

THE DIGEST
National Italian American Bar Association Law Journal

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ARTICLES

Get Your Dirty Gray Market Goods Out of My Country – Enforcement of Patent Rights in the EU *Daniel Hanrahan*

Reconstructing the Twelve Tables: Some Problems and Challenges *Noah J. Stanzione*

CASE COMMENTS

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ARTICLES

Get Your Dirty Gray Market Goods
Out of My Country – Enforcement of
Patent Rights in the EU *Daniel Hanrahan* 1

Reconstructing the Twelve Tables:
Some Problems and Challenges *Noah J. Stanzione* 21

CASE COMMENTS

2010 Case Comments *Editorial Staff* 37

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Get Your Dirty Gray Market Goods Out of My Country – Enforcement of Patent Rights in the EU

DANIEL HANRAHAN*

ABSTRACT

Under European law, the balance struck between competition law and intellectual property rights (“IPRs”) has been shaped by the Agreement on Trade-Related Aspects of Intellectual Property (“TRIPS”), the European Economic Community (“EEC”) Treaty, and the interpretations given to those treaties by the Community Courts and European Commission.¹ In general, the Community Courts and European Commission have reaffirmed that the exercise of IPRs must be compatible with the rules of competition, namely the principle of “free movement of goods.”²

Section I of this paper briefly introduces the main issues for consideration. Section II discusses the controlling treaties and the inherent tension between the exercise of national patent rights and the free movement of goods within the European Union (“EU”). Section III sets forth a hypothetical factual scenario for consideration and then classifies potentially infringing goods in three categories, i.e., gray market, black market and yellow market. Section IV addresses the first-sale doctrine, namely how the location of the first sale of patented goods affects a patent holder’s national enforcement of patent rights under the doctrine of community patent exhaustion in the EU. Section V discusses how the movement of infringing goods within and outside the EU after the first sale could affect enforcement rights. Section VI refers back to the proposed hypothetical factual scenario from Section III and analyzes whether the patent holder may enforce its rights depending on the type of infringing good. Finally, Section VII offers a number of practical strategies and alternative solutions to assist the patent practitioner to prevent imports of parallel and/or infringing goods in the EU.

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1. See generally STEVEN D. ANDERMAN, *EC COMPETITION LAW AND INTELLECTUAL PROPERTY RIGHTS* (Oxford University Press, 1988).

2. *Id.*

INTRODUCTION

A patent holder in the European Union ("EU") obtains certain rights under Article 28 of the Agreement on Trade-Related Aspects of Intellectual Property ("TRIPS") and Article 30 of the Treaty establishing the European Economic Community ("EEC Treaty"), which is also known as the Treaty of Rome. However, those national patent rights are often subject to undermining by the free flow of goods principle elucidated in TRIPS Article 30 and EEC Treaty Article 28. This frequent undermining creates an inherent tension between national patent rights in EU member countries and the free movement of goods across the borders of those member states. This inherent tension has led to a series of factually-intensive decisions that has resulted in a thicket that practitioners must penetrate in enforcing patent rights in the EU. This paper will review those cases and set forth a number of practical strategies to help patent holder's protect and enforce their Intellectual Property Rights ("IPRs") in the EU.

I. PATENT RIGHTS VS. FREE TRADE

A. PATENT RIGHTS

The main intent of patent law is to provide the inventor of new, useful, and non-obvious products an incentive to innovate by securing a limited monopoly to prevent others from marketing and financially exploiting the invention.³ European patent rights are primarily national, with each country creating and enforcing its own patent rights exclusively within its jurisdiction.⁴ Therefore, a patent owner must seek protection and enforcement in each country individually, which invariably creates a set of parallel national patent rights covering the same intellectual property in a variety of jurisdictions.⁵ To complicate matters further, the decisions of the European Community Courts and European Commission concerning enforcement of patent rights are often factually-intensive with issues decided on a case-by-case basis.⁶ As a result, it is often difficult to distinguish between permitted and prohibited exercises of patent rights in the EU.⁷

In the EU, national patent rights are derived from Article 30 of the EEC Treaty. The full text of EEC Treaty Article 30 reads as follows:

3. Daniel Erlichman, Note, *Jazz Photo and the Doctrine of Patent Exhaustion: Implications to TRIPs and International Harmonization of Patent Protection*, 25 HASTINGS COMM. & ENT. L. J. 307, 308 (2003).

4. Vincent Chiappetta, *The Desirability of Agreeing to Disagree: The WTO, TRIPS, International IPR Exhaustion and a Few Other Things*, 21 MICH. J. INT'L L. 333, 340-41 (1999).

5. *Id.* at 341.

6. See generally INGE GOVAERE, *THE USE AND ABUSE OF INTELLECTUAL PROPERTY RIGHTS IN E.C. LAW* (Sweet & Maxwell 1996).

7. *Id.*

“The provisions of Articles 28-29 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archeological value, or *the protection of industrial and commercial property*. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States.”⁸ (emphasis added)

This language meets the treaty obligations of Article 28 of TRIPS, entitled “Rights Conferred,” which states in relevant part:

“A patent shall confer on its owner the following exclusive rights: where the subject matter of a patent is a product, to prevent third parties not having the owner’s consent from the acts of: making, using, offering for sale, selling, or importing for these purposes that product. . . .”⁹

B. FREE TRADE

When forming the EEC, now a pillar of the EU, the signatories to the EEC Treaty recognized the economic benefits of a single, barrier-free “common market.”¹⁰ Consequently, although the EEC Treaty expressly provides that national member state patent rights are to be respected, individual national patent rights are generally subordinate to the pursuit of the shared benefits derived from an open trading market.¹¹

This consensus on common market primacy is expressly set out in the EEC Treaty in Article 28 (previously Article 30 of the Treaty of Rome), which prohibits quantitative restrictions on imports and all measures having an equivalent effect thereto between member states of the EU.¹² The full text of EEC Treaty Article 28 reads as follows: “Quantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States.” This language satisfies the treaty obligations of Article 30 of TRIPS, entitled “Exceptions to Rights Conferred,” which states in relevant part: “Members may provide limited exceptions to the exclusive rights conferred by a patent, provided that such exceptions do not unreasonably conflict with a normal exploitation of the patent and do not unrea-

8. Treaty Establishing the EEC, Mar. 25, 1957, 298 U.N.T.S. 3.

9. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299; 33 I.L.M. 1197 (1994).

10. Chiappetta, *supra* note 4 at 349.

11. *Id.* at 349.

12. Akshaya R. Suresh, Note, *The Conflict between the Principle of Free Movement and Patent Rights in the European Union*, ILS Law College, p.3, http://porosproject.org/docs/pune/Akshaya_Suresh_Free_movement_and_Patent_rights.doc (last visited May 8, 2009).

sonably prejudice the legitimate interests of the patent owner, taking account of the legitimate interests of third parties.”

C. INHERENT TENSIONS BETWEEN PATENT RIGHTS & FREE TRADE:

After some early ambivalence about the interaction between EEC Treaty Articles 28 and 30, in a copyright case in 1971, *Deutsche Grammophon v. Metro*, the European Court of Justice (“ECJ”) decided that exercise of an intellectual property right to prevent imports was a “measure having an equivalent effect” as referred to in EEC Treaty Article 28.¹³ *Deutsche Grammophon* was the first case in which the ECJ squarely addressed the conflict between the freedom of movement of goods and the territoriality of national IPRs squarely. In the central paragraph concerning the specific subject-matter of the relevant German copyright, the ECJ stated:

“If a right related to copyright is relied upon to prevent the marketing in a Member State of products distributed by the holder of the right or with his consent on the territory of another Member State on the sole ground that such distribution did not take place on the national territory, such a prohibition, which would legitimize the isolation of national markets, would be repugnant to the essential purpose of the Treaty, which is to unite national markets into a single market.

That purpose could not be attained if, under the various legal systems of the Member States, nationals of those States were able to partition the market and bring about arbitrary discrimination or disguised restrictions on trade between Member States.”¹⁴

The decision in the 1971 *Deutsche Grammophon* balanced the competing interests very much in favor of the free movement of goods, increasing the apparent conflict between EEC Treaty Articles 28 and 30. Thereafter, the ECJ has consistently resolved the apparent conflict between free trade and protection of national IPRs by reference to the rights of the market over the rights of the patent owner. As discussed in greater detail below, there are numerous cases in which the ECJ has ruled that national patents should not be allowed to restrain parallel importing so as to defeat the free movement of goods policy. Thus, because actions for the enforcement of such rights are not allowed to succeed unless justified by EEC Treaty Article 30, the conflict between the EEC free trade provisions and national IPRs has solidified.

II. TYPES OF GOODS

For illustration, consider a fictitious Italian company, Ferrazzi, which manufactures premium performance automobiles sold throughout the world. Imagine

13. Case C-78/70, *Deutsche Grammophon v. Metro*, 1971 E.C.R. 487, 1 C.M.L.R. 631 (1971).

14. *Id.* at ¶12.

that Ferrazzi has a portfolio of trademarks related to its distinctive trade name and patents related to its automotive technology. One such industrial patent concerns an arrangement and method for monitoring weather including a piezoelectric sensor system arranged in a vehicle's windshield for obtaining information about the weather in the vicinity of the vehicle ("piezoelectric windshield"). With respect to the EU, Ferrazzi has obtained patent protection in Italy and Germany, its largest markets, but has not sought patent protection in any other EU member states (or perhaps could not obtain it because the substantive law of patents was different in those countries). Ferrazzi sells these piezoelectric windshields across the globe and marks them with their trademarked Ferrazzi name.

Now consider a German mechanic, Ferdinand Porcher, who imports many automotive parts to his shop in Hannover, Germany. Intrigued by new technology, Ferdinand recently purchased three piezoelectric windshields through various distribution channels. The first windshield is a genuine Ferrazzi windshield purchased by Ferdinand on a trip he took to Russia. After this trip, Ferdinand returned to his shop but was informed by a co-worker that he paid too much, as his worker knew an aftermarket distributor that would sell him the same windshield for half the price. Faced with this news, Ferdinand sells his genuine windshield to another shop down the road in Germany. He then proceeds to buy two windshields from the aftermarket distributor. These windshields were both imported from outside the EU into France and then resold throughout the EU. The first aftermarket windshield was manufactured by an aftermarket supplier, Cars R Us, and contains the patented Ferrazzi technology but lacks the distinctive Ferrazzi trademark. The second aftermarket windshield was manufactured by a second aftermarket supplier, Holsen's Global Car Parts, and contains the patented Ferrazzi technology as well as the distinctive Ferrazzi trademark. Ferrazzi later learns of these transactions and seeks counsel as to how to protect its patent rights.

In this scenario, how could Ferrazzi prevent the movement of these goods into and within the EU? If Ferrazzi pursues a successful patent infringement action against Ferdinand, Cars R Us and Holsen's Global Car Parts and they are prevented from importing and using the goods in Germany, such an action would restrict the movement of goods in the EU. But would that restriction amount to a "measure equivalent in effect to a quantitative restriction on imports," and therefore, be in contradiction with EEC Treaty Article 28?¹⁵ On the other hand, if Ferrazzi is unable to obtain an injunction against the infringing goods, even after a finding of infringement, wouldn't the patent rights set forth in TRIPS Article 28 be seriously undermined which could justify a prohibition of such a restriction pursuant to EEC Treaty Article 30.

15. Suresh, *supra* note 12.

A. INFRINGING GOODS – YELLOW MARKET GOODS

Patent rights generally exclude others from manufacturing, selling, and using products similar to the patented product but not originally made available for sale by the patent owner.¹⁶ Patent infringement is considered the unauthorized copying, manufacture, use or sale of products protected by patents owned by another.¹⁷ As such, the Cars R Us windshield would constitute an infringing, “yellow market” good because it contains the patented Ferrazzi technology, but not the distinctive Ferrazzi trademark.

B. COUNTERFEIT GOODS – BLACK MARKET GOODS

Patent infringement is sometimes distinguished from commercial piracy of counterfeit goods which involve copyright and/or trademark infringement.¹⁸ In the scenario outlined above, Holsen’s Global Car Parts has compounded its legal issues by combining its patent infringement with commercial piracy of Ferrazzi’s trademark.¹⁹ As such, the Holsen’s Global Car Parts windshield would constitute a counterfeit “black market” good because it contains not only the patented Ferrazzi technology, but also the distinctive Ferrazzi trademark.

C. PARALLEL IMPORTS – GRAY MARKET GOODS

Parallel or “gray” market imports are goods which have been marketed for the first time by the rights owner or with his consent in one country and then exported for resale to another country.²⁰ They are, therefore, distinct from infringing or counterfeit products, which are goods which have been produced without the rights owners’ permission. Accordingly, the Ferrazzi windshield first sold in Russia by Ferrazzi and then resold by Ferdinand in Germany is a gray market good.

III. FIRST-SALE DOCTRINE

In general, “the doctrine of patent exhaustion, [a.k.a. the first-sale doctrine], provides the patent owner with an exclusive right to control the first sale or use of the protected product, but once the good is released into the marketplace and the owner has recouped a financial benefit, his or her right to control the further

16. Brendan Cheong, *Doctrine of Exhaustion as Applied to Patent Rights*, HARAKENZO WORLD PAT. & TRADEMARK: INTELL. PROP. COLUMN, <http://www.harakenzo.com/en/column/article/20050812.html> (last visited Apr. 12, 2010).

17. DANIEL C.K. CHOW AND EDWARD LEE, *INTERNATIONAL INTELLECTUAL PROPERTY 770* (Thomson/West 2006).

18. *Id.*

19. *Id.* Part III. of TRIPS includes heightened enforcement for trademark and copyright piracy, but not for patent infringement.

20. Suresh, *supra* note 12.

destiny of the product is exhausted.”²¹ Therefore, the first sale of a product by a patentee or licensee exhausts the patent monopoly and the first-sale doctrine deprives the holder of patent rights of any further control over resale of the product.²² “Under such a rule, authorized distribution (commonly referred to as a “first sale”) of a good incorporating the IPR will prevent (“exhaust”) the holder’s further enforcement of the related IPRs against those possessing, using or redistributing the particular good.”²³

As simple as the doctrine of exhaustion of rights may seem from the above, there is, however, much debate on how the concept of exhaustion is to be interpreted in the international context, where a patented invention may cross a plurality of jurisdictions, such as in the EU.²⁴ In the EU, “since even before the European Patent Convention came into effect, the case law of the ECJ has held that an intellectual property right generally cannot be enforced in one member state of the EU to prevent importation into that state of goods first put onto the market by the owner of the right in question or with its consent in another member state, since this would infringe one of the underlying principles of the Treaty of Rome, namely the free flow of goods doctrine.”²⁵ However, debate continues to swirl around application of exhaustion and what constitutes a first sale. This debate is not quelled by TRIPS, which contains only a statement to the effect that no portion of the TRIPS Agreement is to be used to address this issue.²⁶

A. TRIPS ARTICLE 6

The principle of exhaustion of rights has arisen as the means of reconciling free movement of goods and the need to protect IPRs. However, defining the geographical extent of “exhaustion of IPRs was one of the most difficult issues during the negotiation of TRIPS, with some countries asserting the territorial rule of [e]xhaustion and others arguing for an international rule of exhaustion.”²⁷ “Consequently, the parties failed to reach common ground on the question of exhaustion and excluded it from the WTO’s dispute settlement mechanism altogether.”²⁸

As a result, Article 6 of TRIPS, entitled “Exhaustion,” states in relevant part: “For the purposes of dispute settlement under this Agreement, subject to the

21. Erlikhman, *supra* note 3.

22. *Id.*

23. Chiappetta, *supra* note 4, at 341.

24. *Id.*

25. Ladas & Perry, LLP, *Chemical and Biochemical Practices at the EPO: The Free Flow of Goods Doctrine*, <http://www.ladas.com/Patents/Biotechnology/EPOBiotechInventions/FreeFlowGoods.html> (last visited Apr. 12, 2010).

26. Cheong, *supra* note 16.

27. Erlikhman, *supra* note 3, at 315.

28. *Id.* at 315-316.

provisions of Articles 3 and 4 nothing in this Agreement shall be used to address the issue of the exhaustion of intellectual property rights." "The lack of consensus provided by the TRIPS Agreement effectively allows jurisdictions to interpret as they please the doctrine of exhaustion of rights, resulting in several variants of the doctrine, namely International Exhaustion, National Exhaustion, Regional Exhaustion, and Modified International Exhaustion."²⁹ As a result, national and regional authorities, such as the EU, retain exclusive decision-making authority over the issue.³⁰

B. THREE GENERAL TYPES OF EXHAUSTION

1. *National*

The national or domestic exhaustion interpretation of the doctrine mandates that the patent owner's rights in patented inventions are deemed to be exhausted only by a first sale by the patent owner in the same jurisdiction as the patent rights.³¹ By this interpretation of the doctrine of exhaustion, a patent owner's rights in a first jurisdiction are not affected by a sale by the patent owner in another jurisdiction.³² Accordingly, if a country follows a rule of national exhaustion, the authorized distribution (first sale) of that good domestically will prevent the patent holder's further domestic enforcement of the patent against those "possessing, using or redistributing the particular good."³³ However, the patent holder would still be able to use the domestic patent to prevent the import or resale of authorized products sold outside of that country's national borders; thus, under a national exhaustion regime the patent holder can use a parallel patent to prevent products first sold in one nation from entering another.³⁴

2. *International*

The international exhaustion interpretation provides that a first sale of the patented invention by the patent owner in any jurisdiction exhausts the patent owner's rights to the patented invention in all other jurisdictions.³⁵ Hence, under a regime of international exhaustion, the first sale of a product anywhere in the world by the patent owner or with the patent holder's consent exhausts the holder's parallel patents in all other countries.³⁶ Consequently, a patent

29. Cheong, *supra* note 16.

30. Chiappetta, *supra* note 4, at 346.

31. Cheong, *supra* note 16.

32. *Id.*

33. A. Bryan Baer, *Price Controls Through the Back Door: The Parallel Importation of Pharmaceuticals*, 9 J. INTELL. PROP. L. 109, 127-28 (2001).

34. *Id.*

35. Cheong, *supra* note 16.

36. Chiappetta, *supra* note 4.

owner is powerless to stop parallel imports under a regime of international exhaustion.³⁷

3. *Regional Exhaustion – Patent Exhaustion in the EU*

The regional exhaustion interpretation requires a collection of jurisdictions (a region) which have agreed to abide by community laws with regard to specific issues, the most definitive example of which is the EU.³⁸ Under the EU community exhaustion doctrine, patents issued in any EU member country and covering a product are exhausted upon the sale of that product in any other EU member country, as long as the initial sale took place with the consent of the patent owner.³⁹ With a general goal of European economic integration in mind, the ECJ has applied exhaustion principles aggressively with respect to products sold in EU countries, permitting parallel imports in situations where the goods were placed in another EU member's market with the domestic patent owner's consent.⁴⁰ The ECJ "considers integration of the internal market to be of primary importance," and will limit the extent of domestic IPRs to achieve that goal.⁴¹ As outlined below, the ECJ's decisions illustrate its dedication to the free market in application of the doctrine.

The first such decision was *Parke Davis*, decided in 1968.⁴² In that case, the Court decided that a Dutch patent could be used to prevent the import to Holland of drugs put on the market by a licensee in Italy (where no patent protection was possible).⁴³ The questions put to the court were, however, in terms of Articles 81 and 82.⁴⁴ The court reasoned that exercise of a patent right could not breach Article 81 in the absence of an improper agreement nor could it breach Article 82 in the absence of any use of the patent right that contributes to a dominant position, the improper exploitation of which will be liable to affect

37. Chiappetta, *supra* note 4.

38. Cheong, *supra* note 16.

39. Marius Keeley Domokos, *International Patent Exhaustion and the Global Semiconductor Industry*, Mar. 2, 2008, <http://semiconductorlawblog.com/blog/?p=18> (last visited April 12, 2010).

40. Alexander Stack, *TRIPs, Patent Exhaustion and Parallel Imports*, 1 J. WORLD INTEL. PROP. 657, 676 (1998).

41. *Id.*

42. Case 24/67, *Parke Davis v. Probel*, 1968 E.C.R. 55 (1968).

43. *Id.*

44. *Id.* The right to free movement of goods is supported by Articles 81 and 82 of the EC Treaty prohibiting respectively, anti-competitive agreements and abuses of a dominant position. See Anna McKay, *The End of Pharmaceutical Parallel Imports?*, *Pharma Patent Bulletin*, (Feb. 2005), <http://www.thepharmaletter.com>. In the Bayer case the ECJ considered Art 81, and decided that there was no breach of it in relation to Bayer's supply of nifedipine (Adalat) to its wholesalers. See Stack, *supra* note 38. Bayer's decision to reduce supplies of nifedipine to its wholesalers was a unilateral act, not an agreement. However, the *Syfait* case is the first case in which the ECJ has had to consider the issue of an abuse of a dominant position under Art 82.

trade between the member states.⁴⁵ The *Parke Davis* decision held that the importation could be barred under Articles 81 and 82.

In *Centrafarm v. Sterling*, the first free flow of goods case involving patents to come before the ECJ under EEC Treaty Articles 28 and 30 decided in 1974, the Court further illuminated the bounds of the exhaustion principle it had formulated in *Deutsche Grammophon*.⁴⁶ The ECJ held that the owner of a Dutch patent could not use its patent to prevent importation of drugs into Holland, which had already been put onto the market in the United Kingdom with its consent under the protection of a United Kingdom ("UK") patent.⁴⁷ The case involved a pharmaceutical company (Sterling) that held Dutch and UK patents on its drug and had licensed its patents in both markets.⁴⁸ Sterling's UK licensee, Centrafarm, imported the drug from the UK into the Netherlands, and Sterling sued Centrafarm for patent infringement.⁴⁹ The ECJ ruled that such partitioning of member markets by Sterling was not permissible given the common market rules against trade restrictions.⁵⁰ The ECJ's reasoning in *Sterling* is particularly insightful into the rationale behind EU Community Exhaustion principles:

Obstacles to free movement may be justifiable for reasons of protection of industrial property when the protection is invoked against a product coming from a Member State in which it is not patentable and has been manufactured by third parties without the consent of the patentee or where the original patentees are legally and economically independent of each other; the derogation to the principle of free movement of goods is not justified when the product has been lawfully put by the patentee himself or with his consent, on the market of the Member State from which it is being imported, e.g. in the case of a holder of parallel patents.

If a patentee could forbid the import of protected products which had been marketed in another Member State by him or with his consent he would be enabled to partition the national markets and thus to maintain a restriction on the trade between the Member States without such a restriction being necessary for him to enjoy the substance of the exclusive rights deriving from the parallel patents.⁵¹

The ECJ extended *Sterling* with its holding in *Merck v. Stephar*, which was decided in September 1981.⁵² The facts of *Stephar* were essentially the same as

45. Suresh, *supra* note 12.

46. VAN BAELE & BELLIS, *Competition Law of the European Union* 605 (Kluwer Law International 2005).

47. Case 15/74, *Centrafarm BV v. Sterling Drug Inc.*, 1874 E.C.R. 1147, 2 C.M.L.R. 480 (1974).

48. Erlikhman, *supra* note 3, at 328-29 (citing Stack, *supra* note 40, n. 123 at 679).

49. *Id.* at 329.

50. *Id.* (citing Stack, *supra* note 40, at 679-680).

51. *Id.* (citing Stack, *supra* note 40, at 680).

52. Case 187/80, *Merck & Co. Inc. v. Stephar BV and Petrus Stephanus Exler*, 1981 E.C.R. 1981, 3 C.M.L.R. 463 (1981).

the *Parke Davis* case, except that this time the question asked of the Court specifically drew attention to the fact that a Dutch patentee put drugs onto the market in Italy, where patent protection was unavailable.⁵³ In *Stephar*, Merck owned patents in the Netherlands on the drug Moduretic, a diuretic.⁵⁴ Merck also marketed this drug in Italy, which, at the time, did not offer patent protection.⁵⁵ *Stephar* purchased the drug wholesale in Italy and sought to resell it in the Netherlands.⁵⁶ Accordingly, Merck argued that since the purpose of patent protection was to allow the patentee to benefit from the exclusive right to first market the patented article, this right could not be exhausted when the first sale was in a state that did not afford such an exclusive right.⁵⁷

Despite the fact that patent protection was not available in Italy, and therefore, arguably no patent rights to “exhaust” existed, the ECJ held that, in this circumstance, it was impermissible to use a patent to prevent importation from Italy.⁵⁸ The Court reasoned that the principle of free movement of goods should prevail given the patent holder’s decision to market the product in a member state where patent protection did not apply.⁵⁹ The ECJ ultimately concluded that the patent holder assumes the risk of exhaustion by choosing to market its products in a member state in which no patent protection existed, even if there was no opportunity to obtain patent protection in the member state in question.⁶⁰

The ECJ’s reasoning in *Stephar* was challenged in *Merck v. Primecrown*. There, pharmaceutical products were first sold in Spain and Portugal at a time when no product patents were available for pharmaceuticals in those countries.⁶¹ Analogous to *Stephar*, these products were purchased wholesale in Spain and Portugal and imported into the UK.⁶² Despite the Advocate General’s opinion to overrule *Stephar*, the ECJ affirmed, again noting the consent of

53. Case 187/80, *Merck & Co. Inc. v. Stephan BV and Petrus Stephanus Exler*, 1981 E.C.R. 1981, 3 C.M.L.R. 463 (1981) In *Parke Davis*, the sales in Italy had been by a licensee of Parke Davis. In *Stephar*, the sales in Italy were by Merck itself. At the time of the decision in the *Parke Davis* case, it is clear that the court did not consider the question of who did the original marketing to be relevant. See Ladas & Parry, LLP, *Patent Litigation in Europe*, http://www.ladas.com/Litigation/ForeignPatentLitigation/Europe_Patent_Lit.html (last visited April 12, 2010). The issue is not mentioned in the decision at all. In view of the reasoning in the *Sterling* case, however, it does not seem to matter whether the original sale was by the party attempting to assert the patent in another country or by a licensee.

54. *Merck & Co. Inc. v. Stephan BV and Petrus Stephanus Exler*, *supra* note 52.

55. *Id.*

56. *Id.*

57. *Id.*

58. VAN BAELE & BELLIS, *supra* note 46.

59. BRYAN HARRIS, *INTELLECTUAL PROPERTY LAW IN THE EUROPEAN UNION* 42 (William S. Hein & Co., Inc. 2005).

60. VAN BAELE & BELLIS, *supra* note 46, at 606.

61. Cases 267-268/95, *Merck & Co. Inc. v. Primecrown Ltd.*, 1996 ECR I-6285, 1 C.M.L.R. 83 (1996).

62. *Id.*

the patentee to market the product in Portugal and Spain.⁶³ Moreover, the ECJ in *Primecrown* also concluded that the "free movement" rule applied despite imposition of price controls in a member state.⁶⁴

C. LOCATION OF THE FIRST SALE – "CLEAN" & "DIRTY" GOODS

Interest in parallel imports was further stimulated by the Judgment delivered in the *Silhouette* case by the ECJ in July 1998.⁶⁵ This Judgment established that the relevant European Directive (89/104/EC) does not afford rights as far as trademark law is concerned to control imports between member states of goods already placed on the market in the EU. However, it does provide them rights to prevent importation into the EU if these goods have been marketed elsewhere.⁶⁶ Consequently, a product sold in any EU member country (even without patent protection) with the consent of a patent owner can be freely imported into any other EU member country. These goods are referred to as "clean goods." However, if the product is initially sold outside the EU, the patent owner is free to block parallel importation of that product into all EU member countries.⁶⁷ These goods are referred to as "dirty goods."

IV. MOVEMENT OF GOODS

A. MOVEMENT AFTER FIRST SALE – "CLEANSED" & "DIRTIED" GOODS

It is clear that the free flow of goods principle of the Treaty of Rome does not apply to trade between the Common Market and a state outside the Common Market, even if that state has a treaty with the Common Market containing clauses in exactly the same terms as Articles 28 and 30.⁶⁸ Therefore, while the EU allows parallel importation for goods sold and distributed within the Community ("clean goods"), the ECJ restricts parallel importation of goods first sold outside the EU ("dirty goods"). However, even if the type of good, as well as the location of the first sale, has each been firmly established, it is also important to consider how the goods moved in transit within and outside of the Community. As explained in greater detail below, where and how the goods moved through commerce could affect whether a patent holder may seek enforcement against gray, black or yellow market goods.

63. Cases 267-268/95, *Merck & Co. Inc. v. Primecrown Ltd.*, 1996 E.C.R. I-6285, 1 C.M.L.R. 83 (1996).

64. *Id.* However, the court did concede that the law had to take into account whether the patent holder was under a genuine, existing legal obligation to market the product in question in the member state.

65. Case C-335/96, *Silhouette Int'l Schmied GmbH & Co. KG v. Hartlauer Handelsgesellschaft mbH*, 1998 E.C.R. I-4799.

66. Suresh, *supra* note 12, at 6.

67. Domokos, *supra* note 39.

68. Suresh, *supra* note 12, at 6.

For example, consider goods that were first sold within the EU, subsequently moved and sold outside the EU, and then re-imported for sale into the EU. Have these goods been transformed into “dirtied goods,” such that the patent holder may prohibit re-importation by enforcement of national patent rights in the EU? Additionally, what if goods were first sold outside of the EU, subsequently imported into a member country without patent protection, and then imported again and sold into another member country where the patent holder has obtained national patent rights? Does this activity magically transform the once “dirty goods” into “clean” or “cleansed goods,” such that the patent holder may not prohibit re-importation by enforcement of national patent rights in the EU?

While there are no ECJ decisions directly on point concerning enforcement of patent rights against purported “cleansed” and “dirtied” goods, recent trademark decisions (discussed in greater detail in section V.B. below) provide valuable insights into how the ECJ may approach such issues.⁶⁹ Although these decisions were based primarily on the specific language of the EU Trademark Directive, the different outcomes demonstrate the crucial role of benefits allocation on exhaustion decisions, which dictates that in order for the common enterprise to maximize the shared benefits of an efficiently operating single barrier-free market, goods must be permitted to move without interference from exercise of parallel member state IPRs.⁷⁰

One commentator explains that the main reason the intra-EU exhaustion rule exists is because all EU members have made a conscious political and economic decision that the benefits derived from creating an integrated and fluid single-market free trade area outweigh the short-run costs to the holder of parallel intellectual property rights.⁷¹ “In essence, the EU members have integrated their cost-benefit analysis, and considered the overall economic benefits to the common market, as well as the costs to the individual patent holders.”⁷² “The author argues, however, that such “common-market” justification does not work when an outsider country is involved, because the evaluation of costs and benefits becomes unclear.”⁷³

Based on this rationale, it would appear that the concept of “cleansed goods” is a myth and the location of the first sale would control the exhaustion analysis in the EU. This reasoning is supported by two traditional EU community ex-

69. See also Clemens Rübel, *Patent Infringement by Transit of Goods Through Germany*, PATENT WORLD, Nov. 2006, available at http://www.bardehle.com/fileadmin/bardehle/sonstiges/Publikationen/CRue_transit.pdf (last visited Apr. 12, 2010) (these decisions were rendered according to trademark law but were also regarded as being authoritative for the interpretation of the term “distributing” in patent law).

70. Chiappetta, *supra* note 4, at 349-50.

71. Erlikhman, *supra* note 3, at 330.

72. *Id.* at 330-31.

73. *Id.* at 331.

haustion principles. First, under the EU community exhaustion doctrine, patent rights in any EU member country are exhausted upon the sale of that product in any other EU member country, as long as the initial sale took place in the EU with the consent of the patent owner – consent is critical in this context, as it establishes the patent holder's acquiescence to Community free trade principles. Second, the "common-market" justification does not work when an outsider country is the local of the first sale, because the importer has stepped outside the integrated and fluid single-market free trade area. Accordingly, if the first sale takes place outside the EU, even if the goods are subsequently imported into an EU member country without patent protection, and then imported again and sold into another EU member country where the patent holder has obtained national patent rights, exhaustion should not apply and the patent holder should be allowed to block the parallel importation of these alleged "cleansed goods."

The issue of "dirtied goods," however, is less clear. Although consent to free trade within the EU may be established if the patent holder first sold the goods in an EU member country, the subsequent importer has trampled the common-market justification by stepping outside the integrated free trade area by involving an outsider country. Because of this destruction of the flow of goods within the common market, patent holders may be justified in attempting to block the parallel importation of "dirtied goods."

B. INFRINGING GOODS IN TRANSIT

With respect to enforcement of patent rights against infringing goods in transit, whether national courts equate "transit" with other acts of use traditionally reserved for the patent holder, e.g., making, using, offering for sale, selling and importing is of critical importance. Several member states of the European Community have reached the conclusion, on the basis of ECJ case law, that interpretation of the term "transit" as one of the acts of use reserved to the patent holder is possible, and have enacted sanctions against those responsible for illegal shipments.⁷⁴

For example, the German patent law enumerates manufacturing, offering, distributing, and the use or import as the acts of use that are exclusive to the patent holder.⁷⁵ However, German courts have expanded these enumerated acts of use of a patented invention to include transit.⁷⁶ This expansion of protected rights exclusive to the patent holder is said to have been created by interpretation of the term "distributing."⁷⁷ This potential "new" act of use is of considerable practical importance, particularly in Germany, which by its central

74. Rübel, *supra* note 69.

75. *Id.*

76. *Id.* (citing an April 2, 2004 decision of the Hamburg District Court which equates transit with traditional acts of use reserved to the patent holder as a sub-category of distributing).

77. *Id.*

geographical situation in Europe and, in the EU, has become an important country of transit.⁷⁸

This decision is part of a European-wide reaction on decisions of the ECJ concerning trademark law rendered on January 7, 2004 in the *Rolex* case (C-60/02) and on April 6, 2000 in the *Polo/Lauren* case (C-383/98).⁷⁹ In *Rolex*, the ECJ held that Art.1 of the European Regulation (EC) 3295/94 of December 22, 1994 is to be applied also in cases when goods imported from a third country and in transit through another third country are seized on the claim of a rights owner alleging infringement.⁸⁰ Additionally, in *Polo/Lauren*, the ECJ explained that provisions of national trademark law that do not prohibit transit of counterfeit goods through the territory of the concerned member state are contrary to EC 3295/94.⁸¹ According to the reasoning of the ECJ in these trademark cases, national courts have to interpret their national trademark laws according to the limits of the European Community law insofar as such an interpretation is appropriate to reach the targets prescribed by Art. 2 of the European Regulation 3295/94, which guarantees right holders protection of their intellectual property against interferences prohibited by applying civil law sanctions on counterfeit goods that are in transit through the territory of the respective country.⁸²

However, another decision of the ECJ of October 23, 2003 in *Rioglass* (C-115/02) seems to contradict the case law of *Rolex* and *Polo/Lauren*.⁸³ Of critical importance, this ruling was rendered for the interpretation of EEC Treaty Articles 28 – 30. In *Rioglass*,⁸⁴ the ECJ explained that the connection between transit and the specific content of trademark law exists to safeguard the right of the trademark owner to use the trademark by way of first distribution of a product and to protect the trademark owner from competitors sale of goods illegally labeled with the trademark.⁸⁵ However, the Court held that this protection only applies in the context of marketing of goods.⁸⁶ As a result, a transit consisting of shipping goods manufactured in a member state through the territory of one

78. Rübel, *supra* note 69.

79. *Id.* at 2.

80. *Id.*

81. *Id.* at 2-4.

82. *Id.* at 2.

83. *Id.* at 3-4. The factual situation of *Rioglass* differs from *Rolex* and *Polo/Lauren* only in that the goods in the latter cases were imported from a third country and not from a member state of the Community. The Court, however, did not regard this difference to be relevant nor did it consider the question of whether the goods had been manufactured legally or illegally in the country of origin (for instance, because there was no corresponding trademark registered in this country) to be a valid criterion of differentiation for the question of whether transit constitutes a marketing of the concerned goods in Germany and therefore concerns the specific subject of trademark law or not.

84. Case C-115/02, *Rioglass and Transremar*, 2003 E.C.R. I-12705.

85. Rübel, *supra* note 69, at 3-4.

86. *Rioglass and Transremar*, *supra* note 84.

or more member states into a third state does not imply any marketing of the concerned goods and can therefore not infringe the specific subject of the trademark law.⁸⁷ This conclusion holds true independently of the final destination of the goods in transit.⁸⁸

This means that an interdiction of transit inside the Community would constitute a contravention against EEC Treaty Article 28, if the transit does not concern the marketing of the infringing products in question.⁸⁹ Accordingly, after *Rioglass*, there are doubts as to whether the ECJ really demands an interpretation of the term "transit" in national law as being applicable to the traditional acts of use.⁹⁰ As a result, it is questionable whether it is possible to stop infringing goods in transit through an EU member state.

V. ANALYSIS OF HYPOTHETICAL FACTUAL SCENARIOS

Referring back to the proposed hypothetical factual scenario, whether Ferrazzi may enforce its rights depends on the type of infringing good, the location of the first sale, and the subsequent movement of the goods. The first windshield, a genuine Ferrazzi windshield purchased by Ferdinand in Russia and later resold in Germany, is a dirty gray market good. As such, Ferrazzi could pursue a successful patent infringement action against Ferdinand, because the product was initially sold outside the EU, and therefore the patent owner is free to block parallel importation of that product into all EU member countries. However, while Ferrazzi would also be able to stop any subsequent sales of such dirty gray market windshields, as outlined above, it may not be able to prevent transit of the windshields within the Community, if the transit does not concern the marketing of the infringing products in question.

The second windshield, which was manufactured by the aftermarket supplier Cars R Us, is an infringing, yellow market good because it contains the patented Ferrazzi technology. As such, Ferrazzi could pursue a successful patent infringement action against Ferdinand and Cars R Us. However, similar to the gray market windshield, Ferrazzi may have a difficult time enforcing its patent rights against any infringing goods in transit, unless it can prove that the transit concerns the marketing of the infringing products.

Finally, the third windshield, which was manufactured by the aftermarket supplier Holsen's Global Car Parts, is a counterfeit black market good, because it contains not only the patented Ferrazzi technology but also the distinctive Ferrazzi trademark. As with the other windshields, Ferrazzi could pursue a successful patent infringement action against Ferdinand and Cars R Us. Yet, un-

87. *Rioglass* and *Transremar*, *supra* note 84.

88. *Id.*

89. *Rübel*, *supra* note 69, at 4.

90. *Id.*

like the other two windshields, Ferrazzi would have a better chance of stopping the goods in transit, if such goods are to be marketed under the Ferrazzi trademark in the member country of transit.⁹¹

VI. PRACTICAL STRATEGIES & ALTERNATIVE SOLUTIONS

A. EU COMMUNITY PATENT PROTECTION

One solution to clear these murky waters would be the creation of unitary IPRs - a single unitary patent, which is valid for the whole of the common market. The idea of an EU-wide patent dates back to the 1960s.⁹² In 2000, the Commission proposed the creation of a Community Patent to give inventors the option of obtaining a single patent that is legally valid throughout the EU.⁹³ Such a system would be an improvement on the current European Patent Convention, where a common filing and examination system results in the grant of a bundle of national patents.⁹⁴

Under the protocol that is attached to the European Patent Convention, a number of existing courts throughout the EU would be designated as Community Patent Courts, and would have EU-wide jurisdiction to deal with infringement and validity issues arising from Community Patents.⁹⁵ Additionally, a single appeal court (Community Patent Appeal Court or COPAC for short) would also have jurisdiction throughout the EU and to which all appeals from national courts relating to matters of patent infringement or validity of community patents would be referred.⁹⁶

Such unification of the EU patent system would eliminate parallel patent rights, as well as create a unified litigation and appeals system by which current ambiguities could be resolved. However, such a solution seems likely to have to wait until a final decision on the Community Convention has been made, although there is some talk of bringing the litigation protocol into effect independently of the full convention and applying the protocol to all patents granted by the European Patent Office, irrespective of whether they are deemed to be Community patents.⁹⁷

91. CHOW & LEE, *supra* note 17, at 770. Under Regulation No. 1383/2003, a rights holder can lodge an application in writing to the relevant customs authorities to seek the suspension of goods that are suspected of infringing trademarks, copyrights, neighboring rights, patents and geographical indications.

92. Suresh, *supra* note 12, at 8.

93. *Id.* at 6.

94. *Id.*

95. *Patent Litigation in Europe*, *supra* note 53.

96. *Id.*

97. *Id.*

B. STRATEGICALLY PATENT

Absent a true EU-wide patent, companies may consider reevaluating their foreign patent prosecution strategies in light of the limitations that patent exhaustion may place on enforcement of such patents, especially in countries or regions that observe international (e.g., Japan) or regional (e.g., EU) patent exhaustion.⁹⁸ To the extent that the value of particular patents in a specific country permitting parallel importation would be derived from preventing importation and the use of products initially sold by the company outside that country or region, "the need to prosecute and maintain those particular patents may be correspondingly reduced."⁹⁹ This situation would most likely arise in a developed country that permits parallel importation, which is a significant commercial market for the company, and which tends to import the company's products (e.g., Japan). In this case, if the products being imported into that country are generally produced by parties covered by cross licenses with the company, the company's ability to assert patents issued in that country against such imported products could be significantly reduced, and the reason for maintaining those patents should be reconsidered.¹⁰⁰

C. STRATEGICALLY SELL

"To the extent a company contemplates relying on patents to prevent the importation of its products into particular jurisdictions, international patent exhaustion may interfere with such an attempt if the respective jurisdictions observe patent exhaustion."¹⁰¹ This would be the case, for example, if the company sold a product in a certain EU country but sought to prevent the importation of that product in another EU country.¹⁰²

In such cases, "the company's [only] ability to prevent unauthorized parallel importation into such a country may be [reliant] on explicit geographic restrictions regarding the sale and/or use of the product at the time of the initial sale."¹⁰³ However, some of these countries prohibit such contractual geographic restrictions on subsequent sales. Additionally, even if not absolutely barred, such a strategy to impose geographic limitations on the subsequent sale or use of products may be significantly limited by restrictions that local law may impose against geographic division of markets.¹⁰⁴ Moreover, some countries require that the restrictions be reiterated at each level of the commercial distribution chain, and that subsequent buyers and users receive explicit notice

98. Domokos, *supra* note 39.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

with respect to such geographic restrictions, with some jurisdictions requiring that the products themselves be appropriately marked (e.g., Japan).¹⁰⁵

D. STRATEGICALLY PRICE

When prices across national markets differ widely, parallel importers have significant financial incentives to move patented goods across borders.¹⁰⁶ In such circumstances, a patent holder essentially has two choices: (1) maintain price differentials, or (2) set nearly uniform prices region wide.¹⁰⁷ Should a patent holder choose the first option, a parallel importer will surely purchase massive quantities of the good in low price countries and re-import them into higher priced markets, thus undercutting the price there.¹⁰⁸ As a result, prices will fall in the high price markets and rise in low price markets due to increased demand for the product as a result of the entry of a new consumer, the parallel importer.¹⁰⁹ Consequently, a relatively uniform regional price emerges regardless.

Therefore, to undermine gray market profiteers, patent holders may seek to “cut to the chase” by choosing the second option and eliminating the underlying arbitrage opportunity altogether. By eliminating or minimizing the price differential between the patented goods in two or more markets, patent holders can greatly reduce the motivation for third parties to move goods across borders.

However, government regulations obviously minimize a patent holder’s ability to price discriminate across markets. For example, many governments have enacted price controls forcing the price of pharmaceuticals down to their marginal costs. As discussed above, the ECJ in *Merck v. Primecrown* concluded that the “free movement” rule applied despite imposition of price controls in a Member State.¹¹⁰ Additionally, all pricing decisions are likely to be met with significant scrutiny in light of stringent price competition regulations in the EU.¹¹¹

105. Domokos, *supra* note 39.

106. A. Bryan Baer, *supra* note 33, at 127-28.

107. *Id.*

108. *Id.* at 128.

109. *Id.*

110. *See, e.g.*, Case 16/74, *Centrafarm BV v. Winthrop BV*, 1974 E.C.R. 1183, 2 C.M.L.R. 480 (1974) (discussing the U.K. regulations in an intra-EU free movement of goods case).

111. *Genzyme Ltd. v. The Office of Fair Trading* [2004] CAT 4, available at <http://www.catribunal.org.uk/files/Jdg1016Genzy110304.pdf> (confirming that predatory practices, such as a price squeeze, are likely to be subject to scrutiny on the basis (Joined Cases C 468/06 to C 478/06) of abuse of dominant position provisions and the GSK case confirms that even non-dominant market players may be restricted in the setting of prices for export when they restrict cross-border trade).

CONCLUSION

National patent rights in the EU are often subject to undermining by the free flow of goods principle, as stated in TRIPS Article 30 and EEC Treaty Article 28 and interpreted by the ECJ. In fact, the ECJ's decisions to-date illustrate its dedication to the free market by continually placing integration of the internal market in a place of primary importance above enforcement of national IPRs. Accordingly, in analyzing whether patent holders may enforce their national patents rights in the EU, practitioners must pay close attention to the type of infringing good, the location of the first sale and the subsequent movement of the goods. More importantly, in an attempt to maximize patent protection across the globe, patent holders must critically analyze their patent and sales strategies to maximize coverage and minimize the opportunities for proliferation of infringing and parallel goods.

Reconstructing the Twelve Tables: Some Problems and Challenges

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INTRODUCTION

The Twelve Tables were a series of Roman laws that were promulgated ca. 450 B.C. and upheld in later popular imagination as exempla of justice, a watershed moment in the movement for class equality in Rome. However, everything we know of them comes at least secondhand, and what evidence we have tends to contradict this romantic assessment. This paper looks at the process of finding the “true” Twelve Tables by surveying a number of standard problems in reconstructing an ancient text and scholars’ responses to them. The first part of this paper critically evaluates the mythologized history of the Tables, while the latter part looks at the process of reconstructing the text itself. The second part concerns itself with how scholars establish the order of provisions in the Tables, how they decide on a provision’s inclusion at all, how they decide on the “correct” version when our sources disagree, and other problems scholars encounter in such an exercise. The paper then concludes on what we can actually know about the Tables with some certainty. This paper does not attempt a full reconstruction of the Tables but rather provides a primer on the sorts of difficulties always present in such an endeavor. It serves as a caution to mythologizing history and to trusting those who do.

I. WHY WERE THE TABLES CREATED?

A. THE PROBLEM OF BIAS

[Q]uis enim rem tam veterem pro certo adfirmet?

But who could assert the truth of such an ancient matter?

—LIVY¹

Scholars trying to understand the Twelve Tables must first separate fact from fiction in the sources, which is not always an easy task. As Robinson reminds us,

The historians . . . are not reliable when dealing with the period before approximately 200 B.C. They were not only using annalists with family scores

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1. TITUS LIVIUS, *AB URBE CONDITA* 1.3.2 [hereinafter *LIVY*]. All translations, except when otherwise noted, are my own.

to make, but also providing propaganda for the new regime; some of their 'history' is probably pure invention, some is undoubtedly a back-projection of events of the later second and earlier first centuries.²

Many of these criticisms can be leveled against Livy, among the latest, and thus unsurprisingly most embellished,³ of our Roman raconteur-cum-folk-historians. The burning of Rome in 387 B.C. destroyed many of the records Livy might have been able to consult, taking him one step further from the actual events.⁴ The specter of the Principate upon Livy's history is also apparent, like in the story about Cossus, which obviously includes a later insertion to get Augustan sanction.⁵

B. A PRODUCT OF CLASS CONFLICT?

In any event, Livy's basic story begins in 462 B.C., when Gaius Terentilius Harsa, the tribune of the plebs, with the consuls away, proposes legislation to curb their power.⁶ Livy thus situates the Tables squarely within the story of the Conflict of the Orders. The prefect of the city, Quintus Fabius, convenes the Senate and viciously thwacks the measure.⁷ After several years of similar proposals, a delegation is sent to Athens to study the laws of Solon.⁸ In 451, once the delegation has returned, ten men (including those from the delegation) are selected to rule with supreme power, i.e., no right of appeal against them.⁹ In the following year, they use their power justly, with each holding charge once every ten days.¹⁰ Despite their plenary grant of power, the decemvirs work to ensure that the laws are fair for all citizens. They consult the people to obtain suggestions for how the laws should be, agreeing on what become the first ten of the Twelve Tables (the "Tables").¹¹ The next year, an almost completely different group of ten men are chosen, who are greedy for power, do not allow the right of appeal, and are dilatory in finishing the Tables.¹² They eventually add two more Tables, which counteract much of the equality achieved through the first ten.¹³

Cicero says all of the members of the second decemvirate were unjust, except for Gaius Julius, who Cicero (using an example involving a corpse) shows was

2. O.F. ROBINSON, *THE SOURCES OF ROMAN LAW: PROBLEMS AND METHODS FOR ANCIENT HISTORIANS* 68 (1997).

3. See A. ARTHUR SCHILLER, *ROMAN LAW: MECHANISMS OF DEVELOPMENT* 145 (1978).

4. OLGA TELLEGEN-COUPERUS, *A SHORT HISTORY OF ROMAN LAW* 3 (1993).

5. See T.J. LUCE, *THE RISE OF ROME* ix, xiii-xiv (Oxford Univ. Press 1998).

6. LIVY, *supra* note 1, at 3.9.1-5.

7. *Id.* at 3.9.6-13.

8. *Id.* at 3.31.7-8.

9. *Id.* at 3.33.1-6.

10. *Id.* at 3.33.8-10.

11. *Id.* at 3.34.1-6.

12. *Id.* at 3.36-37.

13. MARCUS TULLIUS CICERO, *DE RE PUBLICA* 2.62.

content to respect a law of procedure even though he had the power to ignore it.¹⁴ But Livy assigns Gaius Julius to the first decemvirate,¹⁵ so Cicero was likely confused in his sources. Cicero also claims that, at one point, Decimus Verginius killed his daughter in the Forum to prevent her from being raped by one of the second decemvirate.¹⁶ He fled to the army, who abandoned their war to initiate an uprising against the ten.¹⁷

Cicero's account of the uprising seems odd. That the army would up and quit a war to usurp a government of ten men is a bit hard to believe, and the incident of the rape seems an intentional evocation of Lucretia's. This tradition about the decemvirate's overthrow probably arose from a Republican fear of monarchy. The antimonarchical theme is reflected in two further comments in Cicero's *Republic*. First, Tully reports that, after Tarquin was expelled, Romans developed a longstanding hatred of monarchy.¹⁸ Also, Romans were particularly proud that their constitution was gradually developed with popular input, instead of all at once by a single lawgiver.¹⁹

C. THE LAST TWO TABLES

Some doubt also must fall on other parts of the tradition, especially when the sources do not agree. For example, Cicero states that the last two Tables were both unjust, carried out by a cruel second group of ten,²⁰ while Pomponius has one decemvirate legislating twice.²¹ Different still, Diodorus credits the consuls of 449 with the last two Tables.²² The one common thread, and thus likely truth, is that the last two Tables are supplemental to the first ten.²³

As for Cicero's claim that the last two Tables were particularly unjust, scholars tend to disagree with this assessment. Obviously, the law banning interclass marriage was considered unjust, as it was repealed only a few years later. But the other laws in the last two Tables do not stand out: these are fairly standard provisions punishing slaves for theft or damage to property, punishing false claim, and, to some extent, regulating sacral law.²⁴

14. CICERO, *supra* note 13, at 2.61.

15. LIVY, *supra* note 1, at 3.33.3.

16. CICERO, *supra* note 13, at 2.62.

17. *Id.*

18. *Id.* at 2.52.

19. *Id.* at 2.2.

20. *Id.* at 2.62.

21. See Dig. 1.2.2.4 (Pomponius, *Enchiridion*).

22. DIODORUS, *BIBLIOTHECA HISTORICA* 12.26.1.

23. The Roman calendar, according to one tradition, appears to have developed the same way—first ten months, then two more, the two additional months added by Numa the Law-giver. See LUCIUS MESTRIUS PLUTARCHUS, *BIOI PARALLÉLOI: NUMA* 18–19. We might therefore question whether one of these stories is inspired by the other.

24. ROMAN STATUTES 583 (M.H. Crawford ed., Institute of Classical Studies, University of London 1996).

D. FURTHER PROBLEMS WITH THE HISTORY

Tellegen-Couperus highlights further problems with the "historical" accounts.²⁵ Most scholars doubt that there was a second decemvirate, even a delegation to Athens.²⁶ Further, the *comitia curiata* is said to have approved the Tables, but, as they only achieved legislative power in 449, it is unlikely they did so.²⁷ The people likely did not vote on the Tables, as our *fin de République* historians would have us believe. The date, however, seems reasonable, as the Tables cite the Tiber²⁸ as the boundary of Rome, which was true until around 400.²⁹

And though in our ancient sources the Tables are portrayed as part of a conflict between the classes, modern scholars doubt the laws were an attempt at class equality. As Robinson points out,³⁰ the exact nature of this conflict is difficult to determine because the patrician-plebeian legal differences came to an end before our extant sources, such as Livy, wrote. Of course, the ban on interclass marriage – established in the Tables – ended in 445 B.C. with the *Lex Canuleia*. In 367 B.C., plebeians could be elected consul with the *Leges Liciniae Sextiae*. Finally, in 286 B.C., plebiscites were declared binding for all citizens with the *Lex Hortensia*.³¹

E. THE TRIP TO ATHENS

The question of whether the Romans sent men to Athens to study Solon's laws still deserves further attention. Boesch says no because the story is not in our oldest sources, such as Lucius Aelius Stilo. (Crawford admits this does not necessarily mean anything.³²) Wieacker believes that the social and economic approach and the overall structure of the Tables are Greek-influenced, but believes the influence came from Greek cities closer to Rome (e.g., Magna Graecia).³³ On the other hand, there are certain precise parallels with Athenian law. At Crawford's IV, 4 and IX, 1, he does not find the parallels so impressive.³⁴ The more interesting parallels for Crawford occur at his VII, 2–5, 8 and 9; VIII, 13–15; and Table X (the last regulating funerary luxury).³⁵ Other influ-

25. TELLEGEN-COUPERUS, *supra* note 4, at 20.

26. *Id.*

27. *Id.*

28. See ROMAN STATUTES, *supra* note 24, at III, 7; see also FONTES IURIS ROMANI ANTEIUSTIANI III, 5 (Salvatore Riccobono et al. eds., 1918)[hereinafter *FIRA*]. *FIRA* is a main competitor of ROMAN STATUTES, *supra* note 24.

29. TELLEGEN-COUPERUS, *supra* note 4, at 20.

30. ROBINSON, *supra* note 2, at 2.

31. TELLEGEN-COUPERUS, *supra* note 4, at 8.

32. ROMAN STATUTES, *supra* note 24, at 560 (citing FRIDERICUS BOESCH, DE XII TABULARUM LEGE A GRÆCIS PETITA (1893)).

33. *Id.* (citing Franz Wieacker, *Solon und die XII Tafeln*, in 3 STUDI VOLTERRA 757 (1971)).

34. *Id.*

35. *Id.*

ence is also debatable, although Crawford finds work like Yaron's attempt to show Semitic influence unconvincing, as the similarities seem trivial.³⁶

Watson takes a different approach to the question. Watson believes that the development of law (in general) comes not so much from logic nor experience (*pace* Holmes) but from borrowing.³⁷ But since the Romans seemed averse to borrowing, what are we to make of the story of the delegation? Watson suggests the trip to Athens *did* occur and was a tactic by the patricians to put off codifying the law, in which case going to Greece would obviously work better than going only to Magna Græcia.³⁸

Watson also notes that little in the Tables shows Hellenic influence; even the strongest case of the funeral laws is not so close to the laws of Solon. And as Watson observes,

[E]ven if it should be conceded that the mourning provisions of the XII Tables owe something to the laws of Solon, it is inconceivable that burial and mourning practices previously unknown to the Romans were accepted by Rome once they were observed to exist in far away Athens. One would have to postulate that the practices were already known to the Romans, presumably as a result of contact with Magna Græcia.³⁹

Still, Watson wonders why the ancients would have mentioned the expedition to Athens were there no evidence of it in the laws. Watson believes that when the expedition went, it found little worth borrowing. For him, this is consistent with the Roman character of borrowing-aversion, but also solves the problem of why such a story would have been brought into the tradition were it not true.⁴⁰

In the end, of course, the convenient delay the Attic trek afforded mattered little to Rome's other half. The Tables largely failed to help the plebs, as they avoided dealing with matters that could get them into politics, and did not list the formulæ for trials or contracts or freeing slaves.⁴¹ They were "prepared by patricians as the law they were willing to share with plebeians,"⁴² much as our Bill of Rights' terms were too dictated by opposition, written by that great Federalist James Madison!

Still, some light may be shed on the delegation by considering a separate work by Watson, where he discusses his experiences on a panel drafting a new civil code in Armenia in 1997. Many times, Roman law would come up in discussion and, in some unexpected way, influence the draft, although one

36. ROMAN STATUTES, *supra* note 24 at 561 (citing Reuven Yaron, *Semitic Influence in Early Rome*, in DAUBE NOSER 343 (1974)).

37. ALAN WATSON, *THE SPIRIT OF ROMAN LAW* 111 (1995) [hereinafter WATSON, SPIRIT].

38. *Id.* at 111–12.

39. ALAN WATSON, *ROME OF THE XII TABLES: PERSONS AND PROPERTY* 179–80 n.15 (1975) [hereinafter WATSON, XII TABLES].

40. WATSON, SPIRIT, *supra* note 37, at 112.

41. *See Id.* at 1.

42. *Id.* at 38.

would only know this from attending the session Watson was at; there was no evidence in the code-as-written. As Watson says,

[E]vidence for legal history is the written record, occasionally archaeology, but never the spoken word not recorded in writing. So often the evidence for legal history misrepresents what actually happened. I believe that without this chapter there would be no evidence for the role of Roman law in the Armenian civil code.⁴³

If a similar situation occurred with the ancient Romans, much more of the Tables may have been somehow inspired by the laws of Solon than seems to us apparent.

F. OTHER BORROWING

Another question in understanding the Tables' inspirations concerns the laws attributed to the earlier kings. Crawford agrees with Gabba that many of these are bits of Late Republican constitutions that were fathered on one of the kings.⁴⁴ Some laws related to religious practice do, however, appear to be of regal provenance: provisions regarding the religious aspects of homicide, the sprinkling of wine, the Vestal Virgins, etc., all attributed to Numa, especially when we see in them archaisms; "we are dealing either with a text that has preserved an archaic form . . . or at the very least with a text that has corrupted an archaic form which was no longer understood."⁴⁵ These regulations may then have been taken up by the decemvirs, borrowed because they could be, not necessarily because they deserved to be. Watson believes these laws influenced the Tables, but Robinson believes the *leges regiae* had little resemblance to the Tables, agreeing with Schulz.⁴⁶

On the point of undeserved borrowing, Crawford notes the parallel difficulties raised by the seeming disappearance of lavish grave goods in Rome ca. 575–550 B.C. Rather than maintaining the idea that funerary luxury reappeared and had to be suppressed again to explain the presence of Table X, the argument is that earlier regulations suggested similar ones half-unthinkingly for matters of public concern related to funeral customs.⁴⁷ Crawford rejects Cicero's supposition that the sumptuary regulations were to place the rich and poor on equal footing; the abandonment of grave goods seems to be more of a self-regulatory matter by the rich.⁴⁸

43. ALAN WATSON, *ANCIENT LAW AND MODERN UNDERSTANDING* 90 (1998) [hereinafter WATSON, *ANCIENT LAW*].

44. *ROMAN STATUTES*, *supra* note 24, at 562.

45. *Id.* at 562–63.

46. ROBINSON, *supra* note 2, at 1, 21 n.3 (citing FRITZ SCHULZ, *HISTORY OF ROMAN LEGAL SCIENCE* 89 (rev. ed. 1953) (1946); Alan Watson, *Roman Private Law and the Leges Regiae*, 62 *J. ROMAN STUD.* 100 (1972)).

47. *ROMAN STATUTES*, *supra* note 24, at 563.

48. *Id.*

But only so much effort ought to be spent on guessing about the details of the tradition. The next step is to attempt a reconstruction based on the fragments and quotations we have from other authors (as no original source of the Tables remains), which is sometimes a difficult task.

II. RECONSTRUCTING THE TEXT

A. PRELIMINARY OBSTACLES

One recent reconstruction of high acclaim is that of Crawford, who found the remains of the *Lex Osca Tabulae Bantinae*, Law 13, helpful. This was a charter for a Latin colony ca. 300 B.C., which scholars believe shares similarities in language and content with the Tables and therefore can be checked against potential reconstructions. At a minimum, it suggests the bounds of the possible.⁴⁹

In Crawford's introduction, he points out that, where sources disagree, the frequency of one version over another does not help, as the jurists' sources are usually "tralatitician," handed down, so more citations does not make one more authoritative.⁵⁰ Another difficulty lies in determining what of ancient quotation refers to the Tables as they stood, as many of our sources issue from several centuries later, and the authors may be reading their own law or politics into their interpretations or (worse) reimaginings.

Changes in the Latin tongue can also be problematic, as all of our quotations of the Tables can only get so close to the Latin of 451 B.C. Sometimes, changes in the meanings of words caused confusion for our ancient sources, and they themselves misinterpreted a provision. For example, in Gaius' commentary on the Tables (an important source, of which only fragments remain), Gaius defines some words which, according to D'Ippolito, could not have been in the Tables.⁵¹ D'Ippolito suggests that Gaius received these of the commentators, especially Sextus Aelius Pætus, the consul of 198 B.C., but Crawford thinks it not unlikely that they are Gaius' invention instead.⁵² Besides Gaius, Festus is another important ancient source, for a lexicon he wrote. Much of his material comes from Varro and Marcus Verrius Flaccus, an Augustan lexicographer. Festus also contains some bits of the Tables, which Bona believes come mostly independent of the jurists.⁵³

Understanding the nature of the text is also paramount in reconstructing it. According to Gellius, each provision in the Tables was a *lex*.⁵⁴ Gellius reports that key words from a provision were used informally as a title.⁵⁵ Probably the

49. ROMAN STATUTES *supra* note 24 at 556, 561.

50. *Id.* at 556.

51. *Id.* at 558 (citing FEDERICO D'IPPOLITO, QUESTIONI DECEMVIRALI 158–68 (1993)).

52. *Id.*

53. *Id.* at 559 (citing FERDINANDO BONA, OPUSCULUM FESTINUM (private prt., Pavia, 1982)).

54. *Id.*

55. *Id.*

Tables were a combination of existing laws that needed clarification and of innovations. Watson points out, for example, that dowry, of long existence, is not mentioned; the law of slavery is mentioned only briefly; property acquisition is fleetingly treated.⁵⁶ As noted by Daube, “[a]ncient codes give regulations only in those matters where the law is doubtful, or where a reform is at once needed and practicable.”⁵⁷

For Crawford, the Tables seem to be a mixture of public and private law, like the *Lex Osca Tabulae Bantinae*, Law 13.⁵⁸ Sacral and constitutional law was, by and large, omitted, so that the plebeians could not attain any real power. Robinson states that the Tables “settled certain limited issues, after a political struggle; they were not a general code, any more than Magna Carta,”⁵⁹ though, like Runnymede’s text, the Tables have since been heavily fabled.⁶⁰

B. THE ORDERING OF THE LAWS

The order of the provisions in the Tables is, in some places, heavily debated, but what Cicero says falls as Table I, 1 is accepted as such.⁶¹ Like the later praetor’s edict, the Tables begin with the law of procedure. The only real dispute in the order early on comes from Behrends, who shifts the order in the first two Tables only because, in Crawford’s opinion, of modern notions without considering how the ancients would have proceeded.⁶²

Attempts to organize the laws in order go back to the 1500s, though Dirksen’s order in 1824 is generally accepted. Scholars’ reasons for placing the laws in a certain order rest on three factors: if the number of the law is actually mentioned, the order it is presented in Gaius (it is generally assumed that Gaius would have treated the laws in order), and the notion that laws relating to a certain substantive area would have been grouped together.⁶³ The last factor is somewhat more doubtful, though Cicero’s details on funeral customs make this a reasonable assumption. Crawford sometimes disagrees with the usual ordering, and moves certain provisions, like the *iniuria* and *furtum* (injury and theft) sections, which he transplants from Table VIII to I.⁶⁴

56. See WATSON, SPIRIT, *supra* note 37, at 1–2.

57. ROMAN STATUTES, *supra* note 24, at 561 (quoting David Daube, *Nocere and Noxa*, 7 CAMBRIDGE L.J. 23, 32 (1939)).

58. *Id.*

59. ROBINSON, *supra* note 2, at 122.

60. See CICERO, DE ORATORE 1.44 (“All men may grumble, but I shall speak my mind: that one little book called the Twelve Tables seems greater to me, by God, than the vault of all our philosophers, both in the weight of its prestige and the rich abundance of its utility.”).

61. ROMAN STATUTES, *supra* note 24, at 564.

62. *Id.* (citing OKKO BEHREND, DER ZWÖLFTAFELPROZESS 58–59 (1974)).

63. *Id.* at 564.

64. *Id.*

The largest section mentioned in the sources in connection with a specific location would be Cicero's details on funerals, in Table X.⁶⁵ Dionysus of Halicarnassus says the triple sale of a son fell in Table IV.⁶⁶ Scholars are also rather certain from the sources that a provision in Table II, 2 on trial recess belongs there and that the prohibition of interclass marriage "of course" comes from the last two tables.⁶⁷ Crawford doubts a law on the calendar that some sources place in Table XI was in the Tables at all.⁶⁸

The next question becomes: were the Tables of similar length or were the laws grouped topically, length regardless? Schoell believes that the Tables were like what modern scholars sometimes call a *tabula*, i.e., a tablet of uniform length, with clauses running from one to another, like with the *Lex Cornelia de xx quaestoribus*, Law 14. Particularly because of the long, topically coherent quotation from Cicero on funeral regulations, Crawford is inclined to believe the opposite scenario.⁶⁹

As an example of a problem with ordering the provisions, Crawford cites Gaius' discussion on weapons (*telum* in the Tables). This is conventionally placed in Table VIII along with Gaius on *qui arbores . . . ceciderint*, they who fell trees,⁷⁰ but he mentions them in the first of his six books.⁷¹ (We know this from the *Digest*, which, fortunately, with a single exception, listed the location of its quotations from Gaius' commentary.)⁷² In a fragment from another work of Gaius, also quoted in the *Digest*, *telum* is discussed in connection with *furtum*, as it is in a fragment from the jurist Javolenus.⁷³ If Gaius discussed *telum* near *furtum* in his commentary as well, this would support placing the *furtum* provision early in the Tables.⁷⁴ There is a problem, however, with having *furtum* early in the Tables.⁷⁵ Marcus Antistius Labeo talked about *furtum* in the second book of his commentary on the Tables.⁷⁶ If both he and Gaius discussed the provisions in order, his commentary must be longer than Gaius'. But since very little of it survives, this is entirely possible.⁷⁷ Still, Gellius strongly suggests that *iniuria* and *furtum* were near each other. If both fell near the beginning (with *telum*), we must either be missing disproportionately much from the

65. ROMAN STATUTES, *supra* note 24, at 564.

66. *Id.*

67. *Id.* Crawford places it as XI, 1.

68. *Id.*

69. *Id.* (citing RUDOLF SCHOELL, *LEGIS DUODECIM TABULARUM RELIQUIÆ* 67–70 (1866)).

70. This provision was the subject of an infamous example by Gaius on the rigidity of Roman procedure. See GAIUS, *INSTITUTIONES* 4.11.

71. ROMAN STATUTES, *supra* note 24, at 565.

72. *Id.* at 566.

73. *Id.* at 565.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

higher-numbered Tables, or the Tables were very uneven in length.⁷⁸ Also, scholars are fairly certain that some delicts appear in the later sections of the Tables. Having *furtum* and *iniuria* early would mean that subjects were not completely grouped.⁷⁹ But Crawford points out that since *iniuria* and *furtum* were two important actions, it is reasonable to start off the Tables with them.⁸⁰

Crawford has some other problems with the conventional order of the provisions. For example, *FIRA*'s Table VI, 6a and 7 seem to go topically with *FIRA*'s II, 1, so Crawford places both at I, 11.⁸¹ The placement of Table II, 2 seems definite, but Chapter XCV of the *Lex Coloniae Genetivæ*, Law 25 has provisions much like *FIRA*'s II, 3 and II, 2 in that order; as Crawford thinks the *Lex* took its cue from the Tables, he moves *FIRA*'s II, 3 to before II, 2.⁸² Also, Crawford believes scholars' problems with *FIRA*'s VII, 12 are reconcilable by moving it right after VI, 1-2.⁸³ Crawford also feels that scholars' problems with *FIRA*'s VII, 10 are resolved if it is placed with *FIRA*'s VIII, 7. (Crawford puts both at VIII, 3.)⁸⁴

Crawford sees the order of the laws (especially those of the first ten books) as "interestingly coherent," moving from *iniuria* and *furtum* to debt, family, inheritance, rules regarding ownership and disputes among neighbors, back to delict, and finally to matters between the citizen and his community.⁸⁵

C. QUESTIONABLE CASES FOR INCLUSION

Yet, there are ancient references over which scholars dispute a fit into the Tables at all. There are still fragments from Festus and others, referring to provisions in the Tables, for which Crawford has not found a positive spot.⁸⁶ At the same time, some scholars posit an origin in the Tables for some ancient laws not specifically sourced to them. For example, Plautus, in his *Captivi*, says that the conspiracy against the annona was illegal; Crawford thinks this may have something to do with the Tables.⁸⁷ The laws under *de aquis*, Law 43, about protecting the water supply may have been inspired by provisions in the Tables.⁸⁸ The prohibition concerning beehives in the *Riccardi Fragment*, Law 34, has no Roman parallel (that we know about), but it is very similar to a provision in Solon, and may have come to Rome first in the Tables, giving

78. ROMAN STATUTES, *supra* note 24, at 566.

79. *Id.*

80. *Id.* at 567.

81. *Id.* at 568.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* at 569.

86. *Id.* at 572-574.

87. *Id.* at 574 (citing TITUS MACCIUS PLAUTUS, *CAPTIVI* 484-95).

88. *Id.*

some support to the legend of the delegation.⁸⁹ Voigt I, 69–71 lists words from Festus and the *Glossaries* that may come from the Tables, but for which we have no direct reference.⁹⁰ At the same time, Crawford rejects certain statements from Augustine, Pliny, and Sidonius Apollinaris that others believe refer to provisions of the Tables.⁹¹

As Watson points out, the amount of detail we have is highly variable from lex to lex. Some matters in the Tables (such as laws regarding personal relations) were of general interest to non-legal writers; therefore, we know a good deal about them. But where only legal writers commented on a matter (like the law of property or that of obligations), what we have amounts to brief mention of the wording in the provision in the Tables.⁹² As Watson explains the dilemma, “[w]here there was no provision, or no recorded provision, we know virtually nothing about the law. Where there was a recorded provision, we have scarcely any surrounding information to help with its understanding.”⁹³ As an example, Watson cites three provisions on physical injury (*os fractum*, *membrum ruptum*, and *iniuria*) where scholars have yet to convincingly explain all their distinctions or even their relative gravities.⁹⁴

In the absence of definitive information, Watson (being more inclusive than Crawford) believes a reasonable conjecture can be made by looking at how later Roman law functioned in similar types of disputes.⁹⁵ For example, he believes that the three methods of *manus* marriage were codified in the Tables, although we have no remaining provision that would point to this, because of striking similarities in the four sources we have listing all three. Watson believes the only reasonable ultimate source is something official, the Tables being the most reasonable, since the order of the terms and their cases are all the same, and the term *farre(o)* is used instead of the more common *confarreatio*, while all our texts date from no earlier than the second century A.D., and three of the four are “of widely differing provenance.”⁹⁶

Just as Watson believes the types of *manus* marriage were included in the Tables, he believes the regulations on the “capacity and requirements for marriage” were not.⁹⁷ He finds the one exception that we have evidence for (the ban on interclass marriage) to be an innovation; the prohibition had not existed

89. ROMAN STATUTES, *supra* note 24, at 574.

90. *Id.* at 574.

91. *Id.* at 574–75.

92. This makes sense. Consider, in two-and-a-half millennia, what future civilizations may be able to discern of our law; they are far more likely to comprehend our notion of “free speech” or the so-called “right to privacy” than the “rule against perpetuities,” or even the Constitutional right to not have soldiers quartered in one’s home.

93. WATSON, ROME OF THE XII TABLES, *supra* note 39, at 5.

94. *Id.* at 5.

95. *Id.* at 8.

96. *Id.* at 9–11.

97. *Id.* at 20.

before and was added to the Tables precisely because it was new. He argues that if it were simply a restatement of an existing rule, we would have evidence for other rules regulating marriage. Watson believes, based on anecdotes from Livy, that restrictions on marriage were late to develop and tended to be customary, rather than legal.⁹⁸

D. WHAT CAN THE TABLES TELL US ABOUT ROMAN CULTURE?

Watson goes on to draw several other conclusions about what the Tables may or may not have included, and how life was at the time of their creation, to try to understand Roman culture around 450 B.C. At the time of the Tables, Watson argues, most marriages were *manus* marriages.⁹⁹ Even though with a *manus* marriage the bride passed to her husband's control, the wife's family still had an important, and sometimes primary, role in punishing her when she misbehaved. Divorce, though allowed, was rare.¹⁰⁰ Few restrictions on the marriage partner were established in law.¹⁰¹ At that time, a father could kill his son, if he had just cause to do so. For this, he would normally consult a family council, although the council had no legal power.¹⁰² *Adrogatio* (the adoption of one *sui iuris*) seemed to exist at this time, but *adoptio* (the adoption of one *alieni iuris*) did not.¹⁰³ A father could sell his sons into slavery, but only three times. A deformed child was to be exposed,¹⁰⁴ and so forth. In the end, though, Watson reaches the same basic conclusion as most other scholars.

E. AN IMPORTANT SILENCE

While the original purported reason for the establishment of the Tables was to curb consular *imperium*, Watson finds nothing on this or any other part of public law in the Tables.¹⁰⁵ While the decemvirs did not go out of their way to *eliminate* class distinctions, Watson finds very few such distinctions to be positively preserved, especially when compared with some Near Eastern codes where, for example, in cases of assault or theft, the victim's class determined the criminal's punishment.¹⁰⁶ In addition, there are only a few provisions in the Tables that would apply only to patricians, and these are not given special attention in the text. As an example, Watson mentions *confarreatio*, which, despite

98. WATSON, *ROME OF THE XII TABLES*, *supra* note 39 at 20-24.

99. *Id.* at 18 & n.33.

100. *Id.* at 31-32.

101. *Id.* at 24.

102. *Id.* at 42-43.

103. *Id.* at 40 & nn.3-4.

104. *Id.* at 45.

105. *Id.* at 179-80. *But see* ROMAN STATUTES, *supra* note 24, at 561 (arguing that the Tables did contain some public law).

106. *Id.* at 182.

its selective status, is listed in the middle of the three types of *manus*, the least prominent position, with a more neutral word used for its title.¹⁰⁷

Watson does see evidence in the Tables for certain innovations, as well as for clarifications of rare legal situations (e.g., divorce). The most blatant omission to him is a listing of procedures and regulations, such as *legis actio*, which, according to Roman tradition, was not published to the lower class until 304 B.C. by Gaius Flavius.¹⁰⁸ Also missing are the form and effects of *mancipatio*, all the modes of acquisition besides *usus*, consents and prohibitions on marriage, details on the manumission of slaves, &c. Watson does acknowledge the opposing opinion of Daube, who rationalizes the silence by saying that most of these procedures were probably taken for granted, while the Tables only set out changes and clarifications.¹⁰⁹ Watson, however, feels that the omissions are significant in that they in no way helped to empower the people, from whom much of the law remained shrouded.¹¹⁰

F. WHEN OUR SOURCES DISAGREE

While some of Watson's work is rather conjectural – like the chapter defending his view that *manus* marriage was covered in the Tables – at other points, he provides a thorough probe at one or another provision that highlights typical problems in reconstructing the text. A good example of this is Table V, 3. There are three distinct versions, which come from Cicero, Gaius, and Ulpian.¹¹¹ No version can be discounted out of hand, since they all showed an interest in the Tables, and their versions are each supported by fragments from other credible authors. In the end, though, Watson discounts Cicero's version because it seems to conflate what Watson believes are two clauses and is wordier than is characteristic of provisions in the Tables, containing the superfluous *paterfamilias*.¹¹² The only difference between Gaius' and Ulpian's versions is an extra phrase in Ulpian. Since the words in this phrase are odd for classical Latin, Watson finds it more likely that Gaius removed it than that Ulpian added it.¹¹³ Also, since Watson believes Cicero's is a corrupted rhetorical version, and Cicero's contains part of Ulpian's odd phrase, Watson sees this as independent support for Ulpian.¹¹⁴

107. WATSON, XII TABLES, *supra* note 39, at 182.

108. *Id.* at 185–86.

109. *Id.* at 186 (citing David Daube, *The Self-Understood in Legal History*, 18 JURID. REV. 126 (1973)); *see also* text accompanying note 57 *supra*.

110. *Id.* at 186.

111. *Id.* at 52–53. Cicero: "Paterfamilias uti super familia pecuniaque sua legassit, ita ius esto." Gaius: "Uti legassit suæ rei, ita ius esto." Ulpian: "Uti legassit super pecunia tutelaue suæ rei, ita ius esto."

112. *Id.* at 53–54.

113. *Id.* at 55.

114. *Id.* at 54–55.

Once the correct form of the provision is determined, Watson spends almost fifteen pages trying to figure out what it actually means. Since we have less writing from the period of the Tables than from later on, it is sometimes difficult to decipher the meaning of a word at that particular time, especially in a case like this where the classical commentators were themselves confused by the language, and tried to improve it.

On Table V, 3, Crawford disagrees with Watson on some details, but reaches the same conclusion that the odd *super* + ablative phrase came from the original provision; that Gaius, finding it either nonstandard or contextually unnecessary, replaced it with a genitive; that Cicero omitted a different clause because it was "not germane to the particular case" he was discussing; and that *paterfamilias* did not occur in the original but was a Ciceronian addition.¹¹⁵

G. THE PROBLEM OF OBSOLESCENCE

Just as, in reconstructing the text, we must clear away the jurists' glosses on obsolete grammar, so with obsolete practices. While numerous practices codified in the Tables still existed, albeit in changed form, when Cicero or even Gaius wrote, others had long since fallen away, provoking confusion. A good instance of this is with *nexum*, which is mentioned in Table VI, 1 but disappeared from use, according to Watson, thanks to the *Lex Poetilia*, around 313 B.C.¹¹⁶ *Nexum* appears to have involved the binding of a free man to a creditor until he was repaid. One of the most important texts on the legal details of *nexum* comes from Varro, where he relates a dispute between two men over whether *nexum* includes *mancipatio*, a verbal procedure for the transfer of ownership. Varro said that it did not, arguing that *nexum* derives from "neque suum."¹¹⁷ Since *nexum* does not transfer ownership, *mancipatio* cannot be included.¹¹⁸ From a story from Livy, Watson decides that servitude to pay off the debt was reasonable, but prison and the torture chamber were not. The *nexus* seems to have remained a full Roman citizen, since he was still eligible, according to Livy, for military service.¹¹⁹ One unclear issue is how a *nexus* became released once his debt was cleared, especially if he were *sui iuris*, since no one could sue on his behalf. Watson believes the provision in the Tables regarding a father selling his son three times referred to *nexum*, as a father would hardly have opportunity to sell his son three times in normal sale as a slave. To sell one's son to pay off a debt, though, makes more sense.¹²⁰

115. ROMAN STATUTES, *supra* note 24, at 635-40.

116. WATSON, XII TABLES, *supra* note 39, at 111.

117. *Id.* at 112.

118. *Id.* at 111-12.

119. *Id.* at 114.

120. *Id.* at 118-19.

H. REDISCOVERING NUANCE IN THE TABLES

Another provision covered in depth by Watson - where Crawford again disagrees with him - shows once again the attention that must be paid to detail in reconstructing our text. According to Watson, and other scholars, there were two provisions in the Tables concerning the gathering of acorns that fell from one's tree onto a neighbor's land.¹²¹ One allowed the owner of the tree to collect the acorns off his neighbor's land, while the other prevented him from sending his animals onto his neighbor's land to feed on the acorns. Some scholars have been confused by these nuances, and assumed that one of them must be wrong, seeing the provision(s) as but one concerning ownership.¹²² But, to promote good neighborly relations, ownership is specifically not awarded in the Tables; the provisions are a sort of compromise. Crawford assumes that the quotation from Pliny, which is our source for the lex allowing the collection of acorns on a neighbor's land, is simply "not to be trusted,"¹²³ making a single provision forbidding pasturing on another's land, although, as Watson points out, Pliny is Crawford's most important source in reconstructing two other provisions from the Tables.¹²⁴ Thus, Crawford deprives the Tables of rich nuance and genius. But my point here is not to argue so much one construction over another as to highlight the array of problems the exercise inevitably presents.

CONCLUSION

Cicero said when mocking the jurists, "[T]here can be no dignity in so slight a science: for the subject matter is insignificant, being concerned, we might almost say, with spelling and division of words."¹²⁵ Yet, in looking at attempts to understand and reconstruct the Twelve Tables, spelling and division become very important. Mistakes while interpreting the evidence often result from a failure to appreciate subtleties inherent in the Tables and their more-antique Latin. Disagreements among scholars over where to place a provision, or which version is correct, or whether to include it at all, usually center on a few words from a single source—sometimes not even on that much, but on how we conceive the Tables must have been—and can profoundly affect the oft-"retail'd"¹²⁶ histories we come to endorse. From what evidence we have, however, we can make one observation: the Twelve Tables were never the grand codifi-

121. WATSON, *ANCIENT LAW*, *supra* note 43, at 71–83.

122. *Id.* at 81.

123. *Id.* (quoting *ROMAN STATUTES*, *supra* note 24, at 682).

124. *Id.*

125. *Id.* at 82 (citing CICERO, *PRO MURENA* 10.22ff.) (Watson trans.).

126. See WILLIAM SHAKESPEARE, *KING RICHARD III* 3.1.77, at 214 (Antony Hammond ed., Arden 2d ed. 1981).

cation of egalitarian right and justice that the Roman tradition alleges. They seem only to have set out certain laws for clarification and introduced a few changes.

Salman Khade Abuelhawa v. United States **Excessive Charges: Hidden Costs to Increase** **More Than Just Your Monthly Cell Phone** **Statements?**

ANDREW BOUGHRUM

INTRODUCTION

Salman Khade Abuelhawa's case came to the United States Supreme Court on appeal from the Fourth Circuit's decision to uphold his conviction for using a cell phone to "facilitate" a drug felony, in violation of the Communications Facilities Section of the Comprehensive Drug Abuse Prevention and Control Act of 1970. While recognizing that many drugs have proper medical purposes, Congress passed this Act, classifying its violation as a felony, to address the growing problem of the illegal importation and distribution of narcotics, which substantially affected the health and welfare of the American people.¹ In the spirit of prevention, the Fourth Circuit adopted a broad interpretation of this provision, which encompassed any activity that facilitated this felony. As the other circuit courts were split over the proper scope of the provision and recognizing that this split would eventually attract the attention of the Supreme Court, the Fourth Circuit tacitly sought to sway favor towards its expansive interpretation of the provision. The Fourth Circuit upheld the district court's conviction and declared that "facilitation" includes the use of a cell phone to make misdemeanor narcotic purchases, subjecting offenders to more severe felonious penalties, while simultaneously failing to amend Abuelhawa's punishment to fit the more serious felony offense.

A simple review of the legislative history and the principles of sentencing and punishment demonstrate that the Fourth Circuit's interpretation upends the congressional calibration of punishment for the buyer's and seller's individual roles in this bilateral transaction. Therefore, after establishing its interpretation, the Fourth Circuit intentionally failed to amend Abuelhawa's sentence, set below the maximum for the mere misdemeanor, most likely to avoid drawing a constitutional challenge and the immediate review of the Supreme Court. Nevertheless, the Supreme Court granted certiorari of Abuelhawa's appeal to resolve the split among the circuits and pronounce the proper interpretation of the Act which properly aligned congressional intent with the principles of punishment and sentencing.

1. See 21 U.S.C. §801(2) (2010) (The illegal importation, manufacture, distribution, and possession and improper use of controlled substances have a substantial and detrimental effect on the health and general welfare of the American people.).

I. THE COMPREHENSIVE DRUG ABUSE PREVENTION AND CONTROL ACT

The Comprehensive Drug Abuse Prevention and Control Act was enacted to address national concerns over the abuse of drugs and controlled substances.² Congress acknowledged in its findings that many drugs and controlled substances have legitimate medical purposes, when used to maintaining the health of the American population.³ However, it was the illegal importation, manufacture, distribution, possession, and use of these controlled substances that concerned Congress.⁴ Under 21 U.S.C. §841, it is unlawful to knowingly or intentionally manufacture, distribute, or dispense a controlled substance, or possess one with intent to manufacture, distribute, or dispense.⁵ Further, under 21 U.S.C. §844, it is unlawful to possess a controlled substance illegally obtained.⁶ However most relevant to Abuelhawa's appeal is 21 U.S.C. §843(b) which provides:

It shall be unlawful for any person knowingly or intentionally to use any communication facility in committing or causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter. Each separate use of a communication facility shall be a separate offense under this subsection. For purposes of this subsection, the term "communication facility" means any and all public and private instrumentalities use or useful in the transmission of writing, signs, signals, pictures or sounds of all kinds and includes mail, telephone, wire, radio and all other means of communications.⁷

The Supreme Court granted certiorari to resolve the split among the circuit courts and to determine the proper scope of "facilitation" as used in §843(b).⁸ At issue in Abuelhawa's appeal was whether his use of a cell phone, to purchase 2 grams of cocaine, qualified as "facilitation," and fell within the meaning of §843(b). The circuits disagree as to whether the use of a cell phone to make a misdemeanor purchase fell within the meaning of "facilitate" as utilized in §843(b). The two interpretations of §843(b) drastically alter the consequences that Abuelhawa would face.⁹ The Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits give "facilitate" its common place meaning, to make easier.¹⁰

2. In the historical and statutory notes to 21 U.S.C. §801, subchapter I of Title 21, Chapter 13 is commonly referred to as the Controlled Substances Act.

3. 21 U.S.C. §801(1).

4. 21 U.S.C. §801(2).

5. 21 U.S.C. §841 (2009).

6. 21 U.S.C. §844 (2006).

7. 21 U.S.C. §843(b) (2009) (emphasis added).

8. *Abuelhawa v. U.S.*, 129 S.Ct. 2102 (2009) [hereinafter *Abuelhawa*].

9. *Abuelhawa*, *supra* note 8 at 2107.

10. *U.S. v. Abuelhawa*, 523 F.3d 415, 420-21 (4th Cir. 2008) [hereinafter *Initial Appeal*] (citing *U.S. v. Binkley*, 903 F.2d 1130, 1135-36 (7th Cir. 1990); *U.S. v. McLernon*, 746 F.2d 1098, 1106 (6th Cir. 1984); *U.S. v. Phillips*, 664 F.2d 971, 1032 (5th Cir. Unit B Dec. 1981)).

Under this broad interpretation, a buyer's use of a phone to make a misdemeanor purchase would have facilitated a dealer's felonious distribution, subjecting the buyer to extensive penalties.¹¹ The Ninth and Tenth Circuits exclude the use of a cell phone to make misdemeanor purchases from their interpretation of "facilitating" a felonious distribution.¹² As such, the buyer would only be subject to the penalties associated with the misdemeanor purchase and possession under §844(a).

II. FACTS

In early 2000, the Federal Bureau of Investigation (FBI) began investigation of cocaine distribution by Mohammad Said in the Skyline area of Virginia.¹³ In June 2003, the FBI applied for and was granted a wiretap of Said's cell phone under Title III of the Omnibus Crime Control and Safe Streets Act of 1968 and pursuant to 18 U.S.C. §2518.¹⁴ In July 2003, while monitoring Said's cell phone, the FBI issued a subpoena which identified Abuelhawa as the subscriber with a cell phone number produced by the wiretap.¹⁵ The FBI then monitored a total of eight calls between Abuelhawa and Said.¹⁶ On July 2, two calls were made between Abuelhawa and Said to arrange for the purchase of a half gram of cocaine.¹⁷ On July 5, three additional calls were made between Abuelhawa and Said to arrange for the purchase of one gram of cocaine.¹⁸ Finally, on July 12, three more calls were placed to arrange for the purchase of one more gram, to be picked up at the Skyline Grill, a restaurant owned by Said's father and believed to be Said's preferred location for distribution.¹⁹ The FBI arrested Abuelhawa on October 17, 2003 and during interrogation, Abuelhawa admitted that he originally purchased cocaine from Issam Khatib, but when Khatib left the business, Abuelhawa began purchasing cocaine from Said.²⁰ Further, Abuelhawa confirmed that transactions regularly took place outside of the Skyline Grill.²¹ On January 25, 2007, pursuant to 21 U.S.C. §843(b) and 18 U.S.C. §2, a federal grand jury, sitting in the eastern district of Virginia, charged Abuelhawa in a seven-count indictment with unlawfully, knowingly, and intentionally using a communications facility in facilitating the distribution of co-

11. *Abuelhawa*, *supra* note 8. at 2107.

12. *Initial appeal*, *supra* note 10 (citing *U.S. v. Baggett*, 890 F.2d 1095, 1098 (10th Cir. 1990); *U.S. v. Martin*, 599 F.2d 880, 888-89 (9th Cir. 1979)).

13. *Initial Appeal*, *supra* note 10, at 417.

14. *Id.*; *see also* 18 U.S.C. §2518 (1998) (permitting wiretapping by federal agents upon a showing of necessity).

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 417-18.

19. *Initial Appeal*, *supra* note 10, at 418.

20. *Id.*

21. *Id.*

caine in violation of 21 U.S.C. §841(a)(1).²² The jury convicted Abuelhawa on the six counts related to the phone calls made between July 5 and July 12.²³ Abuelhawa appealed the district court's sentence of 24 months probations and a \$2,000 fine contending that §843(b) is not violated when an individual facilitates the purchase of a misdemeanor drug quantity for personal use or, in the alternative, that the Government produced insufficient evidence to show that a drug distribution occurred.²⁴

III. REASONING OF THE FOURTH CIRCUIT COURT

On appeal, Abuelhawa challenged his conviction by claiming that a purchase of cocaine for personal use is a misdemeanor under 21 U.S.C. §844(a)(1) and that §843(b) only applies to the commission of certain felonies.²⁵ Abuelhawa also challenged the sufficiency of the Government's evidence supporting his conviction under §843(b).²⁶ The Fourth Circuit focused on whether Abuelhawa facilitated the commission of a felony, as there was no dispute over his use of a communication facility to arrange the drug transactions.²⁷ Recognizing that the other circuits have split on whether §843(b) is violated by the use of a communications facility to purchase narcotics for personal use, the Fourth Circuit interpreted §843(b) by giving the word "facilitate" its common meaning – to make easier or less difficult, or to assist or aid.²⁸ Further, the court points out that the statute makes the facilitation of "any act or acts constituting a felony," unlawful, with no indication of whose felony must be at issue.²⁹ With this expansive interpretation of the statute, the Fourth Circuit reasoned that Abuelhawa's cell phone use violated §843(b) by facilitating Said's distribution of cocaine, a felony under §841(a)(1), even though Abuelhawa's possession of cocaine for personal use was a misdemeanor under §844(a)(1).³⁰ Following the reasoning of the Seventh Circuit in *United States v. Kozinski*, the court determined that facilitation alone gives rise to criminal liability and that status as buyer or distributor is of no consequence.³¹ Finding sufficient evidence of completed distributions on July 5 and July 12, the Fourth Circuit affirmed Abuelhawa's conviction.³²

22. *Initial Appeal*, *supra* note 10, at 418; *see also* 21 U.S.C. §843(b); 18 U.S.C. §2 (2010); 21 U.S.C. §841(a)(1).

23. *Id.* at 419 (dismissing one count before trial).

24. *Id.*

25. *Id.* at 416; *see also* 21 U.S.C. §844(a)(1); 21 U.S.C. §843(b).

26. *Id.*

27. *Id.* at 420.

28. *Initial Appeal*, *supra* note 10, at 420.

29. *Id.* at 421; *see also* 21 U.S.C. §843(b).

30. *Id.*; *see also* 21 U.S.C. §841(a)(1); 21 U.S.C. §844(a)(1).

31. *Id.* (citing *U.S. v. Kozinski*, 16 F.3d 795, 807 (7th Cir. 1994)).

32. *Id.* at 423.

IV. INITIAL DETERMINATIONS OF THE SUPREME COURT

Justice Souter delivered the opinion of a unanimous Court, which overturned the Fourth Circuit, and declared that the use of a cell phone to make a misdemeanor drug purchase *does not* violate §843(b) as a facilitation of felonious narcotic distribution, in violation of §841(a)(1).³³ The Supreme Court recognized that on the literal plane, the phone calls did facilitate Said's drug distribution, but stopping there would ignore the rule of statutory interpretation that because statutes are not read as a collection of isolated phrases, a word in a statute may or may not extend to the outer limits of its definitional possibilities.³⁴

Justice Souter begins by acknowledging the traditional law that where a statute treats one side of a bilateral transaction more leniently, adding to that party's penalty for facilitating the action by the other would upend the calibration of punishment set by the legislature.³⁵ The Supreme Court consistently followed this line of reasoning in limiting the scope of application of other statutes, such as the prohibition against aiding, abetting, or assisting in the illegal sale of alcohol or in transporting women or girls across state lines for any immoral purpose, such as prostitution or other such debauchery.³⁶ The Court determined that these statutory penalties were aimed at the seller or transporter and the meaning of aiding, abetting, or assisting should not extend to the purchaser or the person being transported.³⁷ The Court reasoned that where a transaction, like a sale, necessarily presupposes two parties with specific roles, it would be odd to speak of one party as facilitating the conduct of the other.³⁸ To wit, the buyer's role is already implied by the term "sale" and to say the buyer facilitates the sale is futile.³⁹

It is presumed that legislatures act with case law in mind and that Congress was familiar with the traditional limitations on the application of terms like "aid," "abet," and "assist" when it enacted §843(b) and therefore, that Congress intended a comparable scope of limitation to apply to "facilitate."⁴⁰ Here, the statutes are more lenient to the buyer's side of the bilateral transaction as

33. *Abuelhawa*, *supra* note 8 at 2104 (emphasis added).

34. *Id.* at 2105 (quoting *U.S. Nat. Bank of Ore. v. Independent Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) and *Dolan v. Postal Service*, 546 U.S. 481, 486 (2006)).

35. *Id.* at 2106.

36. *Abuelhawa*, *supra* note 8 at 2104 (citing *Lott v. U.S.*, 205 F. 28, 29-31 (C.A.9 1913) (refusing to treat noncriminal liquor purchases as falling under the prohibition against aiding or abetting the illegal sale of alcohol) and *Gebardi v. U.S.*, 287 U.S. 112, 116-18 (1932) (refusing to declare that a woman who voluntarily crossed a state line with a man to engage in "illicit sexual relations" could be tagged with "aid[ing] or assist[ing] in . . . transporting, in interstate or foreign commerce. . . any woman or girl for the purpose of prostitution or. . . for any other immoral purpose)).

37. *Id.* at 2106.

38. *Id.* at 2105.

39. *Id.*

40. *Id.* at 2106 (citing *William v. Taylor*, 529 U.S. 362, 380-81 and n. 12 (2000)).

Abuelhawa's two purchases of cocaine were misdemeanors under §844(a)(1), while Said's two sales of cocaine were felonious distributions under §841(a)(1).⁴¹ As such, it would upend the congressional calibration of punishment if the buyer were to be punished more severely by subjecting the buyer to increased penalties under §843(b) for felonious facilitation of the seller's narcotics distribution.⁴² Thus, consistency mandates that the scope of §843(b) be limited to those who facilitate the distribution or distributor of narcotics, as distinguished from an individual sale for personal use.

V. THE PRINCIPLES OF PUNISHMENT AND SENTENCING

"[I]t is deeply rooted in our moral sense of fitness that punishment entails blame and that, therefore, punishment may not justly be imposed where the person is not blameworthy."⁴³ Thus it is important to determine the point at which a person's conduct will subject that person to blame or condemnation for his or her actions. The "principles of criminal responsibility. . . identify the point at which it is believed fair to go from the factual premise, "D caused or assisted in causing X (a social harm) to occur," to the normative judgment, "D *should* be punished for having caused or assisted in causing X to occur."⁴⁴ Once it is determined that a person's conduct has reached that critical point, punishment in criminal law theory requires the infliction of "pain on persons. . . typically by taking their life, liberty, or property."⁴⁵ In general, "criminal laws ought to be fair and, to the extent possible, deal coherently with person charged with crime."⁴⁶ This implies that the laws and their attendant consequences should be appropriately suited to the crimes which they seek to remedy. Therefore, "[l]awmakers must ascertain not only what conduct is wrongful, but they must determine which persons may properly be held accountable for their wrongful behavior, and when punishment is deemed appropriate they must decide what and how much punishment fits the offense and the offender."⁴⁷ As a general principle, "a state's sentencing structure should be consistent with the theories of punishment that are at the foundation of that particular jurisdiction's criminal justice system."⁴⁸ As explained in the Model Penal Code §1.02(2)(a) & (b), the code's sentencing provisions are intended "to prevent the commission of crimes" (deterrence), and "to promote the correction and reha-

41. 21 U.S.C. §844(a)(1); *see also* 21 U.S.C. §841(a)(1).

42. *Abuelhawa*, *supra* note 8, 129 S.Ct. at 2106.

43. JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 3 (3rd ed. 2001) (quoting Sanford H. Kadish, *Why Substantive Criminal Law – A Dialogue*, 29 Clev. St. L. Rev. 1, 10 (1980)).

44. DRESSLER, *supra* note 43 at 3.

45. *Id.* at 11.

46. *Id.*

47. *Id.*

48. *Id.* at 24.

bilitation of offenders.”⁴⁹ Furthermore, §1.02(2)(e) states that sentences should “differentiate among offenders with a view to[wards] a just individualization of treatment.”⁵⁰ In addition, the doctrine of proportionality in sentencing requires that offenders receive a punishment which is appropriate to the crime committed.⁵¹ In other words, when sentencing convicts, the court should look at each offender individually and determine for which crimes the individual is blameworthy and the punishment that is appropriately proportional to the committed offenses.

The Eighth Amendment is implicated and the principle of proportionality in punishment and sentencing is violated when the punishment inflicted is so grossly disproportionate to the offense committed that it is considered cruel and unusual.⁵² In 1910, the Supreme Court ruled that an implicit requirement in the Eight Amendment is that punishment inflicted may not be grossly disproportional to the crime committed⁵³ and that proportionality is “deeply rooted” in common law jurisprudence.⁵⁴

VI. THE SUPREME COURT’S INTERPRETATION OF §843(B) PROPERLY ALIGNS CONGRESSIONAL INTENT AND THE PRINCIPLES OF PUNISHMENT

In the present case, the Fourth Circuit correctly identifies that the facilitation of felonious distribution is harmful to society. However, it construed “facilitate” too broadly. The purchase of 1 gram of cocaine is defined as a misdemeanor under §844(a), while the sale and distribution of cocaine is a felony under §841(a).⁵⁵ The congressional calibration has allotted the buyer a less severe offense than the seller and should likewise suffer less severe consequences. Allowing the Fourth Circuit to then increase a buyer’s penalty by making the purchase a felonious facilitation because a cell phone was used, upsets the congressional determination of the treatment for each side of this bilateral transaction.⁵⁶ Furthermore, this interpretation would likely incentivize users to increase familiarity with local drug dealers, thereby avoiding both the need of a phone and the reach of §843(b), allowing the perpetuation of the recidivistic behavior that was initially sought to be eliminated. It can reasona-

49. DRESSLER, *supra* note 43 at 24.

50. *Id.*

51. *Id.* at 49.

52. U.S. CONST. Amend. VIII.

53. DRESSLER, *supra* note 43 at 55 (citing *Weems v. U.S.*, 217 U.S. 349, 367 (1910)).

54. *Id.* at 55-56 (Although the Supreme Court has stated that the proportionality doctrine is “deeply rooted” in common law jurisprudence, two members of the Court recently stated that, based on their historical study, “the Eighth Amendment contains no proportionality guarantee.” Nonetheless, the Supreme Court is presently wedded to the principle in some form (citing *Solem v. Helm*, 463 U.S. 277, 284-85 (1983))).

55. 21 U.S.C. §844; *see also* 21 U.S.C. §841.

56. *Abuelhawa*, *supra* note 8 at 2106.

bly be inferred that this incentive to increase familiarity with the local drug dealers would actually facilitate the distribution more effectively than if the dealer remained unfamiliar to the buyer, who knows the dealer only as a phone number.

The Supreme Court found support for its limitation of scope in the history of the current statutory text.⁵⁷ Prior to 1970, Congress punished the receipt, concealment, *purchase*, or sale of any narcotic drug as a *felony* and added a minimum of two years, and up to five, on top of that for using a communication facility in committing, causing, or facilitating, *any drug "offense."*⁵⁸ However, in 1970, the Controlled Substances Act downgraded simple possession of a controlled substance to a *misdemeanor* and simultaneously narrowed the communications provision to prohibiting only the facilitation of a drug "*felony.*"⁵⁹ This history demonstrates congressional intent to treat purchases of drugs for personal use more leniently than the felony of distributing drugs, and to limit the application of §843(b) to those who facilitate a drug felony, leaving misdemeanor purchases outside the scope of §843(b).⁶⁰

Likewise, the Fourth Circuit's interpretation of §843(b) is offensive to the principle of proportionality in punishment and sentencing. When determining how to properly punishing criminals for their acts, it is important to consider both the severity of the offense and the level of punishment that similar offenses receive.⁶¹ Essentially, proper proportionality requires that similar crimes receive similar punishments. Further, it is generally thought that one of the purposes of the criminal code is "to safeguard offenders against excessive, disproportionate or arbitrary punishment."⁶² Thus, having determined that Abuelhawa broke the law, the court must determine what and how much punishment would be appropriate

As the government saw it and under the Fourth Circuit's interpretation of §843(b), Abuelhawa's phone use to make two small drug purchases would subject him to the possibility of conviction for six counts of felonious facilitation and a potential sentence of 24 years in prison.⁶³ Significantly, the same purchases conducted without the use of a phone supports only two misdemeanors and up to two years in prison.⁶⁴ The Supreme Court found it impossible to

57. *Abuelhawa*, *supra* note 8 at 2107.

58. *Id.* at 2106; *see also* 21 U.S.C. §174 (1964 ed.) (repealed); 18 U.S.C. §1403 (1964 ed.).

59. *Id.*; *see also* 21 U.S.C. §801 *et seq.*; 21 U.S.C. §844(a); 21 U.S.C. §843(b).

60. *Id.*

61. DRESSLER, *supra* note 43 at 49. (The doctrine of proportionality is also asserted in the context of sentencing, to ensure that an offender receives punishment appropriate to the crime he has committed).

62. *Id.* (Both utilitarianS and retributivists recognize proportionality in their theoretical structures[.] Modern penal codes, as well, acknowledge that one purpose of a criminal code is "to safeguard offenders against excessive, disproportionate or arbitrary punishment").

63. *Abuelhawa*, *supra* note 8 at 2107.

64. *Id.*

believe that Congress intended “facilitating” to include this conduct and to cause a twelve-fold “quantum leap” in punishment for simple drug possessors.⁶⁵ In this case, Abuelhawa was using a phone to set up misdemeanor purchases because his original dealer had left the business and he was unfamiliar with Said’s distribution methods. There is no question that Congress intended §843(b) to impede illicit drug transactions by penalizing the use of communication devices in coordinating illegal drug operations.⁶⁶ But it does not follow that Congress also meant a first-time buyer’s phone calls to purchase two grams of cocaine for personal use should expose him or her to punishment 12 times more severe than would be received by a recidivist offender who purchases from his or her dealer without the need of a phone call based upon the recidivist’s familiarity with the process, or 8 times more severe than the unauthorized possession of a drug used by rapists.⁶⁷

In application, this means, on the one hand, that a first time purchaser who calls a number, received through reference, to purchase his first two grams of cocaine could face 24 year in prison for felonious facilitation by means of a communications facility.⁶⁸ On the other hand, a recidivist user, who is *thoroughly familiar* with the dealer *so as to not require* the use of a cell phone to arrange for her two gram purchase, would face a maximum penalty that is one-twelfth as severe. As described, §843(b) requires the potential for an outrageous punishment for a relatively harmless misdemeanor of simple possession, simply because a buyer used of a device that most cannot live without, a cell phone. Meanwhile, the recidivist user, who regularly facilitates the dealer’s distribution, faces a more realistic punishment and does not fall within the reach of §843(b). In each case, two grams of cocaine were purchased from a dealer. Thus, if proportionality requires similar punishments for similar acts of misconduct, the phone user should not face a punishment 12 times more severe.⁶⁹ Further, a maximum potential sentence of 24 years is more commonly associated with the purchase of two ounces of cocaine. It would be repugnant to the principle of proportionality if a misdemeanor purchaser would face the same poten-

65. *Abuelhawa*, *supra* note 8 at 2107 (fn. 3 And it ill behooves the Government to invoke discretionary power in this case, with the prosecutor seeking a sentencing potential of 24 years when the primary offense is the purchase of two ounces of cocaine (Citing Tr. of Oral Arg. at 41-43 (concession by Government that current Department of Justice guidelines require individual prosecutors who bring charges to charge the maximum crime supported by the facts in a case))).

66. *Id.* at 2107.

67. *Id.* (fn 4. The Government does nothing for its own cause by noting that 21 U.S.C. §856 makes it a felony to facilitate “the simple possession of drugs by others by making available for use. . . a place for the purpose of unlawfully using a controlled substance” even though the crime facilitated may be a mere misdemeanor. This shows that Congress knew how to be clear in punishing the facilitation of a misdemeanor as a felony, and it only highlights Congress’s decision to limit §843(b) to the facilitation of a “felony.”).

68. *Id.*

69. DRESSLER, *supra* note 43 at 24 (criminal law ought to be fair and, to the extent possible, deal coherently with persons charged with crime.).

tial punishments as someone who purchases 28 times the amount cocaine, or one who commits murder.⁷⁰ Such a grossly disproportionate punishment is a clear violation of the principle of proportionality and the Constitution. The Fourth Circuit upheld a punishment that was less severe than the maximum available for simple misdemeanor violations, and nowhere near the potential punishment for facilitation of felonious distribution, under §843(b) in an attempt to sway favor towards its broad interpretation while attempting to avoid a constitutional challenge.

The Fourth Circuit's interpretation of §843(b) fails to properly ensure adherence to the proportionality principle and skews the congressional calibration of buyer-seller penalties in a bilateral transaction.⁷¹ The relevant statutory history reveals that when simple possession of a controlled substance was downgraded to a *misdemeanor*, while the communications provision was simultaneously limited to prohibiting only the facilitation of a drug *felony*, Congress intended to ensure a calibration of punishments that treated the buyer's side of the bilateral transaction more leniently.⁷² Viewed in a different light, Congress was intending the scope of §843(b) to encompass those who facilitate the felony of distribution, or the distributor, by use of a communications facility while excluding those who do so only to facilitate the misdemeanor possession, or the buyer. Therefore, the Supreme Court properly resolved the split among the circuit courts in a way that reflects the desires and ambitions of Congress when enacting 21 U.S.C. §843(b) and is consistent with the principles of punishment and sentencing.

CONCLUSION

In an effort to combat the growing problem of drug importation and distribution, the Fourth Circuit applied the broadest possible interpretation of the public communications facility, subjecting offenders to substantially increased penalties for misdemeanor violations of the Controlled Substances Act. The Fourth Circuit upheld a relatively minor penalty for Abuelhawa's violations, in hopes of swaying favor toward its interpretation of the statute, while avoiding a constitutional challenge for cruel and unusual punishment. Despite its cleverness, the Fourth Circuit's decision was challenged and reversed. The Supreme Court declared that the Fourth Circuit's application of §843(b) violated the principles of punishment and sentencing as well as congressional intent, and was repugnant to the Constitution. The Supreme Court held that the only interpretation of

70. DRESSLER, *supra* note 43 at 52 (punishment must be proportional to the offense committed, taking into consideration both the harm caused and the wrongdoer's degree of moral desert for having caused it); *see also* Abuelhawa, *supra* note 8 at 2107 (footnote 3).

71. Abuelhawa, *supra* note 8 at 2106.

72. *Id.* (emphasis added).

§843(b) which properly aligns the Constitution with the principles of punishment and congressional intent must exclude the use of a cell phone to make misdemeanor purchases.

***Pleasant Grove City v. Summum:* Not Just a Walk in the Park**

MEGAN E. DODGE

INTRODUCTION

Monuments displayed on public property are traditional representations of government speech. In *Pleasant Grove City, Utah v. Summum*, the U.S. Supreme Court unanimously held that a municipality's acceptance of one privately funded permanent monument, and its refusal of another, is a valid expression of governmental speech, and does not violate the First Amendment's guarantee of free speech.¹

In *Summum*, the leader of a church based in Salt Lake City, sought to have a monument dedicated to the "Seven Aphorisms of Summum" placed in the same public park where a tribute to the Ten Commandments has stood for over three decades.² At issue is whether a municipality's approval of a monument depicting the Ten Commandments, and its rejection of a monument with an alternative religious message, violates the Free Speech Clause.

The First Amendment states that, "Congress shall make no law . . . prohibiting the free exercise of religion . . . or abridging the freedom of speech." To communicate this constitutional affirmation, governments have long used monuments to convey a message to the public, and hence use public property as the forum to do so. It follows that a government-commissioned and government-financed monument placed on public land constitutes government speech.³ As such, when privately financed and donated monuments are accepted by a local government, these objects constitute government speech. Ultimately, the Supreme Court held in favor of Pleasant Grove City, finding no violation of the First Amendment's guarantee of free speech, or the creation of a public forum that discriminates based on content.⁴ In finding that the privately donated monument of the Ten Commandments monument could be adopted by the government, therefore making it government speech, the Court may have availed itself to future challenges. This is to say that the Court's decision could give rise to claims against the government for practicing viewpoint discrimination in a public forum for adopting a private message as its own – not an easy path to stroll down.

1. *PLEASANT GROVE CITY V. SUMMUM* (Pleasant Grove III), 129 S.Ct. 1125 (2009) [hereinafter *Summum*].

2. *Summum v. Pleasant Grove City* (Pleasant Grove II), 483 F.3d 1044 (10th Cir. 2007), *rev'd*, 129 S. Ct. 1125 (2009) [hereinafter *Pleasant Grove II*].

3. *Summum*, *supra* note 1 at 1126.

4. *Id.* at 1125.

I. FACTUAL BACKGROUND

Pleasant Grove, a small city in Utah, is home to Pioneer Park. The park consists of historical buildings, statues, and monuments that reflect the town's heritage.⁵ More specifically, to memorialize its history, there is a plaque or sculpture in the park to commemorate the town's first city hall and fire department, a pioneer era school house. Next to one plaque is a granite stone from the first Mormon temple recognizing the community's first settlers.⁶ Pioneer Park also contains a monument depicting the Ten Commandments, which was donated by the Fraternal Order of Eagles over three decades ago,⁷ and was erected in the park in 1971.⁸

Within Pleasant Grove exists Summum, a religious organization which was founded in Salt Lake City in 1975.⁹ In the course of the last ten years, leaders of the faith have sought to erect monuments of the aphorisms in numerous Utah towns—including Pleasant Grove. The group's leaders have sought to display their monuments in the same vicinity in Pioneer Park as the display of the Ten Commandments, which was donated by a private organization.¹⁰

II. CASE HISTORY

In September 2003, Summum formally requested that the city of Pleasant Grove allow the erection of a monument containing the Seven Aphorisms of Summum in Pioneer Park. The group asserted that the structure that was similar in size and nature to the already present, Ten Commandments monument.¹¹ The mayor of Pleasant Grove City denied Summum's request on the grounds that the aphorisms¹² did not directly relate to the city's history, nor was it donated by a community group to show civic commitment.¹³ Summum made a second proposal, and it was again denied permission before filing suit in the United States District Court for the District of Utah, claiming that Pleasant Grove City violated Summum's First Amendment right to free speech.¹⁴

5. *Pleasant Grove II*, 483 F.3d at 1044.

6. *Id.*

7. See, Erwin Chemerinsky, *A Dangerous Free Speech Ruling*, Trial: Supreme Court Review (Jul. 2009), 60; (Among the fifteen monuments in Pioneer Park, eleven were privately donated. The monument discussed in this case is a large Ten Commandments monument donated by the Fraternal Order of Eagles, which has donated hundreds of Ten Commandments monuments all over the country, many of which were paid for by Cecil B. DeMille, director of the 1956 Hollywood film, *The Ten Commandments*).

8. *Pleasant Grove II*, 483 F.3d at 1044.

9. *Id.*

10. *Id.* at 1045.

11. *Id.* at 1047.

12. See generally, *Pleasant Grove II*, 483 F.3d. (Aphorisms are mystical principles that according to Summum, explain the workings of the universe.).

13. *Pleasant Grove II*, 483 F.3d at 1047.

14. *Id.* at 1048.

The district court denied Summum's request for a preliminary injunction requiring the city to display the monument.¹⁵ Summum then appealed to the United States Court of Appeals for the Tenth Circuit where the court sitting in panel, reversed the district court's ruling.¹⁶ The United States Court of Appeals held that: first, the donated Ten Commandments monument constitutes the private speech of the Eagles distinct from governmental speech on behalf of the city, second, the city park is a traditional public forum that requires any discriminatory content-based decisions to be subjected to strict scrutiny review, and third, the city did not meet this heightened standard, and thereby unconstitutionally discriminated against Summum's right to free speech.¹⁷ In so finding, the United States Court of Appeals ordered that the city allow Summum to display the Seven Aphorisms monument.¹⁸ Subsequently, the United States Supreme Court granted certiorari.

III. ANALYSIS

On February 25, 2009, the Supreme Court unanimously ruled against Summum. But did the Court go awry?

Many expected the Court in *Summum* to hold that there should be a distinction made between government speech and private speech, and although the government should have the right to allow the Ten Commandments to be displayed in a public forum, it should not have to endorse all private speech.¹⁹ Following the Court's decision, some fear the result will have truly frightening implications for free speech law.²⁰

A.

It is well-established that the Court's First Amendment jurisprudence maintains that "government action that stifles speech on account of its message, or that requires the utterance of a particular message favored by the government, contravenes this essential [First Amendment] right,"²¹ and that, "content-based regulations are presumptively invalid."²² Writing for the Court, Justice Alito said that by permitting donated, permanent monuments to be erected in a public

15. *Pleasant Grove II*, 483 F.3d at 1048.

16. *Id.* at 1049.

17. *Id.* at 1044.

18. *Summum v. Pleasant Grove City (Pleasant Grove I)*, 499 F.3d 1170, 1171 (10th Cir. 2007).

19. David G. Savage, *Display one creed, permit all? Must a city park that displays one monument also permit others?* L.A. Times, Apr. 1, 2009, available at <http://articles.latimes.com/2008/apr/01/nation/na-monuments1>.

20. Chemerinsky, *supra* note 7 at 61.

21. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

22. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382 (1992).

park, Pleasant Grove was exercising a form of government speech that was not subject to scrutiny under the Free Speech Clause of the First Amendment.²³

In this case, Justice Alito's states, "the display of a permanent monument in a public park" is perceived by a reasonable observer to be an expression of values and ideas of the government since, "persons who observe donated monuments routinely-and reasonably-interpret them as conveying some message on the property owner's behalf," then in this context, "there is little chance that observers will fail to appreciate the identity of the speaker."²⁴ Why does this matter, you ask? Well, because the Court held that "content-based regulations are presumptively invalid,"²⁵ and yet, a local government was permitted to adopt one donated monument and reject another.

In finding that Pleasant Grove accepted and displayed the Ten Commandments, the Court's holding effectively deemed the monument as government speech.²⁶ In so finding, the Court seems to suggest that the Free Speech Clause is inapplicable.²⁷ The decision generated a stir as to what limits the Court may have to review government communication.²⁸ This then leads to the question, what are the implications of the Court's ruling?

B.

While the First Amendment sets forth that "Congress shall make no law . . . abridging the freedom of speech,"²⁹ this constitutional provision serves to restrict the government's ability to abridge private expression.³⁰ As mentioned previously, it does not hamper the government's ability to express its own mes-

23. *Sumnum*, *supra* note 1 at 1126.

24. *Id.* at 1133.

25. *R.A.V.*, *supra* note 22 at 382.

26. *Sumnum*, *supra* note 1 at 1131.

27. *See*, Chemerinsky, *supra* note 7, at 61. Erwin Chemerinsky espouses this point in that, branches of government unavoidably engage in speech and espouse particular messages, but the First Amendment rule requiring content neutrality does not apply when the government is the speaker, because it can choose to express its own viewpoint. This author agrees with Chemerinsky's analysis, that in *Pleasant Grove III*, the Court is extending the same principle to private speech when it has been donated by a private organization and then adopted by the government as its own.

28. *See also*, Adam Liptak, *From Tiny Sect, a Weighty Issue for the Justices*, N.Y. Times, Nov. 11, 2008, available at <http://www.nytimes.com/2008/11/11/washington/11sect.html?hp>. ("In 2003, the president of the Sumnum church wrote to the mayor here with a proposal: the church wanted to erect a monument inscribed with the Seven Aphorisms in the city park, "similar in size and nature" to the one devoted to the Ten Commandments. The city declined, a lawsuit followed and a federal appeals court ruled that the First Amendment required the city to display the Sumnum monument. The Supreme Court's decision was expected to be the most important free speech decision of the term.")

29. U.S. CONST. Amend. I.

30. *See*, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 833 (1995); If a court classifies the speech at issue as private, the court then completes a forum analysis to determine the degree to which the government can restrict access. If, however, a court classifies the speech as governmental, the United States Constitution enables the government to make content-based decisions, and engage in viewpoint-based decision making.

sage, since “[T]he Government’s own speech . . . is exempt from First Amendment scrutiny.”³¹ The lynchpin seems to be that, when adopted on behalf of the city, privately donated works that are placed in public places, are purported expressions of Free Speech. While yes, governments at all levels utilize temporary and permanent displays on its lands as communicative means, the process of including and excluding particular objects for display involves the government’s judgment and determination on policy choices concerning aesthetics, community values and policies, as well as the decision to preserve public land for its intended purposes and public enjoyment.³²

On the one hand, Pleasant Grove’s selection of the monuments and other public displays in Pioneer Park, including the Ten Commandments monument, reflect an editorial judgment about what cultural factors are significant, and worthy of the city’s acknowledgment. This is to say that the city is making decisions as to what aspects to memorialize in a public forum. This is a microcosm of the process the federal government undertakes when selecting its monuments of national historical significance to include in the National Mall.³³ On other hand, there was a private entity exercising its free speech, and the government adopted that group’s individual message as its own. In so doing, the speech was converted from private speech into government speech, thus avoiding the First Amendment’s requirement of content neutrality. The risk involved is that, based on the Court’s ruling in *Summum*, there are no guidelines to prevent the government from crossing the bounds of what is permissible, and engaging in unconstitutional viewpoint discrimination. Justice Alito touched on this point in stating, “government speech doctrine [should] not be used as a subterfuge for favoring certain private speakers over others based on viewpoint;”³⁴ however, he leaves unaddressed a rubric, as to how to determine whether or not one viewpoint is preferred over another.

In a string of earlier cases,³⁵ the Court held that the Free Speech Clause, when read in conjunction with the Establishment Clause, prevents the government from making discriminatory decisions against groups with a religious viewpoint when allocating resources with respect to a public forum (whether it is erecting a privately donated sculpture in a public place, or commissioning a building for public use). This is permissible, so long as the government does not endorse a particular religious message. This is what the Court in *Summum* tried to avoid, as indicated by Justices Scalia and Thomas in their concurrence: “[t]he

31. *Johanns v. Livestock Mktg. Ass’n*, 544 U.S. 550, 553 (2005).

32. See, Jay Alan Sekulow and Erik M. Zimmerman, *Pleasant Grove City v. Summum: Upholding the Government’s Authority*, 3 *Char. L. Rev.* 175 (Winter 2009).

33. See, *Friends of the Vietnam Veterans Mem’l v. Kennedy*, 116 F.3d 495, 496-97 (D.C. Cir. 1997).

34. *Summum*, *supra* note 1 at 1131.

35. See generally, *Widmar v. Vincent*, 454 U.S. 263 (1981); *Lamb’s Chapel v. Ctr. for Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

city ought not fear that today's victory has propelled it from the Free Speech Clause frying pan into the Establishment Clause fire."³⁶ In so stating, the Court leaves undecided whether a permanent monument violates the Establishment Clause by placing a limit on the government's ability to express a message endorsing religion. Justice Souter recognized this absence, and the likelihood of ensuing cases: "[While the] Establishment Clause issues have been neither raised nor briefed before us, there is no doubt that this case and its government speech claim has been litigated by the parties with one eye on the Establishment Clause. The interaction between the 'government speech doctrine' and Establishment Clause principles has not, however, begun to be worked out."³⁷

C.

Perhaps Justice Souter spoke too soon. Not long after the Court reached a decision in *Summum*, it agreed to consider another case, *Salazar v. Buono*, which involves both the issue of Free Speech and the Establishment Clause.³⁸ That case is about the message that a white cross conveys which has been in the Mojave National Preserve for many years.³⁹ A lower court ruled that the cross was unconstitutional establishment,⁴⁰ upon which Congress intervened by conveying the small parcel of land containing the cross to a private organization.⁴¹ By privatizing the speech, the act was meant to quash anti-establishment concerns by disassociating the federal government. However, not all governmental ties were cut, because the government retained a property interest and certain regulatory power in the preserve.⁴² The issue then, is whether the government is permitted to use a private party to convey what essentially remained a government message.⁴³

In comparing *Summum* and *Buono*, it appears that to the extent that Congress was able to privatize the cross by conveying the land, the government became vulnerable to the same type free speech objection that the local government in *Summum* successfully avoided when it accepted a donated monument making it a public object.⁴⁴

36. *Summum*, *supra* note 1 at 1139. (Scalia, J., concurring).

37. *Id.* at 1141 (Souter, J., concurring).

38. *Buono v. Kempthorne*, 527 F.3d 758 (9th Cir. 2008), *cert. granted sub nom. Salazar v. Buono*, 129 S. Ct. 1313 (2009) [hereinafter *Buono*].

39. *Id.*

40. *Buono v. Norton*, 212 F. Supp. 2d 1202, 1217 (C.D. Cal. 2002).

41. *Buono*, 527 F. 3d at 771 (citing Pub. L. No. 108-87 § 8121 (a)-(f), 117 Stat. 1100 (2003), codified at 16 U.S.C. § 410aaa-56.)

42. *Summum*, *supra* note 1 at 1139.

43. *Id.*

44. Nelson Tebbe, *Privatizing and Publicizing Speech*, 104 N. Wes. U. L. Rev. 70, 71-72 (Aug. 2009).

Both of these cases involve transforming the nature of property⁴⁵ in order to evade a constitutional problem with expression. In *Summum*, the Court resolved the issue in favor of the government in finding that it successfully insulated itself from a constitutional challenge, and the Court in *Buono* may very well likely do the same. Despite the differences between the cases (in that one involves the federal government while the other pertains to a local municipality), together they address the issue and broad scope of government privatization and publicization of speech.⁴⁶ *Buono*, however, may serve as an expansion, and perhaps even an answer, to what was left unresolved in *Summum*, which is whether a monument violates the Establishment Clause thereby limiting the government's ability to express a message that endorses a certain religion, whereas in *Summum*, this will be decided on remand.

D.

To separate the forest from the trees in these two cases, and to determine what (or even whether) the broader implications of the Court's holding in *Summum*, it is best to return to the basics. The fundamental notion of government speech is the idea that the government needs to be able to speak for itself so that it can govern effectively – a clearly articulated idea, deeply embedded in First Amendment jurisprudence. Yet, like most fundamental principles, with time, this concept became increasingly complex. In deciding cases involving the government's role in free speech, the Court has not developed a clear test as to determine viewpoint neutrality.⁴⁷ In the absence of a bright-line rule,⁴⁸ the Court is forced to decide these matters on a case-by-case analysis.⁴⁹

Does this mean there are no limits? No. Although not terribly helpful, the ruling the Court issued in *Summum* did not render an opinion so amorphous that those with potential claims are left completely without direction. Justice Alito

45. In *Pleasant Grove City v. Summum*, it was the publicizing of a privately donated monument, and in *Salazar v. Buono* it was the privatization of formerly public land.

46. See *Tebbe*, *supra* note 42 at 72-77 (for further comparison and discussion on the two cases.)

47. See *Harvard Law Review*, *Leading Cases: Government Speech*, 123 *Har. L. Rev.* 232, 237-242 (Nov. 2009).

48. A series of lower court opinions have established various factors in determining whether speech is private or governmental. The Eighth Circuit developed a four-factor test in *Knights of the Ku Klux Klan v. Curators of the University of Missouri*, which was adopted by the Tenth Circuit in *Wells v. City & County of Denver*. See, *Knights of the Ku Klux Klan v. Curators of the Univ. of Mo.*, 203 F.3d 1085, 1093-94 (8th Cir. 2000); *Wells v. City & County of Denver*, 257 F.3d at 1132, 1140-42 (8th Cir. 2000). In *Wells*, the court assessed: (1) the central purpose of the government program in which the speech occurs, (2) the amount of editorial control over the content, (3) the identity of the speaker, and (4) with whom ultimate responsibility rests. *Wells*, 257 F.3d at 1142-43.

49. In *Johanns v. Livestock Marketing Association*, the Court held that an advertising campaign for beef constituted government speech. While the Court did not specifically denote a given test, in reaching its decision, it used factors similar to those in the four-factor test of *Wells*, wherein, the Court assessed the purpose of the program, who had editorial control of the speech, and who exercised ultimate control over the advertising campaign. *Johanns*, 544 U.S. at 560-61.

made clear that the Establishment Clause of the U.S. Constitution is a clear limit on government speech.⁵⁰ *Sumnum* boils down to the idea that government speech can be created when a government accepts, embraces, and communicates a donated message by a private entity thereby transforming that message into governmental speech.⁵¹

CONCLUSION

While *Sumnum* did not promulgate any groundbreaking law, it did reveal the Court's hesitancy to decide Free Speech issues brought on Establishment Clause grounds. As Justice Souter stated, "It is simply unclear how the relatively new category of government speech will relate to the more traditional categories of Establishment Clause analysis, and this case is not an occasion to speculate."⁵² As such, Justice Souter may have gotten his wish in the pending cases for this year's term; and perhaps then, the Court will set forth guiding principles as to the relationship between the government speech doctrine and the Establishment Clause.

50. *Sumnum*, *supra* note 1 at 1127 ("[G]overnment speech must comport with the Establishment Clause."). *See also*, U.S. CONST. Amend. I ("Congress shall make no law respecting an establishment of religion. . .").

51. *See* Andy G. Olree, *Identifying Governmental Speech*, 42 L. Rev. 365, 409-417 (Dec. 2009) (for additional comments on approaches to Free Speech).

52. *Sumnum*, *supra* note 1 at 1142.

Forest Grove School District v. T.A.: Proposing Amendments to the IDEA Can Strengthen the Rights of Children with Disabilities

JENNIFER RECINE

INTRODUCTION

The IDEA (Individuals with Disabilities Education Act) provides the guidelines for special education practices among school districts for students with disabilities. The statute itself has been the center of much special education litigation, specifically in the realm of reimbursement for private education sought in place of public education. While the IDEA is not silent on the matter, the different manners in which the text of the statute can be inferred causes problems that seemingly can be remedied only by the courts. Interpretation is key when analyzing a case that relies heavily on a particular provision of a statute. In *Forest Grove School District v. T.A.*, the court examines 20 U.S.C. 1412(a)(10)(C)(i)-(iii) when determining whether a child who has not previously received special education benefits at his public school district will be entitled to reimbursement for alternate private education sought in place of the FAPE (Free Appropriate Public Education) that was to be provided by the public school district. This paper will analyze *Forest Grove School District v. T.A.*, its procedural history, and consider the holding in regards to proposing a new amendment to the IDEA that will provide a much clearer provision granting relief for students who do not receive a FAPE at their public school district.

I. CASE SUMMARY

Respondent T.A. attended public schools in the Forest Grove School District from the time he was in kindergarten through the winter of his junior year of high school.¹ Throughout his time at the school district, T.A. experienced difficulties with his schoolwork, and in December 2000, T.A.'s mother contacted the school counselor to discuss his problems.² After interviewing him and administering cognitive ability tests, the school psychologist concluded that he did not need further testing for any learning disabilities or other health impairments, including ADHD, therefore, the school district concluded that T.A. did not qualify for special education services.³

T.A.'s parents sought private professional advice, and in 2003, T.A. was diagnosed with ADHD as well as a number of disabilities related to learning and

1. *Forest Grove School Dist. v. T.A.*, 129 St. Ct. 2484, 2488 (2009).

2. *Id.*

3. *Id.*

memory.⁴ This private professional also advised that T.A. would learn best in a structured, residential learning environment; therefore, T.A.'s parents enrolled him in a private school that could accommodate him and specialized in his unique needs.⁵ A few weeks later, in April 2003, T.A.'s parents requested an administrative due process hearing regarding his eligibility for special education services.⁶ The District had a school psychologist evaluate T.A., and it was found that his ADHD did not have a sufficiently significant adverse impact on his educational performance, and therefore, declined to provide him with an IEP (Individualized Education Program).⁷ After the hearing ended in January 2004, the hearing officer issued a decision, finding that T.A.'s ADHD adversely affected his educational performance and therefore the School District did not meet its obligations under the IDEA, including not offering T.A. a FAPE (Free Appropriate Public Education), and the School District was ordered to reimburse T.A.'s parents for the cost of his private school tuition.⁸

The School District brought suit pursuant to § 1415(i)(2) of the IDEA, arguing that the hearing officer erred in granting reimbursement, and the District court accepted the hearing officer's findings of fact but set aside the reimbursement award after finding that the 1997 Amendments to the IDEA categorically bar reimbursement of private school tuition for students who have not "previously received special education and related services under the authority of a public agency."⁹ The Court of Appeals reversed, and held that the IDEA was silent on the subject of private school reimbursement prior to the 1997 Amendments, but courts had granted such reimbursement as "appropriate relief."¹⁰ The court also held that the 1997 Amendments did not impose a categorical bar to reimbursement when a child has not previously received special education services.¹¹

A. MAJORITY OPINION

The case was then remanded to the Supreme Court with instructions to reexamine the equities, including the failure of T.A.'s parents to notify the School District before removing him from public school.¹² The Supreme Court held that the IDEA authorizes reimbursement for private special-education services when a public school fails to provide a FAPE and the private school placement is appropriate, regardless of whether the child previously received special edu-

4. *Forest Grove*, *supra* note 1 at 2488.

5. *Id.*

6. *Id.*

7. *Id.* at 2488-89.

8. *Id.* at 2489.

9. *Id.* at 2490.

10. *Id.*

11. *Id.*

12. *Id.*

cation services through the public school.¹³ The court relied heavily on the previous decisions in *School Committee of Burlington v. Department of Education of Massachusetts* and *Florence County School District Four v. Carter*, which held that § 1415(i)(2)(C)(i)-(iii) authorizes the courts to reimburse parents for the cost of private school tuition when a school district fails to provide a child a FAPE and the private school placement is appropriate.¹⁴ The court also held that the 1997 Amendments do not impose a categorical bar to reimbursement, and that the Amendments made no changes to the central purpose of IDEA or the text of § 1415(i)(2)(C)(iii).¹⁵

As for the School District's argument that § 1412(a)(10)(C)(ii) limits reimbursement to children who have previously received public special education services, unlike T.A. who did not, the court reasoned this argument was unpersuasive because the argument is not supported by the text of the IDEA, as the 1997 Amendments do not expressly prohibit reimbursement in this case and the School District offers no evidence that Congress intended to supersede *Burlington* and *Carter*.¹⁶ In addition, the argument clashes with the IDEA's purpose of granting all children with disabilities a FAPE.¹⁷ The argument would also produce a rule bordering on the irrational by providing a remedy when a school offers a child inadequate special education services but leaving parents with no remedy when the school unreasonably denies access to such services altogether.¹⁸ The School District also argued that IDEA funds must be stated ambiguously; however, the court reasoned that this is satisfied through the decisions in *Burlington* and *Carter*, as states and schools have been on notice since these cases were decided that the IDEA authorizes courts to order reimbursement in such cases.¹⁹ Therefore, the Supreme Court affirmed the judgment of the Court of Appeals.²⁰

B. DISSENTING OPINION

Justice Souter, joined by Justice Scalia and Justice Thomas, authored a dissenting opinion. In it, Souter says the majority decision falls short of trumping what he feels is a clear limitation on public school reimbursement that is imposed by § 1412(a)(10)(C)(ii).²¹ Souter takes a detailed look at the language of the statute, specifically clauses stating, “‘this subchapter does not require a local educational agency to pay for the cost of education. . .of a child with a

13. *Forest Grove*, *supra* note 1 at 2486-87.

14. *Id.* at 2487-88.

15. *Id.* at 2486-87.

16. *Id.* at 2492-93.

17. *Id.* at 2487.

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.* at 2497.

disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school'” §1412(a)(10)(C).²² In addition, clause § 1412(a)(10)(C)(ii) states that “‘if the parents of a child with a disability who previously received special education. . .enroll the child in private school. . .without the consent of or referral by the public agency, a court. . .may require the agency to reimburse the parents for the cost of that enrollment.’”²³

Souter feels that reading clause (i) and (ii) to mean that reimbursement may be ordered whenever a school district fails to provide a FAPE is overstretching the bounds of the statutory interpretation.²⁴ He feels that clause (i) is written with the idea that the school district should be expected to honor their obligations based on the rule that unilateral placement cannot be reimbursed.²⁵ He reads clause (ii) as stating that when a child receives prior special education services, that imposes a limitation on the general rule set out in clause (i) when school officials fail to provide a FAPE.²⁶ Overall, Souter feels that § 1412(a)(10)(C)(ii) should be read to allow reimbursement only for parents of a child with a disability that had previously received special education services in public school.²⁷

II. ANALYSIS

A. THE IDEA

The IDEA is the Individuals with Disabilities Education Act. This act governs how states and public agencies provide special education to children with disabilities. The Act requires that, “all children with disabilities have available to them a free appropriate public education (FAPE) that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living.”²⁸ It goes on to state that its purpose is to “assess, and ensure the effectiveness of, efforts to educate children with disabilities.”²⁹ Public schools create an IEP, which is an Individualized Education Program tailored specifically to meet the unique needs of the child and is developed, renewed, and revised by the child’s parents and the school district, for each student who is found to be eligible.³⁰ The IDEA was amended in 1997.³¹ For purposes of the *Forest Grove* decision, we must focus

22. *Forest Grove*, *supra* note 1 at 2499.

23. *Id.*

24. *Id.*

25. *Id.* at 2499-500.

26. *Id.* at 2500.

27. *Id.*

28. 20 U.S.C. § 1400(d)(1)(A) (2005).

29. *Id.* at § 1400(d)(4) (2005).

30. *Id.* at § 1412(a)(4); *see also* 1414(d).

31. *Forest Grove*, *supra* note 1 at 2488.

on the amended clauses that refer to reimbursement for private school placement. They read as follows:

“(i) . . . this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement: If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.”³²

The last main clause to focus on for this case, 20 U.S.C. 1412(a)(10)(C)(iii), deals with limitations on reimbursement, such as if the parents do not inform the IEP team that they are rejecting placement proposed by the public school, or if the parents did not make their child available for evaluation by the public school.³³

B. IMPLICATIONS OF THE FOREST GROVE HOLDING

This Supreme Court holding makes it clear that a School District will be held responsible when they provide an inadequate FAPE, regardless of the fact that a child has not been afforded special education from the public school. This ruling will hopefully cause schools to have a more thorough examination of children who are suspected of having learning disabilities, so that they may receive a FAPE in the comfort of their own school district. However, this ruling could also become problematic in that it may cause parents to bring suit when it may not be necessary, because they feel that their children are not receiving an adequate FAPE at their public school.

They may do this regardless of the fact that the school had ultimately decided the child did not need special attention or an IEP, and may favor a more prestigious private school, bringing much expensive litigation for the School Districts and imposing higher taxes on the citizens of the states as more districts pay for the private education of the students. However, there are safeguards that are in effect within the IDEA in order to protect against parents abusing the system.³⁴ Any claims made by parents that are found to be in bad faith will be dealt with

32. 20 U.S.C. § 1412(a)(10)(C)(ii).

33. *Id.* at § 1412(a)(10)(C)(iii)(I)(aa); (II).

34. Emily S. Rosenblum, *Interpreting the 1997 Amendment to the IDEA: Did Congress Intend to Limit the Remedy of Private School Tuition Reimbursement*, 77 *FORDHAM L.REV* 2773, 2775-76 (2009).

according to sec. 1412(a)(10)(C)(iii), which states that reimbursement can be denied or reduced based on a finding of "unreasonableness with respect to actions taken by the parents."³⁵ Therefore, the high scrutiny required by the district hearing and courts in this matter coupled with the safeguards found within the IDEA will most likely halt any candidate who is certainly receiving a proper FAPE from continuing pricey unneeded litigation, making this decision an overall groundbreaking case that will ultimately aid in the facilitation of the learning processes of children with disabilities.

C. PROPOSED AMENDMENTS UNDER THE IDEA

In order to aid in the outcome of cases such as *Forest Grove* and keep litigation to a minimum on the subject, the IDEA should be amended to include a provision that provides more specific guidelines stating that a child who has not previously received special education benefits at his public school district will be entitled to reimbursement for alternate private education sought in place of the FAPE that was to be provided. Specifically, § 1412(a)(10)(C)(i)-(iii), which gives courts broad authority to grant appropriate relief, including reimbursement for the cost of special private education when a school district fails to provide a FAPE, could include a new clause.³⁶ This clause could specify that it is not limited only to children who have been provided with special education services that did not adhere to a FAPE, but, by a case-by-case determination, if a child has not received special education services at all, leading the student to be robbed of the opportunity to be provided with a FAPE, the statute would instruct the school district to provide reimbursement.

In this way, there would be a much clearer standard with which to adhere, and a case like *Forest Grove* would most likely have avoided litigation, due to the fact that it is blatantly clear that the public school psychologist failed to diagnose T.A.'s ADHD, which was the only reason he did not receive special education services in his public school. Therefore, with a clear reading of this proposed amendment to the statute, it would be understood that T.A. should be provided with reimbursement for his private school education after he was rightfully diagnosed with ADHD and told by a professional that attending a school that would cater to his unique needs would provide him with a FAPE.

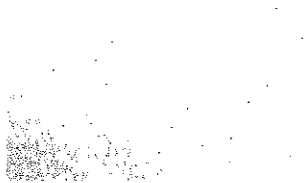
CONCLUSION

Forest Grove v. T.A. is a groundbreaking case that provides the new standard for children who have not been receiving a FAPE due to the fact that they have not received special education or may have been misdiagnosed to have the opportunity to be reimbursed for the special education services they need. Every

35. Bosenblum, *supra* note 34; see also 20 U.S.C. § 1412(a)(10)(C)(iii).

36. 20 U.S.C. § 1412(a)(10)(C)(i)-(iii).

child is entitled to a Free Appropriate Public Education, and if the public school district cannot provide the proper services, it is their duty to provide alternate means. Amending the provisions of the IDEA that deal with this issue would provide more concrete guidelines, even if it would have to be assessed on a case-by-case basis, that will aid in facilitating the process of providing a proper FAPE for every child that is in need.



***Ricci v. DeStafano*: Extinguishing Racism in America**

JOHN R. THEADORE

INTRODUCTION

The provisions of Title VII of the Civil Rights Act of 1964 clearly prohibit workplace discrimination based on race, regardless of whether the individual is considered a racial minority. This was recently reaffirmed by the Supreme Court in the case of *Ricci v. DeStafano*, where it was found that a municipality had violated the provisions of Title VII by failing to certify objective examination results because of what they perceived as a racial disparate-impact. In light of this ruling, more municipalities and businesses will likely face challenges from non-minority employees based on disparate-impact claims as a result of this holding. When one of these cases makes its way to the Supreme Court, the Court will have to address the underlying Constitutional issues associated with Title VII. The provision will eventually be reaffirmed as meaning true equality amongst the races by such a case that challenges employment-advancement criteria that takes racial factors into account, rather than objective skills.

I. FACTS & PROCEDURAL HISTORY

The New Haven, Connecticut, Fire Department uses objective examinations to identify the best qualified candidates for promotions within (and promotions to) the officer ranks.¹ These ranks confer additional duties on the firefighters that hold them, as well as increased salary and benefits.² As such, there is a great amount of competition between firefighters trying to gain advancement in the fire department.

In November and December of 2003, 118 New Haven Firefighters took examinations to qualify for promotions to the ranks of Lieutenant and Captain.³ The results of these examinations would determine which firefighters would be considered for promotions over the course of the next two years, as well as the order in which they would be considered for those ranks. Many firefighters that took the tests studied for months at great personal and financial cost. The examinations were comprised of both a written portion (60%) and an oral portion (40%), with a passing score of 70% overall.⁴

1. *Ricci v. DeStafano*, 129 S.Ct. 2658, 2664 (2009).

2. *Id.*

3. *Id.*

4. *Id.* at 2665.

The results of the examinations showed that white candidates had outperformed minority candidates nearly two to one in terms of their scoring. 77 candidates completed the Lieutenant examination – 25 whites, eight blacks and eight Hispanics.⁵ Of those, 34 candidates passed – 25 whites, six blacks, and three Hispanics.⁶ Eight lieutenant positions were vacant at the time of the examination. Under the rule of three that the department used, ten candidates were eligible for an immediate promotion to lieutenant – all ten were white.⁷ Subsequent vacancies would have been allowed for at least three black candidates to be considered for promotion to lieutenant. 41 candidates completed the Captain examination – 25 whites, eight blacks, and eight Hispanics.⁸ Of those, 22 passed – 16 whites, three blacks, and three Hispanics.⁹ Seven captain positions were vacant at the time of the examination. Under the rule of three, nine candidates were eligible for an immediate promotion to Captain – seven whites and two Hispanics.¹⁰

Based on the examination results, the City officials expressed concern that the exams had discriminated against minority candidates because of the exceptional performance on them by the white firefighters. Some firefighters (especially the black firefighters) argued that the test results should be discarded because they showed that the tests were discriminatory, and threatened a discrimination lawsuit if the City made promotions based on the tests.¹¹ Other firefighters (particularly the white firefighters) said that the exams were neutral and fair, and threatened a discrimination lawsuit if the City ignored the results and denied promotions to candidates who performed well based solely on the statistical racial disparity in the results.¹² In the end, the City chose to throw out the exam results and risk a lawsuit from the white and Hispanic firefighters that were denied promotions, despite their strong performance on the examination.

Accordingly, not long after the City's decision, a group of white and Hispanic firefighters who would have likely received promotions based on their good test results sued the City and some of its officials for throwing out the exam scores. The group alleged that by discarding the test results, the City discriminated against them based on their race, in violation of Title VII of the Civil Rights Act of 1964 and the Equal Protection Clause of the 14th Amendment.¹³ The City argued that if they had certified the test results, they would be

5. *Supra* note 1 at 2666.

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.* at 2667.

12. *Id.*

13. *Id.* at 2671.

liable under Title VII for adopting a practice that had a disparate-impact on the minority firefighters.¹⁴

The US District Court for Connecticut granted Summary Judgment for the Defendants. The Second Circuit Court of Appeals affirmed, holding that the City was acting to “fulfill its obligations under Title VII.”¹⁵

II. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, as amended, prohibits employment discrimination on the basis of race, color, religion, sex or national origin. Title VII prohibits intentional discrimination (known as “disparate-treatment”) as well as, in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as “disparate-impact”).¹⁶ In the case at bar, the firefighters alleged that the City intentionally discriminated against them based on their race when they threw out the test results, and thereby prevented them from gaining promotions.

As enacted in 1964, Title VII’s principal nondiscrimination provision held employers liable only for disparate-treatment. That section made it unlawful for an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual’s race, color, religion, sex or national origin.”¹⁷ Disparate-treatment cases occur where an employer has “treated [a] particular person less favorably than others because of” a protected trait.¹⁸ A disparate-treatment plaintiff must establish “that the defendant had a discriminatory intent or motive” for taking a job-related action.¹⁹

In the case at bar, the firefighters alleged that the City’s motive for this job-related action was to avoid a Title VII lawsuit by the minority firefighters. If that is the case, then the City has violated its duty to protect the rights of the non-minority firefighters by throwing out exam results that were perfectly legitimate without any appropriate reason to do so. In other words, the suing firefighters allege that no disparate-treatment would have resulted against the minority firefighters if the City had followed through with certifying the examination results. Instead, it could be argued that the non-minority firefighters have actually faced disparate-treatment as a result of the City’s decision to dis-

14. *Supra* note 1 at 2671.

15. *Id.*

16. *Id.* at 2672.

17. 42 U.S.C. §2000e – 2(a)(1).

18. *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 985–986 (1988).

19. *Id.* at 986.

card the exam results and deny them promotions that they had in fact earned, based solely on their race.

The Civil Rights Act of 1964 did not include an express prohibition on policies or practices that produce a disparate-impact. However, in *Griggs v. Duke Power Co.*, the Court interpreted the Act as prohibiting, in some cases, facially neutral employment practices that are actually "discriminatory in operation."²⁰ "If an employment practice which operates to exclude [minorities] cannot be shown to be related to job performance, the practice is prohibited."²¹ Conversely, if the employment practice does relate to job performance, then the practice could be acceptable.

Twenty years after *Griggs*, the Civil Rights Act of 1991, 105 Stat. 1071, was enacted. Under the disparate-impact statute, a plaintiff establishes a *prima facie* violation by showing that an employer uses "a particular employment practice that causes a disparate-impact on the basis of race, color, religion, sex, or national origin."²² An employer may defend against liability by demonstrating that the practice is "job related for the position in question and consistent with business necessity."²³ Even if the employer meets that burden, however, a plaintiff may still succeed by showing that the employer refuses to adopt an available alternative employment practice that has less disparate-impact and serves the employer's legitimate needs.²⁴

III. TITLE VII'S EFFECT ON *RICCI*

In the case at bar, the firefighters argued that the City's practice of discarding the test results has caused them a disparate-impact based on their race – as they were *not* minorities. Considering the City's rationale in making their decision, it seems that if the test results were more evenly spread throughout the three racial categories they would not have had any hesitation in certifying the exam results.

Throughout its existence, Title VII has been used to protect the rights of minority citizens who have faced disparate-impact in society and particularly in the workplace because of their race. Given the background of the conditions of society that existed during the time that Title VII was originally enacted, this seems like a logical interpretation of its purpose. Coming out of the struggles of the Civil Rights movement of the 1960s, Title VII was a product of the times. As African-Americans faced harsh discrimination based on their race throughout many facets of society, Congress took steps to protect the rights of these individuals. Nevertheless, this interpretation of the purpose of Title VII is not

20. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

21. *Id.*

22. 42 U. S. C. §2000e-2(k)(1)(A)(i).

23. *Id.*

24. 42 U.S.C. §2000e-2(k)(1)(A)(ii) and (C).

entirely accurate. Title VII's purpose is to prevent disparate-impact against all citizens, regardless of their race – minority or not.

Therefore, it is logical to see how the City of New Haven misconstrued the implementation of Title VII when deciding what to do with their exam results. As Title VII had been used throughout its existence to protect the rights of minorities in society, it was unnatural for them to even consider that they should be using its provisions to protect the rights of the non-minority firefighters who would suffer disparate-impact if the exams were thrown out. To do so would be going against every other use of Title VII within the last 40 years. Obviously fearing that going against the historical uses of the law would result in guaranteed civil rights lawsuits being filed against them, the City did what appeared to be their only justified solution to their problem.

Therefore, due to the fact that they were unclear about the exact meaning of Title VII and what repercussions the minority firefighters would have if they chose to file a lawsuit against them, the City went forward with throwing out the results of the examination. In making this decision, the City likely was well aware that they would still be facing litigation on this matter. However, being put in a situation where they would be sued regardless of their decision, it only seemed prudent to do what was consistent with history surrounding Title VII, and attempt to protect the rights of the minority firefighters.

It is obvious that the heart of this case stems from the confusion surrounding what Title VII exactly means. Without any explicit holding from the Supreme Court up to this point on the effects of Title VII when it is used to protect the rights of non-minority citizens, municipalities such as the City of New Haven were fearful to take such a drastic step against the trend that had been used for 40 years.

As the success of the Civil Rights movement of the 1960s has grown stronger and many of the racial barriers that had plagued American society for years have been erased, the practical effects of Title VII have evolved as well. Instead of only being used to protect the rights of minority citizens, its use in contemporary society is to ensure that disparate-impact discrimination does not exist for any citizens, regardless of their minority/majority status.

To overturn such a trend of how Title VII is implemented in practice, legal precedent must be set, and the Supreme Court needed to give a clear reaffirmation of what the law actually means.

IV. REASONING & HOLDING OF SUPREME COURT

The Court observes that the record in this litigation documents a process that, at the outset, had the potential to produce a testing procedure that was true to the promise of Title VII: No individual should face workplace discrimination based on race. For racial prejudice to be truly eliminated from our society, then racial discrimination should not come into play when making work-related deci-

sions. Rather, employees should receive promotions based on their objective qualifications: those that demonstrate the highest performance and best skills should get preferential treatment compared with those that fail to show such qualities.

The problem in this case, however, is that after the tests were completed, the raw racial results became the predominant rationale for the City's refusal to certify the results. The possibility of simply taking the racial breakdown at face value and certifying them as recorded was found to not be an option. Confronted with arguments both for and against certifying the results – and threats of a lawsuit either way – the City was required to make a difficult inquiry. In the end, the City determined that the results lent themselves to demonstrating a disparate-impact because of the racial breakdown, and decided that it was in their best interest to discard the results rather than face a disparate-impact lawsuit from the minority firefighters that did not perform well on the exams.

However, its hearings produced no strong evidence of a disparate-impact violation, and the City was not entitled to disregard the exams based solely on the racial disparity in the results. The Supreme Court stated in its decision: "Our holding today clarifies how Title VII applies to resolve competing expectations under the disparate-treatment and disparate-impact provisions. If, after it certifies the test results, the City faces a disparate-impact suit, then in light of our holding today it should be clear that the City would avoid disparate-impact liability based on the strong basis in evidence that, had it not certified the results, it would have been subject to disparate-treatment liability. Petitioners are entitled to summary judgment on their Title VII claim, and we therefore need not decide the underlying constitutional question."²⁵ In effect, the Supreme Court declined to address the real question as to whether or not Title VII protected the interests of the non-minority firefighters and whether or not the City's decision to throw out the exam results had caused them some real disparate-impact as a result of their race. The Court's decision did, however, strongly indicate that a future case similar to this one could result in a holding that Title VII does protect the rights of non-minority groups facing discrimination on the basis of race.

V. IMPLICATION OF HOLDING

The Supreme Court's holding further explains how Title VII works to resolve suits under the disparate-treatment and disparate-impact provisions. While not reaching the ultimate constitutional issue in this matter, this decision does help to clarify how employers should act if they are presented with seemingly discrepant results between races on objective examinations. Clearly, if an exam is given that is objective in nature, as the ones in this case were, then the employer

25. *Supra* note 1 at 2681.

should proceed forward with whatever plans they had in mind for their employees based on the results, and they should be able to do this without fear of repercussions from employees that did not perform well.²⁶ Exam results that are truly objective do not show the requisite disparate-impact that would be necessary to create a legitimate claim under the provisions of Title VII.²⁷

It is likely that this ruling will make both municipalities and private businesses take greater care when granting promotions to their employees as to the objective qualifications of each. Rather than become fearful of what the implications could possibly be if the results of such objective tests present some apparent disparity between employees of different races, municipalities and private businesses should be able to rely upon the results to make appropriate determinations to make changes in employment.²⁸ This case has demonstrated that there is harm done if an employer takes action to avoid a potential disparate-impact claim, as the party that does not reap the benefits of such testing has a right to file a claim against the employer for doing so, even if they are a non-minority party. Therefore, it is likely that as a result of the Supreme Court's ruling, both public and private employers will first make sure that their exams related to positions are objective, and second that they will enforce the results of such examinations, even if there appears to be some facial discrepancy that exists.²⁹

On a larger scale, this holding could be used to reinforce objective qualifications in many facets of life, including promotions, new job hiring and college admissions. Rather than just be focused on examinations used by employers for promotions, this case could spur the strong enforcement of objective qualifications for decisions about people throughout society.³⁰ The purpose of Civil Rights Act and Title VII was to bring about a society where people are rewarded for their objective qualifications, and race is not a factor of consideration at all. In light of the decision in *Ricci*, it is likely that those who are in a position to make such decisions will begin to do so more objectively.³¹

The Court's opinion regarding such matters, including affirmative action cases, will likely begin to change as well. For example, cases such as *Grutter v. Bollinger*, where the Court upheld the University of Michigan Law School's

26. Jonathon A. Segal, *The Impact of the Supreme Court Employment Law Cases: Leading Lawyers Analyze Recent Decisions and Their Impact on Employment Law*, Aspatore, 2010 WL 282920 at 8 (2010).

27. *Id.*

28. David T. Barton, *The Impact of the Supreme Court Employment Law Cases: Leading Lawyers Analyze Recent Decisions and Their Impact on Employment Law*, Aspatore, 2010 WL 282926 at 8 (2010).

29. Thomas H. Wilson, *The Impact of the Supreme Court Employment Law Cases: Leading Lawyers Analyze Recent Decisions and Their Impact on Employment Law*, Aspatore, 2010 WL 282923 at 9 (2010).

30. Barton, *supra* note 28 at 8.

31. Wilson, *supra* note 29 at 9.

affirmative action admissions policy, could be overturned. In that case, the Court stated: "The Court expects that 25 years from now, the use of racial preferences will no longer be necessary to further the interest approved today."³² The *Ricci* case could be the beginning of the end for the racial preferences that the Court said would no longer be necessary seven years ago.³³

It is quite possible that *Ricci* will prove to be the first of several court cases that could effectively bring about true equality amongst the races. While this case did not reach the underlying Constitutional issue as to how Title VII protects discrimination against people of all races, regardless of whether or not they have minority status, the Court's holding alludes that it has a desire to move towards the kind of equality they said would likely come in the next quarter-century in *Grutter*.³⁴ When another case of this kind comes about, the Civil Rights Act will finally be realized as it was intended, reflecting a society that is color-blind.

32. *Grutter v. Bollinger*, 539 U.S. 306, 343 (2003).

33. Kathy DeAngelo, *Title VII's Conflicting "Twin Pillars" in Ricci v. DeStafano*, 129 S. Ct. 2685 (2009), 33 HARV. J.L. & PUB. POL'Y 361, 372 (2010).

34. *Id.*



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