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A Need for Better Authentication . . . . . *Robin Paul Malloy*

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Two-Thousand and Eleven

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Cognitive Law: An Introduction*

Luca Arnaudo**

"You may call it 'nonsense' if you like," she said, "but I've heard nonsense, compared with which that would be as sensible as a dictionary!"

—Lewis Carroll, *Through the Looking Glass, and What Alice Found There*

1. Surfing the Neuroscience Wave

Since the turning of the millennium an increasing interest towards cognitive neuroscience has been observed. In fact, not even one day goes by without a new cognitive marriage between disciplines being proposed: from economics to aesthetics, from ethics to politology, these marriages have been experimented by a wide array of sciences so far interested only by professional meetings with mathematics or still proudly entrenched in the Castalia of *humanae litterae.*

Law is no exception to this, since, as we will see, several studies on the subject have already been carried out (although almost exclusively from a common law perspective with regards to criminal issues). But let us approach the subject step by step and start by defining some general principles in order to clarify the present discussion.

By neuroscience we mean the series of scientific research studies on the central and peripheral nervous system, with a particular interest on its structure and function. Although aimed at different purposes, these research studies all follow the experimental method and are aimed at highlighting the biological bases of mental and behavioral expressions of living beings.[1]

As far as the subgroup of cognitive neuroscience is concerned, we can quite rightly say that it is composed of those studies interested in cognitive decision-making processes carried on by the central nervous system. During the last decades of the twentieth century, important technological developments have been able to redefine the research methods applied to these processes. Because use-

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* This essay is the first result of an ongoing research project related to experimental law and cognitive neuroscience: a summary of it has also been recently published by an Italian law journal (*Diritto cognitivo. Prolegomeni a una ricerca*, 41 Politica del Diritto, 101-135 (2010)).

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1. The foundation of the Society for Neuroscience (SfN), which was established in 1969, conventionally represents the institutional consecration of neuroscience. From the point of view of scientific research, Nobel Prize winner John Eccles' work (since the 1950s mainly focused on the connections between neurobiology and neurochemistry) is usually seen as the starting off point. For further information about SfN's work, which now has 40,000 members worldwide and manages over 300 research projects, *See* Society For Neuroscience, http://www.sfn.org.

ful reviews of such developments are easily available,[2] our aim here is only to underline how much broader than the better known electroencephalography (EEG), functional magnetic resonance imaging (fMRI), and positron emission tomography (PET), often criticized for the limitations they encounter in terms of speed or spatial resolution and depth in recording neural activities. In particular, in addition to new experimental technologies still under development, such as transcranial magnetic stimulation (TMS) and the diffusion tensor imaging (DTI), we have long witnessed the emergence of useful combinations of different techniques of neuroimaging and research methods. We can here mention, for example, the eye-tracking process, which, through the layout of the eye movement in relation to images aimed at stimulating an attention reaction, reveals underlying cognitive operations. We can also mention pupil dilation, palm sweating, epidermal conductance, and hormonal reaction, all of which are aimed at recording the involuntary reactions of individuals under observation.[3] Last but not least, new achievements obtained by the so-called optogenetics have to be mentioned here, as they seem to open exciting scenarios related to real-time and highly precise scans of brain activities, due to the unprecedented possibilities to control genetically targeted neurons within intact neural circuits made available by such techniques.[4]

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2. A reference textbook is MICHAEL S. GAZZANIGA, RICHARD B. IVRY & GEORGE R. MANGUN, COGNITIVE NEUROSCIENCE: THE BIOLOGY OF THE MIND (3rd ed. 2008). For a very short but brilliant introduction to some recent, important findings of cognitive neuroscience, *see* Israel Rosenfield & Edward Ziff, *How the Mind Works: Revelations*, 55 N.Y. REV. BOOKS (June 26, 2008), *available at* http://www.nybooks.com/articles/21575.

3. Attention dedicated to these techniques and possible hybrids is growing worldwide: e.g. during a recent conference held by the European Association for Decision Making (EADM) two entire sessions were dedicated to new methods of visual processing and process tracking, together with a session entirely focused on the use of fMRI in recording neural processes. Eur. Ass'n Decision Making [International Conference on Subjective Probability, Utility and Decision Making,] (Aug. 23-27, 2009), *available at* http://discof.unitn.it/spudm22/.

4. Briefly, optogenetics is an emerging field combining optical and genetic techniques to probe neural circuits within intact mammals and other animals. This is obtained by introducing light-activated channels and enzymes that allow manipulation of neural activity with millisecond precision while maintaining cell-type resolution through the use of specific targeting mechanisms: after having introduced these biological devices ("opsins") within the brains of behaving animals, trains of action potentials at specific frequencies can be induced in appointed cell types. As it has been recently claimed, "these methods may help in providing circuit-level insight into the dynamics underlying complex mammalian behaviors in health and disease" Feng Zhang et al., *Optogenetic interrogation of neural circuits: technology for probing mammalian brain structures*, 5 NAT. PROT. 439, 439 (2010) http://www.stanford.edu/group/dlab/papers/zhang%20nprot%202010.pdf.

2. NEUROSCIENCE, ECONOMICS, 'NEUROECONOMICS'

Within the broader frame of a new evolutionary approach to social sciences,[5] and thanks to the aforementioned research methodologies, cognitive neuroscience has been able to reach a deeper knowledge of human cognitive principles and of the subsequent decision making processes. This is of course of extreme interest for disciplines such as economics and the law, as they deal with the study of human behavior in order to define and control social interactions.

Economic thought has been the first to understand the importance of such developments. We believe this has occurred thanks to the successful reappraisal of the principles of the so-called neoclassical economic school of thought. New studies have mainly focused on research concerning behavioral economics and have suggested the (re)introduction of psychological studies in the field of social science.[6] As a matter of fact, axiomatic rationality and its corollary of rational expectations (which means the foundations of neoclassical economics) have supported a positive modeling of human behavior. Nevertheless, the massive use of such rationality has prevented economic thought from fully understanding most of the real psychological mechanisms which regulate individual and group human behavior.[7] On the contrary, bounded rationality, gradually defined by behavioral economics researchers, gives a valuable insight of such mechanisms by supporting a reduced cognitive ability of the real economics agents, as they are usually influenced by a series of conditioning, prejudices, repeated assessment mistakes and operative simplifications.[8]

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5. For an updated survey of the issue let refer to Luca Arnaudo, *Talkin' Bout a Revolution. Some Thoughts on Social Science, New Evolutionary Studies, and the Law* 1-29, (SSRN Working Paper Series 1, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1729996.

6. Matthew Rabin, *A Perspective On Psychology And Economics*, 1-43 (U.C. BERKLEY, DEPT. OF ECON., Working Paper No. E02-313, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=713862. *See Generally* Luigino Bruni & Robert Sugden, *The Road Not Taken: How Psychology Was Removed From Economics, And How It Might Be Brought Back*, 117 EC. J. 146 (2007) (an intriguing analysis of this topic) *available at* http://onlinelibrary.wiley.com/doi/10.1111/j.1468-0297.2007.02005.x/pdf.

7. According to a sharp comment, "Von Neumann and Morgenstern were able to transform some plausible intuitions about human decisions into formal procedures and to express in an axiomatic form the theory of choice under risk conditions. With great modesty they considered their own achievement as a preliminary stage for further developments of the economic science (. . .) Most scholars ignored the prudence of the founding fathers and saw in Von Neumann and Morgenstern's rationality concept the solid rock upon which to build the elegant building of the economic science". MATTEO MOTTERLINI & FRANCESCO GUALA, *Psicologia ed esperimenti in economia*, *in* ECONOMIA COGNITIVA E SPERIMENTALE 2 (Matteo Motterlini & Francesco Guala eds., 2005). For some recent critical remarks on the "basic and simplistic assumptions about the behavior of the individual" allegedly adopted by rational choice theory, *see also* Yulie Foka-Kavalieraki & Aristides Hatzis, *Rational After All. Toward an Improved Theory of Rationality in Economics*, 12 REVUE DE PHILOSOPHIE ÈCONOMIQUE 3, 4 (2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1692441.

8. For a general introduction, also with a strong symbolic relevance for the academic community, *see* Daniel Kahneman, Princeton Univ. Dep't of Psy., Nobel Prize Lecture in Stockholm: *Maps of*

To this end, results obtained by cognitive neuroscience have been put together with psychological research in the field of economics. Therefore, it comes as no surprise that one of the main introductions to the so-called neuroeconomics describes it as "a specialization of behavioral economics that plans to use neural data to create a mathematical and neurally disciplined approach to the microfoundation of economics."[9] This definition is important as it clearly identifies new research paths borrowed from neuroscience on the subject of behavioral economics without breaking away from it intellectually and, at the same time, building a bridge with cognitive neuroscience.

However, we take the liberty of noticing how the prefix 'neuro' can lead to misunderstanding the general idea of the new discipline, thus forbearing a sort of neoscientism which we do not wish here to support. It is, therefore, useful to remember here the opinion delivered by a strong institutional supporter of behavioral economics: According to his words, for instance, "the field is misnamed – it should have been called cognitive economics. . . .We weren't brave enough."[10] This clarification will come in handy as we finally attempt to deal more specifically with potential relations between cognitive neuroscience and the law.

3. COGNITIVE NEUROSCIENCE AND THE LAW

"The question is not whether cognitive neuroscience will change law, but whether cognitive neuroscience should change law now."[11]

This statement, by happily assuming that the impact of neuroscientific findings on law is only a matter of time, fairly echoes the tone of debates currently held in the international scientific community. Despite being quite recent, this line of thought is already firmly grounded at the academic level, and important research programs on the subject are being carried out.[12]

As we mentioned at the beginning of this paper, the fact that these research studies have initially been carried out mainly in a common law environment has

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Bounded Rationality: A Perspective on Intuitive Judgement and Choice, (Dec. 8 2002), *available at* http://nobelprize.org/nobel_prizes/economics/laureates/2002/kahnemann-lecture.pdf.

9. Colin Camerer, *The Case for Mindful Economics*, *in* THE FOUNDATIONS OF POSITIVE AND NORMATIVE ECONOMICS 44, 44 (Andrew Caplin & Andrew Schotter eds., Oxford University Press 2008), *available at* www.e.u-tokyo.ac.jp/cemano/research/DRSS/documents/microCOE0806.pdf.

10. Craig Lambert, *The Marketplace of Perceptions,* 108 HARV. MAG, Mar.-Apr. 2006, at 50, 52 (quoting Eric Wanner, former President of the Russell Sage Foundation, which is a generous financial supporter of behavioral economics researchers since their beginnings), *available at* http://harvardmagazine.com/2006/03/neuroeconomics.pdf.

11. Joëlle Anne Moreno, *The Future of Neuroimaged Lie Detection and the Law*, 42 AKRON L. REV. 717, 737 (2009), *available at* www.uakron.edu/law/lawreview/v42/docs/Moreno.pdf.

12. The most ambitious is probably the one funded by the MacArthur Foundation, launched at the end of year 2007. For more information *see* The MacArthur Foundation Research Network on Law and Neuroscience, VAND. UNIV., www.lawandneuroscienceproject.org. On the European side, see Wellcome Trust Centre for Neuroimaging at the U. C. London http://www.fil.ion.ucl.ac.uk/.

given them a clear imprinting. Scholars have, in fact, focused first and foremost on expected developments and risks caused by the introduction of biometric technologies developed in the field of neuroscience in trial dynamics, especially regarding evidence examination in criminal trials.[13]

The use of clinical exam results as well as psychiatric examinations have long been adopted by courts of law around the world. These have gradually gathered and acknowledged medical innovations that have strongly contributed to redefining criteria ruling assessment of truth in the court of law. According to an incremental perspective, it could therefore seem possible to accept brain assessments made possible by EEG, PET, fMRI and the like, as undoubted evidence at a trial. However, history has taught us that the introduction of new techniques can lead to important cognitive changes that must be correctly channeled in the initial phase in order to avoid dangerous conceptual distortions or wrong applications. This is even more true when, as it is the case with cognitive neuroscience, technological innovation is followed by huge epistemological changes.

The use of further neuroscientific knowledge, or more simply trust in new techniques in the field may surely affect legal proceedings with sea-change consequences. A positive example of this is *Roper v. Simmons*,[14] which the Supreme Court in 2005 decided to exempt from the death penalty anyone under eighteen years of age. In fact, many commentators believed this ruling had been influenced by neuroscientific evidence presented by medical associations and scholars acting as *amici curiae* in order to prove that brain peculiarities in underage subjects may influence their behavior.[15] On the contrary, as an example of a far more controversial case is the one decided by the Pune Tribunal in India in 2008, where the judges charged the defendant with murder by relying upon the results of highly debatable technology and procedures of brain fingerprinting.[16]

From a more general perspective, the widespread presentation of brain scanning images (usually fMRI) in American courts of law as evidence to the individual's ability to act has been seriously challenged. A recent study shows that in most cases data put forward was so confused and lacking the necessary analysis so as to make their results useless. The study argues that data only influenced the jury when it was presented as scientific evidence.[17] As vividly stated

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13. For a recent survey *see* the collection of essays gathered in LAW, MIND AND BRAIN (Michael Freeman & Oliver R. Goodenough eds., 2009).

14. Roper v. Simmons, 543 U.S. 551 (2005).

15. Dean Mobbs, Hakwan C. Lau, Owen D. Jones & Christopher D. Frith, *Law, Responsibility, and the Brain*, 5 PLOS BIOL. 693, 698 (2007), *available at* http://ssrn.com/abstract=982487.

16. *See* Moreno, *supra* note 11, at 723-24.

17. Edward Vul, Christine Harris, Piotr Winkielman & Harold Pashler, *Puzzlingly High Correlations in fMRI Studies of Emotion, Personality, and Social Cognition*, 4 PERSP. PSYCHOL. SCI. 274 (2009), *available at* http://www.pashler.com/Articles/Vul_etal_2008inpress.pdf.

by another commentator, we are facing in this instance "the 'Christmas tree phenomenon' – jurors will be dazzled by the 'pretty lights' in the fMRI image and will not pay sufficient attention to the expert's interpretation of the image."[18]

All this considered, provided that every new technique (such as fMRI) requires recognizable and shared guidelines to be followed in order to be properly used for legal purposes,[19] and leaving out more technical considerations of the evidence assessment procedures,[20] the debate obviously leads to the implications of cognitive neuroscience with subjective liability. It is, in other words, the never-ending debate concerning free will and its legal consequences, now reloaded and revisited in the light of newly discovered relations between law and science, which we will briefly deal with in the following paragraph.

3.1. HUMAN RESPONSIBILITY IN THE LIGHT OF NEUROSCIENCE: SOME REMARKS

Numerous doctrinal contributions have tried to explain the difference between free will and determinism in the light of new findings brought about by cognitive neuroscience with regards to nervous system functioning. Papers of this kind usually study the connection between criminal behavior and verified brain injuries on the basis of numerous clinical case studies,[21] which however do not seem to have been systematically defined yet. Again, it must be also taken into account that these research studies have been carried out mainly by scholars with a background in common law, who therefore focus on institutions belonging to this law system; as for example *mens rea*, obviously neglecting

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18. Neal Feigenson, *Brain Imaging and Courtroom Evidence: On the Admissibility and Persuasiveness of fMRI*, 2 INT'L J.L. CONTEXT 233, 246 (2008) (citing Dean Mobbs, Paper Presented at Law, Mind, and Brain Interdisciplinary Colloquium at University College of London: *The Implications of Brain Imaging Studies for the Law* (Feb. 13, 2006)), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1301112. For an even stronger position on the same topic, with the concluding remark that "functional brain images should not currently be admitted into evidence to prove or rebut criminal *mens rea* charges", *see* Teneille Brown & Emily Murphy, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119, 1125 (2010).

19. Of extreme interest, therefore, is a recent article of Owen D. Jones, Joshua W. Buckholtz, Jeffrey D. Schall & René Morois, *Brain Imaging for Legal Thinkers: A Guide for the Perplexed*, 2009 STAN. TECH. L. REV. 5 (2009) *available at* http://stlr.stanford.edu/pdf/jones-brain-imaging.pdf.

20. Michael S. Gazzaniga, *The Law and Neuroscience*, 60 NEURON 412, 415 (2008) (provides some interesting remarks with reference to Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and FED R. EVID. 702), *available at* http://download.cell.com/neuron/pdf/PIIS0896627308008957.pdf.

21. For theories supporting interrelations between brain injuries of the orbitofrontal cortex and paedophilic tendencies *see* Mobbs et al., *supra* note 15, at 697 (referencing a clinical case reported in 2003), for a more recent study about possible correlations between antisocial behavior and anatomical brain differences *see* Michael Craig, et. al., *Altered Connections On The Road To Psychopathy*, 14 MOLECULAR PSYCHIATRY 946 (2009), *available at* http://www.nature.com/mp/journal/v14/n10/full/mp200940a.html.

specific developments achieved by continental penal schools in the field of conscience and will, guilt and mental connections.

From a more global perspective and with regards to all legal systems, it would seem viable (as it has already been suggested by some commentators) to reduce the impact neuroscientific findings have on the legal operative procedures. In fact, numerous legal principles and institutions have so far successfully come out of similar problematic encounters with science. For instance, this has been the case with the extraordinary developments in the fields of contemporary biology and genetics. The mentioned legal principles and institutions have so far operated even without the help of alleged or true neural basis of criminal behavior: we can therefore assume that they will be able to introduce current and future novelties without being conceptually disrupted. "New details, new sources of evidence, but nothing for which the law is fundamentally unprepared." Rather, "new neuroscience will affect the way we view the law, not by furnishing us with new ideas or arguments about the nature of human action, but by breathing new life into old ones."[22] This could occur, in particular, by revising some assumptions of free will and the subsequent prevailing position of retributive penalty.

From a different perspective, given that a better interpretation of cognitive mechanisms does not necessarily rule out a more in depth analysis of subsequent responsibilities, it is appropriate to review the notion of responsibility of the agent in order to insert it in a multi-factorial context. As it has been rightly said, in this regard "perhaps control, not freedom, is the appropriate notion to act as intermediary between decision and action on the one hand, and moral responsibility on the other."[23] The aforementioned control does not humiliate in any way the active role of the subject, but should take into consideration the complex cultural and biological interrelations typical of any kind of behavior, thus considering the contribution derived from an improved scientific knowledge as a crucial one, but just one of the wide range of elements. Neuroscience will therefore be able to develop new subjective behavioral statutes, more suitable to so-far-unexpected decisional methods which do not however, rule out the agent's responsibility.[24]

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22. Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B 1775, 1775 (2004), *available at* http://www.wjh.harvard.edu/~jgreene/GreeneWJH/GreeneCohenPhilTrans-04.pdf.

23. Adina Roskies, *Neuroscientific Challenges to Free Will and Responsibility*, 10 TRENDS COGNITIVE SCI 419, 423 (2006), *available at* www.unc.edu/~knobe/roskies.pdf.

24. As a matter of fact, "[n]euroscience can help us to sort through the various possible explanations of behavior by allowing us to better discriminate between the competing models as a result of the information it gives us about the brain mechanisms used to make the decision." *See* Terence Chorvat & Kevin McCabe, *The Brain and the Law*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B 1728 (2004), *available at* http://rstb.royalsocietypublishing.org/content/359/1451/1727.full.pdf.

While attempting to further discuss the topic, we will try to observe how neuroscience could change some legal areas of application and their operative assumptions.

3.2. COGNITIVE LAW: MAPPING THE FIELD

As a preliminary discussion to further research studies, and for the aforementioned lexical reasons, we could attempt to talk about 'cognitive law,' rather than 'neurolaw,'[25] as the series of studies which aim at using research, data and techniques derived from cognitive neuroscience in order to analyze, in the light of the best science available at the moment, the principles of human subjectivity in relation to behaviors that have legal relevance. These studies should also aim to highlighting the best guidelines and provisions to manage such behaviors.

In particular, among the tasks to be assigned to cognitive law we can legitimately find:

(1) A better understanding of individual personality as related to the subject's ability to react in order to assess his responsibilities (not exclusively the ones having penal relevance);
(2) a strengthening evidence related to the individual ability to act;
(3) an improvement of legal drafting and of the application of legislative and statutory provisions, in the light of a better knowledge of reactions to said provisions under a cognitive-behavioral profile.

Taking into consideration what was already (although very briefly) mentioned in this essay concerning the first two points, we will now look more in depth at the third point. Studies developed from current knowledge obtained by cognitive neuroscience seem able to shed new light and even to influence new methodologies to define legal-economic relations, as well as the provisions that are relevant to said relations. As it has already been observed in this regard, "understanding how human brains process information can facilitate the building of economic and legal institutions that better serve as extensions of our ability to enter into social exchange. It may help us both to structure institutions which aid in reciprocal or trusting behavior, and productively deal with risk and ambiguity."[26]

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25. *See* Michael Pardo & Dennis Patterson, *Philosophical Foundations of Law and Neuroscience,* [2010] 4 U. ILL. L. REV. 1211, 1211-1250 (2010) (discussing a rather critical use of terms like 'neurolaw' and 'neurolegalism'), *available at* http://illinoislawreview.org/wp-content/ilr-content/articles/2010/4/Pardo.pdf.

26. Terence Chorvat, Kevin McCabe and Vernon Smith, *Law and Neuroeconomics*, 26 (Geo. Mason U. Sch. of Law, Law and Econ. Working Paper Series No. 04-07) (citing J. Liu, A. Harris, & N. Kanwisher, *Stages of Processing in Face Perception: An Meg Study,* 5 NATURE NEUROSCIENCE 910 (2002)), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=501063.

We refer now to the possibilities offered by relevant neuroscientific research to obtain a better understanding of cognitive-behavioral profiles referable to disposition-accomplishment dynamics typical of the legal systems. The first applications that come to mind make reference to possible investigations on brain activities recordable in group tests: for instance, the participants in the experiments could be asked to consider different versions of a provision, meaning distinctive scenarios in terms of sanctions and regulations in a similar situation. From this, useful elements for a better definition of regulating data could be drawn (e.g. we could observe higher or lower emotional reactions based on interrelations traceable among specific areas of the brain), better incentives for its enforcement could be defined, and so on.[27]

However, for a similar development to start and for cognitive neuroscience to be really efficient, a widespread misunderstanding concerning such science must be cleared. We must therefore clearly state that research studies concerning cognitive-neural activities should never forget the cultural nature of individuals and their relevant behaviors. It follows that behavior is strongly influenced by the relevant socio-cultural context, and that these research studies should always follow a systematic-dynamic approach. According to this approach the cerebral localization of relevant functions represents the starting point and a useful criteria to set further interferences. It is not however a definite answer for any question regarding different conducts, representations or reactions, and it must not be taken as a reductionist support for a new, simplistic causalism.[28] The same must also be true when considering neural relations of stimulus-reaction, which instead are still setting off ingenuous enthusiasms based on mechanistic assumptions. This, we believe, humiliates the basic assumptions of developments so far achieved by cognitive neuroscience.[29]

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27. An interesting application of this kind of research and tests would be the so called *Regulation Impact Analysis*, as it has been promoted for years by many international institutions in order to improve the quality of the regulation, See generally *Regulatoy Impact Analysis, OECD*, http://www.oecd.org/document/49/0,3343,en_2649_34141_35258801_1_1_1_1,00.html. *See also*, ANDREA RENDA, LAW AND ECONOMICS IN THE RIA WORLD (2011).

28. "Like neuroreductionists generally, neurolegalists seek to reduce the explanation of all human behavior to the causal level. Believing as they do that "the mind is the brain", neurolegalists have attempted to account for mental capacities, abilities, and processes solely at the level of cortical function" Pardo & Patterson, *supra* note 25, at 1245.

29. Let us take as an example a recent claim according to which "neuroscientists have also located an area in the temporal lobe that, when stimulated electrically, produces intense religious feelings - *e.g.*, the sense of a holy presence or even explicit visions of god or Christ, even in otherwise unreligious people." (*see* Colin Camerer, George Loewenstein & Drazen Prelec, *Neuroeconomics: How Neuroscience Can Inform Economics*. 43 J. ECON. LIT. 9, 18 (2005) (citing Michael Persinger & Faye Healey, *Experimental Facilitation of the Sensed Presence: Possible Intercalation Between the Hemispheres Induced by Complex Magnetic Fields,* 190 J. NERV. MENT. DIS. 533, 533-41 (2002)). *available at* Http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.63.2976&rep=rep1&type=pdf.) In this regard we notice how, on the one hand, the subjective reaction to a stimulus clearly depends on the individual memory and the social and cultural surrounding in which the experiment is carried out (Jesus therefore may more easily appear in a test carried out, say, in Italy rather than in Saudi Arabia). On the

Following what we have just mentioned, interesting research trends are those aimed at highlighting, by means of brain scanning with different and combined techniques, cognitive activities which are seen as representing an action and its consequences: these must be taken as elements of a wider consideration regarding individual conduct. A recent study, for example, has examined cerebral activities involved in the representation of different conducts and the correlated definition of the appropriate sanctions to be applied. This study has also shown that the functioning of different areas of the brain can provide useful elements concerning the level of importance of emotional elements in the decision-making process according to the different cases presented. It is also important to observe that the aforementioned experiment even proved the functioning of the same neural mechanisms in making decisions of economic nature or sanctions proceedings.[30]

The aforementioned experiment takes us back to one of the main issues of this paper, namely the sustainability of cognitive interrelations between law and economics. We will attempt to deal with them in the following conclusive paragraph.

3.3. COGNITIVE LAW: SEEDING THE FIELD

Studies on social science are currently on the verge of an important epistemological revolution. In fact, as already said, even before the introduction of new knowledge provided by cognitive neuroscience, this revolution adopted research results of evolutionary biology and psychology as a primer, thus redirecting law and economics (among other disciplines) to a more realistic and less aprioristic approach to human behavior.[31]

Now, it seems impossible to deny that a better understanding of cognitive-decisional processes, starting from relevant information provided by cognitive

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other hand, longitudinal studies, meaning studies carried out over long periods of time, must be taken into consideration in order to assess men's most typical characteristic to stimuli, namely the process of reprocessing.

30. According to what is summed up by the researchers, "legal decision-making in criminal contexts includes two essential functions performed by impartial 'third parties:' assessing responsibility and determining an appropriate punishment. To explore the neural underpinnings of these processes, we scanned subjects with fMRI while they determined the appropriate punishment for crimes that varied in perpetrator responsibility and crime severity. Activity within regions linked to affective processing (amygdala, medial prefrontal and posterior cingulate cortex) predicted punishment magnitude for a range of criminal scenarios. By contrast, activity in right dorsolateral prefrontal cortex distinguished between scenarios on the basis of criminal responsibility, suggesting that it plays a key role in third-party punishment. The same prefrontal region has previously been shown to be involved in punishing unfair economic behavior in two-party interactions, raising the possibility that the cognitive processes supporting third-party legal decision-making and second-party economic norm enforcement may be supported by a common neural mechanism in human prefrontal cortex." *See* Joshua W. Buckholtz et at., *The Neural Correlates of Third-Party Punishment*, 60 NEURON 930, 930 (2008), *available at* http://www.downloadcell.com/neuron/pdf/PIIS0896627308008891.pdf.

31. *Cf.* Arnaudo, *supra* note 5, at 9-10.

neuroscience on human mind and knowledge organization, may help law as well as economics in better carrying out their tasks.[32] We are referring to law and economics cognitively improved, properly purified of mechanistic rigidities and open to work together towards achieving a cross fertilization of disciplines in order to better understand human behavior.[33]

The central position the economic analysis of law has within this process stands out. Let us here simply recall that, being a line of study which catches on the interesting novelties of the current economic thought, it surely represents one of the most relevant conceptual facilitations in that interrelation between common law and civil law which is extremely important from the point of view of a generalized cognitive law approach. As already mentioned, the success of the axiomatic neoclassical economic theory has had a strong influence on other social studies, which have often interpreted the assumptions of this theory in an undiscriminating and superficial manner. However we must not forget that, as far as law is concerned, the most careful experiences of economic analysis of the law have never overlooked the need for a cautious approach to formalization,[34] and they also supported the introduction of the main behavioral economics achievements within the legal field.[35]

Future developments of a similar approach, which finally has more solid neuroscience basis, can here only be vaguely identified, as they represent a real novelty. At the same time, they have to be managed carefully, keeping out superficial enthusiasms (as well as, we may add, excessive resistances to new, promising paths of research). However, according to what we have previously mentioned some of them seem to be easier to identify: we will claim them from the perspective of future research studies. Having already mentioned the legal aspects of evidence and subjective responsibility in the new light of cognitive neuroscience, we first refer now to the possibility of a useful fine-tuning of legal and regulatory provisions by relying upon evidence of a neural nature.

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32. As it has recently been stated, "How human beings interact is the core of social science research, and human interaction is, in turn, based on the nature of the human mind, so it seems natural that someone casting around for ways to improve the social sciences would turn to cognitive science - the science of the human mind". Mathew D. McCubbins & Mark Turner, *Going Cognitive: Tools for Rebuilding the Social Sciences* 1 (SSRN, WORKING PAPER SERIES 1, 2010) *available at* http://ssrn.com/abstract=1728262.

33. For a pioneering analysis of this kind, *see* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CALIF. L. REV. 1051 (2000), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=229937.

34. "What is a model for? It may even be elegant, but what if it is based on assumptions that blatantly deny the important elements of the reality in which legal procedure is discussed? Of course models aim at reducing complexity. In this case they are welcome, as long as reduction does not turn into reductionism and does not lead to twists that may only end up demonstrating what was known all along" (ROBERT COOTER et al, IL MERCATO DELLE REGOLE. ANALISI ECONOMICA DEL DIRITTO CIVILE 15 (2nd ed. 2006) (It.).

35. *See* EXPERIMENTAL LAW AND ECONOMICS (Jennifer H. Arlen & Eric L. Talley eds., 2008).

We then refer to possible applications in crucial issues such as the determination of proper/optimal sanctions and the consequent public law enforcement.

Moreover, we observe how a more in-depth study of the aforementioned profiles (first of all the one related to fining policies) can prove promising for sectors, such as antitrust, which represent a privileged passage between economics and law: This is also proven by recent attempts at introducing in this field an approach borrowed from behavioral economics.[36]

On the whole, it is a wide and fascinating research movement which surely needs to be more safely rooted, but which is of great interest to a social science culture open to change. All in all, we started with Alice and we are going to conclude with Hamlet. As disrespectful as it may sound, we refer to Shakespeare's famous statement in order to consider that, even if there are more things in heaven and earth than are dreamt of in our law and economics, this does not mean that we should not try to improve our cognitive ability to deal with them.

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36. Academic gold rush towards the establishment of a so called "behavioral antitrust" in on the run, with interesting (as well as highly debated) results. For a recent general survey *see* Amanda P. Reeves & Maurice E. Stucke, *Behavioral Antitrust*, 86 IND. L.J 1527 (2011) *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1582720.

U.S. Mortgages and Global Financial Markets: A Need for Better Authentication©

Robin Paul Malloy**

Introduction

As we have recently learned, there really is no such thing as a local financial market. The global financial crisis of 2008-09 (which will have implications for a number of years into the future) started with a problem in local housing markets in the United States. These seemingly local housing problems quickly escalated to the world stage as they filtered into the broader global securities markets by way of mortgaged related financial instruments. One of the things that became clear early on in this crisis was that the underlying real estate transactions, upon which mortgage related securities were issued, often had little economic substance behind them. These underlying real estate transactions were not what they were believed to be, or represented to be. These transactions bore no authentic relationship to the values upon which the related securities were thought to be based.

Interestingly, at the same time as the mortgage markets were collapsing for lack of authenticated economic substance, Bernie Madoff had his world unravel as the architect of a $50 billion Ponzi scheme. Both of these events focus attention on the same basic problem. Even in a highly regulated and allegedly transparent financial system such as that of the United States, no one can really ever know if there is real substance behind the financial investments we make. The best we can hope for is to lower and manage risk through a strong system of authentication.

In this paper I address two issues that arise from a look at the mortgage market collapse. These include: 1) the mistaken idea (based on work by Her-

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 Robin Paul Malloy is E.I. White Chair and Distinguished Professor of Law; Kauffman Professor of Entrepreneurship and Innovation, College of Law, Syracuse University. [www.law.syr.edu/rpm] This essay was delivered at the Third International Conference on Law and Economics, at St. Gallen University, Switzerland (2010). I wish to thank all of the organizers of the conference for their wonderful assistance. This essay provides a basic overview of how a simplified real estate transaction can create market implications for the broader mortgage and financial markets. The essay will appear in the Conference Papers Collection. Published as R.P. Malloy, A Need for Better Authentication (in Mortgage Markets), pp.109-128 in LAW AND ECONOMICS of GLOBAL FINANCIAL INSTITUTIONS (2010). The essay is based on a much more detailed article by the author published as R.P. Malloy, Mortgage Market Reform and the Fallacy of Self-Correcting Markets, 30 Pace Law Review 79-123 (2009).

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nando DeSoto) of assets and their legally documented representations as living parallel lives, and 2) the inverse prisoner's dilemma problem that contributes to the degradation of underlying real estate transactions. Each of these issues implicates the need for improved authentication procedures for transactions. In the context of fully integrated and global financial markets such authentication procedures need to be global in scope, and not simply the prerogative of a given jurisdiction. For example, the real estate housing markets in the United States depend on substantial investment from outside of the country, and the collapse of American mortgage markets can send the world into a financial crisis. Consequently, these seemingly local activities need to be addressed with input from global market participants.

In addressing these issues, the paper proceeds in several steps. First, it explains the exchange relationships involved in the underlying real estate markets, and the connections to primary and secondary mortgage markets. Second, it addresses the problem of thinking that the securities issued against underlying mortgages live a parallel life from the underlying exchanges themselves. Third, it suggests that there is an inverse prisoner's dilemma problem in the underlying exchanges, and this dilemma works to degrade the entire mortgage based financial market.

A Real Estate Transactions Perspective On U.S. Mortgage Markets

Real estate transactions involve the capturing and creating of value from exchange. Through trade and exchange, opportunities for capturing and creating value emerge and these opportunities incentivize further trades and exchanges. These underlying transactions occur at the primary market level and form the ground and foundation for secondary market activities such as those in the secondary mortgage market.

This part of the paper addresses the exchange relationships among key participants in the primary market, the secondary market, and the third party investors in mortgage related securities. It finishes with a brief discussion of the regulatory importance of dealing with the underlying real estate transaction as fundamental to any effort to reform the secondary market and its securities based operations.

a) The Primary Market

At the core of every transaction in mortgaged backed securities is an underlying transaction in real estate. Thus, we need to understand the nature and quality of the underlying transaction if we hope to get a handle on the current crisis in financial markets.

In a basic home sale transaction we have three transactional perspectives to consider.[1] The primary parties to a purchase and sale agreement are the buyer and the seller of the property. The secondary parties to this transaction are people engaged in administrative and managerial transactions related to the basic purchase and sale agreement. These parties might typically include: brokers, attorneys, a title company, an insurance company, a surveyor, and a loan originator for the mortgage loan. The transcendent third parties are not directly involved in the deal but have a potential future interest in the underlying transaction. These include people meant to be protected by the maintenance of the public records and potential investors further down the transactional chain; potential future buyers and creditors.[2]

The basic exchange relationship of a real estate transaction is illustrated in Diagram 1, below.

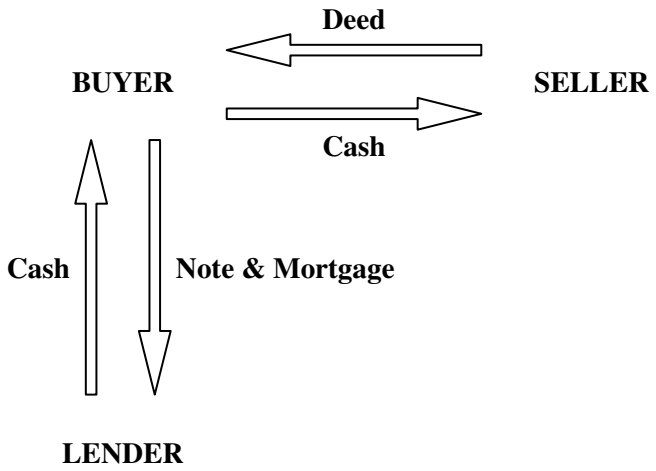

DIAGRAM I. REAL ESTATE TRANSACTIONS AND THE PRIMARY MORTGAGE MARKET

In Diagram 1, above, the basic real estate transaction is illustrated. Seller conveys the agreed upon interest in property to the buyer for a benefit.[3] A typical transaction involves a money payment in exchange for delivery of a deed (this is illustrated in the horizontal exchange depicted in diagram 1, above). Frequently, the buyer does not pay the full purchase price out of her own resources; instead the transaction is leveraged as the buyer finances a large portion of the expense in exchange for providing a mortgage to a lender.[4] This

1. *See generally*, ROBIN PAUL MALLOY AND JAMES CHARLES SMITH, REAL ESTATE TRANSACTIONS 3rd, (2007).
2. *Id.* at 231-268 (discussing the public records).
3. *Id.* at 1-180 (discussing basic contract considerations).
4. *Id.* at 367-510 (discussing basic mortgage considerations).

is shown as the exchange relationship on the left-vertical side of the diagram. In a standard home loan, the lender of the funds secures the repayment of the loan with a promissory note and a mortgage. The note is the promise to repay the loan on the stated terms, and the mortgage provides a conditional claim to the property in the event that the buyer/borrower does not live up to the terms of the promise to repay.

This set of exchange relationships can appear to be very much localized in the absence of a secondary market for mortgages.[5] In the days before a robust secondary mortgage market, a typical home lender would make a loan and hold it in its investment loan portfolio.[6] To be profitable, the lender would need to maintain a positive spread between its cost of funds and the return on its investments, including the mortgage loans it is holding.[7] In the event that a lender elects to make risky loans, without treating them appropriately, the risk of low quality lending would impact on the financial stability of the lender, and any losses would be borne primarily by that institution.

The relationships in this exchange situation establish a congruence of interest between borrower and lender, at least to the extent that each wants the underlying deal and its documentation to be correct, enforceable, and consistent with their risk and investment expectations. As to sellers, once they get their cash they often have little interest in what happens next, unless they have some serious continuing liability under the terms of the conveyance. If there is such a continuing liability it is likely to arise under the instrument of conveyance rather than on the contract because of the doctrine of merger.[8]

In securing financing for the purchase of the property, buyer enters the primary mortgage market. Diagram II, below, illustrates the basic exchange relationships in the primary mortgage market.

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5. *See generally*, ROBIN PAUL MALLOY, LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS, 50-57 (2004) (on how the secondary mortgage market transformed the local home financing system).

6. Malloy and Smith, *Real Estate Transactions* 3rd, *supra* note 1, (also see the 1st edition of this book regarding the same information, 1st edition 1998).

7. *Id.*

8. *Id.*, *supra* note 1, at 145-152 (doctrine of merger).

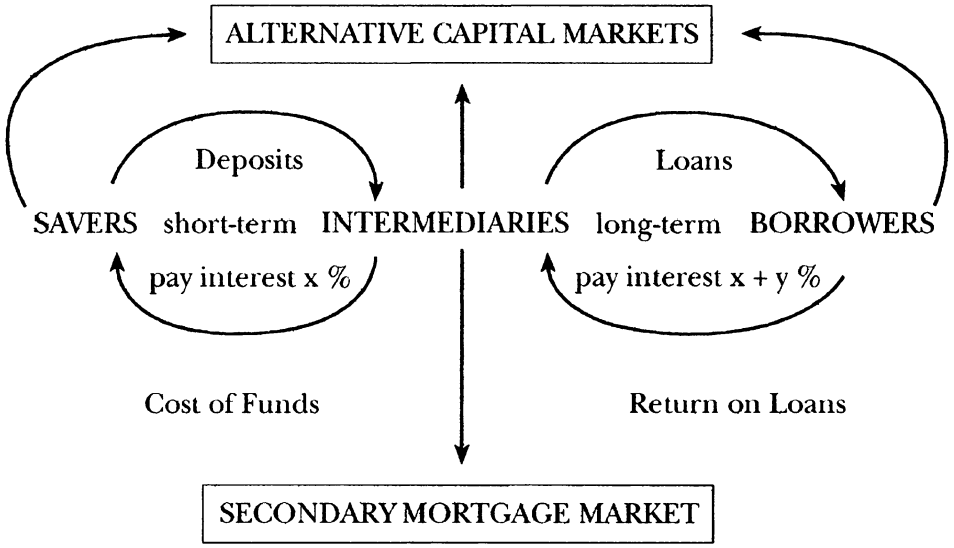

DIAGRAM II THE PRIMARY MORTGAGE MARKET[9]

In Diagram II above we see the primary transaction as it appears when a primary mortgage market is established to interface with other financial networks. In this diagram we see that savers and borrowers have options in the marketplace. There are multiple sources for lending and multiple places to invest one's savings. Financial intermediaries function to bring savers and borrowers together and make a profit by keeping a positive spread between their cost of funds and the return on their investments. In real estate transactions we have intermediaries that deal in mortgages; they compete for savers/investors against other types of investments available in the broader capital markets, such as the market for corporate stocks and bonds. The lenders that make the loans to the parties in the underlying real estate transaction are the originators of the primary mortgages. They often use in-house or external mortgage brokers who work for fees and commissions to originate the mortgages. Primary lenders should basically provide confirmation as to certain aspects of the underlying real estate transaction by verifying such things as the property appraisal against the contract and mortgage price based on underwriting standards meant to reduce the risk of default.

B) THE SECONDARY MARKET

The secondary mortgage market creates opportunities for primary lenders to sell the mortgages that they originate. This enhances liquidity, reduces risk by diversifying the primary lender's investment portfolio and increases the availa-

9. Malloy and Smith, *Real Estate Transactions* 3rd, *supra* note 1, at 380 (used with permission).

ble funds for lending by recharging the assets of the primary lender. There are both public related and private entities functioning as secondary mortgage market intermediaries. These entities buy and sell loans and loan participations as well as package loans into pools for securitization. They also issue various mortgage related securities and bonds and sell these into the financial markets. Diagram III, below, illustrates the basic exchange relationships of the secondary mortgage market.

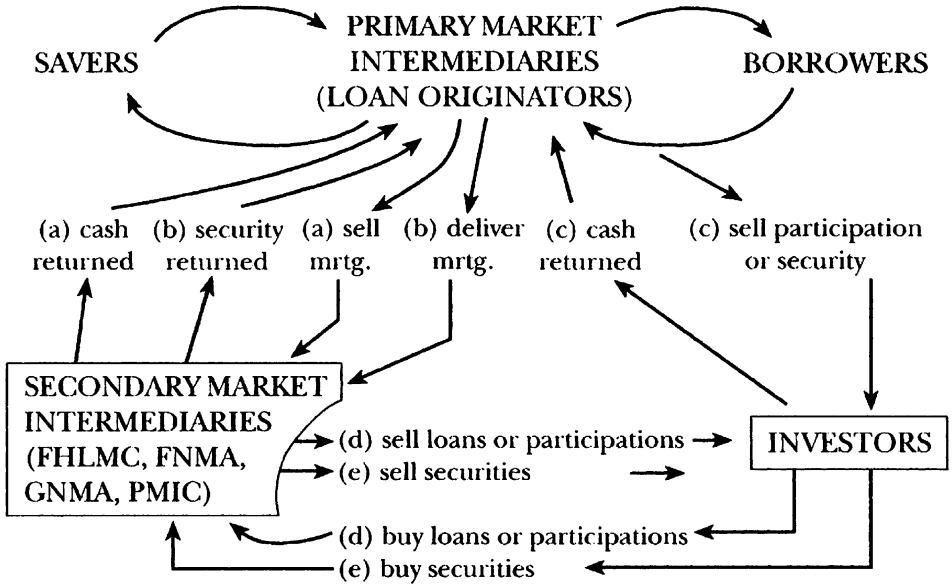

DIAGRAM III THE SECONDARY MORTGAGE MARKET[10]

The secondary mortgage market not only creates a market for primary mortgages, it changes the underlying relationships in the primary market. Prior to the secondary market emergence in the United States around 1980, the primary lenders originated and held their loans. This gave them a vested interest in the quality of the loans and in maintaining good relations with their customers. With the rise of the secondary market, primary lenders were able to sell the mortgages at par (face value and without a discount)[11] to recharge their assets and this provided the opportunity to make money from fees for generating new mortgages rather than from simply originating and holding loans as an investment. In this new situation, lenders shifted their focus to providing services and

10. Malloy and Smith, *Real Estate Transactions* 3rd, *supra* note 1, at 382 (used with permission). (Note that FNMA, GNMA, PMIC are abbreviations for early institutional players in these markets.)

11. One way this is done is by using points that can be passed on to the borrower as closing costs, with the points covering the amount that otherwise would be discounted against face value. *See generally* Malloy and Smith, *Real Estate Transactions* 3rd, *supra* note 1, at 383-84 (discussing this point).

products welcomed by the secondary market intermediaries.[12] The catering to local homebuyers seeking a loan became much less significant to banking operations, as money was to be made in churning the paper of loan originations rather than by cultivating relationships based on long-term lend and hold investment strategies. Transactions became more uniform, standardized, and driven by a desire for fee and servicing income based on relatively quick sales of mortgages to the secondary market intermediaries.

The secondary market also created an exchange environment that influenced behavior in the primary market, beyond that of switching from a loan and hold, to a fund and sell operation. Primary lenders began to adjust their underwriting standards and their risk tolerance based on the willingness of secondary market intermediaries to take non-conforming and subprime loans.[13] As long as there was a market for what they originated, the primary lenders could simply collect their fees and sell the loan off to recharge their asset base and make more fee income. The underlying economic goal of this behavior was not to limit one's self to some personal or idealized standard of loan quality, but to maximize profit based on what one can sell in the relevant secondary market. The underwriting standards of the secondary market intermediaries (the entities purchasing loans from originators in the primary market) changed over time making it easier to fund more borrowers for home mortgages. This was encouraged by federal government policy to advance the idea of "an ownership society" and to further diversify homeownership in terms of race. As the secondary market underwriting standards were made easier, primary market originators adjusted their activities to reflect tolerance for greater risk; risk supported by government incentive structures and applied to all lending, but most specifically to Alt.-A and subprime mortgages.

c) Third Party Investors

Third party investors purchase securities issued against the anticipated and expected value of the cash flow on the underlying mortgages associated with a given issue. The underlying cash flow supports the value of the security but the investor does not typically become an owner of the individual mortgage loans themselves. On the other hand, some investors purchase loan participations that

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12. *See* Malloy, *Law and Market Economy supra* note 5, at 50-57.

13. For a discussion on these lowered lending standards, *see generally* Raymond H. Brescia, *Capital in Chaos: The Subprime Mortgage Crisis and the Social Capital Response,* 56 CLEV. ST. L. REV. 271, 295; Rayth T. Myers, *Foreclosing on the Subprime Loan Crisis: Why Current Regulations Are Flawed and What is Needed to Stop Another Crisis from Occurring*, 87 OR. L. REV. 311, 313 (2008); Benjamin Howell, E*xploiting Race and Space: Concentrated Subprime Lending as Housing Discrimination*, 94 CALIF. L. REV. 101, 125 (2006). Lower standards also included use of negative amortization loans, and piggy back financing where a lender would fund the borrower's 20% equity requirement with a second mortgage so that the borrower really had no equity in the property. Malloy and Smith, *Real Estate Transactions* 3rd *supra* note 1, at 383-399.

give them direct rights to cash flow of a given underlying mortgage or mortgages. In either situation, early payoffs from refinancing, default, and foreclosure can impact the expected value of the cash flow from a given security. Thus, accurate pricing and valuation depend on the quality of the underlying transactions, and, more particularly, on the quality, validity and authenticity of the information about the underlying transactions.[14]

Investors have little firsthand knowledge of the underlying documentation or of the legal rules applicable to the underlying transaction. They rely on the basic uniformity of standardized mortgage documents and the fact that both the primary and secondary intermediaries approved the loans. This reliance factor is enhanced by the presence of two very dominant entities with implicit, although not express, backing of the United States government; Fannie Mae and Freddie Mac. In fact, it is known that the Federal government encouraged loan originations on new and lower underwriting standards.[15]

In the process of packaging and selling mortgaged based securities many complicated financing devices and insurance arrangements obscured information for investors, but to a certain extent the impact of the financial complications are uncertain since many of the investors in these mortgage related instruments were simply buying each other's obligations. In other words, primary market originators were also active investors, thus, investors were, in part, buying each other's bad loans.[16]

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14. Much of what we do in a transactional law practice involves what I have called "transactional authentication". This means we spend time confirming the authenticity of the buyer, seller, the documents, the property, the reality of the mortgage and the credit behind it, etc. These transactions often take place as representations of the property and the debt (dealing in paper representations such as deeds, notes, and mortgages) and we must confirm that the paper representations are of something that is real. For instance, the presence of a paper deed does not verify the existence of the actual property to which the deed refers. As to pricing of these transactions, there are a number of issues including calculation of the expected life of the mortgage as opposed to its stated term. A typical residential mortgage will be for a stated term of 30 years but in reality the life will generally be very much shorter. This occurs for several reasons including a sale of the home, a refinance, or a default. The typical American moves about every five years, for instance, and would generally pay off an outstanding mortgage at the time of the move. *See generally*, Robin Paul Malloy, *Inclusion By Design: Accessible Housing and Mobility Impairment*, 60 HASTINGS L.J. 699, 726 (2009) (discussing housing demographics).

15. *See*, Russell Roberts, *How Government Stoked the Mania*, WALL ST. J., October 3, 2008, A-21, col 1. Congress pushed Fannie Mae and Freddie Mac to make more and more loans to people of lower income, and many of these loans were in the troubled subprime mortgage markets. *Id.* "Fannie and Freddie played a significant role in the explosion of subprime mortgages and subprime mortgage-backed securities." *Id. See also* Ruth Simon, *Mortgage Delinquencies Accelerated During 2007*, WALL ST. J., August 7, 2008, A-3. "Evidence that lax lending standards were leading to higher mortgage delinquencies first emerged in late 2006." *Id.*

16. *See* Carrick Mollenkamp, *Faulty Assumptions: In Home-Lending Push, Banks Misjudged Risk —- HSBC Borrowers Fall Behind on Payments; Hiring More Collectors*, WALL ST. J., February 8, 2007, at A1; Paul Beckett and John Hechinger, Subprime' Could Be Bad News for Banks —- Riskier Loans, Now Prevalent in Industry, Show Problems, WALL ST.J. August 9, 2001, at C1.

THE UNDERLYING REAL ESTATE TRANSACTION AND ITS PARALLEL LIFE

It is important to focus on the underlying real estate transaction in the primary market when considering the future of secondary mortgage market activity. The quality and reliability of the underlying transaction is directly linked to the value of the mortgage based securities in the secondary mortgage market, and thus regulatory reform is required in both markets. One market deals with the property itself, as represented by the deed and other closing documents, and the other market deals in the representations of the underlying transaction. The ability to create documentary representations of the property and then to deal in both the property and its representations adds leverage and liquidity.[17]

For example, by creating deeds, mortgages, and title records we permit property owners to convey an interest in land that can be recorded and used as collateral for borrowing money. Here the deed is a paper representation of rights of ownership in the property, and the mortgage represents a contingent claim of a creditor to proceed against the property, as represented by the deed, in the event of nonpayment on the debtor/property owner's promise to repay the loan. The mortgage simultaneously, when coupled with a promissory note, represents rights to cash flow in terms of the principle and interest to be paid back on the loan. All of these documents can be recorded in the public records so that the market for exchange expands to include people who are distant from the parties to the underlying transaction. With verifiable public records, distant creditors and potential future buyers can extend funds to people with the appropriate documentation of ownership without having personal knowledge of the property or the parties involved.[18] Moreover, an entirely new set of transactions can be developed with respect to representations in the form of mortgaged backed securities. These securities represent rights in the cash flow generated by the underlying mortgages which are themselves supported by the underlying documentation that represents an ownership claim to the property to which they

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17. *See* ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT: AN INTRODUCTION TO MARKET CONCEPTS IN LEGAL REASONING 10, 82-84, 108-109 (2004); HERNANDO DESOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE (2000).

> In the west, . . ., every parcel of land, every building, every piece of equipment, or store of inventories is represented in a property document that is the visible sign of a vast hidden process that connects all of these assets to the rest of the economy. Thanks to this representational process, assets can lead an invisible, parallel life alongside their material existence. They can be used as collateral for credit. The single most important source of funds for new business in the United States is a mortgage on the entrepreneur's house. These assets can also provide a link to the owner's credit history, an accountable address for collection of debts and taxes, the basis for the creation of reliable and universal public utilities, and a foundation for the creation of securities (like mortgage-backed bonds) that can then be rediscounted and sold in secondary markets. By this process the West injects life into assets and makes them generate capital.

DeSoto, *Mystery* at 6.

18. *See* DeSoto, *Mystery*, *supra* note 17.

make reference. Consequently, one observes a market in the land, and market activity in the primary and secondary representations of the land. The secondary mortgage market is essentially a market in the representations of the representations of the value of the underlying land transaction.

It is important to recognize that the market activity in the documents is a derivative or induced market with respect to the underlying transactions in the land itself.[19] Thus, the documentary or induced transactions are not living in some binary and parallel universe with respect to the underlying transaction; these transactions are directly connected.

Two significant errors may arise from not appreciating the deep connection between the underlying real estate transaction and the market for mortgage backed securities. First, one may erroneously assume that the market for mortgage backed securities is independent of the underlying real estate transaction; thus believing that the underlying transactions and the secondary market exchanges live parallel lives.[20] As a consequence, attention is focused on the securities market with little interest in looking back at the fundamentals of the underlying mortgage markets, and this is problematic because the quality of the underlying real estate transaction establishes the real value of the securities that are themselves representations of the underlying exchange. In short, people dealing with mortgage backed securities may come to believe that property, itself, does not matter.

The second error occurs in thinking, that the market values of the induced transactions (those transactions in the secondary market) are the same as those equilibrium values predetermined by the relevant values of the underlying real estate transactions.[21] In other words, the first error is compounded by believing that the value of the induced transaction is basically the same as the value of the underlying transaction such that one only needs to know the price of the mortgage backed security to assume the value of the underlying real estate transaction. This is incorrect because the value of the underlying real estate transaction expresses a degree of freedom with respect to the price of the induced transaction, or stated differently, the value of the induced transaction is not fully determined by or covariant with the underlying transaction.[22] Consequently, buying and selling mortgage related securities at a good price and high profit does not mean that the underlying real estate transactions are of similar good value, nor even that they are economically sound. In other words, the underlying real estate transaction should, but may not, reflect the requisite value attributable to

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19. *See* Malloy, *Law and Market Economy*, *supra* note 5, at 83-85; ISRAEL M. KIRZNER, THE MEANING OF MARKET PROCESS 42 (1992).

20. *See* Desoto, supra note 17, at 6, (. . . assets can lead an invisible, PARALLEL LIFE [emphasis added] alongside the material existence."). (full quote in note 17 *supra*)

21. *See supra* note 19.

22. *See supra* note 19.

it by the secondary market. Again, more attention needs to be paid to the quality and value of the underlying real estate transactions because they substantiate the expected market value of the induced transactions in the secondary mortgage market.

AN INVERSE PRISONER'S DILEMMA PROBLEM IN THE UNDERLYING REAL ESTATE TRANSACTION

Correcting the secondary mortgage market requires that we also attend to problems manifesting themselves in the primary market, at the intersection of the underlying real estate transaction and the loan origination process. One source of problems here is related to what I think of as an inverse prisoner's dilemma problem. In the standard prisoner's dilemma we confront a situation in which transacting parties confront various transaction costs which drive them to take non-cooperative positions resulting in inefficiencies, and these inefficiencies generate less than optimal social benefits.[23] In the standard analysis of the prisoner's dilemma efforts are undertaken to use law to reduce the interfering transaction costs so that the transacting parties will cooperate and negotiate to an efficient exchange relationship. In the current (pre-meltdown) environment a number of problems can be better understood by thinking in terms of an inverse prisoner's dilemma.[24] To a significant degree the problem in the primary mortgage market is one of cooperation rather than failure to cooperate. The incentive structure of the underlying transaction favors cooperation in misbehavior and fraud.[25] In papering fraudulent transactions with hyped up appraisals, bad surveys, and simultaneous flips, it takes more than one participant to succeed.[26] The underlying transactions have basically become degraded and

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23. *See* Malloy, *Law and Market Economy*, *supra* note 5, at 130-32 (discussing the Prisoner's Dilemma); Richard H. McAdams, *Beyond the Prisoner's Dilemma: Coordination, Game Theory, and Law 82* S. CAL. L. REV. 2009 (2009).

24. *See supra* note 23.

25. *See generally* Brescia, *Capital in Chaos*, *supra* note 13, at 292; Gretchen Morgenson, *Inside the Countrywide Lending Spree*, WASH. POST, August 26, 2007, at 3, 1; Bob Tedeschi, *Report Piles Blame on Brokers*, N.Y. TIMES, April 20, 2008, at Re. 10; Julie Creswell and Vikas Bajaj, *A Mortgage Crisis Begins to Spiral, and the Causalities Mount,* N.Y. TIMES, March 5, 2007, at C 1; Kathleen Day, *Villains in the Mortgage Mess? Start as Wall Street Keeps Going*, WASH. POST, June 1, 2008, at B 1.

26. *See e.g.* Michael M. Philps, *Would You Pay $103,000 for this Arizona Fixer-Upper?,* WALL ST. J., January 3-4 (weekend edition) 2009, A-1, col. 3. The article chronicles the financing of a property valued at $15,000 for $103,000 to a woman who had been without a job for 13 years and whose only source of income was welfare and food stamps. *Id*. at A-1, A-6. For a fee of $350 an appraiser valued the house at $132,000 without ever looking at it. *Id*. at A-6. The house is condemned with a notice stapled to the wall that says "unfit for human occupation". *Id*. at A-1. The mortgage was originated by a small mortgage firm named Integrity (a firm located in Arizona), and it collected $6,153 in fees for the origination. *Id.* at A-6. The loan was sold to Wells Fargo and then to the London-based HSBC. Id. The mortgage was then bundled with 4,050 other mortgages and used as collateral for a security issued in July of 2007. *Id.*

corrupt and there is a need for legal action to reduce the incentive to cooperate among the misbehaving participants.

In this section of the essay discussion focuses on the underlying real estate transaction and suggests ways to reduce the incentive to cooperate in degraded transactions by changing the existing exchange relationships.

In the American housing market the problem is that real estate transactions are controlled by a unified gatekeeper and overly incentivized by commission based compensation among repeat players. The origination and securitization process rewards participants according to the quantity of loans generated and not according to the quality of the loans. Rewards are high for writing loans and the penalties are absent or meaningless for originating bad loans (short of being able to prove outright fraud).

As relates to the inverse prisoner's dilemma problem, the real estate sales person and the loan originator often function as gatekeepers for coordinating ancillary services provided by such parties as appraisers, surveyors, title insurers, and closing attorneys. Today these gatekeepers not only prepare the purchase and sale contract but also connect the buyer to a loan originator as well as the other ancillary service providers. In this role as gatekeeper, a sales person, just like the loan originator, is incentivized by making a sale and earning a commission. Even when good intentions are in play, the incentive structure works to facilitate cooperation in a sense that is not always positive. Appraisers, title companies, surveyors, and closing attorneys know that their business is contingent upon cooperation with the gatekeepers who deal in volume. Being cut out of the transaction because one is perceived by a gatekeeper as being difficult to work with, too cautious, a "deal killer" by slowing up the deal, or for following practice guidelines that cost more than the services others will provide means the end of a profitable business relationship. Many business players in the residential market depend on referrals and inclusion by the gatekeepers in order to make a living. Competition that is not properly policed and regulated, therefore, often results in an incentive to cut corners and go along with degraded transactions, even if the deal is economically unsound. The process becomes something like a game of musical chairs where everyone needs to keep playing until the music stops. If everyone else is playing and you sit it out, you simply lose out on the easy money, and if you are an entity with stockholders, the stockholders will seek to replace management (or move to other stocks) for failing to make as much as the competing parties are making.

One of the key underlying problems, of course, involves asymmetrical information.[27] The buyer/borrowers in these transactions have inferior information and typically less knowledge than the parties who are regular participants in the

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27. *See* Malloy, *Law in a Market Context*, *supra* note 17, at 169-172 (discussing asymmetrical information).

networks of primary and secondary mortgage market financing. Consequently, the consumer is in no real position to police or even fully understand the weaknesses of the system in which she is operating. This weakness is not fully corrected by government requirements for pages of disclosure information which most people don't really read or bother to understand, especially since sales people generally are willing to offer a watered down assurance of everything being just fine. It is difficult and perhaps even economically irrational for consumers to spend the time and effort to actually overcome the asymmetrical information problem such that we cannot rely on consumers to correct the market on their own, public regulation is required.

One way to address this problem is by making the underlying transaction more competitive and transparent. Transparency reduces the cost of authenticating the exchange, and the benefits of competition arise from having adversarial participants. Someone has to be incentivized and motivated to care about the quality of the underlying loans rather than simply about generating high volumes of loan originations. Lawyers used to play this role, and perhaps the exchange process can be adjusted to recreate this kind of atmosphere. Returning lawyers to the transaction will beneficially alter the exchange relationship of the transaction. Lawyers are not sales people and they have expertise in the underlying subject matter of the sale and the mortgage financing. More importantly, they are advocates who understand the transactional benefits of an adversarial process. They understand that some transaction costs generate positive social externalities.[28] The attorney does not work on a commission, does not rely on the closing of the transaction to earn a fee, and is held to a professional code of conduct that reduces the incentive for participation in transactional misbehavior. If all parties are represented by attorneys, a rare situation in today's marketplace, there is likely to be a much higher quality transaction and thus a higher quality basis for the derivative transactions in the mortgage backed securities markets. Similarly, if lenders had to hold the loans they generated or retained significant liability for degraded loans there might be more care in the process.

In addition, there should be an incentive structure to encourage participants in a transaction to report misbehavior and fraud to the proper law enforcement authorities. For example, a person reporting the use of hyped-up appraisals or questionable and simultaneous flips might be rewarded with triple the amount of the closing costs, plus attorney fees and cost. This, or something like it, would help break the degraded cooperation that has undermined the soundness of the mortgage markets. We might also require that residential housing loans

28. *See* David M. Driesen and Shubha Ghosh, *The Functions of Transaction Costs: Rethinking Transaction Cost Minimization in a World of Friction*, 47 ARIZ. L. REV. 61 (2005).

be funded by specially charted and registered financial institutions doing nothing but residential mortgages.

Making these changes may increase the cost of closing a given transaction, but then it may save much more than it costs by dramatically improving market outcomes. In other words, increased costs on the individual underlying transactions can nonetheless generate positive externalities for the society that far exceed the costs.[29] Avoiding the hundreds of billions of dollars in catastrophic losses that we are now experiencing would be worth slight increases in the cost of doing the underlying transactions.[30] There are a number of values and factors to consider in comparing overall costs and benefits at the individual micro level and the broader macro level. People just need to face up to the fact that there are expenses and transaction costs that accompany buying and owning a home. These include paying reasonable attorney fees and confronting a given set of transaction costs that lead to positive social benefits for the entire system.

If we want to assist people in buying a first home we should avoid subsidizing them in ways that push them into economically unsound mortgage relationships and that unnecessarily degrade the mortgage market. It is better to get them into mortgages where they can afford the monthly payments, and subsidize them only in terms of the closing costs of getting into a first home.

CONCLUSION

The current global financial crisis is a complex one with many causes. A trigger to this crisis was the collapse of housing and mortgage markets in the United States. And this collapse can be traced back to weaknesses in the economic substance of the underlying real estate transactions in the primary mortgage market. Therefore, as we think about the future of financial regulation and the mortgage related securities markets we must look carefully at the quality of the underlying exchanges. The quality of the primary market transaction drives the potential results that we can expect in the secondary market. With low quality going into the system we will certainly get low quality coming out. Thus, planning for the future of financial regulation must include steps to improve the underlying real estate transaction and its easy authentication.

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29. *Id.*

30. Worldwide losses on bad loans and securitization are estimated to be $4.1 trillion. Harry Maurer & Cristina Linblad, *One Nasty Slump*, BUS. WK., May 4, 2009, at 5.

The Punitive Pregnancy Matrix: Thinking Critically About the Patriarchal Motivations behind Child Abuse Prosecutions for Prenatal Drug Use among American Mothers

Lia A. Mandaglio*

I. The Punitive-Pregnancy Matrix

Approximately six million pregnancies occur every year in the United States.[1] Of them, approximately forty percent are lost or terminated and fourteen percent are subject to medical complications.[2] Factors known to affect the health of a pregnancy are innumerable and fluctuate with scientific development and cultural stigma. However, all factors or sources of harm affecting pregnancy, regardless of their content and era, generally exist within one of four categories: (I) factors intrinsic to the fetus (i.e. its genetic composition)[3], (II) factors intrinsic to the mother (i.e. her physical structure or age), (III) factors foreign but internal to the mother (e.g. the substances or organisms that enter her body), or (IV) factors external to the mother (i.e. her environment).[4]

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1. Ctr. for Disease Control & Prevention, *U.S. Pregnancy Rate Down from Peak; Births and Abortions on the Decline,* (Oct, 23, 2003), http://www.cdc.gov/nchs/pressroom/03facts/pregbirths.htm (last visited Dec. 11, 2009).

2. The Am. Pregnancy Ass'n, *Statistics* (2000-2009), http://www.americanpregnancy.org/main/statistics.html (last visited Dec. 11, 2009).

3. This genetic category consists of the fetus's unique combination of maternal and paternal heredity. In doing so, it accounts for any physical paternal factors that could affect pregnancy, given that no readily available data suggest that physiological paternal factors could influence a fetus's prenatal experience through means other than the child's genetic makeup without first functionally falling within one of the other three categories listed above. That is, health-related paternal issues that could affect pregnancy (e.g. sexually transmitted diseases) would technically classify as Category III (factors foreign but internal to the mother), because the maternal relation to that factor intervenes between the factor's relation to the fetus and to the father.

4. While these categories appear potentially subject to overlap (e.g. when an abusive environment or a maternal gene creates a structural defect in the mother), they are generally not. For example, an abusive environment causing a maternal structural defect is a Category IV factor rather than a Category II factor, because the structural defect is not intrinsic to the mother. Instead, the defect is the function of an extrinsic factor. Likewise, a maternal gene causing a structural defect in the mother that affects the fetus falls under Category II rather than Category I, because the maternal gene is not affecting the pregnancy as an intrinsic (genetic) element of the fetus. The gene affectsthe pregnancy as an intrinsic (genetic and structural) element of the mother. An exception would exist if the gene also affected the pregnancy based on its role in the child's genetic composition, in which case, the factor would classify as both Category II and Category I; though, it would most accurately be grouped with Category I factors.

Societal criticism surrounding pregnancy loss and complications (including the births of unhealthy or disabled infants) varies according to these four categories with key superseding dimensions of societal concern dictating the strength and effect of that criticism. For instance, whether the criticism will render effects as nebulous and personal as a mother's feelings of shame and female inferiority or effects as committed and collective as a mother's prosecution and imprisonment for child abuse or endangerment. These superseding dimensions include (A) attributions of causal responsibility for the pregnancy complication or infant ailment (B), the extent to which the given complication or ailment is perceived as threatening to patriarchal power over the means of reproduction, and (C) the ease with which laws could be imposed with regard to a particular type of pregnancy complication or infant ailment, given the existing legal framework, to facilitate societal control over the means of reproduction. These three dimensions of societal concern necessarily affect the likelihood that a particular prenatal maternal act could become subject to criminal prosecution under a theory of child abuse or endangerment. Though these three dimensions are not the only societal concerns dictating the probability of maternal prosecution, they explain why certain prenatal maternal acts are criminalized over others.

In this note, I will deconstruct interactions among the four categories of factors affecting pregnancy ("matrix of categories') and the three superseding dimensions of societal concern, ("dimensions of societal concern") to reveal the patriarchal motivations behind an American legal movement that aims to *unconstitutionally criminalize women under a theory of child abuse and endangerment for specific drug use during pregnancy*. Additionally, I will use this deconstruction to explain how such a legal movement justifies its agenda without simultaneously advocating for other paternalistic criminal pregnancy laws to which its alleged legal rationale concerning fetus welfare invariably leads, including criminalizing procreation where the infant is prone to genetic defect or disease, self-inflicted uterine wounds resulting in infant harm, as well as prenatal alcohol and cigarette consumption. These analyses will conclude that a legal agenda to prosecute substance-abuse among pregnant women, though genuinely concerned with infant welfare, is, at its core, founded upon a hegemonic motive to protect patriarchal power rather than upon a legal logic to protect the potential lives of unborn children. Before revealing these conclusions through specific applications of the Punitive-Pregnancy Matrix, this paper will first address the physical, cognitive, and behavioral effects of prenatal maternal substance abuse on infants, and secondly, discuss the existing case law regarding prosecutions of drug-using women for prenatal child abuse.

In constructing this 4 (categorical pregnancy factors) X 3(dimensions of societal concern) theoretical matrix to expose the patriarchal impetus behind pregnancy prosecutions, I do not intend to neglect or dismiss the legitimate and

urgent anxieties over infant welfare, particularly among those who advocate for pregnancy prosecutions with genuine concern for children in mind. The biological reality of pregnancy implicates fetus health into the legal protections of female privacy and reproductive control. While the latter are constitutionally guaranteed, and here, assumed to deserve greater governmental investment than fetus safety[5], their existence need not deny society of its safeguards for the health of defenseless progeny. The government has several pro-active and non-punitive means for deterring substance-abusive pregnancies, including its investment in contraceptive education, reproductive health services, and drug rehabilitation for pregnant women. With these means, the United States can construct a socio-legal framework in which pregnancy neither threatens nor is threatened by a woman's bodily autonomy.

II. PRENATAL SUBSTANCE ABUSE IN THE UNITED STATES

A. DESCRIPTIVE STATISTICS ON PREGNANCY AND SUBSTANCE ABUSE

According to recent estimates by the American Pregnancy Association, every year in the United States 820,000 women smoke cigarettes and 757,000 women drink alcohol during pregnancy.[6] Furthermore, each year 221,000 women use illicit drugs and 240,000 pregnant women are subject to domestic violence, which is twice as likely during pregnancy than not.[7] In 1996, the National Institute on Drug Abuse published a study conducted on 2,613 women who delivered infants in 52 rural and urban U.S. hospitals in 1992.[8] The survey reported that "113,000 white women, 75,000 African-American women, and 28,000 Hispanic women used illicit drugs during pregnancy."[9] The data also indicated "a high incidence of cigarette and alcohol use among pregnant women," specifically revealing that "20.4 percent, or 820,000 . . . women smoked cigarettes and 18.8 percent, or 757,000, drank alcohol" during their pregnancies.[10] Strong interactions also existed among use of cigarettes, alcohol and illicit narcotics, such that "[a]mong those women who used both cigarettes and alcohol, 20.4 percent also used marijuana and 9.5 percent took cocaine. Conversely, of those

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5. *See*, Barbara A. Babcock et al. "Sex Discrimination and the Law: Causes and Remedies," 953 Little, Brown & Company, 1975 (a woman's right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as [the Supreme Court] fe[lt] it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy". (*Roe v. Wade*, 410 U.S. 113, 153 (1973))).

6. Am. Pregnancy Assoc., *Statistics, supra* note 2.

7. *Id.*

8. Nat. Drug and Alcohol Abuse Hotline, *Drug Addiction While Pregnant* (2002), http://www.drug-rehabs.org/iarticles/144/drug_addiction_while_pregnant (last visited Dec. 11, 2009).

9. *Id.*

10. *Id.*

women who said they had not used cigarettes or alcohol, only 0.2 percent smoked marijuana and 0.1 percent used cocaine."[11]

B. THE EFFECTS OF PRENATAL SUBSTANCE ABUSE ON PREGNANCY AND FETUS HEALTH

The long and short term effects of prenatal exposure to legal and illicit substances, including cocaine, alcohol, marijuana, and cigarettes are widely disputed.[12] For the purposes of this investigation, I will assume the scientific validity and generally explain the findings of research asserting that substance-abuse during pregnancy causes physical, cognitive and behavioral impairments in children.[13]

The Organization of Teratology Information Specialists (OTIS) contends that most infants prenatally exposed to cocaine do not have a structural birth defect.[14] The possibility of a structural defect increases when the mother frequently used cocaine during her pregnancy. These defects "include abnormalities of the brain, skull, face, eyes, heart, limbs, intestines, genitals, and urinary tract."[15] Other fetal risks of cocaine exposure concern cognitive and behavioral problems. OTIS reports that "[c]ocaine-exposed infants, especially those exposed near birth, have been found to be more irritable, jittery, and have interrupted sleep patterns, visual disturbances, and an inability to deal appropriately with sensory stimulation. Some of these complications may last 8 to 10 weeks after birth or even longer."[16] Additionally, studies suggest[17] that cocaine exposure in utero can also increase the presence of long-term central nervous system complications, which may include delays in cognitive development or

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11. *Id.*

12. See Zero Exposure Project, *Drug Use During Pregnancy,* http://www.zeroexposure.org/index/cfm/fuseaction/Info.Illicit_Drugs (last visited Dec. 11, 2009) ("[s]tudies are inconclusive regarding the risk of learning and behavioral problems due to pre-natal cocaine exposure); See also American Council for Drug Education, *Drugs and Pregnancy,* http://www.acde.org/parent/Pregnant.htm (last visited Dec. 11, 2009) (acknowledges that studies conducted on the results of marijuana use during pregnancy are also indeterminate. This inconclusive research is largely due to the range of intervening variables, including maternal poverty, health, family history and environmental experience, which could affect the health of a pregnancy. These variables complicate the already mathematically-problematic task of determining causal relationships from correlation research.

13. Please consider that evidence against the causal relationships between pre-natal substance exposure and structural, cognitive, emotional, motor and behavioral problems in children significantly undermines arguments in favor of prosecuting mothers for child endangerment due to drug use during pregnancy. I do not address this matter in-depth because it so jeopardizes the alleged legal rationale behind prosecuting substance-abusing mothers that it renders unnecessary my theoretical framework for deconstructing and exposing that alleged rationale.

14. Org. of Teratology and Info. Specialists, *Cocaine and Pregnancy,* available at: http://www.otispregnancy.org/pdf/cocaine.pdf (last visited Dec. 11, 2009) [hereinafter cocian and pregnancy].

15. *Id.*

16. *Id.*

17. *Id.* (recognizing that "additional studies are needed to determine long-term neurobehavioral effects").

learning ability, and behavioral changes.[18] Infants can also demonstrate withdrawal symptoms for several days due to prenatal addiction to cocaine.[19] These withdrawal symptoms most often consist of increased irritability, tremulousness, muscular rigidity, poor sucking ability that hampers feeding, sleeplessness, and hyperactivity or, in some cases, tiredness.[20] In rare circumstances, cocaine-addicted infants experience diarrhea, seizures, and vomiting.[21]

Unlike cocaine, alcohol exposure in utero does not cause withdrawal systems. Instead, researchers suggest that it causes Fetal Alcohol Syndrome (FAS), which is a primary source of mental retardation in children.[22] FAS can cause abnormally low birth size, which is reflected by poor growth rates into adulthood.[23] Additionally, an FAS infant can suffer from abnormally formed and small brain, heart and other organs.[24] These structural defects can cause significant cognitive, motor, emotional and behavioral complications.[25] FAS also creates distinct facial features, "including small eyes, a thin upper lip and smooth skin in place of the normal groove between the nose and upper lip."[26]

Research demonstrates that neither marijuana nor cigarette use during pregnancy causes significant structural, cognitive or behavioral complications among infants.[27] Instead, exposure to either marijuana or cigarettes during pregnancy can lead to low infant birth-weight, stillbirths, or pre-term births.[28] Additionally, cigarette exposure can increase the likelihood of both Sudden Infant Death Syndrome and infant asthma.[29]

III. PROSECUTIONS OF MOTHERS UNDER A THEORY OF CHILD ABUSE FOR PRENATAL SUBSTANCE USE

A. CASE LAW REJECTING PROSECUTIONS OF PRENATAL SUBSTANCE USE AS CHILD ABUSE

Courts have generally held that state statutes criminalizing child abuse or endangerment do not support criminal prosecutions of mothers who abuse drugs

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18. *Id.*
19. Cocaine and Preg, *supra* note 16.
20. *Id.*
21. *Id.*
22. *Id.*
23. Org. of Teratology & Info. Specialists, *supra* note 16.
24. *Id.*
25. *Id.*
26. *Id.*
27. Org. of Teratology & Info. Specialists, *supra* note 16.
28. See Chris Woolston, *How Smoking During Pregnancy Affects You and Your Baby,* ORG. TERATOLOGY & INFO. SPECIALISTS, http://www.babycenter.com/0_how-smoking-during-pregnancy-affects-you-and-your-baby_1405720.bc (last visited on Dec. 11, 2009).
29. *Id.*

during pregnancy, regardless of the born infant's resultant condition.[30] Most statutes criminalizing child abuse do not specifically mention fetuses or address abuses that transpire in utero. In turn, many "court decisions have often rested on the constitutionally required strict interpretation of the definition of 'child' or other terms within the statutes to not include cases involving unborn children."[31] Furthermore, the California Court of Appeals concluded in *Reyes v. Superior Court*, "that under the rule of lenity a criminal statute must be interpreted as favorably for the defendant as the language allows, and where the legislature had not specifically defined 'child' to include unborn infants, the court was unwilling to do so."[32]

Courts also emphasize that legislative failures to explicitly criminalize prenatal substance abuse demonstrate a legislative intent against imposing such a crime.[33] In *Washoe County v. Encoe*, Nevada charged a mother with criminal child abuse for transmitting marijuana and methamphetamines to her child through the umbilical cord.[34] The state maintained that the child abuse law, which did not specifically address prenatal experiences, should extend to protect the child from any transmissions that occurred between birth and the moment that the cord was severed.[35] Here, the infant boy tested positive for the illegal substances.[36] However, the court held that Nevada's interpretation radically extended beyond the scope of the criminal statute.[37] The court also pointed to a then-recently failed bill attempting to prohibit this exact conduct as evidence of legislative intent against such a radical application.[38]

In their refusal to extend child abuse statutes to prenatal substance abuse cases, particularly in the absence of specific statutory language regarding fetal or prenatal experiences, courts generally hold that such applications of child abuse statutes violate due process, because the statutes do not properly notify

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30. *See* JAMES G. HODGE, JR., ANNOTATION, *Prosecution of Mother for Prenatal Substance Abuse Based on Endagerent of or Delivery of Controlled Substance to Child*, 70 A.L.R.5th 461 (1999).

31. *See id.; See e.g.*, [*Reinesto v. County of Navajo*, 894 P.2d 733, 737 (Ariz. Ct. App. Div. 1 1995) (holding that a statute criminalizing child abuse did not encompass prenatal heroin exposure causing neonatal heroin withdrawal, because the statute did not refer specifically to fetuses); *Reyes v. Super. Ct.,* 75 Cal. App. 3d 214, 218-19 (Cal. Ct. App. 1977) (holding that mother could not be charged with criminal child abuse force heroin addiction in her twin infants from prenatal heroin use, because the child abuse statute did not extend to fetuses). *U.S. v. Foreman*, No. ACM 28008, 1990 WL 79309 (A.F.C.M.R. May 25,1990) (holding that an unborn fetus was not legislatively intended to constitute a victim of criminal child abuse)

32. *Reyes*, *supra* note 31 at 218.

33. Hodge *supra* note 30; *See e.g*., *Reinesto*, 894 P.2d at 737 (holding that the legislature had previously rejected bills to extend child abuse protections to unborn children prenatally exposed to maternal substance abuse).

34. *See Washoe County v. Encoe*, 885 P.2d 596 (Nev. 1994).

35. *Id.* at 598.

36. *Id.* at 597.

37. *Id.* at 598.

38. *Washoe County*, 885 P.2d at 596

women that substance abuse during pregnancy is illegal.[39] For example, in *Morabito*, the court held that a mother who smoked cocaine during her pregnancy could not be charged with child endangerment, because the statute did not provide proper notice that its language could apply to a prenatal circumstance.[40] Similar reasoning has compelled courts to conclude that statutes criminalizing child abuse and endangerment are void for vagueness when applied to prenatal maternal conduct. For instance, in *Collins*, the Texas Court of Appeals nullified a misdemeanor charge of "reckless injury to a child" on due process grounds when brought against a mother for prenatal cocaine use.[41] The court held that the criminal statute did not properly define the offense with sufficient clarity regarding the prohibited conduct.[42] That is, the Texan statute did not specifically criminalize a woman's substance abuse during pregnancy or extend the definition of a child to encompass the unborn.[43] Accordingly, the statute did not provide the mother with sufficient notice regarding the criminal nature of her drug use, and thus her prosecution under this statute would violate due process.[44]

Courts are hesitant to uphold prosecutions of pregnant women for conduct against their unborn children, even when statutes clearly and explicitly criminalize maternal substance abuse during pregnancy.[45] Courts find that statutes specially criminalizing drug-related "prenatal child abuse" significantly threaten women's constitutional privacy rights. Courts fear that prosecutions of pregnant mothers for substance abuse enable a "slippery-slope" that could lead to prosecutions of pregnant mothers for use of alcohol, nicotine or over-the-counter medication.[46] Courts even explore the potential for prosecutions of prenatal substance abuse to lead to prosecutions of mothers for endangering the well being of their unborn children through any activity (e.g. sports or exercise).[47] Courts also point out that prosecutions of pregnant mothers for prenatal substance abuse would punish a woman who injures a child during a phase of its existence when she is legally permitted to terminate the unborn child.[48]

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39. *E.g., Reinesto,* 894 P.2d at 737 (expressing fear that viewing criminal child abuse statute as encompassing fetus would not only violate due process by extend child protection laws well beyond maternal substance abuse).

40. *People v. Morabito*, 580 N.Y.S.2d 843 (Geneva City Ct. 1992).

41. *Collins v. State*, 890 S.W.2d 893, 895, 896-97 (Tex. App. 1994).

42. *Id.* at 897.

43. *Id.* at 896.

44. *Id.*

45. *E.g*., *Reinesto*, 894 P.2d at 736-37.

46. *Commonwealth of Kentucky v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (distinguishing a mother's self-abuse of oxycodone where secondary effects occurred to the fetus from a mother's intentional injection of oxycodone into a born infant to hold that equating such incidences would create a "slippery-slope" of pregnancy prosecutions whereby the state could criminalize any maternal activity potentially threatening to the fetus).

47. *Id.*

48. *Reyes,* 75 Cal. App. 3d at 218-19.

Plainly, these laws would more punish pregnant women who injure fetuses than women who abort them.[49] Many courts conclude that a woman's privacy rights protect her pregnancy choices, regardless of their effect (i.e. fetus death or injury).[50] And, because the United States Constitution protects a woman's right to terminate her fetus, the constitution invariably must also protect a woman's right to injure her fetus, as injury is a necessary element of termination.[51]

Additionally, courts resist prosecutions of mothers for substance abuse during pregnancy for public health reasons.[52] Courts acknowledge that such prosecutions potentially incentivize abortion for at-risk mothers, as the law better protects a drug-addicted woman who chooses to terminate her fetus than a woman who gives birth to a child after abusing substances during her pregnancy.[53] Furthermore, these prosecutions deter at-risk mothers from seeking prenatal care and drug counseling or treatment and drive women "underground."[54]

B. Case Law Recognizing Prosecutions of Prenatal Substance Use as Child Abuse

Despite significant resistance among courts to criminalize pregnant substance abuse, several states uphold these prosecutions. For example, in 2004, Texas criminalized marijuana use during pregnancy as a felony resulting in two to twenty years in prison.[55] Additionally, Colorado, Florida, Illinois, Indiana, Maryland, Minnesota, Nevada, Ohio, Rhode Island, South Carolina, South Dakota, Texas, Virginia, and Wisconsin incorporate prenatal substance abuse into their child welfare laws to enable prosecutions of pregnant women, many of which result in terminated parental rights.[56] For example, South Carolina courts held that child endangerment laws encompass a child's prenatal experiences and thus allow prosecutions of mothers for substance abuse during pregnancy.[57] Several states also require health-care professionals to report drug use during pregnancy; these states include: Arizona, Illinois, Massachusetts, Michigan, Utah, and Rhode Island.[58]

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49. *Id.*

50. *See, e.g. id.*

51. *Id.*

52. *State v. Gethers*, 585 So. 2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (holding that prosecuting a mother for voluntarily consuming cocaine during pregnancy under a theory of criminal child abuse would defeat public goals to "preserve the family life of the parents and children" and encourage susceptible mothers to conceal and abort their pregnancies).

53. *Id.* at 1143.

54. *Id.*

55. Am. Pregnancy Assoc., *Using Illegal Street Drugs During Pregnancy*, http://www.americanpregnancy.org/pregnancyhealth/illegaldrugs.html (last visited Dec. 11, 2009).

56. *Id.*

57. *Whitner v. State*, 492 S.E.2d 777, 782 (S.C. 1997) (holding that the mother was guilty of criminal child neglect for abusing cocaine during pregnancy because she "endangered the life, health, and comfort of her" viable fetus.)

58. Am. Pregnancy Assoc., *supra* note 57.

IV. APPLICATIONS AND INFERENCES OF THE PUNITIVE-PREGNANCY MATRIX

In *Welch*, the court expressed concern over the "slippery-slope" effect of prosecutions for prenatal substance abuse, pointing to the potential for these prosecutions to expand into more invasive laws to protect the health of unborn children, like anti-abortion laws and statutes against maternal alcohol consumption or even physical exercise.[59] In a nation where nearly two million of the over six million pregnancies each year are lost, including 1.4 million through abortion, and 875,000 women experience one or more pregnancy complications, this "slippery-slope" concern is fundamental to women's reproductive freedom.[60] That is not to say that one legal measure to protect a fetus logically requires the enactments of other measures to protect a fetus (i.e. laws against prenatal cocaine use do not logically necessitate laws against prenatal heroine abuse). However, the integrity of the protective rationale behind these measures becomes suspect when lawmakers "pick-and-choose" certain prenatal maternal activities for criminalization, especially when other activities threaten fetus welfare as much as, if not more than, the criminalized conduct. In fact, the Punitive Pregnancy Matrix previously introduced reveals a pattern among attempts to criminalize and prosecute prenatal child abuse, which is largely inconsistent with meaningful considerations of fetus welfare. While advocates of these prosecutions undoubtedly care about the health of unborn children, the pattern by which they target certain maternal conduct better protects patriarchal control over reproduction than actual child wellbeing.[61]

A. DIMENSION A APPLICATIONS: REVEALING THAT MATERNAL PROSECUTIONS FOR PRENATAL CHILD ABUSE ARE LIMITED TO MATRIX CATEGORY III FACTORS

Of the innumerable factors affecting fetus welfare during pregnancy, criminal prosecutions of mothers for prenatal child abuse only target those existing within the third category of factors identified in the Punitive Pregnancy Matrix (i.e. factors foreign but internal to the mother, like drug use). In fact, maternal prosecutions do not target the other three matrix categories regardless of their interaction with the three dimensions of societal concern. For example, causality Dimension A is a basic legal principle essential to determinations of culpa-

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59. *Welch*, 864 S.W.2d at 283.

60. Am. Pregnancy Assoc., *supra* note 2.

61. Recall that the matrix interacts the four categories of factors affecting fetus health ([1] factors intrinsic to the fetus, [2] factors intrinsic to the mother, [3] factors foreign but internal to the mother, and [4] factors external to the mother) with the three dimensions of societal concern ([A] attributions of causal responsibility for the pregnancy complication or infant ailment, [B] the extent to which the given ailment or complication is perceived as threatening to patriarchal power over the means of reproduction, and [C] the ease with which laws could be imposed with regard to a particular type of pregnancy complication or infant ailment, given the existing legal framework, to facilitate patriarchal control over the means of reproduction).

bility. In turn, the causal relationship between a mother's conduct during pregnancy and the harm to her fetus or infant informs the likelihood of her prosecution.[62] Specifically, a mother who lacked actus reus for her consumption of an illicit substance during pregnancy (e.g. if the woman was forced by a third party to consume the drug, which would constitute a matrix Category III harm), will not be prosecuted under a theory of child abuse. Similarly, women are not successfully prosecuted in the United States for unknowingly transmitting genetic defects to children (matrix Category I) or accidently exposing themselves to environments that risk fetus health (matrix Category IV). States also do not prosecute mothers for unavoidable physical or structural problems that cause harm to their offspring (matrix Category II). Clearly, all of these factors are outside a mother's control.

However, women are also not prosecuted, even when they are responsible for causing significant harm to their fetuses, if the source of the harm exists in matrix Categories I, II, or IV of factors affecting pregnancy. For instance, women are not successfully prosecuted under a theory of child abuse for reproducing with knowledge that their fetus will be high-risk for or prone to serious birth defects or illness. A woman with Huntington's Disease, for example, will not be prosecuted for giving birth to a child with the disease, even if the mother knew of the fetus' 50 percent likelihood of inheriting the affected gene.[63] Likewise, criminal laws in the United States do not prosecute mothers for child abuse when failed abortions or self-inflicted structural damage or wounds result in serious health problems or birth defects among infants. For example, a mother who self-inflicts a gunshot wound to the abdomen cannot be prosecuted under a theory of child abuse, even if her child is born with serious damage because of her conduct and that result was the mother's original goal.[64] Prosecutions of maternal prenatal conduct also do not pursue mothers who purposefully expose themselves to environments that risk fetus health (e.g. high altitudes, lead paint walls, or extreme contact sports). For instance, a woman who places herself in environments that lack certain foods, particularly foods high in folic acid, significantly risks dramatic physical and cognitive damage to her fetus. This scenario is especially relevant for anorexic mothers and presents devastating fetus health concerns, but does not lead to prosecution.

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62. While legitimate arguments exist that drug-addiction eliminates a woman's free will and thus her culpability for the drug-use, courts supporting prosecutions for prenatal child abuse generally acknowledge the mother's culpable act.

63. As previously discussed, this scenario technically overlaps between matrix Categories I and II. However, for the purposes of this paper, it will be classified as matrix Category I.

64. This is technically a matrix Category IV example, because an environmental harm is causing maternal structural damage. *See Hillman v. State*, 232 Ga. App. 741, 734-44 (Ga. Ct. App. 1998) (holding that a criminal abortion statute could not extend to a pregnant woman's intentional infliction of a gunshot wound to her viable fetus, because the extension would encompass any intentional maternal act to cause a miscarriage or other perceived self-destructive conduct during pregnancy.)

B. UNDERSTANDING THE LACK OF CHILD ABUSE PROSECUTIONS FOR CATEGORY I, II, AND IV HARMS

The purpose of this paper and the Punitive-Pregnancy Matrix is to understand why efforts to prosecute mothers for prenatal drug-use as child abuse do not target other types of maternal conduct in utero that harm infants as much as, if not more than, prenatal substance exposure. The matrix categories reveal that prosecutions of prenatal maternal conduct do not occur against harms classified into Categories I, II or IV. To explain this reality, I turn to applications of the superseding dimensions of societal concern, which dictate the strength and effect of social criticism surrounding pregnancy loss, complications, and harm.

Consider the primary Category I example where a mother knowingly transmits a genetic defect to her offspring. Often times, a person will refrain from producing a biological child when the parent's genes will increase the chances of devastating illness or defect. Despite the egregious threat to and disregard for fetus health where people deliberately reproduce given the likelihood of their child's physical harm, states do not prosecute (e.g. where parents both carrying the Huntington's Disease gene produce offspring with a 75% chance of inheriting the illness). The only arguable "exception" to this rule is prosecutions for incest, as the genetic implications of incest clearly threaten the genetic health of offspring. However, the criminalization of incest did not emerge out of concern for the genetic wellbeing of children; instead the rationale concerns familial harmony. Incest laws often control human sexual behavior in situations that do not harm infant health. For example, some authorities hold that incest can include sexual activity not amounting to vaginal penetration[65] as well as sexual activity between step-fathers and adult step-daughters.[66] Neither circumstance threatens the genetic make-up of a fetus. Furthermore, incest laws apply different punishments to incestuous relationships that would equally harm infant health. Consider that fathers are often subject to significantly harsher penalties for incest committed with daughters than are mothers for incest committed with sons, because the former situation is believed to more threaten familial harmony than the latter.[67] Clearly, the genetic ramifications on a fetus would be the same.

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65. *State v. Brune*, 725 P.2d 454, 458 (Wash. Ct. App. 1986) (holding that vaginal penetration is not an element of incest).

66. *State v. Lowe*, 861 N.E.2d 512, 517 (Ohio 2007) (holding that statute preventing step-father's sexual relations with step-daughter was constitutional given its rational relationship to state interests in protecting familial unity and harmony).

67. Statutory schemes supporting these distinctions have been upheld under equal protection challenges. *See, e.g.*, *People v. Yocum,* 361 N.E.2d 1369 (Ill. 1977) (statute whereby father's incest with daughter was punishable by a maximum term of 20 years imprisonment and mother's incest with son was punishable by a maximum term of 10 years imprisonment, did not unconstitutionally deny equal protection).

While criminal incest laws do not specifically exist for the purpose of avoiding birth defects, the current legal framework surrounding incest (the primary focus of Dimension C) would nonetheless provide a convenient basis for the criminalization of defect-prone procreation (e.g. mating between two known Huntington's carriers) under a theory of child abuse. That is, Dimension C specifically concerns existing legal frameworks that could function with child abuse and endangerment laws to enable prosecutions of mothers for prenatal conduct. For example, the existing legal framework surrounding illicit substances functions alongside child protection laws to compel prosecutions of mothers for prenatal substance abuse. As will be discussed with regard to Category III factors (e.g. cocaine, alcohol, and infectious disease exposure in utero), an existing legal framework condemning certain conduct in everyday life is necessary for successful child abuse prosecutions of that conduct during pregnancy. Accordingly, incest laws, though not founded on a policy effort to protect the genetic health of infants, could help extend child abuse laws to encompass maternal conduct that knowingly endangers an infant's genetic wellbeing.

However, such an advocacy effort is rare and garners little positive feedback in the law. At first glance, the obvious policy reasoning against prosecutions for contemplated genetic defects is an avoidance of laws that limit people's procreative abilities and options. That is, most Americans would agree that people have a significantly greater liberty interest in their reproductive choices than they do in their ability to use illicit drugs, consume alcohol, or smoke cigarettes. Furthermore, to criminalize high-risk pregnancies and even intended transmissions of birth defects to fetuses would create some form of discrimination against genetically-affected individuals. These arguments, however, are inextricably bound to the arguments opposing child abuse prosecutions of mothers for prenatal drug use. For example, concerns over a genetically-affected person's reproductive options and freedom reflect concerns over a woman's bodily autonomy and control during her pregnancy. Similarly, concerns over discrimination against individuals with genetic risks reflect concerns over discrimination against individuals who suffer from drug addiction, a formal disease as classified by the National Institute on Drug Abuse that correlates to legitimate genetic propensities.[68]

Thus, the question remains: why are contemplated genetic harms against infants (Category I factors) tolerable but prenatal drug-related harms against infants (a Category III factor) intolerable, particularly if the genetic harm has long-lasting and debilitating physical ramifications for the child? The Punitive-

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68. Nat'l Inst. on Drug Abuse, *Research Report Series-Heroine Abuse and Addiction*, http://www.nida.nih.gov/researchreports/heroin/heroin3.html (last visited on Dec.11, 2009), Addiction is "a chronic, relapsing disease, characterized by compulsive drug seeking and use, and by neurochemical and molecular changes in the brain."

Pregnancy Matrix, especially Dimension B, suggests that intentional genetic harms caused to offspring are less likely to face criminal charges than intentional substance abuse during pregnancy, because the former is less threatening to patriarchal power over the means of reproduction than the latter.

When a mother purposefully becomes pregnant with knowledge that her genes will more likely than not cause serious physical harm to the child, the mother's direct culpability for the transmission is obvious. However, the mother does not have complete sovereignty over that reproductive act. Her ability to reproduce the defect in the offspring depends upon a male; without sperm, the actual transmission of the gene cannot occur. Even if a man does not know that he is procreating with a woman whose genetic structure will likely cause fetal birth defects, his conduct to create the fetus at the very least implicates him in the transmission of the defect. He has a role, and in that way, an element of control over the result. Dimension A would categorize him as a potential cause of the defect, regardless of his knowledge of its likelihood, solely because he was complicit in forming the child's genetic structure at conception. Male liability is even more likely if a paternal gene is responsible for the child's genetic defect. Thus, criminalizing reckless or purposeful transmissions of genetic defects is unlikely in a patriarchal society, first because men already have some control over reproductive results at conception and thus the law does not need to bolster or create male agency in this context, and second, because such criminalization could potentially expose men to liability.

Contrarily, in cases of prenatal maternal substance abuse, men are fundamentally not implicated. While men may become externally involved or complicit in the drug use, they have no elemental role or intrinsic control over the fetus' health. Accordingly, the criminalization of women for prenatal substance use under child protection laws inserts patriarchal control over the means of reproduction where men otherwise lack control. It is assumed here that legal regulation in the United States represents and implements patriarchal power, given that American society is still fundamentally male-dominated. Furthermore, laws that regulate reproduction in situations where men lack agency clearly serve male interests, because the laws act as agentic proxies for men. Additionally, men are also generally free from potential liability in child abuse prosecutions for pregnant drug use, unless some sort of inchoate crime applies. Thus, child abuse laws that criminalize prenatal drug exposure generate patriarchal power over women's reproductive experiences without meaningfully exposing men to criminal liability.

Therefore, the United States legal system, when compelled by patriarchal motivations, is willing to extend the existing legal frameworks regarding drug use and child abuse to encompass prenatal substance exposure, even when that exposure has debatable and often temporary links to a child's corporal wellbe-

ing.[69] The system will not, however, extend the existing legal frameworks regarding incest and child abuse to encompass reckless or purposeful transmissions of genetic defects to children, because men retain inherent agency over this act and such laws would expose men to potential liability.

This application of the Punitive-Pregnancy Matrix to Category I harms, specifically to parental intentional transmissions of genetic defects, uses relationships between the matrix category and Dimensions B and C to explain why this particular child abuse prosecution does not occur. These same relationships also serve to explain why prenatal child abuse prosecutions do not extend to Category IV harms; while Dimension A best explains the prosecutorial absence for Category II harms. That is, Category II factors affecting fetuses are most likely not prosecuted, because these types of factors fundamentally lack any legal culpability according to Dimension A, as a mother is never responsible for any *intrinsic* structural defect from which she suffers during pregnancy (e.g. a malformed or aged uterus). A maternal structural defect for which the mother could be responsible would likely fall under Category III or IV, depending on the external source that caused the internal defect.

In turn, consider the previously discussed Category IV example, where a mother intentionally self-inflicts a uterine wound to permanently injure her fetus.[70] Clearly, this kind of behavior, if committed against a born infant or any living person, would constitute abuse. Accordingly, the existing legal framework (Dimension C) could lend itself to such a prosecution. In fact, the scenario closely resembles the extension of child abuse laws to encompass prenatal maternal drug use, where the mother's conduct during pregnancy is equated to conduct committed against a born child. Furthermore, paternalistic policy considerations could be raised to advocate for the child abuse prosecution of a mother who, during pregnancy, self-inflicts structural damage that results in fetal injury. For example, reproductive laws often incorporate alleged protections of a "mother's well-being" in order to justify enacting egregious limitations on her bodily autonomy.[71] A similar rationale could apply to the self-inflicted wound scenario in order to "protect" the mother from her own conduct. Despite these arguments, child abuse laws or statutory variations thereof do not extend to encompass this type of maternal action during pregnancy, even in states where courts embrace child abuse prosecutions for pregnant drug use.

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69. Org. of Teratology and Info. Specialists, *supra* note 30. Recall that prenatal marijuana exposure does not cause significant structural, cognitive or behavioral complications among infants.

70. This is technically a Category IV example as explained in note 4, though it initially may appear to overlap with Category II, given its implications for a woman's physical structure.

71. *See*, GONZALES V. CARHART, 550 U.S. 124, 128-29 (2007) (upholding the constitutionality of significant limitations on a woman's reproductive choices, because the "respect for human life finds an ultimate expression in the bond of love the mother has for her child" as well as the alleged observation that "some women come to regret their choice to abort the infant life they once created and sustained").

A probable hesitancy to pursue self-inflicted wound prosecutions is that women who successfully self-terminate their fetuses would act within their legal rights, while those who commit the same conduct, but preserve fetal life, would face criminal prosecution. As discussed in the case law rejecting prosecutions of prenatal substance use as child abuse, the exact point applies to prenatal drug use prosecutions. Specifically, women who use drugs during pregnancy and miscarry or abort their fetuses are free from liability, while those who carry their infants to term are subject to state action.[72]

The distinction between self-inflicted wound prosecutions and prenatal drug use prosecutions is best understood under Dimension B, because self-inflicted wounds threaten patriarchal control over the means of reproduction significantly less than the prenatal drug use. There is both an inherent punishment and deterrent when a woman structurally damages her body in a way that harms her unborn child. The woman's unpleasant bodily experience decreases the likelihood that such conduct will occur and thus decreases a need for society to deter it. Thus, the female agency over reproduction employed in this scenario, though significant, is isolated to rare instances and deterred by its very form and means. Contrarily, the significant female agency over reproduction employed when a woman affects fetal health with drugs during pregnancy is less inherently precluded, as addiction frequently becomes a source of euphoria. Oftentimes drug users, particularly addicts, are not meaningfully deterred by the health concerns affiliated with drug use. The inherent "punishment" or negative ramifications of substance abuse are matched with or overcome by the positive reinforcement of feeding addiction or inducing drug-related rapture. It seems obvious that a potentially addictive maternal act that enables considerable female agency over reproductive results threatens patriarchal control over reproduction significantly more than a highly unpleasant maternal act wielding similar reproductive agency.

Other types of Category IV factors affecting pregnancy expand across all possible environments. Social and scientific opinions regarding the extent to which a given environmental factor will affect an infant's health usually vary with research and development. But, regardless of the particular factor, Dimension A would largely dictate the likelihood of maternal prosecution in the United States. A mother would need to be causally responsible for the fetal harm in order for criminalization or child abuse prosecution to occur. Self-inflicted uterine wounds are examples of Category IV harms for which mothers are clearly causally responsible. However, Dimension A's application probably prevents maternal prosecutions for most other Category IV harms, because intervening causal variables, for which the mother may not be responsible (such

72. *See, Reyes,* 75 Cal. App. 3d at 218-19; Gethers, 585 So. 2d at 1142.

as her age, access to clean air and water, poverty level etc.), mitigate culpability.

Additionally, under Dimension C, a relevant legal framework would likely need to enable extensions of child abuse laws to encompass the specific environmental factor, similar to the way that current anti-drug laws help extend child abuse prosecutions to pregnant substance use. For example, some states legally require individuals to wear seatbelts in automobiles. Advocates of prenatal child abuse prosecutions could attempt to extend these seatbelt laws to encompass harms caused to infants when mothers fail to wear seatbelts. Imagine the hypothetical scenario where a woman is criminally prosecuted for prenatal child abuse when a car accident caused serious damage to her infant due to the mother's failure to wear a seatbelt. The Punitive-Pregnancy Matrix hypothesizes under Dimension C that this kind of maternal conduct is unlikely to elicit child abuse prosecutions or statutes, because the legal framework surrounding the conduct is not broad enough to enable extensions of child abuse laws. That is, societal condemnations of specific environmental harms are often narrow, local and cursory, unlike the societal disapproval of substance abuse, which spans the nation and draws huge federal and state investment. Thus, extensions of anti-drug laws to reach child protection laws are more palatable to and better tolerated by society than would be extensions of seatbelt laws.

Furthermore, the scope of possible Category IV harms seems immeasurable. In fact, the "slippery-slope" threat to a mother's bodily autonomy and personal freedom is most evident when considering potential child abuse prosecutions of environmental factors, because nearly any environment could be construed as threatening to the fetus.[73] Therefore, endeavors to legislate or prosecute Category IV factors become practically impossible in the United States. If such legislation were attempted, the Punitive-Pregnancy Matrix would envision that certain Category IV factors would be more likely targeted for prosecution than others, depending upon applications of Dimensions A, B, and C. Though, as discussed, Dimension A and Dimension C would likely curtail the success of these prosecutions.

Category IV illustrates the fundamental truth that women have vast agency over reproductive outcomes, because American society acknowledges a woman's basic right to control her own environment but does not prosecute environmental harms. Prenatal environments have huge potential to negatively affect a fetus's physical wellbeing. American women can choose their environments, regardless of present teratogens or fetal risks, and prenatally affect infant health accordingly. In turn, the state's probable inability to criminalize prenatal environmental harms may significantly relate to the patriarchal thrust to prosecute pregnant conduct constituting Category III factors. That is, as Dimensions

73. *Welch*, 864 S.W.2d at 283.

A and C impede patriarchal attempts to allay female reproductive control over environmental factors, the patriarchal foundation of Dimension B, which focuses on the extent to which a given pregnancy factor affects patriarchal control over the means of reproduction, directs its influence toward Category III factors, because they are more easily subject to maternal prosecution under Dimensions A and C.

C. CHILD ABUSE PROSECUTIONS FOR SPECIFIC CATEGORY III PRENATAL CONDUCT

Category III factors most at risk for prosecution allow attributions of causal responsibility to the mother, threaten patriarchal control over the means of reproduction, and fit into an existing legal framework that can facilitate extensions of child abuse laws.

Maternal conduct causing a specific Category III harm can be fairly easily identified. For instance, correlations between specific infant ailments and Category III factors like maternal drug use, infectious disease, and food intake, are often strong or compelling enough that science can identify the maternal actions as sources of the ailments. Thus, applications of Dimension A to Category III harms often enable child abuse prosecutions, as compared to environmental harms where attributions of causal responsibility are difficult because of intervening variables.

Despite this, applications of Dimension B demonstrate why several types of Category III harms do not compel child abuse prosecutions. For example, an ill woman would not be prosecuted for becoming pregnant, regardless of the serious health defects that her illness could cause in the infant. Likewise, a woman would not be prosecuted for purposefully contracting an infectious disease to transfer to her fetus. This type of conduct may occur among women who suffer from Munchausen's Disease by Proxy during pregnancy.[74] Application of Matrix Dimension B to the former scenario would closely reflect the earlier discussion on why women are not prosecuted for recklessly, if not purposefully, transmitting serious genetic defects to their children. First, a man would become fundamentally implicated in harming the fetus if he impregnates a woman whose existing illness threatens fetus health, particularly if he knows about the disease. Furthermore, child abuse prosecutions for purposeful prenatal transmission of infectious disease or prenatal health risks due to maternal disease

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74. Cleveland Clinic, *Munhausen's Syndrome by Proxy,* http://my.clevelandclinic.org/disorders/factitious_disorders/hic_munchausen_syndro me_by_proxy.aspx (last visited on Dec. 12, 2009). Munchausen's Disease by Proxy is "a type of factitious disorder in which a person acts as if an individual he or she is caring for has a physical or mental illness when the person is not really sick." *Id.* In the case of pregnancy, a mother with Munchausen's disease could self-inflict ailments or attempt to induce ailments in the fetus "as a means for developing a relationship with the doctor or other health care provider." *Id.*

could extend to fathers, should a father transmit a disease to the mother or to the fetus through its mother during conception. Thus, criminalizing infant health defects caused by maternal disease would subject men to potential liability in a context where they already have some power over reproduction, as males retain an element of agency over the reproductive process at the point of conception. Similarly, applications of Matrix Dimension B to the latter scenario, relevant to prenatal Munchausen's Disease by Proxy, would mirror the earlier explanation for why women are not prosecuted for self-inflicted uterine wounds. Purposefully affecting infant health by infecting oneself with an ailment, like self-inflicting a bodily wound during pregnancy, demonstrates female power of reproductive outcomes. However, such an act does not particularly threaten patriarchy, because it is inherently deterred given that the woman would be injuring herself as a means of affecting her fetus' health. Thus the conduct needs little governmental intervention to limit the probability of its occurrence.

Provided the earlier Dimension A and B analyses, applications of Dimension C reveal why illegal drug use is the only Category III harm that elicits child abuse prosecutions for prenatal maternal conduct. First, consider that maternal alcohol consumption is not incorporated into legislative efforts to protect infants, despite research that prenatal alcohol exposure can lead to serious physical and cognitive defects in children. Contrarily, states appear willing to prosecute prenatal marijuana use, though research suggests that prenatal alcohol consumption causes much more dramatic harm to infants than prenatal marijuana exposure.[75] In this way, the actual harm caused by the specific maternal conduct is not most relevant to the probability of prosecution. Instead, the probability of prosecution appears more determined by the government's ability to fit the maternal conduct into an existing legal framework and extend that framework to the legal realm of child protection laws. For example, anti-drug laws codify societal condemnation of drug use in general and thus enable further condemnation for drug use that affects fetus health. In turn, a very legitimate concern arises regarding the potential for child abuse prosecutions to extend to alcohol use among underage pregnant mothers.[76] Given the existing legal framework that criminalizes underage consumption and the current trajectory of prosecutions for prenatal maternal conduct, the Punitive-Pregnancy Matrix hypothesizes that advocacy efforts to prosecute prenatal maternal conduct could begin to promote child abuse prosecutions of underage mothers for prenatal alcohol consumption. Though obvious hesitations regarding underage criminal culpability will likely emerge, this same concern applies to cigarette use, which is also illegal among minors.

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75. *See*, Am. Pregnancy Assoc., *supra* note 57, (a 2004 Texas statute criminalized marijuana use during pregnancy as a felony resulting in 2-20 years in prison.).

76. *See*, Am. Pregnancy Assoc., *supra* note 2. (Every year 468,988 babies are born to teenage mothers.).

V. CONCLUSION

Applications of the Punitive-Pregnancy Matrix to a range of Category I, II, III and IV factors demonstrate that child abuse prosecutions of prenatal maternal drug use are legally convenient ways for society to insert patriarchal control over the means of reproduction, where such control would otherwise not exist, without exposing men to potential liability. Opponents of this conclusion will likely contend that prenatal drug abuse laws have inherent value in their ability to effectively prevent harmful maternal conduct and thereby protect infants. Given that, criminalizing prenatal maternal actions, regardless of the matrix category under which the conduct falls, is a significant violation of a woman's bodily autonomy and privacy rights. Furthermore, the Punitive-Pregnancy Matrix reveals that states unfairly target drug-using pregnant women for their prenatal actions. Their conduct is criminalized as child abuse, not because it uniquely harms fetuses or because such criminalization is by any means constitutional. Instead, this conduct is criminalized through an unconstitutional extension to child abuse laws, unlike the other forms of maternal conduct discussed in this note, because the three dimensions of societal concern enable its criminalization.

If the United States values an infant's prenatal experience, the government can prevent harmful maternal conduct without unconstitutionally infringing upon a woman's bodily autonomy. As previously discussed, the United States has several non-invasive ways for deterring prenatal substance abuse. For example, in *Welch*, the court recommended that legislatures deal with prenatal substance abuse by criminalizing the inchoate conduct of individuals who knowingly enable a pregnant woman's substance abuse.[77] Additionally, the nation currently suffers from a severe shortage of treatment centers for drug users, particularly of facilities that cater to women's needs.[78] Investing in these facilities as well as contraceptive education and reproductive health services would create an important foundation for respecting women's reproductive and privacy rights and supporting female reproductive health, while protecting the safety of America's unborn children.

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77. *Welch*, 864 S.W.2d at 283.

78. Drug Policy Alliance Network, *Treatment Availability for Pregnant Women and Mother*, http://www.drugpolicy.org/communities/women/treatment/ (last visited Dec. 12, 2009).

Book Review – Diritto Dell'Unione Europea by Professor Luigi Daniele*

Elizabeth F. Defeis**

In little more than half a century the European Union (EU) has evolved from an institution that was primarily a customs union to one that drives the economic, legal and political integration of its member states. Currently, the EU has 500 million inhabitants, generates an estimated 28% of the global economy and its trading rules and business competition laws have an external impact on global markets that affect United States markets and trade. Nevertheless, because of its Byzantine structure, overlapping treaties and confusing institutions, it is sometimes difficult for a United States lawyer to fully understand or appreciate the functions and scope of the European Union.

This Treatise on the European Union, Diritto dell'Unione Europea, by Professor Luigi Daniele of the University of Rome, is both accessible and complete and is, therefore, most welcome. It is the fourth edition in Italian of this important work. Like the previous editions, it is dedicated to that great Italian Professor and Advocate General of the European Court of Justice, Francesco Capotorti. Professor Capotorti, who was much esteemed and considered one of the great jurists of the century, influenced the style and direction of this work. Professor Capotorti himself initiated work on a treatise on the European Union, but his untimely death prevented its completion. Therefore, in the tradition of the Maestro, Professor Daniele has authored this Treatise, a work that is profound and complete in addressing and explaining the competing interests and overlapping institutions, but, at the same time, is written in a simple style that is accessible.

The first edition of this book was published in 2003. However, changes in the scope and structure of the EU have occurred with increasing frequency, both through treaty amendments and the evolving jurisprudence of the European Court of Justice. Indeed, even the name of the Institution created following World War II has changed from the original European Economic Community, to the European Community and finally to the present name, the European Union. With the entry into force of the Treaty of Lisbon on December 2009, a Treaty with constitutional overtones, major changes have been implemented necessitating this fourth edition.

The European Union was established in 1958 through the Treaty of Rome. Its original members included Belgium, France, Italy, Luxemburg, the Netherlands and West Germany. With the last expansion in 2008, the EU includes 27 mem-

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* Luigi Daniele, Diritto Dell'Unione Europea, Third Edition (Giuffrè Editore)

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ber states. However, with the pressure to admit more members, a European Union consisting of 40 states is foreseeable. Although the original focus was economic integration that would result in a higher standard of living for all, its activities have expanded and now reach virtually all aspects of European life, including human rights, social welfare, the environment and consumer protection.

Law making in the EU involves three main institutions: the European Parliament, The Council of Europe and the European Commission. The European Court of Justice (ECJ) is charged with interpreting EU law and ensuring its equal application among all EU states. Despite the fact that the overwhelming majority of the Justices on the ECJ are trained in the Civil Law tradition rather than the Common Law tradition, the Court has been extremely proactive, particularly in the area of Human Rights. Early on it announced the "Supremacy Doctrine" of Community legislation over national legislation and the "Direct Effects Doctrine," which enables litigants to challenge national practices as violative of European Union law in national courts.

When adopted in 1957, the Treaty of Rome was not viewed as a guarantor of rights. Indeed, its only substantive provision pertaining to rights guaranteed women equal pay for equal work. Even this provision, however, was included for economic rather than human rights reasons. Since some states already had an equal pay guarantee (e.g., France), its inclusion was necessary so that those states would not be placed at an economic disadvantage. Thus, when the ECJ announced the doctrine of supremacy of European Union Law over national laws, the doctrine was resisted by some states that had strong human rights provisions in their national constitutions, such as Germany. In response, the ECJ stated in a series of cases that the EU would be guided by Constitutional traditions of the Member States and by the provisions of the European Convention on Human Rights and Fundamental Freedoms. Finally, the Treaty of Lisbon incorporates a Charter of Fundamental Rights of the European Union with expansive and innovative provisions that is now legally binding throughout the Union.

The composition, scope and, indeed, functions of the European Union have changed dramatically since 1957. With the pending enlargement in 2004 of 10 additional states, the European Convention on the Future of Europe was convened to manage the profound changes that would occur. The Convention, sometimes called the Constitutional Convention, was to address the troubling issues of the democratic deficit in the EU and the growing unease with the increasing encroachment of control from Brussels. At the Convention, a Constitution for the European Union was proposed and signed by each of the member states in 2004. However, it was rejected by referendum in two of the member states and, in effect, withdrawn.

After a period of reflection, the Treaty of Lisbon, incorporating many of the features of the proposed Constitution, but rejecting the term "Constitution," was adopted. The Treaty amended the Treaty on European Union (Maastricht; 1992) and the Treaty establishing the European Community (Rome; 1957) and was initially known as the Reform Treaty.

Professor Daniele details the history, development and current status of the European Union together with a discussion of the changes effected by the Treaty of Lisbon. The previous edition is extensively revised and takes into account and highlights the enormous changes effected by the Treaty of Lisbon. The changes include the creation of a President of the European Council and a High Representative of the Union for Foreign Affairs. The Treaty also abolishes the pillar system, and in a nod to more democratic procedures, provides for an increased role for the European Parliament, the only body elected directly by the people of each Member State.

With respect to human rights, the Treaty will have a profound effect. In addition to incorporating the Charter of Fundamental Rights of the European Union, the Treaty provides that the European Union will accede to the European Convention on Human Rights and Fundamental Freedom (ECHRFF). Thus, after more than half a century since the establishment of the EU and through prodding from the Parliament, member States and NGO's, a Charter of Rights applicable to the EU itself is now in place.

Like the previous editions, the book is divided into six parts and each is substantially revised to reflect the changes effected by the Treaty of Lisbon. Particularly, those chapters relating to the Institutions of the European Union and the decision making process within the European Union as it pertains to justice and home affairs are greatly expanded. In addition, the recent important decisions of the European Court of Justice relating to the obligations of the EU and its member states to apply Security Council Sanctions are discussed. Because the ECJ has rejected the view that Security Council Resolutions must be implemented despite human rights and due process concerns, its decisions are closely watched by states called upon to implement such resolutions.

In discussing the development of EU Law, Professor Daniele quotes Lord Denning, Master of the Rolls in the celebrated English Case of *Bulmer v. Bollinger*[1], [1974] 2 CMLR 91, who said that Community Law "is like an incoming tide. It flows into estuaries and up the rivers. It cannot be held back."

For those who wish to keep up with the tide and are seeking a comprehensive overview of the European Union, its history and development, and for those who read Italian, this treatise is highly recommended.

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1. H.P. Bulmer Ltd.v. J. Bollinger S.A., (1974) 2 Ch.401, (1974) 3 WLR 202, (1974) 2 All ER 1226, (1974) 2CMLR 91 (Ct . of Appeal, May 22, 1974)

Bilski v. Kappos: Killing Corporate Competition One Business Method at a Time

Amber Mufale

Introduction

Business method patents are like the corporatist theory; they look great on paper, but in practice they are killing the market economy. The drafters of the Constitution intended to benefit society and promote the progress of science and useful arts by giving inventors exclusive rights to their discoveries for a limited period of time.[1] Affording protection to business methods; however, does the exact opposite. It stifles the economy by creating industry monopolies and allows the business method patent owners to drown all market competition and eliminate any and all competitors.[2] Courts recognized this problem and for decades regularly refused to afford protection to business methods.[3] The floodgates were opened; however, in 1998. The United States Court of Appeals held that business methods fell within the meaning of "process" under section 101 of the Patent Act and were, therefore, patentable subject-matter so long as they were not abstract ideas.[4] 10 years later the U.S. Court of Appeals for the Federal Circuit attempted to dam the flood they caused by implementing a stricter test, the machine-or-transformation test, to determine whether a business method should be patentable subject matter.[5] The United Supreme Court attempted to clean up the mess, but only succeeded in scattering it further. The majority refused to accept the machine-or-transformation test, which required that a method be tied to a particular machine or apparatus or operate to transform a particular article into a different state or thing.[6] Taken literally, the Supreme Court's decision places misguided focus on the common meaning of the word process, which the Court of Appeals defines as "[a] procedure . . . [a] series of actions, motions, or operations definitely conducing to an end, whether voluntary or involuntary."[7] The Court's reliance on the ordinary meaning of the word process classifies any and all series of steps that are not in and of themselves

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1. *see* Andrew Nieh, *Software Wars: The Patent Menace*, 55 N.Y.L. Sch. L. Rev. 295, 296-297.
2. *Id.*
3. *see* Matthew DeIulio, *Courts Left with Little Guidance Following the Supreme Court's Decision in Bilski v. Kappos*, 13 Tul. J. Tech. & Intell. Prop. 285, 287-288.
4. *State Street Bank and Trust Company v. Signature Financial Group, Inc.,* 149 F.3d 1368 (Fed. Cir. 1998).
5. *In re Bilski*, 545 F.3d 943, 949 (Fed. Cir. 2008).
6. *Bilski v. Kappos*, 130 S. Ct. 3218 (2010).
7. *In re Bilski*, 545 F.3d at 952 (quoting Webster's New International Dictionary of the English Language 1972 (2d ed.1952)).

abstract ideas or laws of nature as patentable "process" subject matter and bursts the dam open again and drowns market place competition.[8]

I. FACTS AND PROCEDURAL HISTORY

Bernard L. Bilski and Rand A. Warsaw filed a patent application in April of 1997 for protection of a claimed invention that explains how commodities buyers and sellers in the energy market can protect against the risk of price changes.[9] Claim one of the application described a series of steps instructing how to hedge the risk and claim four put the concept set forth in claim one into a simple mathematical formula.[10] The remaining claims explained how claims one and four could be applied to allow energy suppliers and consumers to minimize the risks resulting from fluctuations in the market demand for energy.[11] Some of the claims suggested using obvious statistical approaches to figure out the inputs to enter in claim four's equation. Claim seven, for example, advised using familiar, random analysis techniques to establish how much a seller can gain from each transaction under each historical weather pattern.[12]

The U.S. Patent and Trademark Office rejected Bilski and Warsaw's application because the invention was not implemented on a specific apparatus.[13] The PTO said Bilski and Warsaw's method merely manipulated an abstract idea to solve a purely mathematical problem without any limitation to a practical application and was not, therefore, directed to the technological arts.[14] The Board of Patent Appeals and Interferences, which reviews rejected applications upon appeal, also affirmed the PTO's decision to deny the application.[15] The Board concluded that the application involved only mental steps that did not transform physical matter and was directed to an abstract idea.[16]

Bilski and Warsaw appealed to the United States Court of Appeals for the Federal Circuit.[17] The U.S. Court of Appeals heard the case en banc and also affirmed the rejection of the application, but the Court was at odds over the analysis.[18] The case produced five different opinions; Chief Judge Michel's majority opinion, Judge Dyk's concurrence and three dissents from Judge Mayer, Judge Rader and Judge Newman.[19] Judge Mayer argued that the application

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8. *Bilski*, 130 S. Ct. at 952.
9. *In re Bilski*, 545 F.3d at 949.
10. *Bilski,* 130 S. Ct. at 3223.
11. *Id.* at 3224.
12. *Id*.
13. *Bilski,* 130 S.Ct. at 3224.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Bilski,* 130 S.Ct. at 3224.
18. *Id.*
19. *Id.*

was not eligible for patent protection because it was directed to a method of conducting business.[20] Judge Rader opined that the method was an unpatentable abstract idea and went on to note that business methods in general may be patentable so long as they are claimed to achieve a useful, tangible and concrete result.[21] Judge Newman, on the other hand, thought the application was not outside the reach of section 101 of the Patent Act and would have remanded the case for further proceedings to determine whether the application qualified as patentable under other provisions of the act.[22]

The Court of Appeals was faced with defining the word "process" within section 101 of the Patent Act, which allows inventors and discoverers to acquire patent protection for any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof.[23] Any invention or discovery falling within these categories must also adhere to the additional requirements implemented in sections 102 and 103.[24] Section 102 requires that the method or process be novel, meaning it must be "new in the absolute sense of never having existed before anywhere."[25] Section 103 requires that the method or process be non-obvious, which means that it is "the product of a creative act going beyond mere talent or artistry."[26] The Court pointed out that there are also three exceptions to section 101's patentable subject matter; "laws of nature, physical phenomena and abstract ideas."[27] The plurality settled upon the machine-or-transformation test in defining the word "process," concluding that a process must be tied to a particular machine or apparatus or operate to transform a particular article into a different state or thing in order to qualify as a patentable invention process.[28] The plurality ultimately rejected Bilski and Warsaw's patent application, concluding that their business method was not tied to any particular machine or apparatus, did not transform a particular article into a different state or thing and was merely an abstract idea and was not, therefore, patentable subject matter.[29]

II. UNITED STATES SUPREME COURT HOLDING AND REASONING

Bilski and Warsaw appealed to the U.S. Supreme Court, who granted certiorari to the issue of whether a patent can be issued for a claimed invention de-

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20. *Id.*
21. *Bilski,* 130 S.Ct. at 3224.
22. *Id.* at 3225.
23. See *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008).
24. *Bilski*, 130 S.Ct at 3225.
25. R. GORMAN & J. GINSBURG, COPYRIGHT 221 (7th ed. 2006)
26. *Id.*
27. *Bilski*, 130 S.Ct at 3225.
28. *Bilski*, 130 S.Ct at 3223.
29. See *In re Bilski*, 545 F.3d 943 (Fed. Cir. 2008).

signed for the business world.[30] The Supreme Court affirmed the Federal Court of Appeals' judgment ruling that Bilski and Warsaw's particular business method was an unpatentable abstract idea, but it rejected the Federal Circuit's reasoning and held that the Federal Circuit violated statutory interpretation principles.[31] The Supreme Court rejected the Court of Appeals' reliance on the machine-or-transformation test as the sole test for determining whether subject matter is patentable and instead turned to precedent.[32]

The Supreme Court relied on precedent that established that the guideline for interpreting the meaning of words within a statute is to take the word's ordinary, contemporary, common meaning unless otherwise defined within the statute.[33] The majority cites section 100 (b) of the Patent Act, which defines a "process" as "process, art or method, and includes a new use of a known process, machine, manufacture, composition of matter, or material," stating that it was unaware of any ordinary, contemporary or common meaning of the word "process" that would require the terms "process, art or method" to be tied to a machine or to transform an article.[34] The Court reasons that section 101 precludes a reading of the term "process" that would categorically exclude business methods because the term "method" within section 100 (b)'s definition of "process" may include at least some methods of doing business because the ordinary, contemporary or common meaning of the word "method" includes business methods.[35] The Supreme Court also cites section 273 (b) (1), which states that an alleged infringer can assert a defense of prior use if a patentholder claims infringement based on a method in a patent.[36] The majority reasons that by allowing this defense, the statute itself acknowledges that there may be business method patents.[37]

Ultimately, the Supreme Court agreed with Federal Circuit Judge Rader, denying Bilski and Warsaw's application because they sought patent protection for the concept of hedging risk and the application of that concept to energy markets, which the Court ruled is not patentable subject matter because it is merely an abstract idea rather than a process.[38] The majority kept its ruling narrowly tailored and refused to exclude all business methods from patentability, stating that while some business methods may be mere abstract ideas, others may satisfy the requirements.[39] Generally, it is in the best interest of society for

30. *Bilski*, 130 S.Ct. at 3223.
31. *Id.* at 3226.
32. *Id.*
33. *Bilski*, 130 S.Ct. at 3226 (quoting Diehr, supra, at 182, 101 S.Ct. 1048) (quotations omitted)).
34. *Bilski*, 130 S.Ct. at 3228.
35. *Id.*
36. *Bilski*, 130 S.Ct. at 3228.
37. *Id.* at 3228-3229
38. See *Bilski*, 130 S.Ct. at 3231
39. *Id.*

Courts to keep their holdings narrowly tailored to the specific interest at hand. The Supreme Court; however, opened up a much broader issue during its discussion and then left it unanswered. In discussing the issue of whether Bilski and Warsaw's particular business method was patentable, the court also opened up the issue of whether business methods in general should be patentable and revoked a standard for determining patentability, but then failed to implement a new standard or come to a conclusion on the broad issue. The Court reasoned that they were not opening the floodgates to patent protection for all business methods in their broad analysis because even though they may now be classified as a process subject to protection, the method must still adhere to the novel and non-obvious restrictions imposed in sections 102 and 103.[40]

The majority's attempt to avoid controversy and skirt around the larger issue at hand by simply rejecting this particular application made a huge mess of an already confusing area of law. As Justice Stevens points out in his concurrence in the judgment, business methods in general have not traditionally been protected in the United States, and for good reason.[41] The majority's analysis, taken literally, quite wrongly suggests that any series of steps that is not an abstract idea or law of nature may constitute a process within the meaning of section 101 and be subject to patent protection. The majority's construction of the word "process" allows patent protection for a wide variety of processes, including business methods that most likely would not have been afforded protection in the past. This has tremendous negative implications on the economy and on the Constitution.

III. IMPLICATIONS OF THE U.S. SUPREME COURT'S HOLDING

Affording protection based on the common, ordinary definition of the word "process" floods the Patent and Trademark Office with ridiculous applications for any series of steps a business may use in practice. It also forces competitors using identical or similar methods to completely restructure the way they do business or forgo switching to a similar, more successful method of conducting business in the future, even if they came up with the methods on their own. Patent protection forbids the use of same or similar methods whether the method was copied or innocently engineered. This is extremely difficult to do in many areas of business where there may only be a handful of ways to conduct business because the business method merges with the business type. It is parallel to the Merger Doctrine theory in Copyright law, in which copyright protection is denied in situations where there are only a handful of ways to express an idea and the idea and expression merge. If the merged method is patented and the competitor cannot come up with a new, successful way to conduct business,

40. *Bilski*, 130 S.Ct at 3225.
41. *Id.* at 3232

he is forced to go out of business, either voluntarily or as the result of an infringement lawsuit against him. Amazon's patent on the "1-click" feature, for example, works to keep other competitors from establishing their own easy purchase systems to make online shoppers' lives easier.[42] The patent essentially creates a monopoly because Amazon, an online shopping website that gathers information about products from other online sellers and allows you to view all options on the Amazon website, is the only business that can implement a feature that allows the user to store information and purchase a third-party seller's product through Amazon.com with just one step and one click.[43] The monopoly over the one step purchase is enticing to online shoppers and takes business away from other businesses that require the purchaser to take more steps to purchase the same product.

This is where the Supreme Court Majority would argue that these types of business methods would be denied protection for failing to adhere to the novelty and non-obvious restrictions, but they failed to look beyond the theory on paper. In practice, these types of business methods are in fact afforded protection regularly. Take the patented method for conducting college football bowl championship playoffs, which was issued to Marc Matthews in April of 2000.[44] Matthews' patented method for conducting a championship playoff includes "the steps of ranking participating teams after a regular season by adding the ranks of each team based upon at least two different polls and assigning a final rank for each system based upon the summation of these polls."[45] Matthews' method description goes on to describe, "[a] championship tournament is then conducted with a plurality of rounds of events to reduce the initial number of teams to a single champion. A secondary tournament would be conducted utilizing the highest ranked teams below those which are utilized in the championship tournament."[46] This is exactly what the National Collegiate Athletic Association (NCAA) has been doing for years in the Division I college football national championship tournament. This is also generally how the championship games for college basketball, college hockey and most other college sports that participate in championship playoffs conduct playoff tournaments. Matthews' patented playoff system does contain some slight variations from the way the NCAA and the rest of the world conduct playoff tournaments, but the differences lie mainly in which days of the year the games would be played.[47] His method clearly does not satisfy the novelty and non-obvious requirements the majority would rely on to weed out unpatentable processes.

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42. U.S. Patent No. 7,877,299 (issued January 25, 2011)
43. '299 Patent
44. U.S. Patent No. 6,053,823 (issued April 25, 2000).
45. '823 Patent
46. '823 Patent
47. See '823 Patent

Matthews no doubt attempted to fix a messy system that people have been complaining about for years, but the patenting of the system actually acts as a roadblock and hurts rather than helps society. Matthews is essentially squatting on the patent and waiting for people to use his method so that he can sue for infringement. This is evidenced by the fact that Matthews recently sent a threatening e-mail to a man named Marc Cuban, the owner of the Dallas Mavericks, who was pushing hard to create a cleaner, easier-to-use NBA champion playoffs system.[48] Matthews' e-mail warned Cuban that a patent on a playoff system already existed and if Cuban made a similar system Matthews would sue him for infringement.[4950] In practice, Matthews' patented method for conducting championship playoffs now bars everyone from using this system without his permission and acts to control an entire industry for conducting business related to championship playoff games in college sports, effectively putting organizations like the NCAA out of business. Patenting methods of this nature goes against all public policy and undermines the intentions of the framers of the Constitution.

Article I section 8 of the U.S. Constitution gives Congress the power to promote the progress of science and the useful arts by giving exclusive rights to authors and inventors over their writings and discoveries for a limited period of time.[51] The purpose for including the limited time exclusive rights was to create incentive for people to use available resources in order to benefit society and enrich the culture by discovering and producing things such as medicines for diseases and art work. Providing patent protection for an invention such as a particular drug gives the inventor a monopoly, for a limited period of time, over how he makes that drug, how he markets that drug and how he sells that drug. He controls price and he can make the price whatever he wants. His monopoly benefits his business greatly and, while it may put a dent in the competitor's profits, it does not take away from how competitors do their business or produce their drugs. Allowing the inventor a monopoly over his drug gives him the opportunity to earn as much profit as he can off of his hard work, but only for a limited period of time. When his protection runs out, the competitor is free to

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48. Mike Masnick, *College Football Playoffs Patented?!?; Mark Cuban Warned Not To Infringe*, Dec. 23, 2010, http://www.techdirt.com/articles/20101223/02211812395/college-football-playoffs-patented-mark-cuban-warned-not-to-infringe.shtml

49. *Id.*

50. Matthews' email stated, "My advise is, don't waste your money. There are three perfected alternatives to the BCS. I own one, a guy with CBS owns another and a guy in Arizona owns the third. By that, I don't mean the screw-ball ideas you see on the internet, but actual branded properties. . . You should also consider that the playoffs are already owned by someone, as in, the patent for resolving the FBS championship by way of a playoff was issued long ago. It's called a method patent, so be careful not to infringe it. Anyway, if you want to know who owns assets in this field, let me know. I can put you in touch with one of my attorneys who can let you know what you're in for. It's much more complex that it's commonly understood to be."

51. U.S. CONST. art. I, § 8

make his own version of that particular drug and sell it for much less, extending the benefit to competitors and consumers. This was the framers' intent, to benefit society and support the growth of society through science and the useful arts. This is also the basis for a competitive market. When the original patent owner's protection runs out, the invention is fair game for others to work with. Since competitors did not spend the resources necessary to research and develop the invention, they can offer the product to the consumer market for much less, driving the price down and giving consumers more choice in the market.

Business methods; however, work against a competitive market. Granting patent protection on particular inventions is intended to promote the growth of useful arts and, indirectly, the economy. Business methods, on the other hand, stifle economic growth by creating monopolies not over a particular invention, but over the way in which a business can function. It does not benefit society; rather it benefits the individual business and harms competitors and the consuming public. When the patent protection on the business method runs out, competitors will not have the opportunity to adapt the business method for their own benefit because they will have gone out of business. Patenting business method patents is a way to squash the competition by rendering it unable to conduct business. If even a couple of companies in each industry were granted business method patents on they way they do business, the Patent and Trademark Office would effectively create a monopolistic economic system, giving consumers no choice in buying products and leaving society with no incentive to create, stifling growth both socially and economically.

Protecting business methods can be good for individual business practice, but protection must be afforded in an appropriate manner that limits the influence on the market as a whole. That is what trade secret protection was established for. Trade Secret protection for business methods is much simpler to acquire. It requires only that the company have information that is valuable in providing a competitive advantage over the industry.[52] The information must also be a secret, meaning that it cannot be generally known or *readily ascertainable by proper means*.[53] To maintain trade secret protection the business must take reasonable measures to maintain the secrecy of the information.[54] That is it. It does not require filing applications and the information remains a secret for as long as you keep it that way. Trade Secret protection, unlike patent protection, never runs out. It allows competitors to continue to conduct business their way while allowing the individual company to flourish using its successful business method. Trade secret protection does not bar competitors from figuring out the

52. Uniform Trade Secrets Act, § 1.

53. *Id.*

54. *Id.*

method on their own, but it does keep them from misappropriating the method.[55] It is the obvious choice for business methods and processes.

Coca Cola is a great example of the way in which a business can protect a process through trade secret and profit greatly without putting the rest of the soft drink industry in grave danger. Coca Cola chose to maintain the formula for Coke as a trade secret rather than attempting to patent it.[56] Had the formula for Coke been patented, the company would have had to disclose the formula to the public and, when protection ran out, competitors would have had the opportunity to use the formula to make their own versions of the soft drink. However, because Coca Cola chose to keep the formula a trade secret, the formula remains a secret some 200 years later and the company is able to maintain a competitive advantage over the industry.

IV. CONCLUSION

With other, more appropriate means of protection available for business methods, it seems unnecessary and even reckless to risk our free-market economy. However, by rejecting the U.S. Court of Appeals for the Federal Circuit's decision to establish the machine-or-transformation test as a requirement for affording patent protection to business methods, the U.S. Supreme Court majority has opened the floodgates to allow ridiculous, otherwise unpatentable business methods to flood the marketplace. By narrowly tailoring its decision and relying on the subject matter restrictions imposed through the Patent Act while refusing to establish any additional restrictions on the patentability of business methods or answering the larger question introduced, the majority has essentially given companies the okay to monopolize their business industry. As we are seeing, patent squatters are already popping up to monopolize certain ways of conducting business in an attempt to gain personal profit at the expense of cultural, economic and social growth. In practice, this looks less like a mixed-market economy, where business thrives on competition, and more like a corporatist economy, in which the economy is neatly arranged into major interest groups who work together to control the market. The downfall of our free-market economy as we know it today is inevitable if we continue to afford patent protection to business methods.

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55. Uniform Trade Secrets Act, § 1.

56. The formula for Coca Cola is technically not a business method; however, the analogy is still relevant.

Christian Legal Society v. Martinez: How Special *ARE* Schools?

John Ryan D. Cummings

Introduction

Attending college is an once-in-a-lifetime experience. Living parents-free for the first time, turning 21, making lifelong friends and truly learning about oneself are miraculous events in a young adult's life that are mostly unique to a college campus. Additionally, there exists a multitude of legal advantages that are unique to the college campus as well, such as free legal service for students, federal student loans, and the privilege of in-house disciplining processes for illegal alcohol use for minors (news of which, quite conveniently, rarely escapes the gates of a campus community). Following 2009's *Christian Legal Society* (CLS) *v. Martinez*, a new uniqueness emerged: the 1st Amendment's freedom of speech and association in the Supreme Court's decision of CLS furthered the thesis that a college campus operates under rules special to them, outside the laws in which the public must abide. The relative youth of the Supreme Court also leads one to believe that this decision sets a powerful precedent going forward that is unlikely to be overturned anytime soon.

I. Facts of the Case

Like most law schools around the United States, Hastings College of Law (Hastings) encourages its students to initiate and take part in extra-curricular associations that contribute and enhance their law school educational experience.[1] Hastings does this through its Registered Student Organization (RSO) program.[2] A RSO is afforded with numerous benefits, such as subsidization for events, exclusive law-school channels of communication, a weekly newsletter, the use of the school's name and logo, and use of the school as a meeting location, just to name a few.[3] There are, however, conditions on becoming a RSO. For example, prospective RSO's must comply with Hastings' "Policies and Regulations Applying to College Activities, Organizations and Students."[4]

The most significant requirement a RSO must abide by in its application is the school's Policy on Nondiscrimination.[5] The policy states

1. *Christian Legal Society v. Martinez*, 561 U.S. ____, 2 (2010).
2. *Id.*
3. *Id.* At 2-3
4. *Id.* At 3
5. *Id.*

> [Hastings] is committed to a policy against legally impermissible, arbitrary or unreasonable discriminatory practices. All groups, including administration, faculty, student governments, [Hastings]-owned student residence facilities and programs sponsored by [Hastings], are governed by this policy of nondiscrimination. [Hastings's] policy on nondiscrimination is to comply fully with the applicable law. [Hastings] shall not discriminate unlawfully on the basis of race, color, religion, national origin, ancestry, disability, age, sex or sexual orientation. This nondiscrimination policy covers admission, access and treatment in Hastings-sponsored programs and activities.[6]

Hastings interprets this policy to mandate all-comers: "School-approved groups must allow any student to participate, become a member, or seek leadership positions in the organization, regardless of her status or beliefs."[7] Considering RSO's are subsidized in part by the mandatory student activity fee, this interpretation of the Nondiscrimination Policy had the effect of allowing any paying member of the school to take part in a RSO they are indirectly funding.[8]

Hastings' chapter of the national Christian Legal Society (CLS) became the first student group at Hastings to apply for RSO status while simultaneously seeking an exemption from the nondiscrimination policy.[9] CLS' predecessor Christian organization, which had been a RSO for over a decade, decided to affiliate CLS' national organization.[10] In order to become members of the national organization, however, student chapters must adopt bylaws that require members to sign a 'Statement of Faith.'[11] A main tenant of the statement, and at issue here, is the belief that sexual activity should not occur outside of marriage between a man and a woman, which Hastings' CLS chapter interpreted to mean exclusion of anyone who engages in homosexual conduct.[12]

In September 2004, the school's Christian organization submitted an application for RSO status as the newly-named and newly-affiliated Christian Legal Society.[13] Included in the application was a copy of its national bylaws, requiring the signature for the Statement of Faith.[14] Due to CLS's interpretation of the national bylaws and their produced effect, Hastings rejected their application for RSO status because it did not comply with the Nondiscrimination Policy; CLS barred students based on religion and sexual orientation.[15] Hastings subsequently denied CLS's request for an exemption from the nondiscrimination policy as well. The school did not, however, shut the group down but

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6. *CLS v. Martinez,* 561 U.S. at 3, 4
7. *Id*. at 4.
8. *Id.* at 21
9. *Id.* at 5.
10. *Id.*
11. *CLS v. Martinez,* 561 U.S. at 5
12. *Id.*
13. *Id. At 6.*
14. *Id.*
15. *Id.*

merely refrained from granting RSO status and the benefits that went with it.[16] CLS, refusing to stray from the bylaws, operated independently during the 2004-2005 school year with great success without RSO status.[17]

II. PROCEDURAL HISTORY

In October 2004, CLS filed suit against various Hastings administrators under 42 U.S.C. §1983 seeking injunctive and declaratory relief, alleging violations of CLS's First and Fourteenth Amendment rights to free speech, expressive association, and free exercise of religion.[18] The Northern District of California ruled in favor of Hastings on cross-motions for summary judgment; the all-comers condition on access to a limited public forum was both reasonable and viewpoint neutral, thus not violative of CLS's free speech.[19] Additionally, the court ruled against CLS's argument that their right to expressive association and free exercise rights were impaired.[20] The 9th Circuit affirmed in a 44-word opinion.[21]

III. THE SUPREME COURT'S OPINION

CLS encouraged the Court to review the Nondiscrimination Policy as written, which in CLS's view, did not enforce an all-comers policy whatsoever but rather narrowly targeted groups that organized around religious beliefs or disapproved of particular sexual activities (in this case, homosexuality).[22] CLS also claimed that they were not equally treated by Hastings because other groups on campus were free to limit their membership to students that were committed to their prospective ideology.[23] Unfortunately for CLS, their argument runs contrary to the joint stipulation of facts both parties agreed to at the summary judgment (District Court) stage, invalidating their claim.[24] CLS additionally claimed that Hastings selectively enforced its all-comers policy in a disadvantageous manner to them, but the Supreme Court noted that neither the District nor the Circuit Court addressed this matter and remanded it to the Ninth Circuit to determine if the issue was preserved.[25] As a result, the Supreme Court only judged the narrow issue of whether the Hastings policy, as written, was reasonable, viewpoint neutral, and whether it violated the First Amendment.[26]

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16. *CLS v. Martinez,* 561 U.S. at 6
17. *Id.*
18. *Id.* at 7.
19. *Id.*
20. *Id.*
21. *CLS v. Martinez,* 561 U.S. at 8
22. *Id.*
23. *Id.*
24. *Id.* at 8-9.
25. *Id.* at 10
26. *CLS v. Martinez,* 561 U.S. at 10

CLS made two separate claims about the Nondiscrimination Policy and argued for two separate and distinct sets of constitutional analyses: first, that it violated their right to free speech and second, that it violated their right to expressive-association.[27] CLS wanted to see the Court apply a line of decisions for their expressive-association claim where the Court had rigorously reviewed restrictions on associational freedom in the public context.[28] However, Associate Justice Ruth Bader Ginsburg, writing for the 5-4 majority, merged CLS's two claims into the singular public forum analysis for three reasons:[29] the same level of scrutiny applies in both situations,[30] strict scrutiny analysis for an expressive association claim would invalidate a defining characteristic of limited public forums[31] and this case fits nicely into the already established limited-public forum analysis considering CLS may exclude anybody for any reason, as presently organized, absent RSO recognition.[32]

As Ginsburg notes, this is not the first time the Supreme Court has taken up the issue of student groups on campus restricted from official recognition by the administration.[33] In all three cases cited in the majority,[34] the Supreme Court had found and ruled that certain student groups had been selectively discriminated against due to their points of view.[35] "Once it has opened a limited public forum, the state must respect the lawful boundaries it has itself set."[36] While this appears to be a dagger in Hastings' argument, the Court conveniently created a caveat where the State *may* exclude speech if it is reasonable in light of the purpose served by the forum.

The Supreme Court first established that the all-comers policy is reasonable under the surrounding circumstances.[37] While the Court is the final arbiter on the constitutionality of any and all regulation, it has cautioned against substituting its own ideas of school policy for those of school authorities who know best due to their 'on-the-ground' expertise.[38] The all-comers policy's goal is to guarantee that all leadership, educational and social opportunities provided by a

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27. *Id*. at 12-13.
28. *Id.*
29. *Id.* at 14.
30. *Id.*; "When these intertwined rights arise in exactly the same context, it would be anomalous for a speech restriction to survive constitutional review under the limited-public-forum test only be to invalidated as an impermissible infringement of expressive association."
31. *CLS v. Martinez,* 561 U.S. at 14.; The line of cases CLS wanted the Court to use to analyze their expressive association claim involved regulations that compelled a group to include unwanted members. Hastings' policy does no such thing here.
32. *Id.* at 15.
33. *Id.* at 17.
34. *Healy v. James*, 408 U.S. 169 (1972), *Widmar v. Vincent*, 454 U.S. 263 (1981), and *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995).
35. *CLS v. Martinez*, 561 U.S. at 19.
36. *Id.*
37. *Id.* at 20
38. *Id.*

RSO are available to all students, regardless of creed or sexual orientation.[39] Also, considering the RSO program is funded by a mandatory student activity fee, the policy helps ensure that students aren't funding organizations that would reject them.[40] It encourages people of diverse background to work together and participate in a unique educational experience.[41] The policy also gives due deference to the language used in the State's nondiscrimination laws.[42] "So long as a public school does not contravene constitutional limits, its choice to advance state-law goals stands on firm footing."[43]

Not only were CLS's arguments unavailing, Ginsburg continued, but they were especially weak in light of the alternate means of communication and group-activities that were available to CLS outside official RSO status.[44] With the advent of social networking devices such as Facebook and Twitter, running a student organization is now significantly easier than it once was.[45] In lieu of RSO status, Hastings even allowed CLS use of the school facilities for meeting space, as well as various other forms of communication outside of the RSO-specific avenues.[46] The Court likened CLS, in this instance, to Greek life on a college campus, which operates successfully without any sort of official school recognition.[47]

The majority also found that the all-comers policy was viewpoint-neutral as well as reasonable. Described as 'textbook viewpoint-neutral,' the policy makes no distinction between any student group on Hastings campus; all groups must allow all students to join.[48] "Hastings' requirement that RSO's accept all comers, the Court is satisfied, is justified without reference to the content of the regulated speech. It targets the act of rejecting would-be group members without reference to the reasons motivating that behavior."[49] By concentrating solely on the act of rejection itself rather than the *rationale* for rejection, Hastings' policy cannot be seen as anything but viewpoint-neutral.

IV. ANALYSIS/IMPLICATIONS

Analysis of the case at hand compared to a recent Supreme Court decision in very similar vein[50] leads this author to believe that when public schools are

39. *Id.* at 21-22.
40. *CLS v. Martinez*, 561 U.S. at 21-22
41. *Id.* at 23.
42. *Id.*
43. *Id.* at 24.
44. *Id.* at 25.
45. *CLS v. Martinez*, 561 U.S. at 25
46. *Id.*
47. *Id.*; As a matter of fact, CLS operated as an organization quite successfully the year following their RSO application rejection, even doubling their average attendance. *See supra* footnote 15.
48. *Id.* at 29.
49. *Id.* at 30.
50. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557.

involved in free speech, they receive special treatment contrary to established precedent due to their status as institutions of higher learning.[51] *Hurley* involved the South Boston Allied War Veterans Council, an association of veterans elected from various veterans groups around the city. The City of Boston had authorized the Council to organize and put on an annual parade for St. Patrick's Day, as well as granting them the power to allow other groups to march with them or not, a power they seldom used for rejection.[52]

In 1993, a group titled GLIB, an organization formed for the purpose of marching in the parade to express their pride not only their Irish heritage but also their status as openly gay, lesbian and bisexual people, asked permission to march.[53] When the Council refused a place for them in the parade, alleging it violated their First Amendment right to convey a particular message, GLIB sued in state court alleging a violation of state law prohibiting discrimination on account of sexual orientation in places of public accommodation.[54] After running the state court gamut, the Massachusetts Supreme Court affirmed the trial court finding that since the parade had no real common theme other than the collective involvement of the participants, combined with their lack of selectivity in choosing parade participants in the past, GLIB's inclusion in the parade would not violate the Council's First Amendment rights and ordered them to include GLIB in the parade.[55]

The United States Supreme Court, however, reversed the Massachusetts ruling on the theory that a public accommodations law requiring private citizens organizing a parade to include marchers who do not agree with the organizer's message *does* violate the First Amendment.[56] According to the Court, parades such as the petitioners' are a form of protected expression due to the fact that the marchers share some collective idea or point, and that such protection is not only limited to banners and songs but also symbolic acts, such as marching.[57] GLIB's participation in the parade was equally expressive since the association was formed around the group's sexual identities and related for that specific purpose.[58] While the Massachusetts law does not violate the federal constitution as a general matter, its application has the effect of significantly altering the message the Council was attempting to portray in their parade, thus violating their First Amendment right to choose the content of their own message. The exclusion of GLIB operated under the Council's right as a private speaker to "shape its expression by speaking on one subject while remaining silent on an-

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51. *Id*. At 560-561
52. *Id.* At 561
53. *Id.*
54. *Id*. At 562.
55. *Hurley,* 515 U.S. at 563-564.
56. *Id.* At 573.
57. *Id.* At 574.
58. *Id.*

other, free from state interference."[59] While *Hurley* was controversial at the time, it remains good law and has been upheld by the Supreme Court numerous times since its ruling in 1995.

There are two major distinctions that can be drawn between the two cases. First, in *Hurley*, the Massachusetts law *compelled* the Council to include GLIB against their wishes, whereas Hastings only denied RSO status and itbbbs accompanying privileges; in no way did Hastings demand CLS to include members who did not agree with their agenda. This distinction alone seems to be enough to make the two cases distinguishable. Ginsburg at no point, however, mentioned the unanimously decided *Hurley* in her majority due to the second distinction that drives my thesis: *CLS* is a case about college students in a college setting.

Ginsburg made a point in her majority opinion to defer to the authorities of the school, whose expertise and on the ground knowledge of proper school policy deserved respect and influence.[60] Ginsburg also alluded numerous times to the benefits a student enjoys when he or she is surrounded by those of diverse characteristics.[61] This is in conjunction with the argument that RSO's are funded by the mandatory student activity fee, and thus everyone who pays that fee (constituting the entire law school student body) should have the opportunity to join any club that is subsidized by it.

Aggregating my previous points, this creates a special legal environment in a school where it seems that typical constitutional rights, such as freedom of expressive association and the right to exclude those that do not agree with your collective message, are stifled in the name of diversity and educational experience. Otherwise, CLS and the South Boston Council of Veterans are quite similarly situated and would deserve equal treatment from the Supreme Court in their bids for expressive association. Due to their proximity in the educational arena, CLS was denied the benefits of most other Hastings student organizations purely because of their religious message and apparent[62] intolerance of homosexuality. Contrarily, they would have had ample opportunity to remain introverted in membership had they been outside the academic arena.

CLS v. Martinez created a strong precedent relating to expressive association in public schools. Following the ruling, Peter Schmidt, a legal columnist for *The Chronicle* online website, expressed his opinion that this case will most likely not end the litigation of school policies in federal court.[63] This is espe-

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59. *Id.*

60. *CLS v. Martinez,* 561 US at 20*, See supra* footnote 37.

61. *Id.* at 20.

62. Based on their interpretation of the national organization's bylaws and the subsequent effect of its application

63. Schmidt, Peter. *Ruling Is Unlikely to End Litigation Over Policies on Student Groups*. The Chronicle, Jun. 30, 2010, http://chronicle.com/article/Many-Colleges-Student-Group/66101/

cially significant considering most schools no longer have an 'all-comers' policy like Hastings but rather a general policy that allows student groups to control their membership and leadership roles within as long as they do so absent discriminatory intent.[64]

At the time of this case, Hastings was not the only law school in the United States to have their Nondiscrimination Policy (all-comers policy) challenged by the Christian Legal Society.[65] However, following the *CLS* ruling, most of these cases settled in compromise where the schools exempted them from requirements to admit any student regardless of race, gender, sexual orientation or the like.[66] This is exceedingly curious considering the Supreme Court ruled that Hastings *was* constitutionally free to restrict RSO status to groups who violated their all-comers policy. While this is instantly an intellectually troublesome accord that most schools seem to be making with their resident CLS chapters, one must believe that there is a hard line drawn somewhere if groups were founded upon an intolerable belief system, such as "a conviction that women or black people are inferior."[67]

Alas, the future of similar cases will most likely follow the path set by the Supreme Court in CLS. With the average age of the Justices around 65 years (five of the justices are under the age of 62 and don't appear to be leaving the high bench anytime soon), the Court is relatively young compared to the earlier half of the decade. This significantly decreases the chances that a case such as this will be overturned in the near future. While much will hinge on the future replacement of Anthony Kennedy, the Court's current swing vote and 5th vote in the case here, it is likely that *CLS v. Martinez* will remain good law for the foreseeable future.

This case is also a quintessential representation of where the United States is today as a nation dealing with discrimination. The Christian Legal Society felt discriminated against based on their religious beliefs because they were not granted Registered Student Organization status at Hastings' College of Law. This amounted to the lack of, in the grand scheme, very minor accommodations relating to advertising, communications and group meeting rooms. The majority opinion seems to intimate that CLS is stretching here to find a discrimination claim. If this is the case, it is a much more significant revelation than one may think. Our nation was founded on the 3/5ths clause in the Constitution, battled a bloody Civil War to rid ourselves of slavery, did not grant women the right to vote until the mid-1920's, failed to resolve many of its race issues until the civil rights movement of the 1960's, and is now just beginning to truly struggle with marriage equality. This shows an incredible growth and maturation as a nation

64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.*

that can only be appreciated in a case such as this where the denial of college funds for a student organization warrants a decision from the Supreme Court of the United States. While seeming to be a small and insignificant case about emailing at college, its symbolism compared to the history of our nation's struggle with discrimination is simultaneously sobering and satisfying.

Salazar v. Buono: State Endorsement of Religion?

Minjun Huang

Introduction

Does a Latin cross in the Mojave Desert, sitting atop Sunrise Peak in a federal park preserve, violate the Establishment Clause of the First Amendment? *Salazar's* complicated facts and procedural history prevent the Supreme Court from resolving this issue directly. Instead, the plurality opinion offered by Justice Kennedy centers on the merits of the constitutionality of the Mojave Desert cross directed at the remedy of the cross itself.[1] The remedy analyzed was the land transfer statute enacted by Congress to preserve the cross.[2] Does the *Salazar* opinion build upon O'Connor's endorsement test as laid out in *Lemon v. Kurtzman* in dealing with Establishment Clause challenges? O'Connor's endorsement test as laid out in *Lemon v. Kurtzman,* found that "A government religious practice or symbol will survive an Establishment Clause challenge when it (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive state entanglement with religion."[3]

I. Facts & Procedural History

The facts center around a Latin cross atop Sunrise Rock constructed out of metal pipes on federal land as a memorial to soldiers who died in World War I.[4] In1934, a wooden cross was built on the same location by the Veterans of Foreign Wars (VFW) as a memorial to veterans who died in World War I.[5] Since 1934, the cross has been an intermittent gathering place for Easter religious services.[6] The current version of the cross is by Henry Sandoz, a private citizen who owns land elsewhere in the Preserve, who is prepared to transfer a portion of his land to the Government in return for the land to be conveyed to the VFW for the land on which the cross stands.[7] The cross currently stands unmarked.[8]

Since 1999, the National Park Service received and denied a request to build a stupa, a mound like structure typically used by Buddhists as a place of wor-

1. Salazar *v.* Buono, 130 S.Ct. 1803, 1811 (2010).
2. *Id.*
3. *Id.* at 1812.
4. *Id*. at 1811
5. *Id*.
6. *Id*. at 1812.
7. *Id.*
8. *Id.*

ship.[9] Congress in 2000 passed a series of laws to preserve the Sunrise Rock cross by providing that government funds cannot be used to remove the cross.[10]

Meanwhile, Frank Buono, a retired National Park Service employee, sued to have the cross removed on the ground that it violates the Establishment Clause of the First Amendment to the United States Constitution.[11] Buono, as a retired park service employee who regularly visits the preserve, was offended by the presence of a religious symbol on federal property.[12] Buono sought an injunction requiring the Government to remove the cross.[13] The litigation process was commenced in several stages.

In *Buono v. Norton*, the District Court ruled in Buono's favor, finding that Buono had standing to maintain his Establishment Clause challenge.[14] The parties agreed on the merits that the dispute should be governed by the Establishment Clause test found in *Lemon v. Kurtzman*.[15] The District Court granted Buono's request for an injunctive relief concluding that the presence of a cross on federal land conveyed an impression of governmental endorsement of religion.[16] The United States Court of Appeals for the Ninth Circuit stayed the prior injunction by requiring the cross either removed or dismantled but did not forbid alternative methods of complying with the order.[17] The Government complied with the injunction by covering the cross, first with a tarpaulin and later with a plywood box.[18] The land-transfer statute later was another approach taken by Congress to comply with the injunction order.[19] On appeal, the judgment of the District Court was affirmed in its standing and on the merits of Buono's Establishment challenge (*Buono II*). The appeals court ruling did not decide whether the Government's actions were motivated by a secular purpose but was based on the decision that a reasonable observer would perceive a cross on federal land as an endorsement of religion by the Government.[20]

During the relevant proceedings, Congress prohibited on several occasions the spending of governmental funds to remove the cross.[21] Prior to *Buono I*'s filing, Congress passed a bill prohibiting the use of governmental funds in removing the cross.[22] In 2002, while *Buono I* was pending in the District Court,

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9. Buono v. Norton, 212 F. Supp. 2d 1202,1205-06 (C.D. Cal. 2002).
10. *Salazar,* 130 S.Ct. at 1813.
11. *Id.* at 1812.
12. *Id.*
13. *Salazar,* 130 S.Ct. at 1813.
14. *Id.* at 1812.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Salazar,* 130 S.Ct. at 1812-13.
19. *Id.* at 1823.
20. *Id.* at 1813.
21. *Id.*
22. *Id.*

"Congress designated the cross and its adjoining land 'as a national memorial commemorating United States participation in World War I and honoring the American veterans of that war.'"[23] After *Buono I*'s decision, Congress once again passed an act prohibiting the use of governmental funds in removing the cross.[24] While the Government's appeal in *Buono II* was pending, Congress passed a statute directing the Secretary of the Interior to transfer the Government's interest in the land that had been designated a national memorial to the VSF.[25] This land-transfer statute provided that if the VSF did not maintain the property as a World War I and American veterans of war memorial, the land will revert to the Government.[26] Buono then returned to court seeking to prevent the government's land transfer by claiming that the transfer was a sham aimed at keeping the cross in place.[27] The court determined that the transfer was indeed an attempt by the Government to keep the cross atop Sunrise Rock and therefore was invalid.[28] In addition, the court granted Buono's motion to enforce the 2002 injunction[29] which "permanently forbade the Government 'from permitting the display of the Latin cross in the area of Sunrise Rock in the Mojave National Preserve.'"[30]

II. REASONING AND HOLDING OF SUPREME COURT

In a 5-4 plurality ruling, the Supreme Court sent the case back down to the lower courts.[31] Justice Kennedy's plurality opinion states that the meaning of the cross must be assessed in the context of all relevant factors.[32] In addition, the plurality opinion remands the case so that the district court can consider the new laws enacted by congressional actions.[33]

Justice Kennedy's plurality opinion makes broad statements about the Establishment Clause. The opinion notes that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm."[34] In addition, "the Constitution does not oblige government to avoid any public acknowledgement of religion's role in society."[35] Instead, the Constitution's framework allows accommodation of various values.[36] Justice Ken-

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23. *Salazar,* 130 S.Ct. at 1813.
24. *Id.*
25. *Id.*
26. *Id.* at 1826.
27. *Id.* at 1814.
28. *Salazar,* 130 S.Ct. at 1814.
29. *Salazar,* 130 S.Ct. at 1814.
30. *Id.* at 1812.
31. *Id.*at 1820-21.
32. *Id.* at 1820.
33. *Id.* at 1820-21.
34. *Salazar,* 130 S.Ct. at 1818.
35. *Id.*
36. *Id.* at 1819.

nedy, in considering the Establishment Clause challenge, finds it inappropriate to inquire into "reasonable observer" perceptions of objects on private land.[37] "The test requires the hypothetical construct of an objective observer who knows all of the pertinent facts and circumstances surrounding the symbol and its placement."[38] Justice Kennedy perceives the Latin cross as more than a religious symbol, affirming a particular religious belief.[39] Instead, Justice Kennedy, in applying the "objective observer" perceptions to the Latin cross given the context and consequences, finds the Latin cross as a symbol honoring and respecting soldiers and veterans for their acts and contributions.[40]

Chief Justice Roberts in joining Justice Kennedy's opinion in full, states simply that the Government should sell the land with the cross on it.[41]

Justice Alito's concurring opinion holds that the land transfer does not violate the injunction at all.[42] The monument, according to Justice Alito, can be interpreted in a variety of ways by different observers.[43] Justice Alito finds that:

> [T]he original reason for the placement of the cross was to commemorate American war dead and, particularly for those with searing memories of The Great War, the symbol that was selected, a plain unadorned white cross, no doubt evoked the unforgettable image of the white crosses, row on row, that marked the final resting places of so many American soldiers who fell in that conflict.[44]

But Justice Alito also acknowledges the cross as a "preeminent symbol of Christianity" with a tradition of Easter services held at Sunrise Rock.[45] Justice Alito's opinion states that the Endorsement test will not violate the land exchange.[46] "The endorsement test views a challenged display through the eyes of a hypothetical reasonable observer who is deemed to be aware of the history and all other pertinent facts relating to a challenged display."[47] Justice Alito finds that a reasonable observer familiar with the origin and history of the cross will not see the land exchange as equal to an official World War I memorial on the National Mall, but will instead realize the transfer was a means for Congress in finding the best solution to address a unique situation.[48]

Justice Stevens joined by Justice Ginsburg and Justice Sotomayor, argues that Congress intends the land transfer in order to preserve the cross. Even after

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37. *Id.*
38. *Id.* at 1819-20.
39. *Salazar,* 130 S.Ct. at 1820.
40. *Id.*
41. *Id.* at 1821.
42. *Id.*
43. *Id.* at 1822.
44. *Salazar,* 130 S.Ct. at 1822.
45. *Id.*
46. *Id.* at 1824.
47. *Id.*
48. *Id.* at 1823.

the land transfer and name change on the land, it will still appear to a reasonable observer that the Government is endorsing the cross.[49] "Changing of the ownership status of the underlying land in the manner required by §8121 would not change the fact that the cross conveys a message of government endorsement of religion."[50] Additionally, since the intent of the land transfer is to preserve the cross, this maintains the Government's endorsement of the cross.[51] Stevens argues that since Congress designates the cross as a national memorial, the lower court's finding of endorsement of religion should apply to the Mojave Desert cross whether the cross sits on public or private land.[52] Throughout the dissent, Justice Stevens points to the significance of the cross as a sectarian symbol, and counters the plurality's and Alito's contrary characterizations as an attempt to re-decide the underlying issue of whether the Mojave Desert cross violates the Establishment Clause.[53] Justice Stevens' dissent applies O'Connor's endorsement test by finding a reasonable observer will likely conclude that Congress, by commanding the cross to remain in place, is in fact endorsing a particular religious view.[54] Justice Stevens maintains that if Congress puts a solitary Latin cross at the Mall in the Nation's Capital as a World War I Memorial, most judges would find it as a clear Establishment Clause violation.[55]

Justice Breyer in a separate dissent declines to address the Establishment Clause question because he believes it was settled when the District Court ruled that the land transfer was a way for the Government to keep the cross and thus is an impermissible government endorsement.[56] Justice Breyer instead simply addresses the law of injunctions.[57]

III. IMPLICATION OF HOLDING

Following the holding in *Salazar*, the status of the Establishment Clause and what tests are applied is in flux. It is unclear how O'Connor's endorsement test is being used and how effectively the test is still applied. O'Connor's endorsement test seems to build on the concept of whether or not the Government intended a religious symbol and if it was used to convey the endorsement of a particular religion.[58]

Justice Kennedy's plurality opinion in *Salazar* seem to focus not on the message conveyed to a religious outsider but on whether an objective observer who

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49. *Salazar,* 130 S.Ct. at 1832.
50. *Id.* at 1837.
51. *Id.* at 1832.
52. *Id.* at 1834.
53. *Id.* at 1834-35.
54. *Salazar,* 130 S.Ct. at 1842.
55. *Id.*
56. *Id.* at 1844-45.
57. *Id.* at 1845.
58. County of Allegheny v. ACLU, 492 U.S. 573, 628 (1989).

views the cross with knowledge of the context and circumstances, will perceive a message of religious exclusion. In addition, Justice Kennedy's opinion insists the Government intended the cross for secular purposes by downplaying the cross's religious importance. Justice Kennedy's opinion appears to use an objective observer standard in order to downplay the religious significance of the Latin cross in order to minimize the threat of an Establishment Clause violation.

Justice Alito repeated in *Salazar* that a monument may be "interpreted by different observers, in a variety of ways"[59] and observed that those who saw the cross monument "appear to have viewed it as conveying at least two significantly different messages,"[60] both as the "preeminent symbol of Christianity" and as a World War I memorial.[61] This seems to build on the idea that the cross was not solely intended for religious purposes, but that a secular purpose can also be perceived. Because the cross can be interpreted by different observers in a variety of ways, the cross was not specifically conveying a religious endorsement. Rather it depends on the observer's perceptions. Although Justice Alito does not indicate unconditional support for the endorsement test, his opinion gives significant weight to factual matters instead of the religious meanings behind the cross. The opinion delves into matters such as the monument's original purpose, the number of people likely to see it, and Congress's intentions in undertaking the land swap.[62] Even though Justice Alito seems to be working within the frame of O'Connor's endorsement test framework, his vote to uphold the cross suggests to a certain point that his idea of "endorsement" may be very different from what O'Connor intended. Justice Alito, just like O'Connor, uses a reasonable observer, but Justice Alito's reasonable observer is "familiar with the origin and history of the monument and would also know both that the land on which the monument is located is privately owned and that the new owner is under no obligation to preserve the monument's present design."[63] In doing so, Justice Alito appears to be following Justice Kennedy's approach in using an objective observer instead of a reasonable observer. But how is it fair that only those observer perceptions with knowledge of the context and circumstances are used to evaluate whether or not it appears as if the Government is in fact endorsing a particular religion?

Justice Stevens' dissenting opinion reaffirms O'Connor's use of a reasonable observer in evaluating whether or not it appears that the Government is in fact endorsing a particular religion.[64] It appears that Justice Stevens views the cross as a religious symbol that contains a secular purpose.

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59. *Salazar,* 130 S.Ct. at 1822.
60. *Id.*
61. *Id.*
62. *Id.* at 1821-23.
63. *Salazar,* 130 S.Ct. at 1824.
64. County of Allegheny, *492 U.S. 573* at 1819.

Even with the land-transfer statute and the cross being on privately owned land instead of federal land, the Government's actions in preserving the land the cross is on appears to be an endorsement of religion. Although this appears to be the case, the Government can still survive an Establishment Clause challenge because a secular purpose exists in the fact that the cross also is a World War I memorial. Additionally, the primary effect of the cross neither advances nor inhibits religion. The Government actions do not convey a religious endorsement. The Government, by enacting the land-transfer statute, essentially eliminates any excessive state entanglements with religion because the cross would no longer be on federal land.

Ten days after the Supreme Court's divided ruling in the case allowed the cross to remain while the case was remanded back to the lower courts, the cross went missing.[65] Those who had helped defend the presence of the cross were outraged at the theft of the cross. The VFW is offering a $25,000 reward for information leading to the thieves and is vowing to rebuild the cross.[66] Although the cross at the center of *Salazar* and multiple litigation proceedings is now missing, the central issue remains. Does the land-transfer statute, transferring the land the cross was on from federal land to private land indicate the Government's support of a particular religion? And does this endorsement constitute a violation of the Establishment Clause?

65. Randal C. Archibold, *Cross at Center of Legal Dispute Disappears*, NYTIMES.COM, May 11,2010, http://www.nytimes.com/2010/05/12/us/12cross.html?_r=1.

66. *Id.*

Holland v. Florida: An Attorney's Incompetence Should Not Be Lethal

R. Renee Yaworksy

Introduction

Holland v. Florida was decided by the United States Supreme Court on June 14, 2010. Although recent, the case is already being heralded as a landmark decision with regards to tolling and capital defendants.[1] The case is significant in that it demands that capital defendants should no longer have their trial attorney's ineptitude regarding timely filing practices held against the defendants. This is a key benchmark in the field of criminal law because it deviates from previous case law. Before *Holland v. Florida*, capital petitioners were expected to languish on death row regardless of their counsel's competence or incompetence at the appellate level. If the prisoner's attorney became forgetful or sloppy, it was the capital client who ended up paying the ultimate price—with his or her life.

In *Holland v. Florida,* the highest Court in the land struggled with the moral and legal implications of allowing such a seeming injustice to take place.[2] The Court reasoned, *inter alia,* that a petitioner's life must hold precedence over certain procedural norms.[3] Where a client's very life is on the line, the rules become more flexible.[4] The lasting effect of *Holland v. Florida* is yet to be seen, but its impact is expected to ripple through death rows across the country.[5] There is also a chance that the effect will trickle down from the capital level to perhaps impact all other criminal defendants and petitioners.[6] The philosophy behind the majority's opinion in *Holland v. Florida* (that a prisoner should not be "punished" for his or her attorney's incompetence) may one day be applied more broadly to prisoners not on death row.

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1. ACLU, Supreme Court In Holland v. Florida Affirms Importance Of Fairness In Construing Habeas Deadlines, June 14, 2010, *available at* http://www.aclu.org/capital-punishment/supreme-court-holland-v-florida-affirms-importance-fairness-construing-habeas-dea; *see also* The Moderate Voice, Holland v. Florida: How Bad Must A Death Penalty Lawyer Be?, June 15, 2010, *available at* http://themoderatevoice.com/76580/holland-v-florida-how-bad-must-a-death-penalty-lawyer-be/ (last visited Feb. 14, 2011).

2. Legal Ethics Forum, SCOTUS releases opinions in Holland v. Florida and Astrue v. Ratliff, June 14, 2010, *available at* http://www.legalethicsforum.com/blog/2010/06/scotus-releases-hollandvflorida-and-astruevratliff.html (last visited Feb. 14, 2011).

3. *Holland v. Florida*, 130 S. Ct. 2549 (2010).

4. *Id.*

5. Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 Am. U.L. Rev. 1499 (2010).

6. NY Times, Justices Ease Deportation Rule in Minor Drug Cases, June 14, 2010 http://www.nytimes.com/2010/06/15/us/15scotus.html.

I. PRECEDENT

The rationale that "death is different" is not entirely foreign to the Court.[7] In another case that has been a milestone for capital defendants, *Roper v. Simmons*,[8] the Court's majority wrestled with the fact that juvenile offenders were being asked to pay the highest price for crimes they committed while their young minds were still developing. The Court recognized that individuals under the age of eighteen may not appreciate the repercussions of their actions nor be able to reason the same way adults can.[9]

Roper v. Simmons effectively outlawed having the death penalty imposed on anyone who committed any crime before the age of eighteen.[10] Regardless of that crime's heinousness, or any aggravating factors, juveniles were, immediately, released from the bonds of capital punishment. Death row prisoners awaiting execution dates, who committed their crimes before their eighteenth birthdays, were given lesser sentences as soon as *Roper v. Simmons* was decided.[11]

The respondent in *Roper v. Simmons* was a death row prisoner who had been seventeen when he committed capital murder.[12] He relied heavily on the Court's decision on another capital punishment issue that had just recently been decided.[13] In *Atkins v. Virginia,* the Court had held that the Eighth Amendment, which is applicable to the States via the Fourteenth Amendment, prohibits the execution of any individual who is found to be "mentally retarded."[14] Such a practice, although previously allowed, violates the Constitution's ban on any punishment that could be considered "cruel and unusual."[15] The Court in that case had reasoned that individuals who had been convicted of capital crimes, but were deemed "retarded," could not fully appreciate the ramifications of their crimes, or even the gravity of the harsh punishment that awaited them.[16]

Both the respondent in *Roper v. Simmons* and the death row prisoner in *Atkins v. Virginia* were victorious because of identical reasoning: where punishment cannot constitutionally outweigh the crime, the death penalty is inappropriate for offenders who lacked the ability to fully understand the weight

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7. Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U.L. REV. 1499 (2010).

8. Roper v. Simmons, 543 U.S. 551 (2005).

9. *Roper v. Simmons*, 543 U.S. 551 (2005).

10. *Id.*

11. Brianne Ogilvie, *Is Life Unfair? What's Next for Juveniles After Roper v. Simmons*, 60 BAYLOR L. REV 293, 294 (2008).

12. *Roper v. Simmons*, 543 U.S. 551 (2005).

13. *Id.*

14. *Atkins v. Virginia*, 536 U.S. 304 (2002).

15. *Id.*

16. *Atkins v. Virginia*, 536 U.S. 304 (2002).

of their crimes.[17] Moreover, punishment by execution is so harsh that a higher standard must be applied to the facts of a capital case.[18] Death is different.

This same line of reasoning guided the *Holland v. Florida* Court and persuaded the majority to give death row prisoners, who are carrying such a unique and heavy burden, the benefit of the doubt in less-than-essential procedural matters.[19] The Court also recognized the need for exactitude when proceeding with the appeals process for capital defendants. One slight error or deviation from sound practices may result in the death of an individual who does not deserve such a punishment.[20]

II. THE FACTS OF THE CASE

Holland v. Florida involved a death row petitioner's late-filed federal habeas appeal.[21] The petitioner, Albert Holland, was convicted of first-degree murder and sentenced to death in the State of Florida.[22] The Florida Supreme Court affirmed that judgment.[23] On October 1, 2001, the U.S. Supreme Court denied Holland's petition for certiorari, which began the 1-year Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limitations clock.[24]

On November 7, 2001, the attorney Bradley Collins was appointed by the State of Florida to represent Holland in all state and federal post-conviction proceedings.[25] Twelve days before the AEDPA limitations period ended, Collins filed a motion for post-conviction relief in the state trial court on Holland's behalf.[26] This filing stopped the AEDPA clock from ticking any further.

For the next three years, Holland's petition remained pending in the state courts.[27] During those years, Holland contacted his attorney to make sure that Collins preserved all of his claims for any future federal habeas corpus review.[28] Collins replied by mail, writing his client: "I would like to reassure you that we are aware of state-time limitations and federal exhaustion requirements."[29] The attorney also promised to "present . . . to the . . . federal courts"

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17. *See* Roper v. Simmons, 543 U.S. 551 (2005); *see also id.*
18. Elisabeth Semel, *Reflections on Justice John Paul Steven's Concurring Opinion in* Baze v. Rees*: A Fifth* Gregg *Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783 (2010).
19. Renee Newman Knake, *The Supreme Court's Increased Attention to the Law of Lawyering: Mere Coincidence or Something More?*, 59 AM. U.L. REV. 1499 (2010).
20. Elisabeth Semel, *Reflections on Justice John Paul Steven's Concurring Opinion in* Baze v. Rees*: A Fifth* Gregg *Justice Renounces Capital Punishment*, 43 U.C. DAVIS L. REV. 783 (2010).
21. *Holland v. Florida*, 130 S. Ct. 2549 (2010).
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Holland v. Florida*, 130 S. Ct. 2549 (2010).
27. *Id.*
28. *Id.*
29. *Id.*

any claims that the state courts denied.[30] Collins even wrote a second letter to his client, stating, "should your Motion for Post-Conviction Relief be denied [by the state courts,] your state habeas corpus claims will then be ripe for presentation in a petition for writ of habeas corpus in federal court."[31]

Holland was denied relief by the state trial court in May of 2003. Collins appealed to the Florida Supreme Court and after two years, that Court heard oral argument in the case.[32] During those two years, the relationship between Collins and his client grew strained. Collins stopped communicating with Holland on a regular basis, even though Holland fervently attempted to contact him many times.[33] Between April of 2003 and January of 2006, Collins only wrote his client three letters and did not communicate with him by phone or visit.[34]

Holland was greatly distressed by this development and wrote two letters to the Florida Supreme Court requesting Collins to be removed from representing him.[35] Holland wrote the Court that he and his lawyer had suffered "a complete breakdown in communication," and that Collins had "not kept [him] updated on the status of [his] capital case."[36] Holland's letters stated that he had "not seen or spoken to" his lawyer "since April 2003."[37] The worried death row prisoner wrote the Court: "Mr. Collins has abandoned [me]" and "[I have] no idea what is going on with [my] capital case on appeal. . . . Collins has never made any reasonable effort to establish any relationship of trust or confidence with [me]."[38] Holland expressed that he did not trust or have "any confidence in Mr. Collins' ability to represent [him]."[39]

After Holland requested a hearing to show that Collins was inadequate, the State answered that Holland could not file any pro se papers with the court while he was being represented by counsel—not even papers requesting a new attorney.[40] The Florida Supreme Court agreed, denying Holland's requests.

Holland also wrote multiple letters to the Clerk of the Florida Supreme Court, writing, among other things:

> "[I]f I had a competent, conflict-free, postconviction, appellate attorney representing me, I would not have to write you this letter. I'm not trying to get on your nerves. I just would like to know exactly what is happening with my case on appeal to the Supreme Court of Florida."[41]

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30. *Id.*
31. *Holland v. Florida*, 130 S. Ct. 2549 (2010).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Holland v. Florida*, 130 S. Ct. 2549 (2010).
37. *Id.*
38. *Id.*
39. *Holland v. Florida*, 130 S. Ct. 2549 (2010).
40. *Id.*
41. *Id.*

In addition to these letters, Holland also filed a complaint against his attorney with the Florida Bar Association. That complaint was denied.

Holland was able to demonstrate evidence to the U.S. Supreme Court that he had repeatedly requested for his lawyer to file the appeal. He was able to produce numerous letters from the lawyer written to him, assuring him that the appeal would be filed in a timely manner and not to worry.[42] Unfortunately, despite the attorney's assurances, the deadline was not met and the appeal was not filed on time.[43]

On December 1, 2005, the Florida Supreme Court issued its mandate, which made its decision final and restarted the AEDPA federal habeas corpus clock.[44] There were only twelve days left on that 1-year meter, as the AEDPA limitations clock restarts when a state court finished its post-conviction review.[45] Therefore, after twelve days passed, on December 13, 2005, Holland's AEDPA time limit expired, despite all Holland's efforts to avoid such a negative outcome.

Holland remained in the dark about the Florida Supreme Court's ruling on his case until five weeks later. On January 18, 2006, he was working in the prison library and discovered what had happened. During those five weeks, he had written his lawyer asking about the status of his appeals, but had heard no reply as had become the usual state of affairs. At once, Holland wrote a pro se federal habeas petition and mailed it to the Federal District Court for the Southern District of Florida the next day.[46]

III. THE DECISION

The heightened stakes at hand regarding capital defendants is just one rationale that was listed by the Court for their decision in the petitioner's favor.[47] The majority opinion, written by Justice Breyer, decided that "the timeliness provision in the federal habeas corpus statute is subject to equitable tolling,"[48] and cited and applied the AEDPA, or 28 U.S.C. § 2244(d).[49] The relevant portion of the AEDPA reads: "[A] 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court."[50] Furthermore: "[T]he time during which a prop-

42. *Id.*
43. *Id.*
44. *Holland v. Florida*, 130 S. Ct. 2549 (2010).
45. *See Coates v. Byrd*, 211 F.3d 1225 (C.A.11 2000) (AEDPA clock restarts when state court completes post-conviction review); *Lawrence*, 549 U.S. 327, 127 S.Ct. 1079 (same).
46. *Id.*
47. *Id.*
48. *Holland v. Florida*, 130 S. Ct. 2549 (2010).
49. *Id.*
50. 28 U.S.C. § 2244(d).

erly filed application for State post-conviction . . . review" is "pending shall not be counted" against the 1-year period."[51]

The Court considered the Court of Appeals' standard "too rigid."[52] That lower court had stated that when a petitioner tries to excuse a late filing on grounds that his or her attorney's conduct was unprofessional, even if the conduct was "negligent," or "grossly negligent," it cannot "rise to the level of egregious attorney misconduct" meriting equitable tolling unless the petitioner has "proof of bad faith, dishonesty, divided loyalty, mental impairment or so forth."[53] Therefore, the Court reversed the lower court's holding and remanded for more proceedings.

IV. CONCLUSION

The full impact of *Holland v. Florida*'s holding remains to be seen; however, because the Court's reasoning can easily be applied to non-capital defendants, it is likely that there will be a trickle-down effect in the future. If such an effect does not take place, it can be surmised that the Court's precedence with regards to the idea that "death is different" will hold firm throughout the decades.

Regardless of possible outcomes for non-capital defendants, the reality is that *Holland v. Florida* is a windfall for death row prisoners who have been struggling with incompetent lawyers. The Court's decision should change prisoners' battles against execution dates in a drastic way. Where once a death row prisoner suffered the punishment for his or her counsel's mistakes, now, with regards to tolling, certain mistakes will not be held against them.

The Court's analysis and decision in *Holland v. Florida* can be interpreted as the fruit of a line of precedent that understands that meticulous care must be employed when proceeding with the harshest of penalties: death. But the reasoning also illustrates the Court's ability and willingness to use common sense and the basic tenants of justice: when one is staring death in the eyes, a lawyer's incompetence should not be the difference between life and death. In specific, severe cases such as these, merely abiding by the letter of the law, instead of its spirit, is no longer enough.

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51. *Id.*
52. *Holland v. Florida*, 130 S. Ct. 2549 (2010).
53. 539 F.3d 1334, 1339 (C.A.11 2008).

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