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THE DIGEST

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Two-Thousand and Two

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A Discursive Essay on the Nature of Marriage and Divorce in Italy and the United States

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I. INTRODUCTION.

As challenges to the notion that marriage is reserved to members of the opposite sex have been increasing in the judicial, legislative and popular arenas over the past decade in the Western World, our basic concept of marriage has been, depending on one's point of view, diminished or expanded. Society defines marriage in various spheres simultaneously: legal, economic, social, moral, ethical and religious (or non-religious, which is nevertheless a statement about religion).

There are, in truth, three temporal time frames, at which society makes and constantly remakes critical decisions that shape this fundamental institution: point of entry (who may marry whom, and how), during marriage (which may, in turn, actually be divided in many cases between the time a married couple cohabits and the time(s), if any, during which they are separated and estranged, but still married) and point of exit (dissolution, divorce, annulment or nullification, or death of one of the parties).[1] Any changes, however slight, in the rules relating to any of these time frames (whether the altered rules relate only to the spouses, or to their relationship with children of their union or children of either of them, or to third parties) necessarily alters what it means to be married.

Without attempting to be exhaustive, this essay will compare and contrast developments in Italian and American law in these arenas.

The reader must keep one important caveat in mind, however. While one can speak with some certainty about Italian family law, American family law remains fragmented. It is governed by the laws of the fifty states, notwithstanding an increasing overlay of federal law. When the National Conference of Commissioners on Uniform State Laws (hereinafter, "NCCUSL") was founded in 1892, it was suggested that one of the major subjects for a uniform act would

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1. Additionally, especially where a marriage has produced children who are minors when their parents divorce, society fashions and refashions rules that continue to regulate the parties in various ways, often long after a marriage is terminated.

be marriage and divorce. A mere seventy-eight years later, the NCCUSL promulgated a proposed Uniform Marriage and Divorce Act (hereinafter, "UMDA"). Today, over three decades later, only eight (8) states have adopted some form of the UMDA.[2] Thus generalizations about the status of American family law are only that: generalizations. To the extent that the authors purport to make such generalizations, they are surely subject to valid dispute in many instances.

II. ENTRY INTO MARRIAGE.

A. THE ITALIAN PERSPECTIVE.

As in any other legal system, according to Italian law, no marriage celebration can validly take place unless the individual holds full capacity for marriage. Marriage is defined as the legal union between a man and a woman, therefore both same sex and polygamous marriages are not allowed.[3]

The minimum age of capacity to marry is eighteen, but Article 84 of the Civil Code states that the minor may be authorized by the Tribunal to enter into marriage if the following requirements are satisfied: (a) he or she is at least sixteen; (b) there exist "serious reasons" to grant the authorization; and (c) the minor is "mature" both from a psychological and a physical point of view.[4]

The other main requirement is competence which, after the reform brought about by the law of 19 May 1975, is considered only from a psychological perspective.[5] In order to enter into a valid marriage, an individual must hold an adequate degree of discretionary judgment, and he or she must be capable to freely determine whether or not to get married. For example, a person who has attempted to kill or actually did kill a spouse of either party is not allowed to marry the other spouse.[6] In addition, the Code also envisages consanguinity restrictions between ascendant relatives, descendant relatives, siblings and other close relatives.[7]

There are also other legal requirements – the so-called formalities. A violation of the formalities does not render the marriage invalid; however, it might

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2. *See* UNIFORM MARRIAGE AND DIVORCE ACT (U.L.A.), Preparatory Note (1998).

3. MARIO BESSONE, GIURISPRUDENZA DEL DIRITTO DI FAMIGLIA 11 (5th ed. 1995). *See* C.C. art. 86 (Italy Codice Civil); *see* Judgment of Rome Court of June 28, 1980, *reproduced in* 1 GIURISPRUDENZA ITALIANA 170 ¶2, 1982) (dismissing the petition of a same-sex couple to be allowed to marry by holding that, "marriage is the lasting union between a man and a woman, regulated by the law.").

4. *See* C.C. art. 84.

5. As a matter of fact, under Article 123 of the Italian Civil Code, which was repealed by the 1975 bill, impotence and sterility rendered the marriage invalid, and thus the concerned person was incapable of getting married. C.C. art. 123 (Mario Beltramo, et al. trans., Oceana Publications, 1969). *See* Lipari, *Delle condizioni necessarie per contrarre matrimonio, reproduced in* COMMENTARIO ALLA RIFORMA DEL DIRITTO DI FAMIGLIA, A CURA DI CARRARO, OPPO E TRABUCCHI 85 (1977).

6. C.C. art. 88.

7. C.C. art. 87.

subject the party that does not comply with them to criminal punishment. Under Italian law there are three fundamental formalities, two directly dealing with a woman's marriage and one regarding a woman's remarriage. Specifically, the formalities are: a period of public notice before the commencement of the marriage; government registration upon marriage; and satisfaction of the waiting period before a remarriage

The first formality is in place in order to allow "interested parties"[8] to file an opposition, alleging that a legal impediment exists to a projected marriage.[9] Article 93 of the Italian Civil Code requires that the future spouses give public notice of their intention to marry.[10] If an opposition is filed before the Tribunal, no marriage celebration can take place until the opposition is dismissed.

The second formality relating to the governmental registration of a marriage is governed by Article 107 of the Italian Civil Code. This article states that the officer of vital statistics must inform the spouses about the fundamental rights and duties arising out of marriage by reading Articles 143, 144 and 147 of the Italian Civil Code; and after each spouse has expressed his or her willingness to enter into marriage, the officer must then declare that the parties are legally married.[11] At this point, the act of the marriage's registration, which is merely intended to inform the community that the marriage was celebrated, will follow.

The third formality, implemented by Article 89 of the Italian Civil Code, is in place in order to prevent the risk of the so-called "confusion of paternity." Specifically, Article 89 provides that a previously married woman cannot remarry unless three hundred days have expired since her divorce or the marriage's annulment, unless her former marriage was declared invalid because of either spouse's impotence or infertility. The Tribunal may grant a dispensation from this requirement if the woman can demonstrate that she is not pregnant, or if there is conclusive evidence that during the above three hundred day period the woman did not cohabit with her spouse. If the woman does not comply with this requirement, and thus gets married before the indicated time period, she is subject to criminal punishment, namely a fine.[12]

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8. C.c. art. 102.

9. However, an author pointed out the complex and time-consuming publication procedure is also directed to warn the prospective spouses about the importance of the matrimonial bond. ANDREA TORRENTE & PIERO SCHLESINGER, MANUALE DI DIRITTO PRIVATO 828 (Giuffré, 1981). [hereinafter TORRENTE, MANUALE].

10. *See* FRANCESCO GAZZONI, MANUALE DI DIRITO PRIVATO 327 (ESI ed., 2001).

11. If the officer failed to officially declare that the parties were united in marriage, the bond must be considered valid as long as he or she actually received both spouses' nuptial declaration and duly reported in the act of marriage that the exchange of consent took place. MASSIMO BIANCA, DIRITTO CIVILE 49 (2d ed. 1985). The opposite conclusion is presented by another doctrinal point of view, which considers the officer's declaration to be an essential legal requirement to a valid civil marriage. TORRENTE, MANUALE, *supra* note 10, at 830.

12. C.c. art. 89.

Following the Concordat of 1929, the Italian State (then a fascist state) and the Holy See agreed that religious marriages would have "civil effects" (i.e. be considered valid and binding by the State too) as long as two fundamental requirements are fulfilled: (a) the minister must remind the parties that the marriage will be considered valid by the Italian State and, as we have seen with reference to civil marriage, the minister must read articles 143, 144 and 147 of the Italian Civil Code; and (b) after the marriage celebration, the minister must send the "act of marriage" to the officer of vital statistics, who will proceed to its registration.[13]

Similar to civil marriage, the Concordat marriage must be preceded by the completion of the public notice procedure, which takes place before both the religious and civil authorities. The purpose of this is to allow a concerned party to follow the opposition procedure described above. In contrast to a civil marriage, where the registration is considered a formality, the registration in a Concordat marriage is an essential requirement for the marriage's validity vis-a-vis the Italian State. It should also be noted that the Concordat marriage registration cannot take place if one of the above indicated essentials is lacking. If the registration is performed, the Concordat marriage is considered "civilly" valid from the time its celebration actually took place – not from the time of the registration itself.[14]

B. THE AMERICAN PERSPECTIVE.

Despite recent challenges, the American legal rules for entry into marriage have evolved only incrementally in the last hundred years. There has been a gradual abatement of affinity prohibitions and, to a lesser extent, a reduction of consanguinity restrictions.[15] During the Twentieth Century, several states abandoned, either by legislation or judicial decree, the doctrine of "Common Law" marriage.[16] That relic of frontier times continues in place (but not in a place of honor) in roughly ten states, including Pennsylvania,[17] where state courts have repeatedly said that the doctrine is to be tolerated, not encouraged.[18]

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13. *See* ACCORDO DI REVISIONE DEL CONCORDATO LATERANENSE, February 18, 1984, It.-Holy See, art. 8 n.1, enacted in Italy by Law no. 121 of March 20, 1985.

14. The above-described "retroactive effect" of marriage registration occurs even when the registration itself is requested a second time and no essential requirement is lacking. TORRENTE, MANUALE, *supra* note 10, at 843.

15. MARY ANN GLENDON, THE TRANSFORMATION OF LAW 56 (1989).

16. Cynthia Grant Bowman, *A Feminist Proposal to Bring Back Common Law Marriage*, 75 OREGON L. REV. 709, 715 n.24 (1996).

17. Staudenmayer v. Staudenmayer, 714 A.2d 1016 (Pa. 1998).

18. "Because claims for the existence of a marriage in the absence of a certified ceremonial marriage present a 'fruitful source of perjury and fraud,' Pennsylvania courts have long viewed such claims with hostility, *see In re* Estate of Wagner, 398 Pa. 531, 533, 159 A.2d 495, 497 (1960). Common law marriages are tolerated, but not encouraged. *Id.* While we do not today abolish common law marriages in Pennsylvania, we reaffirm that claims for this type of marriage are disfavored." *Id.* at 1019-20.

In the last third of the Twentieth Century, the United States Supreme Court issued several significant constitutional rulings affecting the ability of states to regulate marriage. Utilizing the Equal Protection Clause, the Supreme Court struck down an embarrassing relic of the Nineteenth Century, the so-called "miscegenation" laws that still lingered on in sixteen southern states until 1967.[19] These laws prohibited persons of different races from marrying each other. Remarkably, it was not until November 2000 that the last hold-out state, Alabama, actually repealed its unenforceable miscegenation statute.[20]

The Supreme Court also decided two cases involving the impact of poverty on marriage. In one, the Court struck down a Wisconsin statute that prohibited the issuance of a marriage license to a person who had a child out of wedlock who was not in that person's custody, and for whom that person was in arrears in child support or the child was a "ward of the state." This legislation was targeted at "deadbeat dads." The Court held that the regulation was not sufficiently tailored to the governmental purposes involved.[21] Similarly, but ironically in a case involving divorce, the Court struck down mandatory filing and service fees in divorce actions, as applied to indigent married persons, on the grounds that this prevented remarriage.[22]

Subsequently, the Court struck down a state's prison regulations requiring inmates to obtain permission from the prison superintendent before getting married.[23] The Court distinguished an earlier summary affirmation of a decision upholding a state law prohibiting prisoners serving life sentences from getting married.[24]

Toward the end of the Twentieth Century, litigation was brought in a number of American jurisdictions which some perceived as attacking the very foundations of marriage. We refer here of course to the various lawsuits challenging explicit or implicit prohibitions on same-sex couples being married throughout the United States.[25] Particularly momentous were the decisions of the Hawaii and Vermont Supreme Courts.[26] In *Baehr v. Lewin,* the Hawaii Supreme Court held that the plaintiffs had stated a cause of action for violation of their rights under the Hawaii Constitution and remanded the case for trial.[27] In a more final decision, that was nevertheless an incomplete victory for gay rights activists,

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19. Loving v. Virginia, 388 U.S. 1 (1967).

20. *Alabama repeals century-old ban on interracial marriages*, Cnn.com (November 8, 2000) *available at* http://www.cnn.com/2000/ALLPOLITICS/stories/11/07/alabama.interracial/ (last visited April 29, 2002).

21. Zablocki v. Redhail, 434 U.S. 371 (1971).

22. Boddie v. Connecticut, 401 U.S. 371 (1971).

23. Turner v. Safley, 482 U.S. 78 (1987).

24. Butler v. Wilson, 415 U.S. 953 (1974).

25. *See generally*, Robert E. Rains, *The Evolving Status of Same-Sex Unions in Hawaii, Alaska, Vermont and Throughout the United States*, 4 CONTEMP. ISSUES IN LAW 71 (1999).

26. Baehr v. Lewin, 852 P.2d 44 (Haw. 1993); Baker v. State, 744 A.2d 864 (Vt. 1999).

27. *Baehr*, 852 P.2d at 68.

the Vermont Supreme Court in *Baker v. State of Vermont* ruled that denying same-sex couples the benefits of marriage violated their rights under the Common Benefits Clause of the Vermont Constitution.[28]

After the Hawaii Supreme Court remanded the *Baehr* case for trial, Congress and many state legislatures enacted "defense of marriage" acts, in an effort to make clear their disapproval of same-sex marriage.[29] Particularly notable is the federal Defense of Marriage Act (DOMA), which not only allows states to refuse to give "full faith and credit" to same-sex marriages from other states,[30] but also for the first time purports to generally define marriage for federal purposes.[31] Outside of the arena of immigration, it had previously been thought that the federal government would always defer to the determination under state law as to whether a couple was legally married.[32] Now if a state should allow same-sex marriages, DOMA provides that those marriages will not be recognized for any federal purposes.

To some extent congruent with this development, there has been the creation of various quasi-marital statutes. These are in place, not only in a number of major metropolitan centers, such as in New York City where domestic partners are entitled to share various benefits,[33] but also now at the statewide level. In response to the *Baehr* litigation, the state of Hawaii now allows same-sex couples to register as "reciprocal beneficiaries" with many of the same rights and obligations as married couples.[34] Similarly, in response to the Vermont Supreme Court decision in *Baker*, the Vermont legislature has authorized same-sex couples to enter into "civil unions," with essentially all of the rights and duties of married couples in Vermont.[35]

A fascinating variation on the same-sex marriage controversy in recent years has been the issue of determining the legal sex of a post-operative transsexual for purposes of entry into marriage. The predominant Western view has been that one maintains the legal gender that one was born with (which, in itself, is

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28. *Baker*, 744 A.2d at 889. However, the Vermont Supreme Court stopped short of ordering that same-sex couples be allowed to marry (as opposed to having all the rights of married persons). *Id.* at 886-89.

29. Defense of Marriage Act of 1998, Public Law 104-199, 110 Stat. 2419. *See* Henry J. Reskee, *A Matter of Full Faith*, WL 82-JUL A.B.A. J., July 1996.

30. 28 U.S.C. § 1738C (Supp. V 2000).

31. 1 U.S.C. § 7 (Supp. V 2000).

32. *See, e.g.*, 20 C.F.R. § 404.344 (1979)("You may be eligible for [Social Security] benefits if you are related to the insured person as a wife, husband, widow or widower. To decide your relationship to the insured, we look first to State law.")

33. *See* HAYDEN CURRY ET AL., A LEGAL GUIDE FOR LESBIAN AND GAY COUPLES 1-8 (9th ed. 1996).

34. 1997 Haw. Sess. Laws 383.

35. VT. STAT. ANN. tit. 15, § 1201 (2000).

not always readily determinable).[36] Nevertheless, as early as 1976, one state intermediate appellate court upheld a trial court judgment that found that a transsexual, who was born a male, and was both medically and legally transformed into a female, by virtue of sex-reassignment surgery, was entitled to support from her husband.[37] In 1999, a Texas appellate court followed the dominant view that a sex change does not legally change one's gender. Accordingly, the wife was still legally a male post-operatively, and thus, her marriage to a man was void *ab initio*. Therefore, she was precluded from maintaining a wrongful death action where the husband had died, allegedly as a result of medical malpractice.[38]

Yet another intermediate appellate court addressed this same subject in 2001. The Court of Appeals of Kansas, in an extremely thorough opinion, concluded that:

> [a] trial court must consider and decide whether an individual was male or female at the time the individual's license was issued and the individual was married, not simply what the individual's chromosomes were or were not at the moment of birth.
>
> The court may use chromosome makeup as one factor, but not the exclusive factor, in arriving at a decision. . . .
>
> [O]n remand, the trial court is directed to consider factors in addition to chromosome makeup, including: gonadal sex, internal morphologic sex, external morphologic sex, hormonal sex, phenotypic sex, assigned sex and gender of rearing, and sexual identity. The listed criteria we adopt as significant in resolving the case before us should not preclude the consideration of other criteria as science advances.[39]

In March 2002, the Kansas Supreme Court reversed and reinstated summary judgment for the party challenging the validity of the marriage.[40] The Court acknowledged that, there are two distinct lines of cases. One judges the validity of the marriage according to the sexual classification assigned to the transsexual at birth. The other views medical and sexual procedures as a means of unifying a divided sexual identity and determines the transsexual's sexual classification for the purpose of the marriage at the time of marriage.[41]

According to the Court, the sole issue was the meaning of the following provision of the Kansas marriage law: The marriage contract is to be considered in

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36. *See* Corbett v. Corbett, 2 W.L.R. 1306 2 ALL E.R. (P.D.A. 1970). *See also* Cossey v. United Kingdom, 184 Eur. Ct. H.R. (ser. A) (1990); Sheffield and Horsham v. United Kingdom, 1998-V Eur. Ct. H.R. at 2011 (1998).

37. M.T. v. J.T., 355 A.2d 204, 211 (N.J. Super. 1976).

38. Littleton v. Prange, 9 S.W.3d 223, 231 (Tex.Ct.App.1999), *cert. den.* 531 U.S. 872 (2000).

39. *In re* Estate of Gardiner, 22 P.3d 1086, 1110 (Kan.Ct.App. 2001).

40. *In re* Estate of Gardiner, 42 P.3d 120 (Kan. 2002).

41. *Id.* at 124.

law as a civil contract between two parties who are of opposite sex.[42] Summarizing the differing approaches, the Court noted, "[T]he essential difference between the line of cases. . . that would invalidate the Gardiner marriage and the line of cases. . . that would validate it is that the former treats a person's sex as a matter of law and the latter treats a person's sex as a matter of fact."[43]
The Court opined:

> The district court granted summary judgment, finding the marriage void under K.S.A. 2001 Supp. 23-101. Summary judgment is appropriate when there is no genuine issue of material fact (citation omitted). Here, the parties have supplied and agreed to the material facts necessary to resolve the issue. There are no disputed material facts. We disagree with the decision reached by the Court of Appeals. We view the issue in this appeal to be one of law and not fact.

In a passage that is anything but clear, the Court then suggested that transsexuals are in a kind of legal limbo: "The words 'sex,' 'male,' and 'female' in everyday understanding do not encompass transsexuals."[44]

However, without really addressing the more complex biological issues, the Court concluded:

> The plain, ordinary meaning of "persons of the opposite sex" contemplates a biological man and a biological woman and not persons who are experiencing gender dysphoria. A male-to-female post-operative transsexual does not fit the definition of a female. The male organs have been removed, but the ability to produce ova and bear offspring does not and never did exist. There is no womb, cervix, or ovaries, nor is there any change in his chromosomes.[45]

Finally, the Court noted that the legislature is free to change the law on this subject:

> The legislature has declared that the public policy of this state is to recognize only the traditional marriage between two parties who are of the opposite sex, and all other marriages are against public policy and void. We cannot ignore what the legislature has declared to be the public policy of this state. Our responsibility is to interpret K.S.A. 2001 Supp. 23-101 and not to rewrite it. That is for the legislature to do if it so desires. If the legislature wishes to change public policy, it is free to do so; we are not.[46]

Unlike the situation in Italy, there is generally speaking no distinction throughout the United States between the legal consequences of a marriage performed in a religious rite and one performed civilly. There remain in a few jurisdictions some civilly recognized religious anomalies. In the United States,

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42. KAN. STAT. ANN. § 23-101 (Supp. 2001); *In re Estate of Gardiner*, 42 P.2d at 125.
43. *Id.* at 132-33.
44. *Id.*
45. *Id.*
46. *Id.* at 136-37.

however, there are severe restrictions on what the states can do to treat marriages differently, based upon religion, because of the First Amendment to the United States Constitution. Nevertheless, we see in Rhode Island the ability of first cousins to marry if allowable within their religion, but not otherwise.[47] Although there is no difference in legal effect from any other ceremony, Pennsylvania still authorizes the "Quaker wedding" in which a couple marries themselves without an officiating religious authority, such as a minister.[48]

Normally, once those who wish to get married have reached the age of majority, generally eighteen (18), they do not need the consent of a parent to obtain a marriage license to get married.[49] The United States does not generally have legally compelled publication of the intention to get married, nor does it provide a mechanism for parents of adult children to oppose a marriage.

An interesting development, starting in 1997 in Louisiana, has been the notion of "covenant marriage."[50] This concept has now also been adopted in Arkansas and Arizona.[51] The covenant marriage statutes generally provide an option for marrying couples to obtain pre-marital counseling, normally religious counseling.[52] The couples must also agree to enter into a covenant, whereby they will be subject to a lengthier, and presumably more difficult, process if one or both should later decide to get divorced, as opposed to if they had gone through the normal marriage procedures.[53] The rationale was that it is too easy for couples, particularly young couples, to marry without adequate thought, and that this haste gives rise to a high divorce rate.[54] No matter what one may think of this concept in theory, it is already fairly clear that it will have minimal, if any, effect. In 1998, the first full year that covenant marriages were available in Louisiana, there were 39,544 marriages in that state. Of those, a grand total of 609 were covenant marriages.[55] The following year, 1999, which is the last year for which statistics are currently available, even fewer couples opted for covenant marriage in Louisiana; of 41,343 marriages, only 499 (or barely 1 percent) were covenant marriages.[56] Thus, even if such a covenant were later

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47. R.I. Gen. Laws §15-1-4 (2000). *See also In re* May's Estate, 114 N.E.2d 4 (N.Y. 1953).

48. 23 PA. CONS. STAT. §1502 (2001).

49. Glendon, *supra* note 14, at 48.

50. LA. REV. STAT. ANN. § 9:272 (West 2001); *see also Louisiana Embraces 'Covenant Marriage' As Elective Alternative to No-Fault Divorce*, 66 U.S.L.WK. at 2152, Sept. 16, 1997.

51. ARK. CODE ANN. § 9-11-202 (Michie 2001); ARIZ. REV. STAT. 25-901 (2001).

52. *See, e.g.*, LA. REV. STAT. ANN. § 9:273(A)(2)(a) (West 2000).

53. *See, e.g.*, LA. REV. STAT. ANN. § 9:307 (West 2000).

54. *See generally* Katherine Shaw Spaht, *Louisiana's Covenant Marriage: Social Analysis and Legal Implications*, 59 LA. L. REV. 63 (1998).

55. STATE OF LOUISIANA DEP'T OF HEALTH AND HOSPITALS, CENTER FOR HEALTH STATISTICS, 1998 VITAL STATISTICS REPORT SUMMARY. Data provided by the State of Louisiana Department of Health and Hospitals Center for Health Statistics (on file with editors).

56. STATE OF LOUISIANA DEP'T OF HEALTH AND HOSPITALS, CENTER FOR HEALTH STATISTICS, 1999 VITAL STATISTICS REPORT SUMMARY. Data provided by the State of Louisiana Department of Health and Hospitals Center for Health Statistics (on file with editors).

found to be legally binding, which is far from obvious particularly if one of the parties were to seek a divorce in another jurisdiction,[57] it simply appears that the option is so unpopular that it will have little practical impact.

III. THE STATE OF MARRIAGE.

A. THE ITALIAN CONCEPTION OF MARRIAGE.

Marriage can be defined as the legal union between a woman and a man, a partnership for life or until its legal dissolution, which by its own nature is formed and maintained for the well-being of the spouses.[58] This definition requires some thought on the nature of marriage and on the specific meaning of the word "contract," when applied to marriage.

Certainly, the definition of marriage as a contract is common, as it belongs to common law and civil law systems,[59] as well as canon law.[60] However, one may question whether marriage can actually be considered a contract. In fact, under general contract principles, no contract may be considered valid, and thus binding, unless consideration exists.

It is clear that, in some cases, a marriage may involve people owning considerable estates, and that there may be between them a "marriage of financial interests;" however, the abstract notion of marriage does not envisage any economic consideration. Otherwise, the validity of the bond would depend upon the existence of said consideration. Therefore, according to this perspective, marriage is not by its own nature a typical contract.

On the other hand, almost all legal systems provide for a marriage's dissolution, just as in the area of contracts, where, according to the applicable norms, a judge may revoke a contractual agreement.[61] In addition, a marriage can be also declared null and void,[62] and this fact may still be considered as consistent with the idea that marriage is a contract, as it is quite clear that marriages can be declared null and void.[63] Therefore, our dilemma does not seem to find an appropriate solution as to whether a marriage must be considered a contract.

In order to solve this problem, the perspective should be quite different from the one stated above. This is because the definition of marriage as a contract actually describes the specific requirement of marriage; and as is common to

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57. *See* Williams v. North Carolina, 317 U.S. 287, 298-99 (1942).

58. *See* Bianca, *supra* note 12, at 31; BESSONE, *supra* note 3, at 3.

59. Arnaldo Bertola, *Matrimonio (Diritto civile)*, 10 NOVISSIMO DIGESTO ITALIANO 352 (UTET ed., 1957).

60. MARIO FRANCESCO POMPEDDA, STUDI DI DIRITTO MATRIMONIALE CANONICO 166 (Giuffré ed., 1993).

61. *See* C.C. arts. 1453-1469.

62. Vincenzo Franceschelli, *Il Matrimonio Civile: Invalidità*, 2 TRATTATO DI DIRITTO PRIVATO 627-28 (UTET ed., 1992).

63. *See, e.g.*, Italy C.C. arts. 1418-1424.

any contract, both parties' mutual consent is needed in order to enter into that specific agreement.[64] By stating that marriage is a contract, we refer to both parties' agreement. In fact, applicable general contract norms are enacted to protect an individual from binding oneself into any covenant that he or she may choose. For instance, no marriage shall ever be considered valid or binding, just as it happens under contractual theory, if either spouse was forced, lacked capacity or the marriage was celebrated in jest.

We thus define marriage as a covenant between one man and one woman,[65] where both parties are bound to mutual rights and duties. It is up to the parties to make the marriage successful, since accountability for its failure on either spouse may involve considerable economic and moral consequences. The economic consequences may include court ordered support and property obligations.[66]

If marriage is a contract or a covenant, we must recognize some differentiation between "marriage . . . and the act of becoming married."[67] The latter describes the moment in which the covenant is concluded, while the former has a double, fundamental meaning. In fact, marriage here means both "the legal status, condition or relation of one man and one woman united in law for life, or until divorced," and "the act, ceremony, or formal proceeding by which persons take each other for husband and wife."[68] However, note that the "act of becoming married," (i.e. marital consent), cannot take place unless the required formality or ceremony is performed. Thus, we have the important consequence that the former takes place through the latter. No consent is possible unless expressed in due form.[69] That is not to say that the "act of becoming married" and the "formal proceeding" are nothing but the same phenomenon: marriage. Whereas the former concept focuses on the intentional change of personal and social status, the latter refers to the formal act of consent, which constitutes marriage.

Marriage should be considered from two distinct perspectives: public law and private law. The public law view concerns the spouses' position with reference to the public interest. This includes criminal law,[70] the law concerning the family's protection, tax law and, finally, welfare dispositions. The private law per-

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64. BIANCA, *supra* note 12, at 32 ("marriage is a bilateral legal act, which is concluded by the spouses' will expressed through the legal formalities.").

65. *Id.*

66. Francesco P. Luiso, 4 DIRITTO PROCESSUALE CIVILE 263 (Giuffré ed., 1999).

67. TORRENTE, MANUALE, *supra* note 10, at 822.

68. *Id.* at 822.

69. *See* Pasquale Colella, *Il Matrimonio Davanti a Ministri del Culto Cattolico e dei Culti Ammessi*, 2 TRATTATO DI DIRITTO PRIVATO 544-46 (UTET ed., 1992); Lucio Bove, *Il Matrimonio Civile: Condizioni,Fformalità Preliminari, Opposizione e Celebrazione*, 2 TRATTATO DI DIRITTO PRIVATO 613-16 (UTET ed., 1992).

70. *See* C.P. art. 570 (Italy Codice Penale) ("Whoever, deserting the family dwelling or, however, indulging in a conduct contrary to family order or morals, neglects the assistance obligations inherent in

spective regards spouses' personal and economic duties and obligations, whose breach may lead to legal separation and divorce. It also relates to issues such as ancillary orders on maintenance, property distribution (including pensions), child custody, and support.[71]

Breaking down centuries of marital supremacy within Italian society, Article 143 of the Civil Code[72] provides a rather revolutionary family pattern by stating that: "through marriage. . . [the spouses] acquire the same rights and assume the same duties. . .."[73] The husband is no longer considered the head of the family. Rather, the whole of the familial unit is now intended as a partnership of lives. As a matter of fact, both spouses are mutually bound to "loyalty, moral and material support, cooperation in the interest of the family and cohabitation."[74]

The duty of loyalty not only refers to its first evident meaning, the duty not to engage in extramarital sex, but it also refers to all types of relationships that may affect the exclusive nature of married life. Thus, this duty extends beyond the commission of adultery; it prohibits a spouse from engaging himself or herself in an exclusive relationship with a third party, so as to deny the other spouse the right to a true common life, in violation of Italian law.[75]

Although adultery cannot be considered a criminal offense anymore,[76] it does constitute a tort. The effect of this is that the offended spouse has a meritorious cause of action for legal separation, and he or she may even demand it be declared that the marriage breakdown's accountability be placed on the responsible spouse.[77] The same type of petition, whose effects will be examined below, can also be filed with regard to the violation of other duties, which will be briefly illustrated as follows. First, the duty of cohabitation includes not only the right to the sharing of lives within the same residency, but it also refers to the "communio amoris" which is the natural right to a conjugal sexual life.[78] Having said that, the spouse who wrongfully refuses either to live in the same home with the other, or to have a normal conjugal life, equally infringes this

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parental authority or in matrimonial status shall be punished with imprisonment up to one year or with a fine from two hundred thousand to two million lire.").

71. TORRENTE, MANUALE, *supra* note 10, at 847-67.

72. This statement reflects the amendments of Law no. 151 of 1970, which is mainly an application of Article 29 of the Italian Constitution. It should be noted that it is this portion of the constitution that has consistently been the basis of Family Law innovations contained in the Italian Civil Code.

73. For the translation of the hereinafter omitted Italian language, *see* MARIO BELTRAMO ET AL., THE ITALIAN CIVIL CODE AND COMPLEMENTARY LEGISLATION (Oceana Publications ed., 1991).

74. *Cf.* C.C. art. 143

75. *See* Cass., March 28, 1987, n. 4767, 1987; Cass., July 16, 1987, n. 6256, 1987; ALFIO FINOCCHIARO & MARIO FINOCCHIARO, RIFORMA DEL DIRITTO DI FAMIGLIA 271 (Milano ed., 1984).

76. Articles 559 and 560 of the Criminal Code on adultery were declared unconstitutional, and thus, have not been enforced. *See* Racc. uff. 68-126 Foro It I; Racc. uff. 69-147 Foro It I.

77. C.C. art. 151.

78. ARTURO CARLO JEMOLO, IL MATRIMONIO 418 (UTET ed., 1961).

duty.[79] It is clear, however, that the spouse can legitimately interrupt cohabitation any time it becomes intolerable or contrary to a child's interest.

Second, both spouses are obliged to cooperate in the family's interest[80] and to mutual support, both economic[81] and moral, as an everyday effort to constitute and strengthen their community of life. Marriage involves both personal and economic consequences. The first consequence, generally represented by the formula of "personal rights and duties," is to be intended and interpreted according to the general principle of moral and legal equality of spouses. By statute, spouses are mutually obligated to provide moral support and material care, as well as to cohabit and to jointly decide matters concerning the family's interests.[82] This includes the duty of faithfulness, which concerns not only the obligation to refrain from engaging in extramarital affairs, but also the duty of the sharing of life.

The second set of consequences, i.e. economic consequences, vary according to each European country, to the extent that some apply the presumption of common ownership to both spouses' or either spouse's acquisitions from the moment of celebration of marriage to its legal termination. Other countries provide for a system of separate estate, in which the single spouse's acquisitions do not become joint property with the other spouse. In both cases, "European law" generally leaves to *both spouses* the choice to maintain or change the above presumptions.

In any event, each spouse is obliged to assist in the needs of the family according to his or her own economic possibilities. Importantly, a spouse can fulfill this obligation by work within the home.

As far as Conflict of Laws norms are concerned, both personal and economic aspects of marriage are governed by the spouses' common national law and, if different, by the law of the state where conjugal life is primarily located. In any event, spouses have the right to choose to be subject to the national or residential law of either of them.

B. THE AMERICAN CONCEPTION OF MARRIAGE.

The American conception of marriage remained relatively static for the first three quarters of the Twentieth Century. However, in recent decades, marital rights and duties, in certain significant ways, have changed. Perhaps the most profound changes have come about by virtue of federal constitutional recogni-

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79. *See* Pietro Zatti, *Diritti e doveri del matrimonio*, 3 TRATTATO DI DIRITTO PRIVATO at 61-65 (UTET ed., 1992).

80. NATALINO IRTI, IL GOVERNO DELLA FAMIGLIA, IL NUOVO DIRITTO DI FAMIGLIA 6 (Giappichelli ed., 1976).

81. *See* C.c. art. 148 (The measurement of the spouses' contribution is "in proportion to their respective means, and according to their trade or household working ability.").

82. GAZZONI, *supra* note 11, at 353-57.

tion of gender equality under the rubric of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[83] Ironically, in a series of decisions, starting with the "conservative" Burger Court of the 1970's, the Supreme Court struck down several state statutory schemes that tended to treat wives as less competent or capable than their husbands. In the watershed case of *Reed v. Reed*, the Court unanimously held unconstitutional a state law granting preferential placement as estate administrators to men over similarly situated women.[84] Subsequently, the Court nullified a state statute that provided that only wives, and not husbands, were eligible for alimony.[85] The Court likewise held unconstitutional a statutory scheme in a community property state where the husband, as "head and master," had authority to unilaterally sell or encumber the community property of the marriage.[86] A provision in the Social Security Act presuming that widows but not widowers are "dependent" also fell to an equal protection challenge.[87]

Thus, in the late Twentieth Century, the Court carried forward a process begun by state legislatures in the Nineteenth Century with enactment of the Married Womens Property Acts[88] to end the common law myth of the lack of legal identity (and therefore lack of rights) of the married woman.[89] Of course, both Congress and state legislatures also enacted a variety of statutes in the latter part of the 20th Century to accord rights to married (and unmarried) women.[90]

In other ways, the states moved to redefine marriage during the Twentieth Century. Many states enacted rather misnamed "heart balm" statutes, which abolished such common-law torts actions as breach of promise to marry, alienation of affections, and "criminal conversation."[91]

Of course, as in Italy, marriage in the United States is viewed as a contract that is *sui generis*. It is a contract that requires the consent of the parties entering into it, and it is one that is highly regulated by the state. As opposed to

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83. Gender-based discrimination by a state actor is subject to "middle tier" scrutiny under the 14th Amendment. Had the states ratified the proposed Federal Equal Rights Amendment (ERA), it is almost certain that strict scrutiny would be applied. *See* Frontiero v. Richardson, 411 U.S. 677, 691 (1973) (Powell, J. concurring).

84. Reed v. Reed, 404 U.S. 71 (1971).

85. Orr v. Orr, 440 U.S. 268 (1979).

86. Kirchberg v. Feenstra, 450 U.S. 455 (1981).

87. Califano v. Goldfarb, 430 U.S. 199 (1977).

88. Judith T. Younger, *Marital Regimes: A Story of Compromise and Demoralization, Together with Criticism and Suggestions for Reform*, 67 CORNELL L. REV. 45, 61-63 (1981).

89. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 430-432 (Facsimile of 1st ed. 1765-1769, Univ. of Chi. ed., 1979).

90. A particularly important example is the Federal Equal Credit Opportunity Act, 15 U.S.C. §§ 1691-1691f (1976).

91. *See* Hoye v. Hoye, 824 S.W.2d 422 (Ky. 1992); Gilbert v. Barkes, 987 S.W.2d 772 (Ky. 1999). Other states repealed some of these causes of action by judicial decision, *see* Fadgen v. Lenkner, 365 A.2d 147 (1976). A minority of states continue to recognize certain of these causes of action. *See* Emily Heller, *North Carolina's Legal Heart Balm*, NATIONAL LAW JOURNAL, July 30, 2001, at A6.

general notions of freedom of contract, state law greatly restricts the ability of marital contractors to elect the terms and conditions of their contract, especially for terminating their contract. Justice Harlan, writing for the Supreme Court three decades ago, noted:

> As this Court on more than one occasion has recognized, marriage involves interests of basic importance in our society. (citations omitted) It is not surprising, then, that the States have seen fit to oversee many aspects of that institution. Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts, for example, but we are unaware of any jurisdiction where private citizens may covenant for or dissolve marriages without state approval. Even where all substantive requirements are concededly met, we know of no instance where two consenting adults may divorce and mutually liberate themselves from the constraints of legal obligations that go with marriage, and more fundamentally the prohibition against remarriage, without invoking the State's judicial machinery.[92]

The rights and duties within the marriage contract have not evolved at a constant rate throughout the last century. Events and movements, such as World War II (with millions of American women entering the workforce, at least temporarily), the Civil Rights Movement and, of course, the Feminist Movement, all played a role.

One supposedly fundamental marital duty, to engage in sex – normally perceived as a duty of the wife (and a concomitant right of the husband) – came under fire.[93] Recognizing the harsh results, especially in situations where a couple was separated, legally separated or in the process of divorce, or where there was violence[94] or threat of violence used, several states acted to limit or abrogate the husband's exemption from rape laws.[95] One particularly notorious case, which generated tremendous publicity by the standards of the day, involved a husband's unsuccessful constitutional challenge to a marital rape law as violating guarantees of marital privacy and equal protection.[96]

Corresponding with the legal attack on a husband's unconditional right to demand sex, came a rise in awareness of, and legal responses to, domestic violence. Pennsylvania was the leader among the states in enacting a statute that allows one to obtain prompt injunctive relief in domestic violence situations.[97]

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92. Boddie v. Connecticut, 401 U.S. 371, 376 (1971).

93. *See*, Melinda S. DiCarlo, *"The Marital Rape Exemption in Pennsylvania: 'With this Ring. . .,'"* 86 DICK. L. REV. 79 (1978).

94. We do not mean to suggest that rape, by itself, is not a crime of violence.

95. See Act of Dec. 6, 1972 Pa. Laws 1482, No. 334, § 1, *repealed by* Act of March 31, 1975 Pa. Laws 985, No. 10, § 2 (Spec. Sess. No. 1).

96. State v. Rideout, 5 Fam. L. Rep. (BNA) 2164 n. 108 at 129, 130 (1978).

97. *See* Protection From Abuse Act of Oct. 7, 1976 Pa. Laws 1090, No. 218 (codified at 23 PA.CONS. STAT. §§ 6101-6118 (West 2001)).

Subsequently, Congress enacted federal legislation, the Violence Against Women Act, also addressing this scourge.[98]

Within the criminal realm, the notion of unity of marital partners continues to evolve in other ways. Spousal testimonial privilege, once almost absolute, has been subject to legislative and judicial diminution.[99] In 2001, a federal appeals court upheld prosecution of a wife for harboring her husband as a fugitive and being an accessory after the fact to his violation of the Child Support Recovery Act.[100] The court denied her claims based on alleged rights of association, marriage, privacy and due process.[101]

IV. LEAVING THE STATE OF MARRIAGE.

A. DEVELOPMENTS IN ITALY.

Not surprisingly, given the overwhelming dominance of the Catholic Church, legal divorce came late to Italy. The 1942 Civil Code made no provision for divorce, and the dominant political party in the post-war era, the Christian Democrats, opposed divorce as antithetical to the family "as a natural society whose stability should be safeguarded by the indissolubility of marriage."[102] Allied with the Christian Democrats in opposition to divorce were the Monarchists and Neo-Fascists.[103] The Socialists, Liberals and all other political parties coalesced to enact Law No. 898 of 1 December 1970, legalizing divorce. In most instances, the Act required a five to seven year separation as a predicate to divorce.[104]

The Christian Democrats and the Catholic Church did not simply accept this political defeat. They forced a popular referendum to abolish divorce, which took place in the Spring of 1974. After a bitter campaign, the electorate voted to retain legal divorce by an overwhelming 59 percent to 40.9 percent.[105] It was not until 1987 that the period of legal separation prior to divorce was lowered to the current minimum of three years.[106] An overview of the current processes for legal separation and divorce in Italy follows.

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98. Violence Against Women Act of 1994, Pub. L. No. 103-322. Most of the Violence Against Women Act remains intact today notwithstanding the Supreme Court's decision in United States v. Morrison. *See generally* U.S. v. Morrison, 529 U.S. 598 (2000) (striking down certain civil remedies).

99. *See, e.g.* Commonwealth v. McBurrows, 779 A.2d 509 (Pa. Super. Ct. 2001) (providing a general review of the law and holding that a spouse's observation of the act of another spouse is not, in itself, confidential).

100. 18 U.S.C. § 228 (2000).

101. United States v. Hill, 51 F.Supp2d 1091 (D. Or. 1999), *aff'd* 257 F.3d 1116 (9th Cir. 2001).

102. Valerio Pocar and Paola Ronfani, *Family Law in Italy: Legislative Innovations and Social Change*, 12 L. & SOC'Y REV. 607, 618-19 (1978).

103. *Id.*

104. *Id.* at 619.

105. *Id.* at 621-22.

106. Roberta Ceschini, *International Marriage and Divorce Regulations and Recognition in Italy*, 29 FAM. L.Q. 567, 575 (1995).

In the event of marital failure, legal separation is the first remedy as it is intended both to declare the spouses' right to live apart and to regulate all consequential matters.[107]

The second remedy, divorce, leads to marriage dissolution and, thus, to the right to remarry. There are two distinct types of legal separation: (1) separation by mutual consent; and (2) so-called judicial separation. These remedies have two common aspects. They both require judicial intervention and must be based on either the intolerability of joint life or the safeguard of a child's interest. Actually, the formal basis of a mutual consent separation consists of the filing of the petition requesting to separate,[108] and therefore, no allegation as to a petition's legal justification would seem necessary. In practice, Italian lawyers commonly allege one of the legal grounds for separation to back up the petition. This is because from an Italian jurisprudential standpoint, the fundamentals of the Italian legal system provide that no covenant can have a binding effect, unless it is founded on a reasonable ethical or economic justification.[109] Therefore, no judicial remedy can technically be sought unless the petitioner demonstrates a justifiable interest in obtaining it.[110]

The first remedy, separation by mutual consent, consists of a combined procedure, whereby contractual and judicial aspects are both involved. In this procedure, both spouses file a joint petition containing their demand to be legally separated according to the terms of their agreement. The terms of the agreement are listed in the petition itself, and this will regulate each aspect of their new status (e.g., child custody, alimony, etc.). Once the petition is filed, both parties will appear before the President of the Tribunal, or a Delegate Judge, who, after the ritual attempt to reconcile the parties, will approve their agreement.[111] A successive formal ratification decree will issue after 1-2 months from the "Presidential hearing," thus rendering the separation definitive.[112] While separation by mutual consent can be considered a dispute resolution remedy,[113] in many cases, there may either be no agreement on the legal separation itself or on its material conditions, and therefore, the party seeking to leave the marriage is left with no other remedy but judicial separation.

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107. C.C. arts. 151 & 155.

108. *Cf.* C.C. art. 158; *See* BIANCA, *supra* note 12, at 166; Dogliotti, *Alcuni Problemi Interpretativi in Materia di Separazione e Divorzio*, 5 FAMIGLIA E DIRITTO 479 (1997).

109. In practice, this is often referred to as "the causa." *See* C.C. art. 1322 (describing the principle that a contract cannot be enforced unless the covenant "be apt to realize those interests which deserve the protection of our legal system.").

110. *See* C.P.C. art. 100 (Italy Codice di Procedura Civile); SALVATORE SATTA & CARMINE PUNZI, DIRITTO PROCESSUALE CIVILE 151 (Giuffré ed., 1993).

111. Separation can be denied if the agreement affects the children's well-being, *see* C.C. art. 158.

112. BESSONE, *supra* note 3, at 205-11.

113. *See* BIANCA, *supra* note 12, at 175.

According to the judicial separation procedure, one spouse files a petition to the Tribunal indicating the grounds for separation, the specific court orders requested, and the declaration that the other spouse carries the responsibility for the marriage breakdown.[114] Once the petition has been duly filed, the President of the Tribunal issues a decree indicating the day of the hearing.

At the hearing, the President, after attempting to reconcile the parties, will issue a temporary decree providing for the following temporary measures:[115] the authorization for the spouses to live separately; and decisions concerning child custody, support,[116] alimony[117] and possession of the marital house (usually awarded to the spouse who has custody of the child or children).[118]

This first step of the separation procedure is intended to provide an immediate response to the marriage crisis before the definitive sentence is rendered.

In fact, with the above decree, the President appoints an Investigating Judge (or *Giudice Istruttore*, hereinafter GI), who has a diversified jurisdiction over the case. He or she can take various types of evidence including: documents, testimony and psychological evaluations of the parties or the children, or both. The GI also has jurisdiction over the President's orders which, if there is new evidence or new facts emerges, can be modified or revoked.[119] It is clear that the GI also has the power to issue new orders or confirm the old ones, if the facts so require.[120]

Once the evidence has been gathered, the GI closes the investigating phase, remitting the parties before a panel of three judges (the President of the Tribunal, the GI himself or herself, and another judge). Before a final decision is made, the parties are allowed to present written and oral arguments.[121] The final decision, immediately enforceable but subject to appeal, will provide for the same matters regulated by the President and, eventually, the GI's orders.

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114. Often times a comparative evaluation of spouses' behavior is necessary, *see* Corte di Cassazione, January 12, 2000, n. 279. In any event, the accountable spouse is not entitled to alimony or to inherit from the other spouse. Yet, he or she may still be entitled to child custody, depending on the child's interests. *See* Corte di Cassazione, April 14, 1988, n. 2946.

115. *See* The decision on March 8, 1999, of the Tribunale di Taranto, *printed in* 4 FAMIGLIA E DIRITTO 376 (1999).

116. The spouse is obliged to child's support even when the latter has attained the majority but does not have adequate means for self-support. No support is due when the child neglects to look for a job. *See* Corte di Cassazione February 18, 1999, n. 1353, *printed in* 5 FAMIGLIA E DIRITTO 455 (1999).

117. *See* Corte cost., March 29, 2000, n. 3792.

118. *Cf.* Law no. 74 of 1987 (art. 8).

119. BESSONE, *supra* note 3, at 399-403; Fernando Santosuosso, *Il divorzio*, 3 TRATTATO DI DIRITTO PRIVATO 284-314 (UTET ed., 1989).

120. CRISANTO MANDRIOLI, CORSO DI DIRITTO PROCESSUALE CIVILE 249 (Giappichelli ed., 2000).

121. C.P.C. arts. 275-282.

Generally speaking, legal separation is a preliminary step to divorce itself; in fact, three years of uninterrupted separation must then transpire before a party may file a divorce petition.[122]

There are, however, cases in which one might be eligible for divorce without being previously separated, cases where either for personal reasons or because of the couple's difficulties, public policy authorizes an "immediate" divorce petition.[123] Such fault-based grounds include the following:

(a) One of the spouses has been condemned to life imprisonment or to a prison term exceeding fifteen years, whether by single or multiple sentences, even if the judgment concerns a crime committed before the marriage, or one or more intentional crimes, provided that the sentence is final and not related to crimes committed for political, moral, or social motives.[124]

(b) One of the spouses has been condemned for crimes against sexual liberty (a term used in the Italian Civil Code to refer to situations where a person's freedom of choice with regard to sexual relations has been violated, such as rape) or for inducement or coercion to prostitution and/or participation in, or exploitation of, prostitution.[125]

(c) One of the spouses has been found guilty and sentenced in any way for voluntary homicide of his or her child or for the attempted homicide of either the spouse or the child.[126]

(d) In cases where criminal proceedings have been suspended due to the extinction of the crimes, such as by amnesty, pardon, or period of limitation, and the court hearing the divorce case finds that enough evidence exists to support the allegation that the offense was indeed committed.[127]

(e) One of the spouses has been condemned for aggravated assault or the circumvention of an incapable, a term that means taking advantage of the lack of understanding or experience of a person in order to induce him or her to engage in actions, which are self-damaging. This category also includes certain types of fraud. In order to obtain a divorce on this ground, the victim of the circumvention must be either the spouse or child.[128]

However, there is an important caveat to the above grounds. Specifically, in any of the cases in (a) to (e), the petition for divorce may not be presented if the

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122. *See* Law no. 898 of 1970, art. 3, n.2.

123. *See generally* Andrea Russo and Robert E. Rains, *The Reform of the Italian System of Private International Law with Particular Regard to Domestic Relations Issues*, 25 N.C.J. INT'L L. & COM. REG. 271, 282-4 (2000).

124. Law no. 989 of 1970, *modified by* Law no. 436 of 1978 & Law no. 74 of 1987, art. 3, ¶1(a).

125. Law no. 74 of 1987, art. 3, ¶1(b).

126. *Id.* at art. 3, ¶ 1(c).

127. *Id.* at art. 3, ¶ 1(d).

128. *See id.*

applicant spouse has been condemned for cooperation in the crime or if the spouses have resumed cohabitation.[129]

Moreover, an acquittal of one of the listed offenses does not necessarily vitiate that fault ground, inasmuch as additional related grounds include:

(f) One of the spouses has been acquitted of a crime listed under (b), but the court establishes that he or she is unfit to resume the matrimonial relationship.[130]

(g) A person has been cleared or acquitted of a charge of incest because of the absence of public knowledge or moral disapprobation, but the judge believes that this crime has occurred.[131]

Other grounds for divorce not requiring a prior legal separation are:

(h) The other spouse, a foreign citizen, has obtained an annulment or dissolution of the marriage and, notwithstanding the fact that such divorce or annulment has not been recognized in Italy, has married again;[132]

(i) The marriage has not been consummated;[133] and

(j) A declaration of change of sex has been issued and the period to appeal has expired.[134]

The divorce judgment leads to marriage dissolution and – if relevant – to the awarding of alimony, child custody and support and to marital home possession.

As we have already seen in the field of separation, divorce can be obtained through either a litigated procedure or by mutual consent. The basis for both remedies is the impossibility of maintaining or reestablishing "the spiritual and material communion between the spouses."[135]

As far as divorce by mutual consent is concerned, there is not much difference between this procedure and the one examined already with reference to separation. Both spouses file a joint divorce petition containing their agreement, which can be different from the separation petition, on personal matters, economic matters and, finally, on child custody. If the judge[136] approves their agreement, a divorce decree will be issued.

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129. *See id.*

130. *Id.* at art. 3, ¶ 2(a).

131. *Id.* at art. 3, ¶ 2(d).

132. *Id.* at art. 3, ¶ 2(e)

133. *Id.* at art. 3, ¶ 2(f).

134. *Id.* at art. 3, ¶ 2(g)

135. *Id.* The party is eligible to file for divorce only when he or she can prove that a spiritual and material common life between the parties no longer exists; but as one author stated, "the end of the affectio coniugalis is implicit in the submission of the divorce petition to the judge." GAZZONI, *supra* note 11, at 380

136. The wording "judge" here impersonally refers to a panel of three Tribunal judges. *See*, Law no. 898 of 1970, *modified by* Law no. 74 of 1987.

If no agreement has been reached between the spouses on the "divorce conditions," a litigated procedure becomes necessary. The spouse wishing to divorce files a petition, demanding marriage dissolution and, if relevant, awarding of consequential orders on alimony, child custody and other related aspects. The judge will then issue a decree setting the hearing for both spouses. At that hearing, the judge will try to reconcile them and, if the reconciliation fails, an ordinary judgment will take place,[137] until a definitive divorce decree is rendered.[138]

The initial judgment is appealable and it is not immediately enforceable.[139] Therefore, the spouses do not have the right to remarry unless the judgment becomes definitive. During the whole procedure, the judge has full jurisdiction to confirm, modify or revoke the judicial orders regulating petitioners' arrangements.[140] Usually, unless new facts arise, the "divorce judge" will confirm the orders already issued at the time of separation.

Italian law provides for two different forms of marriage celebration: one before the Civil Authority and one before the Minister of a Religious Authority.[141] In the first case, "civil marriage" can be declared void according to the provisions of the Civil Code.[142] However, this procedure is time-consuming and it employs a strict statute of limitations that discourages a majority of eligible petitioners from seeking this remedy.[143]

The procedure for annulment of Catholic marriages does not have the same limitations. In fact, the rendering of a judgment does not usually require more than three years, and no statute of limitations regulates the matter.

The proceeding is run by the Catholic Church's Judiciary and is governed by the norms set forth in the seventh book (second section) of the Code of Canon Law.[144] The religious annulment covers a wide range of cases where,[145] for instance, a spouse: did not have the right to marry,[146] suffered from a mental pathology or illness,[147] or abused the institution of marriage.[148] This list is not exhaustive and other cases do apply.[149] To be definitive, the annulment must be

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137. PIERO PAJARDI & EMANUELA COLOMBO, IL DIVORZIO NELLA GIURISPRUDENZA 1216 (Giuffré ed., 1997).

138. Law no. 898 of 1970.

139. This statement does not, however, apply to those orders which, by their own nature, require immediate enforceability, such as in the case of alimony, child custody and support, among others. *See* Santosuosso, *supra* note 119, at 333.

140. Law no. 898 of 1978.

141. GAZZONI, *supra* note 11, at 317-22.

142. *See* C.c. arts. 117-124.

143. BIANCA, *supra* note 12, at 113-35.

144. PIO VITO PINTO, IL PROCESSI NEL CODICE DI DIRITTO CANONICO 473-549 (LEV ed., 1993).

145. *Cf.* POMPEDDA, *supra* note 60, at 3-508.

146. *Cf.* 1983 CODE c. 1055, § 1 (Codex luris Canonici (1983) (dealing with same-sex marriages).

147. 1983 CODE c. 1095, § 2 (dealing with mental defects).

148. 1983 CODE c. 1101, § 2 (dealing with simulation).

149. *See* FERNANDO DELLA ROCCA, DIRITTO MATRIMONIALE CANONICO (Cedam, 1992).

pronounced by two conforming decisions on the same ground of nullity and between the same parties.[150]

The right to due process is enforced by Section 1620 of the Canon Code, which invalidates a proceeding where the defendant was not given the possibility to act or argue in his or her favor. Also, under Section 1644 of the Canon Code, a new hearing of the case will be granted if the petitioner presents new and conclusive evidence.[151]

According to the Treaties between the Holy See and the Italian Republic, the definitive ecclesiastic decision can be enforced in the Italian legal system if it meets the already examined requirements for recognition.[152] However, a formal ratification procedure before the Appellate Court is still necessary to give effect to the judgment.

Pursuant to a marriage annulment, both parties have the right to remarry and no further alimony by the obligor is due, in consideration of the fact that what is null and void cannot produce any legal effect.[153] In any event, both the restitution of past alimony and child's legitimacy are not questioned by the ecclesiastic annulment sentence.[154]

B. DEVELOPMENTS IN THE UNITED STATES.

Perhaps the most critical change in American marriage law in the last century started in California, with the signing in 1970 of the first no-fault divorce act by the newly-elected conservative governor, later to be our first divorced President, Ronald Reagan.[155] By 1985, the last hold-out state, South Dakota, had enacted a no-fault divorce statute.[156] As is now well understood, the essence of no-fault divorce – that a marriage is unilaterally terminable – has had profound impacts on the nature of marriage.[157] Nevertheless, despite what one would believe from the popular media, it appears that divorce rates in the United States have in fact been declining over the two last decades.[158]

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150. 1983 CODE c. 1644.

151. *See* 1983 CODE c. 1620 & 1644; *see also* AUTORI VARI, IL PROCESSO MATRIMONIALE CANONICO 797 (*Nuova edizione aggiornata e ampliata, a cura di P.A. Bonnet e C. Gullo*, LEV ed., 1994).

152. Law no. 218 of 1995, art. 64.

153. Corte cost., June 11, 1986, n. 1905.

154. C.C. art. 128.

155. HERBERT JACOB, SILENT REVOLUTION, 43-59 (1988).

156. *Id.*

157. *See generally* LENORE J. WEITZMAN, THE DIVORCE RESOLUTION: THE UNEXPECTED SOCIAL AND ECONOMIC CONSEUQNECES FOR WOMEN AND CHILDREN (1985) (some of Prof. Weitzman's most disturbing statistics about the financial impact of divorce on wives and children have been unarguably discredited); Richard R. Peterson, *A Re-Evaluation of the Economic Consequences of Divorce*, 61 AM. SOC. REV. 528 (1996); Richard R. Peterson, *Statistical Errors, Faulty Conclusions, Misguided Policy: Reply to Weitzman*, 61 AM. SOC. REV. 539 (1996); Lenore J. Weitzman, *The Economic Consequences of Divorce Are Still Unequal: Comment on Peterson*, 61 AM. SOC. REV. 537 (1996).

158. Ira M. Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L.Q. 1 (2000).

Although one may describe modern state divorce laws in a variety of ways, certain generalizations may be made. All states have one or more forms of no-fault divorce. As noted, a no-fault divorce may be unilateral; that is, one spouse asserts that the marriage is "irretrievably broken" (or some similar statutorily mandated phrase) and that the parties have been living "separate and apart" (or some similar statutorily mandated phrase), for at least a minimum prescribed period of time.[159] Unless there is a genuine dispute as to the period of separation,[160] the other spouse is unlikely to be able to persuade the court not to grant a divorce by challenging irretrievable breakdown. Thus, even if the plaintiff/petitioner spouse would have been found to be primarily at fault under the old regime, and even if the defendant/respondent spouse is comparatively "innocent and injured" and wishes to remain married, the divorce will almost certainly be granted.[161]

Like Italy, some states, such as New York, require a formal separation for a period of time before entry of a no-fault divorce decree.[162] Other states do not even have the concept of "legal separation."[163]

A number of states also have a bilateral form of no-fault divorce in which both parties consent to entry of the divorce decree.[164] However, if the other spouse will not consent, the unilateral form of no-fault, typically available after a period of living separate and apart, remains available to the spouse seeking the divorce.[165] Thus, in such states, the non-cooperating spouse can only delay, not prevent, entry of a divorce decree.

Finally, a number of states have retained traditional fault grounds for divorce, while augmenting them with no-fault provisions.[166] Such fault grounds, as a practical matter, are seldom used today as the basis for divorce. Indeed, in some states, they are statutorily disfavored. For example, in Pennsylvania, in cases where a no-fault ground is established, the court is prohibited from hearing an alternative fault ground.[167]

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159. *See* UNIF. MARRIAGE AND DIVORCE ACT §302(a), 9B U.L.A. Part II, 1 (Master Ed. 1998). Under the UMDA, the period of separation is 180 days. *Id.* In Pennsylvania, by contrast, this period is two years, 23 PA. CONS. STAT. § 3301(d) (2001). However, Idaho requires a separation period of five years! IDAHO CODE § 32-610 (2000).

160. *See* Sinha v. Sinha, 526 A.2d 765 (Pa. 1987).

161. *See, e.g.*, Desrochers v. Desrochers, 347 A.2d 150 (N.H. 1975).

162. *See* N.Y. DOM. REL. LAW §§ 170(5) & (6) (McKinney 2001).

163. *See* 23 PA. CONS. STAT. §§ 3103, 3302 (2001).

164. *See* W. VA. CODE § 48-5-201 (2001); 23 PA. CONS. STAT. § 3301(c) (2001).

165. *See* W. VA. CODE § 48-5-202 (2001); 23 PA. CONS. STAT. § 3301(d) (2001).

166. *See, e.g.*, W. VA. CODE §§ 48-5-203 to 209 (2001).

167. See 23 PA. CONS. STAT. § 3301(e) (2001), *overturning* Restifo v. Restifo, 489 A.2d 196 (Pa. Super.1985).

Nevertheless, fault in the form of marital misconduct can remain an important factor in determining subsidiary issues, notably alimony.[168] There is great dispute among the states as to whether fault is a valid consideration in determining alimony. States that follow the UMDA explicitly preclude consideration of marital misconduct in awarding or denying maintenance.[169]

As with entry into marriage and rights of the parties to a marriage, exit from marriage has not escaped the attention of the U.S. Supreme Court. As already noted, the Court struck down a non-waivable divorce filing fee which prevented indigent spouses from seeking a divorce.[170] The Court upheld, against a due process challenge, a state's one-year residency requirement for divorce plaintiffs.[171] The Court has fashioned elaborate jurisdictional rules for entry of divorce decrees and decrees over ancillary matters to enable those decrees to be entitled to "full faith and credit" in other states.[172]

With the adoption of no-fault divorce laws, the states have had to grapple with how, and to what extent, to provide economic protection for the jettisoned dependent spouse. For example, this situation arises where a husband abandoned his housewife in favor of a new girlfriend and the marriage was for many years (where the wife's job during the marriage was to entertain and to maintain the marital home), or the marriage was not for many years but the wife's job was to raise the marital children who are still young. The old fault regime provided some promise (not always fulfilled) of economic protection for the "innocent and injured" spouse. The erring husband could not obtain a divorce without the jilted wife's cooperation; thus, she could name her economic terms as his price for the divorce. In the brave new world of no-fault divorce, the relatively innocent and injured spouse's bargaining power diminishes as the requisite time period of living separate and apart nears. Once the spouses have lived separate and apart for the required period, the innocent and injured spouse can only fight a delaying action.

Thus, it was necessary for the states to examine and expand concepts for economic protection of the dependent spouse. Since the dependent spouse was also likely to be the custodial parent of any minor children, there emerged a clear connection between ensuring such protections to the dependent spouse and the best interests of such minor children.[173]

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168. *See, e.g.*, PA. CONS. STAT. § 3701(B)(14) (2001). Fault, other than dissipation of marital assets, is far less likely to be a factor in equitable distribution of marital property. *See also* 23 PA. CONS. STAT. § 3502(A) (2001).

169. UNIF. MARRIAGE AND DIVORCE ACT § 308(b) (amended 1973).

170. Boddie v. Connecticut, 401 U.S. 371 (1971).

171. Sosna v. Iowa, 419 U.S. 393 (1975).

172. Williams v. North Carolina, 317 U.S. 287 (1942); Williams v. North Carolina, 325 U.S. 226 (1945); Estin v. Estin, 334 U.S. 541 (1948); Vanderbilt v. Vanderbilt, 354 U.S. 416 (1957).

173. WEITZMAN, *supra* note 157.

Accordingly, the states have had to address and modify provisions for alimony and distribution of marital property. This has involved, and continues to involve, a highly complex set of issues, the details of which are beyond the scope of this essay.

With regard to post-divorce maintenance, many states expanded provisions for periodic payments to the dependent spouse. This involved rethinking such concepts as economic "need"[174] and whether alimony ought be merely "rehabilitative" (i.e., for a short period to allow the dependent spouse to get "back on her feet") or for an indefinite duration.[175] Some states, such as Pennsylvania, only created provisions for post-divorce alimony when they adopted no-fault divorce grounds.[176]

Roughly concomitant with the adoption of no-fault came enactment of equitable distribution statutes in the common law property states. Prior to modern notions of marital property subject to equitable distribution, title typically controlled ownership (hence distribution) at the time of divorce. Since it was common for the working spouse (husband) to title significant assets in his name alone, this could lead to very harsh results.[177] Under the currently prevalent mandate that (most) property acquired during marriage is marital and thus subject to equitable distribution,[178] even such traditionally separate property as one spouse's pension earned during marriage may be distributed between the spouses.[179]

However, one very valuable asset of many marriages, the graduate degree or professional license of one party (typically the husband) acquired while the other party provided support for the household, has been held in most jurisdictions not to be marital property subject to equitable distribution.[180] Only New York State adheres to the contrary view.[181] Some of the states adhering to the majority view have crafted ameliorative doctrines such as "equitable reimbursement" to mitigate the result for the jettisoned, supporting spouse.[182] Nevertheless, the majority position excluding degrees and licenses from distribution has been harshly criticized.[183]

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174. *Cf.* Clapp v. Clapp, 653 A.2d 72 (Vt. 1994).

175. *Cf.* Rainwater v. Rainwater, 869 P.2d 176 (Ariz. Ct. App. 1993).

176. Act of April 2, 1980 Pa. Laws 63, No. 26 § 501 *et seq.* (codified at 23 PA.CONS. STAT. § 3701 (2001)).

177. *Cf.* Fischer v. Wirth, 326 N.Y.S.2d 308 (App. Div. 1971).

178. *Cf.* 23 PA. CONS. STAT. § 3501 (2001).

179. *See* Berrington v. Berrington, 633 A.2d 589 (Pa. 1993). Distribution of pensions is a highly complex matter subject to both state law and federal law, most importantly the Employee Retirement Income Security Act of 1973 (ERISA), 29 U.S.C. § 1001 *et. seq.* (2001).

180. *Cf.* Hodge v. Hodge, 513 Pa. 264 (Pa. 1986); *In re* Marriage of Olar, 747 P.2d 676 (Colo. 1987).

181. O'Brien v. O'Brien, 498 N.Y.S.2d 743, 746 (N.Y.1985).

182. Bold v. Bold, 574 A.2d 552, 556 (Pa. 1990).

183. WEITZMAN, *supra* note 157, at 124-29.

Unlike Italian law, American law does not generally distinguish between civil and religious marriages at the time of divorce. A notable exception is the New York state "Get" law which requires a party moving for a divorce to certify to the court that he has taken all other steps to free the other spouse to remarry within the religion.[184] This peculiar New York statute is aimed at requiring religious Jewish men to obtain a "Get" from the rabbinate so as to allow their ex-wives to remarry within Judaism. Even the commentary on this law contained in the New York statute book suggests that it is of dubious constitutionality.[185]

V. DIFFERENCES AND SIMILARITIES.

Italy and the United States have traveled greatly different paths to their current concepts of marriage and divorce. Italy, until recently a far more homogenous and mono-religious society, largely adhered to the formal Catholic view of marriage until late in the Twentieth Century. Then, with one leap, for good or ill, Italy went from a system without divorce to a system with no-fault as the dominant method of divorce.

By contrast, at least on paper,[186] the United States had a lengthy period of fault-based divorce only, prior to its embracing of the no-fault revolution.

Clearly, the grip of the Church on Italian family practices has dramatically loosened. As noted, Church opposition long delayed, but could not ultimately prevent, the legalization of divorce in Italy. Despite the Church's emphasis on marriage, the number of marriages celebrated annually in Italy dropped from 440,000 in 1947 to 306,000 in 1987.[187] Similarly, in the United States, marriages per 1,000 unmarried women age 15-44, fell from 149 to 91 between 1969 and 1988.[188]

Interestingly, while cohabitation of unmarried opposite-sex couples is increasingly common and accepted (or at least tolerated) in the United States,[189] Italy has the lowest rate in Europe (9%) of men and women under the age of 30 cohabiting.[190]

By 1991, it was reported that over one-quarter of Italian marriages were celebrated in registrar offices only.[191] Furthermore, Italian women, pursuing educa-

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184. N.Y. DOM. REL. LAW § 253 (McKinney 1999).

185. N.Y. DOM. REL. LAW § 253, Alan D. Scheinkman, Practice Commentaries at C253-1: Background and Commentary (McKinney 1999).

186. *See* MAX RHEINSTEIN, MARRIAGE STABILITY, DIVORCE, AND THE LAW, 256-60 (1972).

187. CHARLES RICHARDS, THE NEW ITALIANS, 141 (1994).

188. Ira Mark Ellman, *Divorce Rates, Marriage Rates, and the Problematic Persistence of Traditional Marital Roles*, 34 FAM. L. Q. 16 (2000).

189. JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUREAU, AMERICA'S FAMILIES AND LIVING ARRANGEMENTS (2000), *available at* (last visited April 30, 2002).

190. *The European Picture of Cohabitation*, INT'L FAM. L., Nov. 2001, at 168-69.

191. RICHARDS, *supra* note 168, at 180.

tion and careers, and delaying or avoiding marriage, have become notoriously non-fecund. According to the World Bank, by the 1990s they were producing an average of only 1.3 children, the lowest birthrate in Europe, and far below the 1.9 average of American women.[192]

Current data indicate that Italian children are still far less likely than American children to be raised in one-parent households. A recently released study by the U.S. Census Bureau shows 1.1% of households in Italy to be single-parent households, compared to a staggering 9% in the United States.[193] In the United States, "Single-mother families increased from 3 million in 1970 to 10 million in 2000, while, the number of single-father families grew from 393,000 to 2 million. . . . Meanwhile, the proportion of single-mother families grew to 26 percent and single-father families grew to 5 percent (from 12 percent and 1 percent, respectively in 1970)."[194] Since single-parent households are usually headed by mothers and are highly correlated with poverty and related social ills, the continued increase in American single-parent households is appropriately a matter of much concern.

Divorce rates in Italy have been a subject of concern there; after all, there was no divorce prior to 1970. Yet, compared with the United States and other Western countries, Italy's divorce rate is modest indeed. By the early 1990s, it was hovering between 7 and 8 percent of marriages.[195] By contrast, provisional 1998 data in the United States indicate a divorce rate of 4.2 per 1000 population *per year*, or approximately 1,135,000 divorces in 1998.[196] Obviously, one cannot attribute the significant disparity between the high American divorce rate and low Italian divorce rate to the availability of no-fault divorce in the United States inasmuch as it is equally available (if generally slower) in Italy. Surely, the lower marriage rate is a factor if the comparison figure is divorce per women, or both men and women. (That is, one cannot get divorced if one is not married.) Yet, even if one only compares divorce rates per married couple, divorce remains far more prevalent in the United States than in Italy. One can speculate whether the "answer" lies deep in the American psyche, such as the frontier experience of "moving on," or in the relatively secular nature of American society, or a host of other reasons.

Some, of course, suggest that the "ease" of no-fault divorce causes the high American divorce rate. But then, how does one explain the comparatively low Italian divorce rate, or the fact that the admittedly high American divorce rate

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192. *Id.* at 137-38.

193. *1-Parent Households Increasing*, THE PATRIOT-NEWS, Nov. 21, 2001, at A5.

194. JASON FIELDS & LYNNE M. CASPER, U.S. CENSUS BUR., AMERICA'S FAMILIES AND LIVING ARRANGEMENTS (2001).

195. RICHARDS, *supra* note 168, at 141-42; *see also* WILLIAM J. GOODE, WORLD CHANGES IN DIVORCE PATTERNS, 54-78 (1993).

196. NATIONAL CENTER FOR HEALTH STATISTICS, FAST STATS (2001), *available at* http://www.cdc.gov/nchs/ (last visited April 30, 2002).

has actually leveled off or declined over the last twenty years? In the words of Professor Ellman, "Indeed, the historical pattern in divorce rate trends is the most persuasive evidence we have for why the law was not itself a major factor for causing either the increase in divorce rates earlier in the century, or their more recent decline."[197]

If anything, Italian divorce law demonstrates that American divorce rates are not caused by American divorce law. To the extent that Americans view our divorce rate as a cause for alarm, we would do better to study Italian society than revert to the regrettable days of fault divorce in the United States.

197. ELLMAN, *supra* note 159, at 3.

The Influence of Federal Law on the Dual Criminal Justice System: The Recent Past and the Emerging Future

JAMES A. STRAZZELLA*

Federal law has profoundly altered the nation's criminal justice system during the last part of the twentieth century. This remarkable surge of federal law presence has manifested itself in both state procedural and substantive criminal law. It has fundamentally reshaped the operation of the criminal justice system and, implicitly, that system's impact on the lives of all the nation's citizens. The federal impact directly affects not only criminal defendants and victims; it also permeates the work of state policing agencies, state and federal courts at the trial and appellate levels, defense attorneys and both state and federal prosecutors. Recent developments make it clear that federal law has the potential to drastically alter the future workings of the criminal justice system and the distribution of federal-state power.

The American criminal justice system is, in fact, composed of sub-systems: the state systems for state crimes (with each state having its own system) and the federal system for federal crimes. Overall, the system is premised on a constitutionally mandated scheme of dual state and federal jurisdiction, which is both delicate and complicated. In fact, this system leaves the vast percentage of crime control to the states, which prosecute over 95% of the serious crimes, and an even higher percentage of the minor crimes. The federal role in this intricate governmental arrangement is important and, indeed, crucial within its sphere. Nevertheless, the federal role in criminal law within the dual system was designed to be limited. As the United States faces the future, an inappropriate expansion of the types of federal crimes creates serious implications for the rational and principled application of the complex, dual American justice system.

I. THE BROADENING SPECTRUM OF FEDERAL INFLUENCE

In the last four decades of the twentieth century, the growing influence of federal law in criminal prosecutions became apparent and considerable. The influence manifested itself in several distinct ways. Three federal law developments are particularly noteworthy here, although there are other manifestations

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of federal influence (e.g, financial influences[1]). First, federal law influenced all fundamental criminal procedures that lie at the heart of state and federal criminal prosecutions. This federal influence continues to affect procedures used by state (meaning state, county and local) police agencies to gather evidence of state crimes and the procedures to be followed by state trial and appellate courts in the prosecution of those crimes. Second, federal law has had a less pervasive, but nevertheless important, impact in limiting the type of conduct that can be criminalized by state legislatures.

A third and different aspect of the federal influence emerges from Congress's expanding authorization for federal entities to investigate, prosecute and sentence an increasing array of conduct as a federal crime in the federal courts. Encompassed within the ballooning number of federal crimes is a noteworthy recent trend to make a federal crime of conduct that traditionally had been left only to state prosecution. This particular aspect of federal influence is often called the "federalization of criminal law," the process of overlapping crimes traditionally left to the states and often involving essentially local conduct. It, too, can have a notable influence on the basic justice system of the nation. The nature of this third federalization force and its implications for American criminal justice occupy an important segment of this essay, but the first two effects of federal law deserve to be underscored.

II. THE IMPACT OF FEDERAL LAW ON STATE CRIMINAL PROCEDURE

Federal constitutional law pervasively reshaped procedure in state criminal cases, starting in the 1960s. It will continue to have an important influence in the present century, insisting on certain federally guaranteed minimum procedural rights that circumscribe state investigative processes, trial procedures and appellate procedures, and that trigger federal court involvement in completed state convictions. The explosion of federally guaranteed rights has now slowed appreciably, but the core extension of these defendant procedural rights remains, and those rights are not likely to be reversed or abrogated.

It would be wrong, of course, to think the state systems are uniform. In fact, they may differ from the federal system and from each other in very significant ways. It is nevertheless true that some forces tend to produce more uniformity than might otherwise exist. Some of these are shared historical, social or economic forces. Starting in the 1960s, however, federal law became the most

1. For example, the listing of three federal law influences puts to one side the significant development of federal financial support for state criminal justice activity and administration, an important development of a different nature. A variation of federal funding to states aims to influence state policy and to move it toward federal preferences by conditioning funding on a state's adoption of congressionally favored standards. An example of this technique is discussed in Kevin R. Reitz, *The Federal Role in Sentencing Law and Policy*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 116, 117-18 (1996) (discussing a federal sentencing bill).

influential force on the procedural front. Most aspects of this federal influence were driven by judicial decision-making in the common law case-by-case tradition, as opposed to legislative or executive decisions. One sector of the influence is constitutional in nature, discerning the degree to which the United States Constitution affords all defendants a minimum level of certain federal rights. As such, this influence is binding on the states.[2] Another force tending toward similarity, however, is the state emulation of federal procedure by state decision-makers who choose federal procedural law as a model when formulating non-constitutional state criminal procedure. This emulation, conscious or unconscious, is elective on the part of state policy makers.

A. CONSTITUTIONAL IMPACT ON STATE PROCEDURE

Over the last four decades of the twentieth century, the Supreme Court of the United States "imposed numerous federal constitutional procedural requirements on state criminal justice officials. In addition, the Court has interpreted the federal habeas corpus and civil rights statutes to permit lower federal courts to enforce these constitutional procedural requirements in state criminal cases. As a result, the federal courts today play an active supervisory role in the administration of state criminal justice that would have been unthinkable just a few decades ago."[3]

This judicially driven development, characterized as the "due process revolution" in criminal procedure, is of historic proportion and was effectuated largely by means of the Supreme Court's interpretation of the Fourteenth Amendment's Due Process Clause in the 1960s and 1970s. That interpretation incorporated the guarantees of the specific amendments contained in the Bill of Rights into the Due Process Clause and thereby applied them to state defendants.[4]

The Court's landmark decisions of this period included a litany of cases that generally reshaped the rights afforded to state defendants, many of whom were indigent. It understates the period to say that these decisions greatly constrained prior state procedures and instigated new ones. Within the span of

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2. "This Constitution . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or law of any State to the contrary notwithstanding." U.S. CONST. art. VI, § 1, cl. 2. This generally understood principle was sometimes resisted or overlooked by some state judges. *See, e.g.*, Estes v. Texas, 381 U.S. 532, 556 (1965) (Warren, C.J., concurring) (noting that when state defendant had argued that televised proceedings violated his rights under the Constitution of the United States, the trial judge had remarked that the case was "not being tried under the Federal Constitution."). *See also* Stone v. Powell, 428 U.S. 465, 494 n.35 (1976) (discussing arguments about the insensitivity of state judges to constitutional rights and stating that "state courts, like federal courts, have a constitutional obligation to safeguard personal liberties and to uphold federal law.").

3. Joseph L. Hoffmann & Lauren K. Robel, *Federal Court Supervision of State Criminal Justice Administration*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 154, 155 (1996).

4. "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ." U.S. CONST. amend. XIV.

approximately two decades, these interpretations of the federal Constitution dramatically remolded the way in which state crimes were investigated by police, tried in state courts and reviewed in the state appellate courts.[5]

The federal decisions reconfigured a range of everyday police practices, including search and seizure, interrogations and identifications. For example, these decisions generally required state courts to exclude, from trial, evidence gathered in violation of the Fourth Amendment. They expanded due process conceptions of impermissibly coerced confessions and extended the reach of the Fifth Amendment's right to remain silent in the face of certain police questioning. They found several bases on which to exclude identification evidence considered unconstitutionally gathered and announced rights to counsel at some questioning stages. The federal opinions altered practice for all criminal law attorneys. The changes limited prosecutorial tactics, such as commenting on the defendant's failure to testify, sharpened federal standards for constitutionally acceptable guilty pleas and restrained prosecutors' decision-making (e.g., by incorporating federal double jeopardy limitations into state prosecutions).[6]

The view from the bench also changed. For example, state trial judges were now required to monitor these and other new issues. They needed to hold federally acceptable evidentiary hearings and remain alert to newly imposed burdens of proof affecting their resolution of legal issues.[7] Judges also had to revise methods of jury selection, reassess traditional jury instructions, afford the assistance of trial counsel to indigent defendants, scrutinize to a new degree the constitutionally acceptable level of counsel performance and consider evolving

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5. Of course, similar rights sometimes already existed under the law of a particular state. However, many of the newly declared rights were novel to all (or nearly all) states. Even where a similar state right existed, the contours of the newly declared rights called for a reshaping of the state declared right in order to comply with the precise shape of the federal right. Federal courts were also affected by constitutional rulings that extended interpretations of the Bill of Rights, although the effect in those courts was appreciably less because the needed changes were less dramatic.

6. *See, e.g.*, Benton v. Maryland, 395 U.S. 784 (1969) (overruling prior law and applying double jeopardy protection to state cases); Boykin v. Alabama, 395 U.S. 238 (1969) (record requirements regarding taking guilty plea); Terry v. Ohio, 392 U.S. 1 (1968) (establishing rules for police stop and frisk activity); Gilbert v. California, 388 U.S. 263 (1967) (right to counsel at certain identification procedures); Stovall v. Denno, 388 U.S. 293 (1967) (due process right against certain suggestive identification procedures); Miranda v. Arizona, 384 U.S. 436 (1966) (requiring certain warnings and rights for defendants subjected to custodial interrogation); Griffin v. California, 380 U.S. 609 (1965) (prohibiting comment on exercise of defendant's failure to testify); Malloy v. Hogan, 378 U.S. 1 (1964) (equating state defendants' right to federal standard for self-incrimination); Massiah v. United States, 377 U.S. 201 (1964), and its progeny (dealing with Sixth Amendment right to counsel at certain interrogations); Mapp v. Ohio, 367 U.S. 643 (1961) (overruling prior law and requiring the exclusion of evidence seized in violation of the Fourth Amendment); Blackburn v. Alabama, 361 U.S. 199 (1960) (deeming an involuntary confession standard to be one that is a convenient shorthand for a complex of values).

7. *See, e.g.*, Jackson v. Denno, 378 U.S. 368 (1964).

standards for speedy trial and the imposition of the death penalty.[8] Appellate courts not only had to review trials for an expanded list of federal errors on the direct appeal of convictions, but they were required to also change their own court practices in light of Supreme Court decisions finding that indigents were constitutionally entitled to trial transcripts and to counsel on appeals of right. Indeed, appellate courts now had to monitor procedures thought to be constitutionally necessary if appellate counsel wished to withdraw.[9] Other state appellate doctrines (such as finding a constitutional error was harmless[10]) were subjected to federal constitutional scrutiny and required compliance with federally set standards. The combined result produced more (and more elaborate) criminal appeals. Not only were these federal rights newly extended to the state proceedings, but the content of these rights also was simultaneously undergoing its own distinct expansion. Although some new rules were limited, or denied expansion, in later years, the sweep of others was expanded; all were further interpreted, demanding constant attention to a larger body of changing constitutional law. And, of course, these expanded federal constitutional rights were superimposed onto state law, producing intersecting and increasingly more complicated sets of rules.

These and a multitude of other decisions of the period "were revolutionary in their aggressive reliance on specific provisions in the federal Bill of Rights to protect state criminal defendants, who had previously been forced to rely on either state law or the general language of the Fourteenth Amendment as the source of their rights."[11] As a result "the Supreme Court's expansive interpretation of the due process clause of that amendment, the states today have considerably less leeway in shaping their laws of criminal procedure than they originally possessed. The Supreme Court had held that the due process clause incorporates and makes applicable to the states almost all of the Bill of Rights' provisions that are concerned with criminal procedure."[12]

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8. *See, e.g.*, Cage v. Louisiana, 498 U.S. 39 (1990) (interpreting Court's 1970 reasonable doubt requirement); Barber v. Wingo, 407 U.S.514 (1972) (establishing criteria for measuring speedy trial right); Furman v. Georgia, 408 U.S. 238 (1972) (spawning a long series of death penalty procedure cases); McMann v. Richardson, 397 U.S. 759 (1970) (ineffective assistance of counsel); Swain v. Alabama, 380 U.S. 202 (1965) (equal protection claim concerning jury selection); Gideon v. Wainwright, 372 U.S. 335 (1963).

9. *See, e.g.*, Anders v. California, 386 U.S. 738 (1967) (discussing standards for withdrawal of appellate counsel); Douglas v. California, 372 U.S. 353 (1963) (granting right to counsel on an appeal of right); Griffin v. Illinois, 351 U.S. 12 (1956) (relying on due process and equal protection notions in affording indigents a right to a trial transcript for appeal).

10. *See, e.g.*, Chapman v. California, 386 U.S. 18 (1967) (determining that federal law governs a state appellate court in determining whether a federal constitutional error was harmless in the case).

11. *See, e.g.*, Joseph L. Hoffmann & Lauren K. Robel, *Federal Court Supervision of State Criminal Justice Administration*, 543 ANNALS AM. ACAD. POL & SOC SCI. 154, 156 (1996).

12. Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130, 131 (1996).

The amount of federal procedural law to be discerned, applied and integrated with state law spread across the spectrum of criminal procedure. State legislatures and committees, which devised state rules of procedure, scrambled to write or update statutes and rules to comply with the new federal standards being overlaid onto state procedure. The imposed overlay of these federal standards evoked extensive reaction in the nation. It was applauded by some and condemned by others – sometimes on analytical and historical grounds and sometimes because of the favored or disfavored end result. What is clear is that these changes were seismic in nature in terms of a force reshaping the state criminal justice landscape.

B. FEDERAL JUDICIAL MONITORING OF STATE CRIMINAL PROCEEDINGS

The declaration of new federal rights in state cases translated into a vastly greater array of federal issues now capable of reaching the Supreme Court through the discretionary certiorari review of federal issues in the direct appeal process. This meant expanded possibilities for defendants and prosecutors, but it also had an institutional impact on the Supreme Court itself, which could now select from a different pool of issues. However, by far, the most significant federal monitoring expansion occurred through a widening of "collateral" relief – federal habeas corpus proceedings in which defendants sought a federal forum in which to contend that their federal rights had been inadequately honored in the state court conviction.[13] The fact that prisoners could now seek federal collateral attack also prompted a widening of state collateral attack mechanisms in order to confront the widening variety of related issues that could result in federal habeas litigation.

This widening highway was constructed by the Supreme Court's case-by-case decision making.[14] Freed from filing time restrictions, and with a new

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13. *See, e.g.*, Joseph L. Hoffmann & Lauren K. Robel, *Federal Court Supervision of State Criminal Justice Administration*, 543 ANNALS AM. ACAD. POL & SOC SCI. 154, 156 (1996) (arguing that these monitoring mechanisms should be restricted in light of the changes in the state conditions that prompted them):

> The explosive growth of federal constitutional criminal procedure was controversial, and caused significant enforcement problems for the Supreme Court. Many state judges overtly or covertly resisted the Court's efforts to trump preexisting state criminal procedure laws with new federal principles. The Court recognized that its own power to review directly the constitutionality of state court decisions, by means of a writ of certiorari, would be inadequate to police the state courts during a time of such serious conflict between state law and federal law. So the Court deputized the lower federal courts by expanding the two primary means by which those courts could help to enforce federal law in state criminal cases – the federal habeas corpus and civil rights statutes.

14. *See, e.g.*, Fay v. Noia, 372 U.S. 391 (1963) (viewing the availability of continuing federal relief as important and setting a high standard for finding defendants had forfeited the right to relief); Sanders v. United States, 373 U.S. 335 (1963) (construing finality for habeas purposes); Townsend v. Sain, 372 U.S. 293 (1963) (discussing the circumstances when a habeas court may engage in fact-finding).

forum (federal district courts) that could entertain claims, a sizeable number of cases now remained alive long after the completion of the state direct appeal process and the expiration of the chance of discretionary Supreme Court review (always numerically slim). By means of several expansive interpretations of the federal statutory writ of habeas corpus,[15] the Supreme Court broadly redefined the number of instances in which state prisoners could litigate federal issues in federal district court, causing an increase in federal judicial caseload as well.

For state prisoners, federal habeas corpus relief is largely limited to pressing federal constitutional claims. The explosion in the number of federal constitutional claims applicable in state proceedings correspondingly increased the number of cases eligible for federal habeas corpus relief. At the same time, court rulings in the 1960s and 1970s made finality more elusive. These rulings narrowed the circumstances under which failure to present the claim appropriately in the state proceedings would forfeit federal review and restricted the circumstances in which state prisoners were barred from federal habeas relief because they had previously filed habeas petitions. Moreover, the expansion of federal issues litigable on habeas petitions found a larger number of courtrooms available to scrutinize state convictions – the courtrooms of the numerous federal district court judges, as compared to that of the Supreme Court, which can hear a very limited number of cases and which employs no evidence-taking functions in criminal cases.[16]

Combined, these and other factors translated into vastly more federal involvement in state criminal cases via habeas corpus litigation.[17] This expansive collateral review of state convictions persisted for several decades. Unlike the staying power of the due process procedural revolution, however, the adverse reaction to expanding habeas review has produced a significant tempering of the federal habeas process. Some of this tempering has resulted from Supreme Court decisions restricting the use of the writ. The Court, for example, has significantly limited the availability of the writ to press at least one common

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15. *See* 28 U.S.C. § 2254 (2002) (governing federal habeas relief for those in state custody).

16. Indeed, Justice William Brennan, author of many of the more expansive habeas decisions and a proponent of broad habeas review, viewed the district courts as surrogate Supreme Courts in habeas cases, made responsible for compensating for the Supreme Court's institutional constraints in "containing state criminal proceedings within constitutional bounds. . . ." Stone v. Powell, 428 U.S. 465, 512, 534 (1976) (Brennan, J., dissenting).

17. The reasons for expansive federal habeas corpus following state convictions are not commonly agreed upon, but, briefly put, these arguments include: the general need for "a continuing mechanism" to vindicate federal rights; the need for a mechanism by which the federal courts can have the last say on federal issues; a concern for monitoring federal rights in state courts which at times are viewed as unsympathetic to federal rights (particularly for reasons of bias in favor of state interests or against classes of individuals); the need to create additional incentive for state courts to conduct proceedings in a manner consistent with established federal constitutional standards; and the need to ensure that an innocent person does not suffer an unconstitutional loss of liberty. Easily accessible suggestions of these views appear in the opinions in *Stone*, 428 U.S. at 480, 491 n.31, 494 n.35, 516-30.

claim (search and seizure), and it re-expanded the circumstances under which the right to press any claim can be forfeited.[18] This judicial battleground is still open territory, but the battle has also been joined on the legislative front, with congressional enactment of restrictive amendments that substantially narrow the time limits in which habeas claims can be asserted, hedge federal review standards and limit the defendant's ability to bring successive petitions for relief.[19]

C. OTHER FEDERAL LAW AS A NONBINDING MODEL FOR STATE PROCEDURAL LAW

Federal law has come to exert still another influence on state systems, one that should be mentioned briefly: the role that non-constitutional federal law (e.g., the Federal Rules of Criminal Procedure or the Federal Rules of Evidence) serves as the dominant model emulated by state systems. This phenomena of federal law as a model for some state law, principally procedure, is articulated and explored by Professor Jerold Israel.[20] For a variety of reasons, state decision makers are often heavily influenced by non-constitutional (nonbinding) federal decisions about procedure, most notably by those embodied in the Federal Rules of Criminal Procedure. Whatever the reasons for this federal influence, the phenomena represents still another important aspect of federal law and its ability to influence the states to alter law. In this instance the alterations of state law are done willingly, and have the effect of moving state procedure toward more national similarity.

III. FEDERAL CONSTITUTIONAL INFLUENCE ON STATE SUBSTANTIVE LAW DEFINING CRIMES: RESTRAINTS ON STATE LEGISLATIVE ACTION

A second and wholly different arena for federal influence concerns federal law limitations imposed upon state substantive lawmaking when it decides what conduct is worthy of criminal sanction. In the area of the substantive criminal law, in which state legislatures define state crimes, the Supreme Court has

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18. *See* Wainwright v. Sykes, 433 U.S. 72 (1977) (derogating the 1960s standard of deliberate bypass in favor of a requirement that the prisoner show "cause and prejudice" in connection with the failure to raise the claim appropriately); Stone v. Powell, 428 U.S. 465 (1976) (restricting the recognition of Fourth Amendment claims to only those in which the defendant was not afforded an opportunity for a full and fair hearing in the state system). *See also* James A. Shellenberger & James A. Strazzella, *The Lesser Included Offense Doctrine and the Constitution: The Development of Due Process and Double Jeopardy Remedies*, 79 MARQ. L. REV. 1, 70-71 (1995).

19. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (containing a series of deletions and additions in 28 U.S.C. §§ 2244, 2253, and 2254, and adding a chapter of special requirements dealing with death penalty cases (§§ 2261-66)). For cases and discussion concerning these changes, see, e.g., YALE KAMISAR ET AL., MODERN CRIMINAL PROCEDURE, ch. 28 & app. B. (9th ed. 1999 & Supp. 2001).

20. *See* Jerold Israel, *Federal Criminal Procedure as a Model for the States*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 130 (1996). Of course, congressional drafting of an effective criminal statute (e.g., racketeering laws) may also be emulated by state legislatures as a matter of state law.

sometimes placed protective limitations on the states' power to criminalize certain conduct, thereby defining constitutionally protected conduct. Usually, these limits have been premised upon finding a limitation in the Bill of Rights. Against assertions based wholly on the more imprecise Due Process Clause of the Fourteenth Amendment, federal courts have been much more cautious about placing constitutional limits on what conduct is off-limits to state legislative criminalization.[21] Nevertheless, fundamental principles of legality (e.g., vagueness) and proportionality (some limits on disproportionate sentencing under cruel and unusual punishment standards) did appear in Supreme Court reports and somewhat limited state legislative decisions.[22]

An emerging third noteworthy area of federal influence on the boundaries of the criminal justice system involves what is known as the "federalization of criminal law" – congressional legislation making a federal crime of essentially local conduct previously criminalized only by state law. This federal legislative activity stems from substantive law making, the establishment of federal crimes, and it is producing a more complicated boundary between state and federal substantive law. Unlike the constitutionalizing of procedure, which required an interweaving of federal law into state proceedings, federalization creates a larger federal system which parallels the state system, with attendant consequences. Unlike the previously discussed federal major influences, which were

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21. The Supreme Court cases which declare certain conduct outside the states' legislative authority are often decided by a closely divided Court and reveal the sensitive nature of the federal judicial role in discerning the extent to which federal law limits the traditional power of a state legislature to criminalize conduct. The instances where the Court has declared conduct protected have been portrayed as generally involving a narrow range of activity protected under more explicit constitutional provisions, rather than the Fourteenth Amendment's Due Process Clause. *See, e.g.,* Bowers v. Hardwick, 478 U.S. 186 (1986) (collecting some relevant cases, and rejecting a due process challenge while expressing, in the majority opinion, concerns about the undermining of the Court's authority when it extends substantive rights under the Due Process Clause); Patterson v. New York, 432 U.S. 197 (1977) (dealing with due process claims regarding burden of proof problems, arising from legislative redefinition of traditional crime, and recognizing that states have wide leeway to define crimes, with the practical effect of affording reallocation of burdens of persuasion). Opinions involving the claim that the Eighth Amendment's Cruel and Unusual Punishment Clause prohibits the criminalization of a particular matter are instructive in this regard. *See, e.g.,* Robinson v. California, 370 U.S. 660 (1962) (criminalization of status of drug addict prohibited); Powell v. Texas, 392 U.S. 514 (1968) (where the Court rejected a cruel and unusual punishment claim and refused to constitutionalize an alcoholism defense to a state charge of being found drunk in a public place).

Though most of these decisions act to limit legislative activity, in some instances the Due Process Clause can also act as a brake on state *judicial* activity. For example, the declaration of "common law crimes" (the judicial declaration of some conduct to be a crime even in the absence of a statute) still exists elsewhere. *See, e.g.,* Shaw v. Director of Public Prosecutions, [1962] A.C. 220 (English House of Lords). These "common law crimes" once existed in this country; however, evolving federal due process notions have played some role in the demise of this practice in the United States.

22. *See, e.g.,* Solem v. Helm, 463 U.S. 277 (1983) (finding a sentence unconstitutionally disproportionate under the Eight Amendment, as applied through the Fourteenth Amendment); Papachristou v. City of Jacksonville, 405 U.S. 156 (1972) (holding a vagrancy ordinance unconstitutionally void for vagueness).

largely driven by judicial decision making, this federalization development is driven by the national Legislative Branch's decision-making and, to some extent, by Executive Branch initiatives. Much of the remainder of this essay views this development through the medium of the ABA Task Force on the Federalization of Criminal Law.[23]

IV. THE FEDERALIZATION OF CRIMINAL LAW: INCREASING OVERLAP OF FEDERAL SUBSTANTIVE LAW IN TRADITIONAL STATE AREAS

Crime breeds criminal laws. These days, it breeds more and more federal laws. For present purposes, what is most notable about this expanding list of federal crime is not simply the number of new federal crimes, but the type of conduct now being subjected to federal law. A distinct and notable segment of the federal law growth involves legislation that increasingly overlaps state crimes.

Not all legislation federally criminalizing conduct raises the issues discussed here. While Congress has criminalized more and more conduct generally, a great deal of that law is not aimed at overlapping areas of essentially local conduct traditionally left to the sole province of the states. Some of the new legislation is, for example, linked to adding a criminal penalty for conduct adverse to an expanding amount of federal programs. This legislation generally seeks to protect a distinct federal interest (e.g., theft or bribery in programs receiving federal funds). Still other congressional legislation criminalizes antisocial conduct against a broadening array of federal personnel (e.g., assaults on federal officials) or emerging types of interstate or international activity (e.g., international terrorism). However, a remarkable portion of the surge in federal law does intrude into the sensitive realm of essentially local activity long subject to state criminal law (e.g., robbing a person of a vehicle).

In assessing this widening net of federal criminal legislation involving traditional state law areas, it is important to acknowledge the forces driving the movement and to grasp the serious implications of this development for the health and rationality of the criminal justice system. These perceptions cannot

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23. *See* A.B.A. CRIM. JUST. SEC., REPORT OF THE TASK FORCE ON THE FEDERALIZATION OF CRIMINAL LAW, JAMES A. STRAZZELLA, REPORTER, THE FEDERALIZATION OF CRIMINAL LAW (1998), hereafter cited as FEDERALIZATION OF CRIMINAL LAW (ABA). The report also is available at <www.abanet.org/crimjust/fedreport.html>. THE FEDERALIZATION OF CRIMINAL LAW is the report of a 16 member bipartisan panel organized under the leadership of then-Section chair William W. Taylor, III. The Task Force was composed of persons heavily involved in the criminal justice system, and was chaired by a former Attorney General, Edwin Meese III. The task force identified a troubling federalization trend and counseled against its continuation. At the end of 1998, the task force completed the study, which was subsequently released in early 1999. *Id.* The author served on that panel and, as Reporter, was the principal author of the panel's report. Portions of this article summarize data and analysis found in that report, and rely heavily on points made therein.

be fully appreciated unless the basic structure of the dual United States system is acknowledged.

A. THE CONSTITUTIONAL STRUCTURE AND ITS CONSEQUENCES

Seen as the power of government to protect all of its citizens from certain serious wrongs, criminal law is one of government's most important powers. Viewed as the power to incarcerate or otherwise punish citizens, criminal law is one of government's most awesome powers, one deserving of careful use and appropriate restraint.[24] The powerful, multifaceted nature of such law is itself an argument for its cautious and rational use. A dual system of criminal law requires a particularly sensitive and rational use of the criminal law power.

The American criminal justice system is an unusual one. It is premised on the notion that the states and the federal government will have their own spheres, with the general police power left with the states, not the federal government. The Constitution contemplates that the federal government will have a limited (although important) sphere of interest to protect. As envisioned by the Framers, the dual system deliberately affords substantial protection from an abuse of power. The fundamental principles distributing the nation's important policing power – in which "preventing and dealing with crime is much more the business of the States than it is of the Federal Government"[25] – are still repeated in Supreme Court opinions today. The Court has underscored that the Constitution confers upon Congress "not all governmental powers, but only discrete, enumerated ones."[26] The Constitution withholds "from Congress a plenary police power that would authorize enactment of every type of legislation"[27] and leaves to the states "all those other objects which can be separately provided for . . .."[28] The United States dual system, innovative for its time, is still unique

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24. Herbert Wechsler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952), articulately captures this important shield and sword nature of criminal law:

> Whatever views one holds about the penal law, no one will question its importance in society. This is the law on which men place their ultimate reliance for protection against all the deepest injuries that human conduct can inflict on individuals and institutions. By the same token, penal law governs the strongest force that we permit official agencies to bring to bear .. on individuals. Its promise as an instrument of safety is matched only by its power to destroy. If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.

25. *Patterson*, 432 U.S. at 201.

26. Printz v. United States, 521 U. S. 898, 919 (1997).

27. United States v. Lopez, 514 U.S. 549, 566 (1995) (citing U.S. CONST. art. I, § 8).

28. THE FEDERALIST NO. 14, at 102 (James Madison) (Clinton Rossiter ed., 1961). Madison reassured his fellow citizens that:

> The powers delegated by the proposed Constitution to the federal government, are few and defined. Those which are to remain in the State governments, are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, negotiation, and

today. A great innovation envisioned in it was that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other" — "a legal system unprecedented in form and design, establishing two orders of government, each with its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it."[29]

It is in the nature of the United States that its laws and processes vary from state to state. The dual system produces a system of federal and state police, prosecutors, courts and prisons – all with somewhat different policies, accountability and limits. Except to the extent that the Federal Constitution is read to command minimum rights, these systems will vary, in many instances significantly. Judges will be selected by different entities and be held to different standards of accountability. The same is true of prosecutors, who will likely be locally elected at the state level, but who are appointed at the national level and who are accountable to those situated in the nation's capital. Within constitutional limits, procedural rights will vary between jurisdictions, reflecting differing views of fairness. Jurors will be selected from different areas, trials will be held in different places and convicted defendants will be committed to the custody of different authorities. Sizeable differences in penalty for essentially similar conduct will be possible. Differing police agencies (local or national), who are, likewise, differently accountable, will be empowered to investigate citizens, procure evidence and make arrests. At base, different legislative bodies will decide what conduct is worthy of criminal sanction and will fix the appropriate range of penalty. All of these reflect potentially differing values.[30]

The power of prosecutors to select illegal conduct and persons for prosecution (or to refuse prosecution) is generally considered an executive function beyond the power of judicial review; it is left to the controls of the selecting authorities, exercising professional self-restraint and ethical norms. Where the

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> foreign commerce . . . . The powers reserved to the several states will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people; and the internal order, improvement, and prosperity of the state.

Id., No. 45, at 292-93.

29. *Printz*, 521 U.S. at 920 (quoting U.S. Term Limits, Inc. v. Thornton, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring)).

30. *See, e.g.*, Neil H. Cogen, *The Rules of Everyday Life*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 97 (1996) (arguing the rules prescribing and proscribing daily citizen conduct have become increasingly federal in origin, and arguing against the wisdom of that trend in areas of local concern where community values are important). *See also* Philip B. Heymann, *Cautionary Note on The Expanding Role of The U.S. Attorneys' Office*, 28 CAP. U. L. REV. 745, 747-48 (2000) (pointing out, in the context of urban violence and drug dealing, that inappropriate federalization allows local police and prosecutors to override the rightful place of state legislative decisions concerning trial rules and sentences. "In short, a matter becomes a federal concern simply because local police or prosecutors think it should be handled differently from the way their state legislatures mandated."); John S. Baker, Jr., *State Police and the Federalization of Local Crime*, 72 TEMPLE L. REV. 673 (1999) (describing consequences of shift in power from state to federal prosecutions).

same conduct constitutes a legislated crime against more than one sovereign (i.e., several states, or a state and the federal government), constitutional double jeopardy law has long been read to allow that same conduct to be prosecuted by either or both entities.[31] The overall result is that American prosecutors have formidable powers to select whether conduct should be prosecuted at all and whether it will be prosecuted as a state and/or federal crime.

B. CONGRESS'S CRIMINAL LAW POWER

The "discrete, enumerated" criminal powers conferred on Congress can be readily stated. Only a few federal crime possibilities are expressly addressed in the Constitution. For example, safeguarding against counterfeit currency, treason, offenses against the "Laws of Nations," and piracy and other felonies on the high seas are mentioned.[32] Even including these, Congress's power can be viewed as falling into just a few categories easy to state abstractly (even if the power is much more difficult to delineate sensibly in practice, particularly with regard to commerce.[33]). To borrow Professor Louis Schwartz's useful categorization:

> The problems of federal penal jurisdiction may be analyzed under four main headings: (1) the core of the federal government's power to preserve itself and carry out federal functions (therein are treason, espionage, tax and customs violations, etc.); (2) the territorial scope within which federal legislative power is plenary (federal enclaves, American vessels on the high seas) and where the federal penal code would be, in principle, as comprehensive as that of an ordinary state; (3) the question of "assimilated crimes" — state-defined offenses which Congress adopts by reference for application in federal enclaves; and (4) the question of the extent to which Congress should, by using its constitutional power (for example, over interstate commerce or the

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31. Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L. J. 1135, 1171 n.189 (1995). In practice, the U.S. Department of Justice has a self-imposed policy limiting the circumstances in which it will prosecute the same conduct in situations where the state has prosecuted first. *Id. See generally* Harry Liftman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996) (discussing the *Petite* policy). The result is that the larger issue with dual jurisdiction is not so much double prosecution or double punishment, but which of the potential defendants will be selected for federal prosecution and which for state prosecution, with the disparate attendant consequences that accompany such selection.

32. *See* U.S. CONST. art. I, § 8 (allocating congressional power to "provide for the Punishment of counterfeiting the Securities and current Coin of the United States" and to "define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations"); U.S. CONST. art. III, § 3 (defining treason against the United States, granting Congress the power to declare the punishment for treason, and affording certain related protections).

33. *See infra* note 45.

> mails), make federal crimes out of behavior that is already penalized by state law.[34]

While the earliest federal crimes tended to protect clear federal functions, Congress bases much of its more recent federal criminal legislation on the Commerce Clause power[35] which, depending on how it is interpreted, provides a potentially wide basis for the exertion of federal criminal law involvement. This is especially so in a modern society in which people and items are mobile and where tangential interstate involvement with wrongful conduct is easily contrived. In an area where it is notoriously difficult to draw easy lines and where arguments for an effect on interstate commerce are plentiful, the constitutional boundaries of this power have been the topic of Supreme Court challenges, Court shifts and heated scholarly debate.[36] Legislation of federal crimes are routinely upheld on thin connections between offending conduct and substantial interstate commerce. There have, of course, been some recent notable battles over the appropriate extent of federal Commerce Clause jurisdiction,[37] and it is always possible that the Supreme Court will more restrictively read the sweep of federal jurisdiction. However, the precise limits of the Commerce Clause power are beyond the role of this essay. This essay proceeds on the reality that, unless changed by a more pronounced shift in Supreme Court law, present law will afford Congress a great legislative latitude within which it can choose to legislate on the basis of the Commerce Clause power.[38]

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34. Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics, and Prospects*, 41 LAW & CONTEMP. PROBS. 1, 16 (1977) (footnote omitted).

35. U.S. CONST. art. I, § 8 (granting Congress the power "to regulate Commerce with foreign Nations and among the several States, and with the Indian Tribes . . .").

36. *See, e.g.*, Champion v. Ames, 188 U.S. 321 (1903) (holding by a closely divided vote that a statute which made it a crime to transport lottery tickets across state lines was constitutional). *See generally* John S. Baker, Jr., *Nationalizing Criminal Law: Does Organized Crime Make it Necessary or Proper?* 16 RUTGERS L.J. 495 (1985); Kathleen F. Brickey, *Crime Control and the Commerce Clause: Life After* Lopez, 46 CASE W. RES. L. REV. 801 (1996); Deborah Jones Merritt, *Commerce!*, 94 MICH. L. REV. 674 (1995); Louis H. Pollack, *Philadelphia Lawyer: A Cautionary Tale*, 145 U. PA. L. REV. 495 (1997); Tom Stacy & Kim Dayton, *The Underfederalization of Crime*, 6 CORNELL J.L. & PUB. POL'Y 247 (1997).

37. *See, e.g.*, United States v. Morrison, 529 U.S. 598 (2000) (finding lack of congressional power to enact a particular federal civil remedy for the victims of gender-motivated violence); Jones v. United States, 529 U.S. 848 (2000) (interpreting statutory language so as to exclude arson of personal residence not otherwise used in interstate commerce); United States v. Lopez, 514 U.S. 549 (1995) (finding constitutional weaknesses in a federal gun-free school zone law).

38. The FEDERALIZATION OF CRIMINAL LAW report has produced a substantial response, including a thoughtful and constructive article by George D. Brown, *Constitutionalizing the Federal Criminal Law Debate: Morrison, Jones, and the ABA*, 2001 U. ILL. L. REV. 983 (2001). That article argues that if the report were to be written today (especially in light of several notable Supreme Court cases decided after the report), it would address more directly the constitutional debate about the extent of federal criminal law power. In particular, Professor Brown carefully argues that the report should have more expressly encouraged Congress to consider the constitutionality of its federal crime legislation. *Id.* at 1001. More widely, the article argues that the Task Force should have made the constitutional issue a more central part of its report, while acknowledging that there are reasons why it might not have done so. *Id.*

C. CONGRESS'S PRESENT USE OF THE POWER TO CRIMINALIZE

The trend to federally criminalize more conduct. Early federal crimes occupied only a small number of statutory pages and numbered less than a score, while the several thousand existing today are thought to elude an accurate count.[39] Many of these federal crimes are the products of increasing federal programs which are then coupled with protective federal criminal laws aimed at abuse of the programs. There is, of course, a wider debate about what socially unacceptable conduct should be left uncriminalized (by either the federal or state law) and instead left to other societal controls, such as moral restraints, private social pressures, or non-criminal law suits.[40] There is also the everyday debate about the wisdom of some particular piece of legislation, regardless of the jurisdictional issue.

As federal programs grow, and as modern life offers a more complex variety of human actions and transactions, it is natural enough to assume there will be more conduct covered by federal criminal law. Nevertheless, the body of federal criminal law has grown in astounding proportions in the last part of the twentieth century. Although Congress, in limited ways, had begun to broaden the types of federal crime in the late nineteenth and early twentieth centuries, a notable federal movement into matters long left to state criminal law occurred in the 1960s and 1970s, when political concern with crime increased.[41] As

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at 1002-03. Speaking only for myself, I think that a 1998 report amounting to a nuanced constitutional brief (addressed partially to Congress's attention but in many ways sounding as though it were addressed principally to the Supreme Court) would have been beyond the charge of the Task Force and less effective. Realistically, such an attempt would also be unlikely to have resulted in a clear consensus and constitutional line-drawing among a broad-based and sizeable group of ABA lawyers, judges, and legislators. Instead, the report acknowledges the constitutional debate, identifies the argued bases for federal jurisdiction, and proceeds. *See* FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23, at 45, 47. I believe that whatever the constitutional limits of federal legislative power are, certain uses of it, within the report's purview, are indeed unwise even if then-existing law were to treat them as constitutional. Clear, collective, legal judgment about precise constitutional line-drawing is not easily arrived at, as Supreme Court opinions, scholarly writings and legislative debates remind us. As does Professor Brown, I take the constitutional debate about the outer reaches of federal power as being an exceptionally important one, and as one having a crucial place in the federalization debate, even if not central to the report's task. Others, however, have certainly lent considerable scholarly effort to that aspect of the debate. *Id.* at 47, 59.

39. FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23 at 9-10, 93-94 (discussing the present number of federal crimes and the difficulty of counting the number of such federal crimes); Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future*, 2 BUFF. CRIM. L. REV. 46, 51-54 (1998) (discussing the number of federal crimes). For a short history of the growth of federal law, *see, e.g.*, Sara Sun Beale, *Too Many and Yet Too Few: New Principles to Define the Proper Limits for Federal Criminal Jurisdiction*, 46 HASTINGS L.J. 979 (1995).

40. For examples of such concerns, see, e.g., Pamela H. Bucy, *Privatizing Law Enforcement*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 144 (1996); Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157 (1967).

41. For histories of this early growth of federal crime, see Sara Sun Beale, *Federalizing Crime: Assessing the Impact on the Federal Courts*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 39, 40 (1996); FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23, at 5-6.

documented elsewhere, "more than forty percent of all federal crimes enacted since the Civil War have been enacted since 1970,"[42] and most of these were enacted in the two decades ending the century.[43] Along with the body of federal legislation, the federal presence in various segments of the federal criminal justice system (e.g., personnel and overall expenditures) has grown at rates disproportionate to the growth of the state systems, a change raising its own related cautions.[44]

As noted, the congressional attention to criminal legislation encompasses a sizeable appetite for an increasing amount of essentially local conduct traditionally prosecuted as a state crime, often violent crimes or "street crimes." Several ready examples illustrate the trend: carjacking (already prosecuted as robbery by the states); drive-by shooting (constituting some form of serious assault at the state level); and murder by escaped prisoners (homicide in state law).[45] This trend to federalize essentially local crime, often jurisdictionally premised on distant or tenuous interstate ties, is an integral part of the federalization concern because it carries such a broad potential sweep for nearly limitless federal jurisdiction.[46] The trend has caused alarm among a wide variety of federal and state judges, scholarly observers, civil liberties groups, bipartisan observers of the issue and (perhaps most tellingly) among state and local prosecutors and other law enforcement participants.[47]

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42. *See* FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23, at 7.

43. The statistics and statutes noted are compiled in FEDERALIZATION OF CRIMINAL LAW (ABA). *See id.* at 7-9. These estimates were derived from a count of statutory sections charted out in the FEDERALIZATION report in Appendix C. *Id.* at 8 n.10. For reasons stated in that report, these estimates may be low. *Id.* at 7 n.9, 8 n.10, 92 n.3.

44. *See* FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23, at 13-14.

45. 18 U.S.C. § 2119 ("carjacking") (theft of motor vehicle by force, violence or intimidation) (originally enacted Oct. 25, 1992, and twice subsequently amended); 18 U.S.C. § 36 (enacted Sept. 13, 1994) (drive-by shooting); 18 U.S.C. § 1120 (murder by escaped prisoner) (enacted Sept. 13, 1994). For other examples, *see* FEDERALIZATION OF CRIMINAL LAW (ABA), supra note 23.

46. Carjacking provides a helpful example of this tenuous tie in both congressional and prosecutorial practice. At first blush, it might seem that federal carjacking jurisdiction would relate to a carjacking that involves interstate transactions at the core of the carjack event, but this is not the case. The statute itself broadly covers "motor vehicles that have been transported, shipped, or received in interstate or foreign commerce," 18 U.S.C. § 2119 (Supp. V 1999). This formulation covers cars long since manufactured in one state (such as Michigan) but long since registered and routinely driven in another state. While it also might be supposed that the particular car robberies selected for federal prosecution from among the many might typically involve interstate escapes or the robbery of a driver during interstate travel, a review of the reported opinions suggests that this is not the typical federal carjacking scenario. At least through the limited prism provided by appellate opinions reciting the facts surrounding federal carjacking convictions, the more typical fact pattern seems to be represented by United States v. Rowe, 92 F.3d 928 (9th Cir. 1996). There, using a handgun, the defendant carjacked a vehicle at a Los Angeles traffic light and was quickly spotted and apprehended by Los Angeles Police Department officers who had been phoned by the victim. The defendant was booked on a state charge of armed robbery of a vehicle, but thereafter the case was turned over to federal authorities by local police "[b]ased on a review of guidelines provided by the Federal Bureau of Investigation . . .." *Id.* at 930.

47. *See* FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23, at 59-77 (recounting the report's background literature). Writers studying federalization overwhelmingly reflect an uneasiness with the

The motivations behind federalization. Identifying what factors drive the development of any body of criminal law (including federal criminal law) can be a subtle task, especially because many "non-legal" factors may come into play.[48] Nevertheless, there are some widely shared beliefs about the reasons behind the current federalization trend.

The public concern with crime, and particularly violent street crime, has translated into issues for political figures at the national level to a degree not imaginable in the earlier part of the last century. Then, long before today's mobile American, and long before information about crimes around the country was so graphically and easily available through a nationwide media, crime was a mainly local issue and crime issues were the stuff of local political debates. Today, violent local crime – the main crime concern of Americans – is an attractive part of federal election debates.

Crime is an important and legitimate citizen concern. Constituents importune government officials "to do something" about crime. Federal legislators are not exempt from this pressure. Whether because of a genuine belief that federalizing local crime will help make the streets safer, or because of the graphic power of a highly publicized, vicious crime, or because of a variety of politically charged reasons, it is politically attractive to be seen as "tough on crime." It is considered politically dangerous to oppose a crime measure (especially if espoused by a politically powerful group). This pressure is considerable. For some, it may appear a "cost free"[49] vote because many of the newly federalized crimes are unlikely to be actually prosecuted in substantial numbers.[50] In any

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nature and extent of the federalization trend. *Id.* The National District Attorneys Association "has long opposed the unwarranted federalization of crime in the belief that it works to the detriment of the efficient and effective use of our law enforcement and legal resources." Letter from William L. Murphy, NDAA President, to the ABA Task Force on Federalization of Criminal Law (October 17, 1997) (on file with author). Some of the criticism about inappropriate federalization comes from a variety of persons heavily involved in the front line criminal justice system — e.g., The Chief Justice of the United States, police executives, the National Governors Association, the ACLU Foundation Prison Project, the National Attorneys General Association, federal judges acting through the Judicial Conference of the United States, a committee of the Federal Bar Association, and the Conference of [State] Chief Justices — and is reiterated at various points in FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23.

48. *See, e.g.,* Sara Sun Beale, *What's Law Got to Do With It? The Political, Social, Psychological and Other Non-Legal Factors Influencing the Development of (Federal) Criminal Law*, 1 BUFF. CRIM. L. REV. 23 (1997).

49. *See, e.g.,* John B. Oakley, *The Myth of Cost-free Jurisdictional Allocation*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 52 (1996) (arguing that criminalization does have serious costs that often go unconsidered).

50. A congressional assumption that newly enacted federal crimes will or will not be prosecuted in significant numbers is not always warranted. With passage of a statute, investigative powers pass to governmental agencies and the power to decide on prosecution passes to the Executive Branch prosecutors. The amount of prosecution for particular crimes may change without open political debate when a future Executive Branch administratively decides that some area of criminal activity now covered by federal statute should be given an enhanced priority. While many of the newly federalized crimes have been prosecuted in relatively low numbers (*see* FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note

event, the temptation to add to the federal list of crimes overlapping traditional state crimes appears to be great.[51]

The question about the exact situations in which Congress should best exercise its criminal law power is a matter of considerable difficulty, no matter what general views about criminal law one holds. The overwhelming view of scholars, however, is that Congress has now gone dangerously too far. The present criminal code has grown largely by piecemeal accretions in response to particular bursts of concerns, prompting many to argue that what is needed is a cohesive federal recodification with a principled, unifying jurisdictional approach. Such a project confronts considerable political hurdles, only some of which are jurisdictional in nature.[52] As to jurisdictional premises, once the asserted jurisdictional premise for federally legislating moves beyond the protection of governmental programs and site-related jurisdiction and once it enters the realm of the Commerce Clause and the appropriate exercise of that power, the disparity of views becomes apparent.

A few, for example, argue that the Commerce Clause power is appropriately exercised whenever the transaction involves any interstate commerce (with widely differing views on how central to the transaction must be that commerce). Others argue the power is wisely used whenever Congress perceives that the states cannot (perhaps because of resources, expertise, or the complexity or multiplicity of jurisdictions involved) or will not (perhaps because of intrastate political pressures or corruption) adequately handle the targeted activity. This is a serious and substantial debate, capable of subtle and differing answers along the continuum. But whatever views are held on this continuum, the present trend to federalize essentially local activity is not being truly driven by most of these arguments for exercise of federal jurisdiction. Instead, the trend appears to be propelled by the political popularity of anti-crime measures, or simply because the criminal conduct is considered serious, coupled with a concern for any possible interstate commerce tie, however tenuous. Significantly, in many recent expansions of federal jurisdiction the "question of whether the states are doing an adequate job in this particular area was never seriously asked," the Chief Justice of the United States has observed.[53] In fact,

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23, at 19-24), history shows that priorities shift, catapulting a low number of federal prosecutions for a particular crime into significantly higher frequency. This was true, for example, of the federal racketeering, drug, and mail/wire (phone) fraud statutes when first enacted, although these statutes are now broadly interpreted and heavily used. *Id.* at 21-23.

51. *See id.* at 2, 12, 14-16 (discussing some of these forces).

52. *See, e.g.*, Louis B. Schwartz, *Reform of the Federal Criminal Laws: Issues, Tactics and Prospects*, 41 LAW & CONTEMP. PROBS. 1 (1977) (describing the work of the governmentally-established National Commission of Reform of Federal Criminal Laws and an attempt to recodify federal criminal law); Robert H. Joost, *Federal Criminal Law Reform: Is It Possible?*, 1 BUFF. CRIM. L. REV. 195 (1997).

53. William H. Rehnquist, Address to the American Law Institute (May, 1998), *in* REMARKS AND ADDRESSES AT THE 75TH ANNUAL AMERICAN LAW INSTITUTE MEETING (ALI), at 18.

the disadvantages to the nation's total criminal justice system are seldom discussed. In the piecemeal reaction to federalization proposals, then, the serious, detrimental (and not always obvious) undermining of the criminal justice system is going unnoticed, ignored or under-appreciated.

D. THE CONSEQUENCES OF FEDERALIZATION FOR THE DUAL SYSTEM OF CRIMINAL JUSTICE

What is it in the federalization trend that sets off serious and widespread alarm from a broad spectrum of those interested in criminal justice, including those on criminal justice's front lines? What are the implications of this trend for the country and for the generations that will inherit such a criminal justice system?

The Report of the ABA Task Force on Federalization collects and analyzes the adverse effects of inappropriate federalization. Before doing so, however, the panel tried to discern whether the federalization of local crime is likely to have any appreciable effect on the type of street crime that concerns most Americans. The panel concluded that federalization is not likely to have even that supposed beneficial effect.[54] In this view, federalization does not help, but its adverse effects do hurt important values. On the other hand, inappropriate federalization: generally undermines the state-federal fabric and disrupts the important constitutional balance of federal and state systems; can have a detrimental impact on the state courts, state prosecutors and state investigating agents who bear the overwhelming share of responsibility for criminal law enforcement; has the potential to relegate the less glamorous prosecutions to the

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54. FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23, at 18. Based on the latest available data, the report concluded that "Increased federalization is rarely, if ever, likely to have any appreciable effect on the categories of violent crime that most concern Americans, because in practice federal law enforcement can only reach a small percent of such activity." *Id.* The best available data on new cases consisted of statistics from the Administrative Office of U. S. Courts on the number of cases filed in federal courts. (For a discussion of the Task Force's statistical use, see *id.* at Appendix B, Section 2.). Extensive Task Force efforts to get statistics directly from the Department of Justice had been unavailing. It might be pointed out that, subsequent to the report, DOJ attorneys noted to the Task Force that for two of the crimes discussed (domestic violence and odometer tampering) prosecutions had been initiated but did not appear in the report's Administrative Office statistics, and therefore did not appear in the report's sampling. These additional numbers are small, however, and have no effect on the Task Force's conclusion that the federal system can reach only a small percentage of such conduct and so are likely to have only a limited impact.

With regard to the Task Force's reference to prosecutions under 18 U.S.C. § 2261 (interstate domestic violence), the additional data forwarded by the DOJ subsequent to the report counted seventeen (17) indictments for this statute. (4-1-99 graph provided to Task Force reporter.) (It is unclear from the provided data whether the DOJ statistics refer to indictments filed in Fiscal 1997 or Calendar 1997; the AOUSC figures refer to Fiscal 1997.) The DOJ numbers for odometer prosecutions, also submitted subsequent to the report, included ten (10) prosecutions (as measured by sentences imposed in Calendar 1997) for 18 U.S.C. § 1984, one of the odometer statutes used in the report (which relied on Fiscal 1997 figures). (Information provided 1-04-99 to Task Force reporter by DOJ Office of Consumer Litigation.)

state system, undermine citizen perception, dissipate citizen power and diminish citizen confidence in both state and local law enforcement mechanisms; creates an unhealthy concentration of policing power at the federal level; can cause an adverse impact on the federal judicial system; creates inappropriately disparate results for similarly situated defendants, depending on whether their essentially similar conduct is selected for federal or state prosecution; increases unreviewable federal prosecutorial discretion; contributes to costly and unneeded consequences for the federal prison system; accumulates a large body of law that requires continually increasing and unprofitable congressional attention in monitoring federal criminal statutes and agencies; and it diverts congressional attention from a needed focus on that criminal activity which, in practice, only federal prosecutions can address. Overall, inappropriate federalization represents an unwise allocation of scarce resources needed to meet the genuine issues of crime. The ABA panel thus viewed the inappropriate federalization trend as misguided, ineffectual, and one with serious adverse consequences too frequently overlooked by a Congress that is pressured to enact more crimes.[55]

As this listing reflects, part of the adverse response to federalization is a reaction that is structural in nature, underscoring the governmental makeup of the United States. This reaction views federalization as shifting and challenging the fundamental constitutional placement of general policing power that has historically resided at the state level. This shift, in turn, raises a number of related sub-concerns about the state criminal justice system and the way in which citizens rely upon it. One such sub-concern is federalization's denigrating impact on all the components of the state systems (including police and prosecutors). As high-visibility cases increasingly gravitate to federal prosecution, that shift denigrates the very systems that bear (and will continue to bear) the bulk of criminal law enforcement responsibility. In some cases, local authorities work cooperatively to decide whether a case will be pursued federally or by the state, but this cooperative attitude varies from place to place and time to time. Another sub-concern is a diluting confusion of responsibility in the eyes of citizens about which agencies are truly accountable for dealing with crime – a shift from state locales to the seat of national government altering the electorate's ability to make community decisions based on varying state values, about what should be criminalized, and about what rights, procedures and sentencing consequences should attach to criminal conduct.

Still another identified concern is that inappropriate federalization amalgamates a general federal police power, controlled at the national level, with its power to investigate, garner information, and interact with citizens' privacy and protected rights. The formulation of a general national police has been historically worrisome to the nation, which has instead preferred to see the general

55. *Id.* at 3, 26-43, 49-50.

policing power housed in local police agencies held responsible by state devices. Still another portion of this list – often emphasized by the federal judiciary – focuses on adverse consequences for the federal court system, as more common-law-type crimes edge onto federal court dockets, disadvantage civil case litigants, compete with the distinctly federal interest crime cases and change the nature of the federal judiciary and its related components – all to the detriment of the nation.

Yet other portions of the adverse consequences relate to Congress and the impact this phenomenon will have on federal resources, especially in light of the growing body of street crime law that will breed constant legislative supervision and amendment, and the diversion of limited federal resources from the distinctly federal crimes (e.g., certain types of terrorism) that only the federal government can adequately address. To be sure, federal criminal law has a valuable and critical role to play in the criminal justice system. The federal power, however, needs to be legislated cautiously and the consequences it engenders need to be carefully considered in the context of the American dual system. Federal law is vitally needed to protect distinctly federal interests, including protection in international criminal matters and in some activity where the core of the criminal conduct is truly interstate.[56] Recent events underscore this notion. The limited resources of the federal government are most wisely used when they are focused on distinct federal interests. To do otherwise undermines a delicate, balanced dual system, deprives the system of sensibility and converts it into a system of redundant penalties and confusingly disparate treatment of those who commit essentially the same indistinguishable wrong.

A particularly important adverse impact of inappropriate federalization is the fact that it accentuates the disparate treatment of citizens who engage in essentially the same conduct. For a variety of reasons, most of the newly federalized crimes will, as a practical matter, go unprosecuted in federal court and be left to the state systems. In a system of overlapping jurisdiction with unrealistic distinctions, different defendants will be selected for federal prosecution (with its differing consequences, including the likelihood of much more severe sentencing), while most are left to the state system and its consequences. However much federal prosecutors apply their high integrity to the selection of some defendants, not even public guidelines concerning the particular nature of selecting defendants for federal prosecution need be announced. Obviously, some particular defendants may present tempting targets for more severe punishment, and there is an equally result-oriented public apathy toward such defendants. There are those who argue articulately that wise use of the federal prosecution power is all that is needed to keep overlapping federal-state crimes in perspec-

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56. *See, e.g.*, Ellen S. Podgor, *Globalization and the Federal Prosecution of White Collar Crime*, 34 AM. CRIM. L. REV. 325 (1997).

tive.[57] While this general Executive Branch self-restraint may mitigate some of the present impact of inappropriate federalization, at the same time, this growing reliance on restraint by individuals lacks the assurances that are generally present in legal principles of restraint historically thought necessary for a comfortable application of the awesome power of criminal law.

V. A DUAL SYSTEM OF LARGELY OVERLAPPING CRIMINAL LAW?

It is becoming increasingly difficult to articulate to a layperson why certain, basically indistinguishable, conduct is prosecuted as a federal crime in one case and as a state crime in another. The criminal justice system necessarily contains a substantial amount of discretion. This is notably true with respect to the dual criminal justice system and selection for federal or state prosecution.[58] An accumulating amount of unprincipled federal-state overlap accentuates this aspect of the criminal justice system and stretches tolerance for otherwise necessary discretion. While "some disparity between consequences inevitably results from the dual system and may be tolerated if carefully considered, principled, and limited in amount," it is also true that "an expansive amount of unprincipled overlap in which very large amounts of conduct are susceptible to selection for prosecution as either federal or state crime is intolerable."[59]

In light of basic ideas of legality, it is difficult to reasonably imagine a state in which all criminal conduct would be, by law, expressly subjected to two sets of widely differing consequences, and in which the decision about which set of

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57. *See, e.g.*, Jamie S. Gorelick & Harry Liftman, *Prosecutorial Discretion and the Federalization Debate*, 46 HASTINGS L.J. 967 (1995); Renée M. Landers, *Prosecutorial Limits on Overlapping Federal and State Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 64 (1996); Harry Liftman & Mark D. Greenberg, *Dual Prosecutions: A Model for Concurrent Federal Jurisdiction*, 543 ANNALS AM. ACAD. POL. & SOC. SCI. 72 (1996). For other discussions of prosecutorial discretion as it generally relates to the federalization debate, *see* FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23, at 34-35; Michael A. Simmons, *Prosecutorial Discretion and Prosecutorial Guidelines: A Case Study in Controlling Federalization*, 75 N.Y.U. L. REV. 893 (2000) (arguing that "so long as Congress is unable to resist creating new federal crimes, the key to controlling federalization is the responsible exercise of prosecutorial discretion" and exploring the use of guidelines to accomplish this goal); G. Robert Blakey, *Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, but the Exercise of Responsible Prosecutive Discretion*, 46 HASTINGS L.J. 1175 (1995); Daniel C. Richman, *The Changing Boundaries Between Federal and Local Law Enforcement*, in 2 CRIMINAL JUSTICE 2000: BOUNDARY CHANGES IN CRIMINAL JUSTICE ORGANIZATIONS 81, 82 (Charles M. Friel, ed., 2000), *available at* <http://www.ojp.usdoj.gov/nij/criminal_justice2000/vol2_2000.html> (last accessed Mar. 20, 2002) (noting that there are political and institutional limitations on federal powers, and taking the position that the "relatively small size of the Federal enforcement apparatus appears to reflect Congress's belief that the precise boundaries of responsibility should be set not through substantive Federal legislation but through explicit or tacit negotiation among enforcement agencies.").

58. For discussions of prosecutorial discretion, see, e.g., Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643 (1997); James Vorenberg, *Decent Restraint of Prosecutorial Power*, 94 HARV. L. REV. 1521 (1981).

59. FEDERALIZATION OF CRIMINAL LAW (ABA), *supra* note 23, at 32.

consequences applied was reposed in essentially unreviewable decision making. The bipartisan ABA panel reached the conclusion that the increasing inappropriate federalization "is moving the nation rapidly toward two broadly overlapping, parallel, and essentially redundant sets of criminal prohibitions, each filled with differing consequences for the same conduct" and concluded that "[s]uch a system has little to commend it and much to condemn it."[60]

The principles of federalism and practical realities provide no justification for the duplication inherent in two criminal justice systems if they perform basically the same function in the same kinds of cases. There are no persuasive reasons why both federal and state police agencies should be authorized to investigate the same kinds of offenses, federal and state prosecutors should be directed to prosecute the same kinds of offenses, and federal and state judges should be empowered to try essentially the same kind of criminal conduct. When the consequences of these parallel legal systems can be so different, increases in the scope of federal criminal law and the areas of concurrent jurisdiction over local crime make it increasingly difficult, if not impossible, to treat equally all persons who engaged in the same conduct and these increases multiply the difficulty of adequately regulating the discretion of federal prosecutors. Moreover, it makes little sense to invest scarce resources indiscriminately in a separate system of slender federal prosecutions rather than investing those resources in already existing state systems which bear the major burden in investigating and prosecuting crime.[61]

Wide discretion is accorded federal and state prosecutors. Under present views of the Commerce Clause, the judiciary has also accorded wide latitude to legislative judgments about interstate activity as a basis for federal crime legislation, although recent Supreme Court cases have again brought the constitutional questions to the fore. Nevertheless, despite judicial expressions of concern, absent some more clear and dramatic legal change, the power to increase federal crimes in state areas will still be left in large part to Congress and to the invocation of its laws by federal prosecutors. It is possible, of course, that the Supreme Court will someday again impose a much more restrictive view of the legislative Commerce Clause power, whether because of an unconscious desire to protect the federal courts' distinct nature, or for more theoretical reasons. In any event, limiting excessive federalization of local crimes is a matter which, in the first instance, involves congressional judgment and wisdom. The wise use of power is not always at its outer limits.

The nation confronts a fundamentally important choice in deciding how much criminal conduct will be subjected to overlapping state and federal jurisdiction. Whatever the pressures on Congress, the hope remains that the long

60. *Id.* at 55.
61. *Id.* at 55-56.

term damage done to the nation's dual government system, and to its delicate dual criminal justice system, will be apparent enough to cause careful federal criminalization of only that crime which involves a distinct federal interest.

VI. CONCLUSION

The due process revolution imposing federal criminal principles on state procedure was court-driven and thought to be constitutionally required, as are the constitutional limits on what conduct the states can criminalize. It is clear that the infusion of this federal law has made the nation's criminal procedure more uniform among components of the dual criminal justice system. To a lesser degree, this is also true of the substantive federal constitutional limits imposed on the state systems.

On the other hand, the federalization of essentially local conduct (which for good reason has traditionally been left to the states) is legislatively inspired and anything but constitutionally required. No one realistically believes that the federal government will or should take over the bulk of prosecuting criminal conduct in this country. In this posture, the accumulating federalization of local crime has led to a greater disparity of unreviewable treatment for an increasing amount of similar criminal conduct. At the beginning of our new century, the future of this federalization trend is unclear, but its outcome is important. Reasoned control of the federalization trend is a matter that requires the careful, sustained attention of the national Legislature. If the trend continues, despite the commonly felt need for careful re-evaluation, it will erode important values and unwisely blur the fundamental and prized boundaries of state and federal criminal justice.

Anonymous Correspondence Disparaging Law School Faculty

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"Poison-pen letters" are letters "written with malice, spite and usually anonymously."[1],[2] The French refer to writers of poison-pen letters as "corbeaux" or "crows."[3],[4] The effects of these letters, "can range from local embarassment . . . to the calculated destruction of their target's happiness."[5]

Anonymous letters can have devastating effects, personally and professionally. In 1996, Chief of Naval Operations Admiral Mike Boorda committed suicide three days after an unsigned letter attacking him appeared in the *Navy Times*.[6] In 1998, a few days after then-President Clinton nominated Richard C. Holbrooke to be U.S. envoy to the United Nations, the State Department received an anonymous poison-pen letter alleging that Holbrooke may have vio-

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1. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 897 (10th ed. 2001).

2. "At best, poison-pen letters contain entertaining information about the evils that others have purportedly done; at worst, the contents are vicarious, malignant and unsubstantiated accusations." *At* http://202.184.94.19/bin/main.exe?f=archtoc&state=O199i4.9.251 (last visited Dec. 04, 2001), *summarizing No to Poison Pens*, New Straits Times Press (Malaysia), Aug. 6, 2000.

3. Philip Jacobson, *Tales of the Carrion Crows*, Times (London), Oct. 28, 1989, at 36.

4. "During the Nazi occupation, the corbeaux had a field day, bombarding the Gestapo with accusations against neighbours, workmates, sometimes friends and relatives, that often amounted to a death sentence. When the Germans were driven out of France, bulging sacks of mail signed by 'un bon Franais' or 'une vrai patriote' [sic] were left unopened . . . [The] phenomenon has been described by one French historian as 'this cancer of the soul.'" Philip Jacobson, *Poison pen letters still shame France*, Sunday Telegraph, Sept. 21, 1997, at 33.

5. Jacobson, *supra* note 3.

6. *After Boorda's Death, Officer Apologizes for Written Attack*, CHATTANOOGA TIMES, May 29, 1996, at A8. ("Aides to Boorda reported that while no one fully understood why Boorda killed himself, he was wounded by the anonymous attack in the Navy Weekly, which was not connected with the media scandal surrounding the propriety of two combat pins he wore").

lated Federal ethics laws.[7] Holbrooke's nomination to be U.N. Ambassador was held-up for 14 months in the Senate.[8],[9]

Poison-pen letters exist in the academic world as well, and some such cases become newsworthy, either because of the involvement of high profile personalities or because of their compelling fact patterns.

In 1997, Bernard Morichere, an Inspector General of National Education in France and one of the country's most influential educationalists, was accused of sending a junior female colleague a series of bizarre, anonymous postcards intended to drive her out of her job.[10]

Then there is the five-year saga involving a research dispute at the University of Toronto. In 2000, Professor Gideon Koren and Dr. Sergio Grinstein were discovered to have written a series of poison-pen letters to physician colleagues at Toronto's Hospital for Sick Children.[11] Reportedly, Dr. Koren and Dr. Nancy Olivieri, one of the targets, had had a falling out in May 1996, while conducting research on an experimental drug for the Canadian drugmaker, Apotex. Dr. Olivieri announced that the drug caused serious side effects, a position Dr. Koren did not support.[12]

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7. Philip Shenon, *The U.N. Nominee Is Put on Hold*, N.Y. TIMES, Sept. 20, 1998, (Week in Review Desk), at 2.

8. Sara Fritz, *Rooting out Waste, Fraud, Makes her Work Unpopular*, ST. PETERSBURG TIMES, June 12, 2000, at 3A.

9. A State Department official admitted that nothing fundamental had been raised in the Holbrooke case, only minor issues and conflicting rules interpretations. Holbrooke paid a $5,000 civil fine for violating federal lobbying laws for allegedly contacting a State Department official sooner than allowed by law after he left the government in 1996. No criminal violations were uncovered. *See Justice Wants U.N. Nominee Holbrooke to Pay Civil Fine*, STAR TRIBUNE, Jan. 22, 1999, at 22A; And Winston Lord, Assistant Secretary of State for East Asia and Pacific Affairs from 1993 to 1997, asked Holbrooke, who was a State Department consultant and special government employee, to set up a meeting with Asian officials. Lord insisted that Holbrooke behaved properly in contacting Ambassador James Laney in South Korea, and stated, "Of course he contacted [U.S.] Ambassador Laney. It would have been ridiculous if he hadn't . . . We never discussed business, only U.S. policy in Asia and Europe." *Nominee for U.N. Ambassador Faces Fine for Contacting a Former Colleague; Justice Department Says It's a Conflict of Interest*, ST. LOUIS POST-DISPATCH, Jan. 22, 1999, at A7.

10. Jacobson, *supra* note 4. The cards reportedly were sent over a period of three years, and included images of an ostrich with its head in the ground, a frog dreaming of turning into an ox, can-can dancers revealing all, and a row of bare male bottoms. The written messages included "You are lousy at your job," "You will never get promoted," and "You might as well pack it in." The recipient of the messages, Jeannine Guigue, reported that these anonymous communications plunged her into professional and personal despair.

11. Sharon Lem, *2nd Poison Pen Letter to Doc*, TORONTO SUN, Jan. 6, 2001, at News 2.

12. Dr. Gideon was chief of the pharmacology division at Toronto's Hospital for Sick Children and deputy director of clinical pharmacology at the university, as well as head of the population health sciences program. Oliveri and three colleagues who defended her in her fight against the drug company – Drs. Helen Chan, Peter Durie and Brenda Galie – were the targets of the letters, which called Chan and Gellie "unethical" and Durie a "foul air baloon." A hospital investigator concluded that Koren was the culprit by comparing the use of language in the letters to articles Koren had written. Koren initially denied authorship of the letters, which referred to his colleagues as "pigs." He finally confessed in 1999 after DNA evidence (obtained from a stamp on one of the letters) linked him to the correspondence.

Closer to home is the case of *Wasson v. Sonoma County.*[13] Sylvia Wasson, a tenured professor of modern and classical languages at Santa Rosa Junior College, went to court seeking legal redress for administrative retaliation against anonymous written attacks on the college's president, attacks she denied making. The court ruled that the college did violate the First Amendment by punishing her for speech she did not make.[14]

In 1996, we learned of the plight of two medical school faculty members who were subjected to institutional investigations of allegations made anonymously in letters received by their Deans' offices. We were surprised and concerned to learn that anonymous accusations leveled against academics would trigger investigations of the targets, investigations at best disruptive of careers. In order to learn whether the receipt of anonymous correspondence disparaging faculty was a rare occurrence and whether an ensuing investigation was atypical, we surveyed separately the deans of all medical colleges belonging to the American Association of Medical Colleges ("AAMC")[15] and the deans of all law schools

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Koren was initially suspended with pay on December 22, 1999, and without pay from April 1, 2000 until June 1, 2000. Koren lost several prestigious appointments, resulting in the loss of research funds. He was also ordered to reimburse his employers for their investigative costs. *See* Sharon Lem, *Poison-pen Doc Faces Dismissal—January Hearing will Determine Physician's Fate*, TORONTO SUN, Dec. 22, 1999, at News 5; Armstrong, *New Charges Launched in "Hate E-mail" Scandal: Colleagues Called "Unethical, Pigs,"* OTTAWA CITIZEN, Jan. 5, 2000, at A5; Nicolaas van Rijn, *MD Suspended Without-Pay forPoison-Pen Letters*, TORONTO STAR, Apr. 15, 2000, at News; *Punish Doctor Again, Colleagues Demand New Dose of Drug Dispute*, TORONTO STAR, May 23, 2001, at News.

13. Wasson v. Sonoma County Junior Coll., 203 F.3d 659 (9th Cir. 2000).

14. From August 1995 to October 1996 a series of anonymous letters accused Robert F. Agrella, the college president, of misconduct (including racism, adultery and anti-Semitism). Wasson, one of three vocal critics on campus, was identified as one of the suspects. An investigator retained by the college concluded that Wasson wrote the letters based on a comparison of handwriting and prose style. On January 14, 1997, the Governing Board of the Sonoma County Junior College District issued a Notice of Decision to Dismiss Wasson, who was placed on paid leave pending administrative appeal of her termination. On March 24, 1997, after an outcry on campus, the Board withdrew without prejudice the Notice of Decision to Dismiss. When the Board could have terminated Wasson at any time until October 28, 2000 simply by reinstating the Notice, Wasson brought suit alleging that her free speech rights were violated because the District falsely imputed to her the anonymous letters critical of the college president. The U.S. Court of Appeals for the 9th Circuit held "there can be no First Amendment claim when an employee is falsely accused of making statements uttered by someone else." *See* Alison Schneider, *Court Rejects First Amendment Claim of Professor Fired Over Anonymous Letters*, CHRON. HIGHER EDUC., Mar.10, 2000, (Faculty), at A20; Robert O'Neil, *Free Speech in Academe: 2 victories and a setback*, CHRON. HIGHER EDUC., May 19, 2000, (Opinion and Arts) at A88.

15. Paola, Malik & Walker, *Poison Pen Letters, Due Process, and Medical Schools' Policies toward Anonymous Correspondence That Disparages Medical School Faculty*, 73 ACAD. MED. 534 (1998). Eighty-three percent of these deans responded, and we found that fifty-six percent of respondents had, during their tenure, been in receipt of anonymous correspondence disparaging current or prospective faculty. Furthermore, we found that twenty-four percent of responding medical school deans reported that they either had or would categorically discard such letters, based solely on the anonymity of the author(s). Seventy-six percent reported that they either did not or would not categorically discard such letters.

belonging to the Association of American Law Schools ("AALS"). This paper reports the results of our survey of law school deans.

METHODS

STUDY POPULATION

Of the 162 law schools belonging to the Association of American Law Schools ("AALS") as of April 1998, the study group consisted of the deans of those 160 schools whose addresses were accessible through the AALS website (www.aals.org).

SURVEY METHODS

A questionnaire was created and two mailings were conducted, the first on April 6, 1998, and the second on June 6, 1998. Because responses were confidential, both the first and second mailings were sent to all 160 AALS deans. Both mailings consisted of a cover letter, the survey, and a self-addressed return envelope. The cover letter for the second mailing asked those institutions that had already completed and returned a survey to disregard the second mailing.

SURVEY QUESTIONNAIRE

(See Survey, *infra*)

RESULTS

The deans returned 122 of the 160 surveys mailed (76%).[16] Of those responding, thirty-nine (32%)[17] reported that their institutions had received anon-

16. One institution refused on principle to participate in a confidential survey. When later invited to participate nonanonymously, they did not respond.

17. Having previously studied American medical colleges, *see* Paola, *supra* note 15, we were not surprised to learn that American law schools so frequently receive anonymous disparaging correspondence. Nonetheless, the thirty-two percent figure is statistically significantly lower than the fifty-six percent reported by medical school deans. While we did not inquire into the length of tenure of responding deans in either of our studies, we do not believe this difference is explainable on the basis of differences in length of tenure. We say this because, to the best of our knowledge, the average tenure of American medical school deans is about 3 ½ years. *See* Samuel Hellman, *Tales of the Unnatural: Return From the Dean (d)*, 280 JAMA 1657 (1998). The comparable figure for law school deans is between 5 and 7 years. *See* 1993-94 Annual Report of the Consultant on Legal Education to the American Bar Association (American Bar Association). To the extent that anonymous disparaging correspondence is authored by colleagues, perhaps the difference reflects a greater understanding on the part of lawyers of the credibility problems inherent in anonymity. To the extent that such letters are penned by dissatisfied "customers," the difference might reflect a lesser tendency on the part of legal clients to express themselves in this way than medical patients. Thus, legal clients might be intrinsically less likely than medical patients to write such anonymous letters; alternatively, academic physicians might see a greater volume of patients than academic lawyers see clients. Perhaps law faculty members are viewed as more formidable targets and more likely to seek retribution.

ymous letters disparaging current or prospective faculty during that dean's tenure. Seven (18%) of these deans reported that they had, based solely on the anonymity of the author, discarded such letters; thirty-two (82%) reported that they had not categorically discarded such poison-pen letters.

Eighty-two (67%) of the responding deans reported that their institutions had not received anonymous letters disparaging current or prospective faculty during that dean's tenure. Ten (12%) of these deans reported that they would, based solely on the anonymity of the author, discard such letters; sixty-nine (84%) reported that they would not categorically discard such poison pen letters.

None of the responding deans returned or reported the existence of a written institutional policy addressing anonymous correspondence disparaging faculty or prospective faculty.

DISCUSSION

We believe that AALS law schools can be divided into two groups based on their responses to anonymous letters disparaging faculty: those that either discard or would discard such correspondence based solely on the anonymity of the author (the "categorical discarders"), and all other schools (the "non-categorical discarders"). The latter would include those sequestering, investigating, or placing poison-pen letters into the faculty member's file, and those basing a handling decision on any factor other than the author's anonymity.

While some might argue that schools categorically sequestering such correspondence should be grouped with the categorical discarders, we disagree. It is hard to imagine retaining such correspondence without foreseeing its possible use against the target at a later date; and even where such correspondence is sequestered without any such purpose, there remains the possibility that it could be discovered and used against the target faculty member by a third party. From the standpoint of the target faculty member, sequestering the anonymous disparaging correspondence is simply not as benign as destroying it.

We found that 17 of 122 responding deans (14%) reported that they either had (7) or would (10) categorically discard anonymous disparaging correspondence. The remaining 101 respondents (83%) either had not (32) or would not (69) categorically discard such correspondence.[18]

In formulating and evaluating policies regarding the handling of anonymous disparaging correspondence, it is important to keep in mind that while some anonymous accusers are bona fide "anonymous whistle-blowers,"[19] some are

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18. Four of the respondents did not answer the relevant survey questions.

19. Anonymous whistleblowers are "employee[s] who [anonymously] report illegal or wrongful activities of [their] employer or fellow employees." BLACK'S LAW DICTIONARY 1101 (abridged 6th ed. 1991).

more properly labeled "poison-pens."[20] Anonymity encourages communication, but does so indiscriminately: while it may encourage honest communication, it may also encourage dishonest communication. Stated otherwise, "Anonymity may induce communicative activity, but for any given communication, anonymity is also likely to reduce its value to the recipient."[21] In contrast, nonanonymity or identifiability may discourage or chill communication but encourages reliability. In other words, nonanonymity may reduce communicative activity, but for any given communication, nonanonymity is also likely to increase its value to the recipient. Thus, policies designed to facilitate anonymous whistle-blowing encourage the submission of poison-pen letters, while policies designed to minimize the submission of poison-pen letters might burden anonymous whistle-blowing.

Fundamentally, deciding whether or not to categorically discard is a decision about how best to trade-off between communication and reliability, and involves taking into consideration the interests of the target, the anonymous accuser, the victim of the target's alleged wrongdoing, and the institution. We argue here in favor of an institutional policy of categorically discarding anonymous disparaging correspondence.

WHY CATEGORICALLY DISCARD?

One might argue that the majority approach (to not categorically discard) adequately protects the interests of the target faculty member. For example, at state law schools the Due Process Clause of the Fourteenth Amendment would require, among other safeguards, that the target faculty member be afforded an "opportunity to confront and cross-examine adverse witnesses,"[22] were a hearing to be held. Likewise, principles of fundamental justice or fairness (if not institutional policy and procedure) would presumably require the same at private law schools. Indeed, two responding law deans specifically mentioned that anonymous correspondence would not be used as evidence at any ensuing hearing. Provided adequate safeguards are built into the investigative process, faculty members falsely accused should be exonerated.

Even putting aside imperfect procedural justice concerns, we find this argument to be unconvincing. First and foremost, it fundamentally misconstrues the interests that the targeted faculty member has at stake; he/she has an interest not merely in being exonerated if innocent, but also in not being required to defend

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20. *See* MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 1, at 1344; *Cf.* OXFORD AMERICAN DICTIONARY 689 (Heald Colleges ed. 1980) (poison-pens are persons "who write malicious or slanderous anonymous letters.").

21. Saul Levmore, *The Anonymity Tool*, 144 U. PA. L. REV. 2191, 2194 (1996).

22. Goldberg v. Kelly, 397 U.S. 254, 269 (1970).

himself/herself against frivolous charges.[23] Such a defense can be costly in terms of time and, if the assistance of counsel is sought, financially.[24] Further, it cannot be denied that being the object of such an investigation is defamatory, irrespective of outcome. There will always be those who harbor doubts about the guilt of the exonerated faculty member, unsure whether that exoneration reflects true innocence or merely insufficient proof of wrongdoing.[25]

Second, where the identity of the person(s) alleging misconduct is unknown, it is difficult if not impossible to assure that the investigative process will be unbiased. An academic misconduct policy that we received in our study of AAMC deans[26] illustrates this. Under that policy, the Vice President of Academic & Provost or designate is to appoint an Investigative Committee "consisting of three experienced members, . . . all at arms length from both the person(s) alleging misconduct and the person(s) alleged to have misconducted themselves . . . ."[27] Clearly, however, where the persons alleging misconduct remain anonymous, one cannot be sure that the all-important "arms length" requirement has been met.[28]

Third, we are concerned that the majority approach allows for unequal treatment of equally situated faculty members. It affords institutions (or individuals purporting to act for them) that are so inclined, a means of justifying pretextual or mixed-motive denials of academic appointment, promotion, or tenure. Thus, we are concerned that institutions that decide how to handle anonymous disparaging correspondence based on any factor other than the author's anonymity could treat differently minority, female, foreign or even simply unpopular faculty members who are otherwise equally situated. The cynic might point out that even those institutions reporting that they place or would place all such correspondence into the faculty member's file, or that they investigate or would investigate all such correspondence, might selectively misplace such correspondence to protect popular faculty members while leaving others to deal with a tarnished file or to negotiate the hazards of an investigation.

As a matter of institutional policy, the majority approach encourages the submission of libelous material by those intent on destroying the reputation of the target faculty member. Under the majority approach, such individuals find

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23. *See* FED. R. CIV. P. 11; *see also* STEPHEN B. BURBANK, *Rule 11 in Transition*: THE REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11, 3. (American Judicature Society, 1989).

24. For example, in the University of Toronto case, Dr. Oliveri and colleagues spent $300,000 defending their case. *See* Lem, *supra* note 12, at 5.

25. Editorial, *The Fraud Case that Evaporated,* N.Y. TIMES, June 25, 1996, at A20.

26. Paola, *supra* note 15.

27. *Id.* at 536.

28. Without knowing the identity of the person alleging the misconduct, how could the Vice President Academic & Provost know that all three members of the Investigative Committee are at arms length from the person making the allegations? And how would this policy provision protect the targeted faculty member where the Vice President himself has made the allegations anonymously?

themselves in a situation where they have nothing to lose and everything to gain.[29]

CONCERNS ABOUT CATEGORICALLY DISCARDING ANONYMOUS CORRESPONDENCE

We reject the contention that a policy of categorically discarding all anonymous correspondence unjustly protects faculty members who are in fact guilty of the allegations contained therein. Misconduct by faculty members that effect their academic appointment, promotion, or tenure can still be brought to the attention of the administration via signed correspondence.[30] Criminal misconduct on the part of faculty members can be brought to the attention of the police, and this may be done anonymously if so desired.[31]

We do not believe that compelling accusers to identify themselves is unfairly burdensome to them. Bona fide accusers need not fear losing a civil suit for libel where the allegations are truthful.[32] Likewise, we reject the contention that accusers need to remain anonymous in order to protect themselves against retribution by the accused where the latter is their superior, for the following reasons. First, while "whistle-blowers who remain anonymous to everyone, including the complaint recipient, [do] take less of a risk of retaliation than do other whistle-blowers,"[33] "retaliation is not the ordinary response to whistle-blowing, and fear of retaliation is not the primary deterrent to whistle-blowing."[34] Rather, "correction of wrongdoing, and well-established, known procedures for reporting the wrongdoing are more important than nonretaliation in facilitating whistle-blowing."[35] Second, it has been reported that discovered anonymous whistle-blowers may experience greater retaliation than non-anony-

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29. Admittedly, the situation has changed somewhat with the introduction of DNA testing of saliva on envelopes and postage stamps—a key factor in the identifying Dr. Gideon Koren as the author of the poison-pen letters at Toronto's Hospital for Sick Children. However, institutions receiving poison-pen letters targeting faculty might be reluctant to launch an investigation, as was Toronto's Hospital for Sick Children initially. *See* Rita Daly, *Doctor Suspended for Sending Hate Mail*, TORONTO STAR, Dec. 22, 1999. Second, envelopes might be unavailable, or the poison-pen might use self-sealing envelopes and self-adhesive stamps, or might employ other means of anonymous communication which do not lend themselves to DNA testing. Third, the costs of testing/investigation might be beyond the financial reach of the target. *See* Tony Allen-Mills, *France Takes Aim at Poison-pen 'Crows'*, TORONTO STAR, Dec. 26, 1999.

30. *See infra* note 37.

31. *See, e.g.*, Illinois v. Gates, 462 U.S. 213, 243-46 (1983) (allowing the use of an anonymous letter, when accompanied by corroborating evidence, to satisfy the "totality of circumstances" test to sustain a determination of probable cause for the issuance of a search warrant).

32. MARC A. FRANKLIN & ROBERT L. RABIN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 841 (4th ed. 1987).

33. MARCIA P. MICELI & JANET P. NEAR, BLOWING THE WHISTLE: THE ORGANIZATIONAL LEGAL IMPLICATIONS FOR COMPANIES AND EMPLOYEES 74 (1992).

34. *Id.* at 232.

35. *Id.* at 235.

mous whistle-blowers.[36] Third, a whistle-blower may identify himself to the complaint recipient while requesting that his identity be kept confidential.[37] In some states, this right to confidentiality is legally protected.[38] Fourth, whistle-blowers legitimately concerned about retaliation (as opposed to poison-pens who would feign such concern to justify their anonymity) have recourse through whistle-blower laws[39] or institutional whistle-blower policies. Where such laws and/or policies afford inadequate protection, the whistle-blower suffering retaliation may also bring, where applicable, a tort action for wrongful firing. In these suits, the plaintiff may seek awards for emotional distress (caused by the retaliatory firing) and punitive damages.[40]

It should be kept in mind that where a whistle-blower foresees the possibility of availing himself of one of these remedies, identifying himself might represent an important defensive strategy. For example, under the Pennsylvania whistle-blower statute an employee alleging a violation of the act must show "by a preponderance of the evidence" that prior to the alleged reprisal, the employee or a person acting on his behalf had reported or was about to report an instance of wrongdoing.[41] Clearly, it is more difficult to make this showing where the report is made anonymously.[42]

We are not unmindful of the fact that the more offensive the anonymous allegations are, the more difficult it is to categorically disregard them; but, of

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36. Marcia P. Miceli & Janet P. Near, *Retaliation against role-prescribed whistle-blowers: the case of internal auditors*, Presentation at the 48th annual meeting of the Academy of Management (1988).

37. *See* Charles Q. Jakob, *Good Bad Press: Observations and Speculations About Internal Revenue Service Accountant-Informants*, 54 OHIO ST. L.J. 199, 209 (1993) (explaining that "confidential informants' are those who request that their names be held in strict confidence," as opposed to "anonymous informants' . . . who [are those that] refuse to identify themselves"). *See also* Levmore, *supra* note 21, at 2199-2200. Levmore has argued for filtration as an alternative to anonymity. Filtration refers to the use, by the informer, of an intermediary "to avoid confrontation with the recipient and to convey information about the reliability of the source." *Id.* at 2199. Thus, Levmore observes, "anonymity is an accepted social practice not when it is complete but rather when there is anonymity as to some recipients or subjects but identifiability to a responsible intermediary". *Id.* at 2200.

38. *See, e.g.*, FLA. STAT. ch. 112.3188 (1992); OR. REV. STAT. § 659.535 (1999); WASH. REV. CODE § 42.40.040 (1) (2000).

39. *See, e.g.*, ALASKA STAT. § 39.90.100 (Michie 1989); CAL. LAB. CODE § 1102.5 (West 1988); CONN. GEN. STAT. § 31-51 (1987); FLA. STAT. ch. 112.3187 (1986); KAN. STAT. ANN. § 75-2973 (1984); KY. REV. STAT. ANN. § 61.102 (Michie 1986); ME. REV. STAT. ANN. tit. 26, § 831 (West 1983); OR. REV. STAT. § 659.510 (1989); WASH. REV. CODE § 42.40.020 (1999).

40. *See* MICELI & NEAR, *supra* note 33, at 236.

41. 43 PA. CONS. STAT. § 1424(b) (2001).

42. Anonymous letter writers may lose other protections besides those afforded by whistle-blower laws. Thus, in Wasson v. Sonoma County, *supra* note 13, the 9th Circuit held that Wasson's complaint of suffering administrative retaliation because her employer had wrongly imputed to her anonymous letters critical of the college president did not implicate the First Amendment. If Wasson was in fact the anonymous writer and the statements were true, she could have reclaimed her free speech rights by admitting authorship.

course, those who cowardly[43] and maliciously author poison-pen letters understand this phenomenon all too well and seek to exploit it.[44] Furthermore, bona fide whistle-blowers are more likely to identify themselves when the alleged wrongdoing is serious.[45]

We submit that the minority approach serves important institutional and systemic interests as well, since it seems likely that fewer false allegations will be made, and consequently that fewer needless investigations will be carried out. Price recently reported that out of 82 anonymous allegations of misconduct made to the U.S. Office of Research Integrity ("ORI") between 1993 and 1997, only three (4%) were sufficiently substantive to be pursued, and only one (1%) resulted in an ORI finding of scientific misconduct.[46]

Nor do we believe that disregarding anonymous accusations of misconduct on the part of law faculty would create an ethical problem for the law school administration. Rule 8.3 (a) of the ABA Model Rules of Professional Conduct states, "a lawyer having knowledge that another lawyer has committed a violation of the rules of professional conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[47] It is not clear to us, however, that a law school dean who receives an anonymous communication accusing a faculty member of professional misconduct can be said to have "knowledge"[48] of a rules violation given the reliability problem associated with

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43. British graphologist Diane Simpson has stated, "All anonymous letter writers have two things in common: the first being that they are all cowards. The second, that they are (would-be) manipulators of other people's behaviour." Julia Orange, *Who Pens the Poison?*, THE TIMES (London), Feb. 10, 1988.

44. The U.S. Supreme Court understood this, and for precisely this reason declined to create a "firearm exception" to the standard *Terry* analysis employed in "stop and frisk" cases. In *Florida v. J.L.*, Justice Ginsburg wrote for the Court: "Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun." Florida v. J.L., 529 U.S. 266 (2000).

45. Marcia P. Miceli, Bonnie L. Roach & Janet P. Near, *The Motivations of Anonymous Whistleblowers: The Case of Federal Employees*, 17 PUB. PERSONNEL MGMT. 281 (1988).

46. Price, *Anonymity and Pseudonymity in Whistleblowing to the U.S. Office of Research Integrity*, 73 ACAD. MED. 467 (1998).

47. A majority of states have now adopted the ABA Model Rules of Professional Conduct in some form, and most law schools make the Model Rules a component of their professional responsibility courses. *See* GILLERS AND SIMON, REGULATION OF LAWYERS: STATUTES AND STANDARDS 188 (1989).

48. Under the Model Rules, "'Knowingly,' 'Known,' or 'Knows' denotes actual knowledge of the fact in question." *See* GILLERS, *supra* note 47, at 10. While "'actual knowledge' embraces those things of which the one sought to be charged has express information and those things which a reasonably diligent inquiry and exercise of the means of information at hand would have disclosed," *see* BLACK'S LAW DICTIONARY 604 (abridged 6th ed. 1991), we believe that not conducting an inquiry at all into allegations made anonymously is not unreasonable. Consequently, law school deans would have no affirmative ethical obligation to conduct any inquiry at all into anonymous allegations coming across their desks.

anonymous communications.[49] Second, many jurisdictions require complainants to identify themselves in any complaints made to that jurisdiction's attorney disciplinary agency.[50] If such disciplinary agencies require complainants to identify themselves, we do not see how it could be unethical for law schools to require the same before launching an investigation. Third, as was brought to our attention by one of the survey respondents, state laws may actually prohibit the solicitation or acceptance of anonymous materials in the evaluation of faculty.[51]

For the above reasons, we believe that provisions that provide specific protection for anonymous whistle-blowers[52] or anonymous complainants,[53] though well intentioned, are mistaken from a policy standpoint. Better, in our view, are whistle-blower policies that condition protection on a written and signed complaint.[54]

We found to be of great interest the fact that none of the responding deans reported the existence of a written policy addressing anonymous correspondence disparaging faculty or prospective faculty. We believe that were such a formal, written policy, providing explicitly for the receipt and consideration of anonymous correspondence disparaging faculty members is in place at a given law school, the faculty could be said to have consented to the receipt of anonymous communications.[55] While "consent is neither a sufficient nor a necessary

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49. There may be an exception for communications where complete anonymity does not sacrifice reliability. Levmore uses the example of A stumbling upon a photograph of B's child engaging in crime and forwarding that photograph anonymously to B. He makes the claim that A's use of an intermediary is unlikely to improve reliability "because a picture is worth a thousand words." *See supra* note 21, at 2205. While we agree with this idea in principle, the above example fails to take into account the ability to alter photographs by using a computer. Other examples cited by Levmore include: "communications such as 'wash me' (found on one's car);" "this locker really smells;" and "the enclosed tape recording will show that your dog barks all day while you are away." See Levmore, *supra* note 21, at 2194 n.1.

50. *See* Cynthia L. Gendry, *Comment: Ethics—An Attorney's Duty To Report Professional Misconduct of Co-Workers*, 18 S. ILL. U. L. J. 603, 611 (1994). For example, in New York, "complaints must be in writing and subscribed by the complainant but need not be verified." N.Y. COMP. CODES R. & REGS. tit. 22, § 603.4(c) (2001).

51. OR. REV. STAT. § 351.065 (3)(g) (1999) provides, in relevant part, "[T]he board, its institutions, schools or departments when evaluating its employed faculty members shall not solicit nor accept letters, documents or other materials, given orally or in written form, from individuals or groups who wish their identity kept anonymous or the information they provide kept confidential."

52. *See, e.g.*, 42 C.F.R. § 50.103 (2001).

53. Thus, in disciplinary proceedings against health care licensees, complaints may be made by any person and, at least in some states, even anonymously. *See* Michael H. Cohen, *Holistic Health Care: Including Alternative and Complementary Medicine in Insurance and Regulatory Schemes*, 38 ARIZ. L. REV. 83, 89 (1996); see also N.Y. EDUC. LAW § 6510.1.a (McKinney 2001).

54. FLA. STAT. ANN. § 112.3187 (7) (West 2001), which provides, "This section protects employees and persons who disclose information on their own initiative in a written and signed complaint . . ."

55. This assumes, of course, that faculty played a role in formulating the policy. Faculty members voting in favor of the adoption of a policy permitting the investigation of anonymous allegations can be said to have explicitly consented to receive anonymous communications; as Levmore has pointed out,

condition for anonymity,"[56] faculty consent would constitute a waiver of sorts of the target's right to object to having to defend himself/herself against anonymous allegations.[57]

CONCLUSIONS

Approximately 14 percent of responding AALS deans either had or would categorically discard anonymous correspondence disparaging faculty or prospective faculty; 83 percent either had not or would not. We have argued that the minority approach (categorically discarding anonymous correspondence) strikes a better balance between communication and reliability and among the interests of all parties involved than does the majority approach (not categorically discarding anonymous correspondence). Fundamental fairness and efficiency considerations favor the minority approach. We believe that the AALS should encourage individual law schools to formulate and publicize written policies for dealing with the receipt of anonymous correspondence disparaging faculty or prospective faculty members. We submit that such policies should provide for the categorical destruction of all such correspondence.

SURVEY

Please place a check in the space preceding the correct response. All answers will be kept strictly confidential and anonymous.

1. To the best of your knowledge, has your institution, during your tenure, been in receipt of anonymous correspondence which disparaged a faculty member or a prospective faculty member?

Yes	39/122 (32%)
No [If NO, proceed to question #5.]	82/122 (67%)

2. How frequently has this occurred? [You may write in an actual number, below and to the left; or, alternatively, you may select one of the terms below and to the right.]

Once	4/39 (10%)
Two to five times	28/39 (72%)

"[it] is plainly the case that, where the recipient explicitly consents to receive anonymous communications, there is little objection to anonymity even if it attaches to critical communications." *See* Levmore, *supra* note 21, at 2197. Whether those faculty voting against such a policy, or those joining the institution after its adoption, can be said to have implicitly consented to bound by it despite their disagreement with it is, we suppose, arguable.

56. *See* Levmore, *supra note* 21, at 2199.

57. For the same reason, the existence of a formal, written policy explicitly providing for the receipt and consideration of anonymous correspondence disparaging faculty members could be said to constitute a waiver of sorts of the law school's (or the parent University's) right to object to the use of its resources in investigating anonymous allegations. Where such policies are informal and unwritten, it is not clear to us that the institution can truly be said to have consented to them.

More than five times	7/39 (18%)

3. How was the anonymous correspondence handled? [Check all that apply.]

It was discarded	29/39 (74%)
It was placed in a sequestered file	12/39 (31%)
It was placed in the faculty member's file	4/39 (10%)
It triggered an investigation into the allegations	18/39 (46%)

4. How the anonymous correspondence was handled was determined by: [check all that apply]

The nature (seriousness) of the allegations	23/39 (59%)
The apparent credibility of the allegations	27/39 (69%)
How long the target had been a faculty member	1/39 (3%)
Other:[specify]*	14/39 (36%)
None of the above	3/39 (8%)

5. Does your institution have an *unwritten* policy (as opposed to handling such matters on an ad hoc basis) for dealing with the receipt of anonymous correspondence which disparages current or prospective faculty members?

Yes	10/122 (8%)
No	106/122 (87%)

6. Does your institution have a *written* policy for dealing with the receipt of anonymous correspondence which disparages current or prospective faculty members?

Yes [If Yes, please enclose blinded copy]	0/122 (0%)
No	117/122 (96%)

[We want to differentiate between an unwritten formal institutional policy, for example, and a situation that leaves it to the discretion of the person receiving the letter. Might current and prospective faculty members be treated differently? Should we ask respondents to describe the unwritten policy, or should we ask specific questions, like: Is the letter discarded? Is the letter placed in a file? Does the letter trigger a review/investigation? What is the nature of the review, if any? Written v. Verbal anonymous correspondence?]

[Answer the last two questions only if you answered No to question #1 above]

7. If your office were to receive anonymous correspondence disparaging a current or prospective faculty member, you would: [check all that apply]

Discard it	33/82 (40%)
Place it in a sequestered file	25/82 (30%)
Place it in the faculty member's file	3/82 (16%)
Investigate the allegations therein	61/82 (74%)

8. In deciding how to handle the disparaging anonymous correspondence, factors that your institution would consider include: [check all that apply]

The nature (seriousness) of the allegations	66/82 (80%)
The apparent credibility of the allegations	68/82 (83%)

How long the target had been a faculty member	9/82 (11%)
Other:[specify]	13/82 (16%)
None of the above	7/82 (9%)

New Organ Donations

REBECCA M. NERI, ESQ.*

I. INTRODUCTION

Though science and technology advance rapidly, the legal system remains one step behind in providing the necessary institutional structure needed to promote and implement these terrific societal advances. Arguably, in no other arena is this institutional lag more apparent than in the organ procurement process. The current American organ procurement structure is incapable of meeting the needs of many who require organs. The tragic result is that many die waiting for an organ transplant. Ironically, this phenomenon is often referred to as "the crisis with a cure." Terrific medical advancements make organs easily retrievable and transplantable so that lives can be saved, but the legal system has failed to provide the means to facilitate this.

The United States currently makes the best of a volunteerism-type organ procurement system, better known as "routine inquiry" and "required request," which emphasizes the value of altruism. Though this system has some merit, it is inadequate precisely because it relies on American principles of property and individual autonomy. For one thing, these ideologues of autonomy and privacy seem to imply some form of property or quasi-property rights in the human body. Using property and individual rights rhetoric as applied to the body is a severe detriment to the resolution of the current organ shortage, simply because these paradigms create additional legal and social barriers instead of minimizing the administrative and social burdens.

This article addresses this problem, and argues that current donation models, including altruistic paradigms and other trendy market-based proposals, cannot solve the organ shortage. Alternatively, this article suggests that our American legal system should give priority to the health needs of the living by removing personal and familial quasi-property and autonomy rights in the body after death. This institutional restructuring would permit transplant facilitators to harvest vital, healthy organs from the deceased and give life to those literally dying for this ready cure. This article recommends the most responsible resolution to the problem by proposing compulsory organ conscription. Conscription, which necessitates the end of all quasi-property and individual rights applied to the body after death, is the most efficient, practical way to harvest organs from those who no longer have need for them (i.e., the dead) and to give them to those who simply want to increase the quality of their lives. Accordingly, the

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legal system, by terminating the current legal recognition of quasi-property and autonomy rights individuals and their families may have in cadavers, will prevent the interment of life-giving organs.

In clarifying this thesis, this article proceeds in several steps. First, it presents an examination of existing notions of property and individual rights as applied to the human cadaver. Then, this article discusses why rationalizing cadaveric rights in terms of property and individual rights issues is detrimental to providing a cure for those who need transplants. Second, it critiques both the current American procurement systems, and in greater depth the more trendy (though socially unpopular) market proposals. This second section concludes by discussing why an economic model is also unable to increase the organ supply. Finally, the article solves the problem by suggesting the total elimination of individual and property rights the American legal system applies to cadavers specifically. This proposal requires the legal system to stop trying to pound the square peg of organ procurement into the round hole of traditional legal rationalizations. That is, the American legal system must strive to formulate a new legal and social consciousness to provide for the ill, instead of insisting upon applying traditional, more comfortable legal reasonings like property and individual rights. In formulating such a new thought awareness, the goal of curing the organ deficit, and therefore the ailing, will be most efficiently and practically attained.[1]

II. SQUARE PEGS AND ROUND HOLES: (MIS)APPLYING THE CONCEPTS OF PROPERTY AND AUTONOMY

The law recognizes certain quasi-property and individual rights in the human body after death.[2] The law also extends many of these rights to family members; for both families and their dead these rights include the control and disposition of their relatives' remains.[3]

This part of the article focuses on the origin and application of property and individual rights to the control the disposition of bodily remains. In discussing these "post-mortem rights," this article deliberately refrains from delving into the debates surrounding the adequacy of technical medical-legal definitions of death as they are beyond the scope of this paper. For the purpose of this text, death shall be considered a given. First, this section discusses the inadequacies of applying traditional notions of property and individual rights (such as control

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1. This article will not discuss the implications of the First Amendment's guarantee of freedom of religion, as that is beyond the scope of this paper.

2. *See, e.g.*, Monique Gorsline and Rachelle Johnson, *The United States System of Organ Donation, The International Solution, and The Cadaveric Organ Donor Act: "And the Winner is. . .,"* 20 J. CORP. L. 5, 10 (1995).

3. Danielle Wagner, *Property Rights in the Human Body: The Commercialization of Organ Transplantation and Biotechnology*, 33 DUQUESNE L. REV. 931, 933 (1994).

and transfer) to this modern problem, and proceeds by critiquing arguments for finding property rights in the human body. Second, this section provides a brief examination of policy that supports eliminating these rights. In discussing this the article focuses on the Uniform Anatomical Gift Act (UAGA).[4] Reference to the UAGA generally is sufficient to provide enough framework for the argument without a need to analyze specific state or federal statutes.

A. APPLICATION OF PROPERTY AND INDIVIDUAL RIGHTS PARADIGMS TO CADAVERS

This section discusses property and individual rights as they are applied to the control and transfer of a cadaver. American jurisdictions currently apply familiar versions of property and individual rights when analyzing issues related to the disposition of cadavers. Seemingly, this recycling of legal rationalization is done to protect the interests of grieving families, and to provide individuals and their families with the psychic gratification of knowing they control their own or their loved ones' remains.[5] The dominant property themes jurisdictions attempt to utilize regarding the disposition of cadavers and their organs, specifically, the right to control one's body, to exclude others, and to transfer remains are also discussed.

Traditionally, basic property rights are abstractly described as a non-absolute "bundle of rights" which includes "the right to possess, the right to exclude, the right to use, the right to dispose [or transfer], the right to enjoy the fruits or profits, and the right to destroy."[6] These rights apply to items of value: personal, public, or otherwise. Because technology has transformed the body into a valuable communal resource, courts, in a sincere attempt to rationalize the potentiality of this resource, have attributed concepts of property rights to the body in an attempt to conceptualize for the public what can and cannot be done with their bodies after death.[7]

The rights to exclude and to transfer property are easily applicable to this discussion and facilitate the connection between property and organ procurement. Though the right to exclude others from invading one's body without consent is a basic tenet of American law (e.g., laws prohibiting assault and battery or rape)[8], the right to transfer body parts as a market commodity is not recognized by any American jurisdiction. This is so despite the definition of "individual rights" as the position that individuals should have ultimate control

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4. *See, generally,* UNIF. ANATOMICAL GIFT ACT 1968, *superseded* by UNIF. ANATOMICAL GIFT ACT 1987, 8A U.L.A. 64, 19.

5. Dorothy Nelkin and Lori Andrews, *Do the Dead Have Interests? Policy Issues for Research After Life*, 24 AM. J. OF L. AND MED. 261, 277-80 (1998).

6. Wagner, *supra* note 3, at 933.

7. *Id.*

8. *See, generally,* N.Y. PENAL LAW § 130.05 (consent as an element of sexual offenses); N.Y. PENAL LAW § 120.05(5) (consent as an element of certain assaults).

of their bodies.[9] The current legal framework insists on construing cadaver remains in terms of property rights which, on the one hand allows freedom to exclude others, while on the other hand, laws prohibiting transfer and true bodily autonomy appear contradictory by their terms. Thus, the issue of whether rights concerning the disposition of a cadaver's organs can be understood in terms of property and individual rights is disputable: two concepts arguably contradict themselves when applied to the body.

Society and law affirm that the value of knowing what happens to personal bodily remains is great to all interested parties (i.e., to individuals, their next of kin, and the community).[10] Statutes, case law, and religious codicils around the world reflect this social and cultural attitude towards the respectful disposition of remains.[11] For individuals and next of kin, the law has adopted and allowed psychological benefits, such as familial grieving and basic pride, to dictate issues of control and privacy over corpses. This is evident in various estate laws and current organ procurement laws. However, the law has purposely omitted transferability from discussions of property rights in the body.[12]

Focusing first on the individual, at the very least a person maintains quasi-property rights and individual freedoms in his or her own body, and thus, the individual, under the rhetoric of bodily integrity and autonomy, is deemed to be able to direct the disposition of their remains.[13] The perceived purpose of defining the body in this way might be to provide a framework in which to discuss what rights people generally have in the enjoyment and protection of their individual autonomy. In other words, a justification for thinking of the body as property might be to maintain a sense of pride and retain freedom. At one time, the thought of likening the body to property was "morally repugnant," and in fact, early common law reflected this sentiment.[14] Early notions of the body as property were taboo as they reminded individuals of "slavery, physical attachment and imprisoning of debtors, and viewing the wife as her husband's chattel."[15]

Despite historical adversity to considering the body as property, some jurisdictions insisted on using the property paradigm to apply what has been neatly termed "quasi-property rights" to corpses. Though using the prefix "quasi" skirts the negative connotations inherent in the term property, the use at all of the term property signals to us the possibility that a corpse – or its owner might

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9. Wagner, *supra* note 3, at 933-34.

10. Nelkin, *supra* note 5 at 277.

11. *Id.* at 279. Common religious death rituals sufficiently evidence their respect for bodily remains.

12. *Id.* at 279. Current organ donor laws require consent prior to the death of the potential donor, and estate laws let the individual control his or her tangible and intangible property after they die. *Id.*

13. Tanya Hernandez, *The Property of Death*, 60 U. PITT. L. REV. 971, 976 (1999).

14. Michael Scarmon, *Brotherton v. Cleveland: Property Rights in the Human Body—Are the Goods Oft Interred With Their Bones?* 37 S. D. L. REV. 429, 429 (1992).

15. *Id.* at 437.

be entitled to constitutional protections, such as due process. For example, in *Brotherton v. Cleveland* the Sixth Circuit held that removing a person's corneas without prior consent constituted a deprivation of a "legitimate claim of entitlement" requiring constitutional protection.[16]

As one author noted, some "scholars have observed that the systemic focus on individual autonomy is one of the main impediments to . . . social reform."[17] The emphasis law and society places on individual rights and property in terms of controlling the disposition of one's remains after death, is an impediment to shifting social consciousness towards encouraging organ procurement and redistribution of organs from the dead to the community. Therein lies the tension between thinking of the dead body in a property- and- individual rights framework and increasing the organ supply. More specifically, property and individual rights paradigms, when applied to a cadaver, prevent the furthering of communal interests in preserving life.[18] In this sense, recognizing individual and property rights over the rights of the community pushes "altruistic values to the periphery," leaving the supply of organs at a minimum.[19]

Turning our focus to familial rights, the court in *Brotherton* held that there is a familial and individual property right of entitlement in a corpse for which due process protections are necessary.[20] This entitlement gives survivors the right to make decisions relating to the disposition of the decedent's remains.[21] Though one might applaud the court in *Brotherton* for its sentiment, this decision outlines the internal conflict created when superimposing individual and property rights paradigms on organ donation problems. The court in this case granted two legitimate claims of entitlement over one deceased body: one to the individual, and the other to the surviving family members.[22]

In practice and in law, however, medical institutions appear to favor the wishes of the family over those of the deceased individual at the point of death.[23] Familial rights might include: "the right to custody of the body; to receive it in the condition in which it was left, without mutilation; to have the body treated with decent respect, without outrage or indignity thereto; and to bury or otherwise dispose of the body without interference."[24] Seemingly, the family retains true control of the relative's body, not the individual. The rights given to the family not only conflict with individual rights paradigms, but also marginalize community needs and basic altruistic values. As a result, the societal reaction to think-

16. 173 F.3d 552 (6th Cir. 1999).
17. Hernandez, *supra* note 12, at 977.
18. TOM ALLEN, THE RIGHT OF PROPERTY IN COMMONWEALTH CONSTITUTIONS, 146-147 (2000).
19. *Id.* at 148.
20. Scarmon, *supra* note 13, at 430.
21. *Id.* at 437.
22. Hernandez, *supra* note 12, at 974.
23. *Id.*
24. Nelkin, *supra* note 5, at 285.

ing of corpses in this manner promotes selfish responses to organ donation, thus further hindering the important organ procurement process.

B. THE MEANS FAIL TO MEET THE ENDS: THE PROPERTY PARADIGM WON'T REACH THE GOAL

As argued above, the disposition of corpses should not be construed in terms of traditional conceptions of property or individual rights. Tenets in law and society are saturated with broad concepts of individual and property rights that are inappropriate when applied to discourse regarding the disposition of corpses. It is inappropriate because of the communal need for redistribution of organs from the dead to living beneficiaries. This part explains those inadequacies and opens the door for a new way of thinking about cadavers and the organ procurement process.

Current organ procurement laws create, among other things beyond the scope of this discussion, conflicting ideologies: those that seek to reinforce individual and property rights and those that seek to appeal to grieving families. Property concepts, as applied to cadavers, seek to provide and clarify rights of privacy and exclusion of all others from disturbing the individual's wishes, while simultaneously providing these same property entitlements to the decedent's family members. Unfortunately, the social climate surrounding issues of death and dying allow the familial entitlements to trump the individual's privacy rights in an attempt to assist in the grieving process.[25]

The dual-entitlement problem and the inability of the legal system to formally decide whether the property or individual rights paradigm should control are problematic, leaving the larger societal problem of a lack of transplantable organs remains unresolved. In February of 2001, there were 74,800 patients waiting for transplants in America and, just five months later, the number of those waiting jumped to over 77, 500.[26] In 1999, only 5,859 cadaveric donors and 4,717 living donors provided organs for all potential American transplant recipients; yet a year later, the numbers of potential donors increased only slightly to 5,984 cadaveric donors and 5,605 living donors.[27] This represents donor increases of 2.1% and 181.8%, respectively. The tragedy in all of this is that as transplants become less risky and more widely available as a real cure, the legal system has yet to reveal how it intends to help society use this genius.[28]

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25. Wagner, *supra* note 3, at 984.

26. UNOS: Critical Data, http://www.unos.org/Newsroom/critdata_main.htm (last visited Nov. 10 2001).

27. *Id.*

28. Lisa E. Douglass, *Organ Donation, Procurement and Transplantation: The Process, The Problems, The Law*, 65 UMKC L. REV. 201, 202 (1996).

Property rights in the body should not be expanded but should instead be eliminated. As shown above, applying the "round-hole" legal definitions of property and individual rights are inconsistent with the modern realities of science and society. Such arguments do nothing to resolve the conflict of entitlements accorded to both individuals and their families in disposing remains. The dual entitlement scheme obfuscates communal goals such as preserving life and makes little sense as an attempt to provide a framework for construing bodily rights. Two claims of rights to a single entity might remind one of law school property lectures of joint ownership, which, if seriously applied to the body would create a legal aberration. Thus, the only viable solution is eliminating both family and individual rights to corpses: this efficiently and quickly increases the supply of transplantable organs and provides easy, bright-line rules for communities to embrace.

C. POLICY REASONS MITIGATING THE APPLICATION OF PROPERTY CHARACTERISTICS TO CADAVERS

In addition to the argument stated above, viable policy arguments can be made against applying property characteristics to the body. Most importantly, as a matter of national and state health policy, organ donations and procurement efforts need to be increased. The severe organ deficit leaves thousands to die needlessly, thus the usefulness of applying traditional property law to the body is depleted. More specifically, traditional property law concepts promote a lack of communal consciousness and prevent the redefinition of fears about death. The ultimate result of which is an increase of barriers to sufficient organ procurement. In this section, I discuss the Uniform Anatomical Gift Act (UAGA) which, as a matter of public policy, fails to adequately increase organ procurement. The reasons underlying the failure of the UAGA to procure needed organs are also discussed.

In addition to adopting an effective pro-organ procurement policy, the United States must also adopt a policy that precludes the application of traditional definitions of property to the body. In general, policies that insist upon using paradigms of property law are ineffective and inefficient as they require judicial resolution of constitutional property procedures, specifically due process and takings law. This section also discusses the net effect of the application of property concepts, thus requiring consideration of the effect of constitutional takings law on organ procurement by state agencies.

1. *The Failure of the UAGA to Increase Organ Supply*—The demand for human organs for transplantation greatly surpasses the supply.[29] Surprisingly, polls of the American population "indicate that there is overwhelming support

29. Wagner, *supra* note 3 at 932.

for organ donation," but statistics indicate that organ reserves do exist to provide for the overwhelming national need for organs.[30] State legislatures attempting to lessen the gap between the desire to donate and actual organ recovery adopted the UAGA in some shape or form.[31] However, since the enactment of the first UAGA scheme in 1968, the organ shortage markedly increased, not decreased.[32]

The stated purpose of the revised UAGA of 1987 is to "appeal to American altruism and make donating organs an easier process. . ." as well as to explicitly ban the sale of any bodily organ.[33] Legislatures relying on pure altruism do not account for the many reasons why a society, which purports to support organ donation, cannot harvest more than a mere fraction of the organs that are available and needed by the American population.

Despite evidence of America's support for donating, authors who study the disparity between support for donating and actually donating suggest three main psychological reasons for why individuals do not consider donating. They include: fears relating to the hastening of their death by overzealous doctors, fears concerning religion or bodily mutilation, and fears concerning thoughts of human mortality.[34] It appears that these fears not only result in a tension between the individual and the greater community need for organs, but they may also account for much of the lack of advances in aggressive organ procurement policies. Though the UAGA attempted to strike a balance between community need for organs and individual autonomy, the UAGA has not been successful in increasing procurement. It fails because stressing hard rules of individual autonomy results in making the act of donating organs an individual promise, rather than a communal gifting process. Therefore, it appears the UAGA is not faithful to the community that it purports to serve.[35] Under the UAGA, to donate is to act alone, while the act of procurement returns the value of cadaveric organs to the community, where such value is not readily seen or reciprocated to the donating individual from the recipient.

Although the UAGA promotes altruistic donation through preserving individual autonomy, privacy and control, the UAGA program fails because it has not increased the supply of organs.[36] The law insists that we argue rights in the body as individual property rights, but this fails to account for communal as-

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30. *Id.* at 943; *see also* Douglass, *supra* note 27, at 202 (commenting that 70% of Americans polled were willing to donate their organs).

31. UAGA, *supra* note 4.

32. Douglass, *supra* note 27, at 202.

33. *Id.* at 211.

34. *See*, e.g., Lloyd Cohen, *Increasing the Supply of Transplant Organs: The Virtues of a Futures Market*, 58 GEO. WASH. L. REV. 1, 9 (1989).

35. Hernandez, *supra* note 12, at 1023.

36. David Jefferies, *The Body as Commodity: The Use of Markets to Cure the Organ Deficit*, 5 INDIANA J. OF GLOBAL LEGAL STUDIES 621, 628 (1998).

pects of organ procurement and transplantation. This in turn prohibits real movement towards changing societal notions from individual towards communal good, not to mention that such paradigms encourage organ donation fears. Law and policy should address communal procurement, as opposed to individual altruistic-style donation to reshape the fears that surround death; and, law and policy should push for a new set of communal norms in response to the organ crisis.[37] To do this, the law must embrace the tenets of true community, like those currently within the community who, on a daily basis, seek to ensure the increase in organ supply not only for those who are currently in need, but for those who may be in need in the future.[38] Deference to these experts might produce new "norms" to increase donation, using criteria and justifications that embrace community good and community obligation.

2. *The Impossibility of Applying Regulatory Takings Law to Organ Procurement*—Some have argued that removing organs under legislative guidance without explicit consent from either the family or the deceased results in unjust deprivation of property by the government.[39] Such a deprivation would require the legal system to apply constitutional takings law to organ removal under the Constitution. The Fifth and Fourteenth Constitutional Amendments "[protect] an individual's rights in property against deprivation by the state without due process."[40] Takings law subjects organ procurement to judicial intervention in order to decide whether the procurement constitutes a governmental taking. Recall the holding in *Brotherton v. Cleveland*, where the court stated that the deceased and a relative of the deceased has a "legitimate claim of entitlement" to control the disposition of the cadaver.[41] The legitimate claim of entitlement granted by this court requires health care professionals to obtain consent from families by law prior to removing organs. Obtaining such consent is usually impractical given the point of time at which such consent is required (i.e., immediately after the death of the potential donor). But without such consent, any attempt by the government to harvest organs will be construed as an unconstitutional taking, regardless of the proven, substantial public health need for such taking. Adding takings regulations only subjects the procurement process to more judicial red tape. This additional red tape and governmental interference would act as a disincentive to donating organs because the costs (including

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37. HERNANDO DESOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 157 (2000) arguing that the legal system of the west integrates existing social beliefs about property with legal structures, thus capitalism flourishes. The same should be done with organ procurement.

38. The term "transplant community" is commonly used to describe those who donate and receive organs, and perform transplant surgeries.

39. Melissa N. Kurnit, *Organ Donation in the United States: Can We Learn from Success Abroad?* 208 B.C. INT'L & COMP. L. REV. 405, 438 (1994).

40. Scarmon, *supra* note 13, at 433.

41. Wagner, *supra* note 3, at 953.

time, money, and even emotional pain) do not outweigh the altruistic benefit one might get from donating.

An additional way of interpreting the juxtaposition of takings law and organ donation is that if courts insist on interpreting the rights to one's body as property, then the government might be entitled to exercise its "taking power" under the Fourteenth and Fifth Amendments.[42] This is subject to two restrictions: the taking must be for a substantial public purpose, such as to remove a public nuisance, or the individual must be justly compensated.[43] One could logically conclude that if the law by statute grants quasi-property rights in a dead body, regardless of consent requirements, the dead body should be entitled to full constitutional protection. However, a per se "taking" of a bodily organ conjures Orwellian-type images of a physical invasion by a government entity.[44] Permitting the government to have the power to physically invade a dead body without consent for the greater public good of saving lives has merit and might effectuate the goal of increasing organ procurement. But, the psychic effect of such sanctioned government invasion is damaging, and furthermore, it would likely constitute a substantial invasion on individual and familial entitlements. Thus, even a showing of the greater public good (i.e., curing the organ deficit) would not be enough to trump property and individual rights in the body, regardless of the constitutional protections offered.

Using a Kaldor-Hicks measure of efficiency, which promotes an efficiency-maximization rule at the expense of property rights, the most promising solution to the organ deficit is the abolition of property rights in the body *after death* and to not permit courts to reach the issue of entitlements after death. This circumvents both the arduous quest for proper consent, and takings law requirements. In doing so, the transplant community will have the necessary societal and legal authority to remove and transplant organs into individuals who can use them to become productive members of society. The very act of transplantation maximizes "society's aggregate utility" by redistributing value to where it is needed.[45] This contrasts the takings law analysis above in that takings laws assume a property right in the first instance, and permit substantial governmental involvement. Instead, I propose that we not even reach the issue of property or quasi-property rights in the body, thereby avoiding completely the problems of governmental involvement.

3. *Entering Into a Discussion about the Body as a Commodity*—As mentioned briefly above, subjecting corpses to traditional property reasoning, and consequently, to judicial resolution creates a blanket disincentive to individuals,

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42. ROBERT COOTER AND THOMAS ULEN, LAW AND ECONOMICS, 191 (1988).
43. US CONST. AMEND. V, and XIV; *See also,* Cooter, *id.* at 191.
44. Allen, *supra* note 17, at 39.
45. ROBIN PAUL MALLOY, LAW AND ECONOMICS: A COMPARATIVE APPROACH, 40 (1990).

families, and members of the transplant community, including doctors, donors, and transplant centers, to participate in organ donation. Essentially, the total costs, in terms of money, time and emotional expenditures, simply do not outweigh the benefits (i.e., a family knowing their gift let some stranger live). Additionally, requiring the government to set prices for organs offends public policy because it permits the government to participate in organ selling and requires the government to set a value scale for each organ procured. Economically, the government and the people cannot afford to purchase the organs needed to satisfy the deficit, nor can either afford to be tied up in litigation while the organ's value dies with its body. In this sense, discussing the body as property inhibits the goal of increasing organs by increasing the amount of red tape one must go through to donate. Nationalization (or the creation of a public right) of human cadaveric organs could also result in serious human rights violations.[46] A simple, more efficient way of thinking that embraces societal problems surrounding organ donation, while shaping public sentiment must take the place of considering the body as property.

Initiating market responses to this problem is not the simple, more efficient way of thinking. Despite this, many argue that a market approach to organ donation could indeed remedy transactional costs as well as eliminate the need for litigation over governmental takings. Additionally, these market advocates feel financial incentives are the most efficient means of remedying the organ shortage. For example, in a recent work David Jefferies proposes that "[t]he most effective way to increase the supply of organs will involve limited commercialization of bodily components."[47] In his view, the law should provide for the use of a "middleman" who has the authority to contract for organs and could halt potential abuses.[48] Upon the death of a willing and contracted donor, doctors would remove the organ(s), and then the appropriate consideration for the organ would change hands.[49] Jefferies then proposes that an organ procurement network set up an altruistic-based distribution system, rather than one conditioned on wealth.[50]

This proposal is not an answer to the inefficient means of organ procurement. As will be shown in Section Three, *infra*, market theories are inefficient and costly. First, contracting for body parts will require more litigation to establish rules, interpret the rules, and to enforce the rules, requiring efforts of all

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46. Jefferies, *supra* note 35, at 642-43 (arguing that prisoners are particularly susceptible to human rights violations should their cadavers escheat over to the state).

47. *Id.* at 646.

48. *Id.* at 464-47. Many question the use of markets as a response to the organ deficit because of the fear of leading to human rights abuses, such as exploitation of the poor and favoring of the rich in terms of organ dealing. *Id.* at 623.

49. *Id.* at 647.

50. *Id.* at 648.

branches of government and the private sector.[51] Second, a contracting scheme exacerbates public fears, rather than reshaping them towards a better awareness of death, in that a contract for your organs might breed paranoia that someone is trying to "snatch" the "goods" prematurely.

III. CRITIQUE OF THE MARKET ALTERNATIVES

As stated above, applying a market strategy to remedy the current organ deficit is neither a more efficient, nor a more practical remedy to the organ deficit problem. A market in organs creates paranoia rather than destroys societal fear, and as such, does not incorporate the goal of shaping a new public sentiment. Though it might eventually alleviate the organ deficit, the selling or contracting of organs would invite human rights abuses, such as body snatching, despite retaining the specter of individual autonomy and public control. This section makes the case that a market remedy for the organ shortage would present more obstacles to meeting the demands for organs. Specifically, this part argues that a market strategy denies the power of substantial societal value systems (such as common notions of ethics and human rights), and favors a select part of the population. After discussing current market proposals and the particular faults of the trendy market cure, the discussion will turn to why market theories are incapable of reshaping the societal preference towards organ donation.

A. THE TREND OF MARKET SOLUTIONS

Many scholars have proposed market systems as a cure for the organ deficit.[52] Specifically, those in favor of creating an organ market have argued that since altruistic systems have failed to produce the necessary organs, self-interest in consideration might provide the adequate incentive to donate.[53] Their basic argument is that

> [i]n the market, the supply would be self-regulating because rising demand would raise the price of tissues in short supply and produce incentives for individuals to sell their organs; these prices would ensure that enough organs would be available to meet demand.[54]

With the demand for organs being met through a market system, these scholars argue that the market is the most efficient system of resource allocation, and that the market would alleviate the imbalance of how benefits and burdens between the donor and recipient are distributed.[55] Thus, economically speaking,

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51. This problem cannot be taken care of through legislation because as history has shown, the law seems to always lag behind medical advances. Market legislation then becomes a greater burden, one that would not provide the flexibility necessary to reach our goal.

52. *See generally* Cohen, *supra* note 33.

53. Cohen, *supra* note 33, at 25.

54. *Id.* at 2.

55. *Id.* at 3.

Pareto efficiency is attained—the exchanges are consensual, voluntary, and utility is maximized.[56]

Variations to the basic supply and demand model have also been proposed. For example, Lloyd Cohen argues for a "futures market" to cure the organ deficit.[57] Specifically, Cohen proposes that "healthy individuals be given the opportunity to contract for the sale of their body tissue for delivery after death."[58] Some would offer alternative methods of exchange, namely, promises to donate organs in exchange for health insurance, tax breaks, death benefits, public recognition of the donation, or a bartering system to secure other necessities.[59]

Regardless of the economic model proposed or the mode or currency of exchange, each purports to disburse ethical and human rights concerns that arise from the notion of selling one's organs. The most cited fear about creating a market in organs is the exploitation of the weak, elderly, poor, and the power the market gives to the wealthy.[60] Another important ethical problem a market must deal with is whether thinking of the body as a commodity is even appropriate.[61] All proponents of a market system insist that heavy regulation and the creation of strict criteria for both the procurement and allocation of organs would remedy ethical concerns.[62]

Any market system proposed will surely exploit the poor. First, any market theory that relies on the availability of something to exchange, and the willingness of participants to exchange necessarily inhibits the participation of the poor. The poor, by virtue of their economic state are not in a position of bargaining power. The poor do not have anything to give to enable the receipt of an organ, and they are easy targets for unscrupulous organ harvesters who would offer them a "meal for their left eye." The tension of economic hardship hardly provides an optimal market scheme of voluntary and consensual exchanges.

Additionally, market systems that require heavy regulation are neither economically nor politically efficient. Regulation necessitates a degree of complex rules, requiring judicial and legislative interpretation. In turn, market regulation of this sort also becomes the embodiment of a recognized property right in one's body. As mentioned above, inviting the body to interpretation as property brings its own set of ethical problems, as well as problems for procuring organs. By entering the body into the stream of commerce, people would most likely seek enforcement of property rights to their body, including rights to privacy,

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56. AMARTYA SEN, DEVELOPMENT AS FREEDOM, 117 (1999).
57. Cohen, *supra* note 33, at 2.
58. *Id.*
59. Wagner, *supra* note 3, at 956-57.
60. Jefferies, *supra* note 35, at 654.
61. *Id.*
62. *Id.*; *See also,* Cohen, *supra* note 33, at 25.

control, and transferability. People might also fear the possibility that their bodies could escheat over to the state once their body becomes a commodity in the stream of commerce. The remedy to this result would be regulation, which in turn forecloses on individual autonomy.

In sum, the free market alternatives to the current system of altruism create rather than destroy social and ethical barriers to efficient organ procurement. This section attempted to illustrate that although the exchange of organs on the free market appears to provide individuals with a great degree of control over the disposition of their bodies, such control is dampened. That damper is created in the face of ethical concerns relating to the exploitation of the poor, and the end result of having to provide for property rights in the body.

B. MARKET MODELS FAIL TO SHAPE A PREFERENCE TO DONATE

Market paradigms purport to shape individual preferences to donate by insisting that people act in their own best interest. In other words, a market paradigm attempts to create specific opportunities for the public so that the beneficial, logical preference for the individual is to donate their organs.[63] In this sense, using a market strategy to provide organs must show that donating outweighs social costs associated with selling organs.[64] This part proffers that the basic supply and demand market paradigm in which money is exchanged for organs is ineffective in providing the public with the means to effectively weigh the social costs and benefits of donating organs. In this sense, the prevailing societal preference under a market system would continue to deplete the organ supply. Thus, any proposed market cure fails as a viable option to correct the current organ shortage.

Humans generally act in their own best interest, though, for the most part, they align with the sense of greater social values. Indeed, some individuals act in accordance with what one author has termed, "socially responsible reasoning," which take humans beyond being purely selfish actors.[65] Markets do not function on exchange alone; they inevitably encompass institutional values, such as social preferences.[66] However, the prevailing social preference of a market in human organs might very well be corrupt at its core, and thus, incapable of providing a structure that weighs the personal costs against the social benefits to organ donation.

The corruption lies not in the potential for market abuses, but rather in the existing social consciousness of the population. As mentioned above, the six

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63. Kenneth G. Dau-Schmidt, *Legal Prohibitions as More Than Prices: The Economic Analysis of Preference Shaping Policies in the Law*, *in* LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES, 153, 155 (Robin P. Malloy et al. eds., 1995).

64. *Id.* at 157.

65. Sen, *supra* note 55, at 261.

66. *Id.* at 263.

most popular reasons people give for not donating organs are: "hastiness of organ retrieval and a feeling that declaration of death and immediate subsequent removal of organs interferes with the family's expression of grief; mutilation; fatalism and superstition; religion; age and ignorance."[67] If the greater social value of organs is to prevent their being interred without harvesting and to save lives, then the market must arrange itself around enabling people to weigh their cost or fear concerning donation. But how is a market to do this when, in fact, the incentive is merely valued in fiscal terms? How can a market theory, which relies on the wealth of its participants more so than the social justice of its actors effectively push social mores towards weighing the benefits of giving over the cost of facing ones personal fears? It simply cannot. Though any market incentive might push people towards realizing that money is preferable in exchange for needed organs, the market incentive simply fails to account for the underlying fears of the people concerning donation.

The market cannot provide a structure in which ordinary people can rationally weigh costs and benefits of organ donation, because the market lacks sufficient grounding in the irrational fears concerning donation. A pure incentive program that replaces altruism with cash, or other necessities is inadequate as it falls short of effectively replacing existing social fears connected with donating organs after death. If there really is to be any increase in the organ supply, the answer lies in reshaping society not through a free market and property system, but rather, through structuring discussion around changing social values at their core.

IV. THE CONSCRIPTION CURE: MANDATORY CADAVERIC ORGAN DONATION

The general will is always right, but the judgment that guides it is not always enlightened. It is therefore necessary to make the people see things the way they are. . .to point out to them the right path they are seeking. Some must have their wills made to conform to the reason, and others must be taught what it is they will. From this. . .would result the union of judgment and will in the social body. From that union comes the harmony of the parties and the highest power of the whole.[68]

Earlier in this article, it was suggested that neither the current altruistic organ donation, nor trendy market proposals that seek to cure the organ deficit work.[69] It has also been suggested that assigning property concepts to bodily organs, such as control, transferability and privacy would neither efficiently deal with the organ shortage, nor incorporate a means of social change. In this section, it

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67. Douglass, *supra* note 27, at 228.

68. Theodore Silver, *The Case for a Post-Mortem Organ Draft and a Proposed Model Organ Draft Act*, 68 B.U.L.Rev. 681, 699 (1988) *quoting* J.J. ROUSSEAU, THE SOCIAL CONTRACT 35 (Hafner Library of Classics 1947 (London ed. 1791)).

69. *See supra* section IIIA of this article.

will be proved that mandatory organ conscription is the most efficient way to cure the deficit and reshape social values. Specifically, this part first discusses the doctrine of conscription, the details how conscription purports to embrace social values and fears in such a way that will mold society into accepting cadaveric organ conscription.

For the purposes of this article, the discussion will focus on the general policy of a conscription plan. Specific legislation would be needed to implement such a plan, but I leave those details for later investigation. In doing so, I briefly touch on presumed consent laws, because they closely relate to the goal of curing the organ deficit, and are a step on the same path as mandatory conscription.

A. PRESUMED CONSENT: A STEP IN THE RIGHT DIRECTION

This section discusses the presumed consent system for organ procurement. Under this system, the presumption is that unless otherwise expressed and recorded, the decedent has consented to the removal and donation of all needed organs after his or her death.[70] In the European Union, this practice appears favored over other market remedies because a market approach seems "inconsistent with the EU objective of a high level of consumer protection [and] the negative opinion of the European Parliament on commercialization or organs. . .."[71]

Ideally, presumed consent systems eliminate the need to seek out the donative intent of the deceased through his family or other means. Despite this intent, some European countries still insist on inquiring into the wishes of the family, while other countries immediately remove organs at the point of death unless there is clear evidence the deceased desired otherwise.[72]

Regardless of the standard employed, the European system is still more effective than the current altruistic system of the United States.[73] Practically speaking, the European model has its advantages: no need to carry donor cards, no need for last minute decision-making, and no need to ask for permission from families to harvest. This system also preserved the semblance of respect for individual autonomy as individuals are on notice to object to harvesting.[74]

This system is not without its imperfections. In practice, most physicians seeking donation still inquire into the family's wishes.[75] It also does not em-

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70. Jefferies, *supra* note 35, at 634.

71. *Id.*

72. *Id.* at 635. In terms of potential for abuse, the issue surrounding the propriety of removing organs at the immediate point of death in conjunction with definitions of death is beyond the scope of this paper.

73. *Id.* at 639.

74. *Id.* at 640.

75. Jefferies, *supra* note 35, at 641.

brace the moral objections families or individuals have regarding donation.[76] In other words, those who objected for moral or social reasons under the system of volunteerism will probably still object under the presumed consent system. Thus, the goal of substantially increasing organ donation (as well as reducing transactional barriers) is not accomplished.

B. THE PRINCIPLES OF CONSCRIPTION

This section discusses the virtues of conscription. A general policy towards conscription of organs would empower every medical provider to harvest "every cadaveric organ suitable for transplantation without regard to any contrary wishes expressed by the decedent while he lives or by surviving relatives after he dies."[77] A system that permits the removal of all necessary organs at death by medical providers is also the most efficient means of producing the necessary supply of organs. A blanket rule such as this reduces judicial and legislative deliberation over the interpretation of the rule, and demolishes the barriers created by thinking of the body as property. Conscription would not require a "promotional campaign, compensation to donors, or even attempts to gain permission from donors and their families."[78] Conscription would also remove some medical liability issues: specifically, doctors would no longer be liable for failing to obtain consent, nor would they have to be burdened by seeking out consent before donations could be made.[79]

Other plans, such as the current volunteerism and the proposed market structures also purport to retain individual autonomy as well as to operate within the framework of the Constitution. For example, advocates of volunteerism suggest that permitting individuals to choose whether to donate encourages charity and generosity.[80] Under this system, generosity and charity drive donating; conflicts between family and individual autonomy are eradicated; and individual autonomy is retained despite the degree of legitimate coerciveness, as it implements greater social good and common will.[81] It is not individual autonomy in the sense of choice, rather, it is individual autonomy in the sense that with enough organs available, a person's capabilities are increased should a personal need for organs arise. Thus one can live freely and have a more productive life.[82]

Some would argue that choice is the touchstone of American freedom, and choice includes the right to direct the disposition of one's body. Yet, in times

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76. *Id.*
77. Silver, *supra* note 67, at 681.
78. A.H. Barnet and David Kasserman, *The Shortage of Organs for Transplantation: Exploring the Alternatives*, 9 ISSUES.L. & MED. 117, 131 (1993).
79. *Id.* at 132.
80. Silver, *supra* note 67, at 696.
81. *Id.* at 696-97.
82. Sen, *supra* note 55, at 37.

of national crisis (or even potential crisis) the population must be directed to join into the greater social good; it is for this reason there is a military draft, as well as prohibitions against assisted suicide.[83] The law has always provided for legitimate yet coercive means of shaping public attitude towards a greater public good. Conscription of organs is not unlike these examples.

C. THE PLAN: HOW CONSCRIPTION SHAPES SOCIAL VALUES

Conscription merely purports to erase all notions of familial and individual property rights in dead bodies. In doing so, the body will not and cannot be commodified, nor will it escheat over to the state. Instead, conscription will provide the medical community with the resources it needs to fulfill a need for organs. Conscription is the most efficient bright line rule the legal system can offer the public and the medical field. As stated in the introduction to this paper, discussions regarding religious objections to conscription are outside the scope of this paper.

Ethically, understanding what it is that the public values and fears most about donating their organs will be crucial to initiating social change towards conscription. Such values include the ability to grieve, individual autonomy, superstition, fear of mutilation, fear of desecration, unwarranted governmental intrusion and religious objection. Arguably, conscription neither denies nor promotes any of these common fears: families will not have to face the decision of whether to donate, and for all intents and purposes, bodily forms stay intact after select organs are harvested; individual freedom is retained in the sense that human growth potential and aligning with a common good will be promoted; and under conscription, the government relinquishes control to the transplant community.

Conscription also alleviates the fear of exploiting the poor, and the over representation of wealthy recipients who have greater bargaining power. Conscription does not favor the wealthy, nor does it prey on the poor. Conscription creates no hold-out power for those whose organs are desperately needed.

V. CONCLUSION

There is a desperate need for organs in America. Patients lose their freedom and ability to live up to their potential: instead, thousands awaiting transplantable organs are dying needlessly as thousands more healthy, viable organs are interred. Social values and ideologies, as they stand today, can be flexed and molded into a new ideology: one of ultimate giving. Conscription provides the cure for the needless deaths; though the rule is radical, it is appropriately coercive. The conscription cure is able to flex social values into new values, such as placing the highest priority in life on saving lives.

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83. Silver, *supra* note 67, at 718-19.

No Guarantees Under Law

SHEILA G. GRAZIANO, ESQ.*

In today's global setting, as new borders are set out and new national themes are examined, there is a tendency for experts, especially democratic Western nation consultants, to call upon their own national experiences to serve as a guide for the setting out of policy and laws in other nations. It might, however, be helpful to first observe the gaps in our own society between written law (statute or case law) and "real" law, i.e., between de jure (defined as that which exists as a matter of law) and de facto (defined as that which exists as a matter of conduct or practice).

As a practicing attorney, I see that these gaps, or incongruities, between law and life are ever-present. A clear example can be found in the lofty ideals expressed in the federal (nationwide) and state anti-discrimination laws of the United States of America and how these laws affect women in the workplace.

If we briefly look at the role of working women in American society, we see cyclical employment opportunities revolving around world wars. During World War I and World War II, employment of women became a national necessity as men went off to fight the war. Cultural stereotypes of women as homemakers and mothers were suspended, in addition to the laws concerning work allowed to women, until the men came home to take back their jobs. We even see women in military service jobs such as the Women's Air Force being replaced by men as the war wound down and male pilots replaced women in non-combat flying. By the 1960's, as part of a general social liberalization and push for equality, we find the start of a new generation of laws concerned with discriminatory behavior against women. This era mirrors advances in social welfare laws passed during the 1930's to protect workers in general from the effects of a devastating depression and union suppression. Not since the post civil war era, had we seen such a flurry of equal rights legislation.

The passage of the Equal Pay Act (hereinafter the "EPA") in 1963 is an appropriate point to start a review of the above-mentioned legislation. Follow-

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ing this discussion, a chronological selection of relevant laws from the 1960's onward will be analyzed.

The EPA[1] is an amendment to the Fair Labor Standards Act (hereinafter "FLSA") of 1938.[2] The FLSA set national standards for conditions of work such as minimum wages, work hours, and safety standards. The EPA uses the FLSA definitions and enforcement mechanisms. In 1974, the FLSA act was amended to allow a lawsuit against any employer (including a public agency) in any federal or state court of competent jurisdiction.[3] Prior to this amendment, state university employees could not sue under the EPA.

Title VII of the Civil Right Act of 1964 was passed to bar gender (and other) discrimination in employment.[4] New York State's parallel statute is Section 296 of the New York State Human Rights Law.[5]

The Age Discrimination in Employment Act of 1967 (ADEA) bars discrimination in employment against men or women who are forty years of age or older.[6]

Title IX of the Education Amendments of 1972[7] states that "no person in the United States shall on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance."[8] Although frequently used to enforce equality in resources available to males and females in sports activities at educational institutes, this law has a broader mandate and addresses general gender discrimination at all levels of state and private (if they use federal funding) education. This protection extends to issues of employment including hiring, firing, retiring, pay, promotion, policies, and any benefits awarded.

42 U.S.C. § 1983 deals with various constitutional rights, including freedom from discrimination on the basis of sex, equal protection of the laws, and procedural and substantive due process. Sex discrimination is covered by section 1983 where the conduct complained of rises to the level of a constitutional tort, that is a violation of the 5th and/or 14th Amendment to the U.S. Constitution.[9] To claim a constitutional deprivation, the equal protection clause of the 5th Amendment must be violated, and absent express policy or treatment distin-

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1. Equal Pay Act (EPA) of 1963 § 3, 29 U.S.C. § 206(d) (1994 & Supp. IV 1998).
2. Fair Labor Standards Act (FLSA) of 1938, 29 U.S.C. §§ 201-219 (1994 & Supp. IV 1998).
3. Fair Labor Standard Act Amendments of 1974, Pub. L. No. 93-259, §§ 6(d)(1), 25(c), 26 (codified as amended in 29 U.S.C. § 216(b)) (1994 & Supp. IV 1998).
4. *See* 42 U.S.C. § 2000-e (1994).
5. N.Y. EXEC. LAW § 296 (McKinney 1993).
6. Age Discrimination in Employment Act of 1967 (ADEA), Pub. L. No. 90-202 (codified as amended in 29 U.S.C. §§ 621-634) (1994 & Supp. III 1997).
7. Title IX of the Education Amendments of 1972, Pub. L. No. 92-318 (codified as amended in 20 U.S.C. §§ 1681 *et seq.*) (1994).
8. *Id.*
9. 42 U.S.C. § 1983 (1994).

guishing between men and women on the basis of gender, a prima facie case will fail and the court will dismiss these causes of action. To allege a violation of due process, however, the interest to be protected must fall under the 14th Amendment's protection of liberty or property. A mere expectation of tenure does not qualify as a property interest. A liberty interest may be violated if public character assassination and stigmatization occurs in the process of denying tenure or a salary increase so that other employment is blocked. Barring a major public relation gaff, low wages, and denial of tenure and promotion do not invoke the constitutional denial of a liberty interest.

Finally, 42 U.S.C. § 1985 creates a cause of action for allegations of conspiracy to interfere with civil rights, while 42 U.S.C. § 1986 creates a cause of action for failure to prevent the deprivation of a constitutional right.[10] Both these protections fail if the underlying complaint of a civil rights violation fails, such as dismissal of a Title VII and section 1983 claim. The right to equal wages under the EPA is a statutory construction and not based on a constitutional right as such. The right to be free from sex discrimination, including the payment of unequal wages under Title VII, is a constitutional right. In examining the differences between what we say and what we do, the focus of this paper will be on a basic, clear, "short" law and how it operates under the "best" of conditions.

The Equal Pay Act (EPA) is brief. It is part of the Fair Labor Standards Act of 1938 and states that employers must pay equal wages for substantially equal work, the performance of which requires equal skill, effort, and responsibility, and is performed under similar working conditions. "Working conditions" refer to the surroundings at work or the possible hazardous conditions at work.[11]

This is an American federal law, mirrored by state laws, enacted by a democratically elected Congress and democratically elected State Legislatures. The State of New York, self-proclaimed as an equal opportunity employer, has numerous state laws which parallel the federal laws.[12] One agency of the New York State government is the state system for higher education, the State University of New York (hereinafter "SUNY") which has a well-defined population for statistical analysis. SUNY had 7,866 full time (plus about 5200 part time) employees across the state at 29 campus locations.[13] SUNY is not a corporation for profit, but dedicated to advancing the education of its students, through, among other avenues, employing teachers in a hierarchy of ranks (lecturer through and beyond full professor) who are proficient in instruction, research and service to students, institution and community. The various campuses have

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10. 42 U.S.C. §§ 1985-1986 (1994).

11. *See* EPA of 1963 § 3, 29 U.S.C. § 206(d) (1994 & Supp. IV 1998).

12. *See, e.g.*, N.Y. EXEC. LAW § 296 (McKinney 1993).

13. LOIS HAIGNERE ET AL., UNITED UNIVERSITY PROFESSIONS, REPORT OF THE WOMEN AND MINORITY SALARY DISPARITY ANALYSIS (1993).

some autonomy in employment matters.[14] A union, United University Professions (hereinafter UUP) represents academic employees across campuses.[15]

Here we have a setting of highly educated and generally sophisticated employees and employers, all part of a statewide system dedicated to non-discriminatory policies of employment. Further, the contract between the union (UUP) and the State of New York (on behalf of SUNY) contains specific provisions barring illegal discrimination.[16] The laws are clear, the policy is clear and the words are explicit: There will be no discrimination because of gender. The participants are all people of good will who are not biased, and many of the employer's administrative agents are women.

And yet, in practice, the de facto situation is that the women at SUNY, as a group, are the victims of gender discrimination. Minorities also share this biased treatment. The employer (the State through SUNY) and the union both admit that statistical analysis shows that there is gender bias in wage levels. It is agreed that women as a group are not paid appropriately, that is, equally with men, and a pay "disparity" exists.[17]

The State of New York through SUNY and the UUP have each analyzed the same state supplied data in tandem studies and, through the use of regression analysis, have both come to the same conclusion. Women are paid, as a group, less than white males.[18]

When data were first being collected on a faculty level in the 1970's, males comprised the majority of faculty and students in undergraduate institutions. To this day, males have continued to prevail numerically in all but the associate levels in academia.[19]

In 1990 a breakdown of population by race and gender at the national level, the New York State level, and then at the SUNY level shows the following percentages:[20]

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14. *Id.*

15. UNITED UNIVERSITY PROFESSIONS, AGREEMENT BETWEEN THE STATE OF NEW YORK AND UNITED UNIVERSITY PROFESSIONS 1999-2003 (1998).

16. UNITED UNIVERSITY PROFESSIONS, AGREEMENT BETWEEN THE STATE OF NEW YORK AND UNITED UNIVERSITY PROFESSIONS 1982-1985 ARTICLE 21 (1981).

17. UNITED UNIVERSITY PROFESSIONS, AGREEMENT BETWEEN THE STATE OF NEW YORK AND UNITED UNIVERSITY PROFESSIONS 1985-1988 ARTICLE 21.1 (1984) (This agreement specifically spells out that state funding shall be "used to correct demonstrated salary disparities within the Professional Services Negotiating Unit".).

18. HAIGNERE, *supra* note 13.

19. *Id.*; Benjamin Ernst, *Disparities in the Salaries and Appointments of Academic Women and Men: An Update of a 1988 Report of Committee W on the Status of Women in the Academic Profession,* ACADEME, Jan. – Feb. 1999 <http://www.aaup.org/Issues/womeninHE/wrepup.htm>.

20. HAIGNERE, *supra* note 13.

	National	State	SUNY
White (Male & Female)	75.6	69.3	88.2
African-American (Male & Female)	11.8	14.3	3.6
Asian (Male & Female)	2.8	3.7	6.0
Male	48.0	48.07	72.5
Female	51.3	52.02	27.5

At the specialized SUNY colleges (optometry, forestry, etc.), the percentages are even more skewed: 90.6% of faculty are white; 82.2% are male and 14.8% are female.[21]

By contrast, gender loading towards males is in the opposite direction for undergraduate students. In the 1970's, males were in the majority; by the 1980's, women achieved parity; and by the 1990's, the number of women undergraduates exceeded males. The projections are that by 2010, males will constitute less than 42% of the overall undergraduate population.[22] Between 1970 and 1996, the percentage of women who earned bachelor of arts degrees rose 77%, and the percentage of males declined 19%.[23]

And yet national figures (which are paralleled by SUNY) show that women comprise: 53% of lecturers, 51% of instructors, 42% of assistant professors, 32% of associate professors and 19% of full professors.[24] Women of color comprise only about 1.2% of full professors.[25]

Data shows that over the last thirty (30) years, the gap in salaries between male and female faculty members has actually increased.[26] The proportion of women granted tenure also shrank at some institutions.[27] Females on the whole earn approximately 85% of the salaries of their male counterparts[28].

Although at first glance, it would seem that salary could be closely tied to promotion and tenure, the regression equations tell us that between 71% and 91% of salary factors are due to gender and race, depending on the campus. Women earn more as they advance in rank but remain less well paid compared to equally situtated males who advance in rank.[29]

Discrepancies between male and females in rank (that is in promotions and granting of tenure) and salary exists despite the EPA, Title VII, ADEA, Title IX

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21. HAIGNERE, *supra* note 13.

22. U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, DIG. OF EDUCATION STAT. 2000 204, 215 (2001).

23. *Id.*

24. *Id.* at 267.

25. *Id.*

26. Ernst, *supra* note 19.

27. Doris Green, *Tips to Help Research Universities Support Women Faculty*, 8 WOMEN IN HIGHER EDUCATION 1, 1 (1999).

28. Ernst, *supra* note 19.

29. HAIGNERE, *supra* note 13.

and all other legislative constitutional protections. All these written laws have been operative for forty years, and women are still sliding backwards.

Under the Equal Pay Act, wage differentials must be job based. The differential must not be a pretext for discrimination. Comparisons must be made between individuals who perform substantially equal work. If the employer cannot show by one of the four affirmative defenses allowed under the statute, that the pay was based on: (1) A seniority system; (2) A merit system; (3) A system which measures earnings by quantity or quality of production; or (4) A differential based on any other factor than sex, then the objective fact of pay difference becomes an illegal act.[30] The EPA is a strict liability statute.[31] The intent of the actor is irrelevant, it is the salary differential itself that is a violation of the law. However, intent to discriminate can add another year of damage collection to the two-year time period in which one can collect damages.[32] Damages consist of the differential in pay that is not contributed to by job related factors, reaching back two years from filing or back three years if intent can be proven, plus attorney fees.[33]

Since the monetary damages obtainable are minimal, EPA cases are usually appended to Title VII or other causes of action. However, because the courts have, with few exceptions, excluded tenure denial and promotion denial cases from litigation, it is the salary issues that survive summary judgment motions, leading to dismissal of other actions from the court.[34] Courts are traditionally reluctant to adjudicate issues that involve academic work-quality and believe that academic institutions should be the judge of these issues. For example, in *Zahorik v. Cornell University*,[35] the court noted:

> [F]or a plaintiff to succeed in carrying the burden of persuasion, the evidence as a whole must show more than a denial of tenure in the context of disagreement about the scholarly merits of the candidate's academic work, the candidate's teaching abilities or the academic needs of the department or university. Absent evidence sufficient to support a finding that such disagreements or doubts are influenced by forbidden consideration such as sex or race, universities are free to establish departmental priorities, to set their own required levels of academic potential and achievement and to act upon the good faith judgments of their departmental faculties or reviewing authorities.[36]

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30. 29 U.S.C. § 206(d)(1) (1994 & Supp. IV 1998).
31. 29 U.S.C. § 215(a)(2) (1994 & Supp. IV 1998).
32. 29 U.S.C. § 216(b) (1994 & Supp. IV 1998).
33. *Id.*
34. *See, e.g.*, Fisher v. Vassar College, 114 F.3d 1332 (2d. Cir. 1997); Coser v. Moore, 739 F.2d 746 (2d Cir. 1984) (various female faculty at SUNY Stony Brook alleged system wide discrimination); Pollis v. New School for Social Research, 132 F.3d 115 (2d. Cir. 1977); Ottaviani v. State University of New York at New Paltz, 679 F.Supp. 288 (S.D.N.Y. 1988); Leder v. Sample, No. 88-CV-418C (W.D.N.Y. Jan. 9, 1997).
35. 729 F.2d .85 (2d Cir.1982).
36. *Id.*, at 94.

This reluctance is a narrow exception to the general rule that if a court (i.e. a judge or jury) does not possess the expertise to make such a decision, then both the parties shall present experts to testify as to the value of life or limb, (as in wrongful death or malpractice cases), degree of harm to the individual or environment (as in negligence cases such as toxic torts), or of family love and stability (as in custody cases). Apparently, the myth of the intellectual superiority of academic decisions persists. Although most state higher education institutes have written "objective" standards, which supposedly are followed for promotion and tenure, these standards are apparently too unrealistic in holding colleges and universities accountable to their own written guidelines.

In the case of SUNY and the UUP, they have acquiesced to these pay disparities (i.e. discrimination in pay) by accepting a request from SUNY to divide up among the female and minority faculty the funds allocated by the State to remedy these pay differentials.[37] The funds earmarked were less than the calculations for *one* year of the salary differential.[38] Thus, all pension, social security, and inequities in other payments dependent upon salary were ignored. Periodic cost of living raises under the contract are based upon salary (i.e. perhaps 3% of salary) and are one example of unaddressed disparity funding. Pensions are contributed to by the employer on a flat percentage basis under a set salary level, and then the percent of contribution increases for higher salaries. Non-salary payments from special funds, merit raises, SUNY Foundation sources, etc, which may go to white males versus others, were not evaluated.[39] Therefore, we have a situation in which only the basic wage for a particular year is raised minimally for those women who are *below the average* salary for men; and further, the raise is only for women who have been evaluated statistically by SUNY and the union to be approximately equal to the men in important major variables.

A female faculty member who may have excelled professionally compared to a male faculty member and who was paid far less than the top paid male faculty in her department (i.e. she might be paid $32,000.00 versus $46,000.00 for the male), would nevertheless be paid a $300.00 or $500.00 one time disparity wage payment, because she is compared only to the mean wage of males in the institution.

To its credit, SUNY attempted to remedy the situation by making periodic "disparity payments" to women (and minority) faculty. However, it has been far too little and far too late. A woman in the position of a full professor who is paid an average of $10,000.00 less than her male colleagues throughout her 30-year career has lost $300,000.00 in salary alone. This does not include the losses in pension, social security, and other financial benefits, which usually

37. HAIGNERE, *supra* note 13.
38. *Id.*
39. *Id.*

add one-third to the income. If we take a minimum loss of $400,000.00 for only 500 women, the total loss equals two hundred million dollars. If we estimate that 2,500 women are underpaid $10,000.00 a year, then their lost income equals one billion dollars. Or, conversely, the State of New York would have saved one billion dollars over the last thirty years on the "backs of women."[40]

It is difficult to correct this situation without strong support from a powerful union. If changes occur, the correction may help the group, but not the individual. When individual women sue, it is not an easy task. Cases can take between five and ten years to reach trial. Many settlement offers are so low as to be out of the question for acceptance. When lawsuits are won, the State (SUNY) asks for jury verdicts to be overturned or a new trial granted. Such relief may be granted by the court and when denied, SUNY has enough resources to appeal. Individuals who sue SUNY have often already been forced out by SUNY and have little money left after the expense of a lawsuit and trial to pay for an appeal. Although such cases are based on an attorney's contingency fee arrangement, the cost of court fees, obtaining documents, and paying for expert witnesses is currently about $15,000.00. Part of the cost goes toward the discovery process, which can be lengthy and arduous.

Under New York State law, all information regarding salaries of state employees is available to the public.[41] However, a new hire does not know this or have access to the college libraries where such data are kept. The department "data book" is not shown to new hires. New hires are just very happy to have been hired. If they knew the salaries that they were competing against, women might be more sophisticated about negotiating for higher salaries and avoid lawsuits.

Unfortunately, the salary information is no longer always public, as lawsuits have proliferated. The salary information in one branch of SUNY is now in the sealed library archive. Written permission must be obtained to review that public data along with clearance given by the State Attorney General's Office, which represents SUNY in discrimination lawsuits. SUNY has its own staff of attorneys, which collaborates on cases so that the legal manpower, resources and resulting support staff far exceed even those available to the largest private law firm, much less the smaller firms, which usually take on discrimination cases for plaintiffs.

When we write about state systems such as SUNY, we are now into an area of professional, highly educated women with a supposedly well-developed sense of who they are, where they are, and what they want to be. Why then do women professors get caught in such a negative situation? How can this happen? Is it ignorance? Women (and minorities) who are just beginning an aca-

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40. *See, e.g., Professor Succeeds in Battle Over Equal Pay*, Times Union, Dec. 8, 2000, at B2; Jay Rey, *Woman Wins Buffalo State Equal Pay Lawsuit*, Buffalo News, Dec. 7, 2000, at 3B.

41. N.Y. PUB. OFF. LAW § 87 (McKinney 1988).

demic career may not realize that a low starting salary keeps their income low for their entire career. Additionally, they do not know what "low" is.

More experienced professors are sometimes afraid to speak out for fear of retaliation. In a study done at one SUNY college testimony had to be taken in secret because so many women were afraid of being labeled troublemakers and losing a chance at tenure, promotion, or retention.[42]

Is there a difference between accomplished, sophisticated and aggressive female (including minority) professors who speak out and demand equality, as compared to those who are ignorant of the rules of the game and/or too timid to push hard? Overall (and of course there are always individual exceptions) the answer is no. Statistical analysis shows that women in the SUNY system are promoted less often, tenured less often, and not paid as well as comparable white males.[43]

In areas where women have other options, that is, the service or practice areas of medicine, law, pharmacy, dentistry, etc. we see that women can move out to a private or group practice when they are not well treated professionally. These types of schools are not fully represented in salary studies.

How can a governmental entity in a democracy continue to knowingly violate the law? We know how this happens in despotic societies and we expect laws to be ignored or even unilaterally changed under communism or fascism or other dictatorships. But in the State of New York, in the United States of America, how can women be paid so much less than they are worth that even the employer concedes this fact and agrees to pay (occasionally, a small amount) more. I believe the answer is that if you do not enforce the law, the law does not get enforced. In this civil law area, enforcement of the law depends on civilian insistence by speaking, shouting, and if necessary, using the court system. The union (UUP) does not agree with this position and believes that it can more adequately represent, over time, professors who are paid below standards. Individual professors who initiate lawsuits disagree.[44]

The Department of Labor under the Fair Labor Standards Act is legally responsible for enforcing the EPA, as is the Office of Civil Rights.[45] Although many complaints from higher education employees center around tenure, promotion, and salary, the time for processing complaints in an administrative agency are long and the results are not always satisfactory.

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42. COMMITTEE ON THE STATUS OF WOMEN AT BUFFALO ST. COLLEGE, GENDER BIAS HEARINGS OF SPRING/SUMMER 1994 (1994).

43. HAIGNERE, *supra* note 13.

44. Gwendolyn Bradley, *Nota Bene*, ACADEME, March-April, 2001. <http://www.aaup.org/newweb/publications/Academe/01ma/MA01NB.htm> (quoting the director of research and legislation for UUP, who was commenting on a successfully litigated EPA case: "Pay equity problems can be solved without the kind of litigation involved in this case.").

45. *See* AAUW LEGAL ADVOC. FUND, A LICENSE FOR BIAS: SEX DISCRIMINATION, SCHOOLS AND TITLE IX (2000).

Perhaps the larger question of why women are in, or allow themselves to be put in this "lying on the bottom" position in the 21st century, has to be answered without reference to legal history. What cultural forces have formed the acceptance of these inequities towards women by men and women? If we go back to the seminal case in this area, we get some clues.

In *Corning Glass Works v. Brennan*,[46] the issue before the courts was whether Corning Glass Works (a maker of household glass products and upscale Steuben Glass decorative pieces) violated the EPA by paying differential pay to men and women for the same job on two different shifts. This New York company had obeyed prior New York Law which forbade the employment of women during the late night hours.[47] This was a measure designed to protect the health of women and to preserve the home life for men and children. When the law was repealed, and women were not only paid less on the day shift, but were paid less on the night shift than men, the Department of Labor sued Corning in Federal Court.

Corning maintained that it did not violate the law as the base pay for both sexes had been made equal. But men had a "red eye" bonus for working the night shift. Because the EPA is a strict liability statute, the intent of Corning was irrelevant; the only relevant issue was the end result that men received higher wages than women for doing substantially equal work. The case went up to the United States Supreme Court, where Justice Marshall wrote eloquently of the perpetuation of the prior discriminatory status for women in their current jobs and the need to break the cycle of low wages for women.

We see this cycle perpetuated beyond the working class into the white-collar groups, such as female professors. The same problems that plagued the female employees in Corning, New York, plague the women of SUNY. They have: fewer bargaining skills, fewer mentors to guide them in how to deal with a particular employer, and frequently carry their historical dependency and peacemaking attributes with them into a competitive marketplace. Perhaps most of all, they need the job; their future is bound by their past.

In the twenty-first century women still fight for equality in our national democracy and enlightened state governments. Payments of token sums as "dis-

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46. 417 U.S. 188 (1971).

47. *See* 1927 N.Y. Laws ch. 453; 1930 N.Y. Laws ch. 868 (codified in N.Y. LAB LAW §§172, 173) (prohibiting women from working between 10:00 p.m. and 6:00 a.m.). In 1953, New York State allowed women over twenty-one to work after midnight if the State Industrial Commission found that employers would provide private transportation for female employees if there was no public transportation and safeguards existed. *See* 1953 N.Y. Laws ch. 708 (codified in N.Y. LAB LAW §172(2)). In 1963, New York repealed and rewrote §§ 170-177 of the Labor Law and placed the above restrictions on women, with some technical changes, into § 173 of the Labor Law. *See* 1963 N.Y. Laws ch. 783 (codified in pertinent part in N.Y. LAB LAW § 173(3)(a)(1)). In 1969, New York State amended the Labor Law to comply with Title VII of the Federal Civil Rights of Act of 1964, by repealing the above restrictions placed on women. *See* 1969 N.Y. Laws ch. 1042 (repealing N.Y. LAB LAW §§ 172, 173 relating to the restrictions of hours women could work).

parity" pay does not alleviate the financial or psychological harm of being treated as less than equal. However, awards of money and having a judge or jury say out loud and in writing that, "you are right and they are wrong;" and "you were worth more than paid to you" goes a long way to heal the damage.

As a practicing attorney who represents clients who have taken on SUNY and won, I note the judicial system is not supportive of these discrimination cases. There is a general attitude by the courts that if women and minorities are paid less (or promoted less or tenured less) they must be worth less (i.e., paid less because their work is not as valuable as males). Fortunately, juries do not always share this sentiment. The average person on a jury votes for equality.

2001 Supreme Court Surveys

EDITORIAL STAFF*

TABLE OF CONTENTS

Arizona v. California
530 U.S. 392, 147 L. Ed. 2d 374

In this case, the Quenchan Tribe and the United States, on behalf of the Tribe, presented a claim for increased water rights for the Fort Yuma Reservation. The claim rested on the contention that the Fort Yuma Reservation includes 25,000 acres of disputed boundary lands not attributed to that reservation in earlier stages of the litigation. The Tribe brought an action before the Indian

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* Ruchi Thaker, the Supreme Court survey editor, has selected these surveys because they were viewed as the most interesting Supreme Court cases decided last year. These selections have been written by Jason Berger, Josh Cole, Matt Cole, David Fernicola, Josh Hazard, Jason Kovacs, Karl Kuhn, Valerie Makarewicz, Maria Lisi-Murray, Carey Ng, Annette Obodai, Jason Tenenbaum, Ruchi Thaker, Corie Thornton, and Ruth Yacobozzi.

Claims Commission (known as Docket No. 320) challenging the 1893 Agreement and, in a 1978 Secretarial Order, the Tribe's entitlement to most of the disputed lands was confirmed. In *Arizona v. California*, 460 U.S. 605 (1983) (*Arizona II*), the Supreme Court decided that the Secretarial Order did not constitute a final determination of the reservation boundaries. The U.S. and the Tribe entered into a settlement of Docket No. 320, which the Court of Claims entered as its final judgment; as part of the settlement, the Tribe agreed it would not assert those claims against the government again.

In *Arizona v. California*, 373 U.S. 546 (1964) (*Arizona I*), the Court held that the U.S. had reserved water rights for the five reservations; that those rights must be considered present perfected rights and given priority, and that those rights should be based on the amount of each reservation's practicably irrigable acreage as determined by the Special Master. In *Arizona II*, the Court held that various administrative actions taken by the Secretary of the Interior did not constitute final determinations of reservation boundaries for purposes of the 1964 decree, and that lands within undisputed reservation boundaries were not entitled to water under res judicata principles. In the Court's 1984 supplemental decree, it again declared that water rights for all five reservations would be subject to appropriate adjustments if the reservations' boundaries were finally determined. In 1987, the Ninth Circuit dismissed (on grounds of the U.S.' sovereign immunity) a suit by California state agencies that could have finally determined the reservations' boundaries. The Supreme Court affirmed.

The issue in this case is whether the Fort Yuma claims of the Tribe and the United States are precluded by *Arizona I* and by the Claims Court consent judgment in Docket No. 320.

The Supreme Court held that, because the State party did not raise the preclusion argument earlier in the litigation and had ample opportunity to do so, the claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation were not foreclosed by *Arizona I*.

The Court noted that the State parties could have raised the defense in 1979 in response to the United States' motion for a supplemental decree granting additional water rights for the Fort Yuma Reservation and could have raised it in 1982 when *Arizona II* was briefed and argued. It quoted Fed.R.Civ. P. 8(c), and stated that res judicata is an affirmative defense ordinarily lost if not timely raised. The Court also held that the claims of the United States and the Tribe to increased water rights for the disputed boundary lands of the Fort Yuma Reservation are not precluded by the consent judgment in Docket No. 320. The Court noted that the settlement of Docket No. 320 had a claim-preclusive effect, but that settlements ordinarily occasion no issue preclusion, unless it is clear, as it was not here, that the parties intended their agreement to have such an effect. Thus, consent judgments (like Docket No. 320) ordinarily support claim preclu-

sion but not issue preclusion. Chief Justice Rehnquist, with Justice O'Connor and Justice Thomas, concurred in part and dissented in part. The dissent believed that the U.S. and Quechan Tribe's claim for additional water rights was barred by the principles of res judicata.

Buckhannon v. West Virginia Dep't of Health & Human Res.
532 U.S. 598, 149 L. Ed. 2d 855

Care home operator Buckhannon Board and Home Care ("Buckhannon") failed an inspection by the West Virginia fire marshal's office because some residents were deemed incapable of removing themselves from situations involving imminent danger. After receiving orders to close its facilities, Buckhannon brought suit seeking declaratory and injunctive relief claiming that the self-preservation requirement violated the Fair Housing Act of 1988 and the Americans with Disabilities Act of 1990. The orders were stayed pending the case's resolution. The state legislature then eliminated the self-preservation requirement and the case was dismissed as moot. Buckhannon requested attorney's fees as the prevailing party based on the catalyst theory, which posits that a plaintiff is the prevailing party if it achieves the desired result because the lawsuit brought about a voluntary change in defendant's conduct.

The District Court denied plaintiff's motion requesting attorney's fees and the Court of Appeals affirmed in an unpublished, *per curiam* opinion, both in accordance with the Fourth Circuit Court of Appeals' decision in *S1 and S2 v. State Bd. of Ed. Of N.C.*, 21 F.3d 49, 51 (1994) (en banc) (A person may not be a prevailing party except by virtue of having obtained an enforceable judgment, consent decree, or settlement giving some of the legal relief sought).

The issue in this case was whether the term prevailing party, found in numerous federal statutes allowing courts to award attorney's fees and costs, included a party that had failed to secure a judgment on the merits or a court ordered consent decree, but had nonetheless achieved the desired result because the lawsuit brought about a voluntary change in defendant's conduct. The Court held that the catalyst theory was not a permissible basis for the award of attorney's fees under the Fair Housing Amendments Act of 1988 and the Americans with Disabilities Act of 1990.

The Court reasoned that a prevailing party is one who has been awarded some relief by a court. Enforceable judgments on the merits and court-ordered consent decrees create a material alteration of the parties' legal relationship and thus permit an award. The catalyst theory, however, allows an award where there is no judicially sanctioned change in the parties' legal relationship. A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary requirement that such a change be in some way judicially caused.

Buckman Co. v. Plaintiffs' Legal Comm.
531 U.S. 341, 148 L. Ed. 2d 854

Buckman Company was a consulting company that assisted manufacturer AcroMed in navigating the Food and Drug Administration's (FDA) approval process for medical devices under the Medical Devices Amendments (MDA) of the Federal Food, Drug and Cosmetic Act (FDCA). Buckman allegedly made false claims to the FDA to gain approval under a 360e procedure as a predicate device. A predicate device may enter the market before full review has been completed if it is demonstrated that the device has been on the market already. Plaintiffs brought this action for injuries sustained due to improper use of orthopedic screws against both AcroMed and Buckman. Plaintiffs claimed they suffered severe injuries due to defects in the device.

The District Court ruled that plaintiffs' tort claims were preempted by the MDA, and that only the federal government may bring claims for fraudulent misrepresentations to the FDA. The Court of Appeals for the Third Circuit reversed, holding that plaintiffs' claims were not specifically preempted by the MDA. The Supreme Court granted certiorari and reversed, holding that the plaintiffs' claims were preempted.

The Court reasoned that fraudulent representations to federal agencies are to be policed by the Federal Government. The Federal Government is responsible for bringing FDA claims. The Court held that if subject to unlimited tort liability, companies are likely to provide so much information to the FDA under a 360 proceeding that the process would slow to the point that it would become ineffective. Furthermore, applicants could fear that any judge at any time could subject them to tort liability.

Fed. Election Comm'n v. Colorado Republican Campaign Comm.
533 U.S. 431, 150 L. Ed. 2d 461

This case was remanded by the Supreme Court's ruling in *Colorado Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604 (1996), to determine the definition of contribution and expenditure under the Federal Election Campaign Act.

The Federal Election Committee ("Committee") challenged limitations on expenditures coordinated with political candidates. Under the Court's ruling in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court held that limits on independent campaign expenditures by a political party are unconstitutional. The original case centered around expenditures by the Committee in support of a political candidate's campaign. The Committee challenged all limitations on political party expenditures as facially unconstitutional. The District Court and a divided Tenth Circuit affirmed the Committee's position. The Supreme Court granted certiorari and overturned the Appellate Court's decision.

The issue in this case was whether limitations on expenditures by political parties were facially unconstitutional. The Court held that coordinated expenditures are more likely to produce political corruption (or the appearance of) and are subject to a higher level of scrutiny. Furthermore, the Court held that coordinated expenditures are more akin to contributions than expenditures and, therefore, a higher level of scrutiny applies.

While the Court in *Buckley* rejected limitations on independent expenditures by political parties, the Court did not determine whether all limits on expenditures were facially unconstitutional. The Committee claimed that limits on coordinated expenditures would unduly burden a political party. The Committee claimed that a political party is unique in that it advocates the views of its membership, and limitations on coordinated expenditures would limit its ability to function in its role. The Committee argued that it was subject to a different level of scrutiny than other political bodies because of the relationship it has with the candidate.

The Court held that coordinated expenditures are subject to the same level of scrutiny as campaign contributions. The Court reviews contribution limits inquiring whether the restriction was closely drawn to match what is a sufficiently important government interest in combating corruption. Coordinated expenditures would allow an individual contributor to circumvent individual contribution limits to candidates by simply donating to a political party. Furthermore, limitations on coordinated expenditures are justified by concerns about political corruption. In addition, the Court held that political parties are subject to the same level of scrutiny as other political actors because of the danger that contributors could circumvent contribution limits to candidates by simply giving to the party.

Ferguson v. Charleston
532 U.S. 67, 149 L. Ed. 2d 205

Charleston public hospital, police, and officials started a program to locate cocaine using maternity patients because counseling and treatment did not lower drug use. The program required testing of patients suspected of using drugs. Specific guidelines were enacted for those patients testing positive, including education, treatment, arresting procedures, and prosecutions for drug offenses, child neglect, or both. The program did not affect the care given to the expecting mothers or the newborns. Patients who tested positive for drugs were arrested. Patients thus arrested through this program claimed that they were subject to unconstitutional searches.

The District Court instructed the jury to rule for the patients (petitioners) unless the jury found consent. The jury found for the city (respondents), holding that the patients consented to the search. The petitioners appealed the case to the United States Court of Appeals for the Fourth Circuit. They argued that

the evidence did not prove consent. The Fourth Circuit, without considering the issue of consent, framed the issue in terms of whether the searches were reasonable because "special needs" may justify searches intended to promote non-law-enforcement ends. The Supreme Court granted certiorari to review the Fourth Circuit's holding based on "special needs."

The issue in this case was whether, under the Fourth Amendment, a drug-testing program used to obtain evidence of a patient's criminal conduct constituted an unreasonable search if the patients did not consent to the test.

The Supreme Court held that a drug-test program is an unconstitutional search if the patient did not consent to the test. Therefore, the Court reversed and remanded the case to determine whether the petitioners consented to the test. In doing so, the Court reasoned that the state hospital is subject to the Fourth Amendment's ban on unreasonable searches and seizures, and the drug tests were unreasonable searches under the Fourth Amendment. Assuming arguendo that the petitioners withheld consent, the Supreme Court held that the drug-testing program was an unconstitutional search. The Court stated that "special needs" did not justify the hospital's unconstitutional searches. The program's overall goal may have been to abate drug use among pregnant women. However, the program's immediate goal "was to generate evidence *for law enforcement purposes* in order to reach that goal." Allowing the searches under "special needs" would immunize "any nonconsensual suspicionless search."

Gitlitz v. Comm'r of Internal Revenue
531 U.S. 206, 148 L. Ed. 2d 613

Petitioners were shareholders of P.D.W. & A., Inc., a corporation that had elected to be taxed under subchapter S of the Internal Revenue Code. In 1991, the company realized $2,021,296 of discharged indebtedness and was insolvent in the amount of $2,181,748. Due to the insolvency, the indebtedness was added to the company's balance sheet. Petitioners increased their bases in the company stock "by their pro rata share of the amount of the corporation's discharge of indebtedness." Petitioners used the increase bases to deduct on their personal tax returns.

The Commissioner of Internal Revenue made the determination that the petitioners could not use the company's discharge of indebtedness and denied the petitioner's deductions. Petitioners then requested that the Tax Court to review the Commissioner's decision, and the Tax Court granted relief to the petitioners. Later, the Tax Court, upon motion by the Commissioner, reconsidered its decision and held that the shareholders could not use an S corporation's discharge to increase their bases. The Court of Appeals affirmed.

The issue in this case was whether the increase in the taxpayers' corporate bases occurred before or after the taxpayers were required to reduce the S corporation's tax attributes.

The Supreme Court reversed the Court of Appeals, and held that the statute provided that the increase in the taxpayer's corporate bases occurred after the basis adjustment and pass-through.

The Court reasoned that the order of the steps of the pass-through and attribute reduction was important in determining whether petitioners were "deficient when they increased their bases by the discharged debt amount and deducted their losses." First, after reviewing the applicable statute, the Court concluded that the reductions were made after the determination of the tax imposed under the statute. The Court stated that in the case at bar, the petitioners had to "pass through the discharged debt, increase corporate bases, and then deduct their losses, all before any attribute reduction could occur."

Second, the Court looked to the policy concerns regarding the structure of the statute. The concern was that if shareholders were allowed to pass through the discharge of indebtedness as the petitioners did, shareholders would face double taxation. Thus, by application of the statute, the shareholder "would be exempted from paying taxes on the full amount of the discharge of indebtedness, and they would be able to increase bases and deduct their previously suspended losses." The Court reasoned that because the statute permitted taxpayers to benefit from the policy concern, the Court was not going to address the concern further.

Kyllo v. United States
533 U.S. 27, 150 L. Ed. 2d 94

Federal Agents suspected that the Petitioner, Danny Kyllo, was growing marijuana in his Oregon apartment. The Agents knew that Kyllo would need high intensity lamps to grow marijuana indoors. Following up on their suspicions, the Agents used a thermal imaging device to scan the exterior of the petitioner's apartment for infrared radiation. When they detected high levels of radiation, the Agents used the information to secure a search warrant for the petitioner's home. A large amount of marijuana was found, and the petitioner was arrested.

At trial, the court denied the petitioner's motion to suppress the evidence seized from his home. The petitioner entered a conditional guilty plea. The Court of Appeals for the Ninth Circuit affirmed, holding that the petitioner "had shown no subjective expectation of privacy because he had made no attempt to conceal the heat escaping from his home." The petitioner appealed to the United States Supreme Court.

The issue in this case was whether the thermal scan of the petitioner's apartment constituted a "search" within the meaning of the Fourth Amendment, thus requiring a search warrant.

The Court, in a 5-4 decision authored by Justice Scalia, held that: "Where, as here, the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a 'search' and is presumptively unreasonable without a warrant."

The Court began its analysis by retracing the evolution of Fourth Amendment search and seizure jurisprudence. The Court recounted the permissibility of ordinary visual surveillance and the evolution of the plain view doctrine. However, Justice Scalia emphasized the fact that a Fourth Amendment search occurs "when the government violates a subjective expectation of privacy that society recognizes as reasonable." The Court noted that "the present case involves officers on a public street engaged in more than naked surveillance of a home." Vigilant of ever increasing advances in technology, the Court held that: (1) the petitioner had a reasonable expectation of privacy in his home, and (2) the information obtained by the Federal Agents would not otherwise have been obtained without physical intrusion into "a constitutionally protected area."

Legal Services Corp. v. Velaquez
531 U.S. 533, 149 L. Ed. 2d 63

Congress enacted the Legal Services Corporation Act in 1974, which established the Legal Services Corporation, a non-profit corporation that distributes funds appropriated by Congress. These funds go to grantee organizations providing financial support—for proceedings in non-criminal matters—to persons unable to afford legal assistance. One of the conditions imposed by Congress prohibits legal representation funded by Legal Services Corporation money if the representation challenges existing welfare law. This restriction emerged as a part of the Omnibus Consolidated Rescissions and Appropriations Act of 1996. As a result of this restriction, Legal Services Corporation could not accept representation designed to change, or to challenge the validity of the existing welfare laws.

Attorneys from New York City, employed by Legal Services Corporation grantees (among others), sought a preliminary injunction in the United States District Court for the Eastern District of New York to declare the restriction invalid. The District court denied a preliminary injunction, finding that there was no probability of success on the merits, a requirement for a successful preliminary injunction. The United States Court of Appeals for the Second Circuit reversed, and approved an injunction against enforcement of the provision and found the provision in violation of the First Amendment. The Supreme Court granted certiorari.

The issue in this case was whether restrictions by Congress, such as prohibiting the use of Legal Services Corporation funds when the representation involves efforts to amend or otherwise challenge existing welfare law, violated

the First Amendment rights of Legal Services Corporation grantees and their clients.

The United States Supreme Court affirmed the decision of the Second Circuit Court of Appeals and held that the funding restriction prohibiting Legal Services Corporation funds from being used to amend or otherwise challenge the validity of existing welfare laws violated the First Amendment and, thus, was unconstitutional.

The Court reasoned that the Legal Services Corporation program was designed to facilitate private speech and not to promote governmental messages. The attorney is not speaking for the government and, instead, is speaking on behalf of the indigent client. The advice from an attorney to his or her client cannot be classified as governmental speech and, thus, the regulation of private speech occurred in the application of this restriction. Permitting this restriction distorts the attorney-client relationship and attempts to exclude cases Congress finds unacceptable, but are within the province of the courts to hear. "Here, notwithstanding Congress' purpose to confine and limit its program, the restriction operates to insulate current welfare laws from constitutional scrutiny and certain other legal challenges, a condition implicating central First Amendment concerns." The Legal Services Corporation Act funds constitutionally protected expression and the Constitution does not permit confining litigants and attorneys in this manner. Thus, the funding condition was held invalid in that it was a violation of the First Amendment.

New York Times Co. v. Tasini
533 U.S. 483, 150 L. Ed. 2d 500

Publishers contracted with the freelance authors to have their individual article printed in publishers' magazines and newspapers. The authors contended that the contracts did not give consent to allow electronic databases, such as Lexis Nexis, permission to reproduce the article. The publisher's theory was that they licensed the rights to copy and sell the authors' individual articles to Lexis and other electronic databases. Thus, when an individual accessed Lexis or the other electronic databases, the authors' articles appear in isolation from the original collective work from which the articles were originally published. Furthermore, Lexis and the other electronic databases did not reproduce the original magazines and newspapers' formatting such as headline size, page placement, advertisements (next to the articles) and pictures.

The United States District Court for the Southern District of New York, entered summary judgment for defendant-publishers and denied plaintiff-authors' motion for reconsideration. The authors appealed. The United States Court of Appeals for the Second Circuit reversed and entered summary judgment in favor of the authors. The Supreme Court granted writ of certiorari.

The issue in this case was whether the freelance authors' copyrights were infringed because their articles were not a *revision* of the *collective work* that they originally appeared in.

The United States Supreme Court held that the reproduction of the freelance authors' works by the publishers and the electronic databases were in violation of 17 U.S.C. § 201(c) (The Copyright Act), because the electronic databases were not part of the collective work or series of publications by the print publishers. The articles appeared as stand-alones and were not in context with the original collective work.

The Court reasoned that a publisher is permitted to reprint an article by a freelance author in a later edition of the magazine, newspaper or book, but it or a licensee may not revise or reprint it in a new anthology or in an entirely new collection. For example, a publisher can take an article from the 1980 Encyclopedia Britannica and reproduce the article in the 1990 edition of Encyclopedia Britannica. However, the publisher cannot take the same article and publish it in another Encyclopedia or periodical. The publisher does not have the author's permission to reproduce or distribute copies of the article in isolation or within new collective work according to § 201(c).

The Court further reasoned that Lexis and the other electronic databases were not similar to microfiche/film because the articles appeared in isolation from the original publications and the original formatting was not preserved. The electronic databases do not present the author's work as part of a revision of the original collective work and therefore fail the § 201(c) test. The Court suggested that authors and publishers should enter into private contracts that allow for electronic reproduction of the authors' works.

Penry v. Johnson
532 U.S. 782, 150 L. Ed. 2d 9

John Penry was arrested for murdering Pamela Carpenter on October 25, 1979. A Texas jury found Penry guilty of capital murder in 1980 based upon jury instructions to answer three special issues following the applicable statute. The judge did not give the jury instructions to consider mitigating factors, such as Penry's mental retardation. The sentencing jury returned a sentence of death.

The United States Supreme Court, on appeal in *Penry v. Lynaugh*, 492 U.S. 302 (1986) (*Penry I*), held that the jury instructions were violative of Penry's Eighth Amendment rights, because the jury was not instructed to consider mitigating factors. The Court held in *Penry I* that the person imposing the sentence must be able to consider mitigating evidence in imposing a sentence such that it reflects a "reasoned moral response to the defendant's background, character, and crime."

In 1990, a new sentencing jury was convened and, again, Penry was sentenced to death. This time, the judge gave oral instructions to the jury to con-

sider mitigating factors in answering the special issues, but the instructions that accompanied the verdict form made no mention of the mitigating evidence, and the jury failed to fully take into account the mitigating factors. The Texas Court of Criminal Appeals affirmed. *Penry v. State*, 903 S.W.2d 715 (Tex. Crim. App. 1995). The Supreme Court again granted certiorari.

There were two distinct issues in this case. First issue was whether testimony regarding Penry's allegedly dangerous character violated his Fifth Amendment rights. The second issue in this case was whether the jury instructions complied with the holding in *Penry I.*

The Supreme Court held that the psychological testimony regarding Penry's character did not violate his Fifth Amendment Rights; however, the jury instructions failed to comply with *Penry I.*

Penry's first argument on appeal to the Supreme Court was the admission of a report by Dr. Peebles in 1977, stating that Penry's future dangerousness was in violation of his Fifth Amendment right against self-incrimination. Penry claimed this case was analogous to the facts in *Estelle v. Smith* 451 U.S. 454 (1981), where the Court disallowed the admission of a psychiatrist's testimony regarding future dangerousness of the plaintiff under Fifth Amendment grounds. However, Estelle also held that the outcome could have been different if the defendant independently produced such psychiatric testimony. In *Penry*, the Court distinguished Estelle because Penry's mental condition was at issue, and Penry's attorney independently chose Dr. Peebles as the psychiatrist to examine Penry. Furthermore, the Court stated that Estelle was a case unique to its particular facts.

Penry's second argument was that the latest jury instructions were not in accordance with the Court's holding in *Penry I.* The Court accepted this argument because the instructions were confusing to jurors since there was no mention of mitigating evidence on the written instructions such that the jurors did not know how to effectively consider these factors in answering the special issues. Thus, the Court affirmed in part, reversed in part, and remanded the case to the lower court.

PGA Tour v. Martin
532 U.S. 661, 149 L. Ed. 2d 904

PGA Tour Inc. (PGA) sponsors professional golf tournaments. Golf carts are allowed according to the Rules of Golf, with the exception that on professional tours, players must walk the course. This exception is intended to increase the fatigue of the player and add more challenge to a shot. Casey Martin (Martin) is a professional golfer afflicted with Klippel-Trenaunay-Weber Syndrome, which is degenerative circulatory disorder that prevents him from walking golf courses. The disorder constitutes a disability under the Americans with Disabilities Act of 1990 (ADA).

The District Court entered a permanent injunction requiring PGA to permit Martin to use a cart because under Title III, golf courses are public accommodations. The court held that the walking rule was intended to inject fatigue into the skill of shot-making and Martin suffers greater fatigue with the use of a cart than his able-bodied competitors endure from walking and to accommodate Martin would not "fundamentally alter the nature" of the tournaments. The Ninth Circuit Court of Appeals affirmed, concluding that golf courses are places of public accommodation during professional tournaments and permitting Martin to use a cart would not "fundamentally alter the nature" of those tournaments.

This case raised two issues: (1) whether the ADA protected access to professional golf tournaments by a qualified entrant with a disability; and (2) whether a disabled contestant may be denied the use of a golf cart because it would "fundamentally alter the nature" of the tournaments, § 12182(b)(2)(A)(ii), to allow him to ride when all other contestants must walk.

The United States Supreme Court affirmed the Ninth Circuit's holding and held that: (1) Title III of the ADA prohibited PGA from denying Martin equal access to its tours on the basis of his disability; and (2) allowing Martin to use a golf cart would not fundamentally alter the nature of PGA's tournaments.

The Court, through Justice Stevens' opinion, reasoned that the "general rule" under Title III of the ADA states: "No individual shall be discriminated against on the basis of disability in the full and equal enjoyment of the. . . privileges. . . of any place of public accommodation by any person who owns, leases, or operates a place of public accommodation." 42 U.S.C. § 12182(a). A "public accommodation" is defined in terms of extensive categories construed liberally and a "golf course" is listed as a place of public accommodation. § 12181(7). Discrimination is defined as "a failure to make reasonable modifications. . .to accommodate individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such. . .accommodations." § 12182(b)(2)(A)(ii). The use of a golf cart by Martin does not fundamentally alter the nature of PGA's tournament because golf carts are consistent with the fundamental character of golf and the purpose of the rule to inject fatigue into shot-making is satisfied. The Court stated that even with the use of a golf cart, Martin suffers greater fatigue than his able-bodied competitors do by walking. Since allowing Martin to use a cart does not fundamentally alter the nature of the tournaments and the PGA failed to make reasonable modifications to accommodate Martin, this constituted discrimination. Martin, therefore, was discriminated against on the basis of a disability at golf courses, which are a public accommodation leased by the PGA. Because this action constitutes a violation of Title III of the ADA, Martin is afforded protection.

Shaw v. Murphy
532 U.S. 223, 149 L. Ed. 2d 420

Kevin Murphy, a prisoner at the Montana State Prison, served as an "inmate law clerk." Murphy attempted to help Pat Tracy, a fellow prisoner charged with assaulting a correctional officer. Murphy—who was not Tracy's designated law clerk—wrote a letter to Tracy, advising him of his rights. Prison officials intercepted the letter. Murphy, punished for insolence and for interfering with due process hearings, brought a 42 U.S.C. § 1983 action against the prison officials. The substance of this § 1983 action was that the prison officials actions violated Murphys's due process rights, the right of inmates to access the court, and his First Amendment right to provide legal assistance to other inmates.

The District Court granted the prison's motion for summary judgment on all of Murphy's claims. Applying the test in *Turner v. Safley*, 482 U.S. 78 (1987), the court found a "valid, rational connection between the prison inmate correspondence policy and the objectives of prison order, security, and inmate rehabilitation," and dismissed Murphy's First Amendment claim. The Court of Appeals for the Ninth Circuit reversed, finding that inmates have a right to assist other inmates with their legal claims. The Ninth Circuit applied the *Turner* test, but found that the special right to legal assistance tipped the balance in favor of Murphy and prisoner's rights and against the government's interest in smooth prison operation.

The issue on appeal was whether Murphy possessed a First Amendment right to provide legal assistance "that enhances the protections otherwise available under *Turner*."

The Supreme Court reversed the judgment of the Ninth Circuit and held that *Turner* did not permit an increase in constitutional protection whenever a prisoner's communication includes legal advice.

The Court premised its opinion by stating its historic reluctance to intervene in prison operations. It then looked at the test it devised in *Turner* for reviewing prisoners' constitutional claims: "When a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests." The court looks at, *inter alia*, whether there is a "valid, rational connection" between the regulation and the "governmental interest put forward to justify it." While the Ninth Circuit looked at the importance of the right to give legal assistance and balanced that with the prison regulation, the Supreme Court rejected such an approach, holding that the *Turner* test does not "accommodate valuations of content." The Court stated that prison officials are primarily responsible for determining what regulations are necessary for prison operation, and rejected altering the *Turner* test to include more judicial oversight of prisons. Finally, the Court stated that granting prisoners' legal advice special protection could undermine prison officials' control over their prisons.

United States v. Hatter
532 U.S. 557, 149 L. Ed. 2d 820

In 1982, Congress extended Medicare to federal employees, which meant that then-sitting federal judges were required to have Medicare taxes withheld from their salaries. In 1983, Congress required all newly hired federal employees to participate in Social Security and permitted, without requiring, almost all (about ninety-six percent) of then-currently employed federal employees to participate in the program. The remaining four percent, including all federal judges, were required to participate, except that those who contributed to a covered retirement program could modify their participation in a manner that would leave their total payroll deduction unchanged. A number of federal judges filed suit, arguing that the laws violated the Compensation Clause, which guarantees federal judges a compensation that shall not be diminished during their continuation in office.

The Court of Federal Claims ruled against the judges, but the Federal Circuit reversed. On certiorari, some of the Justices were disqualified and the Supreme Court failed to find a quorum, thus affirming the Federal Circuit's judgment with the same effect as upon affirmance by an equally divided court. *United States v. Hatter*, 519 U.S. 801 (1996). On remand, the Court of Federal Claims found that the judges' Medicare claims were barred by the six-year statute of limitations, and that in any event, a subsequent judicial salary increase made any damages minimal. The Federal Circuit reversed, holding that the Compensation Clause prevented the Government from collecting Medicare and Social Security taxes from the judges, and that the 1984 pay increase did not remedy the violation. Given the relevant statutory provisions and the passage of time, a quorum became available to consider the questions presented and the Court granted certiorari.

The issues presented in this case were: (1) whether Congress violated the Compensation Clause when it extended the Medicare and Social Security taxes to the salaries of then-sitting federal judges; and (2) if so, whether any such violation ended when Congress subsequently increased the salaries of all federal judges by an amount greater than the new taxes.

The Supreme Court held that the Compensation Clause prevents the Government from collecting Social Security taxes, but not Medicare taxes, from federal judges who held office before Congress extended those taxes to federal employees. The Compensation Clause violation was not cured by the 1984 pay increase for federal judges.

The Court reasoned that although the Compensation Clause prohibits taxation that singles out judges for specially unfavorable treatment, it does not forbid Congress to enact a law imposing a nondiscriminatory tax upon judges and other citizens. Thus, the Medicare tax is constitutional. However, because the Social Security tax rules effectively singled out then-sitting federal judges for

unfavorable treatment, the Compensation Clause forbids the application of the Social Security tax to those judges. In practice, the Social Security tax allowed nearly every then-sitting federal employee to avoid the tax, except federal judges. The new law also imposed a substantial cost on federal judges with little or no expected benefit for most of them. In respect to the pay increase, the context in which the increase took place reveals nothing to suggest that it was to remedy the losses sustained by the pre-1983 judges, rather the increase was more likely given to counter inflation.

Whitman v. American Trucking Ass'ns
531 U.S. 457, 149 L. Ed. 2d 1

The 1990 amendments to the Clean Air Act (CAA) set forth comprehensive plan for reducing ozone levels by revising national ambient air quality standards (NAAQS) for ozone and particulate matter. CAA has the Environmental Protection Agency (EPA) set air quality criteria at five-year intervals. In 1997, such standards were revised. American Trucking Associations (ATA), other private companies, and the states of Michigan, Ohio, and West Virginia challenged the new standards.

The Court of Appeals for the District of Columbia Circuit heard the case, pursuant to 42 U.S.C. § 7607 (b)(1) and held for the ATA in part and against them in part. EPA requested a petition for rehearing. The petition was granted, but the panel rejected the EPA's new arguments. The Court of Appeals denied the EPA's request for a rehearing en banc. The Administrator and the EPA both petitioned the Supreme Court for the review of three questions. Respondents cross-petitioned for review of one additional question. The Supreme Court granted certiorari on both petitions and consolidated the cases.

The Supreme Court addressed four issues in this case: (1) whether § 109(b)(1) of the CAA delegates legislative power to the Administrator of the EPA; (2) whether the Administrator may consider the costs of implementation in setting NAAQS under § 109(b)(1); (3) whether the Court of Appeals had jurisdiction to review the EPA's interpretation of Part D of Title I of the CAA (in terms of implementing the revised ozone NAAQS); and (4) if the Court of Appeals had jurisdiction, whether the EPA's interpretation of that part was permissible.

The Court held that: (1) the EPA does not have a proper delegation of legislative power under § 109(b)(1); (2) the EPA Administrator is not permitted to consider implementation costs in setting NAAQS under § 109(b)(1); (3) the Court of Appeals does have jurisdiction over the implementation issue under the CAA; and (4) the EPA's manner and policy in implementation is unlawful.

The Court based its decisions of four distinct principles. First, the Court addressed the constitutional delegation doctrine. "In a delegation challenge, the constitutional question is whether the statute has delegated legislative power to

the agency." The degree of discretion that an agency has which can be deemed acceptable varies along with the scope of the power given to the agency by Congress. The EPA tried to cure this unlawful delegation by curbing its own power by using a limited construction of the statute. The Court found that the limits that the statute puts on the EPA's own discretion have been held as a violation in other precedents and is impermissible.

Second, the Court addressed the matter of costs. The Court held previously that economic considerations pay no part in the promulgation of ambient air quality standards under the CAA. (*Lead Industries v. Envtl. Prot. Agency*, 449 U.S. 1042 (1980)). Section 109(b)(1) allows the EPA to set air quality standards which are needed to protect the public health. All the statute allows the EPA to do is to identify the maximum airborne pollutants that the public health can tolerate, decrease such to an adequate margin of safety and set the standard for that level. The CAA bars the EPA from looking at the costs of setting their air quality standards because the CAA gives no explicit permission to the EPA to do so; they are limited to the duties explained above.

Third, the Court reviewed the Court of Appeals jurisdiction. The lower court had the power of judicial review over the EPA's implementation policy because the EPA had finalized its plans for setting air quality standards and the lawfulness of the EPA's implementation plans was ripe. The Supreme Court reasoned that its review will not interfere with EPA administrative action because the EPA had already finalized the implementation issue. Judicial review could be obtained because the EPA made a final determination of its standards, which constitute final agency action subject to judicial review.

Lastly, the Court looked at EPA implementation. The Court found part of the statute ambiguous, therefore, the Court must defer to a reasonable interpretation made by the administrator of an agency. *Chevron v. Natural Resources Def. Council*, 467 U.S. 837 (1984). Notwithstanding this deference, the Court found that the agency's interpretation of the statute was an abuse of its discretion. The statute is ambiguous between the interaction of two parts. If the Court were to defer to the EPA's unreasonable interpretation, it would render Subpart two's restrictions on the EPA void once Subpart one (a new ozone NAAQS) had been decided upon. Thus, the Court held that the new standards and interactions between the statute go beyond reasonable interpretation. Therefore, the EPA's implementation policy is unlawful, and it was remanded to the EPA to develop a reasonable implementation policy.

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