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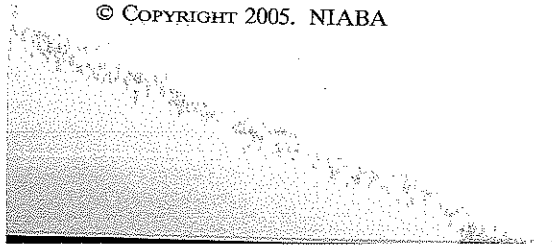

Efficiency, Economic Dynamics, and Climate Change: A Critical Look at the NeoClassical Paradigm for Environmental Law.

DAVID M. DRIESEN† & CHARLES A.S. HALL††

I. INTRODUCTION

The soaring cost of medicine[1] should reinforce the old adage that an ounce of prevention is worth a pound of cure. Yet, in recent years, environmental law, which seeks to prevent death, serious illness, and ecological destruction has become noticeably less vigorous than in the past, especially on the federal level.[2] Perhaps the clearest example of this anemia involves the United States' decision to do nothing serious about climate change, in spite of a scientific consensus that changes in the Earth's climate will likely produce a spread of infectious diseases, sea level rise inundating coastal areas, drought in regions of the world already facing widespread starvation, and destruction of ecosystems.[3] This decline in environmental protection owes much to the dominance of efficiency-based concepts in law and economics.[4] This article explains why these concepts are ill-suited to environmental problems and sets out a new theory that

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1. *See* Stephen Heffler, Health Care Spending Projections for 2002-2012 (2003), *available at* http://www.healthaffairs.org/WebExclusives/Heffler_Web_Excl_020703.htm (last visited on Sept. 24, 2003).

2. *See, e.g.*, Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Baseline Emissions Determination, Actual-to-Future-Actual Methodology, Plantwide Applicability Limitations, Clean Units, Pollution Control Projects, pt. III, 67 Fed. Reg. 80,186 (Dec. 31, 2002) (gutting new source review program under the Clean Air Act); STUMBLING TOWARD SUSTAINABILITY (John C. Dernbach ed., 2002) (reviewing U.S. failure to comply fully with Agenda 21); William Snape III & John M. Carter II, *Weakening NEPA: How the Bush Administration Uses the Judicial System to Weaken Environmental Protection*, 33 ENVTL. L. REP. 10682 (ENVTL. L. INST.) (2003); Richard J. Lazarus, *A Different Kind of Republican Moment in Environmental Law*, 87 MINN. L. REV. 999, 1006-07 (2003) (discussing how George W. Bush has weakened environmental law); ROBERT PERKS & GREGORY WETSTONE, REWRITING THE RULES: THE BUSH ADMINISTRATION'S ASSAULT ON THE ENVIRONMENT 24-29 (2002), *available at* http://www.nrdc.org/legislation/ rollbacks/rr2004.pdf (discussing the role of OMB review).

3. *See* David M. Driesen, *Thirty Years of International Environmental Law: A Retrospective and a Plea for Reinvigoration*, 30 SYRACUSE J. INT'L L. & COM. 353, 361-62 (2003) (President Bush repudiated the Kyoto Protocol); INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, THE REGIONAL IMPACTS OF CLIMATE CHANGE (IPCC): AN ASSESSMENT OF VULNERABILITIES 2-15 (J.T. Houghton et al. eds., 1996) (discussing likely impacts); LYNNE T. EDGERTON, THE RISING TIDE: GLOBAL WARMING AND WORLD SEA LEVELS (1991).

4. *See* DAVID M. DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW 27-31, 36-43 (2003) (discussing the effects of CBA and free trade as manifestations of efficiency-based thinking).

better copes with the underlying dynamics and uncertainties that characterize most significant environmental problems. We refer to this theory as the economic dynamic theory of environmental law. The economic dynamic theory employs precise analysis of incentives to explain change over time. Our hope is that this theory may serve as a replacement for efficiency-based theories that currently dominate environmental policy and economic analysis.[5] This theory complements analysis criticizing the failure of neoclassical economics to adequately take natural resources' role in production and consumption into account.[6]

Economic dynamic analysis of environmental law performs several functions. First, it provides a foundation for critiquing efficiency-based regulatory reform recommendations. Second, it reshapes our understanding of the most important characteristics of environmental law and policy and therefore changes analysis of environmental law and policy. Third, it changes the questions analysts focus upon in contemplating environmental law reform, inviting a focus on how to reshape the dynamics that influence long-term success. Fourth, it enhances analytical precision, which also leads to new reform recommendations.[7] This Article will employ the economic dynamics theory to provide a critique of several efficiency-based recommendations for environmental law and then show how the theory raises new questions about environmental policy and law.

The first substantive Part of this article explains the role that neoclassical concepts of economic efficiency has played in environmental law. The second Part develops criticisms of economic efficiency based on its failure to take into account the role of natural resources and economic dynamics. The third Part explains how economic theory aids critique of efficiency-based remedies and offers alternative avenues to improving environmental law and policy. The fourth Part applies these ideas to climate change.

II. THE EFFICIENCY LENS

Many economists and policy experts view environmental policy through a neoclassical economic efficiency lens.[8] The use of this lens has led to an increased reliance upon cost-benefit analysis (CBA), environmental benefit trading, and free trade-based restraints upon efforts to address international environmental problems.[9]

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5. The economic dynamics theory is spelled out at greater length in DRIESEN, THE ECONOMIC DYNAMICS OF ENVIRONMENTAL LAW 36-43, *supra* note 4.

6. *See* Charles A.S. Hall et. al., *The Need to Reintegrate the Natural Sciences and Economics*, 51 BIOSCIENCE 663 (2001).

7. *See* DRIESEN, *supra* note 4, at 10-11.

8. *Id.* at 1.

9. *Id.* at 15-72 (discussing and critiquing these trends).

A. COST-BENEFIT ANALYSIS

Economists like CBA of environmental regulation, because they believe that it helps make regulation better conform to neoclassical ideals of allocative efficiency.[10] A project is allocatively efficient if its benefits match its costs.[11] This efficiency idea comes from a model of free markets that assumes that buyers pay only as much for a good as it is worth to the purchaser. Economists implicitly analyze regulation preventing harms as the purchase of a good, and assume that the regulator should pay no more than the good (environmental quality) is worth to the public consumers of clean air, water, and land.[12] They treat the environment like a commodity, rather than as a system of life upon which we depend.

While most of the environmental statutes aim to protect public health and the environment, policy-makers have increased reliance upon CBA in recent years. Presidents Reagan, Bush (Sr.), and Clinton promulgated executive orders calling for more CBA and Congress ratified these orders in 1995.[13] Thus, CBA has become influential in establishing the goals of environmental regulation.[14]

CBA depends upon quantifying the harms regulations avoid (the benefits of avoided death, illness, and ecological destruction) in dollar terms and projecting future costs.[15] Science rarely permits reasonably precise estimates of the amount of health or environmental damage a particular regulation will avoid.[16] In order to facilitate comparison of avoided harm with costs, economists ascribe

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10. *See generally* E.J. MISHAN, COST-BENEFIT ANALYSIS (1982).

11. *See* JOHN GOWDY & SABINE O'HARA, ECONOMIC THEORY FOR ENVIRONMENTALISTS 104-06 (1995).

12. *See* David M. Driesen, *The Societal Cost of Environmental Regulation: Beyond Administrative Cost-Benefit Analysis,* 24 ECOLOGY L.Q. 545, 578-79 (1997).

13. *See* Exec. Order No. 12,291, 3 C.F.R. 127 (1982), *reprinted in* 5 U.S.C. § 601 app. at 431-34 (1982); Exec. Order No. 12,866, 3 C.F.R. 638-49 (1993), *reprinted in* 5 U.S.C. § 601 (West Supp. 1995) (issued by President Clinton and repealing President Reagan's Executive Order Number 12,291); The Unfunded Mandates Reform Act, Pub. L. No. 104-4, § 202(a).

14. *See* Driesen, *supra* note 12, at 564 (CBA influences goal setting, not the choice of the most cost effective means of achieving a given goal).

15. *See* Frank Ackerman & Lisa Heinzerling, *Pricing the Priceless: Cost-Benefit Analysis of Environmental Protection,* 150 U. PA. L. REV. 1553, 1553 (2002) (CBA requires reduction of benefits into dollar terms) [hereinafter Ackerman & Heinzerling, *Pricing Environmental Protection*].

16. *See* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation,* 95 COLUM. L. REV. 1613, 1650-73 (1995) (discussing the many sources of uncertainty); Donald T. Hornstein, *Reclaiming Environmental Law: A Normative Critique of Comparative Risk Analysis,* 92 COLUM. L. REV. 562, 572 (1992) (the National Academy of Sciences has identified 50 "inference options," where a policy decision must be made to extrapolate a risk assessment from limited data). *See, e.g.* Cass Sunstein, *The Arithmetic of Arsenic,* 90 GEO. L.J. 2255, 2267-68 (2002); Thomas O. McGarity, *Professor Sunstein's Fuzzy Math,* 90 GEO. L.J. 2341, 2348 (2002) (poor understanding of carcinogenesis leads to great uncertainties in extrapolations from test data).

dollar values to consequences like death and illness.[17] The valuation methodologies needed to do this involve numerous assumptions,[18] which evoke controversy.

Rather than leading to a series of finely balanced decisions, CBA has tended to prevent administrative agencies from making *any* decisions.[19] It has thoroughly paralyzed implementation of the Toxic Substances Control Act and the Federal Insecticide Fungicide and Rodenticide Act, the two federal environmental statutes that rely upon CBA most heavily.[20] A major problem involved government's inability to quantify even well understood known dangers. A court, for example, rejected an Environmental Protection Agency (EPA) ban on asbestos, in part because EPA put too much emphasis on then unquantifiable health damage from asbestosis.[21] We now know that this illness caused so much damage that compensation of victims bankrupted the asbestos industry.[22] Calculation of the value of harms a regulation could avoid tends to paralyze agencies, because substantial uncertainties always bedevil such accounting.[23] Scientists can tell us that climate change will probably spread tropical diseases; it does not follow that they can tell us precisely which diseases or how many people will ultimately die.

B. ENVIRONMENTAL BENEFIT TRADING

Economists have also recommended environmental benefit trading programs as a means of enhancing the cost effectiveness of environmental programs, another type of efficiency.[24] These programs allow polluters to forego required environmental improvements if they pay somebody else to make equivalent improvements in their stead.[25] This allows polluters, for example, to redistribute

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17. *See* Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Prospective*, 68 U. CHI. L. REV. 1137, 1144 (2001) (explaining that CBA reduces advantages and disadvantages of a decision to a "numerical metric").

18. *See* Lisa Heinzerling, *Environmental Law and the Present Future*, 87 GEO. L.J. 2025, 2069-73 (1999) (discussing policy issues in converting deaths to a dollar value); Daniel A. Farber & Paul A. Hemmersbaugh, *The Shadow of the Future: Discount Rates, Later Generations, and the Environment*, 46 VAND. L. REV. 267, 278-89 (1993) (discussing policy choices in discount rates).

19. *See* Driesen, *supra* note 12, at 602.

20. *See* McGarity, *supra* note 16, at 2343 (explaining that CBA has "thoroughly stymied" FIFRA and TSCA).

21. *See* Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1219 (5th Cir. 1991) (refusing to give unquantified benefits from asbestos weight); Driesen, *supra* note 12, at 597 n.226 (noting that asbestos was the principle unquantified benefit at stake). *But see* Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 541-49 (1997) (critiquing *Corrosion Proof Fittings*).

22. *See* Driesen, *supra* note 12, at 596.

23. *See id.* at 601-04.

24. *See* David M. Driesen, *Is Emissions Trading an Economic Incentive Program?: Replacing the Command and Control/Economic Incentive Dichotomy*, 55 WASH. & LEE L. REV. 289, 311-27 (1998) (discussing the cost effectiveness of emissions trading regulation).

25. *Id.*

their pollution control obligations to achieve required reductions at the lowest possible cost. These programs have come to dominate United States policy.[26] This involves the use of efficiency, in the sense of cost effectiveness, to guide choices about the means of environmental protection.[27] While some of these programs have proven successful, the popularity of "market mechanisms" enhancing regulatory "efficiency" has led to overuse of the technique and design failures.[28] When states have applied these programs to unmonitored pollutants, for example, they have often failed miserably in achieving environmental goals.[29]

C. FREE TRADE

Finally, in the international realm, economists advocate free trade to encourage efficient production of goods and services.[30] The free trade regime has expanded its sphere of influence in recent years and begun to act as a restraint on some environmental regulation.[31] International trade tribunals have declared import restrictions protecting dolphins and sea turtles illegal under the General Agreement on Tariffs and Trade,[32] restrictions on beef produced by slaughtering cattle fed with carcinogenic growth hormones contrary to another trade agreement,[33] and, most recently, restrictions on transport of banned

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26. *See id.* at 291-92 (providing examples of use of trading programs).

27. *See* Driesen, *supra* note 12, at 564 (distinguishing between allocative efficient goal setting and cost effectiveness).

28. *See, e.g.*, Approval and Promulgation of Air Quality Implementation Plans; New Jersey; Open Market Emissions Trading Program, 67 Fed. Reg. 64,347 (Oct. 18, 2002) (announcing EPA decision not to proceed with processing New Jersey SIP revisions, because New Jersey had found such serious problems in its emissions trading program that it was planning to abandon it); Richard Toshiyuki Drury et al., *Pollution Trading and Environmental Injustice: Los Angeles' Failed Experiment in Air Quality Policy*, 9 DUKE ENVTL. L. & POL'Y F. 231, 258-63 (1999) (discussing fraud in the estimation of credits and debits that systematically undermines environmental performance).

29. *See* Driesen, *supra* note 24, at 311-19 (contrasting well-monitored and poorly monitored programs).

30. *See* Alan O. Sykes, *Comparative Advantage and the Normative Economics of International Trade Policy*, 1 J. INT'L ECON. L. 49 (1998) (explaining the economic justification for free trade in terms of comparative advantage). The term "free trade" itself, however, is ambiguous. *See* David M. Driesen, *What is Free Trade: The Real Issue Lurking Behind the Trade and Environment Debate*, 41 VA. J. INT'L L. 279 (2001).

31. *See* Driesen, *supra* note 30, at 283; Robert E. Hudec, *The New WTO Dispute Settlement Procedure: An Overview of the First Three Years*, 8 MINN. J. GLOBAL TRADE 1, 21 (growth in legal obligations under the WTO-administered trade agreements explains "substantially" all of the increased case for dispute settlement tribunals).

32. WTO Appellate Body Report on U.S. - Import Prohibition of Certain Shrimp and Shrimp Products, WT/DS58/AB/R (Oct. 12, 1998) 33 I.L.M. 118 n.8; GATT Dispute Settlement Panel Report on U.S. - Restrictions on Imports of Tuna, July 1994, 33 I.L.M. 839, 889-90, 894, 898-99 (Jun. 16, 1994); GATT Dispute Settlement Panel Report on U.S. - Restrictions on Imports of Tuna, September 3, 1991, GATT B.I.S.D. (39th Supp.) at 155, 195, 200-01, 205 (1993).

33. WTO Appellate Body Report on E.C. - Measures Concerning Meat and Meat Products (Hormones), WTO Doc. WT/DS48/AB/R, WT/DS26/AB/R (Jan. 16, 1998).

polychlorinated biphenyls and hazardous waste facilities contrary to the North American Free Trade Agreement.[34] This use of free trade agreements to limit efforts to protect public health and the environment provides an example of efficiency ideas blocking efforts to address international environmental problems.[35]

III. NEOCLASSICAL EFFICIENCY'S FLAWS

Efficiency (and neoclassical economics in general) has at least two important and related flaws. First, it fails to adequately account for the role natural resources play in production and consumption.[36] Second, it fails to adequately account for change over time.[37]

A. FAILURE TO TAKE NATURAL RESOURCES INTO ACCOUNT

Natural scientists and some economists have questioned the notion that the neoclassical efficiency model provides a good means of measuring the desirability of market or non-market transactions.[38] They point out that allocative efficiency considers only optimal allocation of fixed resources.[39] Neoclassical economics lacks a concept of optimal scale for the economy as a whole.[40] It lacks any notion that limits exist to the desirability of growth in the use of finite natural resources as inputs or as pollution sinks. Yet, production always relies upon use of natural resources as inputs and as sinks for waste.[41] Increasingly,

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34. Metalclad Corp. v. United Mexican States, Award, ICSID Case No. ARB(AF)/97/1, para. 131 (Aug. 30, 2000), 16 ICSID Rev.: FOREIGN INVEST. L.J. 168, 202 (2001), *available at* http://www.worldbank.org/icsid/cases/mm-award-e.pdf; S.D. Myers, Inc. v. Canada, partial award, (Nov.13, 2000), http://www.dfait-maeci.gc.ca/tna-nac/documents/myersvcanadapartialaward_final_13-11-00.pdf. Currently, the NAFTA cases may pose the greatest threat to environmental protection. *See generally* Vicki Been & Joel C. Beauvais, *The Global Fifth Amendment? NAFTA's Investment Protections and the Misguided Quest for an International "Regulatory Takings" Doctrine*, 78 N.Y.U. L. REV. 30 (2003).

35. *See* DRIESEN, *supra* note 4, at 47.

36. *See* Hall et al., *supra* note 6.

37. *See* DRIESEN, *supra* note 4, at 44.

38. *See, e.g.*, Hall et al., *supra* note 6 (arguing that neoclassical efficiency concepts neglect the role of natural resources); Charles A.S. Hall et al., *Is the Argentine National Economy Being Destroyed by the Department of Economics of the University of Chicago?* ADVANCES IN ENERGY STUDIES: EXPLORING SUPPLIES, CONSTRAINTS, AND STRATEGIES (S. Ugliati et al., eds., 2001) (questioning the value of neoclassical macro-economic prescriptions for Argentina); *Twenty-five Years of Industrial Development: A Study of Resource Use Rates and Macro-efficiency Indicators for Five Asian Countries*, 4 ENVTL. SCI. & POL'Y 319 (2001) (critically examining the "growth prescription" for Asia using various indicia of biophysical, rather than neoclassical economic, efficiency); QUANTIFYING SUSTAINABLE DEVELOPMENT: THE FUTURE OF TROPICAL ECONOMIES (Charles A.S. Hall ed., 2000) (examining biophysical efficiency and sustainable development in Latin America); HERMAN DALY, BEYOND GROWTH: THE ECONOMICS OF SUSTAINABLE DEVELOPMENT (1996).

39. *See* DRIESEN, *supra* note 4, at 44.

40. *See generally* DALY, *supra* note 38.

41. *See* Hall et al., *supra* note 6, at 666-67 (calling for a model that recognizes the biophysical inputs into production processes and the flow of waste into the environment).

the limits in supplies of natural resources have become an important constraint upon production. For example, the supply of fish provides an important constraint on the production of this important food source, with technology having ceased to be the most significant limiting factor. The fundamental challenge for environmental law involves avoiding depletion of the resource base upon which we depend for our very lives. Several scientific analysts have emphasized the importance of limits to the supply of cheap abundant energy that have, in the past, served as the basis for much economic growth.[42] They argue that prices do not reflect the scarcity of these resources and therefore serve as poor guides to optimal allocation of resources.[43]

Some economists argue that prices will inevitably rise when natural resources become scarce, so that prices adequately reflect resource scarcity.[44] This claim, however, neglects major problems. First, long before a particular resource is scarce in an absolute sense, its harvesting may cause major damage.[45] For example, a timber company can clear cut an entire forest without making wood a scarce commodity worldwide, as long as other forests continue to exist. Clear-cutting may destroy that particular forest's ecosystem, eliminating many species of plants and animals. Second, populations of plants or animals often "crash suddenly and unexpectedly."[46] Fish populations, for example, have disappeared without prices doing a thing to save them. Third, rising prices may increase incentives for producers to destroy natural resources.[47]

Because of the laws of thermodynamics, increased resource use over time diminishes the stock of useful resources that can sustain wealth.[48] For the second law of thermodynamics teaches that production converts low-entropy resources into high-entropy waste, with less economic potential.[49] Thus, over time, use of nonrenewable resources or harvesting of renewable resources at rates exceeding their ability to renew themselves should lead to reductions in wealth.[50] Efficiency and increasing the geographic reach of resource exploita-

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42. *Id.* at 667-70.

43. *See id.* at 670.

44. *See* MICHAEL S. COMMON, SUSTAINABILITY AND POLICY: LIMITS TO ECONOMICS 94-96 (1995).

45. DRIESEN, *supra* note 4, at 100.

46. *Id.* at 101.

47. *See* SARAH FITZGERALD, INTERNATIONAL WILDLIFE TRADE: WHOSE BUSINESS IS IT? 3-8 (1989) (discussing how rising prices can encourage poaching of endangered species); Quirin Shiermeier, *Fisheries Science: How Many more Fish in the Sea?*, 419 NATURE 662 (2002); Ransom A. Myers & Boris Worm, *Rapid Worldwide Depletion of Predatory Fish Communities*, 423 NATURE 280 (2003).

48. *See* Hall et al., *supra* note 6, at 664-66; NICHOLAS GEORGESCU-ROEGEN, THE ENTROPY LAW AND THE ECONOMIC PROCESS (1971).

49. DALY, *supra* note 38, at 65, 194-95; GEORGESCU-ROGEN, *supra* note 48; CHARLES A.S. HALL ET AL., ENERGY AND RESOURCE QUALITY: THE ECOLOGY OF ECONOMIC PROCESS (1986).

50. *See* Herman E. Daly, *Sustainable Growth: An Impossibility Theorem, in* VALUING THE EARTH: ECONOMICS, ECOLOGY, ETHICS 267, 271 (Herman E. Daly & Kenneth N. Townsend, eds. 1992).

tion can delay experiencing the onset of these constraints. Yet, ultimately, these constraints provide serious long term challenges to our prosperity.[51]

Most economists recognize that market transactions fail to internalize ecological costs.[52] They propose to address this by pricing the "benefits" of environmental regulation through cost-benefit analysis and then developing taxes or regulations that force polluters to internalize these costs.[53] While the ideas of optimal scale and related ideas of sustainable development cast doubt on the value of efficiency, they provide only the beginnings of a critique of the regulatory uses of efficiency ideas.

B. ECONOMIC DYNAMIC CRITIQUE OF EFFICIENCY

The economic dynamic theory of environmental law carries the natural science critique of efficiency a step further. It shows that prices, and hence, efficiency-based remedies, also fail to take into account the dynamics of human interaction with ecosystems that produce significant changes over time. In particular, rising consumption and population imply that stress on the ecosystem tends to increase over time.[54] An efficiency-based approach to environmental protection overlooks this dynamic of change over time, and employs an inadequate static transaction-based approach to environmental protection. Economics defines efficiency in static terms, as the efficient allocation of resources for a given technological state.[55] But the world is not static; it changes constantly and, in some ways, in a predictable direction.[56]

We can now generally describe the economic dynamics of environmental law. An observable and predictable economic dynamic tends to lessen environmental quality over time.[57] Any corporation or individual can realize a profit by converting a natural resource into a product consumable by homo-sapiens.[58] Hence, the free market economy creates a continuous incentive to deploy cheap environmentally-destructive innovations to advance the project of profiting from activities meeting human material needs, desires, and even whims.[59] Indeed, through advertising, producers encourage expanding material desires over

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51. *See generally* Douglas A. Kysar, *Sustainability, Distribution, and the Macroeconomic Analysis of Law*, 43 B.C. L. REV. 1 (2001) (arguing that the conventional understanding of the economic process rests on a flawed presumption of an unlimited supply and unlimited capacity of the ecological superstructure); Driesen, *supra* note 14, at 571-73 (arguing that CBA does not serve the goal of sustainability); CHARLES PERRINGS, ECONOMY AND ENVIRONMENT: A THEORETICAL ESSAY ON THE INTERDEPENDENCE OF ECONOMIC AND ENVIRONMENTAL SYSTEMS (1987).

52. *See* Driesen, *supra* note 12, at 553.

53. *Id.*

54. *See* DRIESEN, *supra* note 4, at 45-46.

55. *See id.* at 4.

56. *See id.* at 216.

57. *Id.* at 9.

58. *Id.*

59. *Id.*

time, because expanding materialism offers a source of profit.[60] Population increases and human desires to have more material possessions accelerate this tendency to increase environment-threatening resource use year after year.[61] Although the free market provides significant incentives to innovate to create more goods, the free market provides no strong continuous incentive to create and deploy innovations that only improve environmental quality.[62] The free market encourages SUVs, but does precious little to encourage the development of environmentally-friendly automobiles.[63] The free market encourages entrepreneurial risk-taking motivated by the prospect of getting rich by satisfying peoples' desires for more stuff, but offers precious little incentive for such risk taking on behalf of the environment.[64]

The continuous possibility of profit from activities that harm the environment tends to limit government efforts to protect the air, water, and land.[65] People who make profits from enterprises that degrade the environment acquire the riches needed to hire lawyers and other lobbyists to limit government attempts to preserve the environment.[66] And all people, even those who do not profit from environmental destruction, have an economic incentive to favor tax cuts, which, of course, limit government's administrative capacity.[67] Over time, these tendencies have an enormous impact.[68]

This description differs from standard descriptions of environmental economics, because it focuses upon the macro-economic picture, the general shape of economically-induced change over time. This description eschews a transaction-specific approach. It concerns itself with the rate of change, the calculus, not the math, of economic impact. It concerns itself, in part, with how many decisions private companies might make to degrade the environment and how many countervailing decisions government might make over time. Because the free market is less centralized than the government (federalism notwithstanding), private companies can collectively make many potentially environmentally destructive decisions over time. Relatively centralized government will tend to make relatively few countervailing public decisions.[69] Because of this dynamic, long-term environmental degradation will prove very difficult to avoid.[70]

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60. DRIESEN, *supra* note 4, at 9.
61. *Id.* at 9. *See* Charles A.S. Hall et al., *The Environmental Consequences of Having a Baby in the United States,* 15 POPULATION & ENV'T: A JOURNAL OF INTERDISCIPLINARY STUDIES 505 (1994).
62. DRIESEN, *supra* note 4, at 9.
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.*
67. *Id.* at 9-10.
68. *Id.* at 10.
69. DRIESEN, *supra* note 4, at 10.
70. *Id.* at 9-10.

This economic dynamic description follows from theories of institutional economics that mirror, in some respects, the idea of adaptive management in ecology. Of particular relevance to the economic dynamics of law, Douglas North focuses upon an idea of "adaptive efficiency," an aid to understanding the rules that shape economic evolution over time.[71] Adaptive efficiency concerns itself with the ability of a society to acquire knowledge, to experiment, and to solve problems creatively.[72] Under conditions of uncertainty, North claims, nobody knows the correct answer to the problems they confront, and therefore nobody knows precisely how to maximize profits.[73] Adaptive efficiency maximizes, not present value, but future choice under conditions of uncertainty.[74] Such an approach has special virtues for irreversible problems like climate change. We do not know how to quantify climate change's effects, but we do know that we cannot reverse the effects of having long-lived greenhouse gases in the atmosphere once we learn precisely how severe the impacts of warmer temperatures will prove.[75] Adaptive efficiency induces experiments with new methods and provides feedback mechanisms to allow for post-hoc correction of errors.[76]

The economic dynamic theory calls into question the tacit, but influential assumption that static efficiency merits the obsessive attention the academy has bestowed upon it. After all, many economists claim that technical progress, which reflects economic dynamics, has provided a larger contribution to the growth of industrial economies than the contribution to growth that increased inputs of capital and labor provide.[77] This implies that often inefficient experimentation and creativity play more than a bit role in creating wealth.[78] The problem is that much of this innovation facilitates use of natural capital, which ultimately hastens resource depletion.[79]

Indeed, even that part of economic growth that reflects increased capital and labor inputs responds to economic dynamics, changing demand for products or innovations in production methods. And economists employ an intertemporal economic efficiency framework, not just a static microeconomic allocative effi-

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71. *See* DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE, AND ECONOMIC PERFORMANCE 80 (1990).

72. *Id.*

73. *Id.* at 81.

74. *See id.* at 81, 94.

75. *See, e.g.*, FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING 185 (2004) (discussing one of climate change's irreversible effects) [hereinafter ACKERMAN & HEINZERLING, *Knowing the Price*].

76. *Id.* at 99.

77. MICHAEL COMMON, SUSTAINABILITY AND POLICY: LIMITS TO ECONOMICS 139 (1995); NATIONAL SCIENCE AND TECHNOLOGY COUNCIL, TECHNOLOGY FOR SUSTAINABLE DEVELOPMENT 2 (1994); INVESTING IN INNOVATION: CREATING A RESEARCH AND INNOVATION POLICY THAT WORKS 41 (Lewis M. Branscomb & James H. Keller eds., 1998).

78. ROBIN PAUL MALLOY, LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS 78-99, 137 (2000).

79. *See* Hall et al., *supra* note 6.

ciency framework, to examine the desirable amounts of capital and labor inputs.[80]

Because microeconomic efficiency, by definition, neglects the possibility of technological change, it offers a poor framework for addressing most environmental problems that should create demands for technological change as a means of adaptation. Economists generally address determinants of rates of innovation and economic growth as a macroeconomic topic, rather than as a problem of static microeconomic efficiency.[81] Indeed, static allocative efficiency may contribute less to economic growth than a less efficient allocation would. Economists have debated whether perfect competition aids economic growth, even though all agree that perfect competition is needed for optimum static allocation of services and goods.[82] In theory, perfect competition (a precondition for static efficiency) benefits consumers by lowering prices. These lowered prices, of course, imply less profits for producers than a less competitive market might allow. But lower profit levels may make it difficult to invest in technological innovation. Thus, perfect efficiency may retard economic growth by reducing profits available for investment.[83]

Equilibriums come and go as the economy changes and grows over time.[84] Temporary static equilibriums simply may not have a significant impact in the long run.

If the economy changes drastically and grows in scale, then the relationship of this growth to the earth's carrying capacity, the issue of scale, becomes more important than efficiency, even if one accepts a wealth creation goal.[85] Efficiency, after all, simply allocates fixed resources. It neither augments resources, as economic development does, nor diminishes available resources, as natural resource depletion does.

Much contemporary policy change involves government emulation of the perceived virtues of free markets.[86] Strangely, however, policy analysts have not asked whether the efficiency model reflects the most imitation-worthy features of free markets for public policy purposes. Since most economists do not claim that the free market actually conforms to the model of a perfect market,

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80. *See* DRIESEN, *supra* note 4, at 4.

81. *Id.* at 4.

82. *See* JOHN KENNETH GALBRAITH, AMERICAN CAPITALISM (1952); JOSEPH SHUMPETER, CAPITALISM, SOCIALISM, AND DEMOCRACY (1947); J.S. MILL, IV PRINCIPLES OF POLITICAL ECONOMY 352 (1852); J.B. CLARK, ESSENTIALS OF ECONOMIC THEORY 374 (1907).

83. EDWIN MANSFIELD & ELIZABETH MANSFIELD, THE ECONOMICS OF TECHNICAL CHANGE 104-06 (1993).

84. *See* DRIESEN, *supra* note 4, at 4.

85. *See* QUANTIFYING SUSTAINABLE DEVELOPMENT: THE FUTURE OF TROPICAL ECONOMIES (Charles A.S. Hall ed., 2000).

86. *See* DRIESEN, *supra* note 4, at 2.

selection of the ideal efficiency model seems rather odd.[87] The choice of a perfect efficiency goal allows an analytical concept, rather than a real description of actual free markets, to drive the market emulation project. "Analysis compares the efficiency of regulatory systems to the efficiency of ideal markets, rather than to the performance of real markets. Of course, no system, certainly not the free market, matches the efficiency of this [neoclassical] ideal [market]."[88]

More fundamentally, legal scholars, and even many economists, have expressed doubts about the normative value of efficiency.[89] Many academics, even some employing a static efficiency framework, make rather modest claims for the framework's normative value. They simply argue that efficiency appears relevant to a large variety of problems and therefore offers a potentially fruitful general analytical method.[90]

Still, given the prevalence of academic use of the efficiency framework, it may surprise readers to learn that many thoughtful academics, including many economists, have doubts about the idea that efficiency-based analysis provides a sufficient basis for all policy decisions.[91] Indeed, at a time when the 104th Congress was considering converting the entire regulatory system to CBA-based standard setting, many eminent economists signed a statement recognizing that CBA is "neither necessary nor sufficient for designing sensible public policy."[92] Efficiency-based analysis may not provide a sufficient basis for either sound critique of existing environmental programs or the creation of worthwhile reforms.

The static efficiency used to model markets in goods and services does not focus upon very important perceived free market virtues, that environmental policy might learn from. Surely, many people assume that the free market rewards innovation and changes that improves our lives in some ways.[93] And hero-worship of entrepreneurs suggests that people admire this aspect of free

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87. A. DENNY ELLERMAN ET AL., MARKETS FOR CLEAN AIR: THE U.S. ACID RAIN PROGRAM 312-13 (2000) (noting common market imperfections).

88. *See* DRIESEN, *supra* note 4, at 3.

89. *Id.*

90. *Id.*

91. *See, e.g.*, Jules L. Coleman, *Efficiency, Utility and Wealth Maximization*, 8 HOFSTRA L. REV. 509 (1980); Michael B. Dorff, *Why Welfare Depends Upon Fairness: A Reply to Kaplow and Shavell*, 75 S. CAL. L. REV. 847 (2002); Jules L. Coleman, *The Grounds of Welfare*, 112 YALE L.J. 1511 (2003) (book review); Douglas A. Kysar, *Law, Environment, and Vision*, 97 NW. U. L. REV. 675 (2003); JULES L. COLEMAN, MARKETS, MORALS AND THE LAW (1988); MARK SAGOFF, THE ECONOMY OF THE EARTH (1988); Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003).

92. KENNETH J. ARROW, BENEFIT-COST ANALYSIS IN ENVIRONMENTAL, HEALTH, AND SAFETY REGULATION: A STATEMENT OF PRINCIPLES 3 (1996).

93. DRIESEN, *supra* note 4, at 5.

markets. Economic growth, which, in part, stems from technological change, constitutes the most sought after public benefit from economic systems.[94]

The potential importance of technological change in delivering public benefits suggests that we should pay close attention to change over time. Making technological change central to the analysis introduces a temporal dimension to the study of environmental policy. "The direction of change over time becomes important and questions about cost must include thinking about cost over a long period of time."[95]

One might well want public law to stimulate innovation to better meet public goals. But innovation and growth frequently require experimentation. And experimentation often implies failure and inefficiency.[96] In short, some tension exists between sound economic dynamics and perfect static efficiency.[97]

The insights of institutional economists lie at the base of the description of change over time offered above and provide a micro-economic framework for policy analysis aimed at figuring out how to get better environmental innovation. In particular, institutional economics and organizational theory assume that institutions, such as government agencies and corporations, make decisions using a form of "bounded rationality."[98] Institutional purposes and habits combine with a lack of comprehensive information to constrain the choices that institutions make. Their business and habits may make them more aware of some kinds of information and not others, and more prone to some kinds of actions and not others.

Furthermore, institutional decision-making, which is crucial to environmental policy problems, is "path dependent."[99] Past actions and commitments tend to limit the range of attractive future decisions. For example, assume that a corporation owns a coal-fired power plant. That corporation faces a decision about how to produce more electricity. It will likely focus upon options that involve running its existing plant in different ways, i.e. decisions that continue along a past path.[100] By contrast, a new business deciding how to generate more electricity may decide that building a high-tech windmill makes sense, precisely

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94. DYNAMICS, ECONOMIC GROWTH, AND INTERNATIONAL TRADE 31 (Bjarne S. Jensen & Kar-Yiu Wong, eds., 1997).

95. *See* DRIESEN, *supra* note 4, at 5.

96. *See id.* at 94-97; MALLOY, *supra* note 78, at 85.

97. NORTH, *supra* note 71, at 81.

98. ORGANIZATION THEORY: FROM CHESTER BARNARD TO THE PRESENT AND BEYOND, 106-07, 178-79, 185, 188-91 (Oliver E. Williamson ed., 1995).

99. *See, e.g.*, Adam B. Jaffe, et. al, *Technological Change and the Environment*, at 40-43 (Social Science Research Network, Working Paper No. W7970, 2001), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=252927 (discussing the problem of technological lock-in for environmental technology).

100. DRIESEN, *supra* note 4, at 7.

because the lack of any investment in a coal-fired plant may make this alternative technology the cheapest current option for the new business.[101]

This institutional economic framework provides a basis for a micro-economic analysis of economic incentives, a second pillar (after efficiency) of modern law and economics.[102] While nearly all legal and policy analysts think about economic incentives, that thinking is often haphazard and not focused on problems of achieving suitable change over time.

An economic dynamic analysis of environmental law moves beyond merely noticing what incentives a particular law provides. It instead asks how the incentive provided actually influences the people the incentive acts upon, using the concept of bounded rationality as an analytical tool.[103] The use of this path dependence idea requires the analyst to notice whether the law provides an incentive that the institution (or individual) will actually respond to, given the reality of bounded rationality. For example, the "tax on marriage" may provide an incentive to remain single and lonely. But the incentive may not influence all lonely hearts. Many singles may respond to more fundamental incentives than the economic ones in deciding whether to marry. This possibility of an economic incentive having no effect (and the possibility of unintended consequences) implies a need for detailed study of institutional and individual behavior as part of the analysis of economic incentives.

Too often, legal "analysis" of economic incentives consists of nothing more than just noting what incentive the law creates. But this is insufficient. An economic dynamic analysis of law would take into account non-legal incentives. Thus, the standard observation that stringent standards for new pollution sources provide an incentive to forego modernization of power plants is woefully incomplete. The observed failure to modernize may reflect non-legal incentives that have greater influence on rebuilding.[104] For example, equipment wears out. If precise like-kind replacements disappear as technology advances, polluters may have to modernize regardless of the incentives that stringent standards create.[105] Countervailing market incentives might prove far more influential than legal ones, overriding them in some instances, while rendering them redundant in others.[106] To put it differently, economic dynamic analysis should

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101. ENVIRONMENTAL LAW INSTITUTE, CLEANER POWER: THE BENEFITS AND COSTS OF MOVING FROM COAL GENERATION TO MODERN POWER TECHNOLOGIES, 4-5 (2001).

102. DRIESEN, *supra* note 4, at 2-3.

103. *Id.* at 8.

104. *See id.* at 187-92 (providing a more complete analysis).

105. *See* PSD Review (PSD) and Non-attainment New Source Review (NSR): Equipment Replacement Provision of the Routine Maintenance, Repair and Replacement Exclusion, pt. 3, 68 Fed. Reg. 61,248, 61,253 (Oct. 27, 2003) (indicating that advancing technology may force operators to replace old equipment with more modern equipment when the old equipment wears out).

106. *See, e.g.*, United States v. Ohio Edison Co., 276 F. Supp.2d 829 (E.D. Ohio 2003) (concluding that plant had modernized to replace worn out equipment, but had simply failed to comply with new source review requirements).

carefully account for all of the incentives inside and outside the bounds of "bounded rationality" to notice how law influences (or fails to influence) society.

The theory of economic dynamics not only generates a different description of environmental macroeconomics, and thereby different questions about how to set environmental goals, it also aids critique of legal rules' effects upon innovation and change.[107] This micro-level analysis calls the conventional wisdom regarding regulatory design into question.

An economic dynamic analysis would also build on public choice analysis to better understand possible future directions for law.[108] Public choice analysis predicts that powerful interests have a disproportionate influence upon political decisions and thus upon the content of the law.[109] Noticing whom the free market empowers aids analysis of legal rules.[110]

An economic dynamic analysis also aids identification of the problems free markets will systematically generate over time. Private firms generally consider the costs and benefits to themselves, not abstract societal efficiency, in deciding which innovations they wish to pursue.[111] Recognizing this fundamental limit upon rationality aids prediction of future trends stemming from private decisions about innovation.

This whole economic dynamic, once properly understood, should reshape analysts' thinking about environmental law. The question of how to make each government regulation efficient becomes less important than the question of how to address this larger long-term dynamic. For the economic dynamic analysis above suggests that a limited set of perfectly efficient regulatory decisions will not lead to an efficient economy, since the number of regulatory decisions per unit of time (the calculus) tends to remain smaller than the number of potentially destructive private decisions that may negatively influence the environment.[112]

This theory of economic dynamics should influence both those who believe that efficiency is the proper goal of environmental protection and those who do not. Either way, this dynamic is important.

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107. DRIESEN, *supra* note 4, at 10.

108. *See generally* JERRY L. MASHAW, GREED, CHAOS, & GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW (1997).

109. *See generally* KENNETH J. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (1963); JAMES M. BUCHANAN AND GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962); DENNIS C. MEULLER, PUBLIC CHOICE (1979); ARMATYA K. SEN, COLLECTIVE CHOICE AND SOCIAL WELFARE (1970); Daniel A. Farber and Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873 (1987); Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and 'Empirical' Practice of the Public Choice Movement*, 74 VA. L. REV. 199 (1988).

110. DRIESEN, *supra* note 4, at 8.

111. *Id.*

112. *Id.* at 10.

IV. THE ECONOMIC DYNAMIC THEORY'S IMPLICATIONS FOR REGULATORY REFORM:

Economic dynamic analysis emphasizes change over time, systematic change, and precise analysis of how incentives affect individuals and institutions.[113] This distinguishes it from efficiency-based analysis, which is static, focused on an individual transaction, and frequently employs vague and incomplete analysis of incentives' impacts.

This Part briefly examines some of the questions that economic dynamic analysis raises about cost-benefit analysis and environmental benefit trading. It then provides examples of new directions for reform that an economic dynamic theory reveals.

A. COST-BENEFIT ANALYSIS

Proponents of allocative efficiency tend to advocate increased reliance upon cost-benefit analysis as the means of choosing goals for specific environmental regulations.[114] These proposals have met with some skepticism regarding both the theory and practice of measuring the environmental benefits of regulations.[115] Economic dynamic theory raises some questions about estimates of costs as well, and about the lack of correspondence between optimal regulation and optimal pollution levels.

1. *Compliance Costs*

A regulated party will incur compliance costs after an agency promulgates a regulation (usually several years later).[116] Studies comparing regulatory cost estimates with actual compliance costs show that regulators almost always overestimate costs.[117] This matters a lot, because the regulator pursuing optimal regulatory levels would purchase more emission reductions if the cost were lower.

Economic dynamics help explain why this overestimation occurs so regularly. Even if an agency perfectly estimated the control cost a regulation would

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113. *See id.* at 6-8.

114. *See* David M. Driesen, *Getting Our Priorities Straight: One Strand of the Regulatory Reform Debate*, 31 ENVTL. L. REP. (Envtl. L. Inst.) 10003-04 (2001).

115. *See, e.g.*, Thomas O. McGarity, *The Expanded Debate Over the Future of the Regulatory State*, 63 U. CHI. L. REV. 1463 (1996); Ackerman & Heinzerling, *Pricing Environmental Protection*, *supra* note 15; Lisa Heinzerling & Frank Ackerman, *The Humbugs of the Anti-Regulatory Movement*, 87 CORNELL L. REV. 648 (2002).

116. *See, e.g.*, 42 U.S.C. § 7412(i)(3).

117. THOMAS O. MCGARITY, REINVENTING RATIONALITY: THE ROLE OF REGULATORY ANALYSIS IN THE FEDERAL BUREAUCRACY 131 (1996) [hereinafter, REINVENTING RATIONALITY]; Winston Harrington, Richard D. Morgenstern, and Peter Nelson, *On the Accuracy of Regulatory Cost Estimates*, 19 J. POL'Y ANALYSIS & MGMT. 297 (2000); Thomas O. McGarity & Ruth Ruttenberg, *Counting the Cost of Health, Safety, and Environmental Regulation*, 80 TEX. L. REV. 1997 (2002).

generate prior to promulgation, the very act of enacting the regulation lowers the cost.[118] The pre-promulgation cost estimates represent guesses based on a less-robust market than will exist after an agency promulgates a regulation.[119] Once an agency enacts a rule, regulated companies will expect their managers to find the cheapest possible way of complying in a competitive market.[120] If they use the technologies contemplated at the time of promulgation, they will seek the lowest possible prices through competitive bidding. Furthermore, if they can find a cheaper method of meeting the regulatory target, they will use it.[121] Hence, the equilibrium a cost-benefit criterion tries so hard to capture disappears upon promulgation of a regulation, because of the economic dynamic involved.

The regulatory process creates some economic dynamics that hinder the development of accurate information about costs, even if they were predictable.[122] Regulators rely heavily upon regulated industry for estimates of control costs.[123] Regulated industry has an incentive to exaggerate control costs in order to persuade the regulator to adopt less stringent regulations. CBA would tend to exacerbate this problem by giving erroneous cost estimates greater weight in decision-making.

2. *Optimal Regulation as the Enemy of Optimal Pollution Levels*

A cost-benefit criterion, that the cost of each regulation should equal its benefits, leads to sub-optimal societal pollution levels.[124] Environmental law typically addresses an individual pollution problem, such as urban smog, through a series of regulations demanding reductions from multiple pollution sources because most negative environmental and health effects come from the combined impact of numerous pollution sources.[125] An allocatively "efficient" regulatory system will not produce "optimal pollution" if it fails to address all pollution sources.[126] The combination of a cost-benefit balanced group of regulated pol-

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118. *See* Driesen, *supra* note 12, at 601.

119. *Id.*

120. *Id.*

121. *See* David M. Driesen, *Does Emissions Trading Encourage Innovation?*, 33 ENVTL. L. REP. (Envtl. L. Inst.) 10094, 10101-04 (2003) (explaining that traditional regulation has stimulated innovation when stringent enough to make it worthwhile).

122. *See generally* MCGARITY, *supra* note 117, at 124-64 (discussing the limitations of the regulatory process in spite of bureaucratic efforts).

123. *Id.* at 131-32.

124. *See* DRIESEN, *supra* note 4, at 28-31.

125. *See, e.g.*, 42 U.S.C. §§ 7409, 7410, 7511(a)(2004) (requiring EPA to set national ambient air quality standards and then requiring numerous specific state regulations of pollution sources to meet these goals).

126. *Cf.* Barbara White, *Coase and the Courts: Economics for the Common Man*, 72 IOWA L. REV. 577, 593 (1987) (discussing the cost-benefit relationship in economics in general, stating "[w]ithout full and complete data about the effects throughout the economy, one cannot predict a *priori* which assignment results in the greatest total product.").

lution sources and a group of sources emitting pollution that have no control costs will produce less than the optimal amount of pollution.[127] Today's statutes still leave a number of significant pollution sources, such as non-point water pollution sources, mostly unregulated.[128] So this disjunction between optimal regulation and optimal societal pollution levels is a serious problem, even for those committed to efficiency goals.

Economic dynamic analysis - i.e. an analysis that looks at issues affecting the total number of regulatory decisions over time, not just each decision's efficiency - shows that CBA will increase the number of unregulated polluters, thus exacerbating a serious problem.[129] CBA has produced paralyzing transaction costs.[130] CBA requires an extremely difficult analytical effort and requires enormous resources. Consequently, requirements to conduct CBA make it impossible for agencies to comprehensively address environmental problems. For most of the important problems stem from numerous sources, including small and difficult to regulate, yet cumulatively significant, sources.[131] Pollution continues unabated as the agency conducts the CBA, suffers through judicial review of its analysis, and then responds to a remand based on judicial disagreement with any of the numerous assumptions it must make to employ this ungainly approach. Even if analysis leads to a perfectly efficient decision, the ongoing pollution from sources that agencies never regulate because of the analytic effort will defeat efforts to have the "optimum" amount of pollution.[132]

B. ENVIRONMENTAL BENEFIT TRADING

Efficiency-minded economists have tended to recommend trading programs or taxes as instruments of environmental protection.[133] Since trading has received the most emphasis in practice,[134] this Part will focus on how an eco-

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127. *See generally id.* (one cannot predict that a transaction that is economically efficient with respect to the participants is economically efficient for the society as a whole).

128. For an authoritative summary of the status of non-point source regulation *see* Oliver A. Houck, *The Clean Water Act TMDL Program V: Aftershock and Prelude*, 32 ENVTL. L. REP. (Envtl. L. Inst.) 10385, 10402-03 (2002).

129. *See* DRIESEN, *supra* note 4, at 27.

130. *Id.*

131. *Id.*

132. *Id.*

133. *See* Robert W. Hahn, *Economic Prescriptions for Environmental Problems: How the Patient Followed the Doctor's Orders*, 3 J. ECON. PERSP. 95 (1989); Robert N. Stavins, *Experience with Market-Based Environmental Policy Instruments, in* HANDBOOK OF ENVIRONMENTAL ECONOMICS (K.G. Maler and J.R. Vincent eds., 2003).

134. *See* Driesen, *supra* note 121, at 10094 (discussing pervasiveness of trading programs that give away allowances); Robert N. Stavins, *Market-Based Environmental Policies: What Can We Learn from U.S. Experience (and Related Research)*, Speech at the Center for Regulatory Policy, Kennedy School of Government, Harvard University (July 2, 2003), *available at* http://ksgnotes1.harvard.edu/research/wpaper.nsf/rwp/RWP03-031/$File/rwp03_031_stavins.pdf.

nomic dynamic perspective changes analysis of emissions trading, as an example of environmental benefit trading.

From an economic dynamic perspective, the question of which instrument provides the lowest short-term costs is not particularly important. Rather, the question becomes which instrument provides the most incentive for innovation that can increase our capabilities to adapt to environmental threats over time.

Economists often assume an identity between encouraging efficiency and encouraging worthwhile innovation through the concept of dynamic efficiency.[135] But the suggestion that short term cost effectiveness and desirable innovation coincide ignores both salient economic theory (namely, the induced innovation hypothesis) and precise analysis of relevant incentives.

The induced innovation hypothesis suggests that innovation occurs when the costs of conventional approaches rise, and conversely that little innovation will occur when prices of conventional costs fall.[136] Emissions trading reduces the cost of employing conventional approaches, which would suggest that it would lessen incentives to innovate.[137]

One can see this most easily in the case of high-cost innovation. Emissions trading has not caused coal-fired power plants to shut down in favor of renewable energy sources or car manufacturers to introduce hydrogen-based fuel cells.[138] Emissions trading facilitates selection of the cheapest short-term response to regulatory demand, not the most environmentally advantageous (and adaptively efficient) alternatives for the long-term.[139] This matters, because investment in high-cost options can lower costs over time.[140] High costs often prove temporary under conditions of change.

Traditional regulation mandates emission reductions from specific pollution sources. Does the spatial flexibility of emissions trading provide superior incentives for innovation in general?

The trading mechanism creates an economic incentive for polluters facing high marginal control costs to *increase* emissions above the otherwise applicable limit, at least to the extent that the high-cost polluters plan to purchase relatively cheap credits from other sources.[141] It also creates an incentive for

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135. *See* DRIESEN, *supra* note 4, at 71.

136. *See* Richard G. Newell et al., *The Induced Innovation Hypothesis and Energy-Saving Technological Change*, 114 Q. J. ECON. 941, 942 (1999).

137. *See* Driesen, *supra* note 121, at 10097-98; *cf.* Timothy F. Malloy, *Regulating by Incentives: Myths, Models, and Micromarkets*, 80 TEX. L. REV. 531, 546 (2002) (linking the induced innovation hypothesis to the idea that traditional regulation may induce innovation).

138. *See* Driesen, *supra* note 121, at 10105.

139. *Id.* at 10097.

140. *See, e.g.*, David M. Driesen, *Sustainable Development and Air Quality: The Need to Replace Basic Technologies With Cleaner Alternatives*, 32 ENVTL. L. REP. (Envtl. L. Inst.) 10277, 10285 (2002) (discussing falling cost of renewable energy).

141. Driesen, *supra* note 24, at 334; David A. Malueg, *Emission Credit Trading and the Incentive to Adopt New Pollution Abatement Technology*, 16 J. ENVTL. ECON. & MGMT. 52, 54 (1989).

polluters facing low marginal control costs to *decrease* emissions, at least to the extent the polluter plans to sell credits to sources with high costs.[142] "If the market functions smoothly, then trading occurs, the incentives cancel each other out, and the net economic incentive generally mirrors that of a comparable traditional regulation."[143]

Because a well-designed trading program may induce pollution sources with low marginal control costs to go beyond regulatory limits to a greater degree than they would under a traditional regulation, commentators focusing only on the low-cost sources have argued that emissions trading creates greater incentives for technological innovation than traditional regulation.[144] As some economists have realized, this argument ignores the incentive for high-cost sources to avoid pollution reduction activities.[145] Trading reduces the incentive for high-cost sources to apply new technology.

In theory, emissions trading probably weakens net incentives for innovation. If a regulation allows facilities to use trading to meet standards, the low-cost facilities tend to provide more of the total reductions than they would provide under a comparable traditional regulation.[146] Conversely, the high-cost facilities will provide less of the total required reductions than they would have under a comparable traditional regulation.[147] The low-cost facilities probably have a greater ability to provide reductions without substantial innovation than high-cost facilities.[148] "A high-cost facility may need to innovate to escape the high costs of routine compliance; the low-cost facility does not have this same motivation."[149] Hence, emissions trading, by shifting reductions from high-cost to low-cost facilities, may lessen the incentives for innovation in general.[150]

C. TOWARD ECONOMIC DYNAMIC REFORM

Economic dynamic analysis focuses upon the need for environmentally friendly innovation to occur quite regularly to keep up with growing environmental problems associated with rising population and consumption. It uses the free market as a model, not of perfect efficiency (which it does not possess), but of how to encourage innovation (which the free market sometimes does well when competition is robust). The problem, of course, is that the free market

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142. Robert W. Hahn & Robert N. Stavins, *Incentive-Based Environmental Regulation: A New Era From an Old Idea?* 18 ECOLOGY L.Q. 1, 8 n.33 (1991).

143. *See* Driesen, *supra* note 24, at 334.

144. *See* Hahn & Stavins, *supra* note 142, at 8 n.33.

145. Malueg, *supra* note 141; DAVID WALLACE, ENVIRONMENTAL POLICY AND INDUSTRIAL INNOVATION: STRATEGIES IN EUROPE, THE U.S. AND JAPAN 20 (1995).

146. *See* Driesen, *supra* note 24, at 334.

147. *Id.*

148. *Id.*

149. *Id.* at 334-35.

150. *Cf.* Driesen, *supra* note 121, at 10106 (considering a more subtle argument that trading may change the type of innovation).

does not encourage innovation protecting the environment, except in those cases where environmental protection happily coincides with reduced cost (and not always then).[151] Even when environmental innovation would produce fabulously valuable environmental improvements, even nominal costs can discourage realization of these improvements.[152]

Because of this, governments must produce a regulatory stimulus-driving innovation that works something like consumer demand in free markets.[153] But economic dynamic analysis reveals that impediments exist to government playing this role well. Recognition of the nature of these impediments creates a new set of questions for environmental policy-making and law to focus upon. While we will offer a range of ideas about how one might answer these questions below, our principle aim is to convince the reader that policy-makers should focus on these economic dynamic questions, rather than just efficiency.

1. *Privatization*

Free markets can produce demand for innovation because consumers offer decentralized and flexible sources of demand and opportunity.[154] Government, by contrast, tends toward slow and plodding environmental protection enacted through painstaking rulemaking proceedings.[155] This naturally invites the question of whether privatization can allow government to escape its tendency to fall behind the curve of private decisions increasing pollution.

Any suggestion that privatization may have value will strike those enamored of government solutions as a bad idea. But we already have some environmentally beneficial forms of privatization in environmental law. The citizen suit has privatized some enforcement of environmental law and thereby increased the vigor of enforcement.[156] Likewise, "right-to-know" requirements have encouraged voluntary private pollution reduction.[157] Thus, one can improve the economic dynamics of environmental law by enhancing incentives for citizen suit performance and making wider use of disclosure requirements.

We can design more dynamic economic incentives that encourage competition to reduce pollution, much as the free market creates competition to provide better amenities. This requires creation of mechanisms that circumvent the need for repeated government decisions and allows private actions, rather than government decisions, to stimulate reductions in pollution.

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151. *See* DRIESEN, *supra* note 4, at 98-99.
152. *Id.* at 99.
153. *See id.* at 103-05.
154. *See id.* at 93-95.
155. *See id.* at 115-16.
156. *See* DRIESEN, *supra* note 4, at 140-45 (examining the citizen suit and recommending reforms to make it more economically dynamic).
157. *See* Bradley C. Karkkainen, *Information as Environmental Regulation: TRI and Performance Benchmarking, Precursor to a New Paradigm?*, 89 GEO. L.J. 257, 297 (2001).

"The law can apply either positive economic incentives, such as revenue increases or cost decreases, or negative economic incentives, such as revenue decreases or cost increases, to polluters."[158] This reveals a possibility that has received too little attention: negative economic incentives can fund positive economic incentives.[159]

Governments have created programs that use negative economic incentives to fund positive economic incentives. New Zealand, for example, imposed fees on fishing, a negative economic incentive, and used the revenue from these fees to pay some fishermen to retire, a positive economic incentive.[160] This program aims to address the depletion of New Zealand fisheries. The California legislature has considered imposing a fee upon consumers purchasing an energy inefficient or high pollution vehicle.[161] The proceeds would fund a rebate to reduce the effective price of purchasing an energy efficient vehicle or low polluting vehicle.[162] Similarly, New Hampshire officials have proposed an "Industry Average Performance System" that redistributes pollution taxes to the electric utility industry in ways that favor lower emissions.[163]

One can build on this principle of having negative economic incentives fund positive economic incentives to craft laws that mimic the free market's dynamic competitive character far better than taxes or subsidies. In a competitive free market, a firm that innovates often reduces its competitors' profits by grabbing market share.[164] Hence, firms in a very competitive market face strong incentives to innovate and improve. "Failing to innovate and improve can threaten their survival."[165] Implementing innovations and improvements can help firms prosper in a competitive market. One might seek to design environmental law to create a similar dynamic.

One could craft, for example, an "environmental competition law" requiring polluters with relatively high pollution levels to pay any costs that competitors incur in realizing lower pollution levels plus a substantial premium; thereby creating a significant incentive to be among the first to eliminate or drastically reduce targeted pollutants.[166] This law would simply allow any polluter to collect reimbursement for its pollution avoidance costs plus a premium (pre-set by

158. *See* Driesen, *supra* note 24, at 343.

159. *Cf.* Hahn, *supra* note 133, at 104-07 (describing effluent taxes dedicated to funding environmental improvement).

160. T.H. Tietenberg, *Using Economic Incentives to Maintain Our Environment*, CHALLENGE, Mar. - Apr. 1990, at 43.

161. Nathanael Greene & Vanessa Ward, *Getting the Sticker Price Right: Incentives for Cleaner, More Efficient Vehicles*, 12 PACE ENVTL. L. REV. 91 (1994).

162. *Id.* at 94-95.

163. DRIESEN, *supra* note 4, at 152.

164. *Id.* at 153.

165. *Id.*

166. *Id.*

government) from any competing firm with higher pollution levels.[167] For example, a power plant that switched fuels to reduce its emissions might collect the cost of the fuel switching from a dirtier coal-burning competitor, plus a premium.[168]

An environmental competition law directly addresses a fundamental problem with existing market incentives: the polluting firm must itself pay any clean-up costs.[169] It rarely pays to clean-up, because the firm paying to clean itself up does not experience all of the pollution-related costs that justify the cleanup. (Because the general public suffers the harms, economists say that the firm "externalizes" the pollution "costs").[170] If firms could systematically externalize clean-up costs, just as they externalize the pollution costs (i.e. environmental harms), then even a fairly modest premium might provide an adequate incentive to control pollution.[171]

This practice could solve another problem as well. The free market creates no incentive for environmentally superior performance.[172] The environmental competition statute, however, routinely rewards superior environmental performance.[173]

An environmental competition statute would create private environmental law, meaning law that implements general principles through private dispute settlement, rather than detailed public administrative decision-making. It would, of course, require a few public decisions at the outset to set it up. But it relies upon private enforcement – cases pitting low polluting businesses against high polluting competitors – rather than public enforcement.[174] In day-to-day operation it resembles other kinds of commercial disputes. The law would create a private right of action for businesses that realize environmental improvements through investment in pollution reducing (or low pollution) processes, control devices, products, or services. These businesses may obtain reimbursement for expenses (plus the government-set premium) from dirtier competitors. Hence, the scheme would encourage some companies to become enforcers of the law, rather than duplicating the counterproductive incentives in existing law for most companies to resist enforcement.[175] It would fundamentally change the dynamics of existing law.

Such a proposal overcomes a fundamental problem common to traditional regulation, emissions trading, and pollution taxes (which are so frequently

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167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. DRIESEN, *supra* note 4, at 152.
172. *Id.*
173. *Id.*
174. DRIESEN, *supra* note 4, at 153.
175. *See id.* at 154.

viewed as fundamentally different from each other). These mechanisms rely on government decisions – which tend to be slow and weak – to drive pollution reductions.[176] An environmental competition law relies on private initiative in reducing pollution to drive reductions. It deploys dynamics not central to economic models, but pervasive in actual competitive markets. For it relies upon the prospect of gain and the fear of loss to drive environmental improvement.[177] It also duplicates the uncertainty of free markets. Polluters cannot know how aggressive their competitors might be in innovating, so they have a powerful incentive to innovate as much as reasonably possible to avoid becoming a payor to a more aggressive competitor. This contrasts with the existing system, which demands only that which the government, which knows little about private innovative capacity, demands (either through regulatory levels or pollution tax rates).[178]

Whether or not one accepts the value of this particular idea, it should demonstrate the potential value of taking on the plodding nature of government as a problem to overcome through consideration of the model provided by the economic dynamics of the free market. Once we move beyond policy prescriptions designed primarily to improve "efficiency," new possibilities emerge.

2. *More Fair and Effective Regulation*

Combining analysis of the practical economic dynamic resulting from opportunities to profit systematically from the conversion of natural resources to products for consumption with the insights of public choice theory explains some important features of the regulatory system that receive insufficient attention. Each of us finances the thwarting of environmental regulation through our gas and utility payments.[179] These payments pay for an army of environmental lawyers, scientists, and economists that work hard to prevent enactment and effective enforcement of environmental regulation.[180] This makes environmental regulation less adaptively efficient than it might be, and produces inordinate delay and, at times, gutting of environmental laws.

Yet, efficiency-based analysis pays little attention to this problem. Once one focuses on this as a problem, many potential solutions suggest themselves. Public participation currently rests on the principle of open participation; all can participate as much as they want.[181] This approach advantages those with the most capacity to participate, those who can hire professionals in great numbers to represent them, *i.e.* existing dirty industries. It offers no advantage to the

176. *Id.* at 135.
177. *Id.* at 154.
178. *Id.*
179. *Id.* at 114.
180. *Id.*
181. DRIESEN, *supra* note 4, at 167.

public seeking relief from environmental problems or environmental entrepreneurs hoping to create new markets for environmental innovations.[182]

We should at least think about a system of equal participation.[183] In such a system, those who wish to hire professionals to represent their interests would have to hire professionals for their opposition.[184] A less radical reform might involve devoting more taxpayer money to technical assistance to communities hoping to benefit from environmental regulations and companies with promising new technologies to participate more actively.[185]

Again, our point is not to strongly advocate any particular solution to existing inequities in the regulatory process, but rather to suggest that economic dynamic analysis identifies this as a problem to be solved. And this problem has received insufficient attention, due in part to a myopic focus upon the static efficiency of each regulation viewed as a transaction.

3. *Improved Regulatory Design to Stimulate Change*

The issue of how we design our environmental regulations has received amazingly little attention.[186] Part of this failure to think about this important issue comes from the simplistic preoccupation with the project of bashing "command and control" regulation and promoting environmental benefit trading, a byproduct of excessive preoccupation with static efficiency.[187] But design may matter as much (or more) to the economic dynamics of regulation as the choice between traditional regulation and emissions trading.[188] This should not be surprising. Emissions trading combines a traditional regulation limiting emissions with an authorization to trade.[189] While the trading may enhance regulation's cost savings, the design of the regulatory limits that motivate the trading will influence a trading program, just as design influences a program that does not authorize trading.

One crucial regulatory design issue involves the choice between rate-based and mass-based emission limits. Many regulations, including both traditional regulation and state emissions trading programs, limit emission rates.[190] Emission rates limit the amount of pollution per unit of activity. For example, many

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182. *See id.* at 169-70.
183. *Id.* at 170.
184. *Id.* at 169-72.
185. *Id.*
186. *Cf.* DRIESEN, *supra* note 4, at 183-201 (suggesting avenues for improving regulatory design).
187. *See generally* Driesen, *supra* note 24.
188. *See* DRIESEN, *supra* note 4, at 193.
189. *See* Driesen, *supra* note 24, at 324.
190. *See, e.g.*, Natural Res. Def. Council v. EPA, No. 90-2447, 1991 WL 157261, at *1 (4th Cir. 1991); United States v. Allsteel, No. 87 C 4638, 1989 WL 103405, at *1 (N.D. Ill. 1989); United States v. Alcan Foil Prods., 694 F. Supp. 1280, 1281 (W.D. Ky. 1988), *aff'd in part, rev'd in part*, 889 F.2d 1513 (6th Cir. 1989).

regulations limiting air pollution coming from applications of paints, coatings and solvents, limit the pounds of emissions per gallon of substance used.[191] EPA has traditionally regulated electric utilities through limits on the pounds of pollution per million British Thermal Units (BTUs).[192]

The federal acid rain program, the federal regulations implementing the phase-out of ozone depleting substances, and some Clean Water Act regulations, however, limit the mass of permitted pollution.[193] The regulations phasing out ozone depleting substances limit the tons of substances produced per year.[194] The acid rain program limits tons of sulfur dioxide emitted per year.[195]

This distinction between mass-based and rate-based limits regulation's effectiveness, because of the economic dynamic implications of the choice between these two types of limits. A rate-based regulation does not limit the total mass of pollution that a polluter may emit.[196] If a company's activities increase (as when a plant runs for longer hours), its total pollution (i.e. the mass) will likewise increase. On the other hand, a mass-based regulation limits the total amount of pollution allowed. Increased production at a constant emissions rate raises the mass of emissions. So under a mass-based constraint, a company increasing its production must reduce its emissions rate to remain in compliance.

The choice of limit type profoundly affects significant economic dynamics. Mass-based limits provide a built in economic dynamic that rate-based limits lack. A company increasing production to meet rising demand must find ways to obtain further pollution reductions in order to remain in compliance with a mass-based cap. By contrast, a company subject to a rate-based emission level can increase production and therefore pollution levels with impunity. It remains in compliance with its limits without further improvements or environmental innovations even as its total emissions rise.

This difference should influence both the design of emissions trading and that of traditional regulation. A company subject to a rate-based limit does not need to buy emission reduction credits when its activity levels increase under a trad-

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191. *See, e.g.*, EPA Approval and Promulgation of Implementation Plans, 40 C.F.R. § 52.741 (2004).

192. Byron Swift, *Command Without Control: Why Cap-and-Trade Should Replace Rate Standards for Regional Pollutants*, 31 ENVTL. L. REP. (Envtl. L. Inst.) 10330 (2001).

193. *Id. See, e.g.*, Reynolds Metal Co. v. EPA, 760 F.2d 549, 559 (4th Cir. 1985) (discussing EPA's promulgation of mass-based standards for total toxic organics for the can-making industry); Citizens for a Better Env't-California v. Union Oil Co., 861 F. Supp. 889, 895 (N.D. Cal. 1994) (in exercising its authority pursuant to the Clean Water Act, the Regional Water Quality Control Board amended Unocal, Exxon and other Bay Area oil refineries' National Pollution Discharge Elimination System (NPDES) permits, specifying certain concentration and mass-based limits on the amount of selenium that each refinery could discharge).

194. *See* 42 U.S.C. § 7671c(a)(2001).

195. *See* 42 U.S.C. § 7651a(3)(2001).

196. *Id.*

ing program based on emission rates.[197] By contrast, companies operating under a mass-based emissions trading program, such as the acid rain program, must either make additional reductions or purchase additional reduction credits if they increase their activity levels.[198] This means that a mass-based trading program creates more of an incentive for environmental improvement, and hence, environmental innovation, than a rate-based trading program.[199]

Greater reliance on mass-based limits improves the economic dynamics of the law. Rate-based limits increase the need for repeated regulatory decisions, since they permit rising population and consumption to increase pollution.[200] This unconstrained growth in emissions makes it hard for the regulatory system to keep up.[201] It also increases the complexity of environmental law. In order for government to meet a given goal, even a goal for a single plant or industry, it must regulate repeatedly under a rate-based system.[202] This complexity is not only bad for industry, it is bad for the fundamental dynamics of the system. Rate-based limits effectively require regulators, rather than the quicker, more efficient private decision-maker, to respond to the environmental problems associated with increased production.[203] Rate-based limits lead to more centralized environmental decision-making.

Mass-based limits also help implement the sustainable development concept, as elaborated by the economist, Herman Daly. Daly favors economic development, but disfavors increased "throughput" of resources. Yet translating even Daly's relatively precise concept of sustainable development into concrete regulatory measures poses an enormous challenge.[204] The idea of avoiding increased throughput in order to foster economic development raises a fundamental question: How should this idea influence environmental law? Mass-based limits provide a part of the answer. Mass-based regulation limits throughput.[205] Therefore, use of mass-based limits provides a concrete step toward realizing the goal of sustainable development, whether used in traditional regulation or in an allowance trading program.

Adoption of mass-based limits will require a change in how government officials think about environmental protection. In order to enact mass-based limits, they must have some faith in private sector capacity to carry out environmental innovation. Otherwise, they will allow regulated parties to dissuade them from using mass-based rates out of ill-founded fear that companies cannot possibly

197. *Id.*
198. *Id.* at 195-96.
199. *Id.* at 196.
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id.*
204. *See* DRIESEN, *supra* note 4, at 194-95.
205. *See id.* at 195.

adjust to increased orders through greater reductions in emission rates. Mass-based limits involve government assignment of the duty to reconcile economic development with environmental goals to the private sector, rather than to government.

Stringency constitutes another key variable influencing environmental innovation.[206] While traditional regulation has not proven stellar in stimulating innovation, regulation has produced substantial innovation when sufficiently stringent.[207] For example, bans on ozone depleting chemicals, state rules requiring zero emission vehicles, the phase-out of lead from gasoline, and some of the stricter standards regulating occupational health and safety have all produced substantial innovation.[208]

In general, then, economic dynamic analysis raises the issue of how to improve the economic dynamics of environmental law. This leads to a sharply different set of questions than those currently dominating the field. These questions include the question of privatization, of making administrative procedure more fair and effective, and of how to improve regulatory design. Focusing the policy debate on these questions would constitute a significant and worthwhile change.

V. APPLICATION TO CLIMATE CHANGE

To further illustrate these ideas' capacity to change the debate, this Part will address the problem of climate change. It will first sketch the view of climate change that the efficiency idea has spawned and contrast this with an economic dynamic approach to the problem.

A. THE EFFICIENCY-BASED VIEW OF CLIMATE CHANGE

The Bush Administration has repudiated the Kyoto Protocol to the Framework Convention on Climate Change.[209] One can see this, at least in part, as a manifestation of the efficiency-based approach. This does not mean that all proponents of this approach endorse the President's decision. Rather, it means that this action reflects the static view of the world that the efficiency-based approach encourages.

In particular, this reflects a preoccupation with the question of whether environmental protection costs too much, the question that the efficiency-based

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206. VOLUNTARY APPROACHES IN ENVIRONMENTAL POLICY 137-50 (Carlo Cararro & François Leveque eds., 1999).

207. *See generally* Alan S. Miller, *Environmental Regulation, Technological Innovation, and Technology-Forcing*, 10 NAT. RESOURCES J. 64 (1995) (claiming that modern environmental policy sprang from the evils of technology and that politics have promoted technological solutions).

208. DRIESEN, *supra* note 4, at 197.

209. Donald A. Brown, *Climate Change*, STUMBLING TOWARD SUSTAINABILITY 295 (John Dernbach ed., 2002).

view places front and center. President Bush, in announcing his decision, claimed that Kyoto would have "a negative economic impact."[210] In this, the President followed in the steps of a previous Senate resolution, passed by an overwhelming bipartisan majority, that expressed a similar concern with climate change protection costing too much.[211]

Bush's opponents on this issue in Congress and in the previous administration also embrace the efficiency-based approach, to a significant degree.[212] President Clinton's administration pushed hard for a very broad environmental benefit trading program, which is now part of the Kyoto Protocol, and current bills to address climate change rely heavily upon emissions trading as well.[213]

B. A BRIEF ECONOMIC DYNAMIC CRITIQUE

The CBA that economists have conducted well illustrates the limitations of that technique as a guide to environmental policy and the great value of a dynamic analysis. The CBA attempts to estimate the amount of environmental and health damage that climate change might call and translate it into dollar terms. Douglas Kysar's recent critique of one especially prominent example of the CBA on this issue concludes that the economist conducting it simply left out deaths associated with several significant climate change effects.[214] The economic analysis Professor Kysar critiques failed to count deaths associated with heat waves, drowning, diseases associated with greater flooding, and increased malnutrition from declining crop yields, all outcomes that scientists have high confidence in.[215] Since the economist who conducted the analysis Professor Kysar criticizes is quite well regarded, this failure probably comes from the difficulties of estimating the number of deaths associated with these outcomes, rather than from a simple failure to read the scientific literature. But that sort of failure is a common problem with CBA - what we cannot count, gets left out.

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210. White House News Service, *Remarks of the President on Global Climate Change* (June 11, 2001), *available at* http://www.whitehouse.gov/news/releases/2001/06/20010611-2.html.

211. *See* S. Res. 98, 105th Cong. (1997) (stating that the United States should not sign a climate change treaty that would seriously harm the U.S. economy).

212. *See, e.g.*, S. 556, 107th Cong. (2001) (using an emissions trading approach to address utility carbon dioxide emissions); H.R. 1256, 107th Cong. (2001) (same).

213. David M. Driesen, *Free Lunch or Cheap Fix?: The Emissions Trading Idea and the Climate Change Convention*, 26 B.C. ENVTL. AFF. L. REV. 1, 3 n.5, 27 n.159 (1998).

214. *See* Douglas Kysar, *Some Realism About Environmental Skepticism: The Implications of Bjorn Lomborg's the Skeptical Environmentalist for Environmental Law and Policy*, 30 ECOLOGY L.Q. 223, 264 (2003). Professor Kysar's article reviews Bjorn Lomborg's THE SCEPTICAL ENVIRONMENTALIST (2001). I focus here on the passages in that review that focus upon Professor Nordhaus' cost-benefit analysis of climate change mitigation, which Kysar critiqued because of Lomborg's reliance upon it. *See id.*

215. *Id.*

And sometimes, some of the most important and devastating consequences produce some of the most problems for coming up with reliable numbers.[216]

In order to translate this terribly incomplete listing of effects into dollar terms, the economist must make some kind of controversial judgment about how to value life in dollar terms.[217] The CBA that Kysar critiqued engaged in some especially atrocious assumptions, giving very low dollar values to lives lost in poor countries, because of low per capita income, for example.[218] But translation of such consequences into dollar terms is always deeply problematic and must reflect the values of the analysts.

Less obviously, economists tend to derive cost estimates from information about the costs of making changes today.[219] But historically, such cost estimates usually prove wrong, because adoption of some kind of program will create an impetus to lower costs.[220] Overall, CBA offers poor guidance to policy-makers, because it conceals more than it reveals about the reality of the problem.[221]

The failures of the efficiency approach go beyond CBA's failure as a policy tool. The environmental benefit trading regime found in the Kyoto Protocol minimizes opportunities to stimulate innovation by making opportunities to earn credits extremely broad.[222] As a result, the Protocol may create opportunities to earn fraudulent credits, which will be much cheaper than credits flowing from real innovations reducing greenhouse gas emissions.[223] And the regime offers a lot of opportunities to avoid frequently costly innovation through less innovative approaches.[224]

C. AN ECONOMIC DYNAMIC VIEW OF THE CLIMATE CHANGE PROBLEM

While we will not know the costs of addressing climate change until we try to fight it and we cannot translate its impacts into dollar terms with even reasonable reliability, scientists know a lot about the fundamental dynamics of climate

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216. *See, e.g.*, Driesen, *supra* note 12, at 596-97 (discussing CBA that left out valuation of asbestosis, which caused health damage so massive that compensatory damage awards bankrupted companies associated with the damage).

217. Kysar, *supra* note 214, at 264-66 (discussing a controversial judgment made in one economic analysis of climate change deaths).

218. *See id.* at 264-65.

219. *See id.* at 270 (noting that Nordhaus' first estimates of the cost of climate change mitigation failed to account for technological change at all, and that the revised estimates may have done so inadequately).

220. *See id.* at 268.

221. For example, some studies report high costs for addressing climate change. But these studies often ignore the least expensive measures available to bring about climate-related emission reductions. *See* Brown, *supra* note 209, at 304.

222. *See* Driesen, *supra* note 213, at 41-46, 79-83 (explaining how the Kyoto Protocol may undermine innovation and advocating a design more conducive to innovation).

223. *See id.* at 60-61 (discussing issue of hot air credits).

224. *See id.* at 43-45.

change. An economic dynamic approach begins with some understanding of these dynamics. Scientists agree that human activities – principally burning fossil fuel – have warmed the earth's mean surface temperature and that further fossil fuel use will increase this warming over time.

We also know that carbon emissions correlate positively with economic growth. Hence, increased economic growth, absent some sort of change in policy and practice, will greatly increase emissions and hence the magnitude of climate change.

We also know that greenhouse gases tend to remain in the atmosphere for many decades. This means that we cannot reverse climate change. Emitting a pound more of carbon today means more warming today, tomorrow, and every day thereafter for many decades. If we decide to reduce emissions drastically tomorrow, we still must cope with the consequences of the emissions from yesterday that remain in the atmosphere. This problem grows cumulatively worse over time.

The ideal of adaptive efficiency would suggest that these dynamics would justify a vigorous response of some kind. Because of the nature (not the magnitude) of the consequences scientists predict, we know that climate change can irreversibly cut off future options of some importance. Predicted sea level rise implies the loss of available land, including the possibility of losing important existing cities. Predicted droughts may prove irreversible. Predicted ecological destruction raises the specter of losing unique species and ecosystems of unmeasurable value forever. We need to experiment under conditions of uncertainty (uncertainty about which technologies will develop, what the cost will be, and how great the environmental destruction will prove), and then try to learn more about the results of this experimentation.

Because the problem is cumulative, we probably need fairly drastic change to limit the impacts, if at all possible. We should have a goal of greatly reducing our reliance upon and use of fossil fuels. This implies a need to stimulate substantial innovation in the energy sector.

The idea of economic dynamic analysis can help guide selection of policy instruments to achieve the goal of encouraging the needed shift. While we do not claim that any broad theory, ours included, dictates results, it does point the way to questions that might be considered. The British have successfully phased out a significant amount of coal use without experiencing a rise in electricity prices.[225] We could consider emulating that experience. Banning a common and very dirty option might open up space for cleaner competing technologies, setting off a virtuous economic dynamic.

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225. *See* ENVTL. L. INST., CLEANER POWER: THE BENEFITS AND COSTS OF MOVING FROM COAL GENERATION TO MODERN POWER TECHNOLOGIES 10 (2001) (Britain experienced a 30% decline in real electricity prices as it replaced 40% of its coal-fired generation).

The environmental competition statute might be worth a try here in key sectors. Perhaps carbon should become subject to an environmental competition statute that would allow zero emission options, like windmills, to obtain financing from dirty, old, coal-fired power plants.

If we rely on emissions trading, an economic dynamic analysis can aid appreciation of different designs' impacts on innovation. Polluters will tend to choose the least costly options, not necessarily the innovative options advancing the state of the art.[226] For that reason, if we aim to encourage meaningful innovation, we need to design programs narrow enough to make the innovative options that advance the state of the art attractive.[227] The stringency of limits undergirding the trading program also will influence its capacity to encourage innovation.[228] If we want to encourage clean alternative technologies, we must choose program designs that allow those employing new technologies to earn credits and avoid making them pay firms employing dirty, old approaches for grandfathered credits.

This does not mean that we need to neglect less innovative, but inexpensive, options. Energy efficiency improvements, for example, frequently pay for themselves.[229] This does not mean, contrary to what the neoclassical model might suggest, that people will employ energy efficiency voluntarily with no governmental assistance.[230] Car manufacturers, for example, resist strict Corporate Average Fuel Economy standards, because they can raise the cost of manufacturing vehicles.[231] It does not matter to them if the reduced consumer cost associated with using less fuel fully offsets the manufacturing cost, thus making efficiency economic for society as a whole. Once we look at the bounded rationality of the people involved, we see that often the person in a position to seize an opportunity for greater efficiency will not realize the resulting economic benefit. Hence, we need the environmental legal reform not only to catalyze ambitious innovation, but simply to make regulatory changes needed to realize reforms that are already economically justified without even considering environmental benefits. Car manufacturers have profited enough from the dirty technologies to finance massive resistance to environmental improvements. We need to recognize that as a central problem for climate change policy to overcome, not as a side issue. Climate change demands an economic

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226. *See* David M. Driesen, *Markets Are Not Magic,* 20 ENVTL. FORUM (Envtl. L. Inst.) 19, 21 (2003).

227. *See* Driesen, *supra* note 213, at 78-87 (outlining a pro-innovation emissions trading design in the climate change context).

228. *See* DRIESEN, *supra* note 4, at 197-200.

229. *See id.* at 101.

230. *See generally id.* (discussing market inefficiency).

231. *See* J. Yost Conner, Jr., *Note, Revisiting CAFÉ: Market Incentives to Greater Automobile Efficiency,* 16 VA. ENVTL. L.J. 429, 438-40 (1997) (discussing manufacturers' resistance to CAFE standards and the standards' effect upon the price of new cars).

dynamic approach and illustrates the fundamental weakness of the efficiency-based model in coping with long-term change.

VI. CONCLUSION

One can easily understand why economists find static assumptions convenient for modeling. Unfortunately, legal scholars and policy analysts have carried this too far in converting efficiency into a major normative criterion for policy and law.

Consideration of economic dynamics should be central to analysis and reform of environmental law. The theory of economic dynamics reframes analysis, raises significant questions that have received too little attention, and introduces new possibilities for reforming environmental policy.

Economic dynamic theory calls our attention to the temporal dimension of environmental protection. It asks how well environmental law can cope with growing population, innovation and economic growth over time. This inquiry leads to new modes of analysis. Serious consideration of the role of innovation in changing the shape of our society over time becomes important.

This analysis then leads to new questions about environmental law. Scholars and policy-makers need to think about whether some environmental law functions can and should be privatized. This question requires serious thought about what privatization might mean and how it might be accomplished. It leads to asking about how the process of environmental decision-making could be made more efficient and fair. Finally, economic dynamic theory requires more precise analysis of regulatory design issues. Proper analysis of regulatory design can support efforts to achieve sustainable development. This mode of analysis goes well beyond simplistic generic dichotomies damming traditional regulation as "command and control" regulation and lauding "economic incentive" measures. It involves a more fruitful and more precise look at what can be improved and how.

We live in a dynamic changing world, a world ill-suited to static analytical frameworks. Our way of thinking about environmental law and policy must change to meet the demands of the world we live in.

A Violent Roman Tradition

EDWARD J. MAGGIO, ESQ.

INTRODUCTION

In the geographic region that once was the ancient western world, it is clear the Roman Empire contributed to the advance of human civilization. It is in the realm of law that perhaps we see one of the great achievements of our Roman ancestors. Although it can be said that Roman law did not bloom until the second century B.C., it is apparent that from the "Twelve Tables" onwards in the mid-fifth century B.C. the Romans began to develop new and advanced legal concepts in the ancient world.[1] Although advanced, the "Twelve Tables" still maintained a preservation of the ancient concept "Lex Talionis," physical retaliation (an eye for an eye) for offenses in society.[2] At a time when Roman architecture and engineering were respected and awed, the application of capital punishment by the ancient Roman state gained an equally infamous reputation for its cruel administration. Although the later promulgation of the "Lex Aquilia" legal code attempted to depart from the "Lex Talionis" retaliatory concept in the form of compensation[3], it is arguable that the concept of "Lex Talionis" never left the law or society, and continued on as the Roman Empire reached great heights. The execution of criminal defendants has stayed as a violent Roman tradition that is part of the criminal justice system in modern society, long after the pulse of ancient Rome went dead.

While all societies have some system of societal regulation and conflict regulation, law has been the distinctive singularity in that is it written and administered vengeance along with a form conflict resolution. Law is an enlightening force in any society. Our Roman ancestors wanted society to advance. However, the continued use of the death penalty in various nations in modern times is a return to ancient ways and arguable in its current form around the world, not an advancement of human civilization.

Nations throughout the world use execution as the highest form of state endorsed punishment and conflict resolution. Executions of criminals are performed because retentionist nations believe there are necessary benefits when capital punishment is applied within a given society. Capital punishment was a practice applied in ancient times throughout the world, but it is a practice that must continually be scrutinized. Such scrutiny leads to a determination of whether the practice should be abolished or reformed with more legal and hu-

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1. MARY BOATWRIGHT, DANIEL GARGOLS, RICHARD A. TALBERT, THE ROMANS – FROM VILLAGE TO MODERN WORLD, 416-19 (2004).
2. LARRY SIEGEL, CRIMINOLOGY, 27 (2004).
3. BARRY NICHOLAS, ROMAN LAW 128 (1976).

manitarian protections, beyond what the ancient Roman Empire was capable of achieving. In the course of this article I will look at how retentionist nations currently believe capital punishment is administered properly, deters crime, and is not a cruel form of punishment. Despite such retentionist views in these three areas, the evidence available shows the current harsh reality of this matter. It is important to clarify that retentionist nations are those nations around the globe which hold steadfast to the continued practice of executing criminal offenders in their criminal justice systems.[4] Notably, the U.S. now finds itself in the company of other retentionist nations such as China, Iran, Saudi Arabia, Rwanda, and Sudan.[5] By contrast, abolitionist nations (nations that have abandoned the death penalty) are the rising trend. In 1977, the United Nations General Assembly affirmed in a formal resolution that throughout the world, that it is desirable to "progressively restrict the number of offenses for which the death penalty might be imposed, with a view towards the desirability of abolishing this punishment."[6] By 1998, the total of non-death penalty countries rose to 105, more than the total of countries that retain an active death penalty.[7] In April 1999, the U.N. Commission on Human Rights voted overwhelmingly in favor of a moratorium on the death penalty that was introduced by the European Union.[8] As Roger Hood examined and summarized, by the end of December 2001, there were 75 totally abolitionist countries, 14 abolitionist for ordinary crimes, and 105 retentionist states, of which 71 have carried out executions within the past 10 years, and 34 which were abolitionist de facto.[9]

THE ADMINISTRATION OF THE DEATH PENALTY IN RETENTIONIST COUNTRIES IS PROBLEMATIC

There is an old saying that expectation of death is worse than death itself. The idea of being confined in an isolated area awaiting a possible demise recalls images of Alexandre Duma's classic "The Count of Monte Cristo" and the agony suffered by Edmond Dantes in a solitary dark cell. This illustration from literature raises the issue that the waiting period to die based on the current worldwide administration of executions is unfair and cruel by any standard of human decency as it was in Roman times. This argument is not a new one. Scholars for decades have put forth the notion that the death penalty in its application in modern times is cruel by the length of delay in carrying out execu-

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4. *Capital Punishment and Implementation of the Safeguards Guaranteeing the Protection of the Rights of those Facing the Death Penalty*, U.N. Economic and Social Council, E.S.C. res. 1984/50, annex, 1984 U.N. ESCOR Supp. (N° 1) at 33, U.N. Doc. E/1984/84 (1984).

5. U.N. Panel Votes Ban on the Death Penalty, N.Y. Times, April 29, 1999.

6. G.A. Res. 2857, U.N. GAOR, 32nd Sess., U.N. Doc. A/Res/32/1UN (1977).

7. Amnesty International, Facts and Figures on the Death Penalty (AI Index: ACT 50/02/99) April 1999.

8. U.N. Panel Votes Ban on the Death Penalty, N.Y. Times, April 29, 1999.

9. ROGER HOOD, THE DEATH PENALTY, 13-14 (2002).

tions.[10] Prisoners in many countries are suffering for years under the expectation of death as a result of actions of attorneys working to save the lives of defendants. In the United States, the new post death sentence laws following the *Furman* decision have brought such a heightened degree of litigation and appeals that the average length of time spent on death row rose from around thirteen months in 1976 to over seven years by 1990s, and eleven years and five months by the year 2000.[11] A skilled defense lawyer, who is well versed in criminal procedure, can use motions and delay tactics that prevent a state from carrying out the execution to the benefit of their client. This however causes the condemned to wait long periods of time in jail during their appeals or during motions between the state and defense attorneys. While any form of solution to this dilemma should never require any removal of lawyers or a decrease in protections for defendants within a nation's criminal justice system, it is becoming more apparent that to protect and defend a client will result in a client suffering to a point that most people in a given society would find objectionable. In the United States, the length of time spent on death row remains an important undecided issue that has not been fully tested by the Supreme Court.[12] Although the Supreme Court declined to address the case of Clarence Lackey, two justices wrote separately that *Lackey* raised an important and undecided issue. Justice Stevens noted in his writing the reinstatement of the death penalty in 1976 rested on serving two principal society purposes: retribution and deterrence.[13] Stevens wrote "that neither ground retains any force for prisoners who have spent some 17 years under a sentence of death."[14] Similarly, Justice Breyer likened to Justice Stevens in his dissent from the Supreme Court's refusal to hear the case of William Elledge from Florida by writing that the defense's argument that Elledge's 23 years under sentence of death is unusual and "especially cruel" was worth considering.[15] Europe has already begun to address the length of time on death row issue. After considering the effects of death row syndrome, European Court of Human Rights decided in July 1989 in the case of *Soering v. UK* that it would be a breach of Article 3 of the European Convention on Human Rights for the United Kingdom to extradite a prisoner who would face the death sentence in Virginia because his inevitably long wait on death row would amount to inhuman and degrading treatment.[16] Currently the Privy Council in England is a court which hears the appeals cases of nations that were once British colonies. In a subsequent case, *Pratt*, involving Jamaican citizens, the Privy Council ruled that extensive confinement under

10. DAVID PANNICK, JUDICIAL REVIEW OF THE DEATH PENALTY 162 (1982).
11. U.S. Department of Justice: Bureau of Justice Statistics, *Capital Punishment 2000* 1 (2001).
12. Lackey v. Texas, 514 U.S. 1045 (1995).
13. *Id.* at 1 (Stephens, J. mem. respecting denial of cert.).
14. *Id.*
15. Elledge v. Florida, 1998 WL 440561 (U.S. Fla.) (Breyer, J. dissenting from a denial of cert.).
16. Soering v. United Kingdom, 161 Eur. Ct. H.R. 34 (1989).

threat of execution alone was enough to render a death sentence a human rights violation.[17] The decision of the Privy Council in *Pratt* further meant that confinement for longer than five years on death row is inhuman punishment and reduced the death sentences to life. Hundreds of prisoners in many of the Caribbean countries subject to the Privy Council were affected by this ruling.[18] Many scholars argue that capital punishment therefore cannot be reconciled with legal and human rights standards and is therefore unlawful.[19] The United States and various Caribbean nations however are not alone in keeping condemned prisoners in death row cells for extended periods of time. Japan has had prisoners imprisoned under the sentence of death for over thirty years.[20] Indonesia has had people under the sentence of death for more than 15 years, Zambia has had at least 30 prisoners who have been on death row between eight and twenty five years, and in Swaziland some prisoners serve at least eighteen years on death row before being pardoned.[21]

International scholars and lawyers have been studying the so called, death row phenomenon that results from long term imprisonment before execution.[22] Prisoners on death row suffer like terminally ill patients, and their suffering is heightened by the living conditions in isolated cells, restricted visits, and a monotony existence where the only activity they can participate in is the thought of their own demise and when it occur.[23] It is also not only the condemned that suffer during this long time period, but the families of the condemned and sometimes the families of the victims themselves that expect a prudent conclusion to a case.[24] In the U.S., the death penalty when preceded by long periods of imprisonment can result in the dehumanizing of the recipients, and amounts to a form of torture.[25] In the 1980s, Robert Johnson detailed in his book *Condemned to Die* the psychological deterioration suffered by a majority of death row prisoners.[26] Robert Johnson recorded and studied in great detail how result of death row confinement leads to the brutalized breakdown of the structures of the mental ego, a process not unlike brainwashing.[27] Conditions and procedures have changed little since the time of Robert Johnson's study. A death row prisoner is separated from the rest of the population because they are considered

17. Pratt v. Attorney General for Jamaica, 4 All E.R. 769 (Privy Council, 1993).
18. H. Mills, Death Row Prisoners Escape the Gallows, The Independent, Nov. 3, 1993, at 6.
19. *Id.*
20. Amnesty International, *Japan: Amnesty International Condemns Executions*, AI Index: ASA 22/006/1997 (1997).
21. *Id.*
22. WILLIAM SCHABAS, THE DEATH PENALTY AS CRUEL TREATMENT AND TORTURE 96-120 (1996).
23. *Id.*
24. M. Radelet, M. Vandiver, F. Berardo, *Families, Prisons, and Men with Death Sentences*, 4 Journal of Family Issues 593, 593-612 (1983).
25. Schabas, *supra* note 22, at 96.
26. ROBERT JOHNSON, CONDEMNED TO DIE: LIFE UNDER THE SENTENCE OF DEATH (1981).
27. *Id.*

already a "dead man" and thus considered unworthy to belong with the living.[28] It can be argued that while certain states in the U.S. have tried to make improvements, the overall trend still is quite a long and oppressive period spent in an inadequate and frightening death row facility. For example, Oklahoma has a death row facility where condemned prisoners are confined to their cells twenty three hours or twenty four hours a day, living in small sterile and solitary concrete cages underground for years. It was described by Amnesty International as cruel, inhuman, and degrading.[29] In Florida, death row inmates spend their time in tiny foot cells and are allowed 4 hours of outside exercise a week.[30] Despite legal cases promising greater access to programs and more time out of cells, the trend in prison management practice is towards increasing security measures and making death row facilities a highly secure prison within a prison.[31] The typical death row inmate spends nine years in a 6 by 9 foot isolated cell with little knowledge of when his final day will arrive. Such standards are associated with torture.[32] It wasn't surprising that in 1997, The American Bar Association voted overwhelmingly to seek a halt to the use of the death penalty, asserting that it is administered through a haphazard maze of unfair practice.[33]

It is a safe argument to propose that death row facilities in the U.S. are often horrible conditions to await execution. However, the U.S. has not been alone in drawing such criticism over death row facility conditions. Conditions on death row in Japan feature death row prisoners being subjected to close confinement in manacles for considerable periods.[34] In Zambia such cells are overcrowded with some cells as small as 3 by 2 meters.[35] Overcrowded and harsh sanitation conditions can be found in Caribbean countries, and Chinese prisoners have their hands and feet manacled prior to their time of execution.[36] A prisoner facing their final days under such living conditions creates a legal and moral problem for retentionist nations.

The discretion to sentence to death or just imprison a defendant raises issues of unfairness. The decision to execute often is in conjunction with unclear stat-

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28. SCHABAS, *supra* note 22, at 96.

29. HOOD, *supra* note 9, at 108.

30. *See* R. Hanley, Judge Orders Death Penalty with a Five Year Deadline, N.Y. Times, May 8, 1999, at A17.

31. SCHABAS, *supra* note 22, at 97.

32. Hanley, *supra* note 30, at A17.

33. Saundra Torry, *ABA Endorses Moratorium on Capital Punishment*, Washington Post, Feb. 4, 1997, A4.

34. Amnesty International, *Japan: Executions: Continuing the Secret and Cruel Practice, AI Index*: ASA 22/005/2001(2001); see also AI, *Japan Complacent over Human Rights: Government Must Implement Human Rights Committee's Recommendations,* AI Index: ASA 22/014/1998; and AI, *Japan's Human Rights Record must be Challenged, AI Index: ASA 22/013/1998.*

35. Amnesty International, *Zambia: Time to Abolish the Death Penalty, AI Index*: 17 AFR 63/004/2001 (2001).

36. M. PALMER, PEOPLE'S REPUBLIC OF CHINA, 105 (1996), IN P. HODGKINSON AND A. RUTHERFORD, CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS, 105-120 (1996).

utes that attempt to define the circumstances when the state should execute a defendant. An example of a lack of legal clarity can be seen with China. The Chinese criminal justice system bears the imprint of traditional Chinese legal norms while trying to preserve current political and social order through flexible discretion by its judges.[37] Discretion in China under Article 61 of the 1997 Criminal Code is not guided or constrained except by very broad sections which note that a crime should be scrutinized for its effect on society and the nature of the offensive activity.[38] This leads to considerable arbitrariness in the application of the law on a defendant and the use of execution varies greatly in China from month to month.[39]

Death penalty statutes around the globe are problematic and prone to issues of unfairness.

The United States in particular has tried in various retentionist states to employ new death penalty statutes that were created for the purpose of limiting and providing guidelines for courts to be less arbitrary or discriminatory in the application of the death penalty.[40] The ability of state governing bodies to write legislation that is fair and protective of a defendant's rights is with great uncertainty, especially when statutes are written vaguely and are often unclear. In New York State more recently, the case of *People v. LaValle* has created a stir. The New York Court of Appeals held that the state's jury instructions were unconstitutional under the state constitution for jury coercion reasons and that the constitutional defect could only be cured by passage of a new law by the legislature.[41] Since the death penalty has been reinstated in New York State in 1995, not a single person has been put to death. The Court of Appeals in New York has thrown out the death sentences on three recent cases for more narrow procedural grounds.[42] In addition to developments in New York, relatively new developments have focused renewed attention on the practice of the death penalty in the United States. In January 2000, Governor George Ryan of Illinois imposed a moratorium on the use of the death penalty and exonerated inmates after discovering procedural flaws in the system from 1977 onward.[43]

The United States has demonstrated in law that as horrific crimes and events such as the World Trade Center attacks occur, it is likely that death penalty statutes will be expanded to cover more crimes such as terrorism or organized

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37. *Id.*

38. *Id.*

39. Amnesty International, *People's Republic of China: Death Penalty Log – 1999*, AI Index: ASA 17/49/00 (1999).

40. International Commission of Jurists, *Administration of the Death Penalty in the United States: Report of a Mission*, June (1996).

41. People v. LaValle, 817 N.E.2d 341 (N.Y. 2004).

42. Edward Maggio, *Death by Statute*, N.Y. STATE BAR ASS'N JOURNAL, Vol. 77, No. 2. (2005).

43. William Claiborne, *Illinois Governor, Citing Errors - Will Block Executions*, Wash. Post, Jan. 31, 2000, at A1.

criminal groups.[44] The list of death penalty crimes under such statutes is likely to expand and also to be constructed vaguely or without complete clarity. This would allow the U.S. government more continuing options of prosecution and also lead to an increase of arbitrary decisions and the unfair application of the death penalty. Other retentionist nations face similar difficulties. India restricts capital punishment for crimes that are codified as the rarest of the rare, Japan uses capital punishment for extremely heinous offences, and Egypt has it for crimes with certain aggravating circumstances.[45] Such legal statements are vague and unclear, and the lack of clarity is likely to lead to judicial decisions based on pure discretion to employ death in cases where such a grave punishment should not be used. Such vague and unclear death penalty statutes in different nations will continue to result in arbitrary decision making by judicial bodies or persons to apply capital punishment for a particular crime.[46] The court or judicial officer can decide from one case to the next whether they feel if the crime in question is "heinous" enough or has "offended society" for death to be applied in a case against the defendant, resulting in some defendants living and others put to death for similar crimes in a society. If a defendant murders two citizens violently without provocation, and if another defendant murders three people in a similar, it is problematic to determine that former defendant should live while the latter defendant should be executed based on vague statutes and arbitrary decision making.

Thomas Jefferson stated in the early eighteen hundreds that he advocated the abolition of capital punishment until it was proven that human judgment was infallible and never unfair.[47] A mandatory death sentence for certain crimes invokes a great potential of unfairness and fallible human judgment on the part of a nation's criminal justice system. These sanctions are increasingly rare in most legal systems because of their harshness.[48] However in the Caribbean, the need to remove mandatory death sentences is apparent. The Inter-American Commission on Human Rights and the UN Human Rights Committee have held that excessive delays in executions for the Caribbean nations of the Bahamas, Jamaica, Trinidad, and Tobago can be considered punishment in breech of human rights.[49] A mandatory death penalty and a wide common law definition of murder in Caribbean nations has led legal authorities in these nations, along with rulings from the Privy Council, to reinforce the necessity of allowing po-

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44. *State Legislature Approves Tough Anti-Terrorism Laws*, New York Law Journal, Sept. 18, 2001.

45. HOOD, *supra* note 9, at 177.

46. International Commission of Jurists, *Administration of the Death Penalty in the United States: Report of a Mission*, June (1996).

47. ROGER SCHWED, ABOLITION AND CAPITAL PUNISHMENT 29 (1983).

48. SCHABAS, *supra* note 22, at 68.

49. *Id.*

tential mitigating circumstances due to the colonial past of the region.[50] Likewise, the Belize constitution encountered difficulty following the case of *Reyes* where the court ruled that a system of sentencing that denies the entrance of mitigating circumstances denies the basic humanity of an offender.[51] The British colonial legacy of a mandatory death penalty is slowly being rejected in the region.[52] In United States, the Supreme Court in *Woodson v. North Carolina* has ruled that mandatory death sentences without examining mitigating circumstances are unconstitutional.[53] International criticism against mandatory sentencing of death for crimes is likely to continue and draw attention to the violation of human rights conducted by retentionist nations. However abandoning statutes that provide for mandatory sentencing is not likely to end the problem of unfairness and human rights violations when capital punishment is used by the state. It is possible to come to the opinion, that if a state has non-mandatory sentencing of death for crimes, there is still an increased possibility of uncertainty and unfair variable discretion on the part of a nation's criminal justice system.

IT IS NOT CLEAR IF CAPITAL PUNISHMENT BY RETENTIONIST NATIONS IS DETERRING CRIME

Deterrence is defined as the inhibiting effect of sanctions on the criminal activity of people other than the sanctioned offender.[54] In the realm of history, the justification for capital punishment as a way to deter serious crime for the benefit of all in society has been a general argument by various countries in modern times as it was during the Roman Empire under the Caesars.[55] It is problematic to adopt whole heartedly the social utilitarian arguments that the use of capital punishment prevents crime and saves innocent lives. If such arguments among retentionist nations are believed to be the most compelling reason for using capital punishment, it places a nation in a difficult and arduous position. Ernest van den Haag has contended that in the absence of clear evidence either way on deterrence, a society faces two risks. If the death penalty does not deter criminal behavior then a society ends up forfeiting the lives of prisoners. If the death penalty does deter criminal behavior and society fails to execute, then a society loses the lives of innocents killed by would be deterred murderers.[56] The better option it would seem then would be to execute criminals. However it falls prey to a very simple argument by abolitionist scholars. The burden

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50. E. FITZGERALD, Commonwealth Caribbean (1996), in P. HODGKINSON AND A. RUTHERFORD, CAPITAL PUNISHMENT: GLOBAL ISSUES AND PROSPECTS, 144 (1996).
51. Reyes v. The Queen (2002) UKPC 11, para. 43.
52. FITZGERALD, *supra* note 50, at 151.
53. Woodson v. North Carolina, 428. U.S. 280, (1976).
54. G. SCOTT, THE HISTORY OF CAPITAL PUNISHMENT 4 (1950).
55. M. KRONENWETTER, CAPITAL PUNISHMENT 10 (1993).
56. SCOTT, *supra* note 54, at 64.

of proof is arguably on the retentionist nations to show that capital punishment has a significant deterrent effect over life imprisonment, since society is not justified in mandating a quantifiably different and harsher penalty through death unless its benefits are positive and affirmatively demonstrated.[57] What could be called "Texas utilitarianism" and the policy of killing offenders including possible innocents to save a greater amount of innocent lives isn't a prudent policy decision for any nation. In reality, the fact that innocent people can get killed by the actions of a nation can be considered a possible fatal argument to the use of capital punishment. Notwithstanding such objections, China currently justifies the use of death to deter a broad spectrum of crimes through "strike hard" campaigns against illegality.[58] Despite the arguments for the need to deter crime, investigations have not been conducted in some key retentionist nations regarding the influence of capital punishment to deter people from committing a wide range of crimes other than homicide. For example, the deterrent effects of capital punishment for crimes other than homicide in nations such as China and Iran have not been studied.[59] The studies that generally have been completed focus on the deterrent effect of capital punishment on the rate of homicide in the United States.[60] The various studies conducted regarding the use of capital punishment to deter homicide have been problematic. For example, in the United States there has been no clear relationship between the number of executions in one year and the rate of murder and non-negligent manslaughter in the following year.[61] At whatever period studies have been carried over the past seventy years or so, no convincing evidence has been forthcoming that capital punishment is marginally effective as a deterrent to murder than long term imprisonment.[62] In reference to the U.S., the solution to the question of whether homicide is deterred by capital punishment is dependent on what theory is employed by researchers. It is also difficult to measure the effect of other areas such as the extent to which there is a background of violent behavior and economic issues.[63] Relevant variables such as location, sex, and age have a major effect on the research of whether crime is being deterred by capital punishment.[64]

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57. SCHWED, *supra* note 47, at 35-36.

58. Amnesty International , *People's Republic of China: The Death Penalty in 1998* 4-5 *AI Index*: ASA 17/57/99 (1999).(discussing the application of the death penalty in China), *available at* http// :web.amnesty.org/library/index/ENGSA170571999

59. Y. Zaohiu, *New Crimes Emerging in the Process of China's Development and the Strategic Policies and Measures to be Taken*, UNAFEI Resource Material Series, no. 30 (1986).

60. SCHWED, *supra* note 47, at 30-42.

61. R. Peterson, and W. Bailey, *Is Capital Punishment and Effective Deterrent for Murder? An Examination of Social Science Research*, in J.R. Acker, R.M. Bohm, and C.S. Lanier, America's Experiment with Capital Punishment, 116 (1998).

62. *Id.*

63. SCHWED, *supra* note 47, at 40-60.

64. *Id.* at 30-42.

Overall, it is difficult to produce empirical data regarding deterrent effects of capital punishment in society that might sway a devoted retentionist nation. What is clear is that fewer citizens support the death penalty in the United States on the reasoning that it might have a deterrent affect, which is backed by research on the states that there is no pattern or result that can suggest that the states that have executed offenders have experienced any greater decline in their homicide rates than states who do not employ the death penalty.[65] However, some research suggests that rather than deterring homicide, state executions actually may cause an increase in the number of homicides.[66] Retentionist scholars also raise the argument that if just a small amount of people will not commit serious crime for fear of facing capital punishment, then capital punishment is clearly justified by its deterrence effect in a population. The problem with such arguments is that capital punishment is often used to deter the most severe crimes in society. If you select down or limit too many categories for the use of capital punishment, you are much less likely to have a deterrent effect because grossly heinous crimes are often not done by those that are rational. Such irrational or emotionally charged people are not likely to be deterred by life imprisonment, and won't be deterred by the threat of death from the government. Often it is the case that most capital crimes are committed in the heat of the moment. Most capital crimes are committed during moments of great emotional stress or under the influence of drugs or alcohol, when logical thinking has been suspended.[67] In such cases, violence is inflicted by persons who care little of the consequences to themselves as well as to others. Furthermore, the death penalty is a futile threat for political terrorists because they usually act in the name of an ideology that honors its martyrs.[68]

The next step in the argument is how then to make a greater deterrent effect in society through capital punishment. For a greater deterrent effect, one must know with certainty that one will die if one commits certain crimes. A punishment can be an effective deterrent to crime only if it is consistently and promptly used by a government. Arguably, capital punishment currently in retentionist nations cannot be administered to meet these conditions and protect the human and legal rights of criminal defendants. If capital punishment is made mandatory or almost guaranteed for certain crimes, then there would be more expedient and certain death carried out by a nation. This leads to more difficulties because there is an increased likelihood for a violation of due process issues and a state can end up killing innocent people or those undeserving of capital punishment. For a deterrent effect among a population, the state

65. HOOD, *supra* note 9, at 216.

66. S. Stack, *Execution publicity and homicide in South Carolina: A research note*, 599-611 THE SOCIOLOGICAL QUARTERLY (1990).

67. Hugo Bedau, *The Case Against The Death Penalty,* American Civil Liberties Archives, (1997).

68. *Id.*

would have to employ executions across the board for significant categories of offenses, with it being mandatory or at least with very little discretion. If capital punishment is applied as it is in China to a wider spectrum of crimes with greater expedience and certainty, there is more likely to be deterrence, but at a great cost to innocent people and to the rule of law of a society's legal system. Any nation that values due process and has any notion of humanity and human rights is then put in a problematic situation. If a nation takes the road of lesser evil and retains execution for certain classes of homicide, imposed in a haphazard and arbitrary way for some cases, they then are back to having greater difficulty in trying to justify its general deterrent effect among their population of citizens.[69]

THE INFLICTION OF CAPITAL PUNISHMENT IS STILL CRUEL AND UNUSUAL IN MOST COUNTRIES

The death penalty should be scrutinized and constantly reexamined because the forms of executions used by nations are often cruel and unusual from a legal and moral standpoint. The United Nations has attempted to address retentionist countries on the way the death penalty is used by their governments. The UN Economic and Social Council in 1984 circulated among member nations Safeguard No. 9 for the protection of the rights of those facing the death penalty in countries that have yet to abolish capital punishment.[70] It stated that where capital punishment occurs it should be carried out so as to inflict the minimum possible suffering.[71] Despite such provisions, it is apparent that suffering is not minimized for criminal defendants who are executed in retentionist nations.

First, the involvement of the public during executions creates deplorable conditions for victims and observers, similar to the barbaric involvement of the public in the execution spectacles at the Roman coliseum. Executions in public or broadcasted on television have taken place since 1994 in at least 18 countries or territories.[72] Hanging in public in Iran still takes place in a carnival like atmosphere, and has persisted since the Iranian Revolution.[73] Saudi Arabia has continued doing beheadings in public, and firing squad killings in front of the public still occur in Nigeria.[74] China, Gabon, Libya, Guatemala, have also televised their executions.[75] Public spectacles are created where the condemned suffers on the way to his execution, being mocked along with physical and

69. SCHWED, *supra* note 47, at 30-42
70. HOOD, *supra* note 9, at 97.
71. FITZGERALD, *supra* note 50, at 151.
72. U.S. Department of State, Country Reports on Human Rights Practices, (2002).
73. Amnesty International, *Death Penalty News, March*, 2 *AI Index*: AT 53/002/2001 (2001).
74. Amnesty International, (1995), *Saudi Arabia: Upsurge in Public Executions, Death Penalty News*, and *Nigeria: Public Executions, Death Penalty News*, Sept. *AI Index*: ACT 53/03/95. (1995).
75. HOOD, *supra* note 9, at 102.

psychological damage prior to death. In China, a condemned person can be put into a public rally, be televised, and paraded around and humiliated, in full view of the public prior to being taken to their place of execution.[76] Amnesty International in 2001, reported in regards to the recent Chinese "strike hard" campaign how mass rallies and sentencing takes place in front of massive crowds in sports stadiums and public squares which is often televised.[77]

The death penalty in China is sometimes used as a way to create a public spectacle in support of the government. It can be seen as an overly humiliating experience to the condemned, and presumably tries to work as a deterrent to future criminals.[78]

In the methods of execution we see tremendous difficulties. The U.N. through the Fifth and Sixth Surveys attempted to determine if considerations had been given to the form of execution taking place by retentionist countries.[79] The methods currently used are often imprecise and messy. In the U.S. until only recently, the electric chair was the preferred mode of execution. The electric chair without a doubt has proven itself to not be a form of execution that minimizes pain, but instead maximizes agony. The condemned prisoner is led into the death chamber, strapped into the chair while the electrodes are fastened to the head and legs. When the electricity is applied, there is the awful odor of burning flesh, sometimes smoke rises from the head, and no one knows how long an electrocuted individual retains consciousness.[80] The U.S. however is not the sole user of gruesome forms of capital punishment. Poorly conducted hanging which results in strangulation is often used in the Caribbean.[81] Besides hanging, the form of execution used in many countries that retain the death penalty is usually by firing squad, and particularly in China, a frequent user of the death penalty.[82] In Sudan and Iran, death can be inflicted by a myriad of graphic killing in the form of hanging, stoning, or shooting based on the nature and specific details of the offense. Saudi Arabia and Yemen in particular use a common method of execution in the form of beheading by a sharp curved sword in a ritualistic manner while the offender is on his knees in public.[83] Such forms of execution can be viewed as a violation of decency and should be considered indecent and overly cruel. The U.S. Supreme Court also has not given an opinion on whether certain forms of execution are cruel and possible violations of a person's constitutional right under the eighth amendment.[84] Meanwhile, other

76. PALMER, *supra* note 36, at 105-131.
77. Amnesty International, *supra* note 58, at 4-5.
78. *See id.*
79. FITZGERALD, *supra* note 50, at 143.
80. Bedau, *supra* note 67.
81. FITZGERALD, *supra* note 50, at 143.
82. SCHABAS, *supra* note 22, at 177.
83. *Id.*
84. Bryan v. Moore, 528 U.S. 1133.

nations such as China and Thailand have moved towards using lethal injection.[85]

In theory, lethal injection seems like an easier and less cruel form of execution. In the U.S. the patient is placed in a medical examination type room, attended to by medical personnel, and has a needle placed in his/her arm. The convict goes to sleep, and while asleep a form of cardiac arrest is induced from which the condemned does not awake. Proponents of capital punishment feel this is a compromise with abolitionists and is not a tortuous form of execution.[86]

The reality of lethal injection is far from pleasant and arguably not a method that other nations should adopt. Although lethal injection is expected to be a more sanitized form of execution that is not likely to cause great pain for the condemned, the administering of the drugs involved is problematic. The administering of the drugs can prolong the execution and probably cause the prisoner considerable distress.[87] The execution of Raymond Landry resulted in a blowout of a needle from his vein followed by a spraying of chemicals all over the execution room.[88] Botched executions still continue today. Such botched executions include Stephen McCoy, a convict that had such a violent physical reaction to the drugs (heaving chest, gasping, choking), that a male witness fainted, crashing into and knocking over another witness.[89] Another example is Billy Wayne White, whose execution took 47 minutes due to authorities unable to find a suitable vein, until White himself eventually had to help the authorities insert the needle.[90]

In terms of physicians and technicians, the subject remains a source for disagreement. As Hood has noted, a postal survey of 1,000 medical practitioners in the United States, asking about their willingness to be involved in and attitudes towards capital punishment, found that 41% of the 413 who responded indicated that they would perform at least one action disallowed by the American Medical Association, while 19% said they would be willing to actually give the lethal injection.[91]

It is apparent that the forms of executions in many countries, and the involvement of the public are a glimpse back to the days of the past. Such measures show a great degree of uncivilized and barbaric behavior that most people by today's standards would view as grossly cruel and demonstrate a lack of legal

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85. *China opts for Lethal Injection*, BBC News, August 31, 2000. and Richard Ehrlich, *Thailand Switches to Lethal Injection* Oct 19th, SCOOP, Oct. 13th 2003.

86. Deborah Denno, *When Legislatures Delegate Death: The Troubling Paradox behind State Uses of Electrocution and Lethal Injection and what is Says about Us*, OHIO ST. L.J. (2002).

87. F. Thomas, *Lethal Injection: An Uneasy Alliance of Law and Medicine, Journal of Legal Medicine*, 383-403 (1983).

88. Denno, *supra* 86, at 564.

89. Tim Chavez, *Lethal Injection not a Tidy Method of Execution, The Tennessean*, Oct. 12, 1999.

90. *Id.*

91. HOOD, *supra* note 9, at 105.

protection and respect of an individual. It can be argued that when a nation puts a criminal defendant to death, there is no sanitized way of completing such an objective.

CONCLUSION

There is ample evidence that fair administration, deterrence effects, and humane forms of capital punishment can be highly questionable in retentionist nations. Although investigative publications from Amnesty International and other sources can be criticized for not representing the complete picture of punishment in various nations, they do hint at a great problem with capital punishment. With greater cooperation of retentionist nations, more valid evidence and knowledge can be obtained that demonstrates the problems with using capital punishment. Bringing an end to capital punishment in retentionist countries will continue to be an arduous task for abolitionists. For rententionist states, the burden has fallen that executions, if continued, must be highly reformed and tied to the will of the people and the protection of a defendant. The difficulty in changing the policies of nations in an international spectrum lies not in the presentation of evidence to various governments, but with ordinary people. Friedrich Nietzsche once said that "pain does not hurt as much as it does today."[92] This intriguing quote as interpreted by Jeffrey Reiman puts forth to society the truth that continued progress in civilization is characterized by a lower tolerance for one's own pain and the pain suffered by others in a given society.[93] Therefore, it is up to people in retentionist nations to reevaluate the role capital punishment plays in their specific culture, and for citizens of different nations to pressure their own governments to make sweeping reforms if they wish to keep capital punishment, or abolish the practice. Even retentionist nations that may not abandon the death penalty swiftly or introduce reforms promptly should at a minimum reexamine the manner in which capital punishment exists in their nation and for what purpose. For even if the will of the people cry out for the harshest justice to be implemented on criminal defendants, as it stands now there is no retentionist nation that doesn't face fundamental legal and humanitarian concerns. Capital punishment in retentionist nations as it exists today without any reform is improper violence by the state. As Cesare Beccaria would note, capital punishment will never be useful in society because it is hypocritical that legal systems that detest killing should then act to end the lives of offenders.[94] However retentionist nations would be quick to point out that the increased use of imprisonment as an alternative to execution is

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92. FRIEDRICH NIETZCHE, THE GENEALOGY OF MORALS, in THE BIRTH OF TRAGEDY AND GENEALOGY OF MORALS, trans. Francis Golffing 199-200 (1956).

93. JEFFREY REIMAN, WHY THE DEATH PENALTY SHOULD BE ABOLISHED IN AMERICA, in L. POJMAN AND J. REIMAN, THE DEATH PENALTY: FOR AND AGAINST (1998).

94. CESARE BECCARIA, ON CRIMES AND PUNISHMENT 50 (Henry Paolucci trans. 1963).

also problematic. It is however conceivably better for a nation to try and improve systems of punishment where an offender will live, than to reform and justify a system of punishment where the state is killing its own citizens. And if we look at Europe, and in particular Italy which has abolished the death penalty, maybe it is more appropriate in modern times to be like the Romans once again and strive for improvement and change in a more humanitarian direction.

Perverse Incentives for Employers: The Sickening Co-Existence of the Employment-At-Will Doctrine, Health Finance Policy, and Labor and Employment Statutes.

LOIS GALLUZZO

INTRODUCTION

Employees in nearly all industrialized countries in the world have more protection against unjust discharge than do workers in the United States.[1] Many people justify this difference, claiming that American workers are more productive than European workers because of the insecurity of the "at-will rule."[2] Job insecurity and job loss, however, impose their own costs on the public health and on employee productivity.

> The loss of a job is not only an economic catastrophe but also a psychological and emotional disaster for both the employee and his or her family. The negative aspects of unemployment also affect society by idling labor resources and by burdening society's public welfare systems such as unemployment compensation, welfare, food stamps, and Medicaid.[3]

The United States' combination of employment-at-will and employer-sponsored health insurance introduces an additional variable into the employment bargain. Excellent performance, even in a key job, may be insufficient to prevent discharge; the employee's health costs, and those of his family, may override all other factors in an employer's retention decisions.[4]

Society incurs mental health costs that may be the result of job insecurity[5] and hostile or competitive work environments.[6] These costs, while not readily

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1. *See* J. Hoult Verkerke, *An Empirical Perspective on Indefinite Term Employment Contracts: Resolving the Just Cause Debate*, 1995 WIS. L. REV. 838, 894 (1995).

2. *Id.* at 895.

3. Kathleen C. McGowan, *Unequal Opportunity in At-Will Employment: The Search for a Remedy*, 72 ST. JOHN'S L. REV. 141, 142-43 (1998).

4. *See* Joan Vogel, *Containing Medical and Disability Costs by Cutting Unhealthy Employees: Does Section 510 of ERISA Provide a Remedy?*, 62 NOTRE DAME L. REV. 1024 (1987); Joseph Pereira, *To Save on Health-Care Costs, Firms Fire Disabled Workers*, WALL ST. J., July 14, 2003, at A1.

5. R. M. D'Souza et al., *Work and Health in a Contemporary Society: demands, control and insecurity*, 57 J. EPIDEMIOLOGY & CMTY. HEALTH 849 (2003), *available at* http://jech.bmjjournals.com/cgi/content/full/57/11/849 (last visited Jan. 25, 2004).

6. *See generally* Wilson v. Monarch Paper Co., 939 F.2d 1138 (5th Cir. 1991) (involving a plaintiff alleging age discrimination in the form of on-the-job insults and a demotion which caused him severe stress, leading to the development and diagnosis of bipolar disorder for which he had to be hospitalized).

quantifiable, are substantial.[7] Workplace and unemployment stressors increase the likelihood that an individual will experience a disabling depression that may lead to increased medical costs, permanent disability, or even suicide.[8] Less severe depression and other co-morbid mental health diagnoses are also costly because they decrease productivity. For example, lost productivity resulting from depression alone costs $44 billion annually.[9]

Our current employment law is insufficient to protect the stressed, depressed, or discharged "casualties of the workplace," and creates an "uneven playing field" for the two parties to an employment contract. Congress has responded to employer abuses by passing anti-discriminatory legislation, including the Americans with Disabilities Act (ADA),[10] the Age Discrimination in Employment Act (ADEA),[11] the Family and Medical Leave Act, (FMLA),[12] and the Employee Retirement Income Security Act (ERISA).[13] However, these statutes, while effective in many respects, have had the perverse effect of encouraging employers to use constructive discharge and pretextual last clear chance notices, in order to circumvent liability for wrongful or retaliatory discharge. In addition, employers sometimes deliberately create a hostile work environment, hoping that targeted employees will become so frustrated and angry that they will resign.[14]

I. THE PROBLEM WITH THE CO-EXISTENCE OF THE EMPLOYMENT-AT-WILL DOCTRINE AND EMPLOYEE-SPONSORED HEALTH INSURANCE

Health and disability insurance are a major part of the "benefit of the employment bargain" for most employees. Yet for many, those benefits are elusive; available when not needed, but disappearing along with employment when the benefits are needed.[15] This disappearance occurs because the cost of those benefits provides a perverse incentive for employers to discharge ill workers[16] and replace them with healthier workers. Aided by the employment-at-will pre-

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7. *See* McGowan, *supra* note 3, at n.11.

8. *See* T.A. Blakely et al., *Unemployment and Suicide. Evidence for a Causal Association?*, 57 J. EPIDEMIOL. & CMTY. HEALTH 594 (2003), *available at* http://jech.bmjjournals.com/cgi/content/full/57/8/594 (last visited Jan. 24, 2005); Aini Ostamo et al., *Transitions of employment status among suicide attempters during a severe economic recession*, 52 SOC. SCI. & MED. 1741 (2001).

9. Depression and Bipolar Support Alliance, *Thirty Years After Eagleton Controversy, Mental Health Stigma Still Haunts Political Arena* (Oct. 1, 2002), *available at* http://www.dbsalliance.org/media/newsreleases /Stigma%20Release.html [hereinafter *Eagleton Controversy*].

10. Americans with Disabilities Act, 42 U.S.C.S. § 12101 (2004).

11. Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621.

12. The Family and Medical Leave Act of 1993, 29 U.S.C. § 2601 (2004).

13. The Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 (2004).

14. Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against Tortification Of Labor And Employment Law*, 74 B.U. L. Rev. 387, 408-09.

15. Vogel, *supra* note 4, at 1030.

16. *Id.* at 1024.

sumption, employers are increasingly acting on that cost-cutting incentive by simply discharging employees who have taken disability leaves, or who have high mental or physical health expenses.[17]

By discharging workers who are ill or who have family members who are ill, the employer shifts the costs of illness from the company-provided insurance policy to the employee, and often ultimately to society at large.[18] Although health insurance is a necessary "passport" to health care in the United States,[19] few employees manage to keep health insurance after they become unemployed.[20] As a result, their medical costs often fall on society's welfare and Medicaid programs.[21] In addition to the direct costs, there are "hidden" costs to the public health; people who become uninsured have a strong financial incentive to delay treatment of illnesses, particularly mental illnesses, until they become acute.

A loss of health insurance when it is needed contradicts the basic premise of insurance, which is to pool risks.[22] Some people will become ill and others will not.[23] It is of little comfort to a family or to society that the worker was insured before a major illness. When an employee becomes unemployed and subsequently uninsured, then he, his family, and society must pay directly for costs that were insured as a part of the employment bargain.

An employer's discharge of workers who have high medical expenses thereby breaks not only the employment contract with the worker, but also an implicit contract between the employer and society. Society has provided the infrastructure, security, and trained workforce necessary for the operation of businesses. Society also provides tax rebates for job creation and tax incentives to the companies that provide health insurance for their workers. The transfer of health care costs back to society, through the discharge of employees, is a break of trust with the government that provided the tax incentives.

The cost of care for uninsured individuals is proportionately higher, because medical providers commonly bill higher costs to uninsured patients for the same services that are discounted for insured patients.[24] Many hospitals also employ aggressive collection policies which allow "body attachments" that essentially

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17. *Id.* at 1030; *See also*, Joseph Pereira, *To Save on Health-Care Costs, Firms Fire Disabled Workers*, WALL ST. J., July 14, 2003, at A1 (citing Mercer Human Resource Consulting, from a 2002 survey of 723 employers).

18. McGowan, *supra* note 3, at 142.

19. *See generally* Mamula v. Satralloy, Inc., 578 F. Supp. 563, 577 (S.D. Ohio 1983).

20. GAIL SHEARER & SUSANNA MONTEZEMOLO, CONSUMERS UNION, A PINK SLIP AWAY. . .WHY CONGRESS SHOULD SUBSIDIZE HEALTH INSURANCE COVERAGE FOR LAID-OFF WORKERS (Oct. 22, 2001).

21. McGowan, *supra* note 3, at 142-43.

22. Vogel, *supra* note 4, at 1030.

23. *Id.*

24. Lucette Lagnado, *Medical Seizures: Hospitals Try Extreme Measures to Collect Their Overdue Debts*, WALL ST. J., Oct. 30, 2003, at A1.

reconstruct the concept of a debtors' prison in the United States.[25] Unemployed workers who lose health insurance therefore have strong financial disincentives to seek treatment, at a time when they are likely to need it most.[26]

A. THE CO-EXISTENCE OF EMPLOYMENT AT-WILL AND EMPLOYER-SPONSORED HEALTH INSURANCE AS AN HISTORICAL ACCIDENT

The co-existence in the United States of the employment-at-will doctrine and employer-supplied health insurance is an historical accident. The two grew separately, for different reasons. The combination is not the planned product of legislative reflection and debate. Employment-at-will is a common-law doctrine;[27] employer-supplied health insurance grew in popularity because individual employers, due in part to tax incentives, chose to offer the benefit to their employees.[28]

Employment-at-will is judge-made law[29] that has been enforced by the courts in the United States for over 100 years. The doctrine provides a presumption that an employment contract may be terminated by either party at any time and for any reason, unless the duration is specified in an express contract. The presumption was formulated by H.G. Wood in 1877 when he declared that the burden of proof falls on an employee to prove that an employment contract is not at-will: "the rule is inflexible, that a general or indefinite hiring is prima facie a hiring at will, and if the servant seeks to make it out a yearly hiring, the burden is upon him to establish it by proof."[30]

Termination without cause has been the employers' traditional prerogative in the United States. The Tennessee Supreme Court, in the 1884 case of *Payne v. Western & Atlantic Railroad Co.*, held that employers have a right to discharge their employees for "good cause, for no cause or even for cause morally wrong, without being thereby guilty of legal wrong."[31] Only in recent years has the employment-at-will doctrine been restricted. The current recognition of the doctrine varies widely among the states; but three exceptions to employment-at-will are now widely recognized: "first, breach of an express or implied promise;

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25. Lucette Lagnado, *How a Local Agency Challenged Hospitals' Collection Tactics*, WALL ST. J., Oct. 30, 2003, at A8.

26. *See* McGowan, *supra* note 3, at 142; RICHARD H. PRICE, CAL. CTR. FOR HEALTH IMPROVEMENT, JOB LOSS THREATENS HEALTH, MENTAL HEALTH OF CALIFORNIANS: EFFECTIVE JOB SEARCH PROGRAMS CAN MAKE A DIFFERENCE 2 (2000) (explaining that unemployed persons are more likely to be depressed, and depressed persons are twice as likely as non-depressed persons to have chronic and multiple health conditions).

27. *See, e.g.*, Fadey v. Planned Parenthood Ass'n, 160 F.3d 1048, 1050 n.11 (stating that an "overwhelming majority of states recognize the traditional common law doctrine of employment at-will") 652 P.2d 625, 631.

28. FINKIN ET AL., LEGAL PROTECTION FOR THE INDIVIDUAL EMPLOYEE 754 (1989) at 754.

29. McGowan, *supra* note 3, at 180.

30. H.G. WOOD, A TREATISE ON THE LAW OF MASTER AND SERVANT § 134, at 272 (1981).

31. Payne v. W. & Atl. R.R. Co., 81 Tenn. 507, 513 (Tenn. 1884).

second, wrongful discharge in violation of public policy; and third, breach of an implied covenant of good faith and fair dealing."[32]

Health insurance was rare before 1940; fewer than 10% of Americans had such coverage.[33] After World War II, however, the cost of health insurance was excluded from wage regulations, and employers began offering employer-paid health insurance in an attempt to attract talent despite their inability to raise salaries.[34] The growth continued to a point where in the year 2000, 64.1% of the population was covered by employer-based health insurance.[35]

The disadvantages of the co-existence of the employment-at-will doctrine and employer-sponsored health insurance have become more acute in recent years, as the job market has been destabilized by competitive cost-cutting, and corporate mergers and acquisitions. As a result, Congress responded to the plight of discharged employees who lost their insurance benefits, by passing the COBRA[36] legislation. This statute mandates that discharged employees can temporarily continue their health insurance by paying the full costs of those benefits. However, time has shown that many unemployed workers cannot pay to continue the coverage, and therefore become uninsured very shortly after being discharged.[37]

B. EMPLOYMENT DISINCENTIVES FOR MENTAL HEALTH TREATMENT

Even employed and insured employees who suffer from stress-related illnesses may defer treatment, because they reasonably fear that their employment will be terminated if their employers learn of their stress-related illness.[38] In fact, many employees who have mental health insurance choose to pay those expenses themselves, rather than have that information disclosed to their self-insured employers.[39] Other employees may defer mental-health treatment because they lack coverage for mental-health expenses; many insurance plans offer less or no reimbursement for mental health treatment.[40]

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32. McGowan, *supra* note 3, at 148-49.

33. FINKIN ET AL., *supra* note 28.

34. *Id.*

35. *Id.* at 755.

36. Consolidated Omnibus Budget Reconciliation Act (COBRA) 29 U.S.C. § 1161 (1989) (containing provisions giving certain former employees, retirees, spouses, and dependent children the right to temporary continuation of health coverage at group rates).

37. *See generally* Jeanne M. Lambrew et al., *How the Slowing U.S. Economy Threatens Employer-Based Health Insurance*, 511 THE COMMONWEALTH FUND (November 2001), *available at* http://www.gwhealthpolicy. org/downloads/ 511_Lambrew_slowing_economy.htm (exploring the difficulties of how the unemployed remain insured).

38. *See* RALPH REISNER ET AL., LAW AND THE MENTAL HEALTH SYSTEM 388 (3d ed. 1999).

39. *Id.* at 388.

40. *See* Senator Paul Wellstone Mental Health Equitable Treatment Act of 2003, S. 1832, 108th Cong. § 712 (2003).

The *Eagleton controversy* is an excellent example of the public stigma attached to mental health treatment. George McGovern chose Thomas Eagleton to be the Democratic Party's Vice-Presidential nominee in McGovern's 1972 race against Richard Nixon. However, McGovern changed his mind and asked Eagleton to withdraw from the race after it was publicized that Eagleton had twice received electric-shock therapy as a treatment for depression during the 1960s.[41]

Thirty years after the *Eagleton controversy*, mental health treatment still damages the careers and aspirations of employees, political candidates, and other workers who contribute to our country's economy.[42] Accepting treatment for mental illness causes workers to lose jobs and remain unemployed or underemployed, even in cases where they are capable of continuing to work during treatment, or returning to their former jobs following brief leaves of absence.[43] As a result, moderately stressed or depressed persons are likely to refuse or delay necessary treatment, thereby exacerbating their conditions and increasing the possibility of a tragic ending such as long-term disability or even suicide.

C. MEDICAL COSTS, MENTAL ILLNESS, AND EMPLOYMENT TERMINATION: THE CASE OF CHANDLER V. SPECIALTY TIRES OF AMERICA

The case of *Chandler v. Specialty Tires of America* is illustrative of an employer's reaction to both medical expenses and mental illness.[44] The employee in this case was hospitalized in intensive care, as the result of a suicide attempt. Later, her condition improved and she was planning to return to work when her employer notified her that she had been discharged. The employer claimed that she was fired because of her "irresponsible act of taking an overdose of pills," and not because of any mental disability.[45] The employer admitted, however, that Chandler had been an excellent employee who had received exemplary performance reviews.[46]

When there is a causal connection between an employee's qualifying medical leave and a resulting termination of employment, the employer may be held liable for retaliatory discharge under the Family Medical Leave Act.[47] "[H]ospitalization for severe depression is covered by the statute," an "employee need not specifically mention the FMLA . . . but must only notify the employer that FMLA-qualifying leave is needed," and employers are prohibited from discharging employees for exercising their rights under the FMLA.[48] Ac-

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41. *See* L. SOUTHWICK, PRESIDENTIAL ALSO-RANS AND RUNNING MATES 1788-1980, 661-64 (1984).
42. *See Eagleton Controversy, supra* note 9, at 1.
43. *See* Chandler v. Specialty Tires of Am., Inc., 283 F.3d 818, 821 (6th Cir. 2002).
44. *Id.*
45. *Id.*
46. *Chandler*, 283 F.3d at 826.
47. *Id.*
48. *Id.* at 825

cordingly, the jury in the Chandler case found that the employer was liable for wrongful discharge under the FMLA statute.[49] Their decision was due, in part, to the fact that the employer offered no non-discriminatory reason for her discharge.[50]

II. SOCIETAL COSTS OF ANXIETY, DEPRESSION, AND OTHER MENTAL ILLNESSES

Society bears staggering costs related to depression and suicide. "More than 20 million Americans currently live with depression . . . [as did] Abraham Lincoln, Franklin D. Roosevelt, and Lyndon Johnson."[51] But depression, which is treatable,[52] too often leads tragically to suicide. In the United States, suicide is listed[53] as the cause of one of every eleven[54] or one of every nine[55] deaths, depending on the year and the specific survey. Every year, approximately 30,000 Americans die as a result of suicide,[56] double the number of those who die each year in the United States due to AIDS/HIV infection.[57] There are also approximately 200,000 suicide attempts every year in the United States,[58] which contribute to soaring health costs, and psychologically devastate families and friends.

Suicide, however, is a silent killer.[59] There are no pink ribbons as for breast cancer victims or candlelight vigils as for AIDS victims. The psychological impact on the victim's family and friends is arguably greater than if the victim had died of any other illness.[60] But even families and friends are reluctant to speak openly about suicide.[61] People are more willing to talk about and raise money for almost any other illness. It is common for suicide to be underre-

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49. *Id.* at 827.

50. *Id.* at 824.

51. *Eagleton Controversy*, *supra* note 9, at 1.

52. *Id.* (discussing medical advances allow 80 – 90% of people with depression to be successfully treated).

53. KAY REDFIELD JAMISON, NIGHT FALLS FAST: UNDERSTANDING SUICIDE 26-51 (2000) (suicide is often underreported as a cause of death).

54. Robert Anderson, Deaths: Leading Causes for 2000, CDC National Vital Statistics Reports, Vol. 50, No. 16 (Sept. 16, 2002) *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr50/nvsr50_16.htm.

55. American Association of Suicidology, "Suicide Statistics" for 1996.

56. National Center for Injury Prevention and Control, *available at* http://www.cdc.gov/ncipc/factsheets/suifacts.htm.

57. JAMISON, *supra* note 53, at 22-23 (last reviewed Jul. 26, 2004); JAMISON, *supra* note 53, at 48 (providing facts about suicide in the United States).

58. The Surgeon General's Call to Action to Prevent Suicide, *available at* http://www.surgeongeneral.gov/ library/calltoaction.calltoaction.htm (1999) (explaining that there are approximately sixteen attempted suicides for every successful suicide).

59. JAMISON, *supra* note 53, at 303-04.

60. *Id.* at 24.

61. *Id.* at 290-308.

ported as a cause of death,[62] and many relatives and friends conceal the actual cause of death.[63] The concealment is due to the stigma associated with suicide, and also due to the fact that many life insurance policies exclude payment when the insured has committed suicide.

The loss to society from the actual and attempted suicides is compounded by the psychological distress suffered by their families, friends, and co-workers. "Suicide is a death like no other, and those who are left behind to struggle with it must confront a pain like no other."[64] And because suicide is often "seen by others as a preventable death," those associated most closely with the victim, at home and at work, often bear the brunt of community gossip.[65] In fact, those closest to the victim will themselves have an increased risk of suicide in the coming years.[66] Prompt treatment of mental illness should therefore have the ripple effect of mitigating its effects on others.

III. EMPLOYMENT-INDUCED STRESS AND MENTAL ILLNESS: THE EMPLOYER'S INFLUENCE

Pervasive employer practices may contribute to mental illnesses among American workers. Job insecurity and increasingly competitive work environments increase the likelihood that employees will suffer from anxiety and depression. Even employees who are not "downsized" or discharged experience "pain, guilt, loneliness, depression and job insecurity,"[67] and remain vulnerable to the additional stressor of heavier individual workloads.

"[J]ob security . . . is valued quite highly because employment is an integral and crucial aspect of one's life."[68] Yet most employees are employees "at-will,"[69] and therefore subject to the stressor of job insecurity. It is arguable that few people, if given a choice, would subject the stability of their lives to the whims of their employers.[70] The fact that most employees are employees at-will is therefore a likely testament to the inequality in bargaining power between employers and employees.

The employment-at-will doctrine allows employment contracts, in many states, to be construed more harshly against an employee than other contracts

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62. *Id.*
63. *Id.*
64. *Id.* at 292.
65. *Id.* at 300.
66. National Suicide Prevention Strategy for England: Consultation Document, Department of Health, 27761 (Sept. 17, 2002) RIC. *available at* http://www.dh.gov.uk/assetRoot/04/06/29/35/04062935.htm.
67. Shari Caudron, *Teach Downsizing Survivors How To Thrive*, Personnel Journal., Jan. 1996, at 39.
68. McGowan, *supra* note 3, at 142.
69. *Id.*
70. *Id.* at 147.

that the employee might enter. While some courts imply a "covenant of good faith and fair dealing" to other contracts, [t]he majority of jurisdictions continue to categorically refuse to accept the covenant. . .with respect to at-will employment. Indeed, some extreme jurisdictions refuse to accept the covenant not only in the at-will setting, but in the entire employment context. Other jurisdictions acknowledge the covenant in the at-will setting only where the employee states another claim, such as a violation of public policy . . . .[71]

The employment-at-will doctrine still provides most employers with the presumption that termination of employment is legal.[72] In order to prevail on a claim of wrongful discharge, an employee must rebut the presumption, despite the fact that the employee has very little access to any dispositive data.[73]

A. "FORCED RANKING" SYSTEMS AS A CAUSE OF JOB INSECURITY AND MENTAL ILLNESS

The competitive tension in the workplace is heightened by the widely used "forced ranking" management system advocated by Jack Welch, which competitively pits colleague against colleague.[74] Employees of companies following this 'management philosophy' know that some of them will be branded as 'losers,' and that those 'losers' will be discharged. The prime time show *Survivor* would seem to be an apt analogy, particularly with respect to the survivors' need to form alliances, prevaricate, and exclude others. It is hard to imagine a scenario more likely to lead to anxiety and depression among employees, particularly the 10% of people who must be the losers. These bright, well-educated members of the corporate workforce were not considered to be "losers" when they were hired. Instead, they somehow became "losers" during the competitive battle within the corporation. This winnowing process, which its advocates claim is good for the company, imposes the considerable costs of worker dislocation on society as a whole.[75]

Yet our current public policy not only allows companies to routinely discharge their lowest ranking employees, who may be adequately performing their jobs; it also grants the companies additional 'rights' as they fire the 'losers.' Employers have the right to not offer severance pay, the right to cancel deferred compensation, and the right to immediately stop paying for health, life, and pension benefits.

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71. McGowan, *supra* note 3, at 148 n.31.

72. McGowan, *supra* note 3, at 147-48.

73. Cornelius J. Peck, *Penetrating Doctrinal Camouflage: Understanding the Development of the Law of Wrongful Discharge,* 66 WASH. L. REV. 719, 768 (1991); Vogel, *supra* note 4, at 1046.

74. *See* ROBERT SLATER, 29 LEADERSHIP SECRETS FROM JACK WELCH (2002); JACK WELCH & JOHN A. BYRNE, JACK, STRAIGHT FROM THE GUT (2001).

75. *Id.*

B. UNPAID OVERTIME: COPING WITH PRESSURE TO VOLUNTEER FOR COMPANY CAUSES

Many employers increase stress on their employees by pressuring them to volunteer for company-sponsored charitable causes. Twenty-three percent of employers with 1,000 or more workers are asking employees to donate their own time to company efforts.[76] Only approximately 10% of companies offer paid time off the job to volunteer.[77] The employers' requests often appear coerced; many employees "volunteer" despite the fact that "frazzled workers place a premium on their time these days."[78] In fact, there is anecdotal evidence that at least one company has gone so far as to award "points on the performance evaluations of employees who don a company T-shirt six Saturdays a year and work for free on selected 'volunteer' projects."[79] The employee is therefore compelled to take additional time away from family or leisure pursuits in order to enhance the likelihood of a good performance review.[80]

IV. UNEMPLOYMENT AS A CAUSE OF MENTAL ILLNESS

There is an increased likelihood that workers who become unemployed will suffer additional stress-related physical and mental health problems, such as coronary-artery illness, peptic ulcer, or anxiety and depression.[81] Mental illnesses may become a particularly circular problem; the worker becomes depressed because of unemployment, and then is unable to find another job because of the resultant depression. The cause and effect of this cycle is arguable; some would say that the depression is the cause of, and not the result of, unemployment.[82]

Although it is true that people who have depressive symptoms are less likely to thrive in the workplace,[83] it is also true that "among those who do not have high levels of depressive symptoms initially, the loss of a job can lead to the onset of such symptoms."[84] Involuntary unemployment increases the likelihood that an individual will become depressed, and even attempt suicide.[85] A recent longitudinal study in New Zealand supports a causal connection between unem-

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76. Sue Shellenbarger, *Drafted Volunteers: Employees Face Pressure to Work on Company Charities*, WALL ST. J., Nov. 20, 2003, at D1 (citing Boston College Center for Corporate Citizenship and U.S. Chamber of Commerce, 2003 survey of 515 companies).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. James J. Messina, Ph.D, *Tools for Personal Growth*, *at* http://www.coping.org/growth/content.htm sources (last visited Jan. 26, 2005).

82. *See* Ostamo et al., *supra* note 8, at 1742-43.

83. PRICE, *supra* note 26, at 1.

84. PRICE, *supra* note 26, at n.14.

85. *See* Ostamo et al., *supra* note 8, at 1741.

ployment, depression, and suicide, by noting unemployment that predates symptoms of depression and anxiety.[86] The study avoided confusion in the causal relationship by placing people who left employment because of mental illness in a different group.[87] The correlation between unemployment and suicide was therefore not affected by pre-existing mental illness.[88] The unemployment association was also "comparatively unaffected after controlling for income, education, car access, deprivation, and marital status."[89]

Economic hardship is a crucial factor that links involuntary unemployment and poor mental health:

> It is increasingly clear that the negative mental health impacts of involuntary job loss are due to the resulting economic hardship and family distress rather than being caused by a preexisting psychiatric disorder that could have triggered selection into unemployment. Prolonged economic hardship limits access to healthcare, and may result in family conflict, child abuse and substance abuse. Reemployment that improves financial stability has repeatedly been shown to improve mental health . . . .[90]

The economic impact of involuntary job loss, while cushioned somewhat by unemployment insurance, is therefore one cause that contributes to distress and mental illness in the United States.

Clinical studies of the interactions between unemployment and depression are insufficient to convey unemployment's sometimes catastrophic effect on an individual. Behavioral psychology offers additional insights. According to the idea of the "looking-glass self" theory, people become who they are based on the perceived reactions of others.[91] The status of an individual within the workplace therefore becomes an important part of a person's self-image. The destruction of that image, often laboriously created over a period of many years, is a critical blow. The "unemployed are subject to a host of difficulties, including identity crises imposed from within and without. . ."[92] The unemployed worker is also subjected to isolation from accustomed interpersonal relationships at work, and the disintegration of the structure of his daily life. To some individuals, the toxic situation seems unbearable.

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86. *See* Blakely et al., *supra* note 8, at 598-99.

87. *Id.* at 595.

88. *Id.* at 598.

89. *Id.*

90. PRICE, *supra* note 26, at 1.

91. *See* CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER 151-53 (1902).

92. Note, *Finding a Place for the Jobless in Discrimination Theory,* 110 HARV. L. REV. 1609 (1997).

A. ROILING THE LABOR MARKET AT PUBLIC EXPENSE

Some employers increase psychological distress in the workforce when they choose to replace workers, rather than re-placing them within the company.[93] "[N]umerous companies are adding new workers on the one hand while laying off current ones on the other. . .adding yet another challenge for an already strained work force."[94] Although companies could improve employee morale and reduce the drain on organizational knowledge by re-deploying employees when company needs change, "companies don't have time for that."[95] Outplacement firms therefore work with the discharged employees while recruiters attempt to fill other positions with new hires. The entire process is wasteful and unconscionably roils the United States' labor market. But unfortunately, companies avoid most of the social costs of the discharges, because the employment-at-will doctrine defends their right to fire workers for good reasons and bad reasons, including wasteful reasons. Also, because "many companies [on the one hand]. . .underestimate the expenses. . .that come with major hiring moves,"[96] and on the other hand do not pay the full social costs of discharge,[97] the employers may perceive that the company has benefited from high employee turnover.

The extent of the current roiling in the United States' labor market, due to all causes, is high. For example, "[t]wenty percent of California workers have lost a job within the last three years and 10% have lost a job within the last year.[98] While some economists might argue that the market is positively "adjusting" through the turnover process, it is doubtful that the psychological costs to society are a part of the equation.[99] Rather, those costs may appear as "inexplicable increases" in health care expenses.

B. A FAILED EMPLOYMENT RELATIONSHIP – REPUTATION AND A PRESUMPTION OF EMPLOYEE FAULT

The damage to an employee's reputation caused by discharge is a difficult barrier to overcome, perhaps because failed workplace relationships are widely presumed to be the fault of the employee and not the employer. This perception may be fostered by the employment-at-will doctrine. The doctrine provides an employer with a presumption of the legality of discharge and therefore perhaps also a presumption of no-fault, along with the presumption of no liability. The

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93. Kris Maher, *Hiring-and-Firing Trend Gains as Job Market Remains Murky*, WALL ST. J., Nov. 19, 2003, at B12.
94. *Id.*
95. *Id.*
96. *Id.*
97. McGowan, *supra* note 3, at n.11.
98. PRICE, *supra* note 26.
99. McGowan, *supra* note 3, at n.11.

prevalence of forced-ranking systems may also contribute to the stigma of discharge. Corporate employees accustomed to the discharge of low-ranking performers may assume that a no-longer-needed employee was a "low performer."

Employees will continue to bear the stigma of any discharge unless we, as a society, see those actions as "admissions of [managerial] failure, which is what they really are."[100] If companies strategically planned for future human resource needs, carefully selected, supported and mentored their employees, layoffs might not be necessary. Lincoln Electric, for example, used the knowledge and skill of its employees to find ways to cut costs, and thereby avoided layoffs.[101] Yet stock prices often rise when layoffs are announced, perversely rewarding managerial failure.

V. THE PROBLEM WITH EMPLOYMENT ANTI-DISCRIMINATION STATUTES

The ADA, the FMLA, the ERISA, and the ADEA are all examples of legislative responses to widespread discriminatory practices or other abusive employer practices, as is the currently proposed Paul Wellstone Mental Health Equitable Treatment Act of 2003.[102] These piecemeal solutions have not only failed to significantly curb many abuses,[103] however, they have also had perverse and unintended "side effects." The acts have provided employers with an incentive to discharge employees in order to avoid the costs of leaves, benefits, or accommodations mandated by the acts. But there is also a legal disincentive; an employee discharged for discriminatory or retaliatory reasons may prevail on a legal claim under one of the statutes.

As a result, many employers have resorted to constructive discharge and pretextual "last clear chance" documentation of claimed poor performance in order to "legally" discharge the employee. Both of these discharge methods unnecessarily humiliate and isolate the employee, and increase the likelihood that even a middle-aged employee with no previous history of mental illness will become ill and unable to work.[104]

A. MENTAL HEALTH AND CONSTRUCTIVE DISCHARGE

Constructive discharge is inherently dangerous to employees' mental health, because the employer deliberately creates a hostile work environment, with the

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100. McGowan, *supra* note 3, at 180-81 (quoting Donald Hastings, *Guaranteed Employment*, 62 Vital Speeches 691 (Sept. 1, 1996)).

101. *See* McGowan, *supra* note 3, at 181.

102. Paul Wellstone Mental Health Equitable Treatment Act of 2003, H.R. 953, 108th Cong. (2003) (easing insurance discrimination against mental illnesses by requiring health plans to offer the same coverage for mental illnesses as for traditional physical illnesses).

103. Jessica Barth, *Disability Benefits and the ADA after Cleveland v. Policy Management Systems*, 75 IND. L.J. 1317, 1320 (2000) (explaining that ninety-two percent of ADA claims are unsuccessful).

104. *See* Wilson v. Monarch Paper Co., 939 F.2d 1138, 1141 (5th Cir. 1991).

goal of making work so intolerable that the employee will resign.[105] If "constructively discharged" employees do resign as a result, they may not bring an action for wrongful discharge unless they first prove constructive discharge, in order to overcome a presumption that they have suffered no adverse employment action. It is difficult for an employee to prove constructive discharge.[106] The decision is unique to each case, but the courts will consider:

> [A]ll of the following, singly or in combination: (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer; or (7) offers of continuing employment on terms less favorable than the employee's former position.[107]

The standard is objective; it requires not only that the employee felt compelled to resign, but also that a "reasonable person in his or her position" would have felt compelled to resign because of intolerable work conditions.

1. *Brown v. Bunge Corp.*,[108]
An Unsuccessful Claim of Constructive Discharge

In the case of *Brown v. Bunge Corp.*, for example, the 55-year-old plaintiff alleged constructive discharge due to age discrimination.[109] Brown was presented with a Performance Improvement Plan (PIP) by his new 41-year-old supervisor, and notified that his employment would be terminated if he failed to correct performance deficiencies. He claimed that he was unable to correct his department's problems without additional resources, and that the PIP was a ruse to encourage his retirement.[110]

The plaintiff then requested a vacation leave, and announced his intention to retire after the leave. During the vacation, however, Brown suffered a major depression, and was placed on paid disability leave. He later returned to work, where he found that he had been demoted and had fewer job responsibilities. However, his salary remained the same, and his work was not menial, but still supervisory, albeit over fewer employees. His new supervisor, while three years younger, was a friend and former peer.[111]

The court ruled that Brown had not established enough of the necessary criteria for constructive discharge, and had therefore suffered no adverse employ-

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105. *See* Dennis P. Duffy, *Intentional Infliction of Emotional Distress and Employment at Will: The Case Against "Tortification" of Labor and Employment Law*, 74 B.U. L. REV. 387 (1994).
106. Brown v. Bunge Corp., 207 F.3d 776, 782 (5th Cir. 2000).
107. *Id.*
108. *Id.* at 776.
109. *Id.*
110. *Id.* at 779-80.
111. *Brown*, 207 F.3d at 779-80.

ment action. The court therefore would not hear his claim for age discrimination.[112]

2. *Parrish v. Immanuel Medical Center*,[113] A Successful Claim of Constructive Discharge

When an employee has "resigned her position . . . she may only recover if she demonstrates that [the employer's] actions constituted a constructive discharge."[114] The employee must show that the resignation "was a reasonably foreseeable consequence of the employer's discriminatory actions," and that conditions were so intolerable that a reasonable person would have been forced to resign.[115] The standard is therefore an objective one; it is not sufficient that the individual employee considered the conditions to be intolerable.

Plaintiff Parrish, a 66 year old woman, prevailed on a claim of disability and age discrimination after she resigned and alleged constructive discharge. The employee was hospitalized at a mental health care treatment center for approximately two weeks for depression and anxiety. Upon her physician-approved return, she was told that she could not continue in her former position, but that she would be assigned to a newly created, late-day position that excluded her former contact with patients.[116] The jury determined that her employer's action was intentionally discriminatory, in part because of testimony that the employer knew Parrish was not comfortable returning home after dark, and because her supervisor had informed the employer that Parrish would not choose to work in the newly created position. The appellate court affirmed that the plaintiff had offered sufficient evidence for the jury to conclude that she had been constructively discharged.[117]

3. *Wilson v. Monarch Paper Company*,[118] An Illustration of The Mental Health Costs of Constructive Discharge

Action for constructive discharge may also lie in tort, when it rises to a level of intentional infliction of emotional distress. For example, in the case of *Wilson v. Monarch Paper Company*, the employer company deliberately created a hostile work environment in hopes that Wilson would resign.[119] Wilson had been hired at the age of forty-eight, and his employer routinely rated his per-

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112. *Brown*, 207 F.3d at 782-83.
113. 92 F.3d 727, 732 (8th Cir. 1996).
114. *Id.* at 732.
115. *Id.* (quoting Hukkanen v.Int'l Union of Operating Eng'rs, F.3d 281, 285 (8th Cir. 1993)).
116. *Id.* at 730-31.
117. *Id.* at 736.
118. 939 F.2d 1138 (5th Cir. 1991).
119. *See id.* at 1140-41.

formance as meriting performance bonuses, a new title as Vice President, and merit raises. However, twelve years later, a new president refused to speak with Wilson, expressed a written goal of getting rid of older employees, and subjected him to a year-long campaign of harassment and abuse because his company wanted to force him out of his job.[120] The company's action caused Wilson, who had no previous history of mental illness, to suffer a "severe and long-lasting" depression that required inpatient treatment and electroconvulsive therapy.[121] The appellate court affirmed that the company was liable for both age discrimination and intentional infliction of emotional distress.

Monarch's risk-taking action in creating the hostile work environment was egregious, and caused unnecessary costs to Wilson, to his family and friends, to society, and finally and fittingly, to the company. The court in a footnote stated that there was a suggestion in the record "that Monarch was unwilling to fire Wilson outright because it had no grounds and perhaps feared a lawsuit."[122] The employer's creation of a constructive discharge environment was unsuccessful in forcing Wilson to resign, equally unsuccessful in its goal of circumventing liability for wrongful termination under the ADEA, and costly to judicial resources and the public health.

B. EMPLOYERS' PRETEXTUAL REASONS FOR DISCHARGE AS STATUTORY CIRCUMVENTION

Pretextual discharge is another process used by employers to avoid liability for wrongful discharge, under the anti-discrimination statutes. A pretextual reason is a reason that is simply untrue.[123] Some employers may immediately discharge an employee, and simply give a reason other than the employer's actual motivation.[124] Other employers reach the same end point through a longer process, sometimes called "last clear chance." "Last clear chance" is a process by which an employer gives an employee notice that work performance is no longer satisfactory and may result in discharge. If the opportunity for improvement is real, the process is an admirable attempt to improve performance and retain the employee.

It is arguable, however, that in many cases the discharge is a foregone conclusion by the time the employee receives the "notification." If that is true, then the "improvement opportunity" serves primarily as an opportunity for supervi-

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120. *Id.*

121. *Id.* at 1141.

122. *Id.* at 1145 n.5.

123. Vogel, *supra* note 4, at 1054.

124. *Id.* (citing Folz v. Marriott Corp., 594 F.Supp. 1007, 1015 (W.D. Mo. 1984) (the employer wanted to avoid paying for plaintiff's medical and disability benefits; claim of poor performance was pretextual)); Ursic v. Bethlehem Mines, 719 F.2d 670 (3d Cir. 1983), *aff'd in relev. part*, 719 F.2d 670 (3d Cir. 1983) (employer wanted to avoid paying pension benefits, and claimed the employee had removed tools without authorization.).

sors and co-workers to search for and document pretextual reasons for discharge. The improvement requirement is not difficult to manipulate. Unattainable goals may be set, resources withdrawn, and colleagues uncooperative. Corporate confidentiality may be insufficient to prevent co-workers from understanding the inevitability of the outcome. Co-workers may therefore believe that they will be perceived as disloyal if they associate with the "last clear chance" employee.

The work environment may therefore become as hostile for the "last clear chance" employee as for the "constructively discharged" employee. In both cases the worker may feel isolated and humiliated, and yet work even harder in an attempt to satisfy the employer. The emotional impact of the final notification of discharge, despite the employee's best efforts, should not be underestimated.

VI. POST-DISCHARGE INJURY ADDED TO INSULT

Discharged employees may face a lengthy and emotionally damaging job search. For many, it is a time of intense personal and financial insecurity. This insecurity is intensified when an ex-employee's job options are restricted by either a pre-existing or a post-discharge covenant not to compete. In addition the ex-employee may feel powerless and coerced as they sign waivers of their right to sue for wrongful discharge.

A. THE POST-DISCHARGE BURDEN OF COVENANTS NOT TO COMPETE

The employment-at-will doctrine allows employers to offer no severance to discharged employees, in contrast to the laws of other nations,[125] and also in contrast to the laws of Puerto Rico.[126] As a result, employees may be forced to sign a restrictive covenant not-to-compete in order to receive severance pay that they could be entitled to in other countries. Such covenants are inherently unfair because the "employer's bargaining power is usually superior to the [employee's]."[127] Most employees who sign such covenants after discharge probably do so because they feel coerced by financial pressures. There is no incentive, other than financial, for a discharged employee to sign a covenant not-to-compete.

Employers have a right to protect "trade secrets or other proprietary rights."[128] But these trade secrets or proprietary rights do not become suddenly apparent at the moment of discharge. If a covenant-not-to-compete is to be a

125. Verkerke, *supra* note 1, at 894-95.

126. FINKIN ET AL., *supra* note 28, at 194.

127. Phillip J. Closius & Henry M. Schaffer, *Involuntary Nonservitude: The Current Judicial Enforcement Of Employee Covenants Not To Compete – A Proposal For Reform*, 57 S. CAL. L. REV. 531, 540-41.

128. FINKIN ET.AL., *supra* note 28, at 128.

part of the employment bargain, it should be a part of the earlier bargaining process between the employer and employee, and not coerced at the moment of the employee's greatest vulnerability.

An employer should not be allowed to negotiate a covenant-not-to-compete with an employee it has just fired. It is not credible to assert that an equal bargain is likely to be the result of negotiations in those circumstances. Covenants not-to-compete are often overly broad and not enforceable.[129] Many are nevertheless unchallenged, because former employees may choose to "abide by the covenant's terms rather than face litigation costs and the uncertainty of judicial action."[130] Employers are also able to take advantage of the fact that discharged employees usually do not want to talk about or publicize their discharge.[131] Judicial enforcement of the presumption of employment at-will also discourages any potential claims against severance agreements. The enforced presumption that it was legal for the employer to discharge the employee makes it appear that an employer has been generous in making any severance payments at all, even when the employee has provided additional consideration for the payments.

Unnecessarily restrictive covenants can have damaging effects on the United States' competitive position and on the public health. An employee may be unable to work in his area of expertise, a future employer may be unable to hire a qualified applicant, and the employee's skills may be underutilized or lost to the labor market. Because unemployment contributes to anxiety and depression, non-compete covenants that restrict employment options must also contribute to mental illness.[132]

B. SEVERANCE PAY AND THE WAIVER OF A CONSTITUTIONAL RIGHT TO SUE

In order to receive severance benefits, employees commonly sign agreements waiving their rights to sue for discriminatory or retaliatory discharge. Unfortunately, many employers are able to purchase this waiver very cheaply. Employees, humiliated and attempting to preserve as much of their former reputations as possible, are likely to take whatever severance they are offered and leave quietly. Many large companies have a fixed schedule for severance pay, based on the length of service and the employees' former job title. Such systems allow for little negotiation, even when a discharge may appear particularly harsh.

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129. *See* Closius, *supra* note 127.

130. *Id.* at 546.

131. McGowan, *supra* note 3, at n.11.

132. *Id.*

C. ROUTINELY COERCED CONTRACTS AND PUBLIC POLICY

Employees, by signing either a covenant-not-to-compete or a waiver of a right to sue, have provided additional consideration in order to receive severance pay. Legislatures should therefore consider whether these contracts, regularly made in employment termination situations, are routinely coerced. Any forced idling of skilled labor should be a matter of concern for our elected representatives. Workers must not be enjoined, even temporarily, from offering their skills to other employers. Any under-utilization of our skilled workforce is a cost that our society can ill afford.

D. THE POST-DISCHARGE CANCELLATION OF DEFERRED COMPENSATION

Companies that offer "the most competitive and innovative executive compensation programs anywhere" may have high financial incentives to discharge executives.[133] Employers can unfortunately state that they "value . . . the commitment of executives who spend their careers making [the company] a premier company," and offer long-term awards of deferred compensation, then cancel the deferred compensation if they discharge the employees.[134]

The following two statements were official company representations to a discharged employee who was negotiating a severance package at the time of his suicide:[135]

> "[y]ou will have ninety (90) calendar days from your Termination Date to exercise all of your vested SharePower stock options. Any vested SharePower stock options that are not exercised prior to the expiration of the ninety-day period will expire and be canceled in accordance with and subject to their terms. Furthermore, all of your SharePower stock options that are outstanding and unvested as of your Termination Date will expire and be canceled on that date, in accordance with their terms"[136] and "in the event of your death or disability, all regular awards in effect more than one year will vest 100%."[137]

The fact is that for executives who face discharge from this company, many unvested stock options will be terminated unless they die.

CONCLUSION

There is a fundamental and perhaps uniquely American public policy problem posed by the co-existence of the employment at-will doctrine, employer-

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133. Letter to Executives of a Fortune 100 Company (Sept. 11, 2000) (copy as Appendix 1) [hereinafter Letter].

134. *Id.*

135. Unsigned Severance Agreement (Apr. 5, 2001) (copy as Appendix 2).

136. *See id.*

137. *See* Letter, *supra* note 133.

provided health insurance, and anti-discrimination statutes, which have created perverse incentives for employers to create hostile work environments The combination too often results in unredressed wrongful discharge which causes anxiety, depression, and other co-morbid mental illnesses. These illnesses, which may be caused by the actions of private companies, impose costs on the public health. The high health costs then adversely affect our country's ability to compete in a competitive, global economy.

The employment relationship, particularly during periods of high unemployment, may be crucial to the financial stability and well-being of employees and their families. The severing of that relationship can be an economic catastrophe and an emotional disaster for employees,[138] and the burden of a failure in that relationship is already disproportionately borne by employees. For some employees, the success or failure of the relationship marks a thin boundary line, between: stability and dislocation; financial success and bankruptcy; prestige and humiliation; and health, disability, or even death. Because the stakes are already so high, the additional variable of health insurance is simply unacceptable; it is unconscionable for our society to also allow access to health care to be dependent upon the employment relationship.

If employers are to be the primary health insurers in this country, then United States' employees should be given "just cause" protection. If courts continue to enforce employment at-will, then society must provide a basic, affordable health insurance policy that is available even to those who are "uninsurable" when their COBRA coverage ends.[139] Each policy must be evaluated in light of its interaction with the other. Additional leadership is needed, from both the legislatures and the courts. Legislatures, which support employer-sponsored health insurance through tax incentives, have not adequately addressed the plight of "uninsurable" workers who are discharged from their jobs. Many courts have also responded inadequately, to the unjust realities of the employment-at-will doctrine. Some have refused to examine unfair employee discharges and layoffs, asserting that any substantial changes in the employment at-will doctrine must be legislative.[140]

There is a story about campers by the side of a river who see a man struggling in the water. They rush to the rescue, then later rescue another victim, then still later, another. How long will they wait before they travel upstream to see who is pushing people into the river? In the same manner, how many people will our country treat for mental illness, and how long will society pay increasing health costs, before we address the employment policy reasons why so many people need treatment?

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138. McGowan, *supra* note 3, at 142.

139. 29 U.S.C. § 1166 (1997).

140. Vogel, *supra* note 4, at n.12.

Piecemeal legislation is insufficient, and the only comprehensive attempt to address employment termination issues, the Model Employment Termination Act,[141] has not been adopted by the states. As a result, too many families are "free-falling" through gaps in society's safety net. The present system is too costly, and "wastes" skilled labor and lives that we can ill afford to lose. If government exists to protect the lives and health of its citizens, our current "system" of employment law needs revision. If employers are to be the primary health insurers in this country, then United States' employees need "just cause" protection. If courts continue to enforce employment at will, then society must provide affordable health insurance. A comprehensive overhaul of United States' employment law is needed, in order to eliminate incentives for employers that conflict with the public health.

141. MODEL EMPLOYMENT TERMINATION ACT, 7A-I U.L.A. 300 (1991).

Justice O'Connor's View of Equality and the Strict Scrutiny Standard: Strict Scrutiny is not Necessarily Fatal in Fact.

TODD J. DESIMONE†

INTRODUCTION

In Equal Protection Clause cases, where legislation creates a suspect class of people, either by race or gender, the United States Supreme Court has developed the strict scrutiny standard to determine the legislation's constitutionality.[1] In order for legislation to survive the strict scrutiny standard, the laws ends must be compelling and the means narrowly tailored.[2] Although this equal protection test seems clear enough, as we will see, it is riddled with controversy. In Justice O'Connor's equal protection case opinions, she has made statements leading one to believe what types of issues should survive the strict scrutiny standard.[3] The strict scrutiny test was once considered an impenetrable standard, where once applied to legislation, the law would be dead on sight.[4] Strict scrutiny has been applied in many Court cases, most recently and notably in *Grutter v. Bollinger* where the Court determined that race may be used as one factor in determining admission to the University of Michigan Law School.[5] The Court in *Grutter*, with the majority opinion written by Justice O'Connor, held that diversity in the classroom was a compelling end, and considering race in admissions was a narrowly tailored means to achieve that end.[6] A few years before the *Grutter* decision, Justice O'Connor seized the opportunity to make her strict scrutiny theory clear in *Adarand Constructors, Inc. v. Pena*.[7] In the *Adarand* opinion Justice O'Connor rejected the commonly held belief that legislation is automatically held unconstitutional once the Court applies strict scrutiny. Specifically, she stated: "finally, we wish to dispel the notion that strict scrutiny is strict in theory, but fatal in fact."[8]

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† I would like to thank Congdon Professor of Law William M. Wiecek for his help in developing the topic for this Note.

1. *See* KATHLEEN M. SULLIVAN & GERALD GUNTHER, CONSTITUTIONAL LAW 601, 628-30 (University Casebook Series 14th ed. 2001) [hereinafter SULLIVAN & GUNTHER].

2. *Id.*

3. *See id.* at 652-71.

4. *See* Jaideep Venkatesan, *Fatal in Fact? Federal Courts' Application of Strict Scrutiny to Racial Preferences in Public Education*, 6 TEX. F. ON C.L. & C.R. 173, 173 (2001).

5. Grutter v. Bollinger, 539 U.S. 306 (2003).

6. *Id.* at 325.

7. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 237 (1995).

8. *Id.* (internal quotations omitted).

Over twenty years before Justice O'Connor's opinion in *Adarand*, a prominent Harvard Law School professor, Gerald Gunther, wrote a law review article stating that when the Court applies strict scrutiny, the scrutiny is "strict in theory and fatal in fact."[9] In Gunther's article he was describing the new Burger Court's unwillingness to make new roads for itself in their first term in 1971.[10] Gunther proposed that the Burger Court should adopt a new type of deferential scrutiny over the impossible to pass, in his opinion, strict scrutiny of previous Courts.[11]

Gunther believed that when the Court applied strict scrutiny to an equal protection case, the standard was so hard to satisfy that the legislation would always be held unconstitutional.[12] Conversely, Justice O'Connor believes that when the Court applies strict scrutiny, the legislation will not necessarily be ruled unconstitutional.[13] Although Justice O'Connor believes that the strict scrutiny standard is hard to satisfy, she does not agree with Gunther that it is "fatal in fact."[14] It is the tension between these differing strict scrutiny opinions that this Note hopes to explain and resolve. Justice O'Connor's opinions will demonstrate that her theory is currently the one the Court sides with on the question of whether the strict scrutiny standard is necessarily fatal in fact when applied to equal protection cases.[15] Further, in reviewing her past opinions, other areas of law which Justice O'Connor considers able to pass strict scrutiny will come to light.[16] Finally, Justice O'Connor's strict scrutiny theory will be vindicated through her majority opinion in the *Grutter* decision.[17]

I. GUNTHER'S ARTICLE: THE ORIGINAL SOURCE OF THE TENSION.

In a 1972 Harvard Law Review article, professor Gerald Gunther explained the similarities and differences of the Burger and Warren Courts at the end of the Burger Court's first term.[18] Gunther explains that the Burger Court, with a new conservative slant due to Nixon appointees, has the opportunity to change the Court's direction, but that so far the Court "continues more confident about stopping further extensions of some Warren Court paths than about charting roads of its own."[19] Gunther believes that the Burger Court has not shown any

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9. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972) [hereinafter GUNTHER].
10. *See id.* at 1.
11. *See id.* at 20-23.
12. *See generally id.*
13. *See Adarand*, 515 U.S. at 235-239.
14. *See id.* at 237.
15. *See infra* Part III.L.
16. *See infra* Part III.A-K.
17. *See infra* Part III.L.
18. Gunther, *supra* note 9, at 1.
19. *Id.*

desire to depart from the prior Court's ruling when the opinions created "clear, carefully explained precedent."[20] Gunther is clearly discontented by the Burger Court's first term, evidenced by his view that the Court was "not moved to overturn directly or to stride in new directions, and that standpat stance produces unsatisfying opinions."[21] However, Gunther does see the possibility for a Burger Court turnaround in the subsequent term, claiming equal protection and scrutiny level analysis as the Court's vehicle for this change.[22] Specifically, Gunther stated:

> Can the Burger Court [change] again, much of last term's performance suggests rather not: rather it suggests a transitional Court accepting much of the received doctrine as it happened to stand at the end of the preceding era, a Court gnawing at the fragile edges of the heritage without confronting its underpinnings, by and large a Court standing pat and surer about where it does not want to go than about articulating new directions. But it is difficult to believe that this standpat stance can prove acceptable for long . . . last term's variations on traditional equal protection analyses suggests one useful, affirmative role for the Burger Court. I accordingly turn to a closer look at the potential for creative evolution inherent in these equal protection developments.[23]

Clearly, Gunther feared the Burger Court will simply continue their unoriginal agenda in their next term.[24] It is in his review of the Warren Court's equal protection cases and their scrutiny standards that Gunther brings up the statement of concern to this Note. Gunther summarized the Warren Court's approach to equal protection:

> The emergence of the "new" equal protection during the Warren Court's last decade brought a dramatic change. Strict scrutiny of selected types of legislation proliferated. The familiar signals of "suspect classification" and "fundamental interest" came to trigger the occasions for the new interventionist stance. The Warren Court embraced a rigid two-tier attitude. Some situations evoked the aggressive "new" equal protection, with scrutiny that was "strict" in theory and fatal in fact; in other contexts, the deferential "old" equal protection reigned, with minimal scrutiny in theory and virtually none in fact.[25]

Throughout the rest of the article Gunther condemns strict scrutiny because of its fatal nature and evaluates this deferential scrutiny with 'bite' standard.[26] It is

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20. *Id.* at 5.
21. *Id.*
22. *See id.* at 6-7.
23. *Id.*
24. *See id.* at 20-22.
25. *Id.* at 8.
26. *See id.* at 20-25, 37-48.

this view of legislative fatality when applied to strict scrutiny that Justice O'Connor opposes in her subsequent opinions leading up to *Grutter*.[27]

II. BEFORE JUSTICE O'CONNOR'S OPINIONS, THE ORIGIN OF SURVIVING STRICT SCRUTINY.

Before exploring Justice O'Connor's strict scrutiny analysis, it is important to briefly trace the origins of the Equal Protection Clause and its relationship to strict scrutiny. In *Korematsu v. United States*, the Court applied strict scrutiny to a suspect class and the law survived.[28] In *Korematsu*, the legislation survived because of the fear during World War II by the American government that Japanese-Americans living on the West Coast were potential spies or traitors.[29] Although *Korematsu* is no longer good law, it was the first case to demonstrate how racial legislation can survive the strict scrutiny standard.[30]

III. O'CONNOR'S CASE OPINIONS AND THE EMERGENCE OF HER STRICT SCRUTINY THEORY.

A. LEGISLATION MAY POTENTIALLY SURVIVE STRICT SCRUTINY WHEN: THE LEGISLATION HAS A LOGICAL TERMINATION DATE; AND THE MEANS HAVE A TIGHT FIT TO THE ENDS. HOWEVER, LEGISLATION JUSTIFYING ITSELF BY POINTING TO SIMILAR LEGISLATION IN OTHER DISTRICTS IS NOT A DEFENSE.

In *Richmond v. J.A. Croson Co.* the Court, with the opinion delivered by Justice O'Connor, heightened the strict scrutiny standard.[31] *Croson* involved an affirmative action set-aside program, where the Court held that the remedial fit must be very close to the identified wrong.[32] Therefore, there must be a tight fit

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27. *See infra* Part III.A-K.

28. 323 U.S. 214 (1944).

29. *Id.* In this case, the primary reason the legislation survived was, as Justice Black explained:

> "He [Korematsu] was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our West Coast and felt constrained to take proper security measures, because they decided that the military urgency of the situation demanded that all citizens of Japanese ancestry be segregated from the West Coast temporarily, and finally, because Congress, reposing its confidence in this time of war in our military leaders – as inevitably it must – determined that they should have the power to do just this. There was evidence of disloyalty on the part of some, the military authorities considered that the need for action was great, and time was short."

Id. at 223-24. Justice Murphy's dissent, although not using a suspect classification test (instead used a reasonableness test), said "it is essential that there be definite limits to military discretion . . . . Individuals must not be left impoverished of their constitutional rights on a plea of military necessity that has neither substance nor support." *Id.* at 234.

30. *Id.* at 216.

31. 488 U.S. 469 (1989).

32. *Id.* at 471. The set-aside provision adopted by the city counsel relied on a study which demonstrated that even though the population of the City of Richmond was 50% black, a mere 0.67% of

between the means and the ends for the law to have any chance of surviving.[33] Justice O'Connor's opinion stated that one of the reasons the city ordinance was struck down was because, although it is acceptable to create remedial statutes, the statute in question would have "give[n] local governments license to create a patchwork of racial preferences based on statistical generalizations about any particular field of endeavor."[34]

Additionally, Justice O'Connor mentions in the *Croson* opinion that a remedial statute's benevolent nature does not help the legislation to have a legitimate purpose.[35] Therefore, if Justice O'Connor thinks a statute should survive strict scrutiny, her basis for that decision would not have anything to do with the statute being benign in nature.[36] For a set-aside provision to survive strict-scrutiny, Justice O'Connor opines that the provision must at least:

> [I]dentify that discrimination, public or private, with some specificity before they may use race-conscious relief. . .[and] if all a state or local government need do is find a congressional report on the subject to enact a set-aside program, the constraints of the Equal Protection clause will, in effect, have been rendered a nullity.[37]

Justice O'Connor makes two additional points in *Croson* to further her belief that with certain evidence proven, laws may survive strict scrutiny. An impediment to surviving strict scrutiny, according to Justice O'Connor, is that legislation cannot be justified in one jurisdiction just because there was discrimination in another.[38] Therefore, in future cases, if legislation is defended on the ground that similar areas experienced discrimination, Justice O'Connor will not let this justification be a defense for surviving strict scrutiny.[39] Since Justice O'Connor makes clear that discrimination in one jurisdiction does not justify similar dis-

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Richmond's construction contracts had been awarded to minority businesses in the 5-year period the study was conducted from 1978-1983. *Id.* at 479-80.

33. *Croson*, 488 U.S. at 471.

34. *Id.* at 499.

35. *Id.* at 500 (a benign statute is one that claims to not injure anyone, while at the same time, providing one suspect class with an advantage or benefit).

36. *See id.* In Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990), the Court departed from the theory that strict scrutiny was still applied to benign racial statutes; rather, the Court applied intermediate scrutiny. However, O'Connor dissented, insisting that applying deferential scrutiny is not in line with past case history or the Constitution itself, and all racial classifications should receive strict scrutiny. *Id.* at 603. Five years later, in Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995), under O'Connor's opinion, the Court overruled the part of *Metro Broadcasting, Inc.* which applied deferential scrutiny to racial classification legislation, and stated ". . .we hold today that all racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling government interests. To the extent that *Metro Broadcasting, Inc.* is inconsistent with that holding, it is overruled." *Id.* at 202.

37. *Metro Broadcasting, Inc.*, 497 U.S. at 504.

38. *Id.* at 505.

39. *Croson*, *supra* note 31, at 510.

crimination in another, she is implying that there are certain equal protection laws that may pass strict scrutiny.[40] After opining on what may not pass strict scrutiny, Justice O'Connor describes a situation where she believes legislation would survive the standard. In order for racial legislation to survive strict scrutiny in Justice O'Connor's mind, the legislation must be a "temporary matter,"[41] or "there is a danger that a racial classification is merely the product of unthinking stereotypes or a form of racial politics."[42] Therefore, Justice O'Connor's opinion in *Croson* demonstrates her belief that in order for legislation to have a better chance of surviving strict scrutiny, the legislation should have a rationale point at which it expires.[43]

B. IF LEGISLATION IS CONSISTENT, IT IS MORE LIKELY TO SURVIVE STRICT SCRUTINY.

In *Adarand Constructors, Inc. v. Pena*,[44] Justice O'Connor delivered the Court's majority opinion, holding that suspect classifications based on class do not deserve the strict scrutiny analysis, but instead some lesser form of scrutiny level treatment.[45] Justice O'Connor emphasized how class and race were not synonymous with each other, thus permitting the government to make laws against class as a suspect classification.[46] However, Justice O'Connor also reemphasized the Court's theory that the strict scrutiny analysis automatically applies to legislation that creates race classifications,[47] opining that ". . .requiring strict scrutiny is the best way to ensure that courts will consistently give racial classifications that kind of detailed examination, both as to ends and as to means."[48]

Additionally in *Adarand*, Justice O'Connor defends "across-the-boards" strict scrutiny for racial classification to both benign and invidious discrimination by explaining that if the Court allowed benign discrimination to receive merely deferential scrutiny, this would not be in line with the Court's policy of trying

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40. *See id.*
41. *Id.* at 510.
42. *Id.*
43. *See id.*
44. 515 U.S. 200 (1995). The federal government was giving contractors who worked on government contracts a financial incentive if they hired "socially and economically disadvantaged individuals." *Id.* at 204. Specifically, the plaintiff Adarand submitted the lowest bid on a highway construction project, but lost the contract to Gonzales Construction Company, a company defined as one "controlled by 'socially and economically disadvantaged individuals.'" *Id.* at 205. The company offering to contract, Mountain Gravel & Construction Company, submitted an affidavit which stated that had it not been for the financial incentive to hire Gonzales, they would have hired Adarand because of their lower bid. *Id.*
45. *Id.* at 213.
46. *Id.*
47. *Id.* at 224.
48. *Id.* at 236.

to maintain consistency. This consistency principle is important to the Court's justification for strict scrutiny.[49] Justice O'Connor stated:

> The principle of consistency simply means that whenever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and spirit of the Constitution's guarantee of equal protection. . .The principle of consistency explains the circumstances in which the injury requiring strict scrutiny occurs.[50]

Justice O'Connor's advocacy of the consistency principle helps our analysis because for future cases we now know that Justice O'Connor will insist on the strict scrutiny standard in equal protection cases that create a suspect class defined by race, regardless of the race of the actor in question.[51] Because the principle of consistency may be an impediment to surviving strict scrutiny, Justice O'Connor will make sure that this is one of the three principles of strict scrutiny that is not violated by the statute.[52]

C. RACE CANNOT BE THE SOLE FACTOR IN DETERMINING ELIGIBILITY.

In *Gratz v. Bollinger*,[53] the Court held that the University of Michigan undergraduate admissions policy of automatically awarding minority students twenty out of the one hundred points required for admission was unconstitutional because legislation cannot survive strict scrutiny where the law makes being a minority in itself a decisive factor to the admissions process.[54] Justice O'Connor, by joining in the majority opinion, shows that for legislation to sur-

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49. *Id.* at 228-30.

50. *Id.* at 229-30 (citations omitted). The Court has established three general propositions with respect to governmental racial classifications. The first is 'skepticism' ("[a]ny preference based on racial or ethnic criteria must necessarily receive a most searching examination. . ."). Wygant v. Jackson Board of Education, 476 U.S. 267, 273 (1986), citing Fullilove v. Klutznick, 448 U.S. 448, 491 (1980). The second is 'consistency' ("the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification"). *Croson*, 488 U.S. at 472. The third is 'congruence' (Fifth and Fourteenth Amendments led to the conclusion that a person of any race has the right to the strict scrutiny standard when any racial classifications subjects them to unequal treatment) SULLIVAN & GUNTHER, *supra* note 1, at 787.

51. *Adarand*, 515 U.S. at 228-30.

52. *See id.*

53. 539 U.S. 244 (2003).

54. *Id.* at 275. This holding is distinguishable from *Grutter*. In *Grutter*, the Court determined that since the university "did not define diversity solely in terms of race and ethnicity but considered these as "plus" factors affecting diversity" the admissions policy did not violate the Equal Protection Clause. 539 U.S. at 275. The Court reasoned that:

> ". . .the Equal Protection Clause did not prohibit this narrowly tailored use of race in admissions decisions to further the school's compelling interest in obtaining the educational benefits that flow from diversity. The goal of attaining a 'critical mass' of underrepresented minority students did not transform the program into a quota. Because the law school engaged in a highly individualized, holistic review of each applicant, giving serious consideration to all the ways the applicant might contribute to a diverse educational environment, it

vive strict scrutiny, the law cannot exclude or include individuals based solely on their racial status, however, their race can be used as a factor in considering an individual's status.[55] The *Gratz* opinion furthers Justice O'Connor's theory that strict scrutiny is not fatal in fact by joining in the holding that certain legislation may survive strict scrutiny when race is involved.[56] Further, admission issues may occur in future cases where organizations other than educational institutions, such as country clubs, use race to determine eligibility. For example, if a group of plaintiffs brought suit, alleging that the reason they were denied admission to a country club was solely because of their race, the club's admission procedures may survive strict scrutiny if the club successfully argued that race was only one of many factors in denying or accepting someone for admission. Therefore, although the admission's policy failed to survive strict scrutiny in *Gratz*, the Court left open the door for other possible admission policies to survive strict scrutiny. Additionally, the *Gratz* opinion is another acknowledgement by the Court that Justice O'Connor is correct in her assertion that certain legislative racial classification can survive the strict scrutiny analysis, and further refutes Gunther's strict scrutiny theory.

D. STATISTICAL EVIDENCE ALONE IS INSUFFICIENT TO PROVE LEGISLATION UNCONSTITUTIONAL.

Other recent cases also advance Justice O'Connor's strict scrutiny theory. In *Easley v. Cromartie*,[57] the Court determined that the state of North Carolina had not violated the Equal Protection Clause in drawing a voting district.[58] In the majority opinion, which Justice O'Connor joined, Justice Breyer stated that the district being ". . .heavily African-American [in] voting population all helped the plaintiff's case. But neither that evidence by itself, nor when coupled with the evidence of Democratic registration, was sufficient to show, on summary judgment, the unconstitutional race-based objective that plaintiffs claimed."[59] Therefore, the legislation survived strict scrutiny because the plaintiffs' failed to show, beyond statistical material, the motivation behind the race-based district.[60] Since statistical material alone cannot prove a race-driven suspect class created by legislation that violates the Equal Protection Clause, something more clearly must be proven.[61] Because Justice O'Connor joined in the majority

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ensured that all factors that could contribute to diversity were meaningful considered alongside race."

Id.

55. *Gratz*, 539 U.S. at 277.
56. *Id.* at 280.
57. 532 U.S. 234 (2001).
58. *Id.* at 237.
59. *Id.* at 239.
60. *Id.*
61. *See id.*

opinion, we know that in future cases she will not be persuaded to allow legislation to survive strict scrutiny where the plaintiffs' base their allegations solely on statistical information. Although this Note is primarily interested in discovering what Justice O'Connor believes may survive strict scrutiny, it is also important to know what she believes is insufficient to survive the standard.

The *Easley* majority opinion further held that a second reason the district survived strict scrutiny was because "the attacking party has not successfully shown that race, rather than politics, predominantly accounts for the result."[62] In *Gratz*, Justice O'Connor believed that using race to *solely* determine admission was unconstitutional and the admission's policy failed to survive strict scrutiny.[63] The Court in *Grutter*, briefly explained in the introduction and fully explained in *Section L*, held that using race as one factor, but not the *sole* factor, in determining admissions decisions was constitutional.[64] Somewhat analogous to *Grutter* and *Gratz*, the Court in *Easley* determined that if the legislature created a district *solely* based on racial motive, it would be unconstitutional.[65] However, if race did not play a predominant role, then the district may survive.[66] Therefore, even though *Easley* involves different issues than *Grutter* and *Gratz*, Justice O'Connor's theory that a certain degree of racial consideration in legislation can survive strict scrutiny, so long as this consideration is not the sole reason, comes through in each holding.[67] Therefore, Gunther's accusation is again refuted by Justice O'Connor joining the *Easley* opinion because the Court demonstrates another area of legislation, districting, that can survive the strict scrutiny standard. If a case similar to *Adarand* came to the Court with slightly different facts (such as the government providing financial incentive when companies, in determining who they hired for contracting jobs, used "socially and economically disadvantaged individuals" as one factor), Justice O'Connor may determine that the legislation should survive strict scrutiny because the race determination was just one factor in their selection process.

E. ABSENT LEGISLATION ASSUMING RACIAL PREFERENCES, RACIAL GROUPING MAY IN SOME CIRCUMSTANCES SURVIVE STRICT SCRUTINY.

In *Shaw v. Reno*,[68] the Court held that racial gerrymandering was allowed in redistricting.[69] Justice O'Connor opined that the problem with associating peo-

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62. *Id.* at 257.
63. 539 U.S. at 279 (O'Connor, J., concurring).
64. 539 U.S. at 316.
65. 532 U.S. at 257.
66. *Id.*
67. *See Grutter*, 539 U.S. at 316; *Easley*, 532 U.S. at 257.
68. 509 U.S. 630 (1993).
69. *Id.* at 647 (due to the 1990 census, North Carolina became entitled to a twelfth seat in the House of Representatives. The General Assembly enacted a reapportionment plan that included two majority-

ple of the same race but possibly different in every other dimension is that "[i]t reinforces the perception that members of the same racial group – regardless of their age, education, economic status, or the community in which they live—think alike . . . [and] we have rejected such perceptions elsewhere as impermissible racial stereotypes."[70] This quote makes clear that Justice O'Connor does not like the legislative assumption that people of the same race have the same interests, tastes, etcetera. Therefore, legislation that groups race may survive strict scrutiny, but not when the law assumes preferences based on race.[71] Justice O'Connor reinforces her theory of racial grouping being permissible but not when the legislation assumes preferences based on race when she stated that "when members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from other may reflect wholly legitimate purposes [and therefore would survive strict scrutiny]."[72]

Justice O'Connor also counters Justice Souter's dissent in *Shaw* by defending her theory that, whether benign or malignant, all racial legislation deserves the strict scrutiny standard;[73] we saw this theory in Justice O'Connor's counter opinion to Justice Stevens in *Adarand*.[74] Justice O'Connor stated in *Shaw* that:

> Souter apparently views racial gerrymandering of the type presented here as a special category of "benign" racial discrimination that should be subject to relaxed judicial review. As we have said, however, the very reason that the Equal Protection Clause demands strict scrutiny of all racial classifications is because without it, a court cannot determine whether or not the discrimination truly is "benign."[75]

Therefore, under Justice O'Connor's review, racial legislation that appears "benign" will receive the same strict scrutiny standard as "malignant" legislation.[76] Justice O'Connor has additionally stated that the fact that legislation is "benign" will not make the strict scrutiny standard easier to satisfy.[77]

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black congressional districts. These districts contained district boundary lines of largely irregular shape. *Id.* at 636. "One state legislator has remarked that 'if you drove down the interstate with both car doors open, you'd kill most of the people in the district.'" *Id.* (citing Washington Post, Apr. 20, 1993, P. A4)).

70. *Id.* at 647.

71. *See id.*

72. *Id.* at 646.

73. 509 U.S. at 653.

74. 515 U.S. at 228-30.

75. *Shaw*, 509 U.S. at 653.

76. *See id.*

77. *See id.*

F. EVIDENCE OF DISTRICTING TRADITION FAVORS STRICT SCRUTINY SURVIVAL.

In *Miller v. Johnson*,[78] the Court held that the existence of an oddly-shaped district was not a necessary prerequisite to find the legislation unconstitutional when the district appeared to be based on grouping a suspect class.[79] Justice O'Connor's concurring opinion explained that "[t]o invoke strict scrutiny, a plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices. Those practices provide a crucial frame of reference and therefore constitute a significant governing principle in cases of this kind."[80] Justice O'Connor's phrase "a crucial frame of reference" shows that tradition is important in determining the validity of suspect class created legislation.[81] Therefore, Justice O'Connor may be more apt to allow legislation to survive strict scrutiny when it conforms to identifiable past traditions.[82] If *Miller* came before the Court with evidence of similar districting in the area, Justice O'Connor may have been more persuaded to let the legislation survive strict scrutiny.[83] Justice O'Connor reinforces the idea of importance-in-tradition by saying that:

> [A]pplication of the Court's standard does not throw into doubt the vast majority of the Nation's 435 congressional districts, where presumably the States have drawn the boundaries in accordance with their customary districting principles. That is so even though race may well have been considered in the redistricting process. But application of the Court's standard helps achieve *Shaw*'s basic objective of making extreme instances of gerrymandering subject to meaningful judicial review.[84]

Therefore, Justice O'Connor's opinion in *Miller* suggests that when a suspect class is created, and there is additional evidence of custom or tradition of the suspect class, the legislation is more likely to survive strict scrutiny.[85]

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78. 515 U.S. 900 (1995).

79. *Id.* at 915. This case involved a newly created Eleventh District in Georgia. Two attempts had already occurred to congressionally redistrict, however, the plans failed to receive the Department of Justice clearance under the Voting Rights Act. This failure was largely due to the fact that congress could not locate concentrations of black citizens within a majority black district, and for failure to create three instead of two majority black districts. The Georgia legislature responded by creating three majority black districts. After these three districts were created, this suit was filed by white voters in the districts, claiming that the legislature created a racially gerrymandered district. *Id.* at 906-09.

80. *Id.* at 928 (citations omitted).

81. *See id.*

82. *See id.*

83. *See Miller*, 515 U.S. at 928.

84. *Id.* at 928-29 (citations omitted).

85. *See id.*

G. TRADITION AND/OR MODERN CUSTOM IN DISTRICTING FAVORS SURVIVING STRICT SCRUTINY.

In *Buckley v. American Constitutional Law Foundation*,[86] similar to that held in *Miller*,[87] Justice O'Connor gave great deference to the suspect class legislation when it was created based on tradition or custom.[88] In her concurring opinion, Justice O'Connor explained that legislation should survive strict scrutiny when the legislation is a "classic example of this type of regulation."[89] Justice O'Connor additionally mentions that "Colorado's registration requirement parallels the requirements in place in at least 19 States and the District of Columbia . . . ."[90] Therefore, Justice O'Connor believes that evidence of custom or tradition in legislation will be a positive factor to the law surviving strict scrutiny.[91] Justice O'Connor's concurring opinion in *Buckley* is another example of her commitment to clarifying what characteristics are necessary for legislation to survive strict scrutiny.

H. REDISTRICTING COMPLIANT WITH THE VOTING RIGHTS ACT SHOULD FAVOR STRICT SCRUTINY SURVIVAL.

In *Bush v. Vera*,[92] the Court held that redistricting was unconstitutional where race was a factor in the method of redistricting; the legislators could not prove that there was a compelling interest to use race in redistricting.[93] Although the majority opinion did not address whether compliance with the 1965 Voting Rights Act (hereinafter the "VRA") would constitute a compelling interest to hold the redistricting as constitutional,[94] Justice O'Connor's concurrence stated that "[c]ompliance with. . .the Voting Rights Act (VRA) is a compelling state interest."[95] Therefore, where legislation is compliant with the VRA, Justice O'Connor would likely allow the legislation to survive strict scrutiny.[96] Even though Justice O'Connor's opinion in *Bush* is merely a concurrence, and therefore not binding law, the opinion still helps us understand what she believes should survive strict scrutiny.

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86. 525 U.S. 182 (1999).

87. 515 U.S at 903.

88. *Buckley*, 525 U.S. at 218.

89. *Id.* at 217.

90. *Id.* at 218 (citations omitted).

91. *See id.*

92. 517 U.S. 952 (1996).

93. *Id.* at 955.

94. *Id.*

95. *Id.* at 990 (however, she additionally mentioned that this case was not one to support that conclusion).

96. *See id.*

I. A CLEAR SIGNIFICANCE OF THE LEGISLATION TO THE GOVERNMENT IS NOT ENOUGH TO SATISFY THE COMPELLING INTEREST ELEMENT OF THE STRICT SCRUTINY STANDARD.

In *Turner Broadcasting Systems, Inc. v. Federal Communications Commission*,[97] the Court held that the Federal Communications Commission's Cable Act, requiring cable television stations to dedicate some channels to local broadcasts, was consistent with the First Amendment and survived deferential scrutiny.[98] In Justice O'Connor's dissenting opinion, she does not believe that the must-carry rule is in part a "speech-enhancing" measure created to ensure a "rich mix" of programming.[99] Instead, because five of the seven justices "do not view must-carry as a narrowly tailored means of serving a substantial government interest in preventing anti-competitive behavior"[100] but the five justices "do see the significance of the content of over-the-air programming to the government's. . . efforts to defend the law,"[101] Justice O'Connor believes that the must carry provision should be subject to strict scrutiny [if this is true, she contends, then "the must-carry provision should be subject to *strict scrutiny*, in which they will *surely fail*"].[102]

In Justice O'Connor's *Turner Broadcasting* dissent, she hints that even a clear significance of the law to the government will not persuade her to allow the legislation to survive strict scrutiny.[103] She believes that the compelling interest element of the strict scrutiny standard is a high one to satisfy (which is in opposition to some of the other justices' views).[104] This dissent by Justice O'Connor is important because it provides another factor to what she believes may and may not be important to surviving strict scrutiny.[105]

J. LEGISLATION MAY SURVIVE STRICT SCRUTINY IN CERTAIN CIRCUMSTANCES EVEN THOUGH THE LAW IS FOUND TO BE OVER/UNDER-INCLUSIVE.

In *Church of Lukumi Babalu Aye v. City of Hialeah*,[106] the Court held that a city ordinance denying a church to perform an animal sacrifice ritual was unconstitutional.[107] The concurring opinion, joined by Justice O'Connor, ex-

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97. 520 U.S. 180 (1997).
98. *Id.* at 235.
99. *Id.*
100. *Id.*
101. *Id.* at 234.
102. *Id.* (emphasis added and omitted).
103. *See id.*
104. *See id.*
105. *See id.*
106. 508 U.S. 520 (1993).
107. *Id.* at 520. The religion in question was called *Santeria*. The basis of the Santeria religion is an effort to create a personal relationship with spirits, or "orishas." Part of creating this relationship with

pressed that strict scrutiny should not be applied, because a law burdening religious practice was "not neutral or not of general application."[108] Therefore, if in applying strict scrutiny the Court determines that the law is over or under-inclusive (like in *Korematsu*), in Justice O'Connor's view, that determination alone will not make the legislation necessarily fail.[109]

Additionally, the concurring opinion discusses the relevancy of direct and circumstantial evidence to equal protection cases.[110] Writing for the concurrence, Kennedy stated:

> Here, as in equal protection cases, we may determine the city council's object from both direct and circumstantial evidence. Relevant evidence includes, among other things, the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.[111]

Two things are worth mentioning about this statement: (i) Justice O'Connor's theme (seen in *Buckley* and *Miller*) that evidence of tradition or custom weigh in favor of surviving strict scrutiny is inadvertently mentioned.[112] To survive strict scrutiny, Justice O'Connor clearly believes it is helpful for the legislation to have a relevance to the past;[113] and (ii) Justice O'Connor additionally believes one can look to direct and circumstantial evidence to discover the purpose of legislation.[114] Reliance on circumstantial evidence is a controversial

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the orishas is through animal sacrifice. The religion believes that these orishas depend on their survival through animal sacrifices. These sacrifices are performed, among other things, during marriages and births, and they use pigs, goats, and other animals. When the church opened in the City of Hialeh, the city council held a meeting and quickly adopted ordinances that severely restricted religious animal sacrifice. *Id.* at 524-528. Three ordinances were adopted. Beyond the blatant targeting of the Santeria religion in these ordinances, the Court also looked at the statements made by the city council members during their meetings, which clearly demonstrated the members desire to push the Santeria's out of their city. *See id.* at 541-42. "Councilman Cardozo said that Santeria devotees at the Church 'are in violation of everything this country stands for.'" Councilman Mejides indicated that he was "totally against the sacrificing of animals" and distinguished kosher slaughter because it had a "real purpose." The president of the city council, Councilman Echevarria, asked: "What can we do to prevent the Church from opening?" *Id.* at 541.

108. *Id.* at 579.

109. *Korematsu*, 323 U.S. at 214 (for a full examination of the over-inclusive, under-inclusive analysis, as it concerns strict scrutiny and the Equal Protection Clause, *see* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341 (1949)).

110. *Church of Lukumi Babalu Aye*, 508 U.S. at 540.

111. *Id.* at 540 (citations omitted).

112. *Id.*

113. *See Buckley*, 525 U.S. at 218; *see Miller*, 515 U.S. at 928; *see Church of Lukumi Babalu Aye*, 508 U.S. at 540.

114. *Church of Lukumi Babalu Aye*, 508 U.S. at 540.

issue in the Court, because the Justices disagree over the extent to which "outside" material can be used in finding a lawmaking body's purpose.[115]

K. WHEN APPLYING STRICT SCRUTINY, THE COURT SHOULD EXAMINE THE TEST ON AN *AD HOC* BASIS.

In *Employment Division v. Smith*,[116] the Court held that a state law prohibiting the use of peyote was constitutional because the legislation was not aimed at promoting or restricting religious beliefs.[117] Justice O'Connor's concurrence specified the factors necessary to satisfy the compelling interest element of the strict scrutiny test.[118] Justice O'Connor stated that the strict scrutiny test cannot be rigidly enforced, but must be carefully applied on an *ad hoc* basis, so that each case gets closely examined.[119] Justice O'Connor stated that "the sounder approach – the approach more consistent with our role as judges to decide each case on its individual merits – is to apply this test in each case to determine whether the burden on the specific plaintiffs before us is constitutionally significant . . . ."[120] In believing that each strict scrutiny application must be closely examined on an *ad hoc* basis, Justice O'Connor demonstrates that obviously some cases must survive the strict scrutiny analysis, because otherwise the *ad hoc* method would be a waste of the Court's resources if no case could survive strict scrutiny.[121]

L. RACE CAN BE ONE OF MANY FACTORS IN DETERMINING ELIGIBILITY.

Justice O'Connor's majority opinion in *Grutter* held that race may be used as one factor in determining admission to the University of Michigan Law School.[122] The Court determined that the procedure was constitutional because diversity in the classroom was a compelling end, and considering race in the

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115. William N. Eskridge, Jr., *Should the Supreme Court Read the Federalist but not Statutory Legislative History?*, 66 GEO. WASH. L. REV. 1301, 1301 (1998) ("the most doctrinally distinctive feature of Scalia's statutory jurisprudence is the sweeping rejection of legislative history. Scalia almost always considers the legislative discussion prior to a statute's enactment unworthy of discussion or consideration." *Id.* at 1306).

116. 494 U.S. 872 (1990).

117. *Id.* at 898. The plaintiffs in this case were challenging an Oregon law which prohibited the possession of a "controlled substance." The two plaintiffs were fired from their jobs at a private drug rehabilitation organization because they used peyote for sacramental purposes at a ceremony in their Native American Church. After the respondents were fired, they applied for unemployment compensation, but the Employment Division determined that they were ineligible for benefits because they had been discharged from their jobs for "misconduct." *Id.* 874.

118. *Id.* at 899.

119. *Id.*

120. *Id.*

121. *See id.*

122. Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

admissions policy was a narrowly tailored means to achieve that end.[123] Justice O'Connor explained that for the race-conscious admission program to be narrowly tailored, the program could not:

> insulate each category of applicants with certain desired qualifications from competition with all other applicants. Instead, it may consider race or ethnicity only as a 'plus' in a particular file; i.e., it must be "flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration."[124]

In Justice O'Connor's decision, she frequently quotes her past opinions.[125] Justice O'Connor reemphasizes in *Grutter* that strict scrutiny is not necessarily fatal in fact "when race-based action is necessary to further a compelling governmental interest, such action does not violate the constitutional guarantee of equal protection so long as the narrow-tailoring requirement is also satisfied."[126] The *Grutter* decision validated what Justice O'Connor had promoted in so many prior opinions, that legislation could survive strict scrutiny.

CONCLUSION

Justice O'Connor has been one of the leading advocates of the Court to apply strict scrutiny to cases that question the constitutionality of legislation based on the Equal Protection Clause. However, Justice O'Connor believes that strict scrutiny should be used carefully and once applied the legislation does not automatically fail. It was Gerald Gunther's opinion that once strict scrutiny was applied to an equal protection case, the legislation was bound to fail.[127] Gunther's theory of strict scrutiny being strict in theory, but fatal in fact is what led him to suggest a third-type of scrutiny.[128] It was this tension between Gunther's belief that strict scrutiny equaled fatality of the law and Justice O'Connor's belief that strict scrutiny was not necessarily fatal which this Note intended to resolve.

Through Justice O'Connor's concurrences, dissents, and majority opinions, she clarifies what she considers important and unimportant factors to the strict scrutiny analysis. After all the case opinions this Note has analyzed, two things should be clear: first, Justice O'Connor built a solid foundation of case opinions regarding her strict scrutiny stance. After years of defending and justifying her strict scrutiny theory through various opinions, Justice O'Connor was vindi-

123. *Id.*
124. *Id.* at 329.
125. *See id.* at 329.
126. *Id.* at 334.
127. GUNTHER, *supra* note 9, at 8.
128. *See id.* at 20-22.

cated when she wrote the majority opinion in *Grutter*,[129] which demonstrated how legislation could survive strict scrutiny.[130] Further, because the majority opinion determined that the legislation survived strict scrutiny, Justice O'Connor proved that Gunther's theory was incorrect, and that her opinion eight years earlier in *Adarand*—that strict scrutiny was not fatal in fact—was correct.[131]

The second goal of this Note is to provide the reader with enough background information on Justice O'Connor's strict scrutiny theory so that one may make an informed opinion as to how she may side in future strict scrutiny cases. Justice O'Connor's *Croson* opinion demonstrated her belief that if suspect class created legislation has a termination date, the law is more likely to survive strict scrutiny.[132] Justice O'Connor's *Adarand* opinion showed that when legislation is consistent with past practices, the law is more likely to survive strict scrutiny.[133] Finally, in *Gratz* Justice O'Connor agreed that determining eligibility on race alone could not survive strict scrutiny.[134] These past case opinion statements are just a few examples of the factors that Justice O'Connor has determined make legislation more or less likely to survive strict scrutiny. Since *Grutter* was decided two years ago,[135] there will be future cases that give Justice O'Connor the opportunity to expand her strict scrutiny theory. Hopefully by reading this Note's analysis of Justice O'Connor's already well-founded strict scrutiny theories, some of her future holdings will not be such a surprise.

129. 539 U.S. 306.
130. *Id.* 309.
131. 515 U.S. at 237.
132. 488 U.S. at 510.
133. 515 U.S. at 228-30.
134. 539 U.S. at 280.
135. 539 U.S. at 323.

Locke v. Davey: Has There Been a Change in the Standard of Review for Freedom of Religion Cases?

By Krysta Berquist

Introduction

In *Locke v. Davey*, the Supreme Court departed from traditional strict scrutiny review of freedom of religion cases and held that prohibiting the use of state scholarship funds to pursue a theology degree is constitutional. The issue presented to the Court was whether it is permissible to deny an individual access to a publicly available benefit on the basis of religion. This comment will analyze the Court's departure from traditional strict scrutiny review of freedom of religion cases and the impact that this case will have on freedom of religion in the United States. This case will have long lasting effects on state programs that regulate religion and provide a new standard (or lack thereof) for freedom of religion cases in the future.

The Factual Background

The State of Washington, under its "Promise Scholars" program, awards college scholarships based on academic, income, and enrollment requirements.[1] The stated purpose of the program is "to assist academically gifted students with postsecondary education expenses."[2] The only requirements of the program are that the recipient must be enrolled at least half time in an accredited institution and may not pursue a degree in devotional theology.[3] The prohibition on studying theology is in accordance with the Washington State Constitution, which states, "No public money or property shall be appropriated for or applied to any religious worship, exercise or instruction, or the support of any religious establishment."[4]

Joshua Davey, the Respondent, applied for and was accepted into the Promise Scholars program. Davey chose to attend Northwest College where he planned to pursue a double major in pastoral ministries and business management.[5] Northwest College is a private, Christian college affiliated with the Assemblies of God.[6] Under the Promise Scholars program, the State does not

1. Locke v. Davey, 124 S.Ct. 1307, 1309-10 (2004).
2. Locke v. Davey, 124 S.Ct. at 1309.
3. *Id.* at 1310.
4. *Id.* at 1312.
5. *Id.*
6. *Id.*

determine whether the student's major is religious in nature; the college or university makes that decision. In Davey's case, Northwest College determined that his major was devotional in nature and he was informed that he would not receive his Promise Scholarship funds if he did pursue the majors that he had planned on.[7] Davey brought this suit in response.

Davey filed suit against the State of Washington claiming that the State's denial of scholarship funds on the basis of religion violated "the Free Exercise, Establishment, and Free Speech Clauses of the First Amendment, as incorporated by the Fourteenth Amendment and the Equal Protection Clause of the Fourteenth Amendment."[8] The District Court rejected Davey's claims and granted summary judgment in favor of the State.[9] The United States Court of Appeals for the Ninth Circuit then reversed the District Court's ruling, citing *Church of Lukumi Babalu Aye, Inc. v. Hialeah*.[10] *Lukumi* held that when a state singles out religion for unfavorable treatment the means must be narrowly tailored to achieve a compelling state interest.[11]

The Supreme Court reversed the Ninth Circuit's decision, in a 7-2 ruling, and held that Washington State's prohibition of the use of Promise Scholarships to pursue a degree in devotional theology is constitutional. The Court reasoned that the scholarship program was not hostile to religion and furthered the state's substantial interest in anti-establishment with minimal effects to the plaintiff.[12]

THE LEGAL FRAMEWORK

The Court first argues that there is no animus towards religion in the Promise Scholarship program.[13] The Court factually distinguishes this program from the city ordinance at issue in the *Lukumi* case. In *Lukumi*, a city ordinance made it a crime to engage in certain kinds of animal slaughter, which were characteristic of religious practices taken by members of the Santeria religion.[14] The *Lukumi* court held that programs, which are not facially neutral, are presumptively unconstitutional.[15] The Court argues that the action in *Locke* is far milder and does not require anyone to choose between a state benefit and practicing one's religion.[16] The Court then rejected Davey's free speech claims by arguing that the purpose of the Promise program was not to "encourage a diversity

7. Locke v. Davey, 124 S. Ct. at 1310-11.
8. *Id.* at 1311.
9. *Id.*
10. *Id.*
11. Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 531-32 (1993).
12. Locke v. Davey, 124 S.Ct. at 1315.
13. *Id.* at 1312.
14. *Id.*
15. *Id.*
16. *Id.*

of views from private speakers," but merely to assist needy students with tuition.[17]

The majority argues that both judicial and American history support the notion that religious ministry should be excluded from receiving state dollars. This history gives rise to substantial interest, and therefore the scholarship program is not constitutionally suspect.[18] The Court conceded that the Establishment Clause prohibits the State from disapproving of "a particular religion. . ." but concludes the State has not done so in this case. Since there is no presumption of unconstitutionality, the State's action must only be subject to rational basis review and, therefore, Davey's claim must fail. The Court reasoned that the State has a substantial interest in not funding theology degrees and a relatively small burden was placed on Davey.[19] The Court describes the scholarship program as falling into the "play in the joints," the range of actions that are permitted by the Establishment Clause but not required by the Free Exercise Clause.[20] The Court in *Walz v. Tax Commissioner of the City of New York* said this: "The general principle deductible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference in religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."[21]

Justice Scalia, writing for the dissent, argues with both the law and the reasoning followed by the majority. Scalia argues that the prohibition of the use of state scholarship funds to pursue a theology degree is unconstitutional because it sustains a public benefits program that facially discriminates against religion.[22] State actions that are not facially neutral require strict scrutiny review.[23] And, under strict scrutiny review, the Promise Scholars program must fail.

Scalia first looks to precedent on publicly available benefits as held in the case of *Everson v. Bd. of Education of Ewing*.[24] In *Everson*, the Court prohibited the State of New Jersey from excluding people from public welfare legislation based on their religion.[25] Scalia states, "When the State makes a public benefit generally available, that benefit becomes part of the baseline against which burdens on religion are measured; and when the State withholds that

17. Locke v. Davey, 124 S. Ct. at 1313 (unlike in *Rosenberger* which held a UVA school policy to be unconstitutional for denying a generally available benefit to a religious school publication).
18. *Id.* at 1314.
19. *Id.* at 1315.
20. Walz v. Tax Comm'n of City of New York, 397 U.S. 664, 702 (1970).
21. Walz v. Tax Comm'n of City of New York, 397 U.S. at 702.
22. Locke v. Davey, 214 S.Ct. at 1316 (Scalia, J., dissenting).
23. *Id.* (citing Church of Lukumi Babalu Aye, Inc. v. Hialeah, 508 U.S. 520, 533 (1993)).
24. Everson v. Bd. of Educ. of Ewing, 330 U.S. 1 (1947).
25. Everson v. Bd. of Educ. of Ewing, 330 U.S. at 17.

benefit from some individuals solely on the basis of religion, it violates the Free Exercise Clause no less than if it had imposed a special tax."[26] Scalia seems troubled by the fact that the state carved out a solitary course of study for exclusion, arguing that Davey is entitled to equal treatment and not disfavor based on religion.[27]

Scalia argues that the Court's historical interpretation of this issue is also flawed. The Court is relying on issues in which the State singles out ministers and religious organizations to *receive* public benefits rather than, as in Davey's case, in which the state has *excluded* him from a program.[28] Scalia further argues that the "play in the joints" theory is not a valid legal principle. He states that religion clauses demand neutrality and, if there is no facial neutrality, the law should be subject to strict scrutiny and not rational basis review.[29] He likens what the Court does in *Locke* as similar to imposing a tax on religion; that is, they are singling out the religious for certain reasons. Finally, Scalia argues that the State could achieve its interest against subsidizing theology degrees in many other ways in programs that are not facially discriminatory.[30] However, the Promise Scholars program is facially discriminatory and therefore should be subject to strict scrutiny review.

IMPLICATIONS

This case will have a great impact on the way that states can go about regulating religious conduct. This case sets a precedent for states to make facially discriminatory regulations which must only survive rational basis review in order to be deemed constitutional. While the majority states that this program is not hostile to religion, it offers no evidence to back up that claim. Case law would hold that a regulation that singles out religion to be excluded from a publicly available benefit would be held to a strict scrutiny standard.[31] The court attempts to distinguish Davey's situation from that in *Lukumi*. However, unlike *Lukumi*, while the State of Washington does not criminalize Davey, the State does penalize him. The State is effectively saying that while all eligible students will be allowed to receive the state money to attend college, Davey will not because he is making the private choice to study theology. Because of his "choice," Davey will not be able to pursue his chosen career path.

This case will probably also have the effects of strengthening and legitimizing many school voucher programs. The majority in this case speaks proudly of

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26. Locke v. Davey, 124 S.Ct. at 1316 ((Scalia, J., dissenting) citing principles articulated in Everson v. Bd. of Educ. of Ewing, 330 US 1 (1947)).
27. Locke v. Davey, 124 S.Ct. at 1316 (Scalia, J., dissenting).
28. *Id.* (emphasis added).
29. *Id.* at 1317.
30. *Id.*
31. Church of Lukumi v. Hialeah, 508 U.S. at 579.

the ability for students to use their Promise Scholarship money to "attend pervasively religious schools" and take religious classes.[32] This case will also undoubtedly spur on increased legislation in order to invalidate these programs.

This decision will also open the door for states to treat religions "differently." This majority asserts that differential treatment towards religion is not hostile treatment. "That a state would deal differently with religious education for the ministry than with education for other callings is a product of these views, not evidence of hostility toward religion."[33] Scalia likens the Court's treatment of religion in this case to racial discrimination. In his dissent, Scalia argues, "generally available benefits are part of the baseline against which burdens on religion are measured."[34] The Court's decision in *Locke* is inconsistent with the case of *Rosenberger v. Rector* where the Court ordered the University of Virginia to fund a religious publication so that all student organizations would be treated the same.[35] By removing this imperative, the Court is endorsing hostile treatment of religion.

FUTURE OF FREE EXERCISE CASES

Recently, several religion cases have upheld *Locke v. Davey* and applied its rational basis review standard. In *Eulitt v. Maine Department of Education*, the U.S. Court of Appeals for the First Circuit applied the *Locke* decision and held that a statute that prohibited non-direct aid to sectarian schools was constitutional under rational basis scrutiny.[36] In *Bush v. Holmes*, the Florida court held that the state program which authorized state aid to sectarian schools was unconstitutional, and a state provision which denied funding was not in conflict with the Free Exercise Clause of the Constitution in accordance with *Locke v. Davey*.[37]

Recent decisions have upheld the *Locke* court's reasoning and rules of law, especially the rational basis review aspect of this decision. The majority in *Locke* states that because the state's disfavor of religion is "milder" than in other cases, it will apply rational basis review (stating that the denial of scholarship was not "presumptively unconstitutional"). This will open the door to many state regulations that inhibit the free exercise of religion.

In deciding whether the prohibition was constitutional, the majority did not decide the case under the traditional strict scrutiny method, but instead decided the case under rational basis review and upheld a public benefits program that facially discriminates against religion. The Court ignored the fact that the pro-

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32. Locke v. Davey, 124 S.Ct. at 1315.
33. *Id.* at 1313.
34. *Id.* at 1316 (Scalia, J., dissenting).
35. Rosenberger v. Rector, 515 U.S. 819 (1995).
36. Eulitt v. Me. Dep't Educ., 386 F.3d 344 (1st Cir. Me. 2004).
37. Bush v. Holmes, 886 So.2d 340, 344 (Fla. Dist. Ct. App. 2004).

gram singles out religion as the only course of study that will not be publicly funded in Washington State. The Court stated that although funding a religious education would be constitutional, the State could deny the funding of a theology-based education because the state interest was substantial and the burden imposed on the Promise Scholars was minimal. This decision paves the way for courts to deem facially discriminatory programs constitutional. In this case, the Court has shifted its thinking and decided Joshua Davey's claim under a new and dangerous standard.

Caught Bluehanded: The Supreme Court Provides a Windfall for Employers in *Pennsylvania State Police v. Suders*

AMANDA CHRISLEY

INTRODUCTION

The Supreme Court granted certiorari in *Pennsylvania State Police v. Suders* to resolve whether a constructive discharge precipitated by supervisor harassment ranks as a tangible employment action, precluding the employer from asserting an affirmative defense to a Title VII discrimination claim.[1] In an 8-1 decision authored by Justice Ginsburg, the Court concluded that a constructive discharge is not a tangible employment action because the termination of employment did not occur through an official act, leaving the door open for the employer to assert the affirmative defense. The Supreme Court clarifies the use of agency principles in its decision and provides employers with another way to escape liability.

THE FACTUAL BACKGROUND

Pennsylvania State Police involves the resignation of Suders, a police communications operator for the McConnellsburg barracks.[2] Three of Suders' supervisors continuously subjected her to sexual harassment that only ceased upon her resignation.[3] In June 1998, Suders was accused by one of her supervisors of taking a missing file home with her. After this incident, Suders met with Smith-Elliott, a local Equal Employment Opportunity Officer, and told her that she "might need some help."[4] Smith-Elliott gave Suders her phone number, but neither Smith-Elliott nor Suders followed up on the situation.[5] On August 18, 1998, Suders contacted Smith-Elliot and told her that she was being harassed; Smith-Elliot told her to file a complaint, but failed to tell her how to do so and where to obtain the appropriate form.[6] Two days later, the incident causing Suders to resign occurred.

Suders was required to pass an exam in order to satisfy a job requirement.[7] She took the test several times and each time she was told by her supervisors

1. Pennsylvania State Police v. Suders, 124 S. Ct. 2342 (2004).
2. Suders v. Easton, 325 F.3d 432, 436 (3d Cir. 2003).
3. *Id.*
4. *Id.* at 437.
5. *Id.*
6. *Easton*, 325 F.3d at 437.
7. *Id.* at 438-39.

that she had failed.[8] Suders discovered her exams in a set of drawers one day when she was alone in the barracks locker room.[9] Thinking that the tests were her property, she removed them. Despite her supervisors' representations, she concluded that the reports of her failures were false and that the tests had never been forwarded for grading.[10] When her supervisors discovered that the exams were missing, they devised a plan to arrest her for theft.[11] The officers dusted the drawer with a powder that would cause any skin that came in contact with it to turn blue. When Suders returned the exams to the drawer, her hands came in contact with the powder, and turned her hands blue.[12] With their suspicions confirmed, her supervisors apprehended and interrogated Suders.[13] During the interrogation, Suders told them she wanted to resign, and thereby managed to end the examination.[14] Suders tendered her resignation soon thereafter, and eventually filed suit against the Pennsylvania State Police for sexual harassment and, impliedly, constructive discharge.[15]

THE LEGAL FRAMEWORK AND THE LOWER COURTS' HOLDINGS

To establish a hostile work environment, a plaintiff must show that "the workplace is permeated with discriminatory behavior that is sufficiently severe or pervasive to create a discriminatorily hostile or abusive working environment."[16] To establish a claim of constructive discharge, the plaintiff must make an additional showing that "the abusive working environment became so intolerable that her resignation qualified as a fitting response."[17] Under *Faragher v. Boca Raton*[18] and *Burlington Industries, Inc. v. Ellerth*,[19] "an *employer* is *strictly liable* for supervisory harassment that 'culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.'"[20] However, where there is no tangible employment action, as with a constructive discharge, employers may assert an affirmative defense. The affirmative defense allows the employer to escape vicarious liability if "the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and . . . the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to

8. *Easton*, 325 F.3d at 439.
9. *Id.*
10. *Id.*
11. *Id.*
12. *Easton*, 325 F.3d at 439.
13. *Id.*
14. *Id.*
15. *Id.* at 443, 449.
16. Meritor Savings Bank v. Vinson, 477 U.S. 57, 64, 67 (1986).
17. Pennsylvania State Police v. Suders, 124 S. Ct. 2342, 2347 (2004).
18. 524 U.S. 775, 778 (1998).
19. 524 U.S. 742, 744 (1998).
20. *Suders*, 124 S. Ct. at 2348 (emphasis added).

avoid harm otherwise."[21] An employer may not assert the affirmative defense where the plaintiff's resignation is a "reasonable response to an employer-sanctioned adverse action officially changing her employment status or situation, for example, a humiliating demotion, extreme cut in pay, or transfer to a position in which she would face unbearable working conditions."[22]

Given this framework, the issue often comes down to whether a constructive discharge—which is in itself an actionable violation of Title VII—amounts to a tangible employment action, so as to trigger strict liability for hostile work environment claims. In *Suders*, the Supreme Court was called to determine this very issue. While not expressly claiming an independent constructive discharge in the district court, Suders argued, and the United States Court of Appeals for the Third Circuit agreed, that on these facts, there was sufficient evidence to sustain a constructive discharge claim. Suders claimed that the constructive discharge rose to the level of a tangible employment action, an argument that, if bought, would establish a predicate for vicarious liability and preclude any affirmative defense.

The district court held "that the [Pennsylvania State Police] was not vicariously liable for the supervisors' conduct."[23] The Court of Appeals diverged from the district court in two respects: 1) finding that genuine issues of material fact existed as to the effectiveness of PSP's sexual harassment policy and 2) finding that Suders provided enough evidence to sustain a claim of constructive discharge due to the hostile work environment.[24] Both courts agreed with the district court in that the supervisors' conduct involved a "pattern of sexual harassment that was pervasive and regular."[25]

Sustaining Suders's argument, the Court of Appeals ruled that constructive discharge constitutes a tangible employment action, thereby eliminating the employer's ability to assert the affirmative defense to the claim.[26] The Third Circuit's decision diverged from the Second and Sixth Circuits, both of which had previously found that a constructive discharge does not constitute a tangible employment action.[27] In support of its view, the Third Circuit reasoned that the constructive discharge was a significant change in employment because it terminated the employer-employee relationship and resulted in the infliction of the same type of direct economic harm as found in *Ellerth* and *Faragher*.[28] This

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21. *Suders*, 124 S. Ct. at 2349 (citing *Ellerth*, 524 U.S. at 765; *accord Faragher*, 524 U.S. at 807).
22. *Suders*, 124 S. Ct. at 2347.
23. *Id.* at 2349.
24. *Id.*
25. *Id.*
26. *Id.* at 2350.
27. *Id.*
28. *Id.*

reasoning placed a constructive discharge on the same level as a tangible employment action.[29]

The Supreme Court granted certiorari to resolve the dispute among the circuits and found that an employer may use the *Ellerth/Faragher* affirmative defense when the constructively discharged employee cannot point to any official adverse job action as part of the harassment.[30] However, the employer may not use the affirmative defense when a supervisor's official action, *e.g.*, extreme reduction in pay, humiliating demotion, or transfer to a position in which the employee would face unbearable working conditions, causes a constructive discharge.[31] Prior to this case, the Supreme Court did not have a chance to hold that Title VII encompasses employer liability for a constructive discharge claim.[32] However, the Court already recognized it in the labor-law context.[33] The Supreme Court expressly found in this case that "Title VII encompasses employer liability for a constructive discharge."[34]

BRINGING AGENCY PRINCIPLES TO BEAR ON THE PROBLEM

The misapplication of agency principles is prevalent and is the Court's primary source of confusion in its determination of Title VII hostile work environment and constructive discharge claims.[35] Agency principles are used to force employers to take action to prevent third parties from getting hurt by their employees, and to protect their own employees from discrimination. In this case, the Supreme Court clarifies the use of agency principles within the Title VII context. Previously, the Court specifically stated in *Ellerth* that "'when a supervisor takes a tangible employment action against a subordinate[,] . . . it would be implausible to interpret agency principles to allow an employer to escape liability.'"[36] The Court in *Ellerth* found that a supervisor is given special authority by his employer to act as his agent and this authority allows the supervisor to make decisions which can directly affect the employees under his

29. *Suders*, 124 S. Ct. at 2350.

30. *Id.* at 2351.

31. *Id.* at 2353.

32. *Id.* at 2352.

33. *Id.*; *see* Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 894 (1984) (recognizing a constructive discharge in labor-law, where employers coerced employees into resigning if the employee was participating in union activities).

34. *Suders*, 124 S. Ct. at 2352.

35. *See generally* Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229 (1991).

36. *Suders*, 124 S. Ct. at 2353 (citing *Ellerth*, 524 U.S. at 762-63).

control.[37] Therefore, a supervisor is always aided by the agency relation because he is invested with special authority granted by the employer.[38]

It is with this authority that a supervisor may take actions that are harmful to the employee.[39] The Court says the application of the agency relationship is more difficult in a constructive discharge situation where the supervisor does not take a tangible employment action against the employee, because the supervisor is not using any authority granted by the employer to harass the employee.[40] For example, the employer grants the supervisor power to terminate an employee, but does not grant the supervisor power to harass the employee. Therefore, it is clear that a supervisor is aided by the agency relationship when he terminates or demotes an employee because those actions are tangible employment actions. However, when a supervisor is solely harassing an employee, it is difficult to come to the conclusion that a supervisor is aided by the agency relationship because the employer never expressly authorized the harassment. This explains why the employer cannot be held strictly liable where the supervisor has not taken a tangible employment action against the employee. Some form of notice must be given to the employer in order for the employer to rectify the situation. The conciliation and deterrent purposes of Title VII are best served when employers are encouraged to implement effective anti-harassment policies, and employees are encouraged to report harassing conduct.[41]

However, problems arise when the employer's anti-harassment policy looks great on its face but is ineffective as applied. In certain circumstances, especially where men have traditionally dominated a specific work area, the harassment may be severe and pervasive, but the employee may endure the harassment in order to fit in and be accepted. The job areas which have a predominately male workforce are widely known, and these employers should take extra precautions in order to prevent the harassment. However, as long as these employers have an anti-harassment policy and the employee fails to use those specific grievance procedures, the employer may escape liability because a constructive discharge is a more difficult claim for the employee to prove.

In *Suders*, the plaintiff gave notice to the Equal Employment Opportunity Officer (officer) in June 1998 that she might need some help, but nothing came of the brief conversation. Then, two months later, the plaintiff contacted the officer again and reported the harassment. The officer told the plaintiff to fill out a form, however, she failed to tell the plaintiff where to obtain the form.

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37. *Suders*, 124 S. Ct. at 2353 (citing *Ellerth*, 524 U.S. at 762).

38. RESTATEMENT (SECOND) OF AGENCY (1957) ("An employer is liable for the acts of its agent when the agent was aided in accomplishing the tort by the existence of the agency relation."); *Ellerth*, 524 U.S. at 758, *Faragher*, 524 U.S. at 801.

39. *Suders*, 124 S. Ct. at 2355 (citing *Ellerth*, 524 U.S. at 762).

40. *Suders*, 124 S. Ct. at 2356; *see also* RESTATEMENT (SECOND) OF AGENCY § 228 (1957).

41. *Ellerth*, 524 U.S. at 764.

Two days later, the incident occurred which caused the plaintiff to resign. Although the plaintiff failed to file a complaint, the employer was given sufficient notice. The officer in this case listened to the harassed employee but never actually took any steps to file a complaint. On paper a policy may look great but in actuality the employer has made the actual process difficult and unlikely to succeed. Notice given to the officer should have been sufficient to put the employer on notice. Employers should not be able to have an officer in charge of their grievance procedures that will ignore or make it difficult for a person to file a complaint.

In these situations, the employer should not be allowed to use the affirmative defense. Even the Court's application of the affirmative defense helps to limit employer liability and further discrimination because the Court looks at the employer's policy on its face and does not require any proof that the policy's implementation actually works as it is applied.[42] "Many federal courts assume that if the employer's policy and procedure are reasonable and effective, then the plaintiff's failure to use that policy and procedure must be unreasonable as a matter of law. Therefore, when the plaintiff does not report the harassment to her employer, the employer often prevails on its motion for summary judgment or judgment as a matter of law by offering evidence sufficient to satisfy prong one of the affirmative defense: typically, evidence that it disseminated an anti-harassment policy and complaint procedure."

In the present case, the Court's application of the affirmative defense will cause plaintiffs serious problems if the courts consistently believe that the failure to use the anti-harassment policy is per se unreasonable. The Court should allow a jury to look at the overall circumstances of the harassment and find what in actuality is unreasonable. But, under the guise of agency principles, the Court's decision in this case has further limited employee redress for workplace harassment, and has provided employers with a way to escape liability even in situations where the employee was subjected to severe and pervasive harassment.

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42. Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM J. GENDER & L. 197, 242 (2004) (discovering that "[n]ot one of the cases examined [in her] [a]rticle mentions that an employer has offered evidence that it has conducted surveys of its own employees to determine how the sexual harassment policy works in practice, or evaluated whether its policy has any deterrent effect on the incidence of harassment in its own workplace").

Hamdi v. Rumsfeld: Analyzing the Role of the Judiciary in Labeling Enemy Combatants

AMY L. FERREIRA

I. INTRODUCTION

The democratic political system of the United States maintains a balance between the three branches of government under the Separation of Powers Doctrine. By instituting an intricate system of checks and balances, the Framers of the Constitution went to great lengths to ensure that no one branch of government acquired too much power. The Judiciary, long considered to exist in a vacuum, removed from the taint of politics and societal influence that have historically plagued the other two branches, remains vital to the balance of power. But equally, if not more important, is the Judiciary's obligation to remain steadfast when urged to inappropriately bend to the other branches' personal desires, especially when these personal desires constitute or create fundamental unfairness.

Hamdi v. Rumsfeld, decided by the Supreme Court in June of 2004, seriously calls into question the ability of the Court to act as a check on Executive power and, perhaps even more significantly, to uphold the ideals of justice by protecting personal, guaranteed liberties.[1] *Hamdi*, which questions the detention of enemy combatants, brings to light one of the most important personal guarantees, the right to habeas corpus review. This personal protection guarantees each American citizen the right to a meaningful hearing before he or she is held indefinitely against his will.[2] Thus, habeas corpus review acts as a judicial check on the other governmental branches.[3] Though habeas corpus review remains significant in all situations, it takes on an even more important role during times of international warfare, when fears and suspicions, particularly involving a certain race, nationality, or culture, threaten sinister ramifications sounding in discrimination, inequality, and fundamental unfairness.[4]

In light of the importance of this judicial check during times of international dispute, it becomes necessary to consider the possible consequences of a judicially unchecked system. Unfortunately, however, this consideration does not require speculation since history has a notorious way of repeating itself. But we need not travel back many centuries, or even many decades to find that the situation that the Supreme Court condones in *Hamdi* is the very one it shame-

1. Hamdi v. Rumsfeld, 124 S. Ct. 2633, 2650 (2004).
2. U.S. CONST. Art. I, § 9, cl. 2.
3. *Hamdi*, 124 S. Ct. at 2650.
4. *Id.*

fully rejected in its retraction of the landmark decision of *United States v. Korematsu*.[5]

In *Korematsu*, wartime fear and suspicions caused the United States to discriminate against Japanese-Americans by forcing them into detainment camps simply because of their national origin.[6] There, the Court upheld the constitutionality of Civilian Exclusion Order No. 34 which criminalized the presence of Japanese-Americans in designated military areas.[7] Set against the backdrop of World War II and the United States' conflict with Japan, the order attempted to prevent espionage and sabotage in designated areas by holding suspect each and every individual of Japanese descent.[8] Despite the fact that the order infringed on the rights of a group based solely on national origin, the Court upheld it, explaining that it could not disregard the judgment of the military and Congress that there were disloyal Japanese-Americans who threatened national safety.[9] That Court opined that although compulsory exclusion of certain groups of citizens from their homes constituted a grave injustice under ordinary circumstances, the exclusion order was justified by the exigencies of war and the threat to national security.[10]

In *Hamdi,* the very relaxed standards that the Court condones in labeling one an enemy combatant have the same *Korematsu*-like potential for singling out a group of citizens– here, those of Arab descent– based on nothing more than an immutable characteristic.[11] Though the Court in its plurality opinion claims to do just the opposite, and very well may intend to, the fact remains that as a direct result of the procedures the plurality accepts as to labeling and detaining enemy combatants, personal liberties are violated and the court rejects its responsibility to act as an appropriate check on the Executive branch.[12]

II. CASE SUMMARY

The events of this case begin on September 11, 2001 when the Al Qaeda terrorist network attacked the United States. In response to these attacks, Congress passed a resolution authorizing the President to use all necessary and appropriate force against those persons he determines planned, authorized, committed, or aided the terrorist attacks.[13] In *Hamdi*, acting under this power, the government detained a man suspected of taking up arms with the Taliban

5. Korematsu v. United States, 323 U.S. 214 (1944).
6. *Id.* at 216.
7. *Id.* at 223.
8. *Id.* at 216.
9. *Id.* at 219.
10. *Id.* at 218-20.
11. *Hamdi*, 124 S. Ct. at 2649; *Korematsu*, 323 U.S. at 218-19.
12. *Hamdi*, 124 S. Ct. at 2650.
13. *Id.* at 2635.

regime during the invasion of Afghanistan.[14] The detainee, Yaser Esam Hamdi, was born an American citizen in Louisiana in 1980, and during early childhood he moved with his family to Saudi Arabia.[15] In 2001, when Hamdi was residing in Afghanistan, he was seized by members of the Northern Alliance, a coalition of military groups opposed to the Taliban government, and was eventually turned over to the United States military.[16]

In June of 2002, Hamdi's father filed the present petition for writ of habeas corpus under 28 U.S.C. § 2241 in the Eastern District of Virginia.[17] The petition alleges that the government has held Hamdi without access to counsel or notice of any charges pending against him.[18] The petition further alleges that, as an American citizen, Hamdi enjoys the full protections of the Constitution and that Hamdi's detention in the United States without charges, access to an impartial tribunal, or assistance of legal counsel violates the 5th and 14th Amendments to the United States Constitution.[19]

The District Court appointed the federal public defender as counsel for the petitioners and ordered that counsel be given access to Hamdi.[20] The U.S. Court of Appeals for the 4th Circuit reversed that order, holding that the District Court failed to afford appropriate deference to the government's security and intelligence interests.[21] It directed the District Court to conduct a deferential inquiry into Hamdi's status.[22] On remand, the government filed a response and a motion to dismiss the petition; it attached to its response the Mobbs Declaration.[23]

The Mobbs Declaration sets forth the government's sole evidentiary support for Hamdi's detention, which consists of hearsay testimony from Michael Mobbs, who identified himself as Special Advisor to the Under Secretary of Defense for Policy.[24] This testimony asserts that Hamdi traveled to Afghanistan in 2001, affiliated with the Taliban military unit, received weapons training, and when the Northern Alliance forces were engaged in battle with the Taliban, Hamdi's unit surrendered.[25] Mobbs further contends that since the Taliban is a hostile force engaged in armed conflict with the United States, individuals associated with that group are enemy combatants.[26]

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14. *Hamdi*, 124 S. Ct. at 2635.
15. *Id.*
16. *Id.* at 2635-36.
17. *Id.* at 2636.
18. *Id.*
19. *Id.*
20. *Hamdi*, 124 S. Ct. at 2636.
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.* at 2636-37.
25. *Id.* at 2637.
26. *Hamdi*, 124 S. Ct. at 2637.

The District Court found that the Mobbs Declaration did not support Hamdi's detention.[27] The 4th Circuit reversed, finding that Hamdi's detention was legally authorized and that he was entitled to no further opportunity to challenge his enemy combatant label.[28] It dismissed the habeas corpus petition.[29] Certiorari was granted and the Supreme Court issued its decision in a plurality opinion.[30]

The plurality opinion considers whether the Executive has the authority to detain citizens who qualify as "enemy combatants," and if so, what process is constitutionally due to a citizen who disputes his enemy combatant status.[31] The plurality concludes that the Executive does in fact have the authority to detain citizen enemy combatants, and citizen-detainees seeking to challenge their classification as enemy combatant must receive notice of the factual basis for the classification and a fair opportunity to rebut the government's factual assertions before a neutral decision-maker.[32]

The Court reached its decision by acknowledging that compelling interests exist on both the side of the government and the side of citizens accused of being enemy combatants, and further that these interests must be weighed to strike a balance without sacrificing national security or personal liberties.[33] In sum, the plurality reasoned that while the full protections that accompany challenges to detentions in other settings may prove unworkable and inappropriate in the enemy combatant setting, the threats to military operations posed by a basic system of independent review are not so weighty as to trump a citizen's core right to meaningfully challenge the government's case, and to be heard by an impartial adjudicator.[34] The Court vacated the decision of the lower court and remanded the case.[35]

III. ANALYSIS

Justice O'Connor's opinion, representing the plurality of the Court, seems to lay the foundation for the very scenario it purports to avoid. Despite the fact that Justice O'Connor adamantly conveys the imperativeness of striking a balance between the two competing but compelling interests of national security and personal liberty, she has failed to do just that.[36] In effect, the very procedures the plurality sets forth and the standards it institutes, such as allowing

27. *Hamdi*, 124 S. Ct. at 2637.
28. *Id.* at 2638.
29. *Id.*
30. *Id.* at 2639.
31. *Id.*
32. *Id.*
33. *Hamdi*, 124 S. Ct. at 2647.
34. *Id.* at 2648.
35. *Id.* at 2639.
36. *Id.* at 2648.

hearsay testimony to support labeling one an enemy combatant, disproportionately favor national security at the expense of personal liberty.[37] When such proposals are enacted, all of the potential dangers that the plurality lists when considering and then rejecting a judgment siding entirely with the government come into play.[38] In truth, the plurality, though it may believe otherwise, has not struck a balance between national security and personal liberties. While the plurality is at pains to stress the importance of the Judiciary as a check on the Executive, in all practicality, the plurality refuses to act as a check.[39] By affording such deference to the government and the President through the institution of low evidentiary standards, the plurality has failed to practice the very principles it preaches, and instead of "checking," it "checks out."[40] Most significantly, such a refusal has serious racial and ethnic implications since it allows hearsay testimony fueled by fear, bigotry, and stereotype to suffice for the government's initial showing that one qualifies as an enemy combatant.[41]

Though room for criticism exists in the plurality opinion because it fails to accomplish what it claims to, namely strike a balance between national security and personal liberty, Justice O'Connor remains almost entirely on point while labeling this issue and assessing the importance of the competing interests. She identifies the substantial problems associated with the government's stance, and as such rejects the government's attempts at persuasion through her written word.[42] Unfortunately, despite the fact that the opinion claims to reject the government's one-sided approach, in practicality, it does little more than embrace it.[43]

First, Justice O'Connor correctly explains that the Court must respect both national security and personal liberties.[44] Appropriately, she concludes that because both interests constitute compelling concerns, the Court must establish a middle ground.[45] Justice O'Connor points out that the ordinary mechanism used for balancing serious competing interests and for determining the procedures that are necessary to ensure due process is the test set forth in *Matthews v. Eldridge*.[46] *The Matthews* calculus weighs the private interest that will be affected by the official action against the government's asserted interest, including the function involved and the burdens the government would face in providing greater process.[47] Because of the serious competing interests in-

37. *Hamdi*, 124 S. Ct. at 2649.
38. *Id.* at 2647.
39. *Id.* at 2650.
40. *Id.* at 2649.
41. *Id.*
42. *Id.* at 2648.
43. *Hamdi*, 124 S. Ct. at 2648.
44. *Id.*
45. *Id.*
46. *Id.* at 2646.
47. Matthews v. Eldridge, 424 U.S. 319, 334 (1976).

volved, the plurality appropriately identifies the enemy combatant issue as one that must be subjected to the *Matthews* calculus.[48] The plurality further acknowledges the importance of both interests by proclaiming that liberty is the norm and detention without trial is the carefully limited exception.[49]

Beyond equating the importance of national security and personal liberties, the plurality even regards the latter interest as somewhat more compelling. Many of the plurality's comments elevate personal liberty concerns *above* other concerns by taking into account the war context only to set it aside. The plurality maintains that "it is during our most challenging and uncertain moments that our nation's commitment to due process is most severely tested and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad."[50]

However, despite the fact that the plurality advocates for middle ground and even somewhat favors Hamdi's argument for personal liberties, the very suggestions for accomplishing this monumental task cause it to fail. Though the plurality points out that the exigencies of war allow for a less meticulous legal process, its suggestion of a burden-shifting scheme to achieve middle ground fails by favoring the government at the expense of the accused.[51] The Court suggests that an acceptable process for handling alleged enemy combatants would be one in which, once the government puts forth credible evidence that the habeas petitioner meets the enemy combatant criteria, the burden would shift to the petitioner to rebut that evidence with more persuasive evidence.[52] However, this method is not legally sound because hearsay evidence will suffice to shift the burden of proof to the accused. Hearsay testimony never has and never will qualify as entirely credible, especially in times of war when fears, prejudices and suspicions naturally increase. Though Justice O'Connor asserts that the President and military leaders should not be distracted by arduous legal proceedings, it is hardly middle ground to allow the accusations of one potentially prejudiced individual to force a reversal of American ideals by requiring the accused to prove his own innocence.[53] Ironically, though the plurality vehemently rejects the government's proposed "some evidence" standard—where courts would uphold the label of enemy combatant if *any* evidence exists that *could* support enemy combatant status *including* hearsay testimony— the burden-shifting scheme does only slightly more to protect personal liberties.[54] The plurality's proposed framework still only requires minimal evidence on the

48. *Hamdi*, 124 S. Ct. at 2646.
49. *Id.*
50. *Id.* at 2648.
51. *Id.* at 2649.
52. *Id.*
53. *Id.*
54. *Hamdi*, 124 S. Ct. at 2645.

part of the government even if such "evidence" constitutes nothing more than hearsay.[55]

In addition to emphasizing a balance between national security and personal liberties, the plurality is at pains to reject the notion that the separation of powers doctrine requires the Court to abstain from areas of military concern, including review of enemy combatant status.[56] Justice O'Connor correctly points out that it does not infringe on the core role of the military for the courts to exercise their own time-honored and constitutionally mandated roles of reviewing and resolving claims like those presented in this case.[57]

Furthermore, the plurality not only rejects the government's assertion that separation of powers principles mandate a heavily circumscribed role for the courts, but it holds that separation of powers *requires* that the Judiciary accept a central role.[58] The plurality maintains that the Judiciary must act as a check on the Executive branch in this case because the state of war is not a free for all for the President to impinge on the rights of the nation's citizens.[59] In other words, war power does not remove constitutional limitations safeguarding essential liberties, and as such, the writ of habeas corpus allows, and justice requires, that the Judicial branch play a necessary role in maintaining governmental balance and serving as an important check on the Executive's discretion in the realm of detentions.[60]

However, though the plurality preaches judicial check, in practice, the burden-shifting scheme only allows the Judiciary to check out. By allowing hearsay testimony to shift the burden to the accused, the plurality affords inappropriately increased deference to the President who has the power to label one an enemy combatant. By supporting the burden-shifting scheme which allows for hearsay testimony, the plurality shirks the very duties it claims are so vital to the smooth operation of the government and the protection of personal freedom. By checking out of its required role, the plurality creates an opportunity for the Executive branch to run amok by allowing it to "create" an enemy combatant wherever and whenever it so chooses.

But the potential dangers of a system where the Judiciary backs away from its assigned role are not remote. In fact, *Korematsu* plainly shows us that when warfare clashes with a checked out Judiciary, fear and bias create chaos, discrimination, and fundamental unfairness— the very antitheses of American liberty.[61] Shockingly, however, the plurality does not overlook these dangerous

55. *Hamdi*, 124 S. Ct. at 2649.
56. *Id.* at 2645.
57. *Id.* at 2650.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Korematsu*, 323 U.S. at 223.

potentials, and instead it keenly identifies the possible problem of discrimination that could result if the Judiciary removed itself from meaningful habeas corpus review.[62] Justice O'Connor determines that as critical as the government's interest may be in detaining those who actually pose an immediate threat to national security, history and common sense teach us that an unchecked system of detention carries the potential to become a means for oppression of others who do not present that sort of threat.[63] She holds that because we live in a society in which mere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty, the Judiciary can and *must* step in when dealing with alleged enemy combatants.[64] Unfortunately, despite the plurality's good intentions, the proposed system of dealing with enemy combatants set forth in this case drives a wedge between what the plurality practices and what it preaches.

IV. CONCLUSION

Though *Hamdi v. Rumsfeld* may appear to be a decision showing the respect the Judiciary pays to personal liberties, cynical as it may be, what it really shows is the schism between dicta and law. While the plurality may claim to strike a balance between national security and personal liberties, it does so with an uncalibrated scale.[65] No matter how much the plurality seems to advocate the importance of creating a balance between competing interests, protecting personal liberty, or checking the power of the Executive, the fact remains that the suggested burden-shifting scheme with its low evidentiary standard invalidates these important goals.[66] But most alarming are the potential consequences and implications of this decision. Bearing an eerie resemblance to the horrific scenario set forth in the facts of *Korematsu*, the ruling of *Hamdi* promises to do to Arab-Americans what its predecessor case did to Japanese-Americans– to violate the rights of thousands of innocents based on an immutable characteristic.[67] Have we as Americans learned nothing from our troubled past? From slavery, to detainment camps, to enemy combatants, the United States has fallen into a dangerous two-step process: first discriminate and then apologize. Unfortunately, we have learned nothing from our mistakes, struggles, and shame, and this time we have sacrificed the battle for equality in the name of the war on terrorism.

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62. *Hamdi*, 124 S. Ct. at 2647.
63. *Id.*
64. *Id.*
65. *Id.* at 2646.
66. *Id.* at 2649.
67. *Korematsu*, 323 U.S. at 223.

Tennessee v. Lane: Money Damages under the ADA

ASHLEY W. A. HAMMERICH

INTRODUCTION

Tennessee v. Lane addresses whether Title II of the Americans With Disabilities Act (hereinafter "ADA") permits a federal lawsuit where private citizens may seek money damages from a state for failure to provide proper accommodations such as ramps and elevators for access to its courthouses. Title II of the United States Code Service Section 1331 provides the right for individuals with disabilities to bring a suit against a public entity for violations of the ADA.

The decision in this case creates different consequences for all of the parties involved, as well as for future disability cases. It seems necessary to question whether the Supreme Court should have made the ruling less narrow. While the holding encompasses inaccessible courts and courthouses, it does not include the right of individuals to sue states for money damages under the ADA for all public services and programs, such as public auditoriums and swimming pools. Furthermore, we must question whether the Court really based its decision on due process, or whether it instead relied on fundamental rights. The dissent argued that the majority decided the case based on the violation of the Plaintiffs' fundamental rights, yet it defended its position with due process arguments.

The purpose of this comment is to analyze why the Supreme Court concluded this case so narrowly, how the Court may have inappropriately concluded this case based on fundamental rights, and why the dissent's argument that the State's actions were not a violation of due process rights should have influenced the Court's outcome.

CASE SUMMARY

Two paraplegic plaintiffs, George Lane and Beverly Jones, both requiring wheelchairs for their mobility, brought the action in *Tennessee v. Lane* under Title II of the ADA.[1] George Lane was forced to drag himself up two flights of stairs to appear at a hearing in a courthouse that was not handicap accessible.[2] Lane was arrested for failing to appear in a second hearing because he refused to be carried by officers or crawl up the courthouse stairs again.[3] Beverly

1. James O. Castagnera, *U.S. Supreme Court Holds States Must Ensure Access To Courts For Disabled*, 20 No. 7 TERMINATION OF EMPLOYMENT BULLETIN 2 (July 2004).
2. *Id.*
3. *Id.*

Jones, a certified court reporter, lost many work opportunities and was denied access to the judicial process because of the inaccessibility of numerous Tennessee courthouses.[4]

Title II of the ADA states "no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."[5]

The State of Tennessee moved to dismiss, arguing the State had immunity from private suits for money damages under the protection of the Eleventh Amendment.[6] The U.S. District Court for the Middle District of Tennessee found that immunity under the Eleventh Amendment did not apply and denied the State's motion.[7] The Sixth Circuit of the U.S. Court of Appeals affirmed the district court's decision[8] based on its ruling in *Popovich v. Cuyahoga County Court of Common Pleas*.[9] The Sixth Circuit in *Popovich* ruled the Eleventh Amendment banned Title II claims "based on equal protection violations but Congress could abrogate Eleventh Amendment immunity as to due process claims."[10] The Sixth Circuit decided that the purpose of Title II was "'to guarantee meaningful enforcement' of the constitutional rights of the disabled."[11] Thus, the inaccessibility of courthouses and courtrooms has, in effect, denied disabled people the opportunity "to exercise fundamental rights guaranteed by the Due Process Clause."[12]

The Supreme Court has held that Congress may abrogate State immunity when it has expressed its intent to do so, and has acted within its constitutionally granted authority.[13] In *Board of Trustees v. Garrett*, the Supreme Court held that § 5 of the Fourteenth Amendment does not grant Congress the power to abrogate the states' Eleventh Amendment immunity to private suits for damages under Title I of the ADA.[14] This decision left open the issue of private

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4. *Id.*

5. 42 U.S.C.S. § 12132 (2004).

6. *Supreme Court Upholds Applicability of Title II To States*, 1 No. 8 ANDRES DISABILITY LITIG. REP. 2, June 3, 2004. The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI.

7. Lane v. Tennessee, 40 Fed. Appx. 911 (6th Cir. 2002).

8. Lane v. Tennessee, 315 F.3d 680, 681 (6th Cir. 2003).

9. Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002).

10. Lane v. Tennessee, 315 F.3d 680, 682 (6th Cir. 2003). *See* Popovich v. Cuyahoga County Court of Common Pleas, 276 F.3d 808 (6th Cir. 2002); Board of Trustees v. Garrett, 531 U.S. 356, 360 (2001) (holding that Congress may abrogate the states Eleventh Amendment immunity to private damage suits through § 5 of the Fourteenth Amendment).

11. Lane v. Tennessee, 315 F.3d at 682.

12. *Id.*

13. Kimel v. Florida Bd. of Regents, 528 U.S. 62, 73 (2000).

14. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001).

suits for money damages under Title II. Thus, the Supreme Court considered whether Title II of the ADA surpassed Congress' Fourteenth Amendment power to abrogate Tennessee's Eleventh Amendment right to immunity.[15]

The Supreme Court's 5-4 vote narrowly decided that private individuals may sue a state for money damages where the State of Tennessee had failed to accommodate the disabled plaintiffs with adequate access to certain courthouses. The majority opinion, written by Justice Stevens, concluded "Title II, as it applies to the class of cases implicating the fundamental right of access to the courts, constitutes a valid exercise of Congress' § 5 authority to enforce the guarantees of the Fourteenth Amendment."[16]

In the dissenting opinion, Chief Justice Rehnquist found the majority's opinion to be "irreconcilable with *Garrett*," and although Congress had expressed its intent to abrogate states' sovereign immunity in Title II of the ADA, Rehnquist disagreed with the majority's conclusion "that Title II is valid § 5 enforcement legislation."[17] He criticizes the Court for not limiting "its discussion of constitutional violations to the due process rights on which it ultimately relies" but discussing "a wide-ranging account of societal discrimination against the disabled," which he finds inappropriate since the Court chose a "narrower 'as-applied' inquiry."[18]

Rehnquist was more appalled by the lack of legislative record to support that disabled persons were "systematically denied the right to be present at criminal trials, denied the meaningful opportunity to be heard in civil cases, unconstitutionally excluded from jury service, or denied the right to attend criminal trials," which are the due process 'access to the courts' rights that the majority relied upon.[19] The dissent says the Supreme Court has never held "a person has a constitutional right to make his way into a courtroom without any external assistance."[20] In this case, there is no evidence that a constitutional due process right has been violated since the court offered physical assistance to Lane in order to appear; thus, there is "no basis to abrogate States' sovereign immunity."[21]

Rehnquist also criticizes the majority for claiming Title II "vindicates fundamental rights protected by the *Due Process Clause*—in addition to access to the courts—that are subject to heightened *Fourteenth Amendment* scrutiny" because Title II applies to "any service, program, or activity provided by an entity" and does not "provide prophylactic protection of these rights."[22]

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15. Bd. of Trs. of the Univ. of Ala. v. Garrett, 531 U.S. 356, 360 (2001).
16. Tennessee v. Lane, 124 S. Ct. 1978, 1994 (2004).
17. Tennessee v. Lane, 124 S. Ct. at 1997.
18. *Id.* at 1999.
19. *Id.* at 2000.
20. *Id.* at 2002.
21. *Id.*
22. *Id.* at 2004.

COMMENT

For what should be obvious reasons, the Supreme Court's decision in this case has benefits and consequences for each of the parties involved. The Plaintiffs, and on behalf of a larger, perhaps even under represented group of disabled individuals, have attained a great achievement. This was a considerable step in the efforts to make the largely inaccessible world for many disabled people a little more accessible. Furthermore, disabled individuals can now pursue money damages from the States for not providing better accessibility, to courthouses, at least. From the point of view of the disabled individuals requiring improved accessibility, the States should likely be more inclined to make the physical changes to their courthouses to provide the necessary accessibility in order to avoid incurring further lawsuit damages.

However, there are critics that claim the Court's decision has "unfortunate consequences for people with disabilities" as '[i]t puts them in the position of uncertainty.'[23] The argument is that the Court is continuing a "trend [of] narrowing the scope of the [ADA]" by not expressly "extending the ruling to all public venues."[24] Although the Court upheld Congress' power to abrogate State sovereignty through Title II, the "extent of that power is still subject to review," with the exception of access to courts.[25] The intent of the ADA included "open[ing] up the whole field of government services;"[26] thus, it is unfortunate that the Court was so narrow in its scope. However, the majority found the issue in this case was not Congress' power to "subject the States to private suits for money damages" because they failed to "provide reasonable access to hockey rinks, or even to voting booths, but whether Congress had the right . . . to enforce the constitutional right of access to the courts."[27] Since the Court found the legislation was a "valid" use of Congress' authority where it "applie[d] to the class of cases implicating the accessibility of judicial services," it chose not to go any further.[28]

As a result of this decision, the State of Tennessee, and subsequently other States, are susceptible to these private suits for money damages, or at the very least, the expense and inconvenience of updating and renovating their courthouses in order to avoid the potential for future suits and damages. For the Supreme Court, the narrowly tailored decision saved it from having to draw more bright lines than necessary at this time. However, the holding is likely to

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23. Valerie Jablow, *Court-Access Decision's Narrow Scope Worries Advocates For Disabled*, 40 J. TRIAL LAWYERS AMER. (July 2004).

24. *Id.*

25. *Id.*

26. *Id.*

27. Tennessee v. Lane, 124 S. Ct. at 1993.

28. *Id.*

lead to numerous lawsuits about accessibility to other public facilities. It is arguable that the Supreme Court is delaying the inevitable.

The Court attempted to differentiate between Title I and II "by raising the array of constitutional guarantees that are predicated on access to courts," thus, "technically leaving the door open for future litigants to argue that the actual holding is limited to access to courts" and that any less narrow construction is "merely dictum."[29] Some criticize that the Court's decision was 'restricted to court access in order to get Justice O'Connor's [critical fifth] vote.'[30] By the Supreme Court converting the Eleventh Amendment into a "balancing test," the end result of each constitutional issue "will rest on the attractiveness of the plaintiff and the delicate balance of the Court."[31] The Court's narrow holding will encourage numerous other plaintiffs to bring suits regarding inaccessibility to various other public forums. Perhaps hearing each plaintiff on each facility is the appropriate way to address this issue, however, it is at the very least, costly, time consuming, and inefficient for the court system.

Given the facts of *Lane*, this case should have been decided strictly on whether the plaintiffs' due process rights were violated rather than the majority's view that disabled individuals have a fundamental right to the physical access of courts. The dissent explained that a violation of the plaintiffs' due process rights would have occurred had they been "actually denied the constitutional right to access a given judicial proceeding."[32] If *Lane* had been decided by the dissent, George Lane would have been defeated because he was not denied access to his court hearing; he was just not pleased with the options presented to him in order to gain physical access to the courtroom.

On a personal and moral note, it is unfair for the Plaintiffs to have such physical barriers to simple activities such as attending a judicial proceeding or having accessibility to job assignments. However, the dissent is correct, strictly addressing the issue presented in this case, the Plaintiffs were not denied their constitutional due process rights. There is not a fundamental right to have physical, uninhibited access to courtrooms or courthouses, as the majority suggests. Arguably, the majority has expanded the scope of fundamental rights through this holding.

It is important to consider the Court's decision in economic terms, such as cost and benefit analysis, where "economic concepts are central to . . . legal discourse. . . ."[33] Aside from the money damages for which a state might be held liable, there is the potential for exorbitant costs to make necessary physical

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29. *The Supreme Court*, 25 No. 7 JUD./LEGIS. WATCH REP. 5 (July 2004).

30. Charles Lane, *Disabled Win Right to Sue States Over Court Access*, WASH. POST, May 18, 2004, at A01.

31. *Id.*

32. Tennessee v. Lane, 124 S. Ct. at 2002.

33. ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT 161 (2004).

improvements in order to provide courthouse or courtroom accessibility to disabled individuals. In *Vande Zande v. Wisconsin Department Of Administration*, the paraplegic plaintiff brought suit against the state for not making a "reasonable accommodation" that involved lowering a workplace sink to make it accessible to her.[34] Where the cost to lower the one sink on Vande Zande's floor was $150, the cost to make changes to all the floors exceeded $2000.[35] Judge Posner of the Seventh Circuit Court of Appeals elucidated that "the cost of accommodation should not be disproportionate to the benefit."[36] An employer is not required to make accommodations for a disabled employee if the employer demonstrates that making the changes "would impose an undue hardship on the operation of the . . . [employer's] business."[37] It is important to use market analysis to examine the legal standard set forth in *Vande Zande*, where an individual accommodation may be "reasonable" when taking into consideration an employer's "financial situation," it may be "unreasonable" when viewing the employer's financial circumstances on the whole.[38]

Although *Vande Zande* is distinguishable from *Lane* where it involved accessibility in the workplace and *Lane* involves a due process right to access to the courts, it can be argued there is a strong correlation. States will likely argue that the costs of making reasonable improvements to accommodate accessibility can far outweigh the benefits of easier access to courts received by disabled individuals. This may be especially true where there are alternatives to making structural changes to courtrooms and courthouses, such as reassigning hearings to a handicapped accessible courtroom, disabled individuals accepting physical assistance from court personnel to gain access to the courtroom, or conducting hearings via telephone or interactive webcast.

CONCLUSION

According to the dissent, the majority mistakenly held that denying disabled individuals physical access to state courthouses violates their fundamental rights, thus granting them the right to sue the states for money damages under Title II of the ADA. *Lane v. Tennessee* is a clear case of one's Fourteenth Amendment due process right to be heard, not a fundamental right to physical access to courtrooms. Nonetheless, the majority's narrow holding, which limits suits only to those involving judicial proceedings, has left the disabled community, as well as the states, in an uncertain position regarding inaccessibility to

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34. Vande Zande v. Wisconsin Dept. Of Admin., 44 F.3d 538 (7th Cir. 1995).

35. *Id.* at 546.

36. MALLOY, *supra* note 33, at 159; *see* Vande Zande, 44 F.3d at 542.

37. Vande Zande, 44 F.3d at 542 (quoting the Americans with Disabilities Act of 1990, 42 U.S.C.S. § 12112(b)(5)(A) (2004)).

38. MALLOY, *supra* note 32, at 160.

other public venues.[39] Additionally, it has created a burden for the states that potentially face a multitude of litigation, money damages, and enormous costs for physical improvements to state courthouses. Inevitably, the Supreme Court will have to decide the questions it left unanswered in this narrow holding and specifically address the other public services and programs covered in Title II.

39. Note: There are pending cases, for example, Disability Rights Council of Greater Washington, et al. v. Washington Metropolitan Area Transit Authority, Case No. 1:04CV00498 (D.D.C. filed Mar. 25, 2004) (disabled plaintiffs seek to improve access to Washington D.C.'s public bus transportation).

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