will help reduce the strain on medical resources. Also, some of the savings created by using the alternative programs can be used to hire additional medical staff and eliminate the issues of understaffing and long waits for detainees to be seen by a doctor in detention centers.

B. Passing Enforceable Legislation

The lack of enforceability of the medical care requirements of the ICCPR and CAT is one of the leading contributors to the U.S. violation of these obligations.[226] While ICE has detention standards currently in place, they are unenforceable and are not strong enough in some respects to help ensure compliance with human rights law.[227] The United States is in need of enforceable legislation similar to Sweden's Aliens Act of 2005.

One promising bill that may be the answer is the Strong STANDARDS Act. Senator Robert Menendez (D-NJ) introduced the Strong STANDARDS Act to the Senate on July 30, 2009.[228] As of January 2011, this proposed bill has only been referred to the Committee on the Judiciary and has not yet come up for vote.[229] It is officially described as "a bill to ensure that individuals detained by the Department of Homeland Security are treated humanely, provided adequate medical care, and granted certain specified rights."[230]

This proposed legislation sets solutions for almost all of the major causes of inadequate medical care in detention centers. Some of the requirements of the Act are similar to the detention standards that ICE already has in place. However, since the Strong STANDARDS Act is Congressional legislation, it would be legally enforceable.[231] Although there is a possibility that ICE could be sued for inadequate medical care under the FTCA or the ATCA, there is no guarantee that the detainee will be able to recover by bringing these suits due to ambiguities in the

---

226 *See* TUMLIN, ET AL., *supra* note 11.

227 *Id*.

228 Strong STANDARDS Act, S. 1550, 111th Cong. (2009). The bill did not come up for debate in 2009 and will have to be reintroduced during the current session, resulting in a different bill number.

229 *S. 1550: Safe Treatment, Avoiding Needless Deaths, and Abuse Reduction in the Detention System Act*, GOVTRACK.US, http://www.govtrack.us/congress/bill.xpd?bill=s111-1550 (last visited Oct. 29, 2011).

230 S. 1550.

231 The Secretary of Homeland Security would administer the Act, with oversight by the Immigration Detention Commission. *See* discussion *infra* pp. 31-32.

language of the acts.[232] The Strong STANDARDS Act would eliminate the ambiguity issues because it lays out specific standards to which ICE must adhere. Another benefit the Act has over the FTCA and ATCA is that detention centers can be penalized for noncompliance without the assistance of the courts.[233] Therefore, enacting legally enforceable legislation would solve the problem of lack of liability or penalties when ICE fails to adhere to its own internal standards.

Similar to the Aliens Act of 2005, the Strong STANDARDS Act would require ICE to provide universal no-cost medical care to all detainees.[234] Detention center medical staff would have to provide timely and adequate primary care as well as emergency care, including medical needs that existed prior to detention.[235] The Act also requires "a comprehensive medical and mental health examination by a licensed health care professional no later than 14 days after the detainee's arrival at a detention facility."[236] Additionally, all requests for authorization to provide medical care to a detainee would have to be responded to within 72 hours.[237]

The Strong STANDARDS Act also calls for the creation of an Immigration Detention Commission ("Commission") to monitor the facilities.[238] The duties of the Commission would be to conduct investigations of the detention centers and report on their compliance.[239] The Commission would be composed of:

> (1) Experts from United States Immigration and Customs Enforcement, United States Customs and Border Protection, the Office of Refugee Resettlement, and the Division of Immigration Health Services of the Department of Health and Human Services; and (2) independent experts, in a number equal to the number of experts appointed under paragraph (1), from nongovernmental organizations and intergovernmental organizations with

---

232 Alien Tort Claims Act, 28 U.S.C. § 1350 (2006); West v. Atkins, 487 U.S. 42, 49 (1988).

233 S. 1550.

234 *Id.*

235 *Id.*

236 *Id.*

237 *Id.*

238 *Id.*

239 *Id.*

> expertise in working on behalf of detainees and other vulnerable populations.[240]

One drawback of the Act is that there is no mention of providing legal counsel for detainees as Sweden does. This will not likely occur unless immigration proceedings are reclassified as criminal instead of civil and therefore invoke the constitutional right to counsel.[241] Until this occurs, indigent detainees must rely on pro bono legal organizations to gain legal representation.

In order to aid detainees in acquiring legal counsel, the Act requires that official lists of pro bono legal organizations be prominently posted in the detention centers and updated semi-annually.[242] The Act also requires that detainees be given access to legal information and materials necessary for legal research and correspondence.[243] As for the grievance system, the Act states, "[e]ach detainee has the right to file grievances with the staff of detention facilities, short-term detention facilities, and the Department of Homeland Security, and shall be protected from retaliation for exercising such right."[244]

One of the most important propositions of the Strong STANDARDS Act is creating penalties for non-complying detention centers. The Act would impose financial penalties on detention centers that violate any detention requirements or conditions.[245] The facility's contract would be terminated if noncompliance persists.[246] In addition to the Commission, each facility must designate a compliance officer who would also be in charge of monitoring and remedying noncompliance with the Act.[247] The imposition of penalties will motivate detention centers to adhere to the ICCPR and CAT obligation to provide adequate medical care to detainees.

VI. CONCLUSION

Many immigrants who find themselves in detention centers came to the United States in search of the American Dream but failed to follow all of the required immigration procedures along the way. While they are detained for their infractions, the United States has a duty to protect their

---

240 *Id.*
241 *See supra* text accompanying note 137.
242 S. 1550.
243 *Id.*
244 *Id.*
245 *Id.*
246 *Id.*
247 *Id.*

physical health.[248] To deny detained immigrants their basic right to proper medical care is inhumane treatment and is in violation of the U.S. obligations under the ICCPR and the Convention Against Torture.[249]

Sweden's detention practices provide a good model for the United States on how to meet its international obligations. First, Sweden's policy of using detention as a last resort, compared to the U.S. policy of detention as the primary step, helps avoid the issue of overcrowding that ultimately leads to a lower standard of care for all detainees.[250] In the United States, the overcrowding of detention centers has led to a shortage of medical personnel, which is a main contributor to the growing problem of inadequate medical care.[251] The United States could decrease this problem by executing more alternative detention programs and granting eligibility for these programs to more individuals.[252]

Second, Sweden's standards have more force behind them because they are based on actual legislation, The Aliens Act of 2005, and are therefore enforceable.[253] This is unlike the ICE Standards, which are purely internal and are often ignored due to lack of penalties for violations.[254] The United States needs to pass legislation similar to Sweden's to help ensure that detention standards are adhered to and that penalties are imposed if noncompliance occurs. The Strong STANDARDS Act is similar to Sweden's Aliens Act of 2005 in the following ways: it sets specific standards of medical policies to be followed; it creates rights to a grievance system; and it increases the transparency of detention centers, which is achieved by creating a Commission composed of NGO members to monitor the centers.[255]

By ratifying the ICCPR and the Convention Against Torture, the United States undertook an obligation to eliminate "cruel, inhuman or degrading treatment or punishment" for all individuals in its custody.[256]

---

[248] *See supra* text accompanying notes 7-10; 8 C.F.R. § 236.1 (2007); *see also* AMNESTY INT'L, *supra* note 3, at 4; General Comment No. 15, *supra* note 7 ("It is in principle a matter for the State to decide who it will admit to its territory. However, in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise"); Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948).

[249] *See* Principles of Medical Ethics, *supra* note 18.

[250] *See* ACLU OF MASS., *supra* note 11.

[251] *Id.*

[252] *See About the U.S. Detention and Deportation System*, *supra* note 211.

[253] *See* UTLÄNNINGSLAG [Aliens Act] 2005:716, ch. 8 § 12 ¶ 3 (Swed.) (2006).

[254] *See* TUMLIN, ET AL., *supra* note 11.

[255] *See* Strong STANDARDS Act, S. 1550, 111th Cong. (2009).

[256] *See* BOURNAZIAN ET AL., *supra* note 17.

The United States must provide proper medical care to its immigration detainees in order to comply with these treaties. Utilizing alternatives to detention and passing enforceable legislation such as the Strong STANDARDS Act is necessary in order to meet this obligation.

Processing Citizenship: Jurisdictional Issues in the Unreasonable Delay of Adjudication of Naturalization Applications

Amber Pershon*

* J.D. candidate 2012, Phoenix School of Law; B.A. (Anthropology) 2004, San Francisco State University; Technical Editor, Phoenix Law Review, Vol. V. The views and opinions expressed in this article are solely those of the author and do not reflect the position of anyone but the author. I would like to thank my parents, Marc and Katie, and my brother, Stephen, for all their support in my pursuit of knowledge. I would also like to thank Andrew Hanna for inspiring me to be my best and for unselfishly giving his time and feedback during my research and writing of this article. I also appreciate the valuable feedback, advice, and support I received from Jennifer Spreng, Lori Miller, Jason Holmes, and Chrystal Dickinson. Finally, I would like to thank Dr. Boatamo Mosupyoe for teaching me how to question everything I know.

I. INTRODUCTION

On August 17, 2004, Elyhau Hadad, a lawful permanent resident of the United States, submitted an application for naturalization to United States Citizenship and Immigration Services ("CIS").[1] Four years later, Hadad still awaited a decision on his naturalization application even though CIS was processing to completion other applications submitted in years after Hadad's.[2] CIS's reason for the delay in adjudication of Hadad's application was that it was waiting for the Federal Bureau of Investigation ("FBI") to complete a portion of Hadad's background check, specifically a "name check."[3] On September 22, 2008, Hadad brought an action seeking to compel CIS and the FBI to complete the processing of his naturalization application.[4] Hadad's story represents the delay naturalization applicants face when their background check is not completed by the FBI within normal CIS processing times. When

[1] Hadad v. Scharfen, No. 08-22608-CIV, 2009 WL 654019, at *1 (S.D. Fla. Mar. 12, 2009).
[2] *Id.*
[3] *Id.* at *1, *3.
[4] *Id.* at *1.

these applicants bring similar actions seeking to compel CIS and the FBI to complete the processing of their application, they receive inconsistent results.

In response to the attacks of September 11, 2001 ("September 11th"), the executive branch placed heightened national security measures upon the immigration system, including the addition of the name check through the FBI for immigration applications.[5] The requirement of the name check burdened the naturalization process and now creates inordinate delays for some applicants.[6] While CIS processes most naturalization applications quickly,[7] in the post-September 11th years a number of prospective citizens have waited from two to seven years with no explanation beyond that CIS is waiting on the FBI to complete the background check.[8] After several inquiries about their status, some applicants file suit requesting that a judge compel CIS and the FBI to adjudicate the application by a certain date.[9]

---

[5] The name check involves a check for an FBI record based on an applicant's name. Mocanu v. Mueller, No. 07-0445, 2008 WL 372459, at *4 (E.D. Pa. Feb. 8, 2008); *see also* MICHAEL JOHN GARCIA & RUTH ELLEN WASEM, IMMIGRATION: TERRORIST GROUNDS FOR EXCLUSION AND REMOVAL OF ALIENS 1 (2010) (discussing how the fact that nineteen 9/11 terrorists were foreign-born and present in the United States on temporary visas caused a waterfall of proposed immigration reform legislation).

[6] *See* discussion *infra* Part III.

[7] *See infra* note 67 and accompanying text.

[8] *See* Khananisho v. Chertoff, No. 07 CV 7211, 2008 WL 5217296, at *1 (N.D. Ill. Dec. 10, 2008) (Plaintiff waited two years and two months since the filing of his application); Sawan v. Chertoff, 589 F. Supp. 2d 817, 819 (S.D. Tex. 2008) (Plaintiff waited two years since the filing of his application); Vara v. Cannon, No. 07-15222, 2008 WL 4852930, at *1 (E.D. Mich. Nov. 7, 2008) (Plaintiff waited five years since the filing of his application); Singh v. Still, 470 F. Supp. 2d 1064, 1065 (N.D. Cal. 2007) (Plaintiff waited seven years on his lawful permanent resident application); Aboushaban v. Mueller, No. C 06-1280 BZ, 2006 WL 3041086, at *1 (N.D. Cal Oct. 24, 2006) (Plaintiff waited eight years on his lawful permanent resident application).

[9] *See Hadad*, 2009 WL 654019, at *1; Olayan v. Holder, 1:08-cv-715-RLY-DML, 2009 WL 425970, at *1 (S.D. Ind. Feb. 17, 2009) (discussing Plaintiff's efforts to discover the reason for the delay of his application, including having a senator make an inquiry on his behalf); Palamarachouk v. Chertoff, 568 F. Supp. 2d 460, 468 (D. Del. 2008) (discussing Plaintiff's many follow-ups with CIS which resulted in being told the background check was not completed and to contact CIS again in a number of months); Hamandi v. Chertoff, 550 F. Supp. 2d 46, 48 (D.D.C. 2008); Zagrebelny v. Frazier, No. 07-1682 (PAM/JSM), 2008 WL 624072, at *1-2 (D. Minn. May 6, 2008); Zhu v. Chertoff, 525 F. Supp. 2d 1098, 1099 (W.D. Mo. 2007); Assadzadeh v. Mueller, No. 07-2676, 2007 WL 3252771, at *1 (E.D. Pa. Oct. 31, 2007); Alkeylani v. Dep't of Homeland Sec., 514 F. Supp. 2d 258, 260-61 (D. Conn. 2007); Bondarenko v. Chertoff, No. 07-mc-00002, 2007 WL 2693642, at *1-2 (W.D.N.Y. Sept. 11, 2007); Konchitsky v. Chertoff, No. C-07-00294 RMW, 2007 WL 2070325, at *1 (N.D. Cal. July 13, 2007); Ghazai v. Gonzales, No. 06CV2732-LAB (NLS), 2007 WL 1971944, at *1 (S.D. Cal. June 14, 2007); Pool v. Gonzales, No. 07-258 (AET), 2007 WL

The result of these controversies raises a question that touches upon separation of powers. Congress stripped the judicial branch of its ability to adjudicate applications for both lawful permanent residency and naturalization.[10] Because of this, CIS's position is that statutory language gives it complete discretion for the pace of adjudication, and, even if it does not, the FBI has complete discretion for the pace of completing the name checks.[11] Further, it argues even if CIS and the FBI do not have complete discretion, the amount of time the applicant waits for adjudication of his or her application is not unreasonable.[12] Applicants maintain that CIS and the FBI must process their applications within a reasonable time under the Administrative Procedure Act ("APA") and, therefore, cannot delay indefinitely.[13]

To establish jurisdiction under the APA, a plaintiff must prove an administrative agency has a clear, nondiscretionary duty to take an agency action; the agency action in dispute is rendering a decision on a naturalization application.[14] District courts disagree as to which agency—if any—has this duty when by statute CIS must render the final decision on the application, but it is the FBI that causes delayed adjudication.[15] If a clear, nondiscretionary duty arises at all for the FBI, it must arise through implication rather than through explicit statutory text.[16] Thus, a question remains about whether the jurisdiction stripping provisions of the Immigration and Nationality Act ("INA"), the prevailing immigration statute, still allow the courts to order adjudication of these applications to occur in a reasonable time. Because courts disagree about

---

1613272, at *1 (D.N.J. June 1, 2007); Alhamedi v. Gonzales, No. 07 Civ. 2541(JGK), 2007 WL 1573935, at *1 (S.D.N.Y. May 30, 2007); Fu v. Gonzales, No. C 07-0207 EDL, 2007 WL 1742376, at *1 (N.D. Cal. May 22, 2007); Gelfer v. Chertoff, No. C 06-06724 WHA, 2007 WL 902382, at *1 (N.D. Cal. Mar. 22, 2007).

[10] *Compare infra* note 48, *with infra* note 128.

[11] *See, e.g.*, Litvin v. Chertoff, 586 F. Supp. 2d 9, 10-12 (D. Mass. 2008) (Government Defendants challenge Plaintiff's claims under subject matter jurisdiction, under FED. R. CIV. P. 12(b)(1), arguing "that because the naturalization statute does not provide a deadline by which the government must complete the background check and investigation, the government has the discretion to proceed at a pace of its choosing." They also "argue that even if they have a nondiscretionary duty to act and this court has subject matter jurisdiction over the action, Plaintiff has failed to state a claim of unreasonable delay" under FED. R. CIV. P. 12(b)(6)); Wang v. Mukasey, No. C-07-06266 RMW, 2008 WL 1767042, at *1 (N.D. Cal. Apr. 16, 2008) (Government Defendants move to dismiss defendant FBI, asserting that any duty owed to Plaintiff is owed by CIS, not the FBI).

[12] *Litvin*, 586 F. Supp. 2d at 10-12; *Wang*, 2008 WL 1767042, at *1.

[13] *See infra* Part III.A.; *infra* notes 73-74 and accompanying text.

[14] *See infra* Part V.

[15] *See* discussion *infra* Part V.C.

[16] *See* discussion Part VI.

whether they have jurisdiction to do so, delayed applicants receive inconsistent results.[17]

If the APA is not applied to the naturalization process, CIS and the FBI retain the ability to infinitely delay adjudication.[18] It must be determined whether Congress really intended such a result when it drafted the Immigration Act of 1990. In other words, when Congress delegated authority to naturalize persons to the executive branch, the issue is whether it also handed over an unlimited time frame in which to do so. Upon analysis of the relevant statutory language, legislative history, and policy issues, it is evident that the answer to that question is no; in passing the Immigration Act of 1990, Congress intended adjudication of naturalization applications to occur in a reasonable time frame.[19]

This article will argue that under the APA reasonable time frame restrictions are appropriate for naturalization applications, but not for permanent resident applications. Part II of this article will discuss historical aspects of immigration law and its contribution to the current naturalization process.[20] Part III of this article will compare the cause and magnitude of the delay in background checks and the resulting harms that befall applicants who must await adjudication with the countervailing national security concerns.[21] Part IV will discuss the jurisdiction-stripping provisions of the INA as applied to legal permanent resident and naturalization applicants.[22] Parts V through VII will discuss application of the APA to CIS and the FBI.[23] Finally, Part VIII concludes in support of courts maintaining jurisdiction over delayed naturalization applications and suggests that Congress amend the Naturalization subchapter of the INA to clarify its intent regarding this issue.[24]

II. Overview of American Immigration Law

A. History of Immigration Law in the United States

The U.S. Constitution gives Congress "the power to establish a uniform rule of naturalization."[25] Historically, American immigration and naturalization policy based exclusion on arbitrary factors, such as ethnic-

---

17 *See* discussion *infra* Part V.A.
18 *See* discussion *infra* Part V.B.
19 *See* discussion *infra* Parts IV-VI.
20 *See* discussion *infra* Part II.
21 *See* discussion *infra* Part III.
22 *See* discussion *infra* Part IV.
23 *See* discussion *infra* Parts V-VII.
24 *See* discussion *infra* Part VIII.
25 U.S. Const. art. I, § 8, cl. 4.

ity. As this policy changed into its modern form, Congress sought a more uniform policy by eliminating many of these arbitrary factors. Unfortunately, the inconsistent results for modern naturalization applicants echo the arbitrariness of past immigration law and subtracts from the uniform application of naturalization law as a whole.[26]

Before America's inception, North America became home to a number of different peoples. Columbus's journey to North America opened North America's doors to an influx of settlers. People from various countries immigrated to North America and established colonies that would eventually create a new nation.[27] After the founding of the United States, immigration law rapidly became exclusionary; early immigration law excluded or severely limited immigration from a majority of the globe. The First Congress limited naturalization to "a free white person."[28] Immigration law remained at its most exclusionary in the late

---

[26] *See* Natalia May, "*What's In A Name?" While FBI Slowly Administers Name Checks For USCIS, Some Courts Entertain Mandamus and APA Suits by Frustrated Lawful Immigrants*, 33 VT. L. REV. 749, 749 (2009) (discussing how a common name may provide several variations in spelling for one name check and thus a multitude of results to resolve); *see also* Heena Musabji & Christina Abraham, *The Threat to Civil Liberties and Its Effect on Muslims in America*, 1 DEPAUL J. FOR SOC. JUST. 83, 84 (2007) (discussing that the background checks disproportionately affect Muslims seeking U.S. citizenship and other benefits).

[27] *See* MALDWYN ALLEN JONES, AMERICAN IMMIGRATION 1, 5-6 (2nd ed. 1992) ("American society, economic life, politics, religion, and thought all bear witness to the fact that the United States has been the principal beneficiary of the greatest folk-migration in human history." Additionally, "[t]he growth and expansion of the colonies, their underlying unity no less than their diversity, their distinctive social and political characteristics, and their swelling desire for independence are all traceable in some measure to the course of immigration during the century and three-quarters before 1776."); JOHN POWELL, ENCYCLOPEDIA OF NORTH AMERICAN IMMIGRATION 66 (2005) ("Christopher Columbus laid the foundation for . . . the Europeanization of the Western Hemisphere."); *see also* ALAN TAYLOR, AMERICAN COLONIES: THE SETTLING OF NORTH AMERICA (2002) (discussing the multi-cultural influences in America's development). Immigration policy of the colonies remained fairly open. MICHAEL LEMAY & ELLIOTT ROBERT BARKAN, U.S. IMMIGRATION AND NATURALIZATION LAWS AND ISSUES (1999) ("Colonial immigration laws were designed primarily to promote immigration . . . .").

[28] The Naturalization Act created by the first Congress limited citizenship to "a free white person" residing in the United States for at least two years. An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 (1790) (repealed 1795). Congress repealed this Act and replaced it with one which allowed free white aliens to be naturalized provided they resided within the United States for five years. An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Act Heretofore Passed on that Subject, ch. 20, 1 Stat. 414 (1795) (repealed 1802).

While the text of the Naturalization Act uses the term "person," a woman's legal status was dependent upon that of her husband, and she was stripped of citizenship status if

1800s and early 1900s; Congress tailored the law to exclude immigrants from a multitude of countries.[29]

---

she married a non-citizen. *See* KEVIN R. JOHNSON, THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS 124-25 (2003).

Congress continued to refine its requirements, though the bones of the original Naturalization Act remained. *See* An Act in Further Addition to 'An Act to Establish an Uniform Rule of Naturalization, and to Repeal the Acts Heretofore Passed on That Subject,' ch. 186, 4 Stat. 69 (1824) (refining naturalization of minors which was still limited to "free white person[s]"); An Act Relative to Evidence in Cases of Naturalization, ch. 32, 3 Stat. 258 (1816) (amended 1828) (refining requirement of certificate presentation and proof of residency); An Act to Establish an Uniform Rule of Naturalization and to Repeal the Acts Heretofore Passed on That Subject, ch. 28, 2 Stat. 153 (1802) (amended 1804, 1813, 1828) (adding requirements of registry and reporting to the courts to obtain certificates of arrival and presentment of certificates at the time of application for naturalization).

[29] *See generally* KEVIN R. JOHNSON, THE HUDDLED MASSES MYTH: IMMIGRATION AND CIVIL RIGHTS (2003).

For example, Chinese immigrants faced severe naturalization limitations. *See* MARTIN P. SCHIPPER, A GUIDE TO THE MICROFILM EDITION OF RESEARCH COLLECTIONS IN AMERICAN IMMIGRATION: ASIAN IMMIGRATION AND EXCLUSION, 1906-1913, v (Rudolph Vecoli et al. eds., 1992) (discussing the Burlingame Treaty renegotiation of 1880 in which "China conceded to regulation, limitation, or suspension, although not absolute prohibition, of the immigration of Chinese laborers into the United States, provided that nonlaborers could continue to emigrate."). This change brought on the various Chinese Exclusion Acts which both suspended immigration of Chinese laborers and denied Chinese immigrants naturalization. An Act To Execute Certain Treaty Stipulations Relating to Chinese, ch. 126, 22 Stat. 58 (1882) (suspending "the coming of Chinese laborers to the United States" and "[t]hat hereafter no State court or court of the United States shall admit Chinese to citizenship"). These Acts were extended in 1892 and 1902. *See* An Act to Prohibit the Coming Into and to Regulate the residence Within the United States, its Territories, and All Territory Under its Jurisdiction, and the District of Columbia, of Chinese and Persons of Chinese Descent, ch. 641, 32 Stat. 176 (1902); An Act to Prohibit the Coming of Chinese Persons Into the United States, ch. 60, 27 Stat. 25 (1892) (extending the Chinese Exclusion Act for a period of ten years). The Exclusionary Act became permanent in 1904. *See* Claims Allowed by the Auditor for the Post-Office Department, ch. 1630, 33 Stat. 428 (1904) ("All laws in force . . . regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States, and the residence of such persons therein . . . are hereby, reenacted, extended, and continued, without modification, limitation, or condition . . . .").

Those of Japanese descent were also affected by the informal Gentleman's Agreement of 1907. SCHIPPER, *supra*, at v, vi (The Gentleman's Agreement was an informal agreement between Japan and the United States in which Japan agreed to "refuse[ ] exit visas to laborers wishing to emigrate to the United States"). Congress extended the categories of those excluded from immigration with the Immigration Act of 1917. *See* An Act To Regulate the Immigration of Aliens To, and the Residence of Aliens In, the United States, ch. 29, 39 Stat. 874 § 3 (1917) (excluding "[a]ll idiots, imbeciles, feeble-minded persons, epileptics, insane persons; persons who have had one or more attacks of insanity at any time previously; persons of constitutional psychopathic inferiority; persons with chronic alcoholism; paupers; professional beggars; vagrants; persons afflicted with tuberculosis . . . or with a loathsome or dangerous contagious disease," those with a physical defect

Legislation passed after the Civil War, including the Fourteenth Amendment, challenged this exclusion by extending citizenship to "all persons born in the United States."[30] Despite some changes, however, immigration law remained fairly exclusionary; a new quota system limited immigration to two or three percent of those from each country already present in the United States as of a specific census date.[31] The quota system stymied immigration from certain countries, including southern and eastern Europe.[32] It was not until the mid-twentieth century that immigration law changed into its modern policy; the national origins quota system was abolished, and Congress restricted "any preference or priority or [discrimination] in the issuance of an immigrant visa because of . . . race, sex, nationality, place of birth, or place of residence."[33]

---

which may "affect the ability of such alien to earn a living[,] persons . . . convicted of . . . a felony[,] . . . polygamists, . . . anarchists[,] . . . prostitutes," and persons situated beyond certain coordinates which included most of eastern Asia, India, and the Middle East); *see also Geography & Demographics*, PBS, http://www.pbs.org/rootsinthesand/geography.html (last visited Oct. 25, 2011) (showing a timeline including the Asiatic Barred Zone).

[30] *See* U.S. CONST. amend. XIV, § 1 ("All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States . . . ."); An Act to Amend the Naturalization Laws and to Punish Crimes Against the Same, and For Other Purposes, ch. 254, 16 Stat. 254 (1870) (extending naturalization laws to African aliens and persons of African descent); An Act to Protect All Persons in the United States in Their Civil Rights, and Furnish the Means of Their Vindication, ch. 31, 14 Stat. 27 (1866) ("all persons born in the United States . . . are hereby declared to be citizens of the United States"); United States v. Ark, 169 U.S. 649, 705 (1898) (interpreting the Fourteenth Amendment to include all children born within United States jurisdiction and in the allegiance and under the protection of the same; conferring citizenship upon Ark, of Chinese ethnicity born in San Francisco, such that the Chinese Exclusion Act did not apply to him). Congress repealed The Chinese Exclusion Acts barring those of Chinese descent from naturalization in 1943. *See infra* note 33.

[31] An Act to Limit the Immigration of Aliens Into the United States, and For Other Purposes, ch. 190, 43 Stat. 153 § 11(a) (1924) (lowering the quota to two percent); An Act to Limit the Immigration of Aliens Into the United States, ch. 8, 42 Stat. 5 (1921) (limiting the number of aliens of any nationality "[to three percent] of the number of foreign-born persons of such nationality resident in the United States" according to the 1910 census).

[32] *See* STEVEN G. KOVEN & FRANK GOTZKE, AMERICAN IMMIGRATION POLICY: CONFRONTING THE NATION'S CHALLENGES 131-33 (2010).

[33] *See* An Act to Amend the Immigration and Nationality Act, and For Other Purposes, Pub. L. No. 89-236, 79 Stat. 911 (1965); An Act To Revise the Laws Relating to Immigration, Naturalization, and Nationality; and For Other Purposes, ch. 477, 66 Stat. 163 (1952) (changing the quota percentages to the 1920 census); An Act to Repeal the Chinese Exclusion Acts, To Establish Quotas, and for Other Purposes, ch. 344, 57 Stat. 600 (1943) (repealing the Chinese Exclusionary Acts and adding Chinese persons to the quota system).

The prevailing modern immigration statute is the INA; its naturalization provisions were amended in the Immigration Act of 1990.[34] Congress drafted these prior to the events of September 11th, not anticipating the resulting domestic changes due to heightened national security.[35] Immigration composes a large part of American history.[36] America still "accepts more legal immigrants as permanent residents[37] than all other countries in the world combined."[38] CIS naturalized over one million immigrants in 2008.[39] This trend is mirrored in the number of those

---

[34] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5051; Immigration and Nationality Act, Pub. L. No. 82-414, 66 Stat. 163 (codified as amended at 8 U.S.C. §§ 1101-1537 (2000)).

[35] Congress originally drafted the Immigration and Nationality Act in 1952, and amended the Naturalization subchapter with the Immigration Act of 1990. *See id*.

[36] *See generally* ROGER DANIELS, COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE (2nd ed. 2002).

[37] This article discusses two particular immigration statuses under INA. The first is naturalization, which is the process by which U.S. citizenship is granted to a foreign citizen or national after he or she fulfills the requirements established by Congress in the INA. *Citizenship Through Naturalization*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=d84d6811264a3210VgnVCM100000b92ca60aRCRD&vgnextchannel=d84d6811264a3210VgnVCM100000b92ca60aRCRD (last updated June 3, 2011). Naturalization is achieved through a naturalization application. *Id.* The second status is that of lawful permanent resident, which is any person not a citizen of the United States who is residing in the United States under legally recognized and lawfully recorded permanent residence as an immigrant; this status is traditionally associated with a green card. *Lawful Permanent Resident*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.5af9bb95919f35e66f614176543f6d1a/?vgnextoid=070695c4f635f010VgnVCM1000000ecd190aRCRD&vgnextchannel=b328194d3e88d010VgnVCM10000048f3d6a1RCRD (last visited Oct. 29, 2011). The status of lawful permanent resident is achieved through an adjustment of status application. *Adjustment of Status*, U.S. CITIZENSHIP & IMMIGR. SERVICES, http://www.uscis.gov/portal/site/uscis/menuitem.eb1d4c2a3e5b9ac89243c6a7543f6d1a/?vgnextoid=2da73a4107083210VgnVCM100000082ca60aRCRD&vgnextchannel=2da73a4107083210VgnVCM100000082ca60aRCRD (last updated Mar. 30, 2011). This status is also referred to as an immigrant visa for permanent residence. *Visas*, U.S. DEPARTMENT ST., http://travel.state.gov/visa/ (last visited Oct. 21, 2011).

[38] *See* JONES, *supra* note 27, at 1 ("Immigration, which was America's historic *raison d'être*, has been the most persistent and the most pervasive influence in her development. The whole history of the United States during nearly four centuries has been molded by successive waves of immigrants who responded to the lure of the New World and whose labors, together with those of their descendants, have transformed an almost empty continent into the world's most powerful nation.").

[39] JAMES LEE & NANCY RYTINA, DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: NATURALIZATIONS IN THE UNITED STATES: 2008, 1 (2009). The number of naturalized citizens varies every year, the numbers steadily remain much higher than those reported prior to the 1990s. *See* JAMES LEE, DEP'T OF HOMELAND SEC., U.S. NATURALIZATIONS: 2010, 1 (2010) (showing table of Persons Naturalized: Fiscal Years 1907 to 2010).

receiving a status adjustment to lawful permanent resident.[40] Thus, America's policy on immigration affects millions each year.

Still, September 11th[41] affected America and its citizens' attitudes toward the world.[42] Many policies changed, and America looked upon aliens with more scrutiny.[43] Congress, with its ability to delegate power to other branches of government,[44] centralized authority in the executive

---

[40] RANDALL MONGER & JAMES YANKAY, DEP'T OF HOMELAND SEC., ANNUAL FLOW REPORT: U.S. LEGAL PERMANENT RESIDENTS: 2010, at 1 (2011) (admitting over one million persons as legal permanent residents in 2010 and providing a table showing the trend of legal permanent residents admitted remains higher than those reported prior to the 1990s).

[41] *See The September 11 Digital Archive*, AM. SOC. HIST. PROJECT/CENTER FOR MEDIA & LEARNING & CENTER FOR HIST. & NEW MEDIA, http://911digitalarchive.org/index.php (last visited Oct. 21, 2011).

[42] One year after the September 11th attacks, many Americans indicated they perceived a change in their outlook. *See, e.g.*, *Is Your Life Different?*, UNDERSTANDING AM. AFTER 9/11: A PUB. RADIO COLLABORATION (Aug. 26, 2002 through Sept. 15, 2002), http://understandingamerica.publicradio.org/form/index.shtml (collection of various responses by radio listeners to the question: "As you look at your life today, is it different because of September 11?"). Former President George W. Bush addressed this change in his post-9-11 speeches: regarding the 9-11 attacks, "Americans have known wars but for the past 136 years they have been wars on foreign soil . . . . Americans have known the casualties of war, but not at the center of a great city on a peaceful morning. Americans have known surprise attacks, but never before on thousands of civilians." George W. Bush, 43rd President of the United States, Address to Joint Session of Congress (Sept. 20, 2001). Regarding the war on terror, "Americans should not expect one battle, but a lengthy campaign unlike any other we have ever seen." *Id.*

[43] Former President George W. Bush created the Office of Homeland Security and the Homeland Security Council to focus on security in the United States with regard to terrorist attacks. Exec. Order No. 13,228, 66 Fed. Reg. 51, 812 (Oct. 10, 2001), *codified as* 6 U.S.C. § 111 (2006). The Office of Homeland Security then imposed a color-coded threat system (the Homeland Security Advisory System) designed to alert Americans of the danger level of any present threats; this was later changed to the National Terrorism Advisory System. *See Homeland Security Presidential Directive 3: Homeland Security Advisory System*, DEPARTMENT HOMELAND SECURITY (Mar. 11, 2002), http://www.dhs.gov/xabout/laws/gc_1214508631313.shtm#1; *National Terrorism Advisory System*, DEPARTMENT HOMELAND SECURITY, http://www.dhs.gov/files/programs/ntas.shtm (last modified Sept. 28, 2011). Policy change affected aliens as well. *See National Commission on Terrorist Attacks Upon the United States: Sixth Public Hearing on Security and Liberty*, 108th Cong. (2003) (statement of David Martin, University of Virginia School of Law faculty and former General Counsel of the Immigration and Naturalization Service), *available at* http://govinfo.library.unt.edu/911/hearings/hearing6/witness_martin.htm (discussing the legality of using immigration law to detain illegal aliens suspected as being involved in the September 11th attacks).

[44] *See* U.S. CONST. art. III, §§ 1-2 (delineating Congress' power to establish inferior courts and make exceptions to the judiciary's appellate jurisdiction); Mistretta v. United States, 488 U.S. 361, 372 (1989) (discussing Congress' power to delegate authority to other branches of government provided it establishes "by legislative act an intelligible principle

branch that had not existed prior to September 11th.[45] Both citizen and alien were inconvenienced in the name of national security.[46]

While the executive branch was historically involved in immigration law,[47] Congress traditionally gave the judicial branch the power to confer naturalization.[48] Congress transferred naturalization power to the executive branch with the Immigration Act of 1990, giving it greater control over the immigration process as a whole.[49] This Act stripped the courts of jurisdiction to naturalize aliens and vested "sole authority to naturalize persons as citizens of the United States" in the Attorney General, effectively making naturalization an executive rather than judicial function.[50] Then, after the events of September 11th, CIS elevated security measures

---

to which the person or body authorized to [exercise the delegated authority] is directed to conform, such legislative action is not a forbidden delegation of legislative power." (quoting J.W. Hampton, Jr. & Co. v. United States, 276 U.S. 394, 406 (1928)).

[45] *See, e.g.,* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (allowing roving wire taps and sharing of information between foreign intelligence departments and law enforcement departments among other delegations of power).

[46] A debate remains as to how much privacy Americans gave up under the Patriot Act. *Compare id.*, *with* Declan McCullagh, *Patriot Act Renewed Despite Warnings of 'Secret' Law*, PRIVACY INC. (May 28, 2011, 6:08 PDT), http://news.cnet.com/8301-31921_3-20067005-281.html (discussing how a broad interpretation of the Patriot Act affects Americans' privacy interests regarding various business records). The 9/11 attacks have also led to the creation of new crimes which restrict citizens' actions. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705 (2010) (interpreting "material support" in 18 U.S.C. § 2339B(a)(1) (2006) which makes it a crime to "knowingly provide material support or resources to a foreign terrorist organization" to apply to humanitarian organizations attempting to educate groups on resolving disputes through the United Nations or engaging in political advocacy). The Aviation and Transportation Security Act created heightened security measures, including establishment of the Transportation Security Administration. *See* Aviation and Transportation Security Act, Pub. L. No. 107-71, 115 Stat. 597-647 (2001).

[47] *See* An Act To Revise the Laws Relating to Immigration, Naturalization, and Nationality; and For Other Purposes, ch. 477, 66 Stat. 163, Title I § 103(a) (1952) ("The Attorney General shall be charged with the administration and enforcement of this Act and all other laws relating to the immigration and naturalization of aliens . . . .").

[48] *See, e.g.*, An Act To Revise the Laws Relating to Immigration, Naturalization, and Nationality; and For Other Purposes, ch. 477, 66 Stat. 163, ch. 2 § 310(a) (1952) ("Exclusive jurisdiction to naturalize persons as citizens of the United States is hereby conferred upon the following specified courts: District courts of the United States . . . ."); An Act to Establish an Uniform Rule of Naturalization, ch. 3, 1 Stat. 103 § 1 (1790) (repealed 1795) (stating that aliens wishing to be naturalized must apply "to any common law court of record" and "make proof to the satisfaction of such court, that he is a person of good character").

[49] Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5051 (codified as 8 U.S.C. § 1421 (2006)).

[50] *Id*. at 5038.

in the immigration process by requiring more intensive background checks.[51] Unfortunately, the methods utilized renew arbitrary exclusion in unintended ways.

B. The Current Naturalization Process in the United States

The renewed arbitrary exclusion surfaces in the middle of a lengthy process. The naturalization process begins before an immigrant is even eligible to file a naturalization application. The United States strictly controls entry into the country, both for those wishing to visit and those hoping to stay.[52] To be eligible to apply for naturalization, one must have been a lawful permanent resident for at least five years and resided continuously in the United States up to the date of admission to citizenship, as well as be a person of good moral character.[53]

At that point, an immigrant completes a naturalization application.[54] The prospective new citizen bears the burden of proving eligibility for citizenship, including demonstrating that he is of good moral character.[55] The next step is the execution of the background check.[56] It must include, at a minimum, places a person has lived and worked for the past five years.[57]

The Attorney General adopted a regulation consistent with this provision to include "at a minimum . . . a review of all pertinent records, police department checks, and a neighborhood investigation in the vicinities where the applicant has resided and has been employed, or engaged in business, for at least the five years immediately preceding the filing of the application."[58] To carry out this task, CIS designated the FBI to complete a full criminal background check.[59] In the same regulation, CIS is

---

[51] Mocanu v. Mueller, No. 07-0445, 2008 WL 372459, at *6 (E.D. Pa. Feb. 8, 2008) (discussing how the Immigration and Naturalization Service, now CIS, added "'name check' requirements that never before existed in the naturalization process").

[52] *See* 8 U.S.C. §§ 1111, 1184 (2006); *Visas*, *supra* note 37 ("Before traveling to the U.S., a citizen of a foreign country must generally obtain a nonimmigrant visa for temporary stay or an immigrant visa for permanent residence."). Under the current immigration system, immigrant visas are distributed at prescribed levels, and are awarded generally to either "family-sponsored immigra[tion]" or "employment-based immigra[tion.]" § 1151.

[53] § 1427.

[54] §§ 1427, 1445(a); 8 C.F.R. § 316.4(a-b) (2011).

[55] *See* Etape v. Napolitano, 664 F. Supp. 2d 498, 506-07 (D. Md. 2009); *see also* U.S. CITIZENSHIP & IMMIGRATION SERVS., INSTRUCTIONS FOR N-400: APPLICATION FOR NATURALIZATION 2-5 (2011) [hereinafter INSTRUCTIONS].

[56] 8 U.S.C. § 1446 (2006).

[57] *Id.*

[58] 8 C.F.R. § 335.1 (2011).

[59] § 335.2 (amended by 76 FR 53764-01) (effective Nov. 28, 2011).

restricted from scheduling the next step (the initial examination) until it receives "a definitive response from the [FBI] that a full criminal background check of an applicant has been completed."[60]

Once CIS receives the FBI's response, an applicant must undergo testing to demonstrate "an understanding of the English language, including an ability to read, write, and speak words in ordinary usage in the English language . . . and a knowledge and understanding of the fundamentals of the history, and of the principles and form of government, of the United States."[61] After this step, CIS initiates the naturalization interview where a naturalization officer personally interviews the applicant and renders a decision on the application.[62] If the application is approved, the immigrant is naturalized through an oath of renunciation and allegiance and obtains a certificate of naturalization.[63]

If the application is denied, "the applicant may request a hearing before an immigration officer."[64] If the naturalization denial is affirmed at this hearing, the applicant may seek review with the district courts.[65] Overall, it is a long road, with plenty of chances for error. The second step (the background check) causes the greatest delays in the naturalization process and the most harm to applicants that await their completion.

III. The Delay in Background Checks

A. Background Check History and Process

CIS and the FBI attempt to process applications and background checks by a first-in, first-out policy.[66] The FBI background checks delay naturalization applicants when their application remains unprocessed longer than applications submitted at a later date. A majority of naturalization applications are processed quickly, with processing times generally ranging from four months to one year.[67] The FBI background checks

---

[60] § 335.2(b) (amended by 76 FR 53764-01) (effective Nov. 28, 2011).

[61] 8 U.S.C. § 1423(a) (2006).

[62] 8 C.F.R. §§ 316.14, 335.2 (2011) (amended by 76 FR 53764-01) (effective Nov. 28, 2011).

[63] 8 U.S.C. §§ 1448-49 (2006).

[64] § 1447(a).

[65] § 1421(c).

[66] Kakushadze v. Chertoff, No. 07 Civ. 8338(DF), 2008 WL 2885292, at *3 (S.D.N.Y. July 25, 2008); Karimushan v. Chertoff, No. 07-2995, 2008 WL 2405729, at *5 (E.D. Pa. June 11, 2008).

[67] *USCIS Processing Time Information*, U.S. Citizenship & Immigr. Services, https://egov.uscis.gov/cris/processTimesDisplayInit.do;jsessionid=abcNQcaWg4txi5BNz_ybt (last visited Oct. 21, 2011) (showing processing times at various field offices across the United States, given in real time upon city input).

entail a fingerprint check, a check against the Interagency Border Inspection System, and an FBI name check.[68] Most of the name checks submitted to the FBI take a short time to clear, even though the FBI processed over 3.4 million name checks in 2006, almost half of them at the request of CIS.[69] Some applications, however, require extended investigation time because their name check results in the applicant possibly being the subject of an FBI record.[70] Despite some attempts at eliminating FBI backlogs, delayed cases still surface.[71]

Seeking to compel adjudication, delayed applicants request relief under various legal theories and provisions. One theory plaintiffs pursue is that CIS's name check requirement exceeds the power granted by Congress.[72] Plaintiffs also look to the courts to compel CIS and the FBI to process their applications under various provisions, such as the Declaratory Judgment Act, the Mandamus Act, and, the focus of this article, the Administrative Procedure Act.[73] Many fear their application can be

---

[68] Olayan v. Holder, No. 1:08-cv-715-RLY-DML, 2009 WL 425970, at *1 (S.D. Ind. Feb. 17, 2009).

[69] *See, e.g*, *Kakushadze*, 2008 WL 2885292, at *3 (stating that the FBI returns sixty-eight percent of the name checks CIS submits within 48 to 72 hours); Rajput v. Makasey, No. C07-1029RAJ, 2008 WL 2519919, at *1 (W.D. Wash. June 20, 2008); Dawoud v. Dep't of Homeland Sec., No. 3:06-CV-1730-M (BH), 2007 WL 4547863, at *2 (N.D. Tex. Dec. 26, 2007).

[70] Mocanu v. Mueller, No. 07-0445, 2008 WL 372459, at *4 (E.D. Pa. Feb. 8, 2008).

[71] *See, e.g.*, Vara v. Cannon, No. 07-15222, 2008 WL 4852930, at *1 (E.D. Mich. Nov. 7, 2008) (discussing a joint plan between the FBI and CIS creating target completion goals for backlogged background checks); *Karimushan*, 2008 WL 2405729, at *1 ("[T]he FBI has undertaken numerous initiatives to reduce name check processing times . . . . However, as this case demonstrates, all delays have not been eliminated.").

[72] *See, e.g.*, Aronov v. Napolitano, 562 F.3d 84, 95-96 (1st Cir. 2009) ("It is true that Congress did not define for the agency what a full criminal background check was. Congress chose to let the USCIS, with its particular expertise, decide the content of . . . a full criminal background check. That delegation to USCIS is entirely sensible for a number of reasons . . . . It reached this conclusion after the terrorist attacks of September 11, 2001 and after it discovered that deficiencies in its previous screening process had resulted in the grant of naturalization to a man suspected of ties to [a] terrorist group . . . ." (citations omitted)). *But see Mocanu*, 2008 WL 372459, at *11. (finding CIS "moved beyond an interpretive rule" in requiring a name check).

[73] *See, e.g.*, Palamarachouk v. Chertoff, 568 F. Supp. 2d 460, 462-63 (D. Del. 2008). Declaratory Judgment requests often have been unsuccessful. *See, e.g.*, Sawan v. Chertoff, 589 F. Supp. 2d 817, 822 (S.D. Tex. 2008). The Mandamus Act provides, "[t]he district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff." 28 U.S.C. § 1361 (2006). Mandamus is an "extraordinary remedy" used "only to compel the performance of a 'clear nondiscretionary duty.'" Pittston Coal Grp. v. Sebben, 488 U.S. 105, 121 (1988) (citing Heckler v. Ringer, 466 U.S. 602, 616 (1984)). Mandamus relief is available only if a plaintiff establishes: "(1) a clear right to relief, (2) a

delayed indefinitely, and they seek an absolution—a decision on their application, regardless of whether that decision is to grant or deny the application—and look to the courts to order CIS or the FBI to complete the necessary steps.[74]

B. National Security Concerns

CIS implemented the name check after the attacks of September 11th heightened national security concerns, particularly because a number of the attackers were in the United States on visas.[75] In fact, "[e]ach of the hijackers . . . came easily and lawfully from abroad."[76] As a result, CIS reviewed its background investigation procedures in 2002, determined that more thorough background investigations were necessary, and implemented use of the FBI's name check program.[77] CIS and the FBI contend that national security concerns are at the heart of the delay in background checks.

---

clear duty by the respondent to do the act requested, and (3) the lack of any other adequate remedy." Davis v. Fechtel, 150 F.3d 486, 487 (5th Cir. 1998). The APA and Mandamus Act require similar showings, and are thus subject to the same standard. *Sawan*, 589 F. Supp. 2d at 822. Therefore, "for purposes of compelling agency action that has been unreasonably delayed, the mandamus statute and the APA are co-extensive." Qadir v. Gonzales, No. 07-3741(FLW), 2008 WL 2625314, at *3 (D.N.J. June 27, 2008) (quoting Han Cao v. Upchurch, 496 F. Supp. 2d 569, 575 (E.D. Pa. 2007)).

Because the Mandamus Act and the APA require similar showings and provide similar remedies, relief rests upon a finding of a clear, nondiscretionary duty. Some courts, however, have decided to apply the Mandamus Act over the APA. *See Olayan*, 2009 WL 425970; Ali v. Chertoff, No. 6:07-cv-1341-Orl-22KRS, 2008 U.S. Dist. LEXIS 81390 (M.D. Fla. Jan. 31, 2008); Anjum v. Hansen, No. 2:06-cv-00319, 2007 WL 983215, at *2 (S.D. Ohio Mar. 28, 2007) (finding a question of APA applicability under Ardestani v. Immigration & Nationality Servs., 502 U.S. 129 (1991)). Either way, to afford a remedy, CIS must have a clear, nondiscretionary duty to adjudicate applications. This article will focus on jurisdiction under the APA rather than the Mandamus Act or Declaratory Judgment Act.

74 Sidhu v. Chertoff, No. 1:07-CV-1188 AWI SMS, 2008 WL 540685, at *1 (E.D. Cal. Feb. 25, 2008) (noting that plaintiff "is not asking the court to deny or grant her application. Rather, Plaintiff asks the court to compel Defendants to process her case to conclusion.").

75 *National Commission on Terrorist Attacks Upon the United States: Seventh Public Hearing on Entry of the 9/11 Hijackers Into the U.S.*, 108th Cong. 1-2, 9-10 (2004) (Staff Statement No. 1) [hereinafter *Seventh Public Hearing*] ("As we know from the sizable illegal traffic across our land borders, a terrorist could attempt to bypass legal procedures and enter the United States surreptitiously. None of the 9/11 attackers entered or tried to enter our country this way. So today we will focus on the hijackers' exploitation of legal entry systems." Also stating that the hijackers needed visas to enter, and four of the hijackers' passports were recovered from the ruins after the attack and finally, discussing the need for changes within the immigration system.).

76 *Id.*

77 *Mocanu*, 2008 WL 372459, at *7.

These general national security concerns are the reason some courts find that jurisdiction does not exist over CIS or the FBI; they are unwilling to interfere with national security.[78] Some courts find the executive branch is better suited to address applicants' concerns.[79] Similarly, some courts feel that a finding of jurisdiction would cause the courts to cross the boundary from the judicial branch to the executive branch and interfere with its functioning.[80] These courts discuss that imposition of a court-defined reasonable time frame on adjudication would amount to a judicial determination of what is essentially an executive function—the pace of adjudication.[81]

Courts finding jurisdiction over the pace of adjudication discuss that national security is a strong concern and "judicial deference to the Executive Branch is especially appropriate in the immigration context;"[82] however, a finding of jurisdiction does not harm these concerns. These courts maintain that if delayed applicants really are a national security threat, delaying a decision on their naturalization applications does not relieve that threat.[83] This is because delaying adjudication to those that do not meet the good moral character requirement and actually pose a threat to national security allows them to lawfully remain in the United States for a number of years.[84] Additionally, courts point out that an allegation of general national security concerns, without a showing of how these con-

---

[78] *See* Memic v. Holder, No. 4:10-CV 1692, 2011 WL 1361563, at *6 (E.D. Mo. Apr. 11, 2011); Lauren E. Sasser, *Waiting in Immigration Limbo: The Federal Court Split Over Suits to Compel Action on Stalled Adjustment of Status Applications*, 76 FORDHAM L. REV. 2511, 2538-39 (2008) (discussing similar concerns cited for cases of delay involving lawful permanent resident applications).

[79] *See Memic*, 2011 WL 1361563, at *6; Karimushan v. Chertoff, No. 07-2995, 2008 WL 2405729, at *5 (E.D. Pa. June 11, 2008) (quoting Daraji v. Monica, No. 07-1749, 2008 WL 183643 (E.D. Pa. Jan. 18, 2008)) (discussing that courts are not in a position to fix CIS systemic delays, such as insufficient funding or computerization of data); Sasser, *supra* note 78.

[80] *See Memic*, 2011 WL 1361563, at *6 (affording deference to the Executive Branch for adjudication because it involves matters such as international relations, national security, and governmental funding).

[81] *See, e.g.*, *id.* (discussing that the judiciary is not sufficiently informed on executive matters such as national security to judge whether a naturalization application is delayed unreasonably and cannot order more funding to meet the staff demands that a reasonable time frame would impose).

[82] INS v. Aguirre-Aguirre, 526 U.S. 415, 425 (1999).

[83] *See* Rajput v. Mukasey, No. C07-1029RAJ, 2008 WL 2519919, at *6 (W.D. Wash. June 20, 2008).

[84] *Karimushan*, 2008 WL 2405729, at *6 ("[I]f there is some legitimate national security risk posed by plaintiffs or other applicants currently living and working in the United States, this 'surely militates in favor of prompt security checks, not in favor of delays.'" (quoting *Daraji*, 2008 WL 183643, at *7)).

cerns relate to a particular applicant, is not enough to warrant CIS and the FBI's complete discretion for pace of adjudication.[85] Even if an immigrant is naturalized and later found to be a threat to national security, CIS may revoke his naturalization.[86] Given this context, the harms from delayed adjudication outweigh a general concern for national security.

C. Consequences of Delayed Adjudication

Delayed adjudication causes several negative consequences, including a physical and emotional toll resulting from an uncertain status, preclusion from citizenship benefits, and expenditure of time and money. While lawful permanent residents retain a right to travel abroad,[87] awaiting naturalization puts a damper on an immigrant's travel plans because of the concern that he may lose his status by leaving the United States. There are a number of statutory requirements a prospective citizen must meet that requires his continuous presence in the United States. Naturalization requires that one be a lawful permanent resident for five years, maintain continuous residence, and maintain physical presence within the United States until naturalized.[88]

Maintaining all these requirements as a lawful permanent resident is precarious because status adjustments are at the discretion of CIS. They are considered a privilege and not a right,[89] so the status of a lawful permanent resident may be revoked at any time.[90] To maintain lawful per-

---

[85] *See id* (finding insufficient evidence of reasonableness in agency delay "[w]ithout a specific demonstration that the [Plaintiffs] themselves pose a national security risk causing uncommon complications in their applications for naturalization").

[86] *Rajput*, 2008 WL 2519919, at *6 (citing 8 U.S.C. § 1451 (2006); Gorbach v. Reno, 219 F.3d 1087, 1093-94 (9th Cir. 2000)).

[87] *Karimushan*, 2008 WL 2405729, at *4, n.7.

[88] *See* 8 U.S.C. § 1427(a) (2006); *see also* Abulkhair v. Bush, 413 F. App'x 502, 508 (3rd Cir. 2011) (finding production of cancelled checks, a gas bill, indication of income tax filing, and various other documents insufficient to meet burden of continuous residence and physical presence for the purposes of granting plaintiff's naturalization application when all documents contained a P.O. address rather than a permanent residence).

[89] *See* 8 U.S.C. §§ 1252(a)(2)(B), 1255(a), 1421(a) (2006); U.S. CITIZENSHIP & IMMIGRATION SERVS., WELCOME TO THE UNITED STATES: A GUIDE FOR NEW IMMIGRANTS 7 (2007) [hereinafter WELCOME]. Some courts use Section 1255 of the Immigration and Nationality Act to support this argument. *See* Arbesu v. Keisler, No. 07-22914-CIV, 2008 WL 1914864, at *2 (S.D. Fla. Apr. 28, 2008) (finding naturalization is a privilege and citing 8 U.S.C. § 1255 (2006) as support).

[90] WELCOME, *supra* note 89.

manent resident status, one must have the intent to remain within and become a citizen of the United States.[91]

If an applicant leaves the United States for too long, he may interrupt his continuous residence and may be subject to revocation of his status as a lawful permanent resident.[92] Any trip outside the United States over six months in length interrupts one's continuous residence.[93] Any trip outside the United States over one year subjects an applicant to losing all the continuous residence time he accumulated *before* the trip.[94] Thus, permanent residents may have to re-accumulate time or may be denied their status altogether. Even if a lawful permanent resident only wants to take a short trip (less than six months) outside the United States, he must account for it as a part of his naturalization application if it exceeds twenty-four hours.[95]

In a good faith attempt to comply with the regulations set forth by CIS, especially establishing intent to remain,[96] an immigrant may choose to remain close to his United States home despite having family elsewhere.[97] This restraint on travel does not seem a large price to pay when an average date of adjudication remains within normal processing times of four months to a year. However, given that lawful permanent resident status is revocable by CIS and that time outside the United States may cause interruption in one's required physical presence, an indefinite timeline on adjudication increases the uncertainty and, thus, the concern of an immigrant wishing to travel.

---

[91] *Id.* at 10. While an intent to remain in the United States may help immigrants, it actually hurts non-immigrants present in the United States. *See, e.g.*, Patel v. Immigration & Nationality Servs., 738 F.2d 239, 242 (1984) (intent to remain while in possession of a non-immigrant visa was enough for CIS to find ineligibility).

[92] WELCOME, *supra* note 89, at 10.

[93] *Id.*; *see also* Gildernew v. Quarantillo, 594 F.3d 131 (2nd Cir. 2010) (upholding denial of naturalization when Plaintiff failed to return to the United States after one year, even though the Transportation Security Administration erroneously prevented his return); Abdul-Khalek v. Jenifer, 890 F. Supp. 666 (E.D. Mich. 1995) (holding that an eleven month absence from the United States broke Plaintiff's continuity of residence).

[94] 8 C.F.R. §§ 316.14, 335.2 (2011) (amended by 76 FR 53764-01) (effective Nov. 28, 2011); WELCOME, *supra* note 89, at 10.

[95] INSTRUCTIONS, *supra* note 55, at 3.

[96] WELCOME, *supra* note 89, at 10.

[97] The Supreme Court recognizes the right to travel across state lines. *See* Saenz v. Roe, 526 U.S. 489, 500-01 (1999). This right, however, does not extend to freedom of travel across a U.S. border. *See* Mathews v. Diaz, 426 U.S. 67, 85-86 (1976) (finding "it is not 'political hypocrisy' to recognize that the Fourteenth Amendment's limits on state powers are substantially different from the constitutional provisions applicable to the federal power over immigration and naturalization").

Finally, because unforeseeable events may preclude one out of the country from re-entry or from timely re-entry, applicants may choose not to travel in fear they will miss their naturalization interview. If an applicant misses his interview but gives notice, rescheduling may add several months to the naturalization process.[98] If an applicant misses his interview without notice and does not reschedule within one year, his application is denied.[99]

Delayed adjudication also precludes immigrants from exercising the full benefits of United States citizenship. Lawful permanent residents are not privy to certain citizenship rights: voting, becoming an elected official, and traveling with a U.S. Passport.[100] Further, once one is a citizen, he may sponsor immediate, alien relatives.[101] The relatives are then given priority with no waiting period.[102] Even though these benefits of citizenship are considered a privilege and not a right,[103] an applicant that complies with all naturalization application requirements of CIS should have a right to adjudication.

Part of obtaining the benefits of citizenship is proving good moral character, which is done partially through the FBI background check.[104] If the background check is not complete, then the good moral character requirement remains incomplete, and withholding the privilege of citizenship is not necessarily a harm because it is not yet a vested right. At the stage of a delayed background check, however, an applicant normally has provided all that is requested of him by CIS—presumably, the applicant submitted everything necessary to determine whether he has met the good moral character requirement.[105] Additionally, when he follows up on a delayed application and is not told any details of the reason for

---

98 WELCOME, *supra* note 89, at 10.

99 *Id.*

100 *Id.* at 90-91.

101 U.S. CITIZENSHIP & IMMIGRATION SERVS., I AM A U.S. CITIZEN: HOW DO I HELP MY RELATIVE BECOME A U.S. PERMANENT RESIDENT 1 (2008) [hereinafter RESIDENT]; *see* Sawan v. Chertoff, 589 F. Supp. 2d 817, 821 (S.D. Tex. 2008) (discussing that Sawan desired expedited treatment because he wished to sponsor his mother who was ill and abroad); Kakushadze v. Chertoff, No. 07 Civ. 8338(DF), 2008 WL 2885292, at *1 (S.D.N.Y. July 25, 2008) (Plaintiff wished to be naturalized as soon as possible to sponsor his mother who was subject to dire political and economic conditions in her home country); Moretazpour v. Chertoff, No. C 07-4264 BZ, 2007 WL 4287363, at *1 (N.D. Cal. Dec. 5, 2007) (Plaintiff's urgency to have his naturalization application adjudicated was due in part to his desire to sponsor his wife).

102 RESIDENT, *supra* note 101.

103 *See supra* note 89.

104 *See supra* notes 55-56 and accompanying text.

105 Musabji & Abraham, *supra* note 26, at 86.

delay,[106] nor provided any further means with which he may prove his good moral character to resolve the issue which created the delay, then he has complied with all requirements and should receive a definitive response in a reasonable time frame.

Immigrants also expend time and money, including time off work, in meeting the requirements to be naturalized.[107] If the prospective citizen brings suit in court due to the delay, both the prospective citizen and the governmental agencies expend time and money. Finally, other emotional strains may attach to an uncertain status for which no particular answers are offered.[108] Having an uncertain status, or one that is subject to denial or revocation, makes it difficult to fully invest in a country when one may not be privy to living there in the future.

IV. Pace of Adjudication and the Jurisdiction Stripping Provisions of the INA

Jurisdiction-stripping provisions of the INA extend to both lawful permanent resident and naturalization provisions, such that Congress placed adjudication for both applications under control of the executive branch.[109] Some courts deciding whether they have jurisdiction over the pace of adjudication for naturalization applications support their holding with statutory provisions pertaining to applications for lawful permanent resident status.[110] Similarly, CIS and the FBI often cite the jurisdiction-stripping provisions for lawful permanent resident applications to support dismissal in naturalization application cases.[111] Differences in Congress's construction of these two provisions, however, lead to different results in the question of jurisdiction. In fact, it is likely that Congress intended to impose a reasonable time frame on CIS and the FBI in adjudication of

---

[106] *Id.* (discussing that immigrants following up on delayed naturalization applications are often told only that "'no information on your application is currently available' or 'your case is not yet ready for a decision,' or 'a required investigation into your background remains open'").

[107] *See* Palamarachouk v. Chertoff, 568 F. Supp. 2d 460, 463 (D. Del. 2008) (Plaintiff claimed injury in being denied the benefits of citizenship and loss of significant work time).

[108] *See* Karimushan v. Chertoff, No. 07-2995, 2008 WL 2405729, at *4 (E.D. Pa. June 11, 2008) (Plaintiff asserted that he "suffered the stress and psychological pressure in awaiting the outcome of this arduous process.").

[109] *See* 8 U.S.C. §§ 1252, 1421(a) (2006).

[110] *E.g.*, Arbesu v. Keisler, No. 07-22914-CIV, 2008 WL 1914864, at *2 (S.D. Fla. Apr. 28, 2008) (citing 8 U.S.C. § 1255 (2006) to support the idea that naturalization is a privilege rather than a right).

[111] *E.g.*, Bondarenko v. Chertoff, No. 07-mc-00002, 2007 WL 2693642, at *3 (W.D.N.Y. Sept. 11, 2007) (discussing the jurisdiction-stripping provision 8 U.S.C. § 1252 (2006) for a lawful permanent resident application).

naturalization applications while it did not in lawful permanent resident applications.

A. Jurisdiction Stripping for Lawful Permanent Resident Status

1. Courts Finding No Jurisdiction Under the APA

The Immigration subchapter of the INA, under 8 U.S.C. § 1252, contains the jurisdiction stripping provision for lawful permanent resident applications. The issue of whether CIS and the FBI have complete discretion for the pace of adjudication of lawful permanent resident applications has generated disagreement among the courts.[112] Some appellate courts have found for CIS and the FBI, either by finding an absence of jurisdiction or finding the delay reasonable.[113]

Courts finding a lack of jurisdiction over lawful permanent resident applications generally cite the jurisdiction-stripping provisions of the INA. The jurisdiction-stripping provision for lawful permanent resident applications provides:

> [n]otwithstanding any other provision of law (statutory or nonstatutory) . . . and [28 U.S.C.] sections 1361 and 1651 . . . no court shall have jurisdiction to review - - (i) any judgment regarding the granting of relief under section 1182(h), 1182(I), 1229(b), 1229(c), or 1255 of this title, or (ii) any other decision or action of the Attorney General or the Secretary of Homeland Security the authority for which is specified under this subchapter to be in the discretion of the Attorney General or the Secretary of Homeland Security.[114]

---

[112] *Compare, e.g.*, Zhu v. Chertoff, 525 F. Supp. 2d 1098 (W.D. Mo. 2007) (finding Government is subject to a reasonable time frame and does not have unfettered discretion as to adjudication of a lawful permanent resident), *with* Diini v. Hansen, No. 2:08-cv-357, 2008 WL 4758686 (S.D. Ohio Oct. 27, 2008) (finding Government is not subject to a reasonable time frame and has discretion as to adjudication of a lawful permanent resident).

[113] *See* Bian v. Clinton, 605 F.3d 249, 255 (5th Cir. 2010), *vacated*, No. 09-10568, 2010 WL 3633770 (2010) (finding the court lacked jurisdiction because discretion as to pace of adjudication was completely within the executive branch); Debba v. Heinauer, 366 F. App'x 696, 699 (8th Cir. 2010) (not addressing whether a delay of no action could be a violation of the APA, but finding that as long as there is some action by the Government the delay is not unreasonable).

[114] 8 U.S.C. § 1252(a)(2) (2006). The Attorney General delegated this authority to DHS and CIS. 6 U.S.C. §§ 271, 557 (2006); Rajput v. Mukasey, No. C07-1029RAJ, 2008 WL 2519919, at *4 (W.D. Wash. June 20, 2008).

Lawful permanent resident applications are adjudicated pursuant to 8 U.S.C. § 1255(a), which states:

> The status of an alien . . . may be adjusted by the Attorney General, in his discretion and under such regulations as he may prescribe, to that of an alien lawfully admitted for permanent residence if (1) the alien makes an application for such adjustment, (2) the alien is eligible to receive an immigrant visa and is admissible to the United States for permanent residence, and (3) an immigrant visa is immediately available to him at the time his application is filed.[115]

Under these provisions, Congress made it clear that it intended to place discretion for the pace of adjudication solely within the executive branch. First, the provision explicitly states that no court has jurisdiction for the granting of relief under Section 1255.[116] This restriction is "[n]otwithstanding any other provision of law" and specifically lists provisions that would impose a reasonable time frame, such as the Mandamus Act.[117] Next, the statute eliminates "any other decision or action," which is specified at the discretion of the Attorney General.[118]

As a result, status adjustments for lawful permanent residents are placed explicitly within the Attorney General's discretion in Section 1255. This discretion arguably includes the decision to withhold adjudication because status adjustments are permissive rather than mandatory. Section 1255 states both that (1) the Attorney General *may* adjust an alien's status and (2) status adjustment is conditioned upon the availability of a visa at the time the application is filed.[119] Courts finding no jurisdiction also point out that while regulations may indicate adjudication of the application is mandatory, with phrases such as the applicant "shall be notified," this is not the same as having an express statutory provision requiring that CIS "shall adjudicate."[120] Thus, all of these provisions demonstrate that Congress's intent was to place status adjustment for lawful permanent resident applications, including the withholding of adjudication, within CIS's discretion.[121]

---

115 8 U.S.C. § 1255(a) (2006).
116 § 1252(a)(2).
117 *Id.*
118 § 1252(a)(2)(B)(ii).
119 § 1255(a).
120 Sasser, *supra* note 78, at 2534.
121 *See* Bian v. Clinton, 605 F.3d 249, 253-56 (5th Cir. 2010), *vacated*, No. 09-10568, 2010 WL 3633770 (2010) (finding discretion of pace to be fully within the executive branch when

2. Courts Finding Jurisdiction Under the APA

Given the explicit statutory language indicating Congress's preference for CIS's discretion, courts finding jurisdiction must explain why the jurisdiction-stripping and discretionary language is inapplicable under the APA. These courts do so by finding a narrow interpretation of the terms "decision or action."[122] From this, courts read CIS's discretion as pertaining only to "actual discretionary decisions" and find that a "complete inaction and failure to make any decision" is not a discretionary decision within the meaning of the statutory language.[123] While these statutory hurdles for lawful permanent resident cases require extended explanation by the courts finding jurisdiction under the APA, the same hurdles do not exist for naturalization applications.

3. Comparison of Statutory Construction for Naturalization Applications

Naturalization suits closely parallel those of lawful permanent resident suits for unreasonable delay of adjudication. Some key differences between the two situations, however, arguably lead to a different result, such that the APA should apply in naturalization cases. First, different statutory provisions govern the granting of lawful permanent resident status and the granting of citizenship status.[124] This brings into question statutory language different than that for adjudication of lawful permanent resident applications.[125] Section 1252(a)(2)(B)(i) does not specifically mention adjudication of naturalization applications in its listed exceptions to relief as it does lawful permanent resident applications,[126]

CIS withheld adjudication on an lawful permanent resident because it did not have the available visas; the Court based much of their analysis on statutory language of 8 U.S.C. §§ 1252, 1255 (2006), stating: "If Congress had intended for only the USCIS's ultimate decision to grant or deny an application to be discretionary—as distinguished from its interim decisions made during the adjudicative process—then the word "action" would be superfluous.").

122 Sasser, *supra* note 78, at 2545.

123 *Id.*

124 8 U.S.C. §§ 1151-1252, 1401, 1421(a) (2006).

125 §§ 1252, 1421(a).

126 § 1252(a)(2)(B)(i) (eliminating jurisdiction to review any judgment regarding the granting of relief under section 1182(h), allowing an inadmissibility waiver for certain marijuana offenses under 1182(i), allowing a waiver to inadmissibility for fraud or willful misrepresentation if such person is a spouse, son, or daughter to a U.S. citizen and denial would result in extreme hardship under 1229(b), allowing the cancellation of removal if an alien meets certain qualifications, including that removal would cause hardship to the alien's spouse, parent, or child who must be a U.S. citizen under 1229(c), listing exceptions to 1229(b) under 1255, and setting out lawful permanent resident requirements).

and further exceptions should not be implied.[127] Second, Congress did not include a similar provision in the naturalization section of the INA.[128] This gives rise to an inference that Congress did not intend to preclude claims under the APA for naturalization applications, while it did intend such for lawful permanent resident applications.[129]

Congress also specifically limited the reach of the lawful permanent resident jurisdiction-stripping provision. Section 1252 is contained within a separate subchapter from the section of the INA that addresses naturalization. In fact, 8 U.S.C. § 1252(a)(2)(B)(ii) cancels jurisdiction for any "decision or action . . . specified *under this subchapter* to be in the discretion of the Attorney General."[130] Naturalization applications are not within the Immigration subchapter, which is subchapter II, but are within the Nationality and Naturalization subchapter, which is subchapter III.[131] The jurisdiction-stripping provision of the INA for lawful permanent resident applications is not relevant in naturalization cases. Thus, Section 1252's language prohibiting jurisdiction of the courts for lawful permanent resident cases does not apply to naturalization cases.

B. Jurisdiction Stripping for Naturalization

8 U.S.C. § 1447 contains the jurisdiction-stripping provision for naturalization applications. The statutory language that covers naturalization does allow for overlay of a reasonable time frame under the APA or Mandamus Act because it creates a clear, nondiscretionary duty for CIS to adjudicate applications. The naturalization provision of the INA vests "the sole authority to naturalize persons . . . upon the Attorney General."[132] Naturalizing persons, therefore, is outside a court's jurisdiction.

Applicants are not asking the courts, however, to naturalize them; they are asking only to compel CIS and the FBI to make a decision as to

---

127 Andrus v. Glover Const. Co., 446 U.S. 608, 617-18 (1980) ("Where Congress explicitly enumerates certain exceptions . . . additional exceptions are not to be implied . . . .").

128 *See* 8 U.S.C. § 1421(a) (2006) (stating only "[t]he sole authority to naturalize persons as citizens of the United States is conferred upon the Attorney General.").

129 *See* Hamdan v. Rumsfeld, 548 U.S. 557, 577-78 (2006) ("A familiar principle of statutory construction . . . is that a negative inference may be drawn from the exclusion of language from one statutory provision that is included in other provisions of the same statute.").

130 8 U.S.C. § 1252(a)(2)(B)(ii) (2006) (emphasis added).

131 Subchapter II, entitled "Immigration," begins at 8 U.S.C. § 1151 (2006) and contains 8 U.S.C. § 1252 (2006). Subchapter III, entitled "Nationality and Naturalization," begins at 8 U.S.C. § 1401 (2006) and contains the relevant naturalization provisions.

132 8 U.S.C. § 1421(a) (2006).

their naturalization application.[133] While Congress did not explicitly preclude jurisdiction under the APA or Mandamus Act, as it did with lawful permanent resident applications, courts question whether specific grants of jurisdiction under Section 1447 prevent a general grant of jurisdiction under the APA.

1. Specific Grants of Jurisdiction Preclude Jurisdiction Under the APA

Courts finding a lack of jurisdiction often conclude that because Section 1447 provides two specific instances of judicial jurisdiction, Congress did not intend the courts to have general jurisdiction under the APA over the pace at which naturalization applications are processed.[134] The naturalization statute provides two explicit instances of jurisdiction for the courts.[135] The first instance occurs "[i]f, after an examination . . . an application for naturalization is denied, the applicant may request a hearing before an immigration officer."[136] Therefore, if the naturalization application is denied after that hearing, the applicant may request court review.[137] The second instance occurs "[i]f there is a failure to make a determination . . . before the end of the 120-day period after the date on which the examination is conducted."[138]

---

133 *See, e.g.*, Sidhu v. Chertoff, No. 1:07-CV-1188 AWI SMS, 2008 WL 540685, at *1 (E.D. Cal. Feb. 25, 2008) ("Plaintiff points out that she is not asking the court to deny or grant her application. Rather, Plaintiff asks the court to compel Defendants to process her case to conclusion.").

134 Ivakin v. Hansen, No. 5:07CV3227, 2008 WL 5725580, at *1 (N.D. Ohio Aug. 12, 2008).

135 8 U.S.C. § 1447(a)-(b) (2006).

136 § 1447(a).

137 §§ 1421(c), 1447(a).

138 § 1447(b). District courts have disagreed as to whether "examination" within Section 1447 means the naturalization interview or completion of the entire naturalization process, including the background check. *See* Walji v. Gonzales, 500 F.3d 432, 434-35 (5th Cir. 2007) ("Whether the district court has jurisdiction hinges . . . upon the statutory application of the term "examination" in § 14479(b). The Government argues that the term "examination" refers to the entire investigative process, including the FBI's security check of an applicant . . . Numerous district courts have decided the issue, reaching opposite conclusions."). Some circuit courts have recognized the issue and defined examination to mean the naturalization interview. *See* Bustamante v. Napolitano, 582 F.3d 403, 409 (2d Cir. 2009) (finding exclusive jurisdiction 120 days after the initial interview); Aronov v. Napolitano, 562 F.3d 84, 97 (1st Cir. 2009) (reciting the Government's argument that § 1447 confers jurisdiction 120 days after the interview); *Walji*, 500 F.3d at 439 (finding Congress's intent to be the 120-day clock begins to run upon the naturalization interview and after such time, the courts have jurisdiction); Etape v. Chertoff, 497 F.3d 379, 384 (4th Cir. 2007) (finding § 1447 vests the district courts with exclusive jurisdiction 120 days after

Additionally, the APA provides that a reasonable time frame on agency action may not apply if "statutes preclude judicial review[,] or agency action is committed to agency discretion by law."[139] Because two explicit instances are given for court jurisdiction over naturalization applications and no explicit instance of jurisdiction is given for the pace of adjudication, this provision is used as support that Congress intended the pace of adjudication to be at CIS's discretion.[140] Although Section 1447 provides specific instances of a court's jurisdiction to naturalize, these provisions do not preclude overlay of the APA. The specific instances of jurisdiction granted under Section 1447 relate only to adjudication, not the pace of adjudication, and Congress intended to impose a reasonable time frame for pace of adjudication of naturalization applications.

2. Congressional Intent Supports a General Jurisdiction Under the APA

A grant of jurisdiction under Section 1447 indicates Congress only wanted courts to have jurisdiction to adjudicate applications under the specified conditions. However, it does not necessarily preclude the idea that Congress intended to strip the courts of jurisdiction under the APA. The APA provision precluding judicial review when "agency action is committed to agency discretion by law"[141] does not apply to *any* discretionary agency conduct, but only applies to narrow situations when "the statute ('law') can be taken to have 'committed' the decision-making to the agency's judgment *absolutely*."[142] This interpretation applies, even when a "statute grants broad discretion to an agency," unless a reading of the statutory scheme and other relevant materials "provides absolutely no guidance as to how that discretion is to be exercised."[143] Thus, even if CIS and the FBI have discretion as to *how* the background check or natu-

---

the naturalization interview); United States v. Hovsepian, 359 F.3d 1144, 1151 (9th Cir. 2004), *en banc*, (defining examination under § 1447 as "120 days [after] an applicant's first interview"). The trend in the courts is that jurisdiction exists if naturalization applications are not adjudicated within 120 days after the naturalization interview.

139 5 U.S.C. § 701(a) (2006).

140 *See* Hani v. Gonzales, No. 3:07-CV-517-S, 2008 WL 2026092, at *3 (W.D. Ky. May 8, 2008).

141 *Id.*

142 Natural Res. Def. Council, Inc. v. Fox, 30 F. Supp. 2d 369, 378 (S.D.N.Y. 1998) (quoting Heckler v. Chaney, 470 U.S. 821, 830 (1985) (emphasis added)).

143 *Id.* (quoting Robbins v. Reagan, 780 F.2d 37, 45 (D.C. Cir. 1985)).

ralization application comes out, they do not have discretion to unreasonably withhold those decisions.[144]

Congress had a number of intentions when it stripped the courts of jurisdiction to adjudicate naturalization applications. First, Congress intended to place *adjudication* in the hands of the executive department.[145] Traditionally, the courts adjudicated naturalization applications once they received a recommendation from the Immigration and Naturalization Service ("INS"), CIS's predecessor.[146] The change to administrative naturalization was meant to be a formal change because courts adopted most INS recommendations.[147] Second, by stripping the courts of jurisdiction, Congress actually intended to *speed up* the process of naturalization[148] by streamlining it.[149] Third, while Congress's concern in streamlining the process was with applicants who were past the background check and awaiting only the formal naturalization, the change was also meant to bring certainty and order to the process as a whole. Congress desired to create a "more consistent policy with respect to advising applicants of the disposition and status of their case."[150] Now, however, delays in the background check frustrate certainty.

When the Immigration Act of 1990 passed, Congress had concerns about lengthy background checks where applications were put on the

---

144 *Id.* (finding that while the Environmental Protection Agency had some discretion as to when it deemed state inaction a "constructive submission," it did not have unfettered discretion.).

145 8 U.S.C. § 1421(a) (2006).

146 H.R. REP. NO. 99-905, at 4 (1986). While Congress made naturalization an administrative function through the Immigration Act of 1990, it had been discussing this change for a number of years; thus congressional history of the Naturalization Amendments of 1986, which also sought administrative naturalization but was not enacted, is discussed as relevant to Congress' intent for passing the Immigration Act of 1990. *See* Naturalization Amendments of 1986, H.R. REP. 5558, 99th Cong. (1986); *see also* IGOR KAVASS & BERNARD REAMS, JR., THE IMMIGRATION ACT OF 1990: LEGISLATIVE HISTORY OF PUB. L. NO. 101-649, v-viii (vol. 23, 1997).

147 H.R. REP. NO. 99-905, at 4.

148 United States v. Hovsepian, 359 F.3d 1144, 1163 (9th Cir. 2004) (citing H.R. REP. NO. 101-187, at 8 (1989); 135 Cong. Rec. H4539-02, H4542 (1989) (statement of Rep. Morrison; statement of Rep. Smith)) ("A central purpose of [the Immigration Act of 1990] was to reduce the waiting time for naturalization applicants . . . . Further, in enacting the statute Congress intended to streamline the process of applying for naturalization and intended to reduce the burdens on courts and the INS.").

149 H.R. REP. NO. 99-905, at 2 ("Fully qualified applicants must wait two years . . . to be sworn in as a U.S. citizen. This, of course, affects employment opportunities, travel plans, and conferring of immigration benefits on relatives, and most importantly, deprives these individuals of their right to vote.").

150 H.R. REP. NO. 99-905, at 2.

backburner and held until they could be closed for lack of prosecution.[151] This concern was addressed by directing the "Attorney General to monitor processing time on all applications for naturalization so that cases with unduly long 'lag time' [could] be reviewed and performance and lack of determination investigated."[152] Currently, the Attorney General requires that if a naturalization application "has not been completed within one year of its inception, the district director shall review" the matter.[153] While this provides some oversight regarding the reasonableness of delay, it does not prevent that delay from exceeding beyond the first year.

The ability of an applicant to receive a prompt decision on his application was, to Congress, an important feature of the naturalization process. Regarding adjudication by the immigration board, Congress stated: "It is expected that the Service in all cases will move expeditiously after full investigation of the facts to calendar cases for decision-making . . . . Although . . . exigent circumstances [may] . . . justify a longer processing time, these complex cases must come to resolution at some point . . . ."[154] This sentiment mirrors Congress's feelings on allowing an applicant judicial review of a denied application. Congress stated, "[c]itizenship is the most valued possession of this land and applicants should receive full recourse to the Judiciary before depriving a person of that act."[155] Without a finding of jurisdiction under the APA, however, an infinite delay on background checks deprives an applicant of both processes, the very things Congress wanted to ensure applicants had access to.

Congress never intended unlimited adjudication time, and it actually created the Immigration Act of 1990 to achieve the opposite effect—certainty and efficiency. The process was, therefore, not tailored to include in-depth background checks; at the time of transfer there were "few grounds for denial of naturalization applications—principally, English language and knowledge of U.S. History and Government."[156] While the events of September 11th may have created the need for greater background checks and, thus, greater processing times,[157] the statutory foundation was designed for the opposite. Thus, overlay of a reasonable time

---

151 *Id.* at 6.

152 *Id.*

153 8 C.F.R. § 103.2(b)(18) (2011).

154 H.R. REP. NO. 99-905, at 8.

155 *Id.*

156 *Id.* at 5.

157 *Seventh Public Hearing*, *supra* note 75; *see* Mocanu v. Mueller, No. 07-0445, 2007 WL 2916192, at *7 (E.D. Pa. Oct. 3, 2007).

frame from the APA is in line with Congressional intent for the naturalization process.

V. Establishing Jurisdiction to Compel CIS for Delayed Naturalization Applications

To maintain jurisdiction under the APA, an applicant must show that CIS has a clear, nondiscretionary duty to adjudicate a naturalization application within a reasonable time.[158] In absence of this duty, courts lack jurisdiction because the pace of adjudication is wholly at the discretion of the executive branch.[159] Simply, if statutory language in the INA does not create a clear, nondiscretionary duty, courts have no legal right to enforce and thus lack jurisdiction.[160]

While there remains a great deal of inconsistency in the district courts, both statutory language and policy support the existence of a clear, nondiscretionary duty requiring CIS to adjudicate naturalization applications in a reasonable time frame. Congress, however, prohibits CIS from processing applications without completion of the background check. Therefore, when CIS has done everything it can to expedite an application, courts must decide whether they can compel the FBI to complete the background check so CIS may adjudicate an application.

A. Courts Finding No Jurisdiction to Compel CIS

Uncertainty on this issue leaves some immigrants with a remedy and others without one. Courts are well divided as to whether there exists a clear, nondiscretionary duty to adjudicate naturalization applications and, thus, a valid claim for relief under the APA.[161] In addition, there is also

---

158 *See* Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 61 (2004).

159 *See* 5 U.S.C. § 701 (2006) (The APA does not apply when "(1) statutes preclude judicial review; or (2) agency action is committed to agency discretion by law."); Memic v. Holder, No. 4:10 CV 1692 DDN, 2011 WL 1361563, at *1 (E.D. Mo. April 11, 2011).

160 *See* Marbury v. Madison, 5 U.S. 137 (1803) (discussing a court's ability to enforce a ministerial duty).

161 Several courts have found subject matter jurisdiction exists under the APA or Mandamus Act. Some courts have found subject matter jurisdiction over CIS but not the FBI. Hadad v. Scharfen, No. 08-22608-CIV, 2009 WL 654019 (S.D. Fla. Mar. 12, 2009); Sawan v. Chertoff, 589 F. Supp. 2d 817 (S.D. Tex. 2008); Abdi v. Chertoff, No. 6:08-cv-292-Orl-19DAB, 2008 WL 4371351 (M.D. Fla. Sept. 22, 2008); Ali v. Frazier, 575 F. Supp. 2d 1084 (D. Minn. 2008); Palamarachouk v. Chertoff, 568 F. Supp. 2d 460 (D. Del. 2008) (rendering claims against FBI moot); Abdulmajid v. Arellano, No. CV 08-796-GHK (VBKx), 2008 WL 2625860 (C.D. Cal. June 27, 2008); Hamandi v. Chertoff, 550 F. Supp. 2d 46 (D.D.C. 2008); Sidhu v. Chertoff, No. 1:07-CV-1188 AWI SMS, 2008 WL 540685 (E.D. Cal. Feb. 25, 2008); Ali v. Chertoff, No. 6:07-cv-1341-Orl-22KRS, 2008 U.S. Dist. LEXIS 81390 (M.D.

disagreement between the courts about whether a duty applies to CIS,

Fla. Jan. 31, 2008); Costa v. Chertoff, No. 07-2467, 2007 WL 4456218 (E.D. Pa. Dec. 11, 2007); Sharawneh v. Gonzales, No. 07-683, 2007 WL 2684250 (E.D. Pa. Sept. 10, 2007); Hanbali v. Chertoff, No. 3:07-CV-50-H, 2007 WL 2407232 (W.D. Ky. Aug. 17, 2007).

Some courts have found subject matter jurisdiction as to the FBI but not CIS. Abdalla v. Mukasey, No. C07-1767RAJ, 2008 WL 3540201 (W.D. Wash. Aug. 11, 2008); Kakushadze v. Chertoff, No. 07 Civ. 8338(DF), 2008 WL 2885292 (S.D.N.Y. July 25, 2008); Qadir v. Gonzales, No. 07-3741 (FLW), 2008 WL 2625314 (D.N.J. June 27, 2008); Ghashghai v. Mukasey, No. 07CV0163-LAB (RBB), 2008 WL 706596 (S.D. Cal. March 14, 2008); Sehari v. Gonzales, No. 07CV0295 BTM (BLM), 2007 WL 222 1053 (S.D. Cal. July 31, 2007); Anjum v. Hansen, No. 2:06-cv-00319, 2007 U.S. Dist. LEXIS 22685 (S.D. Ohio March 28, 2007).

Some courts have found subject matter jurisdiction as to both CIS and the FBI or have not distinguished between the government entities in establishing subject matter jurisdiction. Khananisho v. Chertoff, 07 CV 7211, 2008 WL 5217296 (N.D. Ill. Dec. 10, 2008); Litvin v. Chertoff, 586 F. Supp. 2d 9 (D. Mass. 2008); Rajput v. Mukasey, No. C07-1029RAJ, 2008 WL 2519919 (W.D. Wash. June 20, 2008); Karimushan v. Chertoff, No. 07-2995, 2008 WL 2405729 (E.D. Pa. June 11, 2008); Jiang v. Chertoff, No. C 08-00332 SI, 2008 WL 1899245 (N.D. Cal. Apr. 28, 2008); Wang v. Mukasey, No. C-07-06266 RMW, 2008 WL 1767042 (N.D. Cal. Apr. 16, 2008); Zhu v. Chertoff, No. C-07-05570 RMW, 2008 WL 1774166 (N.D. Cal. Apr. 16, 2008); Dawoud v. Dep't of Homeland Sec., No. 3:06-CV-1730-M (BH), 2007 WL 4547863 (N.D. Tex. Dec. 26, 2007); Bodomov v. United States, No. 07-1482, 2007 WL 4373052 (E.D. Pa. Dec. 14, 2007); Moretazpour v. Chertoff, No. C 07-4264 BZ, 2007 WL 4287363 (N.D. Cal. Dec. 5, 2007); Assadzadeh v. Mueller, No. 07-2676, 2007 U.S. Dist. LEXIS 80915 (E.D. Pa. Oct. 30, 2007); *Mocanu*, 2007 WL 2916192; Shaat v. Klapkis, No. 06-5625, 2007 WL 2768859 (E.D. Pa. Sept. 21, 2007); Elhaouat v. Mueller, No. 07-632, 2007 WL 2332488 (E.D. Pa. Aug. 9, 2007); Ajmal v. Mueller, No. 07-206, 2007 WL 2071873 (E.D. Pa. July 17, 2007); Lazli v. U.S. Citizenship & Immigration Servs., No. 05-CV-1680-BR, 2007 U.S. Dist. LEXIS 10713 (D. Or. Feb. 12, 2007).

However, many courts have found the pace of adjudication prior to the naturalization interview to be within the discretion of the Government and therefore awarded dismissal. *See Memic*, 2011 WL 1361563; Ayyub v. Blakeway, No. SA-10-CV-149-XR, 2010 WL 3221700 (W.D. Tex. Aug. 13, 2010); Arreola v. Mukasey, No. C 08-777 JF (PVT), 2008 WL 3916033 (N.D. Cal. Aug. 25, 2008); Ivakin v. Hansen, No. 5:07CV3227, 2008 WL 5725580 (N.D. Ohio Aug. 12, 2008); Hussain v. Mueller, No. H-07-2755, 2008 WL 2557565 (S.D. Tex. Nov. 18, 2008); Du v. Chertoff, 559 F. Supp. 2d 1049 (N.D. Cal. 2008); Khosravani v. Chertoff, No. 08-CV-0220 W(CAB), 2008 WL 2047996 (S.D. Cal. May 13, 2008); Arbesu v. Keisler, No. 07-22914-CIV, 2008 WL 1914864 (S.D. Fla. Apr. 28, 2008); Saini v. Heinauer, 552 F. Supp. 2d 974 (D. Neb. 2008); Alzuraiki v. Heinauer, 544 F. Supp. 2d 862 (D. Neb. 2008); Dorta v. Gonzales, No. 07-21685-CIV, 2008 WL 131206 (S.D. Fla. Jan. 10, 2008); Ibrahim v. Chertoff, 529 F. Supp. 2d 611 (E.D.N.C. 2007); Mighri v. Gonzales, No. 07-03624, 2007 WL 4463590 (E.D. Pa. Dec. 19, 2007); Sinha v. Upchurch, No. 1:07 CV 2274, 2007 WL 4322225 (N.D. Ohio. Dec. 7, 2007); Dairi v. Chertoff, No. 07CV1014 JM(JMA), 2007 WL 3232503 (S.D. Cal. Nov. 1, 2007); Ahmed v. Mueller, No. 07-0411, 2007 WL 2726250 (E.D. Pa. Sept. 14, 2007); Omar v. Mueller, 501 F. Supp. 2d 636 (D.N.J. 2007); Alkhaldi v. Gonzales, No. H-07-1002, 2007 WL 2314287 (S.D. Tex. Aug. 10, 2007); Yarovitskiy v. Hansen, No. 1:07 CV 1174, 2007 WL 2301172 (N.D. Ohio Aug. 8, 2007); Al Gadi Gadi v. Chertoff, No. CV-F-07-090 LJO SMS, 2007 WL 1140825 (E.D. Cal. Apr. 17, 2007); Badier v. Gonzales, No. CIV.A. 1:06-CV-01431, 475 F. Supp. 2d 1294 (N.D. Ga. Dec. 1, 2006).

the FBI, or both.[162] Despite this being an issue of contention with a split in interpretation by the district courts, there is no directly on-point circuit court decision.[163] This is because most cases either settle or become moot at the district court level.[164]

Generally, courts that dismiss for lack of jurisdiction do so because they find that no explicit statutory language provides a time frame for the pace of adjudication and that no *clear*, nondiscretionary duty exists.[165] Other courts do find a clear, nondiscretionary duty on the part of CIS, but find that this duty is contingent on receipt of the background check and, until that time, courts lack jurisdiction.[166] Statutory text supports the existence of a clear, nondiscretionary duty on the part of CIS.

B. Courts Finding Jurisdiction to Compel CIS

Courts maintaining jurisdiction find that statutory language creates a clear, nondiscretionary duty for CIS to adjudicate naturalization applications; therefore, the APA allows courts to compel agencies to act within a reasonable time. The APA provides that "[w]ith due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it."[167] In addition, the APA states that federal courts "shall

---

162 *Hadad*, 2009 WL 654019; *Sawan*, 589 F. Supp. 2d 817; *Abdi*, 2008 WL 4371351; *Ali*, 575 F. Supp. 2d 1084; *Palamarachouk*, 568 F. Supp. 2d 460 (rendering claims against FBI moot); *Abdulmajid*, 2008 WL 2625860; *Hamandi*, 550 F. Supp. 2d 46; *Sidhu*, 2008 WL 540685; *Ali*, 2008 U.S. Dist. LEXIS 81390; *Costa*, 2007 WL 4456218; *Sharawneh*, 2007 WL 2684250; *Hanbali*, 2007 WL 2407232.

163 *See Khananisho*, 2008 WL 5217296 (acknowledging absence of authority from the Seventh Circuit or Supreme Court regarding naturalization applications); *Abdi*, 2008 WL 4371351 at *3 (stating "[i]t is also important to acknowledge that the case law on this issue is particularly unsettled, and the Court's research revealed no Circuit Court of appeals decisions on point."); *Palamarachouk*, 568 F. Supp. 2d 460 (noting the Third Circuit has yet to address this issue).

164 *See Palamarachouk*, 568 F. Supp. 2d at 465 (stating, "[n]umerous cases have been filed by immigrants across the United States alleging improper and unnecessary delays . . . It appears that the government generally moves for dismissal on the basis of lack of subject matter jurisdiction, but while the case winds through the Court, the issues become moot as the individuals become naturalized.").

165 *See* Omar v. Mueller, 501 F. Supp. 2d, 636, 640 (citing Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 65 (2004) for the proposition that "[t]he limitation to *required* agency action rules out judicial direction of even discrete agency action that is not demanded by law.").

166 Hani v. Gonzales, No. 3:07-CV-517-S, 2008 WL 2026092, at *3 (W.D. Ky. May 8, 2008).

167 5 U.S.C. § 555(b) (2006).

compel agency action unlawfully withheld or unreasonably delayed."[168] Thus, "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."[169] This essentially creates two requirements for jurisdiction under the APA.

> First, the person claiming a right to sue must identify some "agency action" that affects him in the specified fashion; it is judicial review "thereof" to which he is entitled . . . . When . . . review is sought not pursuant to specific authorization in the substantive statute, but only under the general review provisions of the APA, the "agency action" in question must be "final agency action" . . . . Second, the party seeking review . . . must show that he has "suffer[ed] legal wrong" because of the challenged agency action . . . .[170]

Adjudication of naturalization applications is an agency action under the APA. "Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."[171] Agency action is defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act*."[172] "'[F]ailure to act[ ]' is . . . a failure to take an agency action—that is, a failure to take one of the agency actions (including their equivalents) earlier defined in § 551(13)."[173] "A 'failure to act' is not the same thing as a 'denial.'"[174] In naturalization cases, the issue is not a denial of an application, but a failure to act on the part of CIS by its failure to render a final disposition on naturalization applications.

This agency action represents final agency action as required under the APA. "[T]wo conditions must be satisfied for an agency action to be 'final': First, the action must mark the 'consummation' of the agency's decisionmaking process[ ]- it must not be of a merely tentative or interlocutory nature. And second, the action must be one . . . from which 'legal consequences will flow[.]'"[175] Adjudication of a naturalization

---

168 § 706(1).
169 § 702.
170 Lujan v. Nat'l Wildlife Found., 497 U.S. 871, 882-83 (1990).
171 5 U.S.C. § 704 (2006).
172 § 551(13) (emphasis added).
173 Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62 (2004) (emphasis removed).
174 *Id.* at 63.
175 Am. Airlines, Inc. v. Herman, 176 F.3d 283, 287-88 (5th Cir. 1999) (emphasis removed) (quoting Bennett v. Spear, 520 U.S. 154, 177-78, (1997)).

application marks the consummation of CIS's decision-making process because it brings together all the steps in the naturalization process to grant or deny an applicant's request for naturalization. Further, the granting or denying of naturalization is an agency action from which legal consequences flow, as the conferring or withholding of citizenship sets one's legal status within the United States. In addition to showing a final agency action, that action must be a clear, nondiscretionary act that confers a legal right. A claim under the APA can proceed "only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take."[176]

While Congress may not have imposed an explicit time limit prior to the naturalization interview,[177] it did choose language within the naturalization statute which created a clear, nondiscretionary duty to adjudicate naturalization applications. Congress stated that CIS *shall* determine whether to grant or deny a naturalization application.[178] CIS must adjudicate; it does not have the option of indefinite delay. Allowing CIS complete discretion for the pace, such that the APA does not apply, would be contrary to the express language that it *shall* adjudicate.[179]

> So long as defendants say that they are still reviewing the application (or even if they say nothing at all), an applicant must continue to wait indefinitely, no matter how long the delay has been. Such discretion would strip defendants' duty of any meaning: "The duty to act is no duty at all if the deadline is eternity."[180]

"[U]nfettered discretion [would] relegate aliens to a state of 'limbo,' leaving them to languish there indefinitely."[181] CIS would never meet Congress's mandate that they shall adjudicate,[182] and the remaining provisions of the statute which allow review of a denied application would be meaningless without an adjudicated application to review.[183]

---

176 *Norton*, 542 U.S. at 64 (emphasis removed).

177 Sawan v. Chertoff, 589 F. Supp. 2d 817, 820 (S.D. Tex. 2008).

178 8 U.S.C. § 1446(d) (2006); 8 C.F.R. § 316.14 (2011).

179 Negonsott v. Samuels, 507 U.S. 99, 106 (1993) (discussing the long established notion that a court should "give[] effect to every clause and word of [a] statute.") (quoting Moskal v. United States, 498 U.S. 103, 109-10 (1990)).

180 Hadad v. Scharfen, No. 08-22608-CIV, 2009 WL 654019, at *3 (S.D. Fla. March 12, 2009) (quoting Saleem v. Keisler, 520 F. Supp. 2d 1048, 1055 (W.D. Wis. 2007)).

181 Palamarachouk v. Chertoff, 568 F. Supp. 2d 460, 467 (D. Del. 2008) (quoting Kaplan v. Chertoff, 481 F. Supp. 2d 370, 399 (E.D. Pa. 2007)).

182 *See* 8 U.S.C. § 1446(d) (2006); 8 C.F.R. § 316.14 (2011).

183 *See supra* notes 135-138 and accompanying text; *see also* Mountain States Tel. & Tel. v. Pueblo of Santa Ana, 472 U.S. 237, 249 (1985) ("[A] statute should be interpreted so as

Even accepting the premise that "naturalization itself is not a right, but a privilege,"[184] assuming that executive agencies may take an applicant's lifetime to complete a background check and decide an application is not reasonable. Indefinite withholding of adjudication would render the remainder of the naturalization process futile.[185] Finally, were CIS to withhold scheduling the naturalization interview indefinitely and, thus, withhold adjudication of naturalization applications indefinitely, immigrants would have no other adequate remedy.[186]

C. Prohibition of Adjudication Until Receipt of the Background Check

Even when courts find CIS has a clear, nondiscretionary duty to adjudicate naturalization applications, the courts may still dismiss for lack of jurisdiction because they find this duty is contingent on receipt of the FBI background check.[187] The naturalization statute provides that before CIS may naturalize a person, the background check *shall* be conducted.[188] Congress reinforced this contingency when it prohibited CIS from expending funding on further processing applications prior to the receipt of the background check.[189]

CIS promulgated a regulation consistent with this mandate: It provides that CIS will only schedule the naturalization interview "after [receiving] a definitive response from the [FBI] that a full criminal background check . . . has been completed."[190] Therefore, when CIS has done all that is within its power to speed up the process and is only awaiting the FBI background check, its duty is contingent upon confirmation of the

---

not to render one part inoperative . . . .") (quoting Colautti v. Franklin, 439 U.S. 379, 392 (1979)).

184 *Hadad*, 2009 WL 654019, at *2 (citing Dora v. Gonzales, No. 07-21685-Civ, 2008 WL 131206, at *1 (S.D. Fla. Jan. 10, 2008)).

185 *See* Dewsnup v. Timm, 502 U.S. 410, 427 (1992) (Scalia, A., dissenting) ("[i]f possible, we should avoid construing [a] statute in a way that produces [ ] absurd results").

186 *See supra* notes 181-83 and accompanying text; *see also* Musabji & Abraham, *supra* note 26 at 90 (discussing one N-400 application that was delayed four years based on agency oversight and discussing that "the only way for [delayed applicants] to get answers from the government . . . is through the additional burden of filing a lawsuit.").

187 *See, e.g.*, Ivakin v. Hansen, No. 5:07CV3227, 2008 WL 5725580, at *3 (N.D. Ohio Aug. 12, 2008).

188 8 U.S.C. § 1446(a) (2006).

189 Kaplan v. Chertoff, 481 F. Supp. 2d 370, 379 (E.D. Pa., 2007) (citing Pub. L. No. 105-119, 111 Stat. 2448 (1997)).

190 8 C.F.R. § 335.2(b) (2011).

background check.[191] To provide a remedy to delayed applicants, courts must have authority to compel the FBI to complete the background check.

VI. Establishing Jurisdiction to Compel the FBI for Delayed Naturalization Applications

Since CIS's duty is contingent upon the FBI background check, courts must determine whether jurisdiction exists over the FBI. A delay in completion of the background check causes a delay of adjudication. Still, jurisdiction over the FBI under the APA depends on whether it has a clear, nondiscretionary duty requiring it to take a discrete action.[192] The final agency action in the naturalization context is a failure to adjudicate.[193] Since this duty belongs to CIS and no statutory text explicitly provides a time frame for completion of the background check, any duty found on the part of the FBI must arise through implication.[194] When name check cases first began to proliferate, there existed a clear trend among district courts of finding no enforceable duty, but more recent cases are finding an implied duty for the FBI.[195] These newer cases show that a clear, nondiscretionary duty requiring completion of the background checks in a reasonable time frame exists under an analysis of the legislative scheme as a whole.

A. Courts Finding No Jurisdiction to Compel the FBI

Courts dismissing for jurisdiction discuss an absence of an explicit statutory limitation on the time frame for background checks.[196] They assert that "[n]o statute or regulation limits the FBI's discretion in how it completes [the] background check, let alone the pace at which this check is undertaken."[197] They conclude, because "the only agency action that can be compelled under the APA is action legally required," the FBI is

---

[191] Some courts, however, find CIS may still be compelled even though they are awaiting the background checks from the FBI by noting the difference between a finding of jurisdiction due to the existence of a duty versus the authority to compel CIS based on the merits of the case. *See, e.g.*, Abdulmajid v. Arellano, No. CV 08-796-GHK (VBKx), 2008 WL 2625860, at *3-4 (C.D. Cal. June 27, 2008).

[192] Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 62 (2004).

[193] *See supra* Part V.B.

[194] *See supra* Part V.C.; Qadir v. Gonzales, No. 07-3741(FLW), 2008 WL 2625314, at *4 (D.N.J. June 27, 2008); *Kaplan*, 481 F. Supp. 2d at 401.

[195] Sawan v. Chertoff, 589 F. Supp. 2d 817, 827 (S.D. Tex. 2008).

[196] *See, e.g.*, Hani v. Gonzales, No. 3:07-CV-517-S, 2008 WL 2026092, at *3 (W.D. Ky. May 8, 2008).

[197] *Id.* (quoting Alzuraiki v. Heinauer, 544 F. Supp. 2d 862, 866 (D. Neb. 2008)).

not required by law to process background checks in a reasonable time frame.[198] As a result, these courts leave the pace of the background checks to the FBI's discretion.[199] This reasoning does not address the legislative scheme as a whole, particularly the fact that Congress mandated completion of a personal investigation. Therefore, a finding of jurisdiction over the FBI is more persuasive.

B. Courts Finding Jurisdiction to Compel the FBI

Courts finding jurisdiction discuss that, while there is not a statute that "expressly imposes a mandatory duty on the FBI to perform background checks," an implied duty may be found through examining the legislative scheme as a whole.[200] First, Congress mandated that "[b]efore a person may be naturalized, an employee of the Service, or of the United States designated by the Attorney General, *shall* conduct a personal investigation of the person applying for naturalization."[201] Thus, completion of the investigation is mandatory, not permissive, creating a clear, non-discretionary duty.

Next, regulations transferred this duty to the FBI.[202] "Although immigration adjudications are the domain of [the Department of Homeland Security], specific duties may be conferred on other entities."[203] The background check is also, by statute, a precondition to CIS's established duty to adjudicate applications.[204] Correspondingly, CIS requires applicants pay fees from which the FBI collects a portion for conducting the

---

198 Al Daraji v. Monica, No. 07-1749, 2007 WL 2994608, at *4 (E.D. Pa. Oct. 12, 2007) (quoting Norton v. S. Utah Wilderness Alliance, 542 U.S. 55, 63 (2004)).

199 *See, e.g.*, *Hani*, 2008 WL 2026092, at *3.

200 Kaplan v. Chertoff, 481 F. Supp. 2d 370, 400 (E.D. Pa. 2007). An inquiry into whether the FBI has a mandatory duty to process background checks "is in essence an inquiry into legislative intent" which may be revealed through the plain language of one enactment, by examining several enactments, or by examining a legislative scheme as a whole. Qadir v. Gonzales, No. 07-3741(FLW), 2008 WL 2625314, at *4 (D.N.J. June 27, 2008) (citing Block v. Cmty. Nutrition Inst., 467 U.S. 340, 349 (1984); Slatky v. Amoco Oil Co., 830 F.2d 476 (3d Cir. 1987)).

201 8 U.S.C. § 1446(a) (2006) (emphasis added).

202 8 C.F.R. § 335.2(b) (2011) (requiring the FBI to complete a full criminal background check and confirm the results with CIS); Ajmal v. Mueller, No. 07-206, 2007 WL 2071873, at *2 (E.D. Pa. July 17, 2007) (citing *Kaplan*, 481 F. Supp. 2d at 400) (finding "the FBI has a mandatory, non-discretionary duty to complete criminal background checks within a reasonable period of time.").

203 Jiang v. Chertoff, No. C 08-00332 SI, 2008 WL 1899245, at *4 (N.D. Cal. April 28, 2008) (citing 8 U.S.C. §§ 1103(a)(1), 1446(a) (2006); 8 C.F.R. §§ 2.1, 335.2 (2008); 1998 Appropriations Act, Pub. L. 105-119, 111 Stat. 2440, 2448-49).

204 8 U.S.C. § 1446(a) (2006); 8 C.F.R. § 335.2(b) (2011).

background checks, with the permission of Congress.[205] Thus, "applicants must pay the FBI, through CIS, to complete the background checks."[206]

The relevant statutory scheme does not indicate that the FBI has discretion to withhold completion of the background check.[207] A finding that the FBI does not have a clear, nondiscretionary duty would require courts to ignore the statutory scheme created by Congress because it would allow the FBI to withhold completion of the background check indefinitely, rendering both the FBI and CIS's duties meaningless.[208] If there is no duty for the FBI to act on a background check, then Congress's directive that CIS determine naturalization applications would be unenforceable and Congress's clear intent would be frustrated.[209]

> It would [ ] defeat Congress's purpose in requiring the background check. If there is no time frame attached to it, a failure to complete the check would mean that applicants who should be rejected because of their criminal background, would be allowed to stay in the [United States] for long periods of time, while applicants who should be approved because they have no criminal background, are denied citizenship.[210]

Without application of the APA to the FBI, there is no external or inherent process that creates a reasonable time frame on completing delayed name checks. Although the FBI attempts to process name checks in a first-in, first-out policy, the same policy does not apply to name checks that require further investigation.[211] Therefore, viewing the entire legislative scheme, Congress directed completion of a personal investigation of the applicant; Congress made CIS's mandatory duty to adjudicate naturalization applications conditional on receipt of the FBI background check; regulations require a definitive response from the FBI on background checks; and Congress allowed the FBI to collect fees,

---

[205] *See Qadir*, 2008 WL 2625314, at *5 (quoting *Kaplan*, 481 F. Supp. 2d at 400-01).

[206] *Id.*

[207] Rajput v. Mukasey, No. C07-1029RAJ, 2008 WL 2519919, at *4 (W.D. Wash. June 20, 2008).

[208] *Id.*

[209] Khananisho v. Chertoff, No. 07 CV 7211, 2008 WL 5217296, at *4 (N.D. Ill. Dec. 10, 2008) (citing *In re* Johnson, 787 F.2d 1179, 1181 (7th Cir. 1986)).

[210] Moretazpour v. Chertoff, No. C 07-4264 BZ, 2007 WL 4287363, at *2 (N.D. Cal. Dec. 5, 2007) (citing Ahmadi v. Chertoff, No. C 07-03455 WHA, 2007 WL 3022573, at *5 (N.D. Cal. Oct. 15, 2007)).

[211] *Rajput*, 2008 WL 2519919, at *1.

through CIS, for the background checks. For these reasons, courts properly find that Congress imposed an implied, but discrete, duty on the FBI.

VII. Finding Unreasonable Delay Under the APA

Finding that CIS and/or the FBI have a clear, nondiscretionary duty under the APA is not the end of the story. The APA also requires that any delay in adjudication be unreasonable before relief may be granted.[212] Some courts address unreasonable delay as part of a jurisdictional analysis,[213] while others address it as part of a failure to state a claim analysis.[214] One method of determining whether there has been unreasonable delay concludes that as long as there is not a "complete failure to act" on an application, a delay is reasonable.[215] Another method employs a factors test.[216] This second method considers the statutory context, consequences of the agency's delay, the length of delay versus CIS average adjudication times, and any practical administrative difficulty that CIS claims.[217]

Requiring the naturalization process to proceed within a reasonable time frame does not contravene national security precautions. It still allows CIS or the FBI to present evidence as to why the delay in a particular naturalization application is reasonable.[218] This gives the immigrant some relief, because it allows a third party to look into the details of the process when the immigrant himself cannot. If CIS or the FBI present reasonable evidence of why the background investigation is delayed, the court may still dismiss the suit or retain jurisdiction and request status reports.[219] Thus, any specific national security concerns are still preserved even applying a reasonable time frame to the naturalization process.

---

212 5 U.S.C. § 706(1) (2006).

213 *See, e.g.*, Ahmed v. Mueller, No. 07-0411, 2007 WL 2726250, at *6 (E.D. Pa. Sept. 14, 2007).

214 *See, e.g.*, Hamandi v. Chertoff, 550 F. Supp. 2d 46, 54 (D.D.C. May 6, 2008).

215 *Ahmed*, 2007 WL 2726250, at *6.

216 Karimushan v. Chertoff, No. 07-2995, 2008 WL 2405729, at *2 (E.D. Pa. June 11, 2008).

217 *Id.*

218 *See* Alkenani v. Barrows, 356 F. Supp. 2d 652, 657 (N.D. Tex. 2005).

219 Singh v. Mukasey, No. C07-1332 RSM, 2008 WL 2230772, at *5 (W.D. Wash. May 29, 2008).

VIII. Suggestions and Conclusion

A. Congress Intended Naturalization Adjudication to Occur in a Reasonable Time Frame

While Congress may have intended an indefinite delay for lawful permanent resident applications, such that the APA or Mandamus statutes do not apply, a review of the naturalization framework shows an absence of the same intention. Accordingly, the applications should be subject to a reasonable time frame. First, statutory language is tailored to different processes, so using provisions that govern lawful permanent applications to support dismissal in a naturalization case does not do justice to Congress's deliberate differences in statutory construction. The process for the adjudication of lawful permanent resident applications places an explicitly discretionary time frame on adjudication.[220] The statutory language of the Immigration subchapter of the INA conditions adjudication of lawful permanent resident applications upon the availability of visas.[221] There is no such limit for naturalization applications.

Additionally, the naturalization application process lacks an explicit ban to relief under other provisions of law that provide a reasonable time frame, such as the APA or Mandamus statutes.[222] In fact, rather than ban overlay of other statutes providing relief, Congress placed a clear requirement that adjudication must happen.[223] While adjudication is predicated upon completion of a personal investigation, Congress did not intend the personal investigation to be an open-ended step in the naturalization process.[224] Like adjudication, the personal investigation is a required step because statutory text requires that the executive branch *shall* conduct a personal investigation.[225] Additionally, if the personal investigation step is not subject to a reasonable time frame as a part of the entire process, it would render the statutory requirement of final adjudication meaningless.[226]

---

220 *See* discussion *supra* Part IV.A.
221 8 U.S.C. § 1255(a) (2006).
222 *See* discussion *supra* Part IV.A.iii.
223 *See* discussion *supra* Part V.B.
224 *See* discussion *supra* Parts V-VI.
225 *See* discussion *supra* Part VI.B.; *see also* 8 U.S.C. § 1446(a) (2006).
226 *See* discussion *supra* Part VI.

B. Imposition of a Reasonable Time Frame on Naturalization Applications Comports With Notions of Justice

Since it is not against the intent of Congress, imposition of a reasonable time frame on naturalization applications comports with notions of justice. Congress intended the Immigration Act of 1990 to bring speedier results to naturalization adjudications.[227] The framework of the statute does not contemplate in-depth background checks that may delay an application indefinitely.[228] The withholding of a reasonable time frame from naturalization adjudication may leave a prospective citizen with no recourse at all. The immigrant's right to a decision would be subject to the executive branch's whim; he may be stranded, with no information about what has been done, or whether anything more will be done, and no other hope of resolution. His only recourse is another fruitless phone call.

While this process drags on, both the government, as the representative of the taxpayers, and immigrant applicants lose time and money. On one side, uncertainty created by having to await a decision may prevent an immigrant from fully establishing himself and cost him time off work to comply with CIS's requests. On the other side, every time a delayed immigrant requests information on his application, CIS work time is devoted to addressing such requests. Also, every time a situation rises to the level of litigation, the Government is spending money to defend that litigation. Given that most, if not all, delayed adjudication cases settle or are dismissed as moot after a district court decision, this litigation becomes a repetitive loss of money and time for both parties.

C. National Security is Still Protected Under a Reasonable Time Frame

Regulations imposed upon the current immigration system are a response to heightened security needs after the events of September 11th.[229] A reading of a reasonable time frame requirement into this process, however, would not harm national security interests because CIS or the FBI would still have a chance to show that the delay is reasonable.[230] If CIS or the FBI has a record of possible evidence against the naturalization of a certain immigrant, it should have the chance to present this

---

227 *See* discussion *supra* Part IV.B.ii.

228 *See* discussion *supra* Part IV.B.ii.

229 *See* discussion *supra* Part II.

230 *See* discussion *supra* Part VII.

before the court. This would at least give third party review regarding whether a delay is reasonable given the needs of a particular application.

Finally, even if the FBI is ordered to return its findings, CIS still has the ability to deny a naturalization application.[231] It remains the immigrant's burden to prove his good moral character, and imposition of a reasonable time frame would not shift this burden.[232] Overall, law should be fairly certain and predictable. As it currently stands, there is such strong divide in the case law on this issue, if one's application ends up being delayed there is no certain outcome as to whether or when an immigrant will receive a decision.[233] This uncertainty is similar to what Congress intended to change in passing the Immigration Act of 1990, and it reflects the more arbitrary, exclusionary immigration law of the past.

D. Congress Should Relieve Uncertainty by Amending Naturalization Law

To relieve uncertainty, Congress should amend the Nationality and Naturalization subchapter of the INA. Originally, Congress placed jurisdiction to naturalize persons with the executive branch to speed up the process.[234] This initial intent was refocused by changes as a result of the events of September 11th, particularly the imposition of heightened security measures.[235] The executive branch was left to fit new security concerns within a pre-September 11th statute that may not have been designed to encompass unlimited latitude in adjudication of naturalization applications.[236] Thus, in light of this radical change in focus, Congress should clarify its intent regarding whether it means to allow an unlimited time frame on personal investigations, and as such also upon adjudication of naturalization applications.

Even if Congress indicates that it desires an unlimited time frame for the pace of adjudication and, thus, removes jurisdiction of the courts under the APA and Mandamus statutes, this clarity would at least provide an immigrant with certainty of the extent of the immigration process. It would allow immigrant applicants to know at the beginning of the process that there is a chance their application may be delayed for several years or even indefinitely. Immigration to the United States is no small

---

231 *See* discussion *supra* Part III.B.

232 *See supra* note 55 and accompanying text.

233 *See supra* note 163 and accompanying text.

234 *See* discussion *supra* Part IV.B.2.

235 *See* discussion *supra* Parts I-II.

236 *See* discussion *supra* Part IV.

investment given that the entire process takes, at the least, over five years to complete.[237]

Until such time, the courts should distinguish between lawful permanent resident and naturalization statutory language, such that naturalization statutory construction allows overlay of a reasonable time frame. This interpretation harmonizes with Congressional intent as it is written. Finally, judicial review of the process provides the certainty it lacks at present and would not frustrate national security concerns. Ultimately, Congress needs to revisit the INA and clarify its modern intent.

---

[237] When one considers the length of time it takes to acquire legal permanent resident status and then naturalization, immigrants may have lived in the country more than five years. *See* Debba v. Heinauer, 366 Fed. App'x 696, 697 (8th Cir. 2010) (stating that as of February 2000, lawful permanent resident applications "faced an approximate waiting period of nine to ten years before their priority date became current."); Vara v. Cannon, No. 07-15222, 2008 WL 4852930, at *1 (E.D. Mich. Nov. 7, 2008) (Plaintiff had been a lawful permanent resident for thirty-seven years); Ghashghai v. Mukasey, No. 07CV0163-LAB (RBB), 2008 WL 706596, at *1 (S.D. Cal. March 14, 2008) (Plaintiff had been a lawful permanent resident for 29 years).