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ARTICLES

COMMENT

THE ALCHEMY OF PROMOTION AND TENURE

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I have seen otherwise honorable faculty members engage in the most unscrupulous, underhanded conduct to avoid hiring or promoting individuals they did not wish to see admitted to their ranks. They have lied, maligned character, altered rules, manufactured precedents and distorted policies.[1]

He was sweating like a Mississippi pig in July. That was some dream. It was a new installment in the dream he had been having the past several weeks. Each one was a different version of the forthcoming faculty meeting on the tenure and promotion of Cyrus M. Tugwell. Tonight it was Ken Cesey in my office yelling Tugwell was a no good son of a bitch Posnerian reactionary who was subverting corporate law and leading Scoff Law School into the celebration of mediocrity. On and on. Then a couple of nights ago Patricia West was screaming at me something about Tugwell not being Black. Talk about a strange statement. "Christ, he's blacker than you; hell, you look more Italian than my wife." Wrong thing to say. Fortunately, he woke up as West was pounding him with a paper weight. Then there was the encounter with Ms. Bay Buckman who, instead of wearing her Dworkin style dress (as in Andrea, not Richard), was in a tight sweater accenting .... What the hell is going on .... Tugwell should be a sure thing. The students like him. He seems to get along with everyone—hangs around with that dangerous bourbon slopping old fool Snopes too much. I'll speak to him about that. Tugwell's publication record is outstanding. Publishing in Stanford and Chicago is not bad for someone so young. And the clincher—he is Black. I should get some points from the President on this promotion. Which I damn well need. I have been getting bad vibes from that guy on our minority program. But if it is a sure thing, why these dreams?

The law school's architect once wrote that the faculty lounge was designed to blend collegiality and scholarly instincts, hence a plush and dignified sitting room on the first floor with a cylinder opening onto the second floor library. Every Friday at 5 p.m. Professor Peabody Snopes took his brandy to a corner on the second floor to reflect on events and ponder on life. Maybe read a little of Dr. Hunter Thompson's best work. It was a quiet Friday, and as usual Scoff Law Library was empty. Snopes

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1. DERRICK BELL, CONFRONT AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTER 75 (1996).

began to nod off with a vague echo of a Patsy Cline song fading—when he was jerked back. Adam Smyth-Symes and Risque Moot were talking. Smyth-Symes was talking in his affected English accent saying something about "interesting—mmm—interesting thing, the female . . . ." His wife had kicked him out when she found a letter of lust to a law student on his PC. That explained why he was here on a late Friday afternoon, but what about Professor Moot? What was that asshole doing here? A minute later Lester B. Bile walked in with Patricia West and Bay Buckman. What a crew! Snopes was dumbfounded. They had nothing in common. Tugwell once said Moot was someone with temporarily unmet challenges who succeeded because his articles were so bad they were critic-proof. Then there was Smyth-Symes, who had been able to beat ten sex harassment charges, two by marrying the complainants. According to rumor, he liked to entertain guests with an extensive choice of porno flicks. Bile, who had been yelling from the moment he walked in, was obviously furious.

"He is not going to get through!" He was almost drooling. He is, Snopes reflected, a very bitter man. Always looks like he is eating a lemon. Tugwell had him tagged: "Bile has low self-esteem, which he earned." Started with a sure winner reputation, law review at Yale, white shoes Wall Street firm, had his first article published in Yale, then zero. Hasn't done a thing in twenty-five years. Every year his Report to the Dean reads "up-dating class materials."

"What I'm saying is that he doesn't meet our standards. He is a miserable failure when it comes to service. (Bile was big on service, which, like many an academic scoundrel, he used to justify his slothful experience.) Never goes to faculty meetings, never shows for committees, and never circulates memorandums. At best he is an antisocial bastard. He is not collegial!"

Snopes snorted. Of course Tugwell didn't go to those things. I don't either, but for different reasons. I can't stand Bile and the gang shoveling smoke—faculty meetings are a joke. But Tugwell doesn't attend because he is so damned busy. The guy is a big draw on the lecture circuit.

"That's not his problem; his problem is that he is not a Brother. Cyrus Tugwell is a low-life version of Clarence Thomas. Like Derrick said about Randall Kennedy, he may look black, but he thinks white. I guarantee he will never get my vote for tenure."

Snopes almost choked on a sip of brandy. So that was it, those deadbeat academic lounge lizards were planning to do a number on Tugwell. Why? Under every conceivable P&T criterion he was a sure thing—and he was Black. What the hell had gone wrong? From experience, Snopes knew that the ungodly alliance of Moot, Bile, West, and Buckman could tear Scoff Law School apart without blinking an eye. An alliance of the meanest academic terrorists ever assembled. Smyth-

Symes was, however, a joke—he must be furious because Tugwell was law review at Yale and he didn't make it.

Snopes had never noticed it before but Tugwell looked a lot like Derrick Bell. They both had the capacity to draw you into some sort of evangelical bond. But that is where the similarity ended. Tugwell often said Bell should have gone into preaching "where he couldn't hurt anyone." They were sitting in Snopes' office, a curmudgeon's museum packed with the residue of over thirty years of making life unpleasant—pure hell—for his colleagues. He kept the dogs off his ass, as they say in Mississippi, with an article every now and then, plus op-ed pieces to irritate his "friends." Essays like "PC Worms Gnawing in Law School" generate nasty glares plus numerous complaints to the Dean.

Tugwell was as perplexed as Snopes. "I think that I can account for one of them, but not the others. I barely know them. But Buckman is another thing. I know her—too well." Snopes knew where the conversation was going and didn't like it.

"You dumb SOB, you slept with her, didn't you. Even Smyth-Symes has sense enough to stick with students. Of all people, she is a head case. They don't call her 'Speedy' for nothing."

"She came on to me—strong. It was my second year and she was very helpful. Buckman knows where the skeletons are buried. Incidentally she said to stay away from you; in fact everyone told me that. The Dean reminded me again yesterday. But then she went into her Glenn Close act. And don't let that Dworkin-style dress fool you, there's plenty underneath. Started showing me off to her radical feminist friends as the answer to Tom Sowell; I was supposed to be a Shelby Steel with compassion. When I realized that my role was to be her ticket to fame—she wanted me to co-author an article—I bailed out. I haven't been near her in two years but she obviously is not going to let go."

"I am not," mused Snopes, "worried about what *she* can do. No one listens to her noise, but Bile and Moot can be trouble. They know how to play a tune on the rules. Especially Moot."

What happened next came out of the blue. It came indirectly through the efforts of Smyth-Symes, who persuaded his current squeeze, the head of the Womyn's Caucus, to plaster the school with posters targeting Tugwell:

FEMINIST ALERT. COLONIZATION ALERT. BACKLASH ALERT.

The Womyn's Caucus has reviewed Professor Tugwell's syllabus for Law and Economics and protests its marginalization of women. The use of Richard Posner's book, ECONOMIC ANALYSIS OF LAW, with its emphasis on male signifiers of objectivity, neutrality, and analysis, is particularly offensive to womyn. We deplore the use of value, utility, and efficiency to define our roles in society. Pos-

ner's text is crammed with sexist comments like: "The prohibition of bigamy (polygamy), which by limiting competition of men for women increases the sexual and marital opportunities of younger, poorer men." He seeks to convert the vagina into a supply and demand equation. He is pressing the heel of economic analysis against our throats!

Some of our sisters complain that the scientific theme of economics excludes the feminine voice. We therefore demand that Professor Tugwell add our perspective to his course with material such as Ms. Sandra Harding's THE SCIENCE QUESTION IN FEMINISM.

The Dean's response was quick and, as usual, to the point:

The administration vigorously defends the right of every professor to select her/his teaching materials. This right comes from the heart of academic freedom and I therefore guarantee Tugwell's complete freedom to teach his course as he sees fit. At the same time we also recognize the importance of diversity and multiculturalism. Womyn speak in a unique voice which results in a wide range of womyn-male encounters. We honor that voice. African Americans, like Professor Tugwell, likewise speak in a distinctive voice which we must honor. I implore everyone in the Scoff community to respect all voices.

As Snopes predicted, the Feminist Alert poster had a minus zero effect; for one thing, the student evaluations of Tugwell were positive and everyone knew about the role Smyth-Symes played in instigating the poster. No one read the Dean's memo; few students even knew who he is. "You can count Bile out too," Snopes told Tugwell. "He has a nasty mouth, but no bite. After his record of shirking, Bile has lost standing to criticize someone like you. You won't even get a memo out of him." He again was on the mark. Bile pestered a few of the Promotion and Tenure Committee people, but let it drop when they ignored him. Moot on the other hand, was a horse of a different brand, and true to character he released his bomb three weeks later, just when Snopes and Tugwell had relaxed and stopped counting votes.

To: Tenured Faculty

From: Rosco Moot

Re: Promotion and Tenure of Cyrus Tugwell

By a 4-1 vote the P&T Committee recommends that Professor Tugwell be granted tenure. I disagree and for the following reason will vote in the negative. Our rules specify that the candidate must demonstrate a record of outstanding teaching, produce scholarly work that makes a significant contribution to our understanding of a legal field, and exhibit a willingness to contribute to the service component of the law school and the profession. Tugwell fails to satisfy the

scholarship category. I do not address the other two categories, although I am willing to concede for the record that he satisfies both.

On paper Tugwell has compiled an impressive record; the publication of two long, heavily-footnoted articles, one in the Stanford Law Review, the other in the Chicago Law Review. In addition, he has published four book reviews, three in reputable economics journals and the other in the California Law Review. All outside reviews of his scholarship were positive. Professor Dali-Jones of Michigan said: "If Professor Tugwell continues at his present pace of development he will, within five years, become a member of a select group of scholars." I am told that he is a highly prized participant at the "best" conferences. Not that it should matter for our judgment on Tugwell but it is clear that whatever we do here will not have a serious impact on his career. He is destined to move up to a higher level school.

Now, for the issue: in light of what I have said about his impressive record, including the vigorous support of the reviewers, how can I vote against Professor Tugwell?

If you dig deeper into his record you will get a very disturbing message: Tugwell is not producing legal scholarship. I repeat—he is not producing legal scholarship. He writes economic articles which have tangential connection to law. His comparative analysis of efficiencies in the airline and trucking industries is, I am told, "outstanding, an important contribution to the literature." The person who made that appraisal was an economist. And that is the problem: Tugwell writes in economic language for economists; he does not have anything to say to judges and lawyers. Check his footnotes: rarely does he cite legal material; instead he refers to equations and economic journals. I suggest that you examine the outside reviewers' credentials; you would discover that three are full time economists, another has a joint law school-economics department appointment, while the fifth is a law professor. The obvious conclusion is that we are ABDICATING OUR REVIEW FUNCTION TO OUTSIDERS, PEOPLE WHO HAVE NO INTEREST IN ADVANCING LEGAL KNOWLEDGE.

There is the definite likelihood of more abdication. It is reaching the tipping point in the classrooms with the cafeteria menu of law and banana courses. In most of these courses professors and students learn to defer to the expertise of the banana outsiders. I have serious doubts about law professors possessing sufficient knowledge of the banana material to compose a credible syllabus. In my judgment, the most serious pressure for abdication comes from the Critical Race Theory movement with its Black perspective strategy. I suspect most of our tenured people are unaware that several of our young folk are presently experimenting with narratives of race and gender experiences. These are stories—like you see on TV. In fact, Professor Bell's short story about space invaders bartering scarce products for the nation's entire Black population was made into an HBO movie. And who can evaluate these stories as scholarship? Not me, not you, thus leaving

> the final authority to the Critical Race Theory people. That is why this vote is so important. If we capitulate to the economist outsiders, we are virtually stopped from denying Critical Race Theory people the ultimate responsibility for evaluating Black "perspective" storytelling.
>
> I hate to end this memorandum on a pessimistic note but reality leaves me no choice. The law academy has conceded too much, tolerated intellectual foolishness, and sold our souls to the "go go" years of the 1980s. Whatever chance we had to preserve the integrity of the system was lost when our trade association, the Association of American Law Schools, became a de-facto companion to the Modern Language Association, a group dedicated to a deconstructed postmodern utopia. The AALS is more interested in workshops on "Integrating Lesbian/Gay/Bisexual Perspectives into Other Courses" than ways to teach the practical core material. The 1996 annual meeting was a lesson in the nontraditional curriculum, with workshops on Critical Legal Studies, Critical Race Theory, Feminist theory, Gay Lesbian Theory, and Storytelling. But the real damage came from the Special Committee on Tenure who recommended new standards that specifically recognize nontraditional scholarship: "The school should commit itself to avoiding prejudice against any particular methodology or perspective used in teaching or scholarship. When evaluating any work embodying innovative or less widely pursued methodologies or perspectives, the standard should be neither higher nor lower than the standard used for evaluating more traditional work."
>
> For the continued integrity of Scoff Law School, and to renew our commitment to the traditions of legal education, I urge you to oppose Professor Tugwell's promotion and tenure.

"Damn, that will change things, Tugwell." Snopes was still in a Wild Turkey haze from last night and now had to acknowledge that Moot had won a round in their long standing battle of office politics. "Remember, Scoff Law School is second tier, meaning that we take the core values seriously. And traditional scholarship—the vocational and doctrinal article—is what our people know and hold to be a core commitment. I told you not to underestimate Moot. He used our own scholarship to whip our butts."

"What is it with that guy? He keeps turning out those tedious articles that only a handful of people read. It's always 'this case holds,' 'this is precedent for,' 'the rule is.' He sure as hell has never advanced the knowledge of anything."

"What Moot did is to get the faculty, especially the seniors, to see your articles as outside the sphere of traditional scholarship. They now look at you as the house radical. That's right, Tugwell, the house Posnerian is now the house radical. You and I know that what you write comes within the government regulation genre but—don't you understand, and this is what Moot was counting on—THEY NEVER READ

YOUR WORK! Never! They don't write, and if you don't write, you don't read—or teach, something my friends conveniently forget. After his memo, they didn't want to read your stuff. As for his motivation, Moot is a very insecure and frightened man. He and his friends see this new style of writing and they panic. It tells them they are becoming obsolete. And that's why I have to give Moot credit for the comments on AALS.

"It is scare tactics—and it worked. Most of the tenured people, the group that counts as far as your vote is concerned, haven't attended an AALS meeting in years. I haven't been to one in over twenty years. My memory, shared I'm sure by the others, is going to workshops on contracts or property during the day and long parties at night gossiping over petty politics. They have no idea the extent to which the organization has been genderized, racialized, and radicalized. Subverted by the politically correct hordes. So Moot brought them up to date and in the process planted a subliminal association between young Cyrus Tugwell and the loony AALS agenda. Subconsciously to them, your economics is just another version of storytelling. No difference.

"It's going to be close, we could probably get a majority but it's doubtful on the necessary two-thirds majority that we need. You can opt for an extension to give us time to call in a few I.O.Us. The Dean needs your promotion for brownie points, and no doubt could call in a few votes."

Tugwell forced a smile. "I feel like I was sucker punched. I don't know, maybe it's time to move on. I've got a fistful of feelers."

"There is," Snopes quietly said, "a final option, guaranteed to be successful. It's worked at other schools. Here it is: come out of the closet, or get someone to out you."

Tugwell exploded. "You old fart, I'm not gay! Why should I pull that preposterous ploy?" "Simple—you get tenure and no one can ever bother you again. Think what it opens up for your career. You can speak in the Black voice on white topics such as economics, speak in a Black perspective voice in narratives, and top it off with a homosexual voice. You would be a legitimate triple threat in legal scholarship."

Tugwell stared at Snopes for a full minute, then slowly walked out.

GIVING SUBSTANCE TO PROCESS: COUNTERING THE DUE PROCESS COUNTERREVOLUTION

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 Assistant Professor, University of Toledo College of Law. B.A., 1985, Barnard College; J.D., 1990, Yale Law School. Thanks to the University of Toledo for the Summer Research Grant which provided financial support for the research and writing of this Article. Thanks to Phil Closius, David Harris, Robert Hopperton, David Koeninger, Blake Morant, Denise Morgan, Bill Richman and Daniel Steinbock for their helpful comments on earlier drafts. Thanks also to my excellent research assistants, Steve Carlson and Maria Sandoval-McKenzie. This article is dedicated to the memory of Justice William J. Brennan.

I. INTRODUCTION

The ability of members of a democratic society to participate in the system of government is essential to the maintenance of a strong and orderly community. To be a citizen is to be able to take part in the functioning of government, and in the process by which decisions are made. Yet, we are currently in the middle of an unheralded due process crisis, which threatens to exclude a large number of people—the poorest members of American society—from almost every aspect of participation in the processes by which decisions about them are made, and thus reduces their status to less than full citizenship. As a result of an ongoing due process counterrevolution, a large segment of the population is becoming increasingly disenfranchised and excluded from the body politic. The formalized manner in which the Supreme Court addresses procedural issues has failed to protect those who need protection most from arbitrary governmental action that threatens the very basis of their livelihood. It is time for the Court to re-think the nature of procedural rights, incorporating more effective notions of fairness and equality in order to put substance back into process.

Many scholars have criticized the Court's approach to due process as confusing, inconsistent and ineffective.[1] It has been called a doctrine which "subsists in confusion,"[2] "a pathological combination of ineffectualness and destructiveness."[3] Some scholars have recognized that the Court is undergoing a retreat from the due process revolution of the 1960s, and have called the retreat a counterrevolution.[4] However, they have not acknowledged the fact that the counterrevolution is most severely affecting the poor. The failure of the Court's due process jurisprudence is most evident in the Court's treatment of the people who most risk arbitrary action by the government because of their lack of economic resources and political power. An in-depth analysis of the Court's approach to the due process rights of poor people will help to elucidate the manner in which the Court's due process jurisprudence fails to meet the needs of society as a whole.

Dating back to the Magna Carta, the concept of due process has encompassed both procedural and substantive elements.[5] For example, the due process prohibition against arbitrariness stems from both the sub-

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1. *See, e.g.*, JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 41 (1985); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 309 (1993); Cynthia R. Farina, *Conceiving Due Process*, 3 YALE J. L. & FEMINISM 189 (1991).

2. Fallon, *supra* note 1, at 309.

3. Farina, *supra* note 1, at 189.

4. *See* MASHAW, *supra* note 1, at 29-30. *See generally* Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996) (tracing the history of the due process revolution, which expanded the scope of interests protected by procedural due process).

5. *See* Jane Rutherford, *The Myth of Due Process*, 72 B.U. L. REV. 1, 9 (1992).

stantive notion that to be arbitrary is to be unprincipled, and the procedural notion that a decision is arbitrary by definition if it is made without allowing those affected to participate.[6] That is, due process has always encompassed substantive values of equality and fairness. Yet, there is a strong tension between the communitarian view of due process as a means to achieve a just society, and the individualist view of due process as a means to protect an individual's life, liberty, or property from outside interference.

The history of due process in our country reflects both views of due process. The drafters of the Constitution emphasized the importance of individual freedom to protect people from incursions by each other, and by the state.[7] To the extent that they were influenced by communitarian ideals, they believed that the community would be strengthened if individuals were protected from each other.[8] Hence, when drafting the Due Process Clause of the Fifth Amendment, "the Framers wanted to preserve their property from the vast unpropertied populace. . . . Protecting the rights of the elite from the incursion of the poor masses."[9] Similarly, the early capitalist economy relied on individual businessmen achieving economic success on an individual basis, without any communitarian notion of economic values. The Constitution does not purport to provide any basis for economic justice and does not provide for positive rights or protections. Rather, the Constitution is a negative document, based on the notion that people have some inalienable rights that cannot be taken away from them, and protecting those people from the usurpation of those rights. In particular, the property of the affluent members of society was protected from being arbitrarily taken away from them, by the government or anyone else, by the Due Process and Takings Clauses of the Constitution.

However, the neutral language of the Due Process Clause of the Fifth Amendment still held out a communitarian promise of participation to all citizens. Moreover, the Framers of the Fourteenth Amendment arguably had more of a communitarian and egalitarian view of due process when they included an identical clause in the Fourteenth Amendment to protect a weak minority (ex-slaves) from the power of the majority.[10] Sparked by the massive unemployment and poverty of the Depression,

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6. *Id.* at 6; *see also* Lawrence Alexander, *The Relationship Between Procedural Due Process and Substantive Constitutional Rights*, 39 U. FLA. L. REV. 323, 324 (1987) (arguing that substantive values affect all procedural decisions).

7. Rutherford, *supra* note 5, at 10-11; *see also* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 163 (1989) ("The Constitution—the constituting document of this state society—with its interpretations assumes that society, absent government intervention, is free and equal; that its laws, in general reflect that; and that government need and should right only what government has previously wronged.").

8. MACKINNON, *supra* note 7.

9. Rutherford, *supra* note 5, at 10-11.

10. *Id.* at 11-12.

communitarian ideals were the impetus for the New Deal legislation, including the passage of the Social Security Act that established Social Security and Aid to Families with Dependent Children.[11] Similarly, the notion of due process began to be transformed by the Court from an individualist doctrine to a more communitarian one based on protecting the welfare of the larger community.[12] Three decades later, Charles Reich, the "father" of the due process revolution, argued that procedural protections should be extended to those who had not been protected by the individualist framework—that is, recipients of government benefits.[13] Reich argued that those benefits must be treated as property, with the concomitant procedural protections.[14] Extending the procedural protections enjoyed by the affluent owners of "old property" to the poorer owners of "new property" would result in a more equitable system of justice. As such, Reich's focus was not on individual protections, but on achieving a system that was fair to the entire community.

In the case of *Goldberg v. Kelly*,[15] the Court expressed a communitarian view of due process, influenced by the theories of Charles Reich, when it found procedural protections for the poor people who benefit from government programs in the same constitution that was written for the rich and powerful.[16] In his *Goldberg* opinion, Justice William Brennan spoke of the dignitary value of process in eloquent language that hinted at the promise of substantive justice and equality.[17] However, in the subsequent case of *Mathews v. Eldridge*,[18] the Court appeared to put aside the egalitarian, communitarian rationale of *Goldberg* and relied on more formalist, individualist reasoning.[19] The individualist approach of the Court in *Mathews* limited the ability of the due process revolution to better the lives of the poor.

The other significant limitation on the due process revolution was the fact that the Court confined its communitarian approach to the procedural realm and refused to extend it to the substantive realm. In the case of *Dandridge v. Williams*,[20] the Court refused to recognize the substantive right to welfare benefits in the Constitution. An examination of the

11. 42 U.S.C. § 602 (1994).

12. Rutherford, *supra* note 5, at 13.

13. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 758-60 (1964) [hereinafter Reich, *The New Property*]; *see also* Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1256 (1965) [hereinafter Reich, *Individual Rights*].

14. Reich, *The New Property*, *supra* note 13, at 785-86.

15. 397 U.S. 254 (1970).

16. *Goldberg*, 397 U.S. at 270.

17. *Id.* at 264-65. In a later speech, Justice Brennan described his opinion in *Goldberg* as "injecting passion into a system whose abstract rationality has led it astray." *See* William J. Brennan, Jr., *Reason, Passion and "The Progress of Law," The Forty-Second Annual Benjamin N. Cardozo Lecture*, 10 CARDOZO L. REV. 3, 20 (1988).

18. 424 U.S. 319 (1976).

19. *Mathews*, 424 U.S. at 340-45.

20. 397 U.S. 471 (1970).

Court's contrasting rulings in *Goldberg* and *Dandridge* reveals a connection between substantive rights and procedural rights that underlies all of the Court's due process jurisprudence.[21] The more economic resources a person possesses, the more likely that person will benefit from an individualist approach to process which merely incorporates formalist procedural protections. On the other hand, a person with fewer economic resources would undoubtedly benefit from a more communitarian approach which also incorporates substantive protections. Ironically, however, the Court has historically refused to formally recognize substantive protections for poor people, but has been considerably more willing to provide substantive protections to people with more economic resources. For example, in the *Lochner* era, the Court applied notions of substantive due process to strike down state statutes that restricted business in order to benefit working people.[22] Recently, the Court has returned to such a substantive due process approach to defining rights of the more affluent in cases involving compensation for regulatory takings.[23] As a result, the Court has been inconsistent in its approach to process depending on the financial resources of the parties involved.

The Court's formalist individualist approach to process in the years since its *Goldberg* ruling, and its refusal to recognize substantive economic rights, has opened the door for the ongoing counterrevolution, which is significantly eroding the due process rights of poor people.[24] Shortly after its ruling in *Goldberg*, the Court began restricting the framework of rights that are protected by the Due Process Clause of the Fourteenth Amendment.[25] In addition, the Court has recently added to the restrictions on the amount of process to which an individual is entitled when she has established that the interest in question falls within the framework of rights protected by the Due Process Clause.[26] Congress also has participated in the due process counterrevolution. Significantly, Congress recently passed a welfare reform bill that ends the entitlement status of welfare benefits, placing *Goldberg* itself in jeopardy.[27] Congress also recently enacted restrictions on the ability of poor people to obtain meaningful representation by an attorney, to bring civil actions, and to lobby effectively.[28] In contrast, procedural protections for more affluent members of our society remain in good standing. While the Court has narrowed the definition of "new property," procedural protections for

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21. *See infra* notes 312-14 and accompanying text.
22. Lochner v. New York, 198 U.S. 45, 64 (1905).
23. *See infra* notes 260-78 and accompanying text.
24. *See* Pierce, *supra* note 4.
25. *See id.* at 1977-78.
26. *See* Sandin v. Conner, 515 U.S. 472, 483-84 (1995); Pierce, *supra* note 4, at 1988-89.
27. *See* Pierce, *supra* note 4, at 1990-91; *infra* notes 184-91 and accompanying text. *See generally* Rebecca E. Zietlow, *Two Wrongs Don't Add Up To Rights: The Importance of Preserving Due Process in Light of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111 (1996) (reviewing recent congressional welfare reform measures).
28. *See infra* notes 203-28 and accompanying text.

owners of "old property," who tend to be more affluent, have not been challenged.[29] Moreover, the Court has taken an activist stance in expanding the rights of owners of "old property" in the doctrine of compensation for regulatory takings.[30]

The widening gap between the rich and the poor in this country has been well documented.[31] Equally serious, but less widely acknowledged is the burgeoning gap between the procedural rights of the rich and poor. Increasingly, due process is returning to its individualist roots—protecting those who have property from losing it, but failing to protect those who do not have property as it is traditionally defined. A communitarian view of due process, with its promises of fairness and equality, has often been lost in the Court's formalism. However, in some cases involving the substantive and procedural rights of poor people, the Court still has taken more of a communitarian approach.[32] It is the central thesis of this article that the Court should return to a communitarian view of process, in which process is viewed as a means to establish a just society, to enable all people to participate fully in our democracy without limitations imposed by a lack of economic resources or political power.

The problem that this article addresses is not one that affects only the poor. When large numbers of citizens are disenfranchised, lacking an investment in the functioning of our political system, they may become a dangerous destabilizing element in our society. The chant of "no justice, no peace" reflects the frustration of people who feel that they are being treated unfairly, and that they lack control over important issues in their lives. The frustration of disenfranchisement can also cause social instability. The essence of due process is that the government should not act arbitrarily towards its citizens.[33] The community as a whole is harmed when a substantial number of its citizens are subject to arbitrary treatment by the government without effective redress.

In Part I of this article, I summarize the developments of the due process revolution and analyze the effect of the substantive and procedural arguments on the Court's due process jurisprudence. In Part II, I examine the practical and theoretical limits of the ability of the due process revolution to better the lives of the poor and the disenfranchised. The roots of the failings of the due process revolution, which has not brought about the fairness that it promised and arguably has created a sterile bureaucratic state, can be found in the Court's theoretical approach to due process, which by its very nature is biased against the needs of the poor

29. *See* Pierce, *supra* note 4, at 1996.

30. *See infra* notes 260-78 and accompanying text.

31. *See, e.g.*, KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR (1990); ROBERT B. REICH, THE WORK OF NATIONS (1991).

32. *See infra* notes 288-311 and accompanying text.

33. *See* Alexander, *supra* note 6, at 327 n.12; Fallon, *supra* note 1, at 310, 322-23; Rutherford, *supra* note 5, at 6.

and the disenfranchised. Despite the shortcomings of its approach, however, the due process hearings for recipients of government benefits, which resulted from the Court's *Goldberg* ruling, remain a significant avenue of participation for poor people. In Part III of the article, I describe how the due process counterrevolution has limited the rights of poor people to participate in all processes which affect their lives, from the administrative realm to the legislative process, from the ability to bring class actions to the ability to obtain effective representation by counsel. In Part IV, I describe how the gap between the procedural rights of the rich and poor has been widening as a result of the due process counterrevolution, undermining the egalitarian underpinnings of the Court's ruling in *Goldberg*. Even as the Court has restricted the procedural rights of poor people on all levels, it has greatly expanded the property rights of the affluent through the doctrine of compensation for regulatory takings. Finally, in Part V of the article, I suggest that the Court return to a communitarian approach to due process which would be more responsive to the needs of the poor. I suggest that the Court build on the "organic" approach of some of its earlier due process rulings, and incorporate substantive notions of economic justice to enhance the fairness of its rulings. It is essential that the Court adopt such an approach to reverse the disenfranchisement of the poor and foster a more just and stable society.

II. THE DUE PROCESS REVOLUTION

In the late 1960s and early 1970s, the Court expanded the notion of due process in a series of cases involving governmental benefits, contracts and other programs. Those Court rulings, foremost of which is *Goldberg v. Kelly*,[34] are generally known as the due process revolution.[35] In *Goldberg*, the Court found welfare recipients constitutionally entitled to trial-type hearings before the termination of their benefits.[36] In other rulings, the Court expanded the notion of due process to encompass prisoners' rights,[37] the rights of government employees,[38] and the right to

34. 397 U.S. 254 (1970).

35. *See* Pierce, *supra* note 4, at 1973. Prior to *Goldberg*, the Court decided the case of *King v. Smith*, 392 U.S. 309 (1968), in which the Court struck down an Alabama statute that deemed the income of any man with whom a woman was cohabiting to the household of that woman, as violative of the Federal Social Security Act. *Smith*, 392 U.S. at 333. The Court's ruling that states must follow uniform federal regulations governing the administration of welfare benefits was based on the view that uniform treatment was more fair, and thus had procedural overtones. However, the Court did not expressly cite the Due Process Clause as support for its opinion, and *Smith* is not generally considered to be a procedural case.

36. *Goldberg*, 397 U.S. at 264.

37. *See* Greenholtz v. Inmates of Neb. Penal and Correctional Complex, 442 U.S. 1 (1979); Wolff v. McDonnell, 418 U.S. 539, 555-56 (1974).

38. *See* Perry v. Sindermann, 408 U.S. 593, 603 (1974) (holding that opportunity must be given to justify a claim of entitlement to continue employment); Board of Regents v. Roth, 408 U.S. 564 (1974) (finding that, though not implicated in the case at hand, when one's reputation is at stake,

avoid a state-imposed stigma to one's reputation.[39] Through these rulings, people of all classes benefitted from the due process revolution. However, the *Goldberg* decision heralded an increase in the procedural rights of the poor, based in part on Charles Reich's expansive notions of the property rights of the poor.

Charles Reich's theories were embraced by the Court in part because of the political mood of the times, characterized by a belief in the power of government to transform society.[40] Reich had argued, in effect, that constitutional law discriminated against the poor by protecting only the property of the rich.[41] However, due process alone, even the expansive, communitarian notion of process expressed by the Court in *Goldberg*, did not serve the function of redistributing economic resources. To the extent that fairness is a component of the procedural rights established by the Court in the due process revolution, it was limited to procedural, not substantive fairness. As such, due process may be criticized for attempting to mask the injustice in a capitalist society, especially since the Court has been extremely reluctant to find substantive economic rights in the Constitution. The benefits of the due process revolution for poor people were limited by the individualist formalism of the Court's rulings subsequent to *Goldberg*, and by the Court's unwillingness to find substantive economic rights in other cases regarding welfare benefits.

A. *Supreme Court Jurisprudence*

The Court's ruling in *Goldberg* is arguably the closest that it came to establishing a communitarian notion of process, which would be particularly beneficial to poor people. The ruling had two significant theoretical bases, which expanded the concept of process to benefit the poorest members of society. First, the Court expanded the definition of property protected by the Due Process Clause to include the entitlement to government benefits.[42] By expanding the definition of protected property and liberty interests, the Court extended individualist protections, previously enjoyed primarily by affluent and middle class owners of traditional property, to the meager and previously unprotected property interests of poor people. Second, the Court extended the notion of due process to include pre-deprivation hearings.[43] That is, the property or liberty interest could not be taken away without the owner first enjoying the right

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procedural due process protections are required); *see also* Pierce, *supra* note 4, at 1978-79 (arguing that *Sindermann* and *Roth* made it very difficult to fire government employees).

39. *See* Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

40. Pierce, *supra* note 4, at 1975-76.

41. *Id.* at 1975.

42. Goldberg v. Kelly, 397 U.S. 254, 264 (1970).

43. *Goldberg*, 397 U.S. at 264-65.

to defend his interest in the property at a hearing.[44] Because the public benefits at issue were often the only significant property owned by the claimants in these cases, pre-deprivation hearings were especially significant.

The key to the due process revolution was the Court's expanded definition of liberty and property rights that triggered protections. In *Goldberg*, the Court recognized a property right in welfare benefits, which had not previously been considered to be property.[45] Charles Reich, whose work was cited by the Court in *Goldberg*, argued that those benefits must be treated in the same way as traditional "old property," with the concomitant procedural protections.[46] Reich had argued that constitutional law discriminated against the poor by protecting only the property of the rich.[47] Extending procedural protections to "new property"[48] would result in a more equitable system of justice, in which property rights would be treated the same regardless of the property involved, or the income of the owner of the property.[49] Reich's goal was to create a governmental system that was fair to everyone.

The due process revolution also reached the more affluent members of society as well as poorer recipients of government benefits. For example, in *Schware v. Board of Examiners*, a precursor to *Goldberg*, the Court held that an attorney could not be deprived of his license to practice law without a prior hearing.[50] In addition, all government employees benefitted from the Court's rulings that the interest in a government job was a property interest protected by the Due Process Clause,[51] and people of all classes benefitted from the protection of their reputation.

The due process revolution was confined primarily to the administrative realm. However, the Court also expanded the constitutional right to an opportunity to be heard in some civil cases. In *Sniadach v. Family Finance Corp. of Bay View*, the Court struck down a Wisconsin prejudgment wage garnishment procedure as violative of due process because it did not allow for any type of notice or hearing prior to an adverse judgment.[52] Similarly, in *Fuentes v. Shevin*, the Court struck down

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44. *See id.* at 264 (finding a due process right to pre-termination hearings for welfare recipients); Sniadach v. Family Fin. Corp., 395 U.S. 337, 341-42 (1969) (striking down a Wisconsin prejudgment garnishment procedure as violative of due process).

45. *Goldberg*, 397 U.S. at 262 n.8.

46. Reich, *The New Property*, *supra* note 13, at 780-83.

47. Reich, *Individual Rights*, *supra* note 13, at 1255-56.

48. Reich defined the "new property" as the property rights created by the state in the form of benefits and licenses. Reich, *The New Property*, *supra* note 13, at 739.

49. Reich, *Individual Rights*, *supra* note 13, at 1252-53.

50. 353 U.S. 232, 238-39 (1957); *see also* Willner v. Committee on Character and Fitness, 373 U.S. 96, 106 (1963) (finding applicant to Bar entitled to prior notice of grounds of his rejection).

51. *See* Pierce, *supra* note 4, at 1978-79 (arguing that *Roth* and *Sindermann* made it very difficult to fire government employees).

52. 395 U.S. 337, 340-42 (1969).

a Florida statute that allowed owners of leased property to obtain an order of replevin, authorizing the sheriff to seize the property, without prior notice and a hearing for the person who possessed the property.[53] As a practical matter, *Sniadach* and *Fuentes* affected the procedural rights of poor people because it was they who most often suffered from abuse of the state procedures in question.[54] Moreover, poor people with less property had more to lose than the more affluent people who had other property interests to fall back on if they were deprived without a prior hearing.

Finally, the fundamental right to be heard also was the basis for the Court's ruling in *Boddie v. Connecticut*, where it found that indigent plaintiffs in divorce suits had a constitutional right to a state procedure for waiver of filing fees.[55] In that case, the Court relied on both due process and equal protection principles, pointing out that to deny plaintiffs an in forma pauperis procedure would effectively deny them access to the only process for terminating their marriage on the basis of their income alone.[56] Subsequently, however, the Court found no due process violation in the federal government's refusal to waive fees in bankruptcy cases in the case of *United States v. Kras*,[57] and the State of Oregon's refusal to waive filing fees for administrative review appeals of welfare benefit hearings in *Ortwein v. Schwab*.[58] In both of those cases, the Court distinguished its ruling from *Boddie* on the basis that *Boddie* implicated the fundamental interest in a familial relationship, while *Ortwein* implicated only the economic interests of the plaintiffs.[59] Thus, the Court's willingness to find civil due process rights outside the administrative realm was limited by its reluctance to find economic rights in the Constitution. This reluctance paralleled the Court's reluctance to find substantive economic rights in other realms that might have impacted on procedural rights.

B. *Substance and Procedure in the Due Process Revolution*

The Court's ruling in *Goldberg* was a victory in a campaign by welfare rights activists and their lawyers to reform the system by which welfare benefits were allocated.[60] The primary goal of the welfare rights activists was to achieve substantive economic gains by establishing a con-

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53. 407 U.S. 67, 96 (1972).

54. *See Sniadach*, 395 U.S. at 340 ("A prejudgment garnishment of the Wisconsin type is a taking which may impose tremendous hardship on wage earners with families to support.").

55. 401 U.S. 371, 382-83 (1971).

56. *Boddie*, at 375-76.

57. 409 U.S. 434, 450 (1973).

58. 410 U.S. 656, 659-60 (1973) (per curiam).

59. *Ortwein*, 410 U.S. at 659; *Kras*, 409 U.S. at 450.

60. *See generally* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT 1960-1973 (1993) (discussing *Goldberg*'s impact on the welfare rights movement); FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 264-359 (1977) (discussing the welfare rights movement).

stitutional right to a minimum income.[61] The legal strategy of advocating for pre-termination fair hearings was seen as a means to achieve that goal.[62] In *Goldberg*, the Court indicated that it might be receptive to arguments for substantive economic rights with its broad based language of equality.[63] However, in the subsequent case of *Dandridge v. Williams*, the Court directly rejected a constitutional claim for economic rights.[64] In retrospect, procedural rights without substantive economic rights achieved limited progress for poor people.

In *Goldberg*, the Court expressed an egalitarian view of process that would encompass protections for all members of society, including welfare recipients.[65] In his opinion, Justice Brennan stated that procedural protections such as pre-termination hearings were essential both to substantive equality and to "foster the dignity and well-being of all persons within [this nation's] borders."[66] Thus, the Court in *Goldberg* saw procedural justice as "a normative horizon rather than a technical problem[,]"[67] and expressed a view of due process that recognized its potential to foster substantive equality in the procedural realm. This communitarian, egalitarian vision held out much promise to poor people, who had never benefitted from procedural protections and were generally disenfranchised. The Court's language indicated that the Court might also be willing to find substantive economic rights in the Constitution, including the right to a guaranteed minimum income or the constitutional right to welfare benefits.[68] However, the Court rejected that concept directly in the case of *Dandridge v. Williams*,[69] belying the promise of substantive justice in Justice Brennan's *Goldberg* opinion.

From the beginning of the welfare rights movement, substantive and procedural concerns were intertwined. The first goal of the welfare rights activists was a substantive economic goal—to achieve the right to a minimum income.[70] At the same time, however, advocates for the poor recognized that the poor were being treated with less dignity because of their lack of economic resources. As Charles Reich said, recalling the

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61. DAVIS, *supra* note 60, at 37.

62. *Id.* at 47.

63. *See* Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders.").

64. 397 U.S. 397, 487 (1970).

65. Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 3 (1990).

66. *Goldberg*, 397 U.S. at 264-65.

67. White, *supra* note 65, at 3.

68. *See Goldberg*, 397 U.S. at 265 ("Public assistance, then, is not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'").

69. *Dandridge*, 397 U.S. at 486-87.

70. DAVIS, *supra* note 60, at 45. The first goal of the National Welfare Rights Organization was "1. Adequate Income: A system that guarantees enough money for all Americans to live dignified lives above the level of poverty." *Id.*

insights that his research on caseworkers' investigative raids of the houses of welfare recipients gave him for his writings on the nature of property:

> I began to see that [the functional view of property] had much more profound implications than I'd first realized.... It was linked to class; the lower on the totem pole you are, the fewer rights you have. To have one rule for television licenses, for example, and another for welfare violates principles of equality.[71]

Similarly, the lawyers for the plaintiffs in *Goldberg* brought the case in part to protect the substantive First Amendment rights of welfare rights activists, who feared having their benefits terminated if they complained to their case workers about their benefit levels or governing regulations.[72]

Substantive economic gains would be meaningless if the state had complete discretion to administer those gains. But process was also valued in and of itself. After their experiences dealing with arbitrary welfare case workers, welfare rights activists wanted formal protections from governmental arbitrariness. Moreover, they wanted to be treated with dignity and have the ability to participate in decisions affecting their lives like other citizens.[73] It soon became apparent that these formal procedural goals would be more easily obtained than substantive economic changes. Indeed, gains in the procedural realm sometimes backfired, resulting in substantive inequity, as in the case of the "special grants" campaign by New York welfare activists. The "special grants" campaign, which combined efforts at both substantive and procedural reforms, was the chief organizational tool of the National Welfare Rights Organization (NWRO). Under the New York state "special grants" program, welfare recipients could apply for one time grants to pay for basic necessities such as furniture and clothing. In the summer of 1967, NWRO organizers assisted welfare recipients in applying for those grants in an organized campaign. Denials were followed up by requests for fair hearings.[74] The goal of this campaign was both to obtain more benefits for those who needed them, and to use the fair hearings system, which had almost never been used before, to pressure state officials for reform.[75] Ironically,

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71. *Id.* at 85 (citing author interview with Charles Reich, Jan. 21, 1989).

72. *See* Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 562-63 (1984). *But see* White, *supra* note 65, at 18 ("Socially powerless speakers do not have the luxury of confrontation....").

73. For example, three of the four goals of the National Welfare Rights Organization in 1967 were process-oriented goals: "2. Dignity: A system that guarantees recipients the full freedoms, rights and respect of all American citizens. 3. Justice: A fair and open system that guarantees recipients the full protection of the Constitution. 4. Democracy: A system that guarantees recipients direct participation in the decisions under which they must live." DAVIS, *supra* note 60, at 45.

74. *Id.* at 48.

75. *Id.* at 47; PIVEN & CLOWARD, *supra* note 60, at 301-05.

the State of New York responded to this "special needs" campaign by creating a new system of smaller, flat grants which would be available to all recipients.[76] Although the new system reduced the benefit levels, it was hard to oppose because it gave the appearance of fairness by concurrently reducing the discretion of welfare caseworkers.[77] In this manner, the state instituted procedural changes that appeared on their surface to be more fair, but actually masked substantive injustice, turning the reformers' strategy on its head. The State of New York's response to the "special needs" campaign illustrates how procedure without substance can become meaningless formalism, harming rather than helping the beneficiaries of that procedure. The state's action foreshadowed later developments, as courts saw procedure in increasingly formalistic terms that rendered it sterile and meaningless.

In *Goldberg* itself, the plaintiffs argued in favor of a substantive right to welfare benefits along with procedural protections, noting in their brief that without "the bare minimums essential for existence . . . our expressed constitutional liberties become meaningless."[78] The plaintiffs also raised substantive economic issues by telling stories of the hardships that they suffered when they had their only means of livelihood cut off for months while they waited for the appeals process.[79] These stories of "brutal need" may have significantly moved the Court toward its ultimate ruling in *Goldberg*.[80] Moreover, the language of the Court's ruling in *Goldberg* indicated that the Court may have been moved by more substantive economic arguments. In particular, Justice Brennan referred to welfare benefits as "not mere charity, but a means to 'promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.'"[81] However, the hope that the Court might find economic rights, as it had procedural ones, in the Constitution, was short lived.

In the case of *Dandridge v. Williams*, the Court specifically rejected the plaintiffs' attempt to establish a fundamental right to a minimum

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76. DAVIS, *supra* note 60, at 53.

77. *Id.* at 53-54.

78. Brief for Appellees at 39, Goldberg v. Kelly, 397 U.S. 254 (1970) (No. 62), *cited in* DAVIS, *supra* note 60, at 104. One attorney for the plaintiffs, Ed Sparer, had argued that it was imperative that *Goldberg* be used as a vehicle to establish a constitutional "right to live." DAVIS, *supra* note 60, at 103-04. Sparer's insistence was based in part on a New York federal court decision issued in another case handled by the Center on Social Welfare Policy and Law, *Rothstein v. Wyman*, 303 F. Supp. 339 (S.D.N.Y. 1969). In *Rothstein*, the court came close to recognizing welfare as a "fundamental right." *Rothstein*, 303 F. Supp. at 346-47; DAVIS, *supra* note 60, at 104. The language in the plaintiff's brief was the result of a compromise between Sparer and his more moderate colleague, Lee Albert, the director of the Center on Social Welfare Policy and Law. DAVIS, *supra* note 60, at 104.

79. *See* DAVIS, *supra* note 60, at 91-92 (emphasizing plaintiffs' plight in trial briefs); *Id.* at 109 (emphasizing plight of welfare recipients in oral argument before the Supreme Court).

80. *See* Brennan, *supra* note 17.

81. *Goldberg*, 397 U.S. at 264-65.

income.[82] The Court upheld a "family cap," imposed by the State of Maryland, which capped the level of benefits for recipients so that the level would not be increased if the recipient had more children.[83] Significantly, the Court treated welfare legislation as an economic regulation which triggered only minimal rational basis scrutiny, like a state's regulation of business interests.[84] The Court rejected arguments that welfare regulations should be treated differently than other economic classifications because of the "brutal need" of the recipients, over Justice Marshall's strident objections.[85] Any remaining expectation that the Court might recognize economic rights was dashed in the Court's opinion in *Wyman v. James*.[86] In that case, the Court analogized welfare benefits to private charity when it held that welfare recipients had no right to refuse access to caseworkers investigating their homes.[87]

Thus, the Court rejected the concept of substantive economic rights which might have accompanied the procedural rights that it found in *Goldberg*. More significantly, by applying a limited rational basis review in *Dandridge*,[88] the Court relegated the fate of poor people to the whims of state legislatures where they have little impact, and which are inherently conservative because of the impact of money on the legislative process.[89] In *Dandridge*, the Court ignored its admonishment in *United States v. Carolene Products Co.*, that discrete and insular minorities require more protection from courts because of their lack of clout in the legislative process, or it at least refused to recognize the poor as a discrete and insular minority.[90] The Court's reasoning stems in large part from its reluctance to apply notions of substantive due process to economic regulations. In the previous three decades, the Court had shied away from involving itself in the economy and disturbing the legislative process.[91] In *Dandridge*, the Court blindly applied the same rationale that it applies to antitrust and commerce clause concepts to the concerns of the poorest of the poor, unwilling to see the difference between regulating industry and allowing people meaningful control over their lives.

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82. Dandridge v. Williams, 397 U.S. 471, 487 (1970).

83. *Dandridge*, 397 U.S. at 481.

84. *Id.* at 485.

85. *See id.* at 520, 522 (Marshall, J., dissenting) (pointing out that the case involved "the literally vital interests of a powerless minority—poor families without breadwinners. . . . It is the individual interests here at stake that . . . most clearly distinguish this case from the 'business regulation' equal protection cases.").

86. 400 U.S. 309 (1971).

87. *Wyman*, 400 U.S. at 326.

88. *Dandridge*, 397 U.S. at 385-86.

89. *See infra* Part IV.E.

90. 304 U.S. 144, 152 n.4 (1938).

91. *See, e.g.*, Williamson v. Lee Optical, 348 U.S. 483, 487-88 (1955) (upholding an Oklahoma statute, under rational basis review, that made it unlawful for any person not a licensed optometrist or opthamologist to fit lenses, or replace or duplicate lenses).

Dandridge was a significant blow to the gains achieved by poor people in *Goldberg* and the other key cases of the due process revolution, and signaled a halt to the progress of the poor in both the procedural and substantive realms.[92] An undercurrent to all of the Court's rulings in cases involving the procedural rights of the poor since *Dandridge* is its refusal to find that class or income level is a suspect classification for the purposes of equal protection analysis. The Court's failure to classify economic interests as fundamental also precludes the Court from analyzing the impact of procedural mechanisms with strict scrutiny.[93] Because the Court has refused to find poverty to be a suspect classification, and because of its reluctance to apply the principles of substantive due process, many of the Court's rulings in favor of indigent petitioners in procedural cases are based on a hybrid reasoning that informally combines due process and equal protection principles to reach a result that comports with the Court's view of fairness.[94] However, these cases are few and far between, and have gotten lost in the Court's overall formalist approach to process.

III. THE LIMITS OF THE DUE PROCESS REVOLUTION

As a practical matter, the due process revolution did not bring about the justice that it promised. Instead, a bureaucratic state developed with an elaborate appellate process that is alienating for many welfare recipients. The failures of the due process revolution can be traced back to the Court's due process jurisprudence since *Goldberg*. The Court's formalist approach is not responsive to the needs of the poor, and is arguably biased against them.

A. *The Bureaucratic Welfare State*

Ever since the Court's ruling in *Goldberg*, scholars have critically analyzed the effect of the administrative state that grew out of the due process revolution.[95] The critiques fall into three general categories. First,

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92. As such, *Dandridge* parallels the impact of *Milliken v. Bradley*, 418 U.S. 717 (1974), on its efforts to desegregate public schools. In *Milliken*, the Court struck down a Detroit area desegregation plan that would have required busing of students between urban and suburban school districts to achieve racial parity. *Milliken*, 418 U.S. at 752-53. After *Milliken*, parents of white children could avoid sending their children to integrated schools by moving to the suburbs. Thus, it signaled the end of meaningful desegregation (as well as the end of decent urban public schools and the decline of urban areas in general). *See also* Denise C. Morgan, *What is Left to Argue in Desegregation Law? The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 108 (1991) ("The Court's experimentation with integration, however, ended with *Milliken v. Bradley*.") In *Milliken*, like *Dandridge*, the plaintiffs asked the Court to cross a line which it refused to cross. The result of both cases was the halt of meaningful reform.

93. *See* Fallon, *supra* note 1, at 314-15 (stating that, in the due process analysis, fundamental rights are subject to strict scrutiny, while non-fundamental rights merit only rational basis review).

94. *See infra* notes 321-24 and accompanying text.

95. *See, e.g.*, Jerry L. Mashaw, *The Management Side of Due Process: Some Theoretical and Litigation Notes on the Assurance of Accuracy, Fairness, and Timeliness in the Adjudication of*

many have criticized the cost of procedures, and advocated for limitations on procedural protections for the sake of reducing those costs.[96] This criticism has been accepted by the Court, and incorporated into its due process jurisprudence.[97] Second, others have critiqued the bureaucratic state that has resulted from implementing *Goldberg*'s requirement of pre-termination hearings.[98] A third area of criticism is the argument that the bureaucratic system seems to value process in and of itself, losing sight of the importance of fairness and justice in our society.[99] All of these criticisms are related, and are a natural result of a system based on process without substance.

Shortly after *Goldberg*, analysts voiced concern about the cost of the procedural protections that the Court had mandated.[100] The cost of process has always been a factor that weighs against the procedural rights of the poor, who cannot afford to pay for their own procedural protections. Since the state must always bear the cost of procedural protections for the poor, they will always be vulnerable to cost related critiques. Moreover, critics charge that money spent on procedural measures administering benefits reduces the amount of money available to recipients of those benefits.[101] According to this zero sum critique, procedure and substance are in direct competition with each other. The Court specifically rejected this argument in its ruling in *Goldberg*.[102] However, the Court tacitly accepted the argument that procedure was too costly in its subsequent ruling in *Mathews v. Eldridge*, and incorporated this criticism into the due process calculation.[103]

Social Welfare Claims, 59 CORNELL L. REV. 772 (1974) [hereinafter Mashaw, *Management Side*]; Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731 (1990) [hereinafter Reich, *Beyond the New Property*]; William H. Simon, *The Rule of Law and the Two Realms of Welfare Administration*, 56 BROOK. L. REV. 777 (1990) [hereinafter Simon, *Rule of Law*]; William H. Simon, *Legality, Bureaucracy and Class in the Welfare System*, 92 YALE L.J. 1198 (1983) [hereinafter Simon, *Legality*]. The Court's ruling in *Goldberg* was codified in the regulations governing Aid to Families with Dependent Children (AFDC), 42 U.S.C. § 602 (1994), and other government benefit programs. The fair hearing requirement as codified at 42 U.S.C § 602(a)(4). However, the AFDC program and all of its governing regulations were abolished by Congress in the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in scattered sections of 42 U.S.C.).

96. *See* Mashaw, *Management Side*, *supra* note 95.

97. *See* Mathews v. Elderidge, 424 U.S. 319 (1976).

98. *See* Simon, *Rule of Law*, *supra* note 95, at 785; Simon, *Legality*, *supra* note 95, at 1215-16.

99. *See infra* notes 114-16 and accompanying text.

100. Mashaw, *Management Side*, supra note 95, 804-24 (analyzing, among other things, the cost of procedures).

101. *See* Wheeler v. Montgomery, 397 U.S. 280, 284 (1970) (Burger, C.J., dissenting) ("[N]ew layers of procedural protection may become an intolerable drain on the very funds earmarked for food, clothing and other living essentials.").

102. *See* Goldberg v. Kelly, 397 U.S. 254, 266 (1970).

103. 424 U.S. 319, 347-48 (1976). *See* Pierce, *supra* note 4, at 1981 (stating that the *Mathews* balancing test was a response to the cost of process).

In *Mathews*, the plaintiff was a recipient of Social Security benefits who suffered from back pain and chronic anxiety.[104] His benefits were terminated by the state agency without a prior hearing, and he sued, claiming that the state action violated his due process rights.[105] In order to determine the extent to which he was entitled to pre-termination hearings, the Court established a three part balancing test to determine how much process is due to recipients of government benefits. According to the *Mathews* test, the state must balance the private interest which will be affected by the government action and the risk of erroneous deprivation of such interests through the procedures used, and the government's interest, including the fiscal and administrative burdens which would result from additional procedural protections.[106] The Court rejected the egalitarian nature of *Goldberg* and focused instead on an individualistic, utilitarian approach to process.[107] In *Mathews*, the Court pitted process against substance, setting up a contest that the poor were likely to lose.

A second area of criticism of the *Goldberg* approach to process focuses on its effect on the day to day administration of public benefits. As a result of the due process revolution, the administration of government benefits became more uniform and less discretionary. The resulting bureaucracy has been criticized by many as being both sterile and ineffective.[108] Charles Reich has argued that once attention was focused on procedure, reformers became preoccupied with the cost of procedure and overlooked the substantive question of individual need.[109] For example, many of the intrusive social workers who worked for welfare administrations prior to *Goldberg* were replaced by bureaucratic functionaries who had little training in meeting the needs of the poor and would simply follow administrative regulations.[110] The individual caseworker still makes most decisions on each welfare recipient's case and the system of appeals plays only a limited role in assuring that he or she makes correct decisions.[111] Moreover, the appeals system is too daunting for many re-

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104. *Mathews*, 424 U.S. at 324 n.2.

105. *Id.*

106. *Id.* at 335.

107. *See* Rutherford, *supra* note 5, at 48-49 (maintaining that a focus on the cost of process "subtly shift(s) the focus of due process from protecting the powerless to serving social utility as defined by the powerful").

108. *See* Simon, *Rule of Law*, *supra* note 95; Simon, *Legality*, *supra* note 95.

109. *See* Reich, *Beyond the New Property*, *supra* note 95, at 737 (arguing in favor of finding substantive economic rights in the Constitution).

110. *See* Simon, *Rule of Law*, *supra* note 95, at 785; Simon, *Legality*, *supra* note 95, at 1215-16 ("Educational requirements were reduced and efforts were made to recruit people who did not aspire to status or responsibility beyond clerical work.").

111. *See* Simon, *Rule of Law*, *supra* note 95, at 785. Although the system of appeals may serve as an incentive for caseworkers to make correct decisions so that they will not be overturned on appeal, they may also serve as a disincentive for some caseworkers, who know that any mistake they make can be corrected through an appeal.

cipients of governmental benefits who lack representation to utilize it.[112] "The fair procedures articulated by the Courts have become a labyrinth"[113] with devastating effects on those who are dependent upon it, and must navigate it for their livelihood.

Finally, others criticize the notion of process itself as empty formalism, bereft of the moral guidance needed to bring about justice in our society. In the bureaucratic welfare state, the humanist vision of *Goldberg* seems to be lost in the way "in which procedural rituals are actually played out."[114] Under this view, process serves to alienate, rather than empower, poor people. For example, formalized rules may intimidate recipients of benefits because they are both complex and constantly in flux, increasing the possibility that their benefits may be terminated by mistake for reasons that are not readily apparent to them.[115] Moreover, the alienating nature of the government bureaucracy may cause it to become a vehicle for gender and class subordination of people who are historically disenfranchised and subordinated because the bureaucracy reflects the stratification of society at large.[116] From this perspective, process has completely lost its substantive underpinnings and has become disengaged from any mechanism that might serve to create the fair society that it once promised.

Ironically, formal procedural rights may hurt rather than help poor people because they serve to mask substantive injustice. For example, the elaborate system of "fair hearings" implies that justice can be achieved through the use of those hearings.[117] However, this is not necessarily the case, especially for unrepresented recipients. Thus, process has become part of the problem to the extent that it has become a means to legitimate a system that is fundamentally unfair.[118] Recent welfare reforms have drastically decreased benefit levels by creating, among other things, five

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112. *See* Susan D. Bennett, *"No Relief But Upon the Terms of Coming Into the House"—Controlled Spaces, Invisible Disentitlements and Homelessness in an Urban Shelter System*, 104 YALE L.J. 2157, 2157-82 (1995) (describing in detail the discouraging process of homeless people in Washington D.C. applying and waiting for government assistance).

113. *See* Sparer, *supra* note 72, at 561.

114. White, *supra* note 65, at 4.

115. *Id.* at 35.

116. *Id.* at 41. *See generally* Gerald F. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984) (criticizing the varying definitions of bureaucracy as a mechanism of deception).

117. *See* Mark V. Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694, 708-09 (1980) (reviewing LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978)) (maintaining that *Goldberg* diminished the forces of equality "by deflecting them into a fruitless struggle against a bureaucracy that readily swallowed the Court-prescribed dose of due process without any change in symptoms, and second by bolstering the idea that fairness was not far away in the American welfare state").

118. For example, the bias of the decision maker remains a factor that may be masked by formal process. *See generally* Elaine Golin, Note, *Solving the Problem of Gender and Racial Bias in Administrative Adjudication*, 95 COLUM. L. REV. 1532 (1995) (detailing bias in administrative adjudications).

year lifetime caps on the receipt of benefits, and imposing work requirements and other restrictions on all welfare recipients.[119] It has been argued that due process is necessary to enforce those restrictions "fairly."[120] However, an equally persuasive argument can be made that those provisions are so substantively unfair that no amount of process can make them so.[121]

Reliance on sterile process rather than moral reasoning may result in a system that is even more unjust, rather than furthering the interests of justice. In modern society, the reliance on formalism allows decision makers to sidestep moral dilemmas and avoid issues of substantive injustice.[122] Because they rely on formal doctrines such as precedent, "judges do not sufficiently focus on the values needed for a meaningful dispensation of justice."[123] Similarly, decision makers may follow formal procedural doctrines rather than being forced to make decisions that are morally correct. Of course, the goal of process is to enable decision makers to make decisions that are morally correct. However, rights may become rarified and abstracted to the point where they lose all meaning.[124] If so, process may become an impediment to achieving a just society, rather than a means to achieve it.

The foregoing discussion indicates that, at the very least, procedure without substance cannot be a goal in and of itself.[125] Yet, the bureaucratic welfare state is based on a cost conscious approach which pits substantive values against procedure. The resulting bureaucracy fails to meet the needs of poor people and may serve to further alienate them instead. The current system of due process rights has not established, indeed cannot establish, the just society envisioned by those who brought *Goldberg*.

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119. *See* Welfare Reform Act of 1996, Pub. L. No. 104-193 § 103(7)(a), 110 Stat. 2105, 2137 (5 year cap); § 824, 110 Stat. at 2323 (work requirements).

120. *See* Alan W. Houseman, *The Vitality of* Goldberg v. Kelly *to Welfare Advocacy in the 1990s*, 56 BROOK. L. REV. 831, 846-47, 853 (1990); Zietlow, *supra* note 27, at 1129-30.

121. *See* White, *supra* note 65, at 42 (arguing that welfare has reflected and sustained women's subordination). *See generally* Martha Albertson Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287 (1996) (arguing that welfare reform has furthered, rather than reduced, women's subordination).

122. Phillip J. Closius, *Rejecting the Fruits of Action: The Regeneration of the Wasteland's Legal System*, 71 NOTRE DAME L. REV. 127, 131 (1995).

123. *Id.* at 131.

124. *See* Sparer, *supra* note 72, at 562.

125. For example, even advocates for due process would not want the full panoply of procedural protections, including a right to appear in civil court for judicial review on the first review of any administrative decision terminating welfare benefits. That process would be too time consuming and complicated. Aside from the court congestion that it would cause, the process would also be a burden for welfare recipients. They would have to wait too long to get a decision, and might feel overwhelmed by the procedural trappings of a civil court case.

B. *The Limits of Formalism*

Many of the effects of the due process revolution that have been criticized above flow naturally from the limits of the formalism with which the Court has approach procedural due process issues since *Goldberg*. The Court uses a two-pronged approach to procedural due process issues. First, the Court determines whether the plaintiff has any liberty or property right at stake. If so, the Court then determines how much process is warranted, applying the three part test of *Mathews v. Eldridge*.[126] The approach that the Court has adopted, which requires a state or federal statute to recognize a positive liberty or property right before any protections are triggered in the first prong of its analysis, is fundamentally biased against the less privileged because it requires someone to have a right to something before they are entitled to any process, and because the courts are more willing to recognize the substantive rights of the rich than those of the poor. In addition, the Court's approach to determining how much process is due, the second step, does not adequately account for the principles of fairness and equality, which are essential for a meaningful due process jurisprudence.

In *Roth v. Board of Regents*, the Court laid out the guidelines for determining whether a property or liberty interest is at stake.[127] A property or liberty interest does not stem from a person's "unilateral expectation" of that benefit.[128] Rather, that person has an identifiable interest only if she can establish that she has "a legitimate claim or entitlement" to it.[129] In order to determine whether an individual has a claim to entitlement, courts should look to "outside sources such as state law."[130] If there is no entitlement, then there is no constitutional requirement to procedural protections.

As a result of the Court's ruling in *Roth*, all individuals who seek due process protections must peruse state law and other sources to prove that they are entitled to some property or liberty interest as a preliminary step to make their case.[131] Courts become mired in the formal questions interpreting state statutes to determine whether they have created a liberty or property interest. Along the way, courts lose sight of what is

126. *See supra* notes 104-07 and accompanying text.

127. 408 U.S. 564 (1972).

128. *Roth*, 408 U.S. at 577.

129. *Id.*

130. *Id.*

131. For examples of innovative approaches to proving a property interest in order to convince courts that process is still due in a block grant era, see John Bouman, *Due Process For Welfare Recipients Subject to Changing Program Rules: An Illinois Case Study*, CLEARINGHOUSE REV., June 1996, at 112-13; and Nancy Morawetz, *A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era*, CLEARINGHOUSE REV., June 1996, at 98-100.

really at issue—the fairness of the state's treatment of the individual.[132] Moreover, the process generates anomalous results. As Jerry Mashaw has noted, "[i]t is a 'strange constitution' that protects hobby kits and the right to dispute one's water bill," but not nursing home residents who object to being moved from one nursing home to another.[133] The Court's positivist approach has been criticized by scholars both because it is relativistic, and because it leaves people subject to the whims of state legislatures.[134] In fact, some judges and scholars have argued that state legislatures are free to limit procedural protections in substantive legislation without any constitutional restrictions.[135] Other scholars have argued that notions of property and contract must have a core of federal constitutional meaning.[136]

The Court's positivist approach is positivist because it depends on the state to create a positive liberty or property interest. It is arguably biased by nature against the poor and the disempowered. The relegation of procedural rights to state legislatures would harm the interests of poor people because of the importance of money in the legislative process. Even more significant, as Mashaw has pointed out, positive law grants no substantive rights when no standards exist for exercising administrative discretion.[137] That is because, after the language of *Roth*, courts must carefully analyze the language of a statute to determine whether a beneficiary had a reasonable expectation of entitlement. When a system of government benefits allows the state complete discretion in its administration, a reasonable person has no expectation of an entitlement.[138] Thus, people with less political power are less likely to have their interests determined to be entitlements by courts.

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132. *See* Jerry L. Mashaw, *Dignitary Process: A Political Psychology of Liberal Democratic Citizenship*, 39 U. FLA. L. REV. 433, 434 (1987) [hereinafter Mashaw, *Dignitary Process*].

133. *Id.* at 437.

134. *See* Farina, *supra* note 1, at 197-201; Sylvia A. Law, *Some Reflections on* Goldberg v. Kelly *at Twenty Years*, 56 BROOK. L. REV. 805, 813-14 (1990); Mashaw, *Dignitary Process*, *supra* note 132, at 437-38; Reich, *Beyond the New Property*, *supra* note 95, at 732.

135. This "bitter with the sweet" theory, put forth by Justice Rehnquist and Judge Easterbrook takes the positivist approach to its logical conclusion. *See* Alexander, *supra* note 6, at 335; Pierce, *supra* note 4, at 1986-87. Under that theory, state legislatures may link substantive benefits with limits on procedural protections. That is, beneficiaries of state benefits must take the "bitter" (lack of process) with the "sweet" (government benefit). Pierce, *supra* note 4, at 1986-87. Such an approach would be completely antithetical to the notion of process and participation as a dignitary value, with fairness as a goal in and of itself. *Id.* ("Acceptance of the 'bitter with the sweet' theory would have constituted clear, if implicit, repudiation of the entire due process revolution."). The theory was rejected by the Court in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985). However, it retains the support of some justices and member of the academy. *See generally* Pierce, *supra* note 4, at 1986-95.

136. *See* Fallon, *supra* note 1, at 329.

137. Mashaw, *Dignitary Process*, *supra* note 132, at 438.

138. *See* Colson v. Sillman, 35 F.3d 106, 109 (2d Cir. 1994) (finding that applicants for children's health benefits provided by the state had no due process rights because the state statute provided for benefits only within the limitations of funds appropriated for the program, and thus the benefits were not entitlements).

Moreover, the entitlement approach is fundamentally biased against the poor because it requires the existence of a property or liberty right before an entitlement to process can be found. "In short, the Court's entitlement analysis, grounded in positive law prescriptions, causes due process protection to drop out of the Constitution when needed most."[139] Therefore, the first step of the Court's due process jurisprudence is fundamentally flawed in its ability to provide process for the poor and the disenfranchised.

The second step of the Court's due process reasoning, the balancing test of *Mathews v. Eldridge*,[140] is also weighted against the interests of the poor and the disenfranchised. In the *Mathews* test, courts pit the state's interests against those of the individual seeking procedural protections. The test is weighted in the state's favor because providing due process will always be costly to the state, so the state will have an interest in not providing procedural protections, and because the property interest of any individual poor person will be small. It also harms poor people in particular because they cannot afford to buy procedural protections. For example, they cannot afford to hire a lawyer to help them enforce their rights.

Moreover, equality is not taken into account in determining the procedural protections required by constitutional provisions of due process. Thus, the Court could find that welfare recipients were entitled to pre-termination hearings in *Goldberg*, and later find that recipients of Social Security benefits, many of whom also depend on their benefits for survival, were not entitled to pre-termination hearings in *Mathews*.[141] Moreover, the *Mathews* approach pits beneficiaries against each other because it is premised on the notion that the state will pay for procedural protections with money that would otherwise have been allocated for benefits.[142] Finally, the *Mathews* balancing test leads naturally to a sterile bureaucracy. State agencies are allowed to mathematically compute how much process they will provide rather than determining what procedures would be the most fair, or the most likely to reach the correct result, and have no incentive to design procedures leading to such results. Therefore, those who are most dependent on those processes—the recipients of governmental benefits—have the most to lose under the balancing test.

C. *The Resonance of* Goldberg

Despite all of its limitations, on both the practical and theoretical level, *Goldberg* and its progeny are still meaningful for the poor and

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139. Mashaw, *Dignitary Process*, *supra* note 132, at 438.

140. 424 U.S. 319 (1976).

141. The Court has been criticized for relying on speculative factual reasoning in *Mathews* because, in fact, many Social Security recipients do rely on their benefits as the sole source of income. *See* Reich, *Beyond the New Property*, *supra* note 95, at 732.

142. Rutherford, *supra* note 5, at 50.

their advocates. Because courts, legislatures and administrators are often not receptive to the substantive claims of the poor, individual hearings are an important arena for advocacy.[143] The right to be treated with dignity is still a value in and of itself, and it remains one of the few rights that poor people can enforce, usually with the help of representatives, in administrative hearings. The value of procedure in and of itself is of particular concern when those affected belong to a historically disadvantaged and disempowered group, especially women and members of racial and ethnic minority groups.

Of all the reforms achieved by welfare rights activists in the 1960s, the right to due process hearings from *Goldberg* may be the only one to remain active and vital.[144] Because courts recently have not been as receptive to impact litigation as they were in the past, advocates have resorted to individual hearings to vindicate their clients' rights.[145] Administrative process provides one of the few avenues of redress for advocates for the poor.[146] Of course, procedural protections are no substitute for substantive economic rights. However, when poor people bring substantive claims, they nearly always threaten the power structure since economic issues are implicated by necessity. As the Supreme Court has failed to find economic rights in the Constitution, poor people must use their procedural rights to glean what they can from the system, even if the system is fundamentally unjust.

Moreover, the notion of formal rights continues to resonate for the poor and the disenfranchised.[147] For example, in the civil rights movement, people risked their lives (and sometimes lost them) in the fight for the formal right to vote. Prior to *Goldberg*, poor people had virtually no rights, procedural or otherwise.[148] One of the highest priorities of the National Welfare Rights Organization was for all people to be treated with

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143. *See* Houseman, *supra* note 120, at 835; Zietlow, *supra* note 27, at 1129-39.

144. *See* Houseman, *supra* note 120, at 832-33 (stating that the substantive reform cases such as *King v. Smith*, 392 U.S. 309 (1968), no longer provide a framework for advocates for the poor). However, *Goldberg* itself is now in jeopardy after the enactment of the recent welfare reform bill. *See infra* notes 184-91 and accompanying text.

145. Houseman, *supra* note 120, at 835; *see* Zietlow, *supra* note 27, at 1115-16 (discussing that legal services attorneys spend much of their time representing clients at individual hearings). In particular, impact litigation advocating for welfare reform has been a target of recent Congressional action as members of Congress were annoyed by the attempts of advocates for the poor to influence welfare reform policy.

146. Houseman, *supra* note 120, at 836.

147. *See, e.g.*, Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 314-15 (1987) (finding informal process to have negative impact on minorities); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studues and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323, 390-91 (1987) (identifying need for structure in identifying and eliminating racism); Patricia J. Williams, *Alchemical Notes: Reconstructing Ideals from Reconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401, 408 (1987) (commenting on need for formal legal processes to assure rights).

148. Law, *supra* note 134, at 806.

dignity, rather than contempt and patronization, by the state workers with which they came into contact.[149]

Studies show that people who are disenfranchised are correct in valuing formal procedures.[150] Decision makers are less likely to act on prejudice if they are constrained by formal procedures.[151] Therefore, people who have faced historical discrimination, including women, people of color and poor people, have more to gain from formal procedures. Process also may serve as a means of empowerment for the disempowered. A formal hearing allows a person an arena in which to voice her concerns and air her grievances.[152] Moreover, process can serve as a means to balance power.[153] Procedural protections are designed to limit power imbalances by allowing people to participate in decisions that affect their lives.[154] Finally, as the opportunity to participate is essential to one's identity as a citizen, we must not overlook the importance of that opportunity to preserve the dignity of all of our citizens, regardless of their race, gender, ethnicity or income level.

IV. THE DUE PROCESS COUNTERREVOLUTION

In recent years, this country has undergone a due process counterrevolution, in which courts and legislatures have restricted the due process rights that they once had expanded thirty years ago.[155] Just as the due process revolution was most beneficial to the economically underprivileged, it is the poor and the disenfranchised who are losing their rights in

149. *See supra* note 73. Similarly, feminists seem drawn to procedural issues and protections as a means of empowerment for women, who have historically been disempowered. *See* Elizabeth M. Schneider, *Gendering and Engendering Process*, 61 U. CIN. L. REV. 1223 (1993).

150. I have addressed this issue at length in my earlier work, Zietlow, *supra* note 27, at 1114-21.

151. *See* Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1387-89 (stating that without procedural formalities, decision makers are more likely to be swayed by prejudice); Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1076 (1984) (stating that poorer parties are disadvantaged in the bargaining process because of their limited resources to finance litigation).

152. In her *Sunday Shoes* article, Lucie White tells the story of her representation of a client in a welfare hearing who appears to be overwhelmed and confused by the formal process of the hearing. White, *supra* note 65. White is effective in pointing out the limits of the effectiveness of procedure as an empowering structure. *Id.* However, White's story, rather than proving the disempowering nature of procedure, shows how it can be effective as a means of empowerment. By White's own account, her client was happy with the hearing and felt that she was able to tell her story. *Id.* at 31. Moreover, although she lost the formal appeal, she won her case when the county welfare department dropped the overpayment charge against her. *Id.* at 32.

153. Rutherford, *supra* note 5, at 5.

154. *See* Fiss, *supra* note 151, at 1077-78 (pointing out that one goal of the Federal Rules of Civil Procedure is to lessen the impact of distributional inequalities through the use of formal procedures).

155. *See generally* MASHAW, *supra* note 1, at 29-41 (suggesting the costs of increased citizen access to administrative hearings has driven courts to rethink participation rights granted in the early 1970s); Pierce, *supra* note 4 (stating that after a relatively stable post-revolution period from 1978-1994, recent developments foreshadow a due process counterrevolution).

the counterrevolution. In the administrative realm, the counterrevolution manifests itself in the Court's cutting back on what constitutes a liberty or property interest that triggers due process,[156] and in reducing the procedural protections that are constitutionally required.[157] Moreover, federal and state legislatures are reducing the procedural rights of recipients of government benefits by redefining some governmental benefits as lacking entitlement status, and therefore as "non-property."[158]

The due process counterrevolution in the administrative sphere will severely affect the ability of the poor to participate in decisions which will affect their lives. In addition, recent developments which encompass a broader notion of process will also serve to further disenfranchise the poor. For example, other related developments in the procedural realm of civil procedure, including amendments to Federal Rule of Civil Procedure 23, will restrict the ability of the poor to bring class actions to vindicate their rights. Restrictions on Legal Services Corporation (LSC) activities signal a significant decline in the procedural rights of the economically disadvantaged, and cuts in funding for the LSC threaten to deprive poor people of the primary access that they have to an attorney, further limiting their ability to participate effectively in decisions that affect their lives. Finally, the Court's interpretation of the First Amendment in election finance cases virtually insures that poor people will have little or no say in the political process. All of these developments have an impact on the ability of the poor to exert control over their own destinies, and implicate the right to participate in a broader sense than that traditionally referred to as procedural.[159] Moreover, they illustrate the increasing disenfranchisement of the poor in almost every aspect of their lives. Therefore, the author considers them to be essential aspects of the due process counterrevolution.

A. *The Administrative Counterrevolution*

The Supreme Court began its retreat from the due process revolution before it was even complete.[160] By 1978, the Court had issued nine opinions that reduced the scope of due process protections required by the Constitution.[161] Moreover, the Court limited the scope of interests triggering due process protections in cases involving harm to one's

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156. *See* Sandin v. Conner, 515 U.S. 472 (1995).

157. *See* Parratt v. Taylor, 451 U.S. 527, 541 (1981), *overruled by* Daniels v. Williams, 474 U.S. 327 (1986).

158. The most significant development in this realm is the new Transitional Aid to Needy Families program of the Welfare Reform Act, which specifically defines welfare benefits as lacking entitlement status. 42 U.S.C. § 601 (1994).

159. For example, neither Mashaw nor Pierce refer to these developments in their discussion of a due process counterrevolution. *See generally* Pierce, *supra* note 4; MASHAW, *supra* note 1, at 29-41.

160. Pierce, *supra* note 4, at 1973.

161. *Id.* at 1973 & n.2.

reputation,[162] and in the context of regulatory proceedings.[163] In several other opinions, the Court held that the Constitution did not require a full *Goldberg*-style hearing before benefits could be terminated, but could be satisfied by an informal paper review prior to governmental action.[164] The most significant of these cases, however, is *Mathews v. Eldridge*,[165] in which the Court rejected the broad-based ideological vision of its *Goldberg* opinion in favor of a utilitarian approach, which principally reflected a concern about the cost of procedural protections.[166] As noted above, *Mathews* set the stage for a due process regime in which poor people are by nature likely to be under served. In a series of cases, the Court has also cut back on what procedural protections are required in the context of claims brought under the primary civil rights statute, 42 U.S.C. § 1983, for compensation sought as redress for denials of process.

Recent Supreme Court rulings have limited the ability of plaintiffs to bring procedural due process claims under section 1983. These rulings reflect the Court's impatience with the number of such claims that resulted from the due process revolution. For example, in *Parratt v. Taylor*, the Court limited the ability of plaintiffs to recover under section 1983 from the lack of pre-deprivation process to protect from the "random and unauthorized acts" of government officials.[167] In *Sandin v. Conner*, the Court limited the ability of a prisoner to recover under section 1983 for actions of prison officials which arguably violated his procedural rights.[168] Both cases can be seen as nothing more than the Court's attempt to curb section 1983 actions when other procedural remedies were available. However, the cases also may have repercussions that further undermine the constitutionally required procedural rights in the administrative context.

In *Parratt*, the plaintiff was a prisoner whose hobby kit was lost by the prison employees in the mail room.[169] Although he could have brought a post-deprivation state court action in tort, he decided instead to file a section 1983 action in federal court, alleging violation of his due process rights by prison officials because he was denied a pre-

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162. *See* Paul v. Davis, 424 U.S. 693, 708-09 (1976) (holding that government action which stigmatizes triggers a property interest only if that stigma denies a state-protected right, and loss of reputation is not such a right).

163. *See* Pierce, *supra* note 4, at 1984.

164. *See id.* at 1983.

165. 424 U.S. 319 (1976).

166. *See* Pierce, *supra* note 4, at 1982 ("The dramatically different tone of the opinion in *Eldridge*, however, seemed to send a message that *Goldberg*, and its welfare context, represented the high water mark for the procedures the Court would require before the government could deprive an individual of an interest protected by due process.").

167. 451 U.S. 527 (1981).

168. 515 U.S. 472 (1995).

169. *Parratt*, 451 U.S. at 529-30.

deprivation remedy.[170] The Court found that pre-deprivation process is not constitutionally required when it is not feasible, and when the person affected has sufficient post-deprivation remedies.[171] The Court held that a state need not provide pre-deprivation procedures to guard against "random and unauthorized acts" by the state.[172]

The Court's ruling in *Parratt* may be nothing more than simply creating an abstention doctrine encouraging plaintiffs to use state tort remedies.[173] However, at the very least, *Parratt* places the burden on plaintiffs to prove the constitutional inadequacy of a state's remedies.[174] The *Parratt* Court appeared to condone random and unauthorized government acts by holding that it would be too difficult to provide pre-deprivation remedies for those acts. If so, *Parratt* represents a significant barrier to establishing due process protections when they are arguably needed the most.[175] For example, in the case of *Clifton v. Shaffer*, the Court of Appeals for the Seventh Circuit relied on *Parratt* when it found that a plaintiff who suffered a two month deprivation of his welfare benefits because of a mistake made by his caseworker did not state a due process claim under section 1983 because the caseworker's act was random and unauthorized.[176] When interpreted in this manner, the *Parratt* doctrine means that due process does not protect against the most arbitrary and unfair state action.

The Court's recent decision in *Sandin v. Conner* also may be a significant development in the due process counterrevolution.[177] In that case, the Court put severe limits on what could be considered to be the definition of a liberty interest, finding that a prisoner is deprived of a liberty interest only when the state's action imposes an "atypical or significant hardship on the inmate in relation to the normal incidents of prison life."[178] The Court found that the plaintiff's thirty days in solitary confinement was not "atypical" or "significant" enough to implicate a liberty interest.[179] Thus, the Court severely limited the scope of what a prisoner could claim as a "liberty" interest.

Most importantly, in *Sandin* the Court appears to have created a third hurdle for persons attempting to bring due process claims—a hurdle

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170. *Id.* at 543-44.

171. *Id.* at 538.

172. *Id.* at 541.

173. *See* Fallon, *supra* note 1, at 345-51.

174. *Id.* at 356.

175. *See* Morawetz, *supra* note 131, at 103.

176. 969 F.2d 278 (7th Cir. 1992). The plaintiff in *Clifton* had also filed an administrative appeal, which eventually resulted in the restoration of his benefits. *Clifton*, 969 F.2d at 280. However, he was left without compensation for the damages that he incurred during the two months in which he was without benefits due to the error of his caseworker.

177. 515 U.S. 472 (1995).

178. *Sandin*, 515 U.S. at 484.

179. *Id.* at 486.

of "importance."[180] The Court's ruling in *Sandin* is presently confined to prisoners' rights cases, and the Court's reluctance to find a liberty interest for an incarcerated individual, as well as its regard for the state's interest in security,[181] were obvious factors in this case. Nevertheless, *Sandin* may have significant repercussions in all administrative due process contexts.[182] The "importance" threshold may be particularly problematic for poor people because the amount of property or liberty at issue in any particular due process claim almost always will be small enough to enable courts to find that their interest is simply not important enough, thus further undermining procedural due process protections to the poor and the disenfranchised. Moreover, it completely sidesteps the issue of fairness. The Court's reasoning in *Sandin* seems to imply that the Constitution will tolerate unfairness as long as the courts do not deem the unfairness to be important.[183]

B. *The End of* Goldberg*?*

Most significantly for the poorest of the poor, the welfare reform bill recently enacted by Congress encourages states to test the validity of *Goldberg* itself.[184] In that statute, Congress abolished the New Deal-era program of Aid to Families with Dependent Children and replaced it with a new program, Temporary Assistance to Needy Families (TANF).[185] This law states emphatically that welfare benefits are no longer entitlements.[186] Since the new welfare benefits are no longer entitlements, the Court might find that they no longer trigger due process protections. Therefore, welfare beneficiaries may no longer be constitutionally entitled to pre-termination hearings, or to any other due process protections.

In *Goldberg*, the Court glossed over the issue of whether the plaintiffs had a protected property interest, noting only that benefits were statutory entitlements.[187] In *Board of Regents v. Roth*, the Court further clarified that a person is entitled to benefits only if he or she can demonstrate "a legitimate claim of entitlement" to them, grounded in statutory

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180. *See* Morawetz, *supra* note 131, at 98.

181. *See* Hewitt v. Helms, 459 U.S. 460 (1983).

182. *See* Pierce, *supra* note 4, at 1989 (stating that *Sandin* may be the first of a series of counterrevolutionary decisions).

183. Moreover, the Court in *Sandin* appeared to place a high threshold on importance when it found that thirty days of solitary confinement was not "important" enough to merit constitutional protection. *Sandin*, 515 U.S. at 486.

184. *See* Pierce, *supra* note 4, at 1976, 1989-90; Zietlow, *supra* note 27, at 1126-27.

185. The Welfare Reform Act of 1996, Pub. L. No. 104-193 § 103, 110 Stat. 2105, 2112 (codified in scattered sections of 42 U.S.C.).

186. *Id.* § 401.

187. *See* Goldberg v. Kelly, 397 U.S. 254, 262, 263 n.8 (1970) (characterizing welfare benefits as statutory entitlements for those eligible and "welfare entitlements as more like 'property' than a 'gratuity'").

law or other sources.[188] After *Roth*, it appears that discretionary programs probably do not trigger due process protections.[189] For example, in the case of *Colson v. Sillman*, the court found that no due process protections were warranted for recipients of state funded children's medical benefits because the statute defining the program stated that their availability depended on money being appropriated for them.[190] Under the new welfare statute, states may run out of money because states also are not entitled to federal money with which to pay for benefits.[191] Therefore, states may link the right to welfare benefits on appropriations, creating contingent entitlements similar to those at issue in *Colson*. The TANF program, while giving a large amount of discretion to states, also goes a step further by emphatically stating that benefits are not entitlements.[192] Given the Court's ruling in *Roth*, and Congress' clear intentions, it is unlikely that the Court would find an entitlement to welfare benefits if it were to decide *Goldberg* today. Without such a property interest to trigger protections, it is unlikely that the Court would find any constitutional requirement to process for welfare recipients under its current mode of analysis.

The TANF program delegates wide discretion to states in establishing and administering welfare programs.[193] Several states have taken the hint from Congress, and restricted the procedural rights of beneficiaries and applicants to their welfare programs.[194] Both Wisconsin and Michigan, considered to be pioneering states in welfare reform issues, have taken steps to reduce the due process rights of welfare recipients. Under the new "Wisconsin Works" (W-2) program, the administering agency, the Department of Workforce Development (DWD), is only required to review agency decisions that involve the denial of an application based solely on the determination of financial eligibility.[195] On all other matters, the DWD is not required to review the local agency's decision, although

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188. *See* Board of Regents v. Roth, 408 U.S. 564, 577 (1972). The Court noted that its decision in *Goldberg* was triggered by the fact that welfare recipients "had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them." *Id.*

189. *See* Morawetz, *supra* note 131, at 104. However, welfare recipients might still be entitled to procedural protections from government action that is completely arbitrary, such as the denial of benefits based on eye color or hat size. *See generally* Joint Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123 (1951); Fallon, *supra* note 1 (discussing procedural protections of the due process clause against arbitrary decisions by the government).

190. 35 F.3d 106, 109 (2d Cir. 1994). *But see* Eidson v. Pierce, 745 F.2d 453, 462 (7th Cir. 1984) (alluding that establishment of eligibility is contingent on availability of resources as establishing an entitlement).

191. *See* Zietlow, *supra* note 27, at 1127.

192. The Welfare Reform Act § 401.

193. The Welfare Reform Act § 401.

194. These measures will almost certainly be subject to challenge on constitutional grounds, and may be found to be unconstitutional by the courts. Such a challenge would give the Supreme Court the opportunity to reinterpret its *Goldberg* ruling. *See infra* Part VII.

195. WIS. STAT. § 49.152(1) (1996).

it is authorized to do so.[196] There is no requirement to continue benefits while an appeal is pending under the W-2 dispute resolution process. Thus, the state of Wisconsin is disregarding the essentials of the *Goldberg* ruling. Moreover, the review need not include the bedrocks of due process—prior notice and the opportunity for a hearing.[197] Rather, the W-2 program allows only for a "review" by the agency or the DWD, and prompt review and notification are not specifically required.[198]

Similarly, in Michigan, the Family Independence Agency (FIA) has proposed regulations that would allow the agency to close or reduce assistance at the time when notice of the proposed action is sent.[199] The regulation would eliminate the procedural protections of advance notice and pre-termination hearings.[200] Moreover, the Administrative Law Judges (ALJs) who conduct the hearings are now strictly limited as to what they can determine in the hearings. ALJs have no authority to make decisions on constitutional grounds, overrule statutes, overrule promulgated regulations or overrule or make exceptions to the agency policy set out in program manuals.[201] Any such issues must be referred to a review board known as the Policy Hearing Authority. These regulations will make it difficult for welfare recipients to win any constitutional, statutory, or policy arguments at their hearings. Like the restrictions on LSC attorneys, their obvious if unstated purpose is to stifle the participation of welfare recipients with regard to any policy issues that may have an impact on a larger number of people.[202]

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196. *Id.* § 49.152.

197. *Id. See* Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950) (stating that "[m]any controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that . . . deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing").

198. WIS. STAT. § 49.152(2). The lack of a requirement for prompt review is particularly significant given the fact that benefits need not be provided while one is awaiting review. This issue was one of the bases for the Court's ruling in *Goldberg*. *See supra* notes 79-81 and accompanying text.

199. *See* MICH. ADMIN. CODE § 400.902 (1997) (proposed version) (copy on file with author).

200. The proposed rules would still allow the reinstatement of benefits if a claimant requests a hearing, in writing, within ten days of the mailing of the notice of the negative action, significantly easing the impact of the lack of prior notice on the recipient. *Id.* § 400.904(5).

201. FAMILY INDEPENDENCE AGENCY, STATE OF MICHIGAN, DELEGATION OF HEARING AUTHORITY (1997) (copy on file with author).

202. The TANF program requires recipients to participate in work activities in order to receive their benefits. *See* The Welfare Reform Act of 1996, Pub. L. No. 104-193 § 824(o)(2), 110 Stat. 2105. Until recently, it appeared that welfare recipients who work would also be exempt from statutory worker protections, such as the Fair Labor Standards Act and the Occupational Health and Safety Act, making even those who work second class citizens with little hope of belonging to society. However, the recently passed House Appropriations Bill, Pub. L. No. 105-133, 111 Stat. 251 (1997), states that welfare workers are "employees" subject to statutory protections. The willingness of Congress to agree to this requirement indicates at least some political will to limit the disenfranchisement of the poor. It also indicates the gains that may result when the poor are supported by powerful lobbyists for big labor, for whom the protections were a priority. *See* Adam Clymer, *White House and the G.O.P. Announce Deal to Balance Budget and to Trim Taxes*, N.Y.

C. *The Lack of Counsel*

Another significant blow to the procedural rights of poor people, initiated by Congress and supported by court rulings, is the decline in access to legal representation for poor people. The principle development in this area is Congress's recent cuts in funding for the Legal Services Corporation (LSC). Representation by an attorney is crucial to enforce the rights, both procedural and substantive, of the poor.[203] The Legal Services Corporation is the principal provider of counsel to the poor.[204] However, in recent years Congress has drastically cut funding to the LSC.[205] As a result, the number of attorneys available to poor people has diminished significantly.[206] Moreover, recent Court rulings indicate that resort to the courts to find a right to counsel would be fruitless. The lack of counsel is a significant blow to the ability of those who cannot afford an attorney to participate in the legal process.

In particular, the lack of representation by counsel affects women and people of color, who have historically suffered from discrimination, most severely. Studies show that women have a particularly hard time speaking for themselves in court and other formal situations because of speech patterns that accompany gender domination.[207] Some linguists have noted significant differences in the speech patterns of women and men, with men being more direct and efficient in transmitting information, and women more concerned at being polite and avoiding offending the listener.[208] Other linguists critique this finding and argue that women's speech patterns are just different "strategies" for conveying information, which are most pronounced in the speech of racially and

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TIMES, July 29, 1997, at A1 (noting that "[u]nions had feared that if those employees were paid less, they would undercut union workers").

203. Zietlow, *supra* note 27, at 1114-15.

204. *See* Houseman, *supra* note 120, at 836-37 (describing the importance of Legal Services Corporation to poverty law).

205. For example, Congress reduced LSC funding by thirty percent to $278 million in fiscal year 1996, a reduction of $122 million from fiscal year 1995. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, 110 Stat. 1321. The budget for fiscal year 1997 provides $283 million in funding, virtually the same level as in 1996. Omnibus Consolidated Appropriations Act, Pub. L. No. 104-208, 110 Stat. 3009 (1997). The proposed budget for fiscal year 1998 has increased slightly, with an appropriations amount of $300 million. S. 1022, 105th Cong. (1997) (passing Senate with 99-0 vote and currently awaiting House action).

206. In 1980, 6,559 attorneys were employed by LSC-funded programs. LEGAL SERVICES CORPORATION, CHARACTERISTICS OF FIELD PROGRAMS SUPPORTED BY THE LEGAL SERVICES CORPORATION START OF 1984—A FACT BOOK 21 (1984). In 1996, the number of attorneys employed by the LSC-funded programs was reduced to only 3,642. LEGAL SERVICES CORPORATION, CHARACTERISTICS OF FIELD PROGRAMS SUPPORTED BY THE LEGAL SERVICES CORPORATION START OF 1996—A FACT BOOK 7 (1996).

207. *See* Colene Flynn, *In Search of Greater Procedural Justice: Rethinking* Lassiter v. Department of Social Services, 11 WIS. WOMEN'S L.J. 327, 345-48 (1996); White, *supra* note 65, at 4.

208. *See* White, *supra* note 65, at 14-16.

economically subordinated women.[209] Both theories indicate the importance of counsel to aid those women in telling their stories to decision makers.[210]

Despite the evidence that counsel is particularly important for the poor and the disenfranchised, the Supreme Court has never found a constitutional right to a government funded attorney for a civil litigant. In *Lassiter v. Department of Social Services*, the Court found a limited right to a determination of whether appointment of counsel was necessary in proceedings to determine whether parental rights should be terminated.[211] However, the Court indicated that a presumption exists against constitutionally requiring the appointment of counsel unless the parent also risked criminal prosecution.[212] In *Walters v. National Ass'n of Radiation Survivors*, the Court evinced even greater hostility toward a constitutional right to representation by counsel when it upheld a ten dollar limit on the amount that attorneys could be reimbursed for helping clients to obtain VA benefits.[213] Presumably, the Court's decision in *Walters* was based on the fear of the expense to the government that paying attorneys a standard fee would entail.[214] If so, it is yet another example of how the cost calculating, utilitarian approach of *Mathews* harms poor people.

Statistics show that poor people are more likely to prevail in hearings if they are represented by counsel, because without counsel, even formal procedures are often ignored by judges.[215] Formal procedures are designed to foster participation and enhance the fairness of the decision-making process.[216] Without attorneys to enforce those procedural protections, however, the ability of poor people to participate in decisions that affect their lives will be limited.[217] In practical terms, the declining availability of counsel to poor people may be the greatest blow to their ability to participate in those decisions, and the most significant factor in the due process counterrevolution.

D. *Limits on Civil Litigation*

Recent restrictions on the ability of the poor to use civil litigation to effectuate law reform constitute another development in the due process

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209. *Id.* at 15-16.

210. *See also* Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1597-1607 (1991) (critiquing the mediation process because lawyers are often excluded and arguing that exclusion of attorneys disproportionately hurts women clients).

211. 452 U.S. 18, 31-32 (1981).

212. *Lassiter*, 452 U.S. at 25-27.

213. 473 U.S. 305, 334 (1985).

214. *Walters*, 473 U.S at 320-21 (noting that "the marginal gains from affording an additional procedural safeguard often may be outweighed by the societal cost of providing such a safeguard").

215. *See* Zietlow, *supra* note 27, at 1114 nn.13-15 (citing statistical studies).

216. *See* Fiss, *supra* note 151, at 1077-78 (arguing that the judicial process knowingly struggles against inequalities of wealth between the parties).

217. *See* Zietlow, *supra* note 27, at 1115 n.22 (providing transcript of Jernigan "trial").

counterrevolution. Restrictions recently imposed by Congress have limited the activities of attorneys funded by the Legal Services Corporation to prevent LSC attorneys from bringing class actions,[218] and from challenging welfare reform measures in court or in administrative hearings.[219] Proposed amendments to Federal Rule of Civil Procedure 23 also would restrict plaintiffs' use of class actions. These developments restrict the ability of the poor to participate through the means of civil litigation, cutting off another avenue of process.

LSC attorneys are now prohibited from representing clients in class action suits, which have historically been a tool for lawyers for the poor to use to enact law reforms which benefit the poor.[220] The ability to use civil litigation to effectuate law reform is particularly important for those disenfranchised due to their race, class or gender because their lack of economic resources and corresponding lack of political clout make it difficult for them to effectively use the political process to achieve reform and for each to hire an individual attorney for their case. The prohibition on class action representation by LSC-funded attorneys, by far the principal provider of legal representation for the poor, thus cuts off one of the main avenues for poor people to fight for legal reform.[221]

The fastest developing and most crucial current legal issue for the poor are the major changes that have resulted from state and federal welfare reform measures. Yet, restrictions on LSC attorneys insure that poor people will find it extremely difficult to influence those reform measures through the use of the civil litigation process. Those restrictions prohibit LSC recipients from initiating litigation involving, or challenging, or participating in, efforts to reform a federal or state welfare system.[222] The new regulation limits the scope of permissible representation to individual issues which do "not involve an effort to amend or otherwise challenge existing law."[223] These restrictions clearly limit the ability of LSC attorneys to effectively represent their clients in welfare related cases because they mistakenly assume that attorneys can bifurcate individual issues from challenges to the legitimacy of laws and regulations in the

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218. Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504, 110 Stat. 1321.

219. Legal Services Corporation: Welfare Reform, 62 Fed. Reg. 30,763, 30,766 (1997) (to be codified at 45 C.F.R. § 1639.3).

220. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR 307 (1971) (stating that poverty lawyers saw class actions as a major vehicle for reforming laws that affect the poor); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 350 (1988) ("In its twenty-two years of existence, subdivision (b)(2) has contributed to the revolutions in civil and welfare rights that have marked the legal history of an era."). For example, *Goldberg* was brought as a class action suit.

221. The new restrictions on LSC funds also prohibit lobbying by anyone employed in a program which receives those funds, thus cutting off the other main avenue for law reform. *See infra* notes 244-51 and accompanying text.

222. Legal Services Corporation: Welfare Reform, 62 Fed. Reg. 30,763, 30,766 (1997).

223. *Id.*

representation of their clients.[224] Most importantly, however, these restrictions severely limit the ability of poor people to participate in decisions about governmental policies that will almost surely impact on their lives.[225] The LSC restrictions are an example of how procedure without substance can be hollow for poor people. Even if LSC attorneys continue to be funded, their ability to help their clients and bring about substantive justice has been hampered severely by the restrictions.

The proposed amendments to Federal Rule of Civil Procedure 23 also limit the ability of plaintiffs to bring class actions and reduce procedural protections for class action plaintiffs. Two proposed changes most threaten the procedural rights of class actions plaintiffs. One proposed amendment would allow for the certification of classes for settlement purposes only.[226] This proposed amendment contains no effective guidelines for certifying such a class, it may violate the constitutional "case or controversy" requirement, and it invites collusion between lawyers who wish to settle actions to insure payment of attorneys' fees, raising ethical concerns.[227] Moreover, to the extent that the proposed changes would encourage settlement of class actions, they would concomitantly reduce the procedural protections of class action litigants, rendering them subject to the more informal, and less protective, settlement process.[228] A second proposed amendment to Rule 23 would allow for interlocutory appeal of trial court orders certifying classes, but not for court orders denying class certification.[229] Again, the pattern is clear. This proposed change would favor defendants, who tend to be richer, more powerful, and more likely to benefit from delay, and harm plaintiffs, who tend to have fewer resources. Thus, both proposed changes would limit the ability of poor people to effectuate law reform through class actions, further contributing to the due process counterrevolution.

E. *Barriers to Political Participation*

The ultimate form of participation in a democracy is the ability to take part in the political system. Yet, the rising costs of political cam-

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224. *See* Recent Legislation, *Constitutional Law—Congress Imposes New Restrictions On Use of Funds By The Legal Services Corporation*, 110 HARV. L. REV. 1346, 1347 n.12 (1997).

225. In addition, at least one state, Michigan, has promulgated rules that exempt welfare eligibility standards from the notice and comment provisions of the Administrative Procedure Act. MICH. COMP. LAWS. § 24.207(7)(m) (Supp. 1997). Without the notice and public hearing required administratively, welfare recipients will have even less opportunity to influence welfare policy.

226. *See* COMMITTEE ON RULES OF PRACTICE AND PROCEDURE OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PRELIMINARY DRAFT OF THE PROPOSED AMENDMENTS TO THE FEDERAL RULES OF APPELLATE, CIVIL AND CRIMINAL PROCEDURE 41-43 (1996) (containing the August 1996 proposed amendments to Fed. R. Civ. Pro. 23(b)(4)).

227. *See* Letter from Steering Committee To Oppose Proposed Rule 23, to Honorable Alicemarie H. Stotler, Chair, Standing Committee on Rules of Practice and Procedure (May 28, 1996) (on file with author).

228. *See* Delgado et al., *supra* note 151, at 1395; Fiss, *supra* note 151, at 1076-78.

229. H.R. 1252, 105th Cong. § 3 (1997).

paigns and resulting importance of campaign fund raising has had the effect of limiting the ability of people without money to have an impact on that process.[230] The Supreme Court has contributed to this phenomenon in its decisions equating spending money with speech in the realm of campaign finance. Moreover, restrictions on the ability of LSC funded agencies to lobby on behalf of their clients further reduce the ability of poor people to participate in public policy making. Thus, poor people are excluded from perhaps the most important form of process—politics itself—and risk complete disenfranchisement.

The Supreme Court linked traditional notions of process with participation in the political process in its decision in *Atkins v. Parker*.[231] In *Atkins*, the plaintiffs challenged a generalized notice that the state of Massachusetts issued to food stamp recipients on due process grounds.[232] The notice informed recipients that their food stamp benefit levels might be decreased as a result of changes to governing regulations, but did not indicate the impact of the changes on an individual's case.[233] The Court found that recipients were not entitled to individualized notices or prior hearings because across the board cuts did not trigger the protections of the Due Process Clause.[234] Instead, the Court found that the legislative process gave recipients all the process that they were due when benefit levels are adjusted by the legislature.[235] Thus, the Court refused to protect poor people through judicial process and sent them into the political realm to fend for themselves as if they were not severely handicapped in that arena.[236]

The Supreme Court has recognized limited economic rights to participate in the political process in cases involving clear economic barriers to participation. For example, the Court struck down the Texas system of financing primary elections in which the candidates themselves were required to pay the filing fees,[237] and a Louisiana law restricting the right to vote in some municipal elections to "property taxpayers."[238] Of course, the pre-*Goldberg* Court invalidated state poll taxes in a ruling that was

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230. In fact, it could be persuasively argued that only the very rich really have the ability to participate in the political process under the current campaign finance system.

231. 472 U.S. 115 (1985).

232. *Atkins*, 472 U.S. at 120-21.

233. *Id.*

234. *Id.* at 129-30.

235. *Id.* (quoting Logan v. Zimmerman Brush Co., 455 U.S. 422, 432-33 (1982)).

236. In an interesting related development, the Ohio state legislature passed a bill which requires applicants for welfare to receive a voter registration application at their required orientation meeting. OHIO REV. CODE ANN. § 5101.54(f) (Banks-Baldwin 1997). Apparently, the author of this provision recognized the importance of political participation for welfare recipients.

237. Bullock v. Carter, 405 U.S. 134 (1972).

238. Cipriano v. City of Houma, 395 U.S. 701, 705-06 (1969).

based in part on the recognition that southern states had used those taxes to exclude African Americans from voting.[239]

In all of these cases, state fees were a concrete barrier to the basic rights to vote and to run for political office. However, the Court has been considerably less sensitive to the impact of one's income on the ability to participate in the political process in cases involving less tangible economic barriers to participation which are more intangible. For example, in *Buckley v. Valeo*, the Court found that the expenditure of money on political campaigns is political speech, protected by the First Amendment.[240] The Court upheld restrictions on direct contributions to campaigns, but struck down provisions of federal campaign finance laws that limited independent expenditures and expenditures by candidates of personal or family funds. Relying on similar logic, the Court also has struck down restrictions on the amount of money that corporations could spend on public initiative campaigns.[241]

In the campaign finance cases, the Court ruled on the side of autonomy of people with financial resources, despite the adverse effect that the ruling would have on the ability of people without those resources to participate in the debate. Because the Court has been unwilling to intervene on behalf of the disenfranchised, it has compounded the injustice inherent in a capitalist society.[242] Since the Court's rulings, the price of campaigns has skyrocketed.[243] Special interest Political Action Committees (PACs) have become the most important source of campaign funding, and have taken on the role of shaping the political agenda, determining which issues are addressed, and which are ignored, in the political debate. Yet PACs are inherently non-democratic because they are privately run and therefore unaccountable for their campaign tactics. Because the power PACs have is directly related to the amount of money

239. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 665-66 (1966).

240. Buckley v. Valeo, 424 U.S. 1 (1976).

241. *See* Citizens Against Rent Control/Coalition for Fair Hous. v. City of Berkeley, 454 U.S. 290 (1981) (striking down City of Berkeley ordinance limiting contributions to $250 to committees formed to support or oppose ballot measures); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (striking down a Massachusetts statute aimed at prohibiting corporate expenditures for the purpose of influencing votes).

242. *See* Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986) ("[A]utonomy may be *insufficient* to insure a rich public debate. Oddly enough, it might even be *destructive* of that goal.") (emphasis added); Owen M. Fiss, *Why the State?*, 100 HARV. L. REV. 781, 783 (1987) (advocating an activist role of the state in First Amendment cases to protect minority voices from being drowned out). Phillip Fremont-Smith, a spokesman for the National Republican Congressional Committee, equated spending money with political speech when he recently explained, "I haven't seen any skittishness from donors. People want to be involved in politics. They want to add their voice." Leslie Wayne, *The Parties Talk of Reform, And Bring in Record Money*, N.Y. TIMES, Aug. 6, 1997, at A1.

243. *See* Joseph Finley, Comment, *The Pitfalls of Contingent Public Financing in Congressional Campaign Spending Reform*, 44 EMORY L.J. 735, 735-37 (1995); Marty Jezer & Ellen Miller, *Money Politics: Campaign Finance and the Subversion of American Democracy*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 467, 468-89 (1994); Wayne, *supra* note 242, at A1.

that they raise, few PACs represent the interests of the poor. Few PACs represent the interests of minorities, and those that do rely on limited funding and therefore have limited power. Moreover, the increased importance of money in the political process by its very nature reduces the access of the poor to that process. The Court's overly capitalist interpretation of the First Amendment, equating money with speech, has further reduced the ability of the poor and the disenfranchised to participate, and has thus contributed to the due process counterrevolution.

Because the access of most people to politicians is limited due to their lack of economic resources, they must resort to lobbyists to voice their cause.[244] Yet, recently enacted restrictions on LSC funds will decrease the number of lobbyists for the poor. In 1996, Congress passed legislation that would prohibit the use of any LSC funds by any agency that is engaged in lobbying activities,[245] or by any agency that is engaged in welfare reform litigation or lobbying.[246] In response to public criticism and court rulings finding the regulations prohibiting lobbying with non-LSC funds unconstitutional,[247] the rule was amended to allow agencies to use non-LSC funds for lobbying.[248] However, the restrictions on lobbying for welfare reform issues remain. Moreover, the access to lobbyists is still limited to those funded by non-LSC funds. Thus, that channel to participation in the political process has been narrowed.

Recent reforms in public benefits program indicate that the voices of poor people are not being heard due to the barriers to their participation in the political process, and the importance of money in that process. For example, the TANF program places a five year life time limit on the receipt of welfare benefits.[249] Amendments to the federal food stamp regulations similarly limit the receipt of food stamps to three months in a 36 month period if the recipient does not fulfill the work requirement.[250] The limit on food stamps is particularly significant for unemployed "able" adults, for whom food stamps were the only source of income. Leaving aside the issue of whether other reforms, such as work require-

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244. The successful lobbying of labor unions on behalf of statutory protections for welfare recipients who work illustrates the impact of powerful allies to speak for the poor within the political process.

245. *See* Omnibus Consolidated Recissions and Appropriations Act of 1996, Pub. L. No. 104-134 § 504, 110 Stat. 1321.

246. *Id.* § 504(a)(16).

247. *See* Legal Aid Soc'y v. Legal Services Corp., 961 F. Supp. 1402 (D. Haw. 1997) (enjoining the LSC from enforcing restrictions on the recipients' use of non-LSC funds because the court determined a fair likelihood that those regulations infringed on First Amendment rights), *cited in* Legal Services Corporation: Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27,695, 27,695 (1997) (to be codified at 45 C.F.R. § 1610).

248. *See* Legal Services Corporation: Use of Non-LSC Funds, Transfers of LSC Funds, Program Integrity, 62 Fed. Reg. 27,695 (1997) (to be codified at 45 C.F.R. § 1610).

249. The Welfare Reform Act of 1996, Pub. L. No. 104-193 § 408(a)(7), 110 Stat. 2105 (to be codified at 42 U.S.C. § 608(a)(7)).

250. The Welfare Reform Act § 824(o)(2).

ments, will benefit the poor, it is clear that the stringent time limits on the receipt of benefits will cause hardship to many people, particularly during hard economic times. It is apparent that the voices of those people were not heard when these limits were proposed and enacted.[251] Thus, the TANF program is a striking example of how the lack of procedural rights can result in a lack of substantive rights.

V. THE WIDENING GAP

The due process counterrevolution will most severely affect the rights of poor people. The counterrevolution also may impact some middle class people. Those who fail to pay their child support or are arrested for drunk driving are affected by recent statues enacted by some states that reduce procedural rights in those arenas. However, procedural protections for the more affluent owners of "old property" have not been threatened by the counterrevolution. Instead, in some statutory arenas the procedural rights of the more affluent have been expanded. Moreover, the Supreme Court has greatly expanded the rights of the most affluent members of society in recent cases regarding the regulatory takings doctrine. As a result of these developments, the gap between the procedural rights of the rich and the poor has widened and may grow wider still.

A. *Exceptions to the Counterrevolution*

Because it hinged on expanding the definition of property to include government benefits, the due process revolution had the greatest positive impact on recipients of those benefits, many of whom have low incomes. Therefore, the recipients of government benefits have the most to lose from the due process counterrevolution in the civil and administrative realms. Moreover, the developments in other procedural areas, described above, are clearly the most harmful to those who lack economic resources. Yet, the "old property," that is real property and other tangible economic assets, remain protected, and unaffected by the counterrevolution.[252] Moreover, while most public employees may lose the procedural rights that they currently enjoy under the counterrevolution, due process protections will continue to apply to academics and to those specialized government employees whose skills could not be transferred easily to the private realm, and who are generally well compensated.[253] Therefore, the people who are least likely to be harmed by the due process counterrevolution are those who already have the most resources in our society.

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251. It is also possible, as Denise Morgan suggested to me in a recent conversation, that Congress heard the voices of poor people but just did not care. Even if Congress did hear the viewpoint of poor people that opposed recent reforms, their actions indicate that the voice was not being heard "loud" enough, most likely because of the lack of financial resources to "amplify" their voices.

252. *See* Pierce, *supra* note 4, at 1995-97.

253. *See id.*

Some aspects of the due process counterrevolution may affect the majority of people in this country who are middle and working class. For example, Congress recently enacted a statute requiring states to implement procedures to improve child support enforcement by providing for the suspension of professional licenses of people who are behind in their child support payments.[254] Some states have passed laws allowing for the suspension of drivers' licenses of those arrested for driving while intoxicated, without providing for prior notice or hearings.[255] These laws will harm middle class people who own cars and earn enough to incur child support obligations. However, they arguably will be more harmful to the poor who cannot afford to pay child support, and who cannot afford to pay a lawyer to help them beat or plea-bargain drunk driving charges.

Moreover, even as the due process rights of the poor and the middle class are being reduced, the rights of the more affluent are being expanded statutorily. For example, the Health Care Quality Improvement Act of 1986 strengthens procedural protections for doctors subject to disciplinary review board actions.[256] Those protections include enhanced notice requirements and detailed provisions governing the hearing process.[257] The purpose of the bill was to provide protections and incentives for physicians participating in professional peer reviews and limit the threat of private money damage liability under federal anti-trust laws.[258] Similarly, the Taxpayer Bill of Rights contains provisions for civil damages for unauthorized collection of taxes and disclosure of information.[259] Although the bill purports to enhance the procedural rights of all taxpayers, it will obviously be of most use to those who pay higher taxes because they are likely to sustain higher damages. Both acts illustrate the ability of money to bargain for more procedural protections through the use of the political process.

B. *A New Process Revolution?*

Even as the Court has cut back significantly on the definition of what liberty and property merit due process protections, the Court has expanded greatly its protection of the property of the affluent in society through its activist approach to cases involving compensation for regu-

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254. 42 U.S.C. § 666(a)(16) (West Supp. 1997). The statute provides for prior notice of license suspension, but does not specifically require a hearing prior to suspension. *Id.*

255. *See* CAL. VEH. CODE § 23157 (West 1997); 1997 Ohio Legis. Bull. 5 (Anderson) (to be codified at OHIO REV. CODE ANN. § 4511.191).

256. Health Care Quality Improvement Act of 1986 §§ 411-412, 42 U.S.C. §§ 11,111-11,112 (1994).

257. *See id.*

258. *Id.* § 402 (stating the findings of Congress prompting the Act).

259. Omnibus Taxpayer Bill of Rights, Pub. L. No. 100-647 § 7433, 102 Stat. 3730, 3748-49 (1988) (codified as amended in scattered sections of 26 U.S.C.).

latory takings.[260] In recent rulings, the Court has taken an activist stance in increasing the burden that the state must meet in order to use its police power to regulate private property by limiting development in furtherance of the public interest. The regulatory takings cases rest, at least in part, on the notion that private property owners are entitled to use their property in whatever way that they want.[261] Thus, the Court has seemingly created and expanded a new form of entitlement to private property. Moreover, the Court has created a new categorical approach to evaluating state action in regulatory takings, greatly increasing both the amount of process and the compensation that is due for private property owners in that context.

The Takings Clause of the Constitution is similar to the Due Process Clause in that it is the other constitutional provision that expressly protects property from government interference.[262] It is by nature more protective of the property of the more affluent, because an individual must own tangible property of value to benefit from the protections of the Takings Clause.[263] In the arena of compensation for regulatory takings, the court first determines whether or not the state's use of its police power to limit the property owner's use of his land is a taking.[264] Then, the court determines whether or not the state must compensate the property owner for any decrease in the value of the property resulting from the state's use of its power.[265] This two-step process is analogous to the Court's two-step due process jurisprudence—determining first whether a property interest or liberty interest exists which triggers protections, and then what protections are due. Even as the Court has restricted both steps of the due process analysis at the expense of the poor and the disenfranchised, it has expanded both steps of its regulatory takings doctrine to the benefit of the most affluent members of society.

In the first step of the regulatory takings doctrine, the Court has taken an extremely broad view of the ability of owners of real estate, the

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260. *See* Robert J. Hopperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, an Analytical Framework, and a Synthesis*, 51 WASH. U.J. URB. & CONTEMP. L. 1, 81-87 (1997). The Court has expanded the doctrine of regulatory takings in several cases. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992); Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

261. *See Nollan*, 483 U.S. at 831.

262. *See* Fallon, *supra* note 1, at 359-60.

263. W. David Koeninger has suggested to me in a conversation that perhaps poor people who are advocating for more procedural rights should argue that their property falls under the Takings Clause, rather than the Due Process Clause. For example, public housing tenants that face the demolition of their units without compensation other than their replacement by Section 8 certificates, could argue that their property is being taken without compensation. *See generally* W. David Koeninger, *A Room of One's Own and Five Hundred Pounds Becomes a Piece of Paper and "Get a Job:" Evaluating Changes in Public Housing Policy from a Feminist Perspective*, 16 ST. LOUIS U. PUB. L. REV. (forthcoming 1997). I agree that this is an interesting idea which should be explored.

264. Penn Central Transp. Co. v. New York, 438 U.S. 104, 124-25 (1978).

265. *Penn Central*, 438 U.S. at 124-25.

most traditional form of "old property," to use their property without state interference. Of course, not all people who benefit from compensation will be very affluent. However, to benefit from the clause, a person must own at least some real property, taking them out of the category of abject property. Moreover, the real estate at issue is sometimes quite valuable. For example, in *Lucas v. South Carolina Coastal Council*, the plaintiff sought and received over $1.2 million in compensation for the regulatory taking of two beach front lots on an island in South Carolina.[266] The state of South Carolina had passed a Coastal Preservation Act that had the effect of prohibiting development on the two beach front lots.[267] Accepting the trial court's finding that the prohibition deprived the plaintiff of all of the value of his land, the Court found that any state action which has such an effect constitutes a per se taking.[268] In *Nollan v. California Coastal Commission*, the Court found that the denial of a land use permit to owners of beach front property who wished to tear down a bungalow and build a larger house was a taking that required compensation.[269] The Court's reasoning in both cases rests on the premise that property owners are entitled to use their property in any manner that they wish.[270] Thus, the Court's rulings enhance the value of the ownership interest of affluent property owners based on their entitlement to use it as they choose.

The second means by which the Court has expanded the scope of its regulatory takings doctrine is by heightening its scrutiny of state action to determine whether compensation is constitutionally required. In previous cases regarding regulatory takings, the Court had recognized the ability of states to remove all of the value of private property, without compensating the owner, when the state's interest in doing so was sufficiently compelling.[271] In recent cases, however, the Court has applied an extremely high level of scrutiny to determine whether the state's interest is sufficiently compelling. For example, in *Nollan*, for the first time the Court imposed a "nexus" requirement—requiring that the state imposed condition must serve the same governmental purpose as the development

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266. 505 U.S. 1003, 1009 (1992).

267. *Lucas*, 505 U.S. at 110-11. The Court was extremely eager to hear the case in *Lucas*, granting certiorari even though the issue was arguably not ripe for review. *Id.* at 1061-62 (Stevens, J., dissenting). Prior to the ruling of the South Carolina court finding no compensable taking, the South Carolina legislature passed a statute which allowed property owners such as Lucas to apply for special permits which would exempt them from the coastal preservation regulations. *Id.* at 1010-11. Lucas had not even applied for such a permit at the time that the Court agreed to hear the case. *Id.* at 1042 (Blackmun, J., dissenting).

268. *Id.* at 1030 (stating that when a regulation totally hinders productive and beneficial uses of property, "compensation must be paid to sustain it").

269. 483 U.S. 825, 841-42 (1987).

270. *See Nolan*, 483 U.S. at 831.

271. *See Lucas*, 505 U.S. at 1047-49 (Blackmun, J., dissenting) (noting that the Court had repeatedly recognized the government's ability to regulate property without compensation no matter how adverse the financial effect may be by weighing private and public interests).

ban.[272] In *Dolan v. City of Tigard*, the Court added a level of scrutiny to the "nexus" requirement, stating that the government's purpose must be "roughly proportional" to the proposed impact of the regulation for the "nexus" requirement to be met.[273] And, the Court clarified that the city or state has the burden of establishing the constitutionality of its regulations by making an "individualized determination."[274]

Most significantly, in *Lucas*, the Court for the first time created a categorical rule that if the regulation removed all of the value of the land, it was a per se taking. The categorical approach is the highest level of scrutiny to which a court may subject state action.[275] It is "uncompromisingly deadly to legislative action."[276] The categorical approach allowed the *Lucas* Court to completely disregard evidence that the plaintiff knew that his property had been flooded in at least half of the prior forty years.[277] The categorical approach also does not take into account the extent to which the state's action may be justified as protective of the safety of its people. In *Lucas*, the state's arguably compelling interest in limiting coastal development was highlighted by the extensive damage to ocean front property caused by hurricane Hugo prior to the passage of the Coastal Preservation Act in question.[278] The Court's categorical approach disregarded even such a compelling interest on the part of the state.

The high level of scrutiny to which the Court subjects regulatory takings contrasts markedly with the rational basis scrutiny merited by most due process categories.[279] This categorical approach also stands in sharp contrast to the Court's *Mathews v. Eldridge* balancing test.[280] The *Mathews* balancing test requires courts to balance the interests of the individual against those of the state, and insures that the cost of the process always will weigh against the individual.[281] The categorical approach, on the other hand, allows courts to completely disregard societal interests and concerns once the individual interest has been established. Moreover, the cost to the state is immaterial in the categorical approach. Ironically, the state of South Carolina could have paid for many *Goldberg-*

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272. *Nollan*, 483 U.S. 837.

273. 512 U.S. 374, 391 (1994).

274. *Dolan*, 512 U.S. at 391.

275. *See* Hopperton, *supra* note 260, at 83-84.

276. *Id.* at 7.

277. Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1038 (1992) (Blackmun, J., dissenting).

278. *See Lucas*, 505 U.S. at 1075 (Stevens, J., dissenting); *see also id.* at 1040 (Blackmun, J., dissenting) (noting that petitioner did not even challenge the state legislature's finding that the building ban was necessary to protect property and life).

279. *See* Fallon, *supra* note 1, at 314-15; Rutherford, *supra* note 5, at 25.

280. 424 U.S. 319 (1976).

281. *Mathews*, 424 U.S. at 335.

style hearings with the $1.2 million that it had to pay as compensation to the petitioner as a result of the Court's ruling in *Lucas*.

The extraordinarily heightened level of scrutiny to which the Court subjected the state legislation in *Lucas* and *Dolan* is reminiscent of the substantive due process approach used by the Court to invalidate state statutes during the *Lochner* era.[282] Overwhelmed by the sense of unfairness by the state taking over $1 million from a private citizen, the Court relied on substantive notions of fairness and justice to create a remedy for the landowner whom, it found, had been wrongfully deprived of his property.[283] Moreover, like the Court in *Lochner*, the *Lucas* Court refused to presume the validity of state regulations when they are reasonably related to a state interest.[284] This approach is a major departure from the Court's usual rational basis scrutiny of state statutes governing economic issues.[285] The Court's regulatory takings doctrine represents the kind of strict scrutiny that it has so far refused to apply to economic regulations that affect poor people. Even as the Court takes away the procedural rights of the poorest of the poor and refuses to recognize economic rights on their behalf, it has resorted to a long discredited Lochnerian approach to find substantive due process rights for the most affluent in our society.

VI. REINTERPRETING THE DUE PROCESS CLAUSE

The formalist individualist approach that the Court has taken to due process issues since the due process revolution has failed to bring about the fairness and justice that should be essential elements of due process. The Court's broad communitarian language of equality in *Goldberg* envisioned a world in which one's procedural rights would not depend on the level of one's income. However, the promise of *Goldberg* faded in the ensuing years as the Court became mired in formalistic reasoning and analysis. With or without the Court's formal acknowledgment, it is clear that substantive values affect all of its procedural decisions.[286] It is time for the Court to return to the communitarian notion of process and justice that it articulated in *Goldberg* and give substance to process, to counter the due process counterrevolution.

The Court has applied an "organic" approach to process in the past which is based on a substantive communitarian notion of fairness rather than the individualist formalist approach which it has adopted in the

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282. *See Lucas*, 505 U.S. at 1069 (Stevens, J., dissenting). In *Lochner v. New York*, 198 U.S. 45 (1905), the Court struck down a state statute that limited the number of working hours of bakers to 60 hours per week and 10 hours per day as violative of the substantive due process right to contract.

283. *Lucas*, 505 U.S. at 1019-32. The Court's approach is particularly ironic given that the facts of *Lucas* indicate that the owner knew very well that the land in question was in danger of being flooded, and the houses washed away, in the event of a hurricane or other major storm. *See id.* at 1020-22.

284. *See* Dolan v. City of Tigard, 512 U.S. 374, 406 n.9 (1994) (Stevens, J., dissenting).

285. *See* Fallon, *supra* note 1, at 314-15.

286. *See* Alexander, *supra* note 6, at 324; MASHAW, *supra* note 1, at 5.

more recent years. Such an organic approach would, by its very nature, be more responsive to the needs of the poor. Several scholars have recently called for the Court to abandon the formalist approach in favor of a more organic approach which allows for the incorporation of more expansive notions of justice and fairness.[287] My approach would build on theirs, but would emphasize the potential of an organic approach to foster communitarian values such as economic justice and fairness throughout society.

A. *Revisiting the Organic Approach*

In order to address the widening gap between the procedural rights of the rich and the poor, the Court must take a new approach to due process which expressly hinges on the need for substantive fairness. The approach to process currently adopted by the Court has failed to provide that substantive fairness for poor people in this country. Instead, the amount of process that one receives is commensurate with one's level of income. This unequal treatment is antithetical to the promise of the due process clause because it is arbitrary. To remedy the problem, the Court must recognize the impact of money on process, and acknowledge the importance of procedural parity to a functional democracy. In *Goldberg*, the Court espoused a communitarian view of process in which substantive fairness was a primary value, but adopted a formalist approach which led to individualism and formalism that belied its original promise. However, prior to *Goldberg*, the Court addressed some due process issues with an organic approach that emphasized the importance of treating people fairly, and with dignity. The Court should return to that approach in order to adequately address the dire needs of poor people who are threatened with complete disenfranchisement from our society.

The essence of due process is that the government should not act arbitrarily towards its citizens.[288] In recent years, however, the general prohibition of arbitrary government action, with its inherent promises of fairness and equality, has been lost in the technical positivist doctrine of the Court's due process decisions.[289] In contrast, an organic, less formal approach to due process would allow the Court to depart from the bifurcated analytical structure which currently dominates its due process jurisprudence.[290] Instead, the Court would rely on a more flexible notion that "when the state inflicts any serious injury on an individual, it must

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287. *See* MASHAW, *supra* note 1, at 42; Law, *supra* note 134, 810-14; Mashaw, *Dignitary Process*, *supra* note 132.

288. *See* Fallon, *supra* note 1, at 322-23 (identifying the recurring theme in due process cases that the government cannot be arbitrary); Rutherford, *supra* note 5, at 6 (discussing substantive and procedural prohibitions against arbitrariness).

289. *See* Mashaw, *Dignitary Process*, *supra* note 132, at 436 (arguing that the positivist approach leads to bizarre constitutional variations of claims).

290. *See* Law, *supra* note 134, at 810-14.

give her a fair opportunity to learn what is going on and to object."[291] Justice Frankfurter applied such an organic approach to process in his concurrence to *Joint Anti-Fascist Refugee Committee v. McGrath*, when he addressed the due process rights of members of organizations which were included in a list of "communist" organizations to be published and sent to the Loyalty Review Board by the Attorney General for use in firing federal employees.[292] In his concurrence, Frankfurter argued that members of those organizations had a right to the essentials of due process, notice and a hearing, before the list was published.[293] Referring to due process as a "feeling of just treatment . . . evolved through centuries,"[294] Frankfurter stated that "fairness of procedure is . . . ingrained in our national traditions and is designed to maintain them."[295] In an opinion decided the year after *McGrath*, the Court relied on similar reasoning when it found that pumping of the stomachs of prisoners violated their substantive due process rights because it "shocks the conscience."[296]

A return to the organic approach to process would allow the Court to sidestep the positivist problem in *Goldberg*, *Roth* and their progeny that results when a court must determine whether or not an interest is substantial enough to trigger protections.[297] The Court would no longer become mired in a tortured determination of whether a constitutionally protected interest is implicated. Instead, it would rely on a more basic premise that the state should not treat its citizens arbitrarily because to do so would be unfair.[298] That premise arguably underlies all of the Court's due process jurisprudence,[299] but it is especially prevalent in the *Goldberg*. In his elegant *Goldberg* opinion, Justice Brennan espoused the view that the government should treat all people fairly, and with dignity, regardless of their income or status in society.[300] The Court's opinion in

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291. *Id.* at 810-11.

292. 341 U.S. 123, 161 (1951) (Frankfurter, J., concurring). The plurality opinion, written by Justice Burton for himself and Justice Black, held only that the publication was not authorized by the Executive Order to the Attorney General. *Id.* at 126.

293. *McGrath*, 341 U.S. at 161 (Frankfurter, J., concurring). *But see* Barsky v. Board of Regents, 347 U.S. 442 (1954) (upholding medical license suspension without a hearing when the doctor refused to testify before the House Un-American Activities Committee).

294. *McGrath*, 341 U.S. at 161 (Frankfurter, J., concurring).

295. *Id.*; *see also* Hurtado v. California, 110 U.S. 516, 532 (1884) (holding that due process requires the protection of "the very substance of individual rights to life, liberty and property").

296. *See* Rochin v. California, 342 U.S. 165, 172 (1952); Fallon, *supra* note 1, at 324 (stating that the *Rochin* Court applied substantive due process to administrative actions).

297. *See* Law, *supra* note134, at 813-14.

298. *See* Fallon, *supra* note 1, at 322-23 (identifying the recurring theme in due process cases that the government cannot be arbitrary); Rutherford, *supra* note 5, at 6 (discussing substantive and procedural prohibitions on arbitrariness).

299. For example, the principle that the government cannot act arbitrarily is the rationale for the Court's landmark ruling in *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). *See* Alexander, *supra* note 6, at 327 n.12.

300. Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) ("From its founding the Nation's basic commitment has been to foster the dignity and well being of *all* persons within its borders.") (emphasis added).

Goldberg thus prefigures a humanist view of justice, and a commitment to substantive equality, that is arguably consistent with the organic approach.[301] If the Court used an organic approach to process, it would be more responsive to the needs of the poor, as it was in *Goldberg*.

In his book, Due Process in the Administrative State, Jerry Mashaw critiques the functionally oriented policy analysis of the Court's recent due process decisions, and argues that such an analysis belies the more meaningful and elastic promise of the due process clause.[302] As an alternative, Mashaw suggests that courts should attempt to formulate basic political principles which merit procedural protections.[303] Mashaw's "dignitary perspective," which mirrors an organic approach to process, would extend procedural protections to "natural rights" such as the constitutional values of privacy, free expression and religious freedom.[304] Equality, predictability, transparency and rationality, and participation, are the core process values in Mashaw's theory.[305] Mashaw emphasizes that his primary goal is to protect individual liberty, not to reinforce communitarian values such as economic justice.[306] However, the elastic nature of Mashaw's theory, like the Court's organic approach to process, allows courts to incorporate the notions of fairness and equality to use process to strengthen the community as a whole. Under this communitarian interpretation of Mashaw's "dignitary" theory, the right of all members of society to participate in decisions that affect their lives, regardless of their level of income, would be paramount.[307]

In order for the Due Process Clause to foster the meaningful participation of poor people in decisions that affect their lives, it must incorporate an element of equal protection.[308] That is, people should be able to enjoy the same procedural protections regardless of their level of income.[309] The prevention of arbitrary action by the state is essential to due process, and unequal treatment is more likely to be arbitrary.[310] Therefore, equality should be a core value of the Court's approach to process.[311] In order for process to foster equality in a meaningful fashion,

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301. *See* White, *supra* note 65, at 3.

302. *See* MASHAW, *supra* note 1, at 42.

303. *Id.*

304. *Id.* at 166.

305. *Id.* at 173-77.

306. *Id.* at 169.

307. *See* Flynn, *supra* note 207, at 330 (pointing out that the Court articulated the "promotion of participation and dialogue" as goals of the due process system in *Marshall v. Jerrico*, 446 U.S. 238 (1980)); Rutherford, *supra* note 5, at 42 (calling "participation" a major theme of due process).

308. *See* Rutherford, *supra* note 5, at 5.

309. *See* Zietlow, *supra* note 27, at 1143-49 (arguing that providing due process rights for more affluent people, but not for the poorest of the poor, would violate the Equal Protection Clause).

310. Rutherford, *supra* note 5, at 65.

311. *See* MASHAW, *supra* note 1, at 173 (listing "equality" as an intuitive process value); Rutherford, *supra* note 5, at 71 (arguing that the Due Process, Equal Protection and Privileges and Immunities Clauses all incorporate notions of equality). *But see id.* at 39-41 (noting that the Court

however, the Court must recognize the impact of economic forces on the ability of people to participate in decisions that affect them. The Court should acknowledge the economic needs of would-be participants, and weigh them in favor of finding procedural rights, when to do so would help to eliminate procedural inequity. If the Court is sensitive to the impact of money on procedural rights, its procedural decisions will be more likely to foster societal fairness. Under a communitarian organic approach, a procedure would be "fair" if it applied equally to all similarly situated participants, regardless of their level of income, or the amount of resources at stake in the individual case.

B. *Giving Substance to Process*

All of the Supreme Court's due process decisions incorporate some substantive values. Arguably, a substantive rule and the procedure applying it must be always viewed as one package.[312] For example, the Court has incorporated the substantive value of fairness into its procedural jurisprudence in its "minimum contacts" analysis to determine whether a court has personal jurisdiction over a defendant.[313] Even so, until recently the Court has been reluctant to expressly acknowledge any notions of substantive due process for the past five decades.[314] In the context of regulatory takings, the Court appears to have returned to a Lochnerian approach to strike down legislative action in the context of regulatory takings. The Court has been willing to recognize substantive due process to protect the rights of the most affluent in our society. Under a communitarian notion of process, the Court would also be willing to recognize substantive due process rights to protect the rights of the least affluent, who face the risk of complete disenfranchisement in our society.

Historically, the Court has been very reluctant to find economic rights for the poor in the Constitution. However, the Court has informally recognized economic need as a factor in several cases where it ruled on the side of constitutional substantive and procedural rights for the poor. For example, in *Goldberg*, the Court was clearly swayed by the substantive economic needs of the plaintiffs in its decision regarding procedural rights. The "brutal need" of the recipients of government benefits influenced the Court as it found increased procedural rights for the recipients

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does not seem concerned with balancing power in "minimum contacts" due process cases—in all instances, the party with more resources seems to prevail, and that even in *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), where the Court expressly incorporated the analysis of fairness into the "minimum contacts" equation, the Court appeared to disregard the obvious imbalance of bargaining power on the part of the franchisees).

312. *See* Alexander, *supra* note 6, at 327; *see also* MASHAW, *supra* note 1, at 5 (stating that question of substance and process are "functionally inseparable").

313. *See* Fallon, *supra* note 1, at 317-18.

314. *See id.* at 322 (stating that the Court is hesitant to find substantive due process rights).

of those benefits in the Constitution.[315] In *Goldberg*, the Court recognized welfare benefits as the sole source of income of the recipients when it held that those recipients were entitled to a pre-termination hearing.[316] The Court's protective attitude towards the poor in *Goldberg* is so apparent that it inspired Justice Black, in his dissent, to accuse the majority of taking a substantive due process approach which incorporated the notion of economic justice in its procedural due process analysis.[317]

In a few cases involving substantive rights, the Court has applied an informally heightened level of scrutiny to government action, acknowledging the economic needs of the parties involved. For example, in *Department of Agriculture v. Moreno*, the Court applied a modified rational basis review to strike down a statute that differentiated between households receiving food stamps.[318] Similarly, in *Plyler v. Doe*, the Court applied an informally higher standard of review in upholding an equal protection challenge to a Texas statute which denied access to public education for children of illegal immigrants.[319] Both cases involved plaintiffs with few economic resources. The Court also has recognized the severity of depriving people of the means of their livelihood in rulings finding pre-termination procedural rights for government employees.[320]

In a few other cases, the Court has applied a hybrid analysis based on both due process and equal protection principles to find economic based procedural rights in some circumstances. For example, the Supreme Court has found a constitutional right to waiver of appellate court fees for indigent litigants in criminal cases.[321] The Court has also recognized the right to waiver of civil court fees in divorce cases[322] and appeals of parental rights termination decisions.[323] Concomitantly, relying on similar principles, the Court has struck down state statutes requiring filing fees for political candidates as unconstitutionally limiting the ability

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315. *See supra* notes 78-80 and accompanying text.

316. Goldberg v. Kelly, 397 U.S. 254, 264 (1970). *But see* Mathews v. Eldridge, 424 U.S. 319, 340-41 (1976) (noting that recipients of disability benefits may have other sources of income when the Court determined that they were not entitled to pre-termination hearings).

317. *See Goldberg*, 397 U.S. at 276-77 (Black, J., dissenting); *see also* DAVIS, *supra* note 60, at 115-16.

318. 413 U.S. 528, 534 (1973) (analyzing the legislative purpose behind the statute that prohibited the distribution of food stamps to households containing unrelated adults, and finding it constitutionally invalid under even a rational basis review because the legislature intended to harm a politically unpopular group, hippies, when it enacted the statute).

319. 457 U.S. 202, 220-24 (1982).

320. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542-43 (1985).

321. *See* Mayer v. City of Chicago, 404 U.S. 189, 196-97 (1971) (finding a constitutional right to waiver of appellate fees in criminal misdemeanor cases); Griffin v. Illinois, 351 U.S. 12, 18-19 (1956) (finding a constitutional right to waiver of appellate fees in criminal matters when the defendant risks incarceration).

322. Boddie v. Connecticut, 401 U.S. 371, 380-81 (1971).

323. M.L.B. v. S.L.J., 117 S. Ct. 555, 570 (1996).

of poor people to participate in the political process.[324] Thus, the Court has sometimes been willing, albeit reluctantly, to incorporate economic justice as a substantive value into its analysis when determining the procedural rights of the poor.

Finally, in two of its most recent rulings, the Court has indicated both a receptiveness to substantive due process and a solicitous attitude towards the poor and the disenfranchised. In *M.L.B. v. S.L.J.*[325] and *Romer v. Evans*,[326] the Court relied on notions of substantive fairness to find rights to participation for people who have been disenfrancished due to their income or status as a group that suffered from the prejudice of the majority.

In *M.L.B.*, the Court ruled that the state of Mississippi could not bar an indigent woman from appealing a trial court ruling terminating her parental rights because she could not afford to pay the fees associated with the appeal.[327] The *M.L.B.* Court strictly limited its ruling to cases involving parental rights terminations, focusing on the fundamental nature of the parent-child relationship.[328] However, the Court's decision to even hear the case is significant. It marks the first time in almost a quarter century that the Court addressed the constitutional rights of civil litigants to waiver of fees, and only the second time that the Court has found a constitutional right to the waiver of fees in a civil case.[329] In *M.L.B.*, the Court relied on both the Due Process and Equal Protection Clauses of the Constitution. Due process was implicated because the proceedings below did not appear to be fair, and the petitioner was denied any means of redressing that unfairness.[330] Significantly, however, the Court stated that its ruling was based primarily on economic based equal protection principles because the Mississippi rule prohibited the petitioner from appealing based solely on her inability to pay the costs.[331] Thus, the Court's decision was based on the substantive values of both fairness and equality in an organic approach to procedural rights.

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324. *See supra* notes 237-39 and accompanying text.

325. *M.L.B.*, 117 S. Ct. at 567-68.

326. 116 S. Ct. 1620 (1996).

327. *M.L.B.*, 117 S. Ct. at 570.

328. *See id.* at 569 ("[W]e have repeatedly noted what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody.").

329. *See* Boddie v. Connecticut, 401 U.S. 371, 375-76 (1971) (finding a constitutional right to apply for waiver of filing fees in divorce cases); *supra* text accompanying notes 55-56. *But see* Ortwein v. Schwab, 410 U.S. 656, 659-60 (1973) (per curiam) (finding that the State of Oregon was not constitutionally required to waive fees for welfare recipients seeking judicial review of administrative decisions); United States v. Kras, 409 U.S. 434 (1973) (finding no such right to waiver of fees in bankruptcy cases); *supra* text accompanying notes 57-59.

330. *M.L.B.*, 117 S. Ct. at 566.

331. *Id. But see id.* at 570 (Kennedy, J., concurring) (arguing that "due process is quite a sufficient basis for our holding," and stating that the fundamental nature of the parent child relationship was sufficient to merit the Court's holding under the *Mathews v. Eldridge* calculus).

The recent case of *Romer* also provides guidelines for a new approach to due process.[332] In that case, the Court struck down, on equal protection grounds, a state constitutional amendment prohibiting states and municipalities from passing legislation proscribing discrimination on the basis of sexual orientation.[333] As in *Moreno*, the Court applied an informally heightened standard of review to strike down a state law under rational basis analysis and scrutinized the legislative purpose behind the amendment.[334] The Court found that the legislative purpose reflected animosity towards an insular class of persons, namely, gays and lesbians.[335] In its analysis, the Court also emphasized the fundamental nature of the participatory rights implicated by the amendment itself.[336] The Court pointed out that the amendment restricted the procedural rights of gays and lesbians in two ways. First, it prohibited them from using the legislative process to fight discrimination.[337] Second, and more significantly, the Court pointed out that the amendment arguably barred gays and lesbians from challenging arbitrary decision by governmental bodies.[338] In its decision, the Court therefore indicated that there is some fundamental right to participate which is implicated by the Equal Protection Clause.[339] That freedom implicates the ability to participate in decision making processes at several different levels, and it implicates the ability to participate equally. Here, the Court again combined the substantive values of fairness and equality in an organic fashion to protect an insular minority.

Both *M.L.B.* and *Romer* provide guidelines for the Court to effectively address the procedural needs of poor people. In *M.L.B.*, the Court acknowledged the impact of the petitioner's economic need on her ability to participate in a decision that would dramatically affect her life. In *Romer*, the Court applied the level of scrutiny, and the type of analysis, which is appropriate for addressing procedural issues that impact on poor people. Thus, the Court followed its admonition in its *Carolene Products* footnote that courts must sometimes protect insular minorities from the

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332. 116 S. Ct. 1620 (1996).

333. *Romer*, 116 S. Ct. at 1629.

334. *See id.* at 1628-29 (citing Department of Agriculture v. Moreno, 413 U.S. 528 (1973)).

335. *Id.*

336. *Id.* at 1625-26.

337. *See id.* at 1625.

338. *Id.* at 1626. In *Romer*, the court stated:

> At some point in the systematic administration of these laws, an official must determine whether homosexuality is an arbitrary and thus forbidden basis for decision. Yet a decision to that effect would itself amount to a policy prohibiting discrimination on the basis of homosexuality, and so would appear to be no more valid under Amendment 2 than the specific prohibitions against discrimination the state court held invalid.

Id.

339. *See id.* at 1628 ("Central both to the idea of the rule of law and to our own Constitution's guarantee of equal protection is the principle that government and each of its parts remain open on impartial terms to all who seek its assistance.").

political process.[340] The Court should do the same with regards for the economically disadvantaged. Because the poor have been so disenfranchised by their inability to participate in the decisions that affect their lives, the Court must be especially solicitous of their needs. While a conservative Court may be reluctant to do so, both *M.L.B.* and *Romer* indicate some receptiveness to such an approach.

C. *A Communitarian Theory of Process*

My communitarian theory of process would build on the Court's organic approach by adding economic based fairness as an element of the fundamental notion implicated in the organic approach. It would borrow the elastic nature of Mashaw's "dignitary theory" as well as borrowing the values of equality, predictability and participation which are essential to his theory. However, I explicitly recognize the potential of a more elastic approach to foster fairness in a community, rather than an individual value, by adding economic fairness as another essential value. Finally, I would encourage the Court to give substance to process, as it has been willing occasionally in recognizing substantive and procedural economic rights.

To illustrate how the Court would apply my communitarian theory of process, imagine that the Court is called upon once again to determine whether or not welfare recipients have a right to a pre-termination hearing. This time, however, the welfare recipients cannot argue that they have an entitlement to benefits because they are provided under a block grant system that specifically denied their entitlement status. How is the Court to rule? Under my approach, the Court would not allow itself to become bogged down in an analysis of whether or not benefits were an entitlement before it decided whether or not the constitution required procedural protections. Instead, the Court would recognize that if welfare recipients did not have pre-termination hearings, the state could act arbitrarily in denying them benefits, and find that the danger of that arbitrary action alone is enough to violate the constitutional provision of due process. Second, the Court would find it constitutionally impermissible for welfare recipients to have fewer procedural rights than other, more affluent recipients of government benefits, such as holders of medical licenses and members of the legal bar. Finally, the Court also would find that the dire consequences of disenfranchising the poorest of the poor by subjecting them to a system that is completely arbitrary and would violate the fundamental notion of fairness which is essential to a communitarian notion of process.[341]

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340. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

341. Similarly, the Court should take a solicitous approach toward the rights of the poor to uphold campaign finance reform legislation, and strike down restrictions placed on legal services attorneys.

VII. CONCLUSION

In this article, I have argued in favor of an approach to process that acknowledges the necessity of substantive economic justice, because process without substance has failed to meet the needs of the people who most need procedural protections. Until now, the Court's approach to process has resulted in a system in which poor people are increasingly disenfranchised at every level where they should have meaningful involvement in the decisions that affect their lives. I have argued that the discrepancy between the way the Court treats the procedural rights of poor and more affluent people violates the notions of fairness and equality that should be an integral part of the Court's procedural jurisprudence.

In order to address the increasing disenfranchisement of the poor, and the disparity between the procedural rights of the rich and the poor, I have suggested that the Court adopt a communitarian organic approach to due process that incorporates the values of equality and fairness along with a protective attitude toward the needs of the poor. Because the poor lack money and power, they need to resort to courts to protect them, even as the Court had suggested in *Carolene Products*. Under my communitarian approach, fairness and equality would be essential procedural values. The Court would acknowledge the impact of economic resources on the ability of the poor to participate in decisions that affect their lives, and decide procedural issues in a manner that would reduce that impact as much as possible. In the egalitarian spirit of *Goldberg*, the Court should be willing to return substance to process, in order to create a system in which all citizens enjoy the rights of citizenship regardless of their level of income.

PERSONAL INJURY INCOME TAX EXCLUSION: AN ANALYSIS AND UPDATE

FRANK J. DOTI*

I. INTRODUCTION

The federal income tax exclusion for personal injury awards in Internal Revenue Code[1] section 104(a)(2) has generated a fair amount of high-powered litigation during the past several years.[2] In fact, this old and relatively short Code provision eventually attracted the interest of the U.S. Supreme Court in 1992, 1995, and 1996 in *United States v. Burke*,[3] *Commissioner v. Schleier*,[4] and *O'Gilvie v. United States*,[5] respectively.

Congress finally got into the act by amending the section 104(a)(2) exclusion in the Small Business Job Protection Act of 1996.[6] Under prior law, the exclusion extended to any compensatory damages received on account of personal injuries or sickness.[7] The amendment limits the exclusion to any compensatory damages received on account of personal *physical* injuries or *physical* sickness.[8]

Prior to *Burke*, *Schleier*, and the 1996 amendment, lower courts were extending the scope of the exclusion to the point where practically

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1. All references to the "Code" are to the Internal Revenue Code of 1986, as amended.
2. I.R.C. § 104(a)(2) (1996).
3. 504 U.S. 229 (1992).
4. 515 U.S. 323 (1995).
5. 117 S. Ct. 452 (1996).
6. Pub. L. No. 104-188, 110 Stat. 1755, 1838-39 § 1605(a) (1996). Congress attempted to amend Code § 104(a)(2) in the Revenue Reconciliation Act of 1995 in section 13611. H.R. 2491, 104th Cong., 1st Sess. (1995). President Clinton vetoed the 1995 Act. H.R. 2491, 104th Cong., 1st Sess. (1995) (vetoed).
7. Confusion with respect to the taxability of punitive damages prior to the 1996 amendment of Code § 104(a)(2) was settled by the U.S. Supreme Court in *O'Gilvie v. United States*, 117 S.Ct. 452 (1996). The Court held that punitive damages are not excludable under section 104(a)(2). For pre-*O'Gilvie* contrary positions see Rev. Rul. 84-108, 1984-2 C.B. 32; Miller v. Commissioner, 93 T.C. 330 (1989), *rev'd*, 914 F.2d 586 (4th Cir. 1990); Roemer v. Commissioner, 716 F.2d 693 (9th Cir. 1983).
8. I.R.C. § 104(a)(2) (1996).

all personal tort or tort-like recoveries were held to be excludable.[9] Starting with the Ninth Circuit's liberal decision in 1983 in *Roemer v. Commissioner*[10] and the Tax Court's acquiescence in 1986 in *Threlkeld v. Commissioner*,[11] the personal injury exclusion was expanded from traditional torts like libel and slander to statutorily created causes of action in various employment discrimination laws of the federal and state governments.[12]

I have two purposes to serve with this work. First, I believe that most of the confusion and controversy surrounding the personal injury exclusion would have been avoided if Congress had carefully considered the scope of the exclusion from its inception.[13] In my opinion, the exclusion should apply only to personal injury damages attributable to lost human capital and not lost wages and earning power. Allowing tax-free treatment for lost wages and earning power for the victim of a physical injury tort (such as an automobile accident) has caused confusion regarding the scope of the exclusion.[14] Unlike other scholars who believe that Congress went too far in restricting the exclusion in the 1996 Act,[15] I believe that Congress did not go far enough. Congress should have eliminated the section 104(a)(2) exclusion for lost wages and earning power in all cases. Furthermore, the 1996 amendment has not cleared up the confusion over the exclusion. Uncertainty and resulting litigation will continue until Congress limits the exclusion to damages attributable solely to losses of human capital.

Second, the new legislation raises a notable issue: What is meant by *physical injuries or physical sickness*? Although amended section 104(a)(2) specifically provides that "emotional distress shall not be treated as a physical injury or physical sickness,"[16] there still are many uncertainties over the meaning of these terms. Since Congress did not

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9. *See* Redfield v. Insurance Co. of North America, 940 F.2d 542 (9th Cir. 1991) (excluding damages for age discrimination); Rickel v. Commissioner, 900 F.2d 655 (3rd Cir. 1990) (excluding damages for age discrimination); Pistillo v. Commissioner, 912 F.2d 145 (6th Cir. 1990) (excluding damages for age discrimination); Byrne v. Commissioner, 883 F.2d 211 (3rd Cir. 1989) (excluding damages for wrongful discharge); Bent v. Commisioner, 835 F.2d 67 (3rd Cir. 1987) (excluding damages for violation of the right to free speech).

10. 716 F.2d 693 (9th Cir. 1983).

11. 87 T.C. 1294 (1986), *aff'd*, 848 F.2d 81 (6th Cir. 1988).

12. These laws include Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1994); Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1994); Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, 42 U.S.C. § 1983 (1994).

13. For a similar view, see Robert Cate Illig, Note, *Tort Reform and the Tax Code: An Opportunity to Narrow the Personal Injuries Exemption*, 48 VAND. L. REV. 1459, 1481 (1995).

14. *See* Commissioner v. Schleier, 515 U.S. 323 (1995).

15. *See* J. Martin Burke & Michael K. Friel, *Getting Physical: Excluding Personal Injury Awards Under the New Section 104(a)(2)*, 58 MONT. L. REV. 167, 168 (1997) (arguing that the amended exclusion is insupportable from the standpoint of tax policy and problematic in terms of administrability).

16. I.R.C. § 104(a)(2).

define them, I provide some guidance for practitioners and the Treasury Department with respect to regulations to be issued under section 104(a)(2).

I begin with an analysis of the human capital theory of the exclusion in Part II. Part III explains how the pre-amended 1996 personal injury exclusion in section 104(a)(2) generated considerable confusion and controversy. Part IV deals with the 1996 Act and the meaning of *physical injury and physical sickness*. I conclude with a proposal to Congress to adopt the human capital theory to make the exclusion more equitable and to avoid confusion and controversy about the meaning of *physical injury and physical sickness*.

II. HUMAN CAPITAL THEORY

From its inception, in my opinion, the exclusion for personal injury awards should have been limited to losses of human capital. By this I mean any losses to a person's birthright—an uninjured body and mind. So far the Internal Revenue Service has not treated an individual's birth as an accession to wealth under the broad definition of income enunciated by the U.S. Supreme Court in *Commissioner v. Glenshaw Glass Co.*[17] Besides being ludicrous, taxing an individual at birth would resemble a capitation or head tax that would have to be apportioned under the Constitution.[18] After birth, of course, persons are subject to federal income tax on any "undeniable accessions to wealth, clearly realized, and over which the taxpayers have complete dominion."[19]

The victim of an automobile accident may receive damages from the tortfeasor to compensate for medical bills, pain and suffering, and lost wages.[20] Under the birthright concept of human capital, the reimbursement of medical bills and pain and suffering is not income, because the victim is compensated for losses to his/her birthright—an uninjured body and mind. The tortfeasor injured the victim's body and mind, and the reimbursement of medical costs and pain and suffering compensates for such losses. There is no gain, since money damages are intended to put the victim back in the same position as before the accident.[21]

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17. 348 U.S. 426 (1955).

18. U.S. CONST. art. I, § 9, cl. 4, which provides: "No capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or Enumeration before directed to be taken." In *Fernandez v. Wiener*, the U.S. Supreme Court held that Congress may tax real estate or chattels only if the tax is apportioned. 326 U.S. 340, 345 (1945).

19. *Glenshaw Glass Co.*, 348 U.S. at 431 n.15.

20. *See generally* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS (5th ed. 1984).

21. For a discussion of the definition of income that is broad enough to encompass most damage awards, see Mark W. Cochran, *Should Personal Injury Damage Awards Be Taxed?*, 38 CASE W. RES. L. REV. 43, 45 (1987), and Joseph M. Dodge, *Taxes and Torts*, 77 CORNELL L. REV. 143, 151 (1992).

The payment of lost wages, however, compensates for a loss of earnings that would have been received from working but for the accident. This is an accretion to wealth and would clearly be income had the victim not been injured. The victim has realized a financial gain that was not part of his human capital (body and mind) at birth.[22]

Under the human capital theory, any damages received on account of injuries to body and mind should be excludable under the Code. Thus, even damages for emotional distress should be excludable, since the victim's nervous system (mind) has been adversely affected. On the other hand, any damages for lost wages or earning power should be taxable in all cases, even in the automobile accident scenario.

The human capital or birthright concept should also extend to damages received on account of an individual's harmed reputation in cases of defamation and other dignitary torts. Perhaps not as obvious as damages to body and mind, the victim's untainted reputation in the community is no less a birthright than an uninjured body and mind. On the other hand, reimbursement of lost profits in a business or profession is not replacement of lost capital, it is a replacement of lost income due to the defamatory remarks. The courts have struggled with the application of section 104(a)(2) to defamation, particularly in the case of business and professional reputation.[23] In my opinion, adoption of the human capital theory would have resulted in much less litigation and the inconsistencies resulting therefrom.

In many tort settlements and judgements there is an award of a lump-sum amount without any breakdown of the specific damages.[24] Obviously this creates an allocation problem, and much of the litigation under section 104(a)(2) is attributable to the Internal Revenue Service's frustrations with lump-sum settlements.[25] Since victims have the burden of proving the excludable portion of any settlement,[26] there would be a strong incentive to break down the settlement into its component parts

22. For other views of the human capital theory see Steven Jay Stewart, Note, *Damage Award Taxation Under Section 104(a)(2) of the I.R.C.—Congress Clarifies Application of the* Schleier *Test*, 47 SYRACUSE L. REV. 1255 (1997), and Paul B. Stephan III, *Federal Income Taxation and Human Capital*, 70 VA. L. REV. 1357 (1984).

23. *See* Roemer v. Commissioner, 716 F.2d 693 (9th Cir. 1983) (holding that damages awarded in a defamation suit were excludable from gross income); Church v. Commissioner, 80 T.C. 1104 (1983) (stating that compensatory damages are excludable from gross income calculations); Threlkeld v. Commissioner, 87 T.C. 1294, 1298 (1986) (holding that "there is no justification for continuing to draw a distinction, in tort actions, between damages received for injury to personal reputation and damages received for injury to professional reputation").

24. *See supra* note 20.

25. *See* Barnes v. Commissioner, No. 21856-95, 1997 WL 12138 (U.S. Tax Ct. Jan. 15, 1997); McKay v. Commissioner, 102 T.C. 465 (1994); Robinson v. Commissioner, 102 T.C. 116 (1994), *aff'd*, 70 F.3d 34 (1995), *cert. denied*, 117 S. Ct. 83 (1996); Downey v. Commissioner, 97 T.C. 150, 161(1991); Stocks v. Commissioner, 98 T.C. 1, 17 (1992).

26. *See* O'Gilvie v. United States, 117 S. Ct. 452 (1996); Seay v. Commissioner, 58 T.C. 32 (1972).

under the birthright view. To avoid unrealistic allocations, the Internal Revenue Service can apply the arm's length (substance over form) standards that it applies in other areas of the federal income tax law.[27]

Taxpayers should find it easier to comprehend the birthright view than the current personal injury exclusion in section 104(a)(2). They surely can appreciate an exclusion for damages to body, mind, and reputation, but would understand why lost wages and earning power are taxable. Because lost wages and earning power would always be subject to income tax, Congress could amend related Code provisions to treat the reimbursement of lost wages and earning power as earned income.[28] Then these damages could qualify for the various tax benefits of earned income, including social security qualification and benefits and tax-favored employee and self-employed benefit plans.[29] On the government's side, treating lost wages and earning power as taxable earned income would increase not only the revenues collected from income taxes, but also revenues from social security, Medicare, and self-employment taxes.

III. HISTORICAL PERSPECTIVE

A. *Early History*

It appears that all branches of the federal government have been confused about the scope of the personal injury exclusion from its inception. The misunderstanding seems to have started with an opinion of the U.S. Attorney General addressed to the Secretary of the Treasury in 1918.[30] The issue was the taxability of accident insurance policy proceeds.[31] At the time, the income tax statute did not contain an exclusion for personal injury awards.[32] The Attorney General advised that "the proceeds of an accident insurance policy received by an individual on account of personal injuries sustained by him through accident are not income taxable."[33] The rationale was that accident insurance proceeds took the place of capital in human ability which was destroyed by the acci-

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27. *See* I.R.C. § 482 (1997) (allocation of income and deductions among taxpayers) and I.R.C. § 267 (1997) (losses, etc. between related taxpayers).

28. For instance, I.R.C. § 3121(b) (1997), which contains the definition of income for social security purposes, and I.R.C. § 1402(b) (1997), which contains the definition of self-employment income. A problem arises, if the tortfeasor is not an employer, with respect to the employer's share of social security (FICA) tax liability under I.R.C. § 3111 (1997) and unemployment tax under I.R.C. § 3301 (1997). A possible solution is to exempt the lost wages portion of a personal injury settlement from these employer taxes.

29. *See* Brick N. Murphy & Dan L. Dodge, *The Small Business Job Protection Act: Taxability and Withholding on Damages*, WIS. LAW., Dec. 1996, at 20, 23 (concluding that a critical issue not addressed by the Small Business Job Protection Act of 1996 is under what circumstances employers must withhold income, FICA, and Medicare taxes from settlement amounts and awards of damages).

30. Income Tax Proceeds of Accident Ins. Policy, 31 Op. Att'y Gen. 304 (1918).

31. *Id.*

32. *Id.*

33. *Id.*

dent.[34] Unfortunately, the Attorney General did not distinguish between losses to the accident victim attributable to bodily injuries and losses of future income from wages and earning power.[35]

Following the lead of the Attorney General in his opinion letter, the Treasury Department held shortly thereafter that "an amount received by an individual as the result of a suit or compromise for personal injuries sustained by him through accident is not income."[36] Congress then effectively codified these positions in 1918 in the first version of a statutory personal injury exclusion.[37] That provision excluded from income "amounts received, through accident or health insurance or under workmen's compensation acts, as compensation for personal injuries or sickness, plus the amount of any damages received whether by suit or agreement on account of such injuries or sickness."[38]

B. O'Gilvie v. United States

Recently the U.S. Supreme Court had the occasion to determine the scope of this original personal injury exclusion statute in *O'Gilvie v. United States*.[39] At issue was the taxability of punitive damages received in a personal injury case prior to the 1996 amendments to section 104(a)(2).[40] The Court held that punitive damages are taxable because they are not received "on account of personal injuries.[41] Instead, punitive damages are generally intended to punish the tortfeasor.[42] Justice Breyer, who delivered the majority opinion, analyzed the 1918 exclusionary provision and made the following significant comments:

> We concede that the original provision's language does go beyond what one might expect a purely tax-policy-related "human capital" rationale to justify. That is because the language excludes from taxation not only those damages that aim to substitute for a victim's physical or personal well-being—personal assets that the Government does not tax and would not have taxed had the victim not lost them. It also excludes from taxation those damages that substitute, say, for lost wages, which would have been taxed had the victim earned them. To that extent, the provision can make the compensated taxpayer

34. *Id.* at 308.

35. 31 Op. Att'y Gen. 304 (1918). The Attorney General Opinion does not specifically address the receipt of accident insurance proceeds to compensate for lost wages and earning power. *Id.* Normally accident insurance is intended to cover various losses suffered by the insured including lost income and earning power. JOHN ALAN APPLEMAN, INSURANCE LAW AND PRACTICE § 24 (1981). Thus, the Treasury Department may have interpreted the Attorney General Opinion broadly to exclude lost wages and earning power in connection with an accident.

36. T.D. 2747, 20 Treas. Dec. Int. Rev. 457 (1918).

37. *See* O'Gilvie v. United States, 117 S. Ct. 452, 455 (1996).

38. Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1066.

39. 117 S. Ct. 452.

40. *O'Gilvie*, 117 S. Ct. at 457.

41. *Id.* at 454.

42. *Id.* at 455.

> better off from a tax perspective than had the personal injury not taken place.[43]

The U.S. Supreme Court recognized that the 1918 personal injury statute went beyond what might have been expected from Congress in an exclusionary provision. It excludes even lost wages, and thus puts the victim in a better income tax position than she would be if she had not suffered the personal injury. In my opinion, the Court is chiding Congress for not having limited the exclusion to human capital losses. It seems the Court would prefer that the personal injury exclusion be limited to losses to a victim's birthright ("*physical or personal well-being*") along the lines that I have suggested.

Congress did not carefully consider how extensive it wanted the personal injury exclusion to be in 1918. The legislative history adds little insight other than stating that "[u]nder the present law it is doubtful whether amounts received through accident or health insurance, or under workmen's compensation acts, as compensation for personal injury or sickness, and damages received on account of such injuries or sickness, are required to be included in gross income."[44] This language suggests that Congress was merely adopting the Attorney General's opinion with respect to accident insurance.[45] It is ironic that the original personal injury exclusion was worded so broadly, since Congress could have simply limited the exclusion to nontaxable losses of human capital.

Of course we have the benefit of hindsight. The federal income tax was relatively new in 1918.[46] Also, the Supreme Court's extension of the definition of income did not come until 1955 in *Glenshaw Glass*.[47] For many years before *Glenshaw Glass*,[48] the courts and Treasury Department thought that the concept of income was limited to gains derived from labor and capital under the rationale of *Eisner v. Macomber*.[49] Since the victim of a tort does not use labor or capital to produce the damage award, all of the proceeds would have been excludable under the old and now out-of-favor *Eisner v. Macomber* rationale. *Glenshaw Glass* extended the concept of income to any increase in a person's wealth regardless of its source.[50] So perhaps it is wrong to blame only the Attorney General for all the confusion that has existed with respect to the personal injury exclusion.

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43. *Id.* at 456.

44. H.R. REP. NO. 65-767, at 9-10 (1918), *reprinted in* 1939-1 (pt. 2) C.B. 86, 92.

45. *Id.*

46. *See* LAWRENCE M. FRIEDMAN, HISTORY OF AMERICAN LAW 494-97 (1973) (discussing the history of federal taxation including the origination of the federal income tax in 1862).

47. Commissioner v. Glenshaw Glass Co., 348 U.S. 426 (1955).

48. *Id.*

49. 252 U.S. 189, 207 (1929).

50. *Glenshaw Glass*, 348 U.S. at 476.

C. United States v. Burke

In 1992, the U.S. Supreme Court had its first occasion to examine the section 104(a)(2) exclusion in *United States v. Burke*.[51] The majority held that damages received for gender discrimination under Title VII of the Civil Rights Act of 1964 are not excludable under section 104(a)(2).[52] The Court found that Title VII at that time was not a tort or tort-like cause of action because the remedies thereunder were limited to back pay, injunctions, and other equitable relief.[53] Title VII, prior to its amendment in 1991, did not provide the traditional tort remedies for pain and suffering, emotional distress, and harm to reputation.[54] Thus, according to the majority, the taxpayer's cause of action failed the litmus test for a tort or tort-like claim.[55]

Justice Scalia wrote a concurring opinion that seems to embrace the birthright theory of the personal injury exclusion. Scalia admitted that the term "personal injury" was susceptible to the broad interpretation given by the majority.[56] Nevertheless, he concluded that a more literal interpretation would encompass only physical and mental injuries.[57] Scalia noted that the phrase "personal injury or sickness" is used in several other parts of Code section 104 in the context of physical and mental health.[58] Therefore, Scalia believed the phrase in section 104(a)(2) should be similarly limited to damages to physical and mental health, but damages received in the form of back pay should be taxable.[59]

I agree in concept with Justice Scalia's view that the personal injury exclusion should be limited to physical and mental injuries. Effectively it coincides with the human capital or birthright theory, which limits the personal injury exclusion. Since Congress wrote the 1918 and subsequent personal injury exclusionary provisions rather broadly, however, I do not agree with Scalia that section 104(a)(2) was so limited at that time.[60] The majority view as expressed in *O'Gilvie*[61] seems to be the better interpretation of section 104(a)(2) prior to the 1996 amendments. As noted

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51. 504 U.S. 229 (1992).
52. *Burke*, 504 U.S. at 242.
53. *Id.* at 241.
54. *Id.* at 239.
55. *Id.* at 240.
56. *Id.* at 243.
57. *Id.*
58. *Id.*
59. *Id.* at 245.
60. Before its amendment in 1996, Code § 104(a)(2) provided as follows: "gross income does not include—(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as period payments) on account of personal injuries or sickness." 26 U.S.C. § 104(a)(2) (1994). The use of the term "any" damages and the fact that no reference is made to requiring physical injuries for exclusion suggests a broader interpretation of § 104(a)(2) as it existed prior to amendment.
61. O'Gilvie v. United States, 117 S. Ct. 452 (1996).

above, the Court in *O'Gilvie* believes that the section 104(a)(2) exclusion extends to lost wages.[62]

D. Commissioner v. Schleier

The frustrations of the judiciary with section 104(a)(2) reached its zenith when the U.S. Supreme Court decided *Commissioner v. Schleier* in 1995.[63] The issue in *Schleier* was whether an Age Discrimination in Employment Act (ADEA) recovery of back-pay and an equal amount of liquidated damages was excludable under section 104(a)(2).[64] The taxpayer, Erich Schleier, was a pilot for United Airlines who was terminated when he reached the mandatory retirement age of sixty.[65] The ADEA provided for recovery of back-pay and an equal amount as liquidated damages if the employer acted wilfully in terminating an employee due to age.[66] The Supreme Court held that the entire recovery was taxable. First, the Court found that an action under ADEA is not a tort or tort-like cause of action.[67] Because ADEA allowed only recovery of back wages and an equal amount of liquidated damages when the employer's conduct is willful, the majority of the Court found that these remedies were not sufficient to treat an ADEA violation as a tort.[68] As the liquidated damages were punitive in nature, the majority felt that the only compensatory damages available under ADEA are back wages.[69]

The Court could have stopped there. Because the damages must be received "on account of" personal injury or sickness, however, the majority felt compelled to add a second prong to the test for exclusion that requires a link between the cause of action and the damages recovered.[70] This new test created a great deal of confusion about the scope of the section 104(a)(2) exclusion.[71] Many believe the Supreme Court's new test in *Schleier* effectively made recoveries of back wages taxable, unless the injured party suffered physical injury as a result of the tortfeasor's conduct.[72] If that is true, employment discrimination and other dignitary tort awards of back wages would nearly always be taxable, because the victim usually does not suffer any physical injuries or sickness other than

62. *Id.* at 455.
63. 515 U.S. 323 (1995).
64. *Id.*
65. *Id.*
66. *Id.* at 326.
67. *Id.* at 336.
68. *Id.* at 330.
69. *Id.* at 336.
70. *Id.* at 337.
71. *See* Frank J. Doti & Peter J. Rimel, *Does the U.S. Supreme Court's* Schleier *Decision Limit the Personal Injury Exclusion to Physical Injuries?*, CAL. TAX LAW., Spring 1996, at 46; *see also* Robert M. Elwood, *Supreme Court Ruling on Taxation of Discrimination Damages Provides Little Resolution*, 83 J. TAX'N 148 (1995) (discussing continuing ambiguities and problems left unresolved by the *Schleier* court).
72. *See supra* note 71.

emotional distress. The majority noted that Mr. Schleier might have suffered emotional distress as a result of his firing.[73] This intangible injury, however, was not sufficient to link the tortious conduct of his employer with the award of back pay.[74]

In my opinion, the Court was troubled by the fact that one-half of the award was to compensate Mr. Schleier for lost wages and the other half was to punish the employer and was determined by reference to the amount of back wages to which Mr. Schleier was entitled. Therefore, all the damages were based upon lost income with no compensation for pain and suffering attributable to emotional distress. Although the majority opinion makes no reference to the human capital theory, I believe that the Court was concerned with opening the door to tax-free treatment of employment discrimination recoveries. Since employment discrimination recoveries are so heavily weighted with lost wages,[75] it seems that the Court could not accept the fact that Congress intended such a loophole to exist for lost wages—a classic form of taxable income.

E. *Recent U.S. Tax Court Decisions*

The U.S. Tax Court has applied the *Schleier* tests in two recent cases that predate the application of the 1996 amendments of section 104(a)(2). In *Barnes v. Commissioner*, the petitioner worked as a bookkeeper for the National Livestock Commission Association (NLCA).[76] After she was served with a subpoena to give a deposition in an lawsuit involving the NLCA, she was fired.[77] As a result of the termination, petitioner suffered embarrassment, humiliation, and other mental distress.[78] Petitioner also claimed that the mental distress manifested itself in the appearance of precancerous tumors which were being monitored by her doctor.[79] She filed a wrongful termination action and eventually settled with the NLCA for $27,000.[80] Although the petitioner signed a general release of all claims, there was no allocation of the settlement award between the specific claims that she had alleged.[81]

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73. Schleier, 515 U.S. at 330.

74. *Id.* at 330 n.4.

75. *See* Grimes v. District of Columbia, 836 F.2d 647, 650 (D.C. Cir. 1988); Corning Glass Works v. Brennan, 417 U.S. 188, 207 (1974)

76. Barnes v. Commissioner, No. 21856-95, 1997 WL 12138, at *1 (U.S. Tax Ct. Jan. 15, 1997). This case was decided by a special trial judge under the small claims procedures of I.R.C. § 7443A(b)(3) and Rules 180, 181, and 182. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* Curiously, the judge in *Barnes* did not make any reference to the precancerous tumors suffered by the plaintiff in his opinion, other than in the recitation of facts. *Id.* Thus, it is difficult to draw any inference between the significance of this possible physical injury and the judge's decision that the mental distress damages were excludable.

80. *Id.*

81. *Id.* at *4.

A special trial judge for the Tax Court examined Oklahoma law to determine if the first prong in *Schleier* was satisfied.[82] The judge found that the Oklahoma Supreme Court had held that a wrongful termination cause of action was founded in tort.[83] Thus, the requirement that the cause of action be tort or tort-like was satisfied. With regard to the second prong in *Schleier*, the court determined whether the damages were received "on account of personal injury or sickness."[84] Since there was no allocation of the damages, the court examined the surrounding facts and circumstances and, in particular, the testimony of the petitioner's attorney in the wrongful termination action and settlement.[85] The judge decided: "Based upon our examination of the record and upon due consideration, we allocate $13,500 to the mental distress claim and $13,500 to the punitive damages claim . . . ."[86]

The judge interpreted *Schleier* liberally and permitted the exclusion of damages received for intangible harms such as mental distress where the state law governing the cause of action provides for such damages.[87] Thus, the amount allocated to mental distress was held to be excludable, whereas the portion allocated for punitive damages was taxable under *O'Gilvie*.[88] It is significant that the court did not require the taxpayer-petitioner to have suffered any physical injury or physical sickness when the tort was committed. Consequently, this court views the second prong of *Schleier* as not requiring physical injury or physical sickness at the time the tort was committed. Presumably the court would have ruled differently with respect to the damages for mental distress, if amended section 104(a)(2) applied to this case.[89]

A similar result was reached in *Knevelbaard v. Commissioner*.[90] The Tax Court held that damages awarded in an action for negligent infliction of emotional distress were excludable under section 104(a)(2) as it is read prior to the 1996 amendments.[91] The petitioner claimed that he suffered mental stress after a bank engaged in fraudulent business practices and made risky loans to one of the petitioner's debtors, which resulted in significant financial losses to the petitioner.[92] Despite his stress, the petitioner did not seek any professional mental health assistance.[93] As in

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82. *Id.* at *2.
83. *Id.*
84. *Id.* at *3.
85. *Id.*
86. *Id.*
87. *Id.* at *4.
88. *Id.*
89. *See* discussion *infra* Part IV with respect to the amended Code § 104(a)(2) requirement that the damages be received on account of physical injury or physical sickness.
90. No. 21366-94, 1997 WL 405191 (U.S. Tax Ct. July 21, 1997).
91. *Knevelbaard*, 1997 WL 405191, at *1.
92. *Id.* at *2.
93. *Id.* at *3.

Barnes, the damages were measured by the petitioner's lost income.[94] Yet the court held that the damages were excludable as a personal injury award under section 104(a)(2).[95]

These very recent Tax Court decisions illustrate the conflicting signals that taxpayers faced in light of *Schleier*. Because of *Schleier*, Congress finally recognized the inconsistencies in the application of section 104(a)(2), especially with respect to employment discrimination awards.[96] I believe the confusion and controversy would have been avoided if Congress had originally adopted the human capital theory of the exclusion.

IV. 1996 ACT & PHYSICAL INJURY REQUIREMENT

A. *Background*

In 1995, Congress attempted to narrow the scope of Code section 104(a)(2) in the Revenue Reconciliation Act of 1995, which President Clinton chose to veto.[97] In 1996, the amendments to section 104(a)(2) became law as part of the Small Business Job Protection Act.[98] The amendment and legislative history are substantially the same as that in the 1995 Act.[99]

The new law applies to amounts received after August 20, 1996 (the date of enactment), in taxable years ending after such date.[100] Under a transition rule, the amendments do not apply to amounts received under a written binding agreement, court order, or mediation award in effect (or issued on or before) on September 13, 1995.[101] Thus, Congress adopted a transition rule date that is nearly one year earlier than enactment, instead of one closer to enactment as is typical, presumably because of its action regarding the Revenue Reconciliation Act of 1995. Although that 1995 Act did not become law, Congress apparently felt taxpayers had notice about its intention to narrow the scope of section 104(a)(2).

As amended, section 104(a)(2) provides that gross income does not include:

> (2) the amount of any damages (other than punitive damages) received . . . on account of personal physical injuries or physical sickness. . . . For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness. The preceding

94. *Id.* at *4.
95. *Id.* at *12.
96. *See supra* text accompanying notes 44-45.
97. H.R. 2491, 104th Cong., 1st Sess. (1995) (vetoed).
98. Pub. L. No. 104-188, 110 Stat. 1755, 1836-39 § 1605(a) (1996).
99. *See* H.R. REP. NO. 104-737 (1996); H.R. REP. NO. 104-280 (II) (1995).
100. *Id.* § 1605(d).
101. *Id.*

> sentence shall not apply to an amount of damages not in excess of the amount paid for medical care (described in subparagraph (A) or (B) of section 213(d)(1)) attributable to emotional distress.[102]

The amendment and legislative history are clear with respect to punitive damages received after August 20, 1997.[103] Punitive damages are taxable whether or not related to a physical injury or physical sickness.[104] The only exception is for punitive damages received in a wrongful death action, if the applicable state law (as in effect on September 13, 1995 without regard to subsequent modification) provides that only punitive damages may be awarded in a wrongful death action.[105]

B. *Legislative History*

With respect to compensatory damages, the House Conference Report contains an explanation of the requirement of physical injury or physical sickness that may not be gleaned from the statutory language.[106] Since the House version of the bill was adopted in conference, the following conference report statements are helpful in understanding part of the meaning of *physical injury or physical sickness*:[107]

> The House bill provides that the exclusion from gross income applies to damages on account of a personal physical injury or physical sickness. If an action has its origin in a physical injury or physical sickness, then all damages (other than punitive damages) that flow therefrom are treated as payments received on account of physical injury or physical sickness whether or not the recipient of the damages is the injured party. For example, damages (other than punitive damages) received by an individual on account of a claim for loss of consortium due to the physical injury or physical sickness of such individual's spouse are excludable from gross income. In addition, damages (other than punitive damages) received on account of a claim of wrongful death continue to be excludable from taxable income under present law.
>
> The House bill also specifically provides that emotional distress is not considered a physical injury or physical sickness. Thus, the exclusion from gross income does not apply to any damages received (other than for medical expenses as discussed below) based on a claim of employment discrimination or injury to reputation accompanied by a claim of emotional distress. Because all damages received on account of physical injury or physical sickness are excludable from gross income, the exclusion from gross income applies to any damages re-

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102. 42 U.S.C. § 104(a)(2) (1996).

103. For the law regarding punitive damages prior to the 1996 amendments, see *supra* note 7.

104. Pub. L. No. 104-188, 1996 H.R. 3448, 110 Stat. 17455, 1838.

105. *Id.* Alabama's wrongful death statute is a good example of such a state law. *See* ALA. CODE §§ 6-5-391 to -410 (1975).

106. H.R. REP. NO. 104-737, at 301 (1996).

107. *Id.*

> ceived on a claim of emotional distress that is attributable to a physical injury or physical sickness. In addition, the exclusion from gross income specifically applies to the amount of damages received that is not in excess of the amount paid for medical care attributable to emotional distress. . . . [108]

The conference report explains Congress' intent with regard to some aspects of the *physical injury or physical sickness* requirement that must be met before compensatory damages are excludable. As the following hypotheticals illustrate, however, there are many issues that are not resolved by the Code and conference report.

C. *Hypotheticals*

For example, examine the situation of the victim of an automobile accident (caused by a tortfeasor) who suffers lacerations and broken bones and is unable to work. She recovers damages which reimburse her for medical costs, pain and suffering, and lost wages from her job.

All of the damages are excludable because she suffered a physical injury as a result of the negligence of the tortfeasor. Since her cause of action had its origin in a physical injury or physical sickness, all compensatory damages that flow therefrom (including the lost wages) are treated as payments received on account of physical injury or physical sickness, and are thus excludable.

If the accident victim in the example also suffers emotional distress as a result of the accident, then any damages received on account thereof are also excludable. This is due to the fact that the emotional distress is attributable to a physical injury or physical sickness. Thus any damages received for emotional distress caused by the victim being upset about her bodily injuries or her inability to work would be excludable. This seems clear under the above conference report, although the statute does not specifically so provide.

When we look at the victim of defamation or employment discrimination, any damages awarded to the victim are normally taxable. This is because the victims of defamation and employment discrimination normally do not suffer physical injury or physical sickness. Although the victim usually suffers emotional distress, it is clear under the conference report that any damages (including emotional pain and suffering and lost wages) are taxable. The only exception is for costs incurred for medical care attributable to emotional distress. Thus, if the victim of a dignitary tort pays a psychiatrist for consultation on her emotional problems attributable to the tortfeasor's conduct, reimbursement of the doctor's fees are excludable.[109]

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108. *Id.* at 301.
109. *Id.* at 301.

With respect to wrongful death actions, any damages received by loved ones from the tortfeasor are excludable even though the plaintiffs did not suffer physical injury or physical sickness. Although the statute does not specifically cover wrongful death actions, the conference report makes clear that the plaintiff effectively steps into the shoes of the victim of the wrongful death.

Problems will certainly arise on what constitutes a physical injury or physical sickness. Neither the Code nor legislative history defines *physical injury or physical sickness*, except to tax recoveries for emotional distress not accompanied by physical injury or physical sickness caused initially by the tortfeasor.

In a footnote to the conference report, the conferees state: "The Committee intends that the term emotional distress includes physical symptoms (e.g., insomnia, headaches, stomach disorders) which may result from such emotional distress."[110] Thus it is clear that rather typical and benign physical symptoms of emotional distress of the types listed will not transform the emotional distress into physical injury or physical sickness. It is not clear, however, whether more serious physical manifestations of emotional distress, such as a nervous breakdown or heart attack, will constitute physical injury or physical sickness.

For example, take the situation of the victim of defamation or employment discrimination who has severe emotional distress that ultimately manifests itself in a mental breakdown. Most medical practitioners consider a mental breakdown to be physical injury or physical sickness.[111] The problem, however, is that defamation or employment discrimination does not normally have its origin in a physical injury or physical sickness. The conference report is not clear on whether the victim of a dignitary tort is required to suffer a physical injury or physical sickness contemporaneous with the time the tort was committed. The conference report states: "If an action has its origin in a physical injury or physical sickness, then all damages (other than punitive damages) that flow therefrom are treated as payments received on account of physical injury or physical sickness. . . ."[112]

The issue becomes whether the dignitary tort had its origin in the mental breakdown. An argument, no doubt, could be made that the bodily processes that ultimately manifested themselves in a mental breakdown started at the time the dignitary tort was committed. The conference report does go on to provide, however, that the exclusion extends only to the amount paid for medical care attributable to emotional dis-

110. *Id.* at 301.

111. *See* Belcher v. T. Rowe Price Found., Inc., 621 A.2d 872, 887 (Md. 1993); Vanoni v. Western Airline, 56 Cal. Rptr. 115 (1967); Smith, *Relationship of Emotional Injury and Disease: Legal Liability for Physic Stimuli*, 30 VA. L. REV. 193 (1944).

112. H.R. REP. NO. 65-767, at 301 (1996).

tress.[113] If the conferees meant this language to apply to the mental breakdown scenario, then the exclusion would be limited to doctor and other medical costs. On the other hand, the conferees' statement with respect to medical care may be referring to psychiatric care for purely emotional distress not accompanied by physical injury or physical sickness, such as a mental breakdown. This ambiguity in Congressional intent will probably not be resolved until the issue is litigated.

Another issue is how serious the physical injury or physical sickness has to be. For example, a tortfeasor spits on a victim who then suffers emotional distress. Or the victim of sexual harassment at work endures unwanted fondling by her superior. Have these victims suffered physical injury or physical sickness? Stated directly, does mere touching of the human body constitute a physical injury or physical sickness? The Code and legislative history are silent on how extensive the physical injury or physical sickness has to be such that it is covered by the section 104(a)(2) exclusion.

Or take a different kind of involvement of the human body. A patron of a fancy restaurant ingests rat feces as part of his Beef Wellington entree. He suffers emotional distress from the unwanted ingredient, but no apparent bodily injury or sickness. Has he suffered a physical injury merely because the restaurant caused an unwanted substance to enter his body? Again, the extent of involvement of one's body under the new law for purposes of exclusion is an unanswered issue.

Black's Law Dictionary defines *physical injury* as: "Bodily harm or hurt, excluding mental distress, fright, or emotional disturbance."[114] The spitting, fondling, and rat feces in the above examples do not normally result in bodily harm or hurt in the literal sense. In fact, these disturbances usually result in only mental distress, fright, or emotional disturbance. Nevertheless, in our examples, an argument could be made that the body was adversely affected and thus harmed or hurt, although to a lesser degree than when the victim suffers cuts and bruises and more obvious bodily injury.

D. *Comparison to Negligent Infliction of Emotional Distress*

In tort law there is a common law rule that physical injury or physical impact is a prerequisite to the recovery of damages for negligent infliction of emotional distress.[115] Although the trend is for jurisdictions to

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113. *Id.*

114. BLACK'S LAW DICTIONARY 1147 (6th ed. 1990).

115. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 361 (5th ed. 1984). For the U.S. Supreme Court's application of the common law rule in a case arising under the Federal Employer's Liability Act (FELA) see Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994); Logan v. Saint Luke's Gen. Hosp., 400 P.2d 296 (Wis. 1965); Weissman v. Wells, 267 S.W. 400 (Mo. 1924); *see also* RESTATEMENT (SECOND) TORTS § 436A.

reject the physical injury/physical impact requirement, the ebbing majority view is to adhere to the traditional rule requiring some form of physical injury or physical impact to recover under negligent infliction of emotional distress.[116] It seems unlikely that Congress had in mind this majority rule of tort law when it amended section 104(a)(2), and the legislative history is silent on the issue.

Florida's application of the physical injury/physical impact requirement in cases of negligent infliction of emotional distress is representative of the majority view.[117] At common law, the physical injury/physical impact rule barred recovery for purely psychological injuries.[118] A plaintiff could only recover damages for emotional distress which flowed from physical injuries caused by a tortfeasor's negligence.[119] The common law rule is based on judges' skepticism about the reliability of evidence regarding the plaintiff's mental state and the possibility that plaintiffs may be faking emotional distress.[120] Because it is usually harder to fake physical injuries, the physical injury/physical impact requirement was interposed in an attempt to avoid the problem of proof of injury.[121]

Congress may have the same concerns that judges have had with respect to emotional distress that is not attributable to physical injury or physical sickness.[122] Hence, Congress imposed the requirement of physical injury or physical sickness for the personal injury exclusion to apply. Furthermore, in its conference report, Congress allows tax-free treatment for emotional distress that is attributable to a physical injury or physical sickness.[123] Coincidentally, Congress' view mirrors the common law rule that allows damages for negligent infliction of emotional distress only if the emotional distress is attributable to physical injury.

Interestingly, the common law physical injury/physical impact rule of negligent infliction of emotional distress has an exception.[124] Recovery is possible for emotional distress attributable to defamation.[125] The conference report, however, provides that the exclusion does not apply to

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116. *See* Scott D. Marrs, *Mind Over Body: Trends Regarding the Physical Injury Requirement in Negligent Infliction of Emotional Distress and "Fear of Disease" Cases*, TORT & INS. L.J., Fall 1992, at 1.

117. *See* Ira H. Leesfield, *Negligent Infliction of Emotional Distress: Where Are We Now?*, FLA. BUS. J., Feb. 1997, at 42.

118. *See supra* note 115.

119. *Id.*

120. *See* Marrs, *supra* note116, at 43.

121. *Id.*

122. H.R. REP. NO. 1104-737 (1996) is silent on the issue of Congress' concern with regard to proof of emotional distress.

123. *Id.*

124. Miami Herald Publ'g Co. v. Brown, 66 So. 2d 679, 681 (Fla. 1953) (holding that mental suffering damages are recoverable in an action for negligent infliction of emotional distress caused by defamation).

125. *Id.*

injury to reputation accompanied by a claim of emotional distress,[126] thus departing from the common law tort rule in the case of defamation.

In questionable situations under amended section 104(a)(2), practitioners, the Treasury Department, and the Internal Revenue Service may want to study the common law tort rules with respect to negligent infliction of emotional distress. Although there are differences (such as in the case of defamation) between the traditional tort rules and Congress' intent regarding the scope of the exclusion, there are many similarities. Obviously, if there is no recovery in an action for negligent infliction of emotional distress because the jurisdiction adheres to the physical injury/impact rule of the majority of jurisdictions, there is no tax issue. If the jurisdiction has abandoned the physical injury/impact rule, then tort recovery for emotional distress is possible and an issue of taxability arises. More important, the issue of taxability arises in other tort or tort-like causes of action for emotional distress, such as in battery and employment discrimination, where there may be a minimal degree of physical contact.

I have identified a few questionable areas in the application of amended section 104(a)(2). For example, in the case of the restaurant patron who ingests rat feces, there is an issue of whether he suffered a physical injury or physical sickness. The majority rule in negligent infliction of emotional distress is that the mere ingestion of a toxic substance is not sufficient physical harm on which to base a claim for damages for emotional distress.[127] The plaintiff must prove that he suffered some present physical harm or sickness caused by the toxic substance to recover damages for emotional distress.[128]

In my opinion, it is likely that amended section 104(a)(2) will be construed against the taxpayer in cases involving emotional distress and minimal physical contact, in accordance with the general rule of narrowly construing an exclusionary Code provision.[129] Where the majority tort law with regard to negligent infliction of emotional distress is unfavorable to the restaurant patron (but he recovers in a jurisdiction following the minority position), the taxpayer's burden of overcoming the presumption of taxability may be insurmountable.

Regarding the bodily contact example of unwanted fondling, there may be a more favorable tax result based on the majority rule in negli-

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126. H.R. REP. NO. 104-737, at 310 (1996).

127. *See* Doyle v. Pillsbury Co., 476 So. 2d 1271 (Fla. 1985) (denying recovery for sight of insect in can of peas); DeStories v. City of Phoenix, 744 P.2d 705 (Ariz. Ct. App. 1978) (denying recovery for exposure to asbestos dust absent proof of actual injury); Cushing Coca-Cola Bottling Co. v. Francis, 245 P.2d 84 (Okla. 1952) (denying recovery for drinking beverage containing decomposed body of mouse absent proof of physical injury).

128. *See supra* note 127.

129. United States v. Burke, 504 U.S. 229 (1992).

gent infliction of emotional distress. The amount of physical contact or injury that must be shown is minimal.[130] Contact, no matter how slight, trifling, or trivial, will support a cause of action in tort law.[131] The difference is probably attributable to the fact that, unlike the restaurant patron, there is direct physical contact between the tortfeasor and the victim of fondling or similar touching of the human body. For purposes of section 104(a)(2), there must be physical injury or physical sickness.[132] In negligent infliction of emotional distress, however, either physical injury or physical impact will normally suffice under the majority rule.[133] Therefore, the Internal Revenue Service may argue that the physical impact must result in a physical injury or physical sickness—not mere physical contact.

It remains to be seen if, when, and how the Treasury defines *physical injury or physical sickness* in regulations to be issued under section 104(a)(2). Since the Code and legislative history leave many unanswered questions, it is certain that the issues will be litigated in spite of regulatory guidance. For guidance on Congress' intent with respect to the meaning of *physical injury or physical sickness,* the Treasury and courts may want to review the tort law with respect to negligent infliction of emotional distress

CONCLUSION

For nearly eighty years, taxpayers, their advisors, and the government have wrestled with the scope of the personal injury exclusion. This author believes that the primary cause of the confusion has been the failure to limit the exclusion to losses of human capital. Once the door was opened by allowing tax-free treatment for financial losses in the form of lost wages and earning power, there was no longer any symmetry to the exclusion. Congress' attempt in 1996 to limit the scope of the exclusion to physical injury and physical sickness torts has gone a long way to cut back on the loss of federal revenue. Unfortunately, it does little to bring symmetry to the personal injury exclusion.

Now victims of defamation, employment discrimination, and other dignitary torts must pay income taxes on damages received for emotional distress in practically all cases. This is wrong, since such victims are merely being made whole for the tortfeasor's conduct in taking away a

130. Homans v. Boston Elevated Ry. Co., 62 N.E. 737 (Mass. 1902) (slight blow from being thrown in automobile); Porter v. Delaware Lockawanna W. R.R. Co., 63 A. 860 (N.J. 1906) (dust in eye); Morton v. Stack, 170 N.E. 869 (Ohio 1930) (inhalation of smoke).

131. Zelinski v. Chimics, 175 A.2d 351, 354 (Pa. 1961) ("[A]ny degree of physical impact, however slight . . . .").

132. 42 U.S.C. 104(a)(2) (1996).

133. *See supra* note 115.

part of the victim's human capital or birthright.[134] On the other hand, the victims of physical injury type torts, such as an automobile accident, can receive lost wages and earning power tax free. Accretions to wealth in the form of lost wages and earning power are quintessential sources of income, not reimbursement for human capital losses. These anomalies appear to be the result of a mistake by Congress in understanding the appropriate limitations on its power to tax personal injury awards.[135]

In my opinion, Code section 104(a)(2) should be amended to read as follows:

> Gross income does not include the amount of compensatory damages, received by an individual on account of personal injuries, that are attributable to losses to the body, mind, and reputation of such individual. Such damages shall be excludable whether received by suit or agreement and whether as lump sums or as periodic payments.

The birthright concept of the personal injury exclusion is incorporated in this proposed amendment of section 104(a)(2). Excludable damages would be limited to human capital losses to the body, mind, and reputation of the victim of a tort or tort-like claim.[136] By negative implication, damages for lost wages, earning power, and punitive damages would always be taxable, regardless of the nature of the tortious cause of action. I believe that this form of section 104(a)(2) would make much more sense to taxpayers, their advisors, and the Internal Revenue Service. It would also avoid the confusion and controversy on what *physical injury or physical sickness* really means under current section 104(a)(2).

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134. A question arises as to whether taxpayers can successfully argue that Congress lacks the power to tax as income damages to human capital. Under the rationale of *Commissioner v. Glenshaw Glass Co.*, 348 U.S. 426 (1955), *income* is defined as accretions to wealth that are clearly realized. *Id.* at 476. Has the victim of emotional distress really gained anything when he or she is merely put back in the position occupied before the tort was committed?

135. *See supra* text accompanying notes 30-38.

136. The current Treasury regulations require that a personal injury be attributable to a tort or tort-like claim. 26 C.F.R. § 1.104-1(c) (1997). The regulations define *damages received* as amounts received "through prosecution of a legal suit or action based upon torts or tort type rights." *Id.* at 414. *See* Commissioner v. Schleier, 115 S. Ct. 2159 (1995); United States v. Burke, 504 U.S. 229 (1992) (showing the U.S. Supreme Court's approval of this regulation with respect to requiring tort or tort-like conduct prior to applying an exclusion).

RECONCILING THE DORMANT CONFLICT: CRAFTING A BANKING EXCEPTION TO THE FRAUDULENT CONVEYANCE PROVISION OF THE BANKRUPTCY CODE FOR BANK HOLDING COMPANY ASSET TRANSFERS

CASSANDRA JONES HAVARD*

I. INTRODUCTION

Banking law and bankruptcy law clash. This is most evident when a bank holding company (parent company)[1] becomes insolvent *after* it has made an asset transfer[2] to its financially troubled bank subsidiary.[3]

The Bankruptcy Code (Code) governs the insolvency proceedings of the bank holding company.[4] Predictably, the parent company's trustee,

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1. A parent company or bank holding company is a "company which has control over any bank or over any company that is or becomes a bank holding company . . . if the company directly or indirectly owns, controls, or has power to vote 25 per centum . . . of any voting securities . . . ." 12 U.S.C. § 1841(a)(1)-(2) (1994). *See generally* Eric J. Gouvin, *Resolving the Subsidiary Director's Dilemma*, 47 HASTINGS L.J. 287 (1996) (stating the nonoperating parent company ownership of operating subsidiaries is the norm in banking law, as well as in other industries).

2. "Asset transfer" is the bankruptcy reference describing the shifting of capital from a debtor to a creditor. The term correlates to banking law's capital maintenance obligation when the parent company making the transfer is insolvent or becomes insolvent as a result of the transfer. A parent company that controls an undercapitalized bank subsidiary may implement a Capital Restoration Plan (CRP), which sets forth how the parent company will recapitalize or basically infuse funds into the bank subsidiary.

3. "Bank subsidiary" refers to federally insured depository institutions commonly called banks and thrifts.

4. The Bankruptcy Code, 11 U.S.C. §§ 101-1330 (1994) (providing a priority scheme designed to treat all creditors equally). *See* Nathanson v. NLRB, 344 U.S. 25, 29 (1952) ("The theme of the Bankruptcy Act is 'equality of distribution' and if one claimant is to be preferred over others, the purpose should be clear from the statute."); Young v. Higbee Co., 324 U.S. 204, 210 (1945) (explaining ratable distribution among creditors is one of bankruptcy law's primary purposes); William T. Bodoh & Michelle M. Morgan, *Inequality Among Creditors: The Unconstitutionality of Successor Liability to Create a New Class of Priority Claimants*, 4 AM. BANKR. INST. L. REV. 325, 347-49 (1996) (explaining that state successor liability claim, which operates to give certain creditors a windfall over others, is also in direct conflict with well-established principles of federal preemptions under the Code and extension of such liability should be left to Congress pursuant to its exclusive jurisdiction on the issue of bankruptcy); Donald R. Korobkin, *Contracturianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541, 602 (1993) (stating that the policy of equality flows from concern for "the welfare of unsecured creditors who lack influence" and signifies a normative commitment to rational planning).

appointed for the protection of *all* the creditors of the bankrupt entity,[5] uses the fraudulent conveyance provision of the Code to have any asset transfers that were made to the bank subsidiary returned to the debtor's estate.[6] The good faith exception to that provision will protect the asset transfer only if the parent company made the transfer for "good and fair consideration."[7]

The banking laws govern the regulation of the entire banking industry, including the insolvency of a financial institution.[8] The banking laws, arguably, provide preferential treatment[9] for the Federal Deposit

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5. S. REP. NO. 95-989, at 49 (1978), *reprinted in* 1978 U.S.C.C.A.N. 5787, 5835; H.R. REP. NO. 95-595, at 177-78 (1977), *reprinted in* 1978 U.S.C.C.A.N. 5963, 6138.

6. Fraudulent conveyance law applies where the debtor receives *less than reasonably equivalent value* in exchange for the assets transferred or the obligations incurred, if the debtor was or became insolvent, after giving effect to the transfer or obligation. 11 U.S.C. § 548(a)(2)(A) (1978). Under the traditional analysis, an insolvent bank subsidiary cannot exchange reasonably equivalent value when its parent company makes an asset transfer. *See* discussion *infra* Part III.B.1.

11 U.S.C. § 547(b) (1994) states that the Code also provides for avoidance of a transfer under the preference provisions. Under that provision, the usual 90-day period is extended to one year for an affiliate or insider, such as a bank subsidiary. 11 U.S.C. §§ 101(2)(B), 101(31)(E) (1994). Assuming that the elements of that section are met, a possible defense to a preference recovery is that the transfer was made in the ordinary course of business. *See* John C. Deal et al., *Capital Punishment: The Death of Limited Liability for Shareholders of Federally Regulated Financial Institutions*, 24 CAP. U. L. REV. 67, 121 (1995) (arguing that the ordinary course of business defense may fail given the amount of the transfers and presuming that the financial institution solvency status is weakened continually over the one-year period).

The fraudulent conveyance provision is the focus of the proposed amendment because its focus on the value of the exchange between the debtor and the transferee correlates with the enterprise liability theory, the premise of parent company liability. *See* discussion *infra* Parts IV-V.

7. *See* discussion *infra* Part II.B.1.

8. *See generally* Fidelity Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) (describing the comprehensive framework that Congress has granted to the [bank regulators] as broad discretionary powers to regulate the industry, and referring to the regulatory scheme as "cradle to . . . grave" regulation).

When a bank subsidiary fails, the regulatory scheme provides for the appointment of a receiver for the orderly distribution of the financial institution's assets. 12 U.S.C. § 1821(c) (1994). It is the financial institution's receiver that reviews the trustee's request to have the parent company's assets returned to the parent company's estate. *See* discussion *infra* Part II.A.3.a. regarding *MCorp Financial, Inc. v. Board of Governors of the Fed. Reserve Sys.*, 900 F.2d 852 (5th Cir. 1990) *aff'd in part, rev'd in part*, 502 U.S. 32 (1991) (denying bank holding company's application to the bankruptcy court for an automatic stay of the regulatory agency's administrative proceedings upon filing of bankruptcy petition and finding that the district court had no jurisdiction over the claim because it was not ripe for judicial review until the conclusion of the administrative proceedings).

9. Many courts have expressed dissatisfaction with the incongruence between the banking insolvency laws and the bankruptcy laws, which seem to give the Federal Deposit Insurance Corporation (FDIC) uncontrollable powers. *See* FDIC v. Continental Fin. Resources, Inc. (*In re* Continental Financial Resources, Inc.), 154 B.R. 385, 388 (D. Mass. 1993) (holding compliance with the Financial Institutions Reform, Recovery and Enforcement Act's (FIRREA) administrative claims procedure is not required before bankruptcy court can hear complaints that do not fall within the definition of claims under FIRREA but that are incident to FDIC's claims against its debtor); FDIC v. Purcell (*In re* Purcell), 150 B.R. 111, 114 (D. Vt. 1993) (explaining that because a provision in FIRREA's administrative claims procedure referring to "claims" applies only to claims by creditors, the provision does not prevent the bankruptcy court from exercising jurisdiction over debtor's cause

Insurance Fund as a failed financial institution's potentially largest unsecured creditor.[10] Banking law allows the parent company to make an asset transfer to avoid the threat of mandated restrictions.[11] It also gives an unfulfilled payment a priority status in bankruptcy.[12] The rules do not state, however, under what circumstances an unfunded capital obligation ought to be allowed. The legality of the asset transfer when a parent company seeks bankruptcy protection is a crucial question for the banking industry.

Establishing an accord when the parent company and its bank subsidiary are both financially troubled requires a recognition of the interrelatedness of the financial resources of the parent company and its bank subsidiary.[13] This approach, which examines the enterprise as a unit, requires close control and monitoring by the parent company of its subsidiary's operations. Specifically, Congress should legislate a fraudulent conveyance exception for parent company asset transfers. Such a provision would require a determination of enterprise liability by either banking regulators or the parent company. The banking regulators must establish that the parent company, through interaffiliate transactions, is risking the capital of the bank subsidiary. Alternatively, the parent company may elect to declare its choice of corporate operation as an integrated enterprise, routinely using the bank subsidiary assets to maximize

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of action against FDIC as receiver for failed bank); All Season's Kitchen, Inc. v. FDIC (*In re* All Season's Kitchen, Inc.), 145 B.R. 391, 393 (Bankr. D. Vt. 1992) ("[W]e believe that the new legal theory being advanced by FDIC and RTC in Bankruptcy Courts across the country threatens the efficient functioning of the federal Bankruptcy system."); *In re* Gemini Bay Corp., 145 B.R. 350, 352 (Bankr. M.D. Fla. 1992) (holding FIRREA does not preclude the bankruptcy court from exercising jurisdiction over the resolution of creditor's objections to FDIC's claim against debtor's estate because the claim does not involve FDIC's claim against assets of the failed institution).

10. 12 U.S.C. § 1823 (1994) (stating that while the federal government guarantees that the deposit insurance fund will meet its obligations to depositors, taxpayers are ultimately liable).

The FDIC is commonly the largest creditor of the receivership estate. The FDIC operates in dual capacities: as FDIC-Corporate and FDIC-Receiver. When an institution fails, the FDIC-Corporate pays insured depositors. It then becomes a general creditor in the receivership estate of the failed institution for the amount that it has paid to insured depositors. 12 U.S.C. § 1821(f) (1994). The FDIC-Receiver satisfies secured claims. It "stands in the shoes" of the member institution and liquidates the assets for distribution to the creditors. Unsecured creditors, such as the FDIC-Corporate, are paid ratably. 12 U.S.C. § 1821(g) (1994). Member institutions fund the FDIC by paying insurance premiums based upon the financial institution's deposit base. 12 U.S.C. § 1817(b) (1994).

11. Capital-based regulations impose stringent regulatory controls, including dividend and growth restrictions and forced conservatorship. There are five capital categories: well capitalized, adequately capitalized, undercapitalized, significantly undercapitalized, and critically undercapitalized. *See* Federal Deposit Insurance Corporation Improvement Act of 1991 § 38(b)(1), 12 U.S.C. § 1831(o)(b)(1) (1994).

12. The Federal Deposit Insurance Corporation Improvement Act of 1991 (FDICIA) gives a priority status to unfunded capital maintenance obligations. 11 U.S.C. § 365(o) (1994). *See* discussion *infra* Part III.C.

13. Bankruptcy law labels the concept substantive consolidation. *See infra* note 141 and accompanying text. This article posits that there should be a pre-petition recognition of the relatedness of the enterprise given the moral hazard of federal deposit insurance in the banking industry.

profits and diversify losses of the entire undertaking.[14] Either situation would immunize an asset transfer should the parent company file for bankruptcy protection. The bankruptcy court's jurisdiction over these particular assets of the debtor parent company's estate would be limited to an evidentiary review for procedural sufficiency. FDIC-Receiver would cease to have a review function over these assets. Moreover, if FDIC-Corporate assesses cross-guarantee liability against the sister institutions, the asset transfers would serve as a credit against the amount of the liability. Legally, such a proposal may be the only way that a capital-weakened parent company, that decided pre-bankruptcy to shore up its bank subsidiary, may avoid the fraudulent conveyance provision.

Part II of the article identifies the statutory basis for the dormant conflict between Titles 11 and 12. Specifically, this section lists the broad array of somewhat identical discretionary powers that both the bankruptcy court and the banking regulatory agencies have as trustee and receiver for insolvent corporations and financial institutions, respectively. Part II concludes with an analysis of the cases in which these discretionary powers of the trustee and the receiver have come into conflict.

Part III discusses the bankruptcy of the Bank of New England Corporation (BNEC). The factual history of this case provides an example of the types of legal issues that an insolvent holding company faces under the banking laws when it files for protection under the Bankruptcy Code. The section ends by specifying post-BNE legislative reforms designed to address issues raised during the liquidation of that failed enterprise.

Part IV identifies the statutory rights that creditors have under the fraudulent conveyance law, including the good faith exception. Finally, Part V proposes an amendment to the current regulatory scheme that would require asset transfers from an insolvent holding company. It posits that the policies supporting the good faith exception are not compromised by the concomitant goal of protecting the Federal Deposit Insurance Fund. The banking enterprise exception establishes a procedure for regulatory assets transfers that is reviewable by the bankruptcy court, and operates as a credit against cross-guarantee liability. The proposed change will more closely merge the policies and purposes of the two schemes that converge when a bank holding company becomes insolvent.

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14. Most parent companies maintain the capital status of their bank subsidiaries voluntarily because it is in the best interest of the enterprise. H. Rodgin Cohen, *Easing FDICIA's Burden: A Holding Company Level Approach to Compliance*, 11 No. 21 BANKING POL'Y REP. 1, 29 (1992) (suggesting that mandating compliance with many banking regulations at the parent company level would be cost-effective and consistent with the exercise of parent company control). *But see* Helen A. Garten, *Subtle Hazards, Financial Risks, and Diversified Banks: An Essay on the Perils of Regulatory Reform*, 49 MD. L. REV. 314 (1990).

II. THE STATUTORY CONFLICTS: EQUITABLE AND LEGAL REMEDIES

A. *Equitable Relief*

The confluence of the bankruptcy protection and the bank regulatory authority raises the issue of the interaction between the automatic stay and the anti-injunction provision.[15] Among the protections that a debtor seeks by filing a bankruptcy petition is a restraint from creditors pursuing repayment of debts. The automatic stay provision of the Bankruptcy Code provides this protection. However, if the debtor is a parent company with an outstanding capital maintenance commitment, the bank failure regulatory scheme allows administrative intervention that could upset those insolvency procedures. As regulators of parent companies, the Federal Reserve and OTS have broad power to charge the failure to follow any banking law or regulation as an unsafe and unsound practice and to issue a cease and desist order to halt the particular practice.[16] One question that needs to be answered is which statutory scheme, bankruptcy or bank failure law, controls the debtor parent company's unfunded capital obligation.

1. The Bankruptcy Trustee's Powers: 11 U.S.C. § 362—The Automatic Stay[17]

The filing of a petition in bankruptcy, without any further action, results in a suspension of legal proceedings as an operation of law.[18] This anti-injunction power is in the form of an automatic stay. The automatic

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15. 11 U.S.C. § 362 (1994) (explaining the automatic stay provision); 12 U.S.C. § 1821(j) (1994) (describing the anti-injunction provision). *See* discussion *infra* Part II.

16. 12 U.S.C. § 1818(c)(2) (1994).

17. The automatic stay provision provides in pertinent part:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities . . . .
>
> (b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay . . . .
>
> (4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;
>
> (5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power; . . .

11 U.S.C. § 362(a), (b)(4)-(5) (1994).

18. The Code provides two options for debtors hoping to seek relief and protection from creditors. One option, a Chapter 7 liquidation, allows the debtor to obtain a complete discharge or release from liability on all pre-bankruptcy debt. In Chapter 7 proceedings, there is a court-appointed trustee who manages the debtor's estate. The trustee removes the debtor from control of its property and then takes charge of all nonexempt property of the debtor, converts it into cash and equitably distributes the proceeds to creditors. 11 U.S.C. § 721 (1994).

The other option, a Chapter 11 reorganization, allows the debtor to make a court-approved schedule of payments to its creditors over time. In Chapter 11 proceedings, the debtor may maintain management of its estate. However, in either proceeding, the bankruptcy court oversees most of the decisions of the trustee or the debtor regarding the management of the estate. The court also hears claims raised by creditors regarding the management of the estate. 11 U.S.C. §§ 1101-1102 (1994).

stay prevents the commencement or continuation of any action or proceeding against the debtor or the property of the estate; any act to create, perfect, or enforce a security interest in the debtor's property; and any act to collect, assess, or recover a claim against the debtor or the property of the estate.[19] There are several exceptions to the issuance of an injunction. Noteworthy is that issuance of the injunction is not authorized if the operation of the stay will serve to undercut a governmental unit's police or regulatory powers.[20]

2. The Anti-Injunction Power: 12 U.S.C. §§ 1818(i)[21] and 1821(j)[22]

The federal banking laws empower the bank regulatory agencies to regulate the supervision and operation of federally insured financial institutions.[23] As administrative agencies with broad supervisory powers, their regulatory processes operate free from judicial interference until there is a final agency action. The administrative agencies have an anti-injunction power similar to that found in bankruptcy.[24]

The banking laws also provide for the reorganization and liquidation of insolvent financial institutions.[25] Specifically, they provide for the appointment of the FDIC as conservator or receiver.[26] As receiver, the FDIC has an anti-injunction power that bars courts from taking any action by regulation or order that would restrain or affect the powers or

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19. 11 U.S.C. § 362(a) (1994).

20. 11 U.S.C. § 362(b) (1994). *See* discussion *infra*, Part II.A.3.a. regarding *MCorp*. Recently, creditors have begun negotiating a pre-petition agreement waiving the court's impost of the automatic stay *See* Rafael Efrat, *The Case for Limited Enforceability of a Pre-Petition Waiver of the Automatic Stay*, 32 SAN DIEGO L. REV. 1133 (1995); *cf.* William Bassin, *Why Courts Should Refuse to Enforce Pre-Petition Agreements That Waive Bankruptcy's Automatic Stay Provision*, 28 IND. L. REV. 1 (1994).

21. 12 U.S.C. § 1818(i) restricts jurisdiction of the courts, stating that "[n]o court shall have jurisdiction to affect by injunction or otherwise the issuance or enforcement of any notice or order under any such section, or to review, modify, suspend, terminate or set aside any such notice or order." 12 U.S.C. § 1818(i) (1994).

22. Section 1821(j) provides, "[e]xcept as provided in this section, no court may take any action except at the request of the Board of Directors by regulation or order, to restrain or affect the exercise of powers or functions of the [FDIC] as a conservator or a receiver." 12 U.S.C. § 1821(j) (1994).

23. The federal banking agencies have the authority to impose administrative sanctions whenever there is (1) an unsafe or unsound practice; (2) a violation of a law, rule or regulation, any condition imposed in writing by the agency in connection with the granting of an application or other request, or any other written agreement entered into with the agency. *See* 12 U.S.C. § 1818(b) (1994).

24. Section 1818(i)(1), which is analogous to § 1821(j), is the anti-injunction provision available to federal banking regulators.

25. 12 U.S.C. § 191 (1994).

26. The Federal Reserve also regulates state-chartered banks that are members of the Federal Reserve system. 12 U.S.C. § 248(a) (1994). The Office of the Comptroller of the Currency (OCC), an agency within the Department of the Treasury, charters and supervises national banks. 12 U.S.C. § 21 (1994). It also makes the determination of when to close those institutions. 12 U.S.C. § 191 (1994).

functions of the FDIC, except at the request of the FDIC.[27] By giving the receiver absolute control over the affairs of the insolvent financial institution, Congress has precluded judicial intervention into the receiver's exercise of its discretionary powers.[28]

3. The Automatic Stay vs. the Anti-Injunction Power

The federal banking agencies have wielded their substantial powers skillfully, albeit with an air of unseemliness. Three cases that follow examine the bank regulatory agencies' successful challenges to the operation of the automatic stay in bankruptcy.

a. MCorp v. Board of Governors of the Federal Reserve System (MCorp)[29]

The jurisdictional conflict between the courts and the bank agency was first tested in *MCorp*. *MCorp* addressed and resolved the issue of whether the Bankruptcy Code's automatic stay was applicable to internal administrative agency provisions.[30]

MCorp, a Texas bank holding company in voluntary bankruptcy, filed for application of the automatic stay to enjoin the Federal Reserve from continuing two administrative proceedings concerning its affairs.[31] MCorp operated a system of twenty-five subsidiary banks throughout the state of Texas.[32] Prior to its bankruptcy, the Federal Reserve had issued cease and desist orders requiring MCorp to restore the capital levels of several MCorp bank subsidiaries.[33] Arguing that the administrative

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27. 11 U.S.C. § 362(a) (1994).

28. Many commentators have described the FDIC's powers as receiver for an insolvent financial institution as "superpowers" because they are analogous to the bankruptcy court's broad sweep of discretion under the Code. *See generally* Richard F. Broude, *The Unstoppable Force Meets the Immovable Object: FIRREA and the Bankruptcy Code*, 715 PLI/COMM 559 (1995); Steven Khadavi, *The Viability of Maintaining Successful Actions Against the RTC and the FDIC*, 63 GEO. WASH. L. REV. 665 (1995); Carol Anne Sennello, *FIRREA's Damage Provisions: Inequitable, Unnecessary and Costly to Boot*, 45 DUKE L.J. 183 (1995); Peter P. Swire, *Bank Insolvency Laws Now That It Matters Again*, 42 DUKE L.J. 469 (1992); Jeffrey S. Westin, *Contract Repudiation and Claim Determination Under FIRREA: The Need for FDIC Restraint and Legislative Reform*, 12 ANN. REV. BANKING L. 557 (1993).

29. 101 B.R. 483 (Bankr. S.D. Tex. 1989), *rev'd in part and vacated in part*, 900 F.2d 852 (5th Cir. 1990), *rev'd on other grounds*, 502 U.S. 32 (1991).

30. *MCorp*, 101 B.R. at 483.

31. The Federal Reserve brought an administrative action requiring the holding company to inject capital into its failing bank subsidiaries. The holding company, which filed for bankruptcy after the beginning of the administrative proceedings, sought the protection of the bankruptcy court's automatic stay provision to terminate the administrative agency's proceedings.

32. Because Texas had restrictions on branch banks, MCorp, like many bank holding companies, chose the holding company structure to evade those restrictions. *See generally* Robert Charles Clark, *The Regulation of Financial Holding Companies*, 92 HARV. L. REV. 787 (1979) (discussing the holding company structure in the context of government regulation).

33. The Federal Reserve and the FHLBB, which is now OTS, interpreted their respective chartering statutes to permit net worth maintenance agreements and the source of strength condition. *See* 12 U.S.C. § 1467(a), (e)(2) (1994) (thrifts); 12 U.S.C. § 1842(c) (1994) (banks) (authorizing an

agency no longer had jurisdiction given its insolvency, the parent company sought the protection of the bankruptcy stay.[34] Claiming that the stay was inapplicable to an internal, ongoing agency proceeding, the Federal Reserve barred application of the stay under section 1818(I)(1).[35] The Supreme Court concluded that the stay did not operate under two exceptions: (1) in furtherance of regulatory or governmental proceedings and (2) powers.[36] The Court's ruling exempted the administrative proceedings from the automatic stay until there was final agency action.[37]

MCorp did not specifically address whether the bankruptcy court should have concurrent jurisdiction over a final administrative proceeding. On close examination of the bankruptcy regime, there is no jurisdictional conflict between the administrative agency and the bankruptcy court. Not only does the Code give the bankruptcy court exclusive jurisdiction over the property of the debtor's estate,[38] the bankruptcy court exercises concurrent jurisdiction in analogous situations.[39]

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evaluation of the projected financial and managerial ability of a potential parent company's current and future financial ability to assist the bank or thrift in maintaining its capital). Using net worth maintenance agreements (thrifts) or regulatory orders based on the source of strength condition (banks), the regulators ordered the parent company to transfer funds to an insolvent subsidiary. *See* Cassandra Jones Havard, *Back to The Parent: Holding Company Liability for Subsidiary Banks—Discussion of the Net Worth Maintenance Agreement, the Source of Strength Doctrine, and the Prompt Corrective Action Provision*, 16 CARDOZO L. REV. 2353, 2370-91 (1995). Several financial institutions that received such orders challenged the authority of the regulatory agencies to issue them, alleging that the orders were unspecific regarding the amount of the financial commitment and/or when it became effective. *See generally* Leonard Bierman & Donald R. Fraser, *The "Source of Strength" Doctrine: Formulating the Future of America's Financial Markets*, 12 ANN. REV. BANKING L. 269 (1993); Craig L. Brown, Board of Governors v. MCorp Financial, Inc.: *Evaluating the Source-of-Strength Doctrine*, 21 HOFSTRA L. REV. 235 (1992); Kieran J. Fallon, *Source of Strength or Source of Weakness?: A Critique of the "Source-of-Strength" Doctrine in Banking Reform*, 66 N.Y.U. L. REV. 1344 (1991); James F. Groth, *Can Regulators Force Bank Holding Companies to Bail Out Their Failing Subsidiaries?—An Analysis of the Federal Reserve Board's Source-of-Strength Doctrine*, 86 NW. U. L. REV. 112 (1991).

34. *MCorp*, 101 B.R. at 485.

35. 12 U.S.C. § 1818(i)(1), which is analogous to section 1821(j), is the Federal Reserve Board's anti-injunction statute. *See supra* text accompanying notes 21, 22.

36. 11 U.S.C. § 362(b)(4), (5) (1994). *See supra* text accompanying note 17.

37. 11 U.S.C. § 362(b)(4), (5) (1994).

38. 28 U.S.C. 1334(b) (1994).

39. The Supreme Court agreed with the Fifth Circuit's interpretation that the statute's specific application is limited to jurisdictional confrontations between district courts. Perhaps hinting at its leanings, the Court said, "prosecution of the Board proceedings, prior to the entry of a final order and prior to the commencement of any enforcement action, seems unlikely to impair the Bankruptcy Court's exclusive jurisdiction over the property of the estate protected by 28 U.S.C. § 1334(d)." Board of Governors of the Fed. Reserve Sys. v. MCorp Fin., Inc., 502 U.S. 32, 42 (1991).

b. Carlton v. FirstCorp, Inc.[40]

In *Carlton v. FirstCorp, Inc.*, the Fourth Circuit Court of Appeals held that the Code's automatic stay provision would not operate to stay an ongoing administrative action by the OTS.[41] The court found that the anti-injunction provision of 12 U.S.C. § 1818(I)(1) precluded the bankruptcy court from interfering with internal agency proceedings as well as temporary cease and desist orders.[42] The effect of the court's ruling was to let stand an OTS order requiring the transfer of a solvent savings and loan to a capital-deficient one.

FirstCorp owned two institutions, First of Raleigh and First of Durham.[43] When the Raleigh institution became insolvent (First of Durham remained financially sound), OTS placed it in federal receivership.[44] It also issued a temporary cease and desist order seeking a payment from the parent company of $45 million, the amount needed to restore the institution to solvency.[45]

FirstCorp sought an injunction to suspend enforcement of the temporary cease and desist order and filed for protection under Chapter 11 of the Code.[46] The parent company requested an order from the bankruptcy court confirming that the automatic stay provisions of the Code suspended the internal OTS administrative proceedings and the temporary cease and desist order.[47] The bankruptcy court held that the automatic stay applied to both the ongoing OTS proceeding and to the temporary order.[48] The district court reversed the bankruptcy court's decision holding that the automatic stay applied neither to the administrative proceeding nor to the temporary order.[49]

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40. 967 F.2d 942, 943 (4th Cir. 1992). FirstCorp, Inc. was a savings and loan holding company in North Carolina that owned and operated two savings and loan associations, First of Durham and First of Raleigh. The Federal Home Loan Bank Board (FHLBB), the designated regulator prior to the passage of FIRREA, conditioned the acquisition of the Raleigh institution on FirstCorp's maintaining the institution's net worth at appropriate levels.

41. *FirstCorp*, 967 F.2d at 946.

42. *Id.*

43. *Id.* at 943.

44. *Id.*

45. *Id.* at 944, n.3. OTS, as the regulator of savings and loan holding companies, then ordered the parent company to minimize the Raleigh institution losses. Specifically, OTS ordered FirstCorp to immediately transfer its stock in the Durham subsidiary to a subsidiary of the Raleigh institution and cancel and return two capital notes to the Raleigh institution that FirstCorp had received in exchange for the 1987 capital infusion of $13.4 million. OTS also issued a "Notice of Charges" charging FirstCorp with committing an "unsafe and unsound practice" because it failed to maintain the Raleigh institution's net worth as agreed at the time of acquisition.

46. FirstCorp filed for the injunction in federal district court as authorized under the statute. The statute gives the affected institution ten days to request a court order to set aside, limit, or suspend enforcement of the administrative order. *See* 12 U.S.C. § 1818(c)(2) (1994).

47. *Carlton*, 967 F.2d at 942.

48. *In re* FirstCorp, Inc., 122 B.R. 484, 491 (Bankr. E.D.N.C. 1990).

49. *In re* FirstCorp, Inc., 129 B.R. 450, 452 (E.D.N.C. 1991).

The Fourth Circuit, in *FirstCorp*, extended the *MCorp* rule and held that the automatic stay provision of the Code is inapplicable to a temporary cease and desist orders under 12 U.S.C. § 1818(I)(1).[50] FirstCorp argued that the temporary cease and desist order was distinguishable from an ongoing administrative proceeding because it is a demand for the parent company to transfer assets of the bankruptcy estate immediately.[51] The circuit court explicitly rejected this argument.[52] The court did, however, limit its ruling to the application of the automatic stay to section 1818(I)(1).[53] The court expressly declined to make a ruling on whether the temporary cease and desist order is subject to the *MCorp* rule, falling within the *exceptions* to the automatic stay.[54]

The circuit court found in FIRREA that the RTC had exclusive jurisdiction to resolve the issues arising out of the failure of savings and loan institutions. It interpreted 12 U.S.C. § 1821(j) as absolute by prohibiting courts from restraining or affecting the RTC's right to manage, contract, and dispose of assets.[55] The court distinguished the two regulatory schemes by explaining that FIRREA's focus is liquidation, while Title 11 is reorganization.[56] That distinction was significant in determining the limits of the bankruptcy court's equitable powers. The court stated, "[t]he comprehensive scheme of FIRREA indicates Congress' intent to allow the RTC full rein to exercise its statutory authority without injunctive restraints imposed by bankruptcy courts or district courts in other proceedings."[57]

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50. *Carlton*, 967 F.2d at 946. The *In re FirstCorp* appeal raised two issues. The first, an issue of first impression, was whether the automatic stay provision was applicable to the temporary cease and desist order. The other issue, whether the automatic stay was applicable to internal administrative proceedings, had been resolved by *Board of Governors of the Fed. Reserve Sys. v. MCorp Fin.*, 502 U.S. 32 (1991). *See infra* Part II.A.3.a.

51. *Carlton*, 967 F.2d at 946.

52. The court instead based its decision on the existing laws and congressional policy supporting the regulation of the nation's banking system. It seemed significant to the court that the regulatory scheme provided the bank holding company with injunctive relief for temporary cease and desist orders as well as with an appeal process. The opinion concluded by stating that though "a comprehensive scheme governing the oversight of financial institutions, from administrative control through judicial review of the administrative agency's actions, and by explicitly making the scheme exclusive, Congress intended to exclude other methods of interfering with the regulatory action." *Id.* at 946.

53. *Id.*

54. 11 U.S.C. § 362(b)(4)-(5) (1994). *See Carlton*, 967 F.2d at 946, n.5.

55. *In re* Landmark Land Co., 973 F.2d 283, 287 (4th Cir. 1992).

56. *In re* Landmark Land Co., 973 F.2d at 288.

57. *Id.* at 290. In a related matter, *RTC v. FirstCorp, Inc.*, 973 F.2d 243 (4th Cir. 1992), the parent company was required to cure immediately the deficiency in its capital maintenance obligation for its subsidiary savings and loan institution as a prerequisite to maintaining its capital maintenance agreement, pursuant to 11 U.S.C. § 365(o) (1994).

c. In Re Landmark Land Co., Inc. vs. RTC[58]

Landmark Land Company (Landmark), which wholly owned Oaktree Savings Bank (Oaktree), caused or permitted six subsidiaries of Oaktree to file Chapter 11 petitions.[59] The OTS ordered Landmark, a nondebtor, to withdraw the bankruptcy petitions of the subsidiaries pursuant to 12 U.S.C. § 1818(i)(1).[60] Two days later, OTS declared Oaktree insolvent and appointed the RTC as receiver.[61] The RTC organized New Oaktree and applied to OTS for chartering.[62] The subsidiaries successfully obtained a preliminary injunction preventing RTC from assuming control of them.[63] Specifically, the injunction prevented the receiver from calling or initiating shareholder meetings of its subsidiaries, changing management, or interfering with the subsidiaries' orderly operations.[64] When the RTC moved to dismiss the temporary restraining order, the district court denied the motion and converted the TRO into a prelimi-

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58. *In re* Landmark Land Co., 973 F.2d at 283. *See also* Richard F. Hewitt, Jr., In re Landmark Land Co.: *A Landmark Roadblock for Bankruptcy Courts v. Federal Regulators?*, 45 S.C. L. REV. 68 (1993); Landmark Land Co., v. OTS, 990 F.2d 807 (5th Cir. 1993). OTS issued an order limiting directors' authority and freezing the assets of directors and their family members. The directors then sought to enjoin enforcement of the order. The court found that the district court abused its discretion in granting an injunction where it failed to apply the four criteria for entertaining a preliminary injunction. *Id.*

59. *In re* Landmark Land Co., 973 F.2d at 287.

60. Landmark filed suit in the district court in Louisiana seeking to enjoin OTS from enforcing the order to withdraw the bankruptcy petitions of the subsidiaries. The Louisiana District Court enjoined the OTS, transferring the proceeding to the district court in South Carolina. The case went to the Fifth Circuit Court of Appeals on mandamus review, with OTS seeking to vacate the order of the Louisiana District Court. OTS argued that, although the cease and desist order required the parent court to withdraw the bankruptcy petitions, the district court lacked jurisdiction over administrative proceedings involving bank regulation and supervision. Furthermore, OTS contended that properly issued cease and desist orders could not be "related" to the bankruptcy proceedings because those orders would have no effect on the bankruptcy. *See* Landmark Land Co. v. OTS, 948 F.2d 910 (5th Cir. 1991) (stating that the district court supervising the bankruptcy proceeding could not exercise jurisdiction under 28 U.S.C. § 1334(b) to enjoin OTS's enforcement of an administrative order under 12 U.S.C. § 1818(I)(1)).

61. *In re* Landmark Land Co., 973 F.2d at 287.

62. OTS used a purchase and assumption agreement in resolving the failure of Oaktree. Under that agreement, New Oaktree purchased all of RTC's right, title, and interest in Oaktree's assets, including its wholly owned subsidiaries. OTS then appointed RTC as conservator of New Oaktree. *Id.* at 284-85.

63. The subsidiaries initially received a temporary restraining order from the bankruptcy court against Oaktree, preventing it from calling a shareholder's meeting to elect new members to their board of directors. When OTS appointed the RTC as receiver, the subsidiaries moved to have the temporary restraining order converted into a preliminary injunction. The subsidiaries argued that the RTC's plan was to liquidate the assets of the subsidiaries to the disadvantage of the subsidiaries' creditors. *Id.* at 287-88. The bankruptcy court justified its actions in restraining the RTC as a need to protect the shareholders' interests and debtors' rights. *Id.*

64. The RTC issued a temporary cease and desist order against one of the subsidiaries, Landmark Land Company, Inc. and its four directors. The temporary cease and desist order was accompanied by a notice of charges for a permanent cease and desist order, removal and prohibition order, and civil penalties. The temporary cease and desist order was enjoined by the Eastern District of Louisiana, and the case was transferred to the District Court of South Carolina. *Landmark Land Co.*, 948 F.2d at 911.

nary injunction, preserving the separate status of the subsidiaries.[65] The court of appeals vacated that injunction.[66]

The circuit court determined that the issue of whether the bankruptcy court could issue the injunction was merely a question of statutory interpretation.[67] By finding that the plain language of the statute was consistent with its legislative history, the court decided that the RTC properly used its powers and the anti-injunction provisions barred any equitable relief.[68] The court reasoned that:

> Congress has delegated the responsibility of resolving failed thrifts to the RTC, and resolution of a failed thrift requires control over all of the thrift's assets. Because the anti-injunction provision specifically precludes equitable interference, the district court may not prevent the RTC from exercising its lawful ownership rights based on the court's determination that current management is best suited to rehabilitate the thrift's bankrupt subsidiaries.[69]

The court's ruling effectively confined the parties' relief to a legal remedy. Those remedies are found in the receivership's claims procedure.[70]

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65. *Id.*

66. *In re* Landmark Land Co., 973 F.2d at 287, 290.

67. *Id.* at 289-90.

68. *Id.* at 287-90.

69. *Id.* at 290. The court distinguished *In re* American Continental Corp., 105 B.R. 564 (D. Ariz. 1989) (declining to follow *In re* American Continental Corp. because the court found that the district court should have sustained the RTC's motion to dismiss the subsidiaries' voluntary petition for relief under Chapter 11, stating that the denial of the motion to dismiss was an interference with RTC rights and functions, and deciding that its statutory interpretation was also inconsistent with the RTC's statutory rights and functions). *In re* Landmark Land Co., 973 F.2d at 289. The liquidation of Lincoln Savings and Loan Association (Lincoln) also raised issues involving the jurisdiction of the Code and the bank regulatory agencies. One day before FHLBB placed Lincoln into conservatorship, eleven wholly owned subsidiaries of Lincoln filed Chapter 11 petitions. FSLIC-conservator replaced management at the subsidiaries. Four months later, the FHLBB placed Lincoln in receivership and transferred its assets to a newly chartered savings and loan association. The RTC, as successor to the conservator of the newly chartered association, moved to disallow the Chapter 11 cases. The district court denied the motion and preserved the separate status of the subsidiaries. The circuit court vacated that injunction. *Id.*

70. *See infra* Part II.B.2 for discussion of 12 U.S.C. § 1821(d)(3)-(11) (1994).

B. *The Legal Remedies*

1. The Trustee's Avoidance Power under 11 U.S.C. § 548[71]

The Bankruptcy Code provides for avoidance of asset transfers under preference and fraudulent conveyance provisions.[72] A debtor or its trustee may avoid transfers in which the creditor received more than it would be eligible to receive under the liquidation rules of Chapter 7 of the Bankruptcy Code.

A debtor or trustee in bankruptcy can avoid transfers that were actually or constructively fraudulent. Section 548 recognizes that transfers made in the year prior to bankruptcy may result in either actual fraud [(a)(1)][73] or constructive fraud [(a)(2)],[74] meaning that the transfers were made without the transferor receiving "reasonably equivalent value."[75]

The Code provides an exception to the requirement that there be a reasonable exchange for value. The good faith exception gives the non-debtor party an opportunity to prove that the transaction was absent of fraudulent intent. If the transferee can prove a lack of intent to avoid the bankruptcy process by showing a legitimate exchange or bargain, the trustee must recognize the validity of that exchange and cannot avoid the transaction.[76]

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71. 11 U.S.C. § 548 provides, in relevant part:

(a) The trustee may avoid any transfer of an interest of the debtor in property, or any obligation incurred by the debtor, that was made or incurred on or within one year before the date of the filing of the petition, if the debtor voluntarily or involuntarily-

(1) made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted; or

(2)(A) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(B)(I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation;

(II) was engaged in business or a transaction, or was about to engage in business or a transaction, for which any property remaining with the debtor was an unreasonably small capital; or

(III) intended to incur, or believed that the debtor would incur, debts that would be beyond the debtor's ability to pay as such debts matured.

11 U.S.C. § 548 (1994).

72. 11 U.S.C. § 547-48.

73. 11 U.S.C. § 548(a)(1).

74. 11 U.S.C. § 548(a)(2).

75. *Id. See* discussion *infra* Part IV.

76. The "good faith exception" provides, in relevant part:

[A] transferee or obligee of such transfer or obligation that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

(d)(1) For the purposes of this section, a transfer is made when such transfer is so perfected that a bona fide purchaser from the debtor against whom applicable law permits such transfer to be perfected cannot acquire an interest in the property transferred that is superior to the interest in such property of the transferee, but if such transfer is not so

2. The FDIC-Receiver's Avoidance Power and Claims Procedure under 12 U.S.C. § 1821[77]

Analogous to the bankruptcy trustee's powers under section 362 is the FDIC's fraudulent conveyance provision, 12 U.S.C. § 1821(d). It allows the federal agency, acting as receiver, to avoid certain transfers of property, interests in property, or obligations incurred by, among others, a person who is a debtor of an FDIC-insured institution.[78] Two conditions must be met in order for the section to be applicable: (1) the transfer must be made or the obligation incurred within five years of the FDIC's appointment as receiver and (2) the transfer must be made or the obligation incurred with the intent to hinder, delay, or defraud the insured depository institution, receiver, or federal banking agency.[79] Furthermore, the FDIC has the right to recover fraudulently transferred property or its value for the benefit of the insured depository institution.[80] That right is "superior to any rights of a trustee or any other party (other than a party which is a Federal agency) under Title 11."[81]

12 U.S.C. § 1821 also operates as a jurisdictional bar for a court to act on claims regarding the assets of a failed financial institution's assets.[82] The statute grants the FDIC as conservator or receiver successor status to decide claims against the insolvent institution.[83] In its capacity as receiver, the statute authorizes the FDIC to exercise "all rights, titles, powers, and privileges of the insured depository institution . . . with respect to the institution and the assets of the institution."[84]

The statute and implementing regulations create an administrative process for determining the claims against the assets of a failed institution.[85] Specifically, until a creditor exhausts the administrative claims

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perfected before the commencement of the case, such transfer is made immediately before the date of the filing of the petition.

11 U.S.C. § 548(c)-(d)(1) (1994).

77. 12 U.S.C § 1821 (1994).

78. 12 U.S.C. § 1821(d)(17)(A).

79. *Id.*

80. 12 U.S.C. § 1821(d)(17)(B).

81. 12 U.S.C. § 1821(d)(17)(D). The FDIC thus precedes all other claimants, except federal agencies, in collecting from the bankruptcy estate of the transferee. Swire, *supra* note 28, at 486.

82. 12 U.S.C. § 1821(d)(3)-(11).

83. 12 U.S.C. § 1821(d)(3).

84. 12 U.S.C. § 1821(d)(2)(A)(i).

85. Courts have read FIRREA to contain a "mandatory exhaustion requirement" that "preclude[s] suit on a claim that was not first presented to the [FDIC]." Office and Prof'l Employees Int'l Union Local 2 v. FDIC, 962 F.2d 63, 66 (D.C. Cir. 1992). *See also* Meliezer v. RTC, 952 F.2d 879, 882 (5th Cir. 1992) (holding that 12 U.S.C. § 1821(d)(13)(D) "clearly establishes a statutory exhaustion requirement"); Rosa v. RTC, 938 F.2d 383, 391-92 (3d Cir. 1991) (finding statutory exhaustion requirement in language of 12 U.S.C. § 1821).

In enacting FIRREA, "Congress expressly withdrew jurisdiction from all courts over any claim to a failed bank's assets that are made outside the procedure set forth in section 1821." FDIC v. Shain, Schaffer & Rafanello, 944 F.2d 129, 132 (3d Cir. 1991). *See* Brady Development Co. v.

process, a court lacks jurisdiction to hear "all suits seeking payment from the assets of the affected institution; all suits seeking satisfaction from those assets; and all actions for the determination of rights vis-à-vis those assets."[86] The jurisdictional bar affects legal and equitable remedies and operates against creditors as well as debtors.[87] The claims process requires the receiver to publish a notice to the failed institution's creditors informing them of the deadline for presentation of claims,[88] to mail a "similar" notice to "any creditor shown on the institution's books,"[89] and to make a determination allowing or disallowing the claim within 180 days.[90] Administrative or judicial review is available for any disallowed claim.[91] This claims procedure applies even when the entity filing the claims has filed a petition for bankruptcy.

RTC, 14 F.3d 998, 1003 (4th Cir. 1994) (noting that Congress chose to place jurisdictional limits on the power of federal courts with respect to matters involving failed savings and loans under FIRREA).

86. Marquis v. FDIC, 965 F.2d 1148, 1151-52 (1st Cir. 1992). The court noted that "FIRREA makes participation in the administrative claims review process mandatory for all parties asserting claims against failed institutions," and "where a claimant has . . . failed to initiate an administrative claim within the filing period, the claimant necessarily forfeits any right to pursue a claim against the failed institution's assets in any court." *Id.* (internal citation omitted).

87. FIRREA's jurisdictional bar has been litigated in the circuit courts and has been applied to various claims. *See* National Trust for Historic Preservation in the United States v. FDIC, 21 F.3d 469 (D.C. Cir. 1994) (noting that 12 U.S.C. § 1821(j) does not bar suit to the extent of seeking a declaratory judgment instead of an injunction); Carney v. RTC, 19 F.3d 950, 957-58 (5th Cir. 1994) (holding that section 1821(j) deprived the court of jurisdiction regarding claims of injunctive relief and declaratory judgment); Lloyd v. FDIC, 22 F.3d 335, 336-37 (1st Cir. 1994) (holding that a debtor's suit for equitable reformation or cancellation of a mortgage contract is subject to the jurisdictional bar of section 1821(d)(13)(D)); Henderson v. Bank of New England, 986 F.2d 319, 320-21 (9th Cir. 1993) (holding that claims by unsuccessful credit card applicants are subject to jurisdictional bar of section 1821(d)(13)(D)); *Meliezer*, 952 F.2d at 883 (holding that a mortgagor's claim of negligence by a financial institution for allowing mortgagor to assume insufficient fire insurance was subject to the jurisdictional bar of section 1821(d)(13)(D)); RTC v. Elman, 949 F.2d 624, 626-27 (2d Cir. 1991) (holding that law firm's assertion of retaining a lien in order to retain custody of a client's legal files is subject to the jurisdictional bar of 12 U.S.C. § 1821(d)(13)(D)); Freeman v. RTC, No. C-93-4215-VRW, 1994 WL 398515, at *1-2 (N.D. Cal. 1994) (holding that claimant's cross claims were barred by the "60-day statute of limitations contained in 12 U.S.C. § 1821(d)(6)(B)"); *see also* Ward v. RTC, 996 F.2d 99, 104 (5th Cir. 1993) ("Like injunction, rescission is a 'judicial restraint' that is barred by [12 U.S.C.] § 1821(j).").

88. 12 U.S.C. § 1821(d)(3)(B) (1994).

89. 12 U.S.C. § 1821(d)(3)(C).

90. 12 U.S.C. § 1821(d)(5)(A). Although claims that are untimely filed must be disallowed, there is an exception for those that are filed late because the claimant did not receive notice of the appointment of the receiver in time to file a claim prior to the bar date. The receiver has the discretion to review those claims, provided there is time to permit payment of the claims. 12 U.S.C. § 1821(d)(5)(C). The statute does not provide a basis for this exception, which means that, even if the receiver fails to mail the required notice, the claimants must still exhaust their administrative remedies. *See* 12 U.S.C. § 1821(d)(3)(C). *See also Meliezer*, 952 F.2d at 882 (holding that 12 U.S.C. § 1821(d)(13)(D) "clearly establishes a statutory exhaustion requirement").

91. *See* 12 U.S.C. § 1821(d)(6)(A)(i)-(ii) (explaining that a claimant seeking judicial review of the receiver's decision may file an action in federal district court within 60 days after the receiver has disallowed an administrative claim or at the expiration of the 180-day period allowed for processing the administrative claim, whichever comes first).

III. BNE: A PARADIGM

The ongoing BNE litigation provides an illustration of the substantive conflict between the two statutory schemes.[92] The conflict of procedure and doctrine becomes more distinct by analyzing the fraudulent conveyance claim and the receiver's administrative review of that claim.

A. *Factual History and the Trustee's Claims*

The Bank of New England Corporation (BNEC) was a bank holding company that owned three bank subsidiaries: Bank of New England (BNE), Connecticut Bank and Trust Co. (CBT), and Maine National Bank (MNB).[93] BNE, the largest of the banks, which had substantial real estate investments in New England, began to deteriorate.[94] The parent company, BNEC, pursuant to regulatory orders, made asset transfers in an attempt to shore up BNE's capital deficiency.[95] Despite these efforts, a series of events led to a fast and serious decline.[96] By July 1989, BNEC and BNE had both become insolvent.[97] CBT and MNB both remained solvent and of substantial value to BNEC.[98]

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92. The failure of BNE resulted in a flurry of litigation. In addition to the ongoing district court litigation discussed herein, the bankruptcy trustee filed a claim in the federal court of claims alleging an unconstitutional taking due to the cross-guarantee claim. In *Branch v. United States*, 69 F.3d 1571, 1582-83 (Fed. Cir. 1995), the Court of Appeals reversed the decision of the court of claims which held that the cross-guaranty provision of FIRREA—directing that when bank failure causes loss to federal bank insurance fund, sister banks owned by same bank holding company may be liable for loss—did not result in prohibited taking of property under Fifth Amendment, even though assessment resulted in bank's insolvency and seizure by government. The court decided that Branch must show that the cross-guarantee assessment was itself a "per se" taking in order for the claim to succeed. *Id.*

93. Branch *ex rel.* Conn. Bank & Trust Co. v. FDIC, 825 F. Supp. 384, 390-91. (D. Mass. 1993) [hereinafter *BNE-I*].

94. *See Failure of the Bank of New England: Hearings Before the House of Republicans Comm. on Banking, Finance and Urban Affairs*, 101st Cong., 2d Sess. 24,26 (1991) (statement of Robert Clarke, Comptroller of the Currency, discussing the damage that banks, including BNE, suffered because the housing market dropped in New England).

95. *See BNE-I*, 825 F. Supp. at 393.

96. In July 1989, OCC released its most recent examination of BNE, which indicated that BNE's combination of uncontrolled growth and poor quality loan performance had led to its insolvency. BNEC, which wholly owned BNE, became insolvent at about the same time due to its loss in value in the bank subsidiary. *Id.* at 392-93.

Through a series of regulatory orders, the regulators began in early 1990, to control virtually all the operations at BNEC. In February 1990, the Federal Reserve entered a cease and desist order concerning BNEC's management, which included the appointment of a new Chief Executive Office, satisfactory to the regulators. OCC, at the same time, entered a cease and desist order against BNE; April and May, 1990 OCC entered the same cease and desist orders against CBT and MNB; finally, in May 1990, OCC issued an order against two other BNEC subsidiary banks, BNE-Old Colony and BNE-West. *Id.* at 394.

97. *Id.*

98. *Id.* at 393.

The BNEC Board of Directors (Board) took several measures to improve the capital status of BNE.[99] In December 1989, when BNE's losses exceeded one billion dollars,[100] the Board began "The Asset Distribution Program," selling significant assets to its subsidiary banks.[101] In February 1990, the Federal Reserve and the OCC issued regulatory orders that effectively controlled all management decisions and the daily operations over the entire BNEC system.[102]

On January 3, 1991, BNEC and BNE issued a statement of fourth quarter operating losses.[103] The report of losses to the public led to massive depositor withdrawals at CBT and MNB.[104] In an effort to stop the depositor runs at CBT and MNB, federal regulators issued a series of regulatory orders that resulted in the OCC declaring BNE insolvent and appointing the FDIC as receiver.[105] BNEC filed a Chapter 7 petition in bankruptcy.[106]

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99. *Id.* (stating that the BNEC Board of Directors were acting on the advice of the federal regulators, who had a daily presence at BNE from the fall of 1989). The Federal Reserve entered into a Memorandum of Understanding (MOU) in November 1989 that required BNEC to act as a source of strength to its subsidiary banks. *Id.* at 393 n.4. *See infra* text accompanying note 124.

100. *BNE-I*, 825 F. Supp. at 393.

101. *Id.* BNEC transferred approximately $500 million in assets through this program. The asset transfers were wide and varied ranging from proceeds from public debt offerings, general asset dispositions, and mergers of subsidiary banks into BNE, to transfers from BNEC non-bank subsidiaries, tax refunds, prepaid expenses, and proceeds from use of trademarks. *Id.* at 394.

102. The Bank Subsidiaries that received regulatory orders included: BNEC, BNE, CBT, MNB, BNE-Old Colony and BNE-West. *Id.* at 393-94.

103. *Id.* at 394. BNEC and BNE released reports showing operating losses of $450 million to their respective regulatory agencies. News media reported the performance problems the following day. *Id.*

104. The district court opinion described the customer lines as similar to the ones of the Great Depression: "For the first time since the Great Depression and the creation of the federal deposit insurance system, depositors literally lined up outside the offices of a major federally insured bank seeking to withdraw their funds." *Id.*

105. The FDIC actions followed MNB and CBT's sale of $1.48 billion and $133.4 million of federal funds, respectively, to BNE. *Id.*

After BNE was declared insolvent, the FDIC as receiver for BNE (FDIC-BNE) immediately valued the federal funds loan from CBT to BNE at zero, allowing the OCC to declare CBT insolvent and appoint the FDIC as receiver (FDIC-CBT). That action allowed FDIC-BNE to value the MNB federal funds loan at zero. FDIC-BNE then filed a Notice of Assessment against MNB, which remained solvent, demanding payment of $1 billion under the FDIC's cross-guarantee provision. 12 U.S.C. § 1815(e) (1994). The amount was based upon the FDIC's estimated loss as receiver for BNE. Since MNB was unable to meet this demand, OCC declared MNB insolvent and appointed the FDIC as receiver (FDIC-MNB), combining the three receiverships into FDIC-Receiver I. FDIC-Receiver I organized insolvent BNEC bank subsidiaries into separate Bridge Banks. Those banks were used to transfer, through purchase and assumption transactions, most of the assets and liabilities of the failed banks. FDIC-Receiver I then authorized the BNEC Board of Directors to file a voluntary Chapter 7 bankruptcy petition. *BNE-I*, 825 F. Supp. at 394-95.

The assessment against MNB under the cross-guarantee provision was the FDIC's initial use of this power by the FDIC as a receiver. A cross-guarantee assessment causes the failure of sibling financial institutions by assessing them with the amount of the capital deficiency of the failed institution. The regulatory agencies can then treat the bank subsidiaries as a single unit. The provision has been challenged as an unconstitutional taking under the Constitution. *See generally* Jennifer J. Alexander, *Is the Cross-Guarantee Constitutional?*, 48 VAND. L. REV. 1741 (1995)

The bankruptcy court appointed Dr. Ben Branch as the trustee of the estate of BNEC.[107] He brought claims against the FDIC in its corporate and receivership capacities and against Fleet Bank of Massachusetts (Fleet), the ultimate purchaser of the failed BNE.[108]

The trustee's common factual allegations alleged that BNE was insolvent and pending failure when the FDIC required BNEC to transfer a majority of its assets to BNE.[109] The trustee alleged that the FDIC made the transfers with actual intent to hinder, delay, or defraud BNEC's creditors, and/or that it was made at a time when BNEC was insolvent, or was rendered insolvent thereby, in exchange for less than reasonably equivalent value.[110] The trustee sought recovery of the various transfers on the grounds that they were fraudulent transfers.

The complaint went on to state the claims against the transferees.[111] The trustee's claims against the FDIC-Receiver alleged that the receiver was liable as the initial transferee of the assets.[112] The trustee claimed that the FDIC-Corporate benefited because its liability to insured depositors of BNE would be reduced as a result of the transfers.[113] The trustee's claims against the ultimate acquirer of the failed group, Fleet, alleged that the Fleet Banks were liable as subsequent transferees on the grounds that they did not acquire the transferred assets in good faith.[114]

(concluding that the provision does not effect a taking without just compensation); Jennifer B. Arlin, *Of Property Rights and The Fifth Amendment: FIRREA's Cross-Guarantee Reexamined*, 33 WM. & MARY L. REV. 293 (1991) (concluding that the cross-guarantee provision opens the door to government abuse); Jeffery M. Cooper, *Out On a Limb: FIRREA's Cross-Guarantee Provision "Takes" Root in* Branch v. United States, 33 HOUS. L. REV. 299 (1996) (concluding that the Court of Federal Claims was correct in finding the provision unconstitutional); Tracy A. Helmer, *Banking on Solvency: The Takings Power of FIRREA's Cross-Guarantee Provision*, 30 VAL. U. L. REV. 223 (1995) (concluding that the FDIC, by making assessments on solvent subsidiaries without a proper showing of fraud or wrongdoing, is taking property without just compensation under the Takings Clause of the Fifth Amendment).

106. *BNE-I*, 825 F. Supp. at 395.

107. *Id.* at 391. BNEC filed for bankruptcy January 7, 1991, the day after BNE failed. The creditors' claims totaled $700 million. *Id.* at 395-96.

108. Branch notified potential bidders of his intent to file fraudulent conveyance claims for those assets transferred from BNEC, CBT, and MNB. The Bridge Banks operated until July 1991, when OCC closed them and appointed the FDIC as receiver (FDIC-Receiver II). FDIC-Receiver II sold the operations of all three former BNEC subsidiaries to Fleet Banks of Massachusetts. *Id.* at 395.

109. *Id.* at 392-93.

110. *Id.* at 395.

111. The fraudulent conveyance provision allows the trustee or debtor in possession to recover the asset transfer from the initial transferee or from a subsequent transferee, when appropriate. 11 U.S.C. § 548(a)(2) (1994).

112. *BNE-I*, 825 F. Supp. at 401.

113. *Id.*

114. The good faith defense exception is available to subsequent transferees under 11 U.S.C. § 548(c). *See infra* note 155.

B. *The District Court Decisions*

1. BNE-I: The Asset Transfer Decision[115]

The BNEC trustee determined that a crucial issue in the initial resolution of the BNEC bankruptcy proceeding involved recovery of the $2 million in asset transfers made under BNEC's Asset Distribution Program (Program). Specifically, the trustee alleged that the regulatory agencies required the transfers of BNEC's assets to reduce the insurance liability of FDIC-Corporate when BNE failed. The trustee buttressed this claim by the fact that BNE was actually insolvent in 1989, but was not declared insolvent by the regulatory agencies until almost two years later, in 1991.[116]

As a threshold matter, the court faced an issue of subject matter jurisdiction. The FDIC contended that the questioned asset transfers were nonreviewable agency orders.[117] The FDIC termed the trustee's inquiry regarding the transfers an "impermissible collateral attack." Relying on statutory procedures, the FDIC's argument was two-fold. First, the agency contended that the trustee failed to request judicial review of the administrative agency orders in a timely fashion. Second, the agency argued that the questioned orders were explicitly exempted from review because BNEC had consented to the issuance of the challenged orders.[118]

In *BNE-I*, the district court recognized the authority of a bankruptcy court to review asset transfers made pursuant to administrative procedures, based on its analysis of the authorizing language in the regulatory orders.[119] That decision thwarted the regulators' arguments that the asset transfers were invulnerable under the Code.

The court's decision addressed two jurisdictional claims: whether the banking regulatory process precluded an avoidance action by the bankruptcy trustee; and, alternatively, whether the asset transfers, because they were required by regulatory orders, were immune from attack under the Code.[120]

The regulators moved to have the claims dismissed, arguing that the trustee's actions were an unwarranted and impermissible collateral attack, interfering with the agency's supervisory powers under section 1818(h)(2). Specifically, the FDIC argued that the cease and desist orders were protected administrative agency orders and as such were subject to

115. *BNE-I*, 825 F. Supp. at 384.

116. *BNE-I*, 825 F. Supp. at 392-93.

117. *Id.* The FDIC based this argument on 12 U.S.C. section 1818(h)(2) (1994).

118. *BNE-I*, 825 F. Supp. at 398. The FDIC also argued that BNEC, by consenting to the Federal Reserve's order, sanctioned the request that BNEC act as a "source of strength" to its bank subsidiaries sanctioned the asset transfers. *Id.*

119. *Id.*

120. *Id.*

judicial review under administrative agency procedures, furthering them beyond the avoidance powers of the bankruptcy trustee.[121] To allow the avoidance claim to proceed, in essence, they argued, permitted for an improper review of the regulatory agencies' legal authority.

The court ruled that the claims were reviewable under the Code.[122] The court distinguished the agency's authority to *require* or authorize the regulatory orders from its authority to execute the manner of the transfer or the amount. The court found the trustee's challenge an appropriate assessment of the "discretionary execution" of the orders.[123] Because the Federal Reserve and OCC orders failed to "define the manner of transfer or the specific assets to be transferred," those orders did not require the challenged asset transfers.[124] The court found that because the challenged orders did not mandate the specifics regarding the asset transfer, i.e., neither the amounts nor the manner, the trustee's claims did not attack the agencies' exercise of discretionary, supervisory authority.

On the second jurisdictional issue, the agencies defended the asset transfers as valid enforceable orders made in compliance with regulatory authority. As such, they contended, the orders automatically met the fraudulent conveyance prerequisite, making them transfers made in "good faith and for fair consideration."[125] Alternatively, the agency argued that the federal banking statutes, not the Code, govern the issue. The court declined to reach this issue based on its previous finding that

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121. *Id.*

122. *Id.* at 399.

123. *Id.* at 398.

124. *Id.* at 398-99. In a footnote in the opinion, the court detailed the specificity found in the orders:

> The FED C & D Order provides in pertinent part: [BNEC] shall submit to the [FED] a written plan to improve the capital positions of the consolidated organization and each of the Subsidiary Banks . . . The plan shall, at a minimum, address and consider: . . . (e) [BNEC's] responsibility to act as a source of financial strength to its Subsidiary Banks and, in connection therewith, to use its assets to provide whatever additional capital support to all its Subsidiary Banks as may be required by the Reserve Bank in a manner consistent with the [FED's] Policy Statement on the responsibility of bank holding companies to act as sources of financial strength to the subsidiary banks. Along with their post-hearing brief, the defendants submitted two "capital maintenance plans," allegedly created by BNEC pursuant to the FED C & D Order and FED MOU. These plans make specific reference to some, but not all, of the challenged asset transfers, and the FED C & D Order contains language which might arguably convert at least the second plan into an "Order" under section 1818. Theoretically, this Court could consider the plans either as public records of the FED, or as external evidence used to determine the Court's subject matter jurisdiction. At this juncture, however, this Court declines to do either. As Branch justifiably argues, the plans were submitted after the presentation of briefs and oral argument and are technically outside the scope of the supplemental briefs requested by the Court. Branch was thus provided no adequate opportunity to respond to the plans. Moreover, although the Court doubts that the plans are concocted, the defendants have presented no affidavits supporting their authenticity. For these reasons, the Court cannot in good conscience consider the plans for the purposes of the present motion.

Id. at 399 (internal citations omitted). *See* discussion *infra* Part V.B regarding the business judgement rule's applicability to this issue.

125. *Id.*

the orders and agreements did not require the specific transfers that BNEC made to its subsidiary banks. Therefore, the court also found that the Code was the applicable law governing the review of these particular claims.[126]

2. BNE-II: Exhaustion of Administrative Remedies[127]

After the regulator's motion to dismiss, the court requested additional information regarding the trustee's filing of administrative claims.[128] FDIC-Receiver alleged that some of those claims were barred for failure to exhaust the administrative process. The subject claims involved the downstream asset transfers from BNEC to BNE while both were insolvent. The trustee sought recovery of the transfers, which were detailed in the proof of claims filed with the Bankruptcy Court, under the fraudulent conveyance provisions of the Code as well as under state common law.[129] FDIC-Receiver alleged that the claims were barred because the trustee had failed to exhaust administrative remedies before filing the federal district court action.[130]

FDIC-Receiver disallowed the claims during the administrative process. Specifically, FDIC-Receiver found that Branch failed to provide sufficient information detailing the specificity of the transactions. FDIC-Receiver denied the claims on those grounds.

Branch contended, and the district court found, that the downstreamed transfers listed in the proof of claims sufficiently identified the claims because they all related directly to the challenged transactions.[131] Furthermore, the court found the receiver's failure to acknowledge the legitimacy of the claims appeared to be an obstruction to FIRREA's administrative process for the equitable distribution of claims.[132] In fact, the court found that the downstreamed assets from the bank holding company were made while the banks were insolvent and thus no reasonably equivalent value was given for the transfer, making the transfers fraudulent conveyances.[133] Interestingly, in *BNE-II*, the court concluded that the challenged transfers were made in good faith and for fair consideration.[134] This determination preserved the legitimacy of the transfers and bolstered the FDIC's argument that they were immune from challenge because they were made pursuant to regulatory orders.

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126. *Id.*

127. Branch *ex rel.* Conn. Bank & Trust Co. v. FDIC, 833 F. Supp. 56 (D. Mass. 1993) (hereinafter *BNE-II*).

128. *BNE-II*, 833 F. Supp. at 57.

129. *Id.* at 58.

130. *Id.* at 57.

131. *Id.* at 60-62.

132. *Id.* at 59.

133. *Id.* at 58.

134. *Id.* at 62.

C. *Post-BNE Legislation*

Congress took aggressive steps in post-FIRREA legislation to ensure that regulators would be able to enforce the previously ambiguous capital maintenance obligations.[135] Some of those reforms were designed to address issues left unresolved by the failure of BNE. The Crime Control Act and FDICIA appear beneficial to regulatory enforcement of the obligations.[136] These recent legislative initiatives attempt to strengthen the capital maintenance commitment by making the obligation a nondischargeable debt,[137] removing the obligation's eligibility as an exemption,[138] requiring the trustee to assume the obligation and immediately cure it, if necessary,[139] and making the obligation a priority among unsecured claims.[140]

Specifically, if the bank holding company has either "recklessly or maliciously" failed to discharge a capital maintenance commitment, that debt is nondischargeable.[141] In a Chapter 7 liquidation, a capital maintenance commitment claim receives priority over other unsecured claims. Finally, section 365(o) requires a debtor parent company to assume and perform a capital maintenance commitment according to its terms.[142] In effect, these provisions give the regulatory agencies' priority rights that are superior to those of other creditors.

The BNE litigation also raised the issue of whether regulatory authorization to make the challenged asset transfer ought to protect it from an avoidance action in bankruptcy.[143] Specifically, a parent company may have restored the capital of its bank subsidiary, i.e., made an asset transfer, within a year became insolvent itself and a trustee moved to avoid the transfer. Congress addressed this in part in FDICIA by creating or authorizing the parent company to make a limited asset transfer.[144]

The prompt corrective action provision (PCA)[145] is a legislative initiative intended to address the issues of parent company control while

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135. *See supra* note 11.

136. *See supra* note 118.

137. 11 U.S.C. § 523(a)(12) (1994).

138. *Id.* § 522(c)(3) (1994).

139. *Id.* § 365(o) (1994).

140. *Id.* § 507(a)(9) (1994).

141. *Id.* § 523(a)(12) (1994). *Tinker v. Colwell*, 193 U.S. 473 (1904), has defined "willful" to mean deliberate or intentional; cases holding that a looser "reckless disregard" standard should be applied were explicitly overruled. H.R. REP. NO. 95-595, at 365 (1977).

142. 11 U.S.C. § 365(o) (1994). "In a case under chapter 11 of this title, the trustee (or debtor in possession) shall be deemed to have assumed . . . and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency . . . to maintain the capital of an insured depository institution . . . ." *Id.*

143. *See* discussion *supra* Part III.B.

144. 12 U.S.C. § 1831o(e)(2)(E) (1994).

145. 12 U.S.C. § 1831o.

also conserving the financial viability of the deposit insurance fund. This statutory provision, which becomes effective whenever a bank subsidiary becomes undercapitalized,[146] allows the parent company to make corrective interventions at its discretion.[147] The capital commitment is of a limited amount and arguably of limited duration.[148] If the parent company chooses not to recapitalize the institution, the bank subsidiary may be subject to stringent regulatory controls.[149]

Congress, through PCA, provided managers of failing institutions with an incentive to operate the bank with risk-free rather than high risk strategies.[150] Requiring that more of a bank's capital be at risk, Congress put more of bank shareholders' funds at risk as well as those of the insurance fund. The legislative intent also indicates that Congress meant to give the parent company the option of selling, recapitalizing, or liquidating.[151] By requiring parent company intervention at the earliest indication of a decline in capital and by specifying the amount of the obligation, regulators exercise less discretion over the regulation of the institu-

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146. A financial institution is subject to this provision if it is categorized as either *undercapitalized, significantly undercapitalized, or critically undercapitalized. See* FDICIA, 12 U.S.C. § 1831o(b)(1). An institution falling in one of these three categories must submit a capital restoration plan to its primary federal regulator in a timely manner. *See* 12 U.S.C. § 1831o(e)(2). The plan must explain in detail how the institution will rebuild capital, specifying year-to-year target levels for capital growth. The plan must be based on realistic assumptions, describe activities that are likely to succeed, and not expose the institution to appreciably increased risk. The plan must also describe the types and levels of activities in which the institution will engage and contain such other information as regulators require. When regulators classify a bank as undercapitalized, several discretionary and mandatory corrective intervention actions take place. These corrective interventions increase in severity as the institution's undercapitalization becomes more critical. *See* 12 U.S.C. § 1831o.

147. The prompt corrective provision did not abolish the highly controversial regulatory tools that regulators previously used to mandate the parent company's restoration of its bank subsidiary's capital. *See* discussion *supra* Part II and accompanying notes.

148. The statute requires that the parent company infuse the amount necessary to bring the institution into capital compliance "as of the time when the institution fails to comply with a [capital restoration] plan . . . ." 12 U.S.C. § 1831o(e)(2)(E)(II). The parent company must also guarantee compliance with the capital restoration plan for four consecutive quarters. 12 U.S.C. § 1831o(e)(2)(C)(ii). The statute limits the amount of the guarantee liability to 5 percent of the depository institution's total assets at the time it becomes undercapitalized, or the amount necessary to bring the institution into compliance with all capital standards. 12 U.S.C. § 1831o(e)(2)(E)(i); *see also* Prompt Corrective Action, 57 Fed. Reg. 44,866, 44,902 (1992) (amending 12 C.F.R. § 325.104(h)(1)(i)) (explaining the final rules implementing the system of prompt corrective action as established by the Federal Deposit Insurance Corporation Improvement Act of 1991)).

149. *See supra* notes 85, 87.

150. Moral hazard describes the disincentive that deposit insurance provides for managers of a failing institution to jeopardize the insurance fund while seeking profits for the institution. Because the depositors' funds will be protected even if the institution fails, managers are willing to gamble with the institution's funds in a high stakes, "win big or lose big" strategy, which, if the institution loses, depletes its capital. *See* S. REP. NO. 102-167, at 32-33 (1991).

151. *Cf.* Eric J. Gouvin, *Shareholder Enforced Market Discipline: How Much is Too Much?* 16 ANN. REV. BANKING L. 311, 350 (1997) (criticizing the regulatory agencies' various protections against moral hazard and arguing that in the aggregate they amount to "regulatory overkill").

tion should the parent company choose not to recapitalize the institution.[152]

A parent company may have chosen to shore up its undercapitalized bank subsidiary under PCA. If the parent company becomes a debtor under the Code, its decision to recapitalize its bank subsidiary will be scrutinized and the transfer may be subject to an avoidance action.[153] Although a PCA-type infusion may be a "regulatory-approved" asset transfer, as the *BNE* court described it, the present bankruptcy scheme undermines the transfer as a fraudulent conveyance.[154]

IV. THE FRAUDULENT CONVEYANCE RULE[155]

While current provisions of the Bankruptcy Code give regulators stronger enforcement mechanisms for capital obligations, they are juxtaposed against the Bankruptcy Code's preexisting statutory scheme regarding the avoidance of asset transfers. The BNE decisions left unclarified a crucial issue: When a bank holding company becomes a debtor after making an asset transfer pursuant to regulatory authority, can that transfer find protection in the bankruptcy scheme? Enforcement of the capital maintenance obligations may pose a conflict between the interests of the financial institution's creditors, which may include the appropriate banking agency, and the institution's holding company's creditors, which may include the same banking agency. A trustee of the holding company may try to avoid a capital maintenance commitment or a payment to a bank subsidiary as a fraudulent conveyance under section 548 of the Code.[156] Only if the capital maintenance obligation falls within the good

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152. The statute prevents an institution from paying dividends or management fees that cause the institution to become undercapitalized as a result of the distribution. *See* FDICIA, 12 U.S.C. § 1831o(d) (1994). As the Senate Report explains, this provision protects the insurance fund by preventing institutions from depleting capital for the benefit of shareholders. See S. REP. NO. 102-167, at 35 (1991). An undercapitalized institution must submit within 45 days a capital restoration plan and the regulatory agency must review that plan within 60 days. 12 U.S.C. § 1831o(e)(2)(D). *See generally* Richard S. Carnell, *Prompt Corrective Action Under the FDIC Improvement Act of 1991*, in *Litigating For and Against the FDIC and the RTC 1992*, 27 (PLI, Comm. Law & Practice Course Handbook Series No. 625, 1992) (discussing the provisions of the Prompt Corrective Action); Nina Cortell, *Aspects of Financial Institutions Exposure*, in *Responsibility of the Corporate Parent for the Activities of a Subsidiary 1990*, 165 (PLI, Corp. Law & Practice Course Handbook Series No. 706, 1990) (discussing the financial institutions' regulatory framework as applied to the parent/subsidiary relationship).

153. *See* 11 U.S.C. § 548 (1994).

154. *Id.*

155. These rules apply with equal force to the trustee of a bankruptcy estate or to a debtor in possession. *Id.*

156. Prior to the passage of the Crime Control Act in 1990, the payment of a capital obligation after its breach raised an issue of the applicability of section 547 of the Bankruptcy Code. This provision allows the bankruptcy trustee to reduce the amount of an asset transfer given by the debtor to the creditor prior to bankruptcy if that creditor receives more than it would have been entitled to in a Chapter 7 proceeding. 11 U.S.C. § 547(b) (1994). The Crime Control Act amended the Bankruptcy Code to give any outstanding amount due under a capital maintenance obligation a higher priority status. 11 U.S.C. § 507(a)(9) (1994). However, if the individual owners of the holding company are

faith exception to this statutory provision will the regulatory agency be successful in enforcing even the more specific capital maintenance obligation.[157]

The payment of a capital obligation, in part or in full, may raise an issue of the applicability of section 548 of the Code.[158] The Code does not provide immunity for transfers made pursuant to regulatory orders.[159] Section 548 provides the bankruptcy trustee with an avoidance remedy for asset transfers made within one year of a debtor's bankruptcy filing.[160] If the trustee is successful in filing the avoidance petition, the trustee will be able to augment the debtor's estate by the amount of the asset transfer in question.[161]

Section 548(a) provides the trustee with a remedy based upon actual or constructive fraud.[162] Under section 548(a)(1), the actual fraud provision, also called the subjective test, the debtor bank holding company must have made the asset transfers with the "actual intent to hinder, delay and defraud."[163] Arguably, the fact that regulatory agencies issue orders requiring capital obligations makes them involuntary transfers.[164] The trustee may elect not to proceed under the actual fraud provision because that claim may be more difficult to prove.[165]

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responsible for funding the obligation and they use section 507 to secure a better priority, section 547 would apply and the trustee would have one year in which to recover the asset transfer as an avoidable preference. *See* 11 U.S.C. § 547 (1994).

157. *See* 11 U.S.C. § 548(e) (1994).

158. The trustee may also pursue an asset transfer challenge under state law pursuant to the Uniform Fraudulent Conveyance Act of 1918, 7A U.L.A. 427 (1985 & Supp. 1997) (amended by the Uniform Fraudulent Transfer Act of 1984, 7A U.L.A. 639 (1985 & Supp. 1997)). These statutes incorporate the state law substantive and procedural requirements into the fraudulent conveyance rule of the Bankruptcy Code. *See* 11 U.S.C. § 544(b) (1994). *See generally* Robert K. Rasmussen, *Guarantees and Section 548(a)(2) of the Bankruptcy Code*, 52 U. CHI. L. REV. 194 (1985) (stating that the focus of examination in determining whether a fraudulent transfer was made under section 548(a)(2) should be between the debtor and the obligor because it is the obligor, not the lender, that benefits from the debtor's guarantee).

159. This was one of the arguments set forth by the trustee in the BNEC case. *See supra* Part III.B and accompanying notes.

160. 11 U.S.C. § 548(a) (1994).

161. The trustee has one year following the avoidance of the transfer to initiate an action against the transferee. 11 U.S.C. § 550(f) (1994).

162. *See* Michael L. Cook, *Fraudulent Transfer Liability Under the Bankruptcy Code*, 17 HOUS. L. REV. 263, 270, 276-77 (1980) (characterizing actual fraud as a subjective test and constructive fraud as an objective test).

163. 11 U.S.C. § 548(a)(1) (1994).

164. Breach of a capital maintenance obligation allows the appropriate regulatory agency to issue a cease and desist order against the parent company under section 1818(I) and then proceed with an administrative hearing. *See supra* Part II.A.2 and accompanying notes.

165. This section may in fact be applicable if the insiders of the parent holding company are themselves liable for any capital deficiency. *See* John C. Deal et al., *Capital Punishment: The Death Of Limited Liability For Shareholders Of Federally Regulated Financial Institutions*, 24 CAP. U. L. REV. 67, 124 (1995). Any transfers that a debtor bank holding company makes when it is nearing insolvency may be problematic considering the fiduciary duties that directors may owe to creditors. *See infra* Part IV.

The involuntary payment of a capital obligation by a debtor bank holding company may pose a less questionable claim under the test for constructive fraud of section 548 (a)(2). Under this test, the trustee must prove that the debtor bank holding company received "less than a reasonably equivalent value"[166] and, most likely, that the debtor bank holding company either was insolvent or was made insolvent due to the transfer or obligation.[167]

The issue of fraudulent conveyance has had limited exposure in the bank holding company context. Courts analyzing the issue in the holding company context have engaged in a two-part analysis. Those courts look first to whether the parent company received an indirect benefit based upon the transfer. Then, they assess the value of that benefit. The discussion that follows analyzes recent cases addressing benefit and value in the holding company context. It then addresses the good faith defense. The section concludes by analyzing these concepts in the bank holding company context.

A. *Evaluating the Asset Transfer: The Parent Company's Benefit*

What underlies the section 548 requirement that a transferor receive an exchange of reasonably equivalent value is the policy of the Bankruptcy Code to maintain the debtor's estate for the benefit of its creditors.[168] Consistent with this policy, the debtor's return benefit may be direct or indirect, but it must have a proportionate value. In the holding company context, the benefit will most likely be an indirect one, and measuring its equivalent value may depend on the financial position of the subsidiary.

When a parent company makes an asset transfer to its subsidiary, it is "downstreaming" assets to the subsidiary. This acceptable common corporate practice increases the value of the subsidiary and, ultimately, increases the parent company's net worth.[169] Thus, although the parent

166. 11 U.S.C. § 548(a)(2)(A) (1994).

167. *See supra* note 71.

168. *See generally* Elizabeth Warren, *Bankruptcy Policy Making in an Imperfect World*, 92 MICH. L. REV. 336 (1993) (discussing the conflicting policy objectives of the bankruptcy system and arguing for a careful assessment of the presumptions underlying those objectives when considering reforms).

169. Intercorporate guarantees are essentially third-party contracts. In addition to the "downstream" guarantee, there is an "upstream" guarantee by a subsidiary of its parent's debt and a "cross-stream" guarantee by a corporation of an affiliated corporation's debt. *See* Rasmussen, *supra* note 158, at 207 (1985).

In the bankruptcy context, courts apply a third-party beneficiary test when determining whether the debtor received reasonably equivalent value from an intercorporate guarantee. Under this analysis, cross-stream and upstream guarantees do not meet the benefit test unless the corporations have failed to maintain separate corporate identities, thereby allowing the court to disregard corporate separateness and treat the corporations as a single entity. *See generally* Jack F. Williams, *The Fallacies of Contemporary Fraudulent Transfer Models as Applied to Intercorporate Guarantees: Fraudulent Transfer Law as a Fuzzy System*, 15 CARDOZO L. REV. 1403 (1994)

company may not receive a direct exchange of value, it should eventually benefit from the transfer.[170]

B. *Evaluating the Asset Transfer: Measuring "Reasonable Equivalence"*[171]

A guarantee is a financing vehicle that commits a non-borrower to agree to repay a loan in the event of a default by the borrower. Typically, a parent company will guarantee an obligation of a subsidiary. The value of these transactions is difficult to assess because the transfer may involve indirect benefits. Courts may use either the net worth maintenance or the identity of interest doctrines when reviewing whether the debtor holding company has made a permissible transfer.

1. The Net Worth Maintenance Theory

Using the net worth maintenance theory to decide whether the parent company has received an indirect benefit depends on the financial condition of the subsidiary. The leading case interpreting the holding company's benefit using the net worth maintenance theory is *Rubin v. Manufacturer Hanover Trust Co.*[172] The Second Circuit ruled that determining whether the debtor holding company has received an economic benefit begins by determining whether the holding company's guarantee of its subsidiary's debt has maintained the financial position of the subsidiary.[173]

The Court of Appeal's ruling reversed the district court, which did not consider the financial condition of the subsidiary.[174] Instead, the court concluded that the debtor holding company had a "vital interest" in the financial affairs of its affiliate. Under that analysis, the district court found that the debtor holding company always received an indirect benefit when it guaranteed its subsidiary's loan.[175]

(discussing the intercorporate guarantee, downstream guarantee, upstream guarantee, and cross-stream guarantee); Barry L. Zaretsky, *Fraudulent Transfer Law as the Arbiter of Unreasonable Risk*, 46 S.C. L. REV. 1165 (1995) (discussing the development of fraudulent transfer law and constructive law provisions).

170. The parent company may only receive an exchange of value when its subsidiary is solvent. *See supra* note 6.

171. 11 U.S.C. § 548 (a)(2)(A) (1994).

172. 661 F.2d 979, 991-92 (2d Cir. 1981) (holding that even though a bankrupt corporation had guaranteed loans that the bank issued to its subsidiary, trustees of the bankrupt corporation brought suit against the bank to recover the value of certain funds and securities of the corporation that the corporation had given as collateral for those loans). *Rubin* was decided under the section 67(d) of the Bankruptcy Act of 1898, which arguably was unchanged by the Bankruptcy Code. *See also* Harman v. First Am. Bank of Md., 956 F.2d 479, 485 (4th Cir. 1991) (finding *Rubin's* indirect benefit rule applicable under section 548 of the Bankruptcy Code).

173. *Rubin*, 661 F.2d at 991.

174. *Id.* at 993.

175. Rubin v. Manufactures Hanover Trust Co., 4 B.R. 447, 456-57 (Bankr. S.D.N.Y. 1980).

The Second Circuit's analysis of indirect benefit focused on comparing the obligation given to the third party with the obligation assumed by the holding company.[176] To result in a benefit, the exchange between the holding company and the parent company must correlate.[177] Following this analysis, an equivalent nexus shores up the benefit to the holding company, and thereby makes the transfer permissible.

After the decision in *Rubin,* several courts adopted the approach of evaluating the subsidiary's financial position as a result of the parent company's transfer. In light of this, courts began considering the degree or the nature of the subsidiary's insolvency. In *Duque Rodriguez v. Avanca (In re Rodriguez),*[178] the "deep insolvency" of the subsidiary supported a determination that the debtor parent company would not receive a benefit and that the parent company's asset transfer decreased the holding company's own net worth, harming the holding company's creditors.[179] Elaborating on the bankruptcy court's conclusion, the Eleventh Circuit[180] affirmed that the "terminal insolvency" of the subsidiary controlled the parent company's choice in paying the subsidiary's debt. The lack of financial viability of the subsidiary meant that the parent company's contribution on behalf of the subsidiary would not sustain the subsidiary's net worth.[181] Given that ultimate result, the parent company would never receive a benefit and the transfers were voidable under section 548.[182]

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176. *Rubin,* 661 F.2d at 991-93.

177. *Id.* at 989 (holding that there must be an approximate worth between the benefit received and the obligation exchanged).

178. 77 B.R. 937, 939 (Bankr. S.D. Fla. 1987) (relying on 11 U.S.C. § 548(a)(2), the trustee of a bankrupt corporation sought avoidance of the transfer of $42,000 from the corporation to the defendant, which was made two months prior to the commencement of bankruptcy action). The courts have considered the degree of insolvency of the subsidiary in determining the parent company's benefit after paying a subsidiary company's obligation. *Id.*

179. "In view of General Coffee's then terminal insolvency, the net worth of Domino was diminished by the transfer and the innocent creditors of Domino were in fact harmed by the transfer." *Rodriquez,* 77 B.R. at 939.

180. Rodriguez v. Murphy (In re Rodriguez), 895 F.2d 725, 728-29 (11th Cir. 1990) (explaining that a trustee brought action to render certain payments made by a holding company to a defendant on behalf of its subsidiary's trustee contending that the debtor holding company did not receive "reasonably equivalent value" for payments and the court emphasized that the decisive issue is whether by paying its subsidiary's debt, the holding company received an economic benefit that was sufficient to preserve the holding company's net worth); *see also* Butcher v. First Nat'l Bank (*In re* Butcher), 57 B.R. 101 (Bankr. E.D. Tenn.) *rev'd on other grounds,* 78 B.R. 520 (1986) (examining a trustee's filed action against First National Bank seeking to avoid preferential and alleged fraudulent transfers to creditors however, the complaint was dismissed on grounds that the action was time barred by the statute of limitations).

181. "Only if Domino shared in the enjoyment of either of these benefits can the payments have conferred an 'economic benefit' upon Domino such that its net worth was preserved by the payments." *Rodriguez,* 895 F.2d at 728.

182. *Id.* at 726-28.

2. The Identity of Interest

The identity of interest or enterprise doctrine evaluates whether the parent company and its subsidiary have combined their operations or enterprise in such a way that their financial condition is indistinguishable.[183] When this occurs, the parent company will undoubtedly receive an indirect benefit.[184]

Under this theory, courts are more concerned with the *actual* operations of the parent and subsidiary corporations as opposed to their legal status.[185] If the corporations are commonly controlled and behave as though they are one enterprise rather than as a related group,[186] bankruptcy law allows the combination of the two corporations.[187] Disregarding the corporate separateness of a parent company and its bank subsidiary will benefit the subsidiary's creditors to the disadvantage of the parent company's creditors. The asset transfer made by the holding company would thereby have a greater priority than the other debts of the holding company. As with the net worth theory, there must be a definable benefit to the debtor holding company.

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183. *See generally* J. Stephen Gilbert, *Substantive Consolidation in Bankruptcy: A Primer*, 43 VAND. L. REV. 207 (1990) (explaining the requirements for substantive consolidation and its consequenses in bankruptcy proceedings); Patrick C. Sargent, *Bankruptcy Remote Finance Subsidiaries: The Substantive Consolidation Issue*, 44 BUS. LAW. 1223 (1989) (asserting that when analyzing substantive consolidation of a parent company and its subsidiary, court should identify whether the subsidiary is a separate entity or just an extension of the parent company); William H. Thornton, *The Continuing Presumption Against Substantive Consolidation*, 105 BANKING L.J. 448 (1988) (arguing against substantive consolidation of a parent company and its subsidiary in bankruptcy).

184. McNellis v. Raymond, 287 F. Supp. 232 (N.D.N.Y. 1968), *rev'd on other grounds*, 420 F.2d 51 (2d Cir. 1970). Trustee brought action to recover alleged fraudulent transfers by debtor to defendant. The court found that proceeds of a loan made by defendant to a subsidiary company formerly owned by defendant's father were placed in debtor's account, thus allowing debtor to postpone the date of bankruptcy. Therefore, payments made by debtor to defendant were not fraudulent because of the indirect benefit conferred on debtor by placement of the loan in its account. *But see* Jones v. National City Bank of Rome (*In re* Greenbrook Carpet Co.), 722 F.2d 659 (11th Cir. 1984). Although the bank knew that a loan given to bankrupt company in satisfaction of a security interest held by the bank would be used for the benefit of a subsidiary company which the bank had refused to make a loan, such knowledge did not render payments by debtor fraudulent transfers. The court found that the transfer between the debtor and the defendant-bank were supported by fair consideration. *Id.* at 661.

185. Enterprise liability, considered primarily a tort law doctrine, places liability for negligence arising out of the enterprise on the owners of the enterprise. *See* Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997); Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190 (1996).

186. This is a common practice in the banking industry among related subsidaires that may engage in such transactions within the specific reglatory context.

187. The bank regulatory agencies have authority under both the Bankruptcy Code and FDICIA to use similar powers. Under section 507 of the Bankruptcy Code, unfulfilled capital maintenance obligations receive a higher priority then other unsecured debts. 11 U.S.C. § 507 (1994). Thus, if a bank holding company files a bankruptcy petition, the regulatory agency will be entitled to receive a portion of the bankrupt's estate to satisfy this obligation. Similarly, FDICIA's prompt corrective action provision authorizes the appropriate regulatory agency to request an assurance of capital maintenance before its bank subsidiary becomes insolvent. *See supra* note 105.

If the downstream transfer of assets depends on the financial position of the subsidiary in order to be an avoidable transfer, the trustee will be successful in avoiding the transactions. The pre-bankruptcy use of funds by a debtor holding company, even if made in compliance with regulatory orders, violates the bankruptcy policy of preserving the estate of the debtor for the equal treatment of all creditors. Even if the transfer were for less than a "reasonably equivalent value," the trustee seeking to avoid it must prove that, as a result of that transaction, the debtor company was financially weakened.

C. *The Debtor's Financial Status after the Transfer*

A court evaluating the financial status of a debtor after it has made a transfer for less than reasonably equivalent value has a choice of three tests. The court may determine the value of the company by determining whether as a result of the transfer 1) the transferor was insolvent or rendered insolvent, 2) the transferor was left with unreasonably small capital, or 3) the transferor intended to incur debts beyond its ability to pay them.[188] The tests are specific and their results depend on the circumstances surrounding the transaction. The Code gives a court great flexibility in choosing the applicable test.

1. The Transferor was Insolvent or Rendered Insolvent

The insolvency test requires an assessment of the debtor's capital at the time of the transfer. The court's choice and application of a measure are crucial to determining the validity of the transfer.[189] Courts commonly choose either a going concern value or a liquidation value.[190]

The going concern measure evaluates the business assets as a composite. This measure evaluates the present and future earnings potential of those assets and includes an assessment of the firm's contingent li-

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188. Subsection 548(a)(2)(a)-(B)(iii) is often viewed as a substitute for the actual fraud provision of section 548(a)(1) because it requires a lower standard of proof. Although both types of cases are difficult to prove, section 548(a)(2)(a)-(B)(iii) requires only the debtor's subjective belief that it would be unable to pay its debts. *See supra* note 6.

189. The party seeking to avoid the transfer has the burden of proof of establishing the insolvency of the company as a result of the transfer. *See* Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 650 (3d. Cir. 1991) (stating once creditor had met burden of proving its secured status, debtor had burden of proving that transfer was avoidable as preference); First Nat'l Bank v. Minnesota Util. Contracting, Inc. (*In re* Minnesota Util. Contracting, Inc.), 110 B.R. 414, 419 (D. Minn. 1990) (explaining trustee of bankrupt company has burden of proving each element of fraudulent transfer claim by preponderance of the evidence); Ohio Corrugating Co. v. DPAC, Inc. (*In re* Ohio Corrugating Co.), 91 B.R. 430, 440 (Bankr. N.D. Ohio 1988) (holding creditor committee failed to sustain its burden of proving that debtor was insolvent even though reconstituted balance sheet indicated that debtor was insolvent at the time of the leveraged buyout).

190. *See* James F. Queenan, Jr., *The Collapsed Leveraged Buyout and the Trustee in Bankruptcy*, 11 CARDOZO L. REV. 1, 16 (1989) (discussing the different methods of valuation).

abilities.[191] Its objective is to make a fair market value assessment, unless such an assessment would be unwarranted because the debtor is wholly inoperative.[192] Its projection is based on obtaining a multiple of a ratio of stock proceeds to earnings for a similar business and the debtor's current annual earning capacity.[193]

A liquidation value measure operates from the premise that the business is decreasing its capital base by selling its assets in a piecemeal fashion.[194] Most courts are reluctant to use the liquidation measure if the business is still a going concern, fearing that its use will result in an inadequate assessment.[195] Courts use this measure only if the business clearly lacks an ability to generate revenue.[196]

2. The Transferor was Left with Unreasonably Small Capital

The test of whether the debtor had "unreasonably small capital" after the transfer is a test of capitalization. The court "examines the relationship, if any, between the amount of capital remaining in the business in the period after the transfer and the business ability to continue operations during that period in the same manner as it conducted them before."[197] Essentially a court analyzes the debtor's financial projections to decide if they are reasonable. The party challenging the asset transfer will be successful if she is able to prove that either the debtor's cash flow was insufficient or the transferee relied upon unreasonable financial projections.[198]

There is in the bankruptcy regime a sole exception to a claim of fraudulent conveyance based on the good faith of the receiving party. The next section examines how courts have interpreted that provision.

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191. *In re* Xonics Photochemical, Inc., 841 F.2d 198, 200 (7th Cir. 1988) (suggesting that contingent liabilities must be reduced to their present value); *cf.* Chase Manhattan Bank v. Oppenheim, 440 N.Y.S.2d 829, 831 (N.Y. Sup. Ct. 1981) (treating the guarantee as matured and not reducing it).

192. Bergquist v. Anderson-Greenwood Aviation Corp., 56 B.R. 339, 385-86 (Bankr. D. Minn. 1985), *aff'd in part and remanded in part*, 850 F.2d 1275 (8th Cir. 1988) (using balance sheets prepared on a going concern); Fryman v. Century Factors, 93 B.R. 333, 341 (E.D. Pa. 1988).

193. Mellon Bank, N.A. v. Metro Communications, Inc., 945 F.2d 635, 647 (3d Cir. 1991); *In re* Vadnais Lumber Supply, Inc., 100 B.R. 127, 132 (D. Mass. 1989); *Bergquist*, 56 B.R. at 386.

194. Covey v. Commercial Nat'l Bank & Trust, 960 F.2d 657, 661 (7th Cir. 1992); *In re* Bellanca Aircraft, 56 B.R. 339 (D. Minn. 1985).

195. *Covey*, 960 F.2d at 661.

196. *Id.* at 661. The Seventh Circuit Court of Appeals suggests that before using a liquidation value under section 548(a)(2)(B)(1), a court should ask "What would a buyer be willing to pay for a debtor's entire package of assets and liabilities?" A positive price indicates that the firm is solvent and a going concern value should be used; a negative price indicates that the firm is insolvent and a liquidation value should be used. *Id.*

197. Barrett v. Continental Ill. Nat'l Bank & Trust, 882 F.2d 1, 4-5 (1st Cir. 1989) (citing Widett v. George, 148 N.E.2d 172 (Mass. 1958)).

198. Murphy v. Meritor Sav. Bank, 126 B.R. 370, 407 (D. Mass. 1991); Credit Managers Ass'n v. Federal Co., 629 F. Supp. 175 (C.D. Cal. 1985).

D. *The Good Faith Defense*

While the trustee seeking to avoid an asset transfer will have the burden of proof, the transferee may meet that challenge with a good faith defense under section 548(c).[199] This exception to the fraudulent conveyance rule forecloses a trustee's right to recover property from a transferee who received the transfer "for value and in good faith."[200] The defense allows an inquiry into the recipient's good faith. Specifically, the transferee must show that it gave a fair consideration, which may have been less than "reasonably equivalent," in good faith.[201] Thus, while the "reasonably equivalent value" standard is strictly an inquiry regarding worth, the good faith exception also focuses on the fairness of the exchange.[202]

When a court applies the good faith exception, it first must make a determination that a fair consideration was exchanged.[203] The court engages in the same "value" assessment discussed regarding reasonably equivalent value.[204]

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199. 11 U.S.C. § 548(c) provides in relevant part:

> Except to the extent that a transfer or obligation voidable under this section is voidable under section 544, 545, or 547 . . . a transferee . . . that takes for value and in good faith has a lien on or may retain any interest transferred or may enforce any obligation incurred, as the case may be, to the extent that such transferee or obligee gave value to the debtor in exchange for such transfer or obligation.

11 U.S.C. § 548(c) (1994). Subsection (d)(2)(a) defines value as: "property, or satisfaction or securing of a present or antecedent debt of the debtor, but does not include an unperformed promise to furnish support to the debtor or to a relative of the debtor" 11 U.S.C. § 548(d)(2)(A) (1994). *See generally* Thomas H. Jackson, *Avoiding Powers in Bankruptcy,* 36 STAN. L. REV. 725 (1984) (discussing the policies that support a trustee's avoiding powers). The courts have not provided a clear definition of how the value of the obligation that a parent company has incurred on behalf of its subsidiary should be measured. *Cf.* RASMUSSEN, *supra* note 158. Rasmussen argues that the reasonable equivalence measure under section 548(a)(2) actually creates two separate categories of transactions. One category evaluates a transaction that decreased the debtor's net worth because the debtor did not receive a reasonably equivalent value. The other category evaluates the transaction to determine whether it impaired the rights of the debtor's creditors. *Id.*

200. 11 U.S.C. § 548(c) (1994).

201. *Id.*

202. The Code repealed the explicit requirement of good faith founded in the earlier statute. *See* Bankruptcy Act of 1898, ch. 541, § 67(d), 30 Stat. 544, 564 (1898) (amended by Chandler Act, ch. 575, § 67(d), 52 Stat. 840, 877 (1938) (repealed 1978)). Section 548 now requires that the conveyance have a 'reasonably equivalent' value. 11 U.S.C. § 548 (d)(2)(A) (1994).

203. McColley v. Rosenberg, 76 B.R. 342, 349 (S.D.N.Y. 1987) (explaining that no consideration was exchanged where transfers were made to principal of a corporation and his family without ever benefitting the corporation); *In re* Jacobs, 60 B.R. 811, 815 (M.D. Pa. 1985) (stating that where no consideration was exchanged at the time of the transfer, transferee may not assert good faith exception); Consumers Credit Union v. Widett, 29 B.R. 673, 675 (D. Mass. 1983) (finding transferee, who was aware of borrower's solvency, and who exchanged reasonably equivalent value, but took a security interest in debtor's property, as not meeting the burden of proof). *See generally* Note, *Good Faith and Fraudulent Conveyances,* 97 HARV. L. REV. 495 (1983) (arguing that courts have expanded the applicability of the good faith component of the test, with some courts even using it inappropriately in place of an assessment of whether fair consideration was exchanged).

204. *In re* American Lumber Co. v. First Nat'l Bank, 5 B.R. 470, 477 (D. Minn. 1980) (stating that a good faith transfer must have "earmarks" of an arm's length transaction).

The rule requires a court to make a factual determination regarding the transferee's intent to hinder or defraud creditors.[205] The court must examine the bargaining situation surrounding the transaction to determine whether the transferee knew of the debtor's weakened financial condition.[206] That test varies from circuit to circuit; most courts do not require actual knowledge, but will charge a transferee with a "reason to know" standard if the transferee's failure to draw the inference would result in bad faith.[207]

Some courts analyze the transferee's intent by determining whether the transferee actually knew or should have known that the transaction would be damaging to creditors.[208] The issue of the transferee's knowledge is always a factual inquiry.[209]

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205. *In re American Lumber Co.*, 5 B.R. at 477; *In re Jacobs*, 60 B.R. at 814-15.

206. *In re* S & W Exporters, Inc. v. Faberge, Inc., 16 B.R. 941, 946 (S.D.N.Y. 1982) (finding that a debtor's receipt of reasonably equivalent value did not protect conveyance from avoidance where transferee had knowledge, actual and/or inferred, of debtor's "unfavorable financial condition").

207. United States v. Tabor Court Realty Corp., 803 F.2d 1288, 1304 (3rd Cir. 1986) (adopting an imputed knowledge standard); *In re* Greenbrook Carpet Co., 22 B.R. 86, 90-91 (N.D. Ga. 1982) ("Good faith may be lacking because of a transferee's knowledge of a transferor's unfavorable financial condition at the time of the transfer."); *Consumers Credit Union*, 29 B.R. at 677 (citing McWilliams v. Edmonson, 162 F.2d 454 (5th Cir. 1947) (stating that a "lender's knowledge of borrower's insolvency prohibits a finding that he is a good faith transferee")). Most courts are willing to find good faith if the conveyance is a payment on an antecedent debt. Boston Trading Group, Inc. v. Burnazos, 835 F.2d 1504, 1508-09, 1512-13 (1st Cir. 1987).

208. *In re* Maddalena, 176 B.R. 551, 555 (C.D. Cal. 1995) (explaining that good faith is an objective test requiring that transferee either knew or should have known that transaction was deceptive).

209. Several courts have adopted the factors suggested in the decision In re Southern Industrial Bank Corp., 99 B.R. 827 (Bankr. E.D. Tenn.), *aff'd*, 115 B.R. 930 (E.D. Tenn. 1989). They are:

> First, were the transactions at issue within the ordinary course of the defendants' business? . . .
>
> Second, what was the nature and extent of the defendant's relationship with the debtor? If the defendant had an established or insider relationship with the debtor, the defendant's good faith is less likely . . . .
>
> Third, what did the defendant know or what should the defendant have known about the effect that the transactions at issue would have on the debtor and its creditors? If the defendant knew or should have known that the transaction would have an adverse effect on the debtor and its creditors, good faith will be difficult to show . . . .
>
> Sub-issues here might include:
>
> (A) Was the transaction in the ordinary course of the debtor's business? If it was not, then there is a greater likelihood of an adverse effect on creditors, and the defendant should probably exercise greater care.
>
> (B) What information was available to the defendant regarding the debtor's insolvency? If information was available indicating insolvency, it would be less likely that the defendant acted in good faith.
>
> Fourth, did the defendant violate any legal or professional ethical duties in the transaction at issue? If so, good faith will be more difficult to establish.
>
> Fifth, did the defendant improperly retain any of the property or otherwise benefit from the transactions at issue? . . .
>
> Sixth, did the defendant participate in the transaction with an honest and innocent intention?

Id. at 839-39 (internal citations omitted).

In the bank holding context, the good faith defense requires an examination of the relationship between the debtor parent company and its capital-deficient bank subsidiary.[210] Although the parent company may have received an indirect benefit by virtue of the transfer, it is the bank subsidiary, and explicitly its creditors including the insurance fund, that must quantify that benefit as well as prove an absence of bad faith.

E. *The Parent Company's Indirect Benefit: Forbearance from Regulatory Action*

The theories that allow a debtor parent company to make a protected pre-bankruptcy transfer to its subsidiary require an enhancement of the parent company's financial status.[211] Both the identity of interest and net worth theories recognize an indirect benefit to a debtor parent company when it makes a pre-bankruptcy transfer to its solvent subsidiary.[212] Similarly, the good faith exception allows an inquiry into the parent company's good faith in making the transfer, while still requiring that there be a quantifiable exchange of value.[213] Under either of the theories, the value of the indirect benefit to the debtor bank holding company when it makes a transfer to its financially troubled bank subsidiary is somewhat problematic.

The parent company's capital contribution restores value to the bank subsidiary.[214] The restoration of value at the subsidiary level directly benefits its creditors as well as the insurance fund. The bank holding company regulatory scheme promotes the capital infusion, because, by definition, the parent company and its affiliated subsidiaries share an identity of interest.[215] The regulatory scheme also implicitly sanctions the

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The Fourth Circuit Court of Appeals adopted a different standard. Gilmer v. Woodson, 332 F.2d 541 (4th Cir. 1964) (stating that a transferee's good faith is not challenged if the conveyance was for an antecedent debt rather than for a present consideration). The *Southern Industrial* factors have limited application under a *Gilmer* test. *Gilmer*, 332 F.2d at 548.

210. *In re* Greenbrook Carpet Co., 22 B.R. at 90. The court stated:

> The term, 'good faith,' does not merely mean the opposite of the phrase 'actual intent to defraud.' That is to say, an absence of fraudulent intent does not mean that the transaction was necessarily entered into in good faith. The lack of good faith imports a failure to deal honestly, fairly and openly.

Id. (citation omitted).

211. *See* discussion *supra* note 33 (discussing operation of the net worth maintenance or enterprise theory).

212. *See* discussion *supra* note 33 and *infra* Part V.B.

213. *In re* Wes Dor, 996 F.2d 237, 242 (10th Cir. 1993) (stating that inquiries into whether a "quantifiable exchange of value" occurred is largely a question of fact to which considerable latitude must be given to the trier of fact, and affirming the bankruptcy court's finding that "quantifiable exchange of value" includes the securing of an antecedent debt of a wholly-owned subsidiary by a bank through the parent company).

214. *In re* Carrousel Motels, Inc., 160 B.R. 993, 1000 (Bankr. S.D. Ohio 1993).

215. *See In re Carrousel Motels, Inc.*, 160 B.R. at 1000. *See also* Board of Governors of Fed. Reserve Sys. v. First Lincolnwood Corp., 439 U.S. 234, 251-52 (1978). The Court stated:

> The Board has frequently reiterated that holding companies should be a source of strength to subsidiary financial institutions. It has used the substantial advantages of bank

transfer between the parent company and the direct beneficiaries, i.e., the bank subsidiary's creditors, including the insurance fund. The banking regulatory structure, by permitting the parent company to serve as a proxy for liability upon the bank subsidiary's decline, creates the identity of interest between the parent company and the bank subsidiary's creditors.[216] Yet, because the parent company receives only an indirect benefit, the good faith exception mandates a fair value for the transaction. The existing banking regulatory structure does not provide a different measure for the proxy arrangement. The difficulty in quantifying the mandated indirect exchange suggests the need for an alternative approach in the banking context.

V. CRAFTING A BANK EXCEPTION TO THE FRAUDULENT CONVEYANCE PROVISION

The banking regulatory structure arguably requires parent companies to make an asset transfer or capital infusion that the Code labels a fraudulent conveyance. The existing bankruptcy regime does not protect a pre-bankruptcy parent company asset transfer.[217] The dormant conflict raises the issue of how these two bodies should authorize the debtor parent company's pre-bankruptcy transfers to its insolvent subsidiary.[218]

Examining the economic identities of the parent and its bank subsidiary is crucial to resolving the conflict. This proposal recommends amending the Code to include a *banking enterprise exception,* which has a three-pronged effect. First, the exception explicitly recognizes the singular nature of banking conglomerates operating collectively with the

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holding-company status to induce applicants to improve their own and their subsidiaries' capital positions. . . . Congress has been apprised of this consistent administrative practice, . . . and has not undertaken to change it.

Id. (citations omitted).

216. *In re* Carrousel Motels, Inc., 160 B.R. at 1000.

217. The enforceability of the capital restoration plan is unaffected by whether the bankruptcy of the parent company precedes that of the banking subsidiary. In *MCorp*, both the parent company and the majority of its bank subsidiaries were insolvent when the Federal Reserve Board issued the regulatory orders requiring the parent company to make the transfers. *See* discussion *supra* Part II.A.B. To the contrary, the insolvency of BNE preceded the insolvency of BNEC by several months. BNEC was book solvent when the banking regulators required it to make capital infusion into BNE. *See* discussion *supra* note 71.

218. Although Congress intended through the prompt corrective action provision to enact a more enforceable capital maintenance obligation, it may have created a more scurrilous one. The source of strength condition, arguably, is mandatory, not discretionary. Failure to comply with the regulatory agency orders regarding source of strength has resulted in issuance of cease and desist orders for engaging in an unsafe and unsound banking practice under 12 U.S.C. § 1818(b). *See* discussion *supra* note 96 (noting that the Federal Reserve issued orders to parent company of failing bank subsidiaries requesting transfers pursuant to source of strength requirement).

To the contrary, the prompt corrective action provision, arguably, is discretionary. The parent company decides to submit a capital restoration plan for regulatory review, yet its failure to comply with the approved plan would subject the parent company and the bank subsidiary to regulatory sanctions. *See supra* note 151 and accompanying discussion.

sanctioned use of federally insured funds.[219] Second, it is consistent with the Code's overall goal to provide an equitable distribution of the debtor's estate to its creditors.[220] Finally, it provides a balance of power between the FDIC-Receiver and the bankruptcy court regarding the review function of the asset transfer.[221] The unique structure of the banking industry requires this specific change to balance the parent company's use of the bank subsidiary funding in order to protect the business decision of the parent company to make the transfer and to limit the powers of the FDIC-Receiver.

A. *The Proposal: The Banking Enterprise Exception*

The banking enterprise exception to the fraudulent conveyance provision offers protection from a trustee's avoidance action to recover a pre-bankruptcy asset transfer to a failed bank subsidiary.[222] It provides the federal banking agency with a defense for the parent company's decision to shore up an insolvent bank subsidiary upon a showing that the parent company, and its bank and nonbank subsidiaries operated as an economic unit.[223] Upon a showing of an economic enterprise operation, the bankruptcy court must recognize the deposit insurance fund as a valid transferee and may not enter an order to return the asset transfer to the debtor parent company's estate.[224] This finding also limits the actions of the bankruptcy trustee. The trustee of a debtor parent company may not file an avoidance action against FDIC-Corporate as a subsequent transferee of pre-bankruptcy assets.[225] Additionally, the proposed change would eliminate the FDIC-Receiver's review function as to these particular assets, except to provide a certification stating the amount of the asset transfers, thereby allowing for an offset or credit of any cross-guarantee assessment that may be imposed against a solvent bank subsidiary in the enterprise.[226] The bankruptcy court has jurisdiction over the claim, reviewing it for legal sufficiency. Thus, the powers of the administrative agency are more properly aligned with those of the bankruptcy court.

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219. *See* discussion *infra* Part V.A.

220. *See* discussion *infra* Part V.B.

221. *See* discussion *infra* Part V.C.

222. *See generally* Branch v. F.D.I.C., 825 F. Supp 384 (D. Mass. 1993).

223. *BNE-I*, 825 F. Supp. at 384.

224. *Id.*

225. This finding would also provide avoidance action protection to any subsequent purchaser of holding company assets.

226. *See infra* note 229.

B. *Inter-Affiliate Transactions as Routine Business Practice*

Banking laws allow the banking conglomerate to operate as a single economic enterprise.[227] However, because the regulatory structure does not mandate that the parent company pool its affiliate funds to reduce losses, the permissive regulatory structure can contribute to a bank subsidiary's failure.[228]

The regulatory process provides a limited policing mechanism to govern the transactions between a bank subsidiary and its affiliates. Section 23 is the statutory scheme that regulates transactions between affiliates.[229] Section 23A regulates the parent company's potential for abusive conduct in transactions between bank and nonbank subsidiary corporations.[230] Section 23B establishes the standards for the terms and conditions of affiliate transactions.[231]

Transactions between commonly owned bank and nonbank subsidiaries must meet qualitative and quantitative requirements. The qualitative restrictions result in a fair market exchange of value, including requirements of full collateralization and no individual transaction exceeding 10 percent of the bank subsidiary's capital and surplus.[232] The quantitative

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227. *See generally* Phillip I. Blumberg, *The Increasing Recognition of Enterprise Principles in Determining Parent and Subsidary Corporation Liabilities*, 28 CONN. L. REV. 295 (1996). Pooling profits is equivalent to the bank maintaining subsidiary's capital if the parent company has used the banking subsidiaries assets for other subsidiaries. However, if the parent company has made transfers among bank and nonbank subsidiaries, the interests of the FDIC may not be protected. *Id.* at 326.

228. 12 U.S.C. § 1821 (1994) (explaining that the cross-guarantee provision addresses this issue in part when the bank fails by allowing the FDIC to assess liability for the cost of the failure of an institution against commonly owned bank subsidiaries).

229. Section 23A of the Federal Reserve Act, 12 U.S.C. § 371c, applicable to all national banks and FDIC insured institutions, identified certain types of transactions between affiliates as risky, e.g., loans, credit, various forms of financial support, and limits the institution's use of capital for these transactions. Originally passed in 1933 as part of the Bank Act of 1933 (Glass-Stegall Act), it evidenced the concern that commercial banks and investments should be separate. In the Bank Affiliate Act of 1982, Congress specifically amended the provision to allow more flexibility and movement of funds. *See* 12 U.S.C. § 371c (1994).

230. The statute defines "affiliate" generally as any company that controls the bank or any other company that is controlled by the company or shareholders that controls the bank. "Control" is deemed to exist with direct or indirect ownership of or power to vote 25 percent or more of any class of voting security of a company, control over the election of a majority of the directors of a company, or the exercise of a controlling influence over the management and policies of a company, as determined by the Federal Reserve. 12 U.S.C. § 371c(b)(3)(A) (1994). *See* 12 U.S.C. § 371c-1(d) (1994) (generally incorporating into Section 23B the definitions set forth in Section 23A); *see also* 12 C.F.R. § 563.41(b)(3)(i)(B) (1997) (regulation applicable to savings associations specifying additional circumstances under which "control" may be found). 12 U.S.C. § 371c(b)(1) (1994). The "affiliate" definition also includes any company of which a majority of the directors also constitute a majority of the directors of the institution or any company that controls the institution. 12 U.S.C. § 371c(b) (1994).

231. 12 U.S.C. § 371c-a (1994).

232. Section 23A is one of several regulations that monitors the conduct of the parent company regarding its bank subsidiary. Congress has identified, and circumscribed the parent company's potential for abusive conduct in several critical areas. These include capital adequacy regulations as

restrictions have a similar scope of protectiveness. Those provisions restrict the bank subsidiary's total interaffiliate transactions to no more than 20 percent of its capital and surplus.[233] Within these limitations, however, the bank and nonbank subsidiaries may operate as a single enterprise.[234] Section 23A arguably favors transactions between bank subsidiaries owned by the same parent company.[235] The so-called "sister-bank" exemption excuses 80 percent of commonly controlled bank subsidiaries from complying with the quantitative limitations of section 23A.[236] Section 23B broadens the scope of section 23A in its inclusion of "covered transactions"[237] and by requiring that the terms and circumstances of a transaction with a bank subsidiary be on as favorable terms as those to comparable institutions, or in good faith.[238]

Transactions between subsidiaries may benefit the entire enterprise.[239] They provide operational flexibility, such as easing geo-

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addressed in 12 U.S.C. § 2154 (1994); insider loans in 12 U.S.C. § 84 (1994); and removing wealth from the bank in 12 U.S.C. § 248 (1994). Section 23 specifically addresses transactions between a nonbank affiliate subsidiary and a bank subsidiary.

Of the several restrictions addressing the quality of the assets, the requirements include that the interaffiliate transaction be: 1) not of "low-quality," 12 U.S.C. § 371c(a)(3) (1994); 2) on terms and conditions consistent with safe and sound banking practices, 12 U.S.C. § 371c(b)(10) (1994); and 3) secured by collateral having a value of at least 100 percent of the amount loaned, 12 U.S.C. § 371c(b)(4) (1994). The statute prohibits a banking subsidiary from any individual transaction that exceeds 10 percent of its capital and surplus. 12 U.S.C. § 371c(1)(A) (1994).

233. 12 U.S.C. § 371c(a)(1)(B) (1994). 12 U.S.C. § 23(d)(1) (1994).

234. 12 U.S.C. section 371c(a)(1)(B) (1994 & 12 U.S.C. section 23(d)(1) (1994).

235. Section 23A will not prohibit transactions between commonly owned bank subsidiaries if they do not involve low-quality assets. *See* 12 U.S.C. § 371 c(d)(1) (1994). *See generally* Veryl Victoria Miles, *Banking Affiliate Regulation Under Section 23A of the Federal Reserve Act*, 105 BANKING L.J. 476 (1988).

236. 12 U.S.C. § 371c(d)(4) (1994).

237. Covered transactions with affiliates also include (1) sale of assets or securities to an affiliate, (2) the payment of money or the furnishing of services to an affiliate under contract, lease, or otherwise, (3) any transaction in which an affiliate acts as agent or broker or receives a fee for its services to the institution or any other person, and (4) any transaction (or series of transactions) with a third party if an affiliate has a financial interest in the third party or is a participant in the transaction or series of transactions. 12 U.S.C. § 371c-1(a)(2) (1994).

238. *See Orders Issued Under Section 4 of the Bank Holding Company Act Metrocorp, Inc.*, 79 Fed. Res. Bull. 352 (April 1993). The Federal Reserve rejected Metrocorp's proposal to engage in nonbanking activity through its affiliate, MAC, because approval of such proposal would be in violation of, and inconsistent with, section 23B which was intended to prevent unsafe or unsound banking practices. The Board found that Metrocorp could not have in good faith provided services to an unaffiliated armored car service without determining the actual cost of such services, but nonetheless charging a flat fee. *See also* FDIC v. Benson, 867 F. Supp. 512 (S.D. Tex. 1994). The FDIC brought suit against officers and directors of bank for their alleged negligence in connection with bank loans. As receiver for insolvent bank, FDIC has same rights and privileges of creditors, shareholders and depositors, therefore by suing the defendants, FDIC was acting in its capacity as bank's subrogee. However, absent proof that defendants knew of actual fraud or concealment, Texas business judgment rule protects the defendants from liability. *Id.*

239. The bank regulators become aware of violations of Rule 23A and 23B only during the examination process. That process is itself bifurcated. The FDIC, OTS, and OCC are the examiners of the bank subsidiary and the Federal Reserve is responsible for the parent company and any

graphical restrictions and lowering the cost of obtaining loans for the bank subsidiary. The bank subsidiary is a ready purchaser of loans to increase its asset portfolio, and the nonbanking subsidiary is a willing seller to meet cash flow needs.[240]

Although a parent company routinely uses the bank subsidiary's low-cost funds, its conduct is not defensible as profit-maximizing for the bank subsidiary under certain circumstances. Abusive parent company conduct may include: 1) relying on core deposits for group funding needs; 2) making loans from banking operations; 3) allowing a bank subsidiary to have a temporary liquidity crisis, thereby requiring borrowing from the Federal Reserve; 4) placing new profit-generating enterprises in nonbank subsidiaries; 5) allowing a nonbank subsidiary to purchase services from banks at low or no profit margins; or 6) allocation of bank profits, including distribution of dividends and new loans to nonbank operations.[241]

Supporting the statutory scheme allowing the use of bank subsidiary funds is the presumption that the examination process will deter the parent company from engaging in, or will detect the parent company's at-

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nonbank subsidiary. Failure to comply with the requirements of Rule 23A and 23B may result in enforcement proceedings based on violation of safety and soundness standards or in civil monetary penalties for the bank's management. *See* discussion of section 1818 *supra* Part II.A.2. Although the Federal Reserve has primary authority to interpret 12 C.F.R. § 250.250, OTS, OCC, and FDIC, because of their primary jurisdiction over depository institutions, also construe this regulation as well as Sections 23A and 23B. *See* Joseph P. Daly, *Asset Purchases from Affiliates: The Federal Reserve's Interpretive Exemption from Limits on Affiliate Transactions*, 113 BANKING L.J. 601 (1996).

240. *See* Sean J. Geary, *The Credit Transaction*, *in* Basics of Banking Law 1991, at 197 (PLI, Comm. Law & Practice Course Handbook Series No. 593, 1990).

241. A transaction involving a bank subsidiary and its nonbank affiliate may not be readily identifiable and would not necessarily be detected in the examination process. A former banking regulator, who favored tighter controls of transactions under Section 23, has outlined the potential for abuses. Improper transactions that may be risky fall into two categories. One category involves transactions that may be profitable to the parent company, but which expose the bank subsidiary to undue risk of failure. Commonly, a parent company may allow its troubled bank subsidiaries to misprice business transactions. For example, a bank subsidiary may charge excessively low loan rates, or transfer assets for book value rather than market value. Similarly, a parent company may allow its bank subsidiary to declare a high dividend, and then use those funds only for nonbank operations. The second category involves improper transactions between the bank and nonbank subsidiary. A parent company may allow its nonbank subsidiaries to make risky loans with a bank subsidiary or the parent company may overcharge bank subsidiaries for management or data processing services. Impermissible transactions are not always easy to detect through the regulatory examination process.

Furthermore, the differing jurisdiction of the regulatory agencies may make a prohibited transaction even more difficult to uncover. The Federal Reserve Board regulates the parent company and the nonbank subsidiary, while the OCC and the FDIC regulate the bank subsidiary.

In Fitzpatrick v. FDIC, 754 F.2d 569 (6th Cir. 1985), the FDIC found that there was blatant abuse of interaffiliate funding which was detectable because the institution was insolvent. The court also stated that loans from a member bank to its affiliates must be secured by a collateral which is only met by perfected security interest. Here, the bank director approved loans that exceeded the lending limits and violated the collateral requirements; the court held that the imposition of a $1,000 civil penalty was not arbitrary and capricious. *Id.*

tempt to camouflage or disguise, the restricted transaction.[242] The examination process, however, serves as a notification only after the deleterious conduct has occurred.

The principle question perhaps becomes one of public statutory policy. A parent company that owns a bank subsidiary is responsible for maintaining its regulatory capital. The banking statutes have a fixed determination of what constitutes undercapitalization.[243] The asset transfers mandated under the banking statutes draw an imprecise correlation between the undercapitalized subsidiary and interaffiliate transfers. Furthermore, that correlation, arguably, is based on the presumption that those transfers contributed to a decline of the banking subsidiary's capital.[244]

Evaluating the funding needs of the subsidiary that receives the transfer becomes critical to determining whether there is abusive conduct in the use of federal depository funds and balances these concerns regarding pairing the capital infusion with the interaffiliate transactions.[245] To determine if the parent company's decision is in the best interests of the bank subsidiary making the transfer, the regulations must include an evaluation of the parent company's conduct at the time of the transaction. Specifically, when the bank funds are shifted or transferred, there should be an assessment regarding whether the receiving subsidiary uses them for investment opportunities or for working capital needs.[246] The evaluation requires the parent company to support its decision to make the transfer at the time of the transaction.[247] A defensible decision is one in which the parent company can show that it used low-cost bank funds for investment purposes.[248] A non-defensible decision is one in which the low-cost bank funds were used for working capital.[249] As a matter of routine business analysis, there should be an assesment, perhaps, a stan-

242. *See generally* John T. Rose & Samuel H. Talley, *Bank Transactions with Affiliates: The New Section 23A*, 100 BANKING L.J. 423 (1983); John T. Rose & Samuel H. Talley, *Section 23A of the Federal Reserve Act: Issues Surrounding Financial Transactions Between a Bank and Affiliated Companies*, ISSUES IN BANK REG., Summer 1978, at 8.

243. 12 U.S.C. § 1821 (1994).

244. The Federal Reserve Board's regulatory order requiring the capital infusion does not identify which interaffiliate transactions have resulted in a decline of the banking subsidiary's capital. That order simply seeks to restore the financial institution's capital adequacy by readjusting a portion of the banking subsidiary's debt as equity. One such method is to infuse, into the banking subsidiary, the amount of capital needed to meet the statutory requirement.

245. Under 12 C.F.R. § 250.250, transactions between the bank and nonbank affiliate may be exempt from rule 23A if three conditions are met: a commitment by the bank prior to the affiliate's commitment to make the loan, an independent credit evaluation by the bank, and the absence of a blanket advance commitment by the bank. *See* 12 C.F.R. § 250.250 (1997). That section has been interpreted through federal reserve rulings to distinguish the use of funds for investment and working capital purposes. *See* Daly, *supra* note 239, at 608-11.

246. *See* Daly, *supra* note 239, at 607.

247. 12 C.F.R. § 250.250(c) (1997).

248. *Id.*

249. *Id.*

dardized range, of the effect on or risk of loss to the subsidiary because of an interaffiliate transaction. Should the bank subsidiary become insolvent, this analysis should yield a correlation between the bank subsidiary's unprofitable posture and the risky or abusive parent company conduct. The lack of a nexus between the operation of the enterprise and the default, and insolvency of the bank subsidiary will allow the bankruptcy trustee to establish that the questioned asset transfer was a fraudulent conveyance, not a routine business transaction protected from an avoidance action.

A transfer made to satisfy working capital needs should not be subject to an avoidance action under the Code. Whether the transfer is used as working capital, can be determined by evaluating whether the parent company has engaged in either beneficial conduct or wrongful conduct. Beneficial conduct describes the parent company's decision to elect to describe its corporate operation as an integrated economic enterprise.[250] This means the parent company acknowledges that it routinely uses the bank subsidiary assets to maximize the profits and diversify the losses of the conglomerate.[251] Moreover, the designation means that the parent company is willing to use enterprise resources, e.g., nonbank subsidiary funds, to assist a bank subsidiary that becomes insolvent.[252] Wrongful conduct describes the appropriate bank agency's determination that the operation functions as an integrated economic enterprise. The appropriate bank regulator must establish that the parent company though interaffiliate transactions jeopardized the capital of the bank subsidiary. This requires an assessment of the parent company's conduct to determine the restrictions on transactions between bank subsidiaries. Specifically, the bank subsidiary's regulator reviews the parent company's record of interaffiliate transactions to evaluate compliance with the parent company's internal policies and guidelines.[253] Those standards should address how

250. *See* Cohen, *supra* note 14.

251. One author argues that holding company level compliance is a more cost-effective means of complying with FDICIA's increased regulatory and compliance costs. *See* Cohen, *supra* note 14. This model suggests that the parent company makes the capital infusion because it is in the best interest of the enterprise to keep the bank subsidiary well-capitalized. *Id.* at 31.

252. This theory is consistent with the investment-backed expectations of investors of a regulated industry, such as banking. The burden of proof follows the party that elects to make the determination. The parent company is allowed to make the declaration because it may be in its best interest not to have the transfer avoided. This situation might arise if, the parent company, at the time the filing of its bankruptcy petition, has solvent bank subsidiaries. Under the proposed change, recognition of a pre-bankruptcy parent company asset transfer as valid operates as a credit against a cross-guaranty assessment made to a solvent bank subsidiary in the same enterprise.

253. These pre-established guidelines and policies are not subject to regulatory approval. *See* Daly, *supra* note 239, at 605. *See also* Mark D. Rollinger, *Interstate Banking and Branching Under the Reigel-Neal Act of 1994*, 33 HARV. J. ON LEGIS. 183 (1996) (discussing new correspondent banking rules).

the parent company evaluates the effect of interaffiliate transactions on a bank subsidiary's capital performance.[254]

Enterprise liability seems appropriate when the parent company has made a decision that creates a *material* risk of loss to the federal deposit insurance fund.[255] The banking enterprise exception is premised on the conglomerate's risky use of federally insured funds as a routine business practice. Parent company obligation is appropriate in those circumstances where the parent company has engaged in abusive or risky use of deposit funds within its operation.[256] Requiring the parent company to monitor its own operations is an appropriate policing mechanism. The parent company becomes responsible for ensuring the reasonable use of federally insured funds.[257] The parent company closely regulates its own conduct determining the effect on the bank subsidiary.[258] By carefully assessing the risk of interaffiliate transactions, a parent company may decide to avoid certain transactions, restructure others or engage in risky ones knowing that those could be costly.

The nexus between the interaffiliate transfers and the bank subsidiary's decline is implicitly articulated by the banking regulatory

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254. The parent company is allowed to make the declaration because it *may* be in its best interest not to have the transfer avoided. This situation might arise if, at the time the filing of its bankruptcy petition, the parent company has solvent bank subsidiaries. Under the proposed change, recognition of a pre-bankruptcy parent company asset transfer as valid operates as a credit against a cross-guaranty assessment made to a solvent bank subsidiary in the same enterprise. *See* discussion *infra* Part V.C.

In *Credit Lyonnais Bank Nederland v. Pathe Comms. Corp.*, 1991 WL 277613, at *1, *34 (Del. Ch. Dec. 30, 1991), Chancellor Allen ruled that directors of a corporation that is in the vicinity of insolvency have an obligation to creditors as well as shareholders. The "vicinity of insolvency" issue is germane to this discussion because the requirement that the parent company make a judgment in the best interests of the bank subsidiary defines the parent company's fiduciary duty on behalf of the subsidiary in a way that also creates a fiduciary obligation to the insurance fund as a creditor.

255. *See* discussion of cross-guarantee provision *supra* note 241. Limited liability protects related corporations from collective responsibility for financial losses. Corporate law disregards limited liability only if the holding company system is using the corporate structure as a veil or sham for other fraudulent business. *See generally* Christopher W. Frost, *Organizational Form, Misappropriation Risk, and the Substantive Consolidation of Corporate Groups*, 44 HASTINGS L. J. 449 (1993); Henry Hansmann & Reinier Kraakman, *Toward Unlimited Shareholder Liability for Corporate Torts*, 100 YALE L.J. 1879 (1991); Larry E. Ribstein, *Limited Liability and Theories of the Corporation*, 50 MD. L. REV. 80 (1991).

256. *See* Havard, *supra* note 33, at 2363-64.

257. In an earlier piece, I posited that an alternative means for securing the capital infusion needed for a troubled bank of a multi-bank holding company system—temporary consolidation of the financial institutions in the holding company structure. I proposed factors that the FDIC should apply to determine whether the subsidiaries in the multi-bank holding fail to have separate economic identities. Such a finding would result in a temporary suspension of the charter in order for consolidation to occur. *Id.* at 2399, 2408-10.

258. *See* Gouvin, *supra* note 151, at 351-53 (arguing that the effect of such parent company or shareholder monitoring results in an overzealousness by the regulatory agencies to protect the insurance fund to the disadvantage of the private market and the self-policing of those shareholders).

structure.[259] The correlation, evidenced in the prompt corrective action provision, values the tangible and intangible benefits of bank holding company affiliation.[260] Furthermore, that *regulatory-permmissible* asset transfer incorporates a legitimate business responsibility: the pooling of funds to meet the bank subsidiary's safety and soundness concerns.[261] Thus, the parent company's decision to shore up its bank subsidiary ought to be immune from attack by its own shareholders.

C. *Economical Use of the Parent Company's Resources*

An asset transfer or capital infusion that reduces the debtor parent company's estate ought to be unavoidable in limited circumstances.[262] Viewing the exchange as one made within the collective conglomerate warrants valuing the capital infusion as payment for a prior liability, an improperly capitalized interaffiliate transaction.[263] Satisfying the banking enterprise exception measures the transfer's value to the conglomerate operation. Viewing the conglomerate collectively also supports the argument that the insurance fund's equitable interest is greater than that of the debtor parent company's estate. The payment is a cost of doing business, or a decision that the parent company made well before the transfer actually occurred.

Recognizing the asset transfer as a valid pre-petition obligation prevents the costs of interaffiliate transfers from being shifted to the FDIC.[264] The downstream contribution is another decision to shift losses or maximize profits within the group.[265] The banking enterprise exception ex-

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259. This policy choice operates even when the parent company has become insolvent because the parent and subsidiary corporations are a single operation based on the realities of their corporate financial structure. *See* Blumberg, *supra* note 227, at 308-10.

260. Havard, *supra* note 33, at 2686-88.

261. Bankruptcy law uses substantive consolidation to join the resources of related corporations to enlarge the debtor's estate to satisfy the claims of creditors. Blumberg, *supra* note 227, at 328-29. *See also* John C. Deal, et. al, *Capital Punishment: The Death of Limited Liability for Shareholders of Federally Regulated Financial Institutions*, 24 CAP. U. L. REV. 67, 129 (1995).

262. The Federal Reserve's regulatory order based on the source of strength doctrine does not identify which interaffiliate transactions have resulted in the decline of the banking subsidiary's capital. That order simply seeks to restore the financial institution's capital adequacy by readjusting a portion of the banking subsidiary's debt as equity, e.g. infuse the amount of capital into the banking subsidiary needed to meet the statutory requirement. FDIC IMPROVEMENT ACT, H.R. NO. 103-330, *reprinted in* 1991 U.S.C.C.A.N. 1901, 1917-1935.

263. This policy choice operates even when the parent company has become insolvent because the parent and subsidiary corporations are a single operation based on the realities of their corporate financial structure. *See* Havard, *supra* note 33, at 2409-10.

264. Emeric Fischer, *Banking & Insurance—Should Ever the Twain Meet?* 71 NEB. L. REV. 726, 771 (1992).

265. Three types of intercorporate guarantees exist: (1) a guarantee by a parent corporation or principal shareholder of a subsidiary's debt (a "downstream" guarantee); (2) a guarantee by a subsidiary of its parent's or principal shareholder's debt (an "upstream" guarantee); and (3) a guarantee by a corporation of an affiliated corporation's debt (a "cross-stream" guarantee). *See generally* Phillip I. Blumberg, *Intragroup (Upstream, Cross-stream, and Downstream) Guaranties Under the Uniform Fraudulent Transfer Act*, 9 CARDOZO L. REV. 685 (1987).

tends enterprise liability to the parent company's decision to fund an insolvent bank subsidiary.[266] To the extent that the parent company has engaged in the beneficial use of the bank subsidiary's deposit funds, its decision to pool enterprise resources to strengthen its financial condition is a protected business judgment.[267] The funding needs and uses of the bank subsidiary are justifiable diversions of group finances.

The questioned asset transfer should withstand an attack alleging violation of the business judgment rule because of the industry practice allowing bank holding companies to engage in inter-affiliate transactions. The financial decline of the bank subsidiary has several attendant losses. The reputation of the enterprise suffers if the bank subsidiary fails.[268] The interdependent bank and nonbank businesses deteriorate.[269] The business practices of the particular bank holding company demonstrates the frequency of the transactions within that enterprise. The nature of the relationship between the parent company and the bank subsidiary, prior to bankruptcy, ought to make the parent company's decision less vulnerable to shareholders' attack.[270]

D. *Limiting the FDIC-Receiver's Function*

The FDIC-Receiver has been highly successful in defending challenges brought by the trustee regarding the exercise of its discretionary powers. Arguably, Congress has camouflaged which body of law "trumps" or controls the procedural jurisdiction of the debtor parent company. A reasoned approach suggests that the two statutory schemes share the grant of jurisdiction.[271] By carefully parsing the statutory language, it appears that Congress has created equitable remedies that are congruent. The bank regulatory agencies are not subject to the automatic

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266. Lissa Lamkin Broome, *Redistributing Bank Insolvency Risks: Challenges to Limited Liability in the Bank Holding Company Structure*, 26 U.C. DAVIS L. REV. 935, 987 (1993).

267. *See* Gouvin, *supra* note 1; *see also* Partricia A. Mccoy, *The Notional Business Judgment Rule in Banking*, 44 CATH. U. L. REV. 1031 (1995); Heidi Mandanis Schooner, *Fiduciary Duties' Demanding Cousin: Bank Director Liability for Unsafe or Unsound Banking Practices*, 63 GEO. WASH. L. REV. 175 (1995); Mark David Wallace, *Life in the Boardroom after FIRREA: A Revisionist Approach to Corporate Governance in Insured Depository Institutions*, 46 U. MIAMI L. REV. 1187 (1992).

268. *See* Garten, *supra* note 14, at 371.

269. *Id.* at 362.

270. The interbank liabilities regulation which requires a bank to develop internal policies and procedures to control exposure in correspondent banking relationships provide bank directors with a safe harbor for the implementation of those policies. 12 U.S.C. § 250 (1994).

271. The Code's automatic stay provision does not address its interaction with FIRREA's bar of judicial intervention. The Second Circuit distinguished *MCorp* in *In re Colonial Realty Co. v. Hirsch*, 980 F.2d 125 (2d Cir. 1992), finding that there was no section 362 exemption available to the FDIC-receiver because the FDIC was suing for damages and recovery of property. The court reasoned that the debtor retains no legal or equitable interest in fraudulently transferred property. Thus holding that the automatic stay applied to the FDIC-receiver's efforts to exercise its powers to avoid asset transfers. *In re* Colonial Realty Co. v. Hirsch, 980 F.2d 125 (2d Cir. 1992); Carroll v. Tri-Growth Centre City, Ltd., 903 F. 2d 1266 (9th Cir. 1990).

stay because the stay occurs by operation of law.[272] The language of section 1821(j) prohibits a court from interfering with the powers and duties of the receiver. Yet, section 362, the automatic stay provision, does not require court action. Instead, the stay is merely activated to control litigation involving the debtor.[273] Therefore, since the stay is self-operating, it literally entails no court action, and thus, results in no violation of the anti-injunction power of the receiver under section 1821(j).

This interpretation, however, would require the FDIC-Receiver to pursue its claims, such as funding a capital maintenance obligation, against the debtor in the bankruptcy court, as suggested by the *MCorp* decision. This concurrent jurisdiction, applicable only to final agency actions, would result in the bankruptcy court's exercising final relief to the claims of the FDIC-Receiver.[274] The question then becomes whether the existing bankruptcy scheme provides an unacceptable frustration of the FDIC-Receiver's efforts to resolve the failure of an insolvent bank. In the terms of this article, the question becomes whether the claims process should govern the trustee's claims against FDIC-Corporate for fraudulent conveyances.

The receiver's grant of jurisdiction should not be equivalent to the bankruptcy court's jurisdiction in this context. The existing bank insolvency scheme invests the receiver with a dual status: successor and adjudicator. Not only is the receiver a fiduciary of the failed institution's assets for the protection of the creditors, the receiver is also a judge of the merits of those creditors' claims. This intrinsic conflict of interest requires a fairer process.[275] By enacting the banking exception, Congress could provide creditors with an objective, preliminary review of claims.[276]

The FDIC-Corporate receives priority status as an unsecured creditor whenever it must contribute funds due to a financial institution's insolvency.[277] Unsecured creditors receive the liquidation value of their

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272. Richard F. Hewitt, Jr., In Re Landmark Land Co.: *A Landmark Roadblock for Bankruptcy Courts v. Federal Regulators?*, 45 S.C. L. REV. 68, 78-79 (1993); J. Van Oliver & John Sparacino, *Chapter 11 and Financial Institutions: Super Powers and Super Problems for Banks, Regulators and Bank Holding Companies, in* Banking Law Series 1993 at 197 (PLI Comm. & Practice Course Handbook Series No. 651, 1993).

273. *In re* Colonial Realty Co., 980 F.2d at 137.

274. Roy C. Snodgrass, III & Shawna L. Johannsen, *Banking Law*, 46 S.M.U. L. REV. 935, 947-48 (1993).

275. *See supra* Part II.B.2. (discussion of administrative and judicial review of receiver's determination of claims).

276. As in the present bankruptcy scheme, a creditor could appeal to the appropriate federal district court for a review of the bankruptcy court's decision. *See supra* Part V.C.

277. The FDIC-receiver (receiver) usually chooses between two resolution methods. The receiver may choose to liquidate the failed institution and distribute the proceeds to creditors. *See* 12 U.S.C. § 1821(d)(2)(E) (1994). Or, the receiver may sell all or a portion of the failed institution to a healthy institution using a purchase and assumption transaction. § 1821(d)(2)(G) (1994). FIRREA requires that the FDIC use the "least costly alternative." 12 U.S.C. § 1823(c)(4)(A) (1994).

claims. Assumed creditors may receive full satisfaction of their claims.[278] The FDIC-Receiver decides whether to allow or disallow all claims, including secured and unsecured priority claims. The receiver's disallowance of a claim precludes judicial review of that claim.[279]

Both the Code and FIRREA are concerned with fair distribution and timely resolution of creditors' claims. Both the receiver and the bankruptcy court have a specialized expertise in winding up the affairs of failed businesses and entities. Both have a state policy objective of ensuring unity in that procedure. Although invested with similar powers and jurisdiction, neither is an expert at the other's job. The insolvency of a parent company that has made an asset transfer or capital maintenance payments in the year preceding its insolvency requires the skill of both.

Concurrent jurisdiction, to the extent that it directs a consistent, equitable review of such a claim, would resolve the dormant conflict. Both the bankruptcy court and the receiver should have jurisdiction to review de novo the claim by a parent company or its trustee that the transfer of funds to the bank subsidiary should be avoided. Other procedural matters should also be uniform, namely, the time deadlines for filing and the opportunity to appeal to the district court for a review of the determination.

The grant of jurisdiction to both the bankruptcy court and the banking receiver should be limited to a determination of the amount, not the validity of the claim. Both should be charged with evaluating the particular claim as it fits into the failure resolution process. Accordingly, if the FDIC has filed a cross-guarantee assessment, the capital maintenance obligation should operate as a "credit" against that liability. The Federal Reserve or OTS, the holding company regulators, would be responsible for filing a statement of outstanding liability whenever a parent company becomes bankrupt. This statement would document the outstanding liability under the guarantee plan as well as a schedule of past payments.

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278. *See* 12 U.S.C. § 1821(i)(2)-(3) (1994). The supplemental payments come from the Bank Insurance Fund, if the failed institution is a bank and from Savings Association Insurance Fund (SAIF) if the failed institution is an S & L. 12 U.S.C. § 1823(e) (1994).

279. 12 U.S.C. § 1821(d)(5)(E) (1994). To be proven, a claim must (1) be in writing, (2) have been executed contemporaneously by the depository institution and the claimant, (3) be approved by the board of directors or the loan committee of the institution and reflected in the minutes, and (4) have been kept continuously as an official record of the institution. 12 U.S.C. § 1823(e) (1994).

For claims proven to the receiver's satisfaction, FIRREA allows a claimant to seek administrative or judicial review within 60 days of the receiver's determination of the claim or 180 days of the date that the FDIC was appointed receiver, whichever is shorter. 12 U.S.C. § 1821(d)(6). FIRREA also directs the FDIC to establish procedures for expedited determination of time-sensitive claims as well as "low cost" and "expeditious" alternative dispute resolution procedures. *Id. See* Note, *Unsecured Creditors of Failed Banks: It's Not a Wonderful Life*, 104 HARV. L. REV. 1052, 1067-71 (1991) (arguing that FIRREA's liability limit provisions are an unnecessary power of the receiver, allowing the receiver to limit, arguably, parent company claims, given the cross-guarantee provision).

The receiver would have the responsibility of determining whether there has been compliance with the guarantee and providing the bankruptcy court with a certification of the amount of the offset against cross-guarantee liability.

To the extent that a parent company seeks to have the bankruptcy court provide equitable relief, the bankruptcy court should be barred. The operation of the automatic stay would unfairly forestall the resolution of a claim. The parent company ought to be estopped from challenging capital maintenance payments in the bankruptcy scheme. Allowing equitable relief at this juncture sanctions a detrimental change to the creditors of the bank subsidiary.

The assumption of a capital maintenance obligation by the parent company provides a basis for bankruptcy court jurisdiction because there is no issue about the enforceability of the obligation. A parent company's decision to recapitalize its bank subsidiary resolves the finality issue under the administrative process. In particular, the parent company that contests an obligation is challenging the amount, not the validity, of the obligation.[280]

The bank regulatory agencies have defended the claims against fraudulent conveyance by arguing that the transfers were made pursuant to valid regulatory orders.[281] This argument sanctions the transfers recapitalizing the bank subsidiary as a means of enforcing safe and sound banking practice.[282] However, without the banking exception as a predicate, this argument fails. The good faith exception cannot support a claim based merely on exercising the requisite authority. Even given valid regulatory orders, the exemption, under a traditional analysis, requires that the transferee show an exchange for value. In a parent-subsidiary relationship, that exchange requires solvency. Without the banking exception, the bankruptcy court, when called upon to review the receiver's determination, would not be able to sustain its decision based on valid exercise of regulatory authority.

Moreover, when there is an outstanding capital maintenance obligation, and the bank subsidiary and parent company become insolvent, the receiver files a proof of claim to recover the outstanding debt; the trustee files to recover past payments. In essence, because of the outstanding obligation, the parent company's estate is a debtor of the receivership. If the parent company's estate must satisfy any unfunded capital mainte-

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280. A parent company that is funding a capital maintenance obligation pursuant to the prompt corrective action provision, presumably, is not contesting the legitimacy of the obligation in the same manner that bank holding companies did under the source of strength or the net worth maintenance theories. *See supra* Part III.C.

281. *See supra* Part III.A (discussing BNE's trustee claims that transfers were fraudulent conveyances).

282. *See supra* Part II.A.2 (discussing 12 U.S.C. § 1818(i)).

nance obligation as a prerequisite to reorganization,[283] the parent company's status to the receivership may not require compliance with FIRREA's administrative claims process.[284] Yet, if the claim is resolved in the bankruptcy court, it may be disallowed, creating an unfair disadvantage for the creditors of the bank subsidiary.[285]

VI. CONCLUSION

Undergirding the body of banking laws are policies that Congress has adopted in order to protect the safety and soundness of the nation's banking system, including the taxpayer funded insurance fund. This system of federal regulation of the nation's financial institutions requires a parent company to either maintain the capital adequacy of its bank subsidiary or relinquish control. The effect of this obligation is to shore up the financial institution's capital and, in case of its failure, to decrease the amount that FDIC-Corporate must pay to insured depositors. A dormant conflict of policy and of law ensues when a parent company that has made the asset transfer also becomes insolvent. The formal priority scheme of the Code, designed to treat all creditors equally, clashes with the banking law's preferential treatment of the insurance fund as an unsecured creditor. The conflict raises a specific issue: When a bank holding company becomes a debtor after making an asset transfer pursuant to regulatory authority, can that transfer find protection in the bankruptcy scheme?

Although this conflict appears to beg the question as to which body of law should control, a closer examination of the banking laws reveals that Congress has made that choice. While recognizing bankruptcy's dual goals of protecting the debtor and ensuring equal treatment of all creditors, Congress, through the established cradle to grave regulation of financial institutions has given the public creditor—the insurance fund—more protection than any single private creditor.

Congress must fill the gap between its articulated policy choices and its existing legislation. A consistent regulatory scheme requires amending the current bankruptcy regime to protect from avoidance any asset transfer made by a now debtor parent company to its insolvent bank subsidiary. The provision would parallel the requirements of the Bankruptcy

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283. *See supra* Part III.C (discussing 12 U.S.C. § 365(o)).

284. *See supra* Part II.B.2 (discussing 12 U.S.C. § 1821(d)).

285. The trustee can thus prove the preference and, because the dividend is highly unlikely to result in payment of the claim in full, the FDIC's claim cannot be allowed. As those things go, not too bad a result for the estate. Another court has held in this situation that, by filing a proof of claim for the balance of the debt, the RTC availed itself of the privileges of the bankruptcy court, and that section 106(a) of the Bankruptcy Code created an independent ground for bankruptcy court jurisdiction. Richard F. Broude, *The Unstoppable Force Meets the Immoveable Object: FIRREA and the Bankruptcy Code, in* 17TH ANN. CURRENT DEVS. IN BANKR. & REORGANIZATION at 559 & 572-73 (PLI Comm. & Practice Course Handbook Series No. 715, 1995).

Code's good faith exception to the fraudulent conveyance provision by creating a separate exception for a banking enterprise asset transfer. Specifically, Congress should legislate procedures that banking regulators must comply with before requiring a debtor parent company to make asset transfers to a bank subsidiary. If the requirements of the exception are met, the assets supporting the transfer would be immune from an avoidance action. Legally, such a proposal may be the only way that the FDIC may avoid the fraudulent conveyance provision.

As in the BNEC bankruptcy proceedings, a bankruptcy trustee, in exercising its fiduciary obligation to distribute the estate for the benefit of all creditors, has an obligation to seek to avoid the transfer. Without a legislative change, a court reviewing the asset transfer must return it to the estate of the debtor for the benefit of the creditors. The concomitant result will be that a parent company that is not itself extremely well capitalized will be unwilling to make a capital infusion at all, particularly since that parent company also may face claims that its decision to shore up a capital-weakened bank subsidiary is violative of the business judgment rule.

Congress undoubtedly did not mean to discourage parent companies from making capital infusions. It may not have envisioned that a parent company that chooses to do so may itself become insolvent. The banking enterprise exception provides a basis for the asset transfer. It merges the two statutory schemes by balancing the policy interests of the two regulatory schemes while allowing the parent company to define its fair obligation to its capital-weakened bank subsidiary. FIRREA's seeming prohibition against judicial intervention and the Code's silence on the issue underscore the need for a more definitive approach that addresses the scope of administrative jurisdiction when a parent company with an outstanding capital maintenance obligation has filed for the protections of the bankruptcy process.

IF IT'S NOT JUST BLACK AND WHITE ANYMORE, WHY DOES DARKNESS CAST A LONGER DISCRIMINATORY SHADOW THAN LIGHTNESS? AN INVESTIGATION AND ANALYSIS OF THE COLOR HIERARCHY

LEONARD M. BAYNES*

One of my friends is a sportswriter, a liberal white guy—very active in social causes. He told me that he was unable to interview Celtic basketball player Robert Parrish in the locker room because Parrish was so dark that it was hard for him to approach Parrish![1]

I. INTRODUCTION

Many scholars in the social theory and anthropological fields tell us that race is often merely a political construction.[2] Many sophisticated individuals have discredited the Social Darwinist view of race as a biological concept.[3] Therefore, some have argued that race really no longer matters.[4]

 Professor of Law, Western New England College School of Law. B.S., 1979, New York University; J.D., 1982, Columbia University; M.B.A., 1983, Columbia University. I would like to acknowledge the help that my research assistants, B.J. Burke, Aleshia Days, and Silvia Perez, have given me on this project. I also want to thank my readers, Margarita Marin Dale, Chris Iijima, and Carlos Cuevas, for their insight. In addition, I want to thank outside readers Juan Roure, Tanya Kateri Hernandez, Kevin Johnson and my siblings—Ethel Richards, John Baynes, Keith Baynes, Pearl Baynes, and Carl Baynes—for their contributions and support throughout this project. I also want to thank the faculty, students, and staff at Western New England who completed the color survey. I especially want to thank my secretaries, Carmen Alexander, Nancy Hachigian, and Donna Haskins, who helped compile the data from the *Western New England College Survey of Attitudes and Beliefs About the Colors of Blacks and Latinos*. I am also grateful for the summer research grant received from Western New England College School of Law, which helped make this article possible.

1. Interview with Bruce Miller, Professor at Western New England College School of Law, in Springfield, Mass. (July 10, 1997). My colleague indicated that his white sportswriter friend was able to interview another black player, Cedric Maxwell, because he had a lighter complexion than Robert Parrish. The experience of Professor Miller's friend occurred some time in 1983-84.

2. *See* Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 LAW & INEQ. J. 7, 9, 23 (1997).

3. *See* John Teirney et al., *The Search for Adam and Eve*, NEWSWEEK, Jan. 11, 1988, at 46. *But see* RICHARD J. HERRNSTEIN & CHARLES MURRAY, THE BELL CURVE: INTELLIGENCE AND CLASS STRUCTURE IN AMERICAN LIFE 269-340 (1994); Arthur R. Jensen, *How Much Can We Boost IQ and Scholastic Achievement*, 39 HARV. ED. REV. 1 (1969) (indicating that the cause of low income and lower status is mainly nature, not nurture, and arguing that educational attempts should focus on teaching specific skills rather than boosting I.Q.).

4. *See generally* John O. Calmore, *Exploring Michael Omi's "Messy" World of Race: An Essay for "Naked People Longing to Swim Free,"* 15 LAW & INEQ. J. 25, 35 (1997) (describing race as an illusion); Omi, *supra* note 2, at 21-22 (indicating that some people view race as an illusion).

Many Critical Race Scholars have written extensively about abandoning the binary character of the Black[5]-White Paradigm.[6] Generally, these articles indicate that discrimination is not the exclusive province of African Americans, and highlight the fact that all people of color experience discrimination in the United States.[7] In addition, they note that discrimination can be based on things besides race, such as accent, language, gender, sexual orientation, income level and immigration status. Each member of a group bearing these indicia of social status faces discrimination in the United States.[8] If we were to superimpose each of these other indicia of social disadvantage on all people of color (whether they be African American, Asian American or Latino), however, the darker the person in each of these individual categories, the more likely he or she will experience discrimination by Whites. For example, many Critical Race Feminists have written that, because of their darker skin, they face different issues than White women.[9]

This article explores the complicated issues of colorism. Most people of color are of different shades and hues. Both Blacks and Latinos can be very light or very dark in appearance. This article explores the question whether darker-complected people of color face more discrimination than those who have lighter complexions. The article defines racism by a Dark-Light Paradigm replacing the older Black-White Paradigm. The Dark-Light Paradigm is still binary, but it is more expansive than the older Black-White Paradigm because it transcends race and ethnicity to include all those members of American society who have very dark skin in the dark category. The dark category would include many Black Americans and some dark-skinned Latinos.

Historically there has been more racial discrimination against darker-skinned persons.[10] This disparity in discrimination persists. Even

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5. This article uses the terms "African American" and "Black" interchangeably to describe people of African descent.

6. *See* Robert S. Chang, *Towards an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space*, 1 ASIAN L.J. 1, 27 (1994); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957, 962-63 (1995); Frank H. Wu, *Neither Black Nor White: Asian Americans and Affirmative Action*, 15 B.C. THIRD WORLD L.J. 225, 251-52 (1995). Several articles in the popular press have also noted that race relations are now more than just a Black-White issue. *See* Stanley Crouch, *Race Is Over*, N.Y. TIMES, Sept. 29, 1996, sec. 6 (Magazine), at 170-71; Tom Morganthau, *What Color Is Black?*, NEWSWEEK, Feb. 13, 1995, at 63.

7. *See* Ramirez, *supra* note 6.

8. *See* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implications of Making Comparisons Between Racism and Sexism (Or Other- isms)*, 1991 DUKE L.J. 397, 399-400; Trina Grillo, *Anti-Essentialism and Intersectionality: Tools to Dismantle The Master's House*, 10 BERKELEY WOMEN'S L.J. 16, 17 (1995).

9. *See, e.g.*, Kimberle Crenshaw, *Mapping The Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Grillo & Wildman, *supra* note 8; Grillo, *supra* note 8; Hope Lewis, *Between Irua and "Female Genital Mutilation": Feminist Human Rights Discourse and the Cultural Divide*, 8 HARV. HUM. RTS. J. 1, 38-46 (1995).

10. *See infra* Part IV.

now, surveys indicate that darker-skinned Blacks and Latinos earn less income and hold less prestigious employment positions than their lighter-skinned counterparts.[11] Whites, Blacks, Latinos, and Asian Pacific Americans share the perception that Whites discriminate more against the darker-skinned people of color (whether they are Black or Latino) than their lighter-skinned counterparts.[12] Perception often has a great deal to do with reality.[13] The income disparity between Blacks and Whites (or Latinos and Whites) parallels the income disparity between darker-skinned Blacks and lighter-complected Blacks.[14] The same is true for Latinos.[15] On average, lighter-complected Blacks and Latinos earn more.[16] These income figures suggest that Whites are discriminating more against darker-skinned people.

In the United States, a color hierarchy exists between and among people of color, which spans different racial and ethnic groups.[17] The premise is very simple and very clear: Lighter is better and darker is worse. Even if we all agree that race itself no longer matters, color will still be a problem because darkness casts a longer discriminatory shadow than lightness. A dark-skinned person of color[18] is likely to encounter more discrimination than his/her light-skinned counterpart.[19] In fact, one survey of African Americans showed that darker-skinned African Americans are twice as likely to report that they have been victims of

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11. *See infra* Part V.

12. *See* Leonard M. Baynes, Western New England College Survey of Attitudes and Beliefs About the Colors of Blacks and Latinos (1997) (unpublished survey on file with author) [hereinafter Baynes, Color Survey].

13. *See id.*

14. *See infra* Part V.C.

15. *See* Edward Telles & Edward Murguia, *Phenotypic Discrimination and Income Differences among Mexican Americans*, 71 SOC. SCI. Q. 4 (1990); *infra* Part V.D.

16. *See infra* Part V.C-D.

17. I agree that there is a certain solidarity between and among people of color. We all face discrimination, but it may manifest itself in different ways based on the stereotype. For example, the American culture, through the media, teaches us that Blacks are lazy, stupid and criminal; that Asian and Pacific Americans are hardworking foreigners who want to take our jobs; and that Latinos are lazy, stupid foreigners who do not want to learn to speak English and who immigrate to the United States for welfare handouts.

18. It is my opinion that this applies to Blacks and Latinos. The question of whether this premise holds true for dark-skinned Native Americans or Asian Pacific Americans is beyond the scope of this article; although I believe, that the farther an individual is from White standards of appearance, the more discrimination one is likely to encounter. In the *Western New England Color Survey*, one Indian women responded in the comment section:

> My ethnic origin is Indian (from India). I have a light-to-medium skin tone. Because I am considered to be quite fair, I have experienced favorable treatment among the Indian population. I am considered more attractive than darker-skinned females. In fact, my skin makes me more marriageable than darker-skinned Indian females. Generally, people in the Indian community are very conscious of skin tone. Skin tone for women is an important indicator of status.

See Baynes, Color Survey, *supra* note 12.

19. *See infra* Part V.C.

discrimination than those with lighter-skinned complexions.[20] Like darker-skinned Blacks, darker, more Indian-looking Mexican Americans also reported a significantly greater amount of discrimination than the lighter, more European-looking Mexican Americans.[21] The ABC news program *Nightline* ran a program highlighting a study demonstrating that lighter-skinned individuals were ascribed more "positive qualities and attributes" than their darker counterparts (which, in fact, were darkened photographs of the same person).[22]

This new Dark-Light Paradigm has several advantages over its predecessor, the Black-White paradigm. First, it is more expansive because it allows us to consider discrimination beyond that of African Americans. Second, it maintains a framework with which we are familiar in discussing discrimination, i.e., a paradigm based on a color continuum. This continuum is the way that Whites consider discrimination.[23] Third, it helps us explain why Asian Americans are viewed as the "model minority" since many Asian Americans from Northeast Asia are lighter in complexion than African Americans. Fourth, it allows us to consider, for affirmative action purposes, the employment of dark-skinned individuals who do not fit neatly into any particular racial category.[24] Fifth, it helps us to explain the phenomenon of passing whereby many light-skinned African Americans conceal their racial identity as Blacks, to work with, socialize with, and marry Whites.[25] Many Latinos also try to conceal their ethnic and or racial identity.[26] There is a comedy

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20. *See* Verna M. Keith & Cedric Herring, *Skin Tone and Stratification in the Black Community*, 97 AM. J. SOC. 760, 775 (1991).

21. *See* Carlos H. Arce et al., *Phenotype and Life Chances Among Chicanos*, 9 HISPANIC J. BEHAV. SCI. 19, 29 (1987); Edward E. Telles & Edward Murguia, *Phenotypic Discrimination and Income Differences Among Mexican Amercans*, 71 SOC. SCI. Q. 682 (1990).

22. *Nightline* (ABC television broadcast, Feb. 28, 1997).

23. Several years ago, I served on the Academic Standards Students Petitions Committee, which reviews the dismissal of students who were academically dismissed from the school. I advocated on behalf of a light-skinned Latino student. During the course of the discussion, it became clear to me that my white colleagues considered the student to be white and would only consider his ethnic status if he had been economically deprived or disadvantaged in some way.

24. *See, e.g.*, Leonard. M. Baynes, *Who Is Black Enough for You? An Analysis of Northwestern University Law School's Struggle Over Minority Faculty Hiring*, 2 MICH. J. RACE & L. 205, 209-12 (1997) [hereinafter Baynes, *Minority Faculty Hiring*] (discussing the faculty struggle over the hiring of Professor Maria O'Brien Hylton because of her mixed race and the student protest based on her Black Latina heritage and lack of identification with one particular race); Leonard M. Baynes, *Who Is Black Enough for You? The Stories of One Black Man and His Family's Pursuit of the American Dream*, 11 GEO. IMMIGR. L.J. 97, 113-24 (1996) [hereinafter Baynes, *One Black Man*] (discussing immigration of the author's ancestors from St. Vincent and Barbados to the United States and the discrimination that they faced from African Americans and Whites in the United States).

25. *See* JOEL WILLIAMSON, NEW PEOPLE: MISCEGENATION AND MULATTOES IN THE UNITED STATES 100 (1980); Renee Graham, *How Black Is Black?*, BOSTON GLOBE, Jan. 19, 1993, at 51.

26. "In addition, in other attempts to assimilate as [W]hite, some Latinos have Anglicized their Spanish surnames, declined to teach Spanish to their children, and married Anglos." Kevin

troupe in California called *Latinos Anonymous* that attempts to make fun of those Latinos who wear blue-colored contact lenses, change their names, and pretend that they are White.[27]

In Part II, this article examines the motivation for my interest in this project. In Part III, the article explores African American and Latino colorism, i.e., the internal workings of the color hierarchy in both of those communities. In Part IV, the article discusses and analyzes the biblical and historical references to dark skin. Part V of this article reviews and evaluates surveys that demonstrate that, on average, darker-skinned Blacks and Latinos have lower incomes, less education, and less prestigious jobs than lighter-skinned Blacks and Latinos. In Part VI, the article considers and analyzes the results of the *Western New England College Color Survey*[28] of attitudes toward skin color variations in the Black and Latino communities. This survey was completed by faculty, students, administrators, and staff at Western New England College. And finally, in Part VII, the article concludes that even if we move beyond the Black-White paradigm, we still have a Dark-Light paradigm with which we must contend.

II. THE ORIGINS OF THIS PROJECT

A. *Are Tyra Banks and Vanessa Williams Biracial?*

About two years ago I was chatting with a white woman friend at my health club. We were discussing a recent advertisement which showed model-actress Tyra Banks. My friend turned to me and said that she wished that she were a "mulatta"[29] like Tyra Banks. I said that I did not think that Tyra Banks was biracial, but she, like many Black Americans, had white ancestors. Another white woman friend came over and said that she thought that actress Terry Hatcher was very attractive because of her "dark" good looks. I asked her what she meant by "dark." She could not answer my question. So I asked her whether she thought that former Miss America/singer/actress Vanessa Williams was lighter or

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Johnson, *Some Thoughts on the Future of Latino Legal Scholarship*, 2 HARV. LATINO L. REV. (1997) (forthcoming); *cf.* Ramirez, *supra* note 6, at 964.

27. *See* Robert Chang, *The Nativist's Dream of Return*, 9 LA RAZA L.J. 55, 58 (1996).

28. *See* Baynes, Color Survey, *supra* note 12.

29. The words "mulatto" or "mulatta" historically referred to biracial people who were a mix of black and white. *See* Paul Knepper, *Race, Racism and Crime Statistics*, 24 S.U. L. REV. 71, 90 (1996). It is a Spanish term, which is derived from the word "mule." THE AMERICAN HERITAGE DICTIONARY 820 (2d ed. 1985). I think that in modern times, the image of the mule has evoked a very negative connotation. After all, a mule is the offspring of a horse and a donkey. *Id.* A horse connotes the attributes of beauty, grace, and speed. On the other hand, a donkey suggests ugliness, obstinacy, and slowness. It is not too hard to guess which racial stereotypes are being used to describe the interracial parents of the mulatto. In addition, mules can not produce offspring. *Id.* So it is again not surprising to me that biracial individuals would be historically referenced as a mule since there was a desire among Whites to prohibit race mixing and decrease the size of the mulatto population. *See* WILLIAMSON, *supra* note 25, at 7-11. In this article I use the term "mulatto" only when it is historically or culturally relevant.

darker than Terry Hatcher. My two friends said it was hard to tell since Vanessa Williams was biracial.[30] I said that I did not believe that she was biracial. We then asked maybe four or five white club members whether they thought Vanessa Williams was biracial. They all said "yes." I was very surprised. It suggested to me that these white people felt a great deal of comfort with Vanessa Williams; so much so, they are almost willing partially to accept her into the White race. It made me wonder about the issue of color and how it overlays the issue of race.

B. *My Family Experiences with Color*

I write about my family experiences because they shape who I am and I believe they are probably not that dissimilar to the experiences of other Blacks. The bottom line is that, for many Blacks, not only are we concerned about discrimination by Whites because of the color of our skin, sometimes we are also concerned about the discrimination we face by other Blacks.

As I have discussed in earlier essays, my parents immigrated from St. Vincent and the Grenadines to the United States many years ago.[31] Like most Blacks in the Western Hemisphere, both my mother and my father were from mixed race backgrounds.[32] My mother's family is mostly lighter in appearance. My father's family, on the other hand, ranges in color from light brown skin to dark skin. My father was a dark man and my mother was a light woman. As a consequence, my siblings range in color from light to dark. My skin color reminds me of the color of caramel candy. It is medium in tone. In the Caribbean it is called "brown skin," i.e, any color that is tawny, tan or brown.

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30. Vanessa Williams has said that both of her parents were Black. *See* Itabari Njeri, *Colorism in American Society, Are Light-skinned Blacks Better Off?*, L.A. TIMES, Apr. 24, 1988, at 1. When Ms. Williams won the pageant, the runner-up was also a black woman Suzette Charles. *Id.* Ms. Williams said that ironically, some Blacks thought that Ms. Charles was blacker than Ms. Williams and even thought that Ms. Williams was biracial when, in fact, it was Ms. Charles who was biracial. *Id.*

31. *See* Baynes, *Minority Faculty Hiring*, *supra* note 24, at 216 n.58; Baynes, *One Black Man*, *supra* note 24, at 113.

32. On average, people of African ancestry in the United States are approximately 20% white. *See* WILLIAMSON, *supra* note 25, at 192; *see also* Interview with Judy Scales-Trent, TONY BROWN'S JOURNAL (1995); Johni Cerny, *Black Ancestral Research*, *in* THE SOURCE: A GUIDEBOOK OF AMERICAN GENEALOGY 579, 579 (Arlene Eakle & Johni Cerny, 1984) (estimating that 75% of African Americans have at least one white ancestor and 15% have predominately white ancestry). Because many black women were sexually exploited and raped during slavery, most people of African ancestry in the Western Hemisphere have some white ancestry. It is also estimated that 27.3% of the Black population has Native American ancestry. *See* WILLIAMSON, *supra* note 25, at 125.

There was also a strata of definitions to describe the mixtures. For instance, a "mulatto" was a person who was half black and white. *Id.* at xii. A "quadroon" was a person who was one-quarter black. *Id.* An "octoroon" was a person who was one-eighth black. *Id.* A "griffe" was a person who was three-quarters black, and a "sacrata" was a person who was seven-eighths black. *Id.*

I do not really remember color to be an important factor in my immediate family or that my parents loved us children any differently based on our various skin colors. There are certainly some incidents that I heard about (or that I remember) that would make me believe that my parents were aware of the color differences. I relay these incidents hesitantly however, because my parents are both deceased and cannot fully explain them.

I have six siblings. My brother Carl is the sixth child and the darkest member of our immediate family. As I understand it, everyone but Carl was born light and as we grew up, we "browned up" to our mature complexion.[33] Carl was the only one who was born dark-skinned and reportedly his skin had a very grey-looking cast. Upon seeing Carl, it has been reported that my mother asked the nurse whether she was sure that Carl was her child. On its face this sounds like a rejection of my brother. But, another possible explanation for my mother's question may have been that she bore five children before Carl, and, at least in terms of complexion, none of them quite looked like him at birth. Presumably my mother was under anesthesia so she did not see Carl when he was first born. My mother may have been thinking that white people often misidentify black people. My mother might have wondered whether the white nurse was making the typical white person misidentification.[34] I do not know what my mother's real feelings were; but she loved all her children. She also told me that she felt that discrimination based on the darkness or lightness of a person's color was wrong.

When Carl was a teenager, he wore a shirt with cutoff sleeves to the dinner table. My father was furious, thought it was disrespectful, and told Carl that it was important for black men, especially *someone as dark as Carl*, to dress in an appropriate manner for dinner. My father believed that manner of dress was very important for black men—otherwise white people were not likely to respect black men and were likely to consider black men disadvantaged. A similar thing happened to me when I visited my father in St. Vincent. He told me that I should dress like "someone" when I travel. Unlike his discussion with Carl, my father did not comment on my skin color. My father's admonitions are not that different than other black men's stories about the importance of attire to combat

33. I believe that not all black babies go through this transformation. Some are indeed born close to their mature complexion. White readers need to think of it as analogous to babies who are born with blond hair. The hair of some of those children becomes very dark as they mature while some stay blond. Meanwhile, other white babies are born with hair closer in color to their darker, more mature color.

34. On the other hand, my mother may have been expressing a deep-seeded psychological desire for a lighter baby than Carl. My mother was a product of her time and probably realized that lighter skin had certain advantages in society.

one's darkness. Harvard Law Professor Charles Ogletree calls his suit a "uniform" which allows him to enter the White world more freely.[35]

When I travel to the Caribbean, I usually spend a lot of time in the sun.[36] One time I came back many shades darker than my untanned complexion (tanning from medium brown to dark brown in color.) My mother's initial reaction was disdain. She asked me, how could I do that to my skin? It was immediate disapproval. It had nothing to do with the fear of skin cancer because it was before that was an issue. It felt like she was asking me whether I was crazy for giving up the privilege of being lighter. I assured her that she should not worry because it would fade.[37]

C. *Other People's Reactions to Me and My Family's Color*

1. Black People

When my mother was in the hospital several years ago, my brother Carl and I visited my mother at the same time. A black orderly saw us together, looked at my mother, and asked Carl and me whether we were related. The orderly said that, if we were related, we must have different fathers. I was shocked and very angry. Despite the differences in skin color, Carl and I look very much alike.[38]

Several years ago, my cousin Cheryl's husband and I worked for the same company. Cheryl is very light-skinned.[39] Some of my black colleagues expressed surprise when they discovered that Cheryl is my cousin. One black person stared at me very hard and said that Cheryl and

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35. Carol Stocker & Barbara Carton, *Guilty . . . of being black*, BOSTON GLOBE, May 7, 1992 at 85.

36. When I was younger I dated a very dark-skinned woman. Her complexion had shimmering black color. My mother did not say anything. One younger female family member asked me: How could I date someone so dark? Why would I do that? I was very surprised by the comment especially from someone so young. *See infra* note 75 and accompanying text (indicating that most black men marry wives at least the same shade or lighter than themselves).

37. When I have come back from vacations several shades darker, the reaction of the Blacks that I encounter, including students and colleagues, often has been one of astonishment. One year, after I returned from the West Indies, one black student saw me, and his jaw literally dropped. He asked me, "What happened to you?" Then he tried to cover it up and said, "Maybe nothing happened, but I don't remember you being so dark!" Other black students and colleagues have not been so open, but I believe I know the subtext of what they are saying to me. Basically, it is the same thing that my mother probably would have said: "Why are you so cavalierly giving up your privilege of being lighter?"

38. Many people have commented that Carl and I even sound alike. In fact sometimes his wife, Shelia, cannot tell the difference in our voices until several words have emanated from our mouths.

39. In contrast, my sister Ethel is light-skinned like my mother. Ethel is the lightest member of my immediate family. She is probably just a few shades darker than my mother. I believe that her lighter coloring is one of the few physical characteristics that she has in common with my mother—otherwise I think she looks more like my father's family. However, I cannot tell you how many people say that she looks the most like my mother.

I looked nothing alike. Another person asked, "Why is Cheryl so light? Who is so light in your family?"

These incidents involve a person looking only at color to determine whether there is a resemblance between my family members and me. So often, it seems that some members of the Black community are really color struck and do not look beyond color.

2. White People

When I was in elementary school, one of my white classmates used to call me "Suntan." At the time, it did not bother me because there were a lot worse things that one could be called in an almost all-White Catholic school in Queens, New York. I remember one time my brother Keith picked me up from school and he heard the boy call me "Suntan." My brother was offended. Keith apparently thought that the boy was trying to say that I was not Black, and that by not defending myself, I was also denying my Blackness. Upon reflection, I do not think that was the other boy's or my motivation. The other boy probably felt that he was being descriptive of my complexion.

In the past, many white people have asked me why I, or many other Blacks, want to be called "Black" since our skin is not really black. I tried to answer their question by pointing out that their skin is not really white but they are still called "Whites." They usually get the point.

On other occasions when Whites come back from vacation with a suntan, they usually jokingly tell me that they are almost my color. Some of them really are! My sister Pearl told me that some olive-skinned white colleagues of hers, after tanning, have told her that they wished that they only darkened to Pearl's complexion, i.e., they wished that their skin did not get so dark in the sun. Maybe they realize with their darkened skin that they may be mistaken for a black person.

Several years ago, Professor Judy Scales-Trent gave a Clason lecture to the Western New England law faculty on the intersection of race and gender.[40] In her presentation, she talked about the blue-vein society and the paper bag test, which were used by light-skinned Blacks to exclude dark-skinned Blacks from churches, social, and civic organizations.[41] Several of my colleagues looked at me to ascertain whether I would meet the qualifications. I was very embarrassed.

These incidents point out how the color and the relative lightness and darkness of one's skin may play a role in one's life in the African American community and the broader community.

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40. Judy Scales-Trent, Clason Lecture at the Western New England College, School of Law (Nov. 21, 1991).

41. *See infra* note 46 and accompanying text.

III. AFRICAN AMERICAN AND LATINO COLORISM

For many Blacks, discussion of this Black-on-Black discrimination is still taboo.[42] I would imagine the same is true for Latinos. Internal discrimination is understood, but rarely discussed or investigated. I have been told that, by raising this issue, I am "running through a mine field carrying a live bomb."[43] Others have asked me, "Why are you doing this? Your conclusions will invariably divide the community and that means someone will lose!" I have also been told that: "You can't win with this project!" I have been told by others, "You're not dark! Why are you writing this?" So, in writing this article, I realize that I have to tread carefully. I see this as the first of a series of articles dealing with this issue of color. This article will discuss and analyze the issues. The next series of articles will explore different legal analysis to deal with the issues herein.

A. *African American Colorism*

African American society has its own discrimination, often light against dark, which sadly was modeled on the White against Black paradigm.[44] It was not uncommon for very light-skinned Blacks (sometimes

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42. *See* Graham, *supra* note 25.

43. At a recent American Association of Law Schools Property Law Conference, I went to dinner with several black people, some of whom were property law professors like me, some of whom were friends of one of my dinner companions. The participants ranged in color from very light to dark. After discussing this topic, I was told that I really liked to live life dangerously.

44. This intra-race discrimination based on color is illegal under Title VII. In *Walker v. IRS*, the court acknowledged the existence of intra-racial discrimination within the African American community based on skin color. Walker v. IRS, 713 F. Supp. 403, 407-08 (N.D. Ga. 1989). The *Walker* court held that an intra-racial discrimination claim brought by a light-skinned African American employee against her dark-skinned African American supervisor was actionable under Title VII of the Civil Rights Act of 1964. *Id.* at 406. "[T]he purpose of Title VII is 'to assure equality of employment opportunities by eliminating those practices and devices that discriminate on the basis of race, color, religion, sex, or national origin." *Id.*

Tracy Walker, a light-skinned federal employee at an Atlanta branch of the IRS, brought an employment discrimination suit against Ruby Lewis, her dark-skinned supervisor. *Id.* at 404. The *Walker* court first noted that the historical predecessor to Title VII was the Civil Rights Act of 1866 and 42 U.S.C. § 1981. *Id.* at 405. The *Walker* court explained: "The stated purpose of § 1981 is the protection of citizens of the United States in their enjoyment of certain rights without discrimination on account of race, color, or previous condition of servitude." *Id.* The court also noted that "[i]n fact, in a suit such as this one, the legal elements and facts necessary to support a claim for relief under Title VII are identical to the facts which support a claim under § 1981." *Id.* at 405. The *Walker* court observed that, in *McDonald v. Santa Fe*, the United States Supreme Court made "repeated reference" to the fact that section 1981 was to apply to citizens of "every race and *color*." *Id.* at 405 (emphasis added) (citing McDonald v. Santa Fe Trail Transp. Co., 427 U.S. 273 (1976)).

The *Walker* court also examined the Supreme Court opinion in *Saint Francis College v. Al-Khazraji* and found that it interpreted section 1981, "*at a minimum* [as reaching] discrimination against an individual because he or she is genetically part of an ethnically and physiognomically distinctive sub-grouping of homosapiens." *Id.* at 406 (emphasis added) (citing Saint Francis College v. Al-Khazraji, 481 U.S. 604 (1987)); *See also* Franceschi v. Hyatt Corp., 782 F. Supp. 712, 721 (D.P.R. 1992). The *Franceschi* court stated that:

> *Saint Francis* stands for the proposition that a person's physical appearance as a caucasian is not determinative in discrimination cases. It is the perception, by the

nicknamed the "blue vein society" because you could see their veins through their skin) to exclude dark-skinned Blacks from their clubs and activities based on skin color.[45] Other organizations would discriminate based on whether a person's skin color was lighter than a brown paper bag.[46] Many of these organizations have changed and now include African Americans of a wide rainbow of colors.[47] Those who have written in this area usually focus on the dysfunction in the Black community over

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> discriminator, of the discriminatee's race that is important for purposes of § 1981. Thus, *Saint Francis* obviates the need to determine the race or ethnicity of the discriminatee and focuses instead on the perception of that person by the discriminator.

Id. at 721 n.14.

In *Saint Francis*, the Supreme Court allowed a racial discrimination claim under section 1981 by one Caucasian of Arab ancestry against someone of the same "race," another Caucasian. *Saint Francis*, 481 U.S. at 607. The *Saint Francis* Court acknowledged that when Congress passed what is now section 1981, the protections were not limited only to groups who were considered racially distinct from the defendant. *Id.* This meant that although the Arab plaintiff was considered by current racial classifications as Caucasian, he could still maintain his section 1981 claim. *Id.*

Given this precedent, the *Walker* court observed that the relevant case law and statutes refer to race and color as separate and distinct from each other. Therefore "'race' is to mean 'race' and 'color' is to mean 'color.'" *Walker*, 713 F. Supp. at 406 ("To hold otherwise would mean that Congress and the Supreme Court have either mistakenly or purposefully overlooked an obvious redundancy."). The court further found that although *color* may be a rare claim, in certain contexts, *color* may be the most sensible claim to present. *Id.* at 406 (emphasis added); *See also* Felix v. Marquez, 1980 WL 242, at *1 (D.D.C. Sept. 11, 1980) (stating that "[c]olor may be a rare claim, because color is usually mixed with or subordinated to claims of race discrimination, but considering the mixture of races and ancestral national origins in Puerto Rico, color may be the most practical claim to present").

The *Walker* court did acknowledge the genuine and substantial difficulty that some courts have identified: the judiciary being placed in the "unsavory business of measuring skin color and determining whether the skin pigmentation of the parties is sufficiently different to form the basis of a lawsuit." *Id.* at 408. *See* Sere v. University of Ill., 628 F. Supp. 1543 (N.D. Ill. 1986). The *Walker* court held, however, that no matter how difficult a determination, discrimination based on color remains an issue of fact for the jury to decide. *Walker*, 713 F. Supp. at 408; *see Franceschi*, 782 F. Supp. at 712.

> But that is precisely the import of the decision: the recognition that physiognomic characteristics are no longer considered the indispensable magic recipient for a cause of action under the statute. Rather, it is the subjection of a person to intentional discrimination—because of the belief that he or she belongs to a given race—that renders such behavior actionable.

Id. at 724.

45. The *Walker* court taught us that intra-racial discrimination based on color by African Americans against each other is actionable. *Walker*, 713 F. Supp. at 408. But, like the White-against-Black form of discrimination, many victims of Black-against-Black discrimination are not likely to bring suit and are unlikely to have a remedy. Since many African Americans are economically powerless, they are not often in positions to discriminate. So much of the Black-against-Black discrimination is still in the social arena. Therefore, even though the *Walker* court acknowledged this unique form of discrimination, it does not give many of its victims a viable remedy.

46. My sister Pearl told me that growing up as a teenager in Queens in the 1960s, she went to a party sponsored by the local chapter of Jack and Jill. Jack and Jill was a club for mostly middle class young black kids. She was horrified that she had to pass the paper bag test, which entailed putting a brown paper bag next to her skin to see whether she was lighter. You see, light skin gained an individual entry into the club. Even though she was admitted, she felt that the club members were only interested in being friends with, and dating, people who were much lighter than she was.

47. One of my nephews who is dark-skinned is currently a member of Jack and Jill in New Jersey.

color. It seems as though they are saying: Look, they even discriminate against themselves.

Much of this intra-race discrimination stems from internalized White discrimination, and the fact that who was Black was defined by the law of hypodescent.[48] In the vernacular, it is known as the "one drop" rule. It did not matter how white you looked; if you had any black ancestry, you were Black.[49] As a result, only the white race remained pure, everyone else was contaminated by black ancestry.[50] It is a very racist rule and undermines our ability to be colorblind today.[51]

African American society reproduced the same type of discrimination that White society spawned, i.e, light over dark. Some of the discrimination is also based on the maximization of advantage by some light-skinned Blacks. They might have felt that they did not want to share the little that they had with anyone else, including the darker-skinned peers. There also may be some resentment by the darker-skinned Blacks over the lighter-skinned Blacks. The lighter-skinned Blacks were descended from the slavemaster. As a result, they may have some historic advantages. They worked in the master's house as opposed to the field. The house slave presumably had a more cushiony job than the field hand.[52] By being in the house, the house slave was more likely to learn the master's ways. In addition, by being the master's offspring, the house slave was more likely to be educated and might even be emancipated by the master.

In fact, "historical evidence indicates that [W]hites placed greater economic value on slaves of mixed parentage and used skin tone or degree of visible white ancestry" as a means to determine the kind of treatment the slave would receive.[53] Biracial slaves "brought the highest prices on the slave market, and the white aristocracy preferred light-skinned Blacks for personal service. . . . White males were more likely to select light-skinned female slaves over darker ones for sexual unions."[54] Whites believed that "[B]lacks with white ancestry were intellectually superior to those of pure African ancestry."[55]

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48. *See* Neil Gotanda, *A Critique of "Our Constitution is Color Blind,"* 44 STAN. L. REV. 1, 24 (1991). *But see* Christine B. Hickman, *The Devil and the One Drop Rule: Racial Categories, African Americans, and the U. S. Census*, 95 MICH. L. REV. 1161, 1196-97 (1997) (articulating the view that the one drop rule may facilitate a certain amount of cohesion in the African American community).

49. Gotanda, *supra* note 48, at 24.

50. *Id.* at 26.

51. *Id.* at 26-27.

52. *Id.*

53. Keith & Herring, *supra* note 20, at 761-62.

54. *Id.* at 762.

55. *Id.* My mother once told me a story about her grandmother—Granny—who was biracial. When my mother's family was in the United States, one of my mother's aunts—Auntie—became sick. Auntie was treated by a white physician in New York City. Granny wrote a highly critical note

The lighter-skinned Blacks "were conscious of the distinctions between themselves and darker slaves" and may have indeed believed that their lighter skin (and white ancestry) made them superior.[56] Others may not have bought into this White ideology, but must have realized that they had certain advantages over the darker-skinned Blacks.

Some of the tensions between the two groups stem from this historic advantage and the desire by some of the lighter ones to preserve this advantage. Biracial Blacks were "over represented in the free Black population and under represented among slaves."[57] By 1850, biracial Blacks "made up 10-15% of the total Black population, 37% of all free Blacks and 8% of slaves."[58] The majority of prominent Blacks were at one time biracial;[59] they often married biracial spouses, and as a result passed their light complected advantage on to their light children. "Research conducted before and during the Civil Rights Movement suggested a continuing relationship between variations in skin tone and life chances . . . of [African] Americans. [Light]-skinned Blacks had higher levels of attainment than darker Blacks on virtually every dimension of stratification."[60] In the twentieth century, more darker-skinned Blacks moved into the upper rungs of Black society. This can be attributed to the increased education as well as the intermarriage of some darker-skinned Blacks into old-line biracial families.[61] It also resulted from increased expansion of the black middle class during the 1960s.[62] In addition, there was the development of social pride in being Black, i.e., "Black is Beautiful!" and the distinctive contributions of black music, literature, and history to the American society. But studies show that light skin still has certain advantages.

These days, the discrimination in the African American community is often dual-sided: light versus dark, and dark versus light. In the film "School Daze," which takes place on an all-Black college campus, Spike Lee underscores this duality and divides the students into two groups: the wannabes (more often light-skinned, and middle class) who are members of fraternities and sororities; and the jigaboos (more often dark-skinned, and from lower economic background) who were often members of

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to the physician disparaging his care of Auntie. The white physician, in a huff actually, came to my mother's house and said to Granny: "I should have expected that a mulatta women would write me such a letter!"

His comments suggest a grudging respect for my great-grandmother. His comments seem also to suggest that she stood up for herself and could write a well-thought out letter only because she was half-white.

56. *Id.*

57. *Id.* at 763.

58. *Id.* In Louisiana, biracial Blacks constituted 80% of the free population. *Id.*

59. *See generally* WILLIAMSON, *supra* note 25 (citing numerous biracial blacks including: Frederick Douglass, Booker T. Washington, Walter White, Langston Hughes, W.E.B. DuBois).

60. Keith & Herring, *supra* note 20, at 761.

61. *Id.* at 764.

62. *Id.*

Black militant groups.[63] In the film, it was evident that the two groups despised and intimidated each other.[64]

I, in fact, did not realize the magnitude of the anti-light sentiment in the American Black community until I was involved in interviewing an African American candidate for a position at the law school. One of the candidates was very light-skinned. Some of the students of color viscerally opposed the black candidate solely on the basis of the candidate's very light skin. Although the candidate had other issues that concerned the students,[65] the students did not focus on those other issues as much as the candidate's lightness. On some levels, I understood the students' concern. Ideally, a black faculty member's appearance should leave no questions as to his/her racial identity. However, Blacks are not monolithic in appearance. We run the color spectrum from white[66] to black. And if we use such rigid and narrow guidelines based solely on appearance, we may lose a lot of good people.[67] Hiring only dark-skinned African Americans does not ensure that you will employ someone who represents the mainstream Black perspective.[68]

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63. SCHOOL DAZE (Forty Acres and a Mule Filmworks 1988).

64. *Id.* I have at least one very light-skinned relative who was discriminated against in a job interview by a dark-skinned African American. The interviewer saw that my relative was active in Jack and Jill and assumed that she was one of the people who prevented her from joining in the past. She told my relative: "Now I am going to discriminate against you!"

65. The candidate expressed concern about the burdens of mentoring students. This expression of concern worried the students that the candidate would not be available to them. The candidate was mostly concerned about, and wanted to avoid, the extra burdens that academic institutions put on faculty of color before they get tenure. In addition, the candidate was from a very middle class background, so the students worried that the candidate may not be able to relate to them.

66. "John Blassingame noted that in Louisiana in the late nineteenth century, . . . racial intermixing had proceeded so far that it was simply impossible to tell on sight whether some people were white or black." WILLIAMSON, *supra* note 25, at 98 (citing JOHN BLASSINGAME, BLACK NEW ORLEANS 201 (1973)). In 1932, Caroline Bond Day did a study of more than 2,500 individuals belonging to families of mixed blood. CAROLINE BOND DAY, SOME NEGRO-WHITE FAMILIES 9-11 (1932). She found that Blacks who were more than half-Black were clearly so. *Id.* at 9. She said that it was impossible to approximate fractions on sight. *Id.* She divided biracial Blacks into two categories: (1) recessive—those that displayed an array of purely African characteristics that made them appear more African than they were; and (2) dominant—those who were more white in appearance. *Id.* at 10. She found that those who were one-fourth black tended not to have any more than one dominant African feature, i.e, tightly-curled hair, dark skin, or broad facial features. *Id.* She found that those who were one-eighth black were very white in color. *Id.*

67. *Cf.* Baynes, *Minority Faculty Hiring*, *supra* note 24, at 221-23.

68. For instance, although the Honorable Clarence Thomas, Associate Justice of the United States Supreme Court, is very dark-skinned, many African Americans would consider him "white" because of ideological and political perspectives. *See* Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363, 370 (1992) Bell states that:

> The addition of Judge Clarence Thomas to the [Supreme Court], as the replacement for Justice Thurgood Marshall, is likely to add deep insult to the continuing injury inflicted on civil rights advocates. The cut is particularly unkind because the choice of a [B]lack like Clarence Thomas replicates the slave masters' practice of elevating to overseer and other positions of quasi-power those slaves willing to mimic the masters' views, carry out orders, and by their presence provide a perverse legitimacy to the oppression they aided and approved.

Today, there seems to be a preference for brown skin rather than skin tone that is either too light or too dark.[69] Many believe that the entire Black population in the United States has become lighter over the generations.[70] In 1927, Gustavas Steward asserted that the groups of Blacks had become noticeably lighter in the preceding twenty-five years.[71] He thought that brown was the prevailing hue.[72] Historian Laurence Glasco studied photographs of students graduating from Howard University during the years 1912 to 1972 to determine the degree which the skin colors of Blacks changed.[73] He noted a drop in both the very light and very dark students, and an increase in the students with brown skin. This lightening of Blacks has probably resulted from marriages between biracial Blacks and darker-skinned Blacks after the Civil War.[74] Studies have shown that black men, "especially those who were successful, generally married women lighter than themselves. Melville J. Herskovits in samplings derived from Howard University students and Harlem citizens found . . . 56.5[%] of the women were reported as lighter than their hus-

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Id.; *see* A. Leon Higginbotham, Jr., *Justice Clarence Thomas In Retrospect*, 45 HASTINGS L.J. 1405, 1427-28 (1994) ("[T]he very fact that [Justice Thomas] so consistently votes against the best interests of African-Americans reveals a great deal about his sense of racial identity and his lack of racial self-esteem. Those votes suggest that there are many aspects of racial self-hatred that sometimes trigger the perverse conclusions he reaches."); A. Leon Higginbotham, Jr., *An Open Letter To Clarence Thomas*, 140 U. PA. L. REV. 1005, 1014 (1991). Higginbotham expresses concern that Justice Thomas's criticisms of civil rights organizations:

> may have been nothing more than [his] expression of allegiance to the conservatives who made [him] Chairman of the EEOC, and who have now elevated [him] to the Supreme Court. But [his] comments troubled me then and trouble me still because they convey a stunted knowledge of history and an unformed judicial philosophy.

Id.; *see* Catharine Pierce Wells, *Clarence Thomas: The Invisible Man*, 67 S. CAL. L. REV. 117 (1993) (seeing Thomas as a "man who has suffered many forms of racial abuse and who has tried to avoid the pain of this abuse by 'living in his head'"); *see also* JANE MAYER & JILL ABRAMSON, STRANGE JUSTICE: THE SELLING OF CLARENCE THOMAS 175 (1994) (indicating that thirty percent of African Americans "branded" Clarence Thomas an "Uncle Tom"); Jack E. White, *Dividing Line*, TIME, June 26, 1995, at 36 (calling Clarence Thomas "Uncle Tom Justice").

69. WILLIAMSON, *supra* note 25, at 191.

70. *Id.* at 118.

71. *Id.* (citing Gustavas Steward, *The Black Girl Passes*, 6 SOC. FORCES 99, 99-103 (1927)).

72. Steward, *supra* note 71, at 99.

73. WILLIAMSON, *supra* note 25, at 190 (citing Laurence Glasco, *The Mulatto: A Neglected Dimension of Afro-American Social Structure*, paper given at the Convention of the Organization of American Historians, 23-26, 38 (Apr. 17-20, 1974)).

> [B]etween 1923 and 1931 the percentage of [very] light men dropped from 14 percent to 4 percent and among women the percentage fell from 39 percent to 18 percent. [Very] dark students dropped by similar percentages. The males fell from 60 percent in 1923 to 38 percent in 1931, while among women the corresponding decline was even more drastic from 29 percent to only 8 percent. The proportion of brown men increased from 26 percent to 58 percent, and brown women rose from 32 percent to 74 percent. A generation later, between 1947 and 1953, light women declined from 17 percent to 3 percent.

Id. As of the 1970s, light women and men did not constitute more than 2%, the very dark students fluctuated widely but never rose higher than 38% of the class for men and 29% for women of the Howard University classes. According to the author, the Howard University students were predominately brown in complexion. *Id.*

74. WILLIAMSON, *supra* note 25, at 118.

bands, while about 14[%] were the same and about 29.5[%] were darker."[75]

Consequently, a brown skin color is believed to be the "somatic norm image" for Black Americans.[76] "Somatic norm image" means a "complex of physical (somatic) characteristics which are accepted by the group as its norm and ideal." "Norm" refers to the use of the image as a measure of "aesthetic appreciation"; "ideal" refers to the fact that no one embodies that image perfectly.[77]

B. *Latino Colorism*[78]

Latinos in the United States are diverse group ranging in color (like Blacks) from white to black in complexion[79] and originating from four primary cultures.[80] The Latino conception of who is White differs[81] from

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75. *Id.* (citing MELVILLE J. HERSKOVITS, AMERICAN NEGRO 62-66 (1968)).

76. HANS HOETINK, THE TWO VARIANTS IN CARIBBEAN RACE RELATIONS 120 (Eva M. Hooykaas trans., 1967).

77. *Id.* This preference for a brown-skin complexion is evidenced by the fact that 100% of the Blacks surveyed in the *Color Survey* rated O.J. Simpson's coloration as medium on a scale of very light to very dark. *See infra* note 228 and accompanying discussion.

78. Although my family roots are in the Caribbean, St. Vincent and the Grenadines are a former British colony and an anglophone country. There was much migration among the Caribbean countries; for instance, my paternal grandfather Joseph Wellington Baynes cut sugar cane in Cuba and my maternal great grandfather Charles Bell went to Panama to work on the Panama Canal. I also have distant cousins on my father's side who live in Venezuela. However, I was not raised in a Spanish-speaking household, which makes a big difference in my cultural perspective. Therefore, my observations are not informed by being a part of the Latino culture.

79. The census does not compile information on the racial breakdown of the Latino population. United States Bureau of the Census, CENTURY OF POPULATION (1909). Experts agree that most Latinos are of mixed racial heritage. WILLIAMSON, *supra* note 25 (citing Gary A. Greenfield & Don B. Kates, Jr., *Mexican Americans, Racial Discrimination and the Civil Rights Act of 1866*, 63 CAL. L. REV. 662, 683, 700 n.197 (1975)).

80. Berta Esperanza Hernández Truyol, *Building Bridges—Latinas and Latinos At The Crossroads: Realities, Rhetoric And Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 385-86 (1994). Latinos currently comprise 22 million people, constituting 9% of the total United States population. The places of origin that they primarily emanate from are: (1) Mexico, 12.6 million persons, constituting 62.6% of all Latinos; (2) Puerto Rico, numbering 2.5 million, or 13% of all Latinos; (3) Central America or South America, also totalling 2.5 million, or 13% of Latinos; and (4) Cuba, 1.1 million, or 5.3% of Latinos. *Id.* The balance, 7.8% of the U.S. Latinos, either have their origins in Spain or do not identify from which place of origin they came. *Id.* at 386-87. Recently, many people from the Dominican Republic have emigrated to the United States; it is estimated that there are now 625,000 Dominican Americans in the United States. Interview with Embassy of the Dominican Republic, in Washington, D.C. (Oct. 21, 1997). Many live in the New York City area. *Id.*

81. These different standards of self-identification sometimes lead to a schism between the African American and Latino communities. In her article *Building Bridges*, Professor Hernández Truyol discusses the case in south Florida in which a Colombian American police officer was charged with killing two African American motorcyclists. *Id.* at 420-22. The shooting led to extensive rioting. The police officer was tried and convicted the first time in Dade County. *Id.* at 421. The Florida Court of Appeals ordered a new trial because the police officer's motion for a change in venue was denied by the trial court. *Id.* The appellate court found that there was uncontroverted evidence that "the case could not then be fairly tried in Dade County." *Id.* The court found that the community and the jury were "justifiably concerned with the dangers which would

U.S. historical and cultural notions, wherein if you had one drop of black "blood," you were considered Black.[82]

It is estimated that only 3% of Latinos designated themselves as Black; 95% designated themselves as White.[83] This racial self-identification as "White" corresponds with the disappearance of Blacks and people of mixed race ancestry in the Puerto Rican census between 1899[84] and 1950.[85] Professor Hernández Truyol notes that these figures are "interesting given that 'as a matter of fact most Latinos are racially mixed, including combinations of European [W]hite, African Black, and American Indian.' Thus it is very unlikely that the [Latino community] is 95% or 97% 'white' by [U.S.] standards."[86] The situation in Puerto Rico coincided with Mexican protests that ensued over the 1930 U.S. census, which "presumed Mexicans to be non[-]white unless 'definitely white.'"[87] As a result, in the 1950 census, Mexican Americans were classified as white.[88] In addition, the Office of Management and Budget Statistical Directive No. 15 classified Mexican Americans as white.[89] In fact,

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follow an acquittal but which would be obviated if . . . the defendant was convicted." *Id.* "The fear that a response to a 'not guilty' verdict would result in an eruption of violence is an 'impermissible factor' and thus it was error to deny the request for a change of venue. Such failure to grant change of venue thus mandated reversal and a new trial." *Id.* Professor Hernández Truyol noticed that "the available newspaper accounts of the trial generally described the police officer by name" and his job. *Id.* Only a few reports mentioned that he was Colombian American. *Id.* at 422. "At least one press report described [the police officer] as white; none described him as Latino." *Id.* Professor Hernández Truyol described the media's message as clear: the police officer was a "good guy," a "white knight", a "protector of the people." *Id.* On the other hand, the media portrayal of the motorcyclists was filled with negative stereotypes and "bad guys." *Id.* "The implicit message was that the black motorcyclists 'were up to no good'." *Id.* Another possibility is that the Colombian American looked "European" and therefore, "White." He may in the eyes of the media or public not have looked obviously "Latino."

82. *Id.* at 384 n.54.

83. *Id.* (citing GERARDO MARIN & BARBARA VAN OSS MARIN, RESEARCH WITH HISPANIC POPULATIONS 2 (1991)).

84. Puerto Rico, Cuba and the Philippines became U.S. possessions after the U.S. victory in the Spanish-American War. In 1902, Cuba became independent. The Treaty of Paris ratified Puerto Rico's annexation, provided that Congress would define the political and civil rights of the people of the island. In that year Congress made the Puerto Rican people U.S. citizens through the Second Organic Act of 1917, known as the Jones Act. In 1952, Puerto Rico achieved commonwealth status.

85. *See* JOSE A. CABRANES, CITIZENSHIP AND THE AMERICAN EMPIRE 97 n.475 (1979). This process of racial self-identification (as "White") is called *blanqueamiento*, or whitening. EDUARDO SEDA BONILLA, REQUIEM POR UNA CULTURA 52 (1970).

86. Hernández Truyol, *supra* note 80, at 384 n.54 (quoting MARIN & MARIN, *supra* note 83, at 2 n.76); *see* Juan F. Perea, *Los Olvidados: On The Making of Invisible People*, 70 N.Y.U. L. REV. 965 (1995).

87. Greenfield & Kates, *supra* note 79, at 683, 699 n.197.

88. George A. Martinez, *Mexican Americans and Whiteness*, *in* CRITICAL WHITE STUDIES: LOOKING BEHIND THE MIRROR (Richard Delgado & Jean Stefanic eds., 1997) (citing LEO GREBLER ET AL., THE MEXICAN-AMERICAN PEOPLE 601-02 (1970)).

89. Transfer of Responsibility for Certain Statistical Standards from OMB to Commerce, 43 Fed. Reg. 19,260, 19,269 (Department of Commerce 1978) (reissuing Office of Management & Budget's standards as the operating standards of the Department of Commerce). One would have expected this white designation to have afforded a certain status on Mexican Americans, but they

many Mexican Americans sought white designation because of the rampant discrimination that they faced if they were identified as Indian.[90] When the United States conquered the Southwest, the government passed laws segregating and severely discriminating against Native Americans.[91] As a result, many Mexican Americans sought and were accorded the illusory status of "honorary White."

Some scholars have stated that the Latin world used a system of mulatto "co-optation," which caused darker-skinned Blacks and Native Americans to stay on the bottom of society.[92] This system of mulatto co-optation was learned from the Arabs who introduced black Slavery to the Iberian peninsula.[93] Arab harems were comprised of African concubines, and domestic service was performed by an inordinate number of Blacks.[94] Like race mixing in United States slavery times, race mixing was rampant in the Arab world, and was usually a one-way affair between Arab males and black women.[95] "These 'mulattoes' were accepted into Arab society provided they became fully Arabicized and . . . Islamicized."[96] "*Mulattoization*" was a process that led from slavery to freedom.[97] "Religious conversion, the adoption of Arab ways, language and prejudices were the corollaries of mulattoization . . . . [B]lacks became integrated into Arab society" as Arabs—not as Blacks.[98] "'Mulattoes' . . . gained full . . . acceptance in Arab societies . . . as '[W]hites.'"[99]

It is argued that the olive-skinned Arabs, who are products of ancient Black-White mixtures,[100]

> were . . . in no position to draw a strict color line against the 'mulatto' without endangering the stability of their own class/color [caste] system. The 'mulatto' was too close in appearance (features) to the 'pure white' Arab population for him not to be included as a bona fide

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experienced many of the same discriminations that African Americans confronted, such as exclusion from public facilities, neighborhoods, and employment opportunities. Martinez, *supra* note 88.

90. *See* Martha Menchaca, *Chicano Indianism: A Historical Account of Racial Repression in the United States*, 20 AMER. ETHNOLOGIST 583 (1993).

91. *Id.* Since many Mexican Americans are Mestizos, i.e., of Spanish White and Indian mixtures, these laws had a devastating effect on these populations. *Id.*

92. Carlos Moore, *Afro-Cubans and the Communist Revolution*, *in* AFRICAN PRESENCE IN THE AMERICAS 206-07 (Carlos Moore et al. eds., 1995); *see* Abdias Do Nascimento, *The African Experience in Brazil*, *in* AFRICAN PRESENCE IN THE AMERICAS 101-05 (Carlos Moore et al. eds., 1995).

93. Moore, *supra* note 92, at 207.

94. *Id.* at 206.

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 207.

99. *Id.*

100. *Id.*

> member of the dominant race. A system of mulatto 'co-optation' into the dominant group[101]

became the norm for Black-White relations in Latin America.[102] And for the same reason, mulattoes became "White" Latinos. The race mixing in Latin America was required since the conquest of Latin America involved mostly military men.[103] The unions of white men and native or black women came about because of circumstances—the absence of white women.[104] These circumstances also directed the black men toward native women.[105]

Belief in Black inferiority is ingrained in both the White and mulatto Latino society.[106] And this belief in inferiority has contributed to Blacks and native peoples being at the lowest caste in many Latin American countries. Some have suggested that calling the region "Latin America" demonstrates the racial oppression in the region.[107] Use of the term "Latin America" illustrates how the European conquerors forced their cultural and ethnic identity onto the native people as well as onto the Blacks who came from Africa. Meanwhile, the whitening of the mulattoes of Latin America is used as proof positive of Latin anti-racism.[108]

In Mexico, a great deal of mixing occurred between the Spaniards and Native American populations and some African Blacks.[109] "The term 'Mestizo' meant half-Spanish and half-Indian."[110] It eventually "came to refer to the entire mixed population regardless the degree of mixture."[111]

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101. *Id.*

102. *Id.*

103. Jose Carlos Luciano Huapaya, *The African Presence in Peru, in* AFRICAN PRESENCE IN THE AMERICAS, *supra* note 92, at 125.

104. *Id.*

105. *Id.*

106. Moore, *supra* note 92, at 210; *see* Bassette Cayasso, *Afro-Nicaraguans Before and After the Sandinista Revolution, in* AFRICAN PRESENCE IN THE AMERICAS, *supra* note 92, at 193 (reporting that a Sandinista leader called the Black Creoles "stupid, ignorant, illiterate monkeys who only lacked tails so that they can be hunted down and shot like animals"); Quince Duncan, *The Race Question in Costa Rica, in* AFRICAN PRESENCE IN THE AMERICAS, *supra* note 92, at 136-37 ("A good Costa Rican should defend the purity of 'our' white race.") (quoting anti-Black articles appearing in the press); *see also* F. JAMES DAVIS, WHO IS BLACK? 88-104 (1991).

107. Nascimento, *in* AFRICAN PRESENCE IN THE AMERICAS, *supra* note 92, at 98.

108. At the Second World Festival and African Arts and Culture, held in Lagos, one member of the Brazilian military dictatorship's delegation stated:

> the predominance of the white portion [in the population] is evident, since in Brazil, even though those of mixed race who have a small or large amount of Black or Indian blood, but without one of these group's physical traits, are considered [W]hite. Which demonstrates the absence of any discrimination of racial nature, in terms of the person's ethnic origin.

Id. at 103 (quoting MANUEL DIEGUES JUNIOR, A AFRICA NA VIDA E NA CULTURA DO BRASIL) (published by the official Brazilian delegation to Festac 77 and distributed in book form at the Festac Colloquium).

109. DAVIS, *supra* note 106, at 88.

110. *Id.*

111. *Id.*

Colonial Mexico under the Spaniards had a fixed caste system with a detailed ranking of racial categories.[112]

> During . . . Spanish rule, the Mestizos occupied a middle status position while the Indians were on the bottom of the ethnic status ladder. . . . The lighter Mestizos were given preference by the Spanish, and there developed a structure of status . . . based on skin color and the degree of Spanish ancestry. . . . The 'Mestizos took pride in their Hispanic ancestry and tried to deny their Indian backgrounds.[113]

The Mestizos now govern Mexico, and the pure Indian people have remained on the bottom of society.[114]

Bolivia was very similar to Mexico. During the Spanish colonial rule, a caste of twenty-three racial categories was established.[115] The Catholic Church generally kept three separate sacramental registries based on race—for Whites, mixed race, and Indians.[116] During the Spanish Conquest, there were few white women, and this resulted in unprecedented race mixing between Whites and the Native American population.[117] Like in Mexico, European Whites in Bolivia were at the top of the hierarchy, Mestizos were in the middle, and Indians were at the bottom.[118]

Today, Bolivia has a small White population, primarily of Spanish descent, a large Mestizo population (also known as *Cholos*), and a very large Indian population.[119] The Mestizos have generally achieved higher status than the Indian population in Bolivia.[120] The Bolivian White population is generally more European in appearance, but only a few can

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112. *Id.* at 89.

113. *Id.*

114. *Id.*

115. CARMEN BERNAND, LOS INCAS, PUEBLO DEL SOL 159-61 (1991) (citing MAGNUS MORNER, LE METISSAGE DANS L'HISTOIRE DE L'AMERIQUE LATINE (1971)).

116. *Id.* at 161.

117. *Id.* at 159.

118. *Id.* This conclusion can be reached by recognizing the nomenclature was hierarchical in nature—from "most preferred White" to "least preferred" Black. *Id.*; *see also* CHARLES ARNADE, BOLIVIAN HISTORY 34 (1984) (stating that the native Indians "have been the lower classes for centuries" and "have been the victims of harsh exploitation").

119. The population of Bolivia is approximately 55% Indian, 28-30% Mestizo, and 10%-15% White, mainly of Spanish descent. FUNK AND WAGNALLS ENCYCLOPEDIA (Infopedia Future Vision Multimedia 1995). The Indians generally follow the ways of life of his or her ancestors, dressing in traditional handmade garb and often speaking the native Indian language such as Quechua or Aymara. ARNADE, *supra* note 118, at 40. The Indian usually has a dark complexion. Like the Indian, the Mestizo often has a dark complexion and noticeable Indian features, but speaks Spanish and wears Western clothing, distinguishing him or her from the Indian. *Id.*

120. The Mestizo or *Cholo* is part of the rapidly growing middle class. ARNADE, *supra* note 118, at 40. He or she is often the skilled laborer, the government worker, the union worker, and as in Mexico, is in apparent control of the economy. *Id.*

claim a pure Spanish genealogy.[121] The white European aristocracy has lost some of its monopoly over land and resources, but continues to maintain its privileged social position.[122]

In most Latin American societies, unmixed Africans are considered Blacks and are accorded less favorable treatment than mixed people.[123] In some Latin American countries, light mixed race people and Mestizos are considered White and will be referred to euphemistically as "brunette" or "little mulatto."[124] In Puerto Rico, unmixed Africans and the darkest biracial persons are at the bottom of society.[125] Black skin color is not preferred.[126] "The terms for racial identities indicate gradations of color and have varied meanings [such as] *blanco* (white), *negro* (African black),[127] *mulata* (mulatto), *trigueño* (wheat-colored, olive-skinned), and *moreno* (brunette, attractively dark)."[128] *Grifa* is someone with light skin but tightly-curled hair, and *jaba* is someone with light skin but African facial features.[129] These categories vary from place to place and are very fluid. It seems most people prefer to be designated as a *trigueño*, and no one wants to be a *negro*. It seems at least in some places that *trigueño* is a fairly broad category covering many people whose skin coloration ranges from light olive to medium brown.[130] The problem, however, exists that when some of these *trigueños* who are darker in complexion move to the United States, they are more easily racialized as non-white. Becoming black must be a real shock for their identity when they were

121. *Id.* The Whites primarily descended from the colonial Spaniards and from the *Criollos* (the children of Spaniards born in Bolivia) who comprised the landed gentry and the rich merchant class during the Wars of Independence from Spain. *Id.*

122. *Id.* at 41.

123. DAVIS, *supra* note 106, at 100 (asserting that "unmixed Blacks differ racially more from Latin American whites than either Indians" or mixed race people).

124. *Id.* "The Spanish term *morena* connotes a type of dark good looks and may reference either a dark Iberian or a mixed race individual. *Morena* means Moorish and is sometimes defined as the darkest a person can be and still be considered white." *Id.* In some countries, it is a polite way to say that someone is black. *Id.*

125. *Id.* at 103.

126. *Id.*

127. *Id.* In some countries, *Negra* is considered pejorative, and those of African ancestry are called *Moreno*. *Moreno* may also be used to refer to someone who is white but has dark hair or is a brunette. *Id.* at 100, 104.

128. *Id.* at 103 ("*Trigueño* connotes a status almost equal to that of *blanco*, and even some unmixed Whites (as well as Blacks) prefer to be identified by this favorable term.").

129. *Id.* at 104. I have been told by Latino friends that these categories may go beyond just color of skin and represent a package of traits from eye color, hair color, hair texture, and facial features.

130. In fact, I have asked many of my Latino friends to describe who fits into the different categories. Those from Cuba and Puerto Rico seem to have very broad definition of who is *trigueno*. Those Latinos from South America have a much more restricted category that covers only those who are really olive-complected.

raised to think of themselves as white, even though some of them must know that Grandma or Grandpa was black.[131]

About 10% of the Puerto Ricans who relocated to the mainland are of unmixed African ancestry, and half or more have some African ancestry.[132] So 60% of these migrants will be perceived in the United States as being black, "while in Puerto Rico most were known as whites or by [some other] designation other than [b]lack."[133] In fact, during World War II Puerto Ricans were treated similarly to African Americans. All "Puerto Ricans in the U.S. Army were in segregated camps, even in Puerto Rico, and the United States Navy refused to accept any Puerto Ricans."[134]

What happens to Latinos' perspectives on color once they come to the United States is not clear. It was expected that lighter Latinos would become white and darker ones would become black.[135] Instead, Latinos are working on forging a common Latino identity.[136] It remains to be seen what they will do about the issue of color in their ranks, which was imported from their home countries.[137]

The purpose of this article is not merely to discuss Black and Latino colorism or intra-race discrimination. I raise it only to demonstrate the complexity of the issues that Blacks and Latinos face every day. The research to date is more likely to be found in the area of this internal discrimination. This article focuses more on how White society deals with the issue of color in choosing between and among people of color of different races and ethnicities for jobs, friendships, or other interactions. The thesis of this article is the following: The closer one is to White standards of attractiveness, the better the treatment one is likely to receive. This truth crosses racial and ethnic lines. This differential in treatment for lighter-skinned persons might have to do with the fact that

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131. One friend told me that the term *trigueno* was used in Puerto Rico as a polite way to convey the message that someone was of color and had African or Indian ancestors. Behind the person's back, however, people would be more critical of that person's non-whiteness.

132. DAVIS, *supra* note 106, at 104.

133. *Id.*

134. *Id.*

135. It is a real testament to Latinos that they have remained together as an ethnic group even though there must be strong forces for the whiter ones to become white and the darker ones to become other in the United States.

136. *See* Angel Oquendo, *Comments by Angel Oquendo*, 9 LA RAZA L.J. 43 (1996); Deborah Ramirez, *Forging a Latino Identity*, 9 LA RAZA L.J. 61 (1996).

137. Some of the internal Latino dynamics revolve around ethnic rivalries between and among Cubans, Puerto Ricans, Mexicans, and Central Americans. Even though this rivalry is phrased in terms of ethnic rivalries, some of the subtext involves issues of color. Many of the Cubans, who came over in the early 1960s are whiter in appearance than the Puerto Ricans, Mexicans, and Central Americans who tend to be darker—more African or Indian in appearance. In fact, many of the 1960s Cuban Americans left their island to predominately African and mixed race people.

Whites may feel closer to light-skinned people than darker-skinned people.[138]

IV. HISTORY OF WHITE DISCRIMINATION OF BLACKS AND LATINOS BASED ON THE LIGHTNESS/DARKNESS OF SKIN

A. *Biblical References to the Curse of Blackness*

Some say that the Bible condones enslavement and indicates the types of people who could be subjected to it. According to Scripture, all people are descended from the sons of Noah—Shem, Japheth and Ham.[139] Ham's son Canaan was condemned to enslavement.[140] Genesis states:

> Noah . . . planted a vineyard; and he drank of the wine, and became drunk; and lay uncovered his tent. And Ham, the father of Canaan, saw the nakedness of his father, and told his two brothers outside. Then Shem and Japeth took a garment, laid it upon both their shoulders, and walked backward, and covered the nakedness of their father; their faces were turned away, and they did not see their father's nakedness. When Noah awoke from his wine and knew what his youngest son had done to him, he said, 'cursed be Canaan; a slave of slaves shall be to his brothers.'[141]

This scriptural passage was used to justify the enslavement of people.[142] *Genesis* indicated that only Ham had descendants who were Black, and his sons populated Ethiopia, Libya, and Egypt.[143] Even though there is no direct reference to color, race, or ethnicity in the bible and some of

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138. This article will not discuss the level of scrutiny or the type of legal review that a court should undertake in evaluating the claims for this type of discrimination. I believe that this type of analysis turns our current thinking concerning the review of discrimination claims on its head. It will also not discuss the affect that this color strata has on the creation of a multiracial category for the United States census. *See* Tanya Kateri Hernandez, *Multiracial Discourse: Racial Classifications In An Era of Color-Blind Jurisprudence*, 56 MD. L. REV. (forthcoming 1997).

139. *Genesis* 9:18-19.

140. *Id.* at 9:24-27.

141. *Id.* at 9:20-25. There is also an "inappropriate" sexual component in this biblical passage, which is not disclosed to the reader. More importantly, the issue of the color or race does not appear in this version of the scripture. However, in the Babylonian Talmud interpretation, the racial and ethnic identity of Ham shifts to African. James H. Sweet, *The Iberian Roots of American Racist Thought*, 54 WM. & MARY Q. 143, 148 (1997). In that version, Noah says to Ham: "You prevented me from doing that which is done in the dark [i.e., coitus]; accordingly, your seed will be ugly and black." *Id.* The eighth century version of the Tanhuma gives the story the following version:

> [A]s for Ham, because he saw with his eyes the nakedness of his father, his eyes became red: and because he spoke with his mouth, his lips became crooked and because he turned his face the hair of his head and his beard became singed and because he did not cover his [father's] nakedness, he went naked and his prepuce became stretched, [all this] because all of God's retributions are commensurate to a transgression.

Id. Some commentators believe that the passage contains certain negative stereotypes associated with Africans. *See id.*

142. Robin Blackburn, *The Old World Background to European Colonial Slavery*, 54 WM. & MARY Q. 65, 92 (1997) (citing AUGUSTINE, THE CITY OF GOD 87 (Henry Bettenson trans., London, 1984)).

143. *Genesis*, *supra* note 139.

Ham's sons were in fact White, it became just a matter of time for this biblical reference to justify the enslavement of Blacks.[144] This biblical passage was thus interpreted as the curse of Noah and the punishment for Ham and his descendants and was described as follows: "Ham was punished by being given black skin. When the world came to be divided up, Japheth received Europe, Shem got Asia, and Ham was awarded Africa."[145]

B. *Historical References to Darkness Being Ugly and Justifying Discrimination*

1. Blacks

In the sixteenth century, Europeans believed that Whiteness was beautiful by degrading Blackness as being ugly.[146] White Europeans attributed moral significance to skin color.[147] For the Europeans of this era, "[w]hite and black connoted purity and filthiness, virginity and sin, virtue and baseness."[148] The European colonists saw the black skin and the racial features of the slaves in a similar manner to the white Europeans, i.e., the slaves were lustful, savage, and dark of character.[149] Thomas Jefferson, one of our founding fathers, saw the United States as "White."[150] He justified the expulsion of Blacks from the United States based on their ugliness.[151] In his *Notes on Virginia*, Jefferson writes:

> It will probably be asked, Why not retain and incorporate the blacks into the State, and thus save the expense of supplying by importation of white settlers, the vacancies they will leave? . . . To these objections, which are political, may be added others, which are physical and moral. *The first difference is that of color* . . . . Is it not the foundation of a greater or less share of beauty in the two races? Are not the fine mixtures of red and white, the expressions of every passion by greater or less suffusions of color in the one, preferable to that *eternal monotony, which reigns in the countenances, that immovable veil of black which covers the emotions of the other race?* Add to these, flowing hair, a more elegant symmetry of form, their own judgment in favor of whites, declared by their preference them, as uniformly as is the preference of the Oran-utan for the black woman

144. Sweet, *supra* note 141, at 148-49.

145. Benjamin Braude, *The Sons of Noah and the Construction of Ethnic and Geographical Identities in the Medieval and Early Modern Periods*, 54 WM. & MARY Q. 103 (1997) (quoting James Fenton, *A Short History of Anti-Hamitism*, N.Y. REV. OF BOOKS, Feb. 15, 1996, at 7).

146. John M. Kang, *Deconstructing The Ideology of White Aesthetics*, 2 MICH. J. RACE & L. 283, 299-300 (1997) (citing WINTHROP D. JORDAN, WHITE OVER BLACK: AMERICAN ATTITUDES TOWARD THE NEGRO 1550-1812 (1968)).

147. Kang, *supra* note 146, at 299-300.

148. JORDAN, *supra* note 146, at 7.

149. Kang, *supra* note 146, at 299.

150. *Id.* at 301.

151. *Id.*

> over those of his own species. The circumstance of superior beauty, is thought worthy attention in the propagation of our horses, dogs, and other domestic animals; why not in that of man?[152]

Jefferson uses the darkness of color alone to justify the exclusion of Blacks from the United States.[153] He also makes moral judgments based on the darkness of Blacks' skins.[154] He states that black women are so ugly that only apes would want to have relations with them.[155] Of course, Jefferson was being hypocritical since his slave Sally Hemmings's dark skin apparently did not prevent him from consorting with her.[156] Moreover Jefferson believed that, because black women are so ugly, that black men only want white women.[157]

Benjamin Franklin also shared Thomas Jefferson's views that black was ugly. He wrote:

> *the number of purely white People in the world was proportionately small. All Africa was black or tawny, Asia chiefly tawny,* and America (exclusive of newcomers) wholly so The English were the principle body of white People, and while we are . . . scouring our Planet, by clearing America of Woods, and so making this Side of our Globe reflect a brighter Light to the Eyes of Inhabitants in Mars or Venus, why should we in the Sight of Superior Beings, darken its People? *Why increase the Sons of Africa, by Planting them in America,* where we have so fair an opportunity, *by excluding all blacks and Tawnys,* of increasing the lovely white and red?[158]

2. Latinos

In his essay, *Los Olvidados: On The Making of Invisible People*, Professor Juan Perea notes that early historians and commentators ob-

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152. THOMAS JEFFERSON, *Notes on Virginia, in* THE LIFE AND SELECTED WRITINGS OF THOMAS JEFFERSON 187, 256 (Adrienne Koch & William Peden eds., 1944) (emphasis added).

153. *Id.*

154. *Id.*

155. *Id.*

156. *See* ANNETTE GORDON-REED, THOMAS JEFFERSON AND SALLY HEMMINGS: AN AMERICAN CONTROVERSY (1997). *But see* WILLIAMSON, *supra* note 25, at 43-48.

157. Jefferson wrote about his impression of Blacks:

> In reason [Blacks are] much inferior, as I think one could scarcely be found capable of tracing and comprehending the investigations of Euclid; and that in imagination they are dull, tasteless, and anomalous . . . . Never yet could I find that a black had uttered a thought above the level of plain narration; never saw even an elementary trait of painting or sculpture.

JEFFERSON, *supra* note 152, at 187, 256. He believed that Blacks were intellectually inferior to Whites. RONALD T. TAKAKI, IRON CAGES: RACE AND CULTURE IN NINETEENTH CENTURY AMERICA 48 (1979). Jefferson attributed the supposed failings of Blacks to biology rather than the detrimental effects of slavery. *Id.* These supposed failings were consistent with Jefferson's view that Blacks were ugly. RONALD T. TAKAKI, A DIFFERENT MIRROR: A HISTORY OF MULTICULTURAL AMERICA 71-72 (1993).

158. Benjamin Franklin, *Observations Concerning the Increase of Mankind, People of Countries, Etc., in* 3 THE WRITINGS OF BENJAMIN FRANKLIN 63, 73 (Albert H. Smyth ed., 1905) (1751) (emphasis added).

served the darkness of Mexican Americans' skin and their mixed race background.[159] David Weber wrote that "American visitors to the Mexican frontier were nearly unanimous in commenting on the dark skin of Mexican Mestizos who, it was generally agreed, had inherited the worst qualities of Spaniards and Indians to produce a 'race' still more despicable than that of either parent."[160] Professor Perea also quotes Rufus B. Sage, a newspaperman and Rocky Mountain trapper who described residents of New Mexico in 1846 in the following way: "There are no people on the continent of America, whether civilized or uncivilized, with one or two exceptions, more miserable in condition or despicable in morals than the *mongrel* race inhabiting New Mexico."[161] Finally, Professor Perea cites the views of historian Walter Prescott Webb writing in 1935, who stated:

> The Mexican nation arises from the *heterogeneous mixture* of races that compose it. The Indian blood—but not Plains Indian blood—predominates, but in it is a mixture of European, largely Latin. The result is a conglomerate with all gradations from pure Spanish to pure Indian. There are corresponding social gradations with grandees at the top and peons at the bottom. The language is Spanish, or Mexican, the religion Catholic, the temperament volatile and mercurial.[162]

Historically, Whites have used the darkness of color of Blacks and Latinos to justify discrimination against them.[163] In fact, in some places a separate category existed for the mixed race descendants of slaves and Whites.[164] These mixed race people received somewhat better treatment than the slaves—although they clearly were looked down upon.[165] Whites seem to have developed an appreciation for the mixed race look, e.g., a light-skinned Latino or African American. Many Whites tan their skins to achieve a darker color. More importantly, several years ago, *Time Magazine* did a study on what a composite American looked like, and it was a person with tan skin and slightly curly hair like some Latinos and

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159. Perea, *supra* note 86, 975-76. Even though most of the following comments refer mostly to Mexican Americans, these same characteristics would probably attributed to many Latinos because Latinos share a mostly mixed race heritage.

160. *Id.* at 976 (quoting FOREIGNERS IN THEIR NATIVE LAND: HISTORICAL ROOTS OF THE MEXICAN AMERICANS 33 (David J. Weber ed., 1973)).

161. Perea, *supra* note 86, at 976 (quoting RUFUS B. SAGE, HIS LETTERS AND PAPERS 1836-1847, (LeRoy R. Hafen & Ann W. Hafen eds., 1956), *excerpted in* FOREIGNERS IN THEIR NATIVE LAND, *supra* note 160, at 7, 74) (emphasis added). I bet there are no doubts who Mr. Sage thought was more miserable.

162. Perea, *supra* note 86, at 976-77 (quoting WALTER P. WEBB, THE TEXAS RANGERS: A CENTURY OF FRONTIER DEFENSE 13-14 (2d ed. 1965), *excerpted in* FOREIGNERS IN THEIR NATIVE LAND, *supra* note 160, at 77) (emphasis added).

163. *See supra* Part IV.B.1.

164. *See supra* Part IV.B.1.

165. *See* James W. Gordon, *Did The First Justice Harlan Have a Black Brother?*, 15 W. NEW ENG. L. REV. 159 (1993).

Blacks.[166] This newer preference may very well cause white Americans to give a preference to light-skinned Blacks and Latinos. This differential in treatment for lighter-skinned Blacks and Latinos might have to do with the fact that Whites may feel closer to them.

In essence, the closer one is to White standards of attractiveness, the better the treatment that one is likely to receive. This truth crosses racial and ethnic lines. As Professor Paulette M. Caldwell writes:

> Judgments about aesthetics do not exist apart from judgments about the social, political, and economic order of a society. They are an essential part of that order. Aesthetic values determine who and what is valued, beautiful, and entitled to control. Thus established, the structure of society at other levels also is justified.[167]

Society puts people into different color categories in order to place individuals into different racial and ethnic groups. As seen in the next sections, this information is then processed to make judgments about individuals.

V. DOES THIS PREFERENCE FOR LIGHT AND ABHORRENCE OF DARK EXIST TODAY?

A. *Light-skinned Blacks and Latinos Face Discrimination*

The question considered in this article is whether this difference in treatment still exists today and whether it spans across racial lines so that darker-skinned Blacks and Latinos suffer more discrimination than lighter-skinned blacks and Latinos. This analysis is not meant to suggest that light-skinned Blacks or Latinos do not face discrimination. In fact, two recent books explore the issues that very light-skinned African Americans undergo in life. Professor Judy Scales-Trent of State University of New York at Buffalo is the author of the book entitled *Notes of A White Black Woman: Race, Color, Community*,[168] and Dean Gregory Howard Williams, dean of the Ohio State University College of Law, is the author of the book entitled *Life On The Color Line: The True Story of a White Boy Who Discovered that He Was Black.*[169] Both books are exceptional personal narratives, which allow the reader to examine firsthand, incidents and introspection surrounding color-based discrimination in the United States.[170] Both authors describe many experiences of dis-

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166. *The New Face of America*, TIME, Sept. 1, 1993 (displaying composite photo on the magazine's cover of a person that looks like either a light-skinned Latina or African-American).

167. Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365, 393 (1991).

168. JUDY SCALES-TRENT, NOTES OF A WHITE BLACK WOMAN: RACE, COLOR, COMMUNITY (1995).

169. HOWARD WILLIAMS, LIFE ON THE COLOR LINE: THE TRUE STORY OF A WHITE BOY WHO DISCOVERED HE WAS BLACK (1995).

170. *See* SCALES-TRENT, *supra* note 168; WILLIAMS, *supra* note 169.

crimination that they have encountered within the African American community and by Whites.[171]

Many African Americans are dark enough for racial recognition never to be at issue. Many who are very easily recognized as Black often wonder what it would be like to be light. Both Scales-Trent and Williams answer that question. They both highlight those unique issues that they encounter as light-skinned African Americans who are so light that they can not easily be racialized. Both authors contribute to the color analysis by challenging our historical conceptions of race, identity, and racial solidarity. Ultimately, they help us to better understand and address how they have encountered discrimination by both sides. It is also very important to point out that both of these people could have passed as White if they wanted to, but chose to stay Black and involved in the African American community.

For Latinos, the basis for their treatment as outsiders is not limited to their color or race. Differential treatment can be based against them on their "surname, language (including accent), national origin, sex, alienage, race and color."[172] Latinos face these issues irrespective of their color. However, those of us who are darker face our own unique challenges.

B. *Self-Evident Truths*

At a recent Northeastern People of Color Conference, I chatted about this color project with two other black law professors. They discussed whether they thought that I was light-skinned. They are both darker in complexion than I am. We agreed that I was really more in the middle of the black color spectrum—perhaps a shade too dark to be considered light-skinned. Part of this scrutiny was to determine subconsciously whether I had standing to raise this issue. But all this, like many things in life, is relative to who is doing the judging, what his or her experience is, and from what part of the country the judge originates. I have been told in some parts of the country: "Oh you are so light-skinned." In other places, I am considered dark.

But there was something that one of my colleagues told me that I really had not considered or noticed before. He said that when he worked at the NAACP Legal Defense Fund, all the attorneys were light-skinned. I had also worked there one summer while I was in law school, and my initial reaction was: "No!" But, upon reflection, I realized that many of the attorneys were light to medium brown in complexion. A light bulb went off in my head. I also realized that in many of the legal jobs that I

171. *See* SCALES-TRENT, *supra* note 168; WILLIAMS, *supra* note 169.

172. Hernández Truyol, *supra* note 80, at 376.

have held, there have been few African Americans, and I have been one of the darker people employed. And I'm not that dark!

Once you look for it, you see the preference for lighter-skinned Blacks everywhere. A friend and I went to see *Steel Pier,* a Broadway Musical. She was going to stay over in New York City and see several plays later that day and the next day. I waited in line with her while she bought discount tickets for several plays. I noticed a big billboard advertisement of actress Whoopi Goldberg appearing in *A Funny Thing Happened On The Way To The Forum.* The advertisement was in the form of a caricature, but it looked very much like Ms. Goldberg—except her skin color was yellow. I turned to my friend, and I asked her: "What is wrong with that advertisement?" She shrieked and said: "That is what you have been talking about. Her color is all wrong!"

Ms. Goldberg's new color reminded me of a story that I read about actress Angela Bassett playing singer/actress Tina Turner in the movie *What's Love Got To Do With It?* Tina Turner has a much lighter complexion than Angela Bassett. The article's premise was that the print advertisement campaign did not show Ms. Bassett's face for this very reason.[173] As you may remember, the campaign used merely a half-drawn, uncolored outline of the real Ms. Turner's face. The writer believed that the public would be more receptive to seeing the movie if the public did not have to look at a dark-skinned Angela Bassett in the advertisements.[174] This may be the same reason why the advertising agency used a "high yellow" caricature of Ms. Goldberg to publicize her recent Broadway endeavors.

C. *Light-Skinned Blacks Have Higher Incomes and More Professional Positions Than Darker-Skinned Blacks*

Professors Hughes and Hertel, using data from the 1980 National Survey of Black Americans conducted by the Institute for Social Research at the University of Michigan, and 1983 census data, found that Blacks with lighter skin[175] have higher socioeconomic status, have spouses higher in socioeconomic status, and have lower Black consciousness than those with dark skin.[176] Dark-skinned Blacks earned only

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173. The film producers of *What's Love Got To Do With It?* were worried about Angela Bassett's skin color. Anderson Jones, *A Lighter Shade of Sale*, ENT. WKLY., Aug. 6, 1993, at 40.

174. *Id.*

175. There of course exists a question of who is light and who is dark. When I have asked friends and family to rate each other's complexions I often get a very broad range of different answers. A lot really depends on who is doing the judging and who they are judging. As result, I asked the respondents to the *Color Survey* to rate and rank the colors of several famous individuals to see if we could come up with a consensus. Baynes, Color Survey, *supra* note 12.

176. Michael Hughes & Bradley R. Hertel, *The Significance of Color Remains: A Study of Life Chances, Mate Selection, and Ethnic Consciousness Among Black Americans*, 68 SOC. FORCES 1105 (1990).

seventy cents for every dollar a light-skinned Black earned.[177] Of professional and managerial occupations—those with high status—light-skinned Blacks held 27% of them as compared to 15% of dark-skinned Blacks who were employed in those positions.[178] Professors Hughes and Hertel believe that "skin color . . . operates as a diffuse status characteristic."[179] They said that they "focused on [W]hites because they are the ones who are generally responsible for making upper-level management and personnel decisions. They are more likely to decide whether people get through educational institutions."[180] And when Whites see a darker-complected Black person, Hughes and Hertel state that the white person thinks he or she is seeing someone "less competent"—someone less like them than a light-complected Black person.[181] This view of the White perspective is subject to disagreement.[182]

Professors Verna M. Keith and Cedric Herring, also using the 1980 census data found that skin complexion of Blacks was "a more consequential predictor of occupation and income than such background characteristics as parents' socioeconomic status."[183] They believe that "the continuing disadvantage that [B]lacks face is due to persisting discrimination against them in the contemporary United States."[184] Professors Keith and Herring's research shows that educational attainment increases as skin color becomes lighter.[185] Very light-skinned Blacks on average have "more than two additional years of education than dark-skinned Blacks."[186]

Very light-skinned Blacks "are substantially more likely to be employed as professional and technical workers than those with darker complexions."[187] In contrast, those Blacks with darker skin "are more likely than all others to be laborers."[188] "Both personal and family income

177. *Id.* These surveys compared the earnings of similarly situated Blacks, i.e., those with about twelve years of education. *Id.* In addition, an all-Black, male and female professional interviewing staff, trained and supervised by the Survey Research Center, Institute for Social research at the University of Michigan conducted the study. *Id.*

178. Njeri, *supra* note 30, at 1.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.* Dr. Alvin Poussaint does not believe that lighter-skinned Blacks are given better treatment by Whites. *Id.* Dr. Poussaint said that the students at Harvard Medical School run the color spectrum of light-to-dark. *Id.* He believed that if the students were too light, that might be a problem. He believed that Whites wanted Blacks who looked Black enough. *Id.* Dr. Poussaint did believe that light skin was an advantage for females because the beauty standards are White. *Id.*

183. Keith & Herring, *supra* note 20, at 760.

184. *Id.*

185. *Id.*

186. *Id.* at 767.

187. *Id.* at 768.

188. *Id.*

increase significantly with lighter skin complexion."[189] In terms of family income, very light-skinned Blacks had incomes 50% greater than those for very dark-skinned Blacks.[190] As for personal income, light-skinned Blacks, on average, make 65% more than dark-skinned Blacks.[191]

D. *Light-Skinned Latinos Have Higher Incomes and More Professional Positions Than Darker-Skinned Latinos*

Mr. Arce and Professors Murguia and Frisbie have written that Mexican Americans with a more "European . . . appearance have more enhanced life chances as measured by higher socioeconomic status than Mexican Americans with indigenous Native American" features.[192]

"The greatest number of years of formal education was reported for fathers and mothers of respondents in the [l]ight/European category while the lowest socioeconomic levels are found in the [d]ark/Indian group."[193] A similar relationship between color and features relates to the fathers' occupation—those who were light/European held more prestigious jobs than those who were dark/Indian.[194] For the respondents of the survey, although they had achieved higher socioeconomic status than their fathers, "it remained the case in the later generation that the lighter the skin color and the more the European the features, the higher the socioeconomic status."[195] Mexican Americans who were lighter/more European had attained 9.5 mean years of education while darker/more Indian Mexican Americans had completed only 7.8 years on the average.[196] Investigations of levels of income revealed the same pattern with light/European earning $12,721 while the dark/Indian group earned only $10,480.[197]

Darker-skinned Latinos are also likely to encounter discrimination based in the sale and rental of homes.[198] In fact, like African Americans and unlike other Latinos, Puerto Ricans live in highly segregated areas, and have developed underclass communities.[199] This difference between Puerto Ricans and other Latinos is perceived to be because of their more pronounced African ancestry.[200] In addition, darker-skinned Latinos are

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189. *Id.* at 768-69.

190. *Id.*

191. Arce et al., *supra* note 21, at 19.

192. *Id.*

193. *Id.* This situation is very complex because in Latin America European Whites have traditionally received more education than non-whites so it is only natural that this may enhance their life chances in the U.S. as compared to non-white Latinos.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID, SEGREGATION AND THE MAKING OF THE UNDERCLASS 11, 96-105 (1993).

199. *Id.*

200. *Id.*

more likely to be questioned by Border Patrol officers in and about the border.[201] Another study conducted by Professors Telles and Murguia found that Mexican American males of a medium complexion reported slightly lower incomes than light-complected males; however, the gap between dark- and medium-complected males was most striking.[202] The mean income for light-complected individuals was $13,008, for medium-complected individuals it was $12,804, but for dark-complected males it was $11,287.[203] The researchers speculated that the income differential between the light- and medium-complected Mexican Americans was not great because a number of medium-complected individuals in the sample earned a good salary as union members in the construction industry.[204] Although these medium-complected individuals may earn salaries almost comparable to their lighter-complected brethren, the lighter-complected Mexican Americans in the survey held jobs with greater occupational prestige.[205]

VI. WESTERN NEW ENGLAND COLLEGE SURVEY

A. *Genesis of the Color Survey*

There are many theories of why light-skinned Blacks and Latinos have higher incomes and professional success in the United States. One theory is that they have historic advantages because the Whites preferred their mixed race children and were likely to free their partially African descendants earlier than those who were not of mixed race ancestry.[206] As a result, those of mixed race ancestry had an early historical advantage over their darker-skin counterparts. This may be true for some light-skinned Blacks and Latinos but not for all. In my own family, on my mother's side, one white male ancestor did show some favoritism to his mixed race offspring.[207] On my father's side, the opposite happened: my grandmother was abandoned by her white father because she was too dark.[208] My family history is probably not that different than others who are of mixed race ancestry.

The second theory, which I wanted to test in the survey is whether Whites notice the differences in color in Blacks and Latinos, and whether

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201. Johnson, *supra* note 26 (citing Gonzales-Rivera v. INS, 22 F.3d 1441 (9th Cir. 1994) (finding that the Border patrol stopped undocumented Mexican American because of "Hispanic appearance")).

202. Edward E. Telles & Edward Murguia, *Phenotypic Discrimination and Income Differences Among Mexican Americans*, 71 SOC. SCI. Q. 682 (1990).

203. *Id.*

204. *Id.*

205. *Id.*

206. *See* KATHY RUSSELL ET AL., THE COLOR COMPLEX: THE POLITICS OF SKIN COLOR AMONG AFRICAN AMERICANS chs. 1-3 (1992).

207. Baynes, *One Black Man*, *supra* note 24, at 115-18.

208. *Id.* at 115.

they would acknowledge that they felt a different comfort level based on the variations in skin color of African Americans and Latinos.[209] The survey was anonymous and was completed by 143 persons.[210] Seventy-five percent of the survey respondents were White; 7% were Black; 8% were Latino; 6% were Asian/Pacific American; and 3% listed themselves as other.[211]

B. *The Colors of Blacks*

1. Recognition and Acknowledgment

I asked the respondents whether they noticed the different skin colors of Blacks. Overwhelming majorities across all racial and ethnic groups surveyed noticed the difference in skin color tones of Blacks.[212] The composite results of the respondents for the different racial/ethnic groups surveyed is as follows:

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209. This survey is not random and may be biased toward the specific attitudes of the respondents who were drawn from an academic environment in Springfield, Massachusetts. Although the survey was anonymous, there is the possibility of contamination due to the fact that the respondents knew the data would be reviewed. From the scientific perspective, the survey results are purely anecdotal. Nevertheless, the results are significant because they help clarify the attitudes of white individuals on these issues, at this location, at this time.

Figures at times may either not add up to or exceed 100%, either because some respondents failed to answer particular questions, checked more than one response, or from rounding out the numbers.

210. Baynes, Color Survey, *supra* note 12. The following groups responded to the survey: (1) students, (2) faculty, and (3) administrators and staff members. The students consisted of students in my two classes: Critical Race Theory and Property. I also asked other students who were not enrolled in my classes, but were registered as students of color to complete the survey. Finally, I asked one undergraduate social work class to complete the survey. The faculty consisted primarily of law faculty, but also included a few faculty members at the undergraduate college who are members of the campus-wide Diversity Committee. The administrators and staff members consisted of all salary levels of individuals primarily at the Law School but also included a few undergraduate administrators and staff members who are members of the campus-wide Diversity Committee. I also asked all other minority employees of the College to complete the survey. Because there are so few people of color on campus, I wanted to create a big enough pool to make the data more useful and to provide a greater level of anonymity. Forty two percent of the survey respondents were male and 58% were female. This gender disparity may have been due to the very large percentage of women in staff and administrative positions. It also may have occurred if male recipients were less inclined to complete the survey.

211. *Id.* Of those who listed "other" as their racial category, respondents described themselves as fitting in the following categories: French Canadian, Latino/Mediterranean, Pacific Islander/White, and a white woman married to an African American.

212. *Id.* I also asked the respondents whether they thought that Whites noticed the difference in skin color of Blacks.

	Whites	Blacks	Latinos	Asians	Other
Yes	84%	60%	83%	75%	50%
No	4%	30%	17%	0%	0%
Don't Know	12%	10%	0%	25%	50%

	Whites	Blacks	Asians	Latinos	Other
Yes	91%	100%	100%	92%	75%
No	9%	0%	0%	0%	25%

For Blacks, noticing the skin color of other Blacks is often used for the purpose of group identification—after all, we cannot rely on surnames like other ethnic groups. There are some Anglo-Saxon names that often are associated with Blacks, like "Washington," "Jefferson," or "Davis." Blacks often took their former slavemaster's name after emancipation. However, there is no guarantee that the holder of such a name is Black. The noticing of other Blacks' skin color may also be for the purpose of establishing relative status and making assumptions based on that person's status. Non-black respondents may notice skin color variations because of human curiosity. In noticing, they may marvel at or denigrate the variation in skin tone of Blacks. For example, one white student confirms my suspicion when he or she wrote in the comment section: "I think we all notice darker skin more than we do lighter because it is dark."[213]

I then asked the respondents to what they attributed the difference in Blacks' skin colors. This was a multiple-choice question with the choices being: (1) White Ancestry, (2) Sun, (3) Place of Origin,[214] (4) Evolution, (5) Other, and (6) Don't Know. The respondents answered in the following manner:

	White Ancestry	Sun	Place of Origin	Other	Evolution	Don't Know
Whites	18%	1%	43%	10%	5%	23%
Blacks	70%	0%	10%	10%	0%	10%
Latinos	50%	0%	25%	0%	0%	25%
Asians	50%	0%	25%	12.5%	0%	12.5%
Other	25%	0%	50%	25%	0%	0%

Although almost everyone notices the differences in the skin coloring of Blacks, only the Black, Latino and Asian respondents know the

213. *Id.* In contrast, one student who did not identify if he or she was black or white wrote the following: "I really do not think of people in shades and degrees of blackness; a person is either Black or they are not." I have wondered if this was written by a black person or a white person. Why did the student not disclose his or her racial identity? If it was written by a White, it seems to suggest that all Blacks are the same and the respondents treat them the same. The comment has the tonal quality suggesting that the student treats all Blacks in a bad manner. It also could be that the particular student was not particularly observant and may perceive black as neutral, neither good nor bad. If it was written by a black student, then he or she seems to be telling me that I am dealing with a taboo subject in mixed company.

214. Place of origin refers to the place that the black person came from, such as a part of Africa, the Caribbean or the United States.

reason for the large color range between and among Blacks, which is the presence of white ancestry.[215] This could be attributable to the fact that 90% of the Black respondents acknowledged that they were of mixed race heritage.[216] It could also be because a very large percentage of the Latinos also acknowledged that they were of mixed race origin.[217] The large percentage of Asians surveyed may have answered in this way because of their contact with my other articles and me. The Whites generally believed that the difference in skin color between and among Blacks is due to the place that they were originally from.

Place of origin is not necessarily a completely wrong answer since there are color variations between and among the different ethnic groups in Africa, but those differences are not likely to cause the range in color that exists in the United States. It is also true that some places may have more of a predominance of dark-skinned Blacks or light-skinned Blacks, but those differences are the result of the frequency of race mixing in those areas. The Whites may be projecting the reason for their own color variations on Blacks. It is common belief that Whites from Scandinavia are more often light—blue eyed and blond haired—and Whites from the Mediterranean are more swarthy in complexion, eye color, and hair color. Whites believe that the variation in their complexions is due to their place of origin—although clearly a large part of it had to be due to race mixing between Africans and Europeans.[218]

Part of this lack of knowledge may be attributable to slavery being taught as a mere anachronism in schools. Unfortunately, one of the sad realities of slavery was that slave women were raped and sexually exploited by white men. The fact that the non-black respondents do not know that suggests almost a collective denial of this issue.

2. Testing Recognition and Acknowledgment

In the Black community, there is a significant minority who believe that Whites cannot tell the difference in color among African Americans.[219] I have also heard this same comment from several black friends and family members. So I asked the respondents to rate the colors

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215. *See* WILLIAMSON, *supra* note 25, at 192; RUSSELL, *supra* note 206, at 9-23.

216. Baynes, Color Survey, *supra* note 12. The question asked was: "Do you know whether you are of mixed race ancestry?" The black respondents answered in the following manner:

Yes	90%
Don't Know	10%

Of those who indicated that they were of mixed race ancestry, most acknowledged that they were mixed with Whites, and a smaller number said that they were mixed with Native Americans.

217. Fifty percent of the Latinos acknowledged that they were of mixed race origin.

218. A very prominent example of this is the story of Mark Anthony and Cleopatra. Shakespeare even centers one of his plays around the interracial love story of Othello, the Moor, and his wife, Desdemona, a light skinned Florentine. WILLIAM SHAKESPEARE, OTHELLO (Oxford Univ. Press 1996).

219. *See supra* note 212.

of several famous black individuals on the following scale: (1) very light, (2) light, (3) medium, (4) dark, and (5) very dark. I picked a group of well-known individuals, i.e, Vanessa Williams, Colin Powell, O.J. Simpson, Dennis Rodman, Clarence Thomas, and Whoopi Goldberg, with a wide range of skin tones.[220]

a. *Vanessa Williams*[221] *and Colin Powell*[222]

A very large majority across racial and ethnic lines would place Ms. Williams in the very light or light skin color category. The respondents were asked the question, "Please describe the skin color, skin tone, skin shade of former Miss America Vanessa Williams." The respondents answered in the following manner:

	Vanessa Williams				
	very light	light	medium	dark	very dark
Whites	11%	41%	43%	4%	0%
Blacks	20%	60%	10%	10%	0%
Latinos	8%	33%	50%	0%	8%
Asians	0%	75%	13%	13%	0%
Other	25%	50%	25%	0%	0%

A very small percentage of Blacks would list her as medium or dark in complexion, but a much larger percentage of Whites and Asian Americans would categorize her as medium in tone. A majority of Latinos see Ms. Williams as medium in complexion. This divergence in results may be related to reference point. For example, if I were white then

220. One of my white colleagues was very surprised by the array of choices, i.e., very light to very dark. He said that before he read the survey, he did not think that there was such a broad range of categories.

221. Baynes, Color Survey, *supra* note 12. I also asked the respondents whether they thought that Ms. Williams was biracial—having one black and one white parent. I did this to see whether the responses of the Whites were consistent with my experience at the health club. *See supra* note 29 and accompanying text. The White responses to this question were as follows:

Yes 21%
No 17%
Don't Know 62%

The overwhelming White response was "I don't know"—although of those who ventured an opinion the majority thought like my friends at the health club.

222. *Id.* I also asked the respondents whether they thought that Colin Powell was biracial—having one black and one white parent. I was most curious about what the Whites thought and their responses were as follows:

Yes 10%
No 32%
Don't Know 58%

It is interesting that fewer are willing to say that General Powell is biracial when (I believe) that he has lighter skin than Ms. Williams. This could be attributable to Ms. Williams's green eyes and straightened auburn hair.

I consider myself light; someone like Ms. Williams with tawny skin would not be considered light in my eyes.

A majority of the Whites and Blacks see General Powell as very light or light in complexion. The actual percentages of how the respondents would describe the complexion of General Powell is as follows:

	Colin Powell				
	very light	light	medium	dark	very dark
Whites	3%	52%	40%	4%	2%
Blacks	20%	40%	40%	0%	0%
Latinos	17%	17%	58%	0%	8%
Asians	0%	25%	63%	12%	0%
Other	0%	50%	50%	0%	0%

A smaller minority in each group saw General Powell as medium-toned. The distribution of responses for Blacks and Whites was more of a match as to General Powell. Asian and Latino respondents were more likely to see General Powell as medium-toned than very light or light. Again this could be related to the positional reference of Asian Pacific American and Latinos, i.e., they might not likely see one as light who is closer to their complexion; they are more likely to see him as medium-toned.

b. *O.J. Simpson and Dennis Rodman*

Across all racial and ethnic groups, most respondents would describe Mr. Simpson's complexion as medium.[223] The respondents described Mr. Simpson's complexion in the following manner:

223. *Id.* I also asked whether the respondents thought that Mr. Simpson had any white ancestors. The white respondents answered in the following manner:

Yes	15%
No	28%
Don't Know	57%

A majority of Whites answered that they did not know whether Mr. Simpson had any white ancestors. Of those willing to venture an opinion, a large majority answered no. This response is in contrast to those for Ms. Williams and General Powell probably because Mr. Simpson is darker and many Whites believe that one must be very light in order to have white ancestors.

	O.J. Simpson				
	very light	light	medium	dark	very dark
Whites	0%	7%	57%	36%	1%
Blacks	0%	0%	100%	0%	0%
Latinos	0%	0%	42%	58%	0%
Asians	0%	13%	75%	13%	0%
Other	0%	0%	100%	0%	0%

However, there is a divergence between Latinos and every other racial/ethnic group surveyed since Latinos were the only group by a majority that would describe Mr. Simpson's complexion as dark whereas a majority of all other groups surveyed found Mr. Simpson medium-complected. This difference is probably caused by different reference points. It seems that Latinos have a much lighter reference point for what they consider dark.[224]

Like Mr. Simpson, most respondents would place Mr. Rodman in the medium category.[225] The composite survey results describing Mr. Rodman's complexion were as follows:

	Dennis Rodman				
	very light	light	medium	dark	very dark
Whites	1%	8%	57%	31%	0%
Blacks	0%	0%	90%	10%	0%
Latinos	0%	8%	50%	33%	8%
Asians	0%	13%	63%	25%	0%
Other	0%	0%	75%	25%	0%

224. See *infra* note 265 and accompanying text for discussion of Rosie Perez being categorized as medium by Latinos, but very light or light by Blacks.

225. *Id.* I also asked the white respondents whether they thought that Mr. Rodman had any white ancestors. They answered in the following manner:

Yes	11%
No	12%
Don't Know	77%

Again a majority of the white respondents answered that they did not know whether Mr. Rodman has white ancestors, but of those who were willing to venture an opinion they were evenly divided. The percentage of Whites who think that Mr. Rodman has white ancestors is larger than that pertaining to General Powell even though (I believe that) General Powell is much lighter than Mr. Rodman. This might be attributable to the fact that Mr. Rodman often sports a blond hair style. Interestingly, one of my white colleagues told me that he described Mr. Rodman as light because Mr. Rodman dyes his hair blond, so he must be light-skinned.

c. *Clarence Thomas*[226] *and Whoopi Goldberg*[227]

Most of the respondents across racial and ethnic lines would describe Justice Thomas's complexion as dark. The composite responses of the descriptions of Justice Thomas's complexion were as follows:

	Clarence Thomas				
	very light	light	medium	dark	very dark
Whites	0%	1%	19%	63%	17%
Blacks	0%	0%	0%	70%	30%
Latinos	0%	0%	17%	58%	25%
Asians	0%	0%	25%	38%	38%
Other	0%	0%	25%	75%	0%

Most respondents would also describe Ms. Goldberg's complexion as dark. The composite Survey descriptions of Ms. Goldberg's complexion are as follows:

	Whoopi Goldberg				
	very light	light	medium	dark	very dark
Whites	0%	0%	10%	76%	14%
Blacks	0%	0%	0%	80%	20%
Latinos	0%	0%	8%	83%	8%
Asians	0%	0%	0%	63%	37%
Other	0%	0%	25%	75%	0%

226. Baynes, Color Survey, *supra* note 12. I also asked the white respondents whether they believed that Justice Thomas had any white ancestors. The composite White responses were as follows:

Yes 10%
No 26%
Don't Know 64%

Again, an overwhelming number of white respondents answered that they did not know. Of those willing to venture an opinion, a very large percentage believed that he does not have any white ancestors. They are probably basing this on Justice Thomas's very dark appearance.

227. *Id.* I also asked the white respondents whether they though that Ms. Goldberg had any white ancestors. The composite White responses were as follows:

Yes 6%
No 32%
Don't Know 62%

Again, an overwhelming majority answered that they did not know. Of those who were willing to venture an answer a very large majority believed that Ms. Goldberg did not have white ancestry. This may have to do with Ms. Goldberg's very natural appearance, i.e., dreadlocks. The white respondents may see her as darker or more African than she is because she wears her hair in a natural style.

d. *Analysis*

The data suggests that the majority of all surveyed—irrespective of race—notice and discern the relative lightness and darkness of a black person's skin color. The sampling seems to suggest a smaller deviation in the relative description of persons by Blacks than by other groups. The identification of O.J. Simpson's complexion is most illustrative. For example, 100% of all Blacks surveyed thought that O.J. Simpson was medium in complexion. This may be because his shade of brown is most desired, and now considered, by many Blacks, to be the somatic norm. It is not too dark, and it is not too light.[228] The white respondents, on the other hand, by a large majority consider Mr. Simpson medium in complexion, but a fairly large minority of Whites think that his complexion is dark.

The much higher numbers describing Simpson as dark by Whites may be the result of the darkened *Time Magazine* cover that came out while Mr. Simpson was on trial. It also may have something to do with their belief in his guilt in the murders of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman.[229] As such, more Whites may see him as dark because they think that he is bad. They want to distance themselves from him, so they see him as dark. After all, darkness has historically been associated with evil.[230] The white respondents may be making this subconscious coloration in their minds.

The converse may be true for Justice Thomas where Blacks and Latinos uniformly agree that he is dark or very dark; most Whites and Asian Pacific Americans generally agree, but a significant minority of Whites would describe him as medium or light in appearance. It suggests to me that some of the Whites and Asian Pacific Americans may feel more comfortable to Justice Thomas because of his conservative political opinions. They may also see him as lighter due to his status as a Supreme Court justice.

The same is true for Mr. Rodman. An overwhelming majority of Blacks describe him as medium-complected, whereas a much smaller majority of Whites would describe Mr. Rodman as dark. Part of it could be that the Whites are shading Mr. Rodman's complexion by his antics on and off the basketball court. Part of the reason that some see him as dark could also be due to the fact that Mr. Rodman is an athlete. He is very physical which is what black men are "supposed" to be.

In general, the results of the *Color Survey* seem to suggest that Blacks draw a hard line for who they consider as dark or medium and

228. *See supra* note 76 and accompanying text.

229. *See* Leonard M. Baynes, *A Time To Kill, The O.J. Simpson Trials, and Storytelling to Juries*, 17 LOY. L.A. ENT. L.J. 549, 560 n.60 (1997).

230. *See supra* Part IV.A.

seem to be uniformly consistent about it.[231] This is evidenced by 100% of the black respondents having the opinion that Mr. Simpson is medium in complexion.[232] The black respondents are much more consistent in terms of who they consider dark and much less consistent on who is light or medium.[233] For those who are medium in complexion and lighter, it seems as though Blacks and Whites disagree as to who fits into which category.[234] Whites may disagree because they are light, so anyone who is darker than them cannot be considered light or very light. Whites who are olive-complected may face certain dissonance in having a black person lighter than them in complexion. This disagreement by Blacks as to who is light or medium may arise because lightness remains a mark of status in the Black society and the respondents may be less likely to confer that status on others. On the other hand, it might be much easier for a majority of Blacks to confer lower status on some dark-skinned Blacks.

For Latinos, 50% thought Ms. Williams was medium complected and 41% thought she was light or very light-complected. This data is different from the other racial and ethnic groups surveyed. In addition, 58% of Latinos thought that Mr. Simpson was dark, and 42% thought that he was medium.[235] This data is very different from the data of other groups. Other groups, by large majorities, thought that Mr. Simpson was medium in complexion.[236] In other responses concerning the skin color of identified persons, Latinos followed the majority of the other ethnic and racial groups.[237] This seems to suggest that the Latinos who were polled have a lighter color threshold than Blacks, and also explains why a majority of Latinos consider Ms. Williams medium-compected and Mr. Simpson as dark complected.[238]

3. Different Treatment Based On Different Skin Color

a. *White Treatment of Blacks Based on Skin Color*

I asked the respondents whether they had a different comfort level for Blacks based on skin shade. They answered the question in the following manner:

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231. *See supra* Part VI.B.2.
232. *See supra* Part VI.B.2.b.
233. *See supra* Part VI.B.2.
234. *See supra* Part VI.B.2.
235. *See supra* Part VI.B.2.b.
236. *See supra* Part VI.B.2.b.
237. *See supra* Part VI.B.2.
238. *See supra* Part VI.B.2.b. This divergence compares nicely with the divergence that Blacks and Latinos have with Rosie Perez and Jimmy Smits. The Latinos saw Ms. Perez and Mr. Smits as medium in complexion and black respondents saw them as light or very light. *See infra* Part VI.C.2.a.

	Yes	No	No Difference	Don't Know
Whites	6%	27%	60%	8%
Blacks	0%	40%	60%	0%
Latinos	0%	42%	42%	17%
Asians	0%	50%	38%	13%
Other	0%	25%	50%	25%

Of the 6% of Whites who said that they had a different comfort level based on the color of a black person's skin, they all said that they felt more comfortable with lighter-skinned Blacks than darker skinned Blacks.[239] I then asked the respondents whether they thought that Whites treat Blacks differently based on the black person's skin color.[240] They responded to the survey in the following manner:

	Yes	No	No Difference	Don't Know
Whites	75%	1%	6%	18%
Blacks	90%	10%	0%	0%
Latinos	83%	17%	0%	0%
Asians	62%	0%	0%	38%
Other	75%	25%	0%	0%

I also asked the Survey respondents how they thought Whites treated dark-skinned Blacks compared to light-skinned Blacks. They responded as follows:[241]

	Better	Worse	No Difference	Don't Know
Whites	0%	70%	11%	19%
Blacks	10%	80%	10%	0%
Latinos	0%	92%	8%	0%
Asians	0%	63%	0%	37%
Other	0%	50%	25%	25%

By very large majorities, each racial and ethnic group believes that Whites treat dark-skinned Blacks worse than light-skinned ones. The

239. *See* Baynes, Color Survey, *supra* note 12.

240. *Id.* A handful of Whites wrote in the comment section of the *Color Survey* that they thought that this question was biased because Whites are not monolithic in opinion, and I was asking them how other Whites think.

241. *Id.* I also asked the respondents the question in reverse, i.e., "How do you think Whites treat light-skinned Blacks in comparison to dark-skinned Blacks?" and the results were the mirror image. Across racial and ethnic lines, the respondents generally thought that light-skinned Blacks were treated better by Whites. The percentages, however, were a little lower, which suggests that respondents know that all Blacks are treated badly by Whites.

largest majorities are among Blacks and Latinos probably because their own personal racial, ethnic and cultural histories demonstrate the seeming White preference for light skin. The Whites and Asian Americans also believe that dark-skinned Blacks are treated worse, but by a smaller majority. For both of these groups, the second highest response was "Don't Know." This suggests that the differences in the size of the majorities for Blacks and Latinos versus Whites and Asian Americans have more to do with a lack of information by the latter two groups than by a difference in opinion.[242]

b. *Analysis*

The survey results of the white respondents dealing with noticing skin color, comfort level and how other Whites treat Blacks based on skin color contradict themselves. A very large percentage of Whites answered that they notice the different skin color variations among Blacks. The same Whites, by large majorities, also answered that they felt no less comfortable or no different between light-skinned Blacks and dark-skinned Blacks. Yet, an equally large percentage of the white respondents felt that Whites treated light-skinned Blacks better than dark-skinned Blacks. In essence, the white respondents are saying that although they do not discriminate, most Whites do. These seemingly con-

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242. I also asked the survey respondents whether they thought that Blacks treat each other differently based on skin color. The survey results were as follows:

	Yes	No	No Difference	Don't Know
Whites	55%	5%	3%	37%
Blacks	90%	0%	0%	10%
Latinos	58%	0%	25%	17%
Asians	50%	13%	13%	25%
Other	100%	0%	0%	0%

Id. A majority across racial and ethnic groups believe that Blacks treat each other differently based on skin color. The size of the majorities vary between Blacks and the other category with the highest percentages and Whites, Latinos, and Asians. However, the differences in the size of the majorities may have to do with lack of knowledge since there was a very large minority answer of "Don't Know" among the non-black respondents.

I then asked the respondents how they felt about how Blacks treated dark-skinned Blacks compared to light-skinned Blacks.

	Better	Worse	No Difference	Don't Know
Whites	17%	21%	10%	52%
Blacks	10%	80%	0%	10%
Latinos	17%	33%	17%	33%
Asians	0%	12%	25%	63%
Other	0%	25%	0%	75%

Id.

A substantial majority of the Blacks surveyed thought that Blacks treated dark-skinned Blacks worse than light-skinned Blacks. The Latinos agreed but by a much lower percentage. The Whites, Asians and those who listed themselves as other generally did not know the answer to the question. These percentages illustrate a lack of knowledge of the Black culture or perhaps a hesitancy to make generalized statements about something that people feel that they do not know enough. For example, after completing the survey one of my students told me that she felt that she did not know enough. She stated, "What do I know as a white girl!"

tradictory responses suggest that, at least with respect to this question, the results may be slightly contaminated. Even though the survey was anonymous, the recipients still may have been concerned about portraying their own feelings and beliefs in the most favorable light.[243]

These result also may be attributed to psychological denial of discriminatory feelings by Whites. Professor Charles R. Lawrence III, in his article *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*,[244] called such denial an example of unconscious racism.[245] It is hard to grow up in our society and not believe certain negative stereotypes about Blacks. Yet, society also teaches Whites that it is socially unacceptable to hold racist thoughts. But, like many thoughts and feelings that are repressed, they often manifest themselves in certain ways. Professor Lawrence gave several examples in his work. For example, Nancy Reagan addressed a group of Republican operatives and said that she wished [Ronald Reagan] could be there to "see all these beautiful white people."[246] When challenged by the media on this issue, Ronald Reagan's Illinois campaign manager defended Mrs. Reagan by stating that "she was talking to her husband about the white snow and that's how she got mixed up."[247] In the case of the *Color Survey*, the white respondents may not be in touch with their own feelings toward Blacks. Their answer that they feel no less comfortable with Blacks based on the skin color variations may be an honest answer at this time.

Despite these seeming inconsistencies, there is a strong message in these findings. A large majority of Whites notice color variations in black people's skin color, and a very large majority of Whites believe (or are aware) that other Whites discriminate more against darker-skinned Blacks. These results are quite remarkable. It is the first time that a group of Whites seem to confirm that other Whites are discriminating in this manner. This data has a great deal of significance in terms of law and policy.

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243. For instance, one question on the survey asked the respondents if they would feel any differently if they discovered that they were of mixed race. One of the white respondents was troubled that she might feel differently, and in the comment section worried about what I would think even though the *Color Survey* was anonymous. *Id.*

244. Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning With Unconscious Racism*, 39 STAN. L. REV. 317 (1987).

245. *Id.* at 322.

246. *Id.* at 340.

247. *Id.* at 388 n.97.

C. *The Colors of Latinos*

1. Recognition and Acknowledgment

I asked the respondents whether they noticed the different skin colors of Latinos.[248] The composite responses were as follows:

	Yes	No	Don't Know
Whites	62%	28%	10%
Blacks	90%	10%	0%
Latinos	100%	0%	0%
Asians	75%	12%	12%
Other	50%	50%	0%[249]

A very strong majority among all racial and ethnic groups surveyed notice the difference in skin colors among Latinos.[250] The majorities vary between highs of 100% for Latinos and 90% for Blacks, 75% for Asian-Pacific Americans and the much lower 62% for Whites.[251] A much higher percentage of Whites, 90%, answered that they noticed the different skin colors of Blacks.[252] This difference could be due to the novelty of the perceived broader range in skin color of Blacks as compared to Latinos.

A very strong minority of 28% of Whites said that they did not notice skin color variations between Latinos.[253] This could be attributable to Whites assuming that all Latinos are olive-complected[254] and imposing a Black identification on any Latino who is dark-skinned. In a *Chicago Sun-Times* story, Rey Colon stated, "I'm a dark Puerto Rican who can't pass for anything but [B]lack. Any time [sic] I felt racism, I felt it as a [b]lack person, not as a Hispanic."[255] Especially for those Whites who are

248. *See* Baynes, Color Survey, *supra* note 12.

249. *See id.* I also asked the respondents whether they thought that whites noticed the different skin coloration of Latinos.

	Yes	No	Don't Know
Whites	55%	19%	26%
Blacks	60%	20%	20%
Latinos	83%	0%	17%
Asians	63%	25%	12%
Other	50%	50%	0%

Id.

250. *Id.*

251. *Id.*

252. *See supra* Part VI.B.1.

253. Baynes, Color Survey, *supra* note 12.

254. In Spanish, olive-complected person is called a *trigueño*. *See supra* note 128 and accompanying text.

255. Don Hayner, *Stranded Between 2 Cultures Series: The Great Divide (Standard)*, CHICAGO SUN-TIMES, Jan. 12, 1993, at 18; *see also* Alisa Valdes, *Past Empowers Black Latinos While Proud of Their African Roots, Many Face Prejudice from All Sides*, BOSTON GLOBE, Mar. 3, 1997, at B1 (discussing prejudice black Latinos must face).

olive-complected, it may cause them some dissonance to consider an olive-complected person of color to be any different from them. So they would certainly not notice a difference in skin color. There are also other ways to recognize Latinos by complexion. Whites may notice the Latinos' complexion less because they can mark them more than just by skin color. They might be able to tell whether someone is Latino by his or her accent, surname, or language. So unlike Blacks, noticing the Latinos' coloration is not the sole (nor necessarily the best) way to identify him or her. I then asked the respondents what they thought caused the difference in skin color. This was a fill-in-the-blank question with the choices being: (1) White Ancestry, (2) Sun, (3) Place of Origin,[256] (4) Evolution, (5) Other, and (6) Don't Know. The survey results were as follows:

	White Ancestry	Sun	Place of Origin	Evolution	Other	Don't Know
Whites	11%	0%	39%	4%	7%	39%
Blacks	50%	0%	30%	0%	20%	0%
Latinos	50%	8%	33%	8%	0%	0%
Asians	25%	0%	38%	0%	25%	13%
Other	25%	25%	25%	0%	0%	25%

The color variation in Latinos is the result of mixing of different racial and ethnic groups, e.g., African Black, Native American and European White. In fact, I asked the Latinos what racial category they thought they fit into and 50% identified themselves as mixed race; 8% said that they were Black; 8% said that they were American Indian; 17% answered that they did not know; and 17% answered other.[257]

Racial mixing manifested itself in different ways depending on the number and types of people located in different places. For example, many Africans were brought to the Caribbeans which had many ports for slave trading.[258] Slaves brought there were sold throughout North America, South America and the Caribbean.[259] As a consequence, a large African presence exists in that area, and a considerable number of people are very African-looking in appearance.[260] The same Latin American countries may have had fewer Africans but more Native people so that the complexion of the Latino who emigrated from there is likely to be influenced by that.[261] The ultimate answer to the question of what causes

256. By place of origin, I meant the place that the Latino came from, such as South America, Central America, Caribbean, and Spain. Baynes, Color Survey, *supra* note 12

257. *Id.*

258. *See* JOHN HOPE FRANKLIN, FROM SLAVERY TO FREEDOM A HISTORY OF NEGRO AMERICAN 115 (3d ed. 1967).

259. *Id.* at 69-70.

260. *Id.* at 357-60.

261. *Id.* at 358.

variations in skin color is the presence of white ancestry in people of color ancestry. The sub-answer is place of origin. In responding to the question, Whites were more likely to attribute place of origin to the variations in Latinos' skin color than the Blacks and Latinos.[262]

Being of varying racial mixtures may pose problems for Latinos in the United States since we still have a Black-White Paradigm. One Latina member of the Campus-Wide Diversity Committee wrote the following in the comment section of the *Color Survey*: "I am Puerto Rican and was once asked by a professor to choose whether I was Black or [W]hite I could not choose I have ancestors who were Taino Indians, Spanish and African so how could I choose-(I didn't)."[263]

2. Testing Recognition and Acknowledgment

I wanted to test the way the respondents actually noticed the differences between and among the color variations of Latinos so I asked the respondents to rate the skin colors of several famous Latino individuals on the following scale: (1) very light, (2) light, (3) medium, (4) dark, and (5) very dark. It was very hard to pick a range of individuals who were very well-known to everyone and yet have a significant variation in skin colors. This difficulty demonstrates the fact that Latinos are still often invisible in our society[264] as Blacks were (and still are, although less so) several generations ago. The fact that there are so few dark Latinos who are household names evidences the more pernicious racial discrimination that they encounter over their lighter-skinned counterparts. I chose a group of well-known individuals; actress Rosie Perez, actor Jimmy Smits and soccer player Pele.

a. *Rosie Perez*

I asked the respondents to describe the complexion of actress Rosie Perez as either (A) very light, (B) light, (C) medium, (D) dark, (E) very dark. The composite answers were as follows:

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262. The Whites did the same thing with Blacks by attributing place of origin as the primary reason for the skin color variations. *See supra* notes 215-18 and accompanying text. Again, this is because they determine their own ancestry in that manner.

263. Baynes, Color Survey, *supra* note 12.

264. *See* Deborah Ramirez, *Forging a Latino Identity*, 9 LA RAZA L.J. 61, 61-62 (1996).

	Rosie Perez					
	very light	light	medium	dark	very dark	don't know
Whites	4%	4%	21%	2%	0%	69%
Blacks	20%	60%	10%	0%	0%	10%
Latinos	8%	8%	75%	0%	0%	8%
Asians	0%	50%	25%	0%	0%	25%
Other	0%	75%	0%	0%	0%	25%

Most of the white respondents did not know Rosie Perez.[265] Of those who knew Ms. Perez, most placed her in the light or medium categories.

b. *Jimmy Smits*[266]

I asked the respondents to describe the complexion of actor Jimmy Smits as either (A) very light, (B) light, (C) medium, (D) dark, or (E) very dark. The composite answers were as follows:

265. I also asked the respondents whether they thought Ms. Perez had white ancestors. The responses are as follows:

	Yes	No	Don't Know
Whites	17%	8%	75%
Blacks	60%	10%	30%
Latinos	25%	25%	50%
Asians	13%	13%	75%
Other	0%	0%	100%

Baynes, Color Survey, *supra* note 12. These results are very interesting. Most of the Whites do not know who Rosie Perez is—which is why there is such a large response of "Don't Know." A very large percentage of the Blacks see Ms. Perez's very light skin and say that she must be part white. In contrast, most Latinos say that they do not know, and of those willing to give an opinion are equally divided. For the Latinos they see Ms. Perez's African facial features, and they are hesitant in saying that she is mixed. In fact several of the Latinos who I spoke to on this issue placed Ms. Perez in the "mulatta' category. *Id.*

266. I also asked the respondents whether they thought that Mr. Smits had white ancestors. The responses were as follows:

	Yes	No	Don't Know
Whites	17%	14%	69%
Blacks	70%	10%	20%
Latinos	33%	25%	42%
Asians	13%	75%	13%
Other	0%	0%	100%

Id. Only the black respondents are more likely to say that Mr. Smits has white ancestry. In each of the other groups the most prevalent answer was "Don't know." The Latinos were more likely to have the opinion that Mr. Smits has white ancestors more than any other group than the Blacks. *Id.*

	Jimmy Smits					
	very light	light	medium	dark	very dark	don't know
Whites	8%	40%	32%	1%	0%	19%
Blacks	10%	60%	20%	0%	0%	10%
Latinos	8%	25%	58%	8%	0%	0%
Asians	0%	25%	50%	0%	0%	25%
Other	0%	25%	50%	0%	0%	25%

Most respondents found Mr. Smits as light- or medium-complected.

c. *Pele*[267]

I asked the respondents to describe the complexion of soccer player Pele as either (A) very light, (B) light, (C) medium, (D) dark, or (E) very dark. The composite answers were as follows:

	Pele					
	very light	light	medium	dark	very dark	don't know
Whites	0%	3%	15%	26%	10%	46%
Blacks	0%	0%	0%	50%	30%	20%
Latinos	0%	0%	0%	67%	33%	0%
Asians	0%	0%	12%	62%	12%	12%
Other	0%	0%	0%	50%	25%	25%

Nearly half of the white respondents did not know Pele. Most respondents of color placed Pele in the dark or very dark categories.

d. *Analysis*

Blacks, Latinos and to a lesser extent, Asians, were willing to draw a hard and fast line on the darkness of Pele. Of the white respondents who were willing to venture an opinion on Pele's complexion, their opinion was more diffuse.

267. I also asked the respondents whether they thought that Pele had white ancestors. The composite responses were as follows:

	Yes	No	Don't Know
Whites	6%	14%	81%
Blacks	10%	40%	50%
Latinos	8%	33%	58%
Asians	12%	38%	50%
Other	0%	0%	100%

Id. Most respondents answered that they did not know whether Pele has white ancestors. Blacks, Latinos, and Asians were more likely to say that he probably does not have any white ancestors. This opinion is probably based on the darkness of Pele's skin.

With Ms. Perez and Mr. Smits, there was significant deviation between Blacks and Latinos as to which category to place them. Most Latinos placed Ms. Perez and Mr. Smits in the medium-complected category whereas most Blacks placed them in the light or very light category. This deviation demonstrates the different standard for color norm that exists in the Black and Latino communities. This divergence contrasts nicely with the survey results for Mr. Simpson where all Blacks surveyed placed him in the medium category whereas Latinos were the only group with a majority which placed Mr. Simpson in the dark category, and the same divergence occurred with Ms. Williams where most Latinos see her as medium complected, but Blacks saw her as light or very light complected. Since medium is the halfway mark between very light and very dark, this divergence shows that Latino color hierarchy of color variations is skewed to a much lighter shade than the black color hierarchy.

This divergence may threaten significant intergroup relations and dynamics. Since African Americans are on average more black than Latinos, it may result in Latinos discriminating against African Americans as they do the *Negroes* in their societies. It also may result in the distancing of members of the two groups from each other. African Americans may look at a Latino and see another Black and feel rejected when they are told that the Latino considers him or herself a *Trigueño*. To the African American, it may feel like those relatives, who rejected us by passing themselves off as white.[268]

It also seems as though some Latinos are in denial about their possible slave heritage. Some of this denial may be because they do not want to admit that they had ancestors who were slaves. Upon reflection, who wants to discuss that issue if you can avoid it? However, many African Americans do not have that choice. They are what they are. And everyone knows that their ancestors were most likely slaves in the United States.

3. Different Treatments Based on Different Skin Color

a. *White Treatment of Latinos Based on Skin Color*

I asked the respondents whether they had a different comfort level for Latinos based on skin color.[269] They answered the question in the following manner:

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268. My mother's Aunt Icy passed for white when she entered the United States. Baynes, *One Black Man*, *supra* note 24, at 123.

269. As with the comfort level with Blacks, most Whites answered that they did not have a different comfort level or felt no differently against Latinos based on the color of their skin. As with the answers concerning Blacks, these responses raise the same issues of contamination and denial. *See supra* Part VI.B.3.a.

	Yes	No	No Difference	Don't Know
Whites	4%	39%	47%	10%
Blacks	10%	50%	40%	0%
Latinos	8%	50%	42%	0%
Asians	0%	63%	25%	12%
Other	0%	75%	25%	0%

I then asked the respondents whether they thought that Whites treat Latinos differently based on the Latinos' skin color. The composite responses were as follows:

	Yes	No	No Difference	Don't Know
Whites	41%	16%	0%	43%
Blacks	60%	10%	0%	30%
Latinos	100%	0%	0%	0%
Asians	62%	0%	0%	38%
Other	25%	50%	0%	25%

There is a strong divergence between the people of color—Asian Pacific Americans, Blacks and Latinos—who said by very strong majorities that Whites treat Latinos differently based on their skin color variations and whites who agreed by a much smaller percentage. Most Whites either did not respond to the question or answered that they did not know. Responses by Whites could be due to a lack of knowledge. The region from which I polled, the Greater Springfield area, is the thirty-fourth most segregated region of the country.[270] For many Whites, Latinos and Blacks may be invisible.[271] One is more likely to see Blacks on television. Latinos are particularly invisible in Massachusetts even though they are the largest minority group.[272] The few times that Latinos are visible in the media, it is usually in an unfavorable light dealing with gang violence. Many of the Whites may legitimately not have seen enough Latinos to know whether other Whites deal with them differently based on their skin color. One white student wrote in the comment section to the *Color Survey*: "I have almost no exposure at all to Hispanics."

There is also a divergence between Latinos, and Blacks and Asian Americans on this issue. All of the Latinos answered in the same way, and large majorities of Blacks and Asian Pacific Americans agreed. For the Blacks and the Asian Pacific Americans, the lesser majorities seem to do with a lack of knowledge. The "Don't Know" answer was the second

270. *See* Buffy Spencer et al., *Our Region 34th Worst in Nation*, SPRINGFIELD SUNDAY REPUBLICAN, Mar. 22, 1992, at B1.

271. *See* Ramirez, *supra* note 264, at 62.

272. Spencer et al., *supra* note 270.

most popular answer for Blacks and Latinos.[273] Again, I think the results show that there is a lack of knowledge of the Latinos' experience in the States.

I also asked the Survey respondents how they thought Whites treated dark-skinned Latinos as compared to light-skinned Latinos. They responded as follows:[274]

	Better	Worse	No Difference	Don't Know
Whites	1%	43%	20%	36%
Blacks	0%	50%	10%	40%
Latinos	0%	92%	8%	0%
Asians	0%	75%	0%	25%
Other	0%	25%	50%	25%

The majority of each racial/ethnic group surveyed believed that Whites discriminate more against darker-skinned Latinos as compared to their lighter-skinned counterparts. The majority percentages are lower for Whites probably because they racialize the darker Latinos as Black. For example, I spoke to a white lawyer in Springfield who told me that one of my students was working for her. She could not remember his name. I asked her what he looked like, and she identified him as a mulatto. She did not realize that he was a Latino. The lower White percentage may be attributable to the lack of exposure to Latinos in the Greater Springfield area. It also may be attributable to discrimination against Latinos based on other characteristics. For example, in the comment section to the *Color Survey*, a faculty member who listed his racial category as other stated:

> Whites treat . . . [Latinos] differently based on degree of assimilation-not so much on skin color . . . . [F]rederico [sic] Pena and Henry Cisneros talk in a familiar way, dress like the majority. People are basically afraid of strangers and the more familiar people sound, look and act the more likely they will be treated as part of the group.

A white member of the administrative staff wrote: "The treatment of Hispanics is more based on language ('Can't speak English' why don't they learn English) rather than skin color."[275]

273. Baynes, Color Survey, *supra* note 12.

274. *Id.* I also asked the respondents the question in reverse, i.e., "How do you think Whites treat light-skinned Latinos in comparison to dark-skinned Latinos?" and the results were the mirror image. Across racial and ethnic lines, the respondents generally thought that light-skinned Latinos were treated better by Whites. The percentages, however, were a little lower, which suggests that respondents know that all Latinos are treated badly by Whites. *Id.*

275. *Id.*

These comments seem to suggest that some Whites would treat Latinos differently based on their assimilation such as speaking English, and manner of dress and customs, more so than color. Maybe some of the white respondents would have checked off other indicia of Latinoness instead of skin color. But the white respondents' reluctance to suggest skin color variation as a means to discriminate against Latinos is too facile. Moreover, it does not correspond with the other survey data in which an overwhelming percentage of Whites noticed the color variations of Latinos. Why are they noticing the color variations unless they are going to process the information in some way? This is just an easy way for the majority of the white respondents to say that they are discriminating against the Latinos because the Latinos are not American enough. The survey respondents seem to be saying that they know nothing about Latinos; the Latinos are *Los Olvidados*.[276] Frankly, if Latinos gave up their cultural heritage and language, I still do not think they would be accepted, especially those with dark skin.[277] But the Latinos surveyed know the truth.[278] One Latina who is a member of the adminis-

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276. *See generally* Perea, *supra* note 86 (discussing the creation of Latino invisibility).

277. *See* Kevin R. Johnson, *"Aliens" and the U.S. Immigration Laws: The Social and Legal Construction of Nonpersons*, 28 U. MIAMI INTER-AM. L. REV. 263 (1997).

278. I also asked the survey respondents whether they thought that Latinos treated each other differently based on skin color. The survey results are as follows:

	Yes	No	No Difference	Don't Know
Whites	19%	14%	0%	68%
Blacks	60%	10%	0%	3%
Latinos	75%	25%	0%	0%
Asians	25%	12%	0%	63%
Other	25%	25%	0%	50%

Baynes, Color Survey, *supra* note 12. I asked the respondents how they felt Latinos treated dark-skinned Latinos compared to light-skinned Latinos.

	Better	Worse	No Difference	Don't Know
Whites	3%	12%	17%	68%
Blacks	0%	60%	10%	30%
Latinos	0%	75%	17%	8%
Asians	0%	12%	12%	75%
Other	0%	25%	25%	50%

Id.

Overwhelming percentages of white and Asian Pacific respondents know very little about Latinos even though Latinos are the largest minority group in Massachusetts. This is evidenced by their answering "Don't Know" or their failure to respond to the question. Some Whites, however, did know about the internal Latino preference for lighter skin. One white student wrote in the comment section of the survey: "When I was an exchange student at the University of Puerto Rico, the UPR administrator who did our orientation told us that lighter-skinned Puerto Ricans are of higher social status than darker-skinned and that we should try to associate with the lighter-skinned classmates." *Id.* The Black respondents, by recognizing the colorism in the Latino community, seem to know the Latino community better than either Whites or Asian Pacific Americans. This is probably attributable to the fact that Blacks and Latinos often live in close proximity to each other. For instance, one black student wrote in the comment section of the survey: "I currently work with a fair number of Latinos and generally their comments and attitudes are very color biased with regard to what is more acceptable within their race." *Id.* Seventy-five percent of Latinos found that Latinos discriminated against darker-skinned Latinos. In the comment section, several of them wrote very moving comments. For instance, one student who listed herself as Latino/Mediterranean said:

trative staff at the College wrote in the comment section of the *Color Survey*: "The lighter you are the easier it is to blend with the white people. This is not how I feel, but how it is. (not fair!)"[279]

VII. CONCLUSION

Many scholars tell us that race is merely a political construction, and it no longer matters.[280] Many of the distinctions that members of the majority have made as to race have focused on the difference in color.[281] Our history has been that black is bad, and white is good.[282] Even if we abandon the Black-White Paradigm as some Critical Race scholars suggest,[283] we need instead to critically examine the way race operates. We need to recognize that there are other stigmas that majority society uses to discriminate such as gender, sexual orientation, income status, and immigration status, just to name a few. But one critical aspect of discrimination that cannot be overlooked is the aesthetic of dark skin. This has been a prime reason for discriminating against Blacks and Latinos in United States history.[284] The visual divergence from what is considered the norm has allowed members of the majority to discriminate against the minority. Darkness of skin has allowed members of the majority to tag those persons with a brand of inferiority. This belief in inferiority of those with dark skin has existed since biblical times. Discrimination based on darkness still exists today. We have a Dark-Light paradigm crossing racial boundaries. This paradigm is not that different than the Black-White one in that dark is still bad, and white is good. Studies show that among both Blacks and Latinos, those with darker skin tones, on average, earn less, have less education, and hold less prestigious positions.[285] These income figures suggest that Whites are discriminating more against darker-skinned people.

The *Western New England College Color Survey* shows that color matters.[286] The *Color Survey* results show that an overwhelming percentage of white respondents notice the variations of color of both Blacks

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> [La]tinos, generally deny or don't want to be associated with any indigenous "blood." The term "Indio" in Venezuela, for ex., is intended to mean stupid or dense. My mother's father was from Spain-blond, blue eyed. My grandmother was indigenous and was bought by him at age 12. I don't know much about him since he died when my mom was a small child. My grandmother also died in her early 30s but somehow spiritually I have more of a connection to her . . . .In fact I'm proud to have that connection to . . . her 'blood.'

Id.

279. *Id.*
280. *See supra* note 4 and accompanying text.
281. *See* Baynes, Color Survey, *supra* note 12.
282. *See supra* Part IV.
283. *See* Chang, *supra* note 6; Ramirez, *supra* note 6; Wu, *supra* note 6.
284. *See* discussion *supra* Part V.
285. *See* discussion *supra* Parts V.C-D.
286. *See* Baynes, Color Survey, *supra* note 12.

and Latinos.[287] There was overwhelming White opinion that other Whites treat dark-skinned Blacks worse than light-skinned Blacks.[288] A majority of White opinion also believed that other Whites treated dark-skinned Latinos worse than light-skinned Latinos.[289] I do not believe that the lower percentages for Latinos mean that white respondents believe that other Whites are less likely to treat dark-skinned Latinos worse. I think that it has more to do with a subconscious belief that Whites are discriminating more against Latinos based on their degree of assimilation in the United States, i.e., language, accent and culture. It also has to do with the tendency of Whites to racialize the darker-skinned Latino as a Black or Native American.

In the United States, there is a color hierarchy between and among people of color that spans different racial and ethnic groups. The premise is very simple and very clear. It is that lighter is better and darker is worse. So that even if we all agree that race itself no longer matters, color will still be a problem because darkness casts a longer discriminatory shadow than lightness. A dark-skinned person of color, whether Black or Latino, is likely to encounter more discrimination than his or her light-skinned counterpart.

By abandoning the Black-White Paradigm, and replacing it with no paradigm and the belief that all discrimination is the same and on an equal basis, as a society, we will lose sight of those basic truths that having dark skin is not considered the norm. In addition, by abandoning this prior paradigm, it will place many Blacks and dark-skinned Latinos at the bottom of society's barrel. Therefore, we need to move beyond Black-White to Dark-Light which shifts the current paradigm and expands it to include more than African Americans.

287. *Id.*
288. *Id.*
289. *Id.*

METAPHYSICAL AND ETHICAL SKEPTICISM IN LEGAL THEORY

ERIC A. BILSKY*

I. INTRODUCTION

The following two propositions frame the classic debate about the link between legal metaphysics and ethics:

> (1) The law is a fiction—merely a construct of lawyers' arguments and the relatively arbitrary action of decision makers.
>
> (2) A judge should state that the law stands for whatever result the judge deems to be correct.

Legal skeptics believe some form of (1), a proposition of metaphysics. Opponents of legal skeptics (call them idealists) typically claim the skeptic also believes (2), something that looks like a proposition of ethics. The idealist then identifies (2) with nihilism—the belief that there are no valid or true ethical principles. This essay examines the debate between skeptics and idealists in light of a detailed examination of one idealist's attempt to paint skeptics as nihilists, concluding that not only are idealists unfair to their skeptical colleagues, but that historically skeptics have often proposed substantial reforms to the legal system based on deeply held moral beliefs.

The essay begins by reviewing twentieth century idealist attacks on skeptics, showing the long and vigorous idealist tradition of treating skeptics as nihilists. Second is a brief discussion of the philosophical debate concerning the "fact/value distinction," a distinction that plays a central role in the skeptic/idealist debate. Third, the essay introduces a version of the idealist attack on skeptics focused on the ethics of the practicing lawyer, considering first how this idealist attack matches various possible pictures or representations of what the legal profession is and does, and then considering the logic of the argument in detail, showing that nihilism is not a logical consequence of legal skepticism. Finally, the essay shows that historically, far from being nihilists, legal skeptics typically use skepticism in the service of a deeply held reformist or revolutionary moral agenda.

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II. HISTORICAL CONTEXT

Throughout this century, idealists have repeatedly accused skeptics of being no more than amoral nihilists.[1] For example, critics of Jerome Frank's skeptical theories found in them "a desire to exalt brute power and official arbitrariness at the expense of the right, the orderly, the lawful, and the just."[2] Thus, idealist critics of legal skeptics have avoided reasoned analysis of skeptical argument on its own terms, instead implying or asserting that the skeptic's denial that morality is intrinsically part of the law is the same as the denial of morality *tout court.*

In the 1940s, a group of Jesuit scholars not only accused Justice Holmes of advocating the position that "might makes right," but warned that adherence to a Holmesian jurisprudence had led to Nazism in Germany and could lead to totalitarian rule in this country.[3] A characteristic outburst shows the violence of these criticisms: "This much must be said for Realism. If man is only an animal, Realism is correct, Holmes was correct, Hitler is correct."[4]

While the Jesuits' position seems extreme, even more temperate commentators took the link between legal skepticism and Nazism seriously. The famous debate between H.L.A. Hart and Lon Fuller, on the separation of law and morals,[5] focuses in part on the arguments of Radbruch. Radbruch was a German philosopher who abandoned his prewar positivism precisely because he came to believe that positivist views were partly responsible for Nazism.[6] One might expect that a distinguished legal theorist like Fuller would reject out of hand the claim that Nazism somehow followed from, or was particularly compatible with, positivism. Instead, Fuller appeared to endorse the claim, stating:

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1. *See* Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1216-17 (1981) (discussing this phenomenon).

2. *See* K.N. Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COL. L. REV. 581, 601 (1940) (describing reactions to Jerome Frank's attempt to use psychoanalytic theory to explain why lawyers mistakenly—according to Frank's skeptical views—believed that rules of law determine results in cases).

3. *See* G. Edward White, *The Rise and Fall of Justice Holmes*, 39 U. CHI. L. REV. 51, 65-67 (1971) (describing the attacks made on Holmes in five articles: John C. Ford, *The Fundamentals of Holmes' Juristic Philosophy*, 11 FORDHAM L. REV. 255, 275 (1942); Paul L. Gregg, *The Pragmatism of Mr. Justice Holmes*, 31 GEO. L.J. 262, 284, 293-94 (1943); Francis E. Lucey, *Jurisprudence and the Future Social Order*, 16 SOC. SCI. 211 (1941); Francis E. Lucey, *Natural Law and American Legal Realism: Their Respective Contributions to a Theory of Law in a Democratic Society*, 30 GEO. L.J. 493, 512, 531 (1942); Ben W. Palmer, *Hobbes, Holmes, and Hitler*, 31 A.B.A. J. 569, 571-73 (1945)). While these articles attacked every segment of Holmes' philosophy as immoral, it is clear that they viewed his skepticism about law to be inextricably linked to the encouragement given by his philosophy to totalitarianism.

4. Lucey, *Natural Law and American Legal Realism*, *supra* note 3, at 531.

5. Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958).

6. Fuller, *supra* note 5, at 657-61; Hart, *supra* note 5, at 617-18.

> Let us put aside at least the blunter tools of invective and address ourselves as calmly as we can to the question whether legal positivism as practiced and preached in Germany, had, or could have had, any causal connection with Hitler's ascent to power. It should be recalled that in the seventy-five years before the Nazi regime the positivistic philosophy had achieved in Germany a standing such as it enjoyed in no other country . . . .
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> . . . .
>
> . . . I cannot see either absurdity or perversity in the suggestion that the attitudes prevailing in the German legal profession were helpful to the Nazis. Hitler did not come to power by a violent revolution. He was Chancellor before he became the Leader. The exploitation of legal forms started cautiously and became bolder as power was consolidated. The first attacks on the established order were on ramparts which, if they were manned by anyone, were manned by lawyers and judges. These ramparts fell almost without a struggle.[7]

Fuller's "calm" discussion shows how easily idealists convinced themselves that skepticism denied morality. Fuller appears unwilling to investigate the paths open to a positivist, on the one hand, and an idealist, on the other, to confront an immoral legal regime. By stressing the separation of law and morals, positivism allows its adherent to identify for herself the moral beliefs she holds paramount. Such a positivist, living in Germany during the rise of Nazism, would have been free to assess the changes in the law enacted by the Nazis and the morality of those changes. If the positivist concluded that a rule of law enacted by the Nazis was immoral, the positivist would then be forced to ask "the final moral question: 'Ought this rule of law to be obeyed?'"[8] The situation of the idealist would have been similar. An idealist who believes, in general, that law is inherently moral would have had to make a comparable "final moral judgment": Is this purported Nazi rule of law, actually a law, or really a lawless act of an immoral government? In other words, neither idealist nor positivist theory compels the lawyer to embrace a noxious doctrine like Nazism, nor do they compel her to oppose it. As Professor Hart pointed out, the real question is why the distinction between law and morals acquired a sinister character in Germany, while elsewhere, for example with the Utilitarians, it "went along with the most enlightened liberal attitudes."[9] The failure of idealists such as Fuller to appreciate this rather simple insight shows the extreme visceral reaction positivism has evoked in its opponents.

Even rather innocuous expressions of legal skepticism have met with withering criticism. Judge Thurman Arnold, a skeptic of the legal realist school, contended in a debate with Henry Hart that in criticizing the com-

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7. Fuller, *supra* note 5, at 658-59.
8. Hart, *supra* note 5, at 618.
9. *Id.*

petence of contemporary judicial opinions, Hart had simply dismissed as poorly reasoned any opinion that disagreed with his own views on the subject.[10] As a secondary point, Arnold contested the theory of judicial deliberation relied upon by Hart, in the voice of a practitioner correcting the unrealistic picture of an academic.[11] As to deliberation, contra Hart, Arnold maintained that "there is no such thing as a process of maturing of collective thought, no such thing as a process of reason, no such thing as decisions rigorously governed by principle," in deliberations of the Supreme Court (or, by extension, deliberations of other judges).[12] Arnold offered as an alternative that a court composed of "men of widely differing experience representing many facets of American thought," will express conflicts that will add to the growth of American law.[13]

Despite the context of the debate, and the clear implication that law could grow and reach good results through discussion between judges of diverse viewpoints, Alexander Bickel responded emotionally to Arnold's view:

> This is cynicism pure and simple. And here, as in other realms, cynicism is what the late Henry L. Stimson called it: "the only deadly sin." As always, there is no reply to be made to it other than that if the estimate of reality on which it feeds is in any degree correct, then the reality must be changed to exactly that degree. The sin is mortal, because it propagates a self-validating picture of reality. If men are told complacently enough that this is how things are, they will become accustomed to it and accept it. And in the end, this is how things will be. That is the reason such a view, or non-view, of the judicial process as Judge Arnold's must be noticed and seen for what it is.[14]

The idealist, Bickel, violently attacks the perceived nihilism of the skeptic, not seeing that the skeptic has proposed an alternative picture of how the law can be moral, but insisting rather that the skeptic has simply embraced immorality.

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10. Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298, 1317 (1960); *see* Henry M. Hart, Jr., *The Time Chart of the Justices, The Supreme Court 1958 Term*, 73 HARV. L. REV. 84 (1959).

11. Arnold stated:

> But if Professor Hart had ever tried to hold together a majority in favor of an opinion which he had written (as I have done on occasion) he would know that compromise in the form of an ambiguity may be inevitable. He would find that he would have to put in something which he believes created an ambiguity in order to avoid provoking a dissent or a concurring opinion which would create even more ambiguity since the Court would be unanimous only on the result. He would find that men can sometimes agree on a result, but rarely on all of the reasons for that result, and that attempts to spell out reasons may be futile.

Arnold, *supra* note 10, at 1312.

12. *Id.* at 1311-13.

13. *Id.* at 1314.

14. ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 84 (1962) (citation omitted).

Ronald Dworkin, the most influential contemporary idealist, has taken a similarly hard, emotional line against skeptics. Opposing the positivist who claims that there is no "right" answer to hard legal questions—seemingly a metaphysical claim—Dworkin responds that "the controversy is really about morality, not metaphysics, and the no-right-answer thesis, understood as a moral claim, is deeply unpersuasive in morality as in law."[15] Later in the same book, Dworkin refers to "the cynic's mocking discovery that it [law] is nowhere at all."[16] Still later, in summarizing an argument against positivism, Dworkin again reaches for ethical (and perhaps even aesthetic) judgments:

> These bizarre conclusions [that Dworkin claims to have drawn from positivism] must be wrong. Law is a flourishing practice, and though it may well be flawed, even fundamentally, it is not a grotesque joke. It means something to say that judges should enforce rather than ignore the law, that citizens should obey it except in rare cases, that officials are bound by its rule.[17]

Once again we see the idealist's refusal to analyze a skeptical claim on its own terms. Instead, the idealist insists on seeing an attack on idealism as an attack on his morality. The idealist therefore emotionally denounces as "bizarre" and "grotesque" any position differing substantially from his own.

In sum, there is a very strong strain in the idealist position which holds that an adherent to legal skepticism must be, at best, a nihilist. Hence, the ethical consequences of legal skepticism are allegedly so repugnant that they justify the rejection of legal skepticism without further ado.

III. THE FACT/VALUE DISTINCTION

Metaphysics is concerned, in the most general sense conceivable, with describing the world. The metaphysician may ask what is the nature of law. Are laws nonphysical entities that exist in some different plane of reality? Are laws like mathematical rules? Are society's laws like the laws of science? Are laws entities, such as ideas in the mind or concepts in language? In contrast, ethics is concerned, in a similar general sense, with how to value and act in the world. The ethicist may ask whether there is a duty to obey the law simply because it is the law, or inquire into the relationship between morality and law.

No readily apparent, necessary link exists between the kind of questions considered in the metaphysics of law and the kind of questions considered in the ethics of law. That an "ought" cannot be derived from an "is" is a cliché of metaphysics. An ethical principle cannot be derived as

15. RONALD DWORKIN, LAW'S EMPIRE at ix (1986).
16. *Id.* at 9.
17. *Id.* at 44.

a necessary consequence from a metaphysical (or physical) principle.[18] This cliché is not universally accepted, and in some sense is at the heart of the dispute that concerns this essay, since idealists want to argue that certain (bad) value judgments follow from a skeptical position. The linguistic formulation of the fact/value distinction, that no conclusion containing an evaluative term may be deduced unless the evaluative term is present in the premises,[19] follows straightforwardly from the view that logic does nothing more than make explicit what is implicit in the meanings of the premises. Therefore, we can view the linguistic formulation as a methodological admonition, rather than a demonstrable truth. Whenever an argument purports to deduce an evaluative judgment from plain statements of fact, examine the statements of fact to see if you can identify a hidden evaluative premise.

There are three interesting ways to attack the linguistic fact/value distinction. First, the antidescriptivist may argue that language is so intertwined with purposes that an evaluative component may not be analyzed out of language. Second, the antidescriptivist may argue that language always presupposes moral beliefs, so that a separate descriptive component cannot be analyzed out of language. Third, the antidescriptivist may analyze language as a human behavior, in the context of human institutions and cultures that presuppose certain values, so that an attempt to analyze out descriptive and evaluative components separately from these institutions and cultures must always be incorrect. While the disputes over these attacks are too intractable to resolve in any short (or long) discussion, this essay sets forth reasons why the fact/value distinction should be retained as a methodological tool.

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18. *See, e.g.*, R.M. HARE, THE LANGUAGE OF MORALS 32 (Clarendon Press 1982) (noting "an imperative cannot appear in the conclusion of a valid inference, unless there is at least one imperative in the premisses"); DAVID HUME, A TREATISE OF HUMAN NATURE 470 (2d ed., Selby Bigge Clarendon Press 1978) (the source of this insight); G.E. MOORE, PRINCIPIA ETHICA 67-69 (Thomas Baldwin rev. ed., Cambridge Univ. Press 1993) (exploring the open question argument, pointing out that after any description of a state of affairs, it is still an open question whether that state of affairs is good). It may be noted that this distinction is parallel to the distinction drawn between observational and theoretical terms in the logical positivist theory of science. *See, e.g.*, JOHN LOSEE, A HISTORICAL INTRODUCTION TO THE PHILOSOPHY OF SCIENCE 190 (2d ed. 1985); Rudolf Carnap, *Foundations of Logic and Mathematics* 143-45, 202-09 *in* 1 INTERNATIONAL ENCYCLOPEDIA OF UNIFIED SCIENCE pt. I (O. Neurath & R. Carnap eds., 1955). This second distinction is undermined by the insight that all language and observation seems to be colored by context and world view so that all observations are to some extent theory laden. *See, e.g.*, NORWOOD RUSSELL HANSON, PATTERNS OF DISCOVERY: AN INQUIRY INTO THE CONCEPTUAL FOUNDATIONS OF SCIENCE 85-92 (1958); THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 111-23 (2d ed. 1970); LOSEE, *supra*, at 190-92, 197-200, 205; Paul Feyerabend, *An Attempt at a Realistic Interpretation of Experience*, 58 PROC. ARISTOTELIAN SOC. 143, 148-49, 160-64 (1958). Whether the interdependence between observation and theory terms in the area of science can be shown to be parallel with an interdependence between description and evaluation terms in the area of ethics is briefly discussed below.

19. *See, e.g.*, HARE, *supra* note 18, at 28-31; J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 72-73 (1977).

A. *Is There a (Separable) Evaluative Component in Language?*

The antidescriptivist may argue that a linguist cannot analyze out of certain words any covert evaluative component. This is so, the argument goes, because all language is to some extent theory-laden, and so some language is evaluative theory, or value-laden.[20] Hence, the antidescriptivist might claim that there are "thick" ethical terms, like bravery, cowardice, charity, and so forth, that interweave the descriptive and the evaluative inextricably.

The antidescriptivist claim fails for a couple of related reasons. First, the antidescriptivist cannot give a satisfactory account of the error in analyzing a thick ethical term into a descriptive and an evaluative component. The typical antidescriptivist objection is that to know the meaning of a thick ethical term, one cannot rely on a "mere" description. Instead, one must know the purpose for using the term. According to the antidescriptivist, the purpose will be inextricably linked, not to description, but to evaluation.[21] For example, terms such as "coward, lie, brutality" and "gratitude" are said to be linked to their function, their role in the way people live, in a way that mere description cannot capture.[22]

While the objection that "description" cannot capture "function" raises a mare's nest of issues in the theory of language, the resolution of these tangled issues turns out not to be relevant to the success of the objection. In the early twentieth century, an "atomistic" picture of language was set forth which has the following properties: the principal aim of language is to describe reality by constructing sentences that correspond to the world; the meaning of language is built up from the meanings of each of its parts; the core units for analysis of language are the word and the sentence; and each word (or sentence) can be analyzed into a "true" logical form.[23] The claim that thick ethical concepts can be analyzed into covert descriptive and evaluative components is taken to be a claim of this school of linguistic analysis. In contrast, and in revolt against this school, some philosophers of language claimed that language should be treated as an artifact, a tool just like other tools we use. Hence, language must be described as part of practices or conventions or forms of life.[24]

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20. *See, e.g.*, BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY 141-42 (1985); Heidi Li Feldman, *Objectivity in Legal Judgment*, 92 MICH. L. REV. 1187, 1205 n.36 (1994).

21. *See* WILLIAMS, *supra* note 20, at 141-42; Philippa Foot, *Moral Beliefs* 83, 85, 92 *in* THEORIES OF ETHICS (Philippa Foot ed., 1967); Feldman, *supra* note 20, at 1212 n.42.

22. *See* WILLIAMS, *supra* note 20, 140-41.

23. *See, e.g.*, Bertrand Russell, *Introduction* to LUDWIG WITTGENSTEIN, TACTATUS LOGICO-PHILOSOPHICUS 7-21 (Tactatus trans., C.K. Ogden Routledge & Kegan Paul Ltd. 1985); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 1, at 2-3 (G.E.M. trans., Anscombe Macmillan 3d ed. 1989).

24. *See, e.g.*, WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 23, § 11, at 6 ("Think of the tools in a tool-box: there is a hammer, pliers, a saw, a screw-drive, a rule, a glue-pot, nails, and screws. The functions of words are as diverse as the functions of these objects."); *Id.* § 23,

Since words are interrelated with each other and other behavior as part of a practice, it is fundamentally mistaken to attempt to assign individual meanings to individual words.

If the correct theory of language were not "atomistic," but instead "holistic," then meanings could not be parceled out to individual words. Instead, the meaning of language would depend on the seamless interconnection of all words with each other and with the practices in the world and forms of life the words described. If the holistic theory were correct, we could not winnow out, for one individual word, a separate descriptive component.

The holistic objection to atomistic theory is fair, but irrelevant to the fact/value distinction. What we must ask is: Is it intelligible to speak of a particular practice in terms of its "function," and in terms of the reasons for action someone engaging in that practice may have, without ourselves adopting or endorsing that practice? If so, we can separate some kind of (holistic) description from (moral) evaluation.

I have yet to see an example where description and evaluation cannot be separated in this way, so it seems wise to use the fact/value distinction as a methodological tool, until such an example is put forth. Hence, while we cannot treat words atomistically if we must treat them as a part of practices, we can still distinguish between description and evaluation. Just as words can be analyzed on the atomistic theory, practices can be analyzed on the holistic theory.[25] In sum, the possibility that the correct theory of language may be holistic appears, in and of itself, to have no bearing on the issue of whether description may be distinguished from evaluation.

B. *Is There a (Separable) Descriptive Component to Language?*

The antidescriptivist may make a different kind of holistic claim, namely that "thick concepts" are parts of world views that are theories of the world in the same way that scientific theories are theories of the world. The holist might claim that scientific theories are theory all the way down—for example, one can see observations of the sky as either observations of celestial bodies circling the earth or observations of the apparent movement of celestial bodies caused by the movement of the earth beneath the feet of the observer.[26] A holist would argue that an ob-

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at 11 ("Here the term 'language-*game*' is meant to bring into prominence the fact that the *speaking* of language is part of an activity, or of a form of life.").

25. Of course the analysis does not show what is *really* going on, in the sense that saying water is *really* H_2O shows the *real* chemical structure of water, but the analysis is nevertheless a useful way of describing what is going on, just as something may be usefully described as either a valiant exhibition of courage or a quarterback sneak (while not *really* being more one than the other) depending on our purpose. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 23, § 22, at 10-11.

26. *See, e.g.*, LOSEE, *supra* note 18, at 190-92; Feyerabend, *supra* note 18, at 160-64.

servation of the world cannot be described, even in the most basic terms, without invoking a theory. Similarly, one could argue that the use of "thick" ethical terms is colored by theory, such that no purely descriptive component could be separated out. The analogy does not destroy the usefulness of the fact/value distinction, since, relative to any particular purpose, and for any scientific activity, we can distinguish between observational and theoretical components. For example, a physicist can distinguish between "seeing" the paths of sub-atomic particles (theory) and describing patterns of bubbles in a cloud chamber (observation).[27] Similarly, relative to any evaluative activity, like praising brave acts, for the meaning of "brave" I can separate out an evaluative component (praise) from the descriptive (seeing someone take an action that risks personal injury to achieve some goal). Hence, while the fact/value distinction may not be an absolute distinction, relative to any specified level of description, i.e., a set of firmly held beliefs, one can distinguish fact from value.

C. *Is Language Analytically Separable from Human Institutions?*

The third attack on the fact/value distinction, related to the analogy to scientific theories, is based on the claim that language has a function in institutions. The simple, but seminal, form of the modern attack on this distinction is that, if we understand the meaning of terms like promise, we can see that evaluative conclusions do follow from descriptive premises. For example, from the sentence "Jones stated 'I promise to pay Smith five dollars,'" we can infer that "Jones ought to pay Smith five dollars."[28] This example shows that certain institutions or practices, if accepted, entail value judgments. To accept the institution of promising is to accept that promises ought to be kept.

Nonetheless, the fact/value distinction is still useful. The proposition: "John ought to pay Smith five dollars," is properly seen as established only relative to some unexpressed presuppositions. One presupposition would be that the full conclusion ought to be: "Someone who accepts the institution of promising must believe that 'John ought to pay Smith five dollars.'" An alternative is that the argument presupposes the premise: "The value judgments implied by the application of the institution of promising to facts in the world are objectively true."[29] We can understand that there is an institution of promising that requires that promises be kept, and still wonder whether one "ought" to accept that institution, either altogether, or at any particular instant. We can describe

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27. *See, e.g.*, LOSEE, *supra* note 18, at 192.

28. *See* John R. Searle, *How to Derive an "Ought" from an "Is,"* 73 PHIL. REV. 43, 44 (1964).

29. *See* MACKIE, *supra* note 19, at 64-72 (presenting a cogent assessment of the significance of Searle's "ought" to "is" derivation).

the facts of an institution without in any way endorsing or accepting the institution.

IV. PICTURES OF THE LEGAL PROFESSION

Historically, legal theory is judge-centered, but it does not need to be. The skepticism/idealism dispute can be recast to focus on lawyers. We considered two propositions above as framing the debate between skeptics and idealists:

> 1) The law is a fiction—merely a construct of lawyers' arguments and the relatively arbitrary action of decision makers.
>
> 2) A judge should state that the law stands for whatever result the judge deems to be correct.

A plausible analogue for proposition (2) is

> 2') A lawyer should do whatever her client wishes—she should argue that the law stands for whatever result her client desires.

In parallel with the morality-based attacks leveled against judge-centered skeptical theories, one commentator, David Luban, has argued that something like proposition 2' follows from legal skepticism, that 2' is repugnant, and that therefore legal skepticism is a false metaphysical position.[30] A critical reading of his arguments illustrates the difficulty, if not impossibility, of forcing a legal skeptic to commit to a particular ethical position as a consequence of his metaphysics. Hence, the critical reading illustrates the fallacy of equating legal skepticism with nihilism.

A complete picture of law in society will include both a theory of the status of legal rules and a theory of the relation of those rules, and the practice of lawyers, to morality. While any legal ethics is logically independent of a descriptive picture of the world, ethics and metaphysics may be linked in emotional, thematic ways. A picture of the world as a raw, impersonal struggle may serve to rationalize an ethics grounded in self-love; a picture of the world as an intricate, interdependent web of relationships may serve to rationalize an ethics grounded in universal love. Thus, any particular legal metaphysical theory may, in fact, be linked by its proponents to legal ethics. For example, a metaphysical theory that conceived of laws as ideal objects might be linked with, and used to rationalize, an ethics that viewed obedience to the law as inherently good. On the other hand, a metaphysics that analogized laws to customs subject to change over time might be linked to an ethics which holds that there is no moral requirement to obey the law.

It also seems logically consistent to hold a theory in which laws are abstract ideals, but nevertheless not inherently good. For example, laws of

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30. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY (1988).

science may be conceived of as abstract ideals, without obedience to the ideal carrying any moral import. (Indeed, obedience to a law of science is constrained by nature and is typically thought to have no moral weight whatsoever.) Equally, one could hold that laws, as society's customs, nevertheless morally compel obedience. For example, one might hold that we have a duty to respect other people and from that duty derive a duty to obey customs.

In one popular picture of the law, the law is complex. In difficult cases good answers may be hard to come by, but though resolutions of the cases are difficult, they are not arbitrary. Because the law is not arbitrary, lawyers, being honorable professionals, do not argue that the law stands for whatever their client wants. Instead, a lawyer will take a legally defensible position in an attempt to advance her client's legitimate interests. A lawyer will not take a legally impermissible position, not only because she is ethical, but also because she knows that an impermissible position will be recognized as such and will be rejected by her adversaries and the decision maker. This view might be called the establishment picture.

The other popular view might be called the skeptical picture. According to this view, lawyers are not constrained by professional honor, since the law is arbitrary. Lawyers are not constrained by the prudential boundaries of an objectively determinable law, since there is no objectively determinable law. Rather, the forces of the market, or perceptions of duty to the client, without opposition, impel the lawyer to maximize her profit by advocating her client's interests as zealously as possible, without regard to any independent conception of the meaning of the law she is interpreting. The lawyer may take this aggressive interpretive stance precisely because the law is just a relatively arbitrary social construct. The law is infinitely malleable and interpretable, thus the lawyer can bend it to her client's ends.

Idealist attacks on legal skeptics seem implicitly to treat these two rival pictures as if they are the only two possibilities. This essay referred above to the possible emotional or thematic link between metaphysical and ethical representations. The designation "emotional" or "thematic" may be taken to be dismissive, a way of saying there is really no content at all to the link, and partisans of the link are simply and inexplicably mistaken. We should not ignore the possibility that we should simply dismiss the idea of a link, but there are other possibilities as well. The kinds of theories a culture generates may reveal a great deal about what that culture values. Objectivity and determinacy may very well be "establishment" values. Practitioners of a profession, like the legal profession, that is a bulwark of the "establishment" of a society, will want both to justify and glorify their professional role by linking their profession to the objectivity that their culture values. In turn, the "establishment" will want to characterize its opponents as rejecting objectivity in metaphysics and in ethics.

The cultural analysis of views on the law/ethics connection remains delegitimating. The cultural analysis does not concern itself at all with whether there actually is such a link. We can also take the link view seriously and worry about whether it is true. Typically, an investigation of the possible link would follow a path from metaphysics to ethics, starting with a picture of the world and trying to conjure a picture of right action from that representation of the world. We should have little confidence that the view would have the force of logic, since we know of no way to deduce an "ought" from an "is." Nevertheless, the link may have the force of emotion or sympathy. The description of the world may impel us to feel that certain ways of acting in that kind of world must be given approbation, while other ways of acting must be treated with repugnance.

The persuasion need not go in the metaphysics to ethics direction, as the idealist attacks show. From a certain perspective, ethical knowledge is much clearer than metaphysical knowledge. Who knows precisely what a legal rule is? How can we argue the point? Yet who doubts that it is wrong to lie, cheat, and steal? As we have seen above, legal theorists often attack metaphysical views on moral grounds. If it were possible to form a chain from such ethical truth to metaphysical truth, legal metaphysics and ethics, and the link between them, could be firmly established.

V. AN ARGUMENT FROM ETHICS TO METAPHYSICS

One commentator, David Luban, has constructed a picture of the legal profession and justified that picture with an argument from ethics to metaphysics.[31] Luban's metaphysical project ultimately fails. Examining his argument illustrates why it appears impossible to use metaphysics to ground legal ethics on any basis other than sympathy and, conversely, why it appears impossible to use moral beliefs as a tool for attacking opposing metaphysical positions. Moreover, a close examination of Luban's project shows that there are indeed many possible pictures for legal theory to adopt, and that the simple establishment/anti-establishment dichotomy forced on one by belief in a metaphysics/ethics link does not accurately describe the universe of legal theories.

Luban's position is interesting and complex; he believes that the establishment picture should be correct, but his position has the following wrinkle: lawyers erroneously believe the anti-establishment picture.[32] Hence, while metaphysics and ethics are linked, actual behavior is not ethical, because people do not understand what the true metaphysics and ethics are. In Luban's idealist metaphysics, law is purposive and spirit-driven.[33] His legal ethic is founded on the values of community, solidar-

31. *Id.* at 18-20.

32. *Id.* at 18 (attributing this view to the critic who argues that instrumentalism is disrespectful of the law).

33. *Id.* at 18, 31.

ity, and respect for ones' fellows. The ethical lawyer takes responsibility for, and shares the ends of, her client.[34] While Luban's primary concern is ethics, he makes an excursion into metaphysics in pursuit of a complex argument intended to validate his communitarian ethical picture.

The strategy of Luban's argument straightforwardly exploits his implicit limitation of most discourse in legal theory to the establishment and anti-establishment pictures. First, Luban describes what he views as the dominant theory of legal ethics, an ethics based on what he calls the principle of partisanship.[35] This ethics is the anti-establishment ethics that the lawyer may do whatever her client wishes. He then claims that the principle of partisanship follows from what he describes as the dominant theory of legal metaphysics, legal realism.[36] Legal realism plays the role of the skeptical metaphysics in the anti-establishment picture. Luban seeks to identify and exploit the link between these metaphysical and ethical pictures. He attempts to demonstrate that the conclusions that follow from the principle of partisanship do not agree with the reader's judgments about right action.[37] Taking this repugnance to common morality to demonstrate that the principle of partisanship is false, Luban exploits the schema by arguing that legal realism is therefore also false.[38] Having established that legal realism is false, Luban poses his own idealist metaphysics as the only natural alternative.[39] Finally, Luban feels free to construct an ethical theory based on his idealist metaphysics.[40]

A close analysis of Luban's argument shows both how we can slip into a distorted picture of legal theory, by misdescribing theories to force them into one of the two pictures, and how the possibility of other pictures undermines any tight link one might attempt to forge between legal metaphysics and legal ethics.

A. *The General Argument Against Legal Realism and the Principle of Partisanship*

Luban characterizes the "principle of partisanship" as that "cynical" view of the law that holds, "[W]hen acting as an advocate, a lawyer

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34. *Id.* at xxii, 30.
35. *Id.* at 7, 11-18.
36. *Id.* at 18-19.
37. *Id.* at 21.
38. *Id.*
39. *See, e.g., id.* at 26.
40. While the argument against realism is a brief passage in Luban's book, it is significant because of its placement. *Id.* at 3-30. The arguments constitute the first two major arguments of the book in chapters 1 and 2. In chapter 3, Luban confronts a related ethical claim, the "ultrarealist" position that there is simply no obligation to obey the law. *Id.* at 30-49. In chapter 4 Luban introduces what he views as possibly the most important defense of the principle of partisanship, the complex of arguments that support the use of the adversary system (in which the principle of partisanship plays a crucial role). *Id.* at 50. This article is not concerned with Luban's discussions of the "ultrarealist" position or his discussion of the adversary system.

must, within the established constraints of professional behavior, maximize the likelihood that the client will prevail."[41] Luban calls the principle of partisanship disrespectful of the law, because the principle is supposed to lead to "instrumental" behavior that treats the law as an amoral tool to be used to satisfy the client's objectives, rather than behavior that treats the law as containing an ideal meaning.[42] According to Luban, there are two, equally bad, types of this instrumental behavior:[43] false formalism argues for the technical letter of the law in order to subvert its spirit;[44] false idealism argues that some particular picture or policy animates the law, to defeat the letter of the law.[45]

Luban contends that the two types of "instrumentalism" are only evils if we can find a true "spirit" and a true letter of the law.[46] By comparing "instrumentalist" actions with the "true" letter or "true" spirit of the law, we can then show that these behaviors are evil.[47] Luban believes that we can only speak of a true letter or spirit of the law from a "picture of law according to which its meaning, purpose, or 'spirit' is a given—univocal, rigid, self-explanatory, and uncontroversial."[48] Hence, Luban moves from an ethical judgment rejecting one part of the anti-establishment schema to a metaphysical judgment rejecting the other part. Luban identifies cynical disrespect for the law with "legal realism."[49] He describes legal realism as a picture of the law that treats law only "instrumentally," rather than treating law as having intrinsic meaning.[50]

Luban links legal realism with the principle of partisanship by appeal to the notion of respect. First, Luban identifies respect for the law as a principle value of the lawyer's role morality.[51] He criticizes the principle of partisanship as not displaying respect for the law.[52] Luban then contends that under legal realism, "only the law in action counts."[53] Next comes the crucial move, establishing the link between metaphysics and ethics. Under realism, Luban claims, if an official respects your actions, your actions exhibit respect for the law.[54] Luban concludes therefore that "if you believe realism, you will also believe that treating the law in-

41. *Id.* at 7, 11. Luban takes his formulation from Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669, 673 (1978).
42. LUBAN, *supra* note 30, at 18.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.* at 19.
50. *Id.*
51. *Id.* at 16 ("[O]ne must respect the law as it is given."); *see id.* at 30-49.
52. *Id.* at 16.
53. *Id.* at 19.
54. *Id.*

strumentally does not exhibit disrespect for it."[55] Realism thus "paves the way for a ready adherence to the principle of partisanship."[56]

From the principle of partisanship, Luban deduces ethical results that are repugnant to commonplace morality. He then argues that these results are incorrect only if skeptical metaphysics is false. In conclusion, Luban draws the moral that his suggested alternative, that the law is imbued with the ideal content of meaning, purpose, or spirit, is correct.[57]

B. *Idealism, Realism, Operationalism, and Determinacy*

Does viewing legal theory through the filter of the two pictures cause Luban to distort his description of the universe of legal theory discourse? To answer this question it may be helpful to revisit some general philosophical categories. As discussed above, schools of metaphysics may be divided into two camps, idealists and skeptics.[58] Idealists believe that there are entities—such as the meanings of words, moral rules, rules of mathematics, or laws of science—that are unlike ordinary physical objects. These entities are supposed to correspond to universal or abstract terms or concepts that the mind may apprehend directly.[59] Empiricist skeptics doubt the existence of ideal entities and seek to explain the nature of the meanings of words, moral rules, rules of mathematics, laws of science, and similar phenomena by reference to observable facts of the experienced world.[60]

American jurisprudence has been dominated by idealist theories (which can be fit into the establishment schema).[61] For an idealist, laws

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55. *Id.*

56. *Id.* at 19-20.

57. *See id.* at 26.

58. The terms used to describe these two schools are numerous and confusing. Idealists in the sense used in the text may also be referred to as realists, since they believe that ideal entities are real, while skeptics are sometimes called nominalists, because they believe that names are just names and do not correspond to ideal entities. Idealists may also be called rationalists, believing that we may know the world by knowing the ideal entities via reason, while skeptics may be called empiricists, since they believe that the world may be explained by reference to what we experience with our senses without recourse to ideal entities. There is a broader sense of idealism that is not used in the text. Idealism may refer to a philosophical school that holds that the world is nothing more than our ideas, while realists, in contrast, believe that the world is independent of our ideas and exists apart from our consciousness. The term legal realism refers to a nominalist or empiricist jurisprudence. The label "legal realism" places the legal realists in the context of the broader American philosophical movements of New Realism, *see, e.g.*, EDWIN B. HOLT, THE NEW REALISM (1913), and Critical Realism, its successor. *See, e.g.*, DRAKE ET AL., ESSAYS IN CRITICAL REALISM: A COOPERATIVE STUDY OF THE PROBLEM OF KNOWLEDGE (1920).

59. *See, e.g.*, Nicholas Rescher, *Idealism*, *in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY 355-57 (Robert Audi ed., 1995).

60. *See, e.g.*, HUME, *supra* note 18, at 1-7.

61. *See, e.g.*, Norway Plains Co. v. Boston & Maine Ry., 67 Mass. 263, 267 (1854) ("[T]he common law consists of a few broad and comprehensive principles, founded on reason, natural justice, and enlightened public policy, modified and adapted to the circumstances of all the particular cases which fall within it."); HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS 166-

reflect or partake of rules or meanings independent of, and logically prior to, the actual law passed by the legislature or created by the rulings of courts.[62] A modern idealist will usually believe that, although the bare formal rules of the actual or positive law may not go so far as to determine every case, the ideal rules of law do determine every case, thereby closing the gaps in the actual law.[63] By reference to the ideal rules of law, the legal practitioner may answer the hard cases where the positive rules of law do not readily give an answer.[64] For example, Hart and Sacks, proponents of the legal process school, believed that "[u]nderlying every rule and standard . . . is at the least a policy, and in most cases a principle. This principle or policy is always available to guide judgment . . . ."[65] By arguing for a purposive, spirit-driven picture of the law, Luban stamps himself an idealist, within the mainstream of American jurisprudence.

Legal realists are skeptics. They do not believe that there are ideal entities corresponding to legal rules. In Felix Cohen's phrase, the realists' description of law dispenses with idealism's "transcendental nonsense,"[66] and pays attention only to "a number of subordinate questions,

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67 (1958) ("Underlying every rule and standard, in other words, is at the least a policy and in most cases a principle. This principle or policy is always available to guide judgment in resolving uncertainties about the arrangement's meaning."); CHRISTOPHER C. LANGDELL, SELECTION OF CASES ON THE LAW OF CONTRACTS 2 (1879) ("Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility . . . constitutes a true lawyer . . . ."); Ronald Dworkin, *Hard Cases*, 88 HARV. L. REV. 1057, 1060 (1975) (stating that "judicial decisions in civil cases . . . characteristically are and should be generated by principle not policy"); Charles Fried, *The Laws of Change: The Cunning of Reason in Moral and Legal History*, 9 J. LEGAL STUD. 335, 336-37 (1980) ("The law is a moral science, and judges, in determining the law, decide as moral agents . . . [O]ne way to get a judge to make a particular decision is to make that decision the correct conclusion for a moral argument."); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 381 (1978) (adjudication, consisting of the case-by-case development or principle, is "a third area of rational discourse, not embraced by empirical fact or logical implication"); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 645 (1923) (stating that law consists of three elements: legal precepts, a body of traditional ideas as to how legal precepts should be interpreted, and "a body of philosophical, political, and ethical ideas as to the end of law . . . with reference to which legal precepts . . . are continually reshaped and given new content and application"); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) ("[T]he main constituent of the judicial process is precisely that it must be genuinely principled, resting with respect to every step that is involved in reaching judgment on analysis and reasons quite transcending the immediate result that is achieved.").

62. *See, e.g., supra* texts cited at note 61.

63. *See, e.g.*, Dworkin, *supra* note 61, at 1060.

64. *Id.*

65. HART & SACKS, *supra* note 61, at 166-67.

66. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). For example, Cohen wrote: "*Jurisprudence*, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics or psychology. In effect, it is a special branch of the science of transcendental nonsense." *Id.* at 821.

each of which refers to the actual behavior of courts."[67] For purposes of his argument, Luban characterizes legal realism as an operationalist jurisprudence that reduces the law to repeated procedures and outcomes consisting of courts considering cases and ruling to punish or not punish specific acts and actors. Luban takes the definitive statement of realism to be Oliver Wendell Holmes' maxim that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."[68] In further support of his operationalist characterization, Luban cites the Felix Cohen maxim, set forth above, that law refers to "the actual behavior of courts"[69] and cites to Cohen and Karl Llewellyn's conclusion that the law is about predicting what officials do about disputes.[70] Luban thereby identifies legal realism with the operationalist theory that the law is nothing but the body of predictions of how the courts will behave in specific cases.

Schools of metaphysics may also be described as determinist or indeterminist.[71] This dichotomy seems logically independent of the idealist/skeptic divide. One can construct a formal logic that can be viewed as reflecting ideal logical concepts, and yet prove that the logic is incomplete, i.e., fails to determine for certain sentences whether the sentences are logical truths.[72] Hence the indeterminist logic corresponds (albeit not completely) to an ideal reality. On the other hand, a skeptic could believe that a system of mathematical postulates was complete, without believing that the postulates reflected anything more than rules for the manipulation of symbols. Legal idealists nevertheless tend to argue as if idealism and determinism were linked parts of the establishment schema. They rely on the existence of ideal legal objects to ensure that the law determines every case. Much of the tension in this debate is over determinism, not idealism proper.

Luban's emphasis on the operationalist aspect of legal realism is consistent with the failure to identify determinism as a separate major issue. Luban wishes to attack an indeterminist view of the law which

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67. LUBAN, *supra* note 30, at 20 (quoting Felix Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 16 (1937)).

68. *Id.* (quoting O.W. Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 461 (1897)).

69. *Id.* (quoting Felix Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 16 (1937)).

70. *Id.* (quoting Felix Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5, 16 (1937); K.N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 12 (1951)).

71. The Critical Legal Studies school has stressed the importance of the concept of indeterminacy in realist and critical thought. *See, e.g.*, Tushnet, *supra* note 1, at 1213 ("Realism showed that subjectivity and indeterminacy resulted when analysis was confined to traditional legal discourse."); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209, 360 (1979) ("For any given factual conflict of rights, the doctrinal structure will offer a choice of categorizations; the techniques of reasoning that are supposed to tell us which choice to make will themselves reproduce that choice at another level.").

72. *See* Kurt Gödel, *Über Formal Uunentscheidbare Sätz der Principia Mathematica und Verwandter Systeme I*, 38 MONATSHEFTE FÜR MATHEMATIK UND PHYSIK 173 (1931).

denies that the law can be "univocal . . . [and] self-explanatory."[73] Operationalism does not entail indeterminism. An operationalist can perfectly well believe that the observable, repeatable behaviors he uses to define law, such as the behavior of judges, exhibit predictable regularities. What he will not believe is that the regularities are explained and determined by ideal entities—such as principles or policies—floating above the plane of behavior. Fairly sophisticated attempts have been made to formulate operationalist theories of law. For example, Max Black offered an operational account of rules in which a rule has just two components: 1) a description of a class of actions and 2) an indication whether that class is required, forbidden, or allowed.[74] Alf Ross has shown how rules about the fictive ideal concept "tû-tû" can be reduced to rules about behavior.[75] Both these operationalist theories result in a picture of univocal rules yielding unique results.

It is not necessary to be an operationalist to deny law's univocal character. The positivist legal philosophy of H.L.A. Hart portrayed law as grounded in language, not in operations. Hart secured the partial regularity of law by a linguistic theory in which there are many core cases of meaning for legal rules—cases for which there is no difficulty in determining what the law is in practice.[76] Yet in extraordinary cases where, according to his theory, the meaning of the law gave out, Hart would differ from a determinist and describe the judge's role as legislating among unforced alternatives.[77]

The heirs to Legal Realism, theorists of the Critical Legal Studies movement, are not operationalists. Instead, at least some of them seem to believe that law has a large scale ideal structure. In contrast to the idealists, practitioners of Critical Legal Studies believe the ideal structure is never univocal. The hallmark of Critical Legal Studies is the slogan that for every principle there is a counter-principle, for every policy a counter-policy, for every rule a counter-rule.[78]

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73. LUBAN, *supra* note 30, at 18.

74. Max Black, *Notes on the Meaning of 'Rule,'* 24 THEORIA 107, 119 (1958), *reprinted in The Analysis of Rules, in* MODELS AND METAPHORS: STUDIES IN LANGUAGE AND PHILOSOPHY 95, 107-08 (1962).

75. Alf Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957).

76. *See, e.g.*, H.L.A. Hart, *supra* note 5, at 607.

77. *See, e.g.*, H.L.A. HART, THE CONCEPT OF LAW 132 (1961) ("The open texture of law means that there are, indeed, areas of conduct where much must be left to be developed by courts or officials striking a balance, in the light of circumstances, between competing interests which vary in weight from case to case.").

78. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977) (describing the transformation of contract law from the dominant equitable theory to the dominant will theory); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000 (1985) (discussing "doctrinal structures that depend on the dualities of public and private, objective and subjective, form and substance"); Kennedy, *supra* note 71, at 355 ("The conflict of rights occurs at every level of the legal system, at least as liberalism conceives the system.").

In sum, it is not the operationalism of legal realism that forces it to deny law's univocal character, but rather legal realism's emphasis that extra-legal considerations, such as politics, psychology, and social class, determine the judge's actions.

The proper target for Luban's attack is that strain of jurisprudence that unites realists and critics: the denial of law's univocal character and the assertion of its fundamental indeterminacy. The realist and the critic both agree that law cannot be predicted from some ideal structure—the realist because he denies the existence of an ideal structure, the critic because he denies its efficacy. Thus, when Luban takes realism as defined by Oliver Wendell Holmes' slogan, "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law"[79] as his enemy, he fails to directly attack Critical Legal Studies, the only current academic school of jurisprudence that might trouble him. On the other hand, the target of Luban's argument does end up being indeterminist theory. As will be seen below, the "nothing more pretentious" clause of Holmes' slogan, which denies idealism altogether, plays no role in Luban's argument. Only the denial that idealism can determine an answer is attacked. Thus, Luban's arguments, if successful, will weigh as heavily against the idealist Critical Legal Studies as against legal realism.

C. *The Dominant Metaphysics and Its Relation to Ethics*

To make the connection between metaphysics and ethics relevant, Luban must argue that realist metaphysics actually influences lawyers' behavior. Luban characterizes legal realism as the "dominant school of jurisprudence in twentieth-century America."[80] His thesis is gravely undermined by the observation that legal realism is far from the dominant strain of twentieth century jurisprudence. Although realism rose in popularity, as a reaction against formalist idealism in the twenties and thirties, idealism made a vigorous comeback in the fifties and sixties with the Legal Process and Neutral Principles schools,[81] the liberal jurisprudence of thinkers like Ronald Dworkin,[82] and the emergence of the law and economics school.[83] Although realist-style indeterminacy arguments

79. LUBAN, *supra* note 30, at 20 (quoting O.W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897)).

80. *Id.* at 19. Luban's pursuit of this argument apparently began with a commentary on an article by Stephen L. Pepper. *Id.* at 20 n.16. Pepper introduced the mischaracterization of legal realism as the dominant school. Stephen L. Pepper, *The Lawyer's Amoral Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 624 (1986). Luban adopted it without further analysis. David L. Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM. B. FOUND. RES. J. 637, 646 (1986).

81. *See, e.g.*, HART & SACKS, *supra* note 61 (explaining legal process); Wechsler, *supra* note 61 (explaining neutral principles).

82. *See, e.g.*, Dworkin, *supra* note 61.

83. *See, e.g.*, DWORKIN, *supra* note 15, at 276-80; Avery Wiener Katz, *Positivism and the Separation of Law and Economics*, 94 MICH. L. REV. 2229, 2260 (1996).

have been revived in the last twenty years with the skeptical analyses of Critical Legal Studies, that school is far from achieving academic dominance.[84]

If determinist idealism, rather than legal realism, is the dominant academic legal metaphysics, Luban's attempt to explain the current professional-role morality by reference to metaphysics is refuted, because he cannot establish a causal link between the two. Luban has an implicit reply to this criticism. He argues that although realism is not taught as the favored doctrine in jurisprudence classes, it is taught, implicitly, in every single substantive legal class.[85] Students are continually called upon to distinguish and analogize cases and to argue for whatever position is assigned. While professors claim to believe the law is determinate, they actually teach that it is indeterminate.[86] Thus, the message of legal instruction may always be a closet realism. The teaching demonstrates that the law is indeterminate and infinitely manipulable. Idealism is honored, but realism is taught.[87] If closet realism is taught, Luban may maintain his thesis.

There are at least five possible explanations for the seeming paradox that idealism is officially honored while legal theory manipulation is taught. Closet realism is only one of them. A second explanation relies on our adversary system of justice and a redescription of what is taught in law school. The idealist professor could object that the closet realist account is just a misunderstanding of legal education. What is really taught is idealist theory building. The student starts out with a toolbox of cases, rules, and policies and a position to support. She then builds a legal theory which provides a principle or policy to explain the cases and support her position. In short, the student learns legal argument.[88] The student is allowed to use it for her client because of the belief that our adversary system requires all lawyers to use the law instrumentally for

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84. *See, e.g.*, Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 579 (1983) (contrasting Critical Legal Studies with the "dominant styles of legal doctrine" which feature, *inter alia*, "ideal purposes, policies, and principles" lending them "a semblance of authority, necessity, and determinacy").

85. *See* LUBAN, *supra* note 30, at 18-19.

86. A variant of this explanation would be that while academic jurisprudists profess that law is a determinate, idealist system, most practicing teachers simply do not think about jurisprudence at all. They naturally end up treating the law as if the most minimal jurisprudence, legal realism, were true. In this variant, there is an institutional hypocrisy resulting from a split between the academics who think about the nature of the law and the academics who teach lawyers how to use the law.

87. *See* Unger, *supra* note 84, at 674-75 (describing most contemporary jurists as regarding with disdain idealists who strive to recreate "objectivism and formalism"). The majority of jurists "abased [philosophy] into an inexhaustible compendium of excuses for the truncation of legal analysis. The social sciences they perverted into the source of argumentative ploys with which to give arbitrary though stylized policy discussions the blessing of a specious authority." *Id.* at 675.

88. *See* DWORKIN, *supra* note 15, at 87-89 (explaining what Dworkin calls, in his later writings, interpretation).

their client.[89] The client himself cannot argue, because he does not know enough law. The other side will also have a lawyer, who will present its best legal theory. An impartial judge will pick the best argument. We could not be sure, the argument goes, of finding the best legal theory, unless both sides were as ably argued for as possible.

The legal theory toolbox explanation does not account for the possibility that one person can determine the law without going through the arbitrated dialectic. If we acknowledge the possibility of determining the law by one's self, how do we explain why a lawyer should not first try to find the truth independent of the judge, and if successful, conform her client's position accordingly? We can call the legal theory toolbox explanation procedural skepticism; the theory that the determinate, univocal nature of the law does not have confining ethical consequences, because that nature is unknowable until the end of the adversary process. If procedural skepticism explains how legal education works, Luban's attack on metaphysics will miss the real target.

A third explanation is hypocrisy. A lawyer may believe idealism is true and know that, in fact, a good argument for the wrong side more often obscures the truth than reveals it. But a lawyer has a skill and needs money. So lawyers legitimize the use of their skill by appealing to the adversary system. The hypocrisy explanation undermines the connection Luban wants to make between metaphysics and ethics at a more basic level. If hypocrisy is the explanation for people's behavior, people are ignoring what they know to be good and right for improper reasons. If people are just bad, it does not matter whether they can appeal to metaphysics to justify their behavior.

A fourth explanation might be called legal descriptivism. Under this theory, law is determinate in virtue of its meaning, but that fact is morally indifferent. While it may be crystal clear that driving faster than the speed limit is illegal, no moral significance whatsoever is attached to this fact. Since there is no disapprobation to be attached to subverting the law, the lawyer is free to help his client do so. This theory is particularly plausible in connection with laws and regulations, such as the tax code, divorced from the traditional morality of most common law torts and crimes, which are regarded as intrinsically evil.[90]

A fifth explanation may be nonuniversalist ethics. If a lawyer believes in a universalist ethics where moral obligations to everyone re-

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89. LUBAN, *supra* note 30, at 50-103 (calling this the "adversary excuse" and discussing it at length).

90. *See, e.g.*, Calvin Woodard, *Thoughts on the Interplay Between Morality and Law in Modern Legal Thought*, 64 NOTRE DAME L. REV. 784, 788 (1989); Richard L. Gray, Note, *Eliminating the (Absurd) Distinction Between Malum in Se and Malum Prohibitum Crimes*, 73 WASH. U. L.Q. 1369, 1374-78 (1995) (giving history of the distinction between malum in se and malum prohibitum crimes).

ceive equal weight, then the lawyer has difficulty in justifying privileging the ends of the client over the ends of the adversary. On the other hand, if the lawyer believes in a kind of local communitarian ethics in which one has tighter obligations to those closer to one than to strangers, the adversary system is easy to justify. The lawyer may believe that duties to those closest to her override any moral imperative that the law prescribes concerning strangers. She is her client's friend and as such owe a greater duty to him.[91]

In other words, even with a legal theory that endorses an establishment metaphysics and ethics, there are numerous ways that metaphysics and ethics could relate to the actual behavior of lawyers. The straightforward scenario in which lawyers conform their behavior to the true ethical theory is only one scenario among many candidates from which to choose. Only if the practice of law is dominated by closet realism will Luban's argument against instrumentalism be of much force in changing lawyers' behavior. Given the multiplicity of equally plausible explanations for belief in the adversary principle, even if Luban's argument does refute closet realism, the more practically important underpinnings of the principle of partisanship survive unscathed.

D. *The Attack on Realism*

Luban offers two arguments intended to show that legal realism is false and a third argument intended to show that even a legal realism modified enough to contain some element of determinism cannot justify the principle of partisanship.

1. Argument 1: The Refutation of Realism

Luban's sketches his first "refutation" of realism as follows:[92]

> 1) "The prophecies of what the courts will do in fact, and nothing more pretentious, are what [is meant] by the law;"[93]
>
> therefore
>
> 2) No act is illegal if the courts can be induced to go along with it;[94]
>
> therefore
>
> 3) The law is what the judge says it is;[95]

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91. *See* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1066, 1071 (1976).

92. LUBAN, *supra* note 30, at 20-21.

93. *Id.* at 20 ("The thesis of legal realism was stated authoritatively by Holmes thus.").

94. *Id.* at 21 ("[N]othing whatsoever is illegal if you are able to get officials to go along with you.").

95. *Id.*

therefore

4) Anything a lawyer does in pursuit of the client's interests is respectful of the law if it works.[96]

Proposition 4 is taken to be a *reductio ad absurdum* of realism. If the argument works, it refutes a metaphysical theory based on an ethical consequence of that theory.

a. *Linking Proposition 1 to Proposition 2*

Proposition 1 is simply a restatement of Holmes' realist slogan. Does proposition 2 follow from proposition 1? As the argument is sketched, it does not. The sketch is an enthymeme—we must add premises that articulate a relation between the propositions. One plausible premise is

1.1) If an act is illegal, then it is prohibited by the law.

1.1 entails

1.2) No act is illegal if it is not the case that it is prohibited by the law.

By substitution from 1 we can now deduce

1.3) No act is illegal if it is not the case that it is prohibited by the prophecies of what the courts will do in fact.

1.3 is still not quite proposition 2. To get from 1.3 to proposition 2, we must add a premise connecting the action of inducing a court to go along with something and the prophecy that the court will go along with it. To make the link, we can add a premise which gives content to the idea of being prohibited by a prophecy of what the courts will do. (This is an awkward formulation, since it is natural to speak of a law as prescriptive, whereas a prophecy is thought of as descriptive. Nonetheless, no problem seems to stem from this awkwardness.)

1.4) An act is prohibited by a prophecy of what the courts will do in fact if and only if the prophecy predicts that the courts will punish the act.

By substitution into 1.3, this yields:

1.5) No act is illegal if it is not the case that the prophecy of what the courts will do in fact predicts that the courts will punish the act.

We may take the "prophecy" of Holmes' slogan to be a prediction which is true.[97] Hence, the slogan tells us that a body of law is the body of

96. *Id.* ("[F]or the realist, anything you do in pursuit of your client's interests is automatically respectful of the law if it works.").

the accurate predictions of the behavior of the courts. It also tells us, in the "nothing more pretentious" clause, that Holmes regards any metaphysical ideal content added to those predictions—content such as natural law, or principles and policies which guide the law—as empty nonsense. Nevertheless, the rejection of ideal content does not entail the loss of the ability to compare the action of the courts with what is predicted. There are three possibilities when a prediction is requested about what the courts will do: 1) a true prediction is made about the courts' action; 2) a false prediction is made; and 3) no prediction can be made. Only in case 1 is there a prophecy. Hence, applying premise 1.5, we can see that by this realist definition of the law, an act may be illegal only in case 1.

For example, we may predict that the courts will punish an act, but then find that the courts do not. We may be mistaken because we are surprised about the court's interpretation of the law, the court's interpretation of the evidence, or some other factor, such as the court's susceptibility to some sort of extra-legal pressure, such as bribery. Since a prophecy is a true prediction, there was no prophecy, although we thought there was. Going strictly by the slogan, we must say that the law, or at least the legal/illegal dichotomy, failed to cover the act. Alternatively, we may not be able to prophecy from knowledge of the law whether the courts will hold an act legal or illegal. Perhaps the law is unclear (such as in a case of first impression), perhaps the facts are unclear, or perhaps the susceptibility of the courts to extra-legal pressure is unclear. Since there is no prophecy, the slogan tells us that the act is not covered by the law.

We now see that we can describe three cases where the courts can be induced to go along with an act: 1) the case where the court's action can be prophesied; 2) the case where the court's action is wrongly predicted; and 3) the case where no prediction can be made. These cases support the following proposition:

> 1.6) If the courts can be induced to go along with an act, then it is not the case that the prophecy of what the courts will do in fact predicts that the courts will punish the act.

By transitivity from propositions 1.5 and 1.6, we can finally derive proposition 2:

> 2) No act is illegal if the courts can be induced to go along with it.

b. *Linking Proposition 2 to Proposition 3*

Proposition 3 states that:

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97. Again, this definition is loose. Presumably a prediction which is true at random, or for the wrong reason, should not count as a prophecy. It should also be understood that on a realist account, whatever is that property which makes a true prediction into a prophecy, it is not a metaphysical property such as having a relation to a principle or a policy. Nonetheless, the truth of the prediction is at least a necessary condition of being a prophecy.

3) The law is what the judge says it is.

Strictly speaking, proposition 3 is in the wrong tense, because the emphasis of the realist definition of law that we have been considering is on prophecy. Accordingly, proposition 3 should be modified as follows:

3.1) The law is what the judge will say it is.

As is shown above, there are three possibilities for the relation between the law and an act. In only one of those cases, the case where we can truly predict what the judge will say, is 3.1 true. Hence, proposition 3.1 does not follow from proposition 2. Modifying again, we obtain:

3.2) If we can truly predict what the judge will say, the law is what the judge will say it is.

In his sketch of this argument, Luban criticizes proposition 3 by appealing to our unreflective moral views of its consequences.[98] These criticisms do not hold up against the weaker proposition 3.2 that is actually derivable from the argument. Luban imagines the court may be induced by bribery or threats to decide in favor of some party, even though that party has committed a plainly "illegal" act.[99] He believes that in this situation the legal realist is compelled to say, contrary to hypothesis, that the act was legal.

For the act to be plainly illegal, according to the legal realist definition of illegality given by Luban, there must be something that would allow one to predict, all else being equal, that the courts would punish the act. We can imagine three cases in which bribery protects an actor from punishment, using the three possible relations between a law and an act. In case 1, the legal realist sees the act and the law, and prophesies that the court will hold the actor liable. In case 2, the legal realist prophesies that the court will not hold the actor liable. In case 3, the legal realist would not be able to prophesy.

In case 1, the legal realist's prediction is undone by the court's corruption. Going by the legal realist slogan, here we must say that the law failed to cover the act.[100] This description does not seem repugnant. Corruption derailed the law and prevented it from applying here. The idealist would disagree, saying that the law did cover the act, but was not administered by the courts. There is a difference of emphasis in the descriptions—the realist paying more attention to what happens in the world, the idealist caring more about text and intentions. This different

98. LUBAN, *supra* note 30, at 21.

99. *Id.*

100. Holmes' slogan distinguishes his brand of legal realism from the operationalism of Black and Ross, or Hart's positivism. *See* Black, *supra* note 74, at 107-08; Hart, *supra* note 5; Ross, *supra* note 75. Those scholars could choose to say that the language of the law picked out a class of actions, such that the law did cover those actions. It is intelligible for them to say that the court's corruption undermined the clear meaning of the law.

emphasis should not offend unreflective moral opinion; hence, it does not refute the realist. The realist is not forced to say that whatever act the court fails to punish is legal.

In case 2, we can imagine that the legal realist knows the law and the act committed, and knows that if the courts operated impervious to offers of bribery, they would punish the act. Nevertheless, the realist also knows the operation of these courts, and knows that the defendant will bribe the judge and get off. Only in this case is the realist forced by his slogan to Luban's suggested conclusion that the act is legal.

In case 3, the realist is unable to prophesy. We can imagine that this is a world in which some judges are corrupt, and some are not, and it is impossible to tell who is what. Thus, neither the realist nor the actor knows, when the act is committed, whether a court will punish the act. The realist will have to say the law does not cover the act. Again the appraisal seems inoffensive. In case 3, no act is categorically forbidden. What happens in any particular case depends completely on what kind of judge one is assigned. The idealist might say that the act is illegal, but one can never tell whether the judge will be corrupt. This idealist formulation fails to stress the law's failure here. If one can *never* predict the way the law will be applied, there is in a sense no law-like regularity. In any case, the difference of emphasis in case 3 does not refute the realist either.

For case 2, the only case rendering the first clause of proposition 3.2 true, we can now examine if proposition 3 is repugnant. Proposition 3 states that the law is what the judge says it is.[101] Let us suppose that the act in question is murder, and the judge is bribed to direct a verdict, saying there is not enough evidence for the prosecution to prove its case. Again, there are three possibilities. Considered absent the bribery, either there clearly was a winning prosecution case, there clearly was not a winning prosecution case, or it is not clear whose case wins. If there clearly was not a winning prosecution case, the judge made the right decision, though for the wrong reason. In the other two cases, the judge may be making the wrong decision. Luban would want to say that when the court makes the wrong decision it has "said" that murder was legal. Luban would argue, therefore, that proposition 3 is false, since murder is illegal.

The attempt to suggest that proposition 3 is false moves too fast. On closer examination, we can see that this attempt reveals a general flaw in

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101. LUBAN, *supra* note 30, at 20-21. Strictly speaking, this formulation is a betrayal of realist principles. It would be more accurate to say that "the law is what the judge orders." It is a familiar phenomenon that an opinion will give lip service to some legal principle and then, by categorizing facts in an extreme manner, vitiate that principle in practice. For example, the judge might say that consideration is necessary to enforce a contract, and then grant relief where consideration is merely nominal or on a promissory estoppel theory.

appealing to unreflective moral opinion. In looking at these examples, we are implicitly dealing with six categories: legal, moral, this world, the world of the hypothetical case, description, and prescription. We may take it as true that murder is illegal in this world and that murder is immoral in both this world and the world in case 3. By hypothesis, murder is legal in case 2, according to the description of realist jurisprudence. Realist jurisprudence is silent, however, on the question of the morality of murder and on the question whether murder ought to be legal in the world in case 2. It is only by the covert conflation of the categories of morality and illegality, and of description and prescription, that we can generate an unreflective moral opinion that the realist description of murder as legal in case 2 is repugnant (based on the unarticulated and false view that the realist is in favor of murder in this world).[102]

In short, case 2 is again indicative of the realist emphasis on the world rather than on intentions. If we actually imagine a world in which anyone with enough money to bribe a judge can commit otherwise 'illegal acts', and everyone knows it, there is a certain truth to be gained by refusing to call those acts illegal in this system. For example, it is a familiar charge that there is a different law in this country for the rich and powerful than for the poor and powerless. If one holds this view, one gains descriptive and rhetorical force by saying that it is not illegal in this country for a rich man to kill his wife, but only for a poor man to do so. On the other hand, in the face of the realization that the courts will not punish this act, there is something hypocritical about nevertheless asserting that the act is illegal in our system. Again, the emphasis is different. The realist will say: This act is legal in this jurisdiction, because it is not subject to any punishment. The idealist will say: This act is illegal in this jurisdiction even though it is never subject to punishment. There does not seem to be anything universally repugnant to unreflective moral opinion in the realist description.

c. *Linking Proposition 3 to Proposition 4*

Having qualified the scope of proposition 3 and assessed its implications, we now come to proposition 4: Anything a lawyer does in pursuit of the client's interests is respectful of the law if it works.[103] Respect is a notion that is foreign to the system of propositions we have been working out. Hence, nothing in the realist theory explicitly says one way or another whether one should respect the law, as Luban believes, or whether an action may be interpreted as respecting or disrespecting the law. The notion of respect refers to the value we place on an institution. The addition of a proposition concerning respect marks the explicit introduction of an evaluative or moral term to Luban's discussion.

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102. Luban may, of course, wish to deny the descriptive/prescriptive distinction made by the legal positivist, but he gives us no reason to go along with him.

103. LUBAN, *supra* note 30, at 21.

There does seem to be an implicit argument from proposition 3 to proposition 4. We might reconstruct the argument by adding a definitional premise about respect:[104]

> 4.1) If a lawyer's act aids the judge in deciding the case in accord with the law, it respects the law.

Since by 3, whatever the judge says is the law, if 4.1 is true, then 4 must be true. If what the lawyer does works, it aids the judge in the decision, which was the law. Nevertheless, since proposition 4.1 defines respect in terms of results according with the law, rather than defining respect in terms of conduct or process, proposition 4.1 cannot be advanced by the idealist. As we have mentioned, it may well happen that despite the bribe, the defendant really did deserve a directed verdict. Hence, by an idealist criterion, the lawyer's bribe aided the court in getting this correct result. By 4.1, the idealist should therefore conclude that the lawyer's bribe respected the law. But this is precisely what Luban is arguing against. Therefore Luban must agree that 4.1 is false.

Alternatively, Luban may try to derive proposition 4 through the use of some intermediate definitional criterion that links respect of the law with legal procedures. Nevertheless, since disrespectful conduct may still be legal, and since, in the example of bribery, the disrespectful conduct is by stipulation accepted by the court, the definition cannot appeal to what legal procedures the court will accept.

If Luban does not define respect in terms of what acts the court will accept, he eliminates the link between "respect" and legal realism's criterion for law. For example, suppose the definition included a list of activities that might be undertaken, consistent with respect for the law, to help the client. All other activities would be disrespectful. Bribery would, of course, be omitted from the list and hence be disrespectful. Since this definition has as a consequence that bribery is disrespectful of the law, it could not be used to imply the result that bribery was respectful. Since this definition implies nothing about whether the court accepts bribery, it cannot be inconsistent with the realist definition of law.

In short, in constructing a proposition 4.1 that can be used to deduce proposition 4, Luban must be careful that the proposition is not so broad that it implies that an idealist might say, depending on the example, that bribery respected the law. In addition, he must be careful that the proposition is not so narrow that it would force a realist to say that the bribery in this example was disrespectful. Unfortunately, Luban cannot escape this dilemma. Since respect is not a term of the realist theory, Luban must define respect independently of that theory. If he gives a definition of respect which refers to legal results, and thereby makes the necessary

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104. *See id.*

link between the definition of respect and the realist criterion of law, an example can be found that makes the definition of respect repugnant to an idealist theory. On the other hand, if he gives an example based on process, one which will be consistent with idealist theory, the definition will have no point of intersection with the results-oriented formulation of legal realism. The definition, therefore, will allow the realist to agree with the idealist that acts like bribery are always disrespectful, regardless of the court's response to those acts.

2. Argument 2: Introducing Value Terms to Realism

Luban does not acknowledge the idealist's inability to come up with a suitable definition for "respect" to use as a club against the realist. Instead Luban declares victory for his argument[105] and forges on, trying to "fix" realism so that the "damaging" argument from respect for the law cannot affect it. He does so by attempting to modify proposition 3. In place of proposition 3, he substitutes:

> 3') "[The] law is what the judge says it is except when she is illegally influenced."[106]

This proposition is incompatible with realism, since it is a denial of the simple Holmesian realism Luban has been attacking. Nevertheless, Luban may feel it is an appropriate suggestion, because the proposition does not add any new entities to the law, but still relies on seemingly operationalist definitions of the law—descriptions of the court's behavior. The new criterion is illegal influence, a natural choice, because we suppose that the judge has been influenced by bribery. Luban argues that this modified definition of law is circular, because it uses the concept of illegal influence, yet the judge herself is the person that says whether the influence is illegal.

In fact, the definition need not be circular on a sufficiently complicated model of the legal system. Up to this point, we have been using a simple model in which we implicitly imagined that there was only one judge and one court. This model has worked fine with all prior examples, but the new proposition 3' shows an important discrepancy between this model and a more complex model. If we imagine a model more like the real world, in which there are multiple courts with the capacity to check each other's conduct, then we can give operational content to the concept of illegal influence beyond reference to the behavior of any single judge. For example, we could rephrase proposition 3' as:

> 3'.1) The prophesies of what the *courts* will do in fact are what the judge says they are except when the judge is influenced by an act that the prophesies of what the courts will do in fact would prohibit.

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105. *Id.*
106. *Id.*

Proposition 3'.1 is an operational definition that maps the way our courts now deal with illegal influence. Illegal influence is identified by getting another court to assess the suspect judge's behavior.

Hence, Luban's objection is not as powerful as it at first seems. The definition of law can be made on a more sophisticated model to refer to the courts, not the individual judge. In such a model, the opinion of one judge only does not make the law. It is the final opinion of the system that counts. The realist construction of "illegal influence" would concern whether we could prophesy that the judge before whom the charge of illegality was presented would punish the act. While Luban's suggestion points out a problem with the model, the problem is not with the realist aspect of the model, but rather that the model only contains one judge. In sum, the realist account of "illegal influence" may be sufficiently robust to avoid Luban's charge of circularity.

Nonetheless, since Luban takes 3' to be refuted by the circularity objection, he suggests another criterion:

> 3") "[The] law is what the judge says it is when she is interpreting it in good faith."[107]

The new criterion introduces the evaluative notion of good faith. The criterion is not as apparently circular as the appeal to legality, but Luban nevertheless finds a circularity problem. According to Luban, 3" is ultimately vacuous, because a judge interpreting the law in good faith must, according to the realist, use the realist definition of law. Thus the judge must sit down and try to prophesy what she will do. This activity can lead nowhere.[108]

In this argument Luban makes a crucial category mistake[109] which leads to a leap of logic in his analysis of the good faith definition of law. Realism is a metaphysics of the law, a theory of what sort of ideal, ontological, or logical status rules of law have. Law itself is a separate thing, the item studied, not the activity of studying. Similarly, biology is the study of living things, but living things are not a science or a study, they are entities (capable of) existing and behaving independent of anyone studying them. There is no reason to suppose that the judge described in legal realist theory must herself believe that theory. Luban conflates the realist study of law with the object of that study, the judge and the judicial system. The realist definition of law says nothing about the metaphysical views of actual judges. The realist would take his definition of law to apply equally well to any legal system, even one staffed by idealists.

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107. *Id.*
108. *Id.* at 22-23.
109. *See* GILBERT RYLE, THE CONCEPT OF MIND 16-18 (1949).

Secondly, even were the judge a realist, it does not follow that her good faith deliberation would be an empty attempt to predict her own behavior. Such a claim confuses a metaphysics of law with a decision procedure for individual cases, two quite different things.[110] For example, the definition of automobile might be "four wheeled vehicle propelled by an internal combustion engine." That definition is definitely not an algorithm for constructing a car, and would aid one very little in a good faith effort to do so. On the other hand, a detailed instruction book on how to make an individual car would not constitute a definition of the automobile. (There are many different kinds of cars which are made in many different ways. A specification for building a Formula One race car would not cover a Volvo station wagon, but both are covered under any satisfactory definition of car.) In short, the realist judge would be free to engage in whatever decision procedure she deemed appropriate.[111]

At this point Luban would say that if you allow the judge a decision procedure—reasoning—then you are admitting, after all, that the law has an ideal structure accessible through reason. That is, what the judge is doing is reasoning about the law, and the result of her reasoning is the discovery of the law. Moreover, in order to prophesy what the judge will do, one need only anticipate the judge's reasoning. Realism appears to be stood on its head—prophecy drops out as an empty notion to be replaced by the ideal reasoning the realist had rejected as pretentious.[112]

The argument moves too fast. Several things must be true for this idealist reduction of realism to work. First, it must be the case that all or most judges reason according to the idealist theory. In that case, and in that case only, the realist lawyer, in prophesying the judge's opinion, would merely reason out the law on his own, according to the correct theory. If, on the other hand, there were many different judges believing in many different theories, the lawyer would want to know which particular theory each individual judge holds. The lawyer would have to do more than reason according to the one true theory; therefore, the realist prophecy of the law would diverge from any one idealist view.

Second, reasoning according to some idealist theory of the law must actually constitute a univocal decision procedure in real cases. Luban appeals to the reasoning outlined in the judicial opinion as in fact being that decision procedure. The realist would emphatically deny Luban's claim, arguing that all legal theories are hopelessly indeterminate and cannot be used to arrive at a unique answer for each case. The reasoning

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110. *See, e.g.*, Cohen, *supra* note 66, at 845-46 (discussing forces that might drive judicial decisions, including economic forces, aesthetic ideals, and political bias).

111. *See, e.g.*, Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 376 (1983) (recommending that the lawyer bring out the true socioeconomic and political foundations of legal disputes); Unger, *supra* note 84, at 667-68.

112. LUBAN, *supra* note 30, at 24.

in the opinion may serve to legitimate the judge's decision, but cannot have necessitated it. So even if all judges did happen to hold the same theory, the realist would argue that the theory did not completely determine the judges' decisions, and that there was something more to prophesy than mere theory-as-decision-procedure manipulation.

There are at least two ways indeterminacy can leak into a theory. One is on the formal level. A determinist theory must have rules tight enough to entail a unique answer for any case that can be posed to it. The second—on the practical level—is the application of the theory to facts. A determinist theory must be grounded in a sufficiently comprehensive practice under the theory so that any set of facts can be resolved into a unique theoretical description. Luban demands that the law be "univocal, rigid, self-explanatory, and uncontroversial,"[113] just to avoid these two kinds of indeterminacy, but it is hard to see how the law can be made "univocal, rigid, self-explanatory, and uncontroversial."[114] Formal indeterminacy is simply a condition with which all systems of knowledge must contend. Completeness and consistency are the two paramount criteria of determinacy for formal systems.[115] A formal system is incomplete if the formal system is not powerful enough to account for all the facts in the domain of the theory.[116] It is inconsistent if its decision procedure decides some cases in two contradictory ways.[117] No formalization of arithmetic is both complete and consistent.[118] If formalizations of arithm-

113. *Id.* at 18.

114. *Id.*

115. These criteria derive from what is known as Hilbert's Program, an effort to provide a foundation for mathematics in logic. *See* Wilfrid Sieg, *Consistency, in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 59, at 155; Mary Tiles, *Philosophy of Mathematics, in* THE BLACKWELL COMPANION TO PHILOSOPHY 325, 346-47 (Nicholas Bunnin & E.P. Tsui-James eds., 1996).

116. More precisely, a formal system is deductively complete when, for every set of sentences, every logical consequence of that set of sentences is derivable from that set of sentences using the formal system. *See* George F. Schumm, *Completeness, in* THE CAMBRIDGE DICTIONARY OF PHILOSOPHY, *supra* note 59, at 141. We may regard a legal theory as having two parts, a description of what counts as legal decision making and a set of sentences setting forth the law. In a formally complete legal theory, every legal consequence from a set of sentences describing a state of affairs should be derivable from the legal decision making process described in the theory plus the sentences in the theory setting forth the law.

117. *See* Sieg, *supra* note 115. More precisely, a set of statements is consistent relative to a formal system if one cannot derive a contradiction from the set of sentences using the formal system. A legal theory itself will be inconsistent if a contradiction is derivable, using the legal decision making process set forth by the theory, from nothing more than the set of sentences in the theory that set forth the law.

118. *See* Godel, *supra* note 72. The incompleteness of any formalized system of arithmetic arises from the impossibility of stating a formalization of arithmetic that avoids self-reference. *See* Tiles, *supra* note 115, at 347-48. It is possible to formalize simple systems, such as the classical logic of sentences or the classical logic of sentences and predicates, without self-reference. *See* Sieg, *supra* note 115, at 155. These systems are complete and consistent. A theory of law that contained within itself meta-legal propositions such as "Whenever the positive law gives out, the judge should refer to principles," and "In every case where the judge is referring to principles and the principles seem to conflict, the judge should assign the principles different weights and follow the weightier

etic are indeterminate, it seems highly unlikely that the much vaguer field of law is formally determinate. Moreover, once we realize that even as rigorous a field as arithmetic is indeterminate, we can see that we need not take the charge of indeterminacy as an invidious criticism of the law, but simply as a recognition of the nature of some complicated systems.

Factual indeterminacy is a phenomenon with which all practitioners are familiar. No matter how much detail is written into a law, it cannot contain within itself its own interpretation.[119] At some stage, some practitioner, whether a lawyer or a judge, must look at the law and at a fact pattern, and make the decision as to whether the fact pattern falls under the terms of the law. The law may contain vague "fudge" words like "reasonable" that invite argument over meaning, or more precise words like "pipe" that seemingly leave little room for dispute. No matter, a case will always come up that does not quite fit accepted usage—the hard case for the legal positivist.[120] In these cases the (existing positive) law does not determine how it is to be applied to the facts.

Even if one grants, like H.L.A. Hart, that there are easy cases completely determined by the theory, it still does not follow that the judge's decisional procedure would be the best prophecy procedure. David Shapiro's article on Justice Rehnquist's jurisprudence eloquently makes this point.[121] Although Rehnquist's opinions will contain the appropriate doctrinal argument about federalism, equal protection, and so forth, Shapiro was able to formulate a more concise realist description of the law in Rehnquist's hands. For example, Shapiro predicts that Rehnquist's holdings would follow the rule: "Conflicts between an individual and the government should, whenever possible, be resolved against the individual."[122] Even if Rehnquist actually thinks through his legitimating doctrine before issuing a decision, that doctrine drops out of the realist calculus.

In his more recent writings, Ronald Dworkin has attempted to solve the problem of indeterminacy by invoking the theory, discussed above in connection with the fact/value distinction, that language is best described as consisting of practices and institutions.[123] Dworkin hopes to exploit the

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principle," would seem to have enough complexity that either inconsistency or incompleteness would be difficult to avoid.

119. *See, e.g.*, WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 23, §§ 143-149, 222, at 56-69, 86.

120. *See* HART, *supra* note 77, at 135.

121. David Shapiro, *Mr. Justice Rehnquist: A Preliminary View*, 90 HARV. L. REV. 293 (1976).

122. *Id.* at 294.

123. It is sometimes unclear, in *Law's Empire*, whether Dworkin really rejects skepticism about law's determinacy, since his theory of interpretation could be taken as an attempt to describe how lawyers think about the law in the absence of determinate guidelines. Nevertheless, Dworkin always comes back to insisting that the position that there "is never one right way, only different ways, to decide a hard case . . . is either a serious philosophical mistake . . . or . . . a contentious political position resting on dubious political convictions . . ." DWORKIN, *supra* note 15, at 412.

institutional method of attacking the fact/value distinction by attempting to describe a legal practice analogous to promising—the practice of interpretation—and distinguishing between internal and external skepticism of that institution.[124] Dworkin claims that the task of the lawyer is interpretation, an intrinsically value-laden project of "imposing purpose on an object or practice in order to make of it the best possible example of the form or genre to which it is taken to belong."[125] Dworkin's idea is that, while it is true that one does not need to accept an institution to criticize it, external criticism of an institution is somehow ineffective. Dworkin's presentation is rather unclear, but his external/internal skeptical distinction appears to be analogous to the following sort of skepticism. An external skeptic of Euclidean geometry doubts that it is objectively true. An internal skeptic doubts that any, or certain, theorems can be derived within Euclidean geometry. Dworkin wants to ignore the first sort of skeptic, roughly on the grounds that, while we are engaged in a practice, we just do it, we do not step outside it and judge it.[126] Ignoring the external skeptic in this way cannot solve the problem of indeterminacy.

Suppose the positivist is the skeptic. The positivist believes that in some cases the law is clear, while in other, hard cases, there is "no right answer." Is the positivist an external or an internal skeptic? As to the easy cases, the positivist is neither. He would probably not disagree with Dworkin's description of how a judge determined the law, and if he did, not much would hang on the disagreement. Moreover, the positivist would believe, based on linguistic facts independent of Dworkin's theory, that the judge's assertion of the law was objectively true. In the hard case, the positivist would be both an internal and an external skeptic. The positivist would not accept that the interpretive method could identify one answer as right, so the positivist would be an internal skeptic. Moreover, the positivist would not believe that there is an "objective" answer somehow "out there," even though our methods for finding answers give out in hard cases, so the positivist is an external skeptic. These two skepticisms are thematically (although not logically) related—if one believes there is a reality somehow independent of and underlying the practice of reasoning about the law, one has reason to have hope that however confused things may look in practice, over the years we will be able to come closer and closer to that reality. On the other hand, if one believes, like the skeptic, that law is just a practice or convention, there is no reason to believe, contrary to appearances, that at some point in the future we must be able, finally, to discover the real answers.

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124. *Id.* at 82-86.

125. *Id.* at 52.

126. *Id.* at 83 ("The practices of interpretation and morality give these claims all the meaning they need or could have.").

Another way of seeing the force of external skepticism is to reflect on Dworkin's claim that "[t]he practices of interpretation and morality give these claims all the meaning they need or could have."[127] In some sense, this is an uncontroversial claim for a conventionalist or a holist concerning linguistic theory to make. Yet this claim does not do what the idealist needs it to do. Consider another practice: workers in a gang putting down sandbags to reenforce a levee. Jones yells "Bag!" Smith hands Jones a sandbag. Jones lays the sandbag along the levee. Jones yells "Bag!" Here the practice of Smith and Jones gives "Bag!" all the meaning it needs or could have. We stipulate that sandbags, the levee, and Smith and Jones exist, so there is no place for external skepticism. Nonetheless, this practice is open to external skepticism analogous to the skepticism of the legal positivist. For what happens if Jones yells "Bag!" even though he can see that Smith has no more bags? What happens if Jones whispers "Bag"? What happens if Smith slides the bag along the ground instead of handing it to Jones? We cannot say. These actions are not already included in the pre-existing practice.[128] The claim that an action is not already included in the pre-existing practice is precisely the claim that skeptics about hard cases make about the law.

Finally, Dworkin claims that interpretation is not only a practice, but it is, in fact, a "constructive" practice.[129] Presumably, a "constructive" practice may be immune from skepticism that any particular instance of the practice is not "already a part of" the practice, since the whole point of the practice is to construct. The game of chess may be considered a constructive practice. Every game is new—no game is played until the moves are made. Different ideas can be tried out. Players will disagree about whether the ideas are good. Players will give reasons to one another in the form of move and counter-move. The dispute will be settled over the board. Someone might claim that there is no "right answer" to the question of whether a certain sequence of opening moves is decent. That claim would be internal skepticism about chess. Yet over a series of games using that line of moves it will become apparent[130] whether that line of moves favors neither side or advantages Black or White to some degree. There are two features of the practice of chess that make this kind of judgment possible. First, chess has rules that determine what moves can be made. Second, chess has rules that determine whether a game is over, and if so whether White has won, Black has won, or the game is a draw. The internal skeptic about interpretation simply doubts

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127. *Id.*

128. *See, e.g.*, WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 23, § 68, at 32-33 ("'But then the use of the word is unregulated, the "game" we play with it is unregulated.'—It is not everywhere circumscribed by rules; but no more are there any rules for how high one throws the ball in tennis, or how hard; yet tennis is a game for all that and has rules too.").

129. DWORKIN, *supra* note 15, at 52-53.

130. In reality, chess is such an extraordinarily complex game that relatively few such questions are settled in practice.

whether we can identify such hard and fast rules for "reasoning" about the law.

In sum, just as a notion of respect is compatible (although external) to a realist theory so are notions of illegal influence and good faith. Moreover, the realist is not trapped by use of these notions into admitting that there must, after all, be an idealist decision procedure, because the realist metaphysic is not itself committed to any particular decision procedure and the idealist cannot show that an idealist decision procedure is determinate in all cases.

3. Argument 3: The Principle of Partisanship

Nevertheless, Luban believes he has shown that the illegal influence and good faith suggestions must somehow be circular. Luban next argues that the realist, in claiming that the judge's good faith interpretation of the law is the law, no matter what that interpretation is (believed by Luban to be a consequence of the circularity argument), is giving himself a false justification for the principle of partisanship. The argument is as follows:

> 1) If my [the lawyer's] good faith interpretation of the law differs from the judge's, it is the judge's interpretation that is correct;
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> therefore
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> 2) I should be agnostic about the law;
>
> therefore
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> 3) There is nothing illegitimate about promoting the point of view most consistent with my client's interests;[131]
>
> therefore
>
> 4) Since I am my client's agent, I should adopt the principle of partisanship, that I must, within the established constraints of professional behavior, maximize the likelihood that the client will prevail.[132]

While Luban does not believe this is a valid argument,[133] he does not recognize that the flaws in the argument allow a realist, as well as an idealist, to disavow the principle of partisanship.

a. *Proposition 1*

Luban wants to say that the argument is unsound because realism is false. Luban assumes that realism is false, that there is one true theory of

131. LUBAN, *supra* note 30, at 27.
132. *Id.*
133. *Id.*

the law, and also one true decision procedure. He therefore contends that proposition 1 is false, because the judge may actually be interpreting the law in bad faith.[134] If the judge interprets the law in bad faith, he would not be following Luban's idealist decision procedure. On the other hand, the mere fact that the judge decides for whom to hold in a frivolous or unethical way does not mean that the legitimating rhetoric the judge uses in his opinion will be inconsistent with established law. There is a distinction between how a decision is made and whether it is correct. Even if there is a decision procedure that will yield a correct result, whether the result is correct is a separate issue from whether the decision procedure was followed, or the result reached by happenstance. Even if a judge acts in bad faith, the ruling may be correct. Hence, proposition 1 is not necessarily false, even if the judge is assumed to be acting in bad faith and an idealist theory is assumed to be true.

Moreover, viewed against the backdrop of the more sophisticated legal realist model discussed above, in which the decision is deemed to be the decision of the entire court system, not just one judge and one court, proposition 1 does not seem that implausible. For example, no matter how fervently one may believe that *Hans v. Louisiana*[135] interpreted the Eleventh Amendment in bad faith, and in flagrant contradiction to the plain language of the amendment, since the federal judiciary has followed *Hans* since it came down, it is perfectly reasonable to assert that the *Hans* case is the law. Likewise, any other holding consistently followed by the entire judicial system is the positive law, regardless of its theoretical justification or the manner in which it was reached.

b. *Linking Proposition 1 to Proposition 2*

Luban wishes to show that the bad conclusion of proposition 4 is necessarily derived from the error of embracing the false proposition 1. Hence, Luban wants to bridge the gap from an "is" to an "ought," by showing that proposition 2 follows from proposition 1. Whether I should be agnostic about the law is a matter of ethical or prudential principles applied to my beliefs about the world. Hence, a realist who believes proposition 1 might nevertheless believe that lawyers' good faith interpretations of the law tally with judges' interpretations often enough that, as a matter of practical advantage, the lawyer is better off predicting the law accurately most of the time and being wrong some of the time, than being an agnostic.

To link proposition 1 with proposition 2, Luban may have some skeptical argument in mind such as the following. Whatever theory I use to predict what the law may be, I may be wrong, since the judge may disagree with me. Since whatever I think about the law may be wrong, I

134. *Id.*
135. 134 U.S. 1 (1890).

do not know anything about the law for certain. Since I do not know anything about the law for certain, I should be agnostic since it would be lying about my state of knowledge to assert the truth of a legal proposition. While this argument is consistent, it is based on an extreme skepticism—that unless I "know for certain," I cannot rely on my opinions. We may contrast this attitude with that of a scientist who only provisionally accepts even the most well-confirmed theory, pending potential experimental or observational disconfirmation. The scientist does not remain practically agnostic about the provisionally accepted theory, but acts on it and builds on it, unless and until it is disconfirmed.

Nevertheless, it is natural for Luban to set up extreme skepticism as the adversary position, because he believes he has a ready-made reply. Luban believes that law must be "self-explanatory."[136] In Luban's model, law is not like science, but like logic. The idealist can adduce the law through reason and hence know what the law is, independent of the judge. Luban's model leaves no purchase for the most extreme skeptic.

The extreme remedy (requiring law to be "self-explanatory") is not necessary to address extreme skepticism. There are many tenable positions for both the idealist and the realist that lie in between the extremes. Hence, the agnosticism of proposition 2 is not a necessary consequence of proposition 1.

c. *Linking Proposition 2 to Proposition 3*

Proposition 3 does not follow directly from proposition 2. Another evaluative premise or set of premises is needed to bridge the gap. One premise is needed to flesh out the meaning of "illegitimate." If "illegitimate" is taken to be synonymous with unethical, a whole set of premises is needed to bridge the gap from lack of belief about the law to lack of ethical responsibility for the client's interests. To see this, all we need do is reflect that seemingly the sole relevant propositions entailed by proposition 2 are:

> Proposition 2') I should be agnostic about whether my client's interests are inconsistent with the law;
>
> and
>
> Proposition 2") In advocating my client's position, I am not knowingly advocating a position inconsistent with the law.

It seems at first glance unobjectionable to maintain that it is unethical for a lawyer to knowingly advocate a position inconsistent with the law, so agnosticism saves a lawyer from one type of unethical conduct associated with partisanship.

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136. LUBAN, *supra* note 30, at 18.

The most direct opposition to the principle of partisanship comes from the theory of role morality that holds one morally accountable for the interests of one's clients (at least if one is directly and knowingly working to advance those interests). Luban refers to this theory in his discussion of the case of the wicked uncle.[137] This theory is indifferent to the happenstance that a client's intermediate goal, for example, that a suspected murderer be prosecuted,[138] is legal, so long as the motive or end result is morally suspect. In the case of the wicked uncle, the morally suspect goal of depriving an heir of his inheritance seems to outweigh that lawful act of prosecuting a man for murder on the basis of colorable evidence that he committed the crime. This theory is perfectly consistent with the realist agnosticism about the law posited by Luban. An agnostic view about the law need not be an agnostic about the morality of one's interests. Therefore, Luban's attacks on the principle of partisanship fail to show any necessary moral deficiency in the extreme realist/skeptical position he sets up as an adversary.

VI. INDETERMINIST ETHICS

In general, the idealist's need to attack skepticism rests on an unwillingness to appeal to principles of morality separate from law when giving an account of the role of law in society. Luban's need to attack realism rests on his unwillingness to appeal to principles of morality explicitly independent from a theory of law in his account of professional ethics. If Luban would allow for a morality independent of law, he would have an independent platform for assessing the role morality of the lawyer. Luban introduces the value of respect for the law, but he makes that value parasitic upon the notion of law itself. His notion of a "generality requirement" to be placed on law is itself value neutral, since it calls for the law to be generally beneficial.[139] Therefore any substantive value system specifying what is beneficial may be used to supply substance to the "general benefit" requirement.

Since Luban does not want to use substantively moral premises to attack the principle of partisanship, he is forced to use the only other kind of premises at hand, namely premises describing the legal/metaphysical world. Luban strives to bridge the is/ought gap to argue that a false metaphysics is responsible for a troubling ethical theory. Such a methodology unfairly dismisses an interesting metaphysical theory (legal realism) and fails to uncover the valid (substantive ethical) reasons we may have to oppose the principle of partisanship.

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137. *Id.* at 3-10; *see also id.* at 6 (Burroughs' cross-examination of Gifford). In the case of the wicked uncle, the heir to a stolen estate returned from America to England. *Id.* at 3. Unfortunately, the heir shot a man to death after his return. *Id.* The man that had wrongfully taken title to the estate instructed his lawyer to prosecute the returning rightful heir for murder. *Id.* Of course the real goal of the usurper was not to see justice done, but to retain the wrongfully obtained title to the estate.

138. *Id.* at 3.

139. *Id.* at 30, 43-49.

Looking at the attitudes of actual realist and critical scholars towards the law and the lawyer's role shows that idealists either misunderstand or misdescribe the moral concerns of skeptics, labeling skeptics as nihilists.[140] Contrary to critics such as Dworkin who misleadingly accuse legal skeptics of moving "toward a new mystification in service of undisclosed political goals,"[141] legal skeptics have been quite vocal about their political goals. Legal skeptics advance the indeterminacy thesis not because they lack moral feeling, but precisely because they feel that a determinate, univocal theory of law deprives legal practice of its moral content. Oliver Wendell Holmes, the source of Luban's definition of realism, argued that the common law grows through the court's legislative considerations of "what is expedient for the community concerned."[142] Holmes argued for a "more conscious recognition of the legislative function of the courts,"[143] which would lead to more self-consciously moral argument. Similarly, the realist Felix Cohen criticized the then dominant formalist jurisprudence on the ground that "[i]ts actual effect is to exclude the conscious consideration of ethical issues from the judicial mind and to lend weight to the unconscious and uncritized value standards by which judges decided what they *ought* to do."[144] Cohen complained that formalism substitutes logical consistency for true ethical standards and advocated a self-conscious consideration of morality in judicial decision making.[145] These realist thinkers mixed metaphysics and ethics as much as the idealists, but with an important difference. They did not pretend that any ethics followed from their conception of the law. Rather they made room in their conception of the law for a consideration of morality derived independently of legal theory.

Critical legal studies scholars also attempt to inject moral considerations into legal reasoning. Peter Gabel and Paul Harris have a three step recommendation for lawyers to deal with the legal system: 1) "develop a relation of genuine equality . . . with the client"; 2) "demysti[fy] the symbolic authority of the State" as exemplified through the trappings of the law; and 3) reshape the way the law represents conflicts, bringing out "the true socioeconomic and political foundations of legal disputes."[146] While grounded in an explicit disrespect of the law and its dominant idealogy, these recommendations are profoundly moral in their tone and argue for an ethical commitment far greater, if far different, than that of the ordinary lawyer. Roberto Unger, perhaps the leading voice for societal transformation in the critical school, offers similar suggestions, desiring to "transform legal doctrine into one more area for

140. *See supra* text accompanying notes 1-19.
141. DWORKIN, *supra* note 15, at 275.
142. O.W. HOLMES, THE COMMON LAW 35 (1881).
143. *Id.* at 36.
144. Felix Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201, 214 (1931).
145. *Id.* at 220.
146. Gabel & Harris, *supra* note 111, at 376.

continuing the fight over the right and possible forms of social life."[147] The transformation will take place through an "internal development" in which the ideal conflicts of law are exploited to transform the actual law bit by bit, first changing the law, then revising ideal conceptions in light of that change, then working for more change.[148]

The point of these examples is not that the left-wing social ethics of critical legal scholars are superior, but rather that these ethics are consistent with critical metaphysics, while being inconsistent with, and hostile to, nihilism in general and the principle of partisanship in particular. In short, it turns out that these skeptical scholars may not fit into the anti-establishment schema described above. On closer inspection, these scholars join a skeptical metaphysics with a nonskeptical ethics that requires lawyers to make moral judgments and take responsibility for their actions in serving their clients.

Luban could have expressed his ethical concerns in more "realist" language, but doing so would have forced him to introduce values extrinsic to the law. The first notion he needs is the law as it should be. Each realist lawyer is entitled to have that notion. The notion could be the provisional, ever subject to revision, notion of ideal morality that Unger favors, or a more traditional, static ideal morality. The second necessary notion is the relation between the law as it should be and the law as it actually is. Finally, Luban needs role-specific notions such as the notions that the lawyer should be loyal to his client and the citizen should be loyal to society. The realist lawyer's role conflicts may get worked out among these conflicting values. Luban's ethical theory could then be reconstructed. The law as it should be would provide the (as close as possible) univocal theory of true morality, the realization of which is the lawyer's goal. The lawyer would attempt to realize the true morality by working through the law as it is, pulling it and pushing it at the margins to be ever closer to its ideal form. As an agent for his client, the lawyer will be loyal, representing only those clients whose problems require that he work to effect morally beneficial change.

It is no accident that a skeptical reconstruction of an "idealist" ethics sounds a lot like the recommendations of Gabel and Harris, or Unger. Both legal realism and Critical Legal Studies are critical movements, and a critical movement is at heart a moral enterprise. The idealist's error is to identify a lack of intellectual respect for a certain style of legal theory with a lack of moral sensibility.

147. Unger, *supra* note 84, at 579.
148. *Id.* at 580.

REMEDYING JUDICIAL LIMITATIONS ON TRADEMARK REMEDIES: MONETARY RELIEF SHOULD NOT REQUIRE PROOF OF ACTUAL CONFUSION

KEITH M. STOLTE*

In recent years, the federal courts have imposed certain stringent, judicially derived limitations on a trademark owner's right to relief for infringement and unfair competition.[1] Requirements relating to a plaintiff's need to prove an infringer's bad faith or the existence of actual confusion have become so pervasive in the courts that the *Restatement (Third) of Unfair Competition* has adopted these court-made conditions for recovery.[2] These restrictions have absolutely no basis in the Trademark Act of 1946 (Lanham Act) or in the legislative history of the Act.[3] Nevertheless, recent court decisions now cite as conclusive authority the position taken by the *Restatement* with respect to these rules rather than rely on an independent review of the Lanham Act itself or its legislative history.[4] Unfortunately, over the past twenty years, these two rules have become unquestioned, black letter principles.

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1. Specifically, some federal circuit courts have imposed a duty on trademark owners to prove that an infringer acted with bad faith, willfulness or with fraudulent intent in order to obtain an accounting of the defendant's profits. *See* International Star Class Yacht Racing Ass'n v. Tommy Hilfiger, U.S.A., Inc., 80 F.3d 749, 753 (2d Cir. 1996) (requiring proof that the defendant acted in bad faith before an accounting of profits could be obtained); George Basch Co. v. Blue Coral, Inc., 968 F.2d 1532, 1540 (2d Cir. 1992) (holding that a plaintiff has the burden of showing that a defendant willfully infringed his trademark before a court can grant an accounting of profits). The circuit courts have also generally created a requirement that a trademark owner make a showing of actual confusion in order to obtain a judgment for damages, and sometimes profits as well. *See Tommy Hilfiger*, 80 F.3d at 753 (holding that a plaintiff must show actual consumer confusion in order to recover damages); Web Printing Controls Co. v. Oxy-Dry Corp., 906 F.2d 1202, 1204-05 (7th Cir. 1990) (stating that "[a] plaintiff wishing to recover damages for a violation of the Lanham Act must prove the defendant's Lanham Act violation, [and] that the violation caused actual confusion"); Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc., 670 F.2d 642, 647 (6th Cir. 1982) (holding that it is necessary for a trademark owner to show that the buying public was actually confused to recover damages in a case involving unfair competition).

2. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 37 cmt. e (1995) (discussing the requirement of a defendant's bad faith for an accounting of profits); *Id.* § 36 cmt. i (claiming that a plaintiff is entitled to money damages for trademark infringement only on a showing of actual confusion).

3. Trademark (Lanham) Act of 1946, ch. 540, 60 Stat. 427 (1946) (codified as amended at 15 U.S.C. §§ 1051-1127 (1994 & Supp. I 1995)). All references to sections of the Lanham Act in the text refer to the session law.

4. *See, e.g., Tommy Hilfiger*, 80 F.3d at 753-55 (citing the *Restatement* as authority for the requisite showing of bad faith to obtain profits and actual confusion in order to recover damages).

In a companion article,[5] the author has comprehensively demonstrated that a stringent rule requiring bad faith in order to obtain an accounting of profits is contrary to the statutory language of the Lanham Act and congressional intent as espoused in the legislative history of the Act.[6] The purpose of the present article is to demonstrate that the Lanham Act does not require a trademark owner to provide a showing of actual consumer confusion before a court may grant monetary compensation for infringement or unfair competition. This article will also establish that Congress never even contemplated such a strict condition on recovery of damages or profits and that such a requirement offends the flexibility that the drafters of the Lanham Act clearly intended courts to employ in awarding monetary remedies in trademark cases.

Part I of this article will briefly set forth the remedies available under the Lanham Act for trademark infringement and unfair competition and will explore the legislative history to understand Congress's intent with respect to trademark remedies.[7] Part II will illustrate the courts' development of a stringent requirement to prove actual confusion. Part III will demonstrate that the "actual confusion" rule offends the principles underlying the Lanham Act. Finally, Part III will also argue that the rule is inherently harsh, unfair and inequitable to trademark owners and that the courts themselves overwhelmingly recognize this inequity, but nevertheless continue to apply the rule.

I. TRADEMARK AND UNFAIR COMPETITION REMEDIES UNDER THE LANHAM ACT

The Lanham Act specifically sets forth the types of relief that a plaintiff may seek in a case involving trademark infringement or unfair competition as defined in sections 34 and 35.[8] The Act provides for both injunctive relief and monetary compensation. These two forms of relief are treated separately in two distinct sections. The remedy of injunctive relief is provided for in section 34.[9] Injunctive relief can be enormously

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5. Keith M. Stolte, *Remedying Judicial Limitations on Trademark Remedies: An Accounting of Profits Should Not Require a Finding of Bad Faith*, 87 TRADEMARK REP. 271 (1997).

6. *See id.* at 293-99 (demonstrating that a bad faith requirement to obtain an accounting of profits conflicts with the language of the Lanham Act and congressional intent).

7. For a complete review of the legislative history bearing on the trademark remedies provided for in the Lanham Act, see 8 & 9 JEROME GILSON, TRADEMARK PROTECTION AND PRACTICE, 34-1 to 34-634 & 35-1 to 35-20 (1997).

8. Lanham Act §§ 34-35, 15 U.S.C. §§ 1116-1117. Conduct which is generally referred to as unfair competition is governed by section 43(a) of the Act. *See id.* § 43(a), 15 U.S.C. § 1125(a).

9. Section 34 states:

> The several courts vested with jurisdiction of civil actions arising under this chapter shall have the power to grant injunctions, according to the principles of equity and upon such terms as the court may deem reasonable, to prevent the violation of any right of the registrant of a mark registered in the Patent and Trademark Office or to prevent a violation under section 1125(a) of this title [(Lanham Act § 43(a))].

Id. § 34, 15 U.S.C. § 1116.

valuable to a plaintiff who seeks a complete or partial cessation of corrosive and damaging trademark infringement.[10] An injunction is necessary to restrain an infringer from any current or prospective infringing activities. In some cases, injunctive relief may entirely satisfy a plaintiff, particularly in the case where an infringer has not yet entered the market in any appreciable manner, or where past sales of infringing articles have not caused significant damage to a trademark owner. Where an infringer's activities, however, have caused injury to a trademark owner, the Lanham Act clearly entitles the trademark owner to compensation for such damage.

In addition to the injunctive relief available under section 34, Congress provided trademark owners who have sustained damages as a result of trademark infringement to recoup their damages from an infringer through various forms of monetary relief.[11] In order to compensate an injured trademark owner to the full extent of his injuries, Congress explicitly entitled a trademark owner to an infringer's profits,[12] and/or to

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10. *See* 3 GILSON, *supra* note 7, § 8.07, 8-126 to 8-130. Under the provision for injunctive relief, courts possess very broad discretionary powers to mold an injunction to meet the exigencies of a particular case. *Id.* § 8.07, 8-128 to 8-129. In fact, the types of conduct which a court can regulate under section 34 are "virtually limitless." *Id.* For example, a court may restrain current practices of infringement and even threatened or imminent activities. *Id.* § 8.07, 8-130. Depending on the urgency and merits of an infringement case, a court may grant temporary relief in the form of a temporary restraining order, interim relief in the form of a preliminary injunction and permanent relief in the form of a permanent injunction. *Id.* § 8.07, 8-127. Moreover, a court may grant complete relief and order an infringer to refrain from all uses of a mark or trade dress or a court may award modified relief and merely order an infringer to change some aspect of his use of a mark. *Id.*

11. Section 35(a) states:

> When a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation under section 1125(a)of this title [(Lanham Act § 43(a))], shall have been established in any civil action arising under this chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title [(Lanham Act §§ 29, 32)], and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action. The court shall assess such profits and damages or cause the same to be assessed under its direction. In assessing profits the plaintiff shall be required to prove defendant's sales only; defendant must prove all elements of cost or deduction claimed. In assessing damages the court may enter judgment, according to the circumstances of the case, for any sum above the amount found as actual damages, not exceeding three times such amount. If the court shall find that the amount of the recovery based on profits is either inadequate or excessive the court may in its discretion enter judgment for such sum as the court shall find to be just, according to the circumstances of the case. Such sum in either of the above circumstances shall constitute compensation and not a penalty. The court in exceptional circumstances may award reasonable attorney fees to the prevailing party.

Lanham Act § 35(a), 15 U.S.C. § 1117(a).

12. Section 35(a) clearly authorizes a court to award a defendant's profits as one means of compensating a plaintiff for any violation of the plaintiff's trademark rights, as set forth in section 32. *Id.* § 32, 15 U.S.C. § 1114. Moreover, the language of section 35(a) explicitly indicates that a court may, within its discretion, adjust the level of profits owing to a plaintiff, depending on whether the court believes that the profits proven are inadequate or excessive. *Id.* § 35(a), 15 U.S.C. § 1117(a).

whatever damages the plaintiff can fairly establish.[13] If profits are to be awarded, section 35 indicates that the defendant bears the burden of proving his costs and other allowable deductions.[14] The plaintiff need only prove the defendant's sales.[15] The scope of damages to which a plaintiff may be entitled includes the loss of goodwill associated with his trademark, the plaintiff's lost sales, the plaintiff's lost profits, and corrective advertising expenses.[16]

The awarding of profits and damages are not mutually exclusive. Unlike English trademark law, which forces a plaintiff to elect either the defendant's profits or the plaintiff's damages,[17] the Lanham Act entitles an injured trademark owner to any fair combination of the two forms of relief that would adequately compensate him.[18] Therefore, in theory, a plaintiff may receive an accounting of profits or an award of damages or some fair combination of both.[19] However, where a court concludes that the plaintiff cannot establish actual damages, and the equities of the case would be fully satisfied by an injunction, a court will not award either type of monetary relief.[20]

Congress made clear that the remedies enumerated in section 35, possibly excepting the discretionary grant of attorney fees, represent only compensation for the plaintiff's injury and should not constitute punitive damages.[21] In addition, Congress also subjected a grant of the defendant's profits or the plaintiff's damages to the "principles of equity."[22] This requirement complements Congress's express intention that the courts award monetary compensation fairly and justly and "according to the

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13. Again, section 35(a) grants a court the discretion to enhance the amount of damages, in addition to the determined value of actual damages, to a level not to exceed three times the amount of actual damages. *Id.* § 35(a), 15 U.S.C. § 1117(a).

14. *Id.*

15. *Id.*

16. 3 GILSON, *supra* note 7, § 8.08[2], 8-176.

17. *See* Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 259 (1916) (distinguishing the U.S. method of awarding both damages and profits from the law of England which requires the aggrieved party to choose one or the other); *see also* Aladdin Mfg. Co. v. Mantle Lamp Co., 116 F.2d 708, 715 (7th Cir. 1941) (providing a brief history of the development of the equitable remedy of profits in infringement suits).

18. Lanham Act § 35(a), 15 U.S.C. § 1117(a); *see also Aladdin*, 116 F.2d at 715.

19. *Hamilton-Brown*, 240 U.S. at 259.

20. Champion Spark Plug Co. v. Sanders, 331 U.S. 125, 131-32 (1947) (holding that where a plaintiff failed to show any significant damages and where the court found little likelihood of profit to the defendant, an injunction satisfied the equities of the case).

21. Lanham Act § 35(a), 15 U.S.C. § 1117(a). For a thorough discussion of the federal courts' view that the Lanham Act did not envision punitive damages, see generally Getty Petroleum Corp. v. Bartco Petroleum Corp., 858 F.2d 103 (2d Cir. 1988).

22. Lanham Act § 35(a), 15 U.S.C. § 1117(a). It is not clear what the drafters of the Lanham Act meant by "principles of equity" in section 35(a). In another section of the Lanham Act, Congress explicitly identified, partially at least, what it deemed "principles of equity." In 1988, Congress amended section 33 to indicate that the subject matter of the section was subject to "equitable principles, including laches, estoppel, and acquiescence. 15 U.S.C. § 1115.

circumstances of the case."[23] A review of the language of sections 34 and 35 of the Lanham Act clearly suggests that Congress balanced its desire to provide trademark owners with the widest latitude of relief against infringement. It believed that, in trade related civil actions, the courts should be given a broad level of discretion to formulate a fair and equitable remedy on a case by case basis.[24] As the next Part will demonstrate, some courts, rather than analyze the fairness and equities of particular remedies based on the individualized facts of each case, have instead created "black letter" principles which effectively destroy the flexibility and fairness that Congress explicitly intended the courts to employ.[25]

II. THE DEVELOPMENT OF THE "ACTUAL CONFUSION" RULE

For reasons entirely unconnected with the statutory language of the Lanham Act or with the legislative history, many circuit courts have adopted a strict rule that requires trademark owners to prove actual consumer confusion before they are entitled to monetary compensation for trademark infringement or unfair competition.[26] Some circuits only pre-

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23. Lanham Act § 35(a), 15 U.S.C. § 1117(a). The statutory authorization of a broad discretion given to the courts to adjust the monetary compensation is specific to both profits and damages. *See id.*

24. In evaluating the issue of monetary compensation in the form of damages or profits, the framers of the Lanham Act expressed grave concern for ensuring that the law provide a flexible and fair manner by which the courts were to craft appropriate remedies for trademark infringement. *Trade-Marks: Hearings on H.R. 102, H.R. 5461 and S. 895 Before the Subcomm. on Trade-Marks of the House Comm. on Patents*, 77th Cong. 203-06 (1941) [hereinafter *Hearings*]. One member of the House Subcommittee on Trademarks expressed his horror that the counter-plaintiff in L.P. Larson, Jr., Co. v. Wm. Wrigley Jr. Co., 20 F.2d 830 (7th Cir. 1927), was awarded more than five million dollars in profits upon very little showing of any damage. *Hearings*, *supra* at 204. Edward S. Rogers, a main proponent and draftsman of the legislation that ultimately became the Lanham Act, responded by stating that he too believed the *Larson* profit award to be excessive, but that the *Larson* court had no authority to reduce the award under the Trademark Act of 1905, ch. 592, 33 Stat. 730 (1905). Ironically, Mr. Rogers had represented Mr. Larson, the recipient of the massive windfall, in at least one of the numerous related cases that resulted in the award. *See* L.P. Larson, Jr., Co. v. Wm. Wrigley Jr. Co., 253 F. 914, 915 (7th Cir. 1918). Rogers clarified that the bill under consideration was intended to place:

> discretion in the hands of the court under the circumstances of the particular case either to increase or decrease the recovery; if in one case [the recovery] is excessive, it ought to be decreased, and if, on the other hand, it is not enough, a reasonable sum in the way of ordinary damages ought to be awarded.

Hearings, *supra* at 205. Concluding his comments, Rogers stated that "[t]he whole purpose of this section [later codified at 15 U.S.C. § 1117], Mr. Chairman, was to give a thing that is now inflexible, a certain flexibility and rely on good judgment of the court to see that the recovery was not excessive but was at least adequate." *Id.* at 206. Congressman Fritz Lanham, for whom the Lanham Act is named, agreed, stating that "we have to rely upon the courts in their discretion to administer these things fairly. I do not know what other assumption that we can make." *Id.* at 205-06.

25. *See* Burger King Corp. v. Mason, 710 F.2d 1480, 1495 n.11 (11th Cir. 1988) (stating that, because all monetary remedies set forth in section 35(a) are subject to the principles of equity, "no hard and fast rules dictate the form or quantum of relief").

26. *See* International Star Class Yacht Racing Ass'n v. Tommy Hilfiger, U.S.A., Inc., 80 F.3d 749, 753 (2d Cir. 1996) (requiring proof of actual consumer confusion before an award of damages could be obtained); Libman Co. v. Vining Indus., 69 F.3d 1360, 1363 (7th Cir. 1995) (stating that actual confusion is necessary where damages are sought); Conopco, Inc. v. May Dep't Stores Co., 46

clude the awarding of damages absent actual confusion while allowing an accounting of profits.[27] Other courts deny all forms of monetary compensation.[28]

Only one circuit, the Ninth, has explicitly refused to adopt a stringent rule with respect to a necessary showing of actual confusion for the grant of either profits or damages, preferring instead to base recovery on the totality of the circumstances of each particular case.[29] Of course, the position adopted by the Ninth Circuit closely comports with the actual language of the Lanham Act[30] and the underlying congressional intent as found in the legislative history of the Act.[31]

F.3d 1556, 1563 (Fed. Cir. 1994) (holding that "[t]o establish entitlement to monetary relief [for unfair competition under section 43(a) of the Lanham Act], a plaintiff must show actual confusion"); W.W.W. Pharmaceutical Co. v. Gillette Co., 984 F.2d 567, 576 n.6 (2d Cir. 1993) (stating that in the Second Circuit, "proof of real and precise actual consumer confusion is required to recover damages"); Coach Leatherware Co. v. Ann Taylor, Inc., 933 F.2d 162, 171 (2d Cir. 1991) (requiring actual confusion before a trademark plaintiff may recover damages); Web Printing Controls Co. v. Oxy-Dry Corp., 906 F.2d 1202, 1204-05 (7th Cir. 1990) (indicating that to collect damages for a violation of the Lanham Act, a plaintiff must establish actual confusion); Woodsmith Publishing Co. v. Meredith Corp., 904 F.2d 1244, 1247 n.5 (8th Cir. 1990) (holding that "[p]roof of actual confusion is necessary for an award of damages"); Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc., 670 F.2d 642, 647 (6th Cir. 1982) (stating that "it is necessary to prove that the buying public was actually deceived in order to recover damages"); Parkway Baking Co. v. Freihofer Baking Co., 255 F.2d 641, 648 (3d Cir. 1958) (stating that, for an action of unfair competition and false advertising, a plaintiff must demonstrate that a portion of the public had actually been deceived).

27. *See, e.g., Tommy Hilfiger*, 80 F.3d at 753-54 (denying damages but reserving the possibility of an award of an infringer's profits where a plaintiff did not prove actual confusion); *Web Printing Controls*, 906 F.2d at 1204-05 (foreclosing a grant of damages in the absence of actual consumer confusion, but preserving the right to profits); Monsanto Chem. Co. v. Perfect Fit Prods. Mfg. Co., 349 F.2d 389, 391-92, 395 (2d Cir. 1965) (denying damages but awarding an accounting of profits where there was no proof of actual confusion); Century Distilling Co. v. Continental Distilling Corp., 205 F.2d 140, 144 (3d Cir. 1953); Resorts Int'l, Inc. v. Great Bay Hotel & Casino, Inc., 830 F. Supp. 826, 838-39 (D.N.J. 1992).

28. *See, e.g., Conopco*, 46 F.3d at 1563 (holding that "[t]o establish [any] monetary relief, a plaintiff must show actual confusion").

29. Lindy Pen Co. v. Bic Pen Corp., 982 F.2d 1400, 1410-11 (9th Cir. 1993). Following the actual statutory dictates of section 35(a) of the Lanham Act, the *Lindy* court stated:

> Other jurisdictions have made a distinction between the elements necessary to establish a legal basis for liability [i.e. mere likelihood of confusion] from those required for proof of damages [i.e. actual confusion]. Although we recognize this distinction, 'nevertheless, an inability to show actual damages [through proof of actual confusion] does not alone preclude a recovery under § 1117.' *In so holding, we express a distinct preference for those opinions permitting relief based on the totality of the circumstances.*

Id. (citations omitted) (emphasis added).

30. Lanham Act § 35(a), 15 U.S.C. § 1117(a) (1994). This section repeatedly requires courts to grant relief based on the "circumstances of the case." *Id.*

31. For a discussion of Congress' clear intent that courts refrain from adopting stringent, inflexible rules in granting remedies for trademark infringement or unfair competition, and instead to subject all relief to equitable principles and flexibility, according to the circumstances of case at issue, see *supra* notes 21-25 and accompanying text.

Outside of citing prior case law and the *Restatement*, courts do not always explain the foundational basis for the actual confusion rule.[32] Almost without exception, the courts do not cite the Lanham Act or the legislative history as a basis for the rule.[33] Moreover, the Supreme Court has never addressed this issue.[34]

In the following pages, Section A will generally discuss what constitutes actual confusion. Section B will explore how the courts variously employ this concept in determining a likelihood of confusion in order to establish liability for technical trademark infringement and unfair competition. Section C will focus on why the courts have adopted the actual confusion rule.

A. *What is "Actual Confusion"?*

On its face, the meaning of "actual confusion" seems obvious.[35] Certainly falling within this concept is evidence that actual consumers have purchased goods bearing an infringing trademark or trade dress with the mistaken belief that the goods were made or marketed by one company when in fact the goods were produced by another.[36] Consumer testimony or affidavits relating to purchases made as a result of confusion or mistake in a genuine market context are probably the strongest

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32. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 36 cmt. i (1995). Comment i states in relevant part the following with respect to actual confusion: "An actor can be subject to liability for trademark infringement or deceptive marketing upon proof of a likelihood of confusion or deception, but the recovery of damages ordinarily requires proof that some consumers have actually been confused or deceived." *Id.*

33. Neither the Lanham Act nor the legislative history discusses the need or desirability for proof of actual confusion to recover any type of monetary relief. The Lanham Act itself is entirely silent on the concept of actual confusion, limiting the test for infringement to designations which are "likely to cause confusion, or to cause mistake, or to deceive." Lanham Act §§ 32(1)(a), 43(a)(1), 15 U.S.C. §§ 1114(1)(a), 1125(a)(1). Moreover, Congress apparently never contemplated the concept of actual confusion during its review of the various pieces of legislation that ultimately culminated in the Lanham Act. For an exhaustive reprint of the legislative history of the Lanham Act, see GILSON, *supra* note 7. Certainly Congress never tied the concept of actual confusion to the entitlement of any remedies provided by the Act.

34. While the Supreme Court has never had occasion to rule on whether the Lanham Act subjects the remedies of damages or profits to a showing of actual consumer confusion, the Court has denied certiorari in numerous cases that did address this issue. *See* International Star Class Yacht Racing Ass'n v. Tommy Hilfiger, U.S.A., Inc., 80 F.3d 749, 753-54 (2d Cir. 1996); Libman, Co. v. Vining Indus., 69 F.3d 1360, 1363 (7th Cir. 1995); Conopco, Inc. v. May Dep't Stores Co., 46 F.3d 1556, 1563 (Fed. Cir. 1994).

35. For a very competent and thorough discussion of the various forms of actual confusion that courts recognize, see Michael J. Allen, *The Role of Actual Confusion Evidence in Federal Trademark Infringement Litigation*, 16 CAMPBELL L. REV. 19, 27-56 (1994).

36. *Id.* at 28. One prominent trademark scholar and practitioner defines actual confusion as "instances in which one or more members of the purchasing public have been confused by the defendant's mark into believing that the defendant's product is made or sponsored by the plaintiff." 2 GILSON, *supra* note 7, § 5.01[3]; *see also* Allen, *supra* note 35, at 28 n.37 (stating that instances of actual confusion also tend to demonstrate likelihood of reverse confusion).

evidence of actual confusion.[37] This type of evidence, however, is very difficult to obtain.[38] As a result of this difficulty, the courts will recognize certain types of circumstantial evidence from which actual confusion can be inferred.[39] Among the forms of circumstantial evidence that courts acknowledge as relevant to establishing actual confusion are consumer surveys, inquiries as to sponsorship or relationship, and misdirected communications.[40] Many plaintiffs who cannot gather evidence of actual instances of consumer confusion in a market context have chosen to conduct consumer surveys to determine the existence of actual confusion.[41] While some experts believe that courts should not consider survey evidence as probative on the issue of actual confusion,[42] case law strongly indicates that the courts heavily rely on this type of evidence to determine the existence or absence of actual confusion.[43]

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37. *See* Allen, *supra* note 35, at 30 (indicating that courts easily acknowledge a high level of probative value of evidence establishing consumer purchases resulting from confusion or mistake in the market place); Brunswick Corp. v. Spinit Reel Co., 832 F.2d 513, 521-22 (10th Cir. 1987).

38. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 36 cmt. i (1995); 2 GILSON, *supra* note 7, § 5.01[3][a]; *see also* Money Station, Inc. v. Cash Station, Inc., No. 95-1240, 1995 WL 697313, at **4 (Fed. Cir. Nov. 27, 1995) (stating that actual evidence is "difficult to obtain"); Wynn Oil Corp. v. American Way Serv. Corp., 943 F.2d 595, 602 (6th Cir. 1991) (recognizing that "evidence of actual confusion is difficult to produce"); Eclipse Assoc. Ltd. v. Data Gen. Corp., 894 F.2d 1114, 1118 (9th Cir. 1990) (upholding a lower court's decision to discount the absence of actual confusion because this type of evidence is difficult to gather); Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc., 281 F.2d 755, 761 (2d Cir. 1960) (stating that "reliable evidence of actual instances of confusion is practically almost impossible to secure"). For a discussion of the difficulties in securing actual confusion evidence, see *infra* notes 84-96 and accompanying text.

39. *See* Allen, *supra* note 35, at 32-50 (discussing various types of actual confusion evidence that courts may rely upon instead of mistaken purchase evidence).

40. *See* Conopco, Inc. v. May Dep't Stores Co., 46 F.3d 1556, 1564 (Fed. Cir. 1994) (stating that "[a]ctual confusion is normally proven through the use of direct evidence, i.e., testimony from members of the buying public, as well as through circumstantial evidence, e.g., consumer surveys"); PDX Enters. v. Audiofidelity Enters., 818 F.2d 266, 271 (2d Cir. 1987); *see also* 2 GILSON, *supra* note 7, § 5.01[3]; Allen, *supra* note 35, at 32-44. Some courts also infer the presence of actual confusion based on an infringer's bad faith adoption of an identical or confusingly similar trademark or trade dress. Resource Developers, Inc. v. Statue of Liberty-Ellis Island Found., Inc., 926 F.2d 134, 140 (2d Cir. 1991); New York Racing Ass'n, Inc. v. Stroup News Agency Corp., 920 F. Supp. 295, 300 (N.D.N.Y. 1996). Some courts may infer actual confusion where the defendant has intentionally infringed a protected trademark or trafficked in counterfeit goods. *Statue of Liberty*, 926 F.2d at 140; Getty Petroleum Corp. v. Island Transp. Corp., 878 F.2d 650, 656 (2d Cir. 1989); *Stroup News*, 920 F. Supp. at 300.

41. *See* Edwin S. Clark, *Finding Likelihood of Confusion with Actual Confusion: A Critical Analysis of the Federal Courts' Approach*, 22 GOLDEN GATE U. L. REV. 393, 408-09 (1992) (discussing the wide usage of survey evidence as a surrogate for actual mistaken purchase evidence in trademark infringement cases). Confusion surveys are now so prevalent in infringement litigation that a plaintiff's failure to conduct one can lead to an inference that confusion does not exist. *Id.* at 408. For a general discussion of the use of survey evidence in trademark cases, see 4 J. THOMAS MCCARTHY, TRADEMARKS AND UNFAIR COMPETITION §§ 32.46-32.55 (3d ed. 1992).

42. *See* Allen, *supra* note 35, at 55 (stating that survey evidence does not adequately correspond to actual confusion of consumers in the real marketplace).

43. *See* Mutual of Omaha Ins. Co. v. Novak, 836 F.2d 397, 400 (8th Cir. 1987); Ambrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1544 (11th Cir. 1986); *see* Lawrence E. Evans, Jr. & David H. Gunn, *Trademark Survey Evidence*, 20 TEX. TECH. L. REV. 1 (1989). It is important, however, to ensure

Other forms of evidence that many courts will recognize as probative of the existence of actual confusion are inquiries as to affiliation, sponsorship, or relationship.[44] Some courts, however, refuse to acknowledge the relevance of these types of inquiries.[45] An example of this type of actual confusion evidence would be written or telephonic inquiries received by the Wm. Wrigley Jr. Company for information regarding a sporting event entitled "The DOUBLEMINT Marathon," where the Wrigley Company has no relationship with or sponsorship of the event.

Similarly, courts will also sometimes infer actual confusion based on evidence of misdirected communications.[46] An example of misdirected communication would be where the Wm. Wrigley Jr. Company received purchase orders for candy products actually produced by the Wiggely Company. Due to the overly speculative nature of the motivation behind misdirected communications, many courts find that this type of evidence is least probative to the existence of actual confusion.[47]

B. *The Courts' Reliance on Actual Confusion in Determining Likelihood of Confusion*

While actual confusion is not strictly necessary for a finding of likelihood of confusion, the courts are universally agreed that a significant presence of actual confusion is highly relevant to the question of whether a likelihood of confusion exists.[48] Similarly, many courts find

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that the survey protocol is developed properly and the survey is conducted in an appropriate manner. *See* Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 263 (5th Cir. 1980) (rejecting the surveys of both plaintiff and defendant due to faulty protocol and inappropriate conduct of the surveys); *see also* Daniel A. Klein, Annotation, *Admissibility and Weight of Consumer Survey in Litigation under Trademark Opposition, Trademark Infringement, and False Designation of Origin Provisions of Lanham Act (15 U.S.C.A. §§ 1063, 1114 and 1125)*, 90 A.L.R. FED. 20, 23 (1990) (stating that surveys should be developed and conducted in a manner that avoids any taint of bias).

44. Allen, *supra* note 35, at 39-44; *see also* Country Floors, Inc. v. Gepner, 930 F.2d 1056 (3d Cir. 1990); Fuddruckers, Inc. v. Doc's B.R. Others, Inc., 826 F.2d 837, 845 (9th Cir. 1987); Armco, Inc. v. Armco Burglar Alarm Co., 693 F.2d 1155, 1160 (5th Cir. 1982); Multi-Local Media Corp. v. 800 Yellow Book Inc., 813 F. Supp. 199, 204-05 (E.D.N.Y. 1993).

45. *See, e.g.*, Miss World (UK) Ltd. v. Mrs. Am. Pageants, Inc., 856 F.2d 1445, 1451 (9th Cir. 1988) (rejecting evidence of inquiries seeking information on affiliation or relationship); Jordache Enter. v. Hogg Wyld, Ltd., 828 F.2d 1482 (10th Cir. 1987); Fisher Stoves, Inc. v. All Nighter Stove Works, Inc. 626 F.2d 193, 195 (1st Cir. 1980).

46. Allen, *supra* note 35, at 32-38. *See, e.g.*, Cullman Ventures, Inc. v. Columbian Art Works, Inc., 717 F. Supp. 96, 130 (S.D.N.Y. 1989) (holding that "misdirected [purchase] order[s] evidences some actual confusion that is worthy of consideration"); Moore Bus. Forms, Inc. v. Seidenburg, 619 F. Supp. 1173, 1184 (W.D. La. 1985) (stating that actual confusion can be inferred from misdirected telephone purchase orders and from Post Office and UPS delivery confusion).

47. Allen, *supra* note 35, at 34-36.

48. World Carpets, Inc. v. Dick Littrell's New World Carpets, 438 F.2d 482, 489 (5th Cir. 1971). The Fifth Circuit summed up the almost dispositive nature of actual confusion evidence in the following manner:

> There can be no more positive or substantial proof of the likelihood of confusion than proof of actual confusion. Moreover, reason tells us that while very little proof of actual confusion would be necessary to prove the likelihood of confusion, an almost overwhelming amount of proof would be necessary to refute such proof.

that where the two parties have concurrently used their respective trademarks or trade dress for a significant period of time and the plaintiff proffers little or no proof of actual confusion, the establishment of likelihood of confusion may be doubtful.[49] The existence or absence of actual confusion, however, is never dispositive in a likelihood of confusion analysis.

Of course, the Lanham Act's statutory benchmark for determining trademark infringement or unfair competition as defined in section 43(a) is whether there exists a likelihood of confusion between a plaintiff's mark or trade dress and a defendant's mark or trade dress.[50] Proof of actual confusion is merely one of a number of factors that courts analyze in order to arrive at a determination of whether or not likelihood of confusion exists.[51] While there are slight differences between the tests that the circuits apply in resolving the issue of likelihood of confusion,[52] most circuits more or less adhere to all or at least many of the factors used in the test set forth by the Second Circuit in its landmark decision in *Polaroid Corp. v. Polarad Electronics Corp.*[53]

The factors enumerated by the *Polaroid* court are: (1) strength of the plaintiff's trademark; (2) similarity between the trademarks; (3) the similarity or relationship between the respective goods; (4) the defendant's intent; (5) the level of consumer sophistication; (6) the quality of the defendant's product; (7) the likelihood that the plaintiff will fill the gap (where the parties are not in direct competition); and (8) the presence

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Id. The *Restatement (Third) of Unfair Competition* specifically recognizes the highly probative value of actual confusion evidence in determining whether or not a likelihood of confusion in trademark infringement cases exists:

> (1) A likelihood of confusion may be inferred from proof of actual confusion.
> (2) An absence of likelihood of confusion may be inferred from the absence of proof of actual confusion if the actor and the [trademark owner] have made significant use of their respective designations in the same geographic market for a substantial period of time, and any resulting confusion would ordinarily be manifested by probable facts.

RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 23 (1995). The *Restatement* further claims that all courts recognize the importance of actual confusion evidence in the rubric of likelihood of confusion analysis, emphasizing that "convincing evidence of actual confusion is ordinarily decisive." *Id.* § 23 cmt. b.

49. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 23(2) (1995); *see also* Homeowners Group, Inc. v. Home Marketing Specialists, Inc., 931 F.2d 1100 (6th Cir. 1991); Plus Prods. v. Plus Discount Foods, Inc., 722 F.2d 999 (2d Cir. 1983).

50. Lanham Act §§ 32(1)(a), 43(a), 15 U.S.C. §§ 1114(1)(a), 1125(a) (1994). A violation of these sections occurs where a person's use of a trademark or trade dress "is likely to cause confusion, or to cause mistake, or to deceive" consumers as to the source of the person's goods or services. *Id.*

51. *See generally* Clark, *supra* note 41 (providing a critical analysis of a recent trend in the courts to overemphasize the actual confusion factor in determining likelihood of confusion, to the detriment of other traditional factors).

52. 2 GILSON, *supra* note 7, § 5.01[3][i].

53. 287 F.2d 492 (2d Cir. 1961).

of actual confusion.[54] These factors are nonexclusive, and the courts weigh the respective factors differently, generally depending on the circumstances of each particular case.[55]

Depending on the facts, courts vary in their reliance on proof of actual confusion in concluding a likelihood of confusion.[56] A few courts automatically place great weight on the actual confusion factor, particularly where a plaintiff has provided at least some proof of actual confusion.[57] But, because of the inherent and universally acknowledged difficulty of obtaining reliable proof of actual confusion, almost all courts place antithetical emphasis on this factor, depending on whether or not such proof exists.[58] That is, where a plaintiff is able to produce actual confusion evidence, courts will give such proof significant weight because proof of actual confusion is typically difficult to obtain.[59] On the

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54. *Polaroid*, 287 F.2d at 495; *see also* Smith Fiberglass Prods., Inc. v. Ameron, Inc., 7 F.3d 1327, 1329 (7th Cir. 1993) (discussing additional factors such as the area and manner of concurrent use and the degree of care expected to be exercised by consumers).

55. *See* McGraw-Edison Co. v. Walt Disney Prods., 787 F.2d 1163, 1167 (7th Cir. 1986) (explaining that "[n]one of these factors by itself is dispositive of the likelihood of confusion question").

56. *See* Ambrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1543 (11th Cir. 1986) (stating that courts should evaluate proof of actual confusion "in the light of the totality of the circumstances involved"). For example, in determining the quantum of actual confusion that could tip the scales in terms of relevancy or persuasiveness, the Eleventh Circuit stated:

> Perhaps as important as, and helping to explain the various interpretations of the relevance of, the number of instances of confusion are the kinds of persons confused and degree of confusion. Short-lived confusion or confusion of individuals casually acquainted with a business is worthy of little weight, while confusion of actual customers of a business is worthy of substantial weight.

Safeway Stores, Inc. v. Safeway Discount Drugs, Inc., 675 F.2d 1160, 1167 (11th Cir. 1982) (citation omitted).

57. Frisch's Restaurants, Inc. v. Elby's Big Boy, Inc., 670 F.2d 642, 648 n.5 (6th Cir. 1982) (opining that "it is difficult to conceive of a situation where a showing of substantial actual confusion would not result in a legal conclusion of likelihood of confusion"); Helene Curtis Indus. v. Church & Dwight Co., 560 F.2d 1325, 1330 (7th Cir. 1977) (indicating that actual confusion evidence, when available, "is entitled to substantial weight"); Safeway Stores, Inc. v. Safeway Ins. Co., 657 F. Supp. 1307, 1316 (M.D. La. 1985), *aff'd*, 791 F.2d 929 (5th Cir. 1986) (stating emphatically that "a sufficient demonstration of actual confusion could sustain a finding of the likelihood of confusion even in the absence of other proof").

58. *See* Wynn Oil Co. v. American Way Serv. Corp., 943 F.2d 595, 602 (6th Cir. 1991) (acknowledging that it is difficult to produce evidence of actual confusion); Lois Sportswear, U.S.A., Inc. v. Levi Strauss & Co., 799 F.2d 867, 875 (2d Cir. 1986) (indicating that "actual confusion is very difficult to prove"); W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656, 661 (2d Cir. 1970) (explaining that a showing of actual confusion is very difficult to demonstrate); Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc., 281 F.2d 755, 761 (2d Cir. 1960) (stating that the courts recognize "that reliable evidence of actual instances of confusion is practically almost impossible to secure"). For a discussion of the difficulties in securing actual confusion evidence, see *infra* notes 84-96 and accompanying text.

59. Dozens of federal court decisions make clear that because of the inherent difficulty in obtaining and producing reliable and admissible proof of actual confusion, when proof is offered, it is highly significant in assessing the existence of a likelihood of confusion. *See, e.g.*, Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1188 (6th Cir. 1988); Bandag, Inc. v. Al Bolser's Tire Stores, Inc., 750 F.2d 903, 914 (Fed. Cir. 1984); Golden Door, Inc. v. Odisho, 646 F.2d 347, 351 (9th Cir. 1980); Grotrian, Helfferich, Schulz, Th. Steinwen Nachf. v. Steinway and Sons, 523 F.2d 1331, 1340 (2d

other hand, where a plaintiff does not make a showing of actual confusion, courts generally discount the actual confusion factor for the same reason.[60]

C. *Why the Courts Adopted the Actual Confusion Rule*

After an exhaustive review of scores of federal court decisions, numerous law review articles, trademark treatises, hundreds of pages of the legislative history of the Lanham Act and other materials, the author has found no authority that conclusively explains why courts have imposed a requirement that a plaintiff prove actual confusion before being entitled to damages and/or an accounting of profits.[61] *The Restatement (Third) of Unfair Competition* implies that the courts view actual confusion evidence as a surrogate for proof of the fact of actual damage, a requisite element for recovery.[62] One respected authority on trademark remedies takes a similar approach in explaining why courts have adopted the strin-

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Cir. 1975); Tisch Hotels, Inc. v. Americana Inn, Inc., 350 F.2d 609, 612 (7th Cir. 1965); American Auto. Ass'n, Inc. v. AAA Ins. Agency, Inc., 618 F. Supp. 787, 794 (W.D. Tex. 1985).

60. *Wynn Oil*, 943 F.2d at 602; Eclipse Assocs. Ltd. v. Data Gen. Corp., 894 F.2d 1114, 1118 (9th Cir. 1990); Roulo v. Russ Berrie & Co., 886 F.2d 931, 937 (7th Cir. 1989); *Lois Sportswear*, 799 F.2d at 875; Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc., 659 F.2d 695, 704 (5th Cir. 1981). In addition to the use of actual confusion to demonstrate likelihood of confusion, courts may also use actual confusion evidence to determine whether a mark has acquired secondary meaning. *See* A.J. Canfield Co. v. Vess Beverages, Inc., 796 F.2d 903, 907 (7th Cir. 1986) (stating that letters and phone calls that evidenced instances of actual confusion could be sufficient to demonstrate secondary meaning); American Scientific Chem., Inc. v. American Hosp. Supply Corp., 690 F.2d 791, 793 (9th Cir. 1982) (relying on examples of actual confusion as an "indicium" of a mark's secondary meaning).

61. The scholarly literature and the case decisions merely recite the rule without explaining why it exists. At least one prominent trademark scholar and practitioner has pointed out that the rule is not apparent from the Lanham Act itself and suggests the actual confusion requirement developed out of a similar rule as traditionally applied to false advertisement cases under section 43(a) of the Lanham Act. 3 GILSON, *supra* note 7, § 8.08[2] n.7.

62. RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 36 cmt. i (1995). Without specifically drawing a connection between a plaintiff's duty to prove actual damage and the alternative showing of actual confusion, the drafters of the *Restatement* seem to imply such a connection in addressing a plaintiff's burden of proving certainty of the fact of loss:

> Although the plaintiff bears the burden of proving both the fact and extent of its pecuniary loss, the difficulty of quantifying loss in a market context frequently justifies a less exacting standard of proof for the amount than for the fact of loss. Once the fact of loss caused by the defendant's misconduct has been established, the plaintiff's burden may be satisfied by evidence that furnishes a reasonable basis for computing damages. The plaintiff is not obliged to provide individualized proof of lost sales. As the fact and extent of the loss become more uncertain, however, the risk increases that an award of damages will represent a windfall to the plaintiff and a penalty to the defendant. In such cases, the appropriateness of a damage award depends on whether the other circumstances of the case justify imposing that risk on the defendant.
>
> An actor can be subject to liability for trademark infringement or deceptive marketing upon proof of a likelihood of confusion or deception, but the recovery of damages ordinarily requires proof that some consumers have actually been confused or deceived.

Id.

gent actual confusion requirement.[63] If this is indeed the justification for the rule, then it would appear that the courts have lost sight of the fact that actual injury can be established through other types of evidence.[64]

A number of older cases applying the actual confusion rule cite as authority Judge Learned Hand's opinion in *G.H. Mumm Champagne v. Eastern Wine Corp.*[65] Judge Hand announced that:

> It is of course true that to recover damages or profits, whether for infringement of a trade-mark or for unfair competition, it is necessary to show that buyers, who wished to buy the plaintiff's goods, have been actually misled into buying the defendant's; but when the question is of an injunction, we can find as little warrant for demanding evidence of actual confusion in cases of unfair competition as in those of trade-mark. This distinction between the [plaintiff's burden of proof of damage] was certainly the basis of the [Supreme Court's] decision in Straus v. Notaseme Hosiery Co.[66]

Judge Hand's reliance on the Supreme Court's decision in *Straus* is, however, misplaced.

The *Straus* Court did, in fact, uphold the grant of an injunction based on its recognition of the existence of a likelihood of confusion and denied an award of profits.[67] But the Court denied the award of monetary compensation in the form of profits, not merely on the basis of an absence of actual confusion, but mainly because of the Court's combined beliefs that (1) the plaintiff failed to prove that the defendant acted with

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63. James M. Koelemay, Jr., *A Practical Guide to Monetary Relief in Trademark Infringement Cases*, 85 TRADEMARK REP. 263, 278-79 (1995). Specifically, Mr. Koelemay explains:

> As a substitute for proof of actual injury or unjust enrichment, some courts look to proof of actual confusion. Proof of confusion demonstrates the existence of legal injury to the plaintiff, and without confusion a defendant will not have benefitted from the infringement. . . .
>
> A significant number of recent decisions have gone further and held that actual confusion must be shown to secure an award of damages, but not for an accounting of the defendant's profits. Other recent decisions have made proof of actual confusion a prerequisite to both damages and an accounting.

Id. at 279. Unfortunately, none of the cases that Mr. Koelemay cites explicitly confirm that the courts' adoption of the actual confusion rule resulted from a willingness to view actual confusion evidence as a substitute or surrogate for proof of actual injury, although Mr. Koelemay's characterization may very well be correct. *See also* Bandag, Inc. v. Al Bolster's Tire Stores, Inc., 750 F.2d 903, 921 (Fed. Cir. 1984) (drawing a connection between evidence of actual confusion and the requisite proof of actual injury); Lenscrafters, Inc. v. Vision World, Inc., 943 F. Supp. 1481, 1489 (D. Minn. 1996).

64. This evidence might take the form of, for example, lost sales trends, damage to reputation, and corrective advertising. A compelling argument can also be made that use of the likelihood of confusion test should satisfy the requisite showing of actual injury in some cases. For a discussion on the relative value of the likelihood of confusion test in determining injury, see *infra* notes 78-83 and accompanying text.

65. 142 F.2d 499 (2d Cir. 1944).

66. *Mumm Champagne*, 142 F.2d at 501 (citing Straus v. Notaseme Hoisery Co., 240 U.S. 179 (1916)).

67. *Straus*, 240 U.S. at 183.

an intent to deceive consumers or "steal the plaintiff's goodwill," (2) the plaintiff failed to show that the defendant's profits were due entirely to his unfair competition and (3) that the plaintiff did not provide "evidence that any deceit or substitution was accomplished in fact."[68] The *Straus* Court did not, as Judge Hand declared in *G.H. Mumm*, announce a stringent rule requiring proof of actual confusion in order to recover damages or an accounting of profits, but rather looked at the totality of the circumstances and equities in the case.

III. THE ACTUAL CONFUSION REQUIREMENT IS CONTRARY TO THE LANHAM ACT AND TO GENERAL EQUITABLE PRINCIPLES

This Part will demonstrate that the "actual confusion" rule offends the principles underlying the Lanham Act and will also present an argument that the rule is inherently harsh, unfair, and inequitable to trademark owners. Section A will discuss how the Lanham Act and its legislative history manifests Congress's clear intent that the courts grant monetary relief on a broad, fair, and equitable basis without recourse to narrow and inflexible rules. Section A will specifically focus on the likelihood of confusion test as the Lanham Act's sole test for infringement and the availability of remedies. Section B will demonstrate that because of the widely acknowledged, inherent difficulty of proving actual confusion, the actual confusion requirement potentially forecloses any monetary relief in a significant number of infringement or unfair competition cases. The injured trademark owner is left, therefore, to suffer his losses regardless of how significant these losses may be. The final Section will discuss the absurdity of denying damages and/or profits to a trademark owner who sues in civil court because he cannot prove actual confusion, while counterfeiters charged under the criminal Anti-Counterfeiting statute can be sent to jail and face tremendous fines without such a showing of actual confusion.

A. The Lanham Act's Standard for all Remedies is Likelihood of Confusion

It is axiomatic that the test of liability for trademark infringement and unfair competition governed under section 43(a) is likelihood of confusion.[69] The statutory scheme makes clear that the "injury in fact" on

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68. *Id.* at 182-83.

69. Lanham Act §§ 32(1)(a), 43(a), 15 U.S.C. §§ 1114(1)(a), 1125(a) (1994). For example, section 32(1)(a) provides that:

> Any person who shall, without the consent of the registrant- (a) use in commerce any reproduction, counterfeit, copy, or colorable imitation of a registered mark in connection with the sale, offering for sale, distribution, or advertising of any goods and services on or in connection with which such use is *likely to cause confusion, or to cause mistake, or to deceive* . . . shall be liable in a civil action by the registrant for the remedies hereinafter provided.

Id. § 32(1)(a), 15 U.S.C. § 1114(1)(a) (emphasis added). This statutory threshold for liability has essentially remained constant since the first federal trademark statute. *See* Trademark Act of 1870,

which evidence must be adduced in order to determine liability is the harmful nexus between the protected trademark or trade dress, and the infringing trademark or trade dress. Whether that nexus exists is a question of fact and turns on whether the objectionable designation is likely to cause confusion or mistake, or to deceive consumers as to the source of a commercial product or service.[70] The only test that the Lanham Act promulgates in order to impose liability is this logical causal connection.[71] Nothing more is required. If the finder of fact determines that there is likelihood of confusion, then there is a violation of the Act.[72]

On its face, the Lanham Act ties most remedies, including the right to an injunction, damages, profits and costs, to likelihood of confusion.[73] The language of sections 32, 34, 35, 36, and 43(a) expressly entitles a trademark owner to all of these forms of relief upon a judicial finding of liability.[74] As mentioned above, evidence of actual confusion is not required to arrive at a determination of likelihood of confusion.[75] It is merely one factor among many.[76] Therefore, a violation of the Act can occur whether actual confusion is demonstrated or not. Accordingly, all remedies provided by the Lanham Act should unconditionally be potentially available even absent evidence of actual confusion.[77] This is the

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ch. 230, §§ 78-79, 16 Stat. 210, 211 (1870) (invalidated in 1879, United States v. Steffens, 100 U.S. 82, 82 (1879)); Act of March 3, 1881, ch. 138, §§ 2, 7, 21 Stat. 502 (1881) (repealed 1905); Trademark Act of 1905, §§ 16, 19, 15 U.S.C. §§ 96, 99 (1905) (repealed 1946); Act of March 19, 1920, § 4, 15 U.S.C. § 124 (1920) (repealed 1946).

70. Lanham Act §§ 32(1)(a), 43(a), 15 U.S.C. §§ 1114(1)(a), 1125(a); Two Pesos, Inc. v. Taco Cabana, Inc., 505 U.S. 763, 782 (1992) (Stevens, J., concurring); Libman Co. v. Vining Indus., Inc., 69 F.3d 1360, 1365 (7th Cir. 1995).

71. *See Two Pesos*, 505 U.S. at 780 (stating that under the Lanham Act "the ultimate test is whether the public is likely to be deceived or confused by the similarity of the marks . . . . Whether we call the violation infringement, unfair competition or false designation of origin, the test is identical—is there a 'likelihood of confusion?'") (quoting New West Corp. v. NYM Co., 595 F.2d 1194, 1201 (1979).

72. *Id.*; Schwinn Bicycle Co. v. Ross Bicycles, Inc., 870 F.2d 1176, 1184, 1187 (7th Cir. 1989).

73. 15 U.S.C. §§ 1114(1), 1116(a), 1117(a), 1118, 1125(a).

74. For example, section 32(1)(a) provides that an infringer who uses a trademark that is likely to cause confusion "shall be liable in a civil action by the registrant for the remedies hereinafter provided." Lanham Act § 32(1)(a), 15 U.S.C. § 1114(1)(a). Similarly, section 35(a) expressly states that "[w]hen a violation of any right of the registrant of a mark registered in the Patent and Trademark Office, or a violation of section 1125(a) of this title [(Lanham Act § 43(a))] shall have been established in any civil action arising under this Act, the plaintiff shall be entitled . . . to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action." 15 U.S.C. § 1117(a).

75. For a discussion of how the existence of actual confusion evidence is useful but not necessary in a court's consideration of whether likelihood of confusion exists, *see supra* notes 48-60 and accompanying text.

76. Libman Co. v. Vining Indus., 69 F.3d 1360, 1365 (7th Cir. 1995) (citing Computer Care v. Service Sys. Enters., 982 F.2d 1063, 1069 (7th Cir. 1992); Schwinn Bicycle Co. v. Ross Bicycles, Inc., 870 F.2d 1176, 1187 (7th Cir. 1989)).

77. In addition to the plain meaning of the language of the Lanham Act's remedy provisions, the legislative history strongly suggests that Congress intended courts to mandatorily award the monetary remedies provided for once they arrived at a finding of likelihood of confusion. *See*

inescapable conclusion if one were to limit a review to the explicit language of the Lanham Act and the legislative history.

However, courts do not generally have so limited a view. Perhaps one explanation for the pervasive view that, while the likelihood of confusion standard is reasonable to enjoin future infringement but "something more is required" to justify a monetary award, is the notion that a determination of likelihood of confusion is a mere fiction. It is a subjective finding by a judge or jury that prospective purchasers would probably be confused or mistaken. The likelihood of confusion standard does not necessarily measure an absolute fact of future injury. Moreover, the standard may not always serve as an objective measure of past factual injury.[78] All courts agree that equity will countenance such a fiction in concluding whether a trademark owner's goodwill and the nation's consumers would be adequately protected by injunctive relief.[79] Most courts, however, are simply reluctant to reach into an infringer's cash box on the basis of so speculative and subjective a finding.[80] So the courts have adopted yet another fiction, in the guise of actual confusion, which when combined with a finding of likelihood of confusion, cumulatively satisfies that indefinable "something more."[81]

That actual confusion evidence provides as tenuous a fiction, if not more so, as the likelihood of confusion standard is easily realized. Hauling two, ten, or even fifty consumers into court to testify that they purchased an infringing product out of confusion or by mistake simply cannot lay an objective factual basis that all other consumers who purchased the product were similarly confused.[82] Such testimony can only serve to prove the factual injury arising out of those particular consumers' purchases. However, most courts rely, and indeed insist, on such testimony to award damages and/or profits far in excess of the harm incurred by

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Hearings on H.R. 4744 Before the Subcomm. on Trademarks of the House Comm. on Patents, 76th Cong. 154-55 (1939).

78. Courts apply the likelihood of confusion test to measure the probability of prospective harm. It appears that no reported case ever used the standard alone to explicitly measure the probability of past harm. The author wonders if there is any real functional distinction in employing the test to determine whether it is more likely than not that prospective consumers *will be confused* by a potentially infringing trademark or trade dress than in using the test to determine whether past consumers *have already been confused.*

79. *Cf.* MCCARTHY, *supra* note 41, § 30.25[4].

80. *Cf. id.*

81. *See id.* "The rationale appears to be that at least in cases of competing goods [or services], proof of some instances of actual confusion strengthens the inference that sales made by the infringer would have been made by the plaintiff." *Id.*

82. Despite this, courts are willing to rely on as few as one instance of actual confusion to find likelihood of confusion and grant monetary relief. *See* Louisiana World Exposition, Inc. v. Logue, 746 F.2d 1033, 1041 (5th Cir. 1984); Varitronics Sys. Inc. v. Merlin Equip., Inc., 682 F. Supp. 1203, 1208-09 (S.D. Fla. 1988); *cf.* Union Carbide Corp. v. Ever-Ready Inc., 513 F.2d 366, 384-85 (7th Cir. 1976).

those purchases.[83] Essentially, testimonial evidence from actual confusion witnesses is a mere substitute for a judge's or jury's own subjective sensibilities to substantiate all other harm caused by the infringing product beyond that harm arising out of those witnesses' own purchases. The judicially accepted forms of circumstantial actual confusion evidence (i.e. surveys and mistaken communications) are even less indicative, in an objective sense, of the existence of actual injury. Survey evidence, in particular, bears more on the likelihood of confusion than on any past instances of actual confusion.[84] For this reason, survey evidence represents the merging of the fiction of likelihood of confusion into the fictional realm of actual confusion.

Are two fictions necessarily better than one? Maybe, particularly when there exists a significant amount of evidence of actual consumer confusion. However, as one prominent commentator has stated, "actual confusion or damage is notoriously difficult to prove, let alone quantify."[85] Where actual confusion evidence does not exist, such as in a tremendous number of the reported cases, the requirement of this type of evidence can be burdensome and unfair in the extreme, something that Congress certainly did not contemplate according to the legislative history of the Lanham Act.[86]

B. *Actual Confusion is "Notoriously Difficult to Prove"*

The courts and other commentators have universally accepted the characterization that actual confusion is very difficult to obtain. Even where a plaintiff possesses some forms of actual confusion evidence, the plaintiff must overcome significant evidentiary obstacles to get the evidence admitted. In a substantial number of cases, these difficulties effectively foreclose the availability of damages and/or profits.

1. Actual Confusion Evidence is Difficult to Obtain

In literally hundreds of cases, the courts have universally acknowledged that proof of actual confusion is extremely difficult, if not almost impossible, to secure.[87] The reasons for the difficulty in obtaining actual

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83. *See* cases cited *supra* note 82.

84. *See* Pfizer Inc. v. Astra Pharm. Prods., Inc., 858 F. Supp. 1305, 1326 (S.D.N.Y. 1994) (stating that "[c]onsumer surveys are probably better described as a statistical means of predicting the likelihood that actual consumers will [be] confuse[d]").

85. MCCARTHY, *supra* note 41, § 30.24[2].

86. For a discussion of Congress's clear intent that courts refrain from adopting stringent, inflexible rules in granting remedies for trademark infringement or unfair competition, and instead subject all relief to fairness and equitable principles that are flexibly applied to the circumstances of the case, see *supra* notes 21-25 and accompanying text.

87. An exhaustive citation to the cases in which courts have recognized this difficulty would likely result in one of the most voluminous footnotes in the history of legal scholarship. Having no interest in achieving this dubious distinction, and wishing to spare the reader as well as himself, the author merely mentions a fraction of the circuit court cases bearing on this point. *See, e.g.*, Computer Care v. Service Sys. Enters., 982 F.2d 1063, 1070 (7th Cir. 1992) ("difficult-to-acquire evidence of

confusion evidence are numerous: (1) the consumer may not realize the purchasing mistake, believing the infringing product to be the genuine trademark article;[88] (2) the consumer may realize that a mistake has occurred but accepts the infringement as an adequate substitute; (3) the consumer may not realize to whom a complaint should be sent;[89] (4) the consumer may feel foolish for having made a mistake and be reluctant to admit to it;[90] (5) the consumer may complain to a retailer, but the retailer fails to forward the complaint to the trademark owner or the infringer;[91] (6) the consumer may simply not want to "spend the time to register a complaint with a faceless corporation;"[92] or (7) the consumer may not be

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actual confusion") (quoting Roulo v. Russ Berrie & Co., 886 F.2d 931, 938 (7th Cir. 1989)); Wynn Oil Co. v. American Way Serv. Corp., 943 F.2d 595, 602 (6th Cir. 1991) ("evidence of actual confusion is difficult to produce") (quoting Wynn Oil Co. v. Thomas, 839 F.2d 1183, 1188 (6th Cir. 1988)); *Wynn Oil*, 839 F.2d at 1188 ("evidence of actual confusion is difficult to produce"); Eclipse Assocs. Ltd. v. Data Gen. Corp., 894 F.2d 1114, 1118 (9th Cir. 1990) ("difficulty of gathering [actual confusion] evidence"); *Roulo*, 886 F.2d at 937 ("difficult-to-acquire evidence of actual confusion"); Plus Prods. v. Plus Discount Foods, Inc., 722 F.2d 999, 1006 (2d Cir. 1983) ("difficult to establish actual confusion") (citing W.E. Bassett Co. v. Revlon, Inc., 435 F.2d 656, 662 (2d Cir. 1970)); Golden Door, Inc. v. Odisho, 646 F.2d 347, 351 (9th Cir. 1980) ("actual confusion is difficult to produce") (citing AMF Inc. v. Sleekcraft Boats, 599 F.2d 341, 353 (9th Cir. 1979)); *AMF*, 599 F.2d at 352-53 ("proving actual confusion is difficult"); Mushroom Makers, Inc. v. R. G. Barry Corp., 580 F.2d 44, 48 (2d Cir. 1978) ("difficulty of establishing actual confusion"); Scarves by Vera, Inc. v. Todo Imports Ltd., 544 F.2d 1167, 1175 (2d Cir. 1976) ("'a showing of actual confusion is . . . very difficult to demonstrate' with reliable proof") (quoting *W.E. Bassett*, 435 F.2d at 662); Grotrian, Helfferich, Shulz, Th. Steinweg Nachf. v. Steinway & Sons, 523 F.2d 1331, 1340 (2d Cir. 1975) ("general difficulty of finding evidence of actual confusion"); *W.E. Bassett*, 435 F.2d at 662 ("showing of actual confusion is . . . very difficult to demonstrate"); Tisch Hotels, Inc. v. Americana Inn, Inc., 350 F.2d 609, 612 (7th Cir. 1965) ("reliable evidence of actual confusion is difficult to obtain") (citing Harold F. Ritchie, Inc. v. Chesebrough-Pond's, Inc., 281 F.2d 755, 761 (2d Cir. 1960)); David Sherman Corp. v. Heublein, Inc., 340 F.2d 377, 381 (8th Cir. 1965) ("it is usually difficult to ferret out instances of actual confusion even though they exist"); *Harold F. Ritchie*, 281 F.2d at 761 (2d Cir. 1960) ("reliable evidence of actual instances of confusion is practically almost impossible to secure") (quoting *Miles Shoes*, 199 F.2d at 317); Maternally Yours, Inc. v. Your Maternity Shop, 234 F.2d 538, 542 (2d Cir. 1956); Miles Shoes, Inc. v. R.H. Macey & Co., 199 F.2d 602, 603 (2d Cir. 1952); Money Station, Inc. v. Cash Station, Inc., No. 95-1240, 1995 WL 697313, at *4 (Fed. Cir. Nov. 27, 1995) ("difficult to obtain"); Conopco, Inc. v. May Dep't Stores Co., 46 F.3d 1556, 1563 (Fed. Cir. 1994) ("difficulty of proving actual confusion"); Money Station, Inc. v. Cash Station, Inc., No. 95-1240, 1995 WL 697313, at *4 (Fed. Cir. Nov. 27, 1995) ("difficult to obtain"); Conopco, Inc. v. May Dep't Stores Co., 46 F.3d 1556, 1563 (Fed. Cir. 1994) ("difficulty of proving actual confusion").

88. *See* Fisons Horticulture, Inc. v. Vigoro Indus., 30 F.3d 466, 476 n.12 (3d Cir. 1994); International Kennel Club, Inc. v. Mighty Star, Inc., 846 F.2d 1079, 1090-91 n.6 (7th Cir. 1988). This lack of consumer recognition of confusion undoubtedly frequently occurs when the infringing product is a counterfeit.

89. Clark, Inc. v. Resnick, 219 U.S.P.Q. 619, 623 (D.R.I. 1982).

90. *See* Bottega Veneta, Inc. v. Volume Shoe Corp., 226 U.S.P.Q. 964, 971 (Trademark Trial & App. Bd. 1985).

91. *Id.* In many cases, consumer complaints are not received by the trademark owner because the trademark owner does not have a direct relationship with the ultimate consumer. *See Clark*, 219 U.S.P.Q. at 623-24. Therefore, the trademark owner must rely on the diligence of retailers to advise them of consumer complaints, which frequently does not happen. *See* Cuisinarts, Inc. v. John Boos & Co., 227 U.S.P.Q. 153, 155 (S.D.N.Y. 1985).

in a position to meaningfully inspect the product to ascertain whether a mistake has been made.[93]

Given the nature of the marketplace, each of these reasons provides a rational, logical and perfectly understandable basis for the difficulty faced by trademark owners in garnering evidence of actual confusion.[94] Because of this understandable difficulty, courts universally agree that evidence of actual confusion is not necessary to a finding of liability.[95] All courts acknowledge that a lack of provable instances of actual confusion does not mean that consumers have not or will not be confused.

Despite the courts' willingness to take a reasonable stance with respect to the role of actual confusion evidence in determining likelihood of confusion, the courts nevertheless almost universally require such evidence in order to claim monetary damages and/or profits, depending on the circuit. Therefore, by adopting such a requirement for monetary relief, the courts consciously force injured trademark owners to overcome evidentiary obstacles that the courts themselves acknowledge are generally very difficult, if not impossible, to overcome.[96] This Catch-22 standard is rendered even more untenable by the recognized difficulty of getting proof of actual confusion that does exist into evidence.

2. Procedural Evidentiary Obstacles

Hampering an injured trademark owner further is the issue concerning the admissibility of actual confusion evidence. A court will give weight only to properly admissible evidence bearing on actual confusion by consumers, and there are a number of evidentiary obstacles to overcome in meeting admissibility standards.

Probably the most difficult obstacle is to entice a consumer who has manifested actual confusion or mistake to appear and testify in court, sit for a deposition, or even sign a declaration or affidavit in the first place. Understandably, many consumers, wary of and unfamiliar with legal proceedings, may simply refuse to subject themselves to any form of

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92. AmBrit, Inc. v. Kraft, Inc., 812 F.2d 1531, 1544 (11th Cir. 1986). A consumer's unwillingness to contact the trademark owner may occur frequently when the purchased product is relatively inexpensive.

93. *See generally* Getty Petroleum Corp. v. Island Transp. Corp., 878 F.2d 650 (2d Cir. 1989) (stating that actual confusion has occurred where consumers could not meaningfully recognize that the gasoline they received was not manufactured by the plaintiff).

94. Courts acknowledge that the "vast majority" of confused consumers never even contact the trademark owner or the infringer. Kinark Corp. v. Camelot, Inc., 548 F. Supp. 429, 446 (D.N.J. 1982).

95. For a discussion of the courts' recognition that proof of actual confusion is not necessary to a finding of likelihood of confusion, see *supra* notes 48-60 and accompanying text.

96. It cannot seriously be considered that Congress, in providing trademark owners monetary relief as set forth in section 35(a) of the Lanham Act, contemplated such an unfair Catch-22 standard for the courts' awarding of monetary remedies. Certainly, the legislative history argues otherwise. For a discussion of Congress's intention that monetary relief should be granted on a fair and equitable basis, see *supra* notes 22-24 and accompanying text.

presenting evidence. Fear of testifying, of being cross-examined, or of simply being legally held accountable for their anecdotal description of a purchasing experience, coupled with the inconvenience and expense of travelling potentially long distances, missing work, or leaving their families, is enough to frighten or otherwise discourage many consumers from providing trademark owners the necessary and admissible proof of actual confusion.

Moreover, relying on consumer declarations, affidavits or other documentary[97] evidence of actual confusion can be risky. For example, while some courts have found these types of evidence to be admissible, whether or not the declarant is available as a witness,[98] other courts have disallowed such evidence as exceptions to the hearsay rule.[99] Courts are even more reluctant to admit oral or documentary evidence that a confused consumer conveyed to a third party[100] where the third party himself presents the evidence.[101] Even if admissible, many courts have given little weight to out-of-court declarations where the declarant is not identified and is not available for cross examination.[102]

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97. For example, consumer letters or written records of telephone inquiries.

98. An oral or written declaration relating to actual confusion in the marketplace may be generally admissible under the "state of mind" or "present sense impression" exceptions to the rule against hearsay. FED. R. EVID. 803(1), (3). The rules provide that:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: (1) Present sense impression. -A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. . . . (3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification or terms of declarant's will.

Id.; *see also* R.J. Toomey Co. v. Toomey, 683 F. Supp. 873, 787 n.7 (D. Mass. 1988); Freddie Fuddruckers, Inc. v. Ridgeline, Inc., 589 F. Supp. 72, 75 (N.D. Tex. 1984) (admitting oral statements and letters under Rule 803), *aff'd*, 783 F.2d 1062 (5th Cir. 1986); Mile High Upholstery Fabric Co. v. General Tire & Rubber Co., 221 U.S.P.Q. 217, 223 (N.D. Ill. 1983) (holding that written records of telephone inquiries and consumer letters are admissible under Rule 803).

99. *See, e.g.*, Duluth News-Tribune, Inc. v. Mesabi Publ'g Co., 84 F.3d 1093, 1098 (8th Cir. 1996) (holding that misdirected mail and telephone calls constituted hearsay); Vitek Sys., Inc. v. Abbott Lab., 675 F.2d 190, 194 (8th Cir. 1982) (discounting actual confusion evidence as a "present sense impression" exception to rule against hearsay); Kusan, Inc. v. Fairway Siding Corp., 7 U.S.P.Q.2d 1202, 1209 (D. Mass. 1988); Pro Hardware, Inc. v. Home Ctrs. of Am., Inc., 607 F. Supp. 146, 152 (S.D. Tex. 1984).

100. Examples of such third parties would be a retailer who receives a complaint by a confused consumer, an investigator taking a statement from a confused consumer, or an employee of the trademark owner who speaks to a consumer about the circumstances of the latter's confusion or mistake.

101. *See* Smith Fiberglass Prods., Inc. v. Ameron, Inc., 7 F.3d 1327, 1329 (7th Cir. 1993); Ocean Bio-Chem, Inc. v. Turner Network Television, Inc., 741 F. Supp. 1546, 1559 & n.7 (S.D. Fla. 1990); Programmed Tax Sys., Inc. v. Raytheon Co., 439 F. Supp. 1128, 1131 n.1 (S.D.N.Y. 1977).

102. Holiday Inns, Inc. v. Holiday Out in Am., 481 F.2d 445, 448-49 (5th Cir. 1973); CMM Cable Rep., Inc. v. Ocean Coast Properties, Inc., 888 F. Supp. 192, 201 (D. Me. 1995), *aff'd*, 97 F.3d 1504 (1st Cir. 1996); Victory Pipe Craftsmen, Inc. v. Faberge, Inc., 582 F. Supp. 551, 558 (N.D. Ill.

Survey evidence that is offered as circumstantial evidence of actual confusion can sometimes be very problematic. There are many factors that bear on whether a particular survey is admissible, and if admissible, the weight to be placed on it.[103] Among these factors are whether:

> (1) the 'universe' was properly defined, (2) a representative sample of that universe was selected, (3) the questions to be asked of interviewees were framed in a clear, precise and non-leading manner, (4) sound interview procedures were followed by competent interviewers who had no knowledge of the litigation or the purpose for which the survey was conducted, (5) the data gathered was accurately reported, (6) the data was analyzed in accordance with accepted statistical principles and (7) objectivity of the entire process was assured.[104]

A flaw in any of these factors may render the survey unreliable, if not inadmissible.[105] Surveys have another important, and sometimes insurmountable, disadvantage: surveys are very expensive.

3. Survey Evidence is Very Expensive

Because surveys need to be conducted with a carefully construed protocol and by experienced and trained interviewers, and because every step of the interviewing, data collection, reporting and analysis process needs to be inscrutable, the cost of designing and conducting a survey can be tremendous. Typically, trademark surveys can cost a litigant between thirty thousand dollars to one-hundred-fifty thousand dollars.[106]

1984); Freedom Sav. and Loan Ass'n v. Way, 583 F. Supp. 544, 548 (M.D. Fla. 1984), *aff'd*, 757 F.2d 1176 (11th Cir. 1985); National Resources, Inc. v. Nova Resources, Inc., 214 U.S.P.Q. 121, 128 (D. Md. 1981), *aff'd*, 701 F.2d 166 (4th Cir. 1983); Mushroom Makers, Inc. v. R. G. Berry Corp., 441 F. Supp. 1220, 1231 (S.D.N.Y. 1977), *aff'd*, 580 F.2d 44 (2d Cir. 1978).

103. Marshall Field & Co. v. Mrs. Field's Cookies, 25 U.S.P.Q.2d 1321, 1334 (Trademark Trial & App. Bd. 1992). During the earlier half of this century, courts were reluctant to recognize the admissibility of trademark surveys. *See* Coca-Cola Co. v. Chero-Cola Co., 273 F. 755 (D.C. Cir. 1921) (refusing to admit survey evidence bearing on likelihood of confusion); Elgin Nat'l Watch Co. v. Elgin Clock Co., 26 F.2d 376 (D. Del. 1928) (disallowing survey evidence because the court determined that such evidence constituted hearsay). In later years, the courts eased the hearsay restrictions against survey evidence as surveys were conducted using more and more scientific and reliable methodologies. *See generally* Edward G. Epstein, *Surveys: Growing Admissibility But Narrow Utilization*, 83 TRADEMARK REP. 863 (1993) (discussing the growing reliance of trademark plaintiffs on survey evidence to establish likelihood of confusion and actual confusion).

104. Toys "R" Us, Inc. v. Canarsie Kiddie Shop, Inc., 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983).

105. For a discussion of some of the recognized pitfalls of relying on survey evidence, see Epstein, *supra* note 103, at 863-65. *See generally* Helene D. Jaffe & Robert G. Sugarman, *The Use of Experts and Survey Evidence in* COPYRIGHT, TRADEMARK AND UNFAIR COMPETITION LITIGATION 477 (PLI Patents, Copyrights, Trademarks, and Literary Property Course Handbook Series No. 463) (providing a comprehensive discussion of the use of, and problems inherent in, surveys for trademark litigation).

106. *See Trademarks and the Federal Trade Commission: Hearings on H.R. 3685 Before the Subcomm. on Courts, Civil Liberties and the Admin. of Justice of the House Comm. on the Judiciary*, 96th Cong. 60 (1979) (testimony of Paul C. Daw, Director, Denver Regional Office, Federal Trade Commission) (stating that in 1979, consumer surveys could cost "[u]pward of $20,000 apiece, in

Moreover, because the admissibility and reliability of survey evidence is still likely to be challenged by the opposing side, litigation costs related to the defense of a survey can significantly increase.[107]

Where actual confusion evidence, such as reported instances of consumer confusion or misdirected communications, is not available, the actual confusion requirement forces trademark plaintiffs to incur substantial, and in some cases impossibly excessive, costs to demonstrate confusion through a consumer survey. Frequently, the damages sustained by the trademark owner, while real, may not rise to the level that would justify the substantial expense of conducting an acceptable and admissible survey. Therefore, the trademark owner must simply suffer his loss. Moreover, courts have held that where a survey has been conducted, an award of costs does not include the significant expense of a consumer survey.[108]

C. *Go Directly to Jail*

Our system of justice generally requires a higher standard of proof for the imposition of criminal penalties than for the awarding of civil monetary awards. It seems absurd, therefore, that an infringer can be sentenced to a jail term and face significant fines for counterfeiting activities without evidence of actual confusion, while a counterfeiter or infringer need not be found liable for monetary damages or profits in a civil case where such evidence is lacking. In 1984, Congress enacted the Trademark Counterfeiting Act of 1984.[109] Essentially, this Act imposes criminal penalties—imprisonment for up to ten years and fines not to exceed two million dollars for individuals and five million dollars for corporate counterfeiters—for trafficking in counterfeit merchandise.[110] The standard for liability for criminal sanctions is that the defendant knowingly used on merchandise: (1) a mark that is identical or substantially indistinguishable from the protected trademark, and (2) that the use of the mark is *likely to cause confusion, to cause mistake or to deceive.*[111]

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some instances upward of $100,000"). In connection with a relatively simple mall intercept survey to determine consumer response to an alleged false advertisement, the author was recently quoted a survey price of $45,000, plus $3,000 a day for expert deposition and trial preparation and attendance.

107. Todd D. Kantorczyk, *How to Stop the Fast Break: An Evaluation of the "Three-Peat" Trademark and the FTC's Role in Trademark Law Enforcement*, 2 UCLA ENT. L. REV. 195, 225 (1995).

108. Gillette Co. v. Wilkinson Sword, Inc., No. 89-CV-3586 (KMW), 1992 WL 30938, at *9 (S.D.N.Y. Feb. 3, 1992).

109. Trademark Counterfeiting Act of 1984, Pub. L. No. 98-473, § 1502, 98 Stat. 2178-2179 (codified as amended at 18 U.S.C. § 2320 (1994)).

110. 18 U.S.C. § 2320(a).

111. 18 U.S.C. § 2320(d)(1)(A).

The courts have held that liability under the Trademark Counterfeiting Act does not require a showing of actual confusion at all.[112] As the Fifth Circuit has held, "[t]he jury need not find actual confusion. The statute expressly requires only likelihood of confusion."[113] Curiously, the Lanham Act also merely requires likelihood of confusion for civil liability.[114] Complicating matters further is that the Trademark Counterfeiting Act expressly provides that all limitations on the remedies provided for in section 35(a) of the Lanham Act shall be applicable in any prosecution under the Anti-counterfeiting Act.[115] The Fifth Circuit, however, failed to recognize that the limitation vis-à-vis the requirement for actual confusion evidence for civil remedies was germane in imposing the criminal sanctions set forth in the Counterfeiting Act.[116] Apparently the courts will send an infringer to jail for up to ten years with no showing of actual confusion, but will not countenance the imposition of monetary damages and/or accounting relief in a civil trademark infringement suit without such evidence. This seems, in a word, bizarre.

CONCLUSION

The legislative history of the Lanham Act, and indeed the language of the Act itself, demonstrates that Congress intended to provide trademark owners a fair and equitable opportunity to obtain injunctive and monetary redress for trademark infringement and unfair competition. Congress purposely stayed clear of setting forth strict, inflexible rules for recovery of damages and profits, preferring instead to allow the courts to grant monetary relief based on the circumstances of each case and in accordance with equitable principles. Despite this, the courts themselves have erected what Congress expressly avoided: stringent rules for the recovery of damages and profits. One such rule is that a trademark owner must offer proof of actual confusion before being entitled to damages, and in some circuits, profits as well.

Ordinarily, reliable evidence of actual confusion is very difficult, and sometimes almost impossible, to obtain. The courts universally recognize this fact. Moreover, where actual confusion evidence does exist, trademark plaintiffs may face serious evidentiary obstacles in getting such evidence admitted. Survey evidence which may demonstrate, circumstantially, actual confusion is sometimes prohibitively expensive for

112. *See, e.g.*, United States v. Yamin, 868 F.2d 130, 133 (5th Cir. 1989) (holding that a jury need not find evidence of actual confusion in order to impose criminal sanctions for counterfeiting).

113. *See Yamin*, 868 F.2d at 133 (discounting the need for actual confusion evidence where the defendants provided proof that consumers were not in fact confused); *see also* United States v. Brooks, 111 F.3d 365, 372 (4th Cir. 1997) (holding that in a prosecution under the Trademark Counterfeiting Act, the "government did not have to prove either actual confusion or an intent to mislead. Rather, the government was required to prove that the defendant knowingly used a counterfeit mark that was likely to cause confusion or to mislead").

114. 15 U.S.C. § 1117(a).

115. 18 U.S.C. § 2320(c).

116. *Yamin*, 868 F.2d at 133; *Brooks*, 111 F.3d at 372.

some trademark owners. Despite this, the courts nevertheless require actual confusion evidence of some sort before granting monetary relief. By adopting an actual confusion rule, the courts have effectively placed trademark owners in a Catch-22 situation, foreclosing recovery in a large number of trademark infringement and unfair competition cases. This result is simply not acceptable in view of the express congressional intent as demonstrated in the Lanham Act and its legislative history.

SEMINOLE TRIBE'S IMPACT ON THE ABILITY OF PRIVATE PLAINTIFFS TO BRING ENVIRONMENTAL SUITS AGAINST STATES IN FEDERAL COURT

F.J. "RICK" DINDINGER II*

It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent. This is the general sense and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.[1]

INTRODUCTION

On March 27, 1996, the United States Supreme Court held in *Seminole Tribe v. Florida*[2] that the Eleventh Amendment[3] bars suits in federal courts by Indian tribes seeking to enforce the Indian Gaming Regulatory Act[4] against states. The ramifications of this holding extend beyond the *Seminole Tribe* facts. Indeed, the Court's decision potentially extends to all federal statutes enacted pursuant to Commerce Clause[5] power, which purport to create federal court jurisdiction over states, among them the many environmental statutes governing mining, oil and gas, and other resource development.

This article evaluates the ability of private citizens or organizations to sue states in federal court for violations of federal environmental laws.[6] Suits to enforce environmental laws, particularly those involving state actors, often define and refine the scope and application of such laws, thereby establishing the exact environmental requirements with which industry must comply.[7] Part I of this essay provides a focused review of the Eleventh Amendment, noting that Congress may abrogate a

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1. THE FEDERALIST NO. 81 (Alexander Hamilton).
2. 116 S. Ct. 1114 (1996).
3. U.S. CONST. amend. XI.
4. 25 U.S.C. §§ 2701-2721 (1994).
5. U.S. CONST. art. I, § 8, cl. 3.
6. This essay does not address the ability of the United States to bring such a suit. Federal jurisdiction in such cases comports with Article III's authorization of judicial review of all controversies "to which the United States shall be a Party." U.S. CONST. art. III, § 2; *see Seminole Tribe*, 116 S. Ct. at 1131 n.14 (stating that the federal government may sue states in federal court and suggesting that this ability ensures the states' compliance with federal law) (citing United States v. Texas, 143 U.S. 621 (1892)).
7. *Cf.* Sierra Club v. Public Serv. Co., 894 F. Supp. 1455 (D. Colo. 1995) (private citizen suit to enforce the Clean Air Act); Colorado Envtl. Coalition v. Romer, 796 F. Supp. 457 (D. Colo. 1992) (private organization seeking state government enforcement of the Safe Drinking Water Act).

state's Eleventh Amendment immunity in certain circumstances. Part II analyzes these circumstances in light of the Court's decision in *Seminole Tribe* and examines the *Seminole Tribe* standard for evaluating federal court jurisdiction over suits against states. Part III applies this standard to environmental statutes and concludes that private plaintiffs generally cannot sue states in federal court. Finally, Part IV discusses three exceptions which enable private plaintiffs to circumvent Eleventh Amendment immunity.

PART I: THE ELEVENTH AMENDMENT

The Eleventh Amendment provides: "The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or subjects of any Foreign State."[8] While the amendment's language speaks only of suits by citizens from other states, the Supreme Court has consistently interpreted it to preclude all suits against a state in federal court.[9] The Court has also extended its bar to prohibit suits against local governmental divisions if the state remains "the real party in interest."[10]

The Eleventh Amendment's jurisdictional bar is not absolute. A state may waive its immunity and consent to suit in federal court.[11] In addition, the *Ex parte Young*[12] doctrine allows plaintiffs to sue individual state officials in federal court for declaratory and injunctive relief to stop continuing violations of federal law.[13] Finally, under some circumstances, Congress may abrogate a state's Eleventh Amendment immunity.[14]

The Eleventh Amendment potentially applies to all actions brought against states under environmental laws. On its face and as consistently interpreted, the amendment serves to prevent any such suit brought in

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8. U.S. CONST. amend. XI. The Eleventh Amendment was ratified in 1798, five years after the Supreme Court's decision in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419 (1793) (holding that Article III permitted suits against a state by citizens of other states). Thus, the Eleventh Amendment provides an example of a constitutional amendment overturning a Supreme Court decision.

9. Employees v. Department of Pub. Health & Welfare, 411 U.S. 279, 280 (1973) (stating that under the Eleventh Amendment, "an unconsenting State is immune from suits brought in federal courts by her own citizens as well as by citizens of another state"); Hans v. Louisiana, 134 U.S. 1 (1890) (barring a citizen from bringing suit against his own state in federal court).

10. Edelman v. Jordan, 415 U.S. 651, 663 (1974); Ambus v. Granite Bd. of Educ., 995 F.2d 992, 994 (10th Cir. 1993). The state is "the real party in interest" whenever "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the Government from acting, or to compel it to act." Dugan v. Rank, 372 U.S. 609, 620 (1963) (citations omitted).

11. Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 238 (1985); *see infra* Part IV.B.

12. 209 U.S. 123 (1908).

13. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 48, at 308-11 (5th ed. 1994); *see infra* Part IV.A.

14. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (discussing Congress's power to abrogate state immunity under Section 5 of the Fourteenth Amendment).

federal court by environmentally concerned citizens and environmental organizations. Nevertheless, if one of the exceptions to Eleventh Amendment immunity applies, states may still be susceptible to these private environmental suits.

PART II: THE *SEMINOLE TRIBE* DECISION

Prior to *Seminole Tribe*, the Supreme Court permitted Congressional abrogation of a state's Eleventh Amendment immunity in two instances.[15] In *Fitzpatrick v. Bitzer*,[16] the Court authorized abrogation whenever Congress legislates pursuant to Section 5 of the Fourteenth Amendment[17] since the enforcement provisions of Section 5 "necessarily limited" antecedent constitutional provisions.[18] In *Pennsylvania v. Union Gas Co.*,[19] the Supreme Court recognized congressional power to abrogate immunity pursuant to the Interstate Commerce Clause[20] on the theory that the Commerce Clause granted Congress similar power as Section 5 of the Fourteenth Amendment.[21]

The *Seminole Tribe* Court addressed these two instances and held that *Union Gas* improperly extended *Fitzpatrick* in permitting abrogation of Eleventh Amendment immunity under the Commerce Clause.[22] In *Fitzpatrick*, the Court relied on the rationale that the Fourteenth Amendment limited state authority possessed under preceding constitutional provisions and thereby altered the existing balance between state and federal power.[23] According to *Seminole Tribe*, however, this rationale cannot serve to abrogate Eleventh Amendment immunity under the Commerce Clause since the Eleventh Amendment came after the Commerce Clause in time and, therefore, worked to expand state authority at the expense of Congress' Commerce Clause powers.[24] In addition to this "last-in-time-controls" rationale, the Court noted that the Fourteenth Amendment contains express terms intended to limit a state's power while the Commerce Clause contains no such language.[25] Consequently,

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15. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1125 (1996).

16. 427 U.S. 445 (1976).

17. Section 5 of the Fourteenth Amendment states: "The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

18. *Fitzpatrick*, 427 U.S. at 456.

19. 491 U.S. 1 (1989), *overruled by* Seminole Tribe v. Florida, 116 S. Ct. 1114 (1996).

20. U.S. CONST. art. I, § 8, cl. 3.

21. *Union Gas*, 491 U.S. at 19-20.

22. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1128 (1996).

23. *Fitzpatrick*, 427 U.S. at 455. The *Seminole Tribe* Court stated that the *Fitzpatrick* decision permitted congressional abrogation because the Fourteenth Amendment fundamentally altered "the balance of state and federal power struck by the Constitution." *Seminole Tribe*, 116 S. Ct. at 1125.

24. *Seminole Tribe*, 116 S. Ct. at 1128.

25. *Id.* The Fourteenth Amendment provides, in part, that:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. amend. XIV, § 1.

the *Seminole Tribe* Court expressly overruled *Union Gas* and restored Eleventh Amendment immunity to statutory schemes created by Congress pursuant to the Commerce Clause.[26]

A. *The* Union Gas *Decision*

The plurality in *Union Gas* found congressional authority to abrogate Eleventh Amendment immunity under Commerce Clause legislation,[27] specifically the Comprehensive Environmental Response, Compensation, and Liability Act of 1990 (CERCLA).[28] Under CERCLA, the United States government sued Union Gas Company for cleanup costs at a dismantled coal gasification plant.[29] Union Gas filed a third-party complaint against the state of Pennsylvania on grounds that the Commonwealth was an "owner or operator" of the plant, and Pennsylvania sought dismissal of that complaint on grounds that Eleventh Amendment immunity barred the suit.[30]

In *Union Gas*, the plurality first evaluated whether CERCLA clearly expresses an intent to hold states liable.[31] Under CERCLA, liability may extend to "persons" and "owners or operators."[32] CERCLA's definition of "persons" explicitly includes "states"[33] and the Superfund Amendments and Reauthorization Act (SARA)[34] provides that states are "owners or operators."[35] The *Union Gas* plurality stated that these definitions conveyed "a message of unmistakable clarity: Congress intended that States be liable along with everyone else for cleanup costs recoverable under CERCLA."[36]

After concluding that CERCLA permits suits against states in federal court, the Court analyzed whether the Commerce Clause granted Congress the power to enact such a statute.[37] The plurality first observed

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26. *Seminole Tribe*, 116 S. Ct. at 1131.

27. *Union Gas*, 491 U.S. at 19-20. Justice Brennan delivered the Court's opinion. Justices Marshall, Blackmun, and Stevens joined Justice Brennan. Justice White provided the fifth vote for the holding but wrote separately to express his disagreement with "much of [the plurality's] reasoning." *Id.* at 45 (White, J., concurring in judgment and dissenting in part). White believed that CERCLA's inclusion of states within the definition of "persons" was insufficient to constitute an "unmistakably clear" expression of congressional intent to abrogate immunity. *Id.* at 45-48. Nevertheless, he considered and voted on the issue of whether Congress possessed power under the Commerce Clause to abrogate Eleventh Amendment immunity since "a majority of the Court conclude[d] otherwise." *Id.* at 45.

28. 42 U.S.C. §§ 9601-9675 (1994).

29. *Union Gas*, 491 U.S. at 6.

30. *Id.*

31. *Id.* at 7.

32. 42 U.S.C. § 9607(a).

33. 42 U.S.C. § 9601(21).

34. Pub. L. No. 99-499, 100 Stat. 1613 (1986) (codified at 42 U.S.C. §§ 9601-9675 (1994)).

35. 42 U.S.C. § 9601(20)(D).

36. *Union Gas*, 491 U.S. at 8.

37. *Id.* at 13.

that part of state sovereignty was surrendered with the United States Constitution's grant to Congress of the power to regulate commerce.[38] It then drew an analogy to the *Fitzpatrick* Court's abrogation of Eleventh Amendment immunity under the Fourteenth Amendment and ruled that *Fitzpatrick* applied to CERCLA since both the Commerce Clause and the Fourteenth Amendment expand federal power while contracting state power.[39] Finally, the plurality noted the need for congressional solutions to environmental problems.[40] Based upon these factors, the *Union Gas* plurality held that Congress possesses authority pursuant to the Commerce Clause to render states liable.[41]

Justice Scalia, joined by Justices Rehnquist, O'Connor, and Kennedy, dissented in part.[42] Justice Scalia's dissent acknowledged that Congress intended for CERCLA to render states "liable to private persons for money damages."[43] However, Justice Scalia declared this intent, even with CERCLA's textual imposition of liability upon states, insufficient to abrogate Eleventh Amendment immunity.[44] Justice Scalia's position stemmed, fundamentally, from the rationale that "state immunity from suit in federal courts is a structural component of federalism, and not merely a default disposition that can be altered by actions of Congress pursuant to its Article I powers."[45]

B. *The* Seminole Tribe *Decision*

In *Seminole Tribe*, the Court critically focused on *Union Gas*.[46] In the period between these two decisions, four of the five justices comprising the *Union Gas* plurality left the Court[47] and one new justice joined.[48] Consequently, *Seminole Tribe* provided the *Union Gas* dissenters with the opportunity to reverse the earlier decision.

The decision involved a suit against Florida for its failure to negotiate with the Seminole Tribe as required under the Indian Gaming Regulatory Act (IGRA).[49] Congress passed the IGRA pursuant to the "Indian Commerce Clause,"[50] which vests Congress with plenary authority over Indian commerce and Indian tribes.[51] The IGRA seeks to provide "a

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38. *Id.* at 14.
39. *Id.* at 16-17.
40. *Id.* at 20-21 ("The general problem of environmental harm is often not susceptible of a local solution.").
41. *Id.* at 23.
42. *Id.* at 29 (Scalia, J., concurring in part and dissenting in part).
43. *Id.*
44. *Id.*
45. *Id.* at 38.
46. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1125-28 (1996).
47. These Justices included Brennan, Marshall, White and Blackmun.
48. Justice Thomas joined.
49. 25 U.S.C. §§ 2701-2721 (1994).
50. U.S. CONST. art. I, § 8, cl. 3.
51. *Seminole Tribe*, 116 S. Ct. at 1126 (discussing the nature of the Indian Commerce Clause).

statutory basis for operation of gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments."[52] It requires tribes to obtain a state's cooperation prior to operating casino-style gaming[53] and requires states to negotiate "with the Indian tribe in good faith to enter such a compact."[54] Finally, it expressly authorizes tribes to sue states in federal courts if a state fails to conduct such negotiations in good faith.[55]

Florida moved to dismiss on grounds that the case violated the state's sovereign immunity from suit in federal court.[56] After the district court denied Florida's motion,[57] the Eleventh Circuit reversed, holding that the Eleventh Amendment barred the suit.[58] In part to resolve a split between the Eleventh Circuit's decision and contrary decisions by the Eighth,[59] Ninth,[60] and Tenth[61] Circuits, the Supreme Court granted certiorari and affirmed the Eleventh Circuit's decision by holding that none of the powers conferred by Article I of the Constitution authorize Congress to abrogate Eleventh Amendment immunity.[62]

The Supreme Court reached its decision by applying a two-pronged conjunctive test. Under the first prong of the test, the Court determined that Congress unequivocally expressed an intent to abrogate states' Eleventh Amendment immunity.[63] The Court analyzed the IGRA's provision authorizing tribes to sue states and the provision describing the remedial scheme available to tribes that file such suits and concluded that these provisions "make it indubitable that Congress intended through the Act

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52. 25 U.S.C. § 2702(1).

53. *Id.* § 2710(d)(1)(C).

54. *Id.* § 2710(d)(3)(A).

55. The IGRA states: "[T]he United States district courts shall have jurisdiction over—(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for purposes of entering into a Tribal-State compact . . . or to conduct such negotiations in good faith." 25 U.S.C. § 2710(d)(7)(A).

56. *Seminole Tribe*, 116 S. Ct. at 1121.

57. Seminole Tribe v. Florida, 801 F. Supp. 655, 663 (S.D. Fla. 1992), *rev'd*, 11 F.3d 1016 (11th Cir. 1996), *aff'd*, 116 S. Ct. 1114 (1996).

58. Seminole Tribe v. Florida, 11 F.3d 1016, 1028 (11th Cir. 1994), *aff'd*, 116 S. Ct. 1114 (1996).

59. Cheyenne River Sioux Tribe v. South Dakota, 3 F.3d 273, 281 (8th Cir. 1993) ("We believe the express provision for federal jurisdiction over claims under the IGRA is sufficient to abrogate the states' eleventh amendment immunity.").

60. Spokane Tribe v. Washington, 28 F.3d 991, 998 (9th Cir. 1994) (holding that the State of Washington is not immune from suit under the IGRA).

61. Ponca Tribe v. Oklahoma, 37 F.3d 1422, 1432 (10th Cir. 1994) ("We conclude that the Indian Commerce Clause empowers Congress to abrogate the states' Eleventh Amendment immunity and that IGRA constitutes an unequivocal expression of Congress' intent to do so.").

62. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1131-32 (1996).

63. *Seminole Tribe*, 116 S. Ct. at 1123-24. The Court cited *Green v. Mansour*, 474 U.S. 64, 68 (1985), and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 246 (1985), for the proposition that Congress must unequivocally express its intent to abrogate the immunity. *Seminole Tribe*, 116 S. Ct. at 1123.

to abrogate the States' sovereign immunity from suit."[64] The Court reached this conclusion without requiring a specific statutory reference to the Eleventh Amendment, signifying that Congress need not refer explicitly to the amendment in a statute in order for that statute to enjoy the requisite intent to abrogate a state's immunity.[65]

Once the Court made a positive determination under the test's first prong, it then addressed whether Congress acted "pursuant to a valid exercise of power,"[66] and evaluated whether the Commerce Clause empowered Congress to abrogate Eleventh Amendment immunity.[67] The Court stated that *Union Gas* stands as the only case recognizing such power[68] and concluded that no principled distinction exists between the Indian Commerce Clause and the Interstate Commerce Clause.[69] This conclusion resulted in the Court's complete review of the *Union Gas* decision.

The Court, after completing its review of *Union Gas*, decided to explicitly overrule the former decision.[70] The Court reached its decision by relying on the position that the Eleventh Amendment limited federal courts' Article III jurisdiction by barring all suits by any citizens against any state.[71] Although the amendment's text speaks only of suits against a state by citizens from other states, the *Seminole Tribe* majority relied on stare decisis from *Hans v. Louisiana*[72] for the proposition that the amendment bars *all* suits against states.[73] *Hans* prohibited a private citizen's suit against a state in federal court even though the citizen sought to sue his own state.[74] The *Seminole Tribe* Court essentially concluded that *Hans* recognized a penumbra of sovereign immunity in the amendment's text which extends beyond the text's plain language.[75] Therefore, Congress cannot authorize suits against states pursuant to statutes passed

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64. *Seminole Tribe*, 116 S. Ct. at 1124.

65. *Id.* In *Union Gas*, the Court also reached the conclusion that Congress clearly intended to abrogate a state's immunity despite the fact that in CERCLA, Congress does not explicitly refer to the Eleventh Amendment. Pennsylvania v. Union Gas Co., 491 U.S. 1, 7-8 (1989).

66. *Seminole Tribe*, 116 S. Ct. at 1124.

67. *Id.* at 1125-32.

68. *Id.* at 1125.

69. *Id.* at 1127.

70. *Id.* at 1128.

71. *Id.* at 1127.

72. 134 U.S. 1 (1890).

73. The Court, believing *Union Gas* was wrongly decided, disregarded stare decisis with respect to the *Union Gas* decision. *Seminole Tribe*, 116 S. Ct. at 1127-28.

74. *Hans*, 134 U.S. at 15.

75. The majority stated that "[b]ehind the words of the constitutional provisions are postulates which limit and control." *Seminole Tribe*, 116 S. Ct. at 1129 (citing Monoco v. Mississippi, 292 U.S. 313 (1934)). In *Union Gas*, Justice Scalia characterized *Hans* as standing for the idea that "the Eleventh Amendment was important not merely for what it said but for what it reflected: a consensus that the doctrine of sovereign immunity for States . . . was part of the understood background against which the Constitution was adopted." Pennsylvania v. Union Gas Co., 491 U.S. 1, 31-32 (Scalia, J., dissenting).

under the Commerce Clause since this clause antecedes the Eleventh Amendment and its penumbra.[76] As such, the Court held that the IGRA's attempt to abrogate Eleventh Amendment immunity failed.[77]

The dissenting opinions in *Seminole Tribe*, like the *Union Gas* plurality, disagreed with the broad principle of sovereign immunity derived from *Hans*. Justice Stevens stated that *Hans* departed from the language, purpose, and history of the Eleventh Amendment,[78] while Justice Souter flatly stated that *Hans* "was wrongly decided."[79] To these Justices, the Eleventh Amendment's text should control instead of the *Hans* principle of broad immunity.[80] The dissenters assert the amendment only bars diversity actions brought by a citizen of one state against another state.[81] Consequently, the *Seminole Tribe* dissent would have permitted federal jurisdiction since the suit involved a citizen from Florida suing the state of Florida.[82] In the same vein, the *Union Gas* plurality permitted a citizen from Pennsylvania to sue the Commonwealth of Pennsylvania, and both dissenting opinions in *Seminole Tribe* and the *Union Gas* plurality would have permitted the suit brought by Hans against his own state.

PART III: APPLICATION OF *SEMINOLE TRIBE* TO ENVIRONMENTAL STATUTES

The *Seminole Tribe* decision applies to all Commerce Clause statutes which permit citizen suits against states in federal court. Many environmental statutes contain "citizen suit" provisions that permit private

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76. *Seminole Tribe*, 116 S. Ct. at 1131-32. The discussion above relating to *Seminole Tribe*'s rejection of *Fitzpatrick*'s applicability to suits brought under the Commerce Clause explains why an antecedent constitutional provision cannot abrogate the immunity vested by the Eleventh Amendment. *See supra* Part II.

77. *Seminole Tribe*, 116 S. Ct. at 1131-32. For more detailed analysis of majority's rationale, see Herbert Hovenkamp, *Judicial Restraint and Constitutional Federalism: The Supreme Court's* Lopez *and* Seminole Tribe *Decisions*, 96 COLUM. L. REV. 2213 (1996) and Henry Paul Monaghan, Comment, *The Sovereign Immunity "Exception,"* 110 HARV. L. REV. 102 (1996).

78. *Union Gas*, 491 U.S. at 25 (Stevens, J., dissenting).

79. *Seminole Tribe*, 116 S. Ct. at 1153 (Souter, J., dissenting).

80. *See Seminole Tribe*, 116 S. Ct. at 1152 (Souter, J., dissenting) ("Because the plaintiffs in today's case are citizens of the State that they are suing, the Eleventh Amendment simply does not apply to them.").

81. *Id.* at 1136 (Stevens, J., dissenting) (agreeing that the "Eleventh Amendment's jurisdictional restriction is best understood to apply only to suits premised on diversity jurisdiction"). Justice Scalia himself apparently agrees with this interpretation of the Eleventh Amendment's text. *See Union Gas*, 491 U.S. at 31 (Scalia, J., dissenting). Justice Scalia stated that if the amendment's text were intended as a comprehensive description of state sovereign immunity in federal courts—that is, if there were no state sovereign immunity beyond its precise terms—then it would unquestionably be most reasonable to interpret it as providing immunity only when the sole basis of federal jurisdiction is the diversity of citizenship that it describes. *Id. But see* Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2033 (1997) (stating that "the dignity and respect afforded a State, which the immunity is designed to protect, are placed in jeopardy whether or not the suit is based on diversity jurisdiction").

82. *Seminole Tribe*, 116 S. Ct. at 1152 (Souter, J., dissenting).

parties to sue violators of those environmental statutes.[83] If these provisions fail to survive the *Seminole Tribe* decision, private citizens will retain few judicial avenues by which to impede abuses of natural resources by state actors. Indeed, "[a]bsent a citizen suit statute, environmentally concerned citizens cannot effectively enforce pollution laws or combat environmental degradation."[84]

A. *Intent to Abrogate*

The precise language of the various environmental citizen suit provisions differ. Still, most of these provisions authorize any "person" to bring a suit against any "person" who violates the statute. Of the statutes defining "person," only the Surface Mining Control and Reclamation Act's definition excludes states;[85] the remaining statutes define person to include states.[86] For example, the Clean Air Act states:

> [A]ny person may commence a civil action on his own behalf—(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged . . . to be in violation of [the Clean Air Act] . . . [t]he [U.S.] district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties.[87]

The Clean Air Act defines person to include "an individual, corporation, partnership, association, State, municipality, political division of a State, and any agency, department, or instrumentality of the United States and any officer, agent, or employee thereof."[88] Thus, under the Clean Air Act's plain language, private citizens may sue states in federal court. Further, in *Union Gas*, the Court held that CERCLA's citizen suit provision manifested congressional intent to hold states liable.[89] Since CERCLA's citizen suit provision mirrors other environmental citizen suit provisions, the Supreme Court appears to agree that the plain language of these provisions

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83. *See* Toxic Substances Control Act, 15 U.S.C.A. § 2619 (West 1986 & Supp. 1997); Endangered Species Act, 16 U.S.C. § 1540(g) (1994); Surface Mining Control and Reclamation Act, 30 U.S.C. § 1270 (1994); Clean Water Act, 33 U.S.C.A. § 1365 (West 1986 & Supp. 1997); Clean Air Act, 42 U.S.C. § 7604 (1994)); CERCLA, 42 U.S.C. § 9659 (1994); Noise Control Act, 42 U.S.C. § 4911 (1994); RCRA, 42 U.S.C. § 6972 (1994); Safe Drinking Water Act, 42 U.S.C. § 300j-8 (1994).

84. Peter H. Lehner, *The Efficiency of Citizens Suits*, ALB. L. ENVTL. OUTLOOK, Fall 1995, at 4.

85. 30 U.S.C. § 1291 (1994).

86. Karl S. Coplan, *Private Enforcement of Federal Pollution Control Laws—The Citizen Suit Provisions*, SA85/3 ALI-ABA 1033, 1040 (1996); *see also* United States Dep't of Energy v. Ohio, 503 U.S. 607, 617 (1922) ("[B]oth the CWA and RCRA define 'person' to cover States, subdivisions of States, municipalities, and interstate bodies.").

87. 42 U.S.C. § 7604 (1994).

88. *Id.* § 7602(e).

89. Pennsylvania v. Union Gas Co., 491 U.S. 1, 8 (1989); *see supra* Part II.A.

demonstrates congressional intent to abrogate state immunity from suits by private citizens in federal court.

B. *Power to Abrogate*

The second prong of the *Seminole Tribe* standard requires courts to ascertain whether Congress, in enacting environmental citizen suit provisions, possesses the power to override Eleventh Amendment immunity.[90] *Seminole Tribe*, standing alone, clearly appears to impede citizen suit provisions to the extent that they authorize suits against states in federal court. This conclusion is bolstered by the application of *Seminole Tribe* by various courts considering non-environmental statutory schemes and the current philosophical trends affecting Supreme Court decisions.

1. Application of *Seminole Tribe* to Non-Environmental Statutory Schemes

The Americans with Disabilities Act (ADA)[91] serves to prevent discrimination against individuals with disabilities.[92] The ADA satisfies the first prong of the *Seminole Tribe* test by containing a clear and unequivocal expression of Congress' intent to abrogate Eleventh Amendment immunity.

> A State shall not be immune under the eleventh amendment to the Constitution of the United States from an action in Federal or State court of competent jurisdiction for a violation of [the ADA]. In any action against a State for a violation of [the ADA], remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in any action against any public or private entity other than a State.[93]

Several courts agree that Congress abrogated Eleventh Amendment immunity under a proper exercise of authority when it passed the ADA.[94] This agreement derives, in part, from Congress' stated purpose "to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce."[95] This alone does not satisfy the second prong of the *Seminole Tribe* test since the

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90. *See supra* Part II.B.

91. 42 U.S.C. §§ 12101-12213 (1994).

92. *Id.* § 12101(b).

93. *Id.* § 12202. CERCLA and the IGRA contain less overt expressions than those in the ADA, yet the *Union Gas* and *Seminole Tribe* decisions recognized that those statutes satisfy *Seminole Tribe*'s first prong. Nevertheless, future environmental legislation might incorporate similar language as in the ADA to avoid any potential debate regarding congressional intent to abrogate immunity.

94. *See, e.g.*, Hunter v. Chiles, 944 F. Supp. 914, 917 (S.D. Fla. 1996); Mayer v. University of Minn., 940 F. Supp. 1474, 1479-80 (D. Minn. 1996); Niece v. Fitzner, 941 F. Supp. 1497, 1501 (E.D. Mich. 1996).

95. 42 U.S.C. § 12101(b)(4).

question of the constitutionality of congressional action does not depend upon express recitals of the power which it undertakes to exercise.[96] Nevertheless, these courts discerned that ADA's purpose to prevent discrimination of disabled people comported with the Fourteenth Amendment's broad purpose of preventing an array of discrimination.[97] If one could establish that environmental laws eliminate discrimination, then one might satisfy *Seminole Tribe*.[98] However, the traditional environmental statutes serve no such purpose, and it is unlikely that any court will extend the abrogation found under the ADA to environmental laws.

The Age Discrimination in Employment Act (ADEA)[99] serves to prevent discrimination based on age in an employer's treatment of its employees or prospective employees.[100] Two recent cases adopt the position that Congress intended to abrogate Eleventh Amendment immunity when it passed the ADEA.[101] This position derives from the inclusion of a "State and any . . . agency or instrumentality of a State"[102] in the ADEA's definition of "employer."[103] Thus, the ADEA satisfies the first prong of the *Seminole Tribe* test.

The two cases split on the issue of whether Congress possessed power to abrogate Eleventh Amendment immunity when it passed the ADEA. *MacPherson* found ADEA's "bedrock" in the Commerce Clause and ruled that abrogation under the ADEA was improper.[104] The *MacPherson* court relied on *EEOC v. Wyoming*,[105] in which the majority left open the question of whether the ADEA was a valid exercise of congressional power under the Commerce Clause.[106] The *Wyoming* dissent and concurrence, however, agreed that the ADEA was not and could not have been passed pursuant to the Fourteenth Amendment.[107] According to the *MacPherson* court, the *Wyoming* majority's reluctance to decide the issue, coupled with the dissent's agreement with the concurrence, provided

96. *See* Woods v. Cloyd W. Miller Co., 333 U.S. 138, 144 (1948).

97. *See Niece*, 941 F. Supp. at 1503-04.

98. *See* Terry Carter, *EPA Steps in to Clean the Air*, A.B.A. J., Nov. 1997, at 32-33 (reporting that students at the Environmental Law Clinic at Tulane Law School have recently argued that the location of a $700 million plastics and chemical plant in St. James Parish, a community which is 80 percent African-American, amounts to environmental racism).

99. 29 U.S.C. §§ 621-634 (1994).

100. *Id.* § 630(b).

101. *See* Teichgraeber v. Memorial Union Corp., 946 F. Supp. 900, 906 (D. Kan. 1996) (stating that Congress clearly and unequivocally abrogated immunity); MacPherson v. University of Montevallo, 938 F. Supp. 785, 787 (N.D. Ala. 1996) (concluding that Congress "clearly and unmistakably intended to abrogate the States' Eleventh Amendment immunity").

102. 29 U.S.C. § 630(b).

103. *MacPherson*, 938 F. Supp. at 787.

104. *Id.* at 789.

105. 460 U.S. 226 (1983).

106. *Wyoming*, 460 U.S. at 243.

107. *Id.* at 250-51.

"one of those rare instances where a dissenting opinion provides a more useful statement of law."[108]

The court in *Teichgraeber v. Memorial Union Corp.*,[109] on the other hand, stated that Congress acted pursuant to the Fourteenth Amendment when it passed the ADEA and upheld the Act's abrogation of immunity.[110] The *Teichgraeber* court stated that without a direct Supreme Court decision to the contrary, it was bound by a Tenth Circuit decision holding that Congress enacted the ADEA pursuant to its powers "under section five of the Fourteenth Amendment."[111] Essentially, *MacPherson* appears to emphasize the ADEA's impact on commerce and employers and thus finds the ADEA's origins in the Commerce Clause. *Teichgraeber*, in contrast, seems to focus on the ADEA's impact on employees and thus finds the ADEA's origins in the Fourteenth Amendment's protection of citizens.

The split described above illustrates that congressional power to abrogate state immunity when it passes environmental statutes *may* become an issue which percolates in divided lower courts and ultimately requires further Supreme Court review. If so, private plaintiffs will have succeeded in at least convincing some lower courts that Congress passed environmental laws pursuant to the Fourteenth Amendment (i.e., to eliminate discrimination) and that the bar to private environmental suits contained in *Seminole Tribe* against states is not absolute.

A third non-environmental statutory scheme is the Fair Labor Standards Act (FLSA),[112] an act Congress passed in 1938 to protect workers from substandard wages and oppressive working hours.[113] Several courts applying *Seminole Tribe* to the FLSA concur that Congress intended to abrogate Eleventh Amendment immunity in enacting the FLSA[114] and recognize that *Seminole Tribe* prohibits congressional abrogation of a state's Eleventh Amendment immunity through the exercise of Commerce Clause powers. The cases then evaluate whether the FLSA derives from congressional power under Section 5 of the Fourteenth Amendment. Of these cases, several summarily dismiss any notion that the FLSA derives from the Fourteenth Amendment and thereby uphold state

108. *MacPherson*, 938 F. Supp. at 788.

109. 946 F. Supp. 900 (D. Kan. 1996).

110. *Teichgraeber*, 946 F. Supp. at 906.

111. *Id.* (analyzing Hurd v. Pittsburgh State Univ., 29 F.3d 564 (10th Cir. 1994)).

112. 29 U.S.C. §§ 201-219 (1994).

113. *Id.* § 202.

114. *See* 29 U.S.C. § 216(b) (actions "may be maintained against any employer (including a public agency) in any Federal or State court of competent jurisdiction"); 29 U.S.C. § 203(x) (defining "public agency" as "the Government of the United States; the government of a State or political subdivision thereof; any agency of . . . a State; or any interstate governmental agency").

immunity.[115] The rationale for such dismissals derives from acknowledging that *United States v. Darby*[116] unequivocally recognized that Congress enacted the FLSA pursuant to its Commerce Clause powers[117] and that the FLSA's language declares that Congress enacted the statute pursuant to the Commerce Clause.[118] These dismissals indicate that federal courts generally follow the *Seminole Tribe* bar to suits against states involving statutes passed pursuant to the Commerce Clause. Thus, the Fourteenth Amendment stands as the only constitutional provision by which plaintiffs may sue states to enforce environmental laws in federal court.

On the other hand, the Sixth Circuit recently held that the Equal Pay Act,[119] a 1963 amendment to FLSA, derives from the Fourteenth Amendment.[120] The rationale for this holding involved congressional intent to eliminate gender-based discrimination when it passed the Equal Pay Act. This rationale prompted the Sixth Circuit to find that the Supreme Court's reasoning in *Fitzpatrick*[121] "applies with equal force to the extension of the Equal Pay Act to the States."[122]

This case suggests that citizen suits against states for environmental law violations might survive the Eleventh Amendment's jurisdictional bar if a private plaintiff can succeed in establishing that environmental statutes fall within the guise of the Equal Protection Clause.[123] The private plaintiff might argue that all citizens should enjoy the protection gained from environmental laws and that if a state violates an environmental law, and thereby causes certain citizens to be deprived of the benefits afforded by that law, such violation denies Equal Protection to those citizens.

A final non-environmental statutory scheme is the Patent Act.[124] The Act clearly demonstrates congressional intent to abrogate the states' Eleventh Amendment immunity and thus satisfies the first prong of the *Seminole Tribe* test.[125] At least one case held and a second case suggested that this abrogation comports with congressional power under the Four-

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115. *See* Rehberg v. Department of Public Safety, 946 F. Supp. 741, 743 (S.D. Iowa 1996); Chauvin v. Louisiana, 937 F. Supp. 567, 570 (E.D. La. 1996); Blow v. Kansas, 929 F. Supp. 1400, 1402 (D. Kan. 1996).

116. 312 U.S. 100 (1941).

117. *Darby*, 312 U.S. at 114-15.

118. 29 U.S.C. § 202(b) (1994) ("It is declared to be the policy of this chapter, through the exercise by Congress of its power to regulate commerce among the several States and with foreign nations . . . .").

119. 29 U.S.C. § 206(d) (1994).

120. Timmer v. Michigan Dep't of Commerce, 104 F.3d 833 (6th Cir. 1997).

121. *See* discussion *supra* Part II.

122. *Timmer*, 104 F.3d at 841.

123. *See infra* Part IV.C (discussing Section 5 of the Fourteenth Amendment).

124. 35 U.S.C. §§ 1-376 (1994).

125. *Id.* (stating that no state or state instrumentality is immune from suit under the Eleventh Amendment).

teenth Amendment.[126] These courts focus on the Fourteenth Amendment's Due Process Clause which prohibits states from depriving any person of life, liberty, or property without due process of law.[127] The district court in *College Savings Bank* observed that Section 5 empowers Congress "to enforce all the provisions of the Fourteenth Amendment, including the Due Process Clause" and found that patents are "property" for purposes of the Fourteenth Amendment.[128] Thus, the court found congressional power to abrogate Eleventh Amendment immunity for claims under the Patent Act.

These Patent Act cases provide a possible avenue for circumventing Eleventh Amendment immunity. Namely, a party seeking to sue a state in federal court might characterize his or her interest in the state's compliance with an environmental law as a property interest. If this characterization succeeds, the principle from *College Savings Bank* suggests that Congress possesses the power under the Fourteenth Amendment's Due Process Clause to abrogate immunity. Although this argument remains untested, private parties certainly enjoy grounds for asserting that environmental laws affect their property.[129] For example, the Clean Air Act and Clean Water Act prevent dangerous particles from contaminating real property; if states break these laws it might result in decreased property values or a total loss of property. Violations of these acts might also result in the death of livestock that might graze on contaminated land or drink polluted water. By the same token, property adjacent to a Superfund site may lose value if the responsible party fails to comply with his or her cleanup responsibilities. As such, the owner of the adjacent property appears to possess a property interest in the responsible party's compliance with CERCLA.

2. Current Ethos Supporting State Rights

The cases applying *Seminole Tribe* to the ADA, the ADEA, the FLSA, and the Patent Act, offer several arguments supporting an abro-

126. *See* College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 948 F. Supp. 400, 425-26 (D.N.J. 1996) (holding that under the Fourteenth Amendment, Congress can abrogate Eleventh Amendment immunity for claims under the Patent Act); Genentech v. Regents of Univ. of Cal., 939 F. Supp. 639, 643 (S.D. Ind. 1996) (suggesting that the Fourteenth Amendment applies but finding no property right in the case at hand).

127. U.S. CONST. amend. XIV, § 1. The cases which found congressional power to abrogate immunity under the ADA, ADEA, and FLSA generally found such power under the Fourteenth Amendment's Equal Protection Clause.

128. *College Sav. Bank*, 948 F. Supp. at 425-26.

129. Interview with Todd S. Welch, Supervising Attorney at Mountain States Legal Foundation, in Denver, Colo. (Jan. 22, 1997); *see also* Jacobs, Visconsi & Jacobs, Co. v. City of Lawrence, 927 F.2d 1111, 1116 (10th Cir. 1991) ("A property interest protected by the due process clause results from a legitimate claim of entitlement created and defined by existing rules or understanding that stem from an independent source such as state law."). *But see* Chauvin v. Louisiana, 937 F. Supp. 567, 570 (E.D. La. 1996) (refusing to find a property interest in wages under the FLSA).

gation of Eleventh Amendment immunity in the context of environmental statutes. Before predicting how the Supreme Court might entertain these arguments, one must recognize that the current philosophical trend affecting Supreme Court decisions supports state rights at the expense of congressional legislation.

Three cases in six years suggest the Supreme Court is strengthening state sovereignty while it diminishes the authority of Congress. In *Seminole Tribe*, the Court struck down the IGRA's suit provision on grounds that states enjoy immunity from suit under the Eleventh Amendment.[130] In *United States v. Lopez*,[131] the Court struck down a federal law banning handguns in local school zones.[132] The *Lopez* Court reasoned that Congress' Commerce Clause authority did not extend to purely local matters and that "[t]he possession of a gun in a local school zone is in no sense an economic activity that might, through repetition elsewhere, substantially affect any sort of interstate commerce."[133] *Lopez* strengthens state sovereignty by limiting the ability of Congress to regulate local affairs under the auspices of the Commerce Clause. In *New York v. United States*,[134] the Court struck down a federal statute on Tenth Amendment grounds. The amendment's text states that "[t]he powers not delegated to the United States, nor prohibited by it to the States, are reserved to the States respectively, or to the people."[135] Prior to *New York*, the Tenth Amendment rarely was used to invalidate federal legislation. Thus, *New York* strengthens state sovereignty by giving the Tenth Amendment renewed viability and by restoring the notion that certain powers are reserved and uniquely held by the states.

Two cases recently decided by the Supreme Court further reinforce this trend. *Idaho v. Coeur d'Alene Tribe*[136] involved a suit by a Native American tribe against the state of Idaho to quiet title to submerged lands within the boundaries of the tribe's reservation.[137] The tribe claimed that its ownership extended to the banks and submerged lands of a lake and various rivers and streams pursuant to the original boundaries of the Coeur d'Alene Reservation.[138] The state argued that it acquired ownership of the submerged lands upon its statehood in 1890 under the equal footing doctrine.[139] The district court dismissed the tribe's claim on grounds

130. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1119 (1996); *see supra* Part II.B.

131. 514 U.S. 549 (1995).

132. *Lopez*, 514 U.S. at 567-68.

133. *Id.* at 567.

134. 505 U.S. 144 (1992). The Court stated that "[w]e have always understood that even where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts." *New York*, 505 U.S. at 166.

135. U.S. CONST. amend. X.

136. 117 S. Ct. 2028 (1997).

137. *Coeur d'Alene Tribe*, 117 S. Ct. at 2032.

138. *Id.*

139. *Id.*

that the Eleventh Amendment barred the claims against Idaho and its agencies.[140] The Ninth Circuit reinstated the claim, holding that state officials' continued enforcement of laws would violate the tribe's rights if the tribe owns the submerged lands.[141] However, the Supreme Court, in a five-to-four decision, held that the suit was barred by the Eleventh Amendment and that the *Ex parte Young* doctrine could not serve to circumvent the amendment.[142] In *Printz v. United States*,[143] law enforcement officers from Montana and Arizona challenged a provision of the Brady Handgun Violence Prevention Act[144] that required state law enforcement officers to conduct checks on prospective handgun purchases.[145] Following the Court's holding in *New York* that Congress cannot compel States to enact or enforce a federal regulatory program, *Printz* held that "[t]he Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program."[146]

At a minimum, these cases reflect the Supreme Court's commitment to re-examine federalism. The consistency of the five cases indicates that the re-examination will result in a strengthening of state rights. Indeed, Steven G. Calabresi, professor of law at Northwestern University, stated that these cases "mark the beginning of a quiet revolution in American constitutional law."[147]

PART IV: OTHER AVENUES BY WHICH TO SUE STATES IN FEDERAL COURT

Seminole Tribe acknowledges the availability of other avenues for plaintiffs seeking to sue states in federal courts.[148] Thus, while arguments premised on abrogation should fail, arguments premised on these exceptions to the Eleventh Amendment's reach may succeed. If so, private party plaintiffs may continue invoking the citizen suit provisions contained in environmental laws to bring actions against states in federal court.

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140. Coeur d'Alene Tribe v. Idaho, 798 F. Supp. 1443, 1452 (D. Idaho 1992), *rev'd in part*, 117 S. Ct. 2028 (1997).

141. Coeur d'Alene Tribe v. Idaho, 42 F.3d 1244, 1254-55 (9th Cir. 1994), *rev'd in part*, 117 S. Ct. 2028 (1997).

142. *Coeur d'Alene Tribe*, 117 S. Ct. at 2043; *see infra* Part IV.A (discussing the *Ex parte Young* doctrine).

143. 117 S. Ct. 2365 (1997).

144. 18 U.S.C. §§ 922-924 (1994).

145. *Printz*, 117 S. Ct. at 2369.

146. *Id.* at 2384.

147. Steven G. Calabresi, *A Constitutional Revolution*, WALL ST. J., July 10, 1997, at A14.

148. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1132 (1996) (recognizing the *Ex parte Young* doctrine).

A. *The* Ex parte Young *Doctrine*

The *Ex parte Young* doctrine results from a Supreme Court decision permitting suits against state officials seeking injunctive relief,[149] based on the idea that "the power of federal courts to enjoin continuing violations of federal law is necessary to vindicate the federal interest in assuring the supremacy of that law."[150] For a suit to fall within the *Ex parte Young* doctrine's contours, the plaintiff must satisfy two criteria: (1) the suit must seek a remedy for a continuing violation of federal law, and (2) the suit must seek prospective and declaratory or injunctive relief.[151] Consequently, plaintiffs seeking to enforce state violations of, or failure to enforce federal environmental laws, must not sue the state *per se*, but instead an official of the state. Furthermore, the suit must seek to end a continuing violation of the federal environmental law; one time violations and past violations fall outside of *Ex parte Young*. Finally, the suit cannot seek monetary damages from the state.[152] Instead, the suit may only seek state cessation of its violation of the law.[153]

Seminole Tribe cast doubt upon the continued viability of the *Ex parte Young* doctrine. The Court held that *Ex parte Young* does not apply to suits under the IGRA since the statute "prescribed a detailed remedial scheme for the enforcement *against a State* of a statutorily created right."[154] Thus, if the statute refers in detail to a suit against a state, courts following *Seminole Tribe* should exercise restraint in implying authorization for suits against state officials.[155] Although the applicability of this holding to environmental remedial schemes remains unclear,[156] *Ex parte Young* suits against state officials for failure to follow environmental laws appear to remain viable. This viability derives from the lack of repeated and exclusive references in environmental remedial schemes to "the State."[157] Further, footnote seventeen of *Seminole Tribe* states that

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149. *Ex parte Young*, 209 U.S. 123 (1908).

150. *In re* SDDS, Inc., 97 F.3d 1030, 1035 (8th Cir. 1996) (citations omitted).

151. Green v. Mansour, 474 U.S. 64, 68 (1986).

152. *See* Hafer v. Melo, 520 U.S. 21, 30 (1991) (noting that the *Ex parte Young* doctrine "does not apply where a plaintiff seeks damages from the public treasury").

153. *See Coeur d'Alene Tribe*, 117 S. Ct. at 2043 (O'Connor, J., concurring). Justice O'Conner stated:

> The *Young* doctrine recognizes that if a state official violates federal law, he is stripped of his official or representative character and may be personally liable for his conduct; the State cannot cloak the officer in its sovereign immunity. Where a plaintiff seeks prospective relief to end a state officer's ongoing violation of federal law, such a claim can ordinarily proceed in federal court.

Id.

154. *Seminole Tribe v. Florida*, 116 S. Ct. at 1132 (emphasis added).

155. *Id.*

156. Interview with Colin C. Deihl, Staff Attorney of Earthlaw, in Denver, Colo. (Jan. 22, 1996). Deihl believes that the applicability of the *Seminole Tribe* Court's analysis to remedial schemes provided by environmental laws remains uncertain. According to Deihl, the Supreme Court may need to offer further clarification of this issue in a future decision.

157. *See supra* Part III.A (discussing the language of environmental citizen suit provisions).

the remedy created by the IGRA "stands in contrast to the statutes cited by the dissent as examples where lower courts have found that Congress implicitly authorized suit under *Ex parte Young*."[158] The dissent cited one environmental statutory scheme, the Clean Water Act (CWA),[159] as an example.[160] Thus, footnote seventeen implies that the CWA's remedial scheme survives the *Seminole Tribe* limitation to the *Ex parte Young* doctrine. Most environmental citizen suit provisions mirror the CWA[161] and thus should fall within footnote seventeen.

The *Strahan v. Coxe*[162] court applied *Seminole Tribe*'s footnote seventeen to the Endangered Species Act (ESA)[163] and stated that the IGRA "stands in contrast" to statutes "authorizing suits against any person who is alleged to be in violation of the relevant Act."[164] This statement emphasizes that remedial schemes which do not exclusively refer to states fall outside of the *Seminole Tribe* limitation on *Ex Parte Young*. The court then observed that the ESA's citizen suit provision broadly permits any person to enjoin any person who violates the ESA.[165] Presumably, this finding permitted the court to then imply authorization for suits against state officials. Finally, the court held that "*Ex parte Young*, even as refined by *Seminole Tribe*, continues to provide an exception from the Eleventh Amendment for lawsuits [by private parties] under the ESA."[166]

The implication from *Strahan*, coupled with the implication discussed above regarding footnote seventeen, leads to the conclusion that *Ex parte Young* authorizes suits in federal court by private citizens seeking to enforce state compliance with environmental laws. This conclusion is bolstered by the similarity of language between the ESA and CWA, and other environmental citizen suit provisions.[167] Thus, so long as environmental statutes do not repeatedly and exclusively refer to states, they fail to fall within the *Seminole Tribe* limitation upon *Ex parte Young*.

The Court's *Coeur d'Alene Tribe* decision extensively discussed the *Ex parte Young* doctrine. The principal opinion acknowledged that the doctrine is a fiction and "an exercise in line-drawing."[168] The principal opinion then held that quiet title actions against states, which implicate

158. *Seminole Tribe*, 116 S. Ct. at 1133 n.17.

159. 33 U.S.C.A. § 1365 (West 1986 & Supp. 1997).

160. *Id.* at 1183 n.63 (Souter, J., dissenting). Souter also cited the Emergency Planning and Community Right-to-Know Act, 42 U.S.C. § 11001 (1994), as an example.

161. *See* discussion *supra* Part III.A.

162. 939 F. Supp. 963 (D. Mass. 1996), *aff'd in part and vacated in part*, 1997 WL 613017 (1st Cir. Oct. 9, 1997).

163. 16 U.S.C. §§ 1531-1544 (1994).

164. *Strahan*, 939 F. Supp. at 982 (citations omitted).

165. *Id.*

166. *Id.*

167. *See supra* Part III.A.

168. Idaho v. Coeur d'Alene Tribe, 117 S. Ct. 2028, 2039 (1997).

special sovereignty interests, fall outside of *Ex parte Young* even though the requested relief in such actions is prospective.[169] Thus, the case does not directly clarify the doctrine's application to environmental suits. Nevertheless, Justice Kennedy suggested that a case-by-case analysis should apply to future *Ex Parte Young* determinations.[170] Under this proposed analysis, courts should evaluate whether a state forum is available to hear the dispute, the nature of the federal right implicated in the dispute, and whether special factors might apply.[171] This analysis might afford guidance to private plaintiffs seeking to invoke *Ex Parte Young*; however, the Court did not adopt it, and its application remains uncertain.

B. *States' Waiver of Eleventh Amendment Immunity*

A state's ability to waive its Eleventh Amendment immunity provides a second avenue by which plaintiffs may sue states in federal courts. In *Atascadero State Hospital v. Scanlon*,[172] the Supreme Court stated: "There are, however, certain well-established exceptions to the reach of the Eleventh Amendment. For example, if a State waives its immunity and consents to suit in federal court, the Eleventh Amendment does not bar the action."[173] Thus, a state may consent to suits in federal court by private citizens to enforce violations of environmental laws. Cooperative federalism, by which a state receives federal money in return for taking actions which would otherwise appear antithetical to the state's interests,[174] supplies one reason a state might consent to such suits.

Courts impose a stringent test for ascertaining whether a state has waived its Eleventh Amendment immunity.[175] A state's consent to suit in its own courts does not constitute a waiver of Eleventh Amendment immunity.[176] Nevertheless, such consent provides a viable avenue for plain-

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169. *Id.* at 2040-47.

170. *Id.* at 2039.

171. *Id.* at 2054.

172. 473 U.S. 234 (1985).

173. *Atascadero*, 473 U.S. at 238; *see also Coeur d'Alene Tribe*, 117 S. Ct. at 2033 (stating that the Eleventh Amendment "enacts a sovereign immunity from suit, rather than a nonwaivable limit on the federal judiciary's subject matter jurisdiction").

174. Joshua D. Sarnoff, *Cooperative Federalism, the Delegation of Federal Power, and the Constitution*, 39 ARIZ. L. REV. 205 (1997).

175. *See Atascadero*, 473 U.S. at 241 (observing that the test is "stringent"); Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990) (stating that courts have adopted a "particularly strict standard").

176. *See, e.g.*, Griess v. Colorado, 841 F.2d 1042, 1044 (10th Cir. 1988) (observing that a state's waiver of immunity, or consent to be sued in the state court, did not constitute a waiver as to actions brought in federal court). The mere fact that a state enters into a contract or agreement with the federal government is insufficient to constitute a waiver of sovereign immunity in federal court. *See* Florida Dep't of Health v. Florida Nursing Home Ass'n, 450 U.S. 147, 150 (1981) (holding that an agreement by the state to explicitly obey federal law in administering a health program does not constitute an express waiver of Eleventh Amendment Immunity); Edelman v. Jordan, 415 U.S. 651, 673 (1974) (stating that general authorization for suit in federal court is insufficient). Finally, the

tiffs to sue states for violations of environmental laws. Despite the viability of this avenue, several negatives potentially exist. State courts might not possess the level of expertise enjoyed by federal courts with respect to environmental laws.[177] Furthermore, state courts might demonstrate hostility toward plaintiffs seeking to sue states since the courts are instrumentalities of the party being sued.[178]

Courts find waiver "only where stated 'by the most express language or by such overwhelming implication[] from the text as [] leave[s] no room for any other reasonable construction.'"[179] "[I]n order for a state statute or constitutional provision to constitute a waiver of Eleventh Amendment immunity, it must specify the State's intention to subject itself to suit in federal court."[180] Thus, if a state citizen suit statute only provides for suits against the state in state court, such a statute is insufficient for bringing suits against the state in federal court. Indeed, suits against states in federal court are prohibited unless a state's statute or constitutional provision unambiguously waives Eleventh Amendment immunity.[181] Consequently, plaintiffs seeking to enforce environmental laws against a state in a federal forum must evaluate the state's waiver to ascertain whether or not the state clearly consented to such suits.

Colorado offers an example of a state which fails to pass the stringent test for waiver. The Colorado Governmental Immunity Act (CGIA) waives Colorado's defense of state sovereignty in limited circumstances.[182] Unfortunately for environmental plaintiffs, the CGIA's plain text offers no language indicating that Colorado intended to waive its Eleventh Amendment immunity.[183] Accordingly, the CGIA "does not effect a waiver of the state's constitutional immunity to suit in federal court"[184] and plaintiffs may not sue Colorado in federal court to enforce environmental laws.

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federal government cannot require states to waive Eleventh Amendment immunity. *See* South Dakota v. Dole, 483 U.S. 203, 210 (1987) (stating that one of the restrictions on congressional ability to attach conditions on the receipt of federal funds requires Congress not to run afoul of other constitutional provisions in the process).

177. *Id.* at 34 (noting that thirty-eight states have some form of judicial election).

178. *See* ERWIN CHEMERINSKY, FEDERAL JURISDICTION 33-38 (2d ed. 1994) (discussing the issue of parity).

179. *Edelman*, 415 U.S. at 673 (quoting Murray v. Wilson Distilling Co., 213 U.S. 151, 171 (1908); *see also Atascadero*, 473 U.S. at 239-40; Welch v. Department of Highways & Pub. Transp., 483 U.S. 468, 473 (1987). Silence alone is clearly insufficient. *See* Mascheroni v. Board of Regents, 28 F.3d 1554, 1560 (10th Cir. 1994).

180. *Atascadero*, 473 U.S. at 241.

181. *Port Authority Trans-Hudson Corp.*, 495 U.S. at 306.

182. COLO. REV. STAT. § 24-10-106 (1997).

183. *Id.*

184. Griess v. Colorado, 841 F.2d 1042, 1044 (10th Cir. 1988).

C. *Section 5 of the Fourteenth Amendment*

In *Fitzpatrick*, the Supreme Court specifically held that Congress may abrogate a state's Eleventh Amendment immunity when legislating under Section 5 of the Fourteenth Amendment.[185] *Seminole Tribe* held that Congress' power under Section 5 cannot serve to abrogate Eleventh Amendment immunity under the Commerce Clause,[186] and no court has suggested that Section 5 serves to abrogate immunity under the Fourteenth Amendment's Equal Protection or Due Process Clauses. Consequently, environmental plaintiffs face a difficult hurdle before they can invoke Section 5 and sue states in federal court, namely, the hurdle of establishing that Congress passed environmental laws pursuant to Fourteenth Amendment powers. Environmental laws intuitively fall outside of the Fourteenth Amendment's original purpose of eliminating racial discrimination.[187]

One might advance the argument that environmental laws serve to eliminate discrimination,[188] fall within the Equal Protection Clause,[189] or create property interests under the Due Process Clause.[190] These arguments are admittedly attenuated. Furthermore, no environmental statutes indicate congressional intent to exercise Fourteenth Amendment powers. Although this in of itself is not fatal,[191] a recent Sixth Circuit decision noted that all legislative schemes upheld under Section 5 of the Fourteenth Amendment concerned race or gender discrimination by state actors.[192] As such, suits against states under Section 5 should not succeed. Nevertheless, no court has specifically ruled that Section 5 cannot serve to abrogate immunity and plaintiffs might at least advance the suggested arguments.

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185. Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976); *see* discussion *supra* Part II; *see also* Wilson-Jones v. Caviness, 99 F.3d 203, 208 (6th Cir. 1996) ("It is settled that the Eleventh Amendment does not limit the effectiveness of legislation passed pursuant to Congress's power under the Fourteenth Amendment.").

186. Seminole Tribe v. Florida, 116 S. Ct. 1114, 1128 (1996). *See* discussion *supra* Part II.

187. *See* Oregon v. Mitchell, 400 U.S. 112, 126 (1970) ("Above all else, the framers of the Civil War Amendments intended to deny to the States the power to discriminate against persons on account of their race.").

188. *See supra* Part III.B.1.

189. *See supra* Part III.B.1.

190. *See supra* Part III.B.1.

191. *See* EEOC v. Wyoming, 460 U.S. 226, 243 n.18 (1983). The Court stated:

> It is the nature of our review of Congressional legislation defended on the basis of Congress's power under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words 'section 5' or 'Fourteenth Amendment' or 'equal protection.'

Id.

192. Wilson-Jones v. Caviness, 99 F.3d 203, 210 (6th Cir. 1996).

CONCLUSION

Seminole Tribe employed a two-pronged conjunctive test for evaluating whether federal courts enjoy jurisdiction over suits against states. Essentially, a court first must determine whether Congress unequivocally expressed an intent to abrogate states' Eleventh Amendment immunity. If so, a court then needs to determine whether congressional power existed to abrogate Eleventh Amendment immunity. A statute survives only if it satisfies both prongs.[193]

Seminole Tribe created a serious impediment to the ability of plaintiffs to sue states in federal court for violations of environmental laws. Although most environmental laws pass the first prong of the *Seminole Tribe* standard for evaluating whether federal courts enjoy jurisdiction over suits against states, they fail the second prong. Until the Supreme Court's composition changes, the Court will adhere to its *Seminole Tribe* decision and prohibit suits against states in federal courts. When Congress acts pursuant to the Commerce Clause it lacks constitutional authority to abrogate a state's Eleventh Amendment immunity. Since Congress passed environmental laws pursuant to this clause, plaintiffs clearly cannot sue states in federal court. Furthermore, the Supreme Court will not accept the argument that Congress passed environmental laws pursuant to the Fourteenth Amendment. In other words, arguments construing environmental laws as creating property interests, furthering the goal of eliminating discrimination, or creating Equal Protection rights, will fail. This conclusion stems from the realization that these arguments serve to diminish state rights while the Court's current inclination is to strengthen state rights.

Fortunately for plaintiffs, *Seminole Tribe*'s footnote seventeen ensures the continuing viability of the *Ex parte Young* doctrine for suits against state officials for violations of environmental laws. Furthermore, plaintiffs may have opportunity to sue states in federal court under the waiver doctrine. Finally, this essay suggests that plaintiffs might bring environmental suits against states under Section 5 of the Fourteenth Amendment but admits that such suits may not succeed.

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193. At least one federal appellate and bankruptcy court and several federal district courts have since applied the *Seminole Tribe* standard. *See* Timmer v. Michigan Dep't. of Commerce, 104 F.3d 833, 837 (6th Cir. 1997); College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd., 948 F. Supp. 400 (D.N.J. 1996); Knussman v. Maryland, 935 F. Supp. 659, 662 (D. Md. 1996); Mayer v. University of Minn., 940 F. Supp. 1474, 1477 (D. Minn. 1996); MacPherson v. University of Montevallo, 938 F. Supp. 785, 787 (N.D. Ala. 1996); Niece v. Fitzner, 941 F. Supp. 1497, 1501 (E.D. Mich. 1996); Union Pac. R.R. Co. v. Burton, 949 F. Supp. 1546, 1552 (D. Wyo. 1996); Headrick v. Georgia, 203 B.R. 805, 807 (Bankr. S.D. Ga. 1996).

COMMENT

CHANDLER V. MILLER: NO TURNING BACK FROM A FOURTH AMENDMENT REASONABLENESS ANALYSIS

INTRODUCTION

The Supreme Court excludes the practice of random, suspicionless drug testing from Fourth Amendment protection in certain circumstances. By allowing the government to conduct such testing, has the Court gone so far as to violate the basic protections guaranteed by the Fourth Amendment?[1] A survey of criticism leveled at the Court for its application of the Fourth Amendment may indeed lead to the alarming conclusion that the Court is in fact a pack of lawbreakers.[2]

This Comment contends that the Court has committed no crime in applying the Fourth Amendment in non-traditional ways to new and changing circumstances, such as the growing problem of illegal drug use. It shows how the Court's actions reflect a legitimate process of constitutional maturation and evolution. This Comment defends the premise that change, even in the understanding and application of core tenets of the law, is natural and necessary.

Such a recognition of the mutability of law opens the door to a broader scope for searches and seizures than the Court has traditionally allowed under the Fourth Amendment. This broader scope allows urine testing of whole classes of persons for the use of illegal drugs without individualized suspicion, a major departure from the traditional requirement for a legal search. The Court has sanctioned these tests by employing a Fourth Amendment reasonableness standard in place of the probable cause standard.[3]

The Court's decision in *Chandler v. Miller*,[4] taken together with the cases leading up to *Chandler* in which the Court endorsed government-

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1. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

2. *See* Joaquin G. Padilla, Comment, Vernonia School District 47J v. Acton: *Flushing the Fourth Amendment—Student Athletes' Privacy Interests Down the Drain*, 73 DENV. U. L. REV. 571 (1996) (asserting that the Court sanctioned illegal government action by holding as constitutional suspicionless drug testing of student athletes).

3. *See infra* notes 7-35 and accompanying text.

4. 117 S. Ct. 1295, 1305 (1997) (finding that suspicionless drug testing of candidates for state offices violated Fourth Amendment protections against unreasonable searches).

ordered suspicionless drug searches,[5] offers a framework in which to analyze the Court's development of a Fourth Amendment reasonableness standard. Accordingly, Part I of this Comment describes the development of Fourth Amendment analysis leading up to *Chandler*, including a comparison of the conjunctive and disjunctive approaches to Fourth Amendment analysis, and presents some of the criticism of the Court's current interpretation of the amendment. Part II outlines the majority and dissenting opinions in *Chandler*. Part III critiques the formalist philosophical basis for a conjunctive reading of the amendment, and offers a pragmatist proposal for a two-tier application of Fourth Amendment probable cause and reasonableness standards.

I. BACKGROUND

A. *The Evolution from Probable Cause to Reasonableness*

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures[6] conducted by the government or its agents.[7] In *Katz v. United States*, the United States Supreme Court announced that the Fourth Amendment protects "people, not places."[8] In so defining the scope of Fourth Amendment protection, the Court moved the amendment's applicability beyond the trespass and property contexts[9] in which the Court traditionally applied it.[10] After *Katz*, the question of whether a person is entitled to protection became not whether the gov-

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5. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2396 (1995) (allowing suspicionless drug testing of middle school and high school athletes); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677 (1989) (allowing suspicionless drug testing of certain classes of United States Customs Service agents); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633-34 (1989) (allowing suspicionless drug testing of railroad employees).

6. The Fourth Amendment extends an individual's right to security from unreasonable search to "persons, houses, papers, and effects . . . ." U.S. CONST. amend. IV.

7. *Skinner*, 489 U.S. at 614; *see also* United States v. McGreevy, 652 F.2d 849, 851 (9th Cir. 1981) (noting that searches conducted without governmental assistance or encouragement do not come within the scope of Fourth Amendment protection).

8. Katz v. United States, 389 U.S. 347, 351 (1967). In *Katz*, federal agents used an electronic device to listen to a telephone call a criminal suspect made from a public telephone booth. *Id.* at 348. The agents acted without first obtaining a warrant. *Id.* at 354-56. The Court held that a conversation from a public telephone booth is constitutionally protected from warrantless search and seizure, rejecting the government's argument that protection was not required, because agents did not physically enter into the area occupied by the petitioner. *Id.* at 358-59 (citing Katz v. United States, 367 F.2d 130, 134 (9th Cir. 1966)).

9. *Id.* at 353 (stating that the trespass doctrine controlling the governmental right of search and seizure has been "discredited" and "eroded"); *see also* William C. Heffernan, *Property, Privacy, and the Fourth Amendment*, 60 BROOK. L. REV. 633, 633-34 (1994) (noting that Fourth Amendment protections derive in part from eighteenth century British precedents which limit the government's right to seize a person's property, and especially one's papers).

10. The "person, not place" standard has been criticized for removing the scope of protection from its traditional, physically defined boundaries. For an example of such criticism, see Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199 (1993). Cloud criticizes the Court for replacing the established property rights theory with an "an ambiguous formula" which is too subjective to be workable. *Id.* at 249.

ernment intruded upon a citizen's property, but whether the citizen had a reasonable expectation of privacy.[11]

The *Katz* privacy standard was vague, providing no definitive guidance to lower courts regarding the scope of its application.[12] In his concurrence, however, Justice Harlan suggested a means to correct the vagueness. Justice Harlan introduced a two-prong test to determine the legality of a search or seizure under the Court's "person, not place" interpretation of the amendment.[13] To satisfy Harlan's test, a defendant must first show an "actual (subjective) expectation of privacy" and, second, the defendant must then show that the expectation is "one that society is prepared to recognize as 'reasonable.'"[14] Subsequently, the Court adopted Harlan's formulation.[15]

Once a court determines that a search occurred within the scope of Fourth Amendment protection, it must determine whether that search was reasonable.[16] Historically, the Court considered searches conducted without warrants issued upon probable cause unreasonable *per se*.[17] In recent years, however, the Court has backed away from a strict warrant requirement.[18] The Court has identified so many exceptions[19] that critics

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11. *See Katz*, 389 U.S. at 360-61 (Harlan, J., concurring).

12. *See* Cloud, *supra* note 10, at 249.

13. *Katz*, 389 U.S. at 361.

14. *Id.* at 361. The second prong of the test has become increasingly important, focusing the analysis on society's view of what constitutes the reasonable scope of Fourth Amendment protection. Paul R. Joseph, *Fourth Amendment Implications of Public Sector Work Place Drug Testing*, 11 NOVA L. REV. 605, 618 (1987).

15. *See* United States v. Jacobsen, 466 U.S. 109, 113 (1984) (defining a search as an action touching on "an expectation of privacy that society is prepared to consider reasonable"); California v. Ciraolo, 476 U.S. 207, 215 (1986) (finding warrantless aerial search of fenced-in yard to be legal); Smith v. Maryland, 442 U.S. 735, 745-46 (1979) (holding constitutional a warrantless registry of all telephone numbers dialed from petitioner's home).

16. *Katz*, 389 U.S. at 361.

17. *Id.* at 357; *see also* Phyllis T. Bookspan, *Reworking the Warrant Requirement: Resuscitating the Fourth Amendment*, 44 VAND. L. REV. 473, 479 (1991) (stating that "under present law, a warrantless search is *per se* unreasonable unless the search falls into an exception").

18. *See* Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2390 (1995) (stating that Fourth Amendment reasonableness *generally* requires judicial issuance of a warrant); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989) (stating that *generally* a legal search must be supported by warrants issued upon probable cause); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619 (1989) (stating that in *criminal* cases, a search or seizure is unreasonable unless performed pursuant to a warrant, except where cases involve "special needs").

19. *See, e.g.*, United States v. Montoya de Hernandez, 473 U.S. 531, 539-41, 544 (1985) (holding border searches beyond scope of typical customs search valid where customs agents reasonably suspect smuggled contraband); Illinois v. Lafayette, 462 U.S. 640, 648 (1983) (discussing police inventory procedures associated with incarceration); United States v. Mendenhall, 446 U.S. 544, 553-55 (1980) (stating that a person is not "seized" due to inoffensive contact with police unless "a reasonable person would have believed that he was not free to leave"); United States v. Biswell, 406 U.S. 311, 317 (1972) (involving administrative searches of closely regulated businesses); Terry v. Ohio, 392 U.S. 1, 30-31 (1968) (declaring that where police officers have reasonable basis to fear for their own or others' safety they are entitled to search person's outer clothing for purpose of recovering weapons); Warden v. Hayden, 387 U.S. 294, 298-99 (1967) (excepting situations where police officers pursue a suspect and delay would endanger lives).

contend the exceptions have swallowed the rule.[20] While announcing the applicability of the probable cause standard in all cases implicating the Fourth Amendment, the Court in effect has developed a standard of Fourth Amendment reasonableness parallel to the probable cause standard.[21]

The Court severed the probable cause standard from a reasonableness standard in *Terry v. Ohio*,[22] where the Court held that evidence found by a policeman acting without a warrant or probable cause in a "stop and frisk" search was admissible at trial.[23] The Court thus introduced the standard of *reasonable suspicion*,[24] a lower standard than probable cause.[25] In applying the reasonable suspicion standard, the Court required that a law enforcement officer must show only that he based a search on facts reasonably sufficient to warrant the search.[26] The Court adopted a test the Court first employed in an administrative context.[27] The test mandates balancing the government's need for a search or seizure with the level of intrusion the action imposed.[28] The Court stated that, outside the context of a search pursuant to a warrant based on probable cause, there "is no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the

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20. *See* Bookspan, *supra* note 17, at 476 (stating a judicial shift from the application of the probable cause requirement to a standard based on common sense debilitates the Fourth Amendment and arguing that the courts have "sacrificed the Fourth Amendment's prohibition against warrantless searches and seizures for a chameleon-like 'reasonableness' approach"). Criticism of the Court's willingness to make exceptions to the warrant requirement is not limited to academics. Justices Marshall and Brennan called the Court to task for doing just that in their dissent in *Skinner*. *Skinner*, 489 U.S. at 639 (Marshall, J., dissenting) ("[T]he Court has eclipsed the probable-cause requirement in a patchwork quilt of settings . . . .").

21. This Comment argues that the Court should acknowledge the fact that it applies a reasonableness standard along with, and not as a subcategory of, the probable cause standard.

22. 392 U.S. 1 (1968).

23. *Terry*, 392 U.S. at 30.

24. *See* Cloud, *supra* note 10, at 231.

25. Christine A. Atkinson, Note, *Mandatory Drug Testing in the Public Work Sector: Erosion of Fourth Amendment Protections*, 12 U. BRIDGEPORT L. REV. 293, 306 (1991).

26. *Terry*, 392 U.S. at 21.

27. Camara v. San Francisco, 387 U.S. 523 (1967). The Court, in the context of an administrative search, defined reasonableness as the balance between the need to search and the invasion the search entails. *Id.* at 537. In the context of a criminal search, reasonableness is aptly defined as "balanc[ing] the strength of an individual's privacy right against the strength of recognized government interests when the two interests clashed." Kenneth Nuger, *The Special Needs Rationale: Creating a Chasm in Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 89, 94-95 (1992) (citing *Terry*, 392 U.S. at 9). In *New Jersey v. T.L.O.*, the Court stated that "[w]here a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, we have not hesitated to adopt such a standard." New Jersey v. T.L.O., 469 U.S. 325, 341 (1985). In addition, a balancing test of sorts was applied before *Camara* in a criminal case. Schmerber v. California, 384 U.S. 757, 768 (1966). The Court held that evidence of blood alcohol level obtained without a warrant was admissible because: 1) the police had probable cause to believe the suspect was inebriated, and 2) blood tests are minimally intrusive upon privacy interests. *Id.* at 768-72.

28. *Terry*, 392 U.S. at 21.

search (or seizure) entails."[29] By establishing a Fourth Amendment reasonableness standard as applied in a balancing test, the Court acknowledged that the amendment could be read in a way which severs the link between reasonableness and probable cause.[30]

The Fourth Amendment consists of two independent clauses, the first declaring the right of the people to be free from unreasonable searches and seizures, the second prohibiting the issuance of warrants without probable cause.[31] These clauses represent logically, as well as grammatically, distinct rights and prohibitions. Academicians have hotly debated whether they are to be read together, so that a warrant based on probable cause becomes the requisite for a reasonable search (the conjunctive theory), or separately, making a reasonable warrantless search constitutionally sound (the disjunctive theory).[32] A recent, exhaustive analysis of the origins of the Fourth Amendment suggests that the Framers intended to link the concept of a reasonable search with a valid warrant, giving contemporary conjunctive theorists new support grounded in historical precedent.[33] Conjunctive theorists have severely criticized the Court for betraying the intentions of the Framers and eviscerating the Fourth Amendment.[34] Despite the criticism, the Court has adopted the

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29. *Id.* at 20-21 (quoting *Camara*, 387 U.S. at 534-37).

30. *See id.* at 19.

31. U.S. CONST. amend. IV. *See supra* note 1.

32. Academicians have hotly debated the merits of the "conjunctive" and "disjunctive" theories of interpretation of Fourth Amendment interpretation for most of this century. The "conjunctive" theorists have dominated. Morgan Cloud, *Searching Through History; Searching for History*, 63 U. CHI. L. REV. 1707, 1721-22 (1996) (reviewing William John Cuddihy, The Fourth Amendment: Origins and Original Meaning (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (on file with UMI Dissertation Services)).

33. *Id.* at 1723-24. The conjunctive interpretation is prominent in Justice O'Connor's dissent in *Vernonia*, in which she frequently refers to Cuddihy's work. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2397-2404 (1995). Justice O'Connor's dissent, based on the principle that constitutional searches require individualized suspicion, departs from her position in previous cases in which she joined the majority in upholding the legality of suspicionless searches. Cloud, *supra* note 32, at 1711. *See infra* notes 78, 80, and accompanying text.

34. *See, e.g.*, Cloud, *supra* note 10, at 200-01 (positing that the state of Fourth Amendment search and seizure law is chaotic); Nuger, *supra* note 27, at 134 (concluding that the Supreme Court has taken the Fourth Amendment "perilously close to incomprehensible disarray"); Michael S. Vaughn & Rolando V. del Carmen, *"Special Needs" in Criminal Justice: An Evolving Exception to the Fourth Amendment Warrant and Probable Cause Requirements*, 3 GEO. MASON U. CIV. RTS. L. J. 203 (1993) (stating that since 1985 the Supreme Court has emaciated the Fourth Amendment requirements for probable cause); Atkinson, *supra* note 25, at 312-13 (arguing that Fourth Amendment protection against unreasonable government intrusion has become almost a "historical artifact"); William R. Hodkin, Comment, *Rethinking* Skinner *and* Von Raab*: Reasonableness Requires Individualized Suspicion for Employee Drug Testing*, 17 J. CONTEMP. L. 129, 156 (1991) (stating that the Fourth Amendment has "lost all meaning because its application is unpredictable"); Jennifer L. Malin, Comment, Vernonia School District 47J v. Acton*: A Further Erosion of the Fourth Amendment*, 62 BROOK. L. REV. 469, 517 (1996) (concluding that failure to require individualized suspicion erodes Fourth Amendment principles); Padilla, *supra* note 2, at 571 (alleging that the government broke the law by infringing Fourth Amendment rights of student athletes).

disjunctive approach as its operative approach to Fourth Amendment interpretation.[35]

B. *Criticism of the Reasonableness Standard*

Critics have put forward many reasons why a reasonableness standard, divorced from a probable cause standard and the warrant requirement, fails to protect Fourth Amendment freedoms. For instance, such a standard has been criticized as being too broad and lacking objectivity.[36] Critics contend that because the definition of reasonableness lacks precision, judges may apply it according to their idiosyncratic inclinations, and so apply the law unequally.[37] In particular, critics disapprove of the standard as the Court applies it through the balancing test announced in *Terry*. Some argue that where a federal court employs a balancing test instead of a reasonableness standard governmental interest will inevitably prevail over individual liberties.[38] If this is true, judicial application of the balancing test becomes a serious threat to individuals' rights.[39] Another criticism of balancing is that courts weigh social values rather than apply constant legal principles and so inappropriately politicize the judicial process.[40] Critics also point out that the results of the balancing test offer lower courts no generally applicable guidance because the test applies very specifically to issues and cases.[41]

The Court continues to apply a disjunctive Fourth Amendment approach with no sign of retreat. Apparently, the Court does not fear that its approach to a reasonableness standard threatens freedom and liberty as

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35. *See* Bookspan, *supra* note 17, at 479 (stating that although the Court maintains that the warrant requirement is normative, it has "circumvented" the requirement by creating new exceptions or "shifting the inquiry to the reasonableness of the search or seizure").

36. *See* Nuger, *supra* note 27, at 120.

37. *See* T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L. J. 943, 973 (1987) (noting that even Roscoe Pound, the pragmatist, after a life's work could produce no mathematically-based, scientific method of balancing competing interests); Bookspan, *supra* note 17, at 511 (vehemently condemning a reasonableness standard, and pointing out that in a balancing test, what is reasonable in one judge's opinion may be unreasonable to another); Cloud, *supra* note 32, at 1723 ("Freed from the constraints of the Warrant Clause, judges applying the increasingly malleable standard of reasonableness can adopt whatever policies they prefer."); Nuger, *supra* note 27, at 120 (arguing that with no objective methodology, the special needs rational results in an uneven application of law because individual judges are free to weigh competing interests at will).

38. *See* Atkinson, *supra* note 25, at 307.

39. *Id.; see also* Nuger, *supra* note 27, at 120 (contending that current Fourth Amendment analysis favors the government).

40. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting) (stating that when "the question comes down to whether a particular search has been 'reasonable,' the answer depends largely upon the social necessity that prompts the search").

41. *See, e.g.*, Nadine Strossen, *The Fourth Amendment in the Balance: Accurately Setting the Scales Through the Least Intrusive Alternative Analysis*, 63 N.Y.U. L. REV. 1173, 1183-94 (1988) (offering a detailed critique of the shortcomings of the balancing test including its lack of judicial guidance); Vaughn & Carmen, *supra* note 34, at 216 ("[T]he 'special needs' exception relies on a case-by-case balancing of individual and governmental interests, resulting in a legal doctrine that is bereft of a definitional conceptual framework for lower courts to follow.").

some contend it does.[42] Indeed, the Court has been willing to expand the reach of Fourth Amendment reasonableness to include searches which require no level of individualized suspicion whatsoever.[43] The Court has been particularly willing to find that suspicionless urine drug testing of certain classes of employees is within the scope of the Fourth Amendment reasonableness standard.[44]

C. *Suspicionless Drug Testing: Pushing the Limits of Fourth Amendment Protection*

Prior to 1989, the Court recognized the requirement for minimal individualized suspicion as the basis for most warrantless searches. For example, the Court approved of a warrantless search of a probationer's home where the search was based on a tip to police that the probationer had violated the terms of his probation.[45] Even in cases in which the Court applied a reasonable suspicion standard, it required individualized suspicion as a prerequisite to any legal search, at least in those cases involving searches of persons not involved in closely regulated businesses, or where the search was minimally intrusive.[46]

The Court changed its stance in a series of three cases beginning in 1989, in which the Court applied the reasonableness balancing test to situations involving urine testing for the use of illegal drugs.[47] In these cases, it allowed testing without requiring individualized suspicion of drug abuse. In each of them, the Court found government-mandated drug tests to be legal on grounds that government needs outweighed the privacy interests of the persons to be tested.

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42. *See supra* note 34 (listing allegations of harm to Fourth Amendment protections due to application of a reasonableness standard).

43. *See supra* note 5 (listing cases in which the Court upheld random suspicionless searches).

44. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633-34 (1989).

45. Atkinson, *supra* note 25, at 306 (citing Griffin v. Wisconsin, 483 U.S. 868 (1987) (discussing search of probationer's home after police were given tip that the probationer possessed firearms)).

46. *Id.* Atkinson states that the government was required to "demonstrate some individualized suspicion." *Id.* However, such individualized suspicion appears not to have been applicable to operators of "pervasively regulated businesses," who may have been subject for some time to suspicionless searches. *See* New York v. Burger, 482 U.S. 691, 702 (1987) (listing three criteria for warrantless searches of pervasively regulated businesses, none of which requires individualized suspicion: 1) a substantial government interest in regulating the business, 2) the necessity of the searches to further a "regulatory scheme," and 3) the searching of businesses with such certainty and regularity so as to give notice and limit the discretion of inspecting officers).

47. Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386 (1995) (involving junior high and high school athletes); *Skinner*, 489 U.S. 602 (involving railroad workers in private industry); National Treasury Employees Union v. Von Raab, 489 U.S. 656 (1989) (involving United States Customs Service employees who carry firearms or handle sensitive information).

1. *Skinner v. Railway Labor Executive's Association*[48]

In *Skinner*, railroad employees filed suit to stop a drug testing program promulgated by the Federal Railroad Administration (FRA) after the FRA determined that industry safeguards against drug abuse by railroad employees were inadequate.[49] The Court found that urine drug testing is a search under the Fourth Amendment.[50] It noted that a urine drug test is no more intrusive than a general physical examination if the test is administered in an environment similar to a general physical examination and without a person monitoring the act of urination.[51] The Court concluded that a urine drug test is not unconstitutionally intrusive to employees who are required to undergo physical examinations as a requirement for employment because those employees have a diminished expectation of privacy.[52] The majority balanced the employees' privacy interests with the government's "compelling" need to ensure railroad safety.[53] It concluded that the government's ability to promote safety would be unreasonably hindered if it were required to test workers only in cases of individualized suspicion.[54] Finally, the Court evaluated the testing regime for its efficacy, finding that it was an effective method of screening workers for drug use.[55]

Justice Marshall dissented, warning that although drug abuse is a hazard to society, impinging on constitutional rights to counter the hazard poses a greater danger.[56] He decried the "incursion" of the balancing test "into the core protections of the Fourth Amendment,"[57] criticizing the malleability of balancing.[58] Marshall faulted the Court for not requiring a warrant for the testing or a showing that it "was based on probable cause or . . . on lesser suspicion because it was minimally invasive."[59] In short, the dissent argued that drug testing without at least a minimal level of individualized suspicion of wrongdoing is unconstitutional.

2. *National Treasury Employees Union v. Von Raab*[60]

In *Von Raab*, employees of the United States Customs Service challenged the legality of a drug screening program for those transferring

48. 489 U.S. 602 (1989). The plaintiff was Samuel K. Skinner, Secretary of Transportation. *Id.*
49. *Skinner*, 489 U.S. at 607-08.
50. *Id.* at 618.
51. *Id.* at 626-27.
52. *Id.* at 627.
53. *Id.* at 633.
54. *Id.*
55. *Id.* at 632.
56. *Id.* at 635 (Marshall, J., dissenting).
57. *Id.* at 640.
58. *Id.* at 641.
59. *Id.* at 642 .
60. 489 U.S. 656 (1989) The respondent in this case was William von Raab, Commissioner of the United States Customs Service. *Id.*

or seeking promotion to positions which involved work in drug interdiction, the carrying of firearms, or the handling of classified materials.[61] The Court weighed the government's "compelling" interest in ensuring that employees charged with drug interdiction have the requisite physical, moral, and intellectual attributes with the employees' privacy interests.[62] It found in favor of the Customs Service, limiting its holding to employees involved directly in drug interdiction and to employees who handle firearms.[63]

Justice Marshall again dissented, stating that a balancing test was an inappropriate Fourth Amendment analysis.[64] Justice Scalia also dissented, but on the grounds that the government failed to prove that its interest outweighed the privacy interests of Customs Service employees.[65] In Scalia's reading of the record, the government did not demonstrate a problem of drug use among employees nor that any harm existed.[66] He noted that he had joined the majority in *Skinner* because in that case the government demonstrated the existence of drug use among the targeted class of employees.[67] Scalia dissented in *Von Raab* because he concluded the government's proposed drug testing program did not respond to a proven problem of abuse, but was instead "symbolic."[68]

3. *Vernonia School District 47J v. Acton*[69]

In *Vernonia*, decided six years after *Skinner* and *Von Raab*, the Court held constitutional a school district's program of using urinalysis to test student athletes for drug use.[70] Having noted that only those privacy interests which "society recognizes as 'legitimate'" are protected under the Fourth Amendment,[71] the Court found that schoolchildren who have been temporarily committed to state custody have a lower expectation of liberty and privacy than do emancipated adults.[72] The Court then concluded that the manner in which the testing was performed[73] and the limited range of information the testing disclosed[74] made the testing proc-

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61. *Von Raab*, 489 U.S. at 660-61.

62. *Id.* at 670-71.

63. *Id.* at 677. The Court could not, based on the record, determine the reasonableness of testing employees who handled classified materials. *Id.*

64. *Id.* at 680 (Marshall, J., dissenting).

65. *Id.* at 686-87 (Scalia, J., dissenting).

66. *Id.* at 681.

67. *Id.* at 680.

68. *Id.* at 681.

69. 115 S. Ct. 2386 (1995). The respondents in this case were Wayne Acton, a student in the Vernonia school district, and his parents. *Id.*

70. *Vernonia*, 115 S. Ct. at 2396.

71. *Id.* at 2391 (quoting New Jersey v. T.L.O., 469 U.S. 325, 338 (1985)).

72. *Id.* at 2391-92.

73. *Id.* at 2393 (involving conditions similar to those the students were accustomed to encountering in public restrooms in their schools).

74. *Id.* (involving a test narrowly designed to detect only drugs).

ess relatively unobtrusive.[75] The Court found in favor of the government after balancing the children's low expectation of privacy with the government's "immediate" need to curb an "epidemic" of drug-related disciplinary problems.[76]

In a brief concurring opinion, Justice Ginsburg noted that the Court reserved the question whether the school district could require all students, not just those voluntarily participating in athletics, to undergo urine drug testing.[77] In her dissenting opinion, Justice O'Connor criticized the Court's acceptance of a suspicionless, blanket search, arguing that the Framers foreclosed the constitutionality of such general searches by requiring individualized suspicion and probable cause as the basis for Fourth Amendment searches.[78] The dissent recognized the constitutional validity of suspicionless searches in *Skinner* and *Von Raab* on the grounds that individualized suspicion as a basis for drug testing was infeasible (because of the chaotic scene after a train wreck or the disruption of the duties of Customs Service employees).[79] Finally, O'Connor concluded that the government's need to perform a blanket test did not outweigh the privacy interests of students because the same result could have been achieved through testing individual students suspected of drug use, rather than the entire class of athletes.[80]

The opinions in these three cases, majority and dissenting, reflect the spectrum of support and criticism of a reasonableness standard applied through a balancing test. By balancing the interests of government entities with an individual's expectation of privacy, the majority in each case can claim that it responded affirmatively to society's need to curb drug abuse while respecting Fourth Amendment rights. They applied a reasonableness standard which, in their view, was consistent with a conjunctive reading of the amendment because they applied it merely as an exception to the warrant requirement.[81] Justices Marshall and Brennan, in their dissents in *Skinner* and *Von Raab,* criticized the majorities for what amounted to an espousal of the disjunctive approach. They argued that the Court's use of the reasonableness balancing approach was illegitimate because a warrant is the "yardstick against which official searches and seizures are to be measured" and anything less is unconstitutional.[82] Justice Scalia, in *Von Raab,* did not challenge the validity of the reasonableness standard or the practicability of a balancing test, but criticized the Court's attempt to balance values. Thus, he maintained that where no

75. *Id.* at 2396.
76. *Id.* at 2395-96.
77. *Id.* at 2397 (Ginsburg, J., concurring).
78. *Id.* at 2399 (O'Connor, J., dissenting).
79. *Id.* at 2401 .
80. *Id.* at 2403-04.
81. *See supra* note 20 and accompanying text.
82. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 637 (1989) (Marshall, J., dissenting) (quoting New Jersey v. T.L.O., 469 U.S. 325, 359-60 (1985)).

problem of drug abuse is shown, no need outweighs an individual's right to privacy.[83] Finally, Justice O'Connor relied on historical analysis to reveal the Framers' intent as she argued for a conjunctive reading in her dissent in *Vernonia.*

Chandler v. Miller[84] is the fourth and latest in the line of cases in which the Court analyzes the constitutionality of suspicionless drug testing under a reasonableness standard and balancing test. In 1990, the State of Georgia enacted legislation requiring that persons seeking certain state offices submit to a urine drug test to qualify for nomination or election.[85] The law forbade any candidate who failed a drug test, or who refused to take one, to stand for nomination or election.[86]

II. *CHANDLER V. MILLER*

A. *Facts and Procedural History*

In May, 1994, three members of the Libertarian Party declared their candidacy for the offices of Lieutenant Governor, Commissioner of Agriculture, and member of the State's House of Representatives.[87] They refused to submit to drug testing, and sued in federal court for declaratory and injunctive relief from Georgia's drug testing requirement on the grounds that the law imposed a search in violation of the Fourth Amendment of the United States Constitution.[88] The district court, relying upon *Skinner* and *Von Raab*, decided that the need of the State to screen out drug-abusing officeholders balanced with the "relative unintrusiveness of the testing procedure" weighed in favor of the State's interest.[89] Accordingly, the court declined to grant the plaintiffs' request for preliminary injunction because the court found little likelihood the plaintiffs would prevail on their claim that the testing violated the Fourth Amendment.[90]

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83. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 681 (1989) (Scalia, J., dissenting).

84. 117 S. Ct. 1295 (1997).

85. The statute lists those state offices for which a certificate of drug testing was required: "Governor, Lieutenant Governor, Secretary of State, Attorney General, State School Superintendent, Commissioner of Insurance, Commissioner of Agriculture, Commissioner of Labor, Justices of the Supreme Court, Judges of the Courts of Appeals, judges of the superior courts, district attorneys, members of the General Assembly, and members of the Public Service Commission." GA. CODE ANN. § 21-2-140(a)(4) (1993).

86. GA. CODE ANN. § 21-2-140(b) (1993).

87. Chandler v. Miller, 73 F.3d 1543, 1544 (11th Cir. 1996).

88. Chandler v. Miller, 952 F. Supp. 804, 805 (N.D. Ga. 1994).

89. *Id.* at 806.

90. *Id.* The court previously stated that a preliminary injunction would not be granted unless the moving party clearly established, among other elements, that there was a "substantial likelihood" that the moving party would prevail on the merits. *Id.* at 805.

Subsequently, the candidates submitted to testing and their names appeared on the ballot.[91] After all three lost in the election, they moved the district court for final judgment on their plea. The court entered judgment in favor of the defendants.[92] The plaintiffs appealed to the Eleventh Circuit, claiming violations of the First, Fourth, and Fourteenth Amendments of the United States Constitution.[93] The court of appeals affirmed in a two to one decision.[94] Relying on the holdings of *Skinner* and *Von Raab,* the Court found in favor of the State after balancing the need to maintain the competency of high ranking officials and public trust in them with the minimal intrusion drug testing imposed upon the plaintiffs' privacy.[95]

The dissent from the appeals court's decision reasoned that Georgia's drug testing requirement violated Fourth Amendment protections because the same result could be effectively obtained through ordinary law enforcement means by requiring a warrant or individualized suspicion.[96] The dissent distinguished *Chandler* from *Skinner, Von Raab,* and *Vernonia.*[97] As well, it contended that conditioning the holding of public office upon submission to a drug test infringed upon the First Amendment right to free speech of those who wished to challenge prevailing drug policy.[98] The petitioners appealed, inviting the United States Supreme Court to find that suspicionless searches of candidates for political office violate the Fourth Amendment, and that Georgia's law was an illegal restriction of the First Amendment right to free speech.[99]

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91. *Chandler,* 117 S. Ct. at 1299.

92. *Id.* Named defendants in the case were the Governor, Secretary of State, and Commissioner of the Department of Human Resources of the State of Georgia. *Chandler,* 73 F.3d at 1543.

93. *Chandler,* 73 F.3d at 1545.

94. *Id.* at 1543

95. *Id.* at 1546-47. The court also held that the law did not infringe on candidates' Fourteenth Amendment rights to run for office and the voters' Fourteenth Amendment rights to choose candidates. *Id.* at 1547-48. Regarding petitioners' First Amendment claim, the court found that the State's regulation of conduct implicating First Amendment free speech rights was legal. *Id.* at 1548-49.

96. *Id.* at 1550 (Barkett, J., dissenting).

97. *Id.* at 1550-52. Judge Barkett pointed out that in this case, unlike in *Skinner,* no present physical threat to the public existed nor was there evidence of a history of drug abuse among the population to be tested. *Id.* at 1550-51. Unlike *Von Raab,* this case did not involve direct contact between law enforcement officials and criminals, nor the duty of law enforcement officials to carry firearms. Further, Judge Barkett noted, political candidates are not at risk for physical injuries on the playing field as were the student athletes who abused drugs in *Vernonia. Id.* at 1551. Finally, he stated, *Chandler* is distinguishable from these cases because it involves the right to participate in government, a constitutionally protect right. *Id.* at 1552.

98. *Id.* at 1552.

99. Brief for Petitioners at i, Chandler v. Miller, 117 S. Ct. 1295 (1997) (No. 96-126).

B. *Supreme Court Decision*

1. Majority Opinion

The majority opinion, written by Justice Ginsburg,[100] held that Georgia's drug testing requirement for candidates for state offices violated Fourth Amendment protections against unreasonable search.[101] The Court also found that government-ordered urine drug testing constituted a search under the provisions of the Fourteenth Amendment,[102] and that the Tenth Amendment did not require the Court to relax the reasonableness standard in deference to Georgia's sovereign right to establish qualifications for its officers.[103] The Court declined to address petitioners' First Amendment claims.[104]

The Court began its analysis by reiterating that the Fourth Amendment requires that a search be based on individualized suspicion of wrongdoing. The Court declared, however, that it often exempts special needs, those beyond the normal needs of law enforcement, from the constitutional requirement.[105] The Court then applied the balancing test, first examining the degree of intrusiveness the State's drug testing regime would impose on candidates.[106] It found that the State's method of testing—producing a urine sample in the office of a private physician and limiting dissemination of the test results to the candidate—was relatively non-invasive.[107]

The majority then addressed the question of the significance of the State's interest and whether it was sufficiently important to outweigh a personal privacy interest.[108] They found it was not, for three reasons. First, the State provided no evidence of an immediate or concrete danger which the State intended the drug testing regime to address, such as a drug abuse problem among elected state officials.[109] Though not a prerequisite for a finding of legitimate special need, a demonstrable problem would have supported the State's position that candidates seeking office should submit to urine testing.[110] The Court noted that although it held suspicionless drug testing to be legal in *Von Raab* despite a lack of evi-

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100. *Chandler*, 117 S. Ct. at 1298. Joining in the opinion were Justices Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, and Breyer. *Id.*

101. *Id.* at 1305.

102. *Id.* at 1300.

103. *Id.* at 1302-03.

104. *Id.* at 1300 n.1.

105. *Id.* at 1301.

106. *Id.* at 1303.

107. *Id.* The Court noted that the drug testing guidelines adopted by the State of Georgia for its candidates were substantially similar to those the Court accepted as relatively unintrusive in *Skinner* and *Von Raab*.

108. *Id.* at 1303.

109. *Id.*

110. *Id.*

dence of actual drug usage among the test target population, it cautioned that *Von Raab* "must be read in its unique context."[111] The Court distinguished *Chandler* by pointing out that *Von Raab* involved direct contact by United States Customs Service agents with drugs, drug dealers, and firearms, as well as the inability of the Service to subject agents to daily scrutiny.[112] The Court pointed out that none of these conditions existed in regard to candidates for political office in Georgia.[113]

Second, the Court noted that the testing regime applied by Georgia's statute would be ineffective in detecting drug use.[114] Because the testing date could be scheduled by a candidate up to 30 days in advance, he or she could easily elude detection by abstaining from drug use during that time.[115] In response to the State's contention that a true addict would be unlikely to abstain and so would be detected, the Court pointed out that the State had offered no evidence to show that such persons were likely to seek office.[116]

Third, the majority found that even if such persons were to seek office, ordinary law enforcement means would likely be sufficient to indict them.[117] Therefore, the Court held that the State's drug testing requirement did not constitute a legitimate exception to the Fourth Amendment's warrant requirement because the goal the statute intended to achieve could be accomplished by ordinary law enforcement means.[118]

The Court then distinguished the importance of "symbolic" need from "special" need in the context of exempting searches from Fourth Amendment protection.[119] It pointed out that the Court took pains in *Skinner*, *Von Raab*, and *Vernonia* to explain why exemptions in those cases rested on particular, practical, and "special" needs.[120] It also noted that the holding in *Von Raab* did not turn on the argument that suspicionless drug testing afforded the benefit of demonstrating a commitment to law enforcement.[121] The Court stated that the action of setting a good example, or making a symbolic gesture to demonstrate a state's commitment to fighting drug abuse, does not rise to the level necessary to warrant a relaxation of constitutional standards protecting individuals

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111. *Id.* at 1304.
112. *Id.* (citing *Von Raab*, 489 U.S. at 674).
113. *Id.*
114. *Id.*
115. *Id.* The Court contrasted the effectiveness of Georgia's testing regime with the regime the Court approved in *Von Raab*. In *Von Raab*, the Court found that the program was effective in part because the test target population "could not know precisely" when they would be tested. *Id.* at n.4.
116. *Id.* at 1304.
117. *Id.*
118. *Id.*
119. *Id.* at 1305.
120. *Id.*
121. *Id.*

from government intrusion.[122] Quoting Justice Brandeis,[123] it concluded that well-meant symbolism is not sufficient reason to exempt a search from Fourth Amendment protection.[124]

Finally, the majority made clear their decision did not touch the issue of a state's requirement of general health screening and financial disclosures for candidates, or the issue of private sector drug testing.[125] The Court reiterated the constitutionality of suspicionless searches where there exists a "substantial and real" danger to public safety, but cautioned that unless public safety is so threatened the Court would not exempt suspicionless searches from constitutional protection.[126]

2. Dissenting Opinion

Chief Justice Rehnquist dissented from the majority's opinion, arguing in favor of the reasonableness and constitutionality of the Georgia statute under the precedents set in *Skinner, Von Raab,* and *Vernonia.*[127] The Chief Justice stated that the Court should determine whether a governmental need to search which goes beyond the normal needs of law enforcement is reasonable and constitutional on the basis of whether it fulfills a proper governmental purpose, not on the basis of its importance.[128] Only after the Court determines that special need exists should it apply a test balancing government interests with individual's privacy interests.[129] At that point, the Court should assess the importance of the government's interest.[130] The Chief Justice criticized the majority for improperly deciding that the State's need for drug testing was not sufficiently important to exempt it from Fourth Amendment protection.[131] He suggested that, in prior cases, governmental needs for searches which the Court found to be legitimate exceptions to Fourth Amendment protection could not all be classified as greatly important.[132]

The Chief Justice contended that Georgia had a reasonable interest in implementing a "prophylactic mechanism" to prevent drug users from attaining high state office.[133] He relied on *Von Raab,* pointing out that the

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122. *Id.*

123. "The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Id.* (quoting Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting)).

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* at 1306-07 (Rehnquist, C.J., dissenting).

128. *Id.* at 1306.

129. *Id.*

130. *Id.* at 1306-07.

131. *Id.*

132. *Id.* at 1306 (offering as examples the "supervision of probationers" and the "operation of a government office") (quoting Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 620 (1989)).

133. *Id.*

Court in that case held that a drug testing program was constitutional even though it was implemented in response to the "pervasive social problem" of drug abuse, not a proven drug problem among the test target population.[134] He said that the State should not have to wait until a drug addict or illegal drug user achieved elected office to protect its interest.[135]

After arguing that Georgia's drug testing regime represented a legitimate government need, the dissent applied the balancing test, weighing the State's interest with the candidates' privacy interests. The Chief Justice criticized the majority's conclusion that candidates are under such a high level of scrutiny that drug testing is unnecessary to screen them for illicit drug use.[136] He called the Court's decision a "strange holding" in light of the fact that the railroad employees in *Skinner* and customs officials in *Von Raab* were under the same type of scrutiny from supervisors and fellow employees as are elected state officials.[137] In addition, he pointed out, the method of testing in this case posed little invasion of privacy because it could be conducted in the office of a candidate's own physician.[138] He disagreed with the majority's conclusion that because a candidate could schedule the test in advance, a candidate who used drugs would have sufficient time to abstain from drug use to pass the test.[139]

The dissent then revisited *Von Raab*. It compared the handling of classified materials by Customs Service agents, a function which the *Von Raab* Court found was sufficiently significant to warrant suspicionless drug searches,[140] with state executive officers handling sensitive materials.[141] It argued that state officials who abuse drugs pose as much risk as do Customs Service agents who abuse drugs.[142] In sum, the dissent concluded that because Georgia had a reasonable need to test its candidates for drug use, and that such testing was minimally intrusive into candidates' privacy, the State's candidate testing requirement was a special need which should have been exempted from Fourth Amendment protection.[143]

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134. *Id.* (quoting National Treasury Employees Union v. Von Raab, 489 U.S. 656, 673-74 (1989)).

135. *Id.*

136. *Id.* at 1306-07.

137. *Id.* at 1307.

138. *Id.*

139. *Id.*

140. *Id.* Though the Court in *Von Raab* did state that Customs Service employees who sought promotion to positions in which they handled sensitive information might be tested for drug use, the Court held that the record of the case was too ambiguous to justify a finding that the class of employees should be tested. National Treasury Employees Union v. Von Raab, 489 U.S. 656, 677-78 (1989).

141. *Chandler*, 117 S. Ct. at 1307.

142. *Id.*

143. *Id.* at 1306-07.

Finally, the dissent questioned the majority's conclusion that a state's right to test a candidate's general health differs so much from urine drug testing that the former is legal, while the latter is not.[144] Such a policy judgment, the Chief Justice stated, is appropriately left to legislatures.[145]

III. ANALYSIS

The holding of *Chandler* may on its face be counted a victory among those who have criticized the courts for whittling away at Fourth Amendment protection. The case represents a halt, at least temporarily, to the expansion of the legality of suspicionless searches. The *Chandler* Court's disjunctive analysis of the amendment, however, severely tempers any solace those critics may take in the Court's decision. The *Chandler* Court does nothing to dismantle the framework which has served as the basis for ever broader applications of the reasonableness standard. That none of the *Chandler* majority chose to question or critique the reasonableness standard indicates that the Court has no intention of reversing its de facto application of a disjunctive approach. Indeed, the lone dissenter argues for an even *broader* application of the reasonableness standard.[146]

Chandler is a tacit declaration that the Court is not going to heed the advice of academicians and return to a conjunctive application of the Fourth Amendment.[147] This Comment proposes that the Court correctly refuses to turn back. It argues that a disjunctive reading of the Fourth

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144. *Id.* at 1307.

145. *Id.* at 1308.

146. *See id.* at 1306-08. Because the holding in *Chandler* limits the expansion of the reasonableness standard, it is logical that any Justice critical of the standard would not choose to dissent from the decision. However, it is interesting to note that in cases in which the standard was applied and resulted in an outcome favorable to the government, at least one Justice criticized the balancing test or the way in which it was applied. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2397 (1995) (O'Connor, J., dissenting) (criticizing the Court's acceptance of the constitutionality of suspicionless drug testing); Michigan Dept. of State Police v. Sitz, 496 U.S. 444, 462-63 (1990) (Stevens, J., dissenting) (arguing that notice should be a prerequisite to a warrantless search); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 653-54 (1989) (Marshall, J., dissenting) (arguing that suspicionless drug testing is an inappropriate response to an emergency situation); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 683-84 (1989) (Scalia, J., dissenting) (arguing that without a demonstrated history of drug abuse among the class to be tested, a suspicionless drug testing regime is unconstitutional); New York v. Burger, 482 U.S. 691, 718 (1987) (Brennan, J., dissenting) (criticizing the majority for allowing a search of a business in an industry which was not closely regulated); O'Connor v. Ortega, 480 U.S. 709, 732-33 (1987) (Blackmun, J., dissenting) (criticizing the majority for an unwarranted application of the balancing test upon an incorrect finding of special need).

147. Professor Aleinikoff wrote in 1987 that "academia [had] fashioned a truce" regarding the balancing test as the Court applied it to "area after area in constitutional law," with the result that debate over the balancing had practically ceased. Aleinikoff, *supra* note 37, at 944. More recently, however, that truce seems to have been shattered. *See, e.g.*, *supra* note 34 (listing a number of authors who see the Fourth Amendment balancing test as a threat to Fourth Amendment protections).

Amendment is a legitimate basis for constitutional adaptation to situations and trends never contemplated in the world of the Framers, such as the pervasive problem of drug abuse. It contends that the call for judicial return to conjunctive analysis often reflects a mourning of the demise of *Lochner*-era jurisprudence,[148] a philosophy of law which dressed up judicial tradition and paraded it as objective and immutable, untouchable by the changing needs of the nation and its evolving society. Whether rejection of this fallacious viewpoint is labeled "Legal Realism" or something else,[149] it recognizes that constitutional freedoms are not guaranteed by judicial conformation to some Platonic legal form.[150]

The following section briefly describes two suggestions to "salvage" the reasonableness balancing test, and then addresses the argument of some academicians that the courts should abandon the application of a reasonableness standard in favor of a warrant requirement. That argument is analyzed in the framework of *Lochner* era formalist philosophy. Finally, this section offers a pragmatist defense for the development of a reasonableness standard, and proposes a two-tiered application of the Fourth Amendment which preserves the traditional protections afforded by the warrant requirement in criminal contexts while allowing the courts to adapt constitutional principles to changing societal needs.

A. *Suggestions to Fix the Reasonableness Balancing Test*

Some critics of the Fourth Amendment balancing test concede, grudgingly, that the Court is not going to abandon it in the foreseeable future, and so have offered suggestions to save it from fatal subjectivity. One proposal urges the addition of a "least intrusive alternative" analysis to the test, not as the final measure of constitutional sufficiency, but as a sufficient condition of constitutionality.[151] Put in very broad terms, this four-fold recommendation would, first, require the state to adopt any measure that is significantly less intrusive than the one being challenged.[152] Second, the state would be obligated to adopt the least intrusive measure reasonably available.[153] Third, the state would have to

148. It is important to distinguish between the call for a return to a conjunctive regime on the grounds that the warrant requirement is the only correct Fourth Amendment interpretation and the argument that the warrant requirement is the only practical alternative to flaws inherent in a reasonableness balancing test. The first argument is essentially formalist and philosophical, the second is pragmatist and empirical. Though the outcome proposed by both arguments is the same, the framework underlying them is radically different. *See infra* notes 180, 185, and accompanying text.

149. Aleinikoff, *supra* note 37, at 963. Aleinikoff posits that the development of the Fourth Amendment balancing process was not simply a Legal Realist reaction to Lochnerism, but to the nihilistic, relativistic extremes of Legal Realism itself. *Id.*

150. Plato posited that ideas and concepts exist as "forms" that are immutable, timeless, and subject to human discovery. 6 THE ENCYCLOPEDIA OF PHILOSOPHY 332 (1967).

151. Strossen, *supra* note 41, at 1257.

152. *Id.* at 1254.

153. *Id.* at 1255.

make a *prima facie* showing that the measure it adopted was the least intrusive option among those which would reasonably advance the state's goals.[154] Fourth, consideration of the costs of a particular alternative measure would be irrelevant unless the costs were great enough to make the alternative practically impossible.[155] Adoption by courts of the least intrusive search or seizure measure, the theory holds, would help protect personal privacy and liberty which is threatened when courts balance governmental and private interests.

Another proposal would abandon altogether the attempt to establish generally applicable standards for a balancing test in favor of an absolute case-by-case determination of reasonableness under the circumstances of a particular search or seizure.[156] Trial courts would be the locus of such determinations.[157] The rationale for this approach is that any attempt to distill rules from cases in which a court employed the reasonableness balancing test is futile.[158] One suggested advantage of this approach is that it would eliminate the need for appeals courts to craft precedents defining reasonableness and would "extract the Court from the tarbaby of Fourth Amendment law."[159]

Neither of these proposals suggests that the Court *should* retain the Fourth Amendment reasonableness balancing test. Instead, they are founded on the notion that if the Court must insist on using the test, it should find a way to do so that is minimally destructive of Fourth Amendment rights.

Several other critics are more straightforward in contending that any reasonableness standard, certainly including a balancing test, is simply too flawed to be a workable guarantor of the Fourth Amendment's protections of liberty, privacy and property.[160] They argue that a reasonableness standard, separated from the requirement for warrants issued on the basis of probable cause, should be abandoned altogether with only rare exceptions.[161] Whether arguing for a modification of the reasonableness

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154. *Id.*

155. *Id.* at 1256.

156. Craig M. Bradley, *Two Models of the Fourth Amendment*, 83 MICH. L. REV. 1468, 1480 (1985). Professor Bradley offers two models aimed at reforming the Court's Fourth Amendment analysis. Model I proposes abandoning current Fourth Amendment analysis which Bradley says results in "incomprehensible rules" in favor of a case-by-case reasonableness analysis. *Id.* at 1491. Model II takes the opposite approach, proposing abandonment of the reasonableness standard altogether in favor of a strict warrant requirement. *Id.* An emergency which absolutely prevents a law enforcement officer from obtaining a warrant would be the only exception to the requirement. *Id.* at 1492. Bradley applies the two models specifically to search and seizure by law enforcement agencies. *Id.* at 1471.

157. *Id.* at 1488.

158. *Id.* at 1491.

159. *Id.* at 1488.

160. *See supra* note 34.

161. *See* Bookspan, *supra* note 17, at 529 (stating that the Court should eliminate all exceptions to the warrant requirement other than exceptions for exigent circumstances); Cloud, *supra* note 10, at

balancing test or writing it off completely, criticism is misguided when it calls for application of a conjunctive reading of the amendment on the grounds that objective standards lie beyond the reach of shifting policy concerns. At its core, this reasoning is an assumption of mistaken philosophical first principles. Such principles find expression in *Lochner* era formalism.[162]

B. *The Philosophical Foundation of* Lochner *Era Formalism*

The *Lochner* era of Fourth Amendment interpretation was developed in a line of cases beginning with *Boyd v. United States*[163] and including *Lochner v. New York*.[164] It extended from the latter quarter of the nineteenth century through the first third of the twentieth. The *Lochner* era's decline is highlighted in the Court's decision in *Olmstead v. United States*[165] in 1928. In that case, the Court held that evidence of criminal activity was admissible in court even though it had been obtained through wiretaps of telephone conversations, without the knowledge or consent of the interlocutors.[166] The Court reasoned that because law enforcement officials committed no physical trespass and made no seizure of physical property, the Fourth Amendment did not protect those

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224 (arguing that warrants are rooted in a rule-based model which provides objective tests against which the constitutionality of a search can be judged); Morgan Cloud, *The Fourth Amendment During the* Lochner *Era: Privacy, Property, and Liberty in Constitutional Theory*, 48 STAN. L. REV. 555 (1996) (advocating a return to theories embraced in the *Lochner* era and a re-dedication to the Fourth Amendment's Warrant Clause); Malin, *supra* note 34, at 488 (contending that individualized suspicion "effectively curtails governmental discretion and arbitrary searches").

162. This is not to say, of course, that everyone who advocates a return to a conjunctive reading of the Fourth Amendment espouses a *Lochner* era philosophy. For instance, Professor Bradley suggests a return to a strict warrant requirement as a practical solution to the problems he believes are inherent in the current state of Fourth Amendment analysis. Bradley, *supra* note 156, at 1472. Nowhere in his article does Professor Bradley argue for the conjunctive theory. Rather, his approach is essentially pragmatist.

163. 116 U.S. 616 (1886) (holding that a subpoena to produce an invoice, in a civil suit by the United States against an importer of merchandise, violated the Fourth Amendment's prohibition of unreasonable search and seizure).

164. 198 U.S. 45 (1905). *Lochner* is not a Fourth Amendment case. It involved the right to contract. The Court held that government-imposed rules limiting bakers to a 60-hour work week were an unconstitutional limitation on the freedom to contract. The case stands as an icon for a legal era which is often characterized as one in which the individualism of capitalist, laissez-faire economics prevailed. For a critique of that characterization, see Stephen A. Siegel, Lochner *Era Jurisprudence and the American Constitutional Tradition*, 70 N.C. L. REV. 1 (1991) (explaining how the *Lochner* era decisions are related to jurisprudential trends before and after that period in history). *See also* Cloud, *supra* note 161, at 601 n.216. (contending that *Lochner* era formalism was designed to promote individual liberty rather than to address economic issues).

165. 277 U.S. 438 (1928).

166. *Olmstead*, 277 U.S. at 464.

charged in the case.[167] It held that Fourth Amendment protections extended only to "material things."[168]

On its face, *Olmstead* appears to be yet another property-law based Fourth Amendment decision. However, the Court's application of property-based principles was so narrow that in effect it excluded a virtual world of human interaction from Fourth Amendment protection, including the expanding world of electronic communication. In *Olmstead*, the Court decided that a person could not expect his or her constitutionally protected privacy to extend beyond spatially limited entities, such as a home or written communication on paper.[169] New relationships between the government and an individual citizen promoted by technological advances and a burgeoning population would outstrip the Court's willingness to extend them traditional search and seizure protections.

Though the Court's holding in *Olmstead* did not divorce Fourth Amendment analysis from its *Lochner* era marriage to property rights, it signaled the beginning of an era in which the relationship would become more and more tenuous, and would ultimately break down.[170] That time was presaged by no less a commanding figure than Justice Oliver Wendell Holmes, who wrote in his dissent in *Olmstead* that "[w]e must first consider the two objects of desire both of which we cannot have and make up our minds which to choose."[171] Holmes' framing of the issue in terms of choice, Professor Morgan Cloud suggests, was a declaration that "[v]alue choices, not deductive application of rules, should control the outcome."[172]

The replacement of "deductive application of rules" with "value choices" in a post-*Lochner* era lies at the heart of much of the criticism of a Fourth Amendment reasonableness standard. Professor Cloud em-

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167. *Id.*

168. *Id.* In his dissent, Justice Brandeis argued that the majority interpreted the amendment's use of the words "persons, houses, papers, and effects" too literally, and that the Constitution applies not merely to "what has been," but also to "what may be." *Id.* at 474 (Brandeis, J., dissenting). Holmes, also dissenting, stated the principle that the Court is free to choose between policies, but that in this case, if the Court confined itself to "precedent and logic," the result must be to conclude that the government's wiretap was illegal. *Id.* at 471 (Holmes, J., dissenting).

169. *Id.* at 465. Cloud contends that the Framers intended written communication, a person's "papers," to be the primary areas afforded protection from unreasonable search and seizure. *See* Cloud, *supra* note 161, at 523, 622.

170. That break is epitomized by the Court's declaration in *Katz* that "the Fourth Amendment protects people, not places." Katz v. United States, 389 U.S. 347, 351 (1967).

171. *Olmstead*, 277 U.S. at 470 (Holmes, J., dissenting). In addition, Holmes' predilection for applying social policy considerations to constitutional analysis is evident in his dissent in *Lochner*, in which he wrote, "general propositions do not decide concrete cases. The decision will depend on a judgment or *intuition* more subtle than any articulate major premise." Lochner v. New York, 198 U.S. 45, 76 (1905) (Holmes, J., dissenting) (emphasis added).

172. Cloud, *supra* note 161, at 614.

ploys the categories "formalist"[173] and "pragmatist"[174] to describe the differences in these two approaches. The former is characterized by an objective, rule-based analysis, the latter by an intuitive, goal-oriented reaction to a fact situation.[175] The *Lochner* era's warrant-based approach is essentially formalist,[176] while the current era of disjunction between a reasonableness standard and a probable cause standard reflects a pragmatist stance. The critics charge that, cut loose from "objective" moorings, constitutional theory will be tossed about in the storms of social change and political exigency.[177] They argue that the bulwark of Fourth Amendment protection from governmental search and seizure, and indeed the protections of all freedoms embodied in the constitution, will erode in the face of "subjective" pressures brought about by time and circumstance.[178] As evidence, the critics may point to the fact that in a post-*Lochner* era it is perfectly legal for the government to subject citizens to a search in the form of a urine drug test without suspicion of wrongdoing.[179] For some, the fact that whole classes of citizens can be legally subjected to searches without even a degree of individual suspicion may be evidence enough to conclude that the rights afforded by the Constitution are in peril from competing values, such as those embodied in a "war" on drugs.

There is a complex framework to the conclusion that "subjectivist" and "pragmatist" forces are at work to undermine constitutional protections. That framework is essentially philosophical. Professor Cloud tacitly acknowledges the philosophical framework behind formalist, objectivist critiques of contemporary applications of the Fourth Amendment by noting that formalist theory relies heavily on the concept of natural law and natural rights.[180] Such formalism embraces a Kantian view that law and ethics is non-empirical, believing that legal principles exist apart

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173. *Id.* at 565. The attributes of nineteenth century formalism include deductive application of identified legal rules. The rules derive from an "existing corpus" of sources and natural law. *Id.* at 565-66.

174. *Id.* at 598. Professor Aleinikoff provides a succinct history and description of legal pragmatism. Aleinikoff, *supra* note 37, at 956-58. He describes it as a "non-formalist mode of legal reasoning attuned to the way in which law actually function[s] in society," noting that it narrows the distinction of the role of the judiciary and the legislature. *Id.* at 957-58. Among the champions of judicial pragmatism he mentions are Justices Holmes, Brandeis, Cardozo, and Stone as well as Roscoe Pound and Karl Llewellyn. *Id.* at 954-56. Though closely associated with Llewellyn and Legal Realism, judicial pragmatism is distinguishable from Legal Realism. *Id.* at 956-57.

175. *See supra* notes 158, 160, and accompanying text.

176. It is "essentially" formalist, because there are certain pragmatist characteristics in *Lochner* era judicial reasoning. Cloud, *supra* note 161, at 625.

177. *See supra* note 34 and accompanying text.

178. *Id.*

179. A drug testing requirement, such as the one Georgia sought to impose, "effects a search within the meaning of the Fourth and Fourteenth Amendments." Chandler v. Miller, 117 S. Ct. 1295, 1300 (1997).

180. Cloud, *supra* note 161, at 567.

from and *a priori* to "fact-propositions" and are "absolute."[181] It is not surprising, then, that Professor Cloud relates the formalist stance to Christopher Columbus Langdell's view that "law is a science,"[182] and states that effective legal analysis should not rely "upon goals or standards extrinsic to the law."[183] Nor is it remarkable that Professor Cloud's description of formalism includes the notion that "legally authoritative reason . . . usually excludes from consideration, overrides, or at least diminishes the weight of, any countervailing substantive reason arising at the point of decision or action."[184] In the formalist, Kantian, Langdellian world, law is to be discovered and deduced from unchangeable, natural principles. According to Professor Cloud, these are the principles which the Framers had in mind as they crafted the Constitution, and which underlie Fourth Amendment theory.[185]

Accepting Professor Cloud's description of formalism's philosophical stance as the basis for *Lochner* era constitutional analysis,[186] one can see why critics of a post-*Lochner*, "pragmatist" approach to Fourth Amendment interpretation distrust a method which applies an outcome-based balancing test. In their eyes, any method which balances "values" (a subjective process) in place of deducing conclusions from principles without regard to the practical outcomes of a particular analysis (an objective process) cannot protect constitutional rights. Critics contend that subjective, case-by-case analysis runs the risk of taking Fourth Amendment analysis out of the realm of deductive, predictable results and throws it open to the uncertain tides of politics and shifting social goals.[187]

The debate over the validity of a conjunctive as opposed to a disjunctive Fourth Amendment approach involves competing fundamental philosophical viewpoints. If one rejects the philosophical first principle that law exists unchanging and immutable, and accepts as a first principle that law is a function of the circumstances of a changing world, then one sees that a reasonableness standard applied in a balancing test does not threaten constitutional freedoms and undermine the rule of law as a formalist may contend it does.[188]

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181. *Id.* at 568 n.48 (quoting EDWIN M. PATTERSON, JURISPRUDENCE: MEN AND IDEAS OF THE LAW 472 (1953)).

182. *Id.* at 565 (citing Christopher Columbus Langdell, *Harvard Celebration Speeches*, 3 L. Q. REV. 123, 124 (1887)).

183. *Id.* at 566.

184. *Id.* (quoting P.S. ATIYAH & ROBERT S. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 246 (1987)).

185. *Id.*

186. *Id.* at 567-68.

187. *See supra* note 34 and accompanying text.

188. To say that law is a function of the circumstances of a changing world is different from saying that law has no foundation in rules and precedent. The difference between formalist and pragmatist positions is not necessarily that one applies strict rules and the other discounts rules. The

Outside a formalist framework, the empirical nature of a reasonableness standard and a disjunctive reading of the Fourth Amendment, separating reasonableness from probable cause, are not inherently threatening. "Empirical" need not mean "relativist." "Subjective" need not connote "absent principles." An empirical, pragmatist application of Fourth Amendment protections can be a reasonable response to changing circumstances, needs, and times. If law is dynamic and dialectic, rather than static, then a reasonable balancing of values can offer a workable framework within which law may evolve.

Of course, criticism of the reasonableness balancing test is not limited to formalists. A pragmatist may also contend that reasonableness balancing lacks objectivity and that it is unacceptably idiosyncratic.[189] However, responses to concerns raised from a pragmatist framework differ from responses to a formalist critique. The latter are ultimately philosophical, the former are practical. A pragmatist response to the problem of subjectivity in a reasonableness balancing test seeks to ensure that courts thoroughly analyze the rationale they use in weighing competing interests, and do not content themselves with balancing "inside a black box."[190] A pragmatist approach to Fourth Amendment balancing recognizes that rules distill from individual circumstances in a dialectic process.[191] For that dialectic to work, courts must be clear and conscientious about articulating the reasoning they employ in balancing competing interests.[192] If courts are disciplined in their reasoning, judicial ration-

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relativist aspect of pragmatism is not absolutely relativist. It need not relegate law to the arena of mere arbitrary choice. Rather, it recognizes the development of law as a dialectic process between rules and fact situations. When those situations confront rules and principles, new rules may evolve which retain the core principles of the original rules. The relationship between the original rules and the evolving rules forms an objective basis for legal decision making. Over time law may transmute itself into something different, but the core rules and principles can, and probably do, remain essentially the same. Unlike the formalist, the pragmatist will likely acknowledge this *relative* objectivity of law.

189. *See, e.g.*, Aleinikoff, *supra* note 37, at 975. Aleinikoff argues that value balancing fails to use a common scale, making the process essentially intuitive and subjective. *Id.* at 976. One need not be a formalist to advance this and other practical criticisms of Fourth Amendment balancing. Certainly not all critics of the current trend in Fourth Amendment analysis are proponents of *Lochner* era legal reasoning, nor are they neo- or pseudo-Kantian. Such critics may argue that the reasonableness test is simply impractical. *See, e.g.*, *supra* note 162 (noting that Professor Bradley's proposal to return to a strict warrant requirement is essentially pragmatist). As well, one may press a conjunctive Fourth Amendment reading based on an historical analysis, arguing that the Framers intended to identify reasonableness with a warrant requirement and therefore that the conjunctive interpretation is the legitimate interpretation.

190. Aleinkoff, *supra* note 37.

191. *See* Cloud, *supra* note 10, at 233 (discussing the pragmatist approach to Fourth Amendment analysis).

192. A good example of imprecision in applying a balancing test occurs in the *Chandler* Court's use of the terms "substantial" and "important." Chandler v. Miller, 117 S. Ct. 1295, 1303 (1997). The Court does not define the terms or explain how the government's interest is any more or less substantial or important than the plaintiffs'. The majority simply concludes that the State did not justify the substantial need or importance of its interests vis-à-vis the interests of the plaintiffs. *Id.*

ale will, over time, yield clear rules. This is a "messy" process, however, that will never satisfy the formalist longing for deductive clarity.

C. *A Pragmatist Proposal for Applying a Fourth Amendment Reasonableness Standard*

Despite the many arguments against the use of a reasonableness standard as applied through a balancing test, some scholars remain skeptical of the notion that a warrant requirement based on a probable cause standard provides the only sure basis for protecting Fourth Amendment rights.[193] Alternatives to the *Lochner*-era conjunctive reading of the Fourth Amendment propose that a reasonableness standard can form the basis for workable Fourth Amendment analysis regarding warrantless searches.[194] The concepts of "reasonableness" and "constitutional reasonableness" are not necessarily exclusive.[195]

Professor Akhil Reed Amar offers an interesting but ultimately impractical method of applying a standard of reasonableness to constitutional law. He points out that the locus of "common sense reasonableness" in the Anglo-American judicial system is the jury, but notes that juries do not decide constitutional reasonableness.[196] The locus of constitutional interpretation is the appellate courts.[197] Can the two loci meet? Professor Amar argues that they can, and should.[198] But the historical and practical rationale for doing so is questionable.[199] Constitutional decisions have historically been decided by trained jurists, not juries.[200] Though Amar contends that allowing juries to decide constitutional issues would result in an effective application of a reasonableness standard and a constitutionally literate citizenry,[201] the specter of having jurors untrained in the law handing down legally binding constitutional precedent is one the

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For the Court to develop a workable reasonableness standard, it must carefully explain the criteria it employs. The level of government need sufficient to pass muster in a balancing test has varied from case to case. *See id.* (substantial and important); Vernonia Sch. Dist. 47J v. Acton, 115 S. Ct. 2386, 2395 (compelling or important); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 633 (1989) (compelling); National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670 (1989) (compelling); New Jersey v. T.L.O., 469 U.S. 325, 339 (1985) (substantial).

193. *See* Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801, 817 (1994) (stating that the Fourth Amendment should be based on "constitutional reasonableness" rather than "probability or warrant").

194. *Id.* at 800.

195. *Id.* at 817.

196. *Id.* at 817-19 (advocating moving the decision making process regarding legitimacy of Fourth Amendment searches into the arena of civil litigation).

197. Cooper v. Aaron, 358 U.S. 1, 18 (1958).

198. *Id.* at 817

199. Cloud, *supra* note 32, at 1735-36 ("I cannot readily discern the inseparable connection between the existence of liberty and the trial by jury in civil cases."). Cloud relies on Cuddihy's historical analysis to critique Amar's conclusion that the Framers intended a disjunctive reading of the Fourth Amendment. *Id.* at 1710, 1742.

200. *Cooper*, 358 U.S. at 18.

201. Amar, *supra* note 193, at 818-19.

American legal system has never embraced, and for good reason. The Anglo-American system of jurisprudence places the responsibility for making findings of fact in the hands of jurors, while charging jurists with the task of making findings of law.[202] The system leaves the role of establishing legal precedents to those trained in the law.[203]

Another approach applies the reasonableness standard to Fourth Amendment analysis while preserving the protections afforded by a warrant-based regime. This way calls for the Court to recognize the distinction between searches and seizures in the criminal context and in an administrative context, and apply the probable cause standard to the former and a reasonableness standard to the latter.[204] Such a judicial adoption of a disjunctive reading of the Amendment would result in a two-tier scale for Fourth Amendment cases, which would yield several benefits.

First, it would help alleviate the threat that expanding application of a reasonableness standard will allow law enforcement agencies to encroach more and more upon traditional constitutionally protected rights in a criminal context.[205] Arguments in favor of preserving the warrant requirement often focus on the criminal context of Fourth Amendment searches and seizures, including the exclusionary rule of evidence,[206]

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202. Henry P. Monaghan, *Constitutional Fact Review*, 85 COLUM. L. REV. 7, 229 nn.29-30 (1985).

203. This is not to say, of course, that the people should not or do not ultimately control their political destiny. Jurists create legal precedent, but the power to correct that precedent is vested in the people through legislative representation and the right to amend the Constitution. *See* Aleinikoff, *supra* note 37, at 960, 984 (discussing generally the court system and legislative function). Though critics of legal pragmatism note that it brings judicial and legislative functions uncomfortably close, nevertheless they remain logically and functionally separate. *Id.* at 958.

204. "Our cases teach . . . that the probable-cause standard is 'peculiarly related to criminal investigations.'" National Treasury Employees Union v. Von Raab, 489 U.S. 656, 667 (1989) (quoting Colorado v. Bertine, 479 U.S. 367, 371 (1987)). Professor Amar points out, however, that the Fourth Amendment makes no distinction between criminal and civil searches. Amar, *supra* note 193, at 770.

205. *See* Lewis R. Katz, *In Search of a Fourth Amendment for the Twenty-First Century*, 65 IND. L. J. 549, 554-55, (1990) (criticizing encroachment on Fourth Amendment protections largely in the context of criminal cases); Harold J. Krent, *Of Diaries and Data Banks: Use Restrictions Under the Fourth Amendment*, 74 TEX. L. REV. 49, 51 (1995) (focusing on law enforcement uses of property and information obtained through a legal seizure). The proposed two-tier Fourth Amendment application does not eliminate all concerns and criticisms regarding the expansion of exceptions to the warrant requirement. It does not address the issue of whether warrantless searches which bring the potential for criminal conviction (such as stop-and-frisk and DUI checkpoint searches) should be curtailed. Rather, it is limited to those situations in which a search would have non-criminal implications, such as affecting a person's employment status.

206. *See* Bookspan *supra* note 17, at 478 ("The evisceration of the warrant requirement and its accompanying erosion of fourth amendment protections derive from judicial dislike of the exclusionary rule."); Louis Michael Seidman, *The Problems with Privacy's Problem*, 93 MICH. L. REV. 1079, 1082 (1995) (analyzing the intersection of the Fourth and Fifth Amendments in the context of informational privacy). The identification of the Fourth Amendment with criminal law, and the exclusionary rule in particular, can be traced to *Boyd v. United States*, 116 U.S. 616 (1886). Cloud, *supra* note 161, at 573. In *Boyd*, the Court interpreted the Fourth and Fifth Amendments together, linking the two "by principles of privacy, property, and liberty." *Id.* at 576. Although the

without distinguishing them from non-criminal contexts.[207] Professor Tracey Maclin notes that supporters of a warrant-based application of the Fourth Amendment "argue that the rule is designed to promote the central premise of the Fourth Amendment, which is to control police discretion."[208] Applying the stricter Fourth Amendment standard in criminal cases would respect the difference between a search which results in the possibility of imprisonment and a criminal record, and one which does not. This distinction between standards applied in criminal and non-criminal cases is analogous to a distinction already firmly rooted in American jurisprudence, the use of separate standards of proof in criminal and civil actions.[209]

The second advantage is correlative to the first. Distinguishing criminal from non-criminal contexts would free the Court to develop a workable standard of Fourth Amendment reasonableness without threatening traditional applications of the warrant requirement in the criminal context. The reasonableness standard is relatively new and immature. As this Comment points out, criticisms of a reasonableness standard frequently point to its vagueness and lack of definition.[210] They contend the probable cause standard is arguably better because it is rule-based and objective.[211] However, there is no internal logic in the warrant require-

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exclusionary rule is the focus of much Fourth Amendment analysis, it does not apply to civil cases, but is intended to exclude illegally obtained evidence from criminal proceedings. Russell W. Galloway, Jr., *Basic Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 737, 776 (1992).

207. Precedent exists for distinguishing Fourth Amendment standards in criminal and administrative contexts. The Court has tended to apply a stricter standard in criminal cases, and the Court has suggested that noncriminal cases are "peripherally" related to the Fourth Amendment. Nuger, *supra* note 27, at 92. Professor Amar criticizes law schools for fostering the identification of the Fourth Amendment with criminal law by teaching it by itself or in criminal procedure courses, rather than in constitutional law classes where it would be put in the context of the Constitution as a whole. Amar, *supra* note 193, at 758. Professor Cloud contends that isolating Fourth Amendment analysis to the area of criminal law "impoverishe[s] both Fourth Amendment theory and general constitutional theory alike." Cloud, *supra* note 10, at 200. *See also* Vaughn & Carmen, *supra* note 34, at 209 (criticizing the Court for confusing application of the special needs exemption from the warrant requirement in administrative and criminal contexts).

208. Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. CAL. L. REV. 1, 7 (1994). Maclin criticizes Amar's proposal to allow juries constitutional review of searches and seizures in part on the grounds that it is an ineffective way of policing the police. *Id.* at 32.

209. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 271-72 (1986) (listing the three accepted standards of proof as proof beyond a reasonable doubt, a preponderance of evidence, and clear and convincing evidence); California *ex rel.* Cooper v. Mitchell Brothers' Santa Ana Theater, 454 U.S. 90, 93 (1981) (stating that the Court has never required proof beyond a reasonable doubt in a civil case). The American system of jurisprudence recognizes that criminal prosecution brings with it the potential of greater penalty than does a civil action, such that a higher burden of proof is imposed in criminal actions. Lego v. Twomey, 404 U.S. 477, 493-94 (1971) (Brennan, J., dissenting) (declaring that "[w]e permit proof by a preponderance of evidence in civil litigation because 'we view it as no more serious in general for there to be an erroneous verdict in the defendant's favor than for there to be an erroneous verdict in the plaintiff's favor'"and noting that "we do not take that view in criminal cases") (quoting *In re* Winship, 397 U.S. 358, 371 (1970) (Harlan, J., concurring)).

210. *See supra* note 36 and accompanying text.

211. Cloud, *supra* note 32, at 1728.

ment or the probable cause standard that makes the warrant requirement inherently more objective than a reasonableness standard.[212] Rather, the warrant requirement's established rules and standards appear more "objective" because they derive from over two centuries of case law which defines its parameters.[213] In contrast, thirty years have passed since *Katz*[214] was decided, and not even fifteen since *T.L.O.*[215] Because the end of the *Lochner* era is still relatively recent, and also because the Court has tried to squeeze the reasonableness standard into exceptions to the warrant requirement, the Court has not had sufficient opportunity to thoroughly define the parameters of a Fourth Amendment reasonableness standard. Given time, the appellate system can produce a constitutional standard of reasonableness which will serve as precedent to lower courts and provide standards for case-by-case analysis.

Third, distinguishing criminal from non-criminal Fourth Amendment criteria would serve to adjust a glaring inequity in the Court's contemporary application of the amendment. Currently, searches which are generally accepted and even lauded in the private sector,[216] such as certain mandatory drug testing of employees, are subject to a much higher degree of scrutiny when conducted by the government of its own employees.[217] Certainly a general testing regime accepted in the private sector for administrative purposes is not by its nature more onerous or more threatening than a test administered under the same circumstances by the gov-

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212. *See* Amar, *supra* note 193, at 770-71 (stating that the foundation of the Fourth Amendment is reasonableness).

213. *See generally* Cloud, *supra* note 32, at 1714, 1725-26 (discussing the development of search warrants).

214. Katz v. United States, 389 U.S. 347 (1967).

215. New Jersey v. T.L.O., 469 U.S. 325 (1985).

216. Though many criticize the use of suspicionless drug testing in the private sector, there is also broad support for it. Businesses may tend to support such testing because of effective results in decreasing costs related to drug abuse, and there are indicators that many employees support work place drug testing. *See* Scott S. Cairns & Carolyn V. Grady, *Drug Testing in the Workplace: A Reasoned Approach for Private Employers*, 12 GEO. MASON U. L. REV. 491, 543 (1990) (stating that a carefully implemented workplace drug testing regime can boost productivity and employee morale); Stephen M. Fogel *et al.*, *Survey of the Law on Employee Drug Testing*, 42 U. MIAMI L. REV. 553, 560 n.23 (1988) (reporting that a 1986 national study showed two-thirds of workers surveyed supported workplace drug testing, while another survey showed 47 percent of adults surveyed supported testing); D. Garrison "Gary" Hill, *The Needle and the Damage Done: The Fourth Amendment, Substance Abuse and Drug Testing in the Public Sector*, S.C. LAW., June 1997, at 19 (noting that by 1990, half the Fortune 500 companies had instituted drug testing policies); Shawn G. Twing, *Drug & Alcohol Testing by Private Employers . . . and Its Relationship to Workers' Compensation Practice in Arkansas*, ARK. LAW., Fall 1996, at 31 (quoting a 1990 study that employers report benefits of drug testing, and that employees register minimal resentment); Alan F. Westin, *Privacy in the Workplace: How Well Does American Law Reflect American Values?*, 72 CHI.-KENT L. REV. 271, 274-75 (1996) (reporting a survey concluded in 1995 that a large majority of employees supported urine drug testing). Support for random workplace drug testing, however, is by no means universal. *See, e.g.*, Patricia A. Montgomery, *Workplace Drug Testing: Are There Limits?*, TENN. B. J., Apr. 1996, at 32 (listing states that have prohibited or restricted random workplace drug testing).

217. Montgomery, *supra* note 216, at 21.

ernment acting in the role of employer or administrator. Adoption of the reasonableness standard for administrative searches would still subject government-ordered searches to constitutionally-mandated judicial scrutiny, but not to the same degree as searches which might result in criminal penalties.

Finally, a two-tier approach to Fourth Amendment analysis would alleviate a source of criticism and confusion in the existing analytical system. Currently, the Court disingenuously maintains that a conjunctive interpretation is the law of the land, even while carving out more and more exceptions to the warrant requirement.[218] The Court disserves itself and opens itself up to much of the criticism it receives by proclaiming one standard while straining to apply another. By clearly applying the more stringent probable cause standard to criminal contexts and applying the reasonableness standard without any pretense of a warrant requirement to administrative contexts, the Court would eliminate much confusion and concern over the fate of the Fourth Amendment.

A disjunctive reading of the Fourth Amendment, applying a warrant requirement based on probable cause to searches and seizures in a criminal context and a reasonableness standard to non-criminal, administrative searches, preserves traditional curbs to police powers while allowing the courts to meet situations and exigencies not anticipated by the Framers. Such an approach respects the traditional role the warrant requirement has played in protecting Fourth Amendment rights, while sidestepping the erroneous tenet of *Lochner* era formalism which demands the application of a probable cause standard in every situation which implicates the Fourth Amendment. A two-tier Fourth Amendment analysis rejects the philosophy which confuses "what has been" with "what always is and ought to be." At the same time, distinguishing the standards applied to criminal and non-criminal situations respects the pragmatist philosophical principle that law can and should evolve to adapt to new demands, rather than forcing new situations to fit the law. The time is ripe for the Court to acknowledge its tacit disjunctive approach to the Fourth Amendment by adopting a two-tier system which distinguishes criminal from non-criminal application of Fourth Amendment protections.

IV. CONCLUSION

The United States Supreme Court's decision in *Chandler v. Miller* tacitly declares that the Court will not sanction all government-ordered suspicionless drug testing. The *Chandler* ruling will probably come as a relief to those who decry and fear that the Court has sapped the life blood out of Fourth Amendment protections against unreasonable search. Any relief felt will be short lived. *Chandler* does nothing to reverse the

218. *See* Bookspan, *supra* note 17, at 529 (urging that the Court abandon "dishonest application of the *per se* unreasonable" standard and condemning "the enigmatic *post hoc* reasonableness evaluation currently in favor").

Court's use of a reasonableness balancing test. That test, one of the Court's critics contends, has left the Fourth Amendment not only anemic but on the verge of death.[219] Such criticism overstates, however, the probability of the imminent demise of Fourth Amendment rights.

From a pragmatist philosophical perspective, the Court's development of the reasonableness balancing test is a legitimate response to exigencies and situations not envisioned or contemplated by the Framers. It reflects an appropriate disjunctive reading of the amendment, which allows for a reasonableness standard to coexist with a probable cause standard for government-ordered searches and seizures. The reasonableness standard lacks the definition and precision of the probable cause standard in part because it has not had the time and opportunity to ripen and mature.

One approach the Court may take to advance the development of the standard distinguishes its use in criminal and non-criminal contexts. Applying the probable cause standard, with its warrant requirement, in criminal contexts will preserve traditional Fourth Amendment protections which critics of the reasonableness standard fear losing. Applying a reasonableness standard in administrative contexts will allow the Court to develop it free from strained, and disingenuous, connections to the probable cause standard. This two-tier application of the standards set out in the Fourth Amendment will allow the courts, over time and through the dialectic process inherent in the evolution of common law, to shape a reasonableness standard as they have the probable cause standard. *Chandler* is a step in that process.

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219. Bookspan, *supra* note 17, at 474 (stating that it is premature to declare the Fourth Amendment dead, but urging drastic action to save it). Professor Bookspan tempers her declaration, however, by referring to Mark Twain's famous statement that "reports of [his] death have been greatly exaggerated." *Id.* (quoting cable from London to Associated Press, 1897).