REGENT UNIVERSITY LAW REVIEW

VOLUME 18 2005-2006 NUMBER 2

CONTENTS

ARTICLES

ESSAYS

COMMENTS

REGENT UNIVERSITY LAW REVIEW

Volume 18 **2005-2006** **Number 2**

ARRESTING OFFICERS AND TREATING PHYSICIANS: WHEN MAY A WITNESS TESTIFY TO WHAT OTHERS TOLD HIM FOR THE PURPOSE OF EXPLAINING HIS CONDUCT?

James J. Duane[*]

Every trial lawyer eventually becomes intimately familiar with the steps of an elaborate *pas de deux* that is danced at almost every trial. The steps go like this:

1. One party, known as the proponent, asks a witness to testify about some information that the witness received from someone else.
2. The opposing party naturally objects that this is inadmissible hearsay.
3. The proponent, who implicitly admits that the evidence would not be admissible under any other exception to the hearsay rule, replies: "It's not being offered for its truth, but merely so that the jury can understand *why* this witness believed what he did, and took the actions that he did, on the basis of what he was told beforehand." In other words, the statement is being offered merely to show what the textbooks sometimes call its "effect on the hearer." By making this response, the proponent is tacitly conceding that the opposing counsel will be entitled to a limiting instruction if he has the good sense to request one.

---

* James Duane is a professor at Regent University School of Law, and a member of the faculty of the National Trial Advocacy College at the University of Virginia School of Law. He is the co-author of *Weissenberger's Federal Evidence* (4th ed. 2001), and the author of over twenty articles on evidence law. He graduated from Harvard College *magna cum laude* (1981) and Harvard Law School *cum laude* (1984). He published an earlier version of many of these ideas in *Litigation News*, Vol. XII, No. 1 (spring 2005), the newsletter of the litigation section of the Virginia State Bar.

4. The objecting party then responds that the evidence, if offered solely for that limited purpose, is not worth the trouble it would cause, because its probative value would be substantially outweighed by its risk of unfair prejudice. This requires the objecting party to persuade the court that (a) the question of *why* this witness did what he did, and how that decision was affected by what others *told* him, is not that central to the case, and (b) the danger is great that the jury would disregard the necessary limiting instruction.
5. The proponent then predictably disagrees, arguing that the probative value is fairly high and that there is nothing unusual about the case to justify a departure from the law's ordinary presumption that jurors can usually be trusted to follow the instructions of the court. He also points out, correctly, that the admission of the evidence carries literally no risk of unfair prejudice to anyone if the jury can be counted upon to follow a court order that the evidence "may not be considered for its truth."

How should the judge rule? It depends on the circumstances of each case. It all comes down to whether the conduct and motives of the witness are important for the jury to decide, and the likelihood that the jury can be safely trusted to follow an instruction to use the evidence only for that purpose and not as proof of the truth of what the witness was told.[1]

This intricate facet of hearsay doctrine has caused a great deal of confusion in the courts. As we shall see, it has accounted for several of the most poorly reasoned evidence rulings that have ever come out of the appellate courts of Virginia, all involving this precise question of whether to admit a statement allegedly offered to explain why the

---

[1] Purely as a matter of semantics, there are two different ways to describe what happens when a trial judge excludes a statement (or when an appeals court reverses a judgment) because the court fears that the jury is likely to disregard a limiting instruction that the statement may not be considered for its truth. A purist would insist that the evidence, by definition, *cannot* be hearsay if the proponent tells the judge, and the judge tells the jury, that it is not offered for its truth; the exclusion of such evidence must be based on a balancing of its probative value against its potential for unfair prejudice. United States v. Evans, 216 F.3d 80, 87 (D.C. Cir. 2000); CHRISTOPHER MUELLER & LAIRD KIRKPATRICK, EVIDENCE §§ 8.12, 8.18 (3d ed. 2003). The Supreme Court of Virginia, however, claims that a statement is *hearsay*, and excluded by the *hearsay* rule, even if the trial judge says it is not admitted for its truth, as long as it carries an unacceptable risk of being misused by the jurors for its truth, or where it appears that the offering party's real motive for offering the evidence was his hope that the jury would do so. *See* sources cited *infra* notes 9, 46, and 50. For the sake of simplicity, this article will adopt the somewhat unconventional terminology employed by the Supreme Court of Virginia.

witness took certain actions on the basis of what he had been told by others. These cases include some of the clearest imaginable situations where the admission or the exclusion of such evidence was obviously the right course. Indeed, the cases discussed in this article furnish textbook examples that could have been used to teach future generations of lawyers about this area of hearsay law and doctrine, except for one little problem. The courts of Virginia got them all dead wrong.

I. ARRESTING POLICE OFFICERS

Courts generally have wide discretion in deciding whether to let a witness testify "I did what I did because of what someone else told me." But the admission of such testimony is always *most* suspect when it comes from a law enforcement officer in a criminal case. One of the leading reference works on American evidence law, *McCormick on Evidence*, specifically cautions that the "one area where abuse may be a particular problem involves statements by arresting or investigating officers regarding the reason for their presence at the scene of a crime."[2] Statements by the police relating "complaints and reports of others containing inadmissible hearsay . . . are sometimes *erroneously* admitted under the argument that the officers are entitled to give the information upon which they acted,"[3] but that is usually an abuse of discretion, since "the need for this evidence is slight, and the likelihood of misuse great."[4] Since the police officer is not a party to the case, his conduct and motives and the reliability of his sources are irrelevant to anything the jury has to decide, except for the rare case when the defendant chooses to make an issue out of them.[5] Such matters are often relevant to the judge ruling on a pretrial suppression motion, but not to the jury at trial. The jury's only assignment is to decide whether the accused is guilty on the basis of the evidence admitted at trial, not whether the police had probable cause

---

2 2 JOHN W. STRONG ET AL., MCCORMICK ON EVIDENCE § 249 (5th ed. 1999).

3 *Id.* (emphasis added).

4 *Id.* Instead of giving the details of the complaints received from others, the testifying officer should merely explain that he arrived at the scene or took certain actions "'upon information received,' or words to that effect," which "should be sufficient" to protect the prosecution from any unfair prejudice or jury confusion. *Id. Accord* United States v. Lopez, 340 F.3d 169, 176-77 (3d Cir. 2003).

5 Such matters usually become relevant only if the accused chooses to make them relevant by advancing the suggestion that he was the victim of "overly aggressive or unjustified enforcement efforts." MUELLER & KIRKPATRICK, *supra* note 1, § 8.18. But even then, the "cure" of allowing the officers to explain their conduct is "often worse than the disease" if it discloses to the jury "the opinions of outsiders that defendants engaged in criminal acts," so it is often wise for the court to exclude such evidence as unfairly prejudicial "if the defense does not raise or exploit the issue in some way." *Id.* For an excellent discussion of this issue, see *United States v. Silva*, 380 F.3d 1018, 1019-20 (7th Cir. 2004), and *United States v. Evans*, 216 F.3d 80, 85-90 (D.C. Cir. 2000).

for his arrest. Moreover, as the Sixth Amendment Confrontation Clause confirms, the risk of unfair prejudice is greatest when the opposing party is the accused on trial for his liberty or life.

This point has been emphasized many times by the United States Courts of Appeals, which have held time and time again that it is error for police officers to relate the details of incriminating complaints they received about the accused for the supposed purpose of explaining how and why they suspected, located, or arrested him.[6] The highest courts of many other states have done the same.[7] As one federal appeals court has observed, "[a]llowing agents to narrate the course of their investigations, and thus spread before juries damning information that is not subject to cross-examination, would go far toward abrogating the defendant's rights under the sixth amendment and the hearsay rule."[8] Such evidence has the greatest imaginable potential for unfair prejudice and little or no probative value, since the jury ordinarily has no reason to learn anything about when or why the accused was suspected or charged.

Once upon a time, that was the law here in Virginia too. Only half a century ago, in *Sturgis v. Commonwealth*,[9] the Supreme Court of Virginia reversed a conviction because the arresting officer testified that he was patrolling a certain highway on the night in question after he had "received some information" that the defendant was hauling illegal whiskey in that area, just before he found and arrested that same suspect and charged him with that same offense. The Supreme Court correctly reasoned that this testimony was "[c]learly" inadmissible and "pure hearsay" because "[i]t conveyed to the jury the information that these officers had been told by other persons that the defendant was or

---

[6] *E.g*, United States v. Solomon, 399 F.3d 1231, 1237 (10th Cir. 2005); United States v. Silva, 380 F.3d 1018, 1019-20 (7th Cir. 2004); United States v. Williams, 358 F.3d 956 (D.C. Cir. 2004); United States v. Lopez, 340 F.3d 169, 175-77 (3d Cir. 2003); Ryan v. Miller, 303 F.3d 231, 252-53 (2d Cir. 2002); United States v. Meserve, 271 F.3d 314, 319-20, 330 (1st Cir. 2001); United States v. Becker, 230 F.3d 1224, 1228-29 (10th Cir. 2000); United States v. Evans, 216 F.3d 80, 85-90 (D.C. Cir. 2000); United States v. Cass, 127 F.3d 1218, 1222-24 (10th Cir. 1997); United States v. Blake, 107 F.3d 651, 653 (8th Cir. 1997); United States v. Sallins, 993 F.2d 344, 346 (3d Cir. 1993); United States v. Brown, 767 F.2d 1078, 1083-84 (4th Cir. 1985); United States v. Hernandez, 750 F.2d 1256, 1256-59 (5th Cir. 1985).

[7] *E.g.*, State v. Broadway, 753 So. 2d 801, 808-10 (La. 1999); Conley v. State, 620 So. 2d 180, 182-83 (Fla. 1993); Craig v. State, 630 N.E.2d 207 (Ind. 1994); State v. Doughty, 359 N.W.2d 439 (Iowa 1984); Gordon v. Commonwealth, 916 S.W.2d 176 (Ky. 1995); Commonwealth v. Rosario, 721 N.E.2d 903 (Mass. 1999); State v. Williams, 525 N.W.2d 538, 544-45 (Minn. 1994); State v. Braxter, 568 A.2d 311 (R.I. 1990); *accord* Shook v. State, 172 S.W.3d 36, 39-40 (Tex. Crim. App. 2005).

[8] United States v. Silva, 380 F.3d 1018, 1020 (7th Cir. 2004).

[9] Sturgis v. Commonwealth,197 Va. 264, 88 S.E.2d 919 (1955).

had been engaged in the very illegal act for which he was then being tried."[10]

Just a few years later, however, the wisdom of that case began to unravel in a pair of terribly reasoned cases. Ironically, both of them involved the fatal shootings of police officers, as if the court was unwittingly destined to prove that tragic cases make very bad law.

In *Fuller v. Commonwealth*,[11] the defendant was charged with capital murder for shooting and killing one of two police officers who had been placing him under arrest for an unrelated charge. Over a hearsay objection, the other officer testified that, at the time of the murder, they had been placing Fuller under arrest because earlier that day they had met a man who was bleeding profusely from a wound on his head, and who told the police that he had been assaulted by Fuller at an address where they might also find a dead woman.[12] This testimony about the details of the other assault charge was obviously hearsay, terribly prejudicial, and irrelevant. Incredibly, however, the Supreme Court of Virginia held that this evidence was properly admitted "not for the purpose of showing the guilt or innocence of the defendant; but for the purpose of showing the reason for the police officers' action in arresting him."[13] That reasoning was exceptionally dubious, because the jury at Fuller's capital murder trial only needed to be told, at most, that Fuller was resisting some sort of an arrest when he shot the arresting officer; the jury had no need to know *why* he was being arrested, much less that it was for an unrelated crime of violence.[14] But as bad as this holding was, at least its logic was originally limited to the unusual situation in which a defendant is charged with crimes he committed *while* resisting

---

[10] *Id.* at 267, 88 S.E.2d at 921.

[11] 201 Va. 724, 113 S.E.2d 667 (1960).

[12] *Id.* at 725, 113 S.E.2d at 668.

[13] *Id.* at 729, 113 S.E.2d at 670.

[14] Under Virginia law, a defendant charged with crimes of violence against an arresting officer may try to reduce the grade of the offense by proving that he was being arrested illegally, but the burden of raising that issue and proving the illegality of the arrest is on the defendant, not the prosecution, Clinton v. Commonwealth, 161 Va. 1084, 1089, 172 S.E. 272, 274 (1934), and the defendant in *Fuller* did not even testify, much less offer any evidence that he was resisting an illegal arrest or that he was threatened with any conduct that would justify the use of deadly force. *See* Banner v. Commonwealth, 204 Va. 640, 647, 133 S.E.2d 305, 310 (1963) ("An illegal arrest of itself would not give the defendant the right to shoot or take the officer's life"). So there is no way the prosecution should have been allowed to prove the legality of the arrest in that case to rebut a defense that had never been raised. In any event, that charitable explanation of the holding in *Fuller* would be especially tenuous today, since "the overall trend in a majority of states has been toward abrogation of the common law right to use reasonable force to resist an unlawful arrest." Commonwealth v. Hill, 264 Va. 541, 548 n.2, 570 S.E.2d 805, 809 n.2 (2002) (noting without deciding whether Virginia should join that trend).

arrest, and the prosecution wants merely to prove why he was being arrested at the time of his crimes against the arresting officer.

In the first two decades after *Fuller* was decided, its scope was drawn slightly into question by a pair of cases in which police officers were permitted to testify as to what they had done immediately after receiving generalized radio reports of suspicious activity then in progress. One officer testified to receiving a report about a "burglary in progress,"[15] and the other explained that he had "gone to investigate noises heard in that building."[16] In both cases, the court cited *Fuller* as if to suggest that perhaps the hearsay rule would never be implicated by allowing a police officer to explain what led him to the place where he found the defendant or to place the defendant under arrest. That reliance was unfortunate and entirely unnecessary. A far more solid foundation for those two rulings would have been simply to note that those cases, unlike *Fuller*, involved police testifying how they immediately responded to reports that did not describe or name the accused or even directly implicate him in any criminal activity, and that those reports were in any event almost certainly admissible, even for their truth, as "present sense impressions" of crimes then in progress.[17] Neither case therefore represented any significant expansion of the holding in *Fuller*.

But any possible limits on that once arguably narrow case were unwittingly obliterated by the disastrous decision of the Supreme Court of Virginia in *Weeks v. Commonwealth*.[18]

The defendant in *Weeks* was one of two men in a car that was stopped by a state trooper for speeding, moments before one of them apparently shot and killed the trooper during that routine traffic stop. Some time later, Weeks was detained by the police for several hours of questioning before he was arrested and charged with the murder. At trial, the police officer who had questioned Weeks about the murder was permitted to disclose that he eventually decided to arrest Weeks after hearing that *another* officer had allegedly been told by the vehicle's other occupant (who was also the defendant's uncle) "that Lonnie Weeks did, in fact, shoot the trooper." Of course, this testimony by a police officer as to what some *other* officer allegedly heard from a witness was "double

---

[15] Upchurch v. Commonwealth, 220 Va. 408, 409, 258 S.E.2d 506, 507 (1979).

[16] Foster v. Commonwealth, 209 Va. 297, 303, 163 S.E.2d 565, 569 (1968).

[17] Hearsay statements are admissible in Virginia when there is "substantial contemporaneity" between the statement and the event being described. BOYD-GRAVES CONFERENCE, A GUIDE TO EVIDENCE IN VIRGINIA 96 (2004).

[18] 248 Va. 460, 477, 450 S.E.2d 379, 390 (1994). All of the facts about the *Weeks* case set forth here are of course taken from that opinion.

hearsay and thus doubly suspect."[19] Nevertheless, the Supreme Court of Virginia affirmed the admission of this hearsay within hearsay on the absurd grounds that it was merely offered to "explain" something the jury had absolutely no need to know: namely, why the officer decided to arrest the defendant and charge him with the very crime for which he was on trial. Quoting but utterly failing to comprehend the language from its earlier holding in *Fuller*, the court stated that "[t]he hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made; this is especially true when the evidence is not offered for the purpose of establishing guilt or innocence of the accused 'but for the purpose of showing *the reason for the police officers' action in arresting him.*'"[20]

The court's careless extension of its holding in *Fuller* was so preposterous that it takes your breath away. When the *Fuller* court approved the admission of hearsay to explain "the reason for the *police officers'* action in arresting him," remember, that court was talking about the *victims* in that case–the officers who were trying to arrest the accused at the time he shot at them and murdered one of them–*not* the other police officers who arrested him hours later and charged him with that murder! If the court had understood and truly followed the logic of its earlier holding in *Fuller*, all it would have approved in *Weeks* would have been the admission of evidence as to why the slain police officer had stopped the accused for speeding just moments *before* the murder, not why a *different* officer decided several hours later, based on inadmissible third-hand information, to charge him with the very same crime for which he was on trial. That testimony, even apart from its obvious unreliability, should have been excluded on the grounds of its sheer irrelevance. There is no need for a jury to learn anything about whether the defendant was ever arrested *on the charge for which he is now being tried*, much less when or by whom or *why*.[21] On the contrary, even in

---

[19] Serv. Steel Erectors Co. v. Int'l Union of Operating Eng's, 219 Va. 227, 236, 247 S.E.2d 370, 376 (1978). In saying that double hearsay is "doubly suspect," of course, the court did not mean that it is always inherently less trustworthy than ordinary hearsay, because it is not. James Joseph Duane, *The Four Greatest Myths About Summary Judgment*, 52 WASH. & LEE L. REV. 1523, 1530 & n.25 (1995). But it is doubly suspect in the sense that there is need for special caution in admitting such evidence, and the proponent must overcome a more daunting burden of demonstrating that the court can safely dispense with the need for both witnesses whose out-of-court declarations are being offered.

[20] *Weeks*, 248 Va. at 477, 450 S.E.2d at 390 (emphasis added). The court said it was quoting its opinion in *Upchurch v. Commonwealth*, 220 Va. 408, 258 S.E.2d 506 (1979), but the passage it quoted from *Upchurch* was actually a quotation from *Fuller*.

[21] In *Weeks*, the Supreme Court reasoned that the incriminating statement by the defendant's passenger "was offered to explain [the police officer's] action in arresting

cases where it is impossible to keep the jury from learning or inferring such facts, the admission of such evidence must be treated with extraordinary delicacy and restraint, since the United States Constitution commands that a jury must not be "permitted to draw inferences of guilt from the fact of arrest and indictment."[22] The fact that the Supreme Court of Virginia could not immediately perceive this great difference is nothing short of astounding.

In fact, although the court did not realize this point, its decision in *Weeks* was plainly controlled by *Sturgis*, which had correctly recognized that it is improper to tell the jury that the police "had been told by other persons that the defendant was or had been engaged in the very illegal act for which he was then being tried."[23] Yet that is exactly what the testifying officer did in *Weeks* with the later blessing of the Supreme Court. Although the court probably did not even realize that it was doing so, its decision in *Weeks* unmistakably overruled *Sturgis*, and represented a complete reversal of the law of Virginia. It also distorted *Fuller* utterly beyond recognition, by expanding the logic of that holding from cases involving crimes committed against arresting officers (a very small subset of all prosecutions) to all cases in which the accused was arrested some time after his crime—in other words, *all* prosecutions.

For the reasons outlined above, *Weeks* is perhaps the most poorly reasoned judicial opinion I have ever seen on any aspect of hearsay law; I will note only in passing (because it is not our central concern here) that the decision is also unquestionably wrong under the Confrontation Clause of the United States Constitution, which plainly forbids any court from doing what the trial judge did in that case.[24]

---

defendant at 7:52 a.m. after considering defendant not in custody 12 minutes earlier, and not to prove that defendant had in fact shot the trooper." 248 Va. at 477, 450 S.E.2d at 390. This completely overlooks the obvious fact that the precise time when the accused was placed under arrest was irrelevant to the jury. The jurors never even should have been told such things, much less given an explanation for them.

[22] Taylor v. Kentucky, 436 U.S. 478, 487 (1978) (explaining the reasons for the need to give criminal jurors an instruction on the presumption of innocence). Many readers with the supposed "benefit" of extensive criminal trial experience will certainly think I do not know what I am talking about because they have seen countless police officers testify at trial about their decision to place the accused under arrest. I am well aware of that common practice, which is entirely because of the unfortunate prevalence of incompetent defense lawyers who have not read *Taylor v. Kentucky* and do not understand that they should be objecting to such prejudicial and irrelevant information, perhaps because they too have seen it happen so often. And so the tragic cycle continues.

[23] Sturgis v. Commonwealth, 197 Va. 264, 267, 88 S.E.2d 919, 921 (1955).

[24] In a case like *Weeks* where two potential suspects were present at a crime, an extrajudicial statement made by one of them to the police and implicating the other is so inherently suspect and devastating that it cannot be admitted at their joint trial, not even if it is admitted with a "limiting instruction" that the jury may not consider it for its truth against the one who did not make the statement, because of the intolerable risk that the jury will be unable to heed such an instruction. Bruton v. United States, 391 U.S. 123

Predictably, the horrendous decision in *Weeks* has led the lower Virginia courts to sustain some of the most egregious examples one could imagine of inadmissible hearsay smuggled into the record under the ridiculous pretense of telling the jury why the police did what they did. For example, in *Fisher v. Commonwealth*,[25] the accused was a felon charged with illegal possession of a shotgun that was found in the trunk of a car he was driving. The arresting officer testified that he stopped the car, among other reasons, because he saw that the defendant (1) had no inspection or rejection sticker on his car, (2) made an illegal turn, and (3) pulled into a private apartment complex where the officer knew the defendant did not live. The officer testified that he decided to have the car towed in accordance with county policy because it had no inspection or rejection sticker, that he then found a bottle of pills in the car during a routine inventory search that tested positive for cocaine, and that he therefore obtained a search warrant for the search of the trunk that turned up the gun.[26] That should have been the end of the matter. That was far more than adequate explanation for the stop, and the search. No jury on earth confronted with that explanation would have ever suspected the police of anything suspicious or improper, and the defendant did not suggest otherwise at trial.[27]

But the prosecutor did not stop there, because he feared the jury might not convict on the gun possession charge when there was no admissible testimony by anyone who had ever seen the defendant touch the gun (much less use it in a menacing manner), or who could say who had put the gun in the trunk, or how long the gun had been there. So, with the consent of the trial judge and the later blessing of the court of

---

(1968). That is true even in a case, such as *Weeks*, where the extrajudicial statement is admitted alongside an alleged confession by the defendant himself. Cruz v. New York, 481 U.S. 186 (1987). Logically, that conclusion is not altered merely because the accused is on trial by himself, at least not in a case like *Weeks* where the evidence was neither relevant nor admissible for any proper purpose to rebut some defense raised by the accused at trial. Tennessee v. Street, 471 U.S. 409, 417 (1985) (Brennan, J., concurring). These points were all plainly settled long before *Weeks* was decided.

[25] 42 Va. App. 395, 592 S.E.2d 377 (Va. Ct. App. 2004).

[26] *Id.* at 399-400, 592 S.E.2d at 378-79.

[27] I say this with complete confidence even though I have not seen the entire trial record in that case, because if the defense had been foolish enough to make an issue out of the traffic stop in front of the jury, the court of appeals surely would have made a point of emphasizing that fact in attempting to justify its ruling. Through personal contact with Fisher's lawyer, I confirmed the unsurprising fact that he did not argue in the presence of the jury that the police lacked lawful authority to stop the vehicle, and even stipulated before trial that he would not do so. Even if that were not the case it would be beside the point, however, since not one word of the *Fisher* opinion suggests that the court's ruling was based on anything done or said by the defense at trial, so that opinion can surely be cited as binding precedent in any case where the accused makes no suggestion of any suspicious or improper misconduct by the police.

appeals, the arresting officer was *also* allowed to testify that one of his *other* reasons for stopping the car was that it had matched both the plates and the description of a car that had been the subject of a broadcast one week earlier, advising the police to "be on the lookout" for an older model Cadillac driven by a black male who had reportedly been involved in an "altercation"[28] and "who carried a shotgun in the trunk of his car,"[29] and who "had brandished a shotgun and put it in the trunk of his car the week before the stop."[30]

The potential of this evidence for unfair prejudice was off the charts. It was the *only* evidence in the entire trial that anyone had ever seen the accused actually touching the gun, much less brandishing it in a menacing manner.[31] Incredibly, however, the prosecution had the audacity to tell the court with a straight face that its only reason for offering this evidence was "so the jury understands this was a legitimate and reasonable stop by the police in this case."[32] The testimony was admitted by the trial judge, and unanimously approved by the court of

---

[28] *Fisher*, 42 Va. App. at 399, 592 S.E.2d at 378.

[29] *Id.*

[30] *Id.* at 405, 592 S.E.2d at 381. The officer's testimony was as follows:

> Approximately one week before on my police radio while in my police car, I listened to a broadcast from another police officer, which stated that a large black Cadillac, 80s model driven by a tall black male bearing Virginia tags YGE3435 had been involved in a brandishing of a firearm on South Langley Street, which is approximately, a block and a half from where I saw him; and it was said on the broadcast that he keeps a shotgun in the trunk.

Appendix at 116, *Fisher* (Nos. 3309-02-4, 0553-03-4). Curiously, by the way, even though the police obtained a search warrant before opening the defendant's locked trunk, *Fisher*, 42 Va. App. at 399-400, 592 S.E.2d at 378-79, the court of appeals was obviously unwilling to uphold the search on that basis, since it went out of its way to sustain the search as an "inventory search." *Id.* at 401-05, 592 S.E.2d at 379-81. The court evidently recognized that the police broadcast was not even trustworthy enough to establish probable cause for the issuance of a warrant, yet it was willing to entrust that same evidence to the jury deciding the guilt or innocence of the accused.

[31] Logically, a conviction would not require proof that the defendant had ever "brandished" the shotgun in a threatening way, and it was possible that a jury might have inferred his knowing possession of the gun from the other circumstantial evidence in that case, including evidence that he nervously slammed the trunk door shut. *Id.* at 400, 592 S.E.2d at 379. But the prosecutor knew well enough that a cautious jury might be reluctant to convict in the absence of more direct proof tying the shotgun to the owner of the vehicle, thus ruling out the possibility that the gun had been left or planted in the car by someone else, and in the absence of any evidence that his use of the gun posed a threat to anyone. *Cf.* United States v. Barker, 1 F.3d 957, 959 (9th Cir. 1993) (noting the risk of jury nullification in felon-in-possession prosecutions, particularly in a nation where mere possession of a firearm is ordinarily legal). Both of those weaknesses in the government's case were fixed by the admission of this inadmissible hearsay tying the gun to the owner of the car, and suggesting that the gun had been in the trunk for at least a week and that he had "brandished" it in connection with some "altercation."

[32] Appendix at 114, Commonwealth v. Fisher, 42 Va. App. 395, 592 S.E.2d 377 (Va. Ct. App. 2004) (Nos. 3309-02-4, 0553-03-4).

appeals, on the theory that its potential for unfair prejudice was outweighed by its supposed probative value in explaining for the jury "what this police officer did upon receiving that information."[33] This ruling was indefensible for three independent reasons, any one of which should have been a decisive reason for reversal.

First, as the Supreme Court of Virginia once cogently declared in the completely indistinguishable case of *Sturgis v. Commonwealth*,[34] testimony by an arresting office is clearly inadmissible and "pure hearsay" if "[i]t conveyed to the jury the information that these officers had been told by other persons that the defendant was or had been engaged in the very illegal act for which he was then being tried."[35] That is exactly what the witness did in *Fisher*. Exactly two weeks after *Fisher* was decided, by the way, a federal appeals court held in a case with an uncannily similar set of facts that the admission of such testimony was plain error. In *United States v. Williams*,[36] another prosecution for possession of a firearm by a convicted felon, the court correctly held that it was plain error to allow the arresting officer to testify that others had told him that they had earlier seen the accused holding a gun, especially since the prosecution easily could have disclosed that the officers had information leading them to question the accused without revealing that it involved a report that he had been *armed*. Could anything possibly be more obvious?

Second, even if we concede that Virginia law after *Weeks* now apparently allows the police, at least as a general rule, to narrate inadmissible hearsay in order to explain their decision to arrest the accused, it boggles the mind to suppose that such testimony might be properly admitted even in a case like *Fisher*, where the officer had already testified without contradiction that he had seen with his own eyes plenty of lawful reasons to stop the accused and search his car, and the "one last reason" the prosecution wanted to sneak into the record was an otherwise inadmissible third-hand report that the defendant was guilty of the very charge for which he was on trial.[37] If that is proper

---

[33] *Fisher*, 42 Va. App. at 406, 592 S.E.2d at 382. By way of clarification, it should be noted that the two charges against Mr. Fisher (possessing a firearm while possessing cocaine, and possessing a firearm while a convicted felon) were tried separately before two different judges, both of whom were named in the reported opinion by the court of appeals. One of them, the Honorable Paul F. Sheridan, was *not* the one who admitted this hearsay evidence. On the contrary, Judge Sheridan sensibly sustained the defendant's hearsay objection to that evidence, surely for the same obvious reasons detailed in this article.

[34] 197 Va. 264, 88 S.E.2d 919 (1955).

[35] *Id.* at 267, 88 S.E.2d at 921.

[36] 358 F.3d 956, 963-64 (D.C. Cir. 2004).

[37] If the prosecutor and the testifying officer had honestly desired to use this evidence solely for the alleged purpose of explaining the conduct of the police that night, (1) they could have limited themselves to the traffic violations without mentioning the

under Virginia law, then we might as well come clean and admit that Virginia hearsay law imposes absolutely no limits on what police officers can tell the jury, as long as the prosecutor will naturally and gleefully accept a pathetic limiting instruction that even the rankest hearsay rumors are being admitted not for their truth but "merely" to explain why some expert in the police department thought they were reliable enough to act on!

Finally, even if one were to agree with the Virginia Court of Appeals that such testimony was properly admitted but not for its truth, it is folly to suggest that the jury in *Fisher* would have understood what was happening when the trial judge told them merely that "whether or not this incident was reported or is true or not is *not the issue*; it's only being offered to you for your consideration to show what this police officer did upon receiving that information; not whether or not it was true one week earlier."[38] This instruction appeared only to tell the jury that it was neither crucial nor important whether the "be on the lookout" warning was true or false, which no jury would understand or believe. That is a far cry from what would have been a minimally adequate limiting instruction under the facts of a case like *Fisher*, where the accused was entitled to insist, at a minimum, that the jury be told something like this:

> Ladies and gentleman of the jury, you have heard that the arresting officer stopped the defendant's car because he said he had heard from the police dispatcher that someone else said they saw the accused brandishing a shotgun and placing it in the trunk of this car.

---

broadcast at all, or (2) they could have revealed only that the police had other "information" leading them to question the defendant without describing that information, or (3) they could have revealed that the report involved alleged possession of contraband without disclosing that it was a gun, or (4) they could have mentioned a report about a gun without disclosing that it also involved a *shotgun* that was allegedly carried around regularly by the vehicle's owner, who had supposedly brandished it in connection with some altercation. *Dayenu!* Incredibly, none of those options were satisfactory to the prosecutor, who still had the brazen audacity to claim that he wanted only to show the jury that the police had lawful grounds to stop and question Mr. Fisher. It is painfully obvious that the prosecutor's true motive was the hope that the jury would disregard the judge's limiting instructions and rely on this hearsay as proof of the defendant's guilt.

To add to the hypocrisy, by the way, the prosecution was able to prevail on the other issue raised by Fisher on his appeal–the legality of the search that led to the discovery of the shotgun in the trunk–only by persuading the court of appeals that it was found during a routine inventory that was not a "pretext concealing an investigatory motive." *Fisher*, 42 Va. App. at 401, 592 S.E.2d at 380 (citation omitted). In other words, the Commonwealth was able to prevail on this appeal only by simultaneously committing itself to the positions that (1) the jurors *needed* to learn about the broadcast involving a shotgun in the trunk to understand why the police stopped this car, but (2) the later decision of those same officers to look inside the trunk had nothing to do with that report of a shotgun in that trunk! It is a pity that some lawyers will say anything to win. It is tragic that courts will sometimes let them get away with it.

[38] *Fisher*, 42 Va. App. at 406, 592 S.E.2d at 382 (emphasis added).

> That multiple hearsay was admitted for only one purpose: to assist you in deciding, if it matters to you, why the police decided to stop the defendant's car. But you are neither required nor expected to decide whether the police had lawful grounds for that stop, which has no bearing on whether you should acquit or convict the defendant. That weapon turned up after the police obtained a search warrant from a judge, who determined there was probable cause to make that search. The law does not allow you to reconsider that question, and the defendant has not asked you to do so.
>
> This double hearsay has not been admitted for any other purpose, and you may *not* give it any weight when deciding any other issue in this case, including whether the defendant ever touched or possessed the weapon that was found in the trunk of the car, or whether he placed it there or knew that it was there. Indeed, because there has been absolutely no admissible evidence that this hearsay report was true, and because the defendant is presumed to be innocent of all misconduct in the absence of admissible evidence to the contrary, I am ordering you to proceed on the assumption, no matter how unlikely it may sound in hindsight, that the report was, in fact, *false*.

As bizarre as this instruction admittedly sounds, it is merely a detailed explication of what the trial judge was supposedly telling the jury in *Fisher*, although there is no chance that any juror would understand all this after hearing a cryptic, baffling, and unpersuasive assertion by the judge that the truth of the out-of-court statement "was not the issue" and that it was not admitted to assist them in deciding "whether it was true." I am not claiming, by the way, that an instruction like the one above would be adequate to protect the rights of the accused in a case like *Fisher*, because it would not. This instruction asks the impossible by seemingly ordering the jurors to make believe that, by the most remarkable coincidence they have ever heard of, some unidentified caller *falsely* claimed that a man was seen putting a shotgun in the trunk of his car, one week before that same man was found with a shotgun in the trunk of that car. But that absurdity is not of my making: I am merely spelling out plainly and exactly what the trial judge was pretending to communicate to the jury in *Fisher*. The absurdity of expecting a jury to follow an instruction like this is the reason why dozens of state and federal courts from around the country have been virtually unanimous in holding that a police officer cannot be allowed to justify an arrest by telling the jury about hearsay reports that the accused committed the same crime for which he is now on trial.[39]

There have been outrageous cases from other jurisdictions where police officers were allowed to relate inadmissible hearsay only because a bungling defense lawyer made the execrable mistake on cross-

---

[39] *See* cases cited *supra* notes 6-8.

examination of asking why they arrested the defendant the way they did. For example, in one Ohio case where the defendant was charged only with drug possession, the testifying officer revealed that a team of seven officers was assembled to make the arrest because "there were other allegations that he was beating the children at the residence."[40] In a Connecticut case, an officer explained that he arrested the defendant with his gun drawn because the police had received information from "other police departments that [the defendant] has carried weapons on his person, that he has also said he wouldn't be taken again, and that he'll shoot it out with the police if he had to."[41] Another police officer suspected the accused of criminal activity after calling headquarters to run his name through "a criminal history check" which revealed that "he [had] past convictions for burglaries as well as larcenies."[42] In all three cases, the admission of this clearly inadmissible hearsay was affirmed only because the error was invited by a foolish question on cross-examination by defense counsel. If those same cases had been tried here in Virginia after *Weeks* and *Fisher*, there would have been no need to wait until cross to make such devastating disclosures; they could have been volunteered on direct examination with a limiting instruction that the officer was merely exercising his supposed "right" under Virginia law to explain why and how he placed the defendant under arrest.

II. TREATING PHYSICIANS

If one were pressed to identify a situation where a witness *should* generally be allowed to testify to what someone else told him, not for its truth but for the purpose of explaining why he later did the things he did, it would probably be impossible to imagine a better case than a medical malpractice defendant attempting to explain that he made the decision that constituted his alleged malpractice only after seeking and relying upon the factual reports and advice of doctors with other pertinent medical specialties.

Unlike the arresting officer in a criminal case, a malpractice defendant is a party to the case, and the reasonableness of his conclusions and conduct is the central issue in the litigation, so any evidence bearing on that matter naturally has the highest degree of probative value. Besides, apart from the special case of police officers, leading evidence texts agree that when a witness wishes to testify to what he was told in order to explain his subsequent decisions and conduct, "unless the need for the evidence for the proper purpose is substantially outweighed by the danger of improper use, the appropriate

---

40 State v. Brack, No. 2000CA00216, 2001 WL 92089, at *4 (Ohio Ct. App. 2001).

41 State v. Brokaw, 438 A.2d 815, 816 n.2 (1980).

42 State v. Wragg, 764 A.2d 216, 219 (Conn. App. Ct. 2001).

result is to admit the evidence with a limiting instruction."[43] All this is obviously consistent with the law's presumption that a jury ordinarily "follows an explicit cautionary instruction given by the trial court,"[44] because if a jury can be trusted to follow a clear instruction that an otherwise relevant statement may not be considered for its truth, there is literally no risk of unfair prejudice to anyone. And let's not forget that, even in the context of testimony by officers explaining the irrelevant reasons for their decision to arrest the accused, the Supreme Court of Virginia has said that "[t]he hearsay rule does *not* operate to exclude evidence of a statement, request, or message offered for the mere purpose of explaining or throwing light on the conduct of the person to whom it was made."[45]

So this should be a no-brainer, right? Surely that logic must follow with incomparably greater force when a malpractice defendant, seeking to explain why he made the decision that constituted his alleged malpractice, wishes to testify to facts and opinions that he *first* solicited and relied upon from doctors with other medical specialties. Right?

Wrong. In a pair of astounding cases decided in the past two years, the Supreme Court of Virginia has apparently eliminated any possibility that a medical malpractice defendant will be allowed to explain that he made his treatment decisions only after consulting with other doctors who had seen the same patient, even if the testimony is offered merely to prove the extent of his efforts to obtain appropriate consultation with relevant specialists.

In *Wright v. Kaye*,[46] the defendant, Dr. Kaye, was accused of malpractice during the surgical excision of a urachal cyst. The plaintiff charged that Dr. Kaye was negligent in using a stapling device to close the affected area and in failing to perform a cystoscopy to visually inspect the dome of the bladder. In his defense, Dr. Kaye testified that he did not complete the surgery until after he sought an intraoperative consulting opinion from a urologist who came into the operating room and then "informed him he was far enough from the bladder to safely use the Endo-stapler and that no cystoscopy was needed prior to closing the

---

[43] STRONG ET AL., *supra* note 2, § 249. *Accord* MUELLER & KIRKPATRICK, *supra* note 1, § 8.18.

> In an astonishing variety of cases, it is important to prove what a person actually knew or understood, what information was provided to her (warning or notice), or what pressures she felt from the urgings or blandishments of others. In such settings, evidence of oral out-of-court statements that she heard, or written statements that she read or had a chance to read, is routinely admitted.

Id.

[44] Riner v. Commonwealth, 268 Va. 296, 317, 601 S.E.2d 555, 567 (2004).

[45] Fuller v. Commonwealth, 201 Va. 724, 729, 113 S.E.2d 667, 670 (1960).

[46] 267 Va. 510, 593 S.E.2d 307 (2004).

surgery."[47] Dr. Kaye testified that he arranged this intraoperative consultation because he wanted the opinion of a urologist to assure "that the anatomy was properly identified."[48] The plaintiff's hearsay objection was overruled, according to the trial judge, because the testimony was admissible not "for the truth of what indeed the [urologist] said, . . . but simply to show why Dr. Kaye did what he did in this particular matter."[49]

In another case decided the same year, *Chandler v. Graffeo*,[50] an emergency room patient complained of chest pains to Dr. Graffeo, who diagnosed the patient "as suffering from a non-dissecting lower thoracoabdominal aortic aneurysm."[51] When the patient's pain subsided, he was released with instructions to see another doctor the next day, but died a few days later. After Dr. Graffeo was sued for his alleged "negligence in discharging [the patient] from the hospital,"[52] he testified that he did not release the patient until after he first consulted with a specialist in nephrology, described the patient's current condition, and confirmed with the specialist that "it was safe to discharge [the patient] from the hospital."[53] Dr. Graffeo testified that he sought and obtained this consulting opinion from Dr. Keith Zaitoun because he was a specialist in nephrology, and because Zaitoun had done a work-up on the patient during a five-day hospital stay a week earlier and therefore "knew the patient better."[54] Again, the plaintiff's hearsay objection was overruled by the trial judge.

These two cases followed a remarkably similar pattern. In both cases, the plaintiff objected on hearsay grounds to the defendant's testimony about the consulting opinion he obtained from a specialist. In both cases, the defendant argued that his testimony was not offered for its truth but to explain why he later made the decisions for which he was on trial, and the trial judge correctly overruled the objection. And in both cases, despite the law that evidentiary rulings are supposed to be reviewed only for abuse of discretion, the Supreme Court of Virginia

---

47 *Id.* at 529, 593 S.E.2d at 317.

48 Deposition of Dr. Kaye at 11-12 and 16-19, *Wright*, 267 Va. 510, 593 S.E.2d 307 (No. 030658).

49 *Wright*, 267 Va. at 529, 593 S.E.2d at 318.

50 268 Va. 673, 604 S.E.2d 1 (2004).

51 *Id.* at 677, 604 S.E.2d at 2. The diagnosis was at least partially correct, because the patient died several days later from a ruptured thoracoabdominal aortic aneurysm. *Id.* at 676, 604 S.E.2d at 2.

52 *Id.* at 681, 604 S.E.2d at 5.

53 *Id.* at 682, 604 S.E.2d at 5.

54 Trial transcript at 840, *Chandler*, 268 Va. 673, 604 S.E.2d 1 (No. 030665). Dr. Graffeo further stated that this was "a patient who [Dr. Zaitoun] had completed his work-up on," *id.* at 838, and that Dr. Zaitoun "had the knowledge of [the patient's] five-day hospitalization at Maryview." *Id.* at 840.

reversed and concluded that the testimony should have been excluded as hearsay.

In both *Wright* and *Chandler*, the court made the mistake of placing almost exclusive reliance on a line of earlier cases in which it had held that a nonparty expert medical witness should not be allowed to testify that he has spoken with others who agreed with his opinion.[55] Those cases made good sense; when a *nonparty* expert witness says that others agree with him, such testimony has absolutely no relevance unless it is taken as evidence of the truth of what the others said, which makes it classic hearsay. The same would also be true if a malpractice defendant testified to conversations he had with other doctors *after* the date of his alleged negligence.

But that is a far cry from what happened in *Wright* and *Chandler*, where the *defendant* in a medical malpractice case testified about the opinions he requested and obtained from specialists who had actually seen the same patient, as a way of demonstrating the extent of his care in obtaining appropriate consultations *during* his treatment of the plaintiff, which is typically a central issue in malpractice litigation.[56] If the evidence is offered for that limited purpose with an appropriate limiting instruction, its relevance does not depend on whether it is true or false, and so no hearsay danger is presented, as the trial judges correctly realized in both of those cases. When the witness on the stand is a *nonparty* medical expert, by contrast, obviously no similar claim can be made that the evidence is "offered for the mere purpose of explaining or throwing light on the *conduct* of the person to whom it was made,"[57] since the lawsuit does not involve *his* conduct at all.

This is why the Supreme Court was mistaken to conclude in *Chandler* that there could be "no other reason for introducing Dr. Zaitoun's opinion than to bolster Dr. Graffeo's testimony to prove that he had complied with the appropriate standard of care."[58] On the contrary, the obvious "other reason" was to show, not that this patient's condition permitted his safe discharge from the hospital (his later death pretty

---

[55] *See* CSX Transp. v. Casale, 247 Va. 180, 182-83, 441 S.E.2d 212, 214 (1994); Todd v. Williams, 242 Va. 178, 181, 409 S.E.2d 450, 452 (1991); McMunn v. Tatum, 237 Va. 558, 566, 379 S.E.2d 908, 912 (1989).

[56] Bracey v. Sullivan, 899 So. 2d 210, 215 (Miss. Ct. App. 2005) (affirming summary judgment for malpractice defendant based on affidavits from expert witnesses to establish, among other things, "that the appropriate consultations were made throughout [the patient's] treatment at the hospital").

[57] Fuller v. Commonwealth, 201 Va. 724, 729, 113 S.E.2d 667, 670 (1960) (emphasis added).

[58] *Chandler*, 268 Va. at 682, 604 S.E.2d at 5. Even if Dr. Graffeo had intended to offer Dr. Zaitoun's opinion on the relevant standard of care, however, it is not clear why that should have made a difference under Virginia law. *See infra* note 64 and accompanying text.

much proved otherwise), but that the defendant *reasonably believed* it did at the time, based on his consultation with a specialist who knew the patient better. Virginia law allows a medical malpractice defendant to testify to the "factual issues in the case, including what actions he took and *his reasons* for taking those actions," and such "factual testimony," even if it includes the doctor's understanding of what "many surgeons do," is "materially different from standard of care testimony."[59]

In attempting to explain why it could not trust a jury to obey the standard limiting instruction in a case like *Wright*, the Supreme Court reasoned: "While [the urologist's] statements would be some evidence of Dr. Kaye's state of mind (why he proceeded in Wright's procedure as he did), that would be true, to some degree, of almost *any* hearsay statement offered by its proponent."[60] In other words, the court reasoned, if we let doctors testify to what others told them in the operating room on the grounds that it is only offered to explain their subsequent conduct, that "exception" to the hearsay rule would quickly swallow the rule, since almost every bit of hearsay could be admitted on that rationale. This is perfect nonsense. Most inadmissible hearsay could never be logically offered on such a theory, either because it was heard by the witness after the event in question, or else because it was heard by a nonparty witness whose conduct is therefore not relevant at the trial. That would most obviously include, come to think of it, *all* of the inadmissible hearsay collected by police officers in criminal cases! Perhaps it should be no surprise that this obvious point was missed by the same court that has evidently perceived no logical limits on the ability of a police officer to do what Dr. Kaye was trying to do.

These two holdings are unfortunate and deeply troubling, and seem to reflect a grave naivety about the nature of medical malpractice litigation. Doctors routinely make life-and-death decisions based in large part on reports that they receive from specialists, lab technicians, nurses, radiologists, and a host of others, as well as the expertise they have acquired over a lifetime of conversations and conferences with

---

[59] Smith v. Irving, 268 Va. 496, 502, 604 S.E.2d 62, 65 (2004) (emphasis added). Believe it or not, this case was decided the same day the court decided *Chandler*, and also on the same day that the court reiterated, in the course of affirming the conviction and death sentence of a criminal defendant, that "[t]he hearsay rule does not operate to exclude evidence of a statement offered for the mere purpose of explaining the conduct of the person to whom it was made." Winston v. Commonwealth, 268 Va. 564, 591-92, 604 S.E.2d 21, 36 (2004) (quoting *Weeks* and ruling that a police officer could testify to incriminating statements made to him by a crime victim solely for the purpose of explaining why the officer took certain photos of the accused). Needless to say, the three opinions were written by three different justices–it could not have been otherwise–but, incredibly, all three cases were unanimous on the points for which I have cited them. It appears that the members of the court may be too busy to read these things very closely.

[60] Wright v. Kaye, 267 Va. 510, 530, 593 S.E.2d 307, 318 (2004) (emphasis added).

other doctors going all the way back to their classes in medical school.[61] All of these sources of guidance are classic hearsay if admitted for their truth, but they are routinely admitted in malpractice litigation, often without objection, even if only to permit the jury to decide whether the defendant made every reasonable effort to gather all pertinent sources of data and insight, and whether he made the right choices in light of the information and knowledge available to him. If the reasoning of *Wright* and *Chandler* is to be taken seriously and carried to its logical conclusion, there is no principled reason why all of these extrajudicial sources of insight would not also be inadmissible hearsay, a result which would have a profound impact on malpractice litigation as we know it.[62]

In both *Wright* and *Chandler*, the court bristled at its mistaken perception that the defendants had attempted to quote some other specialist on nothing but the appropriate "standard of care."[63] Even if that had been true, however, it is not clear why that should have made any difference. The same year it decided both of those cases, the Supreme Court of Virginia held that a medical malpractice plaintiff's expert witness could testify as to the appropriate "standard of care applicable to basic gynecological surgical procedures in Virginia," even though that expert had never practiced medicine in Virginia and had evidently never even observed such procedures in Virginia.[64] So far as the record revealed, the expert had gained his knowledge of the customary Virginia standard of care entirely "through *discussions* with physicians in Virginia, and while attending *seminars and meetings* in Virginia concerning laparoscopic surgery."[65] One wonders whether the court paused long enough to realize that as long as a doctor has never actually *witnessed* those procedures being conducted in Virginia, everything he has learned through discussions, seminars and meetings

---

[61] "[A] physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, *reports and opinions from nurses, technicians and other doctors*, hospital records, and X-rays." FED. R. EVID. 703 advisory committee's note (emphasis added).

[62] Under Virginia law, "statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine or other science or art, established as a reliable authority by testimony or by stipulation shall not be excluded as hearsay," Virginia Code § 8.01-401.1, but that hearsay exception obviously does not apply to the vast wealth of insight a medical doctor collects through decades of oral conversations and conferences with colleagues.

[63] *Wright*, 267 Va. at 530, 593 S.E.2d at 318; *Chandler*, 268 Va. at 682, 604 S.E.2d at 5.

[64] Christian v. Surgical Specialists of Richmond, Ltd., 268 Va. 60, 66, 596 S.E.2d 522, 525 (2004).

[65] *Id.* (emphasis added).

about "how we do it here" is technically hearsay. It is impossible to guess how the court will eventually reconcile this inconsistency.[66]

Those who share my deep concern over these two cases might take some consolation in the knowledge that the court's dubious holdings could be attributable to its confusion over the facts of those cases. In *Wright*, for example, the court mistakenly stated that the allegedly inadmissible hearsay proffered by the defendant involved "an intraoperative consultation he undertook *by telephone*" with a urologist,[67] when in fact that specialist was summoned into the operating room and observed the site of the incision before recommending the proper course to close the affected area.[68] Likewise, the court's opinion in *Chandler* is written as if the court had no idea that the specialist called by the defendant for a consultative opinion had actually seen the same patient one week earlier and knew the patient better than the defendant did.[69] It

---

[66] The court's opinion in *Christian* contains no indication that the defendant explicitly objected on hearsay grounds to the testimony of this expert, and perhaps the court did not see itself as deciding that precise question. But the question presented in that case was whether the proposed expert had demonstrated "sufficient knowledge of the Virginia standard of care at issue in this case to qualify as an expert witness," *id.* at 66, 596 S.E.2d at 525, which is arguably not so different from an explicit hearsay objection. Surely the court could not make a principled reconciliation of *Christian* with *Wright* and *Chandler* on the grounds that *Christian* involved a plaintiff's witness, or that it involved a nonparty expert witness. The court will inevitably need to hold either that (1) "the expert testimony in *Christian* was inadmissible hearsay but we did not decide that question because that was not the issue presented on appeal," or (2) "hearsay testimony about the appropriate standard of care in a medical malpractice case is not admissible, not even from the defendant, if he wants to tell us what he heard from one specialist; it is admissible, however, even from a nonparty expert who has never practiced medicine in Virginia, if he has heard about it from a *lot* of doctors (just don't ask us how many hearsay reports are enough to do the trick)." The later opinion in *Chandler* contains no hint as to which way the justices will eventually try to get around this inconsistency when someone inevitably calls them on it.

[67] Wright v. Kaye, 267 Va. 510, 517, 593 S.E.2d 307, 310 (2004) (emphasis added).

[68] I knew this had to be a mistake; no surgeon in any operating room would ever call a urologist on the telephone and ask "if I try to describe where I have made the incision, would you tell me if I am too close to the bladder?" I checked the record on appeal and confirmed this unsurprising fact for myself. The allegedly inadmissible testimony consisted of what the urologist saw "while he was there," and his response when he was asked for his recommendation "given what you see here." Deposition of Dr. Kaye at 16-19, *Wright*, 267 Va. 510, 593 S.E.2d 307 (No. 030658). There is nothing in the record about any telephone conversation. It is a good bet that this mistake was made by an inexperienced law clerk who did not understand the operative note which stated that the urologist "was *called* for intraoperative consultation." Young folks these days spend so much time on cell phones that they do not even remember the days when "calling" a person sometimes meant to *summon* him.

[69] The court's opinion curiously describes Dr. Zaitoun as "a non-testifying expert." Chandler v. Graffeo, 268 Va. 673, 682, 604 S.E.2d 1, 5 (2004). That is technically accurate, in the narrow sense that all doctors are medical experts, but that is not how a lawyer or a court would normally describe a nonparty treating physician who had actually seen and

appears probable that the court mistakenly thought both cases involved second opinions obtained over the phone from specialists who never saw the patient, which arguably might reduce their precedential significance a great deal–although it must be conceded that nothing in either opinion clearly confirms whether these mistakes about the facts played any role in the court's rulings, or whether the court would have reached a different result if it had known that these cases involved alleged hearsay statements by doctors who were consulted after they had actually seen the patient. Only time will tell whether the court will limit those rulings to cases where the defendant obtained a second opinion from someone who never saw the patient, even though (perhaps unbeknownst to the court) *neither* of those cases actually involved such a situation. This sad chapter in Virginia legal history vividly confirms the wisdom of the rule that evidentiary rulings are supposed to be reviewed only for abuse of discretion by the trial judge, who usually understands the facts and background of the case better than a busy appeals court ever could.

III. CONCLUSION

We summarize by considering a fundamental and frequently recurring question of evidence law, as well as its incredible answer here in Virginia.

Q. Is it proper for a witness to testify to what others told him out of court, where that otherwise inadmissible testimony is offered solely for the purpose of explaining or throwing light on the conduct of the witness?

A. It all depends on who the witness is. If the witness is not even a party but is a police officer in a criminal case trying to explain why he arrested and charged the defendant with the same crime the jury is trying to resolve, the answer is evidently always *yes*—even though such unfairly prejudicial details are irrelevant to the jury, which has no need to learn whether (much less why) the accused was ever placed under arrest, and even though the United States Constitution forbids the jury from attaching *any* weight to the fact of his arrest in deciding his guilt or innocence. Moreover, this is true even if the testifying police officer is merely narrating *multiple* hearsay about what he heard from another

---

cared for the patient. Moreover, in narrating the supposedly relevant facts in that case, the court stated that the defendant "was permitted to testify that *he had described Fields' condition and symptoms to Dr. Zaitoun* and that Dr. Zaitoun had agreed that it was safe to discharge Fields from the hospital," and that the defendant had tried without success to get the patient an appointment to see Dr. Zaitoun. *Id.* (emphasis added). Nowhere in its opinion does the court mention the critical fact that the patient had *already* seen Dr. Zaitoun during an earlier five-day stay at another hospital before the conversation between the two doctors, and that he was discharged by the defendant with instructions to see Dr. Zaitoun *again*. *See supra* note 54.

police agent who allegedly heard it from an alleged witness to the crime.[70]

On the other hand, if the witness is the defendant in a medical malpractice action trying to explain precisely why he took the actions that constituted his alleged malpractice, and why he reasonably believed that those decisions were correct in light of the information available to him, the answer is evidently always *no*—even though that information goes directly to the ultimate issue in the litigation and therefore has a very high level of probative value, and even if the witness is attempting to show the extent of his care in seeking out the opinions of appropriate specialists who also treated the patient and saw the patient with their own eyes.[71]

Both lines of cases are about as wrong as one could imagine. But to think that they came from the same court is simply mind-boggling. It is hard enough to believe that they were written by judges from the same *planet*.

---

[70] This is exactly what happened in both *Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994), and *Fisher v. Commonwealth*, 42 Va. App. 395, 592 S.E.2d 377 (Va. Ct. App. 2004).

[71] This is exactly what happened in both *Wright v. Kaye*, 267 Va. 510, 593 S.E.2d 307 (2004), and *Chandler v. Graffeo*, 268 Va. 673, 604 S.E.2d 1 (2004).

THE CASE FOR A RETURN TO MANDATORY INSTRUCTION IN THE FIDUCIARY ASPECTS OF AGENCY AND TRUSTS IN THE AMERICAN LAW SCHOOL, TOGETHER WITH A MODEL FIDUCIARY RELATIONS COURSE SYLLABUS

Charles E. Rounds, Jr.[*]

> Of all the exploits of Equity the largest and the most important is the invention and development of the Trust.[1]
>
> If we were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence I cannot think that we should have any better answer to give than this, namely, the development from century to century of the trust idea.[2]
>
> [The Trust] is an 'institute' of great elasticity and generality; as elastic, as general as contract.[3]

I. INTRODUCTION

A fiduciary has a duty imposed by law to act solely for the benefit of another as to matters within the scope of the relation.[4] "Fiduciary relationships are children of the forced marriage of agency law and trust law, being respectively common law and equity ideas."[5] The Anglo-American common law concept of a fiduciary bears little, if any, resemblance to the Roman or civil law concept of a fiduciary.[6] In fact, Dr. Joanna Benjamin, a member of the Bank of England's Financial Markets Law Committee, has opined that a "major challenge in achieving a single financial market in Europe is the lack of a domestic law of trusts in the

---

[*] Professor of Law, Suffolk University Law School.

[1] F.W. MAITLAND, EQUITY: A COURSE OF LECTURES 23 (A.H. Chaytor & W.J. Whittaker eds., 2d ed. 1936).

[2] F.W. MAITLAND, SELECTED ESSAYS 129 (1936).

[3] MAITLAND, *supra* note 1.

[4] The priest-penitent, doctor-patient, professor-student, and parent-child relationship, in and of themselves, are mere confidential relationships, not fiduciary relationships.

[5] J.C. Shepherd, *Towards a Unified Concept of Fiduciary Relationships*, 97 L.Q. REV. 51, 51 (1981).

[6] *See* Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434, 443 (1998) (noting, for example, that the civil law *fiducia*, unlike the common law trust, will not afford the beneficiary the protections of asset segregation, the *fiducia* having many of the attributes of a third party beneficiary contract).

civil jurisdictions making up all of Europe other than England and Ireland."[7]

In 1940, formal instruction in the law of agency and the law of trusts was a requirement in most, if not all, American law schools. At one law school, for example, "Agency" was allocated three semester hours and "Equity and Trusts,"[8] a single course, was allocated six semester hours.[9] Today, of the 180 or so law schools accredited by the American Bar Assocation, fewer than twenty still require courses in agency and trusts.

In this article, I endeavor to make the case that a decision we law professors made in the 1960s, namely to marginalize the fiduciary relationship in the American law school curriculum, was misguided, and that the chickens are now coming home to roost. The Enron debacle, the Ovitz severance package, Spitzer's action against the Canary Capital Partners hedge fund, and the accounting firm scandals—all breach of fiduciary duty cases—are only the tip of the iceberg.[10] The fiduciary relationship is not an invention of the Securities and Exchange Commission (SEC). It has been imbedded in the common law for centuries. Perhaps the American law school curriculum has something to do with the absence of collective outrage on the part of the legal profession.

I advocate mandatory instruction in the fiduciary aspects of agency and trusts, not because law students are studying to become agent-fiduciaries, not because agency and trusts are bar examination subjects, not because the durable power of attorney (an agency)[11] and the trust are now the components of most estate plans, and not because a Fidelity mutual fund is a tangle of agency, trust, and contractual relationships. I do so because the agency and the trust are two of the five elements of the periodic table of common law private relationships, the platform upon

---

[7] Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, 13 DUKE J. COMP. & INT'L L. 321, 323 n.15 (2003).

[8] Sometime after 1940, trusts became linked with wills in the American law school curriculum. This linkage is inappropriate. The will is a creature of statute. The trust, a fundamental common law legal/equitable relationship, is a creature of case law.

[9] *See* Suffolk University Law School 1940 Course Catalogue (on file with author).

[10] *See, e.g.*, Class Action Complaint Breach of Fiduciary Duty and Violation of ERISA, Severed Enron Employees Coal. v. N. Trust Co., No. H-02-0267, 2002 WL 32150523 (S.D. Tex. Jan. 24, 2002).

[11] "Unlike corporate law and limited partnership law that provide statutory modifications to the common law of fiduciary duty, there is no statutory provision that alters the common law fiduciary duty of loyalty owed by an attorney-in-fact under a durable power of attorney." Schock v. Nash, 732 A.2d 217, 225 (Del. 1999) (footnotes omitted).

which most legislation is based. The other three elements are the contract, the tort, and the legal interest in property.

II. THE CASE

The agency, the contract, the legal property interest, the tort, and the trust are interrelated. None can be understood in isolation. Knowledge of one requires knowledge of the other four.

Compare, for example, a "money market" deposit account at a bank with a share of a mutual fund. The former is a contract; the latter is an equitable interest in a trust.[12] The contractual right and the equitable interest are both items of intangible personal property. Each itself may be made the subject of a trust.

Because the depositor is in a creditor-debtor contractual relationship with the bank, not in a fiduciary relationship, the depositor is generally limited to an action at law for damages in the event the bank breaches the contract. The mutual fund investor, being in a fiduciary relationship with the mutual fund trustees, however, would have a vast array of equitable remedies available in the event of a breach of fiduciary duty, e.g., tracing, specific performance, damages, injunction, removal, and the appointment of a receiver. Another practical difference between the two relationships is that in the case of the depositor, there may be recourse to Federal Deposit Insurance Corporation (FDIC) insurance.

Law students, some lawyers, and most members of the public confuse the five fundamental legal relationships. Over the years I have asked thousands of students at the beginning of the second year of law school to explain what relationship is established when one deposits money in a bank. Most respond by saying that the account evidences an agency, a bailment, or a trust. Few answer correctly that the relationship is contractual.

When asked what a standard life insurance policy is, they generally respond that it is a trust. It is not a trust. Few appreciate that the policy is a third party beneficiary contract under which the insurance company has no fiduciary duties to the insured or to the third party while the insured is alive. There is no segregation of the premium as would be the case were the premium the subject of a trust.

This muddled understanding of common law fundamentals on the part of students is not the fault of those who teach contracts and property. It is simply that a student cannot have a complete and working understanding of a contract or bailment until the student understands

---

[12] All of Fidelity's mutual funds are trusteed. The law of trusts also applies to mutual funds structured as corporations, i.e., investment companies.

all of the alternatives, until the student has become familiar with all the elements of the common law periodic table.

In the financial world, one is generally either a principal, e.g., an investment banker or an agent, e.g., a broker-dealer:

> [B]roker-dealers ordinarily do not owe their clients duties of loyalty that would require them to make up-front disclosure of each and every conflict. But, when a broker has a relationship of trust and confidence with his customer—and this depends on the facts and circumstances of each individual case—the broker does owe his customer a fiduciary duty to put the customer's interest first.[13]

Powers of attorney are agencies. The corporation and its officers are in an agency relationship, as are a partnership and its general partners.[14] The employer-employee relationship is an agency relationship. Those who control charitable corporations are fiduciaries subject to the law of trusts. Most law schools are charities subject to the law of trusts.

The lawyer is simultaneously an agent of the client, a party to a compensation contract with the client, and often a trustee of the client's property.[15] Two of the three relationships are fiduciary in nature. The third, the contractual relationship, is quasi-fiduciary because it is incident to an agency.

The law professor is an agent of, and in a fiduciary relationship with, his or her employer, the university. The law professor is not in a fiduciary relationship with his or her students. Even law professors have been known to confuse the confidential teacher-student relationship with the common law principal-agent relationship.

In recent years we have begun to see "property" juxtaposed against "contract" in law reviews in ways that suggest that they are two distinct concepts. They usually are not. While land is real property, a corporate bond, being a bundle of contractual rights, is intangible personal property. No one with formal exposure to the law of the trust, a fiduciary relationship with respect to property, would make such a mistake.

---

[13] Cynthia A. Glassman, SEC Comm'r, Remarks Before the Open Meeting Regarding the IA/BD Rule (Apr. 6, 2005), http://www.sec.gov/news/speech/spch040605cag-2.htm. *See also* Patsos v. First Albany Corp., 741 N.E.2d 841, 848-50 (Mass. 2001).

[14] RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c (Tentative Draft No. 2, 2001) [hereinafter RESTATEMENT].

[15] *See generally* Diane L. Karpman, *In the Beginning: A Review of Legal Malpractice Book Review*, 17 GEO. J. LEGAL ETHICS 349, 358-59 (2004) (book review) (noting that a lawyer's "[b]reach of the standard of care sounds in tort, whereas the standard of conduct [applicable to lawyers] is a combination of contractual, agency, and equitable principles").

A prerequisite to competently practicing in any specialized area of the law is a thorough grounding in all five common law legal relationships, not just one of them. One could not, for example, practice in the specialties of taxation,[16] Employee Retirement Income Security Act (ERISA),[17] personal injury litigation,[18] corporate mis-governance litigation,[19] bankruptcy,[20] or the condominium form of ownership,[21] to name only a few, without such a thorough grounding. Title to the underlying condominium property is in a trustee. Although a trust is involved, the trustee is likely to be held to a business judgment standard of conduct, not a prudent person standard. An analysis of how condominium law differs from trust law presupposes an elemental understanding of the background common law.

We ought not allow any law student to pass through an American law school having received formal instruction in some, but not all, of the fundamental common law legal relationships, or in some, but not all, of the elements of the common law periodic table. We hold ourselves out as producing lawyers capable of diagnosing legal problems. Our warranty ought not be sacrificed on the altar of student autonomy.

We cannot expect a law student who has not been exposed to the fiduciary relationship to appreciate why such exposure is critical. Every layman knows what a will does. A layman—and by layman I mean a law student—however, cannot be expected to know where the abstract legal concept of a fiduciary relationship fits into the scheme of things before being exposed to it in an academic context. A student must master the fiduciary relationship to appreciate why he or she needed to master it, and why mastering it is critical to being a complete lawyer. Several credits allocated to a required course in the fiduciary aspects of agency and the property and fiduciary aspects of trusts is a small price to pay for closing the common law loop.

III. REBUTTING THE CASE AGAINST MANDATORY FIDUCIARY RELATIONS

Over the years, we academics have put forth many reasons why instruction in the fiduciary aspects of agency and the property and fiduciary aspects of trusts should not, or need not, be mandatory. I have

---

16 *See, e.g.*, Comm'r v. Estate of Bosch, 387 U.S. 456 (1967).

17 *See* CHARLES E. ROUNDS, JR., LORING: A TRUSTEE'S HANDBOOK § 9.5.1 (2005 ed.).

18 *See, e.g.*, Gorton v. Doty, 69 P.2d 136 (Idaho 1937).

19 *See, e.g.*, Class Action Complaint Breach of Fiduciary Duty and Violation of ERISA, Severed Enron Employees Coal. v. N. Trust Co., No. H-02-0267, 2002 WL 32150523 (S.D. Tex. Jan. 24, 2002).

20 *See* ROUNDS, *supra* note 17, § 9.11.

21 *See id.* § 9.12.

endeavored above to make the case that giving a law student a choice of taking a course in the fiduciary aspects of agency and the property and fiduciary aspects of trusts or taking a course in, say, evidence, is as pedagogically unsound as giving a medical student a choice of taking anatomy or surgery. What follows is a rebuttal of some of the arguments against mandatory instructions in the fiduciary relationship that have been expressed to me over the years:

A. The fiduciary aspects of agency and trusts can be covered in the required professional responsibility course.

The Code of Professional Conduct (Code) relates to the lawyer's license to practice law, i.e., the lawyer's relationship with the state. The common law of agency, contract, tort, and trusts governs the lawyer's fiduciary relationship with his or her client, and it is well settled that partners in a law firm owe each other a common law "fiduciary duty of 'the utmost good faith and loyalty.'"[22] These simultaneous and sometimes conflicting fiduciary duties that an attorney owes to clients and partners were recently the subject of litigation in Massachusetts.[23] In any case, agency's common law proscriptions are more expansive and pervasive than the Code's proscriptions because the Code's focus is regulatory. Diane L. Karpman, a well-known specialist in legal ethics, speculated on why academia has said little regarding the fiduciary relationship:

> Some ethicists maintain that breach of fiduciary duty is not part of the jurisprudence of legal ethics. That is a possible explanation for the paucity of academic attention being directed to teaching future lawyers these theories. However, if fiduciary obligations are inherent in what it means to be a lawyer, with loyalty and confidentiality "acknowledged by every American jurisdiction," then we are failing to teach the future members of the profession the bedrock concepts of these ethical duties.[24]

---

[22] Meehan v. Shaughnessy, 535 N.E.2d 1255, 1263 (Mass. 1989) (quoting Cardullo v. Landau, 105 N.E.2d 843, 845 (Mass. 1952)).

[23] *See* Lampert, Hausler & Rodman, P.C. v. Gallant, No. 031977BLS, 2005 WL 1009522 (Mass. Super. Ct. Apr. 4, 2005).

[24] Karpman, *supra* note 15, at 358 (footnotes omitted).

B. ERISA has preempted the common law of trusts.

The fiduciary duties articulated in ERISA are not exhaustive. "Congress relied on the common law of trusts to 'define the general scope of [the ERISA trustee's] authority and responsibility.'"[25]

C. Only rich people need concern themselves with trusts.

The trustees of the 75 largest mutual funds alone hold title to $2.9 trillion of U.S. equities. That is 20% of the $14.4 trillion market capitalization of the stock market at the beginning of 2001. Add to that the trillions held in trusteed employee benefit plans, and one can see that title to almost half of corporate America is now in the hands of a relatively few trustees who are administering for a vast segment of the American population. One commentator has labeled this phenomenon "fiduciary capitalism," although "fiduciary socialism" might better reflect this diffusion of wealth into the population. The Enron debacle has focused the nation's attention on the passivity of these institutional trustees—all of whom are fiduciaries, particularly as it relates to proxy voting. Note also that in a number of Supreme Court cases, the United States has been found to be a trustee of real and personal property belonging to Native Americans and occupying the status of a fiduciary.[26] Bottom line: The small investor, the worker, and the Native American are also trust beneficiaries.

D. The trust is a creature of equity, and equity is passé.

At all levels, the equitable remedy is taking center stage.[27] Few complaints nowadays are filed in this country without at least one prayer for some kind of equitable relief. Consider the development of the concept of equitable division in the divorce context. At the federal level, section 4 of the Sherman Act and section 15 of the Clayton Act direct the U.S. government "to institute proceedings in equity to prevent and restrain [antitrust] violations."[28] Even on the local administrative level, equitable principles are taking center stage. The relief that the Massachusetts Commission Against Discrimination (MCAD) may grant,

---

[25] Bixler v. Cent. Pa. Teamsters Health & Welfare Fund, 12 F.3d 1292, 1299 (3d Cir. 1993) (quoting Cent. States, Se. & Sw. Areas Pension Fund v. Cent. Transp., Inc., 472 U.S. 559, 570 (1985)).

[26] *See* United States v. Mitchell, 463 U.S. 206, 225 (1983).

[27] In 1934, a Massachusetts divorce court could not award a wife's property to the husband on the basis of equitable principles. *See* Topor v. Topor, 192 N.E. 52, 52-53 (Mass. 1934). Now it can. *See* MASS. ANN. LAWS ch. 208, § 34 (LexisNexis 2003).

[28] Clayton Act § 15, 15 U.S.C. § 25 (2000); Sherman Act § 4, 15 U.S.C. § 4 (2000).

for example, is equitable in nature.[29] Now that law schools, for whatever reason, have chosen to no longer require that a student take Equity, it falls to a course in the fiduciary aspects of agency and trusts to afford the student some exposure to the panoply of equitable remedies that may be available to the victim of a breach of fiduciary duty.

E. Trusts are passé.

We have touched on the growing phenomenon in the United States of "fiduciary capitalism" or "fiduciary socialism." Title to more and more of corporate America is concentrating, for good or for ill, in fewer and fewer individuals. The last time we saw this phenomenon was in the years leading up to enactment of the antitrust laws over a century ago. The trust is an Anglo-American common law invention. Although there are some primitive civil law trust analogs, e.g., the usufruct, the common law trust until recently has not been recognized in the civil law jurisprudence of the Continental jurisdictions, a jurisprudence that has been heavily influenced by Roman Law and the Napoleonic Code. Why? Because imbedded in these two classic bodies of law is the principle that property is indivisible. In other words, nomore than one person can have real rights with regard to the same object. The common law trust violates that principle in spades. Be that as it may, when powerful economic engines such as the United States, England, and Australia employ the trust as an instrument of commerce, others have no choice but to take heed. Italy, the Netherlands, and Malta, for example, have ratified The Hague Convention on the Law Applicable to Trusts and on Their Recognition.[30] It is expected that Switzerland will follow suit. The law schools on the Continent are now offering courses on the common law trust. They do not consider the trust to be passé. Nor do our trading partners on the other side of the Pacific. Mainland China only recently introduced trust law into its jurisprudence by statute through the Trust Law of the People's Republic of China, effective October 1, 2001.[31]

---

[29] *See* Lavelle v. Mass. Comm'n Against Discrimination, 688 N.E.2d 1331, 1335 (Mass. 1997), *overruled by* Stonehill College v. Mass. Comm'n Against Discrimination, 808 N.E.2d 205 (Mass. 2004).

[30] ROUNDS, *supra* note 17, § 8.12.2.

[31] Trust Law of the People's Republic of China (promulgated by the Standing Comm. Nat'l People's Cong., Apr. 28, 2001, effective Oct. 1, 2001), ch. 7, art. 74, http://en.ec.com.cn/pubnews/2004_03_29/200863/1005110.jsp.

F. Equitable property rights, e.g., mutual fund participation, and donative transfers to trustees, e.g., the personal inter vivos *trust, can be taught in the first year property course.*

In my view, our property colleagues have enough on their plates without the added burden of explaining what an equitable property interest under a trust is, how it can arise as a result of a donative transfer to a trustee, powers of appointment, equitable remedies, and what the fiduciary relationship is all about. A bailment is not an agency. "A bailee's freedom from control by the bailor establishes that the bailee is not the bailor's agent."[32] Nor is a simple bailment an equitable or fiduciary relationship. It is a legal relationship, although some very good text-writers have confused the bailment with the trust.[33] A bailee's remedies are generally legal, whereas the beneficiary's remedies are equitable. A "bailee" with fiduciary duties is either an agent or a trustee. Ultimately, it is a question of intent. "Although a few cases outside of the United States treat bailments as fiduciary relationships, that characterization has not been adopted by U.S. courts."[34]

G. One can master agency and trust concepts, together with the fiduciary relationship, in an afternoon at the library perusing the restatements.

In 1940, law schools assigned as many as nine credit hours to the fiduciary relationship. I am of the opinion that only a genius could achieve a working knowledge of the fiduciary aspects of agency and trusts in an afternoon. This opinion is based on twenty plus years of experience teaching the fiduciary relationship. In any case, both the Restatement of Agency and the Restatement of Trusts are currently under revision; the laws of agency and trusts are no longer as "settled" as they were a generation ago.

H. A course in the fiduciary aspects of agency and trusts should be replaced by a writing course.

One who has a firm grasp of the five fundamental common law relationships has a better chance of generating a coherent piece of legal writing than one who is familiar with only some of them. One's writing improves when one has something rational and coherent to say. Ten writing courses will not help the student who is unable to connect the

---

[32] RESTATEMENT, *supra* note 14, § 1.01 cmt. f(1).

[33] JOHN C. DEVEREUX, THE MOST MATERIAL PARTS OF KENT'S COMMENTARIES 202 (New York, Baker, Voorhis & Co. 1881); JOSEPH STORY, COMMENTARIES ON THE LAW OF BAILMENTS ch. 1, § 2 (6th ed. Boston, Little, Brown & Co. 1856).

[34] D. Gordon Smith, *The Critical Resource Theory of Fiduciary Duty*, 55 VAND. L. REV. 1399, 1451 n.211 (2002).

dots because he or she, for whatever reason, does not know where all the dots are.

I. It is our job as law school academics to teach our students how to think, not the black letter law.

Teaching the student the common law, all five facets of it—not *some* aspects of the common law, not *about* the common law—is critical. Any less instruction in the "black letter law" means we must share some of the blame when our students and graduates generate memoranda, briefs, and decisions that are incoherent, incomplete, and, dare one say, "half-baked." Every day we see judges, regulators, and lawyers (especially the litigators) missing the fiduciary issues, or failing to see the common law issue lurking behind some thicket of government regulation. Courses on the black letter common law and courses on "how to think like a lawyer" complement one another.

J. My career has been a success, even though I have had no formal instruction in the fiduciary aspects of agency and trusts.

Whether or not an isolated individual has in his or her own eyes been a professional success is not relevant to the issue of whether there should be mandatory instruction in the fiduciary aspects of agency and trusts in America's law schools.

K. Only a few law schools require agency and trusts.

The number of law schools that require agency and trusts is not relevant to the issue of whether they *should* be doing so. Forty years ago, most did. Now, most do not. Just as little thought was given to the conceptually inappropriate linkage in a single course of the trust, a creature of case law, with the will (or estate), a creature of statute, so also little thought has been given to the consequences of jettisoning the fiduciary relationship from the required curriculum. There is no virtue in running with the lemmings.

L. The fiduciary concept can be adequately imparted in a corporations course.

Scholars have traced the origins of the trust to before the Norman Conquest.[35] Business corporations were uncommon before 1800, particularly in the United States. A trust is a fundamental common law legal relationship.

---

[35] *See, e.g.*, Monica M. Gaudiosi, Comment, *The Influence of the Islamic Law of* Waqf *on the Development of the Trust in England: The Case of Merton College*, 136 U. PA. L. REV. 1231, 1243 (1988).

A corporation is a creature of statute. While one can draft a trust to do all that a corporation can do (to include affording the players limited liability), there are transactional efficiencies in employing the standardized corporate form, particularly for operating enterprises.[36] A corporation, on the other hand, is not a complete trust-substitute.[37] On its own, for example, it cannot bestow property rights on unborn and unascertained individuals. Functionally, it acts like a trusteeship that has been standardized by statute.[38]

While a corporation is neither a trust nor an agency, the law of corporations has borrowed the fiduciary concept from the common law of agency and tweaked it to suit its purposes.[39] "Initially, . . . [for example,] . . . the law of corporations applied the trust law sole interest rule to a corporate transaction with a director, and hence the transaction was voidable at the option of the corporation."[40]

In the corporate context, the duty of loyalty has transmogrified into the duty of "fair dealing." Elements of common law agency are present in the relationships between a corporation and its officers and between the corporation and its agent-fiduciary independent contractors.[41] At common law, directors also were agents of the corporation.[42] The law in the United States has changed in this regard: "Although a corporation's shareholders elect its directors and may have the right to remove

---

[36] "The trust is functionally protean. Trusts are quasi-entails, quasi-usufructs, quasi-wills, quasi-corporations, quasi-securities over assets, schemes for collective investment, vehicles for the administration of bankruptcy, vehicles for bond issues, and so on and so forth. In software terminology, trusts are emulators." George L. Gretton, *Trusts Without Equity*, 49 INT'L & COMP. L.Q. 599, 599 (2000) (footnotes omitted).

[37] Hansmann & Mattei, *supra* note 6, at 472.

[38] *Id.* at 476.

[39] *See* Schock v. Nash, 732 A.2d 217, 225 (Del. 1999).

[40] John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 958-59 (2005).

[41] *See* RESTATEMENT, *supra* note 14, § 1.01 cmt. c.

> The relationship between the foreman and the laborers is not an agency relationship despite the foreman's full control, nor is their relationship one of subagency . . . . The foreman and laborers are co-agents of a common employerwho occupy different strata within the organizational hierarchy; the foreman's role of direction , defined by the organization, does not make the laborers the foreman's own agents. The laborers act on behalf of the common employer, not the foreman. Likewise, the captain of a ship and its crew are co-agents, hierarchically stratified, who have consented to act on behalf of their common principal, the ship's owner.

Id. at § 1.01 cmt. g.

[42] For a historical background on the categorization of directors as trustees or agents, see PAUL L. DAVIES, GOWER'S PRINCIPLES OF MODERN COMPANY LAW 598 (6th ed. 1997).

directors once elected, the directors are neither the shareholders' nor the corporation's agents . . . given the treatment of directors within contemporary corporation law in the United States."[43]

If corporate directors are neither agents of the corporation nor agents of the shareholders, who then is the principal? One learned commentator has suggested that the state is the principal.[44] The point is that the concept of the fiduciary is not a creature of the law of corporations but of common law. In the corporate context, only at the margins has there been statutory modification of the common law of fiduciary duties.[45] It would then seem extraordinarily inefficient, misleading, and pedagogically incoherent to introduce a student to the common law fiduciary concept in a course on the corporation, a statutory construct of relatively recent origin. Moreover, powers of appointment and equitable property interests in unborn and unascertained individuals, a uniquely Anglo-American contribution to global jurisprudence, would inevitably fall by the wayside.

Finally, the trust has a way of taking control of the corporation. The Sherman Antitrust Act was a reaction to initiatives by Standard Oil Company to induce stockholders in various enterprises to assign their stock to a board of trustees and to receive dividend-bearing trust certificates in return.[46] Today, it is through the mutual fund, the employee benefit plan, and the charity that the trust seeks to control the corporation.

At minimum, some exposure to the fundamentals of agency and trust law ought to be a prerequisite to enrolling in any Corporations course. If it is generally the case that those who teach Corporations do not agree with this assessment, then Curriculum Committees may want to have in their files written explanations of why there is disagreement.

M. I am not against instruction in the fundamentals of agency and trust law, it just should not be mandatory.

A course in the fundamentals of agency and trust law should not be elective for the same reasons that courses in the fundamentals of contracts, property, and torts should not be elective. All five fundamental common law legal relationships should have equal status in the law school curriculum because they are interrelated and

---

[43] RESTATEMENT, *supra* note 14, § 1.01 cmt. f(2).

[44] *See* ROBERT CHARLES CLARK, CORPORATE LAW 22 (1986).

[45] *See* Schock v. Nash, 732 A.2d 217, 225 (Del. 1999).

[46] *See* 1 THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES 10-12 (Earl W. Kintner ed., 1978); *see also* Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 207, 217-18 (1926).

codependent. Moreover, together they create the context in which most legislation is crafted. It has been suggested that most students would elect Agency and Trusts in any case. Why would they do so, one might ask? If the institution does not signal an appreciation of the interrelationships of the core common law concepts through the design and hierarchical structure of its required curriculum, it is asking a lot to expect the students to gain such an appreciation left to their own devices. And to make instruction in the fiduciary aspects of agency and the property and fiduciary aspects of trusts mandatory only for marginal students or students in academic difficulty strikes one, to put it mildly, as not in the interest of the profession. A course whose primary focus is the two core common law fiduciary relationships, the agency and trust, ultimately is a values course that is politically and ideologically neutral. Judge Cardozo said it best in what essentially was an agency case:

> A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions.[47]

IV. CONCLUSION

I have endeavored to make the case that it is conceptually incoherent for a law school to have a required curriculum which dos not include a course whose primary focus is the common law fiduciary relationship. I leave it to others to make the practical case for mandatory instruction in the fiduciary relationship, e.g., that agency and trusts are both tested on the bar examination, that agencies and trusts are components of most estate plans, or that a Fidelity mutual fund is a tangle of agency, trust, and contractual relationships. For me, it is not that a student unfamiliar with the fiduciary relationship will leave the law school unable to write a decent estate plan or understand how a Fidelity mutual fund is legally structured; rather, it is that he or she will enter the real world ill-equipped to make legal and ethical diagnoses. That is bad for the student, bad for society, and bad for the law.

---

[47] Meinhard v. Salmon, 164 N.E. 545, 546 (N.Y. 1928) (citing Wendt v. Fischer, 154 N.E. 303, 304 (N.Y. 1926)).

APPENDIX

A MODEL FIDUCIARY RELATIONS COURSE SYLLABUS

(Assumption: 2 credits: (14 classes, 100 minutes each))

5 Classes

Topics: The legal structures of the agency and the trust, the parents of the Anglo-American fiduciary concept, which would include a discussion of the distinctions between these fiduciary relationships and non-fiduciary legal relationships, such as the third party beneficiary contract and the bailment.

Author's Comments: The nuances of a particular fiduciary relationship cannot be taught in a vacuum. The student needs some understanding of the elements of the agency or trust to which the relationship is incident. Thus, the first five classes would be devoted to sorting out the parties to the agency and trust relationships, how these relationships can arise, and how property rights are created or altered by their creation. A third party beneficiary contract, such as a life insurance policy, generally imposes no fiduciary duties on any of the parties to it. An investment management agency agreement or a trusteed mutual fund, however, does. Sorting out the rights, duties, and obligations of the parties to the agency and trust has the added benefit of providing a foundation for the later study of agency-trust statutory hybrids, such as the corporation.

A trust (unlike the agency, where title to the subject property, with some exceptions, remains with the principal) creates vested or contingent equitable property rights. In the case of the mutual fund, vested interests are created in the investor. In the case of an ERISA-qualified defined benefit plan, the employee's equitable interest in the associated trust may be both vested and contingent. One's equitable interest in a private discretionary trust is fully contingent. The type of equitable property interest created pursuant to the terms of a particular trust will determine the nature and scope of the trustee's fiduciary duties.

On the other hand, it should not be absolutely necessary in a pure fiduciary relations course to cover the rule against perpetuities as it applies to equitable property interests and non-fiduciary powers of appointment, each being pure property concepts that happen to be spin-

offs from the trust concept.[48] That being said, serious consideration should be given to mandating their coverage in the first-year Property course. Apart from bar-passage considerations, the rule against perpetuities is the tried and true pedagogical vehicle for affording students a context in which to efficiently sort out contingent and vested legal and equitable property interests; and the power of appointment, which is covered in the Restatement of Property, is "the most efficient dispositive device that the ingenuity of Anglo-American lawyers has ever worked out."[49]

"[D]irect ownership of stocks by American households has declined from 91% in 1950 to just 32% today."[50] As we progress into the twenty-first century, 58% of all stocks are now held in trust or arrangements governed by the law of trusts (such as the investment company and the charitable corporation).[51] Academia's failure to keep abreast of these astounding developments is rendering aspects of the core curriculum provincial, obsolete, and in some cases even irrelevant. In the direct ownership society of the 1960's, it may not have been critical that a law student be trained to distinguish between a contingent property interest and a vested property interest in the equitable context, and between a fiduciary and non-fiduciary power of appointment, or to understand that a trust is not a bailment, or that a trust can arise either gratuitously or incident to a contract. In the indirect ownership (or intermediation) society of the twenty-first century, it is. The ongoing battle over the future of Sweden's Skandia is a good illustration of why this is the case. A trustee of a trust has the title to the underlying assets. If the underlying assets are stock, he, she, or it has a power and a fiduciary duty to vote the stock in furtherance of the interests of the trust beneficiaries, i.e., those with the equitable interests. Collectively, the trustees of a number of Fidelity's mutual funds have title to 9% of Skandia.[52] A majority of Skandia's board members oppose a 44.9 billion Swedish kroner bid ($5.9 billion) by London's Old Mutual PLC to acquire Skandia.[53] Skandia's Chairman, who favors the acquisition by Old Mutual, has felt obliged to resign.[54] Fidelity, which effectively controls

---

[48] It should be noted that the owner of a share in a nominee trust generally possesses a non-fiduciary *inter vivos* power of appointment while the owner of a mutual fund share generally does not.

[49] W. Barton Leach, *Powers of Appointment*, 24 A.B.A. J. 807, 807 (1938).

[50] John C. Bogle, *Individual Stockholder, R.I.P*, WALL ST. J., Oct. 3, 2005, at A16.

[51] *See id.*

[52] *Skandia Chairman to Resign*, WALL ST. J., Oct. 8, 2005, at B6.

[53] *Id.*

[54] *See id.*

Skandia through its mutual funds, is reported to be considering replacing some of Skandia's board members before the offer by Old Mutual expires.[55] It feels it may have a fiduciary duty to its investors to take this action. This is a clear example of how the trust can trump, and is trumping, the corporation. The source of control is where the action is. In this case, the source of control is in Boston, of all places, not London or Stockholm. The aggregation of large chunks of corporate America in the hands of a few trustees at the end of the nineteenth century–a phenomenon that sparked the antitrust legislation that is still with us today–is yet another illustration of how voracious is the appetite of the trust.

4 Classes

Topics: Fiduciary Duties.

- Core Duties
  - Loyalty (self dealing / conflicting fiduciary functions)
  - Duty of Prudence (generally, and in investment matters)

- Specific Duties Incident to the General Duties of Loyalty and Prudence
  - Full Disclosure (no *caveat emptor*)
  - Duty of Confidentiality
  - Duty of Segregation (no unauthorized commingling)
  - Duty of Personal Attention (no unauthorized delegation)
  - Duty to Give Account
  - Duty not to Exceed Authority

Author's comments: "Two grand principles underlie much of the Anglo-American law of trusts: the trustee's duties of loyalty and of prudence."[56] They underlie, as well, the law governing agent-fiduciaries. Neither duty, however, is imposed on a party to a simple contract, unless incident to an associated agency relationship.[57] An insurance company, for example, is not a fiduciary in its capacity as a party to one of its life insurance contracts. The other fiduciary duties above-listed are incident to the duty of loyalty or the duty to be prudent, or both.

---

[55] *Id.*

[56] JOHN A. LANGBEIN & BRUCE A. WOLK, PENSION AND EMPLOYEE BENEFIT LAW 678 (3d ed. 2000) (emphasis omitted).

[57] The lawyer-client contract for compensation is incident to the lawyer-client agency relationship.

1 Class

Topics: Equitable remedies for breaches of fiduciary duty.

- Damages
- Tracing and imposition of constructive trust
- Accounting for profits
- Injunction
- Specific performance
- Removal from fiduciary position
- Reduction or denial of compensation
- Appointment of special fiduciary or receiver
- Punitive or exemplary damages (generally not available in equity)

Author's comments: In the litigation context, the consequences of a breach of fiduciary duty are [generally] different from the consequences of a breach of a nonfiduciary duty, *e.g.*, failing to carry out one's obligations under a sales contract. In the case of a breach of fiduciary duty, there are [generally] more remedy options available to the party to whom the duty is owed [tracing, for example], burdens of proof are likely to fall more heavily on the fiduciary [a presumption of undue influence, for example], and periods in which actions must be brought will tend to run from the time when actual notice of the breach is received by the party to whom the duty is owed [implicating the availability of the equitable defense of laches, for example]. This is generally the case whether the fiduciary relationship is incident to a trust or an agency.[58]

1 Class

Topics: Historical, conceptual, and jurisprudential contexts.

Author's comments: "In the twelfth and thirteenth centuries and in the early part of the fourteenth century the common-law courts exercised powers which we now call equitable. . . . Gradually, however, the common-law courts became more rigid and their equity jurisdiction disappeared."[59] In time, the Court of Chancery took up the equity mantel. This set in motion a chain of events that culminated in the Anglo-American trust, an institution that essentially evolved from an

---

[58] ROUNDS, *supra* note 17, § 7.2 (footnotes omitted).

[59] AUSTIN WAKEMAN SCOTT, LAW OF TRUSTS § 1.1 (1939).

equitable remedy. While an agent is in a fiduciary relation with his principal as a trustee is with the beneficiaries of the trust, the two relationships have a different history and different consequences flow from them, even though "in the middle ages the germ of agency [was virtually indistinguishable] from the germ of what ultimately became the use or trust."[60] Over time, the notion of trust and that of agency came to be differentiated in the following areas: title, control, liability, consent, termination, actions against third persons, and disposition upon death. The following resemble fiduciary relationships but are not: bailment, mortgage, pledge, lien, equitable charge, condition, debt, contract to convey land, third party beneficiary contract, and assignment of a chose in action.

It was once thought that the trust had its origins in Roman law. Today there is a school of thought that traces the origin of the Anglo-American trust to the Islamic *waqf*.[61] It is suggested that the *waqf* was introduced into England by Franciscan friars returning from the thirteenth century crusades.[62] The theory that generally holds sway today is that uses and trusts have their roots in ancient German law.[63] Modern Germany, however, does not recognize the trust. Nor does France, including those areas on the Continent that were once Norman. Until recently, that included the Channel Islands. It was in England that the use evolved into the modern trust.

The concept of the *fiducia* can be traced to Roman law. Its modern counterpart is the French *prete nom* and the German or Swiss *treuhand*. Like a common law trust, the *fiducia* involves a transfer of property to someone (the *fiduciarius*) who must administer it for the benefit of another. Unlike a trustee, however, the *fiduciarius* has both the legal and the equitable interest. The consequence is that the *fiduciarius* can get at the property and the beneficiary has no equitable property right. The beneficiary has only a personal claim against the *fiduciarius* in the event of an unauthorized transfer of the property to a third person. However, in several jurisdictions, a level of protection has been introduced by legislatively imposing Anglo-American agency-like fiduciary duties on the transferee. Other Roman and civil law agency and trust analogs include the following: *special parsimony*, *usufruct*,

---

[60] *Id.* at § 8.

[61] *See, e.g.*, Gaudiosi, *supra* note 35, at 1244-47. The *waqf* is "an Islamic charitable trust created by an owner to assure that private property generates a permanent source of income for the public good and the donor's family." 4 ENCYCLOPEDIA OF THE MODERN MIDDLE EAST 1875 (Reeva S. Simon et al. eds., 1996).

[62] *Id.* at 1244-45.

[63] For a discussion of the origin of the English trust, see ROUNDS, *supra* note 17, § 8.37.

fideicommissum, *emphyteusis*, power of attorney (civil law), foundation (civil law), *stiftung*, and *anstalt*. It is the Roman concept of *special parsimony* that comes closest to resembling the Anglo-American trust.

3 Classes

Topics: Applications of the fiduciary concept.

- Agency
  - Lawyer-client
  - Employee-employer
  - Real estate agent
  - Investment management (agencies)
  - Power of attorney (durable and otherwise)
  - Health care proxy (statutory)
  - Guardianship (statutory)
  - Financial planner
  - Non-trustee ERISA fiduciaries

- Trust
  - Mutual funds (trusteed and corporate, including REITs)
  - Charities[64] (trusts and corporations)
  - Employee benefit trusts
  - Trustees for bondholders (corporate trust functions under Trust Indenture Act)
  - Asset "securitization"[65] trusts (mortgage, credit card, automobile, student loan debt)
  - Nominee trusts (effecting divisibility and transferability of real estate)
  - Executorships (statutory trust variants)

- Agency and/or trust statutory hybrids
  - Corporations
  - Partnerships

- Partnership, corporate, agency, and trust vehicles associated with financial and estate planning

---

[64] Many American universities are public charitable trusts.

[65] By securitization, we mean using the trust device to convert legal property interests in a bundle of assets, e.g., student loan obligations, into equitable interests in the fund or bundle that may be represented by certificates that resemble shares of stock.

Author's comments: The fiduciary relationship is not a professional "specialty." It is an ubiquitous, all-pervasive relationship incident to the agency and the trust, and to their statutory progeny, such as the corporation. At any given time, a layman, a lawyer, or a law professor is likely to be party to numerous fiduciary relationships, whether as an employee or an employer; as a consumer of the services of a lawyer, real estate agent, investment manager, or certified financial planner; as the owner of shares of a mutual fund or shares in a corporation; as a participant in an employee benefit plan; as either an agent or principal under a power of attorney, durable or otherwise; as someone's business partner; as executor of someone's estate; as trustee of someone's personal trust; as a trustee or beneficiary of a trust incident to a divorce property settlement, etc. A license to practice law is a license to be a type of agent-fiduciary. A law school's *raison dêtre* is to churn out agent-fiduciaries. Accordingly, a bare bones course in the fiduciary aspects of agency and trusts should be mandatory in the American law school; and every member of the bar, and certainly every member of a law faculty, should be more than qualified to teach it with little or no advance preparation. If that is not the case, then the legal profession (and society) has a big problem. Too many law schools have made the mistake of marginalizing the fiduciary relationship by relegating it to the domain of the estate planner. Is the next step in the "reform" of the American law school curriculum to relegate formal instruction in contract principles to an elective course in insurance law? Let us hope not. It is high time that this trend get reversed, that we get back to the basics, all the basics. The law of agency is not a "specialty." Trust law is no more a "specialty" than is contract law. And neither is the law of the fiduciary relationship a "specialty." It is a relationship that pervades, cuts across, and has application in all aspects of the law, including all the actual legal specialties and sub-specialties.

THE IRONY OF POPULISM: THE REPUBLICAN SHIFT AND THE INEVITABILITY OF AMERICAN ARISTOCRACY

*Zvi S. Rosen**

I. INTRODUCTION

> Clause 1. The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years; and each Senator shall have one vote. The electors in each State shall have the qualifications requisite for electors of the most numerous branch of the State legislatures.[1]

On April 8, 1913, the populist dream of true mass democracy came to pass with the ratification of the Seventeenth Amendment.[2] The undemocratic Senate, relic of the attempt to produce a republican system of mixed government, had faded into the realm of historical trivia, to be replaced with the modern elected senate. From this point forward, all three forms of government contained within our mixed government would be popularly elected,[3] and America had undergone its transformation from a democratic republic to a democracy with scattered bits of republicanism.

However, this is not what actually happened. The republican system around which the Constitution is built withstood the modification of the Seventeenth Amendment, and the system of mixed government endures to this day. Rather, what the Seventeenth Amendment achieved was merely the diminution of the Senate.[4] The aristocratic component of the government, which the Framers thought so important, found a new home in the federal judiciary, where it resides to this day. As the courts

---

* Mr. Rosen is currently pursuing his LL.M. in Intellectual Property Law at the George Washington University. Prior to this the author completed his J.D. at the Northwestern University School of Law, and recently worked on the nominations of Justice Samuel A. Alito and Chief Justice John G. Roberts as a clerk in the Office of Legal Policy at the United States Department of Justice. The author would like to thank Professor Stephen Presser for his invaluable assistance and encouragement as advisor on this project, as well as Professor Robert Bennett for acting as second reader. Several friends are also owed thanks for reading over sections or all of this paper and providing comments.

1 U.S. CONST. amend. XVII, cl. 1.

2 Jay S. Bybee, *Substantive Due Process and Free Exercise Of Religion:* Meyer, Pierce *and the Origins of* Wisconsin v. Yoder, 25 CAP. U.L. REV. 887, 892-93 (1996).

3 Although the events of the election of 2000 have suggested that election of the President may not be truly popular, the electoral college has effectively been under popular sway for almost two centuries. *See infra* Part II.D.1.

4 Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 79 (1985).

slowly explored their new role in the federal government, they gradually began to utilize the power which befitted their new stature, leading to a Supreme Court which has been an important force on the legislative scene of the nation for the last century. While the Court has been bitterly criticized for its "activist" role, the Court is in fact merely doing its part in the republican shift in government created by the Seventeenth Amendment.

Part II of this paper gives an extremely condensed account of the relevant history of the aristocratic part of mixed government in ancient and Renaissance times, as well as elucidating what is meant by a republic. Part II then examines American Republicanism in theory and practice in the making of the Constitution, with particular attention to the role of mixed government. Part III of this paper offers a condensed history of the Seventeenth Amendment and earlier similar proposals, with particular focus on the changing attitudes towards aristocracy and mixed government. Part IV examines the republican shift at length, namely how the Supreme Court came to replace the Senate as the aristocratic component of government. Finally, Part V offers a summation and final analysis.

II. REPUBLICAN CONSTITUTIONALISM AND MIXED GOVERNMENT

When the Constitution was drafted, the Framers strongly believed that America should be a democratic republic. To determine the composition of the republic, the Framers turned their attention to the philosophers of antiquity, whose conceptions of the Roman Republic the Framers then modified to rectify its weaknesses and to compensate for the passage of time and history. In order to understand the debates and the ideologies of those participating, some background development in republican history and theory is necessary.

A. Republic Defined

In its simplest form, 'republic' simply means "the people"—as in the rule by the people for the people.[5] However, this paper will use a more specific definition similar to the English word 'commonwealth,' which more closely approximates what the founders meant by 'republic.'[6] In this definition, a republic is a government constituted not necessarily by the people, but for the people. The institutions of the government are thus arrayed for the sole purpose of advancing the public good. Integral to this understanding is a structure of mixed government, similar to the

---

5 M.N.S. SELLERS, REPUBLICAN LEGAL THEORY 6-7 (2003).

6 *Id.*

ancient Roman Republic, one that draws a balance between stability, representation, effectiveness, and relative freedom from corruption.[7]

B. Republicanism in the Ancients and Renaissance

Although the Greek philosophers had written about mixed government in various theoretical forms, mixed government would find its truest expression in antiquity among the Romans.[8] The first major writer on the structure of Roman mixed government was Polybius, who briefly set forth the structure of mixed government found in Rome at that time (the height of the Republic at 150 B.C). He argued that it was the system of mixed government which gave Rome its unique strength.[9] The three constituent parts of Polybius's mixed government are democracy (the people), aristocracy (the nobility), and monarchy (the king), each of which possesses its own unique strengths.[10]

A century later, in *On the Commonwealth*, Cicero set forth in greater detail his view of mixed government and its benefits.[11] Cicero shared Plato's fear of the people[12] and found monarchy to be the best of the three forms of government.[13] Cicero argued, however, that all these forms are inferior to a mixed government which integrates the three forms into one system of government.[14] According to Cicero, by integrating the three systems into a system where they check each other, their individual weaknesses are diminished, while their individual strengths are all brought out, and in a highly stable fashion.[15] Without mixed government, each individual form of government inevitably degenerates as a result of its inherent attributes into its corrupted equivalent, be it monarchy to despotism, aristocracy to oligarchy, and democracy to ochlocracy (mob rule).[16] However, in a properly mixed government, the degeneration of each branch is checked by the other branches, as the weaknesses of that branch are the strengths of the other branches. To Cicero's mind, the unchecked intemperance of the Greek democratic institutions was to blame for the fall of the Greeks.[17]

---

7 *Id.*

8 *Id.* at 7.

9 3 POLYBIUS, THE HISTORIES 271-73 (E.H. Warmington ed., W.R. Paton trans., Harvard Univ. Press 1972) (1923).

10 *Id.* at 273.

11 1 CICERO, ON THE COMMONWEALTH 35 (C.D. Yonge trans., Harper & Bros. 1877), *available at* http://www.gutenberg.org/dirs/1/4/9/8/14988/14988-h/14988-h.htm.

12 *Id.* at 43.

13 *Id.* at 45.

14 *Id.*

15 *Id.*

16 POLYBIUS, *supra* note 9, at 275.

17 SELLERS, *supra* note 5, at 11.

He preferred the system of the Roman Republic, in which the formulation of laws was left to the wise, with the proviso that no law could be passed without the assent of the people.[18]

Unfortunately, as Cicero was writing about the glories of the Republic, it was collapsing before his eyes.[19] As the Empire rose and the Republic faded into rose-tinted recollection, many Romans tried to explain how the Republic had failed.[20] Thinkers including Sallust, Plutarch, and Tacitus all further built a notion of a republican tradition, but the notion mostly lay dormant for a millennium following the fall of Rome.[21] One and a half millennia later, on that same peninsula, republicanism would rise from the ashes of distant memory.

Early Renaissance political philosophers debated whether republics only existed at certain times or could exist at any time.[22] Without answering this question, the Florentine republic and others of the Italian Renaissance gave hope for the vitality of republicanism in modern times. As the ancient ideas on government and other areas returned to the intellectual milieu at the time of the Renaissance, attempts to put these ideas into practice would follow.[23] Following the spectacular collapse of rule of the House of Medici in 1494, the government of Florence alternated between republican and Medicean governance for over forty years until the Medici were re-established as hereditary rulers of Florence.[24] Well before this, though, one of the first to note the movement of Florence towards a mixed state was Leonardo Bruni, who proposed that this movement was a result of the masses no longer fighting, and the increased influence thus given to the wealthy who could hire mercenaries.[25] Although mixed government was a good thing from a narrow classical view, in practice the mixed government in Florence led to oligarchy.[26] The aristocracy was too powerful, and it lacked control from the top (i.e., the monarchical part of the republic).[27] Bruni made these observations during the first major period of Medicean dominance, but the overly-powerful aristocracy was a problem that would dog the Florentine republic for its entire history.[28]

---

18 *Id.*

19 *Id.* at 6-7.

20 *Id.*

21 *Id.*

22 J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 84 (1975).

23 *Id.* at 85.

24 *Id.* at 86.

25 *Id.* at 89-90.

26 *Id.*

27 *Id.*

28 Technically it had long been a republic, but in name only, as it was closer in form to an aristocracy.

When the French Army removed the Medici from power in 1494, a new constitution was written for Florence following the example set by the Venetian Constitution of the same time.[29] This new constitution set up a system of mixed government much closer to the Roman ideal than the system Bruni observed half a century earlier.[30] Although it has been observed in modern times that the government was less mixed and much closer in structure to the aristocracy that was causing problems before, in the minds of many, the "Venetian Constitution"[31] of 1494 would signal the rebirth of mixed government in the modern world. And even though that government would fall in 1512, many would continue to advocate republicanism for Florence.[32]

One of the most important of these advocates was Donato Gianotti.[33] The writings of Polybius were being rediscovered at that time, and Gianotti would become "a contributor of originality, if not of direct influence, to the theory of mixed government."[34] The first major Italian writer to reference Polybius,[35] Giannotti's theory of government similarly called for a mixed structure.[36] Furthermore, Giannotti repudiated Polybius's assertion that Rome was the ideal model for mixed government.[37] Under Giannotti's reading of Polybius, in Rome, the three branches were of equal power. However, in his mind, the power of the parts needed to be distinct, not equal.[38] Giannotti's thoughts on mixed government would be "strikingly anticipatory"[39] of the thoughts of James Harrington a century later, and indeed of Americans two centuries later, who would give the people a uniquely important role while recognizing the necessity of aristocracy and monarchy.[40]

Slowly, republicanism would find its way to England. Of course, in some sense, England had possessed a system of mixed government since time immemorial (composed of the House of Commons, House of Lords, and the King). This balanced view, however, was neither acknowledged nor accurate, considering that most power lay with the King.[41] Nonetheless, in 1642, just before the English Civil War broke out, King

---

29 POCOCK, *supra* note 22, at 103.
30 *Id.*
31 *Id.* at 117.
32 *Id.*
33 *Id.* at 272.
34 *Id.* at 273.
35 *Id.* at 296.
36 *Id.* at 300.
37 *Id.* at 308.
38 *Id.*
39 *Id.* at 300.
40 *Id.*
41 *Id.* at 354-55.

Charles I declared England a mixed government, rather than a pure monarchy, in *His Majesty's Answer to the Nineteen Propositions of Both Houses of Parliament*.[42] In this document, the balance between the Commons, Lords, and Kings was not only recognized, but declared as an instrumental aspect of the English Constitution.[43] While this document was issued under duress and suffered from subsequent attempts to reinstate pure monarchy, the document was quickly and widely accepted.[44] This document did not purport to set forth a new doctrine. Rather, the *Answer* recognized that the English Constitution was already one of mixed government as a result of centuries of progress by the parliament.[45] Though the Civil War and subsequent divestment of the king from power somewhat mooted this point, the acceptance of mixed government in America was vital to American thinkers, both in their conception of the English Constitution, and of how it should be reformed and applied to America.

James Harrington, author of *Oceana*, was, like Giannotti before him, "a poor prophet but a successful enricher of the conceptual vocabulary."[46] While *Oceana* was in many ways a seminal work, its unique feature from the standpoint of mixed government was the way it regarded aristocracy as not merely something to be transmitted by hereditary title.[47] Rather, the aristocracy was a natural one to be filled by the elites of society.[48] And although being born into property would enhance one's chances of joining the aristocracy due to superior chances for education and reflection borne from leisure, it was not an automatic qualification for joining the aristocracy.[49]

C. American Republicanism to 1800

With *Oceana*, the stage was set for American constitutionalism. Every aspect of British government accepted mixed government as integral to the English Constitution, a fact of which few interested parties were unaware.[50] The notion of a natural aristocracy made even

---

42 *Id.* at 361.

43 *Id.*

44 *Id.*

45 *Id.* at 362.

46 *Id.* at 302.

47 *Id.* at 395.

48 *Id.*

49 *Id.*

50 Suri Ratnapala, *John Locke's Doctrine of the Separation of Powers: A Re-Evaluation*, 38 AM. J. JURIS. 189, 190 (1993).

more sense in the relatively unstratified society of America than it did in the much older society of England.[51]

1. Natural Aristocracy Defined

Given the background above, a workable definition of natural aristocracy (henceforth referred to simply as "aristocracy" in an American context) is both possible and necessary for the proceeding analysis. The natural aristocracy in the minds of the framers of the American Constitution consisted of men much like themselves – men of education, talent, and wealth.[52] It would thus be men capable of looking beyond the shifting immediate interests of the people, and towards the frequently unpopular but necessary objectives of true statesmanship. Wealth was considered important not merely because it freed these men from the more mundane concerns, which may have impacted their decision-making, but also because it was considered a reasonable index of talent and education.[53]

2. American Republican Theory

In the years following the Glorious Revolution in England, Parliament, having already declared its ultimate power in England, gradually shifted in form to the Parliament we would recognize today. In this environment the Tories and the Whigs, the two schools of thought regarding the English Constitution, were in conflict. The radical Whigs argued that the English Constitution was that of a true mixed government, and that it had merely been corrupted.[54] American observers to this conflict adopted this viewpoint, and believed it to be the proper normative viewpoint of English Constitutionalism. This led many in the American Colonies to believe that they were merely reforming the English Constitution.[55] While this was not the prevailing reading of the English Constitution in England, it was nonetheless widely accepted in America, and was used to temper the impression of radicalism regarding the revolution.[56]

---

51 POCOCK, *supra* note 22, at 514. ("[T]hough [some areas like] the Hudson Valley might offer grounds for disputing this.").

52 CARL J. RICHARD, THE FOUNDERS AND THE CLASSICS 131 (1994).

53 *Id.* ("Americans had decided that . . . education and talent often accompanied wealth . . . ."); Maureen B. Cavanaugh, *Democracy, Equality, and Taxes*, 54 ALA. L. REV. 415, 441 ("A 'natural aristocracy' was soon identified with men of property who could adequately represent the public interest.").

54 GORDON WOOD, THE CREATION OF THE AMERICAN REPUBLIC 200 (1969).

55 Helen K. Michael, *The Role of Natural Law in Early American Constitutionalism: Did the Founders Contemplate Judicial Enforcement of "Unwritten" Individual Rights?*, 69 N.C. L. REV. 421, 436-37 (1991).

56 WOOD, *supra* note 54, at 200-01.

Colonial government was frequently chaotic, and many observing the colonies believed this was due to the lack of an aristocratic component to the government.[57] While some gave thought to the creation of a hereditary aristocracy as an exception to the democratic system, most agreed that this would be ill-advised; a general consensus emerged that another method of finding the natural aristocracy in America would be needed.[58] Additionally, a small number questioned the need for an aristocracy at all and proposed a pure democracy.[59] The number favoring pure democracy would swell over time, and indeed ultimately lead to the Seventeenth Amendment.

Despite some views that a pure democracy was more desirable, the leading theoreticians believed that a mixed government was vital to the success of the Constitution, and explored the nature of the senatorial body. Many of the prominent American thinkers of the time were involved in this debate. For instance, in *Federalist No. 39*, James Madison asserted that only a republican government would be suitable for the "genius of the people of America," and set upon showing the republican character of the Constitution.[60] Madison first looked to the republics of the more recent memory and dismissed them as false republics, usually oligarchies in masquerade.[61] Madison believed that, in a republic "[i]t is *essential* . . . that [the government] be derived from the great body of the society"[62]—anything else is bound to not be for the common good. However, it is not essential that the government be appointed directly by the people. As long as certain elements of the government are appointed by the representatives of the people, there is no concern regarding the republic's true standing.[63]

Interestingly, Madison did not view the appointment of Senators by the states to be particularly important; he described this provision as having been chosen due to being the "most congenial with the public opinion."[64] To be sure, Madison thought state representation in the national government was important.[65] However, Madison also found important "favoring a select appointment," that is, ensuring that the Senators are the natural aristocracy of the republic.[66] In Madison's view,

---

57 POCOCK, *supra* note 22, at 513-14.

58 BERNARD BAILYN, THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION 278 (1969); WOOD, *supra* note 54, at 208.

59 BAILYN, *supra* note 58, at 279-80.

60 THE FEDERALIST No. 39, at 240 (James Madison) (Clinton Rossiter ed., 1961).

61 *Id.* He specifically singled out Venice for this. *Id.*

62 *Id.* at 241.

63 *Id.*

64 THE FEDERALIST No. 62, at 377 (James Madison) (Clinton Rossiter ed., 1961).

65 *Id.*

66 *Id.*

having the state legislatures appoint the Senators was an effective way to kill two proverbial birds with one stone.[67]

While other political figures such as Alexander Hamilton would also write on mixed government,[68] the most important thinker on mixed government and American Republicanism was John Adams. Adams' *Thoughts on Government*, written as a response to Thomas Paine's *Common Sense* and published in 1776, was not only the most important pamphlet on mixed government, it was the most influential pamphlet in general for the early stages of constitutionalism.[69]

In *Thoughts on Government*, Adams first addressed the anarchism he saw in Paine and other pamphleteers of the time, asserting the importance of a well-formed government.[70] Adams shared the opinion of both the ancient and modern republicans that the only good government is a republican government, which would make it the only appropriate government for the new nation.[71] Given Adams' argument for a bicameral legislature, the need for an upper house to moderate the lower house and exercise wisdom was clear.[72] This body would act as "a mediator between the two extreme branches . . . that which represents the people, and that which is vested with the executive power."[73] Also, in Adams' *Thoughts on Government*, he introduced the notion of executive appointment with the advice and consent of the council regarding nominees.[74] Adams admitted that this conservative republican notion was not suitable for true popular government, and yet it found its way directly into the Constitution.[75]

In Adams' mind, "there never was a good government in the world, that did not consist of the three simple species of monarchy, aristocracy, and democracy . . . ."[76] Adams understood that every government has its unique strengths and advocates, and they all make a valid point, even those who advocate monarchy alone.[77] However, each form of

---

67 *Id.*

68 *See, e.g.*, ALEXANDER HAMILTON, THE FARMER REFUTED (1775), *available at* http://www.founding.com/library/lbody.cfm?id=148&parent=56.

69 WOOD, *supra* note 54, at 203.

70 JOHN ADAMS, *Thoughts on Government*, *in* THE PORTABLE JOHN ADAMS 234 (John Patrick Diggins ed., 2004).

71 *Id.* at 235.

72 *Id.* at 236-37.

73 *Id.* at 237.

74 *Id.* at 239.

75 *Id.*; U.S. CONST. art. II, § 2, cl. 2.

76 1 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 149 (Da Capo Press 1971) (1787-88).

77 *Id.* at 151.

government will succumb to corruption if left alone, and no republic of the past had ever survived in a republican form.

Adams' analysis and application of these lessons is unique.[78] Regarding Machiavelli's assertion that "those are much mistaken, who think any republican government can continue long united," Adams responded, speaking clearly to those who favored pure democracy, that "[r]epublics that trust the content of one assembly or two assemblies are as credulous, ignorant, and servile, as nations that trust the moderation of a single man."[79] He believed that a mixed government is the key to stability and justice, not a government which can lead to the tyranny of the multitude.

In response to Machiavelli's assertion that differences and divisions were hurtful to republics, leading to factionalization, Adams noted that all forms of government produce factions, and that not all factionalization is harmful. Furthermore, when government is properly mixed and balanced, "[f]actions may be infinitely better managed."[80] This is because, in a simple government dominated by any one of the three forms, the government itself is a faction.[81] In a mixed government, however, factions take on a much smaller role, since they are checked not only by other factions, but by the other aspects of government. A faction that controls a portion of the democratic branch of government must still contend not only with other factions in the democratic branch, but also the checks of the aristocratic and monarchical parts. Admittedly, this can be overwhelmed by political parties with control over all branches; however, the difficulty of that, both in terms of attaining it and retaining party discipline, is significant, and far more difficult than doing so in a single democratic legislature with all powers. While even at that time many equated a republic with a pure democracy, Adams viewed this equation is simply incorrect.[82]

Advocates of mixed government were hardly limited to these few thinkers though. From the revolutionary period on, many believed that a senatorial part was needed to house the social and intellectual elite.[83] It was thought that these elites would give American legislatures all the virtues of the House of Lords in even greater measure than a hereditary

---

[78] Much of Adams' *Defence* is comprised of an examination of the republics of earlier times, from Rome to the Italian Renaissance to England, which have been discussed above. See *supra* p. 9.

[79] 2 JOHN ADAMS, A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 128 (Da Capo Press 1971) (1787-88).

[80] *Id.* at 129.

[81] *Id.* at 130.

[82] JOHN ADAMS, 3 A DEFENCE OF THE CONSTITUTIONS OF GOVERNMENT OF THE UNITED STATES OF AMERICA 159-160 (Da Capo Press 1971) (1787-88).

[83] WOOD, *supra* note 54, at 209.

aristocracy could offer, while relieving the government from the substantial burdens of a hereditary aristocracy.[84]

Tellingly, in all the debate about the judiciary,[85] and about the ratio of mixed government in the colonies, not much was written about the place of the courts in the regime of mixed government. While the courts might seem to be a natural place for the intellectual aristocracy at first glance, this was not discussed. The best explanation is simply that the courts were not considered to be aristocracy or any other part of government—they were simply an adjunct to the three forms of government. While it was important that courts had power for purposes of separation of powers, they were not direct parts of a mixed government at the time of the Constitution.

The federalists who advocated mixed government had their chance to implement it in many state constitutions, including the Massachusetts Constitution of 1780, which bore Adams' unique stamp and shares many important features with the federal Constitution.[86] And yet the federal Constitution offered both new challenges and opportunities for Constitution-making. In doing so, the advocates of mixed government were able to give the aristocratic part of society a permanent home in the government, a home that would be uniquely appropriate for their talents.

3. Republicanism and the Constitution

When it became increasingly apparent that the Articles of Confederation were simply inadequate to lead what was much more than a loose alliance, the stage was set for a convention to write the Constitution for America. With many states suffering from the vices of unrestrained democracy, those who were not Federalists, such as James Madison, were more amenable to mixed government than they otherwise would have been.[87] This period embodied the high mark of the intellectual popularity of mixed government, ensuring that mixed government principles were bound to be integral to the new Constitution.

One difficulty to implementing these principles was the distillation of the aristocracy from the masses.[88] The direct election of Senators was one such option which met with some support, although mostly from those who did not generally favor mixed government. As William Smith noted though, a legislature in which both houses are elected carries no

---

84 *Id.*

85 *See, e.g.*, THE FEDERALIST No. 78 (Alexander Hamilton).

86 MASS. CONST. OF 1780.

87 *Cf.* THE FEDERALIST No. 10 (James Madison).

88 WOOD, *supra* note 54, at 210.

benefit beyond a legislature with only one house—"[t]hey are only two Houses of Assemblymen."[89] Additionally, as Thomas Jefferson noted, "a choice by the people themselves is not generally distinguished for its wisdom."[90] An aristocracy which is directly accountable to the people is no aristocracy at all, both in content and abilities. The aristocracy would be unable to pursue the balancing function that was so necessary in a republic—keeping the excesses of the people themselves suitably restrained.

Others, including many federalists like Alexander Hamilton, supported life tenure for Senators; however, this was dismissed by those with more democratic tendencies.[91] It also seemed inordinately dangerous to give life terms to the aristocracy; the risk was that they would become the dominant branch, even with the limitations of the purse that were placed on them. Aristocrats with life terms would have had free rein to pursue whatever they desired, accountable to no one.

Another notion that came to be seen as inimical to republican government was having Senators elected by a limited franchise.[92] Although this was a popular idea in the early days of constitutionalism, as time went on, many saw the idea of a limited franchise as an attempt to impose fixed class differences on the new society, and it was not viewed as a serious option by the time of the Constitution.

Thus, the idea that would be adopted for the Constitution came to prominence—having the representatives of the people elect the Senators. The Constitution was drafted so that the Senate not only constituted the aristocracy in the mixed government of the American Constitution, but also so that the states were represented in the federal government. The state legislatures would appoint Senators to the Congress—a system that persisted until the ratification of the Seventeenth Amendment.[93]

Although "the Federalists may have concocted less elitist rationalizations for the upper house, . . . in their hearts they knew that at least to a degree that body would also embody the vestiges of mixed government."[94] Adams and others made mixed government integral to the new Constitution, making sure that "the Constitution as drafted and ratified preserved much of its essence."[95]

---

89 *Id.* at 215.

90 *Id.* at 213; *see generally* THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA (Frank Shuffelton ed., Penguin Books 1999) (1787).

91 WOOD, *supra* note 54, at 503-04.

92 *Id.*

93 U.S. CONST. amend. XVII.

94 John Hart Ely, *The Apparent Inevitability of Mixed Government*, 16 CONST. COMMENT. 283, 285 (1999).

95 *Id.*

4. Mixed Government vs. Balanced Government

Before going further, it is worthwhile to mention the distinction between mixed and balanced government. While both are methods of controlling power in the government, they look to different sources of power in considering the proper arrangement. Balanced government is a way of ensuring that the three branches of government remain balanced relative to each other, and that one branch, be it the legislature, executive, or judiciary, keeps the power to carry out its responsibilities and does not gain power to exercise the responsibilities of another branch to the detriment of that other branch.[96] Mixed government is more of a way to harness the unique qualities of various types of government, and notably did not concern the judiciary in the constitutional debates of the time. Balanced government is a doctrine which the Constitution enforces, while mixed government is a philosophical notion which the Constitution embodies.

D. American Republicanism to 1913

Mixed government had always been an unpopular theory among the people.[97] With the democratic part of the government in a uniquely important role, both the language and structure of mixed government came under assault by those in favor of pure democracy. As the institutions of aristocracy came under attack, the first stirrings of the shift of aristocracy from the Senate to the Supreme Court can be seen.

From the founding of the American republic to the Civil War, the language used to describe the republic shifted markedly toward a democratic point of view. Giants of American legislation, such as Webster, Calhoun, Clay, and others, found a home in the Senate of the time.[98] Observers such as Alexis de Toqueville were struck by the Senate's "eloquent advocates . . . and statesmen of note, whose arguments would do honor to the most remarkable parliamentary debates of Europe."[99] At the same time, the House of Representatives seemed to many to be a house comprised of 'village lawyers' and 'obscure individuals.'[100] The constitutional system seemed to be working exactly as it was supposed to, with the House representing the general public, and the Senate representing the loftier ideals and practices for which the common people might have less sympathy. And yet even by this point,

---

[96] *See, e.g.*, WOOD, *supra* note 54, at 584.

[97] *See generally id.*

[98] C.H. HOEBEKE, THE ROAD TO MASS DEMOCRACY: ORIGINAL INTENT AND THE SEVENTEENTH AMENDMENT 53 (1995).

[99] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 259 (Francis Bowen ed., Henry Reeve trans., 4th ed. 1864).

[100] HOEBEKE, *supra* note 98, at 54 (quoting Alexis de Tocqueville).

dating back almost to the Constitution itself, ideological and political movements were moving to shift this balance towards the mass democracy the Framers of the Constitution abhorred.[101]

While many of the luminaries of the constitutional convention were uncomfortable with direct and unrestrained democracy, others were much less concerned by it and would endeavor to effectively dismantle the Constitution's original structure of mixed government. While de Tocqueville was praising indirect elections as resulting in the uniquely excellent mixture of American Republicanism, in fact what was intended to be one of the vital components of aristocracy in the American mixed government (the Electoral College) had already fallen to mass democracy, leaving the Senate as the remaining bastion of aristocracy in the American Republic.[102]

The Electoral College had been incorporated into the Constitution with the goal of controlling presidential choices.[103] Although there was reasonable confidence that a voting body as large as the entire country would make a reasonable choice, the tyrants who sullied the pages of republican history suggested that absolute confidence in the general population in this regard would be misplaced. As such, a college of electors was constituted, so the people would indirectly elect the President. The Constitution gave no particular guidance on the selection of electors, and originally the majority of states chose their electors, defined as "citizens of 'superior discernment, virtue and information,' who elected the president 'according to their own will.'"[104] This view, however well-considered it seemed in the theoretical framework of mixed government, was "an affront . . . to the democratic sensibilities of the [later] age."[105] By 1832, electors in all states but South Carolina were bound to the decision their party had made in the primary. Since then, the Electoral College has been little more than a rubber stamp with the occasional effect of producing democratically elected presidents who fail to triumph in terms of pure plebiscite. The aristocratic part of the government was thus limited to the Senate. And yet, the Senate seemed to have undergone a similarly ill transformation only shortly thereafter.

Selection of Senators by state legislatures grew increasingly problematic after the Civil War, as problems with both legislative deadlocks and bribery of state legislators sullied the process.[106] As the office of Senator shifted more towards democracy and away from

---

101 *See generally id.*

102 *Id.* at 84-85.

103 *Id.* at 84.

104 *Id.* (quoting Senator Thomas Hart Benton).

105 *Id.* at 85 (quoting Senator Thomas Hart Benton).

106 *Id.* at 91.

aristocracy, it came to be viewed with a certain lesser degree of respect, and more as another political job of influence.[107] Respect for the Senate diminished further as many former captains of industry became Senators, leading to popular assumptions of bribery and corruption, even though such assumptions were rarely grounded in reality.[108] This loss of respect was due largely to a shift in the way fortune was viewed, away from the original perspective that Senators were expected to come from the wealthy.[109] Only a century after the founding, the public largely disapproved of the fact that it was "as difficult for a poor man to enter the Senate of the United States as for a rich man to enter the kingdom of heaven."[110] By the time of the Seventeenth Amendment, the United States Senate was viewed in an unequivocally negative way by many Americans. It was seen as corrupt, enraptured by and captive to big business, undemocratic, and an anachronism. And yet the Senate of the time was already far more democratic than most would assume.[111]

III. THE RISE OF THE POPULARLY ELECTED SENATE

The notion that Senators should be popularly elected dates back to the framing of the Constitution, where extensive thought was given to the way a natural aristocracy would be properly distilled. This notion would achieve absolute fruition with the Seventeenth Amendment to the Constitution, but would begin earlier—even before the Civil War.

A. The Long Road to Amendment

The first proposal that Senators be directly elected by the people of their constituent state was introduced in the United States House of Representatives in 1826.[112] The proposal was tabled without discussion, much like a similar proposal in 1835, and five more in the early 1850s.[113] Andrew Johnson, Tennessee Congressman and future president, sponsored two of these bills in the early 1850s and would become one of the most notable early proponents for the direct election of Senators.[114] In 1868, while addressing a Congress deeply preoccupied with the constitutional and practical challenges of reconstruction and deeply mistrustful of him, President Johnson advocated a constitutional amendment which would institute the direct election of Senators.[115]

---

[107] *See id.* at 91-106.

[108] *Id.* at 99.

[109] *See generally* WOOD, *supra* note 54.

[110] HOEBEKE, *supra* note 98, at 99.

[111] *See id.* at 91-106.

[112] *Id.* at 85.

[113] *Id.*

[114] *Id.* at 85-86.

[115] *Id.* at 86.

While the Constitution would not be amended in this manner for some time yet, a practical shift in the direction of popular election had already occurred.

Popular campaigning for Senate seats (called "canvassing") had a pedigree that stretched back to 1834.[116] This was taken to a new height in the Lincoln-Douglas race of 1858, in which the race for a Senate seat filled by appointment took on national attention. While some editorialized that "[t]he Senator . . . is the representative of the state, as an independent policy, and not . . . of its individual citizens," the majority of the citizenry was hardly alarmed at this surge of democracy.[117] Meanwhile, as new states began to pop up with great frequency in the West following the Civil War, they would often choose their Senators through senatorial primaries rather than the concerned judgment of the legislatures.[118] The state legislatures theoretically had the right to make their own choice; however, much like federal presidential electors, they had practically been reduced to the level of rubber stamp, with harsh consequences for disobedience.

The proposals for direct election of Senators continued unabated, and in increasingly large numbers.[119] In the 1890s, the issue received national prominence for the first time as it became a central issue of the National People's (or Populist) Party.[120] At this point, resolutions began to pass the House advocating the direct election of Senators, and after short time, these resolutions began receiving unanimous votes.[121] While these resolutions did not make it past the Senate, the path of the future Senate was clear.

B. The Ratification of a Progressive Amendment

In 1908, after six years of a quiet surface and unquiet depths on the issue, Congress passed a resolution for an amendment which would mandate direct election for United States Senators.[122] In the Senate, the amendment was stymied because northern Senators attempted to include in the amendment federal control over the voting to ensure that all races could vote equally.[123] Naturally, these additions received little support from southern Senators. Additionally, many of those from the older and more populous states felt that direct elections of Senators

---

116 *Id.* at 87.

117 *Id.* (citing William H. Riker, The Development of American Federalism 148 (1987)).

118 *Id.* at 88.

119 *Id.* at 136.

120 *Id.* at 136-37.

121 *Id.* at 141.

122 *Id.* at 157.

123 *Id.* at 162-63.

would be far more complicated and troublesome because of their large populations.[124] In the larger states, it would be simply impossible for voters to be acquainted with the senatorial candidates the same way they could be in the newer and less populated states. The Senators who led the charge for the Seventeenth Amendment, most notably William E. Borah of Idaho, were in large part Senators from newer and more sparsely populated states that had introduced primary systems for choosing Senators.[125]

Senator Elihu Root gave perhaps the last great defense of counter-majoritarianism on the Senate floor, arguing that the purpose of the Senate was "occasionally to rebuke, never to flatter, the sovereign people."[126] The problems with the Senate did not lie with the nondemocratic method of choosing Senators, but rather that the people had abandoned the model, which in its prime had brought the best and brightest, the natural aristocracy, to the halls of government.[127] And yet the die had already been cast. The resolution would fail to carry, but, a new Congress would come in a week later, and the new Senate would approve a slightly different version than the one approved by the House.[128] After a long period of battle between the House and Senate, the House gave in and accepted the Senate's version on May 13, 1912. Within a year, the amendment had the necessary number of states to pass, with only two states rejecting the amendment, and many accepting it unanimously.[129] On May 31, 1913, the Seventeenth Amendment was formally entered into the United States Constitution by William Jennings Bryan, acting in his capacity as the Secretary of State.[130] Mass democracy was now not only a fact on the ground—it was a part of the Constitution, one unlikely to ever be removed, or even seriously questioned.

IV. THE REPUBLICAN SHIFT

Despite popular sentiments that the aristocratic element should be purged from government, mixed government survived, with the Supreme Court taking upon itself the role of legislative aristocracy. While this shift started slowly, the Seventeenth Amendment was a shock which dramatically accelerated this process, leading to the modern activist court as the aristocratic part of government.

---

[124] *Id.*

[125] *Id.* at 158-64.

[126] *Id.* at 176.

[127] *Id.*

[128] *Id.* at 189.

[129] *Id.* at 189-90. Connecticut, the last state needed, ratified on April 8, 1913. *See id.*

[130] *Id.* at 190.

A. The Resilience of Mixed Government

Some have argued that, by 1913, an argument that the Senate was the vital aristocratic part of a mixed government was so far removed from contemporary discourse "as to be incomprehensible to nearly anyone but constitutional pedants."[131] Yet this is to overstate the level to which contemporary discourse had fallen. Certainly in the popular imagination of the time, America was a democracy, and any nondemocratic institutions were an affront to this viewpoint. Even at the time of the framing, mixed government was unpopular, but viewed as a necessity by those entrusted with framing a government that would stand the test no other republic had successfully stood—the test of time.[132]

Although the use of mixed government as a philosophical notion was at low ebb at the time of the Seventeenth Amendment, it had not fallen off the map. Foreign observers such as Lord Bryce noted that the Senate continued to check "on the one hand the 'democratic recklessness of the House,' on the other, the 'monarchical ambition' of the President."[133] American political figures were much more muted in their recognition of this constitutional fact, preferring to offer false rhetoric about the Constitution's commitment to democracy. However, some were willing to publicly admit that the Constitution was "against the spirit of [pure] democracy."[134]

In fact, the lack of modern support for the Seventeenth Amendment is quite striking. Numerous movements and politicians support the repeal of the Seventeenth Amendment, including former House Majority Leader Tom Delay, former Senator Zell Miller, and former presidential and senatorial candidate Alan Keyes.[135] Senator Zell Miller, shortly before his previously announced retirement, introduced an amendment to repeal the Seventeenth Amendment.[136] Other commentators, including John W. Dean, have also noted the negative effects of the

---

[131] *Id.* at 136.

[132] Ely, *supra* note 94.

[133] HOEBEKE, *supra* note 98, at 127.

[134] *Id.* at 177 (quoting Senator Jonathan Bourne).

[135] Lewis Gould, *Alan Keyes's Daffy Idea to Repeal the 17th Amendment*, HISTORY NEWS NETWORK, Aug. 23, 2004, http://hnn.us/articles/6822.html (last visited May 14, 2005). Despite the title, the article does not give theoretical support for the Seventeenth Amendment—it only repeats that some Senators at the time were corrupt. *Id.*

[136] 150 CONG. REC. S4494-01, S4503 (2004) (statement of Sen. Miller introducing S.J. Res. 35) ("The Senate has become just one big, bad, ongoing joke, held hostage by special interests, and so impotent an 18-wheeler truck loaded with Viagra would do no good.").

Seventeenth Amendment.[137] Belying the claim that mixed government is dead as a basis of government, it has returned to the intellectual and political consciousness of interested parties, to the point that Senator Robert Byrd can refer to it as "the principal basis for the U.S. Constitution."[138]

The insight that the Supreme Court is acting as the aristocratic part of a modern mixed government is not a new one.[139] "[D]espite the substantial assimilation of the character of the Senate to that of the House of Representatives, mixed government survives" with the Supreme Court as aristocracy.[140] Although the amount of scholarship regarding the interaction of contemporary government and mixed government is still small, it is growing.[141] In any case, while the academy has been debating the true nature of republicanism for some time, the structure of mixed government in modern government has slowly begun to become apparent to laypeople as well.[142]

1. Modern Liberal Republicanism

It should be noted that the classical republicanism at issue here is substantially different from the liberal "civic" republicanism which has only recently been in vogue.[143] Although liberal republicanism was an interesting attempt to remake constitutional order in a way more congruent with a certain set of political and social beliefs, it bore little

---

[137] John W. Dean, *The Seventeenth Amendment: Should it be Repealed?*, FINDLAW, Sept. 13, 2002, http://writ.corporate.findlaw.com/dean/20020913.html.

[138] 146 CONG. REC. S2910-02, S2916 (2000) (statement of Sen. Byrd).

[139] *See generally* Ely, *supra* note 94.

[140] *Id.* at 289.

[141] *See, e.g., id.*; Edward L. Rubin, *Getting Past Democracy*, 149 U. PA. L. REV. 711, 721 (2001).

[142] *Judges, Suicide, and the Resurgence of the States*, THE ECONOMIST, July 5, 1997, at 25.

> America is, by common consent, the world's most energetic democracy. But it is also pretty good at aristocracy: the system, as Aristotle defined it, in which an unaccountable but virtuous elite decides things for the common folk. America's democratic politicians wear check shirts, and speak in simple sound-bites. Its aristocrats wear black robes, and communicate through densely argued documents. America's democratic politicians stand or fall by their poll numbers. America's aristocrats are unelected, irremovable; their standing depends not on popular approbation, but on the power of their thought.
>
> The aristocrats, of course, are the nine Supreme Court justices . . . .

Id.

[143] G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in the Legal Academy*, 6 YALE J.L. & HUMAN. 1 (1994) (summarizing scholarship up to that point).

resemblance to classical republicanism.[144] To Adams or Madison, the socialized ideals of civic republicans would remind them most of the diggers[145] who were the antithesis of the order of mixed government.[146] While to advocates of civic republicanism the term republicanism can refer to the New Deal or the Warren Court "republicanism," the republicanism of the Constitution is that of mixed government.[147]

2. The Necessity of Aristocracy

The resilience of republicanism stems in part from the inevitable need for an aristocratic branch to balance out the inevitable democratic tendencies of American Government. There is no particular reason to accept the assumption of the supremacy of democracy in the current American system. This assumption owes little more to its genesis than ill-defined popular wisdom and the political philosophy of the nineteenth century.[148] Rather, an element of aristocratic moderation has always been a necessity to the American political system. Despite the allure of mass democracy, the choices of the people in mass democracy are uneven, and frequently poor.[149] When the newly formed states embraced mass democracy during and following the revolution, the results were frequently chaotic. Since the adoption of the Constitution, however, aristocracy has remained an essential part of the American body politic in various guises—and has contributed to the stability of American government.

B. The Real and Theoretical Senate

1. Progressive Myths

It is often stated that the Senate of the late nineteenth and early twentieth century was little more than a servant to big business with little to commend it. While this is a popular view, its accuracy as a description of the Senate at the time is somewhat questionable.

To attack the Senate for being a rich man's club and thus a perversion of the original purpose of the Senate is to misunderstand the

---

[144] *See, e.g.*, Mark Tushnet, *The Concept of Tradition in Constitutional Historiography*, 29 WM. & MARY L. REV. 93, 97 (1987); *see also supra* Part II.B.

[145] The diggers were a group of English Radicals at the time of the Civil War who advocated "digging" the well-off down so as to enforce economic equality. *Digger*, *in* 4 ENCYCLOPEDIA BRITANNICA 92 (15th ed. 1998).

[146] THE FEDERALIST No. 10, at 84 (James Madison) (Clinton Rossiter ed., 1961) ("A rage for . . . an abolition of debts, for an equal division of property, or for any other improper or wicked project . . . .").

[147] Frank I. Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

[148] *See generally* HOEBEKE, *supra* note 98.

[149] *See, e.g.*, WOOD, *supra* note 54, at 213.

original purpose and intended composition of the Senate. Many proposals for senatorial selection actually placed a fairly high property qualification on proposed Senators. The popular bodies in the immediate aftermath of the revolution sought to take advantage of their power, to the detriment of the property of the few. Indeed, many of the purely democratic state legislatures had conducted land grabs against wealthy Tories and others.[150] To the Framers, theft against the rich was no less heinous than theft against the poor.[151] Having wealth was not viewed in the negative light it was viewed with in the populist era.[152] At the time of the framing, wealth was seen as a sign of talent, something to be valued.[153]

Generally speaking, although the progressives felt they were faulting the Senate for failing its duties, they were actually criticizing it for not being a second House of Representatives. This misunderstanding is reasonable given that the unpopularity of the notion of aristocracy led the defenders of the Senate, even in the times of the Constitution itself, to use bicameralism and not mixed government to defend the institution of the Senate.

And yet the merit of the Senate would not be reduced to bicameralism proper until the passage of the Seventeenth Amendment. As seen above, the Senate retained some of its aristocracy right up to 1913.[154]

2. Actual Diminution

While the Senate would retain some of its aristocracy up to 1913, much of it had been diminished before then.[155] Much of the Senate was indeed composed of party hacks and others who did not do credit to the institution. However, blame for this seems more reasonably placed at the feet of prior democratic reform than the deterioration of the Senate from natural causes. In a statement running contrary to popular opinion, Jefferson noted that the choices of the people are not known for their wisdom.[156] The people had already arranged to choose their own Senators in many states by democratic means; now they were agitating that the Senators were insufficiently democratic. The democratic reforms to the Senate had produced much of the late-nineteenth and early-twentieth century senatorial muddle in the first place. Thus, the people

---

[150] *See, e.g.*, 1 LAW PRACTICE OF ALEXANDER HAMILTON 197-223 (Julius Goebel, Jr. ed., 1964) (dealing with the New York legislature's attempts to do this).

[151] *Id.*

[152] RICHARD, *supra* note 52, at 131.

[153] *Id.*

[154] *See supra* Part III.B.

[155] *See supra* Part III.A.

[156] WOOD, *supra* note 54, at 213 (quoting Thomas Jefferson).

saw more democratic reform as the answer, perhaps because the people insufficiently appreciated the need for aristocracy to check their rash passions.

3. The Fall to Democracy

Even prior to the Seventeenth Amendment, "while the role of the Senate as a comparatively sober, well-educated, and only indirectly elected elite was on the wane, the comparable role of the Supreme Court was symmetrically waxing."[157] With the Seventeenth Amendment, this process only accelerated.[158] Today, the Senate acts in concert with the House of Representatives, occasionally checking it, but more often simply acting in a similar manner since both bodies are subject to similar democratic pressures. It is frequently noted that although there are differences between the two bodies, these differences are minor.[159] Although there are still some wise men in the Senate, Senators are now shackled to the fickle constraints of mediocrity known as popular opinion and special interests.[160] Aristocracy has left the Senate, and shows no signs of returning to it under the current configuration of mixed government.

C. The Rise of Legal Education

Another factor vital to the rise of the Supreme Court was the firming of the association between legal education and intellectual achievement. While at the time of the founding many of the intellectual giants were lawyers, the training process for lawyers was much more uneven, and the intellectual prowess of Hamilton and Adams was a result of factors other than their legal training.[161] It is perhaps no coincidence that legal education began to assume its modern form just as the republican shift began to occur.[162]

The judges, who serve as aristocrats, are generally considered the cream of the modern legal crop. Of course, the notion of lawyers as America's aristocrats is nothing new, going back even before de

---

[157] Ely, *supra* note 94, at 289.

[158] Craig S. Lerner, *Review: Impeachment, Attainder, and a True Constitutional Crisis: Lessons from the Strafford Trial*, 69 U. CHI. L. REV. 2057, 2099 n.156 (2002) ("The Seventeenth Amendment, by requiring the direct election of Senators, has made the body more political . . . .").

[159] *See, e.g., id.*; Alan Hirsch, *Direct Democracy and Civic Maturation*, 29 HASTINGS CONST. L.Q. 185, 246 (2002).

[160] 150 CONG. REC. S4494-01, S4503 (2004).

[161] *See generally* Laura I. Appleman, *The Rise of the Modern American Law School: How Professionalization, German Scholarship, and Legal Reform Shaped our System of Legal Education*, 39 NEW ENG. L. REV. 251 (2005).

[162] *Id.*

Tocqueville's famous assertion to that effect.[163] Additionally, it seems reasonable to believe that the Founders expected a significant portion of the aristocratic part of the government to be comprised of lawyers. However, they certainly did not expect the function of aristocracy to be delegated solely to lawyers. While lawyers have more knowledge of the functionality of the law, that is not necessarily an asset to a body that is meant to be deliberative. While the lawyers in the Supreme Court may be of the highest intellectual caliber, they lack the wealth of knowledge and experience a more diverse body would contain.

Even as the lawyer class was the intellectual elite in de Tocqeville's eyes, lawyers of that time period bear little resemblance to the lawyers of today. While some lawyers were steeped in the classical traditions, this was more a consequence of the system of education at the time, than their legal training, which more closely resembled a medieval apprenticeship than modern legal education.[164] However, this apprenticeship system also resulted in many lawyers, especially in the outlying regions, who were little more than technicians.[165] Legal education developed slowly in America, as the first law school, Harvard Law, was not founded until 1817.[166] Even after this, legal education would not take off until after the Civil War, when various pressures conspired to dramatically reform American legal education into a modern professional discipline.[167] By 1921, many top schools required a college degree for admission, in stark contrast to previous standards.[168] Indeed,

> [l]aw's move from collegiate to professional was not merely a simple change of status, but was perceived as a much needed elevation of the field itself.
>
> By gradually becoming a professional school, law upgraded the value of its degree. No longer just a collegiate school of lectures, law was now a laboratory of legal research, conducted by specialized researchers for professionals. Law school's elevation to a graduate profession provided further proof to the bar that lawyers were . . . the nation's moral arbiters and leadership elite.[169]

---

[163] DE TOCQUEVILLE, *supra* note 99.

[164] *See* Mary M. Devlin, *The Development of Lawyer Disciplinary Procedures in the United States*, 7 GEO. J. LEGAL ETHICS 911, 918 (1994).

[165] *Id.*

[166] Harvard Law School: Facts, http://www.law.harvard.edu/about/faq.php #facts (last visited March 25, 2006).

[167] *See generally* Appleman, *supra* note 161.

[168] RICHARD L. ABEL, AMERICAN LAWYERS 48 (1989).

[169] Appleman, *supra* note 161, at 298.

D. The Rise of the Supreme Court

Aside from the possible exception of *Marbury v. Madison* and *Dred Scott*, the Supreme Court rarely, if ever, engaged in activist judicature prior to the Civil War.[170] In the years following, such practices would slowly increase in both prominence and frequency as the court found its way to the aristocracy it is today.

1. Judicial Activism

Although "judicial activism" is a term thrown around frequently, finding a workable definition of it is somewhat difficult.[171] The definition used here, one used many times by the Supreme Court, is the court acting in a legislative rather than judicial role.[172] Put another way, this definition can be expressed simply as the Supreme Court acting as an aristocratic legislature instead of in an adjudicatory role.

An additional step is reasonable from this definition. If judicial activism is simply acting as an aristocratic legislature, then judicial activism is in fact an assertion by the court of its aristocratic status. As can be seem from the brief history of judicial activism below, the prevalence of these assertions rises in proportion to what would be expected from the Republican Shift.

2. Activism and Aristocracy

It would be a mistake to view activist judges as an aberration on the face of American Government. Put in its simplest form, judicial activism is merely the aristocratic part of government acting as the aristocratic part of government.

Alexander Bickel's seminal work *The Least Dangerous Branch* is striking in its recognition of the aristocracy of the twentieth century Supreme Court.[173] Bickel argues that the Supreme Court should serve to protect "certain enduring values"[174] which could not be reliably protected by the elected branches. Judges "have the leisure, the training, and the

---

[170] Marbury v. Madison, 5 U.S. 137 (1803). A careful observer of *Marbury* and its attendant circumstances will note that, despite being a case that struck down a federal statute, *Marbury* was not activist. Notably, the court's opinion demonstrates submission to the Jefferson administration.

[171] Hon. Frank H. Easterbrook, *Do Liberals and Conservatives Differ in Judicial Activism?*, 73 U. COLO. L. REV. 1401 (2002). For a history of the usage of the term, see Keenan D. Kmiec, *The Origin and Current Meanings of "Judicial Activism"*, 92 CAL. L. REV. 1441 (2004).

[172] Kmiec, *supra* note 171, at 1471.

[173] ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS 24 (2d ed. 1986).

[174] *Id.*

insulation"[175] necessary to properly decide these questions – a clearer definition of aristocracy can scarcely be imagined. The Senate was originally designed to be comprised similarly – with men of leisure, training, and insulation from the whims of the masses.[176]

Many see judicial activism as a tool for liberal meddling. However, more astute observers note that judicial activism can be used by both sides of the political equation.[177] The distinguishing factor is that activist decisions embody the values of the intellectual elite – the natural aristocracy of America.[178] This has been a frequent theme in the dissents of United States Supreme Court Justice Antonin Scalia in decisions he regarded as activist.[179]

Although the first recorded use of the term "judicial activism" was only in 1947,[180] judicial activism had been occurring long before. Following the Civil War, the Court was willing to embrace "a more aggressive review posture."[181] In the 1883 Civil Rights cases, the Supreme Court found that the 1875 Civil Rights act banning various forms of racial discrimination went beyond Congress' power and struck it down.[182] Meanwhile, in several other cases of the era, the Court made a strong activist stand in presuming unduly narrow and restrictive definitions of the reconstruction amendments.[183]

Twentieth century judicial activism began in a manner somewhat different than previous cases. In one of the century's earliest cases, *Lochner v. New York*,[184] the Court applied substantive due process to a

---

[175] *Id.* at 25.

[176] Vikram David Amar, *Indirect Effects of Direct Election: A Structural Examination of the Seventeenth Amendment*, 49 VAND. L. REV. 1347, 1351-52 (1996) ("This function explains the Senate's six-year term, its staggered turnover, its age and residency requirements, as well as the original Constitution's provision for indirect Senate election."). For reasons why it sits less easily, see *infra* Part V.C.

[177] *See, e.g.*, Michael J. Klarman, *What's So Great About Constitutionalism?*, 93 NW. U. L. REV. 145, 188-89 (1998).

[178] *Id.* at 189. "To observe that judicially-enforceable constitutionalism is a politically double-edged sword is not to deny that the practice has any systematic bias; it is only to suggest that the bias operates along an axis other than partisan politics." *Id.*

[179] *See* Romer v. Evans 517 U.S. 620, 652 (1996) (Scalia, J., dissenting) ("When the Court takes sides in the culture wars, it tends to be with the knights rather than the villains - and more specifically with the Templars, reflecting the views and values of the lawyer class from which the Court's Members are drawn."); United States v. Virginia, 518 U.S. 515, 567 (1996) (Scalia, J., dissenting).

[180] Kmiec, *supra* note 171, at 1446.

[181] G. Edward White, *The Constitutional Journey of* Marbury v. Madison, 89 VA. L. REV. 1463, 1521 (2003).

[182] The Civil Rights Cases, 109 U.S. 3 (1883).

[183] Plessy v. Ferguson, 163 U.S. 537 (1896); The Slaughter-House Cases, 83 U.S. 36 (1872).

[184] Lochner v. New York, 198 U.S. 45 (1905).

maximum hours law for bakers, and found it to be unconstitutional.[185] As subsequent commentators have noted, "[t]he *Lochner* decision remains the foremost reproach to the activist impulse in federal judges."[186] In a series of decisions that would follow, the activist Court would invalidate numerous laws that were designed to protect workers from various predations on the basis of freedom of contract.[187] This activist Court would be finally undone by its own attitudes. After several strongly activist decisions striking down New Deal programs, pressure from the President threatening court-packing led to a retreat from activist decisions regarding freedom of contract and the Commerce Clause.[188] Following World War II, the Court handed down a second series of activist decisions, including *Brown v. Board of Education*, *Miranda v. Arizona*, and *Roe v. Wade*.[189]

In recent years, judicial activism has not been constrained by political alignment, and thus can be viewed as aristocracy in its purest form. The Court has issued liberal substantive Due Process decisions, such as *Lawrence v. Texas*,[190] and conservative Commerce Clause decisions, such as *U.S. v. Morrison*.[191] In its purest sense now, the Supreme Court is a vessel for the values of the elite—the values of the aristocracy.

E. Why Only the Supreme Court?

A reasonable question upon all this is why did the Supreme Court in particular become the aristocracy of the United States, and not the federal courts as a whole? The lower courts are staffed by judges of estimable intelligence, with the same protections and rights as justices on the United States Supreme Court. This said, although important decisions are sometimes made by the lower courts, developments listed below that were contemporaneous with the fall of the Senate keep the lower federal courts in the shadow of that of the Supreme Court in terms of acting as legislators.

---

[185] *Id.* at 45.

[186] Brzonkala v. Va. Polytechnic Inst. & State Univ., 169 F.3d 820, 890 (4th Cir. 1999) (Wilkinson, C.J., concurring) (giving a fairly short but more robust history of judicial activism).

[187] *Id.* at 890.

[188] *Id.* at 890-91.

[189] *Id.* at 891-92; Roe v. Wade, 410 U.S. 113 (1973); Miranda v. Arizona, 384 U.S. 436 (1966); Brown v. Bd. of Educ., 347 U.S. 483 (1954).

[190] Lawrence v. Texas, 539 U.S. 558 (2003).

[191] United States v. Morrison. 529 U.S. 598 (2000).

1. The Judiciary Act of 1891

It is difficult to underestimate the impact of these twin innovations of certiorari and the circuit courts of appeal to the Supreme Court of the United States, which were both effected by the Judiciary Act of 1891.[192] As the nation's economy became truly national, the Supreme Court was freed from being the court of appeal for all federal cases, and was given a robust set of courts of appeal which would develop into intellectually formidable courts all their own, which would take on the responsibility of deciding most federal law, and the Supreme Court was freed to focus on cases that interested it.[193] Being freed from the responsibilities of riding circuit was another benefit to judges from this act that freed them from many of their former irksome responsibilities, and led to their assuming their position more or less permanently in the marble walls of One First Street.[194]

2. The Highest Court Effect

As the highest court in the land, there is simply no-one to correct the Supreme Court, while the lower courts can be corrected by the Supreme Court. Thus, even the most radical and important circuit decision can be overturned by the Supreme Court, limiting the influence of the lower courts essentially to when the Supreme Court decides they are right or does not consider the matter worth dealing with. When this effect (which obviously existed since the beginnings of the federal courts) was coupled with the Judiciary Act of 1891, the Supreme Court was finally freed of many of the mundane aspects of being a court of law.

F. Advice and Consent

In recent years, the confirmation battles in the Senate surrounding the President's nominations to various positions have become more and more fierce.[195] Although Republican nominations that have been filibustered, rejected, or otherwise forestalled have made more headlines, Democrats are quick to say that the reverse also occurred, just with less fanfare.[196] While there had been issues of political objections to appointments prior to the Seventeenth Amendment, the

---

[192] 26 Stat. 826.

[193] *Id.*

[194] *Id.*

[195] Independence of the Judiciary: Judicial Vacancies and the Nomination and Confirmation Process, A.B.A. (2005), http://www.abanet.org/poladv/priorities/judicial_vacancies.html (last visited Oct. 2, 2005).

[196] Herman Schwartz, *Nuclear Whiner*, THE AMERICAN PROSPECT, March 24, 2005, http://www.prospect.org/web/printfriendly-view.ww?id=9384.

amendment paved the way for the naked politicization of the procedure of advice and consent.[197]

Perhaps no role is more important for the aristocracy to play in a republic than that of advice and consent. Since the Senate is supposed to be comprised of the natural aristocracy of the republic, its unique level of talent and freedom from politicization is best brought to bear in matters of advising the president on and consenting to the President's appointments to various positions, such as the federal courts.[198] Should an unfit candidate be sent to the Senate, the Senate would reject the candidate, without concern for political alignment in the positive or the negative.

With the shift of the Senate away from aristocracy, learned deliberation became something of an odd role to delegate merely to the Senate. When the Senate is not the natural aristocracy, the reasons to allow it advice and consent slip away. Some would argue that advice and consent should be viewed instead as a democratic power, but if so, why not allow all the democratically elected representatives that power? Obviously, making the new aristocracy of the Supreme Court the arbiter of appointments via advice and consent is impossible due to conflicts of interest. As such, true aristocratic deliberation on nominees is not reasonably foreseeable.

With the delegation of advice and consent to a democratic body, politicization of the process must inevitably follow.[199] As can be seen in the past twenty years, and especially in late 2005, this is exactly what has happened.

V. CONCLUSION: THE TRIUMPH OF THE REPUBLICAN SHIFT

While the Supreme Court still must wait for issues to come before it, this is not much of a concern anymore, as most issues of constitutional import are legislated fairly rapidly nowadays. Furthermore, while the Court can abstain from deciding cases due to issues such as standing and political question, that is a power that is squarely within the Court's

---

[197] 150 CONG. REC. S4494-01, S4503 (2004).

[198] 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787 120 (Max Farrand ed. 1966).

[199] Michael J. Gerhardt, *Toward a Comprehensive Understanding of the Federal Appointments Process*, 21 HARV. J.L. & PUB. POL'Y 467, 489 (1998).

> One obvious effect of the Seventeenth Amendment was to make the Senate's constitutionally imposed duties, such as the confirmation of presidential nominees, subject to popular review, comment, and reprisal. Although there is no hard evidence establishing precisely how much the Seventeenth Amendment has influenced the kinds of people elected to the Senate or the nature of the Senate's proceedings or activities, this change has surely had at least some effect.

Id.

control. With the Supreme Court justices free to not adjudicate cases they did not consider significant,[200] the Court was prepared to take over the role the Senate had been forcibly removed from in the political sphere—that of the aristocratic part of government. But why would it? The answer is that republicanism and mixed government are far too integral to the Constitution to be displaced by an amendment that dealt at most a glancing blow to the core philosophy of the republican document. In order to undo mixed government, the destruction of the Constitution, not just the amendment, would be necessary. The Seventeenth Amendment changed some of the structure of mixed government. Instead of the development of a mass democracy in the place of the former republic, the republic merely shifted its aristocracy in a way it had already been doing in response to democratic attacks on aristocracy—it shifted the aristocracy to the judiciary. The process had anomalous and unwelcome effects on two bodies that were neither designed nor ideally suited for their new roles, but they adapted fairly quickly into the once and future order of democracy, aristocracy, and monarchy.

[200] Due to the advent of Certiorari process. *See supra* part 4.e.1.

A BRIEF CATECHISM ON MARRIAGE

*Teresa Stanton Collett**

The well-being of the individual person and of human and Christian society is intimately linked with the healthy condition of that community produced by marriage and family.[1]

I. INTRODUCTION

Marriage appears to be in trouble in Western European countries, at least among the intellectual elite. The Netherlands and Belgium have embraced same-sex marriage by legislative acts.[2] Seven provinces in Canada have followed suit through judicial command.[3] In the United States, state legislatures continue to hold firm in their refusal to redefine marriage while the courts waiver.[4]

---

* Professor of Law, University of St. Thomas School of Law, Minneapolis, Minnesota. This essay was prepared at the encouragement of Professor Michael Scaperlanda and presented in part at the delightful symposium organized by Professor Lynne Marie Kohm.

1 II VATICAN COUNCIL: GAUDIUM ET SPES § 47 (1964).

2 *See* The Netherlands Ministry of Justice Fact Sheet, Same-sex Marriages (Apr. 2001), http://www.justitie.nl/english/publications/factsheets/same-sex_marriages.asp; Ralf Michaels, *Same-Sex Marriage: Canada, Europe and the United States*, ASIL INSIGHTS, June 2003, *available at* http://www.asil.org/insights/insigh111.htm. The French and Dutch versions of the Belgian law are available at: http://www.dekamer.be/FLWB/pdf/50/2165/50K2165001.pdf.

3 *See* EGALE Canada, Inc. v. Canada (Att'y Gen.), [2003] 225 D.L.R. (4th) 472 (B.C. Ct. App.); Halpern v. Canada (Att'y Gen.), [2003] 225 D.L.R. (4th) 529 (Ont. Ct. App.); Hendricks v. Canada (Att'y Gen.), [2003] 238 D.L.R. (4th) 577 (Que. Ct. App.); N.W. v. Canada (Att'y Gen.), [2004] SKQB 434 (Sask. Ct. Q.B.); Dunbar v. Yukon, [2004] YKSC 54 (Yukon Sup. Ct.).

4 *See* Baehr v. Lewin, 852 P.2d 44 (Haw. 1993) (holding that equal protection under the state constitution requires strict scrutiny of marriage law requiring couples be composed of one man and one woman). The underlying litigation was subsequently dismissed as moot due to a state constitutional amendment that removed the definition of marriage from the equal protection clause of the constitution. Baehr v. Miike, 994 P.2d 566 (Haw. 1999); Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Feb. 27, 1998) (holding privacy protection in state constitution requires strict scrutiny of state requirement that marriage license applications be made only by opposite sex couples). The Alaska legislature responded by proposing a constitutional amendment which passed. It reads: "To be valid or recognized in this State, a marriage may exist only between one man and one woman." ALASKA CONST. art. I, § 25 (added after passage in general election on Nov. 3, 1998). *See also* Standhardt v. Super. Ct. of Ariz., 77 P.3d 451 (Ariz. Ct. App. 2003), *review denied* (May 25, 2004) (finding no state constitutional right to recognition of same-sex unions); Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003) (holding there is a constitutional right to recognition of same-sex marriage); Lewis v. Harris, No. MER-L-15-03, 2003 WL 23191114 (N.J. Super. Ct. Law Div. Nov. 5, 2003) (holding there is no state constitutional right to recognition of same-sex marriage); Hernandez v. Robles, 794 N.Y.S.2d 579 (N.Y. Sup. Ct. 2005); Baker v. State, 744

Independent of the same-sex union debate, marriage itself remains a fragile legal status even in the most conservative of states. It is subject to unilateral termination for the flimsiest of reasons, with no substantial legal requirement that the party seeking the divorce show any attempt to maintain the marriage.[5]

Yet, the more things change, the more they remain the same. Whether it is the Pharisees debating the basis for divorce in Biblical times,[6] university professors blessing Henry VIII's specious reasons for divorce from Catherine of Aragon,[7] or the American Law Institute arguing for recognition of multi-partner relationships today,[8] the nature of marriage has been contested throughout history. The Church has always argued that marriage is the permanent union of a man and woman.[9] It is this vision that must be a part of the American dialogue today as we once again explore the legal structure of marriage and family life in this country.

What is at issue are three characteristics of marriage which were once widely understood to be intrinsic to its legal status: permanence, procreativity, and monogamy. Today, each of these characteristics is deeply contested. The Roman Catholic Church continues to defend each, and her teaching provides great insight into the value of each.

A.2d 864 (Vt. 1999) (holding that state constitutional provision insuring all citizens enjoy all common benefits requires legal recognition of same-sex unions); Anderson v. King County, 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 04, 2004) (holding there is a constitutional right to same-sex marriage recognition).

[5] *Developments in the Law—The Law of Marriage and Family, Marriage as Contract and Marriage as Partnership: The Future of Antenuptial Agreement Law*, 116 HARV. L. REV. 2075, 2086 (2003).

[6] The Biblical books of both Matthew and Mark record exchanges between Jesus and the Pharisees regarding the requirements of divorce. *Matthew* 19:1-9 and *Mark* 10:2-12. The followers of the Hillel school believed that divorce was permitted if "a man's wife should burn his food or even be less pleasing to him than another woman." A NEW CATHOLIC COMMENTARY ON HOLY SCRIPTURE 782, 937 (Reginald C. Fuller et al. eds., 1969) (citing Rabbi Aqiba c. A.D. 120). Members of the Shammai school required that the wife commit adultery or some sexual offense before divorce was permitted. *Id.* This difference in opinion was presented to Jesus to resolve. He, however, rejected both justifications, responding, "Because of the hardness of your hearts Moses allowed you to divorce your wives, but from the beginning it was not so. I say to you, whoever divorces his wife (unless the marriage is unlawful) and marries another commits adultery." *Matthew* 19:8-9 (New American Bible) (This version will be used throughout this article).

[7] *See* Edward A. Pace, *Universities*, *in* THE CATHOLIC ENCYCLOPEDIA, *available at* http://www.newadvent.org/cathen/15188a.htm; Herbert Thurston, *Henry VIII*, *in* THE CATHOLIC ENCYCLOPEDIA, *available at* http://www.newadvent.org/cathen/07222a.htm.

[8] *See* PRINCIPLES OF THE LAW OF DISSOLUTION OF THE FAMILY §6.01 cmt. d (2003) ("Knowledge that a domestic partner is married to another does not alone bar claims under this Chapter.").

[9] *See generally* MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW (1989).

II. PERMANENCE

A. *Traditional Christianity's View*

The Church's recognition of the permanence of marriage arises from scripture.[10] Christ lived in a time when the very nature of marriage was contested. Jesus' exchange with the Pharisees concerning divorce evidences this.[11] While wives were not permitted to divorce their husbands, Jewish Law permitted husbands to divorce their wives if the circumstances met the requirements of Mosaic Law.[12] The content of these requirements was disputed at the time. Followers of the Hillel School believed that divorce was permitted if "a man's wife should burn his food or even be less pleasing to him than another woman."[13] Members of the Shammai School required that the wife commit adultery or some sexual offense before divorce was permitted.[14]

A group of Pharisees approached Jesus, asking him "Is it lawful for a man to divorce his wife for any cause whatever?"[15] Jesus responded, "Have you not read that from the beginning the Creator 'made them male and female' and said, 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? So they are no longer two, but one flesh. Therefore, what God has joined together, no human being must separate."[16]

This response seemed contrary to Jewish law, which clearly recognized the husband's right to divorce his wife, so the Pharisees asked, "Then why did Moses command that the man give the woman a bill of divorce and dismiss (her)?"[17] Jesus' response reveals that divorce was contrary to God's original plan for humanity. "Because of the hardness of your hearts Moses allowed you to divorce your wives, but from the beginning it was not so. I say to you, whoever divorces his wife (unless the marriage is unlawful) and marries another commits adultery."[18] By his answer, Christ refers the Pharisees back to the Genesis account of creation and God's original plan for the permanent

---

[10] CATECHISM OF THE CATHOLIC CHURCH § 1614 (2d ed. 2000). *See also* PIUS XI, CASTI CONNUBII [CHRISTIAN MARRIAGE] (1930).

[11] *Matthew* 19:1-9 and *Mark* 10:2-12. *See also* John Paul II, Theology of the Body: Original Unity of Man and Woman (Nov. 7, 1979); JOHN PAUL II, MULIERIS DIGNITATUM [ON THE DIGNITY AND VOCATION OF WOMEN] (1988).

[12] A NEW CATHOLIC COMMENTARY ON HOLY SCRIPTURE 782 (Reginald C. Fuller et al. eds., 1969) ("Divorce was a privilege of the husband alone.").

[13] *Id.* at 937 (citing Rabbi Aqiba c. A.D. 120).

[14] *Id.* at 927.

[15] *Matthew* 19:4.

[16] *Matthew* 19:5.

[17] *Matthew* 19:6.

[18] *Matthew* 19:6-7.

union of man and woman by marriage.[19] Neither spouse is permitted to destroy that union. In this way, he reestablishes the equal duty of husband and wife to live out the lifelong commitment made in marriage.[20]

B. Permanence of Marriage Eroded by Modern Laws

In her historical review of the institution of marriage in Western European nations, Professor Mary Ann Glendon found that marriage has always been defined as a relationship of extended duration, but subject to dissolution by mutual consent.[21] With the rise of Christianity's influence, marriage came to be viewed as a lifetime commitment subject to dissolution only for grave reasons.[22] Once established, this ideal of marriage as a lifetime commitment held sway in Western European countries until recently.[23] It was only in the mid-1960's that laws began to recognize or expand the application of no-fault and mutual consent divorce statutes.[24]

Simultaneously, either reflecting the same cultural tides that swept through the law or as a result of those legal changes, the number of divorces in the United States skyrocketed.[25] As a consequence, more men and women now find themselves alone or struggling to raise children in a one-parent household. On average, those who choose divorce end up less healthy, wealthy, and happy than their counterparts who persevere in their marriages.[26] Similarly, children raised in a married household comprised of their biological mothers and fathers are physically and mentally healthier, better educated, and more likely to succeed in marriages and careers later in life.[27]

This contemporary research merely confirms what the Church has taught throughout the centuries.

> Matrimonial contracts are by [divorce] made variable; mutual kindness is weakened; deplorable inducements to unfaithfulness are supplied; harm is done to the education and training of children;

---

[19] John Paul II, Theology of the Body: Original Unity of Man and Woman (Nov. 7, 1979).

[20] CATECHISM OF THE CATHOLIC CHURCH § 1614 (2d ed. 2000).

[21] GLENDON, *supra*, note 9, at 17–34.

[22] *Id.*

[23] *Id.* at 149.

[24] *Id.*

[25] Stephen J. Bahr, *Social Science Research: On Family Dissolution*, 4 J.L. & FAM. STUD. 5, 6-7 (2002).

[26] *Id. See also* Department of Health and Human Services, *Cohabitation, Marriage, Divorce, and Remarriage in the United States*, 23 VITAL & HEALTH STATISTICS 3–4 (2002). *See generally* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE (2000).

[27] WAITE & GALLAGHER, *supra* note 26, at 124.

> occasion is afforded for the breaking up of homes; the seeds of dissention are sown among families; the dignity of womanhood is lessened and brought low, and women run the risk of being deserted after having ministered to the pleasures of men.[28]

C. Benefit of Permanent Unions

In contrast, permanence or indissolubility of marriage provides significant benefits to the wife and husband, their children, and the community.

> First of all, both husband and wife possess a positive guarantee of the endurance of this stability which that generous yielding of their persons and the intimate fellowship of their hearts by their nature strongly require, since true love never falls away. Besides, a strong bulwark is set up in defense of a loyal chastity against incitements to infidelity . . . any anxious fear lest in adversity or old age the other spouse would prove unfaithful is precluded and in its place there reigns a calm sense of security. Moreover, the dignity of both man and wife is maintained and mutual aid is most satisfactorily assured, while through the indissoluble bond, always enduring . . . . In the training and education of children, which must extend over a period of many years, it plays a great part, since the grave and long enduring burdens of this office are best borne by the united efforts of the parents. Nor do lesser benefits accrue to human society as a whole. For experience has taught that unassailable stability in matrimony is a fruitful source of virtuous life and of habits of integrity. Where this order of things obtains, the happiness and well-being of the nation is sagely guarded; what the families and the individuals are, so also is the State, for a body is determined by its parts.[29]

By irrevocably rejecting divorce as an option, couples can confidently develop a healthy interdependence and division of labor that yields these benefits—benefits that social scientists are now documenting. When marriage is viewed as a permanent commitment, each partner is encouraged to work toward making the relationship realize its full potential, assured that his or her "investment" in the marriage is protected from unilateral dissolution. Efforts at reconciliation that may, at first blush, seem too taxing, suddenly appear more inviting when separation and life-long celibacy are viewed as the only alternative. The presence of no-fault divorce undermines this sort of commitment and slowly erodes the ability of many couples to weather the difficult times that married couples face.

---

[28] LEO XIII, ARCANUM [ON CHRISTIAN MARRIAGE] (1880). *See also* PIUS XI, CASTI CONNUBII [CHRISTIAN MARRIAGE] (1930).

[29] PIUS XI, CASTI CONNUBII [CHRISTIAN MARRIAGE] (1930).

III. PROCREATIVITY

Contemporary law similarly sends false messages regarding the procreative nature of marriage. Once the bedrock of the American legal understanding of marriage,[30] courts are increasingly confused regarding the role of procreation in marriage. State judges in Vermont,[31] Hawaii,[32] Alaska,[33] Massachusetts,[34] Washington,[35] and New York[36] have declared that the union of two men or two women is the equivalent of marriage and have ordered state officials to recognize such unions under the guise of state constitutional analysis. Citizens in Hawaii and Alaska responded by enacting constitutional definitions of marriage as the union of one man and one woman.[37] Disregarding the desires of Vermont citizens, the Vermont legislature responded to the court order by creating "civil unions," a legal status that equates homosexual unions and marriages.[38] The Massachusetts Supreme Judicial Court declared that the state's constitution required the issuance of marriage licenses to same-sex couples.[39] Trial courts in New York and Washington have also declared same-sex marriage to be a constitutional right.[40]

A. Federal Encroachment Into the Procreative Aspect of Marriage

To date, the federal courts have refused to recognize same-sex unions as marriages.[41] Notwithstanding this fact, confusion regarding the essential nature of marriage reigns at the highest level. Starting with its opinion in *Griswold v. Connecticut*,[42] the Supreme Court has joined the battle over "sexual liberation."[43] With language that

---

[30] *See* Charles Reid, *The Augustinian Goods of Marriage: The Disappearing Cornerstone of the American Law of Marriage*, 18 BYU J. PUB. L. 449 (2004).

[31] Baker v. State, 744 A.2d 864 (Vt. 1999).

[32] Baehr v. Lewin, 852 P.2d 44 (Haw. 1993).

[33] Brause v. Bureau of Vital Statistics, No. 3AN-95-6562, 1998 WL 88743 (Alaska Super. Ct. Feb. 27, 1998).

[34] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

[35] Anderson v. King County, 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 04, 2004).

[36] Hernandez v. Robles, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005).

[37] *See supra* note 4.

[38] Baker v. State, 744 A.2d 864 (Vt. 1999).

[39] Goodridge, 798 N.E.2d 941.

[40] Hernandez, 794 N.Y.S.2d 579, *rev'd*, 805 N.Y.S.2d 354 (N.Y. App. Div. 2005); Anderson v. King County, No. 04-2-04964-4-SEA, 2004 WL 1738447 (Wash. Super. Ct. Aug. 4, 2004) (finding a state constitutional right to recognition of same sex marriage).

[41] In re Kandu, 315 B.R. 123, 139 (W.D. Wash. 2004). "No federal court, however, has explicitly recognized that this fundamental right to marry extends to a person of the same sex." *Id.* at 139.

[42] Griswold v. Connecticut, 381 U.S. 479 (1965).

[43] *See* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

seemingly provided strong support for the institution of marriage,[44] the Court struck down a Connecticut statute that banned the sale of contraceptives to married couples.[45] Expressing little patience for the state's argument that the ban discouraged adultery,[46] members of the *Griswold* Court found that married couples had a constitutional right to use contraception, and declared the ban unconstitutional. None of the justices grappled with the state's interest in the procreative aspect of marriage, or the state's legitimate interest in encouraging fidelity.

Seven years later in *Eisenstadt v. Baird*,[47] the Court expanded this holding to declare that unmarried adults also had a constitutional right to have access to contraceptives. Perhaps even more important to the American understanding of marriage, the Court introduced a radical redefinition of marriage. In explaining what he saw as the natural progression to the opinion in *Eisenstadt*, Justice Brennan wrote:

> It is true that in *Griswold* the right of privacy in question inhered in the marital relationship. Yet the marital couple is not an independent entity with a mind and heart of its own, but an association of two individuals each with a separate intellectual and emotional makeup. If the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as a decision whether to bear or beget a child.[48]

> The case does involve two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle. The petitioners are entitled to respect for their private lives. The State cannot demean their existence or control their destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government.

Id.; Carey v. Population Serv. Int'l, 431 U.S. 678 (1977) (striking down law prohibiting the sale of contraception to minors below the age of sixteen).

[44] *See Griswold*, 381 U.S. at 486.

> Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id.

[45] *Id.*

[46] *Id.* at 498, 505-06.

[47] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[48] *Id.* at 453.

B. Federal Jurisprudence Is Contrary to God's Plan for Marriage and Families

This new emphasis on marriage as "an association of two individuals" and the "right of the individual" within the marriage is contrary to the Catholic understanding of marriage as a communion of persons or one-flesh union.

> In marriage man and woman are so firmly united as to become—to use the words of the Book of Genesis—"one flesh" (Gen 2:24). Male and female in their physical constitution, the two human subjects, even though physically different, *share equally in the capacity to live "in truth and love"*. This capacity, characteristic of the human being as a person, has at the same time both a spiritual and a bodily dimension. It is also through the body that man and woman are predisposed to form a "communion of persons" in marriage. When they are united by the conjugal covenant in such a way as to become *"one flesh"* (Gen 2:24), their union ought to take place *"in truth and love"*, and thus express the maturity proper to persons created in the image and likeness of God.[49]

It is through this communion of persons that the community of the family arises.[50] This communion is expressed by the total gift of self, including the gift of one's procreativity. Through this gift, each comes to know the other and themselves.

> Procreation brings it about that the man and the woman [his wife] know each other reciprocally in the "third," [a child] sprung from them both. Therefore, this knowledge becomes a discovery. In a way it is a revelation of the new man, in whom both of them, man and woman, again recognize themselves, their humanity, their living image. In everything that is determined by both of them through the body and sex, knowledge inscribes a living and real content.[51]

By remaining open to the conception and nurturing of children, the couple evidences their willingness to cooperate with God's plan to be co-creators of new life.

Contrary to popular mythology, the Church does not teach an absolute duty to have as many children as physically possible. Rather, the Church teaches that each married couple must recognize children as

---

[49] JOHN PAUL II, LETTER TO FAMILIES (1994).

[50] JOHN PAUL II, FAMILIARIS CONSORTIO [ON THE ROLE OF THE CHRISTIAN FAMILY IN THE MODERN WORLD] (1981).

[51] John Paul II, Original Unity of Man and Woman: The Mystery of Woman is Revealed in Motherhood (Mar. 12, 1980).

the supreme gift of marriage and that the couple should seek to act in accordance with God's will for their lives.[52]

> With regard to physical, economic, psychological and social conditions, responsible parenthood is exercised by those who prudently and generously decide to have more children, and by those who, for serious reasons and with due respect to moral precepts, decide not to have additional children for either a certain or an indefinite period of time.[53]

If a proper decision is made to postpone or avoid having a child, the Church teaches that couples must do so by cooperating with the natural order rather than seeking to frustrate it through artificial means.[54]

> The choice of the natural rhythms involves accepting the cycle of the person, that is the woman, and thereby accepting dialogue, reciprocal respect, shared responsibility and self-control. To accept the cycle and to enter into dialogue means to recognize both the spiritual and corporal character of conjugal communion and to live personal love with its requirement of fidelity. In this context the couple comes to experience how conjugal communion is enriched with those values of tenderness and affection which constitute the inner soul of human sexuality, in its physical dimension also. In this way sexuality is respected and promoted in its truly and fully human dimension, and is never "used" as an "object" that, by breaking the personal unity of soul and body, strikes at God's creation itself at the level of the deepest interaction of nature and person.[55]

The couple both acknowledges God's design and cooperates with each other in their mutual plan to be fruitful in other dimensions of their married life.

C. Modern Views on Contraception

Mocked at the time as a puritanical alarmist, Pope Paul VI warned that acceptance of artificial means of contraception would lead to widespread sexual immorality, increased sexual denigration of women, and attempts by governmental authorities to control the conception and birth of children.[56] Yet each of these evils has come to pass. Out of

---

[52] PAUL VI, HUMANE VITAE [ON HUMAN LIFE] (1968).

[53] *Id.*

[54] John Paul II, Familaris Consortio [On the Role of the Christian Family In the Modern World] (1981).

[55] *Id.*

[56] PAUL VI, HUMANAE VITAE [ON HUMAN LIFE] (1968).

wedlock births[57] and sexually transmitted diseases[58] have reached crisis proportions. Violence against women continues to escalate, and its control eludes public authorities.[59] Young women increasingly speak out against the coarseness of social interactions they are forced to endure under the guise of "equality."[60] Foreign governments like The People's Republic of China impose draconian policies of forced abortions on women who violate its one child policy, while the rest of the world passively looks on.[61]

---

[57] George A. Akerlof & Janet L. Yellen, *An Analysis of Out-of-Wedlock Births in the United States* (Aug. 1996), http://www.brook.edu/comm/policybriefs/pb05.htm.

> Before 1970, the stigma of unwed motherhood was so great that few women were willing to bear children outside of marriage. The only circumstance that would cause women to engage in sexual activity was a promise of marriage in the event of pregnancy. Men were willing to make (and keep) that promise for they knew that in leaving one woman they would be unlikely to find another who would not make the same demand. Even women who would be willing to bear children out-of-wedlock could demand a promise of marriage in the event of pregnancy.
>
> The increased availability of contraception and abortion made shotgun weddings a thing of the past. Women who were willing to get an abortion or who reliably used contraception no longer found it necessary to condition sexual relations on a promise of marriage in the event of pregnancy. But women who wanted children, who did not want an abortion for moral or religious reasons, or who were unreliable in their use of contraception found themselves pressured to participate in premarital sexual relations without being able to exact a promise of marriage in case of pregnancy. These women feared, correctly, that if they refused sexual relations, they would risk losing their partners. Sexual activity without commitment was increasingly expected in premarital relationships.

Id.

[58] Centers for Disease Control and Prevention, *Tracking the Hidden Epidemics: Trends in STDs in the United States 2000* (as corrected Apr. 1, 2001) http://www.cdc.gov/nchstp/dstd/Stats_Trends/ Trends2000.pdf.

[59] "Nearly one-third of women murdered each year in the United States are killed by their current or former intimate partners. Approximately 1 million women are stalked each year, and 1 in 36 college women is a victim of an attempted or completed rape in each academic year." Letter from John Ashcroft, U.S. Attorney General, and Tommy Thompson, Secretary of U.S. Department of Health and Human Services, to unspecified recipients (undated), http://toolkit.ncjrs.org/files/393409.pdf.

[60] *See, e.g.*, DANIELLE CRITTENDEN, WHAT OUR MOTHERS DIDN'T TELL US (1999); WENDY SHALIT, A RETURN TO MODESTY (1999).

[61] Arthur E. Dewey, Asst. Sec'y for Population, Refugees & Migration, Testimony before the House International Relations Committee (Dec. 14, 2004), http://www.state.gov/g/prm/rls/39823.htm.

> Yet, let me be clear. China's birth planning law and policies retain harshly coercive elements in law and practice. Forced abortion and sterilization are egregious violations of human rights, and should be of concern to the global human rights community, as well as to the Chinese themselves. Unfortunately, we have not seen willingness in other parts of the international community to stand with us on these human rights issues.

Id.

Each of these abuses arises from a failure to appreciate the power of human sexuality. American laws and customs had long attempted to channel that power into permanent unions of one man and one woman, in part because the act of sexual intercourse was understood to hold the potential to create a new life. As a community, we believed that the participants in that act owed a duty to care for the child during infancy. This duty was best fulfilled within marriage.

When the Court and the culture said sexual intercourse could be rendered sterile at will, the nature of marriage necessarily changed. If the signature act of the union was, or could be voluntarily and permanently sterile, what was marriage for? And what were the proper boundaries or rules for this new institution? The legislatures and courts answered "self-fulfillment."[62] "So long as you both shall live," a sensible constraint if the function and meaning was tied to the creation and raising of children, has become "so long as you both shall love," an illusory constraint that in the end poses no real barriers to the unilateral termination of any relationship.

IV. EXCLUSIVITY

A third marital truth under attack today is that marriage, as a total gift of self between husband and wife, is only fully experienced in an exclusive relationship. Implicit in the idea of exclusivity is the loyalty and intimacy enjoyed within the "bonds of matrimony." Exclusivity is a necessary condition for the complete revelation of self that marriage entails.[63] In part, exclusivity eliminates any basis for comparison. This avoids the danger of devaluing the unique gift of the spouse, and the damage suffered from being evaluated, rather than loved.

A. The Growth of 'Domestic Partnerships'

For centuries, the Church has rejected polygamy. The Catechism teaches that polygamy "is contrary to the equal personal dignity of men

---

[62] *See generally* Eisenstadt v. Baird, 405 U.S. 438 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965).

[63] PAUL VI, HUMANAE VITAE (1968).

> Married love is also faithful and exclusive of all other, and this until death. This is how husband and wife understood it on the day on which, fully aware of what they were doing, they freely vowed themselves to one another in marriage. Though this fidelity of husband and wife sometimes presents difficulties, no one has the right to assert that it is impossible; it is, on the contrary, always honorable and meritorious. The example of countless married couples proves not only that fidelity is in accord with the nature of marriage, but also that it is the source of profound and enduring happiness.

Id.

and women who in matrimony give themselves with a love that is total and therefore unique and exclusive."[64] Similar concern for the equal dignity of men and women persuaded the United States Supreme Court to reject claims that polygamy was protected as a religious practice when presented with the issue in 1878.[65]

Today, new claims on behalf of multi-partner unions are made in the name of "domestic partnerships" or polyamorous unions.[66] In its Principles of the Law Governing Family Dissolution, the American Law Institute embraced the idea that a person may be legally responsible to provide for both a spouse and a domestic partner. "Knowledge that a domestic partner is married to another does not alone bar claims under this Chapter."[67] The drafters justify this innovation in the law on the basis that the unmarried member of the *menage a trois* often enters such relationships without knowledge of the marriage, and learns of the marriage only when "the person may not be in a position to leave the relationship and frequently has no power to cure the legal defect."[68] Exactly what circumstances constitute a position in which a person would be unable to leave the adulterous relationship is not specified. Certainly the stranger to the marriage would have no power to "cure the legal defect" by either initiating a divorce or joining in the marriage. Yet why this justifies continuing a relationship with a man or woman who is married to someone else is never explained.

B. 'Polyamorous' Unions

Polyamorous unions are sexual groupings that have no predetermined gender composition.[69] Advocates of such unions argue that, unlike polygamy with its inherent bias against women, polyamorous unions allow women as well as men to arrange their sexual

---

[64] CATECHISM OF THE CATHOLIC CHURCH § 2387 (quoting JOHN PAUL II, [ON THE ROLE OF THE CHRISTIAN FAMILY IN THE MODERN WORLD] (1981)).

[65] Reynolds v. United States, 98 U.S. 145, 165-66 (1878).

> Upon [marriage] society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necessarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests. Professor Lieber says, polygamy leads to the patriarchal principle, and which, when applied to large communities, fetters the people in stationary despotism, while that principle cannot long exist in connection with monogamy.

Id.

[66] *See, e.g.*, Maura Strassberg, *The Challenge of Post-Modern Polygamy: Considering Polyamory*, 31 CAP. U. L. REV. 439 (2003).

[67] PRINCIPLES OF THE LAW OF DISSOLUTION OF THE FAMILY § 6.01 cmt. (d) (2003).

[68] *Id.*

[69] WEBSTER'S NEW MILLENNIUM DICTIONARY OF ENGLISH (preview ed. 2005).

partnerships to suit their tastes.[70] These arguments continue to treat the physical dimension of the sexual act as if there is no inherent emotional or spiritual component. This denies the reality of the person.

Marriage is intended to be a complete and mutual gift of self.[71] This requires exclusivity. In the absence of exclusivity, the intensity of being fully available to the other would be overwhelming. Competing claims for attention or inevitable comparisons would lead to jealousy and bitterness, with ultimate failure in some aspects of the relationships.

V. CONCLUSION

Permanent sexual partnering between men and women has been the bedrock of every society. For over forty years, Americans have experimented with redefining marriage as temporary liaisons between a man and a woman designed for self-gratification and sexual pleasure. The costs of that experiment have been high and borne most immediately by children and women. Some wish to extend the experiment even further by redefining marriage to include any combination of individuals who publicly affirm their sexual unions. Such a radical change would divorce the word marriage from its content in the natural law, and ultimately lead to even greater harm. Men, women, and children flourish only in a society where the sexual powers are exercised in loving, life-long, and exclusive unions between a man and a woman that are intended to be total gifts of self to the other.

---

[70] *See supra* note 62.

[71] *Matthew* 19:5-6.

THE ELEPHANT IN THE ROOM — CONTRACEPTION AND THE RENAISSANCE OF TRADITIONAL MARRIAGE

*John Tuskey**

I. INTRODUCTION

The Regent University Law Review's symposium on Moral Realism and the Renaissance of Traditional Marriage[1] was a needed and valuable contribution to the public conversation concerning both marriage and the contemporary efforts to undermine the traditional understanding of marriage. But while listening to the speakers at the symposium (all of whom, as evidenced by the papers published, had many trenchant and valuable insights), I had the feeling that there was the proverbial elephant in the room that nobody noticed or wanted to notice. That elephant is contraception. More precisely, it is the relationship between contraception, marriage, and the renaissance of traditional marriage.

I think it is time for those who defend traditional marriage, Christians, in particular, to take notice of the elephant. Why? To be blunt, contraception is antithetical to the traditional Christian understanding of marriage. Moreover, accepting contraception vitiates the logic for distinguishing marriage, as the committed sexual union of one man and one woman, from other relationships (most notably so-called same-sex marriage).

These claims might strike some of my Christian brothers and sisters as overstated. They should not. Until recently (within the context of a two-millennia tradition), the universal judgment of all Christian communions (not just Catholics, but Protestants as well) was that using artificial means to thwart the procreative power of sexual relations was immoral and inconsistent with a proper view of marriage.[2] That changed in 1930 when the Anglican Lambeth Conference (Lambeth) held that

---

* Assistant Professor, Regent University Law School. I thank Dawn Manley, my research and editorial assistant.

1 *See* Symposium, *Moral Realism and the Renaissance of Traditional Marriage*, 17 REGENT U. L. REV. 185 (2005).

2 *See, e.g.*, Harold O.J. Brown, *Contraception – A Symposium*, FIRST THINGS (1998), *available at* http://www.firstthings.com/ftissues/ft9812/articles/ contraception.html ("It was not until 1930 at the Lambeth Conference of the Anglican bishops that any Christian body had ever explicitly authorized the use of contraceptives."); Kathleen O'Grady, *Contraception and Religion: A Short History*, *in* ENCYCLOPEDIA OF WOMEN AND WORLD RELIGION 1999, (Serinity Young et al. eds., Macmillan 1999), *available at* http://www.mum.org/contrace.htm ("Prior to the 1930s all Christian denominations were united in their firm rejection of contraceptives."); *see generally*, Aaron D. Wolf, *Hating Babies, Hating God*, 27 CHRONICLES 19 (June 2003), *available at* http://www.chroniclesmagazine.org/Chronicles/ June2003/0603Wolf.html.

"where there is a clearly felt moral obligation to avoid parenthood," a couple could resort to contraception so long as they did so "in light of . . . Christian principles."[3] That "Christian principles" were not then commonly thought to embrace contraceptive use is revealed in a 1931 editorial in the Washington Post, which responded to the Federal Council of Churches'[4] (FCC) decision to endorse "careful and restrained" contraceptive use:

> It is impossible to reconcile the doctrine of the divine institution of marriage with any modernistic plan for the mechanical regulation or suppression of human birth. The church must either reject the plain teachings of the Bible or reject schemes for the "scientific" production of human souls. Carried to its logical conclusion, the committee's report if carried into effect would sound the death-knell of marriage as a holy institution, by establishing degrading practices which would encourage indiscriminate immorality. The suggestion that the use of legalized contraceptives would be "careful and restrained" is preposterous.
>
> It is the misfortune of the churches that they are too often misused by visionaries for the promotion of "reforms" in fields foreign to religion. The departures from Christian teachings are astounding in many cases, leaving the beholder aghast at the willingness of some churches to discard the ancient injunction to teach "Christ and Him crucified." If the churches are to become organizations for political and "scientific" propaganda they should be honest and reject the Bible, scoff at Christ as an obsolete and unscientific teacher, and strike out boldly as champions of politics and science as modern substitutes for the old-time religion.[5]

The reactions to Lambeth's and the FCC's pronouncements on contraception echoed the view of the Reformers, who uniformly

---

[3] CHARLES E. RICE, NO EXCEPTION: A PRO-LIFE IMPERATIVE 47 (1990) (quoting N.Y. TIMES, Aug. 15, 1930, at 1).

[4] *See* JOHN F. KIPPLEY, BIRTH CONTROL AND CHRISTIAN DISCIPLESHIP 5 (2d ed. 1994). The Federal Council of Churches is now the National Council of Churches.

[5] RICE, *supra* note 3, at 48 (quoting Editorial, WASH. POST, Mar. 22, 1931). Professor Rice also noted the reaction of other Protestant leaders to the Lambeth and FCC decisions. According to Dr. Samuel A. Craig, editor of *Christianity Today*, the Lambeth decision "seem[ed] somewhat equivalent to saying that there are circumstances under which we may lie or steal, provided we do so in light of Christian principles." *Id.* at 47 (quoting N.Y. TIMES, Sept. 30, 1930, at 20). Dr. Walter A. Maier, a professor at Concordia Theological Seminary, called contraception "one of the most repugnant of modern aberrations representing a twentieth century renewal of pagan bankruptcy. . . . It tends to degrade motherhood, and through its involved association with companionate marriage and similar laxities, to weaken marriage ties." *Id.* at 48 (quoting WASH. POST, Mar. 22, 1931, at 1). *See also* KIPPLEY, *supra* note 4, at 6 (citing negative reactions of other Protestants to the FCC's decision).

condemned contraception as unbiblical and immoral.[6] Martin Luther, in fact, likened contraception to a form of sodomy,[7] and John Calvin likened contraception to homicide.[8] This historic Protestant teaching was reflected in the spate of laws, such as the federal Comstock Act,[9] which were passed in the late nineteenth and early twentieth centuries. These laws were passed by Protestant, not Catholic legislative majorities.[10]

The Reformers, and their spiritual descendants up until 1930, consistently condemned contraception as unbiblical;[11] this means they recognized that contraception was inconsistent with a Christian idea of marriage (as the above cited Washington Post editorial explicitly stated). Christian morality has always taught that sexual relations are to take place only between spouses in a marriage.[12] If sexual relations are appropriate only for married couples, and the use of contraception during sexual relations is immoral, then contraception by married couples is inconsistent with the good of marital sexual relations and therefore inconsistent with marriage.

---

6 *See* KIPPLEY, *supra* note 4, at 2.

7 *See also* CHARLES D. PROVAN, THE BIBLE AND BIRTH CONTROL 63-93 (1989); 7 LUTHER'S WORKS, LECTURES ON GENESIS CHAPTERS 38-44 at 20-21 (Jaroslav Pelikan ed., 1965). Specifically, Luther wrote with regard to the story of Onan in Genesis 38:10:

> Onan must have been a malicious and incorrigible scoundrel. This is a most disgraceful sin. It is far more atrocious than incest and adultery. We call it unchastity, yes, a Sodomitic sin. For Onan goes in to her; that is, he lies with her and copulates, and when it comes to the point of insemination, spills the semen, lest the woman conceive. Surely at such a time the order of nature established by God in procreation should be followed.

Id.

8 PROVAN, *supra* note 7, at 67-68.

> The voluntary spilling of semen outside of intercourse is a monstrous thing. Deliberately to withdraw from coitus in order that semen may fall on the ground is doubly monstrous. For this is to extinguish the hope of the race and to kill before he is born the hoped-for offspring. This impiety is especially condemned, now by the Spirit through Moses' mouth, that Onan, as it were, by a violent abortion, no less cruelly than filthily cast upon the ground the offspring of his brother, torn from the maternal womb. Besides, in this way he tried, as far as he was able, to wipe out a part of the human race. If any woman ejects a foetus [sic] from her womb by drugs, it is reckoned a crime incapable of expiation and deservedly Onan incurred upon himself the same kind of punishment, infecting the earth by his semen, in order that Tamar might not conceive a future human being as an inhabitant of the earth.

Id. (quoting JOHN CALVIN, COMMENTARY ON GENESIS 38:8-10).

9 Comstock Act, ch. 258, § 2, 17 Stat. 599 (1873) (making it illegal to send obscene, lewd, or lascivious books through the mail) (current version at 18 U.S.C. § 1461 (2005)).

10 *See* RICE, *supra* note 3, at 47; KIPPLEY, *supra* note 4, at 2-3.

11 PROVAN, *supra* note 7, at 63-93.

12 *Exodus* 20:14; *Deuteronomy* 5:18; 1 *Corinthians* 6:9.

We have strayed far from the historical Christian teaching concerning contraception in the past seventy or so years.[13] Most Protestants, it is fair to say, simply do not regard contraceptive use as an important moral issue, except, perhaps, for the question of whether certain contraceptives may have an abortifacient effect.[14] Even though the Catholic Church has twice since Lambeth officially reconfirmed its historical teaching that contraceptive use is contrary to God's law,[15] that teaching is commonly ignored by many, if not a majority of, Catholics, or those who identify themselves as Catholics (at least in the West).[16] Meanwhile, since 1930, we have experienced a revolution in sexual mores, a revolution that has included attempts to redefine the institution of marriage[17].

Indeed, rather than seeing contraception as inimical to a proper understanding of marriage, many (Christians included) see contraception as a means of enriching marriage. In this view, contraception is good because it "frees" the spouses to be more "spontaneous" in their sexual relationship. Put more pointedly, contraception is seen as good for marriage because it allows spouses to engage in and experience the pleasure of sexual relations whenever the mood strikes them without having to worry about the "burden" of possible pregnancy and childbirth. This attitude in effect treats

---

13 Imagine the Washington Post's reaction to the suggestion that there is something wrong with contraception. There is no need to imagine the response of some Christian publications. For instance, one commentator has reported that "*Christianity Today* devoted considerable space in its November 12, 2001, edition" to a book by a young Protestant couple, Sam and Bethany Torode, urging Christian couples to forsake contraception but that *Christianity Today* editors "could not, however, allow the Torodes to go unchallenged, even for one issue" and published an accompanying essay challenging Torodes' conclusions. *See* Wolf, *supra* note 2, at 20-21. The articles to which Wolf refers are Sam Torode and Bethany Torode, *Make Love and Babies*, CHRISTIANITY TODAY, Nov. 12, 2001, at 49; Raymond C. Van Leeuwen, *Be Fruitful and Multiply—Is This a Command or a Blessing?*, CHRISTIANITY TODAY, Nov. 12, 2001, at 59.

14 Lutheran commentator James Nuechterlein has made this point: "[A]mong Protestants, it is not simply that the overwhelming majority of them come down on the same side of the issue [of contraception], but that for most of them *there is no real issue here at all* . . . . [Contraception] is not a matter that engages them." James Nuechterlein, *Catholics, Protestants, and Contraception*, 92 FIRST THINGS 10-11 (April 1999), *available at* http://www.firstthings.com/ftissues/ft9904/opinion/nuechterlein.html. *See also* Wolf, *supra* note 2 at 20 ("Too many Protestant leaders are simply unwilling to let go of the right to choose – in this case, the right to choose to reject God's blessing of children. The issue, therefore, is simply not discussed.").

15 PAUL VI, HUMANAE VITAE (1968); PIUS XI, CASTI CONNUBII (1930).

16 Edward N. Peters, a Catholic canon lawyer, has noted that "[a]ccording to various studies, the lowest reasonable estimate of contraceptive use among Americans seems to be around 85%, with Catholics being statistically indistinguishable from the population at large." Edward N. Peters, *Contraception and Divorce: Insights From American Annulment Cases*, http://www.canonlaw.info/a_contraceptionanddivorce.htm.

17 *See* Goodridge v. Dep't. of Pub. Health, 798 N.E.2d 941 (Mass. 2003).

pregnancy and childbirth–the creation of a new human being made in the image and likeness of God who may, by God's grace, through all eternity give Him glory and praise–as some kind of burden to be avoided at all costs.[18]

All this should make Christians who seek to defend traditional marriage think seriously about contraception. My modest goal in this essay is to stimulate discussion about contraception among (primarily) Christian defenders of traditional marriage—to persuade them at least to take account of the elephant in the room. To do this, I will first set out an account of traditional marriage from a Christian perspective. Then, I will briefly defend the proposition that contraception (acts taken for the specific purpose of thwarting the procreative end of the marital act; e.g. using a condom, barrier, or birth control pills) is inconsistent with that account of marriage. Throughout, I will discuss why this should matter to Christians and others who defend traditional marriage.

In setting forth and defending the account of traditional marriage and explaining why contraception is inconsistent with that account, I will draw on both natural law and scriptural arguments. Since this essay is directed primarily at Christians, I will not be too concerned about mixing the natural law and scriptural arguments. After all, natural law and Scripture are two ways that God reveals to us both Himself and the truths (both purely physical and moral) about His created world.

II. THE ACT OF TRADITIONAL MARRIAGE

There are several important points about marriage in Scripture that are especially relevant when discussing marriage and contraception. First, Scripture tells us that marriage is a "one-flesh union" of a man and a woman.[19] Jesus confirmed the nature of marriage, and that this was God's original plan for marriage, when asked why Moses allowed divorce: "[H]e who made them from the beginning made them male and female, and said 'For this reason a man shall leave his father and mother and be joined to his wife, and the two shall become one flesh'? So they are no longer two but one flesh."[20] St. Paul reiterated the nature of

---

[18] Scripture seems to testify otherwise. *See, e.g.*, *Psalm* 127:3-5 (Revised Standard Version) (All Scripture quotations in this essay are from the Revised Standard Version.):

> Lo, sons are a heritage from the LORD, the fruit of the womb a reward.
> Like arrows in the hand of a warrior are the sons of one's youth.
> Happy is the man who has his quiver full of them!
> He shall not be put to shame when he speaks with his enemies in the gate.

Id. While any number of Scripture passages treats sterility as a curse and fertility as a blessing, I know of no Scripture passage that treats sterility as a blessing or childbirth as a curse.

[19] *Genesis* 2:24 ("Therefore a man leaves his father and his mother and cleaves to his wife, and they become one flesh.").

[20] *Matthew* 19:4-6. *See also Genesis* 2:24.

marriage as a one-flesh union,[21] and then went on to associate the union of man and wife with the union of Christ and His Church.[22] Paul also makes clear that husbands and wives are to "[b]e subject to one another," instructs wives to be subject to their husbands "[a]s the church is subject to Christ," and instructs husbands to "love your wives, as Christ love[s] the Church."[23] Much can be said about these passages from Ephesians, but the key point here is that by associating the union of man and woman in marriage with the union of Christ and His Church, Paul makes Christ's love for His Church the model of marital love.

A. A "One-Flesh" Union

Reflecting on these two points from Scripture enables us to see why contraception is inconsistent with marriage in the Christian tradition. First, what does it mean that marriage is a "one-flesh" union between a man and a woman? "One-flesh" is not simply a metaphor indicating a close emotional bond. Rather the one-flesh union of marriage is a reality "grounded in the complementarity of reproductive functioning."[24] Men and women are different in a complementary way; they "are designed to complement each other . . . . [T]o be whole, they must be united."[25]

Professor J. Budziszewski of the University of Texas, refers to this fact as "blessed incompletion."[26] The incompleteness–the fact that man and woman need each other to be complete–is blessed because it "makes it possible for them to give themselves to each other."[27] To give oneself to another is to give oneself totally: "You cannot partly give yourself, because your Self is indivisible; the only way to give yourself is to give yourself entirely."[28]

What does this have to do with contraception? To see the connection, one must reflect on the nature of marital sexual relations. More precisely, one must reflect on the nature of sexual intercourse between spouses.[29] When a husband and wife unite sexually, they

---

21 *Ephesians* 5:31.

22 *Ephesians* 5:23 ("For the husband is the head of the wife as Christ is the head of the church, his body, and is himself its Savior.").

23 *Ephesians* 5:21-25.

24 Gerard V. Bradley, *Pluralistic Perfectionism: A Review Essay of* Making Men Moral, 71 NOTRE DAME L. REV. 671, 695 (1996) (reviewing ROBERT P. GEORGE, MAKING MEN MORAL, 1993).

25 J. Budziszewski, *Designed for Sex*, TOUCHSTONE, July/Aug. 2005, at 5, *available at* http://www.touchstonemag.com/archives/article.php?id=18-06-022-f.

26 *Id.*

27 *Id.*

28 *Id.*

29 By "sexual intercourse," I mean genital sexual intercourse, or, as John Finnis has put it, "the inseminatory union of male genital organ with female genital organ." John Finnis, *Law, Morality, and "Sexual Orientation,"* 69 NOTRE DAME L. REV. 1049, 1066 n.46

experience and make real the one-flesh union of marriage. This union is literal—by sexually uniting, the husband and wife literally become one flesh. The significance of sexual union in making real the one-flesh union of marriage is reflected in the traditional legal requirement that consummation of marriage by genital sexual intercourse is an essential element of marriage and that failure to consummate is typically a ground for annulling a marriage.[30]

How is it that by uniting sexually, the couple literally becomes one flesh? The explanation is grounded in the complementarity of sexual functioning. No man or woman can procreate by himself or herself; only a mated pair, consisting of a male and a female, can perform the single function of procreation. Germain Grisez has explained:

> Though a male and a female are complete individuals with respect to other functions – for example, nutrition, sensation, and locomotion – with respect to reproduction they are only potential parts of a mated pair, which is the complete organism capable of reproducing sexually. Even if the mated pair is sterile, intercourse, provided it is the reproductive behavior characteristic of the species, makes the copulating male and female one organism.[31]

This is not crude biologism. Rather, as Budziszewski notes, "the union of the spouses' bodies has a more-than-bodily significance; the body emblematizes the person, and the joining of bodies emblematizes the joining of the persons. . . . [O]ne-flesh unity is the body's language for one-life unity."[32] The body is not merely an instrument the true "self" uses for its own purposes. The body is an integral part of the person, so that when the body acts, the whole person acts. Thus, when spouses join bodily in sexual intercourse–when their bodies become, literally, one functioning organism–they join their whole persons together.[33]

(1994). This excludes, for reasons that will become apparent, acts such as sodomy and mutual masturbation.

30 *See* Jay Alan Sekulow & John Tuskey, *Sex and Sodomy and Apples and Oranges – Does the Constitution Require States to Grant a Right to Do the Impossible?*, 12 BYU J. PUB. L. 309, 318, 322 (1998) (citing Robert P. George & Gerard V. Bradley, *Marriage and the Liberal Imagination*, 84 GEO. L.J. 301, 307-09 nn.23-27 (1996)).

31 George & Bradley, *supra* note 30, at 311-12 (quoting Germain Grisez, The Christian Family as Fulfillment of Sacramental Marriage, Paper Delivered to the Society of Christian Ethics Annual Conference (Sept. 9, 1995) (unpublished manuscript, on file with The Georgetown Law Journal)).

32 Budziszewski, *supra* note 25, at 5.

33 *See* George & Bradley, *supra* note 30, at 311 n.32 ("[M]ales and females–who unite genitally in marital acts really do unite biologically (and, because–as [John] Finnis has observed . . . –the biological reality of human beings is part of their personal reality, they unite personally.").

B. Husbands and Wives Subject as the Church is Subject

Budziszewski's observation about the gift of spouses to each other was based on reasoned reflection about the nature of man and woman.[34] That observation also logically follows from Paul's association of marital union between a man and a woman with the union between Christ and His Church.[35] Christ's love for His Church is the model for marital love.[36] And Christ's love is marked by His complete giving of Himself to and for His Bride.[37] In His love for His Church, Christ held nothing back.[38] He, the second person of the Trinity, took on all the infirmities and indignities of human flesh.[39] He subjected Himself to insults and threats, and ultimately poured out His very life on the Cross in His love for us.[40] If, then, Christ's love for His Church is the model for marital love, spouses (ideally) must also give themselves completely to each other. Just as Christ held nothing back in His love for His Bride, spouses must not hold anything back from each other.

III. CONTRACEPTION AND TRADITIONAL MARRIAGE

Now it is possible to explain why contraception is incompatible with the traditional understanding of marriage as one-flesh union between man and women. The explanation is easier to grasp by first considering an objection to the proposition that marriage really is a one-flesh union. Historically, marriages between sterile spouses have been as understood no less a marriage than marriages between fertile couples. But why is that so if marriage is literally a one-flesh union, and that one-flesh union depends upon the spouses joining together in *reproductive* behavior? One might say that a sterile couple's intercourse is no more "suitable for reproduction"[41] than pointing an empty gun at someone and pulling the trigger is behavior suitable for murder by shooting a person.[42] If so, then either the sterile couple is not really married (although we all recognize the couple as being married) or sexual intercourse does not have the

---

34 *See* Budziszewski, *supra* note 25, at 5.

35 *Ephesians* 5:31.

36 *Ephesians* 5:23.

37 *Matthew* 26:47 – 27:54, *Mark* 14:42 – 15:39, *Luke* 22:47 – 23:49, *John* 18 – 19.

38 *Id.*

39 *Id.*

40 *Id.*

41 *See* Finnis, *supra* note 29, at 1066 n.46 ("Biological union between humans is the inseminatory union of male genital organ with female genital organ; in most circumstances it does not result in generation, but it is the behavior that unites biologically because it is the behavior which, as behavior, is suitable for generation.").

42 *See* Sekulow & Tuskey, *supra* note 30, at 320.

unitive significance I have argued it does. If that is so, "[m]arriage as a 'one-flesh union' is, at best, a metaphor."[43]

The objection fails because it refuses to account for the fact that sexual reproduction includes both a behavioral component (sexual intercourse between the spouses) and a non-behavioral component over which the spouses have no control (for example, the motility of the male's sperm or the presence of an ovum in the woman's reproductive tract). When a sterile couple completes the act of sexual intercourse, that couple performs the behavior necessary for reproduction even if non-behavioral factors beyond their control prevent procreation.

Compare the murder example. Committing murder with a gun also involves behavioral components and non-behavioral components. Among the behavioral components are loading the gun, aiming the gun and pulling the trigger. If a person aims and fires a gun he knows to be unloaded and has chosen not to load, he would be omitting an essential part of the behavior necessary to accomplish a murder. However, if a person loads, aims, and fires, but the firing mechanism malfunctions or a gust of wind blows the bullet off target he would still have performed the behavior suitable for murder. Something other than his behavior has thwarted his efforts.[44]

The sterile couple is like the person who fired the malfunctioning gun. Nothing they *did* prevented their intercourse from generating new life. "It is not as if a man and a woman fail or forget to 'load' sperm in the man's semen or ova into the woman's reproductive tract."[45] Just as the man who fired the malfunctioning gun was performing murderous behavior, the sterile couple by engaging in sexual intercourse was engaging in reproductive behavior. As such, by their act of sexual intercourse, the couple does become one functioning organism and therefore does make real the bodily and personal union of marriage.

Contrast a couple who uses contraception. Unlike the sterile couple, the couple using contraception is acting intentionally to ensure (as much as they can) that procreation does not result from their act of intercourse. Procreation is thwarted by their own behavior. They are (forgive the analogy) in the same position as the "murderer" who deliberately refuses to load or deliberately unloads his gun. Just as that person is not performing behavior suitable to murder by shooting, the couple using contraception is not engaging in behavior suitable to reproduction. By acting deliberately to thwart procreation, their act of intercourse is incapable of actualizing the bodily and personal union of marriage.

---

43 *Id.*

44 *Id.* at 321.

45 *Id.*

Recall St. Paul's association of the union of man and woman in marriage with Christ's union with His Church.[46] This association makes Christ's love for His Church the model for marital love; Christ's love for His Church was completely self-giving—He held nothing back.[47]

Spouses' love for each other is reflected in their actions toward each other. Ideally, then, spouses, if they are modeling Christ's love for His Church, will reflect in their actions toward each other the total self-giving love that Christ showed for His Church.[48] This applies to the couple's sexual relations. In fact, one could say that this applies especially to the couple's sexual relations. If, as Budziszewski states, "one-flesh unity is the body's language for one-life unity,"[49] and the one-life unity is meant to reflect a total gift of the spouses to each other, then the bodily language that reflects that one-life unity–the one-flesh union of sexual union–must also reflect that total gift. In other words, in their sexual union, the couple is saying to each other, "I give all of myself to you."

Contraception, however, deprives marital sexual relations of its capacity for total self-giving. That is because by using contraception, the spouses are holding back from each other their fertility, or whatever fertility happens to exist at the time.[50] In this, the couple is acting contrary to what the "body's language" purports to be saying. The act says, "I give all of myself to you;" in reality, however, that is not the case.

Contraception, then, deprives marital sexual relations of the power actually to unify (literally) the couple, to make them literally one-flesh. It is contrary to the total self-giving that marital love (modeled on the love of Christ for His Church) ideally should entail. By embracing contraception, Christians who purport to defend traditional marriage send the message that they are willing to settle for something less than the total self-giving and one-flesh unity that traditional marriage is supposed to be. That something less is a relationship based ultimately on feelings of closeness and sexual pleasure. However, feelings and pleasure, unlike true one-flesh union, do not require a mated pair

---

46 *Ephesians* 5:23.

47 *Matthew* 26:47 – 27:54, *Mark* 14:42 – 15:39, *Luke* 22:47 – 23:49, *John* 18 – 19.

48 Of course, I realize that unlike Christ, we are not sinless and, more often than not, our actual behavior will not meet this standard. Still, morality is based on ideals – how one ought to act – and the fact that we often fail to live up to the moral standard does not mean the moral standard must change or that we need not strive (by the help of God's grace) to meet that standard more and more in our lives.

49 Budziszewski, *supra* note 25, at 6.

50 Note the difference with the infertile couple or the couple having sexual relations during the infertile time of the woman's cycle; they are not holding back from giving each other their fertility in their sexual act. That they are not actually giving each other their fertility occurs only because they have no fertility to give, not because they have it but have taken steps to suppress it.

consisting of male and female. So the question naturally arises: Why should the law give special protection to marriage as the union of one man and one woman when what we are willing to call marriage is not something that requires a man and a woman (or even only a pair, for that matter)?

IV. CONCLUSION

I submit that accepting contraception makes it difficult, if not impossible, to give a convincing answer to that question. Therefore, it is time for those who defend traditional marriage, particularly Christians, to begin to think seriously (as the Church has historically) about contraception. It is time to take notice of the elephant in the room.

STARVING THE TERRORISTS OF FUNDING: HOW THE UNITED STATES TREASURY IS FIGHTING THE WAR ON TERROR

"Armed conflict cannot be waged until it has been financed."[1]

I. INTRODUCTION

"We will starve the terrorists of funding, turn them against each other, rout them out of their safe hiding places and bring them to justice."[2] With these words President George W. Bush issued Executive Order 13224, empowering the United States government to impose financial sanctions against those "that support or otherwise associate" with terrorist organizations and freezing the assets of twenty-seven entities, including non-profit organizations, corporations, and terrorist groups.[3] Treasury Secretary Paul O'Neil told senators, "for the first time we will systematically use all the information . . . at the disposal not only of our government, but co-operating governments . . . to begin a closing down of bank accounts, asking other governments to block accounts, and . . . to confiscate amounts that are in these accounts."[4] Specifically, "[o]ur objective is . . . to follow the money trail, and dismantle entire financial networks and channels from moving money to finance terror."[5]

---

[1] SUN TZU, THE ART OF WAR 72-73 (Samuel Griffith trans., Oxford Univ. Press 1963). *See also* U.S. DEP'T OF THE TREASURY & U.S. DEP'T OF JUSTICE, 2003 NATIONAL MONEY LAUNDERING STRATEGY 53 (2003), *available at* http://www.treasury.gov/offices/enforcement/publications/ml2003.pdf [hereinafter 2003 LAUNDERING STRATEGY]; *Terrorism: Growing Wahhabi Influence in the United States: Hearing Before the Subcomm. on Terrorism, Technology and Homeland Security of the S. Comm. on the Judiciary*, 108th Cong. 9 (2003) [hereinafter *Hearing*] (statement of David D. Aufhauser, General Counsel, Department of the Treasury) (pointing out that terrorists have access to funding, at least in recent years, as evidenced by al Queda having the means to pay the Taliban twenty million dollars annually for safe harbor in Afghanistan). Also worthy of note: the terrorist attacks of 9/11 are believed to have cost al Queda less than $400,000. *Combating Terrorism: Federal Agencies Face Continuing Challenges in Addressing Terrorist Financing and Money Laundering, Hearing Before the Caucus on International Narcotics Control, U.S. Senate,* 107th Cong. 4 (2004) (Statement of Loren Yager and Richard Stana).

[2] U. S. DEP'T OF THE TREASURY, CONTRIBUTIONS BY THE DEPARTMENT OF THE TREASURY TO THE FINANCIAL WAR ON TERRORISM, 2 (2002), http://www.treas.gov/press/releases/reports/2002910184556291211.pdf [hereinafter FACT SHEET].

[3] Exec. Order No. 13,224, 3 C.F.R. 786, 790 (2002), *reprinted as amended in* 50 U.S.C.A. § 1701 (2003).

[4] *See* CNN.com, *Bush: 'Justice will be done,'* CNN.com, Sept. 20, 2001, *available at* http://archives.cnn.com/2001/US/09/20/gen.america.under.attack/ (last visited Jan. 24, 2006).

[5] *Financial War on Terrorism: New Money Trails Present Fresh Challenges: Hearing Before the S. Comm. On Finance*, 107th Cong. 5 (2002) [hereinafter *Financial War Hearings*] (statement of Hon. James Gurule, Under Secretary for Enforcement, Department of the Treasury).

It has proved significantly harder to detect the financial dealings of terrorists than to detect ordinary money laundering;[6] a crime the United States Treasury ("Treasury") is accustomed to fighting.[7] Money laundering by definition involves transferring "dirty" money through the financial system in such a way that it appears "clean."[8] In contrast, terrorists are doing just the opposite; taking "clean" money and using it for "dirty" purposes long after the money has legitimately traveled through our banking system.[9] So how does the Treasury determine which money is destined for terrorists?[10] The Honorable Max Baucus, Chairman of the Senate Finance Committee, has summarized the problem as "looking for a needle in a pile of needles."[11] Despite these hurdles, both the executive branch and the Congress have created some impressive weapons designed to curb the supply of money going to support terrorism. This note will look specifically at how the Treasury is aiding the war on global terrorism by starving the terrorists of funding.

II. THE PROBLEM: FINDING A NEEDLE IN A PILE OF NEEDLES

Lee Hamilton, Vice Chair of the National Commission on Terrorist Attacks (9/11 Commission) recently testified before the House Committee on Financial Services that "[i]n reality, stopping the flow of funds to al Qaeda and affiliated terrorist groups has proven to be essentially impossible."[12] Terrorists finance their activities in a number of ways. In some parts of the world terrorists resort to "extortion, kidnapping, narcotics trafficking, counterfeiting, and fraud to support their terrorist acts."[13] However, a considerable portion of terrorist

---

[6] *Id.* at 2 (opening statement of Hon. Max Baucus, Chairman, Committee on Finance).

[7] *See generally* 2003 LAUNDERING STRATEGY, *supra* note 1.

[8] Economist.com, *The Money Trail*, ECONOMIST.COM, Oct. 22, 2001, http://www.economist.com/agenda/PrinterFriendly.cfm?Story_ID=831312 (last visited April 15, 2006) (on file with author).

[9] *See id.*; *see also Hearing Before the Comm. on Int'l Relations*, 109th Cong. 3 (2004) (testimony of Herbert A. Biern).

[10] *See* Matthew Levitt, Charitable Organizations and Terror Financing: A War on Terror Status-Check 2 (Mar. 19, 2004) (paper presented at the workshop "The Dimensions of Terrorist Financing," University of Pittsburgh), *available at* http://www.washingtoninstitute.org/templateC07.php?CID=104. Levitt points out that no counterterrorism technique or effort, however extensive, international, or comprehensive, will put an absolute end to such attacks or uproot terrorism. There will always be people and groups with entrenched causes, an overwhelming sense of frustration, a self-justifying worldview, and healthy dose of evil, who will resort to violence as a means of expression. *Id.*

[11] *Financial War Hearings*, *supra* note 5, at 3 (Prepared Statements of Max Baucus).

[12] *The 9/11 Commission Report: Identifying and Preventing Terrorist Financing: Hearing Before the H. Comm. on Financial Servs.*, 109th Cong. 108 (2004) (prepared statement of Lee H. Hamilton, Vice Chair, National Commission on Terrorist Attacks).

[13] *Hearing*, *supra* note 1, at 68 (testimony of David D. Aufhauser).

financing originates from petty crime, credit card theft, and illegal cigarette sales,[14] relatively insignificant crimes that are often overlooked by investigators preoccupied with the search for large cash transfers.[15] For example, the Federal Bureau of Investigation estimates the terrorist group Hizballah earned $1.5 million in the United States from 1996 to 2000 "purchasing cigarettes in a low tax state for a lower price and selling them in a high tax state at a higher price."[16] In addition, as the current anti-terrorist financing regime becomes increasingly effective, terrorists are resorting to transporting cash in suitcases—often in amounts that would not raise suspicion even if detected.[17]

The heart of the problem is that unlike money laundering, terrorist financing often originates with legitimate organizations and travels through customary channels. While money laundering "depends on the existence of an underlying crime, terrorist financing does not."[18] It is often difficult, if not impossible, to determine whether funds are destined for a terrorist organization until they are actually delivered. This problem is readily apparent in the case of Muslim charities. Americans alone donate millions to Muslim charities each year.[19] Worldwide, Muslim charities are funded in large part by *zakat*[20] (charitable giving):

---

[14] *Financial War Hearings*, *supra* note 5, at 2 (statement of Hon. James Gurule).

[15] *See Intellectual Property Crimes: Are Proceeds From Counterfeited Goods Funding Terrorism? Hearing Before the H. Comm. On Int'l Relations*, 108th Cong. 4 (2003) [hereinafter *Hearing*] (prepared statement of Larry C. Johnson, Chief Executive Officer, BERG Associates, LLC) Johnson mentions that, incidentally, as airports have increased "security measures there [has been] a dramatic increase in the number of people apprehended carrying stolen airline tickets, money, and drugs." *Id.*

[16] *Money Laundering: Current Status of Our Efforts To Coordinate and Combat Money Laundering and Terrorist Financing: Hearing Before the S. Caucus on International Narcotics Control*, 108th Cong. 17 (2004) (prepared statement of Loren Yager, Director of International Affairs and Trade, General Accounting Office, and Richard M. Stana, Director of Homeland Security and Justice, General Accounting Office).

[17] Wolffe, Richard et al., *Who Did It and How? Huge Obstacles in Global Search for Terrorist Paper Trail*, Financial Times, Sept. 24, 2001, *available at* http://specials.ft.com/aoa/FT3BKGH7ZRC.html.

[18] *See also* 2003 LAUNDERING STRATEGY, *supra* note 1, at 2, n. 1 (pointing out that "money laundering depends on the existence of an underlying crime, while terrorist financing does not").

[19] *Financial War Hearings*, *supra* note 5, at 34 (testimony of Hon. James Gerule).

[20] *See generally* http://www.zpub.com/aaa/zakat-def.html (last visited March 6, 2006).

> The Zakat is a form of giving to those who are less fortunate. It is obligatory upon all Muslims to give 2.5 % of wealth and assets each year (in excess of what is required) to the poor. This is done before the beginning of the month of Muharram, the first of new year. Giving the Zakat is considered an act of worship because it is a form of offering thanks to God for the means of material well-being one has acquired. Zakat means grow (in goodness) or 'increase', 'purifying' or 'making

under Islamic law, every devoted Muslim should give 2.5 percent of annual income to the needy and destitute.[21] Fouad Allam, former head of Egypt's security service, warns that inevitably some of the money collected by charities finds its way to Islamic militants.[22] The Council on Foundations recommends that while charities should "not stop making grants abroad," they should carefully "document all their transactions."[23] A senior State Department official commented on the scope of the problem by saying "any money can be diverted if you do not pay attention to it."[24] Legitimate donations can be funneled, wittingly or unwittingly, to terrorist organizations in negligible sums long after the money has left traceable channels. In addition, the diversion of funds to support terrorism often occurs at the hand of low level workers, after the funds are in a country with unsophisticated money transfer systems, and in ways that fail to implicate the leaders of the organization.[25]

Has the Treasury been wielding too big an axe? "How can [a charity] support any needy . . . families and guarantee that no money will go to someone involved in some [terrorist] action?"[26] asks Ingrid Mattson, professor of Islamic studies at Hartford Seminary. Steve Sosebee, president of the Palestine Children's Relief Fund, cites a program in Hebron which delivers powdered milk to malnourished mothers and children as an example of how desperately money is needed for immediate relief.[27] No one disputes that charities play an important role in the Muslim world.[28] Many Muslim charities argue the Treasury's

---

> pure'. So the act of giving zakat means purifying one's wealth to gain Allah's blessing to make it grow in goodness.

Id.

[21] Salah Nasrawi, *Muslim Charities Allegedly Financing Terrorist Groups*, HOUSTON CHRONICLE, Sept. 20, 2001, at A22.

[22] Associated Press Story, Sept. 1, 2001 *Muslim Charities Eyed: Donations Going to Militant Groups*, *available at* http://www.ci-ce-ct.com/article/showquestion.asp?faq=10&fldAuto=1546.

[23] Christopher Quay, *Official Outlines Treasury's View of Charities, Terrorist Financing*, __ Tax Notes, 1227-28 (2004).

[24] *The Role of Charities and NGO's in the Financing of Terrorist Activities: Hearing Before the Subcomm. on International Trade and Finance of the S. Comm. on Banking, Housing, and Urban Affairs*, 107th Cong. 44 (2002) (quoting Francis X. Taylor, Coordinator for Counterterrorism, Department of State) (citation omitted).

[25] National Commission on Terrorist Attacks Upon the United States, 56 http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

[26] Jane Lampman, *US Muslims in a Quandary Over Charities*, Christian Science Monitor, Nov. 17, 2004, *available at* http://www.csmonitor.com/2004/1117/p11s02-lire.html.

[27] Stephanie Strom, *Charity Seeks to Transfer Money Frozen By Treasury*, NEW YORK TIMES, April 15, 2004.

[28] Christopher Quay, *Officials, EO Reps Discuss Terrorist Financing, 403(b) Regs*, __ Tax Notes 1109 (2004) (citing Chip Poncy, a senior technical advisor at Treasury, as saying that charities are "vulnerable" and that "shutting charities down harms U.S.

actions are needlessly hurting their fundraising efforts. [29] In its report, the 9/11 Commission raised concerns over the government's policy of shutting down charities and freezing funds without a formal determination of wrongdoing.[30] The Treasury recently responded by announcing that it would accept petitions for a release of frozen funds to a third party, who would distribute them for their intended purpose.[31]

So how is the Treasury going about starving the terrorists of funding without unnecessarily hindering legitimate humanitarian efforts or violating civil liberties?[32] The legally acceptable scope of the Treasury's actions is just beginning to be determined in the courts. For example, on November 10, 2004, a coalition of charities filed a lawsuit challenging a rule requiring organizations that receive money from a federal employees' charitable drive to check each of their employees against Treasury terrorist watch lists.[33] The group, led by the American Civil Liberties Union, contends the requirement is vague, difficult to comply with, and violates the law.[34]

---

interests because charitable assistance helps poor Arab communities, making them less prone to the effects of poverty, which is one of the factors that leads to terrorism").

[29] *See generally* Montgomery E. Engel, Note, *Donating "Blood Money": Fundraising for International Terrorism by United States Charities and the Government's Efforts to Constrict the Flow*, 12 CARDOZO J. INT'L & COMP. L. 251, 295 (2004) (arguing that "the use of blocking orders should be minimized wherever possible" because of due process concerns and to better "win the battle for hearts and minds" in the Muslim world).

[30] *See* Report of the 9/11 Commission *at* http://www.9-11commission.gov/report/911Report_Ch12.htm (under "Targeting Terrorist Money").

[31] Jane Lampman, *US Muslims in a Quandary Over Charities*, Christian Science Monitor, Nov. 17, 2004, *available at* http://www.csmonitor.com/2004/1117/p11s02-lire.html.

[32] On October 19, 2001, Congressman Ron Paul from Texas took the floor of the House to quote *Matthew 20:15*, "Do not I have the right to do what I want with my own money?" *available at* http://www.house.gov/paul/congrec/congrec2000/cr101900money.htm. Congressman Paul went on to discuss the "Natzification of America" pointing out that

> [i]f you are fortunate enough to fall into the estimated group of six million millionaires worldwide . . . you automatically may be a criminal suspect . . . because Citibank views these wealthy people . . . as potential criminals . . . [and they] each are watched every minute of every day to see if the engage in money laundering or other financial crimes.

Id.

[33] Chris Strohm, *Groups Challenge Terrorist Screening Rule in Federal Charity Campaign*, Government Executive, Nov. 10, 2004, *available at* http://www.govexec.com/dailyfed/1104/111004c1.htm.

[34] Tim Kauffman, *CFC Terror Watch List Doesn't Scare Away Charities*, FEDERAL TIMES, Aug. 9, 2004, at 6 *available at* http://www.ombwatch.org/npa/acluvcfc-complaint.pdf (reporting that the ACLU is the only charity that withdrew from the campaign while other charities believe that "[c]ertifying that they do not hire terrorists or contribute funds to terrorist organizations is a small price to pay to remain in the campaign") (citing Anthony De Cristofaro, vice president of public affairs for Global Impact, a nonprofit charity organization based in Alexandria, Virginia).

While an inquiry into the normative questions regarding the Treasury's activity is beyond the scope of this note, where applicable, we will mention current legal challenges as we look specifically at how the Treasury is starving the terrorists of funding.

III. THE TREASURY'S STRATEGY TO STARVE TERRORIST OF FUNDING

Prior to the terrorist attacks of September 11, 2001, the Treasury's anti-terrorist actions were limited primarily to its anti-money laundering regime. For example, the Bank Secrecy Act (BSA)[35] required anyone moving over $10,000 in cash in or out of the United States to report the transfer to the Treasury.[36] In addition, financial institutions were required to inform the Treasury of suspicious transactions in excess of $5000.[37] However, this authority proved too limited to fight a global war on terror. For example, *hawala*, an informal value transfer system popular with Muslims, were not considered to be "financial institutions" and thus were not required to comply with the BSA.[38] On October 26, 2001, President Bush signed into the law the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorist Act of 2001 (Patriot Act).[39] Title III of the Patriot Act, entitled, International Money Laundering Abatement and Anti-Terrorist Financing Act of 2001, (referred to as the "smart bomb" of terrorist financing)[40] included amendments to the BSA[41] intended to aid in the "prevention, detection, and prosecution of international money laundering and terrorist financing."[42] Additionally, Section 311 of the Patriot Act authorizes the Treasury to designate a "foreign jurisdiction, institution, class of transaction, or type of account" as a "primary money laundering concern."[43] Section 311 further provides the Treasury with authority to prohibit transactions originating with any entity so designated.[44] These amendments, in addition to Executive Order

---

[35] Bank Secrecy Act of 1970, Pub. L. No. 91-508, 84 Stat. 1114 (codified as amended in scattered sections of 12 U.S.C., 15 U.S.C., 18 U.S.C., and 31 U.S.C.) [hereinafter Bank Secrecy Act].

[36] 31 U.S.C. Part 103 See Bank Secrecy Act–31 C.F.R. Part 103 *available at* http://www.occ.treas.gov/fr/fedregister/69fr19098.pdf.

[37] *See* Bank Secrecy Act, *supra* note 35.

[38] National Drug Intelligence Center, National Drug Threat Assessment 2005, *available at* http://www.usdoj.gov/ndic/pubs11/12620/money.htm.

[39] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 [hereinafter USA PATRIOT ACT] (codified as amended in scattered sections of U.S.C.).

[40] *Hearing*, *supra* note 1, at 78 (statement of David D. Aufhauser).

[41] Bank Secrecy Act of 1970, *supra* note 35.

[42] Due Diligence Anti-Money Laundering Programs for Certain Foreign Accounts, 67 Fed. Reg. 37,736 (May 30, 2002).

[43] 2003 LAUNDERING STRATEGY, *supra* note 1, at 12-13.

[44] *See* USA PATRIOT ACT Section 311(5).

13224,[45] expanded the Treasury's authority by requiring "hawalas to register as 'money services business' or 'MSBs' which subjects them to money laundering regulations including the requirement that they file Suspicious Activity Reports."[46]

Pursuant to its new authority, the Treasury expanded its anti-money laundering operations, established new departments, and added investigative teams designed specifically to target terrorist finances.[47] The Treasury's strategy can be broken down as follows: (1) targeted intelligence gathering;[48] (2) freezing of suspect assets;[49] (3) diplomatic efforts and outreach;[50] (4) outreach to the financial sector;[51] and (5) capacity building for other governments and the financial sector.[52] The following subsections will look at the Treasury's specific actions in light of the five categories above.

A. Targeted Intelligence Gathering

The Treasury is scouring the global financial system for suspicious activities with greater precision than ever before thanks in large part to amendments to the Bank Secrecy Act (BSA) passed as part of the Patriot Act. As mentioned in the previous section, prior to September 11, 2001, the BSA was primarily designed to combat traditional money laundering.[53] Title III of the Patriot Act expanded the BSA to require financial institutions to perform "enhanced due diligence" on private accounts, expanded the BSA to include foreign financial institutions with assets within the borders of the United States, and expanded the United State's "courts' long-arm jurisdiction over individuals and foreign banks suspected of being involved in money laundering."[54] The government was given an opportunity to prosecute under the "long arm money

---

[45] Exec. Order No. 13,224, 3 C.F.R. 786, 790 (2002), *reprinted as amended in* 50 U.S.C.A. § 1701 (2003).

[46] FACT SHEET, *supra* note 2, at 15.

[47] *Financial War Hearings*, *supra* note 5, at app. 32 (Testimony of Hon. James Gurule).

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *The Financial War on Terrorism and the Administration's Implementation of the Anti-Money Laundering Provisions of the USA Patriot Act: Hearing Before the S. Committee on Banking, Housing, and Urban Affairs*, 107th Cong. 2 (2002) [hereinafter *Anti-Money Laundering Provisions Hearing*].

[54] Alicia L. Rause, *USA Patriot Act: Anti-Money Laundering and Terrorist Financing Legislation in the U.S. and Europe Since September 11th*, 11 U. MIAMI INT'L & COMP. L. REV. 173, 175 (2003).

laundering law" when a "Panamanian gold and jewelry merchant who did no business and had no presence or bank account in the United States, but took millions of drug dollars saying she did not know their source" was charged with money laundering.[55] In *United States v. Speed Joyeros, S.A.*,[56] Yardena Hebroni fell under U.S. money laundering laws even though she "did not run a bank or financial institution of any kind, [and] . . . did not have a bank account in the U.S."[57] She was, however, subject to the jurisdiction of the U.S. money laundering legislation because a large portion of the Columbian drug money she received was in the form of checks drawn on U.S. bank accounts."[58] Closer to home, Broadway National Bank, located in New York City, pleaded guilty to failing to report $123 million in suspicious deposits that moved through over 100 accounts.[59]

The Patriot Act has been determined to have altered the BSA in other ways. For example, in the recent case of *United States v. Wray*,[60] a court held that the Patriot Act[61] expanded the BSA's definition of "within the United States" to include "the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the Northern Mariana Islands, American Samoa, the Trust Territory of the Pacific Islands, a territory or possession of the United States, or a military or diplomatic establishment."[62] In *Wray*, United States Custom officials found $120,000 in cash concealed in a suitcase carried by Wray as he attempted to enter the Virgin Islands.[63] The BSA prohibits knowingly concealing more than $10,000 while in transit "from a place outside the United States to a place within the United States."[64] Wray unsuccessfully argued the phrase "within the United States" did not extend to include the Virgin Islands.[65]

Perhaps most controversially, the BSA authorizes the Treasury to require financial institutions to spy on their customers.[66] In the words of one privacy group, the BSA authorizes the Treasury to:

---

55 *Id.* at 176. This case summary is taken almost entirely from this law review article.

56 United States v. Speed Joyeros, S.A., 204 F. Supp. 2d 412 (E.D.N.Y. 2002).

57 Rause, *supra* note 54, at 176.

58 *Id.*

59 2003 LAUNDERING STRATEGY, *supra* note 1, at 45.

60 United States v. Wray, No. CR.2002-53, 2002 WL 31628435 (D.V.I., 2002).

61 31 U.S.C.A. § 5312(a)(6) (2005).

62 Rause, *supra* note 54, at 178.

63 *Id.*

64 31 U.S.C.A. § 5332(a)(1) (2005).

65 Rause, *supra* note 54, at 178.

66 *See generally* BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, BANK SECRECY ACT EXAMINATION PROCEDURES FOR CUSTOMER IDENTIFICATION PROGRAMS, *available at* http://www.federalreserve.gov/boarddocs/srletters/2004/sr0413a1.pdf (last

> require financial institutions to maintain records of personal financial transactions that "have a high degree of usefulness in criminal, tax and regulatory investigations and proceedings." It also authorizes the Treasury Department to require any financial institution to report any "suspicious transaction relevant to a possible violation of law or regulation."
>
> . . . .
>
> This is done secretly, without the consent or knowledge of bank customers, any time a financial institution decides that a transaction is 'suspicious.' The reports are made available electronically to every U.S. Attorney's Office and to 59 law enforcement agencies, including the FBI, Secret Service, and Customs Service. A law enforcement agency does not have to be suspicious of an actual crime before it accesses a report, and no court order, warrant, subpoena, or even written request is needed.[67]

In addition to the civil liberty issues raised by using this information to starve terrorists of funding, there are allegations of abuse.[68] For example, Newsweek reports that in "Operation G-String," the FBI used the Patriot Act to view the financial records of Las Vegas officials believed to have accepted bribes from "the city's biggest strip-club baron."[69]

The Treasury argues the additional powers granted to them in the Patriot Act are necessary, as does Lee Hamilton, Vice Chairman of the 9/11 Commission.[70] Hamilton recently told the House Financial Services Commission that "enforcement of the Bank Secrecy Act rules for financial institutions, particularly in the area of suspicious activity reporting, is key to tracking and disrupting the activities of terrorist groups" because "financial institutions are in the best position to understand and identify problematic transactions or accounts."[71]

---

visited Dec. 17, 2004) (outlining the Bank Secrecy Act requirements for financial institutions).

[67] Privacilla.org, The Bank Secrecy Act, http://www.privacilla.org/government/banksecrecyact.html (last visited Jan. 24, 2006); see *also Legislative Proposals to Implement the Recommendations of the 9/11 Commission: Hearing Before the H. Comm. on Financial Serv.*, 108th Cong. 352 (2004) [hereinafter *Legislative Proposals Hearing*] (testimony of Hon. Stuart A. Levey, Under Secretary, Terrorism and Financial Intelligence, U.S. Department of the Treasury).

[68] Michael Isikoff, *Show Me the Money: Patriot Act Helps the Feds in Cases With No Ties to Terror*, NEWSWEEK (Dec. 1, 2003) *available at* http://msnbc.msn.com/id/3540572/.

[69] *Id.*

[70] Sarah Borchersen-Keto, *Bank Secrecy Act Provisions Central to War on Terrorist Financing, Commission Says*, CCH FOCUS (August 23, 2004) *available at* http://www.business.cch.com/bankingfinance/focus/news/20040823.asp.

[71] *See also Hearing Before the Comm. on International Relations*, 109th Cong. 3 (2004) (testimony of Herbert A. Biern) (concluding that "banking organizations have to

However, Hamilton did admit the Treasury's use of the International Emergency Economic Powers Act against United States citizens and organizations "raises 'significant' civil liberties concerns because it allows the government to shut down an organization on the basis of classified evidence, subject only to a deferential after-the-fact judicial review."[72] The BSA has changed how virtually every financial organization ensures compliance and remains of the most visible expansions of the Treasury's power. Although it is difficult to quantify, the amendments to the BSA passed as part of the Patriot Act constitute significant weapons in the Treasury's attempt to starve the terrorists of funding.

B. Freezing of Suspect Assets

When President Bush signed Executive Order 13224, he authorized the Treasury to freeze or impose financial sanctions on any individual or entity that meets the following five criteria:

> (1) foreign individuals or entities listed in the [executive order]; (2) foreign individuals or entities that "have committed or . . . pose a significant risk of committing acts of terrorism that threaten the [national] security . . ." of the United States; (3) individuals or entities that either are "owned or controlled by" or "act for or on behalf of" [the parties above]; (4) individuals or entities that [support] parties [designated as terrorist organizations]; (5) individuals or entities that are "otherwise associated" with [the parties listed above].[73]

As of January 2004, the Treasury, along with the international community, has used these criteria to freeze at least $139 million in terrorist assets, including at least $36.7 million from within the United States,[74] from 351 individuals and entities.[75] This number does not include the approximately $3.3 billion of Iraqi assets recovered after the

---

take reasonable and prudent steps to combat illicit financial activities such as money laundering and terrorist financing").

[72] Sarah Borchersen-Keto, *Bank Secrecy Act Central to War on Terrorist Financing According to 9-11 Commission*, COMPLIANCEHEADQUARTERS.COM, Aug. 2004, http://www.complianceheadquarters.com/AML/AML_Articles/8_24_04.html (last visited Jan. 24, 2006); *see also* Engel, *supra* note 29, at 295.

[73] U. S. DEP'T OF THE TREASURY, TERRORISM AND FINANCIAL INTELLIGENCE: DESIGNATIONS, http://www.treas.gov/offices/enforcement/designations.shtml (last visited Jan. 24, 2006).

[74] Press Release, Office of Public Affairs, U. S. Dep't of the Treasury, Bush Admin. Announces Budget Increase to Help Fight Terrorist Financing and Financial Crime (Jan. 16, 2004), http://www.treas.gov/press/releases/js1100.htm (last visited Jan. 24, 2006).

[75] U. S. DEP'T OF THE TREASURY, TERRORISM AND FINANCIAL INTELLIGENCE, 3 *available at* http://www.treas.gov/offices/enforcement/ (last visited Dec. 17, 2004).

fall of Saddam Hussein.[76] Freezing terrorist assets remains the Treasury's "primary objective" because it does more than deprive terrorists of their money. Rather, it has the added benefit of being a "highly visible weapon" which often "prevents the collecting, receiving, consolidating, managing, and moving of assets" by deterring those who would use the financial system to fund terrorism in the future.[77] The Treasury warns that "[o]nly a small measure of success in the campaign is counted in the dollars of frozen accounts . . . [t]he larger balance is found in the wariness, caution, and apprehension of donors."[78]

As mentioned earlier, some of the Treasury's more controversial actions have involved charities. Effective November 11, 2003, Section 501(p) of the Military Family Tax Relief Act of 2003,[79] which is an "extension of the authority granted the Executive Branch under the Patriot Act, empowers the President to indefinitely suspend the tax-exempt status of any organization, designated by Executive Order, which is suspected of supporting terrorist activities."[80] Upon receipt of this authority, the Treasury immediately suspended the tax exempt status of the Benevolence International Foundation, Inc., the Global Relief Foundation, Inc., and the Holy Land Foundation.[81] Nearly two years earlier, in December 2001, the Treasury had "blocked suspect assets and records" of the United States offices of the three large charities for supporting terrorism.[82] The Treasury's actions received extensive press coverage and were seen as an attack on legitimate fund raising efforts, particularly in the Muslim world where the charities are well known. The Treasury counters that "the problem underlying this concern is the abuse of charities by terrorist organizations. It is this abuse, not the consequential freezing actions taken by [the Treasury], which undermines donor confidence."[83] Incidentally, during raids in March 2002 on eight Bosnian organizations affiliated with Benevolence International, one of the three large American charities targeted, law enforcement officials uncovered "firearms, a ski mask, numerous

---

[76] *Id.*

[77] 2003 LAUNDERING STRATEGY, *supra* note 1, at 6-7.

[78] *Hearing Before the S. Banking, Hous., and Urban Affairs Comm.*, 108th Cong. 4 (2003) (testimony of David D. Aufhauser).

[79] Military Family Tax Relief Act of 2003 (Pub.L. 108-121, Nov. 11, 2003, 117 Stat. 1335).

[80] Nancy Kuhn, *U.S. Charities Supporting Terrorism? All Are Caught in the Net*, NONPROFIT LEADER, Feb. 2004, http://www.nonprofitleader.org/04_02/article4.html.

[81] *See* Engel, *supra* note 29, at 295 (giving a detailed procedural history and outlining the government's case against the charities).

[82] Jane Lampman, *US Muslims in a Quandary Over Charities*, CHRISTIAN SCIENCE MONITOR, Nov. 17, 2004, *available at* http://www.csmonitor.com/2004/1117/p11s02-lire.html.

[83] *Hearing*, *supra* note 1, at 72 (testimony of David D. Aufhauser).

military manuals on topics including small arms and explosives, and a fraudulent passport," but most interestingly, "photographs of Arnaout (the CEO of Benevolence International) handling rifles, a shoulder-fired rocket, and an anti-aircraft gun."[84] Arnaout later pleaded guilty to racketeering.[85]

The Treasury continues to take steps to block charities that would channel funds to terrorists. On October 18, 2004, Treasury Secretary John Snow posted a list of twenty-seven charities worldwide that the Treasury has designated as financiers or supporters of terrorism.[86] On the same day, the United States Justice Department rejected calls by Muslim groups to provide a list of charities to which Muslims could safely donate as "impossible."[87] Stating, "[o]ur role is to prosecute violations of criminal law. We're not in a position to put out lists of any kind, particularly of any organizations that are good or bad."[88]

The Treasury is also working with other governments to shutter charities around the world that fund terrorism. For example, on March 11, 2002, the United States and Saudi Arabia "jointly designated" Al Haramain, a Saudi NGO, as a supporter of terrorism.[89] To date, the Treasury has worked with dozens of countries to designate twenty-seven charities worldwide as financiers or supporters of terrorism.[90]

C. Diplomatic Efforts and Outreach

A senior Treasury official testifying before Congress stated that "[t]ogether with other agencies, we are using our diplomatic resources and regional and multilateral engagements to ensure international cooperation, collaboration and capability in dismantling terrorist financing networks."[91] Stuart Levey, Under Secretary of Terrorism and

---

[84] *Financial War Hearings*, *supra* note 5, at 29 (statement of Hon. Michael Chertoff).

[85] CNN.com, *Muslim Charity Director Pleads Guilty To Racketeering*, *available at* http://www.cnn.com/2003/LAW/02/10/charity.director.plea/ (last visited April 17, 2006).

[86] Anwar Iqbal, *U.S. Forbids Ramadan Charity to 'Terrorists,'* WashingtonTimes.com, Oct. 19, 2004, *available at* http://washingtontimes.com/upi-breaking/20041019-050521-6847r.htm.

[87] Wayne Parry, *U.S. Rejects Muslims' Plea for a List of Approved Charities*, Boston Herald, Oct. 18, 2004, *available at* http://news.bostonherald.com/ national/view. bg? articleid=49697&format=.

[88] *Id.*

[89] *Hearing*, *supra* note 1, at 71 (testimony of David D. Aufhauser).

[90] Jane Lampman, *US Muslims in a Quandary Over Charities*, CHRISTIAN SCIENCE MONITOR, Nov. 17, 2004, *available at* http://www.csmonitor.com/2004/1117/p11s02-lire. html.

[91] *Financial War Hearings*, *supra* note 5, at app. 32 (statement of Hon. James Gurule).

Financial Intelligence at Treasury, recently testified that the Treasury has "led the initiative to make the battle against terrorist financing a priority in the world" and has done this by engaging in "numerous international fora, including the United Nations, G7, G8, G20, the Financial Action Task Force (FATA), the Egmont Group, and other international financial institutions" as well as regional organizations such as "APEC, the OAS, the OSCE, and the Manila Framework Group."[92] Treasury reports that the Financial Crimes Enforcement Network's (FinCEN) "leadership in the Egmont group has spurred a rapid expansion of financial intelligence units (FIUs), with 94 such FIUs now operating around the world."[93]

The U.S. government has taken on a visible leadership role at an international level. For example, the U.S. is "co-chairing the FATF Terrorist Financing Working Group, which is developing international best practices on how to protect charities from abuse or infiltration by terrorists and their supporters."[94] Based in Paris, France, the FATF is a multilateral organization consisting of thirty-three countries founded in 1989 to combat "money laundering and terrorist financing."[95] Because of the Treasury's work with FATF, "scores of countries are now being called upon to: regulate informal banking systems like *hawala*; include originator information on cross-border wire transfers; freeze and seize terrorist-related funds; overtly criminalize terrorist financing; and increase vigilance over the non-profit sector."[96]

D. Outreach to the Financial Sector

The Treasury is enlisting the financial sector for help in fighting terrorist financing.[97] Section 314(a) of the Patriot Act empowers the Treasury to take an active role to encourage information-sharing[98]. Specifically:

> encourage further cooperation among financial institutions, their regulatory authorities, and law enforcement authorities, with the specific purpose of encouraging regulatory authorities and law enforcement authorities to share with financial

---

92 *Legislative Hearing, supra* note 43, at 39 (testimony of Stuart A. Levey).

93 *Id.*

94 *Financial War Hearings, supra* note 5, at app. 32 (statement of Hon. James Gurule).

95 FINANCIAL ACTION TASK FORCE ON MONEY LAUNDERING, ABOUT FATF, 1 *available at* http://www.fatf-gafi.org/AboutFATF_en.htm (last visited Dec. 17, 2004).

96 *Legislative Hearing, supra* note 43, at 5 (testimony of Stuart A. Levey).

97 *See also* 2003 LAUNDERING STRATEGY, *supra* note 1, at 18

98 *See* USA PATRIOT ACT Section 314.

> institutions information regarding individuals, entities, and organizations engaged in or reasonably suspected based on credible evidence of engaging in terrorist acts or money laundering activities.[99]

The Treasury is actively encouraging cooperation between the business sector and law enforcement.[100] The Treasury reports that "the willingness of the financial community to [cooperate] . . . has been remarkable."[101] The Financial Crimes Enforcement Network (FinCEN) has been charged with the task of implementing Section 314(a).[102] Established in 1990, FinCEN has "worked to maximize information sharing among law enforcement agencies and its other partners in the regulatory and financial communities."[103] FinCEN "enables law enforcement agencies . . . to reach out to 33,510 points of contact at more than 15,000 financial institutions to locate accounts and transactions of persons that may be involved in terrorism."[104] In response to privacy concerns, FinCEN points out that 314(a) does not act as a substitute for a subpoena.[105] Use of information derived under authority of Section 314(a) is specifically limited to "identifying and reporting on" suspected financial activities.[106] FinCEN reports that from February 1, 2003 to September 28, 2004, its efforts "resulted in the discovery and/or issuance of . . . 1,888 new accounts identified, 1091 Grand Jury Subpoenas, and 77 arrests.[107]

There is evidence that the Treasury's efforts to build information sharing relationships with financial institutions are working. In the following example, Citigroup approached the Treasury with information

---

[99] USA PATRIOT ACT, *supra* note 39, at Pub. L. No. 107-56, §314(a)(1), 115 Stat. 272, 307.

[100] *Financial War on Terrorism: New Money Trails Present Fresh Challenges: Hearing Before the Subcomm. On Fin.*, 107th Cong. 32 (2002) (testimony of Hon. James Gurule).

[101] *Anti-Money Laundering Provisions Hearing*, *supra*, note 53, at 2 (testimony of David D. Aufhauser).

[102] Press Release, Office of Public Affairs, Testimony of Stuart A. Levey, Under Secretary Terrorism and Financial Intelligence, http://www.ustreas.gov/press/releases/js1869.htm (last visited Mar. 11, 2006).

[103] U.S. DEP'T OF THE TREASURY, About FinCEN/Overview, http://www.fincen.gov/af_overview.html (last visited Jan. 24, 2006).

[104] U.S. DEP'T OF THE TREASURY, FINCEN'S 314(a) FACT SHEET 1 (2004), http://www.fincen.gov/314afactsheet.pdf.

[105] U.S. DEP'T OF THE TREASURY, FINCEN'S 314(a) FACT SHEET 1 (2005), http://www.ots.treas.gov/docs/r.cfm?480156.pdf

[106] USA PATRIOT ACT, *supra* note 39, at Pub. L. No. 107-56, § 314(a)(5), 115 Stat. 272, 308.

[107] U. S. DEP'T OF THE TREASURY, FINCEN'S 314(a) FACT SHEET 1 (2005), http://www.ots.treas.gov/docs/r.cfm?480156.pdf.

regarding potential terrorist financing activity. Saudi Prince Alwaleed Bin Talal Alsaud, the fourth-richest man in the world, owned $9.4 billion of Citigroup stock.[108] Additionally, he owned a large stake in Samba, the second-largest bank in Saudi Arabia.[109] Citigroup had been running Samba under a management contract for over twenty years.[110] In 2000, the Saudi Arabian government ordered all banks in Saudi Arabia, including Samba, to create an account to channel funds to "martyrs" of the Palestinian *intifada* against Israel.[111] Citibank alerted the Treasury who entered talks with Saudi Arabia who ultimately agreed to phase out the plan.[112]

E. Capacity Building for Other Governments and the Financial Sector.

The Treasury is engaged in capacity-building initiatives with other governments and the private sector with respect to terrorist financing. Since September 11, 2001, 173 countries have frozen terrorist funds and 84 countries have established Financial Intelligence Units (FIUs) to facilitate international cooperation.[113] However, more work remains to be done, particularly among the worlds poorest countries.

---

[108] Robert Lenznar et al., *Terror, Inc*, FORBES, Sept. 18, 2004, at 52, *available at* http://www.forbes.com/business/global/2004/1018/016.html (taken substantively from this article).

[109] *Id.*

[110] *Id.*

[111] *Id.*

[112] CNN.com, *Saudi Princes Seek Immunity Against 9/11 Lawsuits*, CNN.COM, Oct. 17, 2003, http://www.cnn.com/2003/LAW/10/17/saudis.lawsuit/ (last visited Jan. 24, 2006).

> Saudi Defense Minister Prince Sultan bin Abdul Aziz and Prince Turki al-Faisal, formerly head of Saudi Arabia's intelligence agency, have been sued by hundreds of relatives of the victims, who allege that they knowingly contributed money and support to al Qaeda through Islamic charitable organizations.
>
> The $1 trillion lawsuit says members of the Saudi royal family paid protection money to Osama bin Laden's group to keep it from carrying out terror attacks in Saudi Arabia.
>
> The lawsuit claims the money was paid soon after the Khobar Towers bombing in Saudi Arabia that killed 19 U.S. airmen in 1996. The suit does not specify the amount of money involved in the payoff.
>
> The 15-count suit was filed in U.S. District Court for the District of Columbia by more than 900 family members, plus some firefighters and rescue workers.

Id.

[113] UNITED STATES DEP'T OF THE TREASURY, PROGRESS IN THE WAR ON TERRORIST FINANCING *available at* http://www.ustreas.gov/press/releases/reports/js721.pdf (last visited April 17, 2006).

1. Other Governments

The world's financial markets are inseparably interconnected. Thus, the United States needs international cooperation and assistance to starve the terrorists of funding. While many countries have initiated legislation designed to fight terrorist financing and comply with international standards, these countries are often unsophisticated in their efforts.[114] Even sophisticated countries, such as the European Union, differ on what constitutes a terrorist organization.[115] The Treasury is assisting these countries on a bi-lateral basis by "delivering anti-money laundering and counter-terrorist financing technical assistance, including legislative drafting, FIU (Financial Intelligence Unit) development, judicial and prosecutorial training, financial supervision, and financial crime investigatory training."[116] For example, the Treasury is currently assisting the Philippines, Turkey, Serbia, and Montenegro in drafting anti-money laundering legislation designed to increase transparency and intercept terrorist finances.[117] To date, the Treasury has met with officials from over 111 countries.[118] The Treasury's influences are seen as far away as the streets of Kuwait where it is now illegal to make a cash donation to a charity.[119] On October 14, 2004, following a visit from a delegation from the Treasury, Kuwait announced that only approved charities may accept donations; charities must get governmental approval before transferring money abroad; and donations may only be made with special coupons authorizing deductions from the donor's bank account.[120] The Treasury has worked jointly with "Italy, Switzerland, Luxembourg, and the Bahamas," to shut down "an insidious network of financial houses and

---

[114] Press Release, Office of Public Affairs, U.S. Dep't of the Treasury, Combating International Money Laundering, http://www.ustreas.gov/press/releases/ls432.htm (last visited Mar. 11, 2006).

[115] Still other countries disagree on how to handle organizations that admittedly carry out terrorist activities. For example, while the European Union prohibits providing financial support to the military wing of Hamas, it continues to support the humanitarian wing, even in the face of evidence that money is diverted from humanitarian projects for use in military actions. *U.S. Policy Toward the Palestinians in the Post Arafat Era: Hearings Before the Subcomm. on the Middle East and Central Asia*, 109th Cong. 57 (2005) (Testimony of the Honorable David M. Satterfield, Acting Assistant Secretary, Bureau of Near Eastern Affairs, U.S. Department of State).

[116] LAUNDERING STRATEGY, *supra* note 1.

[117] *Id.*

[118] FACT SHEET, *supra* note 2, at 19.

[119] IslamOnline.net & News Agencies, *Kuwait Restricts Charitable Donations in Ramadan*, ISLAMONLINE.NET, Sept. 16, 2004, *available at* http://www.islamonline.net/English/News/2004-10/14/article05.shtml (last visited Jan. 24, 2006).

[120] *Id.*

investment firms" and has even taken action against a "network of honey shops and bakeries in Yemen that funded al Qaida's operations."[121]

On a multi-lateral level, the Treasury is working to ease the financial burden on poorer countries who cannot afford to comply with international standards. Toward the end of facilitating donor countries assisting poorer countries, the Treasury established the Counter-Terrorism Action Group (CTAG)[122] and is co-chairing a Financial Action Task Force (FATF) Working Group on Terrorist Financing.[123] These entities are collaborating with donor states, the International Monetary Fund, the World Bank, and the UN Counter-Terrorism Committee in coordinating the delivery of technical assistance to those governments.[124]

Congress has authorized the Treasury to take action against other governments or entities that fail to cooperate with its anti-terrorism programs. Section 311 of the Patriot Act allows the Treasury to designate a "foreign jurisdiction, institution, class of transaction, or type of account" as a "primary money laundering concern."[125] Section 311 provides the Treasury with authority to take "special measures" with respect to transactions originating with this entity.[126] The Treasury has used these measures against both Nauru and Ukraine.[127] Both countries subsequently took the requested remedial actions and passed legislation bringing their counter-terrorist financing regimes up to international standards.[128]

When President Bush issued Executive Order 13224, greatly expanding the Treasury's authority to impose financial sanctions against those that "support or otherwise associate" with terrorist organizations, he sent a message to the rest of the world that the United States was

---

[121] *Hearing*, *supra* note 1, at 74 (testimony of David D. Aufhauser).

[122] Press Release, White House, Office of the Press Secretary, Action to Enhance Global Capacity to Combat Terror, http://www.state.gov/e/eb/rls/fs/21148.htm (last visited Mar. 11, 2006).

[123] Press Release, Office of Public Affairs, U.S. Dep't of the Treasury, Testimony of Jimmy Gurulé Under Secretary for Enforcement U.S. Department of the Treasury Before the U.S. Senate Finance Committee, http://www.ustreas.gov/press/releases/po3518.htm (last visited Mar. 11, 2006).

[124] *Id.*

[125] 2003 LAUNDERING STRATEGY, supra note 1, at 12-13.

[126] *Id.* at 3.

[127] Mike Allen, *Ukraine, Nauru Face U.S. Sanctions: Countries' Banks Targeted in Terror War*, WASHINGTON POST, Dec. 20, 2002, at A06; *see also* Press Release, Office of Public Affairs, U. S. Dep't of the Treasury, Fact Sheet Regarding the Treasury Department's Use of Sanctions Authorized Under Section 311 of the USA PATRIOT ACT, http://www.ustreas.gov/press/releases/po3711.htm (last visited Jan. 24, 2006).

[128] 2003 LAUNDERING STRATEGY, *supra* note 1, at 13.

serious about starving terrorists of funding.[129] Because of the Treasury's broad power in this area, the government's ever-expanding list of organizations that support terrorism is taken "very seriously, not only in the United States, but all over the world."[130]

2. The Financial Sector

Prior to September 11, 2001, the Treasury already had in place a sophisticated anti-money-laundering regime as it relates to the banking system. However, as it develops its anti-terrorist financing regime, the Treasury has expanded into two specific areas within the financial sector: (1) Informal Transfer Value Systems; and (2) Bulk Cash Smuggling.

A. Informal Transfer Value Systems

The Patriot Act expanded the Treasury's regulatory authority to include informal transfer value systems.[131] Section 359 of the Patriot Act expanded the definition of "financial institution" to include any "person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside the conventional financial institution system."[132] The Treasury defines an informal transfer value system as "any system, mechanism, or network of people that receives money for the purposes of making the funds or an equivalent value payable to a third party in another geographic location."[133] Informal transfer value systems preferred by Arabs are generically referred to as "*hawala*," from the Arabic word meaning "trust."[134] The amount of funds moving through *hawala* is hard to estimate because the funds often move outside the regulated financial sector. However, the Treasury's web site quotes Pakistan officials as estimating that $7 billion crosses that nation's border annually through *hawala* channels.[135] The Treasury reports that terrorists use informal value transfer systems to transfer

---

[129] Exec. Order No. 13,224, 3 C.F.R. 768, 790 (2001), *reprinted as amended in* 50 U.S.C.A. § 1701 (2003).

[130] Rause, *supra* note 54, at 181.

[131] FINANCIAL CRIMES ENFORCEMENT NETWORK, U.S. DEP'T OF THE TREASURY, FINCEN ADVISORY 2 (2003), *available at* http://www.amlcft.com/FinCEN%20Advisory%20 33%20Informal%20Value%20Transfer%20Systems.pdf [hereinafter FINCEN ADVISORY].

[132] 31 U.S.C.A. § 5312(a)(2)(R) (2005).

[133] FINCEN ADVISORY, *supra* note 131 , at 1.

[134] *Hearing*, *supra* note 1, at 75 (testimony of David D. Aufhauser).

[135] FACT SHEET, *supra* note 2, at 15.

funds.[136] On November 7, 2001, the Treasury blocked the assets of a *hawala* based in the United States, the al-Barakaat network, which the Treasury estimates moved "tens of millions of dollars" annually; "a portion of which was siphoned off to terrorist organizations."[137]

Congress and the Treasury have made *hawala* a priority since the attacks of September 11, 2001, and the discovery that *hawala* were used to fund at least two of the highjackers: Mohammad Atta and Marwan al-Shehhi.[138] Additionally, *hawala* are known to have been used to finance terrorist activities in Columbia, India, Kenya, and Tanzania.[139]

Since passage of the Patriot Act, the Treasury has required that all *hawala* comply with all Bank Secrecy Act requirements;[140] over 10,000 have registered with the government.[141] The first successful prosecution under the Patriot Act occurred on April 30, 2002 when Mohamed Hussein was convicted in U.S. federal court of running an unlicensed *hawala*.[142] The prosecution of Hussein was successful in part because the Patriot Act changed the old rule which required the government to show the defendant knowingly broke the law.[143] Hussein received eighteen months in prison for operating a *hawala* without a state license.[144]

B. Bulk Cash Smuggling

Title III of the Patriot Act "makes the act of smuggling bulk cash in or out of the United States a criminal offense and authorizes the forfeiture of any cash or instruments of the smuggling offense."[145] "Money launderers may be sophisticated, but they're not proud. They

---

[136] *Financial War on Terrorism: New Money Trails Present Fresh Challenges: Hearing Before the Subcomm. On Fin.*, 107th Cong. 5 (2002) (testimony of Paul H. O'Neill) (discussing relationship between al Quada and *hawala*).

[137] *Hearing, supra* note 1, at 76 (testimony of David D. Aufhauser).

[138] James J. Savage, *Executive Use of the International Emergency Economic Powers Act: Evolution Through the Terrorist and Taliban Sanctions*, 10 CURRENTS: INT'L TRADE L.J. 28, 39 (2001).

[139] Walter Perkel, *Money Laundering and Terrorism: Informal Value Transfer Systems*, 41 AM. CRIM. L. REV. 183, 184 (2003).

[140] United States Department of the Treasury Financial Crimes Enforcement Network, 33 FINCEN ADVISORY 2, http://www.fincen.gov/advis33.pdf.

[141] *Hearings, supra* note 5, at app. 35 (Testimony of Hon. James Gurule).

[142] Rause, *supra* note 54, at 176-77.

[143] *Id.* at 177.

[144] *Id.*

[145] GEORGIA BANKERS ASSOC., INTERNATIONAL MONEY LAUNDERING AND ABATEMENT AND FINANCIAL ANTI-TERRORISM ACT OF 2001, Pub. L. No. 107-56, Title III §§ 371-72, 115 Stat. 296, 336-39 (2001) (to be codified at 18 U.S.C. §§ 981, 982 and 31 U.S.C. §§ 5317, 5332), (2001) *available at* http://www.gabankers.com/issuesfederal.patriot.summary.htm (last visited Dec. 17, 2004).

will use any available method to launder their dirty money."[146] The Treasury reports that "over $30 billion a year is smuggled in, out and through the United States each year by drug dealers, organized crime and terrorist organizations. This money moves by planes, trains, automobiles, ships and even by mail."[147] Treasury Under Secretary Stuart Levey recently stated that "[a]s the formal and informal financial sectors become increasingly inhospitable to financiers of terrorism, we have witnessed an increasing reliance by al-Qaida and terrorist groups on cash couriers."[148] For example, on December 25, 2003, an official of the African branch of Lebanese Hezbollah was reportedly killed when Flight 141 crashed en route to Beirut.[149] The official was reportedly couriering $2 million dollars in contributions raised in Africa to fund the Lebanese Hezbollah.[150] The movement of money via cash couriers is now one of the principle methods that terrorists use to move funds."[151] At a recent meeting in Paris in October of 2004, the Financial Action Task Force lamented that "[g]overnments worldwide must do more to stop the smuggling of cash across borders."[152] Bulk cash smuggling is also harmful to the war on terror in a more subtle way. Terrorist cells funded by cash leave "few identifiable footprints in the banking system," where much of the Treasury's anti-terrorist financing regime is focused.[153]

Related to cash smuggling is the "emerging issue" of counterfeiting. Terrorists engage in counterfeiting because counterfeiting "offers an attractive, profitable method for making good money while avoiding the penalties associated with high risk activities such as smuggling or drug trafficking."[154] It is estimated that there is in excess of $130 million in

---

[146] Press Release, Office of Public Affairs, U. S. Dep't of the Treasury, Treasury Deputy Assistant Secretary David Medina House Banking Subcommittee on Financial Services and Consumer Credit (May 15, 2000), http://www.treas.gov/press/releases/ls623.htm (last visited Jan. 24, 2006).

[147] *The Administration's National Money Laundering Strategy for 2001: Hearing Before the S. Comm. on Banking, Hous., and Urban Affairs*, 106th Cong. 1 (2001) (testimony of the Honorable Marge Roukema).

[148] Press Release, Office of Public Affairs, U.S. Dep't of the Treasury, Testimony of Stuart A. Levey, Under Secretary, Terrorism and Financial Intelligence, U.S. Department of the Treasury (Sept. 22, 2004) http://www.treas.gov/press/releases/js1940.htm (last visited Mar. 11, 2006).

[149] Levitt, *supra* note 10, at 8 (example taken substantively from this paper).

[150] *Id.*

[151] *Hearing, supra* note 43, at 40 (testimony of Stuart Levey).

[152] Friederike Tiesenhausen Cave, *Terror Taskforce Seeks Curbs on Cash Smuggling*, FINANCIAL TIMES, Oct. 25, 2004, at 4.

[153] Press Release, *supra* note 146.

[154] *9/11 Commission Report, supra* note 12, at 69 (prepared statement of Larry C. Johnson).

counterfeit U.S. currency in circulation worldwide.[155] Recently, one particular "family of counterfeiting" believed to have origins in North Korea, has caused concern because the "sophisticated techniques utilized" are "evidence of a well-funded, on-going criminal enterprise, with a scientific and technical component."[156] Terrorists counterfeit more than cash.[157] Terrorists will counterfeit anything they can use to finance their activity, even toasters.[158] "Most people know what terrorism is, but few understand the scope and scale of product counterfeiting. Moreover, why would a terrorist want to sell a counterfeit toaster? The answer is simple and direct—money. All terrorist groups . . . need money to plan, organize and conduct terrorist attacks.[159]

IV. CONCLUSION

"Money may not be the root of all evil but it is a critical resource for any group that wants to carry out international terrorist attacks."[160] Due in large part to the efforts of the Treasury, "[t]he U.S. government is getting increasingly better at using the intelligence revealed through financial information to understand terrorist networks, search them out and disrupt their operations."[161] According to the 9/11 Commission, "[w]hile definitive intelligence is lacking, these efforts have had a significant impact on al Qaeda's ability to raise and move funds, on the willingness of donors to give money indiscriminately, and on the international community's understanding of and sensitivity to the issue."[162] Much work remains to be done. Lee Hamilton, vice chairman

---

> [S]elling counterfeit products . . . is a relatively risk free activity. Even if caught in the act a merchant probably will suffer nothing worse than the loss of the money he spent to purchase the goods and having the counterfeit products confiscated. A merchant rarely is jailed for selling or distributing counterfeit merchandise.

Id.

[155] Barbara Hagenbaugh, *It's Too Easy Being Green*, USA TODAY, May 13, 2003, *available at* http://www.usatoday.com/money/industries/banking/2003-05-12-newmoney_x.htm. Although the Secret Service, rather than the Treasury, is officially charged with combating counterfeiting, it is relevant to the topic here.

[156] *Hearings, supra* note 43 (testimony of Stuart A. Levey).

[157] *Intellectual Property Crimes: Are Proceeds From Counterfeited Goods Funding Terrorism? Hearing Before the H. Comm. On Int'l Relations*, 108th Cong. 1 (2003).

[158] *Id.*

[159] *9/11 Commission Report, supra* note 12, at 69 (prepared statement of Larry C. Johnson).

[160] *Id.*

[161] *Hearing on Int'l Relations, supra* note 9, at 2. (opening statement by Chairman Michael G. Oxley).

[162] National Commission on Terrorist Attacks Upon the United States, 16 http://www.9-11commission.gov/staff_statements/911_TerrFin_Monograph.pdf.

of the 9/11 Commission recently admitted to the House Financial Services Commission that "[a]lthough the trend line is clear, the U.S. government still has not determined with any precision how much al Qaeda raises, or from whom, or how it spends its money."[163]

Daryl Shetterly

[163] *Id.*

THE DETRIMENT OF THE BARGAIN: HOW THE LIMITING PRINCIPLE AND PRECLUSION OF PRE-CONTRACTUAL EXPENDITURES PLACE UNDUE RISK ON A NON-BREACHING PARTY

I. INTRODUCTION

If scholars conceive of contract law as a tool for assigning default risks and burdens, which the contracting parties have a freedom to alter through prior agreement, then the award of damages arising out of breach has everything to do with encouraging or discouraging future behaviors of the defendant-promisor and plaintiff-promisee. Not every corner of contract law ought to deal in economic carrots, however. There should be room left instead for considerations of corrective justice, so that a court (whose duty is to resolve real disputes between real litigants) may make a promisee whole through the remedy handed down. Such an adjustment would make a "pure" reliance remedy more attractive as an alternative measure of the harm done to the promisee.

Contract law delicately balances issues related to the origin and obligation of the agreement, its performance, and its termination, even as contract scholars aspire to bring all three of these aspects under one overarching theory. Two of the more contentious issues in contract law are (1) whether to enforce a particular agreement, and (2) how to adequately remedy the promisee's injury without overcompensation. Part II of this note will briefly summarize and compare how the law approaches these two issues in contemporary and historical contexts. Part III will focus this inquiry specifically on reliance in terms of enforcement and remedy. Part IV proposes a few reforms to the reliance remedy in light of this discussion, especially as it relates to the limiting principle and the preclusion of pre-contractual expenditures. Part V provides concluding thoughts.

II. BACKGROUND

A. Distinguishing Basis, Interest, and Remedy

Any foray into the complex and hotly-contested realm of contract remedies demands careful examination of the terms in order to facilitate the greatest discovery at the smallest possible risk of confusion.[1] Thus,

---

[1] As Professor Frost suggests, "There is considerable pedagogical value to starting contract problems by focusing on the stakes." Christopher W. Frost, *Reconsidering the Reliance Interest*, 44 ST. LOUIS U. L.J. 1361, 1362 (2000). Strangely enough, discussion of contract remedies was not prominent in law schools until the Realists of the early 1930s brought a renewed focus upon them. *See* Todd D. Rakoff, *Fuller and Purdue's* The Reliance Interest *as a Work of Legal Scholarship*, 1991 WIS. L. REV. 203, 211. Given the

to cavalierly advance an argument with respect to the much-maligned reliance remedy for breach of contract without drawing a distinction between reliance-based obligation, the reliance interest, and the reliance remedy would be to invite chaos at every corner.[2]

"Reliance" across all three connotations has a degree of consistency to the extent that the term lends itself to this broad application: generally, reliance refers to the promisee's actions that are justified by a promise made by another,[3] whether the promisee acts in direct response in order to receive the benefit of a performance from the other party,[4] or acts indirectly by changing position in anticipation of gratuitous performance from that other party.[5]

The law may, and frequently does, recognize a promisee's reasonable reliance on a promise as the *reason* for imposing liability against a promisor who has failed to keep that promise, thereby making reliance the basis for a contractual obligation.[6] Two other possible bases of obligation–formalism and bargained-for consent[7]–have historically been recognized, with the influence of all three bases felt in modern contract law.[8]

Given a valid and enforceable contract according to any of these three recognized bases, the law may seek to satisfy a promisee's reliance *interest* (as opposed to satisfying the expectation interest or restitution interest) in its attempt to place the promisee in as good a position as he

---

foundational position of remedies in contemporary study of contracts, confusion regarding their implementation can easily spill over into other areas of contract law.

[2] *See, e.g.*, discussion of Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245 (N.Y. 1983), *infra* Part IV.F.

[3] ERIC MILLS HOLMES, 3 CORBIN ON CONTRACTS § 8.4, at 12-13 (Joseph M. Perillo ed., rev. ed. 1996).

[4] *Id.* § 8.5, at 13-15.

[5] *Id.* § 8.6, at 15.

[6] Oldham argues that around 1600 the whole of contract law was swallowed by tort through its basis in reliance. James Oldham, *Reinterpretations of 18th-Century English Contract Theory: The View From Lord Mansfield's Trial Notes*, 76 GEO. L.J. 1949, 1953 (1988); *see also* historical discussion *infra* Part II.C. Today, promissory estoppel is the doctrine through which contractual obligation is based upon detrimental reliance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); *see also* discussion *infra* Part III.C.

[7] *See* historical discussion *infra* Part II.C.

[8] Promissory estoppel allows courts to recognize a contract based on the promisee's reliance. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981); *see also* discussion *infra* Part III.C. The Statute of Frauds, adopted in most of the United States, requires parties in certain contracts to put the central aspects of the agreement in writing. 9 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 21:4, at 181-92 (4th ed. 1999) [hereinafter 9 WILLISTON]. Of course, the dominant theory today is bargained-for consent. 1 STEWART MACAULAY ET AL., CONTRACTS: LAW IN ACTION 35 (1995). *See, e.g.*, 24 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 64:2, at 21-22 (4th ed. 1992) [hereinafter 24 WILLISTON]; U.C.C. § 2-204(1) (2002). *See* historical discussion *infra* Part II.C.

occupied prior to the formation of the contract.[9] Causation problems notwithstanding,[10] applying the reliance interest even where a contractual obligation is based on a bargained-for consent does not require any glaring intellectual dishonesty. Fuller and Purdue, in their pioneering article *The Reliance Interest*, frame the reliance interest in terms of bargain-based obligation[11] and "'non-bargain' promises."[12]

Finally, a court may use a promisee's reliance damages as a measure of the appropriate *remedy* for breach, although a contract remedy is no more closely wed to an interest than an interest is to a basis for obligation. For instance, Fuller and Purdue expound an expectation remedy as the best approximation of the reliance interest;[13] courts enforcing contracts based solely on detrimental reliance (promissory estoppel) have awarded expectation damages;[14] and, even though the reliance interest has been thought to include compensation for lost opportunities,[15] "[c]ourts use the term 'reliance' to refer to those out of pocket losses that were incurred as a direct result of the promise."[16]

---

[9] This is reliance as defined by Fuller and Purdue. L.L. Fuller & William R. Purdue, Jr., *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 54 (1936). *See* discussion on the pitfalls attendant with defining the reliance interest, *infra* Part IV.A.

[10] *See* discussion *infra* Part IV.D.

[11] Fuller & Purdue, *supra* note 9, at 65.

> [T]he policy in favor of facilitating reliance can scarcely be extended to all promises indiscriminately. Any such policy must presuppose that reliance in the particular situation will normally have some general utility. Where we are dealing with 'exchanges' or 'bargains' it is easy to discern this utility since such transactions form the very mechanism by which production is organized in a capitalistic society.

Id.

[12] *Id.*

[13] This is to the extent that the reliance interest would include lost opportunities. *See* W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197, 220 (1990) (citing L.L. Fuller & William R. Purdue, Jr., *The Reliance Interest in Contract Damages: 2*, 46 YALE L.J. 373, 373-76 (1936)).

[14] *See* Christopher T. Wonnell, *Expectation, Reliance, and the Two Contractual Wrongs*, 38 SAN DIEGO L. REV. 53, 118 (2001) (citing Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentation*, 15 HOFSTRA L. REV. 443 (1987)).

[15] *See, e.g.*, Michael B. Kelly, *The Phantom Reliance Interest in Contract Damages*, 1992 WIS. L. REV. 1755, 1766; Rakoff, *supra* note 1, at 221. However, Fuller and Purdue chose not to address the question of whether lost opportunity was properly compensable in damages. Fuller & Purdue, *supra* note 9, at 55.

[16] Frost, *supra* note 1, at 1375.

B. Morality, Efficiency, and Risk Allocation

Added to basis, interest, and remedy, contract law may have its normative justification in a number of public policies. That is, the very reason for courts to *ever* enforce private agreements can arise from the morality of keeping promises, the desire to alleviate harm resulting from broken promises, the social stability fostered by upholding promises, or even the economic efficiency of enforcing consensual bargains. As is evident, these norms often will approximate or suggest a particular basis of obligation, protectible interest,[17] or remedy,[18] yet they are compatible with a variety of them.[19]

Historically, the common law has most prominently featured two normative justifications: moral obligation and economic efficiency.[20] While not necessarily opposed,[21] these norms can at times come into conflict within discussions of whether to award punitive damages[22] or attorney's fees,[23] or whether to award expectation damages as opposed to out-of-pocket expenditures.[24]

Contract breach, when described as a sin or a wrong, does not rise to the level of moral transgression associated with lying, for "a promise puts the moral charge on a *potential* act—the wrong is done later, when the promise is not kept—while a lie is a wrong committed at the time of its utterance."[25] A survey of the Ten Commandments will reveal the

---

[17] "An interest resembles a normative claim, but it is not identical to it." Rakoff, *supra* note 1, at 217.

[18] "The invocations of benefit and reliance are attempts to explain the force of a promise in terms of two of its most usual effects, but the attempts fail because these effects depend on the prior assumption of the force of the commitment." Charles Fried, *Contract as Promise*, *in* FOUNDATIONS OF CONTRACT LAW 11 (Richard Craswell & Alan Schwartz eds., 1994).

[19] Catholic jurists of the eleventh and twelfth centuries, along with Puritans of the seventeenth and eighteenth centuries, agreed upon the breaking of a promise as a sin. Harold J. Berman, *The Religious Sources of General Contract Law: An Historical Perspective*, 4 J.L. & RELIGION 103, 109, 113, 115 (1986). So, from a common premise, they crafted very different systems for enforcement. *See id.*

[20] *See* historical discussion *infra* Part II.C.

[21] "[I]n many cases the alleged necessary connection between efficiency and amorality is mythical." Peter Linzer, *On the Amorality of Contract Remedies—Efficiency, Equity, and the Second Restatement*, 81 COLUM. L. REV. 111, 112 (1981).

[22] *See* ARTHUR LINTON CORBIN, 11 CORBIN ON CONTRACTS § 1077, at 380 (Interim ed. 2002) [hereinafter 11 CORBIN].

[23] *See id.* § 1037, at 193-94.

[24] This is because a larger award will tend to deter breach, whereas a smaller one will reduce the incentive to keep a promise. Richard Craswell, *Against Fuller and Purdue*, 67 U. CHI. L. REV. 99, 108 (2000).

[25] Fried, *supra* note 18, at 9. *But see* discussion of causation between wrong and injury, *infra* Part IV.D.

explicit proscription against lying,[26] but a proscription against breaking promises has less emphatic Biblical support.[27]

Breach in the context of the efficiency norm demands remedies designed to allocate cost burdens by default rules except where the parties contract to shift these burdens according to freedom of contract principles.[28] Remedies can therefore be tailored to create efficient outcomes because a promisor's willingness to breach will depend upon the court-imposed cost of that breach.[29] For example, expectancy damages will encourage a breach to be "efficient," so that the promisor will not breach unless that action benefits both parties.[30] By contrast, reliance damages will allow breach where the parties have yet to perform and encourage it where the promisor stands to profit from the breach beyond the expense incurred by the promisee.[31] Alternatively, the default remedies can cause the parties to bargain for a different allocation of risk—including the risk of losing a suit for damages through the assigning of attorney's fees to be paid to the successful party[32]—with one exception being that a liquidated (contractually-determined) damages clause cannot serve as a penalty against the breaching party.[33]

Notwithstanding the particular emphasis on allocation of risk within the economic efficiency norm, the determination of what burden falls upon either party has equal relevance where moral obligation

---

[26] *Deuteronomy* 5:20.

[27] *See, e.g., Jeremiah* 11:1-8. Contractual obligation in the context of this passage was collective, entered into between the people of Israel and God. One New Testament Passage suggests that even individual oaths to God must be kept. *See Matthew* 5:33. "The Parable of the Workers in the Vineyard" treats a contract-like arrangement as its subject, though the message conveyed is that the master can do what he wants with his money. *Matthew* 20:1-15.

[28] "Under the bargain principle, bargains between capable and informed actors are enforced according to their terms." Melvin Aron Eisenberg, *Probability and Chance in Contract Law*, 45 UCLA L. REV. 1005, 1010 (1998). Compare this with Harold Berman's analysis of the moral theory of contract, where "every individual has a moral right to dispose of his property by means of making promises, and that in the interest of justice a promise should be legally enforced unless it offends reason or public policy." Berman, *supra* note 19, at 112.

[29] Linzer, *supra* note 21, at 114 ("[E]fficiency theory suggests that promisors who breach increase society's welfare if their benefit exceeds the losses of their promisees."). One might wonder, though, why courts of justice would ever put more stock in future incentives geared toward a breaching promisor than in retrospective (corrective) compensation for a relying promisee's injury.

[30] Mark Pettit, Jr., *Private Advantage and Public Power: Reexamining the Expectation and Reliance Interests in Contract Damages*, 38 HASTINGS L.J. 417, 431-32 (1987).

[31] *Id.*

[32] *See* 11 CORBIN, *supra* note 22, § 1037, at 193-94.

[33] *See id.* § 1077, at 381.

justifies the enforcement of contracts.[34] Indeed, an allocation process informed by social norms provides the starting point from which to derive all three of the concepts discussed above (basis, interest, and remedy).

The allocation process in contract law ought to have more logical consistency throughout. A court protecting the reliance interest should not attempt to place the promisee in a position as though the promise had been performed, but instead should attempt to place the promisee in the position the promisee occupied before the contract's formation.[35] Also, courts giving force to the mutual assent of the parties should not preclude outright an award of the pre-contractual expenditures of the promisee assented to by the promisor.[36] Moreover, a legal allocation process informed by efficiency norms should properly encourage *ex post* negotiation so that parties may adjust to changing conditions in ways that more fairly allocate noneconomic burdens, which courts have no desire or ability to measure.[37] A privately-bargained method of allocation, on the other hand, need not demonstrate any logical consistency—rather being itself a product of market forces—and better accounts for noneconomic factors.[38]

Viewed more simply, a court acting in its capacity to allocate risk gives to one party at the expense of the other, so that it will enforce a promisee's right to recovery only up to a limit set according to how much pain the law is willing to inflict on a promisor; here, the American system seeks to restore a plaintiff to the *status quo*, no better or worse.[39] This Aristotelian notion of corrective justice has driven Anglo-American contract law from its beginnings.[40] While a court ought not to reflexively take those burdens that rightly belong to a promisee and shift them instead to the promisor, no absolute legal principle suggests that certain

---

[34] Again, the differences between the Puritan and Catholic systems are illustrative. Whereas under the canon law contracts were enforced only to the extent of their fairness, the strict-liability Puritans placed the entire burden of an unfair deal upon the breaching party. Berman, *supra* note 19, at 122; *see also* discussion *infra* Part II.C.

[35] *See* discussion *infra* Part IV.A.

[36] *See* discussion *infra* Part IV.E.

[37] *See* discussion of limitation principle, *infra* Part IV.C. As for the reluctance of courts to factor in noneconomic damages, this principle is as firmly rooted in contract law as the prohibition against awarding punitive damages or attorney fees. *See* 11 CORBIN, *supra* note 22, § 1077, at 380; *id.* § 1037, at 193-94.

[38] Stewart Macaulay, *The Reliance Interest and the World Outside the Law School's Doors*, 1991 WIS. L. REV. 247, 263.

[39] Larry A. DiMatteo, *The History of Natural Law Theory: Transforming Embedded Influences into a Fuller Understanding of Modern Contract Law*, 60 U. PITT. L. REV. 839, 844 (1999). "This remedy is not intended as a means of punishment or retaliation; rather, it is designed to compensate or return damaged parties to the status quo." *Id.*

[40] *Id.*

risks or burdens belonging to one party initially—or even prior to contracting—can never shift to the other party (or disappear altogether through excuse) between the formation and breach of a contract.[41]

C. Historical Trends in Contract Formation, Interest, and Remedy

To flesh out further how basis, interest, and remedy, along with their normative justifications, work together to define modern contract law, it helps to have at least a cursory review of broad historical trends in the Anglo-American system.[42] The temptation, of course, is to begin with the several English Common Law writs and march onward into the nineteenth and twentieth centuries;[43] however, in avoiding this secularized approach, we may instead begin at the beginning.

According to Harold Berman, "Modern contract law originated in Europe in the late eleventh and early twelfth centuries,"[44] as part of a larger effort to create "consciously integrated systems of law . . . *first in the church and then in the various secular polities*."[45] Contractual liability, to the canonists in the church, arose from a combination of the theory that to break a promise is a sin and the idea that society ought to protect the rights of a promisee.[46] Thus, the canonists "developed for the first time the general principle that an agreement as such—a *nudum pactum*—may give rise to a civil action."[47] As a limit to liability, the obligation was enforced only to the extent that it was both "reasonable and equitable."[48]

These rules not only governed the ecclesiastical courts of the day, which had wide jurisdiction over clergy and laymen,[49] but also greatly

---

[41] *See* discussion *infra* Part IV.E.

[42] And, if a proper historical context plays so central a role in descriptive analysis, how much more so does it nurture the normative discussion to follow! As Harold Berman writes, "Both (the) attackers and defenders (of the prevailing nineteenth century theory of contract law) need to be aware . . . of its historical background, and especially of the religious sources from which it was derived and against which it reacted." Berman, *supra* note 19, at 124.

[43] "[S]ome historians of English law have said that it 'was not until the eighteenth century that a serious search for a general theory of contract was undertaken,'" but, replies Berman, "It can hardly be maintained that prior to the eighteenth century contractual liability was not considered to be based on a coherent set of principles, including the principle of the binding force of a bargained agreement expressing the intent of the parties." Berman, *supra* note 19, at 118 (quoting T.F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 652 (5th ed. 1956)).

[44] *Id.* at 106.

[45] *Id.* (emphasis added).

[46] *Id.* at 109.

[47] *Id.*

[48] *Id.* at 110.

[49] *Id.* at 113.

influenced the entire English law of contracts even beyond the time of the Protestant Reformation. As Berman explains:

> Despite the significant changes in the law of contracts which took place in the sixteenth and early seventeenth centuries, in all the legal systems that prevailed in England, including the common law, the underlying presuppositions of contractual liability remained what they had been in the earlier period. Breach of promise was actionable, in the first instance, because—or if—it was a wrong, a tort, and in the second instance, because—or if—the promisee had a right to require its enforcement in view of its reasonable and equitable purpose.[50]

Significantly, though, following the Puritan Revolution of the 1600s, three related changes took place. First, "the underlying liability shifted from breach of promise to breach of a bargain."[51] Second, "the emphasis on bargain was manifested in a new conception of consideration."[52] Finally, "the basis of liability shifted from fault to absolute obligation."[53] These changes were carried through not by lawyers, but by theologians,[54] and were premised on the sovereignty of God, the total depravity of humanity, and the belief in a covenantal relationship between God and humans.[55] Modeling their theory of contract after this relationship, entered into voluntarily by the Creator and the created and absolutely binding on both sides, the Puritans felt that "each man was free to choose his act but was bound to the choice he made, regardless of the consequences."[56]

Contract formation, within law and equity, experienced the influence of three bases for obligation early on in the development of contract: formalism,[57] reliance,[58] and bargained-for consent.[59] First, the

---

[50] *Id.* at 114-15.

[51] *Id.* at 116.

[52] *Id.*

[53] *Id.* at 117.

[54] *Id.* at 119.

[55] *Id.*

[56] *Id.* at 122.

[57] This basis reigned alone prior to the canon law's enforcement of a *nudum pactum*. *See supra* note 47 and accompanying text. It remains influential today in the Statute of Frauds. *See* Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1202 (1998). However, the Statute acts differently than did the seal requirement. 9 WILLISTON, *supra* note 8, § 21:1, at 170. ("[T]he writing was not the particular formality which gave force to such [formal] contracts."). One can view the modern law of contracts as consisting of both formal and informal obligations, with the limitation that formal requirements only determine the enforceability of certain contracts and not their validity. *See id.* Still, Williston suggests a cautionary function for the Statute in addition to its evidentiary function, which places it in closer proximity to the role played by sealed instruments. *See id.* § 21:1, at 172.

seal was at one time the only basis for contractual obligation—under the writ of covenant—giving medieval contract law a very formalistic shape.[60] Through the tort-related writ of assumpsit, however, formal requirements were relaxed,[61] as benefit and detriment became potential bases for obligation, so that reliance became a reason for enforcement.[62] Finally, despite disagreement as to whether consent-based obligation existed prior to 1800,[63] it is agreed that afterward "[a]ll contracts came to be seen as consensual, even wholly executed contracts, even those consisting of an immediate and simultaneous exchange . . . came to be perceived as depending on an agreement or an exchange of promises."[64]

Similarly, the three contract interests—expectancy, reliance, and restitution—were influential long before Fuller and Purdue gave them their present shape.[65] Specific performance, which satisfies a promisee's

---

[58] Reliance-based obligation in the writ system is mostly associated with the Chancery and with the writ of assumpsit, where the wrong done was misfeasance rather than nonfeasance. Oldham, *supra* note 6, at 1956. Still, reliance can act as a basis for obligation in cases of nonfeasance, where the breaching party has refused any performance, just as in cases of misfeasance, where the breaching party performs but not in the way reasonably expected. In either situation, the promisee has taken action based on the promise in hopes that the promisor keeps the promise.

[59] *See id.* at 1952-53 (Likewise, bargained-for consent has its roots more in the nonfeasance, contract-related writ of covenant, but it has just as much to do with cases of misfeasance that were typically resolved under the writ of debt where the only performance left to render was the payment of money from the promisor to the promisee.).

[60] *Id.* at 1951. "Covenant, the writ bearing the closest resemblance to promissory obligations that strike the modern reader as contractual, was hampered by the requirement of a sealed instrument in all cases, and the limitation of its scope to actions for nonfeasance." *Id.* at 1952.

[61] The writ of assumpsit grew out of the tort-related writ of trespass. *See id.* at 1953-54; Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518, 519 (1996) (citing GRANT GILMORE, THE DEATH OF CONTRACT (1974)).

[62] Oldham, *supra* note 6, at 1958 (citing P.S. Atiyah, THE RISE AND FALL OF FREEDOM OF CONTRACT 419 (1979)).

[63] *See supra* note 43.

[64] Oldham, *supra* note 6, at 1958 (quoting P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 419 (1979)).

[65] Contemporary treatment of the three is somewhat artificial, and even Fuller advocated their being treated as a continuum rather than distinct interests. Craswell, *supra* note 24, at 105 (citing Letter from Lon L. Fuller to Karl Llewellyn (Dec 8, 1939), *quoted in* ROBERT S. SUMMERS AND ROBERT A. HILLMAN, CONTRACT AND RELATED OBLIGATION: THEORY, DOCTRINE, AND PRACTICE 41 (West 3d ed. 1997)).

> At times the reliance interest includes the notional value of lost opportunities, and thus approaches congruence with the expectation interest; at other times, it sheds this weight and becomes distinctly thinner. At times, the restitution interest is treated as merely a lesser-included-case of reliance, subject to the same theoretical treatment; while elsewhere the two appear to separate.

Rakoff, *supra* note 1, at 213 (citing L.L. Fuller & William R. Purdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52 (1936)).

expectation interest better than compensatory damages,[66] was present in ecclesiastical courts as early as the eleventh and twelfth centuries.[67] Aside from this exception, the reliance interest was the predominant measure of awards for contract actions until the bargained-for consent basis for contract obligation—which took hold by the nineteenth century[68]—brought the expectancy measure into greater focus.[69] Finally, the restitution interest enjoyed protection from the Chancellor,[70] whose actions influenced the development of the common law writs.[71] Thus, history also paints a picture of several interests in contract working complementarily under one system.

III. RELIANCE BASIS, INTEREST AND REMEDY IN MODERN CONTRACT LAW

A. Fuller and Purdue's The Reliance Interest

In their 1936 article *The Reliance Interest*, Lon Fuller and William Purdue described three interests that a promisee has in relation to a contract; this categorization serves, for good or ill, as the starting point for discussing remedies in many contracts classes today.[72] The three interests are restitution, reliance, and expectancy,[73] though the authors make clear that these interests do not have equal claim to judicial intervention, with restitution providing the strongest claim and expectancy providing the weakest.[74]

There is at least some confusion as to what the reliance interest entails due to some commentators' carelessness with language, in that some suggest it places the promisee in a position as though the contract

---

66 Linzer, *supra* note 21, at 138 ("The general use of specific performance will produce truer economic efficiency than a system that counts the money cost of performance to the promisor but not the unquantifiable emotional and other costs of nonperformance to the promisee.").

67 Berman, *supra* note 19, at 106-07, 109-10.

68 1 CONTRACTS: LAW IN ACTION, *supra* note 8, at 35.

69 Louis E. Wolcher, *The Accommodation of Regret in Contract Remedies*, 73 IOWA L. REV. 797, 804 (1988).

70 ARTHUR LINTON CORBIN, 12 CORBIN ON CONTRACTS § 1102, at 2 (Interim ed. 2002).

71 *See, e.g.*, Oldham, *supra* note 6, at 1953 (citing J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 273 (2d ed. 1979)). As Baker describes it, the transition from the formalistic writs of covenant and debt into the more relaxed writ of assumpsit arose in part due to the law courts' jealousy of the Chancellor, and soon "'the whole law of contract had been temporarily subsumed under the law of tort.'" *Id.* Compare this with modern concerns that promissory estoppel would signal the death of contract. *See generally* GRANT GILMORE, THE DEATH OF CONTRACT (1974). *See also* discussion *infra* Part III.C.

72 Frost, *supra* note 1, at 1362.

73 *See* Fuller & Purdue, *supra* note 9, at 54.

74 *Id.* at 56.

had never been formed.[75] Others suggest it places the promisee in the position he occupied prior to the contract's formation.[76] There is a substantial difference between the two in that the former brings the plaintiff up to the time of trial, while the latter returns him to a time in the past; this rhetorical inconsistency is a difference that opens up deliberation on the limiting principle,[77] the awarding of pre-contractual expenditures,[78] and the relevance of lost or forgone opportunity within the reliance interest.[79] Here, we must proceed with this caveat and–in deference to Fuller and Purdue's article, along with Williston[80]–with the conclusion that the true measure of the reliance interest is the latter definition: that which would place the promisee in the position he occupied *prior to* the contract's formation.

B. Reliance Damages

The remedy of reliance damages, often referred to as out-of-pocket expenditures, will tend to (at least indirectly) satisfy the reliance interest discussed above. Courts will, however, issue these costs to the promisee as the best available approximation of the expectancy interest in cases where the expected profit would be too difficult to calculate.[81]

The first Restatement of Contracts (Restatement), drafted prior to Fuller and Purdue's article, provides for promissory estoppel,[82] restitution,[83] and reliance damages in the form of expenditures "reasonably made in performance of the contract or in necessary preparation therefor [sic]."[84] This suggests that multiple reasons exist for the issuance of contract-related damages, even where no bargained-for exchange has taken place.[85]

---

[75] *See, e.g.*, DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 41 (3d ed. 2002); Kelly, *supra* note 15, at 1766; Slawson, *supra* note 13, at 198.

[76] *See, e.g.*, Fuller & Purdue, *supra* note 9, at 54; 24 WILLISTON, *supra* note 8, § 64:2, at 21; Gregory S. Crespi, *Recovering Pre-Contractual Expenditures as an Element of Reliance Damages*, 49 S.M.U. L. REV. 43, 45 (1995).

[77] Notably, this issue arises because courts ignore *both* of the justifications for reliance by referring to an expectancy cap, and therefore begin by trying to place the plaintiff-promisee in the position as though the contract had been performed. In this way, the limiting principle is entirely inconsistent with any proper theory of reliance, a point to which we will return later. *See infra* Part IV.C. for discussion.

[78] *See* discussion *infra* Part IV.E.

[79] *See* discussion *infra* Part IV.B.

[80] *See supra* notes 76-77 and accompanying text.

[81] See Macaulay, *supra* note 38, at 289. *See also* Mistletoe Express Serv. v. Locke, 762 S.W.2d 637, 638 (Tex. App. 1988).

[82] Rakoff, *supra* note 1, at 206 (citing RESTATEMENT OF CONTRACTS § 90 (1932)).

[83] *Id.* at 207 (citing RESTATEMENT OF CONTRACTS § 326, cmt. a (1932)).

[84] *Id.* (citing and quoting RESTATEMENT OF CONTRACTS § 333 & cmts. (1932)).

[85] *See* Knapp, *supra* note 57, at 1197.

As a witness to the influence of Fuller and Purdue's article, the second Restatement expressly endorses the three damage measures defined therein.[86] Section 349 reads as follows:

> As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation of performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.[87]

The three damage measures are not equal in significance, though, as the overriding purpose of awarding damages is to "secure for that party the benefit of the bargain that he or she made by awarding a sum of money that will place the promisee in as good a position as he or she would have occupied had the contract been performed."[88] Still, when reliance damages are awarded, to include "any reasonably foreseeable costs incurred or expenditures made in reliance on the promise that has now been broken,"[89] the purpose of such an award is to return the plaintiff to "its precontractual position by putting a dollar value on the detriment the plaintiff incurred in reliance on the now-broken promise and reimbursing expenditures the plaintiff made in performing or preparing to perform its part of the contract."[90] The reliance measure's unequal treatment is also apparent in that § 349 does not follow the "pure" reliance interest,[91] and instead limits recovery to what the promisor "can prove with reasonable certainty the injured party would have suffered had the contract been performed."[92] Unsurprisingly, the Restatement also does not break with Fuller and Purdue to adopt the inclusion of pre-contractual expenditures.[93]

Similar to the Restatement, the proposed revisions to Article 2 of the Uniform Commercial Code treat reliance damages as inferior to expectancy; however, this constitutes a step forward since reliance is precluded entirely by the current edition.[94] Overall, the primary purpose

---

[86] 24 WILLISTON, *supra* note 8, § 64:2, at 21 (citing RESTATEMENT (SECOND) OF CONTRACTS § 344 (1981)).

[87] RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981).

[88] 24 WILLISTON, *supra* note 8, § 64:2, at 22.

[89] *Id.* § 64:2, at 31.

[90] *Id.* § 64:2, at 32.

[91] *See* discussion of Fuller & Purdue's article, *supra* Part III.A.

[92] *See* RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981).

[93] *See id.*

[94] Michael T. Gibson, *Reliance Damages in the Law of Sales Under Article 2 of the Uniform Commercial Code*, 29 ARIZ. ST. L.J. 909, 1011-12 (1997).

of compensatory damages is to satisfy the non-breaching party's expectancy interest;[95] although, now in lieu of expectancy, damages may be "determined in any reasonable manner,"[96] thereby opening the door to reliance.[97]

C. Promissory Estoppel: Reliance-based Obligation and the "Death of Contract"

Having already addressed the potential confusion of reliance-based obligation, reliance interest, and reliance damages,[98] we turn now to the doctrine of promissory estoppel, which poses the most serious threat to unravel the progress made thus far. Referred to occasionally as "reliance,"[99] promissory estoppel also appears in the second Restatement:

> (1) A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.[100]

One author famously proclaimed that promissory estoppel, by returning contract theory to its tort-related origins, would bring about the death of contract.[101] These fears may be justifiable, as courts have begun to use the doctrine as an independent basis of enforcement rather than as a fallback theory of recovery.[102]

Most important for our purposes are two principles. First, promissory estoppel exists independently of reliance damages, especially because courts award expectancy damages in most cases where they base contractual obligation on this doctrine.[103] Second, reliance damages

---

[95] U.C.C. § 1-106(1)(a) (2001) (The remedies "must be liberally administered to the end that the aggrieved party may be put in as good a position as if the other party had fully performed.").

[96] *See, e.g.*, Rev. U.C.C. § 2-703(2)(m) (2003).

[97] *See* Gibson, *supra* note 94, at 1011-12. The changes have also allowed for the award of restitution. *See id.*

[98] *See* discussion *supra* Part II.

[99] *See, e.g.*, Barnett, *supra* note 61, at 518-19.

[100] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

[101] *See generally* GILMORE, *supra* note 71.

[102] Barnett, *supra* note 61, at 522-23 (citing Daniel A. Farber & John H. Matheson, *Beyond Promissory Estoppel: Contract Law and the "Invisible Handshake"*, 52 U. CHI. L. REV. 903, 907-10 (1985)). "[P]romissory estoppel is being transformed into a new theory of distinctly contractual obligation." *Id.* at 523 (quoting Farber & Matheson).

[103] *See* Wonnell, *supra* note 14, at 118 (citing Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentation*, 15 HOFSTRA L. REV. 443 (1987)). This approach was also adopted by Williston in drafting the

exist independently from promissory estoppel, since they might be awarded where the basis for obligation is bargained-for consent[104]—or even in equity, where a court does not enforce the contract at all.[105]

IV. TOWARD AN IMPROVED RELIANCE REMEDY

A. The Meaning of "Pure" Reliance

A promisee's reliance interest can be defined as whatever might place that party into the position he occupied prior to entering into the contract.[106] Whether the reliance interest has merit within a consent-based contract system dominated by the expectancy interest–and what form the interest would therefore take–is the focus of this section.

Previous advocates of reliance as the primary interest—or at least a distinct interest—in contract law have not advanced a pure form of reliance that is true to its purpose of placing the promisee in the position he held prior to the contract's formation.[107] Often the problem lies in treating the reliance interest as placing the promisee in the position he would occupy *presently* had the contract not been made before, as in the case of those who call for the inclusion of lost opportunity damages.[108] Elsewhere, the problem lies in trying to satisfy two interests (expectancy and reliance) at once, producing results disloyal to the reliance interest as treated singularly. The consequence of this thinking has been the well-accepted limiting principle of reliance damages.[109] While critiquing both doctrines, this note will scrutinize the limiting principle with greater emphasis than it will examine lost opportunity damages, which have little practical application.

Other doctrines have been advanced that restrict the scope of the reliance interest unnecessarily. While these approaches to reliance are within the reasonable range of what we could call the "pure" form of the reliance interest, good arguments exist for taking an alternative route in each instance. First, the law of compensatory damages precludes the reliance interest due to its inferiority to the expectancy interest, rather than treating it as an alternative interest for the court to protect where

---

Restatement. Fuller & Purdue, *supra* note 9, at 64 (citing discussion of what is now § 90 of the CONTRACTS RESTATEMENT, *in* 4 A.L.I. PROC. app. at 98-99 (1926)).

[104] Macaulay, *supra* note 38, at 289. *See generally* Mistletoe Express Serv. v. Locke, 762 S.W.2d 637 (Tex. App. 1988).

[105] *See, e.g.*, Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245 (N.Y. 1983), discussed *infra* at Part IV.F.

[106] *See, e.g.*, Crespi, *supra* note 76, at 45; 24 WILLISTON, *supra* note 8, § 64:2, at 21.

[107] Kelly, *supra* note 15, at 1760.

[108] *See* discussion *infra* Part IV.B. Here, something is added to the reliance interest.

[109] *See* discussion *infra* Part IV.C. Here, something conceptual is added to the reliance interest, although the practical effect is a decrease in the damages awarded.

appropriate.[110] Underlying the prevailing approach are questions with respect to the nature of the wrong and the harm and whether the former causes the latter, which demand considerable treatment before the reliance interest could be given its independent status as protectable in law or equity,[111] without regard to the basis for contractual obligation.[112] Second, pre-contractual expenditures have also been precluded on the basis of causation defects and a failure to appreciate how the reliance interest might operate in conjunction with consent-based contractual obligation.[113] Again, this note targets the latter doctrine more directly; however, in this instance, the doctrines both depend upon underlying issues of causation and the interplay of obligation and interest, allowing an opportunity to address the former as well.

B. Removing Lost Opportunity

Lost opportunity has not gained great support in commentary or the law, even where reliance damages have been discussed. While Fuller and Purdue included lost opportunity in their theoretical definition of the reliance interest, they left unanswered the question of whether lost opportunity ought to be compensable.[114] The Restatement phrases reliance in terms of expenditures.[115] Courts treat reliance as comprising only out-of-pocket expenses.[116]

Commentator Michael Kelly, a critic of the reliance interest, notes that "an award limited to expenditures . . . deviates from the reliance interest. It excludes any compensation for opportunity costs incurred by the plaintiff, leaving her less well off than she would have been if the contract had never been made."[117] But this claim depends upon a definition of the reliance interest that seeks to place the promisee in a position as though the contract had never been made. By accounting for lost opportunity, the reliance interest would receive similar treatment as expectancy in its emphasis on what might have been. In a perfect market, in fact, the expectancy interest will always match the reliance interest that includes lost opportunity because what the promisee lost within the contract would equal what he would have gained in a deal

---

[110] *See* discussion of the Restatement and Uniform Commercial Code, *supra* Part III.B.

[111] *See* discussion *infra* Part IV.D.

[112] *See* discussion *infra* Part IV.E.

[113] *See* discussion *infra* Part IV.D.

[114] Fuller & Purdue, *supra* note 9, at 55.

[115] *See* RESTATEMENT (SECOND) OF CONTRACTS § 349 (1981).

[116] Frost, *supra* note 1, at 1375.

[117] Kelly, *supra* note 15, at 1766.

with any other person.[118] Given two theoretically identical interests, we could scarcely justify retaining both.

If, however, the definition set forth in this note holds, then the reliance interest appears more like restitution than expectancy, in that it resets the relationship between promisor and promisee by undoing the adverse consequences, rather than giving the expected profit. Reliance and restitution are theoretically different, despite potential cases where the two converge,[119] in that the measure for the reliance interest centers on harm to the promisee, whereas the measure for the restitution interest centers on the benefit to the promisor.

Practically speaking, discussions concerning lost opportunity are moot. Todd Rakoff suggests that "inclusion of loss of opportunity within (the) reliance interest makes it impossible . . . to insist on a purely tangible notion of injury,"[120] because "the value of these will often be impossible to measure."[121] Where the expected profit of a particular contract cannot be reasonably proven, one could hardly think that the value of similar opportunities lost as a result of the breach can possibly escape a similar fate.[122] Factor in the potential speculation as to what opportunity the promisee would have taken,[123] and it seems at least problematic—if not all but impossible—for courts to ever make such calculations.

C. The Case Against the Limiting Principle

As egregious as the error that produces the lost opportunity addition to the reliance interest, a greater one justifies the limiting principle, which is the puzzling rule that a promisee's reliance damages may not exceed what he was expected to recover on the contract[124]—and, in practice, that a promisor may prove the loss avoided to the promisee by way of the promisor's breach.[125] Here, Kelly has a valid grievance in

---

[118] Pettit, *supra* note 30, at 421-22.

[119] If the detriment to the promisee equals the benefit to the promisor, the reliance and restitution interests will match exactly in amount.

[120] Rakoff, *supra* note 1, at 221.

[121] *Id.*

[122] David Slawson discusses the various difficulties faced in valuing lost opportunity. *See* Slawson, *supra* note 13, at 220.

[123] *See id.*

[124] Admittedly, though the theoretical stakes are high, the actual cases where courts invoke the limiting principle are rare. Rakoff, *supra* note 1, at 229 (citing L.L. Fuller & William R. Purdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 75 (1936)).

[125] Mistletoe Express Serv. v. Locke, 762 S.W.2d 637, 638-39 (Tex. App. 1988). This case presents a good example of how the limiting principle works. There, the promisee (Locke) incurred several expenses in order to provide a pickup and delivery service for the promisor (Mistletoe). *Id.* at 638. The majority noted that Mistletoe "is not entitled to have Locke's losses deducted from the recovery, because Mistletoe had the burden to prove that

saying that "[a]ny principled effort to vindicate the reliance interest should not lightly impose those expectation losses on the plaintiff."[126] This is because the limiting principle "treats the promised performance as the starting point for analysis,"[127] rather than the harm suffered in reliance on the promise itself. Again, where the reliance interest purports to place the promisee in the position he occupied prior to the contract, a court seeking to satisfy this interest betrays this logic by referring also to the position the promisee would have occupied had the contract been fulfilled—or, the expectancy interest.[128]

A counter-argument to this analysis would be that courts do not actually seek to satisfy a promisee's reliance interest even where it awards the out-of-pocket component of the overall interest. Instead, a court will award expenditures because a "party's reasonable expectation of profit includes recouping the capital investment."[129] Even given that the pure reliance interest definition does not warrant in itself a limitation imposed by the expectancy measure, courts uninterested in protecting the reliance interest have no definitional hurdle to keep them from imposing such a limit; there remains a case to be made for pure reliance damages in the world of the expectancy interest.

When choosing to implement the limiting principle of reliance damages, courts allocate some risk to the promisee, who then bears the loss of having made a bad deal.[130] The pure reliance remedy, by contrast, places that risk on the promisor, "who must pay all of the [promisee's] expenditures if the [promisee] made a bad deal, and pay expenditures plus profit if the [promisee] made a good deal."[131] On its face, the latter result appears unjust; it appears to constitute a penalty for breach, despite the well-accepted rule that punitive damages will not be

---

amount, if any, and it did not do so." *Id.* at 639. The concurring justice argued against this result "when the loss figure is not available because of the fault of the party suffering the loss." *Id.* at 639 (Grant, J., concurring).

[126] Kelly, *supra* note 15, at 1763.

[127] Rakoff, *supra* note 1, at 231.

[128] As noted above, where the reliance interest includes lost opportunity it will equal the expectancy interest in a perfect market. Because plaintiff would have lost money *in any other similar deal*, it would be easy to see why a reliance interest containing lost opportunity might be capped by the expectancy measure, since that amount best approximates this form of the reliance interest in many instances. Without lost opportunity as a component of the reliance interest, the argument for capping reliance becomes more problematic. Where Kelly argues that "[r]eliance limited by expectation deviates dramatically from the position the plaintiff *would have occupied if the defendant had not made the promise*—the ideal toward which the reliance interest allegedly strives," his erroneous definition of reliance renders this statement a half-truth. *See* Kelly, *supra* note 15, at 1760 (emphasis added).

[129] *See* Mistletoe Express Serv. v. Locke, 762 S.W.2d 637, 638 (Tex. App. 1988).

[130] Kelly, *supra* note 15, at 1772.

[131] *Id.*

available in a contract-based cause of action.[132] If the promisee expected to recover his expenditures through the performance of the contract, and the promisor can prove that this was not possible, then how can the promisee expect to recover the expenditures in a claim for breach?[133] To find otherwise, a court would have to recognize a different allocation of risk than the parties bargained for initially. But is there any basis for a court to do so?

At the time of litigation, in cases where the promisee has been excused from performance, the promisor has committed a material breach.[134] Notably, then, "[a] party who first commits a material breach cannot enforce the contract."[135] This raises a serious question: "Why should the aggrieved party be bound to the limits of the expectations derived from a norm which the [promisor] has denied by the very breach?"[136]

In a contract action, a promisee must prove the following elements, with one or two of these absent depending upon the jurisdiction: (1) the existence of a valid contract; (2) the terms of the contract; (3) promisee's performance; (4) promisor's breach; and (5) damages resulting from that breach.[137]

Thus, a promisee must allege damages, but those may only include the expenditures made in reliance on the promise. Nothing binds the promisee to assert the expectancy damages; therefore he has not enforced the contract by suing for compensation of that interest. Neither, then, should the promisor be allowed to offer evidence related to the expected loss or profit of the contract.[138] Thus, the promisor shall have shifted the burden of a promisee's bad deal over to himself by reason of his breach and thereby through his inability to offer this evidence.[139]

---

[132] 11 CORBIN, *supra* note 22, § 1077, at 380.

[133] "[H]ad the contract been performed, the expenditures would have nevertheless been made, but would not have been lost. . . . At least, this is the situation in cases in which the expenditures do not exceed the expectation interest." Miguel Deutch, *Reliance Damages Stemming from Breach of Contract: Further Reflections and the Israeli Experience*, 99 COM. L.J. 446, 449 (1994).

[134] 23 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 63:3, at 438-39 (4th ed. 2002).

[135] *Id.* § 63:3, at 443.

[136] Deutch, *supra* note 133, at 460.

[137] Momah v. Albert Einstein Med. Ctr., 978 F. Supp. 621, 636 (E.D. Pa. 1997) (interpreting Pennsylvania law), *aff'd* 229 F.3d 1138 (3d Cir. 2000).

[138] We might say the promisor has *waived* the opportunity to offer evidence as to the expected loss or is *estopped* from it where the promisee only claims expenditure damages for his reliance on the contract; either way, the effect is to allow the promisee to recover all expenditures reasonably made in performance on the contract.

[139] Note that an inability to offer *sufficient* evidence in this regard leads to the same result, but here the argument carries this further to bar the offer of any such evidence. *See*

An immediate objection at this point is that under modern contract law, the "wrong" is the promisor's breach, and the "injury" is the promisee's expenditures that will not be recovered. Here, however, they would not have been recovered anyhow; therefore, no injury has taken place. This game of semantics deprives a promisee of compensation where a different understanding of the "wrong" and "injury" would just as easily provide a different result, as will be demonstrated below.[140] For now, three reasons suggest the fairness of barring a promisor from offering evidence that would limit a promisee's recovery: (1) the tendency of courts to under-compensate promisees, especially with respect to noneconomic damages; (2) the initial freedom to contract for a different remedy; and (3) the ability to engage in *ex post* negotiation.

A dominant principle in contract law is that a promisee will receive nothing more than what would restore his rightful position, according to Aristotelian corrective justice.[141] In practice, however, "[o]ur legal system seldom puts aggrieved parties where they would have been had breaching parties performed."[142] This results from the absence of awards for attorney fees and court costs,[143] and also from a court's inability to address noneconomic losses.[144] Not that advocates of the reliance interest have anything more to offer the promisee where the reliance measure usually gives less than the expectancy measure. Where the *expenditure measure*[145] version advocated by reliance scholars dominates, courts will "award the smallest recovery they can rationalize, choosing either the (promisee's) expenditures or the expectation interest."[146] By sharp contrast, the pure reliance remedy will be "[e]xpectation or [e]xpenditures, whichever is higher."[147] If a reasonable basis exists for a higher recovery, then courts ought to allow the higher recovery in light of the relief sought by the promisee.

Another dominant principle of contract is the freedom of parties, within certain limits, to create and shape a legal duty with respect to another person.[148] Thus, default remedies of the courts leave room for

---

Mistletoe Express Serv. v. Locke, 762 S.W.2d 637, 639 (Tex. App. 1988) (Grant, J., concurring).

[140] *See* discussion *infra* Part IV.D.

[141] DiMatteo, *supra* note 39, at 844.

[142] Macaulay, *supra* note 38, at 250.

[143] *Id.* at 252.

[144] *See id.* at 249-52.

[145] That is, out-of-pocket expenses capped by the expectancy measure. *See* Kelly, *supra* note 15, at 1772.

[146] *Id.*

[147] *Id.* at 1771.

[148] GRACE MCLANE GIESEL, 15 CORBIN ON CONTRACTS § 79.4, at 20-21 (Joseph M. Perillo ed., 2003).

parties to opt for alternative remedies in the event of breach, leading some to view the default remedies as merely affecting the initial and subsequent negotiations of the parties.[149] That a promisor has every opportunity to bargain for a better remedy and not take any chances with a potentially adverse award of expenditures (which happens to exceed the expectancy measure) alleviates any harshness this rule might have—especially when the promisor has drafted the contract.[150]

Moreover, the exclusion of the limiting principle creates an incentive for the promisor to renegotiate (through *ex post* negotiation) rather than to breach the agreement.[151] This has the advantage of better accounting for noneconomic factors that may cause a promisee to prefer performance over breach, even where he stands to lose money on the deal.[152] By forcing the promisor to seek out the promisee, this solution balances the interests of the parties and ensures that the promisor will perform or compensate the promisee where the latter's noneconomic interests outweigh his prospect for losing money.[153]

D. Causation and the Interplay Between Basis and Interest

Let us return now to a consideration of "wrong" and "injury" as it relates to the limiting principle and to the issue of whether to award pre-contractual expenditures. Within the reliance interest, the wrong is "the making of a promise that induced the promisee to change her position to her detriment";[154] however, within the expectation interest, the wrong is

---

[149] *See* Craswell, *supra* note 24, at 107.

[150] *See* MARGARET N. KNIFFIN, 5 CORBIN ON CONTRACTS § 24.27, at 282-83 (Joseph M. Perillo ed., 1998).

[151] A 1992 survey of businesspeople indicates that contract disputes frequently spur amicable renegotiation. Russell J. Weintraub, *A Survey of Contract Practice and Policy*, 1992 WIS. L. REV. 1, 22-23. The question specifically asks, "Describe your company's experience when it has asked relief from or modification of its contractual obligations." *Id.* at 22. Eighty-seven percent of respondents had experienced an "amicable working out of the problem by modification of performance of the contract in question," and sixty-six percent had experienced an "amicable working out of the problem by adjustments in future contracts." *Id.* at 23.

[152] Deutch, *supra* note 133, at 451.

> [T]he rationale of the contention denying causation in regard to losses exceeding expectation is . . . that the expenditures would have been wasted anyway, even if the contract had been performed. Yet, this approach ignores an important aspect. It limits the meaning of performance only to its economic value, neglecting its other possible meanings.

Id.

[153] Note that transactional barriers and the relative bargaining positions of the parties affect *ex post* negotiation as much as any other type. Wonnell, *supra* note 14, at 84.

[154] *Id.* at 54.

"the breaking of a promise."[155] For a wrong to cause an injury, the injury must take place concurrently or at a later time than the wrong, so that pure reliance damages cannot result from a breach because the damages occurred before the wrong.[156] But, if the out-of-pocket expenditures were expected to be recovered through performance of the contract, then a breach does cause this narrower component of reliance damages.[157] Similarly, for a wrong to *proximately* cause an injury, there must not be a substantial intervening cause, so that expectation damages cannot result from a promise where the substantial intervening cause of that injury is the breaking of that promise.[158]

By focusing on the promise or the breach as specific points where a wrong has taken place, contract scholars have overly-complicated the picture.[159] It also seems odd, on the one hand, to actively disclaim any true culpability on the part of a promisor[160] and, on the other, to look so carefully at the point of "wrongdoing" that triggered an injury.[161] Contract law is better served by a conception of the contract itself—being an agreement that ultimately fails to actualize during the executory period—as the wrong, where the breach or anticipatory repudiation manifests that wrong.[162] Judges themselves enjoy this "big picture" perspective because they see both the promise and the breach in

---

[155] *Id.*

[156] *See* Deutch, *supra* note 133, at 448.

[157] *See id.*

[158] That courts have given expectancy damages in promissory estoppel cases does not violate this principle. The reliance in question causes a contractual obligation, the breach of which has given rise to an action.

[159] Christopher Wonnell links these two decisions of the promisor, to initially make and to later break the promise, to the reliance and expectancy interests, respectively. Wonnell, *supra* note 14, at 56. Formation and breach have their places in other corners of contract law, but where the question is the fairness of remedying a particular harm, these concepts can interfere with a just result. Having conceded to expectation as the dominant interest in contracts, the present note argues for room in which reliance damages—in the form of expenditures—be allowed to satisfy the reliance interest where the promisee pleads in this way. In doing so, the current section aims broadly in justifying a remedy geared toward a harm that occurs prior to the previously conceptualized wrong. Arguments favoring the reliance interest, such as the attempt made by Wonnell to marry the two wrongs (thus marrying the interests), do not lie within the scope of the present note. *See id.* at 90.

[160] This is indicated by the preclusion of punitive damages in contract actions. *See* 11 CORBIN, *supra* note 22, § 1077, at 381.

[161] *See, e.g.*, Wonnell, *supra* note 14, at 54.

[162] There is a reason, then, that anticipatory repudiation may give rise to a suit before the breach was ever possible: the agreement or contract has proven itself a worthless one, in the sense that performance on the promisor's part will not be forthcoming.

hindsight.[163]

This larger umbrella eliminates causation issues and gives room for inquiry as to any of the three interests and their related measures whenever an obligation has been created. In the event that the agreement falls through, a promisee ought to receive compensation for any reasonable injury arising from that agreement, not to include double recovery based on more than one theory of damages.[164]

E. The Case for Awarding Pre-contractual Expenditures

As a final proposed reform to reliance damages, the rule on whether to award pre-contractual expenditures has less to do with the foregoing discussion and more to do with the formation of a contract; still, even with a workable definition of the contractual wrong that addresses causal concerns as to post-contractual expenditures, a new concern arises in this context: how could expenditures prior to an agreement possibly be imposed on the promisor if not caused by that agreement?

Before we develop a reply to the larger problem thus presented, consider two minor objections one might possibly make to such an award. First, a promisee who takes risks prior to forming the contract should have to suffer the consequences of taking those risks. Second, modern contract law has, as in the case of rejecting past consideration, generally opposed the inclusion of previous events within the contract.

To answer the first objection, although a promisee takes great risk in making pre-contractual expenditures, he does so only until the promisor signs the contract. The gamble in this situation is not whether the promisor will complete performance on the contract, thereby allowing the promisee to recover those pre-contractual expenses.[165] Instead, the promisee gambles on reaching a bargained-for agreement with the promisor, at which point the latter assumes potential liability for those expenditures reasonably given to him. To answer the second objection, the difference between past consideration and pre-contractual expenditures is that past events cannot support a *nudum pactum* (an

---

[163] In judgment of Israel, God occupied a similar perspective. Of course, it would appear that He knew beforehand of both the promise and the breach, but in allowance for free will (to the extent that it is compatible with predestination) reserved judgment for afterward—where in hindsight He could likewise see both the making and the breaking of the promise. Based on Aaron's caveats given when the people first made a covenant (that they would be witnesses against themselves when the covenant was broken), and on God's specific criticism of their failure to keep their end of the deal, it seems the concern was for the covenant in its entirety, from formation to breach. *See Jeremiah* 11:1-8; *Joshua* 24:14-27.

[164] The wrong is the agreement that fails to actualize; the harm is determined according to the relief sought by a promisee.

[165] Or, in the event of breach, to lose those expenses.

unenforceable agreement),[166] but can potentially constitute part of an agreement enforceable on other grounds. At least, nothing prevents parties from contracting with respect to expenditures already made.

Must an agreement that the promisor assumes liability on past expenses be explicit, or can a court infer it under the circumstances? With the rise of consent-based obligation, courts have adopted an objective standard for determining whether a condition may be implied in fact.[167] Apart from precedent, nothing precludes a court from applying this objective analysis to the question of whether the parties included liability for the pre-contractual expenditures as a part of the agreement. The test, as commentator Gregory Crespi proposes, ought to be that courts will impose a pre-contractual expenditure "when it is in the reasonable contemplation of the parties to the contract, at the time of formation, that those expenditures will likely be wasted in the event of breach."[168]

Given that the terms of a contract will include pre-contractual expenditures when they are awardable,[169] causation issues pose no more difficulty for these expenditures than for any other injury arising from the enforceable agreement that fails to actualize.[170]

---

[166] *See* 3 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 7.2, at 17 (4th ed., 1992).

[167] Williston places conditions implied in fact into the class of express conditions, as opposed to constructive conditions implied in law, because these are created "by the manifested intention of the parties to a contract" rather than imposed by the courts. 13 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 38:11, at 419-21 (4th ed., 2000). Surrounding circumstances, in addition to the language of the parties, may be used to imply conditions in fact. *Id.* Nor does the parol evidence rule preclude investigation of surrounding circumstances as a rule of interpretation. 11 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS § 32:7, at 434-39 (Richard A. Lord ed., 1999).

[168] Crespi, *supra* note 76, at 47. Crespi adds to this the standard principles of foreseeability, avoidability, certainty, and the limiting principle—as well as the idea that the parties may contract otherwise. *Id.* Naturally, the present note splits with Crespi on the limiting principle, but otherwise this forms a solid blueprint.

[169] *But see id.* at 47-51. Crespi first justifies the award of pre-contractual expenditures on the notion that the lost opportunities in reliance are never compensated. *Id.* However, later in the article he mentions that "at the moment of contracting those expenditures are irrevocably committed to the objective of contract performance by the plaintiff," in apparent harmony with this mutual assent argument. *Id.* at 66.

[170] When these expenditures are awarded in the context of the expectancy interest, the promisee had a reasonable belief that he would have recouped these losses. When they are given in the context of the reliance interest, they are treated similarly with other expenditures pleaded as such.

F. Reliance as Equity

Until this point, the discussion has centered on reliance as a measure of damages at law. Alternatively, the reliance interest has great potential in equity, as a New York Court of Appeals case will reveal.

In *Farash v. Sykes Datatronics, Inc.*, the plaintiff brought a claim for breach of an oral lease for a term longer than a year, and was therefore barred by the Statute of Frauds.[171] He also sought, on an alternative claim, "to recover for the value of the work performed by plaintiff in reliance on statements by and at the request of defendant,"[172] which would require the court to declare a contract implied in law.[173]

Concerning restitution, the court quoted:

> "[T]he law should impose on the wrongdoing defendant a duty to restore the plaintiff's former status, not merely to surrender any enrichment or benefit that he may unjustly hold or have received; although if the market value or, in the absence of a market value, the benefit to the defendant of what has been furnished exceeds the cost or value to the plaintiff, *there is no reason why recovery of this excess should not be allowed.*"[174]

And, here, the court goes on to grant "restitution" for part performance:

> "The quasi-contractual concept of benefit continues to be recognized by the rule that the defendant must have received the plaintiff's performance; acts merely preparatory to performance will not justify an action for restitution. 'Receipt,' however, is a legal concept rather than a description of physical fact. If what the plaintiff has done is part of the agreed exchange, it is deemed to be 'received' by the defendant."[175]

It is not that the decision presents any miraculous leap of logic. According to the second Restatement, with two unrelated exceptions, "any performance which is bargained for is consideration."[176] In the preceding section, it says that a performance "is bargained for if it is sought by the promisor in exchange for his promise and is given by the

---

[171] Farash v. Sykes Datatronics, Inc., 452 N.E.2d 1245, 1246 (N.Y. 1983).

[172] *Id.*

[173] *Id.* at 1247.

[174] *Id.* at 1247-48 (quoting 12 SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS, at 282-84, 286-87 (3d ed. 1979) (notes omitted)) (emphasis added).

[175] *Id.* at 1248 (quoting JOHN D. CALAMARI & JOSEPH M. PERILLO, CONTRACTS § 15-4, at 574 (2d ed. West 1977)).

[176] RESTATEMENT (SECOND) OF CONTRACTS § 72 (1981).

promisee in exchange for that promise."[177] Notwithstanding the fact that reliance itself does not amount to consideration in the absence of a bargain, this suggests that the rendering of a performance constitutes enrichment of the promisor, which equity has every reason to take from him in the event of breach. Following this reasoning, reliance would not be available as an equitable remedy where the performance does not amount to consideration. On the other hand, courts should feel free to award the reliance interest in equity whenever the promisee chooses to rescind the agreement—to include situations where the contract was valid but unenforceable, or where the promisee would rather seek to recover expenditures because the contract had been a losing one.[178]

V. CONCLUSION

When courts enforce an agreement, they first determine whether that agreement is valid and enforceable, and then decide how to measure the award given to a promisee, governed by the potential interests at stake within an action for damages due to a breach (or, alternatively, for restitution or specific performance). The law has not historically or recently determined an appropriate remedy solely on the basis of what made the agreement valid and enforceable. In fact, this note has shown that a remedies analysis appropriately treats basis, interest, and remedy independently (though with some logical consistency).

Reliance damages—defined as out-of-pocket expenditures—fit easily within the consent-based, expectancy-interest concept of contract remedies. Yet in order to make a promisee whole, the reliance interest can help to shape certain doctrines. Reliance should not include a lost opportunity component for definitional reasons, but also because the expectancy measure, where possible, best approximates this amount. Reliance should not be limited by the expectancy measure, even though the expectancy interest suggests this result, because a promisor by way of breaching the agreement should have no recourse to that agreement in offering evidence of a "losing contract." Reliance should also not be restricted to post-contractual expenditures where the parties reasonably contemplated that the promisor would have liability for certain pre-contractual expenditures made by the promisee.

In lieu of or in addition to these proposed changes, the reliance interest has a potential home within the realm of equity, since a promisor is unjustly enriched by the consideration given by the promisee

---

[177] *Id.* § 71(2).

[178] Note that to rescind a contract, a promisee would have to forgo any pre-contractual expenditures that might have been imposed upon the promisor because the act of rescission removes any contractual liability of either party in order to allow for an equitable solution.

who performs on the contract. Thus, reliance would deserve as much protection as restitution, and a promisee would have the opportunity to rescind a contract and receive the value of the consideration given to the promisor.

William Hart