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# THE LEGAL IMPLICATIONS OF SOCIAL NETWORKING

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## INTRODUCTION

The world has embraced social networking with a fervor rarely seen. Even lawyers, though always slower than the general public to adopt new technology, are increasingly utilizing social networking sites, both for marketing purposes and as a source of evidence.

Unknowingly, they have all dropped into what the military might call a "hot zone." Perils await on all sides, and lawyers are poorly armed. Only recently have we begun to wake up to the dangers of social networking and its ethical implications for lawyers.

Let's take a look at social networking from 10,000 feet and consider some recent statistics.

In April 2009, Facebook announced that it had over 200 million active users worldwide.[1] In the same month, Twitter, the new kid on the social networking block, reached over 14 million users in the United States.[2] LinkedIn claims over 48 million members worldwide[3] and Plaxo over 40 million.[4] MySpace, once the 800-pound gorilla of this new world,

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1 Facebook Timeline, http://www.facebook.com/press/info.php?timeline (last visited Nov. 19, 2009).

2 Posting of Nick O'Neill to Social Times, http://www.socialtimes.com/2009/04/twitter-14-million/ (Apr. 7, 2009, 09:00 EST) (citing March Data is Live on Site Analytics!, http://blog.compete.com/2009/04/07/march-data-live/ (Apr. 7, 2009)).

3 LinkedIn, About Us, http://press.linkedin.com/about (last visited Nov. 19, 2009).

4 Plaxo Company Overview, http://www.plaxo.com/about (last visited Nov. 19, 2009).

has fallen from favor with Internet users.[5] Still, according to TechCrunch, it has an impressive 125 million users globally.[6] These networks are rapidly becoming a part of everyday life to an increasing number of people, but if any of the sites listed above are unfamiliar to you, just take a look at their Wikipedia entries.[7]

Texting and blogging are often included as part of the social networking phenomenon. We will discuss them here from time to time, as there is such interconnection among all these technologies.

This alluring new world has demonstrated many pitfalls. Initially, very few people used the privacy settings that were available to them.[8] They simply left them at the default settings, meaning that everything they posted was wide open to anyone.[9] And let's face it, if your "friend" on Facebook chooses to cut and paste elsewhere some very unseemly language you posted, your privacy settings are all for naught. Additionally, the terms of use, which most people do not read, give the sites enormous power over how your postings may be used. It is enough to give a cautious person a serious case of the willies.

Compounding the dangers, social networks have begun to attract, in a major way, folks who want to use them to spam, to control bot networks, to attract Internet users to sites which will download malware, and even to use photos of your family and friends to peddle their products. Imagine the surprise of the husband who found a photo of his wife in a Facebook "hot singles" ad, with her image used without her knowledge or consent.[10] The advertiser had merely lifted her attractive photo from a Facebook page.[11]

Hackers have shown increasing interest in these sites as well (never a good omen for sites that once seemed fairly innocent). By using the

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[5] *See* Posting of Michael Arrington to TechCrunch, MySpace Is in Real Trouble If These Page View Declines Don't Reverse, http://www.techcrunch.com/2009/05/18/myspace-is-in-real-trouble-if-these-page-view-declines-dont-reverse/ (May 18, 2009).

[6] Posting of Michael Arrington to TechCrunch, Facebook Now Nearly Twice the Size of MySpace Worldwide, http://www.techcrunch.com/2009/01/22/facebook-now-nearly-twice-the-size-of-myspace-worldwide/ (Jan. 22, 2009).

[7] Wikipedia, Facebook, http://en.wikipedia.org/wiki/Facebook (last visited Nov. 19, 2009); Wikipedia, LinkedIn, http://en.wikipedia.org/wiki/LinkedIn (last visited Nov. 19, 2009); Wikipedia, MySpace, http://en.wikipedia.org/wiki/MySpace (last visited Nov. 19, 2009); Wikipedia, Plaxo, http://en.wikipedia.org/wiki/Plaxo (last visited Nov. 19, 2009).

[8] *See, e.g.*, Sophos, *Facebook Members Bare All on Networks, Sophos Warns of New Privacy Concerns*, Oct. 2, 2007, http://www.sophos.com/pressoffice/news/articles/2007/10/facebook-network.html.

[9] *See id.*

[10] Culture Smith Consulting, Husband Speaks Out on Seeing Wife in Facebook Dating Ad, http://www.culturesmithconsulting.com/husband-speaks-out-on-seeing-wife-in-facebook-dating-ad/ (July 29, 2009) (citing Video Post: *Husband Sees Wife on Singles Facebook Ad* (ABC 13 July 29, 2009), http://cfc.wset.com/videoondemand.cfm?id=45551).

[11] *Id.*

sites' features that allow the downloading of content from third-party sites, the networks have left huge security holes for hackers to exploit.[12]

Because social networking is so new, the barrage of tales involving missteps has taken on the force of an avalanche in the last couple of years. Let's take a look at social networking through the prism of the law.

## I. COURTS WRESTLE WITH SOCIAL NETWORKING

The news flashes have come fast and furious in the last two years, so much so that it is truly impossible to keep up with them all, though they assault us nearly every night on the evening news, or their online counterparts.

In the most egregious case on record, a woman sitting on a British jury in a sexual assault and child abduction case polled her friends on Facebook to see which way she should vote.[13] One wants to ask in exasperation, "What in the world was she thinking?" But this is the world in which we live, and we take our jurors as we find them.

For example, Pennsylvania State Senator Vincent Fumo complained in his post-verdict appeal of conviction that a juror used Twitter, Facebook, and blogs to post information about the trial during deliberations.[14] The court rejected the complaint in its ruling on Fumo's post-trial motion.[15]

> The Twitter message at issue simply stated, "This is it . . . no looking back now!"
>
> The Court finds that such a comment could not serve as a source of outside influence because, even if another user had responded to Wuest's Twitter postings (of which there was no evidence), his sole message suggested that the jury's decision had been made and that it was too late to influence him. Moreover, Wuest's comment caused no discernible prejudice. It was so vague as to be unclear. Wuest raised no specific facts dealing with the trial, and nothing in his comment directly referred to the trial or indicated any disposition toward anyone involved in this suit. Finally, there is no evidence that he discussed any of these matters with any of his fellow jurors. Hence, the Court declines to grant the motion on this ground.[16]

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[12] Brian Krebs, *Hackers' Latest Target: Social Networking Sites*, WASH. POST, Aug. 9, 2008, at D1, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/08/08/AR2008080803671.html.

[13] Daily Mail Reporter, *Juror Dismissed After Asking Facebook Friends How She Should Vote on Trial*, MAIL ONLINE, Nov. 25, 2008, http://www.dailymail.co.uk/sciencetech/article-1089228/Juror-dismissed-asking-Facebook-friends-vote-trial.html.

[14] United States v. Fumo, No. 06-319, slip op. 115, 116–17, 125, (E.D. Pa. Jun. 17, 2009), *available at* http://www.paed.uscourts.gov/documents/opinions/09d0710p.pdf.

[15] *Id.* at 128.

[16] *Id.* at 117 (alteration in original) (citation omitted).

With respect to the juror's Facebook postings, the court found that they were in the nature of general status updates which revealed nothing of substance and he did not appear to receive any outside information because of them; thus, there was no prejudice.[17] And though Wuest had posted on his moribund blog that he was on jury duty, he offered no further information, nor did he receive any comments to the blog post.[18]

In conclusion, the court found that "despite violating the [c]ourt's admonition against discussing the details of the trial, Wuest was a trustworthy juror who was very conscientious of his duties. There was no evidence presented by either party showing that his extra-jury misconduct had a prejudicial impact on the [d]efendants."[19]

It is noteworthy in this case that the court clearly finds that this juror violated the court's orders.[20] He "skates," however, and only because the court found that his misconduct had no prejudicial impact.[21] It is all too easy to imagine a case where there might be considerable prejudicial impact from this sort of misconduct.

Consider the following hypothetical facts: There are a number of social networkers who are simply addicted to posting the events of their lives. If they are prone to tell the world that they had a decaf skim latte in the morning and which TV shows they are watching at night (along with which brand of popcorn), the allure of posting about a juicy trial is surely going to be too much to resist.

Another misbehaving juror in Arkansas posted eight tweets during a trial which resulted in a $12.6 million dollar verdict.[22] Stoam Holdings and its owner Russell Wright were accused of running a Ponzi scheme.[23] During the trial, the juror's tweets included one that said, "oh and nobody buy Stoam. Its [sic] bad mojo and they'll probably cease to [e]xist, now that their wallet is 12m lighter."[24]

This could have been very bad "mojo," indeed, for the juror and the trial, but the Court found "that the tweets were [merely] in bad taste,

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[17] *Id.* at 121–22.

[18] *Id.* at 125, 127.

[19] *Id.* at 127–28.

[20] *Id.* at 122.

[21] *Id.*

[22] Jon Gambrell, *Appeal Claims Juror Bias in 'Tweets' Sent During $12 Million Case*, LAW.COM, Mar. 16, 2009, http://www.law.com/jsp/article.jsp?id=1202429071686.

[23] *Id.*

[24] *Id.*

but not improper."[25] It is questionable whether other courts might have treated that offense so lightly.

Consider a recent case in which Miami-Dade Circuit Judge Scott Silverman dismissed a civil fraud lawsuit after declaring a mistrial when Chief Executive Officer Yizhak Toledano took advantage of a bench conference to text Chief Financial Officer Gavin Sussman, who was on the witness stand.[26] After being alerted by a spectator, Judge Silverman questioned Toledano and Sussman, who admitted to the texting.[27] The judge then had the offending text messages read aloud and made part of the record.[28]

In his order dismissing the case, Judge Silverman wrote that the texting

> "was underhanded and calculated to undermine the integrity of this court and the legal process . . . . Regretfully, plaintiff through its unacceptable conduct has reached into the [C]ourt's quiver of sanctions, drawn the bowstring taut and aimed the arrow at the heart of its own case. This [C]ourt has justifiably released the string."[29]

The judge also awarded attorney fees and costs to the defense.[30]

So what do we do with these devices? Some courts, like the United States District Court for the Eastern District of Virginia, ban the entry of cell phones entirely.[31] This practice is, to put it very mildly, not likely to be popular with attorneys or jurors. It is curious, in this electronic age, that this court still insists that attorneys bring paper calendars to court with them to schedule hearings and trial dates rather than use their smartphones. It seems quite deliciously antiquated for an otherwise very modern court.

The United States District Court for the Southern District of New York is experimenting with an interim rule whereby attorneys may bring in pre-authorized electronic devices, though jurors, witnesses, and observers are still required to leave such devices behind.[32]

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[25] Tresa Baldas, *For Jurors in Michigan, No Tweeting (or Texting, or Googling) Allowed*, LAW.COM, July 1, 2009, http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202431952628&slreturn=1&hbxlogin=1.

[26] Deborah C. Espana, *Judge Tosses Fraud Suit After Witness Is Texted by Boss During Trial*, LAW.COM, Aug. 17, 2009, http://www.law.com/jsp/law/LawArticleFriendly.jsp?id=1202433074669.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.*

[31] Sharon Nelson & John Simek, *Three Strikes and You're Out: Judges Talk About Technology in the Courtroom*, LAW PRAC., July–Aug. 2005, at 24, 25.

[32] Katherine A. Helm, Op-Ed, *Courtrooms All Atwitter*, NAT'L L.J. (New York City), Aug. 10, 2009, at 34.

Some states are bringing down the hammer. Michigan acted decisively in making a Supreme Court rule banning the use of any electronic communications devices, such as iPhones and BlackBerrys, while in the jury box or during deliberations.[33]

It is difficult, during a trial of any length, to keep cell phones out of the hands of jurors. As a society, we have become accustomed to using them to stay in touch with family members and to receive important communications from employers. Arguably, if jury members are allowed to have smartphones in the jury box, they can be easily distracted. This would likely be just as true in the jury deliberation room. Perhaps we can ban the use of cell phones in those two places, but can we really forbid access to cell phones during breaks or in the evenings?

A veritable smorgasbord of policies exists. New Jersey permits jurors to bring cell phones inside, provided that they remain off during trial.[34] One Alaska court requires jurors to check their cell phones with the bailiff at the start of deliberations, while Malheur County, Oregon, and the United States District Court for the Western District of Louisiana ban jurors' cell phones outright.[35]

Some courts, like the one in Ramsey County, Minnesota, have issued a new policy prohibiting jurors from bringing any wireless communication device to court. In Ramsey County, a court declared two mistrials after jurors used cell phones during deliberations, in violation of a court order.[36]

The court in Multnomah County, Oregon, has a jury instruction specifically addressing electronic devices and activities: "Do not discuss this case during the trial with anyone, including any of the attorneys, parties, witnesses, your friends, or members of your family. 'No discussion' also means no emailing, text messaging, tweeting, blogging or any other form of communication."[37]

The instruction also warns jurors about Internet searches:

> In our daily lives we may be used to looking for information on-line and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should.[38]

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[33] Anita Ramasastry, *Why Courts Need to Ban Jurors' Electronic Communications Devices*, FINDLAW.COM, Aug. 11, 2009, http://writ.news.findlaw.com/ramasastry/20090811.html.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Cell Phone Policies/Instructions for Jurors*, JUR-E BULL. (Nat'l Ctr. for State Courts, Ctr. for Jury Studies, Williamsburg, Va.), May 1, 2009, http://www.ncsconline.org/WC/Publications/KIS_JurInnJurE05-01-09.pdf.

[38] *Id.*

Another instruction was issued on April 21, 2009, by an Arkansas judge, who said,

> [D]uring your deliberations, please remember you must not provide any information to anyone by any means about this case. Thus, for example, do not use any electronic device or media, such as the telephone, a cell or smart phone, Blackberry, PDA, computer, the Internet, any Internet service, any text or instant messaging service, any Internet chat room, blog, or website such as Facebook, My[]Space, YouTube or Twitter, to communicate to anyone any information about this case until I accept your verdict.[39]

Similar instructions have reportedly been given to jurors by judges frustrated by the misuses of these new technologies.[40]

As always, technology has leap-frogged over our current rules and procedures and we are struggling to catch up. Different courts have played with different rules. Some simply have bailiffs monitor the courtroom, putting the kibosh on any attempt to utilize a smartphone in the courtroom.

The National Center for State Courts has been collecting cell phone policies and related instructions for jurors—notable for the fact that these are all over the map![41] We have clearly identified the problem, but we certainly have not standardized a solution.

Reporters are also caught up in the frenzy. A United States District Judge allowed a reporter to tweet about court proceedings during a trial of six gang defendants in Kansas.[42] He felt it opened the legal process to the public.[43]

In July 2009, a court order in Florida went in the opposite direction. The reporters were given a temporary press room while covering a trial.[44] They were permitted to bring in their "cellular phones, BlackBerries, iPhones, Palm Pilots, and other similar electronic devices as long as they agree[d] in writing to not email, text message, twitter,

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[39] Ride the Lightning: Web 2.0 Jury Instructions in Arkansas, http://ridethelightning.senseient.com/2009/05/web-20-jury-instructions-in-arkansas.html (May 8, 2009, 07:00 EST) (original alterations omitted).

[40] *See, e.g.*, People v. Jamison, No. 8042/06, 2009 WL 2568740, at *6 (N.Y. Sup. Ct. Aug. 18, 2009).

[41] *See Cell Phone Policies*, *supra* note 37.

[42] LarrysWorld.com, Twitter in the court: Federal Judge Gets It, http://www.pcanswer.com/2009/03/09/twitter-in-the-court-federal-judge-gets-it/ (Mar. 9, 2009).

[43] *Id.* (citing Roxana Hegeman, *Twitter Boosts Public Access to Federal Courtrooms*, FOXNEWS.COM, Mar. 6, 2009, http://www.foxnews.com/wires/2009Mar06/0,4670,CourtroomTweets,00.html).

[44] Order Regarding Media Conduct and Electronic Equipment Access, United States v. UBS AG, No. 1:09-cv-20423-ASG (S.D. Fla. July 9, 2009), *available at* http://www.flsd.uscourts.gov/viewer/viewer.asp?file=/cases/pressDocs/109cv20423_106.pdf.

type or otherwise use those devices inside any courtrooms within this District."[45]

Obviously, it is a jungle out there. As the old saying goes, "if you know the rules of one court, you know the rules of one court."

## II. LAWYERS AND JUDGES WHO HAVE FALLEN INTO THE TAR PIT

You might read the preceding section and think, "Gosh, who would do something like that?" It appears, however, that lawyers and judges are no different. Consider some of the following examples.

A Texas judge recounts a case in which a lawyer requested a continuance due to the death of her father.[46] The lawyer's recent Facebook statuses told a different story, however, speaking of a week filled with drinking and partying.[47] Strangely, her story in court did not match her Facebook posts.[48] Another lawyer posted a complaint about the same judge's court on Facebook, prompting the judge to send the lawyer a good-natured Facebook barb of her own.[49] The judge also recalls cases in which lawyers were "on the verge of crossing, if not entirely crossing, ethical lines" with their online complaints about clients or opposing counsel, and once had to warn a family member that her online boasts about how much money she expected to win in a tort suit might hurt her case.[50]

Here is a cautionary tale of a lawyer who seems to have forgotten the rules of engagement. A child was injured at an Old Navy store (a subsidiary of Gap, Inc.) on a clothing rack and a lawsuit ensued in federal court based on diversity jurisdiction.[51] The plaintiffs deposed the Gap's General Liability Claims Manager via video deposition on the chain of custody of the clothing rack.[52] The witness was in Sacramento, California, the defense attorneys were in Fort Lee, New Jersey, and the *pro hac vice* attorney was in Southfield, Michigan.[53] The deponent and the *pro hac vice* attorney "were only visible from the 'chest up'" and their hands were not visible.[54] Can you see where this is going? Before the

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[45] *Id.*

[46] Molly McDonough, *Facebooking Judge Catches Lawyer in Lie, Sees Ethical Breaches*, A.B.A. J., July 31, 2009, http://www.abajournal.com/news/facebooking_judge_catches_lawyers_in_lies_crossing_ethical_lines_abachicago/.

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.*

[51] Ngai v. Old Navy, No. 07-5653 (KSH) (PS), 2009 WL 2391282, at *1 (D.N.J. July 31, 2009).

[52] *Id.*

[53] *Id.*

[54] *Id.*

deposition, the two sent eleven text messages between themselves.[55] During the one hour and twelve minute deposition, the attorney and client exchanged five more text messages.[56] Then came one of those moments that make the virtuous smile. The *pro hac vice* attorney inexplicably sent a text to the *plaintiffs'* attorney saying, "[you are] doing fine," thus hoisting himself on his own petard.[57] Suspecting (do you think?) that something fishy was afoot, the plaintiffs' attorney requested that the *pro hac vice* attorney preserve his text messages from the deposition.[58]

When all was said and done, the essence of the argument against producing the text messages was that they were protected by the attorney-client privilege.[59] The court did indeed find that the text messages made before the deposition were privileged,[60] but the text messages sent during the course of the deposition were not.[61] The court stated that the *pro hac vice* attorney violated Federal Rule of Civil Procedure Rule 30 by texting during the deposition.[62] The court equated the conduct with passing notes to the client that included instructions "intended to influence the fact finding goal of the deposition process."[63]

Had it not been for the *pro hac vice* attorney sending a text to the plaintiffs' attorney, no one would likely have known of this impermissible (and ethically questionable) conduct. It will be a sad day for our system if deposing attorneys need to include a "no texting" provision to deposition admonitions.

In another case, a California lawyer (non-practicing) was suspended for blogging about a trial while serving as a juror.[64] The lawyer had been warned not to discuss the case, orally or in writing,[65] but he apparently knew better, as egotistical individuals always seem to. "Nowhere do I recall the jury instructions mandating [that] I can't post comments in my blog about the trial[.]"[66] He then proceeded to describe the judge and the

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55 *Id.*

56 *Id.*

57 *Id.* (alteration in original).

58 *Id.*

59 *Id.* at *2.

60 *Id.* at *4.

61 *Id.*

62 *Id.* at *4 (citing FED. R. CIV. P. 30(c)).

63 *Id.*

64 Martha Neil, *Calif. Lawyer Suspended Over Trial Blogging While Serving as Juror*, A.B.A. J., Aug. 4, 2009, http://www.abajournal.com/news/calif._lawyer_suspended_over_trial_blog_while_serving_as_juror/.

65 *Id.*

66 *Id.*

defendant in an insulting manner.[67] Because of his misconduct, the appellate court reversed the felony burglary conviction.[68] The California Bar disciplinary authorities were not amused and his law license was suspended for forty-five days.[69]

Let us not assume the judiciary is immune to the temptations of the technological world. On April 1, 2009, the North Carolina Judicial Standards Commission publicly reprimanded a district court judge for making Facebook posts about a child custody and support hearing being tried before him.[70] During the hearing, which lasted from September 9 to September 12, 2008, the judge and the attorney for the defendant became Facebook "friends" and conversed online about the case, with topics ranging from when the case would be settled to whether one of the parties had engaged in an affair.[71]

The judge also used Google to research the plaintiff's business website, which had not been offered into evidence.[72] The judge never disclosed this outside research to the parties or their counsel.[73] On October 14, the judge disqualified himself from the case and his order was vacated.[74] The North Carolina Judicial Standards Commission concluded that the "[j]udge['s] actions constitute[d] conduct prejudicial to the administration of justice that brings the judicial office into disrepute."[75] The judge promised to familiarize himself with the Code of Judicial Conduct and avoid committing such infractions again.[76]

## III. WHY GO WHERE DANGER LURKS EVERYWHERE?

For the lawyers, social networking provides a new venue for marketing and at a lawyer's favorite price—free.[77] What can they accomplish on these social networks that have such appeal?

1. They can establish themselves as having expertise in a particular area of law.[78]

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67 *Id.*

68 *Id.*

69 *Id.*

70 Ryan Jones, *Judge Reprimanded for Discussing Case on Facebook*, THE-DISPATCH.COM, June 1, 2009, http://www.the-dispatch.com/article/20090601/ARTICLES/905319995/1005?Title=Judge-reprimanded-for-discussing-case-on-Facebook.

71 *Id.*

72 *Id.*

73 *Id.*

74 *Id.*

75 *Id.*

76 *Id.*

77 Susi Schuele, *Social Networking for Lawyers: The Lawyer's Guide to Making Friends*, GPSOLO, June 2009, at 40, 41.

2. They can gather followers if they provide consistently valuable content.[79]

3. They can create an online network, and sometimes, they can move that network offline.[80]

4. They may attract reporters, who are known to use and quote blogs on a regular basis.[81]

5. They may receive speaking invitations, leading to business opportunities.[82]

6. They can follow what others in their field are doing and emulate them whenever good ideas crop up.[83]

7. They can simply follow those who give out good information, helping to keep themselves current in their area of practice.[84]

8. They can start up conversations with those in their target markets.[85]

9. Most of all, "there is gold in them thar hills," which deserves its own section of this Article, as social networking sites so often offer up gold nuggets of evidence.[86]

## IV. SOCIAL NETWORKING AS EVIDENCE

The legal world took notice when, on February 20, 2009, the Ontario Superior Court of Justice permitted a defendant to cross-examine a plaintiff in a tort suit about his private Facebook profile.[87] The Court

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78 *Id.*

79 *See id.*

80 *See id.* at 42.

81 *See* Andrew Updegrove, *The Profession: Essentials of Creating a Successful Legal Blog*, BOSTON B.J., May–June 2007, at 16, 17.

82 Diane Levin, *Only Connect: The Impact of Blogging on the Field of ADR*, DISP. RESOL. MAG., Summer 2009, at 24, 25–26.

83 See id. at 26.

84 *See id.*

85 *See* Schuele, *supra* note 77, at 43.

86 *See infra* text and accompanying notes 87–108.

87 Tariq Remtulla, *Canada: Facebook Not So Private? Ontario Court Finds Facebook Profile Discoverable*, MONDAQ, Mar. 23, 2009, http://www.mondaq.com/article.asp?articleid=76332.

noted that it was "reasonable to infer that his social networking site likely contain[ed] some content relevant to the issue of how [the plaintiff] has been able to lead his life since the accident."[88]

There is also the famous case where a woman claiming serious injuries after a car accident was confronted by photos of her skiing in the Swiss Alps.[89] Whoops.

In another case, a woman lost a custody battle after sexually explicit comments on her boyfriend's MySpace page came to light.[90] And in yet another instance, a husband lost credibility after describing himself on MySpace as "single and looking."[91]

In criminal cases, social networking sites often come into play. In 2007, Jessica Binkerd was sentenced to five years and four months in prison after she drove under the influence of alcohol and was involved in a crash that resulted in the death of her passenger.[92] Her attorney anticipated that she would get probation, but she was sentenced to prison after evidence from her MySpace page showed her wearing an outfit with a belt that had plastic shot glasses on it.[93] Other photos showed her holding a beer bottle and wearing a shirt advertising tequila.[94] As her attorney put it, even though the outfit was part of a Halloween costume, the photos were all the judge talked about, saying that she had learned no lesson and showed no remorse.[95]

In 2008, two weeks after being charged with drunk driving in an accident that seriously injured a woman, Joshua Lipton made the foolish decision to show up at a Halloween party in a prisoner costume with the label "Jail Bird" on his orange jumpsuit.[96] Someone posted the photo on Facebook and the prosecutor made effective use of the photo of this young man partying while his victim was recovering in a hospital.[97] The judge called the photos "depraved" and sentenced him to two years in prison.[98]

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88 *Id.*

89 Shannon Kari with Matthew Coutts, *Facebook Postings Not Serious: Defence*, NAT'L POST, Feb. 12, 2008, *available at* http://www.financialpost.com/news-sectors/technology/story.html?id=302023.

90 Vesna Jaksic, *Litigation Clues Are Found on Facebook*, NAT'L L.J. (New York City), Oct. 15, 2007, at 1.

91 *Id.*

92 *Id.* at 7.

93 *Id.*

94 *Drinking, Driving, and Facebook Don't Mix*, CBS NEWS, July 18, 2008, http://www.cbsnews.com/stories/2008/07/18/tech/main4272846.shtml.

95 Jaksic, *supra* note 90, at 7.

96 *Drinking, Driving, and Facebook Don't Mix*, *supra* note 94.

97 *Id.*

98 *Id.*

In another sentencing hearing, Matthew Cordova found himself with a five-year prison sentence in Arizona.[99] He had pled guilty to aggravated assault with a gun.[100] At the hearing, his attorney tried to portray him as a peaceful man who had found religion, yet the prosecution had a MySpace picture of Cordova holding a gun which he posted comments about.[101]

In 2009, Raul Cortez was found guilty of murder.[102] He might not have been sent to death row, however, without the gang signs and colors displayed on his MySpace page being introduced in court.[103]

The police often use social networking sites in their investigations, while prosecutors check the sites of gang members, who regularly discuss their activities on their social networking sites.[104] Happily, they are often dumb enough to provide great fodder for criminal investigations.[105]

Many divorce attorneys have reported to the authors that, whenever they get a new case, they Google all the parties (including their own client) and also check their social networking sites. In one such case in which the authors were involved, a well-groomed woman who portrayed herself as a "soccer mom" was undone by explicit photos of herself that she had posted online looking to "hook up" with men.[106] Dad got custody.[107]

In another case the authors handled, a wife learned of her husband's infidelity because she talked to his lover on his Facebook page.[108] Though the wife had no access to the page, one of her friends did.

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[99] Erica Perez, *Getting Booked by Facebook*, MILWAUKEE J. SENTINEL, Oct. 3, 2007, at 9A, *available at* http://www.redorbit.com/news/technology/1087625/getting_booked_by_facebook/index.html.

[100] *Id.*

[101] Jaksic, *supra* note 90, at 7.

[102] Jay Gormley, *MySpace and Facebook Becoming Evidence in Court*, CBS11TV.COM, Feb. 3, 2009, http://cbs11tv.com/local/MySpace.Facebook.Evidence.2.926231.html.

[103] *Id.*

[104] *See* Jaksic, *supra* note 90, at 7.

[105] *Id.*

[106] Sharon D. Nelson & John W. Simek, *Adultery in the Electronic Era: Spyware, Avatars and Cybersex*, WYO. LAW., Dec. 2008, at 1, 1–2, *available at* http://wyomingbar.org/pdf/barjournal/barjournal/articles/Cybersex.pdf?-session=wybar_user:C6319D2B1890131606osFDE6E8B4.

[107] *Id.*

[108] *Cf.* Ride the Lightning, Social Networks: An Avalanche of Evidence, http://ridethelightning.senseient.com/2009/03/social-networks-an-avalanche-of-evidence.html (Mar. 10, 2009, 14:42 EST).

It should now be a matter of professional competence for attorneys to take the time to investigate social networking sites. You must pan for gold where the vein lies—and today, the mother lode is often online.

## V. HOW MIGHT LAWYERS MANAGE TO GET THEMSELVES TAKEN TO THE WOODSHED?

Apart from some of the courtroom and litigation antics referenced earlier, these areas of conduct may cause an attorney a great deal of trouble:

1. They shill for themselves, which not only backfires as a marketing target, but may violate state ethical rules regarding lawyer advertising.[109]

2. They deliberately or inadvertently form an attorney-client relationship.[110]

3. They drink a glass of wine or two or six and say or do something unwise online.

4. They treat their online conduct as trivial, without the recognition that what you do online may-well live forever. The authors have been told by people who have contacted representatives of Twitter that the company has every tweet that has ever gone out.[111]

5. They fail to realize that they may be divulging client confidences. Even though only their "friends" may have access to their Facebook page, those "friends" may shoot off posts to anyone they wish.

6. They do not properly investigate the privacy settings and therefore expose their online conduct where they may not mean

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[109] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-101(A) (1983) ("A lawyer shall not, on behalf of himself . . . use or participate in the use of any form of public communication containing a . . . self-laudatory . . . statement or claim.").

[110] *See* MODEL CODE OF PROF'L RESPONSIBILITY DR 2-104(A)(4) (1983) (individualized legal advice may bar future employment); MODEL RULES OF PROF'L CONDUCT R. 1.2 annot. at 37 (2003) (unofficially advising pro se litigants is common but disfavored).

[111] *See* Posting of Marshall Kirkpatrick to ReadWriteWeb, Confirmed: Twitter Is Saving All Your Tweets, After All, http://www.readwriteweb.com/archives/confirmed_twitter_is_saving_all_your_tweets_after.php (Sept. 25, 2009, 11:05 PST).

to.

7. They mix their personal and professional online conduct together—not always a wise move. Think, for instance, of a fifty-year-old lawyer who has a child who is her friend on Facebook. The child posts inebriated photos of her mom at her birthday celebration. Mom would have known better—the daughter may not.

8. They get online when they are angry and say something defamatory.

9. They do not proofread and they look like idiots, which is counter-productive to their marketing efforts.

10. They talk about their colleagues, their bosses, their adversaries and their clients, potentially unleashing a perfect storm of unethical conduct.

11. They use deceit to bypass the privacy settings of a social networking site. As an example, an attorney may try to inveigle a third-party into "friending" someone on Facebook in order to gain access to an opposing party's Facebook page.

## VI. SOCIAL NETWORKING: AN E-DISCOVERY AND RECORDS MANAGEMENT NIGHTMARE[112]

Even if you haven't caught what some have deemed "the Twitter bug," some within your firm likely have.[113] And what are they saying, when sending their "tweets" via Twitter?[114] Everyday comments like "[w]alking the dog[]" and "[w]hen did I get so darn fat[.]"[115] But they are also saying "the Smith, Smith, and Smith law firm is EVIL" and naming names.[116] They might also be saying, "We're working on a case that's going to put Acme Corporation in a stock market tailspin."[117]

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[112] Adapted from Sharon D. Nelson & John W. Simek, *Capturing Quicksilver: Records Management for Blogs, Twittering and Social Networks*, WYO. LAW., June 2009, at 1, *available at* https://www.wyomingbar.org/pdf/barjournal/barjournal/articles/Twitter.pdf [hereinafter *Capturing Quicksilver*].

[113] *Id.* at 1.

[114] *Id.*

[115] *Id.*

[116] *Id.*

[117] *Id.*

If you have a "pish posh" reaction to Twitter, you might want to rethink that feeling.[118] "From the *National Law Journal*: 'Beware, Your 'Tweet' on Twitter Could Be Trouble[.] Subheader: Latest networking craze carries many legal risks."[119]

"[I]s a tweet done on firm resources a 'record' for purposes of retention requirements and ESI preservation/production?"[120] Perhaps . . . or perhaps not. Much of this remains unsettled ground.[121]

"If you find that scary, you're not alone."[122] For a while, record managers no doubt thought they had the universe pretty well covered with e-mail and company-approved programs.[123] After a while, some of them caught up with instant messages.[124] But Twitter, blogs, and social networks have given almost everyone a Goliath-sized headache.[125] Whether you are thinking in terms of your own law firm or your clients, you must now consider these new technologies.[126]

They bedevil records management ("RM") in particular.[127] The minute RM catches up to technology, technology leapfrogs ahead with something else to cause consternation.[128]

Douglas Winter, who heads the electronic discovery unit at Bryan Cave, describes tweets as being no different from letters, e-mail, or text messages: they can be damaging and discoverable, which could be especially problematic for companies that are required to preserve electronic records, such as the securities industry and federal contractors.[129] Yet another compliance headache is born.[130]

Tom Mighell of the electronic discovery company Fios suggests that we may find a post from a proud employee that says: "[O]ur disc brakes are fine. I'm an engineer on that product. We test to 5x tolerance on the

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[118] *Id.*

[119] *Id.* (quoting Tresa Baldas, *Beware: Your 'Tweet' on Twitter Could Be Trouble*, NAT'L L.J. (New York City), Dec. 22, 2008, at 6).

[120] *Id.*

[121] *Id.*; *see also* Therese Craparo & Anthony J. Diana, *United States: The Next Generation of E-Discovery: Social Networking and Other Emerging Web 2.0 Technologies*, MONDAQ, Aug. 4, 2009, http://mondaq.com/article.asp?articleid=84000 (discussing the "developing legal landscape" concerning Web 2.0 technologies).

[122] *Capturing Quicksilver*, *supra* note 112, at 1.

[123] *Id.*

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.* at 1–2 (quoting Baldas, *supra* note119, at 6).

[130] *Capturing Quicksilver*, *supra* note 112, at 2.

label, so you can be rougher on them than you think. Don't worry."[131] As Tom points out, after that post, "[y]ou've got potential product liability in 140 characters."[132]

Twitter is by no means alone.[133] There is also Yammer, and present.ly[134] (no, that's not a typo)—and surely many more to come. Enterprise versions are just beginning to emerge, and companies are now faced with the dilemma of developing policy to govern them.[135]

### *A. Blogs*

As blogs have exploded in popularity over the last few years, so have corporate security concerns.[136] Not only might employees disclose trade secrets or divulge insider information on their blogs, but misuse of blogs could also lead to wrongful termination or harassment suits.[137]

There should, of course, be a company policy about blogging at work or about work.[138] Many companies sanction blogs. Microsoft has hundreds of them.[139] One case has suggested that employers may have the right to prevent employees from accessing blogs while at work, which may fend off some of the dangers associated with blogging.[140]

If blogs are allowed at work, the company needs to maintain blog archives where retention is mandated under laws or regulations.[141] Blogs do indeed create a "paper" trail, for better or worse.[142] Corporate blogging and individual employee blogging present different challenges: one clearly speaks for the corporation,[143] while the other may or may not, depending on the circumstances.[144]

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131 *Id.*; Kim S. Nash, *Text Messaging, Facebook Can Get You in Legal Trouble*, PC WORLD, Nov. 6, 2008, http://www.pcworld.com/businesscenter/article/153418/text_messaging_facebook_can_get_you_in_legal_trouble.html.

132 *Capturing Quicksilver*, *supra* note 112, at 2.

133 *Id.*

134 *Id.*; *see* Yammer: About, https://www.yammer.com/about/about (last visited Nov. 19, 2009); Present.ly - Tour, https://presentlyapp.com/tour (last visited Nov. 19, 2009).

135 *Capturing Quicksilver*, *supra* note 112, at 2.

136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*; *see* Microsoft Community Blogs Search Results, http://www.microsoft.com/communities/blogs/PortalHome.mspx (click "Go") (last visited Nov. 19, 2009) (listing various blogs).

140 *Capturing Quicksilver*, *supra* note 112, at 2 (citing Nickolas v. Fletcher, No. 3:06-CV-00043 KKC, 2007 WL 1035012, at *1, 9 (E.D. Ky. Mar. 30, 2007)).

141 *Id.*

142 *Id.*

143 *Id.*

144 *Id.*

Enterprise blogs require security, authentication, and audit trails.[145] Likewise, it should be possible to search them, issue reports, etc.[146] Control over enterprise blogs can be appliance-based, an enterprise application, or through software as a service ("SaaS").[147]

Audit trails should capture all changes, including new posts, changed or deleted posts, and comments and discussion.[148] They should capture context, including who posted/commented, what posts are read, and what posts are trackbacked.[149]

One wit has suggested a very simple corporate blog policy: "Just try to be smart about it."[150]

### *B. Social Networks*

The lifeblood of many employees is their social networks, including MySpace, Facebook, LinkedIn, and Plaxo.[151] Besides being gigantic timewasters, these sites abound with risks for businesses as most businesses do not monitor their employees' sites.[152] Therefore, all the risks associated with blogs apply here.[153] Some experts believe that companies may be well-advised to use filters to block access to social networking sites at work.[154] At the very least, this action will keep the posts from being company records.[155] In fact, a recent survey conducted by web filter ScanSafe found that seventy-six percent of ScanSafe's clients are indeed blocking access to social networking sites, an astonishingly high percentage.[156] Companies report seeing such sites as both a security risk and a productivity drain.[157] On the other hand,

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[145] *Id.* at 3.

[146] *Id.*

[147] *Id.*

[148] *Id.*

[149] *Id.*

[150] *Id.*; Jeremy Zawodny, Yahoo! Employee Blog Guidelines: The Official Version and My Own Advice, http://jeremy.zawodny.com/blog/archives/004725.html (May 31, 2005, 22:35 EST).

[151] *Capturing Quicksilver*, *supra* note 112, at 3.

[152] *Id.*

[153] *Id.*

[154] *Id*; *see also* Craparo & Diana, *supra* note 121 (suggesting that companies address the Web 2.0 trend before the issued is forced upon them).

[155] *Capturing Quicksilver*, *supra* note 112, at 3.

[156] *See* Chuck Miller, *Survey: Social Networks Increasingly Blocked*, SC MAGAZINE, Aug. 19, 2009, *available at* http://www.scmagazineus.com/Survey-Social-networks-increasingly-blocked/article/146833/.

[157] *Capturing Quicksilver*, *supra* note 112, at 3.

genuine business usage of these sites has grown tremendously[158] and it may be very difficult to allow business usage and forbid personal usage, no matter what a company's policy may say.[159]

A 2008 independent survey commissioned by FaceTime Communications (based in the U.K., but we have no reason to suspect the answers would be much different here) found that roughly eighty percent of employees use social networks at work, a statistic that was true of *both* personal and business use.[160] The work-related purposes included professional networking, researching, and learning about colleagues.[161]

As may be obvious, checking the social networking sites of potential employees could be wise, as an employer might get some sense of trouble brewing in the future: a lack of discretion, angry entries, a "TMI" (too much information) proclivity, etc.[162]

Is employer monitoring of social networking sites really happening in the wild?[163] The authors conducted an ad hoc online survey. While everyone said an employer had a right to monitor, no one actually knew of an employer who *was* monitoring personal sites.[164]

### *C. Toss or Keep?*

From our viewpoint, as folks involved in computer forensics, if you don't legally have to keep data and can't think of a reason why you should keep it, toss it.[165] You'll save a fortune if you become embroiled in litigation.[166] Shrinking the data to search will shrink the volume of potentially responsive data that must be reviewed.[167]

Some of the emerging technologies are fluid: comments on blogs, ever-expanding discussions on "wikis," changes on social networking sites, etc.[168] How do you manage something that isn't static and that has multiple authors?[169] Snapshots are one method with risk assessments

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158 *Id.*; *see also Online Social Networks Go to Work*, MSNBC INTERACTIVE, 2009), http://www.msnbc.msn.com/id/5488683/ (last visited Nov. 19, 2009) (discussing the popularity and benefits of the use of social networking sites at work).

159 *Capturing Quicksilver*, *supra* note 112, at 3.

160 *Id.*; FACETIME COMMUNICATIONS, THE COLLABORABORATIVE INTERNET: USAGE TRENDS, EMPLOYEE ATTITUDES AND IT IMPACTS, (Oct. 2008), http://www.facetime.com/survey08/summary/.

161 *Capturing Quicksilver*, *supra* note 112, at 3.

162 *Id.*

163 *Id.*

164 *Id.*

165 *Id.*

166 *Id.*

167 *Id.*

168 *Id.*

169 *Id.*

performed to determine how often snapshots must be taken.[170] Periodic archiving is another possibility, though it is a headache (again) to figure out how to schedule it.[171] Training is helpful—employees need to understand that they are creating "records" when they use these technologies and that they must think before they create records, bearing in mind the risks of the records they create.[172]

It's a brave new world, and most corporations and law firms are having a heck of a time dealing with it. It can involve huge costs, business disruptions, public embarrassment, and even legal liability.[173] Management of Web 2.0 records is limited at best, often chaotic, and duplicative.[174] This is a huge challenge for record managers. And ponder this Web 2.0 risk scenario from Michael Cobb:

> Suppose you're the CIO of a company that dominates its market to the point where competitors are grumbling about monopolistic practices. Some of your employees decide to "help" by going on the offensive, denigrating these grumbling competitors in off-site blog posts and wiki entries, tagging negative stories on the Web, posting slanted questions on LinkedIn, fostering criticism on Facebook and so on. Then the company is hit with a lawsuit by its competitors for engaging in an alleged smear campaign. Your general counsel proclaims innocence and tries to limit the scope of discovery, but is compelled by law to agree to hand over all relevant ESI.[175]

Again, interesting. Your opponents will have trolled the Web for data.[176] Can you claim ignorance?[177] Must you produce these off-site communications by your employees?[178] Can you afford not to know about Web 2.0 data?[179] These are questions that are giving CEOs (and their lawyers) recurring nightmares.[180]

## VII. PRIVACY, WHAT PRIVACY?

Further compounding these problems is the belief that what a user posts is private and will only be seen by them and their select "friends."

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[170] *Id.* at 3–4.

[171] *Id.* at 4.

[172] *Id.*

[173] *Id.*

[174] *Id.*

[175] *Id.* (quoting Michael Cobb, *Web 2.0 and E-Discovery: Risks and Countermeasures*, SEARCHSECURITY, July 2, 2008, http://searchsecurity.techtarget.com/tip/0,289483,sid14_gci1319551,00.html).

[176] *Capturing Quicksilver*, *supra* note 112, at 4.

[177] *Id.*

[178] *Id.*

[179] *Id.*

[180] *Id.*

Thus, individuals go "hogwild" and provide personal information they might otherwise keep to themselves.

For instance, a Facebook profile can contain a virtual treasure trove of personal information: an individual's name; birthday; political and religious views; contact information; gender; sexual preference; relationship status; favorite books, movies, etc.; educational and employment history; and pictures.[181] As the list of features and applications available to those frequenting social networking sites has grown, so too has the depth of information about both who you are and who you know.[182]

Consider for example the all too familiar scenario of a job applicant losing his or her employment offer after the employer finds out that one of their listed interests on Facebook is "smoking blunts."[183]

And while the above story may not seem to have far-reaching implications, others expose the darker side of privacy concerns. For instance, someone used personal photographs obtained from a private photo album to blackmail Miss New Jersey 2007.[184] The thought that anyone can dig up private photographs and disclose them to the world at large is enough to send shivers down anyone's spine.

Making matters worse, unbeknownst to the average citizen, courts have been unwilling to recognize a reasonable expectation of privacy for materials people willingly post on the Internet without taking any measures to restrict access to them, or otherwise protect them.[185]

One such cautionary tale is the case of Cynthia Moreno.[186] After a hometown newspaper publicized her online tirade about how much she despised the town in which she had grown up, both she and her family were subjected to a violent barrage of community outbursts.[187] Ms. Moreno then brought suit against the newspaper alleging, among other things, that the newspaper violated her privacy by publishing her online

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[181] James Grimmelmann, *Saving Facebook*, 94 IOWA L. REV. 1137, 1149 (2009).

[182] *See id.* at 1150 (explaining how sending gifts, creating quizzes, utilizing the poke, or playing games through the multitude of Facebook applications can reveal things about a person's knowledge, beliefs, and preferences).

[183] *Id.* at 1165 (citing Alan Finder, *When a Risque Online Persona Undermines a Chance for a Job*, N.Y. TIMES, June 11, 2006, § 1, at 1).

[184] *Id.* (citing Austin Fenner, *N.J. Miss in a Fix over Her Pics*, N.Y. POST, July 6, 2007, at 5, *available at* http://www.nypost.com/p/news/regional/item_u9E3QCTLwd5sD0W z7Zb0MO).

[185] *See supra* text and accompanying notes 87–150.

[186] Moreno v. Hanford Sentinel, Inc., 91 Cal. Rptr. 3d 858 (Cal. Ct. App. 2009).

[187] *Id.* at 861. Local reaction to the publication was alleged to include "death threats and a shot fired at . . . [Ms. Moreno's] family home." *Id.* The complaint alleged that David Moreno's twenty-year-old family business lost so much money that it was closed, and the family subsequently relocated. *Id.*

remarks in the newspaper.[188] The court explained that the crucial ingredient for an invasion of privacy claim, the public disclosure of private facts, was missing because Ms. Moreno's "affirmative act made her article available to any person with a computer and thus, opened it to the public eye."[189] As such, the court stated it had no choice but to dismiss her invasion of privacy cause of action, even if Ms. Moreno had meant her thoughts for a limited few people on her MySpace page.[190]

Similarly, in *Pennsylvania v. Protetto*, the court held that no expectation of privacy existed with regard to either sexually explicit e-mail messages sent by a man to a fifteen-year-old girl or an electronic chat room conversation between them.[191] Here, the court based its finding on the fact that once sent, the e-mail messages could have been forwarded to anyone, and people often pretend to be someone they are not in a chat room.[192]

Finally, in perhaps the best illustration of the risks associated with posting information about oneself on a social network, the court in *Cedric D. v. Stacia W.* terminated a father's parental rights after viewing his MySpace profile.[193] In so holding, the court found the information posted on his profile highly relevant and determined that it suggested "'his lifestyle was not conducive to one in the best interest of a child.'"[194] As cases like this illustrate, content on an individual's social networking profile may now play a role in establishing criminal or civil liability in court proceedings.[195] More importantly, this case stands for the proposition that users can and will be held accountable for their

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[188] *Id.*

[189] *Id.* at 862.

[190] *Id.* at 863. Although the court dismissed Ms. Moreno's invasion of privacy claims, the court did allow Ms. Moreno's other cause of action, the intentional infliction of emotional distress, to move forward. *Id.* at 864.

[191] Commonwealth v. Proetto, 771 A.2d 823, 831–32 (Pa. Super. Ct. 2001).

[192] *Id.* at 830. The court analogized

> [s]ending an e-mail or chat-room communication . . . to leaving a message on an answering machine. The sender knows that by the nature of sending the communication a record of the communication, including the substance of the communication, is made and can be downloaded, printed, saved, or in some cases, if not deleted by the receiver, will remain on the receiver's system. Accordingly, by the act of forwarding an e-mail or communication via the Internet, the sender expressly consents by conduct to the recording of the message.

*Id.*

[193] Hillel I. Parness, *Toward "Social Networking Law"?*, LANDSLIDE, Mar./Apr. 2009, at 13, 16 (citing Cedric D. v. Stacia W., No. 1 CA-JV 07-0056, 2007 WL 5515319, at *4 (Ariz. Ct. App. Sept. 20, 2007)).

[194] *Id.* (quoting *Cedric D*, 2007 WL 5515319, at *4.).

[195] *Id.*

statements on social networking sites, sometimes with life-altering consequences.[196]

Several different policy interventions have been proposed to "fix" social networks' privacy problems.[197] Some individuals say that perhaps the best policy is to do nothing and allow market forces to establish the optimal level of privacy protection.[198] Others have argued for better technical controls or establishing user restrictions.[199] Still others have suggested a strengthened, public-disclosure tort and a right to opt out.[200]

In order for any of these policies to be practical, they must take into account the social dynamics of social networking and attempt to balance the "good" (i.e., reasons an individual joins a social network in the first place) with the "bad" (i.e., the potential privacy risks that can occur).[201] Which one will provide the best solution is a question that only time and trial-and-error will answer.

For the time being, users should not allow themselves to be lulled into a false sense of security; rather, be mindful that the information they provide may be subject to strict scrutiny by potential employers, the legal system, and their peers. In a report released in August 2009, for example, forty-five percent of employers were reported to use social networking sites to research their job candidates.[202] In the end, privacy risks all come down to what and how much users choose to share about themselves. Perhaps when users decide to join a social network they should be given a *Miranda*-like warning, letting them know that what they say can and will be used against them.

### *A. Not Just a "Minor" Problem: Social Networking and Sexual Predators*

From ninety-year-old grandmothers to a brother's annoying eighth grade sister, everyone is catching the social networking bug. On a darker note, cyber criminals have also begun to tap into social networks and turn these sites into their own twisted little playgrounds.[203] Recently, the

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196 *See id.* (citing *Cedric D*, 2007 WL 5515319).

197 *See generally* James Grimmelmann, *supra* note 181, at 1178–1206 (2009) (discussing proposed solutions to privacy problems that likely will or will not be successful).

198 *See id.* at 1178.

199 *Id.* at 1184.

200 *Id.* at 1195–97.

201 *See id.* at 1206.

202 *See* Press Release, PRNewswire, Forty-five Percent of Employers Use Social Networking Sites to Research Job Candidates, CareerBuilder Survey Finds (Aug. 19, 2009), http://uncw.edu/stuaff/career/documents/employersusing socialnetworkingsites.pdf.

203 Sander J.C. Van Der Heide, Note, *Social Networking and Sexual Predators: The Case for Self-Regulation*, 31 HASTINGS COMM. & ENT. L.J. 173, 176–77 (2009) (citing Jessica S. Groppe, Note, A Child's Playground or a Predator's Hunting Ground?—How to Protect Children on Internet Social Networking Sites, 16 COMMLAW CONSPECTUS 215, 215–16 (2007)).

New York State Attorney General launched a probe into allegations that while Facebook claims to provide a safe online environment, parental complaints of inappropriate and sexually explicit material were allegedly not addressed by Facebook in a timely manner.[204]

And while Facebook and MySpace have set minimum age restrictions for users at age thirteen,[205] an overwhelming number of social network users are, and will continue to be, minors. The large number of children using social networks combined with the prevalence of illicit behavior poses several legal and moral issues regarding what obligations and duties, if any, social networking sites owe to their users.

Various attempts have been made to regulate social networking sites by requiring age verification of site users to prevent sexual predators from turning these sites into hunting grounds.[206] These attempts, however, "have been largely unsuccessful and have given rise to well-established legal defenses."[207] Most notably, social networks have put up legal roadblocks by arguing that they are either immune from liability under the Communications Decency Act of 1996 ("CDA") or that they owe no duty to protect others from a third-party's criminal or tortious acts.[208] These roadblocks have largely been successful in shielding websites from liability for the criminal and tortious acts of their users, thereby preventing injured parties from seeking recourse from anyone save the offending party.[209]

Two recent major cases highlight these well-established lines of defense that social networking sites typically employ when faced with prototypical sexual predator claims. In the first case, MySpace was sued in June 2006 by a mother and her fourteen-year-old daughter, because the girl had been sexually assaulted by a man whom she met on MySpace.[210] The complaint alleged that the social network provider had been grossly negligent, or at the very least negligent, in failing to prevent sexual predators from communicating with minors on its website.[211]

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[204] Joseph Spector, *Cuomo Launches Probe of Facebook*, J. NEWS (Westchester County, N.Y.), Sept. 25, 2007, at 1B.

[205] Facebook Statement of Rights and Responsibilities, (Aug. 28, 2009), http://www.facebook.com/terms.php?ref=pf; MySpace Terms & Conditions, (June 25, 2009), http://www.myspace.com/index.cfm?fuseaction=misc.terms.

[206] *E.g.*, Michael D. Marin & Christopher V. Popov, Doe v. MySpace, Inc.: *Liability for Third Party Content on Social Networking Sites*, COMM. LAW., Spring 2007, at 3, 3.

[207] *Id.*

[208] *See id.* at 3–5 (citing Communications Decency Act of 1996, 47 U.S.C. § 230 (2006)).

[209] *Id.* at 3.

[210] Doe v. MySpace, Inc., 528 F.3d 413, 416 (5th Cir. 2008).

[211] *Id.* The plaintiff parent asserted claims against MySpace for "fraud, negligent misrepresentation, negligence, and gross negligence." *Id.*

MySpace's first defense against this claim was that the immunity provided under the CDA barred any claims based on the publication of third-party content.[212] The court rejected and cited as "disingenuous" the Plaintiffs' attempts to circumvent CDA immunity by arguing that their claims were not against MySpace as a publisher but rather were claims for failing to implement any safety measures.[213] Seeing through this artful pleading, the court held that the underlying bases of the plaintiffs' claims were predicated on MySpace's publication of third-party information; and thus, CDA immunity applied.[214]

In addition to the statutory immunity of the CDA, the district court found that there was no legal basis for the proposition that social networking websites have any duty to protect users for the actions of third parties.[215] And while exceptions to the general rule exist, none of the special relationship exceptions were found to apply in the case of online social networking.[216] A social network provider's relationship with its users is not one which gives rise to a duty to control their actions; a user is simply one of the hundreds of millions of people who have posted a profile on a website.[217]

Notwithstanding this attenuated relationship, the plaintiffs attempted to apply a novel theory of premises liability to argue that MySpace had a duty to protect its users from sexual predators.[218] The court rejected the argument stating that not only was there no legal basis for the plaintiffs' theory, but also that "[t]o impose a duty under these circumstances for MySpace to confirm or determine the age of each applicant, with liability resulting from negligence in performing or not performing that duty, would of course stop MySpace's business in its tracks and close this avenue of communication."[219]

Likewise, in another recent case, *Doe v. Sexsearch.com*, the plaintiff sued the website provider after he was introduced to and had sex with a fourteen-year-old girl posing as an eighteen-year-old, resulting in

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[212] *See id.* In its pertinent part, the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 U.S.C. § 230(c)(1) (2006). Moreover, the CDA further articulates that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." *Id.* § 230(e)(3).

[213] *MySpace*, 528 F.3d at 419–20 (quoting Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 849 (W.D. Tex. 2007)).

[214] *Id.* at 420.

[215] Doe v. MySpace, Inc., 474 F. Supp. 2d 843, 850–52 (W.D. Tex. 2007).

[216] *Id.*; Marin & Popov, *supra* note 207, at 5.

[217] Marin & Popov, *supra* note 207, at 5.

[218] *Id.*; *MySpace*, 474 F. Supp. 2d at 851.

[219] *Id.*

criminal proceedings against him.[220] Plaintiff employed a "double-barreled shotgun approach in this case,"[221] alleging a plethora of claims, all of which essentially "boil[ed] down to either (a) Defendants failed to discover that Jane Roe lied about her age . . . , or (b) the contract terms [were] unconscionable."[222] Unfortunately for the plaintiff, the court determined that he failed to hit a claim upon which liability attached; this was due in large part because the court found that the defendants were immune from liability pursuant to Section 230 of the CDA.[223] The remaining claims were barred either by the Ohio state law or because the contract itself was generally not unconscionable.[224]

In reality, the preceding cases have done nothing to ease the blight of sexual predation occurring with the passive assistance of social networks. They simply reaffirm the fact that social networking sites have been able, thus far, to breathe easy under the auspices of the CDA and demonstrate that attempts to regulate social networks through tort law and legislative action have been for naught. But increasingly negative media scrutiny has caught the nation's attention and appears to be forcing social networking sites into action.[225] This negative national attention pulls at the heart of these social network providers—money. If parents prevent their minor children from using the websites in fear that they may become prey, it means less traffic going through them, which in turn drives down financial profits.

Illinois has recently issued an apparent warning about how far states may be willing to go to prevent online predators from using social networking.[226] The legislation bans all registered sex offenders from using social networking sites during parole.[227] You can see how this has caught the attention of social networks—if banning sex offenders does not work, perhaps the next step is to force these sites to increase and enforce their respective minimum age requirements.

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[220] 502 F. Supp. 2d 719, 722 (N.D. Ohio 2007).

[221] *Id.* at 737.

[222] *Id.* at 724. In total, the plaintiff brought fourteen claims against the defendant which included: breach of contract, fraud, negligent infliction of emotional distress, negligent misrepresentation, breach of warranty, deceptive trade practices, unconscionability of contract, and failure to warn. *Id.* at 723–24.

[223] *Id.* at 724–28, 737 (citing 47 U.S.C. § 230 (2006)).

[224] *Id.* at 728–37.

[225] *See, e.g.*, Claire Cain Miller, *Facebook Moves to Improve Privacy and Transprency*, N.Y. TIMES, Aug. 27, 2009, http://bits.blogs.nytimes.com/2009/08/27/facebook-moves-to-improve-privacy-and-transparency/.

[226] *See* H.R. 1314, 96th General Assem., Reg. Sess. (Ill. 2009), *available at* http://www.ilga.gov/legislation/96/HB/09600HB1314enr.htm.

[227] *Id.* § 3-3-7(a)(7.12).

## VIII. COPYRIGHT ISSUES

As if there weren't already enough potential legal land mines when it comes to social networking, posting content that infringes on intellectual property rights can figuratively "blow up" in the faces of both users and social network providers.

In years past, social networking sites have usually been off-the-hook when it came to copyright infringement pursuant to the safe harbor provisions of the Digital Millennium Copyright Act ("DMCA"), so long as the provider complied with the "notice and take-down" provisions of the statute.[228] Recent lawsuits, however, brought by copyright owners against YouTube and Google for allegedly infringing on the copyright owner's copyrights, may force changes in the legal landscape of copyright law as it pertains to Internet providers and, specifically, to social networking sites.[229]

First, here is a brief history lesson. In 1998, Congress attempted to bring U.S. copyright law into the twenty-first century by ratifying the DMCA, which created a series of "safe harbors" for certain activities of qualifying Internet Service Providers ("ISPs").[230] Section 512 of the DMCA sets forth the criteria an ISP must meet in order to be afforded protection under the DMCA's safe harbor provision.[231] The DMCA requires that 1) the ISP has no "actual knowledge" that infringing material exists on its sites or 2) be aware of any factual evidence tending to make infringing content apparent and, 3) if aware, the site must promptly remove the infringing content.[232] Additionally, an ISP can receive no pecuniary gains "attributable to the infringing activity."[233] Finally, upon notice by the copyright owner of purportedly infringing content, the ISP must remove the material.[234] As a threshold matter, Section 512(i)(1)(A) of the DMCA requires an ISP to have "adopted and reasonably implemented" a policy informing subscribers of the service provider's right to terminate the access of repeat offenders in appropriate circumstances.[235]

Several cases have highlighted a straightforward application of Section 512(c) and the safe harbor provisions as applied to ISPs. Many of

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228 *See* Digital Millennium Copyright Act, 17 U.S.C. § 512(c) (2006).

229 *See infra* text accompanying notes 238–246.

230 Lauren Brittain Patten, Note, *From Safe Harbor to Choppy Waters: YouTube, the Digital Millennium Copyright Act, and a Much Needed Change of Course*, 10 VAND. J. ENT. & TECH. L. 179, 188–90 (2007) (citing 17 U.S.C. § 512(c)).

231 *See* 17 U.S.C. § 512(c)(1).

232 *Id.* § 512(c)(1)(A)(i)–(iii).

233 *Id.* § 512 (c)(1)(B).

234 *Id.* § 512 (c)(1)(C).

235 *Id.* § 512(i)(1)(A).

these cases have focused on the burden of the plaintiffs to notify the defendants of the infringing content. In one such case, brought in 2001, a federal district court in California determined that eBay could not be held accountable for its users' copyright infringement because the popular selling site did not have actual or constructive knowledge of the alleged misconduct.[236] Finding that the website was afforded protection under the auspices of the safe harbor provisions of DMCA, the court granted eBay's request for summary judgment.[237]

Recently, however, several content owners have challenged the protection of Section 512(c) as it pertains to YouTube, a video sharing site. For instance, Viacom has sued YouTube and its parent company Google for copyright infringement, seeking at least one billion dollars in damages.[238] In its complaint, Viacom alleges that YouTube's popularity is built on the website's vast availability of infringing works.[239] Further, Viacom contends that YouTube uses this library of works to increase the amount of traffic drawn to its website.[240] Likewise, a second complaint, filed in May of 2007 by The Football Association Premier League, Ltd., accused YouTube of engaging in copyright infringement for YouTube's gain.[241] The plaintiffs argued that YouTube's ineffective "notice and take-down" mechanism is nothing more than a meaningless attempt to satisfy the requirements of the DMCA.[242] In fact, the plaintiffs complained that not only is it nearly impossible to find all infringing material, but it is also an exercise of futility since YouTube users simply repost the content under a different file name or user name.[243]

In light of these recent lawsuits, some legal experts have commented on the validity of the arguments presented. Some have opined that, if YouTube is serving advertisements according to the kind of videos a user views or searches for, this conduct could amount to a financial benefit attributable to the infringing activities.[244] Under this scenario, YouTube would apparently lose any protection provided through the DMCA's safe harbor provisions and effectively open the

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[236] *See* Hendrickson v. eBay, Inc., 165 F. Supp. 2d 1082, 1093 (C.D. Cal. 2001).

[237] *Id.* at 1094, 1096 (citing 17 U.S.C. § 512(c) (2006)).

[238] Complaint for Declaratory and Injunctive Relief and Damages at 5, Viacom Int'l, Inc. v. YouTube, Inc., 540 F. Supp. 2d 461 (S.D.N.Y. 2008) (No. 07 CV 2103).

[239] *Id.* at 3.

[240] *Id.* at 2–5.

[241] Class Action Complaint at 2, Football Ass'n Premier League, Ltd. v. YouTube, Inc., 633 F. Supp. 2d 159 (S.D.N.Y. 2009) (No. 07 CV 3582).

[242] *See id.* at 4, 13, 21–23, 29.

[243] *Id.* at 28–30.

[244] *E.g.*, Kevin Fayle, *Understanding the Legal Issues for Social Networking Sites and Their Users*, FINDLAW.COM, (2007), http://technology.findlaw.com/articles/00006/010966.html.

company up to legal liability for copyright infringement.[245] Others have argued that these lawsuits against YouTube illustrate the fundamental problems with the DMCA and urge concrete changes through the judicial system.[246] In either case, the outcomes of these cases could reshape the legal obligations of social networking sites, the services they provide, and the business models used.

More certain, though, is the assertion that individual users should always keep in mind that existing laws apply equally to their online and offline conduct. Thus, each time a user posts content on a social network, whether it is text, graphics, photos, etc., the same copyright laws apply and the same risk of liability attaches.

### *A. Watch What You Say! Defamation Online Is on the Rise*

At the risk of sounding like a broken record, social network users might want to watch what they say about other people when online. If a comment is considered defamatory in nature, a user may be liable in both criminal and civil proceedings.

On one hand, social network providers have, thus far, been able to insulate themselves from criminal or tortious liability as a result of a user's defamatory comments by implicating statutory immunities available under applicable law.[247] In fairly uniform fashion, courts have held that any claims premised on a website's role as the publisher of third-party content are barred by Section 230 of the CDA.[248]

For instance, in *Zeran v. American Online, Inc.*, the victim of an online prank sued America Online ("AOL") for its failure to remove the prank ad and failure to promptly post a retraction.[249] The website ad posting "described the [purported] sale of shirts featuring offensive and tasteless slogans related to the April 19, 1995, bombing of" an Oklahoma City federal building and instructed interested buyers to call "Ken" at the plaintiff's home telephone number.[250] Shortly thereafter, the plaintiff received a flood of calls, "comprised primarily of angry and derogatory messages, but also including death threats."[251]

In filing suit, the plaintiff argued that even if AOL was immune from liability with respect to the initial posting, it was negligent in

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[245] *See id.*

[246] *See* Patten, *supra* note 230, at 209–10.

[247] *See supra* text and accompanying notes 228–243.

[248] *See, e.g.*, Zeran v. America Online, Inc., 129 F.3d 327, 330–35 (4th Cir. 1997); Dimeo v. Max, 433 F. Supp. 2d 523, 527–31 (E.D. Pa. 2006).

[249] *Zeran*, 129 F.3d at 328.

[250] *Id.* at 329.

[251] *Id.*

failing to remove the messages after he notified the company of their falsity.[252]

The Fourth Circuit disagreed and upheld the lower court's decision that the CDA barred the plaintiff's claims by largely relying on the preemptive effect inherent in the CDA.[253] The court explained that even if notice had been given, the CDA immunizes interactive computer service providers from liability stemming from defamatory or threatening posts.[254] Likewise, in cases following *Zeran*, courts have held that websites and other interactive computer services cannot be held liable for publishing defamatory statements created by a third-party.[255]

Conversely, because social networking users are not lucky enough to enjoy any of the immunities afforded to social networking sites, they should always be careful to act appropriately when posting messages to a particular site. The few cases on this issue so far have dealt with students suffering some type of legal action or adverse consequences at their schools after posting purportedly defamatory, threatening or indecent messages on social networking sites. Consider for example, the case *J.S. v. Blue Mountain School District*,[256] in which one student learned the potential ramifications of posting defamatory content the hard way. Here, the student created a personal profile on MySpace describing the principal of Blue Mountain Middle School, albeit not by name, as "a pedophile and a sex addict."[257] The school determined that the plaintiff student had violated several provisions of the school's disciplinary code and, as a result, levied a ten-day, out-of-school suspension against the student.[258] The parents of the student brought suit and argued that the punishment violated the United States Constitution because the conduct was outside the school and did not disrupt the classes and infringed upon their rights as parents to direct the upbringing of their child.[259] The court disagreed and held that because the vulgar, lewd, and potentially illegal speech had an effect on the school campus, the school did not violate the plaintiff's

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[252] *See id.* at 330.

[253] *Id.* at 334–35.

[254] *Id.* at 333–34. The court premised its decision on its belief that by imposing potential tort liability for an allegedly defamatory or threatening post would severely undermine the CDA's goal of promoting speech using these Internet services. *Id.*

[255] Marin & Popov, *supra* note 207, at 3.

[256] J.S. v. Blue Mountain Sch. Dist., No. 3:07CV585, 2008 WL 4279517 (M.D. Pa. Sept. 11, 2008).

[257] *Id.* at *1. The posted profile, which included the principal's photograph, described the principal's interests as "detention, being a tight ass, riding the fraintrain, spending time with my child (who looks like a gorilla), baseball, my golden pen, f---ing in my office, hitting on students and their parents." *Id.*

[258] *Id.* at *2.

[259] *Id.* at *3.

Constitutional rights by punishing the student for an imposter profile of the principal.[260]

In the context of defamation cause of actions, the current law appears to be: post a defamatory comment and you, the person posting the comment—not the social network provider—will bear the burden of defending against lawsuits brought by an allegedly injured party. The decision to post inappropriate comments is likely tied to the false sense of privacy a user believes to be attached to social networking, whether from perceived anonymity or the fact that the individual is communicating with a machine rather than a person. Thus, as a rule of thumb, think through each posting and its possible legal implications before posting.

### *B. To Be or Not to Be a Journalist*

More and more frequently, Internet users are turning to blogs as their primary source of major news stories or reading a blogger's posts as an alternative and independent source of the news.[261] As traditional journalists have been afforded both First Amendment and state statutory privileges, the question of whether bloggers should enjoy the same immunities has been pushed to the legal vanguard but remains undecided.[262] This question has sparked numerous debates and has been a catching point in federal legislation.[263] And while courts have yet to definitively fall on one side or another of this issue, a May 2006 ruling by a California appeals court seems to suggest that perhaps online bloggers have the same rights as their more traditional offline counterparts.[264]

In *O'Grady v. Superior Court*, Apple Computer, Inc. ("Apple") issued subpoenas to the publishers of websites seeking the identities of individuals who leaked information regarding new Apple products.[265] The publishers moved for a protective order to prevent the discovery of these sources citing confidentiality; however, the trial court denied this motion and granted Apple the authority to request such information.[266] The California Court of Appeals subsequently reversed this decision, holding that online journalists have the same right to protect the confidentiality of their sources as offline reporters do.[267]

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[260] *Id.* at *6, *9.

[261] *See* Cydney Tune & Marley Degnar, *Blogging and Social Networking: Current Legal Issues*, *in* 929 INFO. TECH. LAW INST. 2008, NEW DIRECTIONS: SOCIAL NETWORKS, BLOGS, PRIVACY, MASH-UPS, VIRTUAL WORLDS AND OPEN SOURCE 73, 87 (2008).

[262] *See id.* at 87–88.

[263] *See id.* at 88.

[264] *See* O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72 (Cal. Ct. App. 2006).

[265] *Id.* at 76.

[266] *Id.* at 81–82.

[267] *Id.* at 105–16.

Proponents advocating bloggers' rights have hailed this decision as the inception of bloggers being afforded the same rights as journalists.[268] Others have been less optimistic and have argued that the issue really boils down to whether a blogger acts like a traditional journalist or not.[269] As the debate rages on, courts will likely make the final call on this hot new issue, building on the precedent of this particular case or departing from this decision and establishing a new line of reasoning.

### *C. Stolen: Your IDENTITY*

All too often, a story will surface about how data thieves, through a social networking site, were able to steal proprietary or sensitive information.[270] The ease and frequency with which these virtual crooks have been able to gain access to private information is a serious cause for concern.

There is a virtual mountain of stories concerning the theft of personal information. Rather than exhaustively listing each and every one, a few of the most interesting and unique stories deserve reference.

Hackers have now turned their attention to the "hundreds of independent applications" created specifically for social networking.[271] In support for this, security blogger Chris Soghoian maintains that a recent article in *2600: The Hacker Quarterly* explained that many popular Facebook applications are vulnerable to simple attacks which allow the thief to view personal information sent to the application itself.[272]

Twitter has also been in the news frequently with respect to information theft. In one such attack, hackers made off with over 300 personal and confidential documents.[273] And these documents didn't just provide an individual's birthday or personal interests. No, "[s]ome of these documents include[d] credit card numbers, PayPal accounts," confidentiality agreements, and even security codes.[274]

This sort of identity theft is now big business—and, as always, the thieves are running way ahead of security experts and law enforcement.

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[268] *E.g.*, Press Release, Electronic Frontier Foundation, Huge Win for Online Journalists' Source Protection, (May 26, 2006), http://www.eff.org/press/archives/2006/05/26.

[269] *See, e.g.*, Citizen Media Law Project, California Protections for Sources and Source Material, http://www.citmedialaw.org/legal-guide/california-protections-sources-and-source-material (last visited Nov. 19, 2009).

[270] *See infra* notes 271–274.

[271] Chris Soghoian, *Hackers Target Facebook Apps*, CNET NEWS, Mar. 27, 2008, http://news.cnet.com/8301-13739_3-9904331-46.html.

[272] *Id.* (citing Siderr, *Facebook Applications Revealed*, 2600: HACKER Q., Winter 2007–2008, at 32, 32–33).

[273] Andrew Lyle, *Twitter Hacked, Personal Documents Leak*, NEOWIN.NET, Jul. 17, 2009, http://www.neowin.net/news/main/09/07/17/twitter-hacked-personal-documents-leak.

[274] *Id.*

### *D. Law Firm Social Networking Policies*

So what are law firms to do? Finally realizing that there are problems with social networking, firms have been scrambling to enact special policies to deal with them. Approximately forty-five percent of law firms have gone so far as to block access to some of the most popular sites.[275] Some may have placed special restrictions on certain sites, while still others have done nothing thus far. And, if you have not completely barred access, you might want to consider this list of eight guidelines highlighting some of the policies every law firm should employ:

1. Remind attorneys that they should avoid the appearance of establishing an attorney-client relationship. Rule of thumb: Don't give legal advice—speak about the issues of law generally and factually instead.

2. Confidential information must at all times remain confidential. Firms must have a rule that explicitly forbids any posting of confidential information. Attorneys should be required to request permission to post any information that may even remotely seem private.

3. Strict privacy settings should be employed when joining a new social network. Do not rely on the default settings for the social network, which are generally very open and public.

4. Require attorneys to use disclaimers when publishing any content that is related to work performed by the law firm. Consider requiring the following generic example: "The postings on this site are my own and don't necessarily represent my law firm's positions, strategies, or opinions."

5. Request good judgment. Ask attorneys to be polite and avoid sensitive subjects.

6. Any use of a firm's insignia or logo should be run through the law firm's marketing department first.

7. Remind attorneys that copyright and financial disclosure laws apply equally to online conduct and offline conduct.

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[275] Doug Cornelius, *Online Social Networking: Is It a Productivity Bust or Boon for Law Firms?*, LAW PRAC., Mar. 2009, at 28, 28, *available at* http://www.abanet.org/lpm/magazine/articles/v35/is2/pg28.shtml.

8. Firms should take steps to educate their attorneys on these guidelines. Whether through a video presentation or a quick, informal seminar, attorneys should be given an opportunity to learn of these guidelines and ask questions about the guidelines if necessary.

Do you see the common theme in the suggested guidelines? For the most part, these guidelines simply ask an attorney to follow the basic rules they learned in their legal ethics classes. The remaining rules are basic, common sense.

And, for heaven's sake, check with your insurance provider. Not all insurance providers cover blogs or social networking activity—and, of those who do, some require special insurance riders to do so.

## CONCLUSION

The electronic world has certainly given us many challenges, with more undoubtedly to come. This new era seems to offer us both benefits and dangers simultaneously. Social networking appears to be here to stay, in one form or another. Thus, risk management in the context of social networking has become a major concern.

Instead of free-falling into this potential "hot-zone" with reckless abandon, deploy your "common sense parachute" which, in reality, would prevent most of the hiccups (or total disasters) that occur. Deploying this "parachute" is simple. Common sense requires neither that a person purchase special technology nor that states adopt new legislation. Rather, common sense simply requires a user to think through his or her actions and realize that there is no special shield protecting a person's online actions. Instead, online actions are analogous to offline actions. The ethical rules forbidding *ex parte* communications, talking to represented clients, and engaging in conduct detrimental to the implementation of justice apply equally in the paper and the online world.

The external forces that make social networking more dangerous than the paper world must be weighed against the benefits of using social networking—and we'll be struggling with that balancing act for some time to come. There is much, however, that you can do to protect yourself from the pitfalls of social networking, but the ultimate responsibility rests on you.

As Air Force cadets are wont to say, "Never jump with a parachute packed by someone else." Good advice for our times.

# DYING TO TESTIFY? CONFRONTATION VS. DECLARATIONS *IN EXTREMIS*

*Tim Donaldson*[*]
*J Preston Frederickson*[**]

## INTRODUCTION

Declarations *in extremis* ("dying declarations") have long been a thorn in the side of legal purists. The Sixth Amendment Confrontation Clause provides that the accused in criminal prosecution shall enjoy the right "to be confronted with the witnesses against him."[1] When the Bill of Rights was ratified in 1791, the common law recognized that some statements taken from persons on their deathbeds were admissible in criminal trials even though they were not made in the presence of the accused.[2] American courts continued to admit dying declarations after ratification of the Bill of Rights without expressing any constitutional concerns.[3] The Supreme Court recently described dying declarations in *Crawford v. Washington* as "one deviation," which was not neatly explained by its ruling that the Confrontation Clause prohibits admission of out-of-court testimonial statements in criminal trials unless the defendant had a prior opportunity to cross-examine the maker of the statement.[4] The Court seemed aware that modern confrontation theory does not correspond with early evidentiary practices insofar as dying declarations were concerned, because it sought to isolate them, writing, "If this exception must be accepted on historical grounds, it is *sui generis*."[5] So, what is the foundation of the dying declaration rule, and how does one reconcile it with the right to confrontation enshrined in the Constitution? This Article first examines the scholarly debate over the

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[1] U.S. CONST. amend. VI.

[2] *E.g.*, The King v. Woodcock, 1 Leach 500, 501–04, 168 Eng. Rep. 352, 352–54 (K.B. 1789).

[3] *See, e.g.*, United States v. Veitch, 28 F. Cas. 367, 367–68 (C.C.D.C. 1803) (No. 16,614); United States v. McGurk, 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680).

[4] 541 U.S. 36, 56 n.6, 68 (2004).

[5] *Id.* at 56 n.6. *Sui generis* means "[o]f its own kind or class; unique or peculiar." BLACK'S LAW DICTIONARY 1475 (8th ed. 2004).

rationale supporting the dying declaration exception to the hearsay rule. It then discusses the U.S. Supreme Court's changing jurisprudence and the history of the dying declaration exception. Finally, this Article discusses the exception's post-founding acceptance and repeated vindication against constitutional challenge, and its post-*Crawford* future.

## I. TWENTIETH CENTURY SCHOLARLY DEBATE—WIGMORE VS. FRIEDMAN

Scholars have attempted to reconcile this traditional hearsay exception with the confrontation requirement from both sides of the equation.[6] In the first edition of his legendary treatise published in the early twentieth century, Professor John Wigmore analyzed confrontation as an outgrowth of the development and enforcement of the hearsay rule, which incorporated exceptions.[7] Later, Professor Richard Friedman approached the issue from the opposite direction, positing that the right of confrontation is not dependent on the traditional hearsay doctrine, and that the dying declaration exception can be constitutionally justified under a confrontation forfeiture principle.[8] Neither explanation has entirely satisfied the Supreme Court. The Court has expressly rejected Professor Wigmore's hearsay-based hypothesis about the meaning of the Confrontation Clause.[9] The Court also recently rebuffed Professor Friedman's effort to unify the dying declaration and forfeiture exceptions for confrontation purposes.[10]

Professor Wigmore acknowledged arguments made by others that the Confrontation Clause's unqualified language could not be escaped even by a witness's death, but he asserted that the confrontation mandate must be construed by reference to the history of the cross-examination requirement developed through the hearsay rule.[11] Wigmore's monumental work on the history of the hearsay rule asserted

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[6] *See generally* Ohio v. Roberts, 448 U.S. 56, 66 n.9 (1980) (citations omitted) (listing pro-prosecution theories, pro-defense theories, and ambiguous theories), *abrogated by Crawford*, 541 U.S. at 60–69.

[7] 2 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 1754–55 (1st ed. 1904).

[8] Richard D. Friedman, *Confrontation and the Definition of Chutzpa*, 31 ISR. L. REV. 506, 511, 526–27 (1997) [hereinafter Friedman, *Confrontation and the Definition of Chutzpa*].

[9] *Crawford*, 541 U.S. at 50–51 (citing Dutton v. Evans, 400 U.S. 74, 94 (1970) (Harlan, J., concurring); 3 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 1397, at 101 (2d. ed. 1923)).

[10] *See* Giles v. California, 128 S. Ct. 2678, 2686–87 (2008) (rejecting the State's argument of forfeiture).

[11] 2 WIGMORE, *supra* note 7.

that hearsay was regularly received as evidence until the mid-1600s.[12] During the 1500s and early 1600s, a general awareness of the impropriety of hearsay usage arose.[13] By the mid-1700s, the exclusionary rule against hearsay became settled.[14] Wigmore reasoned that the primary requirement of the hearsay rule ensured that testimonial statements would be subjected to cross-examination and that this was also the essential object of confrontation.[15] He concluded that "so far as confrontation is an indispensable element of the [h]earsay rule, it is merely another name for the opportunity of cross-examination."[16]

Wigmore went on to say that the right to subject testimony to cross-examination was "not a right devoid of exceptions."[17] During the 1700s, there were both recognized hearsay exceptions and an understanding that other exceptions might be developed.[18] Therefore, Wigmore argued that the Confrontation Clause outlined a general principle that incorporated both existing hearsay exceptions and those later recognized.[19] Wigmore's analysis used deductive reasoning to reconcile the Confrontation Clause with the dying declaration and other hearsay exceptions, concluding:

> The Constitution does not prescribe what kinds of testimonial statements (dying declarations, or the like) shall be given infra-judicially—this depends on the law of evidence for the time being—, but only what mode of procedure shall be followed—*i.e.* a cross-examining procedure—in the case of such testimony as is required by the ordinary law of evidence to be given infra-judicially.[20]

Wigmore's position was never fully accepted by the Supreme Court, as evidenced by Justice John Marshall Harlan II's statement:

> Wigmore's more ambulatory view—that the Confrontation Clause was intended to constitutionalize the hearsay rule and all its exceptions as evolved by the courts—rests also on assertion without citation, and attempts to settle on ground that would appear to be equally infirm as a matter of logic. Wigmore's reading would have the

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[12] John H. Wigmore, *The History of the Hearsay Rule*, 17 HARV. L. REV. 437, 444 (1904).

[13] *Id.* at 444–45; *see also* JAMES BRADLEY THAYER, A PRELIMINARY TREATISE ON EVIDENCE AT THE COMMON LAW 498–501 (Boston, Little, Brown & Co. 1898).

[14] Wigmore, *supra* note 12, at 448 (citing Trial of Captain William Kidd, 13 Will. 3, pl. 416 (1701), *reprinted in* 14 A COMPLETE COLLECTION OF STATE TRIALS 147, 177 (T.B. Howell comp., London, T.C. Hansard 1816)).

[15] 2 WIGMORE, *supra* note 7, § 1365, at 1695.

[16] *Id.*

[17] *Id.* § 1397, at 1754–55.

[18] *Id.* § 1397, at 1755; *see also* Snyder v. Massachusetts, 291 U.S. 97, 107 (1934) (noting that the "privilege of confrontation [has never] been without recognized exceptions" (citing Dowdell v. United States, 221 U.S. 325, 330 (1911))).

[19] 2 WIGMORE, *supra* note 7, § 1397, at 1755.

[20] *Id.*

> practical consequence of rendering meaningless what was assuredly in some sense meant to be an enduring guarantee. It is inconceivable that if the Framers intended to constitutionalize a rule of hearsay they would have licensed the judiciary to read it out of existence by creating new and unlimited exceptions.[21]

Harlan subsequently reconsidered his original stance and adopted the view espoused by Wigmore.[22] The majority in *Crawford*, however, wrote that the "principal evil" against which the Confrontation Clause was directed was the use of *ex parte* examinations in criminal prosecutions.[23] The Court therefore reasoned that the Clause could not be read in a manner which left it open to exceptions and powerless to prevent "flagrant inquisitorial practices."[24] The Court thus rejected Wigmore's view that the application of the Confrontation Clause "to out-of-court statements introduced at trial depends upon 'the law of Evidence for the time being.'"[25]

In contrast to Wigmore, Professor Friedman stated, "The Confrontation Clause does not speak of the rule against hearsay or of its exceptions."[26] Friedman did not exhibit the same reverence toward the hearsay rule as Wigmore, and wrote that most hearsay should be presumptively admissible.[27] Friedman opined that the history of English prosecutorial practices revealed the essential idea behind the Confrontation Clause that witness testimony offered by a prosecutor must be taken before an accused, subject to oath and cross-examination.[28] According to Friedman, those testimonial statements cannot be used at a criminal trial unless a defendant has been afforded an opportunity to cross-examine the statement's maker under oath.[29] There is some overlap with territory covered by the hearsay rule, because Friedman would not only limit the prohibition against *ex parte* "testimony" to formalized declarations, but he would also exclude

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[21] California v. Green, 399 U.S. 149, 178–79 (1970) (Harlan, J., concurring) (citation and footnote call number omitted).

[22] Dutton v. Evans, 400 U.S. 74, 94–95 (1970) (Harlan, J., concurring) (citation omitted) (endorsing Wigmore's view and eschewing his previous stance in *Green*).

[23] Crawford v. Washington, 541 U.S. 36, 50 (2004).

[24] *Id.* at 51.

[25] *Id.* at 50–51(quoting 3 WIGMORE, *supra* note 9, § 1397, at 101).

[26] Richard D. Friedman, *Confrontation: The Search for Basic Principles*, 86 GEO. L.J. 1011, 1022 (1998) [hereinafter Friedman, *Confrontation: The Search for Basic Principles*].

[27] Richard D. Friedman, *Thoughts from Across the Water on Hearsay and Confrontation*, 1998 CRIM. L. REV. 697, 699, 706–07 [hereinafter Friedman, *Thoughts from Across the Water*].

[28] Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1025.

[29] Richard D. Friedman & Bridget McCormack, *Dial-In Testimony*, 150 U. PA. L. REV. 1171, 1228–29 (2002); Richard D. Friedman, *Truth and Its Rivals in the Law of Hearsay and Confrontation*, 49 HASTINGS L.J. 545, 563 (1998).

hearsay uttered in anticipation of its use in the investigation or prosecution of a crime.[30] His work, however, detached the Confrontation Clause from the hearsay rule and its exceptions. Friedman proposed that the confrontation right be subjected to one qualification: An accused should be deemed to have forfeited his or her right to confront a witness if the accused's own wrongful conduct prevented a witness from appearing at trial.[31]

The Supreme Court appears to endorse Professor Friedman's central thesis in *Crawford*, holding that, with limited exceptions established at the time of the founding, the Confrontation Clause prohibits the use of testimonial hearsay in criminal prosecutions unless the defendant against whom the hearsay is offered had an opportunity to cross-examine the missing witness.[32] Following *Crawford*, however, Friedman expressed concern that acceptance of a dying declaration exception on historical grounds would obscure the clarity of the confrontation principle that the Court adopted.[33] He advocated that his confrontation forfeiture doctrine could instead explain the exception.[34]

Professor Friedman asserted that "[t]he idea that the accused cannot claim the confrontation right if the accused's own misconduct prevents the witness from testifying at trial is a very old one."[35] In Friedman's view, "the admissibility of dying declarations . . . is best understood as a reflection of the principle that a defendant who renders a witness unavailable by wrongful means cannot complain about her absence at trial."[36] He reasoned that this principle is preferable to the

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[30] Friedman & McCormack, *supra* note 29, at 1246–52; Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1038–43; *see also* Friedman, *Thoughts from Across the Water*, *supra* note 27, at 706 (defining the term "testimonial"). Professor Friedman suggests that the capacity of a declarant should be considered when determining whether the declarant anticipated that it would be used for prosecutorial purposes. Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 249–52 (2002).

[31] Richard D. Friedman, *Confrontation as a Hot Topic: The Virtues of Going back to Square One*, 21 QUINNIPIAC L. REV. 1041, 1044 (2003); Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1031.

[32] Crawford v. Washington, 541 U.S. 36, 53–54, 56, 60–62 (2004).

[33] Richard D. Friedman, *The Confrontation Clause Re-Rooted and Transformed*, 2004 SUP. CT. REV. 439, 466–67 [hereinafter Friedman, *The Confrontation Clause Re-Rooted*].

[34] *Id.* at 467.

[35] *Id.* at 464; *see, e.g.*, The King v. Archer, 2 T.R. 205, 100 Eng. Rep. 112 (K.B. 1786); Lord Morly's Case, Kelyng 53, 55, 84 Eng. Rep. 1079, 1080 (K.B. 1666). *See generally* Tim Donaldson, *Combating Victim/Witness Intimidation in Family Violence Cases: A Response to Critics of the "Forfeiture by Wrongdoing" Confrontation Exception Resurrected by the Supreme Court in* Crawford *and* Davis, 44 IDAHO L. REV. 643, 647–61 (2008) (tracing the history of the forfeiture by wrongdoing rule).

[36] Friedman, *The Confrontation Clause Re-Rooted*, *supra* note 33, at 467.

"fiction" that the veracity of a dying declaration dispenses with the need for cross-examination.[37] Friedman unified the dying declaration exception under his broader equitable forfeiture theory because it could be harmonized with his view that the confrontation right extends to almost all accusatory statements, subject only to possible loss by forfeiture.[38]

In *Giles v. California*,[39] the Supreme Court demonstrated greater reluctance than Professor Friedman to transform history. In that case, the Court stated that the wrongful conduct of a defendant that caused the death of a witness, alone, would not trigger confrontation forfeiture.[40] It further opined that a criminal defendant's right to confront an unavailable witness is forfeited only if it is shown that the defendant caused the absence of the witness for the purpose of making the witness unable to testify.[41] It was significant to the Court that separate rules existed at common law for dying declarations and forfeiture by wrongdoing.[42] The Court commented on the complete absence of forfeiture arguments in the early dying declaration cases.[43] It also wrote that the dying declaration rule would not have been necessary at common law if a decedent's statements had been admissible solely on the basis of a defendant's wrongdoing.[44] The Court therefore passed on the opportunity to unify the two exceptions under Friedman's forfeiture rationale.

The modern struggle and inability to reconcile the dying declaration rule with the right of confrontation stands in stark contrast to the complete absence of concern about any perceived conflict around the time of founding. The Tennessee Supreme Court encountered one of the earliest reported confrontation arguments against dying declarations in 1838—almost half a century after the founding—in the case of *Anthony v. State*.[45] In that case, the defendant insisted that dying declarations were inadmissible under a state constitutional mandate that read, "'[t]he

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[37] Richard D. Friedman, *'Face to Face': Rediscovering the Right to Confront Prosecution Witnesses*, 8 INT'L J. EVIDENCE & PROOF 1, 24 (2004) (citing McDaniel v. State, 16 Miss. (8 S. & M.) 401 (1847)).

[38] *See* Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1030–31, 1038–43; Friedman, *Confrontation and the Definition of Chutzpa*, *supra* note 8, at 527.

[39] 128 S. Ct. 2678 (2008).

[40] *See id.* at 2684.

[41] *See id.* at 2682–84, 2687–88.

[42] *Id.* at 2684–86.

[43] *Id.*

[44] *See id.* at 2685–86.

[45] 19 Tenn. (Meigs) 265, 277 (1838).

accused shall be confronted by witnesses, face to face.'"[46] The court rejected the claim on the grounds that the Bill of Rights was not intended to introduce a new principle, but to "preserve and perpetuate" rights as they were understood at the time of the country's founding.[47] The court was fortified by the apparent lack of prior confrontation complaints, stating:

> That our view of this question is correct, is made manifest by the fact, that after more than forty years from the adoption of our first constitution, this argument against the admissibility of dying declarations, on the ground of the bill of rights, is for the first time made, so far as we are aware in our courts of justice; and if made elsewhere it does not appear to have received judicial sanction in any state.[48]

The dying declaration rule was accepted both before and after adoption of the Confrontation Clause.[49] The future of a confrontation exception for dying declarations, however, remains in doubt. The U.S. District Court for Colorado asserted in *United States v. Jordan* that "there is no rationale in *Crawford* or otherwise under which dying declarations should be treated differently than any other testimonial statement."[50] The well-chronicled consent to usage of dying declarations in criminal prosecutions cannot be lazily harmonized with our modern understanding of the Confrontation Clause.[51]

## II. SIGNIFICANT MILESTONES IN CONFRONTATION CLAUSE JURISPRUDENCE—*MATTOX* AND *CRAWFORD*

Before examining the history of the dying declaration exception and its relationship to the Confrontation Clause, this Part examines two cases that reflect a shift in jurisprudential thought regarding admissibility of dying declarations.

### *A.* Mattox *vs. Declarations* in Extremis

Clyde Mattox was tried in 1891 for the murder of John Mullen.[52] The defense offered an exculpatory dying declaration at trial, but it was rejected by the trial court.[53] Mattox was subsequently granted a new

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[46] *Id.* at 274 (quoting TENN. CONST. art. I, § IX).

[47] *Id.* at 277–78.

[48] *Id.* at 278.

[49] *See supra* notes 2–3 and accompanying text.

[50] United States v. Jordan, 66 Fed. R. Evid. Serv. (West) 790, 793 (D. Colo. 2005).

[51] *See* Michael J. Polelle, *The Death of Dying Declarations in a Post*-Crawford *World*, 71 MO. L. REV. 285, 289–313 (2006) (discussing the historical underpinnings of the dying declaration exception and its application after *Crawford*).

[52] Mattox v. United States, 146 U.S. 140, 141 (1892).

[53] *Id.* at 142.

trial due to jury tampering, and the trial court's refusal to admit Mullen's dying declarations.[54]

By the time of the retrial, two of the witnesses against Mattox had died, and the court allowed their testimonies from the first trial to be read.[55] Mattox objected and argued on appeal that his confrontation right had been violated.[56] The Supreme Court rejected the argument, holding that the primary object of the Confrontation Clause was to prevent the use of *ex parte* affidavits, and that the purpose of the Clause had not been impaired because the witnesses from the first trial had been cross-examined in the presence of Mattox when the earlier testimony was given.[57] The Court wrote that it was "bound to interpret the Constitution in the light of the law as it existed at the time it was adopted," and not as reaching out for new rights beyond those inherited from the common law.[58] It acknowledged that exceptions were recognized at the time of the founding and held that they were obviously meant to be respected.[59]

In *Mattox*, the Court pointed to dying declarations as an example where technical adherence to the letter of the Confrontation Clause was not justified because it would take the Clause "farther than is necessary to the just protection of the accused, and farther than the safety of the public will warrant."[60] The Court acknowledged that dying declarations are rarely made in the accused's presence, but stated that their admissibility could not be questioned because they had been treated as competent testimony "from time immemorial."[61] Two years later, the Court stated in *Robertson v. Baldwin* that the Confrontation Clause did not prevent admission of dying declarations.[62] The *Mattox* holding has endured changes to Confrontation Clause jurisprudence over the years, and its continuing worth only recently came into question by virtue of the decision in *Crawford v. Washington*.[63]

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54 *Id.* at 150–53 (citations omitted).

55 Mattox v. United States, 156 U.S. 237, 240 (1895).

56 *Id.*

57 *Id.* at 240–44.

58 *Id.* at 243.

59 *Id.*

60 *Id.*

61 *Id.* at 243–44.

62 165 U.S. 275, 282 (1897).

63 *See* Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004) (stating that there is authority for dying declarations to be considered testimonial (citing The King v. Woodcock, 1 Leach 500, 501–04, 168 Eng. Rep. 352, 353–54 (K.B. 1789); Trial of Reason & Tranter, 8 Geo., Hil. 461 (1722), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS 20, 24–38 (T.B. Howell comp., London, T.C. Hansard 1816); THOMAS PEAKE, A COMPENDIUM OF THE LAW OF EVIDENCE 64 (London, Luke Hanfard & Sons 3d ed. 1808))).

### *B.* Crawford *vs. Declarations* in Extremis

*Crawford v. Washington* marked a shift in confrontation jurisprudence toward originalism. During the quarter-century leading up to *Crawford*, hearsay could be admitted in a criminal trial, without violating a defendant's right to confrontation, if the declarant of a statement was unavailable and the out-of-court statement was reliable.[64] Reliability could be shown if the statement fell within a firmly-rooted hearsay exception, or if there were particular indicia of reliability.[65] Declarations *in extremis* satisfied the Confrontation Clause under the reliability test because the admission of dying declarations was a firmly-rooted hearsay exception.[66]

In *Crawford*, the Court held that the reliability test was contrary to the original intent of the Confrontation Clause.[67] There, the Court placed particular emphasis on the development of the law following the 1603 trial of Sir Walter Raleigh, in which the accused was condemned after being repeatedly denied the right to confront his principal accuser.[68] The Court concluded that, by the time of founding,

> the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused. It was these practices that the Crown deployed in notorious treason cases like Raleigh's; that the Marian statutes invited; that English law's assertion of a right to confrontation was meant to prohibit; and that the founding-era rhetoric decried. The Sixth Amendment must be interpreted with this focus in mind.[69]

*Crawford* established a new test that distinguishes between nontestimonial and testimonial out-of-court statements.[70] On the one hand, the Court said that it is consistent with the intent of constitutional framers to afford flexibility to the states in developing hearsay law where the admissibility of nontestimonial hearsay is at issue.[71] On the other hand, when testimonial hearsay is involved, the Court held that the Sixth Amendment demands an opportunity for cross-examination

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64 Ohio v. Roberts, 448 U.S. 56, 66 (1980), *abrogated by Crawford*, 541 U.S. at 60–69.

65 *Id.*

66 Lilly v. Virginia, 527 U.S. 116, 125–26 (1999) (plurality opinion) (citing *Mattox*, 156 U.S. at 243); *Roberts*, 448 U.S. at 66 (citing Pointer v. Texas, 380 U.S. 400, 407 (1964)).

67 *Crawford*, 541 U.S. at 61–62.

68 *Id.* at 44 (citing Trial of Sir Walter Raleigh, 2 James, pl. 74 (1603), *as reprinted in* 1 DAVID JARDINE, CRIMINAL TRIALS 400–01 (London, Charles Knight 1832)).

69 *Id.* at 50.

70 *Id.* at 68.

71 *Id.*

before an out-of-court statement may be admitted against a defendant in a criminal trial.[72]

In *Crawford*, the Court identified various formulations that may describe a core class of testimonial statements:

> *[E]x parte* in-court testimony or its functional equivalent[,] . . . extrajudicial statements contained in formalized materials such as affidavits, depositions, prior testimony, or confessions, . . . [and] statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.[73]

Without adopting a precise articulation, the Court remarked, "Statements taken by police officers in the course of interrogations are also testimonial under even a narrow standard."[74] The Court left "for another day any effort to spell out a comprehensive definition of 'testimonial[,]'"[75] but it did hint that, "[a]lthough many dying declarations may not be testimonial, there is authority for admitting even those that clearly are."[76]

Two years after *Crawford* was decided, the Court further refined a formulation for testimonial statements in *Davis v. Washington*.[77] The Court held in *Davis* that responses to police questioning are not testimonial if the inquiry is conducted under circumstances "objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."[78] Yet, such responses are testimonial if there is no ongoing emergency and "the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution."[79] Neither of the cases consolidated in *Davis* involved dying declarations, but the opinion significantly impacts how they are analyzed, because the Court confirmed that nontestimonial out-of-court statements do not trigger confrontation concerns: "It is the testimonial character of the statement that separates it from other hearsay that, while subject to traditional limitations upon hearsay evidence, is not subject to the Confrontation Clause."[80]

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[72] *Id.* at 68–69.

[73] *Id.* at 51–52 (citations omitted); *see also* Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2532 (2009) (reiterating *Crawford* and holding that certificates of state laboratory analysts, too, are "testimonial statements" (citing *Crawford*, 541 U.S. at 54)).

[74] *Crawford*, 541 U.S. at 52.

[75] *Id.* at 68.

[76] *Id.* at 56 n.6 (citing The King v. Woodcock, 1 Leach 500, 501–04, 168 Eng. Rep. 352, 353–54 (K.B. 1789)).

[77] 547 U.S. 813 (2006).

[78] *Id.* at 822.

[79] *Id.*

[80] *Id.* at 821.

There are decisions from lower courts which have discussed, but have ultimately avoided, having to rule upon whether a dying declaration exception survives *Crawford*.[81] There are also cases that have upheld the use of nontestimonial dying declarations without having to reach the issue of whether an exception still exists for testimonial declarations.[82] There are judicial opinions that appear to generally endorse the constitutionality of a dying declaration but whose value may be limited by inclusion of alternative holdings that the statements at issue therein were nontestimonial.[83] The discussions in these cases warrant reference; yet, the Confrontation Clause does not squarely come into play when nontestimonial dying declarations are involved. As a Maryland court in *Head v. State* recognized: "*Davis* made explicit what had been strongly implied in *Crawford*, i.e., the [C]onfrontation [C]lause set forth in the Sixth Amendment to the United States Constitution applies only to testimonial hearsay."[84] Thus, the constitutional question will remain open until it is directly decided whether testimonial dying declarations may be admitted in criminal prosecutions post-*Crawford*.

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[81] *See* Miller v. Stovall, 573 F. Supp. 2d 964, 995–96 (E.D. Mich. 2008) (citing *Crawford*, 541 U.S. at 56 n.6) (finding it unnecessary to rule on the issue because a suicide note did not constitute a dying declaration); Williams v. State, 947 So. 2d 517, 521 (Fla. Dist. Ct. App. 2006) (citing *Crawford*, 541 U.S. at 68) (stating that the outcome of the case was not dependent upon resolution of the issue because the evidence was cumulative); State v. Meeks, 88 P.3d 789, 793–94 (Kan. 2004) (citing *Crawford*, 541 U.S. at 56 n.6) (noting the potential availability of the dying declaration exception, but ruling instead on forfeiture grounds), *overruled on other grounds by* State v. Davis, 158 P.3d 317, 322 (Kan. 2006).

[82] People v. Ingram, 888 N.E.2d 520, 525–26 (Ill. App. Ct. 2008) (citing *Davis*, 547 U.S. at 815); Head v. State, 912 A.2d 1, 11–13 (Md. Ct. Spec. App. 2006) (citing *Davis*, 547 U.S. at 822); People v. Ahib Paul, 803 N.Y.S.2d 66, 68–70 (App. Div. 2005); State v. Nix, 2004-Ohio-5502, No. C-030696, 2004 WL 2315035, ¶¶ 75–76 (citing *Crawford*, 541 U.S. at 56 n.6).

[83] *See, e.g.*, Commonwealth v. Nesbitt, 892 N.E.2d 299, 311–12 (Mass. 2008) (citing *Crawford*, 541 U.S. at 56 n.6) (addressing the survival of the dying declaration exception while alternatively holding that the statements at issue in the case were nontestimonial); People v. Taylor, 737 N.W.2d 790, 793–95 (Mich. Ct. App. 2007) (holding that nontestimonial dying declarations were alternatively admissible under a historical dying declaration exception to the Confrontation Clause (citing *Crawford*, 541 U.S. at 68; People v. Monterroso, 101 P.3d 956, 971–72 (Cal. 2004))); Commonwealth v. Salaam, 65 Va. Cir. 404, 409, 412 (Cir. Ct. 2004) (holding that both testimonial and nontestimonial statements fall under the hearsay exception of dying declarations incorporated by the Confrontation Clause, but alternatively holding that the dying declaration at issue in that case was nontestimonial (citing *Crawford*, 541 U.S. at 56 n.6; State v. Forrest, 596 S.E.2d 22, 27 (N.C. Ct. App. 2004), *vacated by* 636 S.E.2d 565 (N.C. 2006) (per curium))).

[84] 912 A.2d at 12 (citing *Davis*, 547 U.S. at 822–27).

## III. HEARSAY RULE VS. DECLARATIONS *IN EXTREMIS*

It may be impossible to pinpoint the exact origin of the dying declaration rule, but it likely predates the hearsay rule.[85] Simon Greenleaf's mid-nineteenth century treatise on evidence traced the doctrine to a canon of Roman Civil Law.[86] Professor Wigmore later identified a literary contributor. He commented that the exception was so long understood that even Shakespeare recognized the trustworthiness of deathbed statements.[87] Wigmore additionally noted that the ill-fated Sir Walter Raleigh may have played a role in the rule's development by providing one of the first reported legal passages to explain this commonly-accepted rationale used to justify the admission of dying declarations.[88]

Raleigh was charged with conspiring to kill the King of England and tried principally by depositions given by an alleged fellow conspirator who had confessed his role.[89] After having already been repelled in every attempt to have his accuser made to personally appear,[90] Raleigh tried reverse-psychology and argued that the prosecution should want to have the confessed conspirator, Lord Cobham, brought forward because the confessor possessed no incentive to lie in Raleigh's favor.[91] In doing so, Raleigh analogized his accuser to a dying man, stating:

> [A] dying man is ever presumed to speak truth: now Cobham is absolutely in the King's mercy; to excuse me cannot avail him; by accusing me he may hope for favour. It is you, then, Mr. Attorney, that should press his testimony, and I ought to fear his producing, if all that be true which you have alleged.[92]

Early cases confirm that dying declarations were regularly admitted in criminal prosecutions, but those authorities did not expressly state

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[85] *See, e.g.*, Hoppeoverhumbr' v. Thomas, Y.B. 4 Hen. 3, Hil. 189 (1220), *reprinted in* 1 SELDEN SOCIETY 120 (1887) (considering evidence that the decedent "after the wound and while yet alive declared that [the accused] hit him as aforesaid and charged him with his death"); Geoffrey v. Godard, Y.B. 4 John, Linc. 27 (1202), *reprinted in* 1 SELDEN SOCIETY, *supra*, at 11 (admitting evidence that the decedent "said that [the accused brothers] thus wounded him, and that should he get well, he would deraign this against them, and should he not, then he wished that his death might be imputed to them").

[86] 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 156, at 225 n.1 (Boston, Little, Brown & Co. 10th ed. 1858) (citation omitted).

[87] 2 WIGMORE, *supra* note 7, § 1430, at 1798 n.1, § 1438, at 1804 & n.1 (citing WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN act 2, sc. 6).

[88] *Id.* (citing Trial of Sir Walter Raleigh, 2 James, pl. 74 (1603), *as reprinted in* 1 JARDINE, *supra* note 68, at 400–01).

[89] *Trial of Sir Walter Raleigh, as reprinted in* 1 JARDINE, *supra* note 68, at 401.

[90] *Id.* at 418 (raising legal defenses based upon three English statutes: 1554–1555, 1 & 2 Phil. & M., c. 10.; 1547, 1 Edw. 6, c. 12, § 22; 1551–1552, 5 & 6 Edw. 6, c.11, § 12).

[91] *Id.* at 434–35.

[92] *Id.* at 435.

why. In the 1678 murder trial of Philip Earl of Pembroke, for example, the court admitted statements which arguably could be considered dying declarations, but it did not discuss the legal basis for their admission.[93] The prosecution was allowed to introduce declarations *in extremis* during the 1692 trial of Charles Lord Mohun, but no evidentiary ruling was announced and the evidence appeared to be exculpatory.[94] Charles Viner's *General Abridgment of Law and Equity* indicated that the 1720 case of *The King v. Ely* stood for the rule,[95] but the report for the case does not evidence an outright holding on the subject.[96] Viner summarized *Ely* as saying: "*In the case of murder, what the deceased declared after the wound given*, may be given *in evidence*."[97] The report for *Ely*, however, only confirms, without explanation, that witnesses were permitted to testify that the last words of a decedent who had been run through by Ely's sword were: "*This Villia*[*i*]*n hath kill'd me before I drew my Sword*."[98] Cases similar to *Ely* admitted the last words of those who had received a mortal blow without explaining the grounds for their admission.[99]

The practice of admitting dying declarations collided with the Best Evidence rule in the 1722 trial of Hugh Reason and Robert Tranter.[100] In *Dominus Rex v. Reason*, Reason and Tranter were tried for the execution-style slaying of Edward Lutterell that occurred following a scuffle in which Lutterell struck Tranter with a cane.[101] The report for

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[93] Trial of Philip Earl of Pembroke & Montgomery, 30 Car. 2, pl. 241 (1678), *reprinted in* 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS 1309, 1336 (London, T.C. Hansard 1810).

[94] Trial of Charles Lord Mohun, 4 W. & M., pl. 371 (1692), *reprinted in* 12 A COMPLETE COLLECTION OF STATE TRIALS 949, 987–88 (T.B. Howell comp., London, T.C. Hansard 1816).

[95] 12 CHARLES VINER, A GENERAL ABRIDGMENT OF LAW AND EQUITY § A.b.38(11), at 118 (London, Robinson et al. 2d ed. 1792).

[96] *See* The King v. Ely, 7 Geo. 1 (1720), *reprinted in* THE PROCEEDINGS ON KING'S COMMISSION 5–6 (London, Jonsur 1721).

[97] 12 VINER, *supra* note 95 (citing *Ely*, *reprinted in* THE PROCEEDINGS ON KING'S COMMISSION, *supra* note 96, at 5–6); *see also* 1 THOMAS WALTER WILLIAMS, THE WHOLE LAW RELATIVE TO THE DUTY AND OFFICE OF A JUSTICE OF THE PEACE 773 (London, W. Clarke & Sons et al. 2d ed. 1808) (citing 12 VINER, *supra* note 95); THE CONDUCTOR GENERALIS 153 (James Parker comp., Philadelphia, Charless 1801) (citing 12 VINER, *supra* note 95).

[98] *Ely*, *reprinted in* THE PROCEEDINGS ON KING'S COMMISSION, *supra* note 96, at 6.

[99] *E.g.*, Trial of William Lord Byron, 5 Geo. 3, pl. 545 (1765), *reprinted in* 19 A COMPLETE COLLECTION OF STATE TRIALS 1177, 1191, 1197, 1201–02, 1205–07 (T.B. Howell comp., London, T.C. Hansard 1813); Trial of Major John Oneby, 12 Geo. 1, pl. 468 (1726), *reprinted in* 17 A COMPLETE COLLECTION OF STATE TRIALS 29, 33 (T.B. Howell comp., London, T.C. Hansard 1816).

[100] Dominus Rex v. Reason, 1 Strange 499, 499–500, 93 Eng. Rep. 659, 659–660 (K.B. 1722).

[101] *Id.* at 501, 93 Eng. Rep. at 660–61.

the case indicates that the court admitted several of Lutterell's deathbed statements "without much hesitation."[102] The case does not explain a legal foundation for the dying declaration rule, but the decedent reportedly legitimized his last words as dramatically as a Shakespearean character. A witness testified that he admonished Lutterell that great weight would be given to his final statements and that Lutterell needed to be truthful and to avoid implicating innocent persons.[103] To this warning, the witness reported that Lutterell replied, "As a dying man, as he expected to be tried for this very fact at the bar in heaven, as well as the persons who had injured him, he assured me he was murdered in a barbarous manner."[104]

It came out during the testimony in *Reason* that one of Lutterell's final statements had been taken before justices of the peace and reduced to writing.[105] When the original writing could not be produced, debate ensued whether all of the dying declarations should be excluded or only the one that had been transcribed but not produced.[106] By the time Reason and Tranter were tried, a separate deposition rule had developed that applied in instances where a deponent had died.[107] Certain examinations taken on oath before a justice of the peace or coroner under statutory authority were admissible in evidence in some types of criminal cases if a declarant was dead or absent at the time of trial.[108] It

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[102] *Id.* at 499, 93 Eng. Rep. at 659.

[103] Trial of Reason & Tranter, 8 Geo., Hil. 461 (1722), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 24.

[104] *Id.* Compare Lutrell's response with Shakespeare's wounded character Melun in the play *King John*:

> Have I not hideous death within my view
> Retaining but a quantity of life,
> Which bleeds away, ev'n as a form of wax
> Resolveth from its figure 'gainst the fire?
> What in the world should make me now deceive,
> Since I must lose the use of all deceit?
> Why should I then be false, since it is true
> That I must die here, and live hence by truth?

WILLIAM SHAKESPEARE, THE LIFE AND DEATH OF KING JOHN act 5, sc. 6, lines 23–30, *reprinted in* III THE WORKS OF MR. WILLIAM SHAKESPEARE 180–81 (London, Knapten et al. 1745).

[105] *Reason*, 1 Strange at 499, 93 Eng. Rep. at 659–60.

[106] *Id.* at 500, 93 Eng. Rep. at 660.

[107] *See* 2 GILES DUNCOMBE, TRIALS PER PAIS 617 (Dublin, Rice 9th ed. 1793) (citations omitted).

[108] *E.g.*, Lord Morly's Case, Kelyng 53, 55, 84 Eng. Rep. 1079, 1080 (K.B. 1666) (detailing the importance of coroner examinations before admitting a dying declaration); 2 DUNCOMBE, *supra* note 107, at 481 (describing the acceptance of coroner depositions); MATTHEW HALE, PLEAS OF THE CROWN 263 (London, Richard & Edward Atkyns 1707) (allowing magistrate examinations). *See generally* An Act to Take Examination of Prisoners Suspected of Any Manslaughter or Felony, 1555, 2 & 3 Phil. & M., c. 10

is arguable that only coroner inquisitions could be taken *ex parte*.[109] It had become settled, however, that depositions taken from an informer by a coroner or a justice of the peace could be given in evidence at trial if it was established that "such informer is dead, or unable to travel, or kept away by the means or procurement of the prisoner, and that the examination offered in evidence is the very same that was sworn before the coroner or justice, without any alteration whatsoever."[110] In cases of death or illness, the prior examinations were considered the "utmost Evidence that can be procured, the Examinant himself being prevented in coming by the Act of God."[111]

The Lord Chief Justice in *Reason* restated the Best Evidence rule that examinations reduced to writing must be produced unless a legally sufficient excuse accounted for the absence of the transcript.[112] The Chief Justice was of the opinion that the examination taken before the justices of the peace was inseparable from an earlier unrecorded deathbed statement and that the failure to produce the transcript disqualified testimony about either declaration.[113] Yet other justices expressed their opinions that the missing transcript stood distinctly by itself,[114] and the

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(expanding the types of cases in which justices of the peace were allowed to take depositions); An Act Touching Bailment of Persons, 1554, 1 & 2 Phil. & M., c. 13, §§ IV, V (establishing statutory authority for justices of the peace to conduct preliminary examinations and for coroners to make inquisitions).

[109] 1 JOSEPH CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 402–03 (Philadelphia, Edward Earle 1819) (citations omitted); *see also* The King v. Dingler, 2 Leach 561, 561–62, 168 Eng. Rep. 383, 383–84 (K.B. 1791) (holding that the statutes authorizing magistrate examinations required the prisoner to be present); Trial of the Lord Morley, 18 Car. 2, pl. 222 (1666), *reprinted in* 6 COBBETT'S COMPLETE COLLECTION OF STATE TRIALS, *supra* note 93, at 769, 770 para. 4, 776 (admitting coroner depositions of deceased witnesses despite objection that evidence must be given face-to-face). *But see* The King v. Westbeer, 1 Leach 12, 168 Eng. Rep. 108, 109 (K.B. 1739) (admitting a deposition taken under the magistrate statutes despite loss of the benefit of cross-examination).

[110] 2 WILLIAM HAWKINS, A TREATISE OF THE PLEAS OF THE CROWN ch. 46, § 15, at 592 (John Curwood ed., London, Sweet 8th ed. 1824).

[111] GEOFFREY GILBERT, THE LAW OF EVIDENCE 141 (London, Henry Lintot 1st ed. 1756); *see also* HENRY BATHURST, THE THEORY OF EVIDENCE 30 (Dublin, Cotter 1761) (commenting that such depositions were the best available evidence).

[112] Trial of Reason & Tranter, 8 Geo., Hil. 461 (1722), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 1, 31; *see also* 1 EDWARD HYDE EAST, A TREATISE OF THE PLEAS OF THE CROWN ch. 5, § 124, at 356–57 (London, A. Strahan 1803) (stating that, "[i]n Trowter's Case[,] the court would not admit parol evidence of the declarations of the deceased which had been reduced to writing"); 12 VINER, *supra* note 95, § A.b.38(12), at 118 (restating the Best Evidence rule as applied to dying declarations in Trowter's Case).

[113] *Trial of Reason & Tranter*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 31–33, 34–35.

[114] *Id.*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 35–36.

court allowed testimony regarding dying declarations made by Lutterell before and after the examination by the justices of the peace.[115]

The debate between the Justices in *Reason* exposes the lack of unanimity at that time regarding the status of dying declarations. During the debate, Justice Eyre argued that Lutterell's unwritten first dying declaration might deserve less credit than the later transcribed declaration, but that it was still evidence that would have been regularly admitted by itself at the Old Bailey criminal courts.[116] But Justice Powis disagreed, stating:

> If they were both of equal validity you say something, but it is confessed on all hands, that the second examination was more solemn and valid, because two justices of the peace were present, and there was the awe of magistracy over the person; and the second examination relates to the first.[117]

The Chief Justice similarly commented that even the witness who heard the original dying declaration thought that it might not be good enough and therefore sought to perfect it by having the statement retaken before the justices of the peace.[118]

The statements by Justice Powis in *Reason* illustrate the importance of the oath requirement at common law. When it came to hearsay, lack of cross-examination was a secondary concern to the absence of oath.[119] In the mid-1700s, both Gilbert and Bathurst explained in their treatises on evidence that the principal objection to hearsay was that bare speaking was not allowed in courts of justice.[120] A witness would not be allowed to testify in court without first taking an

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[115] *Id.*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 36–38.

[116] *Id.*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 35–36.

[117] *Id.*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 36. *But see* Douglas v. Duke of Hamilton, [1769] (H.L.) (appeal taken from Scot.) (U.K.), *reprinted in* 2 THOMAS S. PATON, REPORTS OF CASES DECIDED IN THE HOUSE OF LORDS, UPON APPEAL FROM SCOTLAND, FROM 1757 TO 1784, at 143, 169 (Edinburgh, T. & T. Clark 1851) (arguing that a sworn statement was "of no force, when opposed to the dying declarations").

[118] *Trial of Reason & Tranter*, *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 34–35.

[119] *See* 2 HAWKINS, *supra* note 110, ch. 46, § 44, at 596–97. The oath requirement played an important role in the development of the hearsay rule; however, it must be recognized that *Crawford v. Washington* degrades the importance of the oath requirement in relation to its confrontation test. 541 U.S. 36, 52 (2004) (citing Trial of Sir Walter Raleigh, 2 James, pl. 74 (1603), *as reprinted in* 1 JARDINE, *supra* note 68, at 430).

[120] BATHURST, *supra* note 111, at 111; GILBERT, *supra* note 111, at 152.

oath, and unsworn out-of-court statements therefore had even less value.[121]

Despite absence of an oath, deathbed statements were accepted as evidence. During the 1730 trial on appeal of Thomas Bambridge for the death of a prisoner left in his care, an objection was made against admitting what had been said by the deceased, but the court overruled the objection and held, "what is declared as an actual fact" constituted evidence.[122] By 1760, a clear distinction emerged between deathbed statements and other hearsay uttered by deceased witnesses. Numerous declarations *in extremis* were admitted against the Earl of Ferrers in his trial for killing John Johnson.[123] The Earl attempted to counter the prosecution's proof by introducing other prior statements made by Johnson showing a bias against him, but the prosecution objected, explaining:

> My lords, though the declarations of the deceased, whilst a dying man, and after the stroke is given, are to be admitted as legal evidence, yet a deposition of what he or any other person said before the accident, is clearly hearsay evidence, upon the same foundation with all other hearsay evidence; and, with submission to your lordships, ought not to be admitted.[124]

The Earl waived the question in response to the objection,[125] and the relationship between the dying declaration rule and the hearsay rule was not fully resolved.

The 1761 case entitled *Wright v. Littler*,[126] reported by Burrow, became recognized as the leading early case on dying declarations.[127] *Wright* involved a property ownership dispute over land that had been repeatedly transferred in reliance upon title obtained through a will

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[121] BATHURST, *supra* note 111, at 111; GILBERT, *supra* note 111, at 152–53; *see also* Gray v. Goodrich, 7 Johns. 95, 96 (N.Y. Sup. Ct. 1810) (discussing the oath requirement in relation to declarations *in extremis*); FRANCIS BULLER, AN INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT *NISI PRIUS* 289–90 (London, W. Strahan & M. Woodfall 1772) (restating the common law oath requirement). *See generally Crawford*, 541 U.S. at 69–71 (Rehnquist, C.J., concurring) (discussing the common law oath requirement).

[122] Trial of Thomas Bambridge, 4 Geo. 2, pl. 481 (1730), *reprinted in* 17 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 99, at 397, 417.

[123] Trial of Lawrence Earl Ferrers, 33 Geo. 2, pl. 538 (1760), *reprinted in* 19 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 99, at 885, 911, 913, 916–18.

[124] *Id.*, *reprinted in* 19 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 99, at 936–37; *see also* State v. Ridgely, 2 H. & McH. 120, 120 (Md. 1785) (holding that declarations made by a decedent before receipt of a fatal blow were inadmissible).

[125] *Trial of Lawrence Earl Ferrers*, *reprinted in* 19 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 99, at 885, 937.

[126] Wright v. Littler, 3 Burr. 1244, 97 Eng. Rep. 812 (K.B. 1761), *overruled by* Stobart v. Dryden, 1 M. & W. 615, 624–25, 150 Eng. Rep. 581, 585 (A.C. 1836).

[127] *E.g.*, 2 WIGMORE, *supra* note 7, § 1430, at 1798 (citing *Wright*, 3 Burr. at 1244, 97 Eng. Rep. at 812).

witnessed by a William Medlicott.[128] On his deathbed, Medlicott admitted to his sister that he had forged the will.[129] Counsel for a party in the chain of title derived from the suspect will argued during a motion for a new trial that the deathbed statements were inadmissible unsworn hearsay and that there had been no opportunity to cross-examine Medlicott.[130] Counsel for the heir who had been deprived of the property by the allegedly fraudulent will argued that Medlicott's dying declarations were admissible evidence, reasoning as follows:

> This evidence is admissible; because it was the solemn declaration of a dying man to his nearest relation; which is equal to an oath: for such declarations of dying men have been admitted as evidence even in cases of murder. So that it ought not to be called "mere hearsay evidence."[131]

Burrow reported that Lord Mansfield found that the dying declarations were properly admitted, writing:

> The declaration of Medlicott in his last illness . . . is allowed to be competent and material evidence. . . . The account he gave of it in his last moments is equally proper . . . . [A]s the account was a confession of great iniquity, and as he could be under no temptation to say it, but to do justice and ease his conscience[,] I am of opinion "the evidence was proper to be left to the jury."[132]

Despite Burrow's account, it is doubtful that *Wright* established a general hearsay exception at the time it was decided.[133] In addition to Burrow, William Blackstone reported the case.[134] Blackstone announced that the court found certain dying declarations were admissible, but he asserted that no rule was adopted, writing:

> As to the fact, the admissibility or competence of evidence must result from the particular circumstances of the case. No rule can be general. Here the testator died in 1746. Both wills [were] in the custody of Medl[i]cott: the other subscribing witness [is] dead: his wife [is] to be benefitted under it. He, on his death-bed, sends the lessor of the plaintiff his title; which is inconsistent with that under which the defendant claims. Under all these circumstances, I think it admissible evidence. No general rule can be drawn from it.[135]

The cases leading up to, and including, *Wright* demonstrate that it had become common practice to admit dying declarations as evidence, but in light of repeated admonitions in Blackstone's report that the case

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[128] *Wright*, 3 Burr. at 1247–48, 97 Eng. Rep. at 814.

[129] *Id.*

[130] *Id.* at 1248, 97 Eng. Rep. at 814.

[131] *Id.* at 1253, 97 Eng. Rep. at 817.

[132] *Id.* at 1255, 97 Eng. Rep. at 818.

[133] *See* Stobart v. Dryden, 1 M. & W. 615, 625–26, 150 Eng. Rep. 581, 585 (A.C. 1836).

[134] Wright v. Littler, 1 Black. W. 345, 96 Eng. Rep. 192 (K.B. 1761).

[135] *Id.* at 349, 96 Eng. Rep. at 193–94.

was limited to its facts, it is debatable whether the relationship between the hearsay and dying declaration rules had been settled. Yet, a rapid reconciliation took place over the next few decades. The 1768 edition of *Blackstone's Commentaries* stated that in some cases, "the courts admit . . . *hearsay* evidence, or an account of what persons deceased have declared in their life-time: but such evidence will not be received of any particular facts."[136] By the time the 1794 edition was published, it had been resolved that the dying declaration rule had survived the emergence of the prohibition against hearsay, and the earlier passage from *Blackstone's Commentaries* included a footnote that confirmed the following:

> In criminal cases, the declarations of a person, who relates *in extremis*, or under an apprehension of dying, the cause of his death, or any other material circumstance, may be admitted in evidence; for the mind in that awful state is presumed to be as great a religious obligation to disclose the truth, as is created by the administration of an oath.[137]

The presumed sanctity accorded to dying declarations was mentioned in *Margaret Tinckler's Case*.[138] In that case, Tinckler was tried for murder in 1781 for a death that arose out of a botched abortion.[139] The judges "were unanimously of [the] opinion that the[ ] declarations of the deceased were legal evidence."[140] The judges did not agree, however, upon the weight to be given to the decedent's statements because she had been a willing participant in the criminal commission of the abortion.[141] Some judges were of the opinion that the dying declarations were alone sufficient evidence to sustain conviction, because the decedent knew she was dying "and had no view or interest to serve in excusing herself, or fixing the charge unjustly on others[,]" but others thought that additional confirmatory evidence was needed.[142]

In the 1784 case of *The King v. Drummond*, a defendant charged with robbery sought to introduce evidence that another man had confessed to the crime shortly before he was hung for a similar offense.[143] The court rejected the evidence because an attainted convict would not have been permitted at that time to give testimony on oath if alive; but the court unquestionably accepted that dying declarations were not

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[136] 3 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 368 (Oxford, Clarendon Press 1768).

[137] 3 WILLIAM BLACKSTONE, COMMENTARIES *368 n.11 (Edward Christian ed., London, A. Strahan & W. Woodfall 12th ed. 1794).

[138] Margaret Tinckler's Case, (K.B. 1781), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 354.

[139] *Id.*

[140] *Id.*, *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 355–56.

[141] *Id.*, *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 356.

[142] *Id.*

[143] 1 Leach 337, 337, 168 Eng. Rep. 271, 272 (K.B. 1784).

merely bare speaking, writing, "The principle upon which this species of evidence is received is, that the mind, impressed with the awful idea of approaching dissolution, acts under a sanction equally powerful with that which it is presumed to feel by a solemn appeal to God upon an oath."[144]

Some courts did not, however, easily dispense with the oath requirement. In *Thomas John's Case*, Rachael John was beaten by her husband and later fell ill.[145] The trial court admitted testimony about deathbed conversations in which Rachael accused her husband of causing her condition.[146] Thomas John was convicted, but a divided court held on review that an adequate foundation had not been laid for admission of a dying declaration, because Rachael John had not shown any apprehension of death.[147] The court explained: "If a dying person either declare that he knows his danger, or it is reasonably to be inferred from the wound or state of illness that he was sensible of his danger, the declarations are good evidence."[148] These courts adhered to the notion that a mental component secured the solemnity of a dying declaration, and the rule did not apply if a decedent thought she would recover at the time a statement was made.[149]

By this time, the dying declaration rule ripened into an alternative to the deposition rule. The prosecutor in *The King v. Radbourne* argued that an examination taken by a magistrate from a stabbing victim shortly before her death was admissible as either a dying declaration or a qualifying deposition.[150] The court upheld the admission of the evidence in *Radbourne* without stating its grounds,[151] but the 1789 case of *The King v. Woodcock* firmly established that defective depositions might be admitted under the dying declaration rule.[152] In *Woodcock*, a magistrate's examination of a decedent was not taken during the committal of the defendant, as required by statute, and Chief Baron Eyre therefore held that "the Justice was not authorized to administer

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[144] *Id.* at 337–38, 168 Eng. Rep. at 272; *see also* Douglas v. Duke of Hamilton, (H.L. 1769), *reprinted in* 2 PATON, *supra* note 117, at 178 (explaining that a dying person would not rush to meet her maker with "a lie in her mouth and perjury in her right hand").

[145] Thomas John's Case (1790), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 357, 357; *see also* The King v. Woodcock, 1 Leach 500, 504, 168 Eng. Rep. 352, 354 n.(*a*) (K.B. 1789) (summarizing the holding in *Thomas John's Case* in support of the court's own ruling).

[146] *Thomas John's Case, as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 358.

[147] *Id.*

[148] *Id.*

[149] Henry Welbourn's Case, (K.B. 1792), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 358, 360 (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352).

[150] 1 Leach 456, 460–61, 168 Eng. Rep. 330, 332 (K.B. 1784).

[151] *Id.* at 462, 168 Eng. Rep. at 333.

[152] 1 Leach at 500, 168 Eng. Rep. at 352.

an oath."[153] The deposition was consequently stripped of its statutory sanction, but the court held that it might still be admitted as a dying declaration if it qualified as such, because:

> [T]he general principle on which this species of evidence is admitted is, that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone: when every motive to falsehood is silenced, and the mind is induced by the most powerful considerations to speak the truth; a situation so solemn, and so awful, is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice.[154]

Irregular depositions, therefore, became eligible for admission as dying declarations if "the deceased, at the time of giving those depositions, was impressed with the fear of immediate death."[155]

*Woodcock* demonstrates why Professor Friedman cannot claim historical accuracy in his attempt to re-categorize dying declarations under the banner of forfeiture.[156] Death, illness, and forfeiture were each grounds upon which qualifying depositions could be admitted.[157] As the Supreme Court correctly surmised in *Giles v. California*, the dying declaration exception was not included within the forfeiture prong of the deposition rule.[158] *Woodcock* reveals that the dying declaration rule presented an independent ground for admitting irregular examinations in addition to those, such as forfeiture, under which depositions would have been normally allowed in English courts.[159]

*Woodcock* also stands in contrast to *The King v. Paine*, decided almost a century earlier.[160] In *Paine*, depositions had been taken before a mayor, but not in the presence of Paine.[161] By the time of trial the

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[153] *Id.* at 502, 168 Eng. Rep. at 353.

[154] *Id.*

[155] The King v. Callaghan, 33 Geo. 3, (1793), *as reprinted in* LEONARD MACNALLY, THE RULES OF EVIDENCE ON PLEAS OF THE CROWN 385 (Dublin, H. Fitzpatrick 1802); *cf.* The King v. Dingler, 2 Leach 561, 563, 168 Eng. Rep. 383, 384 (K.B. 1791) (excluding a defective deposition after the prosecution admitted that the deceased declarant did not speak under an apprehension of immediate death (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352)).

[156] *See supra* notes 8, 26–38.

[157] *See* 2 HAWKINS, *supra* note 110, ch. 46, § 15, at 592; *cf.* 1 MATTHEW HALE, THE HISTORY OF THE PLEAS OF THE CROWN 585 (Sollom Emlyn et al. eds., London, E. Rider 1800) (recognizing death and inability to travel as grounds for admission of magistrate examinations).

[158] 128 S. Ct. 2678, 2684–86 (2008).

[159] *See Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352; *Callaghan*, 33 Geo. 3, *as reprinted in* MACNALLY, *supra* note 155, at 385.

[160] 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1695).

[161] *Id.*; *see also* Dominus Rex v. Paine, 1 Salkeld 281, 91 Eng. Rep. 246 (K.B. 1695); Rex v. Payne, 1 Ld. Raym. 729, 91 Eng. Rep. 1387 (K.B. 1695); Rex v. Pain, 1 Comberbach 358, 90 Eng. Rep. 527 (K.B. 1695).

deponent had died, and it was determined that the depositions were inadmissible for two reasons[162]: (1) they did not qualify under the deposition rule, which the judges refused to extend;[163] and (2) the defendant had lost the opportunity for cross-examination.[164] *Woodcock* likewise held that an examination taken by a justice of the peace did not qualify under the deposition rule.[165] Yet, in deviation from *Paine*, it held that the examination might be admitted, despite the fact that the decedent's statement was taken in the absence of the defendant, if the statement constituted a dying declaration.[166]

It does appear, however, that *Woodcock* did not extend very far. Shortly after *Woodcock* was decided, the court in *The King v. Dingler* refused to recognize a catch-all best evidence exception for decedent statements that failed to meet the requirements under either the deposition rule or the dying declaration rule.[167]

It would be an oversimplification to conclude that eighteenth-century judges had determined through the acceptance of dying declarations that the cross-examination requirement enunciated in *Paine* was satisfied by "reliable" hearsay. *Woodcock* stated that statutorily-authorized depositions and dying declarations were types of admissible evidence in addition to "[t]he most common and ordinary species of legal evidence [that] consists in the depositions of witnesses taken on oath before the Jury, in the face of the Court, in the presence of the prisoner, and received under all the advantages which examination and cross-examination can give."[168] The presumptive credibility of deathbed statements, however, was mentioned only as a substitute for the oath requirement.[169] The other cases that elaborated on the trustworthiness rationale similarly linked the presumption to the oath requirement, and none appeared to create a general reliability exception.[170]

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[162] *Pain*, 1 Comberbach at 359, 90 Eng. Rep. at 527.

[163] *Paine*, 1 Salkeld at 281, 91 Eng. Rep. at 246 (citing 1 & 2 Phil. & M. c. 13(b) (1554–1555)); *Payne*, 1 Ld. Raym. at 730, 91 Eng. Rep. at 1387; *Pain*, 1 Comberbach at 359, 90 Eng. Rep. at 527 (citing 1 & 2 Phil. & M. c. 13 (1554–1555)).

[164] *Paine*, 5 Mod. at 165, 87 Eng. Rep. at 585; *Pain*, 1 Comberbach at 359, 90 Eng. Rep. at 527.

[165] The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

[166] *Id.*

[167] The King v. Dingler, 2 Leach 561, 562–63, Eng. Rep. 383, 384 (K.B. 1791) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352).

[168] *Woodcock*, 1 Leach at 501, 168 Eng. Rep. at 352.

[169] *Id.* at 502, 168 Eng. Rep. at 353.

[170] The King v. Drummond, 1 Leach 337, 337–38, 168 Eng. Rep. 271, 272 (K.B. 1784); *see also* The King v. Radbourne, 1 Leach 457, 460–61, 168 Eng. Rep. 330, 332 (K.B. 1787) (detailing remarks by the prosecutor that a declaration made when one's life is in danger should be considered equivalent to a statement made under oath); Wright v. Littler,

The apprehension of death requirement has survived,[171] but the reliability justification for dying declarations was not universally accepted around the time of founding.[172] Justice Powis stated in *Reason* that he did not regard dying declarations as standing on the same footing as statements made under oath.[173] Blackstone believed that the reliability considerations accepted in *Wright* were limited to its facts and did not establish a general rule of admissibility.[174] Some of the judges in *Margaret Tinckler's Case* thought that additional confirmatory evidence was needed for conviction despite the admission of compelling inculpatory dying declarations against the defendant.[175] The court in *Drummond* held that the reliability presumption did not overcome incompetency to testify.[176] Many of the concerns regarding the presumption were summarized by Pothier's *Treatise on the Law of Obligations*:

> Much consideration also should be given to the state of mind of the party whose declarations are received. Strongly as his situation is calculated to induce the sense of obligation, it must also be recollected, that it has often a tendency to obliterate the distinctness of his memory and perceptions; and therefore, whenever the accounts received from him are introduced, the degrees of his observation and recollection is a circumstance which it is of the highest importance to ascertain. Sometimes the declaration is of a matter of judgment of inference and conclusion, which however sincere may be fatally erroneous; the circumstances of confusion and surpri[s]e, connected with the object of the declaration, are to be considered with the most minute and scrupulous attention; the accordance and consistency of the fact related, with the other facts established by evidence, is to be examined with peculiar circumspection, and the awful consequences of

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3 Burr. 1244, 1253, 97 Eng. Rep. 812, 817 (K.B. 1761) (stating the equivalency of a "solemn declaration of a dying man . . . to an oath").

[171] *See* Mattox v. United States, 146 U.S. 140, 151–52 (1892) (citing 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §§ 156–58, at 228–29 (Boston, Little, Brown & Co. 15th ed. 1892)); FED. R. EVID. 804(b)(2).

[172] *See infra* Part IV.A.

[173] Trial of Reason & Tranter, 8 Geo., Hil. 461 (1722), *reprinted in* 16 A COMPLETE COLLECTION OF STATE TRIALS, *supra* note 63, at 36.

[174] Wright v. Littler, 1 Black W. 345, 349, 96 Eng. Rep. 192, 193–94 (K.B. 1761); *see also* The King v. Mead, 2 B & C. 605, 607–08, 107 Eng. Rep. 509, 510 (K.B. 1824) (ruling that the holding in *Wright* was limited); Doe v. Ridgway, 4 B. & Ald. 54, 54–55, 106 Eng. Rep. 858, 858 (K.B. 1820) (ruling that *Wright, inter alia*, were "only exceptions to the general rule").

[175] Margaret Tinckler's Case, (1781) (K.B.), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 356.

[176] The King v. Drummond, 1 Leach 337, 338, 168 Eng. Rep. 271, 272 (K.B. 1784); *cf.* Jackson v. Vredenburgh, 1 Johns. 159, 163 (N.Y. Sup. Ct. 1806) (rejecting dying declarations made by an interested party because she would have been incompetent to testify if living).

> mistake must add their weight to all the other motives, for declining to allow an implicit credit to the narrative, on the sole consideration of its being free from the suspicion of wilful misrepresentation.[177]

Despite the uncertainty about the importance of the mental element to the dying declaration rule, the pre-founding cases do address some of the questions that arise from *Crawford v. Washington*.[178] It seems evident that the *Crawford* majority correctly severed cross-examination requirements from reliability considerations.[179] Reliability was discussed in the early dying declarations cases, but it was a factor in relation to the oath requirement.[180] Inability to cross-examine was a separate issue. However, the confrontation requirement was not absolute. The pre-founding cases recognized both a deposition rule and a dying declaration rule which applied in criminal cases.[181] The extent to which the deposition rule permitted use of *ex parte* examinations is open to debate,[182] but it is clear that the dying declarations were admitted even if they were made in the absence of an accused.[183] It is also certain that the dying declaration rule was not limited to informal remarks.[184]

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[177] 2 ROBERT POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS, OR CONTRACTS § 11, at 293 (William David Evans trans., London, A. Strahan 1806); *see also* 2 THOMAS STARKIE, A PRACTICAL TREATISE ON THE LAW OF EVIDENCE *460–62 (Boston, Wells & Lilly et al. 1826) (adding to the remarks made in *A Treatise on the Law of Obligations, or Contracts*, *supra*).

[178] *See supra* Part II.B.

[179] *See* Crawford v. Washington, 541 U.S. 36, 55–56, 60–65 (2004).

[180] *E.g.*, The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789). *But see* SAMUEL M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 200 (London, A. Strahan 2d ed. 1815) (suggesting that the presumed solemnity of dying declarations dispensed with the necessity for cross-examination).

[181] *E.g.*, *Woodcock*, 1 Leach at 501–502, 168 Eng. Rep. at 352–53 (citing The King v. Ely, 7 Geo. 1, (1720), *reprinted in* THE PROCEEDINGS ON KING'S COMMISSION, *supra* note 96, at 5–6).

[182] *See* The King v. Inhabitants of Eriswell, 3 T.R. 707, 722–23, 100 Eng. Rep. 815, 823–24 (K.B. 1790) (citing The King v. Pain, 5 Mod. 163, 87 Eng. Rep. 584 (K.B. 1695); Dominus Rex v. Paine, 1 Salkeld 281, 91 Eng. Rep. 246 (K.B. 1695)); 2 WILLIAM O. RUSSELL, A TREATISE ON CRIMES AND INDICTABLE MISDEMEANORS ch. 2, § 3, at 659–62 (London, Joseph Butterworth & Son 2d ed. 1828) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352).

[183] The King v. Callaghan, 33 Geo. 3, (1793), *as reprinted in* MACNALLY, *supra* note 155, at 385; *Woodcock*, 1 Leach at 501–02, 168 Eng. Rep. at 352–53; *cf.* Thomas John's Case (1790), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 357–58 (holding that declarations made in a prisoner's absence might be admitted under the dying declaration exception, but finding that an inadequate foundation had been laid for its application to that case).

[184] *Callaghan*, 33 Geo. 3, *as reprinted in* MACNALLY, *supra* note 155, at 385; *Woodcock*, 1 Leach at 502–04, 168 Eng. Rep. at 353–54; *cf.* The King v. Dingler, 2 Leach 561, 561–63, 168 Eng. Rep. 383, 383–84 (K.B. 1791) (excluding an *ex parte* deposition, but commenting that it would have been admissible if it had qualified as a dying declaration).

## IV. CONFRONTATION CLAUSE VS. DECLARATIONS *IN EXTREMIS*

### *A. The Enshrinement Approach*

The 1838 term of the Tennessee Supreme Court was not the first time that an American appellate court heard confrontation arguments against the admissibility of dying declarations; courts in Massachusetts and Mississippi heard and rejected confrontation objections in the years immediately preceding.[185] *Anthony v. State*, however, remains one of the earliest known reported cases to address the subject, and the Tennessee Supreme Court was not the only court to find it odd that confrontation claims had arisen so late.[186] The General Court of Virginia also commented in 1845:

> We come now, to the exceptions to the admissions of the declarations of the deceased as evidence.
>
> 1st. Is such evidence contrary to the bill of rights? If his question is to be answered affirmatively, then for nearly 70 years past, the Courts of this Commonwealth have been in the constant practice of violating the bill of rights in a most important particular.[187]

Dying declarations were regularly used in criminal cases in the post-founding period. A Pennsylvania county court admitted dying declarations during a 1796 murder trial.[188] A North Carolina court recognized the rule in 1798, but it felt that it would be improper to allow statements taken six to seven weeks prior to a declarant's death because the rule applied only to statements made by a dying man "so near his end that no hope of life remains."[189] In 1799, the unsigned deposition of a

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[185] Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 436–37 (1836) (citing MASS. CONST. pt. 1, art. XII); Woodsides v. State, 3 Miss. (2 Howard) 655, 664–65 (1837) (citing MISS. CONST. of 1832, art. I, § 10). Note that, in the foregoing cases, the courts are addressing their respective state constitutions' versions of the Federal Confrontation Clause. Yet, because these clauses bear such striking resemblance to the Federal Confrontation Clause, the state courts' analyses are relevant to this discussion. *Compare* MASS. CONST. pt. 1, art. XII ("[E]very subject shall have a right . . . to meet the witnesses against him face to face . . . ."), *and* MISS. CONST. of 1832, art. I, § 10 ("[I]n all criminal prosecutions, the accused hath a right . . . to be confronted by the witness against him . . . ."), *with* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .").

[186] Anthony v. State, 19 Tenn. (Meigs) 265, 278 (1838).

[187] Hill v. Commonwealth, 43 Va. (2 Gratt.) 594, 607 (1845); *see also* Green v. State, 66 Ala. 40, 46–47 (1880) (remarking that dying declarations had been accepted for more than half a century without constitutional challenge); State v. Price, 6 La. Ann. 691, 694 (1851) (commenting on forty years of acquiescence); State v. Houser, 26 Mo. 431, 438–39 (1858) (noting that dying declarations had been frequently admitted without any suggestion of constitutional conflict).

[188] Pennsylvania v. Lewis, Add. 279, 281 (1796).

[189] State v. Moody, 3 N.C. (2 Hayw.) 31, 31 (1798); *see also* Respublica v. Langcake, 1 Yeates 415, 416–17 (Pa. 1795) (recognizing rule but finding no need to apply it in an assault case).

deceased wife was admitted during the murder trial against her husband in *Pennsylvania v. Stoops*, where the court rhetorically asked and affirmatively answered the question: "If the declarations of the dying person had not been written nor sworn to, would they not have been admissible?"[190] The U.S. Circuit Court of the District of Columbia permitted the use of dying declarations in 1802 during *United States v. McGurk*.[191] It also admitted declarations *in extremis* the following year in *United States v. Veitch*.[192] In 1817, the General Court of Virginia held in *Gibson v. Commonwealth* that declarations *in extremis* were admissible in murder cases.[193] In the 1821 case of *State v. Poll*, the North Carolina Supreme Court upheld the admission of dying declarations.[194] A New Hampshire court also recognized the rule in 1821, but the court declined to admit statements made by the deceased because it was not convinced that an apprehension of death had been adequately shown.[195] A New York court admitted some statements as dying declarations during an 1824 murder trial in *People v. Anderson*, but rejected others that were not made under an apprehension of death.[196] As late as 1834, a Pennsylvania county court explained "[t]hat declarations of a person who has received a mortal injury, made under apprehension of death, are admissible in evidence, as well to establish the fact itself, as the party by whom it was committed, is unquestioned and unquestionable."[197] None of these early cases raised a confrontation concern.[198]

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[190] Add. 381, 382 (Allegheny County Ct. 1799).

[191] 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680).

[192] 28 F. Cas. 367, 367–68 (C.C.D.C. 1803) (No. 16,614).

[193] 4 Va. (2 Va. Cas.) 111, 121 para. 7 (1817); *see also* Vass v. Commonwealth, 30 Va. (3 Leigh) 786, 800–801 (1831) (upholding the admission of a dying declaration into evidence); King v. Commonwealth, 4 Va. (2 Va. Cas.) 78, 80–81 (1817) (admitting dying declaration evidence).

[194] 8 N.C. (1 Hawks) 442, 444 (1821).

[195] ARTEMAS ROGERS & HENRY B. CHASE, TRIAL OF DANIEL DAVIS FARMER FOR THE MURDER OF WIDOW ANNA AYER AT GOFFSTOWN, ON THE 4TH OF APRIL, A.D. 1821, at 9–14, 54–55 (Concord, Hill & Moore 1821).

[196] (N.Y. Sup. Ct. 1824), *reprinted in* 2 JACOB D. WHEELER, REPORTS OF CRIMINAL LAW CASES 390, 399–400 (Albany, Gould, Banks & Gould 1851); *see also* United States v. Woods, 4 D.C. (4 Cranch) 484, 484–85 (1834) (recognizing the rule but refusing to admit declarations that were not made *in extremis*).

[197] Commonwealth v. Murray (Pa. 1st Jud. Dist. 1834), *reprinted in* 2 JOHN W. ASHMEAD, REPORTS OF CASES ADJUDGED IN THE COURTS OF COMMON PLEAS, QUARTER SESSIONS, OYER AND TERMINER, AND ORPHANS' COURT, OF THE FIRST JUDICIAL DISTRICT OF PENNSYLVANIA 41, 49 (Philadelphia, John Campbell 1871).

[198] *See supra* notes 188–197 and accompanying text; *see also* United States v. Taylor, 4 D.C. (4 Cranch) 338 (1833); Moore v. State, 12 Ala. 764, 766 (1848) (citation omitted) (admitting dying declarations without mentioning confrontation concerns); People v. Green, 1 Denio 614, 614–15 (N.Y. 1845) (citing The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789)); Commonwealth v. Williams (Ct. Oyer & Terminer, Pa. 1st Jud. Dist. 1839), *reprinted in* 2 ASHMEAD, *supra* note 197, at 69, 73–75; State v.

What was not said in those early cases may be as important as what was announced. The U.S. Supreme Court rejected arguments in *Giles v. California* that a defendant should equitably forfeit his right of confrontation any time the defendant wrongfully caused the unavailability of a witness.[199] The Court reckoned that there would have been no need for the common law to develop a dying declaration exception if statements made by a decedent had been admissible any time a defendant wrongfully caused the declarant's death.[200] The Court placed particular emphasis upon the absence of forfeiture arguments in the early dying declaration cases, stating:

> In cases where the evidence suggested that the defendant had caused a person to be absent, but had not done so to prevent the person from testifying—as in the typical murder case involving accusatorial statements by the victim—the testimony was excluded unless it was confronted or fell within the dying-declaration exception. Prosecutors do not appear to have even *argued* that the judge could admit the unconfronted statements because the defendant committed the murder for which he was on trial.[201]

The Court later drove home the point, explaining:

> Judges and prosecutors also failed to invoke forfeiture as a sufficient basis to admit unconfronted statements in the cases that did apply the dying-declarations exception. This failure, too, is striking. At a murder trial, presenting evidence that the defendant was responsible for the victim's death would have been no more difficult than putting on the government's case in chief. Yet prosecutors did not attempt to obtain admission of dying declarations on wrongful-procurement-of-absence grounds before going to the often considerable trouble of putting on evidence to show that the crime victim had not believed he could recover.[202]

In accordance with the reasoning employed by the Supreme Court in *Giles*, the noticeable absence of confrontation arguments in the post-founding dying declaration cases may play a prominent role in future cases that attempt to retrospectively determine original intent.

The absence of confrontation objections in the early post-founding cases lays bare Professor Friedman's assertion that the Confrontation Clause was meant to exclude accusatory statements made to persons outside the legal system.[203] Nearly all dying declarations would fit within

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Ferguson, 20 S.C.L. (2 Hill) 619, 624 (1835); *cf.* Montgomery v. State, 11 Ohio 424, 425–26 (1842) (remanding, without comment on any constitutional issue or worry, to determine whether the dying declaration exception applied).

[199] 128 S. Ct. 2678, 2684, 2687–88 (2008).

[200] *See id.* at 2684–86.

[201] *Id.* at 2684.

[202] *Id.* at 2686.

[203] Friedman & McCormack, *supra* note 29, at 1251–52; Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1040, 1043.

Friedman's formulation. For example, the decedent in *King v. Commonwealth* exclaimed that "*King* had shed innocent blood."[204] In *Poll*, the victim "said he was poisoned, and, as he believed, by Poll."[205] The deceased declarant in *Commonwealth v. Murray* declared "the man (or men) who took away the stuff had murdered him."[206] The dying declarations allowed in *Vass v. Commonwealth* resulted from leading questions propounded to the dying declarant by a person who was allegedly "performing the part, of a prosecutor, so far as to collect evidence of the prisoner's guilt, to be used in the prosecution for the offence which he anticipated as certain."[207] Each of these statements appears to have been made, as Friedman puts it, under "circumstances a person in the declarant's position should be deemed to have made the statement with the anticipation that it would be presented at trial."[208] Yet, constitutional confrontation arguments were not even mentioned in the reports of those cases.

The absence of confrontation arguments is striking because the dying declaration rule was criticized and disfavored in some quarters. New York courts repeatedly refused to allow usage of dying declarations in civil cases during the early post-founding period, because "the right of cross-examining is invaluable, and not to be broken in upon."[209] A party in *Wilson v. Boerem* sought to introduce dying declarations in a civil case related to a promissory note.[210] The court acknowledged and reviewed criminal cases that admitted declarations *in extremis*, but it refused to extend the rule, writing:

> [D]eclarations *in extremis* were inadmissible evidence, except in the single case of homicide. Having an opportunity to cross-examine a witness is a high and important right, and ought not to be violated, except from the most imperious necessity; and I am persuaded, that neither principle nor policy requires the adoption of any such rule of evidence in civil cases.[211]

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[204] King v. Commonwealth, 4 Va. (2 Va. Cas.) 78, 79 (1817).

[205] State v. Poll, 8 N.C. (1 Hawks) 442, 443 (1821).

[206] (Pa. 1st Jud. Dist. 1834), *reprinted in* 2 ASHMEAD, *supra* note 197, at 49.

[207] 30 Va. (3 Leigh) 786, 788 (1831).

[208] Friedman, *Confrontation: The Search for Basic Principles*, *supra* note 26, at 1040.

[209] Jackson v. Kniffen, 2 Johns. 31, 35 (N.Y. Sup. Ct. 1806) (Livingston, J., concurring).

[210] 15 Johns. 286, 286 (N.Y. Sup. Ct. 1818).

[211] *Id.* at 292. This view, however, was not unanimous. *See* M'Farland v. Shaw, 4 N.C. (Car. L. Rep.) 187, 189–91 (1815), *overruled by* Barfield v. Britt, 47 N.C. (2 Jones) 41, 42–44 (1854); Aveson v. Kinnaird, 6 East 188, 195–96, 102 Eng. Rep. 1258, 1261–62 (K.B. 1805) (Lord Ellenborough, C.J.) (proffering the idea that, in limited circumstances, dying declarations could be expanded beyond homicide); PHILLIPPS, *supra* note 180, at 201 (stating that dying declarations are "admissible in civil cases, as well as in trials for murder").

The New York cases demonstrate that courts were concerned that the admission of dying declarations in civil cases would deprive cross-examination, but the absence of confrontation arguments in the post-founding criminal cases shows that judges and lawyers did not equate the concepts.

Virginia cases also indicate that the right of confrontation was not synonymous with a right to cross-examine the deceased maker of a dying declaration. For example, a specific objection was made on behalf of the defendant in *Gibson* that a deceased's declarations should not be admitted because "they [were] not . . . made in the petitioner's presence[,]" but, no constitutional argument was offered.[212] The defendant similarly argued in *Vass* that he had been deprived of the opportunity to cross-examine the decedent, but no state or federal Confrontation Clause argument was made.[213] "Confrontation" and the cross-examination requirements of the hearsay rule were not used interchangeably insofar as dying declarations were concerned.

At the time when confrontation complaints began to arise, some courts upheld the admissibility of dying declarations on historical grounds. Most of these courts provided a theoretical basis beyond mere acquiescence; they construed the constitutionalization of confrontation as part of the continuing development of the law.[214] The Tennessee Supreme Court held in *Anthony* that the confrontation right was an extension of English law on the subject, writing:

> The provision in the bill of rights was intended only to ascertain and perpetuate a principle in favor of the liberty and safety of the citizen, which, although fully acknowledged and acted upon before and at the time of our revolution, had been yielded to the liberal or popular party in Great Britain after a long contest, and after very strenuous opposition from the crown, from crown lawyers, and if I may so speak, crown statesmen. In this case, as in that of libels and some others, the object of the bill of rights was not to introduce a new principle, but to keep ground already gained, and to preserve and perpetuate the fruits of a political and judicial victory, achieved with difficulty, after a violent and protracted contest.[215]

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[212] *See* Gibson v. Commonwealth, 4 Va. (2 Va. Cas.) 111, 118 (1817).

[213] *See* Vass v. Commonwealth, 30 Va. (3 Leigh) 786, 790–91 (1831).

[214] *E.g.*, Lambeth v. State, 23 Miss. 322, 357–58 (1852); *cf.* Commonwealth v. Carey, 66 Mass. (12 Cush.) 246, 249 (1853) (overruling an objection that the right of confrontation barred use of a dying declaration); Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437 (1836) (stating in dictum that dying "declarations, made when the accused was not present, are admissible evidence . . . and were not intended to be excluded or touched by the [confrontation] provision cited from the [state] bill of rights" (citations omitted)).

[215] Anthony v. State, 19 Tenn. (Meigs) 265, 277–78 (1838); *see also* Hill v. Commonwealth, 43 Va. (2 Gratt.) 594, 614–16 (1845) (Baker, J., concurring) (writing that the constitutionalization of confrontation was an affirmation of the common law that accepted the dying declaration rule).

In *Hill v. Commonwealth*, the Virginia General Court likewise concluded that confrontation had been derived from the Magna Charta and acknowledged in colonial Virginia, but that it was never supposed that the admission of dying declarations violated the right.[216] The overwhelming weight of authority subscribed to the view that the constitutional provision must be read as a product of the common law and not as a rejection of it.[217] As the Louisiana Supreme Court explained in *State v. Price*, "[the Confrontation Clause] has always been regarded as a Constitutional declaration of a great common law right, and to have the full effects of the common law principle, but no more."[218]

The early American cases support this incorporation idea. A 1796 Pennsylvania county court in *Pennsylvania v. Lewis* instructed a jury in accordance with *The King v. Woodcock*.[219] Likewise, a Pennsylvania court in *Stoops* relied upon *Dominus Rex v. Reason*, *Woodcock*, and *The King v. Radbourne* in 1799.[220] In 1803, the U.S. Circuit Court of the District of Columbia admitted declarations *in extremis* in *Veitch* after considering *The King v. Drummond* and *Woodcock*.[221] It also permitted use of dying declarations a year earlier in *McGurk* upon citation to *Woodcock* and

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[216] *Hill*, 43 Va. (2 Gratt.) at 607–08.

[217] *See* Salinger v. United States, 272 U.S. 542, 548 (1926) (citations omitted); Green v. State, 66 Ala. 40, 46–47 (1880); State v. Oliver, 7 Del. (2 Houst.) 585, 589 (1863); Campbell v. State, 11 Ga. 353, 373–74 (1852); State v. Canney (Me. 1846), *reprinted in* 9 THE LAW REPORTER 408, 409 (Peleg W. Chandler ed., Boston, Bradbury & Guild 1847); Woodsides v. State, 3 Miss. (2 Howard) 655, 664–65 (1837); State v. Houser, 26 Mo. 431, 438–39 (1858); State v. Tilghman, 33 N.C. (11 Ired.) 363, 378–79 (1850); State v. Saunders, 12 P. 441, 442–43 (Or. 1886), *overruled on other grounds by* State v. Marsh, 490 P.2d 491, 502 n.47 (Or. 1971); State v. Waldron, 14 A. 847, 849–50 (R.I. 1888) (citations omitted); Miller v. State, 25 Wis. 384, 387–88 (1870); *cf.* People v. Restell, 3 Hill 289, 294–95 (N.Y. Sup. Ct. 1842) (commenting that the admission of dying declarations in homicide trials was the one exception to the right of confrontation); Burrell v. State, 18 Tex. 713, 730–31 (1857) (citations omitted) (following the uniform weight of authority that indicate the admissibility of dying declarations without additional discussion); State v. Baldwin, 45 P. 650, 651 (Wash. 1896) (holding that the issue of the admissibility of dying declarations was so well-settled that the question was no longer open). *But see* 14 GEORGE P. SANGER, THE MONTHLY LAW REPORTER 221 (Boston, Little, Brown & Co. 1852) (detailing an unreported Georgia murder case in which the judge rejected dying declarations on Confrontation Clause grounds).

[218] State v. Price, 6 La. Ann. 691, 694 (1851).

[219] Pennsylvania v. Lewis, Add. 279, 282 (Washington County Ct. 1796) (citing The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789)).

[220] Pennsylvania v. Stoops, Add. 381, 382–83 (Allegheny County Ct. 1799) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352; The King v. Radbourne, 1 Leach 457, 168 Eng. Rep. 330 (K.B. 1787); Dominus Rex v. Reason, 1 Strange 499, 93 Eng. Rep. 659 (K.B. 1722)).

[221] United States v. Veitch, 28 F. Cas. 367, 367–68 (C.C.D.C. 1803) (No. 16,614) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352; The King v. Drummond, 1 Leach 337, 168 Eng. Rep. 271 (K.B. 1784)).

other common law authorities.[222] In 1821, the North Carolina Supreme Court cited *Thomas John's Case* in support of its ruling in *Poll*.[223] A New Hampshire court relied upon *Reason* and *Woodcock* during the 1821 trial of Daniel Farmer.[224] These cases appear to carry over the holdings from the English cases without impediment and corroborate the following conclusion reached by the Georgia Supreme Court in *Campbell v. State*:

> The admission of dying declarations in evidence, was never supposed, in England, to violate the well-established principles of the Common Law, that the witnesses against the accused should be examined in his presence. The two rules have co-existed there certainly, since the trial of Ely, in 1720, and are considered of equal authority.
>
> The constant and uniform practice of all the Courts of this country, before and since the revolution, and since the adoption of the Federal Constitution, and of the respective State Constitutions, containing a [confrontation] provision, has been to receive in evidence, *in cases of homicide*, declarations properly made, *in articulo mortis*.[225]

### *B. The* Woodsides *Approach*

*Campbell v. State* and other cases from the mid-1800s advanced a straightforward construction of the Confrontation Clause. In *Campbell*, the court acknowledged the inviolability of the rule of confrontation, but it did not accept arguments that the rule gave a defendant the right to insist on meeting a deceased declarant face-to-face.[226] The court wrote, "The argument for the exclusion of the testimony, proceeds upon the idea that the deceased is the witness, when in fact it is the individual who swears to the statements of the deceased, who is the witness."[227] Many other courts analyzed the confrontation right in a comparable manner.[228]

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[222] United States v. McGurk, 26 F. Cas. 1097, 1097 (C.C.D.C. 1802) (No. 15,680) (citing *Woodcock*, 1 Leach at 500, 168 Eng. Rep. at 352).

[223] State v. Poll, 8 N.C. (1 Hawks) 237, 239 (1821) (citing Thomas John's Case (1790), *as reprinted in* 1 EAST, *supra* note 112, ch. 5, § 124, at 357).

[224] ROGERS & CHASE, *supra* note 195, at 11 (citing *Woodcock*, 1 Leach at 501, 168 Eng. Rep. at 352; *Reason*, 1 Strange at 500, 93 Eng. Rep. at 660).

[225] 11 Ga. 353, 374 (1852).

[226] *Id.* at 373–75.

[227] *Id.* at 374.

[228] *E.g.*, Green v. State, 66 Ala. 40, 46–47 (1880); Walston v. Commonwealth, 55 Ky. (16 B. Mon.) 15, 35–36 (1855); Robbins v. State, 8 Ohio St. 131, 163 (1857); State v. Murphy, 17 A. 998, 999 (R.I. 1889); *see also* Brown v. Commonwealth, 76 Pa. 319, 339 (1874) (affirming the use of a woman's dying declaration in an appeal of the defendant's conviction for her murder); *cf.* Walker v. State, 39 Ark. 221, 229 (1882) (writing that dying declarations are admissible despite the defendant's inability to cross-examine the decedent, because he is confronted by the witnesses who prove the declarations); State v. Price, 6 La. Ann. 691, 693 (1851) (holding that a deceased declarant ceased to be a witness on death); People v. Corey, 51 N.E. 1024, 1029 (N.Y. 1898) (citations omitted) (holding that a deceased declarant was not considered a witness under a statutory confrontation clause); Brown v.

This approach appears to have been originated by the Mississippi High Court of Errors and Appeals in the 1837 case of *Woodsides v. State*, where it wrote that dying declarations themselves "are regarded as facts or circumstances connected with the murder, which, when they are established by oral testimony, the law has declared to be evidence."[229] Shortly thereafter, the Virginia court in *Hill* similarly compared the allowance of dying declarations to the accepted usage of admissions against interest, writing, "It is analogous to that which authorizes the admissions of the prisoner to be given in evidence against him. In that case, he is not the witness; neither is the dead man. His declarations are facts to be proved by witnesses, who must be confronted with the accused."[230]

These authorities held, "The right secured applied to the witness, and not the subject-matter of his testimony."[231] The cases focused directly upon the "witnesses against" terminology used in the Confrontation Clause. The Ohio Supreme Court explained, in *State v. Summons*, that untenable results would occur if the focus of the Confrontation Clause was shifted from witnesses to the content of their testimony:

> [I]f the right secured by the bill of rights applies to the *subject matter of the evidence*, instead of the *witness*, it would exclude, in criminal cases, all narration of statements or declarations made by other persons, heretofore received as competent evidence. The construction insisted on for the plaintiff in error, treats the person whose statements or declarations are narrated, as the witness, rather than the person who testifies on the trial. This construction would exclude all declarations *in articulo mortis*, by confounding the identity of the dying man with that of the witness called upon in court to testify to such declarations. Precisely the same objection would exclude all declarations by co-conspirators statements made in the presence of the accused in a criminal case, and not denied by him; and the statements by the prosecutrix in prosecutions for rape, made immediately after the commission of the offense. And, by a parity of reasoning, the

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Commonwealth, 73 Pa. 321, 327–29 (1873) (citations omitted) (holding that the rule did not allow use of a wife's dying declaration in a defendant's trial for the murder of her husband, but writing that nothing barred use of a wife's dying declaration at the defendant's trial for her murder).

[229] Woodsides v. State, 3 Miss. (2 Howard) 655, 665 (1837).

[230] Hill v. Commonwealth, 43 Va. (2 Gratt.) 594, 608 (1845); *see also* State v. Nash, 7 Iowa 347, 377 (1858) (citations omitted) (analogizing use of dying declarations to the admission of *res gestae* hearsay); State v. Tilghman, 33 N.C. (11 Ired.) 363, 378 (1850) (stating witnesses were regularly allowed to testify about the content of statements made by a defendant in a deed or letter and the practice of allowing dying declaration testimony was the same).

[231] State v. Canney (Me. 1846), *reprinted in* 9 THE LAW REPORTER, *supra* note 217, at 409.

> admissions or confessions of the accused, and, in prosecutions for perjury, the very testimony of the accused on which the perjury may be assigned, would be excluded by the provision in the bill of rights forbidding that any person shall be compelled, in any criminal case, to be a witness against himself.[232]

It is doubtful that the current U.S. Supreme Court will embrace this line of reasoning from *Woodsides*, *Summons*, or similar cases. The Supreme Court cited the *Woodsides* holding in *Crawford v. Washington*, characterizing it as a decision that limited the "witnesses against" language in the Confrontation Clause to persons who actually testify at trial.[233] The Supreme Court did not directly criticize *Woodsides*, but, after reviewing the history of the right of confrontation, it wrote, "we once again reject the view that the Confrontation Clause applies of its own force only to in-court testimony."[234]

Further examination is nonetheless warranted when the issue of the constitutionality of admitting dying declarations is squarely before the Supreme Court, because the reasoning of *Woodsides* and its adherents is not as broad as suggested in passing by *Crawford*. "Witnessing" was not a concept considered in a vacuum. In *Lambeth v. State*, the Mississippi court elaborated upon its earlier ruling in *Woodsides*, explaining, "The general principle of the common law, on the subject of evidence, with few exceptions, has always been, that 'hearsay evidence' could not be admitted."[235] The court in *Lambeth* also explained, though, that this rule was juxtaposed against the dying declarations rule that was "almost coeval" with the origins of the law and involved a particular type of out-of-court statement that qualified as proof.[236]

The court's view concerning the coexistence of the rules is substantiated by the admission of dying declaration evidence in 1722 during the trial of Reason and Tranter,[237] which was made despite the earlier announcement during the trial of Richard Langhorn: "what another man said is no evidence against the prisoner, for nothing will be evidence against him, but what is of his own knowledge."[238] Both were

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[232] Summons v. State, 5 Ohio St. 325, 341–42 (1856).

[233] Crawford v. Washington, 541 U.S. 36, 42–43 (2004) (citing *Woodsides*, 3 Miss. (2 Howard) at 664–65).

[234] *Id. at* 50.

[235] Lambeth v. State, 23 Miss. 322, 357 (1852) (citing *Woodsides*, 3 Miss. (2 Howard) at 665); *see also* The King v. Inhabitants of Eriswell, 3 T.R. 707, 709, 100 Eng. Rep. 815, 816 (K.B. 1790) (describing the common law rule on hearsay and its presumptive inadmissibility).

[236] *Lambeth*, 23 Miss. at 357.

[237] Dominus Rex v. Reason, 1 Strange 499, 500, 93 Eng. Rep. 659, 660 (K.B. 1722).

[238] Trial of Richard Langhorn, 31 Car. 2, pl. 252 (1679), *reprinted in* 14 A COMPLETE COLLECTION OF STATE TRIALS 417, 441 (T.B. Howell comp., London, T.C. Hansard 1816); *see also* Trial of William Lord Russell, 35 Car. 2, pl. 297 (1683), *reprinted in* 9 COBBETT'S

accepted principles of law. Each of the major treatises on evidence from the mid-eighteenth century explained that hearsay wasn't proof, because bare speaking wasn't considered testimony.[239] Yet, it was resolved by the time of founding that dying declarations still constituted an acceptable species of evidence in criminal cases.[240]

The court in *Lambeth* ascertained that the framers of the U.S. Constitution were familiar with this history and adopted it into American jurisprudence.[241] The Confrontation Clause was not intended to "specify the nature, character, or degree of evidence" that could be admitted.[242] It was instead a reassertion of "a cherished principle of the common law, which had sometimes been violated in the mother country[ ] in political prosecutions."[243] Determinations regarding the nature and kinds of evidence that a witness may give were left "to the courts to decide according to the rules of law, upon the nature and kind of evidence which a witness, when confronted with the accused, might be permitted to give."[244]

The special proof characteristics of dying declarations in the context of this paradigm were described by the Rhode Island Supreme Court in *State v. Murphy* as follows: "The deceased is not the witness; nor are his statements, merely as statements, reproduced in evidence. What he said and did, in natural consequence of the principal transaction, become original evidence, concerning which the witnesses are produced."[245] When it came to dying declarations, "[t]he objection, if there be one, is to the competency of the evidence, and not to the want of the personal presence of the witness."[246] The Mississippi court in *Lambeth* explained that "[t]he dying declarations are not the witness against the accused.

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COMPLETE COLLECTION OF STATE TRIALS 577, 608 (London, R. Bagashaw 1811) (instructing a jury to disregard hearsay because it wasn't evidence).

[239] BATHURST, *supra* note 111, at 111; BULLER, *supra* note 121, at 289–90; GILBERT, *supra* note 111, at 152–53.

[240] *See* The King v. Woodcock, 1 Leach 500, 501, 168 Eng. Rep. 352, 352–53 (K.B. 1789); *see also* JOHN F. ARCHBOLD, A SUMMARY OF THE LAW RELATIVE TO PLEADING AND EVIDENCE IN CRIMINAL CASES 72–73 (London, R. Pheney 1822) (citations omitted) (documenting the longstanding history of dying declarations as an exception to the hearsay rule); *cf.* Gray v. Goodrich, 7 Johns. 95, 96 (N.Y. Sup. Ct. 1810) ("What a deceased person has been heard to say, except upon oath, or *in extremis*, when he came to a violent end, never has been considered as competent evidence.").

[241] *Lambeth*, 23 Miss. at 357.

[242] *Id.*

[243] *Id.*

[244] *Id.* at 357–58.

[245] State v. Murphy, 17 A. 998, 999 (R.I. 1889) (citing State v. Waldron, 14 A. 847, 850 (R.I. 1888)); *see also* Woodsides v. State, 3 Miss. (2 Howard) 655, 665 (1837) ("[T]he murdered individual is not a witness . . . .").

[246] Robbins v. State, 8 Ohio St. 131, 163 (1857).

They are only evidence against him, which the witness confronted with him is permitted to introduce."[247]

At first glance, *Woodsides* might leave the misimpression that courts are left free to contrive evidentiary rules that circumvent the right of confrontation. But, such a reading would inaccurately detach the court's conclusion from its reasoning. The cases that followed the *Woodsides* line of reasoning recognized that the inclusion of a confrontation provision in "the Constitution was intended for the two-fold purposes of giving it prominence and permanence."[248] *Woodsides* left open the development of the law of evidence, but the cases that followed it refused to tolerate the abuses perpetrated in the political trial of Sir Walter Raleigh.[249] Likewise, the court in *Woodsides* expressly limited its holding, confirming: "If [the murdered individual] were, or could be a witness, his declaration, upon the clearest principle, would be inadmissible."[250]

Both *Crawford* and the *Woodsides* line of cases agree in significant areas. They read the post-Raleigh common law history in a similar way, and see the Confrontation Clause as a curb against past prosecutorial abuses.[251] They separate the hearsay rule from the confrontation right.[252] Despite agreement on these points, *Woodsides* and *Crawford* may still be difficult to reconcile on the general question of "witnessing," because they approach the Confrontation Clause from different directions. *Woodsides* examined who the law considered a witness for certain species of proof.[253] *Crawford* focuses on whether particular proof defines its maker as a witness.[254]

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[247] *Lambeth*, 23 Miss. at 358.

[248] Campbell v. State, 11 Ga. 353, 374 (1852).

[249] *See Lambeth*, 23 Miss. at 358 (stating that the credibility of the dying declaration, and of the person who testified to its utterance, should be weighed by the jury); *Waldron*, 14 A. at 849 (distinguishing the right of confrontation, violated in the trial of Sir Walter Raleigh, from the dying declaration exception to the hearsay rule).

[250] *Woodsides*, 3 Miss. (2 Howard) at 665.

[251] *Compare Waldron*, 14 A. at 849 ("We think there is no doubt that the primary purpose of the declaration of right was to secure the exclusion . . . of *ex parte* affidavits or depositions, or the written examinations of coroners and committing magistrates."), *with* Crawford v. Washington, 541 U.S. 36, 50 (2004) ("[T]he principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused.").

[252] *Compare Waldron*, 14 A. at 849 ("'[T]he witnesses against' an accused person, are, in customary speech, the persons who testify against him, not those who merely make or repeat remarks about him."), *with Crawford*, 541 U.S. at 51 ("An off-hand, overheard remark might be unreliable evidence and thus a good candidate for exclusion under hearsay rules, but it bears little resemblance to the civil-law abuses the Confrontation Clause targeted.").

[253] *See Woodsides*, 3 Miss. (2 Howard) at 664–65.

[254] *See Crawford*, 541 U.S. at 51–52.

### C. The Necessity Approach

Ultimately, necessity is the common thread running through the authorities on dying declarations that sets the rule apart from other hearsay exceptions. For example, in *State v. Oliver*, the Court of Errors and Appeals of Delaware wrote that the right of confrontation "was not designed and was never understood" to exclude dying declarations "which were admissible even in our own courts long before any constitution was framed and adopted."[255] In addition, the court recognized that "[t]hey are also in part admitted from necessity."[256] The Virginia court in *Hill* held that a deceased declarant wasn't a "witness"; but, it also acknowledged that the "rule is one of necessity[,] . . . analogous to that which authorizes the admissions of the prisoner to be given in evidence against him."[257] The Georgia court in *Campbell* similarly wrote that the rule may be justified by "urgent necessity."[258] Those courts also used the presumed solemnity of dying declarations to bolster their positions;[259] yet, the California Supreme Court candidly assessed that necessity was truly the reason for dispensing with cross-examination, writing:

> The reasons for the admission of hearsay testimony in the shape of dying declarations, in trials for murder, are very fully stated in the treatises upon criminal law. The most substantial ground upon which the admission of such testimony can be placed, is that of *necessity*. It is true that the condition of the person making the declaration in the last sad hours of life, under a sense of impending dissolution, may compensate for the want of an oath; but it can never make up for the want of a cross-examination. This was very clearly shown in the case of Reason and Tranter.
>
> But, however unsatisfactory such evidence may be, the necessity of the case has always induced the Courts to admit it; and this exception to the general rule of testimony has been too firmly established to be overthrown. There would be the most lamentable failure of justice, in many cases, were the dying declarations of the victims of crime excluded from the jury.[260]

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[255] 7 Del. (2 Houst.) 585, 589 (1863).

[256] *Id.*

[257] Hill v. Commonwealth, 43 Va. (2 Gratt.) 594, 608 (1845).

[258] Campbell v. State, 11 Ga. 353, 374 (1852).

[259] *See Oliver*, 7 Del. (2 Houst.) at 589; *Campbell*, 11 Ga. at 374; *Hill*, 43 Va. (2 Gratt.) at 608–11; *cf.* Mattox v. United States, 146 U.S. 140, 152 (1892) (stating, without addressing constitutionality, that the "admission of the testimony is justified upon the ground of necessity" and presumed solemnity).

[260] People v. Glenn, 10 Cal. 32, 36 (1858) (citing Dominus Rex v. Reason, 1 Strange 499, 500, 93 Eng. Rep. 659, 660 (K.B. 1722)); *see also* Morgan v. State, 31 Ind. 193, 198–201 (1869) (stating that the rule is, of necessity, an exception to the right of an accused to meet an accuser face-to-face, and that abuse must be therefore guarded against with minute

Necessity meant something more than unavailability to these courts and was derived from either the circumstances of the crime committed or the situation in which the decedents uttered their last words. The Court of Appeals of Kentucky, in *Walston v.* Commonwealth, balanced the confrontation right against the "public necessity to preserve the lives of the community, by bringing the manslayer to justice."[261] It explained that justice could not allow murderers to escape their crimes by committing them in secret "where no third person witnessed the transaction."[262] Necessity, however, need not have always been found solely in the circumstances of the crime; it could be supplied by the condition of the victim. The Supreme Judicial Court of Massachusetts, in *Commonwealth v. Casey*, recognized that "[w]here a person has been injured in such a way that his testimony cannot be had in the customary way, the usual and ordinary rules of evidence must from the necessity of the case be departed from."[263]

In the first edition of his treatise, Professor Wigmore criticized the necessity principle. In his view, necessity meant unavailability at common law, and the principle developed in the 1800s was a "heresy" spawned from a misconstruction of comments made in Edward East's *Pleas of the Crown*.[264] East had written that dying declarations were admitted on the basis of fullest necessity "for it often happens that there is no third person present to be an eye-witness to the fact; and the usual witness on occasion of other felonies, namely, the party injured himself, is gotten rid of."[265] Wigmore believed that it was natural for East to pay special attention to the subject of secret murders because his passage on

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particularity); State v. Eddon, 36 P. 139, 140–43 (Wash. 1894) (writing that the rule is tolerated only by necessity).

[261] Walston v. Commonwealth, 55 Ky. (16 B. Mon.) 15, 34 (1855) (citation omitted); *see also* Provisional Gov't of the Hawaiian Islands v. Hering, 9 Haw. 181, 189 (1893) (writing that the dying declaration rule is a necessity exception that does not contravene the state constitutional right to meet witnesses face-to-face).

[262] *Walston*, 55 Ky. (16 B. Mon.) at 34; *see also* Commonwealth v. Murray (Pa. 1st Jud. Dist. 1834), *reprinted in* 2 ASHMEAD, *supra* note 197, at 49 (writing that "artificial distinction and scholastic refinements" should not overcome public necessity); State v. Ferguson, 20 S.C.L. (2 Hill) 619, 624 (1835) (stating that secret assassins commit their deeds in darkness, thereby establishing necessity).

[263] 65 Mass. (11 Cush.) 417, 421 (1853); *cf.* Vass v. Virginia, 30 Va. (3 Leigh) 786, 792, 799–801 (1831) (allowing use of dying declarations uttered in response to leading questions that were asked out of necessity because the declarant's physical condition prevented him from giving narrative).

[264] 2 WIGMORE, *supra* note 7, § 1431, at 1799–1800 (citing 1 EAST, *supra* note 112, ch. 5, § 124, at 353).

[265] 1 EAST, *supra* note 112, ch. 5, § 124, at 353; *see also* 1 SIMON GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE § 156, at 254 (Boston, Charles C. Little & James Brown 3rd ed. 1846) (stating that the public necessity justification limited the doctrine to cases of homicide).

dying declarations appeared in a chapter about homicide, but he argued that East cited no authority for the proposition and believed that later cases took East's explanation out of context to develop some unacceptable doctrinal limitations.[266]

Professor Wigmore's learned criticism notwithstanding, the necessity principle did not originate with East. It was known around the time of founding. Years before East published his treatise, the Supreme Court of Pennsylvania, in the 1795 case of *Respublica v. Langcake*, refused to admit dying declarations in an assault case due to lack of necessity, resolving:

> The general rule was, that hearsay was inadmissible, but there were some exceptions in particular cases, and, among others, the declarations of the deceased person on an indictment for murder, founded principally on the necessity of the case. No such necessity could be pretended here, there having been several witnesses present at the different transactions.[267]

The New York Supreme Court, in *Jackson v. Kniffen*, similarly acknowledged in 1806, without reference to East:

> If the declarations of dying persons are ever to be received, (on which, if *res integra*, much might be said) it will be best to confine them to the cases of great crimes, where frequently the only witness being the party injured, the ends of public justice may otherwise, by his death, be defeated.[268]

Wigmore was correct in that East did not cite authority for the necessity rationale.[269] Yet, as the authorities quoted above demonstrate, East's treatise most likely restated a familiar proposition.

The other aspect of the necessity principle can be seen in the handling of the exception's mental element. Some judges used a declarant's state of mind in a gatekeeping fashion and refused to admit dying declarations unless the court was satisfied that the declarant had demonstrated some apprehension that death was near.[270] Others, however, applied the element with less rigor.[271] The extent to which

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[266] 2 WIGMORE, *supra* note 7, § 1431, at 1800 n.3 (citing 1 EAST, *supra* note 112, ch. 5, § 124, at 353).

[267] 1 Yeates 415, 416–17 (Pa. 1795).

[268] 2 Johns. 31, 35 (N.Y. Sup. Ct. 1806) (Livingston, J., concurring).

[269] *See* 1 EAST, *supra* note 112, ch. 5, § 124, at 353.

[270] Henry Welbourn's Case, (1792) (K.B.), *as reprinted in* 1 EAST, *supra* note 112, at ch. 5, § 124, at 358, 360; Thomas John's Case, (1790), *as reprinted in* 1 EAST, *supra* note 112, at ch. 5, § 124, at 358; *cf.* The King v. Dingler, 2 Leach 561, 563, 168 Eng. Rep. 383, 384 (K.B. 1791) (refusing testimony after the prosecution admitted that the decedent's examination was not given under an apprehension of immediate death (citing The King v. Woodcock, 1 Leach 500, 501, 168 Eng. Rep. 352, 352–53 (K.B. 1789))).

[271] *See, e.g.*, Commonwealth v. Stoops, Add. 381, 383 (Allegheny County Ct. 1799) ("Nor does it seem absolutely necessary for the competency of [dying declarations] that such declarations should be made under an immediate apprehension of death . . . .").

courts insisted upon satisfaction of the mental element related directly to the severity of a decedent's injury. The courts appear to have relaxed the mental element in cases where the declarant was left in an extreme condition that made inquiry into the decedent's subjective state of mind impractical. The court in *Woodcock* acknowledged that the maker of dying declarations had not appeared to apprehend herself in danger, but it still allowed her statements to go to the jury with instructions that they could consider the statements if they determined that the circumstantial evidence satisfied the element.[272] The court in *Mrs. Trant's Case* similarly overruled an objection made against admission of a dying declaration, holding:

> [T]he declarations of a person who has received a mortal wound, are evidence in almost every case *to go to a jury*: and are to receive credit from the peculiar circumstances of the case. But while the jury turn such declarations in their mind, they are also to take into their contemplation the motive which produced such declarations; and the situation in which the party making such declarations conceives himself to be at the time of making them, is also a material object for their consideration.[273]

The 1794 edition of *Blackstone's Commentaries* indicated that the exception applied to statements made by a person "who relates *in extremis*, *or* under an apprehension of dying."[274] These authorities illustrate that courts considered the necessities presented by a declarant's physical condition in relation to his or her ability to relay information in a preferred manner.

A potential failure of justice, alone, may be inadequate to establish necessity in the post-*Crawford* environment. The Supreme Court wrote in *Davis v. Washington* that it was cognizant of proof difficulties presented by certain types of cases, but that it could not "vitiate constitutional guarantees when they have the effect of allowing the guilty to go free."[275] In addition, the Supreme Court rejected arguments in *Melendez-Diaz v. Massachusetts* that it should relax confrontation requirements to allow use of laboratory reports to accommodate the "'necessities of trial and the adversary process.'"[276] Necessity was, however, the principal reason cited by the Court's prior decisions to

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[272] *Woodcock*, 1 Leach at 502–04, 168 Eng. Rep. at 353–54; *see also* The King v. Minton, 40 Geo. 3 (1800), *as reprinted in* MACNALLY, *supra* note 155, at 386, 386 (leaving the point of mental impression for the jury to decide).

[273] Mrs. Trant's Case, 33 Geo. 3, (1793), *as reprinted in* MACNALLY, *supra* note 155, at 385, 385–86.

[274] 3 WILLIAM BLACKSTONE, COMMENTARIES *368 (emphasis added).

[275] 547 U.S. 813, 833 (2006).

[276] 129 S. Ct. 2527, 2540 (2009) (quoting Brief for Respondent at 59, Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009) (No. 07-591)).

sustain the use of declarations *in extremis*.[277] The Supreme Court took notice in *Mattox v. United States* of the historical allowance of dying declarations in criminal prosecutions and upheld their continued usage, writing: "They are admitted not in conformity with any general rule regarding the admission of testimony, but as an exception to such rules, simply from the necessities of the case, and to prevent a manifest failure of justice."[278]

The Supreme Court wrote in *Crawford* that the Sixth Amendment "is most naturally read as a reference to the right of confrontation at common law, admitting only those exceptions established at the time of the founding."[279] A New York court wrote, "By citing *Mattox*, with its reference to the well-settled 'rule of necessity', the *Crawford* Court recognized that a defendant's right of confrontation is not absolute."[280] Courts in North Carolina and Ohio have also recognized, post-*Crawford*, that the public necessity of preventing secret murders justifies continuance of the dying declaration exception.[281]

Both *Davis* and *Crawford* accepted that the right of confrontation may be forfeited by a defendant's wrongdoing.[282] The Supreme Court noted in *Giles* that the dying declaration rule and the forfeiture prong of the deposition rule were separate doctrines at common law.[283] Yet they did coalesce when considering case necessities. The Delaware Superior Court wrote in *Oliver* that dying declarations were "in part admitted from necessity, and the party who by his own act has put it out of the power of his victim to appear in evidence against him, cannot justly complain."[284] In *McDaniel v. State*, the Mississippi High Court of Errors and Appeals similarly recognized that "[i]t would be a perversion of [the] meaning [of the Confrontation Clause] to exclude the proof, when the prisoner himself has been the guilty instrument of preventing the

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[277] *E.g.*, Kirby v. United States, 174 U.S. 47, 61 (1899).

[278] 156 U.S. 237, 244 (1895).

[279] 541 U.S. 36, 54 (2004) (citing *Mattox*, 156 U.S. at 243; State v. Houser, 26 Mo. 431, 433–35 (1858)); *see also* Giles v. California, 128 S. Ct. 2678, 2682 (2008) (citing *Crawford*, 541 U.S. at 54).

[280] People v. Durio, 794 N.Y.S.2d 863, 867 (N.Y. Sup. Ct. 2005).

[281] State v. Bodden, 661 S.E.2d 23, 29 (N.C. Ct. App. 2008); Ohio v. Nix, 2004-Ohio-5502, No. C-030696, 2004 WL 2315035, ¶ 72 (Ohio Ct. App. 2004).

[282] Davis v. Washington, 547 U.S. 813, 833–34 (2006); *Crawford*, 541 U.S. at 62 (citing Reynolds v. United States, 98 U.S. 145, 158–159 (1879)).

[283] *Giles*, 128 S. Ct. at 2684–86 (citing The King v. Woodcock, 1 Leach 500, 500–01, 168 Eng. Rep. 352, 352–53 (K.B. 1789)).

[284] State v. Oliver, 7 Del. (2 Houst.) 585, 589 (Del. Super. Ct. 1863); *cf.* Roberson v. State, 49 S.W. 398, 399 (Tex. Crim. App. 1899) (allowing a rape victim to testify by nodding her head in response to leading questions where her physical disability was caused by the defendant's misconduct).

production of the witness, by causing his death."[285] Although the forfeiture doctrine was limited in *Giles* to cases in which a defendant eliminated a witness for the purpose of making the witness unable to testify,[286] a majority of the members of the Court indicated that there may be instances in which purpose can be inferred.[287] Committing a murder in a manner to avoid detection or which eliminates the only direct witness to a crime both seem to be good candidates to infer an intent-to-silence. These types of circumstances differentiate the necessity justification underlying the dying declaration rule from bare inadequacy of other proof.[288] It is difficult to naïvely ignore that the defendant has created the "overruling public necessity" in such cases by purposefully destroying proof of the crime.[289]

### *D. The Future Approach?*

With the uncertainty surrounding the viability of the necessity justification and the current Court's dissatisfaction with the construction that *Woodsides* and similar cases placed upon the "witnesses against" language, the fate of the dying declaration exception may rest upon returning to its indisputable historical acceptance. *Crawford*, *Davis*, *Giles*, and *Melendez-Diaz* all resorted to the development of the common law and its state at the time of the founding to define the parameters of the Confrontation Clause.[290] The California Supreme Court, holding similarly to how most states' courts have held, stated in *People v. Monterroso* that "it follows that the common law pedigree of the exception for dying declarations poses no conflict with the Sixth Amendment."[291]

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[285] McDaniel v. State, 16 Miss. (8 S. & M.) 401, 416 (1847) (citing Woodsides v. State, 3 Miss. (2 Howard) 655, 656 (1837)).

[286] *Giles*, 128 S. Ct. at 2683–84, 2688.

[287] *See Giles*, 128 S. Ct. at 2695 (Souter, J., concurring in part); *id.* at 2708 (Breyer, J., dissenting). *See generally* Tim Donaldson & Karen Olson, *"Classic Abusive Relationships" and the Inference of Witness Tampering in Family Violence Cases After* Giles v. California, 36 LINCOLN L. REV. 45, 49–79 (2008) (reviewing the intent-to-silence requirement adopted by *Giles*).

[288] *See e.g.*, Commonwealth v. Casey, 65 Mass. (11 Cush.) 417, 421 (1853); Lambeth v. State, 23 Miss. 322, 357 (1852).

[289] *Lambeth*, 23 Miss. at 357; *cf.* People v. Durio, 794 N.Y.S.2d 863, 867 (N.Y. Sup. Ct. 2005) (writing that the admissibility of dying declarations "must be considered in the context of the overwhelming interest of public policy").

[290] Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527, 2534–35 (2009); *Giles*, 128 S.Ct. at 2682–85, 2688–91 (2008); Davis v. Washington, 547 U.S. 813, 825–26, 828 (2006); Crawford v. Washington, 541 U.S. 36, 43–47, 52–56, 62 (2004).

[291] People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004) (citing *Crawford*, 541 U.S. at 54); *see also* People v. Gilmore, 828 N.E.2d 293, 301–02 (Ill. App. Ct. 2005) (citing *Crawford*, 541 U.S. at 56 n.6); Wallace v. State, 836 N.E.2d 985, 996 (Ind. Ct. App. 2005) (citing *Crawford*, 541 U.S. at 56 n.6); Commonwealth v. Nesbitt, 892 N.E.2d 299, 311

In *United States v. Jordan*, a federal court in Colorado held that dying declarations did not escape scrutiny under *Crawford* and deserved no special consideration.[292] That court claimed that the historical underpinnings for the rule failed to justify it.[293] The court reasoned that popular belief in the credibility of dying declarations was contrary to *Crawford*'s rejection of a reliability test.[294] The court additionally denied the exception's history, asserting that "the dying declaration exception was not in existence at the time the Framers designed the Bill of Rights."[295] According to the court in *Jordan*, necessity and an opportunity for cross-examination were required under *Crawford* before admission of any testimonial out-of-court statement was permitted by the Confrontation Clause.[296]

Other courts have disapproved *Jordan*'s reinterpretation of the historical record. The Illinois Court of Appeals in *People v. Gilmore* has stated that it believes "the reasoning of *Monterroso* represents the sensible approach and [chose] to follow it instead of *Jordan*."[297] The Massachusetts Supreme Judicial Court explained in *Commonwealth v. Nesbit* that *Jordan* incorrectly focused on what the Colorado court thought "*ought*" to be excluded as a matter of policy rather than addressing whether dying declarations actually were excluded as a matter of preratification common law.[298]

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(Mass. 2008) (citing *Crawford*, 541 U.S. at 56 n.6); State v. Martin, 695 N.W.2d 578, 585–86 (Minn. 2005) (citing *Monterroso*, 101 P.3d at 972), *abrogated on other grounds by* State v. Moua Her, 750 N.W.2d 258, 265 n.5 (2008); Harkins v. State, 143 P.3d 706, 710–11 (Nev. 2006) (citing *Crawford*, 541 U.S. at 54); *Durio*, 794 N.Y.S.2d at 866–67; State v. Lewis, 235 S.W.3d 136, 147–48 (Tenn. 2007) (citing *Crawford*, 541 U.S. at 56 n.6); Gonzalez v. State, 195 S.W.3d 114, 126 (Tex. Crim. App. 2006) (Johnson, J., concurring) (citing *Crawford*, 541 U.S. at 56 n.6); Commonwealth v. Salaam, 65 Va. Cir. 405, 406–09 (Cir. Ct. 2004) (citing *Crawford*, 541 U.S. at 56 n.6).

[292] United States v. Jordan, 66 Fed. R. Evid. Serv. 3d (West) 790, 792–93 (D. Colo. 2005) (citing *Crawford*, 541 U.S. at 56, 68).

[293] *Id.* at 793–94 (citing Howard L. Smith, *Dying Declarations*, 3 WIS. L. REV. 193, 203 (1925)).

[294] *Id.* at 794–95; *cf.* United States v. Mayhew, 380 F. Supp. 2d 961, 965–68 (S.D. Ohio) (citations omitted) (rejecting arguments that the dying declaration exception survives *Crawford*, because the court doubted the inherent reliability of such statements, but holding that a deceased victim's statements were admissible under the forfeiture by wrongdoing exception).

[295] *Jordan*, 66 Fed. R. Evid. Serv. 3d (West) at 795.

[296] *Id.*

[297] People v. Gilmore, 828 N.E.2d 293, 302 (Ill. App. Ct. 2005) (citing People v. Monterroso, 101 P.3d 956, 972 (Cal. 2004); *Jordan*, 66 Fed. R. Evid. Serv. 3d (West) at 794); *see also* State v. Calhoun, 657 S.E.2d 424, 428 (N.C. Ct. App. 2008) (agreeing with *Gilmore* in its rejection of *Jordan*).

[298] Commonwealth v. Nesbitt, 892 N.E.2d 299, 311 (Mass. 2008) (citing *Jordan*, 66 Fed. R. Evid. Serv. 3d (West) at 790)).

*Crawford* acknowledged the existence of authority for admitting testimonial dying declarations.[299] The Supreme Court left no doubt in *Giles* about its understanding of the status of the dying declaration exception at the time of founding when it confirmed: "We have previously acknowledged that two forms of testimonial statements were admitted at common law even though they were unconfronted. . . . The first of these were declarations made by a speaker who was both on the brink of death and aware that he was dying."[300] There is no foundation for the assertion that the dying declaration exception was nonexistent at the time that the Bill of Rights was designed.[301]

The Court's citation to *State v. Houser* in *Crawford* is noteworthy.[302] *Houser* shared *Crawford*'s concern about *Woodsides*'s construction of the "witnesses against" language, writing that it is a "mere evasion" to say that a person is the witness against an accused when he or she is acting as a "conduit pipe" to repeat what someone else said.[303] The court in *Houser* nonetheless acknowledged that courts are not free to rewrite history.[304] Whatever construction a court places on the Confrontation Clause, it is irrefutable that dying declarations were admitted at common law before and after ratification of the Bill of Rights. If something must yield when reconciling theory and history in this area, the permanence of history should withstand the winds of changing thought. The court in *Houser* explained the relationship between confrontation and the dying declaration rule as follows:

> The admissibility of dying declarations has not been questioned. They have been frequently resorted to in this state, as well as elsewhere, without any suggestion ever having been made of a conflict with this constitutional provision. To exclude them on this ground would not only be contrary to all the precedents in England and here, acquiesced in long since the adoption of these constitutional provisions, but it would be abhorrent to that sense of justice and regard for individual security and public safety which its exclusion in some cases would inevitably set at nought. But dying declarations, made under certain circumstances, were admissible at common law, and that common law was not repudiated by our constitution in the clause referred to, but adopted and cherished.[305]

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[299] Crawford v. Washington, 541 U.S. 36, 56 n.6 (2004).

[300] Giles v. California, 128 S. Ct. 2678, 2682 (2008) (citations omitted).

[301] *See, e.g.*, The King v. Woodcock, 1 Leach 500, 501–02, 168 Eng. Rep. 352, 352–53 (K.B. 1789).

[302] *Crawford*, 541 U.S. at 54 (citing State v. Houser, 26 Mo. 431, 433–35 (1858)).

[303] *Houser*, 26 Mo. at 437–38.

[304] *Id.* at 438.

[305] *Id.*

## CONCLUSION

The fate of the dying declaration rule tests the integrity of the methodology of originalism. The dying declaration rule might appear inconsistent with some of the sweeping generalizations made in *Crawford* about the right of confrontation,[306] however, it is entirely consistent with the *Crawford* methodology. *Crawford* recognized that "[o]ne could plausibly read 'witnesses against' a defendant to mean those who actually testify at trial, . . . those whose statements are offered at trial, . . . or something in between."[307] It therefore turned to the historical background of the Confrontation Clause and the development of the common law up until the time of founding to define the parameters of the Confrontation Clause.[308] The pre-founding and post-ratification acceptance of the dying declaration rule cannot be erased from that history.

From the mid- to late-nineteenth century, state appellate courts repeatedly rejected claims that a defendant's confrontation right was violated by admission of dying declarations.[309] The dying declaration rule was accepted on a variety of grounds. It was upheld based upon its historical pedigree.[310] It was vindicated by necessity.[311] It was recognized as a rule that preserved a restricted species of proof that was heard by a witness but was nonetheless considered direct evidence of the facts or circumstances of a crime.[312] At the end of that century, the Supreme Court acknowledged in *Mattox v. United States* that the dying declaration rule constituted an exception recognized "from time immemorial" that the Bill of Rights respected,[313] and also acknowledged that the rule withstood confrontation objections "from the necessities of the case, and to prevent a manifest failure of justice."[314]

The dying declaration rule has survived previous major shifts in confrontation jurisprudence.[315] The Supreme Court was careful to note in *Pointer v. Texas*, which applied the Confrontation Clause directly to the

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[306] *See* United States v. Jordan, 66 Fed. R. Evid. Serv. 3d (West) 790, 791–95 (D. Colo. 2005).

[307] *Crawford*, 541 U.S. at 42–43 (citations omitted).

[308] *Id.* at 43–47, 52–56, 62 (citations omitted).

[309] *E.g.*, Woodsides v. State, 3 Miss. (2 Howard) 655, 664–65 (1837); State v. Baldwin, 45 P. 650, 651 (Wash. 1896).

[310] *E.g.*, Anthony v. State, 19 Tenn. (Meigs) 265, 277–78 (1838).

[311] *E.g.*, People v. Glenn, 10 Cal. 32, 36 (1858).

[312] *E.g.*, *Woodsides*, 3 Miss. (2 Howard) at 665–66.

[313] Mattox v. United States, 156 U.S. 237, 243 (1895).

[314] *Id.* at 244.

[315] *See* Ohio v. Roberts, 448 U.S. 56, 66 n.8 (1980), *abrogated by* Crawford v. Washington, 541 U.S. 36, 60–69 (2004); Pointer v. Texas, 380 U.S. 400, 407 (1965) (citing *Mattox*, 156 U.S. at 240–44; Mattox v. United States, 146 U.S. 140, 151 (1892)).

states through the Fourteenth Amendment, that "[t]his Court has recognized the admissibility against an accused of dying declarations, . . . and of testimony of a deceased witness who has testified at a former trial . . . . Nothing we hold here is to the contrary."[316] The rule endured until its future was called into doubt by a footnote in *Crawford v. Washington* that acknowledged the rule's historical pedigree but said that "[w]e need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations."[317] The Court subsequently acknowledged in *Giles v. California* that dying declarations were a form of testimonial statement "admitted at common law even though they were unconfronted."[318] The Supreme Court, however, has not yet definitively ruled upon the future of the confrontation exception.

Declarations *in extremis* were admitted in criminal prosecutions for over half a century prior to adoption of the Confrontation Clause.[319] There is nothing in the Clause's history to indicate that the rule was concocted to promote political trials or to deprive a defendant from confronting his or her accusers. The usage of the rule was not disavowed by the time of founding and was instead expanded to encompass defective depositions, provided, however, that such testimony was given under circumstances that satisfied the dying declaration rule.[320] American courts continued to admit dying declarations in criminal prosecutions for almost half a century before confrontation objections began appearing in reported case law.[321] "This exception was well established before the adoption of the Constitution, and was not intended to be abrogated."[322] Thus, the inability of a particular confrontation theory to accommodate the dying declaration rule reveals only deficiencies in the theory itself.

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316 *Pointer*, 380 U.S. at 407 (citations omitted).

317 *Crawford*, 541 U.S. at 56 n.6.

318 Giles v. California, 128 S. Ct. 2678, 2682 (2008) (citing *Crawford*, 541 U.S. at 56 n.6).

319 *See, e.g.*, Dominus Rex v. Treason, 1 Strange 499, 93 Eng. Rep. 659 (K.B. 1722).

320 The King v. Callaghan, 33 Geo. 3, (1793), *as reprinted in* MACNALLY, *supra* note 155 at 385; The King v. Woodcock, 1 Leach 500, 502, 168 Eng. Rep. 352, 353 (K.B. 1789).

321 *See, e.g.*, Anthony v. State, 19 Tenn. (Meigs) 265, 278 (1838); *cf.* Commonwealth v. Richards, 35 Mass. (18 Pick.) 434, 437 (1836) (reporting the first known appearance of a passage in reported case law which addressed the relationship between confrontation and the admission of dying declarations).

322 Kirby v. United States, 174 U.S. 47, 61 (1899).

# CONDUCT AND EFFECTS: REASSESSING THE PROTECTION OF FOREIGN INVESTORS FROM INTERNATIONAL SECURITIES FRAUD

*Derek N. White*[*]

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* J.D., University of Colorado Law School. Thanks to the editorial staff of the Regent Law Review for their excellent work on bringing this article to publication. Much thanks is due Professor Mark Loewenstein, University of Colorado Law School, and the members of his Seminar on Securities Litigation and Enforcement for their valuable direction and feedback. My greatest debt is owed to my family and friends whose support through the storm I cannot hope to repay. All errors are my own; dnwhite@gmail.com.

## INTRODUCTION[1]

A large Australian bank with international operations lists its securities on exchanges in Australia, New Zealand, the United Kingdom, and Japan. The bank also has "American Depositary Receipts"[2] listed on an American stock exchange. To expand the bank's international operations, the bank's management spent $1.22 billion to acquire a majority interest in America's then-sixth-largest mortgage company. The profits of the American mortgage company consistently made up about five percent of the Australian bank's annual net income. Unfortunately, the subsidiary calculated its profits based on a valuation model that used incorrect interest assumptions, resulting in an overstatement of the company's assets. Multibillion-dollar write-downs, amended Form 10-Q filings, earnings restatements, and the consequent plummeting of the parent bank's stock price ensued. Three foreign shareholders, who purchased their shares in the bank on a foreign stock exchange, sued the bank in a U.S. court for violations of Rule 10b-5 promulgated under Section 10(b) of the Securities Exchange Act of 1934.[3] The investors sought to represent a class of foreign purchasers of the bank's stock during the time at issue. This class would function alongside a proposed domestic purchasers' class that would be represented by a fourth domestic plaintiff who purchased his shares on an American exchange.

Should any of the bank's shareholders suffering the adverse affects of the mortgage subsidiary's willful manipulation of profits and the parent bank's subsequent representations that incorporated those exaggerated figures be allowed to seek relief in U.S. courts? Stated another way, should U.S. courts undertake to protect injured investors from international securities fraud? The settled approach of U.S. courts

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[1] The following hypothetical is based on the facts of *Morrison v. National Australia Bank*, a Second Circuit decision that affirmed a foreign shareholder's dismissal based on a lack of subject matter jurisdiction. 547 F.3d 167, 168–70, 176 (2d Cir. 2008).

[2] American Depositary Receipts are issued by U.S. depository banks and constitute a right to obtain the underlying foreign stock. *Id.* at 168 n.1 (citing U.S. Sec. & Exch. Comm'n, American Depositary Receipts, http://www.sec.gov/answers/adrs.htm).

[3] Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, tit. I, sec. 10(b), 48 Stat. 881, 891 (codified as amended at 15 U.S.C. §§ 78a–78nn (2006)). Pursuant to its statutory authority, the Securities and Exchange Commission (the "SEC") promulgated Rule10b-5 to govern fraud claims that arise out of the purchase or sale of securities. 17 C.F.R. § 240.10b-5 (2009).

answers this question by determining whether (1) the purportedly fraudulent conduct took place in the United States, (2) the conduct had a direct impact on specific U.S. investors or markets, and (3) concerns of international comity are implicated.[4] Because of the multi-interest balancing required by this approach, the issue of whether to apply U.S. securities laws extraterritorially to transactions with multiple foreign elements has vexed federal courts for decades.[5]

This Article attempts to resolve the "vexing question of the extraterritorial application" of U.S. securities laws (or the securities law of any nation) to foreign-cubed securities class actions.[6] Foreign-cubed securities class actions concern disputes regarding purported securities violations that arise out of foreign-cubed securities transactions. Foreign-cubed securities transactions occur when *foreign* investors purchase securities of *foreign* issuers on *foreign* stock exchanges.[7] Notice that the three elements of this transaction all contain the word "foreign."[8] Where disputes arise as to the integrity of the information relied upon (or presumed relied upon) in executing foreign-cubed transactions, foreign-cubed class actions are often the favored mechanism to resolve these disputes.

Over the past two decades, securities trading (and business generally) has experienced rapid expansion and increased globalization. Domestic corporations have evolved rapidly into sprawling international enterprises. National stock exchanges have undergone recent consolidation, bringing many exchanges from around the world under common ownership.[9] In this globalized environment, perpetrators of

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4 *See infra* Part I.A–B.

5 *See* Hannah L. Buxbaum, *Multinational Class Actions Under Federal Securities Law: Managing Jurisdictional Conflict*, 46 COLUM. J. TRANSNAT'L L. 14, 17 (2007).

6 *Morrison*, 547 F.3d at 168.

7 Stuart M. Grant & Diane Zilka, *The Role of Foreign Investors in Federal Securities Class Actions*, *in* SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2004, at 91, 96 (PLI Corp. Law & Practice, Course Handbook Series No. B-1442, 2004) (coining the term "foreign-cubed" for such transactions).

8 Black's Law Dictionary defines "foreign" as "[o]f or relating to another country" or "[o]f or relating to another jurisdiction." BLACK'S LAW DICTIONARY 539 (8th ed. 2004). In the context of this Article, the term "foreign" is viewed from the perspective of the national court that is presiding over the dispute. The different "foreign" elements could be composed of multiple different countries or a single foreign nation. For instance, if the dispute is brought before a U.S. court, the "foreign" investors might hail from Japan and Singapore, the "foreign" stock exchanges where the securities transactions occurred might reside in London and Rome, and the "foreign" issuers might be headquartered in Moscow.

9 *See, e.g.*, Roger D. Blanc, *Intermarket Competition and Monopoly Power in the U.S. Stock Markets*, 1 BROOK. J. CORP. FIN. & COM. L. 273, 290 (2007); NYSE Euronext Corporate Timeline, http://www.nyse.com/pdfs/NYSEEuronextTimeline-web.pdf (last visited Nov. 20, 2009); NYSE Group Family Tree, http://www.nyse.com/pdfs/nysegrouptimeline.pdf (last visited Nov. 20, 2009); *see also* Shelley Thompson, *The*

fraud relating to securities transactions do not abide by the strictures of national boundaries or identities. In fact, in today's complex corporate world, securities fraud is rarely traceable to a single act that occurs at a discrete time and in a particular location.[10] The international community can no longer expect to apply current securities laws—drafted to govern finite geographical areas—to transactions and corporate entities that do not consider those finite geographical limits a limit at all. Instead, the current global economy requires massive worldwide cooperation to prevent and deter fraud and to provide injured investors with access to relief for the wrongful conduct of multinational corporate issuers. Part of this cooperation requires agreement upon the selection of appropriate legal fora and the most effective substantive and procedural law to be applied. At the conclusion, this Article proposes several possible approaches that governments might take to accomplish this necessary goal. The final proposal—the formation of an international treaty-based institution, similar to the World Trade Organization—is the approach to which this Article subscribes. An international treaty-based institution stands to have the greatest affect in preventing international securities fraud and in providing relief to injured investors worldwide.

There are three reasons injured investors prefer to bring actions against corporate issuers for securities violations in U.S. courts. First, the United States has an active plaintiffs' bar, which seeks out and cultivates potential claimant groups against large issuers.[11] The existence of this plaintiffs' bar in the securities context is due in large part to the Supreme Court's creation of an implied private right of action for Rule 10b-5 fraud claims.[12] Second, there is a presumption of reliance in fraud claims, which is based on the Court's recognition of the fraud-on-the-market theory.[13] Third, a class action mechanism exists that

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*Globalization of Securities Markets: Effects on Investor Protection*, 41 INT'L LAW. 1121, 1122–23 (2007) (describing "a surge of international mergers over the past several years" in the world's capital markets); Derek N. White, ECNs RIP: How Regulation NMS Destroyed Electronic Communication Networks and All Their Market Improvements 16–23 (2008) (unpublished manuscript, available at http://works.bepress.com/derek_white/1) (describing the recent demutualization and subsequent consolidation of securities exchanges occurring in the United States and globally).

[10] Brief of Securities & Exchange Commission as Amicus Curiae, in Response to the Court's Request at 6, *Morrison*, 547 F.3d 167 (No. 07-0583) [hereinafter SEC Amicus Brief] (quoting *In re* Alstom SA Sec. Litig., 406 F. Supp. 2d 346, 372 (2005)).

[11] *See generally* PRICEWATERHOUSECOOPERS, 2008 SECURITIES LITIGATION STUDY (2009), *available at* http://10b5.pwc.com/PDF/NY-09-0894%20SECURITIES%20LIT%20STUDY%20FINAL.PDF (providing evidence of an active plaintiffs' bar that has given rise to an increase in securities litigation).

[12] Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971).

[13] David M. Brodsky & Jeff G. Hammel, *The Fraud on the Market Theory and Securities Fraud Claims*, 230 N.Y. L.J. 82 (2003). To establish a claim for securities fraud,

allows aggregation of small claims to make the high cost of litigation more economical. While class actions remain an invaluable method of recovery for investors, this type of group litigation also serves an important function in the eyes of corporate-issuer defendants in that it allows them to dispose of claims in bulk via the preclusive effect given to prior judicial decisions (that is, res judicata).[14]

The United States's plaintiff-favorable (and defendant-valuable) dispute resolution mechanisms and substantive law make its courts an attractive place to bring foreign-cubed class actions.[15] As the number of foreign-cubed transactions has increased, there has been a corresponding increase in foreign-cubed class actions—and the complex issues they raise—brought in U.S. jurisdictions.[16]

This Article begins with a discussion of the current level of extraterritorial application of U.S. securities laws to foreign-cubed class actions. It demonstrates why the current regime is inadequate to prevent or deter fraud or to provide relief to injured investors. The Article explains how the expanding global economy requires massive cooperation among regulatory and legislative bodies to protect the integrity of financial markets. It also describes what such cooperation might entail.[17]

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plaintiffs must show that (1) they relied upon defendant's allegedly fraudulent conduct in purchasing or selling securities (transaction causation), and (2) defendant's conduct caused, at least in part, plaintiffs' losses (loss causation). *Id.* The fraud-on-the-market theory is based on the "efficient capital markets" hypothesis and creates a rebuttable presumption of the existence of transaction causation (i.e., that plaintiffs relied upon the allegedly fraudulent statements or nondisclosure) even if they were unaware of the fraud at the time of their purchase or sale. *Id.*

[14] Teena-Ann V. Sankoorikal et al., *Current Legal Issues Relating to the Inclusion of Foreign Plaintiffs in Securities Class Actions*, *in* MANAGING COMPLEX LITIGATION 2008: LEGAL STRATEGIES AND BEST PRACTICES IN "HIGH-STAKES" CASES 11, 14–15 (PLI Litig. & Admin. Practice, Course Handbook Series No. H-786, 2008) (citation omitted). It should be noted, however, that corporate defendants would likely exchange this advantage of wholesale resolution of claims for the reliance presumption.

[15] Buxbaum, *supra* note 5, at 41. *See, e.g.*, *In re* Royal Dutch/Shell Transp. Sec. Litig., 380 F. Supp. 2d 509, 547 (D.N.J. 2005); *In re* Bayer AG Sec. Litig., No. 03 Civ.1546 WHP, 2004 WL 2190357, at *1 (S.D.N.Y. Sept. 30, 2004); Froese v. Staff, No. 02 CV 5744(RO), 2003 WL 21523979, at *1 (S.D.N.Y. July 7, 2003).

[16] Hannah Buxbaum conducted a survey of multinational securities class actions filed in U.S. federal court from 1996 through 2005. She found 115 such cases and assessed how U.S. courts were dealing with the tough jurisdictional issues inherent in these cases. She found that sixteen of those cases were foreign-cubed claims. Buxbaum, *supra* note 5, at 39–41. For a listing of cases involving foreign transactions and securities fraud and how the courts applied the various judicial tests to the procedural and substantive issues faced in these types of cases, see George K. Chamberlin, Annotation, *Subject Matter Jurisdiction of Securities Fraud Action Based on Foreign Transactions, Under Securities Exchange Act of 1934*, 56 A.L.R. FED. 288 (1982 & Supp. 2009).

[17] This Article does not deal with issues of personal jurisdiction based on the "minimum contacts" test of *International Shoe v. Washington*, 326 U.S. 310, 316 (1945);

Part I of this Article begins by laying out the current status of U.S. law as it is applied to foreign-cubed securities class actions and the various issues that arise for the parties involved. Part II compares the current extraterritorial application of securities law to the extraterritorial application of other areas of U.S. law. It then makes the case for a proposed solution to the conundrum of foreign-cubed transactions: massive international cooperation among securities regulatory agencies and legislative bodies to harmonize the substantive and procedural law that deals with claims of fraud in international securities transactions. Part III discusses the problems with the current application of U.S. securities laws, describes the current level of international securities cooperation, and explains why both are insufficient in preventing international securities fraud. This Article concludes in Part IV with a discussion of various possible forms of international cooperation that would better protect investors from and deter fraudulent conduct in international securities transactions.

## I. STATUS OF THE LAW REGARDING FOREIGN-CUBED SECURITIES CLASS ACTIONS

When Congress enacted the U.S. securities laws, it was silent as to the extraterritorial scope of subject matter jurisdiction those laws gave to federal courts.[18] Further, the Supreme Court has never addressed the extraterritoriality of U.S. securities laws aside from stating a general presumption against extraterritorial application of U.S. law.[19] This presumption is based on the theory that "Congress is primarily concerned with domestic conditions."[20] Consequently, the lower courts have had to determine whether "Congress would have wished the precious resources of U.S. courts and law enforcement agencies to be devoted to" these predominantly foreign transactions rather than allowing foreign nations to deal with the problem.[21]

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rather, this Article assumes that plaintiffs have analyzed whether a judgment against the foreign issuer will be enforced in a foreign jurisdiction or whether the foreign issuer has sufficient assets to collect against in the United States. *Id.* (stating that, in accordance with "'traditional notions of fair play and substantial justice,'" a civil defendant could not be subjected to personal jurisdiction by courts in a given state unless the defendant had "minimum contacts" within that state (quoting Milliken v. Meyer, 311 U.S. 457, 463 (1940))).

[18] Itoba Ltd. v. LEP Group, 54 F.3d 118, 121 (2d Cir. 1995).

[19] *See infra* Part III.A. The single exception applicable to this general rule is where a court can show that Congress intended the law in question to reach the foreign conduct or transaction at issue. Foley Bros. v. Filardo, 336 U.S. 281, 284–85 (1949).

[20] *Foley Bros.*, 336 U.S. at 285.

[21] Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985 (2d Cir. 1975).

The federal courts face two intertwined areas of law in addressing foreign-cubed securities class actions.[22] These two areas are substantive antifraud case law and judicially-created procedural tests that attempt to comply with obscure (or nonexistent) congressional intent.[23] The following subsections discuss the approach of U.S. courts in determining whether to exercise subject matter jurisdiction over a securities fraud claim involving foreign investors, issuers, and exchanges. This discussion is followed by an examination of some of the difficulties that foreign claimants face in obtaining subject matter jurisdiction over their claims, and a comparison of the substantive law relating to securities fraud in foreign nations with that of the United States.

### *A. General Approach of U.S. Courts to the Extraterritoriality of Securities Laws*

Federal courts have consistently refused to adopt a bright-line rule barring all foreign-cubed class actions that do not involve harm to U.S. investors.[24] Courts have stated that a bright-line rule would "'conflict with the goal of preventing the export of fraud from America.'"[25] In deciding whether to extend jurisdiction to cases involving foreign transactions, courts begin with the assumption that the laws Congress passes are "primarily concerned with domestic conditions," unless a party can show that Congress intended the legislation in question to reach foreign conduct.[26]

To determine whether Congress intended U.S. law to apply to international securities fraud, courts analyze "(1) whether the wrongful conduct occurred in the United States [the conduct test], and (2) whether the wrongful conduct had a substantial effect in the United States or

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[22] Buxbaum, *supra* note 5, at 67.

[23] *Id.*

[24] Martin Flumenbaum & Brad S. Karp, *'Foreign-Cubed' Securities Class-Action Plaintiffs*, 240 N.Y. L.J. 17 (2008).

[25] *Id.* (quoting Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 175 (2d Cir. 2008)).

[26] Foley Bros. v. Filardo, 336 U.S. 281, 285 (1949). *Foley Brothers* involved a private contractor that contracted with the U.S. government for construction work in Iraq and Iran. *Id.* at 283. A construction worker for the contractor sued the company for overtime wages claiming that the Eight Hour Law, which forbids government contractors from requiring or permitting its workers to work more than eight hours in one calendar day without paying overtime rates, applies even though the work was done in a foreign country. *Id.* Because the statute had no indication "of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control," *id.* at 285, and the statute was enacted over a concern for *domestic* labor conditions, even though the statute stated that the law applies to "every contract" with the United States, *id.* at 282, 286, the Court concluded that the Eight Hour Law was inapplicable to a contract for construction work in a foreign country over which the United States has no direct legislative control. *Id.* at 287.

upon United States citizens [the effects test]."[27] Courts have held that either of these two tests may independently establish jurisdiction.[28] But, "[w]here appropriate, the two parts of the test are applied together because 'an admixture or combination of the two often gives a better picture of whether there is sufficient U.S. involvement to justify the exercise of jurisdiction by an American court.'"[29] Courts tend to search for a way to avoid applying domestic law to predominantly foreign transactions.[30] Occasionally, they look beyond the conduct and effects tests in search of additional scale-tipping factors,[31] or they use alternative means of dismissal.[32]

1. Conduct Test

U.S. securities laws can be applied to predominantly foreign transactions if a certain level of the fraudulent conduct occurred within the United States, even without an independent effect on U.S. investors or domestic markets.[33] Courts have used this test to exert jurisdiction over foreign transactions because "Congress would not want the United States to become a base for fraudulent activity" that is exported to other countries and harms foreign investors.[34] To ensure responsible and appropriate application of U.S. securities laws, the conduct test consists of a two-part analysis. Part one requires a plaintiff class to show that the conduct that took place in the United States was more than "merely preparatory" to securities fraud that was conducted outside the United

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[27] Sec. & Exch. Comm'n v. Berger, 322 F.3d 187, 192–93 (2d Cir. 2003).

[28] *See, e.g.*, Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 905 (5th Cir. 1997).

[29] *Morrison*, 547 F.3d at 171 (2d Cir. 2008) (quoting Itoba Ltd. v. LEP Group, 54 F.3d 118, 122 (2d Cir. 1995)).

[30] *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 30 (D.C. Cir. 1987) (summarizing U.S. courts' practices of limiting their exercise of jurisdiction over foreign securities transactions) (citations and internal quotation marks omitted).

[31] Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 664 (7th Cir. 1998) (noting that the conduct and effects jurisdictional analysis has been guided by "policy considerations and the courts' best judgment").

[32] *See infra* Part I.B.

[33] Buxbaum, *supra* note 5, at 23.

[34] Eur. & Overseas Commodity Traders v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998); *see also*, Buxbaum, *supra* note 5, at 24 (justifying the exercise of jurisdiction over foreign claimants on the grounds that "'Congress [did not] intend[] to allow the United States to be used as a base for manufacturing fraudulent security devices for export'" (quoting IIT v. Vencap, Ltd., 519 F.2d 1001, 1017 (2d Cir. 1975))).

States.[35] The second part is to show the conduct in question directly caused the loss.[36]

In the introduction's fact pattern, the conduct at issue was (1) the mortgage subsidiary's willful manipulation of its profits, and (2) the incorporation of those inaccurate figures into the bank's consolidated financials that were filed with the Securities and Exchange Commission (the "SEC"). What conduct constituted the fraud? What conduct directly caused harm? If the mortgage subsidiary had not created and sent inflated numbers to the parent bank in Australia, there would have been no fraud and no harm to investors. But, no misinformation would have been reported and no investors would have been defrauded were it not for the misleading public statements and filings made by the parent bank. Do the bank's statements consist of mere mechanical compiling of the subsidiary's figures into its financials and SEC filings, or was the dissemination of the statements from Australia the only conduct that caused harm?[37]

This fact pattern illustrates the difficulties inherent in making a proper finding of subject matter jurisdiction. One could make persuasive arguments on both sides of the case. The outcome, however, will be highly fact specific and, therefore, left to the individual judge's philosophy of extraterritoriality.[38] This broad judicial discretion provides too much uncertainty for foreign plaintiffs regarding the likelihood of a U.S. court hearing their claims. Instead of litigation focusing on the merits of those claims, the cases are tied up on procedural issues that fail to achieve the goals of investor protection, access to justice, and deterrence of fraud.

There are several policy justifications that encourage the exercise of jurisdiction based on a finding of domestic wrongful conduct. First, extending jurisdiction would discourage those who wish to use the United States as a base of operations for defrauding foreign securities investors.[39] Second, the antifraud provisions of the U.S. securities laws were intended to assure high standards of conduct in securities transactions within our country and to protect domestic markets and

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[35] Sec. & Exch. Comm'n v. Kasser, 548 F.2d 109, 115 (3d Cir. 1977); 1 JOSEPH M. MCLAUGHLIN, MCLAUGHLIN ON CLASS ACTIONS: LAW AND PRACTICE § 5:68, at 1292 (5th ed. 2009).

[36] MCLAUGHLIN, *supra* note 35 (citing Sec. & Exch. Comm'n v. Berger, 322 F.3d 187, 192 (2d Cir. 2003)).

[37] In *Morrison v. National Australia Bank*, the court found no subject matter jurisdiction due, in large part, to its finding that the actions of the parent bank in Australia were "significantly more central to the fraud and more directly responsible for the harm to investors than the manipulation of the numbers in Florida." 547 F.3d 167, 176 (2d Cir. 2008).

[38] Thompson, *supra* note 9, at 1135.

[39] *Banque Paribas London*, 147 F.3d at 125.

investors from fraud.[40] Third, extending jurisdiction over domestic conduct that harmed foreign investors might induce reciprocal responses by other jurisdictions.[41] This notion assumes that if the United States extends its securities laws to prevent fraudulent conduct from taking place on its shores that injures foreign investors, the United States reasonably can expect other countries to offer comparable protection.[42]

Circuit courts disagree on the exact nature of the conduct that must take place in the United States in order for it to justify extraterritorial jurisdiction over a securities transaction.[43] The Second,[44] Fifth, and Seventh Circuits have taken the middle-of-the-road approach. These Circuits require the conduct in the United States to constitute *substantial* acts in furtherance of the fraud.[45] The conduct taking place in the United States must have been a substantial part of the fraud and "material to its success."[46] The District of Columbia Circuit Court, following the Second Circuit's lead, has adopted the strict rule that requires domestic conduct to constitute an independent violation of U.S. securities law.[47] The Third, Eighth, and Ninth Circuits take the least restrictive approach, focusing on whether at least some of the conduct in the United States was designed to further a fraud that caused losses to investors.[48] Courts have not been consistent in determining what type of conduct is sufficient to warrant the court to exercise extraterritorial jurisdiction of U.S. securities laws. Some circuit courts have found filing reports with the SEC and dissemination of material to shareholders in the United States incidental and therefore insufficient to extend

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[40] Sec. & Exch. Comm'n v. Kasser, 548 F.2d 109, 116 (3d Cir. 1977).

[41] *Id.*

[42] SEC Amicus Brief, *supra* note 10, at 8. Yet the reciprocal response of other jurisdictions can cut in either direction. The exercise of jurisdiction over predominantly foreign transactions may cause other countries to exercise jurisdiction over transactions involving predominantly U.S. interests and parties. *See* Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 372 (D. Del. 2006) (citing Plessey Co. v. Gen. Elec. Co., 628 F. Supp. 477, 496 (D. Del. 1986)); *infra* Part IV.A.

[43] Sankoorikal, *supra* note 14, at 33.

[44] Note that the Second Circuit is deemed to be the most experienced circuit at dealing with securities law. *See* Zoelsch v. Arthur Andersen & Co., 824 F.2d 27, 32 (D.C. Cir. 1987). This may indicate that their approach has the most weight. This Article, however, is concerned with international cooperation among securities regulatory and legislative bodies, not with which circuits possess the highest securities acumen.

[45] *See, e.g.*, Kauthar SDN BHD v. Sternberg, 149 F.3d 659, 667 (7th Cir. 1998); Robinson v. TCI/US W. Cable Commc'ns Inc., 117 F.3d 900, 905–06 (5th Cir. 1997); Psimenos v. E.F. Hutton & Co., 722 F.2d 1041, 1045 (2d Cir. 1983) (citing Leasco Data Processing Equip. Corp. v. Maxwell, 468 F.2d 1326, 1337 (2d Cir. 1972)).

[46] *Kauthar*, 149 F.3d at 667.

[47] *Zoelsch*, 824 F.2d at 31, 33.

[48] *Id.* at 31 (citations omitted).

jurisdiction.[49] Other courts have found that making telephone calls and sending mail to the United States is sufficient domestic conduct to impose the securities laws on the transaction.[50]

The Second Circuit in *Morrison v. National Australia Bank*, its most recent decision in this area, stated that a misrepresentation in a securities filing does not constitute fraud until it is physically filed with the SEC.[51] Under that standard, the preparation of fraudulent financial statements by a U.S. subsidiary that are sent to the foreign parent who consolidated those statements with its own and then filed it with the SEC only constituted fraud when the foreign parent filed. The U.S.-based conduct was held to be merely preparatory and insufficient to extend jurisdiction over the foreign parent. Other Circuits have held that the fraud should have been masterminded within the United States for the conduct test to justify extension of the securities laws to a predominantly foreign transaction.[52]

In affirmative determinations of the existence of subject matter jurisdiction, courts often begin and conclude their analysis with the conduct test.[53] Finding jurisdiction under the conduct test is far easier and, therefore, more likely, than finding jurisdiction under its companion test—the effects test. In fact, the investors in *Morrison* did not argue the effects test at all on appeal, perhaps an acknowledgment of the inherent difficulty in satisfying the requirements for subject matter jurisdiction under the effects test.[54]

### 2. Effects Test

The purpose of creating an effects test was to protect domestic investors or markets that suffer harm from actions occurring outside the United States.[55] The Second Circuit's opinion in *Schoenbaum v.*

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[49] *See, e.g., Kasser*, 548 F.2d at 115.

[50] *Leasco Data Processing Equip.*, 468 F.2d at 1335.

[51] *See* 547 F.3d 167, 176 (2d Cir. 2008).

[52] *E.g.*, Sec. & Exch. Comm'n v. Berger, 322 F.3d 187, 194 (2d Cir. 2003) (finding that the "fraudulent scheme was masterminded and implemented . . . in the United States").

[53] *Id.* at 195 (concluding that the court need not reach the question of whether the effects test provided an independent basis for jurisdiction since jurisdiction existed under the conduct test).

[54] Note the potential error in this line of thinking, as courts often look to an "admixture or combination" of the two tests to determine whether jurisdiction exists. Itoba Ltd. v. LEP Group, 54 F.3d 118, 122 (2d Cir. 1995). In fact, the *Morrison* court counted it against the appellants for not having also discussed the effects of the conduct on U.S. interests. 547 F.3d at 176.

[55] SEC Amicus Brief, *supra* note 10, at 7 (citing Eur. & Overseas Commodity Traders v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998)).

*Firstbrook* contained the first articulation of the effects test.[56] In a derivative action,[57] fraudulent conduct occurred overseas, artificially depressing shareholder equity.[58] The court held the district court's exercise of subject matter jurisdiction over the fraudulent transactions to be appropriate.[59] In reaching its decision, the court emphasized the fact that (1) the transaction involved securities registered and listed on the American Stock Exchange (in addition to the Toronto Stock Exchange), (2) the fraud deprived the foreign corporation of fair compensation when it issued stock, and (3) the fraud caused a reduction in the equity of American investments in the corporation.[60]

To establish jurisdiction under the effects test, the plaintiffs must prove that the predominantly foreign transaction had more than an adverse effect on the "general economic interests [of the United States] or on American security prices."[61] Plaintiffs must show a "concrete harm."[62] In *Bersch v. Drexel Firestone, Inc.*, the Second Circuit held that under the effects test, jurisdiction can be found to reach a predominantly foreign transaction only where there was an intent that the securities be offered to someone in the United States.[63] This holding was based on the express language in the securities acts—Section 17(a) of the 1933 Act limits the application to acts "'in the offer or sale of any securities,'"[64] and Section 10(b) of the 1934 Act is limited to acts "'in connection with the purchase or sale of any security.'"[65] The court in *Bersch* used this statutory language to require that the alleged fraudulent conduct committed abroad must result in injury to purchasers or sellers of

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[56] 405 F.2d 200, 206 (2d Cir. 1968) ("We believe that Congress intended the [Securities and] Exchange Act to have extraterritorial application in order to protect domestic investors who have purchased foreign securities on American exchanges and to protect the domestic securities market from the *effects* of improper foreign transactions in American securities." (emphasis added)).

[57] *Id.* at 204. While this case concerned a derivative action, as opposed to a class action, the analysis used by the courts in determining the extraterritorial application of U.S. securities laws remains the same, as the types of conduct and effects involved in both types of case are likely to be very similar, if not identical.

[58] *Id.* at 208–09.

[59] *Id.* at 208.

[60] *Id.* This application of the effects test is too narrow in scope for the test to be of any use to a foreign-cubed transaction that, by its definition, involves transactions involving securities on a foreign exchange.

[61] Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 985, 989 (2d Cir. 1975).

[62] *In re* SCOR Holding (Switz.) AG Litig., 537 F. Supp. 2d 556, 562 (S.D.N.Y. 2008).

[63] *Bersch*, 519 F.2d at 989.

[64] *Id.* (quoting Securities Exchange Act of 1933, Pub. L. No. 73-22, ch. 38, tit. I, § 17(a), 48 Stat. 74, 84–85 (codified as amended at 15 U.S.C. § 77q(a) (2006))).

[65] *Id.* (quoting Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, tit. I, sec. 10(b), 48 Stat. 881, 891 (codified as amended at 15 U.S.C. § 78j(b) (2006))).

securities "in whom the United States has an interest."[66] The quoted statutory language, however, does not say anything about American purchasers and sellers of securities. The Acts, however, state that there is no fraud except where securities are offered, sold, or purchased, by *anyone*[67]—a requirement that is met in a foreign-cubed action. But the court's interpretation of the statute made it impossible for jurisdiction to be found in such cases based on the effects test alone.

Because of courts' narrow application of the effects test and the requirement that the foreign conduct cause "concrete harm" to U.S. purchasers and sellers of securities, the effects test plays only a very limited role in the jurisdictional analysis for suits arising out of foreign-cubed transactions.[68] Courts have never relied solely on the effects test to find jurisdiction where fraudulent conduct occurred abroad and affected the purchase of a foreign company's securities by a foreign purchaser on a foreign exchange.[69] At most, the level of effect a predominantly foreign transaction has had on U.S. investors and markets has been used as a scale-tipping factor to the conduct test, where a court deems it appropriate to assess the "admixture or combination"[70] of the two tests.

The plaintiffs in the introductory fact pattern recognized this fact and narrowed the issues on appeal to only those they felt were pertinent to the decision of whether jurisdiction should be found.[71] The court, however, used the plaintiffs' failure to argue the effects test on appeal to tip the scale in favor of a finding of no jurisdiction.[72] If the plaintiffs had argued on appeal that the effects of the fraudulent conduct caused harm to U.S. investors or markets, the court likely would have dismissed the case because the foreign conduct did not cause any direct or "concrete harm" to U.S. markets and the foreign class did not represent any injury to U.S. purchasers of securities (such interests were represented by the domestic investor). Further, the class did not represent an injury to U.S. stock markets, because the plaintiffs purchased the underlying securities that were traded on foreign exchanges, rather than the derivative

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66 *Id.*

67 *See* Securities Exchange Act of 1934, sec. 10(b), 48 Stat. at 891 (codified as amended at 15 U.S.C. § 78j(b) (2006)); Securities Exchange Act of 1933, § 17(a), 48 Stat. at 84–85 (codified as amended at 15 U.S.C. § 77q(a) (2006)).

68 In re *SCOR Holding*, 537 F. Supp. 2d at 562; Sankoorikal, *supra* note 14, at 19–20 (stating that foreign-cubed "claims typically only proceed if the [c]onduct [t]est is satisfied"). In general, however, the conduct test has been used as an additional "scale tipping" factor to weigh in favor of one party or the other. *See* Interbrew S.A. v. Edperbrascan Corp., 23 F. Supp. 2d 425, 432 (S.D.N.Y. 1998) (citing Eur. & Overseas Commodity Traders v. Banque Paribas London, 147 F.3d 118, 129 (2d Cir. 1998)).

69 *See generally* Chamberlin, *supra* note 16.

70 Itoba Ltd. v. LEP Group, 54 F.3d 118, 122 (2d Cir. 1995).

71 Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 176 (2d Cir. 2008).

72 *Id.*

securities traded on the New York Stock Exchange ("NYSE").[73] For a court to exercise subject matter jurisdiction based on the effects test, the class members would have needed to be investors "in whom the United States [had] an interest"[74] or purchasers of the domestic mortgage subsidiary's stock or the derivative securities on the NYSE. This twisted mess displays the illogic and impracticality behind application of the effects test to class actions consisting of predominantly foreign elements. The effects test can only be used against the foreign claimants to dismiss their claims.

Even though courts acknowledge that "Congress would have wanted 'to redress harms perpetrated abroad which have a substantial impact on investors or markets within the United States,'"[75] their application of the effects test has been effectively removed from the jurisdictional analysis for foreign-cubed transactions. It may seem sensible for U.S. courts to refuse to extend the jurisdiction of federal securities laws to reach foreign fraud except where some threshold level of the fraudulent conduct occurred on U.S. soil, because this will work to protect direct harm against markets and investors and prevent the United States from becoming a base of fraud for export abroad. Fraud and the resulting loss, however, have still occurred even if it does not directly affect U.S. interests. The generalized impact on U.S. markets and investors may be held as insufficient for U.S. courts to exercise jurisdiction, but in this globalized economy this damage cannot be overlooked as insignificant. The United States and other nations have a mutual interest in ensuring that securities fraud is prevented and deterred and that victims of securities fraud have access to justice. Countries should work together to develop substantive law and procedural mechanisms that will give victims access to justice, deter fraud, and protect investors and market integrity.

### *B. Other Hurdles for Foreign-Cubed Securities Class Actions*

Where predominantly foreign actions have passed the threshold inquiry of subject matter jurisdiction, courts have applied other doctrines to reject a foreign-cubed class action, or a mixed action's foreign components.[76] Following is a discussion of what courts have used to deny claims of foreign investors.

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[73] *See id.*

[74] Bersch v. Drexel Firestone, Inc., 519 F.2d 974, 989 (2d Cir. 1975).

[75] *Morrison*, 547 F.3d at 171 (quoting Eur. & Overseas Commodity Traders v. Banque Paribas London, 147 F.3d 118, 125 (2d Cir. 1998)).

[76] Thompson, *supra* note 9, at 1132–33 (citing Dirienzo v. Philip Servs. Corp., 294 F.3d 21, 33 (2d Cir. 2002); *In re* Royal Dutch/Shell Transp. Sec. Litig., 380 F. Supp. 2d 509, 548 (D.N.J. 2005); *In re* Royal Ahold N.V. Sec. & ERISA Litig., 351 F. Supp. 2d 334, 357 (D. Md. 2004)).

### 1. Class Certification

Under the Private Securities Litigation Reform Act of 1995 ("PSLRA"),[77] securities class actions must still meet the basic structural requirements of Federal Rule of Civil Procedure ("FRCP") 23 on Class Actions. The class representatives may sue on behalf of all members of the class if they satisfy the FRCP 23(a) requirements of (1) numerosity, (2) commonality, (3) typicality, and (4) adequacy; and if they satisfy one of the requirements of FRCP 23(b) (for example, superiority).[78] Defendants have had some success in opposing the certification of the class under FRCP 23, but the foreign-cubed action likely would overcome most of the obstacles to class certification that have plagued mixed-plaintiff groups (both U.S. and foreign members of the class) trying to bring multinational actions.

Plaintiffs in U.S. class actions have had difficulty obtaining class certification where the plaintiff class contains both foreign and American members. In order to gain class certification, the plaintiffs must show that the interests of the group are the same as those of the representative plaintiffs—the so-called typicality requirement.[79] Even where the claims of all members of the plaintiff group arise out of the same fraudulent conduct, the claims might depend on different legal arguments or standards depending on the location that each member purchased the stock. In foreign-cubed actions, however, this difficulty disappears because all of the members of the plaintiff class would be foreign.

Under the commonality requirement, members in mixed plaintiff groups struggle to show that the questions of law or fact that are common among all foreign and domestic members predominate the questions that might apply to individualized class members or groups of members. Foreign-cubed actions overcome this hurdle by excluding American members. The class can then show that the legal and factual issues common to the class are much more significant than issues pertaining to individual class members.

Commentators have noted the havoc that the superiority requirement under FRCP 23(b)—that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy—can have on plaintiff groups trying to obtain class certification.[80] This hurdle in the litigation process is due to the potential difficulty plaintiffs have in enforcing a judgment against foreign assets

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[77] Private Securities Litigation Reform Act of 1995, Pub. L. No. 104-67, tit. I, sec. 101(a), 109 Stat. 737, 739 (codified at 15 U.S.C. § 78u-4(a)(3)(A)(iii) (2006)).

[78] FED. R. CIV. P. 23(a)–(b).

[79] *Id.* at 23(a)(3).

[80] *See, e.g.*, Buxbaum, *supra* note 5, at 31.

of the defendant and the possibility that a judgment obtained will not have preclusive effect in other countries.[81] The former issue is rarely a problem as defendants in the typical large multinational class actions[82] will likely have adequate assets in the United States to satisfy a judgment.[83]

The issue of preclusive effect, however, is a serious problem to class certification where the proposed class consists of some or all foreign claimants. But under FRCP 23(b), a plaintiff class need only satisfy one of the requirements of that section, and subsection (1) of that section allows certification where prosecuting separate actions against individual class members would create a risk of inconsistent or varying adjudications. This is certainly a low hurdle in a foreign-cubed action because the plaintiff group would likely contain members of multiple foreign nations, each having its own elements of fraud, available remedies, and mechanisms for seeking redress. Therefore, class certification is probably easier to obtain in an action made up of wholly foreign class members than an action containing U.S. class members.

### 2. Selection of Lead Plaintiff

The PSLRA changed the process of selecting a lead plaintiff in a securities class action.[84] The PSLRA did away with the old first-to-file rule that allowed the first plaintiff to file a claim against the purported perpetrator to become the de facto lead plaintiff.[85] Now, instead of the first-to-file rule, the first plaintiff to file a securities claim on behalf of a class must publish notice of that action and provide others in the class the opportunity to seek appointment as lead plaintiff.[86] The court then considers the applications and appoints the party who will most adequately represent the interests of the class. The PSLRA creates a presumption that the most adequate lead plaintiff will be the one with the largest financial interest at stake.[87] This presumption can be rebutted by (1) showing that the plaintiff with the largest financial interest will not fairly and adequately protect the interests of the class,

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[81] *Id.*

[82] Additional support for this point is the required personal jurisdiction of the defendant, a topic beyond the scope of this Article. The defendant, however, must have the requisite level of "minimum contacts" as prescribed in the Supreme Court's landmark decision *International Shoe v. Washington* for any U.S. court to be able to hear the case. 326 U.S. 310, 316 (1945). These "minimum contacts" most likely will entail various domestic assets of the foreign entity.

[83] Buxbaum, *supra* note 5, at 31 (citing *In re* Royal Dutch/Shell Transp. Sec. Litig., 380 F. Supp. 2d 509, 547 n.8 (D.N.J. 2005)).

[84] 15 U.S.C. § 78u-4(a)(3) (2006).

[85] Buxbaum, *supra* note 5, at 27.

[86] *Id.* (citing 15 U.S.C. § 78u-4(a)(3)(A)).

[87] 15 U.S.C. § 78u-4(a)(3)(B)(iii)(I).

or (2) showing that the plaintiff would face unique defenses not common to other class members.[88]

Even if the proposed lead plaintiff is a foreign investor who purchased the securities on a foreign exchange and has the largest financial interest at stake, he will face two points of difficulty. First, courts may find it too complex logistically to have a foreign lead plaintiff represent the class and may doubt the ability of a foreign investor to adequately manage U.S. litigation from abroad.[89] But this argument has less weight if the foreign investor is a large institution with substantial assets and resources (not to mention a commercial presence in the United States). The argument also ignores the strong probability that the lead plaintiff's U.S.-based counsel manages the litigation, not the foreign investor.[90]

The second point of difficulty is that foreign plaintiffs in foreign-cubed class actions are likely subject to unique defenses because their claims arise solely from foreign-market transactions (for example, lack of subject matter jurisdiction and *forum non conveniens*).[91] This second difficulty only applies to class actions in which the class contains two groups of plaintiffs: one to represent the interests of foreign class members, and another to represent the interests of domestic class members. Such mixed classes constitute a majority of the class actions that consist of substantial foreign elements. Classes are frequently structured in this way in the hope that the class will have a better chance of avoiding dismissal. If other members of the class desiring to become lead plaintiff challenge the presumption favoring the investor with the largest financial interest at stake under these grounds, it could bar foreign members of the class from becoming lead plaintiffs, and perhaps even bar them from the class itself.

In some cases, courts have adopted a compromise approach to selecting the lead plaintiff in classes composed of both foreign and U.S. investors.[92] This approach appoints co-lead plaintiffs—one that traded in the United States, and one from the foreign market transactions. In appointing co-lead plaintiffs, courts hope that the entire class will be

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88 *Id.* § 78u-4(a)(3)(B)(iii)(II).

89 *See* Buxbaum, *supra* note 5, at 28.

90 *Id.* at 26 (stating that "plaintiffs' attorneys, rather than plaintiffs themselves . . . manag[e][] class actions").

91 *See generally id.* at 26–41 (discussing the jurisdictional issues that may arise during the course of securities class actions).

92 *See, e.g.*, *In re* Cable & Wireless, PLC, Sec. Litig., 217 F.R.D. 372, 375–76, 379 (E.D. Va. 2003) (appointing Canadian investor and U.S. investor as co-lead plaintiffs for a putative class including purchasers of stock traded on the London Stock Exchange and on the NYSE).

adequately protected—the foreign members by the foreign lead plaintiff, and the U.S. members by the U.S. lead plaintiff.[93]

### 3. *Forum Non Conveniens*

As stated above, courts have often sustained defense motions for dismissal for lack of subject matter jurisdiction over foreign investors (under FRCP 12(b)(1)) and class certification. In addition to these threshold grounds, courts have dismissed foreign-cubed class actions under *forum non conveniens* and principles of international comity. Under both of these doctrines, U.S. courts consider whether an adequate alternative forum would be found in a foreign nation.

To convince a court to dismiss a class action on the basis of *forum non conveniens*, "the defendant must . . . show that an adequate forum is available elsewhere" and that the "private and public interest . . . implicated in the litigation weighs strongly in favor of dismissal" or removal to another forum.[94] The problem for plaintiffs in this challenge is that courts focus solely on whether the case will be tried fairly in the proposed forum without considering the differences (and the consequent shift in party favorability) between the substantive law of the foreign and U.S. jurisdictions.[95]

To show that an adequate alternative forum exists, defendants in a securities fraud class action must show that all defendants would be amenable to service of process in the foreign jurisdiction and that the alternative forum will provide redress to the plaintiffs.[96] In securities fraud class actions, two issues arise when courts compare U.S. and foreign justice systems: (1) reliance is presumed in U.S. courts based on the fraud-on-the-market theory, and (2) federal civil procedure allows claims to be aggregated in a group litigation mechanism.[97] Some courts have determined the absence of these two plaintiff-favorable elements to be sufficient to deny removal to a foreign forum.[98]

In *Gulf Oil Corporation v. Gilbert*, the Supreme Court listed various private interests to be considered in making a *forum non conveniens* determination.[99] These private interests include: the relative ease of access to sources of proof; the availability of compulsory process on

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[93] Buxbaum, *supra* note 5, at 29.

[94] *Id.* at 35–36.

[95] *See id.* at 36.

[96] Derensis v. Coopers & Lybrand Chartered Accountants, 930 F. Supp. 1003, 1006 (D.N.J. 1996) (citing Kultur Int'l Films v. Covent Garden Pioneer, 860 F. Supp. 1055, 1063 (D.N.J. 1994)).

[97] Buxbaum, *supra* note 5, at 36–37.

[98] *See, e.g., Derensis*, 930 F. Supp. at 1007–09 (holding absence of presumption of reliance and class action mechanism made Canadian forum inadequate).

[99] 330 U.S. 501, 508 (1947).

uncooperative witnesses; any practical problems that make a trial easy, expeditious, and inexpensive; the certainty of the enforceability of a judgment; and other relative advantages and obstacles to a fair trial.[100] Because the plaintiff's choice of forum receives special deference, the balance must weigh heavily in the defendant's favor in order for a court to dismiss.[101]

While the balance of private interests typically favors plaintiffs in a *forum non conveniens* analysis, plaintiffs in foreign-cubed class actions will have difficulty arguing that the scale tips in their favor. This difficulty arises because the presumed deference to plaintiffs' choice of forum (requiring defendants to show that the interests weigh substantially in their favor) only applies when the plaintiffs have chosen their home forum—a fact that is absent in a foreign-cubed claim.

*Gulf Oil* also outlined the various public interest factors a court should weigh in a *forum non conveniens* analysis. They include (1) the administrative difficulty arising from overloaded court systems, (2) the societal desire to have localized controversies resolved locally, (3) the value in having the forum be the jurisdiction where the law that governs the action applies, (4) the avoidance of problems of conflicts of laws as well as the application of foreign laws, and (5) the burden of jury duty on citizens within the forum's jurisdiction who have no connection to the action.[102] These public interest factors are to be weighed in light of the connection between the alleged fraudulent conduct to the plaintiffs' chosen forum.[103]

Yet these public interest factors are typically construed against a plaintiff who alleges securities fraud in a foreign-cubed class action. This roadblock occurs because the purpose of the public interest factors is to determine whether there is a connection between the chosen forum and the alleged securities fraud. If a securities fraud targeted U.S. investors, and those investors were harmed, jurisdiction over the securities transaction would likely be found. But such a case would no doubt involve injured U.S. plaintiffs, rendering the action a nonforeign-cubed action. A foreign-cubed class (made entirely of foreign plaintiffs) will have difficulty showing that the alleged fraudulent conduct had any connection with the U.S. forum beyond a generalized impact on the integrity of the globalized market system.

Defendants may increasingly seek dismissal based on *forum non conveniens* as a preliminary matter due to the Supreme Court's recent *Sinochem International Co. v. Malaysia International Shipping Co.*

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100 *Id.*

101 *Id.*

102 *Id.* at 508–09.

103 Van Cauwenberghe v. Biard, 486 U.S. 517, 528 (1988).

decision that allows courts to dismiss on the basis of *forum non conveniens* considerations before subject matter jurisdiction or personal jurisdiction are established.[104] But such a premature determination may only be made if subject matter jurisdiction and personal jurisdiction are difficult to determine and the considerations of *forum non conveniens* "weigh *heavily* in favor of dismissal."[105]

### 4. International Comity

International Comity ("comity" or "comity of the nations doctrine") is defined as one nation recognizing the legislative, executive, or judicial rights of another nation to protect the rights and interests of its own citizens or others within its territory.[106] Dismissal based on comity occurs when an action involving the same underlying facts has already been filed in a foreign country.[107] In order for a U.S. court to recognize a foreign proceeding, it must deem the proceeding "to be orderly, fair, and not detrimental" to the interests of the United States.[108] Similar to dismissal for *forum non conveniens*, except that a proceeding is already taking place in another country, dismissal based on international comity centers around the comparison of the claim's connection with the jurisdiction where it was filed to the U.S. interests involved in the case.[109] Under this doctrine, if the interests of another sovereign nation outweigh the interests of the United States and do not prejudice the interests of the United States, the U.S. court should defer to the laws and interests of the other sovereign nation.[110]

In *Paraschos v. YBM Magnex International*, the court dismissed a class action on grounds of international comity because the action was "overwhelmingly dominated by Canadian interests."[111] The class action was brought by predominantly Canadian investors against a Canadian corporation regarding securities that were registered and traded on a Canadian stock exchange (an apparent foreign-cubed action).[112] In addition to these interests, there was a related bankruptcy proceeding and a federal grand jury investigation taking place in the United States, as well as eleven pending proceedings in Canada relating to the same

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[104] Sinochem Int'l Co. v. Malay. Int'l Shipping Corp., 127 S. Ct. 1184, 1194 (2007).

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

[106] Hilton v. Guyot, 159 U.S. 113, 163–64 (1895).

[107] Buxbaum, *supra* note 5, at 38.

[108] Pravin Banker Assocs. v. Banco Popular del Peru, 165 B.R. 379, 384 (S.D.N.Y. 1994).

[109] Buxbaum, *supra* note 5, at 38.

[110] Société Nationale Industrielle Aérospatiale v. U.S. Dist. Court, 482 U.S. 522, 543 n.27 (1987) (citing Emory v. Grenough, 3 U.S. (3 Dall.) 369, 370 n.3 (1797)).

[111] 130 F. Supp. 2d 642, 647 (E.D. Pa. 2000).

[112] *Id.* at 645.

alleged fraud.[113] The court determined that Canadian interests outweighed those of the United States, that deferring to the Canadian judicial system and regulatory body would not be detrimental to the interests of the United States, and that the relief afforded to the plaintiffs under Canadian law and in Canadian courts would be adequate, even if different from that of U.S. courts.[114]

Deferral to the case already filed in the Canadian courts based on principles of comity in *Paraschos* was likely proper, not because it was a foreign-cubed class action, but because it was a Canadian-cubed class action. Because the "foreign" part of each of the three elements in the securities transaction was Canadian, a good case can be made that a Canadian court should hear the action, especially considering that at least some class members desired the action to be brought in Canada (indicated by their filing there). The analysis is wholly different in the case of diverse securities transactions where the "foreign" portions of the elements are each of a different country, for example, if the stock of a British issuer were purchased by Indian investors on a Japanese stock exchange. The analysis departs from the analysis in *Paraschos* even more when the elements are not so simply defined as Japanese, Indian, and British, but when each element contains numerous national identities. This dynamic is increasingly common given the interconnectedness of global stock exchanges as well as the banality of international commercial transactions, the transgressing in multiple jurisdictions, and the involvement of parties from numerous countries in each element of a given transaction.

While comity and *forum non conveniens* both ostensibly ensure that the plaintiffs will still have a fair and adequate foreign remedy when a U.S. court dismisses an action, securities litigation outside the United States is much less practical or useful for investor plaintiffs, making dismissed suits unlikely to be brought in foreign forums.[115] Therefore, dismissal of a foreign-cubed securities class action—and any action seeking recovery from injury caused by the defendants—"is tantamount to plaintiffs having no remedy at all."[116] The next section exposes this point by comparing the U.S. procedural and substantive doctrines that make the U.S. justice system a useful and favorable forum that provides superior access to justice for injured investors.

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[113] *Id.*

[114] *Id.* at 647.

[115] Thompson, *supra* note 9, at 1133.

[116] *Id.* (citing Laurel E. Miller, Comment, *Forum Non Conveniens and State Control of Foreign Plaintiff Access to U.S. Courts in International Tort Actions*, 58 U. CHI. L. REV. 1369, 1389 (1991)).

### C. Comparative Group Securities Litigation

The U.S. court's dismissal of the foreign plaintiffs' case in the introduction's fact pattern raises the question of whether the investor-plaintiffs suffering losses from the parent bank's purported misrepresentations would have effective access to justice in another jurisdiction. Without knowing more about the plaintiff class (for example, where the foreign investors reside), the only semi-certain forum would be in Australia—the location of the parent bank. The securities could have been purchased on neither a U.S. nor an Australian exchange and the investors could have been neither American nor Australian, but the defendant parent bank's residence in Australia should be enough for a court in that country to find jurisdiction. Furthermore, according to the U.S. court that dismissed the case, the conduct in Australia was "significantly more central to the fraud and more directly responsible for the harm to investors" than the mortgage subsidiary's "number crunching" in Florida.[117]

The plaintiff class's chances of success in an Australian court are at best unclear. While Australian courts have allowed securities class actions, no Australian court has allowed a presumption of reliance.[118] Therefore, as the current law rests, plaintiffs in securities class actions must still show individual reliance.[119] But, based on a statement by the High Court of Australia, it may be that as the class action mechanism develops "down under," the possibility of an inference of reliance as a matter of fact may be employed by Australian courts, where the alleged misstatement was "calculated to induce" the investor to enter into the transaction.[120] Securities class actions remain too undeveloped in Australia to know what relief might await the injured plaintiffs in the fact pattern. One thing is certain; the plaintiffs would face far more obstacles to get beyond the pleading stage and to argue the case on the merits than in the more developed, albeit imperfect, U.S. system.

Notwithstanding recent international developments in group litigation discussed below, U.S. courts remain the most attractive forum for groups of plaintiffs who have been injured due to fraudulent events

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[117] Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 176 (2d Cir. 2008).

[118] Jason Betts, *Australia: The Rise of Shareholder Class Actions in Australia*, MONDAQ, Apr. 21, 2005, at 4, *reproduced at* http://www.nera.com/newsletter/Shareholder_Class_Actions_Australia.pdf.

[119] *Id.*

[120] Michael Duffy, *'Fraud on the Market': Judicial Approaches to Causation and Loss from Securities Nondisclosure in the United States, Canada, and Australia*, 29 MELB. U. L. REV. 621, 656 (2005) (noting "'[i]f a material representation is made which is calculated to induce the representee to enter into a contract[,] and that person in fact enters into the contract[,] there arises a fair inference of fact that he was induced to do so by the representation'" (quoting Gould v. Vaggelas (1985) 157 C.L.R. 215, 236 (Austl.))).

surrounding their ownership of certain securities. This attractiveness stems from the strength of the U.S. regulatory regime and the accessibility of litigation for plaintiffs.[121] The use of the class action mechanism and a shift of the prohibitively high burden of proving individualized reliance have been largely unavailable to plaintiffs abroad.[122] The class action dispute resolution mechanism empowers investor plaintiffs to aggregate their small claims and litigate as a group. By aggregating claims, plaintiff groups are able to attract quality counsel on contingency-based fee schedules and, consequently, the defendant's full attention. Thus, one can assume access to justice is increased, providing plaintiffs with an avenue to "achieve both financial compensation and specific corporate governance reforms," while maximizing use of judicial resources.[123] Hence, plaintiffs that would normally be considered the "little guy" can find a more equal legal footing in a dispute with a large corporation (the "big guy")—the age-old David and Goliath parallel. Combined with the implied private right of action, the class action further acts as a deterrent to fraud through the pursuit of relief from fraudulent actors and regulation of corporate malfeasance, using a quasi-public enforcement tool and expressing societal will.[124]

A benefit of U.S. class actions specific to the securities fraud arena is that the cases are conducted with an underlying belief in the fraud-on-the-market theory; thus, plaintiff groups are not required to show individualized reliance on the alleged misrepresentations.[125] It is prohibitively burdensome on class actions if each plaintiff in a group (of

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[121] Thompson, *supra* note 9, at 1144.

[122] *See, e.g.*, Betts, *supra* note 118, at 2–3.

[123] *Id.* at 1–2.

[124] James D. Cox, *Making Securities Fraud Class Actions Virtuous*, 39 ARIZ. L. REV. 497, 497 (1997).

[125] Recognizing the economic theory of the "efficient capital markets" hypothesis, the Supreme Court in *Basic, Inc. v. Levinson* adopted the fraud-on-the-market theory, which assumes that a stock price is a function of all material information about a company, and that any misstatement has a causal link to all individual investors in the stock because the misstatements defraud the market as a whole, which in turn affects the price of the stock. 485 U.S. 224, 247 (1988). Under this premise, the Court determined that requiring a showing of actual reliance by each class member would effectively prevent plaintiffs from succeeding past summary judgment in all securities class actions. *Id.* at 242. But the plaintiffs cannot just sit back and enjoy the benefits of the presumption of reliance; to invoke the presumption

> plaintiff[s] must allege and prove: (1) that the defendant made public misrepresentations; (2) that the misrepresentations were material; (3) that the shares were traded on an efficient market; (4) that the misrepresentations would induce a reasonable, relying investor[s] to misjudge the value of the shares; and (5) that the plaintiff[s] traded the shares between the time the misrepresentations were made and the time the truth was revealed.

*Id.* at 248 n.27 (citing Levinson v. Basic, Inc., 786 F.2d 741, 750 (1986)).

potentially thousands of members) is required to show that he or she relied on the alleged misrepresentations when he or she purchased or sold the securities at issue. As was implied above, the presumption of reliance found in U.S. courts is exceptional in securities litigation worldwide.[126]

Class action litigation is, however, no longer wholly unique to the United States. This method of efficient dispute resolution has steadily gained international ground over the last two decades.[127] Several countries have introduced some form of group litigation through changes to their regulatory structure, substantive law, and procedural law.[128] The following countries have begun to develop mechanisms for group litigation that have been or could be used in security fraud class actions: (1) Australia,[129] (2) the United Kingdom,[130] (3) Canada (including Quebec),[131] (4) Sweden,[132] (5) Germany,[133] (6) Brazil,[134] and (7) South

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[126] The fraud-on-the-market theory has been expressly rejected by Canadian courts because Canadian securities legislation lacks the same concepts involved in Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder. *See* Duffy, *supra* note 120, at 639–41. But Canadian courts have accepted that reliance, as a question of fact, may be inferred from all the circumstances, and that inference could shift the burden to the defendants (that is, requiring a rebuttal). *See, e.g.*, CC&L Dedicated Enter. Fund v. Fisherman, [2001] 8 C.C.L.T. 240, 256–257 (Can.). For a full discussion on the fraud-on-the-market theory as applied by U.S. courts, as well as a study of how Canadian and Australian courts and legislatures have treated the doctrine, see generally Duffy, *supra* note 120.

[127] *See, e.g.*, Richard B. Cappalli & Claudio Consolo, *Class Actions for Continental Europe? A Preliminary Inquiry*, 6 TEMP. INT'L & COMP. L.J. 217, 221 (1992); Antonio Gidi, *Class Actions in Brazil—A Model for Civil Law Countries*, 51 AM. J. COMP. L. 311, 314 (2003); Roberth Nordh, *Group Actions in Sweden: Reflections on the Purpose of Civil Litigation, the Need for Reforms, and a Forthcoming Proposal*, 11 DUKE J. COMP. & INT'L L. 381, 382–83 (2001). *See generally* RACHEL P. MULHERON, THE CLASS ACTION IN COMMON LAW LEGAL SYSTEMS: A COMPARATIVE PERSPECTIVE (2004) (discussing the growth of class action lawsuits in the world's common law legal systems).

[128] Heather Smith, *Is U.S. Exporting Class Action to Europe?*, FULTON COUNTY DAILY REP. (Atlanta, Ga.), Mar. 1, 2006, at 6 (proffering the belief that, because of the dominance of American companies and globalization, European corporate and securities law are beginning to implement more and more American characteristics).

[129] Federal Court of Australia Amendment Act, 1991, No. 181 § 3 (1991); *see also* Betts, *supra* note 118, at 2; S. Stuart Clark & Christina Harris, *Multi-Plaintiff Litigation in Australia: A Comparative Perspective*, 11 DUKE J. COMP. & INT'L L. 289, 289–90 (2001).

[130] Civil Procedure Rules, 2009, Part 19(III) (2009) (U.K.), http://www.justice.gov.uk/civil/procrules_fin/contents/parts/part19.htm.

[131] *See generally* 1 WARD K. BRANCH, CLASS ACTIONS IN CANADA (2009) (discussing the Canadian class action process in full).

[132] Group Proceedings Act (Svensk författningssamling [SFS] 2002:599) (Swed.).

[133] *See* Thompson, *supra* note 9, at 1141 (citing Smith, *supra* note 128).

[134] *See* Gidi, *supra* note 127, at 325–26.

Korea.[135] Several other (largely European) nations have proposals at various stages in the legislative process to create such a dispute resolution mechanism.[136] The U.S.-style of class action still receives much opposition. Many of the European countries that allow group litigation have watered down versions of the U.S. system. Other countries restrict group litigation to a specific type of action.

This opposition and reluctance is due in large part to the international perception of U.S. litigation in three key areas. First, many nations prefer public—regulatory—enforcement (which can be accompanied by disgorgement or sanctions) over private litigation.[137]

Second, the opposition to the U.S. system is due to the difficulties in applying such a mechanism to the different dynamics existing in civil law countries.[138] The difference between civil law countries and common law countries is threefold: the result of a societal preference for legislation, rather than litigation to address social concerns in civil law nations;[139] the difference in the two systems in terms of the relative role of legislators and their political motivations; and the differing legislative processes between the two types of systems.[140]

Finally, many nations resist the adoption of the fraud-on-the-market doctrine for two major reasons. First, adopting it could create an incentive for investors to remain uninformed. Yet this argument is overcome by the mere fact that investors rarely make investment decisions based on what they believe the consequences will be if they rely on a misstatement by the issuer that ultimately causes them harm.

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[135] Walter Douglas Stuber et al., *International Securities and Capital Markets—Developments in 2005*, 40 INT'L LAW. 701, 714 (2006).

[136] *See, e.g.*, GUILLAUME CERUTTI ET AL., RAPPORT NO. 16, RAPPORT SUR L'ACTION DE GROUPE [THE REPORT ON CLASS ACTIONS] (2005) (Fr.); ISABELLE ROMY, LITIGES DE MASSE [MASS PROCEEDINGS] (1997) (Fr.).

[137] Buxbaum, *supra* note 5, at 61; Thompson, *supra* note 9, at 1138 n.104 (providing Turkey as an example, which has a public agency that regulates and supervises the nation's securities markets and forbids private actions by investors against corporate issuers or their executives). Note that in the United States, the Supreme Court has found an implied private cause of action under Rule 10b-5, allowing private investors to bring suits for securities fraud against the perpetrators. Superintendent of Ins. of N.Y. v. Bankers Life & Cas. Co., 404 U.S. 6, 13 n.9 (1971). Nations like Australia, however, are beginning to realize that the encouragement of shareholder class actions can supplement the slow-moving reflexes of government enforcement agencies and are often more intimidating to corporations with a propensity for misstatements or fraud. Betts, *supra* note 118, at 3–4; *see also* Thompson, *supra* note 9, at 1138 n.104 (noting it takes two to three years, and many more years for a judgment, for the public Turkish authority to initiate proceedings in court).

[138] Samuel P. Baumgartner, *Class Actions and Group Litigation in Switzerland*, 27 NW. J. INT'L L. & BUS. 301, 303 (2007) [hereinafter Baumgartner, *Class Actions*].

[139] *Id.* at 311–12.

[140] *Id.*

Investors collect information and analyze issuer statements to make good and profitable investments; that is, investors will still have an incentive to make the wisest possible investment decision based on the available information. Second, adoption would produce unfairness to those investors who actually did rely on the misstatements. This notion of fairness assumes that it is economical for investors who did rely on the misstatements to file a claim by themselves and to prove individualized reliance—which is indeed what they would be forced to do without the reliance presumption—because the class action mechanism would be obstructed from proceeding. In the end, whether other jurisdictions provide plaintiffs with a group-litigation relief mechanism will be largely ineffective in the securities fraud context if the jurisdictions do not also have a presumption of reliance.[141]

International opposition to the U.S. system of class action adjudication will strain negotiations aimed at collaboration and harmonization of international securities law. This clash will be a large obstacle to any international cooperation seeking to prevent securities fraud and injury to investors. To get some increased protection from foreign perpetrators and improved market integrity, the United States may be required to relax some areas of its plaintiff-favorable procedures or substantive laws.[142] Alternatively, such concessions may not be necessary as other countries have begun to realize the utility of the class action mechanism. As a result, they may soon realize how impossible it is to take advantage of that utility while requiring proof of individual reliance.

## II. COMPARISON OF EXTRATERRITORIALITY OF SECURITIES LAW TO THE EXTRATERRITORIALITY OF OTHER TYPES OF U.S. LAW

The application of U.S. securities antifraud laws and regulations to actions with predominantly foreign elements has been less contentious than attempts to apply other areas of U.S. law or regulations to foreign situations.[143] This is likely due to the common interest in regulatory enforcement of antifraud provisions and a desire to shape prospective behavior that may not itself be wrongful.[144] The Second Circuit has stated that "'[t]he primary interest of [a foreign state] is in the righting of a wrong done to an entity created by it. If our anti-fraud laws are

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[141] Forcing each member of a class to prove actual reliance would effectively bar plaintiffs from bringing securities class actions under Rule 10b-5. *See supra* note 125 and accompanying text.

[142] The European Union did this when it abolished its old Place of the Relevant Intermediary Approach and urged its members to adopt the Hague Securities Convention, which opted for the functional approach. *See infra* Part IV.C.

[143] Buxbaum, *supra* note 5, at 62.

[144] *See id.* at 62 n.196.

stricter than [a foreign state's], that country will surely not be offended by their application.'"[145] In sum, while countries may have complex and wide-ranging national interests, incentives, and policies determined by their legislative and regulatory regimes, most countries agree that it is the responsibility of the government to prevent and punish fraudulent conduct.[146] The following is a brief discussion of the extraterritoriality of other areas of U.S. law as compared to the extraterritorial application of U.S. securities antifraud provisions.

### *A. Antitrust Laws*

In terms of both comity and conflict of laws, the extraterritorial application of U.S. antitrust laws is a more serious problem than application of securities antifraud provisions overseas.[147] This is likely due to the common interest among nations in preventing securities fraud, as discussed above. In antitrust cases, however, the various national interests are likely to be in total opposition.

One major legislative difference between extraterritorial application of securities and antitrust laws is the level of Congressional guidance provided. While the Sherman Act—the U.S. antitrust law—is generally considered to be silent on Congressional intent as to its extraterritorial application, the Act is not entirely without extraterritorial guidance. Section 6a of the Sherman Act states that the Act "shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations," unless it has "direct, substantial, and reasonably foreseeable effect" on imports, domestic commerce, or American exporters.[148] But the Supreme Court's analysis of the legislative history interpreted the above-quoted exclusionary rule as allowing federal courts to reach commercial transactions that may not involve American exports but which are wholly foreign, as long as the conduct has adverse effects on *both* foreign and domestic customers.[149]

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[145] Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 175 (2d Cir. 2008) (alterations in original) (quoting IIT v. Cornfeld, 619 F.2d 909, 921 (2d Cir. 1980)).

[146] *See id.* at 175.

[147] RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 416 note 3 (1986); Gary B. Born, *A Reappraisal of the Extraterritorial Reach of U.S. Law*, 24 LAW & POL'Y INT'L BUS. 1, 47 (1992) (citing *IIT*, 619 F.2d at 921). *See generally* SEC Amicus Brief, *supra* note 10, at 1–3.

[148] Sherman Act, 15 U.S.C. § 6a (2006).

[149] The Supreme Court stated that when the defendant, foreign and domestic vitamin manufacturers and distributors, engaged in a price-fixing conspiracy, and the conspiracy adversely affects both foreign and domestic purchasers of vitamins in a significant way, federal courts may apply antitrust laws to the conduct, but only if the foreign injury was not independent of the domestic injury. F. Hoffmann-La Roche, Ltd. v. Empagran S.A., 542 U.S. 155, 158–59, 169 (2004) (reversing the court of appeals under principles of "prescriptive comity," because "[w]here foreign anticompetitive conduct plays

This interpretation highlights a second difference between extraterritorial application of securities and antitrust laws—the level of interference upon foreign interests caused by federal courts extending jurisdiction to foreign conduct. This difference comes to light in the Court's decision in *F. Hoffmann-La Roche., Ltd. v. Empagran S.A.*, where it noted that when the conduct implicated by the antitrust laws adversely affects customers both outside and within the United States, the antitrust laws cannot be applied to the foreign effects if the foreign effects were independent of the domestic effects.[150] The Court reached this conclusion in part because of its rule of statutory construction that seeks to avoid "unreasonable interference" with another nation's sovereign authority.[151] Such application would materially interfere with a nation's ability to regulate its own commerce independently.[152] Application of the antifraud provisions of U.S. securities laws should not cause as much interference with a foreign nation's regulation and enforcement of antifraud provisions because the goals of nations in preventing and redressing fraud are more closely aligned. Interest-balancing would not be required because the foreign states would not have a strong policy against the application of antifraud provisions, while they would against the application of antitrust provisions.

The competing interests among nations in the application of antitrust law are in stark contrast to the aligned incentives found in the application of antifraud provisions of securities laws. There may be rare cases when a country opposes the proper application of antifraud provisions by another nation due to its interest in protecting its own securities issuers. This opposition is based on a misguided view of the role of antifraud provisions. Securities fraud that is conducted in one market eventually affects the integrity of all global securities markets. This widespread impact is due, in large part, to the speed at which information is disseminated across the globe.[153] When a company makes financial performance predictions and statements regarding company goals and significant corporate events, investors worldwide use this source as their main basis of financial decisions. What other source would have better access to information to make statements about a

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a significant role and where foreign injury is independent of domestic effects, Congress might have hoped that America's antitrust laws, so fundamental a component of our own economic system, would commend themselves to other nations as well. But, if America's antitrust policies could not win their own way in the international marketplace for such ideas, Congress, we must assume, would not have tried to impose them, in an act of legal imperialism, through legislative fiat").

[150] *Id.* at 164.

[151] *Id.*

[152] *Id.*

[153] *See infra* note 175.

company's affairs than those working in it? When a country opposes the exposure of its issuers to antifraud enforcement, it may indeed gain some short-term benefits, but the long-term adverse impact on the global economy will likely cause greater damage to that country's economic prosperity.

### *B. General Civil Litigation Discovery Rules*

How have courts treated application of the Federal Rules of Civil Procedure ("Federal Rules") when it is necessary for parties to obtain evidence abroad? Can a court compel the disclosure of documents or other testimony located outside the United States? The Federal Rules and the Rules Enabling Act are both silent as to the extraterritorial reach of discovery rules in civil litigation.[154] Federal courts have recognized that they have the authority to "'order a person subject to its jurisdiction to produce documents, objects, or other information relevant to an action or investigation, even if the information or the person in possession of the information is outside the United States.'"[155]

Implicit in the above quote is that a court must have personal jurisdiction over the party it seeks to compel, even if the party is not present in the court's jurisdiction. In determining whether extraterritorial discovery should be ordered, courts should look at the following considerations: (1) the need for the requested materials; (2) the objectives of the substantive legislation implicated in the dispute; (3) the parties' nationality; and (4) the hardship suffered by private parties.[156] To avoid creating an incentive to place ownership of American assets in countries that ensure secrecy of certain records, the Supreme Court has held extraterritorial discovery proper even in the face of legislation in the foreign jurisdiction prohibiting disclosure of the requested materials.[157] Though it is necessarily difficult to obtain the information, unless the court has personal jurisdiction over the party it seeks to compel, it will be unable to obtain the desired information. The Court has also stated that judges should take into account considerations of international comity in weighing the sovereign interests of the foreign nation and the requesting nation.[158]

Recent developments in bank secrecy laws and information-sharing standards might impact the extraterritorial application of discovery rules to aid in the international collection of fraud judgments by

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[154] Born, *supra* note 147, at 48.

[155] *Id.* (quoting RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 442(1)(a) (1986)).

[156] Born, *supra* note 147, at 49 (citing Société Internationale Pour Participations Industrielles et Commerciales, S.A. v. Rogers, 357 U.S. 197, 204–06 (1958)).

[157] *Rogers*, 357 U.S. at 205.

[158] *Id.* at 205–06.

successful civil plaintiffs. The mystique of small island-nations and minor European countries acting as attractive tax havens for the world's wealthiest individuals and companies has been the substance of spy thrillers for half a century.[159] These tax havens were created via national laws prohibiting banks from sharing the financial information of their customers. This secrecy allows the customers to stash treasures in nations where tax authorities of other countries are unable to discover relevant information to enforce their tax law. These same bank secrecy laws also enable the rich to hide from judgment creditors.

The recent economic downturn has exposed several large scale financial frauds that flourished under these lightly regulated jurisdictions. These jurisdictions include Luxembourg, where funds from Bernard Madoff's Ponzi scheme were based, and Barbuda, which hosted Stanford International Bank.[160] These developments have caused many financially-strapped countries to increase political pressure on countries with heightened bank secrecy laws.[161] As a result of the international pressure, several of the blacklisted countries recently committed to changing their laws to increase bank transparency and provide legal assistance in compliance with the Organisation for Economic Cooperation and Development's ("OECD") tax standards.[162] These countries include Andorra (a tiny country in the Pyrenees between France and Spain), Liechtenstein (a miniscule principality sandwiched by Austria and Switzerland), Switzerland (the largest of tax havens, controlling over $2 trillion), Austria, and Luxembourg.[163] Switzerland has said, however, that the changes to its laws will only come through bilateral treaties (which could require amnesty for prior tax evasion),[164] and will result in the exchange of information only through detailed requests on specific cases, not automatically.[165]

While these bank secrecy developments were aimed at benefiting tax authorities in collecting the necessary information to bring tax

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[159] The Organisation for Economic Cooperation and Development ("OECD") has created a "blacklist" of uncooperative countries that are deemed to be tax havens. The OECD can sanction countries for not complying with its international tax standards. *See* OECD, OECD Work on Tax Evasion, http://www.oecd.org/document/21/0,3343,en_2649_201185_42344853_1_1_1_1,00.html.

[160] David Crawford, *Tax Havens Pledge to Ease Secrecy Laws*, WALL ST. J., Mar. 13, 2009, at A1.

[161] *See* David Crawford & Jesse Drucker, *Swiss to Relax Bank Secrecy Laws*, WALL ST. J., Mar. 14–15, 2009, at A5.

[162] *See id.*; *see also* Crawford, *supra* note 160; BBC News, *Switzerland Eases Banking Secrecy*, Mar. 13, 2009, BBC NEWS, http://news.bbc.co.uk/2/hi/business/7941717.stm.

[163] Crawford & Drucker, *supra* note 161.

[164] *Id.*

[165] *Id.*

evaders to justice, relaxing these laws may also allow for greater reach and efficacy of discovery laws in civil litigation. One possible scenario would be if a fraudulent actor (of the Bernie Madoff variety) is prosecuted by tax authorities who obtained the fraudster's financial information from banks in the Caribbean, the South Pacific, and Europe in order to prosecute him for tax fraud. This information might then be deemed public, or subject to discovery from the IRS, allowing civil plaintiffs suing the fraudster improved access to justice for their injuries.

### *C. Federal Criminal Law*

For centuries, a strong presumption of territoriality existed in the application of a sovereign nation's criminal law.[166] This presumption was largely based on the recognition that "criminal litigation involves a sovereign [s]tate directly seeking to enforce its laws."[167] Over the last century, as the world began to globalize and criminal conduct within one jurisdiction could more easily affect another jurisdiction, this strict territoriality presumption began to erode. In *Strassheim v. Daily*, the U.S. Supreme Court held that any conduct occurring outside a given jurisdiction that was intended to produce a detrimental impact in that jurisdiction will justify a state seeking punitive recourse against the cause of that harm as if the perpetrator was present in the injured jurisdiction while effectuating the conduct.[168] The Court has continued to recognize the point that a sovereign nation has a right "to defend itself" and apply its criminal statutes against criminal perpetrators regardless of where they effectuated the crime, so long as the perpetrators were its own citizens or the crime had an impact on its citizens.[169] In short, the application of criminal laws is not logically dependent on their locality.

The considerations involved in the application of federal criminal law to crimes committed abroad by foreigners work much the same way as the current judicial analysis in multinational violations of U.S. securities laws by foreigners. In criminal law, the "conduct test" is the typical application of federal law against those who break the law on our soil. It is in the "effects test" where the application of U.S. criminal law can be applied to illegal conduct occurring in another country. That is, does the illegal conduct have any major effects on U.S. citizens or interests? If so, the effects test would allow a U.S. court to exercise jurisdiction and apply federal criminal law to the crimes committed abroad that affect U.S. interests. Just as in the extraterritoriality application of securities laws, the U.S. courts will take into account

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166 *See* Born, *supra* note 147, at 51.

167 *Id.*

168 221 U.S. 280, 285 (1911) (citations omitted).

169 *E.g.*, United States v. Bowman, 260 U.S. 94, 98 (1922).

various other considerations (such as international comity) before actually exercising jurisdiction.[170] Because the antifraud provisions in securities laws deal with civil penalties, as opposed to criminal law dealing with criminal penalties, those laws may hold less weight in the eyes of the judiciary when weighed against principles of international comity. This balancing might be why courts tend to require more specific "effects" in the securities context than in the criminal context.

## III. THE NEED FOR MORE INTERNATIONAL UNIFICATION OF SECURITIES LAWS

Fifteen years ago, Gary Born wrote that "[t]echnological, commercial and political changes have created an interdependent global economy, characterized by pervasively transnational commercial activities, in which no nation can ignore what occurs beyond its borders."[171] Since writing those words, the dynamics that Born described have become more exaggerated. U.S. courts have failed to unilaterally take the lead in addressing the "generalized harms" caused by the perpetuation of international fraud,[172] because they have limited the application of the effects test to "concrete harm."[173] Congress and the SEC need to address the harm caused to the integrity of global financial markets upon which countless investment decisions are based every day. They should seek to address this concern through cooperation with their foreign counterparts. The fraud over which U.S. courts have refused to extend jurisdiction (for example, that found in foreign-cubed securities class actions) has a great impact on our domestic markets due to the "globalization of securities markets,"[174] the interconnectedness of the global economy in general, and the speed at which our lines of communication can extend to markets across our so-called "global village."[175] The current status of globally interwoven securities markets, along with the reluctance of U.S. courts to find jurisdiction in

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[170] Born, *supra* note 147, at 54.

[171] *Id.* at 99.

[172] Thompson, *supra* note 9, at 1134.

[173] *See supra* notes 61–70 and accompanying text.

[174] For a full discussion on the consolidation of global securities markets occurring over the last decade, see generally Thompson, *supra* note 9.

[175] Marshall McLuhan coined the term "global village" in his books to describe the global transformation that occurred once electric technology became widespread, allowing information to spread more quickly. The globe contracted into a village, where all become aware of social and political functions instantaneously. *See* MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 6, 408, 454 (W. Terrence Gordon ed., Gingko Press 2003) (1964); MARSHALL MCLUHAN, THE GUTENBERG GALAXY: THE MAKING OF TYPOGRAPHIC MAN 31 (1962); Letter from Marshall McLuhan to Edward S. Morgan, Assistant Editor, Marketing Magazine (May 16, 1959), *in* LETTERS OF MARSHALL MCLUHAN 252, 253 (Matie Molinaro et al. eds., 1987).

predominantly foreign cases, has provided corporate issuers with the "opportunity to access the world's markets while avoiding U.S. regulation and litigation."[176] If the country-to-country treatment of international securities fraud continues down its current disparate path of substantive application and procedural relief mechanisms, companies will seek ways to capitalize on U.S. case law by altering their behavior to minimize litigation risk in the United States. They will realize that litigation in foreign jurisdictions will be much more issuer-favorable.

Securities transactions in a global marketplace can involve multiple participants, components, and events in several countries. For example, executive management might be headquartered in one country, the alleged false representations might be filed, published, or publicly announced in various other nations, accountants, lawyers, and underwriters might have prepared (knowingly or unknowingly) the fraudulent documents in still another jurisdiction, and marketing of the securities at issue might have reached various exchanges worldwide.[177] Because securities fraud is rarely traceable to a single act in a discrete place at a specific time, international harmonization of applicable substantive and procedural law and regulation is necessary for investor protection. On the contrary, if such action is not taken, the causal factors discussed in this Article will "result in greater risk for investors and far less integrity and stability in" global markets.[178]

### *A. Problems with the Current U.S. Approach to Foreign-Cubed Securities Class Actions*

After the *Morrison v. National Australia Bank* ruling applied the common law tests of its predecessor decisions, two points became clear. The first is that foreign investors, suffering the adverse impact of fraudulent conduct would have decreased access to justice in U.S. courts. As noted above, even if dismissed plaintiffs have an alternative forum to seek relief, they will be relegated to jurisdictions with less regulation, less investor protection, and antiquated disputed resolution mechanisms (many countries cling to the one plaintiff-one defendant concept of dispute resolution).[179] Often, plaintiffs dismissed by U.S. courts will have no avenue to seek redress for the harm caused them by fraudulent corporate issuers.[180]

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[176] Thompson, *supra* note 9, at 1144.

[177] SEC Amicus Brief, *supra* note 10, at 5–6 (citing *In re* Alstom SA Sec. Litg., 406 F. Supp. 2d 346, 372 (S.D.N.Y. 2005)).

[178] Thompson, *supra* note 9, at 1144.

[179] *Id.* at 1129 (citing Jacob Zamansky, *How an Exchange Merger Can Create Big Losers*, FIN. TIMES, Aug. 24, 2006, http://www.ft.com/cms/s/0/96abb29e-330c-11db-87ac-0000779e2340.html?nclick_check=1).

[180] *Id.* at 1133 (citing Miller, *supra* note 116, at 1389).

The second point of clarity is that the case law allows foreign issuers to mitigate their exposure to litigation by minimizing the risk of a foreign-cubed class action in plaintiff-accessible U.S. courts. This may be accomplished

> by ensuring that all public communications for non-U.S. investors are prepared and distributed outside the United States, even when they concern U.S. operations, and by communicating information outside the United States prior to or simultaneously with its communication in this country, so that non-U.S. investors cannot claim to rely on information communicated in the [United States].[181]

Such conduct would relegate foreign investors to jurisdictions that provide inferior investor protection and accessibility to justice for fraudulent conduct.[182]

The lack of conclusive direction from the Supreme Court and Congress has produced inconsistent application of judicially-crafted solutions in determining whether to apply U.S. securities laws to foreign-cubed class actions. As was shown above, the current U.S. approach yields only dismissals of claims by foreign investors who seek redress against foreign issuers who conducted fraudulent activities abroad. Unless a "material" portion of the fraudulent conduct occurred on U.S. soil or substantially affected direct and concrete interests within the United States,[183] a portion of the plaintiff class contains U.S. investors, or the securities at issue were purchased on U.S. markets, the claim will be dismissed. Although the United States provides injured investors with the most investor-friendly avenues to relief,[184] it can be argued that by denying investors in foreign-cubed class actions this opportunity to seek relief, the U.S. judiciary is partially complicit in or willfully blind to the perpetuation of international fraud. Such fraud impacts the integrity global financial markets—including those in the United States. Yet it is not the judiciary's role to enforce against international fraud. And, under current law, U.S. courts are forced to weigh difficult issues (such as international comity) as discussed above.

Governments, including the U.S. government, have a duty to protect their citizens and citizen investors from fraud. Unfortunately for injured foreign investors, seeking relief outside the U.S. is difficult and unsatisfactory. As discussed earlier, many jurisdictions do not provide group litigation mechanisms, which prevent many investors from

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[181] Lewis J. Liman & David H. Herrington, *Whether 'Foreign-Cubed' Securities Class Actions Fit in U.S. Courts*, N.Y. L.J., Feb. 17, 2009, LegalTrac, Gale Doc. No. A194327403.

[182] *See generally* Buxbaum, *supra* note 5, at 49–50.

[183] *Id.* at 41 (stating that many cases are clearing the jurisdictional obstacle and often only succeed when there is an intermixing of foreign and U.S.-based transactions); *see also supra* notes 61–70 and accompanying text.

[184] Thompson, *supra* note 9, at 1129.

seeking recovery because their claims are too small individually to make the high cost of litigation worthwhile.[185] Further, many jurisdictions require plaintiffs to prove subjective individualized reliance on the alleged fraud in making a purchase or sale of the securities in question.[186]

If U.S. courts take the helm in adjudicating foreign-cubed fraud actions where other courts or agencies do not, there could be negative repercussions. First, foreign courts may not recognize U.S. judgments in foreign-cubed class actions.[187] Foreign courts may refuse to recognize the judgments because (1) they simply do not recognize the jurisdiction of U.S. courts on issuers located in their country, (2) they are skeptical of the U.S. class action mechanism itself, (3) they think that with a presumption of reliance a case has not been fully heard on the merits, (4) they do not recognize U.S. attorneys' fee structures, or (5) they have a policy to only recognize the judgments if there is a formal reciprocity treaty between the countries.[188]

Second, considerations of international comity require a delicate balancing that goes beyond the substantive law at issue in a case. This area of international law is difficult for courts to apply consistently; it has been called an "amorphous never-never land whose borders are marked by fuzzy lines of politics, courtesy, and good faith."[189] The required judicial balancing test should consider (1) the American interests involved, making sure not to accord undue weight to those interests, and (2) whether the defendant's contacts can be construed to show that he voluntarily availed himself of U.S. jurisdiction and waived the protection of his own country's judicial and legislative system.[190] These impossible considerations have often been deemed to favor restraint on the part of courts in determining extraterritoriality of U.S. law.[191]

Third, foreign courts may try to retaliate against the U.S. courts' extension of jurisdiction by inappropriately extending their own jurisdiction to reach transactions involving primarily U.S. interests and

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185 *See supra* Part I.C.

186 *See id.*

187 Sankoorikal, *supra* note 14, at 29.

188 *Id.* at 29–30.

189 Note, *Predictability and Comity: Toward Common Principles of Extraterritorial Jurisdiction*, 98 HARV. L. REV. 1310, 1322 (1985) (quoting Harold G. Maier, *Extraterritorial Jurisdiction at a Crossroads: An Intersection Between Public and Private International Law*, 76 AM. J. INT'L L. 280, 281 (1982)).

190 *Id.*

191 *See id.* at 1323; *see also* Thompson, *supra* note 9, at 1144 (discussing the historical reluctance of U.S. courts to deal with global issues).

parties.[192] This extension might not be an issue, for the United States wants all issuers that commit fraud to be brought to justice, even its own. But in at least two situations, the extension of foreign legal regimes against U.S. parties can have a negative impact on U.S. interests. First, the foreign courts may be applying their securities regimes solely due to a vendetta against the extraterritorial application of U.S. law by U.S. courts. Such emotional retaliation has no place in the law and can only adversely affect international commerce. Second, the limitations of other jurisdictions' securities regimes could result in unfair treatment of our issuers, such as a lack of preclusive effect as to future claims by class members or the requirement that the corporate issuer dispute each investor claim on an individual basis (that is, no provision for the bulk disposition of claims). In this instance, the United States may find unsatisfactory the fraud enforcement by other countries against U.S. issuers.

These sensitive foreign relations principles tend to discourage unilateral efforts to deter the perpetuation of securities fraud by U.S. courts in foreign-cubed class actions.[193] Therefore, deterrence of fraud and enforcement of violations of antifraud provisions should be a collective and cohesive effort of a coalition of securities regulatory bodies—for example, the International Organization of Securities Commissions ("IOSCO")[194]—and national legislators. It has been said that "'[t]he law applicable to transnational litigation affects the behavior of transnational actors.'"[195] Those tasked with making and applying international securities laws should recognize this "'interplay between lawmaking and transnational actors and of how particular procedural

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[192] Blechner v. Daimler-Benz AG, 410 F. Supp. 2d 366, 372 (D. Del. 2006) (citing Plessey Co. v. Gen. Elec. Co., 628 F. Supp. 477, 496 (D. Del. 1986)).

[193] A unilateral approach may also be discouraged because companies may no longer wish to list U.S. exchanges. However, the United States already has the most plaintiff-friendly system and international companies continue to list on U.S. markets. *Supra* note 15 and accompanying text. Further, with international harmonization of securities laws, all exchanges would be put back on equal footing when companies decide on which exchange to list their securities.

[194] International Organization of Securities Commissions ("IOSCO") is known as a Trans-Regulatory Network ("TRN"). Formed in 1983 out of an inter-American regional organization, today IOSCO members regulate ninety percent of the world's securities markets and is recognized as the "international standard setter for securities markets." Int'l Org. of Sec. Comm'ns, IOSCO Historical Background, http://www.iosco.org/about/index.cfm?section=history (last visited Nov. 20, 2009) [hereinafter IOSCO Historical Background].

[195] Baumgartner, *Class Actions*, *supra* note 138, at 302 (quoting Samuel P. Baumgartner, *Is Transnational Litigation Different?*, 25 U. PA. J. INT'L ECON. L. 1297, 1305 (2004) [hereinafter Baumgartner, *Transnational Litigation*]).

choices may influence it in the long run.'"[196] There is no better way to account for and weigh the incentives of international actors and the law that influences their behavior than broad cooperation among legislative and regulatory bodies.

Some efforts at international cooperation in securities law have been made. The following two sections discuss the current level of international cooperation in this area and the inadequacy of those efforts to prevent harm to investors or provide them with compensatory relief from fraudulent actors.

### *B. Current International Securities Cooperation*

Currently, a (slow) movement toward international securities cooperation is occurring on three fronts. First, IOSCO has created a document concerning cooperation in the area of sharing of information called the Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information ("MMOU").[197] As of September 21, 2009, the MMOU has fifty-five signatories (that is, securities regulatory agencies, including the SEC).[198] The self-proclaimed purpose of the MMOU is for the signatories "to provide one another with the fullest mutual assistance possible to facilitate" the regulation of securities transactions and the enforcement of compliance with their laws and regulations within their respective jurisdictions.[199] By helping securities regulatory bodies regulate and enforce the compliance of their national securities laws, the MMOU is aimed at combating cross-border securities market misconduct. In the shadow of the September 11, 2001 attacks, the IOSCO recognized that increasing global activity in the securities markets produced a need for increased cooperation and consultation among its members.[200] Under the MMOU, the signatories agree to provide one another with investigative material related to bank and brokerage records, records identifying beneficial owners of non-natural persons, and the other critical information.[201] The signatories agreed that the shared information would

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[196] *Id.* at 303 (quoting Baumgartner, *Transnational Litigation*, *supra* note 195, at 1306).

[197] Int'l Org. of Sec. Comm'ns, *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information* (May 2002) [hereinafter IOSCO MMOU], *available at* http://www.sec.gov/about/offices/oia/oia_bilateral/iosco.pdf.

[198] Sec. Comm'n Malay., List of IOSCO Multilateral MOU Signatories, http://www.sc.com.my/main.asp?pageid=632&menuid=&newsid=&linkid=&type= (last visited Nov. 20, 2009).

[199] IOSCO MMOU, *supra* note 197, at 1.

[200] *Id.*

[201] *Id.* at 3.

be kept confidential except to permit use of the information in enforcement and regulatory matters.[202]

Second, the Council of Europe harmonized its members' securities laws regarding insider trading during its Convention on Insider Trading.[203] This Convention created a system of mutual assistance among European countries, who agreed to exchange information to enable the effective supervision of securities markets and to establish definitively whether persons transacting on European securities markets are insiders.[204]

Lastly, the United Nations has tried to develop cooperation among members in the area of conflicts of laws for intermediated securities in its Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary ("Hague Securities Convention").[205] Drafted under the auspices of the Hague Conference on Private International Law,[206] this treaty harmonizes the law so as to remove the legal uncertainties for cross-border securities transactions. The need for this treaty exists because international networks of intermediaries act as holders of securities in cross-border securities transactions between issuers and the ultimate investors; each of the parties involved in the transaction may have multiple offices around the globe.[207] Given the various parties involved in a given securities transaction, the question of which jurisdiction's law applies is difficult to determine. The Hague Securities Convention seeks to provide certainty in this area by identifying a single jurisdiction whose law would apply to any given situation.[208]

The treaty provides a functional, algorithmic approach to determining the correct governing law.[209] First, the account holder and

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[202] *Id.* at 5–6. For a fuller case study on the IOSCO and its MMOU see Pierre-Hugues Verdier, *Transnational Regulatory Networks and Their Limits*, 34 YALE J. INT'L L. 113, 143–50 (2009).

[203] Convention on Insider Trading, Apr. 20, 1989, 1704 U.N.T.S. 133.

[204] *Id.* art. 2.

[205] Convention on the Law Applicable to Certain Rights in Respect of Securities Held with an Intermediary, Jul. 5, 2006, 46 I.L.M. 649 [hereinafter Hague Securities Convention].

[206] The Hague Conference is a worldwide intergovernmental organization that works for "[a] progressive unification of the rules of private international law." Statute of the Hague Conference on Private International Law art. 1, Oct. 31, 1955, 15 U.S.T. 2228, 220 U.N.T.S. 121.

[207] *See* Hague Securities Convention, *supra* note 205, pmbl.

[208] Luc Thévenoz, *Intermediated Securities, Legal Risk, and the International Harmonization of Commercial Law,* 13 STAN. J.L. BUS. & FIN. 384, 392–93 (2008).

[209] *See id.* at 393 & n.21.

the intermediary[210] may choose the governing law by agreement, as long as the intermediary has an office involved in the maintenance of securities accounts in the chosen jurisdiction.[211] If no express designation exists between the parties, the law which the parties agreed to govern the account agreement governs the issues addressed in the Convention.[212] If no result is reached from these two inquiries, the governing law is the law of the location of the intermediary's office through which it entered into the account agreement, as long as the account agreement "expressly and unambiguously" identifies that office.[213] Finally, if still no governing law is determined, the law applicable will be the place of incorporation or organization of the intermediary, or its principal place of business.[214] Clearly, competent legal counsel for an intermediary would ensure that jurisdiction is established in an agreement between the parties or, at the very least, in the account agreement.

In the area of intermediated securities, beyond this conflict of laws issue addressed by the Hague Securities Convention, the International Institute for the Unification of Private Law has sought to supplement the Hague Securities Convention with various substantive rules to determine the rights of investors and collateral holders, provide internationally approved methods for perfecting these rights, and protect investors from the insolvency of intermediaries.[215]

### *C. Insufficiency of Current International Cooperation*

Many problems exist in the current level of international securities cooperation. The following subsections will discuss several of these problems and will then outline the optimal view of how international cooperation should look.

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[210] The term "'intermediary' means a person that in the course of a business or other regular activity maintains securities accounts for others or both for others and for its own account and is acting in that capacity." Hague Securities Convention, *supra* note 205, art. 1(1)(c).

[211] *Id.* art. 4.

[212] *Id.* The Convention's logarithmic function in determining applicable law is not challengeable. Yet the Convention does provide for a "review of practical operation of the Convention" by the Secretary-General of the Hague Conference on Private International Law to determine the desirability of any amendments. *Id.* art. 14.

[213] *Id.* art. 5(1).

[214] *Id.* art. 5(2)–(3).

[215] *See, e.g.*, Int'l Inst. for the Unification of Private Law ("UNIDROIT"), *UNIDROIT Convention on Substantive Laws for Intermediated Securities*, CONF. 11/2–Doc. 42 (Oct. 9, 2009); *see also* Thévenoz, *supra* note 208, at 411 (discussing UNIDROIT's "functional approach" to reducing the legal risks of holding securities through intermediaries).

### 1. Lack of Follow-Through

First, a common problem in international cooperation of securities regulators is that the efforts that have been made are not always carried through. For example, the Hague Securities Convention has not entered into force because it requires *three* nations to ratify or adopt it.[216] Thus far, only the United States and Switzerland have signed the treaty (in July 2006) and they are slowly proceeding toward ratification and adoption, respectively.[217] Yet, other governments have assessed the Hague Securities Convention. For example, the European Commission assessed the Convention and recommended that member states sign it.[218] While E.U. members have still not signed the Convention, the Commission's recommendation was a big step towards its adoption. Because the European Union (once seen as the main opponent to the Convention because it replaced the E.U. "place of relevant intermediary" approach with the functional approach outlined above[219]) has endorsed the Convention, its entry into force seems more likely to become a reality. Yet, even where good harmonization efforts have taken place, the required adoption of those efforts is lacking.

In the case of the Hague Securities Convention, the reason for its lack of adoption may be due to the Convention's heavy favoritism of the banking intermediary in its functional choice-of-law analysis. Most of these banking intermediaries reside in Switzerland and the United States, which might explain the prompt signing of the Convention by these two nations and the subsequent reluctance by other nations who are likely more concerned about the treaty's favoring of intermediaries over account holders. Thus, the parties that are most heavily involved in the negotiation process likely will influence the terms for their own benefit, causing the entire agreement to lack widespread acceptance.

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[216] Hague Securities Convention, *supra* note 205, art. 19(1).

[217] Hague Conference on Private International Law, Status Table for The Hague Securities Convention, http://www.hcch.net/index_en.php?act=conventions.status&cid=72. Mauritius has also signed the Convention, but it is a nonmember state and thus does not count toward the required three signatories. *Id.*

[218] Sandra M. Rocks & Kate A. Sawyer, *International Commercial Law: 2007 Developments*, 63 BUS. LAW. 1375, 1385–86 (2008) (citing Press Release, Eur. Union, Securities Markets: Commission Calls upon Member States to Sign Hague Convention (July 5, 2006), http://europa.eu/rapid/pressReleasesAction.do?reference=IP/03/1725&format=HTML&aged=0&language=EN&guiLanguage=en). The European Union requires unanimous signatures by Member States for the European Union to adopt the Convention. *See* Press Release, Eur. Union, Frequently Asked Questions (FAQs) on Securities Convention: Commission Legal Assessment (July 5, 2006), http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/06/267&format=HTML&aged=0&language=EN&guiLanguage=en.

[219] *See id.* at 1386.

### 2. Lack of Harmonization

With the current international securities cooperation there is no harmonization to the substantive law. The parties cooperating are merely beating around the issue, without addressing the core. The Hague Securities Convention deals with the issue of which law governs a dispute over an international transaction.[220] The MMOU is concerned with the sharing of information in order to enforce the existing substantive securities laws of each nation.[221] Sharing information is a noble pursuit that will aid in enforcing current antifraud laws, but it does not help multinational classes of injured plaintiffs find a forum for relief.

### 3. No Cooperative Action

In the case of the MMOU, the international cooperation only helps securities regulators act alone to better prevent fraud within their own borders. While the level of cooperation encompassed by the MMOU is certainly an improvement and better than no cooperation at all, it fails to address the complexities involved in foreign-cubed transactions and the subsequent difficulties that arise in finding an appropriate forum in which plaintiffs can seek justice. The MMOU would not even apply in a 10b-5 action brought under the implied right of action of *Basic, Inc. v. Levinson*,[222] because the MMOU allows the SEC merely to obtain information from, say, the Australian Securities and Investments Commission, regarding some regulatory enforcement action in which the SEC was involved.[223]

This problem with the MMOU stems largely from the inherent limitations with so-called Trans-Regulatory Networks ("TRNs"),[224] such as the IOSCO, which will be discussed in more detail below. One strength of TRNs is their ability to address problems caused by globalization that occur across national borders and affect multiple nations' interests. While these problems would be difficult for

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220 Thévenoz, *supra* note 208, at 393.

221 Verdier, *supra* note 202, at 145.

222 *See supra* note 125.

223 Further limitations inherent in this type of organization are discussed further in the final section of this Article. *Infra* Part IV.

224 This Article uses Professor Pierre-Hugues Verdier's definition that "TRNs are informal multilateral forums that bring together representatives from national regulatory agencies or departments to facilitate multilateral cooperation on issues of mutual interest within the authority of the participants." Verdier, *supra* note 202, at 118. This type of organization is distinguished from treaty-based organizations like the World Trade Organization, the International Monetary Fund, or the World Bank. *Id.*

governments to address alone, cooperation allows them to address international issues collectively.[225]

4. Regional vs. Global

A final deficiency of international cooperation is that the only currently successful cooperative efforts remain regional. The European Union's Convention on Insider Trading is a commendable harmonization of the insider trading law in European nations, but the direct benefits of the Convention do not extend beyond the borders of member states. Harmonization among the commercial laws of member states was essential to the establishment of the European Union.[226] Thus, it follows that the Convention on Insider Trading was a byproduct of the overall harmonization of the E.U.'s expansive commercial law. It should be no surprise that the E.U. members agreed to its terms, as the underlying premise behind the European Union is the bonding of similar and closely associated nations.[227] But today's global economy requires more than mere regional harmonization; the marketplace is filled with international corporations that conduct business with little regard for national or regional boundaries. It is essential, therefore, to develop international mechanisms and substantive law that apply consistently across all (or most) state lines so as to develop a harmonized body of securities law that reaches as far as modern commerce extends and effectively accomplishes its objective of protecting investors in a globalized marketplace.[228]

Countries may conflict on how best to regulate globalized economic activities. For instance, when the conduct test does provide a jurisdictional basis for foreign-cubed actions, it applies the U.S. regulatory regime on the conduct, which produces a conflict with the regulatory regimes of other countries with an interest in the litigation. If legislators and regulatory bodies cooperate with one another to prevent fraud worldwide, however, conflict-of-laws issues would be mitigated.

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[225] ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER 8 (2004).

[226] Ole Lando, *Principles of European Contract Law: An Alternative to or a Precursor of European Legislation?*, 40 AM. J. COMP. L. 573, 575 (1992).

[227] *See* Consolidated Version of Treaty on European Union, pmbl., 2006 O.J. (C 321) 5, 9–10 (EU).

[228] When it comes to commercial transactions, the borders of the European Union's member states are fluid far beyond the rest of the globalized economy. Nevertheless, the European Union has compelled the member states to harmonize certain areas of substantive commercial law, all the while failing to establish a central agency for securities regulation. Rather, each country is responsible for its own regulation and enforcement, which permits corporate issuers to disclose information in disparate ways, creating information inefficiencies for investors who purchase the issuer's stock. Thompson, *supra* note 9, at 1128–29 (2007).

## IV. POSSIBLE APPROACHES TO FOREIGN-CUBED SECURITIES CLASS ACTIONS

In the increasingly intertwined and globalized economy, fraud in one nation's markets eventually will infiltrate the market integrity of other nations caused by the instant worldwide availability of information disseminated or statements made by the corporate issuer or others. As McLuhan so presciently described the "technological world" of the 1960s as a "global village,"[229] and as Gary Born described our "interdependent" world fifteen years ago,[230] we have only grown more interconnected than these sages could have begun predict. The globalization of business has increased the frequency of foreign-cubed actions over the past decade, thus, the jurisdictional issues involved in these cases will have increasing importance to U.S. courts in the years ahead and will have an increasing impact on investors.[231]

As discussed above, the current approach of U.S. courts produces inconsistent results and fails to effectively prevent or deter international fraud because it refers plaintiffs to other jurisdictions with less effective means of recovery. A new unilateral approach by U.S. courts likely would improve the current judicial framework;[232] however, the best approach to the issue of foreign-cubed securities fraud actions is international harmonization of substantive and procedural laws effecting securities transactions.

The United States is the chief financial center of the world and has the greatest interest in prevention of securities fraud worldwide. Other nations' lack of adequate group litigation mechanisms and their requirement that claimants prove reliance creates huge bars to justice for plaintiffs and fails to deter fraudulent actors. U.S. courts cannot fix this international problem and the current judicial framework fails to address these important issues. But this Article is not intended to criticize the judiciary's attempts to deal with the issues; the competing policies of comity, equity and effective judicial administration, investor protection, and international relations are difficult to balance and have

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229 *See supra* note 175 and accompanying text.

230 *Supra* note 171 and accompanying text.

231 Buxbaum, *supra* note 5, at 41; *see also supra* note 175 (discussing McLuhan's idea of a "global village").

232 *See* Buxbaum, *supra* note 5, at 68–70 (discussing Hannah Buxbaum's "second-best solution"). Another option might be merely to centralize foreign-cubed litigation in U.S. courts. This approach would highlight that it is mostly advantageous to sue in U.S. court if the defendant has substantial assets in the United States. The presence of these assets might itself justify a court's exercising jurisdiction because whether or not the fraudulent conduct occurred in the United States, the fraudulent actor still maintains a presence there, giving its courts an interest in enforcing antifraud provisions against the actor.

far-reaching and obtuse consequences. The legislative and executive branches should work with their foreign counterparts to prevent fraudulent conduct from infiltrating securities transactions, because the interconnectedness among the world's capital markets compels it.[233]

There are four possible forms in which effective international cooperation regarding the prevention and deterrence of international securities fraud might occur. One form is no cooperation at all, but rather unilateral national amendments to current substantive securities law and procedural relief mechanisms. The other three involve some form of cooperation among governments. The final approach discussed is the most extensive level of cooperation and, as such, stands to provide the most global protection to investors. Each possibility has strengths and weaknesses; however, the point remains that some form of effective cooperation is necessary to maintain international market integrity and protect investors infusing capital across national borders.

### *A. Unilateral Amendment to National Laws*

The simplest approach to the problem of international securities fraud is for the United States to amend its own securities laws to clearly define the rights of investors affected by securities fraud—domestic and foreign—and the type, extent, and locale of conduct to which the laws extend. This approach could help to halt the inefficacy of the current judicially-created system discussed above. The new laws would put issuers on notice that conducting business in the United States will be more highly regulated to improve the integrity of the nation's financial markets and protect its investors.

This unilateral approach would also be the most practical. This Article has probably raised serious doubt that true international cooperation can occur on any effective scale. Most attempts at international cooperation are slow-moving and futile. When cooperation does succeed, the result is so fraught with compromise that any negotiations result in a proportionate watered-down effect.[234]

Hannah Buxbaum argued that the best alternative to international cooperation would be to adopt a simple, bright-line rule that limits subject matter jurisdiction under U.S. antifraud provisions to claims arising out of securities transactions on U.S. markets.[235] This rule would provide regulatory clarity to investors and issuers making decisions on

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[233] *See supra* note 9.

[234] *See generally* David B. Hunter, *International Climate Negotiations: Opportunities and Challenges for the Obama Administration*, 19 DUKE ENVTL. L. & POL'Y F. 247 (2009) (describing the slow-moving, complex nature of international negotiations on "climate change").

[235] Buxbaum, *supra* note 5, at 68.

which market to enter into.[236] They would easily and with certainty be able to evaluate the regulatory limits in the United States and how those limits might affect their investment or business structure.[237]

Also, this transaction-based approach would result in well-defined, albeit slight, regulatory protections, which would allow investors to choose from a more diverse selection of investments.[238] If an investor chooses to invest in a foreign market, it will rely on that market's regulatory regime alone. The investor would not be able to rely on the protection of the U.S. regulatory regime.[239] The price of any given security would more accurately account for such factors.[240]

The benefits of this approach must be weighed against the two major problems it invokes. First, the potential plaintiffs that would have access to U.S. courts would substantially vary from current principles of American adjudication. Courts would have to avert their eyes when injured U.S. investors come before them seeking relief for harm incurred due to securities transactions they made in foreign markets.[241] Further, U.S. investors would be excluded from class actions where they did not transact on U.S. markets. Conversely, foreign investors purchasing securities on U.S. markets would have access to group litigation mechanisms in the United States, even though the defendants might not be guaranteed preclusive effect in the investor's home country.[242]

The second problem with this transaction-based approach is that it fails to address the fundamental issues involved in the current trend of cross-border securities fraud occurring in our globalizing economy.[243] The unilateral approach adds clarity to jurisdictional considerations and minimizes regulatory conflict among nations, but it increases the likelihood that wrongdoers would take advantage of the resulting isolated regulatory regimes.[244] Therefore, a higher degree of cooperation is required across borders to address the difficult problem of fraud in foreign-cubed transactions.

### *B. Transnational Regulatory Network*

A second potential approach is for TRNs such as IOSCO to facilitate the development of international standards regarding both the

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[236] *Id.* at 69.

[237] *Id.*

[238] *Id.* at 69 (citing Stephen J. Choi & Andrew T. Guzman, *The Dangerous Extraterritoriality of American Securities Law*, 17 NW. J. INT'L L. & BUS. 207, 221 (1996)).

[239] *Id.*

[240] Choi & Guzman, *supra* note 238, at 221.

[241] Buxbaum, *supra* note 5, at 69.

[242] *Id.*

[243] *Id.*

[244] *Id.*

procedural and substantive law applicable to securities fraud. The IOSCO member regulatory bodies would then be tasked with implementing these standards into their domestic regulatory regimes. This approach would benefit investors and maintain market integrity better than unilateral attempts.

The TRN-style intergovernmental cooperation allows for the facilitation of policy coordination across a given subject matter.[245] Such cooperation would be a natural phenomenon in the case of preventing the perpetuation of international securities fraud, because all market-based economies and their securities regulatory bodies have common regulatory interests in three areas: (1) preventing and deterring fraud in securities transactions; (2) providing reciprocity to protect other countries from fraud committed within their borders; and (3) preventing perpetrators from willingly paying damages for harm to their investors if the benefits received from other markets exceed those damages.[246] Securities commissioners have bonded on this common ground, under the IOSCO umbrella, and have made various successful efforts at international cooperation.[247] But, the extent of cooperation is inadequate because it does not account for the rapidly changing dynamics of securities transactions in the globalized business world. To protect investors and the integrity of international markets, the securities commissioners need to unify and harmonize the securities laws and the remedies available to the various parties as well as ensure that preclusive effect is given to judicial decisions made with regard to international securities disputes.

An additional benefit of TRNs is that they do not possess the same threat to national sovereignty and liberty as world governmental organizations, because they are "decentralized, dispersed, and involve participants that are domestically accountable."[248]

While the difficulties that arise out of the increased globalization of securities law might be well addressed by TRNs because they "expand[] our global governance capacity without centralizing policy-making power,"[249] TRNs contain several weaknesses that limit their ability to accomplish effectively their purported benefits.

First, they are influenced more by domestic constituencies—to whom the national regulators are more accountable—than by a global

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[245] ROBERT O. KEOHANE, AFTER HEGEMONY: COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY 51–52 (1984).

[246] *See* Buxbaum, *supra* note 5, at 57–58.

[247] *See* IOSCO Historical Background, *supra* note 194; *see also supra* Part III.B (discussing the impact of MMOU).

[248] Verdier, *supra* note 202, at 115.

[249] SLAUGHTER, *supra* note 225, at 167.

polity.[250] The members of the IOSCO (and any TRN) are the regulatory bodies of sovereign nations. The SEC, for instance, has no ability to apply "standards" of how each nation should develop and apply its substantive and procedural law. Regulatory bodies are merely enforcement arms of the executive and legislative branches. This proposal would be difficult to implement, especially in the United States, because securities fraud is largely enforced by private actors.[251] Such rulemaking would also be far beyond the general scope of TRNs, which are organized with a focus on fairly narrow issues of law.[252] This narrow scope prevents them from being institutionally suited to address international issues that "must involve concessions and tradeoffs across issue-areas and, in some cases, threats and other manifestations of relative power."[253]

Second, the rules negotiated and implemented by TRNs can cause the costs and benefits of such rules to fall on different states (for example, the nations with more influence can leverage smaller nations into bearing the burden of the new rules).[254] This problem arises in all intergovernmental institutions, and could work to ostracize various nations from the organization. Small nations might continue to serve as safe harbors for international fraudsters and thus negate any benefit the TRN might bring. The idea of international cooperation will only succeed to prevent investor injury and improve market integrity if a large majority of the world is on board with the similar principles of fraud prevention.

Finally, TRNs are weak on enforcement, because states act in a self-interested fashion by reneging on the standards to which they previously agreed in order to obtain short-term economic benefits at the expense of the TRN's collective long-term objectives.[255] If the member regulatory bodies are left to enforce the provisions of any standards or rules made within the TRN, they will have to face the economic and political pressures back home. In short, the TRN structure lacks accountability between the various members.

In the end, while TRNs have speed, flexibility, inclusiveness, and the capacity to dedicate sustained attention to complex regulatory issues,[256] they are "decentralized and dispersed, incapable of exercising

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[250] Verdier, *supra* note 202, at 115.

[251] *See* Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 100–11 (2007) (describing the evolution of the role of private actors in U.S. securities litigation).

[252] *See* Verdier, *supra* note 202, at 115.

[253] *Id.* at 115–16.

[254] *Id.* at 115.

[255] *Id.* at 125.

[256] SLAUGHTER, *supra* note 225, at 167.

centralized coercive authority."[257] The inherent limitations in TRNs overwhelm the IOSCO's usefulness in such a grand scheme as addressing the problem of international securities fraud occurring in foreign-cubed transactions.

### *C. Bi- and Multilateral Agreements*

A third form of cooperation that could effectuate international cooperation to address securities fraud is a network of bi- or multilateral agreements between nations with common desires to deal with the judicial difficulties in preventing international securities fraud and to provide injured investors improved access to justice. Such cooperation has occurred regionally; for example, in the E.U. Convention on Insider Trading.[258] But, as stated above when discussing the Convention, this approach most likely would end up resulting in regional agreements among nations with similar interests and cultures. While it might be a good first step that could evolve into more widespread cooperation, the purported agreement's approach would lack international effect, fail to prevent fraud occurring beyond the borders of allied nations, and fall short of finding some means to prevent (or coerce) economically self-interested and short-sighted nations. This approach also falls prey to the "safe-haven" weakness, whereby certain regions or nations could hold out from joining any agreements, providing protection to issuers and wealthy individuals that might have the propensity to perpetrate fraud.

### *D. World Organization for Securities Fraud Prevention ("WOSP")*

The final possible approach to cooperation, and the one to which this Article subscribes, is a treaty-based organization, such as the World Trade Organization ("WTO"). A treaty-based organization, as discussed in the following paragraphs, would overcome the inherent limitations of TRNs and would provide more widespread effect than bi- or multilateral agreements. Such institutions are not without their problems, but one that is properly constructed could effectuate the level of international cooperation necessary to deter and prevent fraud and to provide injured investors access to justice. Analogizing to the WTO model, the remainder of the Article will discuss how this institution might come into being, how it would be structured, and what difficulties it would face and need to address.

The WTO was a necessary byproduct of the 1947 Bretton Woods Conference, which, *inter alia*, created the General Agreement on Tariffs

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[257] *Id.* at 11.

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

and Trade ("GATT").[259] GATT was meant to address world tariff barriers and to eliminate nontariff barriers.[260] One round of negotiations on GATT (the "Uruguay Round") created the WTO to administer its negotiated agreements regarding international trade;[261] GATT and the WTO have since become the most important source of international trade law.[262]

One major difficulty that results from treaty-based organizations is the inherent political paralysis of such organizations.[263] The complex political interests of the nations often prevent the obtainment of a quorum of signatories and their subsequent ratification of the agreement or treaty.[264] In contrast, the WTO has not had any significant difficulty. Almost immediately upon its creation, the WTO reached the "tipping point" of global membership,[265] causing membership within the organization to become an economically beneficial national objective. The WTO now has 153 member states, with very few significant nations still not members.[266] Because membership in the WTO became an economically beneficial objective, the WTO members are able to implement a "packaged deal" membership regime. If a country wants unfettered trade access to the wealthiest nations, it must bring its domestic laws in compliance with *all* the WTO agreements,[267] with only two exceptions.[268] The WTO membership structure creates worldwide

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[259] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT]; World Trade Org., The GATT Years: from Havana to Marrakesh, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact4_e.htm.

[260] GATT, *supra* note 259, arts. 1, 2; *see also Doha Development Agenda: European Communities on Market Access for Non-Agricultural Products*, ¶¶ 2, 4, COM (Mar. 31, 2003), *available at* http://trade.ec.europa.eu/doclib/docs/2003/june/tradoc_113116.pdf.

[261] Agreement Establishing the World Trade Organization, art. 2, Apr. 15, 1994, 1867 U.N.T.S. 3, 33 I.L.M. 1144 (1994) [hereinafter WTO Agreement].

[262] World Trade Org., What Is the World Trade Organization?, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact1_e.htm [hereinafter, What Is the World Trade Organization?].

[263] *See* Verdier, *supra* note 202, at 119 (citing SLAUGHTER, *supra* note 225, at 167).

[264] The discussion above regarding the Hague Securities Convention illustrates this problem well. *See supra* Part III.C.1.

[265] I am indebted to Malcolm Gladwell's excellent work in behavioral economics for the catchy and useful term "the tipping point," which I not-so-cleverly gleaned from his first bestselling work. *See* MALCOLM GLADWELL, THE TIPPING POINT (2002).

[266] World Trade Org., Members and Observers, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (significant bystanders included the Russian Federation, Iran, Yemen, and the Lebanese Republic).

[267] WTO Agreement, *supra* note 261, art. 16(4).

[268] *Id.* annex 4. The initial Agreement listed four exceptions, however, two have since been terminated. Thus, the only remaining exceptions are agreements regarding trade in civil aircraft and government procurement. *See* World Trade Org., Overview: A Navigational Guide, http://www.wto.org/English/thewto_e/whatis_e/tif_e/agrm10_e.htm #dairyandbeef.

coherence in trade law by forbidding members from choosing which agreements they prefer to join, thus forcing them to subvert their own individualized interests.[269]

The purpose behind the WTO is the reason the "tipping point" was achievable. The WTO argues that its system of open trade benefits everyone because it is based on the economic theory and statistical fact that freer trade produces greater economic growth, which in turn produces increased peace among nations.[270] The economic theory of "comparative advantage" is the idea that even the poorest nations "have assets—human, industrial, natural, financial—which they can employ to produce goods and services for their domestic markets or to compete overseas."[271] The WTO's trade policies, which allow unrestricted, international flow of goods and services, "sharpen competition, motivate innovation[,] and breed success."[272]

Unlike TRNs, a major strength of a treaty-based organization like the WTO is the ability to enforce the agreements among members. To enforce the binding WTO agreements from country to country, the WTO has implemented its Dispute Settlement Understanding, which creates a process governed by a special assembly called the Dispute Settlement Body.[273] Through a system of five well-defined phases of dispute resolution (including an appellate process), one or more countries can seek sanctions, damages, and injunctions against a trading partner for its lack of adherence to WTO agreements.[274]

To effectively prevent and deter international securities fraud and to provide justice for injured investors of securities fraud, developed and developing nations must join together in a round of negotiations to create an international organization that can develop and administer a system of international law regarding securities fraud, addressing the substantive and procedural issues discussed in this Article. For explanatory purposes, this Article refers to this institution as the World Organization for Securities Fraud Prevention ("WOSP"). The WOSP will provide a dispute resolution procedure and its own substantive law regarding securities fraud in foreign-cubed transactions.

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269 *See* IMP. ADMINISTRATION, U.S. DEP'T OF COMMERCE, 2009 ANTIDUMPING MANUAL ch. 29, at 3 (2009), *available at* http://ia.ita.doc.gov/admanual/2009/Chapter%2029%20International%20Agreements.pdf.

270 What Is the World Trade Organization?, *supra* note 262.

271 World Trade Org., The Case for Open Trade, http://www.wto.org/english/thewto_e/whatis_e/tif_e/fact3_e.htm.

272 *Id.*

273 R. FOLSOM ET AL., PRINCIPLES OF INTERNATIONAL BUSINESS TRANSACTIONS, TRADE AND ECONOMIC RELATIONS (2005), *as reprinted in* INTERNATIONAL BUSINESS TRANSACTIONS 380, 380 (Ralph H. Folsom et al. eds., 9th ed. 2006).

274 *Id.* at 381–85.

First, membership in WOSP must be economically desirable. Similar to the recognition by major industrial nations joining the WTO that freer trade leads to greater economic prosperity, major financial nations would be incentivized to join WOSP due to their desire for market integrity—something that is adversely impacted by fraud in international securities transactions. Improving market integrity and decreasing harm to foreign investors will increase economic prosperity of all nations in a similar fashion to that of free trade. Further, WOSP would create a dramatic incentive for other nations to join its ranks because their own businesses would struggle to obtain international investment if they reside in a country that does not abide by the international rules that protect investors (individual and institutional) from securities fraud.

Once the "tipping point" of economic beneficence is achieved, WOSP must compel all members, new and old, to adopt *all* its agreements and resolutions as a "packaged deal." This last point is essential; without it, WOSP would become a TRN wherein parties pick and choose when to apply international standards based on their own interests. This would make WOSP ineffective in preventing securities fraud and providing access to justice for injured plaintiffs. With WOSP, as with the WTO, countries must seek to act collectively for the greater, long-term good of market integrity, as opposed to making self-interested and short-sighted decisions.

Next, while the agreements negotiated among WOSP members would seek to prevent and deter international securities fraud, such members should recognize that absolute elimination of securities fraud is impossible. Thus, injured parties must have a mechanism to seek relief. The preferred mechanism for relief should not be through group litigation, but through the injured parties' own governments (similar to the WTO process). Investors who reside in a WOSP member nation and suffer from alleged international securities fraud would submit a claim to WOSP through their own country's securities fraud representative. This would begin a dispute resolution process within WOSP between the country harboring the purported fraudulent actor and the countries in which the injured investors reside.

This regime of intergovernmental dispute resolution will assuage issues of international comity that the judiciary is forced to weigh in resolving disputes between private parties. Instead, the governments themselves are involved and can hash out their interests directly in an informed manner, rather than having the judiciary "guess" at what interests might be at play.

The WOSP dispute resolution process should have mandatory private negotiations between the governments to ensure the perpetrator is brought to justice and to provide relief to injured investors. These

private negotiations could provide quick and efficient relief to injured plaintiffs. If the result of these negotiations fails to satisfy the interests of each government involved in protecting their citizens, financial institutions, and corporate issuers, the dispute would be referred to a WOSP Tribunal. The Tribunal should be centralized in a major international city, such as The Hague, Geneva, or the like, where governments commonly house their own representatives at other international organizations.[275]

With that procedural framework, the discussion must turn to the difficult issue of what areas the WOSP agreements will encompass and how those issues will be addressed. For most plaintiffs suffering loss from securities fraud, the U.S. class action is the superior method of adjudication. This assertion is due, in part, to the presumption of reliance in federal courts.[276] That other nations require a showing that each member of the class relied on the alleged fraudulent representations acts as a barrier to harmed investors trying to access the courts to recover losses incurred. In other words, the securities law of other nations discourages effective recovery to harmed investors.[277] For this reason, a WOSP agreement should adopt the fraud-on-the-market theory and presume reliance in the intergovernmental disputes heard by WOSP tribunals. There is international opposition to this presumption, but perhaps it can gain enough support among reasonable countries that, through the "packaged deal" approach discussed above, this element will exist in all international disputes for securities fraud.

Effective international cooperation regarding securities fraud must address several other areas of concern. Another WOSP agreement would be in the form of a "Reciprocity Convention," that provides alleged fraudulent perpetrators, represented by their home governments, preclusive effect to judicial decisions of other signatory countries in the area of securities fraud.[278] This agreement would eliminate the critics' fear of multiple recoveries.

The WOSP agreements should be limited to securities fraud alleged in the case of a foreign-cubed transaction, where investors hail from multiple countries, the issuer resides in a country or countries other than those of the investors, and the issuer's stock was purchased on

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[275] An alternate scheme might be a network of tribunals scattered worldwide. But, there are inefficiencies in disputes that involve other-than-regional parties and extra costs involved in governments housing securities fraud representatives in multiple locations.

[276] *See supra* notes 11–15 and accompanying text; *see also* Morrison v. Nat'l Austl. Bank, 547 F.3d 167, 174–75 (2d Cir. 2008) (addressing appellees' argument concerning U.S. courts' recognition of the fraud-on-the-market doctrine).

[277] *See* Buxbaum, *supra* note 5, at 33.

[278] *See id.* at 32. But such a proposal may face opposition as it would require countries to approve of each other's substantive law.

another nation's stock exchange. This approach will not allow foreign investors involved in foreign-cubed transactions access to the U.S. courts' plaintiff-favorable substantive and procedural protections, but it will provide them some form of justice under appropriate circumstances.

The foreign-cubed action does not constitute a large proportion of securities fraud actions brought in U.S., or any other nation's courts. One could argue that this fact limits the necessity of the proposed large-scale international cooperation. But, in the alternative, while these actions might be small in number, they are highly complex and long in duration. Further, the small quantity of actions could aid in limiting the size of WOSP. It may not need to be a gargantuan bureaucracy like the WTO. It might then be able to operate on a lean and streamlined basis (perhaps setting an example of efficiency for other intergovernmental entities), providing investors with improved and increased access to justice while contemporaneously providing corporate issuers with quicker resolution of investor disputes and claims.

Under the WOSP system, private class actions would be done away with in the foreign-cubed context. Investors from multiple nations would band together through a collective action brought by their government against the government of the alleged fraudulent perpetrator. The government of the alleged perpetrator will then bring its citizens and corporate issuers to justice and collect the damages to be paid out to the injured investors of the plaintiff-governments. While the WOSP proposal does create inefficiencies—similar to those inherent in other treaty-based organizations such as the WTO—limiting its effect to the foreign-cubed case will limit the opposition by those such as the U.S. plaintiffs' bar.

Two final forward-looking questions remain in an analysis of WOSP feasibility. First, would the WOSP be politically feasible? That is, would nations care enough about foreign-cubed transactions to create such an organization and make the attendant sacrifices required to do so? While foreign-cubed transactions might be small in number, their impact can be global. As mentioned above, the world's development into McLuhan's "global village" has created an environment where fraud in one corner of the world can quickly spread throughout, adversely impacting the world's financial markets. Also, international Ponzi schemes, such as R. Allen Stanford's scheme based in Antigua, have a huge impact on investor confidence in the integrity of the markets.[279] Therefore, all countries should be concerned about international perpetrators of securities fraud and seek the most effective form of prevention.

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[279] *See* Clifford Krauss et al., *Texas Firm Accused of $8 Billion Fraud*, N.Y. TIMES, Feb. 18, 2009, at A1, *available at* http://www.nytimes.com/2009/02/18/business/18stanford.html.

The second forward-looking, and open, question is how the private U.S. plaintiffs' bar would respond to such a treaty. While WOSP would effectively take foreign-cubed securities litigation out of the hands of the private bar, it likely would have only an insignificant impact on their work flow. This minor impact is the result of the low volume of such cases. Further, investors and corporate issuers would need attorneys to walk them through the WOSP procedure laid out above. As is usually the case, drastic changes in the law often create more work for attorneys, despite initial fears of a decline in work flow.

This WOSP approach is not perfect, and it may not be feasible if countries do not adequately value its potential impact (and if they cannot come to agreement on certain fundamental issues). But, just as the WTO was founded on the principle that free trade is better for everyone, WOSP founders could bond over the principle that effective international fraud prevention and improved access to justice for international investors is better for all concerned.

# RESTORING THE LOST VIRTUE OF PRUDENTIAL JUSTICE TO THE LIFE DEBATE

*Lynne Marie Kohm*[*]

POLITICS FOR THE GREATEST GOOD: THE CASE FOR PRUDENCE IN THE PUBLIC SQUARE. By Clarke D. Forsythe. Downer's Grove, IL: InterVarsity Press. 2009. Pp. 319. $23.00.

Can a book about *prudence* survive in contemporary publication culture? This one will most definitely survive—and may indeed thrive if readers can handle constructive criticism that leads to greater good.

Lamenting the loss of public virtue and the sad reality that political action and involvement has grown frustrating for the evangelical Christian community, Clarke Forsythe gently, empathetically, and thoughtfully reminds the prolife public that we are no more virtuous than our progressive proabortion counterparts when it comes to judicial activism, clarifying the need for a wiser solution. The mantra of "overturn *Roe v. Wade*"[1] reveals at once underlying disdain and a desire for judicial activism. Though Forsythe himself echoes the same incantation,[2] he takes a giant step in offering the remedy in his new book *Politics for the Greatest Good: The Case for Prudence in the Public Square.*

According to Forsythe, the cure is prudence, a most cherished virtue almost completely absent in the politics of the twenty-first century.[3] The politics of prudence are reasoned, strategic, challenging, and measured. They are the essence of practical reasonableness with moral purpose. In a culture gone adrift of virtue, Clarke Forsythe offers a refreshing

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1 410 U.S. 113, 164 (1973) (ruling that abortion is a fundamental constitutional right). A brief internet search reveals no less than 1,180 results for "overturn *Roe v. Wade*," demonstrating the dominating volume of this mantra, even by Ms. Roe herself, Norma McCorvey. *See* Cody Sain, Op-Ed., *Overturning* Roe v. Wade*: As Litigation to Overturn Case Continues, Those Hurt by Abortion Must Speak Out*, BATTALION ONLINE, Mar. 9, 2004, http://media.www.thebatt.com/media/storage/paper657/news/2004/03/09/Opinion/Overturning.Roe.V.Wade-629439.shtml.

2 CLARKE D. FORSYTHE, POLITICS FOR THE GREATEST GOOD: THE CASE FOR PRUDENCE IN THE PUBLIC SQUARE 182–83 (2009).

3 *See id.* at 16–21. At the outset, Forsythe's book will present the reader with a primer on the classical tradition and virtue. In addition, a refresher in every chapter offers the reader a brief review of the cardinal virtues of justice, courage, and temperance, with prudence foremost and the focus of Forsythe's view of the horizon. This type of jurisprudence is critical for the Christian lawyer to maintain, making *Politics for the Greatest Good* a necessary addition to every attorney's must-read list.

challenge to the prolife community in America: take a deep breath; assess, discern, calculate, foresee evil; exercise sagacity; make right decisions, execute, and implement them well.

The reader's first, almost unconscious question will be a nagging reminder of our personal and collective loss of virtue: What is *prudence*? Who uses that word today? This is precisely Forsythe's point—we have lost the virtue we most need. Prudence implies caution in deliberation and practical wisdom to accomplish valuable purposes in the most suitable means, for the utmost common good. Prudence has been absent and must be reclaimed—in both word and deed.

These harsh realities regarding a lack of prudence take on new light in the wake of the murder of well-known late-term abortion provider George Tiller.[4] His killer is in no way representative of the prolife community, as the heinous murder was denounced over and over by prolife organizers.[5] But the killer's lack of understanding of true justice[6] is a reminder of the frustrations lurking in the shadows of prolife America. Prolife citizens vote, prolife citizens work for abortion regulation, prolife citizens sidewalk counsel, and prolife citizens pray. But are we effective? Are we wise? Are we strategic?

*Politics for the Greatest Good* suggests how the prolife community can reconsider a strategy for the greatest good with a solid foundation cemented in the lost art of prudence. According to Forsythe, recovering prudence as a pivotal virtue of the movement is absolutely necessary.[7] Unlike brash, harsh, hateful, and potentially dangerous politics of current events, Forsythe proffers something completely new—the use of

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[4] Nicholas Riccardi, *Doctor At Focus of Abortion Debate Shot Dead in Church*, L.A. TIMES, June 1, 2009, at A1 ("One of the few American physicians who performed late-term abortions, he was targeted by violent extremists as well as principled opponents.").

[5] *See, e.g.*, Posting of Kathryn Jean Lopez to The Corner, re: The Wrong Release, http://corner.nationalreview.com/post/?q=NjIzYmQ0ZGY3NTUyNGRjOTI1ZTliOWUyZDc1ZTVlNjI= (May 31, 2009, 15:40 EST) ("The National Right to Life Committee does the right thing."); Michelle Malkin, Notes on the Murder of George Tiller, http://michellemalkin.com/2009/06/01/notes-on-the-murder-of-george-tiller/ (June 1, 2009, 00:48 PST) ("Every mainstream prolife organization has unequivocally condemned the killing. I repeat: Every mainstream prolife organization has unequivocally condemned the killing. Princeton University professor Robert P. George is right about this: 'Whoever murdered George Tiller has done a gravely wicked thing. The evil of this action is in no way diminished by the blood George Tiller had on his own hands. No private individual had the right to execute judgment against him. We are a nation of laws. Lawless violence breeds only more lawless violence.'" (quoting Posting of Robert P. George to The Corner, Gravely Wicked, http://corner.nationalreview.com/post/?q=NDM5NGYyYWMxZDY3NWFmYjhjZmJiNTI2YmRjZmRlYWE= (May 31, 2009, 15:42 PST))).

[6] *See* Associated Press, *Suspect in Doctor's Death Warns of More Violence*, WASH. POST, June 8, 2009, at A12, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/06/07/AR2009060702565.html (indicating that the accused suspect felt the actions were justified by late term abortions).

[7] FORSYTHE, *supra* note 2, at 19.

prudence in politics. The radical left and the radical right may have defined the terms of the debate in the most critical issues of our times, but Forsythe claims that they have not been effective.[8] This book gently throws down the gauntlet to the prolife community, asking it to employ wisdom, speak with discretion, and work toward progress for the sake of the common good—both present and future.

Forsythe makes this challenge all the more salient by whetting the prolife hunger with the habit of prudence: "To the extent we desire to fulfill our greatest potential, we will consistently pursue prudence."[9] The necessity of practical wisdom and pragmatic reasonableness brings the reader to the intersection of the principled approach and the pragmatic approach and pulls the best of each world into one strategy—prudence. The objective of *Politics for the Greatest Good* is to encourage the use of prudential reasoning "to reflect the greatest measure of justice possible in a world of constraints."[10]

The art of prudence dictates that right action has four key elements: deliberation, judgment, decision, execution. "Prudence is concerned with right action and requires deliberation, judgment, decision and execution."[11] Prudence within politics is indeed a refreshingly novel idea.

Clarke Forsythe, senior counsel for Americans United for Life ("AUL"), the litigation arm of the prolife movement,[12] embodies the picture of prudence and writes from an ethos that is respectful, calm, wise, and most importantly, prudent. He not only walks what he talks, but he is what he writes. Forsythe understands the politically frustrated circumstance of the average prolife citizen and has written this book indeed desiring to reach "the greatest good possible."[13] In his words, he announces that he has written this book "to address the nagging concern that citizens and public officials sometimes have: *whether it's moral or effective to achieve a partial good in politics and public policy when the ideal is not possible.*"[14] Out of his ethos and articulate work Forsythe begins to teach how to choose with prudence in the context of public policy.

Even apolitical, disillusioned attorneys can find refreshment from Forsythe's explanations of why the law will always fall short of expectations, hopes, and dreams. By necessity, law exists in a fallen world. The very good it seeks to create is because of the lack of perfection

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8 *See id.* at 255.

9 *Id.* at 23.

10 *Id.* at 21.

11 *Id.* at 16–17.

12 Americans United for Life, Clark D. Forsythe, http://www.aul.org/Clarke_D_Forsythe; Americans United for Life, About AUL, http://www.aul.org/About_AUL.

13 *Id.* at 13.

14 *Id.* at 11.

within which it must necessarily exist—within a fallen world of imperfect human nature. Nearly every law student sets out on the path of the legal profession with idealism, only to be unsatisfied as a lawyer by what the law can provide for damaged clients. An understanding of the need and methods for implementing prudence from the outset, however, sets a lawyer up for a measure of success and fulfillment based on realistic objectives and practical wisdom. *Politics for the Greatest Good* provides a rigorous salve to prolife jurisprudence to temper expectations, soothe striving, and calm imperfect results with peace and a sense of moral attainment for what good is possible. Through a brief review of the abortion movement and its prolife response, Forsythe reveals a history of dilemma—and a lack of prudence in the public square. This book is a welcome to the principled crowd and the pragmatist set to find the middle ground to reach the greatest good.

Forsythe calls what may be commonly known as the principled approach[15] the "perfectionist" view.[16] He says that a perfectionist view, though attempting to reach the highest good, falls short of making the most good possible.[17] Seeking only the highest good is a paradox in that in striving for the perfect, it misses what could be very good—this is the "paradox [of] moral perfectionism."[18] Rather than the all-or-nothing approach of the principled camp (which Forsythe argues is "neither prudent nor effective"), prudence supports the "wisdom of an *all-or-something* approach."[19] Forsythe then offers a principled argument to the principled approach through the work of scholar Graham Walker, who argues that the principled approach requires the pursuit of the greatest good, even if the perfect is unattainable.[20]

The other end of the spectrum is occupied by what may be commonly referred to as the pragmatic approach.[21] Forsythe, however,

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[15] *See generally*, Lori A. Ringhand, *In Defense of Ideology: A Principled Approach to the Supreme Court Confirmation Process*, 18 WM. & MARY BILL RTS. J. (forthcoming 2009), *available at* http://ssrn.com/abstract=1361102 (detailing why principles of ideology ought to direct in the confirmation process).

[16] FORSYTHE, *supra* note 2, at 19–20.

[17] *Id.*

[18] *Id.* at 20.

[19] *Id.*

[20] *Id.* at 28 (quoting Graham Walker, *Virtue and the Constitution: Augustinian Theology and the Frame of American Common Sense*, *in* VITAL REMNANTS: AMERICA'S FOUNDING AND THE WESTERN TRADITION 99, 135–37 (Gary L. Gregg II ed., 1999)).

[21] The debate between the two camps might be a microcosm of the conflict between the positive law (law made by judicial decree), and the natural law (law discernible by reason). Some have referred to this divergence as the letter of the law versus the spirit of the law. *See* Anne M. Cohler, *Introduction* to MONTESQUIEU, THE SPIRIT OF THE LAWS, at xi, xxi (Anne M. Cohler et al. eds. & trans., Cambridge Univ. Press 1989) (1748); MONTESQUIEU, *supra*, at 5–9. A principled position from which to advance or argue is the antithesis of an opportunistic tendency to use any argument at hand that is effective and

suggests that pragmatism falls short in that it is willing to compromise, possibly even morally, to obtain the desired end. He argues that "prudence is not pragmatism [because] prudence requires [a] moral purpose. Prudence aims to achieve the greatest good possible in the concrete circumstances."[22]

This struggle is similar to the dilemma faced by lawyers and judges who are trying to achieve what is the best result for a child caught in a legal conflict. No one in the child's life can really accomplish what is perfect for him or her when that child's parents separate and divorce and ask a judge to discern how they should best care for, provide for, and protect their child. Because a judge cannot accomplish that perfect world of a happy home life with two married parents, the system looks for what is next best—or what has come to be the legal standard for every child, the best interests of the child ("BIC").[23] You might say that the BIC standard is prudent justice for a child. It is not perfect (moral perfectionism) and it is not merely pragmatic, because the care of a child requires a moral purpose.

In his explanation, Forsythe intimates that America has become a utilitarian society—more concerned with what is useful rather than what is right—and that reality is played out in the life debate in the struggle between the principled and the pragmatic approach.[24] "The theme of this book is the recovery of a rich understanding of prudence, as

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tends to be very common in politics, for example, arguing one way one day, and another later, defended by casuistry, or by saying the cases are different. For practical purposes, in the legal context facts of cases do always differ, allowing case law to be at odds with a principled approach, seemingly defeating the original intent of the law, being the essence of judicial interpretation. Codified law poses a different problem of interpretation and adaptation of definite principles without losing the point; here applying the letter of the law may on occasion seem to undermine the principled approach. Conversely, when one obeys the spirit of the law but not the letter, he is doing what the authors of the law intended, though not adhering to the literal wording. Intentionally following the letter of the law but not the spirit may be accomplished through exploiting technicalities, loopholes, and ambiguous language, thereby comprising principle. Classical natural law theorists may refer to this as positivism or the jurisprudence of materialism, while the opposite, principled position may not yield desired results. *See generally* HEINRICH A. ROMMEN, THE NATURAL LAW 109–38 (Thomas R. Hanley trans., Liberty Fund 1998) (1936) (describing the background of positivism, its prominence in totalitarian regimes, and the reaffirmation of natural law).

[22] FORSYTHE, *supra* note 2, at 20.

[23] *See generally* Lynne Marie Kohm, *Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence*, 10 J.L. & FAM. STUD. 337, 337–40, 370–76 (2008) (explaining the flaws of the BIC standard, yet noting that it alone remains the standard because nothing better has been found to date, other than an intact marriage).

[24] FORSYTHE, *supra* note 2, at 24.

it has been understood by philosophers and statesmen, for its application by policymakers and citizens to contemporary public policy."[25]

A couple of keys are provided by Forsythe for prolife evangelicals: temper expectations with prudential wisdom and balance objectives with an understanding that politics in a fallen world can really only be a "'provisional palliative.'"[26] Changing the law is a good objective, but it will always fall short of perfection. Changing the hearts and minds of men and, particularly, women may prove to be much more effective in the long run—both politically and eternally—and Forsythe holds to this premise, encouraging the community to never forget that prudence is thoughtful but also requires action and, most importantly, excellent implementation of any good objective.

With prudence comes hope. Forsythe applies the prudential ointment to frustrated Christians. "'You must never confuse faith that you will prevail in the end—which you can never afford to lose—with the discipline to confront the most brutal facts of your current reality, whatever they might be.'"[27] "A prudential analysis should yield realistic hopes instead of merely naïve optimism."[28] Do not give up; take a breath; choose prudentially; be encouraged.

Forsythe uses the most classic ideas and authors, from Aristotle's concepts of the human soul,[29] to Augustine's *City of God*,[30] (and "his realism and understanding of God also limits what the [S]tate can and should achieve in that fallen world"[31]) to Aquinas's *Summa Theologica*,[32] all of which are must-reads for Christians called to the law or public policy as servants and stewards of the common good. Also using contemporary favorites like J. Budziszewski's *Written on the Heart*, Forsythe draws in the reader.[33] He then uses historical illustrations that

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[25] *Id.* at 18. Forsythe defines political prudence and notes that it "balances zeal with knowledge." *Id.* at 17.

[26] *Id.* at 28 (quoting Walker, *supra* note 20, at 137).

[27] *Id.* at 37 (quoting JIM COLLINS, GOOD TO GREAT 85 (2001)).

[28] *Id.*

[29] *See id.* at 24–26.

[30] *Id.* at 27–28 (noting Augustine's political realism and holding it up for us to visualize in our times (citing Etienne Gilson, *Foreword* to ST. AUGUSTINE, THE CITY OF GOD 13, 19 (Vernon J. Bourke ed., Gerald G. Walsh et al. trans., 1958))).

[31] *See id.* at 28 (citing RUFUS BLACK, CHRISTIAN MORAL REALISM 8 (2000)). Forsythe's work is rich in classical source material.

[32] *Id.* at 29 (citing ST. THOMAS AQUINAS, SUMMA THEOLOGICA (W.D. Hughes ed. & trans., 1969)).

[33] *Id.* at 27 (citing J. BUDZISZEWSKI, WRITTEN ON THE HEART: THE CASE FOR NATURAL LAW 22–23 (1997)). I was also reminded of *Kingdoms in Conflict*, a 1987 work by Charles Colson (with Ellen Santilli Vaughn). If you have enjoyed and grown from any of these works, you'll appreciate Forsythe's work here. He uses these and many other great works to show that a realistic view of human nature is essential, offering the absolute

detail prudent leadership, prudent politics, prudent activism, and even prudent lawyering, as "prudence in politics aims not at the perfect good but at the greatest good possible in the real world."[34] If this sounds like Forsythe is advocating incrementalism, it seems clear that indeed he is. Forsythe reminds that "[t]he chief end of political prudence is the common good,"[35] not the perfect, common good. For voters, wisdom is also offered:

> We cannot hope for the candidate who perfectly represents us. The choice often boils down to the candidate, among those available, who will most closely represent us or a choice between those pursuing injustice and those with whom we might differ regarding truly prudential questions.
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> . . . .
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> Prudence starts with identifying the good, but quickly moves to identifying the greatest good possible in the concrete situation. Cooperation, in turn, is concerned with separating good from evil when working with others—and politics and public policy inevitably involve working with others.[36]

At times Forsythe's support for "cooperation" gives the sense of splitting hairs over what it means to be involved with doing evil to accomplish something of merit. It seems that he may be advocating the very thing from which he seeks to be separated. In this context, though, he offers concrete examples and strategies to place boundaries around an evil, to limit it as much as possible.[37]

Of great importance is Forsythe's comprehension of the absolute necessity of prudential rhetoric. Effectively done, rhetoric ought to move a listener to prudential action.[38] Why is it that most Americans understand the needs for limits on abortion,[39] yet prolife rhetoric seems

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necessity of understanding the need for a realistic approach to problems in a fallen, imperfect, and fallible world.

[34] FORSYTHE, *supra* note 2, at 38.

[35] *Id.* at 40 & n.104.

[36] *Id.* at 45.

[37] This strategy was to me reminiscent of new lawyering strategies to preserve families as much as possible in divorce litigation. *See, e.g.*, Pauline H. Tesler, *Collaborative Family Law*, 4 PEPP. DISP. RESOL. L.J. 317, 317–25 (2004) (describing the success of collaborative law as an alternative to divorce litigation).

[38] FORSYTHE, *supra* note 2, at 50–52.

[39] Polling data consistently show that 70–80% of Americans support at least some limitations on abortion. Only 15–20% of Americans believe abortion should be legal *at any time of pregnancy and for any reason*. PollingReport.com, Abortion and Birth Control, http://www.pollingreport.com/abortion.htm (last visited Nov. 23, 2009) (providing a collection of polling data from a variety of sources from the past decade). A recent poll by the Pew Research Center for the People & the Press, conducted March 31 through April 21, 2009, found that only 18% thought abortion should be legal in "all cases," but did not probe the stage of pregnancy. PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, PUBLIC TAKES

to be demonized all too often? Here in rhetoric, emotion finds its place, and that emotional rhetorical appeal must be positive, affirming, warm, and loving. It is particularly important for prolife activists to understand how to confront the public perception that abortion is a necessary evil. Forsythe's instruction in this is very well done, and he challenges the young conservative with this type of prudence.[40] The book is neither esoteric nor ivory tower. Rather it is realistic, sensible, and morally appropriate while challenging the reader to act—and to act wisely and well and teaching how to do so. Forsythe brings prudence (an otherwise quite prudish word) into the twenty-first century—to the politics of the right, to a culture quite lacking in it, yet hungry for "the perfected ability to make right decisions."[41] Does the reader still need encouragement to follow the prudential path? Forsythe offers this: "How well one thinks through the process of deliberation, judgment and decision will likely determine how steadfast one is in the decision made."[42]

History lovers will thoroughly enjoy Forsythe's fascinating rendition of political prudence in the American founding. From John Adams's angst in preserving order to Thomas Jefferson's sometimes misplaced optimism in liberty, Forsythe traces how prudence shaped the actions of each end of the spectrum to come together as new Americans.[43] Forsythe proffers that prudential jurisprudence finds its embodiment in the Declaration of Independence, from its fact based reality to its flowery rhetorical appeal,[44] and all as a direct reflection of the Founders' understanding of Scripture and Classical thought.[45]

Before laying out the trends in abortion case law and the public discourse and state and federal legislation of the past forty years of abortion elitism, Forsythe uses the colorful and vivid illustrations of Wilberforce and Lincoln—the best examples of political prudence in turbulent times in the context of another of the great evils of our time, slavery. Forsythe illustrates political prudence in steadfast judgment with Wilberforce in England in his fifty year trek to end slavery and with Lincoln's difficult decisions, strategies, and eventual path to complete

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CONSERVATIVE TURN ON GUN CONTROL, ABORTION (2009), *available at* http://pewresearch.org/pubs/1212/abortion-gun-control-opinion-gender-gap. Indeed, support for legalized abortion in "all or most cases" seems to be trending downward, as an 8% drop in support from August 2008 to August 2009 indicates. *Id.*

[40] FORSYTHE, *supra* note 2, at 52–54.

[41] *Id.* at 26 & n.19 (quoting JOSEF PIEPER, THE FOUR CARDINAL VIRTUES 6 (Univ. of Notre Dame Press 1966) (1954)).

[42] *Id.* at 32.

[43] *Id.* at 72, 75–76.

[44] *See id.* at 57–58.

[45] Forsythe uses some important Scriptural examples that serve independently as Bible studies of encouragement for wise action, from Nehemiah to Romans Chapter 13. *See id.* at 59–63.

emancipation of slaves. *Politics for the Greatest Good* presents a solid legal analysis of the life debate and dilemma through the lens of the abolition movement. Without ever likening slavery to abortion, the reader implicitly understands the amazing similarities between the two movements as Forsythe gently and painstakingly unfolds the frustrations felt and dilemmas faced by two of freedom's most loved and effective champions: England's William Wilberforce and America's Abraham Lincoln.

William Wilberforce, a man of little stature and (initially) less faith, yet possessing effective oratory skills, constantly and consciously "avoided permanent compromise that would prevent future progress."[46] Wilberforce understood that what was immediately impossible might be achievable over time. Strategies detailed by Forsythe of Wilberforce's work are very instructive to public legislation today, providing a script for how to favor partial prohibitions when immediate abolition is not possible. Of particular insight for public policy was Forsythe's illustration of how admiralty related to abolition. An accomplice in the effort to end the slave trade, James Stephen, admiralty lawyer and brother-in-law to Wilberforce, proved in open court that abolition would actually help Britain's war effort against other European powers—almost single-handedly ending the British slave trade to foreigners.[47] "'[C]ompromise on principle was unthinkable, but compromise on tactics was never a problem.'"[48] This sort of state diplomacy is instructive to abortion public policy.[49]

Having laid the foundation for prudence with Wilberforce, Forsythe then develops the western public policy landscape fully with illustrations from Abraham Lincoln. In this one man, America found practical wisdom and moral virtue inextricably intertwined.[50] Forsythe uses and cites strategy and details set forth in Doris Kerns Goodwin's *Team of Rivals*, noting Lincoln's mastery of his emotions and phenomenal understanding

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[46] *Id.* at 43.

[47] *Id.* at 101–02 (citing ROGER ANSTEY, THE ATLANTIC SLAVE TRADE AND BRITISH ABOLITION 1760–1810, at 341–42, 357, 400–01 (1975)).

[48] *Id.* at 109 (quoting J. Douglas Holladay, *Foreword* to JOHN POLLOCK, WILLIAM WILBERFORCE: A MAN WHO CHANGED HIS TIMES 11 (1996)). Forsythe adds that "[o]ne weakness of movement activists is a tendency to confuse every compromise of tactics with a compromise of principle. By equating a compromise of tactics (tactical flexibility) as a compromise of principle, activists can undermine their own strategy and strip themselves of energy." *Id.*

[49] Applying Stephen's strategy to abortion policy could prove to be equally pragmatic. For example, not enough has been made of the crystal clear connection between economic gain to abortion providers and progressive abortion policy, a correlation deserving of much strategic consideration.

[50] *See id.* at 26, 111–16.

of magnanimity and prudence.[51] Lincoln is the classic example of how many factors and forces beyond a leader's complete control can be shaped by prudent decisions and implementation.[52] Forsythe shows how Lincoln used three steps to judgment: "'[1] to know what is good or right, [2] to know how much of that good is attainable, and [3] to act to secure that much good but not to abandon the attainable good by grasping for more.'"[53] Lincoln represents the greatest lesson in conscious striving for self-restraint to accomplish greater common good. His personal character influenced public policy and introduced the notion of political morality, revealing the complex intertwining of public policy with personal character.

Like Wilberforce, Lincoln established fences around slavery that led to the "rebellion" (rather than the "secession"—illustrative of Lincoln's perception in shaping public morality with political rhetoric).[54] For a perfect example, one need only look to Lincoln's summation of his party's policy:

> The Republican Party . . . look[s] upon [slavery] as being a moral, social and political wrong; and while they contemplate it as such, they nevertheless have due regard for its actual existence among us, and the difficulties of getting rid of it in any satisfactory way . . . . Yet having a due regard for these, they desire a policy in regard to it that looks to its not creating any more danger. They insist that it should as far as may be, *be treated* as a wrong, and one of the methods of treating it as a wrong is to *make provision that it shall grow no larger*.[55]

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[51] *Id.* at 121–22 (citing DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN, at xvi–xvii (2005)).

[52] *See, e.g.*, GOODWIN, *supra* note 51, at 107. The classic strategic political feat was that Lincoln positioned himself to be everyone's second choice, knowing he was no one's first choice! *Id.* at 211–12 ("Lincoln's gradually evolving political strategy began with an awareness that while each of his three rivals had first claim on a substantial number of delegates, if he could position himself as the second choice of those who supported each of the others, he might pick up votes if one or another of the top candidates faltered. As a dark horse, he knew it was important not to reveal his intentions too early, so as to minimize the possibility of opponents mobilizing against him.").

[53] FORSYTHE, *supra* note 2, at 112 (quoting HARRY V. JAFFA, CRISIS OF THE HOUSE DIVIDED: AN INTERPRETATION OF THE ISSUES IN THE LINCOLN-DOUGLAS DEBATES 371 (Univ. of Chicago Press 1982) (1959)). "Understanding Lincoln's prudence requires a balanced inquiry into his judgment of proper ends and appropriate means in the context of the particular opportunities and obstacles he faced." *Id.*

[54] *Id.* at 123. Additionally, for those history buffs still irked by Lincoln's suspension of *habeas corpus* eight times during the Civil War, Forsythe sets out the prudence of these acts in a well-reasoned and necessary-for-the-common-good context. *Id.* at 130–34.

[55] *Id.* at 119 (quoting Abraham Lincoln, Seventh Lincoln-Douglas Debate, Alton, Illinois (Oct. 15, 1858), *in* ABRAHAM LINCOLN: SPEECHES AND WRITINGS 1832–1858, at 774, 807–08 (Literary Classics of the United States, Inc. comp., 1989)).

Forsythe makes brilliant arguments for the comparisons between the life dilemma and the abolition dilemma, offering details of how the tri-branch government forces at work to favor slavery prior to Lincoln are very similar to the tri-branch forces at work to favor abortion today—against the majority will of the people.[56]

This discussion aids in the understanding of the outright battle over the life plank in the Republican platform. The life plank is so controversial because it embodies the virtue of a republic—as the essence of republicanism is the dissemination of virtue among the people. Republicanism, therefore, balances the danger of democracy and majority rule. "'Virtue is the spirit of a republic; for where all power is derived from the people, all depends on their good disposition.'"[57] That is indeed a scary thought. The notion that liberty is preserved in republican virtue may be at the heart of the current politically correct demagoguery of the Republican Party and even the Republican Party's unpopularity, as well as the struggle within the party over the life plank. American pop-cultural elitist hatred of religion may be the result of the demise of virtue—a race to squander liberty on the existential without constraint.

What does prudence mean, though, for the life debate today? Forsythe seems to say that prudence requires the overturning of *Roe*. His focus on *Roe*, however, may be his only flaw. While detailing attempts to overturn *Roe* and stating emphatically that the case must be overturned, he essentially sets forth why *Roe* will never be removed.[58] My sincerest criticism of *Politics for the Greatest Good* is the error of thinking that *Roe* is the abortion case that must be overturned. Rather, because it established new parameters of constitutional understanding completely different from *Roe*, *Planned Parenthood of Southeastern Pennsylvania v. Casey*[59] is clearly the landmark case on abortion today. It reaffirmed *Roe* but set new parameters—or as Forsythe would say, it "erect[ed] legal fences against a social evil when they could not prohibit it."[60] *Casey* is much more important than *Roe* now because it changed the constitutional protections from a medical trimester framework to a subjective undue burden standard.[61] Should *Roe* be abolished, *Casey*

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[56] *Cf. id.* at 120 (demonstrating Lincoln's adversity with the three branches of government).

[57] *Id.* at 71 (quoting MICHAEL NOVAK, ON TWO WINGS: HUMBLE FAITH AND COMMON SENSE AT THE AMERICAN FOUNDING 38 (2002)).

[58] *See id.* at 182–88.

[59] 505 U.S. 833 (1992).

[60] FORSYTHE, *supra* note 2, at 147; *see Casey*, 505 U.S. at 845–46; *Id.* at 878–79 (O'Connor, Kennedy, and Souter, JJ., plurality opinion).

[61] *Casey*, 505 U.S. at 872–79 (O'Connor, Kennedy, and Souter, JJ., plurality opinion).

would still remain—along with its undue burden standard controls. Forsythe sees *Casey* as "another force," yet it is actually the peak of the abortion mountain—the height of unfettered choice and the beginning of the descent toward state regulation fencing in abortion.[62]

Forsythe unfolds how protections for the unborn have been developed and grown dramatically since *Roe*. Because the *Roe* opinion was against previous state regulation,[63] states have worked diligently to replace their lost abilities in other ways—particularly by creating state regulation still possible in the wake of *Roe*[64]—leading Forsythe to pronounce that "[w]ith *Roe*, the Supreme Court incurred a self-inflicted wound."[65] Prior to *Roe*, states' laws had a long and strong tradition of protecting the unborn child as a human being under the law, while now the High Court has taken the blame for creating a constitutional right not previously recognized by a majority of states.[66] This is precisely why *Casey* is now the law on abortion and why it has worsened the decision of *Roe* due to the new standard based toward personal existentialism of the "undue burden" standard rather than trimester biological facts of prenatal development. This is why *Casey* controls rather than *Roe*.[67] While characterizing *Casey* as reaffirming *Roe*,[68] Forsythe recognizes that *Casey* abruptly shifted the rationale for the abortion right from history to sociology and notes that "[t]his 'reliance interests' rationale remains the one unifying rationale among the justices for continuing their national power over abortion."[69] Forsythe then suggests that the Court returned the standard of legislative review to strict scrutiny in the 2000 *Stenberg v. Carhart* decision;[70] yet, it seems clear that *Gonzales v. Carhart* is the more important case of the two at this point because of its use of *Casey* jurisprudence, simultaneously upholding the undue burden standard and narrowly upholding the Congressional ban on partial birth

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[62] *See* Lynne Marie Kohm & Colleen M. Holmes, *The Rise and Fall of Women's Rights: Have Sexuality and Reproductive Freedom Forfeited Victory?* 6 WM. & MARY J. WOMEN & L. 381, 400–402 (2000).

[63] *See* Roe v. Wade, 410 U.S. 113, 171–72 (1973) (Rehnquist, J., dissenting).

[64] *See* FORSYTHE, *supra* note 2, at 184. "Since *Roe*, approximately thirty-six states have passed legislation to treat the killing of the unborn child (outside the context of abortion) as a homicide, and twenty-four of these thirty-six states treat the killing as a homicide *from conception*." *Id.* at 183.

[65] *Id.* at 183.

[66] *Id.*

[67] Other legal scholars have agreed with this position. *See, e.g.*, Craig A. Stern, *The Common Law and the Religious Foundations of the Rule of Law Before* Casey, 38 U.S.F. L. REV. 499, 500, 518–22 (2004) (implicitly finding *Casey* to be the law of the land on abortion rights).

[68] FORSYTHE, *supra* note 2, at 202.

[69] *Id.* at 193.

[70] *Id.* at 200; *see* Stenberg v. Carhart, 530 U.S. 914 (2000).

abortion.[71] Forsythe believes that some passages suggest that the "new five-justice majority could uphold virtually any regulations that make medical sense."[72] Indeed, Forsythe makes the case for *Casey* by detailing what "imperfect legislation" has achieved over the past thirty years and mostly in the wake of the *Casey* decision.[73] *Casey* effectively put fences around *Roe* that have limited abortion.

One can disagree that *Roe* is the key, yet nonetheless heed Forsythe's challenges. He offers that the key to the politics of prudence is to clearly focus on women's health. The Court has effectively endangered women's health by never requiring informed consent regarding well-documented medical risks of abortion.[74] These risks include premature delivery of future children, higher risk of placenta previa in future pregnancies, suicide, substance and alcohol abuse, and increase in breast cancer due to "the loss of the protective effect of a first full-term pregnancy."[75] He explains how to think about state abortion prohibitions, regulations, the priorities to be placed on each, which is more effective, and which will be more palatable for enforcement by the Court and adds insight on how to build "a good factual record for judicial and public education."[76] Forsythe further charges that because the Court has never required clinic safety, it has essentially empowered the abortion industry to unilaterally decide abortion standards, profiting from this and the ability to collect attorney's fees each time they win in litigation.[77]

These observations and suggestions are Forsythe's most important contribution to the abortion debate. Prudence offers a strategy to "hollow out" *Roe*, as he puts it.[78] He details exactly what is needed to do so and even suggests what the next test case on abortion must do, noting the importance of the five best medically documented long-term risks from abortion.[79] "The Court has repeatedly issued pronouncements that the people in the states have compelling interests in regulating abortion and

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[71] Gonzales v. Carhart, 127 S. Ct. 1610, 1626–27 (2007). The Supreme Court's decision upheld Congress's ban by holding that it did not impose an undue burden on the due process right of women to obtain an abortion, "under precedents we here assume to be controlling." *Id.* at 1627, 1635. *Gonzales* distinguished (but did not reverse) *Stenberg*. *Id.* at 1629–31.

[72] FORSYTHE, *supra* note 2, at 201.

[73] *Id.* at 175–79.

[74] *Id.* at 184.

[75] *Id.* at 203.

[76] *Id.* at 209–11. Forsythe's prudent strategy should be a check on the prolife mantra to "overturn *Roe*."

[77] *See id.* at 184.

[78] *See id.* at 198–203.

[79] *Id.* at 208.

then issued rules that continually stymie any regulations."[80] Does this imply sabotage, judicial schizophrenia, or simply the inherent problem embodied in the "undue burden" standard? The result is that Forsythe finds himself making the *Casey* argument. "As a practical matter, due to legislative changes in the states since 1973, if the Court overturned *Roe* today, abortion would be legal in at least forty-three states tomorrow."[81] This is exactly why overturning *Roe* is not the answer. Rather, prudentially and incrementally working to make abortion next to impossible through regulations allowed under *Casey* is politics for the greatest good.

Stronger commentary on *Roe* and *Casey* would focus on the peculiarity of such a High Court to so strongly adhere to what it believes to be fact: that abortion is the central way for women "to control their reproductive lives."[82] Unfettered personal autonomy as set forth in *Casey*'s "mystery passage"[83] has paved the way for regulating biotechnology to harm human life and human good with unfettered existentialism. Forsythe details how American law has deeply respected the life of the embryo prior to *Roe*, making an excellent case for *Roe* being the beginning of the end of legal respect for life. The net result is that the effect of *Roe* has been so obviously dangerous that in its July 1974 session the United States Congress even deemed it necessary to enact a "moratorium on any federal funding for embryo research."[84] Congress saw then what *Roe* could bring and legislated against it then accordingly. To be fair, Forsythe sets out critiques of prudential legislation which achieve a "lesser evil"[85] rather than the complete abolition of abortion,[86] and he details some formidable starting points to actively protect human goods immediately.[87] Nonetheless, chapter six is completely devoted to the successful overturning of *Roe*.

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[80] *Id.* at 185. This is a tangential call to the members of the Court to consider future decisions in this light. Forsythe cites twenty-eight contradictory decisions over thirty-plus years. *Id.* at 186.

[81] *Id.*

[82] *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 856 (1992).

[83] "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id.* at 851.

[84] FORSYTHE, *supra* note 2, at 229 (citing National Research Act, Pub. L. No. 93-348, 88 Stat. 342 (1974)).

[85] *See id.* at 73, 172 (quoting THE FEDERALIST NO. 41, at 200 (James Madison) (Oxford Univ. Press, 2008)).

[86] *See id.* at 231–33.

[87] *Id.* at 233–38 (setting forth legislative protection strategies that can be sought without delay).

Yet whether there is disagreement with Forsythe over *Roe* or *Casey* or a concern for compromise with erecting regulatory fences around abortion that intrinsically uphold it as a right to be regulated or the principled crowd disdaining the pragmatic set, the fact remains that all sides of the conflict want the same exact outcome—ideally no abortion. One says all or nothing; the other says get a little at a time to achieve the whole. A fable of Aesop comes to mind regarding a tortoise and a hare.[88]

*Politics for the Greatest Good* comes full circle in the life debate by relating all the prudence needed in the abortion context to the bioethics dilemmas faced by the nation today—and the myriad issues related therein, including cloning, embryo research, chimer hybrid reproduction, genetic selection, and eugenics. Each is well set forth in chapter seven and well-worth the read.

For the safety of women and children, Forsythe also recognizes the dependence of human life on the family. To securely protect human life and reproduction from the beginning, the two-parent family and two-parent childbearing are irreplaceable. The need to preserve a child's right to a complete identity is one of Forsythe's primary observations that brings into full focus how devastating abortion has been on American society.[89] Sociologists refer to this as the inexorable link between marriage and parenting.[90] Forsythe links abortion and the lack of protection for human life with eugenics, the lack of conscientious professional protection, disabilities discrimination, genetic discrimination, cloning discrimination, genetic enhancement, germ line modification, and the patenting of human chimeras and hybrids, along with the lack of parental responsibility noted in the current surplus of extracorporeal embryos, strongly suggesting that abortion rights have led to a myriad of parent (unborn) child conflicts ab initio.[91]

Indeed, the right to procreative freedom has furrowed the ground for more possibilities than imaginable. In this way, Forsythe brings his defense of life back to Aristotle's philosophical anthropology—"that an individual substance with a rational soul . . . retain[s] the core of human nature."[92] The most frightening prescience of his book might be this observation: "The moral-autonomy model in biotechnology means, in practice, freeing powerful human beings to subject powerless human

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[88] Aesop, *The Hare and the Tortoise, as reprinted in* MY STORYTIME TREASURY 106, 106–07 (Olive Beaupré Miller ed., Houghton Mifflin 1991) (1920) (adapted from original).

[89] *See* FORSYTHE, *supra* note 2, at 234–36.

[90] *See generally* LINDA J. WAITE & MAGGIE GALLAGHER, THE CASE FOR MARRIAGE 124 (2000) (analyzing the general finding of researchers that child rearing is best accomplished in a home with married parents).

[91] FORSYTHE, *supra* note 2, at 235–37.

[92] *Id.* at 247.

beings to their will."[93] Not without answers, Forsythe's suggestions and solutions to the life dilemma also offer new proposals for how to think about bioethics as well. Forsythe links the decline in human dignity and respect for human life not only with family breakdown but also with self-seeking utilitarianism.

Primary to a politic of prudence is achieving incremental gains for life whenever possible with moral purpose. The ultimate question begged is whether these positives are accomplished with a mere change of law or a change of human hearts and minds. This answer may fall to the actions of the American body of believers in our choices.[94] This insight brings the reader back to the desperate need for prudence.

> So, how do political leaders achieve the greatest good possible in the particular circumstances?
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> It requires an effective integration of the complicated elements of policy-making—a belief in the pursuit of human flourishing, a real concern for public opinion and for educating our fellow Americans, and a willingness to use prudent rhetoric.[95]

Prudence requires facts, knowledge, analysis, evaluation, and empathetic rhetoric; Forsythe has mastered the key: prudence makes zeal effective.[96] If "wisdom and virtue among the people [is] essential to the perpetuation of liberty and republican government,"[97] Forsythe offers prudent advice for success: "Practically applying prudential reasoning requires an intimate knowledge and understanding of . . . actual circumstances at the particular time . . . identifying effective solutions to those obstacles. *It requires that we tie good and effective means to good ends* . . . . [with] three primary qualities: seeking good counsel, exercising good judgment and implementing that judgment effectively."[98]

In working to transform current realities, the prolife movement needs "clear-sighted objectivity"[99] and the "capacity for foresight."[100] *Politics for the Greatest Good* provides a worthy education—and worthy life application. Using the universally applicable principle of prudence (a heretofore outmoded and unpopular virtue), Forsythe shows exactly why that virtue is so desperately needed in the prolife community today. He

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93 *Id.* at 248.

94 Most important to recall is the believer's freedom in Christ surrendered to the cross. The Apostle Paul's reminder and exhortation to believers is particularly instructive: "'Everything is permissible'—but not everything is beneficial. 'Everything is permissible'—but not everything is constructive. Nobody should seek his own good, but the good of others." 1 *Corinthians* 10:23–24.

95 FORSYTHE, *supra* note 2, at 249.

96 *Id.* at 24.

97 *Id.* at 74.

98 *Id.* at 30.

99 *Id.* at 31.

100 *Id.* at 32.

challenges the movement to a thoughtful strategy for public education, for shaping the popular will, for dealing with opponents, and for placing the U.S. Supreme Court in a position to amend and forever alter its proabortion jurisprudence by ruling on state regulations that will protect both women and children. Forsythe reminds that the abortion debate has not been framed in a full reality—that abortion harms children *and women*—but that prolifer constituents need a much greater focus on women's health and medical protection.[101]

Most of the prolife community will agree with Forsythe—no one law will solve the human life debate. Yet he makes clear that the mistake is to assume the moral argument alone is enough.[102] Rather, what is needed is a strategy that is at once moral and economic, emphasizes safety, and offers foresight that links the many facets of the life dilemma together. Forsythe reminds that the absolutely necessary elements are discernment, deliberation, decision, and implementation[103]—all this is prudent.

As an important contribution to the scholarship and the doctrine in this area, Forsythe also offers interesting reflective insight to the believer—that his faith may cause him or her to over-spiritualize the problem. "People of faith, it seems, are particularly susceptible to imprudence when it comes to their involvement in political and social causes . . . . They sometimes replace prudent action with religious clichés based on a phrase or a verse in Scripture"—which sometimes a believer may think can replace insufficient study and knowledge.[104] Add to this life-based worldview wisdom and prudence.

Prudence lost compromises the common good. In *Politics for the Greatest Good*, a prolife lawyer has provided a well-constructed summary of the commonalities between the fight for abolition and the struggle over abortion—which ultimately might once again reflect a change for the entire world, as a calling from God.

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[101] With all respect and absolutely no ill will toward those wonderful, noble and preserving sidewalk counselors, I have always struggled with the "here's a diaper, have your baby" mentality, leading me to greatly appreciate Forsythe's insight. Of course, mine is an exaggerated view but communicates the need for depth in the prolife solution.

[102] FORSYTHE, *supra* note 2, at 257.

[103] *Id.* at 259.

[104] *Id.* at 260. Indeed, Forsythe takes the opportunity that his foresight suggests by helping believers to see that we may be our own worst enemies in the life debate. "Making a practical difference is sometimes prevented by a religious self-pity or self-condemnation that often sees the biggest problem in the colleagues who 'compromise.'" *Id.* This statement serves as a poignant reminder to the principled crowd to not blame the pragmatic set and for the latter not to hold the former responsible for lost opportunity. Indeed, both are to blame for a lack of factual medical knowledge worked into the legal record that could indeed protect women, and thereby save more lives, both adult and unborn.

# "STREET JUSTICE" FOR CORPORATE FRAUD—MANDATORY MINIMUMS FOR MAJOR WHITE-COLLAR CRIME

*John D. Esterhay*[*]

ABSTRACT

In the midst of one of the worst financial crises in American history, everyone is looking for answers and many politicians are looking to point the blame for failures in institutional safeguards that regulate major investment companies. Although only one small piece of the puzzle, the lack of severe penalties for the most serious white-collar criminals stands out, especially considering the lessons supposedly learned in the wake of the Enron accounting-related scandals of 2001–2002. The breakdown was not for want of strict sentencing statutes and Guidelines; Congress enacted these as part of the Sarbanes-Oxley reform act in 2002, provisions that this Article first reviews in depth. The problem lies in federal district court judges' disdain for imposing the strict penalties recommended by law, especially in light of the new sentencing freedoms accorded to them by the U.S. Supreme Court in *United States v. Booker*. This Article will show, through statistical analysis, the failure of judges to apply the appropriate sentences. In order to achieve appropriate enforcement of corporate regulatory schemes, judges must be persuaded to enact the harsh terms of imprisonment recommended by Congress. Under current law, the best way to accomplish this goal is through mandatory minimums, and this Article advocates for such minimums to be applied to major white-collar fraud in a very specific way. Because of the nature of white-collar crime, many negative aspects of mandatory minimums currently in place for drug and firearm violations are inapplicable when minimums are applied to white-collar offenses. Furthermore, the statutory amendment could be narrowly crafted to ensure only the most deserving violators who perpetrate devastating losses are punished by lengthy statutorily-imposed prison terms. This Article lastly gives a recommendation for such an amendment.

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## INTRODUCTION

Coming on the heels of several of the largest bankruptcies in history, allegations of fraud permeating the entire financial services industry, and a precipitous drop in investor confidence, Congress decided to act to stem further losses and abuse.

The sentence above is referring to the Global Financial Crisis of 2008–2009, right? Clearly, the bankruptcies refer to Lehman Brothers and Washington Mutual,[1] the allegations of fraud involve mispriced and inaccurately rated mortgages[2] and sham investment companies,[3] and the Congressional remedial actions occurred through the implementation of the Troubled Asset Relief Program ("TARP").[4] Unfortunately, however, that description could also be a perfect summation of the 2001–2002 accounting scandals involving the now infamous names of Enron, WorldCom, and Arthur Andersen, among others.[5] That crisis, unprecedented at the time, rocked the nation, caused investor confidence to plummet, and led to legislative action in corporate oversight, which President George W. Bush referred to as the "most far-reaching reforms of American business practices since the time of Franklin Delano Roosevelt."[6]

Although there are many differences between the two major financial crises of the past decade, there are enough similarities (as encapsulated by the opening statement) that it raises the question: Why were these supposedly "far-reaching reforms" so ineffective at preventing corporate misdeeds that led to a widespread economic disaster of even

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[1] CONG. OVERSIGHT PANEL FOR ECONOMIC STABILIZATION, 110th CONG., QUESTIONS ABOUT THE $700 BILLION EMERGENCY ECONOMIC STABILIZATION FUNDS: THE FIRST REPORT OF THE CONGRESSIONAL OVERSIGHT PANEL FOR ECONOMIC STABILIZATION 2 (Comm. Print 2008).

[2] *Credit Rating Agencies and the Financial Crisis: Hearing Before the H. Comm. on Oversight and Government Reform*, 110th Cong. 4 (2008) (opening statement of Rep. Henry A. Waxman, Chairman, H. Comm. on Oversight and Government Reform) ("The story of the credit rating agencies is a story of colossal failure.").

[3] *See, e.g.*, Michael Lewis & David Einhorn, Op-Ed., *The End of the Financial World as We Know It*, N.Y. TIMES, Jan. 4, 2009, at WK9, *available at* http://www.nytimes.com/2009/01/04/opinion/04lewiseinhorn.html.

[4] Emergency Economic Stabilization Act of 2008, Pub. L. No. 110-343, tit. I, 122 Stat. 3765, 3765–800 (codified in scattered sections of 5, 12, 15, and 31 U.S.C.).

[5] Kathleen F. Brickey, *Enron's Legacy*, 8 BUFF. CRIM. L. REV. 221, 222–23, 234 (2004).

[6] Remarks on Signing the Sarbanes-Oxley Act of 2002, 2 PUB. PAPERS 1319, 1319 (July 30, 2002) [hereinafter Signing Remarks].

greater severity? The entire spectrum of reform introduced after the 2001–2002 scandals is beyond the scope of this Article. Instead, this Article will focus on a particular title of the Sarbanes-Oxley Act of 2002, Title IX (the "White-Collar Crime Penalty Enhancement Act of 2002" or "WCCPA"), which sought to increase the penalties of major white-collar crime through higher maximum statutory penalties and enhanced U.S. Sentencing Guidelines ("Guideline(s)" or "Sentencing Guidelines"), thus eliminating a disparity between white-collar and "street" crime.[7] Ultimately, however, federal judges have failed to accept these increased penalties, and continue to be more lenient towards serious white-collar fraud than other types of crime, hampering the important objectives of the WCCPA.[8] This Article aims to demonstrate that disparity through examination of federal sentencing data, and then offers mandatory minimums as a suggestion to help provide increased deterrence for would-be white-collar offenders.

Part I of this Article briefly examines the legislative history behind Sarbanes-Oxley and inspects the text of the WCCPA. The context of the Act is important in investigating Congress's reasoning behind the various provisions placed in the WCCPA, as well as providing a baseline for judging the success of these provisions after the Act's implementation. One of the sections in the WCCPA tasked the United States Sentencing Commission ("Sentencing Commission") with enhancing the Sentencing Guidelines for major white-collar crimes, but left the actual responsibility to the Sentencing Commission, so Part I addresses the 2003 amendments as well.

Part II takes a purely quantitative look at sentencing of white-collar defendants after the Sentencing Commission's 2003 Guideline enhancement. This data shows that even after a specific congressional directive, federal district court judges continually refuse to apply high Guideline ranges to major white-collar crimes—especially compared to other offenses involving similar Guideline ranges. The Sentencing Commission provides data to the United States Department of Justice's Bureau of Justice Statistics in bulk form, tabulating every defendant sentenced in federal district court each year. The Bureau then publishes this data, which contains information regarding the offense, the Guideline range, the actual sentence imposed, and the reason(s) for departure from the Guidelines (if there is one). Reviewing the data for all defendants that have been sentenced under rules incorporating the 2003 amendment, Part II shows that not only are major white-collar crimes granted downward departures with greater frequency than

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[7] White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, 116 Stat. 804, 804–06 (codified in scattered sections of 18, 28, and 29 U.S.C.).

[8] *See infra* Parts II.B–C.

comparable nonwhite-collar offenses, but the departures granted for major white-collar crimes are a much larger percentage of the Guideline minimum. As a result, the WCCPA was a failure.

Part III of the Article presents a solution to judges' leniency: mandatory minimum terms of imprisonment, statutorily set by Congress. This Part explains first why major white-collar criminal activity would be a perfect candidate for imposition of minimum penalties in the statutes by examining the typical rationales for mandatory minimums and individually demonstrating that they apply to white-collar crime. Part III also examines the academic discussion surrounding mandatory minimums—the majority of which is negative—and distinguishes serious white-collar crimes from those federal crimes that have been traditionally subject to mandatory minimums, mainly drug and firearm violations. Much of the negative scholarship on mandatory minimums deals with defendant characteristics, as well as fundamental inequities when severe sentences are imposed in one instance, but not another. White-collar crimes are differentiated both through the status of the defendant and by careful construction of penalties to avoid inequitable effects. Finally, this Part presents an example of the statutory amendments that could be enacted by Congress.

## I. THE WHITE-COLLAR CRIME PENALTY ENHANCEMENT ACT OF 2002

The White-Collar Crime Penalty Enhancement Act is the rather grandiose-sounding title that Congress placed on Title IX of the Sarbanes-Oxley Act of 2002,[9] and it contains all the statutory provisions that are the focus of this discussion. It is important to note that the debate about a possible penal disparity between white-collar and "street" crime is practically as old as the term white-collar crime itself, and sentencing is only one aspect of the overall trend.[10] Even so, observers were acutely aware of sentencing disparities prior to the accounting scandals of 2001–2002,[11] and one of the legislative goals stated on the

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[9] White-Collar Crime Penalty Enhancement Act of 2002, 116 Stat. at 804–06.

[10] In his work, *Defending White-Collar Crime* (part of the influential Yale Studies on White-Collar Crime), Kenneth Mann highlights several differences between the investigation and prosecution of white-collar and "street" crimes. KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 9–13 (1985). Notable among these differences is the involvement of white-collar defense counsel even before the criminal investigation begins, thus allowing for more rigorous advocacy. *Id.* at 4.

[11] *See, e.g.*, Michael D. Silberfarb, Note, *Justifying Punishment for White-Collar Crime: A Utilitarian and Retributive Analysis of the Sarbanes-Oxley Act*, 13 B.U. PUB. INT. L.J. 95, 105 (2003) ("Between 1991 and 2001, the annual average length of sentence for white-collar criminals always fell between 19.0 and 20.8 months; Martin F. Murphy, *No Room at the Inn? Punishing White-Collar Criminals*, BOSTON B.J., May–June 1996, at 4, 14 ("Concerns about the costs of white-collar crime and questions about lenient treatment for

record for the creation of the Sentencing Commission in 1984[12] was to achieve parity in sentencing white-collar criminals.[13] Famous names from the savings-and-loan scandals of the 1980s, like Michael Milken (served 22 months) and Charles Keating (4.5 years),[14] provide some evidence that there existed a punishment disparity in prior similar financial crises (although both men were sentenced for longer[15]).

Nevertheless, this Article seeks to focus solely on a discussion of the lack of success of the WCCPA as witnessed by the present level of sentencing disparity. Regardless of the previous debate and legislative action over the years, the WCCPA was birthed in the fire of the accounting scandals of 2001–2002, and thus its description must necessarily begin with its legislative history.

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white-collar criminals led to major changes in the way federal white-collar defendants are treated under the [F]ederal [S]entencing [G]uidelines, which took effect in 1987."). During the same period, however, violent offenders received sentences ranging between 89.5 and 106.7 months, and drug offenders received sentences ranging from 71.7 months to 88.2 months." (citing U.S. Sentencing Comm'n, Monitoring Data Files 1995–2002, http://www.ussc.gov/LINKTOJP.htm (select the hyperlink for each fiscal year))). Even judges were aware of the disparity. "If [the] study is accurate, the pattern of sentencing revealed is deplorable. . . . I cannot reconcile a policy of sending poorly educated burglars from the ghetto to jail when men in the highest positions of public trust and authority receive judicial coddling when they are caught fleecing their constituencies." Browder v. United States, 398 F. Supp. 1042, 1046 (D. Or. 1975), *aff'd*, 544 F.2d 525 (9th Cir. 1976) (unpublished table decision).

[12] Sentencing Reform Act of 1984, Pub. L. No. 98-473, ch. 2, § 212, 98 Stat. 1987, 2017–18 (codified as amended at 28 U.S.C. § 991 (2006)).

[13] S. REP. NO. 98-225, at 77 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 3182, 3260 ("[S]ome major offenders, particularly white[-]collar offenders . . . frequently do not receive sentences that reflect the seriousness of their offenses."). Then-Circuit Judge Stephen Breyer, one of the Sentencing Commission's original members, wrote,

> The Commission found in its data significant discrepancies between pre-Guideline punishment of certain white-collar crimes, such as fraud, and other similar common law crimes, such as theft. The Commission's statistics indicated that where white-collar fraud was involved, courts granted probation to offenders more frequently than in situations involving analogous common law crimes; furthermore, prison terms were less severe for white-collar criminals who did not receive probation.

Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 HOFSTRA L. REV. 1, 20 (1988).

[14] Lisa H. Nicholson, *The Culture of Under-Enforcement: Buried Treasure, Sarbanes-Oxley and the Corporate Pirate*, 5 DEPAUL BUS. & COM. L.J. 321, 333 (2007) (citing Grace Wong, *Kozlowski Gets Up to 25 Years*, CNNMONEY.COM, Sept. 19, 2005, http://money.cnn.com/2005/09/19/news/newsmakers/kozlowski_sentence/index.htm).

[15] *See* Christian Berthelsen, *Keating Pleads Guilty to 4 Counts of Fraud*, N.Y. TIMES, Apr. 7, 1999, at C2 (reporting a twelve-year sentence for Keating); Ronald Sullivan, *Milken's Sentence Reduced by Judge; 7 Months Are Left*, N.Y. TIMES, Aug. 6, 1992, at A1 (reporting a ten-year sentence for Milken).

### *A. Legislative History*

The WCCPA was not originally part of the Sarbanes-Oxley bill. The first bill that would become Sarbanes-Oxley was introduced by Representative Michael Oxley as House Bill 3763 under the title "Corporate and Auditing Accountability, Responsibility, and Transparency Act of 2002";[16] it passed the House on April 24, 2002.[17] That bill had no criminal provisions for white-collar penalty enhancements,[18] partly because it was generated by the House Financial Services Committee.[19] The focus instead was to improve "the accuracy and reliability of corporate disclosures made pursuant to the securities laws . . . through increased supervision of accountants that audit public companies, strengthened corporate responsibility, increased transparency of corporate financial statements, and protections for employee access to retirement accounts."[20] Senator Paul Sarbanes, Chairman of the Committee on Banking, Housing, and Urban Affairs, then introduced a competing bill as Senate Bill 2673, entitled "Public Company Accounting Reform and Investor Protection Act of 2002."[21] This bill passed the Senate unanimously on July 15, 2002.[22] The Sarbanes bill also focused primarily on oversight[23] and did not contain any criminal provisions.[24]

As these two regulatory-minded bills were being considered in their respective chambers, Senator Patrick Leahy, Chairman of the Senate Judiciary Committee, introduced Senate Bill 2010 with the title "Corporate and Criminal Fraud Accountability Act of 2002."[25] This bill for the first time injected criminal penalties into the discussion, although it originally was narrowly focused on "criminal prosecution and enhanced penalties of persons who defraud investors in publicly traded securities or alter or destroy evidence in certain [f]ederal investigations."[26] But, Senate Bill 2010 did address the Sentencing Guidelines for fraud, creating the section that would ultimately task the

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16 H.R. REP. NO. 107-414, at 2 (2002).

17 H.R. 3763, 107th Cong., 148 CONG. REC. 5548 (2002).

18 Jennifer S. Recine, Note, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 39 AM. CRIM. L. REV. 1535, 1546 (2002).

19 *Id.*; *see also* Ann Marie Tracey & Paul Fiorelli, *Nothing Concentrates the Mind Like the Prospect of a Hanging: The Criminalization of the Sarbanes-Oxley Act*, 25 N. ILL. U. L. REV. 125, 130 (2004) (citing Recine, *supra* note 18, at n.94).

20 H.R. REP. NO. 107-414, at 16.

21 S. REP. NO. 107-205, at 1 (2002).

22 S. 2673, 107th Cong., 148 CONG. REC. 12,961 (2002).

23 S. REP. NO. 107-205, at 2.

24 Recine, *supra* note 18, at 1546.

25 S. REP. NO. 107-146, at 1 (2002).

26 *Id.* at 2.

Sentencing Commission with enhancing the white-collar criminal ranges for major violations.[27] Senator Leahy noted on the record the importance of "enhancing criminal penalties in cases involving obstruction of justice and serious fraud cases where a large number of victims are injured or when the victims face financial ruin . . . [in order] to deter financial misconduct."[28]

The bill that *actually* became the WCCPA was introduced by then-Senator Joe Biden and Senator Orrin Hatch in the Senate Judiciary Committee as Senate Bill 2717 on July 10, 2002.[29] Thus, the only testimony on record specifically addressing the white-collar sentencing disparity is in reference to the provisions of Senate Bill 2717.[30] In a hearing before the Senate Judiciary Committee "on white[-]collar crime and the . . . inadequacy of penalties for these offenses"[31] on July 24, 2002, then-Senator Biden stated his concerns:

> Way before the truly mind-boggling events at WorldCom, we were exploring this question of corporate responsibility and the extent to which so called "white[-]collar" offender should be held accountable in the criminal justice system. Embarrassingly, it is a question that has for years evaded this body, the courts, and the overall criminal justice system.
>
> I say embarrassingly because the answer to that question strikes me as painfully obvious. Of course *white[-]collar criminals should be treated as harshly under the law as petty thieves or drug dealers.*[32]

To accomplish this goal, then-Senator Biden recommended his provisions "that would enhance the underlying criminal penalties for fraud, for conspiracies to commit certain white[-]collar offenses, and for violations of pension protection measures."[33]

The Senator expounded these views further during testimony on the Senate floor. He described the WCCPA as resulting from "a series of hearings I held this year in the Judiciary Subcommittee on Crime and Drugs in which we heard about *the 'penalty gap' between white[-]collar offenses and other serious Federal criminal offenses.*"[34] In describing how

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[27] *Id.* at 13.

[28] 148 CONG. REC. 14,450 (2002).

[29] 148 CONG. REC. 12,516 (2002).

[30] *See Congressional Comments About Sarbanes-Oxley*, 15 FED. SENT'G REP. 252, 252–53 (2003) (providing a summary of congressional comments to date about Sarbanes-Oxley).

[31] *Ensuring Corporate Responsibility: Using Criminal Sanctions to Deter Wrongdoing: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 273 (2003) (statement of Sen. Joseph R. Biden, Jr., Chairman, Subcomm. on Crime and Drugs).

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

[33] *Id.* at 274.

[34] 148 CONG. REC. 14,919 (2002) (emphasis added).

the WCCPA would close that gap, Senator Biden mentioned two examples of equalizing penalties between white-collar and "street" crime, comparing a pension fraudster to "a car thief who committed interstate auto theft"[35] and mentioning that the WCCPA "harmonized conspiracy for white[-]collar fraud offenses with our drug statutes"[36] because "what is good for the drug kingpin is good for the white[-]collar crook."[37] In closing, he argued that white-collar criminal statutes had been ineffective up to that point partly because so few of those criminals were serving hard time; thus, the level of deterrence was too low.[38] As one of the two original proponents of the WCCPA, Senator Biden's message could not have been clearer: serious white-collar offenses need to be punished equally with other serious federal crimes in order to provide the level of deterrence necessary to prevent major financial fraud from disrupting the economy. As discussed in Part II, because of the lack of cooperation by federal judges, the WCCPA has not lived up to the Senator's goals.

The WCCPA in Senate Bill 2717, along with the other criminal provisions in Senator Leahy's Senate Bill 2010, were incorporated into the Sarbanes Senate Bill 2673,[39] which as a more comprehensive act dominated the Oxley bill, House Bill 3763, and provided most of the text for Sarbanes-Oxley when it emerged from the joint conference committee.[40] The Sarbanes-Oxley Act of 2002, containing the WCCPA as Title IX, passed both chambers of Congress shortly thereafter, and was signed into law by the President on July 30, 2002.[41] Although the WCCPA was only one short title of the entire legislation, it was still important enough to generate comment. In testimony on the House floor, Representative Oxley stated, "Investors can be assured that convicted corporate criminals will be sentenced to long jail time. In my view, the prospect of doing time, real time, will serve as an effective deterrent to wrongdoing in the corporate suite."[42] Indeed, the provision that raised the maximum exposure of fraud crimes from five to twenty years (allowing white-collar crime to have greatly expanded Guideline ranges) was singled out by Representative John Sununu in debate on the House

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35 *Id.*

36 *Id.*

37 *Id.*

38 *Id.* at 14,920.

39 Tracey & Fiorelli, *supra* note 19, at 133.

40 *Id.*; *see also* Recine, *supra* note 18, at 1547.

41 148 CONG. REC. D866 (daily ed. July 31, 2002).

42 148 CONG. REC. 14,487 (2002).

floor,[43] and President Bush in his signing statement.[44] Once again, it is clear that increased criminal exposure for white-collar offenses was an important component of this legislative reform.

### *B. Text of the WCCPA*

So what does the WCCPA actually say? The following is a summary of the pertinent sections of the WCCPA for the issue of sentencing disparity under examination in this Article.

#### 1. Section 902: Attempts and Conspiracies to Commit Criminal Fraud Offenses[45]

This section declares, "Any person who attempts or conspires to commit any offense under this chapter [that is, interstate fraud] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."[46] In doing so it created a special criminal conspiracy statute for interstate fraud offenses, codified as 18 U.S.C. § 1349, that allowed for punishment of conspiracy and attempt violations at the same level as the underlying fraud.[47] Prior to the WCCPA, conspiracy to commit fraud followed the same rules as general conspiracy, which provides for a maximum imprisonment of five years regardless of the underlying offense.[48] At first glance, it may seem that with this section Congress was actually making fraud penalties more severe than those levied in comparable offenses. As it turns out, however, most of the major federal crimes already operated with their own conspiracy statutes that served the same purpose as § 1349, often with identical language. For example, the major narcotics offenses,[49] Racketeer Influenced and Corrupt Organizations ("RICO") predicates,[50] terrorism offenses,[51] and even (federal) homicide,[52] all have

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[43] 148 CONG. REC. 15,261 (2002) ("This conference report provides double the jail time that was included in the Senate bill—up to 20 years—for corporate criminals who defraud the public, destroy documents or obstruct justice.").

[44] Signing Remarks, *supra* note 6, at 1320 ("And the maximum prison term for common types of fraud has quadrupled from 5 to 20 years.").

[45] White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, § 902(a), 116 Stat. 804, 805 (codified at 18 U.S.C. § 1349 (2006)).

[46] *Id.*

[47] *Id.*

[48] 18 U.S.C. § 371 (2006) ("If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, . . . each shall be fined under this title or imprisoned not more than five years, or both.").

[49] 21 U.S.C. § 846 (2006) ("Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.").

[50] 18 U.S.C. §§ 1962(d), 1963(a) (2006) (stating that "[i]t shall be unlawful for any person to conspire to violate any of the provisions . . . of this section" and "[w]hoever

(and had in 2002) statutes that make conspiracy punishable at the same level as the underlying offense. Thus, in context this section was undoubtedly meant to equalize conspiracy to commit white-collar violations with other serious federal crimes.[53] Of course, acting alone, this section would not have had any effect, considering all the fraud crimes prior to the WCCPA had statutory maximums of five years. That is where the next section comes in.

### 2. Section 903: Criminal Penalties for Mail and Wire Fraud[54]

Section 903 had the simple effect of raising the statutory maximum penalties on mail and wire fraud from five years to twenty years.[55] But in doing so, this section represents the real core of the WCCPA. Mail and wire fraud are the most important white-collar criminal statutes because they can be used to "provide federal jurisdiction over a broad array of frauds."[56] This section, in combination with section 905 that mandated an increase in Sentencing Guidelines discussed below, actually created a completely new region of *serious* white-collar offenses that would be punished at comparable levels with other major federal crimes. Prior to

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violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment)").

[51] 18 U.S.C. § 2339B(a)(1) (2006) ("Whoever knowingly provides material support or resources to a foreign terrorist organization, or attempts or conspires to do so, shall be fined under this title or imprisoned not more than 15 years, or both, and, if the death of any person results, shall be imprisoned for any term of years or for life.").

[52] 18 U.S.C. § 1117 (2006) ("If two or more persons conspire to violate [the federal homicide statutes], and one or more of such persons do any overt act to effect the object of the conspiracy, each shall be punished by imprisonment for any term of years or for life.").

[53] The statute also created an "attempt" violation that generally does not exist in Title 18. But, "[i]n the case of mail and wire fraud, perhaps this is not exceedingly important considering that mail and wire fraud by their definition (and exposition in case law) include inchoate crimes which have not come to fruition or succeeded." Recine, *supra* note 18, at 1554–55. Furthermore, the statute in its language drops the "overt act" requirement, but this aspect simply serves to make it parallel other conspiracy statutes for major federal crimes, like 21 U.S.C. § 846. *See* United States v. Dempsey, 733 F.2d 392, 396 (6th Cir. 1984) (stating that proof of an overt act is unnecessary with regards to 21 U.S.C. § 846).

[54] White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, § 903, 116 Stat. 804, 805 (codified at 18 U.S.C. § 1341 (2006)).

[55] *Id.*

[56] Shani S. Kennedy & Rachel Price Flum, *Mail and Wire Fraud*, 39 AM. CRIM. L. REV. 817, 818 (2002); *see also* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 57 (1997) (claiming "mail and wire fraud . . . are probably the most important" white-collar offenses); Brian C. Behrens, Note, *18 U.S.C. § 1341 and § 1346: Deciphering the Confusing Letters of the Mail Fraud Statute*, 13 ST. LOUIS U. PUB. L. REV. 489, 526 (1993) ("This 'catch-all' [mail fraud] statute may be the most important tool for apprehending the new breed of crime—white[-]collar crime.").

the WCCPA, the only way for white-collar defendants to receive more than a five year term of imprisonment would be if the district court ordered multiple sentences for fraud counts to run consecutively; however, this rarely happened because defendants often pled guilty to a single count.[57] In theory, after the WCCPA, major white-collar violators could easily receive sentences of as much as twenty years; but, as discussed in Part II, in practice this is still extremely rare.

### 3. Section 904: Criminal Penalties for Violations of the Employee Retirement Income Security Act of 1974 ("ERISA")[58]

The impact of this section was to raise the maximum statutory penalty for fraud violations under ERISA from one to ten years.[59] This statute is used far less frequently then the mail and wire fraud statutes for the simple reason that it is much more narrowly focused. In any case, the purpose was the same: raising statutory exposure of imprisonment for major white-collar violations.[60]

### 4. Section 905: Amendment to Sentencing Guidelines Relating to Certain White-Collar Offenses[61]

This section dovetails with section 903 by directing the Sentencing Commission to implement increased Sentencing Guidelines for serious fraud offenses.[62] In doing so, it "filled in" the new region of increased statutory maximums provided by section 903; if there was no increased Guideline exposure to complement the new maximums, it would be almost impossible for crimes to obtain imprisonment of greater than five years[63] (assuming that judges followed the Guidelines[64]). As a broad

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[57] Recine, *supra* note 18, at 1551–52.

[58] White-Collar Crime Penalty Enhancement Act of 2002, § 904, 116 Stat. at 805 (codified at 29 U.S.C. § 1131 (2006)).

[59] *Id.* § 904(2), 116 Stat. at 805.

[60] Section 904 was more influential when examined in the context of a companion provision in Sarbanes-Oxley which illegalized insider trading during the "blackout period" of employee pension funds covered by ERISA. Sarbanes-Oxley Act of 2002, Pub. L. 107-204, tit. III, § 306, 116 Stat. 745, 779–84 (codified at 15 U.S.C. § 7244 (2006). "This provision would have criminalized the actions of executives at Enron who unloaded stock while their employees—plan participants—were unable to do so." Recine, *supra* note 18, at 1553.

[61] White-Collar Crime Penalty Enhancement Act of 2002, § 905, 116 Stat. at 805–06.

[62] *Id.* § 905(a), 116 Stat. at 805.

[63] This is for the simple reason that the previous Guidelines for fraud violations contemplated statutory maximums of five years, so Guideline exposure ended there for even the most egregious fact patterns.

[64] The WCCPA was passed in 2002, which was prior to the U.S. Supreme Court's decision that made the Guidelines advisory rather than mandatory. United States v. Booker, 543 U.S. 220, 245 (2005) ("[T]he federal sentencing statute . . . makes the Guidelines effectively advisory."). But, even before that holding, judges could and did order

directive to the Sentencing Commission "[p]ursuant to its authority [to] . . . review and . . . amend the Federal Sentencing Guidelines,"[65] section 905 contains no hard numbers. It is useful, however, in providing another window into what Congress hoped to accomplish through the passage of the WCCPA. For instance, this section requires the Sentencing Commission to "ensure that the Sentencing Guidelines and policy statements reflect the serious nature of the offenses[,] . . . the growing incidence of serious fraud[,] . . . and the need to . . . *deter, prevent, and punish such offenses.*"[66] The Sentencing Commission's response will be discussed below in Part I.C. For now, it is important to merely point out that Congress unmistakably wanted to augment prison time for serious fraud.

5. Section 906: Corporate Responsibility for Financial Reports[67]

Like section 902, section 906 creates a new criminal statute in the interstate fraud section of the code. But, unlike the new conspiracy statute, this statute, codified at 18 U.S.C. § 1350, is very specific. Section 1350 requires Corporate Executive Officers ("CEOs") and Corporate Financial Officers ("CFOs") of publicly reporting companies under the Securities Exchange Act of 1934[68] to certify in the corporation's periodic report that the report "fully complies with . . . the Securities Exchange Act [o]f 1934 . . . and that information contained in the periodic report fairly presents, in all material respects, the financial condition and results of operations of the issuer."[69] Thus, if the top executives do not believe the information contained in their public filings is accurate, they will be individually guilty of a crime. The statute sets out two tiers of maximum penalties: ten years and a $1,000,000 fine for "knowing" the reports were inadequate,[70] and twenty years and a $5,000,000 fine for "willfully" certifying reports that are known to be inaccurate.[71] Because this section only affects the top two executives of a corporation, it is perhaps even more singly focused toward major white-collar criminals than other statutes, and shows that Congress meant to provide serious

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departures based on Sentencing Guidelines § 5K2.0. *See generally* U.S. SENTENCING GUIDELINES MANUAL § 5K2.0 (2008). Part II, infra, is a discussion of judges' failure *after* the WCCPA to follow Guidelines for white-collar criminals, regardless of whether the court justifies the departures under Section 5K2.0 or *Booker*.

65 White-Collar Crime Penalty Enhancement Act of 2002, § 905(a), 116 Stat. at 805.

66 *Id.* § 905(b)(1), 116 Stat. at 805 (emphasis added).

67 *Id.* § 906, 116 Stat. at 806 (codified at 18 U.S.C. § 1350 (2006)).

68 Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, tit. I, sec. 13, 15, 48 Stat. 881, 894–96 (codified as amended at 15 U.S.C. §§ 78m(a), 78o(d) (2006)).

69 18 U.S.C. § 1350(b) (2006).

70 *Id.* § 1350(c)(1).

71 *Id.* § 1350(c)(2).

penalties for even the most powerful individuals in corporate America if they act fraudulently.

### *C. Impact on the United States Sentencing Guidelines*

Pursuant to the directive in the WCCPA, the Sentencing Commission initially responded by issuing an emergency amendment effective January 25, 2003.[72] It then permanently incorporated those changes (and others) into the Guidelines for the 2003 Federal Sentencing Guidelines Manual, which went into effect on November 1 of that year.[73] With regard to major frauds, the most significant Guideline provision amended was Sentencing Guidelines § 2B1.1, which provides the base offense level and offense characteristics for embezzlement and fraud, among other crimes.[74] The specific statutes that are governed by § 2B1.1 include the interstate frauds (discussed above in Part I.B) and most offenses under the Securities and Securities Exchange Acts,[75] including insider trading.[76]

Sentencing Guideline ranges are computed using a base offense value for the particular statute violated combined with specific offense characteristics.[77] The § 2B1.1 amendments incorporated alterations in both sections.[78] First, the base offense level was increased for violation of any statute with a maximum penalty of at least twenty years,[79] an obvious reference to the updated interstate fraud statutes. Although the

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[72] Notice of Promulgation of Temporary, Emergency Amendments to the Sentencing Guidelines and Commentary, 68 Fed. Reg. 3080 (Jan. 22, 2003). The requirement for an "emergency" stop-gap amendment came from a provision in the WCCPA. *See* White-Collar Crime Penalty Enhancement Act of 2002, § 905(c), 116 Stat. at 806 ("The United States Sentencing Commission is requested to promulgate the Guidelines or amendments provided for under this section as soon as practicable, and in any event not later than 180 days after the date of enactment of this Act . . . .").

[73] Sentencing Guidelines for United States Courts, 68 Fed. Reg. 26,960 (May 16, 2003). Therefore, the data examined in Part II deals specifically with defendants sentenced under the rules of 2003 or later.

[74] U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a) (2008).

[75] *Id.* § 2B1.1 cmt. statutory provisions (listing securities violations under 15 U.S.C. §§ 77e, 77q, 77x, 78j, 78ff, and interstate fraud violations under 18 U.S.C. §§ 1341, 1344, 1348, 1350, among others).

[76] 15 U.S.C. § 78j (2006). While technically this statute is covered under Sentencing Guidelines § 2B1.4, that provision actually only refers back to § 2B1.1 for offense characteristics after providing a base offense level that is one point higher. U.S. SENTENCING GUIDELINES MANUAL § 2B1.4(b)(1) (2008).

[77] U.S. SENTENCING GUIDELINES MANUAL § 1B1.1(b) (2008) ("Determine the base offense level and apply any appropriate specific offense characteristics, cross references, and special instructions contained in the particular [G]uideline in Chapter Two in the order listed.").

[78] *Id.* § 2B1.1 (2008).

[79] Sentencing Guidelines for United States Courts, 68 Fed. Reg. 26,960, 26,962 (May 16, 2003) (amending U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a) (2008)).

increase was only one point, it still had the effect of limiting "the availability of a probation only sentence . . . to offenses involving loss amounts of $10,000 or less, assuming a two level reduction for acceptance of responsibility."[80] Second, the loss table (which provides for additional points based on the amount of money involved in the fraud) was expanded to include losses in excess of $200,000,000 and $400,000,000, respectively, as the old table only contemplated losses in excess of $100,000,000.[81] Thus, any loss over $400,000,000 attributed to the defendant gained an extra four points from this adjustment. Also, courts were given the freedom to consider "reduction in the value of equity securities . . . that resulted from the offense" as loss for this table,[82] opening up white-collar criminals to potentially huge valuations of loss based solely on market responses. Third, the Sentencing Commission added an additional two points for frauds involving more than 250 victims, as compared to the prior Guidelines, that contemplated only frauds of more than fifty victims.[83]

Fourth, the amendment augmented a section that is now codified as Sentencing Guidelines § 2B1.1(b)(14), but at the time was listed as § 2B1.1(b)(12).[84] Before the amendment, this section "provided a four level enhancement and a minimum offense level of level 24 if the offense substantially jeopardized the safety and soundness of a financial institution."[85] The update allowed imposition of these same enhancements for (1) jeopardizing the financial security of a financial institution, (2) endangering the solvency or financial security of an organization that was either publicly traded or had at least 1,000 employees, or (3) endangering the solvency or financial security of 100 victims, without any need for endangering an organization.[86] Because this section has some overlap with the section addressing number of victims generally, the amendment capped the enhancement total between the two sections at eight points, although the minimum of twenty-four was unaffected.[87] Fifth, the emergency amendment added a four-point enhancement if the defendant violated the securities laws and was an officer or a director of a publicly traded company at the time; the permanent amendment then added licensed broker dealers and investment advisors to this enhancement, and added violations of the

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[80] *Id.* at 26,964.

[81] *Id.* The tax table located at Sentencing Guidelines § 2T4.1 was similarly modified for tax frauds. *Id.* (amending U.S. SENTENCING GUIDELINES MANUAL § 2T4.1 (2008)).

[82] *Id.*

[83] *Id.* (amending U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(2)(c) (2008)).

[84] *Id.*

[85] *Id.* at 26,964–65.

[86] *Id.* at 26,965.

[87] *Id.*

commodities laws as well.[88] It is important to note that "securities law" for the purposes of this enhancement applies to convictions under general fraud statutes—like wire fraud—if the underlying fraud is a violation of securities law.[89] Finally, the amendment also increased penalties for obstruction of justice along with some additional minor alterations.[90]

### 1. The "Typical" Major White-Collar Criminal

The impact of the changes can best be assessed by a Guideline calculation for a "typical" serious white-collar offender, both before and after the amendment. By serious, it is meant that the defendant has caused economic damage of at least several millions of dollars, and possibly significantly more depending on his role. "Typical" is more problematic to define, so this exercise will contemplate two types of white-collar criminals: the CEO of a publicly-traded corporation engaged in securities fraud (but not insider trading),[91] and an individual who sets up a sham investment company that solicits clients mainly by word-of-mouth.[92] Under this analysis of "typical," it is assumed that the defendant pled guilty to the charges rather than go to trial.[93] Finally, as a "typical" defendant, none of the other adjustments[94] or departures[95] will apply in this analysis, excluding acceptance of responsibility for pleading guilty.[96] The calculation is laid out in the table below.

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[88] *Id.* (amending U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(b)(16) (2008), which at the time of enactment was codified at § 2B1.1(b)(14) (2003)).

[89] *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 cmt. application note 14(B) (2008)).

[90] *Id.* at 26,965.

[91] The CEO is assumed to have caused the loss of over $400,000,000 and affected over 250 victims. In other words, he is the worst possible offender contemplated by the Sentencing Guidelines. *Supra* notes 81–83 and accompanying text.

[92] The sham investor is assumed to have caused the loss of approximately $5,000,000 and affected approximately twenty-five victims. He represents a middle-of-the-road offender.

[93] The Sentencing Commission data suggests that roughly 96% of defendants receiving sentences pled guilty rather than go to trial, and fraud as a primary offense category is no different. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl.11 (2008) [hereinafter U.S. SENTENCING COMM'N SOURCEBOOK] , *available at* http://www.ussc.gov/ANNRPT/2008/Table11.pdf. This assumption is important, because a prompt guilty plea usually earns an offender a three point reduction under the Guidelines, which will also be assumed for the purposes of this analysis. *See* U.S. SENTENCING GUIDELINES MANUAL § 3E1.1 (2008).

[94] *See generally id.* §§ 3A–D (listing the several adjustments that can be applied to individual defendants).

[95] *See generally id.* ch. 5, pt. K (listing several circumstances where a judge may depart from Guidelines).

[96] *Id.* § 3E1.1.

| **Guideline Calculation: Two Typical White-Collar Criminals, Pre-2003[97] & Post-2003 Rules[98]** | | | | | |
|---|---|---|---|---|---|
| Guidelines § 2B1.1 | | Pre-2003 | | Post-2003 | |
| (Subsection) | Comment | Sham Investor | CEO | Sham Investor | CEO |
| (a) | Base Offense Level | 6 | 6 | 7 | 7 |
| (b)(1) | Loss Calculation | +18 | +26 | +18 | +30 |
| (b)(2) | Victim Numbers | +2 | +4 | +2 | +6 |
| (b)(12) | Caused Insolvency | - | - | - | +2 |
| (b)(14) | Securities Laws | - | - | - | +4 |
| Subtotal Offense Level | | 26 | 36 | 27 | 49 |
| Guidelines § 3E1.1 | | -3 | -3 | -3 | -3 |
| Total Offense Level | | 23 | 33 | 24 | 46 |
| Guideline Range in Months[99] | | 46–57 | 135–168 (60) | 51–63 | Life (240) |

The affect of the 2003 amendment is minor on the "sham investor"; he gets around the same Guideline range, roughly four to five years. But the CEO goes from a Guideline range of around eleven to fourteen years to life in prison! More realistically, the statute the CEO was charged under most likely had a five-year maximum before the 2003 amendment (if it was like mail or wire fraud), and a twenty-year maximum afterward, so his exposure went from five to twenty years. Consequently, the message suggested by this simple example is that Congress, through and by administrative action of the Sentencing Commission, meant to seriously enhance prison time for the most serious white-collar offenders, while keeping the Guidelines consistent for minor and mid-level crimes. Prior to the WCCPA, the worst offenders would probably be capped at a five-year statutory maximum, and even if this maximum was overcome in some way—like through consecutive sentences for multiple counts—the Guideline range could go no higher than fourteen years. This cap of fourteen years existed at a time when the Guidelines were mandatorily

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[97] U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a), (b)(1)(2), (b)(12), (b)(14) (2002).

[98] U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a), (b)(1)(2), (b)(12), (b)(14) (2003).

[99] The calculation assumes that the defendants have no criminal history, which is *very* typical for white-collar criminals. *See* Murphy, *supra* note 11, at 5 (claiming "white[-] collar criminals . . . typically ha[ve] no criminal record").

imposed. After the WCCPA, offenders are capped at statutory maximums of twenty years or more,[100] and can easily have Guideline ranges exceeding life in prison, depending on the overall economic damage wrought by the fraud. Thus, the WCCPA "created" the crime of major frauds, to receive parallel levels of punishment to major drug offenses or organized crime. Regrettably, the judiciary has failed to cooperate through actual imposition of tough sentences, and the deterrence that Congress attempted to provide for these disastrous crimes remains a fiction.

## II. SENTENCING DATA FOR SERIOUS WHITE-COLLAR OFFENDERS

This Part presents a discussion of the sentencing data published by the Sentencing Commission, focusing on white-collar defendants sentenced under the Guidelines of 2003 or later. The Sentencing Commission releases data on defendants sentenced in federal court, which is provided to them by the various district courts and magistrates.[101] The data is then published by the U.S. Department of

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[100] Some fraud statutes provide for higher statutory maximums then the basic mail and wire frauds. *See, e.g.*, 18 U.S.C. §§ 1344, 1348 (2006) (providing a maximum of thirty and twenty-five years for bank fraud and securities fraud, respectively). Some of these statutes—like § 1344—existed prior to Sarbanes-Oxley and represented another way to get past the five year statutory maximum of mail and wire fraud. Others—like § 1348—were a creation of a Sarbanes-Oxley, albeit in a separate title from the WCCPA. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, tit. VIII, § 807, 116 Stat. 745, 804 (codified at 18 U.S.C. § 1348 (2006)).

[101] The following is a summary of the data (for fiscal year 2007, the most recent year available) provided, along with the actual database file:

> These data contain records of criminal defendants who were sentenced pursuant to provisions of the Sentencing Reform Act (SRA) of 1984 and reported to the United States Sentencing Commission (USSC) during fiscal year 2007. It is estimated that over 90 percent of felony defendants in the federal criminal justice system are sentenced pursuant to the SRA of 1984. The data were obtained from the United States Sentencing Commission's Office of Policy Analysis (OPA) Standardized Research Data File. The Standardized Research Data File consists of variables from the Monitoring Department's database, which is limited to those defendants whose records have been furnished to the USSC by United States district courts and United States magistrates, as well as variables created by the OPA specifically for research purposes. The data include variables from the Judg[ ]ment and Conviction (J and C) order submitted by the court, background and [G]uideline information collected from the Presentencing Report (PSR), and the report on sentencing hearing in the Statement of Reasons (SOR). These data contain detailed information such as the [G]uideline base offense level, offense level adjustments, criminal history, departure status, statement of reasons given for departure, and basic demographic information. These data are the primary analysis file and include only statute, [G]uideline computation, and adjustment variables for the most serious offense of conviction. These data are part of a series designed by the Urban Institute (Washington, DC) and the Bureau of

Justice, Bureau of Justice Statistics, and is available by year in spreadsheet format for free download off the Internet.[102]

### A. Methodology

The analysis in this Part employs sentencing data from 1994 to 2007.[103] But, the focus of this study is on white-collar offenders sentenced under post-2003 amended rules. This class of defendants is fairly homogenous, because the sentencing rules[104] and Guidelines[105] for white-collar offenses have not changed significantly in that time. As a result, serious white-collar defendants sentenced under current rules today are sufficiently described by this group, making it an extremely useful class for study. Merely describing the class as white-collar defendants sentenced under post-2003 amended rules implies two separate distinctions that need to be made, and as a corollary two possible comparisons between classes; this Article scrutinizes both.

#### 1. The "White-Collar" Class Distinction

First, a distinction needs to be made between white-collar defendants and all other defendants. The debate and scholarship on how the term "white-collar" is or should be defined is extensive, partly

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Justice Statistics. Data and documentation were prepared by the Urban Institute.

BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, ICPSR No. 24232, FEDERAL JUSTICE STATISTICS PROGRAM: DEFENDANTS SENTENCED UNDER THE SENTENCING REFORM ACT, 2007, at ii (2009), *available at* http://dx.doi.org/10.3886/ICPSR24232.

[102] The data files examined in this Article are all available from the Inter-University Consortium for Political and Social Research (ICPSR), located at http://www.icpsr.umich.edu.

[103] The selection of this period was simply dictated by the data that was actually available for study.

[104] There would seem to be a glaring problem in this statement, as it ignores completely the impact of *United States v. Booker*, 543 U.S. 220, 245 (2005), which made the Guidelines advisory rather than mandatory. *But see supra* note 64 (discussing how judges prior to *Booker* provided departures through Sentencing Guidelines § 5K2). As it turns out, judges continue to rely on these § 5K2 departures, and while the departure rates have certainly increased after *Booker*, the reasoning behind a non-Guideline sentence is irrelevant for the purposes of this Article. *See* U.S. SENTENCING COMM'N SOURCEBOOK *supra* note 93, fig.G (detailing a 10–12% decrease in Guideline sentences based on the impact of *Booker*). Indeed, even if *Booker* is the justification that a judge gives for a departure and hence departs more often, it is still part of the phenomenon this Article seeks to document: that judges are departing more often for white-collar crime. Furthermore, the baseline for comparison is other serious crimes that of course are also subject to the ruling in *Booker*.

[105] There have been other amendments to Sentencing Guidelines § 2B1.1 since 2003, but none have altered the provisions that are critical for serious white-collar offenders, namely those now located at §§ 2B1.1(a), (b)(1), (b)(2), (b)(14), and (b)(16). *Compare* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2008) *with* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2003).

because it is unclear whether the term refers to the offender or the offense.[106] For the purposes of this study, the definition is necessarily constrained by the information available in the Sentencing Commission data. As detailed below, the data for each defendant contains a variable recording the primary offense with which that defendant is sentenced (that is, the offense with the highest prison term). This variable is the best reference point in an "offense-based" definition, and the data does not contain any "offender-based" information that would be useful towards identifying white-collar criminals. Consequently, the definition of "white-collar" used in this Article's study must be offense-based, and is articulated as follows: "any defendant for whom the primary sentenced offense is *any type of fraud*."

This definition is suitable because all the criminal statutes that were discussed in Part I were frauds, and fraud standing alone is a nonviolent crime. Indeed, in Part I.A's description of legislative history, it was shown that Senators Leahy and Biden and President Bush used the terms "fraud" and "white-collar crime" somewhat interchangeably.[107] While it is certainly possible that a defendant could be sentenced for multiple crimes where only one is a type of fraud, it is highly unlikely that a defendant could be sentenced to a "street" crime, like narcotics or homicide, and a fraud at the same time where the fraud offense results in a higher sentence. The reason for this is that the highest levels of Guidelines for fraud come into play only when the loss amount is in the millions of dollars, meaning that the fraudster must have been in some high position of public trust to have access to such capital. There simply have not been examples of such public figures that are able to maintain drug-distribution or other criminal roles on the side.[108] Toward the lower end of the sentencing spectrum, "street" crimes, like drug dealing and illegal firearm possession, ramp up penalties much more quickly than

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[106] *See* Mark D. Harris & Anna G. Kaminska, *Defending the White-Collar Case at Sentencing*, 20 FED. SENT'G REP. 153, 153 (2008). The man who coined the term, Sociologist Edwin Sutherland, meant it unambiguously to refer to the offender, embracing any crime "'committed by a person of respectability and high social status in the course of his occupation.'" *Id.* (quoting EDWIN H. SUTHERLAND, WHITE COLLAR CRIME 9 (1949)). Of course, such a socioeconomically focused definition, if used in any actual criminal statute or administrative decision, would probably be in violation of the Equal Protection Clause of the Fourteenth Amendment, U.S. CONST. amend. XIV, § 1, and perhaps also the bill of attainder prohibition of the United States Constitution. *Id.* art. I, § 9, cl. 3. Nevertheless, "[o]n any of these definitions, the crimes that fall into the white-collar category today are highly diverse, ranging from a CEO involved in a complex insider trading scheme to a bartender who fails to report all of her tips." Harris & Kaminska, *supra*, at 154.

[107] *See supra* Part I.A.

[108] This is not to say such an intriguing criminal is impossible to imagine. But, for example, if a drug dealer managed to convince directors of a publicly-traded corporation that he or she was a viable candidate for CEO, there would be a strong argument that such a defendant is more white-collar in character than not.

frauds,[109] meaning that if the most serious offense is a fraud, then the defendant can almost certainly be classified as white-collar. Thus, this definition is never over-inclusive.

Conversely, this definition might be slightly under-inclusive if there are other types of violations besides fraud that should be considered white-collar. For the reasons set forth above, however, fraud certainly appears to be the most significant category of offenses describing white-collar crime, and in any case, an under-inclusive definition does not destroy the integrity of the study, because if white-collar defendants are truly getting departures more frequently and in greater magnitude, then the cases that are white-collar but not fraud will be counted along with the general class for comparison, decreasing the observed disparity.

The comparison between post-2003 white-collar offenders and all other defendants sentenced at the same time is fundamental to this study because it demonstrates that white-collar offenses sentenced from 2003 up to and including the present are being treated more leniently than other criminals with similar levels of severity as defined by the Sentencing Guidelines.

### 2. The "Post-2003" Class Distinction

Second, a distinction needs to be made between pre- and post-2003 white-collar offenders. This distinction obviously does not have the potential for controversy, like the white-collar distinction, but it is an important one to make because the WCCPA drastically changed white-collar Sentencing Guidelines as described in Part I. As detailed below, the data contains a variable recording the Guidelines amendment in the year used for sentencing. There is one small complication in this distinction that was touched on in Part I.C. Several of the WCCPA changes were implemented in an emergency amendment that went into effect on January 25, 2003, with the rest coming into effect in the normal Guideline update on November 1, 2003.[110] But, there is no information in the data regarding emergency amendments, so it is impossible to separate the defendants sentenced under the original 2002 rules from those sentenced under the 2002 rules with the emergency amendment. For the purposes of this study, the impact of the emergency amendment

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[109] As an example, mere illegal possession of a firearm by a convicted felon, which violates 18 U.S.C. § 924(g) (2006), combined with two prior violent or narcotics convictions under the Guidelines achieves an automatic offense level of 24. U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(a)(2) (2008). On the one hand, a defendant sentenced for drug dealing under one of the provisions of 21 U.S.C. need only deal five grams of crack (cocaine base) to receive that level. *Id.* § 2D1.1(c)(8). On the other hand, for a fraud conviction to have a base offense level of at least 24, the defendant need have caused the loss of at least $2.5 million. *Id.* § 2B1.1(a), (b)(1)(J).

[110] *See supra* notes 72–73 and accompanying text.

is ignored, and only the normal 2003 update is considered. This decision makes sense for two reasons: (1) the emergency amendment only included *some* of the changes in the full amendment, and thus is not as significant; and (2) by leaving those defendants sentenced under the emergency amendment in the comparison pre-2003 class, the post-2003 class maintains its homogeneity and consistency with defendants sentenced under present rules. Such a division slightly distorts the comparison between pre- and post-2003 white-collar defendants, but its overall impact is small considering the pre-2003 amendment class consists of data from 1994 to 2002, and the emergency amendment was in effect for only a fraction of the defendants sentenced under 2002 rules.

The comparison between pre- and post-2003 white-collar defendants is less fundamental to the study, but it is still informative in showing that the changes implemented in the WCCPA have failed to provide the end goal of higher sentences for the most serious white-collar offenses.

### 3. Detailed Description of the Data

The sentencing data available is for fiscal years 1994–2007, and as provided exists as a separate file for each year.[111] The data is formatted so that a case defines a single defendant sentenced during that fiscal year. There are many variables recorded in the files, but only a few are important for this study. Additionally, all years contain these variables, so the data was first combined into one file for all years, and then stripped of all unnecessary variables. The remaining variables were cleaned up to eliminate any numerical codes[112] or values that would throw off the calculations; these procedures are mentioned in the comments section of the table below, which lists all variables used for the purposes of this Article. Not all defendants have data recorded for every variable, which requires a reduction in the data actually used for the study as discussed following the table.

| Variable | Description | Comment |
|---|---|---|
| AMENDYR | Amendment year Guidelines under which the defendant is | This is, with few exceptions, the amendment year Guidelines in operation on the date the defendant was sentenced.[113] |

[111] The reference numbers for each year 1994–2007 are, in chronological order, ICPSR 23762, 24013, 24032, 24051, 24070, 24089, 24108, 24127, 24146, 24165, 24182, 24200, 24217, and 24232.

[112] The term "numerical code" refers to the technique of putting values like 9990 into a variable to identify some factor that cannot be conveyed by a regular number. Such values obviously present problems for calculations and need to be modified.

[113] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(a) (2008). One exception is that new Guideline amendments cannot be applied if they would violate the *ex post facto*

| | | |
|---|---|---|
| | sentenced. | |
| TOTPRISN | Total prison sentence ordered by the federal district court, in months. | There were some codes in this variable that needed to be modified. All life, death, and 360+ month sentences were normalized to 360 months (30 years) because the Guidelines do not ever contemplate numbers higher than 360,[114] and life/death sentences require a number for calculation purposes. Any codes for less than a day or "time-served" were set at 0 months. Finally, any codes for missing or unknown were simply removed from the data. |
| XMINSOR | Minimum of the calculated sentencing Guideline range, in months. | The same codes as existed in TOTPRISN were changed in XMINSOR in the same way. Additionally, there were several XMINSOR values in the data that were impossible because they are not valid minimum Guidelines (only about 35 out of more than 800,000 cases). These values were rounded up to the nearest possible Guideline minimum.[115] |
| SUB_CAT | Bureau of Justice Statistics code for information on the defendant's primary sentenced offense. | The primary offense code records the category of the defendant's most serious offense (that is, the offense with the longest imposed prison sentence). Codes 190, 200, 430, and 600 are frauds. Everything else is not. About 1,700 cases are missing this code, but such cases can still be considered as "general crimes." |

prohibition in the Constitution, because, for example, the penalties have been increased for a violation after its completion. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(1) (citing U.S. CONST. art. I, § 9, cl. 3). Another exception is for cases that have been remanded by a Circuit Court of Appeals for resentencing.

[114] *See* U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, sentencing tbl. (2008).

[115] *See id.* (portraying some numbers that simply do not exist as possible Guideline range minimums). This step was important because the calculations are done based on averages for each minimum, so having singular outliers could throw off the data, whereas rounding allows for the use of closely approximated real minimums.

Because the Guideline amendment year is necessary to know whether the defendant was sentenced before or after the 2003 amendments, only cases with a valid AMENDYR could be examined. Furthermore, both TOTPRISN and XMINSOR must be valid, because this study is solely concerned with comparing sentences given their applicable Guideline range. Thus, data missing values for any of those three variables had to be removed from consideration. Finally, only defendants with Guideline minimums of at least one year were considered.[116] The breakdown of the number of cases in significant data segments is tabulated below, including benchmarks for serious white-collar crimes as defined by Guideline range minimums.

| Data Segment | Number of Cases | Percent of Total |
|---|---|---|
| Total defendants sentenced, 1994–2007 | 819,600 | 100% |
| Total w/ valid AMENDYR, TOTPRISN, XMINSOR | 757,845 | 92.47% |
| Total, 1994–2007, valid, 12-month+ minimum | 571,348 | 69.71% |

| | | |
|---|---|---|
| Total defendants sentenced, 1994–2007, valid, 12+ | 571,348 | 100% |
| White-collar defendants, 1994–2007 | 54,335 | 9.51% |
| All defendants, post-2003 rules | 180,150 | 31.53% |

| | | |
|---|---|---|
| White-collar defendants, 1994–2007 | 54,335 | 100% |
| White-collar defendants, pre-2003 rules | 42,943 | 79.03% |
| White-collar defendants, post-2003 rules | 11,392 | 20.97% |

| | | |
|---|---|---|
| All defendants, post-2003 rules | 180,150 | 100% |
| All nonwhite-collar defendants, post-2003 rules | 168,758 | 93.68% |
| White-collar defendants, post-2003 rules | 11,392 | 6.32% |
| White-collar, post-2003, Guideline minimum 5+ yrs | 1,267 | 0.70% |
| White-collar, post-2003, Guideline minimum 10+ yrs | 304 | 0.17% |
| White-collar, post-2003, Guideline | 104 | 0.058% |

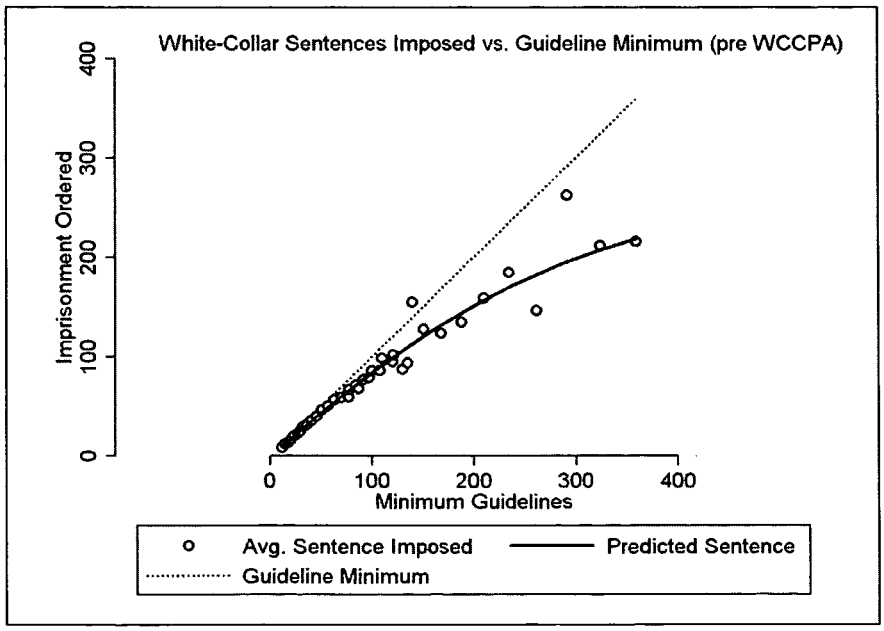
[116] This was done for two reasons. First, this Article's purpose is to examine serious crimes, and anything with less than a one year Guideline minimum is too minor to be applicable. Second, Guideline minimum sentences of one year or more are distinctive because they are Zone D offenses on the sentencing table, and as such can only have their term satisfied by actual imprisonment. *Id.* § 5C1.1(f). Lesser offenses have the option for probation or intermittent confinement. *Id.* § 5C1.1(b)–(e).

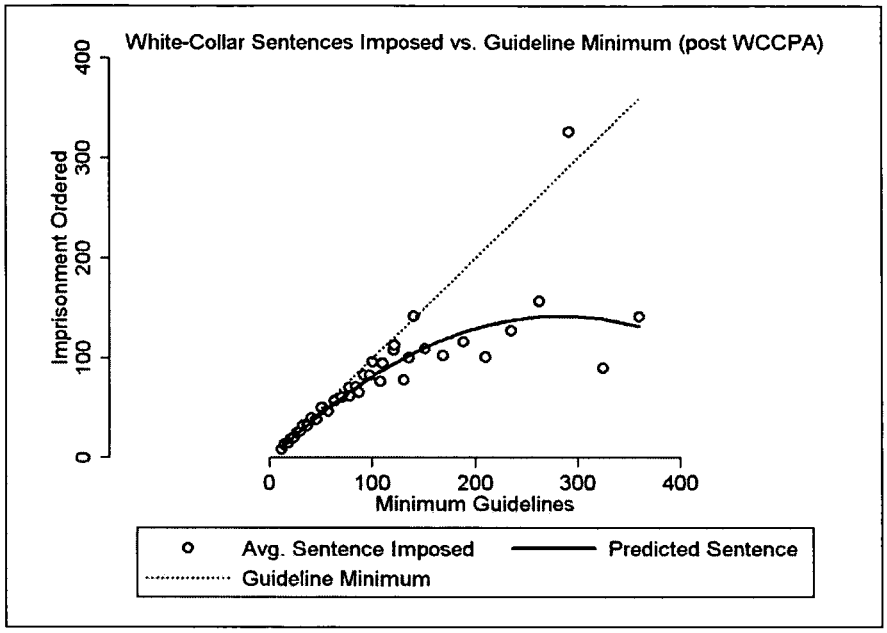
| | | |
|---|---|---|
| minimum 15+ yrs | | |
| White-collar, post-2003, Guideline minimum 20+ yrs | 45 | 0.025% |

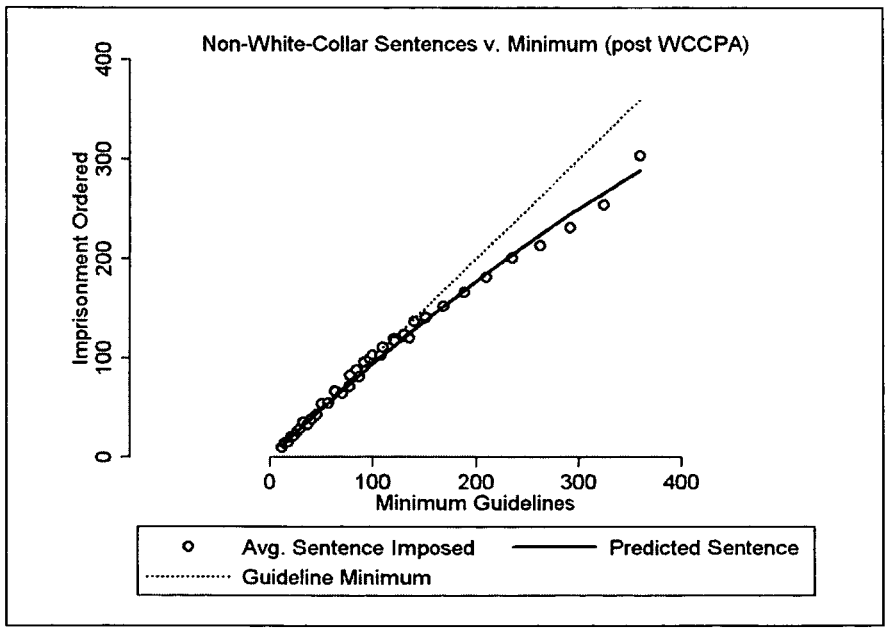
*B. Sentence Imposed Compared to Guideline Minimum*

The first calculation investigates the sentence given to defendants, based on the minimum suggested Sentencing Guidelines for their crime. White-collar defendants after the WCCPA are compared both to white-collar defendants before the WCCPA, and more importantly, all *other* crimes sentenced contemporaneously. The purpose of this comparison is to show that white-collar criminals are being granted departures more frequently and in higher magnitude, leading to more lenient sentences, given the same Guideline range as other criminals. A secondary purpose is to show that the WCCPA was ineffective in changing sentencing severity for white-collar criminals.

The comparison is done graphically by showing the divergence between sentences imposed from the Guideline minimum for each possible minimum, allowing for a visual representation of actual sentences imposed along a continuum of severity, as defined by the Guidelines. Linear regressions were run on each class of defendants and provide predictions for the sentence that will be imposed, given a specific Guideline minimum. The results are graphed below, followed by a table comparing numerical data for the examples introduced in Part I.C.






It can be seen from the graphs that the expected sentence for all classes of defendants lies below the Guideline minimum, so that the

average defendant can expect a sentence with a slight downward departure. There are two important conclusions drawn from this study:

(1) White-collar defendants get sentenced more leniently than nonwhite-collar defendants across all levels of severity, as defined by the Guideline range; and

(2) Disparity increases drastically for the most serious crimes.

Thus, judges are giving breaks to white-collar crime when compared to street crime, and they give the biggest breaks to those defendants that Congress specifically wanted to punish more harshly through the implementation of the WCCPA. As a secondary conclusion, it is easy to see that the WCCPA did not affect the intended change on harsher sentencing for white-collar criminals. The *United States v. Booker*[117] decision has an impact on this conclusion insofar as it had a noticeable impact on departure rates.[118] Nevertheless, the purpose of showing this comparison is not to claim that the WCCPA actually had the opposite effect that it intended, but instead that it just has not had its intended effect. Noticeably, white-collar defendants are not being sentenced more severely at the highest levels, so whether or not this should be partially blamed on *Booker*, the WCCPA was a failure. Numerical data is used in the table below to compare the examples introduced in Part I.C.

| All Units in Months | | **"Sham Investor"** | **"Fraudulent CEO"** |
|---|---|---|---|
| **Pre-WCCPA** | **Guideline Range** | 46–57 | 135–168 |
| | **Expected Sentence** | 40 | 109 |
| **Post-WCCPA** | **Guideline Range** | 51–63 | Life |
| | **Expected Sentence** | 45 | 132 |
| **Change in Expected Sentence** | | **+5 (+12.5%)** | **+ 23 (+21.1%)** |
| **Exp. Sentence for Equivalent Street Crimes (Post-WCCPA)** | | 49 | 289 |
| **White-Collar Disparity** | | **-4 (-8.2%)** | **-157 (-54.3%)** |

[117] 543 U.S. 220 (2005).

[118] *See supra* note 104 and accompanying text. By increasing departure rates across the board, *United States v. Booker* makes it more difficult to draw conclusions from any comparison between white-collar sentencing under the old and new rules.

From this table, it is shown that both types of "typical" white-collar defendants have their sentences boosted slightly after the WCCPA,[119] but the disparity between white-collar and street crimes is extreme for the most serious crimes—white-collar crimes at the highest Guideline range result in sentences that are, on average, less than half the duration of sentences given for all other violations similarly situated at the highest Guideline range.

### *C. Magnitude of Departures When Granted*

The next calculation takes a different approach and looks at the magnitude of downward departures, when given. It has already been shown above in Part II.B that white-collar crimes, especially the serious ones, are given more lenient sentences. As touched upon above, judges can make downward departures from Guidelines in a variety of ways (as opposed to sentencing a defendant within the Guidelines[120]), and only defendants with downward departures were considered in this study. The purpose of this calculation is to show that white-collar criminals who are given departures are granted deviations that are a much larger percentage of their minimum Guideline-suggested sentence. In this calculation, as opposed to the first, only white-collar and other criminals after the WCCPA are compared, because the WCCPA did not change any departure rules.[121]

The comparison is done graphically by showing the average percent of downward departures for each Guideline minimum, allowing for a visual representation of departure magnitude along a continuum of severity. Regressions were run on each class of defendants and provide predictions for the magnitude of a departure if granted, given a specific Guideline minimum. The results are graphed below, followed by a table with the predicted departure percentage (rounded to the nearest whole

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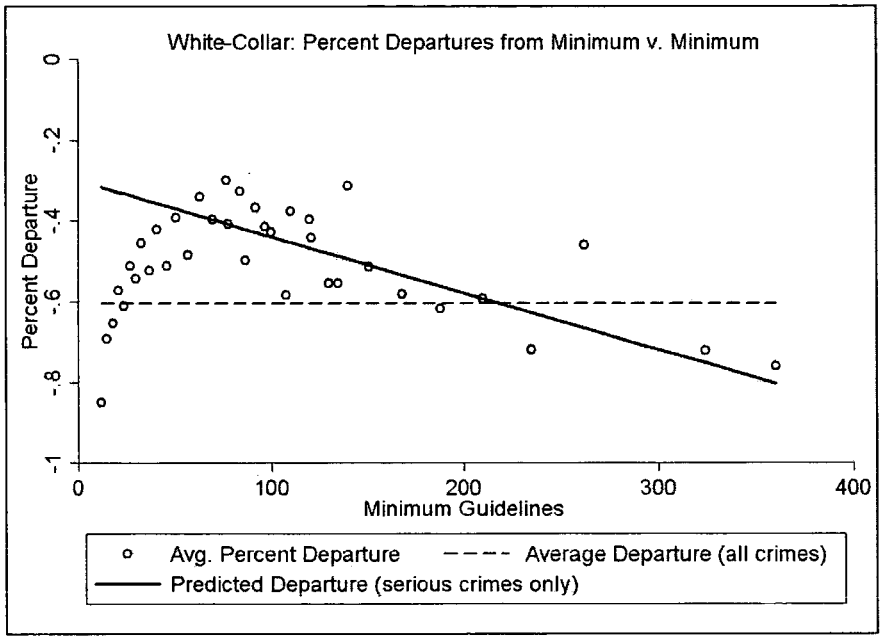
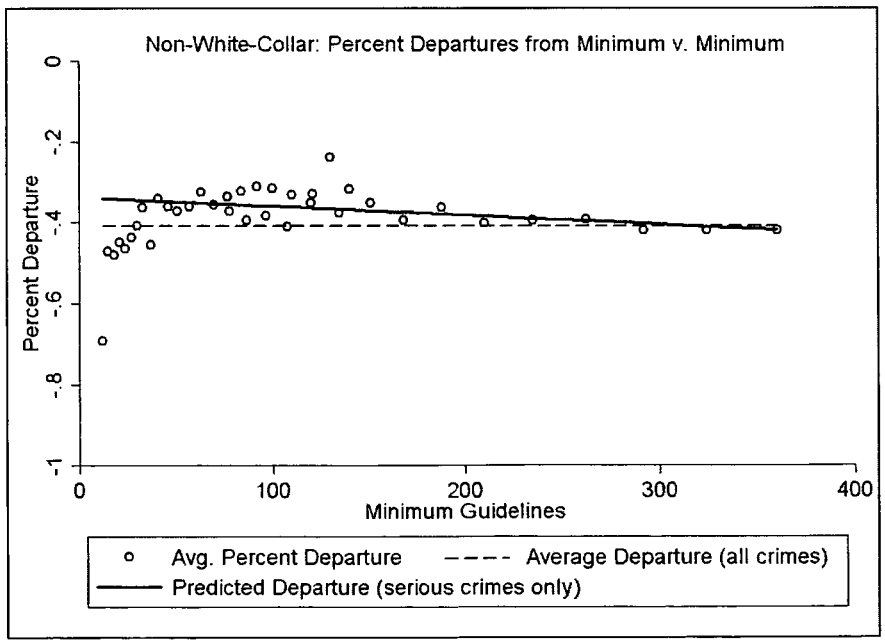
[119] The increase is not nearly to the level desired by Congress, as exemplified by its multiplication of statutory maximums for some frauds by four. *See* White-Collar Crime Penalty Enhancement Act of 2002, Pub. L. No. 107-204, tit. IX, § 903, 116 Stat. 804, 805 (codified at 18 U.S.C. §§ 1341, 1343 (2006)).

[120] Judges can also make *upward* departures under the same reasoning as downward departures. *See supra* note 64. These, however, are comparatively rare. For instance, in fiscal year 2008, only 1.5% of defendants were sentenced above their Guideline range. U.S. SENTENCING COMM'N SOURCEBOOK, *supra* note 93, tbl.N. In comparison, 39% of defendants were given below-range sentences, either on account of departures or the *Booker* decision. *Id.* Thus, upward departures represent relative outliers in sentencing, and by only taking downward departures into account, this part of the study documents a more significant phenomenon.

[121] In theory, the WCCPA could obviously have an indirect effect on judges' decisions for downward departures by simply implying that harsher sentencing procedure was necessary. This point is not crucial to the Article though, because there were no provisions in the WCCPA changing departure rules. Showing whether the WCCPA accomplished something it never attempted to do does not bear on its success or failure.

percent) of the two classes of defendants for each possible Guideline range.



As seen from these graphs, white-collar and nonwhite-collar defendants both benefit from downward departures of substantial magnitude, when given. Even so, white-collar defendants benefit from departures that are a larger percentage of their Guideline minimum at every level of severity, and have an average departure magnitude across all levels that is approximately twenty percent higher. Additionally, the departure percentage increases drastically for white-collar defendants as the seriousness of the crime increases, while the percentage for non-white-collar defendants remains fairly constant. The actual numbers are tabulated below.

| **Guideline Range (months)**[122] | **Expected Departure: Percentage of Guideline Minimum** | | |
|---|---|---|---|
| | **White-collar** | **Nonwhite-collar** | **Disparity** |
| 63–78 | -39% | -35% | **-4%** |
| 70–87 | -40% | -35% | **-5%** |
| 77–96 | -41% | -35% | **-6%** |
| 78–97 | -41% | -35% | **-6%** |
| 84–105 | -42% | -36% | **-6%** |
| 87–108 | -42% | -36% | **-6%** |
| 92–115 | -43% | -36% | **-7%** |
| 97–121 | -43% | -36% | **-7%** |
| 100–125 | -44% | -36% | **-8%** |
| 108–135 | -45% | -36% | **-9%** |
| 110–137 | -45% | -36% | **-9%** |
| 120–150 | -47% | -36% | **-11%** |
| 121–151 | -47% | -36% | **-11%** |
| 130–162 | -48% | -37% | **-11%** |
| 135–168 | -49% | -37% | **-12%** |
| 140–175 | -49% | -37% | **-12%** |
| 151–188 | -51% | -37% | **-14%** |
| 168–210 | -53% | -37% | **-16%** |
| 188–235 | -56% | -38% | **-18%** |
| 210–262 | -59% | -38% | **-21%** |
| 235–293 | -63% | -39% | **-24%** |
| 262–327 | -67% | -40% | **-27%** |
| 292–365 | -71% | -40% | **-31%** |
| 324–405 | -75% | -41% | **-34%** |

[122] For this calculation, the Guideline ranges start at 63–78, because due to the nature of the data (as is easily seen from the graphs) the regression is only accurate for—and indeed was only run on—sentences above a minimum of sixty months. As a result, data for this study is not available for less severe Guideline ranges; but the focus of this Article is primarily on serious crimes.

| | | | |
|---|---|---|---|
| 360–life | -80% | -42% | **-38%** |
| **Spread** | **41%** | **7%** | |
| **Average Departure—all Guideline ranges** | **-60%** | **-41%** | **-19%** |

Once again, this data shows that judges are treating white-collar criminals more leniently and are giving enormous departures for the most serious offenses. Moreover, across all levels of severity, the expected departure magnitude for white-collar criminals is significantly greater. Because Guideline sentences are meant to provide sentences that are "'presumptively reasonable'" for any offense,[123] it is damaging to the consistency of the federal sentencing system that judges are so reticent to apply Guideline sentences to serious white-collar crimes.

## III. AN ANSWER TO THE DISPARITY: MANDATORY MINIMUMS FOR WHITE-COLLAR CRIME

Mandatory minimum terms of imprisonment enacted by Congress via statute provide the perfect solution to district court judges' refusal to impose harsh sentences through the Guidelines on serious white-collar violators. In general, mandatory minimums exist for a wide array of federal violations and evoke varying levels of controversy. Early in its history, the Sentencing Commission was tasked by Congress to conduct an in-depth analysis into the impact of mandatory minimum statutes on federal criminal sentencing.[124] That report, released in 1991, details the breadth of mandatory minimum statutes in the federal code, with such provisions then-existing in over sixty statutes.[125] Furthermore, the report shows mandatory minimums are not a new concept—mandatory

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[123] Rita v. United States, 127 S. Ct. 2456, 2462 (2007) (quoting United States v. Rita, 177 Fed. Appx. 357, 358 (4th Cir. 2006) (unpublished)). This presumption applies to appellate court review. *Id.*

[124] Crime Control Act of 1990, Pub. L. No. 101-647, tit. XVII, § 1703, 104 Stat. 4789, 4845–46.

[125] *See* U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: MANDATORY MINIMUM PENALTIES IN THE FEDERAL CRIMINAL JUSTICE SYSTEM 11 (1991) [hereinafter U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES] ("Today there are approximately 100 separate federal mandatory minimum penalty provisions located in 60 different criminal statutes."). The information in this report is slightly outdated, but it is still useful for examining overall trends and goals, especially since the most frequently applied mandatory minimum offenses have remained consistent. The Sentencing Commission has stated that updating this report is a priority, but unfortunately it has yet to be done. Notice of Final Priorities, 72 Fed. Reg. 51,884 (Sept. 11, 2007).

life sentences have existed for offenses such as piracy and first-degree murder since 1790.[126]

In modern sentencing procedure, the term "mandatory minimum" almost always reflects a more narrow application of statutes, and it is these statutes that also spark the most heated debates over the ultimate impact on different racial and socioeconomic groups. This is primarily due to the fact that more than ninety percent of the sentences imposed with statutorily-mandated imprisonment terms are given for violation of only four different federal laws.[127] These four statutes are the following federal crimes:

(1) Possession with Intent to Manufacture or Distribute a Controlled Substance[128];
(2) Possession of Controlled Substance[129];
(3) Importation or Exportation of Controlled Substance[130]; and
(4) Use of a Firearm During a Drug or Violent Crime.[131]

The importance of emphasizing the high usage of these statutes in mandatory minimum sentencing lies in the fact that most scholarship on mandatory minimums assumes the term itself to refer to one of these crimes. Thus, many of the arguments advanced by opponents of mandatory minimums focus on their application to drug and violent crimes,[132] and do not envision hypothetical application to white-collar violations. For this reason, such arguments are often inapplicable to white-collar crime, as is discussed in Part III.B. This discussion,

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[126] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, app. A; *see also* 18 U.S.C. §§ 1111, 1651 (2006) (setting the mandatory minimum for first-degree murder and piracy, respectively).

[127] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 11. The four statutes listed were responsible for ninety-four percent of the mandatory minimum sentences from 1984 to 1990; in that period, more than half the statutes were never even used once. *Id.* (referencing 18 U.S.C. § 924(c), 21 U.S.C. §§ 841, 844, 960 (2006)). Again, the data is somewhat outdated, but these statutes continue to be frequently used for mandatory minimum sentences.

[128] 21 U.S.C. § 841 (2006).

[129] *Id.* § 844.

[130] *Id.* § 960.

[131] 18 U.S.C. § 924(c) (2006).

[132] In particular, simple possession of controlled substances under 21 U.S.C. § 844 has generated a firestorm of anti-minimum commentary. In fact, the Commissioner of the Sentencing Commission himself recently petitioned Congress for repeal of the mandatory minimum for simple possession of crack cocaine. *See Cracked Justice—Addressing the Unfairness in Cocaine Sentencing: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 43 (2008) (statement of Ricardo H. Hinojosa, Chair, United States Sentencing Commission) ("[T]he Commission strongly and unanimously recommends that Congress . . . [r]epeal the mandatory minimum penalty provision for simple possession of crack cocaine under 21 U.S.C. § 844.").

however, will initially focus on why serious white-collar crimes present such ideal targets for application of mandatory minimums.

*A. Mandatory Minimums Are Appropriate for White-Collar Crime*

To understand why mandatory minimums would be appropriate for serious white-collar crime, it is useful to first examine justifications for mandatory minimums in general. Fortunately, the 1991 Sentencing Commission Report

> conducted a comprehensive review of relevant legislative history, Executive Branch statements, and views expressed in academic literature. The Sentencing Commission [also] conducted and subsequently analyzed field interviews with judges, assistant United States attorneys, defense attorneys, and probation officers to better understand the perceived costs and benefits ascribed to mandatory minimums by those with practical federal criminal justice experience. These analyses identified six commonly offered rationales for mandatory minimum sentencing provisions.[133]

The six rationales, in order from least important to most important according to the Report, are:

(1) Inducement of pleas;
(2) Inducement of cooperation;
(3) Disparity;
(4) Incapacitation, especially of the serious offender;
(5) Deterrence; and
(6) Retribution or "just deserts."[134]

An individual analysis of each of these rationales will show that every one except (4) supports application of mandatory minimums to white-collar crime.

1. Rationales (1) and (2): Inducement of Cooperation and Pleas

Beginning with the least important rationales, (1) and (2), it appears that these relatively straightforward concepts should have equal application to white-collar and street crime. After all, any criminal prosecution, regardless of the crime, can benefit from inducements for greater rates of cooperation and guilty pleas. Mandatory minimums always provide greater cooperation because "cooperation . . . is *the only statutorily-recognized way to permit the court to impose a sentence below the length of imprisonment required by the mandatory minimum sentence*."[135] They provide more frequent guilty pleas as well if the

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[133] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125 , at 12–13.

[134] *Id.* at 13–14.

[135] *Id.* at 13 (emphasis added) (citing 18 U.S.C. § 3553(e) (2006)). This situation has actually changed somewhat since the 1991 Report. The "safety valve" provision added to

prosecution uses the possibility of a mandatory minimum to induce the defendant to plead to a lesser charge,[136] although under current Department of Justice regulations, this type of plea bargaining is not allowed.[137]

Even so, these two rationales actually weigh in favor of application to white-collar crime because of the simple truth that white-collar cases are usually far more complex and costly to prosecute than other crimes.[138] By encouraging more frequent cooperation[139] and guilty pleas,[140] mandatory minimums could greatly ease the burden on federal prosecutors when pursuing major white-collar crimes. White-collar criminal investigations and trials will always be more resource-

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the code allows reduction of sentences for first-time offenders meeting specific qualifications under several drug related statutes, including the first three of the four most commonly imposed. *See* 18 U.S.C. § 3553(f) (2006). But, cooperation is a requirement (among others) of this code provision, so the above statement is still mostly accurate. *See id.* § (f)(5). Section 3553(f) represents a code section in which the controversy over mandatory minimums precipitated actual legislative change.

[136] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 14.

[137] *See Memorandum from Attorney General John Ashcroft Setting Forth Justice Department's Charging and Plea Policies*, 16 FED. SENT'G REP. 129, 130 (2003) ("It is the policy of the Department of Justice that, in all federal criminal cases, federal prosecutors must charge and pursue the most serious, readily provable offense or offenses that are supported by the facts of the case . . . . The most serious offense or offenses are those that generate the most substantial sentence under the Sentencing Guidelines, unless a mandatory minimum sentence or count requiring a consecutive sentence would generate a longer sentence.").

[138] *See* Michael L. Seigel, *Corporate America Fights Back: The Battle Over Waiver of the Attorney-Client Privilege*, 49 B.C. L. REV. 1, 13–17 (2008).

[139] *Id.* at 16 ("[T]he difficult nature of white[-]collar investigation means that it often must be prosecuted bit by bit, as prosecutors unravel the wrongdoing and work their way up the corporate ladder. Charges are first brought against the lower-level employees, who are much more likely to have been caught red-handed, with the hope that their indictment or conviction will lead to cooperation against mid-level management. If this succeeds, the mid-level managers are prosecuted with the hope that they will implicate responsible corporate officers at the highest level."). Increased cooperation, factor (1), would clearly aid in this effort.

[140] *Id.* at 17 ("If the cases are not settled through guilty pleas, each jury trial in a white[-]collar case is likely to be time-consuming and expensive. Prosecutors almost inevitably must introduce a massive amount of documentary evidence, along with the testimony of dozens of witnesses, often including forensic accounting and other experts. Highly paid defense counsel will conduct extensive and often effective cross-examinations of the government's witnesses. After the government rests, the defense is very likely to put on a case of its own. In light of the fact that the defendant probably has no prior criminal record and may even be an upstanding citizen of the community (apart from the criminal conduct alleged in the case), she is free to take the witness stand to proffer her ignorance or good faith defense. Defense experts may be called to rebut the opinions of the prosecution experts. Sometimes, defense counsel will line up a parade of good character witnesses to testify to the defendant's honest, law-abiding nature."). More frequent guilty pleas, factor (2), would reduce the instances of tough trials.

demanding and complicated given the nature of the offenses and the defendants' access to robust defense counsel, but mandatory minimums would at least mitigate that problem to a certain extent. Nonetheless, these two factors are important only ex ante to sentencing, and have no effect on district court judges' decisions. So, even though rationales (1) and (2) support mandatory minimums for white-collar crimes, they are irrelevant to the sentencing disparity and leniency discussed in the rest of this Article.

### 2. Rationale (3): Disparity

In the Sentencing Commission Report, the term "disparity" refers to the disparity between sentences for the *same* offense rather than the type of disparity observed above in Part II, which is disparity between different offense types—white-collar and nonwhite-collar—with the same Guideline range. Disparity between sentences for the same offense is problematic because it means that offenders are given wide ranges of punishment; thus, the punishment is less accurately fitting the crime. The Guidelines themselves were originally established to eliminate this type of disparity by providing consistency nationwide for every federal offense.[141]

Although the Guidelines provide a starting point, judges' departures still create disparity between punishments for similar conduct. So, mandatory minimums are useful when judges are departing often, and at high magnitudes from the Guideline sentence in a manner that is inconsistent from one case to another. Providing an absolute minimum prevents judges from creating disparity through these departures.[142]

Serious white-collar crimes, perhaps more than any other single category of violations, suffer from a disparity in punishment among similar offenses. This fact is demonstrated succinctly from the data on departure magnitudes in Part II.C. While departures are expected to be around forty percent of the Guideline minimum for the most serious non-white-collar crimes, if a white-collar criminal at the highest Guidelines is granted a departure, he can expect it to be *eighty percent*! This means that there is a huge disparity between judges who accept the sometimes-harsh Guideline sentences and judges who rely on departures. A mandatory minimum could conveniently eliminate this spread.

One need not look only at bulk data to get a sense of the inconsistency among cases. Consider, for example, Lance K. Poulsen and Ronald E. Ferguson, a little-known tale of two major white-collar

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[141] *See* Breyer, *supra* note 13, at 4 ("Congress['s] second purpose [in creating the Guidelines] was to reduce 'unjustifiably wide' sentencing disparity").

[142] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 13.

criminals. Poulsen, a former CEO of National Century Financial Enterprises was sentenced to *30 years in prison* on March 27, 2009, for his role as the "architect" of a $1.9 billion fraud.[143] Meanwhile, Ferguson, a former CEO of General Re Corporation, was sentenced to *two years in prison* on December 16, 2008, for his role in a fraud that caused $600 million in shareholder loss.[144] The following table compares the two cases, emphasizing the similarity in Sentencing Guidelines.

| | **Lance K. Poulsen**[145] | **Ronald E. Ferguson**[146] |
|---|---|---|
| **District of Prosecution** | Southern District of Ohio | District of Connecticut |
| **Employment Position** | CEO | CEO |
| **Type of Corporation** | Privately-held | Wholly-owned subsidiary |
| **Fraud Loss** | $1.9 billion | $597 million |
| **Violations** | Conspiracy, securities fraud, wire fraud, and money laundering | Conspiracy, securities fraud, mail fraud, and false statements |
| **Guilty Plea or Trial** | Trial by jury | Trial by jury |
| **Date of Sentence** | March 27, 2009 | December 16, 2008 |

| | | |
|---|---|---|
| **Base Level § 1B1.1(a)**[147] | 7 | 7 |
| **Loss: (b)(1)** | +30 (over $400 million) | +30 (over $400 million) |
| **Victims: (b)(2)** | +4 (over 50 victims) | +6 (over 250 victims) |
| **Sophisticated: (b)(9)(c)** | +2 (yes) | 0 (unclear, assume not) |

[143] Associated Press, *National Century Chief Sentenced*, L.A. TIMES, Mar. 28, 2009, at B2.

[144] Jane Mills & David Voreacos, *U.S. May Appeal Sentence for General Re's Ferguson*, BLOOMBERG NEWS, Dec. 18, 2008, http://www.bloomberg.com/apps/news?pid=20601203&sid=aLFw_VDKXfx0.

[145] *See generally* U.S. Sentencing Memorandum for Defendants Poulsen & Parrett, United States v. Poulsen, 2009 WL 1604975 (S.D. Ohio Mar. 17, 2009) (No. 06-129); *National Century Chief Sentenced*, *supra* note 143. Unfortunately, the district court did not publish a ruling on enhancements, but because Poulsen was sentenced to thirty years, the court must have ruled fairly close to what the government proposed. Moreover, the government also only argued for the U.S. Probation Office's calculation in the Pre-Sentencing Report, and nothing more. *See* U.S. Sentencing Memorandum for Defendants Poulsen & Parrett, *supra*, at 6–14.

[146] *See* United States v. Ferguson, 584 F. Supp. 2d. 447, 448–49, 456 (D. Conn. 2008); Mills & Voreacos, *supra* note 144. With one exception, if an enhancement is not in this ruling, it is assumed that it was not applied. *See infra* note 148.

[147] *See supra* Part I.C (applying this same exercise on sentencing under Sentencing Guidelines § 2B1.1).

| | | |
|---|---|---|
| **Major Fraud: (b)(14)** | +2 (over $1 million, (b)(14)(A)) | 0 (unclear, assume not) |
| **Role: § 3B1.1(a)** | +4 (organizer or leader) | +4 (organizer or leader)[148] |
| **Obstruction: § 3C1.1** | +2 (yes) | 0 (unclear, assume not) |
| **Total Offense Level** | 51[149] | 47 |
| **Adjusted Level[150]** | 43 | 43 |
| **Guideline Sentence** | Life | Life |
| **Sentence Imposed** | 30 years | 2 years |

These cases are relatively similar and yield identical Guideline ranges. Although Poulsen's violation had a few aggravating factors, like obstruction of justice and a larger monetary loss, both individuals were CEOs responsible for major fraud—over $500 million in losses—that easily maxed out the Guidelines. The two defendants were only sentenced three months apart. Yet one defendant was sentenced to thirty years, and the other was sentenced to only two. The resulting disparity is absurd, but it is indicative of the divide between judges who apply the Guidelines and those who depart. Perhaps unsurprisingly, Poulsen in his sentencing memo even made the claim that "district courts frequently impose sentences within the two to five year range when sentencing defendants charged with securities fraud, even where the [g]uidelines call for a life sentence,"[151] relying partly on the recent sentencing of Ferguson. The court apparently disagreed. A mandatory minimum would help fix such disparity.

### 3. Rationale (4): Incapacitation of Serious Offenders

Mandatory minimums aim to enhance public safety by incapacitating serious offenders for substantial periods of time.[152] This is the only rationale that does not support application of minimums to

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[148] Section 3B1.1(a) is not addressed in the district court's ruling, but it is fairly clear that it would be applied here to a CEO, and the defendant argues against its application in one of his sentencing memos. *See* Defendant Ronald E. Ferguson's Supplemental Sentencing Memorandum at 14–24, United States v. Ferguson, 584 F. Supp. 2d. 447 (D. Conn. 2008) (No. 06-137), 2008 WL 5099456.

[149] The government's brief mentions an offense level of 52, but the math seems to add to 51. *See* U.S. Sentencing Memorandum for Defendants Poulsen & Parrett, *supra* note 145, at 6. In any case, that one point is irrelevant because of the adjustment discussed below. *See infra* note 150.

[150] Offense levels over 43 are treated as 43. U.S. SENTENCING GUIDELINES MANUAL ch. 5, pt. A, cmt. application note 2 (2008).

[151] Lance K. Poulsen's Reply to U.S. Sentencing Memorandum at 5, United States v. Poulsen,, 2009 WL 1604975, (S.D. Ohio Mar. 24, 2009) (No. 06-129) (citations omitted).

[152] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 13.

white-collar violators. Once serious corporate fraudsters have been caught and convicted, it is highly unlikely that they can continue to cause the same level of damage, because as felons they would not be able to achieve the same level of public trust as they commanded before. Rationale (4) is therefore undoubtedly primarily for drug and violent offenses, where recidivism rates are much higher.[153] Even though this rationale opposes mandatory minimum sentences for white-collar criminals, the strength of the other five rationales significantly outweighs this counterargument, justifying the minimum sentence requirements.

4. Rationale (5): Deterrence

By providing a considerable, guaranteed term of imprisonment, mandatory minimums deter would-be criminals who are anxious about the prospect of serving hard time.[154] The additional deterrence effect of a definite sentence strongly supports statutorily imposed minimums, because the Guidelines alone have been noticeably ineffectual toward that end.

Additional deterrence was cited by members of Congress[155] and President Bush[156] alike as one of the chief motivations for instituting the enhanced penalties under the WCCPA. But, the fact that judges have failed to impose the increased penalties has completely undermined the effectiveness of such deterrence.[157] The data on departure rates and

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[153] *See, e.g.*, J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 GEO. MASON. L. REV. 45, 102 (2007) (stating that "because white[-]collar criminals have extremely low recidivism rates, restraint through incarceration arguably provides only marginal societal benefit").

[154] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 13. The Sentencing Commission Report talks about specific deterrence (deterring the individual from further criminal activity) versus general deterrence (deterring any potential offenders from that criminal activity). *Id.* Specific deterrence is not relevant to white-collar crime because, as mentioned before, white-collar crime is not plagued by high recidivism. *See supra* note 153 and accompanying text. Thus, this Part focuses on general deterrence only.

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

[156] Signing Remarks, *supra* note 6, at 1321 ("Every corporate official who has chosen to commit a crime can expect to face the consequences. No more easy money for corporate criminals, just hard time.").

[157] *See* Note, *Go Directly to Jail: White Collar Sentencing After the Sarbanes-Oxley Act*, 122 HARV. L. REV. 1728, 1733 (2009) ("Deterrence works best when punishment is swift and certain. White[-]collar sentencing in the years since Sarbanes-Oxley, however, has been anything but. Given the broad range of potential sentences provided by the WCCPA, within which judges now have essentially complete discretion, the sentence can range from mere months in prison to decades. Moreover, unlike the average aspiring criminal actor, white[-]collar offenders usually know that they will have access to a lenient plea bargaining system. They are also often well aware of instances in which a court has

magnitudes presented in Part II shows that serious white-collar criminals can expect a much lower sentence than the Guidelines; these individuals are not deterred because they do not expect the harshest sentences to be applied in their case. This fact was evident in Poulsen's argument in his sentencing memo that white-collar convicts with a Guideline of *life* should instead receive two to five years.[158]

Corporate executives considering illegal behavior with potentially disastrous results should fear the prospect of real terms of imprisonment. Deterrence—if well-constructed and consistent as it would be through mandatory minimums—is more effective against white-collar crime than any other type because individuals who are in a position to commit the most serious offenses have a relatively good understanding of the law.[159] A simple provision, like the one to be discussed in Part III.C, would be internalized rapidly in the business community, without the information problems that usually surround the theory of deterrence.[160] By providing significant and consistent prison sentences, and easily informing the target audience about the applicability of such sentences, mandatory minimums would afford the level of deterrence desired by the legislative and executive branches.

### 5. Rationale (6): Retribution

According to the Sentencing Commission Report, the most commonly-voiced rationale for mandatory minimums "is the 'justness' of long prison terms for particularly serious offenses. Proponents generally agree that longer sentences are deserved and that, absent mandatory penalties, judges would impose sentences more lenient than would be appropriate."[161] This is exactly the phenomenon observed from the data in Part II.B: judges grant large departures from Guideline minimums so that expected sentence imposed for a white-collar criminal at the most

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departed downward from a Guidelines sentence that shock[ed] the conscience of th[e] [c]ourt." (internal quotation marks and citations omitted)).

[158] Lance K. Poulsen's Reply to U.S. Sentencing Memorandum, *supra* note 151, at 5 (citations omitted).

[159] *See* Drury Stevenson, *To Whom Is the Law Addressed?*, 21 YALE L. & POL'Y REV. 105, 159 (2003) ("Deterrence depends partly on the offender's knowledge of the law and its consequences."); *see also* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 267 (6th ed. 2003) ("[A] threat that is not communicated cannot deter."). It is almost cliché to say that white-collar violators are more highly educated than other criminal offenders, and they tend to have excellent knowledge of the law in their business area, especially if they are an officer or director of a large corporation where dealing with legal hurdles is part of their job.

[160] *See* Stevenson, *supra* note 159, at 162 ("If the legislature hopes to achieve a deterrence effect, policy makers must consider the question of how to make the populace aware of the costs imposed on a given crime.").

[161] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 13.

serious Guideline level will be *more than fifty percent less* than comparable crimes that are not white-collar. There is a large disconnect between the sentences that the Guidelines suggest for white-collar criminals, and the sentences they actually receive.

The supporters of the WCCPA spoke on record multiple times about the inadequacy of penalties prior to the Act, often in the context of a disparity between white-collar and nonwhite-collar sentences.[162] By enhancing these penalties, the executive and legislative branches had hoped to ensure that "those who break the law, . . . however wealthy or successful they may be, must pay a price."[163] For various reasons, judges have failed to respond to the new Guidelines.[164] Nevertheless, mandatory minimums must be applied to serious white-collar offenses in order to implement the will of Congress and the President, and also to rectify the injustice of offenders who destroy millions or billions of dollars in wealth for their own gain. That these offenders receive far shorter imprisonment terms than someone who robs a bank for thousands,[165] or merely possesses five grams of crack cocaine,[166] is unconscionable.

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[162] *See supra* Part I.A.

[163] Signing Remarks, *supra* note 6, at 1320.

[164] This Article chooses not to focus on the reasoning behind district court judges' failure to impose harsh sentences, but instead focuses on the impact of their departures and a solution for rectifying the result. There is, however, an implication running throughout this Article that judges are using faulty reasoning in departing so often for white-collar criminals, leading to the inequitable results. For a good overview of judges' reasoning in sentencing post-WCCPA, see Note, *supra* note 157, at 1739–44, which argues that judges significantly undervalue the harm of white-collar crime and believe that the defendants are less worthy of moral condemnation because they have trouble identifying a victim. For an excellent in-depth analysis of judges' reasoning in sentencing white-collar criminals in general (based on actual interviews, among other things), see STANTON WHEELER ET AL., SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS 54–123 (1988) (identifying several offense based and offender based factors in judges' sentencing of white-collar criminals). In summary, it is problematic that judges view white-collar crimes as victimless, fail to take into account the massive economic damage perpetrated by the most severe crimes, and give defendants breaks because of their high social status.

[165] Bank robbery is not a mandatory minimum offense. *See* 18 U.S.C. § 2113(a) (2006). But assuming a Guideline sentence, a first time offender who robs a bank for less than $10,000 with a firearm—but does not use it—would still be looking at an offense level of 27, yielding a range of 70–87 months. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B3.1(a)–(b)(1), ch. 5 pt. A (2008).

[166] *See* 21 U.S.C. § 844(a) (2006). ("[A] person convicted under this subsection for the possession of a mixture or substance which contains cocaine base [crack] shall be imprisoned not less than 5 years and not more than 20 years . . . if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams."). At minimum, a first-time offender with this threshold of crack will get five years.

### 6. Previous Discussion of Mandatory Minimums for White-Collar Offenses

Given that the usual justifications for mandatory minimums overwhelmingly support its application to white-collar crime, it is perhaps telling that there has been almost no debate on this issue. Both academic and political circles have largely ignored the solution proposed in this Part. Their silence can be attributed principally to the present day negative view of mandatory minimums in general. These counterarguments are well-founded in the debate about statutory minimums as applied to the four drug and firearm statutes mentioned at the beginning of this Part. Nevertheless, as will be discussed in the next Part, they are largely irrelevant to white-collar crime. The impressive opposition to mandatory minimums need not extend to white-collar statutes.

Even so, there have been occasional suggestions for mandatory minimums to be applied to white-collar crime, or at the very least, the concept has been acknowledged, and sometimes dismissed. In fact, in 2002, Enron-related testimony before the Senate Judiciary Subcommittee on Crime and Drugs led by then-Senator Joe Biden, one of the legal experts on sentencing for white-collar defendants, advised specifically *against* application of mandatory minimum terms of imprisonment.[167] His alternative recommendation was, however, based on "fair, but certain punishment,"[168] which has obviously not been achieved through the Guidelines. Senator Biden credited his proposals in the WCCPA to what he learned during these hearings.[169] As has been established, there was no mandatory minimum provision in the WCCPA, and no bill since introduced into Congress has contained such a provision for the major fraud offenses.[170]

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[167] *Penalties for White Collar Offenses: Are We Really Getting Tough on Crime?: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 107th Cong. 230 (2003) (statement of John C. Coffee, Professor, Columbia University School of Law).

[168] *Id.*

[169] *See supra* note 34 and accompanying text.

[170] *But see* S. 1843, 111th Cong., § 2 (2009) (providing for increased penalties for health care fraud; read twice and referred to committee on October 22, 2009). This bill provides for mandatory six-month sentences for defendants who commit health care fraud as defined in 18 U.S.C. § 1347, with losses in excess of $100,000. *Id.* Although the bill does not more generally address the major frauds discussed throughout this Article, it shows that at least some members of Congress have recently become interested in looking at mandatory minimums as a prescription for fraud. Additionally, there are two older fraud-related statutes with mandatory minimums. One is a relatively obscure statute under the Title 12 banking provision that provides a minimum of two years for embezzlement, fraud, or false entries by a banking officer that dates all the way back to 1913. 12 U.S.C. § 630 (2006); *see also* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at app. A. The other is the Continuing Financial Crimes Enterprise Statute, created in 1990 , which is a compound criminal statute providing a ten-year minimum for a series of

More recently, several scholars have discussed the potential of mandatory minimums for white-collar offenders. For example, a 2007 article examined white-collar sentencing post-*United States v. Booker*, making the observation that "judges continue to grant huge departures and use sentencing variances in white[-]collar cases."[171] Recognizing the potential problem, the article went on to claim that by basic game theory principles, judges would be more successful in maintaining their discretion by avoiding large and frequent departures because Congress will inevitably take away their authority to do so through implementation of mandatory minimums.[172] The article, however, made no normative or legal judgment on mandatory minimums other than to point out that judges' hate having their authority constrained.[173]

In another example, an essay published in 2005 concerning *Booker*'s impact on white-collar sentences identified the same disparity problem and came to the same conclusion that Congress will undoubtedly act to curb increasing judicial variances in sentencing.[174] The essay took a more negative view of mandatory minimums, however, maintaining that only a few high-profile defendants would actually serve the minimums,[175] and that prosecutors would "charge bargain" away the harshest penalties for lower ranked violators.[176] The piece further claimed that some secondary

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fraud violations. 18 U.S.C. § 225 (2006); *see also* U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at app. A. Neither of these statutes, however, applies to general frauds; § 225 applies only to multiple violators acting in concert against a financial institution and receiving receipts directly from the fraud, and § 630 applies only to banking officials. Yet § 225 does provide a good starting point on how to craft a mandatory minimum fraud statute, discussed *infra* at Part III.C.

[171] Daniel A. Chatham, Note, *Playing with Post-*Booker *Fire: The Dangers of Increased Judicial Discretion in Federal White Collar Sentencing*, 32 J. CORP. L. 619, 635–36 (2007).

[172] *See id.* at 639 ("Though there are presently no mandatory minimum sentences for federal white[-]collar crimes, Congress need only point to a few instances of district courts returning to the view that white[-]collar defendants do not deserve jail time to justify imposing mandatory minimums for white[-]collar crimes as well.").

[173] *Id.* at 623.

[174] Stephanos Bibas, *White-Collar Plea Bargaining and Sentencing After* Booker, 47 WM. & MARY L. REV. 721, 740–41 (2005) [hereinafter Bibas, *White-Collar Plea Bargaining*] ("If, however, judges abuse their new-found freedom, their excessive leniency could provoke a harsh overreaction. Congress would likely step in with more mandatory penalties, causing white-collar prosecution to look more like drug prosecution. . . . In other words, judges may soon bring even more of a straitjacket upon themselves, to the satisfaction of prosecutors.").

[175] *See id.* at 736.

[176] *Id.* at 735–36. "Charge bargaining" is essentially using the threat of a mandatory minimum to garner favorable negotiating power in a plea bargaining deal. *See id.* at 736. As was previously discussed, however, this type of bargaining has been disallowed under Department of Justice policy since 2003, so the essay was in error on this point. *See Memorandum from Attorney General John Ashcroft Setting Forth Justice Department's Charging and Plea Policies*, *supra* note 137.

"defendants who are too stubborn . . . to flip will suffer."[177] Even so, the essay proffered the belief that prosecutors would temper their own actions much like judges, and white-collar defendants' access to more robust defense counsel would ultimately negate some of the effects of having mandatory minimums.[178] The concern that lower-level employees might suffer disproportionately is well-founded, but as will be seen in Part III.C, there are ways to craft mandatory minimum provisions to avoid this issue.

Interestingly enough, an article from 2006 actually advocated for mandatory minimums for white-collar crime,[179] but in a manner much different than this Article. There, the article suggested one- and three-year mandatory minimums for very low thresholds of loss—$1 million and $5 million, respectively.[180] The article was concerned primarily with midrange offenders receiving overly-harsh sentences under the Guidelines, mixed with the reality of judges departing downward and giving almost no prison time.[181] In promoting mandatory minimums, the article was actually suggesting sentences are too harsh, and that the minimum could ease Congress's concern while still allowing judges to depart with frequency.[182] Setting aside this premise, the article's proposal is substantively different from the one advanced here; this Article focuses on the most serious white-collar crimes, attempting to achieve consistency as well as significant terms of imprisonment for major frauds. Furthermore, the 2006 article uses only two relatively low-loss benchmarks, whereas the mandatory minimum proposal in Part III.C incorporates loss calculations in addition to defendant-specific factors in the offense.

Finally, a 2009 student note specifically on the WCCPA and its effects on sentencing recognized that mandatory minimums might reduce the "problematic range of discretion," but declined to consider them as a solution.[183] The note instead argued for a change in loss calculation and increased financial penalties in lieu of prison time.[184]

The fact that no scholar or politician has proposed more severe mandatory minimums for major frauds may be due to apathy about the problem—after all, it can be difficult to get incensed over some fraudulent CEOs getting off too easy when economic times are good.

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[177] Bibas, *White-Collar Plea Bargaining*, *supra* note174, at 737.

[178] *Id.* at 737–38.

[179] Peter J. Henning, *White Collar Crime Sentences After* Booker*: Was the Sentencing of Bernie Ebbers too Harsh?*, 37 MCGEORGE L. REV. 757 (2006).

[180] *Id.* at 782.

[181] *Id.* at 784–85.

[182] *Id.*

[183] Note, *supra* note 157, at 1736 n.54.

[184] *Id.* at 1745–49.

That apathy may change in the midst of a new financial crisis with mega-frauds of proportions never before seen.[185] Another factor is the negative view towards mandatory minimums in general, which is addressed in the next section.

### *B. White-Collar Mandatory Minimums Are Different*

To say that mandatory minimums are out of favor with scholars and politicians is an immense understatement. This Part presents the major counterarguments against mandatory minimums, and explains why they are inapplicable to white-collar crime.

#### 1. The Guidelines Are Better at What Mandatory Minimums Are Trying to Accomplish

Senator Orrin Hatch, the "other" sponsor of the WCCPA, had the following to say about mandatory minimums in 1993:

> While the Commission has consistently sought to incorporate mandatory minimums into the Guidelines system in an effective and reasonable manner, in certain fundamental respects, the general approaches of the two systems are inconsistent. Whereas the [G]uidelines permit a degree of individualization in determining the appropriate sentence, mandatory minimums employ a relatively narrow approach under which the same sentence may be mandated for widely divergent cases. Whereas the [G]uidelines provide for graduated increases in sentence severity for additional wrongdoing or for prior convictions, mandatory minimums often result in sharp variations in sentences based on what are often only minimal differences in criminal conduct or prior record. Finally, whereas the [G]uidelines incorporate a 'real offense' approach to sentencing, mandatory minimums are basically a 'charge-specific' approach wherein the sentence is triggered only if the prosecutor chooses to charge the defendant with a certain offense or to allege certain facts.[186]

The lack of mandatory minimums in the WCCPA then is unsurprising, given the views espoused by one of its two initial proposers. This counterargument has been repeated time and time again by many authors, who all have the same fundamental point that the Guidelines accomplish the same goals as mandatory minimums, but will do so with flexibility. More recently—but still pre-*United States v. Booker*—Justice Anthony Kennedy remarked that "[b]y contrast to the [G]uidelines, I can

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[185] Bernie Madoff's alleged $50 billion fraud, for instance, vastly overwhelms the mere $400 million peak in losses set forth in the Sentencing Guidelines. *See id.* at 1735 n.43.

[186] Orrin G. Hatch, *The Role of Congress in Sentencing: The United States Sentencing Commission, Mandatory Minimum Sentences, and the Search for a Certain and Effective Sentencing System*, 28 WAKE FOREST L. REV. 185, 194–95 (1993) (citations omitted).

accept neither the necessity nor the wisdom of federal mandatory minimum sentences. In too many cases, mandatory minimum sentences are unwise and unjust."[187] Even the Sentencing Commission Report discussed in Part III.A agrees with this sentiment, stating in reference to the six main rationales discussed that "the [G]uidelines are structured so that they are as or more likely to achieve these goals than mandatory minimums."[188]

The fundamental problem with these arguments is that they were made before *Booker* ruled that the Guidelines were merely advisory. These statements may have been convincing before *Booker*, but they fail to acknowledge the ability of a judge today to completely ignore the Guidelines.[189] That leaves mandatory minimums as the *only* legal check on judges' discretion at sentencing.

Specifically, white-collar crime suffers from misapplication of the Guidelines more than "street" crimes, as evident from the data presented in Part II. While the Guidelines would perhaps serve better than mandatory minimums if they were still binding, or at the very least usually applied, the failure of judges to respond to the Guidelines is why mandatory minimums have become a necessity in the first place. This makes the counterargument irrelevant.

2. Mandatory Minimums Cause Inequitable "Cliff" Effects

Another argument against mandatory minimums encountered frequently is that mandatory minimums create "cliff" effects in sentencing by providing a dramatic increase in a sentence for some threshold of violation, in practice usually a quantity of drugs, although the threshold need not be quantitative for the logic to apply.[190]

> For example, a first offender who helps sell 495 grams of cocaine might be thought to deserve anywhere from two to four years of imprisonment. Under the [S]entencing [G]uidelines, his presumptive sentence (after allowance for his acceptance of responsibility and minimal role in the offense) would fall in the range of twenty-seven to thirty-three months, or about two and one-half years. For an identical offender who sold just five grams more, the sentence would double,

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[187] Anthony M. Kennedy, Assoc. Justice, U.S. Supreme Court, Speech at the American Bar Association Annual Meeting (Aug. 9, 2003), http://www.supremecourtus.gov/publicinfo/speeches/sp_08-09-03.html.

[188] U.S. SENTENCING COMM'N, MANDATORY MINIMUM PENALTIES, *supra* note 125, at 32.

[189] To reiterate, judges could always rely on departures before *Booker*. *See supra* note 64. But *Booker* has caused judges to give non-Guideline sentences more frequently, and the Guidelines can be completely cast aside if the judge wishes. *See supra* note 104 and accompanying text.

[190] *See* Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 209 (1993).

> because the five-year mandatory minimum applicable to sales of 500 grams would kick in.[191]

Conceptually, the problem with a "cliff" effect in sentencing is that two substantially similar violations are forced to have significant differences in sentences applied. It is a problem of disparity that is *caused* by mandatory minimums rather than mitigated by them.

The reason this argument is irrelevant with respect to serious white-collar violations, however, is the fact that the "presumptive sentence" of any top level offender is astronomically high, often life in prison.[192] The mandatory minimum applied, whether five, ten, or even twenty years will be less than this Guideline recommendation. As a result, there is no "cliff" effect. Under mandatory minimums for the most serious frauds, if the judge sentences the violator at the statutorily imposed minimum, the defendant will actually receive a lower sentence than his Guideline range. If the judge chooses to apply a Guideline range, then the sentence will be higher, but the judge already has that option under current sentencing rules. Another way of making this point is to say that if the recommendations of this Article are followed, the sentencing floor will be raised for frauds that satisfy the requirements, but not above the current Guideline ceiling—avoiding the state of affairs responsible for the "cliff" effect in drug and firearm statutes.

The oft-mentioned assertion that mandatory minimums over-punish nonviolent and first-time offenders[193] is actually a subset of this argument, and as such is irrelevant to serious white-collar offenses for the same reason. It is implicitly recognized that white-collar offenders will be *both* first-time *and* nonviolent, and Congress *still* directed the Sentencing Commission to impose severe Guideline ranges in the WCCPA. Because the mandatory minimums proposed in this Article are below those Guideline ranges, that proposal cannot be termed unfair to first-time, nonviolent offenders.[194]

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[191] *Id.* (citing 21 U.S.C. § 841(b)(1)(B)(ii)(II) (1988 & Supp. II 1990)).

[192] *See supra* Part I.C.1.

[193] *See, e.g.*, Frank O. Bowman, III & Michael Heise, *Quiet Rebellion? Explaining Nearly a Decade of Declining Federal Drug Sentences*, 86 IOWA L. REV. 1043, 1070 (2001). As mentioned in that article, the "safety valve" provision referenced supra in note 135, was formulated in response to this criticism. *Id.* (citing Vincent L. Broderick, *Flexible Sentencing and the Violent Crime Control Act of 1994*, 7 FED. SENT'G REP. 128, 128 (1994)).

[194] That is, unless one is of the opinion that substantial sentences for serious white-collar criminals are generally undesirable. Such an argument would, of course, be an opposing viewpoint to everything presented in this Article. The purpose of this Article, however, is not to delve into the discussion of whether major white-collar criminals normatively deserve or would be deterred by higher sentences. Instead, this Article is satisfied with pointing out that the legislative and executive branches have stated multiple times on record that such sentences are important for both reasons. *See supra* Part I.A. Additionally, this Article emphasizes that would-be major fraudsters, under current

### 3. Mandatory Minimums Fail to Distinguish Between Levels of Responsibility

A third common critique of mandatory minimums "is the equal treatment of offenders who played sharply different roles in the offense. The ringleader faces the same sentence as a moderately important underling, who in turn gets the same sentence as a young messenger or secretary who had little responsibility or control over the events."[195] This is an example, however, of a criticism of how mandatory minimums have been constructed for drug and firearm offenses, and not for the concept as it could apply to white-collar or any other crime. In drug and violent crimes, the minimums as they are written in the statutes presently are activated by some combination of quantity of drugs,[196] injury or death to victims,[197] prior convictions,[198] or use of a firearm.[199] Roles of responsibility in commission of the offense do not factor into these mandatory minimum statutes, but instead are relegated to sentencing factors under the Guidelines.[200] The fundamental problem that most commentators have with this aspect of mandatory minimums is that they eschew qualitative culpability thresholds, and instead focus on quantitative measurements than can cause minor participants of major violations to suffer sentences disproportionate to their actual involvement.

In any case, there is no plausible theoretical reason to exclude responsibility from construction of a mandatory minimum statute, and the example introduced in Part III.C provides for just that. As will be seen, the chief "role-in-the-offense trigger" will be the defendant's status as an officer or director of a major corporation who commits the fraud in furtherance of his day-to-day employment.

Even so, quantitative loss calculations continue to play a role, because such calculations are the only way to assess the impact of the overall fraud on the public at large. In combination with the role assessment, these loss calculations create mandatory minimums that are

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practices, have come to expect lenient sentences, which *may be* part of the reason that such fraud is occurring more frequently at more extreme levels.

195 Schulhofer, *supra* note 190, at 210–11.

196 *See, e.g.*, 21 U.S.C. §§ 841(b), 844(a), 960(b) (2006) (awarding five years for five grams of crack cocaine under § 844(a) and ten years for a threshold quantity of drugs under §§ 841(b) and 960(b)).

197 *See, e.g.*, 21 U.S.C. §§ 841(b), 960(b) (awarding twenty years for a threshold quantity of drugs where death or serious injury results).

198 *See, e.g., id.*

199 *See, e.g.*, 18 U.S.C. § 924(c)(1) (providing several thresholds for different types of firearms and usages).

200 *See* U.S. SENTENCING GUIDELINES MANUAL § 3B1.1–.2 (2008) (defining aggravating and mitigating roles).

fair by providing lower tiers for offenders who were not *as* responsible—minimums that are still well below the recommended Guidelines, even assuming a reduction by way of a minimal role in the offense.[201] It is arguable that a defendant who had an *extremely* minimal role in a massive fraud would be unduly harmed by a five-year minimum, but such a defendant has no guarantee whatsoever that the judge will give him a downward departure from his stratospheric Guidelines, anyway. Additionally, in such a case the incentive for cooperation[202] provided by that statutorily required term of imprisonment would be useful to help the government bring the true culprits to justice.

A commonly-articulated subset of this argument, however, is that by allowing below-minimum sentences for defendants who cooperate with the prosecution, statutorily imposed terms make the role-in-the-offense problem even more acute for minor players. This is because

> [d]efendants who are most in the know, and thus have the most 'substantial assistance' to offer, are often those who are most centrally involved in conspiratorial crimes. The highly culpable offender may be the best placed to negotiate a big sentencing break. Minor players, peripherally involved and with little knowledge or responsibility, have little to offer and thus can wind up with far more severe sentences than the boss.[203]

Nevertheless, the higher-tier minimums for higher-ranked officials proposed in the following section mitigate this occurrence, whereby the minimums will be at different levels to reflect that disparity in culpability. Additionally, it is unclear that prosecutors would be willing to cooperate with high-ranking corporate officials accused of orchestrating disastrous frauds because such cases are so high profile as to make or break careers, and bringing the chief mastermind to justice is often the point of the entire investigation.[204] Finally, the vertically hierarchical nature of corporations—as compared to a more horizontal model with a less-strict hierarchy in criminal enterprises—makes it

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[201] This is a four-point reduction under Sentencing Guidelines § 3B1.2(a). When combined with the acceptance of responsibility, a three-point reduction under § 3E1.1, a defendant who had a minimal role in a massive fraud would be looking at a final offense level of around 36, § 3B1.1, which results in more than fifteen years for a first-time offender under the Guidelines. *See id.* ch. 5 pt. A.

[202] Recall that cooperation is the only way to get out from under a mandatory minimum. *See supra* note 135 and accompanying text.

[203] Schulhofer, *supra* note 190, at 212.

[204] *See* Bibas, *White-Collar Plea Bargaining*, *supra* note 174, at 736–37 ("A handful of defendants, however, will pay the sticker prices. First, prosecutors hunt famous defendants like big-game trophies. Prosecutors can earn valuable reputations by refusing to bargain away strong cases against prominent corporate CEOs. By forcing these cases to trial, they earn high-profile notches in their belts and favorable, marketable publicity." (citing Stephen Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2464, 2472 & n.27 (2004))).

clear that even low-ranking company employees would be taking orders from *somewhere* above them in the chain-of-command; thus, they will be able to cooperate in order to assist the prosecution of the higher-ups. For these reasons the scenario of the cooperating "kingpin" getting less time than the "go-fer"[205] is unlikely to be replicated in the white-collar arena.

### 4. Mandatory Minimums Result in a Disparate Impact on Protected Classes of Defendants

Perhaps the most frequent criticism of mandatory minimums in their current form is that they result in the imposition of severe sentences disproportionately for defendants in a particular protected class. The arguments vary widely, but authors have argued that mandatory minimums cause a disparate (or at least unreasonable) impact among African-Americans,[206] Hispanic-Americans,[207] women,[208] children,[209] mentally disabled,[210] and indigent defendants,[211] among others. Nevertheless, potential mandatory minimums for white-collar crimes can be distinguished without delving in-depth into these powerfully convincing arguments. This is because all of these viewpoints actually oppose disparate impacts for prosecution of certain crimes which happen to be punished under statutorily imposed minimums. Their anger does not result from the mandatory minimum itself, but instead from the reality that violators are not being treated equally because certain violations—the ones with the harsh minimums—are more likely to be perpetrated by specific disadvantaged groups.

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[205] *See* Schulhofer, *supra* note 190, at 212–13.

[206] *E.g.*, William W. Schwarzer, Comment, *Sentencing Guidelines and Mandatory Minimums: Mixing Apples and Oranges*, 66 S. CAL. L. REV. 405, 407–08 (1992) (citation omitted).

[207] *See, e.g.*, Knoll D. Lowney, *Smoked Not Snorted: Is Racism Inherent in Our Crack Cocaine Laws?*, 45 WASH. U. J. URB. & CONTEMP. L. 121, 147 (1994) (enhanced penalties are "being imposed on a disproportionate number of Black and Latino cocaine users").

[208] *See generally* Shimica Gaskins, Note, *"Women of Circumstance"—The Effects of Mandatory Minimum Sentencing on Women Minimally Involved in Drug Crimes*, 41 AM. CRIM. L. REV. 1533, 1533 (2004) (detailing the plight of women who are minimally involved in a crime and yet are subject to "draconian sentences").

[209] *See, e.g.*, Nekima Levy-Pounds, *From the Frying Pan into the Fire: How Poor Women of Color and Children Are Affected by Sentencing Guidelines and Mandatory Minimums*, 47 SANTA CLARA L. REV. 285, 322–37 (2007) (discussing the various issues children are faced with when a mother is incarcerated).

[210] *See generally* Timothy Cone, *Developing the Eighth Amendment for Those "Least Deserving" of Punishment: Statutory Mandatory Minimums for Non-Capital Offenses Can Be "Cruel and Unusual" When Imposed on Mentally Retarded Offenders*, 34 N.M. L. REV. 35 (2004) (arguing that the imposition of mandatory minimum sentences on mentally retarded offenders violates the Eighth Amendment).

[211] *E.g.*, E.E. Edwards, *Equal Justice Under Law—A Concept, Not Reality*, CHAMPION, May 2004, at 4, 53.

As a concrete example, one can examine the statutorily-mandated penalties for crack cocaine, probably the most despised source of sentencing disparity.[212] The fact that crack—by weight—has much harsher statutory penalties than other drugs unsurprisingly causes crack violations to be punished with more severe sentences. More severe sentences for crack lead to longer prison terms for African-Americans and Hispanic-Americans, as those racial groups overwhelmingly represent that substance's direct distributors.[213] This well-documented issue is probably the most frequently-cited example of mandatory minimum failure.[214]

The failure here, though, is not a result of the penalties being statutorily imposed, because all illegal drugs at various quantities are subject to the same mandatory minimums.[215] The failure is a result of the statute treating different drugs differently, especially one that has such a strong racial alignment. It is true that district court judges cannot exercise their discretion and provide a below-minimum sentence, so in the sense that the disparity cannot be rectified in court, the fault lies with the mandatory minimum. But if Congress had provided equal treatment between crack and cocaine powder, there would be no disparate impact whatsoever.

Likewise, in white-collar crimes, the criminals, almost axiomatically,[216] are highly-educated, wealthy, and not composed of any

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[212] This disparity stems from the 100:1 ratio between crack and cocaine powder penalties for drug distribution, which is written into the statute as a mandatory minimum. *Compare* 21 U.S.C. § 841(b)(1)(B)(ii) (2006) (including five hundred grams or more of cocaine) *with id.* § 841(b)(1)(A)(iii) (including five grams or more of crack cocaine, thus showing the 100:1 ratio in quantity). Also particularly egregious is the mandatory minimum for simple possession of crack, referenced several times in this Part. *See supra* note 132 and accompanying text.

[213] *See Testimony of Congressman Robert C. "Bobby" Scott* (Mar. 3, 2006), *in Inter-American Commission on Human Rights, Hearing on Mandatory Minimum Drug Sentences in the United States*, 18 FED. SENT'G REP. 293, 294 (2006) ("This, in turn, becomes racially disparate in its penalty application, by law, since the direct distributers of crack cocaine tend be overwhelmingly Black or Hispanic.").

[214] *See id.* ("One of the most egregious reflections of the racially disparate impacts of federal mandatory minimum sentencing can be seen in the sentencing for 'crack' cocaine when compared to sentencing for powder cocaine. There is a statutory mandatory minimum sentence of 5 years for possessing 5 grams of 'crack' cocaine as compared to 500 grams of powder cocaine before that level of sentence is required. This disparity clearly has a racial impact in that 95% of those arrested on crack offenses are Black (88%) or Hispanic (7%), although drug use data indicates that over 60% of those who consume crack cocaine are White.").

[215] *See* 21 U.S.C. § 841(b)(1)(A)–(B) (2006).

[216] Of course it *is* axiomatic if one uses an "offender-based" definition of white-collar criminals. This Article relies on an "offense-based" definition. *See supra* note 106 and accompanying text.

particular protected racial or socioeconomic group.[217] The only defendant-specific quality used to trigger a minimum in the proposal below is his status as an officer or director of a major corporation, which is also not aligned with any protected class. Because neither the crimes themselves nor the proposed triggers for statutory minimums are associated with such a group, these arguments—while convincing for statutorily-imposed drug penalties—are inapplicable to white-collar crime.

### *C. "The White-Collar Crime Mandatory Penalty Act"*

This Part presents one plausible example of what mandatory minimum penalties in white-collar crimes could look like. First, the proposed legislation is given, and afterward is a brief discussion on why the act was constructed in such a way, including specific choices that were made.

#### 1. The Proposed Legislation

**SEC. 1: SHORT TITLE**

This Act may be cited as the White-Collar Crime Mandatory Penalty Act.

**SEC. 2: MANDATORY PENALTIES FOR MAJOR FRAUD**

(a) IN GENERAL.—Chapter 63 of Title 18, United States Code, is amended by inserting after section 1350 as added by this Act the following:

**"§ 1351. Mandatory Penalties for Major Fraud**

(a) Any person who is convicted of any offense under this chapter with a maximum allowable sentence of at least 20 years shall be sentenced as follows:
   (1) If the offense occurred in the course of performance of a person's duty as an officer or director of—
      (a) a publicly-traded company;
      (b) a company with at least 1,000 employees; or

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[217] *See* Isaac M. Gradman, Note, *Hot Under the White Collar: What the Rollercoaster in Sentencing Law from* Blakely *to* Booker *Will Mean to Corporate Offenders*, 1 N.Y.U. J. L. & BUS. 731, 754 (2005) ("As a group, white[-]collar defendants tend to have a higher socioeconomic status and stand to benefit the most from consideration of factors such as family life, community involvement and occupational reputation.").

(c) an investment company with at least $100 million under management;

such a person will be sentenced to a term of imprisonment which may not be less than 5 years or more than the maximum provided by the particular statutes violated.

(b) If the fraud for which such a person is convicted resulted in a loss in excess of—
(1) $20 million, then
(i) if that person satisfies the conditions set forth in (a)(1), such person will be sentenced to a term of imprisonment which may not be less than 10 years or more than the maximum provided by the particular statutes violated; or
(ii) such person will be sentenced to a term of imprisonment which may not be less than 5 years or more than the maximum provided by the particular statutes violated.
(2) $400 million, then
(i) if that person satisfies the conditions set forth in (a)(1), such person will be sentenced to a term of imprisonment which may not be less than 15 years or more than the maximum provided by the particular statutes violated; or
(ii) such person will be sentenced to a term of imprisonment which may not be less than 10 years or more than the maximum provided by the particular statutes violated.
(3) $5 billion, then
(i) such person will be sentenced to a term of imprisonment which may not be less than 20 years or more than the maximum provided by the particular statutes violated.

(c) Definitions—
(1) publicly-traded company;
(2) investment company; and
(3) officer or director;
all are defined as under the securities laws, title 15, chapters 2A2E.

(d) For purposes of determining loss from the fraud, the same calculation rules will apply as those promulgated for fraud under the Sentencing Guidelines by the United States Sentencing Commission."

(b) CLERICAL AMENDMENT.—The table of sections at the beginning of chapter 63 of title 18, United States Code, is amended by adding at the end the following new item:

"1351. Mandatory Penalties for Major Fraud."

2. Discussion of Proposed Legislation

Basically, in regular words, the mandatory minimum provision codified here is activated for any Title 18, Chapter 63 fraud which has a statutory maximum of at least twenty years. As discussed in Part I, these are the most important frauds for white-collar law enforcement, and the addition of the twenty-year requirement means only the major frauds will be affected by this new code section.

On the one hand, the effect is to provide a tiered minimum based on three loss thresholds, and these minimum tiers differ depending on whether the offender is an officer or director of a major company, as defined in (a)(1). The business terms in this section, in order to maintain regulatory consistency, are meant to have the same definitions as they have in the securities laws, as evidenced by subsection (c). The actual minimums are five years for any loss amount, ten years for at least $20 million, fifteen years for at least $400 million, and twenty years for at least $5 billion in losses for any officer or director who commits a fraud in the course of his official employment. The requirement that the occurrence be in the course of his executive duties avoids the hypothetical of a CEO committing fraud unrelated to his job and getting punished for it as if he had used his official status to further his offense, which would violate the purpose of this subsection. The scope of that requirement, codified at (a)(1) would, of course, be up to the judge to decide at sentencing, meaning that a legal standard could evolve at the appellate level; the starting point, however, would likely be similar to the agency law "scope of the employment" doctrine.[218]

On the other hand, if the offender is not an officer or director, the tiers are five years for at least $20 million, ten years for at least $400 million, and twenty years for at least $5 billion in losses. The highest tier is the same as the officer/director minimum, because at the point the defendant is responsible for $5 billion in losses, the damage to the public is so high that no distinction is warranted. At lesser loss amounts, officers and directors, as figures in public trust, deserve harsher punishments as they will undoubtedly be more culpable.

It is important to note that sentencing factors need only be proven to a judge by a "preponderance of the evidence," rather than to a jury

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[218] RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006) ("An employee acts within the scope of employment when performing work assigned by the employer or engaging in a course of conduct subject to the employer's control. An employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer.").

"beyond all reasonable doubt."[219] This is not the case if such factors would push the penalty beyond the statutory maximum,[220] but that situation is avoided in the proposed white-collar mandatory minimums because they only apply to statutes with a maximum of at least twenty years, and the highest minimum possible under the new provision would be twenty years. The Supreme Court has repeatedly ruled that mandatory minimum requirements are sentencing factors, and not elements of the crime, and thus are subject to a preponderance of the evidence standard before a judge.[221] The loss calculations, therefore, could function exactly as they do under the Guidelines, and that is the goal of the provision as defined in (b).

The specific thresholds were chosen because: $20 million will yield a Guideline range that is almost always above five years for a first-time offender who pleads guilty (give or take some of the other sentencing factors),[222] meaning the minimum will almost always be below the Guidelines. The highest loss figure contemplated under the Guidelines is $400 million, so that was the next threshold chosen because it provides a minimum punishment for what are currently the most serious frauds in the loss table. Finally, $5 billion was chosen as the highest tier, because, frankly, it is just a really big number above which it becomes difficult to fathom any difference in harm.

It is important to discuss the impact of this proposed legislation on the original examples presented in Part I.C, the "sham investor." On the one hand, the "sham investor" with a fraud loss of $5 million would only be subject to five-year minimum if he is an officer or director of his own investment company and that company manages at least $100 million. Either way, his Guidelines range remains at 51–63 months, just *under* five years. On the other hand, the CEO would be subject to a fifteen year minimum, and possibly a twenty year minimum if the loss from his fraud was over $5 billion. His Guidelines remain at a life sentence. Meanwhile, the two parallel fraudsters from Part III.A would both be

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[219] *See* United States v. Watts, 519 U.S. 148, 156 (1997) (per curiam) (discussing the evidentiary threshold difference between statutory elements of the offense and sentencing factors (citing McMillan v. Pennsylvania, 477 U.S. 79, 91–92 (1986))).

[220] *See* Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (ruling that if a sentencing factor increases the prison term above the statutory maximum, it must be proved beyond a reasonable doubt to a jury, analogous to an element of the offense (citing Jones v. United States, 526 U.S. 227, 243 n.6 (1999))).

[221] *See* Harris v. United States, 536 U.S. 545, 565 (2002) (plurality opinion) (reaffirming that a judge may sentence an individual within the Guidelines range under a preponderance of the evidence standard).

[222] U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2008). Note that Guidelines for this loss will also almost always be above *ten* years (give or take some factors) for an officer or director due to § 2B1.1(16)(a), and the role enhancement in § 3B1.1(c), so the reasoning is analogous for the officer/director minimum at the same threshold.

subject to fifteen year minimums, drastically decreasing the possible disparity in sentences.

## CONCLUSION

It would be the height of overstatement to claim that mandatory minimum penalties for white-collar criminals could, by themselves, end the harm of large-scale frauds wreaking havoc on the national economy. Nevertheless, they *would* go far towards deterring potential violators by providing "just hard time" for the type of criminals that have severely damaged public confidence in corporate America, especially in investment services.

Even beyond providing deterrence, however, implementing the proposed legislation would serve the fundamental goals of justice. As it stands, Congress and the President, through passage of the WCCPA, have made it clear that major white-collar criminals deserve to be sentenced to substantial terms of imprisonment. But federal judges have failed to fulfill their end of the bargain, continually ordering lenient sentences for these offenders. Sentencing for major frauds has become like Russian roulette; violators could be sentenced to thirty years or get off with nothing at all. The preceding code section is very fair and not overly-callous—indeed the minimums that would be imposed are less harsh than the currently existing Guidelines in all but a few extreme and rare situations. Moreover, the improved consistency in punishment would do much to reestablish equity between similar cases. There always should be some predictability in punishment, and the proposed act would provide it.

Recent developments and discoveries regarding the economic crisis make it clear that white-collar fraud is a problem that must be examined from every possible angle in order to arrive at a solution. Fair, consistent, and substantial prison terms for the most devastating white-collar offenders compose one part of the solution that leaders of this country can and should immediately implement. The mandatory minimums described in this Article will provide that fairness and consistency.

# HOLD THAT LINE!: THE PROPER ESTABLISHMENT CLAUSE ANALYSIS FOR MILITARY PUBLIC PRAYERS*

## INTRODUCTION

Four-thousand midshipmen, seeking refuge from the Annapolis elements, gradually break from ranks as they shuffle deep into the bowels of Bancroft Hall. These young men and women, each one with a million thoughts racing through their weary minds, trudge down steps and through side doors until they reach the cavernous cafeteria where they all dine together daily for nine months out of the year. Their thoughts are myriad; most are probably of academics, or of military requirements, or maybe even of weekend preparations. Distracting thoughts notwithstanding, these young men and women press forward, already with one-third of their day behind them—and it's only noon.

Welcome to the noon meal at the United States Naval Academy. The midshipmen will eventually find their assigned tables and stand behind their chairs, waiting patiently for their "shipmates" to do the same and for daily announcements to be read. Finally, a member of the Navy Chaplain Corps will step to the lectern, front and center, and request that those who are willing join him in a word of prayer. Following that brief prayer, during which time midshipmen may choose either to participate or simply to stand in quiet reflection of things greater than their many individual concerns, the frenetic pace of Academy life will immediately resume.

Does this brief time of prayer violate the First Amendment's Establishment Clause?[1] The answer should be an emphatic "no." This very practice (and many others like it), however, has come under direct attack because of the improper application of current Establishment Clause tests to military contexts.[2] This Note refutes the use of those tests and provides a proper analytical framework for public prayer in the military. To that end, two different legal solutions are discussed herein. Part I asserts that military public prayer should be afforded the same historical exemption from Establishment Clause analysis as the legislative prayer in *Marsh v. Chambers*.[3] Alternatively, Part II discusses the inaptness of applying current Establishment Clause

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* Winner of the second annual Leroy Rountree Hassell, Sr. Writing Competition, hosted by the Regent University Law Review.

1 The Establishment Clause states: "Congress shall make no law respecting an establishment of religion . . . ." U.S. CONST. amend. I.

2 *See, e.g.*, Letter from Deborah A. Jeon, Legal Dir., ACLU of Md., to Vice Admiral Jeffrey L. Fowler, Superintendent, U.S. Naval Acad. (May 2, 2008) (on file with author) (demanding cessation of the Naval Academy's noon meal prayer).

3 463 U.S. 783 (1983).

jurisprudential tests to a military context and proffers a new test that was formulated in *Goldman v. Weinberger*.[4]

## I. PUBLIC PRAYER IN A MILITARY CONTEXT IS UNIQUE AND SHOULD BE IMMUNE FROM ESTABLISHMENT CLAUSE TESTS

In *Marsh*, the Supreme Court held that a public prayer did not violate the Establishment Clause of the First Amendment when it was conducted by a chaplain during the Nebraska state legislature's opening session.[5] In support of its holding, the Court proffered both a historical[6] and a practical rationale.[7] While it recognized that historical tradition alone is not enough to justify the continuation of public prayer in a legislative setting, the Court used the common-sense, practical rationale to provide irrefutable evidence of the Founders' belief that the practice did not violate the Establishment Clause.[8]

### *A. The Historical Rationale Supporting Military Public Prayer*

Public prayer in the military should be accorded the same treatment by the courts as historic legislative prayer. Both practices are "deeply embedded in the history and tradition of [the United States]"[9] and therefore satisfy the historical rationale required by *Marsh*. Several specific examples from our nation's two oldest military services, the Army and the Navy, illustrate the point.

The U.S. Army has a rich prayer tradition that dates back to the Revolutionary War:

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[4] 475 U.S. 503 (1986), *superseded by statute*, 10 U.S.C. § 774 (2006). Note that this case is superseded only in the narrow factual circumstances presented therein. The underlying rationale for the holding, upon which the test in Part II is based, remains firmly intact.

[5] *Marsh*, 463 U.S. at 786.

[6] *Id.* at 792 ("In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society.").

[7] *Id.* ("To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country."). Factors listed in support of this practical rationale included the fact that "the individual claiming injury by the practice [was] an adult" who was "presumably not readily susceptible to religious indoctrination or peer pressure." *Id.* (internal citations omitted). These factors are nearly identical to the criteria the Supreme Court has used in its application of the coercion test, which states that "government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" Lee v. Weisman, 505 U.S. 577, 587 (1992) (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (alteration in original). The inaptness of applying this test to military public prayer is discussed at length *infra* Part II.B.

[8] *Marsh*, 463 U.S. at 792.

[9] *Id.* at 786.

> [George] Washington himself impressed upon the men under his command the value of Christian character, and his own example must have aided the chaplains in their difficult labors.
>
> Public prayers were a part of the daily or Sunday routine, followed by the reading of orders, and usually the roll-call. Washington's attitude toward religion in the army was unmistakably set forth when he said: "To the distinguished character of a Patriot, it should be our highest glory to add the more distinguished character of a Christian."[10]

Public prayer in a military context was also alive and well during the Civil War. As one Civil War chaplain eloquently stated, "Prayer comforts the Christian, encourages the inquirer, and is relished even by the irreligious."[11] That same chaplain laid out explicit directions for the recitation of prayer on a daily basis: "It is . . . desirable to have evening prayers in the regiment . . . . Let the colonel order his men to be formed in a square; and then, in a short, earnest, appropriate prayer, let the chaplain commit them to the care of the Almighty."[12]

One specific instance serves well to illustrate the premium placed on such prayer during conflict. Prior to the onset of open hostilities between the North and the South, a Union major named Robert Anderson was charged with defending Fort Moultrie, South Carolina, against any attack from the newly seceded state.[13] Fearing imminent annihilation, Major Anderson moved his small command to Fort Sumter, South Carolina, on December 26, 1860, just a few months prior to its capture by the Confederates.[14]

At noon on December 27, the day after their arrival, Major Anderson's command hoisted the American flag over the new post in dramatic fashion.[15] One newspaper reported the event as follows:

> A short time before noon Major Anderson assembled the whole of his little force . . . around the foot of the flag-staff. The national ensign was attached to the cord, and Major Anderson, holding the end of the lines in his hands, knelt reverently down. The officers, soldiers, and men clustered around, many of them on their knees, all deeply

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[10] CHARLES KNOWLES BOLTON, THE PRIVATE SOLDIER UNDER WASHINGTON 158–59 (1902) (quoting JOHN WHITING, REVOLUTIONARY ORDERS OF GENERAL WASHINGTON 75 (N.Y. & London, Wiley and Putnam 1844)).

[11] W. Y. BROWN, THE ARMY CHAPLAIN: HIS OFFICE, DUTIES, AND RESPONSIBILITIES, AND THE MEANS OF AIDING HIM 45 (Philadelphia, William S. & Alfred Martien 1863) (describing the function of Army Chaplains' prayers for the infirm).

[12] *Id.* at 98.

[13] *See* EBA ANDERSON LAWTON, MAJOR ROBERT ANDERSON AND FORT SUMTER, 1861 3 (1911).

[14] *Id.* at 5–6.

[15] *The Prayer at Sumter*, Vol. 5 No. 213 HARPER'S WKLY. 49 (1861), *available at* http://www.sonofthesouth.net/leefoundation/major-anderson-ft-sumter_Dir/civil-war-prayer-fort-sumter.htm.

> impressed with the solemnity of the scene. The chaplain made an earnest prayer—such an appeal for support, encouragement, and mercy, as one would make who felt that Man's extremity is God's opportunity. As the earnest, solemn words of the speaker ceased, and the men responded Amen with a fervency that perhaps they had never before experienced, Major Anderson drew the Star Spangled Banner up to the top of the staff . . . . If . . . South Carolina had at that moment attacked the fort, there would have been no hesitation upon the part of any man within it about defending that flag.[16]

The Army's public prayer tradition continued throughout the next few decades, striking a chord with many commanders until it reached a most unlikely adherent. General George S. Patton, commander of the U.S. Third Army during World War II and one of the country's great war heroes, saw "that one of the major training objectives of [his] office was to help soldiers recover and make their lives effective in [the] . . . realm [of] prayer."[17] One might think that fostering a prayerful atmosphere in his command would be the last thing a man who was prone to the utterance of obscenities[18] and who once was chastised by his superiors for slapping a soldier suffering from "combat fatigue" (now known as post-traumatic stress disorder)[19] would strive to accomplish. Nevertheless, at one point during his service, General Patton did just that. From September to December of 1944, he found his unit plagued by an "immoderate" rain that had slowed combat operations significantly.[20] At a loss for what to do, Patton sought divine intervention to regain the initiative.[21] He placed a telephone call on the morning of December 8, 1944, to the Third Army Chief of Chaplains and inquired, "[D]o you have a good prayer for weather? We must do something about those rains if we are to win the war."[22] The Chaplain, finding no designated prayer for weather in his prayer books, composed an original.[23] Upon subsequent

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16 *Id.* (internal quotations omitted).

17 James H. O'Neill, *The True Story of the Patton Prayer: The Author of General Patton's Famous Third Army Prayer Reveals the Story of Its Origin, Paying Tribute Both to the General's Trust in God and to the Power of Faith-Filled Prayer*, NEW AM., Jan. 12, 2004, *available at* http://findarticles.com/p/articles/mi_m0JZS/is_1_20/ai_n25081623?tag=untagged.

18 *See, e.g.*, MARTIN BLUMENSON, PATTON: THE MAN BEHIND THE LEGEND 210 (1985) (describing an instance where Patton shouted at a soldier, "You are just a g--damned coward, you yellow son of a bitch"); CARLO D'ESTE, PATTON: A GENIUS FOR WAR 385 (1996) (detailing another occasion where Patton proclaimed to a soldier under his command, "You are trying to kill some German son of a bitch before he kills you").

19 BLUMENSON, *supra* note 18, at 210–11.

20 O'Neill, *supra* note 17.

21 *Id.*

22 *Id.*

23 *Id.* The prayer read:

approval by General Patton, 250,000 copies of the "Third Army Prayer" were printed and distributed to every man in the command.[24]

Patton was not satisfied, however, with the mere distribution of the "weather prayer." He wanted to get to the root of the issue. After his Chief of Chaplains informed him that he "d[id] not believe that much praying [was] going on," Patton proceeded to give his perspective on the role of prayer in a soldier's life:[25]

> Chaplain, I am a strong believer in prayer. There are three ways that men get what they want: by planning, by working, and by praying. Any great military operation takes careful planning, or thinking. Then you must have well-trained troops to carry it out: that's working. But between the plan and the operation there is always an unknown. That unknown spells defeat or victory, success or failure. It is the reaction of the actors to the ordeal when it actually comes. Some people call that getting the breaks; I call it God. . . . We were lucky in Africa, in Sicily, and in Italy, simply because people [back home] prayed. But we have to pray for ourselves, too . . . . Great living is not all output of thought and work. A man has to have intake as well. I don't know what you call it, but I call it Religion, Prayer, or God.[26]

Finally, in the most recent military conflict in Iraq, one unit of the First Cavalry Division was involved in a rescue mission for fellow soldiers pinned down by enemy fire.[27] Prior to their departure, Chaplain Ramon Pena recited the following brief prayer: "Lord, protect us. Give us the angels you have promised and bring peace to these soldiers as they go out. In the name of the Father, the Son, and the Holy Spirit."[28]

The U.S. Navy also has a rich tradition of public prayer in its ranks. While the Navy was still in its infancy, the Continental Congress acknowledged the significance of religion by specifically including provisions that prohibited blaspheming the name of God and directed captains to provide for religious services on board their vessels.[29] The

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> Almighty and most merciful Father, we humbly beseech Thee, of Thy great goodness, to restrain these immoderate rains with which we have had to contend. Grant us fair weather for Battle. Graciously hearken to us as soldiers who call upon Thee that, armed with Thy power, we may advance from victory to victory, and crush the oppression and wickedness of our enemies and establish Thy justice among men and nations. Amen.

*Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

[27] MARTHA RADDATZ, THE LONG ROAD HOME 2–3 (2007).

[28] *Id.* at 3.

[29] Bryan J. Dickerson, *The Navy Chaplain Corps: 230 Years of Service to God and Country*, MARINE CORPS NEWS, Oct. 27, 2005, http://www.marines.mil/unit/2ndmaw/Pages/2005/The%20Navy%20Chaplain%20Corps%20230%20Years%20of%20Service%20to%20God%20and%20Country.aspx.

establishment of the Chaplain Corps grew out of these provisions and, not long after their enactment, the first chaplain began his service at sea.[30]

The Continental Navy, however, was essentially dissolved following the Revolutionary War.[31] But, in 1798, the Department of the Navy was created, the Chaplain Corps was re-established, and many of the traditional public prayer practices were formalized.[32]

> Daily, as well as weekly, religious services were an integral part of life at sea. Morning and evening prayer time was a common feature of that shipboard life. Prayers were common in the whole ship . . . . The publicly announced prayers affected the whole crew except those below decks out of earshot. Everyone else, officers and men, mustered at their respective stations in response to the drum beat to quarters . . . . Those ships that had bands would have their musicians play religious hymns, all hands would uncover and the chaplain would read a short prayer . . . . The crews welcomed those breaks as it was a pause from routine work, an opportunity for a few moments of tranquility and thoughtful meditation and a chance to mingle with crewmates.[33]

The daily prayer tradition at sea has been carried forward to the present day, where it is usually recited over a ship's loudspeaker just before "lights out."[34] Additionally, the traditional burial-at-sea ceremony reserves a time for prayer.[35] Finally, as mentioned in the introduction, chaplains at the U.S. Naval Academy have recited a prayer prior to the commencement of its noon meal[36] and have promulgated other prayer traditions dating back to the institution's inception in 1845.[37]

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[30] *See id.* (discussing Reverend Benjamin Balch, who became the first recorded chaplain to serve on an American ship at sea when he reported to the frigate *U.S.S. Boston* in October of 1778).

[31] *Id.*

[32] CHARLES J. GIBOWICZ, MESS NIGHT TRADITIONS 110 (2007).

[33] *Id.* at 111.

[34] *See* Robert S. Lanham, *I Love the Navy*, GOAT LOCKER, http://www.goatlocker.org/retire/lovenavy.htm (last visited Nov. 19, 2009); Navy Recruiting Command, Delayed Entry Program, Daily Routine, http://www.cnrc.navy.mil/DEP/daily.htm (last visited Nov. 19, 2009).

[35] *See* Naval Historical Ctr., Burial at Sea, http://www.history.navy.mil/faqs/faq85-1.htm (last visited Nov. 19, 2009).

[36] GIBOWICZ, *supra* note 32, at 115; *see also* Jacqueline L. Salmon, *ACLU Might File Suit to End Lunch Prayer*, WASH. POST, June 26, 2008, at B04.

[37] *See, e.g.*, U.S.N.A. Chaplain Ctr., The Midshipman Prayer, http://www.usna.edu/Chapel/midsprayer.htm (last visited Nov. 19, 2009). Often recited at religious services, the text of the Midshipman Prayer is as follows:

> Almighty Father, whose way is in the sea, whose paths are in the great waters, whose command is over all and whose love never faileth; let me be aware of Thy presence and obedient to Thy will. Keep me true to my best self, guarding me against dishonesty in purpose and in deed, and helping me so to live that I can stand unashamed and unafraid before my shipmates, my loved ones, and [T]hee. Protect those in whose love I live. Give me the will to do my best and to

Prominent nineteenth-century Navy Chaplain Walter Colton aptly summed up the integral role of dutiful religious tradition and the practice of prayer at sea as follows:

> The Church must . . . be the friend of the sailor, the advocate of his rights, his patron under injuries, the stern rebuker of his wrongs. She must pity him when others reproach, *pray* for him when others denounce, cling to him when others forsake, and never abandon him, even though he should abandon himself.[38]

One last, brief example may illustrate the aptness of this summation. While crossing the Atlantic one February night in 1943, the troop carrier *Dorchester* was torpedoed by German U-boat 223.[39] Four embarked chaplains immediately leapt into action, passing out life jackets and "preaching calmness and bravery" to the scared soldiers who were abandoning ship.[40] As the life jackets began to run out, leaving men without any flotation devices, the chaplains began, one by one, to surrender theirs.[41] They resolved to go down with the sinking vessel and, as a symbol of solidarity and as a show of strength and confidence for the men they served, all four chaplains linked arms and "[raised voices] in prayer saying the 'Our Father.'"[42]

The purpose of this Note is not to extol the virtues of prayer in military society. That determination is rightly left to Congress to delegate to the individual military services as it sees fit.[43] The foregoing examples are merely a few illustrations of the historical significance of public prayer in the U.S. military. This Note acknowledges that, as the Supreme Court has expressly iterated, such historical significance is not

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> accept my share of responsibilities with a strong heart and a cheerful mind. Make me considerate of those entrusted to my leadership and faithful to the duties my country has entrusted in me. Let my uniform remind me daily of the traditions of the service of which I am a part. If I am inclined to doubt, steady my faith; if I am tempted, make me strong to resist; if I should miss the mark, give me courage to try again. Guide me with the light of truth and keep before me the life of Him by whose example and help I trust to obtain the answer to my prayer, Jesus Christ our Lord. Amen.

*Id.*; *see also* Salmon, *supra* note 36 ("[S]ome form of prayer has been offered for midshipmen at meals since the school's founding, in 1845 . . . .").

[38] WALTER COLTON, THE SEA AND THE SAILOR, NOTES ON FRANCE AND ITALY, AND OTHER LITERARY REMAINS 85 (N.Y., A.S. Barnes & Co. 1851), *available at* http://www.archive.org/stream/seandsailornotes00coltrich (emphasis added).

[39] GIBOWICZ, *supra* note 32, at 121.

[40] *Id.*

[41] *Id.*

[42] *Id.*

[43] *See* 10 U.S.C. § 5142 (2006) (referring to the Chaplain Corps of the U.S. Navy); 10 U.S.C. §§ 3031, 3032, 3073 (2006) (establishing the Chaplain Corps of the U.S. Army and delegating the definition of its responsibilities to the Secretary of the Army).

enough: "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees."[44]

### *B. The Practical Rationale Behind Military Public Prayer*

Military public prayer also closely parallels the practical rationale associated with legislative prayer in that "there is far more [present] here than simply historical patterns."[45] First and foremost, that "something more" can be found in the above historical examples by looking beyond the actual specific instances and rote traditions of military prayers. The various commanders and chaplains listed above used prayer as a practical tool to boost morale and to reinforce the solemnity of particular occasions.[46] An obvious counterargument to this justification is that public prayer will probably not successfully boost the morale of a service member who declines to participate. This argument, however, can be rebutted quite simply—*it just doesn't matter in a military context.*

Admittedly, that assertion appears unduly harsh and insensitive toward the rights of service members who decline to participate in public prayers. Indeed, while this Note focuses on the potential Establishment Clause issues of military public prayer, the Supreme Court has stated that such analysis may not be divorced from its First Amendment counterpart—the Free Exercise Clause.[47] The two Clauses operate in conjunction "not only to protect the integrity of individual conscience in religious matters, but to guard against the civic divisiveness that follows when the government weighs in on one side of religious debate."[48] Therefore, the fact "'that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause.'"[49]

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[44] Marsh v. Chambers, 463 U.S. 783, 790 (1983).

[45] *Id.*

[46] For morale-boosters, see, e.g., *supra* notes 17–28 and accompanying text (discussing General George Patton and the Third Army prayer). For commemoration of a solemn occasion, see, e.g., Naval Historical Ctr., *supra* note 35 (delineating procedures for burials at sea).

[47] The Free Exercise Clause, in conjunction with the Establishment Clause, states: "Congress shall make no law respecting the establishment of religion, or *prohibiting the free exercise thereof* . . . ." U.S. CONST. amend. I (emphasis added). Indeed, the two religion clauses often compete. McCreary County v. ACLU, 545 U.S. 844, 875 (2005). For instance, the government is required to allow for a chaplain corps in the military to provide for the free exercise rights of service members despite its apparent Establishment Clause violation. *Id.* (citing Cutter v. Wilkinson, 544 U.S. 709, 719 (2005)).

[48] *McCreary County*, 545 U.S. at 876 (citing Wallace v. Jaffree, 472 U.S. 38, 52–54 & n.38 (1985)).

[49] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000) (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)).

The Court has also stated, however, that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, *the different character of the military community and of the military mission requires a different application of those protections.*"[50] While the Supreme Court has not abdicated its role as ultimate adjudicator concerning service members' individual rights,[51] it has acknowledged that "[t]he responsibility for setting up channels through which . . . grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates. *The military constitutes a specialized community governed by a separate discipline from that of the civilian.*"[52] Moreover, in no other context has the Court recognized greater deference to Congress than in instances pertaining to what rights are available to service members—this is largely due to the war-making authorities of the government.[53]

It is imperative that service members' rights are subordinate to the good of the whole service so that the above-mentioned goals of mission readiness and effectiveness are met.[54] Accordingly, every legislative body from the Continental Congress to the current Congress has delegated to the individual services the power to develop and implement their religious traditions as they see fit.[55] A large part of those religious traditions has been public prayer, which has existed in the military for as long as the individual branches themselves have existed.[56] If at any point Congress felt such prayers were violations of the Establishment Clause, it could have expressly limited them. It has not done so; to the contrary, Congress has both explicitly and implicitly endorsed the

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50 Parker v. Levy, 417 U.S. 733, 758 (1974) (emphasis added).

51 Rostker v. Goldberg, 453 U.S. 57, 67 (1981).

52 Orloff v. Willoughby, 345 U.S. 83, 93–94 (1953) (emphasis added).

53 *Rostker*, 453 U.S. at 64–66 (citing Middendorf v. Henry, 425 U.S. 25, 43 (1976)).

54 *See generally* Goldman v. Weinberger, 475 U.S. 503, 507 (1986) ("The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission[,] the military must foster instinctive obedience, unity, commitment, and esprit de corps.").

55 *See supra* note 43; *see also* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 598, 119 Stat. 3136, 3283 (2005) (authorizing service academy superintendents to institute prayers at their discretion at mandatory events); Instruction 1730.7D from the Sec'y of the Navy on Religious Ministry Within the Dep't of the Navy, § 6(d) & Enclosure 1 (Aug. 8, 2008) ("[*C*]*ommanders* shall determine whether religious elements as defined in enclosure (1) shall be included in command functions." (emphasis added)) [hereinafter SECNAVINST 1730.7D]; Naval Historical Ctr., Rules for the Regulation of the Navy of the United Colonies of North-America, Art. II, Nov. 28, 1775, *available at* http://www.history.navy.mil/faqs/faq59-5.htm ("The Commanders of the ships of the Thirteen United Colonies are to take care that divine service be performed twice a day on board, and a sermon preached on Sundays, unless bad weather or other extraordinary accidents prevent it.").

56 *See, e.g.*, *supra* notes 10 & 29 and accompanying text.

practice.[57] In one instance of explicit endorsement of military public prayer, Congress specifically provided for the practice at service academies at the discretion of their commanding officers.[58] By continuing to delegate the specifics of religious practice to the individual services and their respective Chaplain Corps, as well as by addressing at least one specific instance of prayer itself, Congress has repeatedly endorsed the use of public prayer in a military context.[59]

Both the doctrine of judicial deference to the war-making authorities and the corresponding congressional delegation of religious activities to the individual services serve as support systems for military commanding officers who are charged with the care, management, and performance of their units as a whole.[60] These units must maintain a heightened state of readiness in order to maximize mission effectiveness. Congress has given commanders significant discretionary authority to determine the means necessary to achieve these crucial ends.[61] For example, commanders are free to require attendance at, or participation in, any number of activities calculated to improve unit cohesion and boost individual morale.[62] Public prayer in the military is irrefutably one of many such activities that commanding officers have used to accomplish those stated goals.[63] Even though a few service members may detest the occasional proffered prayer in a public setting, just as some may deplore the "mandatory fun" activities described above, commanders should not be deprived of the opportunity to use proven techniques that improve unit cohesion and individual morale *as a*

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[57] *See supra* note 55.

[58] National Defense Authorization Act for Fiscal Year 2006 § 598(a). The pertinent text states:

> The superintendent of a service academy may have in effect such policy as the superintendent considers appropriate with respect to the offering of a voluntary, nondenominational prayer at an otherwise authorized activity of the academy, subject to the United States Constitution and such limitations as the Secretary of Defense may prescribe.

*Id.*

[59] *See supra* note 55 and accompanying text.

[60] It should also be noted that the judicial deference doctrine is extended to the military itself as well as to the Congress. *See* Cafeteria & Rest. Workers Union, Local 473 v. McElroy, 367 U.S. 886, 890–94 (1961).

[61] *See supra* note 55 and accompanying text.

[62] Those who are familiar with the military will recognize these activities as "mandatory fun." Popular "fun" activities include unit picnics, softball tournaments, and the occasional golf outing.

[63] *See, e.g.*, GIBOWICZ, *supra* note 32, at 111 ("[A]ll hands [on a navy ship] would uncover and the chaplain would read a short prayer . . . . The crews welcomed those breaks as it was a pause from routine work, an opportunity for a few moments of tranquility and thoughtful meditation and a chance to mingle with crewmates.").

*whole*.[64] Commanders should have all the tools that they desire at their disposal to ensure the maximum level of performance of their units.

The above discussion more than satisfies the "something more" rationale required by the Court in the second half of the *Marsh* analysis. The Supreme Court has recognized that military service members' rights are analyzed differently than those of their civilian counterparts and has given significant deference to Congress's war-making authority in stating what those rights actually are. Furthermore, Congress has both explicitly and implicitly delegated management of religious activities (and, in at least one specific instance, the practice of public prayer itself) to the individual services.

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Military public prayer should be accorded the same exemption from Establishment Clause scrutiny as legislative prayer. Historical examples of military public prayer are myriad, and the numerous practical applications of the practice more than satisfy the criteria set forth in *Marsh*. In the event one does not find this argument persuasive, Part II will discuss the appropriate analytical framework for a military public prayer question.

## II. WHAT'S ONE MORE TEST?

The Supreme Court has "repeatedly emphasized [its] unwillingness to be confined to any single test or criterion in [the] sensitive area [of Establishment Clause cases]."[65] To that end, the Court has formulated three different tests that it may apply to the myriad of different contexts in which Establishment Clause cases may fall.[66] As this Part will show, these tests are inappropriate when applied to military regulations. Therefore, if the Court decides that the *Marsh* analysis is inapplicable to military public prayer, it should refrain from applying the three Establishment Clause tests to the military context. After explaining the inaptness of applying the three current Establishment Clause tests in a military context, this Part will proffer the appropriate test as described

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[64] The purpose of analogizing military public prayer with "mandatory fun" activities is *not* to promote mandatory prayer. I am by no means asserting that a public prayer should be mandatory. Rather, the analogy is made to underscore the military's historic pattern of subjugating individual preferences to the good of the whole. The fact that military public prayer is *not* mandatory probably makes it *less* detestable in the eyes of many than those aforementioned activities that *are* mandatory.

[65] Lynch v. Donnelly, 465 U.S. 668, 679 (1984).

[66] *See* Lee v. Weisman, 505 U.S. 577, 587 (1992) (the Coercion test); *Lynch*, 465 U.S. at 690–91 (O'Connor, J., concurring) (the Endorsement test); Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971) (citing Walz v. Tax Comm'r, 397 U.S. 664, 674 (1970); Bd. of Educ. v. Allen, 392 U.S. 236, 243 (1968)) (the *Lemon* test).

by the D.C. Circuit Court of Appeals and later affirmed by the Supreme Court in *Goldman v. Weinberger*.[67]

### *A. The* Lemon *Test—Soured*

The most widely used (and much maligned) Establishment Clause test is that which was delineated in *Lemon v. Kurtzman*.[68] When addressing the question of whether a particular government regulation or act violates the Establishment Clause, the three-prong *Lemon* test requires (1) that the statute have a valid secular purpose, (2) that its primary effect will neither inhibit nor advance religion, and (3) that it will not foster excessive government entanglement with religion.[69] The Supreme Court has sometimes relegated the test to mere non-determinative "factors" that may be selectively applied to a question of constitutionality rather than as a bright-line rule that requires all three of the prongs to be met.[70] While the Supreme Court has never settled on one single application of the *Lemon* test, it is clear that the test has not been overruled.[71]

One of the preeminent cases that applied only the first prong of *Lemon* was *Wallace v. Jaffree*.[72] In *Wallace*, the constitutionality of three Alabama statutes was challenged: one that authorized a one-minute period of silence in public schools for meditation, another that authorized a period of silence for meditation and prayer, and still another that authorized teachers to lead willing students in prayer acknowledging an "Almighty God."[73] In support of the state's position, state Senator Donald

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[67] 475 U.S. 503 (1986).

[68] 403 U.S. 602 (1971); *see, e.g.*, Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 398 (1993) (Scalia, J., concurring) ("Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, *Lemon* stalks our Establishment Clause jurisprudence once again . . . .").

[69] *Lemon*, 403 U.S. at 612–13 (citing *Walz*, 397 U.S. at 674; *Allen*, 392 U.S. at 243).

[70] *See* Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 314 (2000) (acknowledging the three prongs of *Lemon* but addressing only whether the regulation had a "valid secular purpose" in its analysis (quoting *Lemon*, 403 U.S. at 612)); *see also Lamb's Chapel*, 508 U.S. at 399 (Scalia, J. concurring) ("Sometimes, we take a middle course, calling [the *Lemon* test's] three prongs 'no more than helpful signposts.'" (quoting Hunt v. McNair, 413 U.S. 734, 741 (1973))).

[71] The words of the Tenth Circuit from the latter half of 2008 are quite telling on this point: "the *Lemon* test clings to life because the Supreme Court . . . has never explicitly overruled the case. While the Supreme Court may be free to ignore *Lemon*, this court is not." Weinbaum v. City of Las Cruces, 541 F.3d 1017, 1030 n.14 (10th Cir. 2008) (internal citations omitted).

[72] 472 U.S. 38 (1985).

[73] *Id.* at 40.

Holmes testified that the legislation had no other purpose than to return voluntary prayer to public schools.[74]

In its holding, the Court made clear that *Lemon's* first prong alone may be dispositive and that "no consideration of the second or third criteria is necessary if a statute does not have a clearly secular purpose."[75] The appropriate question to answer when determining whether a statute is in violation of the first prong is "'whether [the] government's actual purpose is to endorse or disapprove of religion.'"[76] Where the "'answer to either question [is yes] . . . the challenged practice [should be rendered] invalid.'"[77] In *Wallace*, the Court had no problem finding that the first prong of the *Lemon* test had been violated where the very sponsor of the legislation in question admitted that there was no secular purpose for the statutes.[78] As such, the Court found that the statutes were unconstitutional without analyzing *Lemon's* second or third prong.[79]

In *Widmar v. Vincent*, the Court analyzed all three prongs in holding that an equal access policy with regard to religious groups at a public university was constitutional.[80] In that case, the University of Missouri at Kansas City enacted a regulation which banned a religious group from using the school facilities to conduct its meetings.[81] The university justified its regulation based on "a compelling interest in maintaining strict separation of church and State," which was "derive[d] . . . from the Establishment Clause[]."[82]

Both the district court and court of appeals found that although the first (valid secular purpose) and third (excessive government entanglement) prongs were not violated by an equal access policy, such a policy would have had the primary effect of advancing religion and, therefore, would have violated the second prong.[83] The Supreme Court agreed with the lower courts' analysis of the first and third prongs, but took exception to the holding that an equal access policy with regard to religious groups would violate the second prong.[84] The Court held that

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74 *Id.* at 43.

75 *Id.* at 56.

76 *Id.* at 56 (quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)).

77 *Id.* at 56 & n.42 (quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring)).

78 *Id.* at 56–57.

79 *Id.* at 59–61 (quoting *Lynch*, 465 U.S. at 690–91 (O'Connor, J., concurring)).

80 454 U.S. 263, 271, 273 (1981).

81 *Id.* at 265.

82 *Id.* at 270 (internal quotations omitted).

83 *Id.* at 271–72.

84 *Id.* at 273. The Court agreed that, because the University had already provided a forum in which many different ideas were exchanged, it would not give the appearance of

since the university had already provided an open forum to many different points of view, the primary effect of such a forum would not be to advance religion.[85] According to the Court, while a particular religious group may in fact benefit from access to the forum, such a benefit was "incidental" and, therefore, not violative of the prohibition on advancement of religion.[86]

These two cases illustrate the complex and sporadic application of the troublesome *Lemon* test. Regardless of whether it is applied in whole or in part, it is not suited for analysis of public prayer in a military context. First, the Second Circuit noted when it addressed the constitutionality of maintaining a military chaplaincy that, "[when] viewed in isolation, there could be little doubt that it would fail to meet the *Lemon v. Kurtzman* conditions."[87] No one could argue with a straight face that such an institution as military chaplaincy would not have the "immediate purpose . . . [of] promot[ing] religion,"[88] thereby making it violative of *Lemon*. Military public prayer would certainly suffer the same fate if subjected to the *Lemon* analysis.

As the Second Circuit aptly noted:

> [N]either the Establishment Clause nor statutes creating and maintaining the Army chaplaincy may be interpreted as if they existed in a sterile vacuum. They must be viewed in the light of the historical

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endorsing religion if it allowed religious groups the same access and therefore would not violate the first prong of *Lemon*. *Id.* at 271 n.10. Similarly, the Court agreed that attempting to exclude all religious groups from meeting in university facilities might risk excessive entanglement with such religion; the school would be compelled to "monitor group meetings to ensure compliance with the rule [forbidding religious worship and religious speech]." *Id.* at 272 n.11.

[85] *Id.* at 273.

[86] *Id.* at 273–74 (citing Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973)).

[87] Katcoff v. Marsh, 755 F.2d 223, 232 (2d Cir. 1985). See also *Everson v. Board of Education*, 330 U.S. 1, 15–16 (1947), which defined the Establishment Clause as such:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and *vice versa*.

[88] *Katcoff*, 755 F.2d at 232.

> background of their enactment to the extent that it sheds light on the purpose of the Framers of the Constitution.[89]

To analyze the unique, historical practice that is military public prayer in a "sterile vacuum" would be just as inappropriate for two reasons, both of which were discussed previously. First, the judicial deference accorded military regulations, described in Part I.B, requires a full analysis of the entire historical context of a regulation rather than a rote application of legal rules.[90] Second, military service members are not accorded the same level of individual rights as their civilian counterparts.[91] Therefore, applying *Lemon* to a military regulation that pertains to service members, just as a court would do with a government regulation that pertains to regular citizens, would fail to account for the disparity in the level of rights accorded to each group. An application of *Lemon* to a military regulation authorizing public prayer would be tragically under-inclusive and would ignore the judiciary's own recognition of deference to the judgment of both the Congress and the military. It is a small wonder that no court has used the *Lemon* test in analyzing whether a military regulation violates the Establishment Clause.[92]

### *B. The Coercion Test: Another Poor Choice*

Yet another Establishment Clause test employed by the courts is the Coercion test, formulated in the Supreme Court's holding in *Lee v. Weisman*.[93] This test states that "the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'"[94]

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[89] *Id.* (citing Walz v. Tax Comm'r, 397 U.S. 664, 680 (1970) (Brennan, J., concurring); Abington Sch. Dist. v. Schempp, 374 U.S. 203, 212–14 (1963)).

[90] *See supra* note 53 and accompanying text.

[91] *See supra* notes 50–52 and accompanying text.

[92] *See, e.g.*, *Katcoff*, 755 F.2d at 233 (refusing to apply *Lemon* or any other Establishment Clause test when determining the constitutionality of the military chaplaincy). Some may counter with the fact that *Lemon* was applied by the Fourth Circuit Court of Appeals in *Mellen v. Bunting* where the court held the Virginia Military Institute's ("VMI") supper prayer was unconstitutional. 327 F.3d 356, 372 (4th Cir. 2003) (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)). That argument is deficient because VMI is *not* a federal military institution. It is operated by the commonwealth of Virginia and its students are not subject to military regulations. Therefore, application of Establishment Clause tests in that circumstance is more appropriate than in those pertaining to the military. *See id.* at 375 n.13 ("[W]e are not called upon to address whether, or to what extent, the military may incorporate religious practices into its ceremonies. The Virginia General Assembly, not the Department of Defense, controls VMI.").

[93] 505 U.S. 577, 587 (1992).

[94] *Id.* (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)) (alterations in original).

In *Lee*, the issue before the Court was whether prayers offered by a member of the clergy at middle school graduation exercises violated the Establishment Clause.[95] In holding that the prayers were unconstitutional, the Court found it particularly troubling that the decision to include prayers at the ceremony was made by the school principal alone, who then proceeded to appoint and collaborate with the designated clergy member, advising him that the prayers should be nonsectarian in nature.[96] Such a degree of school involvement "put school-age children who objected in an untenable position."[97]

This test was also applied, in conjunction with *Lemon*, in the Fourth Circuit's holding in *Mellen v. Bunting*.[98] In that case, the court held that a supper prayer conducted at the Virginia Military Institution ("VMI"), similar in structure to the one described above at the Naval Academy, was unconstitutional because of the institution's "coercive atmosphere."[99] The court recognized that although VMI cadets were not school-age children (as in *Lee*), "they [were] uniquely susceptible to coercion" because of the "educational system."[100]

The Coercion test is inappropriate in military public prayer contexts because its application has been rightly limited to instances where highly impressionable youths would likely be coerced into participating in a religious exercise against their wills.[101] While it would appear that impressionable youths and military service members are two very similar groups when it comes to the risk of coercion, such an analogy is inapt for several reasons.

First, as discussed at length above, military service members are not accorded the same level of individual rights as civilians—young students included.[102] Service members' rights are secondary to the

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[95] *Id.* at 580.

[96] *Id.* at 587–88.

[97] *Id.* at 590.

[98] 327 F.3d 355, 371–72 (4th Cir. 2003) (citing Lemon v. Kurtzman, 403 U.S. 602, 612–13 (1971)); *see also supra* note 94 and accompanying text.

[99] *Mellen*, 327 F.3d at 371–72.

[100] *Id.* at 371.

[101] *See, e.g.*, Lee v. Weisman, 505 U.S. 577, 593 (1992) ("We do not address whether [the choice to dissent from a voluntary religious activity] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place primary and secondary school children in this position."); Chaudhuri v. Tennessee, 130 F.3d 232, 239 (6th Cir. 1997) ("[T]he obvious difference between [a doctor of philosophy] and children at an impressionable stage of life 'warrants a difference in constitutional results.'" (quoting Edwards v. Aguillard, 482 U.S. 578, 584 n.5 (1987))); Tanford v. Brand, 104 F.3d 982, 985–86 (7th Cir. 1997) (holding that "the special concerns underlying the Supreme Court's decision in *Lee* [were] absent" where an invocation and benediction were offered at a *college* graduation).

[102] *See supra* notes 50–52 and accompanying text.

overall good of the unit, and are defined by congressional statute, military regulation, and ultimately by their commanding officer.[103] Second, unlike the school principal in *Lee* who controlled all aspects of the prayer at issue, military commanding officers have been given *express authority* by both Congress[104] and internal military regulation[105] to provide for public prayers within their units. Finally, by definition, even the youngest service member is older than the "impressionable youths" the Coercion test seeks to protect, and has already shown the aptitude to make the enormous life-changing decision to enter the military.[106] Furthermore, the Fourth Circuit's assertion in *Mellen* that the academy's military environment makes an individual "uniquely susceptible to coercion,"[107] is not dispositive. The assumption that service members would allow themselves to be coerced into practicing a voluntary prayer against their will is not only a direct affront to their character and self-determination, but it also ignores the fact that the young men and women who chose to join the service *voluntarily consented* to the limitations on their rights discussed earlier in this Note by undertaking their oaths of enlistment.[108]

### *C. The Endorsement Test: Not a Chance*

The final test used by the courts to analyze whether a particular government regulation violates the Establishment Clause is the Endorsement test. The Endorsement test, best outlined in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, is a derivative of the first (secular purpose) and second (primary effect) prongs of *Lemon*.[109] The two-part rule is both subjective and objective: it subjectively analyzes the government's "inten[t] to convey a message of endorsement or disapproval of religion"[110] and then objectively discerns "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval."[111] Under the

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[103] *See supra* notes 43 & 50–53 and accompanying text.

[104] *See supra* note 43 and accompanying text; *see also* National Defense Authorization Act for Fiscal Year 2006, Pub. L. No. 109-163, § 598, 119 Stat. 3136, 3283 (2005) (authorizing service academy superintendents to institute prayers at their discretion at mandatory events).

[105] *See, e.g.*, SECNAVINST 1730.7D, *supra* note 55 at § 6(d) & Enclosure 1.

[106] *See* 10 U.S.C. § 505(a) (2006) (delineating the minimum age of enlistment not requiring parental approval as eighteen years old).

[107] Mellen v. Bunting, 327 F.3d 355, 371 (4th Cir. 2003).

[108] *See* U.S. Army Ctr. of Military History, Oath of Enlistment and Oaths of Office, http://www.history.army.mil/html/faq/oaths.html (last visited Nov. 19, 2009).

[109] Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[110] *Id.* at 691.

[111] *Id.* at 690.

test, "[a]n affirmative answer to either [the objective or subjective prong] should render the challenged practice [unconstitutional]."[112]

The Endorsement test is typically used in contexts where the constitutionality of a government sponsored religious display is called into question.[113] For example, in *County of Allegheny v. American Civil Liberties Union*, the Court held a crèche display unconstitutional under the objective prong because the government "sen[t] an unmistakable message that it support[ed] and promot[ed] the Christian praise to God that is the crèche's religious message."[114] In that case, a Pennsylvania county's standalone crèche display conveying the words "Glory to God in the Highest!" had the effect of endorsing Christianity to the exclusion of other religions because there was "nothing in the context of the display [that] detract[ed] from the crèche's religious message."[115] Because the crèche by itself had the effect of conveying a religious message, the Court found that the absence of other mitigating displays in the surrounding area demonstrated an unequivocal favoritism toward Christianity.[116]

Like the two previous tests, the Endorsement test is also inapt when applied to military public prayer. First, as stated above, the test is applied in instances of static displays which simply are not at issue in military public prayer contexts.[117] Second, the government, through military public prayer, certainly does not "favor[] or prefer[]" one particular religious belief over another.[118] Prayers are recited by chaplains representing over one hundred different denominations and faith groups.[119] Therefore, military public prayer is unlike the crèche display in *County of Allegheny* because, when taken as a whole, an enormous range of religions (and denominations within religions) are represented by those reciting the prayers. No single religious faith is "favored or preferred" and, thus, government cannot be accused of endorsing religion.

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[112] *Id.*

[113] *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 600 (1989); *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

[114] *County of Allegheny*, 492 U.S. at 600.

[115] *Id.* at 598.

[116] *Id.*

[117] *See supra* note 115 and accompanying text.

[118] *County of Allegheny*, 492 U.S. at 593 (quoting Wallace v. Jaffree, 472 U.S. 38, 70 (1985) (O'Connor, J., concurring)).

[119] U.S. Navy, Careers & Jobs, Chaplain, http://www.navy.com/careers/officer/chaplain/ (last visited Nov. 19, 2009); *see also* E-mail from United States Naval Academy, Public Affairs, to Benjamin D. Eastburn (July 17, 2008, 02:22 EST) (on file with author) (describing the U.S. Naval Academy's Chaplain Corps contingent of five Protestant chaplains, two Roman Catholic chaplains, and one Jewish rabbi who each offer the aforementioned noon-meal prayer on a rotational basis and who are proficient at "accommodat[ing] all faiths in the Brigade of Midshipmen").

### *D. "Legitimate Military Ends": The Right Test*

If the *Marsh* exception and the three current Establishment Clause tests do not apply to military public prayer regulations, how *are* they to be analyzed? Whatever test is used, it should embrace the spirit, if not the letter, of the rationale discussed in Part I above. Namely, it should not deprive commanders of the necessary means of boosting individual and unit morale so that they may ensure the highest level of readiness possible. Additionally, it should be flexible enough to allow traditional military ceremonies to continue to commemorate the solemnity of an occasion with a word of prayer. Perhaps unwittingly, the Supreme Court has already impliedly endorsed such a test in its decision in *Goldman v. Weinberger*.[120]

Although *Goldman* was a case deciding an individual's Free Exercise rights, the definitive rule that was proffered by the D.C. Circuit Court of Appeals and assented to by the Supreme Court is sufficiently broad to apply to all types of constitutional challenges to a military regulation. The rule states: "[A] military regulation must be examined to determine *whether 'legitimate military ends are sought to be achieved'* and *whether it is 'designed to accommodate the individual right to an appropriate degree.'*"[121] As the D.C. Circuit also articulated, this rule "does not require a 'balancing' of the individual and military interests on each side."[122]

Why should this test be preferred for analyzing military public prayer over the other Establishment Clause tests? After all, on its face it appears to assert the same desired goal that the three other tests proclaim: ensuring individual rights are not violated by an unconstitutional governmental recognition of religion. There are two distinct modifiers attached to the Legitimate Ends test, however, that make it appropriate for military public prayer contexts.

#### 1. "Legitimate Military Ends," with Individual Rights Accommodated to an "Appropriate Degree"

The Legitimate Ends test's first distinguishing feature is that it necessarily allows for infringement on individual rights. As stated above in Part I.B, the Supreme Court has found it impossible to divorce the Establishment Clause analysis from the other clauses contained in the First Amendment.[123] The Court has stated, however, that the relationship between the Establishment Clause and the other clauses is

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[120] 475 U.S. 503, 506 (1986).

[121] *Id.* (emphasis added) (quoting Goldman v. Sec'y of Def., 734 F.2d 1531, 1536 (D.C. Cir. 1984)).

[122] *Sec'y of Def.*, 734 F.2d at 1536.

[123] *See supra* notes 47–49 and accompanying text.

analyzed differently in a military context than it is in a civilian setting.[124] As will be shown, the "accommodat[ion of] individual right[s] to an appropriate degree"[125] language contained in the Legitimate Ends test allows for much greater leeway in restricting individual service members' rights and, therefore, is more appropriate to apply to a military public prayer context.

A prime illustration of the different (and more stringent) application of the interplay between First Amendment individual rights and the Establishment Clause in a civilian context was displayed by the Supreme Court in *Widmar v. Vincent*.[126] As detailed above in Part II.A, the University of Missouri at Kansas City's principal argument was that allowing religious groups to use its facilities would violate the second prong of *Lemon* (i.e., that it would have the primary effect of advancing religion).[127] The Court, while tacitly admitting the validity of the university's reasoning, nevertheless stated that such an interest was not "sufficiently compelling to justify content-based discrimination against . . . religious speech."[128] In other words, while the government's *end sought to be achieved* (the "greater separation of church and State"[129]) was valid, the regulation was nevertheless improper due to the limitation on the free speech rights of certain individuals employed by the university.[130]

In contrast, the Court in *Goldman* applied the Legitimate Ends test where a Jewish Air Force chaplain was prohibited from wearing his yarmulke by Air Force uniform regulations.[131] In response to the prohibition, the chaplain contended that the regulation violated his First Amendment free exercise rights.[132] The Court held that since the *end sought to be achieved* by the Air Force (uniformity amongst its service members) was legitimate, a free exercise limitation on one of its service members was acceptable.[133]

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[124] *See* Parker v. Levy, 417 U.S. 733, 758 (1974) ("While the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections.").

[125] *Goldman*, 475 U.S. at 506 (quoting *Sec'y of Def.*, 734 F.2d at 1536).

[126] 454 U.S. 263 (1981).

[127] *Id.* at 270–71.

[128] *Id.* at 276 (internal quotations omitted).

[129] *Id.*

[130] *Id.*; *see also* Carey v. Brown, 447 U.S. 455, 464–65 (1980) ("[E]ven the most legitimate goal may not be advanced in a constitutionally impermissible manner.").

[131] Goldman v. Weinberger, 475 U.S. 503, 505 (1986), *superseded by statute*, 10 U.S.C. § 774 (2006).

[132] *Id.* at 506.

[133] *Id.* at 509–10.

Such an obvious difference between the military's and the government's abilities to restrict individuals' rights may leave one to wonder if the military simply has a blank check to run roughshod over the First Amendment rights of its service members. Of course, that is not the case, which is why the Court wisely appended the Legitimate Ends test with the requirement of "accommodat[ing] . . . individual right[s] to an appropriate degree."[134] So, what exactly is that "appropriate degree" in a military public prayer context?

### *a. Applying the "Appropriate Degree" Language*

It remains to be seen how the Court will define such an ambiguous phrase; however, it means at least this: "The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.' . . . [M]ilitary life do[es] not, [however,] . . . render entirely nugatory in the military context the guarantees of the First Amendment."[135] Such a nominal view of individual rights is a vast departure from typical stringent requirements imposed by courts when safeguarding individual rights from governmental regulations and clearly distinguishes the Legitimate Ends test from other Establishment Clause tests.[136]

There is no question that attaching this modifying phrase to the Legitimate Ends test is meant to both restrict and expand the application of military regulations. It is meant to expand in that, as explained above, it is a departure from the requirements typically imposed by the courts that a governmental regulation is greatly limited in its ability to restrict a civilian's individual First Amendment rights.[137] It is meant to restrict in that it does not give the military *carte blanche* to completely crush its service members' rights in the name of its own interests.[138] In actual application, however, there are probably very few instances in which the Court will flex its otherwise constrained muscles to overturn a military regulation in the name of individual rights.

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[134] *Id.* at 506 (quoting Goldman v. Sec'y of Def., 734 F.2d 1531, 1536 (D.C. Cir. 1984)).

[135] *Id.* at 507 (quoting Orloff v. Willoughby, 345 U.S. 83, 92 (1953)).

[136] *Compare supra* notes 47–54 and accompanying text (describing the subordination of military service members' rights to the overall good of the unit) *with supra* notes 128–130 and accompanying text (demonstrating the elevated nature of civilians' free exercise rights).

[137] *See, e.g.*, Widmar v.Vincent, 454 U.S. 263, 276 (1981).

[138] *See* Parker v. Levy, 417 U.S. 733, 758 (1974) ("[T]he members of the military are not excluded from the protection granted by the First Amendment . . . ."); *see also* Rostker v. Goldberg, 453 U.S. 57, 67 (1981) (reserving a role as ultimate arbiter of service members' rights in certain instances).

For example, with respect to the specific instance of religious activity in the military, a workable standard for what an "appropriate degree" of individual rights considerations might entail lies in the D.C. Circuit's decision in *Anderson v. Laird*.[139] In that case, the court held that regulations at West Point, the Naval Academy, and the Air Force Academy requiring attendance at Sunday worship services were unconstitutional.[140] Specifically, the court stated that while individual freedoms must necessarily be subverted to military interests, those freedoms "may not be sacrificed to . . . the point that constitutional rights are abolished."[141] The court found that since "there is no difference between requiring attendance and requiring worship," service academy members' individual rights had been abolished.[142]

The essence of the D.C. Circuit's argument in *Anderson*, and ultimately in the interpretation of the otherwise ambiguous "appropriate degree" language, lies in a principle of **voluntariness**. As the court rightly observed, compelling attendance at an inherently proselytic event such as a worship service is akin to compelling religious worship itself.[143] That is vastly different, however, than reciting a prayer at a public military function to commemorate the solemnity of an occasion or to bolster morale. Worship services involve participation from congregational attendees and service leaders alike. Prayer requires no such effort and allows for infinitely easier nonparticipation.

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The Legitimate Ends test mandates an accommodation of individual service members' First Amendment rights to an "appropriate degree."[144] In the case of public prayer in a military context, such practice should not be held to violate the "appropriate degree" standard if it is voluntary in nature because it is a non-proselytic activity that may be readily abstained from as an individual desires.

### 2. "Balancing of Interests"

Finally, the unique feature of the Legitimate Ends test, the subordination of individual rights, is further illustrated by the D.C. Circuit's statement that analysis of a military regulation "does not require a 'balancing' of the individual and military interests on each

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[139] 466 F.2d 283 (D.C. Cir. 1972).

[140] *Id.* at 284–85.

[141] *Id.* at 295.

[142] *Id.* at 295–96.

[143] *Id.*

[144] Goldman v. Weinberger, 475 U.S. 503, 506 (1986), *superseded by statute*, 10 U.S.C. § 774 (2006).

side."[145] This statement is critical to understanding the crux of the proffered test because, under this reasoning, *it does not matter how incidental or tenuous a specific instance is in relation to a military regulation.* For example, in *Goldman* the D.C. Circuit tacitly accepted the offended Air Force chaplain's argument that his yarmulke was unobtrusive and insignificant; therefore, no harm would result to the uniformity of the service by allowing him to wear the symbol of his religious faith.[146] The court went on to note, however, that the Air Force cannot make exceptions to its regulations without "undermining the goals of teamwork, motivation, discipline, and the like."[147] Therefore, because of the importance of the overarching goals of the military itself, the strict enforcement of a military regulation in the face of a violation of individual rights was allowed even in a case where the actual tangible harm done to the military interest was slight.[148]

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While the Legitimate Ends test was proffered in a free exercise case,[149] it should be extended to all instances where the validity of a military regulation is analyzed. When the test is applied to military public prayer, it is easy to see how that practice does not violate the Establishment Clause. As has been previously discussed, there is already a legitimate end to public prayer in the military: the commemoration of a solemn occasion and the maintenance and bolstering of unit morale and cohesiveness.[150] Thus, any means by which this end is accomplished are valid (1) even if they violate individual First Amendment rights (provided they accommodate individual rights to an "appropriate degree" discussed above) and (2) regardless of how attenuated the military interest is to the regulation sought to be enforced. This standard rightfully gives military commanders the leeway they need to employ such a practical tool as public prayer in the leadership of their units.

## CONCLUSION

Military public prayer does not violate the Establishment Clause. As demonstrated in Part I, its historical precedent and proven practical application more than satisfy the necessary criteria under *Marsh v. Chambers* to absolve it from further scrutiny. Alternatively, military

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145 Goldman v. Sec'y of Def., 734 F.2d 1531, 1536 (D.C. Cir. 1984).

146 *Id.* at 1539–40.

147 *Id.* at 1540.

148 *Id.*

149 *Id.* at 1536.

150 *See supra* note 46 and accompanying text.

public prayer deserves a separate analysis apart from the convoluted *Lemon*, Coercion, or Endorsement tests described above in Part II.[151] The appropriate analysis should ensure that military interests are met without completely eschewing individual rights. The Legitimate Ends test provides the appropriate analysis. It requires giving an appropriate level of judicial deference to military regulations while ensuring that individual service members' rights are accommodated to an "appropriate degree." Ultimately, regardless of whether the *Marsh* exception or the Legitimate Ends test is applied, courts must remember one key principle before condemning traditional, time-honored military public prayer practices such as the noon meal prayer at the Naval Academy: "*judicial deference to . . . congressional exercise of authority is at its apogee* when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged."[152]

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[151] Additionally, the Supreme Court has recognized that the Legitimate Ends test is necessary for not just military public prayer contexts, but for *all* military regulations. *See* Goldman v. Weinberger, 475 U.S. 503, 506 (1986), *superseded by statute*, 10 U.S.C. § 774 (2006) (asserting that the Legitimate Ends test should be applied to all questions of military regulations).

[152] Rostker v. Goldberg, 453 U.S. 57, 70 (1981) (emphasis added).

# WHAT'S THE COST OF LIVING IN OREGON THESE DAYS?—A FRESH LOOK AT THE NEED FOR JUDICIAL PROTECTIONS IN THE DEATH WITH DIGNITY ACT

## INTRODUCTION

An Oregon resident engaged in a fight for her life in her battle against cancer.[1] But when Barbara Wagner received a letter in May 2008, she learned her new obstacle would be her home state.[2] Ms. Wagner, a sixty-four-year-old, low-income Oregon resident, learned her lung cancer returned after a two-year remission.[3] Her physician wrote a prescription for medication that studies have shown increases the one-year survival expectancy of cancer patients by 9.7 percent.[4] But Lane Individual Practice Associates ("LIPA"), administrators of the Oregon Health Plan in Ms. Wagner's county, denied funding for her prescription.[5] Instead, the Oregon Health Plan offered her funding for comfort care that included the option of a lethal prescription.[6] In response to the letter, Ms. Wagner said, "'To say to someone, we'll pay for you to die, but not pay for you to live, it's cruel . . . . I get angry. Who do they think they are?'"[7]

Ms. Wagner's story is not an isolated incident. Randy Stroup, a fifty-three year old Oregon resident, was also denied treatment funding under the Oregon Health Plan and, likewise, learned that the State would offer to pay for a lethal prescription.[8]

Fortunately, after a swell of publicity, the Oregon Health Plan offered to provide the medications they desired, and both are alive to tell their stories.[9] The stories of Ms. Wagner and Mr. Stroup reveal a scary truth about the Death with Dignity Act[10]—its safeguards are inadequate. A person forced to choose between excruciating pain or a lethal prescription is left with no meaningful choice at all. The state has a duty to provide a mechanism to protect its citizens from being put in that

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1 *See* Tim Christie, *A Gift of Treatment*, REGISTER-GUARD (Eugene, Oregon), June 3, 2008, at A1.

2 *Id.*

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.*

7 *Id.*

8 Dan Springer, *Oregon Offers Terminal Patients Doctor-Assisted Suicide Instead of Medical Care*, FOXNEWS.COM, July 28, 2008, http://www.foxnews.com/story/0,2933, 392962,00.html.

9 *Id.*; Christie, *supra* note 2.

10 Death with Dignity Act, OR. REV. STAT. §§ 127.800–.897 (2007).

position. Unfortunately, based on the aforementioned scenarios, this duty is being ignored. In fact, certain circumstances looming in the not-too-distant future actually increase the likelihood that a citizen will be placed in that situation.

With the rise of the largest senior citizen population in our nation's history on the horizon, as well as the increased cost of health care for both state and private industries, a judicial review process to oversee the Death with Dignity Act is essential to protect senior citizens against its potential abuses. In order to show the purpose and process of adjudicating Death with Dignity Act procedures, this Note unfolds in four parts. Part I explains the circumstances, both present and future, creating the potential for improper use of the Death with Dignity Act. Part II explains why the Death with Dignity Act, as presently written, does not provide adequate safeguards to protect citizens in light of those circumstances. Part III proposes an adjudicative procedure that a state may enact in order to provide sufficient protection for its citizens. Finally, Part IV provides the method for adjudicating Death with Dignity Act cases by using the example of the judicial bypass procedure for minors seeking an abortion. With a process of judicial review as a check on the procedures of the Death with Dignity Act, a state can confidently ensure the protection of patients, as well as the integrity of health care providers.

## I. THE DEATH WITH DIGNITY ACT HAS BEEN AROUND OVER A DECADE—SO WHAT'S THE PROBLEM?

### *A. The Progress of the Death with Dignity Act*

In 1994, the citizens of Oregon passed the Death with Dignity Act by citizen's initiative.[11] The Death with Dignity Act offered certain qualified patients the opportunity to choose to end their lives by obtaining a prescription from their physicians for lethal medication.[12] The purpose of the Act was to provide qualified patients an opportunity to meet their ends quickly and painlessly, as an alternative to the long and painful process they would otherwise endure.[13] Since its passage, the issue of physician-assisted suicide has been subjected to numerous legal challenges, yet it remains unscathed and in full force and effect in the

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[11] Associated Press, *Oregon Voters Allow Assisted Suicide for the Terminally Ill*, L.A. TIMES, Nov. 11, 1994, at A34. Despite its passage, the Death with Dignity Act did not actually take effect until 1997, when an issue as to its constitutionality was decided by the U.S. Supreme Court. *See infra* note 14.

[12] § 127.8805.

[13] *See* § 127.805(1).

states that allow it.[14] Though public opinion on this subject is divided, recent polls show a majority of citizens approve and accept its presence.[15]

In fact, a few more states appear to be heading toward a similar version of the Death with Dignity Act. Washington State citizens recently passed Initiative 1000 in the November 4, 2008 election, allowing qualified citizens an opportunity to choose death by lethal prescription.[16] Some Wisconsin legislators also have sponsored a similar bill in the state legislature.[17] In Montana, a state district court judge found a "right to die" in the state's constitution.[18] Based on its majority support and its spread to other states, it appears the Death with Dignity Act is here to stay.[19]

### *B. The Potential Problems for the Death with Dignity Act*

Despite its legal successes, numerous practical challenges to its ability to remain limited in application are approaching. There are two major circumstances that will likely lead to an increase in the use of the Act, and, therefore, increase the likelihood of abuses. First, the significant increase in the senior citizen population will place a considerable strain on the state, the medical profession, and individuals that will likely open the door to more states enacting a Death with Dignity Act. Second, the skyrocketing costs of providing health care will cause all those involved to undertake a system of "rationing" that may push toward greater use of the Death with Dignity Act.

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[14] *See* Vacco v. Quill, 521 U.S. 793, 808–09 (1997) (permitting states to decide whether to ban physician assisted suicide); Washington v. Glucksberg, 521 U.S. 702, 735–36 (1997) (holding that the debate over physician assisted suicide should continue because Americans are engaged in an earnest and profound debate); Lee v. Oregon, 107 F.3d 1382, 1392 (9th Cir. 1997) (dismissing the case for lack of Article III jurisdiction).

[15] Joseph Carroll, *Public Divided over Moral Acceptability of Doctor-Assisted Suicide*, GALLUP, May 31, 2007, http://www.gallup.com/poll/27727/Public-Divided-Over-Moral-Acceptability-DoctorAssisted-Suicide.aspx.

[16] Janet I. Tu, *Assisted Suicide Measure Passes*, SEATTLE TIMES, Nov. 4, 2008, at A3 (citing 2008 INITIATIVE MEAS. 1000, of Nov. 4, 2008 (Wash.), *available at* http://wei.secstate.wa.gov/osos/en/Documents/I1000-Text%20for%20web.pdf).

[17] Ryan J. Foley, *Assisted Suicide Bill Debated; Testimony Hot at First Such Hearing in Decade*, WIS. ST. J. (Madison), Jan. 24, 2008, at D1.

[18] Baxter v. State, No. ADV-2007-787, 2008 Mont. Dist. LEXIS 482, ¶ 51 (Mont. Dist. Ct. Dec. 5, 2008) (citing MONT. CONST. art. II, §§ 4, 10).

[19] President Barack Obama has sought to reform the health care industry. One of the proposals put forward by the House of Representatives includes "end-of-life" counseling. America's Affordable Healthcare Act of 2009, H.R. 3200, 111th Cong. § 1233(a)(1)(B) (2009). Though not an explicit step toward a federal Death with Dignity Act, the fact that the government has an interest in "end-of-life" through the counseling provision is one step closer to such a program.

### 1. The Increasing Size of the Elderly Population

In the near future, the senior citizen population in the United States will experience a rapid growth. According to the Census Bureau, the "Baby Boomers" generation should reach age sixty-five by the year 2030.[20] Citizens sixty-five and older will increase from 39,000,000 in 2010 to 69,000,000 in 2030, accounting for twenty percent of the population.[21] Likewise, the eighty-five and older demographic will grow significantly. In fact, this age group will grow faster than any other age group, as it is projected to double in size by 2025 and increase fivefold by 2050.[22]

Based on a measurement known as "the elderly dependency ratio," the Census Bureau projects that elderly dependence will reach record levels in the coming years.[23] The dependency ratio is determined by calculating how many children and elderly people exist compared to every 100 people of working age.[24] The elderly dependency ratio will increase from 21.2 in 2010 to 35.7 by 2030, representing a number almost equivalent to the child dependency ratio.[25]

So what is the relevance of this information to the Death with Dignity Act? According to Oregon's Death with Dignity Act Annual Report, the overwhelming majority of participants are fifty-five and older with fifty-one percent over the age of sixty-five.[26] With such a significant increase in the elderly population across the country, it is reasonable to infer that the Death with Dignity Act will also increase in use, possibly expanding beyond Oregon and Washington to a majority of states. If such an expansion takes place, then opportunities for improper use of the Death with Dignity Act will be enlarged.

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[20] JENNIFER CHEESEMAN DAY, U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS P25-1130, POPULATION PROJECTIONS OF THE UNITED STATES BY AGE, SEX, RACE, AND HISPANIC ORIGIN: 1995–2050, at 1 (U.S. Government Printing Office, Washington D.C. 1996), *available at* http://www.census.gov/prod/1/pop/p25-1130/p251130.pdf.

[21] *Id.*

[22] *Id.*

[23] *Id.* at 7.

[24] For example, if there were 25 children, 25 elderly, and 100 working age people, the dependency ratio would be 50. "Children," for purposes of this ratio, are between zero and seventeen years of age. "Elderly" is defined as sixty-five or older. "Working age" is defined as being between the ages of eighteen and sixty-four. *Id.*

[25] *Id.*

[26] OR. DEP'T. OF HUMAN SERVS., OREGON'S DEATH WITH DIGNITY ACT 2007, at 2–3 (2008) [hereinafter OREGON REPORT], *available at* http://egov.oregon.gov/DHS/ph/pas/docs/year10.pdf.

### 2. The High Costs of Health Care

The high costs of health care present a problem in need of an immediate remedy. Total health care spending is expected to increase from $2.3 trillion in 2007 to $4.1 trillion by 2016, accounting for 20% of the nation's gross domestic product.[27] According to the Census Bureau, in 2007, 45.7 million people lived in the United States without health insurance.[28] Though that number represents a decrease in uninsured individuals from the previous year, it does not reflect an increase in private health insurance.[29] Rather, the use of government provided health insurance rose, growing from 80.3 million in 2006 to 83 million recipients in 2007.[30] The pressure to revamp health care is so strong that it nearly dominated the most recent presidential campaigns.[31]

President Barack Obama believes that health care "should be a right for every American," according to his response to a question in one of the 2008 presidential debates.[32] He believes that a nation as large and rich as America should be able to provide insurance coverage for everyone.[33] But with the hike in private health care costs, coverage for everyone will likely mean an increased burden on the state or federal government to provide some form of universal insurance coverage for the uninsured.[34]

Unfortunately, the current burden the government shoulders in its attempt to provide health care assistance is reaching unbearable levels. Though both Medicare and Social Security programs face possible exhaustion of funds, Medicare's rapid decline is expected to be the first to suffer.[35] With the high costs of health care, the government will spend more on Medicare benefits than it will take in from payroll taxes.[36] In order to prevent the exhaustion of Medicare, the government can

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[27] John A. Poisal, et al., *Health Spending Projections Through 2016: Modest Changes Obscure Part D's Impact*, 26.2 HEALTH AFF., w242, w242–43 (2007).

[28] CARMEN DENAVAS-WAIT, ET AL., U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS P60-235, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, at 19 (U.S. Government Printing Office, Washington D.C. 2008), *available at* http://www.census.gov/prod/2008pubs/p60-235.pdf.

[29] *Id.*

[30] *Id.*

[31] *See, e.g.*, Commission on Presidential Debates, Second McCain-Obama Presidential Debate (Oct. 7, 2008), http://www.debates.org/pages/trans2008c.html.

[32] *Id.*

[33] *Id.*

[34] *See, e.g.*, America's Affordable Health Choices Act of 2009, H.R. 3200, 111th Cong. (2009) (explaining that the purpose of the bill is "[t]o provide affordable, quality health care for all Americans and reduce the growth in health care spending.").

[35] SOC. SEC. & MEDICARE BDS. OF TRS., SUMMARY OF THE 2009 ANNUAL REPORTS 2 (2009), *available at* http://www.ssa.gov/OACT/TRSUM/tr09summary.pdf.

[36] *Id.*

increase taxes dramatically, cut more than half of the program's spending, or implement some combination of these two options.[37]

Because of the political damage a tax increase causes, the more likely course of action includes finding areas where decreases in spending will be feasible. The states' funding limitations will inevitably lead to a system of health care rationing. Of course, this rationing leads to economic determinations of treatment and tough decisions as to who will receive funding, as well as to what degree. For low income, elderly individuals in particular, who are unable to afford private health insurance and are suffering from a terminal disease, the risk is especially high that the state will not be able to fund the needed prescriptions and treatment that may be required. But politicians understand that they cannot allow the low-income, elderly citizens suffer through a terminal disease without taking some measure to make their end as comfortable as possible. So how does the government purport to provide care and a sense of dignity to our terminally ill seniors while cutting back on Medicare expenditures? Say hello to the Death with Dignity Act. Through the Death with Dignity Act, the government offers itself the opportunity to provide a health care cost cutting mechanism while claiming to provide the terminally ill an opportunity to retain dignity and a pain free end.

Some are probably thinking that such an idea is preposterous and would never enter into a person's thought process. Remember the story of Ms. Wagner?[38] Why is someone like her denied funding for her prescription but offered a lethal prescription? According to the medical director of Oregon's Division of Medical Assistance Program, "'We can't cover everything for everyone . . . . Taxpayer dollars are limited for publicly funded programs. We try to come up with policies that provide the most good for the most people.'"[39] The purpose of this Note is not to argue that there is anything necessarily wrong with this quote but to show economic efficiency does play a role in the decision making processes for governmental health care providers, even in Death with Dignity Act cases. With limited funding for government programs, the high costs of health care, and the largest increase of senior citizens in years, the Death with Dignity Act will likely find a place on the law books of most states, adding more opportunities for its abuse.

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37 *Id.*

38 *See supra* notes 2–9 and accompanying text.

39 *See* Christie, *supra* note 2, at A1.

## II. HOW ARE THE SAFEGUARDS ENFORCED?—DOES THE PHRASE "BECAUSE I SAID SO" WORK ANYMORE?

In light of the increased potential for abuse of the Death with Dignity Act, it is important to assess the strength of the purported safeguards provided by the statute. The adequacy of the safeguards offered by the Death with Dignity Act has received mixed reviews. Some claim that the statutory protections alone are sufficient to prevent lethal prescriptions from improperly getting into the hands of patients.[40] The basis of this argument rests on the theory that if no actual evidence of abuse, coercion, or misuse of the Death with Dignity Act is produced, then the safeguards are in fact adequate.[41] But such an argument is insufficient, especially when the statute does not require objective investigation into the procedures and physicians involved in the Death with Dignity Act process. For this reason, others argue that the statute, while stating protections against and punishments for abuse, is void of any real enforcement mechanism.[42] There are three main statutory safeguards that can be evaluated for their adequacy to protect a potential Death with Dignity Act patient: capacity, voluntary choice, and terminal disease.

### *A. Do You Know What You Are Asking Me to Do?—The Capacity Requirement*

First, the Death with Dignity Act provides, as a safeguard, the requirement that a patient seeking a lethal prescription be "capable."[43] "Capable" is defined as the patient's "ability to make and communicate health care decisions to health care providers, including communication through persons familiar with the patient's manner of communicating if those persons are available."[44] The determination of capacity rests on the "opinion of a court or . . . the patient's attending physician or consulting physician, psychiatrist or psychologist."[45] Capability of a patient hinges on whether the "patient may be suffering from a psychiatric or

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[40] *See, e.g.*, Kathryn L. Tucker, *In the Laboratory of the States: The Progress of* Glucksberg's *Invitation to States to Address End-of-Life Choice*, 106 MICH. L. REV. 1593, 1602, 1605 (2008) (citing OR. REV. STAT. § 127.805 (2007)) (claiming that the safeguards of the Oregon Death with Dignity Act have been successful).

[41] *Id.* at 1605 (quoting William McCall, *Assisted-suicide Cases Down in '04* COLUMBIAN (Vancouver, Wash.), Mar. 11, 2005, at C2).

[42] See generally Susan R. Martyn & Henry J. Bourguignon, *Now Is the Moment to Reflect: Two Years of Experience with Oregon's Physician-Assisted Suicide Law*, 8 ELDER L.J. 1 (2000) [hereinafter Now Is the Moment] (explaining that the Death with Dignity Act's enforcement mechanisms are weak and amorphous).

[43] § 127.805(1).

[44] § 127.800(3).

[45] *Id.*

psychological disorder or depression causing impaired judgment."[46] Though the statute provides the option of a court determination of capability,[47] it requires the patient's physician to make the initial determination of capacity.[48] Once the physician is satisfied that the patient is capable, the physician must refer the patient to another consulting physician, who then gives a second opinion about the patient's capability.[49] According to the statute, if either the attending or consulting physician is suspicious about the capacity of the patient, she is required to refer the patient to a psychologist or psychiatrist for counseling.[50] A good faith determination of capability by the physicians satisfies this safeguard.[51]

This process, however, has no mechanism for determining whether a physician's determination of capability is accurate. Although the statute requires a report from the attending and consulting physicians that the patient is capable,[52] there is no requirement as to how much information should be provided. Also, physicians are not specifically required to report how they reached their conclusions.[53] There is no requirement that the physician investigate into the determination of the patient's mental history, even as to whether the patient has tried to commit suicide in the past. The scariest fact about this "safeguard" is that a physician is shielded from liability for an incorrect finding of capability, even if she is mistaken or negligent, because the physician is only required to make a "good faith" effort in her determination.[54] Of course, there is no definition of "good faith" in the statute that can be used to check the intentions or performance of this safeguard.

Physicians are not adequately trained to decide whether a patient is suffering from a mental disorder or depression, especially to the extent that it is needed to show "impaired judgment."[55] In a recent survey, twenty-eight percent of physicians, by their own admissions, questioned their abilities to determine whether a patient requesting a lethal prescription is in fact capable of making such a decision.[56] This statistic

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[46] § 127.825.

[47] § 127.800(3).

[48] § 127.815(1)(a).

[49] § 127.815(1)(d).

[50] § 127.825.

[51] § 127.885(1).

[52] § 127.855(3).

[53] *Id.*

[54] § 127.885(1).

[55] Raphael Cohen-Almagor & Monica G. Hartman, *The Oregon Death with Dignity Act: Review and Proposals for Improvement*, 27 J. LEGIS. 269, 283 (2001).

[56] *Id.* (citing Melinda A. Lee, et al., *Legalizing Assisted Suicide—Views of Physicians in Oregon*, 334 NEW ENG. J. MED. 310, 312–13, (1996)).

rises in importance in light of a study revealing that twenty percent of patients seeking a lethal prescription suffer from symptoms of depression.[57] In fact, when patients receive treatment for their depression, some of them decide not to follow through with the lethal process.[58] But there are other impairments to a patient's capacity that physicians are likely to miss. In addition to depression, a patient's judgment may be "impaired" by alcoholism or drug use (especially in the case of a terminally diseased patient), thus rendering the patient incapable of seeking a lethal prescription.[59] The fear of oncoming, excruciating pain can also cloud the judgment of a patient. If, however, she receives the needed pain relief information and medication, a study reveals that she will be less likely to follow through with the lethal prescription.[60] Competency is difficult enough for a psychiatrist to determine, as proven by a survey that found only six percent of psychiatrists confidently assert the ability to determine the capacity of a patient seeking a lethal prescription.[61]

Even assuming that a physician has an ability to discern certain characteristics of mental instability in their patients, counseling referral has steadily declined since the inception of the Death with Dignity Act. In 2007, not one patient who requested a lethal prescription was referred to psychological or psychiatric counseling.[62] That same year, the Death with Dignity Act saw a record number of participants.[63] Perhaps every patient was capable. But, because of the lack of an enforcement mechanism, no one will ever know.

### *B. Are You Sure?—The Requirement of Voluntary Choice*

The Death with Dignity Act requires that a patient voluntarily express a wish to die.[64] Two oral requests must be made with a fifteen day waiting period between them.[65] The patient must also make a written request.[66] There is a forty-eight hour waiting period requirement

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57 Linda Ganzini, et al., *Physicians' Experiences with the Oregon Death with Dignity Act*, 342 NEW ENG. J. MED. 557, 562 (2000) [hereinafter *Physicians' Experiences*].

58 *Id.*

59 Herbert Hendin & Kathleen Foley, *Physician-Assisted Suicide in Oregon: A Medical Perspective*, 106 MICH. L. REV. 1613, 1621 (2008); *see also Now Is the Moment*, *supra* note 42, at 14 (quoting David Orentlicher, *From the Office of the General Counsel: Physician Participation in Assisted Suicide*, 262 J. AM. MED. ASS'N 1844, 1845 (1989)).

60 *Physicians' Experiences*, *supra* note 57, at 560.

61 Linda Ganzini, et al., *Attitudes of Oregon Psychiatrists Toward Physician-Assisted Suicide*, 153 AM. J. PSYCHIATRY 1469, 1473 (1996).

62 OREGON REPORT, *supra* note 26, at 4.

63 *Id.* at 1.

64 OR. REV. STAT. § 127.805(1) (2007).

65 § 127.840.

66 *Id.*

between the written request and the writing of the lethal prescription.[67] The physician is required to suggest that the patient contact her next of kin, though the patient is not required to do so.[68] The statute provides that a patient may change her mind at any time.[69] In seeking to protect the voluntariness of the decisions, anyone who "coerces or exerts undue influence" on a person seeking a lethal prescription under the Death with Dignity Act will be found guilty of a felony.[70] Again, physicians decide whether the patient is making a voluntary decision and must make a report of that finding.[71] As long as the decision is made in good faith, the physician is free of liability.[72]

Though this decision rests on the physician, the statute provides no guidelines as to how the physician is to make that determination. The physician is not required to question family members to determine if familial coercion is present. Neither is she required to inquire into the financial ability of the patient to determine if the patient is making her decision based on a lack of means. The physician could simply ask if the patient is being coerced and, upon receiving a satisfactory answer, decide that the patient is making a voluntary decision.[73] Upon receiving a satisfactory answer, the physician has performed a "good faith" determination of voluntariness.[74]

To claim that this statutory safeguard sufficiently protects patients from coercion is absurd. Coercion and undue influence come in many forms and are often difficult to discover. The most obvious form of coercion is family pressure, especially for the elderly.[75] One of the reasons a person seeks a lethal prescription is because she feels she is a burden to her family.[76] Though at first such a reason rings of nobility on behalf of the elder member, the reasons why the elder member feels that way are worth investigating. It could be that the family members are putting pressure on her in order to hasten their ability to acquire the elder member's inheritance. This danger significantly increases in states, like Wisconsin, that do not deny inheritance rights to family

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67 § 127.850.

68 § 127.835.

69 § 127.845.

70 § 127.890(2).

71 § 127.855(3).

72 § 127.885(1).

73 *See* § 127.815(1)(a) (regarding attending physician responsibilities).

74 § 127.885(1).

75 Hendin & Foley, *supra* note 59, at 1624–25 (citing Erin Hoover Barnett, *A Family Struggle: Is Mom Capable of Choosing to Die?*, OREGONIAN, Oct. 17, 1999, at G01).

76 *Id.* at 1625.

members who assist in the suicide of a family member.[77] Despite these possibilities, the physician is not required to investigate a patient's family before writing a lethal prescription.

Additionally, financial constraints may cause a patient to feel they have no real choice except to "choose" a lethal prescription. Elderly citizens who cannot work, are alone, and have no family to depend on, do not have the means to pay for expensive medical treatment. When the state refuses to pay for treatments but offers to pay for a lethal prescription, a patient in fear of the oncoming pain and suffering associated with the disease will naturally feel compelled to choose the latter.[78] A more subtle form of coercion lies in the hands of the patient's physician. If the physician suggests to a patient that she should take a lethal prescription, the patient may feel compelled to take it.[79] After all, this is the person the patient trusts and relies on to seek her best interest.[80] If the patient happens to have a physician, paid by the state under some publicly funded health care plan, who encourages the patient to take a lethal prescription, that patient may feel that taking the prescription is the best option.[81] Clearly, there are numerous opportunities for coercion that the statutory safeguards are impotent to prevent.

### *C. How Sick Are You?—The Terminal Disease Requirement*

The Death with Dignity Act requires that a patient must be suffering from a "terminal disease."[82] "Terminal disease" is defined as "an incurable and irreversible disease that has been medically confirmed and will, within reasonable medical judgment, produce death within six months."[83] The attending physician makes the initial diagnosis of the disease, followed by a confirmation by the consulting physician.[84] Of course, as long as the physician exercises "good faith" in the analysis of a patient's illness, the Death with Dignity Act shields her from liability.[85]

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[77] *See* Ryan J. Foley, *Kin Who Assist in Suicide Can Inherit; Ruling Thought to Be 1st of Its Kind in U.S.*, CHI. TRIB., Sept. 26, 2008, at 7 (citing Lemmer v. Schunk (*In re* Estate of Schunk), 2008 WI App 157, 760 N.W.2d 446 (Wis. Ct. App. 2008)) (discussing the litigation that arose due to a law prohibiting one who unlawfully kills another from inheriting from the person (citing WIS. STAT. § 854.14 (Supp. 2008))).

[78] Susan R. Martyn & Henry J. Bourguignon, *Physicians' Decisions About Patient Capacity: The Trojan Horse of Physician-Assisted Suicide*, 6 PSYCHOL. PUB. POL'Y & L. 388, 397 (2000) [hereinafter *Physicians' Decisions*].

[79] *Now Is the Moment*, *supra* note 42, at 28.

[80] *Id.*

[81] Cohen-Almagor & Hartman, *supra* note 55, at 293–94.

[82] OR. REV. STAT. § 127.805(1) (2007).

[83] § 127.800(12).

[84] § 127.815(1)(a), (d).

[85] § 127.885(1).

Obviously, a physician cannot know the precise moment when a patient with a terminal disease will die. Thus, the statute places the "within reasonable medical judgment" caveat within the definition for terminal disease.[86] The purpose behind this is to prevent physicians from "mercy" killing and to make sure that no more lethal prescriptions are granted than are necessary.[87] Because this portion of the statute purports to be a safeguard, at a minimum, it should place some tangible, documentary requirements on the physician.[88] For this reason, a guideline suggests that physicians extensively document a patient's disease, prognosis, the written request or video equivalent for the lethal prescription, the conversations between the physician and patient, the physician's offer to rescind at the patient's request, discussions between the patient and her family, and a psychological report of the patients capability.[89] Fortunately, the statute does require documentation of some of the suggestions above by the physician.[90] But even if the physician is wrong or negligent in her diagnosis, no liability will befall her.[91] Therefore, this safeguard evinces weakness and a lack of an actual enforcement mechanism.

## III. ORDER IN THE COURT—I'LL HAVE A LETHAL PRESCRIPTION UNDER THE DEATH WITH DIGNITY ACT

Though the statutory safeguards are inadequate, the Death with Dignity Act need not be scrapped. In fact, there are some areas in which the Death with Dignity Act could expand so long as there is an actual safeguard mechanism to enforce its protections.[92] Rather, the Death with Dignity Act should offer an objective safeguard process beyond the reach of the Oregon Health Plan. This Note proposes that the best method to ensure that the safeguards are enforced is actually mentioned in the

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[86] § 127.800(12).

[87] *See Now Is the Moment*, *supra* note 42, at 8 (citing § 127.805(1)).

[88] Cohen-Almagor & Hartman, *supra* note 55, at 297.

[89] *Id.*

[90] § 127.815(1)(a), (d); § 127.855.

[91] § 127.885(1); *see also Now Is the Moment*, *supra* note 42 at 32.

[92] For instance, the Death with Dignity Act as currently written would not allow an Alzheimer's patient to participate because it is not reasonable to assume that a patient will die within six months when the disease is diagnosed. *See* § 127.800(12) (defining a terminable disease as a disease that will "produce death within six months"). Further, a patient within six months of death will likely not have the capability required under the Death with Dignity Act. *See* § 127.800(3) (defining capability). In addition, the fact that a person writes a "living will" authorizing participation in the Death with Dignity Act is not sufficient to allow participation as currently written. *See* § 127.805 (requiring a person to express her wish to die). With the appropriate enforcement of safeguards, opponents of the Death with Dignity Act may be willing to expand the statute's applicability, at least to cover this undignified disease.

statute, though only referred to once and seemingly glossed over.[93] A process of judicial review over the Death with Dignity Act provides the best option to ensure that each of the protections and procedures are followed. A state that enacts an adjudicative review process will ensure protection of its citizens, as well as the integrity of the medical profession, by providing a mechanism to prevent misuse of the Death with Dignity Act.

### *A. The Experience Factor—Courts Have Already Processed the Safeguards in Other Settings*

#### 1. A Court Can Distinguish Whether You Understand What You Are Asking

The courts offer a tested system for determining the capability of a patient to request a lethal prescription under the Death with Dignity Act. The judicial process has extensive experience in making competency determinations for various issues and people groups. Across the nation, judges determine the competency of those with mental incapacity, children, and the elderly.[94] Courts often have the final say as to the competency of one of these people groups to enter into a contract, make a will, or even to commit a crime.[95] Often, these cases present difficult factual scenarios requiring sophisticated decision-making. For the most part, these tough choices are placed before judges who render decisions based on the law, the facts of the particular cases, and all the evidence presented.

One of the more difficult and extensive issues courts decide is especially pertinent to the Death with Dignity Act—the doctrine of informed consent. Based on the statutory language, an argument can be made that the very definition of "capability" within Oregon's Death with Dignity Act comes from the state's rule regarding informed consent.[96] There are two necessary components that a patient must show to claim informed consent was not obtained. First, the patient must prove that the physician did not "explain . . . [i]n general terms the procedure or treatment to be undertaken; . . . alternative procedures or methods of treatment, if any; and [the] . . . risks, if any, to the procedure or treatment."[97] Though the initial explanation can be in general terms, the

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93 *See* § 127.800(3) (regarding capability).

94 *See, e.g.*, FED. R. EVID. 601.

95 *Id.*

96 *Compare* OR. REV. STAT. § 127.800(7) (2007) (defining "informed decision" for purposes of the Death with Dignity Act) *with* § 677.097 (explaining the procedure for a physician to obtain "informed consent" of a patient). This Note will use Oregon's law regarding informed consent in explaining its meaning and application.

97 § 677.097.

physician also must ask if the patient wants a more detailed explanation; and upon receiving an answer in the affirmative, the physician must give a more detailed explanation of either the procedure or the alternatives unless it would be detrimental to the patient.[98] Second, the patient must show that the lack of explanation by the physician caused the injury.[99] In determining whether the failure to warn causes injury, the issue is whether the particular patient would have consented to the treatment if she had been properly informed of all material risks or alternatives.[100]

Although physicians ordinarily are trusted to use reasonable judgment in deciding whether a patient can give informed consent, the special situation created by the Death with Dignity Act does not lend itself to the usual informed consent procedure. Many physicians, by their own admissions, are not confident in their abilities to determine the capability of a Death with Dignity Act participant.[101] Additionally, some of the participants may suffer from symptoms of depression, rendering them incapable of participating in the Death with Dignity Act.[102] Most importantly, whether that particular Death with Dignity Act patient would have changed her mind if the physician had explained the availability of feasible alternatives will be difficult to unveil for several reasons. First, the Death with Dignity Act does not require the physician to explain how she determined the patient's capability or even how much she explained about the procedure or alternatives. Second, the patient, upon review of the procedure, will likely have died as a result of the prescription, leaving only second guessing as to what that particular patient might have done. Thus, the safer course to protect patients from improper or negligent determinations of capability is to allow courts to review the attending and consulting physicians' determinations of capability before allowing the patient to receive a prescription. The courts have more experience in determining capacity and can use it to ensure that a person is truly able to understand the gravity of her decision to participate in the Death with Dignity Act.

### 2. A Court Can Distinguish Whether You Are Sure This Is What You Want to Do

Courts also provide an able medium for recognizing the difficult situations when coercion and undue influence may be present in a

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[98] *Id.*

[99] *See, e.g.*, Arena v. Gingrich, 748 P.2d 547, 550 (Or. 1988) (discussing cause).

[100] *Id.* This test is subjective, rendering what an objective, reasonable person would do irrelevant. *Id.*

[101] Cohen-Almagor & Hartman, *supra* note 55, at 283.

[102] *See Physicians' Experiences*, *supra* note 57, at 562.

patient's decision to use the Death with Dignity Act. The court system has a wealth of experience in uncovering coercion and undue influence involving issues such as contracts, wills, and criminal proceedings.[103] In addition, cases involving coercion from family pressure, salesmen, and even physicians come before the judiciary.[104] Again, these cases are very fact-specific, depending heavily on the circumstances which a physician who does not investigate beyond the consultation with the patient is likely to miss.

Even assuming good intentions, physicians lack the training to detect coercion and undue influence. Even if they had such training, it would be unlikely that a physician could recognize coercion or undue influence based upon a couple of consultations with the patient.[105] Coercion and undue influence hide well from even the most trained eye. In fact, physicians themselves may play a role in coercing the patients into making the decision to end their lives.[106] When a physician tells a patient that she can suffer in pain for the remainder of her years or can take a lethal prescription as a painless alternative, one can hardly doubt that a patient who hears such words of hopelessness will give extra credence to the suggestion by her trusted doctor.[107] Additionally, the Health Maintenance Organizations ("HMOs") and other state-run health programs may be involved, whether intentionally or not, in coercing patients to end their lives through the Death with Dignity Act.[108] After all, Ms. Wagner and Mr. Stroup might not have been around to tell their stories had they not spread the news throughout the media about the letters they received denying treatment.[109] How do we know that no other such letters were sent out? Who else may have felt there was no hope but did not have the means or support to seek out help or counsel? All we have is the word of the state health department that everything is fine.

A court proceeding, however, could require the patient to prove that the decision is in fact voluntary by producing evidence that a physician is currently not required to unearth. Using its extensive experience in

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[103] *See, e.g.*, Wayne v. Huber (*In re* Wayne's Estate), 294 P. 590 (Or. 1930); Checkley v. Boyd, 14 P.3d 81 (Or. Ct. App. 2000).

[104] *See, e.g.*, Shaw v. Kirschbaum, 653 A.2d 12 (Pa. Super. Ct. 1994); Crawford Chevrolet, Inc. v. McLarty, 519 S.W.2d 656 (Tex. Civ. App. 1975).

[105] *Physicians' Decisions*, *supra* note 78, at 396.

[106] *Now Is the Moment*, *supra* note 42, at 49.

[107] *Id.*

[108] *Physicians' Decisions*, *supra* note 78, at 397 (citing *Lethal Drug Abuse Prevention Act of 1998: Hearing on H.R. 4006 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 17 (1998) (statement of N. Gregory Hamilton, Physicians for Compassionate Care)).

[109] *See supra* notes 2–9 and accompanying text.

deciding these cases, the court provides a method to show that the patient voluntarily decided to accept the option of a lethal injection. Should the court determine that either a physician, family member, HMO, or other entity coerced or unduly influenced a patient's decision, the court can deny the patient's ability to receive a lethal prescription before a life is wrongfully taken.

### *B. Dead or Alive—The Court's Objectivity Regarding the Outcome*

Another benefit to using a court proceeding to enforce the protections of the Death with Dignity Act is the objectivity it brings to the issue. Hot button issues, such as the Death with Dignity Act, often force people to take sides. Of course, people who have an interest in the procedure are more likely to make decisions beneficial to their side.[110] Those who have an interest in preventing the procedure will render decisions that will either limit or eliminate the problem as they see it. Usually, these decisions are self-centered based on the belief system held by the proponent or opponent of the issue, with one side feeling it is "winning" and the other side believing it is "losing."[111]

This is especially true with the Death with Dignity Act. One side argues that the Death with Dignity Act is a necessary addition to the legal and political system because it offers a "compassionate" end to a life of suffering and an opportunity to give individuals control over their own lives.[112] Decision makers in this camp are likely to push for the use of the Death with Dignity Act with few to no limits.[113] Even in the difficult cases, proponents of the Death with Dignity Act might make decisions that serve their own interests rather than their patients' interests.[114] HMOs and state-run health programs have a stake in the use of the Death with Dignity Act as well.[115] They claim to uphold individual rights and a better economy for all, yet they also send out

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[110] *See Now Is the Moment*, *supra* note 42, at 10 (quoting THE OREGON DEATH WITH DIGNITY ACT: A GUIDEBOOK FOR HEALTH CARE PROFESSIONALS 8, 63 (Patrick Dunn & Bonnie Reagan eds., 1998)).

[111] *See id.*

[112] Tucker, *supra* note 40, at 1611.

[113] *See id.*

[114] Hendin & Foley, *supra* note 59, at 1628–30 (citing George Eighmey, Oregon's Death with Dignity Act: Health Care Professionals Speak Out on Its Impact, Remarks at the Nineteenth Annual Meeting of the Council on Licensure, Enforcement, and Regulation (Sept. 3, 1999), *quoted in* N. Gregory Hamilton, *Oregon's Culture of Silence*, *in* THE CASE AGAINST ASSISTED SUICIDE: FOR THE RIGHT TO END-OF-LIFE CARE 175, 184–85 (Kathleen Foley & Herbert Hendin eds., John Hopkins Paperbacks ed. 2004)).

[115] *See Physicians' Decisions*, *supra* note 78, 397 (citing *Lethal Drug Abuse Prevention Act of 1998: Hearing on H.R. 4006 Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 105th Cong. 17 (statement of N. Gregory Hamilton, Physicians for Compassionate Care)).

letters offering lethal prescriptions as an option to those who request life-sustaining treatment.[116] But why should anyone expect less? There are a large number of people who have to be treated and money is tight, especially in the present economy. And with the influx of the largest senior citizen community coming, money will be even tighter. Obviously, if a patient's determination of either capacity or voluntariness is left to one of these proponents, they will more than likely make a decision favorable to their economic needs.

Also, physicians have a stake in the use of the Death with Dignity Act by their patients. Physicians are extremely busy with numerous patients with numerous needs.[117] Obviously, caring for every patient who seeks care from the physician is a difficult and overwhelming task, especially when the patient is suffering from a terminal disease.[118] While a physician has a duty to "do no harm," a physician also must consider a patient's financial limits and not use frivolous attempts of treatments they know are unlikely to work. These conflicting duties force physicians into making determinations that may be more in their best interest than their patients', as they fear liability. Offering the Death with Dignity Act to a patient may free more time for a physician to treat other patients who have, in the physician's opinion, higher chances of survival. Additionally, a physician is free from liability under the Death with Dignity Act, while any other mistakes in treatment may subject him to malpractice.[119] Thus, the Death with Dignity Act is an attractive option for a physician to use to protect himself while seemingly offering his patients an alternative to a life of suffering. Therefore, a physician may have an interest in pushing the patient to make the choice to end her life.

A court procedure offers an objective perspective to each of the procedures in the Death with Dignity Act. The final outcome of the decision made by the court is of no moment to a judge. The judge's only role is to ensure that the law is followed properly and, if violated, to give punishment. Despite personal opinions or prejudices, the judge has a duty not to herself or to her positions, but to the law. Her job is simply to look at the evidence presented by the potential participant and make a determination that every aspect of the Death with Dignity Act is properly and thoroughly observed. Should a judge decide that she cannot make a fair judgment in a matter, she can simply recuse herself from the proceeding, deferring to the judgment of another judge.

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116 *See supra* notes 2–6 and accompanying text.

117 *Now Is the Moment*, *supra* note 42, at 47.

118 *Id.*

119 OR. REV. STAT. § 127.885(1) (2007).

Opponents of this suggestion may argue that a judge who holds a "right to life" position or is a "conservative ideologue" will either refuse all petitions from patients seeking a lethal prescription, decide all of those cases favorably to her position, or that judges may continually recuse themselves so that a potential Death with Dignity Act candidate may not be able to receive a lethal prescription.[120] The beauty of the adjudicative system, however, is that it provides a finding of fact which can serve as the basis for an appeal. If a judge uses her position to advance her own agenda, it is the job of the appellate courts to review and reverse those decisions and hold those judges accountable. Another argument may be that the length of time required might moot the case because the patient seeking assistance under the Death with Dignity Act may pass away before an appeal can be granted. But this argument does not make sense for two reasons. First, if the Death with Dignity Act is only used by a limited number of people, as the proponents of the Death with Dignity Act suggest, the strain on the judicial system should be minimal at all levels.[121] Second, if the patient were to die within the fifteen day period, which is recommended below as the suggested judicial period, one could hardly argue that the Death with Dignity Act was needed to prevent a long and tortuous period of suffering, which debunks the major argument advanced for its passage.[122] Nevertheless, the judicial system provides an adequate avenue of objective decision-making to the Death with Dignity Act and would serve as a protection against the agendas of all parties involved.

### *C. Prescribe Properly or Prepare for Prison—The Court's Actual Mechanism for Enforcement*

Currently, the Death with Dignity Act provides no real mechanism for enforcement of its provisions. The statute makes it a felony to willfully change a request for medication intending to cause a patient's death.[123] Coercion or undue influence to take a lethal prescription is also a felony.[124] Additionally, the Death with Dignity Act claims that it does not in any way limit civil liability for "negligent conduct or intentional misconduct."[125] Proponents of the Death with Dignity Act claim that

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[120] A similar argument has been made in the context of the judicial bypass procedure for minors seeking to obtain an abortion without parental consent. Lauren Treadwell, Note, *Informal Closing of the Bypass: Minors' Petitions to Bypass Parental Consent for Abortion in an Age of Increasing Judicial Recusals*, 58 HASTINGS L.J. 869, 883 (2007).

[121] Tucker, *supra* note 40, at 1604 (citing OREGON REPORT, *supra* note 26, at 1) ("[T]he reports demonstrate that use of physician-assisted dying is limited.").

[122] *See id.* at 1611.

[123] § 127.890(1).

[124] § 127.890(2).

[125] § 127.890(3).

these safeguards offer sufficient incentive to deter misuse of the statute.[126]

But how does the Death with Dignity Act propose to enforce these safeguards? It does not. As one author stated, the Death with Dignity Act "has no teeth."[127] The Death with Dignity Act requires information to be gathered by the physician in order to report it to the state health department.[128] Of course, not every patient's information is reviewed by the health department. The department only seeks a sampling of the patients for reporting purposes.[129] Moreover, the statute does not allow any information taken pursuant to the Death with Dignity Act to be revealed to the public.[130] The only information revealed under the Death with Dignity Act are the statistics gathered by the state health department upon reviewing a sample of the reports.[131]

Without the requisite knowledge, a patient's family cannot possibly know whether a family member wrongfully received a lethal prescription. The criminal authorities will never learn whether a family member coerced a patient into going through with the Death with Dignity Act for monetary reasons. The state health department cannot deduce wrongdoing from the forms turned in from the physicians because the physicians are not required to give details as to how they reached their decisions. They are only required to make good faith efforts in compliance with the provisions, which does not require any measure of specificity of the capacity, voluntariness, or the illness of the patient.[132] Most importantly, a physician who wrongfully prescribes a lethal prescription, whether intentionally or negligently, is immune from liability under the statute.[133] So, even if a family member were to learn that the physician made a mistake in deciding that the particular patient had capacity, the physician would be free from liability as long as she made her determination in good faith.[134] How is the measure of good faith decided? The statute is silent on that issue. It appears that as long as she complies with the requirements set forth in the statute, she has satisfied the requirements necessary to avoid liability.[135] Because the information received pursuant to the reporting requirement to the health department is not open to the public, there is no apparent method

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126 *See, e.g.*, Tucker, *supra* note 40, at 1602 (citing § 127.805(1)).

127 *Now Is the Moment*, *supra* note 42, at 53.

128 § 127.855.

129 § 127.865(1)(a).

130 § 127.865(2).

131 § 127.865(3).

132 § 127.885(1).

133 *Id.*; *see also Now Is the Moment*, *supra* note 42, at 32.

134 *Id.*

135 *See* § 127.815 (regarding physician responsibilities).

by which to obtain proof of wrongdoing surrounding the Death with Dignity Act process.[136] And because of the immunity provision, physicians are exempt from both civil and criminal liability, as long as they make a good faith effort.[137] Thus, the statutory provisions have no mode of true enforcement under the current statute.

A court proceeding has the power to properly enforce the safeguard provisions of the Death with Dignity Act. Prior to receipt of the lethal prescription, a patient can produce evidence before the court proving that she is capable and that her decision has not been improperly influenced by another. Additionally, the judge can look at whether the physician properly determined the capacity or voluntariness to petition for a lethal prescription. If a physician or health provider wrongfully or negligently granted a patient a lethal prescription, the court would allow the patient or patient's family a method of recourse against the physician or health provider. Of course, the court can either allow damages for civil liability or can even enjoin the physician from writing or the patient from obtaining a lethal prescription. By allowing for these options, the safeguards of the Death with Dignity Act will have a more adequate enforcement mechanism to protect patients from receiving a improper lethal prescription.

## IV. BORROWING FROM *BELLOTTI*—THE MODE OF THE DEATH WITH DIGNITY ACT BYPASS PROCEDURE

The adjudicative process necessary to enforce the safeguards of the Death with Dignity Act can be achieved with relative simplicity. This process need not be a long proceeding or consume massive resources of the judicial system. This proceeding and all of its appeals can be accomplished within the fifteen day waiting period required before a lethal prescription may be given to the patient.[138] Additionally, this process need not be expensive for a patient seeking to obtain a lethal prescription. The overarching goal of this process is to make a simple determination, prior to the actual filling of the prescription, that the patient is in fact capable of making a voluntary decision, and that there is no wrongdoing on the part of any person involved in the patient's decision making process. A successful example of this type of process is found in the realm of abortion rights. The Supreme Court allows minors seeking an abortion without parental consent to obtain an abortion under certain circumstances through the mechanism of a judicial bypass procedure.[139] In order to ensure a proper adjudicative procedure for the

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[136] § 127.865(2); *see also Now Is the Moment*, *supra* note 42, at 32.

[137] § 127.885(1).

[138] § 127.850.

[139] Bellotti v. Baird, 443 U.S. 622, 643 & n.22 (1979) (Powell, J., plurality opinion).

Death with Dignity Act, legislatures must consider several aspects regarding the process of enforcing the Death with Dignity Act in order to provide the most efficient and protective system possible.

### *A. For the Executive or Judicial Branch—Any Judicial Bypass Proceeding Is Better than Nothing*

In deciding the process of the Death with Dignity Act adjudicative proceeding, the first consideration a legislature must decide is whether the hearing should take place before a court or an administrative agency. In the abortion realm, the Supreme Court permits a state to conduct the judicial bypass procedure through an administrative agency.[140] The reasoning behind this alternative seems to be that the constitutional rights of children, though equal in theory, may be treated differently in practice.[141]

The same may not, however, be said for an adult system that is similar in nature. The Court grants adults their constitutional rights to the fullest extent of the law. The fact that there is no adjudicative process at all may suggest that any such hearing might survive constitutional muster. There certainly are some advantages to using an administrative hearing. The rules of evidence certainly do not apply in these hearings,[142] leaving more opportunities to present evidence of a patient's capability or voluntariness. Second, an administrative hearing may be easier to access and calendar than placing such hearings in the court system. The primary advantage of the administrative adjudication is efficiency.

There is, however, an obvious disadvantage to such a proceeding. An administrative agency is connected with the state executive department, whose decisions may be influenced by an executive who has the budget as a main concern. Should a hearing officer receive pressure from the chief executive, a patient's or physician's compliance with the safeguards of the Death with Dignity Act may be conveniently swept under the rug in order to lessen the burden of a state health care plan. But despite an administrative hearing's disadvantages, an administrative hearing or a court proceeding would at least add a necessary element by placing a burden of proof prior to a patient's obtainment of a lethal prescription.

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[140] *Id.*

[141] *See id.* at 635 (comparing the juvenile court system with the adult criminal justice system).

[142] Schuler v. Comm'r of Soc. Sec., 109 F. App'x. 97, 102 (6th Cir. 2004) (citing Cline v. Sec'y of Health, Educ. & Welfare, 444 F.2d 289, 291 (6th Cir. 1971)).

### *B. Can You Prove It?—The Burden of Proof in the Death with Dignity Act Bypass Procedure*

Another aspect of the proposed Death with Dignity Act adjudicative process that must be considered is the burden of proof that will be sufficient to show safeguards are adequately observed. States vary in their burdens of proof in their abortion judicial bypass procedures.[143] The Supreme Court allows states to require a minor to prove maturity or best interest by a clear and convincing evidence standard.[144] Some only require a minor prove their maturity by a preponderance of the evidence, meaning only some evidence that proves a minor is more likely than not mature enough to make the decision to have an abortion.[145]

In states using the clear and convincing evidence standard in the abortion judicial bypass cases, several reasons are advanced for its use that may render this standard the best for a legislature to require in Death with Dignity Act cases. Clear and convincing evidence is a measure of proof that will cause the trier of fact to have "'a firm belief or conviction'" about the claims a person is seeking to prove.[146] This standard, according to the Supreme Court, is constitutional because the hearing is ex parte, the minor may be represented by counsel, and there is no rebuttal testimony.[147] Similarly, a patient seeking to establish capacity or voluntariness can be performed ex parte, with the option of assistance of counsel, and no adverse testimony. Additionally, the stakes are much higher in Death with Dignity Act cases where a patient, unlike a fetus,[148] cannot be argued to be anything other than a human life. The Death with Dignity Act is a mechanism to bring a person's life to an end. Regardless of the stance one has on abortion, a person who is alive enough to seek a prescription is a living person. Therefore, a higher standard should at least be strongly considered by legislatures for use in Death with Dignity Act adjudicative proceedings.

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[143] *Compare* TEX. FAM. CODE ANN. § 33.003(i) (Vernon 2008) (requiring the minor to demonstrate "by a preponderance of the evidence" that she "is mature and sufficiently well informed") *with* OHIO REV. CODE ANN. § 2151.85(C) (LexisNexis 2007) (requiring that the minor must prove allegation of maturity, pattern of abuse, or best interests "by clear and convincing evidence").

[144] Ohio v. Akron Ctr. for Reprod. Health, 497 U.S. 502, 515–16 (1990).

[145] *In re* Jane Doe, 19 S.W.3d 249, 251 (Tex. 2000) (quoting TEX. FAM. CODE ANN. § 33.003(i)).

[146] *Akron Ctr. for Reprod. Health*, 497 U.S. at 516 (quoting Cross v. Ledford, 120 N.E.2d 118, 123 (Ohio 1954)).

[147] *Id.*

[148] *See, e.g.*, Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 914 (1992) (Stevens, J., concurring in part and dissenting in part ) ("[T]he state interest in *potential* human life is not an interest *in loco parentis*, for the fetus is not a person." (emphasis added)).

Even with this higher standard of proof, a patient can easily satisfy the burden necessary to prove the safeguards have been properly enforced. Of course, a patient can testify to her capacity and voluntariness in seeking a lethal prescription under the Death with Dignity Act. Additionally, a patient can present testimony from the physician that all aspects of the Death with Dignity Act were properly complied with. Though in person testimony is preferable, the legislature can allow a physician to testify by affidavit. If affidavit testimony is allowable, the legislature should require the physician to specifically articulate the methods used to obtain his determination so that the requisite safeguards are satisfied. This process will be a strong incentive for a physician to exercise care in his decisions and methods when involving a Death with Dignity Act candidate. Under this process, a patient can be ensured that he will be protected when his time to make this decision comes.

### *C. Who Foots the Bill?—A Look at the Public/Private Funding of the Death with Dignity Act Bypass Procedure*

The benefits of an adjudicative process to enforce the safeguards of the Death with Dignity Act are worth any cost. That being said, this process need not be an expensive enterprise. Obviously, some may argue that public funds should not be expended in any way to the termination of human life, much like the argument made against funding abortions.[149] Though this argument is likely a moot point,[150] there is no reason why public funding would be necessary for such an endeavor. The court costs can be paid by patients seeking to obtain a lethal prescription. Having a patient pay this fee and making it a non-refundable payment, will result in two indirect benefits. First, the patient will have to cautiously consider whether she really wants to obtain the medication after having to pay a court fee. Additionally, the patient's family members may be less enthusiastic about a procedure that may leave them with less of an inheritance, however meager it may be. Placing the costs of the adjudicative process on the potential Death with Dignity Act candidate will ensure that the public is not funding a procedure it deems immoral while causing the patient to take added caution before entering into the Death with Dignity Act process.

Naturally, opponents to this idea may argue that such a requirement would serve as a chilling effect toward those who are less fortunate. But legislatures can provide a waiver of court costs for

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[149] *See, e.g.*, Harris v. McRae, 448 U.S. 297, 301 (1980) (citing Hyde Amendment, Pub. L. 96-123, § 109, 93 Stat. 923, 926 (1979)) (regarding the public funding of abortions).

[150] Obviously the states with a Death with Dignity Act already offer public funding for a lethal prescription as Ms. Wagner and Mr. Stroup learned from their letters.

indigent patients who can prove they are unable to pay anything, much like the waiver provision in the abortion judicial bypass cases.[151] Also, the argument used by proponents of the Death with Dignity Act is that the poor do not use the Death with Dignity Act in such a manner as to suggest it is dangerous to them.[152] Based on the report put out by the Oregon Health Plan, the majority of Death with Dignity Act candidates are well-educated, middle-class citizens.[153] If that is true, then there should be no fear that an adjudicative process cost would prevent a terminally ill patient from seeking a lethal prescription. Therefore, a reasonable court fee imposed on the patient allows for the necessary funding to provide an adequate enforcement mechanism of the Death with Dignity Act's safeguards.

## CONCLUSION

An adjudicative process is necessary to adequately enforce the safeguards of the Death with Dignity Act. This process is necessary to prevent wrongdoing on the part of any person or entity involved with the Death with Dignity Act. Especially with the rise of the largest group of senior citizens in our nation's history and the skyrocketing costs of health care, the danger that an elderly patient may be unwittingly coerced into accepting a lethal prescription through the Death with Dignity Act is sufficiently high to demand such protective measures. Every state that considers adoption of the Death with Dignity Act should add this adjudicative process to its statute. The adjudicative proceeding should not be complicated or costly, but it should be efficient and adequate to ensure the safeguards are met.

Ms. Wagner and Mr. Stroup are examples of the possible dangers inherent in the lack of enforcement of the Death with Dignity Act's safeguards. What would have been the result if they had not contacted the media and brought negative attention to the Oregon Health Plan's suggestion that they might pay for a lethal prescription, but not pay for treatment? Would the safeguards of the Death with Dignity Act protect them as currently enforced? Would the state be held responsible for improper influence? How would anyone know the reasons they accepted the medication if the physician did not have to so specify? Unless state

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[151] Planned Parenthood League of Mass. v. Bellotti, 641 F.2d 1006, 1111 (1st Cir. 1981) (citing 1980 Mass. Acts 793–96).

[152] Tucker, *supra* note 40, at 1603–04 (citing Margaret P. Battin et al., *Legal Physican-Assisted Dying in Oregon and the Netherlands: Evidence Concerning the Impact on Patients in "Vulnerable" Groups*, 33 J. MED. ETHICS. 591, 591 (2007); CTR. FOR DISEASE PREVENTION & EPIDEMIOLOGY, OR. HEALTH DIV., DEP'T OF HUMAN RES., OREGON'S DEATH WITH DIGNITY ACT: THE FIRST YEAR'S EXPERIENCE 7 (1999), *available at* http://egov.oregon.gov/DHS/ph/pas/docs/year1.pdf).

[153] OREGON REPORT, *supra* note 26, at 2.

legislatures enact these safeguards, these questions will remain unanswered.

*Andrew R. Page*

# *KENNEDY V. LOUISIANA* REAFFIRMS THE NECESSITY OF REVISING THE EIGHTH AMENDMENT'S EVOLVING STANDARDS OF DECENCY ANALYSIS

*"For if the interaction of this Justice and the constitutional text over the years confirms any single proposition, it is that the demands of human dignity will never cease to evolve."*[1]

## INTRODUCTION

*Kennedy v. Louisiana*[2] is the latest "cruel and unusual punishment" case exposing the problematic nature of the Supreme Court's approach to Eighth Amendment jurisprudence. In a 5–4 split, the Supreme Court held that the death penalty is an unconstitutional punishment for the rape of a child,[3] and arguably for any crime that does not result in the victim's death.[4] In reaching this conclusion, the majority combined the "evolving standards of decency" test with its own understanding of the dictates of the Eighth Amendment to determine whether the challenged punishment was disproportionate to the crime.[5]

Noting that only six states had laws extending the death penalty to cases of child rape, and that the appellant was one of "only two individuals now on death row in the United States for a nonhomicide offense,"[6] the majority concluded that there was a national consensus against capital punishment in that context.[7] The dissent, however, examined the same data through a different lens and reached the opposite conclusion. The dissent looked at the number of states that had legalized capital punishment for child rape in light of the Court's decision in *Coker v. Georgia*.[8] The fact that six states had passed laws making child rape a capital crime *after* and hence *despite* that decision

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1 Justice William J. Brennan, Jr., U.S. Supreme Court, Speech to the Text and Teaching Symposium at Georgetown University (Oct. 12, 1985), *in* ORIGINALISM: A QUARTER-CENTURY OF DEBATE 55, 67 (Steven G. Calabresi ed., 2007).

2 128 S. Ct. 2641 (2008).

3 *Id.* at 2664.

4 *See id.* at 2665.

5 *Id.* at 2649–50.

6 *Id.* at 2657.

7 *Id.* at 2657–58.

8 *See id.* at 2665–70 (Alito, J., dissenting) (discussing the implications of *Coker v. Georgia*, 433 U.S. 584 (1977)). In *Coker*, the Court held that capital punishment was a disproportionate penalty for the rape of an adult woman. *Coker*, 433 U.S. at 597. The Court's reasoning, however, could be taken to suggest that its holding was much broader, encompassing nonhomicide crimes generally. *See id.* at 598 (stating that "[r]ape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder").

indicated society's growing concern with sex crimes against children and approval of harsher penalties.[9] The dissent also argued that the Court's decision in *Coker* kept many state legislatures from expressing their convictions of what society's standards of decency actually are on this issue.[10]

*Kennedy* confirms that the Court's evolving standards of decency test is unworkable. The data used to interpret society's standards can be construed multiple ways, in effect becoming a cover for the majority to impose its own subjective views. By cutting off public policy debate in the state legislatures, the Court substitutes its own voice for the voice of the people speaking through their elected representatives. Furthermore, because the Court's decisions are final, societal views cannot change over time—except within the confines the Court has established. Policymaking is not a judicial function, and the Court should not be at liberty to impose its moral judgments on the rest of the country. Proper deference should be given to those best able to decipher and reflect society's standards of decency—the people's representatives.

The evolving standards of decency analysis that characterizes the Court's Eighth Amendment jurisprudence must be revised if it is to achieve its purpose of accurately reflecting societal values. Instead of seeking to determine national consensus—an inherently subjective task—the Court should limit its inquiry to the particular facts of the case before it. Specifically, the Court should first assess whether the legislature could have reasonably concluded that some criminals could act with sufficient moral culpability to merit the challenged penalty. If the Court concludes that the legislative enactment was indeed reasonable, the Court should then ask whether the jury could have reasonably concluded that the sentenced punishment was justified under the particular facts and circumstances of the case.

This Note is divided into five parts. Part I provides a brief summary of the Eighth Amendment's historical background leading up to its current interpretation by the Supreme Court. Part II analyzes the difficulty of determining national consensus from state legislation, jury sentencing data, and other sources the Court has characterized as "objective indicia." It also discusses the Court's propensity to selectively employ the results of the evolving standards of decency analysis to support its independent judgments. Part III describes the inherent problems of the evolving standards of decency analysis that render it an unworkable judicial construct even if the Supreme Court *could* correctly interpret national consensus. Part IV compares the Court's independent proportionality review of Eighth Amendment cases with its evolving

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[9] *Kennedy*, 128 S. Ct. at 2669, 2671 (Alito, J., dissenting).

[10] *Id.* at 2671–72.

standards of decency analysis, discussing the increasingly transparent overlap between the two. Part V discusses what test could effectively remedy the weaknesses that plague the evolving standards of decency analysis.

## I. HISTORICAL BACKGROUND OF EIGHTH AMENDMENT JURISPRUDENCE

### *A. The Early Meaning and Application of the Cruel and Unusual Punishment Clause*

The language of the Eighth Amendment—"[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted"[11]—was adopted nearly verbatim from the English Declaration of Rights of 1688.[12] There is little evidence in the historical records of the Framers' intent as to the constitutional phrase's meaning and application.[13] The absence of such a protection in the Constitution was noted only twice during the state ratifying conventions, and the inclusion of the Clause in the Bill of Rights received little discussion and debate in Congress before being adopted.[14] The few times this Clause was mentioned, it was referenced within the context of proscribing torturous punishments such as the rack and gibbet.[15] Although the death penalty was the *exclusive* and *mandatory* sentence for offenses such as "murder, treason, piracy, arson, and rape" in the early days of the republic,[16] the "courts rarely adjudicated Eighth Amendment claims."[17] In fact, the Supreme Court relied on the Cruel and Unusual Punishment Clause to decide a mere six cases during the first 175 years of its existence.[18] Hence, it appears from early history that the Eighth

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[11] U.S. CONST. amend. VIII.

[12] Trop v. Dulles, 356 U.S. 86, 100 (1958) (citing English Declaration of Rights, 1688, 1 W. & M., 2d Sess., c. 2).

[13] Furman v. Georgia, 408 U.S. 238, 258 (1972) (Brennan, J., concurring).

[14] *Id.*; Weems v. United States, 217 U.S. 349, 368 (1910).

[15] *See Furman*, 408 U.S. at 258–59 (Brennan, J., concurring) (citing DEBATES IN THE CONVENTION OF THE COMMONWEALTH OF MASSACHUSETTS, ON THE ADOPTION OF THE FEDERAL CONSTITUTION (1788), *reprinted in* 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION, AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 111 (Jonathan Elliot comp. & rev., N.Y., Burt Franklin 1974) (1888)).

[16] Bridgette M. Palmer, Note, *Death as a Proportionate Penalty for the Rape of a Child: Considering One State's Current Law*, 15 GA. ST. U. L. REV. 843, 847–48 (1999) (citing Woodson v. North Carolina, 428 U.S. 280, 289 (1976) (plurality opinion)).

[17] *Id.* at 848 (citing Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 997 (1978)).

[18] Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 10 (2007) (citing THE SUPREME COURT IN CONFERENCE, 1940–1985: THE PRIVATE DISCUSSIONS BEHIND NEARLY 300 SUPREME COURT DECISIONS 618 (Del Dickson ed., 2001)).

Amendment's initial primary purpose was to "prevent[] the prescription of torturous or barbaric methods of punishment."[19]

### *B. A Succinct Overview of the Birth and Development of the Court's Eighth Amendment Evolving Standards of Decency Analysis*

In contrast to its limited historical interpretation, recent Supreme Court jurisprudence has left the meaning of the Eighth Amendment's Cruel and Unusual Punishment Clause purposely vague.[20] Thus, instead of being confined to merely what was considered cruel and unusual punishment at the time of its adoption, the Court has determined that the Clause must adapt to current sentiment.[21]

This reversal of course began with *Weems v. United States*, where the Court held that a Philippine court's sentence of fifteen years imprisonment for falsifying government documents was unconstitutionally severe under the Eighth Amendment.[22] The Court concluded that the proscription of cruel and unusual punishments "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."[23] The Court expanded upon this concept of looking to what society would tolerate rather than past interpretation of the Cruel and Unusual Punishment Clause in *Trop v. Dulles*.[24] In *Trop*, the Court coined the phrase that would come to characterize the new realm of Eighth Amendment jurisprudence: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[25] While the Court split on the issue of whether the death penalty was being imposed arbitrarily and was thus unconstitutional in *Furman v. Georgia*, all the Justices agreed that the Eighth Amendment was not static: "A punishment is inordinately cruel . . . chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard

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[19] Palmer, *supra* note 16, at 848 (citing State v. Wilson, 96-1392, 96-2076, pp. 2–3 (La. 12/13/96); 685 So. 2d 1063, 1065).

[20] *See* Wayne Myers, Roper v. Simmons: *The Collision of National Consensus and Proportionality Review*, 96 J. CRIM. L. & CRIMINOLOGY 947, 960 (2006); Jeffrey C. Matura, Note, *When Will it Stop? The Use of the Death Penalty for Non-Homicide Crimes*, 24 J. LEGIS. 249, 263 (1998).

[21] *Id.*

[22] 217 U.S. 349, 380–82 (1910).

[23] *Id.* at 378.

[24] 356 U.S. 86, 101 (1958) (plurality opinion) (holding that "denationalization as a punishment is barred by the Eighth Amendment").

[25] *Id.*

itself remains the same, but its applicability must change as the basic mores of society change."[26]

Thus, the Supreme Court decided that the Cruel and Unusual Punishment Clause of the Eighth Amendment should be interpreted to reflect society's evolving standards of decency. This left the Court with the challenging task of deciding how exactly to judge "evolving standards," a question the Justices cannot seem to agree on how to answer.[27] Nevertheless, while their views differ as to what factors should be considered when determining national consensus, all the Justices concur that any test must necessarily include an examination of the most reliable "objective indicia" of society's values—state legislation and jury sentencing data.[28]

## II. THE DIFFICULTY OF DETERMINING NATIONAL CONSENSUS AND THE COURT'S PROPENSITY TO SELECTIVELY USE THE EVOLVING STANDARDS OF DECENCY ANALYSIS TO SUPPORT ITS INDEPENDENT FINDINGS

The Supreme Court has not been able to articulate a clear and consistent standard for determining national consensus. In *Coker v. Georgia*, the Court said its "judgment should be informed by objective factors to the maximum possible extent."[29] Yet even when looking at "objective indicia" of societal standards—legislative enactments and jury sentencing data—the Supreme Court cannot agree on what actually constitutes a "consensus" for or against a given punishment.[30] The proper interpretation of the available legislative, jury, and other data is open to dispute, allowing it to be easily manipulated into supporting

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[26] 408 U.S. 238, 382 (1972) (Burger, C.J., dissenting).

[27] Myers, *supra* note 20, at 960 (citing Roper v. Simmons, 543 U.S. 551, 561–64 (2005)); Matura, *supra* note 20, at 255. The Justices have held diverging views on how society's standards of decency should be determined. For example, Justice Stevens has espoused turning to foreign laws for insight. *E.g.*, Atkins v. Virginia, 536 U.S. 304, 316 n.21 (2002). Chief Justice Rehnquist, in contrast, argued that legislative enactments and jury sentences should "be the sole indicators by which courts ascertain the contemporary American conceptions of decency for purposes of the Eighth Amendment." *Id.* at 324. According to Justice Scalia in *Stanford v. Kentucky*, the majority position of the states on a penalty was the determining indicator of society's standards. 492 U.S. 361, 370–71 (1989). Yet, Justice Kennedy in *Roper* stated that a minority position could represent society's standards if it appeared that the position was gaining increasing support. *Roper*, 543 U.S. at 566.

[28] Myers, *supra* note 20, at 960 (quoting *Roper*, 543 U.S. at 563), 980; Matura, *supra* note 20, at 255.

[29] 433 U.S. 584, 592 (1977).

[30] Tonja Jacobi, *The Subtle Unraveling of Federalism: The Illogic of Using State Legislation as Evidence of an Evolving National Consensus*, 84 N.C. L. REV. 1089, 1090–91 (2006).

evidence for whatever the desired outcome of the Court majority happens to be.[31]

### *A. Legislative Enactments*

The Court has relied on legislative enactments in its evolving standards of decency analysis as the best indicator of the will of the people.[32] As the Court expressed in *Gregg v. Georgia*, "'[i]n a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people.'"[33] While the Justices have acknowledged the central importance of state legislation to an analysis of society's standards of decency, however, they have consistently disagreed on how to interpret legislation to determine national consensus.[34]

Writing for the plurality in *Stanford v. Kentucky*, Justice Scalia declared that a state's practice had to be significantly at odds with the rest of the country before the Court would find that there was a national consensus against it.[35] In an attempt to decipher society's view of the death penalty for sixteen and seventeen-year-olds, the plurality in *Stanford* compared the number of states that had an exemption for juveniles in their death penalty statutes to the number of death penalty states that did not exempt juveniles.[36] Because more states allowed the death penalty for juveniles than did not allow it, the Court concluded that national consensus affirmed the appropriateness of that punishment.[37] But the scales would have tipped in the other direction if the state count were construed as the dissent wanted—to include states that banned the death penalty completely.[38]

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[31] *See* Myers, *supra* note 20, at 984.

[32] *See id.* at 980 (stating that state laws are "[t]he first indicator relied upon by the Court," but are "*not* an unfettered reflection of society's views" (citing Norman J. Finkel, *Prestidigitation, Statistical Magic, and Supreme Court Numerology in Juvenile Death Penalty Cases*, 1 PSYCHOL. PUB. POL'Y & L. 612, 622–23 (1995))).

[33] 428 U.S. 153, 175–76 (1976) (plurality opinion) (quoting Furman v. Georgia, 408 U.S. 238, 383 (1972) (Burger, C.J., dissenting)).

[34] Jacobi, *supra* note 30, at 1096.

[35] *See* 492 U.S. 361, 370–71, 380 (plurality opinion) (holding that the Eighth Amendment did not prohibit the execution of sixteen and seventeen-year-olds), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

[36] *Id.* at 370–72 (citations omitted).

[37] *Id.* at 372. In support of its conclusion, the Court stated that "[o]f the 37 States whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual." *Id.* at 370–71.

[38] *See* Lain, *supra* note 18, at 30–31; *see also Stanford*, 492 U.S. at 384 (Brennan, J., dissenting). The dissent would have added the District of Columbia and the fourteen states that did not authorize capital punishment to the states that specifically exempted

The Court reversed course in *Roper v. Simmons*.[39] Although not much had changed in the sixteen years between the Supreme Court's decision in *Stanford* and its decision in *Roper*, the Court found a national consensus against the juvenile death penalty in *Roper* using the same methodology employed by the dissent in *Stanford*.[40] Adding the number of states that had eliminated the death penalty entirely (twelve) to those that had merely exempted juveniles (eighteen) resulted in a total of thirty states against the practice.[41] If the Court had not included in its calculation the twelve non-death penalty states, however, the ratio would be twenty to eighteen, making the states against the juvenile death penalty the minority.[42] Thus, if the Court had chosen to employ the same standards in *Roper* as it did in *Stanford*, there would still be no consensus against a juvenile death penalty; and by the Court's standards in *Roper*, "it could have invalidated the juvenile death penalty in 1989."[43]Hence, it appears that the result—a finding of a given penalty's constitutional validity under the Eighth Amendment—can depend on little more than which equation the Court chooses to employ to determine national consensus.[44]

In *Roper*, the Court tried to get around the inconsistency of its methodology by explaining that it was "'consistency of the direction of change'" that was important in determining national consensus, rather than a sheer number count of states for and against the challenged penalty.[45] In his dissent, Justice Scalia charged the Court with

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juveniles from the death penalty, tipping the count in their favor—twenty-seven opposed to the death penalty for sixteen-year-old offenders and thirty opposed to it for seventeen-year-old offenders, versus twenty-five and twenty-two in favor. *Stanford*, 492 U.S. at 384 (Brennan, J., dissenting).

39 543 U.S. 551 (2005).

40 *See* Lain, *supra* note 18, at 30 (citing *Roper*, 543 U.S. at 564).

41 *Roper*, 543 U.S. at 564 (citing Atkins v. Virginia, 536 U.S. 304, 313–15 (2002)).

42 *See* Myers, *supra* note 20, at 975. In his dissent, Justice Scalia argued that the non-death penalty states should be left out of the equation because they have no laws specifically addressing the juvenile death penalty, and thus the majority could only presume those states believed juveniles were less culpable than adults. *See Roper*, 543 U.S. at 610–11 (Scalia, J., dissenting). In *Stanford*, Scalia criticized the dissent by likening the practice of including non-death penalty states in the state count to "discerning a national consensus that wagering on cockfights is inhumane by counting within that consensus those States that bar all wagering." *Stanford*, 492 U.S. at 370 n.2.

43 Lain, *supra* note 18, at 31.

44 *See id.* (citing *Atkins*, 536 U.S. at 342–44 (Scalia, J., dissenting)).

45 *Roper*, 543 U.S. at 566 (quoting *Atkins*, 536 U.S. at 315). Five states had abandoned the juvenile death penalty since the Court's decision in *Stanford*. *Id.* at 565. The Court concluded: "The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry* [*v. Lynaugh*, 492 U.S. 302 (1989)]; yet we think the same consistency of direction of change has been demonstrated." *Id.* at 566.

substituting its own subjective judgment for national consensus and noted that in previous cases, overwhelming opposition to a challenged practice over a significant span of time was required to overrule a state practice.[46] The Court's new emphasis on "direction of change" led some scholars to draw the logical conclusion that "as long as some measurement of a change in the direction of state laws is consistent, the Court will view it as an indication of a national consensus, even if as few as two or three states are responsible for the change."[47]

The Court chose to ignore its recent "direction of change" line of reasoning in its most recent Eighth Amendment case, *Kennedy*. In that case, the Court glossed over the dissent's argument that the recent enactment of death penalty statutes for child rape in six states could signify a new trend.[48] Instead, it went back to the strict state count methodology of *Stanford*, focusing on the fact that out of the thirty-seven jurisdictions imposing capital punishment, only six States had authorized it for child rape.[49] This latest Eighth Amendment decision demonstrates that the Court has not set a consistent standard for how states should be counted to comprise a consensus for purposes of the evolving standards of decency analysis.[50] In the end, state legislation is not an objective or reliable indicator of national consensus because it may too easily be construed to match the desired outcome of both the Court majority and the dissent.

### *B. Jury Sentencing Data*

The other "objective index of contemporary values" used by the Court is jury sentencing data, but this also can be—and has been—interpreted to support either side of the argument in a given case, making the analysis just as subjective as when the Court examines legislative enactments.[51] In *Stanford*, the rarity of juvenile death sentences was used by the plurality to show that juries were properly considering mitigating circumstances and applying the death penalty only in the most severe cases,[52] while the dissent hailed it as evidence of

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[46] *Id.* at 609, 615 (Scalia, J., dissenting).

[47] Myers, *supra* note 20, at 979; *see also* Jacobi, *supra* note 30, at 1140 (stating that "[*Atkins* and *Roper*] suggest that the consistency of direction outweighs the importance of the number of states to have passed a provision").

[48] *Kennedy*, 128 S. Ct. at 2657, 2672–73 (Alito, J., dissenting).

[49] *See id.* at 2657.

[50] Jacobi, *supra* note 30, at 1155.

[51] *See* Palmer, *supra* note 16, at 873–74 (citing Valerie P. Hans, *How Juries Decide Death: The Contributions of the Capital Jury Project*, 70 IND. L.J. 1233, 1233 (1995) (noting the volatility of jury sentencing statistics)).

[52] *See* Stanford v. Kentucky, 492 U.S. 361, 374 (1989) (plurality opinion).

societal condemnation of the penalty.[53] Conversely, in *Coker v. Georgia*, the plurality cited the fact that only one in ten jurors sentenced convicted rapists to death as conclusive evidence of society's disapproval of the death penalty for rape.[54] Those who would hold that limited death penalty sentences by juries may be nothing more than a reflection of the facts of the crime were in the dissent.

Drawing conclusions about societal consensus based on jury sentencing data is dangerous because it is unclear how such data should be interpreted. Jury reluctance to impose the death penalty does not necessarily mean society disfavors that form of punishment. It is certainly reasonable to believe that, given the weight of responsibility for executing someone, jurors are likely to seriously consider mitigating circumstances and be hesitant to impose the death penalty except in the most severe cases.[55] Also, the results are skewed because it only takes a single juror to prevent a jury from returning a sentence of death.[56]

In his dissent in *Thompson v. Oklahoma*, Justice Scalia used an example to illustrate why jury sentencing data is a fallible basis for a finding of societal consensus.[57] He noted that while thirty women were executed between 1930 and 1955 in the United States, only three were executed between 1955 and 1986, and not one was executed between 1962 and 1984.[58] Under the plurality's reasoning which considers the rarity of jury death penalty sentences, it would be unconstitutional to impose capital punishment on a woman.[59] In addition, one scholar has noted that using evidence of rare jury sentencing to establish national consensus shows a fundamental misunderstanding of the function of deterrence:

> If the criminal justice system works on deterrence, it should be preventing people from committing the sort of crimes for which the death penalty is applicable. The rare use of the death penalty is not evidence that it is not effective; indeed the death penalty could conceivably *never* be exercised and nevertheless be effective, as long as it remained a credible threat.[60]

Furthermore, jury sentiment against imposing the death penalty for a given crime may not be representative of societal opinion as a whole.[61]

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53 *See id.* at 386–87 (Brennan, J., dissenting).

54 433 U.S. 584, 596–97 (1977) (plurality opinion).

55 Palmer, *supra* note 16, at 874.

56 Woodson v. North Carolina, 428 U.S. 280, 312 (1976) (Rehnquist, J., dissenting).

57 487 U.S. 815, 871 (1988) (Scalia, J., dissenting).

58 *Id.*

59 *Id.*

60 Jacobi, *supra* note 30, at 1144.

61 *Woodson*, 428 U.S. at 312 (Rehnquist, J., dissenting).

The majority of society has presumably already spoken through its legislatures, accepting the appropriateness of the punishment.[62]

The fundamental disagreement between the members of the Court over how to interpret jury sentencing data continued in *Kennedy*. The majority claimed that execution statistics "confirm our determination . . . that there is a social consensus against the death penalty for the crime of child rape."[63] "[N]o individual ha[d] been executed for the rape of an adult or child since 1964 . . . [or] for any other nonhomicide offense . . . since 1963."[64] The dissent countered that this fact provided no support for the Court's position because there were no executions *for any crime* between 1968 and 1977.[65] Additionally, there was the potentially chilling effect of *Coker* in 1977, making it doubtful that the Court would uphold a death sentence for a nonhomicide crime.[66] Furthermore, even if jury sentencing data could provide sound evidence of societal consensus, the pertinent "evidence" was not on the majority's side. After Louisiana made child rape a capital offense in 1995, juries returned death penalty verdicts for offenders of that law in two out of four cases.[67] As Justice Alito noted, "This 50% record is hardly evidence that juries share the Court's view that the death penalty for the rape of a young child is unacceptable under even the most aggravated circumstances."[68]

As *Kennedy* confirms, the proper interpretation of jury sentencing data is disputable, making it an unsuitable basis for Eighth Amendment jurisprudence. The numerous ways that jury sentencing data can be interpreted means that any attempt to discern national consensus from such "objective indicia" will necessarily require great judicial subjectivity.[69]

### *C. Other Indicia of National Consensus: Public Opinion Polls, Sociological Data, and International Opinion*

The Court has considered controversial indicia such as public opinion polls, scientific and sociological data, and international opinion

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62 *Id.*

63 *Kennedy*, 128 S. Ct. at 2657.

64 *Id.*

65 *Id.* at 2672 (Alito, J., dissenting) (citing DEATH PENALTY INFO. CTR., EXECUTIONS IN THE U.S. 1608–2002: THE ESPY FILE EXECUTIONS BY DATE 382 (M. Watt Espy & John Ortiz Smykla comp., n.d.), http://www.deathpenaltyinfo.org/ESPYyear.pdf; Bureau of Justice Statistics, U.S. Dep't of Justice, Key Facts at a Glance: Executions, http://www.ojp.gov/bjs/glance/tables/exetab.htm).

66 *Id.*

67 *Id.*

68 *Id.*

69 Jacobi, *supra* note 30, at 1147.

in its attempt to discern national consensus. The Court especially tends to emphasize these additional factors in its analysis when the "primary" indicators of national consensus provide only questionable support for the majority's position.[70]

Foreign laws and sociological data are improper bases for a determination of the nation's evolving standards of decency.[71] International opinion is irrelevant on its face to a determination of our nation's public sentiment, and public polls and statistics promulgated by third party organizations are subject to methodological and other errors which bring their validity into question.[72] Polls can be skewed based on a host of factors, such as the composition of the target population, the sampling design used, and the questions asked.[73] Thus, they can often produce inconsistent and hence unreliable results.[74] Courts are not in a good position to choose between conflicting scientific data, which is why these policy decisions are better left to legislatures.[75] The legislative arena is the proper forum for debating the merits of evidentiary data supporting and condemning a given policy. Legislators directly represent the communities they have been elected to serve, and thus can evaluate scientific data with an eye toward local circumstances and needs.

The broad spectrum of data to choose from on any given issue encourages the Court to overstate favorable findings and overlook unfavorable ones.[76] For example, in *Roper*, the majority cited studies which purported to show that juveniles lack the moral maturity to be fully culpable for premeditated murder, but failed to cite studies that

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[70] *E.g.*, Roper v. Simmons, 543 U.S. 551, 575–78 (2005) (relying heavily on international opinion to support its holding even though the state count was even more open to debate than in *Atkins* (citing Trop v. Dulles, 356 U.S. 86, 102–03 (1958) (plurality opinion))); Atkins v. Virginia, 536 U.S. 304, 322 (2002) (Rehnquist, J., dissenting) (lamenting the Court's use of foreign laws, professional and religious organizational views, and public opinion poll data to support its decision); Lain, *supra* note 18, at 33 ("*Roper* was unique in its heavy reliance on international opinion to support the ruling in the case." (citing *Roper*, 543 U.S. at 575–78)). In *Atkins*, the Court compensated for its inability to show that a clear majority of states favored exempting mentally retarded offenders from the death penalty by emphasizing factors not previously considered, such as foreign laws, the views of professional organizations, and opinion polls. *Atkins*, 536 U.S. at 316 n.21 (citations omitted).

[71] *See Atkins*, 536 U.S. at 322–28 (Rehnquist, J., dissenting).

[72] *Id.* at 325–26.

[73] *Id.* at 326.

[74] *See id.*

[75] *Roper*, 543 U.S. at 618 (Scalia, J., dissenting) (citing McCleskey v. Kemp, 481 U.S. 279, 319 (1987)).

[76] *See* Myers, *supra* note 20, at 988 (citations omitted) (discussing the Court's ability to choose scientific studies and briefs that may be biased towards a certain policy).

concluded that juveniles may be just as culpable as adults.[77] The majority even went so far as to cite one part of a study that supported its position that a juvenile can never be sufficiently culpable to merit the death penalty, and ignored the part that went against its conclusion.[78]

In *Kennedy*, the majority attempted to bolster its position by discussing sociological questions such as the "problems" that capital punishment for child rape presented.[79] These included the special risks of unreliable testimony by children and the fact that the crime often occurs within families.[80] According to Justice Kennedy, families might be inclined to "shield the perpetrator from discovery" when the penalty is death, resulting in more rapes going unreported.[81]

In his dissenting opinion, Justice Alito responded that these concerns and speculations were "policy arguments" that were "simply not pertinent to the question [of] whether the death penalty is 'cruel and unusual' punishment."[82] The Eighth Amendment, he argued, "does not authorize this Court to strike down federal or state criminal laws on the ground that they are not in the best interests of crime victims or the broader society."[83]

The dubious reliability of sociological data makes it shaky ground on which to rest a finding of society's standards of decency. Moreover, it improperly draws the Court into the legislative domain of public policymaking by requiring it to choose between conflicting scientific studies. Therefore, such considerations should have no part in the Court's Eighth Amendment analysis.

## III. EVEN IF THE SUPREME COURT *COULD* CORRECTLY INTERPRET NATIONAL CONSENSUS, THERE ARE STILL INHERENT PROBLEMS WITH THE EVOLVING STANDARDS OF DECENCY ANALYSIS

Even if the evolving standards of decency analysis could be objectively and consistently applied, it is inherently flawed and therefore

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[77] *See id.* at 987 (noting the Court's failure to include any studies showing juvenile culpability (citing *Roper*, 543 U.S. at 617 (Scalia, J., dissenting))).

[78] The study cited by the majority in *Roper* stated, "'[a]dolescents are overrepresented statistically in virtually every category of reckless behavior.'" *Roper*, 543 U.S. at 569 (quoting Jeffrey Arnett, *Reckless Behavior in Adolescents: A Developmental Perspective*, 12 DEV. REV. 339, 339 (1992)). The majority, however, only cited the first part of the finding—that adolescents are overrepresented in every category of reckless behavior—leaving out the rest which would not support its reasoning that all adolescents are too reckless to be held accountable for capital murder. Myers, *supra* note 20, at 988–89 (citing *Roper*, 543 U.S. at 569).

[79] *See Kennedy*, 128 S. Ct. at 2663.

[80] *Id.* at 2663–64 (citations omitted).

[81] *Id.* at 2664.

[82] *Id.* at 2673 (Alito, J., dissenting).

[83] *Id.*

would still be unworkable. The test's most glaring deficiency lies in the fact that it is self-defeating. Society is precluded from reconsidering its standards once the Court draws a bright line rule based on its interpretation of what those standards prescribe at that particular moment in time. In other words, if the evolving standards test is the product of the realization that societal norms are not static but subject to change, then using it to support broad, irreversible prohibitions undermines its essential purpose by freezing the status quo into constitutional law.

Justice O'Connor pointed out in her concurring opinion in *Thompson v. Oklahoma* that the history of public attitudes toward the death penalty has demonstrated the danger of "inferring a settled societal consensus."[84] Beginning around World War I and continuing into the 1950s and 1960s, many states abolished or limited their death penalty statutes, and executions steadily declined "in absolute terms and in relation to the number of homicides occurring in the country," actually ceasing altogether for several years beginning in 1968.[85] Justice O'Connor concluded:

> In 1972, when this Court heard arguments on the constitutionality of the death penalty, such statistics might have suggested that the practice had become a relic, implicitly rejected by a new societal consensus . . . . We now know that any inference of a societal consensus rejecting the death penalty would have been mistaken. But had this Court then declared the existence of such a consensus, and outlawed capital punishment, legislatures would very likely not have been able to revive it. The mistaken premise of the decision would have been frozen into constitutional law, making it difficult to refute and even more difficult to reject.[86]

Public support for the death penalty rebounded after the Court's decision in *Furman v. Georgia*, which had required the current death penalty statutes to be reformed.[87] While the death penalty was only supported by fifty percent of the public when *Furman* was decided in 1972, that figure climbed to sixty-six percent only four years later, the highest level of support for capital punishment in twenty-five years.[88] Thus, the Court would indeed have been mistaken in *Furman* to entrench the status quo by outlawing the death penalty.

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[84] 487 U.S. 815, 854 (1988) (O'Connor, J., concurring).

[85] *Id.* at 854–55 (citing WILLIAM J. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864–1982, at 26–28 (2d ed. 1984); HUGO ADAM BEDAU, THE DEATH PENALTY IN AMERICA 23, 25 (3d ed. 1982)).

[86] *Id.* at 855.

[87] *See* Lain, *supra* note 18, at 22.

[88] *Id.* (citing David W. Moore, *Americans Firmly Support Death Penalty*, GALLUP POLL MONTHLY, June 1995, at 23, 24–25).

The increasing breadth of the Court's Eighth Amendment decisions continues to expand the areas in which society's standards of decency may no longer evolve. In *Coker v. Georgia*, the Court made a categorical ruling that rape of an adult woman, "regardless of the degree of brutality of the rape or the effect upon the victim," can never be deserving of the death penalty.[89] In *Kennedy*, this ruling was expanded to encompass all nonhomicide crimes, except those against the state.[90]

In making broad and categorical determinations on the constitutionality of a given punishment, the Court is usurping the role of states and juries. Whether the death penalty is an appropriate punishment for the crime of rape, for instance, is an open-ended question.[91] The penalty may or may not be an effective deterrent: it may encourage rape victims to come forward knowing societal disapproval of the crime is strong, or it may discourage prosecution if the victim is trying to protect the rapist; it may cause citizens to feel more secure, or it may weigh on their consciences as an excessive punishment.[92] The Court can only guess as to the answer, while the legislatures can evaluate the value of capital punishment as a deterrent given their own local conditions and make informed policy decisions.[93] This is why such questions are best left in the province of legislatures. In support of this position, Justice Burger wrote:

> The Court has repeatedly pointed to the reserve strength of our federal system which allows state legislatures, within broad limits, to experiment with laws, both criminal and civil, in the effort to achieve socially desirable results.
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> . . . .
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> Statutory provisions in criminal justice applied in one part of the country can be carefully watched by other state legislatures, so that the experience of one State becomes available to all. Although human lives are in the balance, it must be remembered that failure to allow flexibility may also jeopardize human lives—those of the victims of undeterred criminal conduct.
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> . . . .
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> . . . It is difficult to believe that Georgia would long remain alone in punishing rape by death if the next decade demonstrated a drastic

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89 433 U.S. 584, 603 (1977) (Powell, J., dissenting in part). The plurality's actual holding stated, "death is indeed a disproportionate penalty for the crime of raping an adult woman." *Id.* at 597 (plurality opinion).

90 *Kennedy*, 128 S. Ct. at 2659.

91 *Coker*, 433 U.S. at 617 (Burger, C.J., dissenting).

92 *Id.*

93 *Id.* at 617 n.11 (citing Gregg v. Georgia, 428 U.S. 153, 186 (1976) (plurality opinion)).

> reduction in its incidence of rape, an increased cooperation by rape victims in the apprehension and prosecution of rapists, and a greater confidence in the rule of law on the part of the populace.[94]

Thus, it ultimately should not matter whether states that choose to make rape a capital offense in certain circumstances are a minority going against the national consensus or are the beginning of a trend.[95]

At the foundation of the Court's Eighth Amendment jurisprudence is the idea that "cruel and unusual punishment" should be defined to reflect society's evolving standards of decency. If the purpose of the evolving standards of decency analysis is to be achieved, the states must be allowed to experiment with their penal laws. To conclude otherwise is to concede "'that the evolutionary process has come suddenly to an end; that the ultimate wisdom as to the appropriateness of capital punishment under all circumstances, and for all future generations, has somehow been revealed.'"[96] For the Court to make rulings with such presumptuous implications demonstrates an "assumption of power," the arrogance of which "takes one's breath away."[97]

An inherent weakness in the evolving standards of decency analysis is that its focus on national consensus robs the states of their policymaking power to experiment and diversify.[98] As previously mentioned, this contradicts the spirit and purpose of the Eighth Amendment test. The Louisiana Supreme Court expounded on the necessity of allowing states to experiment with penal laws in *State v. Wilson*, pointing out that precluding a punishment simply because only a few states have as of yet implemented it would prevent any new laws from being passed.[99] Thus, state legislation that is the first of its kind should not be considered per se unconstitutional.[100] If the needs and standards of our society continually change, and that is the overriding consideration in applying the Eighth Amendment's Cruel and Unusual Punishment Clause, then it is absurd to prevent the legislatures from responding to shifts in societal values. As one scholar wrote, "To the extent that a given limitation rests on a national consensus established by state legislation, the prohibition should not logically be permanent because there is no evidence that the consensus on which it rests is

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94 *Id.* at 615–16, 618.

95 *See id.* at 616.

96 *Id.* at 619 n.15 (quoting Furman v. Georgia, 408 U.S. 238, 430–31 (1972) (Powell, J., dissenting)).

97 Atkins v. Virginia, 536 U.S. 304, 348 (2002) (Scalia, J., dissenting).

98 Jacobi, *supra* note 30, at 1091–92.

99 96-1392, 96-2076, p. 10 (La. 12/13/96); 685 So. 2d 1063, 1069.

100 *See* Palmer, *supra* note 16, at 870 (citing *Wilson*, 96-1392, 96-2076 at p. 10; 685 So. 2d. at 1069).

permanent."[101] States should be free to reverse or amend their policies without fear that the Court will take away their policymaking power.[102] As Justice Scalia commented in *Harmelin v. Michigan*, "The Eighth Amendment is not a ratchet, whereby a temporary consensus on leniency for a particular crime fixes a permanent constitutional maximum, disabling the States from giving effect to altered beliefs and responding to changed social conditions."[103]

Even where it is clear that the states with legislation prescribing a challenged penalty are a minority, the implications of that fact are ambiguous. The Court should not automatically assume that when only a few state legislatures support stricter punishments, those states have not yet been "enlightened."[104] As *Furman* demonstrated, it may well be the case that those states are simply the first to express the public's changing attitude.[105] As another example, the Court in *Coker* emphasized that only three states had reinstated their statutes allowing for execution in cases of rape after *Furman* had struck down all state death penalty statutes as arbitrary in 1972.[106] But the Court had only reinstituted the death penalty as a valid punishment the year before *Coker* was decided in *Gregg v. Georgia*.[107] Hence, the majority could just as easily have found it noteworthy that three states had already re-implemented their death penalty statutes.[108]

In *Kennedy*, Justice Alito argued that the tally of legislative enactments for and against making child rape a capital offense should not be considered in a vacuum.[109] Rather, influential factors such as the Court's prior decisions should be taken into account.[110] The majority emphasized the fact that only six states had laws allowing the death penalty for child rape as strong evidence of a national consensus against it.[111] Alito pointed out an alternative argument. He noted that the six states that had enacted such laws "might represent the beginning of a

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[101] Jacobi, *supra* note 30, at 1119; *see also* Roper v. Simmons, 543 U.S. 551, 616 (2005) (Scalia, J., dissenting) ("[If] the Eighth Amendment is an ever-changing reflection of 'the evolving standards of decency' of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people.").

[102] Jacobi, *supra* note 30, at 1108–09.

[103] 501 U.S. 957, 990 (1991) (plurality opinion).

[104] *See* Jacobi, *supra* note 30, at 1122.

[105] *See generally supra* notes 87–88 and accompanying text.

[106] Coker v. Georgia, 433 U.S. 584, 594 (1977) (plurality opinion).

[107] 428 U.S. 153, 186–87 (1976) (plurality opinion).

[108] Jacobi, *supra* note 30, at 1130.

[109] *See Kennedy*, 128 S. Ct. at 2665–69 (Alito, J., dissenting) (noting how case law interpretation has resulted in a "very high hurdle for state legislatures considering the passage of new [penal] laws").

[110] *See id.*

[111] *Id.* at 2657–58 (majority opinion).

new evolutionary line" that "would not be out of step with changes in our society's thinking since *Coker* was decided."[112] There were abundant indications that society had become more aware of and concerned about sex crimes against children, including the fact that five states had legislation pending that would authorize capital punishment for child rape.[113] The majority dismissed the contention that this was meaningful, stating that it is unsound to base a determination of contemporary norms on state legislation not yet enacted.[114] But, in taking this position, the Court ignored the fact that the state legislatures were "operat[ing] under the ominous shadow" of the Court's dicta in *Coker*.[115]

The argument that the recent legislative enactments making child rape a capital offense could signify a burgeoning trend is compelling given the Court's decision in *Roper v. Simmons*. The Court had found in *Roper* that a mere five states passing laws against the juvenile death penalty was enough to indicate a new consensus regarding society's standards of decency.[116] The trend in *Kennedy* is more persuasive than that in *Roper*.[117] In *Roper*, the Court noted that the five states that had permitted the death penalty for juveniles when it was ruled constitutional in *Stanford v. Kentucky*[118] had since discarded the death penalty in such cases.[119] By enacting penalties less severe than what was constitutionally allowed, those states had no reason to fear invalidation by the Court. In contrast, the Court in *Kennedy* noted that six states had enacted the death penalty for child rape since the Court in *Coker* held that the death penalty for rape of an adult was unconstitutional.[120] Thus, these states were boldly challenging the Court's previous decision by operating outside of the boundaries it had arguably set. States enacting laws in spite of the likelihood that they will be invalidated by the Court is stronger evidence of a new trend in social sentiment than when invalidation is not a risk. Hence, if the Court was willing to conclude that societal consensus had shifted in *Roper*, it should not have hesitated to reach the same conclusion in *Kennedy*.

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[112] *Id.* at 2669 (Alito, J., dissenting).

[113] *Id.* at 2669–71.

[114] *Id.* at 2656 (majority opinion).

[115] *Id.* at 2672 (Alito, J., dissenting).

[116] Roper v. Simmons, 543 U.S. 551, 565 (2005).

[117] Kenneth C. Haas, *The Emerging Death Penalty Jurisprudence of the Roberts Court*, 6 PIERCE L. REV. 387, 434 (2008) (citing State v. Kennedy, 05-1981, p. 43 (La. 5/22/07), 957 So. 2d 757, 788).

[118] 492 U.S. 361, 380 (1989).

[119] *Roper*, 543 U.S. at 565 (citing VICTOR L. STREIB, ISSUE NO. 76, THE JUVENILE DEATH PENALTY TODAY: DEATH SENTENCES AND EXECUTIONS FOR JUVENILE CRIMES, JANUARY 1, 1973–DECEMBER 31, 2004, at 5, 7 (2005)).

[120] *Kennedy*, 128 S. Ct. at 2657.

Legislatures are influenced by what they think the Court will do, making some states hesitant to pass laws they believe will be invalidated.[121] Hence, societal standards of decency are left to evolve in an artificial environment created by the Court, making untainted public sentiment impossible to measure. For example, Justice White's discussion in *Coker* that the current mixed judgment of state legislatures "weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult"[122] was not the only conclusion that could be drawn from the fact that many states chose not to reenact their death penalty statutes for rape after the temporary ban on the death penalty was lifted. Rather, it could just as well represent "hasty legislative compromise occasioned by time pressures following *Furman*, a desire to wait on the experience of those States [that] did enact such statutes, or simply an accurate forecast of [the Court's] holding."[123]

When a legislative enactment's constitutional validity is on the line, other states that may be contemplating similar statutes may wait to see if the Court will uphold the controversial law before enacting their own.[124] There is evidence that this is exactly what followed from the Court's ambiguous decision in *Coker*. In that case, it was unclear whether the Court's holding was limited to precluding the death penalty for rape of an adult woman, or whether it would extend to cover all nonhomicide crimes.[125] In *Kennedy*, Justice Alito contended that the Court's suggestion in *Coker* that laws allowing the death penalty for nonhomicide crimes would be struck down led many legislatures to decline to pass such statutes.[126] Thus, Justice Alito concluded, state legislatures "have not been free to express their own understanding of our society's standards of decency."[127]

The Supreme Court of Florida actually invalidated Florida's capital child rape statute as unconstitutional based on its interpretation of

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[121] Jacobi, *supra* note 30, at 1150.

[122] Coker v. Georgia, 433 U.S. 584, 596 (plurality opinion).

[123] *Id.* at 614 (Burger, C.J., dissenting).

[124] State v. Wilson, 96-1392, 96-2076, p. 10 (La. 12/13/96); 685 So. 2d 1063, 1069 (citing *Coker*, 433 U.S. at 616 (Burger, C.J., dissenting)).

[125] *Coker*, 433 U. S. at 598 (plurality opinion) ("[I]n terms of moral depravity and of the injury to the person and to the public, [rape] does not compare with murder, which does involve the unjustified taking of human life."); *see also* Matura, *supra* note 20, at 249 ("[*Coker*] set a precedent that the Court would closely examine, and possibly invalidate, any sentence of death for a crime not involving a homicide.").

[126] *Kennedy*, 128 S. Ct. at 2665–66 (Alito, J., dissenting). In support of the contention that legislatures were hesitant to pass statutes authorizing the death penalty for nonhomicide crimes following the *Coker* decision, see Joanna H. D'Avella, Note, *Death Row for Child Rape? Cruel and Unusual Punishment Under the* Roper-Atkins *"Evolving Standards of Decency" Framework*, 92 CORNELL L. REV. 129, 134–35 (2006).

[127] *Kennedy*, 128 S. Ct. at 2672 (Alito, J., dissenting).

*Coker* in *Buford v. State*.[128] While acknowledging that the *Coker* holding was facially limited to addressing the constitutionality of the death penalty for rape of an adult woman, the Florida court nevertheless found that "[t]he reasoning of the justices in *Coker v. Georgia* compels us to hold that a sentence of death is grossly disproportionate and excessive punishment for the crime of sexual assault and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."[129] Interpretations such as that of the Florida Supreme Court in *Buford* are indicative of the high hurdle state legislatures faced when considering the passage of laws permitting capital punishment for child rape.[130]

The majority in *Kennedy* claimed that there was a lack of reliable data showing that the Court's decision in *Coker* was deterring states from enacting death penalty statutes for child rape.[131] In so concluding, the majority brushed over the dissent's specific mention of excerpts from the legislative record in Texas, where opponents of a capital child rape law had tellingly argued that "'the law would . . . fail to pass the proportionality test established by the U. S. Supreme Court.'"[132] These legislators further stated: "'Texas should not enact a law of questionable constitutionality simply because it is politically popular, especially given clues by the U. S. Supreme Court that death penalty laws that would be rarely imposed or that are not supported by a broad national consensus would be ruled unconstitutional.'"[133] Thus, it is true that some state legislators bowed to the pressure of anticipated Court opinion, even though they believed their constituents supported laws permitting capital punishment for the rape of a child.[134]

The Court's evolving standards of decency test is self-defeating. The test cannot succeed in accurately measuring societal consensus because the power of the Court to cement the status quo prevents state legislatures from reflecting societal views that conflict with prior or anticipated Court decisions.[135] Thus, the named purpose of the evolving standards analysis is undercut.

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[128] 403 So. 2d 943, 951 (Fla. 1981).

[129] *Id.* at 950–51.

[130] *See Kennedy*, 128 S. Ct. at 2667 (Alito, J., dissenting).

[131] *Id.* at 2655 (majority opinion).

[132] *Id.* at 2668 (Alito, J., dissenting) (quoting TEX. H. RESEARCH ORG., BILL ANALYSIS: DEATH PENALTY, INCREASED PUNISHMENT FOR SEX CRIMES AGAINST CHILDREN, H.B. 8, 80th Sess., at 10 (Mar. 5, 2007)).

[133] *Id.* at 2668–69 (quoting TEX. H. RESEARCH ORG., *supra* note 132).

[134] *See Kennedy*, 128 S. Ct. at 2668 (Alito, J., dissenting).

[135] *See* Jacobi, *supra* note 30, at 1122. As Justice Alito explained:

> When state lawmakers believe that their decision will prevail on the question whether to permit the death penalty for a particular crime or class of offender, the legislators' resolution of the issue can be interpreted as an expression of their own judgment, informed by whatever weight they attach to

## IV. FURTHER MUDDYING THE WATERS OF EIGHTH AMENDMENT ANALYSIS: THE COURT'S INDEPENDENT PROPORTIONALITY REVIEW

An increasingly important component of the Supreme Court's Eighth Amendment analysis is the exercise of its own independent judgment. Aside from a determination of society's standards, the Court independently reviews the imposed sentence to determine whether it amounts to the unnecessary and wanton infliction of pain or is grossly disproportionate to the severity of the offense.[136] Although the Court's evolving standards of decency analysis and independent review are considered to be two distinct inquiries, the two often overlap. The difficulty of discerning national consensus under the evolving standards analysis raises the question of whether the Court's interpretation of society's values is truly accurate, or is simply an echo of the views held by the members of the Court.[137] It is noteworthy that the Court has never found that national consensus conflicted with its independent review.[138] One could argue that a lack of distinction between the two tests is irrelevant; the definition of cruel and unusual punishment should ultimately be left to the Court's subjective judgment. Yet even the Court itself does not take that position; rather, it recognizes the importance of objectivity to an Eighth Amendment analysis.

The suggestion that the Court's opinion alone should be the deciding factor for Eighth Amendment disputes has been met with resounding disapproval by the Court on numerous occasions. Justice Scalia, writing for the plurality in *Stanford v. Kentucky*, discounted the Court's exercise of independent judgment as having no bearing on the acceptability of a particular punishment under the Eighth Amendment,[139] and the Court in *Coker v. Georgia* stated that judgment should be informed by "objective factors to the maximum possible extent."[140] Thus, the Court

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> the values of their constituents. But when state legislators think that the enactment of a new death penalty law is likely to be futile, inaction cannot reasonably be interpreted as an expression of their understanding of prevailing societal values. In that atmosphere, legislative inaction is more likely to evidence acquiescence.

*Kennedy*, 128 S. Ct. at 2669 (Alito, J., dissenting).

[136] Coker v. Georgia, 433 U.S. 584, 592 (1977) (plurality opinion).

[137] *See* Myers, *supra* note 20, at 984 ("[T]he Court's independent judgment will also likely overwhelm any signs of a national consensus . . . . [I]t appears that in *Roper*, the majority selectively utilized the national consensus analysis only so long as it was useful to support its independent findings of proportionality.").

[138] *See* Stanford v. Kentucky, 492 U.S. 361, 379 (1989) (plurality opinion), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005).

[139] *See Stanford*, 492 U.S. at 379 (plurality opinion).

[140] *Coker*, 433 U.S. at 592 (plurality opinion); *see also Kennedy*, 128 S. Ct. at 2649 ("[T]he Eighth Amendment's protection against excessive or cruel and unusual punishments . . . is determined . . . by the norms that 'currently prevail.'" (quoting Atkins

has recognized, at least superficially, that the Eighth Amendment is not subject to the ad hoc views of the prevailing majority on the bench.

The Court, however, has been giving its independent judgment increasing weight in more recent Eighth Amendment decisions. In *Atkins v. Virginia*, the Court backed away from the strong stand taken against the exercise of its independent judgment in *Stanford*.[141] In *Roper v. Simmons*, the Court openly rejected the previous position in *Stanford* and affirmed the importance of its independent findings in Eighth Amendment cases.[142] The danger of the independent review approach lies in the result—societal standards are swallowed up by the Court's subjective judgment.[143] This is exactly what happened in *Coker*, where the Court held that the death penalty was unconstitutionally disproportionate to the crime of adult rape.[144] After discussing the weak evidence of national consensus in its favor, the Court hung its hat on its own moral judgment that rape was not worthy of capital punishment because it did not involve the taking of human life.[145]

The Court also placed substantial weight on its own value judgments in *Kennedy*. The Court affirmed its reasoning in *Coker* that the death penalty for a crime that did not result in the loss of human life was morally unjustifiable.[146] Thus, the Court concluded that capital punishment was prohibited for all nonhomicide crimes except, interestingly, those against the state.[147] The Court claimed that it overturned Louisiana's law based on national consensus as well as its own independent judgment.[148] But when it came to light that the Court had been mistaken about the federal government's position on the death penalty for child rape,[149] the Court declined to rehear the case.[150]

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v. Virginia, 536 U.S. 304, 311 (2002))). Perhaps the Court is reluctant to take off the evolving standards of decency mask that lends facial legitimacy and a false sense of objectivity to its independent judgments.

[141] *See Atkins*, 536 U.S. at 312–13 (citing *Coker*, 433 U.S. at 597 (plurality opinion)).

[142] *See* 543 U.S. 551, 563 (2005) (citing *Atkins*, 536 U.S. at 312). The Court in *Roper* stated that it rejected the view in *Stanford* that the Court's independent judgment is immaterial in determining the constitutional validity of a challenged punishment because such a stance is inconsistent with prior Eight Amendment case law. *Roper*, 543 U.S. at 574–75 (citing Thompson v. Oklahoma, 487 U.S. 815, 833–38 (1988) (plurality opinion); *Coker*, 433 U.S. at 597 (plurality opinion)).

[143] *See Roper*, 543 U.S. at 615–16 (Scalia, J., dissenting).

[144] *Coker*, 433 U.S. at 592 (plurality opinion).

[145] *Id.* at 598.

[146] *Kennedy*, 128 S. Ct. at 2659 (citing *Coker*, 433 U.S. at 598 (plurality opinion)).

[147] *Id.* Delving further into the inconsistency of this reasoning is beyond the scope of this Note.

[148] *Id.* at 2650–51.

[149] Neither the parties to the suit nor the Court had realized that Congress had authorized the death penalty for child rape under military law. *See* National Defense Authorization Act of 2006, Pub. L. No. 109-163, div. A, tit. V, sec. 552(b), 119 Stat. 3136,

Louisiana claimed that a rehearing was necessary because the Court's finding on national consensus had been invalidated by the recently changed military law.[151] In his statement respecting denial of rehearing, Justice Scalia contended that there was no reason to rehear the case based on evidence of a lack of national consensus because the majority opinion had been based solely on the independent judgment of the Court.[152] Scalia's conclusion is bolstered by the Court's silence in response to Louisiana's inquiry as to whether the Court's independent judgment alone was enough to support an Eighth Amendment holding.[153] Hence, it appears from the Court's most recent Eighth Amendment case that the importance of keeping its decisions consistent with *society's* evolving standards of decency may be diminishing.

The Court's independent proportionality review should not take center stage in the Eighth Amendment analysis. The Court has built up its Eighth Amendment jurisprudence around the idea that "cruel and unusual punishment" must be defined in accordance with society's evolving standards of decency. Therefore, it follows that the Justices' personal opinions should give way to society's expressed views.[154]

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3263 (codified as amended at 10 U.S.C. § 920 (2006)); *see also* Bidish Sarma, *Still in Search of a Unifying Principle: What* Kennedy v. Louisiana *and the Supreme Court's Denial of the State's Petition for Rehearing Signal for the Future*, 118 YALE L.J. POCKET PART 55, 55 (2008), http://thepocketpart.org/2008/10/14/sarma.html.

[150] *See Kennedy*, 128 S. Ct. 2641, *rehearing denied* 129 S. Ct. 1 (2008). The Court had stated in its majority opinion that "Congress in the Federal Death Penalty Act of 1994 expanded the number of federal crimes for which the death penalty is a permissible sentence . . . but it did not do the same for child rape or abuse." *Kennedy*, 128 S. Ct. at 2652. Three days after the *Kennedy* opinion was issued, the Court's error was made public by Colonel Dwight Sullivan in his commentary on the CAAFlog blog. Posting of Dwight Sullivan to CAAFlog, http://www.caaflog.com/2008/06/28/the-supremes-dis-the-military-justice-system/#comments (June 28, 2008).

[151] Petition for Rehearing at 4, *Kennedy*, 128 S. Ct. 2641 (No. 07-343).

[152] *Kennedy*, 128 S. Ct. 2641, *rehearing denied* 129 S. Ct. at 3 (statement of Scalia, J.) ("[T]here is no reason to believe that absence of a national consensus would provoke second thoughts."). Justice Scalia also said, "I am voting against the petition for rehearing because the views of the American people on the death penalty for child rape were, to tell the truth, irrelevant to the majority's decision in this case." *Id.*

[153] Sarma, *supra* note 149, at 58–59.

[154] *See* Stanford v. Kentucky, 492 U.S. 361, 379 (1989) (plurality opinion), *abrogated by* Roper v. Simmons, 543 U.S. 551 (2005). Justice Scalia described why it was unacceptable for the Eighth Amendment to be driven by the Justices' subjective views in *Roper*:

> If the Eighth Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of the evolving standards of decency of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people.

*Roper*, 543 U.S. at 616 (Scalia, J., dissenting) (internal quotation marks omitted).

Perhaps the Court's independent judgment should be relegated to a second tier inquiry as in *Stanford*, where the Court stated that the Justices' subjective opinions should only be sought when objective indicia *invalidates* a statutory punishment.[155] Thus, the Judges' independent analysis would be confined to function as an additional protection of state sovereignty by reaffirming the presumed validity of legislative enactments under the Eighth Amendment. The power of the Court's independent proportionality review must be minimized to prevent the Court from morphing into a "committee of philosopher kings."[156]

The evolving standards of decency analysis may be nothing more than a smokescreen for the Court's independent proportionality review. Even so, this does not mean that all attempts to discern societal standards should simply be abandoned. A new test is needed that will minimize judicial subjectivity and protect the ability of state legislatures to enact penal laws that reflect the moral values of the people.

## V. REVISING THE COURT'S EVOLVING STANDARDS OF DECENCY ANALYSIS

If the Court's current approach to determining what constitutes cruel and unusual punishment is inherently flawed and unworkable, then a different test is needed to guide Eighth Amendment jurisprudence. In *Weems v. United States*, the first case to suggest that the definition of cruel and unusual punishment must conform to society's values, Justice White wrote a dissenting opinion advocating a hands-off approach.[157] His approach would essentially limit the Court's task to determining only whether the punishment imposed would have been considered barbaric at the time the Eighth Amendment was ratified.[158] Justice White argued:

> It would be an interference with matters left by the Constitution to the legislative department of the government for us to undertake to weigh the propriety of this or that penalty fixed by the legislature for specific offenses. So long as they do not provide cruel and unusual punishments, such as disgraced the civilization of former ages, and made one shudder with horror to read of them, as drawing, quartering, burning, etc., the Constitution does not put any limit upon legislative discretion.[159]

While Justice White's approach would effectively rid the Court's analysis of all subjective elements, it is hardly an improvement on the current test because it fails to take into account changes in society's

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[155] *Stanford*, 492 U.S. at 379 (plurality opinion).

[156] *Id.*

[157] *See* 217 U.S. 349, 404 (1910) (White, J., dissenting) (citing Whitten v. Georgia, 47 Ga. 297 (1872)).

[158] *See id.* (citing *Whitten*, 47 Ga. 297).

[159] *Id.* (quoting *Whitten*, 47 Ga. 297).

standards of decency. Under such an approach, eighteenth century punishments such as execution for "cutting down a tree, stripping a child, robbery, and forgery"[160] would be constitutionally acceptable as long as they were not considered barbaric at the time the Eighth Amendment was ratified. Both the Court and most Americans today would undoubtedly find such a conclusion preposterous. The Court has rightly rejected a test that only looks backwards and does not take into account society's evolving views on humane punishments. Hence, Justice White's idea of cutting the Court completely out of the equation and leaving the legislatures with nearly unbridled discretion is not the answer. We must look elsewhere for a solution to the problems of the current Eight Amendment test.

A major problem with the Court's evolving standards test is its tendency to usurp the roles of legislatures and juries. One of the strengths of our federal system is that any state, acting under the authority granted by its citizens, can "serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country."[161] This freedom is substantially eviscerated by the Court's current ability to invalidate legislative enactments that do not conform to the status quo. Furthermore, there is no evidence to suggest that sentencing juries cannot accurately assess mitigating characteristics in a particular case; thus, there is no justification for the Court to prevent juries from "treat[ing] exceptional cases with exceptional punishment[s]."[162] Of course, this does not mean legislatures and juries should have unchecked power to do whatever they want; both must operate within the confines of the constitutional mandate against cruel and unusual punishment. But because the Court's function is neither to make policy decisions nor to remove all sentencing discretion from juries, legislatures and juries should have broad latitude to decide whether a given penalty fits the crime. The Court acknowledged this in *Gregg v. Georgia*, stating:

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[160] Matura, *supra* note 20, at 250 (citing William J. Brennan, Lecture, *Constitutional Adjudication and the Death Penalty: A View from the Court*, 100 HARV. L. REV. 313, 328 (1986)).

[161] New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (defending a state's right to confer a monopoly on existing businesses as properly a legislative determination); *see also* Harmelin v. Michigan, 501 U.S. 957, 990 (1991) (plurality opinion) ("Diversity not only in policy, but in the means of implementing policy, is the very *raison d'être* of our federal system.").

[162] Myers, *supra* note 20, at 972 (citing Roper v. Simmons, 543 U.S. 551, 619 (2005) (Scalia, J., dissenting)); *see also Roper*, 543 U.S. at 603–04 (O'Connor, J., dissenting) (arguing that the Court fails to support its claim "that sentencing juries cannot accurately evaluate a youthful offender's maturity or give appropriate weight to mitigating characteristics").

> [I]n assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.[163]

Hence, the proper Eighth Amendment test ought to be flexible, respecting the policymaking discretion of the people speaking through their representatives. This will allow society's laws to reflect society's evolving standards of decency.

The best test for purposes of accurately gauging current societal values combines the views expressed by Justice Brennan[164] in *Furman v. Georgia* with those of Justice O'Connor in *Roper v. Simmons* and Justice Burger in *Coker v. Georgia*. Stated concisely, the test the Court should apply has two parts. First, the Court must determine whether the legislature reasonably concluded that the crime could be committed with a level of culpability proportionate to the prescribed punishment. If so, the Court must then determine whether a reasonable jury could conclude that the criminal act in the instant case meets the required level of culpability. If both questions are answered in the affirmative, the punishment is constitutionally valid under the Eighth Amendment. If the first question but not the second is answered affirmatively, the criminal statute stands but the jury sentence is overruled. If the first question is answered negatively, the legislative enactment is void and the Court need not address the second question.

The proposed test will now be explained in greater detail, beginning with each Justice's contribution. Justice Brennan defined the proper Eighth Amendment test as being a cumulative one:

> If a punishment is *unusually severe*, if there is a *strong probability* that it is inflicted *arbitrarily*, . . . and if there is *no reason to believe* that it serves *any* penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates

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[163] 428 U.S. 153, 175 (1976) (plurality opinion).

[164] Justice Brennan was firmly against the death penalty, considering it unconstitutional under any circumstances and consistently taking the side of those in favor of more judicial oversight. *See* Dwight Aarons, *The Abolitionist's Dilemma: Establishing the Standards for the Evolving Standards of Decency*, 6 PIERCE L. REV. 441, 466–67 (2008). "Justice Brennan, who . . . never voted to affirm a capital sentence, was widely regarded for his behind-the-scenes efforts and willingness to form coalitions with other Justices to issue opinions generally in line with his own jurisprudential philosophy." *Id.* Thus, he would undoubtedly find it ironic that his test is being used in this Note in support of allowing state legislatures more discretion in enacting penal laws under the Eighth Amendment.

> the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.[165]

Justice O'Connor and Chief Justice Burger elaborated on the "unnecessary breadth" of the Court's Eighth Amendment rulings banning the death penalty for entire classes of people.[166] In her dissent in *Roper*, Justice O'Connor argued that the majority erred in striking down the death penalty for those under eighteen: "a legislature may reasonably conclude that at least *some* [seventeen]-year-olds can act with sufficient moral culpability, and can be sufficiently deterred by the threat of execution, [and thus] capital punishment may be warranted."[167] The same can be said of rapists or other perpetrators of nonhomicide crimes that involve atrocious behavior. Chief Justice Burger reached a similar conclusion in *Coker*, noting in his dissent that society could disapprove of the death penalty as a punishment for rape generally, yet approve of it for a repeat felon where no other punishment would be effective.[168] This was exactly the case presented in *Coker*; a recidivist rapist serving a life sentence escaped from prison, broke into the house of a young couple, and raped and kidnapped the wife.[169] Brandishing a knife, the felon told the woman's husband, whom he had bound and gagged, that if he was followed by the police he would kill the woman because "'*he didn't have nothing to lose—that he was in prison for the rest of his life, anyway.*'"[170] By declaring that the death penalty for rape was unconstitutional under all circumstances, the Court took away the only means of deterring Coker and other felons like him from committing further crimes upon escape or in prison, and also took away the possibility of retribution for subsequent crimes committed.[171]

The Court's holding in *Coker* cannot possibly be the result of a proper application of the Eighth Amendment. The Eighth Amendment was written and adopted to prevent the implementation of cruel and unusual punishments, not to obstruct justice. Chief Justice Burger argued that the Court should have narrowed the scope of its decision in *Roper* to address only whether the death penalty was appropriate given the specific facts of the crime.[172] Such a limitation would eliminate the

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[165] Furman v. Georgia, 408 U.S. 238, 282 (1972) (Brennan, J., concurring) (emphasis added).

[166] Coker v. Georgia, 433 U.S. 584, 606 (1977) (Burger, C.J., dissenting); *Roper*, 543 U.S. at 600 (O'Connor, J., dissenting).

[167] *Roper*, 543 U.S. at 600.

[168] *See Coker*, 433 U.S. at 606–07 (Burger, C.J., dissenting).

[169] *See id.* at 609 n.4.

[170] *Id.* (quoting Appendix at 121, *Coker*, 433 U.S. 584 (No. 75-5444)).

[171] *See id.* at 606–07.

[172] According to Chief Justice Burger, the Court should have narrowed the question in *Coker* to whether

problem of sweeping decisions that rob the people, acting through their representatives and juries, of their policymaking powers and sentencing discretion. Because every case presents a unique set of facts and circumstances, the Court should make a determination on the constitutional validity of a challenged penalty by evaluating the case on its own merits. This way the Eighth Amendment cannot be used to undermine justice.

The Eighth Amendment analysis used by the Louisiana Supreme Court in its 1996 decision *State v. Wilson* follows the precepts outlined above fairly closely. In holding that the death penalty for child rape was constitutional, the court deferred to the state legislature's conclusion that the death penalty for the crime of child rape served the penological goals of both retribution and deterrence, making the punishment appropriate for the crime.[173] According to the court, the death penalty is not an excessive punishment for the crime of child rape because of "the appalling nature of the crime, the severity of the harm inflicted upon the victim, and the harm imposed on society" as a result.[174] Thus, the punishment meets the first and third prongs of validity under Justice Brennan's Eighth Amendment test. Capital punishment is not an "unusually severe" punishment for child rape because it serves the penological goals of retribution and deterrence.[175] In addition, it is not inconceivable that the death penalty serves these goals "more effectively than some less severe punishment,"[176] making it an effective expression of society's moral outrage as mandated by *Gregg*.[177]

The Louisiana Supreme Court next assessed whether the death penalty statute for the aggravated rape of a child was applied arbitrarily or capriciously.[178] The court found that the legislature had met the standard of narrowly defining capital offenses.[179] Furthermore, the

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> the Eighth Amendment's ban against cruel and unusual punishment prohibit[s] the State of Georgia from executing a person who has, within the space of three years, raped three separate women, kill[ed] one and attempt[ed] to kill another, who is serving prison terms exceeding his probable lifetime[,] and who has not hesitated to escape confinement at the first available opportunity?

*Id.* at 607.

[173] *See* State v. Wilson, 96-1392, 96-2076, p. 18 (La. 12/13/96); 685 So. 2d 1063, 1073 (citing Gregg v. Georgia, 428 U.S. 153, 183 (1976) (plurality opinion)). The Supreme Court in *Gregg* stated that the death penalty serves the two social purposes of retribution and deterrence, and "is an expression of society's moral outrage at particularly offensive conduct." *Gregg*, 428 U.S. at 183 (plurality opinion).

[174] *Wilson*, 96-1392, 96-2076 at p. 13; 685 So. 2d at 1070.

[175] *See* Furman v. Georgia, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

[176] *Id.*

[177] *Gregg*, 428 U.S. at 183 (plurality opinion).

[178] *Wilson*, 96-1392, 96-2076 at p. 13; 685 So. 2d at 1070.

[179] *Id.* at p. 16; 685 So. 2d at 1072.

defendants[180] were given a bifurcated trial and jury uniform guidelines under the Louisiana Code of Criminal Procedure that prescribed consideration of aggravating and mitigating circumstances.[181] Hence, the second prong of Justice Brennan's test was also met because there was not a "strong probability" that the punishment was being "inflicted arbitrarily."[182] The aggravating and mitigating circumstances of the particular case were examined and determined to have been properly taken into account.[183]

*Wilson* is a good illustration of what should be the extent of the Supreme Court's Eighth Amendment review. The Court ought to first assess whether the legislature could have reasonably concluded that some criminals could act with sufficient moral culpability to merit the challenged penalty (Justice O'Connor's test). In making this assessment, the Court would determine if the challenged penalty is unusually severe so as to serve no legitimate penological goals; whether there is a strong probability that the punishment is inflicted arbitrarily; and whether there is no reason to believe it would be more effective in deterring or recompensing the targeted crime than a lesser penalty (Justice Brennan's test). If the challenged punishment fails the Court's first assessment, then it is unconstitutional under the Eight Amendment and the inquiry ends there. But if the Court concludes that the legislative enactment was reasonable, it must then shift its inquiry to the specific facts of the case. Under this second part of the test, the Court would ask whether the jury could have reasonably concluded that the sentenced punishment was justified under the particular facts and circumstances of the case (Chief Justice Burger's test). Thus, under the redefined evolving standards test the Court would first decide if the legislature could have reasonably envisioned a scenario where the crime would be proportionate to the punishment, and if so, whether the jury could have reasonably concluded that the particular case presented such a scenario. If the answer to both questions is yes, then the punishment is valid under the Eighth Amendment.

The new Eighth Amendment test proposed by this Note would rectify the problems that render the old test unworkable. As Justice Scalia recognized, "the risk of assessing evolving standards is that it is all too easy to believe that evolution has culminated in one's own

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[180] One of the defendants was an HIV-positive male accused of raping a five-year-old girl, a seven-year-old girl, and a nine-year-old girl, one of which was his own daughter. *Id.* at p. 2; 685 So. 2d at 1065. The other defendant allegedly raped a five-year-old girl. *Id.* at p. 1; 685 So. 2d at 1064.

[181] *Id.* at pp. 13–14; 685 So. 2d at 1071.

[182] Furman v. Georgia, 408 U.S. 238, 282 (1972) (Brennan, J., concurring).

[183] *See Wilson*, 96-1392, 96-2076 at pp. 14–17; 685 So. 2d at 1071–72.

views."[184] The new test would remove the temptation for judicial subjectivity by eliminating the need to predict national consensus. Under the current test, the Court attempts to accomplish the impossible task of determining national consensus, allowing it to have its way with the flexible results of social science methodology. Instead of focusing on the arbitrary question of which states are for and against a challenged punishment, the Court should ask whether the legislature that enacted the punishment could have reasonably concluded that it was justifiable. If the legislature had "no reason to believe that it serves any penal purpose more effectively than some less severe punishment,"[185] then it is an excessive penalty. Evaluating the punishment in light of the facts and circumstances surrounding its enactment, thereby doing away with the need to divine national consensus, frees legislatures to experiment with social policies their constituents find appropriate and desirable. The Court would no longer have the power to make broad rulings that entrench the status quo or interfere in any other way with the evolution of society's standards of decency.

The Court has been steadfast in its commitment to the idea that "'capital punishment must be limited to those offenders who commit a narrow category of the most serious crimes and whose extreme culpability makes them the most deserving of execution,'" a commitment it reaffirmed in *Kennedy*.[186] The approach proposed by this Note would not undermine that principle. On the contrary, it offers the defendant even more protection. Even if it is determined that the legislature acted reasonably in enacting the challenged penalty, the Court will still examine the jury's sentencing decision to ensure that the crime could reasonably be found deserving of the punishment given the particular facts of the case. Thus, the purpose of the Court's inquiry would still be to ensure that the punishment meets the standard of being proportionate to the crime. It simply shifts a greater share of the burden of defining "cruel and unusual punishment"—which necessarily involves a moral judgment[187]—to the people's representatives rather than to the "majority of the small and unrepresentative segment of our society that sits on [the Supreme] Court."[188]

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[184] Thompson v. Oklahoma, 487 U.S. 815, 865 (1988) (Scalia, J., dissenting).

[185] *Furman*, 408 U.S. at 282 (Brennan, J., concurring).

[186] *Kennedy*, 128 S. Ct. at 2650 (quoting Roper v. Simmons, 543 U.S. 551, 568 (2005)) (internal quotation marks omitted).

[187] *Id.* at 2649 (citing *Furman*, 408 U.S. at 382 (Burger, C.J., dissenting)).

[188] *Thompson*, 487 U.S. at 873 (Scalia, J., dissenting).

## CONCLUSION

The Supreme Court's decision in *Kennedy* merely reaffirms what the Court's prior Eighth Amendment case law has already shown—that the evolving standards of decency analysis fails in its essential purpose. It does not promote society's sentiment on the appropriateness of a given punishment because it cannot accurately and objectively gauge that sentiment. As illustrated in *Kennedy*, state legislatures often refrain from enacting laws they believe the Court will invalidate. Hence, the Court's attempt to decipher society's true values based on an assessment of state legislation turns into mere speculation. Additionally, there is no hard and fast rule for how the "objective indicia" of national consensus—legislative enactments and jury sentencing data—are to be interpreted. Interpretation of these factors easily turns into a purely subjective judgment call by the Court majority, which can cherry-pick from other favorable "indicators" such as international law or public opinion polls to bolster its decisions. Moreover, even if the Court could properly assess society's current sentiment on the justness of a given penalty, freezing the status quo into constitutional law prevents society from reevaluating its standards or reacting to changed conditions with new penal laws.

The facts and circumstances surrounding the *Kennedy* decision suggest that society's concern for protecting the dignity and welfare of its most innocent and vulnerable citizens may have grown, culminating in the demand that child rapists face the possibility of a harsher penalty. The Court apparently cannot conceive of societal standards evolving toward the imposition of harsher punishments rather than away from them. Perhaps the Court is forgetting that harsher penalties, if they serve their proper purpose as effective deterrents, reflect a desire on the part of society to promote the value of human life rather than show a callous indifference to it. Assessing the justice and effectiveness of a given punishment necessarily involves policy determinations that those closest to the situation—the people's representatives—are best equipped to make. The Court must ultimately have the final say on what constitutes cruel and unusual punishment under the Eighth Amendment, but it can do so without making broad, categorical rules that usurp the discretion of state legislatures and juries. As Judge Warriner from the U.S. District Court of the Eastern District of Virginia aptly remarked:

> I have never understood why the phrase "evolving standards of decency" has been an appropriate concept within the framework of our law and society. If our government were an authoritarian one, or if it were a monarchy, evolving concepts could only be recognized either by judicial declaration or by edict. Within a republic, however, evolving notions are to be manifest in the law as the people through their elected representatives decide. For a judge to deem himself able to

> determine for the people what their concepts of decency are is reminiscent of, if not the functional equivalent of, a monarchy.[189]

The Court must significantly revise its Eighth Amendment evolving standards of decency analysis if it is to truly be a measure of *society's* evolving standards of decency, which is its stated purpose. By eliminating the need to make a subjective pronouncement of national consensus and focusing instead on the specific legislative enactment and jury sentence challenged, the Court will no longer be at liberty to replace society's sense of justice and fairness with its own.

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[189] Riddick v. Bass, 586 F. Supp. 881, 882 n.1 (E.D. Va. 1984).