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The Evolving Principles of Italian Family Law

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In most Western societies, the role of the family and the functions of family law have undergone a dramatic change during the last few decades. Italian law is no exception to such a trend.

Most of the changes in the regulation of the family can be construed as a byproduct of the transformation in economic and social conceptions of the family which have taken place during the last several decades. During the second half of the twentieth century, women obtained increased access and increasingly equal opportunities in the labor market. This induced a change in the social function of the family, thus changing the relative costs of entering into a marriage relationship for the two spouses.

The following pages will reconstruct the evolution of Italian family law in a historical and economic perspective.

1. A BRIEF HISTORY OF ITALIAN FAMILY LAW

In the Italian legal system, the core provisions on family law are contained in Book 1 of the Italian Civil Code, entitled *On Persons and On the Family*.[1] The current regulation of the family is not the product of a monolithic piece of legislation. It originates from a protracted historical evolution, marked by important revolutions in the legal conception of the family. In particular, the original version of the 1942 Civil Code[2] reflected an authoritarian and patriarchal image of the family: the husband was considered the head of the family making all the decisions for his wife and children, and the wife was subordinate to her husband and had less than equal rights in the management of the family. This is not surprising, given the heavy reliance the 1942 Civil Code drafters placed on the pre-existing regulation of the family contained in the 1865 codification, which in turn was an integral reflection of the principles set out in the *Code Napoléon* of 1804.[3] In this area of the law, the Italian Civil Code of 1865 indeed has substantial similarities with the Napoleonic code: both were affected by a conservative cultural heritage and both were underpinned by the value of ownership and the pyramid-like concept of social relations also in the realm of family

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1. The provisions more directly relating to the family can be found in Chapters VI and following, corresponding to Articles 74 ff.

2. This code is still in force although the section on family law has undergone profound changes following the introduction of the Family Law Reform Act of May 19, 1975, No. 151.

3. CIVIL CODE (C. Civ.)(Fr. 1804).

law.[4] The concept of the family embraced by the first European codes stressed the unitary and irreducible nature of the family. Such a concept was born out of an agricultural economy where the family jointly managed the production process and its resources. The various features of family and succession law can be seen as instrumental to the unitary conception of the family enterprise and the maintenance of concentrated ownership of land to allow for economies of scale in agriculture. The authority of the husband over the other members of the family can also be viewed as instrumental to the effective leadership of the family enterprise.

The 1942 Civil Code embraced a more dynamic conception of ownership and enterprise, in line with the pervasive ideology of the time.[5] In terms of family relationships, however, it maintained the authoritarian structure of the family that was contained in the earlier Italian and French codifications. An additional important historical fact is the Concordat between the State and the Holy See, stipulated on February 11, 1929.[6] This international agreement introduced the so-called Concordat marriage, a form of recognized marriage which paralleled the standard form contemplated in the civil legislation. Religious marriages carried out in the Roman Catholic rite were recognized with the same legal effects[7] as civil marriage, subject only to a requirement of registration with civil authorities.

In 1948, the Constitution of the Italian Republic was enacted and it radically changed the principles of family law.[8] Articles 29, 30, and 31 of the Constitu-

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4. For an historical account of Italian family law, *see* BESSONE, ALPA, D'ANGELO, FERRANDO, La famiglia nel nuovo diritto, Bologna 1991; BESSONE, L'ordinamento costituzionale del diritto di famiglia e le prospettive di evoluzione della societa' italiana, in Dir. fam. 1976, 217; BELLOMO, La condizione giuridica della donna in Italia. Vicende antiche e moderne, Torino 1970; GRASSETTI, Famiglia (diritto vigente), in Noviss. Dig. it. App. di Agg., III, Torino 1961, 48 ff.; *Id.* Famiglia (diritto privato), Noviss. Dig., cit., III, 1982, 637 ff. .; BARCELLONA, Famiglia (diritto privato), in Enc. Dir., XVI, Milano 1967; BIANCA, Famiglia (diritto di), in Noviss. Dig. It., VII, Torino 1961; UNGARI, Il diritto di famiglia in Italia, Bologna 1975; BESSONE - ROPPO, Il diritto di famiglia. Evoluzione storica, principi costituzionali, prospettive di riforma, Genova 1975; *Id.* Il diritto di famiglia. Evoluzione storica, disciplina costituzionale, lineamenti della riforma, Torino 1979, 320 ff.; DOGLIOTTI, Principi della Costituzione e ruolo sociale della famiglia, in Dir. fam. 1977 1488 ff. For an italian translation of some classical english writings on the family, *see* T. PARSONS, La famiglia americana, (trad. it.), in Famiglia e socializzazione, Milano 1974, 6 ff.; COOPER, La morte della famiglia, (Italian translation), Torino 1971, 21; HORKHEIMER, Studi sulla autorita' della famiglia, (Italian translation), Torino 1974, 46.

5. The dynamic value of ownership and its relation to entrepreneurial incentives are at the core of the Fascist ideology, which reigned in Italy at the time of the 1942 codification.

6. It became Italian law, No. 847, on May 27, 1929.

7. Two forms of marriage are still possible under Italian law; this was retained even after an accord modifying the Concordat stipulated in Italy in 1985, becoming law, No. 121, on March 25 1985, and following an additional Protocol.

8. In the Italian legal system, the rigidly hierarchical structure of legal sources gives overriding force to the Constitution.

tion introduced an equal-responsibility model of the family, which is now seen as a social formation based on marriage. They state:

> Article 29 [Marriage]:
> (1) The State recognizes the family as a natural association founded on marriage.
> (2) Marriage is based on the moral and legal equality of husband and wife, within the limits laid down by the laws for ensuring family unity.
>
> Article 30 [Education]
> (1) It is the duty and right of parents to support, instruct and educate their children, even those born out of wedlock.
> (2) The law states the way in which these duties shall be fulfilled should the parents prove incapable.
> (3) The law ensures full legal and social protection for children born out of wedlock consistent with the rights of the members of the legitimate family.
> (4) The law lays down rules and limitations for ascertaining paternity.
>
> Article 31 [Family]
> (1) The Republic facilitates, by means of economic and other provisions, the formation of the family and the fulfillment of the tasks connected therewith, with particular consideration for large families.
> (2) It safeguards maternity, infancy, and youth, promoting and encouraging institutions necessary for such purposes.

The new Constitutional principles triggered a pervasive re-conceptualization of the legal notion of the family. The implementation of the new Constitutional principles was carried out with two main instruments: numerous interventions on the part of the Constitutional Court and action by lawmakers (e.g., the 1975 Family Law Reform Act modifying most of the family law norms contained in the Civil Code).[9]

Prior to the 1975 reform, judicial interventions in the field of family law were numerous and, by their own nature, unsystematic. In spite of the occasional interventions of the Constitutional court, the underlying conception of the family remained linked to the older conception of the family as an indissoluble unit with patriarchal governance. The 1975 reform homogenized the piecemeal interventions of the earlier case law. The task pursued by the reform was far from easy. First, the Constitutional principles were difficult to reconcile with the existing legal rules and radical mutations were necessary to give an effective implementation to the new principles. Second, the legislator had to account for the quite diverse social views of the family in order to avoid too drastic a departure from the established understanding of such social institution. In many respects, these tasks were successfully carried out.

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9. Law n. 151 of May 19, 1975, *Riforma del diritto di Famiglia* (Also in Codice Civile, con la Costituzione, il Trattato CEE e le Principali Norme Complementari, a cura di Adolfo Di Majo, Giuffrè, Milano 1998, p. 1113 and ff.).

To highlight some of the most relevant changes the legislative implementation of the constitutional principles yielded, the reader should consider the following summary points:[10] (i) the introduction of a joint relationship, both personal and patrimonial, between spouses; (ii) the raising of the age of consent for marriage; (iii) the inclusion of more causes of invalidity of marriage; (iv) the introduction of a default patrimonial regime with legally-shared assets; (v) the introduction of no-fault separation of spouses; and (vi) the equality of children born both within and outside of the marriage (legitimate and illegitimate offspring).[11]

In the midst of this transition, two additional legislative enactments captured the evolving social conception of the family. In spite of the religious dogma of indissolubility of marriage, the popular consensus endorsed the introduction of divorce in the Italian legal system. In 1970, Italy passed the divorce law allowing for the resolution of the spousal relationship with the cessation of the civil effects of marriage.[12] Other changes of equal ideological importance took effect in 1978, with the legalization of voluntary abortion.[13] Both of these reforms considerably affected the evolving legal and social conceptions of the family.

2. CIVIL AND CONCORDAT MARRIAGE UNDER ITALIAN LAW

Before addressing the legal patrimonial system of the family in Italy, we will set out a few points of reference on Italian family law.

The Italian matrimonial system distinguishes between marriage intended as a legal act and marriage as a legal relationship. This distinction is usually only of a descriptive nature in the theory of juridical acts, but in the area of family law, it proves to be a useful criterion for the understanding of the dual matrimonial regime of Italian law. The regulation of marriage as a legal act governs issues of form and the legal requirements for contracting a valid marriage. The rules governing marriage as a legal relationship address issues related to the personal and patrimonial effects of the marriage between the spouses and with respect to their children.

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10. *See* M. BESSONE - G. ALFA - A. D'ANGELO - G. FERRANDO, *La famiglia nel nuovo diritto*, 1991.

11. For a critical examination of the Italian reform of family law, *see* BESSONE, DOGLIOTTI, FERRANDO, Giurisprudenza del diritto di famiglia, Milano 1975, 217 ff., where the reader can find a wealth of bibliographical references; MONTUSCHI, ROMAGNOLI, FINOCCHIARO, DELL'ORO, PROVERA, FERRI, TALAMANCA, FORCHIELLI, GORLA, Aggiornamento sulla base della legge di riforma del diritto di famiglia, in Commentario del Codice civile, Scialoja and Branca (eds.), Bologna-Roma, 1975; RODOTA', La riforma del diritto di famiglia alla prova, Pol. dir. 1975, 661; CARRARO, Il nuovo diritto di famiglia, Riv. dir. civ. 1975, I, 93; DE CUPIS, Postilla sul nuovo diritto di famiglia, ivi, 1975; BARBIERA, Divorzio e nuovo diritto di famiglia, Dir. fam. e persone 1976; A. and M. FINOCCHIARO, Riforma del diritto di famiglia, I, Milano, 1975.

12. Law No. 898 of December 1, 1970.

13. Law No. 184 of May 22, 1978.

Two forms of marriage exist under Italian law: civil and Concordat.[14] The distinction between the two regimes relates to the notion of marriage as a legal act. Indeed, in the case of civil marriage, the act and the relationship are both regulated by the Italian family law system. In the case of Concordat marriage, the act is regulated by the canonical order, while the Italian legal system continues to regulate the relationship. The Concordat marriage, then, is simply a marriage contracted according to Canon law but recognized, upon registration with the civil authorities, by the Italian legal system.[15]

A triggering factor in the historical evolution of the Concordat marriage was that prior to the political unification of Italy, the Catholic church held a monopoly on the regulation of marriage, at least in the Papal States. This contributed to the consolidation of a social belief of necessity of a religious matrimony for the full validity of a marriage.

Following territorial unification in 1861, however, the State denied effective legal recognition of marriages celebrated by the clergy. This denial did not occasion a wholesale replacement of the older religious ceremonies with secular formalities. Italian citizens who professed the Catholic faith (indeed, the vast majority of the population) felt morally compelled to celebrate two marriages to satisfy both the religious and the secular requirements. The recognition of a couple's union by both Church and State indeed required prospective spouses to celebrate two distinct ceremonies: one marriage to be carried out by a minister of the Catholic church and, soon afterward, another by an official of the State.

The two forms of marriage were independent of one another: one dictated by the rules of Canon Law and the other anchored to the principles of the Italian Civil Code. Apart from the endorsement of the dogma of indissolubility of marriage, there were few points of contact between the two legal orders. Soon the unified State and the Holy See found themselves involved in an unpleasant political debate over the regulation of the family.[16]

In 1929, Italy and the Holy See reached an agreement on two basic fronts: first, on issues of religious protection, via the Concordat between the Holy See and Italy and second, of an institutional nature, with the creation of the Vatican City State. On the regulation of marriage, the formulation of Article 29 of the

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14. In the case of civil marriage, the civil code regulates all aspects of the legal act and the legal relationship of marriage.

15. On the legal significance of Concordat marriage, *see* F. FINOCCHIARO, Matrimonio, arts. 79-83, in Commentario del codice civile, Scialoja e Branca (eds.), Zanichelli 1971, Bologna-Roma; ID. I patti lateranensi e i principi supremi dell'ordinamento costituzionale, in Giurisprudenza italiana 1982, 2, 1 1985; CARDIA, Una ridefinizione del matrimonio concordatario, in Giustizia Civile 1982, I, 1450; BELLINI, Matrimoni concordatario e principio di eguaglianza, in Rivista diritto civile 1982, II, 793 ff.; C. M. BIANCA, Il matrimonio concordatario nella prospettiva civilistica, in Rivista di Diritto Civile, 1986, 1-13.

16. For an interesting comparative discussion of the rise and fall of ecclesiastical jurisdiction over marriage formation, *see* M.A. GLENDON, STATE LAW AND FAMILY: FAMILY LAW IN TRANSITION IN THE United STATES AND WESTERN EUROPE, AMSTERDAM 304-325(North-Holland Publishing 1977).

Concordat is at the origin of the idea of two legal orders regulating two aspects of a same reality. According to the spirit of the Concordat, the legal act of marriage was in the domain of canon law, while marriage intended as a legal relationship was subjected to the civil laws of Italy.

In spite of the theoretical rigor of the distinction, the duality of approach became particularly marked and problematic in cases of marriage annulment. The later formulation of the Italian Constitution is evidence of a conscious tension on the matter. Article 7 of the Italian Constitution acknowledged the prior international agreement: "the State and the Catholic Church are, each in its order, independent and sovereign. Their relations are regulated by the Lateran Pacts . . . ."[17] But the formulation of the Constitution remained mute on the delicate issues arising from the dichotomous discipline of family law.

With regard to the civil aspect of family law, there was considerable doctrinal and jurisprudential debate on the relevance of the Lateran Pacts in the constitutional system. The discussions became particularly intense on the critical issue of marriage dissolution. Would the Lateran Pacts legally prevent the Italian secular system from allowing the voluntary dissolution of marriage? One thought, both doctrinal and political, held that the appeal to the Lateran Pacts and to marriage as the basis of the "family" as natural society (Article 29 of the Constitution) had to uphold the legal conception of marriage as an indissoluble bond. On the opposite front, the constitutionalists argued that the Constitution did not prejudice in any way a (eventual) divorce law.[18]

The problem became relevant in 1970, when divorce was introduced. Its constitutional legitimacy, as the Constitutional Court also argued, was said to rest on the mechanism of the Lateran Pacts. The Pacts had drawn a distinction between jurisdiction over the validity of the act of marriage and jurisdiction over the relationship. Since it reserved the right to decide on the validity of the act to the canonical order, the State's power to regulate the relationship resulting from the act, including dissolution, was total.

On this point, Law No. 898 of December 1, 1978 on marriage dissolution contains two articles which reflect this mechanism. Article 1 states: "The judge pronounces the dissolution of the marriage contracted under the Civil Code when . . . there is a certified absence of material or spiritual union between the spouses."[19] Article 2 establishes: "In cases of marriages celebrated by religious rite and registered under the [Italian] law, the judge, . . . having certified the

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17. It. Cost. (art. 7) (*Costituzione della Repubblica Italiana*) which came into force on January 1, 1948.

18. The constitutionalists' argument rested on the absence of a clear position of the Constitutional Assembly, notwithstanding a express discussion of the matter in a special session.

19. Law n. 898 of December 1, 1970, *Disciplina dei casi di scioglimento del divorzio* (Also in Codice Civile, con la Costituzione, il Trattato CEE e le Principali Norme Complementari, a cura di Adolfo Di Majo, Giuffrè Milano 1998, p. 1229).

absence of material and spiritual union, . . . pronounces the cessation of the civil effects of the registration of the marriage."[20] The result was that the canonical marriage, indissoluble under its own order, became dissoluble under the Italian legal system (and for the sole civil effects of the relationship), if registered and with effect under the law.

The Concordat regime further implies that the relationship aspect of the marriage is governed exclusively by Italian law, the main principles of which can be found in Articles 143, 144 and 147 of the Civil Code. They state:

> Article 143 [Mutual Rights and Duties of Spouses]:
>
> Through marriage, the husband and wife acquire the same rights and assume the same duties.
>
> A mutual obligation to loyalty, moral and material support, cooperation in the interest of the family and cohabitation derives from the marriage.
>
> Both spouses are bound, each in relation to his own assets and his own ability for professional or household work, to contribute to the needs of the family.
>
> Article 144 [Pattern of Family Life and Residence of Family]
>
> The Spouses agree between them the pattern of life and fix the residence of the family according to the requirements of both and to those prevailing for the family.
>
> Each spouse has the authority to implement the agreed pattern.
>
> Article 147 [Duties to Children]
>
> Marriage imposes on both spouses the obligation to maintain, educate and instruct the children, taking into account their ability, natural inclination and aspirations.

The duality of approach is particularly evident in the event of breakdowns in family life. This approach highlights the difference between the rules for the annulment of the act and the rules concerning the cessation of the civil effects of the relationship. When a judge declares a marriage null, he or she is ruling on the act and eliminates it *ex tunc*, i.e., with retroactive effects; on declaration of the cessation of the civil effects he or she is ruling on the relationship, dissolving it and therefore depriving it of its effects *ex nunc*, i.e., with no retroactive effects.[21]

The patrimonial and hereditary aspects of the family are the specific topic of the following sections.

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20. *Id.*

21. Conversely, the separation of the spouses has effects neither on the act nor on the relationship, since separation does not dissolve the bond but eliminates only some of the aspects of the personal relationship between the spouses.

3. THE LEGAL PATRIMONIAL SYSTEM OF THE FAMILY

At the time of the modern European codes, most societies viewed the family as an indissoluble unit with a hierarchical organization. In the presence of an indissoluble relationship, incentive problems in the physiological phase of the family are often governed by the informal rules between the spouses, without any end-game problem. In the old regime, the patrimonial rules were thus attentive to the ex ante incentive of the spouses, rather than being a tool to correct for the potential ex post opportunism of one spouse. In the Italian legal system, the rules that governed the patrimonial relations between the spouses were indeed only minimally articulated and were instrumental to the older conception of the family.

Once the dogma of indissolubility faded away from the secular conception of the family, the regulation of the patrimonial relations between spouses became crucially important. The reformed conception of the family has, as one of its most radical innovations, the introduction of a well articulated patrimonial regime, enacted through the 1975 Family Law Reform Act.

The original version of the 1942 Italian Civil Code envisioned a system of asset separation. This system was consistent with the value of ownership and enterprise which had inspired the code and which could be linked to a tradition dating back to Roman law. Moreover, in the historical period between the two codifications (i.e., between 1865 and 1942), the legal system based on asset separation intensified the inferior patrimonial condition of the wife. But as Italian society evolved, the emergence of new social norms and life models, all of them tending to re-evaluate the work of women and the patrimonial importance of their role in the family, highlighted the need for a radical revision of the patrimonial legal regime of the family. With the enactment of the Constitution, the focus of the legal system shifted towards the protection of the person and human personality (Article 2 of the Constitution), together with the formal and substantial application of the principle of equality (Article 3 of the Constitution). These principles, applied to family law in 1975,[22] led to the proclamation of the moral and legal equality of spouses.

Prior to the 1975 reform, there had been a lively debate on the appropriate domain of a Constitutionally-driven reform of family law. The first platform was one of rigorous interpretation of the Constitutional norms on the principle of shared responsibility and family unity (Article 29, paragraph II of the Constitution). The conclusion, perhaps extreme, was that marriage brings about not only spiritual union but also material union and, therefore, all assets should concur in the realization of one family patrimony. According to this point of view, the unitary nature of the family – as natural society founded on marriage

22. Others provisions, contained in Articles 29, 30 and 31 of the Constitution, played an equally important role in the 1975 revision of family law.

– required a legal regime based on joint ownership of all assets, with no admissible derogations. The other platform was less radical and more attentive to the historical development of Italian family law. According to this latter group, economic considerations – especially applicable to the case of entrepreneurial activities of the family – dictated a more flexible regime for the patrimonial relations of the family. The historical point of view ultimately prevailed; the patrimonial system of the family, only in the absence of other explicit arrangements, is constituted by the common ownership of assets by law. This system was believed to be sufficiently protective of the wife's position in family administration.

In sum, the Italian family law reform of 1975 introduced the following main principles: (i) abolition of the institution of the dowry; (ii) alteration of the patrimonial system from asset separation to common ownership; and (iii) new norms on the administration of commonly-owned assets.

The Italian legal system opted for dirigible common ownership by law. It is neither obligatory nor, moreover, universal since its sphere is restricted. It is binding because no spouse may dissolve it at whim,[23] nor may a spouse acting alone dispose of his or her share. On this latter point, according to a Constitutional Court ruling,[24] spouses do not have individual entitlements to a share but are joint holders of an entitlement to commonly-owned assets.

4. THE CURRENT PATRIMONIAL REGIME OF THE FAMILY

The legal patrimonial system of the family in Italy is based on the common ownership of assets, but spouses may opt for a different regime through mutual assent. In the absence of such an agreement to the contrary, the legal patrimonial system of the family in Italy is one of Common Ownership of Assets as regulated by Section III, Chapter VI, Volume I of the Civil Code (Article 159 of the Civil Code). Section V, Chapter VI, Volume I of the Civil Code regulates the system of voluntary Separation of Assets. Marriage agreements opting for the separation of assets may be stipulated at any time, with a formal requirement of a public notarial act. The decision to opt for separation of assets may also be declared upon registration of the marriage (See Articles 162 – 166 of the Civil Code). The Common Ownership of Assets by Agreement is regulated by Section IV, Chapter VI, Volume I of the Civil Code, Articles 210-214.[25]

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23. *See* C. CIV. art 191.

24. Constitutional Court, March 17 1988, No. 311.

25. On the patrimonial regime of the family, *see* G.BONILINI and G. CATTANEO (eds.), Il diritto di famiglia, II, Il regime patrimoniale della famiglia, Utet Torino 1997, with a rich bibliography; F.D. BUSNELLI, Convenzione matrimoniale, in Enciclopedia del diritto, X, 1962, 512-524; G. TEDESCHI, Il regime patrimoniale della famiglia, in Trattato Vassalli, Utet, 1963, 4th ed.; R. SACCO, in Commentario alla riforma del diritto di famiglia, Oppo, Carraro, and Trabucchi (eds.), I, 1977, Cedam Padova; E. RUSSO, Le convenzioni matrimoniali ed altri saggi sul nuovo diritto di famiglia, Giuffre' 1983; F. SANTOSUOSSO, Il regime patrimoniale della famiglia, in Comm. cod. civ., I, 1, Torino,

A. THE COMMON OWNERSHIP OF ASSETS BY LAW

An analysis of the norms of the Civil Code on the common ownership of assets by law highlights three major categories: assets immediately included in common ownership; common assets *de residuo*; and personal property.

Assets included in common ownership are: (i) items spouses purchased together or separately during the marriage, excluding individual acquisitions; and (ii) in the case of a business enterprises run by spouses prior to their marriage and still managed by them after marriage, common ownership includes only increases in profits.

Some categories of assets are only included in common ownership upon dissolution of this arrangement.[26] This is known as common ownership *de residuo*. The following assets are included in common ownership on dissolution of this arrangement: (i) gains from assets each spouse individually owned, distributed and unconsumed upon dissolution; (ii) proceeds from the separate activities of either spouse if, upon dissolution, they have not been consumed; (iii) assets designated to a business run by either spouse and established after the marriage; and (iv) profits from a business established prior to the marriage and unconsumed upon dissolution.

The following are the personal property of spouses, not common assets: (i) assets which a spouse owned before marriage or of which he or she holds usufruct rights; (ii) assets acquired after marriage by gift or right of succession when the act of gift or legacy does not specify inclusion in common ownership; (iii) assets and accessories for the strictly personal use of either spouse; (iv) assets required for running the trade or business of either spouse, except those designated to a business included in common ownership; (v) assets obtained by way of compensation for damages, and invalidity pensions or benefits in full or in part; and (vi) assets acquired with proceeds from the transfer or sale of personal property provided there is explicit declaration to this effect at the moment of sale.

1983, 154-326; F. CORSI, Il regime patrimoniale della famiglia, II, in Tratt. dir. civ. e comm., Cicu and Messineo and Mengoni (eds.), Giuffre' 1984, Milano; A. and M. FINOCCHIARO, Diritto di famiglia, (legislazione - dottrina - giurisprudenza), I, Giuffre' 1984, Milano; S. MAIORCA, Regime patrimoniale della famiglia (Disposizioni generali), in Novissimo Digesto Italiano, App. VII, 76-120; G. GABRIELLI, Scioglimento parziale della comunione legale fra coniugi, esclusione della comunione di singoli beni e rifiuto preventivo del coacquisto, in Rivista di diritto civile, I, 1988, 341-364; S. MAIORCA, Regime patrimoniale della famiglia (Disposizioni generali), in Novissimo digesto italiano, 1986, App. VI, 450-504; *Id.* Separazione di beni tra coniugi, ivi 1987, App. VII, 76-120; G. OBERTO, Comunione legale, regimi convenzionali e pubblicita' immobiliare, in Rivista diritto civile 1988, II, 187-230; E. ROPPO, Convenzioni matrimoniali, in Enciclopedia Giuridica Treccani 1988, XI, 1-6.

26. Common ownership is dissolved as a result of the certified absence, death or presumed death of either spouse, of the annulment, of dissolution or cessation of the civil effects of the marriage, of the legal separation of the spouses, of the legal separation of assets, of changes in the patrimonial system by mutual agreement, or of the bankruptcy of either spouse.

Having pinpointed the specific sphere of the joint ownership default rules, there follows a summary of norms governing the administration of commonly owned assets and of patrimonial guarantees for such assets.

Both spouses have the power of administration of the jointly owned assets and of representation in judicial proceedings relating to such assets. Spouses may jointly pursue activities of extraordinary administration and stipulate contracts for the creation and transfer of usufruct rights. Both also have power of attorney in pertinent judicial proceedings.

Under the Civil Code, joint ownership creates the following obligations on both spouses: (i) all burdens on the asset at the time of acquisition; (ii) all administration charges; and (iii) family maintenance costs, the education of children and obligations contracted together or separately by spouses in the interests of the family.[27]

When a commonly owned asset is insufficient to service debts encumbent on it, creditors may apply to the personal property of either spouse for up to 50 percent of the debt. This is known as the subordinate liability of personal property. Since the burden of responsibility is not totally but only partially shared, this norm is clearly unfair according to the majority opinion. Consider the example of spouses who jointly guarantee a bank loan for a friend. Suppose this obligation equals 100 while commonly owned assets equal 50. Suppose also that one of the spouses has no assets while the other has a patrimony of 1,000. In this case, the creditor could demand a patrimonial guarantee worth 75 (50 in commonly owned assets plus 25 in personal property of one of the spouses) and not 100 as should be the case according to the general principle of passive solidarity.[28]

B. SEPARATION OF ASSETS

Section V, Chapter VI, Book I of the Italian Civil Code regulates the separation of assets system. Spouses may agree that each retain sole ownership of assets acquired during the marriage. In this case, each spouse has the right of usufruct and administration of the asset of which the other has exclusive ownership. A spouse can prove his ownership of an asset to the exclusion of the other spouse by any means. Assets of which neither spouse can prove exclusive ownership are the undivided property in equal share of both spouses.

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27. C. CIV. art. 186 (Also in Codice Civile, con la Costituzione, il Trattato CEE e le Principali Norme Complementari, a cura di Adolfo Di Majo, Giuffrè, Milano 1998).

28. Note that Article 2740 of the Civil Code merely establishes that a debtor's liability for the fulfilment of obligations includes all present and future assets.

C. THE COMMON OWNERSHIP OF ASSETS BY AGREEMENT

By means of an agreement stipulated by public notarial act, spouses may modify the default system of common ownership of assets that would apply to their patrimonial relations. Article 161 of the Civil Code requires that such agreements be specific in their content and not merely declaratory of the choice of a different legal regime. The rule clearly guards against opting out of the default legal regime by uninformed spouses. Article 210 of the Civil Code further specifies that the following personal property can, in no event, be included in common ownership by agreement: (i) assets and accessories for the strictly personal use of either spouse; (ii) assets required for running the trade or business of a spouse, except those designated to a business included in common ownership; and (iii) assets obtained by way of compensation for damages, and invalidity pensions or benefits in full or in part.

5. MATRIMONIAL BREAKDOWNS AND PATRIMONIAL RELATIONSHIPS

The underlying conception of the family as a joint enterprise of the spouses should be evaluated in light of the absence of an explicit price system within the family. Indeed, there are no explicit prices to compensate spouses for their respective inputs in the management of the family unit. Services rendered by a spouse for the benefit of others within the family remain unpaid. Likewise, there is no explicit contract regulating the respective tasks of the spouses within the family nor any compensation scheme for the services rendered by each spouse. Like any team production problem, spouses work as a team and it is difficult to attribute the product of their joint efforts to the specific input of one or the other. Thus, even the implicit exchange within the family may be incapable of compensating the relative inputs with the marginal value product of the respective labor.

Within the family, just as in any collective enterprise, there is a division of labor between the spouses. Such division is the rational consequence of economies from specialization and will be obtained even in the absence of an initial comparative advantage of one spouse in the production of family services.[29] But, as expected, the presence of economies from specialization in a joint output environment may be problematic. In the absence of a price system, the optimal mix of inputs for the well-being of the family may not coincide with the equilibrium mix of inputs for the two spouses.

The divergence between private and social (i.e. family) incentives is exacerbated by the possibility of a dissolution of the family union upon request of one spouse. In the absence of legal rules regulating the pathological phase of the family union, each subject will set his or her own value of input in such as way

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29. *See* GARY STANLEY BECKER, A TREATISE ON THE FAMILY (1991).

as to equalize marginal private costs and benefits. In the absence of warranties for the case of dissolution of the family unit, the input choice of the spouses will be sub-optimal from the point of view of the family as a whole.

In this setting, the patrimonial legal regime of the family can be viewed as remedial to the risk of ex post opportunism of spouses with a finite horizon of individual optimization. This explains why the increased importance of the patrimonial regime of the family is a necessary by-product of the historical decline of the dogma of indissolubility of the family union.[30]

6. PATRIMONIAL REGIME IN CASE OF SEPARATION OR DISSOLUTION

Family life may enter a pathological phase either temporarily (separation of spouses) or definitively (dissolution of marriage).[31] The 1942 Civil Code regulated family crises solely by the separation of the spouses and, in this, it also reflected the underlying limited domain of private autonomy in family relations. Legal separation was only permitted in cases explicitly envisioned by the lawmaker: adultery (a major cause which was also penal in nature), voluntary desertion, excessively disturbing behavior, violence, threats, serious injury, the conviction of a spouse to life imprisonment or sentencing to more than five years, and failure by the husband to establish a family domicile.

Separation by agreement was originally admitted only by consent of a judge. The 1942 lawmaker, then, had opted for culpability in the general approach to the separation of spouses. The system introduced under the reform was markedly different. It allowed no-fault separation, although many courts continued to rule according to the criterion of spouses' incompatibility with the risk of serious prejudice to the children. Most notably, in 1970, the lawmaker also introduced the cessation of the civil effects of marriage – divorce. The Italian legal system does not recognize consensual divorce following an explicit agreement. The Italian system recognizes remedial divorce, which always envisions a judge's ruling and assessment when a relationship lived in *communio omnis vitae* breaks down.

The present inquiry is confined to the sphere of family law, and we will proceed to consider the patrimonial relations between spouses with children in cases of separation or dissolution.

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30. *See generally*, BECKER, *supra* note 29; ECONOMICS OF THE FAMILY: MARRIAGE, CHILDREN AND HUMAN CAPITAL, (T.H. Schultz ed., 1974); A. CIGNO, ECONOMICS OF THE FAMILY (1991); L.N. WEITZMAN, THE MARRIAGE CONTRACT: SPOUSES, LOVERS AND THE LAW (1981) (discussion of economics of the family).

31. C. CIV. art. 149. Marriage is dissolved by the death of a spouse or by law.

A. EFFECTS OF SEPARATION ON PATRIMONIAL RELATIONS

The first and most important effect of separation on patrimonial relations is the right to support. The general criterion for the amount of support is related to the economic rationale outlined in the previous section. The support, generally established through a judicial order to pay regular maintenance, is determined to assist both spouses in maintaining the same standard of living as they had during the marriage. This criterion is indeed aimed at preventing exploitation of asymmetric irreversible investments into the family by the two spouses. In turn, this remedy prevents the disruption of the spouses' incentives in the physiological phase of the family union.[32]

In decreeing separation, the court provides for the right of spouses to whom separation is not imputable and who has no adequate income of their own, to receive from the other spouse an amount which is regarded as necessary for their support. Not surprisingly, the liquidated amount depends on the circumstances and the relative incomes of the spouses. It must be specified, however, that the Italian legal system explicitly regulates chargeable separation. In adjudicating separation, the court, if circumstances obtain and if petitioned to do so, will determine the at fault spouse because of behavior contrary to marital obligations.

Even if in a state of financial need, the at fault spouse is not entitled to maintenance, but instead is merely entitled to alimony. Alimony differs from maintenance in that it is designed to satisfy only the basic financial needs of the claimant, rather than attempting to equilibrate the standards of life vis-a-vis the other spouse.

Regarding the children, the court establishes custody and determines how much the non-custodial spouse should contribute towards their maintenance and

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32. On the separation of the spouses and the patrimonial consequences, *see* C.M. BIANCA, La famiglia. Le succesioni, II, Milano 1982; P. ZATTI-M. MANTOVANI, La separazione personale, Padova 1983; A. and M. FINOCCHIARO,Diritto di famiglia, I, MIlano 1984; F. SANTORO PASSARELLI, Note introduttive agli artt. 24 e 28, della novella, in Commentario alla riforma del diritto di famiglia, Carraro Oppo and Trambucchi (eds.), I, 1, Padova 215-262; CARDIA, Il diritto di famiglia in Italia, Editori riuniti, Roma 1975; L. CARRARO, Il nuovo diritto di famiglia, in Rivista di diritto civile, I, 1975, 94 ff; G. FERRANDO, Dalla separazione per colpa alla separazione per "impossibilita" della convivenza, in Proceedings of the Conference on Italian family law, Milano, 1976, 55-71; C. GRASSETTI, Scioglimento del matrimonio e separazione personale dei coniugi, in Commentario al diritto di famiglia, Carraro Oppo and Trabucchi (eds.), I, 1, Padova, 1977, 283-314; F. SANTOSUOSSO, Delle persone e della famiglia. Il matrimonio, in Commentario codice civile, I, 1, 1978, Utet Torino; ZANETTI VITALI, Il mutamento del titolo della separazione, in Diritto delle persone e della famiglia, 1980, 264-314; A. BARGAMINI, Appunti sull'autonomia dei coniugi di disporre l'assetto dei loro rapporti patrimoniali in concomitanza della separazione consensuale e in vista di un futuro divorzio, in Giustizia Civile, 1974, I, 173-176; U.M. CAFERRA, L'assegno di mantenimento nel giudizio di separazione dei coniugi, in Giurisprudenza italiana, 1977, I, 1, 1977, 1908 ff; E.QUADRI, L'adeguamento monetario degli assegni periodici con funzione assistenziale, in Giur. it. 1980, IV, 49 ff; A.TRABUCCHI, Il nuovo divorzio. Il contenuto e il senso della riforma, in Rivista diritto civile, II, 1987, 125-147.

education. The court will also rule on the extent and allocation of parental rights over the children.

B. EFFECTS OF DISSOLUTION OF MARRIAGE ON PATRIMONIAL RELATIONS

In the event of dissolution of the marriage, the patrimonial legal regime provides remedies to correct for potential asymmetries between the spouses investments in the family. The goal is once again aimed at preventing the distortion of the incentives of the spouses in the course of the physiological phase of their relationship.

With the decline of the dogma of indissolubility of marriage, the spouses' incentives became affected by the uncertainty concerning the stability and duration of their relationship. Some long-term choices, such as specialization of one spouse in the rearing of the children, which would be regarded as individually optimal in a no-divorce regime, could become irrational in the presence of uncertainty regarding the duration of the family union. The patrimonial legal regime of the family aims at correcting such a potential misalignment of incentives. Because of the retrospective protection provided by the legal system, spouses can live out their matrimonial union as if it were indissoluble. This protection is designed to induce optimal investments in the family and diversification of the labor inputs of the spouses with differing specializations in professional or domestic activities, as their comparative advantages dictate. In this setting, the effects on dissolution of marriage can be viewed as instrumental to providing a solution to such AN incentive-compatibility problem.[33]

According to the Italian legal system, following the dissolution of their marriage, the patrimonial effects on former spouses extend to divorce allowance and assignment of the family home.

With respect to divorce allowances, the court, in decreeing dissolution or the cessation of the civil effects of the marriage, evaluates the following: (a) the condition of both spouses; (b) the reasons for the divorce; (c) the personal and financial contribution of each spouse to family administration and to the formation of the patrimony of each or both; and (d) the current and expected incomes of both spouses.[34] Having assessed all these elements, together with the duration of the marriage, the court will establish the obligation of one of the spouses to provide a periodical allowance to the other when he or she has no adequate

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33. *See* M.F., Brinig, and S.T, Crafton, *'Marriage and Opportunism'*, 23 J. LEGAL STUD. 869 (1994); L. Cohen, *Marriage, Divorce, and Quasi-Rents; or, I Gave Him the Best Years of My Life,"* 16 J. Legal Stud. 267 (1987).

34. Art. 5, par. 6, of the Law n. 898 of December 1, 1970, *Disciplina dei casi di scioglimento del divorzio*, in Codice Civile, con la Costituzione, il Trattato CEE e le Principali Norme Complementari, a cura di Adolfo Di Majo, Giuffrè, Milano 1998.

financial means and cannot justifiably obtain them. By agreement of the parties, this allowance may also be paid in a lump sum.[35]

The divorce allowance has an economic function which is comparable to the maintenance obligation during the separation phase, since it too is determined to assist both spouses in maintaining the same standard of living as they had during the marriage. Both payments maintain optimal incentives during the physiological phase of the family union, encouraging optimal investment in the family on the part of the spouses, while minimizing the exposure for ex post opportunism and the exploitation of asymmetric irreversible investments into the family.[36]

Assignment of the family home is a major factor both in separations and divorces. In the case of separation, the family home preferably and when possible is assigned to the spouse who is given custody of the children. In the case of divorce, the family home is assigned to the spouse who, not only has custody, but with whom the children are likely to live on coming of age. In all cases for the purpose of assigning the family home, the judge will evaluate the

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35. On divorce and its patrimonial consequences between the spouses, *see* M. DOGLIOTTI, Separazione e divorzio, Torino 1988; C.M. BIANCA, La nuova disciplina del divorzio. Appendice di aggiornamento, Milano 1988; L. BARBIERA, Il divorzio dopo la seconda riforma, Bologna 1988; F. MOSCONI, Commentario alla riforma del divorzio, AAVV, Ipsoa, Milano 1987, 45-49 e 147-151; LUMINOSO, La riforma del divorzio: profili di diritto sostanziale, in Rivista giuridica sarda, II, 1987, 591-621; A. LANZI, Commentario alla riforma del divorzio, in AAVV, Ipsoa, Milano 1987, 33-36 e 152-156; E. CIPRIANI, Nuove norme sulla disciplina dei casi di scioglimento del matrimonio, in N. Lipari (ed.), Nuove leggi civili commentate 1987, 874-893; GIUSTI, ivi, 850-874; 1023-1032; V. CARBONE, Divorzio accelerato e maggiori tutele per il coniuge debole, in Corriere giuridico, 1987, 727-732; G. FREZZA, Su alcuni aspetti patrimoniali della separazione e del divorzio, in Giust. Civ. 1994, I, 2540 ff; DELL'ONGARO, Sulla controversa natura dell'assegno di divorzio, in Dir. famiglia 1974, 635; F. MOROZZO DELLA ROCCA, Un problema ancora insoluto: la natura dell'attribuzione dell'assegno di divorzio, in Dir. famiglia 1974, 354; SANTOSUOSSSO, Il divorzio, in Trattato di diritto privato, P. RESCIGNO (ed.), Vol. 3, Torino 1982, 365; ARRIVAS, in ARRIVAS-GUCCIONE-TORTORICI, Dieci anni di giurisprudenza, Palermo 1981, 120; PERILLO, Riflessi patrimoniali del divorzio, in Riv. dir. civ. 1979, II, 532. GALOPPINI, Divorzio (diritto privato e processuale), in Noviss. Dig. It., III, Torino 1982, 100 ff; DE MARTINO-PROTETTI'-TADDEUCCI, Scioglimento del matrimonio. Commentario alla legge n. 898 del 1970, Roma 1971, 551; CAPOZZI, L'assegno periodico al coniuge divorziato, in Dir. giur. 1971, 172; D. VINCENZI AMATO, I rapporti patrimoniali, in Commentario sul divorzio, P. Rescigno (ed.), Milano 1980, 309 ff (with special attention to p. 328); C. M. UDDA, Sull'indisponibilita' del diritto all'assegno di divorzio, in Fam. e dir. 1995, 14-16; L. CAVALLO, Sull'indisponibilita' dell'assegno di divorzio, in Giust. Civ. 1992, I, 1241 ff; A. TRABUCCHI, Assegno di divorzio: attribuzione giudiziale e disponibilita' degli interessati, in Giur. it. 1981, I, 1, 1553; L. BARBIERA, Il divorzio dopo la riforma del diritto di famiglia, in Comm. Scialoja-Branca, Bologna Roma 1979, sub. art. 149, 387; SANTOSUOSSO, Il divorzio, in Trattato Rescigno, 3, 2, Torino 1982, 361; E. QUADRI, La nuova legge sul divorzio, I, Profili patrimoniali, Napoli 1987, 43 ff, and 71 ff; C.M. BIANCA, Diritto civile, II, La famiglia, Milano 1989, 208 ff; *Id.*; Commentario al diritto italiano della famiglia, OPPO-CIAN-TRABUCCHI (eds.), Padova 1993, 358 ff.

36. *See* Joan M. Krasukopf, *Recompense for Financing Spouse's Education: Legal Protection for the Marital Investor in Human Capital*, 28 U. KAN. L. REV. 379 (1980); R.A. POSNER, ECONOMIC ANALYSIS OF LAW, 139-160 (2d ed. 1986); Lenore. J. Weitzman, *The Economics of Divorce: Social and Economic Consequences of Propert, Alimony and Child Support Awards*, 28 UCLA L. REV. 1181 (1981).

financial conditions of the spouses and the reasons for their divorce.[37] He will favor the weaker party. The assigned home, if legally registered, may be sold to a third party under Article 1599 of the Civil Code.[38] Thus, the assignment of the family home in the case of separation and divorce is considered by Italian judges to serve the interests of children and also as a practical means of guaranteeing fulfilment of the obligation of maintenance. With respect to the patrimonial effects on children, the rules the divorce lawmaker introduced resemble those applicable in the case of separation.

7. THE FAMILY ENTERPRISE

We shall now briefly examine the rules applying to the family enterprise, i.e., whenever two or more members of the same family jointly own and manage a family business.[39]

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37. On the assignment of the family home, in cases of separation and divorce, A. FINOCCHIARO, in A. e M. Diritto di famiglia, III, Il divorzio, Milano, 1988, p. 495 ff.; Id., Puo' il giudice della separazione assegnare l'abitazione nella casa familiare al coniuge cui non vengono affidati i figli?, in Giust. Civ., 1981, I, p. 142; Ancora sul potere del giudice del divorzio di disporre della casa familiare, in Giust. Civ., 1982, I, p. 703; C. COCCIA, La casa familiare: qualificazione giuridica e diritti del coniuge, in Dir. fam. e pers., 1985, p. 722; A. GIUSTI, Crisi coniugale e protezione della casa familiare, ivi, 1986, p. 773; R. AMAGLINI, Separazione dei coniugi e assegnazione della casa familiare, in Rass. Dir. Civ., 1982, p. 2; S. BARTOLOMUCCI, Casa familiare e attribuzione giudiziale a seguito di separazione personale fra coniugi, in Giust. Civ., 1985, p. 515, ove ampi riferimenti bibliografici; A. BELVEDERE: Residenza e casa familiare: riflessioni conclusive, in Riv. Crit. Dir. priv., 1988, p. 243; G. TAMBURRINO, Lineamenti del nuovo diritto di famiglia, Torino, 1978, p. 277; G. GABRIELLI, in Commentario della riforma del diritto di famiglia, Carraro, Oppo and Trabucchi (eds.), Padova, 1976, II, p. 16; M. DOGLIOTTI, Separazione e divorzio, Torino, 1988, p. 115 ff. See also, C. M. BIANCA, Diritto civile, II, Milano 1985, p. 160; L. BARBIERA I diritti patrimoniali dei separati e dei divorziati, Zanichelli 1995, p. 45 ff.; E. QUADRI, La casa familiare nel divorzio, in La nuova legge nel divorzio, Napoli, 1988 p. 201 ff.; Id., L attribuzione della casa familiare in sede di divorzio, in Fam e dir. 1995, p. 269; M. G. CECCHERINI, Tutela del coniuge separato e assegnazione della casa familiare , in Riv. Crit. Dir. Priv., 1986, p. 567 ff; M. DI NARDO Attribuzione giudiziale della casa familiare al coniuge non affidatario della prole, in Nuova Giur. Civ. Commentata, 1988, I, p. 127; A. M. MARCHIO Questioni in tema di assegnazione della casa familiare, in Giur. It., 1987, I, 1, p. 1294; G. FREZZA, L'assegnazione della casa familiare al coniuge affidatario della prole, in Giustizia civile 1996, 725; ID. Diversa ratio della assegnazione della casa familiare nella separazione e nel divorzio, in Giur. It. 1996, I, 1, 3 ff.

38. C. Civ. art. 1599 (Also in "Codice Civile, con la Costituzione, il Trattato CEE e le Principali Norme Complementari," a cura di Adolfo Di Majo, Giuffrè Milano, 1998).

39. On the family enterprise, *see* G. OPPO, Scritti giuridici, Vol. V, Cedam 1992, with an extensive bibliography. *See also*, C. M. BIANCA, Diritto civile, cit. 308-354; A. and M. FINOCCHIARO, Diritto di famiglia, I, Giuffre', Milano 1984; F. SANTOSUOSSO, Il matrimonio, in Comm. Cod. civile. Delle persone e della famiglia, Utet Torino 1983, 366 ff.; G. GABRIELLI, I rapporti patrimoniali tra i coniugi, I, Trieste 1981; V. COLUSSI, Impresa familiare, in Rivista di diritto civile, I, 622-766; *Id.*, Impresa e famiglia, Cedam 1985; G. TAMBURRINO, Lineamenti del nuovo diritto di famiglia, Utet Torino 1978, 239 ff.; C.A. GRAZIANI, L'impresa familiare nel nuovo diritto di famiglia. Prime considerazioni, in Nuovo diritto agrario, 1975, 199, 246; *Id.*, Comunione tacita familiare, in Noviss. Dig. it, App. II, 1981, 191-193; L'impresa familiare, in Trattato Rescigno, (ed.), vol. II, 3, Torino 1983, 547 ff; F.D. BUSNELLI, Impresa familiare e azienda gestita da entrambi i coniugi, in Rivista trimestrale di diritto e procedura civile 1976, 1397-1431.

While the economic relevance of family enterprises has declined with the expansion of the large-scale market economy, it is interesting to note that the foundations of the legal discipline shares common roots and concerns with the case of ordinary family life. The family has always been a natural economic component not only in terms of collective needs and activities carried out to satisfy them but also in terms of its capacity to work together in a small scale economic unit. The family – whether undertaking a business activity or not – can be regarded as a firm, with internal division of labor and implicit norms for the division of the joint product.[40] The legal system provides guidelines and constraints for the content of such implicit norms. The case of family businesses is qualitatively analogous. The problems regularly posed by the regulation of the family are, however exacerbated in the event of a family-run enterprise, given the greater personal investment of each family member in the collective enterprise.

A. THE REGULATION OF THE FAMILY ENTERPRISE AFTER THE 1975 REFORM

In the history of the Italian economy, family enterprises have played a relatively important role. Historically, while many legal scholars analyzed the family-enterprise relationship, there had been relatively little jurisprudential or legislative treatment of the matter. The practical matters where eventually adjudicated in with a joint reading and application of the corporate law rules, contained in the fifth Book of the Civil Code, and of rules of family law, contained in the first Book of the Civil Code.

After the 1975 reform of family law, the Italian legal system distinguished three hypothesis: (a) individual enterprise; (b) marital enterprise; and (c) family enterprise. With respect to the case of individual business (i.e., *individual enterprise*) of a spouse, it is presumed that the assets of the business are managed individually and not by the family in common.[41]

Conversely, the case of *marital enterprise* refers to a business jointly run by both spouses.[42] This category includes businesses managed by both spouses, where it is likely that the *affectio coniugalis*, (i.e., the implicit norms in effect

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40. For an introduction, *see* GARY STANLEY BECKER, *'Family Economics and Macro Behavior'*, 78 Am. Econ. 1 (1988); BECKER, *supra* note 29, at 288; POSNER, *supra* note 36, at 139-160.

41. This applies to the following cases: (i) Article 320 of the Civil Code at paragraph V on the representation and administration of children's assets by their parents establishes that a business enterprise cannot be continued without the authorization of the juvenile court following a ruling by the judge acting as guardian; the judge acting as guardian can consent to the enterprise on a provisional basis until the court rules on the petition; (ii) a business run individually by a spouse (his or her personal property), under the common ownership system; and (iii) common ownership *de residuo* of the assets of a business run individually.

42. This includes the following cases: (i) under Article 177, Letter d of the Civil Code, businesses run by both spouses and established after the marriage; (ii) under Article 177, paragraph II of the Civil Code, in the case of businesses belonging to one of the spouses prior to the marriage but then run by both, common ownership concerns only profits and increases in profits.

within the family) prevails over the *societatis*.(i.e., the norms that would govern in a purely commercial business enterprise). The application of norms on the common ownership of assets applies.

Finally, the notion of *family enterprise* includes situations in which the extended family of the spouses (up to the second degree of relationship) jointly contribute to a common business enterprise. Under Article 230 bis of the Italian Civil Code and in the absence of agreements to the contrary, a family member who renders services in the family or in the family enterprise with continuity has a right to maintenance in keeping with the patrimonial status of the family. In proportion to the quantity and quality of the services rendered, he or she may share in profits and increases in profits and benefit from goodwill. Decisions on the deployment of profits and increases in profits as well as those pertaining to the extraordinary course of business, production policy and closedown are majority decisions made by the family members participating in the enterprise.[43]

8. ASPECTS OF FAMILY SUCCESSION

Several aspects of Italian succession law also are instrumental in maintaining optimal incentives in the relationship between family members and close relatives. The patrimony of the family is regarded as the accumulation of wealth and capital obtained through the joint efforts of the members of the family. The close members of the family unit are regarded as residual claimants of a portion of the family wealth, which constitutes the share of wealth subjected to the regime of forced heirship.

In this respect, the law of succession in Italy is highly distinctive from an Anglo-American standpoint, given its special emphasis on the patrimonial unity of the family. The patrimonial unity of the Italian family, protected through the above mentioned forced heirship provisions, is regulated in Book 2 of the Italian Civil Code. The Italian legal system reserves absolute succession rights to a limited group of individuals within the family, which include the surviving spouse, legitimate and illegitimate children, and, in the absence of children, lawful ascendants (Art. 536 C.CIV.).[44]

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43. According to the same Article 230 bis C.c., in all these settings, the work of a woman is considered equivalent to that of a man. Furthermore, the right of participation is not transferable unless the transfer occurs to the benefit of family members. It can be liquidated in money upon termination of the business for any reason. The payment can occur in more than one installment as determined by the court failing agreement.

44. On succession law issues relevant to the family, see generally, Commentario del diritto della famiglia, G.CIAN, G.OPPO, and A.TRABUCCHI (eds.), Padova 1992, Vol.5, with contributions by A.BURDESE (artt. 467-469, c.c.); G.GABRIELLI (artt. 536-548, c.c.); M.COSTANZA (artt. 566-579, c.c.); L.MENGONI (artt. 581-585, c.c.); L.CARRARO (art. 594, c.c.); U.CARNEVALI (art. 687); G.BENEDETTI (artt.692-697, c.c.); P.FORCHIELLO (artt. 737-751, c.c.); U.CARNEVALI (artt. 803-804 e 785, c.c.).

In the usual textbook presentations of Italian succession law, the patrimony of the *de cuius* is considered as made up of two main portions: (a) an indisposable share which is reserved by law for the sole benefit of close members of the family (see above listing); and (b) a disposable share which is transferred according to the express will of the deceased individual or, in the absence of a valid will, according to the rules of default succession of the Italian Civil Code (Arts. 565 through 586 C.Civ.).

The indisposable portion can be claimed by the forced heirs even against the express will of the deceased owner (Arts. 553 through 564 C. Civ.). If he or she dies intestate or if the will is found not to be valid, the intestate succession mechanism is triggered whereby additional family members may succeed to the disposable portion by law (in intestate succession, the inheritance is devolved to the individual's legitimate and illegitimate descendants, collaterals, other relatives to the sixth degree and, in the absence of any individual within those categories, to the State).

If the testator has willed (or previously donated) property whose value exceeds the value of the disposable portion, the rights of the forced heirs are regarded as violated. The Italian legal system permits legitimate heirs to reduce the dispositions (and life donations) made in favor of third parties in a sufficient amount to guarantee the full forced heirship value.[45] Given this premise on family succession, the following paragraphs consider the system of succession in the case of marriage breakdown.

A. ASPECTS OF SUCCESSION IN THE CASE OF SEPARATION

Separated spouses are considered on a par with the non-separated spouse for the purpose of the succession rules considered above (i.e., forced heirship, as per Art. 536 of the C. Civ.) directly apply in favor of the separated spouse. Conversely, the at fault separated spouse (i.e. the spouse to whom the cause of separation has been attributed) loses his or her rights to succession being entitled only to eventual alimony chargeable to the estate.

Both the separated spouse and the at fault separated spouse are on the same social security level in regards to transferable pensions (although the latter, ac-

45. When the testator disposes of a usufruct or life annuity with income exceeding that of the disposable share, the forced heirs to whom the naked ownership of the disposable portion or part of it has been assigned have the choice of carrying out this provision or abandoning naked ownership of the disposable portion. In the second case the legatee, in taking the abandoned disposable portion, does not acquire the status of heir. The same choice belongs to the forced heirs when the testator has disposed of the naked ownership of a share in excess of the disposable portion. If there is more than one forced heir, unanimous agreement is required for the fulfillment of the testamentary provision. The same rules apply if the usufruct, annuity or naked ownership is disposed of by gift.

cording to a unanimous jurisprudential opinion, are not acquired by right of *iure successionis* but of *iure proprio*).[46]

B. ASPECTS OF SUCCESSION IN THE CASE OF DIVORCE

The divorcee acquires the right to succession *mortis causa*, that consists of an alimony payment chargeable to the estate. From the social security point of view, divorced spouses are also entitled to transferable pensions and to a portion of the spouse's retirement lump sums payments. If they follow the death of a former spouse, these two latter patrimonial provisions are rights by *iure proprio*, not *iure successionis*.

With respect to the alimony chargeable to the estate after the death of the obligor, the court may attribute to the spouse previously entitled to the periodical payment of sums of money (under Art. 5) and who is in a state of need, a periodical allowance chargeable to the estate. This allowance may be granted after an evaluation of the sums already paid, the extent of financial need, the existence and amount of the survivor's pension, the wealth obtained through inheritance, the number and category of heirs and their financial status.

The transferable pension applies in the case of the death of a former spouse and in the absence of a surviving spouse possessing the prerequisites for obtaining the pension. The divorced spouse, if he or she has not contracted a new marriage and providing that he or she is the beneficiary of an allowance under Article 5, has the right to the survivor's pension as long as the pension agreement existed before the divorce was decreed.

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46. On the social security profiles of divorce, with reference to workers' compensation, pension and liquidation payments, *see* M.PERSIANI, Commento all'art. 38 Cost., in Commentario della Costituzione, BRANCA (ed.), Bologna-Roma 1979, 232 ff; F.P. ROSSI, La previdenza sociale,.in Enc. giur. del lavoro, G. MAZZONI (ed.), IX, Padova 1993, 1 ff.; S. PICCININNO, Pensione (rapporto di lavoro privato), in Enc. giur. Treccani, XXII, Roma 1990, 1 ff; M. PERSIANI, Diritto della previdenza sociale, Roma 1994, 1 ff; F.P. ROSSI, Pensione (diritto privato), in Enc. dir., XXXII, Milano 1982, 893; M. PERSIANI, La funzione della pensione di reversibilita' nella piu' recente giurisprudenza della Corte Costituzionale, in Giur. cost. 1980, 494 ff.; M. PERSIANI, Commento all'art.38 Cost., in Commentario della Costituzione, BRANCA (ed.), 239 ff .; P. PIERINI, La pensione ai superstiti, in Tratt. di previdenza sociale, BUSSI and PERSIANI (eds.), I, Padova, 1974, 431; G. FREZZA, Coniuge divorziato e trattamento pensionistico di reversibilita', in Giust. Civ. 1994, 2963; *Id.*, Diritto del divorziato alla pensione di reversibilita' e Convenzioni preventive di Divorzio, in Diritto di famiglia e delle persone, 1996, 15 ff.; E. QUADRI, Divorzio: verso quale riforma?, in Foro it. 1987, V, 72 ff.; *Id.*, Le aspettative pensionistiche: vecchi problemi e nuove soluzioni, in Foro it. 1988, I, 3523; Id. Divorzio nel diritto civile e internazionale, in Digesto, Discipline Privatistiche, VI, Torino 1991, 547 ff.; C. MAGGIO, L'attribuzione della pensione al coniuge divorziato e la novella n. 74 del 1987, in Giur. it. 1988, I, 1, 473; A. LUMINOSO, La riforma del divorzio: profili di diritto sostanziale (prime impressioni dulla L. 6 marzo 1987, n. 74), in Dir. famiglia 1988, II, 457; G. TRABUCCHI, L'attribuzione dei diritti previdenziali nel divorzio. L'esperienza tedesca del Versorgungsausgleich, in Riv. dir. civ. 1984, 463 ff; G. LANGENFELD, Der ehertrag, dtv. 1985, 100 ff; e dello stesso autore, Handbuch der Ehevertrage und scheidungsvereinbarungen, Munchen 1989, 180 ff.

Finally the divorced spouse, if he or she has not contracted a new marriage and providing that he or she is the beneficiary of an allowance under Article 5, is entitled to a percentage of the retirement lump sum payments owed to the deceased, even if this sum matured after the divorce was decreed.

9. CONCLUSION

Italian family law has undergone notable transformations since the comprehensive regulation provided by the 1942 Civil Code.[47]

First, family law issues have been subjected to the increasing scrutiny of the Italian Constitutional court. Since 1948, many ordinary family law issues have gradually acquired constitutional relevance due to their fundamental interrelationship with issues of equality and personal rights of the spouses.

Second, since 1970 Italian family law has embraced the concept of consecutive marriages (i.e., the clear contemplation of divorce in the discipline of marriage) revising the rules governing the physiological phase of the marriage relationships accordingly. Issues related to custody, child support, and property division have become an integrating and important part of the modern regulation of the family. Additional developments are likely to emerge in the evolution of Italian family law. The emerging notions of children autonomy and the increasing constraints posed on the parents' authority are likely to lead toward a re-conceptualization of the traditional notion of individual autonomy within the family.

Finally, the decline of the functional view of family is likely to corrode the understanding of what constitutes a "family" in the modern context. This in turn will lead to an expansion of the legal regime of the family, well beyond the traditional domains of family law.

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47. For a comparative perspective on the changing role of family law in the United States and Western Europe, *see* M.A. GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989).

The 1933 Concordat Between Germany and the Holy See: A Reflection of Tense Relations

RONALD J. RYCHLAK†

The artwork on the cover of Michael Phayer's new book, *The Catholic Church and the Holocaust, 1930-1965*, shows a faceless Catholic Cardinal next to a Nazi official. They are both standing on a prone Jew. On the background is written "AD 1933-1945 THE CONCORDAT." The picture is offensive, inflammatory, and factually incorrect.[1] It draws upon a misunderstanding that has plagued the Vatican and sullied the reputation of Pope Pius XI and his Secretary of State, Eugenio Pacelli, the future Pope Pius XII.

The terms of the concordat were not unfavorable to the Vatican, however negotiators for the Holy See, chiefly Secretary of State Pacelli, understood that Hitler's government would never abide by its commitments. As such, they were not anxious to sign, and the Germans had to resort to threats in order to force the agreement. From that point on, however, the Catholic Church used the concordat for all it was worth. Because of its terms, hundreds of thousands of baptismal certificates were used by Jewish people to avoid deportation, Catholic priests had legal authority to resist efforts to draft them into the Nazi party, and the Holy See had express terms on which to base its numerous objections regarding Nazi abuses. It is time for the details of this controversial agreement to be better understood.

THE BACKGROUND

Eugenio Pacelli was sent to Munich during the First World War as the Holy See's nuncio (ambassador) to the German state of Bavaria. Germany was one of the major participants in the war and was viewed by many as the primary aggressor. Pacelli was charged with presenting Pope Benedict XV's peace plan to German leaders and was trying to alleviate the suffering of the victims. He carried out the assignment, and while Benedict's plan did not directly lead to

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1. The Concordat was signed by Germany and the Holy See in 1933, but it remained in effect long after the demise of the Third Reich. On March 15, 1957, the German Constitutional Court upheld the continued validity of the concordat. *The Holocaust Project: Timebase 1949-1999, available at* http://www.antonart.com/shoah/1949-99t.htm.

peace, several of Benedict's suggestions were similar to those included in President Woodrow Wilson's 14-point plan, which eventually helped bring the hostilities to an end. Pacelli remained in Munich after the war, representing the Holy See's interests in the state of Bavaria. Later, he opened a second nunciature in Berlin and took on the additional duty of representing the Holy See in its dealings with the Weimar Republic.

Pope Pius XI (who succeeded Benedict in 1922) viewed concordats as the best way to safeguard and defend the freedom of worship for the Catholic faithful and the essential elements of Catholic life. Such agreements assured the Church the right to organize youth groups, make ecclesiastical appointments, run schools, and conduct religious services. Concordats also usually set forth terms of payment from the state to members of the clergy.

Under the leadership of Pope Pius XI, the Holy See reached agreement with 21 countries, including Czechoslovakia, Austria, Italy, Germany, Poland, Yugoslavia, Latvia, and Lithuania. As nuncio in Germany, Cardinal Pacelli was largely responsible for negotiating the agreements with Bavaria (1924), Prussia (1929), and Baden (1932). He also started negotiations with the Weimar Republic for a concordat with the whole of Germany and attempted to secure an agreement with the Soviet Union.[2] As a lawyer and diplomat, Pacelli agreed with the Pope that this was the best way of preserving the Church's freedom of action.[3]

In 1929, Pacelli was called back to Rome, elevated to the Cardinalate, and shortly thereafter he was named Vatican Secretary of State. In that position, Pacelli strove to be of one mind with Pope Pius XI. In fact, the Pontiff said, "Cardinal Pacelli speaks with my voice."[4] This was important, for at this same time in Germany, Adolf Hitler was coming to power.

The German constitution provided for an elected president who could appoint a chancellor. These were the two most powerful positions in the government. Paul von Hindenburg, a popular war hero, had been president since the mid-1920's, however Germany experienced an almost constant stream of new chancellors in the late 1920's. The six million jobless men in Germany woke up with little to do each morning, except for the daily routine of street fighting. This, in turn, led to political unrest and a continuing series of elections, and by the early 1930's, even Hindenburg's position was insecure.[5]

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2. CONTROVERSIAL CONCORDATS: THE VATICAN'S RELATIONS WITH NAPOLEON, MUSSOLINI, AND HITLER 2 (Frank J. Coppa, ed., Catholic Univ. of America Press) (1999).

3. Confidential Telegram from the Ambassador to the Holy See to the Foreign Ministry (Oct. 16) *in* DOCUMENTS ON GERMAN FOREIGN POLICY, 1918-1945, Series C (1933-1937), vol.3 at 3. (The Germans considered Pacelli more "realistic" than Pius XI, who was said to "often create serious obstacles").

4. ALDEN HATCH & SEAMUS WALSH, CROWN OF GLORY: THE LIFE OF POPE PIUS XII 109 (Hawthorn Books, Inc.) (1957); *see* OSCAR HALECKI & JAMES F. MURRAY, JR., PIUS XII: EUGENIO PACELI, POPE OF PEACE 65 (Farrar, Straus and Young, Inc.) (1954) ("closest possible co-operation").

5. IAN KERSHAW, HITLER: 1889-1936 HUBRIS 418-420 (W.W. Norton & Company) (1998).

In March 1932, Hitler forced a run-off with Hindenburg for the German presidency. Hindenburg won, but Hitler drew thirty-seven percent of the vote, and the Nazis were recognized as a national power. Unrest continued, and by the end of the year, Hindenburg was forced to turn to the one prominent political figure who could unite support behind his administration.

On January 30, 1933, after a month of secret meetings, Hitler was named chancellor of Germany. A month later (less than a week before new Reich elections were scheduled), the Reichstag building suspiciously burned to the ground.[6] President Hindenburg signed an emergency order suspending the constitutional guarantees of individual freedom, freedom of the press, private property, and the privacy of mail. Hundreds of people were incarcerated until the investigation (and election) was over. Berlin took on the appearance of a police state.

On March 5, 1933, with many of their opponents in jail or intimidated, the Nazis and their Nationalist allies won a majority in the Reichstag. One week later, the flag of the German Republic was lowered and the Empire banner was flown alongside the swastika. Hitler was establishing his Third Reich, which he said would follow in the tradition of the Holy Roman Empire and the unified German Empire established by Bismarck. It would, he said, last for 1,000 years. Its establishment was considered a "major defeat for the powers of Jewry, capital, and the Catholic Church."[7]

On March 23rd of that year, the newly-elected Reichstag adjourned, giving Hitler's cabinet the power to rule by decree. (In 1930 the Reichstag had granted Chancellor Heinrich Brüning's request to govern by means of emergency powers, setting the precedent.) An Enabling Act granted Hitler dictatorial powers for an initial period of four years, which made permanent the authority he had already assumed with the emergency order in February.[8] President Hindenburg technically still had the authority to dismiss the chancellor, but no one thought that this was a realistic possibility. In his last address to the disbanding Reichs-

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6. An entry in Goebbels' diary suggests that the burning of the Reichstag surprised Hitler's inner circle. *Time*, Sept. 14, 1987, at 44 (A young man named Marinus van der Lubbe, identified as a Communist, was arrested for arson. He would receive the death sentence in December and be executed a month later).

7. THEODORE S. HAMEROW, ON THE ROAD TO THE WOLF'S LAIR: GERMAN RESISTANCE TO HITLER 12 (Belknap Press) (1997).

8. PETER HOFFMAN, STAUFFENBERG: A FAMILY HISTORY, 1905-1944 61 (Cambridge Univ. Press) (1995) (The Catholic Ceneter Party, including former Chancellor Heinrich Brüning, voted in favor of Hitler's Enabling Bill of 1933); JOHN CORNWELL, HITLER'S POPE: THE SECRET HISTORY OF PIUS XII 135-136 (Viking Press, New York) (1999). This is at least partially due to pressure from the Nazis, who seriously weakened and almost eliminated the Center Party in March 1933. On July 5, 1933, two weeks before the concordat was signed, the party voluntarily dissolved in an effort to stop Nazi brutality. Telegraph from Mr. Newton (Berlin) to Sir J. Simon (July 7, 1933), DOCUMENTS ON BRITISH FOREIGN POLICY 1919-1939 (Her Majesty's Stationary Office) (E.L. Woodward, ed., London 1956)(party members believe that dissolution will end arrests, sequestration, and discrimination against the Catholic press); Peter Gumpel, *Cornwell's Cheap Shot at Pius XII*, CRISIS, Dec. 1999 at 19, 21.

tag, Hitler announced that "treason toward the nation and the people shall in the future be stamped out with ruthless barbarity."[9]

Hitler's first important international agreement was signed on June 7, 1933. Italy, France, the United Kingdom, and Germany signed "the Four Power Pact," which stressed the "entente, collaboration and solidarity" of those nations.[10] Many in the Vatican were hopeful that this agreement signified a period of assured peace.[11] One month later, the Holy See also signed an agreement with Germany.

SIGNING THE CONCORDAT

The Holy See's Concordats with the individual German states of Bavaria, Prussia, and Baden had little meaning now that Hitler had centralized power and control over Germany. Besides that, the Church had been seeking an agreement with Germany for well over a decade.[12] In fact, Pacelli had worked toward a concordat ever since he was appointed Papal Nuncio to Bavaria. Now, however, the Church found itself in a bind. Hitler was happy to accept all of the Church's long-standing demands, because he never intended to keep his word. ("I will be one of the few men in history who have deceived the Vatican," he boasted shortly before signing the concordat.)[13] Hitler's negotiator, Former Chancellor Franz von Papen, made it quite clear that if the Church were to reject the *Führer's* offer to meet the Vatican's existing demands, Hitler would simply publish his own terms and blame the Pope for having rejected a very favorable treaty.[14] In a private conversation with Ivone Kirkpatrick, British

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9. CHRONICLE OF THE 20TH CENTURY 418 (C. Daniel, ed., Chronicle Publications) (1986).

10. PINCHAS E. LAPIDE, THREE POPES AND THE JEWS: POPE PIUS XII DID NOT REMAIN SILENT 101 (Hawthorn Books) (1967).

11. HALECKI & MURRAY *supra* note 4, at 72.

12. Memorandum from Ambassador Bergen to Foreign Minister Neurath (July 3, 1933) in DOCUMENTS ON GERMAN FOREIGN POLICY 1919-1945, Series C (1933-1937), vol. 1, no. 351.

13. Giorgio Angelozzi Gariboldi, Pius XII Hitler e Mussolini: Il Vquaticano fra le dirrature 52 (Mursia) (1995).

14. On June 2, 1945, Pope Pius XII [Pacelli] said: "As the offer [to negotiate] came from the Reich Government, the responsibility of a refusal would have devolved upon the Holy See." Lapide, *supra* note 10, at 101. Vice Chancellor Papen explained his thinking in a letter to the German ambassador to the Holy See. When it became apparent in January, 1932 [sic] that the social collapse of Germany could be prevented only by calling Hitler to power, it was clear for anyone with insight into the situation that assumption of power by the National Socialist movement would necessarily raise a number of fundamental problems. It was clear, above all, that the attitude of the National Socialist movement toward German Catholicism would be one of active opposition. For political Catholicism had fought the movement most bitterly for the preceding 10 years–with the important assistance of the authority of the bishops, at least some of whom had pronounced an anathema against the ideological content of the National Socialist doctrine and had moreover taken action against its followers with the most serious weapons of ecclesiastical disciplinary punishment. It went therefore without saying that all energies had to be concentrated upon overcoming as far as possible the ideological differences between German Catholicism and the National Socialist movement. This was the basic conviction inspiring my ardent desire to reach as quickly as possible a new arrangement of affairs between the Reich and the Holy See.

Ambassador to the Vatican, Pacelli expressed "disgust and abhorrence" of Hitler's reign of terror. "I had to choose between an agreement on their lines," he said on August 11, 1933, "and the virtual elimination of the Catholic Church in the Reich."[15] Kirkpatrick reported to the British Foreign Office:

> These reflections on the iniquity of Germany led the Cardinal to explain apologetically how it was that he had signed a Concordat with such people. A pistol, he said, had been pointed at his head and he had no alternative. The German government had offered him concessions. Concessions, it must be admitted, wider than any previous German Government would have agreed to, and he had to choose between an agreement on their lines or the virtual elimination of the Catholic Church with in the Reich. Not only that, but he was given no more than one week to make up his mind. . . . If the German Government violated the Concordat–as they were certain to do –the Vatican would have at least a treaty on which to base a protest.[16]

At a party in Rome, one of Pacelli's old friends said that it was good that Germany now had a strong leader to deal with the Communists. Pacelli responded: "Don't talk such nonsense. The Nazis are infinitely worse."[17] The Church did not view concordats as endorsements of the existing government.[18] In fact, in two separate articles that were published in *L'Osservatore Romano* in early July 1933, Pacelli expressly rejected the contention that the concordat was a recognition of the Nazi regime.[19] Pius XI explained his thinking in 1937, in his encyclical, *Mit brennender Sorge* (*With Burning Anxiety*):

> When, in 1933, We consented. . . to open negotiations for a concordat, We were prompted by the desire. . . to secure for Germany the freedom of the

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Vice Chancellor to Ambassador Bergen (April 7, 1934) in DOCUMENTS ON GERMAN FOREIGN POLICY 1918-1945, Series C (1933-1937), vol. II, no. 383; OFFICE OF UNITED STATES CHIEF OF COUNSEL 935-36, vol. II.

15. Mr. Kirkpatrick (The Vatican) to Sir R. Vansittart (Aug. 19, 1933) in DOCUMENTS ON BRITISH FOREIGN POLICY 524, Series II, vol. V, no. 352 (1956). RALPH STEWART, POPE PIUS XII AND THE JEWS 17 (St. Martin de Porres Dominican Community & St. Joseph Canonical Foundation) (1999).

16. *Id.*; *see also* John Jay Hughes, *The Pope's Pact with Hitler*, 17 J. OF CHURCH AND ST. 63 (1975) (arguing that the Vatican had no real choice but to negotiate).

17. VINCENT A. LAPOMARDA, THE JESUITS AND THE THIRD REICH, no.36, 240 (Edwin Mellen Press) (1989) (Pacelli viewed Hitler's victory as "more fatal than a victory of the socialist left").

18. In 1929, Pius XI said: "Where there is a question of saving souls, We feel the courage to treat with the Devil in person." PETER NICHOLS, THE POPE'S DIVISIONS: THE ROMAN CATHOLIC CHURCH TODAY 282 (Faber & Faber) (1981); *see* Kevin E. Schmiesing, *Dealing with Dictators*, CRISIS at 47 (Oct. 1999) (reviewing CONTROVERSIAL CONCORDATS: THE VATICAN'S RELATIONS WITH NAPOLEAN, MUSSOLINI, AND HITLER (Frank J. Coppa, ed., Catholic Univ. of America Press) (1999) ("If anyone thought that the signing of concordats meant that the Vatican thereby became a partner, or pawn, of the dictator in question, these essays conclusively demolish the idea") *Id.*

19. CONTROVERSIAL CONCORDATS, *supra* note 2, at 141; J. DEREK HOLMES , THE PAPACY IN THE MODERN WORLD 1914-1978 105 (Crossroad) (1981); James Carroll, *The Holocaust and the Catholic Church*, THE ATLANTIC MONTHLY, October 1999 at 107, 109; *see* HENRI DANIEL-ROPS, A FIGHT FOR GOD: 1870-1939 317 (E.P. Dutton and Co.) (1965) (The Vatican's position on this matter was known to historians during the war).

> Church's beneficent mission and the salvation of the souls in her care, as well as by the sincere wish to render the German people a service essential for its peaceful development and prosperity. Hence, despite many and grave misgivings, We then decided not to withhold Our consent for We wished to spare the Faithful of Germany. . . the trials and difficulties they would have had to face. . . had the negotiations fallen through. It was by acts that We wished to make it plain, that the pacific and maternal hand of the Church would be extended to anyone who did not actually refuse it.[20]

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20. *Mit brennender Sorge*, paragraph 3. Unlike most encyclicals, which are written in Latin, *Mit brennender Sorge* was written in German for wider dissemination in that country. (120,000 copies were distributed in the Münster diocese alone.) MICHELE MACCARRONE, IL NAZIONALSOCIALISMO E LA SANTA SEDE 163 (Studium) (1947). It was smuggled out of Italy and distributed throughout Germany secretly by an army of motorcyclists, where it was copied and distributed to parish priests to be read from all of the pulpits on Palm Sunday, March 12, 1937. No one who heard the Pontifical document read in church could have any illusion about the gravity of these statements or the significance of its having been written. According to Dr. Duncan-Jones, the Anglican Dean of Chichester, the encyclical was of "shattering force." JAMES A DARRAGH, THE POPE AND FASCISM 15 (John S. Burns & Sons) (1944) (quoting DUNCAN-JONES, THE STRUGGLE FOR RELIGIOUS FREEDOM IN GERMANY 225). The only reason *Mit brennender Sorge* was read to anyone was because the Nazis were caught off guard. It was not published in German newspapers. An internal German memorandum dated March 23, 1937, called the encyclical "almost a call to do battle against the Reich government." DOCUMENTS ON GERMAN FOREIGN POLICY 1918-1945, Series D (1937-1945), vol. I, no. 633. All available copies were confiscated (though it continued to be passed from one individual to another). German printers who had made copies were arrested and the presses were seized. Those convicted of distributing the encyclical were arrested, the Church-affiliated publications which ran the encyclical were banned, and payments due to the Church under the terms of the concordat were reduced. In fact, the mere mention of this encyclical was a crime in Nazi Germany. ERIC A. JOHNSON, NAZI TERROR: THE GESTAPO, JEWS, AND ORDINARY GERMANS (Basic Books) (1999); CAMILLE CIANFARRA, THE VATICAN AND THE WAR (E.P. Dutton & Co.) (1944); HOLMES *supra* note 19, at 113; Lothar Groppe, *The Church and the Jews in the Third Reich*, FIDELITY, November 1983, at 21. Nazi official Reinhard Heydrich's belief that the Vatican was the archenemy of National Socialism was only strengthened with the release of *Mit brennender Sorge*. DAVID ALVAREZ & ROBERT A. GRAHAM, NOTHING SACRED: NAZI ESPIONAGE AGAINST THE VATICAN 1939-1945 64 (Frank Cass) (1997). The day following the release of *Mit brennender Sorge*, the Nazi press struck back. The *Völkischer Beobachter* carried a strong counterattack on the "Jew-God and His deputy in Rome." Lapide *supra* note 10, at 110; ROBERT MARTIN, SPIRITUAL SEMITES: CATHOLICS AND JEWS DURING WORLD WAR TWO (Catholic League Publications) (1983). *Das Schwarze Korps* called it "the most incredible of Pius XI's pastoral letters; every sentence in it was an insult to the new Germany." *Id.* Groppe *supra* at 21. The German ambassador to the Holy See was instructed not to take part in the solemn Easter ceremonies, and German missions throughout Europe were informed by the Nazi Foreign Office of the "Reich's profound indignation." They were also told that the German government "had to consider the Pope's encyclical as a call to battle. . . as it calls upon Catholic citizens to rebel against the authority of the Reich." *Id.* Hitler verbally attacked the German bishops at a mass rally in the Berlin *Lustgarten*. THE CHURCH AND THE JEWS IN THE THIRD REICH (Fidelity) (Nov. 1983) at 21. German officials also complained about "the Vatican's harsh policy toward the Third Reich." DOCUMENTS ON GERMAN FOREIGN POLICY 1918-1945, Series D (1937-1945), vol. I, no. 644. Göring gave his own two-hour harangue and announced the resumption of morality trials against Catholic clergy. Cornwell, *supra* note 8, at 183. Hitler dictated a letter to the Pope, complaining that the Vatican had gone to the people instead of coming to him. Pacelli sharply rebuffed German protests, noting that the German government had not been cooperative in the past when the Vatican complained about various matters. HOLMES, *supra* note 19 , at 101. The Nazis waged a propaganda campaign against the Church and subjected several priests to currency or morality trials. At Koblenz, 170 Franciscans were prosecuted for corrupting the youth by turning their monastery into a

As others have noted, the concordat was necessary to protect Catholics in Germany from being brutalized.[21]

The modern tradition of the Vatican is that if relations, no matter how strained, are maintained, there is a possibility of influencing the government and of protecting Catholic interests. Without some form of relationship, the Holy See could not effectively protect and minister to its people. As Pius XI told a meeting of bishops in Rome in May 1933: "If it is a matter of saving a few souls, of averting even graver damage, we have the courage to negotiate even with the devil."[22]

The earlier concordats with the various German states were incorporated into a new concordat covering the whole nation, which was signed on July 20, 1933, following consultation with the German bishops.[23] From the Vatican's perspective, at least on paper the German concordat was surprisingly favorable, one of the best that it had ever signed.[24] The State essentially met all of the demands set forth by the Church, including: independence of Catholic organizations, freedom of the Church, freedom for Catholic schools, free communication with Rome, Church control over religious orders and ecclesiastical property, and religious education in public schools (taught by teachers approved by the bishop). Only minimal restrictions were placed on ecclesiastical appointments (bishops were to be appointed by Rome, subject to political objections by the Reich Government; clergy were to be appointed by bishops, the only requirement being that they be German nationals). The Vatican also received the long-sought right to maintain theological faculties at state institutions and to establish seminaries. In short, "the Catholic religion in Germany was placed on an even foot-

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"male brothel," and a Hitler Youth film was circulated that supposedly showed priests dancing in a bordello. THOMAS BOKENKOTTER, A CONCISE HISTORY OF THE CATHOLIC CHURCH 370-71 (Doubleday & Co.) (1966).

21. In June 1933, after negotiations for the concordat were well underway, the Archbishop of Munich, Cardinal Michael von Faulhaber, cautioned that Hitler wanted an agreement with the Vatican for propaganda purposes. He said that Hitler "sees what a halo his government will have in the eyes of the world if the Pope makes a treaty with him.'" He argued that Catholic people would not understand the Holy See making a treaty with the Third Reich when "a whole row of Catholic officials are sitting in prison or have been illegally ejected." HOLMES, *supra* note 19, at 107. Later, when Faulhaber learned all of the reasons why the Church had agreed to the concordat, he said: "With the concordat we are hanged, without the concordat we are hanged, drawn and quartered." *Let's Look at the Record,* INSIDE THE VATICAN (Oct. 1999) at X. Faulhaber became an outspoken opponent of Hitler, and support from Pius was cited as a reason for his outspokenness. ANDRE FABERT, POPE PAUL VI 36 (Monarch Books, Inc.) (1963); HAMEROW, *supra* note 7, at 75-76; MARY ALICE GALLIN, GERMAN RESISTANCE TO HITLER: ETHICAL AND RELIGIOUS FACTORS 210 (Catholic Univ. of America Press) (1961).

22. LAPIDE, *supra* note 10, at 101.

23. Peter Gumpel, *Cornwell's Cheap Shot at Pius XII,* CRISIS, December 1999, at 19, 21.

24. *See* MARY ALICE GALLIN, GERMAN RESISTANCE TO HITLER: ETHICAL AND RELIGIOUS FACTORS 210 (The Catholic University of America Press) (1961) (arguing that the concordat helped the Vatican by providing it with a legal basis for its arguments); John Jay Hughes, *The Pope's Pact with Hitler,* 17 J. OF CHURCH AND ST. 63 (1975) (without the concordat, Hitler would have been able to persecute the Church without restriction).

ing with the Protestant faith and was guaranteed the same rights and privileges as the latter."[25] Thus, more than a decade after Pope Pius XI first made these demands, the Vatican at least received the promise of what it wanted, not just in one section of the Reich, but throughout the entire country.

According to the French Ambassador at the Vatican, François Charles-Roux, neither Pacelli, nor the Pope, were under any illusions about Hitler's word. Pacelli, however, told him: "I do not regret our concordat with Germany. If we did not have it, we would not have a foundation on which to base our protests."[26] In any event, as Pacelli joked to a British diplomat, the National Socialists "would probably not violate all of the articles of the concordat at the same time."[27]

The existence of a concordat is sometimes mistakenly assumed to represent a close relationship between the government and the Holy See. However, this is not the case. In fact:

> This is the precise opposite of the fact; a country which was on ideally good terms with Rome would not need to have a Concordat at all; and the existence of such a document implies that the two signatory parties are, in a more or less degree, distrustful of each other's intentions. It is an attempt to regularize a difficult situation by tying down either party, on paper, to a minimum of good behavior. . . . *Nothing could be more absurd than to represent [the Concordat of July 1933] as if it meant that the New Germany and the Vatican were working hand in hand.*[28]

The concordat between Germany and the Holy See was ignored by Hitler from the beginning. As such, it failed in its basic purpose of protecting German Catholics.[29] Before long, however, it was being used by the Holy See as a

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25. F. LEE BENNS, EUROPE SINCE 1914 IN ITS WORLD SETTING 266 (Appleton, Century, Crofts) (1949).

26. Mr. Kirkpatrick (The Vatican) to Sir R. Vansittart, (Aug. 19, 1933); DOCUMENTS ON BRITISH FOREIGN POLICY, SERIES II, vol. V, London, 1956, no. 342, p.524.

27. *Id.*

28. DARRAGH, *supra* note 20, at 15. (quoting Knox, *Nazi and Nazarene* at 9) (emphasis in original). *See also* Daniel-Rops, *supra* note 19, at 308.

29. A public statement made by Hitler about the rights of the Catholic Church was made official policy with the signing of the concordat. It read:

> 1. The dissolution of those Catholic organizations which are recognized by the present treaty and which were dissolved without instructions by the government of the Reich, is to be rescinded immediately.
>
> 2. All coercive measures against priests and other leaders of the Catholic organizations are to be annulled. A repetition of such measures in the future is inadmissible and will be punished in conformity to the existing laws.

GUENTER LEWY, THE CATHOLIC CHURCH AND NAZI GERMANY 77 (McGraw-Hill) (1964). The statement ended with an expression of hope that the problems involving the Protestant Churches would also soon be solved.

weapon in its battle against the against the Nazis. Hitler would later vow to "put a swift end" to the concordat.[30]

CHURCH AND POLITICS

John Cornwell, in his book *Hitler's Pope: The Secret History of Pius XII*, argues that Pacelli, as nuncio and Secretary of State, withdrew support from the Catholic Center Party in Germany, transferring power to the Holy See. In particular, Cornwell faults Pacelli for having negotiated the 1933 concordat with Germany. This agreement, according to Cornwell, silenced political priests and bishops who might have held Hitler in check.[31]

The Catholic Center Party had advanced the Church's interests in Germany until Hitler's rise, but by early 1933, he had largely stripped it of power.[32] (In fact, the party had considered forming a coalition with the Nazis in 1932, just for survival.)[33] It was almost eliminated by the Nazis in March 1933.[34] For the next three months, the Nazis brutalized the remaining members of the Center Party as well as other Catholics. On July 5, 1933, two weeks before the concordat was signed, the party membership decided to dissolve voluntarily in the hope that this would stop the persecution.[35] Reportedly, when Pacelli heard the news of it being dissolved, he said:

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30. Once the war is over we will put a swift end to the Concordat. It will give me the greatest personal pleasure to point out to the Church all those occasions on which it has broken the terms of it. One need only recall the close co-operation between the Church and the murderers of Heydrich. Catholic priests not only allowed them to hide in a church on the outskirts of Prague, but even allowed them to entrench themselves in the sanctuary of the altar. HITLER'S SECRET CONVERSATIONS 1941-1944, 449 (Octagon Books) (1972).

31. According to John Cornwell, Pacelli (not Pope Pius XI) agreed to the concordat in the interest of imposing papal absolutism on the Church in Germany. As an initial matter, it should be noted that the 1917 Code applied to German Catholic churches before the concordat was signed. The Code, being a compilation of Church teaching over the years, was binding as soon as it was approved by the Holy See. In fact, the contents of the Code (which came from papal statements, encyclicals, and other authoritative teachings) was binding even before the Code itself was completed. Thus, contrary to Cornwell's claim that the Code was at the heart of this agreement, the concordat itself does not even mention the 1917 Code.

32. The Belgian Ambassador in Rome reported that the party had not consulted Rome about its decision to dissolve, and that Pacelli was irritated about how it all took place, believing that the party had disappeared without dignity. STEWART A. STEHLIN, WEIMAR AND THE VATICAN 1919-1933: GERMAN-VATICAN DIPLOMATIC RELATIONS IN THE INTER WAR YEARS 438 (Princeton Univ. Press) (1983); *see also* Telegraph from Mr. Newton (Berlin) to Sir J. Simon (July 5, 1933); DOCUMENTS ON BRITISH FOREIGN POLICY 1919-1939; *See also* Robert Leiber, *Reichskonkordat und Ende der Zentrumspartei*, STIMMEN DER ZEIT: MONATSCHRIFT FÜR DAS GEISTESLEBEN DER GEGENWART 213 (Dec. 1960).

33. CORNWELL, *supra* note 8, at 128.

34. Peter Gumpel, *Cornwell's Cheap Shot at Pius XII*, CRISIS 19, 21 (1999).

35. *Id. See* Cheetam at 283-4; *see also* Kershaw at 478; *See also* Robert Leiber, *Reichskonkordat und Ende der Zentrumspartei*, STIMMEN DER ZEIT: MONATSCHRIFT FÜR DAS GEISTESLEBEN DER GEGENWART 213 (Dec. 1960). Telegraph from Mr. Newton (Berlin) to Sir J. Simon, (July 7, 1933) in DOCUMENTS ON BRITISH FOREIGN POLICY 1919-1939 (Her Majesty's Stationary Office)(E.L. Woodward, ed., London) (1956); CONTROVERSIAL CONCORDATS, *supra* note 2, at 135 (citing Konrad Repgen,

> Too bad that it happened at this moment. Of course the party couldn't have held out much longer. But if it only had put off its dissolution at least until after the conclusion of the concordat, the simple fact of its existence would have still been useful in the negotiations.[36]

As reflected by this statement to the press, the party was not negotiated away with the concordat. There was, however, a concession regarding political activity. Pius XI, like all Popes since at least Pius X (1903-1914), agreed with removing clergy from direct political involvement.[37] (Pope John-Paul II continues with this approach today.)[38] Pius thought that the Church could be more effectively defended by the terms of the concordat than by parliamentary action.[39] Moreover, the Pope was concerned about the legitimacy of direct political activity by the clergy, and he looked with more favor on the lay organization, Catholic Action.[40] As a result, he agreed to a term barring German priests and bishops from involvement in party politics.

The relevant provision, paragraph 32 of the concordat, said: "the Holy See will prescribe regulations which will prohibit *clergymen and members of religious institutes* from membership in political parties and from working on their behalf" (emphasis added).[41] The supplemental protocol relating to this paragraph said: "The conduct enjoined upon the pastors and members of religious institutes in Germany does not entail any limitation of the prescribed preaching

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Dokumentation Zur Vatikanischen Strategie beim Reichskonkordat, VIERTELJAHRSHEFTE FÜR ZEITGESCHICHTE 31 (1983).

36. STEHLIN, *supra* note 32, at 438.

37. *Id.* at 46-7. (Pius X "believed the mixture of politics and religion to be the most hybrid and dangerous possible for the Church."). Modern Church teaching agrees with him. The Second Vatican Council, in its PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (*Gaudium et Spes*) said: "At all times and in all places, the Church should have the true freedom to. . . pass moral judgment even in matters relating to politics. The ability of the clergy–of the Church itself–to become involved in politics is limited, however, to situations in which "the fundamental rights of man or the salvation of souls requires it."

38. In 1988, John Paul II wrote: "The Church does not have technical solutions to offer for the problem of underdevelopment as such. . . . For the Church does not propose economic and political systems or programs, nor does she show preference for one or the other, provided that human dignity is properly respected and promoted, and provided she herself is allowed the room she needs to exercise her ministry in the world." ON SOCIAL CONCERNS (*Sollicitudo Rei Socialis*) (1998).

39. *See generally*, ANTHONY RHODES, THE VATICAN IN THE AGE OF THE DICTATORS:1922-45, HODDEN AND STOUGHTON (London, Sydney, Auckland & Toronto) (1973). Secret Memorandum from Vice Chancellor Papen to Chancellor Hitler (July 2, 1933) in DOCUMENTS ON GERMAN FOREIGN POLICY 1918-1945, Series C (1933-37), vol. I, no. 347.

40. Pope Pius XI wrote *Quadragesimo Anno* in 1931. This was the first papal encyclical to use the term "social justice." Many modern Catholics equate that term with political action, but according to that encyclical, the Church has the right and duty "to interpose her authority. . . in all things that are connected with the moral law." This right and duty, however, is limited to issues of morality or natural law. Regarding political issues unrelated to morality, Pius wrote: "the Church holds that it is unlawful for her to mix without cause in these temporal concerns." Thus, two years before Hitler's rise to power, Pius XI set forth his thinking on the Church's political involvement.

41. *See*, RONALD J. RYCHLAK, HITLER, THE WAR, AND THE POPE 43-69 (2000).

and interpretation of the dogmatic and moral teachings and principles of the Church."[42]

Despite the removal of Catholic clergy from direct participation in the political process, under this terminology, they were not restricted from making statements that went to basic human rights, and many did make such statements about the Nazi government.[43] Moreover, Catholic laypersons were in no way restricted from political activity by the terms of the concordat.[44] The agreement with Germany was very similar in this respect to the Lateran Treaty signed with Italy in 1929[45] and to instructions given to the French clergy in the mid-1920s.[46] The Church did not in any way agree to restrictions on its right to involve itself in politics whenever "the fundamental rights of man or the salvation of souls requires it."[47] As such, the Catholic clergy was not silenced.[48]

THE IMPACT OF THE CONCORDAT

On July 25, just five days after Germany ratified the concordat, the Reich government announced a sterilization law designed to achieve "perfection of the Aryan race."[49] Germans who were less than perfect were to be sterilized for the glory of Reich. Sterilization was, of course, in direct conflict with Catholic

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42. The entire concordat is reprinted in the Appendix. According to one scholar, "Pacelli insisted that [a ban on clergy participation in party politics] was appropriate only in predominantly Catholic countries, and the Vatican resisted firmly on this point until the dissolution of the trade unions." WILLIAM L. PATCH, JR. HEINRICH BRÜNING AND THE DISSOLUTION OF THE WEIMAR REPUBLIC 302 (Cambridge Univ. Press 1998).

43. Article 16 of the concordat contained a pledge required of new bishops that they "swear and promise to honor the constitutional government and to cause the clergy of my diocese to honor it." Article 32 of the supplementary protocol, however made clear that the German clergy was not prohibited or even limited in preaching about "the dogmatic and moral teachings and principles of the Church." PERSECUTION OF THE CATHOLIC CHURCH IN THE THIRD REICH 552 (London, Burns Oats 1940); *See* CONTROVERSIAL CONCORDATS *supra* note, 2 at 409; Lothar Groppe, *The Church's Struggle with the Third Reich, at* http://www.sterling.holycross.edu/departments/history/vlapomar/persecut/mazi.html (originally appeared in IBW JOURNAL) (Alan F. Lacy trans.).

44. The political restrictions, set forth in paragraph 32 of the concordat, apply only to "clergymen and members of conventional orders."

45. RYCHLAK, *supra* note 41, at 35-41.

46. CORNWELL, *supra* note 8, at 172.

47. *See* THE PERSECUTION OF THE CATHOLIC CHURCH IN THE THIRD REICH at 522 (reprinting the supplementary protocol); THE SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD (*Gaudium et Spes*); *see also* PIUS XI, ON THE RECONSTRUCTION OF THE SOCIAL ORDER (*Quadragesimo Anno*) (1931).

48. In 1943, the German bishops issued a statement saying: "The extermination of human beings is *per se* wrong, even if it is purportedly done in the interests of society; but it is particularly evil if it is carried out against the innocent and defenseless people of alien races or alien descent." Marc Saperstein, *Moments of Crisis in Jewish-Christian Relations,*43 SCM PRESS/TRINITY PRESS INTERNATIONAL (London/Philadelphia)(1989). Since this type of statement related to morality, it was not restricted by the terms of the concordat. Hitler verbally attacked the German bishops at a mass rally in the Berlin *Lustgarten. The Church and the Jews in the Third Reich,* FIDELITY, Nov. 1983 at 21.

49. CHRONICLE OF THE 20TH CENTURY, *supra* note 9, at 153.

teaching about the sanctity of human life, including Pius XI's recent encyclical, *Casti Connubii* (*On Chastity in Marriage*, 1930).[50] Prominent Catholic clergy immediately denounced the program.[51] On July 26 and 27, *L'Osservatore Romano* carried a two-part article by Pacelli in which he vehemently denied any assertion that the concordat indicated approval of National Socialism and instead explained that it was intended to protect the Church's interests in Germany.[52]

Regardless of any Nazi doctrine to the contrary, the Church would not accept the view that a person who had been duly converted to Catholicism was still a Jew. To the Church, the issue was one of faith, not race. Accordingly, as part of the concordat, German officials agreed to regard baptized Jews as Christians. This ended up being one of the most important agreements between the Vatican and the Third Reich–one that saved the lives of thousands of Jews, officially baptized or not.[53]

On July 30, the Nazis took the first steps to dissolve the Catholic Youth League.[54] This same month they also began serious enforcement of their racial laws. Jewish people were fired from civil service jobs. Within a month Nazis were arresting large numbers of Jews and political prisoners (primarily Communists and Socialists) and sending them to concentration camps for infractions such as insulting the state, offending storm troopers, or consorting with German girls. Hitler's chief negotiator Vice Chancellor Franz von Papen (a Catholic) wrote in 1945: "Hitler sabotaged the Concordat."[55]

On August 28, 1933, the German Catholic bishops issued a joint pastoral letter to be read from the pulpits of all Catholic Churches in the nation. Quoting from the Gospel of Matthew, the letter said that: "the messengers of Christianity are to be the 'salt of the earth,' and 'the light of the world,' and 'should let their

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50. *See* CORNWELL, *supra* note 8, at 153.

51. BENNS, *supra* note 25, at 266.

52. *See* CORNWELL, *supra* note 8, at 130-1.

53. Because of this provision, when National Socialists argued that someone baptized into the Catholic faith remained a Jew, it was not just an assault on the Church's authority, it was a breach of the concordat. As such, the Church had a legal basis for its argument to the contrary. Tens of thousands of false baptismal certificates were handed out by Church authorities and used by Jewish people to avoid deportation. Sometimes Church officials were embarrassed about how quickly they would convert Jews to Catholicism for the purpose of avoiding persecution. One small church in Budapest averaged about four or five conversions a year before the occupation. In 1944, those numbers shot up dramatically. Six were converted in January, 23 in May, 101 in June, over 700 in September, and over 1,000 in October. Three thousand Jews became Catholics at this one small church in 1944. INVESTIGATIVE REPORTS (Bill Kurtis, A&E Network). The Nazi occupying forces soon recognized that these conversions were being done only to avoid deportation, so they started persecuting the "converts." *See* ROBERT A. GRAHAM, THE POPE AND POLAND IN WORLD WAR TWO (Veritas) (1968). Since it no longer assured protection, the flood of conversions dried up.

54. Earlier that summer, while the negotiations were still pending, the Nazis had attacked and beaten Catholic youth at a Munich rally. CORNWELL, *supra* note 8, at 146.

55. OFFICE OF UNITED STATES CHIEF OF COUNSEL, *supra* note 14, at 937.

light shine before the people.' The Church should be as 'a city on the hill,' visible from afar in the life of the people."[56] Hitler responded on September 11 that he was not against Christianity itself, "but we will fight for the sake of keeping our public life free from those priests who have failed their calling and who should have become politicians rather than clergymen."[57] Four days later, proving that words had no effect on the Nazis, they passed the Nuremberg Laws, which defined German citizenship and paved the way for later anti-Semitic laws.[58]

As the National Socialists became more confident of their control in Germany, persecution of Catholic officials increased. In May and June of 1934, S.S. Chief Heinrich Himmler circulated a fifty page memorandum on the religious bodies in the Reich. Under the heading "Hostile Clergy," it reported:

> The most dangerous activity of countless Catholic clergy is the way in which they 'mope about', spreading despondency. Favorite topics are the 'dangers of a new time', 'the present emergency', 'the gloomy future.' Prophecies are made about the speedy downfall of National Socialism or at the very least mention is made of the transience of all political phenomena, compared with the Catholic Church which will outlive them all. National Socialist achievements and successes are passed over in silence.

There is thus a deliberated undermining of the very basis of the National Socialist programme of reconstruction, the people's trust in the leadership of the state.[59]

Before long Hitler had anti-Nazi Catholic priests imprisoned on immorality charges. Hundreds of priests and Catholic officials were arrested or driven into exile, while others were accused of violating currency regulations or morality rules (including sexual abuse of minors).[60] Erich Klausener, leader of Catholic Action, was murdered in a June 1934 purge. Between April 1, 1933 and June 1936, the Vatican filed more than fifty protests against the Nazis. Even before the concordat was ratified, the Vatican had made many objections to German officials regarding treatment of the Church.[61] (German foreign secretary Joachim von Ribbentrop testified at Nuremberg that he had a "whole deskfull of protests" from Rome.)[62] The first one, dated April 1, 1933, regarding the anti-

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56. CORNWELL, *supra* note 8, at 179 (calling this a "hollow exhortation").

57. *Id.*

58. *Id.* at 179-80.

59. PETER MATHESON, THE THIRD REICH AND THE CHRISTIAN CHURCHES 48-49 (T&T Clark) (1994).

60. HOLMES, *supra* note 19, at 108; CORNWELL, *supra* note 8, at 180.

61. The Papal Secretary of State to the German Ambassador to the Holy See (Oct. 19, 1933) in DOCUMENTS ON GERMAN FOREIGN POLICY 1918-1945, Series C (1933-1937), vol. II, no.17, at 23. *See* CONTROVERSIAL CONCORDATS, *supra* note 2, at 226.

62. ALVAREZ & GORAHAM, *supra* note 20 , at 56; German bishops at one point considered mediation of the disputes with the Reich, but Secretary of State Pacelli insisted that the agreement was with the Holy See, not German bishops. Vice Chancellor Papen to Ambassador Bergen (Nov. 11, 1933) in

Jewish boycott, and the ninth one, filed on September 9, 1933, asking for protection of Jews converted to Catholicism, were among the forty-five which Hitler never bothered to answer.[63]

The Vatican issued so many complaints regarding violations of the concordat that by 1938, the Nazis were trying to disavow the concordat. On February 17, 1938, *Das Schwarze Korps*, the official paper of the S.S., contained an article protesting that the concordat presupposed the old Germany resting upon a federation of States, a party system, and a liberal outlook. The argument continued that since this agreement was based largely on the Weimar Constitution of 1918, not the Third Reich of Adolf Hitler, a number of clauses were obsolete. As such, the concordat was out of date, and should be abandoned.[64] The article argued that in 1933 Hitler had expected the moral support of the Church in his work of national reconstruction, but he had not received this support. Instead, pastoral letters, sermons, pamphlets, and encyclicals had insulted the Government. Later, Hitler vowed to end the concordat following the war, saying "it will give me the greatest personal pleasure to point out to the Church all those occasions on which it has broken the terms of it."[65]

John Cornwell, in his book *Hitler's Pope: The Secret History of Pius XII*, argues that direct political involvement by Catholic clergy could have held Hitler in check, but that Pacelli, the 1917 Code, and the concordat all served to restrict this possibility in order to centralize the Vatican's authority. This criticism is based upon four assumptions: 1) that Pacelli made the decision, not Pius XI; 2) that the party would have remained viable; 3) that the party would have opposed Hitler; and 4) that the concordat effectively silenced the German bishops. Three of these four assumptions are demonstrably false, and the fourth is far from certain.

As for the assumption that Pacelli was the driving force behind the concordat, Cornwell credits (or blames) Pacelli for decisions that were far beyond his con-

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DOCUMENTS ON GERMAN FOREIGN POLICY, 1918-1945, Series C (1933-37), vol. II, no. 61. The likely reason for this insistence is concern that the Nazis would bully local clergy into compliance.

63. LAPIDE, *supra* note 10, at 103-04; HOLMES, *supra* note 19, at 110; *see* Telegram from the Charg'ed d' Affairs of the Embassy to the Holy See to the Foreign Ministry (Sept. 12, 1933) in DOCUMENTS ON GERMAN FOREIGN POLICY 1918-1945, Series C (1933-1937), vol. I, no. 425. (refusal to accept Catholics of Jewish descent as equal to Catholics of Aryan descent). One of the German officials at the Foreign Office complained that "the Nuncio used to come to me nearly every fortnight with a whole bundle of complaints." ERNST VON WEIZSÄCKER, MEMOIRS OF ERNST VON WEIZSÄCKER 282 (J. Andrews trans., H. Regnery Co.) (1951). In December 1933, the German ambassador to the Holy See wrote to German Foreign Minister Neurath that he considered a clash with the Curia quite possible and that the lack of response to the Vatican's charges would look bad to the world. Ambassador Bergen to Foreign Minister Neurath (Dec. 28, 1933) in DOCUMENTS ON GERMAN FOREIGN POLICY, 1918-1945, Series C (1933-1937), vol. II, no. 152.

64. ANTHANIEL MICKLEM, NATIONAL SOCIALISM AND THE ROMAN CATHOLIC CHURCH: BEING AN ACCOUNT OF THE CONFLICT BETWEEN THE NATIONAL SOCIALIST GOVERNMENT OF GERMANY AND THE ROMAN CATHOLIC CHURCH 1933-1938, 80-82 (Oxford Univ. Press) (1939).

65. HITLER'S SECRET CONVERSATIONS, *supra* note 30, at 449.

trol. Cornwell seems to think that Pacelli was the instigator of all the international moves that took place while he was Secretary of State. That is not, however, the way that diplomats saw it at the time. Reporting back to London on the prospects of the 1939 papal election, the British Minister to the Holy See, Francis D'Arcy Osborne, wrote that "it was always [Pacelli's] task to execute the policy of the late Pope rather than to initiate his own."[66] In fact, Osborne reported that Pacelli had not garnered the ill will typically found between the Secretary of State and other cardinals precisely because he only carried out Pius XI's objectives.[67] Pacelli took pride in executing the will of his Pope, Pius XI. The Pontiff himself said, "Cardinal Pacelli speaks with my voice."[68] Either young Pacelli dominated the Church's international policies years before he had any true authority (as Cornwell asserts) or he carried out the will of his superiors (as Pope Pius XI and others who actually knew Pacelli said). Cornwell's argument is at odds with all relevant evidence.

As to the assumption that the Catholic Center Party in Germany would have remained viable but for the concordat, it too must fail. Hitler's power was sufficiently secure, and his means sufficiently brutal, that by March 1933 no religious institution could really stand up to him.[69] Moreover, neither the concordat nor Church doctrine prohibited Catholic laypersons from being involved in politics.[70] That was not, however, the Nazis' plan. They alone, not the concordat, brought down the Catholic Center Party.

Even the assumption that the Catholic Center Party would have opposed Hitler but for the concordat is subject to question.[71] "The party was split and many Roman Catholics were attracted by the early achievements of the Nazis, as were most Germans."[72] Today one wonders how this could have been possible. At the time, however, Hitler promised to provide economic prosperity, free

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66. *See* Report from the British Legation to the Holy See (Feb. 17, 1939)(British Public Record Office F0/371/23789).

67. *Id.* "To Cornwell, Pius XII was too authoritarian, too monarchical, too powerful. It may be argued that the very opposite was true. Pius XII was not sufficiently confident of his power and of his situation." John Lukacs, *In Defense of Pius*, NATIONAL REVIEW, Nov. 22, 1999.

68. HATCH & WALSH, *supra* note 4, at 109; *See* HALECKI & MURRAY, *supra* note 4, at 65.

69. *Testimony of Cardinal Stefano Wyszynski*, October 18 & 25, 1968, part II, page 578. (before the tribunal of the Vicariate of Rome); *See* CONTROVERSIAL CONCORDATS, *supra* note 2, at 136; *See* CORNWELL, *supra* note 8, at 132; (Hitler given authority to suspend civil liberties).

70. Pope Pius XI preferred dealing with political matters through the lay organization, Catholic Action. Under this approach, the role of the clergy, especially of the bishops, is one of teaching. The clergy are the teachers of tradition and of social justice. That teaching remains on a theoretical level and does not descend to concrete situations and cases. These are left to the laity whose task it is to put the theory into practice. *See* Philip J. Mumion, *Commonwealth*, Sept. 11, 1992 at 23.

71. Cornwell himself notes that the Vatican could not control the party and that many German Catholics left the Center Party and joined the National Socialists. Cornwell also notes that the Catholic Center Party, including former Chancellor Heinrich Brüning, voted in favor of Hitler's Enabling Bill of 1933. That hardly suggests that they were willing to battle Hitler to the end. *See* CORNWELL *supra* note 8, at 135-36, 144, 197.

72. William Rees-Mogg, *The Vatican's Holy Failure*, TIMES (London) October 4, 1999.

Germany from the Treaty of Versailles, end daily street fighting, and promote social justice.[73] Add to these matters that Hitler's socialistic programs seemed to help people who had been in need, and it becomes easier to see how some Christian people might have been attracted to his policies.

Cornwell argues that the concordat created an opening for Hitler by withdrawing support from clergy participation in the political parties. It must be noted, however, that only one party remained in Germany–the National Socialists. The concordat provided Catholic clergy with a reason to decline membership in that party. Many Protestant ministers, not protected by a concordat, were coerced into joining the Nazis.

The assumption that German bishops would have been outspoken against the Nazi regime but were silenced by the concordat, is wrong. The German bishops voted to ask Pacelli to ratify the concordat without delay.[74] They understood that they would not be silenced by this concordat. The supplemental protocol relating to paragraph thirty-two of the concordat made clear that the German clergy was not prohibited or even limited in preaching about "the dogmatic and moral teachings and principles of the Church."[75]

The concordat set forth traditional Church teaching about politics and the clergy. Priests and bishops are not supposed to take sides on matters of economics and politics unless they deal with human dignity or the right and ability of the Church to carry out her mission. When it comes to those matters, however, the clergy are free to speak, even if that means talking about politics.[76] The concordat, in fact, did no more than assert traditional Church teaching (predating the 1917 Code of Canon Law) when it limited the participation of clergy in party politics.[77]

CONCLUSION

The concordat, which may on the surface seem to indicate friendly relations between the Holy See and Nazi Germany, was in fact an indication of precisely the opposite, as the historical record now plainly reveals. It was not a recognition of Hitler's Third Reich. It did not indicate the Holy See's support for Nazism, and in no way did it suggests that Pope Pius XII or the Holy See

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73. *See* BALINT VAZSONYI, AMERICA'S 30 YEARS WAR: WHO IS WINNING? 58 (Regnery Press) (1998). While all of these points were popular with German people, the term "social justice" had particular meaning to Catholics. This term was used in the United States by both Catholic social activist Dorothy Day and radio personality Fr. Charles Coughlin.

74. *See* CORNWELL, *supra* note 8, at 158.

75. *See* Appendix.

76. The German bishops were not silenced by the concordat. They spoke out more brazenly than any other group in Germany. Lothar Groppe, *The Church's Struggle with the Third Reich,* IBW JOURNAL (Alan F. Lacy trans).

77. *See* SECOND VATICAN COUNCIL, PASTORAL CONSTITUTION ON THE CHURCH IN THE MODERN WORLD *(Gaudium et Spes).*

supported the German cause in World War II. It was, instead, Hitler's attempt to take advantage of the Vatican. He accepted long-standing demands, forced the Holy See to agree to them, and then ignored his commitments. Ultimately, however, this proved to be but one more serious miscalculation made by the most notorious madman of the 20th Century. The concordat came back to haunt the Nazis, as Pope Pius and the Catholic Church used it to shield Jewish victims and resist Nazi advances. Thus, before the war was over, Hitler vowed to put the agreement to an end.

Pope Pius XII was steadfast throughout the war in his demand for peace, opposition to suffering, and support for those in need. Among those most in need were Jewish victims of Nazi persecution. In order to protect them and oppose Nazi doctrine, the Pope used every weapon in his arsenal, including the 1933 concordat.

APPENDIX A

THE TEXT OF THE CONCORDAT
CONCORDAT BETWEEN THE HOLY SEE AND THE GERMAN EMPIRE

His HOLINESS, POPE Plus XI., and the President of Germany, being motivated by the same desire to strengthen and further the friendly relations between the Holy See and Germany,

Having the will to regulate in a permanent and mutually satisfactory way the relations between the Holy See and the State throughout Germany,

Have resolved to enter into a solemn agreement which will complement the concordats closed with certain individual German States and secure for the rest a consistent treatment of the pertinent questions, according to Principles laid down herein.

To this end, His Holiness Pope Plus XI. has named His Eminence the Cardinal Eugenio Pacelli, His Secretary of State, as His plenipotentiary, and the President of the German Reich has named the Vice Chancellor of the German Reich, Franz von Papen, who, having exchanged their respective credentials and found them to be in good and proper form, have agreed upon the following articles:

ARTICLE I

The German Reich guarantees the freedom of creed and of public worship to the Catholic religion.

It acknowledges the right of the Catholic Church—within the limits of the law of the land,—to administer its own affairs and to make laws and regulations binding upon its membership within the jurisdiction of the Church.

ARTICLE 2

The concordats established with Bavaria (1924), Prussia (1919), and Baden (1932) remain in force and the rights and privileges of the Catholic Church in the states named remain intact. For the other states the provisions of this Concordat apply in toto. The latter are also binding on the three states named in so far as they refer to matters not regulated in the separate concordats or in so far as they complement the existing terms.

In the future, concordats with separate states will be entered into only with the consent of the German Government.

ARTICLE 3

In order to cultivate the good relations between the Holy See and the German Reich, an apostolic nuncio will reside in the German capital, as heretofore, and an ambassador of the Reich will reside at the Holy See.

ARTICLE 4

The Holy See enjoys complete freedom in its correspondence with the Bishops, the clergy and the other membership of the Catholic Church in Germany. The same holds good for the Bishops and other diocesan authorities in their intercourse with the believers in all matters concerning their pastoral office.

Notices, regulations, pastoral letters, official diocesan papers and other enactments for the spiritual leadership of the believers, which are promulgated by the church authorities within their

jurisdiction, may be published without hindrance and be brought to the attention of the membership in the forms previously in use.

ARTICLE 5

In the exercise of their spiritual office the priesthood enjoys the protection of the State in the same manner as state officials. The State will prosecute insults to their persons or in their capacity as clergymen, as well as disturbances of public worship, according to the general state laws, and when necessary it will grant the protection of the civil authorities.

ARTICLE 6

Clergy and members of conventual orders are freed from the obligation to accept public office and other responsibilities not reconcilable with the provisions of canonical law, with the priesthood, or the rules of their Order, respectively. This applies particularly to the office of bailiff, juror, member of the board of taxation, or of the courts of finance.

ARTICLE 7

In order to accept position or office in the State or in a corporation of a governmental character, clergymen require the "nihil obstat" of their chief diocesan officer as well as of the corresponding public official. The "nihil obstat" may be revoked at any time on important grounds of ecclesiastical interest.

ARTICLE 8

The salaries of clergymen are freed from confiscation on the same terms as those of national and state officials.

ARTICLE 9

Clergymen cannot be questioned by judicial or other authorities for information concerning facts confided to them in the exercise of their spiritual guidance and which therefore come under the duty of pastoral reticence.

ARTICLE 10

The use of clerical dress or that of the dress of a conventual order by laymen, or by clergymen or members of Orders to whom such use has been definitely forbidden, and the civil authorities duly notified of this fact, is subject to the same penalties as the misuse of the military uniform.

ARTICLE 11

The present diocesan organization and circumscription of the Catholic Church in Germany will remain. Any future establishment of a new bishopric or church province or other changes of the diocesan limits remain, in so far as they concern changes within the boundaries of the separate states, subject to mutual agreement with the state authorities. In the case of establishments or changes which affect several states, the agreement is arrived at with the national government which is then left to make the arrangements with the affected states. The same is true of changes in the boundaries of the church provinces, in so far as they may involve several states. These terms do not apply to shifting of church boundaries solely in the interest of local pastoral administration.

A reorganization of the diocesan system and circumscription will be the subject of discussion with the Holy See on the part of the German Government.

ARTICLE 12

Notwithstanding the provisions of Article XI ecclesiastical offices can be freely established or changed if no appropriations from the civic funds are sought. The co-operation of the State in the formation and reorganization of parishes takes place in accordance with the outlines laid down in agreements with the Bishops and for the greatest possible uniformity of which the national government will make recommendations to the state authorities.

ARTICLE 13

Catholic parishes, congregational associations, and diocesan associations, the Episcopal Sees, the bishoprics and chapters, the conventual orders and religious fraternities, as well as the institutions, foundations and properties of the Catholic Church, retain (respectively, receive) the status of public corporations under the general law. They remain public corporations in so far as they have been such in the past, the others may receive equal rights according to the general civil law.

ARTICLE 14

As a matter of principle, the Church has the right freely to appoint all church offices and benefices without the co-operation of the State or of the civil communities, in so far as other provisions have not been made in previous concordats under Article II. This rule applies to the suffragan bishoprics of Rottenburg and Mainz, the bishopric Meissen, and the Metropolitan See of Freiburg on the Rhine. The rule holds also for the first two suffragan bishoprics regarding the appointments of cathedral chapter positions and the regulations of the right of patronage. Furthermore, there is accord on the following points:

1. Catholic clergymen who hold an ecclesiastical office in Germany, or exercise pastoralor educational functions, must:
a. be German citizens,
b. have graduated from a German higher educational institution,
c. have studied at least three years in the field of theology and philosophy in a German state school, a German ecclesiastical academy, or a papal college in Rome.
2. The Bull for the appointment of Archbishops, Bishops, Coadjutors cum jure successionis or of a Praelatus nullis will not be issued until the name of the appointee is submitted to the representative of the national government in the respective state and it has been ascertained that no objections of a general political nature exist.

By agreement of Church and State, Paragraph I, Sections a, b, and c, may be disregarded or set aside.

ARTICLE 15

Conventual orders and religious associations, save for the special provisions of the paragraph following, are not subject to restrictions on the part of the State, either regarding their number, selection of their members, activity in spiritual service, education, care of the sick, and charitable work, or in the management of their affairs and the administration of their property.

Ecclesiastical heads of Orders, having their headquarters in Germany, must be German citizens. Heads of Orders or provincial organizations whose headquarters lie outside Germany, have the right of visitation of the branches lying within Germany.

The Holy See will endeavor so to organize the existing conventual houses that as far as possible they may not be under government of foreign heads. Exceptions may be agreed upon with the German national government in cases where the small number of branches makes a special: German province seem inadvisable or where an historic or administratively proven provincial organization should be permitted to continue.

ARTICLE 16

Before the Bishops take possession of their dioceses, they are to take an oath fealty either to the national representative in the states, or the president of the Reich, respectively, according to the following formula:

> "Before God and on the Holy Gospels I swear and promise—as becomes a bishop-loyalty to the German Reich and to the . . . state. I swear and promise to honor the constitutional government and to cause the clergy of my diocese to honor it. In the performance of my spiritual office and in my solicitude for the welfare and, interest of the German State, I will try to avoid every detrimental act which might endanger it."

ARTICLE 17

The property and other rights of the public corporations, institutions, foundations and associations of the Catholic Church vested in their possessions are secured according to the general laws of the land. For no reason whatever may a building dedicated to Public worship be torn down without the previous consent of the proper church authority.

ARTICLE 18

In case the State finds it necessary to abrogate the performance of obligations undertaken by it toward the Church, either based on law, agreement or special charter, the reasons for such abrogation should be discussed amicably with the Holy See before they are finally worked out, in order that a friendly agreement may be reached. Traditional rights are to be considered as titles in law. The abrogation must be compensated for by an equivalent to the claimant.

ARTICLE 19

The Catholic theological faculties in the state schools will remain. Their relation to the church authorities will be governed by the respective concordats and the terms set forth in the special closing addenda, and with due consideration of the rules of the Church in this connection. The national government will endeavor to secure a uniform set of regulations for all the Catholic faculties in Germany.

ARTICLE 20

The Church has the right, in so far as other agreements are not in existence, to establish theological and philosophical schools for the training of its clergy, these to be dependent solely on the church authorities, if no state subsidies are requested.

The establishment, management and administration of the theological seminaries, under the general limitations, of the civil code is exclusively the prerogative of the church authorities.

ARTICLE 21

Catholic instruction in the grammar, high, trade, and continuation schools is a regular part of the curriculum and is taught in accordance with the principles of the Catholic Church. It will be the special care of religious instruction to inculcate patriotic, civic and social consciousness and sense of duty in the spirit of the Christian faith and moral code, as is the case with the instruction in other subjects. The syllabus and selection of textbooks for religious instruction will be arranged in consultation with the church authorities. The church authorities have the right to investigate whether the pupils are receiving religious instruction in accordance with the teachings and requirements of the Church, the opportunities for such investigation to be agreed upon with the school authorities.

ARTICLE 22

In the appointment of Catholic religious instructors an understanding will be arrived at between the Bishop and the state government. Teachers that have been declared unfit for further exercise of their teaching functions either because of their teachings or moral conduct, may not be employed as teachers of religion as long as the obstacle remains, in the judgment of the Bishop.

ARTICLE 23

The retention and establishment of Catholic schools remains secure. In all parishes in which parents request it, Catholic grammar schools will be established if the number of pupils and the general school situation in the community seem to justify a school run in accordance with the requirements of the State covering schools in general.

ARTICLE 24

In all Catholic grammar schools only such teachers will be employed as are members of the Catholic Church and guarantee the fulfilment of the special requirements of a Catholic School. Within the general arrangements for the training of teachers, provisions will be made which will guarantee a training of Catholic teachers in accordance with the special requirements of the Catholic school.

ARTICLE 25

Conventual orders and religious communities are entitled to establish and conduct private schools, subject to the general educational laws. These private schools, will have the same standing as the state schools in so far as they fulfill the curricular requirements for the latter.

For members of conventual orders or religious communities the general requirements for teachers and appointments to the grammar, continuation or high schools, are applicable.

ARTICLE 26

With reservations looking toward a later comprehensive regulation of the marriage laws, it is understood that except in cases of the critical illness of one of the engaged couple, or in the case of severe moral emergency, the presence of which must be confirmed by the proper church authority, the church marriage ceremony may precede the civil ceremony. In such cases the pastor is in duty bound to notify the registrar's office at once.

ARTICLE 27

The Church will accord to the German Army (Reichswehr) provision for the spiritual guidance of its officers, officials and personnel, as well as their families.

The administration of the pastoral care for the army is to be vested in the Army Bishop. His appointment is made by the Holy See after the latter has got into touch with the national government in order to select an appropriate candidate who is mutually agreeable.

The appointment of military pastors and other military clergymen will be made by the Army Bishop in concurrence with the proper national authority. The Army Bishop can appoint only such pastors as have the permission of the diocesan bishop to enter military religious service and have received a certificate to that effect. Military chaplains have the standing of regular pastors for the troops assigned to them, and for their personnel. Detailed regulations for the organization of the Catholic chaplains service will be laid down by an apostolic brief. The regulation of the official aspects of the chaplain's service will be arranged by the national government.

ARTICLE 28

In hospitals, prisons and other institutions of public benevolence the Church will have the right of visitation subject to the rules of the institutions. If regular ecclesiastical supervision is arranged for in such institutions, and if Pastors must be appointed as state or other public officials, such appointments will be made in accord with the church authorities.

ARTICLE 29

The Catholic members of racial minorities living within the boundaries of Germany will be treated as regards the liberty of worship and instruction in their mother tongue, in accordance with the treatment received by German minorities in the respective country.

ARTICLE 30

On Sundays and holy days special prayers, conforming to the general liturgy, will be offered for the welfare of the German Reich, and its people, in episcopal, parish, and conventual churches and chapels.

ARTICLE 31

Such Catholic organizations and associations as serve a purely religious, cultural or charitable purpose, and as such are subject to the church authorities, will be protected in their establishments and activities.

Catholic organizations and associations which serve in addition to the religious, cultural or charitable purposes, social or professional objectives, shall, without prejudice to civil bodies of a similar character, enjoy the protection of Article XXXI, paragraph I, in so far as they guarantee that their activity lies outside any political party.

The determination of the organizations and associations which fall under the terms of this article will be a matter of agreement between the national government and the German episcopate.

In so far as the Reich and the states sponsor athletic or other young people's organizations, care will be taken that their members are enabled to fulfil their religious obligations on Sundays and holy days and that they are not encouraged to any acts not in accord with their religious and moral opinions and duties.

ARTICLE 32

In consideration of the special situation existing in Germany, and in view of guaranty provided by this Concordat of legislation which will safeguard the rights and privileges of the Roman Catholic Church in the nation and its component states, the Holy See will prescribe regulations which will prohibit clergymen and members of conventual orders from membership in political parties and from working on their behalf. (Cf. Supplementary Protocol.)

ARTICLE 33

All matters appertaining to clerical persons or ecclesiastical affairs which have not been treated in the foregoing articles will be treated according to canonical law. Should differences of opinion arise regarding the interpretation of execution of any article of this Concordat, the Holy See and the German Reich will achieve a friendly solution in mutual agreement.

ARTICLE 34

This Concordat, whose German and Italian text shall have equal force, shall be ratified and the certificates of ratifications exchanged as soon as possible. It is in force from the day of such exchange.

In witness hereof, the plenipotentiaries have signed this Concordat.

Signed in two original exemplars, in the Vatican City, July 20th, 1933

EUGENIO, CARDINAL PACELLI
FRANZ VON PAPEN
(Signed)
(Signed)

THE SUPPLEMENTARY PROTOCOL.

At the signing of the Concordat between the Holy See and the German Reich the duly accredited plenipotentiaries have adjoined the following explanations, which form an integral part of the Concordat itself.

In re:

Article 3: The Apostolic Nuncio to the German Reich, in accordance with the exchange of notes between the Apostolic Nuntiate in Berlin and the Foreign Office, on the 11th and 27th of March respectively, shall be the Doyen of the diplomatic corps in Berlin.

Article 13: It is understood that the church retains the right to levy church taxes (on its membership) .

Article 14 Paragraph 2: It is understood that when objections of a general political nature exist, they shall be presented within the shortest possible time. If after 20 days, such statement has not been made, the Holy See will be justified in assuming that there are no objections to the candidate. The names of the persons in question will be held confidential until the announcement of the appointment. A State veto shall not be required to assign reasons.

Article 17: In so far as public buildings or properties are used for church purposes, these are retained, subject to existing agreements.

Article 19, Paragraph 2: This is founded at the time of the signing of this Concordat on the apostolic constitution: " Deus Scientiarum Dominus ", of May 24th, 1931, and the Instruction of July 7, 1932.

Article 20: The high schools and colleges now under the administration of the Church are recognized as important church institutions per se, and as integral parts of the diocesan organizations.

Article 24: As soon as private institutions are able to meet the requirements of the new educational code for the training of teachers, the existing institutions of the conventual orders and communities will be given due consideration.

Article 26: A severe moral emergency exists when there are insuperable or disproportionately difficult and costly obstacles in the way of securing the customary civil documents at the right time.

Article 27, Paragraph 1: Catholic officers, officials and personnel, as well as their families do not belong to the local parishes and do not contribute to their financial burdens.

Paragraph 4: The publication of the apostolic brief will take place after consultation with the national government.

Article 28: In urgent cases the pastor is to be admitted at all times.

Article 29: After the German government has indicated its willingness to the compromise regarding the non-German minorities, the Holy See declares,—pursuant to its principles regarding the right of employment of the mother tongue in religious instruction and in Catholic Societies,—that it will have in mind similar protective clauses for German minorities when arranging concordats with other countries.

Article 31, Paragraph 4: The principles laid down in this article hold good also for the national labor service.

Article 32: It is understood that similar provisions for nonparticipation in politics will govern members of other creeds also. The conduct enjoined upon the pastors and members of conventual orders in Germany does not entail any limitation of the prescribed preaching and interpretation of the dogmatic and moral teachings and principles of the Church.

In Vatican City, July 20th, 1933.
(Signed)
(Signed)
EUGENIO, CARDINAL PACELLI,
FRANZ VON PAPEN

A Review of Hitler, The War, and The Pope

IAN A.T. MCLEAN†

Historical criticism of the Catholic Church has been a staple of western thought since the fall of Rome. Ancient pagans blamed the Church for undermining the discipline and spirit of Rome. Gibbon made the same claim 1200 years later. Medieval kings bridled at "turbulent priests" who opposed their authority; the bitter controversies over the investiture of bishops were largely objections to the Church's role in temporal matters. The Reformers did not claim that the Church wrongly obstructed sovereigns, but that it was too aligned with them. In the French Revolution the Church had become so identified with the *ancien regime* that men easily parroted the myth that the "divine right of kings" was a Catholic dogma. The clamors have diversified with the quickening pace of human events and the multiplication of constituencies urging drastic changes. Here the Church betrays a good state; there the Church supports a corrupt state. In one place men say the Church encourages socialism; in another place they say the Church ignores the evils of capitalism. Always, as Leo XIII observed, "a hackneyed reproach of old date is leveled . . . that the Church is . . . wholly unable to afford help in spreading that welfare and progress which justly and naturally are sought after by every well-regulated State."[1]

Historical critiques are not difficult for Church apologists. If the Church sides with the state over the common man, why have Communist regimes suppressed by it? If the Church is subversive, why have absolute princes like Phillip II protected it? If the Church is to be condemned for tolerating personal corruption and hypocrisy among its clergy, why is it also condemned for the rise of Savonarola? If the Church favors socialism, why do socialists want to eradicate it? If the Church favors capitalism, why are capitalists angered about its preaching on labor unions? Historical indictments of a universal Church are easily refuted because they must be universal themselves. One need only fetch a contradictory example from the archives, and the indictment collapses into a squabble about whether clerics were bad *as men*, not whether the Church is bad *per se*.

This is why Church critics cannot say enough about Eugenio Pacelli, who reigned as Pope Pius XII from 1939 to 1958 after serving as papal nuncio (ambassador) to the Weimar Republic. Since Pius XII was the last Pope to enjoy the Vatican's vestigial role as a European power, his papacy was intertwined

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1. Leo XIII, *Immortale Dei*, ¶2, Nov. 1, 1885 (N.Y. Paulist Press) (1941).

with Nazism and the Holocaust. It is this historical relationship that gives Church critics hope of demonstrating what they already believe, but what they cannot quite prove. For many reasons, Nazism and the Holocaust are perceived as the *ne plus ultra* of evil. Earlier slaughters are still acknowledged, their perpetrators still condemned. But it is Auschwitz and not the Holocaust, not Melos, or the massacre of Armenians by the Turks that has become the fixed symbol of everything that is and can be wrong with man.

This singularity offers a way to escape the bond of history. Link the Church to Auschwitz, show a basic and undeniable moral failing, and the historical counter-arguments which have been used so well in the past may be thought worthless. The Church will supposedly stand condemned under an indictment which transcends all defense: *The Church may favor one politics over another, it may do so in different ways or different times, but its complicity in the Holocaust proves it is utterly unreliable in the quest for simple human decency.* In the minds of Anti-Papal and Anti-Catholic writers, the Holocaust has the potential to transform the 'hackneyed reproach' spoken of by Leo XIII into one of those 'common truths' that 'everyone just knows.'

This "black myth" of Pius XII's papacy owes much of its origin to Rolf Hochhuth's fictional play, *The Deputy*.[2] Published in 1964, *The Deputy*'s fictional dialogues between SS Officers, Vatican officials and Pius XII portrayed Pius as an insincere sociopath who blandly allowed European Jewry to be put to death for reasons of state. The use of Pius XII as a scourge with which to drive the Church from civilization is well displayed in the play. In the Second Act, Father Riccardo, a Jesuit priest incensed over Pius' apathy, levels the charge: "A deputy of Christ who sees these things and nonetheless permits reasons of state to seal his lips—hesitates even for an hour to lift his anguished voice in one anathema to chill the blood of every last man on earth—that Pope is. . .a criminal."[3]

In Act Five Riccardo, totally disillusioned by Pius' indifference ("Oh Father — is there anything he loves / except his dictionaries and / the cult of the Madonna? . . . I no longer ask / if he was ever able to regard / a single one of Hitler's victims / as his brother"), has himself sent to Auschwitz where he is lectured by the Doctor, a character intended to remind one of Josef Mengele:

> The Church, however, after centuries of killing heretics throughout the West now sets itself up as the exclusive moral authority of this Continent. Absurd! Saint Thomas Aquinas, a mystic, a god-crazed visionary like Heinrich Himmler, who also babbles well-meant nonsense, Thomas condemned the innocent for heresy just as these morons condemn the Jews . . .But you do not cast

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2. *See* ROLF HOCHHUTH, THE DEPUTY (Grove Press, Inc. 1964) (It is odd that Hochhuth calls the Pope the "deputy" of Christ. Rychlak finds the same term used in the *Volkischer Beobachter*, the official Nazi paper, as railing against the "Jew-God and His deputy in Rome").

3. *See id.*, act II.

> him out of your temple! A civilization that commits its children's souls into the safeguard of a Church responsible for the Inquisition comes to the end that it deserves when for its funeral pyres it plucks the brands from our furnaces for human bodies.[4]

These two selections clearly show the attack in its complete form. If Pius XII is a criminal, mankind cannot trust the Church.

A good indicator of the myth's wide acceptance is the Simon Weisenthal Center's website, "Museum of Tolerance," which describes Pius XII and his immediate predecessor, Pius XI, as being exactly what Fr. Riccardo described:

> The head of the Catholic Church at the time of the Nazi rise to power was Pope Pius XI. Although he stated that the myths of "race" and "blood" were contrary to Christian teaching (in a papal encyclical, March 1937), he neither mentioned nor criticized antisemitism. His successor, Pius XII (Cardinal Pacelli) was a Germanophile who maintained his neutrality throughout the course of World War II. Although as early as 1942, the Vatican received detailed information on the murder of Jews in concentration camps, the Pope confined his public statements to expressions of sympathy for the victims of injustice and to calls for a more humane conduct of the war.[5]

Notably, this is the Weisenthal Center's description of Pius XI and Pius XII for use in schools; it appears in the "Teachers' Resources" section. The *Denver Post* follows up with the Doctor's half of the argument, in its review of John Cornwell's *Hitler's Pope*,[6] the most recent and celebrated iteration of the myth: ". . Pacelli [Pius XII] was a self-absorbed political infighter who hated Jews and lots of his other fellow human beings. What a person to walk onto the world stage, just in time to accommodate Adolf Hitler, to whose Final Solution he essentially gave the Catholic Church's imprimatur."[7]

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4. *Id.* at act V, sc. 2.

5. *36 Questions About the Holocaust*, Simon Weisenthal Center Museum of Tolerance Online, http://motlc.wiesenthal.com/resources/questions/index.html#34 (listed under "Teachers' Resources").

6. *See* JOHN CORNWELL, HITLER'S POPE (Viking) (1999).

7. Steve Weinberg, *Pope's Acquiescence to Hitler Traced*, DENVER POST, Oct. 10, 2000 (book review), *available at* http://www.denverpost.com/books/pope1010.htm. Interestingly, although both the *Post's* book review and John Cornwell claim to have proof that Pius XII was an anti-Semite, Hochhuth himself wrote:

> In *The Deputy* . . . there is no imputation that Pius XII and his clergy had anti-Semitic feelings. I have wanted to keep only to provable facts. Thus, I quote here from the report of the Italian banker Angelo Donati, to whom many Jews owe their rescue, and do not cite the bitter personal experiences which that brave man had with a number of priests during the period of the persecutions. Those episodes are fully balanced by the numerous examples of help rendered by other clerics.

See HOCHHUTH, *supra* note 2, at 332 (contained in Sidelights on History). The notion of Pius XII's anti-Semitism arises either from further and better research, or the increasing boldness of anti-Catholicism in the absence of effective opposition. *Id.*

Imprimatur is an official Church statement attached to theological works indicating that they are in agreement with Church teaching. It has become slang for 'approval,' and it is in this sense that the *Post* used the word.

No honest person would approve stripping the Church of its moral prominence on the basis of this indictment without a full examination of the facts. Certainly, those who indict the Church have had full airing of their views. John Cornwell, for example, has had his *Hitler's Pope* published by two major publishers in Britain and America. The book was given lavish attention, being reviewed either favorably or neutrally by the *New York Times* and dozens of other papers and magazines and being discussed on numerous radio, television, and electronic forums. One might think, therefore, this titanic question would have induced publishers to supply creditable works which offer a different view of the Papacy and the Nazis. Sadly Ronald Rychlak's *Hitler, the War, and the Pope* is the only example of the different view. A legal scholar and accomplished attorney, Rychlak displays a formidable talent for accurate research and balanced conclusions. Working from secondary and primary sources, as well as the same Vatican archives John Cornwell claims to have used, Rychlak arrives at a quite different account of the Papacy's response to the Nazis and their Holocaust.

One of the most interesting sections of his book discusses the infamous Concordat between the Vatican and Hitler. The Concordat is often used to symbolize the encouragement the Church gave Hitler, being featured in movies (*Judgment at Nuremberg*), television (the mini-series *Holocaust*), and books such as Cornwell's. Cornwell's book largely re-warms the conventional prejudices about the Concordat, claiming or suggesting that it: (a) was the first major international agreement between Hitler and a foreign power, boosting Hitler's prestige; (b) ordered Catholics to abandon political activity, thus destroying German opposition to Hitler in general and the Catholic Center Party in particular; and (c) prohibited local bishops from opposing Hitler by 'nationalizing' relations between the Vatican and the Reich.[8] Rychlak destroys this conventional wisdom in a thorough discussion of the Concordat, its meaning, and its circumstances.

Proponents of the "black legend" often single out Pius XI and Pacelli for special blame, condemning their assumption (shared by the French and British) that Hitler was a tyrant of the kind Europe had seen before in Cromwell, Napoleon, and Franco. This special blame relies on the false equation of spiritual

8. Oddly enough, the same conventional prejudices have the German Bishops also going along with Hitler. The early actions of Bishop Gröber of Freiberg (whom Cornwell calls "the brown bishop" in reference to the uniforms of Nazi stormtroopers) are cited to prove this point. Gröber's transformation into a bitter and implacable opponent of the Nazis is never mentioned, only his early naive enthusiasm. Regardless of this misuse of fact, it might be asked that if the German Bishops were pro-Hitler, and if the Concordat was pro-Hitler, then why can the Concordat be blamed for this collaboration.

authority and political wisdom. It takes advantage of a naïve understanding of the Papal office and the infallibility God has granted to it, and claims the negotiation of a concordat could not have occurred unless the Pope saw nothing morally objectionable in Hitler or Nazism. The fervor with which this view is held regrettably influences the way facts are regarded. Readers would be well advised to discount Cornwell's suggestion that the July, 1933 Concordat was Hitler's first international diplomatic coup.[9] Rychlak informs us that Hitler's first international treaty was the "four powers' pact" signed in June, 1933 by Britain, France, Italy and Hitler's Reich, in which these countries pledged to support peace in Europe. As Rychlak notes, Hitler's real prestige came from economic benefits to the Germans. By 1935, Germany's unemployment rate had dropped from six million to one million and it was in this year, not the year of the Concordat, that Hitler announced his Nuremberg Laws. Hitler's international prestige was solely a function of Europe's fear of another war, and Hitler's ability to play on this fear rested far more on the allegiance of Germany's people and industry than on Germany's "striped-pants brigade."

Rychlak explains that the Concordat did not order Catholics to cease their involvement in German politics. What Hitler actually wanted is what so many pro-choice Americans also want—for priests, Bishops and Cardinals to abstain from formal political action against fundamental policies of state. This was granted by the Church, in part because Pacelli had misgivings about direct political activity by the clergy and because the Concordat put no restrictions on lay Catholics' involvement in politics. The Catholic Center Party, heralded as a powerful political organization which could have obstructed, if not toppled, Hitler, had already voted to dissolve itself due to the Nazis' slow strangulation of the party and the persecutions of its members. In fact, Rychlak discovers that Pacelli's concession on clerical abstention from party politics was made after,

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9. A review of Cornwell's claims by James Carroll in the *Atlantic Monthly* unfortunately fosters this false perspective: "The first true beneficiary [of Pius XII's negotiations for the Concordat] was Hitler himself: the Reichskonkordat, agreed to on July 8, 1933, was his first bilateral treaty with a foreign power, and as such gave him much-needed international prestige." No doubt, the word "bilateral" is used because it refers to agreements between only two groups; treaties between three or more entities are referred to as "multilateral." If Carroll was arguing that Hitler's negotiating a treaty with only one country somehow made him far more important than his negotiating a treaty with three other powers, Carroll did so very badly by sandwiching the supposedly all-important concept of bilateralism between the words "first" and "treaty with a foreign power." If Carroll was claiming that Hitler's treaty with the Vatican granted him more prestige than his treaty with Italy, France, and the British Empire, he could have simply said so without using vague diplomatic slang. But if Carroll wishes the reader to infer that the Concordat was Hitler's "first . . . treaty with a foreign power," his insertion of the word "bilateral" does nothing to hinder that inference, although it does allow him a veneer of accuracy against a charge of deliberate obfuscation. *Atlantic Monthly* says Carroll is at "work on a book about the history of the conflict between Catholics and Jews." One looks forward to the book's publication in the hope that Carroll's work will include striving for clear language to describe facts. *See* James Carroll, *The Holocaust and the Catholic Church*, ATLANTIC MONTHLY, Oct. 1999 (book review), *available at* http://www.theatlantic.com/issues/99oct/9910pope1.htm.

and because of, these persecutions and the party's dissolution vote. Analogies often made between the Catholics' struggle with Bismarck at the turn of the Century and the Center Party's opposition to Hitler 40 years later are inapt. Germany under Bismarck was never a single nation—it was a federation of nations with long histories of independent political life. Bismarck had neither the power, the extensive state apparatus, nor the sheer disregard for law which Hitler so effectively employed against those who opposed him. By the time of the Concordat, the Reichstag fire had occurred; the Reichstag itself had passed the enabling act making Hitler undisputed *führer* of Germany; Goebels had been appointed Minister of Propaganda and was ruthlessly flooding Germany with pro-Nazi messages to the exclusion of all intelligent debate; the Nazis were preparing for the Fourth Nuremberg Rally; German streets echoed to the march of Rohm's *Sturmtruppen*; and Dachau had been built and was already receiving political prisoners (although even Cornwell does not claim Pacelli or Pius XI knew this). Attributing the political dominance of Hitler and the Nazis during the 1930's to the Concordat is like attributing the Cold War to SALT I—both events were accommodations of political reality, not the reality itself.

The effect of "nationalizing" relations between the Church and Hitler's Germany was intended by Pacelli and Pius XI, but not for the reasons given in the "Black Legend." The legend has it that both men wanted to strip local German bishops of their authority, thus intentionally or unintentionally placating Hitler and removing decentralized Catholic opposition to Hitler. Aside from the amusement one derives from hearing critics of the 'old' Catholic Church praise the authority of Bishops, the contention has little to recommend it. Rychlak painstakingly details how Hitler ignored local concordats with the old federated German states such as Bavaria, and how the Nazis subjected what we know as 'Local Churches' to implacable harassment and interference. Rychlak also describes how eager Nazis were to prevent these Bishops from communicating freely with Rome, an inconvenient fact for those who would claim that the "iron hands" of Pius XII and Pacelli always guided the Church toward appeasement of the Nazis. Placing the rights of Catholics to worship, marry according to Church teaching, select Bishops and priests without interference from the German government, and maintain Catholic youth and educational institutions on a "bilateral" footing between the Vatican and Berlin appeared to be, and for a brief time proved to have been, the best strategy for eliminating this widespread attack on the Church. Rychlak explains how, rather than eliminating local Bishops' ability to oppose the Nazis, the Concordat preserved and even expanded it in many areas.

Rychlak's book would have been valuable enough had it dealt only on the Concordat. Fortunately, his ambition extends to discussing the whole relationship between the Vatican and Hitler's Germany. While the Weisenthal Center would have school children taught that Pius XI neither mentioned nor criticized

antisemitism, Rychlak proves that both Pius XI and Pius XII (then Cardinal Pacelli) used the same language to publicly and specifically condemn anti-Semitism in nearly-identical public statements:

> Mark well that in the Catholic Mass, Abraham is our Patriarch and forefather. Anti-Semitism is incompatible with the lofty thought which that fact expresses. It is a movement with which we Christians can have nothing to do. No, no, I say to you it is impossible for a Christian to take part in anti-Semitism. It is inadmissible. Through Christ and in Christ we are the spiritual progeny of Abraham. Spiritually, we are all Semites.[10]

These speeches were made in 1938, while Italy and Germany were increasing anti-Semitic rhetoric and laws. Anyone familiar with the New Testament, and Catholic tradition, cannot misunderstand the phrase "I say to you." It is an emphatic expression, used by Christ and by Popes to underscore the urgency and strength of the matter. Over and over again, Rychlak quotes the public and emphatic condemnations which Pius XI and Pius XII (both as Cardinal and Pope) made of Fascism, Nazism and Anti-Semitism during the 1930's as "nothing but apostasy," a "pagan cult of race," the tool of "bad shepherds" who were leading their countries "astray into an idolatry of race."[11] The Allies air-dropped 88,000 copies of Pius XII's first encyclical over Germany during WW II.

Rychlak spares no effort describing the repeated cries of Pius XII and the Church about the evils Nazism was perpetrating. In January 1940, Vatican Radio broadcast to the worlds that "Jews and Poles are being herded into separate ghettos, hermetically sealed and pitifully inadequate for the economic subsistence of the missions designed to live there . . . the horror and inexcusable excesses committed on a helpless and a homeless people have been established by the unimpeachable testimony of eyewitnesses."[12] Vatican Radio reported that "Hitler's war unfortunately [for the moral health of Germans] is not a just war" and that "God's blessing therefore cannot be upon it."[13] In a Christmas broadcast in 1942, the year the "Final Solution" was put into full play by the Nazis, Pius XII told the world of "the hundreds of thousands who, through no fault of their own, and solely because of their nation or race, have been condemned to death or progressive extinction."[14] Rychlak explains how Vatican officials made sure that the truth about the concentration camps was disseminated to the Allied powers and Pius XII's approval of their actions.

Rychlak also describes how the resistance of Pius XII was active, not confined to preaching. Pius XII encouraged discussions between high-level

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10. RONALD J. RYCHALK, HITLER, THE WAR, AND THE POPE 99 (Sunday Visitor Ed. 2000).
11. *Id.* at 95-98.
12. *Id.* at 135.
13. *Id.* at 151.
14. *Id.*

Germans and the British regarding a plot to have Hitler deposed in 1940, before the "Final Solution" began. Pius XII did not fully endorse the scheme, partly because he did not want to approve British and French proposals for an occupied Germany, and because the plot came to involve the murder of Hitler. His willingness to oppose the Nazis and the Italian fascists, embracing the sacrifices and efforts of thousands of Catholic religious and lay people, are also well-documented.

Among the interesting aspects of the book is Rychlak's exposure of how the Allies helped make the "Black Legend" of Pius XII for their own purposes. When the Allies called for the unconditional surrender of Germany, Pius XII refused to support the demand. He was concerned not only for the Vatican's official neutrality in the war (something that the Nazis repeatedly accused him of violating), but also the fact that unconditional surrender would only bind the German people more closely to Hitler's own destiny. The Allies, of course, did not agree, and went about variously criticizing Pius for his "silence" about the need to end the war with Germany's surrender. Another interesting episode is the myth that Pius XII pleaded with the Allies not to occupy Rome with black soldiers. Rychlak, tracking down the actual records of papal audiences and military communications, shows that Pius XII was concerned with one particular French unit which had perpetrated atrocities in the last city it had occupied. The unit was from France's North African possessions, and its soldiers were black. But when an American officer had relayed Pius XII's request to his headquarters, the U.S. Army changed the request to exclude black troops as a way of placating the French.

These are but a few of the fascinating events and people who appear in Rychlak's study. It is organized chronologically, from the rise of the Nazis and Pacelli's early career until his death. The book concludes in the final chapter with impressive research into direct and thoughtful discussions of frequently-asked questions, such as "Would a statement by the Pope have diminished Jewish Suffering," or "Should the Pope have excommunicated Hitler." A last chapter specifically addresses itself to John Cornwell's *Hitler's Pope*, dispassionately examining what appear to be grave errors in John Cornwell's research and unsoundness in his evaluations. Rychlak's discussion of how *Hitler's Pope* is being marketed by a doctored photograph of Pius XII is startling, given the seriousness and prominence accorded to John Cornwell's work.

Any author addressing a large history must deal successfully with the tensions between chronological narrative and the themes or trends which only show themselves at different times or in different places. A mere chronology can leave the reader informed as to sequence, but confused as to the meaning, of events. But while a merely topical approach preserves the unity of themes across time, it can have the reader lurching back and forth between decades, unsure of when or where he is supposed to be. Rychlak has masterfully pulled

off the former task, taking the reader through the turbulent first half of the 20th Century while never losing sight of the significance each event bears to his theme. His prose is lucid and clear, and displays none of the stultifying formality one associates with legal writing. His conclusions are well-reasoned and reasonably expressed. One leaves the work feeling far better informed about the whole subject, and quite convinced that while one may criticize the specifics of Pius XII's reaction to the Holocaust, no one can seriously contend that it was a moral failure attributable to the Church as a whole.

The work is not without flaws. Rychlak could have better linked his narrative with familiar specifics of Nazi and World War II history. A depiction of the terrifying invincibility displayed by the German and Japanese war machines from 1939-1942 would have better illuminated Pius XII's decisions about how to confront the Nazis, which must have taken into account the fact that the Nazis were winning the war, and winning it rather handily. Descriptions of Germany's iron grip on France and Eastern Europe, and the Italian and Nazi control over Rome and access to the Vatican, would have helped the reader understand the difficulty, if not the sheer impossibility, of Pius actually communicating Hochhuth's "anathema to chill the blood /of every last man on earth." A review of Allied war crimes, such as the indiscriminate firebombing of German and Japanese cities, the use of nuclear weapons at Hiroshima and Nagasaki, the massacres, rapes, and desecrations perpetrated by advancing Soviet troops upon Eastern Europe and Germany, would have put Pius' appeals for immediate, negotiated peace into better perspective. Of course, a programmatic description of the actual phases of the Holocaust would have served as an invaluable touchstone. Genesis Press should have provided a far more serious index than the measly thing attached to the book. In a work entirely centered on Hitler and Pius XII, the only index entries for Pius XII are "coronation of," "death of," and the titles of his encyclicals; Hitler gets five entries: "childhood," "military record," "writes *Mein Kampf*," "named Chancellor," and "death of."

These flaws do not detract from the essential soundness and value of this specialized historical work. It is a solitary book, bravely poking convincing holes in conventional opinion. It is a book worth reading. You may hold any opinion you like about Pius XII and the Catholic Church during WW II, but you would be unjust to voice it without having read *Hitler, the War, and the Pope.*

Richard Gambino, Vendetta: The True Story of the Largest Lynching in U.S. History

TORONTO: GUERNICA EDITIONS INC., 1998, 2000. (PAGES 198, $8 U.S.D.)

BOOK REVIEW BY: MARIA LISI-MURRAY†

In *Vendetta: The True Story of the Largest Lynching in U.S. History*, Richard Gambino[1] brings a dark, hidden injustice into the light of modern America.[2] He details the lynching of eleven Italian Americans on March 14, 1891, by a mob in New Orleans. Notably, this was the largest lynching documented in American history.[3] Gambino examines the various forces contributing to the materialization of the crazed mob that so brutally carried out its murderous acts. These forces include political, economic, and social prejudices enveloping the New Orleans community and further affecting the entire United States. Gambino identifies the lynching as "one of the first major stimuli of the stereotype of inherently criminal Italian-American culture, a common defamation which still limits the ethic group's position, participation, and possibilities in today's America."[4]

Gambino begins his retelling of the event with the night of October 15, 1890, when Police Superintendent David C. Hennessy was ambushed as he walked home from his office. Hit with a torrent of bullets that ripped into his abdomen, chest, arms, and legs, Hennessy returned fire while other patrolmen responded to the shots.[5] He whispered to a fellow officer that "Dagoes" were responsible.[6] Despite surviving more than nine hours after the shooting, Hennessy never fully identified, nor was asked to further identify, the shooters. Meanwhile, word spread about the "Dagoes" shooting Hennessy and the New Orleans mayor, Mayor Shakspeare, ordered police to arrest every Italian encountered.[7] At the time of Hennessy's death, fifty Italians were already arrested, and between one and two hundred more were taken into custody during the next twenty-four hours.[8]

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1. Richard Gambino is also the author of *Blood of My Blood*, published (by GUERNICA) in 1998. He has a Ph.D. in philosophy from New York University.

2. RICHARD GAMBINO, VENDETTA: THE TRUE STORY OF THE LARGEST LYNCHING IN U.S. HISTORY (Guernica, 1998, 2000) (hereafter "GAMBINO").

3. *Id.*

4. *Id.* at x; *see also* NEIL THOMAS PROTO, SACCO AND VANZETTI AND THE ITALIAN EXPERIENCE IN AMERICA (1999).

5. *Id.* at 3.

6. *Id.*

7. *Id.* at 7.

8. GAMBINO, *supra* note 2, at 8.

Gambino comments on the peculiarities and problems with the investigation surrounding Hennessy's murder. There was a blatant failure to question Hennessy about the perpetrators when he could converse and receive visitors after being shot.[9] It appeared that the frenzy of arrests that followed were based solely on the utterance of the word "Dago."

Gambino also examines the suspect manner in which five Italians who were formally charged were identified after the shooting. The murder created a venue where hatred toward Italians could be fostered and justified. The Mayor, City Council, and others in power throughout New Orleans echoed this hatred. The Mayor appointed the Committee of Fifty, which consisted of eighty-three members from the political and labor powers, the wealthy commercial establishment, and the social elite.[10] The Committee of Fifty, chaired by Edgar H. Farrar, who later became president of the American Bar Association, printed an open letter addressed to the Italian-Americans of New Orleans. The letter called for Italian-Americans to turn on each other and to give up the names of any suspected person. Hearsay and anonymous information were sufficient. An obvious threat of violence against the Italian-American community in the letter illustrated the growing animosity.[11]

The Committee of Fifty continued to have great influence over the investigation and proceeded to have another fourteen Italians indicted for Hennesy's murder. This brought the total number of men indicted to nineteen.[12] The authorities determined that nine of the men would be tried first and the others would be tried later. The first trial began on February 28, 1891.[13]

The result of the trial was the next log to add fuel to the fire. The court declared a mistrial for three of the men. The other six were found not guilty.[14] The judge then ordered that all nineteen Italians be returned to prison. "His stated reason was not as was later claimed, to protect the Italians, but that another charge was still pending against them – that of 'lying in wait with intent to commit the murder of Hennessy.'"[15] Gambino identifies the utter outrageousness of this act after the jury verdict. He further describes the volatile reaction to the verdict in the newspapers, which called the citizens to "take steps to remedy the failure of justice in the Hennessy case."[16]

Gambino details the mob's progression to the lynching in horrifying detail. The mob that formed in response to the newspapers numbered from twelve to

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9. *Id.*
10. *Id.* at 20 (The members of the Committee of Fifty are named in Appendix C at 146).
11. *Id.* (A copy of the letter can be found in Appendix D at 148).
12. *Id.* (The names of the men indicted are listed in Appendix E at 150).
13. *Id.* at 71.
14. *Id.* at 77.
15. *Id.*
16. GAMBINO, *supra* note 2, at 77.

twenty thousand people.[17] They surrounded the prison where the nineteen men were still held and demanded the prisoners be turned over to them. Inside the prison, the warden armed the guards and attempted to speak with the mob. However, the mob began to batter down a prison door. The warden refused to arm the Italians but did set them free inside the prison to hide. The armed mob, upon breaking into the prison, hunted down the Italian prisoners. The gruesome events are thoroughly described by Gambino. As the Italian prisoners are shot and some killed, the gunmen met and decided to bring the few still living out to the crowd. A rope was secured and the brutal lynching began. Several men in the crowd used the hung prisoners as target practice. In all, eleven Italians were killed.[18] Of these killed, three were previously acquitted, three had the trial result in a mistrial, and five had no trial at all.[19]

Gambino goes beyond describing the lynching and identifies other factors likely influencing the discriminatory attitude towards Italian-Americans. The sudden immigration of Italians caused many changes in New Orleans. Italians were brought in to displace black labor. They worked long, hard hours earning pay equal to black field hands. However, Italians were able to grow their own food and save money to bring over more family members from Italy. When Italian-Americans bought boat tickets for family to come to America, resentment grew because they sent money out of the city's economy. They were also seen as an economic threat because of their presence in the oyster and fruit markets. Plantation owners feared Italians could potentially become landowners.

The events after the lynching detail an anti-Italian hysteria that arose within the United States. The lynching was openly approved of in newspapers across the nation. Proponents of the lynching included many high-ranking political officials. There was a call to restrict immigration. The press promoted the conceptualization of all Italians as Mafia criminals and, in fact, encouraged retaliation against Italian-Americans.[20]

A grand jury, convened to investigate the lynching, assumed the role of justifying the horrific acts of the murderers.[21] The results became "one of the most glaring examples of official mendacity in American history."[22] In short, the grand jury justified the lynching making headlines and further infuriating Italian-Americans.

The lynching also impacted the relationship between President Harrison and Congress. Rumors of a potential war with Italy coursed throughout the United

17. *Id.* at 81.
18. *Id.* at 87.
19. *Id.*
20. *Id.* at 111.
21. *Id.* at 97.
22. *Id.* at 107.

States. Italy, with its substantial, powerful navy would easily outmatch the United States in a war at sea. Congress, who had previously seen little need for a navy, now approved the Harrison administration's demand for a new, substantial navy of battleships and cruisers.[23]

The lynching strained the relationship between the United States and Italy. Italy, being in poor economic shape, sought to establish a positive trade relationship with the United States.[24] The lynching put Italy in an unenviable position. They demanded justice and the prosecution of the lynchers. However, the stressed Italian economy was becoming overwhelming. Italy secretly conceded their demand under the weight of heavy public debt and commercial difficulty. Eventually, President Harrison publicly denunciated the lynching and a reconciliation between the two countries began. Harrison also designated a cash indemnity, amounting to about $2,500 per family, to be distributed among the families of the lynching victims.[25] This, notably, occurred without support or approval from Congress.

The actions of the United States and Italy left Italian-Americans without any feeling of justice or peace. They felt that the actions of the United States constituted a "buy off" and the Italian government "sold out" to bolster its economy.[26] Neither country protected Italian-Americans and they justifiably felt betrayed and outraged at both governments.[27]

In conclusion, *Vendetta: The True Story of the Largest Lynching in U.S. History*, provides an intricate, insightful chronicle of the events surrounding the largest lynching in United States history. The reader is presented with political, economic, and social influences that affected the events leading up to and after the lynching. Notions of prejudice and fear permeate Gambino's analysis. He also provides an appendix of the documents and illustrations of the key people detailed in the book. Vendetta brings a hidden and nearly forgotten event in American history out of the past and into the minds of the modern reader. It allows one to appreciate the sacrifices so many immigrants made to begin anew in this country. It also encourages the reader to analyze the modern, popular Mafia stereotype for what it is, a negative racial bias. The reader is left to contemplate the author's words, "if it is true that eternal vigilance is the price of liberty, then we had better pay greater attention to certain monstrous traditions of America. . .."[28]

Vendetta breathes life into the nearly forgotten participants and victims of this event and provides the reader with a powerful example of bigotry against

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23. GAMBINO, *supra* note 2, at 121.
24. *Id.* at 124.
25. *Id.* at 126.
26. *Id.* at 127.
27. *Id.*
28. *Id.* at x.

Italians. This book is a short read, but ultimately conveys a great deal of information. The appendix is particularly effective as it provides clear support for the author's assertions and conveys the tone of the period. This book is highly recommended, especially to those who are not familiar with the lynching or the events surrounding it.

Law and the Color of Markets

ROBIN PAUL MALLOY†

INTRODUCTION

In my work on law and market economy I argue for a new understanding of the relationship between law and market theory.[1] My primary concern is with understanding the meanings and values of market exchange, and the implications of using economic analysis in thinking about law and legal institutions. Consequently, I do not follow the traditional approach of law and economics. Unlike traditional legal economists, I am less interested in efficiency and more interested in the networks and patterns of human exchange. In this article, therefore, I examine exchange in the marketplace, and I consider how the networks and patterns of social organization effect and transform meanings, values, and social relationships.

In examining the market as a place of exchange, I have made several claims that differ from and challenge traditional assumptions in law and economics. One of several key points that I have made is that market choice involves a process of interpretation.[2] This means that market choices are not simply based on a rational calculus of cost and benefit analysis,[3] but rather involve an *interpretation* of costs and benefits, or stated differently, involve a process of interpretation rather than a calculus of efficiency.[4] Furthermore, this process of

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1. *See, e.g.,* ROBIN PAUL MALLOY, LAW AND MARKET ECONOMY: REINTERPRETING THE VALUES OF LAW AND ECONOMICS (2000) (hereinafter LAW AND MARKET ECONOMY); ROBIN PAUL MALLOY, PLANNING FOR SERFDOM: LEGAL ECONOMIC DISCOURSE AND DOWNTOWN DEVELOPMENT (1991); ROBIN PAUL MALLOY, A COMPARATIVE APPROACH TO THEORY AND PRACTICE (1990); LAW AND ECONOMICS: NEW AND CRITICAL PERSPECTIVES (Robin Paul Malloy & Chris Braun eds., 1995); ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS (Robin Paul Malloy & Jerry Evensky eds., 1994, 1995); Robin Paul Malloy, *Toward a New Discourse of Law and Economics*, 42 SYRACUSE L. REV. 27 (1991); *Posner and Malloy Debate: Is Law and Economics Moral?* 24 VAL. U. L. REV. 147 (1990); Sharon Horn & Robin Paul Malloy, *China's Market Economy: A Semiosis of Cross Boundary Discourse Between Law and Economics and Feminist Jurisprudence*, 45 SYRACUSE L. REV. 815 (1994); Robin Paul Malloy, *Letter from the Longhouse: Law, Economics and Native American Values* 1992 WIS. L. REV. 1569.

2. *See* MALLOY, LAW AND MARKET ECONOMY, *supra* note 1.

3. *Id.*

4. My reference to signs here is one related to the work of Charles S. Peirce and Roberta Kevelson. *See, e.g.*, THE ESSENTIAL PEIRCE VOL. 1 (Nathan Houser & Christian Kloesel eds., 1992); THE ESSENTIAL PEIRCE Vol. 2 (Peirce Edition Project eds., 1998); FLOYD MERRELL, PEIRCE, SIGNS, AND MEANING (1997); CHRISTOPHER HOOKWAY, PEIRCE, (1985, 1992); JAMES JAKOB LISZKA, A GENERAL INTRODUCTION TO THE SEMEIOTIC OF CHARLES SANDERS PEIRCE (1996); REASONING AND THE LOGIC OF THINGS: CHARLES SANDERS PEIRCE (Kenneth Lane Ketner ed., 1992); ROBERTA KEVELSON, THE LAW AS A

interpretation involves exchange that occurs by and between people, and is not the product of atomistic cost and benefit calculators operating in isolated and artificial worlds constructed from the 'objective' assumptions of traditional law and economics.[5] To the contrary, as an interpretive process involving sign making beings in a process of continuous exchange, market choices are to a certain degree subjective, emotive, and arational.[6] This distinction is important because it means that market choice becomes a socially situated undertaking in which context, position, and experience are important. Choice is understood, therefore, as experiential and in this sense it is subjective and contextual; it is not detached, atomistic, or exogenously informed.

Each of us, as market actors, are informed by the exchanges in which we participate, and this means that choice is not objective, nor is it universal or rational in the sense used by traditional legal economists. Choice, as an interpretive process, can be influenced or 'colored' by references to past experience or by reference to social convention that teaches us to associate various colors with particular meanings or feelings. Color can be used to give meaning or to establish a tone, mood, or emotive frame of reference for interpretation.

With this in my mind, I began to think about the use of color references in law and about the emotive and expressive nature of color for human beings. I began to wonder how color might shade our understanding of law and legal institutions. Given that market choice involves a process of interpretation, I wondered what role color might play in this process. Initially, I thought of a number of ways to explore the role of color in law. At first I thought in terms of the obvious, in terms of exploring color related to race and the law. I thought of the relationship between color and laws on slavery, marriage (race restrictions), segregation, integration, affirmative action, immigration, colonialism, and even burial (laws on racial segregation even in death). I thought about the complex meanings of ideas such as white, black, Hispanic, and Asian, and the struggle of law in dealing with these shades of distinction. Many older state laws struggled to define racial categories by blood; now the lines are even less clear as attempts are made to provide government benefits and direct affirmative action to specifically defined subgroups within our community.

I next thought about the color of law in terms of the flowing black robes of the jurist. Symbolically submerged in a cloak of darkness, one can visualize the individuality of the judge as giving way to the impersonal rule of law as he or she 'loses a body' in those robes of black and is transformed into the 'talking head' of impartial justice. Similarly, I thought of colonial North America with

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SYSTEM OF SIGNS (1988); ROBERTA KEVELSON, CHARLES S. PEIRCE'S METHOD OF METHODS (1987); ROBERTA KEVELSON, PEIRCE'S PRAGMATISM (1998); ROBERTA KEVELSON, PEIRCE, SCIENCE, SIGNS (1996); ROBERTA KEVELSON, PEIRCE'S ESTHETICS OF FREEDOM (1993).

5. MALLOY, LAW AND MARKET ECONOMY, *supra* note 1.

6. *Id.*

its assorted Jesuit missionaries. I thought of the black religious gowns of the Jesuits as symbolically framing the passionate will of God in expressing a need for divine order, conventional law, and discipline in the wilderness of North America. The Jesuits, in this regard, performed in a manner similar to the jurist, not as individual actors but as detached heads delivering the law to native peoples from a shapeless figure of darkness. The personal and subjective being of the individual Jesuit replaced by a black robe from within which a human served as a vehicle for the pronouncement of God's will.

After this brief excursion into the more poetic dimensions of law and color I returned to the more pragmatic concerns of my training as a real estate lawyer, and I began thinking about the idea of owning property or asserting a claim of ownership under 'color of title.' Here, it seemed interesting to note that having color of title was actually deceptive in the sense that it means that one lacks actual title. A similar meaning is implied when one thinks about government officials acting under the 'color of law.' This actually means that they act 'illegally,' outside of the law, or beyond their official capacity. Color, as such, acts as illusion because it masks a truth that can only be revealed in a more transparent and accessible legal system.

All of this initial thinking finally brought me to a consideration of color related to law in the marketplace. I thought it would be interesting to identify references to color related to issues of law and market economy because it would indicate the use of emotive and experiential references in an area of law considered highly rational and objective by traditional legal economists. As I began to examine color in this context I began to see that, in some ways, the use of color in law and market economy has similarity to references to color in religion. Therefore, I made a brief survey of color as used in early Christian art and proceeded to think of color in relationship to what I would call a transformation from 'homo-theologicus' to 'homo-economicus;' a transformation of human action from ethical, moral, and religious purpose to economic and profit motivated intention.

In many of the references to color in commercial law, I found that there was a connection to the meaning of the color reference in early Christian art. Blues, greens, grays, blacks, yellows, and browns, for example, carried similar shades of meaning in both contexts. One will see this similarity in comparing the examples used in the next two parts of this essay. Therefore, I begin with a short reference to the use of color in early Christian art and then move on to an inventory of color as used in law and market theory. The ultimate purpose of this essay is to heighten awareness to the use of color references in law and market economy, and to suggest that the extensive use of these references reflects the emotive and experiential nature of social/market choice.

II. THE COLORS OF FAITH

Color was used in a variety of ways in Christian art as an important symbol or sign vehicle. For instance, black was a symbol of death, the underworld, mourning, sickness and negation. Yet, when black was presented with white, as in the traditional clothing of a Priest or Nun, it conveyed a message of humility and purity.[7] Blue represented Heaven, truth, and the Virgin Mary.[8] It symbolized the pure blue sky cleansed of clouds and imperfection.[9] Brown was the color of *spiritual* death and degradation.[10] Gray, the color of ashes, as used in the ritual of Ash Wednesday, signified mourning and humility, the death of the *body* and the immortality of the spirit.[11] Green, the color of vegetation, symbolized the victory of life over death.[12] Purple, because of its association with imperial power, was sometimes used to represent God, but also to represent sorrow and penitence.[13] Red, as the color of blood, symbolized the passions of love and hate, and in referencing the lives and blood of the martyrs, it referred to faith.[14] Also, as a color of sovereign power for the Romans, red came to have that same meaning in reference to the color worn by the Princes of the Church in their office of Cardinal.[15] Violet was understood as reflecting love, truth, passion and suffering,[16] and white has always been presented as a sign of purity and innocence.[17] The Holy Father, the Pope, for instance, wears white and white smoke symbolizes the election of a new Pope. Yellow, depending upon its shade and context, presented two opposed meanings. The golden yellow, as used by the Vatican, represents the sun, projected divinity and revealed truth.[18] On the other hand, yellow, particularly dingy yellow, was often used to reflect infernal light, degradation, jealousy, treason and contagion.[19]

Having found color to be an important sign vehicle in telling the stories of faith, I became curious about the connection between color, law, and markets. I began thinking about our highly commodified society in which monetary images, rather than spiritual ones, play an increasingly powerful role in defining many of our social relationships. I also began to see some elements of similarity between color in faith, and color in law and markets. Therefore, I began to wonder about the transition from homo-theologicus to homo-economicus and

7. GEORGE FERGUSON, SIGNS & SYMBOLS IN CHRISTIAN ART 151-153 (1961).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*
13. FERGUSON, *supra* note 7.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. FERGUSON, *supra* note 7.
19. *Id.*

the way in which this transition might color our own identity. I became curious about the way in which color shaded our understanding of law, and legal and economic institutions. I was curious about the connection between signs of color in Christian art, and color in law and the market economy.

In starting my inquiry, I first considered the mediator of our market exchange, the greenback. I found it interesting that our common currency of trade informs everyone that even though we are commercial actors, it is in God that we place our trust. As such, our faith in the value of our currency — our power over goods and services — is linked to our trust in God. Perhaps we free market capitalists are the chosen people, the only money changers that would have been worthy of a place in the Temple. Our pursuit of wealth, our tendency to commodify all that is colored 'sacred' is acceptable and admirable because we act as agents of a divine force. In all things material and monetary, we act with a trust in God; as agents of a divine monetary will. In pursuing our own self-interest, our own monetary objectives, we pursue goodness as we pursue God. The phrase, 'In God We Trust,' becomes synonymous with trusting the monetary instruments of God and consequently, in trusting that the pursuit of wealth is a Godly occupation.

With wealth maximization as our creed, we judge our worth, and that of others, by making reference to market criteria rather than ethical or moral standards. For instance, we are not so much concerned with the ethical or moral conduct of the President as we are with the state of the economy and our own position in it during the time of his Presidency. In a similar way, we no longer judge the importance of a town by the size and stature of its church, or by the importance of its holy relics or the rank and its local Vicar. Today we are more likely to judge a town by the size and stature of its mall, indicating the presence of unusual and upscale merchants, and by the architectural expense of its massive expanse.[20] For us, the mall is not like the medieval marketplace, or the town square. Rather, the mall is a modern 'sacred place,' and not merely a place of trade.[21] It presents order, often constructed in the shape of a cross, and displays repetition of thematic market values in its arrangement and selection of stores, eateries, and spaces. It offers a space cleansed of street people, beggers, and social protesters. The mall is an artificial environment using light, space, color, and texture to transport visitors to a place of safety, solace, and pleasure. The mall stands as a symbolic temple for a commercial people, and as a commercial people, we are more interested in the hours of shopping than in the

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20. *See, e.g., Mall Would be Biggest in U.S.*, HERALD AMERICAN– POST STANDARD, April 30, 2000, at A1. (Syracuse, N.Y. plans a mega-mall expansion to 4.5 million square feet to be largest in the U.S.).

21. One child expressed this feeling in a quote that appeared in a local newspaper. As he gazed up at the grandeur of the five story atrium of the current 1.2 million square foot mall and its light embracing glass ceilings he asked, "Does God live up there?" *KidSpeak*, THE POST STANDARD, April 11, 2000 at C3, col. 1.

schedule for masses. We are more concerned with receiving discounts for smart bargaining than indulgences for the forgiveness of sins. Therefore, we are more interested in the colors of commerce than in the colors of the liturgical calendar.

In the modern world of WTO, GATT, NAFTA,[22] electronic banking and digital credit, we are colored as empowered cost-calculating market players, rather than as God-fearing and superstitious followers of a divine will. In the 'New World Order,' the law provides an expansive infrastructure for coloring the relationships of exchange and social organization. With this in mind, I undertake in this essay to explore some of the references to color that are used in painting the textual images of law and market economy.

III. COLOR CONNECTORS IN LAW AND MARKET ECONOMY

In explaining some of the references to color in the relationship between law and market economy, I begin in the most traditional of places, with a dictionary definition. 'Color,' according to *Black's Law Dictionary*, is "an appearance, semblance, or simulacrum, as distinguished from that which is real. A prima facie or apparent right. Hence a deceptive appearance; a plausible, assumed exterior, concealing a lack of reality; a disguise or pretext."[23]

Thus, color is a sign that at once iconically represents a set of real world meanings while indexically directing our attention to a deceptive otherness. . .to a conflicting alternative buried beneath a superficial surface.[24] The difficulty, of course, lies in the uncovering of the lies hidden beneath the surface of these signs. . . .of imagining the real to which the imagined plausibly but misleadingly points, and peeling back the layers to reveal the naked, colorless, truth.

In exploring these ideas, we find that the convergence of law and market theory generates color signs in various shades and textures. These color references are not literal but are used as signifiers of underlying relationships — signifiers that translate the objectified and detached discourse of both law and of economics into an emotive and visual language. In this sense, color works in a manner similar to that of personalizing the law by giving law a personification in the name of a real person whose plight we have become emotional invested in — e.g. Sara's law,[25] or the Brady Bill.[26] In each instance, the subject which

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22. WTO (World Trade Organization); GATT (General Agreement on Tariffs and Trade); NAFTA (North American Free Trade Agreement).

23. BLACK'S LAW DICTIONARY 181 (6th ed. 1991).

24. This is similar to the concept of acting 'under color of law' or 'under color of title.' What on the surface appears to be a legal action or legal title authorized by law is really not. It is a deception.

25. *See* N.Y. Missing Children's Law, Sec. 837(e) (1999) (Statewide Central Register for Missing Children. Part of the Sara Anne Wood Child Protection Agenda). (Sara Anne Wood was kidnapped and murdered after being taken from her bicycle while riding on a country road near her home in Central New York).

is offered in neutral or objectified language, is concealed, altered, or given new meaning by its relationship to the color or person to which it makes reference.

It is easy to find examples of color infusing our discussion of legal and economic relationships. For instance, we entertain arguments for a gold standard and understand them against a back drop that includes a reference to the goodness and revealed truth of the golden rule, but in business the golden rule is transformed from a relationship of love or friendship into a relationship of power — as in the expression, "he who has the gold, makes the rules."

Similar connections to color abound. We invest in blue chip stocks; we save, but mostly spend, greenbacks; and we describe the status of our work with reference to blue, pink and white collared shirts. We are envious of overpaid executives with golden parachutes; we shop for white sales, red tag sales, and blue light specials; we fear pink slips, abhor red tape; and dream of streets paved in gold. On the battlefields of mergers and acquisitions, we praise white knights who defend our honor, even as they ride off with all of our assets.[27] We object to labor competition from foreign immigrants who obtain green cards permitting them to work at jobs we refuse to take. We have blue sky laws to remove the clouds of misinformation surrounding securities offerings; blue laws to prevent shopping on Sunday; red light districts for trading in the blue pleasure of the flesh; and stock market blues known as Blue Cross, Blue Shield, and Big Blue / IBM.[28] We have yellow dog contracts to protect us from union contagions in our labor relations;[29] we have brownfields on which we develop new uses for contaminated properties;[30] we use platinum, gold, silver, and green colored plastic for payment in trade and exchange; and we anxiously decode every possible layer of meaning in the words and actions of a Federal Reserve Chairman, whose last name is Greenspan.

As these various references reveal, our market relationships are drenched in color. As iconic representations of homo-economicus, we each are fully im-

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26. *See, e.g., Second Amendment Symposium: The Brady Handgun Prevention Act and the Community Protection Initiative: Legislative Responses to the Second Amendment*, 1998 BYU L. REV. 103 (1998); Richard Aborn, *The Battle over the Brady Bill and the Future of Gun Control Advocacy*, 22 FORDHAM URB. L.J. 417 (1995) (Bill Brady was shot and permanently disabled during an attempt on the life of then President Reagan outside the Washington Hilton Hotel).

27. *See generally*, Charles M. Yablon, *Mergers and Acquisitions: Corporate Culture in Takeovers*, 19 CARDOZO L. REV. 553 (1997); *See also*, Melissa J. Rhodes, *White Knight Privilege in Litigated Takeovers: Leveling the Playing Field in Discovery*, 43 STANFORD L. REV. 445 (1991).

28. *See generally*, Mark A. Sargent, *A Future for Blue Sky Law*, 62 U. CINN. L. REV. 471 (1993).

29. *See generally*, Keith N. Hylton, *A Theory of Minimum Contract Terms, With Implications for Labor Law*, 74 TEX. L. REV. 1741 (1996); Katherine Van Wezel Stone, *Mandatory Arbitration of Individual Employment Rights: The Yellow dog Contract of the 1990s*, 73 DENVER U. L. REV. 1017 (1996).

30. *See generally*, Stephen M. Johnson, *The Brownfields Action Agenda: A Model for Future Federal/State Cooperation in the Quest for Environmental Justice*, 37 SANTA CLARA L. REV. 85 (1996); Georgette C. Poindexter, *Separate and Unequal: A Comment on the Urban Development Aspect of Brownfield Programs*, 24 FORDHAM URB. L.J. (1996).

mersed in a world of color as we pursue our self-interested desires, unlimited wants, and passion for non-biblical profits. In this capacity, we are assumed to be keenly aware of our rational and efficient calculating subconscious mind, which permits us to remain calm and self-confident as we continually bid up the value of 'dot. com' companies that simultaneously expand their losses. Our ease in calculation, together with our ability to navigate the frictionless landscape of a Coasean marketplace, assures us that Black Tuesday was merely a blip on the pre-digital horizon — a blip caused by ex ante government intermeddling in a black and white era before colorization and the ex post triumph of free markets.[31]

As homo-economicus, we imagine that we are able to act with the detached, colorless, and rational wisdom of science. We know everything by its price, and know that price instantaneously reflects everything there is to know about the subject of our exchange. More importantly, we know we can buy, sell, trade, and exchange in the market without ever having any act, event, or other person influence our preferences.

In the market worlds we inhabit, we regularly navigate through seas of black, gray, and green. In our role as fishermen of commerce, we enhance our daily catch with the use of exclusionary redlines and inclusionary greenlines.

The black markets we navigate encompass a wide variety of exchanges. In these markets, we can buy and sell almost anything. From an ebay auction of a human kidney (starting price of $25,000 to closing bid of $5 million),[32] to trade in cigarettes and liquor smuggled from Canada to the U.S. by way of 'sovereign' Indian reservations/nations.[33] We can buy children on the black market as an alternative to adoption,[34] and we can buy stolen pets and zoo animals as well.[35] For swinging young men that seek to 'dance' all night, Viagra has become a popular item along with a variety of other pharmaceutical and illegal drugs.[36] There is even a trade in toilet smuggling — for Americans who can not live with the environmentally approved and regulated low-water use toilet

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31. Black Tuesday occurred on October 29, 1929, and marks the time when the crash of the stock market led to the Great Depression.

32. Ruth Levy Guyer, Editorial, *Kidney Auction on eBay Only Makes the Black Market Bigger*, ST. LOUIS POST-DISPATCH, Sept. 12, 1999, at B3.

33. *Ex-Falls GOP Chairman Gets Reduced Sentence for Help Linking Tobacco Firm to Smuggling Ring*, BUFFALO NEWS, Oct. 20, 1999, at C7.

34. *See generally*, State v. Iwakiri, 682 P.2d 571 (Idaho 1984); *Three Sentenced in Baby-Smuggling Case*, POST-STANDARD (Syracuse, N.Y.), April 18, 2000, at A7 (illegally smuggling babies from Mexico to the U.S. and selling them to people who wanted to adopt).

35. *See* Hickey v. Capital Cities/ABC, Inc., 792 F. Supp. 1195 (D. Or. 1980).

36. *Nightclub Crowd Parties With Viagra*, ORLANDO SENTINEL, Aug. 25, 1999, at E2.

required in the United States, there are still plenty of traditional 3.5 gallon toilets to be had across the border in Canada.[37]

Black markets are tempting, but evil. They function as the underworld negation of free and open markets — they operate in opposition to the pure, the transparent, and invisible hand of the deity as explained by Adam Smith.[38]

Grey markets are markets in limbo. Here, the objects of trade are not illegal, but are placed into a stream of commerce for which they were not intended. For example, products manufactured for the Asian market are made to wrongfully flow through the stream of American commerce.[39] Such a move apparently violates the differential quality standards and output controls deemed essential to securing the advantages of unfettered market competition. Grey markets, as such, symbolize the mournful absence or death of a product in one market while providing a link to new life in another.

Green markets are environmentally friendly and full of life. However, they are generally difficult to sustain for homo-economicus because their costs are difficult to reconcile with their benefits. Acting as homo-economicus, it is easy to see that the ability to waste everything but *our* time is efficient. Likewise, it is simple enough to understand that time is money, and our time is worth more to *us* than the potential environmental gain to *someone else*. This is particularly true given the long time horizon attached to most environmental benefits. While we are asked to bear the costs, the benefits are likely to be enjoyed by someone who probably hasn't even been born yet.

As we navigate these markets, we fish for profits, and like Harold with his purple crayon, we sketch unlimited images of possibility.[40] Taking red and green pens, we carefully dissect the physical space of trade and concentrate our efforts on the biggest and tastiest catch.

Redlining creates imaginary boundaries of exclusion encircling a neighborhood and banishing it — coloring it with invisibility and erasing it from our balance sheets.[41] Black, brown, tan, poor, unemployed, undereducated, all encircled — a redline is a deadline in our calculus of value. Redlining credit, redlining housing, redlining car rentals, redlining insurance, and even redlining

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37. Dru Sefton, *Going Against The Flow* Consumers Yearn for the Power of Old Toilets, USA TODAY, Sept. 28, 1999, at 1D (the U.S. restricts toilet tanks to 1.6 gallons of water, causing many backups).

38. *See generally*, ADAM SMITH AND THE PHILOSOPHY OF LAW AND ECONOMICS (Robin Paul Malloy and Jerry Evensky eds., 1994 Hardcover, 1995 Softcover).

39. *See* Idaho v. Hobby Horse Ranch Tractor & Equip., 929 P.2d 741 (Idaho 1996); Donna M. Lach, Note, *The Gray Market and the Customs Regulation – Is the Controversy Really Over After K Mart Corp. v. Cartier Inc.?*, 65 CHICAGO – KENT L. REV. 221 (1989).

40. *See* CROCKETT JOHNSON, HAROLD AND THE PURPLE CRAYON (HarperCollins 1981).

41. *See generally*, Willy E. Rice, *Race, Gender, "Redlining," and the Discriminatory Access to Loans, Credit, and Insurance: An Historical and Empirical Analysis of Consumers Who Sued Lenders and Insurers in Federal and State Courts 1950 – 1995*, 33 SAN DIEGO L. REV. 583 (1996); ROBIN PAUL MALLOY & JAMES C. SMITH, REAL ESTATE TRANSACTIONS 703-725 (1998).

for pizza deliveries. Redlining is economically rational even if the government deems it impermissible. It lowers costs and increases profit for those that exclude. This is what traditional legal economists call rational discrimination. Redlining is the power to define, the power to rationalize, the power to establish a boundary between 'I' and 'you', 'we' and 'them' — the power to banish and the power to reconcile.

Greenlining pursues inclusion. Within its borders desirable, meritorious, profitable, life-giving prospects reside.[42] Land of pre-approved credit, single-family homes, cellular phones, and newly leased S.U.V.s. The glow of abundance prevails in the self-reflecting image of market success. A greenlined neighborhood is one that businesses pursue because it contains people worthy of credit, goods, and services. Here is a place where goodness, merit, and profit converge. Our attention to winners — our pursuit of high incomes and surplus values, this is the joyous pursuit of the God in which we place our trust. It is no accident that green is the color of new life, the color for 'go', and the color of our money.

Like all of the references to color in law and market economy, greenlining and redlining give texture and expression to the cold calculus of exchange. They help translate the deceptive appearance of an imagined objective and rational market world. In reality, redlining and greenlining work to outline particular frames of market interaction — their color is seemingly so different, but beneath this deceptive shading, this plausible, assumed exterior, is a single legal reality — a single economic struggle in all of the colors of exchange, and in all of the relationships between law and economics. A struggle for power in all of its pigmentations — the power to define one's market, to pursue one's profit, to exclude and include as one sees fit. The power to pursue selfish desires from within the protective shadow of an invisible hand — the power to paint self-interest in the color of public purpose.

CONCLUSION

As an interpretive process, the exercise of market choice is emotive, and in many respects subjective. It can be influenced by numerous fluctuations in meanings and values in a dynamic sign system of human exchange. It is not surprising, therefore, that we see color so richly embedded within the language of the law. The ease and frequency with which we see references to color indicates that we are emotive beings. We are not simply mechanical cost and bene-

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42. *See generally*, Robert W. Emerson, *Franchise Selection and Retention: Discrimination Claims and Affirmative Action Programs*, 40 ARIZ. L. REV. 512 (1998); Timothy C. Lambert, Note, *Fair Marketing: Challenging Pre-Application Lending Practices*, 87 GEO. L. J. 2181 (1999); Craig E. Marcus, Note, *Beyond the Boundaries of the Community Reinvestment Act and the Fair Lending Laws: Developing a Market-based Framework for Generating Low-and Moderate- Income Lending*, 96 COLUM. L. REV. 710 (1996); MALLOY, LAW AND MARKET ECONOMY *supra*, note 1, at 703 –725.

fit calculators. We visualize our world, we personalize our relationships, we colorize exchange. We are not color blind and, thus, color plays an important role in creating meanings and values. In this regard, color is as vivid and meaningful to the scientific pretensions of homo-economicus as it was for homo-theologicus. Color transforms our social relationships through visual language, and infuses both law and economics with emotive expression.

The Microsoft Litigation from a Law and Economics Perspective

KENNETH A. REID†

INTRODUCTION

Overwhelming consumer demand can challenge countries with plentiful resources such as the United States and other developed nations. Such countries rely upon market forces to guide their economic infrastructure, goods and services innovation, as well as minimize wasted resources.[1] The primary challenge is to satisfy consumer demand at low cost. Despite the benefits of a free market, it is an imperfect system. The unaided market does not always fulfill the idealistic dreams of many economists. Sometimes the market fails and this failure can be the result of several causes. First, failure can be the direct result of large business firms intentionally or unintentionally attempting to subvert the market through illicit practices leading to cartels, monopolies and oligopolistic behavior. Markets also have the potential to fail due to poorly defined property rights, high transactions costs in an array of exchanges between producers and consumers, spillover costs (externalities) as well as poor legal institutions. Additionally, the market may fail due to its inability to support a competitive industry because in a firm's quest for least-cost production of a good or service, it may depend upon large-scale facilities.[2] If there is a particular demand, within a market and the minimum sufficient size in that market is large relative to that demand then there cannot be a large number of rivals required to provide any adequate competition. This will have the market effect of increased prices to consumers and a reduction of goods and services output.[3] Finally, even a perfect market may fail to reflect the priorities of society as well as powerful political pressure groups exerting strong forces on the market economy.[4]

Antitrust laws work from the premise that, given limitations imposed on the market by such laws, the markets will produce good or better results than if one relied solely on itself for repair. It can safely be said that perfect competition is the target of antitrust.[5]

This article focuses on the current consideration of the Microsoft antitrust case. The analysis of this case will provide a specific and concrete example

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1. Phillip Areeda, *Introduction to Antitrust Economics,* ANTITRUST L.J., Sept. 29-30, 1983 at 523.
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*

within the evaluation of antitrust law. The potential ramifications of this case are great. The Microsoft Corporation, headed by billionaire Bill Gates, is a large, multinational corporation with offices across the world. Microsoft's operating system, Windows 95 and 98, as well as their web browser, Internet Explorer, are among the most widely used in the United States and several other countries. Many experts have indicated that Microsoft's dominance in the market is derived from monopoly power. If the courts are in agreement, Microsoft Corporation stands to lose billions of dollars in revenue as well as possible divestiture (splitting Microsoft into several independent companies). The Microsoft case will be analyzed with an eye towards how classic Chicagoan economic theorists, as well as post-Chicagoan theorists, would view the case.

Several key issues are examined in this paper. First, the paper examines the Microsoft operating system known as Windows 95 and 98, which includes the bundled internet browser, Internet Explorer. Second, the discussion turns to a consideration of intellectual property rights and their application to the bundling of Internet Explorer with the Windows operating system. Third, the paper examines Microsoft's pricing strategy to determine the presence of predatory pricing under the Sherman Act. Fourth, the paper analyzes possible remedies that might be applicable to the Microsoft case. Finally, the paper concludes by opining whether Microsoft is truly a dominant monopolistic entity in the software market and whether it should be culpable for its conduct.

I. THE MICROSOFT OPERATING SYSTEM KNOWN AS WINDOWS 95 AND 98 INCLUDING THE BUNDLED INTERNET BROWSER, INTERNET EXPLORER.

This section of the paper addresses some basic history of the Microsoft Corporation and the events that led to the current lawsuit. The paper will then discuss the Sherman Act, its historical background, and how it determines whether a company is engaged in monopolistic conduct. An analysis utilizing the factors set forth in the Sherman Act follows to determine whether Microsoft pursues monopolistic practices. This discussion is followed by an analysis of the property rights that are involved in the case and whether Microsoft is entitled to all the benefits traditional property rights entail.

Currently, the Microsoft Corporation, led by Bill Gates, is the world's largest supplier of computer products and software for home and business computing use.[6] The popular Windows 95 and 98 operating systems are used in over eighty percent of personal computers utilizing Intel computer chips within the United States. Most users wish to use a wide range of software applications which are mostly designed as Windows-based software applications.

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6. Will Wachs, *The Microsoft Antitrust Litigation: In the Name of Competition*, 30 U. TOL. L. REV., 485, 488 (1999).

Microsoft's preeminence in this technology sector created a "network effect" compelling developers to create more software for the Windows operating systems than other competing operating systems. The majority of developers decided to create software applications for Microsoft's Windows operating system because creating a new operating system would be infeasible due to high cost.[7]

Microsoft's competition arose not from the operating systems market, but rather the development of alternative software platforms. Such alternatives had the potential to halt Microsoft's market dominance because they could operate through competing operating systems. An example of such a threat is Sun Microsystems' Java. Developers could write programs using the Java language and run the programs through Netscape's web browser on competing operating systems. Such a scheme threatened Microsoft's operating systems.[8] Microsoft recognized the threat because Netscape was a pioneer and a formidable force in the web browser market in comparison to Microsoft's own Internet Explorer.

In terms of distributing the Java language to users, non-Microsoft browsers were the primary vehicle.[9] From its infancy, Java was designed to be cross-platform language with the ability to run software on several operating systems.[10] Bill Gates' attention turned to this threat on January 5, 1997.[11] Gates expressed concern over how to increase Microsoft's market share in a subsequent meeting. It was clear that Microsoft's browser Internet Explorer needed to gain market share to remain viable among rising competitors.[12] Developers were using Netscape's browser to write multiple applications thereby reducing dependency on Windows operating systems.[13] Even though Windows 95 and 98 were enjoying considerable market share, Netscape's ability to run on any personal computer threatened to undermine Microsoft Windows.[14] Internet Explorer is the culmination of Microsoft pooling its extensive resources to create a browser worthy of competing with Netscape. Although this was the logical counter-strategy to combat Netscape, Internet Explorer's merit was unable to reclaim lost market share for Microsoft.[15] Microsoft's next alleged move was a tying arrangement between its browser and Windows to build market share.[16]

To no avail, Microsoft attempted to compile various agreements with Netscape and several other parties to promote its browser. Microsoft's wish was for Netscape to provide services for operating systems other than Windows.

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7. *Id.* at 488-89.
8. *Id.* at 90.
9. *Id.*
10. *Id.*
11. Wachs, *supra* note 6, at 490.
12. *Id.*
13. *Id.*
14. *Id.*
15. Wachs, *supra* note 6, at 490.
16. *Id.* at 491.

This would allow Microsoft to retain its competitive edge by becoming the sole supplier of its browser for Windows.[17] Realizing the potential loss, Netscape refused to comply. Microsoft then initiated a huge marketing campaign for Internet Explorer, including the creation of Windows 98 bundled with Internet Explorer.[18] A newer version of Internet Explorer was to be sold separately from the operating system.[19] Because of Microsoft's market strategy of combining Internet Explorer with its operating system, many competitors believed that Microsoft did this purposefully with the intent to dominate the market, impair rival browsers ability to compete effectively, and create a monopoly in the industry.[20] This resulted in claims that Microsoft engaged in anti-competitive practices to restore its dominant position in the computer technology market.

Furthermore, the OEM's claimed that Microsoft had surreptitiously taken their choice by forcing them to adopt Microsoft's uniform "boot up" sequence as a requirement to gaining a license to Windows.[21] The "boot up" sequence determines what the user will see when he or she starts the computer.[22] Microsoft is said to have placed stringent restrictions on the "boot up" sequence with regard to removing any part of the Internet Explorer software or adding rival software in a prominent manner.[23] Consequently, the OEM's claim that Microsoft removed their choice as to what browser software they can provide customers.[24]

Additionally, the ISP's and ICP's claim that Microsoft has coerced them into not promoting competing browsers by presenting them with certain advantages and perks if they agree not to market rival browsers.[25] Automatic placement in Windows "channel buttons" and folders represent such advantages.[26] ICP's benefit through having direct access to the internet through Windows desktop feature.[27] The aforementioned parties claim that these tactics limit competition.

These alleged acts spawned attention from the Department of Justice's Antitrust Division. A suit was initiated against Microsoft, claiming that by tying Internet Explorer with Windows, Microsoft was illegally maintaining an operating system monopoly in violation of the of the Sherman Act. The chief reason behind this allegation was that Microsoft required original equipment manufac-

17. *Id.*
18. *Id.*
19. *Id.*
20. Wachs, *supra* note 6, at 492.
21. *Id.* at 493.
22. *Id.*
23. *Id.*
24. *Id.*
25. Wachs, *supra* note 6, at 492
26. *Id.*
27. *Id.*

tures to license and pre-install Microsoft's web browser as a precondition to obtaining a license to Microsoft's Windows operating system.

II. THE SHERMAN ANTITRUST ACT AND MICROSOFT'S ALLEGED MISCONDUCT.

This section will introduce the Sherman Antitrust Act and the relevant provisions that relate to the Microsoft case, and will discuss why Microsoft's business strategy should not be mistaken for purposeful monopolistic behavior. Rather, Microsoft's success and market power derives from superior business acumen and perhaps a superior product.

The Sherman Act contains language mirroring the common law and serves to condemn illegal contracts, unfavorable business practices and monopolies.[28] Senator Sherman himself expressed that the Sherman Act descends from common law tenets.[29] In adopting the Sherman Act, Congress neither attempted to enact common law nor reference state law or English legal practices.[30] In essence, Congress created a new federal jurisdiction that inevitably required the courts to apply common law doctrines.[31] The Sherman Act should not be seen as prohibiting any specific class of conduct, but rather as employing specific judicial techniques of reasoning and innovating in the common law tradition.[32] Despite the Sherman Act's stipulations, there remains much ambiguity regarding how its provisions should be interpreted. In general, the goals of the Sherman Act beyond economic efficiency include consumer interest in low prices, substantial choices for consumers and producers and dispersed control over economic resources.[33] The focus of the Microsoft antitrust litigation surrounds sections one and two of the Sherman Act with emphasis on section two.

Section one provides "Every contract, combination in the form of trust or otherwise, or conspiracy, in the restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[34] Section two of the Sherman Act states "Every person who shall monopolize, attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States or with foreign nations shall be deemed guilty of a felony."[35]

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28. AREEDA & KAPLOW, ANTITRUST ANAKYSIS: PROBLEMS, TEXT, CASES 43 (Aspen 5th ed. 1997).
29. *Id.*
30. *Id.*
31. *Id.*
32. *Id.*
33. AREEDA & KAPLOW, *supra* note 28, at 43.
34. *Id.* at 43 *(citing 15 U.S.C.S. § 1 (2001)).*
35. Michael R. Kenny & William H. Jordan, *United States v. Microsoft: Into the Antitrust Regulatory Vacuum Missteps the Department of Justice*, 47 EMORY L.J. 1351, 1361 (1998) (citing 15 U.S.C. § 2 (2001)).

Section three of the Sherman Act holds in relevant part that every contract, combination in form of trust or otherwise or conspiracy, in restraint of trade or commerce in any territory of the United States and foreign nations or the District of Columbia and the states and other foreign nations is illegal.[36] Section four primarily vests the courts with the power to prevent and restrain violations of the act and endows the Attorney General with the responsibility to institute proceedings in equity to stop and deter such activity.[37] Section five requires all parties involved in such litigation to come before the court by summons or subpoena regardless of where they reside.[38] Section six gives the United States the power to seize and condemn any property in transport owned under any contract or by any combination, or in tandem with any conspiracy mentioned in section one of the Sherman Act.[39] Finally, section seven provides an exception to trade and commerce with nations unless such trade or commerce has a direct, substantial or reasonably foreseeable effect in the United States or import trade and commerce with foreign nations.[40]

When consumers engage in market transactions, they are also inherently rational maximizers with the intent of obtaining the best quality product for their dollar. Microsoft seeks consumer satisfaction by providing high quality consumer products in mass quantities that bring about high sales and thus higher profits than other firms in the software industry. Succinctly stated, Microsoft provides goods and services that satisfy consumer needs.

If consumers were not satisfied with Internet Explorer's quality at the time of its marketing, then they could have purchased and used rival browser software such as Netscape, despite Microsoft's strategy of pricing Internet Explorer at or below average variable cost. If Microsoft's intent at the time of launching Internet Explorer was to engage in monopolistic conduct, then there would have been no effort by this massive corporation to improve its marketing strategies or its products. The fact that Microsoft engaged in an aggressive pricing strategy should not suggest that its intent was to eliminate all competition.

Netscape's browser had a seventy percent market share at the time Internet Explorer was launched and it dominated the market.[41] Microsoft's pricing strategy, which some would call monopolistic conduct, does not mean that they did not seek to improve their product, marketing strategy, sales and technology. If Microsoft had not aggressively priced its web browser, then they may have been excluded from effectively competing with Netscape. If Microsoft did not wish to compete with rival firms, then Windows 98 coupled with Internet Ex-

36. AREEDA & KAPLOW, *supra* note 28, at 972-973 (citing 15 USCS § 3 (2001)).
37. 15 U.S.C.S. § 4 (2001).
38. 15 U.S.C.S. § 5 (2001).
39. 15 U.S.C.S. § 6 (2001).
40. 15 U.S.C.S. § 7 (2001).
41. Wachs, *supra* note 6, at 489.

plorer 5 would never have been invented. Microsoft continually seeks to upgrade its products to cater to consumer needs and acquire new consumers and patrons.

The United States government claims that Microsoft deliberately tied Internet Explorer to its Windows 95 and 98 operating systems with the express purpose of forcing its competitors to use its internet browser software thereby, attempting to establish a monopoly in the market. By packaging Internet Explorer with the Windows 98 operating system and restricting access to other rivals, Microsoft could exclude its rivals from effectively competing in this market. During the "boot up" sequence of its operating system, only Microsoft software and Internet Explorer are displayed. Therefore, the unwary consumer is coerced into using Microsoft's web browser. Additionally, there are claims indicating that Internet Explorer is so tied into the operating system that it would be difficult, if not deleterious, to remove it from the operating system. Despite these allegations, Microsoft's primary reason for bundling the two products together is not a malicious purpose. Rather integrating their two products provided enhanced performance and ease of use among consumers.

Contrarily, it is true that Netscape had a seventy- percent market share within the web browser market and Microsoft perceived it as a threat. Microsoft responded to this perceived threat by developing a market strategy that would allow it to effectively compete with the already dominant Netscape Corporation. By engaging in self-interest tactics and behavior, Microsoft could implicitly serve the public interest by providing a choice in the web browser market. Microsoft's Internet Explorer came to dominate the market with its operating system, and substantially weakened Netscape's market share; however this should not be viewed negatively but rather as the efficient function of competition. Where a firm is gaining extremely high profits in a particular industry it naturally will attract other firms to the market. The result is lower prices and an increase in supply. This concept is called market competition and is part of the cost of doing business. Microsoft's actions promoted efficient competition. While Netscape enjoyed the predominant share of the browser market, Microsoft created an innovative marketing strategy, which caused its product to become strong in the market, and displace Netscape's dominant market share. This situation is reflective of a market in which stronger products win out over their weaker competitors.

Theoretically, Microsoft could have one contract with each entity specifying the terms and conditions of using its software and eliminate possible high transactions costs between the parties as to who gets specific rights in distribution, marketing and sales. This could foreseeably avoid unnecessary litigation and further transactions cost. Additionally, by allowing Microsoft to couple its software, one eliminates potential asymmetrical information problems between consumers and producers of the software as well as compatibility issues be-

tween technologies that contracting parties use in the development of software to run on Windows 95 and 98 (i.e. operating codes, application program interfaces, etc.).

Microsoft should not be negatively viewed because it has developed a superior product and an ingenious marketing strategy. Product software such as Netscape is available for consumers to purchase separately should they wish to do so; however asymmetrical information problems arise because Netscape is prohibited from advertising on Microsoft's operating system during "boot up" procedures. Some would say that this practice thwarts consumer choice because no information is presented about this software, however one must understand that advertising via computer should not be the sole method of one's marketing strategy. Other avenues to prevent asymmetrical information problems exist that Microsoft's rivals can use to effectively compete.

If Microsoft intentionally developed its Windows 98 operating system to be expressly incompatible with Netscape, Microsoft's intent to dominate the market through monopolistic practices would be much clearer. When Microsoft developed Windows 98, it did so in part, to improve its web browser's performance as well as provide ease of use for consumers. Additionally, Microsoft merely integrated two already existing products it manufacturers because there would be advantages to consumers in purchasing a computer with both products installed. Looking to section two of the Sherman Antitrust Act, it mentions "attempt to monopolize. . . or conspire"[42] Courts have interpreted this provision to require "intent" as to whether an entity should be regarded as engaging in monopolistic actions.[43] Clearly, Microsoft did not create Windows 95 and 98 or Internet Explorer with the express purpose of eliminating Netscape from the market. Microsoft's purpose was competitive and their intent was making profit. If Microsoft wanted to destroy Netscape, it simply would program all of their Windows operating systems to reject Netscape's browser upon an attempt to install it on their software. However, Microsoft had a competitive intent and this intent raised societies aggregate welfare while creating a more efficient market.

With regard to competitors claiming injuries from alleged anti-competitive practices of one or more firms, the Sherman Act focuses on whether a person is injured as to his business or property by reason of any act incongruent with the Act's provisions. If there is a violation, then damages are awarded to those claiming legitimate injury to their business or property.[44] Scholars have defined the injury requirement as being one in which an entities' conduct has impaired

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42. Sherman Antitrust Act, 26 STAT. 209 (1890) (codified as amended at 15 U.S.C. § 2 (1994)).

43. *United States v. Aluminum Co. of America (ALCOA)*, 148 F.2d 424, 424 (2d Cir. 1945); *see also American Tobacco Co. v. United States*, 328 U.S. 781 (1946).

44. AREEDA & KAPLOW, *supra* note 28, at 73.

its competitor.[45] Antitrust laws exist to protect general competition not competitors. When a market is operating efficiently, one of the precursors is that there are many buyers and sellers motivated by self-interest and acting to maximize profit in contestable markets.[46] One true proposition about the market is that of the many buyers and sellers competing for market share and dominance, some will falter for a variety of reasons, such as losses emanating from profit falling below fixed costs. Therefore, competitors will be entering and exiting the market quickly.

With regard to the established browser market, Netscape was a formidable authority that was continuing to gain market share and thus power. Presumably, the high profits Netscape was attaining were attractive to many outside competitive rivals including Microsoft. The aspect of a high profit margin attracts new entrants to a market. The aforementioned point is at the core of competition where one has many buyers and sellers, here producers entering and exiting a new market where revenue can be generated and sustained. Microsoft, as a new entrant into the browser market wished to market its product in a manner that would attract consumers and provide them with a good that was needed. After time, Microsoft established itself as a competitor in the browser market and gained considerable market share. Microsoft is a corporation with large economies of scale and has significant resources at its disposal to market its products. Once Microsoft was established in the market, it made a legitimate business marketing decision to offer Internet Explorer with Windows 95/98. Some claim that this excludes competitors from entering into the market; however nothing prevents those aspiring companies from merging or collaborating with one another to pool together enough start-up revenue and resources to launch a product that will gain the attention of the market and compete with Microsoft. This speaks directly to the ability of new aspiring entrants to innovate and create a product that will attract consumers.

Firms such as Microsoft maintain longevity because of innovation and creativity. Competition produces winners and sometimes the victors become powerful. Such competitors are allowed to compete for customers and new businesses as long as they do not cross the line into anti-competitive conduct. The burden lies on emerging firms to be creative and develop strategies that would assist them in gaining market share and competing with Microsoft. Microsoft should not be turned upon when they emerge as the dominant force in the computer software market. Additionally, the Sherman Act should not be used as a crutch for those competitors who are not able to innovate and create products that will effectively compete with Microsoft. Competition is rigorous and dynamic in certain markets and inherently entails winners and losers.

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45. Kenny & Jordan, *supra* note 35, at 1367.

46. MERCURE & MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM 13 (1997).

Those who win are normally creative and supply goods and services that attract buying customers.[47]

III. INTELLECTUAL PROPERTY RIGHTS AND THEIR APPLICATION TO THE BUNDLING OF MICROSOFT'S INTERNET EXPLORER AND THE WINDOWS OPERATING SYSTEM.

This section of the article will discuss property rights as they exist in the United States under our laws. These property rights will be grouped in three broad categories and discussed respectively. Further, an analysis will be performed as to whether Microsoft is deserving of the property rights accompanying its products and services.

In order to engage in a discussion about property rights, it is necessary to look at the correlating rules that underlie an individual's or entity's property rights. According to Epstein, there are three essential classes of rules pertaining to property rights, each of which is designed to fulfill a particular function. The first class of rules relates to acquisition.[48] In any legal system, there are rules that determine who becomes the owner of the property in question. A legal system establishes laws to specifically define an individual or entity's property rights given that self-government is not a source for a definitive conclusion of ownership rights.[49] Rather, these property rights represent some normative judgment concerning the desirability of particular institutional arrangements. The institutional arrangements are foundations upon which society's legal, economic, social and political systems are constructed.

In designing these institutional arrangements, a legal system cannot haphazardly adopt a system of property rights, but rather property rights must be distributed in an efficient manner.[50] The legal system must delineate how property rights are to be distributed and allocated among members of society. A prerequisite of assigning individuals property rights in our legal system is the concept of first possession.[51] The idea of first possession has a complex and complicated origin. Scholars present conflicting theories as to when one actually acquires possession of a piece of property. Blackstone's model, as seen above, is consistent with traditional Anglo-American views, that decentralization of resources is a necessity.[52] This view comports with the Jeffersonian wish for a government and a social institution of yeoman farmers.[53] First possession takes

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47. Kenny & Jordan, *supra* note 35, at 1365.

48. Richard A. Epstein, *Property as a Fundamental Civil Right.* 29 Cal.W. L. Rev. 187, 190 (1992).

49. Epstein, *supra* note 48, at 190.

50. *Id.*

51. *Id.*

52. DAU-SCHMIDT & ULEN, LAW AND ECONOMICS ANTHOLOGY 178 (1998), *citing*, Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315 (1993).

53. *Id.* at 178.

place by the acquisition of some resource that in turn may lead to private ownership. This rule solves the property identification problem in a cost-effective and efficient manner.[54] Private ownership will encourage us to use resources conservatively, while putting them to the best possible use and thereby creating efficiency. Private ownership also prevents resources from falling into the hands of a single individual or government.[55] Despite the criticisms of the first possession rule, it promotes social welfare across a broad range.[56] Furthermore, with this rule, the sense of private ownership increases the chances that the property at issue will be developed in an efficient manner.[57]

Epstein's second rule that relates to property is a rule of protection.[58] Property rights that are obtained by an individual are only of value to them to the extent that he or she can preserve its use against all those that would seek to encumber it. Once private property has been assigned to one person, it should not be used or taken by another individual without the express authorization by the owner. When an individual acquires rights through the rule of acquisition, all property and benefits derived from that property should be afforded protection through contract and tort laws.[59] If protection were not afforded, there would exist a void as to the expectations in property.[60] Without this apparent stability, there would be no incentive to invest or engage in productive activities on one's land.[61] Although ambiguity exists as to how far this protection extends, surely protection of property rights has become well recognized in our common law tradition. By affording such protections to all individuals and if all individuals represent the public interest collectively, then rules to perpetuate this system directly serve public interest in individual property rights.

Epstein's third rule relates to the transfer of property rights.[62] Epstein emphasizes that no economy or social system should be regarded as static. Property rights are sometimes more valuable in the hands of a third party as opposed to exclusively being possessed by the initial owner. Underlying this particular rule is that of contract law. The idea and mechanism of contract law can aid the process of trade by allowing exchanges to take place and ensuring that a state respects and enforces any contracts that are made. When promises are made, there is strong reason to believe that both parties to the contract stand to gain. Therefore, Pareto efficiency is satisfied by mutual exchange that makes some-

54. Epstein, *supra* note 48, at 190.
55. *Id.* at 191.
56. *Id.*
57. *Id.*
58. *Id.*
59. Epstein, *supra* note 48, at 191.
60. *Id.*
61. *Id.*
62. *Id.* at 192.

one else better off while leaving no one worse off.[63] Additionally, an exchange can be efficient even if one is left in a worse state because, under Kaldor-Hicks efficiency criteria, as long as the winners win more than the losers lose, wealth to society is maintained and that in turn renders efficiency. Overall, the system of property rights is fundamental because its structure determines the social welfare of individuals.

Traditional property encompasses three groups- real property, personal/intangible property and fixtures. Today, it should be evident that when one speaks of property, it is not limited to land acquisition. Property has evolved into many forms including intellectual property and property rights in information. With regard to property rights and information, the situation is quite complex.[64] Information is widely available and many people can share its benefits without it losing its value.[65] However, there are tradeoffs involved between production incentives and distribution of information to various sources.[66]A rule that grants exclusive rights to information will spawn new information of less social value due to its exclusion from others.[67] This is why our system of law incorporates patents and copyright protections.[68] However, the system also realizes that exclusive rights to information should not be indefinite. The assumption is that information regarding innovative products should be able to be developed by other individuals or entities.[69]

The Microsoft Corporation represents the evolution of property in the present generation. Microsoft's assets are mostly intangible and consist of trade secrets, patents and copyrights on many of its software products such as Internet Explorer and its Windows operating systems. Microsoft is a business savvy corporate entity that has sown many seeds and reaped the benefits of extraordinary success and profits but often to the detriment of other competitors. However, its market success was gained naturally in the market through the sale and exchange of goods and services. This is the nature of competition where there will be winners and losers in the marketplace. The winners typically tend to be those with the best products and services that are valuable or needed by the consumer. Microsoft develops primarily computer-coded information or programs that hold intellectual property rights earned by Microsoft and preserved through patents.

The patent right is the right to exclude others and is at the heart of property rights under Epstein's rule of protection.[70] A patent under 35 U.S.C. § 261 is

63. *Id.*
64. Epstein, *supra* note 48, at 198.
65. Epstein, *supra* note 48, at 198.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. Epstein, *supra* note 48, at 191.

defined as property. Nowhere in statutory law is a patent described as constituting a monopoly. There are diverging views as to whether intellectual property such as patents, copyrights and trademarks are monopolies or exclusive rights in property.[71] However, the protection of these types of intellectual property do not succeed in satisfying the anti-competitive monopoly definition because the goal of each of these rights is to promote competition rather than hinder it.[72] Intellectual property rights share a commonality with state real property rights.[73] A patent for an invention should be seen as similar to a patent for land.[74] Both rest upon the same foundation which is the right to protection and exclusion from other persons unduly usurping what does not belong to them. Intellectual property rights are properly viewed as earned property rights.[75] An inventor of a product confers upon the public the benefits of the product, yet that person or entity should be able to reap the benefits of their innovation be they market share or profits.

The traditional scope of property rights should also apply to intellectual property because a rule that grants the initial creator exclusive rights will produce more information. This creation of exclusive rights is analogous to the aforementioned first possession rule. Allowing an individual or entity to gain the exclusive right to a product or resource that they have created fosters more innovation, whereas a system that does not give one a legally enforceable power to exclude others will discourage competition and hinder creativity. Creating a system that rewards Microsoft's innovation especially as it relates to intellectual property will yield more creativity and innovation, thus resulting in efficiency and satisfaction of the public interest.

Accompanied with this right of exclusion is a criticism that protecting Microsoft's rights will work to exclude any potential competitors from developing new products to compete in the market. Despite the potential for exclusion, there is nothing preventing other companies from creating new and superior products and then marketing them in an efficient manner. It is true that the initial outlay costs will be high, but this is not an unattainable goal, because with the right financial and marketing support, a company should be able to compete with Microsoft.

This criticism, in a sense, is an information asymmetrics problem because other smaller, less efficient rival companies do not possess the marketing strategy nor access to the programs that Microsoft uses to construct its software. Forcing Microsoft to divulge its product codes and information to competitors would lead to a potential explosion of competition, thus thwarting Microsoft's

71. AREEDA & KAPLOW, *supra* note 28, at 667-68.
72. *Id.*
73. *Id.* at 669.
74. *Id.*
75. AREEDA & KAPLOW, *supra* note 28, at 669.

perceived market dominance. This action, if done, would seem to undermine a key component in the law of property rights, which is the right to exclude and prohibit others from using a product solely created by an innovative corporation.

A legal rule that forces Microsoft to give its Windows and Internet Explorer codes and information to competitors like Sun Microsystems or AOL/Netscape would be inefficient because it would violate the basic principles of Pareto efficiency. Pareto efficiency is premised upon making another person better off while not placing another in a disadvantageous situation. Clearly, forcing Microsoft to divulge its operating codes would put Microsoft's competitors in a favorable position but Microsoft would, arguably, be left in a weakened state. In essence, the property rights it has in the information it created would be swept away, thus leaving the company vulnerable in the marketplace.

Microsoft should be considered as possessing earned property rights from the software it has created. The owner or inventor of a product or service should acquire a property right in that good or service and be able to reap the benefits flowing from that product or service. As a matter of fairness and efficiency, one can posit that allowing a person or entity exclusive rights to a good or service will foster continual creativity. Following this logic will not undermine basic property rights that have been a part of American jurisprudence for many years.

In most situations, the granting of a new intellectual property right is presumed by society to be a prequel to monopoly and is therefore viewed by the courts and society in a negative light.[76] The more prudent manner to view this situation is that the creator is entitled to property rights for the good or service invented. This earned intellectual property right manifests itself through patents, trademarks and copyrights, which include a right to exclude others for a limited amount of time. Richard Posner and William Landes have acknowledged that "intellectual property rights include both the static benefit of preventing overuse of [a] resource and the dynamic benefit of providing an incentive to create or improve upon existing resources."[77] Although Posner and Landes speak to trademarks exclusively, this concept should be broadly applied to the field of intellectual property.

As Microsoft develops and innovates, they should be able to acquire property rights in their inventions. By allowing Microsoft to "reap what it sows", the corporation will be encouraged to continue developing new and better products for consumer welfare. If one essentially eliminates the right of exclusion and opens the door to all competitors of one firm's innovations and ideas, it will

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76. AREEDA & KAPLOW, *supra* note 28, at 663.

77. Simone A. Rose, *Will Atlas Shrug? Dilution Protection for "Famous" Trademarks: Anti-competitive Monopoly or "Earned" Property Right* 47 FLA. L.REV. 653, 692 (1995), *citing*, William M. Landes & Richard A. Posner, *The Economics of Trademark Law*, 78 TRADEMARK REP. 266 (1998).

slow the drive for creativity to the detriment of society. It is true that property rights as well as the rule of first possession have ambiguous origins, however our legal system has traditionally honored the idea that rights exist in real, personal and intellectual property. A productive company, such as Microsoft, that continually mass produces products and creates new innovative products, must be allowed some right to exclude others, even if only for a short period of time, from that which they have acquired through invention. Without this protection, all corporate incentive to create new and better products would cease to the public detriment and consumer welfare would be reduced.

IV. MICROSOFT'S PRICING STRATEGY AS A DETERMINING FACTOR FOR THE PRESENCE OF PREDATORY PRICING UNDER THE SHERMAN ACT.

This portion of the paper will discuss Netscape's success in the web browser market and Microsoft's pricing strategy concerning its web browser. The discussion will also focus on the concept of predation in competition. Finally, this section will take the concept of predation and apply it to the Microsoft case to determine whether Microsoft engaged in illegal conduct.

Amid the litigation against Microsoft, stands the argument that Microsoft was in fear that Netscape would thwart its dominance in the software market by use of its web browser. Netscape, at the time, controlled the market for web browsers.[78] In response, Microsoft decided to develop Internet Explorer and market the product for no cost.[79] This would force Netscape to price its browser below cost in order for the company to compete with Microsoft for market share. If it did not follow this route, Microsoft undoubtedly would have sustained losses. Contrarily, if Microsoft had not reduced the initial price of its web browser it would not have been able to effectively compete with Netscape and perhaps Netscape would have eventually monopolized the market.[80] Because of Microsoft's actions, the Department of Justice accused Microsoft of allegedly engaging in predatory conduct with the express purpose of undermining Netscape.[81]

Despite the accusation, it seems as though Microsoft engaged in a clever business market scheme which allowed them to compete with Netscape for a share of the browser market. It is plausible to suggest that Microsoft's actions were economically efficient and served the public interest. Netscape's control over the browser market would undoubtedly lead to a monopoly, thus reducing consumer surplus and increasing efficiency losses. The end result would be the negative externalities of higher prices to consumers and reduced output.

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78. Wachs, *supra* note 6, at 489.
79. *Id.* at 491.
80. *Id.*
81. *Id.* at 486-87.

The area of predatory pricing has been debated among scholars for several years beginning with the well-known article published by Areeda and Turner regarding predatory pricing or price discrimination.[82] "Predation exists when the justification of prices is not based on their effectiveness in minimizing losses, but on their tendency to eliminate rivals and create a market structure enabling a seller to recoup his losses."[83] Areeda and Turner suggest that the determining factor for predatory pricing is seeking to output at below marginal cost or average variable cost.[84] Even if an individual or entity has priced products below average variable cost, they should not be classified as a monopolist solely based upon this criteria. Intent to dominate and exclude competitors from the market is still necessary in proving that a person or company purposely engaged in monopolistic practices.

Essentially, it seems that Microsoft, as viewed against the above backdrop, is not using predatory pricing with the intent to exclude other rival firms from the market. Rather, Microsoft saw an established competitor in the market generating high profits and was in turn attracted to this market. As a result of Microsoft's resources and economies of scale, they were able to market a product that consumers wanted and pursued an aggressive market strategy allowing it to compete with Netscape and gain market share. The distinguishing factor in the case at hand is intent. The conduct engaged in by Microsoft had the purpose and intent of advancing the actor's competitive position by improving its market performance through savvy business strategy and prowess.

Microsoft, at the time Netscape's browser was gaining market share at a hare's pace, had less than a twenty percent share of the browser market. If it had not acted, Microsoft may have been competitively excluded from the market. Professor Easterbrook argues that predation is inherently self-deterring because if a competitor persists in marketing a product below average variable cost it will sustain losses.[85] Microsoft Corporation is a business which is geared toward making profit. When the company launched its Internet Explorer browser, it was entering into a market where there existed a rival in control of the dominant share of the market. Microsoft, like any producer, had to attract customers in order to successfully market Internet Explorer. Naturally, they had to provide an attractive price to consumers to pull away some of the competition from Netscape. Microsoft pursued this conduct with the purpose of competing with Netscape for a percent of the market share of the browser market.

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82. Gordon B. Spivack, *The Economics of Horizontal Restraints: The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response*, 52 ANTITRUST L.J. 651 (1983); *citing*, Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

83. Spivack, *supra* note 82.

84. *Id.*

85. Frank Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 891, 897 (1976).

Microsoft's pricing of Internet Explorer at or below cost should not be perceived as predatory because the business strategy was to gain some market share and attract consumers, not to price discriminate and force Netscape out of the industry. Looking ex post, even though Netscape and Microsoft's web browsers are available as free downloads on the internet, both are still in competition with one another because consumers are still able to choose Netscape as their web browser despite Internet Explorer being bundled with Windows 98. Thus, public choice is preserved and social welfare is increased. Microsoft's justification is that to maintain superior efficiency in its business operations and maintain competition, it used a clever strategy to force itself back into a profitable market. This in turn is a legitimate business justification for its aggressive pricing actions.

This section of the paper will briefly discuss the concept of tie-ins in the Microsoft case. One will see how the factors embedded in tie-ins contribute to efficiency losses and how Microsoft has not engaged in illegal anti-competitive tie-in practices to use power in one market to gain control and subsidize another market in hopes of achieving a monopoly.

One of the principal tenets of the Chicago School of Economics is the rejection of the leverage concept which underlies the law of tie-ins in anti-competitive conduct.[86] Firms as well as other monopolistic entities cannot retain their advantage or original market power and impose additional coercive restrictions furthering that monopoly power.[87] Such coercive restrictions would only be viable if the price charged before the restriction was reduced.[88] These restrictions would not serve a purpose except price discrimination.[89] The argument stands that such price discrimination would be more of an enjoyment to the original monopolistic conduct as opposed to an extension of it into another market.[90] Efforts by firms and monopolies to extend their current market power into another adjacent market cannot increase efficiency losses and should not be prohibited.[91]

Courts have battled with the law of tie-ins and have formulated no bright line rule to distinguish between anti-competitive and competitive conduct.[92] There are however analytical frameworks evinced by courts that allow businesses to practice in an area that seems like a tie but is not. These frameworks include: 1) there is no tie if the package of two items are seen to be one unified product; 2) there is no tie unless consumers are coerced into buying the tied product as well

86. Spivack, *supra* note 82.
87. *Id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. Spivack, *supra* note 82.
92. *Id.*

and; 3) the arrangement is legal if the seller lacks economic power in the market for the tying product.[93]

With regard to the first factor, Microsoft, at its launch of the Windows 98/ Internet Explorer package held Windows 98 and Internet Explorer to be symbiotic in nature. The package contained performance advantages if both were purchased together as opposed to purchasing a Windows operating system and a web browser separately. Second, by Microsoft marketing Windows 95 and 98 as separate products, Microsoft is not coercing consumers into buying its web browser because both Windows operating systems are able to support browsers other than Internet Explorer. Last, Microsoft lacked complete economic power in the browser market when it launched Internet Explorer. One must understand that Netscape possessed the dominant market share initially in the browser market while Microsoft lacked market power upon its entrance into the browser market. Microsoft was thereby not exhibiting control over one market (Windows) while trying to gain monopoly in an adjacent market.

V. PROPER REMEDY FOR MARKET MONOPOLY: REGULATION OR FREE MARKET

If a court sees that Microsoft engaged in monopolistic practices with the intent to dominate the market and eliminate competition from more efficient rivals, then the court could select from a wide range of conduct and structural remedies. This segment of the paper will discuss these remedies with an eye towards Chicago School and Post-Chicago School of thought.

A court has conduct remedies at its disposal to curtail a defendant's monopolistic behavior through the use of restrictions and restraints including affirmative duties and injunctions.[94] Alternatively, the court could resort to structural relief that might subject Microsoft to divestiture that would separate Microsoft into several different competing entities.[95] Imposing conduct remedies is an arduous process and implies long-term monitoring of firm behavior. Here, Microsoft would likely face bundling restrictions, application program interfaces, source code disclosure, and compliance with industry standards.[96] In terms of disadvantages, conduct relief would require the court to use valuable resources to monitor Microsoft's progress and ensure that it is not engaging in illicit activities. Further, conduct relief may have limited effectiveness in that it may not be able to start effective competition. It also leaves open the possibil-

93. Spivack, *supra* note 82.

94. R. Craig Romaine & Steven C. Salop, *Slap their Wrists? Tie their Hands? Slice them into Pieces? Alternative Remedies for the Monopolization in the Microsoft Case*, 13 ANTITRUST 15, 17 (1999).

95. *Id.*

96. *Id.* at 18.

ity that Microsoft can design strategies to steer clear of certain conduct but still engage in practices that have the same exclusionary effects.[97]

Structural remedies may be very disruptive initially but will provide near immediate results.[98] The tradeoff here is that ex post this remedy may turn out to be unneeded and stands the chance of not re-igniting competition.[99] One structural remedy, as previously mentioned, is divestiture. It is likely that such a remedy would lead to separating Microsoft into competing businesses such as its internet, operating systems and software businesses.[100] Another remedy may involve a one-time auction transferring Microsoft's intellectual property to its rivals.[101] The chief criticism of such divestiture is that the competition created would fragment the Windows operating system standard. Second, it seems unfair to attack Microsoft who arguably achieved its success legitimately through the creation of a superior product.[102]

Against the Chicago and Post-Chicago schools of thought, it is necessary to analyze the appropriate remedy if Microsoft is seen as a monopoly. The question then becomes about what action is necessary to remedy the market imperfection. Should the government interfere and regulate or should the market be allowed the time to heal itself considering the Chicago viewpoint that monopolies are transitory and short-lived? It is quite obvious to the astute legal and economic observer that scholars are in disagreement as to when a firm ceases to be a competitive entity and indulges in exclusivity denying market share to it opponents subverting competition.[103]

If Microsoft is entitled to intellectual property rights resulting from its creativity and innovations, it follows that Microsoft should determine how its company would be divided in the event that the court decides conduct or structural relief is needed. No one should be able to forcefully take an entitlement to property away from the holder unless the owner voluntarily transacts to give or sell the property.[104]

Additionally, rules of inalienability should be enforced in this instance because of the potential of high transactions costs in litigation by injured third party consumers. Dividing and fragmenting Microsoft and its operating system software may potentially put consumers in disarray due to software compatibil-

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97. Romaine & Salop, *supra* note 94, at 18.

98. *Id.* at 17.

99. *Id.*

100. *Id.* at 23.

101. *Id.*

102. Romaine & Salop, *supra* note 94, at 19.

103. William E. Kovacic, *Designing Antitrust Remedies for Prominent Firm Misconduct*, 31 CONN. L. REV. 1285 (1999).

104. Dau-Schmidt & Ulen, *supra* note 52, at 194, *citing*, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

ity problems. One can only imagine the potential negative ramifications and externalities such an action would have. The costs would likely be very high if the courts were to mandate structural relief. It may be more efficient to prevent structural relief and the subsequent placing of Microsoft in the hands of other producers who have different agendas for the public in contradiction with the court's ideal view of how the separate companies should function as well as the pubic interest.[105]

CONCLUSION — MICROSOFT AS A LEGITIMATE COMPETING ENTITY

One of the basic underlying theories behind antitrust law is the protection of consumers through competitive practices by market participants. Antitrust law encourages efficiency and the dilution of power through the Sherman Act because it protects against anti-competitive practices such as monopolistic conduct by firms seeking to gain dominance in the market. Microsoft should not be held liable for monopolistic practices because it maintains a superior efficient business operation characterized by innovation and creativity. Second, Microsoft should be able to reap the benefits of the property rights accompanying its Windows operating system and Internet Explorer. Microsoft did not purposely engage in predation to weaken Netscape's market share in the web browser market. Rather, Microsoft used creative and efficient business strategies to increase its already low market share so that it could effectively compete with Netscape in this market.

One last thought to consider is that of path dependency and the notion of whether we, as consumers, want one resourceful company to provide one operating system and control the future of the software industry. If there are no other competitors in the operating systems market that have large enough economies of scale and revenues to undertake a massive campaign to compete head-to-head with Microsoft without government having to regulate, then Microsoft should not have to pay because of its success in the software market. The trade-off involves undermining what traditional property rights entails, namely the ability to acquire property and protect one's property from all others versus preservation of public interest and protection of one's ability to choose. The dilemma here is that Microsoft is a corporation that at its core had and pursued an idea which culminated in an operating system so useful and so common in the United States that many rely on it exclusively and have been conditioned to use it. Now that Microsoft is perceived by some to have grown "too big for its britches," one must punish them because there is a perception that Microsoft's intent is solely market dominance and profit. Yet if the judiciary employs the aforementioned remedies through regulation, it may damage the public interest when it did not intend to do so.

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105. Romaine & Salop, *supra* note 94, at 19.

Upon analysis it seems counter-intuitive to encourage individuals and entities to innovate while simultaneously discouraging them from employing clever business strategies to such an extent that no one else can compete. This would seem to act as a barrier to new and existing firms attempting to enter a market or sustaining itself in a market that will take away what they have legitimately acquired when they grow to phenomenal sizes. To conclude, the Microsoft Corporation is a successful participant in a free market economy characterized by winners and losers.

Currently, Microsoft was the recipient of a negative decision by Judge Thomas Penfield Jackson of the U.S. District Court for the District of Columbia.[106] Judge Jackson, in his decision, ordered divestiture of the Microsoft Corporation.[107] Microsoft was ordered to devise a proposed plan of divestiture and submit the plan to the Court not later than four months after the entry of Judge Jackson's final judgment.[108] More specifically, Judge Jackson demanded the separation of Microsoft's Operating Systems Business from its Applications Business including personnel, systems and various assets.[109]Additionally, intellectual property that is used in product development and distribution by the Operating Systems Business as of April 27, 2000, is to be assigned solely to the Applications Business with the Operating Systems Business retaining a royalty free license to license and distribute intellectual property except that related to Internet Explorer or any derivatives.[110] Finally, neither Microsoft shareholders, board of directors nor officers can retain stock, securities or assets in both of the above separated businesses jointly.[111]

As one might expect, Microsoft appealed Judge Jackson's decision seeking to take its case to the appeals court. This required Judge Jackson to stay implementation of his judgment in its entirety pending appeal to the higher courts.[112] The Justice Department sought U.S. Supreme Court approval for quick action in the appellate process with hopes to by-pass intervention by the U.S. Court of Appeals.[113] The Justice Department's hope was to expedite the appellate process and complete the case by year's end before a change in administration occurred.[114] In response, the U.S. Supreme Court rejected the Department of Justice's request that was based upon the need for quick action due to an atmosphere of swift technological advances. The high court deemed that the Justice

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106. United States v. Microsoft Corporation, 97 F.Supp. 2d 59, 63, (2000) *available at, http://legalnews.findlaw.com/cnn/docs/microsoft/ms-final2.html.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.*

111. United States v. Microsoft Corporation, 97 F.Supp. 2d at 63.

112. *U.S. Seeks Fast Microsoft Appeal Schedule,* Reuters, Oct. 3, 2000, *at* http://www.cnn.com/2000/LAW/law.and.business/10/03/microsoft.filing.reut/index.html.

113. *Id.*

114. *U.S. Seeks Fast Microsoft Appeal Schedule, supra* note 112.

Department's crusade against Microsoft be heard by seven judges at the U.S. Court of Appeals.[115]

In its denial of the Justice Department's request to bring the case immediately before the high court, the court gave no explicit reasons as to its rescission of the case back to the appeals court. Justice Breyer dissented from the majority of the court expressing that the court should hear the case given that the case affects such a broad economical sector.[116] Justice Breyer indicated that the court possesses a duty to be expeditious in resolving the Microsoft debacle.[117] Bringing the Microsoft case to speedy close would help promote economic growth and prosperity in this sector with minimal disruption.[118] Of significance is the more personal issue of which Chief Justice Rehnquist faces. The Microsoft Corporation has solicited the expertise of the law firm of Goodwin, Proctor & Hoar to provide representation as local counsel in the antitrust suit.[119] Chief Justice Rehnquist's son is a partner in the firm as well as an attorney working on the Microsoft case.[120] Having to confront the obvious appearance of bias and impartiality, the Chief Justice decided not to recuse himself from the case for two reasons.[121] First, having been mindful of the applicable law in such circumstances, Chief Justice Rehnquist concluded that his interest in the case as well as his son's interest would not be affected by the case.[122] Additionally, the Chief Justice stated that a reasonable person would not conclude that impropriety exists because the Chief Justice's son is working on the case for Microsoft.[123] Recognizing the ramifications that a Microsoft decision could have upon other similar cases, Chief Justice Rehniquist expressed that such a case is not substantially dissimilar to other cases the court presides.[124] Each decision has the potential to affect the children of the judges who practice law as well as their clients.[125] The second reason given by Justice Rehnquist and perhaps most importantly is that there is essentially no other individual who can replace his chair if he were to recuse himself.[126] In part, the U.S. Supreme Court consists of nine judges to avert an equally divided court.[127] To recuse a justice would likely bring a result inconsistent with the high court's creation.

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115. *Id.*
116. Microsoft Corp. v. United States, 530 U.S. 1301, (2000).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. Microsoft Corp. v. United States, 530 U.S. at 1301.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. Microsoft Corp. v. United States, 530 U.S. at 1301.
127. *Id.*

To date, the U.S. Court of Appeals for the District of Columbia heard arguments from the Justice Department and the Microsoft Corporation. At the heart of Microsoft's appeal is the accusation that Judge Thomas Penfield Jackson was overwhelmingly biased against Microsoft and in particular its top executives.[128] Judge Jackson, after the initial trial, made several inappropriate comments towards Bill Gates, the Microsoft legal team, as well as fellow colleagues on the Court of Appeals.[129] Jackson indicated that his fellow brethren on the appeals court lacked trial experience and were "supercilious."[130]

In retaliation to Judge Jackson's comments, Harry Edwards, Chief Judge of the Appeals Court, expressed that judges have a duty to refrain from unnecessary comment concerning the cases over which they preside.[131] Obviously agitated by Judge Jackson's comments, Judge David Sentelle stated to government attorneys, "'I'm not sure how you can ask us with a straight face' to not consider possible bias in Jackson's comments."[132]

In addition to Jackson's blatant derogatory comments, the Microsoft legal team argued that Judge Jackson failed to consider some fifty pieces of testimony and evidence to be presented from additional testimony.[133] Because of Jackson's failure to consider all the relevant evidence, it was Microsoft's wish to start anew with another non-biased trial judge. In contrast to Microsoft's wish, the appellate judges did not believe that such a drastic action was warranted.[134]

Amid the growing attention given to the Microsoft case and the recent comments by an allegedly biased trial judge, speculation exists that structural remedies for the Microsoft Corporation may be inappropriate. The government's primary argument rested with divestiture as an appropriate remedy for Microsoft. With such a remedy being called into question, the government may be forced to be more conciliatory and enter into further settlement negotiations with Microsoft rather than in battle in a court of law. Oral arguments and intensive questioning are now complete and the appeals court is expected to render a decision by mid-spring.[135] Perhaps this is an instance where a rapidly evolving market should ultimately be left alone to care for itself, while interventionists take a back seat and left the "chips fall where they may."

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128. http://www.cnn.com/2001/LAW/02/25/microsoft.trial.ap/index.html. (last visited March 1, 2001).

129. *Id.*

130. *Id.*

131. *Microsoft Cites Bias,* February 27, 2001, *at* http://cnnfn.cnn.com/2001/02/27/technology/microsoft.

132. *Id.*

133. Steve Young, *Microsoft Appeals,* March 3, 2001, *at* http://www.cnn.com/2001/TECH/industry/03/03/Microsoft.appeals/index.html.

134. *Id.*

135. http://www.cnn.com/2001/TECH/industry/03/03/Microsoft.appeals/index.html.

2000 Supreme Court Survey

EDITORIAL STAFF†

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† Cory Loudenslager, the Supreme Court Survey Editor, selected these surveys because they were viewed as the most interesting Supreme Court cases decided last year. These selections have been written by Jodi Ann Argentino, Gina Bavaria, Joe Blake, Elizabeth Frau, Jim Goodnow, Karl Kuhn, Cory Loudenslager, Carey W. Ng, Jason Poplaski, Jason Tenenbaum, Corie Thornton, Ruchi Thaker, Liberty J. Weyandt, and Jeffrey Winitsky.

AGENCY LAW

FDA v. BROWN & WILLIAMSON TOBACCO CORP.
529 U.S. 120

This case reaffirmed the proposition that a federal agency may not assert authority in an area where: (1) legislation existed to prevent such authority; or (2) Congress had spoken in direct conflict with such purported authority.

The central issue presented here was whether the Food and Drug Administration (FDA) has the jurisdiction or authority to regulate tobacco products.

The Food, Drug and Cosmetic Act (FDCA) granted the FDA the authority to regulate, among other things, "drugs" and "devices." In 1996, the FDA asserted jurisdiction to regulate tobacco products, determining that nicotine is a "drug" within the meaning of the FDCA. It also determined that cigarettes and smokeless tobacco were "devices." Pursuant to this authority, the FDA promulgated regulations governing tobacco promotion, labeling, and access by children and minors. Respondents, a consortium of tobacco producers, retailers, and advertisers, filed suit and challenged the regulations on the grounds that the FDA lacked authority to promote such regulations.

The Court based its decision on *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*,[1] a case in which an agency construed the federal statute. Under the *Chevron* test, the Court had to determine whether Congress had directly spoken to the precise question at issue. If so, it had to give deference to congressional intent. If not, the Court must defer to the agency's construction of the statute, as long as it was permissible. Using this test, the Court concluded that construing the FDCA to include tobacco products was inconsistent with the purpose of the Act. Further, the Court concluded that: (1) Congress itself had previously enacted several tobacco-specific statutes in direct opposition to the FDA's position on its regulatory authority; and (2) Congress had considered and rejected several bills that would have granted the FDA such authority.

CRIMINAL RIGHTS

Dickerson v. United States
530 U.S. 428

This case retained the Miranda warnings which were created by the Supreme Court in 1966 in *Miranda v. Arizona*.[2]

Here, the Court not only revisited whether Miranda warnings must be given before a suspect can be interrogated, but it also determined whether Congress had the power to abrogate the Miranda warnings – which were not a constitu-

1. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984).
2. Miranda v. Arizona, 384 U.S. 436 (1966).

tional guarantee, but a constitutional guideline created by the Supreme Court for law enforcement agencies and courts.

Dickerson appealed the decision which allowed his confession into evidence because he had not received his Miranda warnings before he was interrogated. The lower courts, in one vein, determined that his statements were admissible because they were voluntary; however, in the other vein, they backed their decision with the conclusion that Miranda warnings were not a Constitutional holding, therefore Congress could effectively overrule *Miranda* by its enactment of 18 U.S.C. §3501.[3]

The Court spelled out for Congress its own powers, as well as the Court's power: the Supreme Court has the authority to create rules of evidence and procedure for the federal courts where and only where, Congress has not yet acted. Otherwise, Congress cannot supercede the Court's decisions which interpret or apply the Constitution. Here, the Court held that Miranda warnings have "become embedded in routine police practice to the point where the warnings have become part of our national culture," so much so that it refused to overrule *Miranda*. It further held that *Miranda* involved the creation of a Constitutional rule, therefore Congress could not supercede such a rule with 18 U.S.C. §3501.

Carmell v. Texas
529 U.S. 513

This case verified the four categories of *ex post facto* laws laid out in *Calder v. Bull*:[4] (1) that which makes an innocent act when done criminal; (2) that which makes a crime greater than it was when committed; (3) that which makes the punishment greater than it was when committed; and (4) that which lowers the quantum of evidence below what the law required when the act was committed in order to convict the offender.

The issue in this case was whether Texas violated Carmell's *ex post facto* rights when it convicted him under an amended law, which lowered the amount of evidence required to convict him.

Between February 1991 and March 1995, Carmell sexually assaulted his stepdaughter. At the time of the abuse, the stepdaughter was between the ages of twelve and sixteen. Until September 1993, Texas law required either corroborated testimony or that the victim inform another person of the abuse within six months. These provisions did not apply if the child was under fourteen. In September 1993, Texas amended the law extending the age to eighteen and the outcry period to one year. Carmell was convicted of fifteen counts of sexual assault – four of which fell under the amended law, even though they occurred before its effective date.

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3. 8 U.S.C. §3501, allows a confession to be admitted as evidence if "it is voluntarily given."
4. Calder v. Bull, 3 U.S. 386 (1798).

The Court held that the amended law, which lowered the quantum of evidence, because it no longer required children between the ages of fourteen and eighteen to have corroborated testimony, was a violation of the fourth category of *ex post facto* laws. The Court reasoned that a law that lowers the quantum of evidence retrospectively is grossly unfair and fundamentally unjust.

U. S. v. Abel Martinez-Salazar
528 U.S. 304

This case reaffirmed the rule that a constitutional attack against a conviction cannot be sustained when a potential juror is removed by a peremptory challenge, so long as the resulting jury panel is impartial.

The Court had to decide whether the defendant's Fifth Amendment Due Process right was violated when he used a peremptory challenge to remove a biased juror, after the judge refused to remove the juror for cause.

The defendant was convicted of narcotics and weapons offenses. During jury selection, the judge refused defendant's motion to remove a biased juror for cause. The defendant then used a peremptory challenge to remove this juror and was ultimately convicted. The defendant, not being able to claim a Sixth Amendment challenge, because the empanelled jury was impartial, claimed a violation of his Fifth Amendment Due Process rights. The Ninth Circuit Court of Appeals reversed the conviction. Here, the Supreme Court reinstated it.

The Court held that if the defendant elected to cure a trial judge's error of allowing a partial juror on the panel by use of a peremptory challenge, and an unbiased jury subsequently convicted him, no constitutional right had been violated. This conclusion flowed from the observation that peremptory challenges were not of federal constitutional dimension; they were a creation of the Federal Rules of Criminal Procedure. As the Court noted, peremptory challenges are to be used to secure the constitutional guarantee of trial by an impartial jury. Accordingly, the defendant's Fifth Amendment Due Process rights were not violated.

EMPLOYMENT LAW

Christensen v. Harris County
529 U.S. 576

The Supreme Court confronted the issue of whether a public employer who required its employees to use their compensatory overtime, instead of redeeming it for its cash equivalent, was a violation of the Fair Labor Standards Act §207(o)(5).

After concern about its scarce financial resources, Harris County implemented the following policy: upon accumulation of a certain amount of compensatory overtime, an employee must use part or all of his allotment instead of

being paid its cash equivalent. The employees of Harris County sued claiming that this policy violated §207(o)(5) of the Fair Labor Standards Act. The section required an employer to reasonably comply with an employee's request for use of the compen-satory time. Specifically, the petitioners claimed that §207(o)(5) was illegal because it offered the exclusive means for using compensatory time.

The Fair Labor Standards Act required an employer to provide its employees with overtime compensation, and it could not deny an employee's request for usage of this compensatory time, so long as it did not unduly disrupt the employer's operations. The Supreme Court held that the section of the Act did not prohibit an employer from compelling its employees to use their compensatory time, but only prohibited an employer from denying the use of compensatory time upon employee request. The Court reasoned that §207(o)(5) provided for a minimal guarantee that an employee would be able to make some use of compensatory time when he requested such, and it did not affect an employer's right to compel its usage.

FIRST AMENDMENT

City of Erie v. Pap's A.M.
529 U.S. 277

In this case, the Supreme Court reversed a decision of the Pennsylvania Supreme Court, which held that a city ordinance banning public nudity violated the respondent's right to freedom of expression under the First Amendment.

The Court here was asked to determine the appropriate level of review so that the City of Erie's ordinance, which required nude dancers to wear pasties and G-strings, could pass constitutional muster.

The City of Erie enacted an ordinance banning public nudity and made it a summary offense to knowingly or intentionally appear in public in a "state of nudity." Respondent operated an establishment in Erie that featured totally nude women dancing. To comply with the ordinance, dancers were required to wear "pasties" and "G-strings." Respondent filed a complaint against the City challenging the constitutionality of the ordinance. The Pennsylvania Supreme Court held that the ordinance unconstitutionally burdened respondent's expressive conduct.

The Supreme Court reversed the decision of the Pennsylvania Supreme Court and held that the ordinance at issue was content-neutral and unrelated to the suppression of conduct. Therefore, the ordinance only had to satisfy the less stringent *O'Brien*[5] standard of review in order to pass constitutional muster. The Court held that Erie's ordinance satisfied *O'Brien's* four-factor test: (1) the

5. United States v. O'Brien, 391 U.S. 367 (1968).

ordinance was within Erie's constitutional power to enact because the city's efforts to protect the public health and safety were clearly within its police powers; (2) the ordinance furthered the important government interests of combating the harmful secondary effects associated with nude dancing; (3) the government's interest was unrelated to the suppression of free expression; (4) the restriction was no greater than was essential to the furtherance of the government interest.

The Court reasoned that although requiring dancers to wear "pasties" and "G-strings" may not have greatly reduced these secondary effects, *O'Brien* required only that the regulation further the interest in combating such effects. The Court also stated that the ordinance only regulated conduct - that any incidental impact on the expressive element of nude dancing was *de minimis*. The "pasties" and "G-string" requirement was a minimal restriction in furtherance of the asserted government interests. Furthermore, the restriction left ample capacity to convey the dancer's erotic message.

Boy Scouts of America v. Dale
530 U.S. 640

This case retained the law from *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*[6] and held that government cannot control a group's opposition to certain points of view.

The issue presented in this case was whether under New Jersey's Public Accommodation Law, could the State require the Boy Scouts of America to admit a homosexual member into their organization where: (1) the Boy Scouts believed that homosexuality violates the values it seeks to promote; and (2) the Boy Scouts had a First Amendment right to expressive association.

James Dale, an assistant Boy Scout scoutmaster, attended Rutgers University and became the University's Lesbian/Gay Alliance co-president. While at Rutgers, Dale attended a lesbian/gay seminar and was interviewed by a local newspaper about his homosexual advocacy. This controversy arose when Dale's scout troop revoked his Boy Scout membership after the newspaper published the article. Dale filed suit in New Jersey Superior Court alleging the Boy Scouts violated New Jersey's Public Accommodation Law.

The Court held that the Public Accommodation Law violated the Boy Scouts' First Amendment right of expressive association. The Court explained the right of association included the freedom to associate and the freedom to not associate, and that government actions were unconstitutional if those actions forced groups "to accept members [they did] not desire." Any group, public or private, has a First Amendment freedom of association when it engages in "expressive association." Here, the First Amendment protected the Boy Scouts because

6. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc., 515 U.S. 557 (1995).

their mission, "to instill values in young people," was an expressive activity. The Court held that: (1) homosexuality violated the Scouts' requirement that all members be "morally straight;" and (2) Dale's membership as a scoutmaster violated that Scout belief. The Court concluded that New Jersey's Public Accommodation Law materially interfered with the ideas that the Boy Scouts sought to express and held that the Boy Scouts may deny membership to anyone who "burdens [its] right to oppose or disfavor homosexual conduct."

Hill v. Colorado
530 U.S. 703

This case upheld Colo. Rev. Stat. §18-9-122(3)(1999), which forbade a person outside of an abortion clinic "to knowingly approach within eight feet of another person, without that person's consent, for the purpose of passing a leaflet or handbill to, displaying a sign, or engaging in oral protest, education, or counseling with such other person. . . ."

The Supreme Court decided the issue of whether the First Amendment rights of the speaker were abridged by the protection that the statute provided for the unwilling listener.

Before Colorado enacted the statute in question, petitioners performed "sidewalk counseling" within one hundred feet of abortion clinics. "Sidewalk counseling" attempts to "educate, counsel, persuade, or inform" people about abortion and its alternatives through a combination of conversation and literature. Petitioners contended that "sidewalk counseling" often required them to stand within eight feet of those people being counseled, and that the statute had stifled such counseling - a fundamental right - through fear of prosecution. Although no evidence existed to show where "sidewalk counseling" had become abusive, various demonstrations in front of abortion clinics and other medical facilities had impeded access and had often turned confrontational.

The state contended that there was a legitimate interest in protecting the health and safety of its citizens. The petitioners were able to enjoy a right to persuade, which is protected by the First Amendment; however, this right did not extend to the pressing of ideas upon an "unwilling recipient." The statute protected a person's right to be left alone.

The Supreme Court held that the statute in question was content neutral because: (1) it regulated the places where speech may occur and not the speech itself; (2) it was not enacted because of any disagreement with the content of the speech; and (3) the State's interests were unrelated to the content of the petitioners' speech. Instead, the statute protected people entering healthcare facilities from unwanted harassment, nuisance, and physical touching by persons making arguments or passing pamphlets within eight feet of them. It applied equally to all protests, counseling, and demonstrations made in opposition or support of abortions or any other issue. Petitioners were still able to communi-

cate their information via signs, oral statements, and handbills to their audience outside the eight-foot radius. Petitioners were also able to engage in face-to-face counseling with those people who welcome it.

FOURTH AMENDMENT SEARCHES

Bond v. United States
529 U.S. 335

This case retained the law from *United States v. Place*,[7] in holding that a traveler's personal luggage is an "effect" within the meaning of the Fourth Amendment.

The issue presented in this case was whether the Fourth Amendment's proscription against unreasonable searches applied to a traveler's personal carry-on-luggage.

The Petitioner was a passenger on a Greyhound bus which stopped, as required, at the permanent Border Patrol checkpoint in Texas. There, a Boarder Patrol Agent boarded the bus to check the immigration status of the passengers, but also checked soft luggage located in the overhead storage space by "squeezing" it. When the Boarder Patrol Agent came upon the Petitioner's baggage, he squeezed it and felt a "brick-like" object within the bag. The Petitioner agreed to allow the Boarder Patrol Agent to open and search the bag. Upon opening the bag, the Agent discovered a brick of methamphetamine.

The Supreme Court held that the Border Patrol Agent's physical manipulation of the bag violated the Petitioner's Fourth Amendment rights against unreasonable searches. The Fourth Amendment guarantees "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," including the personal luggage here. The Court reasoned the invasive purpose of the inspection conducted by the Boarder Patrol Agent was more intrusive than a "purely visual inspection," which the Court had previously allowed. Furthermore, the Court reasoned that the Petitioner's expectation of privacy was reasonable, because he sought to preserve his privacy by using an opaque bag and placing it directly above his seat.

HEALTH LAW

Pegram v. Herdrich
530 U.S. 211

This case verified that one cannot bring a cause of action against a health maintenance organization ("HMO") for a breach of fiduciary duty under

7. United States v. Place, 462 U.S. 696 (1983).

§3(1)(A) of the Employment Retirement Income Security Act of 1974, ("ERISA").

The Supreme Court was asked to determine whether a beneficiary of an HMO could assert a cause of action against that HMO under §3(1)(A) of ERISA for a breach of fiduciary duty where the HMO limited medical treatment in order to prevent excessive medical care.

In this case, the respondent sought medical treatment from a physician under her husband's HMO because of pain in her groin. The respondent's condition required her to undergo an ultrasound, but the HMO doctor would not allow the respondent to have the ultrasound for another eight days. The physician made this decision under the HMO provision that rewarded physicians for limiting medical treatment. Before the eight days passed, the respondent's appendix ruptured which ultimately led to peritonitis.

After examining the facts of the case, the Supreme Court determined that a beneficiary of an HMO could not assert a cause of action under ERISA against an HMO for a breach of fiduciary duty. In order to make this determination, the Court first examined the provision of ERISA that made "any person who is a fiduciary with respect to a plan" liable for their breach of responsibilities owed under that plan. The Court then elaborated on the ERISA definitions of "plan" and "fiduciary." The Court determined that an HMO constitutes a "plan" under ERISA, where it set forth rules that governed beneficiaries' right to care. The Court also determined that a "fiduciary" in the present case was one who had a duty of loyalty to care for the beneficiaries under the HMO. Given these basic definitions, the Court decided whether a decision concerning a beneficiary's eligibility for treatment under an HMO plan could constitute a breach of fiduciary duty. The Court held that such a fiduciary standard would undermine the policy behind the structure of an HMO, which purported to limit excessive medical care. The Court also held that a breach of fiduciary duty claim against an HMO would ultimately "boil down to a malpractice claim," where typically state-mandated medical negligence standards would apply in a federal court. Above all, the Court maintained that Congress did not enact ERISA to "federalize malpractice claims" or to avoid "poor" physicians from being sued. In short, the Court held that an eligibility decision made by an HMO would not amount to a breach of fiduciary duty under ERISA.

FAMILY LAW

Troxel v. Granville
530 U.S. 57

This case clarified and maintained the fundamental right of parents to control the care, custody, and education of their minor children without state interference.

The Supreme Court determined whether WRC §26.10.160(3), which allows "any person" at "any time" to petition for visitation rights whenever in a child's best interest and the state superior court's broad application of same, is constitional under the Due Process Clause.

After the death of their son, the Troxels petitioned the court for visitation with their grandchildren. The children's mother did not object to any visits with the paternal grandparents but did not agree to the amount of visitation requested by the grandparents. The superior court ruled in favor of the grandparents based on WRC §26.10.160(3). On appeal, the appellate courts dismissed the lower court's decision.

The Supreme Court held that the fundamental rights regarding parenting were based upon the general presumption that the biological/legal parent was the appropriate person to determine the best interests of his child. Thus, absent harm, parents maintain the constitutional right to control the care, custody, and education of their children without interference by the state. As a parent, Granville had the right to control her minor children's relationships with other individuals, including their paternal grandparents. The Washington State Superior Court directly undermined Granville's fundamental right by granting the paternal grandparents' petition without considering Granville's own evaluation of her daughters' best interests. The Court further held that the state court's broad application of WRC §26.10.160(3) was unconstitutionally burdensome.

STATES RIGHTS

Reno v. Condon
528 U.S. 141

This case upheld the Drivers Privacy Protection Act of 1994 ("DPPA"), which regulated the disclosure of personal information contained in the records of state motor vehicle departments.

This case presented the issue of whether the DPPA violated the Tenth and Eleventh Amendments of the United States Constitution.

The DPPA established a regulatory scheme that restricted the state's ability to disclose a driver's personal information without his consent. South Carolina violated this law by allowing the information contained in the state's DMV records to be available to any person or entity that filled out a form listing the requester's name and address and stated that the information would not be used for phone solicitation. The lower courts concluded that the DPPA was incompatible with the principles of federalism inherent in the Constitution.

The Supreme Court, however, reversed the ruling and held that the DPPA was a proper exercise of Congress' authority to regulate interstate commerce, because the information was an article of commerce and its sale or release into the interstate stream of business was sufficient to support congressional regula-

tion. The Court distinguished its holding in *New York v. United States*[8] and *Printz v. United States*:[9] in those cases, the Court held federal statutes invalid, not because Congress lacked legislative authority over the subject matter, but because those statutes violated the principles of federalism embodied in the Tenth Amendment. However, in this case, the Court relied on its holding in *South Carolina v. Baker*,[10] where it upheld a statute that prohibited States from issuing unregistered bonds, because the law "regulate[d] state activities," rather than seeking to control or influence the manner in which States regulate private parties, and stated that the DPPA did not require the States in their sovereign capacity to regulate their own citizens. Additionally, the Court articulated that the DPPA did not require the South Carolina Legislature to enact any laws or regulations, and it dids not require state officials to assist in the enforcement of federal statutes regulating private individuals.

Kimel v. Florida Board of Regents
528 U.S. 62

This case overturned the section of the the Age Discrimination in Employment Act ("ADEA") which waived the states' Eleventh Amendment immunity.

The issue in this case was whether Congress clearly intended to abrogate the states' Eleventh Amendment immunity and if so, whether it was a proper use of its constitutional authority.

In 1974, Congress expanded the ADEA to cover state employees by allowing them to sue for damages. Kimel sued the State of Florida for violating the ADEA. Florida then claimed immunity from suit in federal court under the Eleventh Amendment.

The Court held that Congress may only abrogate a state's constitutional immunity from suit in a federal court if Congress made its intention absolutely clear in the language of the act. The intent to do so was clear here, because the Act indicated that an employee may sue in any federal or state court of competent jurisdiction. However, the Court held that Congress did not have the power under the Constitution to revoke the states' immunity under the ADEA; Congress only had the power to enforce constitutional violations - not the power to determine what was a constitutional violation.

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8. New York v. United States, 505 U.S. 144 (1992).
9. Printz v. United States, 521 U.S. 898 (1996).
10. South Carolina v. Baker, 486 U.S. 1062 (1988).

VOTING/ELECTION LAW

California Democratic Party v. Jones
530 U.S. 567

This case rejected California Election Code §2001,[11] which attempted to change the selection of political parties' nominees for general election from a "closed" election to a "blanket" primary election.

The Supreme Court decided whether California could use a "blanket" primary to determine a political party's nomination for the general election, consistent with the First Amendment's Freedom of Association guarantee.

Until 1996, California used a "closed" partisan primary to select nominees. Only members who had declared affiliation with the political party by registration could vote for its nominee.[12] When a registered voter received a ballot, his choice would be limited to candidates of his own party. This procedure changed when Proposition 198 was adopted and allowed "all persons entitled to vote, including those not affiliated with any political party, [to] have the right to vote . . . for any candidate regardless of the candidate's political affiliation."[13] Under Proposition 198, the ballot listed all of the candidates, and a voter could choose freely among them. Regardless of which system was used, the candidate from each party that obtained the greatest number of votes became the nominee for that party.[14] This case was brought by the California Democratic Party, the California Republican Party, the Libertarian Party of California, and the Peace and Freedom Party, all of which had internal rules that prohibited non-party members from voting in the primary.

The Supreme Court held Proposition 198 to be unconstitutional. The Court recognized that states have substantial regulatory power in structuring and monitoring the election process. States may also act to ensure that competition between candidates is fashioned in a democratic manner in order to: (1) avoid allowing frivolous candidates in the general election; and (2) prevent "party raiding" (when a dedicated member of one party, switches to another party to affect the results of the primary election). However, the Court stressed that a state's power to regulate the process by which political parties select their nominees was limited by the Constitution. The Court held that Proposition 198 dictated the rules regarding how political parties select nominees and was therefore, unconstitutional.

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11. Cal. Elec. Code Ann. §2001 (West Supp. 2000).
12. Cal. Elec. Code Ann. §§2150, 2151 (West 1996).
13. §2001, *supra* note 11.
14. Cal. Elec. Code. Ann. §15451 (West 1996).

Reno v. Bossier Parish School District
528 U.S. 320

In this case, the Supreme Court affirmed its interpretation of the Voting Rights Act, 42 U.S.C. 1973(c).

The Court decided whether §5 of the Voting Rights Act prohibited pre-clearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose.

Bossier Parish School Board had a history of discriminatory voting practices. Under §5 of the Voting Rights Act, jurisdictions were prohibited from enacting any change in "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting," without having first obtained either administrative pre-clearance from the Attorney General or judicial pre-clearance from the District Court for the District of Columbia. In 1993, Bossier Parish submitted a redistricting plan to the Attorney General for approval. The Attorney General rejected the plan, because it imposed unnecessary limits on minority's ability to elect candidates of their choice. The District Court later granted pre-clearance to the plan, and stated that it could not reject the proposed plan under §5, as long as it was not enacted with a retrogressive purpose (it did not worsen the position of the minority voters).

The Voting Rights Act was interpreted to grant the Attorney General the authority to deny pre-clearance to a proposed voting plan, only when it was enacted with a retrogressive purpose. In order to obtain pre-clearance, the moving party must establish that the proposed plan does not have a discriminatory practice and does not abridge one's right to vote on the basis of race. The Petitioners argued that while the proposed plan did not have a discriminatory purpose, the resulting effect was sufficient grounds for denial of pre-clearance. Here, the proposed plan did not draw any majority or minority districts, thus making it more difficult to elect minority officials to the school board. The Court in *Beer v. United States*[15] stated that the phrase in §5, "denying or abridging the right to vote on account of race or color," limited the term "effect" to retrogressive effects. In the present case, the Court refused to adopt this interpretation, because the word "purpose" would result in different meanings. Thus, the Court rejected Appellant's position, holding that §5 did not apply to voting dilution but to retrogression. The purpose of pre-clearance was to ensure that the proposed plan did not abridge the rights of minority individuals any more than the current plan. In sum, "§5 does not prohibit pre-clearance of a redistricting plan enacted with a discriminatory but non-retrogressive purpose."

15. Beer v. United States, 425 U.S. 471 (1976).

National Italian American Bar Association

PMB 932 2020 Pennsylvania Ave., N.W., Washington D.C. 20006

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15. List hobbies or special interests:_____

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16. I represent that the information contained in this application and material sent in support thereof is true, accurate and authentic.

Dated:_____ Applicant's Signature:_____

Mail Application with any supporting materials <u>in one envelope</u>, postmarked no later than August 15, 2002 to:

Sally Ann Janulevicus
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