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We strive to view issues pertinent to Hawai'i through a broader global lens. We balance provocative articles on contemporary legal issues with practical articles that are in the vanguard of legal change in Hawai'i and internationally, particularly on such topics as military law, sustainability, property law, and native rights.

Kūlia mākou e kilo i nā nīnau i pili iā Hawai'i me ke kuana'ike laulā. Ho'okomo mākou i nā 'atikala e ulu ai i ka hoi e pili ana i nā nīnau kū kānāwai o kēia wā a me nā 'atikala waiwai e ho'ololi ana i nā mea kū kānāwai ma Hawai'i a ma nā 'āina 'ē, me ke kālele 'ana i nā kumuhana like 'ole e like me nā kānāwai pū'ali koa, ka mālama 'āina, nā kānāwai ona 'āina, a nā pono o nā po'e 'ōiwi.

Translation by Pauahi Ho'okano

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America Invents Act: Promoting Progress or Spurring Secrecy?

Diane H. Crawley

In law, as in life, incentives matter.[1] Incentives matter because incentives drive human behavior. The child caught with his hand in the cookie jar was driven to his fate by the lure of a chocolate chip. Like cookies, laws create incentives by rewarding certain behaviors and penalizing others. Likewise, altering incentives, such as by stocking the cookie jar with sugar free prune cookies or by changing the law, alters people's behavior because it changes the costs and benefits of making specific decisions.[2] Changes in the law frequently change people's behavior in unexpected, even unintended ways. Laws have consequences, and quite often laws have unintended consequences.[3] As renowned economist Frederic Bastiat put it:

> [A] law gives birth not only to an effect, but to a series of effects. Of these effects, the first only is immediate; it manifests itself simultaneously with its cause—it is seen. The others unfold in succession—they are not seen: it is well for us if they are foreseen.[4]

It is indeed well for us if the consequences of a law are foreseen, that we may evaluate not only the immediate effect, but the series of effects that may be expected therefrom.

When an inventor invents, she is faced with the choice of whether and how to protect her innovation.[5] In particular, where the invention is capable of being kept secret while being commercially exploited, an inventor must choose between secrecy and patent protection.[6] If our inventor chooses to

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[1] JAMES D. GWARTNEY ET AL., COMMON SENSE ECONOMICS 6 (5th ed. 2005).

[2] *Id.*

[3] *See, e.g.*, FREDERIC BASTIAT, THAT WHICH IS SEEN, AND THAT WHICH IS NOT SEEN 23 (Waking Lion Press 2006) (1850) ("[I]n fact, the law produced all the consequences announced . . . the only thing was, it produced others which he had not foreseen.").

[4] *Id.* at 1.

[5] Various industries protect their innovation in a variety of ways, including patents, trade secrecy, lead time and marketing. *See* Wesley M. Cohen et al., *Protecting Their Intellectual Assets: Appropriability Conditions and Why U.S. Manufacturing Firms Patent (or Not)* 1-2 (Nat'l Bureau of Econ. Research, Working Paper No. 7552, 2000), *available at* http://www.nber.org/papers/w7552.

[6] *See* Honorable Howard T. Markey, Chief Judge, U.S. Court of Customs and Patent

keep her invention a secret, she must rely on trade secret law for protection.[7] Alternatively, if our inventor chooses the protection afforded by patent law, she must disclose her invention to the public.[8] In making her decision, our inventor must weigh the costs and benefits, i.e., she must balance the costs of the form of legal protection chosen against the benefits obtained thereby. In other words, she must evaluate the incentives associated with the proffered protection. Recent changes in U.S. patent law alter the incentives involved in choosing between patent and trade secret protection for innovation, and create powerful incentives to choose trade secret protection, and its requisite secrecy,[9] over patent protection, and its mandated disclosure.[10] This article argues that this unintended[11] consequence of this change in the patent law will result in less patenting,[12]

Appeals, Some Patent Problems, Presentation at the Federal Judicial Center Workshops for District Judges, *in* 80 F.R.D. 203, 205-06 (1978).

[7] *Id.* at 205. Obviously, this choice is only available to our inventor if her invention is capable of being kept secret while being commercially exploited.

[8] *Id. See also* 35 U.S.C. § 112(a)(2006)(requiring the patent application to contain a written description of the invention "in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same").

[9] *See* UNIF. TRADE SECRETS ACT § 1(4)(i) (1985) (defining a trade secret as information deriving economic value from "not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use . . . ."); RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 39 (1995) ("A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable *and secret* to afford an actual or potential economic advantage over others." (emphasis added)).

[10] 35 U.S.C. § 112(a) (requiring the patent specification to contain a written description of the invention "in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same . . .").

[11] According to the legislative history of the Act, at least some portions of the Act were actually intended to promote trade secret protection. With regard to the prior user rights provisions of the Act, Senator Blunt conceded that these "can be of great benefit to keeping high paying jobs in this country by giving U.S. companies a realistic option of keeping internally used technologies as trade secrets." 157 CONG. REC., S5402-02, S5426 (daily ed. Sept 8, 2011) (statement of Sen. Roy Blunt).

[12] There is some evidence that trade secret protection is already preferred over patent protection by many businesses. John E. Jankowski, *Business Use of Intellectual Property Protection Documented in NSF Survey*, INFOBRIEF, Feb. 2012, at 1, *available at* http://www.nsf.gov/statistics/infbrief/nsf12307(finding that patents lag trade secrets in importance to most businesses); Cohen et al., *supra* note 5, at 24 (concluding, based on 1994 survey of U.S. manufacturers, that of the mechanisms for protecting invention, including patents, trade secrecy, lead time and manufacturing and marketing capabilities, patents tend to be the least important, and trade secrecy and lead time tend to be the most important).

less disclosure of innovation, less follow on innovation and, consequently, less progress of science and the useful arts.[13]

I. PATENTING PROMOTES THE PROGRESS OF SCIENCE; SECRECY IMPEDES THE PROGRESS OF SCIENCE

That patenting, and its requisite disclosure, promotes the progress of science and the useful arts has long been the justification for having a patent system.[14] Congress's very power to regulate patents is based on this justification, stemming from Article I, section 8 of the U.S. Constitution, which empowers Congress

> [t]o *promote the Progress of Science and useful Arts*, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . . .[15]

Pursuant to this grant of power, Congress has regulated patents since the first patent statute of 1790.[16] As the U.S. Supreme Court has often explained, the "patent system represents a carefully crafted bargain" between inventors and the public, designed to encourage "both the creation and the public disclosure of new and useful advances in technology, in return for an exclusive monopoly for a limited period of time."[17] Thus,

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[13] *See* James R. Barney, *The Prior User Defense: A Reprieve for Trade Secret Owners or a Disaster for the Patent Law?*, 82 J. PAT. & TRADEMARK OFF. SOC'Y 261, 265 (2000) (arguing that "establishing parity between trade secret and patent protection," in the context of the introduction of a limited prior user defense, "ignores the constitutional mandate to 'promote the Progress of Sciences [sic] and the useful Arts' because it encourages secreting, rather than disclosing, of new inventions").

[14] *See, e.g.*, CRAIG A. NARD, THE LAW OF PATENTS 3 (2d ed. 2010) ("[P]atent law can be viewed as a system of laws that offer a potential financial reward as an inducement to invent, to disclose technical information, [and] to invest capital in the innovation process . . . .").

[15] U.S. CONST. art. I, § 8, cl. 8 (emphasis added). The legislative history of the America Invents Act itself, the subject of this article, recognizes the Constitutional mandate. H.R. REP. NO. 112-98, at 40 (2011), *reprinted in* 2011 U.S.C.C.A.N. 67, 69 ("The purpose of the 'America Invents Act,' as reported by the Committee on the Judiciary, is to ensure that the patent system in the 21st century reflects the constitutional imperative. Congress must promote innovation by granting inventors temporally limited monopolies on their inventions in a manner that ultimately benefits the public through the disclosure of the invention to the public.").

[16] *See* NARD, *supra* note 14, at 18.

[17] Pfaff v. Wells Elecs., Inc., 525 U.S. 55, 63 (1998). *See also* Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co., 535 U.S. 722, 736 (2002) ("[E]xclusive patent rights are given in exchange for disclosing the invention to the public." (citing Bonito Boats, Inc. v. Thunder Craft Boats, Inc., 489 U.S. 141, 150-51 (1989))).

patent law seeks to promote the progress of science by creating incentives for inventors to both create, and disclose to the public, advances in technology.[18] In exchange for her patent, a government granted monopoly for a limited time, our inventor must, in her patent application, teach the public, or at least those skilled in the field of her invention, how to make and use her invention after her monopoly expires.[19] This public disclosure, "enablement" to patent lawyers, is the heart and soul of the goal of patent law—the promotion of the progress of science and the useful arts via the dissemination of technical information.[20] It is the "quid pro quo of the patent bargain," monopoly rights for a limited time in exchange for public disclosure of the invention.[21] Once the inventor's patent rights expire, the public is free to make and use the invention disclosed in the patent.[22] Even while the inventor's patent rights remain in force, the public disclosure of the invention in the patent itself allows other inventors to build on and advance technology.[23] Thus, to promote the progress of science and the useful arts, patent law drives a hard bargain with inventors: monopoly rights for a limited time in exchange for public disclosure of the invention.[24]

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[18] *See Pfaff*, 525 U.S. at 63. *See also* Markey, *supra* note 6, at 205 (Patent law "is built on human nature and the role of incentive in the lives of human beings. It involves many incentives: the incentive to invent, the incentive to disclose, and the incentive to invest the average of 14 years and one million dollars which it takes to bring a useful invention to the marketplace at a reasonable price.").

[19] 35 U.S.C. § 112(a) (2006).

[20] *See* NARD, *supra* note 14, at 57 ("The disclosure requirements of § 112 are at the heart of patent law's goal of promoting the progress of the useful arts . . . . By requiring the patent applicant to claim the invention with clarity and to sufficiently disclose his invention to persons having ordinary skill in the art, patent law seeks to facilitate the dissemination of technical information and follow-on innovation."); Markey, *supra* note 6, at 205("The philosophy behind patent law is very simple. It just says, 'Let's encourage disclosure.' That is its purpose, its life blood, its raison d'etre.").

[21] AK Steel Corp. v. Sollac, 344 F.3d 1234, 1244 (Fed. Cir. 2003) ("However, as part of the quid pro quo of the patent bargain, the applicant's specification must enable one of ordinary skill in the art to practice the full scope of the claimed invention."(citing In re Wright, 999 F.2d 1557, 1561 (Fed. Cir. 1993))).

[22] 35 U.S.C. § 154(a)(2) (stating that patent protection extends for a term of twenty years from the date of filing of the patent application).

[23] *See* WENDY H. SCHACHT & JOHN R. THOMAS, CONG. RESEARCH SERV., R41638, PATENT REFORM IN THE 112TH CONGRESS: INNOVATION ISSUES 4 (2011) (noting that, even during the period of the patent term, "[o]thers can build upon the disclosure of a patent instrument to produce their own technologies that fall outside the exclusive rights associated with the patent"); NARD, *supra* note 14, at 57.

[24] *See* Markey, *supra* note 6, at 206 ("In effect, the government [via the patent law] says, 'If you disclose your invention in the particular manner spelled out in the statute, then the courts will enforce your right to exclude others from making, using or selling the claimed

The lure of monopoly rights drives inventors to invent; disclosure draws the map for follow on invention during the patent term, and free use of the invention after the patent expires.[25]

However, this disclosure aspect of patent law holds particular risks for inventors whose inventions could have been maintained as trade secrets.[26] Patent applications are generally published eighteen months after the filing date,[27] and most patent applications are published long before any patent issues.[28] Indeed, applying for a patent is no guarantee that *any* patent will ultimately issue.[29] Our inventor thus must choose between filing for patent protection or keeping her invention a secret, and must evaluate the costs and benefits of these opposing choices.[30] One of the costs of seeking patent protection is the risk that the application for patent will be rejected by the Patent and Trademark Office ("PTO"), in whole or in part, and either no patent will ultimately issue, or any patent that does issue will be so narrow as to be worthless.[31] If this occurs after the application has been published,

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invention for 17 [now 20] years, but not for one moment longer.'").

[25] *Id.* ("But [the patent system] is today, in my view, the finest and the best system yet devised to provide, all at once, the incentive to invent in the first place, the incentive to disclose the invention once made, the incentive to invest the sums necessary to experiment, to produce, and finally get the invention on the market, the incentive to design around and improve upon earlier patents, the only deterrent we have to an unwanted technological secrecy, and the only marketplace for technological ideas.").

[26] Patent protection and trade secret protection are not coextensive, but do overlap and some inventions are capable of being protected by one or the other. *See* David S. Almeling, *Seven Reasons Why Trade Secrets are Increasingly Important,* 27 BERKELEY TECH. L.J. 1091, 1112 (2012). In such cases, inventors must choose between patent protection and its requisite disclosure, or trade secret protection and its requisite secrecy. *See* Markey, *supra* note 6, at 205.

[27] 35 U.S.C. § 122(b)(1)(A) (2012). Applicants may request non-publication if they certify that they will not seek foreign patent protection. *Id.* § 122(b)(2)(B)(i).

[28] In 2009, the total average pendency for patent applications was 34.6 months, greatly exceeding the eighteen month publication deadline. *Patent Pendency Statistics – FY09*, USPTO.GOV, http://www.uspto.gov/patents/stats/patentpendency.jsp [hereinafter *Patent Pendency Statistics*].

[29] The patent statutes are phrased in terms of "[a] person shall be entitled to a patent *unless*" followed by a listing of the vast array of circumstances that will operate to deny an applicant patent protection. 35 U.S.C. § 102 (2006) (emphasis added). Thus, a patent application may or may not ever result in the issuance of a patent.

[30] *See* Markey, *supra* note 6, at 205.

[31] The various statutory requirements of patenting can operate either to deny our inventor patent protection altogether, or to narrow the boundaries of any patent protection obtained. *See* NARD, *supra* note 14, at 41 (detailing the patent prosecution process, where patent applicants are frequently required to narrow the boundaries of their patent claims in response to a patent examiner's rejection of the patent application).

as it almost always will,[32] our inventor is left worse off than if she had never sought patent protection—her application has been published, and her invention disclosed, thus foreclosing trade secret protection, but her attempt to obtain patent protection has been thwarted, either in whole or in part.[33] The patenting process thus poses significant risks to the inventor whose invention could have been maintained as a trade secret—risks our inventor must consider in determining whether to seek patent protection at all.[34]

In light of these risks, some inventors eschew patent protection, in part or altogether, in favor of trade secret protection.[35] When an inventor chooses not to patent her invention, and instead opts for trade secret protection, the progress of science and the useful arts is impeded, not promoted. This principle has been oft cited as a justification for having a patent system at all.[36] The Supreme Court has itself stated that

> the inventor who designedly, and with the view of applying it indefinitely and exclusively for his own profit, withholds his invention from the public, comes not within the policy or objects of the Constitution or acts of Congress. He does not promote, and, if aided in his design, would impede, the progress of science and the useful arts.[37]

With the innovation hidden from the public eye for an indeterminate amount of time, there is no potential for follow-on invention, and no set point at which society will gain the benefit of the free use of the invention.[38] So long as the inventor can keep the secret, and so long as another inventor does not independently invent the thing secreted, society is deprived of the disclosure of the invention, and consequently progress is stunted.

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[32] *See Patent Pendency Statistics*, *supra* note 28.

[33] *See* Tewari De-Ox Sys., Inc. v. Mountain States/Rosen, L.L.C., 637 F.3d 604, 612 (5th Cir. 2011) (holding that information disclosed in a published patent application was not capable of trade secret protection).

[34] Almeling, *supra* note 26, at 1115-16 (arguing that the "gamble" that the eighteen month publication rule forces upon an inventor weighs in favor of trade secret protection).

[35] *Id.*

[36] *See, e.g.*, Kendall v. Winsor, 62 U.S. 322, 328 (1858); Brown v. Campbell, 41 App. D.C. 499, 502 (D.C. Cir. 1914).

[37] *Kendall* 62 U.S. at 328.*See also* Markey, *supra* note 6, at 205-06 (arguing that the patent system provides incentive to invent and disclose and deterrent to unwanted secrecy).

[38] *See, e.g.*, Pennock v. Dialogue, 27 U.S. 1, 19 (1829) (recognizing that the main object of the patent laws "was 'to promote the progress of science and the useful arts;' and this could be done best, by giving the public at large a right to make, construct, use, and vend the thing invented, at as early a period as possible; having a due regard to the rights of the inventor").

II. THE AIA PROMOTES SECRECY

On September 16, 2011, President Obama signed the America Invents Act ("AIA") into law.[39] This long awaited revision dramatically alters U.S. patent law in a multitude of areas including priority,[40] prior art,[41] patent fees,[42] post-grant challenges,[43] enforcement,[44] prior user rights,[45] and best mode.[46] Although touted as a measure to streamline the patent system, improve patent quality, and minimize litigation costs,[47] the AIA instead has the perhaps unintended consequence of tipping the cost-benefit scales decisively in favor of trade secret protection, stymieing the disclosure and dissemination of information that advances technology, and impeding the progress of science and the useful arts instead of promoting it.[48]

The AIA promotes secrecy in two ways: the Act makes patent protection less attractive to inventors, and makes trade secret protection more attractive. The Act makes patent protection less attractive by making patents more difficult and expensive to obtain, more vulnerable to post-grant challenges, and more expensive to enforce, thus increasing the risks of seeking to obtain, and decreasing the rewards flowing from, patent rights.[49] In addition, the Act makes trade secrecy more attractive by enhancing prior user rights, removing the penalty for failing to disclose the best mode of practicing an invention from a patent disclosure and arguably extending the time in which an inventor can secretly practice an invention and still obtain patent protection.[50]

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[39] Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (codified in scattered sections of 35 U.S.C.).

[40] *See id.* sec. 3, 125 Stat. at 285 (codified in scattered sections of 35 U.S.C.).

[41] *See id.* sec. 3, § 102, 125 Stat. at 285-86 (codified at 35 U.S.C. § 102).

[42] *See id.* secs. 10, 11, 125 Stat. at 316-25 (codified at 35 U.S.C. § 41).

[43] *See id.* sec. 6, § 311, 125 Stat. at 299 (codified at 35 U.S.C. §§ 301-329).

[44] *See id.* sec. 19, § 299, 125 Stat. at 332-33 (codified at 35 U.S.C. § 299).

[45] *See id.* sec. 5, § 273, 125 Stat. at 297 (codified at 35 U.S.C. § 273).

[46] *See id.* sec. 15, §§ 119, 120, 282, 125 Stat. at 328 (codified at 35 U.S.C. §§ 119, 120, 282).

[47] *See* H.R. REP. NO. 112-98, at 39-40 (2011), *reprinted in* 2011 U.S.C.C.A.N. 67, 69.

[48] To some extent, the AIA appears to have been intended to encourage secrecy. *See* 157 CONG. REC. S5402-02, S5426 (daily ed. Sept 8, 2011) (statement of Sen. Roy Blunt).

[49] Todd McCracken, *Patent Reform Bill Hurts Small Business*, 18 No. 19 WESTLAW J. INTELL. PROP. 3 (2012) (arguing that the AIA adds risk to patenting and increases the cost of the acquisition, maintenance and enforcement of patent rights, to the detriment of small businesses and innovation).

[50] *See* Almeling, *supra* note 26, at 1113 (identifying the passage of the AIA as one of several recent reforms that increase the incentive for inventors to choose trade secret protection over patent protection).

III. THE AIA MAKES PATENTS LESS ATTRACTIVE

The changes wrought by the provisions of the Act make patent protection less desirable as a form of innovation protection. The Act makes patents more difficult and expensive to obtain by expanding the universe of prior art that may be used to deny patent rights[51] and by increasing patent fees.[52] Moreover, the Act introduces additional pre and post-grant patent challenge procedures,[53] thereby subjecting both pending and issued patents to new third party challenges at the PTO, and tightens the joinder rules in infringement litigation, thereby increasing the cost of enforcing patents.[54] These changes make patent protection less attractive to inventors by raising the costs of obtaining patent protection while simultaneously lessening the potential rewards of obtaining patent protection.

Patents will be more difficult to obtain and less certain to be held valid after the AIA because the AIA expands the universe of prior art that may be used to restrict or deny patent rights.[55] Prior to the AIA, § 102 of the statute required uses and sales to occur in the United States in order to constitute prior art.[56] The AIA removes this geographical requirement, rendering prior uses and sales prior art regardless of where in the world they may have occurred.[57] Thus, prior use or sale of the invention anywhere in the world constitutes prior art which can prevent our inventor from receiving a patent, or be used to later invalidate our inventor's patent if one issues.[58] When contemplating filing a patent application our inventor is faced with the impossible task of searching all prior uses or sales worldwide to determine if her invention is, in fact, patentable. The impossibility of performing such a search[59] introduces additional uncertainty in the initial determination of whether the invention is, in fact, patentable at all. Thus,

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[51] See Leahy-Smith America Invents Act, sec. 3, § 102, 125 Stat. 284, 286-87 (codified at 35 U.S.C. § 102).

[52] *See id.* secs. 10, 11, 125 Stat. at 316-25 (codified at 35 U.S.C. § 41).

[53] *See id.* sec. 6, 125 Stat. at 299-313 (codified at 35 U.S.C. §§ 301-329)

[54] *See id.* sec. 19, § 299, 125 Stat. at 332-33 (codified at 35 U.S.C. § 299).

[55] *See id.* sec. 3, § 102(a)(1), 125 Stat. at 285-86 (codified at 35 U.S.C. § 102).

[56] 35 U.S.C. § 102(2006) *amended by* 35 U.S.C.A. § 102 (West 2011).

[57] Leahy-Smith America Invents Act sec. 3, § 102(a)(1), 125 Stat. at 286 (codified at 35 U.S.C. § 102).

[58] *Id.*

[59] Although not required to do so by the patent law, many inventors do in fact perform searches of prior art prior to filing for patent protection. Margo A. Bagley, *Patently Unconstitutional: The Geographical Limitation on Prior Art in a Small World,* 87 MINN. L. REV. 679, 717 (2003). The AIA's expansion of the prior uses and sales that may constitute prior art makes these searches much more difficult, and, correspondingly less reliable.

our inventor could potentially file for a patent and have her application published eighteen months after filing,[60] only to have the patent application rejected on the basis of a prior use or sale somewhere in the world which her patent search failed to uncover.[61] Alternatively, our inventor could succeed in obtaining a patent, only to have it subsequently declared invalid on the basis of some previously unknown prior use or sale.[62] Obviously, this added uncertainty regarding the patentability of the invention biases our inventor's decision in favor of trade secret protection. This expansion of the universe of prior art instituted by the AIA increases the chances that our inventor will be denied patent protection, or will have her patent held invalid after issuance, on the basis of prior art that our inventor was simply unable to identify prior to filing her patent application. This increased uncertainty surrounding not only the patentability of an invention, but also the long term viability of any patent protection obtained, renders patent protection less attractive to our inventor.

The AIA further expands the universe of prior art by allowing foreign filing dates to serve as priority dates for prior art, making patent defeating prior art effective as of an earlier date.[63] Prior to the AIA, under the holding of *In re Application of Hilmer*,[64] a foreign filing date could not be used as a prior art date for purposes of defeating patent rights, although a foreign filing date could be used as a priority date for the purpose of obtaining a patent.[65] After the AIA, foreign filing dates may be used as prior art effective dates, making more prior art effective as of an earlier date, thus further increasing the universe of prior art that may be used to defeat our inventor's patent rights.[66] Patent rights are rendered more difficult to obtain, and consequently less attractive to our inventor.

The Act also makes patents less attractive by simply making them cost more to obtain. The Act instituted an immediate 15% fee increase, effective ten days after enactment,[67] and vested fee setting authority in the PTO,[68] which many believe will lead to even higher fees.[69] This fee

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[60] *See* 35 U.S.C. § 122(b)(1) (2006).

[61] Leahy-Smith America Invents Act, sec. 3, § 102(a)(1), 125 Stat. at 285-86 (codified at 35 U.S.C. § 102).

[62] *Id.*

[63] *See* Leahy-Smith America Invents Act, sec. 3, § 102(d), 125 Stat. at 286-87 (codified at 35 U.S.C. § 102(d)) (allowing foreign filing dates to serve as the effective prior art date).

[64] 359 F.2d 859 (C.C.P.A. 1966).

[65] *Id.* at 867-68.

[66] Leahy-Smith America Invents Act, sec. 3, § 102(d), 125 Stat. at 286-87 (codified at 35 U.S.C. § 102(d)).

[67] *Id.* sec. 11(i), 125 Stat. at 325.

[68] *Id.* sec. 10(a), 125 Stat. at 316 (codified at 35 U.S.C. § 41).

increase lands squarely on the cost side of our inventor's cost-benefit analysis, tipping the scales even further away from the patenting option.

The Act further discourages patenting by expanding the third party challenges a patent may face at the PTO, both during prosecution and after issuance. First, the AIA amends 35 U.S.C. § 122 to add a mechanism for preissuance submissions by third parties.[70] Although the PTO's regulations previously allowed third parties to submit prior art to the Examiner during prosecution of a patent,[71] under the regulations, third parties could neither provide any explanation of the prior art[72] nor insist that the Examiner consider it.[73] In contrast, the new preissuance submission provision of the AIA not only allows third parties to submit patents, published patent applications, and other printed publications potentially relevant to the examination of an application, but *requires* such third parties to include "a concise description of the asserted relevance of each submitted document . . . ."[74] In addition, the AIA extends the period for making such submissions from the "two months from the date of publication of the application" window provided for in the regulations[75] to the later of six months after publication of the application or the date of first rejection of any claim.[76] Thus, third parties have new ammunition to defeat a patent before it is ever granted, further increasing the risk that our inventor's efforts to obtain patent protection will be thwarted, and giving pause to any

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[69] *Cf.* Tony Dutra, *Patent Bar Association Representatives Fault PTO's Proposed Patent Fee Increases*, PAT., TRADEMARK & COPYRIGHT L. DAILY, Feb. 17, 2013.

[70] Leahy-Smith America Invents Act sec. 8, § 122(e), 125 Stat. at 315-16 (codified at 35 U.S.C. § 122(e)).

[71] 37 C.F.R. § 1.99 (2012).

[72] *Id.* § 1.99(d).

[73] U.S. PAT.& TRADEMARK OFFICE, MANUAL OF PATENT EXAMINING PROCEDURE § 1134.01 (8th ed., rev. Aug. 2012) [hereinafter MPEP].

[74] Leahy-Smith America Invents Act, sec. 8, § 122(e)(2), 125 Stat. at 316 (codified at 35 U.S.C. § 122 (e)(2)).

[75] 37 C.F.R. § 1.99(e) (2012). Submissions under the regulation also had to be made prior to any notice of allowance. *Id.*

[76] Leahy-Smith America Invents Act, sec. 8, § 122(e)(1), 125 Stat. at 316 (codified at 35 U.S.C. § 122(e)(1)). As under the regulations, submissions made under the new § 122(e)(1) must still be made prior to the date of any notice of allowance. *Compare id.*, sec. 8, § 122(e)(1)(A), 125 Stat. at 316 (codified at 35 U.S.C. § 122(e)(1)(A)) (submission must be made before the *earlier* of the date of notice of allowance or the later of six months after publication of the application or the date of first rejection of any claim), *with* 37 C.F.R. § 1.99(e) (2012) (submissions "must be filed within two months from the date of publication of the application . . . or prior to the mailing of a notice of allowance . . . , whichever is earlier.").

inventor contemplating embarking on the expensive and uncertain patent prosecution process.

Moreover, under the AIA, patents face additional post-grant challenges at the PTO even after allowance. Our inventor, having paid the increased fees, successfully navigated the augmented minefield of prior art and survived the preissuance submissions of third parties must now battle new and improved patent killing post-grant opposition proceedings. The AIA adds a new post-grant review procedure for third parties to challenge issued patents,[77] and alters the standards for existing patent reexamination challenge procedures.[78]

The first new obstacle faced by a freshly issued patent is the new post-grant review introduced by the Act. For nine months following grant or reissuance, a patent may be attacked by a third party's petition for post-grant review.[79] The PTO may institute post-grant review if the post-grant review petition "demonstrate[s] that it is more likely than not that at least 1 of the claims challenged in the petition is unpatentable[]"[80] or if "the petition raises a novel or unsettled legal question that is important to other patents or patent applications."[81] This new post-grant review allows a much broader scope of challenge than existing patent challenging procedures at the PTO, and may be based on "any ground that could be raised under paragraph (2) or (3) of section 282(b) (relating to invalidity of the patent or any claim)."[82]

In addition to instituting the new post-grant review procedure, the Act altered the requirements for initiating other existing PTO post-grant challenge procedures. The Act changed the standard for instituting an inter partes challenge proceeding[83] from the previous "substantial new question

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[77] Leahy-Smith America Invents Act sec. 6, §§ 321-329, 125 Stat. at 306-11 (codified at 35 U.S.C. §§ 321-329).

[78] *Id.* sec. 6, 125 Stat. at 299-313.

[79] *Id.* sec. 6, § 321(c), 125 Stat. at 306 (codified at 35 U.S.C. § 321(c)).

[80] *Id.* sec. 6, § 324(a), 125 Stat. at 306 (codified at 35 U.S.C. § 324(a)).

[81] *Id.* sec. 6, § 324(b), 125 Stat. at 307 (codified at 35 U.S.C. § 324(b)).

[82] *Id.* sec. 6, § 321(b), 125 Stat. at 306 (codified at 35 U.S.C. § 321(b)). *See also* Tracie L. Bryant, *The America Invents Act: Slaying Trolls, Limiting Joinder*, 25HARV. J.L. & TECH. 673, 695 (2012) (noting that the AIA post-grant review established, for the first time in history, a means of post-grant review of patents on grounds other than prior art).

[83] The current inter partes reexamination proceeding was replaced with the AIA's inter partes review procedure beginning September 16, 2012. Leahy-Smith America Invents Act, sec. 6, 125 Stat. at 299. Pursuant to the AIA, both the old inter partes reexamination and the new inter partes review challenge procedures now require the new "reasonable likelihood that the requester would prevail" standard for initiation. *Id.* sec. 6(c), 125 Stat. at 301.

of patentability"[84] standard to a "reasonable likelihood that the requester would prevail" standard.[85] Although the legislative history indicated that this change "elevated" the threshold for initiating such review,[86] and commentators initially interpreted the change as making it more difficult for third parties to initiate inter partes challenges,[87] some commentators have expressed concern that, unlike the old standard which required a "substantial *new* question of patentability," the new standard does not require the issue of patentability to be "new," and can be based entirely upon issues of patentability that were already addressed in previous PTO proceedings.[88] In addition, the Act expanded the scope of the existing ex parte reexamination challenge procedure by now allowing third parties to request reexamination based on "statements of the patent owner filed in a proceeding before a Federal court or the Office in which the patent owner took a position on the scope of any claim of a particular patent."[89] This added ground for reexamination further strengthens the arsenal of weapons available to third parties in attacking a patent at the PTO. This new basis for reexamination challenge, coupled with the added uncertainty regarding the standard for instituting inter partes challenges, simply further muddies the waters of patent rights and challenges thereto, decreasing the allure of patent protection to our inventor.

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[84] *Id.* sec. 6, 125 Stat. at 305.

[85] *Id.*

[86] H.R. REP. NO. 112-98, pt. 1, at 47 (2011), *reprinted in* 2011 U.S.C.C.A.N. 67, 77.

[87] Dennis Crouch & Jason Rantanen, *Implementation of the America Invents Act*, PATENTLY-O (Sept. 22, 2011, 11:56 AM), http://www.patentlyo.com/patent/2011/09/implementation-of-the-america-invents-act.html (arguing the new reasonable likelihood that the requester will prevail standard is stricter than the old substantial new question of patentability test).

[88] Dennis Crouch & Jason Rantanen, *Inter Partes Reexamination: Standard for Initiating Reexamination No Longer Requires "New" Issues*, PATENTLY-O (April 7, 2012, 12:55 PM), http://www.patentlyo.com/patent/2012/04/inter-partes-reexamination-standard-for-initiating-reexamination-no-longer-requires-new-issues.html (arguing that the new "reasonable likelihood that the requester would prevail" standard renders the question of whether the raised objections to patentability are "new" irrelevant to deciding whether to order inter partes reexamination); Jon E. Wright & Joseph E. Mutschelknaus, *Guest Post on New Inter Partes Reexamination Standard*, PATENTLY-O (Feb. 1, 2012, 10:49 AM), http://www.patentlyo.com/patent/2012/02/guest-post-on-new-inter-partes-reexamination-standard.html (arguing that the importance of the art's "newness" may have decreased under the reasonable likelihood that the requester will prevail standard for inter partes reexamination).

[89] Leahy-Smith America Invents Act, sec. 6(g), § 301(a)(2), 125 Stat. at 312 (codified at 35 U.S.C. § 301(a)(2)).

Assuming our inventor braves the heightened difficulty and expense of the prosecution process, obtains a patent and survives the threat of third party challenges at the PTO, the AIA further decreases the value of our inventor's patent by raising the cost of enforcing it. The Act created a new 35 U.S.C. § 299 to tighten the rules of joinder and consolidation of trials in patent infringement litigation.[90] Prior to the AIA, patentees often filed one lawsuit against multiple defendants whose only connection was the plaintiff's accusation that they each infringed the same patent, and some courts allowed joinder of these multiple defendants in one infringement suit.[91] This strategy not only saved litigation costs by enabling one-stop litigation of common issues, such as validity and scope of the patent, it also allowed patentees to choose a favorable venue in which to sue multiple defendants, and made it more difficult for individual defendants to obtain a transfer.[92] The AIA's legislative history makes clear that the purpose of the new § 299 was aimed directly at this strategy, to "address[] problems occasioned by the joinder of defendants (sometimes numbering in the dozens) who have tenuous connections to the underlying disputes in patent infringement suits[,]"[93] stating "[n]ew § 299 also clarifies that joinder will not be available if it [sic] based solely on allegations that a defendant has infringed the patent(s) in question."[94]

Pursuant to new § 299, accused infringers may not be joined in one action nor "have their actions consolidated for trial, based solely on allegations that they each have infringed the patent or patents in suit."[95] Moreover, joinder or consolidation are only allowed if the right to relief (1) arises out of the same transactions or occurrences relating to the making,

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[90] *Id.* sec. 19(d), § 299, 125 Stat. at 332-33 (codified at 35 U.S.C. § 299).

[91] *See, e.g.*, MyMail, Ltd. v. Am. Online, Inc., 223 F.R.D. 455, 457 (E.D. Tex. 2004) (rejecting "a rule that requires separate proceedings simply because unrelated defendants are alleged to have infringed the same patent").

[92] Although a patentee's chosen forum court could transfer the case to another district where the case might originally have been brought, where such a transfer would serve "the convenience of parties and witnesses, in the interest of justice," 28 U.S.C. § 1404(a) (2006), where multiple defendants are involved, any one defendant's request to transfer the case to where that one defendant is organized or has a principal place of business will likely fail, as there is likely no one forum that is more convenient for all of the defendants. *See* Bryant, *supra* note 82, at 692 (arguing that under prior law where multiple defendants are sued for patent infringement, any one defendant's motion to transfer is likely to fail because there is probably not another district that is more convenient for all of the defendants).

[93] H.R. REP. NO. 112-98, pt. 1, at 54 (2011), *reprinted in* 2011 U.S.C.C.A.N. 67, 85.

[94] *Id.* at 55 (2011), *reprinted in* 2011 U.S.C.C.A.N. 67, 85.

[95] Leahy-Smith America Invents Act sec. 19(d), § 299(b), 125 Stat. at 333 (codified at 35 U.S.C. § 299(b)).

using, selling, offering for sale, or importing of "the same accused product or process" and (2) involves common questions of fact.[96] Although aimed at the perceived menace of patent trolls, this portion of the AIA applies to all patentees, and necessarily raises the cost of enforcing all patents by limiting a patentee's ability to join multiple infringers into one infringement suit.[97] New § 299 requires instead that patentees file multiple infringement lawsuits, often in far flung forums, against multiple infringers, in order to enforce their patent.[98] In fact, the day before the AIA was signed into law, more than fifty new patent infringement cases were filed in a single day, against over 800 defendants accused of infringing patents, in what many have argued was an attempt to avoid the application of the AIA's new joinder rules.[99] The result of the tighter joinder rules introduced by the AIA is simply that patents cost more to enforce for all patentees and consequently, patent rights are less valuable, offering less incentive for our inventor to choose patent protection.[100]

The AIA simply creates a disincentive for our inventor to seek patent protection, and an incentive for secrecy, because it renders patenting less attractive as a form of innovation protection. After the AIA, patents are more difficult and expensive to obtain, more vulnerable to third party

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[96] *Id.* sec. 19(d), § 299(a), 125 Stat. at 332-33 (codified at 35 U.S.C. § 299(a)).

[97] *See* Bryant, *supra* note 82, at 688-89 (defining "patent troll" as a non-practicing entity that acquires patents only to license them to others or sue for infringement of them and arguing that one of the purposes of the joinder provisions of the AIA was to address the patent troll problem); Dennis Crouch & Jason Rantanen, *Of Immediate Concern: Best Mode and Joinder*, PATENTLY-O (Sept. 14, 2011, 10:48 AM), http://www.patentlyo.com/patent/2011/09/of-immediate-concern-best-mode-and-joinder.html (arguing that the idea behind new § 299 is to raise the litigation costs of patent trolls (non-practicing entities) who frequently accuse a broad spectrum of corporate defendants of infringing their patents).

[98] *See* Bryant, *supra* note 82, at 691 (arguing that patent trolls rely on the litigation strategy of joining multiple defendants (1) to save on litigation costs by litigating validity and scope in one trial and (2) to ensure a favorable venue by preventing transfers); SCOTT W. BURT ET AL., IMPACT OF THE MISJOINDER PROVISION OF THE AMERICA INVENTS ACT 8 (2012), *available at* http://www.jonesday.com/files/Publication/9d86c405-3d78-429e-9f5f-48c2739c12a1/Presentation/PublicationAttachment/66a07a58-15e6-46f2-a981-509a0a0c8465/IPO_WhitePaper.pdf (arguing patent trolls join multiple defendants to save on litigation costs such as filing fees and improve forum selection by reducing the risk of transfer).

[99] Dennis Crouch & Jason Rantanen, *Rush to Judgment: New Dis-Joinder Rules and Non-Practicing Entities*, PATENTLY-O (Sept. 20, 2011, 2:10 PM), http://www.patentlyo.com/patent/2011/09/rush-to-judgment-new-dis-joinder-rules-and-non-practicing-entities.html (reporting the huge numbers of filings and arguing that the filings represented an attempt to avoid the joinder provisions of the AIA, which was signed into law the next day on September 16, 2011).

[100] *See* Crouch &Rantanen, *supra* note 97.

challenges at the PTO and more expensive to enforce against infringers.[101] Our inventor thus has less incentive to disclose her invention to the public in exchange for patent protection, and more incentive to, if possible, conceal the invention from the public, impeding the progress of science and the useful arts and robbing the public of disclosure of innovation.

IV. THE AIA MAKES TRADE SECRET PROTECTION MORE ATTRACTIVE

In addition to making patent protection less attractive to our inventor, the Act renders trade secret protection more attractive as a form of innovation protection. The Act greatly expands the prior user rights that may be used to defend against a claim of patent infringement,[102] thus increasing the incentive for inventors to eschew patent protection, and its requisite public disclosure, altogether in favor of trade secret protection. In addition, the Act removes failure to disclose the best mode as a ground to invalidate a patent, enticing those who do seek some level of patent protection to withhold the best aspects of their invention from the patent disclosure, and keep these as trade secrets instead.[103] Finally, the Act may repeal the forfeiture doctrine, thus removing the "secrecy, or legal monopoly"[104] choice once faced by inventors, and offering the potential for later patent protection after years of secret commercial use.[105] The combination of these changes in the patent law tips the scales in the cost-benefit analysis decisively toward trade secrets, short circuiting the ability of other inventors to build on the public dissemination of innovation, to the detriment of the progress of science and the useful arts.

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[101] *See generally* McCracken, *supra* note 49.

[102] *See* Leahy-Smith America Invents Act sec. 5, § 273, 125 Stat. at 297-99 (codified at 35 U.S.C. § 273).

[103] *See id.* sec. 15, § 282(3)(A), 125 Stat. at 328 (codified at 35 U.S.C. § 282(3)(A)); *see also* Brian J. Love & Christopher B. Seaman, *Best Mode Trade Secrets*, 15 YALE J.L. & TECH. 1, 11-15 (2012-2013) (arguing that the AIA's removal of failure to disclose the best mode as a means of invalidating patent rights will result in inventors withholding preferred embodiments from their patent disclosure and maintaining such preferred embodiments as trade secrets).

[104] Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts, Co., 153 F.2d 516, 520 (2d Cir. 1946).

[105] *See generally* Ron D. Katznelson, *The America Invents Act May be Constitutionally Infirm if it Repeals the Bar Against Patenting After Secret Commercial Use*, 13 ENGAGE: J. FED. SOC'YS PRAC. GROUPS 73, 74-76 (2012), *available at* http://www.fed-soc.org/publications/detail/the-america-invents-act-may-be-constitutionally-infirm-if-it-repeals-the-bar-against-patenting-after-secret-commercial-use (arguing that the America Invents Act is unconstitutional because it repeals the forfeiture doctrine).

First, the Act bolsters the allure of trade secret protection by dramatically expanding prior user rights. Although the pre-AIA patent law already included a prior user defense, the defense was limited to business method patents only.[106] Thus, prior to the Act, although an inventor was free to opt for trade secret instead of patent protection for a non-business method invention,[107] in doing so he ran at least the potential risk that another inventor could independently develop and patent the same invention, then turn around and sue the first inventor for patent infringement.[108] Such a first inventor was not without other defenses, however, primarily the patent invalidating provisions of 35 U.S.C. § 102(g), which provided that an applicant for patent was entitled to one *unless* "before such person's invention thereof, the invention was made . . . by another inventor who had not abandoned, suppressed, or concealed it."[109] Thus, under the pre-AIA law, a first inventor facing a later inventor/patentee's infringement suit could invalidate the later inventor/patentee's patent on the basis of § 102(g) because the first inventor invented before the later inventor/patentee and had not abandoned, suppressed or concealed the invention.[110] However, as noted, § 102(g) required that the first inventor not have "abandoned, suppressed or concealed" his invention in order to avail himself of § 102(g)'s patent invalidating power, and the law concerning what constituted "concealment" within the meaning of § 102(g), and in particular whether secret commercialization of an invention could serve to invalidate a later inventor/patentee's patent under § 102(g), was ambiguous,[111] and the subject of significantly contradictory commentary.[112] Thus, prior to the

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[106] 35 U.S.C. § 273(a)(3) (2006) *amended by* 35 U.S.C.A. § 273 (West 2013).

[107] *Cf.* Kewannee Oil Co. v. Bicron Corp., 416 U.S. 470, 492 (1974) (holding that trade secret law was not preempted by patent law).

[108] 35 U.S.C. § 273(a)(3) *amended by* 35 U.S.C.A. § 273 (West 2013) (limiting prior user rights defense to business methods only).

[109] *Id.* § 102(g)(2) (2006) *amended by* 35 U.S.C.A. § 102 (West 2013).

[110] *Id.*

[111] *Compare* Dunlop Holdings, Ltd. v. Ram Golf Corp., 524 F.2d 33, 36-37 (7th Cir. 1975) (holding that where secret commercialization constituted a "non-informing public use," such use was not "concealment" and later patentee's patent was invalid under § 102(g)), *with* W.L. Gore & Assocs., Inc. v. Garlock, Inc., 721 F.2d 1540, 1549-50 (Fed. Cir. 1983) (finding that a third party's secret use did not invalidate the patent of another), *and* Gillman v. Stern, 114 F.2d 28, 31 (2d Cir. 1940) (prior secret commercialization by third party was a secret use and could not be used to invalidate later inventor's patent rights).

[112] *Compare* Gary L. Griswold & F. Andrew Ubel, *Prior User Rights—A Necessary Part of a First-to-File System*, 26 J. MARSHALL L. REV. 567, 572 n.20 (1993) (quoting U.S. Court of Appeals for the Federal Circuit Judge Pauline Newman: "I have not seen anyone who was a prior user who has been stopped upon raising the 102(g) defense and from that viewpoint[,] it seems that the prior user right is alive and well." (alteration in original)), *and*

Act, a first inventor who chose to protect his non-business method invention via trade secret law faced at least the potential threat of an infringement suit by a later patentee, and was by no means assured of his ability to invalidate the later patent via § 102(g).[113]

The Act eliminated the patent invalidating § 102(g) from the law[114] as part of the switch from a first to invent to a first to file regime, thus removing completely a first inventor's patent invalidating defenses thereunder.[115] However, pursuant to the Act, first inventors now have an expanded prior user defense that includes all technologies, and is not limited to business methods only.[116] In order to utilize the Act's prior user rights as a defense to a patentee's infringement claim, a prior user must have used the invention commercially in the United States for at least one

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Karl F. Jorda, *Patent and Trade Secret Complementariness: An Unsuspected Synergy*, 48 WASHBURN L.J. 1, 27-28 (2008) (arguing that *Gore* merely held that third party trade secrets do not constitute "patent-defeating prior art," and "[s]uch a holding is an entirely different proposition from a holding that the trade secret owner is an infringer vis-á-vis the patentee[,]" and noting that at that time there had not been a reported U.S. case where a prior user/trade secret owner was enjoined by a later patentee), *with* U.S. PATENT AND TRADEMARK OFFICE, REPORT ON THE PRIOR USER RIGHTS DEFENSE 48 n.267(2012) (recognizing that there is "some ambiguity in the case law regarding the conditions under which a non-informing prior use by another may create patent-invalidating prior art under the existing statute."), *and* WENDY H. SCHACHT & JOHN R. THOMAS, CONG. RESEARCH SERV., R41638,PATENT REFORM IN THE 112TH CONGRESS: INNOVATION ISSUES 12 & n.65 (2011) (citing *Gore* as establishing settled patent law principles that prior secret uses do not defeat later patents and first inventors making secret commercial use of their trade secret could face liability for patent infringement to a later patentee).

[113] At least one commentator argued that the introduction of the limited prior user defense of § 273 was evidence that Congress never intended for § 102(g) to serve as a defense for prior secret users against later patentee's infringement suits. *See* Barney, *supra* note 13, at 272 & n.47 (arguing that under the canon of construction *expressiounius, exclusiusalterius*—meaning the expression of one thing suggests the exclusion of others—"the adoption of a specific defense to patent infringement, based on prior secret use, tends to negate the notion that a broader defense already exists under section 102(g) that can be asserted as a validity challenge").

[114] Leahy-Smith America Invents Act, Pub. L. No. 112-29, sec. 3, § 102, 125 Stat. 284, 287 (2011).

[115] Prior to the Act, the U.S. patent system awarded patent rights to the first inventor to invent, and pursuant to § 102(g), a first inventor could, in certain circumstances, invalidate the patent of a later inventor/patentee on the ground that the later inventor/patentee was not the first to invent. *See* 35 U.S.C. § 102(g) (2006) *amended by* 35 U.S.C.A. § 102 (West 2013). The Act transformed the patent system into a first to file regime, awarding patent rights to the first inventor to file a patent application, thus obviating the need for § 102(g). *See* Leahy-Smith America Invents Act sec. 3, 125 Stat. at 285-86.

[116] *See* Leahy-Smith America Invents Act sec. 5, § 273, 125 Stat. at 297 (codified at 35 U.S.C. § 273).

year before the earlier of (a) the filing date of the patentee's claimed invention, or (b) the date of the patentee's public disclosure occurring during the patentee's grace period.[117] If a prior user is successful in meeting these requirements, his prior user rights constitute a defense to the infringement claims of a later patentee.[118]

This expansion of prior user rights instituted by the Act alters the incentives associated with patent law. By expanding prior user rights, the Act rewards inventors of all technologies who choose trade secret protection over patent protection by statutorily shielding them from the infringement claims of a later patentee. Our inventor, contemplating whether to patent, and thus publicly disclose, the invention or, if possible, maintain the invention as a trade secret, is faced with an altered cost-benefit analysis under the new Act, and thus may alter her decision accordingly. Whereas, under the prior law, an inventor choosing trade secret protection would have had extremely limited prior user rights to protect against the infringement claims of a later patentee,[119] under the Act, such an inventor has greatly enhanced prior user protections.[120] Such an inventor, insulated from the infringement claims of later patentees by the expanded prior user rights of the Act, may very well opt to maintain her invention as a trade secret, robbing other inventors and society of the valuable disclosure, the quid pro quo of patent law, on which later inventors can build in advancing innovation.[121] This incentive for secrecy, far from fulfilling the constitutional mandate to "promote the progress of Science and the useful Arts,"[122] will instead promote concealment over disclosure and will retard the progress of science and the useful arts.[123]

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117 *Id.*

118 *Id.*

119 The prior user rights prior to the Act were limited to business method inventions. 35 U.S.C. § 273 (2006) *amended by* 35 U.S.C.A. § 273 (West 2013).

120 Leahy-Smith America Invents Act, sec. 5, § 273(a), 125 Stat. at 297 (codified at 35 U.S.C. § 273) (extending the prior user rights defense to "subject matter consisting of a process, or consisting of a machine, manufacture, or composition of matter used in a manufacturing or other commercial process").

121 *See* NARD, *supra* note 14, at 57 ("The disclosure requirements of § 112 are at the heart of patent law's goal of promoting the progress of the useful arts . . . . By requiring the patent applicant to claim the invention with clarity and to sufficiently disclose his invention to persons having ordinary skill in the art, patent law seeks to facilitate the dissemination of technical information and follow-on innovation.").

122 U.S. CONST. art. I, § 8, cl. 8.

123 *See* Barney, *supra* note 13, at 265 (arguing that even the limited prior user rights introduced by the former § 273 "ignore[d] the constitutional mandate to 'promote the Progress of Sciences [sic] and the useful Arts' because it encourage[d] secreting, rather than disclosing, of new inventions").

In addition to expanding prior user rights, the Act further weights an inventor's choice toward at least partial trade secret protection by removing failure to disclose the best mode as a ground for invalidating a patent.[124] Prior to the Act, patentees were not only required to "set forth the best mode contemplated by the inventor of carrying out his invention"[125] in the patent application, but were also threatened with later invalidation of their patent if they failed to do so.[126] The best mode requirement thus operated as a check on patent law's trade between inventors and society, i.e., in exchange for the limited monopoly of a patent, the inventor discloses his invention to the public via the patent specification, and had been said to lie "at the heart of the statutory quid pro quo of the patent system."[127] The purpose of the best mode requirement is to prevent inventors from circumventing their half of the bargain by obtaining patent protection on an invention, yet at the same time withholding from the public the best embodiment or best way of practicing that invention.[128] Though the best mode requirement was not without its detractors, who questioned, *inter alia*, its effectiveness at motivating inventors to actually disclose the true best mode,[129] the requirement offered at least some additional motivation for an inventor to completely reveal his invention in exchange for the patent monopoly.

Under the law before the Act, an inventor who concealed the best mode of his invention could have his patent application rejected for failure to

[124] Leahy-Smith America Invents Act, sec. 15, §§ 119-120, 282, 125 Stat. at 328.

[125] 35 U.S.C. § 112 (2006) *amended by* 35 U.S.C.A. § 112 (West 2013).

[126] Prior to the Act, invalidity of the patent for failure to comply with the best mode requirement of § 112 was included as a defense in any action involving the validity or infringement of a patent. 35 U.S.C. § 282(3) (2006) *amended by* 35 U.S.C.A. § 282(b)(3)(A) (West 2013). The Act added the words "except that the failure to disclose the best mode shall not be a basis on which any claim of a patent may be canceled or held invalid or otherwise unenforceable" to § 282, effectively removing failure to satisfy the best mode requirement as a means of invalidating a patent. Leahy-Smith America Invents Act, sec. 15, § 282, 125 Stat. at 328 (codified at 35 U.S.C. § 282(b)(3)(A)).

[127] Glaxo Inc. v. Novopharm Ltd., 52 F.3d 1043, 1050 (Fed. Cir. 1995).

[128] Teleflex, Inc. v. Ficosa N. Am. Corp., 299 F.3d 1313, 1330 (Fed. Cir. 2002) ("The purpose of the best mode requirement is to restrain inventors from applying for patents while at the same time concealing from the public preferred embodiments of the inventions they have in fact conceived.").

[129] Some questioned the best mode's effectiveness because of the limited time frame at which disclosure was required, i.e., at filing only with no duty to update, and the limited knowledge required to be disclosed, that of the inventor only. *See, e.g.*, Jorda, *supra* note 112, at 21 (arguing that the best mode requirement is no impediment to the coexistence of patent and trade secret protection because the requirement only applies at the time of filing and only to the knowledge of the inventor).

disclose the best mode, or, assuming his concealment escaped detection by the Examiner, could later pay for his crime with his patent, because failure to disclose best mode was grounds for holding the patent invalid.[130] Although the requirement that a patent applicant disclose the best mode in his application is retained in the law even as amended by the Act,[131] and a Patent Examiner may still raise failure of the patent applicant to do so as a basis for rejection of an application,[132] failure of the patentee to disclose the best mode may no longer be used to invalidate a patent issuing from the application.[133] Many commentators have argued that, for all practical purposes, there is no longer a best mode requirement because of the low probability that an Examiner will, or even can, raise the requirement as a ground for rejection.[134]

The incentive created by this change in the law is relatively clear. Prior to the Act, a patentee had more incentive to disclose the best parts of his invention because failure to do so could result in the invalidation of the patent and the resulting loss of all exclusive rights.[135] Faced with the threat of the loss of his patent rights, with the invention already disclosed to the public via the patenting process, an inventor had a powerful incentive to comply with the best mode requirement. After the Act, this incentive for disclosure is removed.[136] Inventors who opt for patent protection over complete secrecy have an incentive to, if possible, keep the best part of the invention a secret, withholding it from the patent disclosure.[137] Thus, inventors can obtain patent protection for those portions of an invention which cannot be kept secret, yet maintain the secrecy of the portions of the invention that can be kept secret, without fear of loss of the patent right obtained.[138] Again, as with the expansion of prior user rights, the Act alters the cost-benefit analysis an inventor faces in deciding what to disclose to

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[130] *See* 35 U.S.C. § 282(3) (2006) *amended by* 35 U.S.C.A. § 282(b)(3)(A) (West 2013).

[131] 35 U.S.C. § 112 *amended by* 35 U.S.C.A. § 112 (West 2013).

[132] *See* MPEP, *supra* note 73, § 2165.03 (setting forth requirements for rejection of application for lack of best mode).

[133] Leahy-Smith America Invents Act, sec. 15, §§ 119-120, 282, 125 Stat. at 328.

[134] *See* Lee Petherbridge & Jason Rantanen, *In Memoriam Best Mode*, 64 STAN. L. REV. ONLINE 125, 126-27 (2012) (arguing that the best mode requirement has effectively been eliminated from patent law by the AIA); Love & Seaman, *supra* note 103, at 7 (noting that it is extremely uncommon for a patent examiner to reject a patent for failure to disclose best mode).

[135] *See* 35 U.S.C. § 112(a) (2006) *amended by* 35 U.S.C.A. § 112(a) (West 2013); 35 U.S.C. § 282(3) (2006) *amended by* 35 U.S.C.A. § 282(b)(3)(A) (West 2013).

[136] Leahy-Smith America Invents Act, sec. 15, §§ 119-120, 282, 125 Stat. at 328.

[137] *See* Love & Seaman, *supra* note 103, at 12-14.

[138] *Id.*

the patent office, and what to withhold, by removing at least some, perhaps most,[139] of the potential cost of withholding portions of the invention from the patent disclosure. Thus inventors who do seek some form of patent protection have a greater incentive to disclose only what is required to obtain patent rights,[140] yet retain portions of the invention, particularly the best mode of practicing their invention, as trade secrets, robbing the public of the full benefit of the patent monopoly bargain—complete disclosure of the invention.[141]

As much as either the expansion of prior user rights or the removal of failure to satisfy the best mode requirement as a means of invalidating a patent alone tilts the scales in favor of secrecy, the two together completely re-calibrate the analysis.[142] Prior to the Act, an inventor choosing trade secret protection faced at least the possibility of an infringement suit by a later patentee,[143] and an inventor choosing partial patent and partial trade secret protection faced the possibility of invalidation of his patent for failure to disclose the best mode, as well as the possibility of an infringement suit by a later patentee.[144] Under the Act, an inventor, contemplating the best means to protect his rights in his invention, may choose patent protection to the extent that his invention is not capable of being commercialized and kept secret, yet choose to withhold those portions of the invention capable of being kept secret from disclosure in the patent application process, all without fear of infringement liability[145] or loss of patent rights.[146] Thus, under the Act, the inventor enjoys the best of both worlds: the exclusive rights of patent protection for the term of the patent, and the rights of trade secret protection for as long as the secrecy

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139 *See supra* text accompanying note 127.

140 Patent applicants must still comply with the disclosure requirements of 35 U.S.C. § 112. *See supra* text accompanying note 10.

141 *See* Love & Seaman, *supra* note 103, at 3-4 (arguing that the AIA's removal of best mode requirement as grounds for invalidating the patent "may usher in a new era of patent practice in which inventors attempt to secure both twenty-year patent terms and possibly indefinite trade secret protection for their inventions"); *see also* Petherbridge & Rantanen, *supra* note 134, at 126-27 (arguing that the best mode requirement has effectively been eliminated from patent law by the AIA).

142 Lucas V. Greder, *What Do We Do Now? How the Elimination of the Best Mode Requirement Minimizes Adequate Disclosure and Creates a Potentially Unenforceable Fact Pattern*, 3 CYBARIS AN INTELL. PROP. L. REV. 104, 120-21 (2012) (arguing that the elimination of the best mode requirement and the expansion of the prior user defense leads to more secrecy).

143 See *supra* text accompanying note 113.

144 *See supra* text accompanying note 126.

145 *See supra* note 109 and accompanying text.

146 *See supra* note 134 and accompanying text.

can be maintained.[147] In addition, should a later inventor independently develop the secret portion of the invention, and patent it, the first inventor is immune to an infringement suit by the later, independent patentee, provided the first inventor meets the requirements of the Act's prior user defense.[148] The first inventor gets to have his cake and eat it too—a government sanctioned monopoly for the term of the patent, and trade secret protection for the best way of practicing the invention, with no fear of invalidation of the patent or suit for infringement. The incentive for circumventing the quid pro quo of the patent system, by withholding portions of the invention from disclosure, is clear.

Finally, the AIA has created considerable confusion around the issue of whether an inventor's own long term, secret commercialization of an invention will continue to bar that inventor from thereafter obtaining patent protection for her invention. Prior to the AIA, the forfeiture doctrine barred an inventor from patenting her invention if the inventor engaged in secret commercialization of that invention for longer than the one year grace period prior to seeking patent protection.[149] As succinctly stated long ago by Judge Learned Hand, "[I]t is a condition upon an inventor's right to a patent that he shall not exploit his discovery competitively after it is ready for patenting; he must content himself with either secrecy, or legal monopoly."[150]

The AIA's revision of § 102(a) of the patent statute has called this doctrine into question. New § 102(a) provides that a person will be entitled to a patent unless "the claimed invention was patented, described in a printed publication, or in public use, on sale, *or otherwise available to the public* before the effective filing date of the claimed invention[.]"[151] Some commentators have posited that this new "otherwise available to the public" language modifies both "in public use" and "on sale," exerting an overarching requirement that these activities must be "available to the public," and thereby excluding secret uses or sales of the invention from the

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[147] *See* Love & Seaman, *supra* note 103, at 4 (arguing that the AIA's removal of best mode requirement as grounds for invalidating the patent "may usher in a new era of patent practice in which inventors attempt to secure both twenty-year patent terms and possibly indefinite trade secret protection for their inventions").

[148] *See supra* note 117 and accompanying text.

[149] D.L. Auld Co. v. Chroma Graphics Corp., 714 F.2d 1144, 1147-48 (Fed. Cir. 1983).

[150] Metallizing Eng'g Co. v. Kenyon Bearing & Auto Parts Co., 153 F.2d 516, 520 (2d Cir. 1946).

[151] Leahy-Smith America Invents Act, sec. 3, § 102(a), 125 Stat. 284, 286 (2011) (emphasis added).

body of patent-defeating prior art.[152] The legislative history seems to support this interpretation.[153] Pursuant to this interpretation, the AIA frees inventors to practice their inventions as trade secrets indefinitely, so long as they do not make the invention "available to the public," and still retain their right to patent that same invention later.[154] Even in the event that the

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[152] *See* Paul Morgan, *The Ambiguity in Section 102(a)(1) of the Leahy-Smith America Invents Act*, 2011 PATENTLY-O PAT. L.J. 29, 30-31 (2011) (arguing that revised § 102(a) may repeal the forfeiture doctrine and allow an inventor to tack a full patent term onto the end of an indefinite period of secret commercialization); Pier D. DeRoo & Michael J. Flibbert, *Does the AIA Require Public Availability for "On Sale" Prior Art?*, BLOOMBERG LAW REPORTS (March 19, 2012), http://about.bloomberglaw.com/practitioner-contributions/does-aia-require-public-availability-for-on-sale-prior-art/ (arguing that the new § 102(a) introduced significant unpredictability into patent law regarding whether sales and uses must be "otherwise available to the public" in order to constitute patent defeating prior art and predicting that, if so, "inventors may potentially commercialize their inventions indefinitely under a veil of confidentiality, only filing for a patent after competition emerges"); Katznelson, *supra* note 105, at 73 (arguing that the Act's amendment to § 102(a) would "enable companies to extend their commercial exclusivity for certain inventions indefinitely by exploiting and profiting secretly from certain technologies for years and then take out patents on these technologies"); Robert L. Maier, *The Big Secret of the America Invents Act*, INTELL. PROP. TODAY, Dec. 2011, at 18, 19, *available at* http://www.bakerbotts.com/files/Uploads/Documents/Maier_DEC11.pdf (arguing that, under revised § 102 "the forfeiture that previously penalized inventors for maintaining their inventions as trade secrets for some period of time longer than a year is no longer applicable, and inventors are left with the option to practice their invention as trade secrets for now and still patent those same inventions later").

[153] *See* 157 CONG. REC. S5402-02, S5431 (daily ed. Sept. 8, 2011) (statement of Sen. Jon Kyl) ("When the committee included the words 'or otherwise available to the public' in § 102(a), the word 'otherwise' made clear that the preceding items are things that are of the same quality or nature. As a result, the preceding events and things are limited to those that make the invention 'available to the public.' The public use or sale of an invention remains prior art, thus making clear that an invention embodied in a product that has been sold to the public more than a year before an application was filed, for example, can no longer be patented. Once an invention has entered the public domain, by any means, it can no longer be withdrawn by anyone. But public uses and sales are prior art only if they make the invention available to the public."); 157 CONG. REC. S1496-01 (daily ed. Mar. 9, 2011) (statement of Sen. Patrick Leahy) ("One of the implications of the point we are making is that subsection 102(a) was drafted in part to do away with precedent under current law that private offers for sale or private uses or secret processes practiced in the United States that result in a product or service that is then made public may be deemed patent-defeating prior art. That will no longer be the case. In effect the new paragraph 102(a)(1) imposes an overarching requirement for availability to the public . . . ."). *See also* Morgan, *supra* note 152, at 38-42 (noting that a colloquy on the Senate floor supports the interpretation of § 102(a) as repealing *Metallizing*'s forfeiture doctrine).

[154] *See* Morgan, *supra* note 152, at 30-31; McCracken, *supra* note 49, at 36 (arguing that the AIA favors those who hoard secrets and allows them to seek patents after years of use).

inventor's trade secret is independently invented and patented by another, the trade secret owner could potentially claim the protection of the AIA's prior user rights detailed above, and enjoy a safe harbor from any infringement action by the later patentee.[155]

Although the resolution of this issue will have to await judicial review,[156] if the AIA is held to have repealed the forfeiture doctrine, our inventor will have even more incentive to opt for trade secret protection, at least initially, with the promise of potential patent protection for the invention down the road.[157] Without the limitations of the forfeiture doctrine, our inventor could exploit her invention via secret commercialization for a time, and, if and when competitors threaten to independently invent, our inventor could file for patent protection.[158] In the event a competitor wins the race to the PTO and files for patent protection first, our inventor can still retain her right to practice her trade secret pursuant to the prior user rights granted her by the AIA.[159] Although the issue is far from certain, pending judicial resolution of this question, the potential offer of an extended monopoly period is further incentive for our inventor to choose at least initial secrecy over patenting.

The AIA simply makes trade secret protection more attractive to our inventor. The expansion of prior user rights insulates her from the infringement claims of later, independent inventors, and the removal of the patent invalidity penalty for failure to disclose best mode assures her that, to the extent she seeks some patent protection, her withheld best mode trade secret cannot be used to kill her patent. The questionable viability of the forfeiture doctrine post-AIA holds out the promise of potential future patenting even after years of secret commercialization. Our inventor's clear incentive is to opt for complete, or at least partial, secrecy to protect her invention.

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[155] *See* Maier, *supra* note 152, at 19 (noting that an accused infringer who had been commercially using its trade secret process for more than a year prior to a third party patenting that process could claim the prior user defense safe harbor introduced by the AIA).

[156] *See* DeRoo & Flibbert, *supra* note 152, at 5 (noting that the meaning of new § 102(a) must be decided by the courts).

[157] *See* Katznelson, *supra* note 105, at 75.

[158] *Id.*

[159] Leahy-Smith America Invents Act, Pub. L. No. 112-29, sec. 5, § 273, 125 Stat. 284, 297 (2011) (codified at 35 U.S.C. § 273).

V. CONCLUSION

The Constitution tasks Congress with promoting the progress of science and the useful arts, and patent law is Congress' answer to this mandate: monopoly rights for a limited time in exchange for public disclosure of the invention. Thus, when our inventor invents she is faced with a choice—keep her invention a secret and rely on trade secret law for protection, or seek patent protection and disclose her invention to the public. The AIA simply fails to fulfill the constitutional mandate to promote the progress of science and the useful arts because it creates powerful incentives for our inventor to choose trade secrecy over patenting. Without the public disclosure of patenting, other inventors cannot build on the invention to advance technology, and the progress of science and the useful arts is retarded, not promoted. As economic theory admonishes us, incentives matter, and laws have consequences. Patent law is intended to promote the progress of science and the useful arts by securing for inventors, for limited times, exclusive rights in their invention. The government sponsored patent monopoly is offered in exchange for the disclosure of the invention via the patent application process. By rewarding secrecy, the Act instead promotes not the disclosure but the concealment of inventions, whether in whole or in part, thus retarding the progress of science by preventing later inventors from building on the knowledge and innovation that was never disclosed. The Act thus fails to fulfill the constitutional mandate of promoting the progress of science and the useful arts, and instead impedes the progress of science by encouraging protection of innovation via trade secret instead of patent law.

Defending The Environment: A Mission for the World's Militaries

Mark P. Nevitt[1]

Critics often fault the U.S. military for its environmental stewardship, and legal scholarship frequently highlights efforts by the military to seek national security exemptions from various environmental laws and the military's poor cleanup record. Yet the Department of Defense ("DoD") is largely subject to and complies with the full array of American environmental laws in the same manner and extent as any agency of the federal government. While the military's environmental record is far from perfect, a comparative legal survey shows that the U.S. is at the relative forefront of effectively balancing environmental stewardship with national security.

This article surveys the environmental laws that apply to the U.S. and other major militaries of the world during peacetime. Four themes begin to emerge from this comparative analysis. First, the effective use of judicial enforcement within the U.S. via the Administrative Procedure Act ("APA") and environmental citizen suit provisions ensures that the U.S. military is continually accountable to the public for its actions impacting the environment. Second, this "environmental accountability" effectively upholds the longstanding tradition of civilian control over the military, an unexpected and welcome byproduct of American environmental law. Third, despite an initial, post-September 11, 2001 flurry of requests for broader environmental exemptions for the military, these requests have dissipated. Twelve years later, environmental laws as applied to the military have emerged intact, a testament to the durability and permanency of American environmental law. Lastly, there are lessons that the U.S. and other nations can learn from each other about effectively reconciling environmental

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stewardship with national security. Such reconciliation is more important than ever with the emergence of climate change and the need for all sectors of society—including the world's militaries, a significant source of greenhouse gas emissions—to be held fully accountable for their contribution to a changing climate.

I. INTRODUCTION

In 2008, the United States Supreme Court decision in *Winter v. Natural Resources Defense Council*[2] brought the issue of the application of environmental law to the U.S. Armed Forces during peacetime military training exercises to the fore. The United States Court of Appeals for the Ninth Circuit had previously upheld a preliminary injunction limiting the Navy's training with mid-frequency active sonar designed to detect enemy submarines—training that was deemed critical to the Navy's war-fighting capabilities, but which the Natural Resources Defense Council ("NRDC") argued caused harm to marine mammals.[3] Chief Justice John Roberts's majority opinion lifted the preliminary injunction, allowing the Navy's submarines to continue to operate and train utilizing this sonar.[4] In doing so, the Court gave serious consideration to the military judgments expressed in affidavits by military officials, noting that any irreparable injury to the mammals "is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors."[5]

However, Chief Justice Roberts expressly noted, "Of course, military interests do not always trump other considerations, and we have not held that they do."[6] In making this statement, Chief Justice Roberts reinforced a fundamental aspect of U.S. environmental law: the U.S. military is largely subject to and must comply with domestic environmental laws at all times absent an express exemption.[7] This core principle is consistent with the long-standing American constitutional tradition of civilian control over military matters.[8]

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[2] 555 U.S. 7 (2008).

[3] *Id.* at 25 (quoting Captain Martin May, Third Fleet's Assistant Chief of Staff, that the training value associated with using mid-frequency active sonar is "mission-critical."). In 2006, one of China's new classes of submarines remained undetected when it shadowed the U.S. aircraft carrier USS KITTYHAWK off the coast of Japan. *See* Thom Shanker, *China Harassed U.S. Ship, the Pentagon Says*, N.Y. TIMES, Mar. 10, 2009, at A8.

[4] *Winter*, 555 U.S. at 12.

[5] *Id.* at 23.

[6] *Id.* at 26.

[7] *Cf.* WILLIAM A. WILCOX, JR., THE MODERN MILITARY AND THE ENVIRONMENT: THE LAWS OF PEACE AND WAR 11 (2007).

[8] Jim Garamore, *Why Civilian Control of the Military?*, U.S. DEP'T OF DEF. (May 2,

Much has been written about international environmental law and the responsibility of states to respect the environment during times of armed conflict.[9] Yet, there is a relative shortage of writing addressing how each nation's domestic environmental laws practically apply to its respective military. Upon closer inspection, there is considerable uncertainty and diversity regarding the application of environmental laws within the major military powers of the world, ranging from a comparatively high level of environmental accountability for the militaries of the U.S. and its North Atlantic Treaty Organization ("NATO") allies to minimal practical applicability and enforceability for the Chinese military.

Part II of this article provides an overview of the key U.S. environmental laws and their practical application to U.S. military operations—a summary that provides a baseline for the comparative analysis of other nations' laws. The U.S. military is, by far, the largest in the world, with a "standing army" unimagined by the Founders and a presence in numerous nations since the end of the Second World War.[10] Among other things, Part II discusses the extraterritorial application of U.S. environmental laws and DoD policy as applied to the military's overseas operations. This is a significant consideration, given the DoD's vast overseas footprint and the fact that the U.S. Navy is one of the world's only "blue water"[11] navies.[12]

Part III analyzes environmental law as applied to other nations' militaries through a comparative lens. While a comprehensive comparative analysis of every major military power is beyond the scope of this article, this article provides a comparative summary of how key nations and groups of nations are attempting to apply environmental laws to their armed forces: NATO

2001), http://www.defense.gov/news/newsarticle.aspx?id=45870 ("Civilian control of the military is so ingrained in America that we hardly give it a second thought.").

[9] *See, e.g.*, Michael N. Schmitt, *Green War: An Assessment of the Environmental Law of International Armed Conflict*, 22 YALE J. INT'L L. 1 (1997) (providing a general overview of environmental law during armed conflicts while asserting that any protection of the environment by the military up into the Vietnam War was entirely incidental).

[10] For an up to date list of worldwide military expenditures, see, for example, *The SIPRI Military Expenditure Database*, STOCKHOLM INT'L PEACE RESEARCH INST., http://milexdata.sipri.org/ (last visited Feb. 8, 2014) [hereinafter SIPRI].

[11] "Blue water navy" refers to the ability to operate a maritime force on the high seas in a sustained manner. Michael Hughes, *Ensuring "Fair Winds and Following Seas": A Proposal for A Sino-American Incident at Sea Agreement*, 56 NAVAL L. REV. 275, 277 n.15 (2008). For an overview of the U.S. Navy personnel and ship resources, see *Status of the Navy*, AMERICA'S NAVY, http://www.navy.mil/navydata/navy_legacy_hr.asp?id=146 (last visited Feb. 8, 2014).

[12] *Cf.* James R. Holmes, *Top Five Things China's Navy Needs to be a Blue-Water Navy*, THE DIPLOMAT (Aug. 5, 2012), http://thediplomat.com/the-naval-diplomat/2012/08/05/top-5-things-chinas-navy-needs-to-be-a-blue-water-navy/ (asserting that China must do five things to "take its station alongside the U.S. Navy as a blue-water navy").

and the European Union ("EU"), which have largely incorporated environmental standards into its military operations; the Russian Federation and China, which have rapidly developing economies and are members of the United Nations ("UN") Security Council;[13] and India, the world's largest democracy and a nation emerging with one of the largest economies and militaries in the world. All of these nations have militaries and economies that are among the largest in the world,[14] with China, in particular, experiencing rapid economic and military growth that has highlighted the need for sustainable development.[15]

Finally, Part IV summarizes lessons that can be learned from the different comparative approaches, touching on broader themes. This article asserts that environmental stewardship is an important mission for *all* militaries of the world for several reasons and that other nations can draw numerous lessons from the American experience and each other in reconciling environmental stewardship with national security. First, history has shown that short-term environmental shortcuts have an enormous long-term cost in time, money, and resources,[16] and could have a negative effect on long-term foreign relations.[17] Second, holding the military accountable for the environmental consequences of its actions ultimately helps ensure accountability and continued civilian control over the military. Lastly, the challenge of global climate change requires a comprehensive approach from all areas of society including the military, a sector that is a major source of greenhouse gas ("GHG") emissions.[18] Exempting any nation's military from environmental regulations is simply not a viable solution as

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[13] For a list of U.N. Security Council members, including the five permanent members, see *Current Members*, UNITED NATIONS SECURITY COUNCIL, http://www.un.org/en/sc/members/ (last visited Feb. 1, 2013).

[14] *See* SIPRI, *supra* note 10.

[15] *See* Jane Perlez, *Continuing Buildup, China Boosts Military Spending More Than 11 Percent*, N.Y. TIMES, Mar. 4, 2012, at A8.

[16] In the mid-1990s it was estimated that there were approximately 19,000 sites at more than 1,700 military installations that needed environmental cleanup measures, with an estimated cost of $25 billion dollars. Scott M. Palatucci, *The Effectiveness of Citizen Suits in Preventing the Environment from Becoming a Casualty of War*, 10 WIDENER L. REV. 585, 589-90 (2004). This was followed by a 2001 Congressional Report estimating seventy years to complete a cleanup at significant increased costs. *Id.* at 590.

[17] *See* Arc Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092, 1094 (9th Cir. 2005) (ruling that the DoD is not subject to Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") actions relating to the cleanup of Clark Air Force Base in the Philippines).

[18] *Cf.* Alaina M. Chambers & Steve A. Yetiv, *The Great Green Fleet: The U.S. Navy and Fossil-Fuel Alternatives*, 64 NAVAL WAR COLL. REV. 61, 63 (2011) (noting the U.S. military's significant oil consumption).

the world looks to develop a more comprehensive model to address climate change.[19]

II. U.S. ENVIRONMENTAL LAWS AND THEIR APPLICABILITY TO THE U.S. MILITARY

In many developing nations where environmental laws and norms are still emerging, environmental laws are simply not applicable to the military.[20] In the United States, by contrast, there is a longstanding tradition of civilian control of military matters[21] and that tradition is effectively mirrored in its environmental laws.[22] Thus, despite the relatively short history of U.S. domestic environmental laws, it follows that U.S. domestic environmental laws and regulations should apply to the military in keeping with this historical tradition.[23]

Much of the scholarship discussing the intersection of environmental law and national security has focused on the U.S. military's shortfalls in its environmental stewardship.[24] Yet, the legacy is far more complicated and the future far brighter, especially in light of recent efforts to address energy security and climate change by the military. While the military's environmental record is not pristine, environmental laws and regulations for the most part *do* apply to *all* U.S. military activities via broad congressional waivers of sovereign immunity.[25] Indeed, the DoD has learned important

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[19] *Id.*

[20] *Cf.* Nada Al-Duaij, Environmental Law of Armed Conflict 213 (Jan. 1, 2002) (unpublished S.J.D. dissertation, Pace University School of Law), *available at* http://digitalcommons.pace.edu/lawdissertations/1/.

[21] Garamore, *supra* note 8.

[22] *See, e.g.*, Clean Water Act § 313(a), 33 U.S.C. § 1323(a) (2012) (waiving sovereign immunity and mandating that federal agencies, including the DoD, comply with the substantive provisions of the Clean Water Act). As discussed in Part II.B.3 *infra*, the waiver language in the Clean Water Act is mirrored in other statutes to include the Clean Air Act. *See* Clean Air Act § 118(a), 42 U.S.C. § 7418(a) (2012).

[23] *See* Reid v. Covert, 354 U.S. 1, 40 (1957) ("We should not break faith with this nation's tradition of keeping military power subservient to civilian authority . . . .").

[24] *See, e.g.*, STEPHEN DYCUS, NATIONAL DEFENSE AND THE ENVIRONMENT (1996) (presenting a study of the issues raised when the U.S. military and domestic environmental laws conflict); Bridget Dorfman, *Permission to Pollute: The United States Military, Environmental Damage, and Citizens' Constitutional Claims*, 6 U. PA. J. CONST. L. 604, 622 (2004) (concluding that "[u]ntil the military realizes that the environment hosts them, and not the other way around . . . the environment (and America) will continue to lose").

[25] *See infra* Part II.B. *See also U.S. Military Under Attack on Environmental Grounds*, ENV'T NEWS SERV. (June 25, 2001), http://www.ens-newswire.com/ens/jun2001/2001-6-25-03.asp ("While acknowledg-ing that the military is exempt from some laws, Lt. Gai said, 'We are subject to many of the same laws and regulations that industry and public sector are

lessons from prior environmental mistakes—lessons of military stewardship that can be applied to other nations still deciphering how properly to balance national security with environmental protection.

A. National Security and the Environment: the Historic Backdrop

While all domestic environmental laws and regulations largely apply to the U.S. military within U.S. borders at all times,[26] a certain level of opaqueness persists when discerning how, precisely, environmental laws apply to the U.S. military in practice.[27] Part of this confusion may result from American legal and military history. The intersection of the domains of environmental law and military activities rarely met before the 1980s, as environmental laws emerged.[28] At the time, the DoD, the largest federal agency, was a massive standing force at the height of the Cold War.[29]

While concerns about civilian control over the military predate the Constitution,[30] and were famously a topic of debate at the Constitutional Convention,[31] environmental laws and regulations are relatively new and largely a product of the past quarter century.[32] Thus, the Framers "gave

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subject to.'").

[26] *See* DYCUS, *supra* note 24, at 6 (noting that Congress and the courts have made it clear that environmental laws generally apply to the federal government, including the activities of the Department of Defense). U.S. law imposes a host of significant environmental requirements affecting naval training and exercises. Most major U.S. pollution control statutes include a provision requiring federal entities, including the Armed Forces, to comply with federal, state, and local environmental requirements to the same extent as any other person. John P. Quinn et al., *United States Navy Development of Operational-Environmental Doctrine, in* THE ENVIRONMENTAL CONSEQUENCES OF WAR: LEGAL, ECONOMIC, AND SCIENTIFIC PERSPECTIVES 156, 158 (Jay E. Austin & Carl E. Bruch eds., 2000). "[F]ederal law provides only *very general* guidance regarding the development of an environmental protection regime for US military installations worldwide[.]" *Id.* at 168 (emphasis added).

[27] Donald N. Zillman, *Environmental Protection and the Mission of the Armed Forces, A Review of National Defense and the Environment by Stephen Dycus*, 65 GEO. WASH. L. REV. 309, 315 (1997) (asserting that "[m]uch of the problem from a legal standpoint derives from Congress's lack of clarity about the role of environmental statutes on decisions and activities pertaining to national defense").

[28] *Id.* at 309.

[29] *Id.* at 314 (stating that World War II and the Cold War gave rise to a different military whose commitments were worldwide).

[30] *Id.* at 309.

[31] *Cf. id.* at 310.

[32] *See id.* at 315 (stating that "[p]rotection of the environment . . . is a product of the last quarter century").

little thought to environmental protection[,]"[33] but they discussed at length the merits of a standing Army and Navy.[34]

Prior to World War II, U.S. military history was marked by a small, continuous military force with periodic large-scale mobilizations as occurred in the Civil War and Spanish-American War, before drawing down to pre-war levels.[35] The rise of the "military-industrial complex" after World War II in the face of the Cold War fundamentally changed the military's relationship with the environment, and witnessed the emergence of a large, continuous military presence both at home and abroad.[36] Today, the DoD is the largest employer (including civilian and uniformed) in the world[37] with over 450,000 personnel stationed overseas.[38] And the U.S. military is, by far, the largest armed force in the world with a budget of approximately $671 billion in 2012.[39]

B. U.S. Domestic Environmental Law as Applied to the U.S. Military

Exploring the intersection between the military and U.S. environmental laws requires analysis of three issues: (1) statutory provisions to include national security exemptions and the extraterritorial application of environmental laws;[40] (2) the practical implementation and application of environmental laws and regulations to the military via military instructions, directives, and regulations;[41] and (3) international agreements that address

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[33] *Id.* at 310.

[34] *See* THE FEDERALIST NO. 41 (James Madison) (discussing the necessity of an army and navy).

[35] Zillman, *supra* note 27, at 313-14.

[36] *Id.*

[37] *See* Ruth Alexander, *Which is the World's Biggest Employer?*, BBC NEWS (Mar. 19, 2012, 8:19 PM), http://www.bbc.co.uk/news/magazine-17429786.

[38] *See DoD 101: An Introductory Overview of the Department of Defense*, U.S. DEP'T OF DEF., http://www.defense.gov/about/dod101.aspx ("More than 450,000 employees are overseas, both afloat and ashore.").

[39] *DoD Releases Fiscal 2012 Budget Proposal*, U.S. DEP'T OF DEF. (Feb. 14, 2011), http://www.defense.gov/releases/releases.aspx?releaseid=14263.

[40] Environmental statutes apply to the Department of Defense and "to their commercial contractors operating defense facilities, and to industrial plants of every description." DYCUS, *supra* note 24, at 39. Further, many environmental statutes empower state and local agencies to issue permits and collect fees or reasonable service charges from federal facilities related to the administration of state and local requirements. *See* DEP'T OF THE NAVY, MANUAL OF THE JUDGE ADVOCATE GENERAL, 13-14 (JAGINST 5800.7F) [hereinafter JAGMAN].

[41] *See, e.g.*, U.S. Dep't of Def. Dir. 6050.16, DoD Policy for Establishing and Implementing Environmental Standards at Overseas Installations (Sept. 20, 1991) [hereinafter DoDD 6050.16].

the military's environmental stewardship. This section will address "core" domestic environmental laws with a particular focus on whether these laws apply to the military extraterritorially or whether they are subject to national security exemptions. The discussion will focus on statutes that are routinely invoked in litigation against the DoD: (1) the National Environmental Policy Act ("NEPA");[42] (2) the Endangered Species Act ("ESA");[43] (3) the Federal Water Pollution Control Act ("Clean Water Act" or "CWA");[44] (4) the Clean Air Act ("CAA");[45] (5) the Resource Conservation and Recovery Act ("RCRA");[46] (6) the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA");[47] and (7) the National Historic Preservation Act ("NHPA").[48] The article also discusses the Administrative Procedure Act ("APA")[49] and its applicability to military activities.

All of these environmental laws largely apply to federal agencies, including the DoD. Environmental laws speak generically of "federal agencies," "federal departments," and "federal facilities" without statutory clarification or carving out exceptions for military facilities.[50] Hence, to use one example, a Navy SEAL base is treated the same as an Internal Revenue Service facility or National Park and must comply with the same environmental rules and regulations.[51]

Further, as a general matter, individuals may not sue the U.S. government or governmental entities absent an express and unambiguous waiver of sovereign immunity.[52] But Congress has waived sovereign immunity in the core environmental statutes.[53] As discussed in more detail in Part IV, Congress has taken a proactive role in progressively broadening

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[42] 42 U.S.C. §§ 4321-4347 (2012).

[43] 16 U.S.C. §§ 1531-1544 (2012).

[44] 33 U.S.C. §§ 1251-1387 (2012).

[45] 42 U.S.C. §§ 7401-7671 (2012).

[46] 42 U.S.C. §§ 6901-6992 (2012).

[47] 42 U.S.C. §§ 9601-9675 (2012).

[48] 16 U.S.C. §§ 470-470x-6 (2012).

[49] 5 U.S.C. §§ 551-559, 701-706, 1305, 3105, 3344, 5372, 7521 (2012).

[50] *See, e.g.*, CAA § 118, 42 U.S.C. § 7418 ("Each Department . . . of the Federal Government . . . shall be subject to, and comply with, all Federal, State, interstate, and local requirements, administrative authority, and process . . . .").

[51] *See* RCRA § 1004(15), 42 U.S.C. § 6903(15) (amending the Solid Waste Disposal Act to include any agency of the United States within the definition of "person" as applied to facilities).

[52] *See* United States v. Mitchell, 445 U.S. 535, 538 (1980) (holding that waivers of sovereign immunity must be unequivocally expressed).

[53] *See* Kenneth M. Murchison, *Waivers of Immunity in Federal Environmental Statutes of the Twenty-First Century: Correcting a Confusing Mess*, 32 WM. & MARY ENVTL. L. & POL'Y REV. 359 (2008).

sovereign immunity waivers. For example, after the Supreme Court ruled that the sovereign immunity waiver was not clearly and unambiguously waived as it related to the procedural requirements of the CWA and CAA,[54] Congress immediately changed the law to ensure that the procedural waiver applied to federal activities.[55] Sovereign immunity protections are limited to federal employees operating in their official capacity; they do not bar suits against federal contractors or employees acting outside their official capacity.[56] There are a variety of ways for litigants to bring suit against the DoD utilizing existing environmental laws, including the use of citizen suit provisions[57] embedded within many environmental statutes or via the APA.[58]

There is no clear statutory guidance addressing the threshold for what would entail a "national security exemption" and whether environmental rules would continue to apply during an armed conflict. When looking at the text of core U.S. environmental statutes, the military is not often expressly mentioned. While there is usually a mechanism within each environmental statute to receive an exemption that could apply to military activities, this is reserved to the very highest levels of U.S. government.[59] Further, the different exemption schemes require a finding that the military activity would be either in the "paramount interest"[60] of the United States or linked to a "national security interest."[61] The exemption scheme is time-limited (in most circumstances one year) making the request for exemption an administratively repetitive and arduous process.[62] Because of its time limits and the administrative burden, DoD does not often request

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[54] *See* U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 619-20 (1992).

[55] *See* RCRA of 1976, Pub. L. No. 94-580, § 6001, 90 Stat. 2795, 2821 (1976) (waiving the procedural requirement of RCRA).

[56] 3 Susan L. Smith, ENVIRONMENTAL LAW PRACTICE GUIDE § 32A.03[2][a] (Michael B. Gerard ed. 2013).

[57] *See, e.g.*, CAA § 304, 42 U.S.C. § 7604 (2012).

[58] 5 U.S.C. §§ 701-706 (2012).

[59] *See, e.g.*, CAA § 118, 42 U.S.C. § 7418(b) (2012) ("The President may exempt any emission source of any department, agency, or instrumentality in the executive branch from compliance with such a requirement if he determines it to be in the *paramount interest* of the United States to do so . . . ." (emphasis added)).

[60] *Id.*

[61] *See, e.g.*, CERCLA § 120(j), 42 U.S.C. § 9620(j) (2012) ("The President may issue such orders regarding response actions at any specified site or facility of the Department of Energy or the Department of Defense as may be necessary to protect the national security interests of the United States at that site or facility.").

[62] *See* DAVID BEARDEN, CONG. RESEARCH SERV., RS22149, EXEMPTIONS FROM ENVIRONMENTAL LAW FOR THE DEPARTMENT OF DEFENSE: BACKGROUND AND ISSUES FOR CONGRESS 1-2 (2007).

exemptions, and they are seldom granted.[63] For example, one commentator has noted that there has never been a successful military exemption under CERCLA, and the RCRA exemption has been granted only twice in its history.[64] The exemption process has been a recent source of debate among DoD officials who view the current scheme as onerous and time consuming due to the large number and complexity of ongoing military activities taking place at hundreds of military bases throughout the world.[65]

Absent, too, from nearly every major environmental statute is an expression of its jurisdictional application overseas. The question of extraterritoriality of environmental statutes is particularly important for the U.S. military as it "has hundreds of operations in foreign countries and territories."[66] As a general matter, "[i]t has long been assumed that United States environmental laws which regulate military activities in this country have no application abroad[,]"[67] as there is a presumption that domestic laws do not apply outside U.S. borders unless Congress expressly includes an extraterritorial provision in the statute.[68]

Lastly, as discussed in more detail in Part IV, the APA is a critical statute for holding the U.S military accountable in the absence of a built-in citizen suit provision. The APA effectively enables citizens to challenge military "agency actions."[69] This has had the practical effect of making the DoD judicially accountable for its actions before a federal court. As a general matter, all DoD decisions are subject to judicial review like any other

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[63] *Cf. id.* at 2.

[64] Stephen Dycus, *Osama's Submarine: National Security and Environmental Protection After 9/11*, 30 WM. & MARY ENVTL. L. & POL'Y REV. 1, 49 (2005).

[65] BEARDEN, *supra* note 62, at 1-2.

[66] DYCUS, *supra* note 24, at 72.

[67] *Id.* at 73.

[68] *See, e.g.*, E.E.O.C. v. Arabian Am. Oil Co., 499 U.S. 244, 248 (1991).

[69] APA § 10, 5 U.S.C. § 702 (2012) (Right of Review: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: *Provided*, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.").

federal agency and section 704 of the APA provides for judicial review of final agency actions "for which there is no other adequate remedy in a court . . . ."[70]

1. National Environmental Policy Act

NEPA is a bedrock U.S. domestic environmental statute that requires federal agencies to take environmental considerations into account during their project planning and agency decisions through detailed environmental impact statements and assessments.[71] NEPA, the cornerstone statute of American environmental law, is the shortest environmental law but, arguably, the most important. As it applies to federal agencies and its actions, the U.S. military must fully comply with NEPA. While essentially a procedural planning statute without any substantive requirements, NEPA "has had an enormous influence on national security decision-making, not only by increasing the environmental sensitivity of government planners, but also by providing members of the public with a window into the [military] planning process."[72] NEPA mandates that the DoD "shall consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved."[73] Further, while NEPA lacks an express citizen suit provision, litigants have effectively used the APA to bring action against the U.S. for not fully complying with NEPA's guidelines.[74]

Unlike most other major environmental statutes, NEPA lacks an express statutory exemption for military activities.[75] NEPA environmental impact statement ("EIS") requirements, therefore, continue to apply even to what may be considered strategic military decisions, such as the movement of Navy nuclear submarines between naval stations.[76] On specified occasions, however, Congress has granted NEPA waivers in circumstances such "that a particular action is of such vital importance to the nation that its

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[70] *Id.* § 704.

[71] 42 U.S.C. §§ 4321-4347 (2012). NEPA requires the "federal government to plan ahead for the environmental consequences of its actions, and it sets out a procedural framework for doing so." DYCUS, *supra* note 24, at 11. Professor Dycus also notes, however, that NEPA has often been "less rigorously" applied to the defense establishment "especially when fear of foreign aggression has displaced worries about environmental consequences." *Id.*

[72] *Id.*

[73] NEPA § 102(C)(v), 42 U.S.C. § 4332(C)(v).

[74] *See, e.g.*, Winter v. Natural Res. Def. Council, Inc., 555 U.S. 7 (2008).

[75] No GWEN Alliance of Lane Cnty., Inc. v. Aldridge, 855 F.2d 1380, 1384 (9th Cir. 1988) ("There is no 'national defense' exception to NEPA.").

[76] DYCUS, *supra* note 24, at 17.

environmental consequences can be ignored."[77] While each EIS must be made available to the public, normal document classification and security guidelines continue to apply, potentially limiting an EIS's disclosure.[78]

NEPA lacks an express extraterritorial provision that would mandate that its requirements apply outside the U.S. So there is no clear statutory requirement for NEPA's requirements to apply to overseas military activities. Only one federal court has applied NEPA's requirements outside the U.S., and it did so in an opinion that considered activities in Antarctica—a landmass with no sovereign government.[79] By contrast, in *NEPA Coalition of Japan v. Aspin*,[80] another federal court concluded that NEPA's procedural requirements did not specifically apply to a military activity in Japan.[81]

Despite the territorial limitations of NEPA as construed by federal courts, the military does implement NEPA-type requirements as a matter of policy into overseas operations that go beyond the statutory requirement, "analyz[ing] environmental effects and actions within 12 [nautical miles] . . . and those effects occurring beyond 12 [nautical miles] under Executive Order 12114."[82]

2. *Endangered Species Act*

The ESA was passed in 1973 to prevent the extinction of imperiled animal and plant species through the identification of threatened or

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[77] *Id.* at 21 (noting that Congress explicitly waived NEPA requirements for the closing of military installations during the 1988 Base Realignment and Closure Act).

[78] *Id.* at 11.

[79] Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 529 (D.C. Cir. 1993) (applying NEPA's applicability in Antarctica, a landmass without a sovereign).

[80] 837 F. Supp. 466 (D.D.C. 1993).

[81] *Id.* at 466-67. The court in *Aspin* held that NEPA did not apply extraterritorially because of the strong presumption against extraterritorial application of U.S. statutes absent an express extraterritorial clause, which NEPA lacks, and the potentially adverse impact on foreign policy and treaty obligations. *Id.* at 467-68. Presidential Proclamation 5928, issued in 1988, extended the exercise of United States sovereignty and jurisdiction under international law to twelve nautical miles. Proclamation No. 5928, 54 Fed. Reg. 777, 777 (Dec. 27, 1988). Nevertheless, the proclamation did not "extend[] or otherwise alter[] existing Federal or State law or any jurisdiction, rights, legal interests, or obligations derived . . . ." *Id.* As a result, federal law—including NEPA—effectively stops at three nautical miles from the U.S. coastline. *Id.*

[82] JAGMAN, *supra* note 40, at 5-7. Within the Department of the Navy, there is an "At-Sea Policy" that goes beyond legal requirements. "This policy requires [environmental] analysis of testing and training activities and provides an environmental compliance framework for ranges and operating areas [beyond the three nautical mile requirement] . . . ." *Id.* at 5-8.

endangered species as administered by the U.S. Fish and Wildlife Service.[83] The ESA also protects critical habitats of threatened or endangered species from habitat loss—a primary threat to imperiled species.[84] Because of its broad application beyond merely federal actions and the broad prohibition of any "take" of listed species, it is often referred to as the "pit bull" of environmental statutes[85] because of its power and reach. The ESA is of particular importance to the DoD as military installations lack traditional characteristics of economic growth and development (e.g., highways, factories, urban sprawl); installations, therefore, often have habitats that are conducive to imperiled species.[86] The ESA requires federal agencies, including the DoD, to ensure that their actions are not "likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification" of their critical habitat.[87] It reflects a conscious decision by Congress to give endangered species priority over the "primary missions" of federal agencies.[88] The ESA applies to the military during peacetime operations,[89] and there exists a citizen suit provision embedded within ESA's statutory scheme.[90]

In one recent example, Marines training at Camp Pendleton, California had to be bussed between various phases of a training exercise to avoid harming the endangered California gnatcatcher.[91] The Secretary of Defense may also exempt an agency from compliance for reasons of national security.[92] And in the 2004 National Defense Authorization Act ("NDAA"), Congress "granted the Secretary of the Interior the authority to exempt military lands from designation as critical habitat under the

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[83] 16 U.S.C. §§ 1531-1544 (2012).

[84] *Id.*

[85] *See, e.g.*, James E. Landis, *The Domestic Implications of Environmental Stewardship at Overseas Installations: A Look at Domestic Questions Raised by the United States' Overseas Environmental Policies*, 49 NAVAL L. REV. 99, 118 (2002).

[86] *See, e.g.*, L. Peter Boice, *Threatened and Endangered Species on DoD Lands*, DEP'T OF DEF. NATURAL RES. (Jan. 2010), http://www.denix.osd.mil/nr/upload/T-E-s-fact-sheet-1-15-10-final.pdf.

[87] ESA § 7(a)(2), 16 U.S.C. § 1536(a)(2); *See also* DYCUS, *supra* note 24, at 31.

[88] Tenn. Valley Auth. v. Hill, 437 U.S. 153, 185 (1978).

[89] *See, e.g.*, Natural Res. Def. Council v. Evans, 279 F. Supp. 2d 1129, 1179-80 (N.D. Cal. 2003) (holding that the Navy failed to abide by the best available science requirement in 16 U.S.C. § 1536(a)(2) when considering sonar use during peacetime).

[90] ESA § 11(g), 16 U.S.C. § 1540(g).

[91] *See* Erin Truban, *Military Exemptions from Environmental Regulations: Unwarranted Special Treatment or Necessary Relief?*, 15 VILL. ENVTL. L.J. 139, 141 n.18 (2004).

[92] ESA § 7(j), 16 U.S.C. § 1536(j) ("Notwithstanding any other provision of this chapter, the Committee shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.").

Endangered Species Act, if the Secretary determines 'in writing' that a[] [DoD] Integrated Natural Resource Management Plan [a substitute for the critical habitat plan] for such lands provides a 'benefit' to the species for which critical habitat is proposed for designation."[93] Both section 8 and section 9 of the ESA mention both the "territorial sea" and the "high seas," suggesting at least some support that the law applies outside U.S. borders, yet the precise application remains unclear.[94]

As discussed below, the four core pollution statutes—the CWA, CAA, RCRA, and CERCLA—each lack a clear and independent expression of extraterritorial application and have not been interpreted to apply extraterritorially. They also have specific exemption provisions that could impact military activities if requested.

3. Clean Water Act

The CWA's waiver of sovereign immunity is broad and clearly applies to the DoD as an agency of the federal government:

> Each department, agency, or instrumentality of the executive, legislative, and judicial branches of the Federal government (1) having jurisdiction over any property or facility, or (2) engaged in any activity resulting, or which may result, in the discharge or runoff of pollutants . . . shall be subject to, and comply with all Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution in the same manner, and to the same extent as any nongovernmental entity including the payment of reasonable service charges. The preceding sentence shall apply . . . to . . . any requirement whether substantive or procedural . . . .[95]

The CWA lacks an express extraterritorial application, but all federal facilities and military installations are subject to the CWA within the U.S.[96] It authorizes the President to exempt federal facilities (including military installations) if the activity is in the "paramount interest" of the United States.[97] In addition, there is a citizen suit provision[98] within the CWA as

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[93] BEARDEN, *supra* note 62, at 4.

[94] 16 U.S.C. §§ 1536-1538. In *Lujan v. Defenders of Wildlife*, the Supreme Court overturned a circuit court opinion applying the ESA overseas, but did not specifically address the jurisdictional issue. Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992).

[95] CWA § 313(a), 33 U.S.C. § 1323(a) (2012). This waiver language is mirrored in other statutes, including the Clean Air Act. *See, e.g.*, CAA § 118(a), 42 U.S.C. § 7418(a) (2012).

[96] 33 U.S.C. § 1323.

[97] *Id.* § 1323(a) ("The President may exempt any effluent source of any department, agency, or instrumentality in the executive branch from compliance with any such a

"person" has been construed to include governmental agencies.[99] The CWA also contains a lengthy section creating a national uniform standard applied to discharges from vessels of the armed forces.[100] The CWA makes it unlawful for any vessel of the armed forces to "operate in the navigable waters of the United States or the waters of the contiguous zone" if the vessel lacks devices to meet the CWA's standards.[101] The CWA also permits states to limit discharges from military vessels while in port, upon approval of the EPA Administrator.[102]

4. Clean Air Act

The CAA is designed to protect and enhance the quality of the air resources so as to protect the nation's public health and welfare.[103] It applies to the DoD as a federal agency—the sovereign immunity waiver language[104] largely mirrors what is found in the CWA—and there is also a provision allowing for citizen suits against the DoD.[105] The CAA lacks an express statement of extraterritorial application[106] and courts have not held that it applies overseas.

Of note, one section expressly waives CAA inspection and maintenance requirements for "military tactical vehicles."[107] And there is a broader exemption provision that can be applied to the U.S. military:

> The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so.[108]

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requirement if he determines it to be in the *paramount interest* of the United States to do so . . . ." (emphasis added)).

[98] *Id.* § 1365(a)(1).

[99] *Id.* § 1362(5).

[100] *Id.* § 1322(n).

[101] *Id.* § 1322(n)(8)(A).

[102] *Id.* § 1322(n)(7)(A)(i)(II).

[103] *See Clean Air Act (CAA)*, U.S. ENVTL. PROT. AGENCY, http://www.epa.gov/agriculture/lcaa.html (last visited Sept. 27, 2013) ("The objective of the Clean Air Act is to protect human health, welfare, and the environment by maintaining and improving the quality of the air through the development of standards.").

[104] CAA § 188(a), 42 U.S.C. 7418(a) (2012).

[105] *Id.* § 7604(a).

[106] *Id.* §§ 7401-7642.

[107] *Id.* § 7418(c).

[108] *Id.* § 7412(i)(4).

5. Resource Conservation and Recovery Act

RCRA was enacted in 1976 and provides a "cradle to grave" statutory scheme to address the generation, transportation and treatment, storage and disposal of hazardous waste.[109] RCRA has been interpreted to apply to federal agencies including the DoD.[110] There is broad sovereign immunity language within RCRA[111] and there is a citizen suit provision that can be used for lawsuits against the DoD.[112] RCRA, too, lacks an express extraterritorial application within its statutory scheme.

RCRA was amended with the passage of the Federal Facility Compliance Act ("FFCA")[113] in 1992 after the ruling in *United States Department of Energy v. Ohio*.[114] This clarified the waiver of sovereign immunity by reaffirming federal employees' personal criminal liability for violations of hazardous waste laws under RCRA.[115] The FFCA also addressed unserviceable munitions, directing the Environmental Protection Agency ("EPA") to issue regulations that specify when military munitions become RCRA hazardous wastes.[116] The EPA, in turn, defined military munitions broadly, allowing munitions to be covered by the RCRA hazardous waste definition when the munitions are not used for their intended purpose or when they are in the process of being recycled, reclaimed or subject to material recovery activities.[117]

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[109] *See History of RCRA*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/osw/laws-regs/rcrahistory.htm (last visited Sept. 27, 2013).

[110] *See Federal Facilities and the Resource Conservation and Recovery Act (RCRA)*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/compliance/federalfacilities/enforcement/civil/rcra.html (last visited Sept. 27, 2013) ("Federal facilities are required to comply with all Federal, State, interstate, and local solid and hazardous waste requirements.").

[111] 42 U.S.C. § 6961(a).

[112] 42 U.S.C. § 6972.

[113] *See* Federal Facility Compliance Act of 1992 ("FFCA"), Pub. L. No. 102-386, 106 Stat. 1505 (1992) (overturning the sovereign immunity waiver ruling as applied to RCRA by the court in U.S. Dep't of Energy v. Ohio, 503 U.S. 607 (1992)).

[114] 503 U.S. 607 (1992).

[115] FFCA § 102(a)(4), 106 Stat. at 1505.

[116] *Id.* § 107, 106 Stat. at 1513-14.

[117] 40 C.F.R. § 266.202(a)(2) (2013).

6. Comprehensive Environmental Response, Compensation, and Liability Act

CERCLA, often referred to as the "Superfund statute," governs the response to and cleanup of hazardous substances.[118] It is a statute of particular importance to the U.S. military as it directly relates to the efficacy of military base cleanup efforts. Under its sovereign immunity waiver, CERCLA applies to military activities during peacetime[119] and lawsuits have been successfully filed against the DoD challenging the effectiveness of base cleanup mechanisms.[120]

Despite its relevance to base cleanup efforts, CERCLA has not been held to apply overseas. For example, in one recent case, *Arc Ecology v. United States Department of the Air Force*, citizens alleged that the DoD failed to properly clean up Clark Air Force Base in the Philippines.[121] In *Arc Ecology*, the court ruled that the statute had no extraterritorial effect.[122] Lastly, CERCLA does not contain a distinct citizen suit provision but suits under the APA still apply. It does contain a "national security" exemption, time limited to one year,[123] but one commentator has noted that this exemption has never been successfully applied.[124]

7. National Historic Preservation Act

The NHPA, most closely associated with the protection of physical, historical properties within the United States,[125] stands out as the only environmental statute that has been interpreted to expressly apply overseas in another sovereign nation.[126] It lacks a citizen suit provision, and there is

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[118] *See Federal Facilities and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)/Superfund*, U.S. ENVTL. PROTECTION AGENCY, http://www.epa.gov/compliance/federalfacilities/enforcement/civil/cercla.html (last visited Sept. 27, 2013).

[119] CERCLA § 120, 42 U.S.C. § 9620(a) (2012).

[120] *See, e.g.*, New York v. United States, 620 F. Supp. 374 (E.D.N.Y. 1985).

[121] Arc Ecology v. U.S. Dep't of the Air Force, 411 F.3d 1092 (9th Cir. 2005).

[122] *Id.* at 1094 (affirming the district court's dismissal of the case "because CERCLA [did] not provide for the extraterritorial application sought by the appellants").

[123] 42 U.S.C. § 9620(j).

[124] *See* Dycus, *supra* note 64, at 49 (noting that there has never been a CERCLA exemption for the military granted, and there have been two exemptions under RCRA).

[125] NHPA § 1(a), 16 U.S.C. § 470(a) (2012).

[126] Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1111 (N.D. Cal. 2008) (holding that the DoD did not properly comply with the APA and section 402 of the NHPA when it failed to take into account the effects of an installation move on a marine mammal in Japan).

a potential exemption for military activities when there is an imminent threat to national security.[127]

Because there are thousands of DoD employees in numerous bases overseas, NHPA is of particular importance to military activities in light of a recent federal district court case. In *Okinawa Dugong v. Gates*, the United States District Court for the Northern District of California ruled that the extraterritorial provision of the NHPA was properly used to protect a marine mammal in Japan from the consequences of construction of a new American military installation.[128] The court held that the NHPA could protect the dugong, a wild animal, pursuant to the NHPA.[129]

C. The Major U.S. Environmental Statutes Have Criminal Provisions that Apply to DoD Employees

As a general matter, DoD employees *are* subject to the criminal provisions within environmental statutes.[130] As a general matter, individual federal governmental employees—including DoD employees—are not immune from prosecution for their criminal acts.[131] The major environmental statutes, including the CWA,[132] CAA,[133] RCRA,[134] CERCLA,[135] and ESA,[136] have criminal provisions that would apply to U.S. military employees found in violation of the respective criminal provisions.

For example, the criminal provisions of RCRA have been used to prosecute civilian Department of the Army employees "for failing to properly identify, store, and dispose of hazardous wastes generated by their chemical weapons laboratory."[137] As this enforcement action shows, the

[127] 16 U.S.C. § 470h-2(j).

[128] *Okinawa Dugong*, 543 F. Supp. 2d at 1100.

[129] *Id.* at 1111.

[130] *See, e.g.*, United States v. Dee, 912 F.2d 741, 744 (4th Cir. 1990).

[131] *See, e.g.*, United States v. Curtis, 988 F.2d 946, 948 (9th Cir. 1993).

[132] CWA § 309(c), 33 U.S.C. § 1319(c) (2012).

[133] CAA § 113(c), 42 U.S.C. § 7413(c) (2012). This appears to exclude an employee carrying out normal activities who is not a part of senior management or a corporate officer. *See* 42 U.S.C. § 7413(h).

[134] RCRA § 6001(a), 42 U.S.C. § 6961(a) (2012).

[135] CERCLA § 103(b)(3), 42 U.S.C. § 9603(b)(3) (2012); *see also* United States v. Carr, 880 F.2d 1550, 1550-51 (2d Cir. 1989).

[136] ESA § 10(b), 16 U.S.C. § 1540(b) (2012).

[137] William D. Palmer, *Environmental Compliance: Implications for Senior Commanders*, 81 Parameters 81, 81 (1993); *see also* United States v. Dee, 912 F.2d 741 (4th Cir. 1990).

doctrine of sovereign immunity does not attach to DoD employees seeking to avoid criminal prosecution.[138]

The Table below provides an overview of the statutes described above as they apply to U.S. military activities.

[138] *Dee*, 912 F.2d at 744 ("There is simply no merit to [the] suggestion[]" that the Army employees are immune from their criminal actions. "[S]overeign immunity does not attach to individual government employees so as to immunize them from prosecution.").

TABLE 1
APPLICATION OF MAJOR U.S. ENVIRONMENTAL LAWS TO MILITARY ACTIVITIES

Name	Military Exemption?	Extraterritorial Application?	Citizen Suit?	Criminal Liability?
NEPA	No[139]	No[140]	No	Yes
Endangered Species Act	Yes. "National Security"[141]	Unclear – "high seas"[142]	Yes[143]	Yes[144]
Clean Air Act	Yes. "Paramount Interest"[145]	No	Yes[146]	Yes[147]
Clean Water Act	Yes. "Paramount Interest"[148]	No	Yes[149]	Yes[150]
RCRA	Yes. "Paramount Interest"[151]	No	Yes[152]	Yes[153]
CERCLA	Yes. "National Security"[154]	No	Yes[155]	Yes[156]
NHPA	Yes. "Imminent Threat to National Security"[157]	Yes[158]	No	No.

[139] There is no explicit NEPA national security exemption, but in *Winter v. Natural Res. Def. Council*, Justice Roberts held that "any such injury is outweighed by the public interest and the Navy's interest in effective, realistic training of its sailors." 555 U.S. 7, 23 (2008). Additionally, the Council on Environmental Quality ("CEQ") has authority to issue exemptions in emergency situations. *See* 40 C.F.R. § 1506.11 (2013).

[140] *See* Envtl. Def. Fund, Inc. v. Massey, 986 F.2d 528, 532-37 (D.C. Cir. 1993) (holding that there was no clear legislative intent to apply NEPA extraterritorially).

[141] ESA § 7(j), 16 U.S.C. § 1536(j) (2012).

[142] For an in-depth analysis of this uncertainty, see generally Keith S. Gibel, *Defined by the Law of the Sea: "High Seas" in the Marine Mammal Protection Act and the Endangered Species Act*, 54 NAVAL L. REV. 1 (2007).

[143] ESA § 11(g), 16 U.S.C. § 1540(g) (2012).

[144] *Id.* § 1540(b).

[145] CAA § 118(b), 42 U.S.C. § 7418(b) (2012).

[146] *Id.* § 7604.

[147] *Id.* § 7413(c).

[148] CWA § 313(a), 33 U.S.C. § 1323(a) (2012).

[149] *Id.* § 1365.

[150] *Id.* § 1319(c).

[151] RCRA § 6001(a), 42 U.S.C. § 6961(a) (2012).

[152] *Id.* § 6972.

[153] *Id.* § 6928(d).

[154] CERCLA § 120(j), 42 U.S.C. § 9620(j) (2012).

[155] *Id.* § 9659.

[156] *Id.* § 6928(d).

[157] NHPA § 110(j), 16 U.S.C. § 470h-2(j) (2012).

[158] *Id.* § 470a-2. The NHPA was amended in 1980, effectively implementing legislation

D. *Executive Branch Guidance and DoD's Implementation of Existing Environmental Law Reflect a Growing Trend of Environmental Stewardship*

Even though U.S. environmental laws do not apply extraterritorially without an express jurisdictional provision indicating congressional intent,[159] the President has directed the military to adhere to certain norms of environmental stewardship outside of the statutory scheme of the major media statutes.[160] These directives reflect an understanding that it is sound policy for the military to respect the environment wherever it operates.

U.S. executive branch policy requires adherence to U.S. environmental requirements, instituted by executive orders and filtered down to military operations by regulations, directives, and instructions.[161] These executive orders do *not* create a judicially enforceable cause of action to allow the challenging of U.S. actions overseas, but they do provide executive direction and mandate DoD compliance on overseas environmental stewardship.[162]

For example, Executive Order 11,593, issued in 1971, spells out general federal agency responsibilities as they relate to the cultural environment.[163] Further, President Jimmy Carter issued two executive orders, 12,088[164] and 12,114[165] that provide guidance for federal agency actions to include U.S. military operations outside the United States.

Executive Order 12,088 was issued absent any express congressional mandate[166] and was based on the President's independent authority under

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pursuant to in the World Heritage Convention. *See generally* National Historic Preservation Act Amendments of 1980, Pub. L. No. 96-515, 94 Stat. 2987 (1980).

[159] Foley Bros., Inc. v. Filardo, 336 U.S. 281, 284-85 (1949) (holding that Congress must explicitly state that a particular piece of legislation applies outside of the territorial jurisdiction of the United States).

[160] *See* Exec. Order No. 11,593, 36 Fed. Reg. 8,921 (May 13, 1971) ("The Federal Government shall provide leadership in preserving, restoring and maintaining the historic and cultural environment of the Nation.") [hereinafter Exec. Order No. 11,593].

[161] *See* INT'L & OPERATIONAL DEP'T, THE JUDGE ADVOCATE GENERAL'S LEGAL CTR. & SCH., OPERATIONAL LAW HANDBOOK 329 (2011), *available at* http://www.loc.gov/rr/frd/Military_Law/pdf/operational-law-handbook_2011.pdf.

[162] *See generally id.* at 328-35.

[163] Exec. Order No. 11,593, *supra* note 160.

[164] Exec. Order No. 12,088, 43 Fed. Reg. 47,707 (Oct. 13, 1978) [hereinafter Exec. Order No. 12,088], *revoked in part by* Exec. Order No. 13,148, 65 Fed. Reg. 24,595 (Apr. 21, 2000).

[165] Exec. Order No. 12,114, 44 Fed. Reg. 1,957 (Jan. 4, 1979), *reprinted in* 42 U.S.C. § 4321 (1982).

[166] *See generally* Memorandum on Federal Compliance with Pollution Control Standards (Oct. 13, 1978), *available at* http://www.presidency.ucsb.edu/ws/?pid=29977&#axzz

the U.S. Constitution.[167] It requires federal agencies to ensure that the construction or operation of U.S. facilities in foreign countries complies with the environmental pollution control standards of general applicability in the host nation.[168]

Executive Order 12,114 was also issued based on the President's independent authority under the U.S. Constitution, distinct from NEPA's statutory mandate.[169] It provides for a limited preliminary review of U.S. actions that have foreign environmental impacts.[170] It also provides an additional extraterritorial requirement to federal facilities overseas and should be read in conjunction with the underlying environmental statute.[171] Executive Order 12,856, issued in 1993 by President Clinton, applies to the DoD and committed the federal government to go beyond mere compliance to environmental excellence through the funding and implementation of department-specific pollution prevention strategies.[172] It also took the forward-looking step of requiring federal agencies to comply with federal, state, and local right-to-know requirements,[173] as there was no congressional waiver of sovereign immunity within the Emergency Planning and Community Right-to-Know Act ("EPCRA") of 1986.[174]

Following the issuance of these executive orders, Congress directed the Secretary of Defense to "develop a policy for determining applicable environmental requirements for military installations located outside the United States."[175] These DoD instructions, in effect, apply Presidential executive orders to overseas military installations and operations.[176] The various military directives and instructions are also important in understanding the U.S. approach to the environment, particularly overseas,

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[167] *See* Exec. Order No. 12,088, *supra* note 164 ("By the authority vested in me as President by the Constitution and statutes of the United States of America . . . .").

[168] *Id.* ¶ 1-801.

[169] DYCUS, *supra* note 24, at 27.

[170] *Id.*

[171] Environmental impacts inside a "participating nation" would not escape review. *Id.* at 27-28. For example, a proposed action carried out within the territory of a sovereign ally (e.g., Italy, Germany, Japan) would "naturally have to conform to local laws, or to any applicable status of forces agreement." *Id.* at 29.

[172] Exec. Order No. 12,856, 58 Fed. Reg. 41,981, Sec. 3-3 (Aug. 3, 1993), *revoked by* Exec. Order No. 13,148, 65 Fed. Reg. 24,595 (Apr. 21, 2000).

[173] *Id.*

[174] Emergency Planning and Community Right-to-Know Act ("EPCRA"), 42 U.S.C. §§ 11001–11050 (2012).

[175] Quinn et al., *supra* note 26, at 168 (emphasis omitted) (quoting National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, § 342(b), 104 Stat. 1485, 1537 (1990)).

[176] *See, e.g.*, DoDD 6050.16, *supra* note 41.

as they reflect the practical application and implementation of environmental law and guidance. For example, following the signing of these two executive orders, the DoD issued Directive 6050.7, which implemented the Carter-era executive orders and required a NEPA-like process when a major federal action would significantly affect the environment outside the United States.[177] And the DoD recently developed an "Overseas Environmental Baseline Guidance Document" ("OEBGD") that "direct[ed] military personnel . . . to develop environmental standards based on DoD 'suggested criteria' for pollutants such as air emissions, drinking water contaminants, hazardous wastes, noise, and pesticides."[178]

Another directive, DoDD 6050.16, directs military commands overseas to prepare Final Governing Standards ("FGS") for each nation in which the U.S. maintains a substantial installation.[179] It provides a "baseline guidance document for the protection of the environment at DoD installations and facilities outside U.S. territory."[180] It includes what amounts to an important "fallback provision" with regard to environmental stewardship overseas:

> Unless inconsistent with applicable host-nation law, base rights and/or status of forces agreements (SOFAs), or other international agreement, or practices established pursuant to such agreements, the baseline guidance shall be applied by the DoD Components stationed in foreign countries when host-nation environmental standards do not exist, are not applicable, or provide less protection to human health and the natural environment than the baseline guidance.[181]

These FGS requirements are a comprehensive set of country-specific substantive provisions that address environmental concerns, setting forth technical limitations on discharges and environmental management practices within the country.[182] In the event that FGS do not exist for a specific country, the military will still comply with the OEBGD standards, applicable international agreements, and applicable standards under

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[177] U.S. Dep't of Def., Dir. 6050.7, Envtl. Effects Abroad of Major Dep't of Defense Actions 1 (Mar. 31, 1979) [hereinafter DoDD 6050.7], *available at* http://www.dtic.mil /whs/directives/corres/pdf/605007p.pdf.

[178] DYCUS, *supra* note 24, at 74. For the updated OEBGD, see U.S. Dep't of Def., Dir. 4715.05-G, Overseas Envtl. Guidance Document 1 (May 1, 2007), *available at* http://www.dtic.mil/whs/directives/corres/pdf/471505g.pdf.

[179] DoDD 6050.16, *supra* note 41, ¶ 3.2.4.

[180] *Id.* ¶ 3.1.

[181] *Id.* ¶ 3.1.2. This fallback provision is reiterated within military department guidance. For example, within the U.S. Navy, facilities must comply with FGS requirements overseas. *See* JAGMAN, *supra* note 40, at 13-3.

[182] JAGMAN, *supra* note 40, at 5-13.

Executive Order 12,088.[183] In case of conflicting requirements, "the facility will comply with the standard that is *more protective* of the human environment . . . ."[184]

Finally, each military service within the DoD provides extensive guidance regarding how it will comply with environmental laws and regulations. For example, the Department of the Navy's "Environmental Readiness Program Manual" provides for extensive guidance for all Navy activities afloat and ashore.[185] Indeed, at least one commentator has noted that in some instances environmental protection requirements adopted by the Navy for peacetime operations exceed the minimum requirements imposed by domestic legislation or international norms.[186]

The DoD also takes part in extensive operational planning for exercises and real-life missions. As the directives discussed above show, environmental planning is now a fundamental part of military planning, and military operations must now take into account environmental considerations as part of the operational planning process.[187] And "environmental considerations" are now a distinct part of the formal military planning process for any future activity.[188]

E. International Agreements and Status of Forces Supplemental Agreements Reflect the Growing Trend of Specifically Addressing Environmental Obligations for the Military

International agreements provide yet another layer of environmental obligations for the U.S. military, and, unlike many domestic environmental

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[183] *Id.*

[184] *Id.* (emphasis added). DoD directives further designate service specific (e.g., Army, Navy, Air Force) "executive agents" for each host nation, "[i]dentify[ing] host-nation national environmental standards, including those specifically delegated to regional or local governments for implementation, . . . [to] determine their applicability to DoD operations at installations and facilities in that country." DoDD 6050.16, *supra* note 41, ¶ 3.2.2.

[185] DEP'T OF NAVY, ENVIRONMENTAL READINESS PROGRAM MANUAL, OPNAVINST 5090.1C 1-2 (2011). "The mission of the Navy's Environmental Readiness Program is to ensure the ability of United States Navy forces to effectively operate world-wide in an environmentally responsible manner, both ashore and afloat." *Id.*

[186] Quinn et al., *supra* note 26, at 157-58 (noting that "although not required under the MARPOL Convention or by domestic law, in 1990 the Navy required its warships to retain waste plastic on board for shore disposal, to the extent that limited storage space would permit").

[187] *See, e.g.*, U.S. COAST GUARD, THE COMMANDING OFFICER'S ENVIRONMENTAL GUIDE (2007), *available at* http://www.uscg.mil/hq/cg4/cg47/docs/USGC%20Commanding%20Officers%20Environmental%20Guide.pdf.

[188] *See, e.g.*, CHAIRMAN OF THE JOINT CHIEFS OF STAFF, JOINT OPERATION PLANNING & EXECUTION SYSTEM (JOPES) VOL. 1, PLANNING POLICIES & PROCEDURES (2006).

statutes, these agreements clearly apply to the military's operations overseas.[189] While at one point environmental concerns were largely absent from international agreements addressing U.S. military activities overseas, the trend is to incorporate environmental concerns into Status of Forces Agreements ("SOFAs") and other international agreements as discussed below.[190]

SOFAs are important when attempting to determine the U.S. military's legal obligation to the host nation environment pursuant to an international agreement.[191] In the past, SOFAs have not specifically addressed environmental obligations; recent SOFAs, however, have incorporated specific environmental concerns and what is known as "sending state obligations"[192] into SOFA language.[193] The 1951 North Atlantic Treaty regarding the Status of Their Forces,[194] commonly referred to as the "NATO SOFA," does not explicitly address host nation environmental obligations, but does contain a comprehensive claim provision that encompasses environmental claims between a "receiving state" (i.e., the host nation) and a "sending state" (normally the U.S.).[195] Today, the U.S. is often the sending state overseas, particularly in Germany, Italy, Korea, and Japan where there is a large and continual U.S. military presence. Pursuant to the NATO SOFA, each NATO member state,

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[189] R. CHUCK MASON, CONG. RESEARCH SERV., RL34531, STATUS OF FORCES AGREEMENT (SOFA): WHAT IS IT, AND HOW HAS IT BEEN UTILIZED? (2012) [hereinafter SOFA CRS]. While the "issue most commonly addressed in a SOFA is the legal protection from prosecution that will be afforded U.S. personnel while present in a foreign country[,]" a growing trend is to address environmental protection measures within these agreements as well. *Id.* at 3.

[190] *See generally id.*

[191] *See id.*

[192] A sending state's military is the military within the foreign country. For example, the U.S. military has had a long-standing presence within Germany since World War II. In this instance, the sending state for U.S. military installations in Germany is the U.S. and the host nation (or "receiving state") is Germany. Agreement to the Parties to the North Atlantic Treaty regarding the Status of Their Forces, art. VIII, June 19, 1951, 199 U.N.T.S. 67 [hereinafter NATO SOFA].

[193] *See, e.g.*, Unofficial Translation of U.S.-Iraq Troop Agreement from the Arabic Text, art. 8, MCCLATCHY DC (Nov. 18, 2008), http://www.mcclatchydc.com/2008/11/18/56116/unofficial-translation-of-us-iraq.html [hereinafter U.S.-Iraq Troop Agreement].

[194] NATO SOFA, *supra* note 192.

[195] Steve Barnett, *Environmental Requirements and Consequences Related to the Closing of United States Military Bases in Europe, presented at The Fourth International Symposium and Exhibition on Environmental Contamination in Central and Eastern Europe* (Sept. 16, 1998), *available at* http://www.connellfoley.com/content/page/environmental-requirements-and-consequences-related-closing-united-states-military-base ("For environmental property damage cases, the NATO-SOFA would likely bind the parties to resolve their claims in the host nation.").

> waives all its claims against any other Contracting Party for damage to any property owned by it and used by its land, sea or air armed services, if such damage- (i) was caused by a member or an employee of the armed services of the other Contracting Party in the execution of his duties in connexion with the operation of the [treaty] . . . .[196]

Hence, any claims for environmental damage would be administered pursuant to the more general NATO claims provision without a specific environmental duty. Absent a supplemental SOFA, any environmental claims (e.g., an environmental property damage claim arising from a U.S. military installation operating in Italy) would be resolved pursuant to the receiving state's domestic law:

> Claims . . . arising out of acts or omissions of members of a force or civilian component done in the performance of official duty, or out of any other act, omission or occurrence for which a force or civilian component is legally responsible, and causing damage in the territory of the receiving State to third parties, . . . shall be filed, considered and settled or adjudicated in accordance with the laws and regulations of the receiving State . . . .[197]

The U.S.-Japan[198] and U.S.-Korea[199] SOFAs were both signed in the 1960s and continue to govern U.S. military activities in these respective countries; they do not specifically address any environmental obligations.[200] The Japan and Korean SOFAs have effectively "relieved the U.S. of any obligation to restore properties to their previous condition in exchange for a U.S. waiver of any obligation by the host-nation to pay residual value. Here the protection of the environment was in effect bargained away by the host-nations."[201]

But the trend towards environmental considerations can be seen when contrasting the original 1951 NATO SOFA with the most recent NATO Supplemental Agreement ("SA"). Following the end of the Cold War, the U.S. negotiated a SA with the newest member of NATO, a recently unified Germany. Unlike the NATO, Korean, and Japanese SOFAs, the German SA specifically requires compliance with German environmental laws and

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[196] NATO SOFA, *supra* note 192, art. VIII, ¶ 1.

[197] *Id.* art. VIII, ¶ 5.

[198] Agreement under Article VI of the Treaty of Mutual Cooperation and Security Between the United States and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, Jan. 19, 1960, 11 U.S.T. 1652, 373 U.N.T.S. 248 [hereinafter US-Japan SOFA] (entered into force June 23, 1960).

[199] Facilities and Areas and the Status of United States Armed Forces in Korea, July 9, 1966, 674 U.N.T.S. 163 [hereinafter US-Korea SOFA].

[200] *See* US-Japan SOFA, *supra* note 198; US-Korea SOFA, *supra* note 199.

[201] Margaret M. Carlson, *Environmental Diplomacy: Analyzing Why the U.S. Navy Still Falls Short Overseas*, 47 NAVAL L. REV. 62, 82 (2000) (internal citations omitted).

expressly addresses U.S. environmental obligations while operating in Germany.[202] The U.S. is required to apply German environmental law to all activities on the installation "except those deemed to be strictly internal and having no effect on German nationals or property."[203]

The recent SOFA signed with Iraq in 2008 also has an environmental provision that mirrors the obligation of the German SA.[204] While this agreement lasted only three years until American troops withdrew from Iraq, it reflects the trend to specifically incorporate host nation environmental considerations as part of the U.S.'s overseas military obligations. It states:

> Both parties are to execute this agreement in a manner consistent with protection of the natural environment, health and human security. And the U.S. commits again to respecting the laws of the environment and Iraqi laws in implementing its policies for the purposes of this agreement.[205]

International environmental agreements are increasingly addressing the environmental impact of the U.S. military, too. For example, Agenda 21 is a recent international environmental agreement that addresses the management of military generated wastes.[206] It states, "[g]overnments should ascertain that their military establishments conform to their nationally applicable environmental norms in the treatment and disposal of hazardous wastes."[207] Lastly, the U.S. military operating overseas must also be aware of its international obligations where the U.S. is not a party to an agreement.[208]

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[202] Kim D. Chanbonpin, *Holding the United States Accountable for Environmental Damage Caused by the U.S. Military in the Philippines, A Plan for the Future*, 4 ASIAN-PAC. L. & POL'Y J. 321, 353-54 (2003).

[203] Carlson, *supra* note 201, at 82.

[204] U.S.-Iraq Troop Agreement, *supra* note 193, art. 8.

[205] *Id.* There is currently no formal SOFA governing U.S. military operations in Afghanistan. Operations there are largely governed by a two-page exchange of diplomatic notes between Afghanistan and the U.S. *See* SOFA CRS, *supra* note 189, at 10 n.61.

[206] United Nations Conference on Environment and Development, June 3-14, 1992, *Agenda 21*, ¶ 20.22(h), U.N. Doc. A/CONF.151/PC/100/Add.1 (1992) [hereinafter Agenda 21], *available at* http://www.sustainabledevelopment.un.org/content/documents/Agenda21.pdf.

[207] *Id.*

[208] *See* Anne L. Burman & Teresa K. Hollingsworth, *JAGs Deployed: Environmental Law Issues*, 42 A.F. L. REV. 19, 32 (1997), *available at* http://www.afjag.af.mil/shared/media/document/AFD-081204-037.pdf. For example, the Basel Convention, an international environmental agreement that encourages the disposal of waste within the nation in which it is generated, prohibits the shipment of hazardous wastes (to include military wastes) from a non-member nation to a member nation unless a special agreement has been made. *Id.* at 34. During an operation in the late 1990s, the U.S. military needed to

III. COMPARATIVE LEGAL ANALYSIS

A. North Atlantic Treaty Organization and the European Union

The North Atlantic Treaty Organization ("NATO")[209] consists of twenty-eight member nations[210] and has been at the forefront of applying environmental laws and regulations within military training exercises and operations. The NATO Committee on the Challenges of a Modern Society ("CCMS") was organized in 1969, roughly coinciding with the birth of U.S. environmental regulations.[211] CCMS was originally established to make NATO member countries more aware of the common environmental problems that posed a threat to the welfare and progress of their respective nations.[212] In accomplishing this mission, it has played an important role in pioneering environmental guidelines applicable to the military sector.[213] Through CCMS, NATO has served an important purpose in standardizing environmental practice to military activities and doctrine, recently providing detailed environmental guidelines for armed forces during peacetime. In doing so, it stated that the NATO environmental standards would be appropriate for any state to independently adopt.[214] As one

dispose of its hazardous waste generated in Bosnia-Herzegovina by crossing nations that were party to the Convention (Germany, Croatia). *Id.* Despite not being a party to Basel, the U.S. complied with the obligations of the host nation, ultimately securing a "statement of no objection" from neighboring countries before transporting hazardous waste. *Id.*

[209] NATO is an alliance consisting of twenty-eight independent states. For more information on NATO membership status and its history, see *NATO Member Countries*, NORTH ATLANTIC TREATY ORGANIZATION (Apr. 9, 2013), www.nato.int/structur/countries.htm.

[210] *See NATO Member Countries*, NORTH ATLANTIC TREATY ORG. (Apr. 9, 2013), http://www.nato.int/cps/en/SID-5FFE2CC2-856E6FE6/natolive/nato_countries.htm.

[211] *Historical Context*, NORTH ATLANTIC TREATY ORG. (May 31, 2011), http://www.nato.int/science/about_sps/historical.htm (describing the historical mission and transformation of the CCMS). In 2006, CCMS was folded into NATO's Science for Peace and Security Committee.

[212] *Id.*

[213] *See, e.g.*, *Environmental Guidelines for the Military Sector, NATO Committee on the Challenges of Modern Society*, NORTH ATLANTIC TREATY ORG., 9-11 (Jun. 1996), http://www.denix.osd.mil/international/upload/Environmental-Guidelines-for-the-Military-Sector2.pdf (describing the Joint Sweden-U.S. Project). CCMS was established in 1969 in order to provide a "social dimension" to NATO's activities. In 2006, it merged with NATO's Science for Peace and Security Committee. A partial list of the CCMS' work on contaminated environmental sites is available at the EPA "CLU-IN" website. *See Contaminated Site Clean-Up Information*, ENVIRONMENTAL PROTECTION AGENCY, http://www.clu-in.org/search/default.cfm?search_term=ccms&advlit=0&t=all&f= (last visited Sept. 7, 2013).

[214] Arthur H. Westing, *Environmental Dimensions of Maritime Security, in* MARITIME

commentator noted, "[CCMS] has played an important role in bridging the gap between military and environmental considerations" and "has covered a broad spectrum of environmental studies . . . ."[215]

NATO's Standardization Agreement ("STANAG") 7141[216] is a key document for assuring military environmental obligations and standards are met during NATO operations. This document effectively incorporates environmental concerns within NATO operations and serves as NATO military doctrine in protecting the environment during NATO-led military activities.[217] It also serves as an effective blueprint for all NATO-led military activities encompassing actual operations and training exercises.[218] Under this agreement, NATO military commanders are required to consider environmental protection during each phase of the military exercise, and must "balance environmental protection against risks to the forces and mission accomplishment."[219] There is an acknowledgement that NATO commanders "should be aware of differences in the priority given to environmental protection among nations."[220] STANAG 7141 asserts that "NATO Forces should be committed to taking all reasonably achievable measures to protect the environment"[221] and "[e]xercises under peacetime conditions should be conducted in a manner consistent with applicable environmental regulations."[222] Lastly, STANAG 7141 states that NATO Commanders should incorporate environmental impacts as part of their decision-making and provides for environmental planning guidelines.[223] NATO military doctrine, as evidenced by STANAG 7141, has effectively incorporated environmental considerations within military training exercises.

SECURITY: THE BUILDING OF CONFIDENCE 174 (Jozef Goldblat ed. 1992). "Indeed, NATO would suggest that the military sector should serve as an example to the rest of society through the military's own sound environmental policies." *Id.*

[215] Alexandre S. Timoshenko & Masa Nagai, *Application of Environmental Norms by Military Establishments*, *in* UNEP'S NEW WAY FORWARD: ENVIRONMENTAL LAW AND SUSTAINABLE DEVELOPMENT 277, 279 (Sun Lin & Lal Kurukulasunya eds., 1995).

[216] NATO Standardization Agreement, STANAG 7141: Joint NATO Doctrine for Environmental Protection During NATO led Military Activities (Feb. 26, 2008), [hereinafter STANAG 7141], *available at* http://nsa.nato.int/nsa/zPublic/stanags/7141E%20EP%20 ED5%20EC.pdf.

[217] *Id.*

[218] *Id.*

[219] *Id.* at A-1.

[220] *Id.* at A-2.

[221] *Id.* at A-1.

[222] *Id* at A-4. "The only exceptions to this requirement would be emergency situations that threaten human life or safety." *Id.*

[223] *Id.* at A-2, B-1.

NATO's early efforts to incorporate environmental concerns into NATO-led operations may have influenced European Union environmental legislation.[224] Building on the successful role of NATO/CCMS in raising environmental awareness within the military sector, most European Union nations have adopted environmental laws and regulations that apply to the military.[225] The "notion of environmental security enjoys a growing acceptance. In a number of North American and European countries 'environmental security' has become an integral part of the policies of military establishments."[226]

Beginning in the 1980s, the EU began to address the environmental impacts of public projects, including the impacts of military installations. And, at least two European Council Directives potentially effect civil suits for the cleanup of European military bases.[227]

Early EU environmental directives addressing waste management[228] and water pollution discharges[229] do not carve out specific exemptions for military activities. In 1985, the Council passed the "Council Directive on the Assessment of the Effects of Certain Public and Private Projects on the Environment."[230] It instituted similar NEPA-like environment impact assessment requirements, and "appl[ied] to the assessment of the environmental effects of those public and private projects which are likely to have significant effects on the environment."[231] While a step in the right direction toward broader EU environmental stewardship, it explicitly did not apply to "[p]rojects serving national defence purposes . . . ."[232] This directive was later amended in 2003, however, and the blanket national

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[224] There is considerable overlap between the twenty-eight NATO member countries and the twenty-seven members of the European Union ("EU"). *See Countries*, EUROPEAN UNION, http://europa.eu/about-eu/countries/index_en.htm (last visited Apr. 28, 2012).

[225] Timoshenko & Nagai, *supra* note 215, at 280.

[226] *Id.* at 279.

[227] An EU directive requires states to achieve a particular result without dictating the means of achieving that result. An EU regulation is self-executing and does not require any implementing measures. *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 288, Mar. 30, 2010, 2010 O.J. (L 83) 47.

[228] Directive 2008/98, of the European Parliament and of the Council of 19 November 2008 on Waste and Repealing Certain Directives, 2008 O.J. (L 312) 3-30, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2008:312:0003:0030:en:PDF.

[229] Directive 76/464, of May 1976 on Pollution Caused by Certain Dangerous Substances Discharged into the Aquatic Environment of the Community, 1976 O.J. (L 129) 23-29, *available at* http://ec.europa.eu/environment/water/water-dangersub/76_464.htm.

[230] Directive 85/337, of 27 June 1985 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, 1985 O.J. (L 175) 40-48, *available at* http://ec.europa.eu/environment/eia/full-legal-text/85337.htm.

[231] *Id.* art. 1(1).

[232] *Id.* art. 1(4).

defense exemption was stricken as the directive took on a more strategic nature. As amended, the directive's EIA requirement would now normally apply to military activities, but would still allow each EU member to withhold these requirements provided such application would have an adverse effect. It states:

> Member States may decide, on a case-by-case basis if so provided under national law, not to apply this Directive to projects serving national defence purposes, if they deem that such application would have an adverse effect on these purposes.[233]

The EU Strategic Environmental Assessment ("SEA"), issued in 2001, effectively broadens the reach of the 1985 EIA directive to look at broader plans and programs.[234] Yet, the scope of this directive is more limited; it does not apply to "plans and programmes the sole purpose of which is to serve national defence or civil emergency . . . ."[235]

In 1999, the European Parliament adopted a motion for resolution on the "Environment, Security, and Foreign Policy."[236] The Committee on Foreign Affairs, Security and Defence Policy's conclusion on the resolution contained several forward-looking assertions on the relationship between the environment and the defense industry. While not binding on EU member countries, it represents a trend in the EU of linking environmental stewardship with military activities. First, it called upon EU member states to create civil legislation to address environmental cleanup of military

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[233] Directive 2003/35, of the European Parliament and of the Council of 26 May 2003, 2003 O.J. (L 156) 19, art. 3(4), *available at* http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=EN&numdoc=32003L0035 (amending Council Directive 1985/337 on the Assessment of the Effects of Certain Public and Private Projects on the Environment).

[234] Directive 2001/42, of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment, 2001 O.J. (L 197) 30-37, *available at* http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0042:EN:HTML. In its "explanatory statement," the motion for the resolution stated,

> [n]ot only military weapons systems but, by and large, all military activities, including peace-time exercises, have some form of environmental impact. However, when environmental destruction has been discussed, the role of the military has not in general been touched upon, only the impact of civilian society on the environment has been criticised.

Report on the Environment, Security and Foreign Policy, at 20, (Jan. 14, 1999) [hereinafter *Foreign Affairs*], *available at* http://www.europarl.europa.eu/sides/getDoc.do? pubRef=-//EP//NONSGML+REPORT+A4-1999-0005+0+DOC+PDF+V0//EN.

[235] Directive 2001/42, of the European Parliament and of the Council of 27 June 2001 on the Assessment of the Effects of Certain Plans and Programmes on the Environment, *supra* note 234, art. 3(8), at 32.

[236] *Foreign Affairs*, *supra* note 234, at 1.

installations and to apply civil environmental legislation to all military activities.[237] Second, it called upon member states to assume responsibility for, and pay for, the investigation, cleanup, and decontamination of areas damaged by past military activity.[238] Third, it "call[ed] on the military to end all activities which contribute to damaging the environment and health and to undertake all steps necessary to clean up and decontaminate the polluted areas . . . ."[239] In doing so, the EU resolution called on member states to "formulate environmental and health objectives and action plans so as to enhance the measures taken by their armed forces to protect the environment and health . . . ."[240] The resolution urged member states to take measures to support this, in particular, by applying civil environmental legislation to all military activities.[241] It urged EU members to utilize military-related resources for environmental protection by introducing training for environmental troops and "drawing up plans for creating national and European protection teams."[242] Lastly, the explanatory notes to this resolution indicated the importance of establishing an environmental brigade to assist in environmental cleanup matters.[243]

Outside of NATO's efforts to bring its coalition environmental considerations to military operations, the United Nations Environmental Programme ("UNEP") began to address the impact of military activities on the environment in the mid-1990s.[244] While UNEP regulations are distinct

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[237] *Id.* at 30; *see also,* Al-Duaij, *supra* note 20, at 241.

[238] *Foreign Affairs*, *supra* note 234, at 8.

[239] *Id.*

[240] *Id.* at 30.

[241] *Id.* at 8. The full text reads:

> Calls on the Member States to apply civil environmental legislation to all military activities and for the military defence sector to assume responsibility for, and pay for the investigation, clean-up and decontamination of areas damaged by past military activity, so that such areas can be returned to civil use, this is especially important for the extensive chemical and conventional munition dumps along the coastlines of the EU . . . .

Id.

In the United Kingdom the armed forces are explicitly exempted from environmental regulations pursuant to U.K. domestic law, but the military complies with environmental regulations as a matter of policy. Westing, *supra* note 214, at 173.

[242] *Foreign Affairs*, *supra* note 234, at 8.

[243] *Id.* at 25.

[244] *The 1990s: implementing sustainable development*, UNITED NATIONS ENV'T PROGRAMME, http://www.unep.org/geo/geo3/english/057.htm (last visited Oct. 9, 2013). UNEP's mission is "to provide leadership and encourage partnership in caring for the environment by inspiring, informing, and enabling nations and peoples to improve their quality of life without compromising that of future generations." *About UNEP: The Organization*, UNITED NATIONS ENV'T PROGRAMME, http://www.unep.org/Documents.Multilingual/Default.asp?DocumentID=43&ArticleID=1554&l=en (last visited Oct. 9,

from any NATO-member obligations, UNEP's early efforts to address military activities on the environment (such as its UNEP Council paper, "Application of Environmental Norms to Military Establishments") provide insight into the evolution of environmental regulation as they apply to military activities.[245]

UNEP followed up with a series of meetings and conferences addressing military activities and the environment beginning with thirty-three governments and relevant organizations meeting in Linköping, Sweden in 1995.[246] Linköping highlighted that the "end of the Cold War seem[ed] to have had a significant impact on European countries and allowed their military sectors to give more attention to environmental protection."[247] Shortly after Linköping, Finland and Sweden began efforts to apply national laws to the military sector.[248]

From the multinational discussions at Linköping and subsequent UNEP meetings on military activities and the environment, themes emerged which helped determine the likelihood of government application of its domestic environmental regulations to the military.[249] Not surprisingly, the overall international security situation itself is a key factor in the practical application of domestic environmental regulations to the military.[250] Second, the UNEP meetings highlighted that the military sector is more likely to apply environmental norms when the government recognizes

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[245] UNEP Governing Council Decision 17/5, Application of Environmental Norms by Military Establishments, 17th Governing Council, 10th Meeting (May 21, 1993), *available at* http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=54&ArticleID=1127&l=en.

[246] U.N. Environment Programme, Linköping, Sweden, Oct. 5, 1995, *Meeting on Military Activities and the Environment*, at 23, U.N. Doc. UNEP/MIL/4 (Oct. 5, 1995) [hereinafter *Linköping*]. For example, within the United Kingdom, it is the

> policy of the Government to conduct defence activities in accordance with national environmental legislation, European Community directives and international agreements that have been ratified by the United Kingdom. The Ministry of Defence Environmental Manual, published in 1991, is the primary environmental reference document for advice on a range of environmental issues applicable to the United Kingdom Armed Forces. The Government is committed to the integration of environmental concerns into decision-making at all levels. All the government departments, including the Ministry of Defence, have a 'Green Minister,' who is charged with integrating environmental considerations into the strategy and policies of their own departments.

Id.

[247] Timoshenko & Nagai, *supra* note 215, at 281.

[248] *Foreign Affairs*, *supra* note 234, at 22.

[249] Timoshenko & Nagai, *supra* note 215, at 280-281.

[250] *Cf. id.*

environmental protection as one of its important social and economic issues.[251] Mutual recognition between the military sector and other government sectors "provides the military sector with . . . positive incentives and moral support to carry out its activities . . . ."[252]

It is beyond the scope of this paper to describe in detail every European country's environmental laws as applied to the military. The trend, as noted above, is an increasing environmental accountability of military activities. In some countries in Europe, even when the military is exempt from its domestic environmental laws, the laws are followed as a matter of policy. For example, in the U.K. the armed forces are explicitly exempted from environmental regulations pursuant to U.K. domestic law.[253] While U.K. environmental law does not legally apply to the U.K. Armed Forces, environmental laws are followed as a matter of national policy.[254]

B. China: Environmental Law and Practice

Outside of the U.S., NATO, and the EU, China's People's Liberation Army ("PLA") is the world's most populous military force, with approximately three million members, and has the world's largest active standing army with approximately 2.3 million members.[255] Its military budget is estimated to exceed $100 billion in 2012, an eleven percent increase from the previous year.[256] It appears, however, that while China's national law is theoretically applicable to the Chinese military, there does

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[251] *Id.*

[252] *Id.* at 281.

[253] Westing, *supra* note 214, at 173.

[254] Linköping, *supra* note 246, at 17. Within the U.K.,

> in the case of the treatment and disposal of hazardous wastes, specialized military disposal facilities would operate in accordance with standards laid down by environmental protection legislation, for example with regard to emissions to the atmosphere and water which are governed by provisions contained in the Environmental Protection Act 1990. The Armed Forces would comply with technical and other guidance issued by the Government on the proper disposal of the wastes. Where hazardous wastes could be handled at civilian disposal facilities, a hazardous wastes consignment note giving a detailed description of the waste would be provided and the relevant waste regulation authority would be given advance notice of the movement so that it could check that the waste was destined for a properly licensed disposal facility.

Id.

[255] *See* SIPRI, *supra* note 10; *see also* Cooper Smith & Gus Lubin, *12 Frightening Facts About China's Massive Growing Military*, BUSINESS INSIDER (Mar. 4, 2011, 9:56 AM), http://www.businessinsider.com/chinese-military-spending-2011-3?op=1.

[256] *See* SIPRI, *supra* note 10. *See also China Military Budget Tops $100bn*, BBC NEWS CHINA (Mar. 4, 2012, 3:37 PM), http://www.bbc.co.uk/news/world-asia-china-17249476.

not appear to be a long history of enforcement against the Chinese military for failing to comply with its domestic environmental laws.

In contrast to most Western militaries, the PLA is intensely political, and its unique position as the defender of the Communist party makes it unlikely that the PLA will ever be fully de-linked from politics.[257] Indeed, "PLA officers are also party members, and there is a separate party machine inside the military to make sure rank and file stay in line with party thinking."[258]

1. Chinese military organization

The starting point for a discussion of how environmental laws apply to the Chinese military must start with China's unique structure. The PLA consists of five military subgroups and is under the authority of the powerful Central Military Commission ("CMC").[259] Under China's Constitution, most recently amended in 1982, the CMC of the People's Republic of China directs the armed forces of the country.[260] Further, the CMC is composed of the Chairman, the Vice-Chairmen, and Members.[261] The Chairman of the CMC has overall responsibility for the commission and the term of office of the CMC is the same as that of the National People's Congress.[262] The Ministry of National Defense reports to the State Council, but does not exercise any independent control over the PLA.[263]

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[257] *See How China is Ruled: Armed Forces*, BBC NEWS (Oct. 8, 2012, 6:46 AM), http://www.bbc.co.uk/news/world-asia-pacific-13908159.

[258] *Id.* Much has been written about the growing Chinese economy and the recent uptick in military expenditures. *See, e.g.*, Perlez, *supra* note 15. Every four years, the U.S. military issues a "Quadrennial Defense Review" ("QDR"), a legislatively mandated review of DoD strategy and policies. 10 U.S.C. § 118(a) (2012). The U.S. military's most recent QDR, published in 2010, highlighted climate change as a national security issue, and also noted that "[China's] lack of transparency and the nature of China's military development and decision-making processes raise legitimate questions about its future conduct and intentions within Asia and beyond." DEP'T OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 60 (2010).

[259] *See Chinese People's Liberation Army*, CPC ENCYCLOPEDIA, http://www.cpcchina.org/2011-10/19/content_13994372.htm (last visited Sept. 7, 2013). This stands in sharp contrast to the U.S. where, for example, all DoD directives, SOFA, and policy documents are easily accessible online.

[260] XIANFA art. 93 (1982) (China).

[261] *Id.*

[262] *Id.*

[263] *See generally* JAMES C. MULVENON & ANDREW N. D. YANG, THE PEOPLE'S LIBERATION ARMY AS ORGANIZATION: REFERENCE VOLUME V1.0 (2002), *available at* http://www.rand.org/content/dam/rand/pubs/conf_proceedings/2008/CF182part1.pdf.

In theory, the National People's Congress ("NPC") exercises considerable control over the CMC, including electing the Chairman,[264] but the reality is different. While the 1982 Chinese Constitution gives the National People's Congress a prominent role, one commentator has noted that "it is little more than a rubber stamp for party decisions."[265] The CMC exercises de facto, authoritative policy-making and operational control over the military through the General Political Department of the PLA.[266] The head of the CMC is also the President of China, currently Xi Jinping.[267] It is common for the President of China to continue to serve as head of the CMC for several years after stepping down as President. For example, President Jiang Zemin served as the head of the CMC for two years following his Presidency.[268] Hu Jintao, however, simultaneously stepped down from his position as President and head of CMC when Xi Jinping became China's President.[269] This further cements the centralization of power within select Communist Party officials that appear to have minimal practical accountability outside the party apparatus.[270]

2. Chinese environmental law

Against this backdrop, environmental legislative development in China has proceeded slowly, with the Environmental Protection Law ("EPL") of the People's Republic of China first issued in 1979 and subsequently amended and implemented in 1989.[271] The EPL addresses natural resource protection through the "rational use of natural environment, prevention and elimination of environmental pollution and damage to ecosystems, in order

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[264] *How China is Ruled: National People's Congress*, BBC NEWS (Oct. 8, 2012, 4:59 AM), http://news.bbc.co.uk/2/shared/spl/hi/indepth/china_politics/government/html/7.stm.

[265] *Id.* The Chinese Constitution was issued in 1982 and subsequently amended four times in 1988, 1993, 1999, and 2004. *See Constitution to be Amended a Fourth Time*, CHINA THROUGH A LENS, http://www.china.org.cn/english/10th/89070.htm (last visited Oct. 9, 2013).

[266] *Central Military Commission*, GLOBALSECURITY.ORG, http://www.globalsecurity.org/military/world/china/cmc.htm (last visited Sept. 7, 2013).

[267] *See Xi Jinping – PRC president, CMC chairman*, GLOBAL TIMES (Mar. 14, 2013, 1:44 PM), http://www.globaltimes.cn/content/768100.shtml#.UlYD4lPOT2s.

[268] Sophia Fang & Jane Lin, *Through Retirement Hu Jintao Seeks Victory*, THE EPOCH TIMES (Nov. 20, 2012), http://www.theepochtimes.com/n2/china-news/through-retirement-hu-jintao-seeks-victory-317091.html.

[269] *Id.*

[270] Edward Wong, *In China A Man's Fall From Grace May Aid a Rise to Power*, N.Y. TIMES, Apr. 26, 2012, at A4.

[271] *See* 1 NICHOLAS ROBINSON ET AL., COMPARATIVE ENVTL. LAW & REGULATION § 15:6 (2011).

to create a clean and favourable living and working environment, protect the health of the people and promote economic development."[272]

The Chinese Constitution addresses the environment in Article 26: "[t]he State protects and improves the environment in which people live and the ecological environment. It prevents and controls pollution and other public hazards. The State organizes and encourages afforestation and the protection of forests."[273] In all, there are nine major environmental laws and regulations adopted by the NPC Standing Committee and ten laws dealing with the protection of specific resources.[274]

Many of the Chinese environmental laws have approximate U.S. counterparts. For example, the "Law of the People's Republic of China on the Prevention and Control of Environmental Pollution by Solid Waste"[275] roughly approximates RCRA and the "Law on Prevention and Control of Water Pollution"[276] roughly approximates the Clean Water Act within the U.S. These major Chinese environmental laws and regulations, with few exceptions, leave out any reference to the military or governmental agencies.

Article 1 of the EPL states that it is "formulated for the purpose of protecting and improving people's environment and the ecological environment, preventing and controlling pollution and other public hazards, safeguarding human health and facilitating the development of socialist modernization."[277] The EPL applies "to the territory of the People's Republic of China and other sea areas under the jurisdiction of the People's Republic of China."[278]

Article 6 contains a provision that could theoretically provide for citizen suit actions by Chinese citizens.[279] It states that it "protect[s] the

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[272] [Environmental Protection Law of the People's Republic of China] (promulgated by the standing Comm. Nat'l People's Cong., Sept. 13, 1979, effective Sept. 13, 1979), art. 2 (China).

[273] XIANFA art. 26 (2004) (China).

[274] *See* CHARLES R. MCELWEE, ENVIRONMENTAL LAW IN CHINA: MITIGATING RISK AND ENSURING COMPLIANCE 60-67 (2011) (listing the legislative history and purpose of these laws).

[275] [Law of the People's Republic of China on the Prevention and Control of Environmental Pollution by Solid Waste] (promulgated by Standing Comm. Nat'l People's Cong., Dec. 29, 2004, effective Apr. 1, 2005) (China).

[276] [Law of the People's Republic of China on the Prevention and Control of Water Pollution] (promulgated by Standing Comm. Nat'l People's Cong., May 11, 1984, effective Nov. 1, 1984) (China).

[277] [Environmental Protection Law of the People's Republic of China] (promulgated by the Standing Comm. Nat'l People's Cong., Dec. 26, 1989, effective Dec. 26, 1989), art. 2 (China), *available at* http://www.china.org.cn/english/environment/34356.htm.

[278] *Id.* art. 3.

[279] *Id.* art. 6.

environment and shall have the right to report on or file charges against units or individuals that cause pollution or damage to the environment."[280] It is unlikely that this will occur in practice, however, as China lacks an accompanying citizen suit statute or APA-stylized remedy.

Article 7 of the EPL effectively allows the armed forces and other administrations to self-regulate ("conduct supervision and management") via their internal environmental protection departments without clear outside and independent accountability.[281] It states:

> The state administrative department of marine affairs, the harbour superintendency administration, the fisheries administration and fishing harbour superintendency agencies, *the environmental protection department of the armed forces* and the administrative departments of public security, transportation, railways and civil aviation at various levels shall, in accordance with the provisions of relevant laws, conduct supervision and management of the prevention and control of environmental pollution.[282]

There are legal liability provisions within the EPL to include criminal prosecution,[283] yet, as discussed below, environmental enforcement has been lax and continues to undermine the overall environmental regime. Today, for the first time in twenty years, the EPL is being rewritten. Yet, it appears that the new EPL lacks provisions allowing for lawsuits to protect the environmental public health and safety and does not specifically address the military.[284]

Additionally, the Chinese Water Pollution Control Law states, in the event of a large number of interested parties harmed by water pollution, that interested parties may select a representative to participate in a joint

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280 *Id.*

281 *Id.* art. 7.

282 *Id.* (emphasis added). Article 7 also states:

> The competent department of environmental protection administration under the State Council shall conduct unified supervision and management of the environmental protection work throughout the country. The competent departments of environmental protection administration of the local people's governments at or above the county level shall conduct unified supervision and management of the environmental protection work within areas under their jurisdiction.

Id.

283 *See, e.g.*, *id.* art. 45 ("Any person conducting supervision and management of environmental protection who abuses his power, neglects his duty or engages in malpractices for personal gains shall be given administrative sanction by the unit to which he belongs or the competent higher authorities; if his act constitutes a crime, he shall be investigated for criminal responsibility according to law.").

284 *See* Yan Shuang, *Experts say proposed environmental protection laws fail to protect*, GLOBAL TIMES (Sept. 27, 2012, 12:45 AM), http://www.globaltimes.cn/content/735657.shtml.

action.[285] Yet, as discussed in greater detail below, it remains highly unlikely that independent citizen groups (referred to as Civil Society Organization, or "CSOs," in China) could successfully bring a lawsuit to enforce these provisions.

The "Law of the People's Republic of China on the Environmental Impact Assessment" was adopted in 2002, and places NEPA-like requirements to provide environmental impact assessments in the promotion of sustainable development.[286] Similar to the EPL, its jurisdiction includes the "territory of the People's Republic of China and all other sea areas under the jurisdiction of the People's Republic of China."[287] Military construction projects are specifically mentioned in Article 201: "[t]he measures of environmental impact assessment for military facility construction projects shall be formulated by the Central Military Commission in accordance with the principle of this Law."[288] This rather general provision reinforces the central role of the CMC in environmental management of the PLA without outside judicial or clear citizen accountability.

China has also adopted a Marine Pollution Law, which appears to apply broadly to activities that could feasibly encompass Chinese naval operations.[289] It specifically applies to the internal sea, territorial seas, contiguous zone, continental shelves, and other sea areas under the jurisdiction of the PRC.[290] It states, "All units and individuals engaged in navigation, exploration . . . and other operations in the sea areas under the jurisdiction of the PRC, or engaged in operations in the coastal areas that have impact on the marine environment shall comply with this law."[291] Yet

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[285] *See* [Law of the People's Republic of China on the Prevention and Control of Water Pollution] (promulgated by Standing Comm. Nat'l People's Cong., Feb. 28, 2008, effective Jun. 1, 2008), art. 88 (China).

[286] [Law of the People's Republic of China on the Environmental Impact Assessment] (promulgated by the Standing Comm. Nat'l People's Cong., Oct. 28, 2002, effective Sept. 1, 2002), art. 1 (2002)(China) [hereinafter China EIA]. "This Law is formulated in order to implement the strategy of sustainable development, prevent the adverse impact on environment brought about by the implementation of plans and construction projects, and promote the harmonized development of economy, society and environment." *Id.*

[287] *Id.* art. 3.

[288] *Id.* art. 37.

[289] The Chinese Navy is actually part of the People's Liberation Army ("PLA") and is referred to as the "People's Liberation Army Navy" ("PLAN"). *See A Modern Navy with Chinese Characteristics*, FED. OF AM. SCIENTISTS, 1 (Aug. 2009), http://www.fas.org/irplagency/oni/pla-navy.pdf; Marine Environmental Protection Law (promulgated by the Nat'l People's Cong., Aug. 23, 1982, effective Mar. 1, 1983), art. 2 (1983)(China).

[290] MCELWEE, *supra* note 274, at 61.

[291] *Id.* (quotation omitted).

because Chinese military environmental stewardship is effectively self-governed by its own "environmental protection department," current Chinese environmental laws lack the ability to provide for third-party oversight of its military activities.

3. Implementation and enforcement

The likelihood of citizen suits to enforce environmental regulations would not appear to be high if sought to be applied against the Chinese military.[292] No citizen suits under Chinese environmental law have even been attempted until fairly recently when a CSO named the "All-China Environmental Federation" sued a port container firm for violation of the "laws related to environmental impact assessment, and the prevention and control of air, water and noise pollution" for alleged environmental violations.[293] Not surprisingly, there have been no citizen suit actions against any Chinese military activities.

As discussed above, China has passed several environmental laws in the last thirty years, but they have been largely marked by ineffective implementation and enforcement.[294] In China the low status of law as a means of achieving societal goals, the lack of capacity within the country's bureaucracies and legal institutions, and China's delegation of responsibility for environmental protection to local or administrative authorities have all been identified as reasons for lack of environmental enforcement.[295] To further highlight this, the Yale/Columbia

[292] *Cf.* ROBINSON ET AL., *supra* note 271, § 15:35. There are no self-organized citizen environmental groups in China at the present time. Of note, the National Resources Defense Council, a frequent litigant with the Department of Defense does have an office in Beijing, China but does not file lawsuits to enforce Chinese laws. For more information, see *Accelerating the Greening of China*, NAT'L RES. DEF. COUNCIL, http://www.nrdc.org/international/china/ichina.asp (last visited Sept. 15, 2013).

[293] Li Jingrong, *Port Container Firm Sued for Environmental Violation*, CHINA.ORG.CN (July 9, 2009), http://www.china.org.cn/environment/news/2009-07/09/content_18100902.htm.

[294] MCELWEE, *supra* note 274, at 2-3. One commentator has asserted that this is emblematic of the low status within China of "positive law" as a tool to influence behavior and achieve broader societal goals. *Id.* at 4 n.6.

[295] *Id.* at 4-6. This problem is particularly acute when applied to the Chinese military where local officials may fear retributive action if they were to take bold steps to enforce environmental regulations against the military. Other factors include: developing the economy outranked protecting the national environment; horizontal fragmentation of environmental compliance responsibility weakens environmental enforcement efforts; public oversight of the implementation of environmental laws and regulations is constrained; strong influence of informal networks on the application and administration of laws and regulations; environmental policymaking and implementation is characterized by

Environmental Performance Index ranks countries on environmental and public health performance indicators and serves as a gauge for how countries are matching up to their stated environmental goals.[296] In the 2012 survey, China ranked 116 out of 120 tracked countries.[297] Further, China does not have a cooperative federalism model such as the one seen in the United States, for example, whereby states and local governments exercise considerable authority over their environmental enforcement and administration to include military activities within their respective state.

At first blush, it appears that the Chinese military has a broad environmental legal regime within its regulations that *could* apply to military activities.[298] The "People's Liberation Army Environmental Protection Ordinance of China," issued by the CMC, states in its purpose statement:

> In order to regulate the environmental protection work of the armed forces, protect and improve the army management and use of the living environment of the region, the ecological environment, safeguarding human health, according to the relevant provisions of the Environmental Protection Law of the People's Republic of China and other environmental protection laws, the enactment of this Ordinance.[299]

Yet, it is unclear how the military practically applies the EPL and other Chinese national environmental law to the armed forces.

Since 1979, China's National People's Congress and Standing Committee have passed twenty-nine pieces of environmental legislation, nearly ten percent of the total legislation passed in China.[300] Yet despite

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bureaucratic fragmentation; and structural flaws in existing laws and regulations. *Id.* at 6-9.

[296] ENVTL. PERFORMANCE INDEX, http://epi.yale.edu/ (last visited Sept. 10, 2013).

[297] *See EPI Rankings*, ENVTL. PERFORMANCE INDEX, http://epi.yale.edu/epi2012/rankings (last visited Sept. 10, 2013). Unlike nations with Anglo-American legal systems, there is limited case law in China. *See* Wang Xi, *Environmental Law of China*, *in* INTERNATIONAL ENCYCLOPEDIA OF LAWS 52 (Kurt Deketelaere et al. eds., Kluwer Int'l 2012). There has been a recent advance in this area, however, with Stanford University translating, publishing, and posting key Chinese Supreme Court cases. *See* Stephen Tung, *As Chinese Courts Announce 'Guiding Cases,' Stanford Law School Helps to Spread the Word*, STANFORD REPORT (Feb. 6, 2012), http://news.stanford.edu/news/2012/february/china-guiding-cases-020612.html. For more information on the "Chinese Guiding Case" initiative, *see China Guiding Cases Project*, STANFORD LAW SCHOOL, https://cgc.law.stanford.edu/ (last visited Sept. 10, 2013).

[298] For a good overview of China's environmental laws, see generally MCELWEE, *supra* note 274, at 51-70.

[299] "People's Liberation Army Environmental Protection Ordinance of China" (unofficial translation) (on file with author) [hereinafter PLA Ordinance].

[300] Wang Jin, *China's Green Laws are Useless*, CHINA DIALOGUE (Sept. 23, 2010), http://www.chinadialoguenet/article/show/single/en/3831.

these legislative gains, there appears to be enormous gaps in environmental law in China and its day-to-day enforcement.[301] Criminal enforcement is especially difficult because "as long as no major pollution of the environment, no major loss of property and no major injuries result, then there is no crime."[302] Penalties and enforcement practices are not a sufficient deterrent in itself.[303] This can be attributed, in part to an overall lax enforcement of China environmental laws.[304] Further, in enforcing environmental regulations, the Chinese judiciary has shown a reluctance to take on "sensitive or special cases, meaning they can refuse to let someone bring an action and leave them with no other options to pursue."[305]

These generic problems of environmental enforcement are compounded when applied to the Chinese military, which essentially has the status of an independent entity that is accountable only to the CMC.[306] The PLA is not expressly subject to the environmental regulations adopted and amended by the NPC Standing Committee and the PLA operates, essentially, as an independent entity that is outside the jurisdiction of Chinese environmental regulations.[307]

China *has* made attempts to adopt a more sustainable model of environmental regulation,[308] however, and there have been *some* efforts underway within the CMC to address environmental stewardship in the PLA as a result.[309] For example, the PLA has its own internal

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[301] *Id.* (asserting that "in order to enforce some particular responsibility, more often than not you find there is no applicable regulation").

[302] *Id.*

[303] "Penalties for noncompliance with some of China's environmental laws are so low that it is often cheaper not to comply and pay fines than to undertake the actions necessary to meet the statutory mandates." Charles R. McElwee II, *Who's Cleaning Up This Mess?*, 35 CHINA BUS. REV. 20 (2008).

[304] One commentator noted, "If one factor had to be identified as the cause of China's environmental crisis, it would be lax enforcement of the existing environmental laws—the practical manifestation of the 'clean up later' policy." *Id.*

[305] Jin, *supra* note 300.

[306] *See Chinese People's Liberation Army*, *supra* note 259 ("[T]he CMC exercises operational command over the whole PLA and leadership for the development of the PLA.").

[307] *See, e.g.*, [Regulations of the People's Republic of China on the Prevention and Control of Vessel-Induced Marine Environment Pollution], (promulgated by the Prime Minister on Sept. 9, 2009, effective Mar. 1, 2010) (China) (exempting the Chinese military from a majority of its regulations).

[308] McElwee, *supra* note 303 (". . . China has shifted its environmental regulatory model from 'command and control' . . . to 'sustainability' . . . .").

[309] *See* MINISTRY OF NATIONAL DEFENSE, *Reform and Development of the PLA*, (2009), *available at* http://www.china.org.cn/government/whitepaper/2009-01/21/content_17162870.htm ("The PLA has launched an in-depth movement to conserve energy and

environmental regulations, such as the "People's Liberation Army Environmental Protection Ordinance."[310] Its purpose is to "regulate the environmental protection work of the armed forces, protect and improve the army management and use of the living environment of the region, the ecological environment."[311] It contains numerous noble environmental goals (e.g. "[e]nvironmental protection work of the armed forces should be integrated into the army building and development plans").[312] But similar to the nine core environmental laws, it is unclear what legal effect these military guidelines have—they appear to be more guiding policy documents without judicially enforceable standards.[313] And one report has noted a total of 835 Chinese "National Resources and Environmental Management" ("NREM") policies, but only ten that apply to Chinese military installations without any history of outside judicial enforcement.[314] Lastly, China lacks any fallback provision akin to the APA within U.S. law that allows citizens to bring legal challenges to "agency action" by China or Chinese officials.[315] Absent such administrative protections, it is unlikely that the Chinese military will be fully accountable to any outside group or citizen group for violating its environmental laws.

C. India

As a nation of more than one billion people with one of the world's fastest growing economies, India faces significant environmental challenges.[316] Following independence from England, India adopted a parliamentary form of government in 1950 with a constitution that guarantees fundamental rights to citizens that are enforceable against the

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resources by encouraging conservation-minded supply and consumption. It protects the ecological environment of military areas by initiating a grassland conservation project, a pilot project for preventing and alleviating sand storms affecting coastal military facilities, and efforts to harness pollution by military units stationed in the area known as the Bohai Sea rim.").

[310] PLA Ordinance, *supra* note 299.

[311] *Id.*

[312] *Id.*

[313] *Id.*

[314] ASIAN DEVELOPMENT BANK, COUNTRY ENVIRONMENTAL ANALYSIS FOR THE PEOPLE'S REPUBLIC OF CHINA, 53 (2007), *available at* http://www.adb.org/sites/default/files/pub/2007/39079-PRC-DPTA.pdf.

[315] Administrative Procedure Law of the People's Republic of China (promulgated by the President of the People's Republic of China, Apr. 4, 1989, effective Oct. 1, 1990) (unofficial translation) (on file with author). *See also*, Peter Heinlein, *People's Republic of China*, GLOBAL ENVTL. LAW BLOG, http://globalenvironmentallaw.com (last visited Sept. 10, 2013).

[316] Mohammad Naseem, *Environmental Law in India*, *in* INTERNATIONAL ENCYCLOPEDIA OF LAWS 37 (Kluwer Int'l, 2011).

State.[317] India is the world's largest democracy in the world and its military is also one of the largest in the world.[318] The Indian military is directly under the control of the Minister of Defense, a civilian position, and the country's president is the Supreme Commander of its armed forces.[319]

While both China and India are emerging economies with large militaries, India has taken a much different approach in applying its environmental regulations to the military, and, more generally, to holding the military accountable for protecting the environment. An analysis of the constitution and applicable laws in India demonstrates that Indian military activities are largely subject to domestic environmental laws and regulations.[320] A principal feature of India's constitution is several "fundamental rights" that are judicially enforceable and guaranteed to all citizens.[321] Accordingly, these fundamental rights serve as an important starting point when deciphering how India's environmental laws practically apply to Indian military activities.

For example, article 13 of the Indian Constitution states that all laws inconsistent with the fundamental rights embedded within the Constitution "shall, to the extent of such inconsistency, be void."[322] Article 21 of the Indian Constitution states, "[n]o person shall be deprived of his life or personal liberty except according to procedure established by law."[323] The Indian Supreme Court has interpreted this right to life and personal liberty to include the right to a clean environment.[324] All sectors of Indian society, to include the military, are accountable to upholding these fundamental rights. Under article 33 of the Indian Constitution, "Parliament may, by law, determine to what extent any of the rights conferred by this Part shall . . . appl[y] to . . . the members of the Armed Forces . . . ."[325]

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[317] *Id.* at 39; *see also* INDIA CONST. arts. 32-35.

[318] *See India Profile*, BBC NEWS ASIA (Sept. 13, 2013, 6:08 AM), http://www.bbc.co.uk/news/world-south-asia-12557384.

[319] *Indian Defence*, FACTS-ABOUT-INDIA.COM, http://www.facts-about-india.com/Indian-defence.php (last visited Sept. 10, 2013).

[320] *Cf.* INDIA CONST. art. 48A.

[321] *See id.* arts. 12-35.

[322] *Id.* art. 13(1).

[323] *Id.* art. 21; *see also* Neal A. Kemkar, *Environmental Peacemaking: Ending Conflict Between India and Pakistan on the Siachen Glacier Through the Creation of A Transboundary Peace Park*, 25 STAN. ENVTL. L.J. 67, 86-88 (2006).

[324] *See* Kemkar, *supra* note 323, at 86. (quoting the decision in Rural Litigation & Entitlement Kendra v. State of Uttar Pradesh, A.I.R. 1985 S.C. 652, 656 (India)).

[325] INDIA CONST. art. 33(a). The fundamental rights are addressed in articles 12-35. *See supra* text accompanying note 321. This article does not apply solely to the armed forces and reads in full:

> Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.—Parliament may, by law, determine to what extent any of the rights

India's constitution was updated in 1976 with new provisions addressing environmental protection.[326] The 1976 Indian Constitution makes it a fundamental duty of every citizen "to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures . . . ."[327] The 1976 constitutional amendment included a part titled "Directive-Principles of State Policy," whereby the "State shall endeavour to protect and improve the environment and to safe guard the forests and wild life of the country."[328] This broadly applicable provision contains no express constitutional exemption for the Indian military, and no express provision for a suspension of fundamental rights in times of national emergency.[329]

The 1984 Bhopal Gas tragedy was a watershed moment in making environmental policy more stringent in India.[330] It had the practical effect of empowering the Department of the Environment into a Ministry of Environment and Forest with far greater powers.[331] Soon thereafter, the Environmental Protection Act of 1986 was passed providing comprehensive and stronger umbrella environmental legislation.[332] In effect, it empowered the Central Government to take all necessary measures to protect the environment.[333]

In India, environmental regulations and laws do not generally distinguish the civil from the public sector.[334] In general, Indian national

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> conferred by this Part shall, in their application to,— (a) the members of the Armed Forces; or (b) the members of the Forces charged with the maintenance of public order; or (c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or (d) person employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

Id.

326 *See* Barry E. Hill et al., *Human Rights and the Environment: A Synopsis and Some Predictions*, 16 GEO. INT'L ENVTL. L. REV. 359, 368 (2004) ("[T]he Constitution of India was amended in 1976 to expressly address environmental quality . . . .").

327 INDIA CONST. art 51A(g)); *see also* Naseem, *supra* note 316, at 46.

328 INDIA CONST. art. 48A.

329 For emergency provisions of the Constitution, see *id.* art. 352. Under article 33, "Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to . . . the members of the Armed Forces be restricted or abrogated . . . ." *Id.* art. 33(a).

330 Naseem, *supra* note 316, at 51.

331 *Id.* at 52.

332 *Id.*

333 *Id.*

334 *Id.* at 6. "It is also pertinent to mention that in India the provisions and norms under the environmental legislation are equally applicable to all industries and operations. There is

environmental laws, regulation and policy applied to government sectors, including the military sector.[335] "Environmental consideration[s] w[ere] being integrated into all levels of decision-making. Environmental impact assessment was required for certain categories of development projects that may include those for military establishments."[336] For example, a hazardous waste regulation addressing the control of generation and disposal of wastes was enacted in 1989 and specifically applied to the military sector's handling of hazardous wastes.[337]

Not only do environmental regulations fully apply to its military during peacetime, the Indian military has specific military units, so-called "Eco-Task Forces" that enforce domestic environmental regulations.[338] Through these Eco-Task Forces, Indian defense personnel are playing a constructive role in the restoration of degraded land ecosystems throughout India.[339] The use of an active military unit that seeks to halt ecological degradations appears to be unique to India and has been described as a "great success" in helping the environment.[340]

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no distinction in the provisions of these Acts for military activities." *Id.*

[335] *Id.* UNEP brought representatives of nine South Asian countries, including India, to Bangkok, Thailand. The meeting report from Bangkok provides insight into the Indian military's approach to the environmental regulations. At the Bangkok conference, the representative of India reported that there had been regulatory mechanisms for the protection of the environment, such as legislation for the control of water and air pollution. The overall environmental control measures were set out in India's Environmental Protection Act. Within India, "no specific institutional arrangements had been made between the environmental sector and the military sector concerning environmental matters. However, the military sector had its own institutional arrangement for the protection of the environment." Further, the Indian military gives "due consideration to the protection of the environment" with Indian representatives noting, "[the military's] standard of their environmental ethics [is] considered higher than that of the general public." *See* Sub-regional Meeting on Military Activities and the Environment, Bangkok, Thai., October 29-31, 1995, Report of the Meeting, at 6-7, U.N. Doc. UNEP/MIL/SA/1 (Nov. 15, 1996) [hereinafter Bangkok Report].

[336] Bangkok Report, *supra* note 335, at 6.

[337] *Id.* at 7.

[338] *Cf.* Ashish Bose, *Stalling the March of Thar Desert,* ECON. & POL. WKLY., Apr. 2003, at 1630-31, *available at* http://www.jstor.org/stable/4413482. As of this writing, there appears to be six "ecological battalions" as part of the Indian Territorial Army ("TA"). *See* Vijay Mohan, *Battling for Green Cover,* THE TRIBUNE (Oct. 8, 2005), www.tribuneindia.com/2005/20051008/saturday/main1.htm.

[339] Bangkok Report, *supra* note 335, at 6-7.

[340] Bose, *supra* note 338, at 1632.

D. Russian Federation

The Armed Forces of the Russian Federation was established after the dissolution of the Soviet Union and has a budget of approximately $64 billion.[341] The Russian President also holds the title of Supreme Commander-in-Chief of the Armed Forces.[342] Environmental law is a distinct branch within Russian law.[343] An analysis of the constitution and applicable laws in Russia shows that peacetime Russian military activities are normally subject to domestic environmental regulation.[344] Still, the current practical level of enforcement through the use of citizen suits or other means remains unclear. There has been an increasing trend towards decentralization in environmental enforcement in Russia, but military units, and facilities situated on land in federal ownership continue to remain under Russian federal jurisdiction.[345] And the Russian administration under President Boris Yeltsin classified all information related to nuclear facilities as state secrets.[346]

There has been rapid growth in the environmental legal framework in Russia—there were just six environmental laws and codes in the early 1990s and now there are at least thirty.[347] Today's environmental laws in Russia rely upon the basic framework that existed in the Soviet Union, premised on exclusive state ownership of natural resources.[348] This creates some uncertainty in the actual implementation of regulations within the

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[341] SIPRI, *supra* note 10.

[342] KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF][CONSTITUTION] art. 87(1) (Russ.).

[343] "Environmental . . . law can be defined as an independent branch of Russian law consisting of legislative acts and administrative (executive) bylaws . . . ." Oleg Kolbasov & Irina Krasnova, *Environmental Law. Russian Federation*, *in* INTERNATIONAL ENCYCLOPEDIA OF LAWS 23 (Kluwer Int'l 2003). The Russian Regional Environmental Centre has an outstanding website with detailed guidance on Russian environmental laws. RUSSIAN REGIONAL ENVIRONMENTAL CENTRE, http://rusrec.ru/en/node/1670 (last visited Sept. 30, 2013).

[344] *Cf.* Al-Duaij, *supra* note 20, at 229, 234 (noting that the Russian military is required to get permits for its air emissions and environmental impacts).

[345] ORG. FOR ECON. CO-OPERATION AND DEV. ("OECD"), ENVIRONMENTAL POLICY AND REGULATION IN RUSSIA: AN IMPLEMENTATION CHALLENGE 34 (2006) [hereinafter OECD], *available at* http://www.oecd.org/env/outreach/38118149.pdf.

[346] *The Environmental Outlook in Russia*, FED'N OF AM. SCIENTISTS (Jan. 1999), http://www.fas.org/irp/nic/environmental_outlook_russia.html [hereinafter *Envtl. Outlook*]. There have been reports of an ex-Russian naval officer being imprisoned for treason for reporting on environmental problems on Russian military installations. *Id.*

[347] OECD, *supra* note 345, at 24.

[348] ROBINSON ET AL., *supra* note 271, § 45:7.

current Russian Federation, as "three different levels of government authority each have essentially the same basic responsibilities . . . ."[349]

Russian Presidential decrees have increasingly addressed environmental security provisions impacting Russian military operations.[350] And a recent Russian military doctrine formulates the strategic objectives of improving the control over the turnover of hazardous substances and the destruction of chemical weapons.[351]

The Russian Federation Constitution, adopted in December 1993, has the highest legal force and is directly applicable to the entire Russian Federation to include the Russian Armed Forces.[352] The Russian Constitution provides many rights to its citizens. For example, specific articles of the Russian Federation Constitution are applicable when discerning the application of environmental laws to the military. There is a general environmental protection provision within the Russian Constitution—it provides that "[e]veryone shall have the right to [a] favourable environment, reliable information about its state and for a restitution of damage inflicted on his health and property by ecological transgressions."[353]

There is a separation of competence between federal and state authorities among many Russian Constitutional articles. Pursuant to Article 71 of the Russian Constitution, the federal government has sole "competence" (i.e. jurisdiction) regarding "defense and security; military production; determination of rules of selling and purchasing weapons, ammunition, military equipment and other military property . . . ."[354] Both the Russian Federation government and its member-units (federal regions) can enact legislation regarding "nature utilization, protection of the environment and ensuring ecological safety[,]" as this falls within a "joint jurisdiction" covered in Article 72(e) of the Russian Federation Constitution.[355]

In 2002, Russia adopted the overarching Federal Law on Environmental Protection that provides sixteen chapters and eighty-four articles "regulating environmental relations, [by] concentrat[ing] on the right of individuals to a healthy environment . . . ."[356] Under this law, "[t]he Russian military [is] obliged to obtain permits for emission and other environmental impacts, just like other governmental organizations. Their

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[349] *Id.* § 45:1.

[350] OECD, *supra* note 345, at 31.

[351] *Id.*

[352] *Id.* at 24-26.

[353] KONSTITUTSIIA ROSSIISKOI FEDERATSII [KONST. RF][CONSTITUTION] art. 42 (Russ.).

[354] *Id.* art. 71(l).

[355] *Id.* art. 72(e).

[356] Kolbasov & Krasnova, *supra* note 343, at 40.

planned activities are subject to review by a commission of ecological experts, under the law On Ecological Expertise of 1995 . . . ."[357] In general, "[p]rovision is made that military objects *are not exempted* from compliance with environmental requirements, except for emergencies."[358]

The Russian Law on Environmental Protection creates specific environmental requirements for "military and defense facilities and operations" within the Russian Federation.[359] During the actual deployment of troops and equipment, the requirements still apply except in "special situations" where the military is allowed "to violate environmental protection laws . . . [but] must compensate for any damage it causes to health or environment."[360]

The Russian counterpart to the U.S. Clean Air Act, the Law On Air Protection, "was adopted in 1999, [and] provides for establishing standards for air quality and emissions limitation."[361] The statute does not exempt the military from its jurisdiction as it applies to "any administrative agency."[362] Under certain provisions the President of the country can suspend some laws, including environmental laws.[363]

Despite the constitutional guarantees and provisions, enforcement of environmental laws in Russia appears to be "uneven and unpredictable."[364] The practical application of Russian environmental laws continues to remain uncertain, as there "is not yet a clear division of authority between the federal government in Moscow and each of the 88 regional governments that comprise the Russian Federation."[365] Further, there has been inadequate attention paid to environmental activities by the Russian judiciary.[366]

Despite the decreased size of the current Russian military budget, there are enormous cleanup challenges from ex-Soviet military bases from the Cold War,[367] making the applicability of domestic Russian environmental laws and regulations particularly important. The Soviet Union during the Cold War did not leave a rich legacy of applying environmental laws to the military. Not unlike today's environmental laws as applied to the Chinese

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[357] Al-Duaij, *supra* note 20, at 229.

[358] Kolbasov & Krasnova, *supra* note 343, at 55 (emphasis added).

[359] ROBINSON ET AL., *supra* note 271, § 45:23.

[360] *Id.* at n.12.

[361] Al-Duaij, *supra* note 20, at 234.

[362] *Id.*

[363] *Id.*

[364] ROBINSON ET AL., *supra* note 271, § 45:1.

[365] *Id.*

[366] *See* OECD, *supra* note 345, at 46-47, 55.

[367] *See generally* CLEAN-UP OF FORMER SOVIET MILITARY INSTALLATIONS (R.C. Herndon et al. eds., 1995).

military, many important military enterprises were *de facto* exempted from complying with Soviet law and this time period was marked by overall lax enforcement.[368]

For example, pollution from Russian military plutonium sites has caused extensive damage to Russian water resources.[369] And in the late 1990s Russian naval officers came forward to the press to report environmental problems at military installations.[370] Commentators analyzing Russian environmental laws have also noted a culture of secrecy within the Russian military, making it difficult for environmentalists and outside groups to gain access to environmental information at military installations.[371] For example, Russian government statistics do not include emissions from some military enterprises.[372] Unfortunately, there are no Freedom of Information Act ("FOIA")[373]-type provisions within the Russian system and there has been a trend towards increased secrecy and classification after Russian whistleblowers came forward in the 1990s to highlight pollution at Russian military installations.[374]

IV. THEMES AND BROADER POLICY IMPLICATIONS FOR THE U.S. AND THE WORLD

As demonstrated above, different nations take a wide range of approaches to the application of domestic environmental laws to their respective militaries. Important lessons can be learned from these approaches and applied as nations look to balance national security with environmental stewardship in the twenty-first century. The American experience is particularly instructive, given the far-flung nature of its military and its relatively longer experience attempting to harmonize national security with environmental concerns. These lessons may be applied to other nations, particularly in developing countries still struggling

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[368] Deborah K. Espinosa, *Environmental Regulation of Russia's Offshore Oil & Gas Industry and Its Implications for the International Petroleum Market*, 6 PAC. RIM. L. POL'Y. J. 647, 656 (1997), *available at* http://digital.law.washington.edu/dspace-law /bitstream/handle/1773.1/900/6PacRimLPolyJ647.pdf?sequence=1.

[369] *Envtl. Outlook, supra* note 346.

[370] *Cf. id.* (discussing naval officers that were charged with treason for discussing environmental problems of the Pacific Fleet).

[371] Laura A. Henry & Vladimir Douhovnikoff, *Environmental Issues in Russia: Annual Review of Environment and Resources*, 33 ANN. REV. ENVIRON. RESOURCES 437, 450-452 (2008), *available at* http://www.bowdoin.info/faculty/v/vdouhovn/pdf/douhovnikoff-environmental-issues-in-russia.pdf.

[372] *Id.* at 447.

[373] *See infra* notes 403-411 and accompanying text.

[374] Henry & Douhovnikoff, *supra* note 371, at 447.

with sound governance and still in the nascent stages of attempting to balance national security and environmental stewardship.

A. U.S. Judicial Enforcement: Citizens Suits and Action Brought Pursuant to the APA Ensure Accountability

One of the strengths of the American environmental approach to holding the military accountable for its environmental record is judicial enforcement of environmental laws. This approach to environmental stewardship stems from the citizen suit provisions embedded throughout the environmental law statutory scheme and the universal applicability of the APA to *all* federal agencies, including the DoD.[375] As discussed in Part II, there are exceptions that the military can seek from environmental laws and regulations, but they are limited in time and scope.[376] Despite the initial granting and seeking of exemptions following September 11th, environmental laws have emerged intact and durable. This author has not been able to find any formal request from the Obama administration for environmental exemptions pursuant to a national security privilege.[377]

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[375] *See* 5 U.S.C. § 706 (2012).

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
>
> (1) compel agency action unlawfully withheld or unreasonably delayed; and
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be--
>
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
>
> (B) contrary to constitutional right, power, privilege, or immunity;
>
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
>
> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
>
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

Id.

[376] *See supra* Part II.B; *see also* Dycus, *supra* note 64, at 49 (noting that there has never been a CERCLA exemption for the military granted and there have been two exemptions under RCRA).

[377] The author could not find any evidence of a formal request for exemptions from environmental laws from the Obama administration during the course of his research for this

Today, the prevalent default position is that U.S. environmental laws will continue to apply to military actions absent a granting of these exemptions.

Commentators extolling the APA's virtues note that administrative law is "renowned as one of the great inventions of the American experience . . . mak[ing] governmental activity more open, accountable, and responsive to the public than in any other country."[378] The APA has been referred to as "the most important piece of legislation governing federal regulatory agency policy making . . . ."[379] Further, the APA provides for jurisdictional grounds for a suit provided that the plaintiff has exhausted his administrative remedies before resorting to litigation.[380] It thereby serves as an important justiciability "gap-filler" in the absence of a statute-specific citizen suit provision. Within environmental law, the APA often provides a jurisdictional basis for suits against the federal government under most environmental and natural resource statutes.[381] The APA "entitles *any person* suffering legal wrong because of agency action to judicial review . . . ."[382] Citizen suit provisions within the CWA,[383] CAA,[384] RCRA,[385] and CERCLA[386] generally allow for any person to initiate a civil action against any other person (including the United States).

In addition, many of the DoD's senior leaders, including uniformed flag and general officers, are not entitled to absolute civil immunity from a

article. Further, a recent LEXIS-NEXIS search of federal case law since 2008 conducted on October 27, 2013 using various search terms to include: "environmental law," "national security," and "exemption," did not indicate any federal cases referencing existing Presidential exemptions for environmental laws.

378 JAMES RASBAND ET AL., NATURAL RESOURCES LAW AND POLICY 220 (2d ed. 2009).

379 Kathryn E. Kovacs, *A History of the Military Authority Exception in the Administrative Procedure Act*, 62 ADMIN. L. REV. 673, 674 (2010) (citation omitted). At the time of the APA entering into law, the American Bar Association ("ABA") predicted that the APA might "become the most important event in improving the administration of justice since the Judiciary Act of 1789." *Id.*

380 5 U.S.C § 702 (2012). For example, the CWA contains a specific citizen suit provision, CWA § 505, 33 U.S.C. § 1365 (2012), while NEPA lacks any suit provision but compliance may be sought by private citizens pursuant to the "arbitrary and capricious" standard of the APA. *See, e.g.*, Nevada v. Dep't of Energy, 457 F.3d 78, 88 (2006) ("Again, we apply the APA's arbitrary and capricious standard to a NEPA challenge.").

381 Kovacs, *supra* note 379, at 675.

382 RASBAND ET AL., *supra* note 378, at 387 (emphasis added). The APA further defines "person" as an "individual, partnership, corporation, association, or public or private organization other than an agency." 5 U.S.C. § 551(2) (2012).

383 CWA § 505, 33 U.S.C. § 1365 (2012).

384 CAA § 304, 42 U.S.C. § 7604 (2012).

385 RCRA § 6972, 42 U.S.C. § 6972 (2012).

386 CERCLA § 310, 42 U.S.C. § 9659 (2012).

lawsuit.[387] This was reinforced in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics* where the Supreme Court ruled that it will infer a private right of action against federal government officials for monetary damages where there exists no other federal remedy in order to provide an avenue to vindicate constitutionally protected interests.[388]

The definition of "agencies" within the meaning of the APA includes the DoD;[389] the U.S. military is not, by itself, a special agency category in American environmental law with its own distinct subset of laws and regulations. The DoD as an executive departmental agency is, essentially, treated the same as all other federal agencies.[390] Hence, the DoD is subject to day-to-day challenges from persons outside the defense establishment pursuant to the APA's "arbitrary and capricious" standard.[391] All federal agencies are, essentially, co-equals and subject to judicial review.

During time of war, DoD agency actions *could* be subject to a general military authority exception.[392] Yet, it appears that no one has ever successfully litigated the military authority exception since the APA's passage in 1945.[393] Indeed, "'agency' means each authority of the Government of the United States, whether or not it is within or subject to

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[387] *See* Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics, 403 U.S. 388, 389 (1971). A "Bivens action" is a claim against federal officials in their individual capacity where there has been an alleged constitutional violation. *See* United States v. Stanley, 483 U.S. 669, 678 (1982). Courts have held that military officials, to include active-duty military officers, are subject to Bivens actions. *See, e.g.*, *id.* at 675 (stating that Bivens actions may be brought against military officials, but not by military members for "wrongs which involve direct orders in the performance of military duty").

[388] *Bivens*, 403 U.S. at 389.

[389] *Cf.* Jonathan Masur, *A Hard Look or a Blind Eye: Administrative Law and Military Deference*, 56 HASTINGS L.J. 441, 512-13 (2005) ("[T]he only cognizable exceptions that might exempt a military agency such as the D[o]D from APA strictures are the narrow ones written into the statute itself. . . .").

[390] This treatment of "agency" is mirrored in NEPA. Judge Skelly Wright, writing for the court in *Calvert Cliffs' Coordinating Comm., Inc. v. U.S. Atomic Energy Comm'n* noted, "NEPA, first of all, makes environmental protection a part of the mandate of every federal agency and department. . . . It [the agency] is not only permitted, but compelled, to take environmental values into account." 449 F.2d 1109, 1112 (D.C. Cir. 1971).

[391] 5 U.S.C. § 706(1)(A) (2012). The APA Rule-Making section provides for a notice and comment period prior to agency rule making. It does exempt "military or foreign affairs function of the United States . . . ." *Id.* § 553(a)(1).

[392] Masur, *supra* note 389, at 513 ("[T]he only cognizable exceptions that might exempt a military agency such as the DOD from APA strictures are the narrow ones written into the statute itself: the APA 'does not include . . . (F) courts martial and military commissions; (G) military authority exercised in the field in time of war or in occupied territory.'").

[393] *Id.*

review by another agency, but does not include . . . military authority exercised in the field in time of war or in occupied territory . . . ."[394]

Holding the DoD equally accountable with other expert agencies ultimately upholds the rule of law and reinforces civilian and outside control of the military. In effect, judicial oversight dissuades agencies from taking "inconsistent positions, arriv[ing] at unsupported policy choices, or to otherwise operate in frustration of the purposes and ideals embodied in the agency's empowering statutes."[395] The U.S. military is entitled to no greater deference than any other expert administrative agencies:

> Government organizations of all types must abide by the legal rules that have been established to govern their behavior, and . . . meaningful judicial review exists to hold governmental actors to those terms, is fundamental both to the American constitutional structure and, at a more elemental level, to liberal legality itself.[396]

This is the "rule of law" principle that underlies much of administrative law.[397] Indeed, courts have not explicitly provided for a larger military authority exception, and the *Winter* opinion, as discussed *supra*, did not rely upon a generic and implicit military authority exception when ruling for the Secretary of the Navy.[398]

In addition, the U.S. military is accountable for environmental stewardship through the transparency-forcing function of the Freedom of Information Act ("FOIA").[399] FOIA contains provisions that apply to each military department, requiring the military to make information available to the public regarding agency rules, opinions, orders, records, and proceedings.[400] While there are nine exemptions to FOIA requirements,[401] the general rule is that military records including those related to environmental stewardship will be reviewable by the public.[402] During the

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[394] 5 U.S.C. § 551(1)(G) (2012); *see also* 5 U.S.C. § 701(b)(1)(G) (2012). While the APA provides a military authority exception in the field in time of war, this exception has not been widely utilized since the APA's inception nearly seventy years ago. This provision could, theoretically, be broadly applied under an expansive definition of "in the field in time of war." *See generally* Kovacs, *supra* note 379.

[395] Masur, *supra* note 389, at 485.

[396] *Id.* at 491.

[397] *Id.* at 492.

[398] Winter v. Natural Res. Def. Council, 555 U.S. 7, 7 (2008).

[399] 5 U.S.C. § 552(f) (2012) (stating that for the term "agency" includes military departments).

[400] *Id.* § 552.

[401] *Id.* § 552(b).

[402] *Cf. id.* § 552(a) (mandating that each federal agency make extensive documentation available to the public). Agencies may, however, withhold certain information classified information pursuant to executive order. *Id.* § 552(b)(1).

NEPA process, for example, there may be a classified appendix that is a portion of the environmental impact statement that may not be available to the public but which can still be viewed by legislative staff with the proper clearances.[403] Federal courts, too, will continue to review sensitive documents *in camera.* The judiciary does not provide a blank check to the military services that claim they can neither confirm nor deny the existence of a certain document or activity.[404] And efforts by the executive branch to assert a broader privilege will be met unfavorably by the judicial branch. For example, in *Committee for Nuclear Responsibility, Inc. v. Seaborg,* conservationists brought an action seeking to prevent a proposed underground nuclear test under NEPA.[405] An environmental group sued the Atomic Energy Commission pursuant to the APA; the central issue litigated was the release of sensitive military and diplomatic documents.[406] Through discovery, the conservationists pressed for release of these documents in the government's possession.[407] The government resisted production of the documents, claiming executive privilege.[408] Yet, the court ordered *in camera* review of sensitive environmental documents after the President asserted a broad executive privilege.[409] The court expressed its role as:

> An essential ingredient of our rule of law is the authority of the courts to determine whether an executive official or agency has complied with the Constitution and with the mandates of Congress which define and limit the authority of the executive. Any claim to executive absolutism cannot override the duty of the court to assure that an official has not exceeded his charter or flouted the legislative will.[410]

This case, decided at the very beginning of American environmental law, serves as an effective bookend to the *Winter* case in ensuring judicial accountability and oversight of sensitive environmental matters.

B. Despite an Initial Period of Requests for Environmental Military Exemptions, Environmental Laws after September 11th Have Emerged Intact.

Many commentators critical of the military's environmental record have focused on the DoD's request for environmental exemptions in the

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[403] 40 C.F.R § 1507.3(c) (2012).
[404] *See* Philippi v. CIA, 546 F.2d 1009, 1013-14 (D.C. Cir. 1976).
[405] 463 F.2d 788 (D.C. Cir. 1971).
[406] *Id.* at 790.
[407] *Id.*
[408] *Id.*
[409] *Id.* at 791.
[410] *Id.* at 793.

aftermath of September 11th.[411] Unquestionably, there were continual requests during the Bush administration for broader environmental waivers for the U.S. military—but such waivers were often limited in duration, and the frequency with which they have been requested has diminished over time.

For example, beginning in 2003, the DoD sought an exemption from receiving a permit for incidental takings pursuant to the Migratory Bird Treaty Act in order to prevent a delay in training activities.[412] While the 107th Congress enacted an interim exemption, this period covered four years.[413] Effective February 28th, 2007, "incidental takings of migratory birds during military readiness activities" is permissible.[414]

The following year, the military was granted a broader exemption under the Marine Mammal Protection Act for "national defense" while amending the definition of "harassing" marine mammals.[415] The Secretary of Defense has invoked this authority, but the House Armed Services Committee expressed concerns and directed the Navy to assess and quantify the effect on military readiness as a result of this exemption.[416]

The DoD was also granted a potential exemption under the ESA, whereby the Secretary of the Interior could exempt military lands from critical habitat designation provided that the Secretary determined that the DoD's Integrated Natural Resource Management Plan[417] provided a benefit to the species at issue. Further, language was included to direct the Secretary of the Interior to "consider impacts on national security when deciding to designate a critical habitat."[418] Despite the inclusion of this exemption language, the application of the ESA to the military remains intact to a significant degree: the ESA's Section 7 consultation requirements and Section 9 takings requirements continue to apply to the DoD.[419]

Subsequent requests by the DoD for broader exemptions within RCRA, CERCLA, and CAA have not been successful. From Fiscal Year 2003 to 2008, Administration authorization proposals requested exemptions from

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411 *See, e.g.*, Hope Babcock, *National Security and Environmental Laws: A Clear and Present Danger?*, 25 VA. ENVTL. L.J. 105, 148 (2007).

412 BEARDEN, *supra* note 62, at 4.

413 *Cf. id.*

414 *Id.*

415 *Id.* at 4-5.

416 *Id.* at 5.

417 The Integrated Natural Resource Management Plan is a requirement distinguishable from the ESA and complies with the Sikes Act. *See* 16 U.S.C. § 670a(a)(1)(B) (2012).

418 BEARDEN, *supra* note 62, at 4.

419 *Id.*

RCRA, CERCLA, and CAA.[420] Yet, Congress has not enacted these exemptions, and the DoD has not sought similar exemptions since this time.[421]

Indeed, requests for military exemptions from environmental laws have effectively ended in recent years. The twelve years after September 11th—the first major attack on U.S. soil since Pearl Harbor[422]—saw a remarkable increase in military activities at home and abroad, with two major forces in Iraq and Afghanistan and an increase in training and readiness activities at home in preparation for overseas combat.[423] This all occurred in the age of American environmental law. Despite some requests for broader exemptions and fears of frontal wholesale neutering of environmental regulation of the military, the environmental statutory scheme as it applies to the U.S. military is intact and remains strong. This bolsters the status of environmental law within the U.S. and demonstrates the status, permanency, and durability that environmental law has achieved in the U.S. Indeed, the *Winter* case was litigated in the midst of two major conflicts in Iraq and Afghanistan and the carrier strike group at issue was temporarily prohibited from conducting certain training operations in preparation for near certain future military engagement. It should not go unnoticed that prior to the Supreme Court's decision, the Ninth Circuit provided injunctive relief to the plaintiffs, effectively stopping the very symbol of American military power and power projection—American aircraft carrier strike groups—from fully training and operating during a period of heightened tension and international armed conflict.[424]

There has been a broader historical trend, too, of Congress taking action to increase the applicability of environmental laws by gradually broadening the waiver of sovereign immunity that is found throughout many environmental statutes. For example, in *Hancock v. Train* the Supreme Court interpreted the sovereign immunity waiver to not include the procedural requirements affecting the CAA.[425] The next year, Congress amended the CAA, CWA, and Safe Drinking Water Act to unambiguously waive the sovereign immunity waiver as applied to federal agencies,

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[420] *Id.* at 1.

[421] *See supra* note 377.

[422] *September 11th and After*, U.S. ARMY RESEARCH LAB., http://www.arl.army.mil/www/default.cfm?page=492 (last visited Sept. 10, 2013).

[423] *See, e.g.*, AMY BELASCO, CONG. RESEARCH SERV., RL33110, THE COST OF IRAQ, AFGHANISTAN, AND OTHER GLOBAL WAR ON TERROR OPERATIONS SINCE 9/11 (2011).

[424] Natural Res. Def. Council, Inc. v. Winter, 518 F.3d 658, 661 (9th Cir. 2008) *rev'd*, 555 U.S. 7 (2008).

[425] 426 U.S. 167, 194-95178-79 (1976), *superseded by statute*, Clean Air Act Amendments, Pub. L. No. 95-95, *reprinted in* 1977 U.S.C.C.A.N. 1077.

including the DoD.[426] In 1992, the Supreme Court ruled in *United States Department of Energy v. Ohio* that there was no sovereign immunity waiver as applied to retroactive penalties against federal agencies.[427] Shortly thereafter, Congress passed legislation in the Federal Facilities Compliance Act that clearly waived sovereign immunity for penalties affecting federal agencies under RCRA.[428] Most recently, in 2011, Congress broadened the CWA's sovereign immunity waiver language by mandating that federal facilities, to include military installations, must now pay reasonable service charges associated with a state or local stormwater management program.[429] When the judiciary has narrowly construed the sovereign immunity waiver, Congress has shown a willingness to act to expand the scope of the waiver in an unambiguous manner, thereby ensuring that federal agencies, and the DoD, are held accountable.[430]

C. U.S. Environmental Laws Serve to Uphold the Longstanding Tradition of Civilian Control of the Military

Ultimately, judicial enforcement through the APA and myriad citizen suit provisions within environmental statutes serves to uphold the U.S.'s longstanding tradition of civilian control over the military. Such enforcement furthers the Constitution's adherence to a civilian controlled military led by an elected President serving as Commander in Chief of the Army and Navy,[431] and addresses the centuries-old concern about a standing Army as a potential danger[432] and broader concerns regarding separation of powers.[433] This is more important than ever, as there has been an increasing chasm between civil and military sectors with the emergence

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[426] Murchison, *supra* note 53, at 367-74.

[427] U.S. Dep't of Energy v. Ohio, 503 U.S. 607, 627-28 (1992).

[428] Federal Facility Compliance Act of 1992, Pub. L. No. 102-386, 106 Stat. 1505, 1505 (1992) (codified at 42 U.S.C. § 6961(a) (2012)).

[429] Federal Responsibility to Pay for Stormwater Programs, Pub. L. No. 111-378, 124 Stat. 4128 (2011) (codified at 33 U.S.C. § 1323(c) (2012)).

[430] Interestingly, there is no evidence of Congress *narrowing* the sovereign immunity waiver—when Congress acted it did so to broaden the waiver.

[431] U.S. CONST art. II, § 2.

[432] *See* THE FEDERALIST NO. 8 (Alexander Hamilton) (warning about the dangers of a Standing Army).

[433] *See* THE FEDERALIST NO. 47 (James Madison) (asserting a system of "checks and balances" across the DoD); THE FEDERALIST NO. 48 (James Madison) (entitled "These Departments Should Not Be So Far Separated as to Have No Constitutional Control Over Each Other").

of an all-volunteer force emerging at the end of the Vietnam War and a comparative lower number of elected officials with military service.[434]

For example, James Madison, in Federalist No. 51, warned that "usurpations are guarded against by a division of the government into distinct and separate departments."[435] The Founders desired to have all three branches of government assert some form of control over the military. Today, American environmental law is largely faithful to the Founders' vision in not carving out a completely different set of laws for the military. This ensures constitutional control and day-to-day accountability to its citizens, reaffirming the longstanding tradition of civilian control of the military and serving as a bulwark against usurpation.

This is significant. For many day-to-day matters, the U.S. military operates separately from the civilian world and society that it is sworn to protect. The importance of having a military accountable to, and representative of, the citizenry serves a democracy-reinforcing function that is aligned with the Founders' concerns regarding the military's role in a democratic society. These concerns are particularly critical today in light of the sheer size of today's military and the continual existence of standing armed forces. A "standing Army"— no longer a Cold War novelty—is now the new normal. The Founders could not imagine the existing military-industrial complex that exists in the U.S. with its forces stationed throughout the globe. Today, the DoD is the largest single employer *in the world*, a hegemonic military power that is equal in size and power to the next twelve militaries of the world combined[436]—and it is included within the reach of American environmental law.

Contrast, too, environmental citizen suit provisions and the APA's civil remedies with the U.S. military's existing criminal justice system. Only uniformed officers currently serving in the military can prosecute service members charged with a crime in a military court-martial, and there is a distinct and separate criminal law system within the military governed by the Uniform Code of Military Justice ("UCMJ").[437] Civilians play a limited role in this system and, while the judgments of military courts are ultimately reviewable by the U.S. Supreme Court, this is exceedingly rare.[438] And the military justice system is effectively self-contained within

[434] *See, e.g.*, David H. Gurney & Jeffrey D. Smotherman, *An Interview with Michael G. Mullen*, JOINT FORCE http://www.ndu.edu/press/lib/images/jfq-54/1.pdfQ., 7-11 (July 2009).

[435] THE FEDERALIST NO. 51 (James Madison) (entitled "The Structure of the Government Must Furnish the Proper Checks and Balances Between the Different Departments").

[436] *Cf.* SIPRI, *supra* note 10.

[437] *Cf.* 10 U.S.C. § 802 (2012) (listing persons subject to the UCMJ).

[438] *See* Joseph Ax, *Fort Hood Shooter's Death Sentence Heads for Appeal With or Without Him*, REUTERS (Aug. 28, 2013, 8:49 PM), http://www.reuters.com/article

the uniformed military on DoD installations. The use of civil litigation pursuant to environmental laws, by contrast, ensures continual and important oversight of the military's actions.

Consider the inherent value of citizen suit and the APA's provisions that allow for judicial enforceability against the DoD. These judicial protections ensure a consistent nexus and mechanism for accountability between the larger civilian population and the military.[439] On a practical level, getting on a military installation without a DoD identification card can be difficult without an official purpose for the visit. And force protection and anti-terrorism measures have only increased the difficulty of obtaining installation access since September 11th. For example, prior to the attacks on September 11th, Norfolk Naval Station was largely an open base available for tours and visits by the general public.[440] Now, general visitations on base are rare occurrences, only increasing the divide between the civilian and military sectors.[441]

Indeed, the DoD is often sued by people well outside the military sphere, such as environmental groups actively engaged in reviewing—and litigating—the DoD's actions. Provided that the Article III case or controversy requirements are met,[442] any person or citizen group may bring a lawsuit in federal court against the DoD seeking relief pursuant to a citizen suit provision embedded within the particular environmental regulation, or pursuant to the APA.[443] There is a considerable body of litigation against the DoD by environmental groups well outside the normal military province that would otherwise not normally interact with the military.

One recent example of the power and jurisdictional reach of American administrative and environmental law, as compared to other nations' laws, was seen in a federal district court case, *Okinawa Dugong v. Gates.*[444] Utilizing the National Historical Prevention Act ("NHPA")[445] and its

/2013/08/29/us-usa-crime-forthood-appeal-idUSBRE97S01O20130829 (stating that either party could petition the U.S. Supreme Court for review, "though it is rare for the Supreme Court to do so").

[439] *See, e.g.*, Gurney & Smotherman, *supra* note 434.

[440] Mike Hixenbaugh, *Navy Base Invites Public On Ships For 1st Time Since 9/11*, PILOTONLINE.COM (Oct. 10, 2011), http://hamptonroads.com/2011/10/navy-base-invites-public-ships-1st-time-911.

[441] *Cf. id.*

[442] U.S. CONST. art. III, § 2.

[443] 5 U.S.C. § 706 (2012).

[444] 543 F. Supp. 2d 1082 (N.D. Cal. 2008).

[445] NHPA § 402, 16 U.S.C. § 470a-2 (2012).

> Prior to the approval of any Federal undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the

extraterritorial application in conjunction with the APA's agency action review,[446] Japanese citizens joined with U.S. environmental groups and sued the Secretary of Defense, seeking an injunction in U.S. federal court.[447] The lawsuit was successful, ultimately safeguarding a marine mammal, the dugong, which was protected under the Japanese Cultural Property Law.[448] The court in California ultimately sided with the Japanese citizens and U.S. environmentalists. Japanese law, however, did not have a similar citizen suit provision or APA-stylized administrative remedy in Japanese courts to enforce the environmental impact of the move on the dugong, and the U.S. court thousands of miles away was the only venue available to challenge the military's move.[449]

Outside of civil litigation, military employees in the United States have been successfully prosecuted in federal court for environmental violations. For example, in *United States v. Dee,* three civilian employees at the Army's Aberdeen Proving Ground were successfully convicted for illegally storing and dumping hazardous waste in violation of RCRA.[450] Under RCRA, it is a crime for any "person" to knowingly violate the Act.[451] The court in *Dee* reaffirmed that sovereign immunity does not attach to an individual and does not provide for blanket protection for DoD employee criminal violations under RCRA.[452] Additionally, federal employees'

> applicable country's equivalent of the National Register, the head of a Federal agency having direct or indirect jurisdiction over such undertaking shall take into account the effect of the undertaking on such property for purposes of avoiding or mitigating any adverse effects.

Id.

[446] 5 U.S.C. § 704 (2012).

> Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

Id.

[447] *Okinawa Dugong*, 543 F. Supp. 2d at 1083.

[448] *Id.* at 1112.

[449] *Id.* at 1089-90.

[450] 912 F.2d 741, 743 (4th Cir. 1990), *cert denied,* 111 S. Ct. 1307 (1991).

[451] RCRA § 3008(d), 42 U.S.C. § 6928(d) (2012).

[452] *Dee*, 912 F.2d at 744.

convictions had also been upheld for violating CERCLA and the Clean Water Act among the major media statutes.[453]

D. Lessons to Apply from the U.S. and Abroad

In many developing countries, the military is viewed as a necessary support for the state, and civilian authorities are often reluctant to impose restrictions on military activities.[454] Yet, in the long-term, this can be dangerous and can lead to conflict and unrest. History is beset with numerous military-led coups due to the disproportionate power relationship that exists between the military and its civilian political leaders.[455]

Other nations of the world can learn from the American experience—in particular, from the robust judicial enforcement of U.S. environmental laws against the military. For example, while the Chinese military is theoretically accountable to the EPL and other core laws, enforcement appears weak as applied to the military, making the PLA effectively outside the umbrella of broader national environmental regulation.[456] And there does not appear to be a practical judicial enforcement mechanism for citizens or citizen groups to bring lawsuits against a polluting military sector.[457] As the Chinese economy and military sector grow, it is concerning that there is limited accountability while its military activities grow and continue to have a greater impact on the environment. Indeed, Chinese military environmental regulations appear to be entirely self-governing, begging two questions: (1) what practical environmental standards apply to the Chinese military?; and (2) what routes exist for the Chinese populace to hold its military accountable for environmental regulations?

Unfortunately, Chinese environmental law today, as practically applied to its military, appears to share some similarities with the environmental record of the Soviet Union during the Cold War. As discussed above,

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[453] *See, e.g.*, United States v. Carr, 880 F.2d 1550 (2nd Cir. 1989); United States v. Curtis, 988 F.2d 946 (9th Cir. 1993).

[454] Al-Duaij, *supra* note 20, at 222 (observing "that the larger the economy, the less power the military has, because the power shifts from people who have guns to people who have money").

[455] *See, e.g.*, Galip Dalay, *The Ergenekon Coup Trial Verdict Sent a Message to Egypt's Coup Leaders*, MIDDLE EAST MONITOR (Sept. 16, 2013, 1:28 PM), http://www.middleeastmonitor.com/articles/europe/7374-the-ergenekon-coup-trial-verdict-sent-a-message-to-egypts-coup-leaders (describing the Egyptian and Turkish military coups as a result of the disproportionate power that both militaries wielded over their respective governments).

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

[457] *See supra* Part III.B

under the People's Liberation Army Environmental Protection Ordnance, the Chinese military is accountable to the relevant provisions of the Environmental Protection Law. It is unclear, however, how this accountability is implemented in practice given the apparent absence of citizen suits or judicial enforcement from Chinese law.[458] The Soviet Union military was, essentially, exempt from its environmental laws throughout the Cold War.[459] Perhaps not surprisingly, the Soviet military's legacy of environmental stewardship was poor and this was further exacerbated by a secrecy-driven culture.[460]

Other nations can learn, too, from the U.S.'s relatively transparent environmental process and from the accountability the U.S. military has to federal, state, and local environmental requirements. Judicial oversight allows for a robust discovery process, as does the Freedom of Information Act. Indeed, U.S. environmental law relies heavily upon a cooperative federalism model whereby states and localities have enormous authority to regulate DoD activities.[461] The Clean Water Act's waiver language requires that the DoD must comply with all "Federal, State, interstate, and local requirements, administrative authority, and process and sanctions respecting the control and abatement of water pollution . . . ."[462] American military installations must not only comply with federal water pollution law, but must also comply with *local and state* requirements, all of which are subject to judicial enforcement.[463] In this sense, U.S. military installations are required to interact with state, local, and county regulators to comply with their local and state environmental laws,[464] yet another mechanism for ensuring accountability and openness at all levels of society.

The U.S. can learn lessons of its own from other nations' experiences in balancing national security with environmental concerns. Of particular note is the novel use of the Indian military to assist in fighting environmental degradation. There is still an enormous need within the United States to clean up older DoD installations, many of which are home to unexploded munitions and other environmental hazards.[465] The estimated costs of a complete cleanup are staggering, furthering the perception that the U.S.

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

[459] *See generally* Espinosa, *supra* note 368, at 656.

[460] *See supra* Part III.D.

[461] *See* Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack?*, 20 DUKE ENVTL. L. & POL'Y F. 1, 6-7, 27-28 (2010).

[462] CWA § 313(a), 33 U.S.C. § 1323(a) (2012).

[463] *See id.*

[464] *Id.*

[465] *See supra* Part II.A.6.

military is an unresponsive steward of the environment. Oftentimes the U.S. military is the "first responder" to international crises that have been brought about by environmental degradation or disaster.[466] Having a uniformed "environmental brigade" or "Quick Response Force" with heightened experience in environmental disasters—not unlike India's novel Eco-Task Forces—and cleanup would be a valuable commodity in the event of an environmental disaster.

In addition, the U.S. can learn from aspects of EU law. While one of the strengths of American environmental law is the treatment of the military as a co-equal federal agency without special treatment, the military does work with inherently dangerous materials and munitions. American environmental law applies generally to the military, as the DoD is normally included within the definition of "agency" and "person," but no allowance is made for the inherent danger found in DoD activities on military installations.

As discussed in Part III, the EU has begun to address military activities specifically when applied to the environment, acknowledging, in effect, that the nature of the military's work is unique with a potentially disproportionate impact on the environment.[467] The nature of military activities and its sheer physical size[468] can have disproportionate effects on the environment with its bombing ranges, cleanup sites, and hazardous materials. Indeed, military activities at federal installations deal with uniquely dangerous activities to include production, storage, use of conventional and chemical weapons and the hazardous wastes associated with these activities.[469] Given this reality, perhaps it makes sense to hold the DoD to a *higher* standard in certain cases. For example, within the sovereign immunity waiver of the CWA and CAA, military activities in the U.S. are susceptible to federal, state and local laws but only to the "same manner, and to the same extent as any nongovernmental entity."[470] U.S. military activities, thus, cannot be held to a higher standard than non-military activities, even if such activity poses a greater environmental risk.

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[466] *See, e.g.*, *U.S. Forces Aid Tsunami Relief Efforts in Southeast Asia*, U.S. DEP'T OF DEF., http://www.defense.gov/home/features/tsunami/ (last visited Oct. 29, 2013) (outlining the various U.S. military responses and efforts to the 2005 Indonesia tsunami).

[467] *See supra* Part III.A.1.

[468] For example, Fort Hood in Texas is the largest military base in the world at 340 square miles, with 65,000 military and civilian employees. *Fort Hood: The Largest Military Base in the World*, THE TELEGRAPH (Nov. 6, 2009, 7:00 AM), http://www.telegraph.co.uk/news/uknews/defence/6511138/Fort-Hood-The-largest-US-military-base-in-the-world.html.

[469] Smith, *supra* note 56, § 32A.01[1].

[470] *See, e.g.*, CWA § 313(a), 33 U.S.C. § 1323(a) (2012).

Sovereign immunity jurisprudence is strict as any waiver of sovereign immunity by Congress must be clear and unambiguous and is strictly construed in favor of the U.S.[471] Should this be changed in light of the inherent danger associated with some U.S. military activities? Does this still make sense? Perhaps the very nature of military activities and cleanup efforts deserves special treatment and should be subject to a higher standard of compliance within existing environmental law as has been recently developed in the EU.

E. Climate Change and Beyond

Finally, it bears noting that from a policy perspective, the DoD has now formally recognized climate change as a national security threat and has begun to plan accordingly for its effects.[472] Indeed, there has been a recent "environmental awakening" within the DoD.[473] This is encouraging. As we look to the future, it is more important than ever to hold the militaries of the world accountable to existing environmental regulations with the challenges posed by climate change. As the military looks to "untether itself"[474] from fossil fuels and reduce Greenhouse Gas ("GHG") emissions, it is now effectively aligned in the effort to combat climate change with environmental organizations, presenting unique opportunities for collaboration. Alternative energy initiatives—including wind turbines and solar projects—are being funded on military installations, and the Secretary of the Navy has announced bold plans to launch a "Great Green Fleet" on alternative energy sources.[475] This is a fundamental shift in the environment-national security chess game, and it will take some time to build the trust and collaboration that could lead to further innovation in environmental stewardship across these new partners. Nevertheless, because the DoD is the largest consumer of fuel in the world, the nascent alignment of DoD planning priorities and efforts to combat climate change bode well for future innovation in energy security.

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[471] *See supra* note 52 and accompanying text.

[472] DEP'T. OF DEF., QUADRENNIAL DEFENSE REVIEW REPORT 84-88 (Feb. 2010), *available at* http://www.defense.gov/qdr/images/QDR_as_of_12Feb10_1000.pdf [hereinafter QDR 2010].

[473] For example, a top Pentagon official, Amanda Dory, has labeled the cultural shift toward climate change planning as a "sea change" within the DoD. John M. Broder, *Climate Change Seen as Threat to U.S. Security,* N.Y. TIMES, Aug. 9, 2009, at A1.

[474] *See Clean Energy and National Security, the California Promise,* ENVTL. ENTREPRENEURS, http://www.e2.org/jsp/controller?cmd=docprint&docName=CleanEnergy NationalSecurity (last visited Oct. 14, 2013).

[475] *See* Chambers & Yetiv, *supra* note 18, at 63.

Among other things, the U.S. military, by far the largest in the world and an enormous consumer of energy,[476] has begun to apply numerous lessons regarding energy security from the conflicts in Iraq and Afghanistan.[477] One commentator sees this as a fundamental game-changer, asserting that the military's new focus on climate change and energy policy amounts to a new "Green Arms Race" where the military will utilize its enormous resources and history of technological innovation to "green" the military force and bring about positive change in the areas of energy innovation and climate change.[478] Further, the U.S. recently declared climate change a national security issue and has begun to plan for its effects.[479] This historic acknowledgement bodes well for the future as planning for climate change's effects becomes embedded within DoD's culture and future planning.

Today, among the world's militaries, the United States is probably the most conscious of the need to reduce energy demand.[480] Recent executive orders apply to the DoD as they have sought to increase federal fuel efficiency standards and to reduce GHG emissions.[481] And President Obama recently issued an executive order to further strengthen energy efficiency within the federal government.[482] These are encouraging signs that bode well for applying a broader international climate change treaty to military activities. The military sector is an enormous contributor of GHG emissions and some estimates now indicate that China, for example, is the single largest producer of GHG emissions.[483]

The Kyoto Protocol[484] was the last major international treaty addressing climate change.[485] It did not fully address nor completely mandate that the military comply with GHG emissions standards.[486] Yet any future

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[476] *See id.*

[477] *Id.*

[478] *See* Siddhartha M. Velandy, *The Green Arms Race: Reorienting the Discussions on Climate Change, Energy Policy, and National Security*, 3 HARV. NAT'L SEC. J. 309 (2012).

[479] QDR 2010, *supra* note 472, at 84-88.

[480] Michael Brzoska, *Climate Change and the Military in China, Russia, the United Kingdom, and the United States*, 68 BULLETIN OF THE ATOMIC SCIENTISTS 43, 46 (2012).

[481] *See, e.g.*, Exec. Order No. 13,423, 72 Fed. Reg. 3919 (Jan. 24. 2007).

[482] Exec. Order No. 13,514, 74 Fed. Reg. 52,117 (Oct. 5, 2009).

[483] Chris Buckley, *China Says it is World's Top Greenhouse Gas Emitter*, REUTERS (Nov. 23, 2010, 8:02 AM), http://www.reuters.com/article/2010 /11/23/us-climate-cancun-china-idUSTRE6AM1NG20101123.

[484] *Kyoto Protocol*, UNITED NATIONS: FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfcc.mt/kyoto-protocol/items/2830.php (last visited Sept. 30, 2013).

[485] *Cf. Legacy of a Climate Treaty: After Kyoto*, 491 NATURE 653 (2012), *available at* http://www.nature.com/news/legacy-of-a-climate-treaty-after-kyoto-1.11880 (discussing the lack of an international climate regulation after the expiration of the Kyoto Protocol).

[486] *See, e.g.*, Jeffrey Salmon, *National Security and Military Policy Issues Involved in the*

meaningful international climate change treaty must address all activities to include military activities, one of the largest contributor of GHG emissions. Fully exempting military activities now would undermine this effort. If there is *already* a history and framework for domestic environmental accountability over the military, then domestic implementation of such measures pursuant to an international treaty should ultimately prove to be more successful.

V. CONCLUSION

The different militaries of the world have taken different approaches to environmental protection. While its historical environmental record is not perfect, the U.S. military has succeeded in incorporating many of its lessons learned into future environmental governance standards in a relatively short period of time. Today, U.S military activities are within the national environmental law umbrella with a judicial enforcement mechanism to match. Further, twelve years after the attacks on 9/11 and two major armed conflicts, U.S. environmental laws as applied to the military are intact. This is truly a testament to the durability and status of environmental law within the U.S.

Outside the U.S., there are different approaches among the world's major militaries and other countries can learn from the U.S. experience, particularly the important role of judicial enforcement as a rule of law enforcing function. Looking ahead it is important to incorporate military activities into nations' domestic laws with practical enforcement mechanisms as we look ahead to address GHG emissions and combat climate change. Global environmental challenges such as climate change will only increase in complexity, demanding a comprehensive approach from all governmental agencies.

Ultimately, both the military's goals and the goals of environmental law are linked.[487] "Both share the ultimate goals of ensuring [the nation's] well-being, and preserving our rich national heritage[]" for present and future generations.[488] How different nations approach these dual goals and address the governance of military activities will be critical for the health of their respective nation and the larger global commons.

Kyoto Treaty, GEORGE C. MARSHALL INSTITUTE (May 18, 1998), http://www.marshall.org /article.php?id=70.

[487] Zillman, *supra* note 27, at 314.

[488] *Id.* (quoting DYCUS, *supra* note 24, at 3).

Blocking the Ax: Shielding Corporate Counsel from Retaliation as an Alternative to White Collar Hypercriminalization

Eric Alden[1]

Public company corporate and securities counsel should be protected from retaliation by senior business officers through the expedient of requiring that the selection, compensation and, most importantly, termination of such counsel be approved in advance by the corporation's independent audit committee. The objective of this proposed reform is to use structural checks and balances to reduce the tremendous real world pressures to collude or acquiesce in the commission of white collar crime.

Reform of this type has already been implemented to protect outside auditors of public companies against pressure from corporate officers. Counsel responsible for corporate transactional structuring and securities law disclosures constitute the other critical professional watchdog over public company legal compliance. By shielding these gatekeepers more effectively from retaliatory termination, the proposed reform seeks to improve prophylaxis against sophisticated corporate fraud and the resultant harm that arises therefrom. Checks and balances in the corporate governance structure

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provide an alternative path to ever greater reliance on ever harsher white collar criminal penalties which our society has followed in recent years.

To translate theoretical discussion into practical implementation, this article proposes the specific text of potential amendments to the New York Stock Exchange ("NYSE") and Nasdaq corporate governance listing standards to effect the reform suggested here.

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I. INTRODUCTION

As in the life of individuals, each human society faces at intervals, developmental forks in the road. Two or more paths lead forward, in different directions. Nor do all routes pass to "broad, sunlit uplands," in the memorable phrase of Winston Churchill.[2] Some present perils are not yet fully appreciated. America currently stands before such a choice with respect to white collar criminal law and the governance of public corporations. We can either proceed further down the path of proliferating criminal prohibitions backed by ever sharper penalties in the white collar arena, or we can pursue a different prophylactic course with respect to corporate misconduct, one less fraught with long-term danger to individual dignity and a free society. This article explores such an alternative.

That alternative is the enhanced use of checks and balances in the corporate governance structure to prevent abuse. In particular, the structural protections established by the Sarbanes-Oxley Act of 2002 ("Sarbanes-Oxley")[3] and the closely related 2003 amendments to the New York Stock Exchange ("NYSE") and Nasdaq Stock Market ("Nasdaq") corporate governance listing standards,[4] designed to safeguard the

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[2] In his address to the House of Commons, Winston Churchill stated:

> I expect that the Battle of Britain is about to begin. Upon this battle depends the survival of Christian civilization. Upon it depends our own British life, and the long continuity of our institutions and our Empire. The whole fury and might of the enemy must very soon be turned on us. Hitler knows that he will have to break us in this Island or lose the war. If we can stand up to him, all Europe may be free and the life of the world may move forward into broad, sunlit uplands. But if we fail, then the whole world, including the United States, including all that we have known and cared for, will sink into the abyss of a new Dark Age . . . .

Winston Churchill, Prime Minister of the United Kingdom, Address to the House of Commons (June 18, 1940), *available at* https://www.winstonchurchill.org/learn/speeches/speeches-of-winston-churchill/122-their-finest-hour.

[3] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 15 U.S.C. and 18 U.S.C.).

[4] Those amendments to the corporate governance listing standards of the NYSE and the Nasdaq were approved and discussed by the Securities and Exchange Commission ("SEC"). *See* NYSE and Nasdaq Rules of Corporate Governance, Exchange Act Release No. 48,745, 68 Fed. Reg. 64,154 (Nov. 4, 2003). The corporate governance listing standards of the NYSE are to be found in Section 303A of the NYSE Listed Company Manual. NYSE Listed Company Manual § 303A (approved Aug. 22, 2013), *available at* http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F4%5F3&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F. Those of Nasdaq are to be found

independence and critical objectivity of outside auditors, were never extended to apply to the legal counsel responsible for the transactional structuring and securities law disclosures of public companies.[5] This article explores the arguments weighing in favor of and against such an extension. The article concludes that, in the interest of forestalling further upward ratcheting of the white collar criminal penalty structure, or even creating leeway for some relaxation thereof, the termination and selection of such corporate transactional and securities regulatory counsel of a public corporation should be subject to prior formal approval by the corporation's audit committee.

The impetus for such a reform lies in the potential collateral consequences of the white collar criminal juggernaut which continues to roll forward over the American legal landscape. The growth in modern society of business organizations to enormous size, coupled with active markets in their securities and corporate public reporting obligations, has led to a state of affairs in which mendacity or other misconduct at the helm of an enterprise can lead to sudden, catastrophic collapse in a corporation's stock price, with great resultant harm to investors, employees, and others. This was clearly seen with the wave of corporate scandals which came to light just after the turn of the millennium. Societal reaction to such harm is nigh inevitable, as witnessed with the passage of Sarbanes-Oxley in 2002. Even those politicians otherwise opposed to greater regulation of business felt compelled to vote in favor—the political riptide engendered by the collapse of first Enron, then Worldcom, swept all before it.[6]

In many respects, some level of response to that pre-Sarbanes-Oxley wave of corporate scandals was understandable. In earlier years, white collar crime in the financial sphere had often appeared to skate past punishment.[7] Relatively few cases were discovered, pursued and prosecuted. Of those that were, convictions were always an uncertain

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in Rules 5600 to 5640 of the Nasdaq Listing Rules. Nasdaq Listing Rules § 5600-40, *available at* http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F3&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F.

[5] *See* discussion *infra* Part IV.

[6] In the House of Representatives, the vote was 423 in favor, 3 opposed, 8 abstaining. *Final Vote Results for Roll Call 348*, OFF. OF THE CLERK, U.S. HOUSE OF REPRESENTATIVES, http://clerk.house.gov/evs/2002/roll348.xml (last visited Nov. 4, 2013). In the Senate, the vote was 99 in favor, 1 abstaining. *U.S. Senate Roll Call Votes 107th Congress – 2nd Session*, U.S. SENATE, http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress =107&session=2&vote=00192 (last visited Nov. 4, 2013).

[7] *Id.* ("Even within the federal system, white collar cases of all sorts are a relatively small part of a criminal docket dominated by immigration, drug, and gun cases, which together comprised nearly 73% of all federal cases in 2009.").

matter.[8] And even upon conviction, the penalties often appeared incongruously small compared to the magnitude of the misconduct.[9] The pre-Sarbanes-Oxley wave of corporate scandals illustrated that in those observed cases, and presumably innumerable others which could reasonably be surmised, many corporate actors' methods had become "unsound."[10] It is not difficult to see how Congress concluded that legislative action was required to provide more effective penalties for knowing criminality at the helm of public companies.

Nonetheless, the degree of legislative reaction was nearly unprecedented. Sarbanes-Oxley, with even more recent amplification from the Wall Street Reform and Investor Protection Act ("Dodd-Frank"),[11] represented a bold and decisive leap down the path of wholesale criminalization of business law in the United States. The penalties are draconian, the predicate offenses legion.

Yet, an alternative means for our society, as a practical matter, to prevent corporate misconduct and ensure accurate public reporting relies not on punishment and fear, but rather on a principle of organizational structure of best, long-standing American pedigree. That principle is the use of checks and balances to prevent abuse.

Two corporate institutional instances are of tremendous weight in this regard: the financial auditors; and corporate transactional and securities regulatory lawyers, serving both in-house and as outside counsel. Those are the lawyers responsible for transactional structuring and implementation, advising as to corporate governance matters, and both preparing and reviewing public company disclosures under the securities laws.[12] Together, the auditors and such corporate counsel constitute the critical gatekeepers in a company's securities law compliance and public reporting.[13] The former now enjoy structural protection in the integrity of their function; the latter do not.

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[8] *Id.* at 55 (stating that "judges approached [white collar crime] cases in a regime of unbounded discretion").

[9] *See* United States v. Edwards, 622 F.3d 1215, 1217-19 (9th Cir. 2010) (discussing the unreasonably lenient sentences for serious white collar offenses).

[10] *See* JOSEPH CONRAD, HEART OF DARKNESS 63 (Robert Kimbrough ed., W. W. Norton & Company, Inc. 1963) (1899) ("[T]here is no disguising the fact, Mr. Kurtz has done more harm than good to the Company . . . . [A]nd why? Because the method is unsound.").

[11] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of U.S.C.).

[12] For the sake of brevity, such corporate transactional and securities regulatory lawyers, though not their litigator brethren, will in many cases be referred to herein simply as "corporate counsel" or "corporate lawyers."

[13] For an excellent discussion of the gatekeeper function played by auditors and corporate counsel, and the historical evolution of their respective roles and professional

Although Sarbanes-Oxley undertook fundamental bone-breaking and resetting to ensure the effective independence of outside auditors, no counterpart intervention has ever occurred to protect the corporate counsel of major public corporations from the threat of retaliation and the lure of co-option, corruption, and subornation.[14] Yet, corporate lawyers are as important to the overall compliance, corporate governance, and public reporting process as are the auditors.

Certain accounting frauds originate with and are effectuated almost exclusively through finance and sales personnel. There exist a myriad of ways to cook the books through accounting manipulations or through the simple expedient of backdating sales agreements. Corporate lawyers do not drive, and may very well be unaware of, specific occurrences of these species of fraud.[15]

Corporate transactional and disclosure lawyers are likely to be found, however, at the beating heart of many of the most sophisticated and far-reaching corporate reporting frauds. Lawyers are generally the individuals who actually form new legal entities and draft the operative contractual and other legal documents necessary to implement such a fraud. Because many sophisticated frauds involve evasion of accounting, tax, securities, and other regulatory standards whose application depends on specific entity, contractual, and other legal relationships, lawyers will likely have been

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standards over time, see JOHN C. COFFEE, JR., GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE (Oxford Univ. Press 2006).

[14] As Professor Coffee has noted, merely to adjure attorneys to ethical behavior, without addressing real-world, practical measures to strengthen their hand, is unlikely to be effective "because legal ethics at its core views the attorney as a client-serving professional who is not permitted to dominate the relationship (and because market conditions make it unlikely that lawyers could do so today), legal ethics does not hold out a practical remedy for gatekeeper failure. One must therefore look beyond legal ethics and the moral exhortations it provides to find a realistic means to empower the attorney as gatekeeper." *Id.* at 229.

[15] There also exist, of course, counterexamples where corporate counsel was involved in backdating sales agreements. *See, e.g.*, Press Release, United States Department of Justice, Former Computer Associates Executives Indicted on Securities Fraud, Obstruction Charges (Sept. 22, 2004), *available at* http://www.justice.gov/opa/pr/2004/September/04_crm_642.htm ("In the week following the end of fiscal periods, while the books were held open, Kumar [CEO] and Richards [head of sales] directed CA sales managers and salespeople to finalize and backdate license agreements. Revenue from those falsely dated license agreements was then improperly recognized in the quarter just ended."); Stephen Taub, *Ex-CA Lawyer Gets Two Years*, CFO (Jan. 16, 2007), http://ww2.cfo.com/accounting-tax/2007/01/ex-ca-lawyer-gets-two-years/ ("In 1992, observed Newsday, Woghin was a 10-year veteran at the Department of Justice when he joined the software company previously known as Computer Associates. He allegedly headed up a team of CA lawyers that 'routinely' drafted software licensing contracts with clients after a quarter had closed, according to the newspaper.").

involved in designing the structures used to end-run those standards.[16] And lawyers stand at the very center of the process of deciding which disclosures will be made, and the language in which they will be couched, in public company reporting documents.

Of those lawyers, some may be natively corrupt, having no regard whatsoever for the ethics and legal principles of their profession, other than as to the likelihood of being uncovered and personally punished for misconduct. There will, however, be many others who would not have it that way, who would prefer to play by the legal rules in which they are expert and whose observance they have sworn to uphold, were it not for the omnipresent fear of retaliation. This second category consists of normal people, friends, colleagues, and neighbors, subjected to the tremendous stress and pressure of losing their jobs, their careers, their financial security, their houses, and possibly, as the personal repercussions of career catastrophe ripple outward, their families, if they do not "play ball" with others, hierarchically situated above them in the corporate structure, intent on pursuing a course of action which skirts or violates applicable law. They are those who on their own would not cheat but, in the white hot crucible of real world choices and real world consequences, at the end of the day are willing to do so, even if it involves mental evasion on their part as to the true character of their actions. And then, finally, is to be found a third category, namely those who refuse to engage in illegal conduct irrespective of reprisals they face as a consequence and the personal cost to be paid. While any simple taxonomy such as the foregoing must necessarily fail to do complete justice to the full variety of individual personalities, anyone with significant experience in the field will immediately recognize the fundamental archetypes described above.

The incentive structure of the first two categories, in particular the second category consisting of individuals who would not engage in illegal conduct but for the real, justified fear of retaliation, can be dramatically affected precisely by reducing that fear.

The general counsel ("GC") of a public corporation generally reports and is subordinate to the company's chief executive officer ("CEO"), chief financial officer ("CFO"), or other senior business officer.[17] The overall

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[16] For a detailed examination of the role of corporate lawyers in constructing and implementing such arrangements in one prominent case, see Milton C. Regan, *Teaching Enron*, 74 FORDHAM L. REV. 1139, 1140 (2005) ("The company created elaborate organizational structures, often with multiple layers of control, that were intended to use legal form to disguise economic substance.").

[17] Roughly a decade ago, the Association of Corporate Counsel ("ACC") (at the time still under the name American Corporate Counsel Association), Susan Hackett, *Inside Out: An Examination of Demographic Trends in the In-House Profession*, 44 ARIZ. L. REV. 609,

ethical tenor of the workplace depends directly on the character of those senior business officers. In good situations, the CEO and CFO, while naturally not overjoyed at being subject to burdensome government regulation in all its various guises, nonetheless consistently play within legal lines. In less fortunate cases, those officers routinely push at or over those lines. In extreme cases, a corporation may find itself saddled with senior business management set upon conscious, repeated, and material disregard for the law.

The CEO and, in other cases, the CFO have the practical ability to cost the GC his or her job. If a situation arises where those senior business officers are firmly intent upon illegal conduct but face a GC unwilling to execute upon or bless the intended course of action, they may outright terminate the recalcitrant counsel or, in the more subtle but equally effective manner of those sophisticated in the fine art of retaliation, verbally, or otherwise, signal that the GC's continued employment in that position is no longer desired.

609-10 (2002), the leading organization of in-house counsel in the United States, RICHARD H. WEISE, REPRESENTING THE CORPORATION: STRATEGIES FOR LEGAL COUNSEL, 2009-1 SUPPLEMENT IA-15 (2d ed. 2009), conducted "the first ever census of the American in-house legal profession." Hackett, *supra*, at 609-10. The survey is now updated annually. *See Legal Resources*, ASS'N OF CORP. COUNSEL, http://www.acc.com/legalresources/resourceCenter.cfm?rs_mtg=Surveys (last visited Feb. 9, 2014). Ms. Hackett, writing at the time as senior vice president and general counsel of the ACC, indicated that, based on the survey results:

> In the majority of cases (61.4%), the general counsel reports to the CEO of the organization. Slightly fewer than 30% of respondents said that the general counsel reports to either the president (15.3%) or another executive (12.7%). Approximately 7% of respondents indicated that the general counsel reports to the chief financial officer. . . . Reporting relationships are one of the fiercest issues faced by general counsel today . . . . Most general counsel closely guard their reporting relationship to the senior-most executive in the company. The hated and feared newest trend (often coming out of Europe, where it is more common) is the delegation of legal reporting to the CFO. . . . [T]he most frantic phone calls I receive are from general counsel who want information on whether there's an ethical or demographic prescript that they can use to argue against the assignment of their department's reporting to the CFO.

Hackett, *supra*, at 612.

In the Author's experience as a former big-firm partner who has worked as outside securities regulatory and corporate governance counsel with numerous public corporations, the reporting relationship of in-house general counsel has universally been to either the CEO or CFO. Nor is there any reason to expect that reporting by a general counsel to a president or chief operating officer who does not serve as CEO would raise ethical or relationship issues materially distinct from those faced in reporting to the CEO or CFO. For simplicity of exposition, the discussion in this article accordingly often refers simply to CEOs and CFOs, but the analysis should generally be considered to be equally applicable to reporting by in-house counsel to other senior business officers as well.

The corporation's board of directors will be informed, after a fashion, of the intended departure of the GC, and the board will be consulted, after a fashion, as to the CEO and CFO's pick for a successor GC. Yet, these internal corporate procedures for replacement of the GC are no more robust, and in many respects far less so, than those practiced prior to Sarbanes-Oxley and the new NYSE and Nasdaq corporate governance listing requirements with respect to replacement of a corporation's outside auditors. As Congress concluded with its passage of Sarbanes-Oxley, those auditor replacement procedures had proved endemically insufficient to prevent a corrupt CEO and CFO from using carrot and stick, the award of business and the threat of retaliation, from disciplining outside auditors in many cases to their will.[18] A fortiori the position and function of the GC can be corrupted through the threat of retaliation. A GC who contravenes their CEO and CFO on a course of action which the CEO and CFO intend with determination to carry through, will soon be looking, potentially desperately, for new employment. Nor are these grim realities limited solely to the GC. Corporate transactional and securities regulatory counsel, both in-house and at outside law firms, generally face the same potential retaliatory dynamic.

The critical reform effected by Sarbanes-Oxley and the new NYSE and Nasdaq corporate governance listing standards to prevent malfeasant management from corrupting the outside auditors was to require that hiring, firing, and compensation of outside auditors all be accomplished directly through the audit committee of the board of directors; that all audit and non-audit work awarded to the auditors be preapproved by the audit committee; and that the audit committee consist solely of outside directors, strictly independent from and free of the carrot and stick discipline of the CEO and CFO.[19] This simple expedient has effected a sea change in the relationship between outside auditors and the senior officers of public corporations in the United States, markedly enhancing the independence of

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[18] See, e.g., the Senate Banking Committee's provision-by-provision explanation of the rationale behind the various corporate governance reforms of Sarbanes-Oxley, including specifically the requirement that the audit committee have sole responsibility for hiring and firing the outside auditors. S. REP. NO. 107-205, at 23 (2002) ("A. Issuer audit committees. Oversight of Auditors. Witnesses at the Committee's hearings suggested that the auditing process may be compromised when auditors view their main responsibility as serving the company's management rather than its full board of directors or its audit committee. For this reason, the bill requires audit committees to be directly responsible for the appointment, compensation, and oversight of the work of auditors, and requires auditors to report directly to the audit committee. Many witnesses testified as to the importance of these provisions. In particular, witnesses believed that the hiring and firing of the auditor should be the exclusive province of the audit committee.").

[19] *See* discussion *infra* Part V.A.

judgment and communication essential to the effective monitoring of reported financial results by outside auditors.

Yet, enhancing the independence of outside auditors represents but one, admittedly vital, component of the reporting and governance compliance story. The other component of central importance—practical independence of the GC and other corporate transactional and securities regulatory counsel, which hinges directly upon freedom from the threat of retaliation—remains to date unaddressed.

Achieving structural protection from retaliation for the GC and such other counsel would be no more complex than the central step taken by Sarbanes-Oxley to protect outside auditors: require that hiring, firing, or materially altering the compensation of a public corporation's GC and other lead corporate transactional and securities regulatory counsel be formally approved by the audit committee of the board of directors.

With an audit committee approval requirement, no longer could a corrupt CEO and CFO short circuit the company's legal function through retaliation, without independent eyes being brought to bear on the subject. In today's enforcement climate, members of the audit committee will be loath to sign off on such a replacement of counsel without first hearing from the other side, without first having comfort that the termination of the GC or other corporate transactional and securities regulatory counsel is not for refusing to participate in, condone, or through nondisclosure, conceal, illegal acts.

If our society chooses to, through one of several avenues, by means of the simple expedient outlined above, institute widespread protection for the corporate counsel of public companies from retaliation for refusal to engage in illegal conduct, the practical ability of a corrupt CEO and CFO to impose their will on the structuring of a company's transactions and the reporting thereof in public filings with the Securities and Exchange Commission would decline precipitously. Many major, sophisticated frauds, which might otherwise occur, would never get off the ground if a truly independent GC and other corporate counsel were unwilling either to assist in the fraud, to turn a blind eye, or to warp and twist their legal advice to bless that which does not, objectively, work legally.

Effective means to prevent many of the worst corporate frauds is in turn, the essential political precondition for Congress to reconsider the wisdom of the path it is following toward ever greater criminalization of business law. Our penalty structure has already attained stratospheric altitude. The substantive white collar criminal law erected by Congress sweeps well beyond the financial markets into all aspects of a modern society whose logistical lifeblood is communication and documentation. Hypercriminalization threatens to affect our society in myriad ways, many

as yet dimly foreseen, for generations to come. It is not too late to turn back, or at least to remove our foot from the legislative accelerator.

Part II of this article focuses on the provisions of Sarbanes-Oxley and Dodd-Frank, which promise to radically expand white collar criminal liability over time, and their potential broader long-term ramifications for American society.

Part III turns to the central role played by lawyers not only in the public reporting process, but also in structuring and "papering" the myriad corporate transactions which form the basis for much substance of the financial statements examined by the outside auditors. This part considers the issue of whether, as a consequence corporate counsel is willing to play a corrupt game in conjunction with senior business management, there may be inadequate security against major fraud or misreporting even following the reforms effected by Sarbanes-Oxley.

Part IV examines existing whistleblower protections and discusses the reasons why, although helpful in certain respects, they will often prove insufficient to shield individuals from many forms of retaliation, particularly, retaliation as practiced by a supervisor with a modicum of social intelligence and finesse.

Part V reviews Sarbanes-Oxley's effective means for protecting outside auditors from retaliation and how such protection might be extended to a public corporation's legal function. Recognition and respect will be paid to the isolated voices of those who in recent years have likewise raised the call for reform along these lines, thus beginning the policy debate. Much work remains to be done, however, to refine the concept with precision and craft means for effective implementation. This article undertakes that task. The article both delineates clearly which lawyers should be protected from retaliation, and recommends that a new "antiretaliation clause" be adopted by the NYSE and Nasdaq as an amendment to their respective corporate governance listing standards. The actual text of the proposed amendments to those listing standards is laid out in a form that could be adopted as written.

Part VI discusses alternative structures that might be employed to ensure the fidelity with which the corporate transactional and securities regulatory function is exercised within public corporations, specifically either external or internal legal audit to complement the existing financial audit.

Part VII explores certain important countervailing considerations and arguments. Refutation, however, is offered as to a recent certain scholarly contribution to the debate addressed in this article on grounds that that contribution fails to recognize and give due weight to the tremendous practical pressures to which counsel are subject in actual, real world

situations. The foundation of any sensible policy in this regard must be founded upon such recognition.

Most importantly, this article acknowledges significant concerns and countervailing considerations in connection with the reform proposed here, yet argues that the danger posed by ever increasing criminalization in the white collar sphere potentially outweighs those considerations. The heart of this piece is its emphasis on the interrelation and potential tradeoff between protection of disclosure counsel from retaliation and the ever upward spiral of white collar criminalization.

The article then concludes.

II. THE DAWN OF A NEW ERA IN WHITE COLLAR CRIMINAL ENFORCEMENT

For good or ill, it has been inevitable that the rise of the administrative state over the past century and a half has been accompanied by governmental efforts to ensure the efficacy of its regulatory measures through implementation of a penalty structure for noncompliance, both civil and criminal.

In the United States, we have witnessed an explosion of regulatory provisions backed by criminal sanctions at both the state and federal levels. In particular since the New Deal, federal criminal provisions have proliferated massively.[20] Moreover, the federal government has

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[20] For review of the historical record regarding the marked increase in the number of federal criminal provisions, see, for example, William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514-15, 515 n.34 (2001); Kathleen F. Brickey, *Criminal Mischief: The Federalization of American Criminal Law*, 46 HASTINGS L.J. 1135, 1144 (1995).

This increase in the number of federal criminal provisions, as well as the scope and mens rea requirements thereof, has brought together concerned public interest groups from across the political spectrum, including the American Bar Association, the American Civil Liberties Union, the Cato Institute, the Heritage Foundation, and the National Association of Criminal Defense Attorneys. *See Reining in Overcriminalization: Assessing the Problem, Proposing Solutions: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. 6 (2010) (statement of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary).

As a result of criminal provisions appearing in scattered sections of the U.S. Code, and as a result of interpretive issues regarding the correct methodology for counting complex, multipronged criminal provisions, the precise number of such provisions has been the subject of various estimates and learned discussion. A frequently cited ballpark estimate is that there are currently more than 4,000 federal criminal provisions, and the number grows larger every year. *See, e.g.*, JOHN S. BAKER, REVISITING THE EXPLOSIVE GROWTH OF FEDERAL CRIMES (2008), *available at* http://www.heritage.org/research/reports/2008/06/revisiting-the-explosive-growth-of-federal-crimes; Gary Fields & John R. Emshwiller, *As*

deliberately crafted criminal provisions designed to serve as prosecutorial weapons of tremendous scope and breadth. 18 U.S.C. § 1001, commonly referred to as the Federal False Statements Act ("Section 1001"), is a cardinal case in point, generally criminalizing false statements to federal government officers in any matter within the jurisdiction of the federal government.[21]

Section 1001 is illustrative of the manner in which a simple, broad criminal provision, subject to little or no constraint upon its application on the face of the statute, can over time metastasize outward from its point of legislative origin, reaching into myriad aspects of modern society. From its Civil War inception as part of a prohibition on false claims against the federal government, the provision which would eventually be codified as standalone Section 1001 was broadened in 1934 to give teeth to the enforcement of New Deal economic regulation by punishing misreporting of information to public agencies even where there was no intent to obtain

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Criminal Laws Proliferate, More Are Ensnared, WALL. ST. J. (July 23, 2011), http://online.wsj.com/news/articles/SB10001424052748703749504576172714184601654 (citing to Baker study). In the early 1980s, a study by the Department of Justice concluded that there were approximately 3,000 federal crimes at that time. *See* Ronald L. Gainer, *Federal Criminal Code Reform: Past and Future,* 2 BUFF. CRIM. L. REV. 45, 54 (1998).

For further discussion of the increasing federalization of criminal law, see, for example, J. Richard Broughton, *Congressional Inquiry and the Federal Criminal Law,* 46 U. RICH. L. REV. 457 (2012); John S. Baker, Jr., *Jurisdictional and Separation of Powers Strategies to Limit the Expansion of Federal Crimes,* 54 AM. U. L. REV. 545 (2005); Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization,* 54 AM. U. L. REV. 747 (2005); Erik Luna, *The Overcriminalization Phenomenon,* 54 AM. U. L. REV. 703 (2005); Ellen S. Podgor, *Jose Padilla and Martha Stewart: Who Should Be Charged with Criminal Conduct?,* 109 PENN. ST. L. REV. 1059 (2005).

[21] 18 U.S.C. § 1001 (2006). For excellent summaries of the scope of 18 U.S.C. § 1001 and some of its practical implications, see Andrea C. Halverson & Eric D. Olson, *False Statements and False Claims,* 46 AM. CRIM. L. REV. 555, 557-73 (2009); Steven R. Morrison, *When Is Lying Illegal? When Should It Be? A Critical Analysis of the Federal False Statements Act,* 43 J. MARSHALL L. REV. 111 (2009); Geraldine Szott Moohr, *What the Martha Stewart Case Tells Us About White Collar Criminal Law,* 43 HOUS. L. REV. 591 (2006).

18 U.S.C. § 1001 reads in part: "(a) [w]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully . . . (2) makes any materially false, fictitious or fraudulent statement or representation . . . shall be . . . imprisoned not more than 5 years . . . ." 18 U.S.C. § 1001(a)(2) (2006).

"Section 1001 of Title 18 of the U.S. Code is a broad and frequently used statute that criminalizes the act of making false statements to the United States government. . . . [I]t is used frequently because of the comparative malleability of its elements." Halverson & Olson, *supra,* at 557.

money or property from the federal government.[22] Yet today, Section 1001 is used by federal authorities across the prosecutorial map, from cases involving false statements to Securities Exchange Commission ("SEC") investigators,[23] to immigration[24] and customs[25] authorities, to park rangers,[26] and to other agencies of the federal government,[27] as well as a host of cases against figures in high political office.[28] Once set into the statutory wild, a provision such as Section 1001 can and will be used wherever prosecutors perceive misconduct and the possibility of successful application.

Nor is Section 1001 alone in this respect. The federal mail[29] and wire fraud[30] provisions are similarly broad, generally prohibiting false statements with intent to defraud in effectively every mode of communication from one person to another, save direct, face-to-face speech.[31] Like Section 1001, the mail and wire fraud provisions are workhorses of the federal prosecutorial bar.[32]

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[22] *See, e.g.*, Morrison, *supra* note 21, at 125-27.

[23] *See, e.g.*, United States v. Stewart, 433 F.3d 273, 318-19 (2d Cir. 2006). 18 U.S.C. § 1001 is a standard tool used in connection with joint investigations by the SEC and the Department of Justice, where someone who is under investigation with respect to possible violations of the securities laws is found to have made false statements to investigators. *Id.*

[24] *See, e.g.*, United States v. Popow, 821 F.2d 483, 487 (8th Cir. 1987).

[25] *See, e.g.*, United States v. Grotke, 702 F.2d 49, 53-54 (2d Cir. 1983).

[26] *See, e.g.*, United States v. Snider, 976 F.2d 1249, 1251 (9th Cir. 1992).

[27] *See, e.g.*, United States v. Hausmann, 711 F.2d 615, 616 (5th Cir. 1983).

[28] *See, e.g.*, United States v. Poindexter, 951 F.2d 369, 387 (D.C. Cir. 1991); United States v. Stevens, Crim. No. 08-231(EGS), 2008 WL 8743218, *1 (D.D.C. Dec. 19, 2008); United States v. Cisneros, 26 F. Supp. 2d 24, 36-38 (D.D.C. 1998).

[29] 18 U.S.C. § 1341 (2006).

[30] *Id.* § 1343.

[31] The wire fraud provision reads in major part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits . . . by means of wire . . . in interstate or foreign commerce, any writings . . . or sounds for the purpose of executing such scheme or artifice, shall be . . . imprisoned not more than 20 years . . . . If the violation . . . affects a financial institution, such person shall be . . . imprisoned not more than 30 years . . . .

18 U.S.C. § 1343.

For a discussion of the scope and breadth of the mail and wire fraud statutes, see William M. Sloan, *Mail and Wire Fraud*, 48 AM. CRIM. L. REV. 905 (2011).

[32] Jack E. Robinson, *The Federal Mail and Wire Fraud Statutes: Correct Standards for Determining Jurisdiction and Venue*, 44 WILLAMETTE L. REV. 479, 479 (2008) ("The federal mail and wire fraud statutes, particularly since their amendment in 2002, have become the most prevalent and lethal weapon in the federal prosecutor's arsenal in the post-Enron and Worldcom efforts of the United States Department of Justice (DOJ) to be tough on white-collar and financial crimes.").

A. The Radical Criminal Penalty Provisions of Sarbanes-Oxley

Into this line of development stepped Sarbanes-Oxley, with bold stride. Intended to fundamentally recast the white collar landscape in a more punitive mode, the act introduced several new serious felony provisions and radically jacked up the penalties associated with others of long standing. It is difficult to appreciate just how severe the new regime was designed to be without briefly considering the full scope of that wrought by Congress.

First, as to preexisting felony provisions, the act literally quadrupled the penalty for mail and wire fraud, from five years to twenty years.[33] These are statutory provisions brought into play day-in and day-out in white collar prosecutions. With a simple stroke of the pen, Congress thus radically increased the potential penalties for white collar crime across the board. Moreover, this sharp hike in penalties is particularly significant in view of the fact that mail and wire fraud are not limited to the public company securities context, but rather are tools of general application.

The act raised the penalty for Employee Retirement Income Security Act ("ERISA") fraud from one year up to now ten years,[34] and the penalty for willfully violating the Securities Exchange Act of 1934 or any SEC rule thereunder from ten years up to now twenty years.[35] It also provided that attempts and conspiracies would be punishable to the same extent as the underlying offense.[36] Further, multiple sections of the act called for the Federal Sentencing Guidelines to markedly increase the penalties for white collar crime.[37]

For a particularly colorful and memorable description of the centrality of the mail and wire fraud statutes to the federal prosecutor's toolkit, see Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 DUQ. L. REV. 771, 771 (1980). ("To federal prosecutors of white collar crime, the mail fraud statute is our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart – and our true love. We may flirt with RICO, show off with 10b-5, and call the conspiracy law 'darling,' but we always come home to the virtues of 18 U.S.C. § 1341, with its simplicity, adaptability, and comfortable familiarity. It understands us and, like many a foolish spouse, we like to think we understand it.").

[33] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 903, 116 Stat. 745, 805 (2002).

[34] *Id.* § 904, 83 Stat. at 805.

[35] *Id.* § 1106, 83 Stat. at 810.

[36] *Id.* § 902, 116 Stat. at 805 (codified at 18 U.S.C. § 1349 (2006)).

[37] *Id.* §§ 805, 905, 1104, 116 Stat. at 802, 805, 808. It should be noted in this context, that several years later the Supreme Court in United States v. Booker, 543 U.S. 220, 245 (2005), declared the Federal Sentencing Guidelines to be advisory rather than mandatory in nature, though they remain a significant and influential factor in the sentencing process. *See, e.g.*, William K. Sessions III, *Federal Sentencing Policy: Changes Since the Sentencing Reform Act of 1984 and the Evolving Role of the United States Sentencing Commission*, 2012 WIS. L. REV. 85, 100 ("Even when judges depart from guideline ranges, the average length of those adjustments has remained consistent and relatively modest. Essentially, then,

Second, the act created multiple new, sharp-toothed felony provisions. In the public company securities context, the act created a new twenty-five-year felony provision for defrauding "any person in connection with any security" of a public reporting issuer.[38] This new securities fraud provision notably omits the otherwise familiar Rule 10b-5 requirement that fraud occur in connection with "purchase or sale" of a security,[39] and was deliberately worded by Congress simply and broadly to provide ease of prosecution.[40] The act also requires CEOs and CFOs to certify public company reports on, generally, a quarterly basis, backed up by a twenty-year felony for willfully certifying compliance knowing that the report so certified does not satisfy all applicable SEC requirements.[41]

Beyond the public company securities context, the act created a new ten-year felony provision for retaliating against any person for providing information to law enforcement officers.[42] Most significantly, in response to the massive document shredding undertaken by Arthur Andersen in connection with the Enron debacle,[43] Congress crafted a new twenty-year felony provision[44] specifically designed to legislatively short circuit case law limits imposed by courts on existing obstruction of justice statutes, in

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the guidelines have become accepted as part of the culture of the federal criminal justice system.").

[38] Sarbanes-Oxley Act § 807, 116 Stat. at 804 (codified at 18 U.S.C. § 1348 (2012)).

[39] *See id.* SEC Rule 10b-5 prohibits the employment of manipulation and deceptive devices "in connection with the purchase or sale of any security." 17 C.F.R. § 240.10b-5 (2012).

[40] A central component of the legislative history of Sarbanes-Oxley is the unanimous favorable report of the Senate Judiciary Committee on The Corporate and Criminal Fraud Accountability Act of 2002, whose bill contained the various criminal provisions later appearing in the final Sarbanes-Oxley statute as enacted. S. REP. NO. 107-146, at 33 (2002). With respect to the new 25-year securities fraud felony provision, codified at 18 U.S.C. § 1348, the Senate Judiciary Committee wrote: "The provision should not be read to require proof of technical elements from the securities laws, and is intended to provide needed enforcement flexibility . . . . [N]ew § 1348 will be more accessible to investigators and prosecutors . . . ." *Id.* at 20.

[41] Sarbanes-Oxley Act § 906, 116 Stat. at 806. Similar quarterly certification requirements also now exist pursuant to Sarbanes-Oxley section 302 and SEC implementing regulations thereunder. *Id.* § 302, 116 Stat. at 777.

[42] *Id.* § 1107, 116 Stat. at 810.

[43] *See* S. Rep. No. 107-146, at 2 (discussing the Enron debacle as the impetus for the legislation).

[44] Sarbanes-Oxley Act § 802, 116 Stat. 800-01. Section 802 also creates a lesser, ten-year felony provision for destroying corporate audit and review workpapers. *Id.* (codified at 18 U.S.C. § 1520(b) (2006)). In addition to section 802, the statute in section 1102 amended 18 U.S.C. § 1512 to create a twenty-year felony for tampering with evidence. *Id.* § 1102, 116 Stat. 807 (codified at 18 U.S.C. § 1512(c)).

order to permit the prosecution of what is sometimes referred to as "anticipatory obstruction."[45]

Much like Section 1001, this new provision ("Section 1519"), codified at 18 U.S.C. § 1519, has extraordinarily broad reach. It criminalizes, inter alia, the act of altering, destroying or making a false entry (i.e., any false statement or false information) in any record, document or tangible object (including, of course, all written documents, computer files, emails, etc.) with the intent to influence the "proper administration of any matter within the jurisdiction of any department or agency" of the federal government, or "in relation to or contemplation of any such matter . . . ."[46] Both the wording of the statute as well as the legislative history make clear that Congress intended Section 1519 to cover acts occurring before any federal investigation or proceeding had been initiated, in other words, anticipatory obstruction.[47] The act of deleting a "bad" email, in order that it not, some day long in the future, be discovered and used against one in an investigation, would now appear to constitute a twenty-year felony. This is a major departure from preexisting American law with respect to obstruction of justice.[48] It is worth noting, moreover, that since nearly

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[45] *See* Dana E. Hill, *Anticipatory Obstruction of Justice: Pre-emptive Document Destruction Under The Sarbanes-Oxley Anti-Shredding Statute, 18 U.S.C. § 1519*, 89 CORNELL L. REV. 1519 (2004) (discussing the law before Sarbanes-Oxley, the cases that shaped the doctrine, the legislative history, and the expansive reading of § 1519).

[46] 18 U.S.C. § 1519 (2006). Sarbanes-Oxley section 802 reads, in relevant part:

> § 1519. Destruction, alteration, or falsification of records in Federal investigations and bankruptcy[:]
>
> Whoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States or any case filed under title 11, or in relation to or contemplation of any such matter or case, shall be fined under this title, imprisoned not more than 20 years, or both . . . .

Sarbanes-Oxley Act § 802, 116 Stat. at 800.

[47] The Senate Judiciary Committee report specifically addressed this point several times. For example, referring to 18 U.S.C. § 1519 as "a new general anti-shredding provision," the report states:

> Section 1519 is meant to apply broadly to any acts to destroy or fabricate physical evidence . . . . *[T]his statute is specifically meant not to include any technical requirement*, which some courts have read into other obstruction of justice statutes, *to tie the obstructive conduct to a pending or imminent proceeding or matter*. . . . [I]t also extends to acts done in contemplation of such federal matters, so that *the timing of the act* in relation to the beginning of the matter or investigation *is also not a bar to prosecution. The intent of the provision is simple; people should not be destroying, altering, or falsifying documents to obstruct any government function.*"

S. REP. NO. 107-146, at 14-15 (emphasis added).

[48] As to Congress' explicit intent legislatively to override long-established obstruction of

every conceivable business activity involves the creation of written documentation in either paper or electronic format, and bears ramifications, which may be viewed as affecting the "proper administration" of matters falling within the broad jurisdiction of one or another federal agency, Section 1519 criminalizes, at a very high level of potential liability, the creation at any time of effectively any false written statement in the business setting.

Nor is Section 1519 limited to the business setting. Like Section 1001, Section 1519 is a law of general application, not limited in any way, shape or form to the public company securities context from which it sprang. In its relatively short lifespan, Section 1519 has already been applied to the destruction of evidence or, especially, the making of false entries in cases involving child pornography,[49] after-action or other reports by law enforcement personnel,[50] patient records,[51] computer hacking,[52] and tax returns.[53] Ultimately, Section 1519 can and will be applied in innumerable different contexts throughout American life.

B. Reckless Aiding and Abetting Under Dodd-Frank

In a similar vein, in 2010, Congress, in Dodd-Frank, reached out to ensure that not just the principal behind the commission of a white collar securities law offense is subject to the full weight of criminal penalty, but also all those others who stand too close to the flame.[54] Among its voluminous pages, Dodd-Frank, in three short sections, amended the major securities laws to make clear that aiding and abetting a violation under those laws, the threshold for which is rendering "substantial assistance" to

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justice caselaw precedent in this respect, see *id.*

[49] *See, e.g.*, United States v. Wortman, 488 F.3d 752, 753-54 (7th Cir. 2007) (destruction of CD containing child pornography in order that it not be discovered during an investigation by the FBI).

[50] *See, e.g.*, United States v. Fontenot, 611 F.3d 734, 735-36 (11th Cir. 2010) (false entry in use of force report by corrections officer); United States v. Hunt, 526 F.3d 739, 741-42 (11th Cir. 2008) (false entry in incident report by police officer); United States v. Jensen, 248 F. App'x 849, 850 (10th Cir. 2007) (false entry in report regarding inmate's urinalysis results).

[51] *See* United States v. Hoffman-Vaile, 568 F.3d 1335, 1138-40 (11th Cir. 2009) (altering patient records in connection with investigation into Medicare fraud).

[52] *See* United States v. Kernell, 667 F.3d 746, 748-49 (6th Cir.) (deletion of information from computer in connection with FBI hacking investigation), *cert. denied*, 133 S. Ct. 259 (2012).

[53] *See* United States v. Hyatt, 369 F. App'x 48, 49 (11th Cir. 2010) (failure to report gambling winnings on tax return).

[54] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929M(b), 124 Stat. 1376, 1861 (2010).

the principal violator, is punishable to the same extent as the underlying offense;[55] and that one need not "knowingly" have aided and abetted, but rather need only have "recklessly" aided and abetted, in order to trigger criminal liability.[56] In one sense, these Dodd-Frank provisions are merely incremental—aiding and abetting liability already existed prior to the Act under Section 20(e) of the Securities Exchange Act of 1934 ("'34 Act"),[57] and certain courts had taken the position that the earlier "knowingly" standard in aiding and abetting cases could be satisfied by recklessness.[58] Yet, extension of the concept of aiding and abetting liability across the securities law spectrum, and clear and uniform application of a recklessness rather than a higher mens rea standard, is of some import as a practical matter, because recklessness can easily be viewed as little more than an aggravated or extreme form of negligence—it is often satisfied by ignoring "red flags" in connection with, or deliberately turning a blind eye to the misconduct of others.[59] That is, even a person who was not the primary

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[55] *Id.* §§ 929M-929N, 124 Stat. at 1861-62 (codified at 15 U.S.C. 77o(b) (2012) (§ 929M), 15 U.S.C. 80b-9 (2012) (§ 929N)).

[56] *Id.* § 9290, 124 Stat. at 1862 (codified at 15 U.S.C. § 78t(e) (2012)).

[57] Securities Exchange Act of 1934, Pub. L. No. 73-291, ch. 404, 48 Stat. 881 (1934) (codified as amended at 15 U.S.C. §§ 78a-78kk (1988)).

[58] It has long been established at the circuit court level that recklessness is sufficient to establish primary liability under Section 10(b) of the '34 Act. *See, e.g.*, Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308, 319 n.3 (2007) ("Every Court of Appeals that has considered the issue has held that a plaintiff may meet the scienter requirement by showing that the defendant acted intentionally or recklessly, though the Circuits differ on the degree of recklessness required."). However, as to the requisite level of mens rea to establish aiding and abetting, compare the language of Graham v. SEC, 222 F.3d 994, 1000 (D.C. Cir. 2000) (aiding and abetting liability under the '34 Act requires "that the aider and abettor had the necessary 'scienter'—i.e., that she rendered such assistance knowingly or recklessly."), with that in SEC v. Fehn, 97 F.3d 1276, 1288 (9th Cir. 1996) (concluding that aiding and abetting liability under the '34 Act required "actual knowledge by the alleged aider and abettor of the primary violation and of his or her own role in furthering it;" and that such knowledge requirement was satisfied in the instant case), and in SEC v. KPMG LLP, 412 F. Supp. 2d 349, 382 (S.D.N.Y. 2006) ("The legal standard for aiding and abetting liability under Exchange Act Section 20(e) . . . . [T]he SEC argues that Section 20(e) encompasses recklessness in addition to actual knowledge. This contention must be rejected.").

[59] The Model Penal Code defines recklessness and negligence in a manner which illustrates the close connection between the two. "A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct." MODEL PENAL CODE § 2.02(c) (1962). "A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct." *Id.* § 2.02(d). Similarly, recklessness involves a "gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation," *id.* § 2.02(c), while negligence involves a "gross deviation from the

malfeasor may be held criminally liable for failing to increase their level of diligence and care above ordinary levels in situations where circumstances should have put them on notice as to potential misconduct by others.

These provisions are quite obviously intended to embrace within the class of the potentially liable all those professionals who help to structure and implement or advise in connection with transactions or public reports. That is, lawyers. But the arc of potential liability swings far beyond corporate and securities attorneys. It is clear that all those persons, whether attorneys or not, standing or operating in the penumbra around a principal securities law malfeasor may themselves become targets, if they can be viewed as having rendered substantial assistance.[60] This is because persons who become involved with or even merely observe misconduct by a principal malfeasor, through this proximity alone, acquire knowledge, either direct or indirect, of greater or lesser specificity, which contaminates them. In order to avoid liability for aiding and abetting, a person whose own activities are connected closely enough with those of the principal malfeasor to satisfy substantial assistance faces the practical choice of either stopping the violation (often not possible in an organizational sense, and quite possibly at the cost of one's employment), resigning their position (thus certainly at the cost of one's employment), or informing the federal government.[61] This is a high bar to meet. Many will try to find a way to avoid incurring one of these grim consequences.

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standard of care that a reasonable person would observe in the actor's situation." *Id.* § 2.02(d).

Conscious disregard is, of course, rarely easy to demonstrate through direct evidence of a defendant's state of mind. Instead, the requisite state of mind is often inferred from objective circumstances relevant to the conduct. *Cf.* Redman v. Cnty. of San Diego, 942 F.2d 1435, 1450 (9th Cir. 1991) (stating that analysis of the surrounding circumstances is required because defendants rarely admit to "an awareness and conscious disregard of a risk"). The very same types of factors which can lead to a finding of negligence can often, in more aggravated form, lead to a finding of recklessness. For detailed discussion in this respect, see Edwin H. Byrd III, *Reflections on Willful, Wanton, Reckless, and Gross Negligence*, 48 LA. L. REV. 1383, 1396 (1988) ("The knowledge of the risk element is used . . . to distinguish the more culpable state of mind that has been said to accompany recklessness from ordinary negligence. Yet because the knowledge is inferred from the conduct, and presumed to accompany highly unreasoanable [sic] conduct, the analysis is not of the actor's state of mind at all but merely disguises the analysis that courts are really undertaking.").

[60] *See* Dodd-Frank Wall Street Reform and Consumer Protection Act, §§ 929M-929N, 124 Stat. at 1861-62 (codified at 15 U.S.C. 77o(b) (2012) (§ 929M), 15 U.S.C. 80b-9 (2012) (§ 929N)).

[61] If one is unable to stop the conduct through internal organizational activism or through becoming a formal whistleblower and informing the federal government, there exists at that juncture no remaining alternative but to resign one's position. This is a view

We have, as a society, thus shifted our system of criminal law a small but tangible increment in the direction of collective liability. Further, those now at risk of being swept into the investigation and prosecution of securities law violations may not be entirely innocent, but neither do they necessarily bear much resemblance to the archetypal principal architects of major fraud. We have come a step closer to declaring the conduct of normal people, of admittedly not stellar but rather normal ethical constitution, engaged in normal business activity in an admittedly messy and imperfect world, to be potentially subject to criminal sanction. That is not a healthy state of affairs for any society.

Although the rapid multiplication of federal criminal provisions has been in full swing for many decades now, the changes cumulatively effected by Sarbanes-Oxley and Dodd-Frank—the overnight quadrupling of penalties under the all-purpose and omnipresent mail and wire fraud statutes, the introduction of a new twenty-year anticipatory obstruction provision of likewise general application, the extension of liability under all the major securities laws to reckless aiders and abettors, and the sharpening of white collar penalties under the federal sentencing guidelines—stand out in historical profile.[62]

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commonly articulated and stressed by government enforcement officials as well as required by professional ethics rules. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.16 (2011) ("[A] lawyer . . . shall withdraw from the representation of a client if . . . the representation will result in violation of . . . law . . . .").

[62] *See* discussion *supra* Part II.A. The recent case of John Farahi and David Tamman provides an example of the type of potential criminal penalties prosecutors may now bring to bear in the post-Sarbanes-Oxley environment. Donnel v. Nixon Peabody LLP, No. CV-12-04084DDP(JEMx), 2012 WL 3839402 (C.D. Cal. Sept. 5, 2012).

Farahi ran an investment firm in Southern California. *See* Stuart Pfeifer, *L.A. Radio Host John Farahi is Accused of Swindling Investors*, L.A. TIMES (Jan. 12, 2010), http://articles.latimes.com/2010/jan/12/business/la-fi-iran-scam12-2010jan12. In short, he both converted investor funds to personal use and conducted high-risk trading strategies at odds with what had been disclosed to investors. *See id.* The SEC commenced an investigation. *Donnel*, 2012 WL 3839402, at *3. Tamman, outside counsel to Farahi's firm, assisted Farahi in obstructing the SEC's investigation through the creation of backdated disclosure documents. *Id.* at *3.

Farahi was ultimately charged by the Department of Justice with forty separate counts, including multiple counts of mail and wire fraud (18 U.S.C. §§ 1341, 1343), obstruction (18 U.S.C. § 1512(c)), altering documents (18 U.S.C. § 1519), and falsifying, concealing and covering up a material fact (18 U.S.C. § 1001), carrying a combined statutory maximum penalty of 717 years in prison. *See* Press Release, Fed. Bureau. of Investigation, Former Fund Manager Indicted on Federal Charges of Bilking Primarily Persian Investors and Banks Out of at Least $20 Million (Dec. 8, 2011), *available at* http://www.fbi.gov/losangeles/press-releases/2011/former-fund-manager-indicted-on-federal-charges-of-bilking-primarily-persian-investors-and-banks-out-of-at-least-20-million [hereinafter Indictment Press Release].

C. The Dangers of Hypercriminalization

The principal reasons we should care about these developments are that they are of a magnitude and scope which begin to raise genuine long-term concerns about the character of American society and the texture of life therein. It is often said that there is very little crime in Saudi Arabia by virtue of the fact that theft is punished by cutting off the perpetrator's hand.[63] But is that the kind of society in which one wants to live? Do we

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Farahi ultimately agreed to plead guilty to four of the forty charges in exchange for the prosecutors agreeing not to ask for more than ten years in prison. *See* Press Release, U.S. Dep't of Justice, Former Fund Manager Pleads Guilty In Investment Fraud And Obstruction Case In Which Losses May Exceed $20 Million (June 7, 2012), *available at* http://www.justice.gov/usao/cac/Pressroom/2012/076.html.

Ten years is, of course, a significant number in this context, as prisoners sentenced to more than ten years are generally ineligible for minimum security "Club Fed" facilities, being placed instead into the general federal prison population. There is no parole in the federal prison system. *See, e.g.*, UNITED STATES COURTS, PAROLE IN THE FEDERAL PROBATION SYSTEM, THE THIRD BRANCH NEWS (May 2011), http://www.uscourts.gov/news/TheThird Branch/11-05-01/Parole_in_the_Federal_Probation_System.aspx (under the Sentencing Reform Act, federal civilian defendants sentenced for offenses committed after Nov. 1, 1987 are no longer eligible for parole; the only exceptions are for grandfather provision, violations of District of Columbia law, military offenders, and foreign transfer treaty cases).

Tamman, as outside counsel, was likewise indicted, in his case on ten counts, five of which were for altering documents (18 U.S.C. § 1519), carrying a combined statutory maximum penalty of 190 years in prison. *See* Indictment Press Release, *supra*. Tamman declined to plead guilty, choosing instead to fight the charges in court. He was convicted on all ten counts. *See* Press Release, U.S. Dep't of Justice, Attorney Who Twice Helped Obstruct Investigations Into $22 Million Ponzi Scheme Sentenced to Seven Years in Federal Prison (Sept. 23, 2013), *available at* http://www.justice.gov/usao/cac/Pressroom/2013/117.html.

None of this is related to contest the guilt of those charged or the appropriateness of criminal liability for the charged misconduct, but rather solely to illustrate the quite extraordinary level of potential penalties which now apply and the tremendous pressure to plead guilty which such potential penalties may exert upon those charged in order to achieve a negotiated level of penalty rather than facing the full statutory maximum.

Other recent examples of penalties of this magnitude include those handed down to Allen Stanford, sentenced to 110 years in connection with long-running Ponzi schemes, and Russell Wasendorf, Sr., sentenced to 50 years. *See* Jacob Bunge, *Peregrine Founder Hit With 50 Years*, WALL ST. J., Feb. 1, 2013, at C1. With no parole in the federal system, these sentences are equivalent to life without possibility of parole, the most serious punishment in the U.S. legal system, short of the death penalty.

[63] *See, e.g.*, Newsweek Staff, *The World's Most Barbaric Punishments*, NEWSWEEK (July 8, 2010, 8:00 PM), http://www.newsweek.com/worlds-most-barbaric-punishments-74537. For even more severe punishment, see, e.g., Saad Abedine, *Saudi Arabia Beheads Men for Stealing*, CNN (Mar. 13, 2013, 7:59 PM), http://www.cnn.com/2013/03/13/world/meast/saudi-executions-beheading/ (based on information provided by SPA, the official

really want to rely upon fear to such an extent? Are there alternative ways of structuring incentives to influence personal behavior?

In addition to the tremendous personal disutility occasioned by pervasive fear, consideration is due the risk that federal prosecutors may over time, wielding an ever more powerful array of criminal statutes covering an ever broader field of human activity and an ever greater swath of ordinary society, begin to apply the destructive power inherent in their prosecutorial discretion in a manner politically or personally influenced. Persons not in favor with those entrusted with prosecutorial discretion might expect little lenity; those others who do enjoy such favor would simply not be prosecuted, for reasons never articulated, investigated, or flushed into the light of day.

U.S. Attorneys are appointed by the President with the advice and consent of the Senate, and serve at the pleasure of the President.[64] Moreover, Washington is a town of revolving doors.[65] Careers are long and go through many changes of position, both within government and between government and private practice.[66] People keep score of who their friends are and who is on the other side. A person serving as U.S. Attorney is likely to have obtained that position through political connections and know that remaining in the good graces of their political allies is absolutely essential to their own future employment prospects over the course of the years. The potential for politically motivated decisions to prosecute or not to prosecute is manifest. To the extent such calculations do enter into the prosecutorial equation, and to the extent federal prosecutors, through the ongoing expansion of broad white collar criminal provisions, begin to acquire enhanced and highly flexible technical means to target disfavored individuals, the avoidance of criminal sanction would come to depend to an ever greater degree upon how many powerful friends one has in Washington. Such a development, were it to come to pass, would be corrosive to the fundamental social contract upon which constitutional democracy relies. We must strive to avoid establishing criminal sanctions so broad and punitive that they enable whichever side of the political spectrum currently holds the levers of power to pursue its political enemies through use of the criminal justice system.

Nor should it be expected that the judicial system will act as a significant brake upon the legislative and executive branches in this respect. There is a

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Saudi news agency).

[64] 28 U.S.C. § 541 (2006).

[65] *See* Ben Protess, *Slowing the Revolving Door Between Public and Private Jobs*, N.Y. TIMES, Nov. 11, 2013, at F18.

[66] *See, e.g., id.*

limited toolkit of judicial doctrines, such as void-for-vagueness, which have, on occasion, been used to invalidate criminal provisions.[67] Section 1001, the mail and wire fraud statutes,[68] and Section 1519, for example, have all survived void-for-vagueness challenges.[69] Nor is there any significant likelihood that the new, higher penalty structure would be viewed as unconstitutionally disproportionate to the predicate offenses—outside of capital cases, defendants have only rarely prevailed on proportionality arguments.[70] In light of this record, it is difficult to see how application of Section 1519 would be materially constrained by the courts.[71] If American society is to pull back from or even slow the seemingly inexorable advance of ever harsher federal criminal penalties, at least in the white collar arena, such a change in course would need to come from the political sphere, as a matter of policy, decided by democratically elected representatives driven, or at least permitted by, voter sentiment. That sentiment is, as the historical record with both Sarbanes-Oxley and Dodd-Frank demonstrates, sensitive to the frequency and size of corporate collapse in the wake of public reporting and other legal compliance failures. More effective prophylaxis against such lapses, by means other than criminal sanction, may thus be an important factor in, if not even a practical prerequisite to, ameliorating the political forces which, in recent years, have pushed those sanctions ever higher.

III. THE CENTRALITY OF LAWYERS TO CORPORATE FRAUD AND THE PREVENTION THEREOF

The great unaddressed opportunity for achieving substantially greater prophylaxis is structural reform to safeguard the independent professional

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[67] *See, e.g.*, Lanzetta v. State of New Jersey, 306 U.S. 451, 458 (1939) (holding that New Jersey statute criminalizing being a "gangster" was void for vagueness); Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1925) ("A statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process . . . .").

[68] 18 U.S.C. §§ 1341, 1343 (2006).

[69] *See, e.g.*, United States v. Gibson, 409 F.3d 325, 334 (6th Cir. 2005); United States v. Hunt, 526 F.3d 739, 743 (11th Cir. 2008).

[70] As commentators have observed: "For all practical purposes, the Court is out of the business of using the Constitution to regulate the proportionality of prison sentences other than life imprisonment." Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 892 (2005); "[F]ederal defendants have rarely made successful Eighth Amendment challenges to federal carceral sentences." Michael J. Zydney Mannheimer, *Cruel and Unusual Federal Punishments*, 98 IOWA L. REV. 69, 85 (2012).

[71] In United States v. Hunt, for example, the court rejected a vagueness challenge to the constitutionality of 18 U.S.C. § 1519. 526 F.3d 739, 743 (11th Cir. 2008).

judgment of corporate and securities attorneys. The omission of such measures from Sarbanes-Oxley and the new NYSE[72] and Nasdaq[73] corporate governance listing requirements is noteworthy, given the huge packet of reforms involved and the legislative authors' clear and evident understanding of the mechanisms of auditor subornation and of steps required to ensure auditor independence. One critical class of gatekeeper was protected; another was not.

There are of course certain types of major fraud, particularly accounting fraud, that may be conducted primarily or exclusively by officers and employees in the operations and finance functions of an organization and which do not rely, to any significant extent or at all, on lawyers.[74] Lawyers would not necessarily be involved in or aware of the intricacies of pure accounting matters, at least not until after the damage had been done.

However, many, many corporate frauds involve misconduct in which attorneys will have played an important role, spanning the range of culpable collusion from passive acquiescence up through active assistance.[75] Prophylactic potential exists in this regard due to the central role played by lawyers in so many facets of corporate life, particularly those relating to corporate governance, contractual relations, the formation of new entities, regulatory compliance, and disclosures under the securities laws.[76]

Enron furnishes of course the exemplar without equal, where complex entity and contractual structures were used to accomplish massive accounting and public reporting fraud. Lawyers were tightly interwoven with others in effectuating the transactions and signing off on the disclosures involved.[77] And Enron is far from alone. There exist many

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[72] *See* NYSE Listed Company Manual, *supra* note 4, § 303A.

[73] *See* Nasdaq Listing Rule § 5605(c)(1), (3).

[74] A classic example from the late 1980s was MiniScribe, which literally shipped pallets of shrink-wrapped bricks instead of computer hard drives in order to create fraudulent in-transit inventory to bridge an "inventory hole." *See* United States v. Wiles, 102 F.3d 1043 (10th Cir. 1996), *reh'g granted in part, denied in part, and relief denied*, 106 F.3d 1516 (10th Cir. 1997), *vacated sub nom.* United States v. Schleibaum, 118 S.Ct. 361 (1997), *remanded to* 130 F.3d 947 (10th Cir. 1997).

Similarly, around the turn of the millennium the finance executives at Worldcom fraudulently misclassified operating expenses as capital expenditures in order to boost apparent net revenues. *See* Third and Final Report of Dick Thornburgh, Bankruptcy Court Examiner at 278, *In re* Worldcom, Inc., No. 02-13533 (Bankr. S.D.N.Y. 2003), http://www.klgates.com/files/upload/WorldCom_Report_final.pdf.

[75] *See, e.g.*, Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1185-90 (2003); Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW. 143, 158-60 (2002).

[76] *See* Gordon, *supra* note 75; Cramton, *supra* note 75.

[77] *See* Gordon, *supra* note 75; Cramton, *supra* note 75.

cases where it is obvious from the particulars of the fraud that the services of lawyers must have been used intimately in carrying out aspects thereof, or that lawyers proximate to the misconduct must have contorted themselves massively in order to bless misleading disclosures or legal positions beyond objective defensibility.

A. Has Sarbanes-Oxley Already Effected a Cure?

There may be those who counter that Enron has been addressed, that the newfound independence of outside auditors following Sarbanes-Oxley is now in and of itself sufficient to have ended major corporate misconduct in the United States, and that independence of corporate counsel is therefore simply not needed. Admittedly, the impact of truly independent auditors on the fidelity of corporate reporting has been profound. Yet is it enough? There are grounds for skepticism in this regard, for several reasons.

To begin with, financial statements alone are insufficient to paint a complete disclosure picture. Nonfinancial, narrative disclosures are likewise vital to a full understanding of a public company's story, current status, risk profile, management team, internal governance, and so on. These voluminous narrative disclosures are the bailiwick of the lawyers.

Second, the financial statements themselves can be heavily influenced by the conduct of lawyers. In proofing the financial statements, auditors rely on the documents furnished to them. When those documents have been backdated, when they contain false statements, when they contain counterfactual assumptions, when they fail to reveal the material side letter which alters the nature of the transaction, and so on, the auditors may easily come to incorrect financial reporting conclusions. Many of those documents being fed to the auditors are the bailiwick of the lawyers.

Third, of somewhat more inchoate nature yet nonetheless of vital importance, is the role in the overall process of preventing misconduct and formulating complete public disclosure, which can be played by an intelligent observer, woven into the corporate fabric, highly educated in the specific, technical disclosure requirements of the securities laws, familiar with the personalities, character, and ethical tendencies of those other officers with whom they are in daily contact. That is, ideally and potentially, the corporate lawyer. Yet the extent to which the leading lawyers for a corporate entity will be willing to risk playing the salutary role described here will often be a function of whether they are crippled by fear of retaliation and grim personal consequence for speaking out.

In support of the idea that we may not yet in the post-Sarbanes era have arrived at the end of history, at least the end of history as it concerns the potentiality for corporate fraud, consider the examples of the financial

reporting scandal at Refco, the option backdating scandals, and the 2008-2009 systemic derivatives and credit crisis, all of which involved financial statements issued after Sarbanes-Oxley and the new NYSE and Nasdaq listing requirements.

Refco was a major derivatives brokerage house that went public on the NYSE in August 2005, then collapsed two short months thereafter following revelations that the company had engaged in significant financial statement fraud.[78] According to the bankruptcy examiner's report, one aspect of that fraud involved moving certain bad receivables off the balance sheet by means of transferring them to another, unconsolidated entity controlled by the CEO of Refco in exchange for a receivable from that entity.[79] In order to conceal from Refco's auditors the fact that the receivable was owed to Refco by a related party (which would have affected the required treatment in Refco's financial statements), the report concludes, immediately prior to the end of each financial quarter a series of transactions were entered into designed to give the auditors the impression that the receivable was in fact owed to Refco not by the related party, but instead by unrelated third parties.[80] Shortly after the end of each financial quarter, these transactions were then reversed back out, such that the receivable was once again due and owing to Refco from the related party entity.[81] This set of transactions and reversals was carried out multiple times over the course of a number of years up through 2005.[82] That is, including the period post-Sarbanes-Oxley.

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[78] *See* In re Refco, Inc., 628 F. Supp. 2d 432, 435 (S.D.N.Y. 2008).

[79] Final Report of Examiner at 4, In re Refco Inc., 628 F. Supp. 2d 432 (S.D.N.Y. 2008) (No. 05-60006), *available at* http://online.wsj.com/public/resources/documents/WSJ_LB_ExaminerReport.pdf [hereinafter Refco Bankruptcy Examiner Report].

It should be noted that the information and statements contained in the bankruptcy examiner's report "representing the Examiner's conclusions and opinions, should not be taken as admissions or findings for or against any person or entity." *Id.* at 7. That being said, senior officers at Refco, including the CEO and CFO during the relevant period, either pleaded guilty or were convicted in connection with the fraud. *See* Press Release, U.S. Att'y's Office, S. Dist. N.Y., Joseph Collins, Principal Attorney for Former Commodities Firm Refco, Sentenced in Manhattan Federal Court to One Year and One Day in Prison for Securities Fraud (Jul. 15, 2013), *available at* http://www.justice.gov/usao/nys/pressreleases/July13/JosephCollinsSentencingPR.php. The Author does not possess any material substantive information regarding the case other than as recited in the Refco Bankruptcy Examiner Report, and assumes the validity of the statements, allegations and conclusions therein solely for purposes of argumentative exposition in this article. No comment or view is intended to be expressed with respect to the government's allegations against individual defendants in the various Refco-related criminal proceedings.

[80] Refco Bankruptcy Examiner Report, *supra* note 79, at 4.

[81] *Id.*

[82] *Id.* at 5.

The significance for the discussion here is simply that legal documentation (such as loan agreements, guarantees, and indemnifications) was created by lawyers to paper the transactions described here,[83] such documentation was then used by Refco management to claim certain treatment in Refco's financial statements, and the auditors signed off on those financials.[84] What comes out of the audit sausage factory is often, to a nontrivial extent, a function of what has been fed into it at the front end.

Another example is the wave of option backdating scandals which swept across the country several years ago, particularly evident in the technology industry and Silicon Valley.[85] While in many cases the conduct at issue occurred pre-Sarbanes-Oxley,[86] in other instances relevant conduct also occurred following passage of the statute in 2002.[87] In a vast number of cases, lawyers were involved in preparing backdated option agreements (along with backdated board consents, minutes of fictitious board meetings, etc.).[88] The purpose of consciously and deliberately producing backdated or otherwise false documents is clearly to fool the outside auditors. Here, again, the financial audit can be no more robust than the legal documentation upon which it, in such substantial measure, relies.

As to the 2008-2009 systemic credit crisis, as the situation unfolded it came to be seen that multiple major publicly traded financial institutions had entered into vast numbers of mortgage-related and other derivative

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[83] *Id.* at 239.

[84] *Id.* The outside law firm partner involved in creating the legal documentation discussed here was also ultimately charged and convicted in connection with the fraud at Refco. *See* Press Release, U.S. Dist. Att'y's Office, S. Dist. N.Y., *supra* note 79.

[85] For one overview of the backdating scandals, see David I. Walker, *Unpacking Backdating: Economic Analysis and Observations on the Stock Option Scandal*, 87 B.U. L. REV. 561 (2007). A list of SEC enforcement actions against executives in connection with such option backdating practices is available at *Spotlight on Stock Options Backdating*, U.S. SECURITIES AND EXCHANGE COMMISSION, http://www.sec.gov/spotlight/optionsbackdating.htm (last visited Dec. 12, 2013).

[86] See, e.g., the SEC's enforcement action against Kobi Alexander and others in the Comverse option backdating matter. Press Release, Securities and Exchange Commission, SEC Charges Former Comverse Technology, Inc. CEO, CFO, and General Counsel in Stock Option Backdating Scheme (Aug. 9, 2006), *available at* http://www.sec.gov/news/press/2006/2006-137.htm.

[87] See, e.g., the SEC's enforcement action against Greg Reyes in the Brocade option backdating matter. Complaint, SEC v. Reyes, 491 F. Supp. 2d 906 (N.D. Cal. 2007) (No. C-06-4435), http://www.sec.gov/litigation/complaints/2006/comp19768.pdf.

[88] See, e.g., the SEC's enforcement action against Nancy Heinen in the Apple option backdating matter. SEC Settles Options Backdating Charges With Former Apple General Counsel for $2.2 Million, SEC Litigation Release No. 20683 (Aug. 14, 2008), *available at* http://www.sec.gov/litigation/litreleases/2008/lr20683.htm.

positions which exposed them to tremendous financial risk.[89] Investors in those entities were caught by surprise.[90] Although relatively few enforcement actions have, to date, been brought by the government against the major players in the industry in connection with the crisis,[91] more robust disclosure as to the potential risks those institutions faced as a result of their business activity than was contained in their financial statements is easily conceivable. The relevance here is that financial statements, signed off on by independent outside auditors, were not alone enough to flag the potential for significant enterprise risk. Although one cannot go beyond mere speculation as to whether the approach discussed in this article might have produced better corporate governance and more foresighted disclosure, the more truly independent eyes that are brought to bear on public company disclosures, the greater the likelihood that sensitive issues and delicate matters will be flushed to the surface before catastrophe strikes.

IV. WHY WHISTLEBLOWER PROTECTIONS DO NOT SUFFICE

There may also be those who counter that recently adopted whistleblower protections in Sarbanes-Oxley[92] and Dodd-Frank[93] afford corporate

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[89] For general discussion of the 2008-2009 credit crisis and its causes, see Sewell Chan, *Financial Crisis Was Avoidable, Inquiry Finds*, N.Y. TIMES (Jan. 25, 2011), http://www.nytimes.com/2011/01/26/business/economy/26inquiry.html (discussing the post-crisis report of the federal Financial Crisis Inquiry Commission), and Bill Thomas, Keith Hennessey & Douglas Holtz-Eakin, *What Caused the Financial Crisis?*, WALL ST. J. (Jan. 27, 2011, 12:01 AM), http://online.wsj.com/news/articles/SB100014240527487046980045761045005249982 80 (setting forth dissenting views of three members from that report of the Financial Crisis Inquiry Commission).

[90] *See, e.g.*, Frank Partnoy & Jesse Eisinger, *What's Inside America's Banks?*, THE ATLANTIC (Jan. 2, 2013, 5:38 PM), http://www.theatlantic.com/magazine/archive/2013/01/whats-inside-americas-banks/309196/; Sanjai Bhagat & Roberta Romano, *Reforming Executive Compensation: Simplicity, Transparency and Committing to the Long-term* 7 (Yale University, Working Paper), *available at* http://www.law.yale.edu/documents/pdf/cbl/Reforming_Executive_Compensation_Breakfast_Feb_2010.pdf (stating that the financial crisis "caught government regulators, financial institutions and investors alike, totally by surprise").

[91] Gretchen Morgenson & Louise Story, *A Financial Crisis With Little Guilt*, N.Y. TIMES, Apr. 14, 2011, at A1.

[92] Sarbanes-Oxley contains three separate provisions designed to protect whistleblowers. First, there is the requirement that each public company audit committee establish procedures for "the receipt, retention, and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters . . . ." Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 776 (2002) (codified at 15 U.S.C. § 78f(m)(4)(A) (2006)).

Second, the act provides a hearing procedure and potential remedies through the Department of Labor ("DOL") in situations where a public company employee has been:

transactional and securities regulatory attorneys sufficient protection from retaliation that they need not have genuine fear.[94] However, although these newfound whistleblower protections have clearly injected a new element into the game, there are significant reasons why they do not provide, and should not be expected to provide, an adequate shield.

A. Retaliation and Removal Prior to Attachment of Protections

The first and foremost reason is that businesspeople, accountants, and attorneys working together in the corporate context are generally repeat players. Relationships are at issue, which involve frequent, often daily contact, indeed, depending on the roles, often contact multiple times within the course of a single day on a wide variety of different matters. People locked into such frequent contact with each other have more than ample opportunity to take each other's measure. Again and again throughout the

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> discharge[d], demote[d], suspend[ed], threaten[ed], harass[ed], or in any other manner discriminate[d] against . . . in the terms and conditions of employment because of any lawful act done by the employee . . . to provide information, cause information to be provided, or otherwise assist in an investigation regarding any conduct which the employee reasonably believes constitutes a violation of any of a host of specified federal laws and regulations.

Id. § 806, 116 Stat. at 803 (codified at 18. U.S.C. § 1514A((a) (2006)). The remedy is "all relief necessary to make the employee whole[,]" including reinstatement, back pay and litigation costs. *Id.* § 806, 116 Stat. at 803-04 (codified at 18 U.S.C. § 1514A(c) (2006)).

Third, the act created a new ten-year felony provision for whomever "knowingly, with the intent to retaliate, takes any action harmful to any person, including interference with the lawful employment or livelihood of any person, for providing to a law enforcement officer any truthful information relating to the commission or possible commission of any Federal offense . . . ." *Id.* § 1107, 116 Stat. at 810 (codified at 18 U.S.C. § 1513(e) (2006)).

[93] Dodd-Frank section 922 created a new bounty program for the provision of original information to the SEC relating to violations of the securities laws leading to recovery of more than $1 million by the government. Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 922, 124 Stat. 1376, 1841 (2010) (codified at 15 U.S.C. § 78u-6 (2012)). The awards to be paid are not less than 10% nor more than 30% of any amounts so recovered. *Id.* § 922, 124 Stat. at 1842 (codified at 15 U.S.C. § 78u-6(b)(1) (2012)). Section 922 also contains prohibitions designed to protect whistleblowers furnishing information pursuant to that section or otherwise pursuant to the securities laws. *Id.* § 922, 124 Stat. at 1845 (codified at 15 U.S.C. § 78u-6(h) (2012)). Those protections are similar to the Sarbanes-Oxley section 806 DOL protections discussed *supra* note 92, but permit suit to be brought directly in federal district court, *id.* § 922, 124 Stat. at 1744 (codified at 15 U.S.C. § 78u-6(h)(1)(B)(i) (2012)), and allow recovery of double back pay. *Id.* § 922, 124 Stat. at 1846 (codified at 15 U.S.C. § 78u-6(h)(1)(C)(ii) (2012)).

[94] There also exist other potential whistleblower incentives, such as the possibility of bringing qui tam actions under the False Claims Act. *See* 31 U.S.C. § 3729 (2006), and the IRS whistleblower program, *see* I.R.C. § 7623(b) (2006).

relationship there arise issues of judgment, issues which pit personal advantage against legal and ethical standards, issues which reveal the character and pattern of thinking and decision among the various actors. If someone is not "on board" with the others, is not willing "to play ball," or, as is often said in the law firm context, is "too rigid," "does not have a good bedside manner," and "is not sticky with clients," this difference in temperament soon becomes apparent to all. Moreover, it will often become apparent long before a major, wrenching, ethical, and legal crisis has come to a head.

The practical significance of this is that those of a mind to engage in misconduct will have notice, motive, and opportunity to remove the ethically inclined individual from their organization at a stage where the ethical and legal judgments and issues at stake have not yet risen to the level where a whistleblower complaint holds much promise of either being given serious attention by governmental authorities or potentially providing sufficient compensation to offset the likely destruction of the whistleblower's career.[95] Governmental resources are, for good and obvious reasons, limited. The ethical and legal straight arrows will, in many cases, be flushed into the open and weeded out long before whistleblower protections become a practical reality for them.

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[95] The DOL procedure provided for in Sarbanes-Oxley section 806, although helpful at the margin, is insufficient to effectively deter retaliatory termination for the reason that monetary penalties under section 806 involve little more than the retaliating employer would have paid in any event, namely back pay, admittedly augmented primarily by interest thereon and litigation costs. Sarbanes-Oxley Act of 2002, § 806, 116 Stat. at 804. The goal is to provide what is in essence a contract remedy to an aggrieved employee, rather than the type of remedy available in tort which could involve punitive damages. Considering solely for the moment section 806, the employer desirous of retaliating has no real incentive not to give it a college try—after all, if the discharged employee sues and wins, not all that much has been lost. The primary irritant to the employer under section 806 is the reinstatement obligation, since this could re-inject a now bitter and hostile employee disinclined to participate in misconduct into the organization at the same level of seniority as previously enjoyed. The presence of such a person in the organization would clearly make it much more difficult to engage in unobserved misconduct going forward. The DOL procedure can also take a while to litigate, and the employee is not certain of victory.

As to the new ten-year felony provision, Sarbanes-Oxley section 1107, *supra* text accompanying note 42, would appear only to attach once information has already been provided by the employee to a law enforcement officer and retaliation occurs in response thereto. Sarbanes-Oxley Act § 1107, 116 Stat. at 810 (codified at 18 U.S.C. § 1513(e) (2006)). In situations where an employer senses that an employee has become disaffected and presents the potential to inform the authorities, it would appear from the text of the provision that all the employer need do facially to vitiate section 1107 is to move quickly to terminate the employee before he or she has approached government officials as an informant. *Id.*

B. Future Unemployability

The second major reason why whistleblower protections provide thin comfort is that reliance on them is a high risk gambit. Someone who makes a whistleblower complaint has, to a very high degree of likelihood, rendered themselves practically unemployable in the industry going forward.[96] Employers who skate close to or over the line will not hire such a person for obvious reason, and even employers who play by the book will have questions in their mind as to whether the whistleblower was fully justified in making their complaint or is to the contrary a dissatisfied crank or someone seeking a dirty advantage in an employment dispute—the unknowns are too great and the person simply is not hired.[97] If the whistleblower does finally find a position, it may well be in a different line of work, perhaps in a different part of the country, at a vastly reduced rate of compensation. And while the black and white picture painted here may perhaps be somewhat simplistic and overdrawn, it is not so by much. Anyone who has spent a significant amount of time in private industry will be well acquainted with the practical realities described here.

Knowing that the act of coming forward is at nearly certain the cost of one's career means that all the chips are on the table when contemplating a whistleblower complaint. In some cases the affected person may feel so abused that they are sufficiently bloody-minded and angry enough to proceed despite the likely cost. In many other cases, however, some rational calculation should be expected to enter into the mix. The loss of career and employment opportunities is economically catastrophic over the long run of a person's active adult life. A whistleblower payoff has to be sufficiently large to cover that loss of likely future income, or only the economically suicidal will come forward.

Whistleblower awards on that order of magnitude, though no longer absolutely unheard of, are exceedingly rare, at least compared to the total number of whistleblower complaints. The recent $104 million sum paid by the IRS to former UBS banker Bradley Birkenfeld is an eye-catching exception which illustrates the general rule.[98] While we admittedly have

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[96] *See* Joan Corbo, *Kraus v. New Rochelle Hosp. Medical Ctr.: Are Whistleblowers Finally Getting the Protection They Need?*, 12 HOFSTRA LAB. & EMP. L.J. 141, 142 (1994) ("In addition to the very real possibility that whistleblowers may lose their jobs, prospective employers may fear hiring whistleblowers, which could make a known whistleblower practically unhirable.").

[97] *See* Julie Jones, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-at-Will Doctrine*, 34 TEX. TECH L. REV. 1133, 1137 (2003).

[98] Orly Lobel, *Linking Prevention, Detection, and Whistleblowing: Principles for*

yet to see how the new whistleblower provisions play out in practice over time, it is difficult to imagine that many sufficiently large awards will be made consistently and predictably to compensate whistleblowers for the costs they incur by stepping out of line. This is particularly so in light of the fact that the new SEC bounty program mandated by Dodd-Frank has been interpreted by the agency in a manner designed to bar attorneys, both in-house and outside, from participating in the program if to do so would violate their duties of confidentiality to their corporate clients.[99]

Designing Effective Reporting Systems, 54 S. TEX. L. REV. 37, 38 (2012).

[99] *See* Implementation of the Whistleblower Provisions of Section 21F of the Securities Exchange Act of 1934, Exchange Act Rel. No. 64545, 56 (May 25, 2011), *available at* http://www.sec.gov/rules/final/2011/34-64545.pdf. Under the SEC's interpretation, information acquired by an attorney generally will not constitute

> "independent knowledge or analysis *of a whistleblower*," because the information or analysis was acquired by an individual: (1) . . . ; or (2) in the performance of an engagement required by the federal securities laws . . . . [O]nly when one of the exceptions to these exclusions set forth in the rules applies should information acquired in these situations constitute independent knowledge or analysis of the whistleblower.

Id. at 53-54 (emphasis in original). This has "the goal of ensuring that the persons most responsible for an entity's conduct and compliance with law are not incentivized to promote their own self-interest . . . ." *Id.* at 54. From a policy perspective, said the SEC:

> compliance with the federal securities laws is promoted when individuals, corporate officers, and others consult with counsel about possible violations, and the attorney-client privilege furthers such consultation. This important benefit could be undermined if the whistleblower award program created monetary incentives for counsel to disclose information about possible securities violations in violation of their ethical duties to maintain client confidentiality.

Id. at 56. To this end, the SEC drafted its final rules to clarify that the foregoing exclusion applies not only to outside counsel but also "to attorneys who work in-house for an entity and provide legal services (e.g., attorneys in an entity's general counsel's office)." *Id.* at 59. "In our view," wrote the SEC, "the exclusions send a clear, important signal to attorneys, clients, and others that there will be no prospect of financial benefit for submitting information in violation of an attorney's ethical obligations." *Id.* at 61.

That being said, the final rules do permit an attorney to participate in the program if inter alia permitted to disclose information to the SEC pursuant to Rule 205.3 (17 C.F.R. 205.3(d)(2)), that is, pursuant to the SEC's reporting-up rules for attorneys once internal reporting processes have been exhausted and no satisfactory response to the report of a material violation has been received. *Id.* at 59-61. Similarly, the final rules would permit an attorney to participate in the program with respect to information the attorney is not barred from disclosing by state bar rules, such as in the case of a crime-fraud exception to attorney-client privilege. *Id.*

C. Becoming an Enforcement Target

Third, the potential whistleblower may need to fear personal liability as well. Under doctrines all too familiar to white collar criminal attorneys, and obviously depending greatly upon the whistleblower's own conduct and relationship to the misconduct at issue, prosecutors might decide to pursue the whistleblower himself or herself.[100] Ironically, the more aggressive the statutory provisions and agency enforcement positions become with respect to aiding and abetting liability, the greater the personal risk faced by potential whistleblowers.

D. The Informant Society

Finally, programs designed to protect whistleblowers not by preventing retaliation in the first place, but rather by compensating those who have come forward at risk of their future income, merit careful examination. Clearly, the objective of such programs is in certain respects important and laudable, insofar as they compensate for the loss of future income. But do they attack the problem of retaliation and its consequences at the optimal point in the incentive structure? Is our society best served by a legal regime characterized by very high potential criminal penalties coupled with huge potential rewards for reporting others to the government? As Americans, as members of a free society, we should be concerned by solutions which systemically incentivize citizens to inform on each other to the authorities, even when those who come forward are morally and legally justified in so doing. From a historical perspective, it is precisely totalitarian societies which have relied upon members of ordinary civil society constantly to police their neighbors in an all-embracing and all-pervasive enforcement state.[101] This is not to say that we currently find ourselves in such a

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[100] *Cf.* Peter M. Panken, *The Sarbanes-Oxley Act: Employment Implications for Privately Held and Publicly Traded Companies*, SL040 ALI-ABA 813, 819 (2006) ("Adding an element of personal liability and liability beyond the corporate employer, Section 806 extends also to any officer, employee, contractor, subcontractor or agent of such company.").

[101] The co-option and use of citizens as informants against each other is a common pattern in totalitarian societies. A notable recent example is provided by the communist East German internal political police, the Staassicherheit, or "Stasi," which through a variety of means had recruited vast numbers of citizens in both East and West to serve as "inoffizielle Mitarbeiter" (so-called "IMs") (unofficial colleagues or co-workers) to inform on their fellow citizens and provide other information to the Stasi. *See generally* JOHN O. KOEHLER, STASI: THE UNTOLD STORY OF THE EAST GERMAN SECRET POLICE (1999).

Nor, of course, is this pattern unique to communist totalitarianism. *See, e.g.*, ERIC A. JOHNSON, NAZI TERROR: THE GESTAPO, JEWS, AND ORDINARY GERMANS 15 (2000) ("By

condition. But co-option of the civilian population as informants in government enforcement efforts is a tool whose use should be approached with great caution and deliberation in light of its broader, longer-term consequences for the type of society in which we wish to live.

V. PROTECTING CORPORATE COUNSEL FROM RETALIATION

A. Protecting the Auditors Under Sarbanes-Oxley

The central corporate governance intervention by Sarbanes-Oxley was to elevate the role and status of the public company audit committee to true arbiter of a company's relationship with its outside auditors, to the effective exclusion of interloping by corporate officers.[102] As to public companies

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means of political denunciations, common citizens frequently served as the eyes and ears of the Gestapo.").

None of this is to suggest that American society resembles either of these historical totalitarian examples. The point is merely that co-option of the civilian population as government informers is an enforcement technique favored by such regimes and one which should be handled with great care and restraint.

[102] Even prior to the passage of Sarbanes-Oxley, companies listed on the NYSE and Nasdaq were subject to a requirement that they have an audit committee, possessing a committee charter and consisting of three members subject to independence requirements. *See* NEW YORK STOCK EXCHANGE, INC., REPORT OF THE NYSE CORPORATE ACCOUNTABILITY AND LISTING STANDARDS COMMITTEE 6-7 nn.2-3 (June 6, 2002). These preexisting audit committee requirements, however, were less prescriptive and tightly focused than those adopted pursuant to and in connection with Sarbanes-Oxley.

Of particular relevance to the discussion here is the audit committee's sole hiring and firing authority with respect to the outside auditors. As explained in the 2002 Report of the NYSE Corporate Accountability and Listing Standards Committee leading up to adoption of the massive amendment of the corporate governance standards in 2003, the NYSE's preexisting audit committee standard prior to the passage of Sarbanes-Oxley stated "that the audit committee charter must specify that the selection, evaluation and firing of the independent auditor is subject to the *'ultimate' authority* of the audit committee . . . and the board of directors." NEW YORK STOCK EXCHANGE, INC., *supra*, at 13 n.10 (emphasis added). The Corporate Accountability and Listing Standards Committee recommended that the standard specifically be changed to "[i]ncrease the authority and responsibilities of the audit committee, including granting it the *sole authority* to hire and fire independent auditors, and to approve any significant non-audit relationship with the independent auditors." *Id.* at 13 (emphasis added). The Corporate Accountability and Listing Standards Committee explained that "[t]his requirement does not preclude the [audit] committee from obtaining the input of management, but *these responsibilities may not be delegated to management.*" *Id.* (emphasis added).

For discussion and text of the new NYSE and Nasdaq corporate governance listing requirements instituted after Sarbanes-Oxley, including the new audit committee requirements discussed here, see NASD and NYSE Rulemaking: Relating to Corporate Governance, Exchange Act, Exchange Release No. 34-48745, 68 Fed. Reg. 64,154 (Nov. 4,

listed on an exchange such as the NYSE or Nasdaq, the statute provides that each such company's audit committee:

> shall be directly responsible for the appointment, compensation, and oversight of the work of any registered public accounting firm employed by that issuer (including resolution of disagreements between management and the auditor regarding financial reporting) . . . and each such registered public accounting firm shall report directly to the audit committee.[103]

Moreover, the statute requires that all audit and non-audit services by the outside auditors be approved by the audit committee,[104] and prohibits a company's outside auditor from providing a host of non-audit consulting services to that company.[105] Audit committee membership became subject to strict statutory independence requirements.[106]

These new statutory provisions immediately effected a sea change in the relationship between public companies and outside auditors. Prior to Sarbanes-Oxley, it was not at all uncommon to hear people in the industry speak of the outside auditors' role as being to assist management in the preparation of a company's financial statements. Such remarks bore the tenor of a cozy, cooperative relationship, as if the outside auditors were, in effect, expert consultants hired by the company to help management fulfill one of its functions. And that cozy relationship was reflected in the award of non-audit business to auditing firms enjoying the good graces of a company's management team.[107] An audit partner whose compensation,

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2003).

[103] 15 U.S.C. § 78j-1(m)(2) (2006).

[104] *Id.* § 78j-1(i).

[105] *Id.*

[106] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775-77 (codified at 15 U.S.C. § 78j-1(m) (2006)). In addition, the act contained several other provisions designed to reduce the risk of corruption of the integrity and independence of the outside audit function, including a prohibition on involvement by the auditors in bookkeeping or other services related to the accounting records or financial statements of the audit client, *id.* § 201, 116 Stat. at 771 (codified at 15 U.S.C. § 78j-1(g)(1) (2006)), audit partner rotation, *id.* § 203, 116 Stat. at 773 (codified at 15 U.S.C. § 78j-1(j) (2006)), a prohibition against attempting improperly to influence the auditors, *id.* § 303, 116 Stat. at 778 (codified at 15 U.S.C. § 7242(a) (2006)), and establishment of the Public Company Accounting Oversight Board, *id.* §§101-109, 116 Stat. at 750-71, (codified at scattered sections of 15 U.S.C.), which last item effectively put an end to self-regulation by the accounting profession (given that a majority of the five-person board statutorily must consist of non-accountants). *Id.* § 101, 116 Stat. at 751 (codified at 15 U.S.C. § 7211(e)(2) (2006)).

[107] The new audit committee and auditor independence requirements imposed by Sarbanes-Oxley and the SEC implementing regulations thereunder were designed in part to address precisely this concern. *See, e.g.*, Standards Relating to Listed Company Audit Committees, Securities Act Release No. 8220, Exchange Act Release No. 47654, Investment Company Act Release No. 26001, 68 Fed. Reg. 18,788, at II.B.1 (Apr. 16, 2003) [hereinafter

and indeed whose continuance of employment, within his or her audit firm was heavily dependent on maintaining the flow of revenue from corporate clients, had powerful incentives not to displease senior corporate management. Such an industry-wide incentive structure was inherently inimical to the exercise of an independent check on companies' financial statements.

As a result of Sarbanes-Oxley, it was no longer feasible as a practical matter for company officers to use the carrot of awarding fresh business, or the stick of causing an existing business relationship with the auditing firm to be curtailed or terminated, as tools to discipline outside auditors to the officers' will.

B. The Shoe That Did Not Drop: Protecting Corporate Counsel

However, with respect to corporate counsel, a carrot-and-stick incentive structure similar to that suffered by auditors prior to Sarbanes-Oxley remained in place. Nothing in the new statutory scheme sought to insulate corporate counsel from the threat of retaliation and the risk of subornation. For all its sharp recalibration of the relationship between management and the auditors, Sarbanes-Oxley left the relationship between management and corporate counsel nearly untouched.

The principal effect of Sarbanes-Oxley on the legal profession or, more precisely, on the structure of rules and incentives operative upon legal practitioners was to sharpen the professional responsibility regime[108] and

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Listed Company Audit Committee Standards] ("The auditing process may be compromised when a company's outside auditors view their main responsibility as serving the company's management rather than its full board of directors or its audit committee. This may occur if the auditor views management as its employer with hiring, firing and compensatory powers.").

[108] Section 307 of Sarbanes-Oxley mandated that the SEC develop rules addressing the professional responsibility of attorneys "appearing and practicing before the Commission." Sarbanes-Oxley Act, § 307, 116 Stat. at 784 (codified at 15 U.S.C. § 7245 (2006)). Pursuant to that mandate, the SEC promulgated rules generally requiring public company corporate attorneys (both in-house and outside counsel) to report evidence of material violations of law to more senior officers and, if no adequate response is received, ultimately to the audit committee or to a "qualified legal compliance committee." *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47276, Investment Company Act Release No. 25919, 68 Fed. Reg. 6296, 6307 (Jan. 29, 2003) [hereinafter Final Reporting Up Release].

A point of considerable controversy at first arose in this connection as to whether attorneys would, upon ultimate failure of a corporation's board of directors to respond appropriately to a material violation of law, be required under certain circumstances to report evidence of misconduct directly to the government itself, as distinct from purely internal reporting within the corporate entity. The SEC initially proposed precisely such a

ratchet up the level of potential white collar criminal penalties for malfeasance. In other words, Sarbanes-Oxley increased lawyers' fear of personal punishment by the government under the law, but did little or nothing to diminish their fear of personal economic loss due to business retaliation against them by senior corporate managers.

C. Extending Protection from Retaliation to Corporate Counsel

Yet it would be possible effectively to insulate corporate counsel from much of the threat of retaliation through a similar expedient as that applied to auditors. The core of the reform would be to provide that a public company's corporate counsel may only be appointed and, more critically, terminated, upon prior approval by the audit committee. Such a reform could be implemented through the use of relatively few prescriptive words, and would introduce little or no direct cost to corporate budgets. It is elegant, it is simple, and it would be tremendously effective in practice.

1. Initial calls for reform

An early clarion call for reform along these lines came from Professors Rutheford Campbell and Eugene Gaetke shortly following the passage of Sarbanes-Oxley. In *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*,[109] an article of great intellectual clarity and insight primarily addressing the American Bar Association's 2003 amendments to its Model Rules of Professional Conduct, Campbell and Gaetke also proposed that "responsibility for the selection of the corporation's lawyer

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mandatory requirement, but that proposal was met with substantial opposition from the private bar and eventually languished. *See* Implementation of Standards of Professional Conduct for Attorneys, Securities Act Release No. 8150, Exchange Act Release No. 46,868, Investment Company Act Release No. 25,829, 67 Fed. Reg. 71,670 (Nov., 21, 2002). The SEC ultimately settled for a version of its rules under which the SEC purports to authorize attorneys to report directly to the SEC (implicitly, though not explicitly, in potential derogation of the attorneys' duties of confidentiality under state law), but does not require that they do so. *See* Final Reporting Up Release, *supra*, 68 Fed. Reg. at 6310. Direct disclosure by attorneys of misconduct to the SEC is thus permissive rather than mandatory under the final rules.

Against this background it is worthy to note that the governance reform proposal ventured in this article would in no way, shape, or form require corporate counsel to report directly to government authorities. Rather, it seeks to protect the practical ability of corporate counsel to advise compliance with the law internally, within the corporate organization, without fear of retaliatory termination.

[109] Rutheford B. Campbell, Jr. & Eugene R. Gaetke, *The Ethical Obligation of Transactional Lawyers to Act as Gatekeepers*, 56 RUTGERS L. REV. 9 (2003).

should be moved [from senior management] into the hands of a decision-maker that better represents the interests of shareholders. The most appropriate corporate decision-maker for that responsibility is the corporation's independent audit committee."[110] Underlying their recommendation was the observation that:

> [s]enior managers' control over a corporation's lawyer's employment is significant. Corporate counsel is almost always selected by senior officers .... In some cases, the board may approve the selection of counsel for a particular undertaking, but in such cases it likely selects counsel proposed by senior officers. Thereafter, the pay, hours of work, additional assignments, evaluation, and, if necessary, termination of corporate counsel are normally determined by senior officers. Pleasing senior officers, therefore, can have valuable economic and other career consequences for the corporate lawyer.[111]

Campbell and Gaetke were shortly thereafter joined in this policy recommendation by Sung Hui Kim in *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, a tour de force applying seminal research conducted by Stanley Milgram in the field of social psychology in the early 1960s to the practical realities of life as in-house corporate counsel.[112] In tremendous detail and clearly based on deep personal experience, Kim writes of the ethical pressures placed on in-house corporate counsel by senior managers and the many ways in which such counsel's conduct often may, and indeed subjective views and attitudes can, respond plastically to such pressures.[113] Similarly to Campbell and Gaetke, Kim concluded that:

> [t]he answer is to simply change the structure so that inside counsel obeys a different master and accounts to a different principal. More specifically, my first proposal requires the boards of public companies to redirect the

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[110] *Id.* at 42.

[111] *Id.* at 39. Expanding on this point, Campbell and Gaetke wrote:

> In our experience as law professors, lawyers, and members of corporate boards, the board of directors typically exercises little or no control over the selection of counsel .... In infrequent instances involving special situations, however, the board may be made aware of or even approve the lawyer or law firm retained by the company. Examples of these situations may include counsel retained to advise the company in the face of an unsolicited takeover bid or regarding a large public offering. Even in these instances, however, it is likely that the board will choose counsel recommended by senior officers and then essentially leave it to senior officers to deal with evaluation, use, and, if required, termination of counsel. In all events, therefore, our experience suggests that senior managers essentially control the economic fate of the corporation's lawyers.

Id. at 39 n.108.

[112] Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983 (2005).

[113] *See id.*

> responsibilities over legal affairs from that of the senior officers to a committee of independent board members who may be organized as the audit committee or a separate [qualified legal compliance committee] . . . . This committee would make hiring and firing decisions, evaluations, and compensation determinations for the general counsel and would determine the budget for her department. This would be a dramatic change from the status quo, as boards generally play no role in the retention, evaluation, or compensation of counsel, apart from special circumstances, or in legal compliance.[114]

A unifying and vitally important characteristic of both the Campbell and Gaetke, and Kim articles evident from their writing, is their authors' intimate personal familiarity with the realities faced by attorneys in corporate and securities practice.[115] That experience in the field is the touchstone of sound and effective legal policy.

a. A philosophical distinction to Kim

An important aspect of Professor Kim's article is worthy of mention at this juncture. Throughout her argument, Kim emphasizes very strongly the impact of outside influences on individual behavior, to the point of appearing potentially to reflect a fairly deterministic view of human nature. For example, she introduces her article with a quote from Stanley Milgram to the effect that "[i]t is not so much the kind of person a man is, as the kind of situation in which he is placed, that determines his action."[116] Kim cautions against adopting the "conventional wisdom" which emphasizes individual moral choice as a central issue in corporate scandals, despite the fact that the conventional wisdom "provides great comfort by ratifying the sacred notion of free will."[117] She believes that "we grossly under-attribute the relevance of situational influences on our behavior and over-attribute the strength of dispositional factors,"[118] and suggests that the role of lawyers as subordinates to business managers in corporate organizations can even have "a significant effect in aligning private beliefs" of the lawyers, who "tend to automatically adopt the principal's perspective of the world."[119] She recognizes that "one could object to this story as too

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[114] *Id.* at 1055.

[115] *See* Campbell & Gaetke, *supra* note 109; Kim, *supra* note 112.

[116] Kim, *supra* note 112, at 984 (quoting Stanley Milgram, *Some Conditions of Obedience and Disobedience to Authority*, 18 HUM. REL. 57, 72 (1965)).

[117] *Id.* at 991.

[118] *Id.* at 995.

[119] *Id.* at 1010 (explaining that a study has found that whether a subject worked as an auditor for either a seller or buyer had a significant effect in aligning the subject's beliefs

deterministic," but stresses in response that "cognitive psychology teaches us that many of our mental processes are automatic, rapid, unintentional, effortless, and operate to a great extent without our conscious awareness."[120]

The point in bringing out this aspect of Professor Kim's work is not to engage in the broader debate regarding free will versus determinism as the foundation of human conduct. Rather, it is to observe that one can easily come to the same policy conclusion in favor of protecting corporate counsel from retaliatory termination suggested here in this article, even if one has a view of human nature predicated upon a belief in the existence of free will, of individual moral choice, and of individual moral responsibility for those choices, as does the Author.

Professor Kim's primary concern in this regard appears to be that those who emphasize individual moral choice in corporate misconduct do so with either the purpose or practical effect of "isolating the problem of corruption to a handful of aberrant cases."[121] Yet an emphasis on individual moral choice need not necessarily be applied to minimize the scope of the problem. A philosophy of human nature founded on free will and moral choice can be entirely and easily consistent with the view that of morally fallible beings, which we all are, a great, great many will exhibit material ethical failings when placed under great stress. It takes tremendous personal courage of a type all too often absent in the observed world to say, in the words of Tom Petty, "you can stand me up at the gates of hell, but I won't back down."[122]

Advisability of the reform proposed in this article is thus not philosophically path-dependent, at least not along the axis of free will versus determinism. Whatever the reader's personal views may be on the topic, and it is a subject of importance to many, one need not adhere to a deterministic view of human nature to approve the reform proposed here.

Nor should the philosophical differences be overstated. The Author fully concurs with Professor Kim in the descriptions throughout her article of the "situational pressures"[123] faced by counsel.[124] Likewise, Professor Kim's major objective in stressing those pressures and their psychological impact is not necessarily to absolve counsel of moral responsibility, but rather

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about the client's accounting in favor of the client).

[120] *Id.* at 1026.

[121] *Id.* at 991.

[122] TOM PETTY & JEFF LYNNE, *I Won't Back Down*, *on* FULL MOON FEVER (MCA Records 1989).

[123] Kim, *supra* note 112, at 1044, 1045.

[124] *Id.* at 1001-04 (describing "obedience pressures"), 1008-11 (describing "alignment pressures"), 1019-24 (describing "conformity pressures").

simply to argue that those pressures lead to a problem which is endemic rather than limited to isolated, unusual cases.[125] "[M]any inside lawyers (and lawyers generally)," she writes, "hunger to be more ethical and want independence from the demands of senior management."[126] The reform proposed by the Author and by Professors Kim, Campbell, and Gaetke is founded upon recognition of the systemic nature of the problem.

2. Refining the concept

Despite the debate over structural protection of counsel from retaliatory termination having been initiated, much work now lies ahead to create a proposed provision of precise and clear delineation and to delve deeper into discussion of alternative means for implementation, in order to prepare such a reform for potential translation into operative practice.

a. Independent director oversight of the legal function

To begin with, exactly how far should the proposed reform go in calling for direct, day-to-day oversight by the board of directors of legal compliance matters? Several different approaches are conceivable.

i. One new potential approach: A "legal committee" of the board

The most forward-leaning variant of the concept would be to propose that all public companies be required to institute a new "legal committee" of the board of directors, of like stature and fully independent composition as the already mandated audit, compensation, and nomination committees. The mandate of the committee would be oversight of the legal department and legal compliance matters generally, in much the same manner as the audit committee is charged with oversight of the financial reporting processes of a corporation.[127] Given the central importance of legal compliance in the interest of both protecting investors through securities law disclosures and limiting a company's risk of legal exposure, particularly to severe government enforcement action and penalties in the wake of criminal misconduct,[128] such a requirement would appear to make

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[125] *See id.* at 1077.

[126] *Id.*

[127] *See supra* notes 102-06 and accompanying text (describing the responsibilities of the audit committee under Sarbanes-Oxley).

[128] *See, e.g.*, Casey Sullivan, *Lawyer Sentenced to Prison for Role in $2.4 Billion Fraud at Refco*, REUTERS (Jul. 15, 2013, 6:05 PM), http://www.reuters.com/article/2013/07/15/us-usa-refco-collins-idUSBRE96E0XJ20130715.

eminently good sense. In light of the potentially catastrophic consequences which serious misconduct may in today's legal environment visit upon a corporation and upon the value of its shares held by the public, it is difficult to see how a board of directors can claim to have satisfied the fundamental duty of care it owes to shareholders without according due attention to oversight and monitoring of legal compliance. Simply delegating de facto functional control over legal matters quasi *in toto* to an accountant or business executive, such as the CFO or CEO, untrained in legal matters, hardly seems responsible board conduct. For the same reason that a board should not simply abdicate control and oversight of so important a matter as a company's financial statements to the CFO, a board should not simply abdicate effective control and oversight of so important a matter as a company's legal compliance.

Further, for the same reason that it is questionable to delegate functional control over legal compliance to accountants or business executives, untrained in legal matters, who serve in officer positions, it appears questionable to delegate the board's control and oversight responsibility as to legal compliance to the accountants and business executives, untrained in legal matters, who overwhelmingly populate corporate audit committees. They populate audit committees, of course, for good reason—the field of accounting is intensely complex and competent execution thereof requires many years of dedicated training and later experience in practice. Thus, a lawyer cannot effectively perform the function of an accountant or financial executive.

But the converse is also true: The field of law is likewise intensely complex and competent execution thereof requires many years of dedicated training and later experience in practice.[129] An accountant or financial executive thus cannot effectively perform the function of an attorney any more than vice versa. It is the rare individual who in their lifetime is able to achieve high specialization and competence in two distinct professional fields. Audit committees, both in their historical genesis as well as today, are primarily concerned with financial results and the application of highly technical accounting standards.[130] They must of necessity feature significant expertise in accounting matters. As currently constituted,

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[129] For discussion of this widely known verity, and of the difficulty in obtaining in law school practice-oriented education taught by former practitioners with significance in their field, see, e.g., David Segal, *What They Don't Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=0 (explaining that after three years of formal training in law school, lawyers still require much further professional training and practice before becoming competent lawyers).

[130] *See infra* note 137.

however, most audit committees lack significant expertise in legal matters.[131] Either public company audit committees would need to be required to seed their membership with persons who as trained attorneys have such legal expertise, or board oversight of legal compliance should be lodged in a newfound legal committee of the board of directors consisting primarily or solely of trained attorneys.

The concept of requiring a board "legal committee" described here goes far beyond the idea of instituting a "qualified legal compliance committee," or QLCC, as laid out by the SEC in 2003 in its reporting-up rules for attorneys.[132] The SEC's QLCC definition is actually fairly narrow in scope—a QLCC is an independent board committee responsible for receiving reports of material violations of law from attorneys under the reporting-up rules, investigating such reports, and making recommendations (distinct from actually directing action) as to remedial measures and responses thereto.[133] A QLCC would not need to be populated with even a single licensed attorney, and a company's audit committee could easily don the hat of QLCC without in any way changing its composition or otherwise affecting its mission.[134] The most active component of a QLCC's role is the initiation of investigations into reports of misconduct,[135] but the QLCC would not otherwise generally oversee the company's legal function or involve itself in any manner in hiring or firing decisions as to legal personnel.[136]

To articulate the concept of a new board "legal committee" of broader mandate, however, illuminates all too clearly the gap between that position and the reality of what is. Perhaps it is a bridge too far, not necessarily in terms of desirability on principle, but in terms of ready practical acceptability to industry and the political sphere, to reach for a new board legal committee requirement. Many in industry and politics would presumably be loathe, and in many respects justifiably so, to add such large

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[131] *See, e.g.*, Jayanthi Krishnan, Yuan Wen & Wanli Zhao, *Legal Expertise on Corporate Audit Committees and Financial Reporting Quality*, 86 ACCT. REV. 2099, 2100 (2011) ("In our sample of Russell 1000 firms, 36 percent and 37 percent of audit committees in 2003 and 2005, respectively, have at least one director with a legal background.").

[132] *See* Implementation of Standards of Conduct for Attorneys, Securities Act Release No. 8185, Exchange Act Release No. 47276, Investment Company Act Release No. 25919, 68 Fed. Reg. 6296 (Feb. 6, 2003).

[133] *Id.* at II (discussing the definition of "qualified legal compliance committee" set forth in SEC conduct rule 205.2(k), codified at 17 C.F.R. § 205.2(k) (2013)).

[134] *See id.*

[135] *See id.* (noting that the rule codified at 17 C.F.R. § 205.2(k)(3)(ii)(B) provides the authority for the QLCC to initiate an investigation if it deems one is necessary after a report of evidence of a material violation).

[136] *See id.*

numbers of lawyers to the governing bodies of America's leading corporations. The much more modest proposal that existing audit committees be required to add a securities attorney to their ranks, so as to improve their position competently to fulfill a legal compliance oversight role, would already significantly improve the quality of board oversight of corporate legal functions and be much more easily palatable to industry. And even there, significant resistance is to be expected.

ii. Enhancing the audit committee's role as to legal oversight?

If no new board legal committee requirement is instituted, and we are left with existing audit committees to do the job, should the mandate and scope of responsibility of audit committees be expanded to include oversight of the legal function similar to the audit committee's current oversight of the financial reporting function?

In NYSE-listed companies, the audit committee's mandate does already extend to legal compliance matters, though in none of the specificity and detail with which the committee's responsibilities as to financial reporting oversight are laid out.[137] As to Nasdaq-listed companies, the exchange standards are generally silent as to whether the audit committee's mandate extends to legal compliance.[138]

What might, for example, be involved in enhancing the audit committee's mandate as to legal compliance matters would be to enumerate in the audit committee charter responsibilities and authority as to legal oversight bearing some general philosophical and operational comparability to the items of financial reporting oversight currently featured in such

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[137] The NYSE corporate governance rules indicate that an audit committee's purpose must inter alia be, at minimum, to "assist board oversight of (1) the integrity of the listed company's financial statements, (2) the listed company's compliance with legal and regulatory requirements, (3) the independent auditor's qualifications and independence, and (4) the performance of the listed company's internal audit function and independent auditors . . . ." NYSE Listed Company Manual, *supra* note 4, § 303A.07(b)(i)(A).

Although the foregoing cursory list includes legal compliance within the audit committee's mandate, it is the financial reporting components of that list which are then spelled out in significantly greater detail as specific duties with which the committee is tasked in further portions of the NYSE rule, indicative of the dominant purpose and function of audit committees in their current incarnation. *See id.* § 303A.07(b)(iii).

[138] Unlike the NYSE, Nasdaq's corporate governance rules do not require that the audit committee exercise any oversight as to legal compliance generally, other than the specific prescription under Sarbanes-Oxley that the audit committee address complaints relating to accounting, internal control and auditing matters, and establish an anonymous complaint procedure therefor. *See* Nasdaq Listing Rules § 5605(c)(1), (3), *available at* http://nasdaq.cchwallstreet.com/NASDAQTools/PlatformViewer.asp?selectednode=chp%5F1%5F1%5F4%5F3&manual=%2Fnasdaq%2Fmain%2Fnasdaq%2Dequityrules%2F.

charters at NYSE-listed companies. Broadly speaking, this would include direct reports to the audit committee on legal compliance matters, especially those bearing on transactional structuring and securities law disclosures, along with direct meetings solely between the committee and legal counsel, including discussion of conflicts with other management personnel as to legal and ethical issues.

An expansion of audit committee responsibilities to embrace the totality of the legal department and legal compliance matters generally appears to be the approach favored by Professor Kim, though she leaves open whether such authority might alternatively be vested in some other committee of independent directors.[139] This general concept likewise appears to be contemplated in Professors Campbell and Gaetke's article, which indicates that such authority should be vested specifically in the audit committee, and that the committee's oversight role should be particularly active with respect to securities law reporting and corporate transactional matters.[140]

Expanding the audit committee's mandate to embrace the totality of the legal function, however, raises precisely the same committee composition issue flagged above with respect to creation of an entirely new "legal committee" of the board.[141] Just as it is necessary to populate the audit committee in its current incarnation with individuals who have professional expertise in financial accounting matters, proper, effective oversight of legal matters requires that the committee be populated at least in part by individuals with professional expertise in the law, particularly securities regulation and corporate transactional structuring.

Expanding the audit committee's mandate coupled with enhancing the committee's membership in the manner described here might be somewhat

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[139] Kim's article appears clear and explicit on this point in its recommendation to:

> redirect the responsibilities over legal affairs from that of the senior officers to a committee of independent board members who may be organized as the audit committee or a separate QLCC. . . . The committee's mission would include the oversight of legal compliance, the handling of all internal reports of evidence of material violations, and the ensuring of the quality of the company's legal resources. Accordingly, the committee would demand that the company's lawyers, both inside and outside counsel, inform directors of all material issues as they make corporate policy. . . . This would be a dramatic change from the status quo, as boards generally play no role in the retention, evaluation, or compensation of counsel, apart from special circumstances, or in legal compliance.

Kim, *supra* note 112, at 1055 (footnotes omitted).

[140] The Campbell and Gaetke article contains language suggestive of an active monitoring role which goes beyond mere preapproval decisions as to selection of counsel. For example, they wrote that "the audit committee should itself be directly involved in the selection and monitoring of lawyers representing the company in major transactions and in securities matters." Campbell & Gaetke, *supra* note 109, at 44 n.125.

[141] *See* discussion *supra* Part V.C.2.a.i.

more palatable in industry circles than requiring an entirely new "legal committee." It would, after all, piggyback off of an existing committee structure and presumably involve fewer attorneys being brought onto the board of directors. Nonetheless, it can also be expected to encounter resistance from industry circles.

One might, of course, in the alternative choose to expand the committee's mandate without adding at least one corporate and securities attorney to the committee's membership. However, because this would extend the committee's mandate to cover an area outside the area of professional specialization of those who currently typically populate audit committees, such a proposal would likely also be met with reluctance.

These observations as to potential industry reluctance are positive rather than normative statements. Adopting a new "legal committee" requirement or decisively enhancing the audit committee mandate to embrace all aspects of the legal department and legal compliance may well be highly advisable from an overall policy perspective.[142] However, given the resistance that such approaches might face, the question arises whether there might be an alternative approach which surgically addresses the core of the issue with less collateral consequence for operation of the board and its committees.

iii. A modest Proposal: The "antiretaliation clause"

This leads us to the approach suggested in this article. Irrespective of whether the audit committee mandate is expressly expanded as described above, there remains a minimal proposal, narrowly tailored with an eye toward preventing retaliation and nothing more, which might still serve significantly to ameliorate the risk of retaliatory termination,[143] which lies at the beating heart of corporate counsel's incentive structure. This proposal would not alter composition of the audit committee whatsoever, and would add but one single provision to the enumerated list of required clauses in the committee charter. That new provision would simply require that the audit committee of each public company be directly responsible for and have sole authority over any termination of corporate counsel. This would include not only formal but also constructive termination, such as through material adverse changes in compensation, responsibilities, or

[142] Particularly since the extent of fraudulent and other unethical conduct among inside counsel is likely greater than some would acknowledge. *See* Kim, *supra* note 112, at 987.

[143] *See id.* at 1042 ("If the inside attorney makes an unwelcomed report to the board, her boss could demote her, give her a smaller bonus, freeze her salary, or worse, terminate her, upon which she would lose all of her unvested stock options, insurance, or other benefits. Moreover, she could be professionally blacklisted and, in many states, left with no legal recourse to sue for retaliatory discharge.").

working conditions.[144] It would also optimally include the selection of new counsel, so that if the CEO and CFO bore a general inclination toward disrespect of the law, they would not be able to handpick at the outset particularly sycophantic and pliable counsel not likely ever to raise an ethical issue. For brevity of future reference, a provision of the type described in this paragraph will simply be termed an "antiretaliation clause."

aa. Focus on termination of counsel

Note, however, that although selection of new counsel would be included in the scope of the audit committee's direct responsibility,[145] the focus of the proposed provision is on termination. It is precisely the fear of retaliatory termination in the wake of ethical confrontation, or preemptive termination by senior managers inclined to weed out the boy scout before trouble arises, with no positive professional recommendation to follow, which can so profoundly affect the personal calculus of lawyers facing pressure to play along with or facilitate white collar crime.[146] Plucking the thorn of fear is the crux of the matter.

In this regard, the proposal here potentially differs from the Campbell and Gaetke article, at least in emphasis. Particular stress is laid by Campbell and Gaetke on the selection of corporate counsel. Campbell and Gaetke recommend that "lawyers for a corporation should be selected, compensated, and supervised by independent audit committees."[147] They write that:

> audit committees under our proposal could select the company's law firms annually and could handle the task similarly to the way it selects the company's auditors. Thus, late in the year, the committee could meet to select the firms that will, for example, handle the company's transactional work for the next year . . . .[148]

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[144] *See* Steven A. McCloskey, *Constructive Termination Must Be Recognized in Wrongful Termination Cases as a Matter of Law: Plaintiff's Duty to Mitigate Damages*, 2 CHARLOTTE L. REV. 201, 203 (2010) (explaining that "constructive termination" involves the imposition of "intolerable conditions" by the employer that justifies the employee in resigning).

[145] *See* Campbell & Gaetke, *supra* note 109, at 70-71.

[146] *See* Kim, *supra* note 112, at 1025 ("A fourth reason [for the silence of employees regarding issues at work is] the fear of retaliation or punishment, such as losing one's job or not getting a promotion.").

[147] Campbell & Gaetke, *supra* note 109, at 70-71.

[148] *Id.* at 44 n.125.

Further, "the audit committee should itself be directly involved in the selection and monitoring of lawyers representing the company in major transactions and in securities matters."[149]

It may be that Campbell and Gaetke believed that direct and sole responsibility for terminating old counsel might in a sense be a reasonably implicit consequence of direct and sole responsibility for selecting new counsel. "We suggest that audit committees be delegated the responsibility of selecting the company's lawyer,"[150] they wrote, "as a means to reduce the conflict that corporate lawyers face when they are hired, evaluated and, at times, fired by corporate managers."[151] After all, their proposed provision directly mirrors the Sarbanes-Oxley provision mandating that the audit committee "be directly responsible for the appointment, compensation, and oversight"[152] of the work of the outside auditors, which language conspicuously does not explicitly mention termination.[153] If the Sarbanes-Oxley provision was enough to achieve de facto audit committee control over auditor terminations as well, shouldn't a mirror image provision as to counsel likewise be sufficient?

Yet there the timing of the Campbell and Gaetke article may have played a role. It was published shortly after Sarbanes-Oxley, in 2003.[154] Only in February of that year did the SEC first propose, and in April adopt, implementing regulations under Sarbanes-Oxley setting standards for listed company audit committees.[155] In those regulations, the SEC added explicit authority over auditor termination to the list of audit committee powers: "[T]he audit committee . . . will need to be directly responsible for the appointment, compensation, retention and oversight of the work of [the outside auditors] . . . . These oversight responsibilities include the authority to retain the outside auditor, which includes the power not to retain (or to terminate) the outside auditor."[156] In essence, the SEC sensibly treated the omission from the text of Sarbanes-Oxley of authority over auditor termination as a drafting oversight by Congress. Thus, when the observation is made that Sarbanes-Oxley effected a sea change in the relationship between public companies and their outside auditors, due in

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[149] *Id.*

[150] *Id.* at 45.

[151] *Id.*

[152] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 776 (codified at 15 U.S.C. § 78j-1(m)(2) (2006)).

[153] *See id.*

[154] Campbell & Gaetke, *supra* note 109. Sarbanes-Oxley was enacted July 30, 2002. Sarbanes-Oxley Act, 116 Stat. 745.

[155] Listed Company Audit Committee Standards, *supra* note 107.

[156] *Id.* at II.B.1.

large part to clipping the ability of senior corporate management to use carrot-and-stick incentives to suborn the auditors, that observation properly refers to Sarbanes-Oxley as implemented via SEC rulemaking thereunder. The approach taken in the SEC's implementing regulations is the same one that should be followed in the proposed reform suggested here.

bb. Which attorneys should be covered

The next issue of scope to be tackled is precisely which attorneys should be covered by the antiretaliation clause. Existing work has not yet provided an unambiguous roadmap in this regard.

Clearly, a company's general counsel ("GC") should be protected. But should protection reach further down into the ranks? At the most extreme, the hiring and firing of any legal personnel within the organization would need to be preapproved by the audit committee. However, this would seem to go too far. It would create a nontrivial burden on the committee members of larger corporations, and would significantly exceed the typical scope of board control solely over senior management appointments and terminations, as distinct from terminations at lower levels of the organization.

At the same time, the GC may not be the only, or even the lead, attorney involved in transactional structuring and documentation and in critical disclosure decisions. Not a few GCs are litigators or former government enforcement personnel who have little to no prior experience with the actual, down-in-the-weeds transactional work and securities law compliance judgment calls where corporate reporting fraud takes place (at least in the sense of personally being an actor in the process, rather than attacking or defending the acts of others ex post facto, much as a drama critic does not stand on stage but rather comments from the balcony on the performance of others). In such cases, there will often be a deputy or associate GC who serves as the lead corporate and securities attorney for the entity. It would seem reasonably self-evident that protection should similarly be extended to an attorney playing such a role. A lawyer thus shielded from ready retaliation will be referred to here as a "protected attorney."

Extending the direct reach of the antiretaliation clause below this level, however, would begin to raise resistance from board members and might not strictly be necessary, as long as hiring and firing decisions within the legal department are under the exclusive authority of lead attorneys who are directly protected by the clause. A GC, or lead corporate and securities counsel, who is directly protected and thus less subject to fear of retaliation,

will presumably have correspondingly less incentive to hire, retain, and promote other attorneys largely on the basis of ethical pliability.

A tricky area of application is the recently developed position of chief compliance officer ("CCO"). Arising from the generalized, secular increase in regulatory requirements across the business landscape,[157] responding to incentives under the federal organizational sentencing guidelines to establish compliance programs,[158] and taking example from the specific SEC requirement that mutual funds and investment advisers employ CCOs,[159] CCOs are now seen in many companies, especially in the financial services and healthcare industries.[160] The general mandate of the CCO is to ensure legal compliance across the business platform of the modern, heavily regulated enterprise.[161]

Given the still developing character of this position, a certain variability is observed in practice as to its precise contours. Many CCOs are lawyers, but not all.[162] Sometimes the CCO is located within the legal department, sometimes not. In certain cases the GC serves as CCO, in other cases not. Some CCOs report to the GC, some to the CEO, some directly to the audit committee.[163]

How to address the CCO position in the context of the proposed antiretaliation clause is accordingly less obvious than is the case for the general counsel. Nonetheless, given the only minor burden imposed upon

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[157] *See* DELOITTE & TOUCHE LLP, THE RISK INTELLIGENT CHIEF COMPLIANCE OFFICER, CHAMPION OF RISK INTELLIGENT COMPLIANCE 6 (2012) (stating that there is more work for CCOs than ever because "businesses are subject to more laws and regulations than ever, and the laws and regulations address a wider variety of issues").

[158] *See id.* (stating that there is a greater need for compliance because "[p]enalties for compliance failures have become more severe, putting executives and board members at greater personal risk").

[159] *See* 17 C.F.R. § 275.206(4)-7(c) (West, Westlaw through 2013) (providing that investment advisers must employ CCOs to administer the policies and procedures adopted by the adviser and designed to prevent violations of the Investment Advisers Act of 1940).

[160] *See* DELOITTE & TOUCHE LLP, *supra* note 157, at 5 ("Thanks to regulators and other authorities, many companies now have a CCO or equivalent senior-level compliance executive.").

[161] *See id.* at 4.

[162] *Cf.* Aruna Viswanatha, *Wall Street's Hot Trade: Compliance Officers*, REUTERS (Oct. 9, 2013, 7:05 AM), http://www.reuters.com/article/2013/10/09/us-usa-banks-compliance-idUSBRE9980EE20131009 (explaining that although "[t]here are no specialized degrees for compliance officials," many CCOs today are graduates of "reputable law schools").

[163] *See* Benjamin W. Heineman, *Don't Divorce the GC and Compliance Officer*, THE HARV. L. SCH. FORUM ON CORP. GOVERNANCE AND FIN. REG. (Dec. 26, 2010, 9:53 AM), http://blogs.law.harvard.edu/corpgov/2010/12/26/don't-divorce-the-gc-and-compliance-officer/ (arguing that having a CCO that reports to the GC is the ideal arrangement).

the audit committee simply to oversee hiring, firing, and compensation of the protected positions, without requiring detailed, day-to-day oversight of the function, it would appear perhaps advisable to include the CCO among the protected for those companies which have chosen to establish such a position. This is the approach recommended in the draft antiretaliation clause discussed below.

Turning now to outside counsel, should the antiretaliation clause reach there as well? Professor Kim in her article wrote that

> [u]nlike outside lawyers, inside lawyers may get into employment disputes with their client, sometimes leading to their discharge by a co-agent. While outside lawyers also may be terminated by their clients, rarely do such acts threaten their livelihood, as lawyers in private practice are typically diversified. Inside lawyers, on the other hand, may be faced with the dilemma of doing the right thing and losing one's job, or obeying one's boss and violating the law or other ethical mandates.[164]

Speaking as a former full equity partner of two major AmLaw 100 law firms, the Author respectfully disagrees with that assessment of the risk faced by outside counsel. It is of course correct to say that a partner at an outside law firm has a more diversified client base than an in-house general counsel. But the fundamental incentive structure of the senior management personnel who decide the fate of in-house counsel is essentially unchanged when it comes to their interactions with outside counsel—senior corporate managers inclined to push the edge of the envelope or to step cleanly past the limits of the law, expect and will insist upon obedience by counsel to their will, irrespective of whether that counsel sits within or without their own organization. An outside law firm partner who dares decline to participate in misconduct upon which senior corporate managers are intent[165] faces likely attempts at retaliation. The senior corporate managers can simply fire the law firm and take the work elsewhere. If it would be inconvenient to change firms, they can, in the alternative, complain to even more senior partners within the law firm[166] that they are unhappy with the

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[164] Kim, *supra* note 112, at 1064. As to subsequent discussion by Professor Kim several years later, however, describing practical business risks faced by ethical outside law firm partners, see *infra* note 167.

[165] This is, of course, distinct from the quite common scenario where a senior corporate manager might naturally desire a certain convenient approach to a problem, unaware that legal requirements stand in the way of the objective, and who, even if not happily, readily and without rancor or ill-feeling accedes to the advice of counsel not to violate those requirements.

[166] Large law firms typically have internal hierarchies of partners, both de facto and de jure, with those higher in the firm pecking order often effectively at liberty to determine which junior partners and other attorneys will work on any given account.

partner currently working on their account and, while willing to consider remaining with the law firm overall, indicate that they wish a different partner to be put on the account. It is child's play for corporate managers to base such a request not upon any explicit concession of malfeasant intent on their part, but rather upon personality fit, bedside manner, and responsiveness of the lawyer, all ethically neutral criteria for desiring to change counsel.

Law firms generally track the revenue attributable to each partner.[167] A partner who loses an account to another law firm, or who is pulled from the account by a law firm wishing to retain the business by supplying a different partner to handle the account, sees his or her "book" of business reduced.[168] The size of one's book is thus the critical determinant not only of one's compensation level, but ultimately of whether one is permitted to remain partner at a firm. Gone are the days when law firm partnership was generally for life.[169]

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[167] *See* COFFEE, *supra* note 13, at 227; Sung Hui Kim, *Gatekeepers Inside Out*, 21 GEO. J. LEGAL ETHICS 411, 432-33 (2008).

[168] This phenomenon has also been commented on by Professor Coffee:

> [M]uch commentary has emphasized that lateral mobility was destructive of firm culture, principally by forcing firms to alter their compensation practices to reward the partner who brings in business over those more skilled at the craft. A less conspicuous impact may have been an erosion in the willingness of the large firm to support, protect and shelter the partner whose ethical sensitivities cause him or her to lose a client. Under the 'eat what you kill' compensation formulas towards which law firms gravitated in order to hold onto their most mobile partners, the 'ethical' partner is automatically disciplined by reduced compensation if he or she loses business.

COFFEE, *supra* note 13, at 227 (internal footnote omitted). Similarly, Professor Kim has written:

> [M]odern partner compensation practices no longer insulate individual attorneys from catastrophic client losses. . . . Today, . . . all but a few law firms have replaced lock-step compensation with 'eat-what-you-kill' schemes which divide the firm's profits based on each partner's direct contributions rather than seniority.
>
> Since a partner's welfare is now based almost entirely on her own individual efforts to generate revenue from her own client base, the potential threat of client defection incentivizes her to accede to client demands out of a desire to keep the client. Also, the client's increased leverage over the partner is exacerbated by the looming possibility that she might be dismissed from the firm for failing to generate the threshold amount of revenue. Following the trend in the accounting industry beginning in the early 1990s, unproductive partners in law firms have been summarily fired. Short of termination, partners can be *de-equitized* for failing to bring in business. In sum, the firm's diversified client base gives cold comfort to the individual partner—the functional gatekeeper—whose only large client is about to fire him for resistance.

Kim, *supra* note 167, at 432-33 (internal footnotes omitted).

[169] Although titularly designated as "partners," the members of large law firms are in truth often no more than at-will employees subject to capital contribution requirements. Law

Moreover, dealing with clients on ethically or legally sensitive matters is not a one-time occurrence where the outside law firm partner can for the sake of conscience take the hit to a small fraction of their business and move on with relative impunity. Ethical and legal compliance issues arise all day, every day, across the client base. *Plus ça change, plus c'est la même chose.*[170] What matters are the incentives of those who, as a class of similarly situated individuals, make the decisions regarding who is granted the gift of economic life through the award or termination of client business. A lawyer who tends to take stands, or worse, acquires a general reputation in the relevant business and legal community for taking stands, unpopular with that class of decision-making individual may well see their business shrivel over time. It may not be full termination of all employment in one fell swoop, as for a general counsel who has been fired, but it may easily be death by a thousand cuts. The bite of a great white shark is quick and decisive, but the bites of hundreds of piranhas have the same end result. Disputes with such decision-making individuals absolutely threaten the livelihood of outside counsel. The process may be more gradual and occur in piecemeal fashion, but the fundamental retaliatory mechanisms and results are very much alive and highly effective. This is not to say it is impossible to be an ethical lawyer acting as outside counsel, it is merely to observe that they face very much the same ethical pressures as do in-house counsel, albeit in more diversified form.

Thus, to change the incentive structure of outside public company transactional and securities regulatory counsel, it is essential to change the class of individuals making the hiring and firing decisions as to such counsel.

The light touch means of doing so is to require decisions as to the employment and termination of outside public company transactional and securities regulatory counsel to be vested solely in lead protected in-house

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firm constitutive documents often vest absolute hiring and firing authority as to partners in the hands of an executive committee. *See, e.g.*, EEOC v. Sidley Austin Brown & Wood, 315 F.3d 696, 699 (7th Cir. 2002) (finding that partners of the large law firm defendant in this case were "at the [executive committee's] mercy," because the committee had authority to "fire them, promote them, demote them . . . raise their pay, lower their pay, and so forth"); Douglas R. Richmond, *Changing Times and the Changing Landscape of Law Firm Disputes*, 2009 PROF. LAW. 73, 96-97 (2009) ("[C]ourts have recognized for more than a decade that the centralized management common among large professional partnerships has blurred the line between partners and employees to the point that partners may sometimes enjoy the protection of anti-discrimination laws.").

[170] Originally stated in French, English translation as follows: "[T]he more that changes, the more it's the same thing." Translation of *plus ça change, plus c'est la même chose*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/plus%20ça%20change,%20plus%20c'est%20la%20même%20chose (last visited Nov. 16, 2013).

attorneys, such as the general counsel, as Professor Kim has suggested.[171] A more robust variant would be to vest this decision directly in the audit committee itself, or to require audit committee pre-approval of a recommendation coming from protected in-house counsel, as Professors Campbell and Gaetke have suggested.[172]

While both of the foregoing approaches would work, the approach suggested in this article lies between these two poles. For the vast majority of outside counsel hiring and termination decisions, vesting this authority in a retaliation-protected general counsel would serve quite well. Indeed, it might be sufficient to vest authority over all outside counsel hiring and firing decisions, without exception, in the protected general counsel. There is, however, one particular outside counsel relationship which is of central importance to whether a company plays by the rules or strays across the line into the structuring of fraudulent transactions and misleading disclosures—namely the company's lead corporate transactional and securities regulatory counsel. It would not be too much to ask the audit committee to be responsible for the hiring and firing decision as to that one particular outside law firm and to any specification the company might wish to make to that law firm regarding which corporate and securities partner at the firm is to be the company's primary point of contact. Leaving these decisions solely in the hands of the general counsel would certainly be possible, but would place all the eggs in the basket of a single individual. Even if retaliation-protected, the general counsel will remain a fallible human being with personal interests and personal prejudices, which may enter into the picture. These interests may include maintaining a reputation for ethical flexibility with an eye toward future employment in another, more favorable GC position with another company. Given the tremendous importance of this particular outside counsel relationship to a corporation's stance with respect to transactions and disclosures bearing a potential for major tax, accounting, and securities fraud, this decision should be vested directly in the audit committee itself. This would not place an undue burden on the committee. It would situate a decision of significant importance to the company at an appropriate level in the corporate hierarchy. Finally, by virtue of the committee's broader membership, this would help insulate against personal considerations which might otherwise affect the judgment of even protected in-house counsel. On balance, this would appear to be the preferable approach.

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[171] *See* Kim, *supra* note 112, at 1062 ("Since the general counsel would report to the independent directors, it would be clear that the general counsel would be responsible for the retention of all counsel within the confines of the legal budget allocated by the independent board committee.").

[172] *See* Campbell & Gaetke, *supra* note 109, at 44 n.125.

b. Implementing the antiretaliation clause

Separate from issues of scope is the question of how such a requirement might best be implemented. Given the multiple statutory and regulatory regimes which impact upon public companies and their governance, a handful of different potential implementation modalities lie to hand: (i) federal legislation; (ii) SEC rulemaking; (iii) NYSE and Nasdaq corporate governance listing requirements; (iv) state legislation; and (v) recommendations as to "best practice."

Federal legislation would possess the advantage of unambiguous democratic legitimacy and would situate the regulatory decision at the highest level of governmental authority. At the same time, a federal statute is a relatively inflexible tool that is less susceptible as a practical matter to critical reconsideration and periodic fine-tuning or major revision or outright repeal, than other potential approaches discussed below. Moreover, and of great importance, internal corporate governance has in the United States traditionally been the province of state law.[173] Thus there are vitally important considerations of federalism to be taken into account. Federal regulation, particularly in derogation of or substantive overlay on preexisting state law, should not be taken lightly.

SEC rulemaking would have the advantages of significant expert input from securities regulation professionals at the SEC, extended public comment and potential revisions in response thereto,[174] and ease of amendment or repeal in light of experience gained over time. However, pursuant to its original statutory mandate from Congress during the Great Depression, the SEC does not generally have authority under the '34 Act to dictate matters of internal corporate governance to public companies, either through direct regulation or through the mechanism of dictating stock exchange listing requirements to the NYSE and Nasdaq.[175] Absent an

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[173] *See* Business Roundtable v. SEC, 905 F.2d 406, 414 (D.C. Cir. 1990) ("'[W]e are reluctant to federalize the substantial portion of the law of corporations that deals with transactions in securities, particularly where established state policies of corporate regulation would be overridden.'" (quoting Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977)). *See also* Jill E. Fisch, *The New Regulation of Corporate Governance*, 28 HARV. J.L. & PUB. POL'Y 39, 39 (2004).

[174] *See* 5 U.S.C. § 553 (2006) (requiring agencies to provide public notice and allow public participation in the rule-making process).

[175] *See Business Roundtable*, 905 F.2d at 414. In a decision addressing solely statutory construction rather than constitutionality, the D.C. Circuit reviewed the legislative history of the '34 Act and concluded that Congress clearly had not intended to give the SEC "'power to interfere in the management of corporations' . . . ." *Id.* at 411 (quoting S. REP. NO. 73-792, at 10 (1934); H.R. REP. NO. 73-1838, at 35 (1934) (Conf. Rep.)). The court indicated that the '34 Act created no statutory basis for "SEC control over corporate governance through

affirmative grant by federal legislation of internal corporate governance authority, such as was done by Congress in 2002 with Sarbanes-Oxley Sections 301 (audit committee composition, authority, and responsibilities)[176] and 402 (no loans by public companies to directors or executive officers),[177] SEC rulemaking to this end would therefore not be appropriate.[178] Moreover, federal enabling legislation would raise the same federalism concerns discussed above.

The NYSE and Nasdaq already impose on issuers admitted for trading on those markets a host of corporate governance listing requirements.[179] One

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national listing standards . . . ." *Id.* at 416. The court specifically referred to requirements for independent directors and independent audit committees as involving "issues traditionally governed by state law" which would not fall within the SEC's statutory grant of authority under the '34 Act. *Id.* at 412. Absent some other grant of statutory authority by Congress to the SEC subsequent to *Business Roundtable,* imposition by the SEC of an affirmative antiretaliation clause requirement would clearly fall afoul of the limits on its authority described in that case.

For further detailed review of the legislative history of the '34 Act in this regard, see generally Stephen M. Bainbridge, *The Scope of the SEC's Authority over Shareholder Voting Rights* (UCLA Sch. of Law Pub. Law & Legal Theory Research Paper Series, Paper No. 07-16, 2007), *available at* http://ssrn.com/Abstract=985707.

An exception to the foregoing, of course, exists where Congress has explicitly granted to the SEC such statutory authority under the '34 Act as to internal corporate governance matters, as it did with Sarbanes-Oxley sections 301 (audit committee composition, authority, and responsibilities) and 402 (no loans by public companies to directors or executive officers).

[176] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 301, 116 Stat. 745, 775-77 (codified at 15 U.S.C. § 78f (2006)).

[177] *Id.* § 402, 116 Stat. at 787-88 (codified at 15 U.S.C. § 78m).

[178] A more subtle issue of agency authority is raised by the possibility that the SEC might adopt not a mandatory corporate governance rule, but rather a requirement that public companies disclose whether they have adopted an antiretaliation clause, and if not, why not. Such "shaming" disclosures have in the past proven tremendously effective in inducing changes in corporate behavior. Various precedents for such an approach already exist. For example, Sarbanes-Oxley and SEC implementing rules thereunder require each public company to disclose whether its audit committee features an "audit committee financial expert," and if not, to disclose the reasons therefor. *Id.* § 407, 116 Stat. 745 (2002) (codified at 15 U.S.C. § 7265); Disclosure Required by Sections 406 and 407 of the Sarbanes-Oxley Act of 2002, Securities Act Release No. 8177, Exchange Act Release No. 47,235, 68 Fed. Reg. 5110 (Jan. 23, 2003). Desirous of avoiding such embarrassing disclosure, public companies generally strive to find audit committee financial experts whenever possible.

However, in light of the agency's lack of general corporate governance authority under the '34 Act (except where expressly so authorized), the programmatic use of a shaming disclosure requirement for the conscious purpose of effecting internal corporate governance change would not appear appropriate in the absence of express Congressional authorization. Such an approach has consequently not been suggested by the Author herein.

[179] *See* THE NASDAQ OMX GROUP, INITIAL LISTING GUIDE 10-11 (2013), http:// listingcenter.nasdaqomx.com/assets/initialguide.pdf; Corporate Responsibility Section of the

or both of these stock exchanges could voluntarily choose to amend its extant listing standards as they relate to audit committee duties in order to include an antiretaliation clause. If the NYSE and Nasdaq were to act in tandem in this manner, as they did in massively amending their corporate governance listing standards around the time Sarbanes-Oxley passed into law roughly a decade ago,[180] these two markets could achieve corporate governance reform among public companies representing the vast majority of U.S. equity market capitalization.[181]

To the extent the governing bodies of those two exchanges have concerns with the new white collar criminal environment and its long-term impact on the American business community, and if they were to concur in the Author's suggestion that the pace of accelerating white collar criminalization might potentially be alleviated by more robust prophylaxis against corporate fraud, they might choose to adopt antiretaliation clause requirements out of public spirit. Not to succumb to wide-eyed idealism, however, there is a second and significantly more proximate reason for the exchanges to act. The NYSE and Nasdaq have an entirely economic interest in building and maintaining a reputation for high quality listings by issuers who exhibit consistent integrity in their public reporting.[182] This

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NYSE Listed Company Manual, NYSE, http://nysemanual.nyse.com/LCMTools/PlatformViewer.asp?selectednode=chp%5F1%5F2%5F2%5F1&manual=%2Flcm%2Fsections%2Flcm%2Dsections%2F (last visited Nov. 16, 2013).

[180] For further discussion of this, see Robert Todd Lang et al., *Special Study on Market Structure, Listing Standards and Corporate Governance*, 57 BUS. LAW. 1487, 1487 (2002) (noting in an August 2002 update that both the NYSE and Nasdaq had proposed "extensive changes to their respective governance listing standards" since the initial publication of the study in May 2002, and that the Sarbanes-Oxley Act had also been enacted since the initial publication).

[181] *See Market Capitalization of Listed Companies*, THE WORLD BANK, http://data.worldbank.org/indicator/CM.MKT.LCAP.CD (last visited Dec. 5, 2013); *NYSE Composite Index*, NYSE EURONEXT, http://www.nyse.com/about/listed/nya_characteristics.shtml (last visited Dec. 5, 2013).

[182] The stock markets' revenues are driven by issuer listing fees. The number of issuers who choose to list with a market is driven in part by public perception of that market for use in issuers' own marketing and co-branding efforts directed toward their own current and potential investors. For example, the NYSE's own headline marketing materials emphasize the "[w]orld's highest listing and governance standards." NYSE EURONEXT, THE LEADING, MOST LIQUID EXCHANGE GROUP IN THE WORLD (2009), http://www.nyse.com/pdfs/nyx_most_liquid.pdf. The market offers "NYSE Governance Services," "an integrated suite of resources for public and privately held companies worldwide seeking to create a leadership advantage through corporate governance, risk, and ethics and compliance practices." *NYSE Governance Services*, NYSE EURONEXT, https://usequities.nyx.com/listings/governance (last visited Dec. 5, 2013). Accordingly, the NYSE's "listings and compliance standards remain the most stringent of any global exchange group." NYSE EURONEXT, CORPORATE RESPONSIBILITY REPORT 2009 22 (2009), http://www.nyse.com/pdfs/NYX_Corporate_

essentially marketing interest in perceived issuer quality has driven the exchanges over the course of the years to adopt, and from time to time to modify and strengthen, the various corporate governance listing standards they respectively require of all issuers listed thereon.[183]

Adoption by the NYSE and Nasdaq of an antiretaliation clause requirement would also go far toward ameliorating federalism concerns. The two exchanges are both independent, self-regulatory organizations with their own governing bodies.[184] Though subject to extensive federal regulation, including preapproval by the SEC of all changes to their listing standards,[185] the NYSE and Nasdaq do not constitute part of the government per se. If the exchanges were voluntarily to adopt such a requirement at their own initiative and for their own reasons, we would not have a situation where the federal government had affirmatively invaded the state law province of internal corporate governance in the same manner as via federal statute.[186]

Responsibility_Report.pdf.

[183] For example, in 1853, the NYSE strengthened its listing standards to require listed companies "to provide complete statements of shares outstanding and capital resources." *Timeline*, NYSE, http://www.nyse.com/about/history/timeline_regulation.html (last visited Feb. 13, 2013) [hereinafter NYSE Timeline]. In 1869, the exchange prohibited "watering stock," and in 1927 it first established rules governing proxy solicitations. *Id.* In 1933, the NYSE moved to require companies applying for listing on the exchange to agree to prepare audited financial statements. SEC Timeline, SECURITY AND EXCHANGE COMMISSION HISTORICAL SOCIETY, http://www.sechistorical.org/museum/timeline/1930.php#-11-1933-2 (last visited Nov. 16, 2013). As discussed further *infra* note 186, in 1977 the NYSE adopted a requirement that all listed boards of directors maintain an independent audit committee. *See* NYSE Timeline, *supra*. In 1986, the NYSE adopted a standard applicable to companies with "common stocks of unequal classes of voting rights." *Id.* And, of course, in 2003 the NYSE, along with Nasdaq, massively amended its corporate governance listing standards, *supra* note 4 and accompanying text.

[184] For discussion of the history of self-regulation by the exchanges, see, e.g., Concept Release Concerning Self-Regulation, SEC Concept Release No. 34-50700, 69 Fed. Reg. 71256, 71257 (Dec. 8, 2004).

[185] 15 U.S.C. § 78s(b)(1) (2006).

[186] "Of course an exchange may delist an issuer and thus in some sense 'enforce' its listing standards, but it still does not exercise any governmental authority to 'regulate' the issuer." Business Roundtable v. SEC, 905 F.2d 406, 414 (D.C. Cir. 1990).

The analysis here has been stated in simplified form in order to drive home the major point. In practice, there exist certain entangling relations between the stock exchanges and the SEC which cloud the picture somewhat. The adoption of a new, or modification of an existing, public company listing requirement by either the NYSE or Nasdaq requires prior approval by the SEC. *See* 15 U.S.C. § 78s(b)(1). Moreover, the SEC through its regulatory power over the exchanges has ways to make an exchange's life difficult if the exchange falls into ill grace with the agency. Suffice it to say that SEC suggestions to the exchanges with regard to their corporate governance listing standards have a good chance of being taken seriously by the latter.

Turning now to state legislation as an implementation modality, Delaware, for example, could amend its General Corporation Law ("DGCL") to require publicly traded companies to adopt an antiretaliation clause. Such action by this tiny eastern state alone would affect most of the Fortune 500 and roughly half of all public companies in the United States.[187]

Yet while implementation via state regulation would obviously allay federalism concerns and provide an experimental laboratory for regulatory innovation, there are significant reasons to question whether such an approach is likely to be attempted. First, a mandatory provision of such type would be at stark variance with the current structure of Delaware law—as a general matter, the DGCL does not delve into highly prescriptive rules regarding which substantive decisions are to be made when, or in which manner, by the board or committees thereof.[188] Instead, directors are subject to general duties of care and loyalty developed under the caselaw, with the board enjoying open discretion with respect to the creation and composition of board committees and the allocation to them of specific decision-making authority.[189] Explicitly requiring adoption of a detailed,

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A historical example nicely illustrates the SEC's bully pulpit ability to influence stock exchange listing standards. In the mid-1970s, then chair of the SEC Roderick Hills suggested in a letter to the NYSE that the stock exchange adopt a listing standard requiring all listed companies to create an independent audit committee of the board. Letter from Roderick M. Hills, Chairman, Sec. and Exch. Comm'n, to William Batten, Chairman, N.Y. Stock Exch. (May 11, 1976), *available at* http://www.sechistorical.org/collection/papers /1970/1976_0511_Hills_Batten.pdf [hereinafter Letter on Audit Committee Reform]. The NYSE acceded to the SEC's suggestion and adopted just such a listing standard. For a description of these events, see Donald E. Schwartz, *Federalism and Corporate Governance*, 45 OHIO ST. L.J. 545, 571 (1984). Professor Schwartz referred to this elegantly as "regulation by raised eyebrow." *Id.*

[187] *See* About the Del. Div. of Corps. Agency, STATE OF DELAWARE, http://www.corp. delaware.gov/aboutagency.shtml (last visited Nov. 16, 2013) ("The State of Delaware is a leading domicile for U.S. and international corporations. More than 1,000,000 business entities have made Delaware their legal home. More than 50% of all publicly-traded companies in the United States including 64% of the Fortune 500 have chosen Delaware as their legal home.").

[188] The DGCL's overall grant of authority to the board of directors is broad and all-embracing: "The business and affairs of every corporation . . . shall be managed by or under the direction of a board of directors . . . ." DEL. CODE ANN. tit. 8, § 141(a) (West, Westlaw through 2013 legislation).

[189] "The board of directors may designate 1 or more committees . . . . Any such committee, to the extent provided in the resolution of the board of directors . . . shall have and may exercise all the powers and authority of the board of directors in the management of the business and affairs of the corporation . . . ." *Id.* § 141(c)(2). The only limitations are that the board may not delegate to a committee the power to approve or recommend corporate action requiring approval of the shareholders, or to amend the bylaws. *Id.*

prescriptive antiretaliation clause and vesting its administration in the audit committee would be out of place in such a statutory scheme.

Second, the State of Delaware has significant economic incentives not to make itself unattractive to directors as a corporate domicile.[190] Not that the observation comes as any surprise, but speaking from experience in practice, directors generally prefer to have fewer duties rather than more, and to enjoy personal insulation from unpleasant corporate decisions wherever possible. Sitting audit committee members are unlikely to be overjoyed at the prospect of seeing their responsibilities and potential liabilities as directors expanded by an antiretaliation provision. Absent the threat of federal preemptive legislation or regulation in the absence of state action, Delaware is unlikely to burden directors with such a requirement.

Finally, one might encourage professional and advocacy organizations to issue statements supporting the voluntary adoption of antiretaliation clauses as a corporate "best practice." Nonetheless, in light of the personal interests discussed above, the directors and senior business executives of public companies, each group for their own separate reasons, are unlikely to adopt such a provision on a purely voluntary basis. A toothless "best practices" approach would, in the end, most likely represent nothing more than a recipe for simple inaction.

Of the foregoing palette of options, the "sweet spot," as it were, for adoption of a mandatory corporate governance rule would appear to be amendment by the NYSE and Nasdaq of their corporate governance listing standards. This approach has the benefit of wide reach and general uniformity without raising the same type of federalism concerns as would direct legislation by Congress or rulemaking by the SEC.

c. Suggested draft text of the antiretaliation clause

The final mile with any reform proposal is to reduce the concept to operative language, to actual text. Failure to specify the governing provisions with precision can cause the attempted reform to be either innocently misinterpreted or deliberately circumvented in practice and thus ultimately frustrated in its purpose. Theoretical discussion must be translated into practical implementation in order to be effective.

Based on the totality of the foregoing discussion, it is possible to craft a draft amendment to the NYSE and Nasdaq corporate governance listing

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[190] *See* LEWIS S. BLACK, JR., WHY CORPORATIONS CHOOSE DELAWARE 1 (2007) ("The People of Delaware are aware that the income received from corporation franchise taxes is an important part of the state budget and that Delaware law firms that specialize in business law matters employ significant numbers of people.").

standards that would introduce an antiretaliation clause into the enumerated list of audit committee duties and powers.

Specifically, NYSE Listed Company Manual Section 303A.07, entitled "Audit Committee Additional Requirements," would be amended to add a new subsection 303A.07(b)(iii)(H) (and the currently existing subsection 303A.07(b)(iii)(H) would be moved one spot further along the list and relabeled as subsection 303A.07(b)(iii)(I)).[191] Section 303A.07(b) would, as a result of such amendment, thus read in relevant part as follows (added text shown in italics):

> (b) The audit committee must have a written charter that addresses: . . . (iii) the duties and responsibilities of the audit committee—which, at a minimum,

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[191] *See* NYSE Listed Company Manual, *supra* note 4, § 303A.07. As a minor point in connection herewith, the "and" currently appearing at the end of existing subsection 303A.07(b)(iii)(G) would be stricken.

It would, in the alternative, be possible and in minor, clerical respect easier, to place the proposed new subsection at the end of the list of current subsections 303A.07(b)(iii)(A)-(H), that is, to label the proposed new subsection as 303A.07(b)(iii)(I) and leave current subsection (H) (which requires the audit committee to "report regularly to the board") where it is. However, from the perspective of structural aesthetics it is marginally preferable to place the new antiretaliation clause before the reporting to the board requirement, since reporting regularly to the board would seem the most natural capstone to a list of all other substantive duties and should logically include reporting to the board any decisions reached pursuant to the antiretaliation clause. In the interest of substance over form, the antiretaliation clause of proposed new subsection has accordingly been placed with the other substantive duties of the audit committee and labeled as subsection (H), and the audit committee's board reporting requirement in current subsection (H) has been moved one place further in the list to a new position as subsection (I). However, not much rides on the choice either way, and both of the two drafting alternatives discussed here would work just as well in practice.

The "Commentary" appearing here is a feature of each of the existing audit committee duties specified in current Section 303A.07(b)(iii). More importantly, given the drafting straightjacket imposed by the grammatical formatting of the currently existing subsections of current Section 303A.07(b)(iii), the Commentary serves the important function of specifying that prior audit committee approval is required for the taking of any of the actions specified in the antiretaliation clause. An alternative means of setting forth this requirement, namely stating in the main text of proposed new subsection (H) that the audit committee "shall preapprove" the taking of any of those actions, might easily be inadvertently misinterpreted as attempting to impose a requirement upon the audit committee that it do so. Such a reading would, of course, utterly vitiate the antiretaliation clause by frustrating its central objective of bringing the independent judgment of the audit committee members to bear on the question of whether the specified counsel should be terminated. The decision whether or not to preapprove should lie entirely within the discretion of the audit committee.

There are other alternative formulations, equally ungainly, involving the main text of proposed new subsection (H). For the sake of simplicity and ease of exposition, the draft language here has placed the important explanatory indication in the subsection's Commentary.

must include those set out in Rule 10A-3(b)(2), (3), (4) and (5) of the Exchange Act, as well as to: . . . *(H) be directly responsible for, and have sole and prior approval authority with respect to, the (1) hiring, (2) compensation and other material terms of employment, and (3) termination of employment, of the company's: (i) general counsel and chief legal officer (which officer position the company is required to fill and which officer shall in turn, other than as set forth in this paragraph, have sole authority as to the hiring, compensation and other material terms of employment, and termination, of all outside counsel and of all persons employed by the company as in-house counsel), (ii) lead in-house corporate transactional and securities regulatory counsel (if different from the general counsel and chief legal officer), (iii) the chief compliance officer (if the company has chosen to designate such a position, and if such position is occupied by a person other than those specified in either clause (i) or (ii) above), and (iv) lead outside corporate transactional and securities regulatory counsel (including (v) specification of the lead corporate transactional and securities regulatory partner serving the company's account on behalf of the outside law firm); and* . . . .

Commentary: Consistent with the audit committee's duty pursuant to Section 303A.07(b)(i)(A)(2) to assist board oversight of the listed company's compliance with legal and regulatory requirements, the hiring, the specification or material modification of the compensation or other material terms of employment, and the termination of employment, of the counsel and persons listed in this paragraph, shall require prior approval by the audit committee.

The corresponding amendment to Nasdaq's audit committee requirements would be of similar tenor. Specifically, Nasdaq Listing Rule 5605(c)(3), entitled "Audit Committee Responsibilities and Authority," would be amended to add an additional sentence at the end thereof.[192] Rule 5605(c)(3) would, as a result of such amendment, thus read as follows (added text shown in italics):

The audit committee must have the specific audit committee responsibilities and authority necessary to comply with Rule 10A-3(b)(2), (3), (4) and (5) under the Act (subject to exemptions provided in Rule 10A-3(c) under the Act), concerning responsibilities relating to: (i) registered public accounting firms, (ii) complaints relating to accounting, internal accounting controls or auditing matters, (iii) authority to engage advisors, and (iv) funding as determined by the audit committee. Audit committees for investment companies must also establish procedures for the confidential, anonymous submission of concerns regarding questionable accounting or auditing matters by employees of the investment adviser, administrator, principal underwriter,

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[192] *See* Nasdaq Listing Rules, *supra* note 4, Rule 5605(c)(3).

or any other provider of accounting related services for the investment company, as well as employees of the investment company. *Prior approval by the audit committee shall be required for the (A) hiring, (B) specification or material modification of the compensation or other material terms of employment, and (C) termination of employment, of the Company's: (i) general counsel and chief legal officer (which officer position the Company is required to fill and which officer shall in turn, other than as set forth in this paragraph, have sole authority as to the hiring, compensation and other material terms of employment, and termination, of all outside counsel and of all persons employed by the Company as in-house counsel), (ii) lead in-house corporate transactional and securities regulatory counsel (if different from the general counsel and chief legal officer), (iii) the chief compliance officer (if the Company has chosen to designate such a position, and if such position is occupied by a person other than those specified in either clause (i) or (ii) above), and (iv) lead outside corporate transactional and securities regulatory counsel (including (v) specification of the lead corporate transactional and securities regulatory partner serving the Company's account on behalf of the outside law firm).*

VI. AN ALTERNATIVE PROPHYLACTIC APPROACH: LEGAL AUDIT

Are there alternative structures which might be employed to ensure the fidelity with which the corporate and securities legal function is exercised within public corporations? There are. The major issues with those alternatives, however, tend to be the cost and complexity arising from the proliferation of lawyers operating under simultaneous, separate mandates.

A. External Legal Audit

For example, at its most robust, one might choose to require outside legal audits, conducted by an independent law firm hired and subject to termination only by the audit committee, much the way all public companies must already submit to outside financial statement audits.[193] The policy rationale for this requirement in the case of the financial statements is obvious—the farmer has been called in to keep an eye on CEO and CFO foxes guarding the financial statement henhouse. The financial statements are of clear and evident importance to investors, and senior executives of the corporate enterprise can have significant personal incentives to portray financial results and condition in the rosiest light possible. An independent check on those financial statements is not out of order.

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[193] *See* 15 U.S.C. § 78l(g)(1) (2006).

But as discussed earlier, disclosure to investors goes far beyond the financial statements. Narrative, nonfinancial disclosure, particularly as to potential risks faced by an enterprise, is vital. Moreover, financial statements to a great extent reflect legal transactions undertaken by corporate and securities counsel, and can be manipulated in myriad ways through the structuring and documentation of those transactions. To a nontrivial extent, the financial statements are only as good as what the auditors receive served up to them by the transactional lawyers.

Thus the same policy rationale for imposing an outside, independent check on the financial statements lends significant support to the argument that a similar outside, independent check as to the legality of transactions structured and undertaken, and as to the probity of disclosure judgments made, by corporate counsel.

Yet the prospect of employing an outside law firm to serve as legal auditor would likely make many a stouthearted executive quail. The cost of paying that many additional lawyers to conduct a systematic review would raise further the already significant administrative expense of being a public company.[194] Moreover, many might recoil from the potential ramifications—legal and otherwise—of receiving differing views, some of them ex post, from different sets of lawyers as to the legality of transactions and the advisability of various disclosure positions.

All this is not to say that external legal audit might not be a superb prophylactic measure. External legal audit would be particularly robust in terms of independence from senior business management, though would admittedly face the same handicap of the outsider faced by external financial auditors, namely reliance on documents prepared and furnished by others. The issues to be wrestled with are those of cost and of acceptability to industry.

B. Internal Legal Audit

Similar though less pronounced considerations of cost and complexity arise with respect to a toned-down version of the same fundamental concept, namely explicitly adding legal review to the mandate of a public

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[194] *See* THOMAS E. HARTMAN, FOLEY & LARDNER LLP, THE COST OF BEING PUBLIC IN THE ERA OF SARBANES-OXLEY 1 (2006), http://home.financialexecutives.org/eweb/upload/FEI/The%20Cost%20of%20Being%20Public%20in%20the%20Era%20of%20Sarbanes%20Oxley_4th%20annual%20study_Foley%20and%20Lardner_June%2015%202006.pdf ("Since the enactment of the Sarbanes-Oxley Act, the average cost of compliance for companies with under $1 billion dollars in annual revenue has increased more than $1.8 million to approximately $2.9 million . . . .").

company's internal auditors and requiring that the internal auditors be protected from retaliation through an antiretaliation clause.[195]

The proposal ventured in this article as to fidelity of the legal function is, in effect, good corporate governance on the cheap. It would avoid multiplication of lawyers and the associated cost, while at the same time creating some room for independence of legal judgment through personal security from retaliatory harm.

VII. COUNTERVAILING CONSIDERATIONS

As the foregoing discussion nonetheless illustrates, there are nontrivial countervailing considerations to be taken into account in weighing whether the proposal ventured in this article should ultimately be viewed as desirable from a policy perspective.

A. Economic Inefficiency Due to Legal Risk Aversion

One concern is the flip side of the proposal's virtue, namely the creation of a class of persons who no longer, or to a diminished extent, have incentive either to break the law overtly or even to "push the envelope" of that which is legal. This can be expected to lead to what might some may view as "overcompliance."[196]

Modern society is characterized by an ever growing welter of highly prescriptive, detailed, micromanaging regulations addressing myriad aspects of our lives. Many good, reasonable people, in order both to maintain their sanity and to continue to function effectively despite the regulatory overlay, take various "shortcuts" throughout the course of their everyday lives. Rare is the individual who can in good faith claim never to have strayed slightly over the posted speed limit or made an illegal U-turn.

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[195] *See* NYSE Listed Company Manual, *supra* note 4, § 303A.07(c). The NYSE requires each listed company to have an internal audit function "to provide management and the audit committee with ongoing assessments of the listed company's risk management processes and system of internal control." *Id.* Although risk management and internal controls both involve legal matters to some extent, at least tangentially, the emphasis here appears to be on general business risk and financial accounting, and no explicit mention is made as to review of legal matters by the internal audit department.

The Nasdaq Listing Rules are silent as to whether listed companies must have an internal audit function.

[196] *See, e.g.*, LOUIS M. BROWN ET AL., THE LEGAL AUDIT: CORPORATE INTERNAL INVESTIGATION § 7:52 (1990), *available at* Westlaw, Corporations Texts & Treatises, current through August 2013 update ("[I]t is possible to develop an atmosphere of over-compliance in which employees avoid legal conduct because it seems similar to conduct that they know to be illegal.").

To carry the analogy further, by insulating counsel from retaliation for refusing to countenance the corporate equivalent of reckless driving or vehicular manslaughter, the proposed antiretaliation clause would also shield counsel from retaliation for the corporate equivalent of insisting on strict compliance with all minor traffic regulations, even if it might arguably be economically inefficient for all businesses to comply with all laws and regulations in all their burgeoning detail all the time.

Moreover, there is the cynical observation that although shareholders might not wish for corporate executives to violate the law by making fraudulent disclosures to investors in the corporate enterprise, shareholders might rather enjoy the economic upside of having the corporation successfully engage in other violations of law toward the government or private third parties. For example, a pharmaceutical company can profit by marketing drugs in violation of FDA strictures; an oil company can profit by violating safety rules designed to protect workers and the environment; any corporation can profit by successfully engaging in tax fraud. Unless and until misconduct is discovered and prosecuted, crime does, unfortunately, pay. From a purely Machiavellian standpoint, the inquiry is simply one of the estimated likelihood of detection and the potential cost of punishment, versus immediate and certain competitive advantage.

In rejoinder to these considerations, it is worth noting to begin with that the analogy to traffic violations is perhaps not entirely apt. Many minor traffic infractions, while involving perhaps slightly heightened risk to others, do not have risk to others as their objective, nor is injury to others the typical result. At least where corporate fraud is involved the objective generally is precisely to hurt someone else, be it the government, investors, or contractual counterparties.

As to shareholders who might not want to know what goes into the hot dog of higher profits, but like how it tastes, the rejoinder here is that American society as a whole has already weighed the collective benefits and costs of a given pattern of conduct and determined through the legislative and regulatory process that the conduct should be proscribed. It is not legitimately within shareholders' discretion, nor should it be counted in the policy analysis here, to favor the returns on capital to the few over the broader, common good already sought to be advanced or protected by promulgated law.

Yet the unimpeachable point remains that the proposal here would constitute yet another brick in the wall of modern bureaucratism. This would without question constitute a tangible cost of the proposal.

B. Soft Deputization of the Legal Class

More subtly, and more dangerously, the proposal's arguable creation of a class of persons who have incentives only to adhere to the law and not to resist government interpretations of its own authority could perhaps be viewed as a soft form of federal deputization of corporate counsel.

By virtue of Sarbanes-Oxley, audit committee members receive fees for serving on the board and its committees, and will often have a small equity stake in the company, but will not otherwise receive income or benefit from success of the corporate enterprise.[197] Given the meager to nonexistent upside any audit committee member might personally enjoy from corporate profit driven by corporate misconduct, the sensible course for them is to remain steadfastly risk averse and law abiding. To place in audit committee hands the termination authority over corporate counsel would extend this compliance-preferring incentive structure to the attorneys who, located both within and without the corporate organization, represent the corporation as a private juridical person in its relations with, and against, the government.

This concern is nontrivial, going as it does to the heart of the relationship in American society between private citizens (including private citizens who have chosen to associate themselves collectively as a corporation) and their government. It is essential that private parties, either through judicial process or through good faith interpretation of existing legal requirements and conduct in accordance with such interpretation, be able to challenge the government's own view of its authority under the law. Representatives of the executive branch tasked with enforcing the law will on occasion have an overly aggressive and potentially unjustifiable view of their own mandate under the law.[198]

Challenge to the government's view of its own authority may of course be made either by prior litigation or by conduct in derogation of that view. Although challenge to the government's view through prior litigation generally would not involve personal risk, this course is not always feasible in a practical world in terms of cost, effort, and delay. Yet the other avenue, namely challenge to a governmental position through a contrary reading of applicable law and through conduct in accordance with that contrary position ("Damn the torpedoes, full speed ahead!"), without prior declaration by the courts, obviously involves potential personal risk.

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[197] *See* 15 U.S.C. § 78j-1(m)(3)(B)(i).

[198] For a discussion of the executive branch's approaches to statutory interpretation, see, e.g., Yehonatan Givati, *Strategic Statutory Interpretation by Administrative Agencies*, 12 AM. L. & ECON. REV. 95, 95 (2010) (noting that administrative agencies often choose to interpret statues aggressively in when promulgating regulations).

By insulating corporate counsel from fear of personal repercussions from the business side of their organizations for toeing the government line in all matters, the proposal in this article could make it less likely for public companies to challenge the government through conduct at odds with the government's stated position.

This is a serious matter, and one which this article has no intention of understating. It is worth noting in this regard, however, that we are not speaking here of the broad, generally applicable class of situation where government agents are acting fully within their duly constituted authority in promulgating regulations and enforcing the law. In those situations, a knowing decision by a private actor not to comply with the law generally does not serve a legitimate purpose in a democratic society under the rule of law and consequently deserves no special protection. Rather, the issue here addresses the narrow class of exceptional situations where government agents have arguably overstepped their legal authority. Even here, the prior litigation route remains open to private actors in cases they deem to be significant.

Precisely how serious one believes this concern to be, and whether it outweighs the policy considerations in favor of the proposal in this article, is a matter of judgment where reasonable minds may differ. But in this regard we should keep firmly in mind the long-term dangers to American society posed by the rising tide of extreme white collar criminalization, driven in good part by reaction to corporate compliance scandals.[199] The proposal in this article would markedly alter the compliance landscape, tangibly reducing the likelihood of major fraud and other large-scale violations of law at publicly traded corporations. Any potential of this proposal to help brake the onrushing criminalization juggernaut should weigh heavily in the balance.

C. The Hamermesh Critique

In addition to the foregoing considerations, critique has recently been voiced in 2012 by Professor Lawrence Hamermesh of Widener University. In *Who Let You into the House?*,[200] he takes issue with the approach recommended in Professor Kim's article referred to earlier,[201] namely not only to adopt antiretaliation protection along the lines proposed here by the Author but also "to redirect the responsibilities over legal affairs from that

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[199] *See supra* Part I.C (discussing the dangers of extreme white collar criminalization); *supra* Part III (discussing recent scandals involving lawyers and corporate fraud).

[200] Lawrence A. Hamermesh, *Who Let You into the House?*, 2012 WIS. L. REV. 359 (2012).

[201] *See supra* notes 112-21 and accompanying text (discussing Professor Kim's article).

of the senior officers to a committee of independent board members," where such "committee's mission would include the oversight of legal compliance, the handling of all internal reports of evidence of material violations, and the ensuring of the quality of the company's legal resources," including demanding "that the company's lawyers, both inside and outside counsel, inform directors of all material issues as they make corporate policy."[202] In Professor Kim's words, "[t]his would be a dramatic change from the status quo . . . ."[203]

Professor Hamermesh argues that if an approach along such lines were to be adopted, "access and respect . . . would not be as readily accorded to a general counsel more generally perceived and situated as a 'cop' or 'gatekeeper',"[204] and that "general counsel would lose the benefit of the informal communications from senior managers that invariably emerge in the context of a relationship of trust and confidence."[205] Professor Hamermesh views such a reluctance on the part of senior business managers to confide in truly independent in-house counsel as affecting "the capacity, and not just the willingness, [of the general counsel] to monitor for misconduct," which "is a key quality of an effective gatekeeper."[206] "It certainly cannot be assumed that a radical alteration in the relationship between general counsel and senior management will have no impact on general counsel's access to internal corporate information."[207]

"To be an effective promoter of good corporate behavior," he asserts, "the advice of general counsel must be received by other senior managers with a degree of trust and respect."[208] This is more likely, he claims, if counsel "is perceived as supportive and sympathetic, rather than as a distant and adversarial monitor."[209] He poses the question as follows: "is a suggestion that some course of conduct may be improper and should be avoided more likely to be accepted and internalized if received from a close friend, or from someone perceived as an enforcer whose incentives include avoiding potential liability for any failure to stop improper conduct?"[210]

In lieu of the approach suggested by Professor Kim, Professor Hamermesh then proposes a list of soft, precatory measures which would leave the status quo in effect unchanged, that is, would leave senior

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[202] Kim, *supra* note 112, at 1055.
[203] *Id.*
[204] Hamermesh, *supra* note 200, at 373.
[205] *Id.* at 374.
[206] *Id.*
[207] *Id.*
[208] *Id.* at 378.
[209] *Id.*
[210] *Id.*

business managers free to terminate corporate counsel without prior approval by the audit committee or other committee of independent directors.[211]

There is a fundamental, structural problem with the foregoing analysis and set of counterproposals. At its core, Professor Hamermesh's argument and set of recommendations reduce to the proposition that senior business managers should continue to enjoy an essentially unfettered ability to terminate recalcitrant corporate counsel at will, in order that counsel at all times maintain an attitude perceived by the business managers as "supportive and sympathetic."[212] The key motivational factor here is obviously—indeed, can be nothing other than—fear. The structural centerpiece of his argument is that corporate counsel which is protected from retaliatory termination and supervised directly by the audit committee will begin to be perceived (presumably based on actual conduct) as a "cop" and "gatekeeper,"[213] whereas counsel which lives in fear of termination will conduct themselves in such a way so as to be perceived as being a "close friend" of the senior business managers.[214]

This may not cause a problem as long as the senior business managers are persons of impeccable personal honor and integrity and are not engaged in corporate misconduct. But precisely the situation for which one must be prepared, precisely the situation for which protective rules are implemented, is the contrary fact pattern, namely an unfortunate case where senior business managers know very well what they are doing and are

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[211] The measures which Professor Hamermesh recommends in place of protecting corporate counsel from retaliation are:

> (1) [I]dentifying general counsel's independence as a norm and expectation . . . ;
> (2) Involving independent directors in interviewing and evaluating general counsel candidates;
> (3) Encouraging the CEO to consult with independent directors in selecting the general counsel;
> (4) Encouraging the CEO to consult with independent directors in designing and revising the general counsel's compensation package;
> (5) Encouraging the CEO to establish a relationship with the general counsel . . . ;
> (6) Providing regular opportunities for the independent directors to consult with the general counsel in an 'executive session' . . . ; and
> (7) Otherwise encouraging independent directors to consult with the general counsel, without the intervention of other senior managers.

Id. at 362.

The common thread here, of course, is the lack of any actual, structural protection for corporate counsel from retaliatory termination. This is in essence a precatory list of suggested best practices, and nothing more.

[212] *Id.* at 378.

[213] *See id.* at 373.

[214] *See id.* at 376, 378.

determined to proceed with an illegal course of conduct in the pursuit of advantage. This is the acid test. This is when it counts. This is when you need corporate counsel with the intestinal fortitude and practical ability to say, "Stop." The last thing in the world one wants at this juncture is cringing, sycophantic, pliable counsel unable or unwilling, due to an entirely justified fear of termination and the tremendous personal consequences which can easily and foreseeably flow therefrom, to assert themselves successfully against determined, corrupt senior managers engaged or proposing to engage in illegal conduct.[215]

Professor Hamermesh's article asserts, "[t]he more that inside counsel, and general counsel in particular, are institutionally established as gatekeepers at arm's length from organizational constituents, particularly CEOs, the less likely it is that such counsel will . . . be heeded with respect to advice on . . . corporate compliance . . . ."[216] Why we should draw this conclusion is unclear. Perhaps his article is operating on an implicit assumption that all senior business managers are honorable, honest, and ethical, and merely wish a warm, comfortable, intimate relationship with corporate counsel free of interference from the audit committee. But human nature being what it is, that will not always be the case. The possibility to be concerned about is if a corporation is faced with the unfortunate situation where senior business management is not honorable, honest and ethical, but rather the converse. In that type of circumstance, those intent on misconduct will not be happy with corporate counsel who does not roll over and play along with the intended course of action. Anyone who shows the moxie to issue contrary legal advice, or to decline to participate in the misconduct, can anticipate only genuine animosity and attempts at retaliation in return. The lawyer who dares to say "stop" is not perceived by wrongdoers as supportive and sympathetic. If the contrary legal advice is nonetheless ultimately, grudgingly heeded in this tense and unhappy situation, it will not be due to a clubby atmosphere in which the lawyer is viewed by wrongdoers as a close friend, but precisely because the lawyer has acted as a gatekeeper at arm's length. This is not a comfortable situation, but it is reality.

Following this line of thinking, Professor Hamermesh's article thus arrives at the paradoxical conclusion that "[r]e-situating general counsel to report to a committee of independent directors is thus potentially

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[215] At its most basic, Professor Hamermesh's argument reduces to the proposal that we use fear, in order to cause corporate counsel's attitude to be more amenable to business managers, so that counsel are privy to more information concerning misconduct, so that they then can act without fear to stop the misconduct. The internal logical contradiction here is self-evident.

[216] Hamermesh, *supra* note 200, at 378-79.

counterproductive to the goal of relying on general counsel to promote [responsible] behavior."[217] The Author respectfully disagrees with the reasoning underlying that claim.

It is important in this connection to note that Professor Hamermesh has indicated that the critique offered in his article was directed specifically at the broader version of audit committee reform proposed by Professor Kim, which would appear to task the committee with direct oversight of all legal compliance matters, rather than the more narrowly tailored version of reform proposed here by the Author: "Professor Kim's proposal . . . was much broader . . . . I continue to think that an approach that radical would have the negative effects I articulated. If the proposal were much narrower—as yours commendably is—the calculus might be a lot different."[218] Professor Hamermesh has indicated that the contentions advanced in his article were not intended "as arguments against [the Author's] antiretaliation rule."[219]

VIII. CONCLUSION

Our society is not static. It is dynamically evolving over time. The extraordinary white collar criminal provisions recently passed into law by Congress have a logic, certainly, in enabling the government to pursue significant corporate misconduct which had previously been difficult for prosecutors to root out and hunt down.[220] These criminal provisions promise to unfold their deterrent power as ever more successful prosecutions and life-shattering sentences are handed down over time. Yet like the powerful chemotherapy drugs used to treat cancer, they bring concomitant side effects of far-reaching scope and magnitude. Over the very long run, they may prove to have corrosive effect on the foundations of a society founded on liberty, individual dignity, and freedom from fear.

There is an alternative cure to corporate misconduct at hand, one not fraught with equivalent potential harm to the patient. That different course of therapy is the use of checks and balances in the corporate governance structure to insulate vital gatekeepers from the ever-present threat of retaliation. We need to create sanctuary for those who would be honest.

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[217] *Id.*

[218] E-mail from Lawrence A. Hamermesh, Ruby R. Vale Professor of Corporate and Business Law, Widener Univ. Sch. of Law, to Eric Alden, Assistant Professor of Law and Co-Director of the Transactional Law Practice Ctr., Salmon P. Chase Coll. of Law, Northern Kentucky Univ. (Jan. 23, 2013, 11:49 EST) (on file with author).

[219] *Id.*

[220] *See supra* notes 7-10 and accompanying text (discussing how few cases in the pre-Sarbanes-Oxley era were discovered, prosecuted, or meaningfully punished).

We could do so through the adoption of a new stock exchange listing requirement that the termination of public company transactional and securities regulatory counsel be subject to prior approval by the independent audit committee.

The Restatement (Second) of Contracts' Reasonably Certain Terms Requirement: A Model of Neoclassical Contract Law and a Model of Confusion and Inconsistency

Daniel P. O'Gorman*

The Restatement (Second) of Contracts ("Second Restatement") states that the formation of a contract requires that a bargain's terms be "reasonably certain." It seeks to make this vague standard clearer with the following test: "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." The Second Restatement then provides comments and illustrations to help explain the test. This Article shows, however, that the test and its supporting comments and illustrations create more confusion than clarity.

The confusion stems from inconsistent signals as to whether indefiniteness is to be assessed as of the time of the bargain's formation or at the time of the lawsuit. These inconsistent signals cause further confusion about the answers to two more specific questions. First, if only the plaintiff's promise is too indefinite to enforce does this automatically mean no contract was formed, or is the defendant's sufficiently definite promise still enforceable as part of a contract as long as the plaintiff's promise is not relevant to the dispute that arises? Second, what is meant by an "appropriate" remedy, and, specifically, can a remedy be appropriate only if it protects a party's benefit of the bargain (the so-called expectation interest), or can a remedy be appropriate if the plaintiff seeks something less, such as damages to compensate for the plaintiff's reliance on the promise?

The answers to these questions will not only help answer the temporal question referenced above, but will reveal whether the entity that adopted and

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promulgated the Second Restatement, the American Law Institute ("ALI"), views the reasonably certain terms requirement as a legal formality—a rule requiring a bargain to be in a certain form and that can have consequences contrary to the parties' intentions—or as simply a restatement of other doctrines designed to enable a court to resolve the dispute before it (or perhaps a bit of both). In other words, although it is clear that the Second Restatement sought to relax the traditional certainty requirement, did the ALI intend to simply minimize it or did it intend to abolish it? The answers to these questions are important because they will affect how often bargains fail to be contracts. And if more bargains fail to be contracts because of indefiniteness, more promisees will have to proceed under an alternative theory of enforcement, primarily promissory estoppel, a theory under which it is usually more difficult for promisees to prevail.

Though the answers are far from clear, the better interpretation of the Second Restatement's reasonably certain terms requirement is that even though it remains a formation doctrine, whether the bargain's terms enable a court to determine the existence of a breach should be assessed as of the time of the lawsuit, thus, it is not a requirement that the plaintiff's promise be sufficiently definite. However, only an award protecting the plaintiff's expectation interest is an appropriate remedy even if the plaintiff is only seeking something less, such as reliance damages. The test, therefore, has aspects of a legal formality while at the same time having aspects of simply enabling the court to resolve the dispute that arises. In this respect, the Second Restatement is a model of neoclassical contract law, retaining some of classical contract law's focus on the moment of contract formation while at the same time encouraging courts to look at post-formation events to reach a just outcome in individual cases. But because a formation doctrine cannot logically look at such events, it is also a model of inconsistency.

"[W]e have tried to be a little more helpful in spelling out what is meant by [the reasonably certain terms requirement]."[1]

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I. INTRODUCTION

The Restatement (Second) of Contracts ("Second Restatement"), consistent with established law,[2] states as a black letter rule that the

[2] *See* RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932) ("An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain."); ARTHUR LINTON CORBIN, CORBIN ON CONTRACTS § 95, at 143 (One Vol. Ed. 1952) ("Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, may prevent the creation of an enforceable contract."); E. ALLAN FARNSWORTH, CONTRACTS 108 (4th ed. 2004) (stating that to have a contract, an agreement must be definite enough to be enforceable); JEFFREY FERRIELL, UNDERSTANDING CONTRACTS § 5.11, at 289 (2d ed. 2009) ("[T]he terms of an agreement must be reasonably definite in order for an agreement to be enforced. If the terms are so indefinite that the court would find it impossible to detect a breach, or, even if a breach could be identified, to frame a remedy, no contract can be

formation of a contract[3] requires that a bargain's terms be "reasonably certain."[4] "If this minimum standard of certainty is not met, there is no contract at all."[5]

The Second Restatement seeks to make this vague standard[6] clearer[7] by providing the following test, which, though not part of the Restatement (First) of Contracts ("First Restatement"),[8] was modeled after a Uniform Commercial Code ("U.C.C.") provision:[9] "The terms of a contract are reasonably certain if they provide a basis for determining the existence of a breach and for giving an appropriate remedy."[10] The Second Restatement then provides comments and illustrations to help explain the test.[11]

But if the Second Restatement's test and its supporting comments and illustrations are designed to spell out what is really meant by the reasonably

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found." (footnote omitted)); JOHN EDWARD MURRAY, JR., MURRAY ON CONTRACTS § 39, at 93 (5th ed. 2011) ("It is commonly suggested that, although parties intend to form a contract, if the terms of their agreement are not sufficiently definite or reasonably certain, no contract will be said to exist."); JOSEPH M. PERILLO, CALAMARI AND PERILLO ON CONTRACTS § 2.9, at 43 (6th ed. 2009) ("[E]ven if the parties intend to contract, if the content of their agreement is unduly uncertain no contract is formed.").

[3] Although the Second Restatement defines a contract as *any* legally enforceable promise, *see* RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) ("A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."), including one enforceable as a result of the promisee's reliance, *id.* § 90(1), this Article uses the term *contract* to refer only to a legally enforceable bargain. *See* BLACK'S LAW DICTIONARY 394 (revised 4th ed. 1968) (defining *contract* as "[a] promissory *agreement* between two or more persons that creates, modifies, or destroys a legal relation[]" and "[a]n *agreement*, upon sufficient *consideration*, to do or not to do a particular thing." (emphases added)).

[4] RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981).

[5] *Id.* § 362 cmt. a.

[6] *See* Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1695 (1976) (recognizing that the U.C.C.'s test for reasonably certain terms, which is the model for the Second Restatement's test, is a standard, not a rule).

[7] *See* AMERICAN LAW INSTITUTE, *supra* note 1, at 326 ("[W]e have tried to be a little more helpful in spelling out what is meant by that [standard].") (remark by Reporter Robert Braucher regarding the Second Restatement's provision on the requirement that a contract's terms be reasonably certain).

[8] *See* Robert Braucher, *Offer and Acceptance in the Second Restatement*, 74 YALE L.J. 302, 308 (1964) (noting that the test provided for the reasonably certain terms requirement is a new standard for the Second Restatement).

[9] *See id.* (noting that the new standard follows the U.C.C.).

[10] RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981); *see also* Robert E. Scott, *A Theory of Self-Enforcing Indefinite Agreements*, 103 COLUM. L. REV. 1641, 1643 (2003) ("A contract . . . must be sufficiently complete such that a court is able to determine the fact of breach and provide an appropriate remedy.").

[11] RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. & illus. (1981).

certain terms requirement,[12] they fall short of the mark. Despite the good intentions of the American Law Institute ("ALI"),[13] the test and its supporting comments and illustrations result in more confusion than clarity.

The confusion stems from the ALI sending contradictory signals as to whether a court should assess indefiniteness as of the time the bargain was formed (and thus not consider post-formation events) or at the time of the lawsuit (and thus consider such events). These inconsistent signals make the answers to two more specific questions unclear. First, if only the plaintiff's promise is too indefinite to enforce does this automatically mean that no contract was formed (the position taken in the First Restatement),[14] or is the defendant's sufficiently definite promise still enforceable under a contract theory as long as the plaintiff's promise is not relevant to the dispute? Second, what is an "appropriate" remedy under the Second Restatement's test? Specifically, can a remedy be appropriate only if it protects a party's expectation interest, or can a remedy be appropriate if the plaintiff seeks something less, such as reliance damages?[15]

The significance of the answers to these questions can be illustrated with the following two hypotheticals:

A and *B* enter into a bargain under which *A*, an elderly woman, promises to *B*, a caregiver, the following: to pay *B* a specified amount of money; to provide room and board to *B* while *B* cares for *A*; and to reimburse *B* for the reasonable expenses incurred by *B* in caring for *A*. In exchange, *B* promises to "take care of" *A* for the next six months. The parties do not discuss what "take care of" means, and there is no relevant evidence to determine its meaning other than the express language used. Assume *B*'s promise is *not*

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[12] *See supra* note 7.

[13] *See* Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 150 (1969) (stating that the Restatements are "a modest but essential aid in the improved analysis, clarification, unification, growth and adaptation of the common law"). Professor Wechsler was the ALI director from 1963 to 1984. Norman I. Silber, *Wechsler, Herbert*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 577, 578 (Roger K. Newman ed., 2009). The ALI promulgated and approved the Second Restatement *of Contracts*. RESTATEMENT (SECOND) OF CONTRACTS Foreword (1981) (foreword written by Herbert Wechsler).

[14] *See* RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932) ("An offer must be so definite in its terms, or require such definite terms in the acceptance, that the promises and performances to be rendered by *each party* are reasonably certain." (emphasis added)).

[15] The promisee's expectation interest is "his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed . . . ." RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981). The promisee's reliance interest is "his 'interest' in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made . . . ." *Id.* § 344(b); *see generally* Lon L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: 1*, 46 YALE L.J. 52, 53-56 (1936) (explaining the distinction between expectation interest and reliance interest).

reasonably certain under the Second Restatement's test,[16] but that *A*'s promises are sufficiently definite. Before the time *B* is to begin performing, *A* repudiates the bargain, without justification, for a reason other than the vagueness of *B*'s promise.[17] *B* sues *A* for breach of contract and seeks expectation damages, not specific performance. Assume the amount of cost or other loss avoided by *B* from not having to perform can be determined to a reasonable certainty primarily because *A* was going to provide room and board to *B* and reimburse *B* for *B*'s reasonable expenses. *A* admits repudiating without justification, but defends on the ground that *B*'s promise to "take care of" *A* is vague, and, thus, no contract was formed due to the bargain lacking reasonably certain terms. *B* maintains that whether *B*'s promise is too vague is irrelevant because all the court must do is determine whether *A* breached (or repudiated) *A*'s promise and give an appropriate remedy to *B*, and *A*'s promise is sufficiently certain to do both of these things.[18]

If the court requires that both parties' promises be sufficiently definite, *A*'s defense will succeed and the court will conclude that no contract was formed.[19] If *B* hopes to enforce the promise, then *B* will have to establish the elements of promissory estoppel.[20] If the court requires that only the defendant's promise be sufficiently definite, then *A*'s defense will fail and the court will find *A* liable for breach of contract.

Consider the next hypothetical, assuming that *A* and *B* entered into the same bargain as in the prior hypothetical:

After entering into the bargain, *A* expends money remodeling a portion of her house so that she can provide suitable living quarters for *B*. *B* was aware, at the time the parties entered into the bargain, that *A* would have to incur these expenses. Before *B* is to begin performance, but after *A* makes the expenditures, *B* repudiates the bargain, without justification, for a reason other than the vagueness of *B*'s promise. *A* sues *B* for breach of contract and seeks reliance damages, not expectation damages or specific performance. *B* admits repudiating without justification, but defends on the

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[16] *See* Dombrowski v. Somers, 362 N.E.2d 257, 258 (N.Y. 1977) (holding that the phrase "take care of" was too vague to be enforced). *But see* Brackenbury v. Hodgkin, 102 A. 106, 107-08 (Me. 1917) (enforcing an agreement to maintain and care for one of the parties).

[17] These two hypotheticals do not require that a party repudiate. Rather than repudiate, the party whose performance is due first could fail to perform when performance is due. *See also* RESTATEMENT (SECOND) OF CONTRACTS § 253 (1981).

[18] Hypothetical and explanations provided by the author.

[19] *See Dombrowski*, 362 N.E.2d at 258 (holding that the phrase "take care of" was too vague to be enforced).

[20] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) (setting forth the elements of promissory estoppel).

ground that "take care of" is vague and thus no contract was formed due to the bargain lacking reasonably certain terms. *A* maintains that whether *B*'s promise is too vague is irrelevant because all the court has to do is determine whether *B* breached (or repudiated) *B*'s promise (which *B* clearly did, irrespective of its vagueness), and although *B*'s promise might be too indefinite to protect *A*'s expectation interest, *A* is seeking only reliance damages.[21]

If the court considers an appropriate remedy to be limited to an award protecting the plaintiff's expectation interest, and assuming the court concludes *B*'s promise is too indefinite to determine to a reasonable certainty the position *A* would have been in had *B* performed as promised, *B*'s defense will succeed, and the court will conclude that no contract was formed. If *A* hopes to enforce the promise, then *A* will have to establish the elements of promissory estoppel.[22] If the court considers an appropriate remedy to be an award protecting the plaintiff's reliance interest, then *B*'s defense will fail and the court will find *B* liable for breach of contract and award reliance damages to *A*.

The Second Restatement's answers to these hypotheticals depend on when the court is to assess a bargain's indefiniteness. If the test directs courts to assess indefiniteness as of the time of the bargain's formation (and thus to not consider post-formation events), then both parties' promises must be sufficiently definite because at the time of formation it would not be known which party will breach. Also, only an award protecting each party's expectation interest could be considered an "appropriate" remedy because at the time of formation neither party will have relied upon the bargain.

If the test directs courts to assess indefiniteness at the time of the lawsuit (and thus consider post-formation events), then it would not be a requirement that the plaintiff's promise be sufficiently definite because the plaintiff's promise might not be relevant to determining whether the defendant breached or to giving the plaintiff a remedy. Also, an award protecting the plaintiff's reliance interest might be considered an "appropriate" remedy if the plaintiff relied upon the bargain and is seeking such a remedy. Thus, without knowing whether under the Second Restatement's test the court is to assess indefiniteness as of the time of the bargain's formation or at the time of the lawsuit, an answer to these two hypotheticals cannot be provided.

An answer to this temporal question will not only provide answers to these more specific questions, but will help identify the underlying policies

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[21] Hypothetical and explanations provided by the author.

[22] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

served by the Second Restatement's test. If the test directs courts to assess indefiniteness as of the time of the bargain's formation, it views the reasonably certain terms requirement as a so-called legal formality—a requirement that a bargain be in a particular form to be a contract and which at times operates contrary to the parties' intentions.[23] But if it directs courts to assess indefiniteness at the time of the lawsuit, the test might be viewed as nothing more than a restatement of other doctrines designed to enable a court to resolve the dispute before it—such as the requirement that the plaintiff prove by a preponderance of the evidence that the defendant breached the contract[24]—as well as to establish any requirements for the particular remedy being sought.[25]

The ALI's contradictory signals on the temporal issue make it unclear, however, whether the requirement has just a "formal" aspect or just a "practical" aspect, or perhaps a bit of each. In other words, though it is well known that the Second Restatement sought to relax the traditional certainty requirement,[26] it is unclear whether the ALI intended to simply minimize it or to abolish it.

The answers to these questions are important because if the reasonably certain terms requirement has a formal aspect, more bargains will fail to be contracts than if it has just a practical aspect.[27] And if more bargains fail to

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[23] *See* Kennedy, *supra* note 6, at 1691-92 (discussing legal formalities and noting that "they operate through the contradiction of private intentions" and that "the formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored"); *id.* at 1692, 1698 (referring to the "sanction of nullity"); Joseph M. Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39, 41 n.22 (1974) ("[T]he term 'form' or 'formality' means any manner of expressing or memorializing an agreement other than oral or tacit non-ritual expression."); Gregory Klass, *Three Pictures of Contract: Duty, Power, and Compound Rule*, 83 N.Y.U. L. REV. 1726, 1743 (2008) ("A legal formality is a type of act, such as the utterance of special words or the production of a document in a certain form, that has no extralegal significance.").

[24] *See* Pisani v. Westchester Cnty. Health Care Corp., 424 F. Supp. 2d 710, 719 (S.D.N.Y. 2006) (stating that the plaintiff in a breach of contract action has the burden of proving by a preponderance of the evidence that the defendant breached the contract).

[25] *See* Lands Council v. Packard, No. CV05-210-N-EJL, 2005 WL 1353899, at *8 (D. Idaho June 3, 2005) ("The burden is on Plaintiffs to establish that the remedy requested is appropriate."). Of course, the rules applicable to whether a particular remedy will be granted might include a legal formality, but that would not make the general rule requiring the plaintiff to establish the appropriateness of the requested remedy itself a legal formality.

[26] *See* Sandra Chutorian, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377, 403 n.129 (1986) (recognizing that the Second Restatement "relaxed the traditional certainty requirement to provide for 'reasonable' certainty").

[27] Of course, if parties are sufficiently aware of the requirement's status as a legal formality, more bargains might be saved due to parties setting forth their bargains in greater

be contracts because of indefiniteness, more promisees will have to proceed under an alternative theory of enforcement, primarily promissory estoppel,[28] a theory under which it is usually more difficult for promisees to prevail.[29]

As will be shown, though the Second Restatement's treatment of the reasonably certain terms requirement is not a model of clarity, the best reading of it is that courts should assess definiteness at the time of the lawsuit (a practical aspect), but that the test also retains a formal aspect. With respect to a bargain's terms having to provide a basis for determining the existence of a breach, they are sufficiently definite as long as they enable a court to determine a breach in the dispute before it.[30] Thus, this portion of the test serves a practical purpose, and the plaintiff's promise being sufficiently definite is, therefore, not a requirement as long as it is not relevant to resolving the dispute. An "appropriate" remedy, however, is only one that protects the plaintiff's expectation interest (i.e., full enforcement of the defendant's promise) even if the plaintiff is seeking a

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detail, thereby saving some bargains that would otherwise have failed under the requirement even if it were not a legal formality.

[28] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) (setting forth the elements of promissory estoppel). If the promisee conferred a benefit upon the promisor, the promisee could sue for restitution instead of seeking to enforce the promise. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31(1) (2011) ("A person who renders performance under an agreement that cannot be enforced against the recipient by reason of . . . indefiniteness . . . has a claim in restitution against the recipient as necessary to prevent unjust enrichment."); *id.* cmt. d ("If a contract cannot be enforced because the terms specified by the parties fail to yield 'a reasonably certain basis for giving an appropriate remedy' via damages or specific performance (U.C.C. § 2-204(3)), a performing party is entitled to restitution of a prepaid price, or to the value of a contractual performance for which the performer has not received the promised equivalent."); PERILLO, *supra* note 2, § 2.9, at 44 ("If . . . the agreement is fatally indefinite, any payments made for which a return performance has not been rendered must be disgorged and the value of any uncompensated performance can be recovered.").

[29] *See* Robert A. Hillman, *Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study*, 98 COLUM. L. REV. 580, 580 (1998) (reporting a low success rate for promissory estoppel claims). *But see* Juliet P. Kostritsky, *The Rise and Fall of Promissory Estoppel or Is Promissory Estoppel Really as Unsuccessful as Scholars Say It Is: A New Look at the Data*, 37 WAKE FOREST L. REV. 531, 542 (2002) (disputing Hillman's conclusion and finding that "promissory estoppel claims succeed at significant rates when demonstrably weak claims are subtracted"). Even if "promissory estoppel claims succeed at significant rates when demonstrably weak claims are subtracted," *id.*, such a claim is still more difficult to establish than a claim for breach of contract because the promisee must establish reliance on the promise; that the reliance was sufficiently foreseeable; and that injustice would result if the promise was not enforced. *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) (listing elements of claim for promissory estoppel).

[30] *See infra* Part V.A.

remedy that would only partially enforce the defendant's promise (e.g., reliance damages).

Thus, the Second Restatement's test has both a practical and a formal aspect. In this respect, it is a model of neoclassical contract law,[31] retaining some of classical contract law's focus on the moment of the bargain's formation, while at the same time encouraging courts to look at post-formation events to reach a just outcome in individual cases. But because a formation doctrine cannot logically look at such events, it is also a model of inconsistency.

Part II of this Article explains the different ways in which bargains are indefinite. Part III addresses why parties might enter into bargains with indefinite terms. Part IV provides an overview of the reasonably certain terms requirement, with a focus on the Second Restatement. Part V discusses the uncertainty in the Second Restatement's test for reasonably certain terms and attempts to remove the uncertainty. Part VI explains how the Second Restatement's test, as interpreted in Part V, is a model of neoclassical contract law, but also a model of inconsistency. The last part is a brief conclusion. Parts II, III, and IV are descriptive, and those familiar with the topics covered in those Parts might wish to proceed directly to Part V. For those unfamiliar with the topics, Parts II, III, and IV provide background information that will be helpful when reading the subsequent parts.

II. WAYS IN WHICH BARGAINS ARE INDEFINITE

An indefinite bargain is one in which the parties have failed to expressly or impliedly agree upon a matter within the bargain's scope.[32] There are two principal ways in which a bargain might be indefinite.[33] First, the bargain might have a gap, which is when the bargain is incomplete because of an omitted term.[34] Second, the parties might have a misunderstanding

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[31] *See* Jay M. Feinman, *Relational Contract Theory in Context*, 94 NW. U. L. REV. 737, 738 (2000) (referring to the law of the U.C.C. and the Second Restatement as neoclassical contract law "because it addresses the shortcomings of classical law rather than offering a wholly different conception of the law").

[32] *See* PERILLO, *supra* note 2, § 2.9, at 43.

[33] *Id.* § 2.9, at 44-45. Professor Perillo identifies three categories (gaps, misunderstandings, and agreements to agree), but, as discussed below, an agreement to agree is simply a type of gap. *Id.*

[34] *Id.*

about what each party believes has been agreed upon.[35] Each type of indefiniteness is discussed in more detail below.[36]

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[35] *Id.* at 44.

[36] A bargain's incompleteness is sometimes divided into two other categories—patent (or intrinsic) ambiguities and latent (or extrinsic) ambiguities. A patent ambiguity is "[a]n ambiguity that clearly appears on the face of a document, arising from the language itself. . . ." BLACK'S LAW DICTIONARY 93 (9th ed. 2009); *see also* PERILLO, *supra* note 2, § 3.10, at 131 n.23 ("A patent ambiguity is apparent on the face of the document . . . ."). A latent ambiguity is "[a]n ambiguity that does not readily appear in the language of a document, but instead arises from a collateral matter when the document's terms are applied or executed." BLACK'S LAW DICTIONARY, *supra*, at 93; *see also* PERILLO, *supra* note 2, § 3.10, at 131 n.23 ("[A] latent ambiguity exists when the term appears clear but extrinsic information makes it ambiguous.").

In the categories identified in this Article, patent ambiguities generally include ambiguities of syntax, conflicting language, and gaps regarding matters essential to performance. *See* BLACK'S LAW DICTIONARY, *supra*, at 93 (providing as an example of a patent ambiguity when two different prices are expressed in a written agreement); *see* W. Way Builders, Inc. v. United States, 85 Fed. Cl. 1, 15 (2008) (stating that patent ambiguities include obvious drafting errors and gaps). Latent ambiguities generally include vague words, ambiguities of term, and gaps regarding matters that might not be essential to performance. *See* Williams v. Idaho Potato Starch Co., 245 P.2d 1045, 1048-49 (Idaho 1952) (holding that latent ambiguity existed when parties' agreement referred to "pump" and the term could refer to different types of pumps); BLACK'S LAW DICTIONARY, *supra*, at 93 (providing as an example of a latent ambiguity when a written agreement for the sale of goods states that the goods will arrive on the ship *Peerless*, but two ships have that name); PERILLO, *supra* note 2, § 3.10, at 131 n.23 (referring to the case of the two ships named *Peerless* as "[t]he best known illustration of a latent ambiguity"); Riera v. Riera, 86 So. 3d 1163, 1167 (Fla. Dist. Ct. App. 2012) ("'[I]f a contract fails to specify the rights or duties of the parties under certain conditions or in certain situations, then the occurrence of such condition or situation reveals an insufficiency in the contract not apparent from the face of the document.' . . . This insufficiency is . . . considered a latent ambiguity . . . ." (quoting Hunt v. First Nat'l Bank of Tampa, 381 So. 2d 1194, 1197 (Fla. Dist. Ct. App. 1980))).

In some jurisdictions, the distinction is relevant to whether extrinsic evidence will be admitted to give meaning to an ambiguous word or phrase; extrinsic evidence is admitted to explain a latent ambiguity but not a patent ambiguity. *See* 11 SAMUEL WILLISTON & RICHARD A. LORD, A TREATISE ON THE LAW OF CONTRACTS § 33:43, at 1197-98 (4th ed. 2012) ("[T]he distinction remains significant in a number of jurisdictions, the court[']s ruling that while parol evidence is admissible to explain a latent ambiguity, it may not be admitted when the ambiguity is patent."). "According to this view, a patent ambiguity must be removed by construction according to settled legal principles, and not by extrinsic evidence." R.T.K., Annotation, *Rule that Latent Ambiguities may be Explained by Parol Evidence but that Patent Ambiguities may not*, 102 A.L.R. 287 (1936). But even for those jurisdictions that consider the distinction relevant, the practical effect might not be as significant as commonly thought. *See id.* ("Even a casual examination of the cases, however, discloses that such a statement of the rule is too broad. According to the better view, or the more accurate statement of the true rule, extrinsic evidence is admissible to show the situation of the parties and all the relevant facts and circumstances surrounding them at the time of the execution of the instrument, for the purpose of explaining or

As the discussion proceeds, it is important to recognize the difference between indefiniteness *in fact* and indefiniteness *in law*. Indefiniteness in fact means there was a gap or a misunderstanding when considering the parties' states of mind.[37] But, as will be discussed below, as a result of legal rules that will apply in such situations (including so-called "gap fillers"[38] and the so-called "objective theory of contract"[39]), the law might not consider the bargain indefinite even though there was indefiniteness in fact. In these situations, it can be said that even though there is indefiniteness in fact, there is not indefiniteness in law.

Also, it is possible to have a combination of the two forms of indefiniteness (a gap and a misunderstanding).[40] One party might believe the parties have impliedly reached an agreement on a particular issue, while the other party never gave the issue any thought. An example might be a usage of trade and a bargain between a well-established business and a new business. The well-established business might believe the usage of trade is impliedly part of the bargain while the new business, unaware of the usage of trade, never gave it any thought.

Further, it will sometimes be difficult to distinguish between a gap and a misunderstanding. The parties might reduce their bargain to a written document that includes a provision covering a particular topic, but the parties might not have given the particular provision any thought or have even been aware of the provision (this might be particularly true in the case of a form contract).[41] Or the parties might have given the provision thought but not considered how the provision would apply to a particular situation that later arises.

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resolving even a patent ambiguity.").

[37] Though it has been said that even "the devil himself knoweth not the mind of men," Leland v. Oregon, 343 U.S. 790, 803 (1952) (Frankfurter, J., dissenting), the situation referred to here is one in which the fact finder in a lawsuit concludes (or assumes) that the parties to the bargain had such a misunderstanding. Fact finders routinely make findings regarding a person's state of mind, particularly in criminal law cases and tort cases.

[38] A *gap-filler* is "[a] rule that supplies a contractual term that the parties failed to include in the contract." BLACK'S LAW DICTIONARY, *supra* note 36, at 749.

[39] The "objective theory of contract" is "[t]he doctrine that a contract is not an agreement in the sense of a subjective meeting of the minds but is instead a series of external acts giving the objective semblance of agreement." *Id.* at 1178.

[40] *See, e.g.*, E. Allan Farnsworth, *Disputes Over Omission in Contracts*, 68 COLUM. L. REV. 860, 873 (1968) ("[S]ince at least two parties will be involved, and several persons may act on behalf of a single party, there may be several different reasons for the omission.").

[41] *See* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 12 (2013) (explaining why consumers do not read boilerplate in form contracts); Perillo, *supra* note 23, at 60 ("The utilization of standardized printed contract forms by large industrial and commercial companies has resulted in a situation in which contracting parties are frequently uninformed as to the content of the printed form.").

A. Gaps ("Omitted Terms")

A gap exists in a bargain when the parties, at the time the bargain is formed, do not expressly or impliedly address a particular matter within the bargain's scope.[42] Gaps tend to be more numerous in bargains formed through conduct (so-called "implied-in-fact contracts");[43] the lack of a written document makes it likely the parties have not agreed, even implicitly, about numerous topics. But gaps also exist in express agreements (even express agreements that are evidenced by a written document).[44] Although often unintended,[45] gaps can even be intentional. For example, an intentional gap includes the so-called "agreement to agree," which is when the parties to a bargain agree to work out the details of a particular matter within the bargain's scope at a later time.[46] In such a situation, a gap exists at the bargain's formation regarding the term to be agreed upon.[47]

1. Types of gaps

Gaps are of two types. The first type—more significant but less common than the second type—is when the parties do not address at the time of the bargain's formation something that must be known for one or both of the parties to perform.[48] Such a term may be called an "essential term." The

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[42] Even if the bargain's language appears to cover a particular matter, there is a gap if "neither party intended the language to cover the case." Farnsworth, *supra* note 40, at 875.

[43] *See* BLACK'S LAW DICTIONARY, *supra* note 36, at 370 (defining an *implied-in-fact contract* as "[a] contract that the parties presumably intended as their tacit understanding, as inferred from their conduct and other circumstances").

[44] *See id.* at 369 (defining an *express contract* as "[a] contract whose terms the parties have explicitly set out").

[45] See *infra* Part III, for a discussion of why parties enter into bargains with indefinite terms.

[46] *See* BLACK'S LAW DICTIONARY, *supra* note 36, at 78 (defining an *agreement to agree* as an agreement that "leav[es] some details to be worked out by the parties"). For example, an agreement for the lease of an apartment might include a provision giving the tenant an option to extend the lease term upon a rate to be agreed upon by the parties.

[47] PERILLO, *supra* note 2, § 2.9, at 53.

[48] These gaps are less common than the first type because parties tend to pay more attention to the requirements of performance than other matters when forming a bargain. *See* Farnsworth, *supra* note 40, at 870-71 ("The most likely expectations to be selected for reduction to contract language are those that describe the performance of each party in the usual course of events. [Professor Stewart] Macaulay concluded that 'businessmen pay more attention to describing the performances in an exchange than to planning for contingencies or defective performances or to obtaining legal enforceability of their contracts.'" (quoting Stewart Macaulay, *Non-Contractual Relations in Business: A*

second type—less significant but more common than the first type—is when the parties do not address at the time of the bargain's formation what the consequences will be if a particular fact exists (or does not exist) or if a particular event occurs (or does not occur).[49] Such a term may be called a "non-essential term."

Examples of a gap regarding an essential term include a failure to address the services, land, or goods (or the amount of goods) to be exchanged for a promised price;[50] the price for the promised services, land, or goods;[51] or the time, place, or manner for performance (such as the time or place for delivery of goods).[52] These gaps are more serious than the second type because, as a result of the gap, it is certain that a party will not know how to perform at least part of his or her end of the bargain. These gaps will be apparent at the time the bargain is formed.[53]

The second type of gap (a gap regarding a non-essential term) tends to involve a failure to qualify a party's duty to perform if an unknown fact exists at the time of the bargain's formation or a particular unanticipated event occurs after formation. Examples include the following: a bargain to buy and sell a cow believed to be infertile that does not address what will happen if the cow is in fact fertile;[54] a bargain for the use of a music hall that does not address what will happen if the hall burns down before the

Preliminary Study, 28 AM. SOC. REV. 55, 60 (1963))).

[49] *See* Eric A. Posner, *The Parol Evidence Rule, the Plain Meaning Rule, and the Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 533 (1998) (stating that a gap exists when "the terms are silent with respect to a contingency").

[50] *See* RESTATEMENT (FIRST) OF CONTRACTS § 32 cmt. b (1932) (noting that "[p]romises may be indefinite . . . in the work or things to be given in exchange for the promise"); FARNSWORTH, *supra* note 2, at 201 ("Simple examples of agreements that do not meet the requirement are those in which the description of the subject matter is inadequate, as where the description or quantity of goods to be sold is lacking."); 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 37, at 56-57 (1920) ("A lack of definiteness in an agreement may concern the . . . work to be done, [or the] property to be transferred . . . .").

[51] *See* WILLISTON, *supra* note 50, § 37, at 56-57 ("A lack of definiteness in an agreement may concern . . . the price to be paid . . . ").

[52] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. d (1981) ("Valid contracts are often made which do not specify the time for performance."); RESTATEMENT (FIRST) OF CONTRACTS § 32 cmt. b (1932) (noting that "[p]romises may be indefinite in time or in place . . . "); WILLISTON, *supra* note 50, § 37, at 56-57 ("A lack of definiteness in an agreement may concern the time of performance . . . .").

[53] *See* Richard E. Speidel, *Restatement Second: Omitted Terms and Contract Method*, 67 CORNELL L. REV. 785, 796 (1982) ("Some failures of agreement are apparent from the time the parties conclude the bargain. For example, the bargain may say nothing about price or may explicitly leave the price 'to be agreed' upon by the parties.").

[54] Sherwood v. Walker, 33 N.W. 919 (Mich. 1887), *overruled in part by* Lenawee Cnty. Bd. of Health v. Messerly, 331 N.W.2d 203, 208 (Mich. 1982).

date for its use;[55] a bargain to use an apartment to watch the king's coronation procession that does not address what will happen if the procession is cancelled because the king falls ill;[56] a bargain that fails to specify whether the parties are required to correct an obvious mistake by the other party regarding the bargain's terms;[57] and a bargain that does not specify the remedy for a breach,[58] including whether the non-breaching party will be excused from performing.[59]

All bargains are incomplete in this second (non-essential term) sense because the future events that might have some impact on the parties' bargain are limitless, and foresight is imperfect.[60] This type of gap will not, however, necessarily have an effect on the parties' abilities to perform the bargain because the facts are probably as believed, and the unanticipated future event that is not addressed will likely never occur. The cow is probably barren (as believed); the music hall will probably not burn down before the concert; the king will probably not fall ill; the parties will probably not make a mistake about the bargain's terms; and the bargain will probably not be breached. Often, it will not even be apparent at the time the bargain is formed that there is a gap of this type.[61] The older view was that in these situations there was not even a gap, based on the notion that a duty not expressly qualified is unqualified.[62]

2. Situations in which it appears the bargain has a particular gap, but it

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[55] Taylor v. Caldwell, (1863) 122 Eng. Rep. 309 (K.B.).

[56] Krell v. Henry, [1903] 2 K.B. 740 (appeal taken from Eng.).

[57] Brunswick Hills Racquet Club, Inc. v. Route 18 Shopping Ctr. Assocs., 864 A.2d 387 (N.J. 2005).

[58] *See* Melvin Aron Eisenberg, *Third-Party Beneficiaries*, 92 COLUM. L. REV. 1358, 1386 (1992) ("[A]lthough it is relatively easy for contracting parties to specify the performances they want, it is often extremely difficult to specify remedies in advance of knowing the nature of the breach and the circumstances of the world at the time of the breach.").

[59] Jacob & Youngs v. Kent, 129 N.E. 889 (N.Y. 1921).

[60] Scott, *supra* note 10, at 1641 ("All contracts are incomplete. There are infinite states of the world and the capacities of contracting parties to condition their future performance on each possible state are finite."); *see also* E. Allan Farnsworth, *"Meaning" in the Law of Contracts*, 76 YALE L.J. 939, 956 (1967) ("The parties may simply not have foreseen the problem at the time of contracting."); FERRIELL, *supra* note 2, § 5.11, at 289 ("Even in large transactions, with both parties adequately represented, the parties and their lawyers might fail to successfully anticipate every matter upon which an agreement might be useful.").

[61] *See* Speidel, *supra* note 53, at 796 ("[Some failures of agreement] become apparent as performance unfolds, new information is discovered, or circumstances change.").

[62] *See* GRANT GILMORE, THE DEATH OF CONTRACT 49-53 (Ronald K. L. Collins ed., Ohio State Univ. Press 1995) (1974) (describing the idea of absolute contractual liability in England and in the United States).

does not (either in fact or in law)

There are three situations in which it might appear that a bargain has a particular gap, but it does not (either in fact or in law): a written document has a particular gap but the parties' bargain does not; the parties' express bargain has a particular gap but the gap is filled with an implied-in-fact term; and the parties' bargain in fact (including express and implied-in-fact terms) has a particular gap but the gap is filled by the court with an implied-in-law term. Each of these situations is discussed below.

a. Gap in written document only

First, the parties might make an effort to reduce the bargain's terms to a written document, yet fail to include in the document all of the terms that are part of the bargain.[63] As long as such terms are not excluded from their bargain under the parol evidence rule,[64] those terms are part of it and their exclusion from the written document would not mean the bargain has gaps regarding those matters; it would mean only that the written document is an incomplete expression of the bargain, a so-called "partially integrated agreement."[65] The term "agreement" (which is part of the definition of "bargain")[66] is not limited to the express terms in a written document; rather, it extends to all of the terms to which the parties manifested assent.[67] Thus, when referring to a bargain having a particular gap, one is referring to the parties' entire bargain, and not simply a written document providing evidence of the bargain.

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[63] CORBIN, *supra* note 2, § 95, at 145.

[64] *See* RESTATEMENT (SECOND) OF CONTRACTS § 213(1)-(2) (1981) (providing that "[a] binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them" and "[a] binding completely integrated agreement discharges prior agreements to the extent that they are within its scope").

[65] *See id.* § 210(2). When the parties reduce their agreement to a written document but mistakenly omit a term agreed upon (a so-called mistake as to expression or mistake in integration), *see* JOHN P. DAWSON ET AL., CONTRACTS: CASES AND COMMENT 421 (10th ed. 2013) (referring to a drafting error as a "mistake in expression" or "mistake in integration"), "the court, at the request of a party, may reform the writing to express the agreement actually reached." FARNSWORTH, *supra* note 2, at 430-31; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 155 (1981). Reformation is also available if the parties mistakenly included a term not agreed upon or incorrectly stated a particular term. *See* FARNSWORTH, *supra* note 2, at 431.

[66] *See* RESTATEMENT (SECOND) OF CONTRACTS § 3 (1981) ("A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.").

[67] *See id.* ("An agreement is a manifestation of mutual assent on the part of two or more persons.").

b. Implied-in-fact terms

Second, the terms of a bargain include those that are implied in fact.[68] An implied-in-fact term is one upon which the parties impliedly manifested assent, as opposed to expressly manifesting assent, through the use of oral or written words.[69] Such terms are inferred by logical deduction from express terms[70] and from the surrounding circumstances,[71] including "standard terms, trade or local usages, a course of dealing between the parties prior to the agreement, and a course of performance after it."[72] Similarly, the Second Restatement provides that "the word 'promise' is commonly and quite properly . . . used to refer to the complex of human relations which results from the promisor's words or acts of assurance, including the justified expectations of the promisee and any moral or legal duty which arises to make good the assurance by performance."[73] For example, in the celebrated case of *Wood v. Lucy, Lady Duff-Gordon*, the court, in an opinion by Judge Benjamin Cardozo, found that an agreement providing one party with the exclusive privilege to market the fashion designs of the other included an implied promise by the former to the latter to make reasonable efforts to market the designs.[74]

A bargain's express silence on a topic might mean, however, that the parties manifested an intention that the existence (or non-existence) of a particular fact or the occurrence (or non-occurrence) of a particular event would not have an effect on the parties' legal rights and duties as expressed in the bargain. Because "contracts generally are a device for allocating risks,"[75] the issue will be whether a reasonable person would believe the

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[68] *See id.* § 4 ("A promise . . . may be inferred wholly or partly from conduct."); *id.* § 33 cmt. a ("Terms may be supplied by factual implication . . . ."). It was not always so. *See* Farnsworth, *supra* note 40, at 862-63 ("Courts in the seventeenth century, with a literalism characteristic of their time, sought to confine themselves to the bare framework provided by the parties through the letter of their contract language.").

[69] *See* Farnsworth, *supra* note 40, at 865 (stating that an implied-in-fact term is one that "was 'intended' by the parties and the intention [is] reasonably inferable from conduct other than words . . . ").

[70] RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. c (1981).

[71] *See* PERILLO, *supra* note 2, § 2.9, at 46-47.

[72] *Id.* at 47; *see also* Edwin W. Patterson, *The Interpretation and Construction of Contracts*, 64 COLUM. L. REV. 833, 836 (1964) (noting that under the doctrine of "practical construction," the parties' "conduct during the course of performance may support inferences . . . as to their intentions with respect to gaps and omissions in the contract").

[73] RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. a (1981).

[74] Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917); *see also* Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 37 (8th Cir. 1975) (holding that a buyer impliedly promised to purchase all of its propane gas requirements from the seller).

[75] CHARLES FRIED, CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION 59

parties' silence on the topic meant they manifested an intention that the bargain's expressly stated rights and duties be left undisturbed by the fact or event.

The more likely it is that the particular fact exists or that the particular event will occur, the more likely a reasonable person would believe the parties impliedly manifested an intention that their expressly stated rights and duties be left undisturbed, and vice versa. For example, "[i]n a contract for future delivery [of goods] the seller takes on himself the risk that the goods will rise in price or that for some other reason it will become more burdensome for him to perform, and the buyer assumes reciprocal risks."[76] In this sense, the parties' silence regarding the consequences of the fact existing or the event occurring is no gap at all. But whether there has been an implied manifestation of an intention that a particular risk has been assumed is always a matter of interpreting the bargain, taking into account, along with any other relevant evidence, the bargain's language, whether the event was discussed during negotiations, the bargain's context, and how foreseeable the event was.[77]

c. *Implied-in-law terms*

Third, even when there is a gap "in fact," the omitted term, if essential to a determination of the parties' rights and duties, is supplied by the court.[78] These terms are called implied-in-law terms,[79] constructive terms,[80] or

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(1981).

[76] *Id.*

[77] For example, in the well-known case of *Sherwood v. Walker*, 33 N.W. 919 (Mich. 1887), "the court found that the seller [of a cow] had not transferred nor had the buyer paid for the chance that [the] apparently barren prize cow was in fact pregnant." FRIED, *supra* note 75, at 59. *But see* Wood v. Boynton, 25 N.W. 42, 45 (Wis. 1885) (holding that the seller of a stone that the parties thought was probably a topaz assumed the risk that it was an uncut diamond).

[78] RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981); *see also id.* § 33 cmt. a ("[I]n recurring situations the law often supplies a term in the absence of agreement to the contrary."); *id.* ch. 9 intro. note ("[R]ules of law must fill the gap when the parties have not provided for the situation which arises."); Farnsworth, *supra* note 40, at 864 ("Gradually, courts began to go beyond the parties' actual expectations as well as their contract language, and came to read into the contract what they themselves thought was fair or just, on the pretext that it was the parties' 'intention.'"); *id.* at 866 ("It was admitted that the agreement of the parties was not an exclusive source, but only one to be deferred to when it could be established.").

[79] *See* BLACK'S LAW DICTIONARY, *supra* note 36, at 823 (defining "implied in law" as "[i]mposed by operation of law and not because of any inferences that can be drawn from the facts of the case").

[80] Farnsworth, *supra* note 40, at 865.

default rules.[81] As stated by Professor E. Allan Farnsworth, "A court, having determined that there is a contract, cannot refuse to decide a case on the ground that the parties failed to provide for the situation."[82] Courts may even supply a term when the gap is the result of a so-called "agreement to agree," which is when the parties agree to work out the details of a particular matter at some point after the bargain is formed.[83] Although "[t]he traditional rule is that an agreement to agree as to a material term prevents the formation of a contract[,]"[84] under both the Second Restatement and the U.C.C., courts are to fill these gaps as well.[85] Professor Edwin W. Patterson aptly called gap-filling terms "aids for the ailing agreement."[86]

The court will supply a term as directed by a particular statute (such as the U.C.C.) or, in the absence of a statutory directive, a term that is "reasonable in the circumstances."[87] In the absence of a statutory directive,

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[81] *See* BLACK'S LAW DICTIONARY, *supra* note 36, at 1446 (defining "default rule" as "[a] legal principle that fills a gap in a contract in the absence of an applicable express provision but remains subject to a contrary agreement"). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 5 (1981) (referring to such a term as a "term of a contract" as opposed to a "term of a promise or agreement"—the latter phrase referring to express and implied-in-fact terms).

[82] Farnsworth, *supra* note 40, at 860 n.2; *see also* ROBERT A. HILLMAN, PRINCIPLES OF CONTRACT LAW 67 (1st ed. 2004) ("Despite some decisions to the contrary, courts should make every effort to fill gaps and enforce agreements when the parties intended to contract."); *id.* at 253 ("[C]ourts are inclined to fill gaps for the parties, rather than give up on the contract."); Rego v. Decker, 482 P.2d 834, 837 (Alaska 1971) ("[C]ourts should fill gaps in contracts to ensure fairness where the reasonable expectations of the parties are fairly clear. The parties to a contract often cannot negotiate and draft solutions to all the problems which may arise.").

[83] *See* BLACK'S LAW DICTIONARY, *supra* note 36, at 78 (defining "agreement to agree" as an agreement "leaving some details to be worked out by the parties").

[84] PERILLO, *supra* note 2, § 2.9, at 53 (emphasis omitted); *see also* Walker v. Keith, 382 S.W.2d 198, 205 (Ky. Ct. App. 1964) (refusing to enforce an agreement to agree upon the rental price of a parcel of land).

[85] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 illus. 8 (1981) (providing that when there is an agreement to agree on price and the parties do not ultimately agree on a price, but manifest an intent to be bound, the court should supply a reasonable price term); *see also* U.C.C. § 2-305(1)(b) (2013).

[86] STATE OF NEW YORK, 1 REPORT OF THE LAW REVISION COMMISSION FOR 1955, STUDY OF THE UNIFORM COMMERCIAL CODE 275 (William S. Hein & Co. 1998) (remark by Professor Edwin W. Patterson).

[87] RESTATEMENT (SECOND) OF CONTRACTS § 204 (1981); *see also* MURRAY, *supra* note 2, § 91, at 485 ("When an omitted term is supplied by a court, it is not *interpreting* the contract, i.e., it is not discovering such a term by discerning the meaning of the parties' expression of agreement. The process is one of judicial construction, in which courts supply an omitted term which is fair and reasonable under the circumstances." (emphasis in original) (internal citations omitted)).

there are two different ways courts will decide which term to supply. First, under the traditional approach,[88] which has been referred to as the "hypothetical model of the bargaining process,"[89] the court supplies a term that it believes the parties would have agreed to had they considered the matter when forming the bargain.[90]

Second, under the Second Restatement's approach (which rejects the hypothetical model of the bargaining process)[91] a term is supplied that "comports with community standards of fairness and policy."[92] This approach considers principles and policies, such as seeking "substantial equivalence in commercial exchanges[,]" "discourag[ing] litigation by promoting certainty[,]" "plac[ing] the risk in a way that is thought desirable from the point of view of a particular market or of society in general[,]"[93] encouraging due care by not having a prudent party pay for the loss of a careless party, and reducing problems of administration (including having default rules that will avoid the judicial expense involved with a systematic legal inquiry).[94] An example of using policy reasons to fill in a gap (and the antithesis of the hypothetical model of the bargaining process) is the so-called "penalty default," under which the term selected is "purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties (especially the courts)."[95]

In most cases, the distinction between the hypothetical model of the bargaining process and supplying a term that "comports with community standards of fairness and policy" is likely insignificant because courts will, one expects, probably conclude that the parties would have agreed to a term that turns out to be consistent with community standards of fairness. The

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[88] Farnsworth, *supra* note 40, at 891.

[89] RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981).

[90] *See* PERILLO, *supra* note 2, § 2.9, at 47; Farnsworth, *supra* note 40, at 865; *see generally* RICHARD A. POSNER, ECONOMIC ANALYSIS OF THE LAW 98 (8th ed. 2011) (advocating for such an approach to gap filling based on the belief it results in efficient terms).

[91] *See* RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981) ("[W]here there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy rather than analyze a hypothetical model of the bargaining process.").

[92] *Id.*; *see also id.* § 5 cmt. b ("Much contract law consists of rules which may be varied by agreement of the parties. Such rules are sometimes stated in terms of presumed intention, and they may be thought of as implied terms of an agreement. They often rest, however, on considerations of public policy rather than on manifestation of the intention of the parties.").

[93] Farnsworth, *supra* note 40, at 878-79 (citations omitted).

[94] FRIED, *supra* note 75, at 62-63.

[95] Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989).

distinction would be relevant, however, if the court considers policy matters when supplying a term.

An important example of an implied-in-law term is the implied covenant of good faith and fair dealing.[96] When a party engages in conduct the legal consequences of which the parties did not expressly or impliedly agree upon (i.e., conduct that was not anticipated at the time of the bargain's formation), the court will consider such conduct a breach if it is not consistent with "community standards of decency, fairness or reasonableness."[97]

Courts will usually only refuse to fill a gap when the omitted term is important[98] and relates to a matter that is particularly subjective (such that it is difficult or impossible to say what would be "reasonable in the circumstances"). Examples include, "where the parties have omitted from their agreement the kind or quantity of goods or the specifications of a building contract . . . ."[99] Unfortunately, however, because "[it] cannot be said that the legal system has adopted any . . . criteria [for gap filling] as exclusive . . . it is difficult to know, without research, when the courts will or will not supply a gap-filler, and, if they will, how the gap will be filled."[100]

The legislatures and the courts have, though, established default rules for certain recurring gaps. For example, if the parties fail to agree on a price for a service or for goods, "a court will hold that the parties intended that a reasonable price should be paid and received."[101] Similarly, if no time is specified for performance, performance is due within "a reasonable

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[96] RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981).

[97] *Id.* cmt. a.

[98] *See* FARNSWORTH, *supra* note 2, at 212 ("[A] court may be more willing to supply a term if the court regards the term as relatively unimportant."). In deciding the importance of a missing term, the Second Restatement encourages courts to take into account the dispute that has arisen. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981) ("It is less likely that a reasonably certain term will be supplied by construction as to a matter which has been the subject of controversy between the parties than as to one which is raised only as an afterthought."). Such an approach seems inconsistent with classical contract law's focus on the time of formation.

[99] PERILLO, *supra* note 2, § 2.9, at 48 (internal citations omitted).

[100] *Id.* § 2.9, at 47.

[101] *Id. See also* RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981); U.C.C. § 2-305 (2013). For an argument that such a term is an implied-in-law term based on the policy against unjust enrichment, at least when goods have been delivered and accepted (or services provided and accepted), and not an implied-in-fact term, see Patterson, *supra* note 72, at 835 ("Yet if goods have been delivered and accepted, the context may show that no gift was intended, as the recipient knew, and the court will construe (imply) a duty to pay the reasonable value of the goods. The policy seems to be to prevent unjust enrichment, yet the duty construed is contractual, not quasi-contractual.").

time."[102] If the parties fail to agree on a place for the delivery of goods, the place for delivery is the seller's place of business.[103] If the parties fail to agree on a time for payment for goods, payment is due when the buyer receives them.[104] If the parties fail to specify the consequences of a party's non-performance, the other party is entitled to suspend its own performance if the non-performance is material,[105] and if the non-performance is a breach, it is entitled to recover damages to protect its expectation interest.[106] The courts have also established default rules for situations involving a mistake of fact at the time of contract formation,[107] involving an unanticipated event occurring after contract formation that makes a party's performance impossible or much more difficult than expected,[108]

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[102] RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981); U.C.C. § 2-309(1) (2013); PERILLO, *supra* note 2, § 2.9, at 48.

[103] U.C.C. § 2-308(a).

[104] *Id.* § 2-310(a).

[105] *See* RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981). Under the U.C.C.'s perfect tender rule, a buyer has the privilege to suspend performance under a non-installment contract if the goods fail to conform in any respect to the contract. U.C.C. § 2-601(a).

[106] *See* RESTATEMENT (SECOND) OF CONTRACTS § 347 (1981). A party's expectation interest is "his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been performed." *Id.* § 344(a).

[107] *See id.* § 152(1) ("Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake . . . ."); *id.* § 153 ("Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake . . . and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake."). Of course, if the parties have expressly or impliedly agreed about the consequences of a mistake of fact, the default rule does not apply. *See id.* § 154(a) (providing that a party bears the risk of mistake when "the risk is allocated to him by agreement of the parties").

[108] *See id.* § 261 ("Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."). The fact that the default rule regarding impracticability is considered an implied-in-law term and not an implied-in-fact term is shown by the Second Restatement's Introductory Note to the relevant Second Restatement chapter. *See id.* ch. 11, intro. note ("The rationale behind the doctrine[] of impracticability . . . is sometimes said to be that there is an 'implied term' of the contract that such extraordinary circumstances will not occur. This Restatement rejects this analysis . . . ."); *see also id.* § 204 cmt. a (indicating that the default rule regarding impracticability is an implied-in-law term). Of course, if the parties have expressly or impliedly agreed about the consequences of an event making performance impracticable, the default rule does not apply. *See id.* § 261 (noting that discharge of the duty does not occur

and involving an unanticipated event occurring after contract formation that makes one party's performance meaningless (or virtually meaningless) to the other party.[109]

As a result of implied-in-law terms, it is unusual that a bargain will be unenforceable because of a gap. As discussed above, such a result will occur only when there is no statutory or judicially-recognized default rule to fill the gap and the gap relates to an important and particularly subjective matter, such that it would be difficult or impossible to determine what would be a reasonable term in the circumstances.[110]

Importantly, however, it should be recognized that gaps might mean that a reasonable person would conclude that the parties did not even reach an agreement (and thus did not form a bargain).[111] As the Second Restatement provides, "[t]he fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance."[112] "The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement."[113] And gap filling with implied-in-law terms does not occur until it is determined that the parties have manifested assent to a bargain. If, however, the parties have manifested assent to a bargain, under

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under the default rule if "the language or the circumstances indicate the contrary").

[109] *See id.* § 265 ("Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary."). Like the impracticability doctrine, the fact that the default rule regarding frustration of purpose is considered an implied-in-law term and not an implied-in-fact term is shown in the introductory note of chapter 11 in the Second Restatement. *See id.* ch. 11, intro. note ("The rationale behind the doctrine[] of . . . frustration is sometimes said to be that there is an 'implied term' of the contract that such extraordinary circumstances will not occur. This Restatement rejects that analysis . . . ."); *see also id.* § 204 cmt. a (indicating that the default rule regarding frustration of purpose is an implied-in-law term). Of course, if the parties have expressly or impliedly agreed about the consequences of an event that substantially frustrates a party's principal purpose, the default rule does not apply. *See id.* § 265 (noting that discharge of the duty does not occur under the default rule if "the language or the circumstances indicate the contrary").

[110] *See notes* 98-100 and accompanying text.

[111] *See* PERILLO, *supra* note 2, at 43 ("Indefiniteness in a communication is some evidence of an intent not to contract. The more terms that are omitted in an agreement the more likely it is that the parties do not intend to contract." (internal citations omitted)); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. d (2011) ("A transaction resulting in an indefinite [bargain] must not be confused with a failed negotiation producing no [bargain] at all.").

[112] RESTATEMENT (SECOND) OF CONTRACTS § 33(3) (1981).

[113] *Id.* § 33 cmt. c.

modern contract law, a gap will rarely result in the bargain not being a contract because of indefiniteness.

B. Misunderstandings

The second type of indefiniteness—a misunderstanding—occurs when the parties to a bargain have expressly or impliedly addressed a particular matter (thus, there is no gap in the sense of an omitted term), but what each party intends the agreement to mean is different from what the other party intends it to mean, or the parties disagree about how the agreement is to apply to a particular situation.[114] In other words, the parties have attached different meanings to some of the words or conduct that formed the bargain (thus there is a gap in understanding).

1. When language causes a misunderstanding

When a misunderstanding results despite the parties' agreement to use particular words as evidence of their bargain, it is often because of the use of either vague language or ambiguous language.[115] Each is discussed below.

a. Vague language

A vague word is one that is "best depicted as forming not a neatly bounded class but a distribution about a central norm."[116] It describes something that can be imagined on a continuum and covers a range of possible meanings, but with the range's boundary being unclear.[117] Thus, "[a] word that may or may not be applicable to marginal objects [or events] is vague."[118] For example, the word "red" is vague because a person might

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[114] *See* BLACK'S LAW DICTIONARY, *supra* note 36, at 1093 (defining "misunderstanding" as "[a] situation in which the words or acts of two people suggest assent, but one or both of them in fact intend something different from what the words or acts express").

[115] *See* Farnsworth, *supra* note 40, at 860 ("Sometimes, because of vagueness or ambiguity in the language they have used, the parties will disagree over the meaning of what they said or over how their language applies to a situation for which they have provided."); *see also* Farnsworth, *supra* note 60, at 952-57 (explaining vagueness and ambiguity in the context of contract disputes).

[116] Farnsworth, *supra* note 60, at 953 (quoting W. QUINE, WORD AND OBJECT 85 (1960)); *see also* BLACK'S LAW DICTIONARY, *supra* note 36, at 1689 (defining "vague" as "[i]mprecise; not sharply outlined; indistinct; uncertain").

[117] *See* FERRIELL, *supra* note 2, § 6.03, at 330 (noting that vague words cover "a range of possible meanings").

[118] Farnsworth, *supra* note 60, at 953.

or might not intend her use of that word to include crimson (i.e., exactly where red starts and stops is unclear).[119] A party might promise to "take care of" another party, but it is unclear what tasks are encompassed with the range of that phrase.[120] A party might promise to make a "prompt" shipment, but it is unclear after exactly how many days the shipment is no longer prompt.[121] Or a party might promise to deliver "chickens," but it is unclear what kind of chickens are to be delivered.[122]

Vague words, which are more common than ambiguous words,[123] also include those that form a distribution about a central norm because they are based on individual value judgments. The adjective "reasonable," which is defined as "fair, proper, or moderate under the circumstances[,]"[124] is perhaps the most obvious example, but there are others. An employer might promise to pay an employee "a *fair* share of my profits" in addition to a salary.[125] As the court noted in that case, a "fair" share was "pure conjecture" and "may be any amount from a nominal sum to a material part according to the particular views of the person whose guess is considered."[126] Or a person might promise a "generous" reward for the return of lost property.[127] Of course, whether (or the extent to which) such words are vague depends upon what they are modifying. As previously noted, gaps are often filled with terms including the adjective "reasonable,"[128] presumably because such things as a reasonable

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[119] *Id.* at 952-53.

[120] *See* Dombrowski v. Somers, 362 N.E.2d 257, 258 (N.Y. 1977) (holding that the phrase "take care of" was too vague to be enforced). *But see* Brackenbury v. Hodgkin, 102 A. 106, 107 (Me. 1917) (enforcing an agreement to maintain and care for one of the parties).

[121] Farnsworth, *supra* note 60, at 956-57 (citing Kreglinger & Fernau Ltd. v. Charles J. Webb Sons Co., 162 F. Supp. 695 (E.D. Pa. 1957), *aff'd*, 255 F.2d 680 (3d Cir. 1958)).

[122] *See* Frigaliment Importing Co. v. B.N.S. Int'l Sales Corp., 190 F. Supp. 116, 118 (S.D.N.Y. 1960); *see also* FARNSWORTH, *supra* note 2, at 441, 451 (providing *Frigaliment* as an example of vague language); Farnsworth, *supra* note 60, at 953.

[123] FERRIELL, *supra* note 2, § 6.03, at 331 ("Misunderstandings involving true ambiguity are rare; those involving a range of possible meanings are more common.").

[124] BLACK'S LAW DICTIONARY, *supra* note 36, at 1379.

[125] Varney v. Ditmars, 111 N.E. 822, 823-24 (N.Y. 1916).

[126] *Id.* at 824.

[127] *See* Greene v. Heinrich, 300 N.Y.S.2d 236, 238-39 (N.Y. Civ. Ct. 1969) (enforcing the promise of a "generous" reward and concluding that 10% of the value of the returned property would be "generous"), *aff'd*, 319 N.Y.S.2d 275 (N.Y. App. Term 1971), *aff'd*, 327 N.Y.S.2d 996 (N.Y. App. Div. 1971).

[128] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981) (reasonable price); U.C.C. § 2-305 (2013); RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981) (reasonable time for performance); U.C.C. § 2-309(1).

price or a reasonable time for performance would not be subject to a wide range of disagreement among reasonable persons.

> Although parties reduce their bargains to written documents to decrease the likelihood of a misunderstanding, the inherent indefiniteness of most words means this risk can usually not be entirely eliminated. In a certain sense, all words are indefinite because "it is men who give meanings to words and [thus] words in themselves have no meaning. . . ."[129] As stated by Justice Roger Traynor, the "most prominent state court judge of his generation,"[130]If words had absolute and constant referents, it might be possible to discover contractual intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents. 'A word is a symbol of thought but has no arbitrary and fixed meaning like a symbol of algebra or chemistry. . . .' The meaning of particular words or groups of words varies with the '. . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.' Accordingly, the meaning of a writing '. . . can only be found by interpretation in the light of all the circumstances that reveal the sense in which the writer used the words.'[131]

Importantly, "the context of words and other conduct is seldom exactly the same for two different people, since connotations depend on the entire past experience and the attitudes and expectations of the person whose understanding is in question."[132]

b. Ambiguous language

Ambiguous language comes in three varieties: ambiguity of term, ambiguity of syntax, and conflicting language. Each presents essentially the same problem: the bargain's language is capable of being interpreted in two entirely different ways.

Ambiguity of term occurs when the parties use an ambiguous word.[133] A word is ambiguous if it has "two [or more] entirely different connotations so that it may be applied to an object and be at the same time both clearly

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[129] Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 164 (1965).

[130] Benjamin Field, *Traynor, Roger J.*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 548, 549 (Roger K. Newman ed., 2009).

[131] Pac. Gas & Elec. Co. v. G. W. Thomas Drayage & Rigging Co., 442 P.2d 641, 644-45 (Cal. 1968) (ellipses in original) (citations omitted) (quoting Pearson v. State Soc. Welfare Bd., 353 P.2d 33, 39 (Cal. 1960)); *See also* Corbin, *supra* note 124, at 187).

[132] RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. b (1981).

[133] Farnsworth, *supra* note 60, at 954.

appropriate and inappropriate . . . ."[134] An example is the word "light," which can refer to either color or weight,[135] or the word "ton," which can refer to either a long ton (2,240 pounds) or a short ton (2,000 pounds).[136] Or a general contractor and a subcontractor might agree that the subcontractor will paint an apartment "unit," but it is unclear whether the word "unit" was intended to refer to only the apartment's interior or to both the interior and the exterior.[137]

A type of ambiguity of term is proper name ambiguity, which is when two or more persons or things share the same name.[138] A famous example was involved in *Raffles v. Wichelhaus*, where the parties agreed to buy and sell cotton to be delivered on the ship *Peerless* sailing from Bombay, but there were two ships with that name sailing from that city.[139] Another example is *Kyle v. Kavanagh*, in which the parties agreed to buy and sell land on Prospect Street in Waltham, Massachusetts, but there were two streets in that city with that name.[140]

An ambiguity of syntax, which is probably more common than an ambiguity of term, is an ambiguity caused by grammatical structure.[141] An example is an insurance policy that covers any "disease of organs of the body not common to both sexes."[142] Does "not common to both sexes" qualify "disease" or "organs"? Thus, is it the disease or the organs that must not be common to both sexes to be covered (for example, is a fibroid tumor of the womb covered)?[143] Or the parties to a marriage settlement agree to "equally pay for the cost of [their] minor child's college tuition,

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[134] *Id.* at 953; *see also* MERRIAM-WEBSTER, INC., MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 39 (11th ed. 2003) (defining "ambiguous" as "capable of being understood in two or more possible senses or ways").

[135] *See* Farnsworth, *supra* note 60, at 953 (stating that an example of an ambiguous word is the use of the word "light" when referring to a feather; the speaker might use the word to refer to the feather's color or its weight).

[136] *Id.* at 954.

[137] *See* Flower City Painting Contractors v. Gumina Constr. Co., 591 F.2d 162 (2d Cir. 1979).

[138] Farnsworth, *supra* note 60, at 954.

[139] *See* Raffles v. Wichelhaus, (1864) 159 Eng. Rep. 375 (Exch.).

[140] Kyle v. Kavanagh, 103 Mass. 356, 356-57 (1869). A similar ambiguity can result when there is no person or thing with the specified name, but two or more persons or things with names similar to the specified name. For example, the parties might refer to "the ship *Lady Adams* that is sailing from Nantucket," when there is no ship with that name sailing from Nantucket, but one ship sailing from Nantucket named *Abigail Adams* and another sailing from Nantucket named *Mrs. Adams*.

[141] Farnsworth, *supra* note 60, at 954.

[142] *Id.*

[143] *Id.*

books, supplies and any and all other related expenses."[144] Does "related expenses" refer to "college" or to just "tuition, books, [and] supplies"? Thus, are "related expenses" all those related to college or simply those related to "tuition, books, [and] supplies"?[145] Ambiguity caused by the use of the words "and" and "or" is also an example of ambiguity of syntax.[146]

Another source of ambiguity is the use of conflicting language.[147] For example, a written document might provide in one provision that a buyer agrees to pay a specified rate per item provided; in another, the number of items the seller will provide; and in another, the total price to be paid. The amount owed according to the first two provisions might, however, conflict with the amount specified in the third.[148] Or the price to be paid might be identified in both words and numbers, with the amounts specified being different.[149] Many of these conflicts appear in form contracts that have conflicting language added by the parties.[150]

2. *When a misunderstanding is rendered irrelevant under law—the effect of the objective theory of contract and other aids to interpretation and construction*

Just as the law will often supply omitted terms and, thus, render bargains sufficiently definite in law despite the inevitable gaps, under the so-called "objective theory of contract," the court will give vague or ambiguous language the meaning attached to it by one of the parties if the other party was more at fault for the misunderstanding.[151] Thus, if the first party knew or had reason to know of the meaning attached by the second party, and the second party did not know or have reason to know of the meaning attached by the first party, the second party's meaning is used.[152] This process is

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[144] Riera v. Riera, 86 So. 3d 1163, 1165 (Fla. Dist. Ct. App. 2012).

[145] *Id.* at 1167.

[146] Farnsworth, *supra* note 60, at 955.

[147] *Id.* at 956.

[148] *See id.*

[149] *See* WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 401 (Arthur L. Corbin ed., 3d Am. ed. 1919).

[150] Farnsworth, *supra* note 60, at 956.

[151] RESTATEMENT (SECOND) OF CONTRACTS § 201(2)(a) (1981).

[152] *Id.* In deciding whether a party had reason to know of a meaning attached by the other party, courts disagree on the type of evidence that should be admitted when the parties have reduced their bargain to a written document and the language used is unambiguous on its face. There is the more restrictive plain meaning rule, which is the majority rule, and the more liberal "contextual" approach. *See also* FARNSWORTH, *supra* note 2, at 463-69 (explaining the difference between the restrictive view and liberal view). *See also* PERILLO, *supra* note 2, § 3.10, at 129-30 (explaining that, under the plain meaning rule, "if a writing,

really no different from the court filling a gap by supplying a term that is reasonable in the circumstances. The parties did not agree on the term's meaning, but the court will select one of the parties' meanings if that party was less at fault for the misunderstanding because it is reasonable to do so in the circumstances (recall that encouraging due care is a policy considered when filling gaps). Imposing liability on the party who was more at fault for the misunderstanding induces parties to learn what most persons mean when they use particular language, thereby reducing future misunderstandings.[153]

Various guides to interpretation and construction have been recognized to implement this fault standard and to implement other policies. For example, one is that "[o]rdinarily a party has reason to know of meanings in general usage."[154] Thus, "[u]nless a different intention is manifested, . . . where language has a generally prevailing meaning, it is interpreted in accordance with that meaning . . . ."[155] Also, specific terms are given greater weight than general terms,[156] and terms that are negotiated

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or a term is plain and unambiguous on its face, its meaning must be determined from the four corners of the instrument without resort to extrinsic evidence of any kind[,]" though some plain-meaning jurisdictions admit evidence of surrounding circumstances) Thus, if the court follows the plain meaning rule and the language is unambiguous on its face, no extrinsic evidence (other than perhaps surrounding circumstances) is admitted to determine which party was more at fault for the misunderstanding (the party who attached a meaning different from the plain meaning is deemed more at fault). This is true even if the extrinsic evidence would show that the parties attached the same meaning to the word, a meaning that is different from its plain meaning. Under the Second Restatement and U.C.C. approach, any relevant evidence is admitted to determine the meaning of contract language. RESTATEMENT (SECOND) OF CONTRACTS §§ 200-204 (1981); U.C.C. § 2-202 cmt. 2 (2013). There is considerable tension between the plain meaning rule and the rule followed in some jurisdictions that extrinsic evidence is admissible to give meaning to a latent ambiguity. *See, e.g.*, 21 STEVEN W. FELDMAN, 21 TENN. PRACTICE: CONTRACT LAW AND PRACTICE § 8:56 (2012) ("A major problem in Tennessee contracts jurisprudence, unacknowledged in the decisions, is the tension between the plain meaning rule and the latent ambiguity principle. When the contractual text contains no clue that the words might mean more than they say, the parties' litigation positions will be predictable. One party will say that the terms should receive their usual, ordinary, and plain meaning, limited by the four corners rule, and no need exists for further construction. The other party will respond that the rule of latent ambiguity entitles the party to present extrinsic evidence to clarify the meaning, even though the words are clear on their face. Many decisions support both viewpoints; some courts and commentators have acknowledged the difficulty of reconciling these principles.").

[153] POSNER, *supra* note 90, at 126.

[154] RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. b (1981). Professor Perillo refers to this as a "watered-down version of the plain meaning rule[.]" PERILLO, *supra* note 2, § 3.13, at 137.

[155] RESTATEMENT (SECOND) OF CONTRACTS § 202(3)(a) (1981).

[156] *Id.* § 203(c).

between the parties are given greater weight than standardized terms.[157] Under the *ejusdem generis* canon (Latin for "of the same kind or class"),[158] "where a contractual clause enumerates specific things, general words following the enumeration are interpreted to be restricted to things of the same kind as those specifically listed."[159] Similarly, under the *noscitur a sociis* canon (Latin for "it is known by its associates"), "the meaning of an unclear word or phrase should be determined by the words immediately surrounding it."[160] Under the *expressio unius est exclusio alterius* canon (Latin for "expression of one thing is exclusion of another"), "to exclude one thing implies the exclusion of the other, or of the alternative."[161]

Another canon provides "that if two terms in a writing conflict, the first term controls."[162] Also, under the "last antecedent rule," when it is unclear which word a qualifying phrase refers to, it is construed as applying to the last antecedent.[163] Because the party who chooses vague or ambiguous language is "more likely than the other party to have reason to know of uncertainties of meaning,"[164] vague or ambiguous language is usually construed against the party who chose it.[165] And "consistent with a policy of avoiding forfeiture and unjust enrichment,"[166] doubts are generally resolved in favor of construing the occurrence of an event as a promise and not an express condition.[167]

Because courts apply a fault standard and other policies to determine meaning in the case of a misunderstanding and do not require that the parties attach the same meaning to the term, "the meaning of the words or other conduct of a party is not necessarily the meaning he expects or understands."[168] Thus, as a result of the objective theory of contract and

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[157] *Id.* § 203(d).

[158] BLACK'S LAW DICTIONARY, *supra* note 36, at 594.

[159] PERILLO, *supra* note 2, § 3.13, at 137.

[160] BLACK'S LAW DICTIONARY, *supra* note 36, at 1160-61.

[161] *Id.* at 661.

[162] PERILLO, *supra* note 2, § 3.13, at 136.

[163] Wohl v. Swinney, 888 N.E.2d 1062, 1065 (Ohio 2008).

[164] RESTATEMENT (SECOND) OF CONTRACTS § 206 cmt. a (1981).

[165] *Id.* § 206. "[T]he rule is in practice a makeweight rather than a tie breaker." Beanstalk Group, Inc. v. AM Gen. Corp., 283 F.3d 856, 859 (7th Cir. 2002) (Posner, J.). Most jurisdictions recognize an exception to this rule when the non-drafting party is a sophisticated party who was represented by an attorney during the drafting process. *Id.* at 858.

[166] RESTATEMENT (SECOND) OF CONTRACTS § 227 cmt. b (1981).

[167] *See id.* § 227(1).

[168] *Id.* § 200 cmt. b (1981). The party whose meaning does not apply might, however, avoid the contract under the doctrine of mistake. *Id.* § 20 illus. 4; § 153 illus. 5, 6. In such a situation, however, the mistaken party would have to demonstrate that "the effect of the mistake is such that enforcement of the contract would be unconscionable," since the

other aids to interpretation and construction, most misunderstandings *in fact* will not result in indefiniteness *in law*.

Also, where the evidence shows that "the parties have attached the same meaning to a promise or agreement or a term thereof [a so-called mutual understanding], it is interpreted in accordance with that meaning."[169] And importantly, part performance after the bargain is formed may show a shared meaning of an indefinite term.[170] "The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning."[171] Thus, an alleged misunderstanding by one party might turn out, according to the fact finder, to have not been a misunderstanding at all.

Similarly, conflicting language in a written document might simply have been a drafting error by the parties in reducing the bargain's terms to written form (a so-called "mistake in expression" or "mistake in integration").[172] In such a situation, there is no misunderstanding regarding the bargain's actual terms, just a drafting error, and if such an error is proven by clear, strong, and convincing evidence, the court may reform the written document to reflect the parties' actual bargain.[173]

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mistake is considered a unilateral mistake, not a mutual mistake. *Id.* § 153(a); *see also id.* cmt. b.

[169] *Id.* § 201(1); *see also* Berke Moore Co. v. Phoenix Bridge Co., 98 A.2d 150, 156 (N.H. 1953). The Second Restatement uses the phrase "mutual understanding" for when the parties attach the same meaning to a term. *See* RESTATEMENT (SECOND) OF CONTRACTS § 201 cmt. c (1981). As previously discussed, in those jurisdictions that follow the plain meaning rule, extrinsic evidence showing that the parties attached the same meaning to a particular word might never be admitted into evidence, and the meaning used by the court might, therefore, be different from the meaning attached by the parties. *See* PERILLO, *supra* note 2, § 3.10, at 130.

[170] RESTATEMENT (SECOND) OF CONTRACTS § 34 cmt. c (1981).

[171] *Id.* § 202 cmt. g; *see also* U.C.C. § 2-208 cmt. 1 (1978) (repealed 2001) ("The parties themselves know best what they have meant by their words of agreement and their action under that agreement is the best indication of what that meaning was."); Patterson, *supra* note 72, at 836 (noting that under the doctrine of "practical construction," the parties "conduct during the course of performance may support inferences as to the meaning of language in the contract").

[172] *See* DAWSON ET AL., *supra* note 65, at 421 (referring to a drafting error as a "mistake in expression" or "mistake in integration").

[173] *See* RESTATEMENT (SECOND) OF CONTRACTS § 155 & cmt. c (1981); Benyon Bldg. Corp. v. Nat'l Guardian Life Ins. Co., 455 N.E.2d 246, 253 (Ill. App. Ct. 1983); Hoffman v. Chapman, 34 A.2d 438, 439 (Md. 1943).

III. WHY PARTIES ENTER INTO INDEFINITE BARGAINS

There are many reasons why parties enter into bargains with indefinite terms. First, the parties might not have thought about a particular matter, particularly because it is difficult if not impossible for the parties to foresee all of the problems that might arise.[174] Second, the parties might not want to spend the time addressing particular matters, especially about events unlikely to occur or that seem unimportant at the time.[175] Even for problems that are foreseeable or even foreseen, persons have limited attention and "give [this] 'limited attention' only to a limited number of situations which they choose by some initial process of selection."[176] In particular, time might be of the essence and the parties do not have the opportunity to address all of the issues that they otherwise would. Third, the parties might not want to raise a troublesome issue that might cause delay or the deal to collapse, "perhaps in the hope that the problem may never arise or that if it does it can be better dealt with on a business basis after a specific dispute has arisen."[177] The parties might, therefore, not address the topic at all or agree upon a vague term, comfortable to let the matter be decided by the appropriate forum if necessary.[178]

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[174] *See* FARNSWORTH, *supra* note 2, at 202; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (1981) ("The parties to an agreement may entirely fail to foresee the situation which later arises and gives rise to a dispute . . . ."); Farnsworth, *supra* note 40, at 871 ("Fate may outstrip even the most sybilline [sic] draftsman, with a probability that increases with the life of the contract.").

[175] *See* FARNSWORTH, *supra* note 2, at 202; *see also* RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (1981) (noting that the parties might not address a matter because "the situation seems to be unimportant or unlikely" to occur); Ayres & Gertner, *supra* note 95, at 92-93 ("Scholars have primarily attributed incompleteness to the costs of contracting. Contracts may be incomplete because the transaction costs of explicitly contracting for a given contingency are greater than the benefits. These transaction costs may include legal fees, negotiation costs, drafting and printing costs, the costs of researching the effects and probability of a contingency, and the costs to the parties and the courts of verifying whether a contingency occurred. Rational parties will weigh these costs against the benefits of contractually addressing a particular contingency. If either the magnitude or the probability of a contingency is sufficiently low, a contract may be insensitive to that contingency even if transaction costs are quite low." (citations omitted)).

[176] Farnsworth, *supra* note 40, at 869.

[177] *Id.* at 872; *see also* FARNSWORTH, *supra* note 2, at 202 ("Another common cause of indefiniteness is the parties' reluctance to raise difficult issues for fear that the deal might fall through."); Farnsworth, *supra* note 60, at 956 ("[O]ne or both [of the parties] may have foreseen the problem but deliberately refrained from raising it during the negotiations for fear that they might fail—the lawyer who 'wakes these sleeping dogs' by insisting that they be resolved may cost his client the bargain."); RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (1981) ("[D]iscussion of it might be unpleasant or might produce delay or impasse.").

[178] See Farnsworth, *supra* note 60, at 956. This often occurs when an employer and a

Fourth, the parties might raise the issue but not be able to agree on a term to cover the matter and, thus, leave a gap or agree to use a vague term.[179] Fifth, the parties might "have expectations but fail to manifest them, either because the expectation rests on an assumption which is unconscious or only partly conscious."[180] Sixth, "it may be difficult to formulate orally or write down a term that would properly reflect" the parties' agreement about the consequences of a particular event occurring.[181]

Seventh, the parties might reach an oral agreement or prepare a draft written agreement with the intention of preparing a more detailed written document, but before doing so, one of the parties repudiates, leaving behind an agreement with gaps.[182] Eighth, it might be advantageous to avoid specificity, particularly when dealing with long-term agreements that might require flexibility.[183] Ninth, the drafters of a written contract might simply be clumsy or inept.[184]

Tenth, the parties might not realize that they each attach a different meaning to a particular term.[185] Eleventh, a party with more information about a particular matter (a situation of so-called "asymmetric information")[186] might strategically withhold that information to avoid having to pay a higher contract price that would result if the information were known to the other party.[187] Twelfth, an offeror might intentionally

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union draft a collective bargaining agreement. *See* Archibald Cox, *Reflections Upon Labor Arbitration*, 72 HARV. L. REV. 1482, 1491 (1959) ("The pressure to reach agreement is so great that the parties are often willing to contract although each knows that the other places a different meaning upon the words and they share only the common intent to postpone the issue and take a gamble upon an arbitrator's ruling if decision is required.").

[179] Société Franco Tunisienne d'Armement v. Sidermar S.P.A., [1961] 2 Q.B. 278, 299 (1960); *see also* Franklin G. Snyder, *Clouds of Mystery: Dispelling the Realist Rhetoric of the Uniform Commercial Code*, 68 OHIO ST. L.J. 11, 37 n.128 (2007) (noting that the parties might have chosen a vague term because they could not agree on a more precise term).

[180] RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. b (1981).

[181] Karen Eggleston et al., *The Design and Interpretation of Contracts: Why Complexity Matters*, 95 NW. U. L. REV. 91, 107 (2000).

[182] A contract can be formed even though the parties manifested an intention to prepare a written document evidencing the bargain and then failed to do so. *See* RESTATEMENT (SECOND) OF CONTRACTS § 27 (1981).

[183] MARVIN A. CHIRELSTEIN, CONCEPTS AND CASE ANALYSIS IN THE LAW OF CONTRACTS 114-15 (6th ed. 2010).

[184] *Id.* at 101. This is the most likely cause of ambiguities of syntax and conflicting terms.

[185] *See* Harry G. Prince, *Contract Interpretation in California: Plain Meaning, Parol Evidence and Use of the "Just Result" Principle*, 31 LOY. L.A. L. REV. 557, 649-50 (1998) ("Parties may sometimes attach different meanings to the very same words or phrases, ignoring the other party's understanding.").

[186] Eggleston et al., *supra* note 181, at 109.

[187] *See* Ayres & Gertner, *supra* note 95, at 94. An example would be a consumer who

make the offer's terms vague to render the bargain unenforceable, while requiring the offeree to perform first, and, thus, potentially obtaining the benefit of the offeree's performance without having to himself perform.[188]

IV. AN OVERVIEW OF THE REASONABLY CERTAIN TERMS REQUIREMENT

Despite the various rules of law that help make those bargains that are indefinite *in fact* become definite *in law* (such as through gap filling and the objective theory of contract), some bargains will remain indefinite *in law*. Thus, it is necessary for the law to have rules regarding the effect of indefiniteness on a bargain's enforceability.

The Second Restatement provides that "[e]ven though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain."[189] Similarly, there is no manifestation of mutual assent if the parties attach materially different meanings to the bargain's terms (a misunderstanding) and neither party is more at fault than the other for the misunderstanding.[190]

The Reporter's Note to the Second Restatement's misunderstanding section states that "[i]f a term is so vague that the court cannot interpret it, the court should decide enforceability as an issue of the requirement of reasonable certainty in contracts," and that "[a] contract should be held nonexistent under this Section only when the misunderstanding goes to conflicting and irreconcilable meanings of a material term that could have either but not both meanings."[191] Accordingly, the reasonably certain terms requirement applies to indefiniteness caused by gaps and vague words, and

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demands a warranty, signaling to the other party that the consumer places a high value on the requested performance. Eggleston et al., *supra* note 181, at 109.

[188] *See* Ayres & Gertner, *supra* note 95, at 105-06 (referring to this as the "perverse incentive" to offer an intentionally unenforceable bargain).

[189] RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981).

[190] *Id.* § 20(1); *see also* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 242 (Mark DeWolf Howe ed., Belknap Press 1963) (1881) ("[E]ach [party] said a different thing. The plaintiff offered one thing, the defendant expressed his assent to another."). Under the Second Restatement's test, the bargain fails to be a contract if neither party knew of the meaning attached by the other, but each had "reason to know" of the meaning attached by the other. *See* RESTATEMENT (SECOND) OF CONTRACTS § 20(1) (1981). Thus, the Second Restatement adopts a contributory negligence standard, not a comparative negligence standard, which seems inconsistent with the Second Restatement's general preference for saving bargains. When there is no manifestation of mutual assent because of a material misunderstanding, the court does not replace the term that was the subject of the misunderstanding with what it considers a "reasonable term" in the circumstances. Speidel, *supra* note 53, at 802-03.

[191] RESTATEMENT (SECOND) OF CONTRACTS § 20 reporter's note (1981).

the misunderstanding doctrine applies to indefiniteness caused by ambiguous language.[192] Thus, this Article (which deals with the reasonably certain terms requirement) will not further address, in detail, the issue of ambiguous language.

The Second Restatement comment explains that the reasonably certain terms requirement "reflects the fundamental policy that contracts should be made by the parties, not by the courts . . . ."[193] But "[w]here the parties have intended to make a contract and there is a reasonably certain basis for granting a remedy, the same policy [that contracts should be made by the parties] supports the granting of the remedy."[194] Thus, the doctrine is premised on the related ideas that contract law should enforce agreements made by the parties, but avoid imposing duties upon them that were not voluntarily assumed. This statement of the reasonably certain terms requirement's policy is, however, somewhat misleading (and not particularly helpful) because of the Second Restatement's position that courts should aggressively fill gaps with implied-in-law terms.[195]

Under the Second Restatement's test, a bargain's terms are "reasonably certain" as long as "they provide a basis for determining the existence of a breach and for giving an appropriate remedy."[196] As noted by Professor Joseph Perillo, "an agreement must be sufficiently definite before a court can determine if either party breached it."[197] Although the First

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[192] Although the reporter's notes are not approved by the council or ALI, *see* Wechsler, *supra* note 13, at 150-51, reporter's notes to uniform laws are given substantial weight. *See* William S. Blatt, *Interpretive Communities: The Missing Element in Statutory Interpretation*, 95 NW. U. L. REV. 629, 669 n.272 (2001) ("Reporters' notes for uniform laws . . . receive great weight.").

[193] RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981).

[194] *Id.*

[195] *See id.* § 204 ("When the parties to a bargain sufficiently defined to be a contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."). Although this black letter rule suggests that gap filling does not occur until after it is determined that a contract was formed, the comments to the Second Restatement's section on reasonably certain terms suggests otherwise. *See id.* § 33 cmt. a ("[I]n recurring situations the law often supplies a term in the absence of agreement to the contrary."); *id.* cmt. b ("It is less likely that a reasonably certain term will be supplied by construction as to a matter which has been the subject of controversy between the parties than as to one which is raised only as an afterthought.").

[196] *Id.* § 33(2). A comment to the Second Restatement refers to this as a "minimum standard of certainty." *Id.* § 362 cmt. a.

[197] PERILLO, *supra* note 2, § 2.9, at 44; *see also* CORBIN, *supra* note 2, § 95, at 143 ("A court cannot enforce a contract unless it can determine what it is."); RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (1981) ("If the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract.").

Restatement required that the terms of an offer be sufficiently definite,[198] the current view is that the bargain, not the offer, must be sufficiently definite, which takes into account that some offers permit the offeree to select among different terms.[199] The Second Restatement's test was modeled after the U.C.C.'s reasonably certain terms provision,[200] which provides that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[201]

The tolerated degree of indefiniteness has grown over time.[202] Classical contract law (the law that developed in the nineteenth century and that

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[198] *See* RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932).

[199] *See* RESTATEMENT (SECOND) OF CONTRACTS § 34(1) (1981); PERILLO, *supra* note 2, § 2.9, at 44.

[200] *See* AMERICAN LAW INSTITUTE, *supra* note 1, at 326 ("[T]hese subsections are drawn from the language found in the Uniform Commercial Code." (remark by Reporter Robert Braucher regarding the Second Restatement's provision on the requirement that a contract's terms be reasonably certain)).

[201] U.C.C. § 2-204(3) (2013).

[202] The indefiniteness doctrine dates to at least the late sixteenth century. *See* A.W. BRIAN SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT: THE RISE OF THE ACTION OF ASSUMPSIT 532 (1975) (referencing the 1594 decision of Sackford v. Phillips, Moo. K.B. 689 (1594)). By the seventeenth century, one of the recognized defenses to an assumpsit action was that the contract was not "clear and certain." KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 81, 83 (1990). In 1641, in William Sheppard's *Touchstone of Common Assurances*, which was an attempt "to impose some order upon the development of assumpsit[,]" it was stated that a requirement of a contract or a promise was that it be "clear and certain." SIMPSON, *supra*, at 506 (internal citation omitted). This requirement was related to the need to have certainty in the issue to be tried by the jury. *See* TEEVEN, *supra*, at 83 ("The requirement is associated with the need to plead to the issue in trial by jury by averring the promise with certainty."); SIMPSON, *supra*, at 532 ("If in the action of assumpsit this certainty in the issue was to be achieved, the promise must itself be averred with certainty . . . ."). Importantly, though, "[t]he principle applied both to the promise sued upon and to a promise averred as a consideration, for the latter was not a good consideration unless itself actionable, and to be actionable it must be certain." *Id.* Thus, the definiteness requirement was premised on both the practical need to determine a breach as well as the requirement of mutuality. Early English decisions applying the definiteness requirement were somewhat inconsistent. For example, a promise to pay £100 within a "short time" in return for a promise to deliver two oxen within a "short time" was held too indefinite to enforce as was a promise to forbear from suing for a "little time." *See* TEEVEN, *supra*, at 83 n.74, (citing Tolhurst v. Brickenden, Cro. Jac. 250, 1 Rolle Rep. 5; 1 Bulst. 91 (1610)); *see also* SIMPSON, *supra*, at 532. In contrast, promises to forbear from suing for a "reasonable time" and a "great time" were held sufficiently definite. *Id.* (citing Treford v. Holmes, Hutton 108 (1628), and Mapes v. Sir Isaac Sidney, Hutton 46, Cro. Jac. 683 (1621)). Also, even when a promise to forbear was not limited to any time, the court would provide that it "be a total forbearance, or at least a forbearance for a convenient

dominated into the early twentieth century)[203] was particularly concerned with a court not creating a bargain for the parties or creating the bargain's terms, as evidenced by rules making it difficult to form a contract while at the same time refusing to infer terms excusing non-performance.[204] Classical contract law, therefore, also exhibited intolerance for indefiniteness.[205]

But in the twentieth century it was generally accepted that contract law went beyond merely implementing the parties' intentions and necessarily involved making policy choices.[206] With such a concession, courts became more willing to risk error in determining the terms of the parties' bargain, and made saving the bargain a priority. Thus, so-called modern contract law,[207] or neoclassical contract law,[208] liberalized the formal rules regarding

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time . . . ." SIMPSON, *supra*, at 451 (quoting Mapes v. Sir Isaac Sidney, Hutton 46, Cro. Jac. 683 (1621)). Similarly, "[a]ssumpsit permitted market values or a reasonableness standard to be read into a promise [to pay for services]." TEEVEN, *supra*, at 83. For example, "[i]n the late sixteenth century it came to be settled that the action of assumpsit would lie where the plaintiff averred a promise to pay an uncertain sum . . . ." SIMPSON, *supra*, at 65. Thus, even though "[w]ell before the nineteenth century, the common law had a certainty requirement associated with the need to plead a promise with certainty in trial by jury, . . . this did not stand in the way of market values and reasonable standards being read into promises in Assumpsit actions." TEEVEN, *supra*, at 238.

[203] *See* Ian R. Macneil, *Contracts: Adjustment of Long-term Economic Relations Under Classical, Neoclassical and Relational Contract Law*, 72 NW. U. L. REV. 854, 855 n.2 (1978) ("Classical contract law refers . . . to that developed in the 19th century and brought to its pinnacle by Samuel Williston in THE LAW OF CONTRACTS (1920) and in the RESTATEMENT OF CONTRACTS (1932).").

[204] GILMORE, *supra* note 62, at 49-53.

[205] *See* Melvin A. Eisenberg, *Why There is No Law of Relational Contracts*, 94 NW. U. L. REV. 805, 817 (2000).

[206] *See, e.g.*, Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 577 (1933) ("When courts . . . proceed to interpret the terms of the contract they are generally not merely seeking to discover the actual past meanings (though these may sometimes be investigated), but more generally they decide the 'equities,' the rights and obligations of the parties, in such circumstances; and these legal relations are determined by the courts and the jural system and not by the agreed will of the contesting parties."); Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1287 (1990) ("The problems of classical contract law quickly became apparent to judicial and scholarly commentators. Contractual liability, like all other legal liability, did not arise solely from the individual's choice but came from the court's imposition of legal obligation as a matter of public policy; a contract was binding because the court determined that imposing liability served social interests, not because the individual had voluntarily assumed liability through his manifestation of assent.").

[207] *See* Charles L. Knapp, *Taking Contracts Private: The Quiet Revolution in Contract Law*, 71 FORDHAM L. REV. 761, 766 (2002) ("It has become a commonplace observation among contract writers and teachers that American contract law underwent a major evolution during roughly the middle half of the last century, from the 'classical' contract law

formation and construction. For example, the U.C.C. provided that "[a] contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract[,]"[209] and provided that "[a]n agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined."[210] The U.C.C. even rejected "one of the sacred rubrics of classical contract law,"[211] the mirror-image rule,[212] which required that an acceptance match the offer's terms in order to form an agreement.[213]

Likewise, the rules applicable to definiteness were liberalized[214] with indefinite bargains to be enforced if at all possible, as long as the parties had intended to make a contract (presumably still determined objectively).[215] As previously indicated, the U.C.C. provided that "[e]ven though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."[216] The general purpose of this provision was "to prevent the courts from requiring strictly that everything be clearly and definitely settled before the Court will find that a contract was formed."[217] In fact, a "major innovation of Article 2 [was] its abandonment—or at least its minimization—of the common law requirements of certainty."[218] As stated by Chancellor Murray, "The Code standard, in effect, is indefiniteness be damned, as long as two critical

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exemplified by the teaching and writings of Professors Langdell and Williston to what some of us at least are accustomed to calling 'modern' contract law.").

[208] *See* Feinman, *supra* note 31, at 738 (referring to the law of the U.C.C. and the Second Restatement as neoclassical contract law "because it addresses the shortcomings of classical law rather than offering a wholly different conception of the law").

[209] U.C.C. § 2-204(1) (2013).

[210] *Id.* § 2-204(2).

[211] John E. Murray, Jr., *Contract Theories and the Rise of Neoformalism*, 71 FORDHAM L. REV. 869, 888 (2002).

[212] U.C.C. § 2-207.

[213] *See* Eggleston et al., *supra* note 181, at 114 ("The common-law mirror image rule holds that a contract is not formed unless the offer and acceptance are identical.").

[214] TEEVEN, *supra* note 202, at 261.

[215] The Official Comment to the U.C.C. recognized, however, that "[t]he more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite omissions." U.C.C. § 2-204 cmt. (2013).

[216] *Id.* § 2-204(3).

[217] STATE OF NEW YORK, *supra* note 86, at 274 (remark by Professor Edwin W. Patterson).

[218] Snyder, *supra* note 179, at 36.

elements are present: a manifested intention to make a contract and a reasonably certain basis from which a court may afford a remedy."[219]

The Second Restatement followed suit, stating in a comment that if "the actions of the parties . . . show conclusively that they have intended to conclude a binding agreement, even though one or more terms are missing or are left to be agreed upon . . . courts endeavor, if possible, to attach a sufficiently definite meaning to the bargain." [220] As noted by Professor Robert Braucher (the Reporter for the Second Restatement section dealing with formation),[221] the Second Restatement's test, "harmonizing with the Uniform Commercial Code and with a growing body of authority, tends toward greater toleration of indefiniteness and more readiness to enforce agreements where the parties intended to be bound."[222]

However, because the line between enforcing the parties' bargain and creating a different bargain will often be fuzzy, "it will always be difficult to draw lines between definite and indefinite promises."[223] Of course, if there is a gap that relates to an important matter, and the gap relates to a particularly subjective matter for which there is no statutory or judicially-recognized default rule to fill in the gap, then the contract is too indefinite to enforce.

With respect to vague language, "uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract."[224] Thus, vague language threatens to prevent the formation of a contract only when the language relates to an important term of the bargain. It appears likely that the Second Restatement implicitly adopts the approach it takes to contracts that have a term that is against public policy: that the rest of the bargain would remain enforceable as long as the promise that is too indefinite to enforce "is not an essential part of the agreed exchange."[225]

Promises will usually be considered too vague to enforce when they are "subject to a broad range of equally-plausible interpretations" such "that the

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[219] John E. Murray, Jr., *The Standardized Agreement Phenomena in the Restatement (Second) of Contracts*, 67 CORNELL L. REV. 735, 742 (1982).

[220] RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (1981).

[221] Professor Braucher served as the Reporter from 1962 to 1971, at which time he was appointed to the Supreme Judicial Court of Massachusetts. Herbert Wechsler, RESTATEMENT (SECOND) OF CONTRACTS foreword (1981).

[222] Braucher, *supra* note 8, at 307.

[223] ERIC A. POSNER, CONTRACT LAW AND THEORY 119 (2011); *see also* PERILLO, *supra* note 2, § 2.9, at 44 ("The rule does not supply a precise standard. Indefiniteness is a matter of degree.").

[224] RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. a (1981); *see also id* § 201 cmt. d ("There may be a binding contract despite failure to agree as to a term, if the term is not essential . . . .").

[225] *Id.* § 184(1).

intention of the parties cannot be ascertained."[226] Stated another way, a promise will be considered too indefinite because of vagueness if the language chosen makes it a meaningless expression of what the parties intended.[227] Or, to take account of the objective theory of contract, a promise will be considered too indefinite because of vagueness if the language chosen makes it too difficult to determine what a reasonable person would believe it to mean.

The difficult question, of course, is how broad the range of plausible meanings must be before one cannot ascertain, within an acceptable margin of error, what a reasonable person would believe the vague language means. Deciding when the range is too broad necessarily involves: (1) deciding how broad the usual range may be (the typical acceptable range), which requires the court to decide whether to err on the side of over-enforcement or under-enforcement (the Second Restatement erring on the side of over-enforcement); (2) adjusting the typical acceptable range based on the importance to the bargain of the particular term (the adjusted acceptable range);[228] and (3) then comparing the adjusted acceptable range to the court's view on how broad a reasonable person would consider the range of plausible meanings to be in the particular bargain based on the bargain's language and context (the bargain's range of vagueness). If the bargain's range of vagueness exceeds the adjusted acceptable range, the bargain should be considered too indefinite to enforce. If the bargain's range of vagueness does not exceed the adjusted acceptable range, the bargain should be considered sufficiently definite.

For example (and to take the cases at the far ends), if a court believes the typical acceptable range is broad because it errs on the side of over-enforcement, the court views the term as not particularly important, and the vague language is not subject to a particularly broad range of plausible meanings, the court will find that the bargain is not too indefinite. To the contrary, if a court believes the typical acceptable range is narrow because it errs on the side of under-enforcement, the court views the term as

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[226] Lenihan v. Boeing Co., 994 F. Supp. 776, 802 (S.D. Tex. 1998).

[227] *See* Patterson, *supra* note 72, at 835 ("An action has been brought upon an alleged contract which has vague and meaningless expressions of what would normally be important terms; *e.g.*, the quality and quantity of goods are vague, and so is the price. In such a case the symbolic conduct will ordinarily be adjudged to be too indefinite to be enforced. 'The court cannot make a contract for the parties,' is the basic policy.").

[228] *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 3, topic 3, § 33 cmt. a (1981) ("Where the parties have intended to conclude a bargain, uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract. If the *essential* terms are so uncertain that there is no basis for deciding whether the agreement has been kept or broken, there is no contract." (emphasis added)).

important, and the vague language is subject to a particularly broad range of plausible meanings, the court will find that the bargain is too indefinite.

Promises of vague services, or promises conditioned on the performance of vague services, are often considered too indefinite. For example, a promise to convey land "for services to be rendered" was held too indefinite.[229] A promise to leave a business to the promisee if the promisee would "attend" to it was held too indefinite.[230] A promise to provide employment, without specifying its nature, is considered too indefinite to enforce.[231] Vague promises to care for or help out the promisee tend to be too indefinite for the courts. For example, a promise to "help" the promisee was found too indefinite.[232] Qualifying the type of service with a vague adjective often does not help. For example, a promise to an employee of "fair" treatment was considered too indefinite,[233] as was a promise to give a sibling "a good education."[234] A promise to "take care of [the promisee] in a very comfortable way" was held too vague to enforce.[235] Whether a promise to use "best efforts" is too indefinite depends largely on the circumstances of the bargain.[236]

Promised payments of an unspecified amount (which would be a gap) or an amount qualified by a vague adjective (which would be the use of a vague word) also tend to be too indefinite, if the court believes the range of the possible amount under a reasonable interpretation would be too broad. Thus, an employer's promise to an employee of "reasonable salary increases" and "reasonable annual bonuses" was held too indefinite.[237] A promise to another party for the opportunity to obtain more funds from the promisor in the future without specifying an amount (or a time period within which to provide them) was too indefinite.[238] Promises of

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[229] 1 WILLISTON & LORD, *supra* note 36, § 4:26, at 787 (citing Sherman v. Kitsmiller, 17 Serg. & Rawle 45, 1827 WL 2754 (Pa. Oct. 19, 1827)).

[230] *Id.*

[231] *Id.*

[232] Mooney v. Mooney, 538 S.E.2d 864, 867 (Ga. Ct. App. 2000).

[233] Rood v. Gen. Dynamics Corp., 507 N.W.2d 591, 607-08 (Mich. 1993)

[234] 1 WILLISTON & LORD, *supra* note 36, § 4:26, at 787 (citing Bumpus v. Bumpus, 19 N.W. 29 (Mich. 1884)).

[235] Cohn v. Levy, 725 N.Y.S.2d 376, 376 (App. Div. 2001); *see also* Dombrowski v. Somers, 362 N.E.2d 257, 258 (N.Y. 1977) (holding that the phrase "take care of" was too vague to be enforced). *But see* Brackenbury v. Hodgkin, 102 A. 106, 107 (Me. 1917) (enforcing a promise to maintain and care for the promisee).

[236] E. Allan Farnsworth, *On Trying to Keep One's Promises: The Duty of Best Efforts in Contract Law,* 46 U. PITT. L. REV. 1, 8 (1984).

[237] Rochlis v. Walt Disney Co., 23 Cal. Rptr. 2d 793, 799 (1993), *overruled on other grounds by* Turner v. Anheuser-Busch, Inc., 876 P.2d 1022 (Cal. 1994).

[238] Jensen v. Oliver, No. 97 C 1018, 1998 WL 673829, at *3 (N.D. Ill. Sept. 23, 1998).

employment without identifying the compensation have also been held too indefinite to enforce.[239] Although the U.C.C. and the Second Restatement direct courts to supply a price term if the parties intended to conclude a bargain (a reasonable price at the time the goods are to be delivered or the services are to be provided), this only applies when "nothing is said as to price," "the price is left to be agreed by the parties and they fail to agree," or "the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded."[240]

But presumably because the reasonable range for time for performance tends to be narrow (and presumably not as an important matter as the services to be provided or the price to be paid), vague references to the time for performance tend not to be too indefinite to enforce. Thus, a promise to perform "immediately," "at once," "promptly," "as soon as possible," or "in about one month" are not too indefinite.[241]

The indefiniteness doctrine is narrowed somewhat by the doctrines of cure-by-concession (a type of waiver) and modification. Under the cure-by-concession doctrine, indefiniteness will be removed if one of the parties, after the bargain's formation, concedes to the meaning attached by the other party (or to the most favorable meaning possible for the other party).[242]

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[239] 1 WILLISTON & LORD, *supra* note 36, § 4:26, at 787 (citing Lester v. Pet Dairy Products Co., 246 F.2d 747 (4th Cir. 1957). But a promise to pay a "generous" reward for the return of lost property was considered sufficiently definite. *See* Greene v. Heinrich, 300 N.Y.S.2d 236, 239 (N.Y. Civ. Ct. 1969) (enforcing the promise of a "generous" reward and concluding that 10% of the value of the returned property would be "generous"), *aff'd*, 319 N.Y.S.2d 275 (App. Term), *aff'd*, 372 N.Y.S.2d (App. Div. 1971).

[240] U.C.C. § 2-305(1) (2013); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. e (1981) (adopting rule set forth in U.C.C. § 2-305(1)).

[241] RESTATEMENT (SECOND) OF CONTRACTS § 33 illus. 3 (1981).

[242] *See* FARNSWORTH, *supra* note 2, at 212; *see also* Omri Ben-Shahar, *"Agreeing to Disagree": Filling Gaps in Deliberately Incomplete Contracts*, 2004 WIS. L. REV. 389, 393 ("[T]here is a substantial line of cases in which the parties left the payment terms open 'to be agreed upon,' where courts applied the doctrine of 'cure by concession' and allowed the buyer to enforce the deal if she agrees to make a full payment in cash and with no delay, namely, in a manner most favorable to the seller."). The cure-by-concession doctrine is impliedly accepted by the Second Restatement's use of the doctrine in an illustration and its reference in a comment. *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 illus. 2 (1981) ("*A* agrees to sell and *B* to buy a specific tract of land for $10,000, $4,000 in cash and $6,000 on mortgage. *A* agrees to obtain the mortgage loan for *B* or, if unable to do so, to lend *B* the amount, but the terms of loan are not stated, although both parties manifest an intent to conclude a binding agreement. The contract is too indefinite to support a decree of specific performance against *B*, but *B* may obtain such a decree *if he offers to pay the full price in cash.*" (emphasis added)); *see also id.* § 201 cmt. d. ("In some cases a party can waive the misunderstanding and enforce the contract in accordance with the understanding of the other party.").

Similarly, "part performance . . . may have the effect of eliminating indefinite alternatives by . . . modification."[243]

An indefinite offer of a bilateral contract might be construed as also offering a unilateral contract that is incorporated within, but divisible from, the offer of the bilateral contract.[244] The Second Restatement provides the following illustration:

> *A* says to *B*: "I will employ you for some time at $10 a day." An acceptance by *B* either orally or in writing will not create a contract. But if *B* serves one or more days with *A*'s assent *A* is bound to pay $10 for each day's service.[245]

Further, "[a]n express or implied promise may be found to reimburse expenses incurred pursuant to the indefinite agreement."[246] The Second Restatement provides the following illustration:

> *A* agrees to sell and *B* to buy a specific house and lot for $10,000, mortgage terms to be agreed. At *B*'s request, reinforced by a threat not to perform, *A* makes certain alterations in the house, which add nothing to its value. *B* then repudiates the agreement without reference to mortgage terms. *A* may recover the cost of alterations.[247]

Recovery could presumably be had under a bargain theory, based on an offer of a unilateral contract that was accepted by making the alterations.

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[243] RESTATEMENT (SECOND) OF CONTRACTS § 34 cmt. c (1981).

[244] *Id.* cmt. d.

[245] *Id.* illus. 4 (emphasis added).

[246] *Id.* cmt. d.

[247] *Id.* illus. 5 (emphasis added). The illustration was based on the well-known case of *Kearns v. Andree*, 139 A. 695 (Conn. 1928), a case that permitted recovery under quasi-contract (not an actual contract). *See id.* reporter's note, cmt. d ("Illustration 5 is based on Kearns v. Andree, 107 Conn. 181, 139 A. 695 (1928) . . . ."); *see also Kearns*, 139 A. at 698. Professor Braucher believed that a restitution remedy would not be appropriate in such a situation, presumably because no benefit was received by the promisor, and thus the remedy had to flow from a promise. *See* AMERICAN LAW INSTITUTE, *supra* note 1, at 326-27 ("We have tried to distinguish in the new [section on "certainty"] between those cases where the part performance of the contract eliminates the uncertainty and thus forms a contract and those cases, of which there are some, where the part performance does not eliminate the uncertainty, but nevertheless makes a contractual remedy appropriate, particularly in cases where there would be unjust enrichment otherwise. In such cases the *Restatement of Restitution* provides that there may be recovery of benefits conferred under a contract which is too indefinite to be enforced, *but the restitutionary remedy is not always the appropriate remedy, and we have stated that in subsection (3), and the illustrations drawn from actual cases make it clear that courts do sometimes give contractual remedies after part performance, even though the contract would be too indefinite if it were entirely executory on both sides.*" (remark by Reporter Robert Braucher regarding the "certainty" section of the Second Restatement) (emphasis added)).

Also, the Second Restatement takes the position that a promisee can assert a claim under promissory estoppel when a bargain did not result in the formation of a contract because it lacked reasonably certain terms.[248] Of course, if it is the defendant's promise that is indefinite, and such indefiniteness prevents the plaintiff from proving a breach, the claim would fail.[249] Also, even if the plaintiff can establish a breach, she would have to establish promissory estoppel's demanding standards, including the requirement of reliance and the requirement that "injustice can be avoided only by enforcement of the promise."[250] If a plaintiff is suing for breach of contract, the plaintiff does not have to show actual reliance on the bargain to prevail.[251]

Under promissory estoppel, not only does the promisee have to establish reliance on the promise,[252] the reasonableness of the reliance and whether it was of a definite and substantial character are factors to be considered in deciding whether injustice can be avoided only by enforcing the promise.[253] Also, the promise's formality is taken into account.[254] Thus, whereas promises made as part of a bargain usually do not require any particular form to be enforceable, a promise's informal nature could result in the court refusing to enforce it under a promissory estoppel theory.

Further, when the promise is enforced under promissory estoppel, "[t]he remedy granted for breach may be limited as justice requires."[255] Thus, although full-scale enforcement by protecting the promisee's expectation interest is often appropriate in a promissory estoppel case, the same factors that bear on whether the promise should be enforced will be considered by the court in deciding whether a lesser remedy is appropriate.[256] Accordingly, in some instances the court will decide that protecting the

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[248] *See* Dixon v. Wells Fargo Bank, N.A., 798 F. Supp. 2d 336, 344 (D. Mass. 2011) ("[T]he Restatement 'has expressly approved' promissory estoppel's use to protect reliance on indefinite promises." (citing Michael B. Metzger & Michael J. Phillips, *Promissory Estoppel and Reliance on Illusory Promises*, 44 Sw. L.J. 841, 842 (1990))).

[249] *See* Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 B.U. L. REV. 1397, 1440 n.178 (2009) ("[I]n some jurisdictions, a promissory estoppel claim is available to recover expenses made in reliance on an indefinite agreement if the indefiniteness does not preclude a finding of breach.").

[250] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

[251] *See id.* § 19 cmt. c ("[N]o . . . change of position . . . is necessary to the formation of a bargain . . . . [T]he law must take account of the fact that in a society largely founded on credit bargains will be relied on in subtle ways, difficult or incapable of proof.").

[252] *Id.* § 90(1).

[253] *Id.* § 90 cmt. b.

[254] *Id.*

[255] *Id.* § 90(1).

[256] *Id.* § 90 cmt. d.

promisee's reliance or restitution interest is justified in lieu of protecting the promisee's expectation interest.[257]

V. REMOVING THE UNCERTAINTY FROM THE SECOND RESTATEMENT'S TEST FOR REASONABLY CERTAIN TERMS

Despite trying to spell out what is really meant by the reasonably certain terms requirement,[258] the Second Restatement fails to expressly address two important questions about its test: (1) must the plaintiff's promise be sufficiently definite; and (2) what is an "appropriate" remedy? The answers to these questions depend primarily on whether the Second Restatement directs the court to assess indefiniteness as of the time of the bargain's formation (thus directing courts to ignore post-formation events) or at the time of the lawsuit (thus directing courts to consider such events).

If assessed as of the time of formation, both parties' promises must be sufficiently definite because at the time of formation it would not have been known which party would breach. Also, only an award protecting the parties' expectation interests would be an appropriate remedy because at the time of formation neither party would have yet relied on the bargain. In such a case, the Second Restatement would treat the reasonably certain terms requirement as a so-called "legal formality," which, as previously noted, is a requirement that a bargain be in a particular form to be a contract and which at times operates contrary to the parties' intentions.[259]

If assessed at the time of the lawsuit, it would not be a requirement that the plaintiff's promise be sufficiently definite because the plaintiff's promise will not always be relevant to resolving the dispute before the court. Also, a remedy short of protecting the plaintiff's expectation interest might be an appropriate remedy because the plaintiff might have relied on the bargain and might be seeking only reliance damages. In such a case the

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[257] *Id.* The promisee's restitution interest "is his interest in having restored to him any benefit that he has conferred on the other party." *Id.* § 344(c).

[258] *See* AMERICAN LAW INSTITUTE, *supra* note 1, at 326 ("[W]e have tried to be a little more helpful in spelling out what is meant by [the reasonably certain terms requirement] . . . ." (remark by Reporter Robert Braucher regarding the Second Restatement's provision on the requirement that a contract's terms be reasonably certain)).

[259] *See* Kennedy, *supra* note 6, at 1691-94 (discussing legal formalities and noting that "they operate through the contradiction of private intentions" and that "the formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored"); *id. at* 1692, 1698 (referring to the "sanction of nullity"); Perillo, *supra* note 23, at 41 n.22 ("[T]he term 'form' or 'formality' means any manner of expressing or memorializing an agreement other than oral or tacit non-ritual expression."); Klass, *supra* note 23, at 1743 ("A legal formality is a type of act, such as the utterance of special words or the production of a document in a certain form, that has no extralegal significance.").

Second Restatement would not treat the reasonably certain terms requirement as a legal formality and would treat it as simply having a practical aspect (i.e., its purpose would be to enable the court to resolve the dispute before it).

The language of the Second Restatement's rule in section 33 (no contract is formed),[260] along with the rule's placement in the chapter titled "Formation of Contracts—Mutual Assent,"[261] suggests that the ALI intends indefiniteness to be assessed as of the time of the bargain's formation.[262] This would mean the court should ignore post-formation events and that the requirement has only a formal aspect. But the Second Restatement sends mixed signals and thereby creates confusion because the supporting comment b. and its illustrations suggest that indefiniteness should be assessed at the time of the lawsuit and, thus, has a practical aspect. For example, the supporting comment states that "the degree of certainty required may be affected by the dispute which arises and by the remedy sought. Courts decide the disputes before them, not other hypothetical disputes which might have arisen."[263]

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[260] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted *so as to form a contract* unless the terms of the contract are reasonably certain." (emphasis added)).

[261] *See id.* ch. 3 (titled "Formation of Contracts—Mutual Assent").

[262] The rule's language even suggests that an apparent offer without reasonably certain terms is no offer at all. *See id.* § 33(1) (referring to "a manifestation of intention [that] is *intended to be understood as an offer* . . . ." (emphasis added)).

[263] *Id.* § 33 cmt. b. Leading contracts scholars generally accept that the Second Restatement test has solely a practical purpose, and has lost any role as a legal formality. *See, e.g.*, Randy E. Barnett & Mary E. Becker, *Beyond Reliance: Promissory Estoppel, Contract Formalities, and Misrepresentations*, 15 HOFSTRA L. REV. 443, 475-76 (1987) ("Under both the Uniform Commercial Code (UCC) and more modern case law in some jurisdictions [as well as the Second Restatement's test] it is sufficient that the terms have been worked out with sufficient certainty to support a conclusion that the parties intended to be bound provided that the indefiniteness is not *relevant to the remedy requested by the plaintiff*." (emphasis added) (citations omitted)); Charles L. Knapp, *Enforcing the Contract to Bargain*, 44 N.Y.U. L. REV. 673, 693 (1969) (describing the U.C.C. provision that the Second Restatement's test was modeled on as posing the following question: "Is there a reasonably certain basis for giving an appropriate remedy to *this plaintiff*, against *this defendant*, in the circumstances of *this breach* of the agreement?"). Professor Edwin W. Patterson's analysis of U.C.C. § 2-204(3) for the New York Law Revision Commission reveals that he might have agreed with professor Knapp's analysis of the U.C.C. provision. STATE OF NEW YORK, *supra* note 86, at 275 (remark by Professor Edwin W. Patterson). He provided three different possible interpretations of that provision, and for one of the interpretations he provided a rephrased provision that would have, in his opinion, better implemented that interpretation. *Id.* In the rephrased provision, he made reference to "the remedy sought by the aggrieved party." *Id.* Different courts applying or referencing the

In an attempt to remove the uncertainty created by the Second Restatement's mixed signals, an analysis of the two requirements of the Second Restatement's test—that the terms "provide a basis [1] for determining the existence of a breach and [2] for giving an appropriate remedy"[264]—is undertaken below. The discussion relating to "determining the existence of a breach" will focus on whether there are any clues in the Second Restatement as to whether the bargain's terms must be sufficiently definite such that a court would be able to determine the existence of a breach by the plaintiff, even if that is not an issue in the lawsuit. The discussion about an "appropriate remedy" will focus on whether there are any clues in the Second Restatement as to whether the bargain's terms must be sufficiently definite such that a court would be able to determine the

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Second Restatement's test have suggested or hinted at different interpretations. For example, some courts have addressed the indefiniteness of the plaintiff's promise. *See* Ass'n Benefit Servs., Inc. v. Caremark RX, Inc., 493 F.3d 841, 849-52 (7th Cir. 2007) (citing Second Restatement section 33 and holding, under Illinois law, that the bargain's failure to identify with specificity the plaintiff's obligations meant that a contract had not been formed due to the reasonably certain terms requirement, but also referencing a "lack of mutual assent"); Bus. Sys. Eng'g, Inc. v. Int'l Bus. Machs. Corp., 547 F.3d 882, 888-90 (7th Cir. 2008) (applying Illinois law and the Second Restatement's test and holding that a contract had not been formed due to the reasonably certain terms requirement because it was not clear what work plaintiff promised to do); Kottke v. Scott, No. 03–10–00071–CV, 2011 WL 1467194, at *4-5 (Tex. App. Apr. 14, 2011) (citing the Second Restatement's test and ruling that a promise by the defendants to sell their home to the plaintiffs did not result in a contract because, among other reasons, the plaintiffs' promise to pay the purchase price was not reasonably certain since "[t]he record contain[ed] no evidence as to whether or how often the interest was to be compounded, how payments were to be made, or any other terms of a purchase or financing agreement"). Other courts, while not explicitly addressing the definiteness of the plaintiff's promise (or its lack of definiteness), have suggested the same view by using phrases such as "each party's obligation" or "the promises made" when discussing the terms needed to make the bargain reasonably certain. *See, e.g.*, Big M, Inc. v. Dryden Advisory Grp., No. 08–3567(KSH), 2009 WL 1905106, at *14 (D.N.J. June 30, 2009) (applying New Jersey law, and referencing the Second Restatement's test, and stating that "[a] court must be able to accurately determine with reasonable certainty *each* party's obligation to enforce the contract" (emphasis added)); McLinden v. Coco, 765 N.E.2d 606, 613 (Ind. Ct. App. 2002) (referencing "the promises made" and citing the Second Restatement's test within the discussion). At least one court refused to award reliance damages for breach when the defendant's promise was too indefinite, which would suggest the court believes the test is assessed as of the time of formation and is thus a legal formality. *Kottke*, 2011 WL 1467194, at *6 (reversing the trial court's award of reliance damages when the alleged bargain was too indefinite to create a contract). On the other hand, another court that cited the Second Restatement's test suggested that the court might be concerned only with the definiteness of the defendant's promise because the court's task is "to ascertain the scope of the duty it is asked to enforce." Schwarzkopf v. Int'l Bus. Machs., Inc., No. C 08–2715 JF (HRL), 2010 WL 1929625, at *5 (N.D. Cal. May 12, 2010).

[264] RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

plaintiff's expectation interest, even if the plaintiff is not seeking a remedy that protects that interest (such as seeking only reliance damages).

A. Determining the Existence of a Breach

For a bargain to have reasonably certain terms under the Second Restatement's test, the terms must provide a basis for determining the existence of a breach.[265] Obviously, this means that at a minimum the bargain's terms must be sufficiently definite to enable the court to determine if the defendant breached,[266] and in this respect the requirement serves a purely practical purpose. But does it do so only incidentally? Is there more to the requirement than simply enabling a court to resolve the dispute before it? Specifically, must the plaintiff's promise also be sufficiently definite such that a court would be able to determine a breach by that party, even when the definiteness of the plaintiff's promise is not relevant to resolving the dispute before it?

The first section of this Part will address classical contract law's position (as set forth in the First Restatement) that the plaintiff's promise must be sufficiently definite and discuss the possible reasons classical contract law might have adopted such a position. The second section will address the Second Restatement's confused treatment of this issue and conclude that the best interpretation of the Second Restatement's test is that it rejects the First Restatement's position, and that it is not necessary that the plaintiff's promise be sufficiently definite if it is not an issue in the dispute before the court.

1. Classical contract law's treatment of the plaintiff's promise

Classical contract law (the law that developed in the nineteenth century and that dominated into the early twentieth century),[267] as set forth in the First Restatement of Contracts,[268] required that for an offer to be valid, the

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[265] *Id.*

[266] *See, e.g.*, *Schwarzkopf*, 2010 WL 1929625, at *5 (citing the Second Restatement test and stating that "[t]he court must be able to ascertain the scope of the duty it is asked to enforce").

[267] *See* Macneil, *supra* note 203, at 855 n.2 ("Classical contract law refers . . . to that developed in the 19th century and brought to its pinnacle by Samuel Williston in THE LAW OF CONTRACTS (1920) and in the RESTATEMENT OF CONTRACTS (1932).").

[268] *See* Melvin Aron Eisenberg, *The Emergence of Dynamic Contract Law*, 88 CAL. L. REV. 1743, 1749 (2000) (stating that classical contract law found its central expression in the First Restatement). The First Restatement has been described as the high-water mark of classical contract law. *See* Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678, 678-79 (1984); *see also* Robert A. Hillman, *The Crisis in Modern*

promises and performances to be rendered by *each* party must be reasonably certain.[269] Professor Samuel Williston, the Reporter for the First Restatement[270] and the "[a]rchitect of the fundamental concepts of classical contract law,"[271] provided the following rationale for the reasonably certain terms requirement: "[T]he rule . . . is one of necessity as well as of law. The law cannot subject a person to a contractual duty or give another a contractual right unless the character thereof is fixed by the agreement of the parties."[272] But this does not explain why the plaintiff's promise would need to be sufficiently definite if its definiteness was not relevant to the dispute before the court. There are three possible reasons, each of which are discussed below.

a. Deduction from the requirement's status as a formation doctrine

Classical contract law's requirement that both parties' promises be sufficiently definite was likely deduced from the proposition that a contract cannot be formed unless its terms are reasonably certain.[273] If this doctrinal proposition is accepted, it can be deduced that both parties' promises must be sufficiently definite because it would be illogical for a formation doctrine to take account of post-formation events. As stated by Professor Melvin Eisenberg, "The rules of classical contract law concerning indefiniteness tended to be static, because generally speaking the determination whether an agreement was sufficiently definite to be enforceable focused on the terms of the agreement at the time that it was made."[274]

This basis for requiring both parties' promises to be reasonably certain is not, of course, normatively sustainable unless the doctrinal proposition

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Contract Theory, 67 TEX. L. REV. 103, 123 n.136 (1988) (noting that classical contract law "reached its pinnacle in the early twentieth century with the *Restatement (First) of Contracts*").

[269] RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932).

[270] *See* Wm. Draper Lewis, RESTATEMENT (FIRST) OF CONTRACTS intro. (1932) (identifying Professor Williston as the Reporter).

[271] Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 208 (2005).

[272] RESTATEMENT (FIRST) OF CONTRACTS § 32 cmt. a (1932). In Williston's 1920 Contracts treatise, he simply wrote that "[i]t is a necessary requirement in the nature of things that an agreement in order to be binding must be sufficiently definite to enable a court to fix an exact meaning upon it." WILLISTON, *supra* note 50, § 37, at 56.

[273] Under the First Restatement, an indefinite offer was not a "valid offer," and thus prevented a manifestation of mutual assent. RESTATEMENT (FIRST) OF CONTRACTS § 32 & cmt. a (1932).

[274] Eisenberg, *supra* note 268, at 1795.

from which it flows—that a contract is not formed unless the bargain's terms are reasonably certain—is itself normatively sustainable.[275] And classical contract law had a habit of deducing rules from propositions that were taken to be axiomatic.[276]

b. Mutuality of obligation

Classical contract law's requirement that both parties' promises be reasonably certain was likely also deduced from another doctrinal proposition—the rule that neither party should be bound to a bargain unless both parties were bound, the so-called requirement of mutuality of obligation.[277] From this doctrinal proposition, it can be deduced that both parties' promises must be sufficiently definite because if the plaintiff's promise is too indefinite to enforce, then the plaintiff is not bound.

For example, at early English common law, the definiteness requirement "applied both to the promise sued upon and to a promise averred as consideration, for the latter was not a good consideration unless itself actionable, and to be actionable it must be certain."[278] Williston, in his famous 1920 Contracts treatise,[279] stated that "[t]he indefiniteness of promises is important not simply because of the inherent difficulty of enforcing a promise to which no exact meaning can be attached, but also because such a promise is insufficient consideration for another promise."[280] The First Restatement, with Williston as its Reporter,[281] adopted this view, providing that "a promise which is neither binding nor capable of becoming binding by acceptance of its terms is insufficient consideration" (except under limited circumstances).[282] Williston explained that "[t]he ultimate basis of the legal requirement of sufficient consideration

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[275] Melvin A. Eisenberg, *The Theory of Contracts*, *in* THE THEORY OF CONTRACT LAW 206, 213 (Peter Benson ed., 2001).

[276] *Id.* at 208.

[277] *See* FARNSWORTH, *supra* note 2, at 109 (discussing the doctrine of mutuality of obligation).

[278] SIMPSON, *supra* note 202, at 532.

[279] *See* E. Allan Farnsworth, *Williston, Samuel*, *in* THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 593 (Roger K. Newman ed., 2009) (referring to Williston's four-volume treatise, *The Law of Contracts*, as "one of the great textbooks of Anglo-American law").

[280] WILLISTON, *supra* note 50, § 49, at 81. Unfortunately, Williston did not provide any cases to support this proposition, and although he stated that the matter would be discussed more in another section (§ 104), that section does not address the issue directly, discussing only illusory promises. *Id.* at 81-83.

[281] *See* Wm. Draper Lewis, RESTATEMENT (FIRST) OF CONTRACTS intro (1932) (identifying Professor Williston as the Reporter).

[282] RESTATEMENT (FIRST) OF CONTRACTS § 80 (1932).

for promises is the belief not only that something should be given in exchange for a promise in order to make it binding, but that what is given should have value . . . ."[283] Even anti-classicist Professor Arthur Corbin stated that "[a] promise can be so vague and indefinite in its expression that it cannot be enforced and is therefore not a sufficient consideration."[284] And this appears to remain the general rule.[285]

Thus, classical contract law's requirement that both parties' promises be sufficiently definite was likely based on notions of mutuality of obligation, either as a formalistic deduction from that doctrine and the related doctrine of consideration or based on the substantive concern that a promise should usually only be enforced if given for something of value.

c. Plaintiff's inability to prove it was ready, willing, and able to perform

Some courts require that a plaintiff, to establish a claim for breach of contract, prove that he either performed or that he was ready, willing, and able to perform.[286] This requirement is presumably based on the notion that if the defendant is held liable for breach despite a plaintiff not having been ready, willing, and able to perform, the plaintiff will be put in a better position than if the defendant had not breached. If the plaintiff's promise is too indefinite, the plaintiff presumably could not establish that it was ready, willing, and able to perform its end of the bargain, unless the indefiniteness had been removed under cure-by-concession or modification. Classical contract law's requirement that the plaintiff's promise be sufficiently definite might have been premised, at least in part, on the belief that a plaintiff whose promise is indefinite cannot prove that he either performed or that he was ready, willing, and able to perform.

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283 *Id.* § 80 cmt. a.

284 CORBIN, *supra* note 2, § 143, at 208.

285 *See* 1 WILLISTON & LORD, *supra* note 36, § 4:32, at 883-84 ("Indefinite promises give rise not only to the inherent difficulty of enforcing a promise to which no exact meaning can be attached but also to a problem of insufficiency of consideration. A promise too indefinite to be enforced will, for that very reason, be insufficient consideration for a counterpromise. If one promise of a bilateral agreement is too indefinite, neither promise will be enforceable. The indefinite promise cannot be enforced because of its uncertainty, and the counterpromise, even though in itself definite, cannot be enforced because of lack of consideration.").

286 *See* Winkleblack v. Murphy, 811 So. 2d 521, 529 (Ala. 2001); Singarella v. City of Boston, 173 N.E.2d 290, 291 (Mass. 1961).

d. The requirement's status as a legal formality

Classical contract law's requirement that both parties' promises be sufficiently definite can also be attributed to its status as a so-called legal formality. Although it was not described as such at the time, Professor Duncan Kennedy has recognized that the requirement was (and perhaps still is) a legal formality.[287] In contract law, a legal formality is a rule providing that a party's (or parties') failure to express or memorialize a bargain or promise in a particular manner or form will have a specified legal consequence, even if that consequence is contrary to the party's (or parties') actual or manifested intention(s).[288] Requirements of form "operate through the contradiction of private intentions."[289] As explained by Professor Kennedy:

> [T]he formality means that unless the parties adopt the prescribed mode of manifesting their wishes, they will be ignored. The reason for ignoring them, for applying the sanction of nullity, is to force them to be self conscious and to express themselves clearly, not to influence the substantive choice about whether or not to contract, or what to contract for.[290]

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[287] Kennedy, *supra* note 6, at 1691-92.

[288] *See* Perillo, *supra* note 23, at 41 n.22. Following Professor Perillo, this Article does not consider the requirement of a manifestation of mutual assent to be a requirement of form. *See id.* ("Even a simple oral contract made with no particular ritual words has a 'form.' . . . Throughout this Article, however, the term 'form' or 'formality' means any manner of expressing or memorializing an agreement *other than oral or tacit non-ritual expression.*" (emphasis added) (citation omitted)). Although a manifestation of mutual assent must have a form in the sense that the assent must be manifested, the manifestation need not take any particular form. *See* RESTATEMENT (SECOND) OF CONTRACTS § 19(1) (1981) ("The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act."); *id.* cmt. a (1981) ("Where no particular requirement of form is made by the law a condition of the validity or enforceability of a contract, there is no distinction in the effect of the promise whether it is expressed in writing, or orally, or in acts, or partly in one of these ways and partly in others. Purely negative conduct is sometimes, though not usually, a sufficient manifestation of assent."). Accordingly, this Article limits the term "legal formality" to a requirement that a particular act have a certain form and does not extend it to an act simply because the act itself has a form. To do so would expand the definition of "legal formality" to such an extent that it would no longer be a useful concept. Also, this Article does not consider it to be a requirement of form that an act be in a form sufficient to permit a fact finder to conclude, based on a preponderance of the evidence, that the act occurred. To treat this as a requirement of form would mean that every act that must be proven to establish a claim is a requirement of form and would likewise expand the definition of "legal formality" to such an extent that it would no longer be a useful concept.

[289] Kennedy, *supra* note 6, at 1691.

[290] *Id.* at 1692.

Although formalities "will lead to many instances in which the judge is obliged to disregard the real intent of the parties,"[291] the hope is that if parties generally comply with the formalities, the benefits derived from their use will outweigh the occasional miscarriages of justice.

Contract law has numerous legal formalities. For example, if the relevant jurisdiction recognizes the seal as a basis for rendering a promise enforceable,[292] even when a party intends a promise of a gift to be legally binding, if the promisor does not make the promise under seal, then the failure to use the proper form might result in a legal consequence contrary to the party's intention at the time of making the promise. Similarly, if a promisor intends a bargain to be legally binding, but it is oral and within the Statute of Frauds,[293] then the failure to evidence the bargain with the proper form (a signed writing with the essential terms)[294] might result in a legal consequence contrary to the party's intention. The common law's mirror image rule[295] is a legal formality[296] because even if the parties intended to conclude a deal, no contract was formed if the acceptance deviated from the terms of the offer.[297]

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[291] *Id.* at 1697.

[292] *See* RESTATEMENT (SECOND) OF CONTRACTS ch. 4, topic 3, statutory note (1981) ("In many of the jurisdictions . . . recognizing the seal there seems to be no statute or decision depriving the seal of its common-law effect as a substitute for consideration."); Klass, *supra* note 23, at 1762-63 ("While the seal is no longer a condition of contractual liability, many jurisdictions still recognize it as a substitute for consideration or as triggering a longer statute of limitations.").

[293] *See* RESTATEMENT (SECOND) OF CONTRACTS § 110 (1981) (describing which classes of contract are covered by the Statute of Frauds).

[294] *Id.* § 131.

[295] *Id.* § 59. *See also* Weisz Graphics Div. v. Peck Indus., Inc., 403 S.E.2d 146, 149 (S.C. Ct. App. 1991) (stating that restatement section 59 is known as the "mirror image" rule).

[296] *See* Douglas G. Baird & Robert Weisberg, *Rules, Standards, and the Battle of the Forms: A Reassessment of § 2-207*, 68 VA. L. REV. 1217, 1231 (1982) ("[T]he mirror-image rule was a paradigm of legal formality . . . .").

[297] *Id.* at 1231-32. Even though Professor Lon Fuller famously argued that the consideration requirement might be a legal formality, *see* Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941), the modern view that sham consideration is not consideration, *see* RESTATEMENT (SECOND) OF CONTRACTS § 71 cmt. b (1981) ("[A] mere pretense of bargain does not suffice, as . . . where the purported consideration is merely nominal. In such cases there is no consideration . . . ."), means that the consideration requirement can no longer be considered a legal formality, if it ever could have been. *See generally* Joseph Siprut, *The Peppercorn Reconsidered: Why a Promise to Sell Blackacre for Nominal Consideration is Not Binding, But Should Be*, 97 NW. U. L. REV. 1809, 1817-21 (2003) (surveying the cases purportedly holding that nominal consideration was sufficient and concluding they can be explained on other grounds). Parties can no longer deliberately make a transaction appear to be a bargain so as to render it legally enforceable. Also,

It should be recognized that failure to use a legal formality does not always mean the promise does not have any legal effect, despite Professor Kennedy's reference to the "sanction of nullity"[298] and Professor Lon Fuller's statement that the "sanction of the invalidity . . . is the means by which requirements of form are normally made effective . . . ."[299] For example, even though it is often stated that a failure to satisfy the Statute of Frauds' requirement of a signed writing renders a promise within one of the Statute's categories unenforceable,[300] this is not always true. There are exceptions to the Statute's writing requirement, including detrimental reliance (at least according to the *Second Restatement* and some courts).[301] Accordingly, the failure to use the Statute's required form is not automatically a sanction of nullity. Rather, it simply means that an exception to the Statute will have to be used. Likewise, for those jurisdictions that still consider a promise under seal to be enforceable, the failure to use the seal does not automatically render the promise unenforceable.[302] Rather, it simply means that the promisee will have to identify an alternative basis for rendering the promise enforceable.[303]

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whether the parol evidence rule is a legal formality depends on one's approach to the rule. If it is simply used to determine whether the parties intended the promise to be part of the bargain, then it is not a legal formality because its goal is to implement the parties' intentions, not to operate (in some instances) contrary to their intentions. If, however, it is designed to discharge promises that were not included in a subsequent written document, even if it is believed the parties intended the prior promise to be legally enforceable, then it is a legal formality. Similarly, with respect to interpreting the text of a bargain, the plain meaning rule is a legal formality because it presumably operates contrary to the parties' intentions in certain situations (the legal formality being the use of language that clearly describes the parties' intentions), whereas the contextual approach to interpretation is not a legal formality because any relevant evidence is admissible. In fact, many of the disputes over how contract law rules should be applied are disputes over whether the rules should be legal formalities.

[298] Kennedy, *supra* note 6, at 1692.

[299] Fuller, *supra* note 297, at 803.

[300] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 110(1) (1981).

[301] *See id.* § 139(1) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise."); McIntosh v. Murphy, 52 Haw. 29, 36-37, 469 P.2d 177, 181-82 (1970) (holding that the plaintiff's reliance on the defendant's promise of employment for a definite term was sufficient to overcome the Statute of Frauds). *But see* Stearns v. Emery-Waterhouse Co., 596 A.2d 72, 74-75 (Me. 1991) (rejecting the use of detrimental reliance to overcome the Statute of Frauds with respect to promises of employment). For a recent and thorough treatment of the issue, see generally Stephen J. Leacock, *Fingerprints of Equitable Estoppel and Promissory Estoppel on the Statute of Frauds in Contract Law*, 2 WM. & MARY BUS. L. REV. 73 (2011).

[302] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 95 cmt. a (1981) (noting that the

Of course, there are some situations in which a legal formality truly is a *requirement* of form in the sense that the failure to use it will result in the sanction of nullity. For example, under the federal Older Workers Benefit Protection Act of 1990,[304] an employee's release of a federal age discrimination claim is of no effect unless certain formalities are complied with (including the release being written in a manner calculated to be understood by the employee; having the waiver specifically refer to claims under the federal age discrimination statute; having the employer advise the employee in writing to consult with an attorney prior to executing the release; and providing the employee at least twenty-one days to consider the release),[305] and there are no exceptions.[306]

A legal formality can serve a variety of functions. The most widely recognized functions are the three identified by Professor Lon Fuller.[307] First, a legal formality can serve an evidentiary function, by providing evidence of the bargain and its terms.[308] Although a court could determine what occurred without the use of a legal formality (by admitting and considering any relevant evidence, irrespective of its form), a requirement of form (if complied with) reduces the time and expense involved in this determination. Also, if the formality is well known, one would expect that it will reduce the error rate involved in the court's factual determination (if it is well known, a failure to use the form is good evidence that the alleged transaction did not occur). The evidentiary function also benefits the parties because it enables them to more reliably predict what the court will conclude if the dispute is litigated, thereby giving them greater knowledge of their legal rights, which in turn leads to better decision making.

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nonexistence of one of the requirements for a sealed contract "does not preclude the formation of a contract binding as a bargain").

[303] *Id.*

[304] Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621-626 (2006)).

[305] Older Workers Benefit Protection Act § 201(f)(1)(A), (B), (E), (F), 104 Stat. at 983, (codified at 29 U.S.C. § 626(f)(1)(A), (B), (E), (F) (2006)).

[306] *See* Oubre v. Entergy Operations, Inc., 522 U.S. 422, 427-28 (1998) (holding that an employee's release that fails to comply with the requirements of the Older Workers Benefit Protection Act is ineffective and cannot be ratified under common-law ratification doctrines).

[307] *See* Fuller, *supra* note 297, at 800-03.

[308] *See id.* at 800 ("The most obvious function of a legal formality is . . . that of providing evidence of the existence and purport of the contract, in case of controversy." (internal quotation omitted)); Perillo, *supra* note 23, at 64 ("A primary function of contractual formalities is, of course, to supply and preserve evidence of the contract."); Kennedy, *supra* note 6, at 1691 n.14 ("The evidentiary function includes both providing good evidence of the existence of a transaction and providing good evidence of the legal consequences the parties intended should follow.").

Second, a legal formality can serve a cautionary function, in the sense of "acting as a check against inconsiderate action,"[309] and "making the parties think twice about what they are doing and making them think twice about the legal consequences."[310] The requirement that a party formalize her promise, by reducing it to a signed writing for example, will cause the transaction to take more time, thereby increasing the likelihood of deliberation and likely impressing upon the promisor the seriousness of the matter. For example, "[t]he seal in its original form fulfilled this purpose remarkably well. The affixing and impressing of a wax wafer—symbol in the popular mind of legalism and weightiness—was an excellent device for inducing the circumspective frame of mind appropriate in one pledging his future."[311] Thus, by inducing parties to spend more time thinking before they act, the cautionary function helps reduce the number of inefficient exchanges caused by hasty and inconsiderate action.

Third, a legal formality can serve a channeling function by offering "a legal framework into which the party may fit his actions,"[312] so that the party knows how to accomplish a desired end. In other words, "it enables the parties to search out and find the appropriate device to accomplish their intent to create an obligation."[313] For example, a seal permits a person to accomplish the objective of making a promise legally enforceable.[314]

In addition to the famous tripartite evidentiary, cautionary, and channeling functions set forth by Fuller, Professor Joseph Perillo has identified many other purposes a legal formality can serve.[315] Importantly for this Article, Perillo recognized that a formality can serve a clarifying function by leading parties to uncover points of disagreement during a bargain's formation, which enables them to work the issues out prior to finalizing the bargain.[316] By doing so, the parties will reduce the number of post-formation disputes caused by gaps and misunderstandings.[317]

Legal formalities do, however, have at least two harmful effects apart from occasionally defeating the parties' expectations. First, because legal formalities take time to comply with, they slow the pace of business.[318]

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[309] Fuller, *supra* note 297, at 800; *see also* Perillo, *supra* note 23, at 53 (noting that one of the functions of a legal formality "is to caution the promisor that he is entering into a binding relationship").

[310] Kennedy, *supra* note 6, at 1691 n.14.

[311] Fuller, *supra* note 297, at 800.

[312] *Id.* at 801.

[313] Perillo, *supra* note 23, at 49.

[314] *See* Fuller, *supra* note 297, at 802.

[315] Perillo, *supra* note 23, at 43-69.

[316] *Id.* at 56-58.

[317] *See id.*

[318] *Id.* at 70.

Second, they enable a party to use noncompliance to avoid a bargain because the deal has become undesirable.[319] The less well known a legal formality is, the more often the latter effect is likely to occur.

The best legal formality is one that is adopted when the following conditions exist: the transaction type to which it is applied is in the normal course (i.e., without the legal formality) in some sense deficient in accomplishing the goals of legal formalities (i.e., there is a need for the formality);[320] compliance with the legal formality is not so time-consuming that the transaction costs involved in complying with it outweigh the benefits to be received from the bargain (and thus have the effect of discouraging what would otherwise be a mutually beneficial exchange);[321] and the legal formality is well known so that it is made use of;[322] and miscarriages of justice (i.e., results contrary to the parties' intentions) are kept to a minimum.[323]

The consequence of treating the reasonably certain terms requirement as a legal formality is that more bargains will fail to be contracts than if the requirement was treated simply as a doctrine to implement the parties' intentions, and as a restatement of other doctrines designed to enable the court to resolve the dispute before it. Also, treating the requirement as a legal formality has the strange effect of permitting a plaintiff to proceed on a contract theory even though the plaintiff lacks evidence to prove expectation damages to a reasonable certainty,[324] but prohibiting the plaintiff from proceeding on a contract theory if the bargain's *terms* (as opposed to the evidence) in regard to the plaintiff's expectation interest, are not reasonably certain.[325] The question that needs answering, then, is why

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[319] *Id.*; *see also Snyder*, *supra* note 179, at 37 (referencing the possibility that a party will rely on the indefiniteness doctrine to escape a bargain that is no longer beneficial to her).

[320] *See* Fuller, *supra* note 297, at 805 ("The need for investing a particular transaction with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises . . . ." (emphasis omitted)).

[321] *See* Fuller, *supra* note 297, at 805 ("Forms must be reserved for relatively important transactions. We must preserve a proportion between means and end; it will scarcely do to require a sealed and witnessed document for the effective sale of a loaf of bread.").

[322] If a formality is not well known, the benefits of the formality will be reduced, and its harmful effects will be increased.

[323] *See* Perillo, *supra* note 23, at 70 (noting that formalities enable a party to use them to avoid a bargain that has become undesirable).

[324] A party can only recover loss up to an amount that the evidence establishes with reasonable certainty. RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981).

[325] The former concept appears applicable to situations in which the contract terms are sufficiently definite, but there is insufficient evidence to determine the amount of loss caused by the breach of the definite term. These tend to be situations in which the promised performance (which is sufficiently definite) was simply a means to an end for the promisee,

classical contract law might have considered contractual invalidity an appropriate sanction for entering into a bargain with indefinite terms, even when the court has before it all that is needed to implement the parties' manifested intentions and to resolve the dispute that has arisen.

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as opposed to being the end in itself. Although the promised performance is clear, the value of the performance is not. An example would be a contract between a promoter and a boxer for the boxer to fight a particular opponent and the parties to share the profits. *See, e.g.*, Chi. Coliseum Club v. Dempsey, 265 Ill. App. 542 (1932). The boxing match is simply a means to an end for the parties—the end being revenue. Accordingly, although the contract's terms are sufficiently definite (it is clear what each party is to do), the loss from a breach of the contract might be difficult to prove, and, thus, the value of the promise to box is uncertain. Another example would be the breach of a contract to publish a novel. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a, illus. 1 (1981); Freund v. Wash. Square Press, Inc., 314 N.E.2d 419 (N.Y. 1974). The promise to publish the novel might be definite, but the evidence might not permit the loss caused by the failure to publish (including lost royalties and loss to reputation) to be established to a reasonable certainty. As the court in *Freund* noted, "the value to [the] plaintiff of the promised performance—publication—was a percentage of sales of the books published and not the books themselves." *Id.* at 422. A further example is a landowner who breaches a promise to sell land to a prospective buyer, when the buyer plans to build a drive-in theater on the land. RESTATEMENT (SECOND) OF CONTRACTS § 352 cmt. a, illus. 2 (1981). In such a situation, even though the parties' promises are sufficiently definite, the prospective buyer might not be able to prove the lost profits to a reasonable certainty. *Id.* In these cases, it is simply the loss that is uncertain and not any of the contract's terms.

The latter concept deals with a situation in which the difficulty of proving the promisee's expectation interest is caused by the vagueness of the promise that was breached. An example is the well-known case of *Sullivan v. O'Connor*, 296 N.E.2d 183 (Mass. 1973). In that case, the patient alleged that a surgeon "promised to perform plastic surgery on her nose and thereby to enhance her beauty and improve her appearance . . . ." *Id.* at 184. There seemed to be little doubt that the promise was breached: the patient alleged that the result of the surgeries was to leave her with a nose that "had a concave line to about the midpoint, at which it became bulbous; viewed frontally, the nose from bridge to midpoint ws [sic] flattened and broadened, and the two sides of the tip had lost symmetry." *Id.* at 185. One of the reasons the court only awarded reliance damages was because, in cases involving a doctor's promise to a patient regarding the results of a medical procedure, "to put a value on the condition that would or might have resulted, had the treatment succeeded as promised, may sometimes put an exceptional strain on the imagination of the fact finder." *Id.* at 188. Presumably, it would be too difficult to prove with reasonable certainty the position the plaintiff would have been in had the defendant performed as promised.

A related situation is when the promise is definite and the promised performance was an end in itself, such that it is clear the position the non-breaching party would have been in had there been performance, but it is difficult to put a dollar value on that position. For example, in the famous case of *Hawkins v. McGee*, 146 A. 641 (N.H. 1929), what the doctor promised the patient was arguably not vague ("a hundred per cent perfect hand or a hundred per cent good hand"), *id.* at 643, but it might be difficult to put a dollar value on a 100% perfect or good hand.

To identify the purposes served, it is important to identify the harm caused by bargains lacking reasonably certain terms, beyond making it difficult for a court to resolve the dispute before it. Indefinite bargains make it difficult for the parties to know their legal rights and duties arising from the bargain, which increases the likelihood of misunderstandings, and which in turn increases the likelihood of post-formation disputes. When the bargain has a gap and the unanticipated event occurs, the parties might disagree as to which gap-filling term is "reasonable in the circumstances" or, more importantly, which gap-filling term a court will conclude is "reasonable in the circumstances."[326]

Similarly, when the bargain has a vague term, and it is unclear whether an event that occurs is within or outside the term's range of meaning, the parties might disagree as to how a court would interpret the term. The likelihood of these disagreements is increased by each party having an *ex post* incentive to advocate for the meaning that is now most favorable to itself. A post-formation dispute not only results in lost time and inefficient expenditures during the dispute, it presumably also increases the likelihood that the parties' post-formation, pre-dispute, reliance expenditures will be wasted if the parties cannot resolve it. Also, such disputes would likely disrupt the plans of third parties who relied on the expected performance of the bargain.

Further, if one party's promise is not reasonably certain, and the other party's performance is due first, one would expect that there is an increased chance the latter party will repudiate the bargain before performing. The latter party will understandably be reluctant to perform when the contours of the performance to be received in exchange are uncertain and when there is an incentive for the first party to construe the indefinite return performance narrowly. Although the latter party entered into the bargain even when the other party's promised performance was not reasonably certain, the latter party might have done so without sufficient deliberation or attention to the lack of certainty—and only at the time for its own performance, came to recognize that it was unclear exactly what it had bargained for. If the court requires a plaintiff, when seeking expectation damages, to prove its cost or loss avoided from not having to perform, this will provide a further incentive.

Misunderstandings arising from indefinite bargains also increase the chance the exchange is not beneficial for one of the parties, and thus run counter to one of contract law's principal aims, which is to encourage

[326] *See, e.g.*, Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 460-61 (1897) ("The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.").

mutually beneficial exchanges.[327] Indefinite bargains are also likely to have been entered into without careful deliberation, further increasing the chance the exchange is not mutually beneficial.

There is an increased chance these problems will be avoided if the reasonably certain terms requirement is treated as a legal formality, is applied at the time of the bargain's formation, and requires both parties' promises to be sufficiently definite. A sanction of contractual invalidity that applied only if the promise sought to be enforced is indefinite would only enhance, at the time of the bargain's formation, each party's interest in ensuring that the promise of the other party was sufficiently definite. The promisee would have an incentive to ensure that the other party's promise was sufficiently definite because if it was not, the promisee would not acquire a contract right to performance by the promisor. A rule that did not require the plaintiff's promise to be sufficiently definite would not itself provide an incentive for a party to ensure that its own promise was sufficiently definite because indefiniteness would not affect the party's acquisition of a contract right to performance by the promisor. The other party would, of course, have an incentive under the rule to make sure the first party's promise was sufficiently definite, but for each promise there would only be an incentive under the rule for one of the two parties to make sure the promise is reasonably certain.

There would, of course, be incentives originating from sources other than the rule for a party, at the time of the bargain's formation, to ensure its own promise is sufficiently definite. A party whose promise is indefinite runs the risk of a post-formation dispute with the other party, something the party will want to avoid.[328] And worse still, the post-formation dispute might lead to a lawsuit with the indefinite promise being construed against the party. Also, if a party's promise is indefinite, it may be difficult for the party to determine its cost of performance, which would thereby make it difficult to determine if the exchange is beneficial to her.

These incentives to enter into bargains with reasonably certain terms might suggest that there is no need for the reasonably certain terms requirement to be treated as a legal formality. As previously noted, a legal formality is best reserved for those situations in which the transaction type is, in the normal course (i.e., without the legal formality), deficient in accomplishing the goals of legal formalities (i.e., there is a need for the formality).[329] These incentives, however, might be considered insufficient

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[327] *See* Omri Ben-Shahar, *The Tentative Case Against Flexibility in Commercial Law*, 66 U. CHI. L. REV. 781, 783 (1999) (noting that one of contract law's principal aims is to promote mutually beneficial exchanges).

[328] *See* Perillo, *supra* note 23, at 57.

[329] *See* Fuller, *supra* note 297, at 805 ("The need for investing a particular transaction

to avoid indefinite bargains. As previously discussed, there are a host of reasons why the parties might enter into a bargain that lacks reasonably certain terms.[330] These circumstances will lead to indefinite bargains despite the incentives to avoid indefinite bargains, and in turn lead to all of the problems caused by such bargains.

The court might, therefore, consider it advisable to add an extra incentive for the parties to make the terms of their bargain reasonably certain. Imposing the sanction of contractual invalidity when the plaintiff's promise is indefinite might provide such an incentive. If the party is aware of the rule, it will know that if a court determines its promise is not reasonably certain, it will be unable to enforce (under a contract theory) the other party's promise.[331] This increases the likelihood that both parties will have an incentive to make sure that all of the promises in the bargain are reasonably certain. Under this approach, the reasonably certain terms requirement operates as a deterrent to entering into an indefinite bargain, even if it turns out that the way in which the bargain is indefinite is irrelevant to resolving the dispute that ends up before the court.[332]

So what functions of form might the reasonably certain terms requirement serve if it is treated as a legal formality and used as a sanction for entering into an indefinite bargain? The evidentiary function would not be served in the respect of providing the court with evidence of the bargain and its terms because that function would already be served by treating the requirement as nothing more than a restatement of other rules needed by the court to resolve the dispute before it.[333] The evidentiary function would also not be served with respect to gaps in the bargain. The evidentiary function is designed to provide evidence of the bargain and its terms,[334] and if there is a gap, there was no manifested agreement on a particular issue, and thus, there is no term of which to provide evidence.

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with some legal formality will depend upon the extent to which the guaranties that the formality would afford are rendered superfluous by forces native to the situation out of which the transaction arises . . . ." (emphasis omitted)).

[330] *See supra* Part III.

[331] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981)(1) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.").

[332] *Cf.* Ayres & Gertner, *supra* note 95, at 97 (discussing the Uniform Commercial Code's zero-quantity default rule as a potential penalty for both parties).

[333] The evidentiary function would, however, be served in this respect if the reasonably certain terms requirement provided that the terms of the defendant's promise must be more definite than simply enabling the plaintiff to prove, by a preponderance of the evidence, that the defendant's promise was breached.

[334] Fuller, *supra* note 297, at 800; *see also* Perillo, *supra* note 23, at 64; Kennedy, *supra* note 6, at 1691 n.14.

But the evidentiary function would be served by providing evidence to the parties that they attached the same meaning to a vague term, preventing one of the parties from later denying that shared meaning.[335] By offering an additional incentive for a party to ensure its own promise is reasonably certain, the parties are more likely to avoid vague terms and are more likely to draft them in a way that reflects their mutual understanding of the term's meaning. This will then eliminate the ability of a party, after the bargain's formation, to take advantage of the vague term and deny that there was a mutual understanding.

Treating the reasonably certain terms requirement as a legal formality also serves the cautionary function of form. Providing an additional incentive for a party to ensure that its own promise is sufficiently definite will increase that party's deliberation about her promise, thus encouraging the party to think carefully about whether it desires to enter into the bargain.[336] This will reduce the number of bargains that are not beneficial to one of the parties.

And, perhaps most importantly, treating the reasonably certain terms requirement as a legal formality serves the clarifying function of form. Providing an additional incentive for a party to ensure that her own promise is sufficiently definite will result in parties uncovering points of disagreement during a bargain's formation, which thereby enables them to work issues out prior to finalizing the bargain.[337]

By treating the reasonably certain terms requirement as a legal formality, the requirement would be, as argued by Professors Ian Ayres and Robert Gertner, a "penalty default."[338] It would penalize the parties (or a party) for not affirmatively specifying the details of the bargain, and thereby encourage them to be more specific.[339] And although treating the reasonably certain terms requirement as a legal formality was not a policy referenced by Williston in the First Restatement,[340] it seems likely that this rationale contributed, at least in part, to classical contract law's requirement that both parties' promises be sufficiently definite to form a contract.

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[335] This would be important because where the evidence shows that "the parties have attached the same meaning to a promise or agreement or a term thereof [a so-called mutual understanding], it is interpreted in accordance with that meaning." RESTATEMENT (SECOND) OF CONTRACTS § 201(1) (1981); *see also* Berke Moore Co. v. Phoenix Bridge Co., 98 A.2d 150, 155-56 (N.H. 1953).

[336] *See* Perillo, *supra* note 23, at 53-56 (discussing the cautionary function of formalities).

[337] *See id.* at 56-58 (discussing the clarifying function of formalities).

[338] Ayres & Gertner, *supra* note 95, at 97.

[339] *See id.* at 99.

[340] *See, e.g.*, RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932).

2. The Second Restatement's treatment of the plaintiff's promise

The Second Restatement "completely reformulated" the First Restatement's rule on reasonably certain terms,[341] and part of its reformulation included replacing the First Restatement's reference to "the promises and performances to be rendered by each party"[342] in the black letter rule with the requirement that "the terms of the contract [be] reasonably certain."[343] The Second Restatement then provided that the "terms" are reasonably certain "if they provide a basis for determining the existence of a breach and for giving an appropriate remedy."[344] Intentionally or not, an express statement of whether the plaintiff's promise must be sufficiently definite was left out of the black letter rule's reformulation.[345]

With respect to the doctrinal proposition that a contract is not formed unless the bargain's terms are reasonably certain (a basis upon with the First Restatement's position regarding the plaintiff's promise having to be sufficiently definite was likely based), the Second Restatement's black letter rule maintains the reasonably certain terms requirement as a formation doctrine.[346] The rule expressly provides that unless the bargain's terms are reasonably certain, an offer cannot be accepted "so as to form a contract."[347]

Though the doctrines of cure-by-concession and modification (which focus on post-formation events and render an otherwise indefinite bargain sufficiently definite)[348] might suggest that the reasonably certain terms requirement cannot possibly be a formation doctrine, a Second Restatement comment states that in situations such as these "it may be impossible to identify offer or acceptance or to determine the moment of formation."[349] Thus, subsequent action by one party removing the indefiniteness could be viewed as an acceptance of the other party's original offer (which might have been an acceptance, not an offer, at the time of formation of the first unenforceable bargain), with the understanding that the otherwise indefinite

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[341] RESTATEMENT (SECOND) OF CONTRACTS § 33 reporter's note (1981).

[342] RESTATEMENT (FIRST) OF CONTRACTS § 32 (1932).

[343] RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981).

[344] *Id.* § 33(2).

[345] *See id.* § 33(1)-(3).

[346] *See id.* § 33(1) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted *so as to form a contract* unless the terms of the contract are reasonably certain." (emphasis added)).

[347] *Id.*

[348] *See supra* Part IV.

[349] RESTATEMENT (SECOND) OF CONTRACTS § 34 cmt. c (1981).

offer would be construed by a reasonable person as impliedly including within it an offer to contract on the terms most favorable to the offeror.[350] If both parties manifest assent to the subsequent action as a method of performance, then the subsequent action would be a modification of the bargain's terms with the bargain becoming enforceable upon formation of the modified bargain.[351] Thus, the Second Restatement's reference to these doctrines is not inconsistent with it treating the reasonably certain terms requirement as a formation doctrine.

Its treatment of the requirement as a formation doctrine would logically lead to the conclusion that under the Second Restatement's test, both parties' promises must be sufficiently definite.[352] If the Second Restatement's supporting comment points in the other direction, the language of the Second Restatement's black letter rule and its supporting comment must be in conflict.

In contrast to carrying forward classical contract law's treatment of the reasonably certain terms requirement as a formation doctrine, the Second Restatement does not appear to retain the mutuality of obligation rationale as a basis for the reasonably certain terms requirement. For example, concern for mutuality of obligation is not referenced in the Second Restatement comment as a basis for the definiteness requirement. Instead, the only policy referenced is the policy against a court making a contract for the parties,[353] which would only implicate the court's concern with resolving the dispute before it. Also, mutuality of obligation is, in general, downplayed in the Second Restatement.[354] For example, under the Second Restatement, as long as an agreement has consideration, there is no additional requirement of mutuality of obligation,[355] and a promise is consideration as long as it was bargained for and is legally sufficient.[356]

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350 The subsequent action would not be a counter-offer because a counter-offer proposes "a substituted bargain *differing* from that proposed by the original offer." *Cf. id.* § 39 (emphasis added). The offeror repudiating prior to the offeree's concession would, however, terminate the power to accept the incorporated offer, *see id.* § 36(1)(c) (providing that revocation terminates the offeree's power of acceptance), unless an option contract had arisen, perhaps through reliance. *See id.* § 87(2) (offer rendered irrevocable as a result of foreseeable and substantial reliance by offeree).

351 *Cf. id.* § 39.

352 *See id.* § 33.

353 *Id.* § 33 cmt. b.

354 *See* Roy Kreitner, *The Gift Beyond the Grave: Revisiting the Question of Consideration*, 101 COLUM. L. REV. 1876, 1933 (2001) (noting that the Second Restatement "relaxed the doctrine [of mutuality of obligation] in several areas of application").

355 RESTATEMENT (SECOND) OF CONTRACTS § 79(c) (1981). Clause (c) of Second Restatement section 79, which expressly rejects a requirement of mutuality of obligation as long as consideration exists, did not have a counterpart in the First Restatement. *See id.* § 79

Importantly, the Second Restatement does not state that an indefinite promise is legally insufficient (other than an illusory promise, of course, which is no promise at all).[357] In fact, merely because one of the parties' promises is voidable or unenforceable does not affect the enforceability of the other party's promise.[358] Rather, the only bargained-for promises that are legally insufficient are promises to perform a legal duty owed to the promisee;[359] promises to forbear from asserting a clearly invalid claim or defense when the promisor does not believe "the claim or defense may be fairly determined to be valid"[360] conditional promises when the promisor knows the condition cannot occur;[361] and promises where the promisor reserves a choice of alternative performances and one of the alternatives is not consideration.[362]

In fact, a Second Restatement comment strongly suggests that a bargained-for indefinite promise (indefinite in the sense of being vague, not illusory) is consideration by stating as follows:

> The value of a promise does not necessarily depend upon the availability of a legal remedy for breach, and bargains are often made in consideration of promises which are voidable or unenforceable. Such a promise may be consideration for a return promise. But it is sometimes suggested that a promise is not consideration if it is not binding, or if it is "void." The examples used commonly involve . . . indefinite promises (see §§ 33-34) . . . .[363]

The comment goes on to state that the examples provided are *not* exceptions to the Second Restatement's general rule that a promise is consideration as long as it is bargained for.[364]

Thus, whereas the Second Restatement's treatment of the reasonably certain terms requirement as a formation doctrine is evidence that it is necessary that the plaintiff's promise be sufficiently definite (even if not

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reporter's note (1981) ("Clause (c) is new.").

[356] *Id.* § 71(1) & cmt. b.

[357] *See id.* § 77 (addressing the issue of illusory promises).

[358] *See id.* § 78 (stating that a voidable or unenforceable promise can still be valid consideration).

[359] *Id.* § 73.

[360] *Id.* § 74(1)(b).

[361] *Id.* § 76(1).

[362] *See id.* § 72 ("Except as stated in §§ 73 [legal duty rule] and 74 [settlement of claims rule], any performance which is bargained for is consideration."); *id.* § 75 ("Except as stated in §§ 76 [conditional promises] and 77 [illusory and alternative promises], a promise which is bargained for is consideration if, but only if, the promised performance would be consideration.").

[363] *Id.* § 75 cmt. d (internal citations omitted).

[364] *Id.*

relevant to the dispute), its apparent treatment of bargained-for indefinite promises (again, indefinite in the sense of being vague, not illusory) as consideration is evidence that it is not necessary that the plaintiff's promise be sufficiently definite. This does not mean, of course, that a court could not still consider the imbalanced nature of an exchange when the defendant received an indefinite promise from the plaintiff that cannot be enforced.[365] The Second Restatement, however, does not appear to consider such imbalance as a reason to always require that the plaintiff's promise be sufficiently definite (which would, in fact, be in keeping with the Second Restatement's famous shift from rules to standards).[366]

Additional evidence points away from the Second Restatement requiring that the plaintiff's promise be sufficiently definite. As previously noted, the Second Restatement comment states: "[T]he degree of certainty required may be affected by the dispute which arises . . . Courts decide the disputes before them, not other hypothetical disputes which might have arisen."[367] The comment's emphasis on the dispute brought before the court suggests that the indefiniteness of the plaintiff's promise will not automatically render the bargain unenforceable under the reasonably certain terms requirement.

For example, with respect to determining whether the defendant breached, it would only be relevant that the plaintiff's promise is too indefinite if the defendant asserts that the plaintiff breached his promise first and uses this as an excuse for the defendant's non-performance.[368] But when the defendant was to perform first, or if the defendant repudiated before the plaintiff's performance was due, the indefiniteness of the plaintiff's promise is irrelevant to the court's ability to determine the existence of a breach. There is also no suggestion within the Second Restatement comment that the indefiniteness doctrine is premised, at least in part, on the requirement that the plaintiff be able to prove that she performed her end of the bargain or that she was ready, willing, and able to perform.[369]

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[365] To consider the First Restatement as having a greater concern than the Second Restatement for imbalanced exchanges would, of course, be a surprising position.

[366] *See generally* E. Allan Farnsworth, *Some Prefatory Remarks: From Rules to Standards*, 67 CORNELL L. REV. 634, 634-35 (1982) (discussing the Second Restatement's move from rules to standards). For explanations of the differences between rules and standards, see Kennedy, *supra* note 6, at 1687-1701; Baird & Weisberg, *supra* note 296, at 1227-31.

[367] RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981).

[368] *See id.* § 237 ("[I]t is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.").

[369] *See id.* § 33 cmts. a-f.

Further, the Second Restatement comment states that when a court is deciding whether to fill a gap in the bargain, it is more likely to do so if the gap is one that is not important with respect to the dispute that has arisen.[370] If gap-filling takes into account the dispute that has arisen (as opposed to assessing the perceived importance of a term as of the time of the bargain's formation), it would be consistent to assess indefiniteness at the same point in time, in which case a plaintiff's indefinite promise should be ignored if it is irrelevant to resolving the dispute. The comment further states that "[w]here the parties have intended to conclude a bargain, uncertainty as to incidental or collateral matters is seldom fatal to the existence of the contract."[371] Consistent with the Second Restatement's approach to gap-filling, the comment likely contemplates an assessment of whether a matter is "incidental or collateral" based on the dispute that arises.[372]

Considering the importance of a vague or omitted term to the dispute that has arisen is likely designed to prevent parties from taking advantage of the indefiniteness doctrine when their non-performance was due to other reasons (such as wanting to avoid a bad bargain). For example, Professor Franklin Snyder has recognized that this concern most likely caused the U.C.C. drafters to relax the reasonably certain terms requirement,[373] and also likely motivated (at least in part) the Second Restatement drafters. For example, Professor Joseph Perillo has stated that:

> The courts must take cognizance of the fact that the argument that a particular agreement is too indefinite to constitute a contract frequently is an afterthought excuse for attacking an agreement that failed for reasons other than indefiniteness. In such instances, the court should not be too fussy to determine how the gaps should have been filled.[374]

This is consistent with Perillo's assertion that the indefiniteness doctrine "is designed to prevent, where it is at all possible, a contracting party who is dissatisfied with a bargain from taking refuge in the doctrine to wriggle out of an agreement."[375] And Perillo expressly links this concern to the Second Restatement's statement that the degree of certainty required is affected by

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[370] *See id.* § 33 cmt. b ("It is less likely that a reasonably certain term will be supplied by construction as to a matter which has been the subject of controversy between the parties than as to one which is raised only as an afterthought.").

[371] *Id.* § 33 cmt. a.

[372] *See id.* § 33 cmts. a-b.

[373] *See* Snyder, *supra* note 179, at 37-38.

[374] ARTHUR LINTON CORBIN & JOSEPH M. PERILLO, 1 CORBIN ON CONTRACTS § 4.1, at 535-36 (rev. ed. 1993).

[375] PERILLO, *supra* note 2, at 55 (citing RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981)).

the dispute that arises.[376] This in turn suggests that the plaintiff's promise being sufficiently definite is not a requirement because doing so would not permit the court to consider whether the defendant is simply using the requirement as an afterthought to avoid liability.

The first illustration in the Second Restatement's section on reasonably certain terms provides further evidence that the indefiniteness of the plaintiff's promise does not automatically render the bargain unenforceable.[377] The illustration is loosely based on, and intended to repudiate, the 1940 House of Lords decision in *G. Scammell & Nephew, Ltd. v. Ouston*.[378] In that case, the House of Lords reversed the court of appeal and the trial court and held that a bargain to sell a new motor-van on hire-purchase terms over a two-year period[379] was too indefinite to be enforced by the buyers because the details of the hire-purchase terms were not agreed upon.[380] There was no suggestion in *Scammell* that the defendant's promise was too indefinite to enforce,[381] and the defendant apparently repudiated before any reliance by the plaintiffs on the bargain.[382] The defendant repudiated because he objected to the condition of a trade-in van that the plaintiffs promised to give to the defendant as part of the exchange[383] (a position found to be unjustified),[384] and not because the hire-purchase terms had not been agreed upon.[385]

The decision included an opinion by Lord Wright,[386] who has been described as an "innovative traditionalist,"[387] and his opinion in the case has been used as an example of his reluctance at times to "follow his argument that courts should be willing, in commercial law matters, to see the law play second fiddle to established business practices."[388] Lord Wright believed

[376] CORBIN & PERILLO, *supra* note 374, § 4.1, at 536 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981)).

[377] RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b, illus. 1 (1981).

[378] [1941] A.C. 251 (H.L.) (Eng.). *See also* RESTATEMENT (SECOND) OF CONTRACTS § 33 reporter's note cmt. b (1981) (stating that illustration 1 repudiates the reasoning of *Scammell*).

[379] *G. Scammell & Nephew Ltd.*, [1941] A.C. at 251.

[380] *Id.* at 254, 257, 261, 273.

[381] There was apparently no dispute as to the type of motor-van the seller promise to provide to the buyer. *See id.* at 258 (Lord Russell) (setting forth the specifications of the motor-van); *id.* at 261-62 (Lord Wright).

[382] *See id.* at 252.

[383] *Id.* at 263 (Lord Wright).

[384] *See id.* at 267.

[385] *See id.*

[386] *Id.* at 261-73.

[387] Neil Duxbury, *Lord Wright and Innovative Traditionalism*, 59 U. TORONTO L.J. 265, 265 (2009).

[388] *Id.* at 302. In this respect Lord Wright's opinion is reminiscent of Judge Benjamin

that the defendant's unjustified motive in repudiating the bargain did not prevent him from relying on the bargain's indefiniteness as a defense:

> It is true that when the [defendant] broke off the affair [he] gave reasons for doing so which [he] could not justify. But when [he was] sued for breach of contract [he was] entitled to resist the claim on any good ground that was available, regardless of reasons which [he] had previously given. . . . [I]f a party repudiated a contract giving no reasons at all, all reasons and all defences in the action, partial or complete, would be open to him. Equally would this be so, I think, if he gave reasons which he could not substantiate. If there never was a contract, they could not be made liable for breach of contract.[389]

The House of Lords' decision in *Scammell* was a model of classical contract law's approach to indefiniteness (though decided during the time classical contract law was waning). Because the vague term had nothing to do with the reason the defendant repudiated, the court's focus was necessarily on the definiteness of the bargain as of the time of formation, and not at the time of the lawsuit. The plaintiff's promise was held too indefinite to form a contract, without any discussion of whether such indefiniteness would affect the ability of the court to determine the existence of a breach by the defendant or to give an appropriate remedy to the plaintiff (though its indefiniteness would presumably have made it difficult to determine the cost avoided by the plaintiff from not having to perform).[390] Also, the defendant's motive in repudiating the bargain was

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Cardozo's controversial opinion in *Sun Printing & Publ'g Ass'n v. Remington Paper & Power Co.*, 139 N.E. 470 (N.Y. 1923), in which he held a bargain too indefinite to enforce. *Id.* at 471-72. With respect to the controversial nature of the opinion, see Lawrence A. Cunningham, *Cardozo and Posner: A Study in Contracts*, 36 WM. & MARY L. REV. 1379 (1995):

> Many have observed that it was peculiar for Cardozo, widely regarded as a "contract maker," to have refused to find a contract worth enforcing in Sun Printing. For example, Cardozo could have accepted the buyer's argument that the parties had entered into one or more option contracts and enforced the contract in these terms very easily. Accordingly, something else must have led Cardozo to act as a "contract breaker." Corbin hinted at one possibility: "Was Cardozo less moved to cure defects in the work of the well-paid lawyers of two rich corporations?"

Id. at 1394 n.77 (citations omitted). The Second Restatement and the U.C.C. each reject Cardozo's rationale in *Sun Printing* (that the bargain was too indefinite because the parties failed to agree on a price). *See* RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (1981) (stating that the court should fill in the gap with a reasonable price); U.C.C. § 2-305 (2013) (same); Cunningham, *supra* at 1407 (recognizing that "the received understanding of Sun Printing—holding that a contract that does not fix a price term is unenforceable—had been reversed by section 2-305 of the Uniform Commercial Code").

[389] *G. Scammell & Nephew Ltd.*, [1941] A.C. at 267-68 (Lord Wright).

[390] *See generally id.*

considered irrelevant.[391] The House of Lords' permitted range of indefiniteness was also narrower than that used by the lower courts with the House of Lords concluding that there were simply too many different terms of the indefinite hire-purchase agreement that would be reasonable in the circumstances.[392]

The *Scammell* decision caught Professor Arthur Corbin's attention when Professor Lon Fuller included it in a draft of the mutual assent portion of a casebook they were collaborating on at the time.[393] In a December 1941 letter to Fuller discussing Fuller's selection of cases for that portion, Corbin told him that "[m]y impression was generally good, although the opinion in Scammell v. Ouston did not impress me very well."[394] Fuller was apparently not impressed by the opinion either (despite including it in the draft casebook), referring to it in his famous 1958 *Harvard Law Review* article, replying to H.L.A. Hart,[395] as an "outstanding example"[396] of the British courts, in recent years in the field of commercial law, falling "into a 'law-is-law' formalism that constitutes a kind of belated counterrevolution against all that was accomplished by Mansfield."[397]

In his famous 1950 Contracts treatise, Corbin explained that the Court of Appeal's reasoning that the parties should "be bound to perform according to some reasonable and customary 'hire-purchase' agreement" was one that he believed "seem[ed] reasonable."[398] Thus, Corbin considered the House of Lords' decision to be incorrectly decided because the terms of the hire-purchase agreement could be supplied by industry custom, and thus the

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[391] *See id.* at 267-68 (Lord Wright) (stating that if there was never a contract, the repudiating party could not be made liable for breach, regardless of the reason given for the repudiation).

[392] *See id.* at 256 (Viscount Maugham) ("[A] hire-purchase agreement may assume many forms and some of the variations in those forms are of the most important character, e.g., those which relate to termination of the agreement, warranty of fitness, duties as to repair, interest, and so forth."); *id.* at 260-61 (Lord Russell) ("An alleged contract which appeals for its meaning to so many skilled minds in so many different ways, is undoubtedly open to suspicion . . . . [The contemplated hire-purchase agreement] could be brought about in various ways, and by documents containing a multiplicity of different terms."); *id.* at 268 (Lord Wright) (basing his decision not only "on the actual vagueness and unintelligibility of the words used, but . . . the startling diversity of explanations, tendered by those who think there was a bargain, of what the bargain was").

[393] *See generally* Scott D. Gerber, *Corbin and Fuller's Cases on Contracts (1942?): The Casebook that Never Was*, 72 FORDHAM L. REV. 595 (2003) (discussing the collaboration).

[394] *Id.* at 622.

[395] Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 637 n.5 (1958).

[396] *Id.*

[397] *Id.* at 637.

[398] ARTHUR L. CORBIN, 1 CORBIN ON CONTRACTS § 95, at 293 n.10 (1950).

buyer's promise was not too indefinite.[399] Corbin was a consultant on the Second Restatement until his death in 1967,[400] and his distaste for the decision perhaps played a role in the inclusion of an illustration loosely based on the case—an illustration that, according to Professor Braucher, the Reporter, "repudiates the reasoning of G. Scammell & Nephew v. Ouston . . . ."[401]

If the illustration was designed simply to repudiate the House of Lords' reasoning in *Scammell*, then the illustration would have little relevance to determining whether the Second Restatement requires the plaintiff's promise to be sufficiently definite. In such a case, the illustration would simply stand for the unremarkable proposition that the Second Restatement's tolerance for vague language is greater than classical contract law's tolerance for such language. The illustration, however, throws a curveball by including within the bargain's terms a liquidated damages provision that did not exist in the bargain in *Scammell* and then suggesting that it is the liquidated damages provision (not industry custom) that results in the bargain's terms being sufficiently definite. The illustration provides as follows:

> A agrees to sell and B to buy goods for $2,000, $1,000 in cash and the "balance on installment terms over a period of two years," *with a provision for liquidated damages*. If it is found that both parties manifested an intent to conclude a binding agreement, the indefiniteness of the quoted language does not prevent *the award of the liquidated damages*.[402]

Although the illustration does not indicate which party allegedly breached, if the illustration is loosely based on *Scammell*, one can assume that *A*, the seller, repudiated.

The strange inclusion of a liquidated damages provision in the bargain suggests that the illustration's drafters considered the bargain's terms, in the absence of that provision, to be too indefinite because important details of the plaintiff's promise to pay off the balance were not agreed upon (e.g., the number of installments, how much per installment, and how much interest). The inclusion of a liquidated damages provision (and presumably a plaintiff's request to be awarded the liquidated damages) is apparently what

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[399] *Id.* One wonders if Corbin also believed that a liberal approach to gap filling was appropriate in the case because the defendant's motive for repudiating was not related to the indefiniteness of the plaintiff's promise.

[400] Herbert Wechsler, RESTATEMENT (SECOND) OF CONTRACTS foreword (1981); *see generally* Joseph M. Perillo, *Twelve Letters from Arthur L. Corbin to Robert Braucher*, 50 WASH. & LEE L. REV. 755 (1993) (describing some of Corbin's work as a consultant on the Restatement).

[401] RESTATEMENT (SECOND) OF CONTRACTS § 33 reporter's note cmt. b (1981).

[402] *Id.* § 33 cmt. b, illus. 1 (emphasis added).

makes the bargain's terms sufficiently definite (which, making things stranger, would not, in fact, repudiate the House of Lords' reasoning in *Scammell*, as stated by Braucher[403]). This in turn suggests that as long as the plaintiff can prove that the defendant breached (which the plaintiff can in the hypothetical if it is based on *Scammell* because there was a repudiation not based on the indefiniteness of the plaintiff's promise), the indefiniteness of the plaintiff's promise is irrelevant because it does not affect the ability of the court to give an appropriate remedy (here, liquidated damages).

This does not mean that the indefiniteness of the plaintiffs' promise could not become relevant to the dispute before the court if the facts were different; if, for example, the defendant alleged that the plaintiffs breached first, thereby excusing the defendant's non-performance; or if there were no liquidated damages provision, and the plaintiffs sought expectation damages and the indefiniteness of the plaintiffs' promise made it difficult to determine the plaintiffs' cost avoided from not having to perform. But this illustration suggests that the reasonably certain terms requirement does not *require* that the plaintiff's promise be sufficiently definite. Thus, it does seem to repudiate the decision in *Scammell* to the extent the House of Lords took the position that the plaintiff's promise must be sufficiently definite, but not for the reason that made the decision objectionable to Corbin.

Further evidence in support of the conclusion that the Second Restatement's "determining the existence of a breach"[404] requirement is assessed at the time of the lawsuit is provided by the rule's requirement that the terms be sufficiently definite to determine both the existence of a breach *and* to give an appropriate remedy. If the time for assessing definiteness is as of the time of formation, and if the terms are sufficiently definite to determine the existence of a breach, they necessarily must be sufficiently definite for purposes of giving an appropriate remedy. For example, if the terms are sufficiently definite at the time of formation to determine the existence of a breach, the court will necessarily be able to identify the position the promisee would have been in had there been performance, and thus will be able to protect the promisee's expectation interest. There would be no reason to have two requirements; a single requirement providing that the terms must be sufficiently definite to determine the existence of a breach would be sufficient.

Conversely, if the time for assessing definiteness is at the time of the lawsuit, the two requirements could serve different functions. At the time of the lawsuit, a court might be able to determine the existence of a breach

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[403] RESTATEMENT (SECOND) OF CONTRACTS § 33 reporter's note cmt. b (1981).
[404] *Id.* § 33(2).

because the defendant's actions (or inaction) were beyond the scope of a vague promise's range of plausible meanings, which would surely be the case if there was a repudiation or no attempt at performance, as was the case in *Scammell*.[405] Yet the terms of the vague promise might not be sufficient to protect the promisee's expectation interest because, even though it is clear there has been a breach (or repudiation), the promise's vagueness makes it impossible to determine the position the promisee would have been in had there been performance. The vagueness of the plaintiff's promise might also make it impossible to determine the position the plaintiff would have been in had there been performance because the "cost or other loss" avoided by the plaintiff in not having to perform might be impossible to determine.[406] Alternatively, a promised performance might be sufficiently definite to protect the promisee's expectation interest, but the duty to perform might be subject to a vague condition. In such a situation, the terms would not be sufficiently definite to determine the existence of a breach, though they would be sufficiently definite to determine the position the promisee would have been in had there been performance.

Also, in general, "[t]here has been movement to weaken or eliminate formal requirements for contract."[407] An interpretation that does not require the plaintiff's promise to be sufficiently definite is in keeping with this movement. Similarly, such an interpretation is consistent with a modern desire, when assessing the indefiniteness of a bargain, to look past the time the bargain was formed, even while paying homage to the requirement's status as a formation doctrine. Professor Larry DiMatteo described this tendency at work, relying on a 1979 California appellate decision and quoting from the opinion:

> The modern trend toward enforceability and the notion of fairness plays a role in the court's "forward-looking" or result-oriented rationale. The formalism of classical contract law is discarded in favor of the "norm of enforcement": "The modern trend of the law is to favor the enforcement of contracts [and] to lean against their unenforceability because of uncertainty . . . ." "'[I]f it is possible [for a court] to reach a fair and just result,'" then the uncertainty norm of classical contract should not hold sway. In place of the contract voiding rationales of uncertainty, liberal rules of construction and gap-filling

[405] *See* G. Scammell & Nephew, Ltd. v. Ouston, [1941] A.C. 251 (H.L.) 264 (Eng.) (Lord Wright) (stating that at trial there was found to have been a repudiation of the contract).

[406] *See* RESTATEMENT (SECOND) OF CONTRACTS § 347(c) (1981) (providing that in measuring the plaintiff's expectation interest for purposes of awarding expectation damages, the amount must be reduced by "any cost or other loss that [the plaintiff] has avoided by not having to perform").

[407] Gergen, *supra* note 249, at 1440 n.178.

devices should be utilized to salvage contracts that show a reasonable modicum of contractual intent.[408]

In the end, what supports a conclusion that the Second Restatement's reasonably certain terms requirement requires the plaintiff's promise to be sufficiently definite is the inclusion of the requirement in the formation section[409] and the black letter statement that unless the bargain's "terms" are reasonably certain a contract is not formed.[410] The reference to "terms" is not, however, particularly significant. The requirement that the "terms" be reasonably certain is defined in the black letter rule as requiring that "they provide a basis for determining the existence of a breach and for giving an appropriate remedy,"[411] and the supporting comment and illustrations strongly suggest that being able to determine the existence of a breach is assessed at the time of the lawsuit, not at the time of formation.[412]

Although the Second Restatement retaining the requirement as a formation doctrine is strong evidence that the "determining the existence of a breach"[413] analysis is assessed at the time of the bargain's formation, the substantial evidence to the contrary leads, on balance, to the conclusion that the requirement is assessed at the time of the lawsuit, and therefore does not *require* that the plaintiff's promise be sufficiently definite. This in turn suggests that the Second Restatement's requirement that a bargain's terms be sufficiently definite to determine the existence of a breach serves a purely practical purpose, and not a formal purpose.

A formal aspect would be retained, however, if the court required that the terms' definiteness be greater than that which would be necessary to establish the existence of a breach by a preponderance of the evidence.[414] If

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[408] Larry A. DiMatteo, *The Norms of Contract: The Fairness Inquiry and the "Law of Satisfaction"—A Nonunified Theory*, 24 HOFSTRA L. REV. 349, 413 (1995) (quoting Larwin-Southern Cal., Inc. v. JGB Inv. Co., 162 Cal. Rptr. 52, 60 (Cal. Ct. App. 1979)).

[409] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (which is placed in Chapter 3 titled "Formation of Contracts—Mutual Assent").

[410] *Id.* § 33(1).

[411] *Id.* § 33(2).

[412] *See, e.g., id.* § 33 cmt. b ("[T]he degree of certainty required may be affected *by the dispute which arises* and by the remedy sought." (emphasis added)).

[413] *Id.* § 33(2).

[414] A somewhat similar issue is involved with respect to whether the Second Restatement's requirement that "[d]amages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty." *Id.* § 352. The Second Restatement does not make it clear whether this standard is designed to make it more difficult to recover contract damages than under a preponderance of the evidence standard that would apply irrespective of the black letter rule. *See, e.g.*, MindGames, Inc. v. W. Publ'g Co., 218 F.3d 652, 657 (7th Cir. 2000) (Posner, J.) (stating that the requirement in a contract action that lost profits be proven to a reasonable certainty is simply the rule that is

the court applied a narrow acceptable range for indefiniteness,[415] the rule would presumably result in decisions contrary to the manifested intentions of the parties. For example, even though the evidence before the court was sufficient to enable one to conclude, based on a preponderance of the evidence standard, that the defendant had breached a vague promise, a court applying a narrow acceptable range might consciously decide that the reasonably certain terms requirement demands greater certainty for finding a breach.

Although the Second Restatement does not address this issue, the use of the phrase "provide a basis for determining the existence of a breach"[416] suggests that the court is not to apply a standard more demanding than whether the terms are sufficiently definite to determine the existence of a breach by the preponderance of the evidence standard. This is further supported by the comment's statement that "[t]he test is not *certainty* as to what the parties were to do . . . ."[417]

A final argument against the conclusion that the Second Restatement's requirement that the terms be sufficiently definite to determine the existence of a breach serves a purely practical purpose must be considered—namely, that if it serves a purely practical purpose, it is no more than a restatement of the general requirement that the plaintiff prove a breach of contract by a preponderance of the evidence.[418] And if this is so, why include it as a black letter rule?

It is likely that the drafters desired to have a black letter rule and a section on "certainty" that encompassed various issues involving indefiniteness.[419] And one of those issues is that the indefiniteness of a bargain's terms (as opposed to the indefiniteness of what occurred after formation, which is likely what one usually means when referring to proving a breach by the preponderance of the evidence) might prevent the plaintiff from proving that the defendant breached the bargain.

Although it might have been better to place this doctrine in Chapter 10 of the Second Restatement (dealing with "Performance and Non-Performance"),[420] there is evidence that the drafters included in the "Certainty" section doctrines that are, in fact, simply restatements of other

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applicable to the recovery of damages in general).

[415] *See supra* Part IV.

[416] RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

[417] *Id.* § 33 cmt. b (emphasis added).

[418] *See* Pisani v. Westchester Cnty. Health Care Corp., 424 F. Supp. 2d 710, 719 (S.D.N.Y. 2006) (stating that the plaintiff in a breach of contract action has the burden of proving by a preponderance of the evidence that the defendant breached the contract).

[419] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (titled "Certainty").

[420] *See id.* §§ 231-260.

doctrines. For example, the comment's discussion of the greater degree of certainty needed to obtain an award of specific performance[421] shows that this doctrine, which is not a formation doctrine,[422] is encompassed within the Second Restatement's "Certainty" section and is within the black letter rule's reference to the terms having to be sufficiently definite to give an appropriate remedy.[423] Also, the "Certainty" section's third subsection addresses the issue of whether indefiniteness means that the parties have not manifested assent to a bargain,[424] an issue that is analytically distinct from the requirement that a bargain's terms be reasonably certain and is in fact a particular application of the black letter rule on preliminary negotiations.[425] Thus, the "Certainty" section, including its comment and illustrations, although placed in the formation chapter, appears to be a hodgepodge of analytically distinct issues (some of which have nothing to do with contract formation) whose only commonality is that they involve whether a bargain's terms are indefinite.

Further support for the conclusion that the "determining the existence of a breach"[426] requirement is simply a restatement of the requirement that the plaintiff prove a breach is the Second Restatement's downplaying of the former requirement in favor of the "appropriate remedy" requirement.[427] Although the comment, when discussing the reasonably certain terms requirement in general, states that "[i]f the essential terms are so uncertain that there is no basis for deciding whether the agreement has been kept or

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[421] *See id.* § 33 cmt. b ("In some cases greater definiteness may be required for specific performance than for an award of damages . . . ").

[422] *See id.* § 362 cmt. a:

> One of the fundamental requirements for the enforceability of a contract is that its terms be certain enough to provide the basis for giving an appropriate remedy. See § 33. If this minimum standard of certainty is not met, there is no contract at all. It may be, however, that the terms are certain enough to provide the basis for the calculation of damages but not certain enough to permit the court to frame an order of specific performance or an injunction and to determine whether the resulting performance is in accord with what has been ordered. In that case there is a contract[,] but it is not enforceable by specific performance or an injunction.

Id.

[423] *See id.* § 33(2) (referring to the need for terms to be sufficiently definite to enable the court to give an appropriate remedy).

[424] *Id.* § 33(3).

[425] *See id.* § 33 cmt. c ("The rule stated in Subsection (3) is a particular application of the rule stated in § 26 on preliminary negotiations."); RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 31 cmt. d (2011) ("A transaction resulting in an indefinite [bargain] must not be confused with a failed negotiation producing no [bargain] at all.").

[426] RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

[427] *Id.*

broken, there is no contract,'"[428] the comment heading for the discussion of the subsection listing the two requirements is simply titled "Certainty in basis for remedy."[429] Also, there are no references in that particular comment to the requirement that the terms be definite enough to provide a basis for determining the existence of a breach.[430] Further, Professor Braucher, when discussing the two requirements, simply referred to there having to be "a reasonably certain basis for granting a remedy.'"[431] The test was also modeled after U.C.C. § 2-204(3),[432] which refers only to "a reasonably certain basis for giving an appropriate remedy."[433] All of this suggests that the "determining the existence of a breach" requirement was simply a restatement of the general requirement that a plaintiff prove a breach of contract and that the "appropriate remedy" requirement was the true test for the reasonably certain terms rule (at least to the extent it exists as a rule separate from others). We will now turn to that requirement.

B. An "Appropriate" Remedy

For a bargain to have reasonably certain terms under the Second Restatement's test, not only must the terms be sufficiently definite to provide a basis for determining the existence of a breach, they must also provide a basis for giving an "appropriate" remedy.[434] This language was not used in the First Restatement, and was modeled after a U.C.C. provision.[435] The Second Restatement does not indicate, however, which remedies are "appropriate."[436] In particular, the Second Restatement fails to state whether protecting the plaintiff's reliance interest is an appropriate remedy or whether appropriate remedies are limited to those protecting the plaintiff's expectation interest.[437]

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[428] *Id.* § 33 cmt. a.

[429] *See id.* § 33 cmt. b (titled "Certainty in basis for remedy").

[430] *See id.*

[431] Braucher, *supra* note 8, at 308.

[432] *See* AMERICAN LAW INSTITUTE, *supra* note 1, at 326 ("[T]hese subsections are drawn from the language found in the Uniform Commercial Code.") (remark by Reporter Robert Braucher regarding the Second Restatement's provisions on reasonably certain terms).

[433] U.C.C. § 2-204(3) (2013).

[434] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

[435] Braucher, *supra* note 8, at 308 (noting that the test provided for the reasonably certain terms requirement is based on U.C.C. section 2-204(3)).

[436] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS § 344(a) (1981) (defining "expectation interest," "reliance interest," and "restitution interest"); *id* § 33 (not explaining what constitutes an "appropriate" remedy).

[437] The promisee's expectation interest is "his interest in having the benefit of his bargain by being put in as good a position as he would have been in had the contract been

If the ability of a court to give an appropriate remedy is assessed as of the time of the bargain's formation, an appropriate remedy is presumably limited to the protection of the parties' expectation interests. If the requirement is assessed as of this time, considering reliance damages to be an appropriate remedy would be nonsensical because there cannot be reliance on a bargain until after the bargain's formation.[438] One would either have to take the position that the possibility of reliance means that the bargain's terms are always sufficiently definite to provide a basis for giving of an appropriate remedy (which would defeat the purpose of including an "appropriate remedy" requirement) or that the possibility of reliance should not be considered (which would defeat the purpose of concluding that reliance damages are an appropriate remedy).

But if the ability of a court to give an appropriate remedy is assessed at the time of the *lawsuit*, an appropriate remedy presumably could include the protection of the plaintiff's reliance interest, provided the plaintiff has relied on the bargain and seeks such a remedy.[439] Whether the bargain's terms are sufficiently definite to provide an appropriate remedy for the defendant would be irrelevant as long as the defendant is not asserting a counterclaim for breach of contract.

The Second Restatement's comments include portions that suggest partial enforcement of a promise, such as through an award of reliance damages, might be considered an appropriate remedy for purposes of an indefiniteness analysis. For example, the comments state that there must be "a reasonably certain basis for granting *a* remedy," that "uncertainty may preclude one remedy without affecting another," and that "the degree of certainty required may be affected . . . by the remedy sought."[440] Another Second Restatement black letter rule states that "[a]ction in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed."[441] The rule's reference to reliance making a

performed . . . ." *Id* § 344(a).

[438] Reliance damages protect the promisee's reliance interest. The promisee's reliance interest is "his interest in being reimbursed for loss caused by reliance on the contract by being put in as good a position as he would have been in had the contract not been made . . . ." *Id.* § 344(b).

[439] *See id.* (defining the reliance interest).

[440] *Id.* § 33 cmt. b. Even when a plaintiff has suffered no loss or cannot prove any loss, the plaintiff is entitled to recover nominal damages. *See id.* § 346(2). Because this is just "a small amount," it would be difficult to argue that an award of nominal damages is an appropriate remedy. *See* BLACK'S LAW DICTIONARY, *supra* note 36, at 447 (defining *nominal damages* as "[a] small amount fixed as damages for breach of contract without regard to the amount of harm"). Also, this would render the adjective "adequate" irrelevant.

[441] RESTATEMENT (SECOND) OF CONTRACTS § 34(3) (1981).

remedy "appropriate" suggests that reliance damages are, in fact, an "appropriate remedy" under the indefiniteness test.

This language is consistent with statements by Professor E. Allan Farnsworth in his hornbook that suggest that the plaintiff's choice of remedy, including a request for reliance damages, could render an otherwise indefinite bargain sufficiently definite.[442] He states that "[e]ven where damages [as opposed to specific performance] are sought, the effect of indefiniteness on the ability to estimate loss depends on the measure of damages involved. It is usually easier to estimate damages based on the *reliance* interest than on the expectation interest."[443]

But another portion of the Second Restatement suggests otherwise. With respect to the Second Restatement's black letter rule stating that "[a]ction in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed,"[444] the supporting comment suggests that the reliance might not make an award of reliance damages an appropriate remedy.[445] The comment states that because of a promisee's reliance, "partial or full enforcement through an award of damages for breach of contract or a decree of specific performance may become appropriate," and then cites to section 90 for support,[446] which is the section dealing with promissory estoppel.[447] Here, it is important to remember that the Second Restatement considers a promise enforceable as a result of reliance to be a contract,[448] thus showing that the reference to a remedy for "breach of contract" could have been intended to refer to a claim for promissory estoppel. Professor Joseph Perillo seems to agree that the claim here would be under promissory estoppel and not for breach of contract.[449] Further, the premise that any award protecting less than the expectation interest is not an appropriate remedy is supported by any such award being an inadequate remedy at law for purposes of obtaining an equitable remedy.[450]

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[442] *See* FARNSWORTH, *supra* note 2, at 207.

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

[444] RESTATEMENT (SECOND) OF CONTRACTS § 34(3) (1981).

[445] *See id.* § 34 cmt. d.

[446] *Id.*

[447] *See id.* § 90.

[448] *See id.* § 1 (defining *contract* as "a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty").

[449] PERILLO, *supra* note 2, at 56 & n.112 (stating that a discussion of Restatement section 34 comment d and detrimental reliance on an indefinite bargain is discussed in the hornbook's chapter 6, which deals with promissory estoppel).

[450] *See* RESTATEMENT (SECOND) OF CONTRACTS § 359(1) (1981).

Similarly, Professor Farnsworth, in his hornbook, uses *Kearns v. Andree*[451] and *Wheeler v. White*[452] as examples of courts protecting the reliance interest when the terms are too indefinite to give an expectation damages award.[453] The former was based on an implied-in-law contract theory[454] and the latter a promissory estoppel theory.[455] Also, Professor Farnsworth, when explaining the rationale for the definiteness requirement, stated that the requirement:

> [I]s implicit in the premise that contract law protects the promisee's *expectation interest* [because] [i]n calculating the damages that will put the promisee in the position in which the promisee would have been had the promise been performed, a court must determine the scope of that promise with some precision.[456]

Professor Kevin M. Teeven suggests the same, stating that "[i]n order for a court to decide on expectation damages, a court must know the scope of the promise . . . ."[457] One court also explained that the reason a claim for promissory estoppel does not require reasonably certain terms is because the usual remedy (according to that court) is not expectation damages:

> The reason for the distinction between the contract requirement of reasonable definiteness and the promissory estoppel requirement of reasonable and foreseeable reliance is the nature of the remedy available. Promissory estoppel only provides for damages as justice requires and does not attempt to provide the plaintiff damages based upon the benefit of the bargain. The usual measure of damages under a theory of promissory estoppel is the loss incurred by the promisee in reasonable reliance on the promise, or "reliance damages." Reliance damages are relatively easy to determine, whereas the determination of "expectation" or "benefit of the bargain" damages available in a contract action requires more detailed proof of the terms of the contract.[458]

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[451] 139 A. 695 (Conn. 1928).

[452] 398 S.W.2d 93 (Tex. 1965).

[453] *See* FARNSWORTH, *supra* note 2, at 214-15.

[454] *See Kearns*, 139 A. at 698.

[455] *See Wheeler*, 398 S.W.2d at 96-97.

[456] FARNSWORTH, *supra* note 2, at 108 (emphasis added) (internal footnote omitted); *see also id.* at 201 ("We have seen that the requirement of definiteness is implicit in the principle that the promisee's expectation interest is to be protected.").

[457] TEEVEN, *supra* note 202, at 238.

[458] Rosnick v. Dinsmore, 457 N.W.2d 793, 800 (Neb. 1990). Many jurisdictions award expectation damages in promissory estoppel cases if such damages can be proven to a reasonable certainty. *See also* Richard Craswell, *Against Fuller and Perdue*, 67 U. CHI. L. REV. 99, 147 (2000) ("[C]ourts today often award expectation damages even in promissory estoppel cases, at least when the expectation damages are measurable.").

Also, considering reliance damages to be an appropriate remedy under the Second Restatement's test would render "appropriate" a virtually meaningless qualification to "remedy" because most contracts will induce reliance.[459] Also, considering reliance damages to be an appropriate remedy would leave only the restitution interest and nominal damages as candidates for the label "inappropriate." Further, if a remedy was appropriate as long as it was sought by the plaintiff, all remedies would be appropriate, and the Second Restatement, rather than referring to "appropriate remedy," would have stated that that the bargain's terms are sufficiently definite as long as they enable the court to give the remedy sought by the plaintiff.

The Second Restatement section on certainty provides only two illustrations with respect to the definiteness necessary to enable the court to give an appropriate remedy, and neither deals with a plaintiff seeking reliance damages.[460] The first illustration is loosely based on *Scammell and Nephew, Ltd. v. Ouston*[461] and shows that an award of liquidated damages is an appropriate remedy.[462] The second is used to show that a plaintiff seeking specific performance can waive or remove the indefiniteness within the plaintiff's promised performance (which would be relevant to the remedy sought because an order of specific performance will make the plaintiff's performance a condition of the remedy) by offering to perform in the manner most favorable to the defendant.[463] These illustrations do, however, suggest that a bargain's indefiniteness is only relevant if it precludes an award of the specific remedy sought by the plaintiff. This in turn would suggest that a request for reliance damages would be an appropriate remedy as long as the indefiniteness of either party's promise does not make it difficult to determine whether a particular act was in reliance on the bargain.

But such a conclusion drawn from these two illustrations is contradicted by the previously discussed citation to section 90 (the promissory estoppel section) in the Second Restatement comment, when it states that in many cases reliance on an indefinite bargain will make partial or full enforcement appropriate.[464] So how can the differing treatment be reconciled?

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[459] *See* P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT 4 (1979) (stating that except for situations in which the promisor has made some mistake and quickly attempts to withdraw the promise, "the probability is that some action in reliance (or some payment) will soon be performed by the promisee").

[460] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b, illus. 1, 2 (1981).

[461] [1941] A.C. 251 (H.L.) (Eng.).

[462] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b, illus. 1 (1981).

[463] *See id.* § 33 cmt. b, illus. 2.

[464] *See id.* § 34 cmt. d.

The Second Restatement's rule is that the bargain's *terms* must "provide a basis for . . . giving an appropriate remedy,"[465] and the supporting comment explains that the requirement "reflects the fundamental policy that contracts should be made by the parties, not by the courts, and hence that remedies for breach of contract must have a basis *in the agreement of the parties*."[466] With respect to a party conceding to a meaning that is most favorable to the opposing party via the cure-by-concession doctrine,[467] or the court granting liquidated damages,[468] the bargain's *terms* provide a basis for giving the requested remedy. The cure-by-concession doctrine essentially alters the terms and permits full enforcement of the promise. The liquidated damages provision is part of the original bargain.

A remedy of reliance damages, however, has no basis in the parties' agreement.[469] Also, when it is a party's reliance that makes an agreement enforceable, the plaintiff is usually required to proceed under a promissory estoppel theory.[470] Thus, the comment's citation to section 90 and the illustrations can be reconciled by recognizing that reliance does not result in the bargain's terms enabling the court to provide an appropriate remedy, whereas the cure-by-concession doctrine and a liquidated damages provision do result in the bargain's terms enabling the court to provide an appropriate remedy. Of course, part performance can remove uncertainty,[471] but the issue here is whether mere reliance is sufficient to make an award of reliance damages an appropriate remedy, even if the reliance does not remove the indefiniteness. In fact, the black letter rule's reference to reliance making a contractual remedy appropriate "even though uncertainty is not removed,"[472] suggests that the bargain remains too indefinite to be enforced as a contract.

For those who find such reconciliation objectionable as being based solely on word parsing, the different treatment of the cure-by-concession doctrine and liquidated damages on the one hand, and reliance damages on the other, makes practical sense. The first two situations are ones that involve conduct that should be encouraged. Rewarding a cure-by-

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[465] *Id.* § 33(2).

[466] *Id.* § 33 cmt. b (emphasis added).

[467] *See* Ben-Shahar, *supra* note 242, at 421 ("Under the doctrine of 'cure by concession,' when the contract is silent over a material term the indefiniteness is overcome by granting the plaintiff the option to concede the missing term in accordance with the defendant's most favorable arrangement.").

[468] *See* RESTATEMENT (SECOND) OF CONTRACTS § 356 (1981).

[469] Reliance damages are defined as an "interest in being reimbursed for loss caused by *reliance* on the contract . . . ." *Id.* § 344(b) (emphasis added).

[470] RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

[471] *Id.* § 34(2).

[472] *Id.* § 34(3).

concession by permitting a claim on the contract encourages a party to resolve a dispute by conceding to the meaning of a bargain that is most favorable to the other party. Rewarding the inclusion of a liquidated damages provision encourages parties to use such clauses, and such a provision "saves the time of courts, juries, parties and witnesses and reduces the expense of litigation."[473] In contrast, reliance on indefinite bargains (at least to the extent the reliance does not remove the bargain's uncertainty) should be discouraged because it will often be inefficient behavior. Indefinite bargains often lead to disputes with the result being that one or both of the parties' reliance expenditures are wasted.

Also, if a bargain's terms simply had to be sufficiently definite to provide the plaintiff with the remedy being sought (and assuming, as previously discussed, that it was not necessary for the plaintiff's promise to be sufficiently definite if not relevant to the dispute), the reasonably certain terms requirement would be designed solely to enable the court to resolve the dispute before it. While this might not be objectionable from a normative standpoint, it would render irrelevant a separate doctrine involving reasonably certain terms, and thus destroy it. By treating the plaintiff's expectation interest (or liquidated damages) as the only appropriate remedies, it explains the survival of the reasonably certain terms requirement as a separate doctrine.

Accordingly, the Second Restatement's comments and illustrations support the conclusion that an "appropriate" remedy is only one that permits full enforcement of the parties' bargain (i.e., an award protecting the expectation interest or an award of liquidated damages) as opposed to partial enforcement (e.g., an award protecting the reliance interest or the restitution interest, or an award of nominal damages).[474]

What then, is to be made of the comment's statement that "the degree of certainty required may be affected by . . . the remedy sought"?[475] The most likely explanation is that the comment refers to the higher degree of certainty needed to award specific performance as opposed to expectation damages. Shortly after this statement, the first statement after two sentences addressing how the degree of certainty required may be affected by the dispute which arises (as opposed to the remedy sought), in the

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[473] *Id.* § 356 cmt. a.

[474] If protecting the reliance interest is not an appropriate remedy, an award protecting the restitution interest would not be an appropriate remedy because the restitution interest is usually smaller than the reliance interest. *See id.* § 344 cmt. a ("Although [the restitution interest] may be equal to the expectation or reliance interest, it is ordinarily smaller because it includes neither the injured party's lost profit nor that part of his expenditures in reliance that resulted in no benefit to the other party.").

[475] *Id.* § 33 cmt. b.

comment notes that "[i]n some cases greater definiteness may be required for specific performance than for an award of damages . . . ."[476] Shortly thereafter, a citation is given to the Second Restatement sections on specific performance and injunctions.[477] The statement might also be referring to a plaintiff who is only seeking liquidated damage. Although the comment includes a statement that "[p]artial relief may sometimes be granted when uncertainty prevents full-scale enforcement through normal remedies,"[478] this statement most likely refers to the following section dealing with reliance on an indefinite bargain, which, as previously discussed, cites to section 90, the promissory estoppel section.[479]

Thus, on balance the evidence supports the conclusion that the Second Restatement's test only considers a remedy to be appropriate if it has a basis in the parties' agreement, which means either a remedy protecting the plaintiff's expectation interest, including an award of specific performance or expectation damages, or an award of liquidated damages (i.e., so-called full enforcement).[480] Anything less, such as reliance damages, restitution, or nominal damages (so-called partial enforcement),[481] would not be considered an appropriate remedy. Accordingly, if one assumes parties intend bargains to be enforceable in the sense of protecting the parties' expectation interests, then the appropriate remedy requirement (by not considering partial enforcement to be an appropriate remedy) has a formal aspect to it, and thus, at least in part, serves the various functions of form that were served by classical contract law's requirement that the plaintiff's promise be sufficiently definite, even if not relevant to the dispute.

Before moving to the next topic, the effect this conclusion has on the previously discussed issue—whether the plaintiff's promise must be sufficiently definite even if it is not relevant to the dispute—must be recognized. By concluding that the bargain's terms must be sufficiently definite to enable the court to fully enforce the defendant's promise, the indefiniteness of the plaintiff's promise, although not a *requirement* under

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[476] *Id.*

[477] *Id.* (citing *id.* §§ 357-62).

[478] *Id.*

[479] *See supra* notes 444-45 and accompanying text.

[480] *See* Edward Yorio & Steve Thel, *The Promissory Basis of Section 90*, 101 YALE L.J. 111, 114 n.16 (1991) (stating that expectation damages constitute a full enforcement of the promise); Larry A. Dimatteo, *A Theory of Efficient Penalty: Eliminating the Law of Liquidated Damages*, 38 AM. BUS. L.J. 633, 630 (2001) (stating that if a liquidated damages clause is part of the bargain, then full enforcement of the clause will be consistent with the parties' intentions).

[481] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. d (1981) (discussing "partial enforcement").

the reasonably certain terms test, will often make the court unable to fully enforce the defendant's promise.[482]

If the plaintiff's promise is indefinite (and that indefiniteness has not been removed under the cure-by-concession doctrine or by modification), and the plaintiff's cost or other loss avoided from not having to perform is too difficult to determine as a result of the indefiniteness of the plaintiff's promise, then the bargain's terms are too indefinite for the court to give an appropriate remedy unless the bargain included a liquidated damages provision. The court cannot award specific performance because an order directing the plaintiff to perform cannot be framed. The court cannot award expectation damages because it cannot determine the position the plaintiff would have been in had the bargain been performed.[483]

Thus, if the only appropriate remedy is full enforcement of the defendant's promise, the indefiniteness of the plaintiff's promise (though irrelevant to the "determining the existence of a breach" analysis) often will render the bargain too indefinite under the "appropriate remedy" analysis. This would be the case even if the court, after concluding that a contract had been formed, places the burden on the defendant to prove the plaintiff's savings from not having to perform.[484]

VI. THE SECOND RESTATEMENT'S TEST: NEOCLASSICAL CONTRACT LAW (TO A FAULT)

With the help of supporting comments and illustrations, a drawing of the Second Restatement's vague black letter rules on the definiteness doctrine has been sketched above, bringing the rule's contours more into focus. And

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[482] *See, e.g.*, Wheeler v. White, 398 S.W.2d 93 (Tex. 1965), discussed *infra* notes 520-25 and accompanying text.

[483] *See* RESTATEMENT (SECOND) OF CONTRACTS § 347(c) (1981) (providing that in measuring the plaintiff's expectation interest for purposes of awarding expectation damages, the amount must be reduced by "any cost or other loss that [the plaintiff] avoided by not having to perform").

[484] *See generally* Kearsarge Computer, Inc. v. Acme Staple Co., 366 A.2d 467, 470 (N.H. 1976).

The general rule is:

> If the plaintiff's required expenditures are of cash or material, the tendency is to put the burden of allegation and proof of the amount thereof on him, but if his expenditures would be of time or labor, the burden is normally placed on the defendant. The court usually decides whether the plaintiff's performance requires an outlay of money or material from the nature of the contract, without a specific raising of the point by the parties.

Id. at 470 (quoting R.F. Martin, Annotation, *Burden of Proving Value of Relief From Performing Contract in Suit Based on Defendant's Breach Preventing or Excusing Full Performance*, 17 A.L.R.2d 968, 972 (1951)).

the image revealed is unmistakably that of a work of neoclassical contract law.

Neoclassical contract law is the name given to the law that started to develop in the 1920s in response to classical contract law, and which produced the U.C.C. in the middle of the century and the Second Restatement in the latter part of the century.[485] Whereas classical contract law was the law of Langdell, Holmes, and Williston,[486] neoclassical contract law is the law of Corbin and Llewellyn.[487] "[T]he rules of classical contract law were centered . . . on a single moment in time, the moment of contract-formation,"[488] whereas neoclassical contract law is willing to take account of post-formation events to ensure a just outcome.[489] Neoclassical contract law has been described as follows:

> [It] attempts to balance the individualist ideals of classical contract with communal standards of responsibility to others. The core remains the principle of freedom of contract, distinguishing contract from tort and other areas, but this principle is "tempered both within and without [contract's]

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[485] *See* Curtis Nyquist, *Single-Case Research and the History of American Legal Thought*, 45 NEW ENG. L. REV. 589, 594 (2011) ("Neoclassical contract law begins to come into focus in the 1920s and 1930s and still dominates the practice of law."); Hillman, *supra* note 268, at 123 n.136 (noting that "[n]eoclassical contract law [is] evidenced by the Restatement (Second) of Contracts and article 2 of the Uniform Commercial Code").

[486] *See* Eisenberg, *supra* note 268, at 1749 ("In the late nineteenth and early twentieth centuries, the school of thought now referred to as classical contract law, which found its central inspiration in Langdell, Holmes, and Williston, and its central expression in the Restatement (First) of Contracts . . . held virtually absolute sway over contract theory.").

[487] Knapp, *supra* note 207, at 766-67.

[488] Eisenberg, *supra* note 268, at 1748. *See generally* Macneil, *supra* note 203, at 863-65 (describing classical contract law's focus on the moment of formation with respect to the rights and duties that arise between the parties).

[489] *See generally* Murray, Jr., *supra* note 211, at 881-82 (explaining neoclassical contract law's willingness to consider post-formation events); Larry A. DiMatteo, *The Counterpoise of Contracts: The Reasonable Person Standard and the Subjectivity of Judgment*, 48 S.C. L. REV. 293, 320 (1997). On the other side of neoclassical contract law (i.e., moving further away from classical contract law and its emphasis on the time of formation) is so-called relational contract theory, which places more emphasis on post-formation events than neoclassical contract law. *See generally* Peter Linzer, *Uncontracts: Context, Contorts and the Relational Approach*, 1988 ANN. SURV. AM. L. 139 (1988) (describing the characteristics of relational contract theory). Relational contract theory has not, however, had a significant impact on the rules of contract law. *See* Eisenberg, *supra* note 205, at 805.

> The identification of relational contracts as a critical construct and an important field of study has led to important insights concerning the economics and sociology of contracting. It has not, however, led to a body of relational contract law: that is, we do not have a body of meaningful and justified contract law rules, either in place or proposed, that apply to, and only to, relational contracts.

Id.

> formal structure by principles, such as reliance and unjust enrichment, that focus on fairness and the interdependence of parties rather than on parties' actual agreements." In deciding the scope of contractual liability, courts weigh the classical values of liberty, privacy, and efficiency against the values of trust, fairness, and cooperation, which have been identified as important by post-classical scholars.[490]

Also, whereas classical contract law favored inflexible, abstract rules that did not take into account the particular parties involved or the circumstances (beyond determining if the rule applied),[491] neoclassical contract law is more willing to adopt flexible standards to enable a court to reach what it believes is a fair result based on the particular facts before it.[492]

The Second Restatement's treatment of the reasonably certain terms requirement is quintessentially neoclassical contract law. It keeps one foot in the formalism of classical contract law by maintaining the reasonably certain terms requirement as a formation doctrine[493] and by seemingly rejecting reliance damages (and anything less) as an "appropriate" remedy.[494] It puts the other foot squarely in modern contract law by modeling its test for reasonably certain terms on the U.C.C.'s provision, by stating that "the degree of certainty required may be affected by the dispute which arises and by the remedy sought"[495] and by stating that "[c]ourts decide the disputes before them, not other hypothetical disputes which might have arisen"[496] (and by apparently not requiring the plaintiff's promise to be sufficiently definite).

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[490] Feinman, *supra* note 206, at 1287-88 (internal footnote omitted).

[491] *See* LAWRENCE M. FRIEDMAN, CONTRACT LAW IN AMERICA: A SOCIAL AND ECONOMIC CASE STUDY 20 (1965) ("[T]he 'pure' law of contract [of the nineteenth century] is an area of what we can call abstract relationships. 'Pure' contract doctrine is blind to details of subject matter and person."); Macneil, *supra* note 203, at 863 ("[Classical contract law] treats as irrelevant the identity of the parties to the transaction.").

[492] *See* James W. Fox Jr., *Relational Contract Theory and Democratic Citizenship*, 54 CASE W. RES. L. REV. 1, 6 (2003) ("[W]here classical contract law was rule-based, neoclassical contract law is more willing to adopt standards."). For explanations of the differences between rules and standards, see Kennedy, *supra* note 6, at 1687-1701; Baird & Weisberg, *supra* note 296, at 1227-31.

[493] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 (1981) (placed in the chapter on "Formation of Contracts—Mutual Assent"); *id.* § 33(1) ("Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted *so as to form a contract* unless the terms of the contract are reasonably certain." (emphasis added)).

[494] *See id.* § 34 cmt. d ("In some cases partial or full enforcement through an award of damages for breach of contract or a decree of specific performance may become appropriate. See § 90 [promissory estoppel].").

[495] *Id.* § 33 cmt. b.

[496] *Id.*; *see also* Macneil, *supra* note 203, at 873 (discussing neoclassical contract law's

The drafters seemed unwilling to let go of the past and jettison the idea of the reasonably certain terms requirement being a formation doctrine, while at the same time wanting to take account of and apparently approve of courts' propensities to take into consideration post-formation events so that justice can be done in individual cases.[497] Unlike classical contract law, the Second Restatement's test seems to encourage courts to peek at post-formation events when deciding if a contract was formed at an earlier time: Did the indefinite term turn out to be unimportant to the dispute that arose? Is the defendant simply using indefiniteness as an afterthought to avoid what turned out to be a bad bargain?

But this compromise approach comes at an intellectual price. The reasonably certain terms requirement cannot be both a formation doctrine and a doctrine that assesses definiteness based on the dispute that arises. It is either a formation doctrine, or it is not. If it is a formation doctrine, no peeking should be permitted. The only conceivable way to make these positions consistent would be to maintain that a contract—defined as "a promise or a set of promises for the breach of which the law *gives* a remedy, or the performance of which the law in some way *recognizes* as a duty"[498]—is never really formed until a court gives a remedy or recognizes a duty between specific parties. But the Second Restatement rejects this approach, indicating that a legal duty to perform as promised arises from operative acts occurring prior to a court recognizing such a duty.[499]

How and why the Second Restatement's treatment of the reasonably certain terms requirement ended up lacking clarity and containing apparent inconsistencies is unclear, but it was perhaps due to one or more of the following: a belief that the reasonably certain terms requirement is rarely invoked by modern courts and was thus not worthy of substantial attention;[500] the combining of related, yet analytically distinct, concepts within a single Second Restatement section dealing with "certainty," resulting in perfunctory and unfocused treatment of the reasonably certain

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treatment of the reasonably certain terms requirement).

[497] *See, e.g.*, Macneil, *supra* note 203, at 870 (stating with respect to neoclassical contract law's treatment of the reasonably certain terms requirement that the "system may be seen as an effort to escape partially from such rigorous [focus on the time of formation], but since its overall structure is essentially the same as the classical system it may often be ill-designed to raise and deal with the issues").

[498] RESTATEMENT (SECOND) OF CONTRACTS § 1 (1981) (emphasis added).

[499] *See id.* cmt. d (discussing the operative acts necessary to create a legal duty to perform).

[500] *See* Scott, *supra* note 10, at 1651 ("The contemporary presumption toward filling gaps in incomplete contracts has led commentators to assume that the common law indefiniteness doctrine is no longer a serious impediment to legal enforcement.").

terms requirement;[501] an apparent desire to deemphasize classical contract law's focus on the moment of contract formation,[502] even with respect to the reasonably certain terms requirement[503] without recognizing the confusion this might cause; simply relying on the reasonably certain terms provision in the U.C.C.,[504] which was itself not explained in any detail and refers only to gaps, not vague terms;[505] a desire to have the requirement left

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[501] Second Restatement section 33 is simply titled "Certainty" and incorporates the related, yet analytically distinct, concepts of whether a reasonable person would construe an apparent offer with gaps as mere preliminary negotiations and not a manifestation of assent, *see* RESTATEMENT (SECOND) OF CONTRACTS § 33(3) & cmt. c (1981), the requirement that a bargain have reasonably certain terms to be a contract, *see id.* § 33(1)-(2), and the requirement that greater definiteness is usually required for an order of specific performance than an award of damages. *See id.* § 33 cmt. b ("In some cases greater definiteness may be required for specific performance than for an award of damages . . . .").

[502] *See* Eisenberg, *supra* note 268, at 1749 ("[T]he rules of classical contract law were centered . . . . on a single moment in time, the moment of contract-formation.").

[503] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. b (1981) ("[T]he degree of certainty required may be affected by the dispute which arises and by the remedy sought.").

[504] *See* AMERICAN LAW INSTITUTE, *supra* note 1, at 326 ("[T]hese subsections are drawn from the language found in the Uniform Commercial Code.") (remark by Reporter Robert Braucher regarding the Second Restatement's provisions on reasonably certain terms).

[505] *See* U.C.C. § 2-204(3) (2013) ("Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy."). All that the Official Comment provides regarding the reasonably certain terms requirement is the following:

> Subsection (3) states the principle as to "open terms" underlying later sections of the Article. If the parties intend to enter into a binding agreement, this subsection recognizes that agreement as valid in law, despite missing terms, if there is any reasonably certain basis for granting a remedy. The test is not certainty as to what the parties were to do nor as to the exact amount of damage due the plaintiff. Nor is the fact that one or more terms are left to be agreed upon enough of itself to defeat an otherwise adequate agreement. Rather, commercial standards on the point of "indefiniteness" are intended to be applied, this Act making provision elsewhere for missing terms needed for performance, open price, remedies and the like. The more terms the parties leave open, the less likely it is that they have intended to conclude a binding agreement, but their actions may be frequently conclusive on the matter despite the omissions.

U.C.C. § 2-204 cmt. (2013); *see also* PERILLO, *supra* note 2, at 55 ("What is not clear is when a court will find that 'there is a reasonably certain basis for giving an appropriate remedy.'"). Professor Edwin W. Patterson, as part of his analysis of § 2-204(3) for the New York Law Revision Commission, stated that while the section's "general purpose [was] . . . to prevent the courts from requiring strictly that everything be clearly and definitely settled before the Court will find that a contract was formed[,]" then provided the following cautionary note: "[T]he ways in which this general purpose is to be implemented are not clear. While the comment to this subsection indicates that only 'a reasonably certain basis for granting a remedy' is requisite, no illustrations are given." STATE OF NEW YORK,

vague so that courts would be able to apply it flexibly;[506] a desire to completely strip the reasonably certain terms requirement of its formal aspect without wanting to say so explicitly; or simply describing what they saw (courts considering the requirement as a formation doctrine, but often unable to bite the bullet and ignore post-formation events).[507]

No matter the reason, the result is unfortunate. As stated by Herbert Wechsler, ALI director from 1963 to 1984,[508] the Restatements are "essential aid[s] in the improved analysis, clarification, unification, growth and adaptation of the common law."[509] It is well known that the Restatements often seek to move the law in a particular direction,[510] but the result should not be a black letter rule and supporting comments and illustrations that cause confusion and create inconsistencies. If the ALI desired to jettison the reasonably certain terms requirement as a formation doctrine, it should have done so expressly. And if it desired to retain it as a formation doctrine, it should have removed comments referencing post-

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supra note 86, at 274 (remark by Professor Edwin W. Patterson). The leading treatise on the U.C.C. does not provide much explanation of the Code's reasonably certain terms requirement, simply stating that Article 2 "makes contracts easier to form," then setting forth, as one example, the text of § 2-204(1) and lastly noting that "Article 2 itself helps provide this 'reasonably certain basis' through numerous provisions which fill gaps in an agreement that might otherwise fail for indefiniteness." JAMES J. WHITE & ROBERT S. SUMMERS, UNIFORM COMMERCIAL CODE 29 (6th ed. 2010). The authors direct the reader to chapter 4 of the book, which deals with filling in gaps in an incomplete contract. *Id.* at ch. 4. It is clear that Professors White and Summers consider the reasonably certain terms requirement to be a dead letter under the U.C.C.

[506] My thanks to Professor Stephen Leacock for suggesting this motive.

[507] The official comment to the U.C.C. provision on unconscionability recognized the tendency of courts to manipulate unfavorable doctrines to reach just results. *See* U.C.C. § 2-302 cmt. 1 (2013).

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract.

Id. Karl Llewellyn, the principal drafter of Article 2 of the U.C.C., *see* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710, 712 (1999), famously referred to this as the use of "covert tools." K.N. Llewellyn, Book Review, 52 HARV. L. REV. 700, 703 (1939). Professor Grant Gilmore colorfully referred to this as "courts avoid[ing] practicing on weekdays what they so eloquently preached on Sundays." GILMORE, *supra* note 62, at 52.

[508] Silber, *supra* note 13, at 578.

[509] Wechsler, *supra* note 13, at 150.

[510] *See* Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1665 (1995) (book review) ("[A] restatement seeks improvement of the law through simultaneous ordering and change.").

formation events, except with respect to cure-by-concession and modification. What it left us, however, is a treatment of the reasonably certain terms requirement that provides something for everyone and that permits a reader to construe it whichever way she wants.

Also, the ALI's apparent desire for courts to consider post-formation events when assessing indefiniteness is puzzling when one considers that promissory estoppel is available as an alternative claim. Under the Second Restatement, the sanction for failing to have a bargain with reasonably certain terms is not the sanction of nullity, but the sanction of *contractual* invalidity.[511] By making the requirement one for contract formation, a promisee is not precluded from seeking to enforce an indefinite bargain under an alternative theory. Importantly, the Second Restatement, like the First Restatement,[512] expressly recognizes promissory estoppel,[513] and the Second Restatement even recognizes promissory estoppel as an alternative claim when a bargain's terms are too indefinite to form a contract.[514] This doctrine, with its emphasis on a promisee's reliance and its goal of avoiding injustice,[515] enables a court to consider post-formation events to ensure a just outcome in a particular case.

This does, of course, still operate as a sanction for entering into a bargain with indefinite terms because it is more difficult for a promisee to enforce a promise under the doctrine of promissory estoppel than to enforce a promise within a contract.[516] But relegating a promisee to a promissory estoppel claim when the bargain's terms are too indefinite to form a contract seems to be an appropriate compromise between enforcement of the promise under a contract theory (no sanction) and automatic non-enforcement (the sanction of nullity). This is so because even though there are benefits to encouraging parties to have their bargains include reasonably certain terms, there might be situations in which the benefits of enforcement outweigh the benefits of non-enforcement, reinforcing the requirement's formal aspect. The flexibility given to the court by promissory estoppel's injustice element makes it an ideal device for the court to weigh the

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[511] *See* RESTATEMENT (SECOND) OF CONTRACTS § 33(1) (1981) ("[A manifestation of intention] *cannot be accepted so as to form a contract* unless the terms of the contract are reasonably certain." (emphasis added)).

[512] RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932).

[513] RESTATEMENT (SECOND) OF CONTRACTS § 90 (1981).

[514] *See* Dixon v. Wells Fargo Bank, N.A., 798 F. Supp. 2d 336, 344 (D. Mass. 2011) ("[T]he Restatement 'has expressly approved' promissory estoppel's use to protect reliance on indefinite promises." (quoting Metzger & Phillips, *supra* note 242, at 842)).

[515] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

[516] *See* Hillman, *supra* note 29, at 580 (1998) (reporting a low success rate for promissory estoppel claims).

competing benefits of enforcement versus non-enforcement. As stated by one court, promissory estoppel "supplies a needed tool which courts may employ in a proper case to prevent injustice."[517]

For example, in deciding whether the injustice from not enforcing the promise would outweigh the benefit from reinforcing the legal formality, the court might take into consideration, among any other relevant circumstances, the following, many of which are post-formation events: how reasonable it was for the plaintiff to rely on the indefinite bargain (which would presumably require a comparison of the amount of reliance to the degree of indefiniteness and the bargain's informality);[518] whether the plaintiff's reliance was definite and substantial;[519] whether the defendant encouraged the plaintiff to rely on the bargain because the reliance benefited the defendant;[520] the degree of fault on the part of the plaintiff in failing to specify the bargain's terms with greater definiteness, including the "relative competence and the bargaining position of the parties;"[521] whether the defendant in the lawsuit is simply trying to take advantage of the reasonably certain terms requirement to avoid what has become a bad bargain;[522] and whether the defendant intentionally drafted indefinite terms to have an excuse for non-performance.[523]

Thus, an example of when the court might conclude that the benefit to enforcement outweighs the benefit of reinforcing the legal formality through the sanction of nullity would be when one party encourages the other to take substantial action in reliance on the indefinite bargain because such reliance benefits the promisor, then refuses to perform for a reason unrelated to the bargain's indefiniteness, and then relies on the bargain's indefiniteness as a defense to the lawsuit.[524] In fact, as previously

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[517] Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274 (Wis. 1965).

[518] *See* RESTATEMENT (SECOND) OF CONTRACTS § 90 cmt. b (1981) (noting that factors to consider in deciding whether injustice will occur from not enforcing the promise include "the reasonableness of the promisee's reliance" and "the formality with which the promise is made").

[519] *See id.* (noting that a factor to consider in deciding whether injustice will occur from not enforcing the promise includes the "definite and substantial character [of the reliance] in relation to the remedy sought").

[520] *See, e.g.*, Dixon v. Wells Fargo Bank, N.A., 798 F. Supp. 2d 336 (D. Mass. 2011), discussed *infra* notes 539-49 and accompanying text.

[521] RESTATEMENT (SECOND) OF CONTRACTS § 87 cmt. e (1981).

[522] *See* CORBIN & PERILLO, *supra* note 374, § 4.1, at 535-36 ("The courts must take cognizance of the fact that the argument that a particular agreement is too indefinite to constitute a contract frequently is an afterthought excuse for attacking an agreement that failed for reasons other than indefiniteness.").

[523] *See, e.g.*, *Dixon*, 798 F. Supp. 2d at 336, discussed *infra* notes 539-49 and accompanying text.

[524] The rule in the Second Restatement that provides that an option contract arises when

discussed, parties taking advantage of indefiniteness to escape a bargain for an unrelated reason was the most likely reason the U.C.C. relaxed the reasonable certainty requirement.[525]

The well-known cases of *Wheeler v. White*[526] and *Hoffman v. Red Owl Stores, Inc.*[527] are perhaps examples of such a situation. In those cases, the plaintiffs' reliance on the indefinite bargain was substantial, and in each case the defendant encouraged the plaintiff to rely on the indefinite bargain and then used its indefiniteness as a defense.

In *Wheeler*, the parties entered into a bargain under which the defendant promised to secure a loan for the plaintiff (or, if unable to secure it from a third party, to provide the loan himself) so that the plaintiff could build a commercial building or shopping center on his land, and in exchange he promised to pay the defendant a specified sum of money.[528] The bargain's terms with respect to the promised loan, however, "failed to provide the amount of monthly installments, the amount of interest due upon the obligation, how such interest would be computed, [and] when such interest would be paid."[529] The parties also agreed that the defendant would receive a commission on the rent received from any tenants he obtained for the commercial building or shopping center.[530] Thus, the defendant presumably had an incentive for the plaintiff to proceed with the plans to build the commercial building or shopping center before the defendant secured the loan, so that it would be easier for the defendant to secure the loan in the first place and so that the defendant could begin earning commissions on rent sooner.

The plaintiff alleged that the defendant, before securing a loan from a third party, urged the plaintiff to demolish the existing buildings on the land and to otherwise prepare the land for the commercial building or shopping center, which the plaintiff did, only to have the defendant then tell him there would be no loan.[531] When the plaintiff sued the defendant for breach of contract, the defendant argued that the bargain lacked reasonably certain

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an offeree foreseeably and substantially relies on an offer and injustice would result if the offeror were able to revoke the offer before acceptance, would not apply because this rule results in the formation of a contract (though "[f]ull-scale enforcement of the offered contract is not necessarily appropriate in such cases"). *Id.* § 87 cmt. e. No contract can be formed if the terms are not reasonably certain. *Id.* § 33(1).

[525] Snyder, *supra* note 179, at 37-38.

[526] 398 S.W.2d 93 (Tex. 1965).

[527] 133 N.W.2d 267 (Wis. 1965).

[528] *See Wheeler*, 398 S.W.2d at 94 n.1, 95.

[529] *Id.* at 95.

[530] *Id.*

[531] *Id.*

terms and therefore no contract was formed.[532] The court held that although the complaint did not state a claim for breach of contract because the terms of the promised loan were indefinite, the complaint stated a claim for promissory estoppel.[533]

In *Hoffman*, the plaintiffs (husband and wife) alleged that the defendant, Red Owl Stores, promised the plaintiff husband that he only needed $18,000 in capital to start up a Red Owl grocery store,[534] but the bargain (if one had been reached)[535] did not specify "the size, cost, design, and layout of the store building; and the terms of the lease with respect to rent, maintenance, renewal, and purchase options."[536] The plaintiffs alleged that after making this promise, the defendant encouraged them, among other things, to sell their bakery building and business, to buy the inventory and fixtures of a small grocery store to gain experience, to then sell the small grocery store, and to obtain an option to buy land on which to build the Red Owl store.[537] Professor Robert Scott has suggested that the defendant had an incentive to encourage the plaintiffs to undertake these actions in reliance on the defendant's promise of a Red Owl store: "All these actions gave Red Owl some further indication of the kind of franchisee that Hoffman was likely to be—was he enterprising and resourceful, or was he a bit of a doofus?"[538]

After these actions in reliance on the promise, the defendant raised the required amount of capital investment to $34,000.[539] When the plaintiffs sued the defendant for breaching the promise, the defendant argued that the terms were insufficiently definite.[540] The court held, however, that the facts supported enforcing the promise under promissory estoppel, even though the promise was insufficiently definite to form a contract.[541]

In these cases the defendant is perhaps primarily responsible for the harm (the wasted reliance) caused by the indefinite bargain. Thus, permitting the

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[532] *Id.* at 94-95.

[533] *Id.* at 97.

[534] Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 268 (Wis. 1965).

[535] It is unlikely that a bargain was entered into in *Hoffman* because there was likely no offer and, if there was an offer, no acceptance. *See id.* at 274-75. The promise in *Hoffman* seems to have been a promise by the defendant to make an offer to the plaintiffs and to have the promise within the offer conditional on a promise by the plaintiffs of a capital contribution of not more than $18,000. *See id.*

[536] *Id.* at 274.

[537] *Id.* at 268-70.

[538] Robert E. Scott, Hoffman v. Red Owl Stores *and the Myth of Precontractual Reliance*, 68 OHIO ST. L.J. 71, 93 (2007).

[539] *Hoffman*, 133 N.W.2d at 271.

[540] *See id.* at 274.

[541] *Id.* at 275.

promise to be enforced under promissory estoppel in these instances will have the beneficial effect of deterring such behavior. A party will no longer have an incentive to encourage the other party to rely on the contract to the benefit of the promisor and then use the indefiniteness of its own promise as a defense. Of course, if, as argued by Professor Scott, the dispute in *Hoffman* arose because of a misunderstanding regarding the amount of financing,[542] then perhaps the sanction of nullity (as opposed to simply the sanction of contractual invalidity) would have been warranted.

A recent example is *Dixon v. Wells Fargo Bank, N.A.*,[543] which arose out of the subprime mortgage crisis.[544] The plaintiffs alleged that the defendant promised to consider their eligibility for a mortgage loan modification if they took certain steps, including defaulting on their mortgage loan payments and submitting certain financial information to the defendant.[545] The plaintiffs alleged that they did these things, but that the defendant refused to modify their mortgage loan and instead proceeded to foreclose on their home.[546] The plaintiffs then sued the defendant, asserting a claim for promissory estoppel.[547] The defendant moved to dismiss the complaint, asserting, among other things, that any promise it made was insufficiently definite.[548]

The court seemingly recognized that the defendant's promise to negotiate a mortgage loan modification was not enforceable as part of a contract because (in addition to not being supported by consideration) the parties had not "elaborate[d] on the boundaries of that duty to negotiate" and the duty was thus too indefinite.[549] The court held, however, that the complaint stated a claim for promissory estoppel.[550] The court noted that the doctrine of promissory estoppel is well suited for situations in which the defendant's conduct was "designed to take advantage of the promisee,"[551] and when "'there has been a pattern of conduct by one side which has dangled the

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[542] *See* Scott, *supra* note 540, at 97; *see also* Robert E. Scott, Hoffman v. Red Owl Stores *and the Limits of the Legal Method*, 61 HASTINGS L.J. 859, 863 (2010) ("[T]he best inference to be drawn from the record was that the breakdown in the negotiations between Joseph Hoffmann [the court misspelled Hoffmann's name, *see id.* at 861 n.5] and Red Owl officials was primarily attributable to a fundamental misunderstanding between the parties as to the amount and nature of Hoffmann's capital contribution to the franchise operation.").

[543] 798 F. Supp. 2d 336 (D. Mass. 2011).

[544] *See id.* at 360.

[545] *Id.* at 339.

[546] *Id.*

[547] *Id.* at 338-39.

[548] *Id.*

[549] *Id.* at 343.

[550] *Id.* at 348.

[551] *Id.* at 344.

other side on a string.'"[552] The court stated that "[w]hile there is no allegation that its promise was dishonest, [the defendant] distinctly gained the upper hand by inducing the [plaintiffs] to open themselves up to a foreclosure action."[553]

A particularly egregious form of this behavior (which would occur at the time of formation) is when an offeror *intentionally* makes an indefinite offer to induce reliance that benefits the offeror, planning from the outset on refusing to perform based on the bargain's lack of certainty. For example, Professors Ian Ayres and Robert Gertner argue that an exception to the general rule that indefinite bargains should not be enforced should be "[w]hen the indefiniteness is clearly attributable to one party and induces inefficient reliance from the other party . . . ."[554] They use the well-known case of *Lefkowitz v. Great Minneapolis Surplus Store, Inc.*[555] as an example of the suggested exception.[556]

In *Lefkowitz*, the defendant published two advertisements in the newspaper.[557] In the first, the defendant stated that it was selling three brand new fur coats "[w]orth to $100" for one dollar, "[f]irst [c]ome [f]irst [s]erved."[558] In the second, published one week later, the defendant stated it was selling a stole "[w]orth $139.50" for one dollar, also "[f]irst [c]ome [f]irst [s]erved.".[559] The plaintiff was the first person at the appropriate counter of the store on each day, but the store refused to sell to him because he was a man.[560] The court held that the advertisements were offers and that the defendant breached a contract to sell the stole for one dollar,[561] but held that the trial court properly disallowed the plaintiff's claim for breach of contract to sell a fur coat because "the value of these articles was speculative and uncertain."[562] The court stated that "[t]he only evidence of value was the advertisement itself to the effect that the coats were 'Worth to $100.00,' how much less being speculative especially in view of the price for which they were offered for sale."[563]

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[552] *Id.* (quoting Pappas Indus. Parks, Inc. v. Psarros, 511 N.E.2d 621, 622 (Mass. App. Ct. 1987)).
[553] *Id.* at 346.
[554] Ayres & Gertner, *supra* note 95, at 106.
[555] 86 N.W.2d 689 (Minn. 1957).
[556] Ayres & Gertner, *supra* note 95, at 105-06.
[557] *Lefkowitz*, 86 N.W.2d at 690.
[558] *Id.*
[559] *Id.*
[560] *Id.*
[561] *Id.* at 691.
[562] *Id.* at 690.
[563] *Id.*

Professors Ayres and Gertner argue that a situation like *Lefkowitz* should be an exception to the general rule that indefinite offers will not be enforced.[564] They argue that the penalty of non-enforcement will in fact encourage sellers to create indefinite (and hence unenforceable) offers that induce inefficient reliance by offerees because the inefficient reliance is in fact beneficial for the offeror.[565] The seller in *Lefkowitz* was not interested in the sale of the fur coats or the stole, he wanted to induce persons to come to the store with the hope they would make other purchases.[566] Thus, there will be some cases in which the offeror has an incentive to make indefinite (and hence unenforceable) offers because the offeror will obtain the desired performance from the offeree without having to himself perform.[567]

The *Lefkowitz* problem, however, is solved not by relaxing the reasonably certain terms requirement for the formation of a contract but by permitting the plaintiff to proceed under a promissory estoppel theory. If the offeror made an intentionally indefinite promise to obtain performance from the offeree with the expectation of not having to perform his end of the bargain (because no contract will be formed), that motive will support the conclusion that "injustice can be avoided only by enforcement of the promise."[568] Even if many cases like *Lefkowitz* (including *Lefkowitz* itself) do not involve reliance of a definite and substantial character, reliance of that character is not a requirement for a recovery under promissory estoppel,[569] but is simply a factor that weighs in favor of enforcement.[570] If the plaintiff could prove that the defendant made an intentionally indefinite offer to encourage reliance that was beneficial to the defendant with the expectation that he would not have to perform his end of the bargain, this would be sufficient to conclude that injustice would result from non-enforcement irrespective of the character of the reliance.

Thus, because of situations like *Wheeler*, *Hoffman* (assuming it was not simply a case of a misunderstanding), *Dixon*, and *Lefkowitz* (assuming the defendant had a bad motive), the sanction of contractual invalidity, and not

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564 Ayres & Gertner, *supra* note 95, at 106.

565 *Id.*

566 *See id.*

567 *See id.*

568 RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981).

569 *Compare* RESTATEMENT (FIRST) OF CONTRACTS § 90 (1932) ("A promise which the promisor should reasonably expect to induce action or forbearance *of a definite and substantial character* on the part of the promisee and which does induce such action or forbearance . . . .") (emphasis added), *with* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) (1981) ("A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promise . . . and which does induce such action or forbearance . . . .").

570 *See* RESTATEMENT (SECOND) OF CONTRACTS § 90(1) cmt. b (1981).

the sanction of nullity, would seem appropriate. The flexible nature of promissory estoppel's injustice element will permit courts to balance the benefits of enforcing the promise against the benefit of reinforcing the legal formality. This flexibility will permit courts to conduct that balancing on a case-by-case basis, and there will likely be situations other than those such as *Wheeler*, *Hoffman*, *Dixon*, and *Lefkowitz* in which courts will conclude that enforcement under promissory estoppel is warranted.

The flexible nature of promissory estoppel will also permit those courts that favor legal formalities more than other courts to assign greater weight to the benefits from reinforcing the legal formality.[571] Thus, a court would be able to deny enforcement under promissory estoppel in a particular case if it believes it would ultimately be more harmful to protect a party to a commercial transaction who did not protect himself.[572] The court will also be able to enforce the promise but only award reliance damages. For example, in *Wheeler*, the court, although enforcing the promise under promissory estoppel, concluded that an award of reliance damages, not expectation damages, was appropriate because the plaintiff was partly at fault for the bargain's indefiniteness.[573] If, however, the defendant's behavior was egregious, an award of expectation damages might be appropriate, assuming the bargain's terms and the evidence permit such an award. Although punitive damages are usually not recoverable for the breach of a contract,[574] the character of the defendant's conduct is sometimes taken into account when determining the amount of damages to award.[575]

Thus, a court has three options when confronted with a promissory estoppel claim based on a promise within a bargain whose terms are too indefinite to create a contract. These options are as follows: enforce the promise under promissory estoppel and award expectation damages (for those cases in which the injustice from not enforcing the promise substantially outweighs the benefit from reinforcing the legal formality, and

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[571] *See id.* ("The principle of this Section is flexible.").

[572] *See, e.g.*, James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344, 346 (2d Cir. 1933) (L. Hand, J.) ("[I]n commercial transactions it does not in the end promote justice to . . . aid . . . those who do not protect themselves.").

[573] Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1965).

[574] RESTATEMENT (SECOND) OF CONTRACTS § 355 (1981).

[575] *See id.* § 352 cmt. a (stating that with respect to the requirement that a plaintiff prove damages to a reasonable certainty, "[a] court may take into account all the circumstances of the breach, including willfulness, in deciding whether to require a lesser degree of certainty . . . ."); Robert A. Hillman, *Contract Lore*, 27 J. CORP. L. 505, 509 (2002) ("[I]n construction contracts, the degree of willfulness of a contractor's breach helps courts determine whether to grant expectancy damages measured by the cost of repair or the diminution in value caused by the breach, the latter often a smaller measure.").

the indefiniteness does not prevent the expectation interest from being determined); enforce the promise under promissory estoppel but award only reliance damages (for those cases in which the injustice from not enforcing the promise substantially outweighs the benefit from reinforcing the legal formality, but the expectation interest cannot be determined either because the breached promise is indefinite or the evidence does not permit the expectation interest to be proved to a reasonable certainty, and those cases in which the injustice from not enforcing the promise only moderately or slightly outweighs the benefit from reinforcing the legal formality); or refuse to enforce the promise under promissory estoppel (when the benefit from reinforcing the legal formality outweighs the injustice from not enforcing the promise).

This flexibility provided by promissory estoppel makes it puzzling that the Second Restatement's test encourages courts to consider post-formation events when determining whether a bargain's terms were sufficiently definite to form a contract. A solution to the ALI's desire to maintain the reasonably certain terms requirement as a formation doctrine while at the same time encouraging courts to consider post-formation events to achieve a just outcome in a particular case was just down the road in section 90. So what happened?

One possibility for the ALI's failure to rely on promissory estoppel as a way to consider post-formation events was through an uncritical reliance on the U.C.C. provision. The U.C.C. was drafted at a time when promissory estoppel was not well received with respect to commercial transactions,[576] and it is, therefore, understandable that the U.C.C. would not have relied on promissory estoppel as a device for relaxing the certainty requirement. Another possibility is that the ALI itself believed the goal of relaxing the certainty requirement and encouraging courts to focus on post-formation events would suffer if relegated to the Second Restatement's promissory estoppel section, a section setting forth a controversial doctrine.[577] In other words, the ALI might not have wanted its goal of relaxing the certainty requirement to be jeopardized by throwing its lot in with promissory estoppel. Or perhaps the ALI was concerned that injustice would still occur in some situations in which the plaintiff could not establish any reliance

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[576] The U.C.C. was drafted in the 1940s and 1950s. Robert Braucher, *The Legislative History of the Uniform Commercial Code*, 58 COLUM. L. REV. 798, 799-804 (1958). During this time, courts were reluctant to use promissory estoppel in commercial transactions. Kevin M. Teeven, *Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement*, 34 U. MEM. L. REV. 499, 604-05 (2004).

[577] *See* Tess Wilkinson-Ryan & David A. Hoffman, *Breach is for Suckers*, 63 VAND. L. REV. 1003, 1039-40 (2010) ("[M]ost commentators have seen promissory estoppel as controversial . . . .").

(though without reliance it would seem unlikely injustice would occur). Or maybe the ALI simply wanted to abolish the certainty requirement. In any event, the suitability of promissory estoppel for taking into account post-formation events makes it puzzling that the ALI incorporated such concerns into a doctrine dealing with the formation of a contract.

VII. CONCLUSION

The ALI, in the Second Restatement of Contracts, sought to make the reasonably certain terms requirement clearer, but its effort fell short. Despite providing a test for reasonably certain terms—whether the terms "provide a basis for determining the existence of a breach and for giving an appropriate remedy"[578]—the ALI failed to make clear whether the plaintiff's promise must be sufficiently definite and whether an award protecting the plaintiff's reliance interest is an appropriate remedy.

This Article has shown that, though the answer is far from clear, the better interpretation of the Second Restatement's test is that it is not necessary that the plaintiff's promise be sufficiently definite, but (somewhat paradoxically) only an award protecting the plaintiff's expectation interest (or an award of liquidated damages) is an appropriate remedy. Thus, while the Second Restatement retains the reasonably certain terms requirement as a doctrine of contract formation, it also encourages courts to consider some post-formation events (but not others, such as the remedy sought). Thus, the test has a practical aspect but retains a formal aspect as well. In this respect, it is a model of neoclassical contract law. But because a formation doctrine cannot logically consider post-formation events, it is also inconsistent. The drafters therefore failed in their goal "to be a little more helpful in spelling out what is meant by [the reasonably certain terms requirement]."[579]

The issue is, of course, just one piece of the larger struggle over whether the better model for contract law is one where parties are expected to comply with established rules and suffer the consequences if they do not, or whether courts should seek a just outcome in individual cases. An unwillingness to take a firm position on this issue, at least with respect to the reasonably certain terms requirement, is perhaps what led the ALI to give us a test for reasonably certain terms that is not only a

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[578] RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981).

[579] AMERICAN LAW INSTITUTE, *supra* note 1, at 326 (remark by Reporter Robert Braucher regarding the Second Restatement of Contract's provision on the requirement that a contract's terms be reasonably certain).

model of neoclassical contract law, but a model of confusion and inconsistency.

2013 Law and Administrative Rules Governing Appeal Procedures of Hawaii's Office of Information Practices

Cheryl Kakazu Park and Jennifer Z. Brooks[1]

I. INTRODUCTION

January 1, 2013 ushered in a new law and new administrative rules governing appeals from decisions of and complaints made to Hawaii's Office of Information Practices ("OIP"). This article provides a detailed explanation of the new law and rules, including the legislative history concerning agencies' right to appeal from OIP's decisions regarding Hawaii's open records and open meetings laws. As the Legislature originally intended, the new law and rules enable OIP to continue providing a free and relatively simple dispute resolution process as an alternative to judicial action or contested case proceedings.

By way of background, twenty-five years earlier in 1988, Hawai'i became the first state to establish a centralized office to provide uniform

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[1] The author, Cheryl Kakazu Park, J.D., M.B.A., was appointed on April 1, 2011, by Governor Neil Abercrombie as the Director of the Office of Information Practices ("OIP"). A graduate of the William S. Richardson School of Law where she was a member of its Law Review, Ms. Park also earned her Masters of Business Administration from the University of Hawai'i at Manoa, and is licensed to practice law in Hawai'i and Nevada. After clerking for Chief Judge James S. Burns of the Hawai'i Intermediate Court of Appeals, Ms. Park entered private practice and became a partner at the Honolulu law firm of Watanabe, Ing, & Kawashima. She left the firm in 1992 to live in Europe and subsequently moved to Reno, Nevada, where she worked in the business world with American Express Financial Advisors and Wells Fargo Insurance, as well as in the legal world as a staff attorney for the Nevada Supreme Court. After nearly 19 years of living abroad and on the continent, Ms. Park returned to Hawai'i, where she was born and raised.

Co-author Jennifer Brooks has been a staff attorney at OIP since 2000. Prior to joining OIP, Ms. Brooks spent two sessions as a staff attorney for the Hawai'i Senate Judiciary Committee, and before that she was in private practice with the law firm of Damon Key Leong Kupchak Hastert. Ms. Brooks earned her law degree from the Marshall-Wythe School of Law at the College of William and Mary.

The authors wish to thank the other members of OIP's dedicated and knowledgeable team, who provide legal opinions, practical advice, helpful training, and timely updates that can be found on OIP's website at oip.hawaii.gov.

Certain assertions and opinions in this article are derived from the author Cheryl Kakazu Park's experience and knowledge gained from her position as Director of OIP. These shall hereinafter be cited as "Statements by Cheryl Kakazu Park, Director, Office of Info. Practices."

legal interpretation of and training on the state's open records law, the Uniform Information Practices Act (Modified) ("UIPA").[2] In 1998, OIP was given the additional responsibility of administering the state's "Sunshine Law," or open meetings law.[3] Despite being administered by the same agency and oftentimes being involved in the same cases, each of these open government laws had different provisions for appeal of an OIP decision, and judicial interpretations of these laws resulted in consequences that were inconsistent with the original legislative intent behind the open government laws.

When the Sunshine Law was enacted in 1975,[4] OIP did not exist, nor was any agency charged with accepting Sunshine Law complaints from the general public,[5] and thus the law was written to allow "any person"[6] to sue for judicial enforcement.[7] When OIP was created in 1988 to implement and interpret the UIPA, the UIPA provided only for judicial appeal of an OIP decision by "a person aggrieved by a denial of access to a government record"[8] and contained no right for agencies to appeal an OIP decision.[9]

When OIP was given the additional responsibility of administering the Sunshine Law in 1998, that law's existing provision allowing "any person"

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[2] *See* 1 STATE OF HAWAII, REPORT OF THE GOVERNOR'S COMMITTEE ON PUBLIC RECORDS AND PRIVACY 39, 42 (1987) (discussing the optional provision creating an Office of Information Practices found in the Uniform Information Practices Code approved by the National Conference of Commissioners on Uniform State Laws, and noting that no state had yet adopted the Uniform Information Practices Code). Notably, although the federal Freedom of Information Act ("FOIA") was enacted in 1966, it was not until 1978 that the Office of Information Law and Policy, later renamed the Office of Information Policy ("federal OIP"), was established within the Justice Department to oversee agency compliance with FOIA, and it was not until 2007 that a federal FOIA ombudsman was created within the National Archives and Records Administration to mediate and facilitate FOIA disputes and review FOIA compliance and policy. *See* Mark H. Grunewald, *Freedom of Information Act Dispute Resolution*, 40 ADMIN. L. REV. 1, 46-50 (1988); Melissa Davenport & Margaret B. Kwoka, *Good but Not Great: Improving Access to Public Records Under the D.C. Freedom of Information Act*, 13 D.C. L. REV. 359, 373 (2010).

[3] HAW. REV. STAT. § 92-1.5 (2012). *See also Sunshine Law*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, http://oip.hawaii.gov/laws-rules-opinions/sunshine-law/ (last visited Sept. 29, 2013).

[4] Act of June 2, 1975, No. 166, 1975 Haw. Sess. Laws 364 (codified at HAW. REV. STAT. §§ 92-1 to -13 (2012)).

[5] *See* Act of June 9, 1988, No. 262, § -41, 1988 Haw. Sess. Laws 474 (codified at HAW. REV. STAT. § 92-1.5 (2012)) (creating OIP and providing that OIP shall receive complaints from the public).

[6] HAW. REV. STAT. § 92-12(c) (2012).

[7] *Id.*

[8] *Id.* § 92F-15(a).

[9] *See* Act of June 9, 1988, No. 262, 1988 Haw. Sess. Laws 474 (codified at HAW. REV. STAT. § 92-1.5 (2012)).

to go to court to resolve a Sunshine Law dispute was left untouched.[10] Despite clear legislative intent that OIP decisions mandating the disclosure of records under the UIPA could not be appealed by agencies,[11] Hawaii's courts, in 2009, allowed an appeal of a UIPA decision by the County of Kaua'i.[12] Finding a "plainly irreconcilable conflict"[13] between the two laws, the Intermediate Court of Appeals interpreted them to give effect to the "plain language" of the Sunshine Law allowing "any person," including an agency, to appeal the UIPA decision.[14]

By disregarding the Legislature's deliberate omission of an agency appeals process under the UIPA and allowing an agency to judicially challenge OIP's determination,[15] the practical effect of the 2009 appellate decision was to eliminate OIP's authority as the *last word* when mandating an agency's release of records. Rather than enforcing the UIPA's intent to prevent appeals by agencies, the court's decision essentially allowed agency appeals based on the appellate provisions for a different statute that is implicated by the contested government record. As a result, depending on the type of government record withheld by an agency, appellate jurisdiction could conceivably be rationalized under the Sunshine Law, procurement law,[16] land use or planning law,[17] declaratory judgment law,[18] or any number of laws that allow for judicial review of an agency's action. Rather than test the limits of this judicial interpretation and risk being embroiled in further time-consuming and expensive appeals, OIP began issuing only "advisory" opinions for the three years following the 2009 court decision and avoided issuing mandates that could be challenged by agencies.[19]

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[10] *See* Act 137, S.B. 2983, 19th Leg., Reg. Sess. (Haw. 1998) (amending the Sunshine Law to give OIP the responsibility of administering the Sunshine Law, but not amending the provision allowing "any person" to resolve disputes in court).

[11] *E.g.*, S. REP. NO. 17, 15th Leg., Reg. Sess. (1989) (Conference Comm.), *reprinted in* 1989 HAW. SEN. J. 763, 764 ("Your Committee wishes to emphasize that while a person has a right to bring a civil action in circuit court to appeal a denial of access to a government record, a government agency dissatisfied with an administrative ruling by the OIP does not have the right to bring an action in circuit court to contest the OIP ruling. The legislative intent for expediency and uniformity in providing access to government records would be frustrated by agencies suing each other.").

[12] Cnty. of Kaua'i v. Office of Info. Practices, 120 Haw. 34, 43-44, 200 P.3d 403, 412-13 (App. 2009), *aff'd*, No. 29059, 2009 Haw. LEXIS 264 (Oct. 26, 2009) [hereinafter *Cnty. of Kaua'i*].

[13] *Id.* at 43, 200 P.3d at 412.

[14] *Id.* at 43-44, 200 P.3d at 412-13.

[15] *Id.*

[16] *E.g.*, HAW. REV. STAT. § 103D-711(a)-(c) (2012).

[17] *E.g.*, *id.* § 205-6(e).

[18] *E.g.*, *id.* § 632-1.

[19] Press Release, State of Hawaii Office of Info. Practices, The Raw Truth (July 19,

In an effort to clear the confusion created by the 2009 case and to avoid further litigation over jurisdictional issues, OIP sought legislative clarification of agencies' appeal rights regarding OIP decisions during the 2012 legislative session.[20] OIP's proposal, Senate Bill 2858, was introduced as a measure supported by Governor Neil Abercrombie and his administration,[21] and was signed into law as Act 176.[22] While some opponents have criticized the bill for not simply stating that agencies cannot appeal an OIP decision,[23] as was originally intended by the UIPA, the stark reality is that clear legislative intent to the contrary did not prevent the courts from allowing judicial review of OIP's actions in 2009 and was not likely to prevent court review again in the future. Moreover, disallowing appeals under the UIPA while allowing appeals under the Sunshine Law, as some critics had urged,[24] would not result in a uniform appellate process and would create much confusion when both laws are implicated in the same case. Further, OIP realized that given the desire for checks and balances within our democracy, the bill's opponents' attempt to grant absolute power to OIP would undoubtedly have been counterbalanced by the Legislature with complicated procedural safeguards, which would have destroyed OIP's ability to provide the free and relatively simple dispute resolution process the Legislature intended it to provide[25] as an alternative to judicial action or contested case proceedings. Finally, the bill's

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2011), *available at* http://oip.hawaii.gov/whats-new/whats-new-press-release-july-19-2011-the-raw-truth/ [hereinafter Press Release, The Raw Truth].

[20] *See* OIP's Justification Sheet attached to its original proposed Bill, S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012), *available at* http://www.capitol.hawaii.gov/session2012/Bills/SB2858_.pdf [hereinafter Justification Sheet].

[21] *See, e.g.*, Beverly Keever, *Freedom of Information At Stake in Legislature*, CIVIL BEAT (Apr. 26, 2012), http://www.civilbeat.com/posts/2012/04/26/15662-freedom-of-information-at-stake-in-legislature/.

[22] Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. §§ 92 to 92F (2012)).

[23] *See* Keever, *supra* note 21.

[24] *Id.*

[25] An appeal to OIP of a record access denial "shall not be a contested case under chapter 91 . . . ." HAW. REV. STAT. § 92F-42(1) (2012); *see also* H.R.REP. NO. 1288, 15th Leg., Reg. Sess. (1989) (Standing Comm.), *reprinted in* 1989 HAW. HOUSE J. 1319, 1319, wherein the House Committee on Judiciary stated in part:

> This provision is necessary to comply with the legislative intent behind Chapter 92F, that review by [OIP] be expeditious, informal, and at no cost to the public. The review is optional in nature and anyone aggrieved by a denial of access to a government record, under either part II or III of Chapter 92F, may appeal immediately to court for a full evidentiary hearing. An explicit statutory exemption from the contested case will serve to avoid future challenges to the administrative procedures of the [OIP] for failure to have contested case hearings.

Id.

opponents failed to recognize that the government's fiscal constraints made it improbable that an increase in OIP's power and duties would be accompanied by an increase in the funding and personnel needed to implement such changes.[26] The likely end result of the opponents' position would have been that OIP would no longer be able to operate as a free, informal, and timely alternative to court actions, as originally intended by the Legislature.

Instead, the new law remains true to the UIPA provision exempting OIP from Chapter 91 contested case procedures[27] and the UIPA's original legislative intent that OIP would be "a place where the public can get assistance on records questions at no cost and within a reasonable amount of time."[28] The new law eliminates the problems described earlier and provides a clear and simple process allowing agencies to timely seek expedited judicial review of OIP's decisions, without requiring either OIP or the public to be unwilling parties to the appeal.

The new law also restores most of OIP's authority by setting a high standard of judicial review. This standard requires the courts to defer to OIP's decisions mandating disclosure of records under the UIPA unless OIP's factual and legal determinations are found to be "palpably erroneous,"[29] a deferential standard of review that was subsequently applied by the Hawai'i Supreme Court in a Sunshine Law decision.[30] Moreover, agencies can no longer simply ignore OIP's decisions mandating disclosure, as they must now timely appeal within thirty days or be unable to challenge the decision if an enforcement action is filed by members of the public.[31] Thus, members of the public now have a faster and easier means to obtain judicial enforcement where an agency ignores an OIP decision requiring the

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[26] For example, in fiscal year 1995, OIP had fifteen approved positions, the highest number of staff in its history. STATE OF HAWAII OFFICE OF INFO. PRACTICES, OIP ANNUAL REPORT 2012 11 (2012), http://files.hawaii.gov/oip/reports/annualreport2012.pdf [hereinafter OIP ANNUAL REPORT 2012]. In 1998, its work doubled when administration of the state's Sunshine Law, Part I of HRS Chapter 92, was transferred to OIP from the Department of the Attorney General. *See supra* note 3 and accompanying text; *infra* note 43 and accompanying text. Nevertheless, the number of OIP's approved positions in fiscal years 1998-2003 was reduced to eight, then to seven in fiscal years 2004-2006, and has been at 7.5 since fiscal year 2007. OIP ANNUAL REPORT 2012, *supra*. When adjusted for inflation, OIP's total budget allocation was reduced from a high of $1,292,530 in fiscal year 1994 to $803,635 in fiscal year 1998 and $382,282 in fiscal year 2012. *Id.*

[27] HAW. REV. STAT. § 92F-42(1).

[28] H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818.

[29] HAW. REV. STAT. § 92F-43(c) (2012).

[30] Kanahele v. Maui Cnty. Council, 130 Haw. 228, 244, 307 P.3d 1174, 1190 (2013).

[31] HAW. REV. STAT. § 92F-43(a).

disclosure of records. In addition, as prevailing parties, those members of the public will be entitled under existing law to recover reasonable attorney fees and costs.[32] And for OIP, the new law enables the office to continue to expeditiously and informally resolve open government disputes, while also fulfilling its many responsibilities to provide training and advice to government agencies and the general public.[33]

OIP's new administrative rules regarding appeals to OIP are consistent with the new law allowing agency appeals to the courts and retain the informal nature of OIP proceedings. OIP's rules went into effect on December 31, 2012.[34]

This article will describe in greater detail the new agency appeals process and OIP's administrative rules. Part II explains the history of Hawaii's open government laws, the establishment of OIP, the original legislative intent concerning agencies' right to appeal under the UIPA, and the 2009 court case that led to the need for legislative clarification. Part III describes the 2012 legislative solution and details the new laws' provisions, while Part IV explains the new rules regarding appeals to OIP. Part V concludes the article.

II. HISTORY OF THE SUNSHINE LAW, UIPA, OIP, AND THE RIGHT TO APPEAL AN OIP DECISION

Enacted in 1975, Hawaii's Sunshine Law[35] governs the manner in which all state and county boards[36] must generally conduct their business at public

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[32] *Id.* § 92F-15(d).

[33] As an example of its training and advisory duties, OIP responded to over 937 inquires in fiscal year 2012, usually within the same day, under OIP's "attorney of the day" service. *See* Press Release, State of Hawaii Office of Info. Practices, OIP Reduces Case Backlog (July 19, 2012), *available at* http://oip.hawaii.gov/whats-new/oip-reduces-case-backlog/. OIP also provides various training materials and courses, *Training Materials Index*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, http://oip.hawaii.gov/training/ (last visited Sept. 29, 2013), and conducted twenty-five workshops and training sessions in fiscal year 2012 to educate people about Hawaii's open government laws. OIP ANNUAL REPORT 2012, *supra* note 26, at 46. Moreover, OIP is closely involved in Governor Neil Abercrombie's efforts to modernize the state's aged technological resources and make government more open and accessible, and is working with other agencies to post government data electronically at data.hawaii.gov, a centralized state website. *See* Press Release, State of Hawaii Office of Info. Practices, The State of Hawaii's Plan to Modernize its Medieval Tech Systems (Jan. 8, 2013), http://oimt.hawaii.gov/the-state-of-hawaiis-plan-to-modernize-its-medieval-tech-systems/.

[34] HAW. CODE R. §§ 2-73-1 to -20 (LexisNexis 2013).

[35] HAW. REV. STAT. §§ 92-1 to -13 (2012).

[36] *See id.* § 92-2(1) (defining "Board" in the Sunshine Law as "any agency, board, commission, authority, or committee of the State or its political subdivisions which is

meetings and requires, with few exceptions:[37] public notice of meetings;[38] public access to the board's discussions, deliberations, and decisions;[39] the opportunity for public testimony;[40] and written minutes of public meetings.[41] The intent of the law is to protect the people's right to know and to open up governmental processes to public scrutiny and participation by requiring state and county boards to conduct their business as openly as possible.[42]

When it was originally enacted, the Sunshine Law was administered by the state Attorney General's office.[43] OIP did not exist at that time, and it was not until 1998 that administration of the Sunshine Law was transferred to OIP.[44]

OIP was created in 1988,[45] with the enactment of the UIPA,[46] to ensure public access to government records, while balancing the right to privacy embodied in the Hawai'i constitution.[47] The conference committee report in 1988 described OIP as being:

> intended to serve initially as the agency which will coordinate and ensure implementation of the new records law. In the long run, however, the Office is intended to provide a place where the public can get assistance on records questions at no cost and within a reasonable amount of time.
>
> Provisions have been made in the bill to assure that the Office does not

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created by constitution, statute, rule, or executive order, to have supervision, control, jurisdiction or advisory power over specific matters and which is required to conduct meetings and to take official actions"); *see also* Office of Info. Practices, Sunshine Law Application to Vision Teams and Neighborhood Board Members' Attendance at Vision Team Meetings, Op. Letter. No. 01-01, at *3 (Apr. 9, 2001), *available at* http://files.hawaii.gov/oip/opinionletters/opinion%2001-01.pdf (concluding that neighborhood Vision Teams are "boards" subject to the Sunshine Law).

[37] *See* HAW. REV. STAT. § 92-5 (2012) (allowing closed meetings in special circumstances); *see also id.* § 92-2.5 (authorizing eight "permitted interactions" that allow discussions between board members outside of a meeting in specific circumstances).

[38] *Id.* § 92-7.

[39] *Id.* § 92-3.

[40] *Id.*

[41] *Id.* § 92-9.

[42] *Id.* § 92-1.

[43] *See* Fair Notice of Meeting Agenda Required—Copies of Minutes Required, 30 Haw. Op. Att'y. Gen. 85-2 (1985) (on file with the Hawai'i Attorney General's Library) (demonstrating that in 1985, the Attorney General administered the Sunshine Law).

[44] Act of June 24, 1998, No. 137, 1998 Haw. Sess. Laws 514.

[45] *Openline July 1998*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (July 1, 1998), http://oip.hawaii.gov/newsletter/openline-july-1998/.

[46] HAW. REV. STAT. § 92F-1 et. seq. (2012).

[47] *Id.* § 92F-2; *see also* HAW. CONST. art. I, § 6 ("The right of the people to privacy is recognized and shall not be infringed without the showing of a compelling state interest. The legislature shall take affirmative steps to implement this right.").

become a roadblock to access by ensuring that a direct right of appeal to the courts will exist at all times. The Office, therefore, will become an optional avenue of recourse which will increasingly prove its value to the citizens of this State as the law is implemented.[48]

The UIPA originally did not provide a right for an agency to appeal, and it only allowed members of the public to appeal directly to the courts when an agency refused access to government records.[49] With respect to judicial

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[48] H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818-19. In addition:

> The bill will provide clear recognition of both its primary goal of ensuring access to government records and the constitutional right of privacy which must clearly be considered in every appropriate case. The recognition of both factors is not intended to diminish the vitality of either but is simply intended as full notice of the competing consideration involved in these cases.

Id. at 817.

Before the UIPA's enactment, there were obvious conflicts between different statutes that had been written at different times for different purposes and without regard for each other: HRS Chapter 92 had set forth a broad public right of access to records while HRS Chapter 92E protected the privacy of individuals about whom information is kept and allowed that information to be corrected. VOL. I REPORT OF THE GOVERNOR'S COMMITTEE ON PUBLIC RECORDS AND PRIVACY 1-2 (Dec. 1987). At the recommendation of the committee appointed by then Governor John Waihe'e to review the existing law, solicit public comments, review alternatives and report on its work, *id.* at 3, the Legislature enacted the UIPA based on the model code, with modifications, recommended by the National Conference of Commissioners on Uniform State Laws. H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Standing Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 817. As enacted, the UIPA combined both the public records law and the privacy law into a new chapter, HRS Chapter 92F, and created OIP to administer the new law.

[49] *See* Act of June 9, 1988, No. 262, § 15, 1988 Haw. Sess. Laws 473, 477 (codified at HAW. REV. STAT. § 92F-15 (2012)), which provides:

> (a) A person aggrieved by a denial of access to a government record may bring an action against the agency at any time to compel disclosure.
>
> (b) In an action to compel disclosure the circuit court shall hear the matter de novo. Opinions and rulings of the office of information practices shall be admissible. The circuit court may examine the government record at issue, in camera, to assist in determining whether it, or any part of it, may be withheld.
>
> (c) The agency has the burden of proof to establish justification for nondisclosure.
>
> (d) If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation.
>
> (e) The circuit court in the judicial circuit in which the request for the record is made, where the requested record is maintained, or where the agency's headquarters are located shall have jurisdiction over an action brought under this section.
>
> (f) Except as to cases the circuit court considers of greater importance, proceedings before the court, as authorized by this section, and appeals therefrom, take precedence on the docket over all cases and shall be assigned for hearing and trial or for argument at the earliest practicable date and expedited in every way.

enforcement, the conference committee report noted the following:

> The bill will provide for immediate access to the courts when an agency refuses to release records. Section -15 provides for a de novo hearing, in camera review, attorneys fees and expenses, liberal venue provisions, and expedited review by the courts, and places the burden of proof on the agencies.
>
> In this regard, the intent of the Legislature is that exhaustion of administrative remedies shall not be required in any appeal of a refusal to disclose records. Any internal or administrative appeals structure which is established would be optional and an aggrieved party may proceed directly to court if the party chooses to do so.
>
> There is also a need to provide a remedy for those whose records are inappropriately disclosed. While this bill does not address this issue, except as to personal records, it is a subject for immediate attention at future sessions.[50]

In 1989, the law was amended to add to Hawai'i Revised Statutes ("HRS") section 92F-15(a), a two-year time period after agency denial for a member of the public to bring an action against the agency.[51] When the law was amended in 1989, the conference committee report noted as follows:

> Your Committee wishes to emphasize that while a person has a right to bring a civil action in circuit court to appeal a denial of access to a government record, a government agency dissatisfied with an administrative ruling by the OIP does not have the right to bring an action in circuit court to contest the OIP ruling. The legislative intent for expediency and uniformity in providing access to government records would be frustrated by agencies suing each other.[52]

Despite the lack of a statutory appeals process and the clear legislative intent to prohibit agencies from challenging OIP's decisions mandating the disclosure of records, the courts allowed an agency to challenge such an OIP opinion in *County of Kaua'i v. Office of Information Practices*.[53] In this first case brought directly against OIP to challenge a decision mandating disclosure of records, Kaua'i County sought to judicially overturn an OIP decision requiring executive committee minutes to be

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Id.

[50] H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818.

[51] Act of June 7, 1989, No. 192, § 3, 1989 Haw. Sess. Laws 366, 367.

[52] H.R.REP. No. 167, 15th Leg., Reg. Sess. (1989) (Conference Comm.), *reprinted in* 1989 HAW. HOUSE J. 843, 843.

[53] 120 Haw. 34, 43-44, 200 P.3d 403, 412-13 (App. 2009), *aff'd*, No. 29059, 2009 Haw. LEXIS 264 (Oct. 26, 2009).

disclosed under the UIPA.[54]

The case arose from a Sunshine Law complaint brought following the Kaua'i County Council's closed executive session meeting to discuss allegedly unethical activity of the Kaua'i Police Department.[55] In response, OIP opined on April 14, 2005 that, except for a limited portion of the discussion exempted by the attorney-client privilege, the matters considered by the Council during its executive session did not meet the Sunshine Law's limited exceptions for convening closed meetings.[56] The County requested reconsideration of OIP's decision and OIP's director responded that he was disinclined to reconsider. When the County made another request to argue its position and provided OIP with materials upon the condition that OIP make a "commitment of confidentiality" regarding them, OIP explained in a letter, dated June 17, 2005, that it would not agree to the condition in order to review the materials for reconsideration.[57]

In the meantime, the complainant and another person made a request under the UIPA to obtain copies of the board's executive committee minutes. On June 8, 2005, OIP demanded that the County release the executive session minutes to the requesters by the next day, but allowed the County to withhold from disclosure a portion of one page that was protected by the attorney-client privilege, pursuant to HRS section 92-5.[58]

On June 17, 2005, the County filed a complaint for declaratory relief against OIP in the circuit court, alleging that the court had jurisdiction pursuant to HRS sections 92-12 (Sunshine Law), 92F-13 (UIPA), 603-21.5 (declaratory judgments), and 632-1 (declaratory judgments).[59] OIP unsuccessfully sought to first dismiss the complaint and then to obtain summary judgment, arguing, among other things, that HRS section 92F-15.5(b) did not give the County any right to appeal an OIP decision mandating disclosure of a record and cited the UIPA's legislative history.[60] After the circuit court ordered the executive session minutes to be withheld pursuant to the Sunshine Law's exception for the attorney-client privilege,[61]

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[54] *Id.* at 38, 200 P.3d at 407.

[55] *Id.* at 36, 200 P.3d at 405.

[56] *Id.* at 37-38, 200 P.3d at 406-07.

[57] *Id.* at 38, 200 P.3d at 407.

[58] *Id.* The UIPA allows a closed meeting in order "[to] investigate proceedings regarding criminal misconduct[.]" HAW. REV. STAT. § 92-5(a)(5) (2012).

[59] *Cnty. of Kaua'i*, 120 Haw. at 38, 200 P.3d at 407.

[60] *Id.* at 38-39, 200 P.3d at 407-08.

[61] *Id.* at 36, 200 P.3d at 405. The court specifically cited a statute that allows closed meetings "[t]o consult with the board's attorney on questions and issues pertaining to the board's powers, duties, privileges, immunities, and liabilities. . . ." HAW. REV. STAT. § 92-5(a)(4) (2012).

OIP appealed to the Intermediate Court of Appeals ("ICA").[62]

On appeal to the ICA, OIP again vigorously argued that the County had no standing to contest OIP's determination mandating disclosure of the executive session minutes and was required by the UIPA to disclose the record.[63] The ICA, however, rejected this argument. The ICA reasoned that the UIPA and Sunshine Law should be interpreted *in pari materia* so as to construe them with reference to each other, while favoring the more specific law over a general statute covering the same subject matter in the event of a plainly irreconcilable conflict between the laws.[64] The ICA then concluded that the "plain language" of the Sunshine Law granting "any person," including the County, the unrestricted right to bring suit in the circuit court controlled over the more general UIPA, which did not address agency appeal rights.[65] Ultimately, the ICA held that the circuit court did not err in requiring that the executive session minutes be kept from disclosure because they were protected by the attorney-client privilege under the Sunshine Law.[66]

The practical effect of the 2009 ICA decision was to make irrelevant the UIPA's deliberate omission of an agency's right to appeal OIP's decisions and to eliminate OIP's authority as the *last word* when mandating an agency's release of records. By ignoring the UIPA's intentional omission of an agency's appeal right, the court essentially allowed agencies to appeal based on the type of record that OIP was requiring agencies to disclose. Because many UIPA cases typically seek the release of records created under the Sunshine Law, the court's reasoning in *County of Kaua'i* conceivably could have analogously rationalized agency appeals when the underlying record involved the interpretation of any number of laws allowing for an appellate procedure, such as the procurement law[67] or land use or planning law.[68] Moreover, while the court did not reach these issues, the declaratory judgment law[69] or the interpretation of the state or federal Constitutions, provide even stronger bases for appellate review of UIPA cases.

Thus, for the three years following the 2009 court decision, OIP issued only advisory opinions and carefully avoided rendering determinations mandating disclosure of records under the UIPA, to avoid becoming

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[62] *Cnty. of Kaua'i*, 120 Haw. at 35, 200 P.3d at 404.

[63] *Id.* at 43, 200 P.3d at 412.

[64] *Id.*

[65] *Id.* at 43-44, 200 P.3d at 412-13.

[66] *Id.* at 46, 200 P.3d at 415.

[67] *E.g.*, HAW. REV. STAT. § 103D-711 (2012).

[68] *E.g.*, *id.* § 205-6.

[69] *E.g.*, *id.* § 632-1.

embroiled in another agency appeal that would have tied up OIP's limited resources, increased its case backlog, and potentially resulted in further erosion of its authority through judicial rulings on the standard of review and other appellate issues.[70] Finally, in 2012, OIP sought and succeeded in obtaining legislative clarification of the agency appeals process and restoration of most of its authority.[71]

III. THE 2012 LEGISLATIVE SOLUTION: S.B. 2858

This part will begin with a brief summary of S.B. 2858's[72] legislative history before discussing in detail its major provisions.

A. Legislative History

Before the start of the 2012 legislative session, OIP worked hard to develop a reasonably balanced appeals proposal, to obtain the support of Governor Abercrombie and his administration, and to explain the proposal to various agencies,[73] community organizations,[74] the general public,[75] and legislators. OIP submitted its legislative proposal to the Governor in September 2011; after review by the Attorney General's office and the

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[70] *See* Press Release, The Raw Truth, *supra* note 19.

[71] *See infra* Part III.

[72] S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

[73] OIP provided drafts of its proposal to agencies in all branches of government, including the Governor's Office, Lieutenant Governor's Office, Attorney General's Office, Department of Budget and Finance, Office of Information Management and Technology, Hawai'i Tourism Authority, Boards and Commissions Office, Judiciary, and the Mayors and Councils of all four counties. Statements by Cheryl Kakazu Park, Director, Office of Info. Practices.

[74] OIP Director Cheryl Kakazu Park and staff attorney Jennifer Brooks explained OIP's legislative proposal at a meeting arranged on November 9, 2011, by Senator Les Ihara, Jr., with representatives of various community organizations, the media, and other agencies, including the Campaign Spending Commission, State Ethics Commission, Common Cause, League of Women Voters, Life of the Land, Americans for Democratic Action, Kanu Hawaii, AARP, Voter Owned Hawaii, Phocused Hawaii, and the Sierra Club. *Id.*

[75] From January through May 2012, OIP sent out eighteen What's New press releases, e-mails, and articles on its website to explain its legislative proposal and the progress of S.B. 2858 in the Legislature. *See Posts Made in 2012*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, http://oip.hawaii.gov/2012/page/5/?cat=4 (last visited Oct. 2, 2013). OIP's director also participated in two radio interviews with Beth Ann Koslovich of Hawaii Public Radio on February 23, 2012, and April 6, 2012, to discuss OIP's legislative proposals. *OIP Interview on Hawaii Public Radio*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Feb. 27, 2012), http://oip.hawaii.gov/whats-new/oip-interview-on-hawaii-public-radio/; *HPR Interview Regarding OIP's Bills*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Apr. 10, 2012), http://oip.hawaii.gov/whats-new/hpr-interview-regarding-oips-bills/.

Department of Budget and Finance and a meeting with the Governor and his staff, OIP's unamended proposal was approved by the Governor to be included in his administration's package.

The proposal was introduced in January 2012 as Senate Bill 2858, and referred to the Senate Judiciary and Labor Committee ("JDL") chaired by Senator Clayton Hee.[76] Following the JDL hearing and an amendment to set a thirty day time limit for agency appeals, S.B. 2858, S.D. 1 was passed by the Senate.[77]

In the House, the bill was referred first to the Judiciary Committee ("JUD") chaired by Representative Gilbert Keith-Agaran, which amended the bill to prohibit an agency challenge to an OIP decision if the agency failed to timely appeal.[78] The bill was then referred to the Finance Committee ("FIN") chaired by Representative Marcus Oshiro, which inserted a July 1, 2030 effective date to ensure that it would go into conference.[79] Following the House Committee hearings and amendments, S.B. 2858, S.D. 1, H.D. 2 was passed by the House of Representatives.[80]

The differences between the Senate and House drafts were ultimately resolved in a conference committee chaired by Senator Hee for the Senate and Representatives Keith-Agaran and Sharon Har as co-chairs for the House.[81] The bill passed final reading of both the House and Senate on

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[76] S.B. 2858 Status Archive, HAWAII STATE LEGISLATURE, http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=SB&billnumber=2858&year=2012 (last visited Oct. 2, 2013) [hereinafter S.B. 2858 Status Archive]. An identical bill was introduced in the House of Representatives as House Bill 2596 and was first referred to the House Judiciary Committee ("JUD") chaired by Representative Gilbert Keith-Agaran, with a subsequent referral to the Finance Committee ("FIN") chaired by Representative Marcus Oshiro. *See* H.B. 2956 Status Archive, HAWAII STATE LEGISLATURE, http://www.capitol.hawaii.gov/Archives/measure_indiv_Archives.aspx?billtype=HB&billnumber=2596&year=2012; H.B. 2596, 26th Leg., Reg. Sess. (Haw. 2012). After hearing H.B. 2596 on February 10, 2012, the House Judiciary Committee decided to defer further action on the bill in favor of working with the Senate companion bill, S.B. 2858, which, at that point, had been amended and unanimously reported out of the Senate Judiciary and Labor Committee on February 7, 2012. *OIP Bills Advancing*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Feb. 15, 2012), http://oip.hawaii.gov/whats-new/oip-bills-advancing/; *OIP's Bills' Status*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Feb. 7, 2012), http://oip.hawaii.gov/whats-new/oips-bills-status/.

[77] *See* S. REP. NO. 2457, 26th Leg., Reg. Sess. (2012) (Standing Comm.), *reprinted in* 2012 HAW. SEN. J. 1319, 1319.

[78] H.R.REP. NO. 1216-12, 26th Leg., Reg. Sess. (2012) (Standing Comm.), *reprinted in* 2012 HAW. HOUSE J. 1404, 1404.

[79] H.R.REP. NO. 1591-12, 26th Leg., Reg. Sess. (2012) (Standing Comm.), *reprinted in* 2012 HAW. HOUSE J. 1529, 1529.

[80] S.B. 2858, S.D.1, H.D.2, 26th Leg., Reg. Sess. (Haw. 2012).

[81] S. REP. NO. 2457, 26th Leg., Reg. Sess. (2012) (Standing Comm.), *reprinted in* 2012 HAW. SEN. J. 1319, 1319.

May 1, 2012.[82] It was signed by Governor Neil Abercrombie on June 28, 2012, as Act 176, SLH 2012, and went into effect on January 1, 2013.[83]

The final version of S.B. 2858[84] added a couple of important provisions, but otherwise differed little in substance from the original proposal. The major provisions of the final bill are briefly summarized below.

First, S.B. 2858 added a new section to Part IV of HRS Chapter 92F and amended other parts of the UIPA and the Sunshine Law to create a uniform process for an agency to obtain judicial review of OIP's decisions, without requiring OIP or a member of the public affected by OIP's decision to participate as parties in an appeal by an agency, unless they wish to exercise their right to intervene.[85]

Second, S.B. 2858 applied a "palpably erroneous" standard of judicial review in agency appeals and clarified that de novo review of an OIP opinion only applies where a requester appeals to the court after OIP upholds the agency's denial of access.[86] In other actions under the Sunshine Law or UIPA, OIP's opinions are admissible and are precedential, unless determined to be "palpably erroneous."[87]

Third, S.B. 2858 limited the record on appeal to what was presented to OIP, except in "extraordinary circumstances."[88]

Fourth, S.B. 2858 required an agency to appeal within thirty days of the date of the decision and if the agency fails to do so, prohibits the agency from challenging an OIP decision requiring disclosure of records under the UIPA.[89]

Finally, S.B. 2858 added miscellaneous provisions for the purposes of clarity.[90] These new provisions are discussed in detail as follows.

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[82] S.B. 2858 Status Archive, *supra* note 76.

[83] Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. § 92 to 92F (2012)).

[84] Unless specifically identified otherwise, "S.B. 2858" will refer to the final version of the bill, S.B. 2858, S.D. 1, H.D. 2, C.D. 1, 26th Leg., Reg. Sess. (Haw. 2012). Full copies of the bill in its various drafts are available at the legislative website. S.B. 2858 Status Archive, *supra* note 76.

[85] Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. § 92-92F (2012)).

[86] *Id.* §§ 4(b), 5(b).

[87] *Id.* § 1(c).

[88] *Id.*

[89] *Id.* § 1(a).

[90] *See, e.g.*, *id.* § 3(d) ("Opinions and rulings of the [OIP] shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous.").

B. Discussion of S.B. 2858's Provisions

1. Under the new law allowing an agency to seek judicial review of OIP's UIPA and Sunshine Law decisions, OIP and the requester may intervene, but are not necessary parties to the appeal

By adding section 92F-43 to the HRS, S.B. 2858 granted agencies the right to seek judicial review of an OIP decision made under the UIPA or Sunshine Law, but specifically "provided that the office of information practices and the person who requested the decision shall not be required to participate in the proceeding . . . ."[91] As explained in the Justification Sheet prepared by OIP and attached to S.B. 2858 as introduced, "the proposed bill seeks to create a uniform procedure applicable to both the UIPA and the Sunshine Law that would strictly define and limit agencies' right to appeal OIP opinions without requiring OIP's appearance in the appeal."[92]

The Justification Sheet also noted that "[t]his bill will not force members

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[91] HAW. REV. STAT. § 92F-43(b) (2012). The original bill stated, "provided that neither the office of information practices nor the person who requested the decision shall be required to participate in the proceeding[.]" S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

[92] *See* Justification Sheet, *supra* note 20. Although the Report Title and Description on the page preceding the Justification Sheet contains a disclaimer stating that "[t]he summary description of legislation appearing on this page is for informational purposes only and is not legislation or evidence of legislative intent," the Justification Sheet itself, written on different pages, is a separate document. *Id.* In the case of S.B. 2858, the Justification Sheet should be considered especially strong evidence of legislative intent because the final version of the bill did not delete major provisions or substantively alter the original proposal, and instead added a couple of key provisions. *Compare* the original bill, S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012), *with* the final bill, S.B. 2858, S.D.1, H.D.2, C.D.1, 26th Leg., Reg. Sess. (Haw. 2012). Moreover, since the original bill and Justification Sheet were prepared by OIP, OIP's legislative testimony and website articles concerning S.B. 2858 should be accorded persuasive weight and credibility in determining legislative intent. *See* 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 48:5 (7th ed. 2007) (noting that messages from the executive or members of the executive branch to the legislature urging passage of certain legislation may be used as an aid to statutory interpretation); *see also id.* § 48:12 (stating that "[c]ommentaries of persons intimately involved with drafting of legislation are entitled to weight in interpretation of a statute[,]" particularly where the drafter's views were "clearly and prominently communicated to the legislature when the bill was being considered for enactment . . . ."). Finally, great weight and credence should be accorded to the comments on the final bill made by the Senate and House Judiciary chairs in their respective chamber's Journal, which closely track each other's comments, the information provided in S.B. 2858's Justification Sheet, and OIP's testimony. *See id.* § 48:14 (stating that floor statements by the member in charge of a standing committee that reported out a bill "may be taken as the opinion of the committee about the meaning of the bill" and thus are generally accorded the "same weight as formal committee reports").

of the public to go to court to defend an agency's appeal of an OIP opinion. Members of the public will remain entitled to de novo review when challenging an opinion from OIP upholding an agency's denial of access to a record."[93] Elsewhere, the Justification Sheet noted that this bill would give agencies the right to challenge an OIP opinion without requiring OIP's involvement in the appeal and stated as follows:

> Just as a judge is not required to appear on appeal to defend his or her decision, this bill will relieve OIP of the need to go to court to defend its prior opinions. The proposed appeal process will not require either OIP or the requester to participate in the judicial review proceeding. The deferential review standard provided for, together with the general limitation of confining the court's review to the record before OIP, will allow a court to render its decision essentially on the pleadings.[94]

Although the bill requires agencies to give OIP and the requester notice of the appeal and unambiguously grants them the right to intervene in an agency appeal, agencies have not been made necessary parties to the action.[95] The Justification Sheet made clear that the appeal would be "against the decision itself, rather than against either OIP or the member of the public who originally requested the opinion."[96] Therefore, an agency cannot win its appeal simply by default if OIP or the requester fails to appear in the action.[97]

Like the Justification Sheet[98] and OIP's testimony,[99] both the Senate and House Judiciary committee chairs agreed in their comments on the final bill that the new law "does not require OIP or the person who requested the decision to appear in court as parties to the appeal."[100]

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[93] Justification Sheet, *supra* note 20.

[94] *Id.*

[95] The new section 92F-43(b) states that:

> The agency shall give notice of the complaint to the office of information practices and the person who requested the decision for which the agency seeks judicial review by serving a copy of the complaint on each . . . . The office of information practices or the person who requested the decision may intervene in the proceeding.

HAW. REV. STAT. § 92F-43(b) (2012). With minor differences, the same language was found in the original S.B. 2858. *See* S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

[96] Justification Sheet, *supra* note 20.

[97] *See A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Finance*, 26th Leg., Reg. Sess. 3 (Haw. 2012) (testimony of Cheryl Kakazu Park, Director, Office of Information Practices), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_HD1_TESTIMONY_FIN_03-30-12_3_.pdf [hereinafter Park Testimony].

[98] *See* Justification Sheet, *supra* note 20.

[99] *See* Park Testimony, *supra* note 97, at 3.

[100] H.R.REP. No. 105-12, 26th Leg., Reg. Sess. (2012) (Conference Comm.), *reprinted in*

Some opponents of the bill argued that the agencies should not be granted the right to appeal because, when the Legislature adopted the UIPA, it had intentionally omitted such a right, and the opponents sought to reinforce the original legislative intent to make OIP's UIPA decisions absolutely unreviewable by the courts with respect to agency challenges.[101] While agreeing that it was the original legislative intent to not allow agency appeals, OIP did not agree that the opponents' proposal would have a realistic chance of succeeding without resulting in more adverse, unintended consequences.[102] OIP had already seen how its reliance on the UIPA's legislative intent could not prevent judicial appeals by agencies and believed that it would be extremely unlikely that a total ban on appeals would be upheld by the courts in all circumstances, including when constitutional rights were being asserted or challenged.[103] OIP also wanted to ensure a uniform appellate process for OIP decisions, as UIPA cases may also involve Sunshine Law issues, and OIP did not want appellate rights and procedures to depend on which law was being invoked.[104] More importantly, OIP believed that the opponents' proposal seeking absolute power for OIP would have undoubtedly been counterbalanced by the Legislature with severe limitations similar to judicial or contested case procedures,[105] which would only serve to contradict the original design of OIP to be "a place where the public can get assistance on records questions at no cost and within a reasonable amount of time"[106] and could have resulted in the repeal of OIP's express exemption from contested case proceedings.[107] Finally, OIP recognized that given the state's severe fiscal

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2012 HAW. HOUSE J., 823, 825 (written remarks of Rep. Gilbert S. C. Keith-Agaran, House Judiciary Chair).

[101] *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Finance*, 26th Leg., Gen. Sess. (Haw. 2012) (testimony submitted by Beverly Ann Deepe Keever, Professor Emerita, University of Hawai'i), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_HD1_TESTIMONY_FIN_03-30-12_3_.pdf.

[102] *See OIP's Bills are Passed*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (May 1, 2012), https://oip.hawaii.gov/whats-new/oips-bills-are-passed/ [hereinafter *OIP's Bills are Passed*].

[103] *See id. See also supra* Part II (discussing the ICA's holding in *Cnty. of Kaua'i*, 120 Haw. 34, 200 P.3d 403 (App. 2009), *aff'd*, No. 29059, 2009 Haw. LEXIS 264 (Oct. 26, 2009)).

[104] *See A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Finance*, 26th Leg., Reg. Sess. 3 (Haw. 2012) (testimony of Cheryl Kakazu Park, Director, Office of Information Practices), available at http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_HD1_TESTIMONY_FIN_03-30-12_3_.pdf.

[105] *See OIP's Bills Are Passed, supra* note 102.

[106] H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818.

[107] *See* HAW. REV. STAT. § 92F-42(1) (2012) ("any review by [OIP] shall not be a

constraints, a significant expansion of OIP's staffing and resources was highly unlikely, so that the office would not be able to resolve disputes expeditiously and effectively if required to operate under contested case procedures while still performing its numerous other advisory and training duties.[108]

For OIP, having absolute power was less important than remaining a "free, expeditious, and simple alternative body to the courts" that could easily resolve disputes between the public and agencies without burdening the parties or OIP with expensive and complicated contested case proceedings.[109] Thus, OIP was willing to recognize a new right to appeal by agencies, in exchange for strict limitations on that right and a strong standard of review requiring the courts' deference to OIP's factual and legal determinations under the UIPA and Sunshine Law.

2. *Palpably erroneous standard of judicial review applies to agency appeals and de novo standard is limited to appeals by requesters*

A highly deferential "palpably erroneous" standard of judicial review for agency appeals is mandated in S.B. 2858.[110] The new section 92F-43 states unambiguously that "[t]he circuit court shall uphold a decision of the office of information practices, unless the circuit court concludes that the decision was palpably erroneous."[111] The UIPA was also amended at HRS section 92F-15(b) to state that "[o]pinions and rulings of the office of information practices shall be admissible and shall be considered as precedent unless found to be palpably erroneous[.]"[112] Additionally, the Sunshine Law was amended to state that "[o]pinions and rulings of the office of information practices shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous."[113]

The Justification Sheet distinguished the palpably erroneous standard applied by the ICA for review of OIP's Sunshine Law decisions in *Right to*

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contested case under chapter 91 . . . .").

[108] *OIP's Bills Are Passed*, *supra* note 102.

[109] *Id.*

[110] S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

[111] HAW. REV. STAT. § 92F-43(c) (2012). The final bill substantively tracked the original proposal, which provided that "[t]he circuit court shall uphold a decision of the office of information practices unless it concludes that the decision was palpably erroneous." S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

[112] HAW. REV. STAT. § 92F-15(b) (2012). The further proviso distinguishing the "palpably erroneous" standard in agency appeals from the de novo standard applicable to requesters' appeals is discussed *infra* notes 120-124 and accompanying text.

[113] *Id.* § 92-12(d).

Know Committee v. City Council[114] from the abuse of discretion standard addressed in *'Olelo v. Office of Information Practices*[115] by the Hawai'i Supreme Court in dicta.[116] As the Justification Sheet explained, the palpably erroneous standard requires:

> deference to OIP's statutory interpretations of provisions of the Sunshine Law or UIPA, in addition to OIP's factual determinations or mixed determinations of fact and law, whereas the abuse of discretion standard would require deference only as to factual or mixed factual and legal determinations. The "palpably erroneous" standard will give greater clarity to the agencies and members of the public who seek OIP's opinion on how Sunshine Law or UIPA provisions apply or are interpreted in particular situations, because the OIP opinions thus obtained will carry greater precedential weight.[117]

The Legislature ultimately adopted S.B. 2858 with its palpably erroneous standard,[118] which requires the courts to defer to OIP's legal, factual, and mixed factual and legal determinations.

In contrast to the new agency's right to appeal created by S.B. 2858, previously existing law allows members of the public to directly appeal to the court when an agency refuses to disclose a record[119] and requires that "[i]n an action to compel disclosure, the circuit court shall hear the matter de novo[.]"[120] To avoid confusion as to the effect of the palpably erroneous standard applicable to agency appeals under the new judicial review process, S.B. 2858 clearly distinguished it from the de novo standard applicable to requester's appeals. As the Justification Sheet explained,

> the bill would further clarify that de novo review only applies in a requester's (not an agency's) appeal to court after an OIP decision upholding the agency's denial of access, and the de novo standard does not apply to other OIP decisions that may be considered by the court in the course of that appeal.[121]

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[114] 117 Haw. 1, 13, 175 P.3d 111, 123 (App. 2007).

[115] 116 Haw. 337, 346, 173 P.3d 484, 493 (2007).

[116] Justification Sheet, *supra* note 20.

[117] *Id.*

[118] Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. §§ 92 to 92F (2012)).

[119] HAW. REV. STAT. § 92F-27(a) (2012) ("An individual may bring a civil action against an agency in a circuit court of the State whenever an agency fails to comply with any provision of this part, and after appropriate administrative remedies under sections 92F-23, 92F-24, and 92F-25 have been exhausted."). Sections 92F-23 to 92F-25 refer to the procedures to gain access to and correct personal records, as distinguished from other general public records. *See id.* §§ 92F-23 to -25.

[120] HAW. REV. STAT. § 92F-15(b).

[121] Justification Sheet, *supra* note 20. The final bill made grammatical, nonsubstantive

Thus, the new law now clearly limits de novo review to "an action to compel disclosure brought by an aggrieved person after the office of information practices upheld the agency's denial of access to the person as provided in section 92F-15.5(b) . . . ."[122]

Additionally, in considering the precedential value of OIP's prior opinions, a new subsection (b) in HRS section 92F-27 specifically requires that OIP's opinions and rulings "shall be admissible and shall be considered as precedent unless found to be palpably erroneous . . . ."[123] The new law distinguishes OIP's prior case precedents, which are subject to the palpably erroneous standard, from the actual opinion or ruling challenged in an appeal by a member of the public, which is subject to the de novo standard, as the law further clarifies that "the opinion or ruling upholding the agency's denial of access to the aggrieved person shall be reviewed de novo."[124]

During the legislative hearings, S.B. 2858 was opposed by representatives of three of Hawaii's four counties, who generally argued that the bill gave OIP too much power and attacked the "palpably erroneous" standard of review.[125] Two Maui council members opposed the bill, arguing that OIP is an Oahu-based State agency and not a court and that "OIP's opinion should not be given the weight provided by this bill[]"[126] as it "would have the effect of making the Sunshine Law even more burdensome than it already is."[127] One Maui councilmember added

changes to this language. *See* Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. §§ 92-92F (2012)).

[122] HAW. REV. STAT. § 92F-15(b). Notably, the final language of S.B. 2858 was the same as the original proposal, except that a proviso was added to eliminate an agency's right to challenge an OIP decision if the agency failed to appeal within the specified time period. *Cf.* S.B. 2858, 26th Leg., Reg. Sess. (Haw. 2012).

[123] HAW. REV. STAT. § 92F-27(b).

[124] *Id.*

[125] *See A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statements of Danny A. Mateo, Council Chair, City Council, County of Maui; Alfred B. Castillo, Jr., County Attorney, Office of the County Attorney, County of Kauai; and Douglas S. Chin, Managing Director, Office of the Mayor, City and County of Honolulu), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf. The County of Hawai'i did not submit any testimony in support of or in opposition to S.B. 2858.

[126] *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement of Danny A. Mateo, Council Chair, City Council, County of Maui; and concurring written statement of Joseph Pontanilla, Vice Chair, City Council, County of Maui), *available at* http://www.capitol.hawaii.gov/session2012/testimony/sb2858_testimony_jdl_02-02-12.pdf.

[127] *Id.*

that the bill "would establish OIP as a 'judge and jury' . . . [with] the authority to render opinions of law and to adjudicate challenges to these opinions."[128] The Kaua'i County Attorney opposed establishing OIP's opinions and rulings as precedent and contended that the palpably erroneous standard is vague and potentially ambiguous in application.[129] Similarly, the Honolulu Mayor's Office opposed the bill because it allegedly

> would give OIP's opinion undue weight and deference in agency appeals. It creates a new review standard whereby the Court would have to uphold an OIP opinion unless the agency can demonstrate that it was "palpably erroneous." This is in contrast to the abuse of discretion standard that is used to review actions of all other agencies as required under HRS section 91-14(g).[130]

The Legislature, however, rejected these attempts to dilute the standard of review and weaken OIP's authority to determine issues regarding the UIPA and Sunshine Law. In accord with the Justification Sheet and OIP's testimony, Representative Keith-Agaran, with similar comments by Senator Hee, commented on the final bill as follows:

> While the bill now gives agencies the right to judicially challenge OIP's decisions, it also sets a strong standard of review that would accord a presumption of validity and require the courts' deference to OIP's factual and legal determinations concerning the administration and interpretation of the UIPA and Sunshine Law, unless such determinations are "palpably erroneous" and result in a definite and firm conviction that a mistake has been made. *See, e.g.*, *Right to Know Committee v. City Council*, 117 Haw. 1, 175 P.3d 111 (2007); *Aio v. Hamada*, 66 Haw. 401, 664 P.2d 727 (1983). The bill further clarifies that the de novo standard of review referenced in HRS Sec. 92F-15(b) applies only to judicial appeals brought by the general public, and

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[128] *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the Sen. Comm. on Judiciary and Labor*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement of Riki Hokama, Member, City Council, County of Maui), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_TESTIMONY_JDL_02-02-12_LATE.pdf.

[129] *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement of Alfred B. Castillo, Jr., County Attorney, Office of the County Attorney, County of Kaua'i), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf.

[130] *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the Sen. Comm. On Judiciary and Labor*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement of Douglas S. Chin, Managing Director, Office of the Mayor, City and County of Honolulu), *available at* http://www.capitol.hawaii.gov/session2012/testimony/sb2858_testimony_jdl_02-02-12_late.pdf.

that agencies' appeals are instead subject to the higher "palpably erroneous" standard. The bill does not affect the standard to be applied by the courts in reviewing OIP decisions with respect to constitutional issues or other matters beyond OIP's sphere of expertise regarding the UIPA and Sunshine Law.[131]

Thus, the plain language of the bill and its legislative intent firmly establish that in agency appeals, the palpably erroneous standard of review is to be applied to OIP's legal, factual, and mixed factual and legal determinations under the UIPA and Sunshine Law and that the challenged OIP decision shall not be overturned unless there is a definite and firm conviction that a mistake has been made. The same palpably erroneous standard must also be applied to review OIP's precedential decisions that are not being directly appealed. The de novo standard of review is only applicable to the OIP opinion being appealed in a court action brought by a requester challenging an OIP opinion upholding the agency's denial of access to a record sought by that person. The new law does not address the standard of review in cases not involving the UIPA or Sunshine Law, such as constitutional issues, as they are beyond OIP's jurisdiction.

In its first Sunshine Law ruling since 1993,[132] the Hawai'i Supreme Court applied the palpably erroneous standard in its unanimous decision in *Kanahele v. Maui County Council*,[133] which was issued on August 8, 2013. Although an OIP decision was not being directly challenged in *Kanahele*, the court cited seven OIP opinions[134] and viewed them under the palpably erroneous standard found in the new law[135] to determine whether the Sunshine Law had been violated by the repeated continuances of public hearings and by emails distributed by and between Maui

[131] H.R.REP. NO. 105-12, 26th Leg., Reg. Sess. (2012) (Conference Comm.), reprinted in 2012 HAW. HOUSE J. 823, 824-25 (written remarks of Representative Gilbert Keith-Agaran). Nearly identical comments, with minor non-substantive changes, were included in the Senate Journal by Senator Clayton Hee. *See* 2012 HAW. SEN. J. 663-64 (comments of Senator Clayton Hee on S.B. 2858, S.D. 1, H.D.2., C.D. 1).

[132] Kaapu v. Aloha Tower Dev. Corp., 74 Haw. 365, 846 P.2d 882 (1993).

[133] Kanahele v. Maui Cnty. Council, 130 Haw. 228, 307 P.3d 1174 (2013).

[134] The court cited the following OIP formal opinions: Haw. OIP Op. Ltr. No. 01—06, 2001 WL 1876821, at *5 (Dec. 31, 2001); Haw. OIP Op. Ltr. No. 04—01, 2004 WL 232019, at *1 (Jan. 13, 2004); Haw. OIP Op. Ltr. No. 04—04, 2004 WL 409087, at *1 (Feb. 20, 2004); Haw. OIP Op. Ltr. No. 05–015, 2005 WL 2214087, at *2 (Aug. 4, 2005); Haw. OIP Op. Ltr. No. 06–02, 2006 WL 1308299, at *1 (Apr. 28, 2006); Haw. OIP Op. Ltr. No. 06–05, 2006 WL 2103475, at *4 (Jul. 19, 2006); Haw. OIP Op. Ltr. No. 07–02, 2007 WL 550326, at *2 (Feb. 2, 2007). *Kanahele*, 130 Haw. at 246-58, 307 P.3d at 1192-1204. As support for the palpably erroneous standard, the court also cited its decision in *Gillan v. Gov't Emps. Ins. Co.*, 119 Haw. 109, 119, 194 P.3d 1071, 1081 (2008), and the ICA Sunshine Law decision in *Right to Know Comm. v. City Council, City & Cnty. of Honolulu*, 117 Haw. 1, 13, 175 P.3d 111, 123 (App. 2007). *Id.* at 244-45, 307 P.3d at 1190-91.

[135] HAW. REV. STAT. § 92-1.5 (2012).

councilmembers.[136] After recognizing that that OIP is the agency charged with the responsibility of administering the Sunshine Law, the court went on to state that OIP's "opinions are entitled to deference so long as they are consistent with the legislative intent of the statute and are not palpably erroneous."[137] Ultimately, "based on the OIP's construction of the Sunshine Law as well as the legislative history of the statute,"[138] the court concluded that Sunshine Law had not been violated by the repeated continuances of meetings.[139] Consistent with OIP's opinions cited in the *Kanahele* decision, the court further ruled that the Maui councilmembers had violated the Sunshine Law by distributing written memoranda among themselves outside of a duly noticed meeting.[140] The *Kanahele* decision thus makes it reasonably certain that the courts will apply the palpably erroneous standard in reviewing OIP's decisions interpreting the Sunshine Law and the UIPA.

3. *Record on appeal is limited to record presented to OIP*

As for the facts of a case, the new law requires OIP, within thirty days of service of a complaint in an agency's appeal, to file in the circuit court a certified copy of the record that it compiled to make its decision and to mail a copy of the record index to the agency.[141] The law further provides that "[t]he circuit court's review shall be limited to the record that was before the office of information practices when it rendered the decision, unless the circuit court finds that extraordinary circumstances justify discovery and admission of additional evidence."[142] The Justification Sheet explained that "[t]he deferential review standard provided for, together with the general limitation of confining the court's review to the record before OIP, will allow a court to render its decision essentially on the pleadings."[143] Limiting the record on appeal in this manner also forces the agency to present its best case to OIP, rather than withholding facts and arguments to be made before a court in a subsequent appeal. As the House Judiciary

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[136] *See Kanahele*, 130 Haw. at 243-48, 307 P.3d at 1189-94. *See also Supreme Court Issues Sunshine Law Opinion*, STATE OF HAWAII OFFICE OF INFO. PRACTICES (Aug. 12, 2013), http://oip.hawaii.gov/whats-new/supreme-court-issues-sunshine-law-opinion/ (summarizing the *Kanahele* decision).

[137] *Kanahele*, 130 Haw. at 245, 307 P.3d at 1191.

[138] *Id.* at 248, 307 P.3d at 1194.

[139] *Id.* at 260, 307 P.3d at 1206.

[140] *Id.*

[141] HAW. REV. STAT. § 92F-43(c) (2012).

[142] *Id.*

[143] Justification Sheet, *supra* note 20, at 4.

Chair Representative Keith-Agaran noted in the House Journal:

> As is typical in appeals from administrative decisions, this bill limits the record in an agency appeal to what was presented to OIP when it rendered its decision, thus requiring an agency to present its best case to OIP and not rely upon having a second chance to present new evidence in a judicial appeal. Only in extraordinary circumstances would the circuit court allow discovery and admission of additional evidence during an appeal from an OIP decision.[144]

In opposing the bill, the Honolulu Mayor's Office had argued that limiting the record on appeal was "problematic" because OIP had no administrative rules covering agency appeals.[145] As the City's Managing Director argued:

> OIP does not have any rules or procedures for agencies to submit evidence, facts, or arguments in support of their positions. As a result, what the parties submit, and what OIP considers, for purposes of an OIP advisory opinion is too random and unreliable to serve as an exclusive record . . . .
>
> Before an agency can be bound by an OIP opinion, and before an agency's right to appeal can be restricted, there must be an established procedure whereby agencies are afforded an opportunity to present information and argument in support of their position. Rather than legislate deference to OIP advisory opinions in an appeal to Circuit Court, we believe the proper course would be for OIP to promulgate rules for a fair and equal administrative process whereby both individuals and agencies are allowed to present information and argument to OIP.[146]

Requiring rules to be in place before the law was enacted, as desired by the City, would have been placing the proverbial cart before the horse. Moreover, except for identifying the items that will be provided to the circuit court as the record on appeal, OIP's new rules are not necessary to implement the new law. Nevertheless, anticipating the need for administrative rules to govern appeals to OIP before they are decided and become eligible to be appealed to the court, OIP proposed an effective date of January 1, 2013 for S.B. 2858.[147] Immediately after S.B. 2858 was

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[144] H.R.REP. NO. 105-12, 26th Leg., Reg. Sess. (2012) (Conference Comm.), *reprinted in* 2012 HAW. HOUSE J., 823, 825 (written remarks of Representative Gilbert Keith-Agaran).

[145] *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statements of Douglas S. Chin, Managing Director, Office of the Mayor, City and County of Honolulu), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf.

[146] *Id.*

[147] Justification Sheet, *supra* note 20; *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written

passed with this effective date, OIP reviewed appeals rules that it had previously drafted and revised the rules to conform to the new law. Upon completing the Chapter 91 rule-making process, OIP's administrative rules were adopted and went into effect on December 31, 2012.[148] These rules are explained in detail in the last part of this article.

4. "Fish or Cut Bait"—Thirty days for agency appeals, or agency is prevented from challenging an OIP decision requiring record disclosure under the UIPA

As requested by the League of Women Voters ("League"), the Senate Judiciary Committee added a thirty-day time limit for an agency to appeal an OIP decision.[149] At the League's further request, the House Judiciary Committee added a provision preventing an agency, which has not timely appealed, from challenging an OIP decision mandating disclosure, if an action to compel disclosure is later brought by a member of the public.[150] Consequently, the final version of S.B. 2858 provides in the new section 92F-43(a) as follows: "Within thirty days of the date of the decision, an agency may seek judicial review of a final decision rendered by the office of information practices under this chapter or part I of chapter 92, by filing a complaint to initiate a special proceeding in the circuit court . . . ."[151]

Additionally, the section providing for judicial enforcement of the UIPA by members of the public, HRS section 92F-15(b), was amended to read as follows:

> In an action to compel disclosure, the circuit court shall hear the matter de novo; provided that if the action to compel disclosure is brought because an agency has not made a record available as required by section 92F-15.5(b) after the office of information practices has made a decision to disclose the record and the agency has not appealed that decision within the time period provided by section 92F-43, the decision of the office of information practices shall not be subject to challenge by the agency in the action to compel

statements by Cheryl Kakazu Park, Director of OIP), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf.

[148] HAW. CODE R. §§ 2-73-1 to -20 (LexisNexis 2013).

[149] S.B. 2858, S.D. 1, 26th Leg., Reg. Sess. (Haw. 2012); *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the Sen. Comm. on Judiciary and Labor*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement by the League of Women Voters), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_TESTIMONY_JDL_02-02-12_LATE.pdf.

[150] *Id.*

[151] HAW. REV. STAT. § 92F-43(a) (2012).

disclosure.[152]

The League requested this last provision to reduce the "risk of having to fight a belated agency challenge to the OIP decision."[153] This new provision requires the agency to proverbially "fish or cut bait," as it must timely file an appeal or no longer be able to challenge OIP's decision in an enforcement action subsequently brought by a member of the public. As noted by the House Judiciary Chair, "[t]his provision thus encourages agencies to take timely action, and it discourages agencies from simply ignoring an OIP decision and indefinitely refusing to disclose a record that OIP has determined should be disclosed under the UIPA."[154] Moreover, because the agency would not be able to challenge the OIP decision if it failed to timely appeal, the member of the public seeking to enforce the decision would have a better chance of prevailing and being awarded attorney fees and costs.[155]

Neither the "fish or cut bait" nor any similar provision was added to the Sunshine Law, as that law differs from the UIPA with respect to OIP's authority to impose remedies upon a finding of violation and the potential remedies available. Under the UIPA, OIP simply decides whether or not a record must be disclosed by an agency and if OIP mandates the disclosure of public records by an agency, then the UIPA specifically provides that "the agency shall make the record available."[156] OIP has no enforcement powers nor can it seek court assistance to compel disclosure.[157] Therefore, if the agency fails to disclose a record as mandated by OIP, it is left to the requester whose record request was denied to seek judicial enforcement under HRS section 92F-15.[158]

Under the Sunshine Law, however, OIP could find any number of potential violations, for which there could be various temporary or

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[152] *Id.* § 92F-15(b).

[153] *A Bill for an Act Relating to Open Gov't: Hearing on S.B. 2858 Before the H. Comm. on Judiciary*, 26th Leg., Reg. Sess. (Haw. 2012) (written statement by the League of Women Voters), *available at* http://www.capitol.hawaii.gov/session2012/Testimony/SB2858_SD1_TESTIMONY_JUD_03-16-12_.pdf.

[154] H.R.REP. NO. 105-12, 26th Leg., Reg. Sess. (2012) (Conference Comm.), *reprinted in* 2012 HAW. HOUSE J., 823, 825 (written remarks of Representative Gilbert Keith-Agaran).

[155] *See* HAW. REV. STAT. § 92F-15(d) ("If the complainant prevails in an action brought under this section, the court shall assess against the agency reasonable attorney's fees and all other expenses reasonably incurred in the litigation.").

[156] *Id.* § 92F-15.5(b).

[157] 'Ōlelo: The Corp. for Cmty. Television v. Office of Info. Practices, 116 Haw. 337, 346 n.2, 173 P.3d 484, 493 n.2 (2007).

[158] HAW. REV. STAT. § 92F-15(a) allows the requester to bring an action against an agency that denies access to a record, with or without an OIP decision.

permanent remedies that OIP is not authorized to impose.[159] Rather, those remedies must be ordered by the court in enforcement actions to be brought by the attorney general or prosecuting attorney.[160] While the Sunshine Law authorizes OIP to determine whether the Sunshine Law has been violated and allows "any person" to sue to enforce the law itself, such a suit could not be brought to enforce an OIP decision mandating agency action because OIP lacks the statutory authority to mandate agency action as a remedy for a violation.[161] Consequently, the Sunshine Law does not contain provisions similar to those found in the UIPA at HRS section 92F-15, which give a requester the right to seek judicial enforcement of an OIP opinion.[162]

5. *Miscellaneous provisions*

The Sunshine Law was amended by the new law to state that "[a]n agency may not appeal a decision by the office of information practices made under this chapter, except as provided in section 92F-43."[163] OIP suggested adding this provision to ensure that a person looking only at the Sunshine Law would be aware that the agency appeals process could be found in the UIPA, rather than in the Sunshine Law itself.[164]

Finally, the new appeals procedure allows an agency "to initiate a special proceeding in the circuit court."[165] Although the law does not define the "special proceeding," it provides clear parameters, as it specifically does not require OIP or the requester to be parties to the appeal but gives them the right to intervene,[166] provides a thirty-day time limit for agency appeals,[167] and limits the appellate record to what was presented to OIP.[168] The new law also unambiguously directs that "[t]he circuit court shall uphold a decision of the office of information practices, unless the circuit court concludes that the decision was palpably erroneous"[169] and that the

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[159] Potential remedies include a stay of agency proceedings, HAW. REV. STAT. § 92-12(e); voiding of the agency's final action, *id.* § 92-11; imposition of a fine or imprisonment for willful violations that amount to a misdemeanor, *id.* § 92-13; the summary removal of a board member, *id.*; or any other appropriate remedy, *id.* § 92-12(b).

[160] *Id.* § 92-12(a).

[161] *Id.* §§ 92-12(a)-(b) (giving the attorney general, the prosecuting attorney, and the circuit courts of the state the authority to enforce the provisions of the Sunshine Law).

[162] *Id.* § 92F-15(a).

[163] *Id.* § 92-1.5.

[164] Statements by Cheryl Kakazu Park, Director, Office of Info. Practices.

[165] HAW. REV. STAT. § 92F-43(a).

[166] *Id.* § 92F-43(b).

[167] *Id.* § 92F-43(a).

[168] *Id.* § 92F-43(c).

[169] *Id.*

"[o]pinions and rulings of the office of information practices shall be admissible in an action brought under this part and shall be considered as precedent unless found to be palpably erroneous."[170] Moreover, as the UIPA already requires expedited court proceedings in appeals by a requester,[171] the same expedited court procedures would rationally apply to appeals by agencies and could be applied by the courts without a statutory mandate to do so. Thus, while the law allows the court to further define the "special proceeding" under which agency appeals may be taken, its specific statutory provisions strictly limit agencies' appeal rights and provide basic parameters for the courts' special proceedings.

IV. NEW RULES REGARDING APPEALS TO OIP

Following the Legislature's recognition of the agencies' right to appeal OIP decisions and adoption of a clear, uniform appeals process in S.B. 2858, which Governor Abercrombie signed into law on June 28, 2012,[172] OIP immediately went to work to complete its drafting of administrative appeals rules.[173] Although these administrative rules govern complaints to OIP regarding alleged UIPA or Sunshine Law violations, and not agency appeals of an OIP decision to the court,[174] the rules implement requirements established by the new law, such as defining the record that would be provided to the court upon an agency's appeal from an OIP decision.[175] After review by the administration and a public hearing, OIP's rules were approved by Governor Abercrombie and went into effect on December 31, 2012, one day before the effective date of the new law.[176]

OIP's administrative appeals rules arise out its dispute resolution function, and do not address its other duties to provide advice and training regarding the UIPA and Sunshine Law.[177] The rules largely follow OIP's

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[170] *Id.* § 92-12(d).

[171] An expedited judicial appeals process for agency appeals is consistent with the existing provisions of HRS § 92F-15(f) that requires judicial enforcement actions brought by aggrieved persons under the UIPA to be given precedence on the court's docket over all cases, assigned for hearings, trials, and arguments at the earliest practicable date, and "expedited in every way," unless there are cases that the circuit court considers of greater importance. *Id.* § 92F-15(f).

[172] *See* Act of June 28, 2012, No. 176, 2012 Haw. Sess. Laws 615 (codified at HAW. REV. STAT. §§ 92 to 92F (2012)).

[173] Statements by Cheryl Kakazu Park, Director, Office of Info. Practices. OIP's administrative rules are authorized by HAW. REV. STAT. § 92F-42(12) and *id.* § 92-1.5.

[174] *See generally* HAW. CODE R. §§ 2-73-1 to -20 (LexisNexis 2013).

[175] *Id.* § 2-73-20.

[176] *Id.* §§ 2-73-1 to -20.

[177] STATE OF HAWAII OFFICE OF INFO. PRACTICES, IMPACT STATEMENT FOR PROPOSED

previously existing procedures for appeals to resolve live disputes between parties, and they do not govern OIP's actions in meeting its advisory and training functions, such as providing advice or assistance to only one party or guidance based on hypothetical situations.[178] The rules are further designed to provide an informal, flexible dispute resolution process as a relatively simple, timely, and free alternative to lawsuits filed in courts or to contested case proceedings.[179] While addressing appeals relating to the UIPA, Sunshine Law, and Department of Taxation ("DOTAX"),[180] the new rules remain true to the original legislative intent in establishing OIP to be "a place where the public can get assistance on records questions at no cost and within a reasonable amount of time."[181]

The major provisions of OIP's administrative appeals rules are discussed as follows. The discussion presumes that the reader already has a good understanding of the Sunshine Law and the UIPA, including the UIPA's distinction between government records and personal records.

A. Section 2-73-2: Definition of an Appeal to OIP

The "appeals" covered by the rules are defined as:

> a written request by a person to OIP to review and rule on:
> (1) An agency's denial of access to information or records under [the UIPA,] chapter 92F, HRS: [sic]
> (2) The denial or granting of access to government records by the department of taxation under chapter 231, HRS, or
> (3) A board's compliance with [the Sunshine Law,] part I of chapter 92, HRS.[182]

Notably, the rules do not allow for appeals to OIP from an agency's *granting* of access to public records under the UIPA. As the Impact Statement explains:

RULES OF THE OFFICE OF INFORMATION PRACTICES ON ADMINISTRATIVE APPEALS PROCEDURES (2012), http://files.hawaii.gov/oip/Appeals%20Rules%20Impact%20Statement.pdf [hereinafter IMPACT STATEMENT]. Prior to their adoption, OIP's proposed administrative appeals rules were accompanied by the IMPACT STATEMENT, which explained the proposed rules. As the proposed rules were adopted with minor changes, the IMPACT STATEMENT remains an important and authoritative source of the considerations that went into developing the rules.

[178] HAW. CODE R. § 2-73-4; IMPACT STATEMENT, *supra* note 177, at 12-13.

[179] IMPACT STATEMENT, *supra* note 177, at 9.

[180] *See* HAW. REV. STAT. § 231-19.5(f) (2012) (allowing appeals to OIP from "written opinions" of the Department of Taxation).

[181] H.R.REP. No. 112-88, 26th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818.

[182] HAW. CODE R. § 2-73-2.

> [T]he UIPA only recognizes a requester's right to appeal an agency's denial of access, not an agency's granting of access. This proposed rule therefore does not provide for a general appeal of an agency's granting of access under the UIPA.
>
> The UIPA has no provision setting out a right to administratively appeal an agency's granting of access in the way that sections 92F-15.5 and 92F-27.5, HRS, set out the right to administratively appeal a denial of access. Thus, although section 92F-42(1), HRS, provides that OIP "[s]hall review and rule . . . on an agency's granting of access," the UIPA does not provide for OIP to do so as part of an administrative appeal process. The omission of any specific provision for appeal of an agency's granting of access is consistent with the structure of the UIPA's exceptions to disclosure in sections 92F-13 and -22, HRS, which allow, but do not require, an agency to withhold records covered by an exception. Thus, while OIP could conclude that records disclosed by an agency fell within an exception to disclosure such that the agency could have withheld all or a portion of the records, OIP could not conclude that the agency's disclosure actually violated the UIPA (except in the limited circumstance where the agency intentionally disclosed information explicitly described by specific confidentiality statutes). *See* HRS §§ 92F-13, -17, and -22 (1993). To the contrary, an agency's good faith disclosure of a government record would be immune from civil or criminal liability. HRS § 92F-16 (1993).[183]

Although the rules do not allow a person to file an administrative appeal to challenge an agency's *granting* of access under the UIPA, the person may still seek an *advisory* opinion[184] from OIP as to an agency's granting of access.[185] For example, an agency might disclose records that a business claimed should have been withheld as confidential business information, in which case the business could ask OIP for an advisory opinion as to whether the UIPA actually required the agency to disclose the records, or whether the agency could have instead chosen to assert an exception to disclosure.[186]

B. Section 2-73-11: What May Be Appealed

The rules allow any person to submit an appeal to OIP when:

> (1) The person seeks a review of an agency's denial of access to information or records under [the UIPA];
>
> (2) The person meets the requirements under chapter 231, HRS, for

[183] IMPACT STATEMENT, *supra* note 177, at 5-6.

[184] As explained earlier, advisory opinions are not covered by the administrative appeals rule. *See supra* note 177 and accompanying text.

[185] *See* HAW. REV. STAT. §§ 92F-42(1)-(3) (2012).

[186] *See id.*

> appealing to OIP a decision of the department of taxation concerning disclosure of a written opinion and the person has exhausted the administrative remedies in accordance with rules established by the department of taxation;
> (3) The person seeks to determine a board's compliance with or to prevent a violation of [the Sunshine Law]; or
> (4) The person seeks to determine the applicability of [the Sunshine Law] to discussions or decisions of a public body.[187]

A "person" is broadly defined by the rule and the UIPA as "an individual, corporation, government, or governmental subdivision or agency, business trust, estate, trust, partnership, association, or any other legal entity."[188]

C. Section 2-73-12: Time Limits for Appeal to OIP

Depending on the basis for the appeal, the rules provide the following time limits for filing an appeal with OIP:

> (1) For an appeal of a denial of access to records under [UIPA], . . . within one year after:
> (A) Receipt of the agency's final written denial of access; or
> (B) Receipt of the agency's partial denial of access; or
> (C) Where the agency does not provide a written response to the request, the last day of the time period provided for the agency's written response under chapter 92F, HRS, and chapter 2-71.
> (2) For an appeal of a decision by the department of taxation concerning the disclosure of a written opinion, within the time period set for appeal to OIP under chapter 231, HRS [which is currently sixty days from the date of the department's decision];
> (3) Within six months after a board's action that the appellant contends was in violation of [the Sunshine Law]; or
> (4) For an appeal to determine the applicability of [the Sunshine Law], to discussions or decisions of a public body, at any time during the public body's existence.[189]

As the Impact Statement explains, the one-year time limit (under subsection (1) above) for a person seeking OIP's review of an agency's denial of access in response to a UIPA request is shorter than the statutory two-year period that a requester in such cases has to appeal to the circuit court de novo.[190] Since the statutory time period is not tolled by an

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[187] HAW. CODE R. § 2-73-11.

[188] *Id.* § 2-73-2; HAW. REV. STAT. § 92F-3 (2012).

[189] HAW. CODE R. § 2-73-12.

[190] IMPACT STATEMENT, *supra* note 177, at 14-15. A requester's appeal under the UIPA

administrative appeal to OIP, the one-year limit to appeal allows time for an OIP decision to be issued while the requester is still within the two-year period for going to court de novo.

As with government records, the UIPA also provides a two-year statutory time limit for appealing denials of access to personal records, but the time may be tolled until an OIP final decision is reached.[191] Therefore, the one-year rule for filing an appeal with OIP does not prejudice the requester, who will still have two years after OIP's final decision to file a court action.

It is also preferable for the requester to submit a fresh request after more than a year has passed to see if the agency's response remains the same before appealing to OIP. Even if an agency has already responded to a previous, identical record request, HRS section 92F-11(b) requires the agency to respond to a new record request made a year or more later.[192] Thus, the practical effect of the law and this rule is that a requester who fails to appeal a denial of access to OIP within one year has the option of either (1) making a new request for the same records to the agency, and filing an appeal with OIP within one year of the denial of the new record request, or (2) going straight to court to appeal the denial of the original request, if the two-year limitation period has not yet passed.[193]

For an appeal of a DOTAX decision, OIP's time limit for appeal refers to the law, which currently sets a sixty-day time limit from the date of the DOTAX's decision to appeal to OIP.[194]

With respect to Sunshine Law violations, OIP's rule sets a six-month time limit from the date of an alleged violation for a person to appeal to OIP.[195] Because OIP does not have the power to void an action taken by a board, this rule assumes that a person seeking such a remedy would go straight to court within the ninety-day statutory period to file an enforcement action.[196] Thus, as the Impact Statement explains:

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to the circuit court regarding general government records must be filed "within two years after the agency denial . . . ." HAW. REV. STAT. § 92F-15(a) (2012).

[191] In the case of an agency's denial of access to a personal record, the UIPA allows an individual to appeal to the circuit court no later than "two years after notification of the agency denial, or where applicable, the date of receipt of the final determination of the office of information practices." HAW. REV. STAT. § 92F-27(f).

[192] HAW. REV. STAT. § 92F-11(b)(2).

[193] *See* IMPACT STATEMENT, *supra* note 177, at 14-15.

[194] A person who has exhausted administrative remedies for contesting DOTX's denial of access or granting of access to a written opinion may appeal to OIP "within sixty days of the date of the department's decision." HAW. REV. STAT. § 231-19.5(f). Thereafter, the appellant can appeal OIP's decision to circuit court "within thirty days after the date of the decision of the office of information practices." *Id.*

[195] HAW. CODE R. § 2-73-12(a)(3) (LexisNexis 2013).

[196] For a court challenge of an alleged violation, the Sunshine Law provides a ninety-day

> [T]he time limit for appeal to OIP does not anticipate a need for an appeal to be filed or for an OIP determination to be issued prior to the 90-day limitation period for a suit to void an action taken in violation of the Sunshine Law. Instead, the proposed rule's six-month period reflects OIP's assessment of the length of time after which a board may have difficulty in responding to a complaint of an alleged violation, due to fading memories of what occurred at a meeting or during a conversation, turnover of board members, and other effects of the passage of time. OIP's six-month time limit for Sunshine Law appeals also helps to keep boards focused on their current, ongoing compliance with the Sunshine Law's requirements.[197]

OIP has set this time period to limit new filings to appeals arising from a board's recent history. In contrast, for appeals to determine whether the Sunshine Law applies to a public body, OIP's rule allows an appeal to "be filed at any time during the body's existence, as the question of whether or not the body must follow the Sunshine Law is pertinent at any time in that period."[198]

D. Section 2-73-12: Contents of an Appeal

All appeals must "include sufficient information about the appellant to enable OIP to contact and correspond with appellant."[199] Although appeals may be made anonymously, a person's identity is an essential element to prove a right to access personal records under the UIPA.[200] In other cases, the weight and credibility of the evidence may be affected by the appellant's anonymity.[201]

Additionally, the request for appeal may include a statement of relevant facts; a discussion of the appellant's basis for disagreeing with the agency's denial of access or the board's actions, or for believing that the Sunshine Law applies to the public body; and any other information that the appellant wants OIP to consider in ruling on the appeal.[202] To ensure easy access to OIP without the need for legal counsel, a statement by the appellant is not required, but providing one could help OIP to better understand the

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limitation period for a suit to void a final action taken in violation of the law. HAW. REV. STAT. § 92-11; *see* HAW. REV. STAT. § 92-12 (providing enforcement procedures in general).

[197] IMPACT STATEMENT, *supra* note 177, at 16.

[198] HAW. CODE R. § 2-73-12(a)(4); IMPACT STATEMENT, *supra* note 177, at 16.

[199] HAW. CODE R. § 2-73-12(b).

[200] *See generally* Haw. OIP Op. Ltr. No. 90-37 (Dec. 17, 1990), 1990 WL 482385; *see also* IMPACT STATEMENT, *supra* note 177, at 17.

[201] *See* IMPACT STATEMENT, *supra* note 177, at 17 (stating that an "appellant's factual allegations are likely to be more compelling coming from an identified individual . . . .").

[202] HAW. CODE R. § 2-73-12(e)(1)-(3).

appellant's concerns and determine how best to proceed.[203]

On the other hand, an appeal based on the denial of records under the UIPA must "clearly identify or describe the [government] records or information to which access has been denied and for which appellant is seeking review, and shall include a copy of the agency's written denial of access . . . ."[204] As the Impact Statement notes, "[t]his proposed rule requires the appellant to make a written request for records, due to the importance of beginning an appeal with a clear understanding of (1) what was requested and (2) how the agency responded."[205]

As for a Sunshine Law appeal, the appellant must clearly identify what board actions allegedly were non-compliant or the public body whose discussions and decisions are allegedly subject to the Sunshine Law.[206]

E. Section 2-73-13: OIP's Response and Notice of Appeal

Within five business days after accepting an appeal, OIP shall either:

> (1) Notify the appellant that the appeal will not be heard and specify the reasons why the appeal is not warranted or the additional information that OIP requires [in order to hear the appeal]; or
> (2) Issue a notice of appeal to the appellant and the agency whose action is being appealed.[207]

If OIP notifies the appellant that the appeal will not be heard, a brief explanation will be provided to the appellant, with a copy to the agency.[208] For example, the explanation may be that an appeal is untimely under Hawai'i Administrative Rules ("HAR") section 2-73-12 because it complains of a board's e-mail vote on a board issue three years earlier. For an appeal based on a union's refusal to provide access to records, OIP's explanation may be that the appeal did not state a valid claim against a government agency under the UIPA or the Sunshine Law, as set out in HAR section 2-73-11.[209] Where the agency's written denial of access was not submitted or the request and response dates were not provided, OIP could therefore explain that an appeal challenging the agency's denial of access could not be opened without the missing information.

If an appeal is accepted, then OIP will respond to the appellant with a

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[203] *See* IMPACT STATEMENT, *supra* note 177, at 19-20.
[204] HAW. CODE R. § 2-73-12(c).
[205] IMPACT STATEMENT, *supra* note 177, at 18.
[206] HAW. CODE R. § 2-73-12(d).
[207] *Id.* § 2-73-13(a)(1)-(2).
[208] *See id.* § 2-73-13(c).
[209] *See id.* § 2-73-11(4).

notice of appeal.[210] OIP will also send the agency a copy of the request to appeal, along with OIP's notice of appeal.[211] The notice of appeal will give the parties an initial idea of what to expect, as it must include a description of general procedures that OIP will follow in resolving the appeal and set out the response required from the parties.[212]

F. Section 2-73-14: Agency's Response

Upon receipt of OIP's notice of appeal, the agency must respond within ten business days with a written statement that includes the following information:

> (1) a concise statement of the factual background;
> (2) a list identifying or describing each record withheld, if applicable;
> (3) the agency's explanation of its position, including the agency's justification for the denial of access or actions complained of, with citations to the specific statutory sections and other law that support the agency's position;
> (4) any evidence necessary to support application of any claimed exception, exemption, or privilege; and
> (5) information as to how OIP may contact the agency officer or employee who is authorized to respond and make representations on behalf of the agency concerning the appeal.[213]

Unlike the appellant, who is typically an individual member of the public, an agency is required to provide a substantive argument in support of its position in order to further the policy of both the UIPA and Sunshine Law to conduct government business as openly as possible.[214] To further this policy, the Sunshine Law specifically instructs that it be interpreted to favor openness and to disfavor closed meeting provisions,[215] and the UIPA unambiguously places the burden of proof on the agency to justify nondisclosure.[216] As a practical matter, an agency is also likely to have both superior knowledge of the relevant factual background and superior access to counsel or other resources to assist it in responding to the appeal. Thus, even though the agency is the appellee, the agency has the burden of proof to show that its action is justified by an exception to the general rule of openness under the Sunshine Law or the UIPA, and it must provide a

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[210] *See id.* § 2-73-13(a).
[211] *Id.* § 2-73-13(c).
[212] *Id.* § 2-73-13(b).
[213] *Id.* § 2-73-14.
[214] *See* HAW. REV. STAT. §§ 92-1, 92F-2 (2012).
[215] *Id.* § 92-1(2)-(3).
[216] *Id.* § 92F-15(c).

substantive justification of its position to prevail in the appeal.

G. Section 2-73-15: Other Procedures on Appeal

This rule sets out a nonexclusive list of additional actions that OIP may take in the process of resolving an appeal.[217] Not all of the listed procedures will be applicable in an appeal, but they provide guidance as to how OIP may exercise its discretion to determine how to fairly and expeditiously resolve an appeal.[218]

Note that OIP's rules intentionally do not provide for any form of discovery among the parties to an appeal.[219] OIP does not believe that a discovery process would be consistent with the legislative intent that review by OIP be expeditious, informal, and at no cost to the public.[220] Additionally, as OIP is expressly exempt from holding contested case proceedings,[221] the rules are intended to retain the free and informal nature of OIP's dispute resolution process.

1. Participation by third parties

Depending on the circumstances of the pending case, HAR section 2-73-15(a) recognizes OIP's discretion to permit one or more third persons, in addition to the appellant and the agency, to participate in an appeal and to determine the extent of the permitted participation.[222] Generally speaking, such third persons would need to have a substantial interest in the record at issue, such as a person to whom the record refers or who may be affected by its disclosure. This rule is related to subsection (e), which allows OIP to consider input or relevant materials from persons who have not sought party status.[223]

2. Written statements and documents from parties other than the agency

As discussed above, an agency whose action is being appealed is required by HAR section 2-73-14 to submit a written statement of its position. HAR section 2-73-15(a) allows OIP to request, but not require,

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217 *See* HAW. CODE R. § 2-73-15.
218 *See id.* § 2-73-15(j).
219 *See id.* §§ 2-73-1 to -20.
220 H.R.REP. NO. 1288, 15th Leg., Reg. Sess. (1989) (Standing Comm.), *reprinted in* 1989 HAW. HOUSE J. 1319, 1319.
221 *See* HAW. REV. STAT. § 92F-42(1).
222 HAW. CODE R. § 2-73-15(a).
223 *See id.* § 2-73-15(e).

that other parties, including third-party participants, each submit a written statement to OIP.[224] Typically, a relatively brief and informal statement will be adequate, such as a short e-mail explaining why an individual member of the public believes that certain government records should be disclosed. Where appropriate, an appellant or other participating party may be asked to submit a longer and more formally presented statement.[225] For example, a business represented by counsel, and participating as a third party to support an agency's denial of a competitor's request for a proposal submitted by the business, may be asked to send in a more formal statement with legal argument and citations.

3. In camera review of documents

OIP often needs to review copies of undisclosed documents that are in the agency's or another party's possession.[226] For example, in an appeal of an agency's denial of access to records, OIP may need to review the government records that are at issue in the appeal before determining whether a claimed exception to disclosure is applicable.[227] In an appeal questioning whether an executive session was proper, OIP may review the minutes of the executive session.[228] HAR section 2-73-15(c) allows OIP to require that documents be submitted to OIP and to examine the documents in camera, with appropriate protections against disclosure, as necessary to preserve a claimed exception, exemption, or privilege against disclosure.[229] After its in camera review of a record, if OIP decides that the record should have been disclosed to the requester, then the agency, not OIP, remains responsible for providing the requester with access to those documents.[230]

4. Restrictions on OIP's in camera review

To generally assure agencies that they will not waive the attorney-client privilege by providing a record to OIP, HAR section 2-73-15(d) sets forth more specific restrictions on OIP's in camera examination of records that an agency claims are protected by the privilege.[231] Upon request, the

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[224] *Id.* § 2-73-15(a).
[225] *See id.* § 2-73-15(b).
[226] *See id.* § 2-73-15(c).
[227] *See id.*
[228] *See id.*
[229] *Id.*
[230] *See id.* § 2-73-15(k).
[231] *Id.* § 2-73-15(d). The attorney-client privilege is a possible exception to or exemption from disclosure under the UIPA and the Sunshine Law's executive session purposes. *See*

agency may provide the record in redacted form if OIP can still determine whether the privilege applies by reviewing the redacted version.[232]

5. Input from non-parties and ex parte communications

HAR section 2-73-15(e) makes clear that OIP is not limited to considering only the statements submitted by the parties to an appeal, but may also seek and accept information and relevant materials from any person and may speak to a party or another person without the presence of the other party or parties.[233] Ex parte communications are specifically permitted, except to the extent that OIP has required the parties to copy one another on written submittals under HAR section 2-73-15(k).[234] Moreover, HAR section 2-73-15(f) allows OIP to take notice of generally known and accepted facts;[235] thus, in making its decision, OIP may refer to a newspaper article or similar source and determine its appropriate weight and credibility.[236]

6. Consolidation, mediation, and conferences

As appropriate, HAR section 2-73-15(g) allows OIP to consolidate appeals with similar facts or issues or similarly situated parties, as where several different appeals are filed regarding essentially the same actions by a board, or where multiple appellants seek the same records or information.[237] Besides being the most efficient approach for OIP to resolve them, consolidated appeals will also give all the affected parties the opportunity to be heard on the common questions being resolved by OIP.

Mediation may be another effective way to reach a compromise between the parties and resolve an appeal. Thus, HAR section 2-73-15(h) allows OIP to ask the parties to mediate one or more issues within an appeal or an entire appeal, on terms set by OIP.[238] As is consistent with the mediation process, parties will not be required to participate in mediation but may do

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HAW. REV. STAT. §§ 92-5, 92F-13, 92F-22(5) (2012); *see also Cnty. of Kaua'i*, 120 Haw. 34, 46, 200 P.3d 403, 415 (App. 2009) (holding that redaction, in this case, was impractical since the privileged portions of the transcript were so intertwined).

[232] HAW. CODE R. § 2-73-15(d).

[233] *Id.* § 2-73-15(e).

[234] *Id.*

[235] *Id.* § 2-73-15(f).

[236] *See In re* 'Īao Ground Water Mgmt. Area High-Level Source Water Use Permit Applications, 128 Hawai'i 228, 255, 287 P.3d 129, 156 (2012) (stating that there is precedent in Hawai'i for courts to take judicial notice of "facts as reported by newspapers").

[237] HAW. CODE R. § 2-73-15(g).

[238] *Id.* § 2-73-15(h).

so voluntarily.[239]

As a less formal version of a mediation or a hearing, or simply to help move an appeal forward, OIP may set up an informal conference under HAR section 2-73-15(i), with the parties' agreement.[240] Such a conference could be used to gather information, to question witnesses or parties, to clarify and simplify the issues and the parties' positions, to hear oral argument, to discuss a settlement or informal resolution of the appeal, or take any other action that will help to resolve the appeal.[241] It may be attended by the parties and any additional witnesses, and might be conducted in person or via telephone or similar means.[242]

7. Extension of time limits

Under HAR section 2-73-15(k), OIP may require a party to provide to any other party a copy of the statement or other document submitted to OIP.[243] If so, then delivery must be on the same date that the document is submitted to OIP.[244] If delivery is improper, then OIP may order an extension of time limits or any other appropriate remedy.[245]

H. Section 2-73-16: Documents Submitted to OIP

Although OIP's rules do not require sworn statements, HAR section 2-73-16 nevertheless is a reminder that all documents submitted to the OIP in an appeal are subject to state law, which provides that unsworn falsification of a document is a criminal misdemeanor.[246]

I. Section 2-73-17: OIP's Decision

HAR section 2-73-17 provides that OIP will issue a final written decision on an appeal, and send a copy of the decision to each party.[247] The rule recognizes that an OIP decision "may reach any conclusion and make any order that is consistent with the UIPA, the Sunshine Law, and other laws

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[239] "OIP may, at a party's request or on OIP's own initiative, *request* that the parties participate in a mediation of the appeal . . . ." *Id.* (emphasis added).

[240] *Id.* § 2-73-15(i).

[241] *Id.*

[242] *Id.*

[243] *Id.* § 2-73-15(k).

[244] *Id.*

[245] *Id.*

[246] *Id.* § 2-73-16; HAW. REV. STAT. § 710-1063 (2012).

[247] HAW. CODE R. § 2-73-17(a).

referenced therein (such as confidentiality statutes or statutes controlling the disclosure of specific records or information, incorporated by the UIPA's exceptions and the Sunshine Law's closed meeting provisions)."[248]

If an agency's action or position is upheld, OIP's decision will notify the appellant of the right to seek judicial relief under the relevant section of the Sunshine Law, UIPA, or tax statutes.[249] If the agency's action or position is not upheld, then OIP will inform the agency of its right to appeal OIP's decision to court under section 92F-43.[250] Thus, OIP's decision will answer the questions most unsuccessful appellants will have: whether a further appeal is possible and what the next step may be.

The rule also distinguishes formal, published opinions with precedential value from unpublished memorandum opinions or other written dispositions that are advisory and have no precedential value.[251] Formal opinions are so designated by the director because of their discussion of general concepts under these laws and their broad applicability to similar factual situations.[252] Formal opinions fully set forth OIP's interpretations of provisions of the UIPA and the Sunshine Law, and they are relied upon as precedent by OIP in the issuance of its opinions.[253]

In contrast, OIP generally issues informal or memorandum opinions "in instances where the legal questions raised by a dispute have been previously resolved and discussed in a formal opinion, and where the legal opinion is based upon specific facts that limit the opinion's usefulness for

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[248] *See id.* §§ 2-73-17(a)(4)-(5); *see also* IMPACT STATEMENT, *supra* note 177, at 34-35.

[249] *See* HAW. CODE R. § 2-73-17(c).

[250] *Id.*; HAW. REV. STAT. §§ 92F-15.5, -43 (2012).

[251] HAW. CODE R. § 2-73-17(d); *see also Opinions*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, http://oip.hawaii.gov/ laws-rules-opinions/opinions/ (last visited Oct. 12, 2013) [hereinafter *Opinions*]; *Informal Opinion Letter Summaries*, STATE OF HAWAII OFFICE OF INFO. PRACTICES, http://oip.hawaii.gov/laws-rules-opinions/opinions/ informal-opinion-letter-summaries/ (last visited Oct. 12, 2013)[hereinafter *Informal Opinion Letter Summaries*].

[252] See Opinions, *supra* note 251.

[253] Some of OIP's formal opinions in its first twenty-three years of existence arose from requests for an advisory opinion that would not qualify as appeals under these proposed rules. *See, e.g.*, Haw. OIP Op. Ltr. No. 89-01 (Sept. 11, 1989), http://oip.hawaii.gov/wp-content/uploads/1989/09/opinion-89-01.pdf; Haw. OIP Op. Ltr. No. 89-04 (Nov. 9, 1989), http://files.hawaii.gov/oip/opinionletters/opinion% 2089-04.pdf; Haw. OIP Op. Ltr. No. 89-05 (Nov. 20, 1989), http://files. hawaii.gov/oip/opinionletters/opinion%2089-05.pdf. Although OIP will continue to accept requests for advisory opinions, it no longer intends to designate advisory opinions as formal opinions. OIP will, however, continue to rely upon and consider as precedent its previously existing formal opinions, even if they arose from requests for an advisory opinion and would not have qualified as appeals under these new rules. IMPACT STATEMENT, *supra* note 177, at 36-37.

general guidance purposes."[254] "These opinions are often abbreviated in form and refer the reader to OIP's formal opinions for a full discussion of the legal concepts applied."[255] While not considered binding precedent on the underlying issues, "an agency could submit for OIP's consideration an informal opinion previously issued to the agency to show that its actions were consistent with OIP's prior advice, and OIP would consider the opinion for its relevance to showing the agency's good faith . . . ."[256]

Not all dispositions will take the form of an opinion.[257] OIP's decision could be a simple written letter or disposition confirming a settlement, as where the parties had successfully resolved their dispute through mediation.[258]

J. Section 2-73-18: Dismissal of Appeal

HAR section 2-73-18 allows OIP to dismiss an appeal at any time and provides a nonexclusive list of possible good reasons for doing so:

(1) A prerequisite for filing an appeal . . . has not been met;
(2) The appeal is determined to be frivolous;
(3) The issues are beyond OIP's jurisdiction;
(4) No violation of the law can be found when viewing the issues in the light most favorable to the appellant;
(5) The appellant requests that the appeal be dismissed;
(6) The appeal has been abandoned;
(7) The same issues on appeal have been previously addressed in a published OIP decision; or
(8) An OIP decision on the appeal would be advisory or moot.[259]

Because the list given in this proposed rule is not exclusive or exhaustive, OIP may dismiss an appeal for a sufficiently good reason, even if it is not listed in the proposed rule.[260]

K. Section 2-73-19: Reconsideration by OIP

HAR section 2-73-19 recognizes OIP's discretion to reconsider any

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254 *Informal Opinion Letter Summaries*, *supra* note 251.
255 *Id.*
256 IMPACT STATEMENT, *supra* note 177, at 37.
257 HAW. CODE R. § 2-73-17(d) (LexisNexis 2013).
258 IMPACT STATEMENT, *supra* note 177, at 37-38.
259 HAW. CODE R. § 2-73-18.
260 *See id.* ("The director may issue a notice dismissing all or part of an appeal at any time for good reason, *including but not limited to* [the reasons listed above] . . . ." (emphasis added)).

decision, either on its own initiative or on request.[261] For reconsideration of OIP's final decision in an appeal, a party has ten business days (or approximately two calendar weeks) from the date of issuance of the decision to submit a written request for reconsideration of that decision.[262] With or without a request, OIP may choose to reconsider at any time a precedent set by a prior OIP decision.[263] In either case, reconsideration must be based on a change in the law, a change in the facts, or other compelling circumstances.[264]

The party seeking reconsideration may be required to provide a written statement setting out the basis for the request for reconsideration, and interested parties will be allowed by OIP to submit counterstatements.[265] OIP will notify interested parties of "any request for reconsideration received and granted, a copy of the request, and any written statement filed."[266]

OIP's rule distinguishes between reconsideration of the decision in the appeal at hand, which is binding on the parties and must be requested within ten days,[267] and reconsideration of a standing precedent, which may not involve the same parties and does not require an agency to take a particular action, so may be requested at any time.[268] The Impact Statement gives the following example:

> For instance, suppose that in an appeal by Kimo K. Public, who is seeking access to Widget Regulation Reports maintained by the Department of Commerce and Consumer Affairs ("DCCA"), OIP decides that the reports are public and issues a formal opinion ordering DCCA to disclose the reports. DCCA now has an obligation to disclose the reports as required by the decision, absent a successful request for reconsideration filed within ten days or a successful appeal to circuit court. Suppose further that DCCA does disclose the records to Mr. Public and does not seek reconsideration or appeal to circuit court at that time, but two years later, DCCA requests reconsideration of the issue on the basis that the reports now include different information than they previously did and a recent federal law protects information submitted by widget producers. Based on the changes in the facts and the law, OIP may reconsider the issue of whether Widget Regulation

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[261] *Id.* § 2-73-19(a).

[262] *Id.* § 2-73-19(b) ("A party must make a request for reconsideration within ten days after the director issues a final decision . . . ."); *see also id.* § 2-73-3(1) ("[A] period of time is measured in business days . . . .").

[263] *Id.* § 2-73-19(c).

[264] *Id.* § 2-73-19(d)(1)-(3).

[265] *Id.* § 2-73-19(e).

[266] *Id.*

[267] *See id.* § 2-73-19(b).

[268] *See id.* § 2-73-19(c).

Reports are public. Nevertheless, OIP's reconsideration will not change DCCA's previous obligation, based on OIP's decision two years previously, to have produced the specific reports requested by Mr. Public that were the subject of the earlier appeal.[269]

L. Section 2-73-20: Record on Appeal to the Court

The new agency appeals law requires the court's review to be generally limited to the record before OIP and requires OIP to provide the circuit court with a certified copy of the record that it compiled to make its decision.[270] HAR section 2-73-20 defines OIP's record to consist of all written, electronic, and other physical documents related to the appeal, including non-paper records such as audio or video recordings or e-mails or other electronic records, as well as an index.[271] Documents submitted to OIP for in camera review will be listed in the index as other documents are, but will be accessible only to OIP and the courts.[272] Within thirty days of the service on OIP of an agency's complaint to circuit court, OIP shall file a certified copy of the record in the circuit court and mail a copy of the index to the record to the agency.[273]

V. CONCLUSION

The changes to the UIPA and the Sunshine Law set out by Act 176 bring clarity to what had previously been a confused legal landscape as to an agency's appeal from an OIP decision. Similarly, the new administrative rules set out by HAR Chapter 2-73 bring clarity to the process by which individual citizens and others can bring a complaint to OIP regarding an agency's actions regarding access to government records or the meetings to a government board.

The new appeals law eliminates the problems described earlier and provides a clear and simple process allowing agencies to timely seek expedited judicial review of OIP's decisions, without requiring either OIP or the public to be unwilling parties to the appeal. The new law also restores most of OIP's authority by setting a high standard of judicial review that requires the courts to defer to OIP's decisions mandating disclosure of records under the UIPA, unless OIP's factual and legal

269 IMPACT STATEMENT, *supra* note 177, at 41-42.

270 HAW. REV. STAT. § 92F-43(c) (2012).

271 HAW. CODE R. § 2-73-20.

272 *Id.*

273 *Id.*

determinations are found to be "palpably erroneous."[274] Moreover, agencies can no longer simply ignore OIP's decisions mandating disclosure, as they must now timely appeal within thirty days or be unable to challenge the decision if an enforcement action is filed by members of the public.[275] Thus, members of the public now have a faster and easier means to obtain judicial enforcement where an agency ignores an OIP decision that records must be disclosed, and as prevailing parties, those members of the public will be entitled under existing law to recover reasonable attorney fees and costs. And for OIP, the new law enables the office to continue to expeditiously and informally resolve open government disputes, while also fulfilling its many responsibilities to provide training and advice to government agencies and the general public.

As appeals from OIP's decisions will be limited to the record presented to OIP, the new administrative rules define the contents of the record that will be presented to the court for its consideration in an appeal. The main focus of the new administrative rules, however, is on appeals made to OIP, not appeals from OIP's decisions. The new rules set out clearly what a complainant's and an agency's respective rights and obligations are when a complaint is filed with OIP, and what form OIP's eventual decision may take.

The new standards in Act 176 and the new administrative rules remain true to both the UIPA provision exempting OIP from Chapter 91 contested case procedures and the UIPA's original legislative intent that OIP would be "a place where the public can get assistance on records questions at no cost and within a reasonable amount of time."[276] While honoring OIP's original mission, these changes will help OIP to move forward for its next twenty-five years and beyond.

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[274] HAW. REV. STAT. § 92F-15(b).

[275] *Id.* § 92F-43(a).

[276] H.R.REP. NO. 112-88, 14th Leg., Reg. Sess. (1988) (Conference Comm.), *reprinted in* 1988 HAW. HOUSE J. 817, 818.

Borrowing Valor: A Comment on *United States v. Alvarez* and the Validity of the Stolen Valor Act of 2013

Casey G. Jones[1]

I. INTRODUCTION

JOHN: "How many weddings are we gonna crash?"

JEREMY: (Jeremy looks at his day planner.) "I've got us down for eight."

JOHN: "Any of them cash bars?"

JEREMY: "Two. But I got it covered." (Jeremy pulls out two medals.) "Purple Hearts. We won't have to buy a drink all night."

JOHN: "Perfect."[2]

This excerpt from the popular movie Wedding Crashers exemplified a federal misdemeanor under the now defunct Stolen Valor Act of 2005 ("SVA").[3] But is this type of innocuous bar-stool braggadocio,[4] made in a private setting, really what Congress intended to prevent in drafting the SVA? As written, the SVA applied to all false representations regarding military medals; the statute failed to include a requirement that the speaker utter the falsehood intentionally in the hope of personal gain.

The SVA criminalized false claims of the receipt of military decorations or medals, providing an enhanced penalty if the falsehood concerned the Congressional Medal of Honor.[5] In invalidating the law in the summer of 2012, the Supreme Court held that the SVA unconstitutionally infringed

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[1] J.D. Candidate, 2014, William S. Richardson School of Law, University of Hawai'i at Mānoa and Captain, United States Army, attending law school under the Army's Funded Legal Education Program. This article is dedicated to the 3,468 military service members that legitimately earned the Nation's highest military honor. *See Medal of Honor, Statistics*, U.S. ARMY, CENTER FOR MILITARY HISTORY, http://www.history.army.mil/moh/mohstats.html (last visited Oct. 13, 2013). I would like to thank my wife, Kristen, my daughters, Delaney and Olivia, and all my friends and family for their continued support. The views expressed in this paper are that of the author and shall not be attributed to the United States Army, the Department of Defense, or the United States Government.

[2] WEDDING CRASHERS (New Line Cinema 2005).

[3] 10 U.S.C. § 704 (2006).

[4] This colorful language is courtesy of Justice Breyer's concurrence. United States v. Alvarez, 132 S. Ct. 2537, 2555 (2012) (Breyer, J., concurring).

[5] 18 U.S.C. § 704(b), (c) (2006).

upon First Amendment freedoms of expression.[6] In declaring the law unconstitutional, the Court ruled that "exacting scrutiny" must be met and that the government failed to show proof of harm to the military.[7] The Court determined that less restrictive means other than criminal penalty exist that will meet the government's stated objective.[8]

The Supreme Court's central holding in *United States v. Alvarez* is that the SVA's overbreadth impinged on First Amendment freedom of expression provisions, including one's inherent right to lie.[9] Although the Wedding Crashers example and the conduct of Xavier Alvarez clearly demonstrate an element of scienter, or knowing falsehood, used to derive a material benefit for the speaker, the Court determined the SVA's ambiguity does not require the government to prove this element.[10] Thus, innocent falsehoods could be pulled under the umbrella of the SVA, allowing the government to criminalize relatively harmless, everyday behavior.

Knowing falsehoods espoused about one's military honors, however, may be tantamount to fraud in certain instances when used to provide a benefit for the speaker at the expense of another. This becomes apparent in an election context where the credibility and background of the speaker could be the ultimate difference in a narrow political contest. Inducing constituents to cast their vote in the speaker's favor by lying about one's résumé directly harms political opponents and voters. Of course, regulating political speech—sacrosanct communication under the First Amendment—is a near impossibility, even if the regulation only applies to the speaker's assertions about his personal history and qualifications.

Regulating a speaker's falsehoods remains an overwhelming task when interpreting a line of recent Supreme Court cases, coupled with the Court's decision in *Alvarez*. This Comment discusses the background of the SVA and the Court's ruling in *Alvarez*, specifically identifying whether the Supreme Court permanently foreclosed Congress's ability to criminalize lying about one's résumé, even if the lie aided the speaker in receiving financial or material gain.

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[6] *See generally* James Dao, *Lying About Earning War Medals Is Protected Speech, Justices Rule*, N.Y. TIMES, June 28, 2012, at A18, *available at* http://www.nytimes.com/2012/06/29/us/justices-say-lying-about-military-honors-is-protected.html?_r=0.

[7] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW, 2012 SUPPLEMENT 156 (3d ed. 2012).

[8] *Id.* The government's objective is "protect[ing] the interests of those who have sacrificed their health and life for their country . . . by seeking to preserve intact the country's recognition of that sacrifice in the form of military honors." *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring).

[9] *Id.* at 2547 (majority opinion).

[10] *Id.* at 2543-46.

Prior to delving into *Alvarez*, it is necessary to examine historic and recent First Amendment case law that influenced the *Alvarez* decision. Accordingly, Part II of this Comment gives a brief history of First Amendment case law dealing with content-based regulations on speech. This section summarizes two recent Supreme Court cases, *United States v. Stevens*[11] and *Snyder v. Phelps*,[12] that indicate First Amendment protections, especially relating to speech involving matters of public concern, have reached a historical zenith. Part III of this Comment provides an overview of the significant facts and procedural background of *United States v. Alvarez*. This section identifies the legislative intent behind the SVA and discusses historical regulations that criminalized the falsification of military medals.

Part IV then analyzes the Court's holding in *Alvarez* and its potential implications on similar statutes criminalizing falsehoods. This Comment agrees with the plurality's central holding that the SVA, due to its overbreadth, represented an unconstitutional restriction of content-based speech. The plurality's opinion, however, extends too much protection to intentional false speech, placing knowing false statements on a level identical to a fundamental constitutional right. Further, this Comment sides with the principle, advanced in both Justice Breyer's concurrence and Justice Alito's dissent, that if Congress narrowly tailors the SVA, imposing limitations on context and requiring proof of injury,[13] for example, the false representation of military medals can be punished under the Constitution. This Comment also sides with Justice Breyer's concurrence that posited that the Court could apply a less restrictive test in analyzing the SVA—such as intermediate scrutiny.[14]

Following analysis of the *Alvarez* holding, this Comment then explores the implications of the Court's decision on other statutes that criminalize false statements, including Article 134 of the Uniform Code of Military Justice ("UCMJ"), which criminalizes the fraudulent wear of military awards.[15] Part V highlights recent Congressional legislation aimed at modifying the SVA following *Alvarez*, determining whether the SVA can be amended to survive constitutional scrutiny. Finally, this Comment discusses Congress's effort to re-draft the SVA following *Alvarez*, determining if the revisions, signed into law on June, 3, 2013,[16] are sufficient to pass constitutional muster.

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[11] 559 U.S. 460 (2010).

[12] 131 S. Ct. 1207 (2011).

[13] *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring).

[14] *Id.* at 2552 (majority opinion).

[15] 10 U.S.C. § 934 (2012).

[16] *Stolen Valor Act of 2013 Signed Into Law*, THE AMERICAN LEGION (June 4, 2013),

II. FIRST AMENDMENT CASE LAW DEALING WITH CONTENT-BASED REGULATIONS ON SPEECH

A. Traditional Limitations on the Freedom of Speech

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or the press . . . ."[17] If the government action represents a "content-based" regulation on the freedom of expression, the Court generally subjects the governmental action to strict scrutiny.[18] Historically, the Court limits content-based restrictions on speech to the following categories:[19] incitement, "obscenity, . . . defamation, . . . speech integral to criminal conduct, . . . so-called 'fighting words,' . . . child pornography, . . . fraud, . . . true threats, . . . and speech presenting some grave and imminent threat the government has the power to prevent . . . ."[20] When the government attempts to regulate speech outside of these historically unprotected categories, the regulation is presumptively invalid.[21] These traditionally unprotected categories of

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http://www.legion.org/legislative/215862/stolen-valor-act-2013-signed-law.

[17] U.S. CONST. amend. I.

[18] United States v. Alvarez, 617 F.3d 1198, 1202 (9th Cir. 2010) [hereinafter *Alvarez I*], *aff'd*, 132 S. Ct. 2537 (2012); *see also* United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

[19] *Alvarez*, 132 S. Ct. at 2544 (quoting United States v. Stevens, 559 U.S. 460, 468 (2010)).

[20] *Id.* The Court cited the following cases relating to unprotected categories of speech: advocacy intended, and likely, to incite imminent lawless action, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam); obscenity, *see* Miller v. California, 413 U.S. 15 (1973); defamation, *see* N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964) (providing substantial protection for speech about public figures); Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (imposing some limits on liability for defaming a private figure); speech integral to criminal conduct, *see* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949); so-called "fighting words," *see* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); child pornography, *see* New York v. Ferber, 458 U.S. 747 (1982); fraud, *see* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976); true threats, *see* Watts v. United States, 394 U.S. 705 (1969) (per curiam); and speech presenting some grave and imminent threat the government has the power to prevent, *see* Near v. Minn. ex rel. Olson, 283 U.S. 697 (1931); N.Y. Times Co. v. United States, 403 U.S. 713 (1971) (per curiam). *Alvarez*, 132 S. Ct. at 2544.

[21] R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("The First Amendment generally prevents government from proscribing speech, *see, e.g.*, Cantwell v. Connecticut, 310 U.S. 296 . . . (1940), or even expressive conduct, *see, e.g.*, Texas v. Johnson, 491 U.S. 397, 406 . . . (1989), because of disapproval of the ideas expressed."). *See also* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991); Consol. Edison Co. of N.Y., Inc. v. Public Serv. Comm'n, 447 U.S. 530, 536 (1980); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

speech that "have never been thought to raise any Constitutional problem"[22] do not include lying about the receipt of military medals or general false statements of fact.

False statements of fact have never received a specific exemption from First Amendment protection. The Court has, however, ruled that "the erroneous statement of fact is not worthy of constitutional protection . . . ."[23] In *Gertz v. Robert Welch, Inc.*, the Supreme Court held that "there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open' debate on public issues."[24] The Court expanded on this notion in later cases, stating that "[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas,"[25] false statements "are not protected by the First Amendment in the same manner as truthful statements[,]"[26] and that "false statements may be unprotected for their own sake . . . ."[27]

In an analogous situation to that of the SVA, the Court previously declared content-based statutes unconstitutional when the government attempts to restrict one's ability to discredit the military. In *Schacht v. United States*[28] the Court declared unconstitutional a federal law that allowed wearing a military uniform only if the portrayal does not tend to discredit the armed forces.[29] The Court found this statute to be content-based: allowing a pro-military view while restricting an anti-military view.[30]

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[22] *Stevens*, 559 U.S. at 460 (quoting *Chaplinsky*, 315 U.S. at 571-72 ("[I]t is well understood that the right of free speech is not absolute at all times and under all circumstances.")).

[23] *See Gertz*, 418 U.S. at 340.

[24] *Id.* (quoting *Sullivan*, 376 U.S. at 270). It is important to point out that both *Gertz* and *Sullivan* were civil actions for defamation, not criminal cases. *See generally Alvarez*, 132 S. Ct. at 2539, 2544, 2553.

[25] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988).

[26] Brown v. Hartlage, 456 U.S. 45, 60 (1982). *See also* Herbert v. Lando, 441 U.S. 153, 171 (1979) ("Spreading false information in and of itself carries no First Amendment credentials."); *Va. State Bd. of Pharmacy*, 425 U.S. at 771 ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.");; *Gertz*, 418 U.S. at 340 ("[T]here is no constitutional value in false statements of fact."); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.").

[27] BE & K Constr. Co. v. NLRB, 536 U.S. 516, 531 (2002).

[28] 398 U.S. 58 (1970).

[29] *Id.* at 63.

[30] *Id.*

B. Recent Supreme Court Decisions Prohibiting Content-Based Limitations on Speech

In two recent decisions, the Supreme Court demonstrated a willingness to continue its expansive view of speech protected under the First Amendment. Briefly analyzing the facts and holdings in *United States v. Stevens*[31] and *Snyder v. Phelps*,[32] which directly preceded and influenced the Court's decision in *Alvarez*, enhances one's understanding of the Supreme Court's rationale in striking down the SVA.

1. United States v. Stevens*: A continued narrowing of the government's ability to develop content-based speech restrictions*[33]

In 2010, two years prior to *Alvarez*, the Court invalidated legislation regulating content-based expression, even when the expression disgusts the public at large.[34] In *United States v. Stevens*,[35] the Court considered whether 18 U.S.C. § 48, which Congress enacted to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty, namely animal "crush" videos, applied to graphic and vicious dog fighting footage.[36] The defendant, Robert J. Stevens, argued, *inter alia*, that § 48 violated his First Amendment rights because it "applie[d] to common depictions of ordinary and lawful activities, and that these depictions constitute the vast majority of materials subject to the statute."[37]

Conversely, the government argued that this type of imagery should be added to a new category of unprotected speech.[38] Government attorneys suggested that a test similar to intermediate scrutiny should apply in determining the constitutionality of § 48. The government's brief to the Court stated: "[w]hether a given category of speech enjoys First

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[31] 559 U.S. 460 (2010).

[32] 131 S. Ct. 1207 (2011).

[33] For a discussion of the Supreme Court's recent jurisprudence involving content-based speech, see generally Ronald K. L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 432 (2013).

[34] Nadine Strossen, *United States v. Stevens: Restricting Two Major Rationales for Content-Based Speech Restrictions*, 2009-2010 CATO SUP. CT. REV. 67, 82 (2010).

[35] 559 U.S. 460 (2010) (holding that federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad, and thus, the statute was facially invalid under the First Amendment protection of speech).

[36] *Id.* at 464-66.

[37] *Id.* at 473.

[38] *Id.* at 469-70.

Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs."[39]

In response to that particular argument, the Court held, "[a]s a free-floating test for First Amendment coverage, that sentence is startling and dangerous."[40] While the Court did not totally foreclose the ability of the government to define new categories of unprotected speech, it limited this ability severely.[41] The Court held that exceptions to First Amendment protections must be "historic and traditional," a test that the Court indicated it would interpret very narrowly.[42] To qualify as a "historic and traditional" exception, the exception must be contained in those recognized by the court from 1791 to the present.[43] The majority rejected the government's contention "that categories of speech may be exempted from the First Amendment's protection without any long-settled tradition of subjecting that speech to regulation."[44] For all intents and purposes, the Court's decision in *Stevens* makes it virtually impossible for legislators to develop new regulations restricting content-based speech unless the government can demonstrate similar regulations were historically part of American society.[45]

2. Snyder v. Phelps: *Adopting a wide-ranging definition for "matters of public concern"*

In the term following *Stevens*, the Court in *Snyder v. Phelps* held that the "Free Speech Clause of the First Amendment can serve as a defense in state tort suits, including suits for intentional infliction of emotional distress[,]"[46]

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[39] *Id.* at 470.

[40] *Id.*

[41] *Id.* at 472.

[42] *Id.* at 468.

[43] *Id.*

[44] *Id.* at 469.

[45] *Cf. id.* at 469-70. *See also* United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (stating that "[b]efore exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription . . . .'" (quoting Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734 (2011))); Collins, *supra* note 33, at 432 ("In Stevens, the Court powerfully reaffirmed that the First Amendment leaves unprotected only a handful of 'historic and traditional categories long familiar to the bar,' including 'obscenity,' 'incitement,' and 'defamation.'" (internal quotations omitted)).

[46] Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011) (holding that the Westboro Baptist Church (Phelps) could picket near the funeral of a military service member (Snyder's son) free from tort liability because the object of its protest was of public concern and therefore entitled to special protection under the First Amendment).

when the speech's content is of public concern.[47] In applying a strict scrutiny approach to a Maryland tort law, the Court opined, "[w]hether the First Amendment prohibits holding Westboro [Baptist Church] liable for its speech . . . turns largely on whether that speech is of public or private concern, as determined by all the circumstances of the case."[48]

The Court concluded that the content of Westboro's signs displayed outside the funeral of a deceased marine plainly related to public, rather than private, matters.[49] The Court determined Westboro's signs[50] focused on issues of public concern—"the political and moral conduct of the United States and its citizens, the fate of the Nation, homosexuality in the military, and scandals involving the Catholic clergy . . . ."[51] Therefore, even if Westboro's signs contained messages related to a particular individual, the fact that the dominant theme of Westboro's demonstration spoke to broader public issues protected it from tort liability via the First Amendment.[52]

Despite the fact that the Court's holding in *Snyder* is not overly impactful to *Alvarez*, it is nevertheless worthwhile. *Snyder* demonstrates the Court's willingness to protect speech that even tangentially addresses matters of public concern. Seemingly, any speech concerning a political race or the U.S. military, no matter how peripheral, is squarely within the definition of "matters of public concern" following *Snyder*.

III. *UNITED STATES V. ALVAREZ*: STRIKING DOWN THE SVA OF 2005

A. Background

To resolve a conflict within the circuit courts,[53] in the term immediately following *Snyder*, the Supreme Court reviewed the SVA's constitutionality in *United States v. Alvarez*. Relevant portions of the SVA provide:

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[47] *See generally* RODNEY A. SMOLLA, 2 LAW OF DEFAMATION § 11:13.50 (2d ed. 2013).

[48] *Snyder*, 131 S. Ct. at 1211 (quoting Connick v. Meyers, 461 U.S. 138, 145 (1983) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values and is entitled to special protection." (internal quotations omitted))).

[49] *Id.*

[50] Signs carried by Westboro included, but were not limited to, the phrases: "America Is Doomed," "God Hates America," "Thank God for Dead Soldiers," "Semper Fi Fags," "You're Going to Hell," and "God Hates You." Snyder v. Phelps, 580 F.3d 206, 214 (4th Cir. 2009), *aff'd*, 131 S. Ct. 1207 (2011).

[51] *Snyder*, 131 S. Ct. at 1211.

[52] *Id.*

[53] Inapposite to the Ninth Circuit's holding in *Alvarez I* and United States v. Alvarez, 638 F.3d 666 (9th Cir. 2011) [hereinafter *Alvarez II*], the Tenth Circuit found the SVA to be a constitutional exercise of congressional power. *See* United States v. Strandlof, 667 F.3d 1146, 1167 (10th Cir.), *abrogated by* United States v. Alvarez, 132 S. Ct. 2537 (2012) and

> (b) Whoever falsely represents himself or herself, verbally or in writing, to have been awarded any decoration or medal authorized by Congress for the Armed Forces of the United States, any of the service medals or badges awarded to the members of such forces, the ribbon, button, or rosette of any such badge, decoration, or medal, or any colorable imitation of such item shall be fined under this title, imprisoned not more than six months, or both.[54]

"The prescribed prison term is enhanced to one year if the decoration involved is the Congressional Medal of Honor, a distinguished-service cross, a Navy cross, an Air Force cross, a Silver Star, or a Purple Heart."[55] Predecessor versions of the SVA have existed in some form since 1923.[56] The SVA of 2005 deviated from prior versions by criminalizing all false representations, including verbal and written communication, compared with previous versions that criminalized only the false wear of military decorations.[57] Congressional findings associated with the SVA of 2005 noted that "[f]raudulent claims surrounding the receipt of the Medal of Honor [and other Congressionally authorized military medals, decorations, and awards] damage the reputation and meaning of such decorations and medals[,]" and that "[l]egislative action is necessary to permit law enforcement officers to protect the reputation and meaning of military decorations and medals."[58]

B. Significant Facts

Xavier Alvarez ran for election to public office in California flaunting a unique and remarkable résumé, including, among other things, that he was a recipient of the Medal of Honor, the highest military decoration awarded by the U.S. government for combat bravery.[59] Alvarez's lies contributed to his winning a seat on the Three Valleys Water District[60] Board of Directors in

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vacated, 684 F.3d 962 (10th Cir. 2012). *Alvarez II* was a denial of the government's petition for a rehearing en banc.

[54] 18 U.S.C. § 704(b) (2006).

[55] *Alvarez I*, 617 F.3d 1198, 1202 (9th Cir. 2010) (citing 10 U.S.C. § 704(c), (d) (2006)).

[56] *See* Michael J. Davidson, *Bits of Ribbon and Stolen Valor*, FED. LAW., Sept. 2011, at 20, 21.

[57] *See* Stolen Valor Act of 2005, Pub. L. No. 109-437, § 3(b)(2), 120 Stat. 3266, 3266 (2006).

[58] Stolen Valor Act of 2005 § 2(1), (3), 120 Stat. at 3266.

[59] United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012). Alvarez also claimed that he played hockey for the Detroit Red Wings, that he once married a starlet from Mexico, and that he rescued American hostages in Iran in 1979. *Id.* at 2542, 2565; *see also* Bill Mears, *Lying About Valor: Justices to Debate Free Speech Case*, CNN (Feb. 21, 2012, 2:54 PM), http://www.cnn.com/2012/02/21/justice/scotus-stolen-valor/index.html.

[60] "Three Valleys is a public agency, organized under the California State Water Code,

2007.[61] On July 23, 2007, at a public meeting, Alvarez introduced himself, stating, "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around."[62] With this statement Alvarez committed a federal offense under the SVA of 2005. Federal prosecutors subsequently indicted Xavier Alvarez for falsely claiming he had been awarded the Medal of Honor.[63]

C. Procedure

On September 26, 2007, in the United States District Court for the Central District of California, federal defendant Xavier Alvarez pleaded guilty to a charge of falsely claiming that he received the Medal of Honor in violation of the SVA.[64] Prior to pleading guilty, Mr. Alvarez filed a motion to dismiss on the grounds that the statute violated his First Amendment right to free speech, a motion that the district court denied.[65]

In his appeal to the Ninth Circuit, Alvarez brought both facial and as-applied challenges to the constitutionality of the SVA under the First Amendment.[66] On August 17, 2010, subsequent to Mr. Alvarez's appeal, the Ninth Circuit reversed and remanded Alvarez's conviction, finding the Act invalid under the First Amendment.[67] A divided Ninth Circuit panel held that the government may not prohibit speech simply because it is knowingly false, further explaining that some knowingly false speech could have favorable constitutional value.[68] Having determined that the SVA represented a content-based restriction on speech, the Ninth Circuit applied strict scrutiny review to the Act.[69] The Court found the SVA represented an

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and operates in an open and public environment." THREE VALLEYS MUN. WATER DIST., http://www.threevalleys.com/ (last visited Dec. 25, 2012). "The seven members of the Board of Directors are elected to office . . . ." *Id.*.

[61] *Alvarez II*, 638 F.3d 666, 667 (9th Cir. 2011).

[62] *Id.* It bears noting that Xavier Alvarez made these statements after winning the election. He did, however, make several statements during the campaign highlighting his "military service." *See* Mears, *supra* note 59.

[63] *Alvarez II*, 638 F.3d at 667.

[64] *United States v. Alvarez*, THE OYEZ PROJECT AT IIT CHICAGO-KENT COLLEGE OF LAW, http://www.oyez.org/cases/2010-2019/2011/2011_11_210 (last visited Oct. 1, 2013) [hereinafter OYEZ]. The court sentenced Alvarez to three years of probation and a $5,000 fine. *See* Mears, *supra* note 59.

[65] *Alvarez II*, 638 F.3d at 678.

[66] *Alvarez I*, 617 F.3d 1198, 1201 (9th Cir. 2010).

[67] *Id.* at 1217.

[68] OYEZ, *supra* note 64.

[69] *Id.*

unconstitutional exercise of government authority because the statute was not narrowly tailored to achieving a compelling governmental interest.[70]

Following the Ninth Circuit's reversal of Alvarez's conviction, the government moved for a rehearing en banc, which the Ninth Circuit denied.[71] Judge Smith, writing in concurrence of the denial of rehearing en banc affirmed the court's initial ruling that the SVA did not fall into one of the "well-defined and narrowly limited classes of speech" that are unprotected by the First Amendment.[72] Relying heavily on the Supreme Court's recent decision in *United States v. Stevens*, the Ninth Circuit determined that the government's ability to apply a "free-floating" balancing approach in regulating content-based speech is virtually non-existent.[73] On October 17, 2011, the Supreme Court granted certiorari.[74]

D. Plurality's[75] *Holding*

In the wake of *Stevens* and *Snyder*, the SVA was destined for the statutory scrap heap. On June 28, 2012, overshadowed by the Court's highly publicized ruling on the constitutionality of the Affordable Care Act,[76] the Court, in a 6-3 verdict, held that the SVA operated as an unconstitutional infringement upon First Amendment freedoms of expression.[77]

The Supreme Court ruled that the SVA regulates the freedom of speech and expression based on content, and therefore, applied a strict scrutiny test to the SVA's constitutionality.[78] Under the strict scrutiny approach applied

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[70] *Alvarez I*, 617 F.3d at 1200.

[71] *See Alvarez II*, 638 F.3d 666 (9th Cir. 2011).

[72] *Id.* (quoting United States v. Stevens, 559 U.S. 460, 468-69 (2010)); *see supra* note 20, listing the unprotected categories of speech.

[73] *Alvarez I*, 617 F.3d at 1204-05 (quoting *Stevens*, 559 U.S. at 470 (noting that the government's suggestion that "[w]hether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs" is "startling and dangerous.")).

[74] United States v. Alvarez, 132 S. Ct. 457 (2011).

[75] The plurality included Justices Kennedy (author of the opinion), Ginsberg, Sotomayor, and Chief Justice Roberts. United States v. Alvarez, 132 S. Ct. 2537, 2542 (2012). Justice Breyer filed a concurring opinion joined by Justice Kagan. *Id.* at 2551. Justice Alito authored a dissent joined by Justices Scalia and Thomas. *Id.* at 2556. For a discussion of the issues raised in Justice Alito's spirited dissent, Michael I. Krauss, *A Marine's Honor: The Supreme Court from* Snyder *to* Alvarez, 20 GEO. MASON L. REV. 1, 19-23 (2012).

[76] Nat'l Fed'n of Indep. Bus. v. Sebelius, 132 S. Ct. 2566 (2012).

[77] OYEZ, *supra* note 64.

[78] The plurality never used the term "strict scrutiny" but applied an analogous test. *See Alvarez*, 132 S. Ct. at 2543 ("When content-based speech regulation is in question, however,

by the Court, the government bears the burden of showing the SVA "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[79] Once the Court elected to apply a strict scrutiny test, the SVA was doomed. Even the staunchest of advocates for the SVA lamented that the regulation would not remain intact if subjected to a strict scrutiny review.[80]

The Court found that while the government's interest in protecting the Medal of Honor and other awards is compelling, imposition of a criminal penalty via the SVA is unnecessary to achieve the government's stated interest.[81] The Court reasoned that the SVA does not represent the "least restrictive means among available, effective alternatives" to meet the stated objective of the statute.[82] The Court mainly focused on counterspeech, through political opponents and a government database, as a less restrictive means to meet the government's purpose.[83]

The plurality found that the sanctity of the military awards system, and more globally, the government's ability to punish *mere lies*, are not historically permitted content-based restrictions on speech.[84] When the government imposes a content-based restriction, such as the SVA, in a situation that does not fall within one of the unprotected categories, the regulation is presumptively unconstitutional.[85]

The Court held that the SVA failed to meet *Stevens*' high threshold for historical content-based regulation and is therefore invalid.[86] Thus, the

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exacting scrutiny is required.").

[79] Widmar v. Vincent, 454 U.S. 263, 270 (1981).

[80] Judge Bybee of the Ninth Circuit, who dissented in *Alvarez I* and voted to grant the government's petition for a rehearing en banc in *Alvarez II*, acknowledged that "*if* the Stolen Valor Act were subjected to strict scrutiny, the Act would not satisfy [the strict scrutiny] test." *Alvarez I*, 617 F.3d 1198, 1232 n.10 (9th Cir. 2010) (Bybee, J., dissenting).

[81] *Alvarez*, 132 S. Ct. at 2549. Following a historical narrative of valorous acts of Medal of Honor recipients, the Court stated, "[t]he Government's interest in protecting the integrity of the Medal of Honor is beyond question. But to recite the Government's compelling interests is not to end the matter." *Id.*

[82] *Id.* at 2551.

[83] *Id.* at 2549-51.

[84] *Id.* at 2544. *See supra* note 20, listing the unprotected categories of speech.

[85] *Alvarez*, 132 S. Ct. at 2543-44 ("As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." (quoting Ashcroft v. Am. Civil Liberties Union, 535 U.S. 564, 573 (2002) (modification omitted))). Furthermore, the Court, in several cases prior to *Stevens*, deemed that content-based regulations are presumptively invalid when not within one of the historically unprotected categories. *See* Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 115 (1991); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 536 (1980); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972).

[86] *Alvarez*, 132 S. Ct. at 2543-47. *See also* R.A.V. v. City of St. Paul, 505 U.S. 377, 382

SVA failed the ultimate test for content-based regulations and the Court invalidated the SVA of 2005, overturning the conviction of Xavier Alvarez.

E. Justice Breyer's Concurrence

Justice Breyer, joined by Justice Kagan, invalidated the SVA due to its overbreadth[87] but preserved the government's ability to narrowly tailor the SVA in the future.[88] Justice Breyer suggested implementing intermediate-level scrutiny to the SVA "to determine whether the statute works speech-related harm that is out of proportion to its justifications."[89]

Justice Breyer criticized the plurality's reliance on counterspeech as a less intrusive alternative to the SVA, stating:

> This remedy, unfortunately, will not work. The Department of Defense has explained that the most that it can do is to create a database of recipients of certain top military honors awarded since 2001 .... Because a sufficiently comprehensive database is not practicable, lies about military awards cannot be remedied by what the plurality calls "counterspeech."[90]

The concurrence also questioned the ability of the public to readily access such a resource, if it existed, and quickly expose deceit concerning false military honors.[91]

(1992) ("The First Amendment generally prevents government from proscribing speech."); Cantwell v. Connecticut, 310 U.S. 296, 309-11 (1940) (or even expressive conduct); Texas v. Johnson, 491 U.S. 397, 406 (1989) (because of disapproval of the ideas expressed).

[87] Addressing the overbreadth of the SVA, Justice Breyer stated, "[A] speaker might still be worried about being prosecuted for a careless false statement, even if he does not have the intent required to render him liable." *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring) (emphasis omitted).

[88] On the possibility of amending the SVA, Justice Breyer stated:

> We must therefore ask whether it is possible substantially to achieve the Government's objective in less burdensome ways. In my view, the answer to this question is 'yes.' ... As is indicated by the limitations on the scope of the many other kinds of statutes regulating false factual speech, ... it should be possible significantly to diminish or eliminate these remaining risks by enacting a similar but more finely tailored statute.

Id. at 2555-56 (internal citations omitted).

[89] *Id.* at 2551.

[90] *Id.* at 2559-60 (internal citation omitted).

[91] *Id.*

IV. LEGAL ANALYSIS OF *UNITED STATES V. ALVAREZ* AND ITS IMPLICATIONS

A. The SVA as Written is Unconstitutionally Overbroad

The plurality's most logical and persuasive reason to invalidate the SVA involves the statue's glaring overbreadth.[92] The SVA "seeks to control and suppress" any and all false statements about the receipt of military awards in "limitless times and settings," including private, whispered conversations.[93] Additionally, the Court identified that the SVA eviscerates false speech entirely "without regard to whether the lie was made for the purpose of material gain."[94] This lack of specificity is fatal to the SVA's constitutionality.

Lack of a scienter, or knowing, reckless falsehood, element in the SVA extends the statute's reach, making it overbroad and unconstitutional.[95] "The first step in overbreadth analysis is to construe the challenged statute; it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."[96] The SVA covers a significant amount of military awards, leading to an inherent "risk of chilling that is not completely eliminated by *mens rea* requirements[.]"[97]

In defending the SVA, the government argued that false statements "'have no First Amendment value in themselves,' and thus 'are protected only to the extent needed to avoid chilling fully protected speech.'"[98] Furthermore, the government argued that the SVA seeks to protect and

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[92] For a discussion of the overbreadth doctrine and its effects on protected speech, see Julia K. Wood, *Truth, Lies, and Stolen Valor: A Case for Protecting False Statements of Fact Under the First Amendment*, 61 DUKE L.J. 469, 510 n.259 (2011) ("The overbreadth doctrine . . . is one of those rare constitutional rules in which an admittedly 'guilty' person may be set free . . . because the law is so broad that it might be used against another person who had engaged in protected activity." (alterations in original) (quotations omitted)).

[93] *Alvarez*, 132 S. Ct. at 2547. The Court also declared that "[t]he Act by its plain terms applies to a false statement made at any time, in any place, to any person." *Id.*

[94] *Id.*

[95] *See generally id.* at 2555 (Breyer, J., concurring). *But cf. id.* at 2557 n.1 (Alito, J., dissenting) (explaining that "[a]lthough the Act does not use the term 'knowing' or 'knowingly,' we have explained that criminal statutes must be construed 'in light of the background rules of the common law . . . in which the requirement of some *mens rea* for a crime is firmly embedded'" (alterations in original) (quoting Staples v. United States, 511 U.S. 600, 605 (1994))).

[96] United States v. Williams, 553 U.S. 285, 293 (2008). For an application of this principle, see United States v. Stevens, 559 U.S. 460, 474 (2010).

[97] *Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring).

[98] *Id.* at 2543 (majority opinion) (citing Brief for Petitioner at 18, 20, *Alvarez*, 132 S. Ct. 2537 (2012) (No. 11-210)).

enhance the morale of service members that can be significantly diminished by the aggregation of impostors like Xavier Alvarez while, simultaneously, leaving breathing room for protected speech.[99] The government's argument is mildly persuasive; however, it does not address the lack of an intent element in the SVA. Effectively, the SVA, as written, could chill or even freeze the speech of former veterans—exactly the citizens the statute attempts to protect—by placing them under the fear of prosecution for inadvertent misstatements.

While the plurality gave numerous examples of how false statements may serve to fulfill "useful human objectives,"[100] the plurality, along with Justice Breyer's concurrence and Judge Kozinski's Ninth Circuit opinion, failed to advance any legitimate example of how lying about military honors enhances these human objectives.[101] This was also true of Alvarez's counsel during oral arguments who conceded that no protected speech would be chilled by the SVA.[102] Justices and judges invalidating the SVA, in both the Supreme Court[103] and Ninth Circuit,[104] advanced outlandish

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[99] *See id.* ("The Government defends the [SVA] as necessary to preserve the integrity and purpose of the Medal .... [T]he Government argues that it leaves breathing room for protected speech, for example speech which might criticize the idea of the Medal or the importance of the military.").

[100] *See id.* at 2553 (Breyer, J., concurring) ("False factual statements can serve useful human objectives, for example: in social contexts, where they may prevent embarrassment, protect privacy, shield a person from prejudice, provide the sick with comfort, or preserve a child's innocence; in public contexts, where they may stop a panic or otherwise preserve calm in the face of danger; and even in technical, philosophical, and scientific contexts, where (as Socrates' methods suggest) examination of a false statement (even if made deliberately to mislead) can promote a form of thought that ultimately helps realize the truth." (internal quotations omitted)). *See, e.g.*, *Alvarez II*, 638 F. 3d 666, 673-75 (9th Cir. 2011) (Kozinski, J., concurring in denial of rehearing en banc)).

[101] *See Alvarez*, 132 S. Ct. at 2564 (Alito, J., dissenting) ("In stark contrast to hypothetical laws prohibiting false statements about history, science, and similar matters, the [SVA] presents no risk at all that valuable speech will be suppressed. The speech punished by the [SVA] is not only verifiably false and entirely lacking in intrinsic value, but it also fails to serve any instrumental purpose that the First Amendment might protect.").

[102] *See id.* (majority opinion) (citing Transcript of Oral Argument at 36, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11-210)).

[103] Justice Breyer advanced one particularly outlandish example, stating: "And those who are unpopular may fear that the government will use that weapon selectively, say by prosecuting a pacifist who supports his cause by (falsely) claiming to have been a war hero, while ignoring members of other political groups who might make similar false claims." *Id.* at 2553 (Breyer, J., concurring).

[104] In criticizing the dissent's "truthful utopia" Judge Kozinski stated:

> If false factual statements are unprotected, then the government can prosecute not only the man who tells tall tales of winning the Congressional Medal of Honor, but also the JDater who falsely claims he's Jewish or the dentist who assures you it won't hurt a

hypotheticals to demonstrate the breadth of government reach if the SVA were to be upheld. The examples put forth, however, would make even the most tyrannical dictator cringe at the level of government repression imagined in these colorful rants.

The Court is also extremely concerned that "the threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart."[105] But aside from Justice Breyer's hypothetical pacifist who lies about receiving the medal of honor—the nation's highest military award—to lend credence to his/her argument, whatever that may be, the Court fails to identify a reasonable situation where the SVA would "chill" protected speech. It simply warns of a general chilling that could occur, no matter how tangential, if the SVA were in force.

The most plausible and important example where the SVA could have damaging effects, which was not advanced by the Court, is the chilling of a former military service member's speech about his or her own military résumé in fear of an accidental criminal misstatement. Many of the awards included in the SVA are relatively trivial, common achievements. For example, marksmanship badges are received two to three times per year or more,[106] at times on multiple weapons systems. A misstatement about one's marksmanship badge received at a specific point in a career is relatively easy to make compared to a misstatement about receiving the Medal of Honor, which is virtually impossible to forget. For some perspective, remembering a specific marksmanship badge in your military career is analogous to remembering a score earned on a law school assignment, while remembering receipt of the Medal of Honor is analogous to remembering if you ever attended law school. Without an intent clause limiting the SVA's scope, a former service member's haziness of memory could lead to an inadvertent, illegal misstatement under the Act.[107]

> bit. Phrases such as 'I'm working late tonight, hunny,' 'I got stuck in traffic' and 'I didn't inhale' could all be made into crimes. Without the robust protections of the First Amendment, the white lies, exaggerations and deceptions that are an integral part of human intercourse would become targets of censorship, subject only to the rubber stamp known as 'rational basis review.'

Alvarez II, 638 F.3d at 673 (9th Cir. 2011) (Kozinski, J., concurring in denial of rehearing en banc).

[105] *Alvarez*, 132 S. Ct. at 2553 (Breyer, J., concurring) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 340-41 (1974)).

[106] *See generally* DEP'T OF THE ARMY, PAMPHLET 350-38: STANDARDS IN TRAINING COMMISSION 2 (2012), http://www.apd.army.mil/pdffiles/p350_38.pdf (stating that, at minimum, all Department of the Army ("DA") Soldiers will qualify with their assigned weapon every six months).

[107] *See Alvarez*, 132 S. Ct. at 2555 (Breyer, J., concurring).

Although the Court struggled to identify examples of speech chilled by the SVA, the Court reached the correct result to shelter those who the statute intended to protect—military veterans. Potential criminal liability for veterans may be alleviated by adding a *mens rea*, or scienter element to the text of the SVA, thereby punishing only those who have strayed from the bounds of constitutional protection. Amending the statute in this fashion dissipates the chilling of any viable First Amendment freedom of expression. Concern over this type of overbreadth could also be alleviated by amending the SVA to only include significant awards, such as those listed in section 704(b),[108] rather than including all military awards.

B. Protecting Intentional Falsehoods as a Fundamental Right

In reaching the proper result—invalidating the SVA as overbroad—the Court travelled much further than necessary by granting extreme protection to speakers who intentionally utter false statements of fact. The *Alvarez* plurality concentrated on a more global concern—the government's attempt to classify any false speech as a *nouveau* unprotected category—rather than simply striking down the SVA due to its overbreadth.[109] Effectively, the Court made one's right to lie equal to other fundamental rights under the Constitution. This favored treatment of blatant falsehoods subjects government regulations enacted to prevent known lies to the most exacting judicial scrutiny.[110]

Both the Ninth Circuit and Supreme Court opinions overreached into the government's potential to criminalize all lies, rather than simply addressing only the crux of the case—the narrow issue of the criminalization of lying

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[108] 18 U.S.C. § 704(b) (2006).

[109] *Alvarez*, 132 S. Ct. at 2547 ("The Government has not demonstrated that false statements generally should constitute a new category of unprotected speech . . . ."). This was of extreme concern to the Ninth Circuit and discussed at length. *See Alvarez I*, 617 F.3d 1198, 1200 (9th Cir. 2010). The majority in *Alvarez I* held:

> if the Act is constitutional under the analysis proffered by [the dissent], then there would be no constitutional bar to criminalizing lying about one's height, weight, age, or financial status on Match.com or Facebook, or falsely representing to one's mother that one does not smoke, drink alcoholic beverages, is a virgin, or has not exceeded the speed limit while driving on the freeway. The sad fact is, most people lie about some aspects of their lives from time to time. Perhaps, in context, many of these lies are within the government's legitimate reach. But the government cannot decide that some lies may not be told without a reviewing court's undertaking a thoughtful analysis of the constitutional concerns raised by such government interference with speech.

Id.

[110] *Alvarez*, 132 S. Ct. at 2543 ("When content-based speech regulation is in question, however, exacting scrutiny is required. Statutes suppressing or restricting speech must be judged by the sometimes inconvenient principles of the First Amendment.").

about the receipt of military awards. As discussed, Justices and judges from both Courts[111] advanced outlandish examples of lies that government regulations would criminalize if the SVA were allowed to survive.[112] These fears about the collateral damage from criminalizing known lies, however, may be misplaced.

Even if false statements of fact were not afforded the protection of strict scrutiny, under a heightened or intermediate scrutiny approach,[113] the government would still need to advance a legitimate governmental purpose for the regulation. Lying about one's weight, for instance, would be subject to some kind of test and undoubtedly fail, even if subjected to the most deferential standard. Adopting an intermediate scrutiny approach for falsehoods concerning military medals, as Justices Breyer and Kagan suggested, may have assuaged Judge Kozinski's concerns of prosecutions for those who lie on internet dating sites, those who lie to their spouses about taking out the trash, or those who lie about their height and weight.[114]

C. Historical Restrictions on Falsehoods Concerning the Receipt of Military Medals and Other Statutes that Criminalize Lying

The decision of the Court breaks with precedent in offering "exacting scrutiny" to false factual statements.[115] This break, however, seems to be in line with the Court's precedent in *Stevens* that strongly cautions against using a "free-floating" balancing approach to determine new categories of unprotected speech.[116] But is lying about military medals, and more broadly, intentional lies in general, a historically unprotected category of speech? Prior to exempting a previously unrecognized category of speech

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[111] *See supra* notes 103, 104.

[112] *See, e.g.*, Adam Liptak, *Justices Appear Open to Affirming Medal Law*, N.Y. TIMES, Feb. 22, 2012, at A13, *available at* http://www.nytimes.com/2012/02/23/us/stolen-valor-act-argued-before-supreme-court.html?_r=0 (stating that during oral argument "Justice Sonia Sotomayor asked about false statements made while dating. Justice Elena Kagan asked about lies concerning extramarital affairs. Chief Justice John G. Roberts Jr. asked whether Congress could make it a crime to lie about having a high school diploma.").

[113] To pass the less rigorous intermediate scrutiny review, the challenged law must further an important government interest by means that are substantially related to that interest. *See Intermediate Scrutiny*, LEGAL INFORMATION INSTITUTE (Aug. 19, 2010), http://www.law.cornell.edu/wex/intermediate_scrutiny.

[114] *See supra* note 104, for a portion of Judge Kozinski's narrative.

[115] *Alvarez*, 132 S. Ct. at 2563 (Alito, J., dissenting) ("This radical interpretation of the First Amendment is not supported by any precedent of this Court. The lies covered by the [SVA] have no intrinsic value and thus merit no First Amendment protection unless their prohibition would chill other expression that falls within the Amendment's scope.").

[116] United States v. Stevens, 559 U.S. 460, 470 (2010).

from the prohibition on content-based restrictions "the Court must be presented with 'persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription . . . .'"[117]

1. Historical prohibitions on lying about military honors

Although the Court in *Stevens* did not necessarily establish a bright line of 1791 as the baseline for content-based restrictions, it did mandate that the government must demonstrate an extensive history of proscription to validate a new category of content-based regulation on speech.[118] The Court held that the government failed to demonstrate this historical tradition even though there are several statutes that criminalize lying beyond fraudulent conduct.[119] With regard to military awards, George Washington noted the following: "[s]hould any who are not entitled to these honors have the insolence to assume the badges of them, they shall be severely punished."[120] Additionally, predecessor versions of the SVA have existed since 1923.[121] Many states also employ criminal statutes substantively identical to the SVA that prohibit knowingly false statements about military decorations.[122]

2. Federal false personation statutes and state laws restricting speech

Analogous to the SVA, several federal statutes criminalize general false statements of fact. These "false personation" statutes include 18 U.S.C. § 911 which makes it a federal crime to falsely claim one is a citizen of the United States.[123] The statute mandates, "[w]hoever falsely and willfully represents himself to be a citizen of the United States shall be fined under this title or imprisoned not more than three years, or both."[124] It is difficult to reason how false claims to citizenship prosecuted under 18 U.S.C § 911 would survive the *Alvarez* plurality's "exacting" scrutiny approach if facially challenged. Similar to the Court's rationale in *Alvarez*, counterspeech or a government database could overcome the Government's

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[117] *Alvarez*, 132 S. Ct. at 2547 (quoting Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2734, (2011)).

[118] *See Stevens*, 559 U.S. at 468; *see also supra* note 45.

[119] *Alvarez*, 132 S. Ct. at 2547.

[120] Davidson, *supra* note 56, at 20 (quoting 152 CONG. REC. H8821 (daily ed. Dec. 6, 2006) (statement of Rep. Salazar)).

[121] *Id.* at 21.

[122] *See infra* Part IV.C.2.

[123] 18 U.S.C. § 911 (2012).

[124] *Id.*

contention that the regulation "is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[125]

18 U.S.C. § 911 survived a facial challenge to its constitutionality upholding the criminal conviction of a defendant who falsely claimed to be a citizen of the United States.[126] In *United States v. Esparza-Ponce*, a defendant "falsely claimed to be a citizen of the United States when apprehended" by law enforcement.[127] Esparza-Ponce argued that 18 U.S.C. § 911 was overly broad because the statute "[did] not require that the false claim be made in a federal immigration matter, a federal matter, or even any other governmental matter."[128] Several hypothetical examples of § 911's broad reach that could potentially chill were advanced, including: speech at political rallies, grocery stores, country clubs, and cocktail parties.[129] Analogous to the approach Justice Alito suggested in *Alvarez*,[130] the Ninth Circuit interpreted the statute to contain limitations consistent with the government's argued purpose and affirmed Esparza-Ponce's conviction.[131] The Supreme Court denied *certiorari* in *Esparza-Ponce*, and the statute remains in force.[132]

18 U.S.C. § 911 is part of a larger subsection of criminal statutes that prohibit falsities, including criminalizing lies about being a member of the 4-H Club or Red Cross.[133] Generally, these statutes include a knowing

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[125] Widmar v. Vincent, 454 U.S. 263, 263 (1981).

[126] *See* United States v. Esparza-Ponce, 193 F.3d 1133, 1137-38 (9th Cir. 1999). The Court's ruling in *Esparza-Ponce* that the limiting construction of 18 U.S.C. § 911 was reasonable is consistent with *United States v. Achtner*. United States v. Achtner, 144 F.2d 49, 52 (2d Cir. 1944) ("[R]epresentation of citizenship must still be made to a person having some right to inquire or adequate reason for ascertaining a defendant's citizenship; it is not to be assumed that so severe a penalty is intended for words spoken as a mere boast or jest or to stop the prying of some busybody . . . ."). *See also* United States v. Franklin, 188 F.2d 182 (7th Cir. 1951). *But see* United States v. Karaouni, 379 F.3d 1139, 1140 (9th Cir. 2004) (Karaouni brought an as-applied challenge leading to the reversal of a criminal conviction for checking the wrong box on an immigration form.).

[127] *Esparza-Ponce*, 193 F.3d at 1137.

[128] *Id.*

[129] *Id.*

[130] *See* United States v. Alvarez, 132 S. Ct. 2537, 2563 (2012) (Alito, J., dissenting).

[131] *See Esparza-Ponce*, 193 F.3d at 1139.

[132] United States v. Esparza-Ponce, 193 F.3d 1133 (9th Cir. 1999), *cert. denied*, 121 S. Ct. 107 (2000).

[133] The false personation statutes prohibit lying in the following contexts: 18 U.S.C. § 911 (Citizen of the United States), § 912 (Officer or employee of the United States), § 913 (Impersonator making arrest or search), § 914 (Creditors of the United States), § 915 (Foreign diplomats, consuls or officers), § 916 (4-H Club members or agents), § 917 (Red Cross members or agents). *See* 18 U.S.C. §§ 911-917 (2012).

element, at times coupled with an intent to defraud,[134] which narrows their scope. These "false personation" statutes, however, apply in limitless times and places and, in most situations, have no history of proscription dating back to 1791. Thus, these statutes may come under First Amendment scrutiny following the Court's ruling in Alvarez.

This is also true of many state statutes that criminalize intentional falsehoods. Several state laws prohibit knowingly false statements of fact in general, including laws punishing speakers who falsely claim to be members of a veteran's organization,[135] the parents of a child,[136] or public officials.[137] These laws punish speech, even in the absence of harm or intent to mislead.[138]

3. *Commercial speech*

In restricting false commercial speech, the Court applies no analogous historical requirement. As recently as 1978, the Supreme Court ruled that states may regulate commercial speech via content-neutral time, place, and manner regulations.[139] Moreover, states retain the power to prohibit *false or misleading advertisements*.[140] The Court has ruled that advertisements by professionals, such as attorneys, are protected so long as they are truthful and not deceptive.[141] In addition, the Court has held that the government can punish deception in advertising including that which occurs by omission.[142] Again, the Court's holding in *Alvarez*, giving extreme protection to false statements, breaks with precedent dealing with falsehoods in commercial speech cases.

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[134] *See, e.g.*, 18 U.S.C. § 911 ("Whoever falsely and *willfully* . . . ." (emphasis added)).

[135] KAN. STAT. ANN. ("KSA") § 21-6410 (West 2013).

[136] 720 ILL. COMP. STAT. ANN. ("ICSA") 5/17-2(b)(7) (West 2013).

[137] IOWA CODE ANN. ("ICA") § 718.2 (West 2013).

[138] *See* KSA § 21-6410; 720 ICSA 5/17-2(b); ICA § 718.2.

[139] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) (stating that the Court has often approved restrictions of time, place, and manner).

[140] *Id.* at 762.

[141] *See* Bates v. State Bar of Ariz., 433 U.S. 350, 383-84 (1977), *reh'g denied*, 434 U.S. 881 (1977); Friedman v. Rogers, 440 U.S. 1, 18-19 (1979), *reh'g denied*, 441 U.S. 917 (1979); *Va. State Bd. of Pharmacy*, 425 U.S. at 772-73.

[142] *See* Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 655 (1985) (affirming disciplinary board's finding of violation based upon, *inter alia*, attorney's omission of his contingent-fee arrangements in his advertisements).

D. The Court Incorrectly Classifies Knowingly False Statements About One's Background as Political Speech

As discussed, in *Snyder* the Court expanded the definition of matters of public concern, yet failed to delineate a workable test for its application.[143] Traditionally, the First Amendment served to protect statements on matters of public concern that failed to contain a "provably false factual connotation."[144] The Court in *Snyder*, however, opined that:

> [a]lthough the boundaries of what constitutes speech on matters of public concern are not well defined, this Court has said that speech is of public concern when it can "be fairly considered as relating to any matter of political, social, or other concern to the community," . . . or when it "is a subject of general interest and of value and concern to the public . . . ."[145]

This narrative fails to exempt false statements from the "matters of public concern" umbrella.

Whether "speech addresses a matter of public concern must be determined by the content, form, and context of a given statement, as revealed by the whole record."[146] Alvarez's lawyer Jonathan Libby, a federal public defender who argued *Alvarez* before the Justices, "said his client's accumulated lies -- while a 'bunch of whoppers,' . . . were 'political speech' and deserved protection."[147] "'Mr. Alvarez was a publicly elected official who told a lie at a meeting,' said Libby. 'It's our position he was engaging in that same kind of political speech.'"[148] Libby's position, and possibly that of the Court, would envelop most speech by an elected official into matters of public concern. This extends significant protection to false statements made by public officials even if the speech is unrelated to their official duties.

Alvarez, coupled with *Snyder*, could have far reaching implications for future elections. The Court effectively immunizes intentional lying about one's résumé in the course of an election, determining lying is not a public

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[143] Snyder v. Phelps, 131 S. Ct. 1207, 1211 (2011).

[144] Milkovich v. Lorain Journal Co., 497 U.S. 1, 20 (1990).

[145] *Snyder*, 131 S. Ct. at 1211.

[146] Connick v. Meyers, 461 U.S. 138, 147-48 (1983).

[147] Mears, *supra* note 59. These lies include claiming, in a local newspaper, to have saved a woman from "certain death" when she got stuck behind a refrigerator, while he was allegedly out campaigning door-to-door in the neighborhood. *Id.* All Alvarez's claims of military service were a lie, including that he was in three helicopter crashes and been shot fifteen or sixteen times. *Id.* Alvarez's campaign literature included lies about his service and false claims that he was a professional engineer with a degree from Cal Poly. *Id.*

[148] *Id.*

wrong addressable through criminal penalty.[149] It is apparent, however, that known falsehoods harm political opponents as well as voters, whose choice of political representative rests significantly on a candidate's character and experience.[150] Of course, criminalizing the mistruths of all politicians in the course of a campaign is a daunting task, but specific lies about military service are easily traceable and have a noticeable impact on elections.

If known lies about one's résumé are classified as political speech, punishing Alvarez-like conduct presents an extremely difficult task for the government. Prior case law declares that "the First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office."[151] The Supreme Court opined that:

> [w]hatever differences may exist about interpretations of the First Amendment there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.[152]

It is clear that truly political speech is afforded the highest of judicial protections. But does Alvarez's conduct really classify as political speech in even the broadest sense? Lying about one's résumé hardly relates to structures and forms of government or government operations. The Court's opinion in both *Alvarez* and *Snyder*, however, may insulate any statement made in the course of an election, or made by a representative during a public proceeding, from potential criminal prosecution.

Speakers' lies about their own credentials offer no contribution to the public debate.[153] "They are objective facts that we can know for certain,

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[149] *See* United States v. Alvarez, 132 S. Ct. 2537, 2550 (2012) (ruling that public refutation (counterspeech) in cases like *Alvarez* can overcome lies made in the public arena). *See also id.* at 2556 (Breyer, J., concurring), for a much more searching discussion of the effects of Alvarez on elections.

[150] Justice Breyer highlighted the potential problems of applying the SVA in an election context:

> In the political arena a false statement is more likely to make a behavioral difference (say, by leading the listeners to vote for the speaker) but at the same time criminal prosecution is particularly dangerous (say, by radically changing a potential election result) and consequently can more easily result in censorship of speakers and their ideas. Thus, the statute may have to be significantly narrowed in its applications.

Id. at 2556.

[151] Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) (quoting Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971)).

[152] Mills v. Alabama, 384 U.S. 214, 218-19 (1966).

[153] Brief of Texas, et al. as Amici Curiae in Support of Petitioner at 6, United States v. Alvarez, 132 S. Ct. 2537 (2012) (No. 11-210) [hereinafter States' amicus brief].

not the sort of empirical questions that benefit from a robust exchange of ideas."[154] Furthermore, as posited by the States' amicus brief, "[l]ies about unearned credentials serve only to cloak the speaker in unwarranted credibility, and frustrate the pursuit of truth."[155] It is plainly obvious that a candidate-speaker's lies about military honors are employed to garner enhanced ethos leading to a fraudulent benefit (e.g., vote, campaign contribution, or volunteer service) from the audience. This was illustrated by Bob Kuhn, president of the Three Valleys Water District's board of directors, who stated: "where the public trust was really violated, in my opinion, and when I became very offended was when I realized that realistically, the election hinged on the fact that [Alvarez] was a war hero."[156] Whether it be a round a drinks for the Wedding Crashers, a seat on a governmental water management board, or respect and admiration, military honors can be a powerful tool in pursuing one's ambitions.

E. The Court's Holding in United States v. Alvarez *Will Not Affect the Military's Ability to Punish Similar Dishonest Conduct*

Even though the *Alvarez* holding limits the government's ability to criminalize lying about military honors, the Supreme Court's decision will not impede the military's ability to punish service members who fraudulently display military decorations not received. The Uniform Code of Military Justice ("UCMJ"), the criminal code that applies to U.S. service members, criminalizes the wearing or attempted wear of fraudulent awards.[157] The elements of the crime include:

> (1) That the accused wore a certain insignia, decoration, badge, ribbon, device, or lapel button upon the accused's uniform or civilian clothing;
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> (2) That the accused was not authorized to wear the item;
>
> (3) That the wearing was wrongful; and
>
> (4) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces.[158]

The maximum punishment for this offense is a bad-conduct discharge, forfeiture of all pay and allowances, and confinement for six months.[159]

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[154] *Id.*

[155] *Id.*

[156] Mears, *supra* note 59.

[157] *See* JOINT SERV. COMM. ON MIL. JUST., MANUAL FOR COURTS-MARTIAL IV-4, IV-135 (2012) [hereinafter MANUAL FOR COURTS-MARTIAL].

[158] *Id.* at IV-144-45.

Although the decision in *Alvarez* addresses the exact subject matter at issue in UCMJ Article 134, the military's ability to prosecute service members is likely to remain intact due to a long standing tradition of deference to military decision makers in applying the UCMJ. The Court has frequently reasoned that "military society has been a society apart from civilian society, so '(m)ilitary law . . . is a jurisprudence which exists separate and apart from the law which governs in our federal judicial establishment.'"[160] To maintain essential discipline in performance of its mission, the Court allowed the military to carve out exceptions to rights generally granted to all American citizens.[161]

Accordingly, the review of military regulations challenged on First Amendment grounds receives a less scathing constitutional review compared with similar laws or regulations applicable to civilian society.[162] Although both military service members and civilians have the right to express "ideas to influence the body politic[,]"[163] speech "protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected."[164] Thus, there is a wide range of conduct of military personnel to which Article 134 may be applied without infringement of the First Amendment.

Recently, in a case addressing First Amendment rights in the military, the Court of Appeals of the Armed Forces ("CAAF") demonstrated a more expansive view of the freedom of expression for military members in applying the reach of Article 134.[165] In *United States v. Wilcox*, the CAAF addressed the conviction of a soldier tried under Article 134 for espousing racist, anti-Semitic, and disloyal viewpoints during private internet "chats" with an undercover military investigator.[166] Private First Class Jeremy Wilcox identified himself as an Army Paratrooper at Fort Bragg, North Carolina on his online profile, the profile which he used to make several racist comments.[167] Army prosecutors charged Wilcox under Article 134's

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[159] *Id.* at IV-145. In 2012, the maximum punishment has been increased to include a bad-conduct discharge because this offense often involves deception. *Id.* at IV-100.

[160] Parker v. Levy, 417 U.S. 733, 744 (1974) (quoting Burns v. Wilson, 346 U.S. 137, 140 (1953)).

[161] Martin v. Mott, 25 U.S. (12 Wheat.) 19, 35 (1827). The court termed this "customary military law" or "general usage of the military service." *Id.*

[162] *See, e.g.*, Richenberg v. Perry, 73 F.3d 172, 173 (8th Cir. 1995) (per curiam).

[163] United States v. Brown, 45 M.J. 389, 395 (C.A.A.F. 1996).

[164] *Parker*, 417 U.S. at 759 (citing United States v. Gray, 42 C.M.R. 255, 258 (C.M.A. 1970)).

[165] *See* United States v. Wilcox, 66 M.J. 442 (C.A.A.F. 2008).

[166] *Id.* at 445.

[167] *Id.*

General Article[168] that allows the military to punish "all disorders and neglects to the prejudice of good order and discipline in the armed forces, [and] all conduct of a nature to bring discredit upon the armed forces . . . ."[169]

In overturning the U.S. Army Court of Criminal Appeals, the CAAF ruled that the Government failed to present sufficient evidence to show Wilcox's conduct met the elements of Article 134, namely that his behavior was "prejudicial to good order and discipline" or "service discrediting."[170] More importantly, the CAAF went on to develop a new test for speech charged as "service discrediting" to comport with First Amendment protections.[171] The CAAF concluded "that a direct and palpable connection between speech and the military mission or military environment is also required for an Article 134, UCMJ, offense charged under a service discrediting theory."[172] Justice Margaret Ann Ryan stated, "If such a connection were not required, the entire universe of service member opinions, ideas, and speech would be held to the subjective standard of what some member of the public, or even many members of the public, would find offensive."[173]

The CAAF rendered the traditional balancing test—between First Amendment considerations and military needs—moot if there is no nexus to the military mission or military environment.[174] *Wilcox* greatly eroded the legacy of past CAAF holdings,[175] ushering in a new and more restrictive test for speech crimes in the military.[176] Similar to recent Supreme Court decisions, the CAAF's decision represents a more expansive right of free speech for military personnel.

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[168] *Id.* at 443.

[169] MANUAL FOR COURTS-MARTIAL, *supra* note 157, at IV-100.

[170] *Wilcox*, 66 M.J. at 451.

[171] *Id.* at 448.

[172] *Id.* at 448-49.

[173] *Id.* at 449.

[174] *Id.* at 451 ("Having concluded that there is no evidence establishing that Appellant's speech was either prejudicial to good order and discipline or service discrediting, we are unable to conduct the ultimate balancing of First Amendment considerations and military needs that *Priest* requires.").

[175] *See, e.g.*, United States v. Priest, 45 C.M.R. 338, 343-44 (C.M.A. 1972) (holding that in the military, the right of free speech is not unlimited and balanced with the paramount concern of providing an effective fighting force to defend the U.S.); Parker v. Levy, 417 U.S. 733, 758 (1974) (holding that speech restrictions that may not be permitted in the civilian community may be permitted in the military); Schenck v. United States, 249 U.S. 47 (1919) (holding that there may exist liability for words that interfere with military recruitment).

[176] Michael C. Friess, *A Specialized Society: Speech Offenses in the Military*, ARMY LAW., Sept. 2009, at 18, 23.

Despite the CAAF's relatively liberal interpretation of First Amendment rights for service members, as demonstrated in *Wilcox*, Article 134's provision criminalizing lying about military experiences or awards will remain intact. False claims about one's service while under UCMJ jurisdiction is undoubtedly a crime both before[177] and after the CAAF's holding in *Wilcox* because deceit involving awards, decorations, and skill badges directly prejudices good order and discipline while concerning the military mission. Soldiers receive promotion points, which lead to pay increases, increased respect, and unique skill identifiers from awards, badges, tabs, and decorations received. The quid pro quo fraudulent benefits of these falsities are apparent. Additionally, the wearing of false awards significantly impacts the morale of others within the unit; if the military allowed this type of behavior to go unpunished, it would cause substantial disciplinary concerns.

V. CONGRESSIONAL RESPONSE: ANALYZING THE PROPOSED "SVA OF 2013"

A. The Possibility of Amending the SVA Following Alvarez

In *Alvarez*, the Supreme Court explained that "[a]lthough the First Amendment stands against any 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment,'" . . . the Court has acknowledged that perhaps there exist "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law."[178] Following this acquiescence to one of the government's arguments, the Court ruled that, despite the histrionics of deceit involving military medals, this behavior is not unprotected speech.[179] But does the Court's holding in *Alvarez* and *Stevens* eliminate the ability for Congress to modify the SVA?

As discussed, five Justices in total[180] agreed that the government could criminalize false speech relating to military medals. Justices Breyer and Kagan struck down the SVA on the limited basis of overbreadth noting that

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[177] For an example of a pre-*Wilcox* violation of Article 134, see United States v. Stone, 40 M.J. 420 (C.M.A. 1994). In *Stone*, the CAAF ruled that the First Amendment does not protect false statements about military operations made by a soldier in uniform to a public audience of high school students. *Stone*, 40 M.J. at 424.

[178] United States v. Alvarez, 132 S. Ct. 2537, 2547 (2012) (some alterations in original) (internal citations omitted); *see also* United States v. Stevens, 559 U.S. 460, 472 (2010).

[179] *Alvarez*, 132 S. Ct. at 2547.

[180] Justices Breyer, Kagan, Alito, Thomas, and Scalia.

the SVA could be modified to pass constitutional scrutiny.[181] Thus, Justice Breyer's concurrence becomes critical in redrafting the SVA. Breyer suggests condensing the reach of the SVA to pass constitutional muster.[182] Under Breyer's rationale, the SVA would resemble a fraud statute,[183] similar to those that punish falsehoods about military service to gain illegal veteran's benefits.

Penalizing speakers that benefit from false claims in the employment context represents a significant challenge for Congress in drafting an updated SVA. The *Alvarez* plurality deemed that Alvarez's lies "[did] not seem to have been made to secure employment or financial benefits or admission to privileges reserved for those who had earned the Medal."[184] While Justice Kennedy's analysis is technically correct, Alvarez, and most others similarly situated, attempt to gain future employment largely based on the respect granted to military awards and military service in general. The "financial benefits or admission to privileges reserved" relate to arduously earned respect, and that ultimate respect—a valuable, if not easily quantifiable, commodity—comes with intrinsic benefits, which Alvarez commandeered.

Interpreting Justice Kennedy's rationale suggests that the SVA, if constitutional, could only address conduct that directly conveyed a benefit on the speaker, a quid pro quo lie.[185] Quid pro quo benefits for awards represent relatively trivial remunerations compared with employment positions, political or otherwise, garnered from the enhancement of a résumé through honorable military service. More valuable benefits, such as employment, of which the falsehood is a significant factor, are the object of

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[181] *See Alvarez*, 132 S. Ct. at 2556 (Breyer, J., concurring).

[182] *See id.*

[183] Fraud statutes "typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury." *Id.* at 2554 (referencing RESTATEMENT (SECOND) OF TORTS § 525 (1976)).

[184] *Id.* at 2542 (majority opinion).

[185] Many states and private businesses provide relatively nominal quid pro quo benefits for military awardees. For example, the State of Florida provides a fee waiver to recipients of the Purple Heart or other combat decoration superior in precedence if the recipient is enrolling in a Florida public community college or state university, and provided he or she meets specific criteria. FLORIDA DEPARTMENT OF VETERAN'S AFFAIRS, FLORIDA VETERANS BENEFITS GUIDE 11 (2013), *available at* http://www.mydigitalpublication.com/publication/?m=1509&l=1. Several states offer special license plates for Purple Heart recipients. *Purple Heart License Plate Programs (State by State)*, PURPLEHEART.ORG (revised Dec. 2012), http://www.purpleheart.org/Downloads/ PurpleHeartLicensePlates.pdf. Some corporations grant discounts for awardees, including discounted mortgage rates. *See, e.g.*, *Warrior Rewards*, SERVICE CREDIT UNION, https://www.servicecu.org/civilian/content /WarriorRewards.asp.

Congress's purpose in safeguarding the rights afforded to those who rightly received awards.

Implementing both Justice Breyer's concurrence and the plurality's decision in *Alvarez* necessitates drafting the SVA to include a provision requiring fraudulent intent on behalf of the speaker. Altering the SVA in this fashion changes the character of the statue, making it more analogous to fraud, exempt from First Amendment scrutiny. Likewise, adding these elements effectively dissipates the chill that would arise from inadvertent, harmless conduct from military veterans.

B. The SVA of 2013

In the wake of *Alvarez*, congressional representatives are attempting to modify the SVA to survive constitutional scrutiny. In late 2012, both the House of Representatives and Senate advanced substantially similar revisions to the SVA.[186] Wrangling over specifics eventually led Congress to scrap the tentative "SVA of 2012," deferring modification of the SVA until the 2013 legislative session.[187] Subsequent modifications led to the SVA of 2013.[188] The revised Act criminalizes the receipt of a military decoration if the object of the lie is personal gain.[189] "Those caught lying for personal gain or for a tangible benefit would face a fine of up to $10,000 and up to six months imprisonment."[190] This narrower version of 18 U.S.C. § 704 reads as follows:

> (b) Fraudulent representations about receipt of military decorations or medals.--Whoever, with intent to obtain money, property, or other tangible benefit, fraudulently holds oneself out to be a recipient of a decoration or medal described [below] shall be fined under this title, imprisoned not more than one year, or both.
>
> (c) Enhanced penalty for offenses involving Congressional Medal of Honor.--
>
> (1) In general.--If a decoration or medal involved in an offense under subsection (a) is a Congressional Medal of Honor, in lieu of the punishment provided in that subsection, the offender shall be fined under this title, imprisoned not more than 1 year, or both.

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[186] Rick Maze, *Senate Passes Revised Stolen Valor Act*, ARMY TIMES (Dec. 3, 2012, 7:31 PM), http://www.armytimes.com/article/20121203/NEWS/212030317/.

[187] *See, e.g.*, *Lee Ferran, Obama Signs Stolen Valor Act Into Law*, ABC NEWS (Jun. 3, 2013, 3:03 PM), http://abcnews.go.com/blogs/headlines/2013/06/obama-signs-stolen-valor-act-into-law/.

[188] Stolen Valor Act of 2013, Pub. L. No. 113-12, 127 Stat. 448 (2013).

[189] Maze, *supra* note 186.

[190] *Id.*

> (d) Enhanced penalty for offenses involving certain other medals.--
>
> (1) In general.--If a decoration or medal involved in an offense described in subsection (a) is a distinguished-service cross . . . , a Navy cross . . . , an Air Force cross . . . , a silver star . . . , a Purple Heart . . . , a combat badge, . . . the offender shall be fined under this title, imprisoned not more than 1 year, or both.
>
> (2) Combat badge defined.--In this subsection, the term "combat badge" means a Combat Infantryman's Badge, Combat Action Badge, Combat Medical Badge, Combat Action Ribbon, or Combat Action Medal.[191]

The condensed SVA of 2013 omitted several provisions advanced by Congress late in 2012. Among these omitted was the definition of "tangible benefit,"[192] which in earlier versions prohibited the speaker from award-centric falsities in an election context. Rather than publish an inclusive list of prohibited settings, Congress instead elected to leave the ambiguous statute to interpretation by the courts. Surely, the SVA of 2013's "tangible benefit" clause and the degree of attenuation from the lie will be subject to judicial review in the future.

C. Looking to the Future: Analysis of the SVA of 2013

Congress's attempt to resurrect the SVA, narrowing the scope of targeted behavior, should survive constitutional muster. While the SVA of 2013 specifically criminalizes quid pro quo lies, it inherently punishes lies about military awards that may only be a contributing factor in a material gain for the speaker. Certainly Congress intends to punish this type of behavior, behavior that causes the most negative impact to true awardees.

Congress, however, placed responsibility with the judiciary to define "tangible benefit," which could hamper the ability of the SVA to punish non-quid pro quo lies. The ambiguity of the tangible benefit clause will

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[191] 18 U.S.C.A. § 704 (West 2013).

[192] Military Service and Integrity Act of 2012, S.3372, 112th Cong. (2012), *available at* http://thomas.loc.gov/cgi-bin/query/z?c112:S.3372:. The draft definition of "tangible benefit," which was ultimately not accepted, provided:

> (2) TANGIBLE BENEFIT OR PERSONAL GAIN---For purposes of this subsection, the term 'tangible benefit or personal gain' includes--
>
> (A) a benefit relating to military service provided by the Federal Government or a State or local government;
>
> (B) employment or professional advancement;
>
> (C) financial remuneration;
>
> (D) an effect on the outcome of a criminal or civil court proceeding; and
>
> (E) an impact on one's personal credibility in a political campaign.

Id.

likely lead to inconsistent results in courts hearing cases where fraudulent awards were a significant factor in the speaker's receipt of a tangible benefit. Even though the statute lacks clarity as to the definition of tangible benefit, the SVA is not ambiguous in a constitutional sense. Thus, the statute, which essentially represents fraudulent conduct, an unprotected category of speech, should pass constitutional scrutiny.

In regulating the political arena, however, the SVA of 2013 still faces significant challenges. As discussed, the Court practically extinguished the ability of Congress to punish lies that directly influence a political race by ruling that counterspeech represents a less restrictive means than the SVA for achieving the government's interest. It would be nearly impossible, under any interpretation of the tangible benefit clause, to prove that a candidate-elect won a race primarily due to a lie; this would represent an evidentiary nightmare, the efforts of which would far outpace any societal benefit. Effectively, the Court's decision in *Alvarez* placed the onus on political opponents and voters to instantaneously rebuke the lies of candidate.

Counterspeech, as applied to the SVA of 2013, would not represent a less restrictive governmental alternative in determining the SVA's constitutionality. While a database of Medal of Honor winners is easily created, a database of those awarded Purple Hearts, Combat Action badges, and other less prestigious awards becomes much harder to realize. This is due to the increased number of awardees since the War on Terror began and the inefficiencies of the award reporting system. Further, inclusion of the Medal of Honor in the SVA represents a painful irony; receipt of the country's most prestigious military award is the most publicized and easiest to confirm, whereas claims of lesser awards with less precise recording procedures are not easily refuted with counterspeech. Thus, the Medal of Honor could ultimately be removed from protection of the SVA to retain the statute's constitutionality.

VI. CONCLUSION

Considering the Court's recent First Amendment jurisprudence and historic principles on content-based speech, the *Alvarez* plurality correctly invalidated the overly broad SVA of 2005. The plurality, however, traveled too far in protecting knowing false statements of fact. This places other important statutes concerning false conduct in jeopardy and may foreclose the government's ability to punish knowing falsities. This is especially true of falsehoods uttered concerning a speaker-candidate's résumé during the course of an election.

Employing counterspeech as a panacea to all falsities concerning military awards affects Congress's ability to protect the most sacred of military awards—the Medal of Honor—even if a less rigorous test than "exacting scrutiny" is applied. Medal of Honor aside, five Justices will uphold Congress's latest attempt to protect the sanctity of military honors, the SVA of 2013, if the statute returns to the nation's highest court. Although the statute contains a glaring ambiguity as to the definition of "tangible benefit," it incorporates elements analogous to fraud, a category of speech unprotected by the First Amendment.

Finally, a central question in the SVA dialogue, aside from the constitutionality of the statute, is whether society requires the criminalization of deceit concerning military awards to preserve the honor of actual award recipients. Justice Kennedy pronounced, "Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication."[193] Those heroes that have dutifully earned the Medal of Honor and other significant military awards can never have their legitimate valor stolen. It can merely be borrowed by charlatans like Xavier Alvarez.[194] Brave, valorous military service members can find solace in the honor and recognition bestowed upon them by fellow brothers in arms, family, friends, and other purveyors of truth who will never let their valor truly be stolen.

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[193] United States v. Alvarez, 132 S. Ct. 2537, 2550-51 (2012).

[194] For sources that display images and information about those who display false military honors and impersonate U.S. military service members, see *Hall of Shame*, GUARDIAN OF VALOR, http://guardianofvalor.com/ (last visited Oct. 28, 2013); *Secured Targets*, STOLEN VALOR, http://www.stolenvalor.com/target.cfm?source=link&sort=order (last visited Oct. 28, 2013). These types of websites and their presence on social media represent the most useful form of counterspeech available to the public.

Hamilton v. Lethem: The Parental Right to Discipline One's Child Trumps a Child's Right to Grow Up Free From Harm

Jessica Gima*

I. INTRODUCTION

Laws allowing parents to defend accusations of child abuse should provide ample guidance for parents and judges alike so that either may readily determine exactly what the laws allow, and those laws should ban any type of actual physical harm to the child manifested in, but not limited to, bruises, marks, and scratches. Because children are normally unable to advocate for themselves,[1] protection of their well-being should be a priority for legislators and judges. Yes, parents have a fundamental liberty interest in the upbringing of their children[2] and to familial privacy,[3] but that liberty interest does not include the right to cause lasting physical and psychological harm to a developing member of society when administering physical discipline.[4]

In *Hamilton v. Lethem*,[5] the Hawai'i Supreme Court reaffirmed a parent's protected right to physically discipline his or her children.[6] The Court also reaffirmed and clarified the parental discipline defense, codified in Hawai'i Revised Statutes ("HRS") section 703-309(1), available as an affirmative defense when a parent is charged with child abuse.[7] However, the Court

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[1] Emily Buss, *Confronting Developmental Barriers to the Empowerment of Child Clients*, 84 CORNELL L. REV. 895, 927 (1999) ("[C]hildren, particularly abused children, struggle to capture their views in words at all." (citations omitted)).

[2] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925) ("The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations.").

[3] Prince v. Mass., 321 U.S. 158, 166 (1944) (stating that there is a "private realm of family life which the state cannot enter."); *see also* Smith v. Org. of Foster Families, 431 U.S. 816, 845 (1977) ("[T]he liberty interest in family privacy has its source, and its contours are ordinarily to be sought, not in state law, but in intrinsic human rights, as they have been understood in 'this Nation's history and tradition.'").

[4] *See* Santosky v. Kramer, 455 U.S. 745, 766 (1982) (explaining that the state has a *parens patriae* interest in "preserving and promoting the welfare of the child").

[5] Hamilton *ex rel.* Lethem v. Lethem, 126 Haw. 294, 270 P.3d 1024 (2012).

[6] *Id.* at 302, 270 P.3d at 1032.

[7] The *Hamilton* Court explicitly held that:

(1) parents have a constitutional right to discipline children inhering in their liberty

emphasized that this right, to physically discipline one's child, is in no way absolute.[8] The physical force used on a child for disciplinary purposes must be "reasonable."[9] In determining whether force is reasonable, a fact finder must conclude that:

> (a) The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; and
> (b) The force used is not designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.[10]

This note focuses on the Hawai'i Supreme Court's guidance, within its recent decision in *Hamilton* and other relevant cases, in distinguishing between domestic child abuse, which amounts to criminal consequences,[11] and physical parental discipline.[12] This note also explores the changes that

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> interest in the care, custody, and control of their children, under the due process clause, article 1, section 5 of the Hawai'i Constitution, (2) a parent may raise the right of parental discipline in a Hawaii Revised Statues (HRS) § 586-5 show cause hearing in opposition to the continuation of a temporary restraining order (TRO) issued under HRS chapter 586 on allegations of domestic abuse, (3) in such circumstances trial courts shall consider whether the discipline is reasonably related to the purpose of safeguarding or promoting the welfare of the minor in determining whether the parent's conduct constituted abuse or proper discipline, and (4) generally a non-custodial parent retains the right to discipline a child when the child is under his or her supervision.

Id. at 296, 270 P.3d at 1026. *See also* State v. Matavale, 115 Haw. 149, 164, 166 P.3d 322, 337 (2007) ("When a question of parental discipline is raised, the prosecution must prove beyond a reasonable doubt that the parent's . . . conduct did not come within the scope of parental discipline as prescribed in HRS § 703-309(1).").

[8] *See Hamilton*, 126 Haw. at 296, 270 P.3d at 1026.

[9] *Id.* at 307, 270 P.3d at 1037.

[10] *Id.* at 304, 270 P.3d at 1034 (quoting HAW. REV. STAT. § 703-309(1) (2012)).

[11] *See* HAW. REV. STAT. § 586-1 (West, Westlaw through 2013 Act 288) (defining "domestic abuse"). Hawaii's domestic abuse statute defines "extreme psychological abuse" as:

> [A]n intentional or knowing course of conduct directed at an individual that seriously alarms or disturbs consistently or continually bothers the individual, and that serves no legitimate purpose; provided that such course of conduct would cause a reasonable person to suffer extreme emotional distress.

Id.

[12] For purposes of this note, the terms "corporal punishment," "physical punishment," and "physical discipline" are synonymous. "Physical punishment" is more commonly used among parents in the United States; "corporal punishment" is commonly used internationally and is used in the United States by teachers, principals, and policy makers. Elizabeth T. Gershoff, *More Harm than Good: A Summary of Scientific Research on the Intended and*

could be made to current Hawai'i law regarding the use of physical force when disciplining a child.[13]

First, Hawai'i law offers sufficient guidance to parents regarding current child abuse laws and the parental right to discipline. The Court has made a noticeable effort to set precedent for family courts deciding cases of child abuse and the affirmative defense of parental discipline. Further, Hawaii's parental discipline statute, as amended in 2013, specifically prohibits certain types of physical acts against a child.[14] In this respect, Hawai'i has not fallen behind other states that either codify the parental discipline defense or allow the use of corporal punishment[15] under the state's common law.[16]

Second, although parents indisputably have a liberty interest in the upbringing of their own children, lawmakers should zealously protect a child's right to grow up free from significant bodily harm inflicted by his or her parents. Because many children cannot speak effectively for themselves, those who can must speak for them and their protection. Limited physical force may be necessary in certain situations, but the Hawai'i Legislature and courts should ban any type of physical force with the use of an object and physical force that leaves bruises and marks lasting and causing pain for longer than a few hours. Under current Hawai'i law, a parent may cause his or her child bruises and pain that last longer than a

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Unintended Effects of Corporal Punishment on Children, 73 LAW & CONTEMP. PROBS. 31, 33-34 (2010).

[13] In 2013, the Hawai'i Legislature amended Hawaii's parental discipline statute to place reasonable limits on the parental discipline defense as to what types of force parents may use. *See* HAW. REV. STAT. § 703-309(1) (West, Westlaw through 2013 Act 288). This note was written prior to those amendments, and has been subsequently re-worked to account for them.

[14] *See id.* § 703-309(1)(a) (stating that there is a rebuttable presumption that "throwing, kicking, burning, biting, cutting, striking with a closed fist, shaking a minor under three years of age, interfering with breathing, or threatening with a deadly weapon" are not justifiable uses of force).

[15] Black's Law Dictionary defines "corporal punishment" as a "physical punishment; punishment that is inflicted upon the body (including imprisonment)." BLACK'S LAW DICTIONARY 1269 (9th ed. 2009). For purposes of this note, "corporal punishment" as pertaining to children is "'the use of physical force with the intention of causing a child to experience pain, but not injury, for the purpose of correction or control of the child's behavior.'" David Orentlicher, *Spanking and Other Corporal Punishment of Children by Parents: Overvaluing Pain, Undervaluing Children*, 35 HOUS. L. REV. 147, 150 (1998) (quoting MURRAY A. STRAUS & DENISE A. DONNELLY, BEATING THE DEVIL OUT OF THEM 4 (1994)).

[16] *See infra* notes 36-40 and accompanying text.

day.[17] Allowing physical discipline up to the point of "substantial bodily injury"[18] places the children of Hawai'i in a position of great vulnerability.

Third, at the very least, law makers should consider reforming the parental discipline defense to specifically ban physical discipline that can lead to lasting *psychological and emotional injury*. The current law simply allows too much room for a parent's behavior to cross the line, leaving lasting physical and psychological effects on the children of Hawai'i without repercussion.

II. SUMMARY OF A PARENT'S CONSTITUTIONAL RIGHT TO DISCIPLINE HIS OR HER CHILD

Parents have physically disciplined their children since biblical times.[19] During the American Colonial period, the laws supported severe corporal punishment used for the purpose of "preventing sin and immorality."[20] In 1831, some religious leaders advocated for starving children as young as fifteen months old to force them to submit to their parent's authority.[21] Although the practice of harsh corporal punishment has been lessened to some extent, spanking and physical force still remain as popular forms of discipline in American families today.[22]

In 1923, the United States Supreme Court ("SCOTUS") affirmed that the substantive due process liberty interests guaranteed by the Fourteenth Amendment of the United States Constitution included the right of individuals to establish a home and raise children.[23] Then, in 1925, SCOTUS explained that that same liberty interest specifically protected the right of parents to direct the upbringing and education of children under their control.[24]

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[17] *See* State v. Matavale, 115 Haw. 149, 166, 166 P.3d 322, 339 (2007) ("[A]lthough corporal discipline may be considered excessive when it results in significant bruises or welts, 'bruises are not necessarily indicative of excessive corporal discipline.'" (citing T.G. v. Dep't of Children & Families, 927 So. 2d 104, 106 (Fla. Dist. Ct. App. 2006))).

[18] HAW. REV. STAT. § 703-309(1) (West, Westlaw through 2013 Act 288).

[19] Deana Pollard, *Banning Child Corporal Punishment*, 77 TUL. L. REV. 575, 579 (2003) (citations omitted).

[20] *Id.* at 580 (citing Judge Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983, 988-90 (1996)).

[21] *Id.* at 580 (citing Edwards, *supra* note 20, at 989 n.37).

[22] *Id.* at 581.

[23] Meyer v. Nebraska, 262 U.S. 390, 399 (1923); *see also* Kyli L. Willis, *Willis v. State: Condoning Child Abuse as Discipline*, 14 UC DAVIS J. JUV. L. & POL'Y 59, 72 (2010).

[24] *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925).

Fast-forward a couple of years and SCOTUS, in *Prince v. Massachusetts*,[25] once again reaffirmed that parents have a fundamental right to control the upbringing of their children.[26] However, this time around, the Court clarified that family life is a private realm that the government cannot enter unless public interest necessitates regulation of the parent-child relationship.[27] When a parent's conduct is not in the best interest of the child, the government may take on the role of *parens patriae* and enter into the private realm of the family when a parent threatens a child's health, well-being, or life.[28]

The parental discipline defense predominantly rationalizes a parent's use of violence or physical force on a child to promote that child's welfare as long as the force is reasonable and related to preventing or punishing the child for misconduct.[29] This defense arose from the "long-held belief that parents have broad authority to *protect, educate, and generally raise their children* as they see fit."[30]

Although SCOTUS has not directly answered the question of whether the right to care for children specifically includes a right to physically discipline them, it has decided several cases that imply that it would recognize a parental right to use corporal punishment.[31] Additional support for physical parental discipline can be found in the Restatement (Second) of Torts. In 1965, the Restatement (Second) of Torts addressed the civil liability of parents for torts committed against their children,[32] and stated that a parent is "privileged to apply such reasonable force or to impose such

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[25] 321 U.S. 158 (1944).

[26] *See id.* at 166; *see also* Amanda L. Krenson, *Reining in the Parental-Discipline Defense: Addressing the Need for Standards that Work to Protect Indiana's Children*, 44 VAL. U. L. REV. 611, 621 (2010).

[27] *See Prince*, 321 U.S. at 166 (noting that the State may interfere with parental rights "to guard the general interest in the youth's well being").

[28] *See id.* ("Acting to guard the general interest in youth's well being, the state as parens patriae may restrict the parent's control by requiring school attendance, regulating or prohibiting the child's labor, and in many other ways." (citations omitted)).

[29] Krenson, *supra* note 26, at 615-16.

[30] *Id.* at 618.

[31] *See* Hamilton v. Lethem, 126 Haw. 294, 302, 270 P.3d 1024, 1031 (2012) (citing Sweaney v. Ada Cnty., Idaho, 119 F.3d 1385, 1391 (9th Cir. 1997) (stating that SCOTUS has not answered the question whether the right to care for children also includes a right to use corporal punishment as discipline); Troxel v. Granville, 530 U.S. 57, 65 (stating that "the [constitutional] 'liberty [interest] of parents and guardians' includes the right 'to direct the upbringing and education of children under their control'" (quoting Pierce v. Soc'y of Sisters, 268 U.S. 510, 534-35 (1925)); Parham v. J.R., 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children.")).

[32] RESTATEMENT (SECOND) OF TORTS § 147(1) (1965).

reasonable confinement upon his [or her] child as he [or she] reasonably believes to be necessary for [the child's] proper control, training or education."[33] Many states, such as Hawai'i, use this Restatement as a model for their parental discipline defense.[34] Consequently, various court- or legislature-made laws throughout the majority of the states agree that a parental discipline defense should be available as a defense to child abuse.[35]

Presently, forty-nine of the fifty states legally permit parents to spank their children.[36] For example, Indiana allows "parental discipline"[37] of a child when "reasonable and not cruel or excessive."[38] Ohio's domestic violence and child abuse statute states, "No person shall knowingly cause or attempt to cause physical harm to a family or household member."[39] On the other hand, the Supreme Court of Ohio has indicated when interpreting its domestic violence statute that the legislature did not intend to prohibit "'proper and reasonable parental discipline' but, rather, incidents of corporal punishment that cause substantial physical injuries."[40]

Like these other states, Hawai'i has case law and legislation protecting the parental right to control the upbringing and discipline of children through employing physical force. The HRS defines "domestic abuse" as "[p]hysical harm, bodily injury, assault, or the threat of imminent *physical harm, bodily injury, or assault, extreme psychological abuse* or malicious property damage between family or household members[.]"[41] However, in affirming the parental discipline defense to child abuse, the Hawai'i Supreme Court held in *In re Doe*[42] that, "'the interest of parents in the care, custody, and control of their children . . . is perhaps the oldest of the

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[33] Krenson, *supra* note 26, at 630 (citing RESTATEMENT (SECOND) OF TORTS § 147 (1965)).

[34] *See* HAW. REV. STAT. § 703-309(1) (West, Westlaw through 2013 Act 288); *see infra* notes 36-40 and accompanying text.

[35] *See infra* notes 36-40 and accompanying text.

[36] *Compare Should Spanking Your Child Be Illegal?*, Good Morning America, ABC NEWS (Nov. 28, 2007), http://abcnews.go.com/GMA/story?id=3924024#.UM9yUm_O2pQ (stating that parents are legally allowed to spank their children in all 50 states), *with* S.B. 234, 146th Gen. Assemb., Reg. Sess. (Del. 2012) (amending Del. Code § 1100 to define "physical injury" to a child as "any impairment of physical condition or pain," which could cause spanking to be classed as an act of child abuse).

[37] Smith v. State, 489 N.E.2d 140, 141 (Ind. Ct. App. 1986).

[38] *Id.* (citing Hinkle v. State, 26 N.E. 777 (Ind. 1891); Hornbeck v. State, 45 N.E. 620 (Ind. Ct. App. 1896)).

[39] OHIO REV. CODE ANN. § 2919.25(A) (West, Westlaw through 2013 portion of 2013-2014 Legis. Sess.).

[40] State v. Jones, 747 N.E.2d 891, 896 (Ohio Ct. App. 2000) (quoting State v. Suchomski, 567 N.E.2d 1304, 1306 (Ohio 1991) (other citations omitted)).

[41] HAW. REV. STAT. § 586-1 (West, Westlaw through 2013 Act 288) (emphasis added).

[42] 99 Haw. 522, 57 P.3d 447 (2002).

fundamental liberty interests recognized by [the United States Supreme Court.]'"[43]

Now, not only Hawaii's case law makes the physical discipline defense available to parents, but Hawaii's Legislature also codified the parental right to physically discipline children in HRS section 703-309(1), which provides, in relevant part:

> The use of force upon or toward the person of another is justifiable under the following circumstances:
>
> (1) The actor is the *parent, guardian,* or other person similarly responsible for the general care and supervision of a minor, or a person acting at the request of the parent, guardian, or other responsible person, and:
>
> (a) The force is employed with *due regard* for the *age and size* of the minor and is *reasonably related to the purpose of safeguarding or promoting* the welfare of the minor, including the prevention or punishment of the minor's misconduct; provided that there shall be a rebuttable presumption that the following types of force are not justifiable for purposes of this subsection: throwing, kicking, burning, biting, cutting, striking with a closed fist, shaking a minor under three years of age, interfering with breathing, or threatening with a deadly weapon; and
>
> (b) The force used *does not intentionally, knowingly, recklessly, or negligently create a risk* of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.[44]

When faced with a charge of child abuse, a parent may raise the affirmative defense of parental discipline under this statute.[45] Furthermore, the *Hamilton* Court clarified that a non-custodial parent has a "residual parental right"[46] to physically discipline his or her child during a period of unsupervised visitation.[47]

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[43] *Id.* at 532, 57 P.3d at 457 (quoting Troxel v. Granville, 530 U.S. 57, 65 (2000)).

[44] HAW. REV. STAT. § 703-309(1)(a)-(b) (West, Westlaw through 2013 Act 288) (emphases added).

[45] Hawaii's "Abuse of family or household members; penalty" statute provides, in relevant part: "It shall be unlawful for any person, singly or in concert, to physically abuse a family or household member or to refuse compliance with the lawful order of a police officer . . . ." HAW. REV. STAT. § 709-906 (West, Westlaw through 2013 Act 288).

[46] Hamilton *ex rel.* Lethem v. Lethem, 126 Haw. 294, 310, 270 P.3d 1024, 1040 (2012).

[47] *Id.*

III. *HAMILTON V. LETHEM*

A. Facts

Hamilton v. Lethem, the focus of this note, involved two parents battling over what each thought was best for their child. On September 23, 2005, "Mother" filed for a temporary restraining order ("TRO") on behalf of "Minor" to enjoin Minor's father ("Father") from contacting, calling, or visiting Minor.[48] The trial court granted the TRO on the day Mother filed it,[49] and at the show cause hearing Minor alleged three incidents of abuse committed by father.[50]

Minor first alleged that on August 11, 2005, Minor called Father and lied to him, telling him that he did not have to pick her up because Mother would pick her up.[51] In reality, Minor, another teenage girl, and two teenage boys drove to a store to purchase the "morning after pill" for the other teenage girl.[52] Minor had a scheduled visitation with Father and later that night, Father called Mother in an attempt to locate Minor.[53] Mother told Father that she had not heard from Minor.[54] Minor arrived back at Mother's house at around 10:00 pm and Father picked Minor up and took Minor back to his home.[55] The day after, Father and Minor had a conversation about what happened and Father discovered that Minor had lied.[56] Father claimed that Minor was "just ranting and raving," and "screaming" at her younger sister.[57] Minor claimed that Father hit her "a couple of times" and that he attempted to slap her on the face but she blocked his tries.[58] In response, Father explained that he only wanted to hit Minor on the shoulder because Minor tried to leave.[59] Mother called the police when she was told that Minor and Father were having an argument.[60] Minor had no bruises resulting from this argument.[61]

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[48] *Id.* at 297, 270 P.3d at 1027.
[49] *Id.*
[50] *Id.* at 298, 270 P.3d at 1028.
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*

Minor secondly alleged that on August 25, 2005, she and Father "'got into a power struggle.'"[62] She testified that, "'[a]s I was covering my head, like, he hit me on my arms.'"[63] Father also allegedly told Minor, "Don't make me do that again."[64] Minor later called Mother and told her she felt uncomfortable staying with Father.[65]

Minor finally alleged that on September 16, 2005, Father visited her school unannounced.[66] Father told her that "everything had been [her] fault,"[67] "[Father's] financial problems were [her] fault,"[68] and Minor's younger sister was "'better than' Minor in various ways."[69]

Based on Minor's testimony, the trial court found that the TRO was warranted because Mother had sole legal custody of Minor and therefore Father had no right to discipline Minor.[70] Father appealed to the Hawai'i Intermediate Court of Appeals ("ICA"), arguing that the TRO (1) violated his right to discipline his children, (2) violated his procedural due process protection, (3) was gender-biased, and (4) was unwarranted.[71] On May 16, 2008, the ICA held that Father's case was moot because the TRO had expired by its own terms.[72]

The Hawai'i Supreme Court, however, vacated the ICA's decision and remanded the case to the ICA to address the merits of Father's case, because even though the TRO had expired, issuance of the TRO would cause harm to Father's reputation.[73] On remand, the ICA held that

> HRS Chapter 586, which empowers the family court to grant a TRO in cases of domestic abuse, did not violate the procedural or substantive due process guarantees of the Fourteenth Amendment to the United States Constitution or of article 1, section 5 of the Hawai'i Constitution because parents do not have a right to abuse their children.[74]

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[62] *Id.*
[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id.*
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] *Id.* at 299, 270 P.3d at 1029.
[71] *See id.* at 300, 270 P.3d at 1030.
[72] *Id.* (citing Hamilton *ex rel.* Lethem v. Lethem, No. 27580, 2008 Haw. App. LEXIS 248 (App. May 16, 2008) *vacated*, 119 Haw. 1, 193 P.3d 839 (2008)).
[73] *Id.* (citing Hamilton *ex rel.* Lethem v. Lethem, 119 Haw. 1, 12, 193 P.3d 839, 850 (2008)).
[74] *Id.* at 300-01 (citing Hamilton *ex rel.* Lethem v. Lethem, 125 Haw. 330, 337-47, 260 P.3d 1148, 1155-65 (App. 2011)).

B. The Hawai'i Supreme Court's Ruling and Clarification of the Parental Discipline Defense

Father then appealed to the Hawai'i Supreme Court, submitting two questions:

> (1) When determining whether to issue a TRO, does the parental right to discipline children require the application of clear and articulable guidelines to distinguish truly abusive behavior from actions that are "moderate and reasonable to discipline [that] is often part and parcel of the real world of parenting?[75]
> (2) When considering whether to issue a TRO, must the Family Court recognize that a non-custodial parent maintains a "residual parental right" to discipline his[/her] child during a period of unsupervised visitation, including the right to discipline the child for morals?[76]

In response, the Hawai'i Supreme Court first held that the family court should determine whether the parent's discipline is reasonably related to the purpose of promoting the welfare of the child:

> [T]he appropriate standard for the family courts to apply in contested HRS chapter 586 show cause hearings is whether the parent's discipline is *reasonably related* to the purpose of safeguarding or promoting the welfare of the minor. In applying such a standard, the surrounding circumstances, including factors such as the nature of the misbehavior, the child's age and size, and the nature and propriety of the force used, have been universally considered and should also guide the courts in this state.[77]

The *Hamilton* Court then held that a non-custodial parent retains the right to physically discipline his or her child when the child is under his or her care: "We conclude that a non-custodial parent retains the right to discipline his or her child for conduct that occurs while the child is under the supervision of the noncustodial parent."[78]

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[75] *Id.* at 301, 270 P.3d at 1031.
[76] *Id.*
[77] *Id.* at 308, 270 P.3d at 1038 (emphasis added).
[78] *Id.* at 310, 270 P.3d at 1040.

IV. ANALYSIS

A. The Hawai'i Supreme Court's Effort to Distinguish Between Child Abuse and Parental Discipline Compared to the Efforts Made by Other States

Prior to *Hamilton*, the Hawai'i Supreme Court faced the challenge of interpreting HRS sections 709-906 and 703-309(1) on a number of occasions, and in each instance the Court provided guidance to parents as to when physical discipline of one's child crosses the line into child abuse.[79] Throughout these challenges, both statutes have "withstood attack on the ground that they lack sufficient clarity as to the level of force that may be used to discipline a minor."[80]

In *State v. Matavale*,[81] the Court established that "[i]n determining whether force is reasonable, the fact finder must consider the child's age, the child's stature, and the nature of the injuries inflicted . . . ."[82] More specifically, the fact finder should consider "whether the force used was designed to cause or known to create a risk of causing substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage given the child's age and size."[83] Furthermore, the family court should consider in a TRO show cause hearing "whether the parent's discipline is reasonably related to the purpose of safeguarding or promoting the welfare of the minor."[84] Thus, Hawaii's Legislature has not only codified the parental discipline defense, but Hawaii's Supreme Court has also ratified it and provided guidance to parents regarding what type of punishment would cross the line into child abuse, leaving no question as to what the law in Hawai'i is. *Hamilton* exemplifies Hawaii's effort to provide clear direction to both family court judges and parents in child abuse cases.

The ruling in *Hamilton* supplements Hawaii's previous case law nicely regarding child abuse and the parental discipline defense, by holding that

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[79] *See, e.g.*, State v. Matavale, 115 Haw. 149, 158-69 166 P.3d 322, 331-342 (2007); State v. Stocker, 90 Haw. 85, 95, 976 P.2d 399, 409 (1999); State v. Crouser, 81 Haw. 5, 10-15, 911 P.2d 725, 730-35 (1996).

[80] *Hamilton*, 126 Haw. at 304, 270 P.3d at 1034 (citing *Stocker*, 90 Haw. at 95, 976 P.2d at 409; *Crouser*, 81 Haw. at 14-15, 911 P.2d at 734-35).

[81] 115 Haw. 149, 166 P.3d 322 (2007).

[82] *Id.* at 164, 166 P.3d at 337.

[83] *Id.*

[84] *Hamilton*, 126 Haw. at 308, 270 P.3d at 1038 ("In applying such a standard, the surrounding circumstances, including factors such as the nature of the misbehavior, the child's age and size, and the nature and propriety of the force used, have been universally considered and should also guide the courts in this state.").

family courts must recognize that non-custodial parents still retain the right to physical discipline if the child is under that parent's care and control. Father, Minor's biological father, in *Hamilton* did not have legal custody of his daughter, but did have visitation rights.[85]

Also, the *Hamilton* opinion logically lays out that in many cases, the terms "physical harm," "bodily injury," and "assault" suffice to distinguish abuse from discipline.[86] Father asked the court to "hold that a parent has a right to use reasonable force to discipline a child,"[87] and "request[ed] that [the Court] articulate a standard that family courts may apply in evaluating whether a parent's conduct amounts to abuse. . . ."[88] The Court declined and recognized that the Legislature meant for the statute to be read broadly, allowing the family courts discretion in determining whether a parent's act constituted abuse or discipline under the law.[89]

Furthermore, the *Hamilton* Court articulated what "reasonable force" and "reasonably related to . . . promoting the welfare of the minor"[90] entails when determining what constitutes child abuse or parental discipline and, once again, what factors should be considered.[91] The Restatement (Second) of Torts, summarizing common-law principles codified in HRS section 703-309(1), recognizes that "[a] parent is privileged to apply such *reasonable force* or to impose such reasonable confinement upon his child as he *reasonably believes* is necessary for [his child's] proper control, training, or education."[92] Citing to various other state cases, the *Hamilton* Court stated, "The formulations for determining whether a parent's conduct is reasonably related to discipline vary among the states, but they are more similar than not."[93] Presently, the consensus among states in determining

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[85] *See id.* at 309, 270 P.3d at 1039 (stating that "Petitioner had visitation rights with Minor even though Mother had sole legal custody").

[86] *Id.* at 306, 270 P.3d at 1036.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 305, 270 P.3d at 1035 (approving the ICA's recognition that "[t]he Legislature intended the definition of acts constituting domestic violence for purposes of TROs to be broader than those subjected to criminal liability under the penal code").

[90] *Id.* at 308, 270 P.3d at 1038.

[91] *Id.* at 307-08, 270 P.3d at 1037-38. The Court explained that "[r]easonableness is the standard that has long been employed by the states in the area of parental discipline." *Id.* at 307, 270 P.3d at 1037.

[92] RESTATEMENT (SECOND) OF TORTS § 147 (1965) (emphasis added).

[93] *Hamilton*, 126 Haw. at 307, 270 P.3d at 1037. For examples of the formulations used in other states, *see, e.g.*, State v. Bell, 223 N.W.2d 181, 184-85 (Iowa 1974); State v. Thorpe, 429 A.2d 785, 788 (R.I. 1981); Diehl v. Commonwealth, 385 S.E.2d 228, 230 (Va. Ct. App. 1989); Simons v. State, 803 N.W.2d 587, 592-94 (N.D. 2011); P.W v. D.O., 591 S.E.2d 260, 265-67 (W. Va. 2003)).

"whether force or confinement is reasonable for the control, training, or education of a child,"[94] is to consider the following factors:

> (a) whether the actor is a parent;
> (b) the age, sex, and physical and mental condition of the child;
> (c) the nature of his offense and his apparent motive;
> (d) the influence of his example upon other children of the same family or group;
> (e) whether the force or confinement is reasonable necessary and appropriate to compel obedience to a proper command;
> (f) whether it is disproportionate to the offense, unnecessarily degrading, or likely to cause serious or permanent harm.[95]

Consequently, *Hamilton* not only reaffirmed the precedent on child abuse and the parental discipline defense, but also clarified and added to Hawai'i law by summarizing the law in other states regarding how to determine reasonableness in child abuse and parental discipline cases.

B. Hawaii's Statutory Standards for Distinguishing Between Child Abuse and Parental Discipline Compared to Other States

Hawaii's child abuse and parental discipline defense statutes prove either on par or progressive compared to what other states have established thus far. Some states have codified the parental physical discipline defense to child abuse or the parental right to corporal punishment, as Hawai'i has done. Washington's laws, for example, provide that parents or teachers may physically discipline children under their guidance if they use reasonable and moderate force:

> It is the policy of this state to protect children from assault and abuse and to encourage parents, teachers, and their authorized agents to use methods of correction and restraint of children that are not dangerous to the children. However, the physical discipline of a child is not unlawful when it is reasonable and moderate and is inflicted by a parent, teacher, or guardian for purposes of restraining or correcting the child. Any use of force on a child by any other person is unlawful unless it is reasonable and moderate and is authorized in advance by the child's parent or guardian for purposes of restraining or correcting the child.
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> The following actions are presumed unreasonable when used to correct or

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[94] *Hamilton*, 126 Haw. at 307, 270 P.3d at 1037.

[95] *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 150 (1965)). For example, in Connecticut, "[i]n a substantiation of abuse hearing . . . the hearing officer must determine whether the punishment was reasonable and whether the parent believed the punishment was necessary to maintain discipline or to promote the child's welfare." Lovan C. v. Dep't of Children & Families, 860 A.2d 1283, 1289 (Conn. App. Ct. 2004).

> restrain a child: (1) Throwing, kicking, burning, or cutting a child; (2) striking a child with a closed fist; (3) shaking a child under age three; (4) interfering with a child's breathing; (5) threatening a child with a deadly weapon; or (6) doing any other act that is likely to cause and which does cause bodily harm greater than transient pain or minor temporary marks.[96]

On the other hand, Florida has a less-detailed parental discipline statute which provides that corporal discipline is excessive or abusive when it results in injuries such as "temporary disfigurement,"[97] or "significant bruises or welts."[98] The injuries must be "likely to cause the child's physical, mental, or emotional health to be significantly impaired."[99]

Other states have not codified the parental discipline defense to child abuse.[100] Parents in Rhode Island must rely on a court-mandated test of reasonableness.[101] The Rhode Island Supreme Court has held that "[w]ithin the bounds of moderation and for the purpose of the best interests of the child, the parent is entitled to be the judge of what is required and the means to be adopted."[102] A parent meets the test of unreasonableness when that "parent ceases to act in good faith and with parental affection and acts immoderately, cruelly, or mercilessly with a malicious desire to inflict pain, rather than make a genuine effort to correct the child by proper means."[103] However, Court mandated law may be confusing to an ordinary person as to what behavior constitutes illegal behavior, especially when the court's opinion uses legalese like "good faith" and "malicious."

C. Reforming the Hawai'i Child Abuse Laws to Disallow Any Bruising and Marks that Persist for Longer Than a Few Hours

As mentioned *supra* in Sections I and II, current law in Hawai'i allows corporal punishment when:

> The force is employed with due regard for the age and size of the minor and is reasonably related to the purpose of safeguarding or promoting the welfare of the minor, including the prevention or punishment of the minor's misconduct; . . . [t]he force does not intentionally, knowingly, recklessly, or negligently

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[96] WASH. REV. CODE. § 9A.16.100 (West, Westlaw through 2013 legislation).
[97] FLA. STAT. § 39.01(32)(a)(4)(i) (West, Westlaw through 2013 Act 272).
[98] *Id.* § 39.01(32)(a)(4)(k).
[99] *Id.* § 39.01(2).
[100] *See* Willis, *supra* note 23, at 75-76.
[101] *See* State v. Thorpe, 429 A.2d 785, 788 (R.I. 1981).
[102] *Id.*
[103] *Id.*

> create a risk of causing *substantial bodily injury, disfigurement, extreme pain or mental distress, or neurological damage.*[104]

The statutes define "substantial bodily injury" as injury that causes:

> (1) A major avulsion, laceration, or penetration of the skin;
> (2) A burn of at least second degree severity;
> (3) A bone fracture;
> (4) A serious concussion; or
> (5) A tearing, rupture, or corrosive damage to the esophagus, viscera, or other internal organs.[105]

The above statutes should be amended to better protect the well-being of Hawaii's children.

Although the previous section asserted that Hawai'i law appears relatively clear-cut regarding child abuse and the parental discipline defense, holes remain within the law that need patching. The existing arguments against corporal punishment and for banning any form of physical discipline in sum should inspire the Hawai'i Supreme Court the next time it sees a case like *Hamilton*, or the Hawai'i Legislature, to amend HRS Section 703-309(1) to disallow physical discipline administered by any object *or* injury that lasts more than a couple of hours (providing an exception where a child bruises extremely easily). This would create a bright line for the parent, and only allows physical discipline to a point where minimal pain occurs, enough pain to deter the child from behaving wrongly.

There are three strong arguments for banning corporal punishment and the parental discipline defense. First, physical discipline within a United States home should be banned for the same reasons states have banned corporal punishment within schools.[106] Second, the research on the effects of physical discipline shows it as an ineffective, and potentially harmful, method to control one's children.[107] Third, the worldwide trend has been to ban corporal punishment within the home due to the abundance of research stating that physical discipline does more harm to a child's welfare than good.[108]

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[104] HAW. REV. STAT. § 703-309(1)(a)-(b) (West, Westlaw through 2013 Act 288) (emphasis added).

[105] *Id.* § 707-700.

[106] *See infra* Part IV.C.1.

[107] *See infra* Part IV.C.2.

[108] *See infra* Part IV.C.3.

1. The history of corporal punishment within schools

Although corporal punishment in schools—spanking or paddling by teachers for misbehavior—remains constitutional based on the SCOTUS holding in *Ingraham v. Wright*,[109] the practice has rapidly lost its favorability amongst adults in the United States.[110] The practice is currently banned within public schools in all but 19 states.[111] In fact, Iowa[112] and New Jersey[113] have also passed laws to ban corporal punishment from private schools.[114] Furthermore, national polls in 2002[115] and 2005[116] "found that 72% and 77% of American adults, respectively, said they did not think teachers should be allowed to spank children in school."[117]

Teachers typically administer corporal punishment in schools with objects such as large wooden paddles,[118] an instrument that would be considered a weapon if wielded by one adult against another adult.[119] Recognizing that fact, teachers should not be allowed to physically punish their children with dangerous instruments that could cause substantial harm and injury.

However, Hawaii's parental discipline defense statute does not ban the use of large, dangerous objects such as a paddle and does not limit the

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[109] 430 U.S. 651, 671-76 (1977); *see also* Gershoff, *supra* note 12, at 48 ("Corporal punishment in schools remains constitutional in the United States based on the 1977 Ingraham v. Wright Supreme Court decision that the Eighth Amendment does not apply to corporal punishment administered by school personnel . . . .").

[110] *See* Gershoff, *supra* note 12, at 48-49.

[111] Yunji De Nies, *Should Your Child Be Spanked at School? In 19 States, It's Legal*, Good Morning America, ABC NEWS (March 16, 2012), http://abcnews.go.com/US/spanking-school-19-states-corporal-punishment-legal/story?id=15932135.

[112] IOWA CODE ANN. § 280.21(1) (West, Westlaw through 2013 Reg. Sess.).

[113] N.J. STAT. ANN. § 18A:6-1 (West, Westlaw through 2013 legislation, c. 165 and J.R. No. 11). The New Jersey statute allows school employees to use reasonable force only in very limited circumstances: to quell a disturbance wherein physical injury is threatened to others; to obtain possession of weapons in the control of a student; for the purpose of self-defense; and to protect persons or property. *Id.*

[114] *See* Gershoff, *supra* note 12, at 48 (citing Center for Effective Discipline, *Discipline at School (NCACPS): U.S.: Corporal Punishment and Paddling Statistics by State and Race*, http://www.stophitting.com/index.php?page=statesbanning (last visited Oct. 7, 2013)).

[115] Gershoff, *supra* note 12, at 49 (citing Julie Crandall, Poll: *Most approve of Spanking Kids: Most Americans Think Corporal Punishment is OK*, ABC NEWS (Nov. 8, 2002), http://abcnews.go.com/US/story?id=90406&page=1).

[116] *Id.*

[117] *Id.*

[118] *Id.* (citing HUMAN RIGHTS WATCH, A VIOLENT EDUCATION: CORPORAL PUNISHMENT OF CHILDREN IN US PUBLIC SCHOOLS 3 (2008)).

[119] *Id.*

punishment to the use of a parent's bare hands.[120] If parents view paddling by teachers as child abuse because of its potential to inflict serious harm, then, following the same train of logic, parents themselves should not be allowed to wield objects in punishing their children either. Thus, the parental physical discipline defense or the child abuse statute should be amended to ban the use of objects in administering corporal punishment within the home.

2. Research on "spanking" children

Research done in this area shows that physical discipline can easily affect a child's mental and physical well-being because corporal punishment promotes verbal and physical aggression,[121] poor performance in school,[122] and possible substantial injuries and death.[123] All of these findings provide substantial support for restricting the parental discipline defense.

Children who experience corporal punishment while growing up tend to not only subject their children to the same violent environment,[124] but also show more verbal and physical aggression toward their spouses or dating partners.[125] This type of behavior can be prevented by better protecting the environment surrounding a child throughout his or her childhood.[126]

Additionally, some research has shown that corporal punishment can also be linked to poor performance in school.[127] One study of middle-school-aged children shows that children physically punished by their parents scored significantly lower on a brief measure of IQ than children who were

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[120] HAW. REV. STAT. § 703-309(1) (West, Westlaw through 2013 Act 288).

[121] Elizabeth T. Gershoff & Susan H. Bitensky, *The Case Against Corporal Punishment of Children*, 13 PSYCHOL. PUB. POL'Y & L. 231, 234 (2007).

[122] *See* Gershoff, *supra* note 12, at 46.

[123] *See id.* at 41.

[124] *Id.* at 47.

[125] *Id.* (citing Alicia D. Cast et al., *Childhood Physical Punishment and Problem Solving in Marriage*, 21 J. INTERPERSONAL VIOLENCE 244, 254 (2006)).

[126] *See id.* at 37 (arguing that non physical forms of punishment, such as time-outs, are as effective as physical punishment).

[127] *Id.* at 46.

not.[128] Children whose parents physically punished them frequently showed the lowest levels of IQ.[129]

Finally, research shows that physical discipline can easily get out of hand, placing a child in immediate danger. Corporal punishment is often times a precursor to child abuse,[130] and the risk of child abuse should encourage the government to place stronger restrictions on allowable corporal punishment. Almost two-thirds of reported child abuse cases started as acts of corporal punishment meant to correct a child's misbehavior.[131] Thus, it does not come as much of a surprise that research also shows that the United States is the most violent of the advanced industrial societies—with a homicide rate of nearly three times that of Canada and nearly eight times that of Western European countries.[132]

Specific research studies within the United States have found that many parents in the United States, even with the best intentions, take corporal punishment too far and place their children in imminent danger when physically disciplining them. "Nearly seventy percent of child abuse cases in child protective services agencies result from corporal punishment going too far."[133] In 1995, the U.S. Department of Health and Human Services found that over 2,000 children die every year at the hands of their own parents, while approximately 18,000 are permanently disabled.[134] The

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[128] *Id.* (citing Katherine J. Aucoin et al., *Corporal Punishment and Child Adjustment*, 27 J. APPLIED DEV. PSYCHOL. 527, 533 (2006)). Gershoff further added, "In a similar finding with younger children, one-year-olds whose parents relied on corporal punishment had significantly lower scores on a standardized test of mental abilities than did children whose parents used corporal punishment rarely or never." *Id.* (citing Thomas G. Power & M. Lynn Chapieski, *Childrearing and Impulse Control in Toddlers: A Naturalistic Observation*, 22 DEV. PSYCHOL. 271, 273 (1986)).

[129] *Id.* It is important to note that the research that has been performed attempting to link performance in school to corporal punishment has not been conclusive. *Id.* (stating "[n]otably, though, a significant association between corporal punishment and children's cognitive abilities has not always been replicated across studies. In studies of math and reading achievement, grade-point average, and intelligence, corporal punishment was not significantly related to children's cognitive ability. More research is needed to help explain the inconsistent findings to date, but they do suggest that concern about effects on children's cognitive abilities may be well placed."). However, despite the research inconsistencies, the results still raise concerns about how corporal punishment, no matter how slight, affects the cognitive development of children.

[130] "Because corporal punishment involves physical force applied to a child to the point that he or she experiences pain, and because parents are larger and stronger than children, there is always the potential for injury, even by well-intentioned parents." *Id.* at 41.

[131] *Id.*

[132] *See* Pollard, *supra* note 19, at 577 (citing Murray A. Straus, *Spanking and the Making of a Violent Society*, 98 PEDIATRICS 837 (1996)).

[133] *Id.* at 621.

[134] *Id.* at 583 (citing U.S. DEP'T OF HEALTH & HUMAN SERVS. ADVISORY BD. ON CHILD

same study also found that another 142,000 children are seriously injured every year as a result of unreasonable discipline.[135] Based upon all of this research, law makers should seriously consider amending Hawaii's laws to better protect children from physical discipline taken too far by banning discipline administered by any object or creating injuries lasting longer than a few hours.

3. Foreign legislation prohibiting parental spanking

Based upon the abundance of research that now connects corporal punishment with various harms to children, parents, and society, thirty-six foreign countries have banned all forms of corporal punishment.[136] This position has been adopted by the United Nations through their Convention on the Rights of the Child.[137] Further, Sweden started the worldwide trend toward banning all forms of corporal punishment in 1979,[138] and the following countries have now also outlawed, by statute or court decision,[139] *any form* of corporal punishment: Finland, Norway, Austria, Cyprus, Italy, Croatia, Latvia, the United Kingdom, Denmark, Israel, Nepal, Hungary, Romania, Greece, Portugal, New Zealand, Netherlands, Uruguay, Spain, Venezuela, Republic of Moldova, Costa Rica, Togo, Luxembourg, Liechtenstein, Poland, the Republic of Congo, Kenya, Tunisia, Honduras, South Sudan, Albania, Bulgaria, Ukraine, and Germany.[140] Hawai'i could

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ABUSE AND NEGLECT, A NATION'S SHAME: FATAL CHILD ABUSE AND NEGLECT IN THE UNITED STATES, at xxiv-vi, 16 (1995)).

[135] *Id.*

[136] *States with Full Abolition*, GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, http://www.endcorporalpunishment.org/pages/progress/prohib_states.html (last updated October 2013) (noting that corporal punishment has been outlawed by legislation in thirty-four countries, and also by Supreme Court decisions in Italy and Nepal but has not yet been codified in those two countries).

[137] Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3; *see also* Comm. on the Rights of the Child, General Comment No. 8, 42d Sess., May 15-June 2, 2006, ¶ 3, CRC/C/GC/8 (Mar. 2, 2007) (highlighting "the obligation of all States parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel or degrading forms of punishment of children"); *see also* Pollard, *supra* note 19, at 592.

[138] *See* Willis, *supra* note 23, at 69 ("The Swedish government amended its Parent and Guardianship Code to forbid parents from subjecting their children to corporal punishment or other 'injurious or humiliating treatment.'" (citing Dennis Alan Olson, *The Swedish Ban of Corporal Punishment*, 1984 BYU L. REV. 447, 447 (1984))).

[139] *Id.* ("[I]n 1996, Italy's highest court, the Supreme Court, judicially proscribed parental use of corporal punishment as a technique for raising or educating children." (citing Susan H. Bitensky, *Spare the Rod, Embrace Our Humanity: Toward a New Legal Regime Prohibiting Corporal Punishment of Children*, 31 U. MICH. J.L. REFORM 353, 380 (1998))).

[140] *See* GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN, *supra* note

start a national trend towards banning corporal punishment by restricting the parental discipline defense to discipline without the use of objects and not allowing any lasting bruises or marks.

Most of the countries that have banned corporal punishment focus on the "body of research demonstrating the ineffectiveness of corporal punishment as well as its potential for negative side effects"[141] rather than human-rights concerns.[142] For example, research on the potential negative effects of physical discipline summarized in a report by the New Zealand government's office for the Children's Commissioner[143] was influential in building support for New Zealand's universal ban on corporal punishment.[144] Using these countries as examples, the Hawai'i Legislature should seriously consider amending the State's child abuse laws to better protect Hawaii's children as the research shows that allowing corporal punishment increases the chances of child abuse and perpetuates violence among adults.

Sweden accompanied its ban of corporal punishment with a support program for parents to educate them on the ill-effects of corporal punishment and alternative methods they may use.[145] Furthermore, although Swedish law bans all forms of physical discipline, it does not ban use of physical force necessary to *protect* the child.[146] For example, a

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136; *see also* Dan Izenberg, *Supreme Court: Corporal Punishment of Children is Indefensible*, JERUSALEM POST, Jan. 26, 2000, at 4, *available at* http://www.nospank.net/israel.htm.

[141] Gershoff, *supra* note 12, at 54-55.

[142] *Id.* (citing ROWAN BOYSON, NSPCC, EQUAL PROTECTION FOR CHILDREN: AN OVERVIEW OF THE EXPERIENCE OF COUNTRIES THAT ACCORD CHILDREN FULL LEGAL PROTECTION FROM PHYSICAL PUNISHMENT 64-65 (2002), http://www.respectworks.eu/file admin/website/downloads/equalprotectionforchildren_wdf48095.pdf).

[143] ANNE B. SMITH ET EL., THE DISCIPLINE AND GUIDANCE OF CHILDREN: A SUMMARY OF RESEARCH (2004), http://www.skip.org.nz/documents/resources/research-and-training/the-discipline-and-guidance-of-children.pdf.

[144] Gershoff, *supra* note 12, at 55. *See also* BETH WOOD ET AL., UNREASONABLE FORCE: NEW ZEALAND'S JOURNEY TOWARDS BANNING THE PHYSICAL PUNISHMENT OF CHILDREN 31 (2008), http://resourcecentre.savethechildren.se/sites/default/files/documents/4851.pdf (explaining that "[g]rowing public concern over family violence and the existence of strong international research evidence discrediting the use of physical punishment were two of the critical factors underpinning pressure for change in New Zealand").

[145] *See* Pollard, *supra* note 19, at 588 (citation omitted).

[146] *See id.* ("All Swedish families received a pamphlet describing the law, which emphasized that the law forbids all physical punishment, including swats, but that it was not illegal to grab a child to prevent the child from hurting himself or herself." (citing Joan E. Durant, *The Swedish Ban on Corporal Punishment: Its history and Effects*, *in* FAMILY VIOLENCE AGAINST CHILDREN: A CHALLENGE FOR SOCIETY 23-25 (Dettev Frehsee et al. eds., 1996))).

parent may grab and yank a child to avoid running into traffic. If Hawai'i were to amend or even completely ban corporal punishment, Sweden's model would provide a great starting point.

D. Reforming the Hawai'i Child Abuse Laws to Prevent Emotional and Psychological Harm Resulting from Corporal Punishment

Even if HRS Section 703-309(1) is never amended to ban physical injury through any object or harm lasting for more than a couple of hours, the parental discipline defense should still be amended to disallow harm which may create lasting *mental or psychological injury*. Although Hawaii's *domestic* abuse statute imposes criminal consequences for inflicting "extreme psychological abuse"[147] and "bodily injury,"[148] the parental discipline defense statute merely bans "substantial bodily injury"[149] while failing to emphasize protecting children against the lasting psychological effects of violence within the home.[150]

Contrary to the belief of many parents who employ corporal punishment, research shows that children who experience corporal punishment while growing up are more likely to exhibit symptoms of depression or anxiety.[151] For the past half-century or so, the majority of psychology and pediatric studies on child corporal punishment have found that the use of physical disciplinary means led to subsequent problems for that child.[152] For example, in 1997, researchers in New Hampshire and Texas released a study that found that when parents use corporal punishment to decrease anti-social behavior in children, the children eventually became even more anti-social.[153] Children who experience corporal punishment and physical discipline while growing up experience it as a highly stressful event and for developing minds and bodies, the stress can interfere with cognitive

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[147] HAW. REV. STAT. § 586-1 (2012).

[148] *Id.* § 586-1 (defining "domestic abuse" as "bodily injury"); *see, e.g., id.* § 586-3(a) (action for protective order in cases of domestic abuse).

[149] *See id.* § 703-309.

[150] *See id.*

[151] Gershoff, *supra* note 12, at 43-44.

[152] *See* Pollard, *supra* note 19, at 594 (citing Am. Acad. of Pediatrics, Consensus Statements, 98 PEDIATRICS 853, 853 (1996) (providing consensus statements from a 1996 Conference entitled, "The Short- and Long-term Consequences of Corporal Punishment")).

[153] *Id.* at 603 (citing Murray A. Straus et al., *Spanking by Parents and Subsequent Antisocial Behavior of Children*, 151 ARCHIVES PEDIATRIC ADOLESCENT MED. 761, 761-67 (1997)). "The findings also suggested that if the parents replace corporal punishment with other forms of discipline, it could reduce antisocial behavior in children and eventually reduce the level of violence in society." *Id.*

functioning.[154] This cognitive interference resulting from spanking or slapping produces strong negative emotions, such as anger, humiliation, and sadness.[155]

The more frequently or severely a child experiences a spanking, the more likely he or she will suffer from depression or anxiety, both at the time of the discipline and in the future.[156] Depression and anxiety will affect the child's adult life and how the child will eventually fit into society, if at all.[157] Additionally, the stress of living through physical discipline can cause a child to perform poorly in school and erode the quality of the child's relationship with his or her parents, further affecting that child's future.[158] Much of these detrimental psychological effects could be prevented through an amendment to the parental physical discipline statute banning psychological or mental harm to the child when practicing physical discipline.

V. CONCLUSION

The United States, as a nation and as a collection of individual states, has fallen behind the worldwide trend to fight for and protect children's rights. In *Hamilton v. Lethem*, the Hawai'i Supreme Court declined to change Hawai'i law and protected the parental right to physically discipline one's children. Hawaii's current parental discipline defense does not protect children against violence administered by paddles, sticks, or other dangerous objects, violence that creates physical harm that may not be considered "substantial" to the law but is substantial to the child, and violence that comes hand in hand with lasting psychological effects. In a modern world where children's rights are human rights,[159] that type of treatment of children cannot be tolerated.

While the Hawai'i Supreme Court has put forth a decent effort to interpret Hawaii's child abuse and parental discipline defense statutes for

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[154] *See id.* at 617 (citing Heather A. Turner & David Finkelhor, *Corporal Punishment as a Stressor Among Youth*, 58 J. MARRIAGE & FAM. 155, 155-56 (1996)).

[155] *See id.*

[156] Gershoff, *supra* note 12, at 43-44.

[157] *Id.* at 46-47 ("Given the strong link found between corporal punishment and aggression and antisocial behavior in childhood, it is not surprising that this association would continue into adulthood.").

[158] *Id.* at 44-45.

[159] *See, e.g.*, Convention on the Rights of the Child, Preamble, Nov. 20, 1989, 1577 U.N.T.S. 3 ("Recognizing that the United Nations has . . . proclaimed and agreed that everyone is entitled to all the rights and freedoms . . . without distinction of any kind [and] [r]ecalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance[.]").

parents and lower courts in *Hamilton v. Lethem*, the statutes should be amended to better protect children from potential harm and even death. Taking into account: (1) the trend within the United States to ban corporal punishment within schools; (2) the research and studies done linking corporal punishment to inhibited cognitive and behavioral development in children and increased likelihood for child abuse or death; and (3) the worldwide trend towards banning any form of corporal punishment, Hawai'i should not only amend the statutes to ban potential emotional and mental "substantial" injury resulting from corporal punishment and physical discipline administered with an object, but also to ban any form of punishment resulting in lasting bruising, welts, or physical injury.

Parents indeed have a right to control the upbringing of their children, as recognized by both the Hawai'i and U.S. Supreme Courts. Further, it is understood that parents have short- and long-term goals when using corporal punishment to correct their children's misbehavior.[160] However, this fundamental right is not absolute and does not grant a parent permission to surround a growing child with a violent, aggressive environment. The well-being of children must be protected, and Hawaii's government, acting as children's *parens patriae*, has a duty to protect the well-being and the voices of the children of Hawai'i.

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[160] Gershoff, *supra* note 12, at 34 ("[Parents'] short-term goal is typically to get the child to stop engaging in the unacceptable behavior—to get the child to comply. Yet other short-term goals might include getting the child's attention or quickly communicating to the child that the parent is in charge. Parents also have a variety of long-term goals . . . key among which are reducing the likelihood that the child will repeat the undesirable behavior and increasing the likelihood that the child will behave in socially acceptable ways.").

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