GROVE CITY COLLEGE

JOURNAL OF LAW & PUBLIC POLICY

ARTICLES

Nature and Nurture: Limiting the Rights of Parents in Genetic Enhancement . . . . . *Steven L. Jones*

Breaking the Chains: The Inability of the International Criminal Court to Combat the Persistent Problem of Slavery and the International Justice Mission's Model for Enforcement . . . . . *Emma J. Finney*

Two Sides of the Same Coin: The Implications of *Hodel v. Irving* on Pennsylvania's Inheritance Tax . . . . . *Timothy J. Witt*

Volume 3 Number 1 Spring 2012

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The *Grove City College Journal of Law & Public Policy* invites submissions of unsolicited manuscripts, which should conform to *The Bluebook: A Uniform System of Citation* (18th ed. 2005). Manuscripts should be submitted electronically in Microsoft Word™ format to LawJournal@gcc.edu.

The editors strongly prefer articles under 15,000 words in length, the equivalent of 50 *Journal* pages, including text and footnotes. The *Journal* will not publish articles exceeding 20,000 words, the equivalent of 60 *Journal* pages, except in extraordinary circumstances.

To facilitate our anonymous review process, please confine your name, affiliation, biographical information, and acknowledgements to a separate cover page. Please include the manuscript's title on the first text page.

Please use footnotes rather than endnotes. All citations and formatting should conform to the 18th edition of *The Bluebook*.

Selection takes place on a per-volume basis; thus, a piece is selected for a particular volume, but not necessarily a particular edition. Submissions are reviewed on a rolling basis, beginning in February and concluding when the volume is filled, typically around mid-October.

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*The views expressed within these articles are those of the authors and do not necessarily reflect the policies or opinions of the *Journal*, its editors and staff, or Grove City College and its administration.

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GROVE CITY COLLEGE

Grove City College was founded in 1876 in Grove City, Pennsylvania. The College is dedicated to providing high quality liberal arts and professional education in a Christian environment at an affordable cost. Nationally accredited and globally acclaimed, Grove City College educates students through the advancement of free enterprise, civil and religious liberty, representative government, arts and letters, and science and technology. True to its founding, the College strives to develop young leaders in areas of intellect, morality, spirituality, and society through intellectual inquiry, extensive study of the humanities, and the ethical absolutes of the Ten Commandments and Christ's moral teachings. The College advocates independence in higher education and actively demonstrates that conviction by exemplifying the American ideals of individual liberty and responsibility.

Since its conception, Grove City College has consistently been ranked among the best colleges and universities in the nation. Recent accolades include: The Princeton Review's "America's Best Value Colleges," Young America's Foundation "Top Conservative College," and U.S. News & World Report's "America's Best Colleges."

GROVE CITY COLLEGE JOURNAL OF LAW & PUBLIC POLICY

The *Grove City College Journal of Law & Public Policy* was organized in the fall of 2009 and is devoted to the academic discussion of law and public policy and the pursuit of scholarly research. Organized by co-founders James Van Eerden '12, Kevin Hoffman '11, and Steven Irwin '12, the *Journal* was originally sponsored by the Grove City College Law Society. The unique, close-knit nature of the College's community allows the *Journal* to feature the work of undergraduates, faculty, and alumni, together in one publication.

Nearly entirely student-managed, the *Journal* serves as an educational tool for undergraduate students to gain invaluable experience that will be helpful in graduate school and their future careers. The participation of alumni and faculty editors and the inclusion of alumni and faculty submissions add credence to the publication and allow for natural mentoring to take place. The *Journal* continues to impact educational communities around the country and can now be found in the law libraries of Akron University, Regent University, Duquesne University, the University of Pittsburgh, and Pennsylvania State University. The *Journal* has been featured by the Heritage Foundation and continues to be supported by a myriad of law schools, law firms, and think tanks around the nation.

EDITOR'S PREFACE

"Either write something worth reading or do something worth writing."

—Benjamin Franklin

Dear Reader,

A terrible complacency has settled over much of the collegiate world. Tell me if this sounds familiar: "college kids," desperate to succeed but unwilling to give up their weekends, grasp at high grade point averages and memberships in impressive-sounding organizations just to slap onto their resumes. Academic institutions, desperate to broadcast a well-rounded campus but unwilling to risk pushing students too hard, relax their grading standards so that students can "sign up" for every aspect of campus life. If only diplomas revealed the hours a student spent immersed in her topic of study, discussing controversies with peers and challenging her own perspectives. I wish a résumé included a section for everything a student sacrificed when he led his organization, his struggles through controversy to uncover truth, or all the ways he influenced the conversation around him. What if employers and graduate schools demanded more of applicants than empty achievements and academic adequacy? Would anyone care about being more than minimally qualified?

I cannot speak for every undergraduate student, but I can speak for my peers at Grove City College represented by the staff of the *Grove City College Journal of Law & Public Policy*: they care. They care enough to spend their weekends vetting another's research, and they care enough to try to change someone's mind about an issue in the world. Each student who has ever worked for or submitted his work to the *Journal* has made the conscious decision to step beyond the minimum requirement and *do* something else, something valuable, something that doesn't earn extra credit but actually earns an education.

These students have invested so much of themselves in this publication that they inspired their professors, who care beyond statistics, to work above and beyond to contribute to their cause. They are joined by Grove City College alumni who, after achieving that place in graduate school or reaching that next step in their career, remain committed to fighting intellectual inertia. They challenge themselves to contribute articles that spark new interests and probe our presuppositions.

The resulting publication first began as an impossible project dreamt up by "college kids" who cared more about excellence than sufficiency. I am proud, as its newest Editor-in-Chief, to say that this edition's student staff is equally dedicated to moving beyond minimum requirements to create something worth reading.

Remember these students, for they will be the graduates who do something worth writing. Please enjoy their work in this spring's edition of the *Grove City College Journal of Law and Public Policy*.

Julia L. Haines '14
Editor-in-Chief

*The *Journal* would not be possible without our staff and the help of several individuals. President Jewell, as always, remains a source of support and a fount of encouragement. Our faculty advisor, Dr. Sparks, has remained a steadfast support and is an invaluable source of wisdom and guidance. I am always overwhelmed by the generosity of alumni and friends of the College whose financial contributions encourage our staff and support the publication's continuity. Mr. Jeff Prokovich in Advancement and Mr. Larry Hardesty of Student Life & Learning remain foundational supports. The faculty and alumni who serve on our Editorial Board are such a blessing to this publication, and the success of the *Journal* is a direct reflection of their contributions. The students on the Executive Board deserve so much praise for their work this semester, and I cannot imagine working with more dedicated or supportive friends. Jared Smith and Dorothy Williams, you are the pillars of this publication; I am thankful I had the opportunity to learn from and work with you before you leave undergraduate life behind. Noelle Huffman, I cannot overstate the value of your dependability and your friendship. I also thank Steve Irwin, the previous Editor-in-Chief: you have been an invaluable source of guidance, and your constant support and encouragement throughout my time with the *Journal* have granted me the strength to pursue the project's original vision. Kevin Hoffman, thank you for always stepping up times of need even after your official responsibilities to the *Journal* have passed. Finally, I am indebted to the entire current student staff, whose tireless efforts never cease to amaze me, and those students no longer on the membership roll who have, far from forgetting their first law journal, reached back to assist and encourage. Personally, I am thankful that I have had the chance to contribute to such a valuable project during my time at Grove City College, which wouldn't have been possible if my parents hadn't encouraged their nervous freshmen daughter to sign up as a copy-editor when the rest of her friends signed up for the swing dance club. Above all, I thank God for his continual blessings.

FOREWORD

Dear Reader,

I am extremely honored to introduce you to the First Edition of Volume Three of the *Grove City College Journal of Law & Public Policy*. Not even a year ago, I worked alongside student members of the *Journal* staff with faculty and alumni editors. I know firsthand the countless hours and revisions they have poured over these pieces to bring you a remarkable association of ideas—and perhaps the best edition of the *Journal* yet.

In this edition, you will find unique pairings of articles and notes on the most controversial and engaging topics from faculty, alumni, and students of the College: genetic enhancement and tissue patents, inheritance and sumptuary taxation, international human trafficking laws, and First Amendment religious freedom.

Dr. Steven Jones analyzes the technological developments taking place in the area of biogenetic engineering, such as gene screening and commercialized genetic counseling for parents. In discussing the relevant case law, the author addresses the consequences these changes will have on parental rights and privileges. In a case note, Abigail Lepsch '12 addresses genetic material patenting, comparing *Greenberg v. Miami Children's Hospital Research Institute* with the landmark *Moore v. Regents of the University of California*, on the issue of "unjust enrichment".

Alumna Emma Finney '08 critiques the interpretation of "enslavement" in Article 7 of the Rome Statute by the International Criminal Court for the purpose of combating human trafficking on a global scale. Finney argues that a more effective approach would be to combat trafficking at a more localized level. Connor Baer '13 also weighs in on international human trafficking laws, reviewing critiques of the UN Human Trafficking Protocol. The author asserts that the Protocol fulfills the limited purpose for which it was created and has successfully stimulated international solidarity around the issue of human trafficking.

Alumnus Timothy Witt '07 examines the implications of *Hodel v. Irving* on the Pennsylvania inheritance tax. The author suggests that despite undermining over a century of case law, this landmark decision has opened the door for opponents of the inheritance and estate taxes to challenge the power of the state to levy them. Caleb Fuller '13 joins Witt in the broader discussion of taxation, examining the harmful effects of sin tax policy. Fuller suggests that, in effect, these sumptuary taxes distort the economy and ultimately fail to achieve their purpose.

In a case note, James VanEerden '12 discusses the very recent and controversial, 9-0 Supreme Court decision, *Hosanna-Tabor v. EEOC*, which upheld the ministerial exception in employment discrimination. The author disagrees with the ruling and argues that it has created more questions than it answers, ensuring that the First Amendment debate on religious freedom will continue.

I hope you find this impressive composition of articles and notes engaging and informative.

Sincerely,

Lisa Herman
The Ohio State University Moritz College of Law
J.D. Candidate 2014

NATURE AND NURTURE:
LIMITING THE RIGHTS OF PARENTS IN GENETIC ENHANCEMENT

*Steven L. Jones**

ABSTRACT: *This article examines the rights of parents over the bodily integrity of their children. It begins with a short analysis of some of the new scientific and medical possibilities with regard to genetic manipulation and other enhancement practices. Commercialization, the main vehicle through which much of the public will encounter these new possibilities, is also explored. Finally, the authority of parents in this area is examined, including Supreme Court law as well as recent efforts in legal and political theory to envisage the parent-child relationship as one based on fiduciary models as opposed to hierarchical models.*

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* Dr. Steven Jones is Associate Professor of Sociology at Grove City College, where he has taught since 2004. His main scholarly interests include the relationship between technology and society, and the intersection of parental rights, religious freedom, and the needs and interests of the state. He is the author or editor of four books, and several essays. He also coaches the college's debate team.

In the fall of 2011, the national news media picked up on a story coming out of California that captures some of the new ground being broken in an old debate. Pauline Moreno and Debra Lobel are a lesbian couple raising an eleven-year-old boy named Tommy. Since the age of three, Tommy has indicated to his parents that he wants to be a girl. Moreno and Lobel originally believed this was just a case of mild confusion, but Tommy was so insistent that when he came of age, they began giving him hormone blockers to delay the onset of puberty to allow him time to explore his gender identity and make a choice as to how he would live. Tommy, called Tammy, will remain in a prepubescent state until the age of fourteen or fifteen when Moreno and Lobel think he is more prepared to make the decisions ahead in terms of gender identity. Hormone therapy is a recognized part of gender transition protocols, but given the patient's age, this case attracted significant attention and criticism even among proponents of gender reassignment.

The factors of this particular case can seem overwhelming. Pundits commented on everything from the general public's confusion over gender reassignment to the appropriateness of gay marriage and parenting. There are also medical uncertainties here about the side-effects and long-term risks that may be associated with hormone blockers being given to an adolescent. These are surely pressing issues, but of particular interest here is the question of authority. Who has the right to make these decisions for a minor patient? The judgment of parents is clearly an important aspect of the story, but what is their relationship to the medical

professionals that actually carry out the necessary procedures? What about the child; how much emphasis should be given to his concerns? Even the number of participants in the conversation is a matter of dispute: ethicists, doctors, patients, mental health professionals, interest groups, legislators, and the parents themselves, all have not only an interest but in some cases a responsibility to be part of this and similar discussions.

I. New Possibilities

Even when the case is not quite so inflammatory, the issues here are layered and controversial. While each generation faces new medical possibilities, the twenty-first century is likely to see an increase in both the number and the sheer scope of what is possible. Revolutions in biotechnology and gene therapy point promisingly towards new breakthroughs, not just in the therapeutic treatment of disease and injury but in enhancing our cognitive and physical abilities beyond what we now perceive as "normal limits." Indeed, they may cause us to altogether redefine "normal."[1]

Consider the case of human growth hormone (HGH). The pituitary gland at the base of the brain controls the natural production and secretion of growth hormone. Individuals with pituitary deficiencies may be at increased risk for certain kinds of dwarfism

1 Maxwell Mehlman, Wondergenes: Genetic Enhancement and the Future of Society (2003) (Mehlman identifies a number of "revolutions" in various fields that together open new horizons for medical treatments. These include breakthroughs in gleaning genetic information from DNA samples to new therapeutic possibilities through drug production based on recombinant DNA. Mehlman also discusses behavioral genetics, that is, the possibility of changing people's behavior by altering their genetic makeup.).

or other stature-related conditions. Other conditions associated with HGH deficiency include certain congenital malformations or delayed sexual maturity. In the late 1960s, Berkeley biochemist Choh Li unlocked the amino acids that make up growth hormone and successfully synthesized it in 1970. Synthesized human growth hormone, or somatropin, can be injected into individuals with naturally occurring growth hormone deficiencies to treat a variety of conditions, a therapeutic practice approved for children by the U.S. Food and Drug Administration in 1985.[2] It is not just children with documented conditions that can benefit from a growth hormone regimen. Children with no diagnosable condition can also use HGH to increase their height, but even kids whose stature may fall perfectly within the normal range can use HGH to gain those desired inches. The same is true for young athletes who may already be taller than many of their peers. With the easy availability of HGH online, parents who want their children to have whatever advantage they can for whatever reason they deem appropriate have access to the potential benefits of HGH.[3]

Though various guidelines exist to protect against the misuse

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2 HGH is also used to treat adults for various conditions including Short Bowel Syndrome and AIDS Wasting. It is also used by athletes and bodybuilders to increase muscle mass and performance, though that practice is not sanctioned by the FDA. As such, numerous websites offer to sell HGH without a prescription. In 2007 actor Sylvester Stallone was arrested in Australia for smuggling in nearly 50 vials of HGH, which he subsequently and defiantly admitted using to prepare for one of his recent action films. These uses of HGH are not under direct consideration here.

3 There are guidelines in place for who can be prescribed HGH for stature-related issues. Children with diagnosed conditions such as Turner syndrome or Prader-Willi syndrome are approved candidates, as are children who are more than two standard-deviations below the average for their age and sex.

of somotropin and similar treatments, studies suggest that as much as 30% of growth hormone prescriptions in the United States are for uses not approved by the FDA. HGH is popular among body-builders and athletes for its ability to increase muscle mass, and its reputation as an anti-aging wonder is well documented. Online testimonials credit it with everything from tightening the skin to promoting better sleep, from increasing mental clarity to improving vision. There are even pyramid schemes in which one enrolls as a promoter of HGH and receives commissions from the producer for any recommendation that results in a purchase. Anecdotal evidence aside, there are documented benefits to an HGH regimen, but studies also show that the benefits may be only temporary. Additionally, there are known adverse effects associated with HGH, including increased risks of carpel tunnel syndrome, diabetes, and even cancer for some long-term users.[4]

Adults seeking to combat the effects of aging are perhaps the main target audience of those that promote off-label use of HGH, but they are not the only potential source of revenue. In 2007 the Public Broadcasting System's Religion and Ethics Newsweekly reported the case of Mitchell Greenwood, a then twelve-year-old boy who took daily injections of HGH to add a couple of inches to his projected height. Mitchell's parents are both shorter than average (neither was over five foot four inches tall), and Mitch-

4 Thomas Perls, Neal Reisman & S. Jay Olshansky, *Provision or Distribution of Growth Hormone for Anti-Aging: Clinical and Legal Issues*, 294 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 2086 (2005). *See also* S.J. Olshansky & T. Perls, *New Developments in the Illegal Provision of Growth Hormone for "Anti-Aging" and Bodybuilding*, 299 JOURNAL OF THE AMERICAN MEDICAL ASSOCIATION 2792 (2008).

ell's doctor had suggested that without treatment, Mitchell may not have exceeded five feet one inch. Mitchell's HGH regimen may add one or two inches to his height, but is unlikely to do more than that. It will certainly not make him above average height, and thus, given the expense and at least some measure of increased risk, the Greenwoods' decision may be difficult for some to understand. In explaining their course of action, Mitchell's mom opined that most parents will always do what they can to give their children every chance for success and happiness.[5]

This tendency of parents to seek a benefit for their child is at the heart of Harvard political theorist Michael Sandel's concerns about an enhancement arms race as parents give in to the temptation to go off label in an effort to give their children a competitive advantage. If and when medical science permits anxious parents to increase their children's height, muscle mass, or intellectual aptitude through genetic manipulation, what is to prevent them from

5 Unfortunately, the Greenwoods' concerns are not without foundation. In a consumer-oriented, image-conscious society like ours the psychological and social wellbeing of children, to say nothing of their opportunities for material success, are surely impacted by characteristics such as height. Studies show benefits associated with increased height range from subjective measures such as increased enjoyment of life and happiness, and also related to objective measures such as higher incomes. There are numerous variables at play in the relationship between height and economic success, but one should not too quickly dismiss increased self-esteem and less risk of discrimination faced by taller individuals. These are exactly the sort of factors that families such as the Greenwoods take into account in making their decisions. *See* Anne Case & Christina Paxson, *Height, Health, and Cognitive Function at Older Ages*, 98:2 AMERICAN ECONOMIC REVIEW PAPERS AND PROCEEDINGS 463 (2008). *See also* Angus Deaton & Raksha Arora, *Life at the Top: The Benefits of Height* (National Bureau of Economic Research, Working Paper Series No. 15090, 2009).

making sure their children have just a bit more of the desirable characteristics than their neighbors' children? But if the neighbors' children are themselves enhanced, then we set in motion a potentially never-ending race to the top of the genetic pyramid. While many Americans would favor the use of something like HGH to help individuals on a therapeutic level, when these treatments are used to enhance otherwise "normal" individuals, the consensus breaks down. Discussing a number of concerns for this and other forms of genetic enhancement, Sandel warns that the quest for mastery over the genetic lottery that up to now has been an unavoidable aspect of parenthood may place nearly impossible burdens on parents. Additionally, while all parents hope the best for their children before and after they are born, there is, in having children, an openness to the vagaries of chance. Indeed, the norm of unconditional parental love is in part a response to the fact that our children may not always be what we want them to be. The expectations surrounding genetic enhancement may undermine that norm if the child is not all the geneticist promised, leaving parents to grapple with a new level of frustration and disappointment.[6] Some children may have to live with the realization that their parents are disappointed in them at the most fundamental level, that of their genes. Or consider the plight of the adolescent whose parents gave her every athletically-oriented enhancement available but simply does not enjoy competitive sports. While these dynamics are part of family life in the status quo, genetic

6 MICHAEL SANDEL, THE CASE AGAINST PERFECTION: ETHICS IN THE AGE OF GENETIC ENGINEERING (2007).

enhancement may lead them into uncharted territory in the relationship between parents and their children.

There is another dimension to the kind of treatments Sandel has in mind as well. In January of 2009, doctors in London delivered the first "cancer-free" baby known to be born in Britain. Nine months earlier an embryo had been screened for the BRCA-1 gene, known to be linked to breast and ovarian cancer. The Medical Director of the Assisted Conception Unit, Dr. Paul Serhal, perhaps inadvertently gave rise to a set of policy considerations that have yet to be fully understood, much less explored: "The parents will have been spared the risk of *inflicting* [emphasis mine] this disease on their daughter. The lasting legacy is the eradication of the transmission of this form of cancer that has blighted these families for generations."[7] By this reasoning, parents who could have screened and treated an embryo to avoid an illness but did not do so for whatever reason have "inflicted" a disease on their children. Child abuse is currently defined as "an act, or failure to act, on the part of parent or caretaker that results in the death, serious physical or emotional harm, sexual abuse, or exploitation of a child, or which places the child in an imminent risk of serious harm."[8] Experimenting with untested or unproven genetic enhancement at the potential expense of the well-being of the child/subject would surely qualify as a form of abuse. But with the line between enhancement and therapy less clear than

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7 *Cancer Free Baby Born in London*, CNNHEALTH (Jan. 9, 2009), http://articles.cnn.com/2009-01-09/health/uk.cancerfree.baby_1_cancer-gene-brca-1-testing-embryos?_s=PM:HEALTH (last visited Jan. 26, 2012).

8 42 U.S.C.A. § 5106g (West 2010).

ever before, one can imagine a situation in which failure to intervene could be considered a potential form of child abuse. The law already defines withholding medical treatment from children as potentially criminal. Normally associated with things like refusing blood transfusions for religious reasons,[9] the "withholding of medically indicated treatment" addresses the "failure to respond to the infant's life-threatening conditions by providing treatment (including appropriate nutrition, hydration, and medication) which, in the treating physician's or physicians' reasonable medical judgment, will be most likely to be effective in ameliorating or correcting all such conditions."[10]

Other policy implications are equally murky. Could insurance companies refuse to pay for treatment if a given condition could have been avoided through various means (up to and including abortion)? Could medical professionals intervene over the wishes of parents if, in their reasonable medical judgment, they deemed it in the best interest of the child in terms of social advantages and competitive wellbeing, even if the child's life is not under threat? As happens in this field, our technology may be moving faster than our moral, legal, and political reasoning.

Another set of concerns is raised by biomedical ethicist, legal expert, and policy advisor Maxwell Mehlman. Taking it for granted that various kinds of enhancements will be available in the relatively near future, Mehlman focuses on how the advan-

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9 On religious liberty and medical treatment, *see* Courtney Campbell, *Religious Liberty and Authority in Biomedical Ethics*, *in* CHURCH-STATE ISSUES IN AMERICAN TODAY 247-77 (Ann Duncan & Steven Jones eds., 2008).

10 42 U.S.C.A. § 5106g, *supra* note 8.

tages of enhancement will be distributed in a society with notable inequality. Free-market approaches run the risk of creating or at least reinforcing an actual genetic basis for inequality, and should provoke dialogue in a society concerned with equal opportunity.[11] Outright bans are also problematic in light of the difficulties associated with preventing those with means from either obtaining enhancements on the black market or traveling to parts of the world where the enhancement market is less regulated. Mehlman finds merit in licensing enhancements before they are made available to individuals, thus bringing into existence some sort of review board that could require a "socially beneficial" purpose before granting a license. The full scope of this board is left open in Mehlman's analysis, as is any real discussion of what may constitute a socially beneficial purpose.

Government-funded distribution would likely be way too expensive to be palatable to taxpayers, but even if the government were to control enhancement distribution, Mehlman sees more problems on the horizon. Practices that offer whatever enhancements are necessary to satisfy individual citizen's wants or perceived needs, so-called welfare egalitarian approaches would result in very unequal distribution with some people wanting more and more, while others, content with less, foot the bill. Resource egalitarians, those who favor equal distribution regardless of one's starting position, still result in inequality in terms of

11 It is worth noting here that those societies that promoted the idea that some members were genetically superior to others are among some of the most reviled of the contemporary period, from World-War-Two-era Germany to Apartheid to the Jim Crow South.

outcome. Even John Rawls' veil of ignorance in which goods such as enhancements are distributed without knowledge of the identity or even the social location of the eventual recipient does not satisfy the concerns of equality. Given that we may be talking about inheritable increased physical or mental capacity, the possibilities for expanding social inequality are considerable.

II. Commoditized Genes

Even while the various ethical and social considerations are debated, the science moves ahead. Every month it seems as if new discoveries are made in terms of what genes are responsible for what characteristics or conditions. Increasingly, we are learning how to manipulate genes as well, turning them "on" or "off" so as to better control our own genetic future and that of our offspring. The commercial implications of all of this have not gone unnoticed. Numerous companies already advertise their laboratory's ability to test potential parents for the likelihood that their children may inherit certain genetic conditions. For instance, 23andMe offers its clients the opportunity to test their own genetic material to find out their carrier status for more than forty inheritable conditions, including Cystic Fibrosis, Tay-Sachs, and Sickle Cell Anemia. Starter kits are priced as low as $99, but can be bundled with other services such as a year-long subscription to their Personal Genome Service for just over $200. Their website is complete with testimonials from grateful customers and video tutorials. Other companies do not offer direct-to-the-consumer services (their services must be ordered by a physician or genetic

counselor), but still advertise their ability to test for hundreds of disorders.[12]

Counsyl, a California start-up, has gone further, claiming that their efforts can help eradicate various diseases by weeding them out of the gene pool. Their website informs potential clients of the "new medical consensus" that all adults of reproductive age should seek genetic counseling before starting a family and warns readers that they may unknowingly be carriers of genetic conditions that could affect their children. Clients are also informed that with testing, they can "prevent" diseases such as Spinal Muscular Atrophy through the use of pre-implantation genetic diagnosis done in conjunction with in vitro fertilization. Counsyl's Universal Genetic Test offers clients the opportunity to prevent diseases that, they assure you, cannot be cured. Their mission is "to scale up the Jewish community's successful campaign of universal carrier screening for Tay-Sachs by expanding coverage and accessibility." To this end, Counsyl's value statement affirms that "[they] believe that genetic counseling is a human right, not a luxury…[that] children deserve healthy lives, free from genetic disease…[and in] universal access, especially for those most in need."[13] Counsyl markets their tests to both doctors who join their network, and to individuals who can, through their website, find a participating physician or encourage their own doctor to join Counsyl's team. Characterizing their efforts as a campaign against inheritable diseases, the website explains:

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12 *See* 23ANDME, www.23andme.com (last visited on Mar. 1, 2012).

13 *See* CONSYL, www.counsly.com, (last visited on Feb. 27, 2012).

> The organization was founded by social entrepreneurs and philanthropists with the audacious belief that every child deserves a chance in life. It is something new, born of the realization that cutting-edge science and market forces can actually *increase* equality and promote social justice. It is a cause, a campaign to finally end the needless suffering of preventable genetic disease. And most of all, it is you. Call us idealistic, but we believe that everyone loves their children and will do the right thing when it comes to safeguarding their future.[14]

III. Parental Authority

All of this has the potential to change the terrain of the old nature-nurture debate. In trying to determine why people do what they do, the old, probably over-simplified answers stressed either one's biology or the environment in which one was raised. The assumptions behind whole academic disciplines sometimes tilt toward one explanation or the other. Sociology, for instance, might stress the nurture side of the equation, while biology may especially emphasize nature. Even as the whole binary structure of this debate gives way to far more nuanced positions, medical science may be undermining the old logic. Nature, it was widely assumed, was more fixed than nurture. Everyone recognized that social environments, the nurture side, could vary across time and space. Indeed, that was part of its explanatory power. Social norms and values vary from society to society, and thus, people behave differently. But now nature itself is at least potentially malleable.

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14 *Id.*

Gender, for example, may be a social construction that varies with time and place, but now sex itself, as a biological characteristic, is subject to change. This may have profound implications for how we think about a number of issues, not least of all the relationship between children's rights, parental authority, and the law.

With reference to the control over the environment in which children are raised, there exists a broadly recognized and affirmed set of cultural and legal assumptions that give considerable discretion to parents. Justice O'Connor clearly stated as much in *Troxel v. Granville,* a case affirming the authority of parents to regulate the visitation rights of grandparents: "The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court."[15] She went on to cite some 75 years of precedent upholding not just the rights of individual parents but the foundational assumptions in which they are rooted. The broad range of issues covered in her narrative is instructive in that it shows how consistently parental prerogatives have been recognized and upheld. O'Connor cited two cases from the 1920s, *Meyer v. Nebraska* and *Pierce v. Society of Sisters.*[16] The right of parents to establish and maintain a home in which they directed the upbringing of their own children was recognized in *Meyer,* while *Pierce,* in overturning Oregon's law requiring all students to attend public schools, stated clearly that "the child is not the mere creature of the state; those who nurture him and direct his destiny

15 Troxel v. Granville, 530 U.S. 57, 65 (2000).

16 Meyer v. Nebraska, 262 U.S. 390 (1923).

have the right coupled with the high duty to recognize and prepare him for additional obligations."[17]

American jurisprudence is not alone in this recognition of parental prerogatives. The Universal Declaration of Human Rights, adopted by the United Nations in 1948, established education as part of the "inherent dignity and inalienable rights of all members of the human family" and one of the means through which freedom, as the "highest aspiration of the common people" will be achieved. Article 26 declares:

> (1) Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit.
>
> (2) Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace.
>
> (3) Parents have a prior right to choose the kind of education that shall be given to their children.[18]

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17 Pierce v. Soc'y of Sisters, 268 U.S. 510 (1926).

18 *See* United Nations Declaration of Human Rights, http://www.un.org/en/

Though the Declaration is without ambiguity, the practice of education by member states has a far murkier past. The third paragraph, establishing the "prior right" of parents to direct what sort of education their children receive has been especially problematic, even in the enlightened and rights-conscious West.

The Court has also upheld parental prerogatives in areas other than education. O'Connor cited the Court's confirmation of the Constitutional dimension to parental rights in *Prince v. Massachusetts,* a 1944 case that recognized the rights of parents even as it upheld a Massachusetts law restricting the abilities of children to distribute religious literature in public spaces. Parental control over the medical treatment of children also has a long history in American jurisprudence. For most of American history it was all but a non-issue. Of course, parents were the primary decision-makers for their children, at least in terms of consent, if not for the efficacy of treatment options. As early as 1912 a state court in Pennsylvania ruled that parents could refuse their consent for a surgical procedure aimed at remedying the effects of rickets on the legs of a seven-year-old boy, Tony Tuttendario. The Society for the Prevention of Cruelty to Children sought permission in the courts to have Tony's care entrusted to them so that his parents' objections would be rendered moot. The Pennsylvania court ruled against the Society's request, stating that the uncertain prognosis for the surgery coupled with their respect for the natural love found between parents and children required a rejection of the

documents/udhr/index.shtml#a26, (last visited on Mar. 30, 2012).

"Spartan rule" that children belonged to the state.[19] Later courts, under different circumstances, found that the rights of parents could be limited if the wellbeing of the child was threatened by parental action, or in some cases, inaction. The well-known cases of Jehovah Witnesses parents who refuse blood transfusions for their children, a position they take from their reading of scripture, confirm that the rights of parents to control the medical care of children are not absolute, even when foundational issues such as religious freedom are at stake.[20]

Parham v. J.R. More approached the ground under discussion here in that it dealt with the rights of parents in the medical care of their children. In *Parham,* the Supreme Court upheld the rights of parents when it comes to determining some aspects of their children's medical care, and reaffirmed the basic supposition that parents would act in the best interests of their children.[21] These cases, and others cited by O'Connor, establish an "extensive precedent," making it clear that "the Due Process clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[22] Of course, there have been exceptions to the reasoning O'Connor found so prevalent in the Court's history. Justice Stevens' dissent in *Troxel* recognizes that parental liberties might, in some cases, not serve the best interests of their children. In his

19 Walter Wadlington, *Medical Decision Making for and by Children: Tensions Between Parent, State and Child,* 1994 U. ILL. L. REV. 311 (1994).

20 Prince v. Massachusetts, 321 U.S. 158 (1944).

21 Parham v. J.R., 442 U.S. 584 (1979).

22 Granville, 528 U.S. at 66.

view the Court had "never held that the parent's liberty interest in this relationship is so inflexible as to establish a rigid constitutional shield, protecting every arbitrary parental decision from any challenge absent a threshold finding of harm."[23] Justice Douglas' dissent in the 1972 *Yoder* case is also interesting. He argued that self-determination rights of "mature minors" should be constitutionally protected when they come into conflict with the rights of parents, and though the specific context of his dissent focused on education (nurture), the issues he raised have implications well beyond schooling. A number of academic fields have, over the past several decades, come to see children's input, and perhaps consent, as critical to legitimate decisions regarding their welfare. As a general principle children are still subject to the legal authority of various adults (parents or various agents of the state), but increasingly legal and political theorists, as well as child development experts from various fields, have held that children should be more involved in decision-making regarding their welfare, a move that may have inverse implications for the rights of parents.

Advances in modern medicine like those described earlier in this essay have made these issues even more difficult. We now have the ability to shape children through surgical and/or medicinal treatments that would scarcely have been imaginable to earlier generations. Indeed, a mid-century study of the connections between law, public policy, and public opinion as they related to parental authority asked only one question about medical care,

23 *Id.* at 86 (Stevens, J., dissenting).

focusing instead on issues related to child labor and education.[24] Now, with so many heretofore-unimagined capabilities in front of us, there are more questions than answers. How then should we think about the rights of parents in these contexts?

Historically, most models of the family have been based on a clear hierarchy with the rights and autonomy of parents clearly trumping those of the child. The zone of autonomy and privacy that surrounded family was a recognized social space, and though the state could intervene into this space, the justifications of such intervention had to be compelling indeed. Today the recognition of parental authority is still the norm, though I believe that advances in medical science raise troubling questions about limitations on parental authority. In her discussion of the United States Supreme Court's decision in *Parham,* Alicia Ouellette noted that though this is usually recognized as a case endorsing parents' rights, the Court also recognized that the rights of parents are not necessarily coterminous with those of children, a recognition that helped lay the groundwork for a legal revolution in our thinking about how to evaluate the best interests of children. She advances the "non-subordination principle" to address the restrictions on one person's liberty required to recognize and protect the liberty of another.[25]

The exact parameters of this or similar principles are the

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24 JULIUS COHEN, REGINALD ROBSON & ALAN BATES, PARENTAL AUTHORITY: THE COMMUNITY AND THE LAW (1958) (Interestingly, the study found that the public was quite willing to put aside the rights of parents if the well-being of the child was at stake, but the question itself was formulated in such a way as to make that the obvious response.).

25 Alicia Ouellette, *Shaping Parental Authority over Children's Bodies*, 85 IND. L.J. 955 (2010).

subject of many a political theory class, but applying it to the parent-child relationship is particularly difficult given the responsibilities of parents to raise their children. Every decision made by parents can be understood as affecting the future of the child, and in that sense may limit their ability to make free and unfettered decisions when they reach the age of legal adulthood. Recent debates over the proposed ban on circumcision in San Francisco revolved around just these claims. Circumcision is often carried out before infant males even leave the hospital, obviously well before any sort of consent from the child could even be discussed, much less made determinative. Once done, the procedure does render future deliberation by the child on this permanent issue of bodily integrity moot. Accordingly, critics of the procedure held that the interests of the child were being subjugated to the rights or norms of parental authority.

Ouellette holds that the non-subordination principle "should be embedded in legal models for evaluating the scope of parental power,"[26] explicitly challenging the hierarchical model of decision-making in which the concerns of parents are paramount. Such approaches are part of a larger shift in family law towards recognizing children as full partners in family life with interests of their own.[27] Going further, Ouellette identifies several models of the family that she believes may be helpful in that they recognize the child as a complete individual within a functioning social unit in a way that approaches focusing on parental rights do not.

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26 *Id.* at 985.

27 MARY ANN GLENDON, THE TRANSFORMATION OF FAMILY LAW: STATE, LAW, AND FAMILY IN THE UNITED STATES AND WESTERN EUROPE (1989).

These models, many of which hold that parenthood may be understood as a form of trust in which the best interests of the child at some future date (when they have reached the age of majority, for instance), often protect autonomy interests for the child above particular interests of the parents. Thus, parental decision-making that would limit the future autonomy of the child should be carefully considered, even regulated, by the state out of respect for the child's interests later on. In her work, this includes so-called shaping cases in which children are subjected to often invasive medical procedures to fit parental desires or expectations. The use of human growth hormone is a case in point.

IV. Concluding Remarks

With Ouellette I would limit the ability of parents to physically shape their children's bodies and genetic inheritance more broadly, but her reasoning does not support the family policy goals I want to recommend. Limiting the rights of parents in the nature sphere, which Ouellette and I both advocate, could be prologue to further restrictions on parents in the nurture sphere. Parental prerogatives in education, for instance, or religious training, could be undermined if parents are restricted from making decisions for their children that might limit the child's ability to choose for themselves later on, one of the guiding principles of those family models that treat parenthood as a trust.[28] Protecting the future

28 Some political, educational, and legal theorists have already moved in this direction when it comes to religious schooling. For discussion, *see* Steven Jones, Religious Schooling in America: Private Education and Public Life (2008).

autonomy of children is a worthy goal, but it should not trump the prerogatives, and duties, of parents to raise their children in accordance with deeply held religious, philosophical, and political convictions. At the bottom of Ouellette's position is an understanding of individual personhood rooted in, and pointed towards, the fully autonomous individual. Actions that limit the future autonomy of the child, in these cases the right to control one's own body, are violations of this goal.

While some of her analysis is compelling, there is reason to be concerned about what these models would do to undermine the private social space that surrounds the natural family and more particularly the rights of parents to raise their children in accordance with deeply held religious and philosophical convictions. This private social space cannot be absolutely inviolable, but policy preferences that favor familial structures with a proven track record of rooting children in the communities and norms that most contribute to their well-being should not be too quickly discarded.

Social science evidence confirms that people benefit from attachments to authoritative communities, including families, that help pass on spiritual, philosophical, and moral precepts. These communities are critical to human wellbeing and thus policies that even inadvertently weaken these communities and institutions may undermine the full potential for human thriving. Legal and philosophical understandings of the family that lean towards the emancipation of children from their parents, or that see the sort of thick ties parents often try to foster between their children, and say, religious communities, as potential limitations on

an individual's future autonomy, need to be checked against an impressive body of research from the social and behavioral sciences. There is an emerging consensus that children do better on a host of indicators ranging from school performance to avoidance of drugs and delinquency when they have strong attachments to *primordial institutions* such as the family and the church. While models of the family that protect the future autonomy of children are not necessarily antagonistic to such institutions, it is also true that such models are a relatively untested experiment, the social costs of which could be quite high.[29]

This short essay has raised more questions than it has answered, but I hope it will serve as a catalyst for further discussion of the sort of policy considerations that will need to be addressed as our society moves forward with genetic enhancement. If it also promotes dialogue between legal theorists, policy makers, and social scientists about the intersection of their respective domains, then so much the better.

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29 *See, e.g., Hardwired to Connect: The New Scientific Case for Authoritative Communities* (2003). This report was a joint effort of the Institute for American Values, Dartmouth Medical School, and the YMCA of the United States that reviewed both medical science, especially neuroscience, and the social sciences to identify a new scholarly consensus around the benefits of strong attachments between individuals and communities.

BREAKING THE CHAINS:
THE INABILITY OF THE INTERNATIONAL CRIMINAL COURT TO COMBAT THE PERSISTENT PROBLEM OF SLAVERY AND THE INTERNATIONAL JUSTICE MISSION'S MODEL FOR ENFORCEMENT

*Emma J. Finney**

ABSTRACT: *Slavery was one of the first human rights issues to arouse widespread international concern, and today, international human rights law unequivocally outlaws all forms of slavery. Despite these legal protections, slavery continues to be a persistent problem. Currently, "enslavement" as defined in Article 7 of the Rome Statute has yet to be interpreted by the International Criminal Court (ICC) to adequately cover contemporary models of slavery. This article seeks to educate readers about contemporary forms of slavery, to demonstrate the enforcement problems at the national level; to analyze the difficulties with using the ICC even with an expansive definition of enslavement to prosecute modern slavery; and to highlight the success of the International Justice Mission in working to gain convictions where nations have adopted, but are not enforcing domestic and international anti-trafficking laws and to endorse its model for addressing slavery around the world.*

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> "Sir, the nature and all the circumstances of this trade are now laid open to us; we can no longer plead ignorance, we cannot evade it, it is now an object placed before us, we cannot pass it. We may spurn it, we may kick it out of our way, but we cannot turn aside so as to avoid seeing it; for it is brought now so directly before our eyes that this House must decide, and must justify to all the world, and to their own consciences, the rectitude of the grounds and principles of their decision."

~William Wilberforce, May 12, 1789 speech to the British Parliament advocating for the abolition of slavery[1]

> "The States Parties to this Statute, ... *affirming* that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensured by taking measures at the national level and by enhancing international cooperation, *determined* to put an end to impunity for the perpetrators of these crimes and thus to contribute to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."

~ Preamble to the 1998 Rome Statute of the International Criminal Court[2]

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1 William Wilberforce, *Speech to Parliament, May 12, 1789*, in THE PARLIAMENTARY HISTORY OF ENGLAND, FROM THE EARLIEST PERIOD TO THE YEAR 1803 FROM WHICH THE LAST-MENTIONED EPOCH IT IS CONTINUED DOWNWARDS IN THE WORK ENTITLED, "THE PARLIAMENTARY DEBATES." VOL. XXVIII COMPRISING THE PERIOD FROM THE EIGHTH OF MAY 1789, TO THE FIFTEENTH OF MARCH 1791 (T.C. Hansard 1816).

2 Rome Statute of the International Criminal Court, United Nations

> "The Purposes of the United Nations are: … to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. …"
>
> ~ United Nations Charter, Article 1[3]

Vijayan and his wife spent thirteen years working seven days a week, eighteen hours a day in a rice mill.[4] In return for their labor they received porridge made from spoiled rice incapable of being sold at the market.[5] Instead of attending school or playing outside, their young children spent their days cleaning a cow shed, carrying husks or helping to spread rice to dry in the sun.[6] When Vijayan and his family tried to escape, the owner of the rice mill tracked them down, forcibly dragged them back, and beat them with a belt from the mill machinery.[7]

When presented with these facts, one might assume he

Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998, pmbl., 2187 U.N.T.S. 90 [hereinafter Rome Statute].

3 Charter of the United Nations, 59 Stat. 1031, 3 Bevans 1153, (Oct. 24, 1945) Ch. 1 Art. 1.2.

4 Samantha Power, "A Reporter at Large: The Enforcer: A Christian Lawyer's Global Crusade," THE NEW YORKER, Jan. 19, 2009, at 61-62.

5 *Id.* at 62.

6 *Id.*

7 *Id.* Other slaves at the Rice Mill received even harsher treatment, for example, Bonda, was "placed in iron chains and kept in solitary confinement for a week. By the time he was released, he couldn't stand up, and blood oozed out of his ears." *Id.*

or she was hearing an account of slavery from the distant past. Regrettably, slavery is still far from being eradicated.[8] Until 2006 Vijayan was a victim of bonded slavery, a practice that remains prevalent in India and other countries today.[9] The International Justice Mission, a non-governmental organization, which was the catalyst behind the Indian police raid on the rice mill where Vijayan was enslaved, litigated fifty-six bonded slavery cases in the Indian Court system in Chennai, the capital city of the Indian state of Tamil Nadu, in 2009.[10] Since 2003, the International Justice Mission's Chennai office has placed almost 2,500 freed slaves

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8 *See* Organization for Security and Co-operation in Europe, Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, Combating Trafficking as Modern-Day Slavery: A Matter of Rights, Freedoms, and Security, 2010 Annual Report of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings Presented to the Permanent Council, 9 Dec. 2010. Available at: http://www.ungift.org/doc/knowledgehub/resource-centre/OSCE_Annual_Report_2010.pdf. *See also*, L. SHELLEY, HUMAN TRAFFICKING: A GLOBAL PERSPECTIVE (Cambridge 2010); Anti-Slavery, Transparency International, UNODC, The Role of Corruption in Trafficking in Persons 30 (2009); International Labour Office (ILO), Belser, P. and Danailova-Trainor, G., *Globalization and the Illicit Market for Human Trafficking: An Empirical Analysis of Supply and Demand,* Declaration Working Paper 53 SAP-FL (Geneva, 2006).

9 *See* 2010 Annual Report of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings Presented to the Permanent Council, *supra* note 9. Vijayan originally borrowed fifteen dollars or five hundred rupees from the rice mill owner as a loan, but because of the high rate of interest that is charged it would have been impossible for Vijayan to ever pay off the debt. *Id.* Bonded Slavery is further defined in this paper. *See also*, U.N. Econ. & Soc. Council [ECOSOC], Sub-Comm'n on the Promotion & Protection of Human Rights, Comm'n on Human Rights, Working Group Report: Contemporary Forms of Slavery at 23, U.N. Doc. E/CN.4/Sub.2/2000/23 (July 21, 2000). [Hereinafter UN Report]

10 Samantha Power, *supra* note 5, at 62; for more information about Chennai, India visit the official government website of Chennai District, http://www.chennai.tn.nic.in/ (last visited Mar. 10, 2011).

in aftercare.[11] This number pales in significance compared to the estimate of human rights groups that between twenty-five and sixty million Indians live in a condition of slavery.[12] Even when convictions are won, the resulting sentences can be shockingly insubstantial.[13] The sheer volume of Indian citizens currently enslaved in contravention to local and international law reveals the failure of the Indian legal system to provide an appropriate solution to the nation's problem of bonded slavery.

Slavery was one of the first human rights issues to arouse widespread international concern, and today, international human rights law unequivocally outlaws all forms of slavery.[14] Over sev-

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11 Samantha Power, *supra* note 5 at 62.

12 The estimates of the number of slaves in the world vary based on how slavery is defined and whether the statistics used are self-reported by national governments or compiled by human rights groups. *See, eg.* KEVIN BALES, ENDING SLAVERY: HOW WE FREE TODAY'S SLAVES (2007), 9, 69. (He estimates 27 million live in slavery worldwide and that India has the largest number of slaves in the world, which he points out is "more than twice the number of people taken from Africa during the 350 years of the Atlantic Slave Trade."); U.N. Report, *supra* note 10, at 21(The report reveals estimates that between 44 to 100 million people are subject to contemporary forms of slavery in India.); Human Rights Watch, *Small Change: Bonded Child Labor in India's Silk Industry* 18 (2003), http://www.hrw.org/sites/default/files/reports/india0103.pdf (This report estimates that at least 15 million child laborers in India are modern day slaves.).

13 Samantha Power, *supra* note 5 at 62. ("One slave owner spent only a day in jail.") *Id.*

14 *See* David Weissberodt, Anti-Slavery Int'l, Office of U.N. High Comm'r for Human Rights, Abolishing Slavery and Its Contemporary Forms 3 (2002), http://www.ohchr.org/Documents/Publications/slaveryen.pdf; Renee Colette Redman, *The League of Nations and the Right to be Free from Enslavement: the First Human Right to be Recognized as Customary International Law*, 70 CHI.-KENT L. REV. 759, 780 (1994); Barcelona Traction, Light and Power Co, Ltd. (Belgium v. Spain), 1970 I.C.J. 32 (Feb. 5); M. Cherif Bassiouni, *Enslavement as an International Crime*, 23 N.Y.U. J. INT'L L. & POL. 445, 445 (1991) (Slavery and its more modern related practices are both a breach of international treaty law and *jus cogens* violations).

enty-nine major international documents were operative by the end of the twentieth century dealing with slavery, forced labor, slavery-related practices, and the slave trade.[15] Yet despite these legal protections, slavery continues to be a persistent problem. [16]

As the preamble to the Rome Statute states, the International Criminal Court (ICC) was created to end impunity for perpetrators of the crimes deemed most serious by the international community.[17] Wilberforce remains as correct today as he was in 1789. As the English Parliament of the time was aware of practice of slavery, neither can today's international community claim ignorance of slavery's continuance, and the ICC and the United Nations must justify to the world their action or inaction against this serious crime.[18]

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15 Bassiouni, *supra* note 15 at 454.

16 Few countries are left untouched by the scourge of slavery. *See* U.S. DEP'T OF LABOR, 2004 FINDINGS ON THE WORST FORMS OF CHILD LABOR 25 (2005); A. Yasmine Rassam, *International Law and Contemporary Forms of Slavery: An Economic and Social-Rights Based Approach*, 23 PENN ST. INT'L L. REV. 809, 829 (2005); THE POLMCAL ECONOMY OF NEW SLAVERY (Christien van den Anker ed. 2004); KEVIN BALES, NEW SLAVERY: A REFERENCE HANDBOOK 7 (2000); OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS, FACT SHEET NO. 14: CONTEMPORARY FORMS OF SLAVERY, http://www.ohchr.org/Documents/Publications/FactSheet14en.pdf.

17 *Id.*

18 Rome Statute, *supra* note 2, art. 7(1) (listing "enslavement" and "sexual slavery" as crimes against humanity.) *See e.g.*, Prosecutor v. Kunarac et al, Case No. IT-96-23-T & IT-96-23/1-T, Judgment, ¶ 117-18 (Int'l Crim. Trib. for the Former Yugoslavia Feb. 22, 2001); CHILD SLAVERY NOW: A CONTEMPORARY READER 45 (Gary Craig ed. 2010); KNUT DÖRMANN, ELEMENTS OF WAR CRIMES UNDER THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, SOURCES AND COMMENTARY, 328-29 (2002); William Schabas, *Customary Law or "Judge-Made" Law: Judicial Creativity at the UN Criminal Tribunals*, in THE LEGAL REGIME OF THE INTERNATIONAL CRIMINAL COURT: ESSAYS IN HONOUR OF PROFESSOR IGOR BLISHCHENKO 98 (José Doria, Hans-Peter Gasser and M. Cherif Bassiouni eds. 2009).

Currently, "enslavement" as defined in Article 7 of the Rome Statute has yet to be interpreted by the ICC to adequately cover contemporary models of slavery. This impedes the ICC's ability to hold perpetrators' accountable. For the ICC to address the culture of impunity towards slavery present at the domestic level, the definition of enslavement must be interpreted expansively. However, even with an expansive definition, other problems inhibit ICC's ability to universally extinguish human slavery. This article seeks to educate readers about contemporary forms of slavery in Part I; in Part II, to demonstrate the enforcement problems at the national level; in Part III, to analyze the difficulties with using the ICC even with an expansive definition of enslavement to prosecute modern slavery; and in Part IV to highlight the International Justice Mission's success in both gaining convictions in nations that do not normally enforce anti-trafficking laws and their development of a model for addressing international slavery.

I. Contemporary Forms of Slavery

Slavery has undergone a significant transformation since William Wilberforce delivered his abolition speech to the British Parliament in 1789. The 1926 Slavery Convention of the League of Nations defined slavery as "the status or condition of a person over which any or all of the powers attaching to the right of ownership are exercised."[19] The element of ownership is the crucial difference between the chattel slavery that Wilberforce opposed and the 1926 Slavery Convention targeted and modern day slav-

19 Slavery Convention of 1926, art. 1(1), Mar. 9, 1927, 60 L.N.T.S. 253.

ery.[20] Today, slavery involves less formal ownership and is more dependent on "a critical level of control over slaves."[21] The United Nations Working Group on Contemporary Forms of Slavery identified the major types of contemporary slavery in the world in 2006 where a critical level of control is exercised over victims as: bonded labor,[22] forced prostitution and human trafficking,[23]child

20 Weissbrodt, *supra* note 14. (Traditional chattel slavery which possesses the element of ownership is becoming increasingly rare.)

21 Ashley V. Tomlinson, *Comment: Slavery in India and the False Hope of Universal Jurisdiction*, 18 TUL. J. INT'L & COMP. L. 231, 235 (2009). *See also*, KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 5 (2004).

22 Bonded Labor is specifically prohibited by The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, adopted by a Conference of Plenipotentiaries convened by Economic and Social Council resolution 608 (XXI), Sept. 7, 1956, Art. 1 (a), 226 U.N.T.S. 3, 7 C.T.S. 1963; The Abolition of Forced Labour Convention (No. 105), June 25, 1957, 320 U.N.T.S. 291; and the International Convention on Civil and Political Rights, art. 8(3), U.N. Doc. A/6316 (Mar. 23, 1976.).

23 Human Trafficking is specifically prohibited by the International Agreement for the Suppression of the White Slave Traffic, May 18, 1904, 35 Stat. 1979, 1 L.N.T.S. 83; the International Convention for the Suppression of White Slave Traffic, May 4, 1910, 2 U.S.T. 1997, 30 U.N.T.S. 23; the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, U.N. Doc. A/RES/34/180 (Dec. 18, 1979), http://untreaty.un.org/English/TreatyEvent 2001/pdf/01e.pdf, and the U.N. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, U.N. Doc. A/55/383 (Nov. 15, 2000), [hereinafter the Palermo Protocol].

labor,[24] and children in armed conflict.[25],[26]

Each type of modern slavery is defined by international law. The Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery defines debt bondage, also known as bonded labor, as:

> [T]he status or condition arising from a pledge by a debtor of his personal services or of those of a person under his control as security for a debt, if the value of those services as reasonably assessed is not applied towards the liquidation of the debt or the length and nature of those services are not respectively limited and defined.[27]

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24 Child labor is outlawed by the Convention on the Rights of the Child to which has been ratified by every country except Somali and the United States. Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3. *See also*, Convention Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (No. 182), June 17, 1999, 38 I.L.M. 1207 [hereinafter Convention 182] (adopted by the General Conference of the International Labour Organization at its eighty-seventh session.)

25 Forced conscription of children is specifically outlawed by the Palmero Protocol *supra* note 22, and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, G.A. Res. 54/263, Annex I, art. 3, U.N. GAOR 54th Sess., Supp. No. 49, U.N. Doc. A/54/49 (2000) (Feb. 12, 2002) [hereinafter Children in Armed Conflict Protocol].

26 United Nations Economic and Social Council Commission on Human Rights Sub-Commission on the Promotion and Protection of Human Rights Fifty-second session Item 6 of the provisional agenda, *Contemporary Forms of Slavery: Report of the Working Group on Contemporary Forms of Slavery on its twenty-fifth session Chairperson-Rapporteur: Ms. Halima Embarek Warzazi*, U.N. Doc. E/CN.4/Sub.2/2000/23, (July 21, 2000) http://daccess-dds-,ny.un.org/doc/UNDOC/GEN/G00/143/98/PDF/G0014398.pdf?OpenElement. *See also*, OFFICE OF THE HIGH COMM'R ON HUMAN RIGHTS, FACT SHEET NO. 14: CONTEMPORARY FORMS OF SLAVERY, available at http://www.ohchr.org/Documents/Publications/FactSheet14en.pdf.

27 The Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 21.

This definition of debt bondage had also been incorporated into national legislation.[28] The general definition of human trafficking from the Palermo Protocol is:

> [T]the recruitment, transport, transfer, harbouring or receipt of a person by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.[29]

Exploitation is defined to include "the exploitation of the prostitution of others or other forms of sexual exploitation." [30] The Interpretative note to this section of the text states that "the travaux preparatories should indicate … [t]he terms 'exploitation of the prostitution of others' or 'other forms of sexual exploitation' are not defined in the Protocol, which is therefore without prejudice to how State Parties address prostitution in their respective domestic laws."[31] Therefore, although forced prostitution is against international law, what constitutes forced prostitution is left to be determined by each sovereign nation.

The International Labour Organization (ILO) defines children as all persons under the age of eighteen.[32] The ILO defines

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28 *See, e.g.*, the Victims of Trafficking and Violence Protection Act of 2000, 22 U.S.C. 7101 §103 (4).

29 Palermo Protocol, *supra* note 22.

30 *Id.*

31 Interpretative Note (64) to the Palermo Protocol, *supra* note 22..

32 ILO, Convention 182 Worst Forms of Child Labor, *supra* note 23 at art.2.

the term "the worst forms of child labour" in Article 3 as:

> (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties; (d) work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.[33]

Here the definition of child labor is expansive and extends beyond child slavery and slave-like practices. The most expansive definition of a child soldier is that of the Cape Town Principles from 1997:

33 *Id.* at art (3).

> Any person under 18 years of age who is part of any kind of regular or irregular armed force or armed group in any capacity, including but not limited to cooks, porters, messengers, and anyone accompanying such groups, other than family members. The definition includes girls recruited for sexual purposes and for forced marriage. It does not, therefore only refer to a child who is carrying or has carried arms.[34]

Although the Cape Town definition existed when the Rome Statue was drafted, the drafters chose a narrower definition, which finds the use of child soldiers to be a war crime under Article 8, but does not include other categories of child soldiers who are not "active participants" in combat.[35]

Of the four major contemporary forms of slavery to date, the ICC has concentrated most of its energy on combating the use of child soldiers.[36] Thomas Lubanga Dyilo is currently on trial for

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34 UNICEF, Cape Town Principles and Best Practices on the Recruitment of Children into the Armed Forces and on Demobilization and Social Reintegration of Child Soliders in Africa (Cape Town, 27-30 Apr. 1997), http://iggi.unesco.or.kr/web/iggidocs/02/952579100.pdf [hereinafter Cape Town Annotated Principles] (Adopted at the symposium on the prevention of recruitment of children into the armed forces and on demobilization and social reintegration of child soldiers in Africa).

35 Rome Statute, *supra* note 2, at Article 8(2)(xxvi) (declaring it a serious violation if "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities"). At the conference where the Rome Statute was drafted the crime was limited to the use of children in active hostilities and would "not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use as domestic staff." Report of ICC Preparatory Committee, A/CONF/183/2/Add.1, 14 Apr. 1998.

36 *See* Prosecutor v. Thomas Lubanga Dyilo, Case No.: ICC-01/04-01/06, Warrant for Arrest (Feb. 10, 2006), http://www.icc-cpi.int/iccdocs/doc/doc191959.PDF.

"enlisting and conscripting…children under the age of 15 years into the [Patriotic Forces for the Liberation of Congo (FPLC)] and using them to participate actively in hostilities in the context of an international armed conflict from early September 2002 to 2 June 2003 which is punishable under article 8 (2)(b)(xxvi) of the Rome Statute" as a war crime.[37] Additionally, Germain Katanga and Mathieu Ngudjolo Chui are also on trial for among other charges, the war crimes of using child soldiers within the meaning of article 8(2)(b)(xxvi) of the Rome Statute, and sexual slavery under Article 8(2)(b)(xxii), and sexual slavery as a crime against humanity under Article 7 (1)(g) of the Rome Statute.[38] Thus far the ICC has focused on only two of the forms of modern slavery: children in armed conflict and sexual slavery. The ICC Prosecutor has also chosen not to bring charges against any of the individuals for enslavement using the crimes against humanity article 7(1)(C).[39] By failing to prosecute, the ICC is perpetuating the international culture of impunity that permits contemporary forms of slavery to flourish.

II. A Culture of Impunity on the National Level

On the surface, most countries appear committed to abolish-

37 *Id.* On March 14, 2012, in the first judgment of the International Criminal Court, the ICC convicted Lubango of using child soldiers. Lubanga will be sentenced later this year. He could receive life imprisonment. Mike Corder, "In First for International Court, Warlord Convicted for Using Child Soldiers," The Associated Press, Mar. 15, 2012.

38 Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Case No. ICC-01/04-01/07, Warrant of Arrest (July 6, 2007), http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/ Situations/Situation+ ICC+0104/Related+Cases/ ICC+0104+0107/Democratic+Republic+of+the+Congo.htm.

39 The Rome Statute, *supra* note 2, at Article 7(1) "enslavement."

ing slavery, and worldwide many people erroneously presume it to be a long-extinct practice.[40] Domestic and International laws may theoretically prohibit it, but they lack meaningful enforcement.[41] This allows slavery to persist in a blatant disregard for human dignity. India is an excellent example of a domestic culture that condones slavery through its inaction.

A. India's Experience with Bonded Labor

India has been identified by the International Labor Organization as the country with the largest number of bonded laborers.[42] Furthermore, many of the contemporary forms of slavery such as child laborers, sexual slaves, and trafficking are all present

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40 Numerous International treaties outlaw the existence of slavery. *See, e.g.*, 1815 Declaration Relative to the Universal Abolition of the Slave Trade [Congress of Vienna, Act XV], 2 Martens Nouveau Recueil 432, reprinted in 63 Parry's T.S. 473 (1969); The 1841 Treaty for the Suppression of the African Slave Trade (Treaty of London), 6 Martens Nouveau Recueil 139, reprinted in 92 Parry's T.S. 437; 1910 International Convention for the Suppression of the White Slave Traffic, 7 Martens Nouveau Recueil (ser. 3) 252, reprinted in 211 Parry's T.S. 45; The 1926 Slavery Convention of the League of Nations *supra* note 18; U.N. Charter art.2; The Universal Declaration of Human Rights, G.A. Res.217 (III) A, U.N. Doc. A/810 (1948); Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, *supra* note 26; 1957 Convention (No. 105) Concerning the Abolition of Forced Labor , 320 U.N.T.S. 291; 1966 International Convention on Civil and Political Rights, G.A. Res. 2200A(XXI), 21 U.N. GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1967); 1989 United Nations Convention on the Rights of the Child, *supra* note 23, Rome Statute, *supra* note 2; Palmero Protocol, *supra* note 22; Children in Armed Conflict Protocol, *supra* note 24.

41 Beth Stephens, *Accountability for International Crimes: The Synergy Between the International Criminal Court and Alternative Remedies* 21 WIS. INT'L L. J. 527, 527 (2003).

42 Int'l Labour Org. (ILO), Stopping Forced Labour 35 (2001), http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---declaration/documents/publication/wcms_088490.pdf.

in India.[43] In addition to contravening India's international treaty obligations, all of these practices are illegal under Indian law.[44]

Article 23(1) of the Indian Constitution states, "Traffic in human beings and *begar* and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with the law."[45] Article 24 prohibits labor in factories for children under the age of 15.[46] Article 39 (e) states "that the health and strength of workers, men and women, and the tender age of children are not abused and that citizens are not forced by economic necessity to enter avocations unsuited to their age or strength."[47] The Indian Penal Code also criminalizes several acts of slavery.[48]

Furthermore, in 1976, a federal Bonded Labour System (Abolition) Act (BLA) was enacted.[49] This federal act was to be implemented by vigilance committees which were to be estab-

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43 Tomilinson, *supra* note 20 at 237.

44 *See* BHANDARY M. LEELADHARA, INDIA'S POSITION ON MULTILATERAL TREATIES DEPOSITED WITH THE UN SECRETARY GENERAL, STATUS AS OF 31 DECEMBER 2004, IN INDIA AND INTERNATIONAL LAW 345 (Bimal N. Patel ed, 2005) (India is a party to at least 10 treaties regarding slavery and slave related treaties that impose an obligation on the member state to take effective steps to criminalize, punish, and provide mutual assistance to other member states dealing with slavery.)

45 INDIA CONST. art.23(1).

46 *Id.* at art. 24.

47 *Id.* at art. 39(e).

48 Tomlinson, *supra* note 20 at 244. INDIA PEN. CODE §§ 363, 367, 370-71, 374 (prohibits unlawful compulsory labor).

49 The Bonded Labour System (Abolition) Act, No. 19 of 1976, INDIA CODE (1997), art. 4, http://ncpr.gov.in/Acts/Abolition_of_Bonded_Labour_System_Act_1976.pdf. (This act defines the bonded labor system as a "system of forced, or partly forced labour under which a debtor enters into, or is presumed to have entered into, an agreement with the creditor," to the effect that the debtor might forfeit certain basic rights).

lished by individual states.[50] This act requires the identification, release, and rehabilitation of all bonded laborers in the country and cancels their outstanding debts.[51] Violators of the BLA are subject to up to three years imprisonment and an INR $2,000 fine for each violation of the BLA.[52] Numerous laws also proscribe Child Labor.[53] Laws have also been adopted on the state level in an attempt to eradicate the bonded labor systems particularly present in each state.[54]

The justices of the Indian Supreme Court have further interpreted the definitions of forced labor and bonded labor to include those who are paid less than the minimum wage for their services.[55] In a subsequent case, the court created a legal presumption that once the court determines that a worker provided "forced labour," it is to be presumed that "he is required to do so in consideration of an advance or other economic consideration received by

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50 For more in-depth information about the act, *see*, L. MISHRA: BURDEN OF BONDAGE (1997); *and* Y. REDDY: BONDED LABOUR SYSTEM IN INDIA (1995)

51 BLA, *supra* note 48, art. (6)(1), art.4.

52 *Id* at art. 18.

53 Specifically, The Children (Pledging of Labor) Act, The Juvenile Justice (Care and Protection) Act, The Factories Act, and the Child Labour (Prohibition and Regulation) Act. See, The Children (Pledging of Labor) Act, No.2 of 1933 (1933); INDIA CODE, art.2, http://indiacode.nic.in/fullact1.asp?tfnm=193302; The Juvenile Justice (Care and Prevention) Act, No. 56 of 2000; INDIA CODE, art. 26, http://indiacode.nic.in/fullact1.asp?tfnm=200056; The Factories Act, No. 63 of 1948; INDIA CODE (1993), arts. 67, 71, http://www.labour.delhigovt.nic.in/act/html_ ifa/fa1948_index.html; The Child Labour (Prohibition and Regulation) Act, No. 61 of 1987; INDIA CODE (1993), sched. A, available at http://www.bba.org.in/resourcecentre/clprohibtion&regulationact.php.

54 ILO, Stopping Forced Labour, *supra* note 41 at 38.

55 *See*, People's Union for Democratic Rights v. Union of India, AIR 1982 S.C. 1473.

him and is therefore a bonded labourer."[56] These decisions have paved the way for an expansive definition of a "bonded labourer" for purposes of the Act.[57] Despite this expansive definition of bonded labourer, statistics reveal that the number of people living in bonded slavery in India is horrifyingly high. Shortly after the implementation of the Bonded Labor (Abolition) Act, a 1978-79 survey undertaken by the Ghandi Peace Foundation and the National Labour Institute, estimated that in the ten Indian States surveyed 2,617,000 Indians were living as bonded labourers.[58] Now roughly thirty years later, the 2009 U.S. Department of State Country Human Rights Reports show that forced or compulsory labor practices remain widespread and that successful prosecutions are rare.[59] It is hard to determine the actual number of those currently living in contemporary forms of slavery, but what is clear is that the number has not decreased since the implementation of the legislation against slavery or slave-like practices.[60] An October 1995 report submitted to the Indian Supreme Court by

56 Bandhua Mukti Morcha v. Union of India, AIR 1984 S.C. 802. *See also*, Neeraja Choudary v. State of Madhya Pradesh, AIR 1984, S.C. 1099 (There the court held that if a person provides forced labour for no remuneration or nominal remuneration, the presumption is that the person is a bonded labourer entitled to the benefits available under the provisions of the Act.).

57 ILO, Stopping Forced Labour, *supra* note 41, at 34.

58 Gandhi Peace Foundation and the National Labour Institute, *National Survey of the Incidence of Bonded Labour*, National Labour Institute, New Delhi, 1979, page 18 (The survey was based on a random sample of 1,000 villages in 10 different states).

59 *See* U.S. Dep't of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices: India (2009), http://www.state.gov/g/drl/rls/hrrpt/2009/sca/136087.htm (last visited Mar. 10, 2011).

60 ILO, Stopping Forced Labour, *supra* note 41, at 36. The federal Government of India has openly recognized the difficulty of collecting reliable statistics on slavery and slavery like practices such as bonded labour. *Id.*

the Commission on Bonded Labour in Tamil Nadu estimated that there were 1,250,000 bonded labourers living in the single State of Tamil Nadu.[61] As recently as March 11, 2011, Swami Agnivesh, Chairman of the Bonded Labour Liberation Front was quoted as saying at the National Convention on Bonded Labour in Chennai, India, "Instead of dying out, bonded labour is actually on the rise today, despite the government's claims to the contrary."[62]

India is failing to enforce its antislavery legislation and failing to appropriately punish the violators when they do end up before a judicial figure in the courtroom. Some of the reasons for the failure to enforce the existing legislation are common plagues of civilization: greed, corruption, and apathy.[63] The Indian government has blamed its failure to eradicate bonded labor on a "lack of sensitivity and will to deal with the problem-particularly at the lower levels of public administration-and a shortage of resources at all levels for the total eradication of bonded labour."[64] The Bonded Labourer (Abolition) Act set up district Vigilance Committees to oversee and implement the Act at the lowest level of government. The National Human Rights Commission, tasked in 1998 with monitoring the Vigilance Committees' work in the thir-

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61 ILO, Stopping Forced Labour, *supra* note 41, at 35.

62 TNN, *Bonded Labour: The Barbarity Continues in Tamil Nadu,* THE TIMES OF INDIA, Mar. 11, 2011, http://articles.timesofindia.indiatimes.com/2011-03-11/chennai/28679224_1_labour-irulas-rehabilitation-measures. (last visited Mar. 10, 2011).

63 Ravi S. Srivastava, Bonded Labour in India: Its Incidence and Pattern (Int'l Lab. Off. Working Paper No. WP43, 2005) at 35. *See also*, AntiSlavery Int'l, Forced Labour in the 21st Century 9 (2000), http://www.antislavery.org/homepage/resources/forcedlabour.pdf.

64 ILO, Stopping Forced Labour, *supra* note 41, at 38.

teen states with the highest prevalence of bonded laborers, found that the state governments failed to utilize the Vigilance Committees at all.[65] Moreover an investigation by the Parliamentary Committee revealed that "of the funds allocated for rehabilitation [of the newly freed bonded laborers] in 1996, only 38.9% had actually been used for that purpose."[66] Without the initial rehabilitation assistance that the laborers are to be provided with under the Bonded Labourer Abolition Act, even those who are officially set free often slide back into slavery.[67]

Another reason for India's failure to enforce its laws and punish offenders is its culture of discrimination based on its people's entrenched belief in the caste system.[68] Many of the bonded laborers belong to the Dalits, the historically disadvantaged or "untouchables" caste.[69] This discrimination fuels the corruption such that the states of Gujarant and Rajasthan, which have the highest rates of bonded labor, deny the very existence of debt bondage within their territories.[70]

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65 ILO, Stopping Forced Labour, *supra* note 41, at 38-39.

66 Tomlinson, *supra* note 20, at 248. *See also*, Human Rights Watch, The Small Hands of Slavery: Bonded Child Labor in India 193 (1996), http://www.hrw.org/sites/default/files/india969.pdf.

67 ILO, Stopping Forced Labour, *supra* note 41 at 38-39.

68 Anti-Slavery Int'l, *supra* note 63 at 9.

69 U.S. Department of State Human Rights Report, *supra* note 59. Anti-Slavery Int'l, Contemporary Forms of Slavery Related to and Generated by Discrimination: Forced and Bonded Labour in India, Nepal, and Pakistan (2003), http://web.archive.org/2003/701174628/http://www.antislavery.org/archive/submission/submission2003-discrimBL.htm ("Many local officials continue to show a reluctance to implement legislation which prohibits bonded labour [...] because the individuals and institutions themselves are inherently discriminatory and sympathise with the idea that Dalits owe a duty of labour to landlords.").

70 Human Rights Watch, The Small Hands of Slavery: Bonded Child Labor

Although the Indian Supreme Court has embraced an expansive definition of bonded labor at the lower levels of the judicial system, judges often refuse to "issue a release certificate even after all the ingredients of bonded labour system have been proven beyond doubt."[71] Thus bonded laborers often lack effective legal remedies because the district magistrate is their only hope.[72] The courts perform no better with regard to the Child Labor (Prohibition and Prevention) Act (CLA). The Indian Supreme Court in a straightforward ruling in *Mehta v. State of Tamil Nadhu* (1996) delineated the remedies for victims and the sentences and fines to be given to offenders as well as setting out the obligations of the state governments under the Act. [73] As shown through statistical studies gathering data from the *Mehta* ruling until 2006, lower courts have refused to follow the court's precedent and only 21,436 of the approximately 143,000 detected violations have resulted in convictions in the state courts, a mere 15% conviction rate.[74] Those offenders who are convicted often receive only light sen-

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in India *supra* note 66 at 182.

71 Anti-Slavery Int'l, Contemporary Forms of Slavery Related to and Generated by Discrimination: Forced and Bonded Labour in India, Nepal, and Pakistan (2003), http://web.archive.org/2003/701174628/http:/ /www.antislavery.org/archive/submission/submission2003-discrimBL.htm (Statement by the Former Indian Secretary of Labour)

72 "In a 2002 Case, a district magistrate refused to issue orders for the release of a family of bonded laborers, declaring that because they had borrowed money from the landowners, they were ordered to remain in the village until the debt was repaid." Tomilinson, *supra* note 20, at 249. Bonded laborers cannot afford to appeal an adverse decision.

73 Mehta v. State of Tamil Nadhu, A.I.R. 1996 S.C. para. 31.

74 Tomilinson, *supra* note 20 at 251. Ministry of Labour & Employment, Figures on Child Labor, http://labour.nic.in/cwl/EnforcementFiguresonchildLabour.pdf).

tences.[75] Employers of children in a hazardous occupation should under Article 3 of the CLA receive sentences of imprisonment, yet employers rarely spend even a day inside a jail.[76] Fines under article 3 of the CLA should range from INR $10,000 to $20,000 but are routinely decreased to a few hundred rupees.[77]

Along with the dismal judicial conviction rate, India also suffers from a lack of inspectors to even initiate investigations that could result in convictions.[78] Members of the Vigilance Committees, which are to enforce the CLA and BLA, are characterized as "totally pro-employer," overburdened, and susceptible to corruption.[79] For example, "the Secretary of Labour in Uttar Pradesh reported that there were only forty inspectors in the state to inspect 10,000 factories."[80] The two million inspections that did occur over a nine-year period produced only 143, 804 detected violations.[81] International efforts to encourage India to fulfill its

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75 Asha Bajpai, 'Right Against Economic Exploitation- -Child Labour', Child Rights in India, in Weiner, Burra & Bajpai, BORN UNFREE 21, 33 (2006).

76 Bajpai, *supra* note 76 at 31-32.

77 Human Rights Watch, The Small Hands of Slavery: Bonded Child Labor in India 193, *supra* note 67. INR stands for Indian rupee which is the official currency of the Republic of India

78 Bajpai, *supra* note 76, at 33.

79 Human Rights Watch, Small Change: Bonded Child Labor in India's Silk Industry 47 (2003) (quoting a member of the Varanasi Vilgilance Committee in Uttar Pradesh, discussing his colleagues on the Committee), http://www.hrw.org/sites/default/files/reports/india0103.pdf.

80 Tomilinson, *supra* note 20 at 250; MyronWeiner, The Child and the State in India: Child Labor and Education Policy in Comparative Perspective, in Weiner, Burra & Bajpai *supra* note 76 at 54.

81 Ministry of Labour & Employment, Figures on Child Labor, *supra* note 75. This number is low and likely evidence of corruption and bribery. See, Ranjan K. Agarwal, *The Barefoot Lawyers: Prosecuting Child Labour in the Supreme Court of India*, 21 ARIZ. J. INT'L & COMP. L. 663, 691 (2004).

international obligations to outlaw and eradicate bonded labor and child labor will need to focus not only on eliminating corruption in the judiciary but also in encouraging the state-appointed inspectors to fulfill their obligations.

III. The Need for an International Solution to Restore the Rule of Law.

The International Criminal Court was created, for among other purposes, to have "jurisdiction over the most serious crimes of concern to the international community" and "to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes."[82] One serious crime that has been of concern to the international community since the mid-1800s is enslavement.[83] It is surprising then that since the Rome Statute became operative on July 1, 2002, the ICC has not indicted a single suspect for the crime against humanity of enslavement.[84] Just as the British Parliament in 1789 could not plead ignorance of the nature and circumstances of the slave trade, neither can the ICC plead ignorance of contemporary slavery. It is true that the ICC should be a court of last resort and the principle of comple-

82 Rome Statute, *supra* note 2, at pmbl.

83 1815 Declaration Relative to the Universal Abolition of the Slave Trade [Congress of Vienna, Act XV] 2 Martens Nouveau Recueil 432, reprinted in 63 Parry's T.S. 473 (1969). ("This Declaration asserts that the slave trade had been viewed by just and enlightened men at all times as repugnant to the principles of humanity and universal morality. It notes that the governments resolved to put an end to the slave trade, and that all the Powers with colonies had recognized by legislative acts, treaties, and other formal undertakings, the obligation and necessity of abolishing it." Bassiouni, *supra* note 15 at 460.

84 *See* ICC Situations and Cases, http://www.icc-cpi.int/Menus/ICC/Situations+and+Cases/.

mentarity requires that victims initially turn to domestic courts for relief.[85] However, when the state fails to enforce its own standards and international law obligations, as in India, the ICC may intervene.[86] Additionally for child and bonded labor at the least, "international enforcement is necessary because as the forces of globalization perpetuate the widespread use of child labor, the burden of enforcing child labor norms should be shared by all nations."[87] How then does the International Criminal Court justify its reticence to engage in ending the culture of impunity towards these enslavement violations? Are the ICC's hands simply tied by jurisdictional obstacles or definitional difficulties or are there other reasons that the ICC is not addressing the problem of contemporary enslavement?

A. Subject Matter Jurisdiction: The Contextual Requirements for Crimes Against Humanity

An initial bar to the ICC's ability to address the problem of enslavement is that the enslavement must satisfy the criteria in article 7 of the Rome Statute that the prohibited crime be committed in the context as "a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[88] The use of the word "attack" does not indicate that the

85 Rome Statute, *supra* note 2, pmbl.

86 Rome Statute, *supra* note 2, pmbl.

87 Emily Camastra, *Note: Hazardous Child Labor as a Crime Against Humanity: An Investigation into the Potential Role of the International Criminal Court in Prosecuting Hazardous Child Labor as Slavery*, 15 GEO. J. POVERTY LAW & POL'Y 335 (2008).

88 Rome Statute, *supra* note 2, at art. 7 (1).

crime must have been committed in connection with an armed conflict.[89] Instead the Rome Statute interprets the phrase "attack directed against any civilian population" to mean "a course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such an attack."[90] While it may not be easy to satisfy any of these contextual requirements, the hardest portion of the chapeau requirement to meet is linking enslavement to "a State or organizational policy."[91]

The requirement of a widespread or systematic attack is an attempt to ensure that "single, isolated, dispersed or random acts that do not rise to the level of crimes against humanity, cannot be prosecuted as such."[92] Contemporary forms of slavery can be considered a "widespread or systematic attack" because the relationship between the oppressor and the victim exemplifies ongo-

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89 *Id.* at art. 7(2)(a); See also, ROY S. LEE, THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE, ISSUES, NEGOTIATIONS, RESULTS 93 (2d.ed. 2002). (If an armed conflict was required then crimes against humanity would be redundant, as they would be covered by Article 8 war crimes) *Id.*

90 *Id.*

91 This was the point of disagreement between the majority and dissenting judge in the Pretrial Chamber decision on the situation in the Republic of Kenya. ICC-01/09, 34-40, 48-54, 63-76. The dissenting Judge failed to "see a State policy according to which the civilian population was attacked. Information that some local politicians were engaged in the organization of violent acts does not necessarily entail that a policy was established or at least endorsed at the high level of the State." *Id.* at 75. The Majority found that planning by "local leaders, businessmen and politicians associated with the two leading parties" was sufficient. *Id.* at 49.

92 Amnesty Int'l, *The International Criminal Court Fact Sheet 4, Prosecuting Crimes Against Humanity*, http://web.amnesty.org/library/Index?ENGIOR400052000?open&of=ENG-385.

ing acts of oppression, as most modern forms of slavery involve exploitation over a long period of time.

Additionally, the widespread or systematic test is "disjunctive, a prosecutor need only satisfy one or the other threshold."[93] Widespread, as defined by case law, focuses on the "large-scale nature of the attack and the number of victims."[94] The huge number of Dalits living in bonded slavery in India could satisfy the widespread requirement.[95] Systematic has recently been defined as "the organized nature of the acts of vigilance and the improbability of their random occurrence."[96] The large number of Dalits enslaved could also be categorized as an attack directed on a civilian population.[97] The employment of Dalits as bonded laborers is a consequence of continued targeting of members of that caste.

Under the Rome Statute another requirement for a crime against humanity is that it must be "pursuant to or in furtherance

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93 ROBERT CRYER, HAKAN FRIMAN, DARRYL ROBINSON, ELIZABETH WILMSHURST, AN INTRODUCTION TO INTERNATIONAL CRIMINAL LAW AND PROCEDURE, 236 (2d. ed. 2010).

94 Prosecutor v. Tadic, Case No. IT-94-1-I, Judgment, ¶ 206(Int'l Crim. Trib. for the former Yugoslavia May 7, 1997); Kunarac et.all, *supra* note 106, at ¶ 428; and The Prosecutor v. Al Bashir, Case No. ICC -02/05-01/09, First Warrant of Arrest for Omar Hassan Ahmad Al Bashir, ¶ 81 (March 4, 2009), http://www.icc-cpi.int/iccdocs/doc/doc639078.pdf.

95 U.S. Department of State Country Report for India, *supra* note 59. Choosing to focus on the plight of the Dalits would also satisfy the civilian population requirement as "the potential civilian victims of a crime under article 7 of the Statute are groups distinguished by nationality, ethnicity or other distinguishing features." Pre-Trial Chamber II, Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo, ICC-01/05-01/08-424, para.76.

96 *See e.g.*, Nahimana, Case No. ICTR 99-52-A, Judgment ¶ 920 (Int'l Crim. Trib. for Rwanda Nov. 28, 2007), Al Bashir arrest warrant case, *supra* note 128, at ¶ 581.

97 Rome Statute, *supra* note 2, at art. 7(1).

of a State or organizational policy to commit such an attack."[98] Comment 6 to the ICC Elements of the Crimes states that a policy "may be implemented by a deliberate failure to take action which is consciously aimed at encouraging such attack."[99] Regarding bonded labor in India, governmental officials often turn a blind eye to the forced labor within their jurisdiction.[100] Additionally, the lower levels of the judicial system routinely refuse to enforce the legislation outlawing bonded labor and child labor, which could satisfy comment six of the elements.[101] The lower level state investigators are often corrupted from owning slaves themselves or accepting bribes; they permit other civilians to continue exploiting Dalits in their region, and this may be enough to meet the state policy requirement.[102] On the other hand, the upper levels of the Indian government has passed laws which appear to combat slavery but lack enforcement; this undermines the state organizational policy.[103]

The ICC could then, with some difficulty, meet the Chapter 7 contextual requirements. As India is wary of the ICC, it has not yet signed the Rome Statute. Therefore, it is likely that if the ICC brought an indictment against an Indian citizen, India would

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98 Rome Statute, *supra* note 2, art. 7(2)(a).

99 Elements of the Crimes, *supra* note 115, at footnote 6.

100 U.S. Department of State Country Reports India, *surpa* note 59.

101 *Id.*

102 ICTY, *Prosecutor v. Blaskic,* Case No. IT-95 -14-T, Judgment, 3 Mar. 2000, para. 204. (The policy "does not necessarily need to be conceived at the highest level of the State Machinery." See also, Pretrial Chamber II Situation in the Republic of Kenya, at 37 ("Hence, a policy adopted by regional or even local organs of the State could satisfy the requirement of a State policy.").

103 See *Infra* Part II.

attempt to improve its judicial system as quickly as possible, so that under the principle of complementarity the ICC would no longer have subject matter jurisdiction. [104]

B. Subject Matter Jurisdiction: The Prohibited Act: An Uninterpreted Definition of Enslavement

To be fair, the ICC is prosecuting the war crime of "conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities" and the crime of "committing rape, sexual slavery, enforced prostitution."[105] The arrest warrant for Joseph Kony also includes a count for the crime against humanity of enslavement within the war context.[106] However, it is important for the ICC to send a message to those who practice enslavement outside of the context of war; they should fear prosecution, but no warrants have ever been issued.

i. The Term "Enslavement"

Article 7 (c) of the Rome Statute states that enslavement "means the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular wom-

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104 *Id.*

105 *See e.g.*, Prosecutor v. Kony, Case No. ICC-02/04-01/05, Warrant of Arrest for Joseph Kony, (Sept. 25, 2005), http://www.icc-cpi.int/iccdocs/doc/doc97185.PDF.

106 *Id.* Kony has recently become a common figure in the media and military advisors are being deployed to locate Kony and serve the arrest warrant which has been outstanding since 2005. *See,* "Joseph Kony," THE NEW YORK TIMES, Mar. 25, 2012.

en and children."[107] The first part of the definition is essentially borrowed from the 1926 Slavery Convention, which was the first international instrument to define slavery.[108]

Crucial to the 1926 Slavery Convention is the formal ownership paradigm where the master exerts physical custody and ownership over the victim.[109] While the types of practices that constitute slavery or slave-related practices are expanded in the 1956 Supplemental Convention on the Abolition of Slavery, the Slave Trade, and Institution Similar to Slavery, the definitions still retain the concept of formal ownership rights.[110] Other international agreements seem to be moving away from the formal ownership paradigm towards "a functional paradigm that takes into account extreme economic exploitation."[111] A question that the ICC must address is which paradigm the term enslavement of Rome Statute article (7)(c) is meant to incorporate. If the court chooses to embrace the historical ownership paradigm, the term will be under inclusive and will bar the ICC from hearing cases involving many of the contemporary forms of slavery in which it is impossible to demonstrate complete physical control. As Pro-

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107 Rome Statute, *supra* note 2, at art. 7(c).

108 Bassiouni, *supra* note 15, at 466; The 1926 Slavery Convention, 60 L.N.T.S. 253, reprinted in 21 AM. J. INT'L L. 171 (Supp. 1927) (art. (1)(a) states "Slavery is the status or condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.") *Id.*

109 Bassiouni, *supra* note 15, at 454-56.

110 Camastra, *supra* note 88 at 343. *See*, Supplemental Convention, *supra* note 26, at art. 1. (Slavery is expanded to include: debt bondage, serfdom, selling women into marriage, and child labor exploitation.) *Id.* (Child Labor exploitation includes "a child or young person under the age of 18 years, [who] is delivered by either or both of his parents or by his guardian to another person." *Id.* at art. 1(d).

111 Camastra, *supra* note 88, at 342-43.

fessor Cherif Bassiouni explains, "whenever control is less than total, such as when it's partial and limited in time, it is removed from the system of [slavery] protection developed by these international instruments."[112] For example, by this definition, the use of children in sweatshops as forced labor would not be slavery because it is "'disguised by legitimate or quasi legitimate labor practices' in that the employer claims that the worker has agreed to work and to the terms of conditions of employment out of his/her own free will, and that the worker is 'free' to leave the 'employment' at any time."[113]

Human Rights Case Law has been split over which paradigm to choose. In *Siliadin v. France* the European Court of Human Rights chose to follow the historical ownership paradigm. In that case a Togolese child living in France had been held as an unpaid domestic worker for more than four years, working fifteen hour days without any days off.[114] The court did find against France, but it held that there was no violation pertaining to slavery because there had been no exercise of "a genuine right of legal ownership over the victim."[115] If the ICC were to endorse this definition of enslavement, many of the more modern forms of slavery would reside outside its jurisdiction.

Embracing the other functional paradigm was the International Criminal Tribunal of Yugoslavia (ICTY), demonstrated in

112 Bassiouni, *supra* note 15, at 454-456.

113 Bassiouni, *supra* note 15, at 458.

114 European Court of Human Rights, Siliadin v. France, Applic. No. 73316/01, 26 July 2005.

115 *Id.*

Prosecutor v. Dragoljub Kunarac et. Als.[116] The case dealt with the "systematic detention and rape of women by Serbian Forces in the town of Foca, Bosnia in 1992."[117] The ICTY held, "The 'acquisition' or 'disposal' of someone for monetary or other compensation is not a requirement for enslavement."[118] The ICTY found that enslavement could occur where "the free will of the victim is rendered impossible or irrelevant by 'psychological oppression or socio-economic conditions.'"[119] The ICTY convicted Dragoljub Kunarac of gang rape, torture, and enslavement in Foca and rendered a 28-year imprisonment sentence.[120]Adoption of the ICTY's definition of enslavement would permit the ICC to take cases involving modern day forms of slavery.

Working in tandem with the ICTY's expansive reading of the definition of enslavement are the interpretations given to enslavement and slavery by United Nations Treaty bodies. Benjamin Whitaker, Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities, stated that "the phenomenon of slavery manifests several of the gravest forms of the violation of human rights: often it combines coercion, severe discrimination, and the most extreme form of economic exploitation."[121] The ILO Worst Forms of Child Labor

116 Prosecutor v. Dragoljub Kunareac et. al., Case No. IT-96-22 & 23-/1-A, Judgment, ¶ 117-19 (Int'l Crim. Trib. for the Former Yugoslavia June 12, 2002).

117 *Id.*

118 *Id.*

119 Camastra, *supra* note 88 at 344; Dragoljub Kunareac et. al. *supra* note 1.

120 *Id.*

121 Benjamin Whitaker, Special Rapporteur, *Updating of the Report on Slavery Submitted to the Sub-Commission in 1966,* U.N. Doc. CES E/CN.4/

Convention 182 also takes an expansive view of slavery. Article 3 outlaws (a) "all…practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom, and forced or compulsory labor, including forced or compulsory recruitment of children for armed conflict."[122] The UN Working Group on the Contemporary Forms of Slavery has focused on defining slave-like practices rather than on what it means to exert formal rights of ownership over another person.[123] The ICC, although separate from the United Nations, should follow the U.N.'s lead in moving beyond formal ownership in defining enslavement.

Whenever a term is ambiguous, the Vienna Convention on the Law of Treaties directs interpreters to look to "supplemental means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion."[124] The Rome Statute Elements of Crime, indicate that the drafters had an expansive view of enslavement; in the first element they declared that "the perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty."[125] Comment

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Sub.2/1982/20/rev.1 (July 5, 1982).

122 Convention 182, *supra* note 23, art. 3(a).

123 *See* A. Yasmine Rassem, *International Law and Contemporary Forms of Slavery: An Economic and Social Rights Based Approach*, 23 PENN. ST. INT'L L. REV. 809, 833 (2005).

124 Vienna Convention on the Law of Treaties, art. 32, May 23, 1969, 1155 U.N.T.S. 331.

125 United Nations Preparatory Commission for the International Criminal Court, Report of the Preparatory Commission for the International Criminal Court Addendum Part II Finalized draft text of the Elements of Crimes, Enslavement (7)(c)(1), (2 Nov. 2000) U.N. Doc. PCNICC/2000/1/Add.2,

11 states that:

> It is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. It is also understood that the conduct described in this element includes trafficking in persons, in particular women and children.[126]

Interestingly, although the last sentence about "trafficking in persons, in particular women and children" is included in the actual Rome Statute, the section mentioning forced labor and similar deprivation of liberty is not.[127] When the Summary of Statements devised in a plenary session in connection with the adoption of the report of the Working Group on the Rules of Procedure and Evidence and the report of the Working Group on Elements of Crime is consulted to see if any countries commented on the interpretation of the elements of enslavement, it is discovered that enslavement was not mentioned.[128] It does not require a tortured reading

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http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N00/724/27 /PDF /N0072427 pdf?OpenElement. [hereinafter Elements of Crimes]

126 *Id.* at Comment 11.

127 Rome Statute, *supra* note 2, at art. 7(2)(c).

128 United Nations Preparatory Commission for the International Criminal Court, Summary of Statements Made in Plenary in Connection with the Adoption of the Report of the Working Group on the Rules of Procedure and Evidence and the Report of the Working Group on Elements of Crime, (13 July 2000) U.N. Doc. PCNICC/200/INF/4, http://daccess-dds-ny.un.org/doc/UNDOC/LTD/N00/531/40/PDF/ N0053140.pdf?OpenElement.

of enslavement to interpret it as encompassing the more modern forms of slavery. If the ICC interprets enslavement as including more than just formal ownership, then the current definition of enslavement will not be a bar to the ICC hearing cases involving contemporary forms of slavery.

ii. Criticisms/Critiques to Expanding the Definition

The trend of interpreting enslavement expansively to include contemporary forms of slavery has not developed without criticism. Suzan Miers claims that that using the term "slavery" in a way that covers such a wide range of practices renders it "virtually meaningless."[129] Certainly no one advocates detracting from the ICC's task of prosecuting systemic enslavement of entire populations by belligerent states. Others agree with Miers stating, "[T]he inclusion of a wide array of exploitative practices under the rubric of contemporary forms of slavery dilutes its meaning to the extent that international law has no power to deal with real slavery."[130] While this is a legitimate concern, slavery has undergone such a metamorphosis that very few instances of traditional chattel slavery exist, while the contemporary forms of slavery are omnipresent.[131] These exploitative practices should be addressed by the international community when domestic judicial systems fail to

129 SUZANNE MIERS, SLAVERY IN THE TWENTIETH CENTURY: THE EVOLUTION OF A GLOBAL PROBLEM 453 (2003).

130 Rassam, *supra* note 113, at 853.

131 Ashley V. Tomlinson, *Comment: Slavery in India and the False Hope of Universal Jurisdiction*, 18 TUL. J. INT'L & COMP. L. 231, 235 (2009). *See also*, KEVIN BALES, DISPOSABLE PEOPLE: NEW SLAVERY IN THE GLOBAL ECONOMY 5 (2004).

adequately prosecute them. Therefore, the ICC should interpret enslavement to include more than just legal ownership to enable the ICC to fulfill its purpose in ensuring that "the most serious crimes of concern to the international community as a whole" do not go unpunished.[132]

iii. Personal Jurisdiction

Even after the case for subject matter jurisdiction has been tenuously made, prosecutors will have a difficult time establishing personal jurisdiction over some of the worst modern day slavery offenders. India, Nepal, and Pakistan, three of the main countries with widespread enslavement, are not signatories to the Rome Statute.[133] Prosecution is to be initiated under the Rome Statute by: (a) referral to the Prosecutor by a State Party in accordance with article 14, (b) referral by the Security Council acting under Chapter VII of the Charter of the United Nations, or (c) by the prosecutor's own initiative based on information of crimes being committed within the jurisdiction of the court.[134] Article 12, however, limits the court's jurisdiction to parties of the statute, where the state in which the crime occurred is a party to the statute, or where the accused is a national of a state which is a party to the statute.[135] Therefore, the only avenue for the ICC to exert jurisdiction over

132 Rome Statute, *supra* note 2, at prmbl.

133 Rome Statute, *supra* note 2. For a list of the State Parties to the Rome Statute see http://www.icc-cpi.int/Menus/ASP/states+parties/.(last visited Mar. 10, 2011). ("As of 12 October 2010, 114 Countries are State Parties to the Rome Statute of the International Criminal Court.") *Id.*

134 Rome Statute, *supra* note 2, arts. 13-14.

135 Rome Statute, *supra* note 2, arts. 12.

an Indian national would be if the matter is referred to the prosecutor by the U.N. Security Council.[136] A U.N. Security Council referral would require considerable political will to accomplish, especially since three of the five permanent members of the U.N. Security Council (China, Russia, and the United States) are not signatories of the Rome Statute.[137] In order for the U.N. Security Council to make such a referral, it would have to find that modern day slavery in India constituted a threat to "international peace and security."[138] This threat is not immediately observable, and on the surface bonded labor may appear to be a purely internal matter that should be dealt with by domestic law. However, looking closer at the situation, it is an example of a country flagrantly disregarding its treaty obligations.[139] When countries become comfortable flouting treaties, international peace and security are threatened, particularly when the practices undermine the value of human life. Although not likely, it is possible that the U.N. Security Council would refer the matter to the prosecutor. Therefore, jurisdiction, while perhaps a deterrent, is not a technical bar to the ICC's involvement in dealing with the contemporary forms of slavery. However, other countries with significant child labor, child conscription, bonded labor, and human trafficking problems are parties to the Rome Statute, and the ICC could start enslave-

136 Rome Statute, *supra* note 2, arts. 13-14.

137 U.N. Charter, Ch. V, art.23. (China, the Russian Federation, and the United States are not parties to the Rome Statute).

138 U.N. Charter, Chapter VII.

139 *See Infra* part A referencing the 79 international treaties about Slavery and Slave like practices.

ment prosecutions in one of those countries.[140]

iv. Criticisms/Critiques to Using the ICC to Address the Contemporary Forms of Slavery

One argument against using the ICC to prosecute enslavement violations perpetrated in India is that while it might achieve justice in an individual case, the ICC will not appropriately deter other Indian citizens from engaging in similar behavior. As Ashley Tomlinson explained:

> The prosecution of Indian Nationals in distant courtrooms, in countries with no comprehension of Indian cultural traditions, is unlikely to yield a paradigm shift in Indian social and labor practices. In order to eradicate modern forms of slavery in India, there must be an internal movement to dismantle caste bias and antiquated notions that value work over education. A distant courtroom is not the proper forum to bring these issues to the Indian masses, who are the ones that must instigate that change.[141]

While this criticism is directed specifically at addressing the enslavement problem in India with its caste system, it can easily be extended to other developing countries whose leaders may view the ICC's involvement as legal imperialism and resent the

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140 *See* The State Parties to the Rome Statute, *supra* note 85. Boliva, for example, is a party to the Rome Statute and has a large number of child laborers. *See*, Kurt Henne & David Moseley, *Combating the Worst Forms of Child Labor in Boliva*, 32 HUM. RTS. 12, 13 (2005).

141 Tomlinson, *supra* note 20, at 259-60.

ICC's interference.[142] Governments may actually move slower in their eradication of slavery if they resent the intrusion into their domestic sovereignty. However, not prosecuting because it may not deter future crimes sells the justice system short. Deterrence is just one of many objectives of international criminal law, and, thus, the ICC should not be ruled out as a solution purely because it may not be a deterrent.[143]

Another overarching concern is funding. It may be too costly for the ICC to police private acts of enslavement in domestic countries. The travel costs of bringing the evidence and parties before the ICC could be substantial.[144] Expenses would also accumulate when prosecutors travel to the countries to conduct the investigation.

The fact that most of the slave "owners" are frequently individual mill owners, or brick kiln owners, also creates a problem in that the ICC Prosecutor has a stated policy of prosecuting those bearing greatest responsibility for crimes.[145] Although the owners

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142 Kate Allan, *Prosecution and Peace: A Role for Amnesty before the ICC?*, 39 DENV. J. INT'L L. & POL'Y 239, 290 (2011). *See also*, Okechukwu Oko, *The Challenges of International Criminal Prosecutions in Africa*, 31 FORDHAM INT'L L. J. 343, 354 (2008) and Catalino Echiverri, "*International Justice as Legal Neo-Imperialism? The African Union's Problem with Universal Jurisdiction.*" Paper presented at the annual meeting of The Law and Society Association, Grand Hyatt, Denver, Colorado, May 25, 2009, http://www.allacademic.com/meta/p303754_index.html.

143 CRYER, at 22-39 (Listing some of the goals to be retribution, deterrence, rehabilitation of the offenders, incapacitation, denunciation, education, justice for victims, recording history, and post-conflict reconciliation.)

144 Due to the widespread nature of modern day slavery in many countries as discussed in *Infra Part A* a solution for India would only be a beginning of a solution for eradicating contemporary slavery.

145 Situation in the DRC, ICC A. CH. 13, paras. 66-82 (July 2006). Cryer points out however that neither the Prosecutor or the Court see "this as a legal

often bear sole responsibility for their actions, they are not high-ranking officials. These "small fish" do not attract the attention of the world compared with senior governmental officials who commit genocide, and it is appropriate for the ICC to address these pressing problems first.

V. Conclusion: How the International Community Should Address National Cultures of Impunity toward Modern Day Enslavement

A solution is needed to reduce the domestic culture of impunity that many nations hold towards contemporary forms of slavery. The ICC provides one possible avenue for relief, assuming it chooses to interpret its enslavement provision to include more than just chattel slavery by relinquishing the formal element of ownership, and that it can overcome the jurisdictional hurdles.[146] However, the ICC is not the most practical forum for producing long-lasting change in the countries plagued by the contemporary forms of slavery; a more permanent answer must be sought elsewhere.

Another alternative solution may be found in the model used by the International Justice Mission (IJM). IJM seeks to combat "victimization and violence on the level of the individual, and supports functioning public justice systems where the poor urgently need an advocate."[147] Their mission enables their staff (lawyers,

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limitation on the power of the Court" but rather a sensible view of "of the limitations of resources of the international court." Cryer, at 161.

146 Bassiouni, *supra* note 15, at 454.

147 International Justice Mission: Who We Are, *available at* http://www.ijm.org/who-we-are (last visited Mar. 4, 2012).

investigators, social workers, etc.) to come alongside countries such as India and work with the national governments to reduce the victims of modern day slavery community by community. The highest levels of the Indian government, for example, have demonstrated a commitment to ending bonded labor and child labor through the legislation it has passed and the judicial decisions the Supreme Court has rendered.[148] However, the enforcement of the legislation and judicial decisions fails at the lower levels of government.[149] IJM addresses this problem "[b]y pushing individual cases of abuse through the justice system from the investigative stage to the prosecutorial stage...determin[ing] the specific source of corruption, lack of resources, or lack of good will in the system denying victims the protection of their legal systems."[150] IJM collaborates with local authorities to best address the problems and meet victims' needs. Its goals are to provide victim relief, perpetrator accountability, survivor aftercare, and structural transformation.[151] The four-pronged approach enables IJM to alleviate an individual's immediate slavery, deter his or her oppressor from enslaving others, assist the former slave so that he or she will not slide back into bondage, and transform the local court and law enforcement so that similar situations in that area will be dealt with in accordance with the anti-slavery legisla-

148 *See*, CLA *supra* note 53; BLA, *supra* note 48; and the Indian Supreme Court Decisions *supra* notes 55 and 56.

149 *See*, *infra* Section 2.

150 International Justice Mission: What We Do, http://www.ijm.org/our-work/what-we-do (last visited Mar. 4, 2012).

151 *Id.*

tion.[152] Allaying the fears of the Indian government officials that they will be forced to relinquish control over their affairs, IJM employs national advocates who receive training in advocating for slaves and using the governing Indian law on the modern forms of enslavement, which strengthens the legal system in India.[153] As more cases are filed and the judges become more familiar with the existing anti-slavery laws and see advocates speaking for the weak and poor who had no previous voice, reduction of corruption and non-enforcement should follow in the lower levels of the Indian justice system.[154] Holding trials in the local Indian courts as opposed to the ICC, counters Tomlinson's criticism that justice in a distant courtroom will not effectuate meaningful change in the Indian society.[155] The efforts of IJM are highly visible to the Indian people and, therefore, are more likely to be more successful than the work of the ICC even if it adopts a better definition of enslavement. The demonstrated success of IJM's model in the

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152 Where IJM was involved with Project Lantern battling underage sex trafficking in the Philippines a five year assessment of the impact and change in the public justice system found that [a]t an overall level, Project Lantern's law enforcement-based approach to combating sex trafficking in Metro Cebu has demonstrated its merit by contributing to significantly enhanced police operations, services to rescued victims, and prosecution of criminals as well as to a public justice system that is increasingly capable and mobilized to track down on and deter sex traffickers. The evidence points to more vigorous and sustained law enforcement and criminal justice as crucial elements of a broader, comprehensive response to a phenomenon that is clearly deep-seated, multi-dimensional, and resistant to simple, short-term solutions." Andrew Jones, Rhonda Schlangen and Rhodora Bucoy, *An Evaluation of the International Justice Mission's "Project Lantern,"* (October 2010), *http://www.ijm.org/sites/default/files/resources/120610-Project-Lantern-Impact-Assessment-AJ.pdf.*

153 Statute, Art. 2(a). The Statute is set out in Security Council Resolution 1757 (2007).

154 ILO, Stopping Forced Labour, *supra* note 41, at 38.

155 Tomlinson, *supra* note 20, at 259-60.

Philippines, Cambodia, and India, offers hope of a solution for combating modern day slavery. Other non-governmental organizations interested in alleviating modern day slavery can follow IJM's model and partner with other countries with high rates of contemporary enslavement such as Nepal and Pakistan.[156]

As another British statesman, Edmund Burke stated 200 years ago, "[W]hen bad men combine, the good must associate; else they will fall, one by one, an unpitied sacrifice in a contemptible struggle."[157] Or, as it is more famously remembered, "All that is necessary for the forces of evil to triumph is for enough good men to do nothing."[158] When people defy the law and show no fear of its consequences by enslaving others, those who claim to minister in the law's name must not allow the flagrant disregard of the law as the lower levels of the Indian judicial system have done. Rather, they should rally to defend the laws, treaties, and *jus cogens* norms protect human beings essential dignity. If the national culture of impunity is allowed to continue unchecked in those areas of the world where modern day slavery is most prevalent, millions of fellow human beings will languish in bondage. Whatever solution the international community chooses to employ, various international organizations and individuals will need to "justify to all the world, and to their own consciences, the rectitude of the grounds and principles of their decision."[159] As

156 ILO, Stopping Forced Labour, *supra* note 41 at 34-39.

157 Edmund Burke, Thoughts on The Cause of the Present Discontents 106 (1770).

158 Edmund Burke: Appraisals & Applications, Daniel E. Ritchie ed. xiii (1990).

159 William Wilberforce, *supra* note 1, at 63.

Gary Haugen, president and founder of the International Justice Mission states in *Terrify No More*:

> What would this nation look like if we began to lead with riches of compassion, grandness, or purposes, and an abundance of hope? Indeed I think the God of history takes attendance. And he convenes a tribunal of our grandchildren, who will someday ask us, "Where were you?" "Where were you Grandpa, when the Jews were fleeing Nazi Germany and seeking safety on our shores?" "Where were you, Grandma when our African-American neighbors were being beaten for registering to vote?" … Likewise when our grandchildren ask us where we were when the weak and the voiceless and the vulnerable of our era needed a leader of compassion and purpose and hope---I hope we can say that we showed up, and that we showed up on time.[160]

160 GARY HAUGEN, TERRIFY NO MORE 32 (2005).

TWO SIDES OF THE SAME COIN: THE IMPLICATIONS OF *HODEL V. IRVING* ON PENNSYLVANIA'S INHERITANCE TAX

*Timothy J. Witt**

ABSTRACT: *This article argues that the right of inheritance consists of two complementary rights, the right of transmission and the right of succession, both of which should be afforded constitution protection under the Fifth Amendment following the United States Supreme Court's decision in Hodel v. Irving. The article, using Pennsylvania's inheritance tax and related case law as an example, examines the commonly held view that the right to inherit is a privilege created or permitted by the state that can be eliminated by the state at any time, whether by outright escheat or confiscatory taxation. In reviewing the Supreme Court's Irving decision, the article also evaluates and responds to arguments aimed at having that decision narrowly applied. Seeking to expand the application of the Irving decision to inheritance tax contexts, the paper notes the direct relationship between estate taxes and inheritance taxes and analogizes the right of succession with the constitutionally protected right to be the recipient of free speech.*

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I. INTRODUCTION

Americans take the right of inheritance for granted. Parents and elderly persons assume that their property will be appropriately transferred to their loved ones by will or the intestate system after they pass away. Sometimes, children presumptuously expect to receive inheritances from their parents. While individuals may consider the existence of legal obstacles that could impede the transfer of property to their heirs, few people, if any, anticipate legislative action that would abolish inheritance entirely. In the United States, as in other Western countries, inheritance has achieved nearly institutional status, and much scholarship has examined the societal role of inheritance.[1] However, the highest court in nearly every state in the union has handed down at least one decision expressly stating that the right of inheritance could be abolished by legislative fiat at any time by way of escheat provisions or confiscatory inheritance taxes. Regardless of whether a state would ever take such dramatic action, most Americans would, presumably, be shocked and alarmed to hear that state governments wield such extensive power over something considered as intensely personal and private as inheritance rights.

Until 1987, no constitutional authority provided any limit, either explicit or implicit, on the states' claim to sweeping control over inheritance rights.[2] In that year, however, the Supreme

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1 *See e.g.*, RONALD CHESTER, INHERITANCE, WEALTH, AND SOCIETY (Indiana University Press, 1982); ROBERT K. MILLER, JR. & STEPHEN J. MCNAMEE, INHERITANCE AND WEALTH IN AMERICA (Plenum Press, 1998).

2 *See e.g.*, Daniel J. Kornstein, *Inheritance: A Constitutional Right?* 36 RUTGERS L. REV. 741, 749 (1983-1984) (concluding that the right of inheritance is not a constitutionally-protected right).

Court of the United States decided the case of *Hodel v. Irving*. In articulating its reasoning in that decision, the Court implied that the right to transmit property by will or intestacy is a natural right that cannot be completely abolished without violating the "takings clause" of the United States Constitution, thus further implying that the right to inherit property is also a constitutionally protected right.

This article seeks to examine the implications of the Supreme Court's decision in *Hodel v. Irving* on Pennsylvania's inheritance tax, which, in light of the unanimity of state case law on the nature of inheritance rights, serves as a proxy for all state inheritance taxes. Part II begins by introducing the Commonwealth's inheritance tax and discussing the nature of inheritance and the inheritance tax. Part III examines and interprets the Court's decision in *Hodel v. Irving*. Part IV seeks to determine the significance of the *Irving* decision by applying its reasoning to the Pennsylvania inheritance tax and then concluding that the right of inheritance is protected by the Constitution and, accordingly, cannot be abrogated by the Commonwealth's *inheritance tax*. Part V provides a brief summary and conclusion of the ideas developed in the preceding four parts.

II. Pennsylvania's Inheritance Tax

Besides being the first state to levy an inheritance tax, having done so in 1826,[3] Pennsylvania is one of only a handful of states

3 1825-26 Pa. Laws 227-30.

that still imposes an effective inheritance tax as of 2012.[4] Pennsylvania's inheritance tax law[5] requires that an inheritance tax be paid on inherited property at pre-determined, statutory rates.[6] Not all inherited property is taxed, however, and several categories of transfers are exempt from the inheritance tax.[7] Taxable transfers of inherited property are taxed at rates based on the relationship between the decedent and the receiving heir.[8] Transfers to a decedent's spouse are taxed at a rate of zero percent.[9] Transfers to a decedent's grandparents, parents, sons-in-law, daughters-in-law, and lineal descendants are taxed at a rate of four and one-half percent.[10] Siblings of a decedent who receive inherited property are taxed at a rate of twelve percent,[11] and transfers to all other collaterals are taxed at a rate of fifteen percent.[12]

As Pennsylvania's case law makes clear, the Common-

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4 As state and federal tax law changes, this list is constantly in flux. For an example of the changes to the list of states with effective inheritance taxes, see JULIEANNE E. STEINBACHER & ADRIANNE J. STAHL, PENNSYLVANIA TRUST GUIDE: A HANDBOOK FOR TRUSTEES AND THEIR ADVISORS 525 (2008) (listing states with effective inheritance or estate taxes as being Connecticut, Indiana, Iowa, Kansas, Kentucky, Maryland, Nebraska, New Jersey, Oregon, Pennsylvania, and Tennessee). *See also* Jeffrey A. Cooper, *Interstate Competition and State Death Taxes: A Modern Crisis in Historical Perspective*, 33 PEPP. L. REV. 835, 877-79 (2006) (listing many of the states with effective inheritance taxes and discussing how the list of states with effective inheritance or estate taxes is in flux).

5 72 PA. STAT. ANN. §§ 9101-9196.

6 *Id.* § 9106.

7 *Id.* §§ 9111-9113.

8 *Id.* §§ 9106, 9116.

9 *Id.* § 9116(a)(1.1)(ii).

10 *Id.* § 9116(a)(1). Transfers to a parent from a decedent twenty-one years of age or younger are taxed at a rate of zero percent. *Id.* § 9116(a)(1.2).

11 *Id.* § 9116(a)(1.3).

12 *Id.* § 9116(a)(2).

wealth's inheritance tax is a levy on the right of inheriting property from a decedent rather than the transfer of inherited property itself. This right, also known as the right of succession, is well-recognized in Pennsylvania jurisprudence[13] and is applicable when property is inherited either by will or intestacy.[14] With regard to the right of succession, however, Pennsylvania case law has not used the term "right" in the deontological, status-based sense. Instead, Pennsylvania courts have equated the right of succession with "the *privilege* of receiving at death the property possessed by a decedent."[15] In characterizing such transactions as a privilege, Pennsylvania courts have also been unequivocal in articulating the statutory basis of that privilege.[16]

A. The Privilege of Succession

Pennsylvania case law unambiguously affirms the assertion that the right of succession is merely a privilege created, permitted, and sustained by the legislature. This conclusion has been expressed with increasing clarity in the decisions of the Commonwealth's Supreme Court and Superior Court.

One of the Court's earliest opportunities to address the nature of succession came in 1866 in the case of *Strode v. Commonwealth*.[17] In that case, Pennsylvania's Supreme Court was

13 In re Kirkpatrick's Estate, 275 Pa. 271 (1922); In re Tack's Estate, 325 Pa. 545 (1937); In re Lacey's Estate, 19 Pa.C.C. 431 (1897).

14 In re Lacey's Estate, 1897 WL 3417; In re Tack's Estate, 325 Pa. 545 (will); In re Webb's Estate, 250 Pa. 179 (intestacy). In re Belefski's Estate, 413 Pa. 365 (both); In re Wright's Estate, 391 Pa. 405 (both).

15 In re Kirkpatrick's Estate, 275 Pa. 271, 274 (1922) (emphasis added).

16 *Id.*

17 Strode v. Commonwealth, 1866 WL 6214 (Pa. 1866).

asked to determine the taxability of inherited bonds issued by the federal government.[18] The lower court, in deciding for the Commonwealth that the bonds were taxable, described the nature of inheritance and the inheritance tax:

> [A]s the right to take by succession and testament is derived from the state, it must necessarily be enjoyed subject to such conditions as the state may impose. And if a condition be that the kindred or legatees shall pay a bonus, this is not a tax or burthen imposed on *their property,* or on the property of anybody else. It is simply the price of the privilege which the state has conferred upon them. If they do not choose to avail themselves of the privilege they need not pay the price, and are no worse off than before.[19]

In quoting and briefly affirming the lower court's decision, the Supreme Court explained that "the opinion of the learned judge below is so satisfactory as to leave very little for us to add."[20]

In 1895, the Pennsylvania Supreme Court decided *Commonwealth v. Henderson* and relied on the statutorily-created character of inheritance rights in reaching its decision.[21] Although the case raised the issue of whether a decedent's nephew, who was adopted by the decedent pursuant to a special act of the Commonwealth's General Assembly, was required to pay a collateral inheritance tax on property devised to him by the decedent, the court also

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18 *Id.* at *1.

19 *Id.* at *3.

20 *Id.* at *6.

21 Commonwealth v. Henderson, 172 Pa. 135 (1895).

examined the nature of inheritance.[22] In finding that the defendant-nephew was not liable for the collateral inheritance tax, the court noted, "The right of inheritance at all is, so far the administration of justice is concerned, purely statutory, and one of the results from the power to grant this right is that the legislature may prescribe the terms of taking."[23]

Seventeen years later, in *Goldstein v. Hammell*, the Pennsylvania Supreme Court was asked to resolve the question of whether a child adopted after the execution of the adopter's will has a claim on the adopter-decedent's testamentary estate.[24] The Court explained, "The right of inheritance is purely statutory, and he who claims a share in the inheritance must point to the law which transmits it to him."[25] As there was no basis for an adopted child's claim under Pennsylvania's then-existing pretermitted heir statute, the Court proceeded to rule against the adopted child, who was unable to support her claim with Pennsylvania law.[26] In 1921, the Court again applied this reasoning in *Boyd's Estate*, the dispositive facts of which were virtually identical with those in *Goldstein*.[27] Once again, the Court noted that "the right of inheritance is purely statutory."[28]

In *Kirkpatrick's Estate*, decided in 1922, the Court reiterated

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22 *Id.*

23 *Id.* at 139. In light of the constitutional jurisprudence, it is interesting to note the Court's, perhaps unwitting, use of the term "taking" to describe the extent of the General Assembly's power.

24 Goldstein v. Hammell, 236 Pa. 305 (1912).

25 *Id.* at 309.

26 *Id.*

27 In re Boyd's Estate, 270 Pa. 504 (1921).

28 *Id.* at 507.

the statutory nature of the right of succession.[29] When petitioned to decide whether amounts paid to the federal government for the federal estate tax could be deducted from a decedent's taxable estate for purposes of calculating Pennsylvania inheritance tax liability, the Court again reviewed the nature of inheritance.[30] Additionally, the Court also commented on the extent of the legislative power to tax inheritances: "[The] right or privilege [of inheritance] is purely a creature of statutory law. It did not exist at common law, and individuals possess no natural right to such succession; the sovereign authority that gives it may demand payment for the gift."[31]

In 1929, the Court decided *Knowles' Estate*, which provided yet another opportunity to comment on the nature of succession by inheritance.[32] Resolving a dispute about the relationship between the federal estate tax and the Pennsylvania inheritance tax and who is liable for payment of the latter, the Court concluded that the appellants were unaffected by the taxes and, therefore, were not interested parties.[33] In making this finding, the court noted that "the right to take under a will or by inheritance is a privilege...."[34]

Six years later, the Court commented once more on the nature of inheritance when it decided the matter of *Link's Estate*.[35] In *Link's Estate*, the Court was asked to determine whether suffi-

29 In re Kirkpatrick's Estate, 275 Pa. 271 (1922).
30 *Id.* at 273-74.
31 In re Kirkpatrick's Estate, 275 Pa. 271, 274 (1922).
32 In re Knowles' Estate, 295 Pa. 571 (1929).
33 *Id.* at 576-92.
34 *Id.* at 589.
35 In re Link's Estate, 319 Pa. 513 (1935).

cient evidence had been presented to conclude that the appellants were the decedent's surviving next-of-kin, which would keep the decedent's estate from escheating to the Commonwealth.[36] While explaining the justification for the state's power to escheat property, the Court stated, "It is only by the grace of the commonwealth that heirs or legatees are permitted to receive any benefit from a decedent's toil and energy."[37]

In *Tack's Estate*, the Court also discussed the nature of inheritance and its implications with regard to the inheritance tax.[38] Primarily about whether bonds issued pursuant to a statutory tax exemption could be included in a decedent's taxable estate, *Tack's Estate* provided the Court the opportunity to assert that a broad consensus existed with regard to views of the basis for right of succession.[39] The Court stated:

> The right to transmit or to receive property by will or through intestacy is not a natural right but a creature of statutory grant. Students of law all agree that the state has a right to declare an escheat of all the property of a decedent and therefore, as the price of allowing a legatee, devisee, or heir to inherit, it may appropriate to itself any portion of the property which it chooses to exact.[40]

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36 *Id.* at 515-18.

37 *Id.* at 516.

38 In re Tack's Estate, 325 Pa. 545 (1937).

39 In re Tack's Estate, 325 Pa. 545, 546-49 (1937).

40 *Id.* at 548.

By 1939, the Supreme Court of Pennsylvania had firmly established as authoritative precedent its views on the nature of inheritance. In that year, the Commonwealth's Superior Court integrated those views into its decision in *Crossley's Estate*.[41] In holding that adopted children and their descendants cannot inherit from their natural parents or grandparents through intestacy, the Superior Court noted, "The right to transmit or to receive property by will or through intestacy is not a natural right, but a creature of statutory grant."[42] Sixty-four years later, those views were still cited as precedential authority. The Superior Court, in *Estate of Rosen*, emphasized the power of the state: "It is only by the grace of the commonwealth that heirs or legatees are permitted to receive any benefit from a decedent's toil and energy."[43]

One of the most lucid explanations of the nature of inheritance and its implications is found in Justice John C. Bell's dissenting opinion in *Estate of Wright*.[44] There, the Supreme Court was asked to construe the provisions of a will to determine which beneficiaries would be saddled with the corresponding inheritance tax liability.[45] Disagreeing with his colleagues, Justice Bell concluded that the will in question should not be interpreted to have the inheritance taxes paid from the residuary bequests.[46] In articulating his reasoning, Justice Bell noted the state of the law with

41 In re Crossley's Estate, 135 Pa.Super. 524 (1939).

42 *Id.* at 527.

43 In re Estate of Rosen, 819 A.2d 585, 589 (2003) (quoting In re Link's Estate, 319 Pa. 513, 516 (1935)).

44 In re Estate of Wright, 138 A.2d 102 (Pa. 1958).

45 *Id.*

46 *Id.* at 417-34.

regard to the nature of inheritance:

> The law is well settled that beneficiaries of a decedent's estate (whether by will or descent) have *no natural or vested right* to receive such property; on the contrary, whatever rights such beneficiaries possess are derived from and governed by statute and consequently the beneficiaries take under and subject to applicable statutes. Unfortunately, it is established law that a State may validly escheat *all* of a decedent's net estate and such action would violate neither the United States nor the Pennsylvania Constitutions.[47]

The treatment of the nature of inheritance by Pennsylvania's courts is hardly exceptional. Courts or legislative bodies in every state, with the notable exception of Wisconsin, and the District of Columbia have reached conclusions similar to those expressed in Pennsylvania case law.[48] From a historical perspective, courts

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47 *Id.* at 431-32.

48 Daniel J. Kornstein, "Inheritance: A Constitutional Right?" 36 RUTGERS L. REV. 741 (1983-84). *See, e.g.*, Parker v. Foreman, 252 Ala. 77 (1949); Alaska Statutes §§ 13.11.005, 13.11.150 (1973); In re Estate of Wilkens, 54 Ariz. 218 (1939); Rockafellow v. Rockafellow, 192 Ark. 563 (1936); In re Estate of Burnison, 33 Cal. 2d 638 (1949); Wolfe v. Mueller, 46 Colo. 335 (1909); Appeal of Nettleton, 76 Conn. 235 (1903); Riggs Nat'l Bank v. Zimmer, 304 A.2d 69 (Del. Ch. 1973); In re Estate of Blankenship, 122 So. 2d 446 (Fl. 1960); Alexander v. Lamar, 188 Ga. 273 (1939); In re Estate of Lawrence, 45 Hawaii 199 (1961); Simmons v. Ewing, 96 Idaho 380 (1974); Ramsay v. Van Meter, 300 Ill. 193 (1921); Earle v. Indiana Nat'l Bank, 246 Ind. 251 (1965); In re Estate of Bradley, 210 Iowa 1013 (1930); State v. Mollier, 96 Kan. 514 (1915); Traughber v. King, 235 Ky. 658 (1930); Minor v. Young, 149 La. 583 (1920); United States Trust Co. v. Douglass, 143 Me. 150 (1948); Safe Deposit & Trust Co. v. Bouse, 181 Md. 351 (1943); Merchants Nat'l Bank v. Merchants Nat'l Bank, 318 Mass. 563 (1945); In re Estate of Hill, 349 Mich. 38 (1957); In re Eggert, 245 Minn. 401 (1955); Wilson v. Polite, 218 So. 2d 843 (1969); State ex rel. McClintock v. Guinotte, 275 Mo. 298 (1918); State ex

from other states have also agreed that the ability to inherit property is a statutorily-created privilege.[49] Professor Ronald Chester, a noted historian of American property law, asserts:

> From the time of the Revolution, American legal thinkers viewed both the right to transmit and to receive property at the death of its owner as positivistic, not natural rights: rights created and regulated by the state, rather than fundamental rights....To the leaders of a new nation casting off the shackles of a hereditary monarchy, the notion of inheritance rights as a creation of civil society, subject to its regulation, must have seemed both logically and politically sensible.... Among the revolutionary generation, Thomas Jefferson and his circle best exemplified American legal and political theory on the subject.... The Jeffersonians argued that any rights to transmit or receive property at an owner's death were "civil" not "natural rights": rights created by our society for its own convenience....American courts beginning with the Virginia case of *Eyre v. Jacob* were quite consistent in applying

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rel. Bankers' Trust Co. v. Walker, 70 Mont. 484 (1924); State ex rel. Slabaugh v. Vinsonhaler, 74 Neb. 675 (1905); Kanable v. Birch, 86 Nev. 558 (1970); Thompson v. Kidder, 74 N.H. 89 (1906); In re Santelli, 28 N.J. 331 (1958); Dillard v. New Mexico State Tax Comm'n, 53 N.M. 12 (1949); In re Estate of Becker, 47 Misc. 2d 443 (Surr. Ct. 1965); Vinson v. Chappell, 275 N.C. 234 (1969); Moody v. Hagen, 36 N.D. 471 (1917); Ostrander v. Preece, 129 Ohio St. 625 (1935); In re Will of Abrams, 182 Okla. 215 (1938); United States Nat'l Bank v. Snodgrass, 202 Or. 530 (1954); Hazard v. Bliss, 43 R.I. 431 (1921); Gibson v. Rickard, 143 S.C. 402 (1928); Fransioli v. Podesta, 21 Tenn. App. 577 (1937); Poole v. Stark, 324 S.W.2d 234 (Tex. Civ. App. 1959); State Tax Comm'n v. Backman, 88 Utah 424 (1936); In re Estate of Stacy, 131 Vt. 130 (1973); Commonwealth v. Fleet's Ex'r, 152 Va. 353 (1929); In re Estate of Ward, 183 Wash. 604 (1935); Black v. Maxwell, 131 W. Va. 247 (1948); Colonna v. Alton, 23 App. D.C. 296 (1904).

49 *See supra* note 47.

> the Jeffersonian, positivistic view of the right to transmit and receive property at death. The Virginia court's declaration of the civil as opposed to natural origin of these rights became a mainstay in the power of states to tax inheritance.[50]

B. Inheritance Tax on the Privilege of Succession

Pennsylvania case law also clearly establishes the nature of the Commonwealth's inheritance tax as a tax on the right of succession rather than a tax on the right of transmission or the property itself. In this sense, it is an excise tax levied on the occurrence of a particular event (*i.e.*, a transfer of property resulting from someone's death).[51] The Supreme Court made this clear in a highly-publicized case shortly before the Great Depression dealing with the estate of Henry Clay Frick, one of Pennsylvania's wealthiest residents at the beginning of the twentieth century.[52] In *Frick's Estate*, the court was called upon to decide how to apply the state's inheritance tax to an extensive estate with assets located in several states under a testamentary distribution scheme that included large bequests to charities.[53] It determined that "a multitude of authorities state...that this is not a tax on the tangible personalty in [other states], but *only on the right of transmission given by the laws of this state*, where testator and [the] distributees

50 Ronald Chester, "Inheritance in American Legal Thought," in INHERITANCE AND WEALTH IN AMERICA 23-24 (Robert K. Miller, Jr. and Stephen J. McNamee, eds., Plenum Press, 1998).

51 Estate of Super, 428 Pa. 476, 479 (1968) (citing Wright's Estate, 391 Pa. 405 (1958)).

52 In re Frick's Estate, 277 Pa. 242 (1923).

53 *Id.*

alike were and are domiciled."[54]

Eighteen years later, in *Schmuckli's Estate*, the Supreme Court of Pennsylvania reaffirmed this explanation of the inheritance tax.[55] There, the court found, "It is well settled, as argued by the Commonwealth, that an inheritance tax is not a tax upon the property itself, but rather a tax on the succession or right of inheritance of the assets of the estate of the decedent."[56] In 1960, the Court issued two opinions that further clarified the nature of the inheritance tax and distinguished it from estate taxes.[57] "The [inheritance] tax is on the beneficiary's right of succession to, or the privilege of receiving, either by will or under the intestate law, property possessed by a decedent at his death."[58] Furthermore, "[a]n inheritance tax is not an estate tax; the former is a tax on the right of succession to property and the latter is a tax on the transmission of property."[59] In *Estate of Remmel*, the Pennsylvania Supreme Court described inheritance taxes somewhat differently: "A]n inheritance tax is neither a tax on the property of the decedent or on the transfer of such property but rather a tax on the right of succession in the estate of the decedent."[60] Despite

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54 *Id.* at 260 (emphasis added).

55 In re Schmuckli's Estate, 341 Pa. 36 (1941).

56 *Id.* at 38 (citing In re Tack's Estate, 325 Pa. 545).

57 In re Estate of Hoffman, 399 Pa. 96 (1960); Estate of Loeb, 400 Pa. 368 (1960).

58 Estate of Loeb, 400 Pa. 368, 371 (1960) (citing Shugars v. Amusement Enterprises, Inc., 284 Pa. 200 (1925)).

59 In re Estate of Hoffman, 399 Pa. 96 (1960) (citing In re Wright's Estate, 391 Pa. 410 (1958); In re Harvey's Estate, 350 Pa. 58 (1944); In re Mellon's Estate, 347 Pa. 520 (1943)).

60 Estate of Remmel, 425 Pa. 325 (1967) (citing Belefski Estate, 413 Pa. 365 (1964); Tack's Estate, 325 Pa. 545 (1937); Orcutt's Appeal, 97 Pa. 179 (1881)).

subsequent statutory revisions, this view of the Commonwealth's inheritance tax has been consistently maintained by the state's appellate courts.[61]

III. *Hodel v. Irving*

In 1987, however, the Supreme Court of the United States handed down a decision calling into question the manner in which Pennsylvania case law characterized the Commonwealth's inheritance tax and the nature of inheritance itself.[62] *Hodel v. Irving* reached the Court on the issue of whether a federal statute violated the "takings clause" of the Fifth Amendment.[63] In deciding for the appellees that the statute effectuated an unconstitutional taking, the Court noted that the statute eliminated a property owner's

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61 In re Estate of Kleinhans, 454 Pa. 539, 545 (1973) (citing Remmel Estate, 425 Pa. 325, 328 (1967); Belefeski Estate, 413 Pa. 365, 369-70 (1964); Hoffman Estate, 399 Pa. 96, 100 (1960); Tack's Estate, 325 Pa. 545 (1937); Shugars v. Chamberlain Amusement Enterprises, Inc., 284 Pa. 200, 205 (1925); Orcutt's Appeal, 97 Pa. 179, 185 (1881)) ("[t]his Court has often recognized that the inheritance tax is imposed upon the privilege of receiving decedent's property, or alternatively, is a 'tax on the right of succession in the estate of the decedent'"); In re Estate of Morell, 455 Pa. 512, 516 (1974) (citing Hoffman Estate, 399 Pa. 96 (1960)) ("[t]he Pennsylvania inheritance tax is a tax on the right of succession to property....On the other hand, the Federal estate tax is a tax on the transfer of property...."); Estate of Beck, 489 Pa. 276, 280 (1980) (citing Remmel Estate, 425 Pa. 325 (1967); Tack's Estate, 325 Pa. 545 (1937)) ("[t]he Pennsylvania Inheritance Estate Tax is not a tax on property, but upon the right of succession or the privilege of receiving property possessed by the decedent"); Estate of Ross, 815 A.2d 30 (Cmwlth, 2003) (quoting In re Estate of Remmel, 425 Pa. 325, 328 (1967)) ("[a]n inheritance tax is neither a tax on the property of the decedent or on the transfer of such property, but rather a tax on the right of succession in the estate of the decedent").

62 Hodel v. Irving, 481 U.S. 704 (1987).

63 *Id.* at 706 ("[t]he question presented is whether the original version of the 'escheat' provision of the Indian Land Consolidation Act of 1983...effected a 'taking' of appellees' decedents' property without just compensation").

ability to transmit a certain category of property by either will or intestacy.[64]

Since the late nineteenth century, the fractionalization of Native American land ownership had been a serious and perpetual problem. Studies conducted by Congress in the 1960s indicated that approximately half of all acreage held in trust for the Native Americans by the federal government was owned in fractional shares.[65] Additionally, parcels totaling about three million acres were fractionally owned by six or more persons.[66] By the 1980s, when *Irving* was decided, the problem had only worsened. For example, forty acre parcels in the Sisseton-Wahpeton Sioux tribe's Lake Traverse Reservation were oftentimes subdivided into hundreds of undivided interests.[67] "The average tract [had] 196 owners, and the average owner [had] undivided interests in 14 tracts."[68] Forty-acre parcels generated annual total rents of $1,000, but several owners received only pennies in rental income from their share.[69] And, as the Court noted, the difficulty did not end there.

64 *Id.* at 716-18.
65 *Id.* at 708-09.
66 *Id.* at 709.
67 *Id.* at 712.
68 *Id.*
69 *Id.*

> The administrative headache [caused by fractional ownership] can be fathomed by examining Tract 1305, dubbed "one of the most fractionated parcels of land in the world." Tract 1305 is 40 acres and produces $1,080 in income annually. It is valued at $8,000. It has 439 owners, one-third of whom receive less than $.05 in annual rent and two-thirds of whom receive less than $1. The largest interest holder receives $82.85 annually. The common denominator used to compute fractional interests in the property is 3,394,923,840,000. The smallest heir receives $.01 every 177 years. If the tract were sold (assuming that the 439 owners could agree) for its estimated $8,000 value, he would be entitled to $.000418. The administrative costs of handling this tract are estimated by the Bureau of Indian Affairs at $17,560 annually.[70]

In 1983, Congress attempted to tackle the fractionated land ownership problem by passing the Indian Land Consolidation Act.[71] By having all fractional shares in land that did not meet certain requirements escheat to the tribe in whose reservation the land was located, Section 207 of the Act eliminated the possibility of inheriting those fractional shares.[72] Therefore, once a fractional

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70 *Id.* at 713.

71 *Id.* at 712.

72 *Id.* at 709. The text of Section 207 of the Indian Land Consolidation Act provided as follows:

> No undivided fractional interest in any tract of trust or restricted land within a tribe's reservation or otherwise subject to a tribe's jurisdiction shall [descend] by intestacy or devise, but shall escheat to that tribe if such interest represents 2 per centum or less of the total acreage in such tract and has earned to its owner less than $100 in the preceding year before it is due to escheat. *Id.*

share became a small, statutorily-defined size, it would automatically be escheated to the tribe upon the death of the owner. The tribe would then be able to consolidate these shares and, hopefully, stem the tide of further fractionalization.

Although many Native Americans favored the legislation,[73] some who would have otherwise inherited escheated fractional shares claimed that it violated their constitutional rights and filed suit in the United States District Court for the District of South Dakota.[74] The District Court found Section 207 of the Indian Land Consolidation Act to be constitutional,[75] holding that the plaintiffs "had no vested interest in the property of the decedents prior to their deaths and that Congress had plenary authority to abolish the power of testamentary disposition of Indian property and to alter the rules of intestate succession."[76] Consequently, the plaintiffs appealed to the Eighth Circuit Court of Appeals, which reversed the decision of the district court.[77] The Eighth Circuit conceded that the plaintiffs lacked a vested interest in the decedents' property.[78] It concluded, however, that the decedents had held a right to control the disposition of their property at death, which was derived from an early Sioux allotment statute.[79] The federal government subsequently appealed to the Supreme Court of the Unit-

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73 *Id.* at 712. The Sisseton-Wahpeton Sioux tribe, which appeared *amicus curiae* in support of the Department of the Interior, is one such example. Id.

74 *Id.* at 710.

75 Hodel, 481 U.S. at 710.

76 *Id.*

77 Irving v. Clark, 758 F.2d 1260 (8th Cir. 1985); Hodel, 481 U.S. at 710.

78 Irving, 758 F.2d at 1264; Hodel, 481 U.S. at 710.

79 Irving, 758 F.2d at 1264-65; Hodel, 481 U.S. at 710.

ed States.[80]

In its opinion, after summarizing the history of the Indian Land Consolidation Act and the procedural posture of the case, the Supreme Court concluded that the owners' descendants had standing to bring their lawsuit and then proceeded to analyze the descendants' claims under Fifth Amendment "takings clause" jurisprudence.[81] Quoting from the opinion authored by Chief Justice Rehnquist in *Kaiser Aetna v. United States*, the Court explained that "it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance."[82] Using this test, the Court found that the economic impact of the regulation and its interference with the reasonable investment backed expectations of the property owners were likely insufficient to support a finding that Section 207 of the Act was unconstitutional.[83] The Court noted, however, that "the character of the Government regulation [under Section 207 was] extraordinary."[84] It articulated its legal reasoning in the traditional language of property rights:

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80 Hodel, 481 U.S. at 710.

81 Hodel, 481 U.S. at 711-14.

82 *Id.* at 714 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979).

83 *Id.* at 714-16.

84 *Id.* at 716.

> In *Kaiser Aetna v. United States*, we emphasized that the regulation destroyed 'one of the most essential sticks in the bundle of rights that are commonly characterized as property—the right to exclude others.' Similarly, the regulation here amounts to virtually the abrogation of the right to pass on a certain type of property—the small undivided interest-to one's heirs.[85]

That property owners had the ability to dispose of their property using inter vivos transfers during life did not persuade the Court of the Act's constitutionality.[86] In holding that the Act, which completely abolished both descent and devise, was an unconstitutional taking, the Court reaffirmed the broad power of the state and federal governments "to adjust the rules governing the descent and devise of property without implicating the guarantees of the [Fifth Amendment]."[87] Drawing a distinction between prior Court decisions and its holding in *Irving*, the Court emphasized that under the facts of *Irving*, both descent and devise were completely abolished by the Act.[88]

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85 *Id.*
86 *Id.* at 716-17.
87 *Id.* at 717.
88 *Id.* at 718.

IV. Implications of Hodel on Pennsylvania's Inheritance Tax

The implicit reasoning employed by the Court in *Hodel v. Irving* has the potential to undermine nearly a century and a half of jurisprudence defining the nature of the right of inheritance.[89] By recognizing the right of transmission as a natural right, an uncompensated taking of which would constitute a violation of the Constitution, the foundation is laid for questioning the plenary power of the separate states to abolish the right of succession, whether by direct escheat or through confiscatory taxation.[90] However, an attempt to challenge the states' broad power over inheritance on Fifth Amendment grounds is contingent upon the Court's decision in *Irving* being interpreted as denying the government the right to abolish the right of transmission.

A. The "Strange Case" of Hodel v. Irving?[91]

At least one scholar of American inheritance law has concluded that *Irving* can and should be interpreted to limit its "radi-

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89 See e.g., Suzanne S. Schmid, *Escheat of Indian Land as a Fifth Amendment Taking in Hodel v. Irving: A New Approach to Inheritance?* 43 U. Miami L. Rev. 739, 758-63 (1989).

90 This precedent is contrary to the principle that inheritance is not a constitutionally-protected right previously identified by Daniel J. Kornstein, *supra* note 2 at 749. *See also* J.D. Truth & Shahid A. Butler, *Resurrecting "Death Taxes": Inheritance, Redistribution, and the Science of Happiness*," 16 J. L. & Pol. 765, 780-83 (2000) (arguing that the Supreme Court's decision in *Irving* should be narrowly interpreted and limited to its specific factual situation).

91 Ronald Chester, *Is the Right to Devise Property Constitutionally Protected? – The Strange Case of Hodel v. Irving* 24 Sw. U. L. Rev. 1195 (1995) (using the phrase "strange case" to describe *Irving* in light of the author's analysis).

cal potential" and its "importance in the field of inheritance law."[92] In presenting this argument, Ronald Chester has identified three reasons as to why the decision in *Irving* lacks precedential value or should be narrowly interpreted.[93] Chester first asserts that the decision really only ends up protecting the right to transmit at death by will, which lacks the historical pedigree of the right to transmit by intestacy.[94] Focusing on a single sentence of the opinion, Chester thus concludes that the Court intended only to protect the right to devise by will.[95] He then suggests that the decision may lack weight because the right to devise is "much less established than that of intestate succession."[96]

This reading of *Irving* is problematic for several reasons. It focuses on a single sentence in the Court's opinion and attempts to interpret the rest of the decision exclusively through the lens of that brief line. In the process, Chester ignores that sentence's context. That the Court concluded that it may be constitutionally permissible to abolish the right of descent must be considered in light of the fact that abolishing the right of descent would also have solved the land fractionalization problem facing the tribes and the Department of the Interior. The right of transmission is realized through either the right of descent or the right of devise, and abolishing only one would, therefore, not constitute an abolition of the right of transmission. The *Irving* decision could just as

92 *Id.* at 1207 (1995).
93 *Id.* at 1207-11.
94 *Id.*
95 *Id.*
96 *Id.* (quoting JESSE DUKEMINIER AND STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 13-14 (4th ed. 1990)).

easily be interpreted to mean that the government could abolish the right of devise so long as it left the right to descent intact. Such a reading accords with the "both" language employed by the Court: "What is certainly not appropriate is to take the extraordinary step of abolishing both descent and devise of these property interests..."[97] Furthermore, Chester's conclusion that the Court's decision protects only the right to devise does not necessitate a narrow reading of *Irving*. On one hand, the assertion that the right of devise is less well-established is questionable on historic grounds. Even if the right to devise had only scant historical support, however, the Court's unambiguous decision to protect it with a binding, precedential opinion neither could nor should be easily tossed aside and disregarded.

Second, Chester claims that *Irving* "is not technically saying that the complete abrogation of the rights of descent and devise is in itself unconstitutional."[98] Instead, he argues, "What the Court is saying is that 'complete abolition of both descent and devise of a particular class of property may be a taking' in circumstances such as those in *Irving*, where the Court felt alternative means of passing property at death were not realistically available."[99] To bolster his interpretation of *Irving*, Chester emphasizes the widespread

97 Hodel v. Irving, 481 U.S. 704, 718 (1987). The Court used the same language earlier in the opinion as well when it stated that "[i]n holding that complete abolition of both the descent and devise of a particular class of property may be a taking, we reaffirm the continuing vitality of the long line of cases recognizing the States', and where appropriate, the United States', broad authority to adjust the rules governing the descent and devise of property without implicating the guarantees of the Just Compensation Clause." *Id.* at 717.

98 Chester, *supra* note 91 at 1209.

99 *Id.*

availability and use of will substitutes.[100] Once again, Chester's reading of *Irving* is too narrow. The Court's decision should be analyzed from a perspective that takes into account both the narrower factual context and the full text of the decision. For example, the passages on which Chester focuses could just as easily (or, perhaps, more easily) be seen as an application of the general rule—that the right of descent and the right of devise cannot both be abolished—in light of the specific facts of *Irving*.

The Court's mention of the impracticality of using will substitutes is additional, unnecessary commentary on the particular factual circumstances in *Irving* and is not an explication of the general rule established in the decision. That Chester bases his conclusion on only a small portion of the opinion is problematic because, in doing so, he fails to address other parts of the decision that suggest the practical availability of will substitutes is of no legal consequence when the rights of descent and devise are both abrogated. For example, in discussing the economic impact of Section 207, the Court conceded, "Of course, the whole of the appellees' decedents' property interests were not taken by § 207. Appellees' decedents retained full beneficial use of the property during their lifetimes as well as the right to convey it *inter vivos*."[101] Nonetheless, immediately after recognizing this fact, the Court added, "There is no question, however, that the right to pass on valuable property to one's heirs is itself a valuable right."[102]

Related to his second argument's focus on will substitutes,

100 *Id.* at 1208-09.

101 Hodel, 481 U.S. at 715.

102 *Id.*

Chester's third argument is that *Irving* should be interpreted as a reaffirmation of the government's broad, all-encompassing authority over the privileges of descent and devise.[103] Therefore, as Chester suggests, the government has the power to abolish both of these privileges when individuals are able to use will substitutes, which differ from descent and devise in that they are privately regulated legal arrangements.[104] This explanation, however, does not limit the "radical" potential of *Irving*. While his third argument certainly reasserts and explains the government's authority over the rights of descent and devise (and, accordingly, its power to regulate those rights), his explanation fails to provide a sufficient justification for establishing the state's plenary power to abolish the right of transmission in its entirety.

Rather, Chester's explanation of the *Irving* decision would effectively redefine the right of transmission to include not only the rights of devise and descent but also the right to convey by will substitute. Apparently, the state has the power to include property transferred by will substitutes upon the owner's death in the estate of the decedent for estate tax or inheritance tax purposes.[105] Consequently, a law that either escheats a decedent's entire taxable estate or levies a one hundred percent tax rate on taxable estates would, absent an exemption, fall equally on assets transferred using will substitutes and those passed by descent or devise. If, at the very least, as Chester argues, decedents retain the right to transfer property by employing will substitutes, then special pro-

103 Chester, *supra* note 91 at 1209-11.

104 *Id.*

105 26 U.S.C.A. § 2031(a); 72 P.S. § 9107(c).

vision must be made for such property interests. Chester himself recognizes as much when he concludes that:

> The result of [his analysis] is a reading of Hodel v. Irving that contradicts [the] positivist thrust only in the extremely rare case, such as Justice O'Connor felt existed in Irving, where the modern inter vivos "escape hatch" was not practical. If this is true, legislatures, or Congress, will continue to have the ability constitutionally to regulate transfers made at death in any way they like so long as inter vivos will substitutes are not foreclosed on the facts. Thus arguably, a 100% tax on transfers by will or descent would be constitutional but not one that also tried to impose the same 100% tax on inter vivos will substitutes.[106]

Thus, Chester's interpretation of *Irving* does not undermine the natural right of transmission but instead increases the number of ways by which the right is exercised. The state must allow decedents' property to be transferred either by devise, descent, or will substitute. It cannot constitutionally abrogate transfer by all three, thereby according with the view that property transmission upon death is a constitutionally-protected natural right.

Since the Court's decision in *Irving*, courts have interpreted the decision in a way that reaffirms a natural rights view of the right of transmission. In these cases, courts have broadly described the holding of *Irving* without reference to any factors or considerations that would support a more narrow interpretation like that

106 Chester, *supra* note 91 at 1211.

proffered by Chester.[107] These courts describe the *Irving* decision as holding that a state cannot abolish both the rights of descent and devise, and they do not recognize or identify a concern by the Court about the practical availability of will substitutes.[108]

Ten years after deciding *Irving*, the Court handed down an opinion in *Babbitt v. Youpee* that further strengthens *Irving*'s implicit conclusion that the right of transmission is a constitutionally-protected natural right.[109] In that case, the Court was asked to examine the constitutionality of the same section of the Indian Land Consolidation Act that it had in *Irving*.[110] Section 207 had been amended in several significant respects, but it retained its essential character as a provision that, when certain conditions were met, escheated fractional property interests in Indian lands to the tribe.[111] In examining the amended provisions, the Court began by summarizing its decision in *Irving* in broad terms: "Key to the decision in Irving…was the 'extraordinary' character of the

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107 Eastern Enterprises v. Apfel, 524 U.S. 498, 541, 543 (1998); Boggs v. Boggs, 520 U.S. 833, 873 (1997); Amato v. Wilentz, 952 F.2d 742 (3d Cir. 1991); Philip Morris, Inc. v. Reilly, 312 F.3d 24, 43-45 (1st Cir. 2002); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 177 (4th Cir. 1988); District Intown Properties, Ltd. Partnership v. District of Columbia, 198 F.3d 874, 887-88 (D.C. Cir. 1999); Seawall Associates v. City of New York, 74 N.Y. 2d 92, 110 (Court of Appeals of New York, 1989).

108 Eastern Enterprises v. Apfel, 524 U.S. 498, 541, 543 (1998); Boggs v. Boggs, 520 U.S. 833, 873 (1997); Amato v. Wilentz, 952 F.2d 742 (3d Cir. 1991); Philip Morris, Inc. v. Reilly, 312 F.3d 24, 43-45 (1st Cir. 2002); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 177 (4th Cir. 1988); District Intown Properties, Ltd. Partnership v. District of Columbia, 198 F.3d 874, 887-88 (D.C. Cir. 1999); Seawall Associates v. City of New York, 74 N.Y. 2d 92, 110 (Court of Appeals of New York, 1989).

109 Babbitt v. Youpee, 519 U.S. 234 (1997).

110 *Id.* at 236-37.

111 *Id.* at 240-41.

Government regulation. As this Court noted, § 207 amounted to the 'virtua[l] abrogation of the right to pass on a certain type of property.' Such a complete abrogation of the rights of descent and devise could not be upheld."[112] The Court then evaluated the federal government's argument that Section 207, as amended, cured the constitutional deficiency of the original version.[113] It found, however, that the statute was still unconstitutional despite the availability of inter vivos transfers and will substitutes and the decedents' ability to devise their property to a limited class of individuals.[114] Thus, the Court reinforced the natural rights concept of the right of transmission and implicitly rejected the view that *Irving* should be narrowly interpreted.

B. Applying Irving to the Pennsylvania Inheritance Tax

With the Supreme Court's decision in *Irving* holding that governments cannot abrogate both the rights of descent and devise, it would seem that Pennsylvania, like other states, would be precluded from levying an inheritance tax at a rate of one hundred percent.[115] Such a tax would presumably violate the Fifth Amendment in light of the holding of *Irving*. The Commonwealth, however, could argue that the nature of its inheritance tax renders "takings clause" jurisprudence, and therefore the *Irving* hold-

112 *Id.* at 240.

113 *Id.* at 243-45.

114 *Id.* at 244-45.

115 Rights secured by the Fifth Amendment are protected from infringement by the fifty states by incorporation through the Fourteenth Amendment. Kelo v. City of New London, 545 U.S. 469 (2005) (applying the protections of the Fifth Amendment to determine that action by a state was not unconstitutional).

ing, inapplicable. In particular, Pennsylvania might claim that its inheritance tax, unlike the escheat provision at issue in *Irving*, is a levy on the right of succession as opposed to the right of transmission.[116] Furthermore, the Commonwealth may assert that the right of succession is 1) not protected by the Court's decision in *Irving*, which exclusively dealt with the right of transmission and, thus, is subject to the absolute authority of Pennsylvania's legislative body, the General Assembly; and 2) not a vested property interest sufficient to invoke the protection of the "takings clause."

This overly formalistic analysis of Pennsylvania's inheritance tax and the implications of the *Irving* decision, however, is both unrealistic and unconvincing. The right of succession is indelibly linked to the right of transmission; what affects one necessarily affects the other. As a result of this reciprocal relationship, the rights of transmission and succession are two sides of the same coin. For example, a law restricting whom a testator may select as a legatee limits the right of transmission, yet also limits the class of persons who hold the corresponding right of succession in such a situation. Likewise, a tax on the right of transmission inherently also has an effect on the right of succession by decreasing the value of property received by virtue of the latter right. Accordingly, this logic applies equally to the inverse situation as well; a tax on the right of succession inherently also affects the right of transmission. The unitary and complementary nature of these two rights undermines creating any strict dichotomies or technical distinctions between them. In *Irving*, the Court recognized as

116 *See supra* Part II.

much, albeit in the course of deciding a different issue raised in the case. Key to the Court's conclusion that the plaintiffs had standing to challenge Section 207 was the close relationship between the plaintiffs' interests and the interests of their decedents.[117] The Court found:

> Under [the circumstances of Hodel, plaintiffs] can appropriately serve as their decedents' representatives for purposes of asserting the latters' Fifth Amendment claims. They are situated to pursue the claims vigorously, since their interest in receiving the property is indissolubly linked to the decedents' right to dispose of it by will or intestacy.[118]

An unrealistic distinction between the right of transmission and the right of succession is particularly unconvincing in the field of tax law, an area of law that has traditionally emphasized substance over form.[119] As illustrated previously, the economic reality of a tax on the right of succession is that such a tax is also levied equally on the right of transmission. Therefore, it both intuitively and logically makes sense to apply constitutional restrictions on the government's power to tax the right of transmission to the government's power to tax the corresponding right of succession.

Similar logic has been employed in other areas of constitu-

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117 Hodel v. Irving, 481 U.S. 704, 711-12 (1987).

118 *Id.*

119 Boulware v. U.S., 128 S.Ct. 1168, 1175-76 (2008); U.S. v. Williams, 514 U.S. 527, 535-36 (1995); Diedrich v. C.I.R., 457 U.S. 191, 194-95 (1982); Moorman Mfg. Co. v. Bair, 437 U.S. 267, 290 n. 6 (1978); Frank Lyon Co. v. U.S., 435 U.S. 561, 576-77 (1978); C.I.R. v. Hansen, 360 U.S. 446, 461-62 (1959); Weiss v. Stearn, 265 U.S. 242, 253 (1924).

tional jurisprudence, particularly in the protection of First Amendment free speech rights. The Supreme Court of the United States has found that the right to free speech necessarily also includes the reciprocal right to receive such speech.[120] To protect the right to free speech is practically meaningless unless the right to receive that speech is protected as well; the right to speak freely is of no substantive or practical effect if an audience is unavailable to hear one's speech. In precisely the same way, the right to transmit property by will or intestacy is of no substantive or practical value if a legatee is unavailable to inherit such property. For this reason, the Court's decision in *Irving* must protect the right of succession from the extensive powers claimed by the states. *Irving* expressly protects only the right to transmit by devise or descent. To allow a state to escheat inherited property or levy a confiscatory, one hundred percent tax on the right of succession would, however, have the same practical effect as abrogating the right of transmission. Therefore, to ensure that the right of transmission is not violated by an unconstitutional government taking, the right of succession must also be afforded Fifth Amendment protection. Consequently, Pennsylvania's power to levy a one hundred percent tax on the right of succession would be curtailed accordingly.

120 Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 756-57 (1976). *See also Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969); Martin v. City of Struthers, 319 U.S. 141, 143 (1943); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Lamont v. Postmaster General, 381 U.S. 301, 307-308 (1965) (Brennan, J., concurring).

V. Conclusion

With its decision in *Hodel v. Irving*, the Supreme Court has provided opponents of inheritance taxes with the authority to challenge the power of the states to escheat or levy a confiscatory tax on inheritances. Pennsylvania has long claimed absolute, unqualified power over inheritances, deeming the right of succession to be a privilege granted to state residents by the General Assembly.[121] Similarly, the Commonwealth has defined its inheritance tax as a tax on the right of succession, which further implies that the state has the power to levy a confiscatory inheritance tax at a rate of one hundred percent.[122] In 1987, however, the Supreme Court decided *Hodel v. Irving*, in which the Court held that a federal statute that abolished the right to transmit by descent or devise was a taking that violated the Fifth Amendment of the Constitution.[123] Although other commentators have attempted to narrowly interpret the Court's decision,[124] *Irving* is most fairly read as holding that the right of transmission is a natural right granted constitutional protection under the Fifth Amendment.[125]

In defending the right of transmission against governmental encroachment, the Court also provided constitutional protection to the right of succession, albeit indirectly. To disallow a complete abrogation of the right of transmission but to permit the abolition of the right of succession would not only be ineffectual, but

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121 *See supra* Part II.A.

122 *See supra* Part II.B.

123 *See supra* Part III.

124 *See* Chester, *supra* note 91 at 1209-11 (arguing that *Irving* should be narrowly interpreted as applied to future cases).

125 *See supra* Part IV.A.

counterproductive as well; instead of imposing a confiscatory tax on the right of transmission, Pennsylvania could simply impose a confiscatory tax on the right of succession.[126] The integrated, reciprocal nature of the rights of transmission and succession, however, should be legally recognized; one necessarily implies and is dependent upon the other.[127] Therefore, just as tax law has emphasized substance over form and First Amendment jurisprudence recognizes a reciprocal right to receive speech, the right of succession should be granted constitutional protection under the Fifth Amendment.[128] The rights of transmission and succession are two sides of the same coin, a coin that states like Pennsylvania would be able to seize completely and absolutely, despite constitutional limitations on the government's claim to one side of the coin, if the right of succession were not recognized as a protected property interest under the "takings clause" of the Fifth Amendment.

126 *See supra* Part IV.A.

127 *See supra* Part IV.B.

128 *See supra* Part IV.B.

A FIRM FOUNDATION
A DEFENSE OF THE UN TRAFFICKING PROTOCOL

*Connor J. Baer**

ABSTRACT: *In 2000, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons was passed by the UN General Assembly with 117 nations signing on within the first two years. Since its formulation, however, the Protocol has come under severe scrutiny from critics who claim it does not sufficiently eradicate human trafficking at the international level. Yet what its critics fail to realize is that the Protocol was designed to increase international solidarity around anti-trafficking legislation rather than to act as a comprehensive anti-trafficking law in itself. To that end, the UN Protocol is sufficient and has helped significantly to focus much of the international discussion over human trafficking issues since.*

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"*. . . [E]ffective action to prevent and combat trafficking in persons, especially women and children, requires a comprehensive international approach in the countries of origin, transit and destination that includes measures to prevent such trafficking, to punish the traffickers and to protect the victims of such trafficking, including by protecting their internationally recognized human rights . . . .*"[1]

Trafficking in Persons Protocol, 2000

I. Introduction and Background

The most recent U.S. State Department statistics[2] declare that upwards of 800,000 people are trafficked internationally each year in addition to an estimated two to four million people trafficked within national borders.[3] At any given point in time, an estimated 12.3 million children and adults are the victims of "forced labor, bonded labor, and forced prostitution around the world."[4] Furthermore, all nations are, at least to some extent, affected by trafficking—whether they are countries of origin, transit, destination, or involved in some combination of the three.[5] Even the United

1 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, U.N. Doc. A/55/383 (2000), [hereinafter Trafficking Protocol].

2 Many of these figures would be considered, in other areas of research, to be outdated. One of the most problematic aspects of trafficking in persons, however, is that good data collection and statistics are extremely difficult to uphold year after year. The U.S. State Department often reuses its statistics in its Trafficking in Persons (TIP) Report every year and so I have, where possible, cited the most recent statistics from the most recent TIP Report. U.S. State Dept., *Trafficking in Persons Report* (2011).

3 U.S. State Dept., *Trafficking in Persons Report* 23 (2004).

4 U.S. State Dept., *Trafficking in Persons Report* 7 (2010).

5 K.C. Ryf, *The First Modern Anti-Slavery Law: The Trafficking Victim Protection Act 2000*, 34 Case W. Res. J. Int'l L. 45, 47 (2002); UN Office on Drugs and Crime, *Trafficking in Persons: Global Patterns*, (April 2006).

States, widely considered to be the leader in anti-trafficking legislation and initiatives, is severely affected. On average, two people are trafficked into the U.S. every hour [6] and 1,500 to 2,000 persons are smuggled into the States over the Canadian border every year.[7]

Monetarily, the global profits of human trafficking total an estimated $32 billion,[8] though some scholars have placed the figure as high as $51 billion.[9] Sex slavery is especially lucrative. According to trafficking researcher Siddharth Kara, "[O]nly 4.2 percent of the world's slaves are trafficked sex slaves, but they generate 39.1 percent of slaveholders' profits."[10] In 2007, the average slave earned $3,175 in net profits at a profit margin of roughly 60%.[11] As an illicit trade, trafficking in persons is second in total revenues behind only the international drug trade.[12]

In the past, many attempts were made to resolve this internationally recognized transgression of human rights. Early 20th century efforts were largely unsuccessful, as they were primarily concerned with "enslavement of white women into prostitution and much less concerned with the continuing enslavement and trafficking of other ethnic groups."[13] Any sort of multi-national

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6 Author's calculation based upon data in U.S. State Dept., *Trafficking in Persons Report* 23 (2004).

7 U.S. State Dept., *Trafficking in Persons Report* 86 (2006).

8 International Labor Organization, *A Global Alliance Against Forced Labor* 55 (2005).

9 SIDDHARTH KARA, SEX TRAFFICKING: INSIDE THE BUSINESS OF MODERN SLAVERY 21 (2009).

10 *Id.* at 19.

11 *Id.* at 222.

12 *Id.*

13 Kevin Bales & Becky Cornell, *The Next Step in the Fight Against Human Trafficking: Outlawing the*

anti-trafficking standard could not be attained until after the formation of the United Nations in 1945. The resulting UN resolutions, however, were focused on the singular issue of trafficking for sexual purposes, largely ignoring all other forms of trafficking.[14] No sense of international solidarity was created, as nations were not required, or requested, to pursue a universal standard for the prosecution and prevention of human trafficking.

In 1998 the UN General Assembly confronted international human trafficking standards in the form of the Convention Against Transnational Organized Crime; it remains the recognized international standard on transnational organized crime. Three supplementary protocols were organized and opened for signature in Palermo, Italy in December 2000. The Palermo Protocols dealt with *Smuggling of Migrants,*[15] *Trafficking in Persons—Especially Women and Children,*[16] and *Trafficking in Firearms*.[17] The UN Protocol for Trafficking in Persons was the first agreed-upon international step to reduce the amount of transnational human trafficking; it was signed by 117 different nations within the first two years.

Trade in Slave-Made Goods, 1 INTERCULTURAL HUMAN RIGHTS LAW REVIEW 211, 214 (2006).

14 Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, 96 U.N.T.S. 271 (1949).

15 Protocol Against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention Against Transnational Organized Crime, Nov. 15, 2000, U.N. Doc. A/55/383 (2000).

16 Trafficking Protocol, *supra* note 1.

17 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition, supplementing the United Nations Convention Against Transnational Organized Crime, May 31, 2001, U.N. Doc. A/RES/55/255 (2001).

In the decade since it first appeared, the UN Trafficking Protocol has suffered attacks from numerous critics who claim it fails to fulfill its purpose. These critics have proposed changes to the Trafficking Protocol to make it a more universal and comprehensive standard for nations to uphold. This paper aims to examine whether these proposed changes would, in fact, establish a better and more enforceable international standard on human trafficking. The first section will deal with the most common critiques of the Protocol, measuring them for both practicality and logic. The second section will defend the Protocol's capability to sufficiently create an international anti-trafficking standard and encourage multilateral international cooperation to eliminate human trafficking within its signatory states.

II. Critiques of the Trafficking Protocol

A. The Definition of "Trafficking in Persons"

Two main critiques center on the Trafficking Protocol's definition of "Trafficking in Persons": the consent of the victim, and the generalized objective of trafficking. After an extended period of discussion over "correct" wording during the Protocol's formation, the UN committee finally settled on the following definition:

> "Trafficking in persons" shall mean the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs...[18]

The *consent* of the victim continues to be a contested issue. Because the traditional discussion of trafficking focuses primarily on trafficking for sexual purposes, it was unclear at the time of the Protocol's ratification whether non-coerced adult prostitution could be considered human trafficking by the Protocol's definition. The original critics of the finalized definition, a coalition led by Argentina and the Philippines, held that it would be morally wrong to make a distinction between forced and voluntary prostitution. To do so, they argued, would be to legitimize voluntary prostitution. The coalition suggested adding the phrase "irrespective of the consent of the person" to the definition to ensure that traffickers would not be able to use the victim's coerced "consent" as a defense.[19]

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18 Trafficking Protocol, *supra* note 1, at art. 3(a).

19 Anne Gallagher, *Human Rights and the New UN Protocols on Trafficking and Migrant Smuggling: A Preliminary Analysis*, 23 HUMAN RIGHTS QUARTERLY

The original opponents to this view, a group led by the ambassadors for the United States, contended that to include voluntary prostitution in the definition would severely blur the lines between human trafficking and migrant smuggling. According to current definitions, one of the important distinctions between trafficking and smuggling is that trafficking is involuntary while smuggling is voluntary. Smuggling can often lead to trafficking, but the two definitions should not be confused. The U.S. also claimed that consent would not be an issue because other parts of the definition clearly state that trafficking includes "consent-nullifying behavior" of some kind (deception, coercion, force, *etc.*).[20] A compromise was ultimately reached through the addition of a note stating that consent is moot wherever any of the forcible behavior mentioned in the definition is used, essentially upholding the arguments of the latter party.[21] Despite the fact that the phrase "irrespective of the consent of the person" was ultimately rejected in the finalized definition, proponents of its addition still maintain that the definition ought to be changed in order to meet their standards.

In addition to the issue of consent, the purpose(s) of trafficking was also a significant area of disagreement. The same parties who advocated that "prostitution regardless of consent" should be included in the definition also claimed that prostitution should be stated as a separate and distinct goal of trafficking. This group sought to continue the prostitution-focused mindset of trafficking

975, 984 (2001).

20 *Id.* at 985.

21 Trafficking Protocol, *supra* note 1, at art. 3(b)

that was so prevalent in the previous century. Critics argued that including all forms of prostitution as a distinct objective of trafficking would broaden the scope of the definition to the extent that it would detract from the more important aspects that ought to be prosecuted. Another compromise added the phrase "the exploitation of the prostitution of others or other forms of sexual slavery" in addition to the other mentioned goals of trafficking. [22]

In both of these compromises, the proponents of a prostitution-focused mindset considered their efforts to have been defeated and the other side to have won. The finalized definition, however, does not allow for such a cut-and-dry outlook. The result of the compromises was not a negation of both definitions but rather a combination of the previous century's perspective with a broader, more modern understanding of trafficking. The necessary compromise served to provide a more practical understanding of human trafficking that could be better used by the signatories. Ultimately, the finished product was more in line with the essential purpose of the protocol. Despite the compromise, however, parties still criticize the Protocol and call for its modification.

A. Troublesome Definition

To some degree, the debate that consumed the discussion within the Palermo Conventions highlights a significant aspect of trafficking in persons. Human trafficking is not a singular uniform entity—it is manifested in different regions in unique ways. Some areas are plagued by trafficking for sexual exploitation, others for

22 *Id.* at art. 3(a).

forced or bonded labor. These categories can be further divided by age, sex, and economic status of those exploited as well as the different ways in which they are trafficked. No absolute profile of a victim or a perpetrator exists; as a result, human trafficking is an extremely difficult crime to pin down.

Within the United States, classified as a tier 1 nation for more than a decade,[23] human trafficking is by no means an easily-categorized issue. Of the 2,515 cases opened for investigation between 2008 and 2010 by the Department of Justice, 82% (2,065 cases) were the result of sex trafficking while 14% (350 cases) were the result of labor trafficking.[24] The 83% of victims involved in sex trafficking cases were American citizens while 67% of victims in labor trafficking cases were undocumented aliens, many of whom had been smuggled across national borders.[25] Further complicating matters, roughly half of victims were under the age of seventeen[26]; one third were white, one third were African-American, and one third were Hispanic.[27] The profiles of suspected traffickers were similarly muddled.[28]

Not only are there not uniform characteristics of traffickers and victims, but the plethora of trafficking cases are comparably diverse. In some instances, capture and trafficking can be attributed to the economic and social conditions of the environments

23 *Trafficking in Persons Report, supra* note 2.

24 U.S. Department of Justice, *Characteristics of Suspected Human Trafficking Incidents, 2008-2010* 1 (2011). http://bjs.ojp.usdoj.gov/content/pub/pdf/cshti0810.pdf

25 *Id.*

26 *Id.*

27 *Id.*

28 *Id.*

in which the victims reside. Refugee camps are a prime example: because of their high population density of women and children, 72% of 9.9 million people, the camps often become targets for pimps and traffickers.[29] Other situations involve children sold to known traffickers or prostitution rings by their families or girls given as wives to strangers.[30] In cases of labor trafficking, individuals or even entire families can be trafficked as slaves due to some pre-existing generational debt.[31] The profit-gains of labor trafficking cause the perpetrators to be discreet about their dealings, which makes their illicit activity hard to track, even harder to prosecute, and nearly impossible to study.

Ultimately, "trafficking in persons" is a nebulous phrase used to categorize a broad set of complicated illegal activities. Profiles of traffickers and victims are diverse and the forms of trafficking even more so. With this in mind, the debates in Palermo over the definition of trafficking are understandable. Inevitably, the resulting definition had to be broadly defined in order to allow for all possible iterations of trafficking.

C. Prosecution, Protection, and Prevention

As scholarship and research in the area of human trafficking has increased in recent decades, three subsections or measures of human trafficking regulations have become universally recognized as foundational to any functional standard: the prosecution

29 KARA, *supra* note 9, at 7.

30 *Id.* at 8-9.

31 United States Department of State, *The Facts About Human Trafficking for Forced Labor*, http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1005&context=forcedlabor, (last visited on Mar. 30, 2012).

of trafficking perpetrators, the protection of trafficking victims, and the prevention of any future offenses—also known as the "3-P Index." While the UN Trafficking Protocol does address all three measures, critics claim that it fails to handle them correctly and sufficiently. Thus, according to its opponents, the Protocol has not lived up to its purpose and should be reformed.

First, the *prosecution* of trafficking crimes is a crucial component to a comprehensive law against human trafficking. In Article 5 of the Trafficking Protocol, measures are instated to ensure that states create or adopt laws criminalizing trafficking in persons: "Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences the conduct set forth in article 3 of this Protocol, when committed intentionally."[32] Three supportive measures are subsequently laid out that explicitly condemn traffickers, accomplices, and anyone "organizing or directing other persons to commit an offense."[33] Yet despite its apparent specific treatment of *who* ought to be prosecuted, the Protocol fails to provide any sort of practical framework of *how* they ought to be prosecuted. In this sense, a broad sweep of legislation is possible that may fulfill the letter of the article but not its spirit.

Critics condemn the Protocol for its overly general treatment of the prosecution of trafficking cases, because it does not provide any sort of concrete minimum legal standard for States to uphold. This generality is, however, in line with the purpose of the Pro-

32 Trafficking Protocol, *supra* note 1, at art. 5(1).

33 *Id.* at art. 5(2c).

tocol. The very nature of allowing individual countries to create their own trafficking laws allows for standards that, while different from country to country, uphold the same general principle. In this way, prosecution can be locally carried out across the world to best deal with issues that may be specific to a particular area. In reality, human trafficking does not look the same in every country; thus, it ought to be prosecuted differently in different regions.

Second, the *protection* of victims is an integral part of any human trafficking legislation. Chapter II of the Protocol specifically deals with the issue of protection by laying out a few measures that ought to appear in countries' standards. Among these are the right of the victim to privacy and confidentiality, information on court proceedings, assistance as needed to testify against the traffickers, housing, counseling and information on their legal rights, medical assistance of any sort, and opportunities for education and employment.[34] Critics have identified that this section lays out a general framework for individual state legislation, but it "contains very little in the way of hard obligation" for those states involved.[35] A country is only required to provide assistance to victims "in appropriate cases and to the extent possible under its domestic law."[36] Again, as in the case of its prosecution measures, the Trafficking Protocol was criticized for the general nature of its protection framework. Anne Gallagher, an internationally recognized trafficking expert, has stated outright, "The weakness of the protocol's protection provisions [...] is likely to undermine its

34 *Id.* at art 6.

35 Gallagher, *supra* note 19, at 990.

36 Trafficking Protocol, *supra* note 1, at art. 6(1).

effectiveness as a law enforcement instrument."[37]

Evidence has shown that even when concrete measures for their protection are available, most victims of trafficking crimes do not utilize any sort of afforded help.[38] A prime example of this is the opportunity the United States has afforded victims to sue their traffickers in a U.S. district court under 18 U.S.C. § 1595 passed in the Trafficking Victims Protection Reauthorization Act of 2003 (TVPRA).[39] Despite the opportunity victims have to legally sue their traffickers in court for damages, only eighteen cases have been recorded of victims having done so and never has any victim of sex trafficking used the measures.[40] This underutilization of the current protection laws makes both the protection of the victims and the prosecution of the traffickers more difficult. In light of this, critics claim that victims would be more likely to make use of protection laws if such laws were more explicitly mentioned and guaranteed by international law. Once again, the vague nature of the Protocol's measures is attacked. That victims do not use the laws, however, is not the fault of overly-generalized standards. The United States has what are considered by many to be the most concrete and comprehensive anti-trafficking-laws in the world.[41]

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37 Gallagher, *supra* note 19, at 991.

38 Jennifer S. Nam, *The Case of the Missing Case: Examining the Civil Right of Action for Human Trafficking Victims*, 107 COLUM. L. REV. 1655, 1678 (2007).

39 18 U.S.C. § 1595(a) (Supp. IV 2004) (stating that "[a]n individual who is a victim of a violation of section 1589, 1590, or 1591 of this chapter may bring a civil action against the perpetrator in an appropriate district court of the United States and may recover damages and reasonable attorney's fees.").

40 Nam, *supra* note 38, at 1656-57.

41 The United States has consistently been ranked among the best nations for anti-trafficking leglislation since the release of the UN Protocol in 2000.

While the U.S. may need to examine its laws for possible failures, it is not the UN's obligation to reform international law to invoke more usage of the U.S.'s policies. To do so would contradict the Protocol's purpose more than what the critics claim the Protocol's vagueness does.

Third, and often considered most important, within any policy attacking human trafficking is *prevention*. As is identified by the Protocol, this can be further separated into two distinct functions: "States Parties shall establish comprehensive policies, programmes and other measures: (a) To prevent and combat trafficking in persons; and (b) To protect victims of trafficking in persons, especially women and children, from revictimization."[42]

To establish the first, preventing trafficking violations from ever occurring in the first place, multiple measures must be affected in order to ensure that the crime is cut off at the root. The United States, through the standards laid out in the Trafficking Victims Protection Act of 2000 (TVPA),[43] has attempted to work out reform from the ground up by providing for "the establishment of international initiatives directed at improving the economic conditions of vulnerable groups."[44] Models like this help to establish international precedent for productive avenues to combat the spread of trafficking using a holistic approach. States

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Seo-Young Cho, Axel Dreher & Eric Neumayer, *The Spread of Anti-trafficking Policies - Evidence from a New Index, Cege Discussion Paper Series No. 119*, Georg-August-University of Goettingen, Germany (also IZA Discussion Paper No. 5559 and CESifo Working Paper No. 3376, 2011).

42 Trafficking Protocol, *supra* note 1, at art. 9(1).

43 Trafficking Victims Protection Act, P.L. 106-386, 106th Cong. (2000).

44 Note, *Remedying the Injustices of Human Trafficking through Tort Law*, 119 HARV. L. REV. 2574, 2580 (2006).

must take precautions that their stringent laws do not merely push the illicit activity further underground. As an illustration, in 1999, Sweden criminalized the clients of sex workers; since then, trafficking in Sweden has increased and become more violent as traffickers have had to work harder to stay hidden from the law while attempting to turn a profit.[45]

The second aspect of prevention, that of protecting trafficking victims from revictimization, is also integral to a nation's laws. The retrafficking of victims is an extreme problem in many areas as victims often have no other place to turn for a job than back to their traffickers and prostitution. Estimates have placed the retrafficking rate in some areas to be higher than 40%—making the total annihilation of human trafficking crimes very difficult.[46] To date, the Trafficking Protocol contains no explicit provisions addressing the problem of retrafficking. Many NGOs and humanitarian organizations, such as the International Justice Mission and the Red Cross, supplement the Protocol by seeking to both prosecute traffickers to the full extent of domestic law as well as provide assistance to victims once they are rescued and protect them from being retrafficked.

In the area of prevention, critics have again condemned the UN Trafficking Protocol for being too general in its language. Its initiatives, they claim, "are phrased in the UN's best, programmatic, non-obligatory style.... There is no reference to the acknowl-

45 Ann D. Jordan, *Human Rights or Wrongs? The Struggle for a Rights-Based Response to Trafficking in Human Beings*, 10 GENDER & DEV. 28, 31 (2002).

46 Rebecca Surtees, *Second Annual Report on Trafficking in Victims in South-Eastern Europe* 88 (2005).

edged root causes of trafficking."[47] These critics, however, fail to consider that trafficking often has different causes in different global regions. To make an international standard acknowledging only one cause of trafficking would be to turn a blind eye to the numerous distinct factors that influence trafficking globally. Not mentioning specific root causes gives states freedom of initiative to research and combat trafficking in a more local and focused context.

III. Rebutting the Critics

In Article 2, the UN Trafficking Protocol explicitly names its purpose:

> (a) To prevent and combat trafficking in persons, paying particular attention to women and children;
>
> (b) To protect and assist the victims of such trafficking, with full respect for their human rights; and
>
> (c) To promote cooperation among States Parties in order to meet those objectives.[48]

If one critically analyzes these objectives, it becomes apparent that the core purpose of the Protocol is outlined in clause (c)—"to promote cooperation among nations." There is no reason

47 Gallagher, *supra* note 19, at 995.

48 Trafficking Protocol, *supra* note 1, at art. 2(a)-(c).

to expect a universal control mechanism to exist; the UN has no inherent powers that are not given to UN actions by the cooperative efforts of UN member states. To truly combat trafficking, the UN must first instigate cooperation amongst its members. In essence, the first two objectives stated are what the Protocol proposes to do; the last is how it proposes to do it.

The Protocol's critics hold it to a capricious and fairly illogical standard. They critique it based upon how well it addresses every conceivable permutation of human trafficking around the world, a standard it does not claim to meet. As has already been identified, human trafficking will appear and function differently in different regions—one cannot use a broad brush to paint reform over multiple distinct areas of the world. The Protocol's purpose is not to single-handedly eliminate trafficking, it is to lay a foundation for further legislation and initiative on the part of the signatory nations.

What the Protocol has accomplished is exactly what it claims—cooperation among member nations. Before the Protocol emerged in 2000, there was no sense of international solidarity around the issue of human trafficking—crimes were dealt with mainly on an ad-hoc basis from country to country, if at all. After the construction of the Convention Against Transnational Organized Crime and its three supporting protocols, countries finally had an international standard behind which to rally.

Identified even by its critics, "The convention is essentially an instrument of international cooperation."[49] UN member states

49 Gallagher, *supra* note 19, at 978.

quickly recognized the cooperative value of the Trafficking Protocol, 117 signing on within only two years.[50] To date, 140 nations have become signatories. The United States led much of the post-Palermo anti-trafficking campaign; in October of 2000 Congress passed the Victims of Trafficking and Violence Protection Act (TVPA) and has reauthorized it many times since.[51] In addition to the TVPA, the U.S. Department of State publishes its annual Trafficking in Persons (TIP) Report that documents every country and rates them on how well each nation's government upholds the legal standards outlined in U.S. and international law. Supporting the United States, the United Kingdom has also passed multiple iterations of anti-trafficking legislation.[52] The European Union in April of 2011 passed Directive 2011/36/EU, "on preventing and combating trafficking in human beings and protecting its victims."[53] More recently, India with the help of the United Nations Office on Drugs and Crime announced its new initiative "Strengthening the law enforcement response in India against Trafficking in Persons through Training and Capacity Building" and hopes to train a large number of "Anti-Human Trafficking Units" in the next two years.[54] Even Mongolia, a state that has

50 Signatories to the UN Trafficking Protocol, (2011), http://www.unodc.org/unodc/en/treaties/CTOC/countrylist-traffickingprotocol.html, (last visited on Mar. 30, 2012).

51 U.S Department of State, *Trafficking in Persons Report*, http://www.state.gov/j/tip/laws/, (last visited Mar. 30, 2012).

52 Namely: the Sexual Offences Act (2003), the Asylum and Immigration Act (2004), and the Coroner's and Justice Act (2009).

53 European Union, *DIRECTIVE 2011/36/EU*, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:101:0001:0011:EN:PDF, (last visited Mar. 30, 2012).

54 Ministry of Home Affairs, http://mha.nic.in/uniquepage.asp?ID_PK=467,

been traditionally classified by the TIP Report as a tier 2 state and one beset with trafficking issues, passed new anti-trafficking legislation in January, 2012.[55] Countries are cooperating around the framework outlined in the UN Protocol to produce more stringent and comprehensive anti-trafficking law.

In addition to individual states, many inter-governmental organizations have bonded together to combat transnational trafficking in persons. The most prominent of these organizations, the United Nations Global Initiative to Fight Human Trafficking (UN.GIFT), was created in March, 2007. UN.GIFT was formed through a cooperative movement between six other distinct organizations: the International Labour Organization (ILO), the Office of the United Nations High Commissioner for Human Rights (OHCHR), the United Nations Children's Fund (UNICEF), the United Nations Office on Drugs and Crime (UNODC), the International Organization for Migration, and the Organization for Security and Cooperation in Europe (OSCE). All of these organizations release their own reports detailing both the nature and severity of human trafficking around the world and their recommendation on how to best eliminate human trafficking as an international problem. To the end of producing international agreement and cooperation, the Protocol is sufficient.

(last visited on Mar. 30, 2012).

55 Asia Foundation, http://asiafoundation.org/in-asia/2012/02/15/mongolia-marks-passage-of-landmark-anti-trafficking-and-corruption-legislation/, (last visited on Mar. 30, 2012).

IV. Conclusion

In December of 2000, the UN opened for signing the first international standard on human trafficking that defined the crime broadly enough to allow for a substantial base of legislation to be created against it. Previous efforts had focused too singularly on prostitution and sexual trafficking, ignoring the larger scope of human trafficking in areas such as forced labor. The UN Trafficking Protocol constructed a framework within which countries could pass their own legislation, creating a sense of international solidarity while at the same time allowing trafficking to be dealt with at a more localized, and therefore productive, level.

The Protocol is critiqued for being too general and vague in its measures. In doing so, however, critics hold the Protocol to a purpose it never claimed to promote. The document was not designed to be a comprehensive international law against human trafficking anticipating every possible manifestation of trafficking at every level. Rather, the Protocol was created to be a standard upon which countries could base their own legislation to properly deal with regionalized issues. In that light, the Protocol does fulfill its purpose. Countries have been supplementing the Protocol in the years since its ratification with more specific and comprehensive anti-trafficking laws. The Protocol has served as the foundation upon which the past decade of anti-trafficking legislation has been built. If further legal attention is required, it ought to be done on the national level. Internationally, however, a firm foundation has already been laid.

THE FAILURES OF SUMPTUARY TAXATION

*Caleb S. Fuller**

ABSTRACT: *There are several goods and services which "society" has deemed harmful to the harmonious interactions of individuals. Goods such as alcohol and cigarettes are viewed as destructive because of their ill effects on health and their potentially addictive qualities. Some have suggested taxation of these goods as a way to decrease their appeal. This paper examines the harmful effects of sin tax policy. Sin taxes cause distortions throughout the productive economy, and ultimately fail to curb the very behaviors for which they are imposed.*

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I. INTRODUCTION

Taxation can be defined as a coercive, non-contractual transfer of physical assets from one party to another.[1] A sumptuary tax is a specific category of Pigouvian taxes which is levied with the twin goals of raising government revenue and manipulating social behavior to prevent or reduce negative externalities.[2] Pigouvian taxation schemes focus primarily on how taxation of production can reduce negative externalities, such as pollution, which physically affect the property of a third-party. Sumptuary taxes, a subset of Pigouvian tax schemes, target more arbitrary "harms" which are inflicted by members of society. Behaviors that are generally considered undesirable include excessive consumption or use of alcohol, cigarettes, drugs, pornography, or even "unhealthy" foods. Some argue that addicts need every incentive to quit their habit; others argue that addicts, such as alcoholics, have an obligation to mitigate the costs they have imposed on society.[3] In actuality, the imposition of a sin tax is likely to impose greater costs to society than is the consumption of the "sinful" good.

The focus of this paper will be on the "sin tax" commonly levied on goods which are generally deemed to have socially detrimental effects.[4] As such, the sin tax is a form of the partial excise

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1 HANS-HERMANN HOPPE, ECONOMICS AND ETHICS OF PRIVATE PROPERTY: STUDIES (2d ed. 2006).

2 James R Hines, *Taxing Consumption and Other Sins*, 21 JOURNAL OF ECONOMIC PERSPECTIVES 49, 49-50 (2007).

3 Rachel E. Morse, *Resisting the Path of Least Resistance: Why the Texas "Pole Tax" and the New Class of Modern Sin Taxes Are Bad Policy*, 29 B.C. THIRD WORLD L.J. 189 (2009).

4 Adam Hoffer, *Spatial Dependence in Tobacco Excise Taxation: An Analysis of Special Interest and Tax Competition*, PUBLIC CHOICE SOCIETY (2011).

tax, which is a tax levied on some, instead of all, commodities in a market.[5] Economic analysis of sin taxation exposes various tax-created market distortions. In short, the imposition of a sin tax causes distortionary secondary effects, while often failing to achieve its primary objective—the eradication of undesirable behavior

While many economists argue that sin taxes fail in their objective of raising government revenue, that investigation will not be the focus of this paper. Instead, this paper will examine not only how sumptuary taxation fails to eradicate culturally objectionable behaviors, but also how it creates harmful and distortionary secondary effects. These secondary effects include distortion of the capital structure that often adversely affects individuals far removed from the "sin," shifting to substitutes, emergence of black market activity, disproportionate harm to the poor, and incentives to rent-seeking behavior. Furthermore, it is impossible to reconcile the fiscal and non-fiscal ends of sumptuary taxation; they are fundamentally at odds.[6]

II. Overview of Taxation

Before examining the specific case of sin taxation, it is important to note some general effects of any taxation scheme imposed on the unhampered market economy. Taxation constitutes an intervention on the market and, as such, reduces the amount of

5 Murray Newton Rothbard, Man, Economy, and State a Treatise on Economic Principles; with Power and Market: Government and the Economy (2004).

6 Ludwig Von Mises, Human Action: a Treatise on Economics (1998).

income an individual can expect to receive through appropriation (such as homesteading), production, or contract. Because all these activities require the use of scarce resources—at the very least, labor and land—which could have been employed in leisure or consumption, taxation raises the opportunity cost of productive enterprises. The marginal utility of leisure increases, while the marginal utility of production falls. Thus, taxation also reduces the present incentive for future production, thus decreasing future income and future consumption. Because taxes cannot simply be levied on consumption without distorting time preferences, any tax has a profound effect on production itself. The ultimate effect of taxation is to reduce societal standards of living below where they would have been in a free market.[7]

This general analysis of taxation has focused on the expropriation of private revenue. However, most tax analysis assumes that tax monies are subsequently spent by the government. As such, the government is effectively a consumer. Unless the state spends its new revenue in exactly the same patterns as consumers on the market, the effect will be to shift demand throughout the economy. For example, if the government taxes cigarette producers in order to increase expenditures on armaments, cigarette producers experience a drop in demand (or at least the equivalent through a decrease in net revenue), while the arms manufacturers experience an increase in demand.

The short-run effects of this intervention will be decreased profits (or potentially losses) for the cigarette producer, and profits

7 HOPPE, *supra* note 1.

(or increased profits) for the armaments producer. These producers will, in turn, increase (decrease) their demands for factors of production, thus re-distributing incomes to non-specific factors, and perhaps permanently increasing (decreasing) the demand for specific factors of production. Because these are the general effects of any taxation scheme, there is no such thing as the neutral tax.[8] While the partial excise tax is often viewed as relatively neutral (supposedly affecting only consumption, not the production structure), this view is proven fallacious in the following section.

III. Incidence of Partial Excise Taxation

It is essential to include an analysis of tax incidence to show that the government's objective of punishing consumption must fail, to some extent, beginning with the very imposition of the tax. While shortsighted politicians conceive the sin tax as a panacea for many social ills, economists argue that the burden of the tax will not fall solely on consumers.

For many economists, the sin tax vividly highlights the inability to tax consumption. Legislators may intend for the imposition of the sin tax to only penalize consumption and leave income and capital unscathed. In fact, all three categories of economic activity are impinged by the levying of a sin tax. All excise taxes are ultimately income taxes, though haphazardly applied. As such, sin taxes have the potential to affect rents to land, interest to capitalists, wages to labor, and profit to entrepreneurs. The direct impact of the tax is to lower the revenue of sellers by the amount

8 Rothbard, *supra* note 5.

of the tax. The tax is "shifted backward" to interest earned by capitalists, wages earned by labor, or rents earned by land-owners. In addition, it will reduce the profit that the entrepreneur is earning. The tax ensures that the firm will receive a lower price because it must now subtract the tax from the price consumers pay in order to fulfill its obligation to the state. Because entrepreneurs are now correctly forecasting lower prices, they will begin decreasing the amount that they are willing to bid for original factors of production. Income to these factors will decrease.[9]

This analysis demonstrates that it is economically naïve to believe that only consumers of certain goods will be punished in the form of higher prices, which firms have escaped by "shifting them forward." While specific incidence will vary according to the particulars of the situation, it is likely that labor employed in this industry will experience a drop in wages. Additionally, rents that are paid to land-owners in this line of production will also decline. Thus, the sin tax reduces incomes of workers, land-owners, and capitalists—none of whom are necessarily consumers of the good.

Because the price of the good cannot be increased by the amount of the tax, marginal firms and entrepreneurs will be driven out of the business in search of other opportunities. Highly specific factors of production will be hit hardest by the partial excise or sin tax because it is difficult for them to find any streams of income outside the production of the now-taxed good.[10]

This examination reinforces the crucial concept that it is

9 *Id.*

10 *Id.* at 1162-64.

impossible for the sin tax to behave neutrally—that is to say, it cannot simply "punish" consumers without adversely affecting the income of producers of a good, even those far removed from the consumer good in the structure of production.

The above analysis has examined the distortionary effects of taxation more broadly, the incidence of partial excise taxes, and the effects of partial excise taxation on production and incomes. It should also be noted that there is a fundamental conflict to which sumptuary taxation falls prey. If the goal is to yield the greatest revenue to the state, then only empirical analysis of a specific market can reveal the "ideal" level of taxation. However, if the goal of the tax is to reduce sales and consumption of a good—as is often the stated justification—then it follows that the higher tax rate is more effective. If the tax is to fully achieve its non-fiscal objective of weaning people from a certain good, then the revenue will eventually fall to zero.[11]

IV. Conflicting Goals of Paternalistic Taxation

Not only do sin taxes reduce the income of individuals who are not engaged in consumption of the "sinful" good (such as wages to labor), but even when the goal of the state is largely non-fiscal, sin taxes often simply fail to reduce consumption of the desired good. Sin taxes are imposed from a paternalistic worldview, which assumes that government can more effectually ensure lifelong utility of its citizens better than those individuals themselves. Excessive consumption of certain goods—alco-

11 Mises, *supra* note 6.

hol and cigarettes for instance—can lead to lower lifespans. Thus, governments impose taxes on these goods in an attempt to raise the price and lower quantity demanded.[12]

However, it is important to note that several studies have shown that demand for goods with addictive qualities is highly inelastic (relatively unresponsive to changes in price). A recent working paper published by the National Bureau of Economic Research highlighted the failure of sin tax policy to address the heterogeneous nature of alcohol consumers. While there had been studies showing that price can negatively affect the quantity of alcohol consumed, this analysis often failed to account for differences in demographics and also the average amount of alcohol consumed before the tax was imposed. When these variables are accounted for, demand for alcohol is highly inelastic among heavy drinkers. Thus, the demographic that might impose the greatest harm on society is the group which is least responsive to increases in price. The study found this effect to be even stronger among older drinkers.[13]

Thus, the imposition of the sin tax may succeed in raising government revenue if it is levied on a good for which there is relatively inelastic demand, but it will concurrently fail to reduce consumption of the "sinful" good; in fact, this often serves as an additional justification for the imposition of excise taxes on goods with inelastic demand, goods which are also often considered

12 Kaisa Kotakorpi, *Paternalism and Tax Competition*, 111 SCANDINAVIAN JOURNAL OF ECONOMICS 125 (2009).

13 Padmaja Ayyagari, Partha Deb, Jason Fletcher, William T. Gallo & Jody L. Sindelar, *Sin Taxes: Do Heterogeneous Responses Undercut Their Value?* (Working Paper No. 15124, 2009).

"sinful." Known as the Ramsey rule, this proposition states that taxes should be levied inversely with elasticity so as to minimize social cost.[14] The existence of the Ramsey rule demonstrates the conflicting nature of selective excise taxation—government revenue or the tradeoff of reduced consumption.

One study found that the demand for cigarettes, perhaps counter intuitively, is even less elastic in less-developed countries than it is in more-developed nations. This demonstrates that it is not simply high levels of affluence which stabilize demand in the face of increasing prices.[15]

V. Cross-Border Shopping

Consumers will often find many ways to evade the higher prices that come with the imposition of a sin tax. One such evasion method was studied in Scandinavian countries. It was known that "tax competition" between countries could erode one nation's tax base at the expense of another. Similar analysis shows that paternalistic tax policies might induce "cross-border shopping" that undermines a government's attempt to control the harmful behavior which it is trying to reduce. When one country adopts a highly paternalistic tax policy and its neighbors do not, the objective of the paternalistic government is undermined. The lower the transportation costs from one country to another, the greater will be the purchases in the country with a freer tax policy. Economet-

14 William F. Shughart, *The Economics of the Nanny State*, *in* Taxing Choice: the Predatory Politics of Fiscal Discrimination 13 (1997).

15 P. Lance, J. Akin, W. Dow & C. Loh, *Is Cigarette Smoking in Poorer Nations Highly Sensitive to Price? Evidence from Russia and China*, 23 Journal of Health Economics 173 (2004).

ric analysis of Finland, Denmark, and Estonia revealed that the effect of tax competition between nations was to heavily reduce the impact of paternalistic taxation, but not to eliminate it altogether. In October of 2003, Denmark reduced its excise duty on spirits by 45% in response to the relatively low prices of alcohol to be found in Germany in order to reduce cross-border shopping. Likewise, alcohol taxes in Finland were cut on average by 33% in 2004 due to the availability of cheaper alcohol in Central Europe and Estonia. Estonia had reduced its restrictions on alcohol, and the Finnish government realized that this development would reduce their ability to control alcohol consumption via domestic sin taxation. The EU itself has recognized the ineffectiveness of paternalistic taxation in the presence of cross-border shopping, and thus has imposed minimum rates for excise duties on most types of alcohol for member states.[16]

In short, cross-border shopping will occur (either between nations or states) if the costs associated with shopping are outweighed by the benefits of obtaining the good at a lower price. Costs commonly associated with shopping include transaction costs, information costs, and the cost of time. Even a relatively large price differential between states will likely be outweighed by the costs associated with crossing state lines—if the consumer purchases the same quantity he would have in the absence of the tax. However, because transaction, information, and time costs are constant, the consumer can act so that his marginal benefit outweighs his marginal cost by purchasing a greater quantity of the

16 Kotakorpi, *supra* note 12.

good, thereby diluting his costs. Thus, the effect of differing sin tax rates between states is for consumers to acquire a larger quantity of the good than they would have were they able to purchase the good in-state at the same price. Purchasing a larger quantity becomes more economically efficient.[17]

VI. Substitutes, Relative Prices, and Compensating Behavior

A second way that the sin tax fails to stamp out consumption of a product is through consumers shifting to substitutes—often with perverse results. Like all excise taxes, sin taxes are levied per unit. Thus, the tax only addresses one risk factor that is associated with cigarette smoking: average daily consumption. It fails to address other determinants of health such as daily intake of tar from the consumption of cigarettes. Smokers who desire to purchase fewer cigarettes at the higher prices, but also wish to maintain their current level of tar or nicotine intake "might take longer drags or reduce the time between puffs."[18] Another way for smokers to maintain nicotine intake is to switch to longer-lasting versions of their favorite brand.[19] A 1998 econometric study found that taxes do indeed reduce consumption of cigarettes; however, this reduction was *more* than offset by the increase in tar and nic-

17 Richard K. Vedder, *Bordering on Chaos: Fiscal Federalism and Excise Taxes*, *in* Taxing Choice: the Predatory Politics of Fiscal Discrimination 271 (1997).

18 William N. Evans & Matthew C. Farrelly, *The Compensating Behavior of Smokers: Taxes, Tar, and Nicotine*, 29 The RAND Journal of Economics 179 (1998).

19 *Id.* at 578.

otine consumption. Furthermore, smokers who prefer lower tar cigarettes did not quit in disproportionate amounts.[20]

The same study examined the widely held view among economists and other experts that sin taxes would create a disproportionate disincentive to smoking among young adults—the very demographic containing the highest number of new smokers. If this view were correct, it could presumably provide long-term health benefits. To the contrary, Evans and Farrelly found that the "compensation effect" was stronger among those aged 18-24. In the face of the sin tax, nicotine and tar consumption actually increased.[21]

A closely related way that sin taxes may encourage perverse outcomes is through the changing of relative prices. With the imposition of the sin tax, the price for a particular good will increase, other things constant. When a tax is placed on a product, its price will change relative to substitutes that may be more expensive. However, consumers are more responsive to relative prices than they are to nominal prices. As an example, 1920's Prohibition in the United States saw a dramatic increase in the potency of the alcohol that was being illegally manufactured. Relative prices explain this phenomenon.

Suppose that one (more potent) beverage is twice as expensive as a (less potent) substitute. Prohibition effectually imposed a "tax" on this market by increasing the cost of production in the form of the risk posed by law enforcement. This "tax" decreases

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20 *Id.* at 584-87.

21 *Id.* at 587-89.

the relative price of the high potency alcohol in relation to its low potency counterpart because the same "cost" has been placed on both. Unsurprisingly, consumption of stronger drink increased during Prohibition and declined dramatically shortly after the repeal of Prohibition. By the same measure, there has been a steady increase in the potency of illegal drugs and a concurrently steady decrease in the potency of legal drugs. A tax works in the same way to change the spread of relative prices. Thus, a per-unit sin tax levied on cigarettes is likely to induce a shift from low-potency cigarettes to more expensive (but now relatively cheaper) higher-potency substitutes.[22]

Producers can also shift their production in the face of a per-unit excise tax. Product optimization occurs over a wide variety of margins, and a partial excise tax is not likely to cover all these margins. For instance, if a tax is imposed on a certain commodity with n characteristics, the producers will substitute more of the non-taxed characteristics into the production of the good. As one example, excise taxes tend to increase the level of tar and nicotine in cigarettes. Hence, the effect of an excise tax is not only to induce consumers into higher potency cigarettes, but also to encourage producers to supply higher potency products.[23]

VII. Black Markets

An additional way that the sin tax fails to reduce undesirable behavior is through the emergence of black markets. This

22 Mark Thornton, The Economics of Prohibition (1991).

23 *Id.* at 94-95.

"underground" activity does not always emerge, but a higher tax rate makes its appearance more probable. During the 1980s, Canadian lawmakers began to view cigarette taxation as both an important source of revenue as well as a way to discourage smoking. Between April and June of 1985, the federal excise tax on a cigarette carton was increased from $6.01 to $9.18. By 1991, this had increased to $19.14 per carton. After a series of tax decreases, the Canadian government introduced the Federal Tobacco Control Strategy which aimed for reduced smoking rates. As a result, July of 2002 saw federal taxes as high as $15.85 per carton.[24] Analysts have noted the correlation between the level of the excise tax and the size of the underground cigarette market. During the tax rate reduction of the late 1990s, underground activity fell markedly, but with the imposition of the latest round of draconian rates, there has been a sizeable resurgence in black market activity.[25] Among the illegal suppliers are "above-ground" sellers who distribute cigarettes from a legal store-front but under the counter. In addition, "underground" suppliers distribute cigarettes in public venues.[26]

The Canadian black market also developed a phenomenon known as "returning exports." This form of evasion involved legally exporting cigarettes directly across the border to avoid the tax, and then immediately smuggling the cigarettes back into the market where they could be sold tax-free. Several tobacco companies were involved in this scheme as they sought to flood the

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24 Nachum Gabler & Diane Katz, *Contraband Tobacco in Canada: Do Excise Taxes Encourage the Black Market?* (2010).

25 *Id.* at 8.

26 *Id.* at 5-6.

Canadian market with cigarettes, thereby lowering both the lawful and unlawful price, increasing the quantity demanded, and thus, sales.[27]

There are several detrimental effects that black market activity imposes on society. It is likely the product will be scarce and also costly to cover the risks that producers face by violating the law. Illegality also hinders the process of information distribution, and the result will be a less efficient market, both in terms of arbitraging effects that would naturally occur and in the quality of the product produced. The secrecy of the black market decreases the ability of large-scale companies to operate, reducing the productive advantages gained from economies of scale. This further reduces market efficiency. A high enough tax may also bestow a monopolistic grant to black marketeers.[28] Additionally, entrepreneurs that enter the black market are likely to possess a different skill-set from those that succeed on the legal market. Successful black marketeers are likely skilled criminals who possess a premium on bypassing the law instead of a premium on successfully satisfying consumer demand.[29]

In addition, black market production tends to be of inferior quality compared to legal production. Consumer sovereignty is diminished because there is nowhere else to obtain the good. Buyers and sellers are more concerned with avoiding detection than

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27 *Id.* at 5-7.

28 Ironically, this may somewhat accomplish the goal (albeit indirectly) of paternalistic taxation: reduced consumption. After all, monopolies restrict output to raise price and increase profit. *See* THORNTON, 137.

29 Rothbard, *supra* note 5.

testing for product quality.[30] The combination of these black market effects may be much more detrimental to the consumer than simply consuming the "harmful" product unhindered.

In the case of a high per-unit sin tax, black market suppliers can make a large profit margin by selling slightly below the legal market price. This large profit margin is often put to use bribing bureaucrats or enticing police into selective enforcement.[31] Economic theory would also predict violence among underground sellers as a way to enforce contracts, gain market share, or defend territory.[32] The Canadian experiment with high excise taxes has empirically verified this analysis as one study directly linked organized crime with the re-importation scheme of contraband tobacco. In fact, one of the stated goals of the Canadian legislature during the first repeal of taxes was to reduce the crime associated with underground trafficking.[33] Consequently, high sin tax rates can increase incentives to crime, adversely affecting all members of society.

VIII. Sin Tax Regressivity

While sin taxes are often imposed with the goal of helping citizens, especially low-income individuals, to quit their destructive habit, the result is often detrimental to the very persons who are ostensibly aided through the sin tax. If demand for a good is

30 Mark Thornton, *Prohibition: The Ultimate Tax*, *in* Taxing Choice: The Predatory Politics of Fiscal Discrimination 171 (1997).

31 Thornton, *supra* note 22.

32 *Id.* at 111-12.

33 Gabler, *supra* note 24.

inelastic, the higher price brought about by the tax will only serve to reduce the income of those who consume it. The regressive nature of partial excise taxation ensures that the poor will be hurt disproportionately compared to the wealthy. A regressive tax is one that reduces a greater percentage of the income of the poor than it does of the wealthy.

The cigarette tax is particularly regressive because cigarette consumption is negatively correlated with income. Between 1976 and 1994, smoking rates in the lowest income group in the United States fell by 4.6%, but the same rate fell by 14% among the highest income group. Thus, cigarette taxes are regressive in two senses. First, since the sin tax is a flat tax, the poor will pay a higher proportion of their income. Second, the poor, as a class, also pay a higher absolute dollar amount because they consume a greater number of cigarettes. However, others, who prefer a life cycle approach, have argued that the regressivity of a tax is not accurately determined by examining a single time period.[34]

Differences in life-cycle and annual measures of tax may be particularly pronounced with a consumption tax. One reason that this may occur is because of time preference. For example, it is reasonable to assume that the young and the elderly consume more than their current income. If this were true, annual incidence studies would show a disproportionate burden on these groups, but would appear smooth over a lifetime measurement. Even when this is accounted for, Lyons and Schwab found that life-

34 William N. Evans, Jeanne S. Ringel & Diana Stech, *Tobacco Taxes and Public Policy to Discourage Smoking*, (MIT Press, Working Paper, 1999).

cycle estimates of regressivity appear almost identical to "snapshot" measures of regressivity. This study concluded that those in the poorest quintile devote 40% more of their lifetime income to alcohol consumption than do those in the richest quintile.[35]

IX. Incentives to Rent-Seeking

A final failure of sumptuary taxation includes increased incentives to rent-seeking behavior. Many advocates of the sin tax argue that the revenues could be used to fund public health initiatives that combat advertising for "sinful" products and even traditional "junk" foods.[36] The possibility of ostensibly private organizations such as the American Cancer Society receiving revenue from sin taxes increases the incentive for groups like this to lobby for increases of these taxes.[37]

This type of behavior by private individuals, companies, or groups is known as rent-seeking. Rent-seeking occurs whenever a revenue stream is obtained outside the normal profit-loss mechanism of the market economy. One of the results of rent-seeking behavior is decreased productivity as groups divert energy and resources into obtaining a government-imposed regulation that will benefit them. The opportunity cost is failing to direct resources into lines of production which consumers judge to be

35 Andrew B. Lyon & Robert M. Schwab, *Consumption Taxes in a Life-Cycle Framework: Are Sin Taxes Regressive?*, 77 The Review of Economics and Statistics 389 (1995).

36 Jeff Strnad, *Conceptualizing the "Fat Tax": The Role of Food Taxes in Developed Economies*, (Working Paper No. 286, 2005).

37 Thomas J. DiLorenzo, *Taxing Choice to Fund Politically Correct Propaganda*, *in* Taxing Choice: the Predatory Politics of Fiscal Discrimination 117 (1997).

more valuable through demonstrated preference. Selective excise taxes place more of a burden on some groups as opposed to others (by contrast, a general tax would impose the same burden on all groups). One result of this differential burden is to incentivize those who stand to lose to expend resources in the political process to prevent the taxes from being enacted. Conversely, those who stand to benefit have an incentive to see that the taxes are enacted. These political costs impose welfare losses on society that would not necessarily exist in the face of a potential broad-based tax.[38]

Thus, Holcombe argues that the arguments for sin taxes, which are often couched in public-interest terms such as the need to internalize externalities, are usually advanced by special-interest groups. Ultimately, all interventions are justified on the idea that they will further the public interest. In reality, interventions always benefit one group at the expense of another in a zero-sum game.[39] One such historical example of rent-seeking appeared in the nineteenth century when the dairy industry lobbied for taxes on margarine to protect the "wholesomeness" of food that people consumed. The campaign of the dairy industry was advanced under the pretense that the consumer must be protected from the fraud inherent in a product that masqueraded as butter. For a time, butter producers were able to secure an artificial profit by the taxes and other regulations imposed on margarine producers.[40]

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38 Randall G. Holcombe, *Selective Excise Taxation From an Interest-Group Perspective*, *in* TAXING CHOICE: THE PREDATORY POLITICS OF FISCAL DISCRIMINATION 81 (1997).

39 *Id.* at 81-82.

40 Adam Gifford, Jr., *Whiskey, Margarine, and Newspapers: A Tale of Three*

In fact, the margarine case is significant in a study of public policy because the margarine tax raised a Constitutional question. The excise tax on margarine was imposed, not with the purpose of raising government revenue (legitimate under the Constitution), but with the specific intent of regulation. As such, its imposition would increase the police powers of the federal government. In the words of Justice Marshall, "the power to tax is the power to destroy," and taxation for revenue purposes does not constitute destruction because it would be nonsensical for the government to destroy its source of revenue. After intensive lobbying from butter manufacturers, Congress imposed an excise tax of two cents per pound. The tax pushed one-third of the margarine makers out of business.[41]

X. Conclusion

If Prohibition did not significantly curtail the consumption of alcohol in the 1920s, are we to expect that a mere excise tax can eradicate drunkenness or second-hand smoke?[42] Sin taxes are often imposed out of the best motives—namely the welfare of individuals within the taxed jurisdiction. One role of economic analysis is to examine the difference between the stated goals of a policy and the actual results. This involves examining not only what is seen, but also what is unseen. In the case of sin tax analysis, we have concluded that the imposition of the tax has many undesirable sec-

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Taxes, *in* Taxing Choice: the Predatory Politics of Fiscal Discrimination 57 (1997).

41 *Id.* at 69-71.

42 *See* DiLorenzo, *supra* note 37, at 135.

ondary and "unseen" affects. Laborers, entrepreneurs, and capitalists experience a drop in their respective incomes, even those not closely related to the "sinful" good. Furthermore, consumers find a myriad of ways to compensate for the tax, sometimes through even more perverse consumptive behaviors. Black markets and illegal activity increase incentives to crime. The tax creates yet another avenue for individuals to seek income outside the profit-loss safeguard of productive market activity. In short, the burden of government is expanded with the imposition of any tax. The type of tax is immaterial—it allows the state to gain command of additional resources, thus depriving members of society from using the same. Worse, government expenditures are devoid of net income and net worth calculations that determine profitability on the free market.[43] The shift of resources from private control to control by the state is what constitutes the greatest burden of taxation—and one that ultimately affects every member of society.[44]

As with any tax scheme, the most important issue of economic analysis is often obscured. The fundamental issue to determine regarding any tax is the gross amount of resources that have been transferred from private individuals (and thus economic calculation) and into the hands of the public sector, thus obscuring economic calculation. Though there are many political pressures to increase the sin tax rate, either because concerns over health are on the rise or because it is a relatively "popular" tax when the gov-

43 *See* MISES, *supra* note 6, at 200-18, for a discussion of how economic calculation ensures that entrepreneurs do not squander scarce resources. Most importantly, he notes on page 215 that "Economic calculation cannot comprehend things which are not bought and sold against money."

44 ROTHBARD, *supra* note 5.

ernment is strapped for revenue, the foregoing analysis shows that the sin tax imposes heavy costs on society. Given these concerns, the tax should never be levied from the naïve viewpoint, often adopted by shortsighted politicians, that social outcomes can be manipulated through coercive force. Instead, consumptive decisions are best left to individuals, not only for their own good, but also for the maximum welfare of all members of society.

CASENOTES:

Greenberg v. Miami Children's Hospital Research Institute

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I. Introduction

The court in *Greenberg v. Miami Children's Hospital Research Institute* upheld the principle of "unjust enrichment" as a cause of action in disagreements over the use of human tissue.[1] This case follows the landmark decision in *Moore v. Regents of the University of California,*[2] which the *Greenberg* Plaintiffs cited as precedent. Like Moore, the *Greenberg* Plaintiffs disputed the use of their tissue for research and the resulting economic gain. In *Moore v. Regents*, the Court decided that the Plaintiff did not have property rights to his excised tissue and the resulting technology, dismissing the claim of conversion. The Plaintiffs in the *Greenberg* case made similar claims which proved unsuccessful but their unique claim to "unjust enrichment" was upheld and provides an important precedent in cases concerning the patenting of biotechnology.

Unjust enrichment, the sole cause of action and the central legal issue in the *Greenberg* case, is based in principles of equity and restitution.[3] As described first in the 1937 Restatement of Restitution and most recently in the Third Restatement, "[a] person who has been unjustly enriched at the expense of another is required to make restitution to the other."[4] The relevant Florida law describes the conditions for unjust enrichment as the following: "(1) the plaintiff conferred a benefit on the defendant,

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1 Greenberg v. Miami Children's Hosp. Research Inst., 264 F. Supp. 2d 1064 (S.D. Fla. 2003).

2 Moore v. Regents of the Univ. of Cal., 51 Cal. 3d 120 (1990).

3 Emily Sherwin, *Restitution & Equity: An Analysis of the Principle of Unjust Enrichment*, 79 Tex. L. Rev. 2083 (2001).

4 *Id.*

who had knowledge of the benefit; (2) the defendant voluntarily accepted and retained the benefit; and (3) under the circumstances it would be inequitable for the defendant to retain the benefit without paying for it."[5] With regard to the *Greenberg* case, the Plaintiff claimed that the Miami Children's Hospital Research Institute had profited through the patent and licensing of the genetic information that was discovered through use of the participants' tissue donations. By upholding the Plaintiffs' claim based on this vague and broadly-applied legal principle of unjust enrichment, the court has provided a unique strategy for challenging the patent of human genetic material.

II. Facts

The case concerned a research endeavor that successfully identified the genes associated with the Canavan disease, a fatal disease that predominantly affects individuals of Ashkenazi Jewish ancestry. The Plaintiffs are a group of individuals and non-profit groups that entered into collaboration with Dr. Reuben Matalon and the Miami Children's Research Institute. In the late 1980s, Daniel Greenberg and the Chicago Chapter of the National Tay-Sachs and Allied Disease Association Inc. began locating families with individuals with Canavan disease and asking them to donate DNA samples. Dr. Matalon consented to work with the individuals and partnered with the Miami Children's Hospital Research Institute in 1990. With the collaboration and financial support of the Plaintiffs, Matalon and MCHRI collected a registry of human

5 Greenberg, 264 F. Supp. 2d at 1072.

tissue from individuals with Caravan disease. Through studying these samples, the associated gene was identified in 1993.[6]

From this information, related centers began offering Canavan testing but in 1997, the U.S. patent office granted a patent to MCHRI that gave them control over the use of the genetic information gained from their sequencing of the Canavan gene. The Plaintiffs claim that the Defendants threatened the centers to stop offering testing under the conditions stipulated by the patent. The point of contention was the private commercialization of the genetic information with the Plaintiffs arguing that the information should remain a public good. The Plaintiffs argue that they were not informed of the researchers' intention to acquire a patent for the knowledge that was gained from their donations. The Plaintiffs filed the lawsuit in October 30, 2000 in a district court in Illinois (subsequently transferred to Florida) claiming lack of informed consent, breach of fiduciary duty, unjust enrichment, fraudulent concealment, conversion and misappropriation of trade secrets.[7] On May 29, 2003, Judge Federico Moreno of the U.S. District Court of Southern Florida ruled to dismiss all the claims with the exception of unjust enrichment. According to a joint press release from the Canavan Foundation, the parties settled out of court and the Defendants successfully filed for dismissal on September 20, 2003.[8]

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6 *Id.* at 1066-67.

7 *Id.*

8 Canavan Foundation, http://www.canavanfoundation.org/news/09-03_miami.php, (last visited on Mar. 30, 2012).

III. Legal Background

The *Greenberg* case deals with the relatively emergent legal questions surrounding the patenting of human tissue. Beginning in the 1990s, the practice of patenting human genetic material has been controversial. The *Greenberg* case provides a significant block in the legal foundation surrounding this issue and no doubt will serve as precedent in future cases. Furthermore, the *Greenberg* case also raises the broader topic of "unjust enrichment" and provides a concrete example of how this obscure concept is applied in the courtroom.

A. Patenting Human Genetic Material

The arguments raised by those objecting to the patenting of human genetic material span from those concerned with the ethical questions of human dignity to those arguing that patents will inhibit the progress of research. As these discussions continue in academia and the public, the practice of patenting has become well established with the rapid rise of biotechnology in the past three decades. The court has upheld companies' right to patent biotechnology derived from human genetic material without major exception despite international statements and public dissent.[9] The legal structures surrounding this new practice, however, have faced practical controversies. The *Greenberg* case represents a common area of dispute concerning the relationship between research and patient (or other donor).

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9 Patenting human genetic material: refocusing the debate. Timothy Caulfield, E. Richard Gold, and Mildred K. Cho, http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2220019/, (last visited on Mar. 30, 2012).

The most prominent case concerning this topic was *Moore v. Regents of the University of California*.[10] In this landmark case, the fundamental issue concerned whether one had property rights to his human tissue and the technology which is created from it. Moore sued his physician, Dr. David Golde, who was treating him for hairy-cell leukemia. After creating and patenting a cell-line from Moore's blood and tissue samples, Golde profited financially from the commercialization of his findings. Moore sued Golde under the claim of conversion.[11]

The tort claim of conversion rests on the premise that Moore's blood and tissue should be considered his tangible personal property.[12] As stated in the California Court of Appeals' decision on *Moore v. Regents*, conversion is a "distinct act of dominion wrongfully exerted over another's personal property in denial of or inconsistent with his title or rights therein, . . . without the owner's consent and without lawful justification."[13] As the decision goes on to state, conversion is strictly a liability tort. It does not depend on the "knowledge or intent of the Defendant."[14] The case for conversion, in the *Moore* decision, depends on the foundational question of Moore's property rights to his tissue and the subsequent cell line.

In the California Supreme Court's decision, the court balances competing interests and recognizes the unprecedented case

10 Moore v. Regents of the Univ. of Cal., 249 Cal. Rptr. 494 (Ct. App. 1988), *rev'd*, 51 Cal. 3d 120 (1990).

11 *Id.* at 498.

12 *Id.* at 503-04.

13 *Id.* at 503.

14 *Id.*

of extending conversion liability to the domain of human tissue and derivative biotechnology. The decision states that no other court has imposed conversion liability in the case of research from human tissue, making Moore's claim unprecedented. The court argues that Moore did not expect to retain possession of the removed cells and under the stipulations of conversion, he must have maintained ownership interest. Also, the court concludes that:

> The subject matter of the Regents' patent - the patented cell line and the products derived from it - cannot be Moore's property. This is because the patented cell line is both factually and legally distinct from the cells taken from Moore's body. Federal law permits the patenting of organisms that represent the product of "human ingenuity," but not naturally occurring organisms.[15]

In light of these facts, the court concluded that it would be inappropriate to extend conversion liability in this case. The three reasons they cite for this are (1) the need to balance relevant policy considerations, (2) legislative resolution is better suited to problems in this area, and (3) tort conversion is not necessary to protect patients' rights. This decision created a precedent that the use of human tissue in medical research does not constitute conversion.[16]

The Plaintiffs in the *Greenberg* case also claimed conversion

15 Moore, 51 Cal. 3d at 141-42.

16 *Id.* at 169-70.

and the Court denied their claim, citing the *Moore* decision as precedent. The decision states that the "Plaintiffs have no cognizable property interest in body tissue and genetic matter donated for research under a theory of conversion."[17] The *Greenberg* case upheld the California Supreme Court's decision to dismiss conversion as a cause for action in the case concerning property rights of donors to the products derived from their genetic material.

B. Use of Unjust Enrichment

An important outcome of the *Greenberg* case is its application of the principle of unjust enrichment. Unjust enrichment is related to the broader principle of restitution, which has been a part of English and U.S. common law; in application, unjust enrichment exists separately from restitution and outside of tort and contract law.[18] Recent efforts to clarify its role in judicial decision making have made some progress in identifying its proper application.[19] The broad application of unjust enrichment stems from its role as a "unifying principle" in the area of restitution.[20] Unjust enrichment does not necessarily involve liability or wrongdoing but is grounded more broadly in principles of equity.[21] Current understanding of this legal principle indicates that it exists

17 Greenberg, 264 F. Supp. 2d at 1074.

18 Debra Greenfield, *Greenberg v. Miami Children's Hospital: Unjust Enrichment and the Patenting of Human Genetic Material*, 15 ANNALS HEALTH L. 213 (2006).

19 *See* Greenfield, *supra* note 18; James S. Rogers, *Restitution for Wrongs and the Restatement (Third) of the Law of Restitution*, 42 Wake Forest L. Rev. 55 (2007); *and* Sherwin, *supra* note 3.

20 Sherwin, *supra* note 3.

21 *Id.*

separately from tort and contract law, as stated previously, but the space that it does inhabit is less clearly defined.[22] The obscurity lies in the relationship between equity, restitution and unjust enrichment. This principle was articulated most recently in the Restatement (Third) of Restitution and Unjust Enrichment, which has come to be widely accepted as a clarifying document of the concept.[23] Arguably, the outcome of the *Greenberg* case provides a practical example of changes in the application of this legal principle.

The importance of the Restatements in shaping the application of unjust enrichment merits further examination. Emily Sherwin in "Restitution and Equity: An Analysis of the Principle of Unjust Enrichment," describes the tension between unjust enrichment as an descriptive idea and unjust enrichment as a legal principle. Central to unjust enrichment as a descriptive, organizational idea is the term "quasi-contract," written into the first Restatement of Restitution (1937).[24] Defined most clearly in *Kozlowski v. Kozlowski*, a "quasi-contract is ... a legal concept rationalizing a sanction to prevent unjust enrichment based upon the equitable principle that whatsoever it is certain that a man ought to do, the law supposes him to have promised to do."[25]

Unjust enrichment as a legal principle is addressed in the introductory section of the third Restatement. The Restatement

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22 Rogers, *supra* note 19.

23 *Id.*

24 Sherwin, *supra* note 3.

25 Greenfield, *supra* note 18, at 222, n. 57 (quoting Kozlowski v. Kozlowski, 395 A.2d 913, 918 (N.J. Super. Ct. Ch. Div. 1978)).

denies any intention "to repudiate the traditional, equitable explanation of restitution liability,"[26] as it was established in the First Restatement and has been understood since. However, the Third Restatement is not concerned with enrichment in a "broad sense, but with a narrower set of circumstances giving rise to what is more appropriately called unjustified enrichment .... Unjustified enrichment is enrichment that lacks an adequate legal basis . . . ."[27] Here lies the tension between previous understanding of unjust enrichment as an organizational principle and unjust enrichment as a legal principle. As a legal principle, unjust enrichment allows for greater judicial creativity as exemplified in its application in the *Greenberg* case.

IV. Analysis

The *Greenberg* case provides important insight into the continuing legal controversies surrounding the patenting of human genetic material. Following *Moore v. Regents of the University of California,* it upholds the decision that individuals do not have property rights over the products derived from their genetic materials. The claim to conversion did not stand in either case, supporting the rights of researchers to patent their findings and reap the financial benefits. However, an important difference between the *Moore* and *Greenberg* cases indicates a potential change in the legal environment surrounding the patenting of human tissue, namely the use of unjust enrichment as a cause of action in these

26 Sherwin, *supra* note 3, at 2087.

27 *Id.* at 2088.

cases. With the development of unjust enrichment from guiding idea to legal principle, the court in the *Greenberg* case supported the Plaintiffs' claim that the exclusive patent rights and resulting financial profit of the researchers represented an inequitable and unjust gain. This use of unjust enrichment in the case of patenting human tissue may prove to be a valuable tool to those who challenge the practice but its full potential remains to be seen.

HOSANNA-TABOR V. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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I. Introduction

One of the most contentious debates among legal scholars centers on the interpretation of First Amendment liberties, particularly the liberties outlined in the Free Exercise and Establishment clauses. Many questions concerning religious liberty are rooted in the words of early American political architects. As justices and constitutional scholars defend their jurisprudential philosophies, discussion concerning these issues becomes increasingly vitriolic.

Despite the grievances often attributed to constitutional debates, the benefits from such exchanges contribute to public discourse and establish important guidelines for social interaction. As a mouthpiece for justice, the Supreme Court must speak out on vital concerns that impact culture by making logically defensible decisions on important issues. One such example is the Supreme Court's recent decision in *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunity Commission,* which involves many hot button issues including religious liberty and employment discrimination.

II. Facts of the Case

The case *Hosanna-Tabor v. EEOC*, thereafter referred to as Hosanna-Tabor, involved a dispute between the plaintiffs, the Lutheran church and its subsidiary school, and the defendant, the Equal Employment Opportunity Commission acting on behalf of its client Cheryl Perich.

Beginning in 2000, Perich taught at Hosanna-Tabor Grade School in Redford, Michigan. The school operated under a con-

gregation affiliated with the Lutheran Church Missouri-Synod, which oversaw other similar schools and churches throughout the country. In June 2004, Perich was hospitalized for a medical condition later diagnosed as "narcolepsy" – a sleep disorder causing randomized and involuntary sleep patterns. The school provided Perich with full benefits and promised to reserve her position for after her recovery. In December of the same year, Perich's doctor told her that she could return to work in several months, and Perich promptly communicated this information back to the school's administration.

During this time, the school increasingly doubted Perich's ability to fulfill her duties as a teacher and subsequently hired a replacement. On January 30th, 2005, at the behest of the school board and the Hosanna-Tabor congregation, the school requested Perich's voluntary resignation.[1]

The disgruntled Perich refused to tender her resignation, and the following day she appeared on school grounds claiming she was reporting for work per the guidelines outlined in her initial employment contract. She threatened to pursue legal recourse under the *Americans with Disabilities Act of 1990* if the employment dispute were not resolved. On April 10th, 2005, the Hosanna-Tabor congregation voted to terminate Perich's employment contract, citing several reasons including long-term health concerns and disapproval of her repeated claims to pursue a legal remedy. After the *Equal Employment Opportunity Commission* (EEOC)

1 Ira Lupu, David Masci & Robert Tuttle, *In Brief: Hosanna-Tabor v. EEOC - Church Unemployment Disputes and the "Ministerial Exception"*, The Pew Forum On Religion & Public Life 1 (2011).

filed a complaint on behalf of Perich, the District Court reviewed the case and sided against her. However, the Sixth Circuit Court of Appeals reversed the lower court's decision, and the Supreme Court decided to hear the case on March 28th, 2011.

III. Nature of the Case and Central Legal Argument

The primary focus of this case revolves around "ministerial exception," which deals with fundamental First Amendment issues contained in the Free Exercise and Establishment clauses. The legal rationale behind the "ministerial exception" is that churches and other religious institutions should be allowed to freely employ their ministers without restriction from governmental authority. This legal doctrine is significant because Perich and the EEOC brought suit under a three-fold series of alleged violations that referenced the Americans with Disabilities Act, Title VI of the 1964 Civil Rights Act, and the Michigan's Persons with Disabilities Civil Rights Act. If upheld, the ministerial exception would nullify Perich's claims before the court and invalidate each of the three aforementioned violations.[2]

According to the decision by the United States Sixth Circuit Court of Appeals, the ministerial exception bars employment discrimination claims if the following qualifications are met: "(1) the employer must be a religious institution and (2) the employee must be a ministerial employee."[3] According to the District Court, the Court of Appeals, and the Supreme Court, the first of these

2 *Id.* at 2.

3 E.E.O.C. v. Hosanna-Tabor, 597 F.3d 769, 778 (6th Cir. 2010), *rev'd*, 132 S.Ct. 694 (2012) [hereinafter E.E.O.C.].

two requirements was adequately met. According to the Sixth Circuit, "To qualify as a religious institution under the first prong, the employee need not be a traditional religious organization, such as a church, diocese, or synagogue, nor must it be an entity operated by a traditional religious organization."[4] A prior case decided in 2004 by the Fourth Circuit Court of Appeals entitled *Shaliehsabou v. Hebrew Home of Greater Wash., Inc.* established that the only requirement for a "religious organization" is that its "mission is marked by clear or obvious religious characteristics." Neither the Sixth Circuit nor the Supreme Court argued that Hosanna-Tabor was not a "religious institution" under this definition.

The primary area of contention involved the second requirement for ministerial exceptions, the provision that "the employee must be a ministerial employee." In the initial ruling on the case, the District Court concluded that Perich's title and duties as a "commissioned minister" fulfilled the second part of the ministerial exception requirement. In a unanimous decision, the Sixth Circuit Court of appeals disagreed and vacated the lower court's order to enter summary judgment on behalf of the defendant. The Supreme Court subsequently issued a Writ of Certiorari to hear the case after Hosanna-Tabor appealed the lower court's ruling.

IV. Supreme Court Holding

In its first ruling on the ministerial exception concerning an employment dispute, the Supreme Court decided in favor of Hosanna-Tabor and reversed the Sixth Circuit Court of Appeals

4 *Id.*

decision. Speaking on behalf of a unanimous court, Chief Justice John Roberts said, "The interest of society in the enforcement of employment discrimination statutes is undoubtedly important. But so too is the interest of religious groups in choosing who will preach their beliefs, teach their faith, and carry out their mission."[5] He concludes, "The church must be free to choose those who will guide it on its way."[6]

In order to understand the contributing factors that led to the decision, it is important to first identify the primary arguments advanced by the Sixth Circuit which preceded the Supreme Court's ruling. According to the Sixth Circuit, Perich was not considered to be within the reach of the ministerial exception because her duties as a school employee were predominantly secular. Writing on behalf of the court, Justice Clay explained that Hosanna-Tabor traditionally hired two types of teachers: "lay teachers" and "called teachers." The "lay teachers" were hired by the school for a determined period of time and were instructed to perform specific duties if the school was not able to procure a sufficient number of "called teachers."[7]

Clay noted that although some substantial differences existed between the requirements of each position, there was no functional difference. Both "lay teachers" and "called teachers" performed essentially the same duties. As such, Clay argued that it

5 Hosanna-Tabor v. E.E.O.C., 132 S.Ct. 694, 710 (2012) [hereinafter Hosanna-Tabor].

6 *Id.*

7 E.E.O.C., *supra* note 3 at 772.

would be improper to consider Perich a "minister" since a similar designation could be ascribed to any employee of Hosanna-Tabor, either "lay" or "called." Since at least one of the "lay teachers" was not even a confessing member of the Lutheran church, this would be a rather absurd and certainly inaccurate label.

Although Perich initiated prayer, taught religion class four days a week, and led a chapel service twice per year, Clay argues that her time spent on these activities was far less than the time Perich spent on her secular duties as a teacher of non-religious subjects. To clarify Perich's religious duties, Clay adds the caveat that "teachers leading chapel or teaching religion were not required to be called or even Lutheran, and, in fact, at least one teacher was not. In all, the record supports the district court's finding that activities devoted to religion consumed approximately forty-five minutes of the seven hour school day."[8] Furthermore, the Sixth Circuit argues that Perich taught a majority of classes using secular textbooks, and she rarely injected religious commentary into her lectures.

The Supreme Court reversed and remanded this decision. On behalf of the Court, Chief Justice Roberts appealed to the robust principles of religious liberty upheld in the Constitution. Citing President James Madison, Roberts suggested that "the Religion Clauses ensured that the new Federal Government . . . would have no role in filling ecclesiastical offices."[9] Roberts clarified that he would not adopt a rigid formula concerning the requirements of

8 *Id.* at 779.

9 Hosanna-Tabor, *supra* note 5 at 696-97.

"being a minister" but that in this particular instance, because of the circumstances of her employment, Perich qualified as such.

V. Analysis of the Decision

The Court's decision in Hosanna-Tabor lacked a substantive methodological approach and a clear rational foundation. Perhaps most conspicuously, the Court failed to answer several key legislative claims that Perich presented. Consequently, although the Court provided plausible constitutional support on behalf of Hosanna-Tabor, far too many questions remain unanswered.

Perich's claim that the ministerial exception does not permit religious institutions from explicitly disobeying laws is supported by a credible body of legal precedent that Chief Justice Roberts largely avoided discussing. The claim is coherent in a general sense since the historic concept of justice entails the idea that "no man is above the law." Both societies and the legal systems which provide their support will erode if institutions (religious or otherwise) can claim permanent and complete exemption from established legal norms.

The Supreme Court upholds this view in a 1990 decision entitled *Employment Decision v. Smith*. In *Smith*, the Court determines that although the First Amendment protects religious institutions and individuals from laws that would specifically preclude them from engaging in their religious practices or beliefs, the "free exercise" clause does not exonerate religious groups from culpability who violate the laws that generally apply to all institutions and groups in a society.

In *Smith*, the Court ruled that two plaintiffs, Alfred Smith and Galen Black, were rightfully dismissed from their jobs as drug rehabilitation counselors for their use of the hallucinogen "peyote" as part of a religious practice in their church. Justice Antonin Scalia provided the Court's majority opinion:

> Respondents in the present case, however, seek to carry the meaning of 'prohibiting the free exercise [of religion]' one large step further. They contend that their religious motivation for using peyote places them beyond the reach of a criminal law that is not specifically directed at their religious practice, and that is concededly constitutional as applied to those who use the drug for other reasons.[10]

Scalia concludes:

> They assert, in other words, that 'prohibiting the free exercise [of religion]' includes requiring any individual to observe a generally applicable law that requires (or forbids) the performance of an act that his religious belief forbids (or requires). As a textual matter, we do not think the words must be given that meaning. It is no more necessary to regard the collection of a general tax, for example, as 'prohibiting the free exercise [of religion]' by those citizens who believe support of organized government to be sinful than it is to regard the same tax as 'abridging the freedom . . . of the press' of those publishing companies that must pay the tax as a condition of staying in

10 Emp't Div., Dept. of Human Res. of Or. v. Smith, 494 U.S. 872, 878 (1990).

business.[11]

Scalia's rationale in this decision supports Perich's claims since the Americans with Disabilities Act (ADA) was both constitutionally justified and "not specifically directed" at Hosanna-Tabor, the Lutheran Church, or religion in general. The legislation applied broadly to all institutions and should not have been so readily dismissed by the court.[12]

Perich also has a legitimate claim that her role as a teacher at *Hosanna-Tabor* involved disproportionately less religious teaching than secular teaching, thus disqualifying her as a true "minister" of the faith. According to the Court of Appeals opinion authored by Justice Clay, "Perich taught secular subjects using secular textbooks commonly used in public schools, and she can only recall two instances in her career when she introduced religion into secular subjects."[13] If Perich's duties included only 45 minutes of religious teaching in a seven-hour school day and her testimony supports the claim that religion was integrated sparingly into her class instruction, then she should be excluded from being characterized as a "minister" under the law.

Although the *Smith* case provided general legal credence to her arguments, Perich also wielded the support of specific provisions outlined in the ADA. Evidence produced during trial showed that *Hosanna-Tabor* rationalized its termination of Perich on the

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11 *Id.*

12 Oswald Eckstein, *A Delicate Balance: The Free Exercise Clause and the Supreme Court*, The Pew Forum On Religion & Public Life 1 (2007).

13 *Id.* at 3.

basis that she had "damaged beyond repair" her relationship with the institution by "threatening to take legal action."[14] The letter also made specific references to her perceived insubordination and disruptive behavior that stemmed almost entirely from her threat to pursue legal action.

In defense of Perich, the EEOC referenced a retaliation clause embedded in the ADA that precludes employers from targeting employees who appeal to the ADA for protection. According to the ADA, employers are prohibited from "discriminating against any individual because such individual has opposed any act or practice made unlawful by [the ADA] or because such individual made a charge...under [the ADA]."[15] If the religious organizations were exempt from the ADA, this clause would have little significance. However, according to a House Report released to clarify the applicability of this piece of legislation:

> Religious organizations are not exempt from title 1 of the ADA or [these regulations]. A religious entity is required to consider qualified individuals with disabilities who satisfy the permitted religious criteria on an equal basis with qualified individuals without disabilities who similarly satisfy the religious criteria.[16]

Because the ADA retains enforceability amongst religious institutions, Hosanna-Tabor's actions are not legally justifiable.

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14 *Id.* at 6.

15 Legislative Counsel, Mich., 1 www.tcsg.org/sfelp/PersonsDisability220.pdf.

16 *Id.* at 2.

Not only does the federally enforceable ADA create questions about the Supreme Court's ruling, but so does a state-wide law entitled *Michigan's Persons with Disabilities Civil Rights Act* (PDCR). Whereas the ADA can be applied only to entities with 15 or more employees, the PDCR covers businesses with 15 or less and is more localized in its jurisdictional reach and descriptive purpose. According to section 102(1) of the bill:

> The opportunity to obtain employment, housing, and other real estate and full and equal utilization of public accommodations, public services, and educational facilities without discrimination because of a disability is guaranteed by this act and is a civil right.[17]

Because of the broad coverage of the ADA and the more specific qualifications of the PDCR, Hosanna-Tabor was effectively cornered by two pieces of comprehensive legislation.

In addition to these more substantive claims, Perich had legitimate qualms about the Hosanna-Tabor's termination procedure. For example, before Perich applied for a disability leave of absence during the 2004-2005 school year, she wanted to ensure that her position was secure pending clearance from her doctor and a healthy status update. The Court of Appeals confirmed, "The principal of Hosanna-Tabor, Stacy Hoeft, informed Perich that she would 'still have a job with Hosanna-Tabor when she regained her health.'"[18]

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17 MICH. COMP. LAWS ANN. § 37.1102(1) (West 2012).

18 E.E.O.C., *supra* note 3 at 773.

During her recovery process, Perich provided Hoeft with meticulous health reports and maintained a constant stream of communication. In February 2005, Perich's doctor provided written notification that Perich's health was sufficient to resume unrestricted day-to-day work. However, Hoeft and the Hosanna-Tabor school board still expressed their growing disinterest in Perich and subsequently denied her request to resume her responsibilities as a teacher at the school.

Although there was no written, legally actionable contract agreed upon by Hoeft and Perich during their initial discussion, it is clear that Hoeft verbally committed to Perich's return. At a minimum, Hoeft's failure to fulfill her promise to Perich undermines the credibility of Hosanna-Tabor as an institution and creates doubt about the legitimacy of its status as a constitutionally protected religious institution.

VI. Conclusion

As the first landmark Supreme Court case involving the ministerial exception, Hosanna-Tabor v. EEOC is immensely significant. Although First Amendment freedoms are essential--including the freedom of religion as supported by the Establishment and Free Exercise clauses--there must be a reasonable limit on the latitude granted by the federal government. If all restrictions are lifted from religious institutions, religious employees lose guaranteed protection of employment abuse. Hosanna-Tabor provides

a compelling case study of the cancerous nature of interpreting constitutional rights.

To end his opinion, Chief Justice Roberts explains that the decision of the Court has no bearing on other claims by non-ministerial employees who allege employment discrimination. According to Roberts, "We express no view on whether the exception bars other types of suits, including actions by employees alleging breach of contract or tortious conduct by their religious employers. There will be time enough to address the applicability of the exception to other circumstances if and when they arise."[19]

Indeed, the ruling in Hosanna-Tabor is likely a foreshadowing of what is certain to be a continued legal debate surrounding the nexus of religious and employment discrimination claims.

19 Hosanna-Tabor, *supra* note 5.