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ARTICLES

LEADING THE WORLD IN THE WRONG DIRECTION: IS IT TIME FOR THE UNITED STATES TO ADOPT THE WORLD STANDARD "LOSER PAYS" RULE IN CIVIL LITIGATION?

by

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I. INTRODUCTION

Although there has long been a debate in the United States as to whether we are an overly litigious society[1], it is fair to say that the world largely views the United States as the most litigious nation on earth. Not open to debate is the fact that there is a great deal of litigation in the United States every year, and that the number of United States civil litigations (5,806 cases filed per year per 100,000 people) is much higher than in other countries (compared, for example, to other major legal systems such as the U.K. [3,681 cases per 100,000 people], Australia [1,542 cases filed per 100,000 people] and Canada [1,450 cases filed per 100,000 people]).[2]

Concomitantly, it is not surprising that the United States has more lawyers than any other country. Recent estimates show there are more than 1.1 million lawyers in the United States, or one lawyer per 270 residents.[3] Direct comparisons to other countries is difficult for a variety of reasons, including the fact that providers of legal

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services can include non-lawyers such as notaries who provide legal services in many countries around the world. Nevertheless, by any reasonable measure it is clear that both the amount of litigation and the number of lawyers in the United States are robust.[4]

Similarly not surprising is that all of this litigation with all of these lawyers come at substantial cost to litigants in the United States. Costs of tort litigation alone in the United States have risen from $1.8 billion in 1950 when it represented 0.62 percent of Gross Domestic Product (GDP) to $148.1 billion in 2009 or 1.74 percent of GDP.[5] Tort costs as a percentage of GDP are significantly higher in the United States than in any other country and have increased steadily from $1.8 billion (0.62% of GDP) in 1950 to $260.1 billion by 2004, (representing 2.22% of GDP for that year).[6] Unquestionably such legal costs have been increasing significantly in the United States. The average annual increase in tort costs from 1950-2004 is 9.6% while the average annual increase in GDP for the same time period is 7.1%.[7] As a ratio to economic output, United States tort costs exceed those of other industrialized countries by a sizable margin; with the exception of Italy, which had a tort cost as a percentage of GDP of 1.7% (compared to 2.2% for the United States), other countries have recent tort costs relative to economic output comparable to those in the United States in the 1960s and 1970s.[8] Per capita tort costs in the United States adjusted for inflation have risen by a factor of nearly 10 from 1950 to 2004.[9]

There arguably exist many factors that combine to cause the American explosion of litigation and its attendant costs. A major contributing factor encouraging litigiousness and its resultant costs in the United States is the continued use of the “American Rule” as the general mechanism for assigning the payment of lawyers’ fees. This rule, generally requiring each party to a litigation to bear that party’s respective attorney’s costs, affords plaintiffs little risk in pursuing law suits under the simple calculus that for limited and often estimatable legal fees plaintiffs can instigate and pursue lawsuits which may allow a significant payoff if they win, whereas defendants also must pay legal fees to minimize the risk of losing, whether they are or are not legally in the wrong.

This approach is in contrast to the so-called "English Rule" that requires the losing party in a civil law suit to reimburse the winning party's legal costs[10] (this is really the "World Rule" inasmuch as the rest of the world generally follows this rule, as well as in that the "American Rule" is followed only in the United States[11]; which also begs the question: Is the rest of the entire world wrong?), Such a "loser pays" rule as otherwise used world wide appears to have the advantage of eliminating the plaintiffs' incentive for bring suits that may in fact be dubious.

This article examines the history and contemporary application of the American Rule, with an eye toward assessing whether American justice might better and more cost effectively be served by a change to a "Loser Pays" system like that presently used in England, and around the globe.

II. BRIEF BACKGROUND ON ATTORNEY-FEE SHIFTING

The "United States Rule" that each party to litigation should, in the absence of a statute to the contrary, bear the cost of its own legal costs is well ingrained in our system. The losing party in civil litigation in federal courts is generally assessed court costs in both trial and appellate cases.[12] The state rules generally parallel the federal rule with few exceptions.[13]

But this was not always the case in the United States. Originally, colonial America adopted the English Rule and allowed the prevailing party to collect attorney's fees from the losing party.[14] In migrating to and then maintaining the American Rule the most often cited rationale was enhancing access to justice—a concern that a "loser pays" system may discourage aggrieved parties from pursuing legal remedies in the courts out of fear of having to pay not only their own attorney's fees, but also those of the defendant if they lose.[15] Of note, however, is that contrary to the oft stated rationale, the English Rule (again, more accurately the "World Rule") was not adopted in the United States after its independence from England because of any concern about access to justice, but rather out of a desire by lawyers to not be limited to the statutory compensation provided for under the old statutes.[16] The English Rule was abandoned along with the low statutory limits on lawyer's fees, effectively allowing lawyers to charge higher fees but removing the requirement that the loser pay both his/her attorney's fees along with those of the prevailing party in civil suits.[17]

The genesis of the American Rule as a means of maximizing the profitability of a law practice is a useful fact to keep in mind when evaluating the relative merits of the American Rule versus the World Rule.

III. WHO BENEFITS FROM THE AMERICAN RULE?

In the debate over the relative merits of the American Rule over the English/World Rule, access to justice is a primary argument advanced for maintaining the *status quo.* If "loser pays" is adopted, the argument goes, plaintiffs, in particular those of limited means, will be dissuaded from asserting their rights in court for fear of having to pay the potentially high attorneys' fees of the prevailing party.[18] But commentators have also argued that this American no-indemnity rule "is a practice of the bar that worked for it and not a solution consciously chosen to meet ideals of access to justice. The latter . . . is an after the fact rationalization."[19] With each party having to bear the cost of their attorney's fees, there is little risk for plaintiffs to assert weak claims in the hope of extracting a settlement from defendants who know that defending such suits can be more costly than settling even when they have a high probability of success at trial.[20] The American rule can also makes many, and some argue most, legal victories Pyrrhic ones because unreimbursed legal fees can be greater than the actual judgment a winning plaintiff obtains at trial.[21]

The results are even worse for defendants who when faced with determined plaintiffs with weak or inflated claims have the unsavory choice to either settle such claims or litigate them in court where they will eventually prevail but be left to pay their own lawyers' fees in addition to the inconvenience and frustration of having to litigate such claims. A notorious case in point is that of a Washington D.C. plaintiff suing a dry cleaner for $67 million for the loss of a pair of pants.[22] The plaintiff, a Washington D.C. administrative law judge, eventually reduced his suit to $54 million for pants lost by the dry cleaners; the ensuing litigation which dragged on for more than two years and cost the defendants in excess of $100,000 eventually led to their closing down the business, even though fundraisers and local donations helped defray most of the defendant's litigation costs.[23]

Where is the justice for this defendant under the American Rule? This is a result that could only happen in the United States and the fact that it is rare must be of little consolation to the Chung family who have no recourse in law after prevailing in court in a case that clearly illustrates the potential for abuse made possible by the American custom that each litigant should be responsible for his/her own legal fees.[24] Although an extreme example, the design of the American system allows for many lesser unpublicized but still significant obstacles to justice.

IV. CURRENT FEE SHIFTING IN THE UNITED STATES

Under our current system, court costs and attorney's fees are treated differently. The losing party pays all court costs with only rare exceptions in federal courts for both trials and appeals.[25] Costs include modest witness fees, but do not generally include compensation of expert witnesses.[26] And attorney's fees are awarded only under exceptional circumstances such as when a statute allows for reimbursement of legal fees or when a court finds that a lawsuit was brought in bad faith. Since the 1970's, the number of federal statutes that allow for attorney's fee awards have increased dramatically.[27] Since the first federal fee-shifting statute in 1870 that required awarding attorneys' fees to the prevailing plaintiffs at trial in cases involving federal civil rights acts, the practice has become more common at the federal and state levels.[28] The number of statutes allowing the award of attorney's fees to prevailing plaintiffs increased from 30 in 1975 to approximately 150 in 1983.[29]

A. Federal Examples of Loser Pays Rules

1. Federal Offer of Judgment Rules:

Rule 68 of the Federal Rules of Civil Procedure contains an offer of judgment provision that was intended to clear the congested federal dockets by promoting settlement and avoiding protracted litigation.[30] The drafters intended to allow defendants who made an offer of judgment to a plaintiff to recover their post-offer costs when the plaintiff rejected the offer, proceeded to trial, and prevailed, but received a judgment less favorable than the offer.[31] This rule provided the defendant with an incentive to make a serious offer in order to invoke the effects of the rule and plaintiffs were given an incentive to seriously consider accepting the offer or risk penalties for choosing unwisely to continue litigation after a settlement offer was made.[32] However, only the Eleventh and Fourth Circuits have interpreted Rule 68 to allow for the reimbursement of both court costs and attorney's fees incurred by the prevailing party after a settlement offer is rejected if the subsequent award is less than the settlement offer.[33]

2. The Equal Access to Justice Act:

Originally passed by Congress in 1980[34], the Equal Access to Justice Act is intended to permit certain parties, particularly individuals and small businesses,[35] to challenge unreasonable federal government actions, by allowing federal courts to award attorney's "fees and [other] expenses[36] to certain prevailing parties in certain actions involving the federal government[37].

The Act's two main provisions generally allow for recovery of reasonable attorney's fees and other costs in administrative proceedings[38] and civil lawsuits[39], respectively. An award will be made unless the adjudicating officer or court finds that the position of the United States was substantially justified, or that special circumstances exist that would make such an award unjust[40].

While the Act is "one sided" in that it permits only the non-government litigant the possibility of collecting by enforcing "loser pays" against the government, like the numerous other federal fee shifting rules, the Equal Access to Justice Act provides at least some relief similar to that provided under the English Rule

B. States with Loser Pays Rules

Some states provide fee shifting or loser pays rules under certain circumstances by statute. Although the circumstances under which fee-shifting to the losing party can occur vary and, with the exception of Alaska are quite modest, a brief overview of some of these "loser pays" provisions may be instructive.

*1. **Alaska:***

The State of Alaska allows courts to compensate prevailing parties for attorneys' fees and authorizes the Alaska Supreme Court to determine by rule or order the costs that may be awarded in civil actions to prevailing parties.[41] Courts are granted the discretion to abate in whole or in part the awarding of attorneys' fees in cases involving the United States Constitution or the Constitution of the State of Alaska.[42] Prevailing parties in civil actions are generally entitled to receive an award for attorneys' fees to parties awarded money judgments under the following schedule:[43]

Judgment and, if awarded, Prejudgment Interest	**Contested with Trial**	**Contested without Trial**	**Non-Contested**
First $ 25,000	20%	18%	10%
Next $ 75,000	10%	8%	3%
Next $400,000	10%	6%	2%
Over $500,000	10%	2%	1%

In a case in which the prevailing party recovers no money judgment, the prevailing party is entitled to receive 30 percent of reasonable actual attorney's fees which were necessarily incurred if the case goes to trial, and 20 percent of its actual attorney's fees which were necessarily incurred if the case is resolved without going to trial.[44] Courts are given the authority to vary the legal fees awarded under the noted formula if they believe varying the fees is warranted after weighing a variety of criteria enumerated in the statute.[45] Thus, judges are provided significant discretion to raise or lower legal fees awarded under the statute to ensure that they are equitable on a case by case basis.

2. ***California:***

California provides limited "loser pays" provisions in cases involving "unfair methods of competition and unfair or deceptive acts or practices undertaken by any person in a transaction intended to result or which results in the sale or lease of goods or services to any consumer are unlawful."[46] Under California law, consumers who prevail in an action arising out of an unfair method of competition or deceptive business practice are entitled to recover both court costs and attorney's fees.[47] Prevailing defendants in such actions may also recover court costs and reasonable attorney's fees if a court finds that the plaintiff brought the action in bad faith.[48]

California also allows partial attorney's fees to be awarded (capped at $75 per hour with discretion given the trial court to raise the amount based on cost of living or limited availability of counsel[49]) in cases brought by or against the state related to the determination, collection, or refund of any tax, interest, or penalty in any court of record in the state.[50]

An offer of judgment provision is also available under California law that requires a plaintiff who rejects an offer of judgment to pay the defendant's post-offer court costs and post-offer attorney's fees if the offer of judgment is rejected the plaintiff subsequently obtains at trial a judgment that is less than the defendant's settlement offer.[51]

3. Florida:

Florida adopted the English Rule for medical malpractice cases in 1980 and required the losing party to pay all of the prevailing party's litigation expenses, including attorney's fees, but repealed the fee-shifting provisions five years later with inconclusive results.[52]

Like California and several other states, Florida has an offer of settlement provision that requires a plaintiff to pay a portion of the defendant's attorney's fees if a court determines that a settlement offer is rejected unreasonably.[53] Under the Florida statute, "[a]n offer shall be presumed to have been unreasonably rejected by a defendant if the judgment entered is at least 25 percent greater than the offer rejected, and an offer shall be presumed to have been unreasonably rejected by a plaintiff if the judgment entered is at least 25 percent less than the offer rejected."[54] Unreasonable rejection of a settlement offer will require payment of the court costs, expenses and reasonable attorney's fees incurred by the other party after the settlement offer was rejected.[55]

4. Illinois:

Under its Consumer Fraud and Deceptive Business Practices Act, Illinois allows a court to award reasonable attorney's fees in addition to court costs to the prevailing party in civil actions for consumer fraud and deceptive business practices.[56]

5. New York:

As part of its consumer protection laws, New York allows a court to assign reasonable attorney's fees to the prevailing plaintiff in civil actions involving deceptive business acts and practices.[57] Attorney's fees may also be awarded by a court to the prevailing party, other than the state, for civil action brought against the state, unless the court finds that the position of the state was substantially justified or that special circumstances make an award unjust.[58]

*6. **Oklahoma:***

Oklahoma makes the losing party in a wide range of civil actions responsible for the prevailing party's attorney's fees through separate statutory provisions. A sampling of these areas include property line disputes;[59] livestock liens;[60] actions for injunctive relief to prevent the unlawful use of a lender's name, trade name or trademark;[61] actions to enforce visitation agreements;[62] actions for labor or services rendered or on certain accounts, bills and contracts;[63] and actions involving the unauthorized use of a deceased personality's right of publicity[64] among many others.

*7. **Oregon:***

Oregon allows for a court to award reasonable attorneys' fees to a prevailing plaintiff in certain small claims in tort where the amount in controversy does not exceed $7,500 if a demand for payment was made at least 30 days prior to the commencement of the action by the plaintiff of the defendant or the defendant's insurance company.[65] No attorneys' fees may be awarded, however, if a settlement offer was made by the defendant before the action was commenced that is the same or more than the final judgment obtained in court.[66] Defendants may also be awarded reasonable attorneys' fees for successful counterclaims for amounts of $7,500 or less.[67]

Reasonable attorneys' fees may also be awarded a prevailing plaintiff In any action for damages for breach of an express or implied warranty in a sale of consumer goods or services where the amount pleaded is $ 2,500 or less if the court finds that written demand for the payment of such claim was made on the defendant not less than 30 days before commencement of the action and that the defendant was allowed within that 30 days reasonable opportunity to inspect any property pertaining to the claim.

However, attorneys' fees are not available if the defendant tendered a settlement offer to the plaintiff, prior to the commencement of the action of an amount not less than the damages awarded to the plaintiff at trial.[68] Prevailing defendants may also be awarded reasonable attorneys' fees if the action is found to have been frivolous.[69]

Oregon also allows the award of reasonable attorney's fees to prevailing plaintiffs (and prevailing defendants if the action is deemed to be frivolous) in cases involving unlawful discrimination in both court and administrative proceedings;[70] in actions for intimidation;[71] in actions for trade discrimination;[72] and in civil actions for involuntary servitude or trafficking in persons.[73] Oregon also provides for the award of reasonable attorneys' fees to prevailing plaintiffs in a range of other actions, including: the award of liquidated damages to sports official subjected to offensive physical contact;[74] the sale or successful solicitation of sale of securities in violation of Oregon Securities Law;[75] injury to or removal of produce, trees or shrubs;[76] discrimination in renting housing because of assistance animal (attorneys' fees may be awarded to the prevailing plaintiff or to the prevailing defendant if the plaintiff's case is determined to be frivolous);[77] in actions by employees to collect wages not paid within 48 hours (excluding weekends) of the time they become due;[78] unlawful discrimination in employment, public accommodations and real property transactions (attorney fees awardable to the prevailing party);[79] actions to recover on insurance policies or contractor's bond unpaid within six months where settlement is not made within six months of proof of loss (defendants may recover a reasonable amount towards their attorneys' fees if a settlement offer rejected by a plaintiff is the same or larger than the ultimate judgment obtained at trial);[80] and, among others, unlawful trade practices (prevailing defendants may also be awarded attorneys' fees when a court finds the plaintiff's case to be frivolous).[81]

8. ***Texas:***

Texas imposes an offer of settlement system that can make parties who reject an offer liable for a portion of the prevailing party's attorneys' fees under certain circumstances. The offer of settlement under Texas Rules of Civil Procedure[82] Rule 167 must be invoked by the defendant by filing a declaration invoking the rule within 45 days of the case being set for trial.[83] Once invoked, Rule 167 provides that if an offer is rejected and the judgment entered is significantly less favorable than the settlement offer, then the prevailing party whose offer was rejected is entitled to be reimbursed for the litigation costs incurred after the offer was made.[84] A judgment award on monetary claims is defined as significantly less favorable than an offer to settle those claims if the offeree is a claimant and the judgment would be less than 80 percent of the offer, or if the offeree is a defendant and the judgment would be more than 120 percent of the offer.[85] Litigation costs are defined to include court costs, reasonable fees for not more than two testifying expert witnesses, and reasonable attorney fees.[86] The litigation costs that may be awarded under the rule cannot exceed the sum of the noneconomic damages, the exemplary or additional damages, and one-half of the economic damages to be awarded to the claimant in the judgment minus the amount of any statutory or contractual liens in connection with the occurrences or incidents giving rise to the claim.[87] In addition, the rule does not apply to a class action, a shareholder's derivative action, an action by or against the State, a unit of state government, or a political subdivision of the State, an action brought under the Family Code, an action to collect workers' compensation benefits under title 5, subtitle A of the Labor Code, or an action filed in a justice of the peace court or small claims court.[88]

V. WHAT IS THE LIKELY IMPACT OF ADOPTING THE WORLD RULE OVER THE AMERICAN RULE?

In sum, the oft cited argument in defense of the American Rule is that loser pays systems will have a chilling effect on plaintiffs' willingness to assert their lawful claims in court for fear of having to pay the defendant's costs if they do not prevail in court. [89] This position is combined with the fear that requiring payment of the prevailing party's legal fees can have a chilling effect on individuals of limited means asserting valid claims in court for fear of losing and having to bear not only their own legal expenses, but also those of the winning party.[90] Critics of the American Rule counter that having to pay for one's own legal expenses can also prevent plaintiffs with limited means from using the courts to settle valid claims and provides an advantage to litigants with superior resources.[91] These critics also note that it fails to fully compensate successful plaintiffs for their losses since they must unjustly pay their lawyers to receive that to which they are legally entitled to.[92]

In fact there is little disincentive for individuals under the American System to refrain from pursuing cases with little merit in the courts for their nuisance value since settling such cases can be far less costly for defendants regardless of their merit. Although current data on national and regional average hourly rates charged by lawyers is hard to come by, one recent survey of 250 national firms found the average rate charged by these firms to be $372 per hour.[93] Legal advice is expensive, and litigation more so. It is generally accepted that only 2-3 percent of civil cases in the United States proceed to a verdict;[94] the rest are settled or abandoned before a judgment is entered.[95]

Although reliable statistics are not available on the number of civil cases settled in the United States every year, most commentators often cite settlement figures of 90% or more.[96] The high cost of litigation no doubt encourages settlement of cases under the American Rule, especially those of relatively low value as the cost of defending against these in the courts can be high. Indeed, it is not unusual for the combined legal bills of litigants to equal or exceed the amounts in controversy in litigated cases.[97] It is understandable, then, that many defendants faced with the unsavory choice of settling a low-merit claim or paying a significantly higher amount in attorneys' fees to defend in court will often choose expediency over justice and settle a weak claim.

VI. CONCLUSION

It is not possible to predict with certainty the effect of adopting a “loser pays” system in the United States. Replacing the American Rule with the World Rule would likely reduce the number of claims with questionable merit as plaintiffs faced with the prospect of having to pay the defendant’s legal fees should they not prevail in court would be less likely to bring such cases in the first instance. Likewise, it stands to reason that fewer questionable claims would be settled by defendants unburdened by having to pay their own legal costs in cases when they are likely to prevail in court. But even if this were not the case, there is still a compelling reason to abandon the American Rule: Fundamental fairness. In bringing legal action, a plaintiff subjects a defendant to legal costs and significant inconvenience that a defendant can only avoid by capitulating to the plaintiff’s claims. The American Rule requires each party, regardless of the merits of their case, to bear their own legal expense simply because it is the established practice that they should do so. This practice can victimize both virtuous plaintiffs and defendants by requiring them to bear the cost of prevailing in court while at the same time rewarding unreasonable plaintiffs and defendants by allowing them to use the cost of litigation as leverage to exact advantageous settlements to which they have little legal claim.

Valid concerns about preserving access to justice can be addressed within the context of a loser pays system in various ways. Both the federal government and states could follow Alaska’s lead and adopt a system that awards attorneys’ fees based on a sliding scale as a percentage of judgments obtained at trial. Exceptions can be carved out awarding attorneys’ fees to prevailing parties, such as in matters relating to family law, civil rights, or class actions. Courts can also be given the right to refuse claims for attorneys’ fees for compelling reasons under their equity powers when justice requires it.

While American exceptionalism may justify standing in opposition to the rest of the world when there is just cause, the

American Rule seems to offer little more by way of compelling justification in the final analysis than a custom and tradition whose only clear beneficiaries are the lawyers who thrive in a country with the dubious distinction of being universally acknowledged as the most litigious nation on earth.

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[1] See generally Marc Galanter, "The Day After the Litigation Explosion," 46 Md. L. Rev. 3 (Fall, 1986); Deborah L. Rhode, "Frivolous Litigation and Civil Justice Reform: Miscasting the Problem, Recasting the Solution," 54 Duke L.J. 447 (November, 2004).
[2] J. Mark Ramseyer & Eric B. Rasmusen, "Comparative Litigation Rates," Harvard John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 681, 5 (November 2011). Available online at http://www.law.harvard.edu/programs/olin_center/papers/pdf/Ramseyer_681.pdf (Last accessed March 11, 2012).
[3] Charles N. W. Keckle, "Lawyered UP: A Book Review Essay," 27 T.M. Cooley L. Rev. 57, 74 (Hilary Term, 2010).
[4] *Id.*
[5] Towers Watson, *2010 Update on U.S. Tort Cost Trends*, at 3 (available online at http://www.towerswatson.com/assets/pdf/3424/Towers-Watson-Tort-Report-1.pdf (last accessed January 29, 2012).
[6] Towers Perrin Tillinghast, U.S. Tort Costs and Cross-Border Perspectives: 2005 Update at 6 (2005) available at http://www.towersperrin.com/tillinghast/publications/reports/2005_Tort_Cost/2005_Tort.pdf (Last accessed March 11, 2012).
[7] *Id.*
[8] *Id.* at 4.
[9] *Id.* at 6.
[10] See generally John F. Vargo, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice," 42 Am. U.L. Rev. 1567 (Summer, 1993) for a discussion of the genesis of the American Rule and English Rule (arguing in favor of the American Rule).
[11] *Id.* at 1598
[12] See James R. Maxeiner, *Section II.C: Civil Procedure: Cost and Fee Allocation in Civil Procedure*, 58 Am. J. Comp. L. 195, 197 (2010) (noting that court costs are generally payable by the losing party in federal courts, but not expert witness fees or attorneys' fees absent statutes directing awards and a few judge-made exceptions).
[13] *Id.* at 196.
[14] Christopher R. McLennan, *The Price of Justice: Allocating Attorneys' Fees in Civil Litigation*, 12 Fl. Coastal Law Rev. 357, 365-66 (Winter, 2011)

(quoting Jennifer M. Smith, *Credit Card, Attorney's Fees, and the Putative Debtor: A Pyrrhic Victory? Putative Debtors May Win the Battle But Nevertheless Lose the War,* 61 ME. Law Rev. 171, 187).
[15] See, e.g., John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U.L. Rev. 1567 (Summer 1993).
[16] *Id.* at 1574
[17] *Id.*
[18] See generally Deborah L. Rhode, *Too Much law, Too Little Justice: Too much Rhetoric, Too Little Reform,* 11 Geo. J. Legal Ethics 989, 1005 (1998).
[19] Maxeiner, *supra* note 12 at 218
[20] *See generally* Marie Gryphon, Assessing the Effects of a "Loser Pay" Rule on the American Legal System: an Economic Analysis and Proposal for Reform, 8 Rutgers J.L. & Pub. Pol'y 567 (Spring 2011).
[21] *Id.* at 569.
[22] Lubna Takruri, *$54 million 'pant suit' runs cleaners out of business,* The Associated Press, Washington, September 20, 2007, at A2.
[23] *Id.*
[24] *Id.*
[25] Maxeiner, *supra* note 12 at 198 (referencing Fed. R. Civ. P. 54(d)(1) and Fed. R. App. P. 39).
[26] *Id.*
[27] Jeff Holth, I Win, You Pay: Considerations of Efficiency and Fairness in Minnesota Appellate Litigation of Attorney's Fees, 37 Wm. Mitchell L. Rev. 267, 270 (2010).
[28] *Id.*
[29] *Id.*
[30] Daniel Glimcher, LEGAL DENTISTRY: HOW ATTORNEY'S FEES AND CERTAIN PROCEDURAL MECHANISMS CAN GIVE RULE 68 THE NECESSARY TEETH TO EFFECTUATE ITS PURPOSES, 27 Cardozo L. Rev. 1449 , 1453 (2006).
[31] *Id.*
[32] *Id.*
[33] *Id.* at 1471-1474.
[34] Pub. L. No. 96-481, 94 Stat. 2325 (1980)
[35] Generally individuals whose net worth do not exceed $ 2,000,000 and any owner of an unincorporated business, partnership, corporation, association, unit of local government, or organization, whose net worth does not exceed $ 7,000,000 and which had no more than 500 employees at the time the adversary adjudication was initiated (5 U.S.C. § 504 (b) (1) (B) for administrative actions and (28 U.S.C. § 2412 (d) (2) (B) for court actions)
[36] "Fees and other expenses" include the reasonable expenses of expert witnesses, studies, analyses, engineering reports, tests, and projects found

by the court to be necessary for the preparation of the party's case, and reasonable attorney fees. The amount of fees awarded are based upon prevailing market rates for the kind and quality of the services furnished, except that no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States and attorney fees shall not be awarded in excess of $ 125 per hour unless the court determines that special circumstances justify a higher fee. initiated (5 U.S.C. § 504 (b) (1) (A) for administrative actions and (28 U.S.C. § 2412 (d) (2) (A) for court actions)

[37] See H.R. Rep. No. 96-1418, 96th Cong., 2d Sess. 5-6 (1980), reprinted in 1980 U.S. Code Cong. & Admin News 4984

[38] 5 U.S.C. § 504 (a) (1)

[39] 28 U.S.C. § 2412 (d) (1) (A)

[40] 5 U.S.C. § 504 (a) (1) and 28 U.S.C. § 2412 (d) (1) (A), respectively

[41] Alaska Stat. § 09.60.010(a) (2012)

[42] *See* Alaska Stat. § 09.60.010(c)-(e) (2012)

[43] *See* Alaska Rules of Civ. Proc. Rule 82 (a)-(b) available at http://courts.alaska.gov/civ2.htm#79 (Last accessed February 24, 2012).

[44] Alaska Rules of Civ. Proc. Rule 82 (b)(2). available at http://courts.alaska.gov/civ2.htm#79 (Last accessed February 24, 2012).

[45] Alaska Rules of Civ. Proc. Rule 82 (b)(3)(A)-(K). available at http://courts.alaska.gov/civ2.htm#79 (Last accessed February 24, 2012). The specific enumerated criteria in this subparagraph that judges may weigh in assessing legal fees different from those provided for in the stature include the following: (A)the complexity of the litigation; (B) the length of trial; (C) the reasonableness of the attorneys' hourly rates and the number of hours expended; (D) the reasonableness of the number of attorneys used; (E) the attorneys' efforts to minimize fees; (F) the reasonableness of the claims and defenses pursued by each side; (G) vexatious or bad faith conduct; (H) the relationship between the amount of work performed and the significance of the matters at stake; (I) the extent to which a given fee award may be so onerous to the non-prevailing party that it would deter similarly situated litigants from the voluntary use of the courts; (J) the extent to which the fees incurred by the prevailing party suggest that they had been influenced by considerations apart from the case at bar, such as a desire to discourage claims by others against the prevailing party or its insurer; and (K) other equitable factors deemed relevant. If the court varies an award, the court shall explain the reasons for the variation.)

[46] *See* Cal Civ Code § 1770(a)(1)-(22) (2012) for a listing of unfair business competition and unfair or deceptive business practices.

[47] Cal Civ Code § 1780(e) (2012).

[48] *Id.*
[49] Cal Rev & Tax Code § 7156(C)(iii) (2012)
[50] Cal Rev & Tax Code § 7156(a) (2012).
[51] Cal Code Civ Proc § 998(c)(1) (2012).
[52] *See generally* Christopher R. McLennan, "The Price of Justice: Allocating Attorneys' Fees in Civil Litigation," 12 Fl. Coastal L. Rev. 357 at 382.
[53] Fla. Stat. § 45.061(2) (2012).
[54] *Id.*
[55] Fla. Stat. § 45.061(3)(a) (2012).
[56] 815 ILCS 505/10a (b)(2012).
[57] NY CLS Gen Bus § 349(h) (2012).
[58] NY CLS CPLR § 8601(a) (2011). *See also* NY CLS CPLR § 8602(b) (2011).
[59] 4 Okl. St. § 150.1 (2012).
[60] 4 Okl. St. § 201.10 (2012).
[61] 6 Okl. St. § 1418 (2012).
[62] 10 Okl. St. § 7505-1.5 (2012).
[63] 12 Okl. St. § 936 (2012).
[64] 12 Okl. St. § 1448 (2012).
[65] ORS § 20.080(1) (2010).
[66] *Id.*
[67] ORS § 20.080(2) (2010).
[68] ORS § 20.098(1) (2010).
[69] ORS § 20.098(2) (2010).
[70] ORS § 20.107(1) (2010).
[71] ORS § 30.198(3) (2009).
[72] ORS § 30.860 (2009).
[73] ORS § 30.867 (2009).
[74] ORS § 30.882 (2009).
[75] ORS § 59.115 (2009).
[76] ORS § 105.810 (2009).
[77] ORS § 346.690 (2009).
[78] ORS § 652.200 (2009).
[79] ORS § 659A.885 (2009).
[80] ORS § 742.061 (2009).
[81] ORS § 646.638 (2009).
[82] Available online at http://www.supreme.courts.state.tx.us/rules/trcp/rcp_all.pdf (Last accessed March 4, 2012).
[83] Tex. R. Civ. P. 167.2(a) (2012).
[84] Tex. R. Civ. P. 167.4(a) (2012).
[85] Tex. R. Civ. P. 167.4(b) (2012).
[86] Tex. R. Civ. P. 167.4(c) (2012).
[87] Tex. R. Civ. P. 167.4(d) (2012).

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[88] Tex. R. Civ. P. 167.1(a)-(f) (2012).
[89] *See generally* John F. Vargo, "The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice," 42 Am. U.L. Rev. 1567 (Summer 1993);
[90] Christopher R. McLennan, "The Price of Justice: Allocating Attorneys' Fees in Civil Litigation," 12 Fl. Coastal L. Rev. 357, 367-367 (Winter 2011).
[91] *Id.* at 368.
[92] *Id.*
[93] *2009 Law Firm Billing Survey*, The National Law Journal, December 7, 2009 available at http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202436068099&slreturn=1&hbxlogin=1 (Last accessed March 18, 2012).
[94] John Barkai, Elizabeth Kent, and Pamela Martin, "Settling Civil Lawsuits in the Hawaii Circuit Courts," 10 Hawaii B.J. 1 (2007).
[95] *Id.*
[96] *Id.*
[97] Maxeiner, *supra* note 12 at 200.

HOME BUILDING and LOAN ASSOCIATION v. BLAISDELL REVISITED

by

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ABSTRACT

The Depression-era Supreme Court decision Home Building and Loan Association v. Blaisdell has been reviled as one of the worst in the history of the high court. This paper argues that it was one of the most prescient and practical of its decisions.

The 1934 Supreme Court case Home Building and Loan Association v. Blaisdell[1] made the list as one of The Dirty Dozen, a book authored by Robert A. Levy and William Melor in 2008.[2] The authors argue that Blaisdell, among others selected to their list of dishonor, ranks among the worst overreaches of government power sanctioned by the United States Supreme Court.

This article argues that the contrary is the case: that the decision was prescient in anticipating and signaling a change in the courts pro-business approach in 1937. It also demonstrated the court's deference to a state's decision to invoke its emergency powers to aid citizens caught in the economic disaster of the Great Depression.

The Dirty Dozen which added Blaisdell to the list of "bad decisions" by the high court, first appeared in 2008, just as the impact of the "Great Recession" was taking hold in the United States.[3]

This paper leaves it to the reader to judge if Blaisdell was a "bad decision" and also raises the question of why states did not intervene to protect their citizens in 2008-13 as they did in the 1930s.

The Background of the Case

In 1933, the state passed the Minnesota Mortgage Moratorium Act. The legislature was aware of the challenges facing farmers and home owners during the Depression.[4] Because many could not pay the mortgages that were due on their land and houses, the law allowed courts to prevent foreclosures even where the property owners had defaulted on their payments.

John and Rosella Blaisdell used the law to prevent their 14 room house and garage from being foreclosed upon even though they were paying a small amount to the lender each month.[5] The Home Building and Loan Association went to court to obtain its money but the state court ruled in favor of the Blaisdells, that the law protected them from having to pay more than $40.00 per month which was the fair rental value of the property.[6]

The case turned on Article I section 10 of the Constitution which states:
"…No state shall pass any law impairing the obligation of contracts"…[7]

The clause, placed in the Constitution in 1787 at the urging of Rufus King, a delegate from Massachusetts, had its origin in the economic crisis in the fledging United States in the 1780s.[8]

Many Americans could not pay their debts and two points of view on the problem emerged. Creditors maintained that just debts should be paid since they had been legally incurred by the borrowers and through "hard work and frugality" the obligations should and could be met.[9]

On the other side were advocates of compassion for those who found themselves in financial distress. Some states passed laws that imposed delays on lawsuits brought by creditors to collect their debts.[10] Among the consequences of these laws was reluctance on the part of lenders to extend credit since there was uncertainty about their ability to eventually collect what was owed.

One of the most alarming events from the point of view of the propertied class was Shays Rebellion in 1786-1787. That uprising was led by small farmers who found themselves unable to pay their debts and taxes. Their plan was to prevent court sessions from being held to protect creditor rights.[11]

Ostensibly the reason for convening the Constitutional Convention in 1787 was to amend the governing document, allowing the Articles of Confederation, which contained no provision allowing the national government to intervene to

ameliorate the debt crisis.
The convention resolved to prohibit states from meddling in private contracts like the ones between creditors and debtors.[12]

Since the "contracts" clause contained very few words, the Supreme Court had to interpret what it meant, an opportunity that arose in some early cases most notably Fletcher v. Peck[13] and Trustees of Dartmouth College v. Woodward.[14]

Even though the clause did not distinguish between public and private agreements, Fletcher v. Peck dealt with the issue of public contracts. In that case, Chief Justice John Marshall used the contract clause to prevent Georgia from trying to avoid the consequences of land grants the state had made years earlier.

In the most prominent case involving the clause, Trustees of Dartmouth College v. Woodward, the Marshall court prevented the New Hampshire legislature from altering the 1769 charter that authorized the creation of the college.

From these early cases and others decided in the latter part of the 19th century, it was clear that the court established the parameters within which the Contract clause cases would be decided. The court determined that the clause applied to existing contracts not to future agreements. The court also believed that it was the intent of the framers of the Constitution to bar government interference with contracts that had already been made in accordance with laws that were in place at the time.[15]

It was also clear, and this became the salient point in Blaisdell, that the Contract clause is not superior to the police power of the states.[16] The latter power, which has never been ceded to the federal government, permits the state to exercise all powers that are necessary to protect the health, safety, and welfare of its people.[17] The principles of the Contract clause and the state's police power collided in the Blaisdell case.

When the Blaisdells borrowed $3800.00 from the Home Building and Loan, they agreed to a mortgage on their home and land and that, if they defaulted, the lender could sell the property.[18] The Building and Loan put the property up for sale and then bought it for the amount of the mortgage which was in accordance with the original contract. Under the Minnesota law in effect when the Blaisdell's bought the property and when the Building and Loan eventually purchased it, the latter became the owner.[19]

Under the Minnesota Mortgage Moratorium Act however, the legislation declared because there was an economic emergency, the lender could not foreclose on the property even if the debtor did not pay his obligation.[20]

Upholding the law the Minnesota Supreme Court delayed the transfer of title to the Building and Loan for two years and ordered the Blaisdells to pay $40 each month and live in the house. If they paid the monthly fee, the Blaisdells could again pay the mortgage once the two years were up.[21]

To some, especially hard-passed debtors, this seemed like a fair bargain, but to those who were defenders of contract rights, it seemed as though the lender was being denied its rights to own and sell the property which put the Building and Loan in a vulnerable position subject to declining property values as the Depression continued.[22]

THE HUGHES MAJORITY v. THE SUTHERLAND DISSENT

The Supreme Court decision split 5-4. Voting with the majority were Justices Brandeis, Stone, Roberts and Cardozo.[23] The minority consisted of the so-called "Four Horsemen of the Apocalypse", Willis Van Devanter, Pierce Butler, James McReynolds and the author of the dissenting opinion, George

Sutherland.[24] These justices formed the conservative core of the court, striking down virtually all New Deal legislation that came before it.

The author of the majority opinion Chief Justice Charles Evans Hughes emphasized that the police power of the states is basic to the federal system, noting that the economic emergency did not justify its existence but did justify the use of the power.[25]

The Depression created the need for the use of the police power because of the dire conditions it had created for homeowners.

Hughes conceded that the Minnesota law was the kind that the contract clause was designed to prevent. In fact, early cases had voided similar laws.[26]

Hughes believed that the Constitution should be interpreted differently given the current conditions. An earlier precedent, Bronson v. Kinzie[27], appeared to be a case directly on point. Illinois had passed a law as a response to the Panic of 1837. The legislation allowed debtors to buy property sold at a foreclosure sale by paying the purchase price and 10% interest. The court struck down the law violative of the contract clause.[28]

Hughes seemed to believe that such precedents did not apply to the Blaisdell case. He preferred that the court apply cases which held that "the state…continues to possess authority to safeguard the vital interests of its people."[29] Significantly, he wrote:

> The economic interest of the state
> may justify the exercise of its continuing
> and dominant protective power
> notwithstanding interference with contracts.[30]

According to Hughes, the contract clause does not, therefore, prohibit all impairment of contractual obligations.

Hughes stated that the Court had a growing appreciation of "public needs and of the necessity of finding ground for a rational compromise between individual rights and public welfare."[31]

The originalist interpretation of the Constitution holds that "what the provision of the Constitution meant to the vision of that day it must mean to the vision of our time."[32]

Hughes believed that a judge could not fully know the meaning of a constitutional provision until he had considered the social and political background of the case.[33] A critic would argue that Hughes' approach places no constraints on the exercise of judicial power: The Constitution is whatever the justices of the Supreme Court at any given time say it is.

The basic premise of Justice Sutherland's dissent is that what the contract clause meant when "framed and adopted", it should mean for all time.[34]

> A provision of the Constitution….
> does not mean one thing at one
> time and an entirely different thing at
> another time."[35]

Sutherland was particularly disdainful of the majority's argument that "an essential attribute of sovereign power is to safeguard the vital interest of its people."[36] Sutherland questioned whether Blaisdell's financial problems affected the fundamental interest of the state.

Sutherland believed that there were certain activities within the police power of the state, like "banning the sale or manufacturing of intoxicating liquors" or preventing "private parties from creating harmful nuisances.[37] Debt relief did not fall into that category since the loan to the Blaisdell's was legal when it was made and similarl loans were legal even after the moratorium law went into effect.[38]

In Sutherland's view all the Minnesota legislature enabled the Blaisdells to avoid their obligations under a contract they had entered and prevented the Building and Loan from enforcing an obligation that was as lawful after the statute was passed as it was before.[39]

The majority opinion believed that the relief provided by the statute was "reasonable and appropriate" since the Blaisdells had to eventually pay the mortgage. Only time for payment had been extended and during the extension period the Blaisdells still had to pay a monthly rent to the lender.[40]

Sutherland worried about the latter's plight more than that of the impoverished homeowner. Sutherland believed that the rental was scant compensation for the lender's inability to foreclose. Sutherland wondered about the impact on the lenders interests should the quality of the building deteriorate and the value of property fall below the purchase price.[41]

Hughes' majority opinion and Sutherland's dissent represent opposite poles of constitutional interpretation. Hughes believed that a provision of the Constitution has little meaning in the abstract, that it should be interpreted in the context of the entire Constitution and the "social situation confronting the court.[42]

Thus, there can be different results despite the similarity in the facts of the case depending on the point in time in which the case is decided.

Sutherland repudiated such a position stating that the Founding Fathers fixed the meaning of the Contract clause in all cases for all time. As Sutherland and the dissenters read the Contract clause, the mortgage moratorium law was unconstitutional.[43]

THE EFFECT OF BLAISDELL TODAY

While most commentators agree that Blaisdell rendered the Contract clause virtually moribund, there were two cases decided by the Court in the 1970s that belied that notion: United States Trust Co. v. New Jersey[44] and Allied Structural

Steel Co. V. Spannaus.[45]

In the United States Trust Co. case, the Court struck down a New Jersey law that impaired the rights of bondholders by repealing a covenant that barred the use of bond funds for mass transit. The court found that the impairment of the bond holders rights was not "necessary" since lesser measures could have been used to serve the state's goals.[46]

In the Allied Structural Steel case decided in 1978, the Supreme Court struck down a Minnesota law that impaired a private agreement. The law required that an employer who ended a pension plan or left the state had to fund pensions for workers with ten years of service to the company even if their rights were not vested under the original plan. The court found that this law significantly altered the obligations of employers under existing private pension fund contracts.[47]

Since its decision in the Allied case it appears that the Supreme Court has reverted to a Blaisdell like approach. In three cases,[48] the Court has made it clear that in cases involving the impairment of private contracts, it will defer to state's judgment of reasonableness and necessity.

It appears that the present Supreme Court defers to state legislatures' determinations of the need to abrogate a contract. The Court first determines if the state law involves a "substantial impairment of a contract.[49] If there is a substantial impairment, a state can argue that the law has "significant and legitimate public purpose" such as a alleviating a social or economic situation.[50] But as subsequent cases indicate, the problem need not necessarily be an emergency. For example in Energy Reserves Group, Inc. v. Kansas Power and Light Co., the Court upheld a law that capped price increases under a natural gas supply contract, which was an economic hardship not a national economic crisis.[51]

Finally the Court will not approve changes to the parties' contract if they are unreasonable and unrelated to the purpose of the law.[52]

That the courts are unlikely to overturn state laws that abrogate contracts whose purpose is to remedy an economic hardship is evidenced by lower federal court action in connection with two natural disasters.[53] When Hurricane Andrew struck Florida in 1992, it was then the most expensive storm in United States history (later surpassed by Hurricane Katrina in 2005)[54] causing property damage amounting to $16-18 billion.

Because the insurance companies had written policies and charged premiums that were inadequate to cover the damage inflicted by Andrew, some insurance companies went bankrupt. After the storm, the companies that remained in business cancelled policies and did not renew others.[55]

In response, the state legislature passed and Governor Lawton Chiles signed legislation to bar the cancellation or non-renewal of homeowner's policies for six months.[56]

In Veta Fire Insurance Corp. v. State of Florida,[57] the Court of Appeals dismissed the Contract Clause argument by the insurance company holding "the statute's impact on existing insurance contracts cannot be said to be a constitutional impairment."[58]

In 2005 Hurricane Katrina struck several southern states including Louisiana, Mississippi and Alabama. Then Hurricane Rita hit southwestern Louisiana. Again the insurance companies were hit with extraordinary losses – in excess of $60 billion.[59] Under Louisiana law the companies had to allow policy holders twelve months to submit claims.

The Louisiana legislature passed a law signed by Governor Kathleen Blanco which extended the time period for the filing of claims to two years. The insurance companies sued claiming that Louisiana impaired their contractual obligations.[60] In State of Louisiana v. All Property and Casualty Insurance Carriers Authorized and Licensed to Do

Business in the State of Louisiana[61] the court held that measures taken by the legislature were both "appropriate and reasonable in order to protect the rights of the citizens of Louisiana and their general welfare".[62] The courts in both cases based their decisions on Blaisdell and its progeny.

Senator Ellen Anderson (DFL – St. Paul) and Representative Jim Davnie (DFL-Minneapolis) introduced the Minnesota Subprime Foreclosure Deferment Act of 2008 to stop foreclosures of sub-prime or negative amortization[63] loans for one year although homeowners would have had to make minimum monthly payments.[64] The one-year grace period would have allowed homeowners time to negotiate with their lenders while awaiting a federal program.

The legislators estimated that at least 15,000 homeowners of approximately 33,500 were expected to face foreclosure.[65]

Andersen and Davnie emphasized that their bill differed from the old Minnesota Mortgage Moratorium Act which was broader in scope. The 2008 version would have required lenders to cancel sheriffs foreclosure auctions for one year if the homeowner had a subprime or negative amortization loans made between Jan 1, 2001 and August 1, 2007.[66]

While homeowners would have had to continue making payments, they would have to pay than less 65% of the payments they were making when they defaulted or the minimum payment they made when they first got their loan. If the homeowner missed a payment, the foreclosure action would resume.[67]

The bill did not explain how property owners would later make up the money they did not pay during the grace period. Apparently that matter would have been left to negotiations between the banks and the homeowners.

Prentiss Cox, a law professor at the University of Minnesota, stated that the 1933 act was far more sweeping, but argued that because of the current crisis the state should intervene as "a response to abusive and unfair subprime lending that went unchecked for a decade."[68]

The bill passed both Houses despite opposition mounted by the American Securitization Forum (ASF) and the Securities Industry and Financial Markets Association (SIFMA). Both groups argued that the law would result in increased costs for all borrowers and the possibility that the supply of money to the mortgage market would dry up.[69]

The argument became academic when Republican Governor Tim Pawlenty vetoed the bill. The Governor issued a written statement.

> No other state in the nation has enacted a bill like (this). There is a reason for that, it is not sound policy.[70]

The bill was never reintroduced but, given its modest provisions and the attitude of the Supreme Court in Blaisdell and in subsequent cases discussed here, it would likely have been upheld.

CONCLUSION

It is the duty of government to protect its citizens and the states have a weapon to do so: the police power. In the face of the greatest threat to the survival of the country: the Great Depression, Minnesota acted to protect homeowners from mass foreclosure.

> To claim as Sutherland did that the value of money being held constant, without the consent of the debtor, the mortgage moratorium statute of issue in Blaisdell represented an awkward, perhaps even clumsy, effort at the state level to undo the mischief brought on by federal action.

> The state statute can be justified not as an effort to correct market outcomes but as an effort to correct government misconduct – meddling with private contracts – that falls within the traditional confines of the police power.[71]

The issue in Blaisdell was far more complex than the 3800.00 owed by the family. The decision may have undermined the Contract Clause but enhanced the state's police power and gave the latter the right to protect its citizens to even the playing field between creditors and borrowers.[72]

The Supreme Court may well have to address even more ambitious efforts by the states and municipalities to assuage the adverse effects of the Great Recession. Many cities are embracing the concept of eminent domain as a device to seize homes that are underwater.

The Home Affordable Modification Program has not produced results many had hoped for because it relies on banks to deal with the crisis.[73]

Evidence shows that entities like the Bank of America "denied mortgage modifications to qualified homeowners, falsely claimed not to have received necessary paperwork, falsified electronic records, ignored properly completed applications, denied applications en masse because the paperwork was no longer current, and gave employees bonuses for pushing homeowners who qualified for modification because foreclosures were more profitable."[74]

During the housing bubble, banks bundled mortgages and sold securities backed by the loans. Since the banks do not own these securitized mortgages, they only service these mortgages for investors.[75] Therefore they have little incentive to expend the to negotiate a modification.

The bankers have threatened to sue and to cutback on their lending so some communities have backed off. But other municipalities are forging ahead: to buy mortgages that are likely to end up in foreclosure and negotiate new ones that homeowners can afford.[76]

When the economic system fails can there be any doubt that the states can and should exercise the police power? As a result of the Blaisdell case, the states can take steps to protect its citizens and its communities.

In Blaisdell, Chief Justice Hughes recognized that the dire economic conditions created by the Depression justified the Courts decision. The Minnesota law was one of many passed during the period in the wake of mass violence and an avalanche of foreclosures and forced sales.[77] Lenders were able to take advantage of farmers at foreclosure sales, paying paltry sums for what ordinarily would have been valuable property.[78]

As one author has put it, "…if there was ever a time and place for debtor relief, Minnesota was the place."[79] The legislature passed the law for good reasons and a non-discriminatory purpose. In the 1780s the debtor protection law passed by the states that so concerned the farmers discriminated in favor of their own citizens against out of state creditors.[80]

The Minnesota law only dealt with in-state mortgage its purpose was not to harm creditor interests but to protect the state's economy. It was sound public policy. The law may have impaired mortgagor's rights but did not abrogate them.

One is left to wonder why more states did not attempt to take similar action during the Great Recession of 2008-2013. Was it the timidity of the politicians or the power of the banking interests that caused so many foreclosures and dislocations?

ENDNOTES

[1] 290 U.S. 398 (1934)

[2] The Dirty Dozen: How Twelve Supreme Court Cases Radically Expanded Government and Eroded Freedom, Cato Institute (hereinafter The Dirty Dozen)

[3] Id.

[4] Id. at 54.

[5] Amity Shlaes, "Judging the Judges: The Dirty Dozen" by Robert A. Levy and William Mellor, Wall St. J. May 1, 2008 at A15.

[6] Id.

[7] U.S. Const., Art I, § 10 cl.1.

[8] supra, note 2 at 55.

[9] Id. at 54.

[10] Id. at 54-55.

[11] Id. at 55. See Frederick Lewis Allen. Since Yesterday: The 1930s in America Sept. 3, 1929 – Sept. 3, 1939. Harper-Row 1939 at 86-88 for a description of farmer's reaction to foreclosures in 1930s.

[12] Id.

[13] 10 U.S. (6 Cranch) 87 (1810).

[14] 17 U.S. (4 Wheat) 518 (1819)>

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[15] Ogden v. Sanders 25 U.S. 12 Wheat 213 (1827).

[16] Atlantic Coast Line Railroad Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914).

[17] Police power consists of residual prerogatives of sovereignty which the states had not surrendered to the federal government. Lawrence H. Tribe American Constitutional Law § 6-3 at 405 (2ed 1988).

[18] The Dirty Dozen at 57.

[19] Id.

[20] Id.

[21] Id. at 58.

[22] Id.

[23] Charles A. Bieneman "Legal Interpretation and a Constitutional Case: Home Building and Loan Association v. Blainsdell" 90 Mich L. Rev, 2534-2564 at 2536 n. 14 (hereinafter Legal Interpretation and a Constitutional Case).

[24] Id.

[25] Id. at 2536.

[26] Id. at 2537.

[27] 42 U.S. (I How) 311 (1843).

[28] "Legal Interpretation and a Constitutional Case, supra note 23 at 2537 n. 25.

[29] 290 U.S. at 434.

[30] 290 U.S. at 437.

[31] 290 U.S. at 442.

[32] 190 U.S. at 442.

[33] Legal Interpretation and a Constitutional Case at 2539.

[34] 290 U.S. at 449.

[35] 290 U.S. at 448.

[36] The Dirty Dozen, supra note 2 at 60.

[37] Id. at 61.

[38] Id.

[39] Id.

[40] Id.

[41] 290 U.S. at 481.

[42] 290 at U.S. 434.

[43] 290 U.S. at 449.

[44] 431 U.S. 1 (1977).

[45] 438 U.S. 234 (1978).

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[46] Henry N. Butler and Larry E. Ribstein, "Symposium: Regulating Corporate Takeovers: State Anti-Takeovers Statues and the Contract Clause," 57 Cin. in. L.Rev 611 (1988) at 628 (hereinafter "Regulating Corporate Takeovers").

[47] Id. at 629.

[48] Energy Reserve Group v. Kansas Power and Light Co. 459 U.S. 400 (1983) Exxon Corp v. Eagerton 462 U.S. 179 (1983) and Keystone Bituminous Coal Association v. Debenedicis 107 S.Ct. 1232 (1987).

[49] The Dirty Dozen at 63.

[50] Id.

[51] Id.

[52] Id.

[53] Id. at 64-65.

[54] Id. at 64.

[55] Id. at 64.

[56] Id.

[57] 141 F.3d. 1427 (11th Cir. 1998).

[58] The Dirty Dozen at 65.

[59] Id.

[60] Id.

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[61] 937 So.2d 313, (La 2006).

[62] 937 So.2d. 327.

[63] Negative amortization mortgages have payments even less than the interest charged on the loan which increases the loan balance over time. Jennifer Bjorhus, "MN Bill to Stop Subprime Foreclosure For One Year," Twin Cities.com. PioneerPress.com, Mar 7, 2008, rense.com.

[64] Id.

[65] Id.

[66] Id.

[67] Id.

[68] Id.

[69] "ASF and SIFMA Oppose Minnesota Subprime Foreclosure Deferment Act, www.sifma.org, Mar 17, 2008.

[70] Tom Streissguth, "What Is the Minnesota Mortgage Deferment Act?", www.ehow.com/info_8243894.

[71] Richard A. Epstein, "Toward a Revitalization of the Contract Clause," U. of Chicago L.Rev 51, 703-751 (Summer 1984) at 737.

[72] Id.

[73] Brad Miller, "Fighting Foreclosures With Eminent Domain," Wall St. J. July 3, 2013 at A13.

[74] Id.

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[75] Id.

[76] "California City Moves to Expand Eminent Domain Proposal", The Boston Globe, Sept. 12, 2013 at B9. See also "A City Works to Save Homes By Invoking Eminent Domain", N.Y. Times, July 30, 2013 at A1-B25.

[77] "Legal Interpretation and a Constitutional Case", supra note 23 at 2561.

[78] Id.

[79] Id.

[80] Id.

KIRTSAENG v. JOHN WILEY & SONS, INC.—AN EXPANDED APPLICATION OF THE "FIRST SALE DEFENSE"

by

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INTRODUCTION

Under U.S. copyright law, a copyright holder possesses the exclusive right to distribute copyrighted material to the public for sale or other transfer of ownership. That exclusive right is, however, subject to a number of statutory exceptions. One exception is the "first sale" doctrine, which not only cuts off the copyright holder's ability to structure the sale and downstream distribution of copies of that material that were manufactured in the United States but also allows the owner of a lawfully acquired copy of that copyrighted material to resell it without obtaining the permission of the copyright holder. In the recent case of *Kirtsaeng v. John Wiley & Sons, Inc.* (hereinafter *Wiley*),[1] the U.S. Supreme Court was asked to reconcile a number of statutory provisions in order to determine whether there was an extraterritorial dimension to the "first sale" doctrine. This article will examine how the Court's decision in *Wiley* expanded the application of the "first sale" doctrine to include copyrighted goods that were

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manufactured abroad rather than limiting it to copyrighted goods that were manufactured domestically.

THE FACTUAL BASIS FOR THE COPYRIGHT CLAIM IN THE *WILEY* CASE

The parties involved in the *Wiley* case were a foreign student with an entrepreneurial plan and a major U.S. publisher of textbooks. In 1997, Supap Kirtsaeng, a native of Thailand, came to the United States to earn an undergraduate degree in mathematics at Cornell University. After graduating from college, Kirtsaeng received a fellowship to continue his education in the doctoral program in mathematics at the University of Southern California, Los Angeles.

As an undergraduate, Kirtsaeng discovered two things about his college textbooks. This first was that they were very expensive. The second was that the foreign editions of the same textbooks were a lot cheaper. It was this second discovery that gave Kirtsaeng the idea to sell copies of the foreign editions of textbooks to U.S. students for a profit. Prior to executing his plan, Kirtsaeng consulted with some friends in Thailand and checked out copyright rules on the website "Googles Answers."[2] After concluding that his plan was viable, he asked his family and friends buy the textbooks in Thailand and ship them to him in California. Kirtsaeng, doing business as BlueChristine99, then posted the books for sale at a significantly higher price on commercial websites such as eBay.com. As he had anticipated, his plan proved to be a financial success. His earned revenues, prior to reimbursing his family and friends, were reported to be somewhere between $900,000 and $1,200,000.[3]

John Wiley & Sons, Inc. (hereinafter Wiley) was the holder of the copyright for some of the textbooks that Kirtsaeng resold on the internet. Wiley published the textbooks targeted for its domestic market in the United States and John Wiley & Sons (Asia) Pte Ltd. (hereinafter Wiley Asia), its wholly-owned subsidiary, published the foreign editions of those same textbooks abroad.[4] In most cases, the contents of the domestic and foreign books were either similar or identical. The biggest differences were in the design, the supplemental content (U.S. versions typically included CD-ROMS), the type and quality of the materials used in the printing and binding, and the quality of the graphics.[5]

It should be noted that inside every book published by both Wiley and Wiley Asia was the following warning:

> No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means . . . except as permitted under Sections 107 or 108 of the 1976 United States Copyright Act.[6]

In addition, every textbook contained a specific claim for copyright protection. A typical copy of an American edition of a Wiley textbook would read:

> Copyright ©2008 John Wiley & Sons, Inc. All rights reserved . . . Printed in the United States of America.[7]

The insert in the foreign edition of a comparable Wiley Asia textbook would read:

> Copyright © 2008 John Wiley & Sons (Asia) Pte Ltd[.] . . . All rights reserved. This book is authorized for sale in Europe, Asia, Africa and the Middle East only [and] may not be exported

> out of these territories. Exportation from or importation of this book to another region without the Publisher's authorization is illegal and is a violation of the Publisher's rights. The publisher may take legal action to enforce its rights. . . . Printed in Asia.[8]

When Wiley became aware of Kirtsaeng's operation, it filed a lawsuit against him in the U.S. District Court in the Southern District of New York claiming federal copyright[9] and trademark infringement[10] as well as unfair competition under New York state law.[11] Wiley's primary claim was that Kirtsaeng had infringed on Wiley's exclusive right to distribute copies of copyrighted works and had engaged in the unauthorized importation of copyright goods. Kirtsaeng denied liability and asserted that his actions were protected by the "first sale" defense.

THE DEVELOPMENT OF THE "FIRST SALE" DEFENSE IN THE UNITED STATES

HISTORICAL BACKGROUND

The "first sale" defense is based on the common law doctrine that restraints should not be placed on the alienation of chattels. To illustrate this doctrine, Lord Coke gave an example of a person who possessed a horse or some other chattel and either gave it to a donee or sold it to a vendee on the condition that that party was prohibited from giving or selling it to anyone else. According to Coke such a condition should be void since "it is against Trade and Traffic, and bargaining and contracting between man and man; and it . . . should ouster him of power given to him."[12]

The "first sale" defense to copyright infringement claims was recognized by the U.S. Supreme Court in the 1908 case of *Bobbs-Merrill Company v. Straus et al. d/b/a/ R.H. Macy & Company* (hereinafter *Bobbs-Merrill*).[13] Bobbs-Merrill, the publisher and copyright owner of a work of fiction, *The Castaway*, had inserted a notice in the front cover of each copy of the novel stating that: "The price of this book at retail is one dollar net. No dealer is licensed to sell it at a less price, and a sale at a less price will be treated as an infringement of the copyright."[14] Macy & Co. purchased multiple copies of the book from wholesale dealers with the intention of reselling them in its stores. Even though Macy & Co. was aware of Bobbs-Merrill attempt to place limits on the retail price for the book, it chose to sell its copies at the retail price of eighty-nine cents per copy. Bobbs-Merrill responded by filing a lawsuit in federal court seeking to restrain Macy & Co. from selling the copyrighted books.

The Supreme Court began its discussion of Bobbs-Merrill's copyright claim by noting that federal copyright protection is a statutory right that Congress established under its Article I, § 8 power to: "To 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." It therefore agreed that it would be prudent to construe the copyright statutes "with a view to effecting the purposes intended by Congress . . . [and] ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant."[15] While the Court acknowledged that the purpose of copyright law is "to secure to the author the right to multiply copies of his work,"[16] that purpose does not result in limitless protection. Section 4952 of the Revised Statutes of the United States (1901) specifically gave the copy holder the "sole liberty of printing, reprinting, publishing, completing, copying, executing, finishing and *vending* [emphasis added] the same." But, according to the Court, that sole right to vend did not include the right to restrict "the subsequent alienation of the subject-matter of copyright after the owner had parted with the title to one who had acquired full dominion over it and had given a satisfactory price for it."[17] Absent contract provisions or license agreements limiting the subsequent sale of the copyrighted material, copyright statutes do not give copyright holders the right, after the sale of the book to a purchaser, to restrict future retail sales of the book or the right to specify that it may only be resold at a certain price. The statutory right to vend is the right to first sell copies of the protected material in quantities and at a price that is satisfactory to the copyright holder. It is not the right to control all future retail sales of those particular copies. "The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he may not publish a new edition of it."[18]

The "first sale" doctrine, which was established by the Court in *Bobbs-Merrill,* was codified in the Copyright Act of 1909[19] and in the Copyright Act of 1947.[20] Both versions of the law began by stating that the exclusive rights with regard to copyrighted works include the right "to print, reprint, publish, copy, and *vend* [emphasis added] the copyrighted work."[21] Congress went on to limit those rights subject to the *Bobbs-Merrill* "first sale" defense. Section 41 of the 1909 Act stated that:

> [T]he copyright is distinct from the property in the material object copyrighted, and the sale or conveyance, by gift or otherwise, of the material object shall not of itself constitute a transfer of the copyright, nor shall the assignment of the copyright constitute a transfer of title to the

> material object but *nothing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work the possession of which has been lawfully obtained*.[22] [Emphasis added.]

Section 27 of the 1947 Act subsequently adopted § 41 of the 1909 Act almost verbatim.

When the Copyright Act of 1976[23] was enacted, it included a number of changes relevant to the "first sales" defense. Among the exclusive rights granted to the "owner of the copyright under this title" and enumerated in §106 was the right to:

> (3) *To distribute* [emphasis added] copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.[24]

The exclusive rights found in §106 were limited, however, by §§107 through 122. The "first sales" doctrine was addressed in §109 (a)[25] which specified that:

> Notwithstanding the provisions of §106 (3), the owner of a particular copy or phonorecord *lawfully made under this title,* [emphasis added] or any person authorized by such owner, is entitled, without the authority of the copyright owner, to sell or dispose of the possession of that copy or phonorecord.

An additional provision of the Copyright Act specifically placed limitations on the importation of copyrighted materials. Section 602(a) provided, in part, that:

> Importation into the United States, without the authority of the owner of copyright under this title, of copies or phonorecords of a work that have been acquired outside of the United States is an infringement of the exclusive right to distribute the copies or phonorecords under § 106, actionable under § 501.

Section 602 then listed three instances in which the importation of copyrighted materials without the authority of the copyright holder was not an infringement of the exclusive right to distribute under § 106. The exceptions included: the importation of copies or phonorecords under the authority or for the use of the government (§ 602(a)(1)); the importation of not more than one copy or phonorecord for the private use of, but not for distribution by, the importer and the importation of copies and phonorecords that are part of a person's personal luggage when he or she arrives from outside the U.S. (§ 602(a)(2); and the importation by or for scholarly, educational, or religious organizations for archival purposes or for library lending purposes (§ 602(a)(1).

Section 501(a) (referred to in § 602(a)) stated, in part, that:

> Anyone who violates any of the exclusive rights of the copyright owner as provided by §§ 106 through 122 or of the author as provided in § 106A(a), or who imports copies of phonorecords into the United States in violation of § 602, is an infringer of the copyright or right of the author, as the case may be.

RECENT U.S. SUPREME COURT CASE LAW

Quality King Distributors, Inc. v. L'anza Research International, Inc.

In 1998, the U.S. Supreme Court, in the case of *Quality King Distributors, Inc. v. L'anza Research International, Inc.* (hereinafter *Quality King*),[26] addressed the question of whether the "first sale" defense should apply to copyrighted goods that had been manufactured in the United States, sold for the first time to a buyer in an international market, and then imported back to and resold in the United States. L'anza was a manufacturer and seller of hair care products—all of which were made in the United States and affixed with copyrighted labels. The L'anza products were expensive and were intended for a more select clientele. Nonetheless, L'anza was concerned that its targeted American consumers might not be willing to pay the higher prices for its products if they were sold next to less expensive hair care products in supermarkets or drug stores. Consequently, it devised a marketing plan whereby it would only sell its goods to U.S. distributors who limited their sales to authorized retailers (barber shops, beauty salons, and professional hair care colleges) within limited geographical areas.[27] L'anza also spent additional capital to advertise in trade magazines and to offer special training sessions to its authorized retailers.

Although L'anza's sales were not restricted to the domestic market, there are two signification differences between how the company operated in the United States and how it operated abroad. The first difference was that L'anza spent much less money on advertising and promotion in the foreign markets. The second was that it charged its foreign distributors prices that were between 35% and 40% lower than it charged its domestic distributors. And, it was this global price discrimination plan that eventually led to the lawsuit against Quality King.

In the early 1990s, L'anza's distributor in the United Kingdom sold a large quantity of its products (all with company's copyrighted labels) to a distributor in Malta at a contract price that was calculated according to the foreign price scheme. The goods, all of which had been made in the United States and had been shipped to a foreign destination, eventually made their way back to United States where they were resold by Quality King to a number of unauthorized retailers. L'anza subsequently sued Quality King as well as the Malta distributor and the U.S. retailers for violating its exclusive right to reproduce and distribute the copyrighted goods in the United States.

The issue in *Quality King* was whether L'anza, the copyright holder, could protect the exclusivity of its products in the domestic market by limiting the importation back to the United States of those same exact products. The statutory problem was whether the copyright holder's authority to limit importation under § 602(a) was similar to its exclusive right to distribute granted under § 106(3) and, therefore, limited by §§ 107 through 120. Or, more specially, whether the "first sale" doctrine (codified in § 109(a)) also applied to imported copies. The Court, in a unanimous decision delivered by Justice John Paul Stevens, concluded that the rights of a copyright holder under § 602(a) were limited to the same extent that they were limited under § 106(3).[28]

The Supreme Court found no merit in L'anza's claim that § 602(a) prohibited foreign distributors from reselling L'anza's products to U.S. vendors who had not been able to buy them from L'anza's authorized domestic distributors. The Court distinguished between L'anza's incorrect claim that § 602 categorically prohibited the unauthorized importation of copyrighted goods and Quality King's claim that, while an importation might be an infringement of exclusive right to distribute copies under § 106(3), that right was subject to the limitations enumerated in §§ 107 to 120.[29] In *Bobbs-Merrill*, the exclusive right "to vend" had been limited by the "first sale" doctrine. Under § 106(3), the exclusive right "to distribute" was similarly limited by the codification of the "first sale" doctrine in § 109(a). Therefore, since § 602(a) only applied to the unauthorized importation of goods that was an infringement of an exclusive right under § 106(3) and since that right was limited by the "first sales" doctrine found in §109(a), § 602(a) could not be used to prevent the domestic and foreign owners of the already distributed goods from importing and reselling them in the United States.[30]

L'anza had presented the Court with two statutory arguments. The first was that the application of the "first sale" defense in the case would have rendered § 602(a) and its three exceptions superfluous "unless it cover[d] non-piratical ("lawfully made") copies sold by the copyright holder, because importation nearly always implie[d] a first sale."[31] The second was that the § 501 definition of an "infringer" referred to two distinct violations—those described in §106 and those referred to in § 602. The Court rejected both arguments on the grounds that neither adequately accounted for why § 602(a) contained the phrase "under § 106."

With regards to L'anza's first argument, the Court identified three instances in which the application of the "first sale" defense had not rendered § 602(a) superfluous. While it was true that the Copyright Act had explicitly prohibited the importation of "piratical" or unauthorized copies long before the enactment of § 602(a),[32] that prohibition had subsequently been incorporated into § 602(b) of the current Act, which stated that: "In the case where the making of the copies or phonorecords would have constituted an infringement of copyright if this title had been applicable, their importation is prohibited." L'anza had argued that since § 602(b) specifically referred to pirated goods, § 602(a) had to apply to something else--nonpiratical ("lawfully made") copies. Although the Court disagreed with L'anza's conclusion, it pointed out that even if § 602(a) only applied to piratical goods, it still provided the copyright holder with something that was quite significant—a private remedy against the importer that was not available under § 602(b).[33] The Court then pointed to the fact that while the § 109(a) "first sale" defense could be asserted by the "owner" of a lawfully made copy, it was unavailable, in a § 602(a) action, to nonowners such as bailees, licensees, consignees, or others whose possession of the copy was unlawful. Finally, the Court noted that there was a third category of cases (other than those involving pirated copies of copies "lawfully made under this title") that was covered by § 602(a) Those were cases involving copies that had been "lawfully made" under the copyright laws of some other country.[34]

The Court next turned to L'anza's second argument involving the proper meaning of § 501 definition of an "infringer." Section 501 specifically stated that an "infringer" was: "Anyone who violates any of the exclusive rights of the copyright owner as provided by §§ 106 through 118 or of the author as provided in §106A or who imports copies or phonorecords into the United States in violation of § 602." L'anza had claimed that the § 501 references to § 106 and § 602 were, in fact, references to two discrete violations. Although the Court admitted that "the use of the words "*or* who imports," rather than words such as "*including* one who imports," was more consistent with L'anza's claim that a violation of § 602 is distinct from a violation of § 106," it cited other provisions in the statute to contradict that conclusion. The Court compared how the prohibited importation under §

602(a) was unambiguously stated to be an infringement of the exclusive right "under § 106, actionable under § 501" while the infringement referred to in § 106A[35] (which was also cross-referenced with § 501), stated that it was "independent of the exclusive rights provided in §106." This suggested to the Court that, while §106A described an independent right, § 602(a) violations were, in fact, more properly identified as a species of § 106 violations. [36]

The Court found even more persuasive the fact that § 106 rights were subject to all of the provisions of §§ 107-120 and not just the § 109(a) "first sale" defense. If § 602(a) were an independent right, none of the limits provided for in §§ 107-120 would be applicable. Consequently, a foreign publisher, unable to assert the §107 "fair use" defense, would be liable for importing a newspaper to the United States if its book review column included excerpts from a U.S. copyrighted book. The Court, citing the importance of the "fair use" defense to publishers of scholarly works, found it "difficult to believe that Congress [had] intended to impose an absolute ban on the importation of all such works containing any copying of material protected by a United States copyright."[37] Such a result would be counter to the fundamental purpose of the Copyright Act, the promotion of the "useful Arts" through the rewarding of creativity and the protection of original works. While the consequences of adopting L'anza's construction would certainly aid a company in its marketing of copyrighted materials in different global market sectors, it would also "inhibit access to ideas without any countervailing benefit."[38]

The Court concluded by declining to engage in a policy discussion over the wisdom of placing governmental restraints on the "gray market" and the use of "parallel importation."[39] It chose instead to restrict itself to interpreting the text of the Copyright Act that was provided by Congress. And, the Court, having completed that task, ruled in favor of Quality King Distributors.

It should be noted that Justice Ruth Bader Ginsburg filed a brief concurring opinion in *Quality King* that anticipated the next “first sale” issue that would present itself to the Court. The sole purpose of her concurring opinion was to attempt to limit the *Quality King* holding to cases involving the “round trip” journey of copyrighted copies from the United States to locations abroad and then back to the United States. As far as she was concerned, the holding did not resolve the issue for cases in which the alleged infringing goods had been manufactured abroad.

Costco Wholesale Corp. v. Omega

In 2010, the Supreme Court granted a writ of certiorari to a Ninth Circuit case[40] involving allegations of copyright distribution and importation infringements under §§ 106(3) and 602(a). The issue in *Costco Wholesale Corp. v. Omega* (hereinafter *Omega*)[41] was whether the holding in *Quality King* limited the use of the “first sale” defense to cases in which the copies of the copyrighted work had either been made or previously sold in the United States with the authority of the copyright owner.

Omega, a Swiss manufacturer of high quality watches (all of which were engraved on their underside with a U.S. copyrighted “Omega Globe Design), participated in the international market through a network of authorized distributors and retailers. Costco Wholesale Corp. (hereinafter Costco), which was neither an authorized distributor nor retailer, purchased the copyrighted Omega watches from the “gray market” for resale in its discount stores. In this particular case, the watches, which Omega had produced in

Switzerland and sold to authorized distributors overseas, were at some point purchased by unidentified third parties who sold them to ENE Limited, a New York company, who, in turn, sold them to Costco. While the initial foreign sale of the watches had been authorized by Omega, their subsequent importation into the United States had not been. Costco's legal response to the Omega lawsuit was the same as Quality King's to L'anza—it asserted the "first sale" defense. Both parties filed motions for summary judgment. The trial court, without comment, ruled in favor of Costco. When Omega appealed the case to the U.S. Court of Appeals for the Ninth Circuit, the sole issue was whether the Supreme Court's decision in *Quality King* had overruled the appellate court's precedent that limited the "first sale" defense to copies of copyrighted materials legally made in the United States. The three justice panel reversed the lower court decision on the grounds that the "first sale" defense was unavailable to the Costco.

The Court of Appeals, relying on *Quality King*, held that the copyright holder's claims depended on the relationship between §§ 106(3), 109(a), and 602(a) of the Copyright Act. Prior to *Quality King,* case law in the Ninth Circuit had differentiated between "round trip" importation cases (in which the copies of the copyrighted material had been lawfully made in the United States, exported to an authorized foreign distributor, sold to unidentified third parties abroad, and shipped back to United States without the authorization of the copyright holder) and cases in which the copy of the material had been made abroad and subsequently imported to the United States without the copyright holder's permission. In *BMG Music v. Perez* (hereinafter *BMG),*[42] the appellate court had held that §109(a) could not be used as a defense to a § 602(a) claim if the goods in question had been manufactured abroad since §109(a) only applied to goods "lawfully made under this title." And, "lawfully made under this title" "grant[ed] first sale protection only to copies legally made and sold in the United States."[43] *Parfums Givency, Inc. v. Drug Emporium, Inc.*[44] modified the holding in *BMG* by creating an exception that would allow the § 109(a) defense to be used in § 602(a) cases even though the copies of the copyrighted material had not been made in the United States so long as an authorized first sale had occurred in the United States.[45] That exception was subsequently followed by the Ninth Circuit in the case of *Denbicare U.S.A, Inc. v. Toys "R" Us, Inc.*[46]

In *Omega*, the question was what impact, if any, *Quality King* would have on the Ninth Circuit's construction of § 109(a). The first issue to be resolved was whether the holding in *Quality King* applied to all varieties of importation cases. Referring to Justice Ginsburg's concurring opinion, the Court of Appeals held that *Quality King* was limited to "round trip" importation cases. This conclusion was supported by the observation that the Supreme Court had neither discussed the scope of § 109(a) nor defined the meaning of "lawfully made under this title."[47]

The next issue was whether the Ninth Circuit's general rule that § 109(a) was limited to copies that had been "legally made in the United States" was irreconcilable with *Quality King.* The basis for the Circuit Court's rule was its presumption that U.S. laws should not be applied extraterritorially unless the contrary is clearly indicated by statute.[48] For the "first sale" defense to apply to copies made abroad would require the acknowledgment that they were "lawfully made under this title." And, that "would ascribe legality under the Copyright Act to conduct that occurs entirely outside of the United States, not withstanding the absence of a clear expression of congressional intent in favor of extraterritoriality."[49] The Circuit Court also cited the example used by the Court in *Quality King*[50] whereby a U.S. copyright holder gave the exclusive U.S. distribution rights to the publisher of the U.S. edition and the exclusive British distribution rights to the publisher of the British edition. The Supreme Court had noted that:

> [P]resumably only those [copies] made by the publisher in the United States edition would be 'lawfully made under this title' within the meaning of § 109(a). The first sale doctrine would not provide the publisher of the British edition who decided to sell in the American market with a defense to an action under §602(a).

This further suggested that "lawfully made under this title" referred exclusively to the copies of the U.S. copyrighted material that had been made in the United States.

The Ninth Circuit, in *Costco,* concluded that its general rule limiting the "first sale" defense to copies of copyrighted materials legally made in the United States was compatible with *Quality King* and remained binding precedent. As a result, the § 109(a) defense to the claims under §§ 106(3) and 602(a) was unavailable to Costco and the lower court decision in favor of Costco was reversed and the case was remanded to the District Court.

The judgment of the Ninth Circuit was affirmed by the U.S. Supreme Court. But, it did so by means of a per curium opinion, without comment, that was issued by an equally divided Court. Justice Elena Kagan took no part either in the consideration or the decision in the case.

THE APPLICATION OF THE "FIRST SALE DEFENSE" TO *KIRTSAENG v. JOHN WILEY & SONS, INC.*

The primary claim in the *Wiley* case was that Kirtsaeng had infringed on Wiley's §§ 106(3) and 602(a) rights when he arranged to have foreign editions of textbooks send him in the United States and when he sold them for a profit without obtaining the authorization of the copyright holder. The central issue was whether a §109(a) "first sales" defense was available to Kirtsaeng even though the textbooks had been published abroad and the first sale had taken place abroad.

U.S. DISTRICT COURT

During the pre-trial proceedings, Kirtsaeng had submitted to the trial court a proposed instruction to the jury charging that the "first sale" doctrine could be used as a defense against a claim of copyright infringement.[51] Judge Donald Pogue denied Kirtsaeng's request and further instructed him not to raise the "first sale" defense during trial on the grounds that "[t]here is no indication that the imported books at issue here were manufactured pursuant to the U.S. Copyright Act . . . [and,] [t]o the contrary, the textbooks introduced as evidence purport, on their face, to have been published outside of the United States."[52]

Pogue's decision was based on his determination that goods "lawfully made under this title" applied to goods actually made within U.S. borders and not to goods made abroad but in a manner consistent with the Copyright Act. The process by which Pogue arrived at that decision began with a review of the structure of the Act. Unfortunately, that "[did] not provide a determinative conclusion."[53] He next analyzed of the legislative history of §§ 109 and 602—which also proved to be inclusive.[54] His consideration of the public policy issues was equally frustrating—since valid arguments could be made for either interpretation of § 109(a).[55] In the end, Pogue based his decision on dicta found in *Quality King.* The dicta in question was the Court's statement that "§ 602(a) [would] appl[y] to a category of copies that are neither piratical nor "lawfully made under this title."[56] And, the category of not "lawfully made under this title" "encompassed copies that were 'lawfully made' not under the United States Copyright Act, but instead, under the law of some other country."[57] Since the books sold by Kirtsaeng had been manufactured abroad, they were not "lawfully made" under the Act, and "first sale" defense provided for in § 109(a) was inapplicable.

Prior to trial, Kirtsaeng had sought to preclude the introduction of evidence relating to his online "PayPal" sales records (including the gross revenues from his sale of the foreign editions of Wiley textbooks) and the profits he had earned on unrelated sales activities. The trial judge granted the motion but only with regard to evidence of profits earned from books produced by other publishers (subject to a number of exceptions). When the case was finally given to the jury, Kirtsaeng also objected to jury instructions relating to the assessment of statutory damages. The jury found Kirtsaeng liable for willful infringement of the Copyright Act and imposed damages of $75,000 for each of the eight Wiley books in question.[58] Kirtsaeng appealed the case to the U.S. Court of Appeals for the Second Circuit.

U.S. COURT OF APPEALS

The principal question on appeal (which was one of first impression for the Second Circuit) was whether the "first sale" doctrine could be asserted as a defense in an action alleging a copyright infringement for copies of copyrighted materials that had been manufactured abroad. The key concern was whether those materials had been "lawfully made under this title." The Court of Appeals, in a 2-1 decision delivered by Justice José

Cabranes, affirmed the lower court's ruling and held that the §109(a) defense was inapplicable.

The appellate court's de nova review of the case began with an acknowledgement that there was "some tension" between the broad control that § 602(a)(1) gave to the copyright holder with regard to the direct or indirect importation into the United States of the copies of the copyrighted goods and the § 109(a) limits placed on the copyright holder with regard to the distribution of those goods after their initial sale.[59] Even though the Supreme Court's unanimous decision in *Quality King* had held that § 109(a) limited the copyright holder's rights under §602(a), the Second Circuit was hesitant to apply that ruling to *Wiley*. The reason for that hesitation was based on a key difference between the two cases—the fact that while the goods in *Quality King* had been manufactured in the United States, the goods in *Wiley* had been manufactured abroad. The Court of Appeals cited Ginsburg's concurring opinion in *Quality King* (which attempted to limit the Court's holding to "round trip" journeys) and Steven's "instructive dicta" (which suggested that § 602(a) "encompasses copies that may not be subject to the first sale doctrine—e.g., copies that are lawfully made under the law of another country")[60] as well as Steven's hypothetical description of the limits on the exclusive rights of an American publisher and distributor of an American edition of a book and a British publisher and distributor of a British edition of the same book).[61] These references seemed to suggest that the Supreme Court had concluded that copyrighted material manufactured abroad were not subject to the "first sale" defense. But, such a suggestion was mudded by the Supreme Court's failure to transform the dicta in *Quality King* into a compatible holding in *Omega*.

In order to clarify the meaning of the phrase "lawfully made under this title," the appellate court focused on the text of §

109(a) and the structure of the Copyright Act. Understanding the text of § 109(a) turned out to be problematic given the fact that the word "made" was not a term of art under the Copyright Act[62] and the word "under" was something of a "chameleon" that the courts have only understand by "draw[ing] on its meaning from its context."[63] Attempts to understand the words in the context of the Act were equally frustrating. If the phrase "lawfully made under this title" was interpreted to mean "lawfully made in the United States," it would be compatible with the general presumption that statutes do not apply extraterritorially. (Such a presumption had, in fact, been adopted in previous Second Circuit copyright cases.)[64] But, such an interpretation would also ignore the fact that the Copyright Act also explicitly took into account activities occurring abroad.[65] After considering a number of alternative possibilities, the majority opinion concluded that the "relevant text [was] simply unclear" and, in fact, the phrase ""lawfully made under this title" could plausibly be interpreted to mean any number of things, including: (1) "manufactured in the United States," (2) "any work made that is subject to the protection of this title," or (3) "lawfully made under this title had this title been applicable.""[66]

Since the appellate court found the text of § 109(a) to be "utterly ambiguous," it decided "to adopt an interpretation of § 109(a) that best comport[ed] with both § 602(a) and the Supreme Court's opinion in *Quality King*."[67] Two assumptions concerning § 602(a) convinced the majority to deny the "first sale" defense to cases involving copies of copyrighted works made abroad. The first was the assumption that § 602(a) was intended to give copyright holders some degree of flexibility in how they divided and treated their international and domestic markets for the same copyrighted work. Such an intention led to the conclusion that the "first sale" defense should be limited to copies "lawfully made in the United States" so that copyright holders, in most instances,[68] could control the circumstances in which foreign made copies could be legally imported into the United States. The second assumption was that § 602(a) would be irrelevant in the vast majority of cases if the "first sale" defense was allowed to apply to every copy manufactured abroad that were either made "subject to protection under Title 17," or "consistent with the requirements of Title 17 had Title 17 been applicable." Consequently, it had to be read in such a way as to limit the "first sale" defense to works manufactured in the United States.

The Second Circuit Court dismissed the Supreme Court's affirmation of the contradictory holding in *Omega* and focused instead on "what the Justices appear to have had in mind when deciding *Quality King*."[69] It followed the District Court's lead and relied on the dicta that found the scope of § 602(a) to be broader than § 109(a)—at least in so far as it "applie[d] to a category of copies that [we]re neither piratical nor "lawfully made under this title" [and] [t]hat category encompassed copies that were 'lawfully made' not under the United States Copyright Act, but instead, under the law of some other country."[70] The appellate court concluded that since, "in the [Supreme] Court's view, copies "lawfully made" under the laws of a foreign country—though perhaps not produced *in violation* of any United States laws—are not necessarily "lawfully made" insofar as that phrase is used in § 109(a) of our Copyright Act,"[71] the District Court was correct when it decided that Kirtsaeng could not assert a "first sale" defense.[72]

U.S. SUPREME COURT

Majority Opinion

The U.S. Supreme Court's landmark ruling in *Kirtsaeng v. Wiley & Sons, Inc.*, unequivocally extended the "first sale" defense to the owners of copies of copyrighted goods that had been manufactured abroad. Justice Stephen Breyer delivered the opinion for the majority of the Court that included Chief Justice John Roberts and Justices Clarence Thomas, Samuel Alito, Sonya Sotomayer, and Elena Kagan. Justice Kagan filed a separate concurring opinion, in which Justice Alito joined. The dissenting opinion, filed by Justice Ruth Bader Ginsburg, was joined by Justices Anthony Kennedy and by Justice Antonin Scalia (except for Parts III and V-B-1).

The Court granted a writ of certiorari in the *Wiley* case, in part, to resolve the different ways that the U.S. Circuit Courts had handled the issue of whether the "first sale" defense applied to copyrighted works manufactured abroad. The Second and Ninth Circuits had taken the view that the phrase in §109(3) referring to copies "lawfully made under this title" created a geographical limit on the scope of the "first sale" defense. The geographical limit recognized by the Second Circuit only subjected copies "made in territories *in which the Copyright Act is law*" [emphasis added)[73] to the "first sale" defense. The Second Circuit concluded that the "first sale" defense could apply to copies that had been "manufactured domestically" but not to copies manufactured "outside of the United States." The Ninth Circuit, on the other hand, extended its geographically limited application of the "first sale" defense to cases involving copies that had been lawfully made in the United States as well as copies that had been lawfully made outside the United but had been initially sold in the United States with the copyright owner's permission.[74] Both the Second and Ninth Circuits' geographical interpretations precluded Kirtsaeng from successfully asserting a "first sale" defense with regard to the Wiley (Asia) books. Even though the U.S. copyright holder had given permission to Wiley (Asia) to *make* the copies abroad, the copyright holder had never given anyone who *bought* copies of those books permission to resell them. And, that was the result regardless of whether the copy had been purchased at a retail store, over the internet, or at a library sale.[75]

The Third Circuit had rejected a geographical approach on the grounds that limiting the "first sale" doctrine only to copies made within the United States "d[id] not fit comfortably within the scheme of the Copyright Act."[76] It preferred an interpretation of the words "lawfully made under this title" to mean made "in accordance with" or "in compliance with" the Copyright Act. Under this non-geographical approach, the "first sale" defense could apply to copyrighted materials that had been made abroad according to the requirements of American copyright law and with the authorization of the copyright holder.[77]

In order to evaluate the different approaches taken by the Circuit Courts, the Supreme Court focused on the language of §109(a) and its context within the Copyright Act, the common law history of the "first sale" defense, and the practical consequences of adopting the conflicting interpretations. The Supreme Court's linguistic analysis favored a nongeographical interpretation of "lawfully made under this title." That meant that it extended to copies that had been made "in accordance with" or "in compliance with" the Copyright Act. The Court was impressed by the fact that a literal reading gave each word in the five-word phrase a distinct purpose. "Lawfully made" copies were distinguished from copies that were unlawfully made. Since the dictionary meaning of the word "under" can mean "in accordance with,[78] "under this title" could be easily be read to mean "in accordance" with a particular standard of lawfulness (i.e. the Copyright Act). For the majority, the nongeographical interpretation was simple, promoted a traditional copyright objective (the combating of piracy), and made word-by-word linguistic sense.[79]

In comparison, the Court found the geographical interpretation favored by Wiley to be linguistically wanting. In order for the geographical interpretation to work, the emphasis in the phrase "lawfully made under this title" would have had to be placed on the word "under." The suggestion that "under this title" meant "in conformance with the Copyright Act *where the Copyright Act is applicable*" would not work unless the reader was also able to show that the Act was "applicable only in the United States."[80] And, that was a serious obstacle for Wiley to overcome—especially since nothing in the phrase "under this title" (including the word "under") could be interpreted to mean "where."[81]

An additional, and more serious, problem with the geographical interpretation arose when an attempt was made to read the geographical limitation into the word "applicable" (or the equivalent). The Court, by way of example, suggested that just because the Act did not instantly protect an American copyright holder from unauthorized piracy occurring abroad did not make the Act inapplicable to copies made abroad. Foreign-printed pirated works were clearly subject to the Act under § 602(a)(2), which states that:

> Importation into the United States or exportation from the United States, without the authority of the owner of the copyright under this title, of copies or phonorecords, the making of *which either constituted an infringement of copyright, or which would have constituted an infringement of copyright if this title had been applicable*, is an infringement of the exclusive right to distribute copies or phonorecords under §§ 501 and 506 (emphasis added).

The Court also referred to § 104(a), in which works "subject to protection under this title" included unpublished works "without regard to the nationality or of the author," and to §104(b), in which protection also was provided for works "first published" in any one of the nearly 180 nations that are parties to a copyright treaty with the United States.[82]

Finally, the Supreme Court found the Ninth Circuit's extension of its geographical interpretation (to include copies manufactured abroad but first sold in the United States with the American copyholder's permission) to be linguistically disingenuous. There was simply no way to interpret "lawfully made under this title" to be half-geographical and half-nongeographical. If the Ninth Circuit's interpretation prevailed, a publisher, which printed its books abroad and authorized their importation and sale in the United States, could prohibit students from reselling the textbooks back to a campus bookstore at the end of the semester. And, that was an unacceptable consequence and a misreading of "lawfully made under this title."

The Court next reviewed the "first sale" defense from both a historical and contemporary statutory context—and concluded that Congress was concerned about something other than geographical limits when it enacted the present version of § 109(a). The "first sale" defense, which was initially established as a statutory defense in the Copyright Act of 1909,[83] stated that: "[N]othing in this Act shall be deemed to forbid, prevent, or restrict the transfer of any copy of a copyrighted work *the possession of which has been lawfully obtained*" [emphasis added]. Since there was no reference to geography in the original "first sale" provision, the Court was interested in determining whether the text of the current statutory provision, which applies to those who are "owners" of a copy of a copyrighted work that was "lawfully made under this title," was altered to address geographical concerns. The

Court noted that the difference in the two statutory provisions was not based on any concern for geographical limitations but rather on a concern to limit who was eligible to assert the "first sale" limitation. In the 1909 Act, the right belonged to whoever lawfully possessed the copy—which meant that it might be claimed by bailees and lessees (such as owners of movie theaters who had leased copyrighted films from movie distributors or filmmakers) as well as actual owners. Since Congress was not satisfied with that result, it changed the wording of the current Act to restrict the defense to the "owners" of copies "lawfully made under the title." The legislative history leading up to the revisions in the current Act seems to support the conclusion that it was a "who" rather than a "where" issue that precipitated the statutory language.[84]

Another relevant change in the current Act (which phased out the "manufacturing clause") reflected a concern that materials manufactured abroad and materials manufactured in the United States should be accorded "equal treatment."[85] A geographical interpretation of the "first sale" defense would frustrate the purpose of the "equal treatment" principle since it would give the holder of a U.S. copyright (who might be a foreign national) the right to permanently control the U.S. distribution chain (including sales, resales, and gifts) for copies of the materials that were printed abroad--but not for copies printed in the United States.[86]

The final contextual argument raised by the Court related to the normal presumption that words lawfully made under the same title should carry the same meaning when they occur in different (but related) sections. Sections 109(c), 109(e), 110(1), and 106 of the Copyright Act all contain the phrase "lawfully made under this title."[87] The Court found unacceptable the suggestion that it adopt a nongeographical reading of the phrase in the first three cases and a geographical reading only for the provision relating to the "first sale" defense. Such a result would be inconsistent and contrary to the result that Congress had intended.

One of the reasons that the Court reviewed the common law background of the "first sale" defense was to see if the presumption, that when Congress passes legislation in an area that was previously governed by common law, it does so with the intention of retaining the substance of the common law, held in this case.[88] The common law basis for the "first sale" defense was the rule that restraints should not be placed on the alienation of chattels. Lord Coke's articulation of that rule in the early 17th century emphasized the importance of enabling buyers to freely dispose of property that they had previously acquired.[89] That same common law rule was used by the Supreme Court, in the case of *Bobbs-Merrill,*[90] to create the "first sale" defense for copyrighted materials. Congress subsequently codified that defense (the predecessor of § 109(a)) in the Copyright Act of 1909. After reviewing Coke's common law rule, the Court's precedent in *Bobbs-Merrill*, and the codification of that precedent in the 1909 Act, the Court was unable to identify any geographical distinctions that would preclude the "straight forward" application of the *Bobbs-Merrill* "first sale" defense to authorized copies made abroad.[91]

The Court, in a pragmatic turn, next considered the impact that a geographical interpretation would have on a basic constitutional copyright objective—"To promote the Progress of Science and useful Arts" (U.S. Constitution, Art. I, § 8, cl. 8). Libraries would have to get permission from the copyright holders of books published abroad and obtained by the library before they could circulate or otherwise distribute them.[92] A large portion of the used book business would be in jeopardy.[93] American purchasers of technology dependent items (such as cars, microwaves, calculators, mobile phones, and computers) that had been made abroad and that contained one or more copyrighted software programs or packaging, would not be able to resell those items without obtaining the permission of the holders of each copyrighted component.[94] Retailers would face the uncertainty of copyright infringement suits for the many copyrighted items that were manufactured abroad and purchased by the retailers for the purpose of resell in their stores.[95] And, museum directors would face the prospect of having to obtain the permission of the copyright owners of foreign produced art (which may have already been sold or donated to a foreign museum by the copyright holder) before they could display that art in the United States.[96] While Wiley and the dissenting opinion dismissed these "horribles" as "artificial inventions," the majority of the Court was less sanguine and concluded that "the practical problems . . . described are too serious, too extensive, and too likely to come about for us to dismiss them as insignificant—particularly in the light of the ever-growing importance of foreign trade to America."[97]

The majority opinion concluded by addressing four arguments raised in the dissenting opinion. The first was whether the Court's unanimous decision in *Quality King* supported a geographical interpretation. Under *Quality King,* the Court had ruled that the Copyright Act's "importation provision" (now § 602(a)(1) and then § 602(a)) did not bar the owner of copies of American made copyrighted materials purchased abroad from importing those materials back into the United States if the U.S. copyright holder had authorized the first sale and original exportation of the goods but had not authorized the return importation. Just as the copyright holder's exclusive right to distribute the goods under § 106 was subject to the § 109(a) "first sale" defense so to was the copyright holder's right to limit the importation of previously sold copies of those goods under the "importation provision."

The dissent had argued that if § 602(a)(1) did not apply to pirated goods or to owners of lawfully made copies, it would in fact be superfluous. The majority countered that (without permission, and subject to the exceptions in § 602(a)(3)), the "importation provision" would still prohibit the importing of copies that were lawfully made abroad where "(1) a foreign publisher operating as the licensee of an American publisher prints copies of a book overseas but, prior to any authorized sale, seeks to send them to the United States; (2) a foreign printer or other manufacturer (if not the "owner" for purposes of § 109(a), e.g. before an authorized sale) sought to send copyrighted goods to the United States ; (3) a book publisher transports copies to a wholesaler" and the wholesaler (not yet the owner) sends them to the United States, . . . or (4) a foreign film distributer, having leased films for distribution, or any other licensee, consignee, or bailee sought to send to the United States."[98]

The Court also rejected the suggestion that the example, in *Quality Court*, of the copyright holder who gave the exclusive American distributions rights to a publisher in the United States and the exclusive British distribution rights to a publisher in England was controlling in this case. That example had concluded with the statement that "presumably only those [copies] made by the publisher of the United States edition would be 'lawfully made under the title' within the meaning of § 109(a)."[99] Wiley had argued that that statement supported its geographical interpretation of the current § 602(a)(1) (previously § 602(a)) since it meant that even books published abroad under a valid license did not qualify as works "lawfully made under this title." The majority dismissed the *Quality Court* statement as "pure dictum" and as "*unnecessary* dictum" that was contained in a rebuttal to a counterargument. The meaning of "lawfully made under this title" was neither an issue in *Quality King* nor an issue that had been fully argued.

Since the Court's consideration of the issue in the current case had demonstrated that the dicta was, in fact, incorrect, it is not bound by that dicta.[100]

The Court next addressed the dissent's assertion that the legislative history supported its geographical interpretation of § 109(a). The historical events to which the minority referred occurred over a decade before the enactment of the 1979 Act and reflected the concerns of that the representatives of the book, record, and film industries had made to the Registrar of Copyrights regarding the difficulty of dividing international markets. The Registrar of Copyrights had responded to those concerns by proposing two draft provisions. A report prepared by the Copyright Office had explained that the second draft provision would have made the importing of a copy without the permission of the copyright holder a violation of the exclusive right of the copyright holder where the copyright holder had authorized the making of copies in the foreign country for distribution only in that country. The Court found that it could better ascertain the meaning of § 109(a) (as it was enacted in the 1979 Act) by placing greater weight on the congressional report accompanying § 109(a) (which was written in 1975)[101] rather than on the remarks of industry representatives concerning § 602 (which were made in 1964).[102] The congressional report (referred to by the majority) reiterated the importance of the "first sale" doctrine and explained the nongeographical purposed for the words "lawfully under this title."[103]

The Court conceded the validity of the third claim raised by the dissent—that a nongeographical interpretation of § 109(a) would seriously disrupt attempts by publishers and copyright holders to divide foreign and domestic markets. But, that was not seen to be a problem since there is no basic principle of copyright law that would suggest that publishers were entitled to the right to charge different prices for the same book in different geographical markets. Art. I, §8, cl. 8 of the U.S. Constitution gave Congress the power to "secur[e]" to "authors" for "limited [t]imes" the "exclusive [r]ight to their . . . [w]ritings." While the Founders conceived of that as a limited right to exclude competition, there is nothing to suggest that they thought it included "a right to divide markets or a concomitant right to charge different purchasers different prices for the same book, say to increase or maximize gain."[104] The inclusion of the "first sale" defense in copyright law placed limits on a copyright holder's ability to divide domestic markets. In reading the Copyright Act, the Court could find nothing to indicate that Congress believed that copyright owners should have more power to divide international markets.[105]

The final issue raised by the dissent was its concern that the Court's decision in *Wiley* would launch United States copyright law into an unprecedented regime of "international exhaustion"—which the United States opposed.[106] This latter claim was neither made by the Solicitor General in the *amicus* brief nor in oral arguments. In fact, when pressed, the Solicitor General had admitted in oral argument that reading the Copyright Act to allow the copyright holder to retain perpetual downstream control was worse than the restriction of market segmentation.[107]

Concurring Opinion

Justice Elena Kagan filed a concurring opinion that was joined by Justice Samuel Alito. While she fully agreed with the Court's opinion, she thought it was necessary to point out the way Congress could address the problems that might inevitably result from reading the *Wiley* decision in conjunction with *Quality King.* When read together the two decisions "constrict the scope of § 602(a)(1)'s ban on unauthorized importation."[108] But that was only the case because *Quality King* did not apply the importation ban to copies receiving first-sale protection under § 109(a). To read the ruling in *Wiley* (that copies "lawfully made under this title" extend to copyright copies made abroad) with the ruling in *Quality King* would, in fact, diminish of the scope of § 602(a)(1) "to a fairly esoteric set of applications."[109] But, if such a result was unacceptable to Congress, then Congress should "recognize *Quality King*—and not [*Wiley*]—as the culprit."[110] Congress might have been concerned with market segmentation when it enacted § 602(a)(1). It might have intended copyright owners to be able to divide the market in the very way Wiley sought. But, it was also likely that Congress had not intended to remove first-sale protection from every copy manufactured abroad. The more likely objective was to allow the copyright holder to continue to control the import of those goods even when the first-sale doctrine applied. Kagan rejected the dissenting justices "misconstrued" interpretation of §109(a)—which was meant "to restore §602(a)(1) to its purposely rightful function of enabling copyright holders to segment international markets."[111] At the same time, she suggested that if Congress wanted copyright owners to have a greater ability to restrict importation and to divide markets, it should address the Court's decision in *Quality King.*

Dissenting Opinion

The dissenting opinion, written by Justice Ruth Bader Ginsburg and joined by Justice Anthony Kennedy, and (in part) by Justice Antonin Scalia, found the majority's interpretation of the Copyright Act to be "at odds with Congress' aim to protect owners against the unauthorized importation of low-priced, foreign-made copies of their copyrighted works."[112] In order to determine whether the unauthorized importation of foreign-made copies was a copyright infringement under U.S. law, Ginsburg focused on the § 602(a)(1) importation ban and its interpretation in *Quality King.* In that instance, the Court had refused to apply the § 602(a)(1) ban to the round trip importation back to the United States of copyrighted materials that had been made in the United States and subsequently sold abroad. That was because the § 602(a)(1) ban only applied to materials had been "lawfully made" under the laws of some country other than the United States. Ginsburg argued that since the books imported by Kirtsaeng had not been "lawfully made" in the United States, the "first sale" doctrine under § 109(a) did not apply[113] and "the unauthorized importation constitute[d] copyright infringement under § 602(a)(1)."[114]

Ginsburg pointed to the text of the Copyright Act to show a strong Congressional intent to provide copyright holders "with a potent remedy against the importation of foreign-made copies of their copyrighted works."[115] One way for that Congressional intent to be realized would be to limit the application of the "lawfully made under this title" phrase in §109(a) to those instances in which the materials in question were governed by and conducted in compliance with the U.S. Copyright Act. Since the Court had already held that the Copyright Act d[id] not apply extraterritorially, Wiley's printing of the textbooks abroad was neither governed by the Copyright Act and nor "lawfully made under [the Act]."[116]

The dissenting opinion's exegesis of the phrase, "lawfully made under this title," questioned the majority's understanding of the term "under" and argued that it should have been interpreted it to mean the "signal[ing] of a relationship of subjection, where one thing is governed or regulated by another."[117] Ginsburg observed that "only by disregarding this established meaning of "under" c[ould] the Court arrive at the conclusion that Wiley's foreign- manufactured textbooks were "lawfully made under" U.S. copyright law, even though the law did not govern their creation."[118]

The dissent then undertook a review the legislative history of §602(a)(1) (which Scalia did not join). The review focused on the role of the U.S. Copyright Office in the lengthy revision effort that culminated in the enactment of the Copyright Act of 1976. The dissent took exception with the majority's view that the legislative history was "inconclusive." It claimed instead that the history confirmed what the "plain text" of the Act conveyed . . . that the intention of § 602(a)(1) was to "provide copyright owners with a remedy against the unauthorized importation of foreign-made copies of their works, even if those copies were made and sold abroad with the copyright owner's authorization."[119]

Another concern raised by Ginsburg was the inconsistency between the majority's decision and the position that the United States has taken with regard to the international trade issue of national versus international exhaustions of protection for intellectual property.[120] While the minority acknowledged that there was no international consensus on the issue of "whether the sale in one country of a good incorporating protected intellectual property exhausts the intellectual property owner's right to control the distribution of the good elsewhere,"[121] it noted that the United States had rejected the international exhaustion rule and taken the position that domestic copyright owners should be able to prevent the unauthorized copies of their work sold abroad.[122] The minority was concerned that the majority's ruling in favor of an international-exhaustion rule (that benefits U.S. consumers but could disadvantage foreign holders of U.S. copyrights) "risks undermining the United States' credibility on the world stage."[123]

The dissenting opinion concluded with a discussion of the "parade of horribles" that the majority feared would occur if the Court had not applied the "first sale" defense in this case. Libraries would not be closed, used-book dealers would not be put out of business, art museums would not be crippled, and the resale of a wide range of consumer goods would not be prevented. While the occurrence of those kinds of events would be horrible, Ginsburg suggested that existing copyright laws and precedents would prevent those events from actually occurring.[124]

CONCLUSION

Kirtsaeng v. John Wiley & Sons, Inc was very much about the competing interests of copyright holders and the owners of copies of copyrighted materials. But, it was about those competing interests in a world of increasingly borderless markets. The first time purchasers of the copies of copyrighted material may be individual consumers, small-time entrepreneurs, big box stores, or on-line shopping networks. In *Quality King*, those purchasers were allowed to use the "first sale" defense against copyright holders who produced their copies in the United States and shipped them abroad with the expectation that those copies would not return to compete in the domestic market without the copyright holder's authorization. After *Quality King*, many copyright holders thought that the solution might be to manufacture *and* sell the copies of their copyrighted materials abroad with the expectation that those copies would be prevented from being imported to the United States under § 602(a)(1). But, that solution has proved to be disappointing since the Court's *Wiley* decision made the "first sale" defense applicable to those situations. There is now no doubt that *Wiley* will facilitate the gray market importing of goods outside of the distribution channel that the copyright holders had envisioned and negotiated. Wiley Asia was unsuccessful in its attempts to keep Kirtsaeng and his cohorts from acquiring the less expensive foreign copies of its textbooks, shipping them to the United States, and placing them in direct competition with the more expensive editions published by Wiley. Entrepreneurs such as Kirtsaeng and big box stores like Costco were certainly the "winners" under the current ruling.[125] But, the Court was also concerned about the other group of winners who would continue to profit from the Congress' promotion of the progress of science and the useful arts after the Court's current ruling. Those winners included libraries and their patrons, used-book dealers and their customers, technology companies and the consumers of their cars, microwaves, mobile phones, and personal computers, art museums and their visitors, as well as retail stores and their purchasers of foreign goods. Unfortunately, the losers in this case were not limited to the copyright holders--but also to consumers in developing markets who may no longer be offered lower prices for goods that sell for much more in the United States.

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1 133 S. Ct. 1351 (2013).

2 *John Wiley & Sons, Inc. v. Kirtsaeng* , 2009 U.S. Dist. LEXIS 96520, 2009 WL 3364037, at *7 (S.D.N.Y., 2009). "Google Answer" is a website provides web users with research help from other web users.

3 *John Wiley & Sons v. Kirtsaeng,* 654 F.3d 210, 215 (2nd Cir, 2011.)

4 The "Reprint Agreement" between Wiley and Wiley (Asia) specifically assigned to Wiley (Asia) the rights to the reprinting and publishing of foreign editions of its books "for sale as English language reprint editions in the following territories: India, Bangladesh, Indonesia, Myanmar, Nepal, Pakistan, Phillipines, Sri Lanka, [and] Vietnam [the "territories]." *Supra,* note 1, at *5.

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[5] *Supra,* note 3, at 213.

[6] *Supra,* note 1, at 1356.

[7] *Id*. at 1356.

[8] *Id*. at 1356.

[9] 17 U.S.C. § 501.

[10] 15 U.S.C. § 1114(a).

[11] Wiley would eventually drop the trademark and unfair competition allegations against Kirtsaeng.

[12] 1 E. Coke, *Institutes of the Laws of England,* § 360, p. 223 (1628).

[13] 210 U.S. 339; 23 S. Ct. 722 (1907).

[14] *Id*. at 341.

[15] *Id*. 346.

[16] *Id*. at 347.

[17] *Id*. at 350.

[18] *Id*. at 350.

[19] Chap. 320, § 41, 35 Stat. 1075, 1084 (1909).

[20] Chap. 391, § 27, 61 Stat. 652, 660 (1947).

[21] Chap. 1, §1, 35 Stat. 1075 (1909).

[22] *Supra*, note 10.

[23] 17 U.S.C. §§ 101-810.

[24] 17 U.S.C. § 106 (3).

[25] 17 U.S.C. § 109(a).

[26] 523 U.S. 135, 118 S. Ct. 1125 (1998).

[27] *Id.* at 138.

[28] Justice Ruth Bader Ginsburg, in a brief concurring opinion noted that this case involved the "round trip" journey of copyrighted materials that were manufactured in the United States, distributed abroad, and reimported back to the United States and did not resolve cases where the goods were manufactured abroad and then imported to the United States. *Id*. at 154.

[29] *Id*. at 144.

[30] *Id*. at 145.

[31] *Id*. at 146.

[32] See 17 U.S.C. §§ 106, 107 (1970).

[33] Section 602(b) invests the Customs Service with an exclusive enforcement right.

[34] *Supra,* note 23, at 147. The Court gave a specific example of a copy that is lawfully made under a foreign law and subject to the import limitations of § 602(a). It involved an author who gave the exclusive U.S. distribution rights to the publisher of the U.S. edition and the exclusive

British distribution rights to the publisher of the British edition. The Court went on to say that “presumably only those made by the publisher of the U.S. edition would be “lawfully made under this title” within the meaning of § 109(a). The first sale doctrine would not provide the publisher of the British edition who decided to sell in the American market with a defense to an action under § 602(a) (or, for that matter, to an action under § 106(3), if there is a distribution of the copies.” *Id*. at 148.

[35] Section 106A enumerates the rights of certain authors to attribution and integrity.

[36] *Supra*, note 23, at 149.

[37] *Id*. at 151.

[38] *Id*. at 151, quoting *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 450-451, 104 S. Ct. 774 (1984).

[39] The Court had previously used those terms to refer to the importing of foreign-manufactured goods bearing a valid U.S. trademark without the consent of the trademark holder. Id. at 153, citing *K mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 285-286, 108 S. Ct. 1811 (1988).

[40] *Costco Wholesale Corporation v. Omega* (*Omega*), 541 F. 3d 982 (9th Cir., 2008).

[41] 131 S. Ct. 565 (2010).

[42] 952 F. 2d 318 (9th Cir. 1991).

[43] *Id*. at 319.

[44] 38 F. 3d 477 (9th Cir. 1994).

[45] *Id*. at 481.

[46] 84 F. 3d 1143 (9th Cir. 1994).

[47] *Supra*, note 37, at 987.

[48] *Id*. at 987-988.

[49] *Id*. at 988.

[50] See note 31.

[51] *Supra*, note 3, at 214.

[52] *Supra*, note 2, at *9.

[53] *Id*. at *21.

[54] *Id*. at *27.

[55] *Id*. at *31.

[56] *Supra*, note 23, at 147.

[57] *Id*. at 147.

[58] *Supra*, note 3, at 215.

[59] *Id*. at 217.

[60] Id. at 218, quoting *Quality King*, *supra*, note 23, at 148-149.

[61] See note 32.

[62] *Supra*, note 3, at 219.

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[63] *Id*. at 219, quoting *Kucana v. Holder*, 130 S. Ct. 827, 835 (2010).

[64] *Id*. at 219, citing *Update Art, Inc. v. Modiin Pub., Ltd.*, 843 F. 2d 67, 73 (2d Cir. 1988).

[65] *Id.* at 219, citing § 104(b)(2) in which "[t]he works specified by §§ 102 and 103, when published, are *subject to protection under this title* if the work is first published in the United States or in a foreign nation that, on the date of first publication, is a treaty party" [emphasis added].

[66] *Id*. at 220.

[67] *Id*. at 220.

[68] That right would still be subject to exceptions found in §§ 107, 108, and 602(a)(3).

[69] *Supra*, note 3, at 221.

[70] Id. at 221, citing *Quality King*, *supra*, note 23, at 147.

[71] *Supra*, note 3, at 221.

[72] The Court of Appeals also ruled that the District Court did not err in refusing to give Kirtsaeng's proposed instruction regarding the "first sale" defense and allowing the admission of evidence regarding gross revenue from all of Kirtsaeng's sales. *Id*. at 223.

[73] *Supra*, note 1, at 1357, quoting *Wiley, supra*, note 48, at 221-222.

[74] *Id*. at 1358. See *Denbicare U.S.A. Inc. v. Toys "R" Us, Inc.*, 84 F. 3d 1143, 1149-1150 (1996) and *Omega, supra*, note 37, at 986.

[75] *Id*. at 1358.

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[76] *Id*. at 1357, quoting *Sebastian Int'l. v. Consumer Contacts (PYT) Ltd.,* 847 F. 2d 1093, 1098, n.1 (3rd Cir. 1988).

[77] *Id*. at 1358.

[78] *Id.* at 1358. Citing 18 Oxford English Dictionary 950 (2d ed. 1989. See also Black's Law Dictionary 1525 (6th ed. 1990) ("according to").

[79] *Id*. at 1358.

[80] *Id*. at 1358.

[81] *Id*. at 1359.

[82] *Id*. at 1359. The Court went on to note that this would make the Act applicable to "an Irish manuscript lying in its author's Dublin desk drawer as well as to an original recording of a ballet performance first made in Japan and now on display in a Kyoto art gallery."

[83] *Supra,* note 17.

[84] *Id*. at 1361. See House Committee on the Judiciary, Copyright Law Revision, Supplementary Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law: 1965 Revision Bill, 89th Cong.,1st Sess., pt. 6, p. 30 (Comm. Print 1965); H.R. Rep. No. 94-1476, p. 79 (1979).

[85] *Id*. at 1361. "The manufacturing clause" (§ 601, 90 Stat. 2588) had limited the importing many copies of copyrighted works printed outside of the United States. It should be noted that prior to 1891, U.S. copyright law totally excluded foreign works from U.S. copyright protection. Under the current law, most domestic and foreign works are governed by the same legal regieme. See *Golan v. Holder,* 565 U.S. ___, ___, 132 S. Ct. 873, 893 (2012).

[86] *Id*. at 1361-1362.

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[87] Section 109(c) provides that: "Notwithstanding the provisions of §106(5), the owner of a particular copy *lawfully made under this title*, or any person authorized by the owner, is entitled, without the authority of the copyright owner, to display that copy publicly, either directly or by projection of no more than one image at a time, to viewers present at the place where the copy is located" [emphasis added].

Section 109(e) provides that: "Notwithstanding the provisions of §§ 106(4) and 106(5), in the case of an electronic audiovisual game intended for use in coin-operated equipment, the owner of a particular copy of such a game *lawfully made under this title*, is entitled, without the authority of the copyright owner of the game, to publicly perform or display that game in coin-operated equipment, except that this subsection shall not apply to any work of authorship embodied in the audiovisual game if the copyright owner of the electronic audiovisual game is not also the copyright owner of the work of authorship" [emphasis added].

Section 110(1) provides that notwithstanding the provisions of § 106, the following is not an infringement of copyright: "Performance or display of a work by instructors or pupils in the course of face-to-face teaching activities of a nonprofit educational institution, in a classroom or similar place devoted to instruction, unless, in the case of a motion picture or other audiovisual work, the performance, or the display of individual images, is given by means of a copy that was not *lawfully made under this title*, and that the person responsible for the performance knew or had reason to believe was not lawfully made" [emphasis added].

[88] *Supra*, note 1, at 1363.

[89] *Id*. at 1365.

[90] *Supra*, note 10.

[91] *Supra*, note 1, at 1363-1364.

[92] *Id*. at 1364.

[93] *Id*. at1365.

[94] *Id*. at 1365.

[95] *Id*. at 1365.

[96] *Id*. at 1365.

[97] *Id*. at 1367.

[98] *Id*. at 1368.

[99] *Id*. at 1368, quoting *Quality King*, *supra*, note 23, at 148.

[100] *Id*. at 1368.

[101] *Id*. at 1370, citing Accord, S. Rep. No 94-473, pp. 71-72 (1975).

[102] *Id*. at 1370, citing Preliminary Draft for Revised U.S. Copyright Law and Discussions and Comments, 88th Cong., 2d Sess. (Comm. Print 1964).

[103] *Id*. at 1370.

[104] *Id*. at 1371.

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[105] *Id*. at 1371.

[106] *Id*. at 1371.

[107] *Id*. at 1371, referencing Tr. Of Oral Arg. 51.

[108] *Id.* at 1372.

[109] *Id.* at 1372.

[110] *Id.* at 1372.

[111] *Id.* at 1373.

[112] *Id.* at 1373.

[113] § 109 (a) only applies to "the owner of a particular copy or phonorecord *lawfully made* [emphasis added] under [Title 17]."

[114] *Id.* at 1376.

[115] *Id.* at 1376.

[116] *Id.* at 1376.

[117] *Id.* at 1376.

[118] *Id.* at 1377.

[119] *Id.* at 1383.

[120] Options taken by various countries include: 1. the national-exhaustion rule (whereby a copyright owner's right to control distribution of a particular copy is exhausted only within the country where the copy was

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sold); 2. the international-exhaustion rule (whereby the authorized distribution of a particular copy anywhere in the world constitutes an exhaustion of the copyright holder's distribution right everywhere in the world with regard to that copy; and 3. the intermediate-exhaustion right (whereby the sale of a particular copy of copyrighted material within a particular region (i.e. the European Union) exhausts the copyright holder's distribution rights within that same region.)

[121] *Id.* at 1383.

[122] *Id.* at 1384. Ginsburg referenced the drafting history of the negotiations leading up to the Agreement on the Trade-Related Aspects of Intellectual Property Rights (TRIPS).

[123] *Id.* at 1385.

[124] *Id.* at 1386-1390.

[125] It would appear that the Court's equally divided decision in *Costco* will no longer prevent the discount store from acquiring Omega watches abroad in order to sell them in the United States.

THE LIBOR SCANDAL: A NEED FOR REVISED NATIONAL AND INTERNATIONAL REFORMS AND REGULATIONS

by
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INTRODUCTION

Few individuals or even major investors are aware of the London Interbank Offered Rate (LIBOR), a little-known activity that profoundly affects local and world finances. The total value of securities and loans affected by LIBOR is approximately $800 trillion dollars annually. In contrast, the global Gross Domestic Product (GDP) is approximately $69.65 trillion dollars and the US GDP is around $15 trillion. Until the global economy suffered a great loss commencing in 2007, little attention was paid to the gross LIBOR abuses by banks, securities firms, and other financial institutions in the financial markets. This article examines the LIBOR rate manipulation which has led to investigations by the United States Commodity Futures Trading Commission (CFTC) and the United Kingdom Financial Services Authority (FSA).

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Significant fines were assessed by these governmental agencies. Civil lawsuits by affected legal persons also resulted. This article concludes that, in the absence of responsible actions by financial businesses, antifraud regulations must be strengthened and enforced, even though the manner and mechanisms of such regulations have not yet been finalized.

LIBOR: THE SELF-DETERMINED INTERBANK INTEREST RATE

LIBOR establishes the interest rate that banks charge each other for short term loans. It indicates the average rate that a LIBOR contributor bank would have to pay to obtain unsecured funding in the London interbank market for a designated time frame in reasonable market size for a given maturity in a given currency. It is set by the British Bankers Association (BBA) each business day between 11:00am and 11:10am London time. Each of the designated contributor banks is asked the question: "At what rate could you borrow funds, were you to do so by asking for and then accepting inter-bank offers in a reasonable market size just prior to 11:00am?" It is the lowest rate that would be charged to the particular bank given its credit and liquidity risk profile. It is also the perceived rate because as the contributor bank need not have actually borrowed unsecured funds from other banks. The LIBOR rates are quoted based on annualized interest rates which can vary significantly for a particular bank borrowing funds on a particular date.

LIBOR rates are important because they assist setting rates for a wide range of financial products from pensions to fixed and adjustable mortgage rates, currencies, mutual funds, and derivatives. [1]

The British Bankers Association (BBA) name does not disclose the fact that the Association is composed of 18 “panel banks” from all over the globe. The banks, setting the rates since 1986, are selected based on their scale of market activity, credit rating, and perceived expertise in the particular currency utilized by them. For example, the following banks are the Association’s contributor banks for the US Dollar: Bank of America, JP Morgan Chase, Bank of Tokyo-Mitsubishi UFJ Ltd, Lloyds Banking Group, Barclays Bank plc, Rabobank, BNP Paribas, Royal Bank of Canada, Citibank NA, Societe Generale, Credit Agricole CIB, Sumitomo Mitsui Banking Corporation, Credit Suisse, Norinchukin Bank, Deutsche Bank AG, Royal Bank of Scotland Group, HSBC, and UBS AG.[2]

Each day at noon London time, the BBA agent Thompson Reuters distributes maturity rates globally to approximately 300,000 recipients with respect to five currencies with seven maturities: overnight, spot/next, one week, one month, two months, three months, six months, and twelve months.[3] These rate reports were commenced in 1986 in response to the creation of sophisticated new market instruments, including interest rate swaps, foreign currency options, and forward rate agreements.

The five currencies reported by Thomson Reuters include the Swiss Francs, the Euro, the Pounds Sterling, the Japanese Yen, and the US Dollars. [4]

The LIBOR rates, however, were used to obtain profit for financial institutions in a fraudulent manner rather than merely to reflect a good faith estimate of perceived interest rates.

THE LIBOR RATE BANK MANIPULATION

Trader and Bank Manipulations Discovered

In 2012, investigators for the United States CFTC and the United Kingdom FSA discovered financial trader and bank executive malfeasance before, during and after the 2007-2009 financial crises. Traders and bank executives acted together to produce false LIBOR numbers. One financial trader joked and offered favors, indicating that “Coffees will be coming your way” with respect to an exchange for a manipulated number; another trader stated he owed another trader ‘big time” for the made up cost of borrowing funds and a third wrote himself to “Ask for High 6M Fix.” The manipulations produced great personal gain for the traders because even small fluctuations of the LIBOR rates produce millions of dollars of gains for the perpetrator daily. Bank executives in turn concealed the trader operations because they feared a run on their banks if the submissions indicated a higher than average borrowing rate. Banks also had incentives to falsify the cost of borrowing because a higher than average borrowing cost might signal weakness on their balance sheets which, in turn would exacerbate their difficulties. [5]

In addition, the banks and their executives acted together to falsify the LIBOR rate statements. Traders’ manipulations affected the LIBOR rate to the extent of 1-2 basis points, but the false submissions by banks affected the rates by 30-40 basis points.[6]

The 2008 Geithner Warning

For a number of years prior to the 2012 public disclosure of the rate manipulation, questions were raised concerning its possibility. In testimony before the United States House of

Representatives, Timothy Geithner, the then Secretary of the Treasury, stated that he, as President of the Federal Reserve of New York, warned British authorities in 2008 of possible irregularities. In an email to Mervyn King, Governor of the Bank of England, Geithner warned that the BBA should not have the right to regulate LIBOR because that association was not strong enough to oversee its rate setting methodology. Geithner's testimony stated: "In the detailed recommendations we gave to the British, we identified a series of specific things that would make it untenable for this rate to be affected by the banks' incentive to lower their reported cost of funds. We gave them very specific detailed changes for doing that. If those had been adopted sooner, you would limit this risk going forward." He further stated the reforming LIBOR had to be accomplished internationally.[7]

Among the recommendations made by Geithner, with the apparent concurrence of US banks, was the establishment and publication of best practices by the BBA for calculating and reporting rates including the requirement that external auditors confirm adherence to these best practices and attest to the accuracy of banks' LIBOR rates. Geithner further suggested the increase in size and the broadening of the composition of the US Dollar panel with additional US banks on the panel such as State Street, Northern Trust, and the Bank of New York. He proposed a second US dollar LIBOR fixing for the US market to capture rates when the US market is active. Geithner recommended changes which included a) the specification of transaction size which would be adjusted flexibly over time so as to reflect significant changes in market conditions; b) the reduction of the number of quoted maturities; c) the report of only the LIBOR maturities for which there is a direct benefit; and d) the elimination of the incentive to misreport by randomly selecting a subset of 16 banks from which the trimmed average rate would be calculated.[8]

Secretary Geithner was criticized broadly by Congressional Representatives for not revealing his concerns to the committees of Congress. Representative Jeb Hensarling claimed that Geithner treated the LIBOR manipulation “as a curiosity, or something akin to jaywalking, as opposed to highway robbery”. Other Representatives stated that, notwithstanding LIBOR difficulties known to the Treasury Department, the Federal Reserve continued to use LIBOR in a number of financial rescue programs. Geithner defended his role alleging: “We were in the position of investors all around the world….” “We had to make a choice about what was the best rate. It was a rate that was vulnerable to manipulation, but we tried to initiate reform with the British.”[9]

The Bank of England confirmed that it had received the Geithner communication in June 2008. The Bank alleged that it had notified the BBA of the recommendations. The Bank also noted that there were a number of emails between its staff and the BBA, but apparently little or no action was taken as a result of the suggestions made in the emails. Both the Bank of England and the New York Federal Reserve Bank alleged that they failed to act because they had no responsibility for oversight of LIBOR which was left exclusively to the BBA. The BBA claimed that it did publish a paper in November of 2008 which suggested changes in its governance structures and disciplinary procedures as well as better scrutiny and analysis in setting the rate.[10]The UK Parliament subsequently passed the Financial Services Act of 2012, discussed below.

RESULTS OF THE LIBOR SCANDAL: PROSECUTIONS, SUITS AND PLANS

Prosecutions

Barclays Bank:

The first casualty of the LIBOR scandal was the 300-year-old Barclays Bank (Barclays PLC, Barclays Bank PLC, and Barclays Capital Inc.). After many complaints, the US Commodity Futures Trading Commission (CFTC) issued a June 27, 2012 Order settling the charges instituted against the Bank. The Order noted that the Bank, since at least 2005, repeatedly attempted to manipulate the rate and made false, misleading or knowingly inaccurate submissions concerning two global benchmark interest rates to the BBA and to the European Banking Federation's Interbank Offered Rate (EURIBOR).[11] According to the Order's findings of fact, Barclays' conduct involved multiple desks, traders, offices and currencies, including the US Dollar, the Pound Sterling, the Euro, and the Yen. Its daily LIBOR submissions were made at the requests of the Bank's swaps traders who attempted to affect the official published LIBOR to benefit the Bank's derivatives trading positions. Its swaps traders coordinated with and aided traders at other banks to influence LIBOR submissions.[12]

The Order noted that, during the financial crisis of 2007-2009, Barclays lowered its LIBOR submissions in order to manage perceived negative market perceptions that the Bank had liquidity problems based on its high submissions in comparison to lower submissions of other banks with respect to the cost of borrowing unsecured funds. The Bank's failure to have proper supervision of its trading desks, especially that of its swaps dealers, permitted senior managers to engage in false submissions. Barclays routinely based its LIBOR and EURIBOR submissions on its traders' requests, rather than reflecting the actual cost of borrowing, in order to benefit the Bank's derivatives trading positions. It lowered its submissions to reflect the lower costs of borrowing submitted by other banks in an endeavor so as to not appear to be an outlier bank.

Barclays Bank consented to the imposition of a $200 million penalty by the CFTC as well as to $160 million penalty to the Fraud Section of the US Department of Justice, and to implement the following procedures:

- Make submissions based on specified factors with Barclays' transactions being given the greatest weight, subject to specified adjustments and considerations;
- Implement firewalls to prevent improper communications including between traders and submitters;
- Prepare and retain certain documents concerning submissions, and retain relevant communications;
- Implement auditing, monitoring and training measures concerning its submissions and related processes;
- Make regular reports to the CFTC concerning compliance with the terms of the Order;
- Use best efforts to encourage the development of rigorous standards for benchmark interest rates; and
- Continue to cooperate with the CFTC.[13]

The scandal led to the replacement of its longstanding senior executives including its Chairman, Marcus Agius, CEO Bob Diamond, and COO Jerry Del Missier.[14] The public and governmental call for retribution may have made Barclays Bank an easy target but, as noted below, it was not the only bank to be punished for its wrongdoing.

UBS (formerly Union Bank of Switzerland):

The largest bank in Switzerland, UBS, was ordered to pay 1.4 billion Swiss francs (US $1.5 billion) to US, UK, and Swiss regulators for its involvement in the rate-rigging scandal concerning LIBOR submissions. These penalties amount to three times those imposed upon Barclays Bank. [15] The sum includes £160 million ($260 million) to the UK FSA, and 59 million francs in estimated profits to the Swiss Financial Market Supervisory Authority. The UK financial regulator found some 2,000 documented requests by UBS traders to alter interest borrowing rate submissions involving 45 or more bank personnel over a 6-year period. The UBS employees worked with interdealer brokers whom they bribed to manipulate Yen LIBOR submissions by other banks. The UBS traders were able to have other persons submit higher and lower rates to LIBOR to benefit their proprietary trading positions. The UBS branch in Japan pled guilty to one count of wire fraud for manipulation of the Yen LIBOR. Its operation in Japan was only modestly affected in that it paid a fine equal to about its three weeks revenue in Japan. The Japanese UBS operation was also prohibited in participating in the Tokyo interbank derivative market for a week, and had to strengthen its compliance and internal controls.[16]

The FSA also noted one specific example in which a UBS trader agreed with a fellow trader that he would attempt to manipulate UBS's submissions in small drops in order to avoid arousing suspicion of regulators. The trader stated: "if you keep 6s [6 month JPY LIBOR rate] unchanged today…I will f…ing do one humongous deal with you… Like a 50,000 buck deal, whatever…I need you to keep it as low as possible…if you do that…I'll pay you, you know, 50,000 dollars, 100,000 dollars…whatever you want…I'm a man of my word."[17]

Royal Bank of Scotland (RBS):

In a situation similar to the UBS controversy above, the UK FSA, the US CFTC and the US Department of Justice fined RBS £290 million ($610 million) for its manipulative practices. The sum was to be paid from moneys taken back from paid bonuses and future bonuses of executives of the Bank. RBS traders colluded with other traders in London, Singapore, Tokyo, and elsewhere to fix LIBOR rates in hundreds of trades involving the Japanese Yen and Swiss francs from 2006-2010. The prosecution of RBS was based on its failure to have and enforce compliance measures to detect and prevent fraudulent activity. Investigators noted that derivatives traders and submitters worked together at the same desk thereby facilitating potential conflicts of interest. The fine was significantly lower than that imposed on UBS because 82 percent of its shares are owned by the British government.[18] Investigators also noted that other banks on the LIBOR panel were engaged in rate manipulation.[19]

Rabobank (Cooperatieve Centrale Raiffeisen-Boerenleenbank B.A).:

In October, 2013, US and European regulators fined Rabobank of the Netherlands the sum of €774 million ($1 billion) for alleged manipulation of LIBOR and EURIBOR currency rates by some 30 staff members. The bank was also found to have manipulated the Yen LIBOR causing it to close it Tokyo’s offices leaving only a representative branch therein. The regulators noted that the bank had filed to act in the light of one of its employees having told an internal audit group of yen manipulations in 2009. In 2006, a Rabobank derivatives trader on a number of occasions asked the bank’s money market desk in London that supervised rate submitters for rates favoring his position. The desk head of the London office said to the trader that "I am fast turning into your LIBOR bitch."[20] In addition, a criminal information was filed in the US District Court for the District of Columbia charging the bank with wire fraud for the said rate manipulation but deferred prosecution pending the bank's cooperation with the Department of Justice in its ongoing investigation of LIBOR manipulation.[21]

Additional Investigations:

The LIBOR scandal has resulted in investigations of Citigroup, Deutsche Bank, HSBC, ICAP, and JP Morgan Chase. A financial trader at Citigroup in the Bank's Tokyo office, for example, needed assistance with respect to the Japanese Yen. He contacted a RBS broker-trader and asked for an artificially low LIBOR estimate of the Yen for the next day. The Citigroup trader indicated his appreciation for any favors in this regard, and the RBS trader responded affirmatively. That message and other similar type messages led prosecutors in the US to indict the Citigroup trader for conspiracy, wire fraud, and other charges. He was also arrested in England at a later date. The Japanese Services Agency suspended briefly Citigroup's Global Markets Group from Yen trading. JP Morgan Chase and the Bank of America are presently under investigation by the US, UK, Canadian, Swiss, and other financial regulators.[22]

The UK Financial Conduct Authority stated in December, 2013 that it will also fine individual traders from a half dozen firms including Barclays of more than £100,000 ($US $160,000). Traders contesting the fines may have their cases heard by the Authority's internal tribunal. A former UBS trader, Tom Hayes, who had been scheduled to enter a plea of guilty in a London court instead decided to enter a "Not Guilty" plea with two other traders. His trial is scheduled for January, 2015. In December, 2013, the US Department of

Justice indicted Hayes concerning LIBOR rate manipulations by conspiring with employees of JPMorgan Chase, HSCH, RBS, and ICAP.[23]

Civil Litigation

The United Kingdom:

The criminal fines imposed on Barclays Bank, described above, were only the beginning of its financial difficulties rather than the end of its financial exposure. Guardian Care Homes commenced a lawsuit for £70 million (US $113 million) concerning the alleged miss-selling of interest rate hedging products based on LIBOR rates.[24] London's Court of Appeals ruled in August, 2013 that its lawsuit against the Barclays Bank, which was the first bank to acknowledge rate manipulation, as well as a lawsuit against Deutsche Bank by India's Unitech, could proceed to trial.[25] This admission has led some commentators to demand equal investigation and enforcement against other banks which similarly colluded to artificially set LIBOR.

The United States:

There are pending US civil lawsuits, including a class action brought in August 2012 on behalf of investors in Alaska, Wyoming, North Dakota, and some 20 other states. The March 29, 2013 Federal District Court for the Southern District of New York decision, *In re LIBOR-Based Financial Instruments Antitrust Litigation*, however, indicated that a number of difficulties may arise in civil actions against the financial institutions and their senior executives for LIBOR manipulation alleged injuries.[26]

The federal Judicial Panel on Multi-District Litigation assigned District Court Judge Naomi Buchwald to coordinate and consolidate pretrial proceedings with respect to a number of civil lawsuits commenced nationally involving LIBOR manipulation. The defendants had filed motions to dismiss with respect to the four categories of plaintiffs: (1) over-the-counter traders; (2) exchange-based traders; (3) bondholders; and (4) the Charles Schwab company. All but the fourth were class action plaintiffs. A stay was entered by the court with respect to all new complaints pending its decision.

The court addressed the defendants' motions to dismiss. The complaints alleging federal antitrust violations were dismissed for failure to establish "antitrust injury" defined as "an injury that results from an anticompetitive aspect of defendants' conduct." Although the plaintiffs had alleged that the defendants conspired to suppress LIBOR over a three-year period causing injury to the plaintiffs, nevertheless, they failed to allege that the injuries resulted from any harm to competition. Bank submissions to LIBOR were not in themselves competitive and the plaintiffs failed to allege that the conduct of the defendants had an anticompetitive effect in any market in which the defendants compete.

With respect to the plaintiffs' complaint of market manipulation, the court determined that the plaintiffs had adequately pleaded their claims, and would not be dismissed for failure to state a course of action. But the claims were time-barred because there were numerous articles published in April and May of 2008 in prominent publications that should have made the plaintiffs aware of the defendants' commodities manipulation claims that were based on contracts entered into between August 2007 and May 29, 2008. Plaintiffs' claims for contracts entered into between April 15, 2009 and May, 2010 may or may not survive the statute of limitations pending further amendment to their complaints.

Plaintiffs' complaints concerning RICO (*Racketeer Influenced and Corrupt Organization Act*)[27] violations were dismissed. The predicate acts of mail and wire fraud could have been part of a claim for securities fraud and would thus be barred by the PSLRA (*Private Securities Litigation Reform Act of 1995*).[28] Because the fraudulent actions alleged took place in England, RICO would not be applicable; the Act applies only to domestic enterprises. The additional complaints alleging state-law claims alleging antitrust violations were also dismissed for lack of antitrust injury as well as the exchange-based New York common law unjust enrichment because the plaintiffs failed to allege any relationship between them and the defendants.

Assuming the decision is not reversed on appeal in whole or in part, it appears that civil litigation claims will have substantial difficulties in overcoming motions to dismiss, including due to statute of limitations difficulties.

Plans

Suggested Rate Setting Mechanisms:

A number of alternative suggestions for the replacement of LIBOR have arisen:

- Members of the European Repo Council consisting of a number of the leading banks globally, including Goldman Sachs and Deutsche Bank, requested the European Central Bank to find a new way of calculating interest rates for inter-bank unsecured loans. The Council suggested that the Central Bank set up a benchmark based on actual “secured market” trades (bonds and other assets used as security for loans). The secured market alternative to the unsecured interbank market should be used to set the price for trillions of euros for financial products including home loans and derivatives.[29]

- The former Chairman of the US Federal Reserve Board, Ben Bernanke, in testimony before United States Congressional committees, suggested two market-determined replacement alternatives, namely (1) use of repo rates, i.e., repurchase agreements defined as collateralized lending transactions whereby one party agrees to sell securities to a second party against a transfer of funds while the other party agrees to repurchase the said or equivalent securities at a specific price in the future;[30] or (2) Overnight Interest Swap (OIS) rates between banks, which exchange an overnight interest rate for a short-term interest rate.[31]
- The former Chairman of the US CFTC, Gary Gensler, stated that the current international financial benchmark for setting rates on mortgages, car loans, and futures market trading is not sustainable. He quoted Mervyn King, the Governor of the Bank of England who said of LIBOR in 2008: “It is, in many ways, the rate at which banks do not lend to each other.” Gensler noted that there has been a significant structural change in the manner in which market participants finance their balance sheets and trading positions, from borrowing unsecured toward borrowings that are secured by posting collateral. The 2008 financial crisis and the 2010 debt crisis and the downgrading of banks’ ratings have cause unsecured borrowings to diminish substantially. Basel III international capital rules, which now include an asset correlation factor that requires additional capital when

a bank is exposed to another bank, have also reduced outlays for unsecured borrowings. Coupled with the revelations of bank manipulations, Gensler suggested that it is time to undertake possible alternative mechanisms which include overnight index swaps rates, benchmark rates based on actual short-term collateralized financing, or a new standard based on government borrowing rates.[32]

- Use of the Eurodollar rate which is published daily by the Federal Reserve Board as published by Bloomberg ICAP Eurodollar screen at 9:30 A.M. EST.[33]
- Rates based on actual trades rather than estimates. Those opposed to such computations allege that many banks cannot borrow from other banks and thus there are no LIBOR transactions. Three-to-six month transactions are virtually impossible for certain currencies.[34]
- Additional alternatives for determining rates for adjustable rate mortgages (ARMS) include the linking of ARMS to Treasuries; "effective" federal funds rate; and general collateral finance repurchase agreements.[35]

United Kingdom Legislative Action – The Financial Services Act of 2012:

The revelations of impropriety in the LIBOR rate setting mechanism brought about UK Parliamentary action. At the behest of the Chancellor, The *Financial Services Act of* 2012 was enacted. The then existing Financial Services Authority (FSA) was abolished and replaced by a single financial services regulator and two new regulatory bodies, to wit, the Prudential Regulation Authority (PRA), a subsidiary of the Bank of England and the Financial Conduct Authority (FCA). The effective date of the transition is April 1, 2013.[36] The purposes for the new Authorities are to "carry forward our philosophy of outcomes-based regulation, intensive firm supervision and credible deterrence."[37] The role of the PRA is to regulate the UK financial system of all deposit-taking institutions and investment banks. The FCA's role is to regulate the wholesale and retail financial markets and their infrastructure and all financial firms not regulated by the PRA.[38] Martin Wheatley, the Chief Executive of FCA, produced an 85 page Wheatley Review final report concerning the LIBOR system and concluded that the system should continue.[39]

- LIBOR should be reformed rather than replaced as a benchmark;
- Transaction data should be explicitly used to support LIBOR submissions; and
- Market participants should continue to play a significant role in the production and oversight of LIBOR.[40]

Transfer of Oversight of LIBOR:

As a result of the failure of the British Bankers' Association to regulate LIBOR and the recommendations of the Wheatley Review, oversight of LIBOR was transferred from the BBA to a regulator to oversee the rates set forth by the BBA.[41]

Will reforming LIBOR instead of replacing it resolve the problem of rate manipulation? At least one commentator observed that, by the continued use of LIBOR setters by banks, the FCA will simply discard submissions it deems too high or too low and inadvertently create a rate manipulation of its own making, and subject to possible future manipulation. The increased layer of rate inspection, however, by a non-industry party will certainly produce some guards against fraudulent manipulations.[42]

CONCLUSION

In a 2014 Chartered Financial Analyst (CFA) Global Market Sentiment Survey of more than 6,500 members, more than half of its members (54 percent) believed that there was a failure of an ethical culture within financial firms. This failure has led to a lack of trust in the industry. A majority of members believed that there should be increased global coordination to monitor systemic risks to avoid future financial crises; greater transparency respecting trades; improved corporate governance; and adherence to governmental rules and regulations.[43]

The world of finance is immensely complicated. Even so-called sophisticated investors lack sufficient knowledge of derivatives, swaps, and other instruments of finance. It is difficult to comprehend that reputable international banks and financial institutions have engaged in rate manipulation almost without fear of discovery. Their malfeasance has consisted alternatively of corporate decisions to manipulate rates to boost their standing; by their failure to have safeguards against manipulation; or by their failure to supervise rogue employees who were able to profit extensively by such manipulation. Scandals in the financial industry continue to abound: corporate ratings organizations such as Standard & Poor's, Moody's, and Fitch Ratings have allegedly given higher than merited ratings to corporate financial institutions in order to receive their business. The result of these and other scandals precipitated the passage of the Dodd-Frank Act[44] and other national and international legislation, including regulatory investigations by affected government commissions. These investigations and their resulting fines have in turn substantially raised the costs of providing financial services.

Unfortunately, the LIBOR scandal was revealed after the promulgation of Dodd-Frank and thus had no specific provisions relating to the scandal. At best, the Act expanded the powers of the US CFTC in its regulations of derivatives. It is highly unlikely that Dodd-Frank will be amended to cover the additional manifestations of the LIBOR scandal. The House of Representatives, in fact, has sought to repeal the Act.[45] Financial institutions complain extensively of being overburdened by governmental regulations. But unless they collectively and individually act responsibly, governments have little choice other than greater oversight and prosecution for such malfeasance.

Although the task presents great challenges, the ordered enforcement of national and international antifraud regulation must occur. The United Kingdom Financial Services Act, the extension of Dodd Frank to govern disclosure of LIBOR rate setting and continuing national and international initiatives to enforce due diligence in the setting of these rates are absolutely necessary to avoid illegal actions which affect individual persons and corporate entities. Suggested rate setting mechanisms must be continually revised and diligently enforced.

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RESTORATIVE JUSTICE FOR THE VICTIMS OF SCHOOL BULLYING: HOW FAR DOES THE LAW GO?

by

John Paul*

I. INTRODUCTION

Beyond its effect on individual students, bullying has a profound effect on the entire educational community. Recognizing the wide impact of bullying on the educational environment, the U.S. Court of Appeals for the Fourth Circuit observed that schools have an obligation to protect their students from harassment and bullying in the school environment, an obligation that outweighs free speech concerns.[1]

The extent of a problem can arguably be measured by how much attention it receives from society in general. Using this attention measurement, bullying is a problem of monumental proportions.[2]

School bullying formerly had not received much attention from policy-makers, scholarly researchers or the general public.[3] Recently, however, a great deal of attention has focused on school bullying as several cases of student suicide have garnered national media coverage.[4] A 2012

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documentary film called *Bully* follows the lives of five students who were bullied and two of these students killed themselves.[5] Numerous programs and websites focus on the problem of bullying.[6] The news media regularly reports on bullying incidents, such as the Tyler Clementi (Rutgers University student) suicide and the recent conviction of his roommate. Celebrities have prominently campaigned against it.[7]

The federal government has also become involved in the problem of bullying. In 2010, six federal departments, including the U.S. Department of Education and the U.S. Department of Health and Human Services, held the first-ever National Bullying Summit to bring together, national, state, local, civic and corporate leaders to create a strategy to end bullying.[8] Then, in 2011, President Barack Obama and First Lady Michelle Obama convened the White House Conference on Bullying Prevention.[9] They launched a website to raise funding to combat bullying: www.stopbullying.gov.[10]

Despite the media and political attention being paid to the problem, bullying persists. According to a 2010 survey conducted by the Josephson Institute Center for Youth Ethics, 47 percent of the 43,321 students surveyed reported being bullied (taunted, teased, and/or physically abused) and about 50 percent reported bullying others.[11] A more detailed breakdown of bullying behavior is provided by the School Crime Supplement (SCS) to the National Crime Victimization Survey. According to the SCS, 21 percent reported that they had been called names, insulted or made fun of by others; 18 percent revealed that they had been the subject of rumors; 11 percent stated that they had been pushed, shoved, tripped or spit on; 6 percent said that they had been threatened with harm; 5 percent felt they had been left out of activities on purpose, and 4 percent reported that their property was destroyed and that others had coerced them to do things they did not want to do.[12]

Bullying is not a new problem and many adults today were probably bullied in one form or another. Access to cell phones and the Internet, however, has made bullying much worse as "the Internet has provided young people with an arsenal of weapons for social cruelty."[13] As Rutgers University Dean Richard Ludescher stated, "……part of what's out there on the Internet is the Wild West. An entire generation is growing up on the Web."[14] The prominence of bullying that occurs on the Internet, known as cyberbullying, indicates that the schoolyard bully has gone digital.[15]

Before the Internet, the victims of bullies could find respite when there was no school session or when they weren't forced to be face-to-face with their tormentors. In many cases, bullies became bored and moved on to new targets. With cyberbullying, victims are no longer able to escape the bullying when they leave school; the torment follows them wherever they are when the cruel comments are posted on the Internet. Once a comment or video is posted, it is online, possibly forever, for everyone in the world to see. These comments or videos may haunt them for the rest of their lives. Anyone who does an Internet search may be able to locate these hurtful comments and this may affect the victims' personal and professional relationships over their lifetimes.[16] As the use of the Internet advances, especially among young people, and as social networking sites continue to grow exponentially, cyberbullying can be expected to substantially increase in the future.[17]

The sheer magnitude of bullying has serious implications for both the victims of bullying and the bullies themselves. Research findings over a 15-year time period indicate that bullies and the victims of bullying are at risk for short-term and long-term academic problems, psychological difficulties and social relationship problems.[18] Specifically, bullying victimization was found to be linked to avoidance behavior, depression, illness, low self-esteem, poor academic performance, aggression and violence including carrying a weapon and fighting as well as suicidal thoughts and attempts. For bullies, their behaviors were found to be linked to later delinquency and criminality.[19]

This article will analyze the legal system's approach to holding elementary, secondary and collegiate schools liable for cyberbullying in relation to the First Amendment. It will conclude that the legal system must: (1) recognize that there is a difference between valuable, constitutionally-protected political speech and worthless, unprotected bullying speech; and (2) hold schools liable for bullying-related injuries especially in cases where schools exercise control and have undertaken a duty.

II. BULLYING AND SPEECH IN SCHOOLS: FIRST AMENDMENT RIGHTS

Antibullying policies involve a number of constitutional issues. Although there are various definitions of bullying, the common thread among all of the definitions is a communication or physical act of some form that adversely affects a student. When the form of bullying is expressed by words or other forms which are non-physically threatening, the First Amendment is always a factor influencing the action that a government can take in response to that bullying.[20] The cases which follow do or can shed light on the bullying/free speech relationship.

A. Tinker

The first major case to address a student's right to free speech in a school setting was *Tinker v. Des Moines Independent Community School District.*[21] *Tinker* involved a group of students who objected to the Vietnam War and showed their support for a truce by wearing black armbands in school.[22] The principal objected and announced that any student who wore an armband would be asked to remove it and would be suspended if the student failed to comply.[23] Several students continued to wear the armbands and were suspended as a result. The students sued the school on First Amendment grounds. In its decision, the U.S. Supreme Court said, "that it can be hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[24] The Court stated that in order for free speech to be curbed, there must be a substantial disruption or material interference with school activities.[25]

The lower courts have yet to focus any attention on the portion of the *Tinker* decision which authorizes school officials to curb the speech of students if that speech "involves……invasion of the rights of others.[26] Since cyberbullying often affects the rights of others, it will be interesting to see if the phrase *invasion of the rights of others* takes on heightened significance in the evolving jurisprudence of school bullying.

B. Bethel

The next significant case to build upon *Tinker* involved a student's use of profanity at a school assembly.[27] In *Bethel School District vs. Fraser,*[28] Fraser delivered a nomination speech at a school assembly, which 600 students attended. Fraser used explicit sexual metaphors to describe his candidate throughout his speech.[29] After the speech, the school suspended Fraser and removed him from the list of candidates who would deliver the graduation speech.[30] Fraser sued the school claiming that the school violated his First Amendment right to free speech.[31] Upon review, the U.S. Supreme Court found that the school had the absolute authority "to prohibit the use of vulgar and offensive terms in public discourse"[32] and that allowing the student to speak in such a lewd manner would "undermine the school's basic educational mission."[33] The Court distinguished between speech uttered in school and speech uttered outside of school when it asserted that "Matthew Fraser could have given his salacious speech outside of the school and could not have been penalized simply because government officials considered his language inappropriate."[34]

It can be argued that *Bethel* may be used to defend certain acts of cyberbullying on the grounds of free speech if the cyberbullying took place outside of the school. In fact, the Third Circuit recently rejected a school district's attempt to use *Bethel* as the basis for its punishment of a student who created a fake MySpace profile of his high school principal. In *Layshock v. Hermitage School District,*[35] the school district argued that the MySpace profile was "unquestionably vulgar, lewd and offensive" and therefore unprotected by the First Amendment when it wound up in the school community.[36] While the Third Circuit had previously held that "a school may categorically prohibit lewd, vulgar or profane language,"[37] the court clarified this opinion by stating that this prohibition applied only when the speech was given "inside *Tinker's* schoolhouse gate."[38] Since the student's speech did not create any substantial disruption in school, the Third Circuit concluded that it never made it through the schoolhouse gate.

C. Hazelwood

The next substantial case to reach the U.S. Supreme Court regarding students' First Amendment rights in a school environment involved student editors of the school newspaper.[39] In *Hazelwood School District v. Kuhlmeier,*[40] the school principal deleted two pages from the school newspaper.[41] The deleted pages contained information about specific instances of student pregnancies, as well as potentially damaging details about a student's parents who recently divorced. Although the names of the students were changed in the article, the principal felt that the readers would still be able to identify them. The student editors sued the school, claiming that their First Amendment rights were violated.[42] The Supreme Court held that the high school newspaper did not qualify as a public forum and this allowed school officials the right to impose reasonable restrictions on student speech in the newspaper. The Court concluded that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities as long as their actions are reasonably related to legitimate pedagogical concerns."[43]

Since the newspaper was distributed to the educational community, the Court differentiated between the *Tinker* standard and the situation in *Hazelwood*, which required a higher degree of control over student speech. The Court stated that a school must be able to set high standards for student speech that is disseminated under its auspices and that these standards may be higher than those demanded by some newspaper publishers or theatrical producers in the "real" world.[44]

D. Morse

In a more recent case, the U.S. Supreme Court addressed student speech that took place outside of school grounds.[45] In *Morse v. Frederick,*[46] several students raised a banner that read "Bong Hits 4 Jesus" at a school-sponsored event that was held off-campus. The principal demanded that the students remove this banner and all but Frederick complied. The principal confiscated the banner and suspended Frederick who then sued.[47] The Supreme Court found for the school stating that a student cannot "stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.[48] The Court explained that there is a "compelling interest" to ban the promotion of illegal drug use[49] and held in a 5-4 decision that "the First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers."[50]

E. The Current Focus of the Courts

The majority of the courts today does not focus on the origin of speech and instead apply the *Tinker* substantial disruption test.[51] In *J.S. ex rel. H.S. v. Bethlehem Area School District,*[52] students created a website where they posted comments about their teacher such as "F—k you, Mrs. Fulmer. You are a Bitch. You are a Stupid Bitch," and "Why Should She Die."[53] On another website, there was a sketch of Mrs. Fulmer with her head cut off and blood dripping from her neck.[54] When Mrs. Fulmer saw these websites, she was unable to complete the school year and took a medical leave of absence for the following year. She testified that she suffers physically and emotionally as a result of what the students wrote about her on those websites. The Supreme Court of

Pennsylvania held that this type of substantial disruptive effect satisfies the *Tinker* test and justifies control of student speech.[55]

Then there is the more recent case of student speech outside school grounds, *J.C. ex rel. R.C. V. Beverly Hills Unified School District*,[56] where the plaintiff, J.C., posted a video on YouTube of C.C.'s friends calling her "spoiled" and a "slut" and mocking her for talking about "boners." In the video, J.C. also said that C.C. is "the ugliest piece of sh-t I've ever seen in my whole life." C.C. saw the video, printed out the comments and showed it to school officials, who suspended J.C. for 2 days. The Second Circuit said that in order for the school to establish substantial disruption, there needs to be more than "a mild distraction or curiosity created by the speech," but need not rise to the level of "complete chaos."[57] The fact that students talked about the video is not enough to satisfy the *Tinker* standard.[58]

Overall, it appears that the courts are reluctant to find that on or off-campus student speech has actually caused a substantial disruption because of the belief that the public is best served by a dissemination of ideas.[59] The main problem is that most courts use the *Tinker* standard in evaluating student speech even though *Tinker* was based on the students' free speech rights to express their opinions on controversial political issues.[60] The political speech in *Tinker,* though substantial disruption in certain circumstances, is different from the worthless cyberbullying speech intended to humiliate and offend others. The First Amendment should not be used as a shield to protect the cyberbullies' worthless speech, which does not rise to the level of the worthy speech assessed in *Tinker.*

III. BULLYING ON COLLEGE CAMPUSES

Although bullying is a well-known problem in K-12 schools and in the workplace, little research exists on bullying in college and university settings. Anecdotally, there is a growing concern among college and graduate school professors about the perceived increase in student "incivility, insubordination, and intimidation."[61] Professors are being harassed, stalked, physically assaulted and even murdered. From 1993 to 1999, college and university professors experienced an average annual rate of 41,600 incidents of nonfatal workplace violence.[62] An article in the *Chronicle of Higher Education* provides the following examples:

- A chemistry professor at Virginia Tech asked his class how to solve an equation and a student in the back of the room shouted, "Who gives a sh-t?"
- When a professor at Utah State University refused to change a student's grade, that student screamed at her, "Well, you goddamned bitch, I'm going to the department head, and he'll straighten you out!"
- A historian at Washington State University was challenged to a fight when a student didn't like the grade he received.[63]

Two recent studies confirm the anecdotal evidence about college bullying. The first study surveyed 1,025 undergraduate students and found that 33.4 percent of these students witnessed a student bully another student in college once or twice, 24.7% witnessed bullying occasionally, while 2.8% reported seeing it very frequently. Around 40% reported seeing a teacher bully a student while about 60% reported seeing a student bully another student in college.[64] The second study confirmed that although bullying does decrease as students matriculate, it doesn't stop and that college students were more likely be bullied in college if they were bullied in elementary or high school.[65]

Since no independent cause of action exists for bullying in a college environment, students must rely on other grounds to challenge bullying. Bullying victims can file harassment claims under federal statutes, but these claims require a high standard of proof making it difficult for them to recover.[66] Finding colleges and universities liable for bullying is more challenging than similar actions against elementary and high schools because of the reduced control over students in a college environment. In general, tort actions based on bullying have been unsuccessful against colleges due to the courts' reluctance to impose special duties on colleges for students' safety.[67]

Plaintiffs have obtained some measure of success in suing K-12 schools for their failure to stop extreme bullying by pursuing tort theories with lower standards of proof.[68] Universities and colleges should be prepared for such suits to be filed against them.

A. Protected Class Membership Suits

Congress passed Title IX in 1972 primarily to assist women in gaining access to the same educational opportunities to which men traditionally had access. When Title IX was passed, it was uncertain as to whether it was intended to cover sexual harassment. This changed in the 1990s when the U.S. Supreme Court heard cases pertaining to sexual harassment and Title IX.

One of these cases was *Gebser v. Lago Vista Independent School District*,[69] in which an eighth grade student claimed that her teacher made sexually suggestive comments to her and to other female students. The teacher also fondled the student's breasts and engaged in sexual intercourse with her. The U.S. Supreme Court set out a two-part test for holding schools liable under Title IX: (1) a school official with authority must have actual notice of the harassment; and (2) the school official must fail to adequately respond. In applying this standard to the facts of *Gebser*, the Court determined that school officials were aware of the teacher's sexually inappropriate comments to students and warned him about it but did not have actual notice of the teacher's sexual acts with the student; therefore, based on this lack of actual notice, the Court refused to find the school liable under Title IX for sexual harassment.[70]

In 1999, the U.S. Supreme Court heard another case involving Title IX and sexual harassment issues in *Davis v. Monroe County Board of Education.*[71] This case involved student-on-student sexual harassment, rather than teacher-on-student harassment. The student sued the school district, not for the other student's actions, but for the school's inaction in allowing the harassment to continue. During the 1999 school year, Davis, a female fifth-grade student endured continued verbal and physical harassment from a male classmate. This male classmate attempted to touch her breasts and genital area and rubbed up against her making comments such as "I want to feel your boobs" and "I want to get into bed with you." The student and her mother complained to school officials who took no action to stop the harassment. The harassment stopped when the male student was charged with sexual battery to which he plead guilty. The Court held because the harassment occurred during school hours and on school property, the misconduct was within the school's control.[72]

B. Non-Protected Class Membership Suits

If a plaintiff is not a member of a protected class, the plaintiff may bring a lawsuit alleging a number of tort theories, such as negligence, negligent infliction of emotional distress and intentional infliction of emotional distress.[73] The largest barrier to these actions is establishing that a college or university has a general duty to provide a safe learning environment. In general, no duty exists to keep a student safe from a third party and a majority of the courts have rejected the university-student relationship by itself as a basis for liability. The courts have also dismissed the custodian-charge relationship as establishing a duty since college students are adults who are able to take care of themselves.[74]

Some courts have found colleges to be liable for student injuries resulting from third party action when: (1) such behavior was reasonably foreseeable by the college;[75] (2) the college failed to investigate hazing incidents;[76] and (3) the college did not enforce its own hazing policy.[77]

Since college bullying cases remain a relatively new phenomenon, few published settlements or verdicts exist. Based on the hazing cases, colleges and universities may be held liable if courts can find a duty and a foreseeable injury. Student handbooks prohibiting bullying may provide the basis for that duty, but the victim would also have to prove that the college knew about the bullying.[78]

IV. CONCLUSION

While school bullying may not have received that much attention from a historical perspective, recent events have led policy-makers, researchers, the media and the general public to focus more attention on this growing problem.

In particular, cyberbullying is rising at a rapid rate and can no longer be treated as harmless playground behavior.

Unfortunately, under the current legal system, the courts appear to be reluctant to find that cyberbullying causes a substantial disruption in the school, except for a few extreme cases, because of the belief that the public is best served by a dissemination of ideas. The legal system needs to catch up with the times and realize that there is a difference between valuable political speech that is protected by the First Amendment and worthless cyberbullying speech that should not be protected by the First Amendment.

Generally, the victims of bullying at the college level tend to have fewer remedies available to them when compared to the victims of bullying at the elementary and secondary school levels. This is due to the fact that establishing a college's duty to its students is difficult in traditional tort actions as no duty exists based only on the college-to-student relationship.

Little research exists exploring the nature and frequency of college bullying; however, the more extensive research documenting the detrimental effects of bullying at the K-12 school levels warrants more investigation into college bullying.

Nevertheless, there are legal, social and psychological reasons as to why cyberbullying and college bullying should be more fully addressed. Recent cases indicate that the courts may be willing to reexamine their reluctance in finding colleges liable for injuries by third parties especially in cases where colleges exercise control and have undertaken a duty.

It is the legislatures' job to make the standards clear so that schools know the extent of their ability and authority to get involved and reprimand cyberbullying. Likewise, it is the job of the courts to provide guidance to ensure that students not only retain their constitutional rights while on campus but also while in cyberspace. Finally, it is the job of the elementary, secondary and collegiate schools to develop a more multifaceted approach to bullying in order to foster an educational environment that is safe and respectful.

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[1] Kowalski v. Berkeley County Schools, 652 F.3d 565, 572 (4th Cir. 2011).
[2] JAMES C. HANKS, SCHOOL BULLYING (2012).
[3] *See* Dan Olweus, *Bullying at School: Basic Facts and Effects of a School Based Intervention Program*, 35 J. CHILD PSYCHOL. AND PSYCHIATRY 1171 (1994).
[4] *See* Sabaha Dracic, *Bullying and Peer Victimization*, 21 MATERIA SOCIO MEDICA 216 (2009).
[5] Bully, Official Site, http://thebullyproject.com (last accessed August 20, 2013; Information also available at http://www.imdb.com/title/tt1682181/?ref_=fn_al_tt_2 (last accessed August 20, 2013).
[6] *See, e.g.*, Bullying Support Groups, http://www.overcomebullying.org/Bullying-support-groups.html#LocalYouthSchoolBullying (last accessed August 20, 2013); Dakarai I. Aarons, *Efforts to End Bullying, a Challenge to Leaders, Gain New Momentum*, EDUC. WK: SPOTLIGHT ON BULLYING, May 12, 2010; U.S. Dep't of Health and Human Services, stopbullying.gov, http://www.stopbullying.gov/ (last accessed August 20, 2013).
[7] Reports of bullying incidents at school are widespread. *See, e.g.*, Michelle Nicks, WFMJ, Wellsville Mother Speaks Out Against Bullying, After Son Tries to Take His Own Life (Mar. 22, 2012), http://www.wfmj.com/story/17234194/wellsville-mother-speak-out-against-bullying-after-son-tried-to-take -his-own-life; Carrie Wood, *Bullying Incidents on the Rise in Lake Washington School District*, KIRKLAND REP., Feb. 24, 2010, *available at* http://www.kirlandreporter.com/news/85094287.html; Peter Schworm & Milton J. Valencia, *Anger Turns Toward Staff in Bullying Case*, BOSTON GLOBE, Mar. 31, 2010, *available at* http://www.boston.com/news/local/massachusetts/articles/2010/03/31/anger_turns_toward_school_staff_in_bullying_case/. Such reports often involve lawsuits filed against schools. *See e.g.*, Steve McConnell, *Bullying Federal Lawsuit Lodged Against Scranton School District Headed to*

Settlement Talks, SCRANTON TIMES-TRIB., Mar. 23, 2012 *available at* http://thetimes-tribune.com/news/bullying-federal-lawsuit-lodged-against-scranton-school-district-headed-to-settlement-talks-1.1289388#axzz1r0uyO78t. The Tyler Clementi case received extensive media attention. *See, e.g.*, Joseph Ax & Jessica Dye, Reuters, Rutgers Hate Crime Verdict Sends Anti-Bullying Message (Mar. 17, 2012) http://www.reuters.com/article/2012/03/17us-crime-rutgers-analysis-idUSBRE82G04B20120317. On celebrity campaigns, see John Mitchell, Popeater, Celebrities Team Up for Anti-Bullying Campaigns (Oct. 6, 2010), http://www.popeater.com/2010/10/06/tim-gunn-ellen-degeneres-bullying-psa/; JAMES C. HANKS, SCHOOL BULLYING (2012).

[8] *See* Press Release, U.S. Dep't of Educ., U.S. Education Secretary to Keynote Department's First-Ever Bullying Summit: Partners Will Come Together to Develop a National Strategy for Reducing and Ending Bullying (Aug. 2010), *available* at http://www.ed.gov/news/media-advisories/us-education-secretary-keynote-departments-first-ever-bullying-summit (last accessed August 20, 2013).

[9] President Obama and the First Lady, White House Conference on Bullying Prevention, WHITEHOUSE.GOV, Mar. 10, 2011, *available at* http://www.whitehouse.gov/photos-and-video/video/2011/03/10/president-obama-first-lady-conference-bullying-prevention#transcript (last accessed August 20, 2013).

[10] U.S. Dep't of Health and Human Services, stopbullying.gov, http://www.stopbullying.gov/; JAMES C. HANKS, SCHOOL BULLYING (2012).

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[20] JAMES C. HANKS, SCHOOL BULLYING (2012).
[21] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).
[22] *Id.* at 504.
[23] *Id.*
[24] *Id.* at 506.
[25] *Id.* at 514.
[26] *See id.* at 513 (finding that "conduct by the student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech").
[27] *Bethel Sch. District v. Fraser*, 478 U.S. 675 (1986).
[28] *Id.*
[29] *Id.* at 678.
[30] *Id.*
[31] *Id.* at 679.
[32] *Id.* at 683.
[33] *Id.* at 685.
[34] *Id.* at 688.
[35] *Layshock v. Hermitage School District,* 650 F.3d 205 (3d Cir. 2011).
[36] *Id.* at 216.
[37] *See* Saxe v. St. Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d. Cir. 2001).
[38] *Layschock v. Hermitage School District,* 650 F.3d at 217 n.17.
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[52] *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist.*, 807 A.2d 847 (Pa. 2002).
[53] *Id.* at 851.
[54] *Id.*
[55] *Id.* at 858-859, 869.
[56] *J.C. ex. rel. R.C.*, 711 F. Supp. 2d at 1108.
[57] *Id.* at 1109.
[58] *Id.*; *See also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969); *J.S. v. Blue Mountain Sch. Dist.*, No. 3:07 CV 585, 2007 WL 954245 (M.D. Pa. Mar. 29, 2007). The courts provide conflicting decisions about what constitutes substantial disruption. In *Wisniewski ex rel. Wisniewski v. Board of Education*, a student inserted an icon next to his username where the teacher's head would fall off and blood would squirt out. *Wisniewski ex rel. Wisniewski v. Bd. of Educ.*, 494 F.3d 34, 40 (2d. Cir. 2007). In that case, the Court held that "there can be no doubt that the icon, once made known to the teacher or other school officials would foreseeably create a risk of substantial disruption." *Id.* But in *Mahaffey ex rel. Mahaffey v. Aldrich*, the Court found no substantial disruption from a website that instructed visitors on how to kill a person in a specific, gruesome fashion. *Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 785 (E.D. Mich 2002).
[59] *Beussink ex re. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175 (E.D. Mo. 1998); *Marcus v. Iowa Publ. Television*, 97 F.3d 1187, 1140-41 (8th Cir. 1996); *Elrod v. Burns*, 427 U.S. 347 (1976).
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[61] *See* Helen Smith et al., *Violence on Campus: Practical Recommendations for Legal Educators*, OKLAHOMA CITY LAW REVIEW, Vol. 32, No. 3 442 (2007).

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[63] Alison Schneider, *Insubordination and Intimidation Signal the End of Decorum in Many Classrooms,* 44 THE CHRON. OF HIGHER EDUC., Mar. 27, 1998, at A12.

[64] *See* Mark S. Chapell, *Bullying in College by Students and Teachers,* 39 ADOLESCENCE 53, 56 (2004).

[65] *See* Mark S. Chapell et al., *Bullying in Elementary, High School and College*, 41 ADOLESCENCE 633, 633-34 (2006).

[66] *See* Kathleen Conn, *Bullying in K-12 Public Schools: Searching for Solutions,* Commonwealth Education Policy Institute (2006); Susan H. Duncan, *College Bullies – Precursor to Campus Violence: What Should Universities and College Administrators Know About The Law?,* 55 VILLANOVA LAW REVIEW 269 (2010) (noting that victims often rely on harassment actions as none of the current anti-bullying statutes provide private causes of action and anti-bullying statutes generally leave enforcement to the local Boards' discretion).

[67] *Marshall v. Cortland Enlarged City Sch. Dist.,* 697 N.Y.S.2d 395, 396 (N.Y. App. Div. 1999).

[68] *See, Flores v. Morgan Hill Unified Sch. Dist.,* 324 F.3d 1130, 1132 (9th Cir. 2003) (allowing plaintiff's sec. 1983 claim alleging sexual orientation discrimination to proceed); *Montgomery v. Indep. Sch. Dist. No. 709,* F.Supp.2d 1081, 1081 (D. Minn. 2000) (rejecting motion to dismiss plaintiff's sec. 1983 claim); *L.W. v. Toms River Reg'l Schs. Bd. of Educ.,* 915 A.2d 535, 548 (N.J. 2007) (rejecting deliberate indifference standard).

[69] *Gebser v. Lago Vista Independent School District,* 524 U.S. 274 (1998).

[70] *Id.,* at 277-79.

[71] *Davis v. Monroe County Board of Education,* 526 U.S. 629 (1999).

[72] *Id.,* at 632-36.

[73] Susan H. Duncan, *College Bullies – Precursor to Campus Violence: What Should Universities and College Administrators Know About The Law?,* 55 VILLANOVA LAW REVIEW 269 (2010)

[74] Robert D. Bickel and Peter F. Lake, THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: WHO ASSUMES THE RISK OF COLLEGE LIFE (1999).

[75] *Knoll v. Bd. of Regents,* 601 N.W.2d 757, 762 (Neb. 1999).

[76] *Morrison v. Kappa Alpha Psi Fraternity,* 738 So. 2d 1105, 1117 (La. Ct. App. 1999).

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CUT! ARGUMENTS AGAINST TELEVISING TRIALS

by

Reginia Judge*

I. INTRODUCTION

Trials involving sensational facts or celebrity defendants garner a tremendous amount of media attention. They are often the focus of daily news reports, newspaper and Internet articles as well as blogs. Opinions differ as to whether the constant barrage of media attention helps or hinders a defendant's case. The broadcast of these trials, often called "trials of the century" or "high profile trials" is the center of much debate. Scholars, jurists and attorneys disagree as to the effects that videotaping of criminal trials has on the judicial process. There are as many opinions favoring the televising of trials as there are against it. This paper examines negative views of camera use and therefore it will highlight arguments opposing it.

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II. CASE LAW

Estes v. Texas[1] and *State v. Hauptmann*[2] provide us with early examples of why trials should not be videotaped. They illustrate the negative effects cameras have on courtroom participants, the obtrusiveness of the cameras themselves, their accompanying equipment, and their operators.

The United States Supreme Court considered the issue of cameras in the courtroom and whether they prejudiced defendant's rights in *Estes v. Texa*s. This trial was held in Smith County Texas, 500 miles west of its original jurisdiction in Reeves County. The case had attained national notoriety generating eleven volumes of press clippings.[3] The defendant, a well-known financier, was indicted for obtaining property by false pretenses. He was charged with inducing farmers to purchase nonexistent fertilizer tanks and equipment assigning him chattel mortgages on fictitious property. [4] There was extensive media coverage before the trial began. The pretrial hearing determining whether the case would be televised was itself telecast and attended by a sizable audience. Oddly enough, also present during this procedure were prosecution witnesses as well as the original jury panel.[5] Cables and wires snaked around the courtroom floor; microphones were placed on the judge's bench and the counsel tables.[6] The hearing was carried live by both radio and television and the unedited tape recording was repeated later in the evening and seen by approximately 100,000 viewers.[7] On one occasion the videotape was rebroadcast in place of the late movie on one station and the "Tonight Show" on another.[8] When the jury was finally impaneled, four of the jurors had seen all or part of the hearing or its broadcast.[9]

Upon denial of the motion to prevent the telecast, the trial court made preparation for filming by altering the courtroom to accommodate television cameras. A booth with an aperture to allow the lens of the cameras an unrestricted view of the courtroom was constructed. Although recording restrictions were delineated, disruptions ensued. All seats in the courtroom were full and observers stood in the aisles. Photographers roamed throughout the courtroom at will. As Chief Justice Warren later noted, even as defendant's counsel made his objection, one of the many photographers "wandered behind the judge's bench and snapped his picture."[10] There is no doubt that the activities of the television crews and news photographers led to significant disturbance during the trial. Their actions resulted in a chaotic free-for-all that detracted from the administration of justice.

The Supreme Court identified several factors that adversely affected the *Estes* trial. It recognized that the mere presence of the cameras themselves caused distractions. "Human nature being what it is, not only will a juror's eyes be fixed on the camera, but his mind will be preoccupied with the telecasting rather than with the testimony."[11] The Court also expressed concern over the overall quality of the trial; particularly, the effect the cameras had on those involved in the proceedings. It took into account the effects felt by the witnesses, and its impact on their testimony by stating:

> "The quality of the testimony in criminal trials will often be impaired. The impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable. Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward over-dramatization."[12]

The justices also weighed the effect that a televised trial has on the defendant and his counsel. It noted that telecasting could deprive a defendant of effective counsel in an instance where the desire to film the defendant consulting with his lawyer could compromise the attorney-client relationship. In this situation, a confidential, private conversation might thereby become public. Broadcasting a trial might also create the temptation on the part of counsel to play to the public audience rather than focusing on his client.[13]

Finally, the Court commented that the heightened public clamor resulting from radio and television coverage would inevitably result in prejudice. It described the presence of cameras in the courtroom as a form of mental, if not physical, harassment resembling that of a police line-up or interrogation.[14]

The state argued that there was no showing of actual prejudice as a result of the cameras used in *Estes* and the defendant therefore suffered no harm.[15] The Court determined that a showing of actual prejudice was not required. It emphasized that the high probability of prejudice in such an atmosphere was sufficient to persuade it to believe that the defendant's Fourteenth Amendment rights were violated.[16] "Television in its present state and by its very nature, reaches into a variety of areas in which it may cause prejudice to an accused. Still one cannot put his finger on its specific mischief and prove with particularity wherein he was prejudiced."[17] The high court therefore reversed Estes' conviction.

The chaos caused by the video equipment used in *Estes* would not have the same effect on a modern day trial. Advancements in technology has produced wireless cameras and microphones therefore, the physical equipment itself would not disturb a judicial proceeding; however, the effects felt by the trial participants persist. "The real threat lies not in the physical presence of the camera, but in the awareness of being televised and all that it represents."[18] Aside from the natural human tendency to be self-conscious in front of a camera, there exists the possibility that "neither the judge, prosecutor, defense counsel, jurors or witnesses would be able to go through trial without considering the effect of their conduct on the viewing public."[19]

In 1935 Bruno Hauptmann was charged and convicted of the kidnapping and murder of Charles Augustus Lindbergh, Jr. There were approximately 275 spectators inside the courtroom, along with as many as 700 reporters and 129 photographers.[20] It was no surprise that the Hauptmann trial was disrupted due to the large number of media personnel involved. There is little evidence to suggest that the use of cameras was intrinsically disruptive, however the facts do bear witness that the violations of press photographers' and newsreel camera operators' agreements with the judge caused the most damage.[21] The court allowed one cameraman to provide newsreel coverage and four photographers to take pictures during the trial. They could do so, however, only when court was not in session. This mandate was breached by photographers who took pictures of Mr. and Mrs. Lindbergh on the witness stand [22] and by cameramen who recorded testimony, and later screened it in 14,000 movie theaters.[23]

The pandemonium that accompanied the Hauptmann trial caused the American Bar Association (ABA) to adopt Judicial Canon 35 [later amended to 35A(7) which included television, audio and visual media recording].[24] This recommendation provided:

> "Proceedings in court should be conducted with fitting dignity and decorum. The taking of photographs in the courtroom during sessions of the court or recesses between sessions, and the broadcasting of court proceedings are calculated to detract from the essential dignity of the proceedings,

> degrade the court and create misconceptions with respect thereto in the minds of the public and should not be permitted."[25]

III. THE O.J. SIMPSON MURDER TRIAL

The People of the State of California v. Orenthal J. Simpson[26] provides further evidence that trials should not be televised. Simpson, a former professional football player, actor and spokesperson, was charged with the 1994 deaths of his ex-wife Nicole Brown Simpson and her friend Ronald Goldman. Camera presence seemingly transformed his trial from a fact-finding tribunal into a three ring circus that mocked the criminal justice system. "After the quality and behavior of police, prosecutors, defense attorneys, judges, juries, and forensic experts are examined,"[27] this trial illustrates what can go wrong when a camera's lens is fixed on a criminal case.

The O.J. Simpson trial received an immense amount of attention from various media outlets and became a spectacle. The frenzy that accompanied it cast so much attention on its participants that they became instant celebrities. "[The case] made media stars of a host of defense lawyers, prosecutors, police officers, and forensic experts."[28] The public became immediately acquainted with Denise Brown, Fred Goldman and Al Cowlings as a result of the trial. At the conclusion of the litigation, Marcia Clark, Kato Kaelin and Mark Fuhrman obtained radio or television shows because of their notoriety.[29] Many others published books. It is evident that some of the focus of the trial shifted from the pursuit of justice to the pursuit of fame and fortune. The Simpson trial received international attention, and many seized upon the opportunities offered them as a result of their association with it.

"The Simpson case provides a telling example of how televising a high-profile case alters the behavior and experiences of all the trial's participants."[30] The presence of the cameras during the proceedings affected the behavior of the media, jurors and attorneys; unfortunately for the worse. Several reporters were ejected from the courtroom because of disruptions.[31] Rather than focus on the testimony, some jurors were inattentive. Others were secretly making book deals.[32] The attorneys were constantly accused of playing to the camera and grandstanding.[33] "Many commentators suggested that no amount of advertising could buy the publicity that the defense and prosecuting attorneys in the Simpson case received daily, and that this exposure motivated the attorneys to show off…"[34] The defense team's pandering to the media generated accusations that they selfishly acted on their own interests rather than on behalf of their client.[35]

IV. ARGUMENTS AGAINST THE USE OF CAMERAS IN THE COURTROOM

A. *Televising Criminal Trials Does Not Educate the Public*

Some believe that gavel-to-gavel coverage of trials helps to educate the public about the judicial system. However, if one does not already have an understanding of the court system, simply watching a trial on television will not provide the education needed to fully comprehend the process. The viewer won't understand the legal terms used, why testimony is overruled or why evidence is inadmissible. "When the public sees a trial for itself, or through the lens of the camera, there's always a risk of misunderstanding: it may mistake zealous advocacy for obstruction of justice, or vice versa. A judge's impartial ruling, based on binding law, may seem arbitrary or even biased; when a defendant prevails on an obscure legal ground like immunity or jurisdiction, some will see injustice."[36] In order for one to obtain a full understanding of the criminal trial process, one must first learn general information concerning the law and legal concepts. It is helpful to learn among other things; legal definitions, roles of the parties involved, fundamental information about the Rules of Evidence, and the stages of the process. This, in conjunction with viewing a trial on television, serves to educate the public. Watching a trial without a foundational basis only serves to confuse the viewer. Contrary to the claims of ex truTV (formerly known as Court TV) CEO Steve Brill, simply making criminal trials available to anyone who has cable television is not educating the public about the trial process.[37]

A. *The Goal of a Televised Trial is to Entertain*

"Television is largely an entertainment medium, and viewers watch trials primarily for entertainment purposes. When network executives decide which trials to televise they look for those that will draw the most viewers. Televised trials often feature sex, violence, celebrities or a combination of these elements.[38] The trial of William Kennedy Smith involved a member of a well-known American family and a sexual assault accusation. Dr. Conrad Murray was prosecuted for the death of pop star Michael Jackson. The initial trials of Lyle and Eric Mendez involved allegations that they murdered their parents for their inheritance. The facts of all these cases are worthy of the scripts of blockbuster movies and thus worthy of telecasting. "Cameras in the courtroom have been accused of sensationalizing courtroom proceedings."[39] This statement may be warranted when you view the underlying reason for televising trials. Many are broadcast because of their ability to acquire huge ratings for the network airing it. A dull, monotonous trial will not captivate an audience; however one surrounding a heinous crime and a famous defendant or victim certainly will entice viewers.

Unfortunately, televising actual trials causes the public to see them in the same light as those portrayed in television shows.[40] This unrealistic association can cause misperception. Television show trials are crafted for dramatic purposes. They are orchestrated to draw audiences and therefore generate huge ratings. Although they may contain hints of authenticity, they do not illustrate an precise view of a real trial. Their purpose is to excite and entertain; therefore, they cannot be completely accurate; inaccuracies breed misunderstanding.

B. Trials are Televised for Profit

Another argument against the televising of trials conveys that they convert legal proceeding into capitalistic ventures for practically everyone involved; particularly television networks and advertisers.[41] Two longstanding American values, entertainment and capitalism, drive trial telecasts.[42] Cases that will produce a large viewership are selected to air. truTV chooses to broadcast proceedings that arouse public interest and curiosity, those that generate the most profit.[43] Profit is realized through selling advertisement time and other products and services such as courtroom feeds and videotapes.[44]

truTV, began broadcasting in 1991. Its goal was to educate the American public concerning the ins and out of judicial procedures. Although it had an educational goal as its basis at the outset, that goal has given way to one that emphasizes financial gain. Critics charge that the desire for high ratings caused truTV to abandon its educational mission in order to expose its audience to trials with sensational facts primarily involving celebrities.[45] The bottom line is that truTV is a commercial venture like any other television network. Profitability dictates that it televises trials that will attract large audiences which result in increased ratings and advertising dollars.[46] When all is said and done, the goal of any television network is to make money.

Not only does the televising of high profile trials generate revenue for television networks, but spin-off shows achieve the same objective. "Highly publicized trials sometimes spawn evening shows featuring panels of legal experts discussing courtroom events of the day." The advent of these shows allows the networks to retain the same audience and advertising it has gained from televising the original trial. It therefore remains profitable even after the trial has ended.

Television networks are not the only ones profiting from the televising of trials. Advertisers reap benefits in the form of the sale of products and services marketed in commercials aired during the course of the trial. Legal analyst and commentators that provide observation of trial events, and defense attorneys who receive both legal fees and free publicity during the course of the trial, gain as well. The trial judge who may be up for re-election also receives free publicity as he hands down judicial determinations before his constituents. Finally, jurors who sell their stories to tabloids or receive book deals after the trial concludes, also profit.[47]

C. *Televising Trials Undermines the Integrity of the Court*

Commentators contend that camera use during trials threatens the honor and integrity of the judicial system.[48] They assert that camera presence is inconsistent with the decorum of the courtroom. This is because their existence causes a shift in a trial's focus. The public's esteem for the court diminishes when its focus is no longer the swift administration of justice but on some other goal or purpose. It is feared that the desire for ratings results in the "tabloidization" of criminal trials.[49] When this exploitation occurs the courtroom takes on a circus-like atmosphere, reducing the seriousness of the judicial process. [50] Critics opposing videotaping, also express a concern that judges facing reelection will offer campaign speeches under the guise of legal rulings.[51] Others surmise that the cameras will cause other trial participants to pander to cameras rather than concentrate on the case at hand.[52] These examples illustrate some situations where the court's hallowed walls become the backdrop for drama and sensationalism and elicit negative criticism. Public confidence in the court system is weakened when it cannot trust it to satisfy its onus; seeking justice. The court's only mandate is to adjudicate fairly the determination of guilt or acquittal; not to educate and certainly not to entertain.

D. Televising Trials Promotes Negative Behavior on Behalf of Judicial Participants

Arguments in opposition to the use of cameras in the courtroom emphasize the adverse effects they have on those involved in the trial. The presence of cameras in the courtroom can sometimes affect how witnesses, lawyers and even judges handle a case. Unfortunately, their reactions can be negative. "It does not take a behavioral scientist to recognize that people change their behavior when placed in front of a camera."[53] The fact that court proceedings may be broadcast to hundreds of millions of people can only heighten this effect."[54] Chief Justice Warren commented, "….awareness that a trial is being televised to a vast, but unseen audience is bound to increase nervousness and tension."[55]

1. Witnesses:

Televising a trial may have an effect on witness testimony. "Testifying before a judicial tribunal might conjure butterflies in the stomachs of witnesses. Add the presence of a camera and the butterflies turn to nervousness.[56] Witnesses who appear nervous in the presence of cameras appear unreliable and untrustworthy to the jury.[57] "Even the most subtle changes in a witness' mannerisms, inflections and body language can send confusing signals to the jury.[58] Testifying before a camera might, however, produce an opposite reaction in other witnesses. Rather than appearing nervous, they might seem overconfident or arrogant; impressions that can also cause them to appear unreliable and dishonest. Still others might bask in the attention received as a result of being a witness in a high profile case. "The presence of cameras can attract witnesses who are willing to "color or slant their testimony" for dramatic effect in the spotlight of national exposure."[59] Kato Kaelin, a witness in the O.J. Simpson murder trial, is a prime example. It is unknown whether he skewed the truth during his testimony, but it is evident that he received favorable exposure because of it. After testifying in the trial of the century, "[Kaelin] was able to improve his acting career, obtain a book deal, radio show, and a position on a touring comedy circuit.[60]

There are some witnesses that might be deterred from testifying all together upon discovering that their testimony will be televised. "Witnesses may …. express hesitance towards testifying at all, knowing that they will be exposed to the nation via the camera."[61]

Another negative response seen in some witnesses testifying before a camera is the altering of testimony in order to be viewed positively by the public. The broadcasting of testimony leads to a loss of witness anonymity which makes it more likely that the witness will alter his or her testimony to conform to popular beliefs. This is done in an effort to avoid public ostracism. [62] Others may be inclined to lie in order to protect themselves and their families from media scorn.[63] By the same token, the presence of cameras may attract witnesses who are willing to exaggerate their testimony for dramatic effect and attention."[64]

The fact that their testimony will be televised for millions of people to see raises safety concerns for other witnesses.[65] Some fear harassment from persons who might see them on television. The Supreme Court has recognized this fear as a legitimate concern when considering the propriety of allowing cameras in the courtroom.[66] Similar fears have led judges to close trials to spectators as well as the electronic media.[67]

Finally, televising trials makes it possible for witnesses to hear the testimony of other witnesses.[68] The familiar tactic of keeping a witness outside the courtroom while another testifies is lost if one can simply turn on the television and hear what another witness has testified. This action can thus affect the testimony the subsequent witness provides the court. He may change his testimony based on what he has heard and or perceives to be true.

2. Attorney:

The presence of cameras in the courtroom has an effect on the attorneys appearing on behalf of a case. The O.J Simpson trial proved that they not only affect the attorney's demeanor, but their physical appearance as well. Prosecutor, Marcia

Clark, changed her hairstyle and Johnnie Cochran donned new suits during the course of trial.[69]

Lawyer grandstanding provides an example of negative behavior on behalf of attorneys when the cameras roll.[70] A huge concern involves impairment of a defendant's Sixth Amendment right to effective assistance of counsel during a televised trial. The alarm is that lawyers may concentrate more on posturing to the cameras than effectively representing their client. [71]

Some critics argue that the presence of the television cameras had a major role in Prosecutor Christopher Darden’s risky move of requesting that O.J. Simpson try on the bloody leather glove in front of the jury and television audience. It is believed that if the glove had fit it would have bolstered Darden's public image. Regrettably, the glove did not fit and Darden became known as the attorney who pursued an inquiry when he didn’t know the outcome, which is akin to asking a question when one does not already know its answer. [72]

3. Judges:

Cameras in the courts can produce adverse behavior on behalf of the judge presiding over a trial. The judge may be more concerned with his public image than with the progression of the case.[73] He/she might attempt to appear stern and therefore make inappropriately harsh pronouncements. The opposite was true, however, for Judge Lance Ito, the jurist who presided over the Simpson murder case. His attempts to present a positive image led him to act overly cautious. His failure to control the court through his decision making power, most notably the cessation of extended attorney quarrels and prolonged witness testimony, led to negative public perceptions.[74]

Unfortunately, some judges won't resist the opportunity to make themselves appear larger than life before the cameras in an effort to obtain attention. While presiding over the case determining the custody of Anna Nicole Smith's body, Judge Larry Seidlin gave lengthy personal monologues, and cried while delivering his judgment. [75] It is alleged that his actions were a ruse used to obtain a television show.[76]

Another argument against cameras in the court concerns elected judges: if the judge can be immediately observed by the electorate, he may be inclined to focus on his career aspirations as opposed to the merits and intricacies of the case at hand.[77] [A judge] might therefore seize the opportunity to influence voters while the cameras roll.[78]

4. Jurors:

Cameras may also have a negative effect on juries. Jurors might become distracted by the cameras when they should be focusing on the trial. “As jurors become preoccupied with the presence of the camera, their attention may be directed away from the testimony, thereby inhibiting their function in the trial process.”[79] In addition, because they are being scrutinized by so many people, “Jurors may make a decision that the public wants, and not what the law mandates.”[80] If the jury is aware of the public's disposition in a case, they may then try to decide in accordance with public opinion.[81]

Fear might also affect the decision-making of jurors. Routine footage of trial include panoramic shots of the jury. “[Some] may be afraid that they will be identified on television [they] could become the victims of a crime. [82] Others fear that the use of video footage by a defendant’s allies will be used to identify jurors and seek retribution against them.[83]

E. Televising Trials is Unfair to the Defendant:

The effect that a televised trial could have on a defendant is something that is often ignored. The fact is, a judge can allow the fate of one accused to be played before a worldwide audience, while another’s is not. This act singles out some defendants, and exposes them to prejudices not encountered by others.[84]

A defendant found not guilty after his televised trial might experience increased condemnation from the viewing public. This could become problematic as he attempts to integrate back into society. [85] An example of this is presented in the Casey Anthony case. Upon her acquittal and release, Anthony went into hiding for her own safety. The State of Florida went so far as to refrain from entering her information into its parolee's database to ensure her safety as well.[86]

V. CONCLUSION

Televising trials shifts the focus from the court's purported purpose of finding the truth, into a three ring circus. It is not surprising that this environment is not only tolerated, but is welcomed by the network airing the trial since it produces increased ratings. "Cameras in the courtroom do two things that are bad. They not only adversely influence participants in the trial (including the lawyers, witnesses, and the judge), but they also taint the entire trial process by causing the public to confuse law with entertainment."[87] Many applaud the use of cameras in the courts as educational vehicles; however, the opposite of this sentiment is true. They bring out the worst in its participants and subvert the legal process. A prime example is the televising of the O.J. Simpson murder trial. If there is any educational value to be derived from the Simpson case, it is that the trial was a perfect example of how not to conduct a legal proceeding.[88]

[1] Estes v. Texas, 381 U.S. 532 (1965).
[2] State v. Hauptmann, 180 A. 809 (N.J. 1935).
[3] Estes, 381 U.S. at 547.
[4] Christo Lassiter, *TV or Not TV--That is the Question*. 86.3 J. Crim. L. & Criminology 928, 939 (1996).
[5] Id.
[6] Id. at 535.
[7] Id. at 556.
[8] Id. n28 at 571.
[9] Id. at 548.
[10] Joshua Sarner, *Justice, Take Two: The Continuing Debate Over Cameras in The Courtroom*, 10 Seton Hall Const. L.J. 1053, 1068 (2000).
[11] Estes, 381 U.S. at 546.
[12] Id. n2 at 547.

[13] Estes, 381 U.S. at 549.
[14] Id. at 549.
[15] Id. at 541.
[16] Id. at 541.
[17] Id. at 544.
[18] Sarner at 1058.
[19] Id.
[20] Jacob Marvelley, *Lights, Camera, Mistrial: Conflicting Federal Court Local Rules and Conflicting Theories on the Aggregate Effect of Cameras on Courtroom Proceedings*, 16 Suffolk J. Trial & App. Adv. 30, 36 (2011).
[21] Daniel Stepniak, *A Comparative Analysis of First Amendment Rights and the Televising of Court Proceedings*, 40 Idaho L. Rev. 315, 330 (2004).
[22] Stepniak at 319.
[23] Stephen D. Easton, *Cameras in Courtrooms: Contrasting Viewpoints: Whose Life is it Anyway?: A Proposal to Redistribute Some of the Economic Benefits of Cameras in the Courtroom from Broadcasters to Crime Victims*, 49 S.C. L. Rev. 1, 9 (1997).
[24] 62 A.B.A. Rep. 1134-35 (1937).
[25] Model Code of Judicial Ethics Canon 35 (1952).

[26] People of the State of California v. Orenthal J. Simpson, No. BA097211 (Cal. Super. Ct. acquitted Oct. 3, 1995).
[27] Wayne J. Pitts, et al., The *Legacy of the O.J. Simpson Trial,* 10 Loy. J. Pub. Int. L. 199, 200, (2009).
[28] Id.
[29] Pitts n90 at 221.
[30] Peter Arenella, *People v. Simpson: Perspectives on the Implications for the Criminal Justice System*, 69 SCALR 1233, 1256 (1996).
[31] S.L. Alexander, *The Trial of the Century,* 92 Judicature 245, 247 (2009).
[32] Id.
[33] Id.
[34] Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything about the Real Law?* 58 OHSLJ 655, 679 (1997).
[35] Andrew G.T. Moore, II, *The O.J. Simpson Trial--Triumph of Justice or Debacle?* 41 STLULJ 9, 22 (1996).
[36] Alex Kozinski & Robert Johnson, *Of Cameras and Courtrooms*, 20 Fordham Intell. Prop. Media & Ent. L.J. 1107, 1123 (2010).
[37] Paul at 664.
[38] Stephen D. Easton, *Cameras in Courtrooms: Contrasting Viewpoints: Whose Life Is It Anyway?"* 49 S.C. L. Rev. 1, 22(1997).
[39] Kozinski at 1120.
[40] Richard K. Sherwin, *Symposium Law/Media/Culture: Legal Meaning in The Age Of Images: The Jurisprudence of Appearances,* 43 N.Y.L. Sch. L. Rev. 821, 826 (1999).
[41] Jay C. Carlisle, *An Open Courtroom: Should Cameras be Permitted in New York State Courts? 18 Pace L. Rev. 297,* 306 (1998).
[42] Easton at 20.
[43] Melissa A. Corbett , *Lights, Camera, Trial: Pursuit of Justice or The Emmy? 27 Seton Hall L. Rev. 1542* *1*565 n108 and 109. (1997).
[44] Easton at 26.
[45] Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?* 58 Ohio St. L.J. *655, 668* & 9 n56 (1997).
[46] Paul n55 at 668.
[47] Easton at 27.
[48] Carlisle at 304.
[49] Moore at 39.
[50] Kozinski at 1128.
[51] Arenella at 897.
[52] Corbett at 1563.

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[53] Goldfarb n5 at 62.
[54] Sarner at 1060.
[55] Estes, 381 U.S. at 569.
[56] Carlisle at 305.
[57] Corbett n1 at 1563.
[58] Winograde n39 at 37.
[59] Sarner at 1063.
[60] Paul at 679.
[61] Corbett at 1564.
[62] Stacy R. Horth-Neubert, *In The Hot Box and on The Tube: Witnesses' Interests in Televised Trials,* 66 Fordham L. Rev. 165,179 (1997).
[63] Johnson at 147.
[64] Sarden at 1063.
[65] Horth-Neubert at 175.
[66] Id.
[67] Id. n66 at 175.
[68] Arenella at 903.
[69] Blake D. Morant, *Resolving The Dilemma of The Televised Fair Trial: Social Facilitation and The Intuitive Effects of Television,* 8 Vajspl 329, 368. (2001).
[70] Johnson at 147.
[71] Sarder at 1064.
[72] Morant at 383.
[73] Sarder at 1064.
[74] Morant at 386.
[75] Kozinski at 1111.
[76] Id.
[77] Marvelly n11 at 45.
[78] Sarder at 1065.
[79] Sarder at 1062.
[80] Johnson at 148.
[81] Marvelley at 48.
[82] Elizabeth A. Stawicki, *The Future of Cameras in the Courts: Florida Sunshine or Judge Judy, 8 PGH. J. Tech. L. & Pol'y 4*, 10 (2007).
[83] Marvelley n3 at 30.
[84] Corbett at 1559.

[85] Shelly Rosenfeld, *Will Cameras in the Courtroom Lead to More Law and Order?* 6 Crim. L. Brief 12, 16 (2010).
[86] Martin A. Holland, *Identity, Privacy and Crime: Privacy and Public Records in Florida,* 23 UFLJLPP 235, 238. 92012).
[87] Richard K. Sherwin, *Symposium Law/Media/Culture: Legal Meaning in The Age Oof Images: The Jurisprudence of Appearances*, 43 N.Y.L. Sch. L. Rev. 821, 825. (1999).
[88] Moore at 38.

FOREIGN JURISDICTIONAL ALGEBRA and KIOBEL v. ROYAL DUTCH PETROLEUM: FOREIGN CUBED AND FOREIGN SQUARED CASES

by

Robert S. Wiener*

INTRODUCTION

In its recent term, the United States Supreme Court appears to have decided unanimously in Kiobel v. Royal Dutch Petroleum[1] that U.S. federal courts cannot hear and decide *foreign cubed* cases. These are cases with three fundamental foreign elements: in which a **foreign** plaintiff sues a **foreign** defendant for acts committed on **foreign** soil.[2] Justice Breyer in a concurring opinion joined by three other justices and Justice Kennedy in another concurring opinion seem to have left the jurisdictional door ajar, at least for foreign squared cases in which only two of the three foreign factors exist. This paper analyzes the Kiobel case's four opinions and considers possible foreign squared scenarios.[3]

This international law case raises the jurisdictional question, what can the courts of one country do in response to multinational corporate support of government-sponsored atrocities in another country? The issue is whether a state[4] can

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decide the legal fate of foreign corporations for acts against foreign nationals in a foreign country. Specifically, in this case, under the United States Alien Tort Statute (ATS),[5] can United
States federal courts adjudicate a civil suit brought by Nigerian citizens (Kiobel et al.) who now reside in the U.S. against corporations incorporated in foreign countries (here the Netherlands,[6] England,[7] and Nigeria[8]) for allegedly aiding and abetting atrocities by the Nigerian government in Nigeria?[9]

I. EXTRATERRITORIAL JURISDICTION: GENERAL PRINCIPLES

Jurisdiction is the authority of a court to hear and decide a case. To have that authority, a court must have jurisdiction both over the subject matter of the case and over its parties. Extraterritorial jurisdiction is particularly problematic because it is the assertion of the power to make legal judgments for acts outside the geographic territory of the court's government. Such a claim is difficult when the territory is international such as on "the high seas" and in the territory of no country. It is even more complicated when the disputed acts are alleged to have occurred in another government's geographic territory and, therefore, there may be conflicting jurisdictional claims.

A court might exercise jurisdiction on a number of bases, but, in cases of concurrent jurisdiction, it is presumptuous for one country to impliedly claim that it can provide justice better than another country, especially when the other country has closer connections to the case. From the perspective of serving one's own citizens, why should money from government coffers be used to provide judicial services to citizens of other countries? If the rationale is that it serves the country's diplomatic interest, shouldn't the country's political branches, that is, its executive and legislative branches, make that decision rather than its judicial branch? If the rationale is concern for international human rights, shouldn't an international body make that decision?[10]

Extraterritorial[11] jurisdiction may be based on bilateral or multilateral agreements, or upon one or more of the following basic principles for international jurisdiction.[12]

1. Territoriality: over acts within a state's geographic territory with extraterritorial effect
2. Nationality: over citizens of one's state who cause harm outside that state's territory
3. Protective: to protect one's state from harm resulting from extraterritorial acts
4. Passive personality: to protect one's citizens outside the state's territory
5. Universality: to prosecute acts seen universally as crimes, regardless of where they occurred[13]

II. ALIEN TORT STATUTE

The Alien Tort Statute (ATS), adopted in the Judiciary Act of 1789,[14] states

> The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States

28 U.S.C. § 1350 : US Code – Section 1350: Alien's action for tort[15]

It had rarely been used for two centuries until the Second Circuit in the 1980 case of Filartiga v. Pena-Irala[16] and the United States Supreme Court in the 2004 case of Sosa v. Alvarez-Machain[17] decided that private parties could bring claims under “federal common law.”[18] The original question in this case was whether the ATS substantively covers the acts claimed, but re-argument was ordered on the jurisdictional question of “whether a claim may reach conduct occurring in the territory of a foreign sovereign.”[19]

Sometimes what is omitted from an opinion is as important as what is included. The Second Circuit had dismissed the *Kiobel* complaint on the grounds that “the law of nations does not recognize corporate liability.”[20] This issue was not even mentioned in any of the U.S. Supreme Court *Kiobel* opinions; in other words, corporate liability was assumed *arguendo*. This is an important point. It means that the U.S. Supreme Court has not decided that corporations may not be sued under the Alien Tort Statute. That result would have established a barrier against suits based upon ATS jurisdiction against all corporations, domestic or foreign, regardless of whether the plaintiff, defendant, and location of the acts in question were foreign.

III. FOREIGN CUBED CASES: *KIOBEL* SUPREME COURT OPINIONS

Despite unanimity as to the result by the U.S. Supreme Court in the case of *Kiobel v. Royal Dutch Petroleum*, four separate opinions were reported. Therefore, predicting how this case will function as a precedent under *stare decisis* is somewhat complicated.

A. *Opinion of the Court*[21]

Chief Justice John Roberts, Jr. delivered the opinion of the Court, joined by Justices Antonin Scalia, Anthony

Kennedy, Clarence Thomas, and Samuel Alito, Jr. Roberts wrote "[t]he question presented is whether and under what circumstances courts may recognize a cause of action under the Alien Tort Statute, for violations of the law of nations occurring within the territory of a sovereign other than the United States."[22]

Kiobel *et al*. argued that the ATS does indeed provide for extraterritorial U.S. jurisdiction under "[t]he law of nations," otherwise known as "customary international law,"[23] under circumstances such as aiding and abetting such acts as "(1) extrajudicial killings; (2) crimes against humanity; (3) torture and cruel treatment; (4) arbitrary arrest and detention; (5) violations of the rights to life, liberty, security, and association; (6) forced exile; and (7) property destruction."[24] However, the majority decided that there is no extraterritorial jurisdiction, regardless of the existence of the circumstances above, in *foreign cubed* cases, that is, when there are three basic foreign elements, a foreign plaintiff sues a foreign defendant for acts committed on foreign soil. It based its decision on "[t]he presumption against extraterritorial application."[25] Under this technical principle of statutory construction, a domestic statute does not have extraterritorial application unless such application is clearly indicated.[26] This approach avoids the foreign affairs implications of unintended conflicts with foreign laws.[27] And it reflects the desire of the judicial branch to leave foreign policy decisions with "the political branches."[28] The majority acknowledged that the language of the ATS does not hint at a territorial limitation of its jurisdiction, yet here it deferred to this often ignored presumption regardless. In *Sosa*, by contrast, extraterritorial application was apparently assumed by the Supreme Court, with jurisdictional concern for foreign policy implications limited to a narrow interpretation of the relevant law of nations as "specific, universal, and obligatory."[29]

The majority did consider possible grounds that might rebut the presumption against extraterritorial application of the ATS including:

1. Text of the statute -- construction of the ATS. But if found nothing explicitly demanding its extraterritorial application.[30]
2. Transitory torts doctrine -- that a tort, regardless of where it occurred, can provide for jurisdiction over a civil action wherever subject matter and personal jurisdiction can be obtained.[31] But observed that this doctrine may have been applicable in Sosa where the grounds were U.S. law, but not in this case where the law was foreign law.[32]
3. *Stare decisis* – judicial history and three applicable offenses referred to in prior cases to assert extraterritorial application of the ATS, "violations of safe conducts, infringement of the rights of ambassadors, and piracy."[33] But argues that "[t]he first two offenses have no necessary extraterritorial application"[34] and that one of four contemporary cases[35] were extraterritorial. The third offense, "piracy," according to the majority, typically occurs "on the high seas" and, therefore, outside of any country's territory,[36] where no country has territorial jurisdiction. Therefore, foreign policy consequences are "less direct" and the offense of "piracy" does not justify jurisdiction over acts on foreign soil, as in this case.[37]
4. Nationality principle -- the majority read a 1795 opinion by Attorney General William Bradford as an ambiguous[38] nationality principle case, restricting jurisdiction to U.S. citizens for acts on foreign soil.[39] In this case the defendant corporations were not U.S. citizens.
5. Legislative history -- analysis of the intent of the

drafters of the Alien Tort Statute. The majority quoted an opinion forty years after passage of the ATS as proof that its authors did not intend "to make the United States a uniquely hospitable forum for the enforcement of international norms"[40] and claimed that imputing legislative intent to apply the ATS to acts in foreign countries would be "implausible."[41]

Therefore, the majority ruled that since the ATS is a domestic statue and extraterritorial application is not clearly indicated for this type of case, application of the presumption against extraterritorial application dictated that the ATS did not have extraterritorial application in this foreign cubed case.

Justice Roberts ended his opinion by raising the specter of unintended "serious foreign policy consequences,"[42] including a tit-for-tat backlash of lawsuits against "our citizens" in the courts of other nations for "alleged violations of the law of nations occurring in the United States, or anywhere else in the world."[43] This seems to be the kind of foreign policy analysis Justice Roberts, earlier in his opinion, reserved to the other "political" branches of government.

B. Concurring Opinion: Kennedy[44]

Justice Kennedy is often the "swing vote" in the current U.S. Supreme Court's 5-4 decisions. Therefore, even though this case was unanimous decision and Kennedy joined the opinion of the court, it is important to pay attention to his additional independent concurring opinion as it may be crucial in deciding a future extraterritorial jurisdiction foreign squared case or possibly even in foreign cubed cases with different facts, such as no legal recourse elsewhere.

Kennedy asserted that questions here are left open and that this case is not the final chapter on the ATS[45] and, especially, his concern for a legal response to human rights abuses outside the United States. "Many serious concerns with respect to human rights abuses committed abroad have been addressed by Congress in statutes such as the Torture Victim Protection Act of 1991 (TVPA) [not including cases against corporations] …, Other cases may arise with allegations of serious violations of international law principles protecting persons."[46]

C. Concurring Opinion: Alito[47]

Justices Samuel Alito, Jr. and Clarence Thomas agreed with C.J. Roberts that the case should be decided on the narrow grounds that, in an ATS case with "claims [that] touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application"[48] and for there to be extraterritorial federal jurisdiction. However, Justice Alito wrote an additional concurring opinion, joined by Thomas, stating a preference for a broader isolationist[49] standard, affirming the presumption against extraterritorial application by using a "focus' of congressional concern" test and re-asserting the Sosa requirements, with a statutory construction emphasizing the legislative intent of the 1789 authors of the ATS.[50]

D. Concurring Opinion: Breyer[51]

Justice Stephen Breyer, joined by Justices Ruther Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, concurred with the Court's judgment, but not its reasoning. They rejected Roberts's reliance on "the presumption against extraterritoriality."[52] Instead, "guided in part by principles and practices of foreign relations law," they would adopt ATS jurisdiction based upon territoriality, nationality, or protective principles: "where (1) the alleged tort occurs on American soil [territoriality] (2) the defendant is an American national, [nationality] or (3) the defendant's conduct substantially and adversely affects an important American national interest" [protective].[53] Key is Justice Breyer's definition of important American national interests as including "a distinct interest in preventing the United States from becoming a safe harbor (free of civil as well as criminal liability) for a torturer or other common enemy of mankind."[54] Breyer, like Alito, quoted Sosa, but more expansively, focusing on its general principles.[55] However, the facts in *Kiobel* did not meet any of these standards and, therefore, federal court jurisdiction should not be granted here.

A basic distinction among the approaches of Breyer, Roberts, and, especially, Alito, is their jurisprudence, specifically their approaches to statutory construction. Whereas Alito interpreted the ATS as limited to whatever was of concern in 1789, and Roberts constrained the ATS with a restrictive presumption against extraterritoriality principle, Breyer referred to the Sosa characterizations of the legislative history as providing "18^{th}-century paradigms" for judges to fashion "a cause of action" "based on the present-day law of nations."[56] Breyer, in his evolutionary judicial approach, noted that the purpose of the ATS was to grant a cause of action where none existed before and, therefore, frames the key question as "Who are today's pirates?" providing a remedy to those harmed "*when those activities take place abroad*."[57]

Breyer rejected application of the "presumption against extraterritoriality" to the ATS, a statute enacted "with 'foreign matters' in mind."[58] He also rejected a legal "distinction between piracy at sea and similar cases on land," noting, for example, that crimes on a flagged ship are within the jurisdiction of that nation as though they were on land.[59]

Justice Breyer's core position on the role of the courts concerning international human rights violations is that "just as a nation that harbored pirates provoked the concern of other nations in past centuries…so harboring "common enemies of all mankind" provokes similar concerns today."[60] Thus Breyer's presumption is different from that of Roberts; "I would assume that Congress intended the statute's jurisdictional reach to match the statute's underlying substantive grasp."[61]

To help determine the proper jurisdictional scope of the ATS, Breyer referred to the Restatement (Third) of Foreign Relations Law, including its Section 402 jurisdiction principles of territoriality,[62] nationality,[63] protective,[64] and, universality.[65] At the same time, Breyer accepted jurisdictional limitations, such as exhaustion of legal remedies, *forum non conveniens*, and comity, as well as courts "giving weight to the views of the Executive Branch."[66]

Breyer then cited, with apparent approval, two lower federal court decisions that accepted ATS jurisdiction where the alleged conduct violated well-established international law norms and the defendant was present in the United States when the suit was filed, although both plaintiff and defendant were foreign nationals and the acts occurred outside of the U.S.[67] Breyer observed that such an approach "is consistent with international law and foreign practice" citing foreign authors and courts that accept jurisdiction of cases where the acts occurred abroad.[68]

Breyer observed that if Congress was concerned as to the judicial interpretation of the extraterritorial reach of the ATS by federal courts since *Filartiga* in 1980 or since *Sosa* in 2004, it could have limited the substantive or jurisdictional reach of the ATS by legislation, but it did not.

Therefore, Breyer concluded that his approach is consistent with *Sosa* and should not cause concern that other countries will respond by "hal[ing] our citizens into their courts for alleged violations of the law of nations occurring in the United States, or anywhere else in the world.[69]

However, it would "reach too far to say" that there are grounds for jurisdiction based on the facts of this particular case – where foreign nationals sue two foreign corporations with minimal presence in the United States (a New York City office owned by an affiliated company) for acts such as torture they allegedly helped but did not directly engage in.[70]

IV. FOREIGN SQUARED CASES: POST-KIOBEL

Once again, one of the most important elements of majority opinion is what was omitted. Among the significant questions left open is whether there might be jurisdiction under principles of nationality or territoriality. The majority opinion apparently closed U.S. courts to cased based on ATS jurisdiction when the case is a "foreign cubed" case, that is, where "a foreign plaintiff is suing a foreign defendant for acts committed on foreign soil."[71] However, whether federal courts have ATS jurisdiction over "foreign squared" cases, where one of these three elements is domestic, that is, either the plaintiff or the defendant is a U.S. national (nationality) or the act is committed in the U.S. (territoriality) remains unclear.[72]

It is possible that as many as seven of the justices, excluding Justices Alito and Thomas as a result of their broad concurring opinion, would decide that at least some foreign squared cases that "touch and concern the territory of the United States -- with sufficient force" overcome the presumption against extraterritorial jurisdiction.[73] However, this is not an easy reading of Robert's opinion.

Four justices, Breyer and the three justices joining him, seem squarely behind extraterritorial jurisdiction in some foreign squared cases. But four does not a majority make; therefore such jurisdiction appears to depend on Justice Kennedy. The possibility of U.S. federal court extraterritorial jurisdiction is enhanced by Kennedy's dicta in his opinion.

> Other cases may arise with allegations of serious violations of international law principles protecting persons, cases covered neither by the TVPA [Torture victim Protection Act] nor by the reasoning and holding of today's case; and in those disputes the proper implementation of the presumption against extraterritorial implementation application may require some further elaboration and explanation.

Even though the vote was unanimous against extraterritorial jurisdiction in this case, Kennedy's vote may be the swing vote in a foreign squared case, or even in a case based upon non-ATS jurisdiction. And that might well focus on whether the United States should judicially ignore the equivalent of modern-day piracy, possibly including not only actual piracy,[74] but also offenses against international law.

CONCLUSION

The *Kiobel* case is likely to result in continued efforts to bring foreign squared cases against multinational corporations under ATS jurisdiction and even to bring foreign cubed cases under other theories of extraterritorial jurisdiction.[75]

If there were an international court with jurisdiction over alleged civil violations of the law of nations anywhere in the world against individuals and business organizations, this issue would be moot. As long as such a court remains a pipe dream, the majority of the United States Supreme Court may be prepared to stand idly by, with our political branches allowing grave human rights violations to occur against persons in foreign countries who then have no legal redress for their grievances.[76] But that might be a topic for an international business ethics paper.

ENDNOTES

1 Kiobel v. Royal Dutch Petroleum, 569 U.S. __, 133 S. Ct. 1659; 185 L. Ed. 2d 671 (2013), *available at* http://www.supremecourt.gov/opinions/12pdf/10-1491_8n59.pdf.

2 Oana Hathaway, *Kiobel Commentary: The door remains open to "foreign squared"* cases, SCOTUSblog (April. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/

3 Several articles have already been written on the case. Adam Liptak, *Justices Bar Nigerian Human Rights Case From U.S. Courts*, N.Y.TIMES (April 17, 2013) http://www.nytimes.com/2013/04/18/us/justices-bar-us-suit-in-nigerian-human-rights-case.html?_r=0; The Editorial Board, *A Giant Setback for Human Rights*, N.Y. Times, (April 17, 2013) http://www.nytimes.come/2013/04/18/opinion/the-supreme-

courts-setback-for-human-rights.html; Anton Metlitsky, *Commentary: What's left of the Alien Tort Statute?* (April 17, 2013), http://www.scotusblog.com/2013/04/commentary-whats-left-of-the-alien-tort-statute/#more-162581

[4] State, government, country, and sovereign will be used as synonyms in this paper.

[5] "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or treaty of the United States," 28 U.S.C. § 1350: Alien's action for tort, *available at* http://codes.Ip.findlaw.com/uscode/28/IV/85/1350

[6] Royal Dutch Petroleum Company, at 1.

[7] Shell Transport and Trading Company, at 1.

[8] Shell Petroleum Development Company of Nigeria, Ltd. (SPDC), joint subsidiary, at 2.

[9] "[B]eating, raping, killing, and arresting residents and destroying or looting property" in response to environmental protection protests, at 2.

[10] This raises the question of what to do if there is no appropriate international body to resolve a dispute of this sort -- for example, where the defendant is a corporate entity rather than a nation-state. Concern for the Act of State Doctrine, that the judicial branch should not assume the role of the executive branch on matters of state, are lessened if the acts are not by a nation-state, but by a corporation. However, that concern, in practice arises again if the corporation is acting as a proxy or alter-ego of the nation-state.

[11] Extraterritorial, abroad, and outside a state's geographic territory will be used as synonyms in this paper.

[12] SCHAFFER, AUGUSTI, DHOOGE, EARLE, INTERNATIONAL

BUSINESS LAW AND ITS ENVIRONMENT (South-Western 2012, 8th ed.).

[13] One example seems to be Israel's single case of capital punishment, that of Adolf Eichmann for Nazi crimes of war. See Schaffer at 57.

[14] *Id*. at 3.

[15] http://codes.1p.findlaw.com/uscode/28/IV/85/1350

[16] Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980).

[17] Sosa v. Alvarez-Machain, 542 U.S. 692, 714, 124 S. Ct. 2739, 159 L. Ed. 2d 718 (2004), *available at* http://www2.bloomberglaw.com/desktop/public/document/.

[18] *Id*. at 4.

[19] *Id*. at 4.

[20] 621 F. 3d. 111 (2010). This raises the question of whether this reasoning remains valid post Citizens United. Citizens United v. Federal Election Commission, 558 U.S. 310 (2010). In fact, the U.S. Supreme Court did not address this issue.

[21] ROBERTS, C.J., delivered the opinion of the Court, in which SCALIA,KENNEDY, THOMAS, and ALITO, JJ., joined.

[22] *Id*. at 1, http://www.supremecourt.gov/opinions/12pdf/10-1491_8n59.pdf. It was this specific question presented for unusual second oral arguments before the U.S. Supreme Court, conducted on October 1, 2012. In this case there is no bilateral or multilateral agreement.

[23] *Id*. at 2.

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[24] *Id*. at 2.

[25] *Id*. at 4. *See* Morrison v. Nat'l Australia Bank Ltd., 130 S. Ct. 2869, 177 L. Ed. 2d 535 (2010). See William S. Dodge, *Understanding the Presumption against Extraterritoriality*, 16 BERKELEY J. INT'L LAW 85 (1998). Available at: http://scholarship.law.berkeley.edu.bjil/vol16/iss1/5. But see Jonathan Turley, *When in Rome: Multinational Misconduct and the Presumption against Extraterritoriality*, 84 NW. U.L.REV. 598 (1989-1990) (arguing for a presumption for extraterritoriality).

[26] Morrison (slip op., at 6).

[27] Aramco at 248.

[28] The legislative and executive branches. *Id*. and Sosa at 727.

[29] Sosa at 732, quoting Marcos, 25 F.3d 1467 (CA9 1994).

[30] *Id*. at 7.

[31] *Id*. at 7. Dennick at 18.

[32] In this case that would be Nigerian law. *Id*. at 8. Might there be an argument that international human rights law is part of federal common law?

[33] *Id*. at 8, Sosa at 724; see 4 W. Blackstone, Commentaries on the Laws of England 68 (1769).

[34] And that Blackstone's examples focus on territorial rights. Blackstone; *Id*. at 8.

[35] That is, at approximately the same time as the ATS was adopted. *Id*. at 9.

[36] *Id*. at 10. Blackstone, *supra*, at 72.

[37] *Id*. at 10. Its seems that Roberts also argues for a limited definition of piracy (only acts on the high seas?) and that the human rights abuses here are on dry land.

[38] With possible universal principle application for civil suits.

[39] *Id*. at 11-12.

[40] *Id*. at 12; Justice Story "*custos morum* of the whole world" quote, United States v. The La Jeune Eugenie, 26 F.Cas.832, 847 (No. 15,551)(CC.Mass. 1822). "A self-righteous soul can identify himself as custos morum." William Safire, *Delicious Delicto*, N.Y. TIMES, Mar 30, 1986, *available at* http://wordsmith.org/words/custos_morum.html.

[41] *Id.* at 12. The majority repeatedly uses the term "sovereign" to refer to conduct occurring in foreign territories, possibly to invoke the concept of "sovereign immunity,", although it does not apply here because the defendants are not foreign sovereigns.

[42] *Id*. at 13.

[43] *Id*. at 13.

[44] KENNEDY,J., filed a concurring opinion.

[45] "The opinion for the Court is careful to leave open a number of significant questions regarding the reach and interpretation of the Alien Tort Statute," Kennedy opinion, at 1.

[46] *Id*. at 1.

[47] ALITO, J., filed a concurring opinion, in which THOMAS, J., joined.

[48] Roberts, at 14.

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[49] My characterization.

[50] Alito at 1. Apparently unwilling to expand the legal definition of "piracy" beyond that of an 18th century pirate.

[51] Breyer, J., filed an opinion, concurring in the judgment, in which Ginsburg, Sotomayor, and Kagan, JJ., joined.

[52] Breyer, at 1.

[53] *Id*.

[54] *Id*., and at 7.

[55] "[F]or purposes of civil liability, the torturer has become -- like the pirate and slave trader before him -- *hostis humani generis,* an enemy of all mankind." Breyer, at 2, quoting Sosa, at 732, quoting Filartiga, at 890.

[56] *Id*. at 2, Sosa at 724-25.

[57] *Id*. at 3.

[58] *Id*.

[59] *Id.* at 4. Breyer notes adverse foreign policy risks in cases such as "the Barbary Pirates, the War of 1812, the sinking of the *Lusitania*, and the Lockerbie bombing" to deny a viable sea/land distinction. *Id*. at 5.

[60] *Id*. "Nothing in the statue or its history suggests that our courts should turn a blind eye to the plight of victims in that 'handful of heinous actions.'" *Id*. at 8.

[61] *Id*. at 6.

[62] Restatement (Third) of Foreign Relations Law, Section 402(1).

[63] *Id*., Section 402(2).

[64] *Id*., Section 402(3) and Section 402(4).

[65] *Id*. Section 404. "[A] state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade," and analogous behavior. Breyer, at 7.

[66] *Id*. at 7.

[67] Filartiga, 630 F. 2d 876 (2d Cir. 1980) and Marcos, 25 F. 3d 1467, 978 F. 2d 493, both approved in Sosa, at 732.

[68] Breyer at 10-11. Even including "'universal' criminal 'jurisdiction.'" *Id*. at 11.

[69] *Id.* at 14, quoting Roberts at 13.

[70] *Id*. at 14-15.

[71] Oona Hathaway, *Kiobel Commentary: The door remains open to "foreign squared" cases*, SCOTUSblog (Apr. 18, 2013, 4:27 PM), http://www.scotusblog.com/2013/04/kiobel-commentary-the-door-remains-open-to-foreign-squared-cases/.

[72] *Id*.

[73] *Supra* note 1 at 14.

[74] Such as in Somalia. *See* Billy Kenber, *Life sentences recommended for Somali pirates*, WASHINGTON POST (August 2, 2013) http://articles.washingtonpost.com/2013-08-

02/world/41002236_1_jean-adam-robert-riggle-somali-pirates

[75] The U.S. Supreme Court has already denied jurisdiction in another foreign cubed case this term, Daimler AG v. Bauman, No. 11-965, 134 S. Ct. 746, 187 L. Ed. 2d 624, 2014 U.S. LEXIS 644 (2014). A number of lower courts have denied jurisdiction following *Kiobel.* Steve Nickelsburg, *A Continuing Trend To Define Scope of Kiobel*, LAW360, NEW YORK (Jan. 16, 2014, 12:48 AM), http://www.law360.com/articles/500958/a-continuing-trend-to-define-scope-of-kiobel.

[76] Cf. Joe Sexton, *Reviving Kitty Genovese Case, and Its Passions*, N.Y. TIMES (July 25, 1995) http://www.nytimes.com/1995/07/25/nyregion/reviving-kitty-genovese-case-and-its-passions.html