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INTRODUCTION FOR THE GOODWIN SEMINAR ARTICLES: TRADE WINDS IN CARIBBEAN LAW— EVOLUTION OF LEGAL NORMS AND QUEST FOR INDEPENDENT JUSTICE

JANE E. CROSS*

During the fall semester of 2004, Nova Southeastern University Shepard Broad Law Center (NSU Law Center) devoted its Goodwin Seminar series to an examination of emerging legal trends and institutions in the Commonwealth Caribbean. Accordingly, the seminar series invited a number of speakers to explore the ongoing legal reform and change within the region. Along these lines, the Goodwin Seminar speakers provided insights into the long-term efforts to address contemporary national, regional, and international concerns by advancing Caribbean law and legal institutions. These innovations have culminated with such historic regional undertakings as the inauguration of the Caribbean Court of Justice (CCJ) scheduled for April 2005 and the establishment of the Caribbean Single Market and Economy (CSME).

The speakers for the Goodwin Seminar were selected in order to provide a full variety of perspectives on the current legal developments in the Caribbean. As the list below indicates, the featured speakers included individuals from the legal academy, government, judiciary, and the legal profession. NSU Law Center was honored to host the following distinguished speakers:

- The Honorable Dr. Kenny Anthony, Prime Minister of St. Lucia;
- Dr. Rose-Marie Belle Antoine, Director of the Master of Law Program at the University of the West Indies and a Senior Lecturer in Law;
- C. Dennis Morrison, Q.C., Partner, DunnCox Law Firm, Kingston, Jamaica;
- The Honorable Mia Amor Mottley, Q.C., M.P., Deputy Prime Minister, Attorney General and Minister of Home Affairs, Barbados; and
- Sir David A. C. Simmons, K.A., A.C.H., Chief Justice of the Supreme Court of Barbados.

Nova Law Review has graciously consented to publish the papers of four of these speakers – Dr. Antoine, Mr. Morrison, Minister Mottley, and

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Chief Justice Simmons. This issue of the *Nova Law Review* includes the papers of Dr. Antoine and Chief Justice Simmons.¹ The remaining two papers by Mr. Morrison and Minister Mottley will be published in a forthcoming issue of *Nova Law Review*. For that reason, these two papers are not referenced below. This introduction does, however, reference points from the unpublished keynote address by Prime Minister Anthony.

As underscored by each of the Goodwin speakers, the Commonwealth Caribbean community is undergoing a post-colonial renaissance as shown by its emerging legal institutions and identity. Caribbean institutions and the actors within those institutions have continually explored the bounds and parameters delineating the character of Commonwealth Caribbean jurisprudence. By themselves, such efforts would prove highly significant. These legal initiatives, however, are now taking shaping in an increasingly collaborative environment in the Caribbean. Most importantly, these endeavors seek to benefit all of region's parts, by strengthening the whole. At the core of this effort is the establishment of the CSME. The establishment of the CSME will be reinforced by the coincidental establishment of the CCJ. Thus taking all of these trends together, the consolidation of regional self awareness with this remarkable culmination of the legal philosophy and organization will categorically transform law and the legal systems in the Caribbean.

The first featured Goodwin Visiting Professor is Dr. Rose-Marie Belle-Antoine who is Director of the Master of Law Program at the University of the West Indies and a Senior Lecturer in Law. In addition to these positions, she works as an attorney-at-law and has worked as international legal consultant on projects that have included international organizations such as the ILO, the World Bank, UNICEF and the Inter-Development Bank.

Dr. Antoine received her LL.B. with honors from the University of the West Indies, Barbados and her Legal Education Certificate from the Norman Manley Law School in Jamaica. She continued her studies in England, earning her LL.M. with distinctions at Cambridge University and her Doctorate in Law from Oxford University. To add to those distinctions, Dr. Antoine is the recipient of a Certificate in International Human Rights Teaching from the Centre for International Human Rights Teaching in France, and a Diploma in International Human Rights Law from the International Institute of Human Rights at the Court of Human Rights in Strasbourg, France.

1. The author would like to offer profound gratitude to the Krista Kovalcin, Katherine Miller, Christopher Sprague, and Nicole Velasco for all of their efforts on behalf of these authors.

In 1999, she completed her doctoral thesis on *Legal Issues in Offshore Finance*.² Since then, she has written a number of books on this subject, including *Legal Aspects of Offshore Finance Law*,³ *Trusts and Related Tax Issues in Offshore Financial Law*,⁴ and *Confidentiality in Offshore Financial Law*.⁵ Dr. Antoine has also authored numerous chapters and articles for a variety of publications, including the *Caribbean Law Bulletin*, the *Caribbean Law Review*, the *Oxford Journal of Legal Studies*, and the *International and Comparative Law Quarterly*. Her most recent book is *Commonwealth Caribbean Law and Legal Systems*, second edition, scheduled for publication in August 2005.⁶ Finally, in addition to being the Leo Goodwin Senior Chair in Law, Dr. Antoine has received numerous awards and honors, and has represented Barbados and the Caribbean as an official delegate at regional and international conferences.

In her paper, entitled, *Waiting to Exhale: Commonwealth Caribbean Law and Legal Systems*, Dr. Antoine provides a brief overview of Caribbean legal system from a historical perspective.⁷ In this section, she explores the psychological legacy of slave societies and its influence of the adoption of British jurisprudence without fully adapting these norms and institutions to the diverse demands of Caribbean society.⁸ In the remainder of her paper she delves into four momentous legal themes in the region. These are: (1) the replacement of the English Judicial Committee of the Privy Council with the Caribbean Court of Justice;⁹ (2) the controversial issue of the constitutionality of the death penalty in the Caribbean;¹⁰ (3) the innovative legal régime of the offshore financial sector;¹¹ and (4) the legal transformation need for political and economic regional integration.¹² Throughout her article, she dis-

2. Dr. Rose-Marie Belle Antoine, *Legal Issues in Offshore Finance* (1999) (unpublished thesis) (on file with author).

3. ROSE-MARIE BELLE ANTOINE, *LEGAL ASPECTS OF OFFSHORE FINANCE LAW: CONFIDENTIALITY IN OFFSHORE FINANCE LAW & OFFSHORE TRUSTS AND RELATED TAX ISSUES IN OFFSHORE FINANCIAL LAW* (2005).

4. ROSE-MARIE BELLE ANTOINE, *TRUSTS AND RELATED TAX ISSUES IN OFFSHORE FINANCE LAW* (2005).

5. ROSE-MARIE BELLE ANTOINE, *CONFIDENTIALITY IN OFFSHORE FINANCIAL LAW* (2002).

6. ROSE-MARIE BELLE ANTOINE, *COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS* (Cavendish Pub. Ltd. 2000) (1999).

7. Rose-Marie B. Antoine, *Waiting to Exhale: Commonwealth Caribbean Law and Legal Systems*, 29 NOVA L. REV. 139 (2005).

8. *Id.* at 141–42.

9. *Id.* at 144–50.

10. *Id.* at 150–54.

11. *Id.* at 154–61.

12. Antoine, *supra* note 7, at 162–64.

cusses the factors supporting the impetus for legal evolution within the Caribbean and also highlights the internal and external forces that both seek to support and inhibit such change.¹³ Overall, Dr. Antoine's article provides judicious insight into the critical contemporary challenges facing Caribbean Law and Legal Systems.¹⁴

The second featured Goodwin Visiting Professor is Sir David A.C. Simmons, who became the twelfth Chief Justice of Barbados on January 1, 2002. Justice Simmons is a graduate of the Faculty of Law at the London School of Economics where he received his L.L.B. (with honors) in 1963 and was the first Barbadian to receive his L.L.M. awarded in 1965 from the University of London. He is also a barrister of Lincoln's Inn. Sir David Simmons has lectured law in London and at the Faculty of Law of the University of the West Indies (UWI). In June 2003, he became an Honorary Fellow of the UWI. In December 2003, he was the first Caribbean person ever awarded an honorary L.L.D. by the University of London.

Sir David Simmons has had an impressive career as an attorney, Member of Parliament, and Attorney General in Barbados. He was appointed Queen's Counsel in Barbados in February 1984, served in the Parliament of Barbados from February 1976 to August 2001, and served twice as Attorney General of Barbados from 1985 to 1986 and from 1994 to 2001. On several occasions during the latter period as Attorney General, Sir David Simmons acted as Prime Minister of Barbados. Due to his distinction in public service and politics, in January 2001 he was awarded the Barbados Centennial Honour (B.C.H.), and on November 30, 2001, he received Barbados' highest national honor when he was named a Knight of St. Andrew (K.A.).

As Attorney General, Simmons has chaired numerous committees, initiatives and conferences, including the Caribbean Financial Action Task Force (1997/98), the Regional Committee for the Establishment of a Project for Maritime Cooperation Against the Traffic in Illicit Narcotic Drugs in the Caribbean (1999-2002), the Preparatory Committee to Establish the Caribbean Court of Justice (1999-2001), the Regional Judicial and Legal Services Commission (2003-2004), EU/Caribbean Conference (1996), and the Joint U.S./Caribbean Sub-Committee(1997). He has also represented Barbados at regional and international forums and is the author of numerous papers and publications.

In the *Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, Sir David Simmons describes the historical background leading to

13. *Id.*

14. *Id.* at 140.

the planned inauguration of the CCJ.¹⁵ In this paper, he also explores a series of arguments supporting and opposing the establishment of the CCJ,¹⁶ and justifies the designation of the CCJ as a court *sui generis*.¹⁷ Justice Simmons then explains (1) the impetus the CCJ will create to upgrade regional and local justice systems,¹⁸ and (2) the process of severing links with the JCPC.¹⁹ He then briefly outlines some final steps to the anticipated inauguration of the CCJ in 2005.²⁰ He ends by concluding that the creation of the CCJ “will complete our independence and finally remove the self-doubt and lack of self-confidence which have been deeply ingrained in the psyche of our former colonial peoples.”²¹

The themes elaborated by Dr. Antoine and Justice Simmons were reinforced by the insightful remarks of Prime Minister Kenny Anthony during his keynote address during the Goodwin Seminar series. Elected Prime Minister of St. Lucia in 1997, Dr. Anthony is an educator, former General Counsel to CARICOM, and leader of the St. Lucia Labour Party. In this keynote address, Prime Minister Anthony noted that although much of the opposition to the establishment of the CCJ comes from the notion that it will be a “hanging court,” this has never been the primary goal or purpose of the CCJ.²² He explained that while the series of death penalty cases beginning with *Pratt v. Attorney General*²³ have intensified both support for and opposition to the CCJ, the efforts to establish the CCJ pre-date this seminal decision.²⁴ In addition, Prime Minister Anthony noted other compelling reasons for the establishment of the CCJ, such as creating affordable access to justice,²⁵ transforming Caribbean jurisprudence,²⁶ and fostering a Caribbean legal culture.²⁷ He also explained that the establishment of the CCJ will be critical to ensuring the success of the CSME.²⁸ He stated that without the CCJ, “[c]ompeting

15. Honorable Sir David Simmons, *The Caribbean Court of Justice: A Unique Institution of Caribbean Creativity*, 29 NOVA L. REV. 169 (2005).

16. *Id.* at 177–84.

17. *Id.* at 186–93.

18. *Id.* at 195.

19. *Id.* at 196.

20. Simmons, *supra* note 15, at 196–97.

21. *Id.* at 198.

22. Kenny D. Anthony, Establishment of the Caribbean Court of Justice: The Political and Legal Imperatives, Address at the Nova Southeastern University Shepard Broad Law Center Goodwin Seminar 4–5 (Oct. 7, 2004).

23. (1993) 43 W.I.R. 340.

24. Anthony, *supra* note 22, at 3–9.

25. *Id.* at 13–14.

26. *Id.* at 14–15.

27. *Id.* at 15–16.

28. *Id.*

judicial interpretations [of the CSME] could cause confusion, uncertainty and delay.”²⁹ He ended by noting that ultimately while the CCJ has been designed to be insulated from political interference, the support or opposition to the CCJ rests with one’s belief or disbelief in the personal integrity of the appointed justices.³⁰

It is notable that all of the speakers in this Goodwin Seminar series expressed strong optimism in the impending establishment of the CCJ. Following the submission of the papers by Dr. Antoine, Chief Justice Simmons, and Prime Minister Anthony, however, the establishment of the CCJ suffered a major setback due to a decision by the JCPC delivered on February 3, 2005 in *Independent Jamaica Council for Human Rights (1998) Ltd. v. Marshall-Burnett*.³¹ In this decision, the JCPC struck down three acts passed by Jamaican Parliament in 2004.³² These acts were: (1) the Caribbean Court of Justice (Constitutional Amendment) Act 2004, Act 20 of 2004,³³ (2) the Caribbean Court of Justice Act 2004, Act 21 of 2004,³⁴ and (3) the Judicature (Appellate Jurisdiction) (Amendment) Act 2004, Act 19 of 2004.³⁵ Respectively, these acts were passed (1) to replace the Privy Council with the CCJ as the final court of appeal from decisions by the Jamaican Court of Appeal,³⁶ (2) to implement in Jamaica the CARICOM Agreement Establishing the Caribbean Court of Justice as amended by the Protocol to that Agreement Relating to the Juridical Personality and Legal Capacity of the Court,³⁷ and (3) to substitute the Deputy of Public Prosecutions’ right of appeal to the Privy Council in criminal cases with the right of appeal to the CCJ.³⁸

The Privy Council held that the first two acts described above effectively amended entrenched provisions of the Jamaican Constitution.³⁹ As such, the acts could not take effect by a mere majority of the parliament, but required a two-thirds vote as required by the Jamaican Constitution.⁴⁰ In addition, the passage of amendment to an entrenched provision requires a six-month lapse between the bill’s introduction into and passage by Parlia-

29. Anthony, *supra* note 22, at 20.

30. *Id.* at 23.

31. [2005] U.K.P.C. 3, available at <http://www.privacy-council.org.uk/files/other/independent%20jamaica.jud.rtf>.

32. *Id.* ¶ 24.

33. *Id.* ¶ 5.

34. *Id.* ¶ 6.

35. *Id.* ¶ 8.

36. *Marshall-Burnett*, [2005] U.K.P.C. 3, ¶ 5.

37. *Id.* ¶ 6.

38. *Id.* ¶ 8.

39. *Id.* ¶ 21.

40. *Id.* ¶ 10.

ment.⁴¹ Finally, amendment of an entrenched provision requires approval by the majority of the Jamaican electorate.⁴² Although the third act did not amend an entrenched provision and could be affected by a majority vote in the Parliament, that constitutional amendment was voided as well.⁴³ The reason for its voiding was that this legislation was inextricably linked to the first two acts and, therefore, could not accomplish its intended effect if severed from the two voided acts.⁴⁴ As such, the Privy Council held that all three acts were void due to unconstitutionality.⁴⁵

With the delivery of this inopportune judgment by the Privy Council, the Caribbean Court of Justice has a more difficult future. More notably, the implications of this opinion once again shine a glaring light on the jarring effect of some Privy Council pronouncements. In essence, this case encapsulates the jurisprudential tension at the heart of the efforts to establish the Caribbean Court of Justice. As noted by Dr. Antoine in her paper, there remains a question of the impartiality of the Privy Council.⁴⁶ This issue of impartiality takes center stage in this most recent case even though the Privy Council expressly stated that “it must be understood that the Board [of the Privy Council], sitting as the final court of appeal of Jamaica, has no interest of its own in the outcome of this appeal. The Board exists in this capacity to serve the interests of the people of Jamaica.”⁴⁷

Accordingly, despite the inexorably long historical march to the establishment of the CCJ, as outlined by Dr. Antoine and Justice Simmons, the Commonwealth Caribbean must continue its struggle at the doorstep of full regional judicial autonomy.⁴⁸ Correspondingly, judicial colonialism, though slated for death by the agreement to establish the CCJ, cannot yet be dealt its death knell because its execution has been temporarily stayed due to the intervention of the Privy Council. It is doubtful that this irony will be overlooked by proponents of the CCJ.

In the aftermath of the JCPC pronouncement, the process to establish the CCJ may falter somewhat, but will unquestionably continue. Edwin W. Carrington, the Secretary General of CARICOM, has stated that “[t]here is as yet no indication that the Privy Council’s ruling on Jamaica’s legislation introducing the Caribbean Court of Justice (CCJ) would delay the establish-

41. *Marshall-Burnett*, [2005] U.K.P.C. 3, ¶ 10.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at ¶¶ 22, 24.

46. Antoine, *supra* note 7, at 149.

47. *Marshall-Burnett*, [2005] U.K.P.C. 3, ¶4.

48. See Antoine, *supra* note 7; Simmons, *supra* note 15.

ment of the Court by CARICOM Governments.”⁴⁹ In addition, P.J. Patterson, Prime Minister of Jamaica, issued in part the following statement in reaction to the JCPC decision: “[t]he Jamaican Government remains committed to the establishment of the CCJ as our final appellate court. It intends to take the necessary steps, arising from this decision to honour our commitments to the Jamaican people and our partners in the region.”⁵⁰

As this process to establish the CCJ continues to evolve and face new challenges, there will be a recurring need for academic forums to explore and discuss these salient topics both within and without the Caribbean region. Thus, although this Goodwin Seminar series at NSU Law Center undertook to contribute to the discussion of the evolving legal norms and institutions in the Caribbean, clearly the dialogue will expand to explore new possibilities, processes, and understandings.

ACKNOWLEDGEMENT OF SUPPORT FOR THE FALL 2004 GOODWIN SERIES

As always, the success of any undertaking like the Goodwin Seminar involves the collaboration and cooperation of a number of dedicated individuals. First, I would like to thank Dean Joseph Harbaugh and Associate Dean Bill Adams for entrusting me with this important responsibility. Next, I would like to give my profound thanks to Linda Lahey, Michelle Hurley, and Deborah Brown who were all invaluable in organizing and coordinating the seminar events. I would also express my deep appreciation to Paula Habib, Eleanore Jones, Richard Corbyons, and Jessica Chacon for their considerable help in carrying the administrative load created by the series. I would also like to thank Rhonda Gold for her wonderful support and creation of the Goodwin display in the Law Library. Also from the Law Library, I give my thanks to its Director, Lisa Smith-Butler, and its Assistant Director, Roy Balleste, for their kind assistance. Finally, I thank Ray Andrade for providing fantastic audiovisual support.

In addition, there were many faculty members, students, and others who provided me with support and encouragement throughout this series. First, I extend my thanks to the entire law faculty for supporting this series in innumerable ways. I would especially like to thank Kathy Cerminara, Linda Har-

49. Press Release 32/2005, Caribbean Community Secretariate, CARICOM States Move to Establish CCJ on Schedule (Feb. 4, 2005) available at http://www.caricom.org/pres32_05.htm (last visited Feb. 23, 2005).

50. Press Release, Jamaica Information Service, Statement by Prime Minister of Jamaica the Most Honourable P. J. Patterson, ON, PC, QC, MP on the Privy Council Decision in the Litigation Concerning the Caribbean Court of Justice (Feb. 3, 2005) available at <http://www.caricom.org/newsflash-ccjruling-ja.htm> (last visited Feb. 23, 2005).

rierson, Carolyn Nygren, Stephanie Aleong, and Alina Perez. I also express my sincere appreciation to the students who lent their support to me in this effort including, but not limited to, Alvin Abraham, Nerina Smart, Sophia Lopez, and Lawrence Eberst. I also extend my appreciation to all of the members of the Caribbean Law Students Association.

In addition, I thank the various members of administrative staff who graciously assisted me in making arrangements for the speakers in the Goodwin Seminar. This group of extraordinarily patient and tolerant individuals included Cecelia La Corbinere (Prime Minister Anthony); June Christian (Justice David Simmons); Hazel Mederick (Minister Mottley); and Deborah Cadogan (Minister Mottley)

Last, but not least, I extend my thanks to those members of the Caribbean-American Community who supported this series. Among them are the Consul Generals from Barbados, Ed Bushnell, as well as the Deputy Consul General Joyce Bourne, from St. Lucia, Kent Hippolyte and from Jamaica, Ricardo Allicock and his assistant Cheryl Wynter. I would also like to thank Stephen Vaughn, Pamela Gordon, Dahlia Walker, and Marlon Hill of the Caribbean Bar Association for their support of the Goodwin Seminar. Finally, I thank Dr. Rovon Locke for his conscientious coverage of the seminar events in the Caribbean-American Commentary Newspaper.

WAITING TO EXHALE: COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS

DR. ROSE-MARIE B. ANTOINE*

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I. INTRODUCTION: THE ANATOMY AND CONTEXT OF COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS

This is an exciting and appropriate time to be discussing Commonwealth Caribbean legal systems. We stand at the very crossroads of a Caribbean revolution in legal development. At this juncture, we have several important choices to make, and our future will be determined by the wisdom of those choices as we attempt to define our place in the world. I suggest that we have never had a more opportune time to create an independent legal philosophy, whilst at the same time, steaming ahead to forge a unified Caribbean identity. Caribbean legal systems can be said to be at the boiling point. Perhaps there has been no other time in our history when every Caribbean man and woman is aware of, and has a stake in, the directions in which our laws and legal policies are going. Whether we are speaking about the retention of the death penalty, or the abolition of appeals to the English Privy Council, or the Caribbean Single Market and Economy (CSME), or changes in our official financial system brought about by blacklisting attempts of the world community, the latter which impacts directly on employment opportunities, we all relate intimately with and participate directly in these developments.

And at this crossroad—whilst we stand, waiting to exhale—the relationships which we have with the rest of the international community, through our practices and our legal system, are very much swinging in the balance. It is appropriate, therefore, that I should be addressing my remarks to an external audience, in a country and state with which the Caribbean has had very many links, and with which there are many similarities, not just in hurricane impacts, but in our very legal history, in some of the judicial patterns which we may in the future emulate and, unfortunately, some of the problems which we face.

While this is a huge topic, I will contain my discussion to four main areas: 1) the turning away from the Privy Council to an indigenous final Caribbean Court of Appeal and jurisprudence; 2) Constitutional Reform arising from the death penalty and other social problems, such as gender; 3) the impact of the offshore financial sector and its contribution to our legal development; and 4) initiatives toward political and economic unity which necessitate law reform and possible harmonization of laws in the region.

What we find is that there are common denominators in all four of these main areas. They are issues of political sovereignty, economic problems, and even questions of economic survival. These underline the vulnerable status and place of small developing countries in the world. It should also be

noted that some of our main discussion areas are closely intertwined. I suggest that an important thread running through our analyses is the extent to which small, poor, developing nations such as ours have the freedom and the flexibility to fully define the legal systems therein. This may, at first blush, seem to be an alarmist, rather extreme position, but upon closer examination, we shall see that there are important truths and realities to be ascertained.

When we speak of difficulties in defining and shaping the legal systems in the region, we are not, of course, speaking of the kind of legal displacement that can occur when one country invades or intervenes into another smaller, weaker country. That brings its own dynamics and is certainly something which occurred very early in our legal history, although the existence of the legal and political systems of the original peoples is hardly even acknowledged.¹ Here, legal displacement may be far more subtle and may even be welcomed with open arms; in some cases, it is self-perpetuating. First, however, a brief description of Commonwealth Caribbean legal systems and legal infrastructure is outlined.

II. DESCRIPTION OF COMMONWEALTH CARIBBEAN LEGAL SYSTEMS

The Commonwealth Caribbean region is made up of a number of small democratic states, over fourteen of them having formed themselves into a loose political community, called the Caribbean Community (CARICOM).² Only a few countries in the region are still dependent territories of the United Kingdom, among them Anguilla, the British Virgin Islands, the Cayman Islands, and Montserrat. These are associated members of CARICOM, with the exception of Montserrat, which is a full member.³ There are current initiatives toward formal economic integration and more formal political ties, but the principle of autonomous self-government for each one of these states is likely to be retained. The governmental system, the Westminster Parliament system, including its traditions of political and legal conventions, fol-

1. Nor did the legal systems of early European conquerors like the Spanish, French, Portuguese, or Dutch endure except in isolated cases, such as in St. Lucia and Guyana.

2. See Caribbean Community Secretariat, *The History of CARICOM*, at <http://www.caricom.org/archives/caricom-history.htm> (last visited Dec. 14, 2004) [hereinafter *History of CARICOM*]. Originally, CARICOM was made up of only English speaking states which are part of the Commonwealth, but more recently, non-English speaking states, such as Suriname and Haiti, have become members. *Id.*

3. Caribbean Community Secretariat, *Caricom Members & Associate Members*, at <http://www.caricom.org/members.htm> (last visited Dec. 14, 2004).

lows closely the model set out by England, the former coloniser of the Commonwealth Caribbean.⁴

The region can boast of enviably high levels of literacy and often quality education, particularly at the primary and secondary school levels, also inherited from the British.⁵ Although the Caribbean has a relatively small population, there have been three Nobel Prize winners. Incredibly, two come from the same country, the tiny nation of St. Lucia (150,000 people), for Economics and Literature, and recently a third, for literature, from Trinidad and Tobago.

Commonwealth Caribbean legal systems, like United States' legal systems, were born out of our English colonial heritage, ensuring that the shape and flavour of our law is largely the common law legal tradition. I say largely because the history of conquest in the region was a very colourful one, with many of our countries changing hands between the French, Spanish, and English. This means that not only English law was received but, at least initially, so was the civil law. Only Guyana and St. Lucia have retained aspects of the civil law. In the case of St. Lucia, the country (called the Helen of Troy of the West) changed hands between the English and French fourteen times, resulting in a hybrid legal tradition. This may be described as a unique mixture of the English common law, French civil law, and indigenous law, facilitated by a bond with all things French and the development of a French Kweyol language.⁶

The experiences of slavery, also a feature of United States historical development, have perhaps had a more direct impact on our legal systems than those of the United States. This is because the ancestors of African slaves form a larger percentage of our population than in the United States. Thus, they are not the minority but the majority, a consequence which arguably has very positive consequences, but which, understandably, make the negative experiences of slavery more enduring.

4. See *History of CARICOM*, *supra* note 2. While there are now two non-English speaking CARICOM members, this paper confines itself to a discussion of the legal systems of the Commonwealth Caribbean.

5. Ironically, a recent trend is that some British parents have been sending their children to the Caribbean to obtain their grounding in education because of concerns that the education system at that level in the United Kingdom is inadequate. See Gareth Rubin, *Passport to Better Learning*, THE INDEPENDENT, July 1, 2004, at <http://education.independent.co.uk/schools/story.jsp?story=536879>.

6. For further reading on the hybrid legal system of Saint Lucia, see Kenny D. Anthony, *The Viability of the Civilist Tradition in St. Lucia: A Tentative Appraisal*, in *ESSAYS ON THE CIVIL CODES OF QUÉBEC AND ST. LUCIA* 33 (Raymond A. Landry & Ernest Caparros eds., Univ. of Ottawa Press 1984).

Thus, the psychological impact and longevity of brutal slave societies has led to what can be described as feelings of insecurity and dependency in our societies today. Perhaps this is the reason why today, we still send our final appeals to the Privy Council located in England and why so many Caribbean people doubt that we can adjudicate final appeals for ourselves in a just manner. Interestingly, this belief that we could not be trusted to do things right for ourselves was one of the reasons why, upon independence, we ended up with written constitutions which secured rights and created obligations, instead of continuing with the pure Westminster model of unwritten constitutions. Independence was attained for most states during the 1960s and 1970s, making the countries in question exceedingly young nations.

Our ex-slave societies may also be described as apathetic, as a result of the enduring alienation that Caribbean peoples, the governed, feel with those who govern. There is a sense of disconnect, a feeling that we do not and cannot control our own destiny and that our voices are not heard. I would suggest that although this may be changing in relation to models of government, it is being substituted for the growing feelings of helplessness that so called Third World countries feel in relation to international economics and politics. In those paradigms, small developing countries have little voice and little control over their destinies. We see this, for example, in the negative way in which free trade law constructs have impacted upon our banana industries, our sugar industries, and even our international financial services sector.

These human traits in our societies perhaps best explains the failure to “strike out . . . and mould” the common law to “suit [our] needs” and development.⁷ We remain today, largely “mimic men”⁸ in terms of our legal development, an unhappy stance which is much lamented but which is changing too slowly. Few proactive initiatives, from either our judges or our practitioners, are taken to rectify this situation. Unlike the United States, which took the English common law and created vibrant, sometimes radically new legal concepts, interpretations, and precedents, Commonwealth Caribbean courts and jurists still rely heavily, almost totally, on English precedent. More recently, we have sometimes substituted English law with European Law and U.S. law, particularly in relation to human rights issues.

7. *Persaud v. Plantation Versailles*, [1971] 17 W.I.R. 107, 118 (Guy. C.A.). *Persaud* is a well-known case in the Caribbean.

8. V.S. NAIPAUL, *THE MIMIC MEN* (1967). The term “mimic men,” as used to describe West-Indians, was made famous by Sir V.S. Naipul, who is also the Nobel Prize Winner for literature from Trinidad and Tobago.

It appears that we are successful legal civilisations if we judge ourselves by how admirably we have retained and maintained the English justice that we inherited or, more accurately, was thrust upon us. However, we are failures by our inability to put our own stamp, our own face, on our justice. Ultimately, law is meant to reflect society and to engineer society. Yet, our law still looks very alien and foreign to many.

III. THE ABOLITION OF FINAL APPEALS TO THE PRIVY COUNCIL AND THE INSTITUTION OF A CARIBBEAN COURT OF JUSTICE

I will touch only briefly on this topic, as I am aware that other speakers in the Goodwin Seminar will speak exclusively on it. Suffice it to say that after decades of talking, we are at the doorstep of a new era in adjudication as it appears that the Caribbean Court of Justice (CCJ) will now become a reality in March 2005.⁹ However, not all of the countries of the region have joined the momentum toward sovereign and independent justice by putting an end to final appeals to the Privy Council. Some, like The Commonwealth of The Bahamas, have refused flatly, at least at this juncture, to participate in the appellate jurisdiction of the CCJ.¹⁰ Others, like Jamaica, while their governments have supported the idea,¹¹ have been plagued with much opposition to the cutting of ties with the apparent fountain of justice that is England. It should be noted, however, that all of the independent Commonwealth Caribbean countries will participate in the original jurisdiction of the CCJ,¹² discussed further below.

This topic has perhaps been the one which has engendered the most emotive responses from Caribbean peoples, particularly attorneys.¹³ At the top of the list are fears that the CCJ will not dispense impartial justice, that it will be too costly, that the region will not be able to choose judges based on merit, that those judges will not be competent enough to make right deci-

9. Press Release, Caribbean Community Secretariat, Postponement of Inauguration of the Caribbean Court of Justice (CCJ) (Oct. 11, 2004), at http://www.caricom.org/press-releases/pres157_04.htm.

10. Response by the Hon. Fred Mitchell, Minister of Foreign Affairs, to FNM's Spokesman on Caribbean Single Market and Economy (Aug. 26, 2003) at http://www.bahamasuncensored.com/csme_response.html.

11. HUGH RAWLINS, THE CARIBBEAN COURT OF JUSTICE: THE HISTORY AND ANALYSIS OF THE DEBATE 5 (2000), http://www.caricom.org/archives/ccj_rawlins.pdf.

12. Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2000, art. II, <http://www.caricom.org/archives/agreement-ccj.pdf> [hereinafter CCJ Agreement].

13. Caribbean Court of Justice, *About the Caribbean Court of Justice*, at <http://www.caribbeancourtsofjustice.org/abtccj.htm> (last visited Dec. 16, 2004) [hereinafter *About the Caribbean Court of Justice*].

sions, and that the larger countries in the region will dominate the court.¹⁴ We can observe the preponderance of the reasons that seem connected to my earlier points about insecurity and dependency which plague us as a people in our moves toward development.

While the driving forces behind the CCJ deny that it is a direct response to unpopular Privy Council judgments which prevented the implementation of the death penalty,¹⁵ there is little doubt that the Privy Council's high-handed approach to constitutional interpretation with regard to the death penalty, and its failure to appreciate the principles by which Caribbean peoples wish to live, have acted as catalysts to the institution of the CCJ. This is but another example of the way in which international forces have plunged us along a path which some maintain that we are not yet ready for.

Yet the CCJ represents so much to Caribbean peoples. Its advocates argue, correctly, that independence should not have a price tag.¹⁶ We also have the positive example of an integrated court in the Organization of Eastern Caribbean States (OECs) Court of Appeal, and a Guyana final court of appeal since that country abolished appeals to the Privy Council many years ago.¹⁷ These existing courts should serve as assurances to Caribbean peoples since they have operated efficiently, and largely without stains of bias or incompetence. Further, an independent Legal Commission has been established to ensure impartiality in judicial selection for the CCJ.¹⁸

A. *Cost of Justice*

The question of cost is not limited to the funding of the CCJ. A grave defect in our legal system is the relatively poor access to justice. Justice is expensive at every level, mainly because of the absence of contingency fees as found in the United States and the glaring absence of adequate legal aid for many matters. This is compounded, of course, by the relatively high lev-

14. *Id.*

15. This began with the landmark decision of *Pratt v. A-G*, [1993] 43 W.I.R. 340 (P.C.), which held that undue delay on death row constituted cruel and inhuman punishment which violated Commonwealth Caribbean constitutions. *Id.* at 359–60.

16. See, e.g., Dorcas White, *Jettison the Judicial Committee? You T'ink It Easy?* (1975) (unpublished paper, on file with the Reserve Collection, Faculty of Law Library, University of the West Indies). However, it should be noted that the CCJ will be funded by external monies, at least initially, which is another instance of our dependence on external factors.

17. See RAWLINS, *supra* note 11, at 5. Information about the OECs Court of Appeal can be found at the Eastern Caribbean Supreme Court website, <http://www.ecsupremecourts.org.lc/> (last visited Feb. 9, 2005).

18. *About the Caribbean Court of Justice*, *supra* note 13.

els of poverty in the region, where litigation is perhaps viewed as a luxury.¹⁹ It is particularly costly where appeals have to be brought to the Privy Council, not the least because the rules of the court dictate that British counsel must be retained.

B. *Indigenous Jurisprudence and the Declaratory Theory*

My own view is that the CCJ has been too long in coming. Its existence is imperative for the embodiment of independence and sovereignty which every society must display and live by. It is also the most viable tool for the encouragement and development of an indigenous Caribbean jurisprudence. Yet, it is the latter which is the most problematic. The crux of the issue is not simply a court located in the region, but a jurisprudence located in the region. I have argued elsewhere that, unless Caribbean jurists mend their ways, in particular, their restrictive approach to precedent and their over-reliance on English law, what we are in danger of seeing is only a change in the complexion of our judges and not of our law.²⁰

This thinking comes from an approach that views the reception of the common law in the most restricted way, holding onto a belief that it is only the House of Lords of England that can legitimately declare the correct principles of the common law. Such a view, which is often expressed by our judges,²¹ results in a very limited opportunity for change and for an evolving jurisprudence. It is in direct contrast to the United State's approach to reception and the evolution of the common law. Caribbean judgments are rarely seen as authoritative. Indeed, they are seldom cited.

C. *Turn Toward United States Law?*

There is another possibility for the direction of CARICOM jurisprudence and legal infrastructure. While we may turn away from an incestuous English jurisprudence, we may seek to find solutions, not so much out of our own creativity and experience, but in the increasingly accessible United States and North American models. This is by no means far-fetched. Cur-

19. A recent view expressed by the Chief Magistrate of St. Vincent and its Magistrate for the Family Court is that legal aid should be available even for family court and divorce matters, as many couples stay together simply because they cannot afford a divorce. First OECS Law Fair, September 17, 2004, Kingstown, St. Vincent. Legal aid, where granted, such as in murder cases, has largely been viewed as inadequate.

20. ROSE-MARIE BELLE ANTOINE, COMMONWEALTH CARIBBEAN LAW AND LEGAL SYSTEMS 249 (reprint 2000) (1999).

21. See, e.g., *Jamaica Carpet Mills, Ltd. v. First Valley Bank*, [1986] 45 W.I.R. 278 (Jam. C.A.).

rently, our constitutional law is heavily informed by United States constitutional law, largely because of the absence of a written United Kingdom constitution upon which to lean.

The convergence toward North American models of legal systems is also seen in the recent adoption of case-management, court practices, and rules borrowed from Canada and which aims to make court adjudication more efficient. Further, we have already seen a high degree of Americanization of the region, aided, no doubt, by our geographical closeness and the dominance of American television and pop culture. That same television is a medium for transmitting models of justice, such as televised trials, racially constructed juries, new rules of evidence, and changing the locations of juries to avoid bias. These may challenge long-held assumptions about the correct (English) way of doing things. Perhaps the day is not too far away when we will be electing judges! There is anecdotal evidence to suggest that the Caribbean layperson has been seduced into believing that the American way is the more relevant and accurate face of justice.

Some options which may be borrowed from the American legal system seem more attractive than others. Contingency fees, for example, may be suitable in societies such as ours where many citizens find the cost of justice to be prohibitive, and where, as noted earlier, legal aid is scarce. It may also have the effect of speeding up the process by encouraging legal counsel to be more time-efficient. In addition, it has been argued that multicultural societies such as ours should be reflected in the composition of our juries, a position which has been resisted under the traditional English jury system, but adopted in the United States.

Similarly, access to court trials on television, a medium which is wholeheartedly embraced in the region, may encourage more inclusion in the adjudication system, in societies whose peoples have traditionally felt that formal channels of justice were closed to them or alienated from them. This is not to suggest, however, that the American model of justice is a panacea for all of the evils of the law and legal systems of the Commonwealth Caribbean. Its relevance and suitability to the region should be carefully scrutinised. Television trials, for example, have great potential to distort truth or sensationalise litigation.

Further, while the doctrine of judicial precedent should fit appropriately into the changing values of a society, the English model of precedent offers more certainty than its U.S. counterpart. Change is necessary in a legal system but it is to be approached rationally and cautiously. Ironically, the Pratt and Morgan controversy arose out of the unusual step to deviate from certain

routes of punishment as laid down by well-established precedent.²² More recently, some Privy Council judges have found it appropriate to speak out against such radical change in favour of a return to a more conservative approach to precedent.²³

D. *Our Unrecognised Contribution to the Privy Council's Jurisprudence*

A point which is seldom made is one that is positive for Caribbean jurisprudence, and this is that Caribbean legal practitioners and Caribbean judges are often those who create the defining precedents in our jurisprudence, although they seldom get the credit. Statistics show that a large percentage of Caribbean Court of Appeal decisions are actually approved by the Privy Council and the reasoning therein merely adopted.²⁴ Yet it is the Privy Council judgments that we cite approvingly and the justices of that court which get the credit for these outstanding jurisprudential creations. This is particularly the case with constitutional jurisprudence. Arguably, England has a relatively undeveloped constitutional jurisprudence because of the absence of a written constitution. Consequently, English judicial personnel may be less *au fait* with constitutional matters than in other areas. Indeed, English jurisprudence has often been at loggerheads with European human rights jurisprudence and the trend is only now changing with the incorporation of the European Convention on Human Rights into English law.²⁵ The fear that our judicial personnel is incapable of forming intellectually adequate arguments is, therefore, grossly inaccurate.

E. *Political Interference*

There is a growing cynicism in our region, which I believe is also reflected in the United States and elsewhere in the world, that politicians cannot be trusted and that they are able to overreach well beyond the boundaries

22. See *Pratt v. A-G*, [1993] 43 W.I.R. 340 (P.C.).

23. See, e.g., *Lewis v. A-G of Jamaica*, [2000] 57 W.I.R. 275, 308 (P.C.) (Lord Hoffmann, dissenting). Interestingly, Lord Hoffmann relies on the practice of the United States Supreme Court of overruling precedent reluctantly. *Id.*

24. The Hon. Mr. Justice M.A. de la Bastide, *The Case of a Caribbean Court of Appeal*, 5 CARIB. L. REV. 401, 403 (1995). Michael de la Bastide is the former Chief Justice of Trinidad and Tobago, and is now the President Elect of the forthcoming CCJ. See Caribbean Net News, *Chief of New Caribbean Court Sworn In* (Aug. 19, 2004), at <http://www.caribbean.netnews.com/2004/08/19/ccj.htm>.

25. E.g., Les P. Carnegie, *Privacy and the Press: The Impact of Incorporating the European Convention on Human Rights in the United Kingdom*, 9 DUKE J. COMP. & INT'L L. 311 (1998).

of what is acceptable and interfere with the judicial process. Little mention is made of the potential for the reverse, where it is the judges who intervene in the political process. It is perhaps an area with which American jurists are more familiar. However, that is a topic beyond the scope of this paper.

In the case of the Commonwealth Caribbean, the fears of political intervention are even less well-founded, as politicians do not even have a stake in the appointment of the judiciary,²⁶ except in rare instances such as at the Chief Justice level in the OECS. The processes are implemented and supervised by independent legal commissions,²⁷ and judges enjoy enviable security of tenure.²⁸ Yet, there is an entrenched and, I believe, largely irrational belief that judges “dance to the bidding” of politicians. Such fears endanger the integrity of the judicial process if we accept the adage that “justice must not only be done but it must be seen to be done.”

Nonetheless, fears that judges are contaminated by the political process are rooted largely in the immaturity of our democracies, which are offshoots of the insecurities discussed earlier. As the democracies and legal systems of the region mature, it is to be expected that the people will have more faith in them. This is yet another argument for the existence of the CCJ: to enable a demonstration of growth in both democracy and the legal infrastructure.

F. *Does the Privy Council Dispense Impartial Justice?*

The question whether the Privy Council can truly be impartial is often raised. Some Caribbean peoples appear fearful about the potential bias of our Caribbean judges but believe unquestionably in Privy Council judges. Nevertheless, we should inquire whether, at least in issues which impinge on sensitive areas, such as international trade, neo-colonialism and even independence, British judges (like all judges) are coloured by their own ideologies. For example, it was the British Privy Council which had to determine whether Rhodesia, now Zimbabwe, could legitimately seize its independence from the United Kingdom.²⁹ Closer to home is the *Mitchell* case, in which the question for the courts was whether the Grenadian revolution had created a state that had political and legal legitimacy.³⁰

26. See CCJ Agreement, *supra* note 12, art. V(3).

27. *Id.*

28. *Id.* art. IX.

29. See Alison Grabell, *New Northern Neighbor? An Independent Quebec, the United States, and the NAFTA*, 2 SW. J. L. & TRADE AM. 265, 276 n.68 (1995) (citing In Re: Resolution to Amend the Constitution, [1981] 1 S.C.R. 753, 755 (Can.)).

30. *Mitchell v R*, [1985] L.R.C. (Const.) 127.

The United States invasion of Grenada never reached the courts, but had it done so, how would the Privy Council have judged it? Reportedly, the Queen of England frowned upon the United States initiative, particularly upon the fact that Grenada was still part of the Empire, which meant that she was the Head of State. The view was that the United States should have sought permission from the United Kingdom first.

These are legal decisions which directly involve or impact political issues. It is not to be expected that judges who decide such issues be devoid of ideological influences. Indeed, it may be a valid expectation that judges who decide such questions should be grounded in an ideological position. Hence, it is even more important for such ideological positions to emanate from within the society upon which the decisions impact, and not from some external societal reality. It is where there are ideological disconnects that legal decisions which are violently opposed by the majority in society occur, as appeared to be the case in the *Pratt and Morgan* decision.³¹

IV. CONSTITUTIONAL REFORM AND THE DEATH PENALTY

The issue of constitutional reform and, in particular, the jurisprudential wrangling over the constitutionality of the death penalty and its execution, is a controversial one in the region. An underlying theme here is the extent to which international norms and pressures have been weighing in on the constitutional development of the Commonwealth Caribbean.

Here, I am concerned not with the substantive issue of the death penalty and its constitutionality, but with its impact on Caribbean legal systems and Caribbean justice. The issue came into focus with the landmark ruling of the Privy Council in *Pratt and Morgan*, which found that the delay that prisoners experienced in having their sentences of death executed was sufficient to constitute cruel and inhuman punishment and thereby violated the constitution.³² This was despite the constitutionality of the death penalty itself and irrespective of the fact that the delay was caused substantially by the appeal processes which the convicted were pursuing. Thereafter, in a line of cases, the Privy Council went further and held that it was unconstitutional to construe the death penalty as a mandatory penalty.³³

These judgments were hugely unpopular in the region, by governments and peoples alike who, by and large, supported the death penalty. Many

31. See *Pratt v. A-G*, [1993] 43 W.I.R. 340, 340 (P.C.).

32. *Id.* at 359–60.

33. See, e.g., *Reyes v. R.*, [2002] 60 W.I.R. 42, 66 (P.C.); *R v. Hughes*, [2002] 60 W.I.R. 156, 225 (P.C.); *Roodal v. Trinidad and Tobago*, [2003] 64 W.I.R. 270 (P.C.); cf. *Boyce v R.*, [2004] 64 W.I.R. 37, 39 (P.C.).

believed that the Privy Council was attempting to force its own belief that the death penalty should be outlawed (which is the position in the United Kingdom) onto Commonwealth Caribbean legal systems. Notwithstanding cries of judicial imperialism made by the general public, it is clear from precedents from the European Court of Human Rights and the United Nations Human Rights Committee that the position on undue delay was one grounded in international law.³⁴ Yet, the judgments displayed a serious disregard for the intent and spirit of the constitutions in question and the will of the Caribbean peoples.

Another telling point is that the judgments also betrayed the dollars and cents implications of Caribbean justice which held such cases to ransom. The slowness of the judicial process is due mainly to a lack of resources which can expedite appeals and, in some cases, the paucity of adequate legal representation. This underscores my earlier point about the impact of problems, that are really about development, on the legal system.

Thereafter, Barbados attempted to amend its constitution to make it more difficult to find the death penalty unconstitutional in any form. Some countries, such as Jamaica and Trinidad and Tobago, also initiated moves to remove themselves from the Optional Protocol to the United Nations Convention on Human Rights and the relevant protocol under the Inter-American System.³⁵ This was to avoid the judicial jurisdiction of these bodies and eliminate the possibility of them finding that the death penalty or its process is often unconstitutional.

A. *Static Construction Through Saving Law Clauses Versus Purposive Construction*

Despite the controversy over Pratt and Morgan and its progeny, these decisions are not really anomalies. We have witnessed many liberal constitutional interpretations by the Privy Council. These cement their oft-quoted sentiments that constitutions are to be given purposive and generous interpretations. They are, therefore, living instruments. Often, these decisions have followed the European Court on Human Rights, so that we can legitimately claim that our focus, at least in constitutional jurisprudence, is international.

34. E.g., Daniel J. Sharfstein, *European Courts, American Rights: Extradition and Prison Conditions*, 67 BROOK. L. REV. 719, 721, 742 n.77 (2002); William A. Schabas, *Mens Rea and the Criminal Tribunal for the Former Yugoslavia*, 37 NEW ENG. L. REV. 1015, 1016 (2003).

35. Sharfstein, *supra* note 34, at 742 n.77 (citing Natalia Schiffrin, *Jamaica Withdraws the Right of International Petition Under the International Covenant on Civil and Political Rights*, 92 AM. J. INT'L L. 563 (1998)).

These purposive constructions are far cries and a welcome relief from earlier constitutional jurisprudence, which interpreted our constitutions as static through the use of saving law or existing law clauses. These are provisions inserted into some of the independence constitutions in order to preserve the English law which existed before independence.³⁶ The narrow interpretation of these clauses was that they did not create new rights or law but merely preserved existing law.³⁷ The very existence of such clauses and their interpretation is perhaps evidence of the fear of self-determination inherent in Commonwealth Caribbean legal systems. This was why in *Collymore v. Attorney General*,³⁸ a case which emerged just after Trinidad and Tobago's independence, the court looked at the right to associate and, in examining whether it embodied within it a right to strike, determined that there could be no right to strike since there had been no such right under the common law.³⁹ In this respect, the critique of the decision relates to the method employed and not necessarily to the result obtained.

B. *Internationalism and the Evolution of Constitutional Jurisprudence*

As noted earlier, the seemingly radical decisions on the death penalty were in line with human rights jurisprudence from international courts and bodies. Increasingly, Commonwealth Caribbean courts, whether local courts or the Privy Council sitting as a Caribbean court, are being influenced by normative standards laid down by notions of international consensus of what are human rights and democratic ideals. Commonwealth Caribbean legal systems conform to the common law approach to international law that international law does not supersede domestic law unless incorporated. However, the courts are more and more adopting, unilaterally, of treaty obligations and values, without benefit of the legislative process.

One lesson we have learned, therefore, is that constitutional jurisprudence and reform can be influenced, not so much by the social ethos—the ground norms of the society, but by external sources and pressures. Once again, Caribbean societies are being shaped by an internationalist, and even metropolitan, point of view of what is right and appropriate for Caribbean peoples. It can happen, of course, because we are not yet completely in control of our own political and economic destinies, and far less of our legal destinies.

36. See Joanna Harrington, *The Challenge to the Mandatory Death Penalty in the Commonwealth Caribbean*, 98 AM. J. INT'L L. 126, 128 (2004).

37. *Id.*

38. [1967] 12 W.I.R. 5 (C.A. Trin. & Tobago).

39. *Id.* at 15.

This is not necessarily a bad thing, as the Commonwealth Caribbean region, as elsewhere, subscribes to the view that there should be basic standards of decency which all nations should share. Yet, locating the threshold for these standards can sometimes produce jurisprudential tensions. This is particularly the case where the constitution is silent or unclear on a particular matter.

Apart from the death penalty, some Commonwealth Caribbean courts have also rejected corporal punishment, grounding their reasoning in the universal norms shared by civilised nations.⁴⁰ In *Hobbs v. The Queen*,⁴¹ for example, the Court of Appeal of Barbados looked to international norms and the evolving standards of civilisation in making its decision that the cat o' nine tails was unlawful.⁴² The court said:

Punishments which are incompatible with the evolving standards of decency that mark the progress of a maturing society . . . Are repugnant . . . What might not have been regarded as inhuman or degrading decades ago may be revolting to the new sensitivities which emerge as civilisation advances.⁴³

Similarly, notions of gender equality, absent or weak in domestic legislation and even in constitutions, have benefited from the courts' awareness of international ideals and their willingness to adopt them. This was the case, for example, in a case on sexual harassment from Trinidad and Tobago.⁴⁴ The Industrial Court looked toward ILO Conventions and international standards of appropriate conduct at the workplace to come to its decision that a co-worker who had sexually harassed another should have been dismissed, as his actions went against good industrial relations practice.⁴⁵

C. *Trend Towards Legislative Supremacy*

Yet more recently, courts, particularly the Privy Council, appear to be re-directing their decisions away from perhaps more abstract ideas of international law and practice to more concrete expressions of legislative will. They are thus turning away from the internationalist trend, preferring instead to give effect to the intent of the legislature, even where that intent seemingly

40. *E.g.*, *Hobbs v. R*, [1991] C.L.B. 45 (Barb. C.A.).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Bank Employees Union v. Republic Bank, Ltd.* (Unreported) No. 17 of 1995, decided March 25, 1996, (Industrial Court) Trinidad and Tobago.

45. *See id.*

violates accepted international values about human rights. This allows domestic law to once again trump over international law, and allows constitutional jurisprudence to be more predictable, albeit more conservative. This is not an undesirable approach as it allows constitutional change to be what it is supposed to be: the rational, reflective expressions of the ideals of the peoples in any particular society as laid down by their representative legislature. In contrast, ignoring the legislative will creates the danger of making law the unpredictable “plaything” of judges influenced by norms which do not always represent that society.

On the question of corporal punishment, for example, in *Pinder v. R*⁴⁶ the Privy Council upheld a judgment of the Court of Appeal of The Bahamas in finding that a law which reintroduced corporal punishment into The Bahamas was constitutional.⁴⁷ This was despite the fact that the courts clearly viewed corporal punishment as inhuman and degrading punishment,⁴⁸ when assessed from the perspective of civilised societies as recognised in the international sphere. Whilst agreeing that constitutions should be interpreted purposively, the Privy Council stated:

If the Court indulges itself by straining the language of the constitution to accord with its own subjective moral values then, as Holmes J. said almost a century ago in his first opinion for the Supreme Court of the United States (*Otis v. Parker*, [187 U.S. 606, 609 (1903)]):

“a constitution, instead of embodying only relatively fundamental rules of right, as generally understood by all English-speaking communities, would become the partisan of a particular set of ethical or economical opinions.”

A constitution is an exercise in balancing the rights of the individual against the democratic rights of the majority. On the one hand, the fundamental rights and freedoms of the individual must be entrenched against future legislative action if they are to be properly protected; on the other hand, the powers of the legislature must not be unduly circumscribed if the democratic process is to be allowed its proper scope. The balance is drawn by the Constitution. The judicial task is to interpret the Constitution in order to determine where the balance is drawn; not to substitute the judges’ views where it should be drawn.⁴⁹

More important perhaps, is the Privy Council’s apparent reversal of its position on the mandatory nature of the death penalty in *Boyce v. The*

46. [2002] U.K.P.C. 46.

47. *Id.* ¶ 18.

48. *Id.* ¶ 4.

49. *Id.* ¶ 14-15.

Queen.⁵⁰ The court found that a law decreeing the mandatory death penalty for murder in Barbados was an “existing law,” and remained constitutional whether or not it was inhuman or degrading punishment.⁵¹ The law was also constitutional despite the fact that it was inconsistent to various human rights treaties to which Barbados was a party.⁵² Surprisingly, the Privy Council in *Boyce* also expressly stated that its earlier decision in the case of *Roodal v. State*,⁵³ which had declared the mandatory death penalty unconstitutional,⁵⁴ had been wrongly decided and should not be followed.⁵⁵

D. Law Enforcement Versus Civil Liberties

But the need for constitutional reform and reflection also conjures up the pressing modern needs of law enforcement and the consequent balancing of individual rights. This is another reference to the United States, whether we are speaking about crime prevention or terrorism. How much of our civil liberties must hang in the balance? Is the death penalty itself a desirable objective in evolved, modern, civilisations? As in the United States, in an increasingly dangerous world “John Q. Public”⁵⁶ is often enthusiastic about law enforcement, even harsh methods such as the death penalty.

V. CONTRIBUTION OF THE OFFSHORE FINANCIAL SECTOR TO LEGAL DEVELOPMENT

It is perhaps to the controversial offshore financial sector that we must turn in order to see our most dramatic legal development. The offshore sector, a hugely important one to the economies of CARICOM, also makes a significant contribution to our legal system. It does this by introducing many new legal concepts and by clarifying and correcting several gaps in the legal framework, not just of our domestic legal system, but internationally.

There is an irony here. Caribbean legal systems have long been criticized as lacking an indigenous jurisprudence and as too eager to copy from the United Kingdom. However, the remarkably successful legislative and

50. [2004] 64 W.I.R. 37, 39 (P.C.).

51. *Id.*

52. *Id.*

53. [2003] 64 W.I.R. 270 (P.C.).

54. *Id.* at 317.

55. *Boyce*, [2004] 64 W.I.R. at 58.

56. “John Q. Public” is a name commonly used to describe an average member of the public. *See, e.g.*, WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1218 (2002).

judicial creations in the area of offshore law⁵⁷ have either gone relatively unnoticed, are not placed in context, or have been severely attacked by powerful onshore nations fearful of the huge financial losses resulting from their citizens investing offshore, and because of the success of offshore jurisdictions at filtering moneys from onshore to offshore. Indeed, many of these innovative legal concepts are in danger because of the concerted efforts by onshore nations and international organizations manned by these nations to discredit and dismantle the offshore industry. This means that these important jurisprudential contributions and their impact on the legal system have not been adequately acknowledged.

A. *The Context of Offshore Legal Infrastructure*

It is suggested here that offshore law, apart from being indigenous, may be seen as a subset of the entire legal system. It is, in a sense, an alternative legal system and one that has been created entirely for foreign investors.⁵⁸ This is a legal infrastructure created purely for commercial reasons. And herein lies the dilemma: it is the very success of the offshore sector in attracting business and income from foreign, wealthier shores that has made it a magnet for confrontation.

I have consistently argued that much of the challenges and attacks made by some developed countries and international organizations, such as the United States, France, and the Organisation for Economic Co-ordination and Development (OECD), on the offshore sector about alleged money laundering, secrecy, unfair tax competition, and so on, has less to do with legal principle and more to do with dollars and cents.⁵⁹ Undoubtedly, some financial impropriety exists within the offshore sector. However, financial impropriety exists in all financial sectors. There is sufficient proof that most impropriety (money laundering, financial transactions that benefit terrorism, etc.) occurs most frequently in the large, metropolitan financial centres of the world, such as New York, London, and Russia, and in the domestic financial sector.⁶⁰ Yet, we have seen a barrage of financial regulations and attacks requiring offshore financial centres, particularly in small developing coun-

57. We may define offshore law as a body of law concerned with investment, financial arrangements, and entities, created by non-residents of a particular jurisdiction primarily for non-residents but structured within that jurisdiction.

58. ROSE-MARIE BELLE ANTOINE, CONFIDENTIALITY IN OFFSHORE FINANCIAL LAW 3 (2002).

59. *Id.* at 41.

60. See, e.g., *Annan Boodram*, The Many Faces of Money Laundering, THE CARIBBEAN VOICE, at <http://www.caribvoice.org/Business/moneylaund.html> (last visited Feb. 21, 2005).

tries, to do much more in the way of self-regulation than these large centres even contemplate.

The unfair tax competition charge emanating from the OECD is well-known.⁶¹ Offshore financial centres were condemned for offering tax incentives to non-residents,⁶² a phenomenon still practised in many “onshore” countries. My explanation is that these large-scale attacks have really had to do with politics and not legal wrongs. Often, there have been objections to legal rules that are well established and which onshore countries themselves follow. One small example is the traditional rule on the non-enforcement of foreign fiscal law.⁶³ Another is the Westminster rule on the legitimacy of tax avoidance, as opposed to tax evasion,⁶⁴ now severely undermined by onshore tax authorities determined to do something about thinning revenue coffers, largely as a result of offshore opportunities. It is also curious that onshore countries have often promoted confidentiality in financial affairs in litigation with other onshore countries and in their own self-interest, but have frowned upon it when utilised by developing offshore jurisdictions.⁶⁵ Similarly, unilateral extraterritorial jurisdiction to reach assets appears to be asserted mainly over offshore jurisdictions, while onshore nations are given the benefit of comity (the respect which one nation gives to the laws of another).

There is, therefore, a constant pressure for offshore centres to change their modus operandi. The required change is really to destroy the legal mutations that have occurred in offshore law and which permit more flexibility in commerce. These mutations, of course, permit some businesses to save on taxes because of more generous tax régimes, which give incentives to non-resident business. The result is that today there have been many changes in the onshore tax régime, and the offshore tax function has weakened.

Nevertheless, flexibility and creativity continue to be the hallmarks of offshore legal régimes, often going much further than onshore laws in accommodating the perceived needs of international business. This is a proactive approach that relies on market demands and does not view law as merely responses to problems after they have arisen. Instead, it is an approach which seeks to create new business opportunities.

We have seen an evolution of current legal principles or radically new ones. Many of these creations speak to true commercial concerns. However,

61. See ANTOINE, *supra* note 58, at 313.

62. ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 20–21 (1998).

63. Gov't of India v. Taylor, [1955] A.C. 491 (H.L.).

64. The Comm'rs of Inland Revenue v. Duke of Westminster, [1936] A.C. 1, 2 (H.L.).

65. See, e.g., *In re Uranium Antitrust Litig.*, 480 F. Supp. 1138, 1143 (N.D. Ill. 1979). But see *United States v. Bank of Nova Scotia*, 691 F.2d 1384 (11th Cir. 1982).

the fact that their *raison d'être* is business and commercial enterprise is no indictment. It is a rationale for lawmaking which is found in several other areas of law. Offshore law is thus no less legitimate because it embodies such a rationale. Indeed, trust law was created to assist wealthy persons from saving their property during war and, later, for tax revenues owed to a needy state. This was the experience of the landed poor in the United Kingdom. Similarly, the creation of the limited liability company in company law was first thought to be unethical and unconscionable, but has now become a staple. Indeed, it may be credited as having elevated company law, since the limited liability company may be viewed as a bastion of capitalism and free enterprise. It has helped to make company law more viable and more relevant.

In the same vein, offshore laws seek to uphold principles and needs of commerce and international business. Thus, they are not out of sync with other areas of commercial law and should be similarly judged. Fortunately, it is being recognised by judges, jurists, and lawmakers elsewhere that offshore law, such as offshore trust law, can elevate more traditional areas of law found onshore.

B. *Transplanting Offshore Law: If You Can't Beat Them, Join Them*

The fruits of the legal evolution, or revolution, created by offshore law are slowly but steadily emerging. Indeed, many of the offshore legal innovations are now being embraced onshore, particularly in trust law. These modifications of traditional onshore law are entering the mainstream because of the existence of offshore legal precepts. The offshore legal solution and its developmental approach has proven so effective and so attractive, that today, even states in the United States have sought to emulate offshore jurisdictions, introducing trust, banking, and tax laws which borrow heavily from offshore legal paradigms. These U.S. developments include asset protection, and trust and tax planning features in six main states: Alaska, Delaware, Montana, Nevada, Rhode Island, and Colorado.⁶⁶ Offshore-type features now also exist to a lesser extent in several other states including: Idaho, Illinois, Maine, Maryland, Arizona, Missouri, New Jersey, Ohio, South Dakota, Virginia, and Wisconsin.⁶⁷ This latter group, for example, instituted “dy-

66. Jesse Dukeminier and James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2003).

67. *Id.* at 1314–15. “Dynasty trust” is a term typically defined as “a trust set up primarily to perpetuate the trust estate for as long a period as possible,” commonly by way “of a chain of life interests.” Lawrence M. Friedman, *The Dynastic Trust*, 73 YALE L.J. 547, 547–48 (1964).

nasty trusts” by abolishing the rule against perpetuities and allowing estate taxes to be deferred indefinitely.⁶⁸ Familiar offshore asset protection features against creditors, challenging forced heirship régimes, and so on, are evident.⁶⁹ Self-settled, protective trusts are now allowed in some of these states solely for non-resident trusts, despite long standing rules in United States courts that such trusts are against U.S. public policy. This, of course, creates a dichotomy under U.S. law. While the rest of the United States adheres to the rule that it is against U.S. policy, it is allowed for non-residents. It begs the question whether it can remain a rule of U.S. public policy.

While these new offshore-onshore states create competition for offshore jurisdictions, they should be welcomed because they demonstrate the credibility, legitimacy, and intelligence of the offshore law approach. Surely, offshore law cannot be effectively challenged if onshore states are now redefining their own legal systems so as to incorporate so-called offshore type laws, which were previously frowned upon. It is evident that these onshore jurisdictions have recognised the success of offshore legal innovations and, in the name of profitability, have decided to join them instead of challenging the legal precepts upon which they are based.

C. *Some Specific Examples of Offshore Law*

Perhaps the most adventurous area of offshore law is the law on trusts. Offshore trusts are more closely aligned to business and companies than their onshore counterparts. Offshore law allows for a host of things that a traditional trust either cannot do, or cannot do effectively. One example is that offshore trust law allows persons from civil law jurisdictions to take advantage of a structure that was traditionally reserved for persons in common law countries.⁷⁰ Apart from simply benefiting from the trust’s three-tiered structure, settlors from civil law jurisdictions may avoid forced heirship or mandatory succession régimes.⁷¹

The trust under offshore law has now become a more viable commercial entity. For example, it permits the abolition or liberalisation of perpetuity

68. See, e.g., Banking Code of Colorado, Title 11, COLO. REV. STAT §§ 11-37.5-103(16), -402 (2003) (providing that non-residents transacting with banks in Colorado incur no state taxes with respect to income from bank deposits, certificates of deposit, purchases of gold, silver, platinum, and other precious metals, foreign currency exchange for U.S. dollars, and other forms of personal, tangible property). See also Qualified Dispositions in Trusts Act, DEL. CODE ANN. tit. 12, §§ 3570-76 (1996).

69. See Qualified Dispositions in Trust Act, R.I. GEN. LAWS §§ 18-9.2-1-7 (2003); Alaska Uniform Custodial Trust Act, ALASKA STAT. §§ 13.60.010-.990 (Michie 2002).

70. See ANTOINE, *supra* note 58, at 179.

71. *Id.*

and accumulation periods, thereby enabling the creation of dynasty trusts. It further allows the creation of purpose trusts, thus abolishing the traditional common law rule that a trust must have identifiable beneficiaries. This rule has often been criticised as being without real justification in a modern commercial environment, and there have been proposals in both Canada and the United Kingdom to change the rule so that it conforms with offshore law.⁷²

These examples of new legal ideas, emanating from the offshore sector and being transplanted to onshore jurisdictions, are evidence of legal development and new directions in Commonwealth Caribbean legal systems. The challenges faced by offshore financial centres in the region also represent tensions evident in these legal systems at the current time.

D. *Conflict of Laws Under Offshore Law*

There have also been dramatic legal accommodations in offshore legal régimes in the area of private international law. The offshore sector has sought to clarify and even create conflict of laws rules. This is particularly the case in relation to trusts, where, traditionally, few such rules existed. These new rules serve a dual purpose. First, appropriate rules of private international law must be clearly identified, so as to avoid confusion in the law. Second, in order for innovative trust law principles to survive, it is imperative that the offshore trust falls under the offshore law régime and not under that of the onshore law. Simply put, the law must be configured so that offshore entities are created and adjudicated by offshore laws which are supportive of the aims of offshore financial régimes.

This, in turn, means that other jurisdictions are able to consider these legislative solutions to gaps in the law as credible legal solutions for onshore trusts also. This is particularly the case as the offshore sector has sought to be in line with the Convention on The Law Applicable to Trusts and on their Recognition as far as possible.⁷³

For example, offshore jurisdictions promote the settlors' choice of law as the proper law of the trust and encourage the insertion of exclusive jurisdiction or forum selection clauses. These are in keeping with the modern position as gleaned from the Hague Convention on the Recognition of

72. See, e.g., David Hayton, *Developing the Obligation Characteristic of the Trust*, 117 Q. REV. 96 (2001); LAW REFORM COMM'N OF B. C., REPORT ON NON-CHARITABLE PURPOSE TRUSTS (1992).

73. Convention on the Law Applicable to Trusts and on Their Recognition, July 1, 1985, U.K.T.S. 14 (1992), 23 I.L.M. 1388 [hereinafter *The Hague Convention on the Recognition of Trusts*].

Trusts.⁷⁴ It also gives priority to the autonomy of the settlor and the owner of property. Conveniently, it allows the settlor to choose the more user-friendly offshore trust law as the proper law. As this is an emerging issue, few courts have advised on it, but the evidence suggests that it is an appropriate approach.⁷⁵

Similarly, courts, even those outside of the region, are beginning to pay respect to offshore law practice. They have begun to accept that the courts of offshore jurisdiction have exclusive jurisdiction over the trust, and that the offshore trust law chosen by the settlor is the proper law. For example, in *Green v. Jernigan*,⁷⁶ a Canadian company made such a choice of law with respect to an offshore trust set up in Nevis, and chose Nevis as the exclusive forum for purposes of jurisdiction.⁷⁷ The court found that there must be a “strong cause” to displace such exclusive jurisdiction clauses.⁷⁸ Such decisions are helpful for the viability of offshore legal régimes, which often hinge on jurisdiction and proper law issues.

E. *Recognition and Capacity Under Offshore Trust Law*

Issues on the recognition of the trust in civil law countries, and the capacity of settlors from civil law countries where there is no trust law to establish trusts are also resolved. Settlors are granted the capacity to create trusts, and legislative mechanisms exist which seek to ensure the recognition of trusts established in this manner. It is perhaps in this area that offshore trusts have made the most impact. The legislative approach of stating clearly that the offshore trust is to be recognized and to be governed by offshore law is now an accepted one validated under the Hague Convention on the Recognition of Trusts.⁷⁹

Thus, offshore trusts are to be recognized under offshore law, whether or not the settlor originates from a civil law jurisdiction. This is traditionally a difficult issue under onshore law. Often, trusts were not recognized or were transformed into some other similar entity, such as the foundation or a type of contract, to enable dealings with civil law settlors. This was the defect that the Hague Convention on the Recognition of Trusts sought to cure.⁸⁰

74. *See id.*

75. *See, e.g.,* Trib., 23 sept. 1997, *Casani v. Mattei*, reprinted in 1 I.T.E.L.R. 925 (1998/99) (Italy).

76. [2003] reprinted in 6 I.T.E.L.R. 330 (Sup. Ct. B.C.).

77. *Id.* at 336–37.

78. *Id.* at 339.

79. *See Casani*, 1 I.T.E.L.R. at 943, 945; *see also* *Re an Isle of Man Trust*, (1998/99) 1 I.T.E.L.R. 103 (Swed. Tax Panel).

80. *See* The Hague Convention on the Recognition of Trusts, *supra* note 73.

In *Casani*, the trust was recognized in Italy although it sought to defeat forced heirship rights, or mandatory rights of succession granted to heirs, typically found in civil law countries.⁸¹ The decision thereby answered a question which had long been asked in relation to the survivability of anti-forced heirship provisions, such as are found in offshore trusts, when addressed by civil law courts. The Italian court found that such a trust did not violate public policy, and was not, and could not be invalid on that ground, as the trust was essentially a recognizable entity.⁸² Other means could have been found to satisfy disappointed heirs.⁸³

These legislative changes and their interpretation make significant contributions to trust jurisprudence. What we are witnessing, therefore, is a virtual revolution in the financial legal infrastructure. In this revolution, Caribbean legal sub-systems are being both challenged and emulated around the world. Undoubtedly, these are important advances in our legal development. Yet, once again, as with the CCJ, the future direction of the offshore legal paradigm seems heavily dependent on the extent to which we can conduct ourselves in the international sphere, and the degree to which we can uphold notions of sovereignty and independence in our law and legal systems.

VI. IMPACT OF POLITICAL AND ECONOMIC UNITY ON LAW REFORM

The attempts toward political and economic unity in the region are fuelled by the need for economic survival in what is perceived as an increasingly hostile world. There is a growing realisation that small states such as ours cannot make it on their own. The advent of the CSME, which will bring economic unity, and other such initiatives clearly necessitates changes in the respective laws of the countries in the region. Perhaps the most obvious would be in the labour laws.

Already, Caribbean governments have begun the process of the “Free Movement of Skilled Workers” throughout the region,⁸⁴ and changes to domestic law are slowly being made. There is, however, considerable opposition to this, particularly from the countries which are currently more eco-

81. *Casani*, 1 I.T.E.L.R. at 946–47.

82. *Id.* at 948.

83. *See id.* at 947.

84. *E.g.*, Press Release, Caribbean Community Secretariat, Education Focus at COHSOD Meeting (Mar. 28, 2003), at http://www.caricom.org/pressreleases/pres49_03.htm; Press Release, Caribbean Community Secretariat, CARICOM Council for Human and Social Development (COHSOD) to Focus on Labour (Oct. 7, 2003), at http://www.caricom.org/pressreleases/pres130_03.htm.

nomically successful. Trinidad and Tobago, for example, is an oil-rich economy and will naturally attract many workers.

As yet, however, the other necessary reforms such as the harmonisation of labour laws, particularly with respect to workers' rights, have been slow in coming. As a result of the Harmonisation of CARICOM Labour Laws Project, an in-depth report⁸⁵ paving the way forward for harmonisation was produced. However, the political connotations of labour law reform and the customary unilateral approach of the region's governments have not produced uniform results. These are small states jealous of their political autonomy. Nonetheless, the Report is used as a blue print for labour law reform and has acted as a catalyst in several areas of labour law. Notwithstanding, the levels of protection for workers, the obligations of employers, and the conditions of business are variable throughout the region. Other areas relevant to the free movement of workers and which have yet to even be discussed, are the portability of benefit schemes from one country to another, and the availability of benefits for transplanted workers.

A. *Discrimination in Employment and HIV*

There are two sub-topics in this area that I believe need to be urgently addressed. One is the appalling lack of legal protection for discrimination in employment issues in many of the CARICOM states and the almost non-existent legal framework for HIV/AIDS sufferers.⁸⁶ The latter is particularly remarkable considering that the region has been documented as having one of the highest levels of HIV/AIDS in the world. The deficiencies in ordinary legislation are not cured by our constitutions which seek to protect rights, as those rights apply only to citizens viz-a-viz the State, and private employers are thereby excluded from the requisite obligations. Further, our constitutions have been construed quite narrowly where issues of discrimination have arisen. This is particularly the case in relation to issues of gender, a term absent from the various constitutions. On the one hand, the protections have often only been mentioned in the preambles of the constitutions and

85. See generally Website of the Caribbean Community Secretariat, at <http://www.caricom.org> (last visited Feb. 21, 2005).

86. Countries which have appropriate laws against discrimination are Guyana and St. Lucia. Trinidad and Tobago drafted such laws but they were not brought into force, the main reasons being the controversy over whether sexual orientation should be included and the non-existence of enforcement mechanisms and institutions. Only the Bahamas has laws protecting against discrimination because of HIV/AIDS, and the protections are sparse.

have therefore been construed as unjusticiable.⁸⁷ On the other, some courts have inserted high thresholds for finding discrimination, such as malice, making it exceedingly difficult to ground an offence.⁸⁸

In addition to restrictive constitutional interpretation, litigation has been sparse. This is in part due to the lack of awareness of the rights of the citizenry. More likely, however, it is due to cultural attitudes which do not perceive certain types of conduct as discriminatory, unlawful, or even inappropriate. Such attitudes spill over into the interpretation of the law. One example relates to sexual harassment. In a case which was brought under a summary dismissal heading, a male employee who was dismissed for fondling and ogling female employees at the workplace challenged the dismissal, and a female magistrate viewed it as merely “ungentlemanly conduct” insufficient to warrant dismissal.⁸⁹ Currently, a non-governmental group attempting to introduce sexual harassment legislation in Barbados⁹⁰ is facing much opposition from a male-based lobbying group.

The gaps and inconsistencies between the laws of various Commonwealth Caribbean countries, in particular, labour laws, make it difficult to envisage a smooth integration process either economically or politically. It also makes nonsense of projected goals of investment on a regional basis as opposed to an individual country basis as ascertaining the varying laws and obligations is a nightmare for any investor.

Recently, more conscious Caribbean firms have rushed to implement reasonable standards against discrimination in employment as a response to international trade requirements for business. This however, is an externally driven, fragmented, and rushed “stop-gap” approach to the problem. Such individualistic approaches are probably unsuited to the real needs and sensitivities of the workplaces in question, as they are uninformed by coherent planning. In some cases, for example, enterprises have merely adopted the codes of ethics of companies based overseas. That such laws and policies are necessary is indisputable, but they should be part of national and regional initiatives which reflect well-researched and relevant legal policy.

87. See, e.g., *Girard and the St. Lucia Teachers' Union v. A.G.* (Unreported Judgment), No. 371 of 1985, decided Dec. 17, 1986 (St. Lucia). See also Civil Appeals Nos. 12 & 13 of 1986 (Jan. 25, 1988), Court of Appeal, St. Lucia.

88. *Smith v. L.J. Williams, Ltd.*, [1980] 32 W.I.R. 395 (Trin. & Tobago, High Ct.).

89. *Jones v. Bico*, (Barb.Magis. Ct.) Feb. 16, 1995, *aff'd* by the C.A. in [1996] 53 W.I.R. 49.

90. See S.J. GOOLSARRAN, *INTERNATIONAL LABOUR STANDARDS AND LABOUR RELATIONS IN THE CARIBBEAN PUBLIC SERVICE* 7 (Int'l Labour Org. 2003), <http://unpan1.un.org/intradoc/groups/public/documents/CARICAD/UNPAN010846.pdf>.

B. *Economic and Political Sovereignty*

The region's economic and political sovereignty is clearly not untouched, even directly, by the dictates of larger states. Recently, for example, the United States responded to CARICOM's refusal to vote to excuse the United States from the jurisdiction of the International Criminal Court by withholding aid.⁹¹ Washington was also not amused by the region's lack of enthusiasm over the Iraq War, although the region was hardly alone in this stance. The position taken by some leaders that Haiti's democratically elected leader should not have been summarily disposed was similarly disapproved of. The threat that international aid will be withheld if we do not toe the line is ever present.

These political realities may have implications for the kinds of laws which we put into place. For example, politics has had practical impact in the urgency with which the region has had to implement laws against terrorism, which is perhaps not a pressing need in these lands of sun and sea, albeit laudable. Such initiatives also have hefty economical implications. Millions of badly needed monies have been spent to make our ports safer for American tourists⁹² and to upgrade our financial reporting systems to ensure that terrorists do not exploit them. While these are not undesirable objectives in themselves, they do demonstrate the extent to which legal changes in policy may be dictated from outside of the region, and the often low priority given to pressing issues of law reform in favour of external priorities. Often, these are not choices, but imperatives.

Incidentally, it is not only foreign governments which have the ability to influence regional governments. The powerful multinational cruise industry has succeeded in preventing the region from implementing laws to install a paltry five U.S. dollars head tax on passengers, a tax needed to upkeep the ports and protect the reefs and other aspects of the environment. They have done this by threatening to take their business elsewhere if the tax is implemented. It is possible that "John and Jane Public, USA" would happily pay the tax if they were aware of the problem and the significant and sorely needed revenue it could create for struggling CARICOM economies.

91. See Press Release, Amnesty International, International Criminal Court: CARICOM Should Reject U.S. Impunity Agreements (May 7, 2003), at <http://web.amnesty.org/library/Index/ENGIOR510012003?open&of=ENG-385>; Kenneth Roth, *Letter to Colin Powell on U.S. Bully Tactics Against International Criminal Court*, FREE REPUBLIC, July 1, 2003, at <http://209.157.64.200/focus/f-news/938720/posts>.

92. See *BVI Ports Authority Improves Service and Security*, CARIBBEAN NET NEWS, Nov. 1, 2004, at <http://www.caribbeanetnews.com/2004/11/01/service.htm>.

C. *The CCJ's Original Jurisdiction for Trade Disputes*

Economic unification and regional integration also make it imperative that there be a clear and credible means of adjudicating the inevitable disputes that emerge with trade régimes and inter-governmental policies. Hitherto, this has been lacking in CARICOM, despite the Revised Treaty of Chaguaramus, which attempted to define trade régimes for the region.⁹³ The CCJ, with its original jurisdiction to interpret the treaty and related trade issues,⁹⁴ will fill this glaring gap in Caribbean jurisprudence. All of the independent Commonwealth Caribbean countries will participate in this original jurisdiction.⁹⁵

Increasingly, matters related to both trade and competition are emerging. They too, have impacted significantly on the minds of the man and woman on the Caribbean street. The most recent, and perhaps the most volatile example, is the fishing impasse between Trinidad and Tobago and Barbados. In that scenario, Barbados fisher-folk illegally entered Tobagonian waters on a consistent basis, following migratory flying fish which had left Barbadian waters for more favourable Tobagonian waters. The issue expanded when Barbados, rather belatedly, claimed that the waters themselves were in dispute. Consequently, a maritime boundary matter is currently in issue.

D. *Funding Justice*

Finally, we should note that issues of law reform and legal development, whether we are speaking about jurisprudence or justice generally, cannot come to fruition without adequate physical infrastructure. Our courts need to be adequately funded and supported. This is as true for criminal trials as it is for civil trials, and for juvenile justice. For example, often juveniles spend nights in jail with hardened adult criminals because of a lack of facilities to house them. The *Pratt and Morgan* doctrine on undue delay,⁹⁶ discussed earlier, is significantly fuelled by the lack of resources. It highlighted the need to make the administration of justice more efficient and

93. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 5, 2001, <http://www.caricom.org/archives/revisedtreaty.pdf> (last visited Dec. 30, 2004) [hereinafter Revised Treaty].

94. CCJ Agreement, *supra* note 12, art. XIII; Revised Treaty, *supra* note 93, art. 211.

95. CCJ Agreement, *supra* note 12, art. II.

96. *Pratt v. A-G*, [1993] 43 W.I.R. 340, 359–60.

speedy, thereby ensuring that prisoners do not spend long periods on Death Row.⁹⁷ In other words, hang them quickly or not at all.

Funding is just as important for finding the legal principles which inform the court. This necessitates, for example, adequate and efficient law reporting. All of these things are lacking in the region because of our fragile and needy economies, economies which are further vulnerable to the forces of nature and to international market forces. If Commonwealth Caribbean law and legal systems are to realise their true potential—if they are to “exhale”—these difficulties must be overcome.

97. *Id.* at 359.

THE CARIBBEAN COURT OF JUSTICE: A UNIQUE INSTITUTION OF CARIBBEAN CREATIVITY

HONORABLE SIR DAVID SIMMONS*

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I. INTRODUCTION

For more than thirty years, a debate has engaged the attention of lawyers across the Commonwealth Caribbean. It concerned the appropriateness of the independent states of that sub-region continuing to seek final appellate justice, not from a Caribbean Court of last resort, but from the Judicial Committee of the Privy Council (JCPC) in England.

In the last decade of the twentieth century, observers of the contemporary scene in the sub-region will have noted that the phenomena of globalization, trade liberalization, and the emergence of new trading blocs, have all combined to pressurize the democracies of the sub-region to re-think, re-structure, and reposition their economic perspectives and arrangements. Change is inescapable if these democracies are to survive and be competitive and relevant in the new global environment.

From colonial times, the JCPC has been the final court of appeal for Commonwealth Caribbean States,¹ and its jurisdiction has continued notwithstanding those states' attainment of political independence during the period 1962 to 1980.² In the twentieth century the jurisdiction of the JCPC, as the final court of appeal for the countries of the Commonwealth, has narrowed to the point where it is now the court of last resort only for the majority of Commonwealth Caribbean States and five others, including Mauritius and Brunei.³

However, a change in the relationship with the JCPC is imminent. Similarly, a change in the economic and trading arrangements among Commonwealth Caribbean States is also imminent. The Treaty of Chaguaramas of 1973, which created a limited Common Market régime in the sub-region, has been substantially revised to provide for the free movement of capital,

1. Rhea P. Hamilton, *Alumni Research Guide: A Guide to Researching the Caribbean Court of Justice*, 27 *BROOK. J. INT'L L.* 531, 532 (2002) (citing HUGH RAWLINS, *THE CARIBBEAN COURT OF JUSTICE: THE HISTORY AND ANALYSIS OF THE DEBATE* 9 (2000), available at http://www.caricom.org/archives/ccj_rawlins.pdf; Roget V. Bryan, *Toward the Development of a Caribbean Jurisprudence: The Case for Establishing a Caribbean Court of Appeal*, 7 *J. TRANSNAT'L L. & POL'Y* 181, 183-84 (1998)).

2. RAWLINS, *supra* note 1, at 5; Hamilton, *supra* note 1, at 531 (citing Bryan, *supra* note 1, at 183 n.8).

3. Bryan, *supra* note 1, at 185 (citing Honorable Mr. Justice M.A. de la Bastide, *The Case for a Caribbean Court of Appeal*, 5 *CARIB. L. REV.* 401, 402 (1995)).

goods, and services, and ultimately, the free movement of people across the borders of national states.⁴

A new legal architecture is being designed, and central to the new Commonwealth Caribbean of the twenty-first century will be the Caribbean Court of Justice (CCJ).

Sometime in the first quarter of 2005, the CCJ will be inaugurated in Port-of-Spain, Trinidad.⁵ Inauguration of the Court will finally demonstrate the self-confidence of the people of the Member States of Caribbean Community (CARICOM)⁶ that we are mature enough to manage and operate our highest judicial institution. In his recent book, *The Caribbean Court of Justice: Closing the Circle of Independence*, Duke Pollard⁷ captures the meaning, relevance, and importance of the appellate jurisdiction of the CCJ in the following words:

The establishment of the Caribbean Court of Justice in its appellate jurisdiction will not only sever the last remaining vestige of a colonial condition, but will signal the birth of autonomous judicial decision-making in Member States of the Caribbean Community and close the circle of independence which commenced as early as 1962. In a real sense, too, the establishment of the Court will mark the culmination of initiatives to create our own regional institutions to facilitate and promote the development of an indigenous jurisprudence reflective of the moral, political, social and economic imperatives of our Region and which commenced with the establishment of the Council of Legal Education in 1970.⁸

The CCJ is a unique adjudicatory body—*sui generis*—in the world. For in addition to it being a final appellate court for the States of the Common-

4. See Revised Treaty of Chaguaramas Establishing the Caribbean Community Including the CARICOM Single Market and Economy, July 5, 2001, <http://www.caricom.org/archives/revisedtreaty.pdf> [hereinafter Revised Treaty].

5. Press Release, CARICOM, Postponement of Inauguration of the Caribbean Court of Justice (CCJ) (Oct. 11, 2004), at http://www.caricom.org/pressreleases/pres157_04.htm [hereinafter CCJ Press Release]. The inauguration, previously set for November 6, 2004, has been deferred to a date in March, 2005. *Id.*

6. The states are: Antigua and Barbuda, Barbados, Belize, the Bahamas, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, St. Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, and Suriname. Their membership is at different levels. For example, contrast Montserrat (a British overseas territory) to the Bahamas, which is not yet prepared to be fully integrated in the regional integration process.

7. Mr. Pollard is the Director of the Legislative Drafting Facility at the CARICOM Secretariat in Georgetown, Guyana.

8. DUKE E. POLLARD, *THE CARIBBEAN COURT OF JUSTICE: CLOSING THE CIRCLE OF INDEPENDENCE* 204 (2004) (emphasis added).

wealth Caribbean, the CCJ will have a central role to play in the adjudication of disputes arising under the CARICOM Single Market and Economy (CSME) due to come into effect also in 2005.⁹

In this paper, the historical development of the CCJ will be sketched to explain the context in which this new institution has evolved. It is a new Caribbean venture, and no innovation or change is easily explained in the absence of a sense of history and an appreciation of the factors or forces that influenced the new direction.

The reasons for and against the establishment of the Court are discussed next in order that readers may better understand the regional debate and the lofty motives which inspired the creation of the Court. The paper then seeks to justify the assertion that the CCJ is indeed a Court *sui generis* by highlighting some of the distinctive features of the Court, including its constitution and jurisdiction under the Revised Treaty of Chaguaramas, modalities of appointment of its judges and staff, and the creative solution devised to finance its operations. I then suggest that the decision to establish the CCJ is having a positive effect on national justice systems and briefly indicate how regional States may de-link from the JCPC. In the final section of the paper, I endeavour to provide a glimpse into the next steps to be taken prior to inauguration and the actual adjudication of cases.

II. HISTORICAL BACKGROUND: THE ORIGINS OF THE IDEA

It must be made very clear at the outset that the CCJ is *not* the product of some sudden or knee-jerk reaction to recent decisions of the Judicial Committee of the Privy Council (JCPC), our highest appellate court. Researchers have unearthed information which suggests that the idea of a final indigenous court for the Commonwealth Caribbean had its origins as long ago as 1901 in an editorial in the Daily Gleaner newspaper of Jamaica.¹⁰ Hugh Rawlins suggests that the idea was first mooted at a high level during a meeting of colonial governors in Barbados in 1947.¹¹

In 1962, Jamaica and Trinidad and Tobago gained their political independence from Britain.¹² Other countries in the region became independent in the 1960s,¹³ and those of the Organisation of Eastern Caribbean States

9. See Revised Treaty, *supra* note 4.

10. POLLARD, *supra* note 8, at 199.

11. RAWLINS, *supra* note 1, at 5.

12. Robert B. Lubic, *The Present Status of International Commercial Arbitration in the English Speaking Caribbean*, 63 REV. JUR. U.P.R. 117, 121 (1994).

13. *Id.* at 121 n.12. Barbados and Guyana both became independent in 1966. *Id.*

(OECS) became independent during the decades of the seventies and eighties.¹⁴

Political independence implied autonomy for Commonwealth Caribbean states in legislative and executive affairs. No longer would the legislative arm of government reside in Westminster; no longer would executive actions and policy-making be dictated from Whitehall. Upon independence, Commonwealth Caribbean countries assumed responsibility for the legislative and executive arms of government. However, final decision-making in judicial matters has continued to reside in Downing Street at the premises of the JCPC.¹⁵ Appeals from the Courts of Appeal of the several Commonwealth Caribbean countries still go to the JCPC, and, as indicated above, this circumstance has spawned the debate as to the appropriateness of those countries continuing appeals to the JCPC as independent nations.

Since 1970, when the Faculty of Law was established at the University of the West Indies (UWI), there have been principled calls for the repatriation of the final appellate court to the Commonwealth Caribbean. It is one of the paradoxes of the legal history of the Commonwealth Caribbean, for reasons which will appear later, that it was Jamaica which first sounded the bell for the establishment of a regional court of last resort.¹⁶ Two years later, in 1972, the Organisation of Commonwealth Caribbean Bar Associations (OCCBA) made a similar proposal.¹⁷ Having been closely associated since 1994 with the movement to establish an indigenous final appellate court, it is my opinion that the movement for such a court gained momentum after the inauguration of the Faculty of Law of the UWI. The Faculty inspired, promoted, and published a wealth of learning in support of a final court of appeal for the region. Many learned and carefully researched papers were written by the academic staff of the Faculty.¹⁸

14. *Id.* at 118 n.3, 121 n.12.

15. Hamilton, *supra* note 1, at 531 (citing RAWLINS, *supra* note 1, at 5; Bryan, *supra* note 1, at 183).

16. RAWLINS, *supra* note 1, at 5; Hamilton, *supra*, note 1, at 532 (citing Duke Pollard, *The Caribbean Court of Justice: What It Is, What It Does*, at <http://www.caricom.org/archives/ccj-q&a.htm> (Apr. 17, 2000)). The proposal that a regional court of last resort be established to replace the JCPC was made by the Jamaican delegation to the Heads of Government Meeting in 1970. *Id.*

17. Neil Dennis, Note, *Using One's Head to Sustain One's Heart: A New Focus for the Establishment of the Caribbean Court of Justice*, 26 *FORDHAM INT'L L.J.* 1778, 1807 n.140 (citing RAWLINS, *supra* note 1, at 56). Aubrey Fraser, a former Justice of Appeal of the Supreme Court of Trinidad and Tobago, produced a report for OCCBA, known as the "Fraser Report," in which he advocated the establishment of a Caribbean Court of Appeal to replace the JCPC. See *id.* at 1807 n.140.

18. See, e.g., Dr. Francis Alexis, *The Case Against West Indian Appeals to the Privy Council (1975) Bulletin of East Caribbean Affairs*; Hugh Rawlins, *The Privy Council or a*

In the years after 1970, Commonwealth Caribbean countries began to review the Westminster-type constitutions imported from Britain upon independence. There was a need to examine and analyse the continuing relevance of these constitutions to the requirements of contemporary Caribbean societies. Various commissions were set up to review the independence constitutions in some territories. In Trinidad and Tobago, the Commission on Constitutional Reform, presided over by the great Trinidadian jurist, Sir Hugh Wooding, reported in 1974 and recommended discontinuance of appeals to the JCPC.¹⁹ In fact, every Constitution Commission appointed in any Commonwealth Caribbean country since 1974 has recommended severance of ties with the JCPC.²⁰

It was not, however, until 1988 that any firm *decision* was taken to establish a final appellate court in the region, although in 1987 the Trinidad and Tobago delegation to the Eighth Meeting of Heads of Government in St. Lucia proposed the establishment of a Caribbean Court of Appeal to replace the JCPC.²¹ Between 1970 and 1988 there was much talk, much writing, but no concrete action to transform the idea into a reality.

It all changed in 1988. The Heads of Government of the region met in Antigua and Barbuda.²² They made the decision to establish a court to replace the JCPC.²³ The very next year, at their meeting in Grenada, the Heads made another equally significant and far-reaching decision.²⁴ They established the West Indian Commission (the Ramphal Commission) under the

Caribbean Final Court of Appeal?, 6 CARIB. L. REV. 235 (1996); Jeff Cumberbatch, *Appeals to the Judicial Committee of the Privy Council – A Re-examination of the Issues* (1994); SIMEON C.R. MCINTOSH, CARIBBEAN CONSTITUTIONAL REFORM (2002).

19. RAWLINS, *supra* note 1, at 13, 20 n.10, 21 n.21.

20. Most recently, *The Report of the Constitution Review Commission of Barbados 1998*, which was chaired by former Attorney General of Barbados, Sir Henry Forde, K.A., Q.C. THE COMMUNICATIONS UNIT, CARIBBEAN COMMUNITY SECRETARIAT, ANNUAL REPORT OF THE SECRETARY-GENERAL OF THE CARIBBEAN COMMUNITY (CARICOM) 1998, at <http://www.caricom.org/archives/sgreport/rep98over.htm> (last visited Feb. 7, 2005).

21. Press Release, CARICOM, Communiqué of the Eighth Meeting of the Conference of Heads of Government of the Caribbean Community held at Castries, Saint Lucia from June 29-July 3, 1987, at <http://www.caricom.org/archives/communiqués-hgc/8hgc-1987-communique.htm> (last visited Dec. 20, 2004).

22. Press Release, CARICOM, Communiqué Issued at the Conclusion of the Ninth Meeting of the Conference of Heads of Government of the Caribbean Community held at Deep Bay, Antigua and Barbuda from July 4-8, 1988, at <http://www.caricom.org/archives/communiqués-hgc/9hgc-1988-communicé.htm> (last visited Jan. 17, 2005).

23. *Id.*

24. Press Release, CARICOM, Communiqué Issued at the Conclusion of the Tenth Meeting of the Conference of Heads of Government of the Caribbean Community held at Grand Anse, Grenada from July 3-7, 1989, at <http://www.caricom.org/archives/communiqués-hgc/10hgc-1989-communicé.htm> (last visited Jan. 17, 2005).

chairmanship of Sir Shridath Ramphal, a former Secretary-General of the Commonwealth, to consider and report on the way to deepen and widen the process of regional integration.²⁵ The time had come to revisit the Treaty of Chaguaramas (1973).

This Treaty had, as its principal objective, the economic integration of the thirteen States of the Commonwealth Caribbean by the establishment of a common market régime commencing the process of regional economic integration. But, in 1989, there was the realization that a common market was too limited an economic mechanism for deeper and wider integration. More had to be done to deepen and widen the regional integration process.

The Ramphal Commission set out to consult the views of Commonwealth Caribbean nationals all over the world.²⁶ They discussed the future structures for the region in London, North America, and across the Caribbean.²⁷ After the widest possible consultation, the Commission handed in its report, *Time for Action*, in May 1992.²⁸ The report made a very strong case for an indigenous final court and, most importantly, located the need for such a court in the process of regional integration itself.²⁹

The Report concluded: “[T]he case for the CARICOM Supreme Court, with both a general appellate jurisdiction and an original regional one, is now overwhelming—indeed it is fundamental to the process of integration itself.”³⁰

The Heads of Government took action to implement the recommendations of the Ramphal Commission.³¹ A two-pronged strategy was devised. In order to establish a single market and economy, the Treaty of Chaguaramas had to be revised.³² A Task Force³³ was therefore established to prepare the several protocols necessary to amend and revise the 1973 Treaty. So far as a final court was concerned, the Legal Affairs Committee of

25. *Id.*

26. TIME FOR ACTION: REPORT OF THE WEST INDIAN COMMISSION 11 (2d ed., The Press 1993) (1992) [hereinafter TIME FOR ACTION].

27. *Id.*

28. *Id.* at xxix.

29. *See id.* at 497–501.

30. *Id.* at 498.

31. Press Release, CARICOM, Communiqué of the Special Meeting of the Conference of Heads of Government of the Caribbean Community held at Port-of-Spain, Trinidad and Tobago from October 28 to 31, 1992, at <http://www.caricom.org/archives/communiqués-hgc/sphgc-oct1992-communique.htm> (last visited Jan. 17, 2005).

32. *Id.*

33. The Task Force was chaired by Ambassador Nigel Barrow, Barbados’ Ambassador to CARICOM.

CARICOM (LAC)³⁴ was instructed to draft the various instruments necessary to underpin the establishment of the Court and, at the same time, to refine the Protocols before commending them to the Heads for signature.³⁵

During my tenure as Attorney General of Barbados (1994-2001), I was directly involved in the finalisation of every Protocol and every instrument relating to the CCJ. It was a huge task.³⁶ The LAC began its work in earnest at a meeting in Barbados in December 1994. There was in existence an Inter-Governmental Agreement signed by Heads of Government in July 1990 which provided a rudimentary basis for action upon the decision of 1988.

In July 1999, the Heads appointed a Preparatory Committee (Prep. Comm.) to supervise the work leading to the inauguration of the Court³⁷ and later, they approved the creation of a full-time Coordinating Unit at the CARICOM Secretariat in Georgetown, dedicated to driving the necessary day-to-day work to facilitate the establishment of the Court.³⁸ I had the honour to chair the Prep. Comm. until my retirement from political office in August 2001. The drafting of eight instruments specific to the establishment of the Court was completed by the time of my retirement, and I had the satisfaction of commending the Agreement Establishing the Caribbean Court of Justice³⁹ to Heads of Government for signature on February 14, 2001 at a ceremony in Barbados. We were on the way to inauguration of the CCJ. The

34. The Committee comprises the Attorneys-General or Ministers who are responsible for legal affairs in CARICOM States.

35. See Press Release, CARICOM, Communiqué Issued at the Conclusion of the Second Meeting of the Legal Affairs Committee held at Nassau, The Bahamas from September 7-10, 1998 (Sept. 9, 1998), at http://www.caricom.org/pressreleases/pres73_98.htm.

36. Nine Protocols were developed by the Task Force, and were then examined and amended where necessary by the Legal Affairs Committee of CARICOM – prior to being sent for signature by the Heads of Government and State. The Protocols have since been reformulated and incorporated in the several chapters and articles of the “Revised Treaty of Chaguaramas establishing the Caribbean Community including the CARICOM Single Market and Economy,” signed by Heads of Government and State of the Caribbean Community on July 5, 2001. Revised Treaty, *supra* note 4.

37. Press Release, CARICOM, Communiqué Issued at the Conclusion of the Twentieth Meeting of the Conference of Heads of Government of the Caribbean Community held at Port-of-Spain, Trinidad and Tobago from July 4-7, 1999, at <http://www.caricom.org/archives/communiqués-hgc/20hgc-1999communique.htm> (last visited Jan. 17, 2005). The Prep. Comm. comprises the Attorneys-General of Barbados (Chair), Guyana, Jamaica, St. Kitts and Nevis, St. Lucia, and Trinidad and Tobago. *Id.*

38. Press Release, CARICOM, Communiqué Issued at the Meeting of Members of the Caricom Ministerial Sub-Committee for Resource Mobilisation for Crime and Security and a United Kingdom Senior Level Time on Security Cooperation held at Kingston, Jamaica on March 3, 2004 (Mar. 5, 2004), at http://www.caricom.org/pressreleases/pres28_04.htm.

39. Agreement Establishing the Caribbean Court of Justice, Feb. 14, 2001, <http://www.caricom.org/ccjagmnt.htm> [hereinafter CCJ Agreement].

CCJ was a few years away from realization. After thirty-one years of debate and discussion, an important milestone in Caribbean legal history had been reached. The completion of our independence was at hand.

III. THE COMPETING ARGUMENTS

During the many years of debate and discussion, some of them acrimonious, the competing arguments in support of and against the Court had crystallized. The Prep. Comm., as a deliberate strategy, determined to discuss the establishment of the Court with the regional public. We were conscious that the region had experimented with a political Federation of the West Indies for four years (from 1958-1962), and that experiment had failed. Failure was attributed to many reasons but it is generally agreed that a lack of understanding of the Federal idea among the mass of Caribbean people was one of the main reasons. The Prep. Comm. was determined that the CCJ should not founder because the people of the region did not support the Court or did not understand the reasons for its creation. Thus, members of the Prep. Comm. and the Coordinating Unit went across the region promoting and explaining the Court. It was during these interactive consultations with the people of the region that we were able to discuss the competing arguments for and against the Court and understand the legitimate concerns of the people.

A. *Arguments in Favour*

1. Access to Justice

The foremost reason for an indigenous final court is a conviction that such a court will increase access to justice. Especially in civil appeals, the sheer distance of the JCPC in London from the Caribbean has denied access to litigants. In addition, the costs associated with taking appeals beyond local Courts of Appeal are an inhibiting factor. It is true that, comparatively recently, there has been an increase in civil appeals to the JCPC, but these appeals have largely been pursued by litigants who can afford the costs. During my years in private practice in Barbados (from 1970-1994) few civil appeals went from Barbados to the JCPC. I appeared in the first civil appeal from Barbados in thirty years in *Elias v George Sahely & Co.*⁴⁰

On the other hand, access to justice in criminal appeals is relatively easy. There is a regular flow of appeals to the JCPC. The vast majority are appeals against convictions for murder or appeals raising constitutional

40. [1983] A.C. 646, 648 (P.C.).

points arising out of the imposition of the death penalty. Even though these criminal or constitutional appeals do not cost the appellants personally, there are substantial costs to be borne by the governments which fund these appeals since the appellants are invariably poor and make applications in forma pauperis.

To the extent that the CCJ will be an itinerant court taking justice to the people of the region, it will immeasurably increase access to justice. I pause here to mention that we are not short on experience of itinerant courts. During the federal experiment there was a Federal Supreme Court.⁴¹ It was headquartered in Trinidad,⁴² but it moved around the region. In contemporary times, the Eastern Caribbean Supreme Court has its Seat in St. Lucia but travels to all of the States of the OECS dispensing justice.⁴³

2. Development of a Caribbean Jurisprudence

There are two fundamental functions of a final appellate court: first, the correction of errors of lower courts, and, second, development of the common law. A rational reason for the establishment of the CCJ is rooted in a desire to promote the development of a Caribbean jurisprudence giving its own flavour to the common law. Over time, countries which severed relationships with the JCPC have contributed in quite unique ways to the growth and development of the common law. One thinks immediately of the High Court of Australia, the Supreme Court of Canada, the Supreme Court of India, and the Constitutional Court of South Africa.

It has been persuasively argued that retention of the JCPC has restricted the development of a Caribbean jurisprudence. In the words of the Ramphal Commission, "it must be to a local not an external, court that we must look for the sensitive and courageous development of our law"⁴⁴ in the post-independence phase of our development.

In 2002, the Honorable Michael de la Bastide, former Chief Justice of Trinidad and Tobago (and recently appointed first President of the CCJ)⁴⁵

41. See Sheldon A. McDonald, *The Caribbean Court of Justice: Enhancing the Law of International Organizations*, 27 *FORDHAM INT'L L.J.* 930, 1010 (2004).

42. See *id.*

43. See *id.* at 960 n.96, 1010.

44. TIME FOR ACTION, *supra* note 26, at 499.

45. The Honorable Michael de la Bastide was appointed by the Heads of Government at their meeting in Grenada in July, 2004. Press Release, CARICOM, Communiqué Issued at the Conclusion of the Twenty-Fifth Meeting of the Conference of Heads of Government of the Caribbean Community held at St. Georges, Grenada from July 4-7, 2004 (July 8, 2004), at <http://www.caricom.org/archives/communiqués-hgc/25hgc-2004-communicé.htm> [hereinafter Twenty-fifth Communiqué].

speaking extra-judicially, emphasised that: "It is very important that the judges who make the decisions which create our jurisprudence have a close and very intimate connection with our societies."⁴⁶

Even more pointedly, Lord Hoffman, one of the serving Privy Council judges, seemed to lament the remoteness of the JCPC from the Caribbean societies for which they are the final appellate court when he addressed the Law Association of Trinidad and Tobago on October 10, 2003. His Lordship said:

It is an extraordinary fact that for nearly nine years I have been a member of the final court of appeal for the independent Republic of Trinidad and Tobago, a confident democracy with its own culture and national values, and this is the first time that I have set foot upon the islands. No one unaware of the historic links between the islands and the United Kingdom would believe it possible.⁴⁷

Lord Cooke of Thorndon, a New Zealander who sat in the JCPC for many years, wrote in similar vein in *The Commonwealth Lawyer* (April 2003) in support of New Zealand's withdrawal from the JCPC, that: "Since 1987 I have been and remain converted to the view that the development of our legal system requires replacing the Privy Council. . . . Judges in the United Kingdom, however eminent and enlightened, can have only a superficial acquaintance with New Zealand conditions and problems."⁴⁸

3. The Single Market and Economy

A third reason for the CCJ, as the Ramphal Commission observed, lies in the process of regional integration itself. The contemporary world order (or disorder) is generating more and more regional arrangements for economic cooperation and integration. Inevitably, disputes will arise between states in any regional economic grouping. Those disputes require resolution

46. Honorable Michael de la Bastide, Address at a Convocation on the CCJ, Kingston, Jam., (Apr. 9, 2002); Government of Jamaica, Ministry of Commerce, Science and Technology, News Stories, *St. Lucian Prime Minister and Trinidad and Tobago's Chief Justice for CARICOM Single Market and Economy/Caribbean Court of Justice Convocation*, at http://www.mct.gov.jm/csme_forum.htm (last visited Jan. 28, 2005).

47. The Right Honorable Lord Leonard Hoffmann, Speech at the Annual Dinner of the Law Association of Trinidad and Tobago, at 5 (Oct. 10, 2003).

48. LORD COOKE OF THORNDON, NEW ZEALAND CENTRE FOR PUBLIC LAW, FINAL APPEAL COURTS: SOME COMPARISONS 17–18 (2001), at <http://www.law.vuw.ac.nz/vuw/fca/law/files/-occasionalpaper7.pdf>.

by an independent and impartial tribunal applying appropriate rules of international law or international trade law.

Under the Treaty of Chaguaramas there was no satisfactory dispute resolution mechanism.⁴⁹ The Heads of Government in Conference were the ultimate arbiters. The Revised Treaty of Chaguaramas of 2001, enacting a specific protocol for dispute settlement,⁵⁰ provides for judicial resolution of the disputes which will eventuate upon the coming into force of the Single Market and Economy in 2005. It would be difficult to conceive of a role for the JCPC once the Single Market and Economy becomes a reality in the Commonwealth Caribbean. I shall discuss the adjudicatory function of the CCJ in relation to its original jurisdiction under the Revised Treaty of Chaguaramas later. But for the moment, it is submitted that in the light of the decision to establish a Single Market and Economy, the CCJ is a necessary regional institution responding to the realities of regional integration and the prevailing global economic environment.

4. Sovereignty and Independence

Duke Pollard disagrees with my view that notions of sovereignty are sound reasons justifying the establishment of the CCJ.⁵¹ It is freely admitted that such notions may appear to be hoisted on a flag of emotionalism. But, having regard to our colonial past, considerations of sovereignty and independence (independence that is both legal and psychological) are, in my opinion, central to the self-respect, self-confidence, and self-definition of Commonwealth Caribbean people. I reiterate my view that if Commonwealth Caribbean countries can legitimately claim political independence, it must surely be the case that they are not truly and fully independent while their highest court sits outside the region, in London, and is staffed by judges from outside the region. Our statute laws are no longer made for us in the United Kingdom; our Cabinets, exercising executive authority, no longer receive dictates of policy from the United Kingdom. Why should our law continue to be interpreted and fashioned in Downing Street? The third arm of government, the judicial, requires repatriation. Continuation of appeals to the JCPC is an affront to sovereignty and inconsistent with independence.

One of our most distinguished jurists, the Right Honorable Telford Georges, who himself sat as a judge in the JCPC, wrote in 1998:

49. See Treaty Establishing the Caribbean Community, July 4, 1973, 12 I.L.M. 1033, http://www.jis.gov.jm/special_sections/CARICOMNew/CARICOMTreaty.pdf.

50. See Revised Treaty, *supra* note 4, art. 211.

51. See POLLARD, *supra* note 8, at 238.

It appears to me that an independent country should assume responsibility for providing a court of its own choosing for the final determination of legal disputes arising for decision in the country. It is a compromise of sovereignty to leave that decision to a court which is part of the former colonial hierarchy, a court in the appointment of whose members we have absolutely no say.⁵²

And Lord Cooke makes a similar point:

It is inconsistent with that nationhood to submit our legal issues to the adjudication of those, whoever they may be, who happen at any one time and in any particular case to comprise a majority of Judges of another country, appointed and sitting far off in that country and primarily versed in the laws of that country.”⁵³

B. *Arguments Against*

1. Quality of Judges

The arguments against the CCJ are essentially three. Some of the opponents of the CCJ speak of the quality of the judges of the JCPC almost in terms of infallibility. It is undeniable that the JCPC has been a regional court of the highest quality, comprising as it does, a majority of House of Lords judges. It is also undoubted that in the area of constitutional law, the JCPC has been a great protector of the fundamental rights and freedoms of Caribbean people. Lords Diplock and Wilberforce were extremely influential in shaping our constitutional law and jurisprudence.

For example, Lord Wilberforce advised in *Minister of Home Affairs v. Fisher*⁵⁴ that the interpretation of a Constitution should be large, liberal, and purposive eschewing as far as possible “the austerity of tabulated legalism.”⁵⁵ *Hinds v. R.*⁵⁶ established that the doctrine of the separation of powers is implicit in the Westminster model Constitutions of the Commonwealth Caribbean. In *Maharaj v. Attorney-General of Trinidad and Tobago*,⁵⁷ Lord Dip-

52. Right Honorable Telford Georges, Address to a Symposium on Caribbean Rights, Barbados, (Nov. 28, 1998); Attorney General, Honorable Godfrey Smith, *The Caribbean Court of Justice: An Overview of the Challenges & Prospects*, Aug. 28, 2001, at http://www.belize.gov.bz/features/Caribbean_court/challenges&prospects.html.

53. THORNDON, *supra* note 48, at 20.

54. [1980] A.C. 319 (P.C.).

55. *Id.* at 328. This celebrated phrase was coined by the late Professor Stanley de Smith, a British Constitutional lawyer.

56. (1975) 24 W.I.R. 326, 328 (P.C.).

57. (1978) 30 W.I.R. 310, 310–11 (P.C.).

lock created a public law remedy of damages for breach of fundamental rights caused by judicial error. *Thomas v. Attorney General of Trinidad and Tobago*⁵⁸ held that public servants were not dismissible at pleasure under the Constitution of Trinidad and Tobago. More recently, Lord Bridge ruled that where the Cabinet of Barbados was exercising a statutory power (the award of a contract), its decision was judicially reviewable.⁵⁹

However, to suggest that a kind of infallibility inheres in the judgments of the JCPC is a wide *proposition* not supported by recent evidence. In fact, our highest court has shown itself to be exceptionally fallible especially in developing the jurisprudence on the death penalty. One merely has to examine the long list of decisions in the death penalty cases between November 1993 and March 2004 to discover how often the JCPC judges have reversed themselves by the slenderest majorities (for example, three to two, or five to four) on the same point!⁶⁰ The judicial gymnastics of the JCPC in the death penalty cases prompted one of the very judges of the JCPC to warn his brethren in 2000 that “the rule of law itself will be damaged and there will be no stability in the administration of justice in the Caribbean,”⁶¹ if JCPC judges continue to give decisions on the basis of “a doctrinal disposition to come out differently. . . .”⁶² I go so far as to say that it is disconcerting that our highest court should be a source of instability in the administration of justice in the Commonwealth Caribbean. One of the functions of a final appellate court is to bring certainty to the law. But, it might be explicable on the ground that no Caribbean judge was ever invited to sit on the panels of judges when the JCPC was fashioning the death penalty jurisprudence in the period between November 1993 to December 2003.⁶³

58. [1982] A.C. 113, 126-7 (P.C.).

59. *C.O. Williams Constr. Ltd v. Blackman*, (1994) 45 W.I.R. 94, 100 (P.C.).

60. *See, e.g., Guerra v. State*, (1994) 45 W.I.R. 400 (P.C.); *Reckley v. Minister of Pub. Safety and Immigr.*, (1995) 47 W.I.R. 9 (P.C.); *Henfield v. A-G*, (1996) 49 W.I.R. 1 (P.C.); *Fisher v. Minister of Pub. Safety and Immigr.*, (1997) 52 W.I.R. 1 (P.C.); *Fisher v. Minister of Pub. Safety and Immigr.*, (1998) 53 W.I.R. 27 (P.C.); *Thomas v. Baptiste* (1999) 54 W.I.R. 387 (Trin. & Tobago C.A.); *Lewis v. Attorney Gen.*, (2000) 57 W.I.R. 275 (P.C.); *Roodall v. State*, (2003) 64 W.I.R. 270 (P.C.).

61. *Lewis*, 57 W.I.R. at 309 (Lord Hoffmann, dissenting).

62. *Id.*

63. A change of attitude came in December 2003. The JCPC was hearing an appeal from Barbados. *Boyce v. R*, (2004) 64 W.I.R. 37 (P.C.). During argument it appeared to the Bench of five judges that it might be necessary to overrule the decision they had given a few months before in the Trinidadian case, *Roodall. Boyce*, 64 W.I.R. at 42; *see also Roodall*, 64 W.I.R. at 287. An enlarged panel was convened in March 2004 to hear re-argument in *Boyce*, along with two other appeals from Jamaica and Trinidad and Tobago viz. *Watson v. The Queen*, (2004) 64 W.I.R. 241 (P.C.), and *Matthew v. State*, (2004) 64 W.I.R. 412 (P.C.) on whether the mandatory sentence of death was constitutional in Barbados, Trinidad and Tobago, and

However that may be, fairness and objectivity demand that the great contribution which the JCPC has made to the development of the common law in the Commonwealth Caribbean must be acknowledged.

2. Lack of Judicial Talent

It has been suggested by detractors of the CCJ that there is a lack of judicial talent in the Caribbean. I take issue with the suggestion. The Caribbean has long been an exporter of judicial talent to other countries of the Commonwealth and to international courts or tribunals.⁶⁴ More to the point, in July 2004, three Caribbean judges were appointed to the JCPC by the Prime Minister of Britain. They are Honorable Michael de la Bastide, Sir Dennis Byron, and Dame Joan Sawyer.⁶⁵ Those appointments clearly imply that it is recognised that there are persons in the Commonwealth Caribbean who possess the qualities to sit as equals with the judges of the JCPC. The argument of a lack of judicial talent fails in the face of these recent appointments. It is also an empty argument which ignores the contributions made by the University of the West Indies (U.W.I.) and the Council of Legal Education (CLE) to the graduation of our own, home-grown lawyers since 1973. A regionally trained lawyer, Justice Adrian Saunders, is today Acting Chief

Jamaica. *See also Boyce*, 64 W.I.R. at 37. When the panel was constituted, the Rt. Honorable Edward Zacca, a former President of the Court of Appeal of Jamaica, was added. *See Boyce*, 64 W.I.R. at 40; *Watson*, 64 W.I.R. at 214; *Matthew*, 64 W.I.R. at 412. Overruling *Roodall*, the JCPC, by a majority of five to four, held that the mandatory death sentence was constitutional in Barbados and Trinidad and Tobago, but not in Jamaica. *Boyce*, 64 W.I.R. at 60; *Watson*, 6 W.I.R. at 262; *Matthew*, 64 W.I.R. at 425.

64. Sir Hugh Wooding (Trinidad and Tobago), Sir William Douglas (Barbados), Rt. Honorable Telford Georges (Trinidad and Tobago), and Sir Vincent Floissac (St. Lucia) all sat as judges in the JCPC. Privy Council, *Privy Council Members*, available at <http://www.privycouncil.org.uk/output/Page76.asp> (last visited Feb. 7, 2005). Sir Dennis Byron (Chief Justice of the Eastern Caribbean Supreme Court) is currently presiding over the Rwandan tribunal regarding alleged genocide. Press Release, International Criminal Tribunal for Rwanda, Sir Charles Michael Dennis Byron Appointed as Permanent Judge of the ICTR (Apr. 20, 2004), at <http://www.icttr.org/ENGLISH/PRESSREL/2004/384.htm>. The Honorable Patrick Robinson of Jamaica is presiding over the Milosevic hearing. The Telegraph (UK), *Milosevic accused of presiding over era of 'medieval savagery,'* at <http://www.balkanpeace.org/hed/archive/feb02/hed4683.shtml> (last visited Feb. 7, 2005).

65. Dame Joan Sawyer is President of the Court of Appeal of The Bahamas. The Government of the Bahamas, *Supreme Court Justices*, available at <http://www.bahamas.gov.bs/BahamasWeb/aboutthegovernment.nsf/Subjects/Members+of+the+Judicial+System> (last visited Feb. 2, 2005).

Justice of the Eastern Caribbean Supreme Court.⁶⁶ Many graduates of the U.W.I. and C.L.E. hold high offices as Attorneys-General, Directors of Public Prosecutions, Solicitors-General, *inter dios*.

3. A Hanging Court?

Before concluding the discussion on the pros and cons of the CCJ, it is necessary to address a distorted argument and perception that has gained currency. It is the unworthy suggestion that the CCJ is being established as “a hanging court.” The argument has its genesis in the line of cases following the landmark decision in *Pratt v. Attorney General*.⁶⁷ Broadly, the effect of those cases has been to prevent the use of the death penalty in the region. Caribbean people and their governments became frustrated and angry that the reasoning of the judges of the JCPC in case after case went beyond acceptable judicial activism and was clearly judicial legislation in an issue of social policy. The parliaments of the region were not abolishing the death penalty; the judges of the JCPC were. “It is impermissible for [judges] to develop the law in a direction which is contrary to the expressed will of Parliament.”⁶⁸ “[C]ourts [should be] slow to develop the common law by entering . . . a field regulated by legislation.”⁶⁹

The spate of death penalty decisions came between 1993 and 2000, precisely at the time when serious work was going on in the region to make the CCJ a reality. There was therefore a coincidence, even a collision, of events that gave rise to the distorted argument. At the same time, as the proponents of the Court were promoting it throughout the region, dissatisfaction was being expressed with the decisions of the JCPC. It is not hard to see how the debate got derailed. The JCPC judges were accused of using Eurocentric attitudes and values to seek to abolish the death penalty in the region contrary to the wishes of the people of the region and usurping the powers of national parliaments as the only constitutional authorities to repeal statute laws. Abolition of the death penalty in the region must be the function of the parliaments in the region. As Chief Justice de la Bastide remarked in 2002:

66. Eastern Caribbean Supreme Court, *Honorable Justices of the Eastern Caribbean Supreme Court, Honorable Adrian Saunders, Biography*, <http://www.ecsupremecourts.org.lc/index.htm> (last visited Jan. 28, 2005).

67. (1993) 43 W.I.R. 340 (P.C.).

68. *Re McKerr*, [2004] 2 All E.R. 409, 425 (H.L.) (quoting *R. v. Chief Constable of the Royal Ulster Constabulary*, [1997] 4 All E.R. 833, 838 (H.L.)).

69. *McKerr*, [2004] 2 All E.R. at 419.

“We are firmly of the view that if the death penalty is no longer to be mandatory in Trinidad and Tobago, this change must be effected by Parliament.”⁷⁰

That view of the Court of Appeal of Trinidad and Tobago has been endorsed in the recent decisions of *Boyce* and *Matthew* by the majority in the JCPC.⁷¹

I am bound to say that the suggestion that the Court is being established for the collateral purpose of accelerating hangings in the region distorts reality and flies in the face of history. I have demonstrated above that the idea for such a Court (raised in both 1901 and 1947) predated *Pratt*, which took place in November 1993, and so did the *decision* of Heads of Government in 1989 to replace the JCPC with an indigenous Court. The *raison d’etre* of the CCJ is *not* to accelerate hangings. Gossip to the contrary is all the more frivolous when it is remembered that no judges were appointed to the CCJ when the gossip was at its height. In truth, the gossip is an attack on the integrity and impartiality of the body charged with responsibility for appointing the judges and it implies that the judges, will be appointed on the basis of their personal views on the death penalty. Nothing could be further from the truth.

On balance, the arguments in favour of the CCJ far outweighed those against it and convinced the Heads to pursue their determination to establish the CCJ. They recognised that the Court is indispensable for the good governance of the region and has a critical role to play in the efficient administration of justice in Member States of CARICOM.

Our current judicial hosts, the JCPC, will not be sad to see us leave. Over the years the Commonwealth jurisdiction of the CCJ has steadily contracted. Canada, Australia, the states of East and West Africa, India, Pakistan, Singapore, inter alia, have all de-linked from the JCPC.⁷² Most recently, in October 2003, New Zealand enacted legislation to sever its relationship with the JCPC.⁷³

A feature of the termination of these relationships has been the resistance of the private bars to the rupture. The Government of New Zealand met stern opposition in its efforts to end the relationship with the JCPC.⁷⁴ We faced it in the Caribbean. The Bars of Jamaica, Trinidad and Tobago and, to a lesser extent, the OECS, have resisted the establishment of the CCJ.

70. *Roodall v. State* (Criminal Appeal No.64 of 1999) p. 21 (C.A. Trinidad & Tobago).

71. See generally *Boyce*, [2004] U.K.P.C at 32; *Matthew*, [2004] U.K.P.C. at 33.

72. TOM BINGHAM, *THE BUSINESS OF JUDGING: SELECTED ESSAYS AND SPEECHES* 387 (2002).

73. See *New Zealand Gets Own Justice System After 160 Years*, PAC. NEWS AGENCY SERVICE, July 1, 2004, 2004 WL 56683169.

74. BINGHAM, *supra* note 72, at 388.

The strident, almost virulent, opposition to the CCJ in Jamaica is, as I indicated above, paradoxical when it is remembered that as long ago as 1970, it was Jamaica which proposed to the regional Heads of Government that the region replace the JCPC with its own indigenous court of last resort.⁷⁵

However that may be, the concerns of the Bars were taken into account by the Prep. Comm. and helped to improve the text of the CCJ Agreement. In common with sections of the general Caribbean public, those concerns were focused on securing the independence of the Court in regard to the appointment of judges and the financing of the Court.

IV. THE UNIQUENESS OF THE CCJ

We shall now examine some of the distinctive features of this Court confident in the assertion that it is a court *sui generis*. The CCJ has two jurisdictions. It is a municipal court which will hear appeals in civil and criminal cases in the same way as the JCPC now hears appeals from Commonwealth Caribbean States. At the same time, regional governments accepted the recommendations of the Ramphal Commission: that the CCJ should have original jurisdiction, that is to say, jurisdiction to hear and determine disputes arising under the Revised Treaty of Chaguaramas governing arrangements for the CSME. To that extent, the CCJ is also an international court.

A. *Compulsory and Exclusive Original Jurisdiction*

The Ramphal Commission envisaged a central role for the CCJ in a deeper and wider regional integration process, and Article 211 of the Revised Treaty of Chaguaramas gives the Court compulsory and exclusive jurisdiction in the settlement of disputes concerning the interpretation and application of that Treaty.⁷⁶ No other courts in the region have competence to hear and determine disputes involving the interpretation and application of the Revised Treaty.⁷⁷ Indeed, if an issue as to the interpretation and application of the Revised Treaty arises before a national court, that court must stay the proceedings and refer the issue to the CCJ for its determination.⁷⁸

In the context of its role as a judicial institution in a regional integration movement, the CCJ will apply rules of international law, but it may also em-

75. RAWLINS, *supra* note 1, at 5.

76. Revised Treaty, *supra* note 4, art. 211.

77. *See id.*

78. CCJ Agreement, *supra* note 39, art. XIV.

ploy other principles of law or equity where necessary.⁷⁹ In this regard, the jurisdiction of the CCJ differs from that of other regional courts such as the European Court of Justice, which must apply Community Law (the norms peculiar to the European Union).⁸⁰ The CCJ is not a supra-national institution. The States of the Caribbean which have signed the Revised Treaty and submit to the original jurisdiction of the Court are all sovereign, independent states. They have not ceded any of the attributes of sovereignty to any supra-national entity as, for example, is the case with the European Union.

So far as original jurisdiction is concerned, Article XII of the CCJ Agreement, as well as Article 211 of the Revised Treaty, provides that the CCJ will

have *compulsory and exclusive jurisdiction* to hear and determine disputes concerning the application and interpretation of the Revised Treaty including:

- (a) disputes between Member States parties to the Agreement;
- (b) disputes between Member States parties to the Agreement and the Community;
- (c) referrals from national courts of the Member States parties to the Agreement;
- (d) applications by persons in accordance with Article 222, concerning the interpretation and application of this Treaty.⁸¹

The circumstances in which such persons, or nationals, may have standing before the Court are where:

- (a) the Court has determined in any particular case that the Treaty intended that a right conferred by or under the Treaty on a Contracting Party shall enure to the benefit of such persons directly; and
- (b) the persons concerned have established that such persons have been prejudiced in the enjoyment of the benefit mentioned under (a) . . . ; and
- (c) the Contracting Party entitled to espouse the claim in proceedings before the Court has:

79. Revised Treaty, *supra* note 4, art. 217.

80. E.g., Jürgen Schwarze, *Judicial Review in EC Law—Some Reflections on the Origins and the Actual Legal Situation*, 51 INT'L & COMP. L.Q. 17, 28 (2002).

81. *Id.* art. 211. Article XII of the CCJ Agreement is very similar to Article 211 of the Revised Treaty, and its subsection (d) refers to applications by nationals who, with special leave, are given locus standi to appear in three specific cases under Article XXIV of CCJ Agreement. CCJ Agreement, *supra* note 39, art. XII.

- (i) omitted or declined to espouse the claim, or
- (ii) expressly agreed that the persons concerned may espouse the claim instead of the Contracting Party so entitled; and
- (d) the Court has found that the interests of justice requires that the persons be allowed to espouse the claim.⁸²

B. *Non Liquet*

Closer examination of the original jurisdiction of the Court highlights in a stark way some of the other distinctive characteristics of the Court apart from its dual jurisdictions. First is the principle of non liquet. Article XVII, subsection two of the CCJ Agreement prohibits the Court from refusing to determine a matter on the grounds of “silence or obscurity of the law.”⁸³ Whereas in civil law systems, a court might decline to give a decision if there were particular difficulties in reaching a decision and leave the issue for future determination, both the CCJ Agreement and the Revised Treaty require decisiveness of the CCJ.⁸⁴ Although the non liquet provision has been criticised by H.R. Lim A. Po,⁸⁵ it is justified on grounds of certainty and predictability in the interpretation and application of the Revised Treaty. It would not be appropriate for national courts to seek to resolve disputes arising under the Revised Treaty. Clearly it would be preferable to have a separate court, independent of individual states, adjudicate issues under the Revised Treaty. Such an arrangement would better promote certainty, predictability, and impartiality, hence the role of the CCJ.

C. *Stare Decisis*

A third unique feature of the original jurisdiction is seen in the incorporation of the doctrine of stare decisis in that jurisdiction.⁸⁶ It is true that, traditionally, this doctrine has had no application in international law or civil law jurisdictions and is absent from the Articles of the European Court of Justice.⁸⁷ The doctrine of binding precedent is a common law phenomenon

82. *Id.* art. XXIV.

83. *Id.* art. XVII(2).

84. CCJ Agreement, *supra* note 39, art. XVII; Revised Treaty, *supra* note 4, art. 217.

85. H.R. Lim A. Po, Bridging the Divide, An Address to a Symposium on the CCJ in Suriname (October 31, 2003).

86. CCJ Agreement, *supra* note 39, art. XXII. “Judgments of the Court shall be legally binding precedents for parties before the Court unless such judgments have been revised in accordance with Article XX.” *Id.*

87. *See* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3.

facilitating certainty in the law as far as practicable. And, although the framers of the CCJ Agreement and the Revised Treaty were conscious of the membership of Haiti and Suriname (two civil law jurisdictions) in the Caribbean Community, and although it was appreciated that courts in civil law jurisdictions may depart from previous decisions, the drafters nevertheless were persuaded to write the doctrine into the documentation.

The justification for the decision to include Article XXII lies in a recognition of a movement in the European Court of Justice and other courts to promote greater certainty in the law by an adherence to previous decisions. Inconsistency in judicial decisions promotes uncertainty and injustice.

D. *Locus Standi for Private Entities*

A fourth distinctive feature of the original jurisdiction can be seen in Article XII. This Article introduces an important exception to the general principle that in traditional international law only States and States' entities are subjects of international law and competent to espouse claims in an international form.⁸⁸

The Legal Affairs Committee in 1998 accepted a recommendation to include in the CCJ Agreement a procedure to provide an opportunity for *non-States parties* to appear before the CCJ in special circumstances. There is no automatic right for a private entity to move the Court, but access may be accorded either through the State of the national or via Article 214 of the Revised Treaty.⁸⁹

The Revised Treaty is intended to be a rules-based mechanism widening and deepening the integration of the Caribbean region. But, at its centre, it is intended to benefit *the people* of the region. It is right, therefore, that the régime for the settlement of disputes should provide a mechanism by which the people of the region, natural and corporate, should be able to invoke the Court's jurisdiction in appropriate cases.

E. *Constitution of the Court*

Turning to the constitution of the Court, the Agreement makes provision for the Court to be staffed by nine judges and a President.⁹⁰ The Judges, other than the President, will be appointed or removed by a majority vote of all of the members of the Regional Judicial and Legal Services Commission

88. See CCJ Agreement, *supra* note 39, art. XII; Statute of the International Court of Justice, 1945 I.C.J. Acts & Docs. art. 34(1).

89. Revised Treaty, *supra* note 4, art. 214.

90. CCJ Agreement, *supra* note 39, art. IV(1).

(RJLSC).⁹¹ In the case of the President, however, he or she is appointed by a vote of three-fourths of the Heads of Government on the recommendation of the RJLSC.⁹² This formula owed much of its final form to the comments of the Jamaica Bar Council and the concerns of the regional public. They were all determined that, as far as practicable, judicial appointments should be insulated from the possibility of political influence. Some of the detractors of the Court preferred that *all* of the judges should be appointed by the RJLSC, but the Prep. Comm. was not persuaded and saw no compelling reason to deny the Heads of Government the privilege of a final say in the appointment of the President. Those detractors ignored the glaring facts that the judges of the JCPC, our highest court, are appointed upon the recommendation of the British Prime Minister, and that Chief Justices of the region are appointed by the Head of State acting on the recommendation of a Prime Minister after consultation with the Leader of the Opposition.

F. *The Judges*

Any Caribbean or Commonwealth judge with five or more years of service or judges from civil law jurisdictions are eligible for appointment as judges of the CCJ.⁹³ In addition, a practitioner or teacher of law with fifteen years of experience in any part of the Caribbean, the Commonwealth, or a civil law jurisdiction, may be eligible for appointment.⁹⁴

The Agreement has deliberately cast a wide net for the judges of the Court in order to capture the best available talent in common law and civil law jurisdictions and to invest the Court with the kind of diversity that a final Court deserves. Specific provision is made in the Agreement for at least three judges of the Court to have expertise in international law and/or international trade law.⁹⁵ It is my opinion that extending eligibility for judicial appointment to academic lawyers is a highly progressive and desirable innovation.

Again, the provisions for appointment of the judges are so crafted as to highlight the uniqueness of the Court. As Duke Pollard observes: "The CCJ is the only international institution of its kind in the world where judges will not be appointed, directly or indirectly, by the political directorate of the

91. *Id.* art. V(3)(1)(a).

92. *See id.* art. IV(2), VI(1).

93. *Id.* art. IV(10)(a).

94. *Id.* art. IV(10)(b).

95. CCJ Agreement, *supra* note 39, art. IV(1).

States participating in the regime. Cases in point are the International Court of Justice (ICJ), the European Court of Justice (ECJ).⁹⁶

In early 2004, when advertisements ran worldwide for judges of the Court, the RJLSC received ninety applications from all over the world. At their meeting in Grenada during July 4-7, 2004, the Heads of Government unanimously accepted the recommendation of the RJLSC that the Honorable Michael de la Bastide, T.C., Q.C., a former Chief Justice of Trinidad and Tobago, be appointed as the first President of the CCJ.⁹⁷ The RJLSC met on the 27th and 28th of September, 2004 and selected a further five judges for appointment.

In my opinion, the Agreement establishing the CCJ makes adequate provision for ensuring the judges' security of tenure. For example, the President can serve for a period of seven years (non-renewable) or until the age of seventy-two.⁹⁸ The other judges must retire at age seventy-two, and there is no power to extend a judge's term of office.⁹⁹ This is an important provision aimed at reducing the possibility of a judge submitting to improper influence. Similarly, the office of a judge cannot be abolished while there is a substantive holder of it.¹⁰⁰ The salaries and allowances payable to the judges, as well as their other terms and conditions of service, cannot be altered to their disadvantage during their tenure of office.¹⁰¹ And removal from office is not an easy process. A judge may only be removed from office if he or she is unable to perform the functions of office by reason of ill-health or mis-behaviour.¹⁰² I will not set out in this paper the detailed procedure for removal of a judge from office. Suffice it to say that there is an elaborate procedure which makes ample provision for securing a fair hearing and involves the appointment of a special tribunal to hear and determine a proposal for removal.¹⁰³

So far as the emoluments and perquisites of judicial office are concerned, salaries and allowances are free of tax, and judges will be entitled to

96. POLLARD, *supra* note 8, at 38.

97. See Twenty-fifth Communiqué, *supra* note 45. The Honorable Michael de la Bastide was sworn in as President on August 18, 2004 at a ceremony in Port-of-Spain. Caribbean Net News, *Chief of New Caribbean Court Sworn In* (Aug. 19, 2004), at <http://www.caribbean.netnews.com/2004/08/19/ccj.htm>.

98. CCJ Agreement, *supra* note 39, art. IX(2).

99. See *id.* art. IX(3).

100. *Id.* art. IX(1).

101. *Id.* art. XXVIII(3).

102. *Id.* art. IX(4).

103. See generally CCJ Agreement, *supra* note 39, art. IX(4), (6) (outlining the reasons and procedure for removing a judge from office).

housing allowances, cars, drivers, and other benefits.¹⁰⁴ Superannuation benefits are as follows:

(a) less than 5 years' service – a gratuity of 20 per cent of the Judge's pensionable emoluments at the time of retirement for every year of service;

(b) 5 to 10 years' service – a monthly pension equivalent to two-thirds of the Judge's monthly pensionable emoluments at the time of retirement.

(c) more than 10 years' service – a monthly pension equivalent to the Judge's monthly pensionable emoluments at the time of retirement.¹⁰⁵

G. *Mode of Appointment of Judges and Staff: The RJLSC*

More and more throughout the Commonwealth, it is accepted that appointments to judicial office should be made by an independent, impartial, autonomous body. In the constitutions of the Commonwealth Caribbean States, a Judicial and Legal Service Commission is a common feature of such a body. In the case of the CCJ, a deliberate attempt was made to ensure that the appointments of judges were made by such a body. Thus, the Agreement has adopted the constitutional mechanism of appointment (and removal) of the judges of the CCJ by the RJLSC.¹⁰⁶

The RJLSC is an independent body comprised of persons nominated or chosen by institutions or persons with no political affiliation.¹⁰⁷ It consists of the President of the Court as Chairman and ten other persons drawn from the Caribbean region and includes: the Chairman of a Judicial and Legal Services Commission of a Contracting Party, the Chairman of a Public Service Commission of a Contracting Party, two persons from civil society appointed by the Secretary-General of the Caribbean Community (CARICOM), two persons nominated by OCCBA and the Bar Association of the OECS, two distinguished regional jurists, and two nominees of the Bar Associations of Contracting Parties.¹⁰⁸ The independence of the Commission is reinforced by a Protocol conferring various privileges and immunities on it, and its independence is specifically incorporated in the Agreement: "In the exercise of their functions under this Agreement, the members of the Commission shall

104. *Id.* at App. II.

105. *Id.*

106. *Id.* art. V(3), IX(5)(2).

107. *See id.* art. V(1).

108. CCJ Agreement, *supra* note 39, art. V(1).

neither seek nor receive instructions from any body or person external to the Commission.”¹⁰⁹

The RJLSC assumed office on August 20, 2003. Among its responsibilities is the appointment of the Judges, officials, and staff of the Court.¹¹⁰ The President took up office on August 18, 2004, but prior to his appointment, the Commission met every month after August 20, 2003 to prepare and put into place a wide range of necessary administrative and infrastructural arrangements. These included, inter alia, the establishment of budgets for library materials and technological support systems, preparation of a code of judicial conduct, identification of human resource requirements, and advertising for judges and staff of the Court. The Commission has worked hard and well.

H. *Headquarters*

The Seat of the Court will be in Trinidad and Tobago, but, as mentioned earlier, the Court will be itinerant.¹¹¹ The Government of Trinidad and Tobago is providing a building in Port-of-Spain to house the Court, and the offices of the RJLSC are also presently located in Port-of-Spain.

V. FINANCING THE COURT: AN EXAMPLE OF UNIQUE CREATIVITY

Now to the very important matter of financing the Court. As indicated earlier, the people of the region were concerned that the financing of the operations of the Court should be put on a secure and sustainable basis. This concern was born of the experiences of many of our regional institutions which have, from time to time, suffered from fiscal disequilibrium owing to the delinquency of some governments in paying their contributions in a timely manner. Caribbean peoples were determined that the CCJ should not be subjected to fiscal uncertainty or embarrassment. To meet these concerns, the Prep. Comm. designed a mechanism to secure the efficiency, effectiveness, financial independence, and viability of the Court,¹¹² and the Heads of Government courageously accepted the arrangement proposed. It called for

109. *Id.* art. V(12).

110. *Id.* art. V(3)(1).

111. *Id.* art. III(3).

112. On the evening before a meeting of the Legal Affairs Committee of CARICOM in Jamaica (June 18, 2000), Duke Pollard discussed with me the creation of a trust fund to provide financial independence for the Court. We agreed it was an idea worth canvassing with the Prep. Comm. Upon sharing the idea with the Prep. Comm., it agreed to develop the broad idea in more concrete terms.

their willingness to enter into substantial borrowing to invest the Court with sustainable financing and enhance its independence. A truly unique mechanism was designed to secure the financing of the Court.

VI. THE TRUST FUND

The mechanism ultimately agreed upon by regional governments was the creation of a trust fund.¹¹³ Broadly, the arrangement is as follows: It was estimated that 100 million U.S. dollars would be required to sustain the operations of the Court in perpetuity. Heads of Government agreed that the Caribbean Development Bank (CDB) should raise this amount on their behalf on the international capital markets.¹¹⁴ Each Government undertook to borrow a part of the sum raised and to be liable to repay the CDB the part borrowed of the 100 million U.S. dollars according to an established formula in CARICOM on the basis of a long term loan. In the meantime, the sum raised will be transferred to trustees who will use it to constitute the corpus of the Trust Fund and the trustees will then invest the corpus in securities to yield income.¹¹⁵ This income will thereafter be used to finance the recurrent and capital expenditure of the Court and the Commission. The trustees are expected to administer the Trust Fund, keeping in mind considerations of economy, efficiency, cost-effectiveness, and the need to safeguard the independence and sustainability of the Court.

The trustees are a group of highly respected, prominent, Caribbean persons with a wealth of expertise and experience in a variety of disciplines. None has any known or obvious connection with the political directorates of the region. The trust fund arrangement has been well received in the region and applauded outside of the region. I believe that this novel creation has substantially buttressed the independence of the CCJ.

Both the mechanism for the appointment of the judges, and the mechanism for financing the Court, have indeed been testaments to the creativity of Caribbean people and offer excellent paradigms for securing judicial independence. New norms for ensuring judicial independence have been established by small countries.

113. See generally Press Release, CARICOM, Caribbean Court of Justice Trust Fund Agreement Enters into Force – Court Arrangements Advance (Feb. 11, 2004), at http://www.caricom.org/pressreleases/pres17_04.htm.

114. *Id.*

115. *Id.*

VII. THE INFLUENCE OF THE CCJ ON NATIONAL DEVELOPMENT

The influence of the CCJ is being felt throughout the region. National justice systems are going through a process of modernisation to improve the delivery of justice as a contributor to national development generally. Many of the economies of the region are service-oriented and it is vital that national justice systems be modernised to assist in the facilitation of the delivery of services.

Justice and development are inextricably linked. Since the middle of the 1990s, international financial institutions such as the World Bank, the International Monetary Fund, and the Inter-American Development Bank, have accepted that thesis. In fact, those three institutions came together with the regional judiciary and the Attorney Generals in December 1999 in Jamaica to examine that link more closely. Broadly, it is acknowledged that the justice sector contributes as much as twenty-five per cent to the gross domestic product of Caribbean countries.

However, the justice sector of the Caribbean region has traditionally been under-provisioned. Justice infra-structure has lagged behind other sectors of the economies of the countries of the region. That inferior status of the justice sector prompted many opponents of the CCJ to call for a deferral in the establishment of the Court until local courts and the justice sector as a whole were brought up to respectable standards, according to the notional standards of the opponents. Quite simply, it was argued that the money being spent to set up the CCJ would be better spent improving the national justice sectors across the region while hanging on to the coat tails of the judges of the JCPC interminably. It was not an argument that commended the Prep. Comm. to abandon establishment of the CCJ, but it was a catalyst to spur action at the national level to improve the national justice systems.

Since 1999, therefore, all of the Commonwealth Caribbean countries have devised strategies and programmes for the modernisation of their justice systems with assistance from external sources. The OECS has made spectacular progress; Barbados is currently implementing a Justice Improvement Project with a loan of 12.5 million U.S. dollars from the Inter-American Development Bank.¹¹⁶ Jamaica is undergoing modernization, as well as Trinidad and Tobago. Rules of Civil Procedure are being harmonized across all countries of the Commonwealth Caribbean,¹¹⁷ and the pace of judicial education and training has been markedly accelerated.

116. Inter-American Development Bank, *Administration of Justice Program*, available at <http://www.iabd.org/exr/doc98/apr/ba1332e.pdf> (last visited Feb. 2, 2005).

117. See, e.g., GILBERT KODILINYE & VANESSA KODILINYE, COMMONWEALTH CARIBBEAN CIVIL PROCEDURE (1999).

It is unquestionable that the movement to establish the CCJ has inspired these several reforms. It is equally undoubted that the international financial institutions have seen the improvements in the justice sector as essential attributes for attracting investment necessary for sustainable economic development and are demonstrating a willingness to assist in tangible ways.

VIII. DE-LINKING FROM THE JCPC

In the Commonwealth, some countries have gone the route of creating a Supreme Court to replace the JCPC.¹¹⁸ Canada, Ghana, and Singapore are three examples. New Zealand also proposed a similar court when it decided to withdraw from the jurisdiction of the JCPC in October 2003.¹¹⁹ Australia, of course, created the High Court of Australia as its final court in 1986. For Commonwealth Caribbean States, the CCJ will be similar to the Supreme Courts mentioned or the High Court of Australia.¹²⁰ There is no difficulty in conceptualization. But there are practical difficulties in seeking to de-link the appellate jurisdiction from the JCPC because of Constitutional differences among the Member States. Some states, for example, Jamaica and Barbados, require a simple majority vote of Parliament to sever. In the majority of States of the OECS, it is thought that they require a referendum in addition to a qualified majority vote in Parliament. Let me hasten to add, however, that no special majorities or referenda are required in any of the states to join the *original jurisdiction* of the Court. That explains why all of the Member States of the Community have had no difficulty in acceding to the original jurisdiction of the CCJ. A challenge may lie ahead for some states in joining the Court in its appellate jurisdiction upon inauguration.

IX. THE NEXT STEPS TO INAUGURATION

How soon can it be expected that the CCJ will begin hearing cases? The RJLSC has made substantial progress towards the establishment of necessary administrative and procedural infrastructure. To the extent that the CCJ is a regional court, efforts must be made to recruit staff on a regional basis. It is necessary therefore to advertise posts regionally and these proce-

118. James F. Smith, *Comparing Federal Judicial Review of Administrative Court Decisions in the United States and Canada*, 73 TEMPLE L. REV. 503, 545–54 (2000).

119. See John Turner, *Review: Civil Procedure*, 2004 NEW ZEALAND L. REV. 345, 359. As of January 1, 2004, the New Zealand Supreme Court replaced the JCPC as the appellate court for New Zealand cases. *Id.*

120. Michael Kirby AC CMG, *Rules of Appellate Advocacy: An Australian Perspective*, 1 J. APP. PRAC. & PROCESS 227, 228 (1999).

dures consume time. However, it is anticipated that by the end of 2004, applicants for senior and executive posts of the Court will have been interviewed and selected. Response to the various advertisements has been massive, attesting to the interest in the Court and esteem in which it is held.

Judges sufficient to start the Court and fulfill Treaty obligations, such as the making of the Rules of Court,¹²¹ have been selected and it is confidently asserted that the first six judges of the Court will assume office early in 2005.¹²² Even after selection in September 2004, time has to be allowed for the selected judges to give reasonable notice to end their current employment.¹²³

There are other considerations which militate against inauguration before March 2005. The headquarters of the Court are not yet ready,¹²⁴ but the Government of Trinidad and Tobago forecasts completion of necessary works within six months.¹²⁵ This time frame ought also to be sufficient to allow some regional governments to take legislative action to transform the Agreement establishing the Court into local law and to proclaim dates after which cases will cease going to the JCPC.¹²⁶

Inauguration, however, does not imply that there will be an immediate end of appeals to the JCPC. Governments will have to proclaim the dates after which appeals will cease going to the JCPC. All appeals pending before those “cut-off dates” will be adjudicated by the JCPC since the appellants will have had accrued rights to hearings before the JCPC. Their legitimate expectations cannot be denied. There will also be enough time for all of the preconditions to the disbursement of the funds from the CDB to the trustees of the Trust Fund to be satisfied.

121. Under the aegis of the Preparatory Committee and the Legal Affairs Committee, Draft Rules of Court in both jurisdictions have been prepared. When the judges assume office, they will be required to consider the drafts and determine whether to adopt them as drafted or to amend them. See generally *Caribbean Court of Justice (CCJ): Draft Rules of Court*, available at <http://www.caricom.org/ccj-index.htm> (last visited Feb. 8, 2005).

122. CCJ Press Release, *supra* note 5. At its meeting of September 27-28, 2004, the RJLSC selected five persons for appointment as judges of the Court. *Id.*

123. *Id.*

124. *Id.*

125. The Government of Trinidad and Tobago recently determined to change the location of the headquarters of the Court from Richmond Street, Port-of-Spain to 134 Henry Street, Port-of-Spain.

126. CCJ Press Release, *supra* note 5. At the time of writing, Guyana, Trinidad and Tobago, and Grenada have not passed relevant legislation to invest the CCJ with jurisdiction in local law. *Id.*

X. CONCLUSION

Realistically, it is anticipated that inauguration of the CCJ is likely in March 2005. Upon its inauguration, the CCJ will be a final appellate court for the Commonwealth Caribbean and a court essential to the regional integration movement of which the entire Caribbean can be proud. Its establishment will enable the region to make its own contribution to the development of the common law and provide the stimulus for the development of Caribbean jurisprudence. As the Trinidad and Tobago delegation to the Eighth Meeting of Heads observed in 1987: “[In] the field of law, Caribbean jurists have long ago attained the maturity, competence and distinction to man a Caribbean Court of Appeal with honour.”¹²⁷

Its establishment will complete our independence and finally remove the self-doubt and lack of self-confidence which have been deeply ingrained in the psyche of our former colonial peoples.

In its creation, the decision-makers of the region have demonstrated to the world the creativity and ingenuity that inhere in the people of the region. New norms have been developed for the appointment of the judiciary; new norms have been established for bolstering judicial independence; new norms have been created for the financing of courts, expanding judicial autonomy and independence; new norms have been created in international law. This unique judicial paradigm stands ready to take its place among the final appellate courts of the Commonwealth and alongside other regional courts such as the Court of Justice of the Andean Community, the Court of Justice of the Common Market for Eastern and Southern Africa (COMESA), and the Central American Court of Justice (CACJ). The CCJ is essential for the structured and efficient functioning of the CSME.

Winds of change are blowing in the Caribbean in the dispensation of justice and in the integration of the economies of the region. The independence of Commonwealth Caribbean States is not yet complete. We are seeking to complete that independence by repatriation of the judicial arm of government at its highest level from the United Kingdom. In that search for independence in judicial matters, the people of the Caribbean have evolved several exciting new norms to promote and safeguard the independence, integrity, and credibility of the Court. The journey in the evolution of region-specific legal norms and the quest for independent justice in the Commonwealth Caribbean has begun. History will determine whether it succeeds.

127. POLLARD, *supra* note 8, at 2.

NOTES ON LAWYERS AND COMMERCE

ANTHONY CHASE*

Reasons for business clients disliking or being suspicious of attorneys are legion. First, some clients (including business clients) are disserved by the lawyer they have retained. “Unfortunately,” observes Richard Abel, “most people view lawyers through their personal experience of the law, which is usually unhappy (always for the losing party in litigation, often for the winner too), and firmly believe lawyers produce *injustice* (clients want to win, not lose to vindicate an ideal).”¹ Just as the victims of crime may look upon the criminal defense attorney as the enemy (as much perhaps as the alleged perpetrator himself), and adversaries in a divorce or child custody proceeding may regard the lawyer for the other side with as much disdain, if not more, than they hold for their soon-to-be former spouse, business clients may see a competitor’s lawyer as more of a problem than their opponent who, while temporarily on the other side of a dispute, remains nevertheless engaged in the same or similar trade.

“While business might find lawyers useful,” remarks David Sugarman, in an historical commentary on the British legal profession, “they also found them expensive, technical, and time-consuming.”² As it was, these factors often “turned litigation into a game of chess, which put a premium on tactics and the wearing down of one’s opponents [and u]sually only those with sufficient resources could take on a dedicated and well-financed adversary.”³ Such observations immediately bring to mind the *New Yorker* magazine cartoon where a lawyer clasps his hands together and asks the client, sitting across the desk from him, just how much justice he can afford.⁴ Business clients gain no more pleasure than any anyone else from being compelled to pay expensive, sometimes exorbitant, legal fees.

Even where business clients become convinced they are getting their money’s worth, they may still feel a sense of helplessness as a result of what

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1. Richard L. Abel, *Lawyers and Legal Services*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 814 (Peter Cane & Mark Tushnet eds., 2003).

2. David Sugarman, *Simple Images and Complex Realities: English Lawyers and Their Relationship to Business and Politics, 1750-1950*, in 2 LAW IN HISTORY: HISTORIES OF LAW AND SOCIETY 145, 168 (David Sugarman ed., 1996).

3. *Id.* at 169.

4. J.B. Handelsman, *Cartoon*, in THE NEW YORKER BOOK OF LAWYER CARTOONS 73 (1993).

they perceive to be a dependent relationship with their attorney. “Not only does the law factory serve the corporate system,” wrote C. Wright Mills in his book, *White Collar*, “but the lawyers of the factory infiltrate the system. At the top, they sit on the Boards of Directors of banks and railroads, manufacturing concerns, and leading educational institutions.”⁵ Whatever the commercial client’s business strategy may be, it is the attorney who tells the client what the law does and does not permit—it is the lawyer who seems to call the shots. Describing the emergence of trade on a world scale, Kenneth Pomeranz and Steven Topik record the following:

In most Southeast Asian ports, traders were organized into ethnic communities, each of which had a headman who was supposed to keep order. So if, say, a Gujarati and a Dutch merchant fell out, their respective headmen would first meet to settle the dispute. This had its own perils for the merchants—they often lost the chance to speak for themselves, and might find their own case sacrificed to the broader interests of their communities, or the political ambitions of their headman.⁶

While C. Wright Mills acknowledges the Wall Street law firm’s interest in national politics “is usually only a means of realizing its clients’ economic interests,”⁷ one still wonders how many corporate clients must nevertheless have felt that their subservience to their respective headmen was not all that different from the Dutch merchants who first penetrated the Southeast Asian market.

The commercial client’s anxiety over the power of attorneys and expenses added on to the normal costs of doing business incurred when lawyers become involved is of ancient vintage. As we shall see, it was already present and given voice in the ancient world—specifically, the world of Greek maritime traders. This essay briefly examines the attitudes and commentary upon lawyers and the law’s delay, characteristic of classical Greece and medieval Spain, before turning to a brief assessment of similar complaints expressed in the New World, that of colonial America. The latter represents an instructive example of law and lawyers in a commercial setting where the familiar adage that the more things change, the more they stay same, turns out not to apply. In *The Ancient Economy*, M.I. Finley states that whatever the precise definition of the term *class society*,

5. C. WRIGHT MILLS, *WHITE COLLAR* 126 (1951).

6. KENNETH POMERANZ & STEVEN TOPIK, *THE WORLD THAT TRADE CREATED: SOCIETY, CULTURE, AND THE WORLD ECONOMY, 1400 – THE PRESENT* 31 (1999).

7. MILLS, *supra* note 5, at 126.

[F]or the ancient historian there is an obvious difficulty: the slave and the free wage labourer would then be members of the same class, on a mechanical interpretation, as would the richest senator and the non-working owner of a small pottery. That does not seem a very sensible way to analyse ancient society.⁸

While G.E.M. de Ste. Croix, in his landmark book, *The Class Struggle in the Ancient Greek World*, clearly disagrees with Finley on the applicability of this category to the analysis of ancient society,⁹ both historians readily agree that if the world of the Greek maritime traders was a full-blown commercial society, it was not a capitalist one.¹⁰ On the contrary, the emergence of capitalism in Western Europe was still two thousand years away.

“Litigants who faced Athenian juries did so with minimal professional help,” observes Steven Johnstone, and “[t]here were no legal experts, no lawyers, in Athens.”¹¹ But if ancient Athens was without a legal profession, it was not without litigation. Not only was Athenian law procedurally complex¹² but “even without specialized personnel, Athenian litigation gave rise to insular traditions of legal practice.”¹³ For Johnstone, these “practices of litigation mark the autonomy of courts.”¹⁴ The autonomy of Greek courts, the insular traditions of legal practice, and the procedural complexity of Greek law all contributed to growing problems of delay in Greek justice. An important exception to one side, according to Edward Cohen, “[t]he Athenian courts otherwise were subject to long delays.”¹⁵ Cohen cites one case which “came to trial some seven years after initiation of the prosecution” and adds that “[w]hile the statutory time limitation . . . appears normally to have been five years” another case did not come to court until “fourteen years after the relevant agreement had been made.”¹⁶

What was that single exception to the typical delay litigants suffered in Athenian courts? It was the separate system of maritime law and adjudication. “Thus Athenian commercial maritime law,” says Cohen, “was in accord with various modern systems that in practice offer procedural time-

8. M.I. FINLEY, *THE ANCIENT ECONOMY* 49 (updated ed., 1999) (1973).

9. G.E.M. DE STE. CROIX, *THE CLASS STRUGGLE IN THE ANCIENT GREEK WORLD FROM THE ARCHAIC AGE TO THE ARAB CONQUESTS* 58 (1981).

10. *Compare generally* FINLEY, *supra* note 8 with DE STE. CROIX, *supra* note 9.

11. STEVEN JOHNSTONE, *DISPUTES AND DEMOCRACY: THE CONSEQUENCES OF LITIGATION IN ANCIENT ATHENS* 18 (1999).

12. *See id.* at 130.

13. *Id.* at 44.

14. *Id.*

15. EDWARD E. COHEN, *ANCIENT ATHENIAN MARITIME COURTS* 10 (1973).

16. *Id.*

preference for certain commercial actions.”¹⁷ It is this commercial fast-track which Cohen takes as the primary subject of his research and he argues that “[t]he peculiar procedural characteristics of empiric cases developed in a legal system that had attained considerable sophistication in its commercial maritime regulations.”¹⁸ Cohen discusses the remarkable supranationality of Greek maritime courts, their openness to traders of all nationalities, and concludes that “[w]ith commerce so vital to Athens, with the state interest in trade accordingly high, the autonomy of commercial procedure at Athens is understandable.”¹⁹ At least it is understandable that in a commercial society, commerce may be valued sufficiently that a relatively autonomous system of commercial litigation might be created for the purpose of avoiding many of those typical complaints business clients routinely lodge against lawyers and the legal system.

Cohen points out that it was not only the maritime courts of Athens, in the fourth century B.C., which were open to traders from all throughout the maritime world.²⁰ At both Syracuse and Rhodes, “nationals of foreign states could also litigate freely in the local commercial courts”²¹ and it was at Rhodes that both substance and procedure adopted by the Greek maritime courts began to be codified.²² “The Rhodian Code,” according to A. Pearce Higgins and C. John Colombos, “which dates from the third or second century B.C., was evidently of great authority in the Mediterranean for its principles were accepted by both Greeks and Romans and its memory lasted for a thousand years.”²³ The *Rhodian Code* helped to shape maritime law up through the French *Laws of Oleron* and the British *Black Book of the Admiralty*.²⁴ “All of these attempts at codification,” asserts Stanley Jados, “are best exemplified by the codification, publication, and general acceptance in the fifteenth century of the *Consulate of the Sea*. Azuni referred to the *Consulate*, as a document ‘whose authority is above all others.’”²⁵

17. *Id.* at 10 (footnote omitted).

18. *Id.* at 63.

19. *Id.* at 69.

20. COHEN, *supra* note 15, at 70.

21. *Id.* at 69.

22. See generally A. PEARCE HIGGINS & C. JOHN COLOMBOS, *THE INTERNATIONAL LAW OF THE SEA* 24 (1943) (stating the Romans adopted the Sea Laws of the Rhodians).

23. *Id.*

24. See *id.* at 24–28.

25. STANLEY S. JADOS, *Preface to the CONSULATE OF THE SEA AND RELATED DOCUMENTS*, at xiii (1975).

Edgar Gold, who also refers to the *Consulate* as the “law of Barcelona,”²⁶ records that the first version of this codification was written in the Catalan language about 1300 and became “immensely popular”²⁷ because it managed to appear “at the right time—the time of the expansion of truly international trade and commerce.”²⁸ In the main English language monograph on the *Consulate of the Sea* (or *Consulado del Mar*), Robert Sydney Smith’s *The Spanish Guild Merchant*, the author observes:

Innumerable records furnish evidence that a fundamental motive of the Spanish Consulado was to secure the expeditious, economical, and equitable adjudication of disputes concerning maritime and mercantile contracts. An early privilege (1325) granted to the councilors of Majorca reveals their determination to circumvent the legalism and obstructions encountered in the ordinary courts through the institution of the Consulado (citation omitted). The sea consulate of Barcelona was established “in order to do away with the expenses of lawsuits and the strife of judicial proceedings among merchants and navigators” (citation omitted).²⁹

Here Smith tills the very same soil as the historians discussed above in mapping various pitfalls that await the business litigant in conventional courts and routine legal process. Just as Sugarman’s British commercial interests often found recourse to lawyers expensive, technical, and time-consuming, and just as Cohen’s ordinary Athenian courts were subject to long delays, the *Consulado del Mar* provided maritime traders with an attractive alternative to the legalism and obstruction encountered in medieval Barcelona’s regular courts.³⁰ Smith continues:

Pointing to the procedure of the consular court in Perpignan as a model for the sea-consuls of Montpellier, the king declared that the trammels of ordinary justices had reduced many merchants to poverty (citation omitted).

...

Pleading for consular privileges, the merchants of Burgos represented that in ordinary courts mercantile cases were “never terminated,” because lawyers found ways to prolong litigation, no matter how unjust the claim.³¹

26. EDGAR GOLD, *MARITIME TRANSPORT: THE EVOLUTION OF INTERNATIONAL MARINE POLICY AND SHIPPING LAW* 27 (1981).

27. *Id.*

28. *Id.*

29. ROBERT SYDNEY SMITH, *THE SPANISH GUILD MERCHANT: A HISTORY OF THE CONSULADO, 1250-1700*, at 6 (Octagon Books 1972) (1940).

30. *Id.*

31. *Id.* at 6–7.

Thus, Spanish mercantile traders seeking enforcement or interpretation of maritime contracts, were presented with the same kind of commercial fast-track or procedural time-preference, as Cohen put it, as were early Greek traders.³² And just as the Athenian maritime courts had pioneered a very forward-looking supranational jurisdiction, treating litigants equally regardless of nationality, the *Consulado del Mar* provided a direct response to those medieval merchants, described by Smith, who railed against the “inability of foreign traders to secure fair treatment at moderate cost in the ordinary courts of [Marseilles].”³³ So it can be said that when confronted with a contradiction between the “inherent nature of commerce,”³⁴ the equally inherent nature of law, and the almost inescapable expense and technical complexity encountered in seemingly endless legal process, a range of societies sufficiently sympathetic to the business client’s woes (and the stake of society as a whole, after all, in an expeditious as well as efficient public support for commerce) simply created an alternative social process to that of traditional litigation for the handling of mercantile disputes.

It was just these elements of flexibility and attention to the existing practices of maritime traders which declined when Spain’s role as a dominant force in international trade and commerce itself began to decline.³⁵ Eventually, as John Lynch argues, the Spanish government in 1690

appointed a junta to advise on the promotion of American trade, and subsequently asked [Manuel de] Lira to comment on its report, which simply recommended rigid prohibition of trade with foreigners. Lira reacted sharply against the growing xenophobia He argued that it was precisely the ban on trade with foreigners that induced the English, the Dutch and the French to establish settlements in the Indies. . . . In addition to reviving and expanding American trade, which in turn would stimulate Spanish manufactures and merchant marine, Lira believed that his proposals would convert England and the United Provinces into firm allies, for they would have a stake in a vital sector of the Spanish economy³⁶

Sadly for Spain, as Lynch points out, Manuel de Lira was pessimistic about the chance of his proposals being adopted and “in fact they were not. Many of them would have simply legalised existing practice, and the government could not bring itself to do this.”³⁷ Thus the very things that had

32. COHEN, *supra* note 15, at 10.

33. SMITH, *supra* note 29, at 6 (citation omitted).

34. COHEN, *supra* note 15, at 63.

35. See generally 2 JOHN LYNCH, SPAIN UNDER THE HABSBURGS: SPAIN AND AMERICA 1598–1700 (1969).

36. *Id.* at 279.

37. *Id.*

removed the law's delay and the trammels of conventional litigation from the commercial arena—that had lifted these legal burdens from the merchant's shoulders—lost favor, and precisely in that part of the world where the *Consulado del Mar* had been born and proved so effective. It was the existing practice of merchants, not lawyers and government bureaucrats, on which the international system of commerce had seemed to thrive. And it was the “establishment of an exceptional commercial jurisdiction,”³⁸ in ancient Greece as well as medieval Spain, which had given rise to such successful (and unobtrusive or counterproductive) commercial regulation. But the wheel of power and prestige in the world of global trade was simply making another turn—this time in the direction of the New World.

If maritime traders in the sixteenth century complained of the plethora of suits among merchants trading with America, and government policy two centuries later failed to recognize the link between an open system, *comercio libre*, and American trade and development, the colonists who had settled in the sometimes bitter environment across the Atlantic were themselves initially hostile to the kind of entrepreneurial values which animated economic traders and helped relationships of commercial exchange to multiply rapidly.³⁹

The story about how the early resistance of New England's European settler communities gradually gave way, by the end of the eighteenth century, to an emerging agrarian capitalist society is by now not only familiar but the most widely accepted description of just what happened within the New World economy during this period. Equally credited by historians is the once-controversial narrative of how lawyers and courts reshaped early American common law and institutions to serve the dominant interests of commercial enterprise: “Real values pushed aside by exchange values, declining employment of equitable remedies, and the rise of *caveat emptor*, judges subordinating common law to the market—these were the hallmarks of an entrepreneurial revolution which took the nineteenth-century legal system by storm.”⁴⁰

On the event of this transformation, however, the most conventional sort of diatribe was directed at attorneys by the merchant class and Republican pamphleteers. Charles Warren, in *A History of the American Bar*, records that “the most powerful attacks on the ‘dangerous’ and ‘pernicious’ ‘order’ of lawyers and their ‘malpractices, delays and extravagant fees’ were the letters of Benjamin Austin, an able pamphleteer and Anti-Federalist poli-

38. SMITH, *supra* note 29, at 7.

39. *Id.* at 73–76.

40. *Id.* at 111.

tician of Boston, who wrote, in 1786, under the name of 'Honestus,' and whose letters had a widespread influence."⁴¹ While less familiar and harder to find, Austin's essays and broadsides, published in *The Independent Chronicle* under the name "Old-South," pack such a punch and contain such a fine vitriolic wit that they remain worth reading.⁴² In his discussion of the judiciary, for example, Austin asks, "is there a man in the United States who wishes to extend this department of our government? Where is the man who candidly thinks that the bench and the bar, (though respectable as men) have not already their full preponderancy of weight in the community?"⁴³ After a stinging attack on Theophilus Parsons, Esq., for not appearing in court promptly at ten o'clock in the morning on a day when an argument by him had been scheduled, Austin extended his frustration to the whole of the profession, "[a] particular body of men, [who] of late have placed themselves in an attitude which appears calculated to *stop the wheels of government*. They assume an arrogance of deportment to which no free government ought to submit."⁴⁴

One way of looking at the American case is simply to argue that, as in antiquity and medieval Spain (up to a point), experience eventually taught the professions of law and commerce, as well as those who managed the judicial and legislative apparatus, that the substance and procedure of law needed to be streamlined if business was to be carried on efficiently and profitably. But such an argument would actually miss the point—overlooking the most important aspect of New World law and economy. While an independent body of maritime law was preserved and developed in early America, it was not simply the legal universe of merchants and traders that was redesigned to serve specific economic goals. The entire legal and political system, in fact, was refashioned in order to serve not just businessmen but capitalism itself as a mode of production.

Even after the 'great transformation' of American law in the years prior to the Civil War, such a revolutionary project would not and could not eliminate all the concerns and frustrations of the merchant class in any particular division or sector of the economy. That was not its purpose. As Ellen Meiksins Wood puts it:

41. CHARLES WARREN, A HISTORY OF THE AMERICAN BAR 219 (1990).

42. BENJAMIN AUSTIN, JR., CONSTITUTIONAL REPUBLICANISM, IN OPPOSITION TO FALLACIOUS FEDERALISM; AS PUBLISHED OCCASIONALLY IN THE INDEPENDENT CHRONICLE, UNDER THE SIGNATURE OF OLD-SOUTH (1803).

43. *Id.* at 251.

44. *Id.* at 297.

The economic imperatives of capitalism are always in need of support by extra-economic powers of regulation and coercion, to create and sustain the conditions of accumulation and maintain the system of capitalist property. The transfer of certain 'political' powers to capital can never eliminate the need to retain others in a formally separate political 'sphere'....

To stabilize its constitutive social relations—between capital and labour or capital and other capitals—capitalism is especially reliant on legally defined and politically authorized regularities. Business transactions at every level require consistency and reliable enforcement, in contractual relations, monetary standards, exchanges of property.⁴⁵

Consequently, contemporary conflicts between the economic interests of different professions (law, medicine) or industries (health care, insurance) or social groups (consumer advocates, tort reform) may at times produce both animosity and sharp opposition. These conflicts may be mitigated, resolved, heightened, or exploited by politicians and the mass media. A corporation, downsizing, may decide to bring its legal representation in house in order to save money on legal expenses. Government may impose labor or ecological regulations on private industry which cut into profits or encourage relocation abroad. IRS lawyers may try to prove in court that a company has not paid its fair share of taxes, and so on. But none of that means that lawyers—or the legal system—are fundamentally hostile to business. On the contrary, within capitalism alone do businessmen and women find themselves operating in a legal environment where the entire system has been designed to serve the main aims of capital. In what alternative economy would the fortunes of business share a brighter prospect?

45. ELLEN MEIKSINS WOOD, *THE ORIGIN OF CAPITALISM: A LONGER VIEW* 178–79 (Verso 2002) (1999).

CRITIQUE, CULTURE AND COMMITMENT: THE DANGEROUS AND COUNTERPRODUCTIVE PATHS OF INTERNATIONAL LEGAL DISCOURSE

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Theory is always for someone and for some purpose. All theories have a perspective. Perspectives derive from a position in time and space, specifically social and political time and space. The world is seen from a standpoint definable in terms of nation or social class, of dominance or subordination, of rising or declining power, of a sense of immobility or of present crisis, of past experience, and of hopes and expectations for the future There is, accordingly, no such thing as theory in itself, divorced from a

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*standpoint in time and space. When any theory so represents itself, it is the more important to examine it as ideology, and to lay bare its concealed perspective.*¹

*[H]ave we a right to assume the survival of something that was originally there, alongside of what was later derived from it? Undoubtedly. There is nothing strange in such a phenomenon, whether in the mental field or elsewhere. In the animal kingdom we hold to the view that the most highly developed species we have proceeded from the lowest; and yet we find all the simple forms still in existence today.*²

*Nothing we do can be defended absolutely and finally. But only by reference to something else that is not questioned.*³

I. INTRODUCTION

International law has undergone profound and radical transformations. The history of international law is replete with paradigm shifts as momentous as those in the history of science, philosophy, or the arts. The first great paradigm was forged out of the Treaty of Westphalia in 1648, that point in history commonly given for the genesis of modern international law. Out of the Treaty, certain metaphors for the state and inter-state relations became well-entrenched and pervasive. They concerned the equality of sovereign and independent nations and rules of action designed to prevent conflicts and wars. The next great shift involved the move away from natural law to positivism, which gained strength in the late eighteenth century, and culminated in the efforts of the great codifiers of the late nineteenth and early twentieth centuries, those who were determined to set down the rules of international law in a coherent and systematic manner. However, this quasi-scientific approach was deemed a failure. Alejandro Alvarez, in the 1920s, recognized that a new international law was needed to deal with the issues of globalization, to better describe the intertwined nature of law and politics. This realization resulted in a move away from positivism toward postmodernity, from

1. Richard K. Ashley & R.B.J. Walker, *Reading Dissidence/Writing the Discipline: Crises and the Question of Sovereignty in International Studies*, 34 INT'L STUD. Q. 367, 369 (1990) (quoting Robert W. Cox, *Social Forces, States and World Orders: Beyond International Relations Theory*, in NEOREALISM AND ITS CRITICS 207 (Robert O. Keohane ed., 1986)).

2. Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT'L L.J. 1, 77 (1999) (quoting SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS 15 (James Strachey ed. & trans. 1961) (1930)).

3. LUDWIG WITTGENSTEIN, CULTURE AND VALUE 16e (Peter Winch trans., G.H. Von Wright ed., 1980) [hereinafter WITTGENSTEIN I].

the strict notions of a rules-based system, to a new conception of international law, as an ideology, a social system, a great conversation in which all nations, and ultimately all individuals, groups, corporate entities, and NGOs, potentially can participate and realize a new international society.⁴

The important point for purposes of this paper is that at each of these historical “moments,” at each major paradigm shift, the prior understandings and conceptual assumptions were not eradicated or wholly replaced. While modified and transmuted by the new innovations, each prior understanding remained intact as part of the structure upon which the succeeding layer was constructed. Contemporary international law, as this paper seeks to show, is an amalgam of its history. International law exists in a very special and interesting conceptual space. It is simultaneously postmodern and antiquated, aspirational and antiquarian, forward-looking and backward-referencing. International legal arguments routinely rely on old precedents encapsulating bright-line legal rules, such as in *The Lotus Case*,⁵ where territoriality trumped nationality. At the same time, they also look forward to customary and so-called “soft” law, relying on emerging trends in support of a so-called “graduated normativity,” where there can be various degrees of more binding and less binding norms. As exemplified in *The Nuclear Weapons Case*,⁶ the court recognized that a trend existed, that the international community is moving toward a prohibition of nuclear weapons, but that a bright-line rule representing an all-out ban under any conditions had not yet been realized.⁷ These considerations, the simultaneous referencing of past legal principles, and the importance of emerging trends as having a degree of normative force complicates matters, makes the discerning of bias more difficult as historical distance arguably can never really be achieved.

The present study has as its goal to identify, catalogue, and explore the biases and blind spots, prejudices, and unintended consequences which reside in and around present-day international law, in this its most recent phase of its history. Philip Allott has described the new international law as a so-

4. This historical process of change has been well-documented and extensively analyzed. See ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW? A REAPPRAISAL OF THE LIMITS OF LEGAL IMAGINATION AND INTERNATIONAL AFFAIRS* (1986); Leo Gross, *The Peace of Westphalia, 1648-1948*, 42 AM. J. INT’L L. 20 (1948); David Kennedy, *International Law and the Nineteenth Century: History of an Illusion*, 17 QUINNIPAC L. REV. 99 (1997); David Kennedy, *Primitive Legal Scholarship*, 27 HARV. INT’L L.J. 1 (1986); see also LORI FISLER DAMROSCH, ET AL., *INTERNATIONAL LAW: CASES AND MATERIALS xxvii-xxxvi* (4th ed. 2001).

5. S.S. *Lotus* (France v. Turkey), 1927 P.C.I.J. (ser. A) No. 20, reprinted in 2 WORLD COURT REPORTS 20 (Manley O. Hudson ed., 1935).

6. See *Legality of the Threat or Use of Nuclear Weapons*, 1996 I.C.J. 226 (July 8, 1996).

7. *Id.*

cial phenomenon, as a “self-constituting” phenomenon, a process whereby the international society is coming to know itself and is actualized.⁸ For Allott, international law is a social-psychological phenomenon, and law and society exist out of (as well as in) the minds of its constituents.⁹ My basic thesis is that because of the inherent subjectivity of any system designed to regulate and mediate relations between people—and peoples—it is of the utmost importance to subject the new international law to a searching scrutiny, to ask hard questions about its tendencies to emphasize certain interests, exalt particular groups, and order society in predetermined or preconceived ways. The outcomes and distributional consequences of the various decisions, models, and discourses—ways of framing, conceptualizing, and talking about international law—must be examined.

The biases of the past are easier to perceive than the biases of the present and the future. One example, the use of the term “civilized nations” (which is still in existence in Article 38)¹⁰ and the language employed by the jurists of the nineteenth century reveal their prejudices, prejudgments, and biased attitudes.¹¹ But the prejudices of the contemporary discourses are not so easy to discern. Under normal conditions, we are too close in time and perspective during our everyday legal activities to be able to perceive the new international law’s biases and unintended consequences. It takes a lot of thought and consideration—a lot of patient self-criticism and self-appraisal—to be able to take a step (or more) back, to reevaluate the process and enterprise of international law making in this new era.

The problem is further complicated by the fact that bias is not a monolithic entity. It does not merely exist—as stereotypically conceived—in law’s views of cultures, ethnicities, and political structures. Although culture does play a part in the discussion which follows, this is only one lens through which to view bias in international law. There are many metaphors which international law has employed, many built-in, structural biases which exist so deeply entrenched in the system of international law as to be part and parcel of its function, exhibited in so-called background rules and their assumptions. Bias is also found in the major procedural doctrines of international law, in the conceptions of sovereignty, jurisdiction, state responsibility, nationality, statehood, self-determination, and standing. These structural, sys-

8. See Philip Allott, *The Concept of International Law*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* ¶¶ 3.1, 3.4, at 69 (Michael Byers ed., 2000).

9. *Id.* ¶ 4, at 70.

10. See 1947 I.C.J. Acts & Docs. 38, reprinted in 2 *THE FUTURE OF THE INTERNATIONAL COURT JUSTICE* app. 1, at 789 (Leo Gross ed., 1976).

11. See *infra* Part II.

temic modes, dictating the procedural apparatus of international law, constitute the main subject of this study. Outside the direct scope of this paper, but equally important, are the more well-recognized and well-documented biases in the context of international law's substantive regimes: for example, human rights, the environment, or in rules surrounding a particular nation's labor practices, trade, or immigration policies.¹²

Before moving to the specific examples of bias, there must be an exploration of what we mean by the term itself and whether bias itself can be employed in an effective, meaningful, and cogent way. To put it succinctly, is there a bias in talking about bias? The genesis of my thinking about these issues derives from my reading of Roland Barthes' essay, *The Eiffel Tower*.¹³ Perhaps, in some trivial sense, all discourse (all thinking for that matter) is biased in favor of one group, party, person, or identity, usually but not necessarily in favor of the speaker, the client, or the special interest being represented. Like Barthes' inhabitant of Paris ascending the Eiffel Tower, we as international lawyers and academics exist within the structural constraints and presuppositions of the international legal regime. Once the sightseer attains the summit and looks down from the tower's apex, there is a transformation of the city landscape. The city of Paris is seen in a particular way, an idiosyncratic viewing, mediated by the viewer's position within the tower, its height, location, and most importantly, by the experience of the viewer as a person "inside" the tower's structure.

In much the same way, the international lawyer is conditioned to see the "territory" of international law in preconditioned, predetermined, and idiosyncratic ways. As Barthes comments, the viewer upon looking out over the city landscape expects to see certain landmarks, anticipates seeing the historical Paris, populated with various indicators and remembrances of the city's past.¹⁴ When for some reason the landmarks are not present, invisible, obscured, or otherwise not apparent, the mind of the viewer necessarily "fills in" the gaps created by the lacunae of his experience.¹⁵ This is a natural process, an automatic and usually unnoticed and subconscious process, whereby our experience is made whole by the insertion of our fantasies. Our fantasy of the perceived Paris is made to match the reality of the expected

12. See, e.g., David Kennedy, *The International Human Rights Movement: Part of the Problem?* 3 EUR. HUM. RTS. L. REV. 245 (2001) [hereinafter Kennedy I].

13. Roland Barthes, *The Eiffel Tower*, in A BARTHES READER 236 (Susan Sontag ed., 1982).

14. *Id.* at 237.

15. *Id.* at 238.

Paris, the preexisting Paris residing like a specter of normalcy beneath the curtain of our conscious minds.¹⁶

Through the thought-experiment of Barthes, we can see the manifestation of non-trivial bias. This bias is (usually) unseen and unappreciated by the speaker and this is where the difficulties arise. More than that, it is at this point that international legal discourse can become dangerous and counter-productive. Actors within the international community, within the matrix of international law, can confront their prejudices, which exist for them outside the tower, but are prevented from confronting such prejudices, which exist instead as *a priori* constructs part and parcel of the tower's structure. The perception of "outside" bias is sometimes achieved, as mentioned above, when there is temporal distance between the usage of the rule and its formation. When enough time has passed and society has changed, it becomes easier to recognize the biases inherent in, for example, the international legal rules supporting colonialism, slavery, or the slave trade. The orthodoxies of preceding generations can become the heresies of their successors.¹⁷ Bias can also be discerned more readily when there is a plurality of voices clamoring for attention. There is perhaps a better chance to uncover biases and blind spots when a variety of alternative narratives are competing to tell the story of international law, as opposed to a narrow range of "official" stories which are received without questioning and perceived as authoritative doctrine. In this sense, the chances for achieving a more unbiased, just, and fair conception of international law has arguably been increased in modern times by the more recent, latest incarnation of international law. As it moves from a monolithic, top-down, rules-based model to a more circular, bottom-up, sociological conception, international law becomes more porous, transparent, and amenable to change, as more voices are raised and more perspectives explored and integrated into the web of inter-connecting relationships.¹⁸

This modern structural change in the mode in which international law operates raises another point, which must be mentioned at the outset. International law, because of its relative lack of top-down vertical structure, because of the lesser emphasis it places on black and white, on-off, well-settled clear rules, is much more dependent for its legitimizing upon its own rhetoric

16. *Id.*

17. Of course this process also occurs in the domestic and not just the international realm. Take, for example, all the instances in which the United States Supreme Court has decided to reverse prior cases and suspend the doctrine of *stare decisis*. For example, consider the recent case in the context of state sodomy laws, *Lawrence v. Texas*, 539 U.S. 558 (2003), *rev' d*, *Bowers v. Hardwick*, 478 U.S. 186 (1986).

18. It could also be argued, conversely, that a plurality of voices instead creates cacophony and confusion.

than domestic law or other general fields of law. In other words, what jurists, commentators, academics, and international actors say about the doctrines of international law and how we speak about them is more important, is more constitutive of international law than what we say about, for example, a particular nation's contract law or property law. This brings us to talking "as if"—if we talk *as if* there is an emerging world state, *as if* there is a particular international legal rule, this is much more important to the formation of the reality of the world state and the rule than if we talk about the existence of adverse possession in domestic property law, for instance. The strong vertical hierarchy of most domestic legal systems is able to do the work of legitimating and authorizing reinforcement which international law arguably lacks.

International law makes up for the deficiency of verticality by its heightened reliance on a conversational, circular, or horizontal structure, a wait-and-see attitude which is largely foreign to the domestic realm. Precisely because of this inherent importance of international legal discourse, we need to pay special attention, be especially vigilant, concerning what we are saying and how we are talking when we talk about international law, international relations, and international legal theory. The discourse of international law is a moral force in and of itself. It propagates stereotypes and creates power relationships. It sneaks up on us because it is so essential to the process of creating law.

International law is not made in a vacuum. By this I mean we must remember the practical, pragmatic, real-world nature of international law. International law, like domestic law, is made out of a feedback mechanism. International law is, as Allott has written, the world community becoming conscious of itself, waking up and looking around, putting out small fires and big ones, and generally trying to coordinate and harmonize the multifarious relationships which arise in our current stage of globalization.¹⁹ This is important to keep in mind because the nature of the legal rules of course must be seen in connection with the real-world state of affairs and the circumstances, against the backdrop of these circumstances, which force adjudicators and parties to treaties to create these rules in the first place. Many authors recently have noted the relevance of international relations to international law and are working to bridge the gap between the two fields.²⁰ This practical aspect of international law, this close connection between "the world" and international law—international law as a series of real-time, real-

19. See Phillip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT'L L.J. 1, 13–14 (1988).

20. See, e.g. Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503, 503 (1995).

world responses to actual situations—is also, however, another place where bias is especially likely to creep in.

This point, regarding the danger of what I call “real-world” bias, is manifest by the all-too-easy way facts may seem to be objective, settled, and are all too often taken for granted as true. Despite the seeming concreteness of the reported facts, the so-called “facts” in any particular case are always a social construction, always someone’s social construction, and most often the social construction of the most powerful players in the world arena. This is not to make the very obvious claim that the facts are often in dispute, which they often are and very well may be. Rather, the point is that the range of possible explanations for events—the facts themselves as conceived by all the players to a dispute—may be imposed by the power elite and this imposition often goes unnoticed and unchallenged. Events happen in the world. Unfortunately (or fortunately), events are not perceived as actually happening or as have happened until we have the language, conceptual tools, and will to explain through discourse what has happened, why it has happened, and what remedies, if any, exist to try to ameliorate the harm caused.

Bias also seeps in and surrounds international law by its very attempt to be a postmodern institution and activity. This point is elucidated by Nathaniel Berman in his article, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, concerning the relationship between international law and modern art.²¹ In this article, Berman draws a parallel between four aspects, as he sees them, of modernism and then maps these aspects onto the contemporary conception of international law.²² For Berman, modernism, as seen through the lens of modern art, embraces the following characteristics: “1) the critique of representation; 2) an openness to so-called ‘primitive’ sources cultural energy; 3) innovative experimentation . . . and 4) the juxtaposition, in a single work, of elements considered [heretofore] irreconcilable”²³ These four characteristics also inform our understanding of the new international law—after the world wars—when international law fashioned itself as a way of appeasing nationalistic energies and harmonizing competing and discordant voices within the world. The new international law has the following four characteristics, reminiscent of modern art: “1) the critique of...[sovereignty] as the object which defines international law; . . . 2) an openness to [heretofore] repressed . . . forces of nationalism; 3) the unprecedented invention of a wide variety of techniques, understood as specifically

21. Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 YALE J.L. & HUMAN. 351, 352 (1992).

22. *Id.* at 354.

23. *Id.*

'legal'; and 4) the juxtaposition, in international legal discourse, doctrines, and institutions, of elements incompatible under traditional legal criteria."²⁴

This insight of Berman highlights one further way in which the new international law (and for that matter modernism itself) reinforces traditional (and even non-traditional) biases under the guise of a more reactive, calibrated, and sensitive international legal structure. For example, the notion under the new conception of international law of "primitivism" (viewed in the new vocabulary as "nationalism")²⁵ is especially pregnant with meaning. This notion sets up an implicit dichotomy between the "modern" and the "primitive" and at the same time tries to contain, mediate, and deconstruct the "primitive" to provide an outlet for nationalistic feelings and aggressions. To a large extent bias is built into modernity itself, which has to define itself to a large extent against the rubric of the primitive, the primordial, and the irrational.

As a final consideration in this preliminary and introductory exploration of the concept of bias in international law, the practical importance of this enterprise must be emphasized. As Charles Taylor has noted, groups, like individuals, manufacture their identities—their self-worth and self-conceptions—based largely on others' recognition or absence of recognition.²⁶ The importance of uncovering bias is fundamental to allowing groups to fully develop and evolve because their development and actualization is not dependent merely on their own actions and their own perceptions alone.²⁷ Rather, as the traditional jurisprudence of international law teaches, it is dependent on the perceptions of the international community as a whole and on the way other states, governments, and courts view individual states. A people's, government's, or social minority's search for "recognition" may be described as a mirror, created and maintained by the international community, upon which the group can view their own identity and their own reality. With this insight, it becomes apparent that a people's conception of itself is especially susceptible to bias: as Taylor says, a colonized people's "own self-deprecation . . . becomes one of the most potent instruments of their own oppression."²⁸

Bias, prejudice, and blind spots have unintended consequences and inflict costs on both the development of international law and human life and well-being. They impact the plight of the injured and the oppressed; they

24. *Id.* at 362.

24. *Id.* at 363.

26. See Charles Taylor, *The Politics of Recognition*, in *MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION* 25 (Amy Gutmann ed., 1994).

27. *Id.* at 25–26.

28. *Id.* at 26.

form hidden impediments, which obscure pain, injustice, and oppression. In some cases, they may even directly be the cause of pain, injustice, and oppression.²⁹ It is the aim of this paper to uncover the more insidious structural and procedural biases of international law, those which exist just beneath the surface, as well as those which are firmly embedded deep within the subterranean consciousness of the discipline's conception of itself.

The paper proceeds first with a discussion of three major procedural or structural discourses of contemporary international law: those revolving around sovereignty, jurisdiction, and state responsibility. Within the sovereignty discussion, I further distinguish between three categories of bias: 1) biases emanating from the concepts which remain as remnants of nineteenth century and pre-nineteenth century discourses; 2) biases surrounding the major metaphors of international law, specifically examined are those illuminated by feminism's critique of the state and state power; and 3) biases surrounding the major substantive areas of international law, focusing specifically on the environment and the Kyoto Protocol. Lastly, Part III contains a discussion of "fairness" discourse, an attempt to define and reign in the concept of bias, and to thereby deal with and resolve the paradox of universalism and the conundrum this paradox has created for international law and society.

II. BIAS AND THE MAJOR CONTEMPORARY PROCEDURAL/STRUCTURAL INTERNATIONAL LEGAL DISCOURSES UNDERLYING PRESENT-DAY INTERNATIONAL LAW

A. *Sovereignty*

The first topic of international legal discourse to be considered is perhaps the most basic and fundamental one serving to ground and delimit the state, the actor traditionally considered at the center of international legal relations. It is not difficult to see many of the actual and potential biases surrounding the conception of "sovereignty," that aspect of statehood, which has served as both sword and shield, as the basis for justifying the actions of states and immunizing them from sanctions. "Sovereignty" often has functioned to retard or freeze the evolution of international law by protecting states from paying out claims and even from the disapprobation of the international community, despite an emerging international legal rule or trend which otherwise would have condemned their behavior. As will be discussed, it is a concept which has its genesis in mid-sixteenth and early seven-

29. See Kennedy I, *supra* note 12, at 249.

teenth century Europe and has undergone its own peculiar evolution, but still is relied on as an implicit backstop and failsafe, utilized as an important — albeit eroding—cloak of protection.

Stephane Beaulac has explored the origins of the term “sovereignty” from its introduction in the sixteenth century in Jean Bodin’s *Six Livres de la Republique*.³⁰ Beaulac undertakes to examine the history of the term, pointing out that it was originally employed by Bodin and his contemporaries for purposes of domestic governance.³¹ Beaulac’s analysis is premised on the important insight (echoing Wittgenstein) that language is not merely a “thing,” but an activity which communicates “tremendous social power within the shared consciousness of humanity.”³² Beaulac relies upon Philip Allott to help explain the importance of understanding the pivotal words which have shaped international law and society.³³ In Allott’s words,

As persons and as societies, we are what we were able to be, and we will be what we are now able to be. *So it is with the history of words.* We are what we have said; we will be what we are now able to say. *Words contain social history, distilled and crystallized and embodied and preserved, but available also as a social force, a cause of new social effects.*³⁴

Bodin in *Six Livres* defines “sovereignty” as follows: “Majesty or Sovereignty is the most high, absolute, and perpetual power over the citizens and subjects in a Commonwealth.”³⁵ Beaulac points out that the French text identifies two characteristics of sovereignty as it being “absolute” and “perpetual.”³⁶ But the “absolute” or “unlimited” nature of Bodin’s “sovereignty” was tempered by the caveat that the prince still is subject to “the laws of

30. See Stephane Beaulac, *The Social Power of Bodin’s ‘Sovereignty’ and International Law*, 4 MELB. J. INT’L L. 1 (2003). Beaulac acknowledges that although Bodin did not invent the term, Bodin is considered “the ‘father’ of ‘sovereignty’ because he provided the first systematic discussion of the nature of this . . . powerful word.” *Id.* at 6–7.

31. *Id.* at 4.

32. *Id.* at 2.

33. *Id.*

34. Beaulac, *supra* note 30, at 2 (quoting PHILIP ALLOTT, *EUNOMIA: NEW ORDER FOR A NEW WORLD* 9 (Oxford University Press 1990) (emphasis added)).

35. Beaulac, *supra* note 30, at 11 (quoting JEAN BODIN, *SIX LIVRES DE LA REPUBLIQUE*). Only 19 copies are recorded of the original French edition of *SIX LIVRES DE LA REPUBLIQUE*, published in 1576. *Id.* at 9 n.48. The version quoted is JEAN BODIN, *THE SIX BOOKS OF A COMMONWEALE* (Richard Knolles trans., 1606) (translation of *LES SIX LIVRES DE LA REPUBLIQUE*) [hereinafter *SIX BOOKS I*]. The version used by this Law Review is the English translation, *SIX BOOKS OF THE COMMONWEALTH* (M.J. Tooley trans., Basil Blackwell Oxford) [hereinafter *SIX BOOKS II*].

36. *Id.* (quoting JEAN BODIN, *SIX LIVRES DE LA REPUBLIQUE* 124).

God, of nature, and of nations.”³⁷ Bodin more specifically outlines three limits on supreme power: “i) to honor contracts; ii) to respect private property; and iii) to consent to taxation.”³⁸ Furthermore, Bodin wrote that there existed other certain “fundamental laws” which the prince must accept, concerning essentially “rules of succession of the throne . . . and . . . the inalienability of the public domain.”³⁹ Bodin envisioned the power of the Prince resting upon a pyramidal structure, and the power of sovereignty as that of the “highest unified power, distinguished from that of the subordinate decentralised power.”⁴⁰

As Beaulac explains, Bodin’s use of the term “sovereignty” arose out of the specific social and historical context of France and the French monarchy in the late sixteenth century.⁴¹ It was a term designed to support and maintain the monarchy and especially “to place the ruler at the apex of a pyramid of authority.”⁴² It was only subsequently, in Vattel⁴³ and later in Wheaton,⁴⁴ that the “internal” sovereignty of which Bodin wrote was distinguished from “external sovereignty,” i.e., “the independence of one political society, in respect to all other political societies.”⁴⁵ As Beaulac points out, the transformation of the term “sovereignty,” from internal to external, shows its malleability, its rhetorical force, and power as a term that is continually and continuously changing.⁴⁶

This transmutation of “sovereignty” from its internal to its external usage allowed states, rulers, and governments to project their power outward as well as inward. It allowed for the propagation and instantiation of idiosyncratic attitudes and prejudices, even in contravention of trends supported by the majority of states within the international community. The biased nature of external sovereignty was especially apparent in the context of slavery and the slave trade. An early example of sovereignty’s role in preserving and

37. *Id.* at 13 (quoting SIX BOOKS I at 90; SIX BOOKS II at 28).

38. *Id.* at 14 (citing SIX LIVRES 152–57, 855–913; SIX BOOKS I 106–110, 649–686; SIX BOOKS II at 29–33, 185–90).

39. *Id.* at 14–15 (citing SIX LIVRES 973–1013, 857–863; SIX BOOKS I at 721–754, 651–54; SIX BOOKS II at 25–31, 8).

40. Beaulac, *supra* note 30, at 19 (emphasis in original).

41. *Id.*

42. *Id.* at 22.

43. See EMER DE VATTEL, THE LAW OF NATIONS, OR PRINCIPLES OF THE LAW OF NATURE: APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS/FROM THE FRENCH OF MONSIEUR DE VATTEL (1797).

44. See HENRY WHEATON, HISTORY OF THE LAWS OF NATIONS IN EUROPE AND AMERICA: FROM THE EARLIEST TIMES TO THE TREATY OF WASHINGTON (1845).

45. Beaulac, *supra* note 30, at 27 (quoting HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 27 (Richard Henry Dana ed., 1866)).

46. *Id.*

justifying such trade occurred in *The Antelope*, a decision by the United States Supreme Court in 1825.⁴⁷ In that case, the Spanish and Portuguese consuls filed claims concerning “certain Africans as the property of subjects of their nation,” after the ship transporting them was brought back to the United States under the command of an American captain, John Smith.⁴⁸ Smith also brought a claim for possession of the Africans as slaves captured *jure belli*.⁴⁹

The Court in adjudicating the various claims went to great pains to emphasize that although public sentiment was against the slave trade, the matter was “unsettled,” and the Court must not yield to such feelings.⁵⁰ The Court, after reviewing prior cases, concluded that the following rule was to be applied: “that the legality of the capture of a vessel engaged in the slave trade, depends on the law of the country to which the vessel belongs. If that law gives its sanction to the trade, restitution will be decreed.”⁵¹ This rule was premised on several propositions emanating directly out of the external sovereignty of states: e.g., “No principle of general law is more universally acknowledged, than the perfect equality of nations Each legislates for itself, but its legislation can operate on itself alone.”⁵² Consent becomes required before a nation can be seen to have relinquished a “right” to engage in the slave trade, a trade “in which [historically] all have participated.”⁵³ Applying these principles, the Supreme Court entered into a calculation based upon testimony and documentary evidence as to the precise number of Africans taken from Spanish ships.⁵⁴ Since the number belonging to any Portuguese ships could not be determined, the Court ultimately held that the Africans be divided between Spain and the United States “to be disposed of according to law.”⁵⁵

The other paradigmatic use of “sovereignty” in the nineteenth century, was as a tool for state actors to justify expansion of their empires, as a means for legitimating the process of colonization. Antony Anghie has written extensively on this subject.⁵⁶ He explains the myriad effects that positivism

47. *The Antelope*, 23 U.S. (10 Wheat.) 66 (1825).

48. *Id.* at 67–68.

49. *Id.* at 68.

50. *Id.* at 114.

51. *Id.* at 118.

52. *The Antelope*, 23 U.S. at 122.

53. *Id.*

54. *Id.* at 126–28.

55. *Id.* at 132–33.

56. See Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 HARV. INT’L L. J. 1 (1999).

and notions of sovereignty had in supporting the colonial encounter.⁵⁷ Anghie's main thesis goes further, however, in that he asserts that "the problem of order among states, is a problem that has been peculiar . . . to the specificities of European history . . . the extension and universalization of the European experience, which . . . has the effect of suppressing and subordinating other histories of international law and the people to whom it has applied."⁵⁸ For Anghie, his interest lies "not only in the important point that positivism legitimized conquest and dispossession, but also in the reverse relationship—in identifying how notions of positivism and sovereignty were themselves shaped by the encounter."⁵⁹

The reverberations of nineteenth and pre-nineteenth century thought—with its sharp distinction between "civilized" and "uncivilized" states—still are heard today, as will be discussed.⁶⁰ Anghie sums up his argument as follows: "that central elements of nineteenth-century international law are reproduced in current approaches to international law and relations."⁶¹ This insight is based upon the fact that the "naturalist notion of a mythic state of nature [was] replaced by a positivist notion of a mythic age when European states constituted a self-evident family of nations."⁶² Sovereignty became a tool for dividing the European from the non-European world: "since the non-European world was not 'sovereign,' virtually no legal restrictions were imposed on the actions of European states with respect to non-European peoples."⁶³

"Sovereignty," as a concept, certainly has evolved since the days of *The Antelope* and its use in furthering the colonial encounter; but still is utilized to justify state power, as a means of immunizing states from international sanction, and as a shield from international disapprobation. Before World War II, for example, there was unbounded optimism that the external sover-

57. *See id.*

58. *Id.* at 7.

59. *Id.* at 6.

60. *Id.* at 23. Anghie cites Wheaton for standing behind the proposition that what counts as law is the custom "which is practiced only among 'civilized countries.'" Anghie, *supra* note 56, at 23. Wheaton wrote:

Is there a uniform law of nations? There certainly is not the same one for all the nations and states of the world. The public law, with slight exceptions, has always been, and still is, limited to the civilized and Christian people of Europe or to those of European origin.

Id. (quoting HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 17 (Richard Henry Dana ed., 1866)).

61. Anghie, *supra* note 56, at 8.

62. *Id.* at 68.

63. *Id.* at 69.

eignty of individual nations could be mediated by the League of Nations.⁶⁴ Geoffrey Butler opined in an article published in the *British Year Book of International Law* (1920-21), that sovereignty can be checked by the League, but in a way that preserves fundamental rights.⁶⁵ His own summarization of his point is as follows:

in so far as the League of Nations supplies a mechanism for the preservation of these rights and values, the conception of sovereignty, with its necessary implication of moral authority, can for the first time be applied to external affairs in a more adequate sense than as a mere assertion of the unchecked power either of the states or of some central federation.⁶⁶

For Butler, the League represented a way to ensure peace, so that “sub-conscious” activities of states, e.g., mining, engineering, locomotion engineering, and preventative medicine, could be conducted without the interruption of war.⁶⁷

Unfortunately, the League failed in its mission to keep the peace and the tragedy of World War II resulted. During and after the Second War, international legal scholars and jurists were beginning to reconceive the notion of sovereignty just as they began to reconceive the nature of the state itself. This conceptual transformation is evident in Hans Kelsen’s 1942 work, *Law and Peace in International Relations*.⁶⁸ Kelsen questioned the Austinian assumption that a state is sovereign because “no order can be conceived to exist above the state or the legal order of the state such that it can obligate the state or the individuals representing it.”⁶⁹ For Kelsen, sovereignty (like the state itself) does not exist “in the world of physical reality,” but rather as a mental construct.⁷⁰ “The state is sovereign if we conceive it to be sovereign, if we conceive the order of the state to be the highest. It is not sovereign if we proceed from a different assumption.”⁷¹ Kelsen speaks of the “dogma of sovereignty” which functions to support the state, just as “[t]he concept of the state is a typical product of political theology.”⁷²

64. See Geoffrey Butler, *Sovereignty and the League of Nations*, BRIT. Y.B. INT’L L. 35 (1920-21).

65. *Id.* at 41.

66. *Id.*

67. *Id.* at 42-44.

68. HANS KELSEN, *LAW AND PEACE IN INTERNATIONAL RELATIONS*, THE OLIVER WENDELL HOLMES LECTURES 1940-41 (2d prtg. 1948).

69. *Id.* at 79.

70. *Id.* at 78.

71. *Id.*

72. *Id.* at 74, 78.

The principles espoused in 1942 by Kelsen in a theoretical sense were later articulated and expanded upon in a practical setting by Judge Alejandro Alvarez in the *The Corfu Channel Case (U.K. v. Albania)* in 1949.⁷³ Alvarez, in the late 1920s, had previously written about the importance of the “new” international law embracing a new psychology and ideology, where the artificial division between law and politics was not so clearly defined.⁷⁴ Alvarez continued this thinking and applied it in practical terms to decide a case between Britain and Albania arising out of an incident that occurred in the Corfu Strait on October 22, 1946.⁷⁵ On that date, two British destroyers struck mines in Albanian waters, causing damage to the ships and loss of life.⁷⁶ In *Corfu Channel*, Alvarez had this to say regarding the evolving concept of sovereignty:

[b]y sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States....Some jurists have proposed to abolish the notion of the sovereignty of States, considering it obsolete. That is an error. This notion has its foundation in national sentiment and in the psychology of the peoples, in fact it is very deeply rooted This notion has evolved, and we must now adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist régime, according to which States were only bound by the rules which they had accepted [i.e., as in *The Antelope*, discussed *supra*]. Today, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an *institution*, an *international social function* of a psychological character, which has to be exercised in accordance with the new international law.⁷⁷

Alvarez, in his individual opinion, then proceeded to discuss state responsibility, concluding *inter alia* that there is a place under international law for—what he termed—the concept of a “misuse” or “abuse” of right.⁷⁸

73. *Corfu Channel (U.K. v. Albania)*, 1949 I.C.J. 4 (Apr. 9).

74. Alejandro Alvarez, *The New International Law*, in TRANSACTIONS OF THE GROTIUS SOCIETY 35–51 (1929).

75. *Corfu Channel*, 1949 I.C.J. at 12–13.

76. *Id.*

77. *Id.* at 43.

78. *Id.* at 43–46.

For Alvarez, states could be held liable even if their actions were undertaken within their sovereign rights.⁷⁹

It is clear from the above-discussed sources that sovereignty has undergone a radical change from the days of *The Antelope*, Wheaton, Vattel, and Bodin. At this point, I will begin consideration of some examples of modern discourses of sovereignty, to determine the biases within these discourses, and to map out how the above-discussed “proto-sovereignities” which existed at various points in international law’s historical past are still with us, permeating the conceptual space of international law and its language-games. Before making this transition, it is worth considering the four propositions regarding discourses on sovereignty noted in *Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies*.⁸⁰ These propositions may be rendered in condensed form as follows:

1. Discourses of sovereignty cannot relate to their object, sovereignty, as other than a problem or question. [This statement emanates from the realization that] sovereignty enters discourse . . . as a reflection on a lack, on a loss, on something that might have been but is no longer.
2. The problem of sovereignty is profoundly paradoxical. [The paradox is derived from the dual nature of sovereignty, as referring to something that is] a fundamental principle, a supporting structure, a base [but at the same time dependent on activity that proceeds without foundations], hence a foundation beyond doubt.
3. It follows that texts or discourses that would produce a semblance of a resolution to the problem of sovereignty must engage in a kind of duplicity.
4. [And, finally, that all] ‘resolutions’ to the problem of sovereignty proffered by texts or discourses can only be unstable and tentative.⁸¹

It is important to bear in mind the ultimate tentativeness of any discourse involving sovereignty.⁸² As the authors of *Reading Dissidence* conclude, “[t]he word [sovereignty] can but connote a boundless region of am-

79. *Id.* at 44.

80. See Richard K. Ashley & R. B. J. Walker, *Reading Dissidence/Writing the Discipline: Crisis and the Question of Sovereignty in International Studies*, 34 INT’L STUD. Q. 367 (1990).

81. *Id.* at 381–83.

82. *Id.* at 383.

biguous activity that a vagabond desire . . . would mark off, fill, and claim as a territory of its own.”⁸³ In sovereignty’s ambiguity, I submit, lies its ambition, as well as its effectiveness as a strategic tool for those who use it to preserve the status quo and their power.

The following discussion revolves around three groupings of bias surrounding the notion of sovereignty in international law. I focus on a representative sample of bias from each group. The groups may be labeled as follows: 1) remnants of bias in the still extant *concepts* of nineteenth and pre-nineteenth century international law; 2) bias existing in the prevailing *metaphors* of contemporary international law; and 3) bias in the use of sovereignty in the major substantive areas of international law.

I have chosen the following topics to focus on within each group: within the “concepts” category, the civilized/uncivilized distinction; within the “metaphors” category, feminism, and new conceptions of state sovereignty; and within the “substance” category, the environment, specifically, the Kyoto Protocol.

1. Remnants of Bias in the Still Extant Concepts of Nineteenth Century and Pre-Nineteenth Century International Law: The “Civilized/Uncivilized” Distinction

An important remnant of nineteenth century sovereignty discourse directly shaping and influencing contemporary international law discourse is the “civilized/uncivilized” dichotomy.⁸⁴ One of the most glaring examples may be found in Article 38 of the Statute of the International Court of Justice (“ICJ”), used universally today as the main mode of determining appropriate sources of international law.⁸⁵ Article 38, subsection 1(c), provides as follows: “[t]he Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: . . . (c) the general principles of law recognized by civilized nations.”⁸⁶ This use of “civilized” in the most foundational document of modern international law is a clear indication that some nations—i.e., those deemed “uncivilized”—will be excluded from the discourse of international law.⁸⁷

More than that, the civilized/uncivilized dichotomy, as Anghie has written, represented a technology of control, an ordering for non-European

83. *Id.*

84. Anghie, *supra* note 56, at 23.

85. *See id.* at 75 n.267.

86. 1947 I.C.J. Acts & Docs. 38, *reprinted in* 2 THE FUTURE OF THE INTERNATIONAL COURT JUSTICE app. 1, at 789 (Leo Gross ed., 1976).

87. *See id.*; *see also* Anghie, *supra* note 56, at 75.

states.⁸⁸ It presented “non-European societies with the fundamental contradiction of having to comply with authoritative European standards in order to win recognition and assert themselves.”⁸⁹ Sovereignty for the non-European nations was “a profoundly ambiguous development, as it involved alienation rather than empowerment, and presupposed the submission to alien standards rather than the affirmation of authentic identity.”⁹⁰ Anghie makes the point that this dichotomy and its racial overtones became “something of an embarrassment” for the new international law which tried in large part to expunge this language from the discourse.⁹¹

While the *language* may have been largely expunged—with the explicit exception of Article 38—the *concept* still remains with us in insidious and thinly-veiled ways. An example is the new liberalism, epitomized in the work of Anne Marie Slaughter.⁹² Slaughter utilizes international relations theory and applies it to fashion a new international law based on the distinction between liberal and non-liberal states.⁹³ In her article, *International Law in a World of Liberal States*, she outlines her project, “consistent with an overall commitment to a new generation of interdisciplinary scholarship ... to re-imagine international law based on an acceptance [of the distinction between liberal and non-liberal states] and an extrapolation of its potential implications.”⁹⁴ At the outset, it should be mentioned, Slaughter openly acknowledges the potential “distastefulness” of this enterprise with the following caveat:

[t]he very idea of a division between liberal and non-liberal States may prove distasteful to many. It is likely to recall nineteenth century distinctions between ‘civilized’ and ‘uncivilized’ States, re-wrapped in the rhetoric of Western political values and institutions. Such distinctions summon images of an exclusive club created by the powerful to justify their dominion over the weak. Whether a liberal/non-liberal distinction is used or abused for similar purposes depends on the normative system developed to govern

88. Anghie, *supra* note 56, at 72 n.257.

89. *Id.* at 73.

90. *Id.*

91. *Id.* at 74–75.

92. See Anne-Marie Slaughter, *International Law in a World of Liberal States*, 6 EUR. J. INT'L L. 503 (1995).

93. *Id.* at 505.

94. *Id.*

a world of liberal and non-liberal States. *Exclusionary norms are unlikely to be effective in regulating that world.*⁹⁵

For Slaughter, the division between states based on “liberality” is a tool that can be “used or abused” and such use or abuse depends, as she asserts, on the “normative system” governing such a system.⁹⁶ In a further attempt to distance herself from the ethical implications of her project she self-consciously labels it a “self-professed ‘thought-experiment,’” as opposed to a call to action, a proposal for the future, or some other more ambitious real-world enterprise.⁹⁷

Slaughter’s caveat is ineffective to insulate the project from the “distasteful” bias of the nineteenth century for at least two reasons. First, there is the implicit assumption that the “normative system,” developed to govern a world of liberal and non-liberal states, will shy away from “[e]xclusionary norms,” allegedly because such norms would be “unlikely to be effective in regulating that world.”⁹⁸ However, this assumption is unwarranted. The “exclusionary norms” of the nineteenth century were quite “effective” in creating a normative order for the “civilized” world, and providing a legal context which supported slavery, the slave trade, and colonialism. There is no reason to suppose categorically that exclusionary policies would not be “effective” to order contemporary society just because the term used to describe preferred states has been changed from “civilized” to “liberal.” Such policies and norms are very often effective and may be used to create alliances and trading practices, which may have widespread economic advantages causing deleterious consequences to so-called “non-liberal” states.

A second reason to call into question Slaughter’s distinction concerns the other implicit assumption contained in her caveat: that the “normative order” can be divorced from the distinctions, language-games, and analytic framework used to build that order, as if the normative order is somehow separate and distinct from the conceptual distinctions that it itself uses to carve up reality.⁹⁹ The normative order is created out of, and directly reflects, the language we use to represent the state of affairs of contemporary international reality. Slaughter attempts to wash her hands clean of any racist connotations or disadvantageous consequences flowing to non-liberal states by supposing that some “normative order” will be able to swoop down

95. *Id.* at 506 (emphasis added).

96. *Id.*

97. Slaughter, *supra* note 92, at 514.

98. *Id.* at 506.

99. *Id.* at 510.

(*deus ex machina*) to prevent abuses.¹⁰⁰ Such an assumption is ill-conceived, unrealistic, and simplistic. It presupposes a faith in a reified order, which exists somehow outside the “liberal/non-liberal” construct created to do the governing in some hypothetical world. Such an un-tethered normative order is a fantasy.

Under Slaughter’s model, the very notion of sovereignty is radically re-defined.¹⁰¹ The State is a “disaggregated entity.”¹⁰² This redefinition, the “new sovereignty,” operates however for the purpose of facilitating the acquisition and retention of power for the so-called “liberal” states.¹⁰³ In the newly conceived world of liberal states:

- ‘the State’ is composed of multiple centres of political authority— legislative, administrative, executive, and judicial;
- each of these institutions operates in a dual regulatory and representative capacity . . . defined in terms of a specific set of functions it performs . . .
- the proliferation of transnational economic and social transactions creates links between each of these institutions and individuals and groups in transnational society.
- [I]nteractions among counterpart or coordinate institutions from different States . . . are shaped by . . . an awareness of a common or complementary function transcending a particular national identity . . .¹⁰⁴

Under the new system, a “negarchy” is created; “a liberal political order between anarchy and hierarchy in which power is checked horizontally rather than vertically.”¹⁰⁵ As Slaughter observes, “the norm of sovereignty would have to be constructed so as to constitute and protect the political institutions of liberal States in carrying out their individual functions and in checking and balancing one another.”¹⁰⁶

It should be mentioned at this juncture that it is not my contention that Slaughter’s entire project should be dismissed outright because of the potential bias inherent in her redefinition and re-conception of the international

100. *See id.* at 538.

101. *See id.* at 534.

102. Slaughter, *supra* note 92, at 505.

103. *Id.* at 534.

104. *Id.* at 534–35.

105. *Id.* at 535 (quoting Daniel H. Deudney, *The Philadelphian System: Sovereignty, Arms Control, and Balance of Power in the American States-Union, Circa 1787-1861*, 49 INT’L. ORG. 191, 208 (1995)).

106. *Id.* (emphasis added).

legal order. To the extent that she points out the disaggregated nature of power and the many-layered intricacies of power relationships between and among international actors and political institutions, I agree that her project adds an important level of realistic sophistication to our model of international community.¹⁰⁷ My argument instead is that a harder look needs to be taken concerning Slaughter's assumptions, specifically, for example, the primary empirical and neo-Kantian assertion that liberal states do not make war with each other, or that the world (as a whole) would be better off with the imposition of such a stark distinction between states based on some characterization of their liberal nature.¹⁰⁸ This more searching inquiry actually has been undertaken by José Alvarez in a critique of Slaughter's liberal theory, in which he argues that she relies upon questionable assumptions about how "liberal" or "democratic" states behave.¹⁰⁹

Alvarez first points out that Slaughter's liberal theory is prescriptive and not merely descriptive; it is not merely a "thought-experiment" as she initially envisioned and characterized it.¹¹⁰ According to Alvarez, "[t]he liberal theory of international relations, or 'transgovernmental[ism],' is . . . presented as a 'blueprint for the international architecture of the 21st century, offering nothing less than 'answers to the most important challenges facing advanced industrial countries.'"¹¹¹ Slaughter's liberal theory, for Alvarez, is "millenist, triumphalist, upbeat," and he underscores the exceedingly positive reception it has received among policy-makers, at least in the United States.¹¹²

In contrast to this good reception, Alvarez notes that there have been several critiques of liberal theory, but most have failed to grapple with the assumptions the theory makes about how states actually behave.¹¹³ For example,

Harold Koh has criticized liberal theory for being "essentialist" and for failing to recognize that nations are not permanently liberal or non-liberal. Susan Marks has criticized Slaughter's liberal theory as part and parcel of . . . "liberal millenarism" . . . [and its] uncritical and superficial view of democracy, noting that liberal mil-

107. See Slaughter, *supra* note 92.

108. See *id.*

109. José E. Alvarez, *Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory*, 12 EUR. J. INT'L L. 183 (2001).

110. *Id.* at 187, 193 (quoting Slaughter, *supra* note 92, at 505).

111. *Id.* at 188 (quoting Anne-Marie Slaughter, *The Real New World Order*, FOREIGN AFF., Sept.-Oct. 1997, at 197).

112. *Id.* at 189-90.

113. *Id.* at 192.

lenarists too readily assume that periodic elections ensure a genuine political choice or a real free market of ideas. Harsher critiques have emerged from . . . ‘critical’ legal scholars, ‘new streamers’ or scholars of the “sub-altern” or the “post-colonial” For these critics, liberal theory does more than “shift attention away from the scale, character and sources of deprivation, oppression and conflict in the contemporary world:” it *is* the oppressive voice of neo-liberal hegemony.¹¹⁴

Alvarez’s critique, however, is more limited and pointed.¹¹⁵ He asks a central question behind Slaughter’s liberal theory: whether liberal states behave better than non-liberal states?¹¹⁶ An inquiry into this question is crucial because it was just such an unquestioned assumption about the allegedly self-evident moral superiority of so-called civilized states in the nineteenth century that created and supported the regimes of slavery and colonialism, which we now abhor.¹¹⁷ He concludes, in answer to the question—Do Liberal States Behave Better?—as follows: “we do not know for sure but . . . there is plenty of reason to be sceptical [sic].”¹¹⁸

Alvarez makes clear that his inquiry “[does] not take issue with many of Slaughter’s premises,” e.g., the ethical attractiveness of democracy, its importance in fostering civil and political rights as well as economic development, and its benefits in quelling violence especially in the context of ethnic conflict.¹¹⁹ Alvarez instead investigates the “little that we know about compliance, [and] whether liberal theory accurately describes the international law-making practices of liberal states, whether in the context of traditional treaties, transnational networks, or ‘transjudicial communication.’”¹²⁰ He also explores *inter alia* whether “liberal theory and its prescriptions will further peace among nations.”¹²¹ His conclusions, as he describes them, are “a great deal more equivocal than those reached by Slaughter,” and at the same time “less damning than those reached by her harshest critics.”¹²²

While it is beyond the scope of this paper to recount each of Alvarez’s arguments, I would like to mention a couple representative arguments made in support of his critique. Alvarez points out that the paradigm of a liberal

114. Alvarez, *supra* note 109, at 192 (citations omitted).

115. *See id.*

116. *Id.* at 193.

117. *See id.* at 240.

118. *Id.* at 194.

119. Alvarez, *supra* note 109, at 193.

120. *Id.*

121. *Id.* at 193.

122. *Id.* at 193–94.

state, the United States itself, “has plainly not taken the route followed by European states with respect to direct or vertical enforcement of human rights conventions.”¹²³ Enforcement of international human rights in United States courts has been made “notoriously difficult” given the reservations and limitations placed upon human rights agreements by the United States.¹²⁴ Alvarez makes the further point that contrary to the predictions of the liberal theorists:

the leading examples of US treaty obligations permitting “vertical” enforcement by US domestic courts have not been treaties with other liberal nations but bilateral investment treaties (BITs), *mostly with non-liberal nations* . . . [the list includes:] Bangladesh, Cameroon, Egypt, Grenada, Morocco, Senegal, Turkey and Zaire . . . [and later] Haiti, Panama, the Congo and Poland.¹²⁵

The example of BITs (and also FCN treaties, i.e. treaties of Friendship, Commerce, and Navigation) appear to undermine Slaughter’s presuppositions about compliance and liberal and non-liberal states’ treaty-making practices.¹²⁶

Alvarez next addresses liberal theorists’ assumptions regarding the general law-abiding nature of liberal regimes, and challenges Slaughter’s prescriptive claim regarding “transnational networks,” namely that “liberal states are . . . more likely to establish, maintain, and adhere to these networks, and all the ‘soft’ informal obligations that result from them.”¹²⁷ Alvarez suggests that perhaps Slaughter’s descriptive reliance on such networks as a basis for a prescriptive argument is circular since:

[i]t may be true that the kinds of transgovernmental contacts that Slaughter describes prevail among Western industrialized states [I]f one defines the relevant governmental contacts to be those that one finds among the West’s quasi-autonomous governmental institutions, it stands to reason that we would find more such contacts in the West.¹²⁸

Later in the paper, Alvarez attacks Slaughter’s description of how international law norms are nationalized under the classic sources of international

123. *Id.* at 194.

124. Alvarez, *supra* note 109, at 194.

125. *Id.* at 196–97 (emphasis added).

126. *Id.* at 210.

127. *Id.* at 211.

128. *Id.*

law, arguing that “[t]he suggested dichotomy—traditional international law is coercive and top-down while regulatory networks are soft and bottom-up—does not accurately describe either approach to norm-making or the complex interplay between the two.”¹²⁹

Alvarez also calls into question Slaughter’s assumptions regarding the purported connection between liberal theory and peace.¹³⁰ In support of her assumption, “Slaughter says nothing about the many debates about which wars or how many casualties ought to ‘count,’ [or] about arguments that the thesis of a liberal peace may only be viable for the relatively short post-1945 period.”¹³¹ Alvarez is especially critical of the liberal theorists’ failure to provide a convincing rationale for liberal peace.¹³² Slaughter’s explanation of attitudes shared by liberal states “point in all directions at once” and do not provide a basis, according to Alvarez, for prescriptive claims.¹³³ As Ido Oren has written, cited by Alvarez, liberal peace is “not about democracies per se as much as it is about countries that are perceived to be ‘of our kind.’”¹³⁴ If Oren is correct, it leaves room for the possibility that “liberal states may have a tendency, perhaps a greater tendency than non-liberal states, to wage war on those that they perceive to be non-liberal.”¹³⁵

The Slaughter-Alvarez conversation is a healthy one for the future of international law. The kind of critique proposed by Alvarez challenges the somnambulistic tendency of any adherent acting, judging, or speaking within a conceptual structure to fall back into the patterns of the past. There is the real danger, which discourse itself engenders, of allowing our thinking to be shaped by the processes, distinctions, and underlying prejudices of prior discourses. The answer is to be ever-vigilant against the subconscious urges that drive us toward rationalization and justification of the current sphere. The theories of mainstream international law, as quoted at the beginning of this paper, are always “for someone and for some purpose. All theories have a perspective. Perspectives derive from a position in time and space, specifically social and political time and space.”¹³⁶

129. Alvarez, *supra* note 109, at 213.

130. *Id.* at 234–38.

131. *Id.* at 234–35.

132. *Id.* at 235.

133. *Id.* at 236.

134. Alvarez, *supra* note 109, at 236 (quoting Ido Oren, *The Subjectivity of the “Democratic” Peace: Changing U.S. Perceptions of Imperial Germany*, 20 INTERNATIONAL SECURITY (1995), <http://www.mtholyoke.edu/acad/intrel/oren.htm> (last visited Feb. 10, 2005)).

135. *Id.* at 238.

136. Ashley & Walker, *supra* note 1, at 369 (quoting Robert W. Cox, *Social Forces, States and World Orders: Beyond International Relations Theory*, in NEOREALISM AND ITS CRITICS 204, 207 (Robert O. Keohane ed., 1986)).

2. Bias Existing in the Prevailing Metaphors of Contemporary International Law: Feminism and New Conceptions of State Sovereignty

The next modern discourse of sovereignty to be considered is an especially good example of the perspective nature of theory, of how preconceived notions of “the State” can have far-reaching consequences in terms of state practice and norm creation. Feminist writers have attacked biased notions of the state, specifically ways in which bias arises from and shapes background conceptions held by international lawyers, jurists, scholars, and other international actors.¹³⁷ Karen Knop has noted “[i]nternational law does not yield easily to feminist legal methods.”¹³⁸ I would submit that this is a very polite—a perhaps consciously toned down—understatement of the true state of affairs. A more accurate description of international law is a discipline which has on occasion “looked the other way,” one in which until recently the subjugation of women and other minority groups have either been ignored, permitted, justified, or condoned in times of war and in times of peace.

Knop begins her analysis by noting the ambivalent notion of sovereignty under international law.¹³⁹ She eloquently describes the nature of sovereignty as “at once brute fact of power and central metaphor of normativity, obstacle to the paradisiacal future worlds and means of their realization, barrier to transparent global relations between individuals and groups and essential sanctuary for them.”¹⁴⁰ These ambivalent, ambiguous, and contradictory natures of sovereignty are at once its power and its poison. Knop’s first self-described project is to “increase women’s participation in the process of international lawmaking.”¹⁴¹ Her second project, interconnected with the first, is to examine “[t]he implications of feminist theory for alternative conceptions of sovereignty.”¹⁴² I will focus on this second question, specifically Knop’s discussion of how the “metaphor of the sovereign State as a bounded, unified self returns us to the problematic equation of State sovereignty with individual autonomy.”¹⁴³

137. See Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 *TRANSNAT’L L. & CONTEMP. PROBS.* 293 (1993).

138. *Id.* at 294.

139. *Id.* at 295.

140. *Id.*

141. *Id.* at 296.

142. Knop, *supra* note 137, at 296.

143. *Id.* at 297.

Before discussing the prevailing metaphor of the state as a “bounded, unified self,”¹⁴⁴ Knop makes an interesting and effective move in identifying those aspects of sovereignty which can be viewed as at the “center” and those at the “periphery” of international law.¹⁴⁵ Inasmuch as the center-periphery distinction itself is merely a metaphor for the locus of entrenched power relations, the distinction functions mainly as a mode of instantiating and reproducing the structural bias of the system.¹⁴⁶ Knop turns the center-periphery distinction on its head, however, with her insight into a further dimension to the international civil society, beyond “statism,” i.e., the notion that states are the central and most important players in the international arena.¹⁴⁷ For Knop, “international civil society is a creature both liberated and enslaved by its *marginality*. Its existence at the edges of the system of States frees this mix of non-governmental organizations, unofficial groups of experts, and other initiatives from the narrow confines of self-interest.”¹⁴⁸ Knop accepts the center-periphery distinction, but at the same time uses it to catapult herself to a new understanding of power in the international community.¹⁴⁹

Knop’s discussion continues by citing other feminist thinkers who also seek to get beyond the center-periphery dichotomy.¹⁵⁰ Anne Marie Goetz, for example, “struggles to eliminate the elements of centre, unity, and totality that organize structures into hierarchical oppositions [and] allows for the fact that women experience simultaneously many oppressions and must engage in a multitude of struggles that conflict and supplement each other.”¹⁵¹ Knop calls this trend that operates outside the mainstream statist system, “dancing in the normative margins.”¹⁵² She notes, however, that gender conscious groups have to “contend with the fact that these margins are defined by the mainstream fora.”¹⁵³ More than this, it also may have a dark side: “the dark side of unregulated international civil society is its tendency to replicate the imbalance of political and economic power that characterizes

144. *Id.*

145. *Id.* at 296.

146. *See id.*

147. *See* Knop, *supra* note 137, at 296–97.

148. *Id.* at 316 (emphasis added).

149. *See id.*

150. *Id.*

151. *Id.* at 316 (citing Anne Marie Goetz, *Feminism and the Claim to Know: Contradictions in Feminist Approaches to Women in Development*, in GENDER AND INTERNATIONAL RELATIONS 133, 149–53 (Rebecca Grant & Kathleen Newland eds., 1991)).

152. Knop, *supra* note 137, at 316.

153. *Id.*

the system of States, an imbalance apparent in relations between First World and Third World NGOs [for example]."¹⁵⁴

With respect to the metaphor of the state as a "bounded, unified self," Knop points out the limitations of making such an analogy between the state and an individual being: "the analogy cannot take into account that States are not like individuals in the significant respect that they are not unified beings, they are not irreducible units of analysis."¹⁵⁵ Knop identifies the bias that flows from the individualistic conception of the state when she observes that "the analogy renders problematic any consideration of the status of individuals and groups in international law, other than as part of a monolithic State."¹⁵⁶ She further argues that some feminist approaches to international law are colored by two resulting viewpoints emanating from such analogy: "the territory of the State as the physical body of the individual and the territory of the State as the individual's private property."¹⁵⁷ Her salient point is that these metaphors arising out of the bias of statism prevent our progress toward a greater appreciation of the rights of women and people within states.¹⁵⁸

Knop concludes with an examination of two "normative approaches" to sovereignty: "limited sovereignty" and "overlapping sovereignty."¹⁵⁹ The concept of limited sovereignty takes into consideration the question "why the State should have a monopoly on representation in international fora when it may not [be able to] decide the issue at hand domestically," because, for example, "ethnic minorities are claiming greater autonomy within the State."¹⁶⁰ In contrast, the concept of "[o]verlapping sovereignty is at odds with this monocular view of sovereignty," instead embracing "the recognition of overlapping legal orders."¹⁶¹ The paradigm here is the European Community which coexists with its constituent states, and contains mediating institutions which at the same time allow for the retention of an intact, albeit more porous state sovereignty.¹⁶²

Knop's work should be applauded for utilizing the center-periphery distinction to highlight ways women can be empowered by "the [relatively]

154. *Id.* at 317 (citations omitted).

155. *Id.* at 320.

156. *Id.*

157. Knop, *supra* note 137, at 322.

158. *Id.* at 321-22.

159. *Id.* at 341.

160. *Id.*

161. *Id.* at 342. The term "overlapping sovereignty" is Neil MacCormick's. Knop, *supra* note 137, at 342 n.207 (citing Neil MacCormick, *Beyond the Sovereign State*, 56 MOD. L. REV. 1 (1993)).

162. *Id.* at 342.

fluid and un-constricted nature of emerging international civil society”¹⁶³ and, even more importantly, for her ability to see the detrimental as well as the beneficial aspects of working at the margins. Knop also deserves credit for examining the various conceptions of state power as being determined by pre-existing metaphors. She takes the existing literature concerning new ways to conceptualize international law—for example, the policy-oriented perspective of McDougal and Lasswell, the transition toward a new world order system of Richard Falk, the functionalism of Julius Stone, and Douglas Johnston—and suggests ways feminist thinkers can harness these ideas to better represent women’s and group’s interests.¹⁶⁴

3. Bias in the Use of Sovereignty in the Major Substantive Areas of International Law: A Study of the Discourses Surrounding the Kyoto Protocol and the Environment

I will focus in this section on the Kyoto Protocol because it has become the situs of an acrimonious debate over national sovereignty and the perceived dangers of a new enviro-imperialism, balanced against the necessity for a new international framework to deal with global and transnational problems. Couched within the arguments proffered on both sides of the debate are the remnants of nineteenth century conceptions of sovereignty, as well as new metaphors created to deal with the monumental problems of our new society.¹⁶⁵ The Protocol derives from the 1992 Framework Convention on Climate Change, which was designed to set up a regime to address the problem of global warming by the eventual lowering of green house gas emissions.¹⁶⁶ “[I]n 1997 more than 160 nations met in Kyoto, Japan to negotiate binding limitations on greenhouse gases for the developed nations, pursuant to the objectives of the Framework Convention.”¹⁶⁷ The Kyoto Protocol was produced as a result of the 1997 meeting, “in which the developed nations agreed to limit their greenhouse gas emissions, relative to the levels emitted in 1990.”¹⁶⁸ “The United States agreed to reduce emissions from 1990 levels by 7 percent during the period 2008 to 2012.”¹⁶⁹ However, the United States subsequently failed to ratify the Protocol.¹⁷⁰

162. *Id.* at 316.

164. *Id.* at 335, 339–40.

164. See Shalini Prakash, *Enforcement of International Environmental Law: The Kyoto Protocol*, at http://www.devalt.org/newsletter/nov03/of_7.htm (last visited Feb. 10, 2005).

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.*

170. See Prakash, *supra* note 164.

The core critique of the Protocol made by the staunch pro-traditional state sovereignty voices, tracks a familiar narrative concerning the inviolability of state power, and especially relies on rhetoric concerning the necessity that the state be permitted to withdraw its consent to treaty conditions.¹⁷¹ In addition, supporters of the traditional sovereignty decry the Protocol's authority to set energy emissions.¹⁷² This is the rhetoric of one such position encapsulated in the following quotation:

[t]he Protocol does not limit emissions in the developing countries. China will rapidly surpass America's emissions early in the next century. Greenhouse gas emissions will not be slowed by the Protocol; they will simply be shifted from the northern hemisphere to the southern hemisphere.

So will America's jobs, industry, and wealth. The first-step Protocol is designed to start a series of five-year "budget periods" for which the Conference of the Parties is empowered to adjust the emissions limits on developed countries. By limiting America's emissions, the UN effectively limits our energy use. By embracing this Protocol, America is willingly giving up its authority to set its own energy policy. The Gore/Clinton Administration has embraced the Protocol and has the audacity to claim that it is not a surrender of national sovereignty.¹⁷³

Later in the article, the author creates an alarming picture of the dangers of the Protocol, characterizing it as invading "every facet of American life."¹⁷⁴

The consequences of the Kyoto Protocol include another giant step toward global governance. The international bureaucracy being constructed by the UN is reaching its tentacles into every facet of American life—hiding behind the scary scenario of planetary impoverishment. Society is being transformed incrementally to conform to the vision of Al Gore's 1992 declaration

171. See Ray Evans, *The Kyoto Protocol: Fast Road to Global Governance*, Address to the Samuel Griffith Society Sydney Conference (Nov. 10-12, 2000), (transcript available at <http://www.lavoisier.com.auf/papers/articles/EvansKyoto.html>).

172. *Id.*

173. Henry Lamb, *Kyoto: The Consequences*, <http://www.citizenreviewonline.org/news/stories/398c5.html> (last visited Feb. 11, 2005).

174. *Id.*

that societies must be restructured around the central organizing principle of protecting the environment.¹⁷⁵

The above-voiced American position has also been echoed by other national voices, including those in other developed countries.¹⁷⁶ Here is an example from an Australian perspective:

[w]hy should the Kyoto Protocol, of itself, presage a new imperialism? What distinguishes the Kyoto Protocol from every other international treaty which Australia has ratified? The difference between Kyoto and every other international treaty is this: If Kyoto is brought into effect, the economic dislocation which must follow its implementation will be unprecedented in modern times. It will be equivalent to the famines of the early nineteenth century in its disruptive power, (except that the famines were followed by good seasons). There are some treaties which Australia has ratified which have caused economic loss to Australians and to people in other countries. The Basel Convention is the best known example. But the extent of the economic loss due to Basel is minuscule, at least in Australia, and understood by very few people. The Kyoto Protocol is a different thing indeed, compared with Basel.¹⁷⁷

In contrast to these voices, the other side of the narrative stresses the benefits to both the environment and to developing countries.¹⁷⁸ As stated in a recent World Bank article entitled *Supporting Poor Communities Under the Kyoto Protocol*:

[t]he [Community Development Carbon Fund] will provide financial support to small-scale greenhouse gas reduction projects in the least developed countries and poor communities in developing countries. Poorer communities will get the advantage of development dollars coming their way, and participants in the fund will receive carbon emission reduction credits for reductions in carbon emissions.¹⁷⁹

175. *Id.*

176. *See id.*

177. Evans, *supra* note 171.

178. *See* Press Release, The World Bank Group, Supporting Poor Communities Under the Kyoto Protocol (July 15, 2003) (available at <http://lnweb18.worldbank.org/ESSD/sdvtxt.nsf/43ByDocName/NewsandMediaPressReleasesArchive>).

179. *Id.*

The pro-Kyoto Protocol side of the debate also minimizes the impact on the infringement to traditional notions of national sovereignty.¹⁸⁰ For example, in the 1998 hearings before the United States House of Representatives International Relations Committee, there was much discussion of the effects of the Protocol on sovereignty and especially its economic effect given the mandated reduced emissions.¹⁸¹ During the hearings, experts addressed several key concerns, namely that the Protocol would not be applied to DOD (Department of Defense) emissions and fears that the Protocol would create a “super U.N. Secretariat.”¹⁸² With respect to the first concern, it was reported that “the President determined recently that to ensure defense readiness, he will propose that military operations and training be completely held harmless from any national emissions limits that might be adopted.”¹⁸³ With respect to the second concern, Mr. Eizenstat, United States Under Secretary of State for Economics, Business and Agriculture Affairs, attempted to allay fears of a world dominating U.N. such as those reflected in the above.¹⁸⁴ He had this to say:

[a] second misconception is that somehow the protocol will create a super U.N. Secretariat, threatening U.S. sovereignty. That is also fallacious. The review process and the protocol simply codifies already existing practices under the 1992 Rio Convention.

The review process is not by some centralized U.N. Secretariat; it is intergovernmental. The review teams are chosen by the government officials and then they can only come into a country with the invitation of that government. They cannot come onto any private property unless the property owner himself or herself permits it. *There will be no black helicopters swooping down on farms.*

Also, this intergovernmental team recently visited in April the U.S. Capitol, met with congressional staff and Members of the Congress, *and the Capitol still stands. So the notion that somehow people are going to be intruding on our sovereignty is simply and totally untrue.*

180. See *The Kyoto Protocol: Problems with U.S. Sovereignty and the Lack of Developing Country Participation: Hearing Before the House Comm. on Int'l Relations*, 105th Cong. (1998), available at http://commdocs.house.gov/committees/intlrel/hfa49425.000/hfa49425_0.htm (last visited Feb. 11, 2004) [hereinafter *The Kyoto Protocol*].

181. *Id.* at 5.

182. *Id.* at 31, 46–47.

183. *Id.* at 31.

184. *Id.*

Finally, there are some who suggest the protocol is going to result in a huge government transfer of foreign aid to Russia. That is also not true. U.S. private sector firms may on their own choose to purchase international emissions credits from Russia or any other country that wants to sell them. It will be purely a private decision. The U.S. Government is not transferring taxpayers' money to anyone. Indeed, this will be one of the crucial ways that the private sector can achieve cost-effective reductions. It will be their decision.¹⁸⁵

The various positions of the two sides, as reflected in the above quotations, make clear that each has internalized a traditional and monolithic conception of sovereignty.¹⁸⁶ No one, it seems (except perhaps law professors and other academics) came out and said that there is no such thing anymore as an impermeable membrane called sovereignty surrounding national territories that must never be relinquished, even in matters of global environmental concern. The territorial conception of sovereignty is apparent in Mr. Eizenstat's response, when he states that there is no intrusion of national sovereignty because "[t]here will be no black helicopters swooping down on farms."¹⁸⁷ This overly-simplistic (and perhaps jocular) expression of this pro-Kyoto position shows that the porous and post-modern notions of sovereignty have not trickled down at least to discourse occurring on the domestic level.

On the international plane, however, there was a different conception of sovereignty being discussed and employed in operative ways.¹⁸⁸ The new sovereignty became apparent in the interaction between states and environmental non-governmental organizations (ENGOs).¹⁸⁹ As reported in a law review article on the subject, at the sixth Framework Convention Conference of the Parties at The Hague in November 2000, "representatives of NGOs outnumbered representatives of States."¹⁹⁰ It should be mentioned that NGOs are frequently excluded from "closed-door" sessions at formal treaty negotiation sessions and are further disadvantaged because "the institutional setting favors a more moderate approach than is often advocated by EN-

185. *The Kyoto Protocol*, *supra* note 180, at 31 (emphasis added).

186. *Id.*

187. *Id.*

188. See Michele Betsill, *Environmental NGOs Meet the Sovereign State: The Kyoto Protocol Negotiations on Global Climate Change*, 13 COLO. J. INT'L ENVTL. L. & POL'Y 49 (2002).

189. *See id.*

190. *Id.* at 50.

GOs.”¹⁹¹ But this institutional bias is counteracted when NGOs are able to exert their force through public opinion and in other less formal ways. Betsill underscores the important role of NGOs:

[i]n the Kyoto Protocol negotiations, ENGOs played important roles behind the scenes and influenced the negotiations in ways that cannot readily be observed in the treaty text. By focusing only on the effects of NGO activity on the outcome of international negotiations, one runs the risk of missing the ways that NGOs shape the process of the negotiations. ENGOs influenced the Kyoto Protocol negotiations by catalyzing and framing debates on emissions trading and sinks, and by increasing pressure on States to reach agreement. Thus, ENGO activities have had indirect effects on the final agreement.¹⁹²

Betsill further reports that “[d]uring the Kyoto Protocol negotiations, some ENGOs organized demonstrations and protest activities to draw public and media attention to the negotiations and the issue of climate change.”¹⁹³

In the context of the new international law, according to Betsill, “the notion of sovereignty is being redefined in the post-Cold War era, suggesting that there could be greater opportunity for ENGOs to shape international climate change negotiations.”¹⁹⁴ The President of the Carnegie Endowment for International Peace, Jessica Mathews, contends “that power is shifting to new actors. ‘National governments are not simply losing autonomy in a globalizing economy. They are sharing powers—including political, social, and security roles at the core of sovereignty—with businesses, with international organizations, and with a multitude of citizens groups’”¹⁹⁵ Betsill also cites Professor Karen Litfin, who points out “that the development of international environmental regimes challenges the authority of States. ‘[O]nce States have acceded to nonbinding principles or other weak agreements, they usually find it difficult not to agree to increasingly more robust

191. *Id.* at 51.

192. *Id.* at 56–57.

193. Betsill, *supra* note 188, at 55.

For example, during COP 1 in Berlin, three Greenpeace activists suspended themselves from a smoke stack near Cologne, Germany, in an effort to highlight the role of coal-burning power stations as carbon dioxide emitters. At COP 3, Japanese ENGOs covered bushes outside the conference hall with messages, such as “Are U going to save us, AI?,” and Greenpeace erected a dinosaur made out of used oil cans and spare car parts.

Id.

194. *Id.* at 52.

195. *Id.* (quoting Jessica T. Mathews, *Power Shift*, FOREIGN AFF., Jan.-Feb. 1997, at 50).

commitments.”¹⁹⁶ Betsill concludes “NGOs can influence negotiations by holding States accountable to their prior commitments to protect the environment, thereby limiting the ability of States to make autonomous decisions.”¹⁹⁷

Taking a step back for a moment, beyond the scope of the Kyoto Protocol and outside of the specific problems concerning the Protocol’s implementation, there is a further consideration which must be addressed which has exerted its own independent force in recent years in an increasing way against efforts to support environmental protection, in general terms. Richard Falk has identified the very process of economic globalization as exerting a “downward pull on the efforts to address various environmental challenges through effective regulatory efforts.”¹⁹⁸ He argues that “given the time horizons of policy makers, economic globalization and environmental protection stress fundamentally inconsistent policy objectives that could be rendered compatible only by the imposition of effective regulatory authority based on an underlying political equilibrium between the competing economic and environmentalist constituencies.”¹⁹⁹

This is an important insight because it suggests another bias, which exists simultaneously overlaid onto the puzzle of state-centric sovereignty. As Falk explains, the old paradigm, which explained the downside of the state-centered system, is no longer explanatorily adequate.²⁰⁰ The old paradigm was characterized by the “essentially inward-looking nature of political authority in the world,” and held that the state as a self-interested party could not therefore protect the global commons.²⁰¹ “This was attributed to a generalized reluctance of states to cooperate externally, and, more specifically, to the related inability to solve the free-rider problem”²⁰² But the new paradigm, defined and shaped by globalization, presents an even greater difficulty.²⁰³ Under the new paradigm, “all governments are increasingly subject to the discipline of global capital in relation to organizing their activities and setting their priorities with respect to public expenditures and goals.”²⁰⁴

196. *Id.* at 52 (quoting Karen T. Litfin, *Sovereignty in World Ecopolitics*, 41 MERSHON INT’L STUD. REV. 167, 181 (1997)).

197. Betsill, *supra* note 188, at 52.

198. Richard Falk, *Environmental Protection in an Era of Globalization*, 6 Y.B. INT’L ENVTL. L. 3, 3 (1995).

199. *Id.*

200. *Id.* at 4.

201. *Id.* at 5.

202. *Id.*

203. Falk, *supra* note 198, at 5.

204. *Id.*

Globalization, for Falk, is a tremendous force that exists and functions to a large extent on its own accord or—to use another metaphor—like a runaway train.²⁰⁵

[T]he increasingly globalized character of trade, finance, and investment, as reinforced by media, computerization, and advertizing [sic], have created strong regulatory imperatives that appear for various reasons to go beyond the capacity and will of states to manage, either directly on their own, or indirectly through the establishment of international regimes.²⁰⁶

Thus conceived, Falk views globalization as a “world-order crisis of a structural and ideological character that has not existed in prior historical periods.”²⁰⁷ Under this view, the traditional individuated state is sapped of its power, not by any concerted conscious effort at global governance or regime change (like the Kyoto Protocol), but instead because of a basic, systemic, and structural condition that is changing the landscape of the world—both literally and figuratively.²⁰⁸

Falk is careful in his conclusion to temper his remarks about the dangers and pressures created by globalization by the caveat that “globalization by its nature is not weighted against environmentalism.”²⁰⁹ Rather, “[i]t is globalization as shaped by neo-liberalism in a world of very diverse sovereign states”²¹⁰ There are pressures that work to counteract environmental regulation, for example, “the unevenness of material conditions around the world, which makes it difficult for some actors to feel responsible for environmental decay of a global scope and others to feel unfairly expected to bear disproportionate costs in relation to environmental cleanups.”²¹¹ In Falk’s view, the neo-liberal willingness to promote economic growth makes environmentalist concerns “less pressing.”²¹² An ensuing crisis in public goods has resulted, one which “places a premium on reduced government expenditures of public goods of all varieties . . . definitely including environmental protection.”²¹³

205. *See id.*

206. *Id.* at 4.

207. *Id.* at 4–5.

208. *See Falk, supra* note 198, at 5.

209. *Id.* at 24.

210. *Id.*

211. *Id.* at 6.

212. *Id.*

213. Falk, *supra* note 198, at 6.

Globalization may be viewed as another bias, which may force state actors into positions of reduced responsibility. It is a new and awe-inspiring characteristic of international life not encompassed by any of the old metaphors of the sovereign state or even by the “society or system of states.”²¹⁴ Instead, globalization is a metaphor itself for the problems, which exist beyond the comprehension of one state. These are problems—like global environmental degradation, terrorism, and fluctuations in trade and the world economy—for which it does not make sense anymore for one state or even a minority of individuated powerful states to lay claim to and to attempt to solve alone.²¹⁵

B. *Jurisdiction*

The next major procedural/structural international legal discourse to be discussed revolves around the changing concept of jurisdiction. Like sovereignty, notions of jurisdiction have developed in many ways, influencing how state actors, corporate entities, and individuals conceive of the limitations placed upon the exercise of state power. The evolving concept of jurisdiction over time is intimately linked with the changing conceptions of sovereignty, discussed above in Part A. Jurisdiction, like sovereignty, has become divested from the strictly territorial, the strictly physical-self of the state; it has been expanded to meet the needs of an increasingly interdependent and globalized world. To the extent jurisdictional discourse, like the discourse surrounding sovereignty, holds onto, perpetuates, and engenders antiquated and biased modes of viewing the world, it must be reinterpreted and reformulated to better meet the needs of our evolving international society. To place contemporary jurisdictional discourse in perspective, I begin with a look at the way jurisdiction was conceived of by United States courts in the nineteenth and early twentieth centuries.

In *The Schooner Exchange v. McFaddon*,²¹⁶ decided in 1812, the United States Supreme Court was called upon to decide the following issue: “whether an American citizen can assert, in an American court, a title to [a public] armed national vessel” found within United States waters.²¹⁷ The

214. *Id.* at 4.

215. *See id.* at 4–7. For Falk, this realization leads to his conclusion that globalization should serve as the basis, as he says, for “the negotiation of an unprecedented global social contract, an undertaking of immense complexity, and one that will arouse the ideological fury of those who believe in neo-liberal approaches.” *Id.* at 7.

216. 11 U.S. (7 Cranch) 116 (1812).

217. *Id.* at 135.

Court answered in the negative.²¹⁸ The decision necessarily hinged on the Court's understanding of the nature of jurisdiction, territorial sovereignty, and consent.²¹⁹ Its jurisdictional discourse was framed as follows:

[t]he jurisdiction of *courts* is a branch of that which is possessed by the nation *as an independent sovereign power*.

The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself. Any restriction upon it, deriving validity from an external source, *would imply a diminution of its sovereignty to the extent of the restriction, and an investment of that sovereignty to the same extent in that power which could impose such restriction*.

All exceptions, therefore, to the full and complete power of a nation within its own territories, must be traced up to the consent of the nation itself. They can flow from no other legitimate source.

This consent may be either express or implied. In the latter case, it is less determinate, exposed more to the uncertainties of construction; but, if understood, not less obligatory.²²⁰

As this passage shows, jurisdiction was intimately connected with the state's territory, not to be infringed except by consent.²²¹

Because of the mutual exclusivity of sovereign power, the general rule described in *The Schooner Exchange* was that "[the] full and absolute territorial jurisdiction being alike the attribute of every sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign sovereigns nor their sovereign rights as its objects."²²² This shows the Court's reluctance to presume any type of extra-territorial application of jurisdiction.²²³ A state could, however, exercise jurisdiction over foreign persons or entities within its borders. Such exercise would be suspended however, provided a specific license was given for the activity under consideration or if certain exceptions applied.²²⁴

218. *Id.* at 147.

219. *Id.* at 136.

220. *Id.* at 136 (emphasis added).

221. *The Schooner Exchange*, 11 U.S. at 136.

222. *Id.* at 137.

223. *See id.*

224. For example, the exemption of the person of a foreign sovereign from arrest or detention, the immunity of foreign ministers, and waiver of jurisdiction over troops of a foreign prince allowed to pass through a territory.

In *American Banana Co. v. United Fruit Co.*,²²⁵ decided in 1909, the Supreme Court again wrestled with whether jurisdiction should apply, but this time in the context of activities occurring outside the territory of the United States, and, as the Court further explicitly noted, “within that of other states.”²²⁶ The plaintiff brought an action to recover threefold damages under the Sherman Act alleging that its operations had been unfairly interfered with by the defendant-corporation.²²⁷ The plaintiff claimed *inter alia* that “in July [1904], Costa Rican soldiers and officials, instigated by the defendant, seized a part of the plantation and a cargo of supplies and have held them ever since, and stopped the construction and operation of the [plaintiff’s] plantation and railway.”²²⁸

Justice Holmes, writing for the Court in *American Banana Co.*, took great pains to base his jurisdictional narrative on the precept that “[a]ll legislation is *prima facie* territorial.”²²⁹ Holmes begins his analysis by expressing surprise that any other conception of jurisdiction could be conceived: “[i]t is obvious that, however stated, the plaintiff’s case depends on several rather *startling* propositions. In the first place the acts causing the damage were done . . . outside the jurisdiction of the United States It is *surprising* to hear it argued that they were governed by [an] act of Congress.”²³⁰ For the court, “not only were the acts of the defendant in Panama or Costa Rica not within the Sherman Act, but they were not torts by the law of the place and therefore were not torts at all, however contrary to the ethical and economic postulates of that statute.”²³¹ Although the Court acknowledges that an American defendant-corporation is bound by the laws of the United States, it found dispositive the fact that the acts of other states—namely Panama and Costa Rica—were involved: “a seizure by a state is not a thing that can be complained of elsewhere in the courts [of a foreign nation].”²³²

It is fascinating to juxtapose the “proto-jurisdictional” discourse within *The Schooner Exchange* and *American Banana Co.* with the more modern and sophisticated conceptions of jurisdiction exemplified in the *Restatement (Third) of Foreign Relations Law* and recent cases.²³³ The modern discourses regarding jurisdiction have developed beyond looking strictly at the

225. 213 U.S. 347 (1909).

226. *Id.* at 355.

227. *Id.* at 353–54.

228. *Id.* at 354–55.

229. *Id.* at 357 (quoting *Ex parte Blain*, 12 Ch. D. 522, 528 (1879)).

230. *Am. Banana Co.*, 213 U.S. at 355 (emphasis added).

231. *Id.* at 357.

232. *Id.* at 357–58.

233. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402 (1987).

territorial locus of the parties' actions and instead encompass a broad range of further principles, which focus on the nationalities of parties and national interest, and which coexist and overlap with the territorial principle.²³⁴ These other discourses can be found embedded within section 402 of the Restatement.²³⁵ That section provides in full as follows:

Subject to § 403, a state has jurisdiction to prescribe law with respect to

(1)(a) conduct that, wholly or in substantial part, takes place within its territory;

(b) the status of persons, or interests in things, present within its territory;

(c) conduct outside its territory that has or is intended to have substantial effect within its territory;

(2) the activities, interests, status, or relations of its nationals outside as well as within its territory; and

(3) certain conduct outside its territory by persons not its nationals that is directed against the security of the state or against a limited class of other state interests.²³⁶

Within section 402 is the still thriving "territorial principle" reflected in three parts of section 402(1).²³⁷ Section 402(2) embodies the so-called "nationality principle" and section 402(3), the "protective principle."²³⁸

Section 403 of the Restatement, referenced explicitly in section 402, provides the limitations on the exercise of jurisdiction to prescribe, even where the section 402 rules would be otherwise applicable.²³⁹ The extreme flexibility of section 403 is especially apparent in its reliance on the tort concept of reasonableness.²⁴⁰ Under section 403(1), "a state may not exercise jurisdiction . . . with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."²⁴¹ Section 403(2) gives further guidance to the legislator, adjudicator, or party by

234. *See id.*

235. *Id.*

236. *Id.*

237. *See* DAMROSCH ET AL., *International Law: Cases and Materials* 1090–91 (4th ed. 2001).

238. *Id.*

239. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

240. *Id.*

241. *Id.* § 403(1).

enumerating various factors to be applied in determining unreasonableness, including:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;

(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;

(d) the existence of justified expectations that might be protected or hurt by the regulation;

(e) the importance of the regulation to the international political, legal, or economic system;

(f) the extent to which the regulation is consistent with the traditions of the international system;

(g) the extent to which another state may have an interest in regulating the activity; and

(h) the likelihood of conflict with regulation by another state.²⁴²

Section 403(3) imposes a hortatory duty of good-faith and deference upon two states where a conflict in jurisdiction exists: “a state should defer to the other state if that state’s interest is clearly greater.”²⁴³

The jurisdictional principles set forth within these Restatement sections, as applied by modern United States courts, have resulted in inconsistent and diverging results.²⁴⁴ In some instances, the net has been cast very wide,

242. *Id.* § 403(2).

243. *Id.* § 403(3).

244. See Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273, 1293 (1990) [hereinafter *State Extraterritorially*].

namely in those cases involving drug trafficking,²⁴⁵ trade and business interests, and alleged Sherman Act violations.²⁴⁶ However, in other types of cases, namely those involving employment discrimination under Title VII of the Civil Rights Act of 1964 (“Title VII”),²⁴⁷ the environment,²⁴⁸ and constitutional guarantees such as the Fourth Amendment, courts have refused to extend jurisdiction extraterritorially.²⁴⁹ Is there a clear line of demarcation between these two sets of cases, an underlying rationale that helps to explain their divergences that preserves some underlying consistent jurisdictional discourse which is both coherent and appropriately tailored to modern social, political, and cultural conditions? Or, are the courts instead laboring under biased notions of jurisdiction rooted in outmoded and inappropriate conceptions of sovereignty, territory, and national interest?

Take for instance, *United States v. Aluminum Co. of America*,²⁵⁰ where in 1945 the Second Circuit considered whether the Sherman Act applied to activities of a foreign corporation allegedly to constrain trade in aluminum ingots, which had taken place outside the United States.²⁵¹ In that case, the court was careful to formulate the main issue such that it concerned the consequences which could be found to flow to the United States.²⁵² This crucial move is apparent in the following passage:

[d]id either the agreement of 1931 or that of 1936 violate § 1 of the Act? The answer does not depend upon whether we shall recognize as a source of liability a liability imposed by another state. On the contrary we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it. That being so, the only question open is whether Congress intended to impose the liability, and whether our own Constitution permitted it to do so: as a court of the United States, we cannot look beyond our own law. Nevertheless, it is quite true that we are not to read general words, such as those in this Act, without regard to the limitations customarily observed by nations upon the exercise of their powers; limitations

245. See *United States v. Noriega*, 117 F.3d 1206 (11th Cir. 1997).

246. See *Cont'l Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

247. See 42 U.S.C. §§ 2000e–2000e-17 (2004); *Boureslan v. Aramco*, 857 F.2d 1014, 1016 (5th Cir. 1988).

248. See *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm’n*, 647 F.2d 1345 (D.C. Cir. 1981).

249. *United States v. Verdugo-Urquidez*, 494 U.S. 259 (1990).

250. 148 F.2d 416 (2d Cir. 1945).

251. See *id.* at 421.

252. See *id.* at 443.

which generally correspond to those fixed by the “Conflict of Laws.” *We should not impute to Congress an intent to punish all whom its courts can catch, for conduct which has no consequences within the United States.*²⁵³

This emphasis on “consequences within the United States”²⁵⁴ is wholly absent from the subsequently overruled *American Banana Co.* case, which took a less sophisticated, more bright-line, on-off approach to jurisdiction.²⁵⁵ For the *Aluminum Co. of America* court, the consequences must be determined and will be determined by the court.²⁵⁶

The Second Circuit in *Aluminum Co. of America* candidly admitted that it was going slightly beyond the precedent in a sense by reading the Sherman Act so broadly.²⁵⁷ Judge Learned Hand, writing for the court, remarked as follows:

[i]t is true that in [prior] cases the persons held liable had sent agents into the United States to perform part of the agreement; but an agent is merely an animate means of executing his principal’s purposes, and, for the purposes of this case, he does not differ from an inanimate means; besides, only human agents can import and sell ingot.²⁵⁸

This transition from “animate” to “inanimate” means, while made almost as an aside, represents a major transition.²⁵⁹ It shows the willingness of the court to begin to apply and formulate a more common-sense “reasonable-ness” test, undeterred by technicalities.

Before looking at cases on the other side of the ledger, i.e. to those cases where jurisdiction was *not* granted, consider the language (and its origins) pervading *United States v. Noriega*,²⁶⁰ decided by the Eleventh Circuit in 1997.²⁶¹ Manuel Noriega appealed his convictions in the Southern District of Florida for drug trafficking.²⁶² Noriega’s principal arguments were that the indictments against him should have been dismissed by the district court

253. *Id.* at 443 (emphasis added).

254. *Id.*

255. *See Am. Banana Co v. United Fruit Co.*, 213 U.S. 347 (1909).

256. *See Aluminum Co. of Am.*, 148 F.2d at 421–22.

257. *See id.* at 443–44.

258. *Id.* at 444.

259. *Id.*

260. 117 F.3d 1206 (11th Cir. 1997).

261. *Id.*

262. *Id.* at 1209.

due to “his status as a head of state and the manner in which the United States brought him to justice.”²⁶³ In addressing the “head-of-state” argument the court relied explicitly on *The Schooner Exchange*:

[t]he Supreme Court long ago held that “[t]he jurisdiction of courts is a branch of that which is possessed by the nation as an independent sovereign power. The jurisdiction of the nation within its own territory is necessarily exclusive and absolute. It is susceptible of no limitation not imposed by itself.” (citations omitted). The Court, however, ruled that nations, including the United States, had agreed implicitly to accept certain limitations on their individual territorial jurisdiction based on the “common interest impelling [sovereign nations] to mutual intercourse, and an interchange of good offices with each other . . .” (citations omitted). Chief among the exceptions to jurisdiction was “the exemption of the *person of the sovereign* from arrest or detention within a foreign territory” (citations omitted).²⁶⁴

The Eleventh Circuit proceeded to discuss how *The Schooner Exchange* doctrine subsequently led to the development of the modern notions of foreign sovereign immunity and its eventual codification in the Foreign Sovereign Immunities Act, passed in 1977.²⁶⁵ Since the Act did not address “head of state” immunity in the criminal context, the court held that the only way immunity could attach was through reference to “the principles and procedures outlined in *The Schooner Exchange* and its progeny.”²⁶⁶ Moreover, the court found itself obligated to “look to the Executive Branch for direction on the propriety of Noriega’s immunity claim.”²⁶⁷

By providing that the Judicial Branch “must look to the Executive Branch”²⁶⁸ for guidance, the court has in effect self-consciously circumscribed and de-emphasized its role in deciding the case in deference to the recognition bestowed or withheld by the political branch.²⁶⁹ The Executive Branch, generally, follows one of three paths with respect to such recognition: “(1) explicitly suggests immunity; (2) expressly declines to suggest

263. *Id.*

264. *Id.* at 1211 (quoting *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 136–37 (1812)) (alterations in original).

265. *Noriega*, 117 F.3d at 1211–12; *See* *Jurisdictional Immunities of Foreign States*, 28 U.S.C. §§ 1602–1611 (2000).

266. *Noriega*, 117 F.3d at 1212.

267. *Id.*

268. *Id.*

269. *See id.*

immunity; or (3) offers no guidance.”²⁷⁰ “Some courts have held that absent a formal suggestion of immunity, a putative head of state should receive no immunity.”²⁷¹ In *Noriega*, the court ultimately denied the defendant’s immunity claim, noting that the Executive Branch had “not merely refrained from taking a position . . . [but pursued] Noriega’s capture and [his] prosecution . . . [thus manifesting] its clear sentiment that Noriega should be denied head-of-state immunity.”²⁷² Moreover, the court further pointed out that “Noriega never served as the constitutional leader of Panama [and] that Panama has not sought immunity for Noriega.”²⁷³

Although *Aluminum Co. of America* was a civil action²⁷⁴ and *Noriega* involved criminal drug-trafficking,²⁷⁵ both cases illustrate the various techniques courts have used to justify and articulate their exercise of extraterritorial jurisdiction over foreign defendants.²⁷⁶ In *Boureslan v. Aramco*,²⁷⁷ however, the court rejected the exercise of jurisdiction in an (arguably) more compelling case for jurisdiction, involving a United States plaintiff and defendant.²⁷⁸ In that case, the Fifth Circuit framed the issue as follows: “Does Title VII regulate the employment practices of businesses which, although incorporated in the United States, employ citizens of the United States in foreign countries?”²⁷⁹ The plaintiff’s employer had its principal place of business in Saudi Arabia.²⁸⁰ Plaintiff, a naturalized American citizen of Lebanese descent, alleged he was discriminated against on the basis of his race, religion, and national origin while working in the defendant’s offices in Saudi Arabia.²⁸¹ The court rejected plaintiff’s main argument that extraterritorial application of Title VII was mandated by drawing a “negative inference” from the statute’s “alien exemption provision.”²⁸² The court similarly rejected the EEOC’s reliance on the legislative history of Title VII, suggesting extraterritorial application, holding that it fell “far short of the clear ex-

270. *Id.*

271. *Noriega*, 117 F.3d at 1212 (citing *In re Doe*, 860 F.2d 40, 45 (2d Cir. 1988)).

272. *Id.*

273. *Id.*

274. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945).

275. See *Noriega*, 117 F.3d at 1206.

276. See *Aluminum Co. of Am.*, 148 F.2d at 416.

277. 857 F.2d 1014 (5th Cir. 1988).

278. *Id.* at 1015.

279. *Id.* at 1015–16.

280. *Id.* at 1016.

281. *Id.* at 1015.

282. *Boureslan*, 857 F.2d at 1018 (quoting *Bryant v. Int’l Sch. Servs., Inc.*, 502 F. Supp. 472, 482 (D. N.J. 1980)).

pression of congressional intent required to overcome the presumption against extraterritorial application.²⁸³

What lurks beneath the surface of the court's reasoning in *Boureslan* is its worry about the sovereign rights of other nations, as evidenced by its observation that "[t]he religious and social customs practiced in many countries are wholly at odds with those of this country."²⁸⁴ Although not addressed directly by the majority, this subconscious preoccupation is apparent. The subtext of the opinion is that by applying Title VII abroad, other nations' sovereign rights could be infringed in violation of the territorial principle enshrined in *The Schooner Exchange* and *American Banana Co.*²⁸⁵ As made clear in the dissent, one of the arguments against extraterritorial application was that "because labor relations are a peculiarly domestic matter, it would be an affront to the sovereignty of other nations to apply Title VII extraterritorially."²⁸⁶ Both the defendant and *amicus curiae* argued that application of Title VII abroad would be "unreasonable" under section 403 of the Restatement.²⁸⁷

The dissent conducted an exhaustive analysis of the reasonableness of applying Title VII to United States citizens abroad under the factors set out in section 403.²⁸⁸ It found dispositive that the statute was expressly exempted from application to aliens as provided in 42 U.S.C. § 2000e-1.²⁸⁹ "Since Title VII expressly exempts from coverage aliens employed abroad by U.S. corporations, the logical negative inference is that Title VII was intended to cover U.S. citizens employed abroad. Indeed, the alien exemption provision would be meaningless if Title VII did not apply extraterritorially."²⁹⁰ For the dissent, it was not unreasonable to apply the statute abroad because there would be no conflict with other nations' local laws:

[t]he argument that extraterritorial application of Title VII is unreasonable because it would offend the sovereignty of other nations is not persuasive. The fact that another nation may exercise jurisdiction over employment relations on the basis of territory does not render the exercise of U.S. jurisdiction on the basis of nationality unreasonable. The likelihood that concurrent jurisdiction

283. *Id.* at 1019.

284. *Id.* at 1020.

285. *See* *Am. Banana Co. v. United Fruit Co.* 213 U.S. 347 (1909); *The Schooner Exchange v. McFadden*, 11 U.S. (7 Cranch) 116 (1812).

286. *Boureslan*, 857 F.2d at 1026 (King, J., dissenting).

287. *Id.* at 1025; *See also* RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987).

288. *Boureslan*, 857 F.2d at 1021-1035 (King, J., dissenting).

289. *Id.* at 1032.

290. *Id.*

would produce international discord is minimized by the fact that the United States seeks to regulate *only* the conduct of its own nationals and by the fact that Title VII may be reconciled with foreign law in the event of a conflict.²⁹¹

The fact that there might be “concurrent jurisdiction” does not automatically result in a determination of unreasonableness: “[i]nternational discord does not arise from the existence of concurrent jurisdiction alone as much as it arises from an attempt to regulate the conduct of foreign nationals.”²⁹²

In addition to labor law cases, a similar result, denying application of United States laws extraterritorially, has been found in the context of the environment and environmental impact assessment.²⁹³ In *Natural Resources Defense Council Inc. v. Nuclear Regulatory Commission* (“NRDC”), the District of Columbia Circuit Court of Appeals considered whether the National Environmental Protection Act (“NEPA”) applied to the sale for export of a nuclear reactor and related nuclear materials to the Philippines.²⁹⁴ As the court noted, the United States Nuclear Regulatory Commission “decided in the case before us to license a nuclear export without evaluating health, safety and environmental impacts *within the recipient nation*.”²⁹⁵ In deciding that NEPA did not apply, the court hinged its decision on the anticipated infringement of the foreign nation’s sovereign regulatory framework by imposing NEPA’s requirements on exports:

[w]e do honor to the sovereignty of national governments, our own included, when we respect foreign public policy by not automatically displacing theirs with ours. This calls for a thorough understanding of our interests as defined by Congress—we can then reasonably balance the scope of our own regulation alongside the rightful regulatory jurisdiction of the Philippines.²⁹⁶

The court’s opinion in *NRDC* is laden with concerns about “imperialism” and “coercion.”²⁹⁷ For example, the court acknowledged that some amount of “regulatory coercion [is a possibility] across national borders . . .

291. *Id.* at 1031.

292. *Id.* at 1029.

293. *See, e.g.,* *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm’n*, 647 F.2d 1345 (D.C. Cir. 1981).

294. *Id.* at 1346, 1348.

295. *Id.* at 1347.

296. *Id.* at 1357.

297. *See id.* at 1345.

for the United States when we hold the cards. But when a foreign development program—the public provision of electricity—is at stake, we should not assign an insignificant place to the foreign political interest.”²⁹⁸ Although the court held “[t]his is not a case of the United States imperiously imposing its will on the Philippines,”²⁹⁹ it nevertheless found that “conditioning export licenses on the satisfaction of standards fashioned in the United States may unnecessarily displace domestic regulation by the government of the Philippines.”³⁰⁰

In other instances, United States courts have been able to decide cases without reaching (or by sidestepping) the issue of extraterritoriality in the context of NEPA.³⁰¹ For example, as noted in *NRDC* itself, the court in *Sierra Club v. Adams* did not decide the extraterritoriality issue because the government “never questioned the applicability of NEPA to the construction of this highway in Panama.”³⁰² The District of Columbia Circuit in *NRDC* further distinguished *Adams* by pointing out that in that case the United States had “two-thirds of the ongoing financial responsibility and control over the South American highway construction. Moreover, the [Environmental Impact Statement] (EIS) requirement had been originally triggered by health effects on United States livestock herds.”³⁰³

A subsequent case in 1993 also concerned the extraterritorial application of NEPA.³⁰⁴ In *Environmental Defense Fund, Inc. v. Massey*,³⁰⁵ the plaintiff brought an action against the National Science Foundation to enjoin it from permitting incineration of food waste in Antarctica.³⁰⁶ Again, sovereignty (or more specifically, the lack of sovereign power) was pivotal for the court in deciding the extraterritoriality question:

the presumption against the extraterritorial application of statutes . . . does not apply where the conduct regulated by the statute occurs primarily, if not exclusively, in the United States, and the alleged extraterritorial effect of the statute will be felt in Antarctica—a continent without a sovereign, and an area over which the United States has a great measure of legislative control.³⁰⁷

298. *Natural Res. Def. Council, Inc.*, 647 F.2d at 1357.

299. *Id.* at 1356.

300. *Id.*

301. *See, e.g., Sierra Club v. Adams*, 578 F.2d 389 (D.C. Cir. 1978).

302. *See id.* at 392.

303. *Natural Res. Def. Council, Inc.*, 647 F.2d at 1368.

304. 986 F.2d 528 (D.C. Cir. 1993).

305. *Id.* at 528.

306. *Id.* at 529.

307. *Id.*

The *Massey* court emphasized that both parties had acknowledged that Antarctica is unique in that it “is the only continent on earth which has never been, and is not now, subject to the sovereign rule of any nation.”³⁰⁸

Efforts by plaintiffs after *Massey*, to extend the decision’s scope to regions *with* sovereignty, have been wholly unsuccessful.³⁰⁹ For example, in *NEPA Coalition of Japan v. Aspin*,³¹⁰ the plaintiffs argued that NEPA should be applied to the U.S. Secretary of Defense concerning the environmental impact of American military installations in Japan.³¹¹ In finding NEPA not applicable, the court was careful to distinguish *Massey*, holding that the prior case involved the “unique status of Antarctica . . . not a foreign country.”³¹² Subsequent courts have agreed that NEPA is not applicable extraterritorially when foreign sovereign rights are found to be implicated.³¹³

Commentators on these jurisdictional discourses running through the American cases have noted that the language of “national interest” or “common good” serves to reflect and reinforce the “dominant, hierarchical structures and naturalizes the position of those in power who decide what is best for the ‘we.’”³¹⁴ As the authors of the leading critical article on this subject, point out:

[o]n the domestic level, appeals to “shared values” have been used to justify the subordinated position of, among others, blacks and women. Similarly, in discussions of extraterritoriality, appeals to “shared” beliefs have justified an expansive conception of jurisdiction in such fields as antitrust and securities, but a more constricted

308. *Id.* Consistent with the holding in *Massey*, courts have held similarly in cases involving NEPA’s application on the high seas. See *Ctr. for Biological Diversity v. Nat’l Sci. Found.*, No. C02-5065JL, 2002 WL 31548073 (N.D. Cal. Oct. 30, 2002); *Natural Res. Def. Council, Inc. v. U.S. Dep’t of Navy*, No. CV-01-07781CAS(RZX), 2002 WL 32095131 (C.D. Cal. Sept. 17, 2002).

309. See, e.g., *NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C. 1993).

310. *Id.* at 466.

311. *Id.* at 467.

312. *Id.*

313. See, e.g., *Mayaguezanos por la Salud y el Ambiente v. United States*, 38 F. Supp. 2d 168, 179 (D.P.R. 1999) (holding that NEPA did not require United States’ consent for retransfer of irrecoverable nuclear waste); see also *Born Free USA v. Norton*, 278 F. Supp. 2d 5, 8 (D.D.C. 2003) (holding that preliminary injunction not warranted when animal welfare organizations interested in welfare of elephants brought action against the U.S. Department of the Interior and the Fish and Wildlife Service, challenging its decision to issue permits to two zoos for the importation of eleven African elephants, because the Fish and Wildlife Service had no discretion with respect to Swaziland’s determination to remove the elephants from their indigenous habitat).

314. *State Extraterritorially*, *supra* note 244, at 1293.

version in areas such as the constitutional rights of aliens and anti-discrimination laws. Thus, the securities fraud activities of a foreign defendant against a foreign company in Canada have been proscribed, although the discriminatory practices of Aramco against American workers in Saudi Arabia have gone unchecked.³¹⁵

These authors make the important point that “the language of jurisdictional argument matters, because language both communicates social meaning and, by circumscribing the ways in which communication takes place, creates meaning.”³¹⁶

One solution to the divergences and inconsistencies of the judicial application of jurisdiction in these American cases is to apply an *alternative* discourse, one embracing a new conception of the state and sovereign power.³¹⁷ For Malley, Manas and Nix:

jurisdictional arguments couched in the univocal language of territory, citizenship, or national interest obscure the complexity of the substantive issues at stake and fail to provide meaningful guidance to decision-makers. As one commentator has argued, debates about extraterritoriality “protect the discourse from having to assert its own normative theory.” Although perceived and presented as a ‘preliminary’ matter, determination of justiciability actually regiments the outcome of the inquiry.³¹⁸

While these commentators admit that:

[f]raming the issue differently might not have led the courts in any of these cases to reach different *jurisdictional* result . . . [the point is that] [t]he courts’ rhetoric corresponded to a particular geography of the jurisdictional world, one in which self-proclaimed national interests were given precedence over transnational groups’ normative claims.³¹⁹

While I am in general agreement with Malley, Manas, and Nix about their approach and project of imagining alternative discourses, it should be noted that alternative discourses *also* are susceptible to bias, mislabeling, and

315. *Id.* at 1293–94 (citing *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988)).

316. *Id.* at 1290.

317. *See id.* at 1304–05.

318. *Id.* at 1303–04 (quoting DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* 126 (1987)).

319. *State Extraterritorially*, *supra* note 244, at 1300.

misunderstanding, because what counts as “interests” and what counts as components of the diffuse and disaggregated power of the state may vary among cultures, societies, and even among individuals. In particular cases, the interests at stake necessarily will be largely defined by the parties themselves and other interests will be left out of the discussion—just by the very nature of the litigation process. Moreover, although these authors admit that *perhaps* jurisdictional results would not change given application by the judges of alternative conceptual paradigms, discourses, and conceptualizations of the state power, it is certainly true that *in reality* the jurisdictional results in these and some future cases will indeed change if different discourses and assumptions are used. Assuming *arguendo* that such changes in discourse *will* lead to changes in outcomes in specific cases, the next question is: is this a good or bad thing?

The answer to this question necessarily brings us to the paradox of universalism. On one hand, there is the attractiveness of exporting liberal values and of the beneficial effects which greater rights and regulation may have on people’s lives around the world, either by applying NEPA’s environmental standards in the Philippines, American anti-discrimination labor laws in Saudi Arabia, or the guarantees of the Fourth Amendment in Mexico.³²⁰ On the other hand, there is the equally serious counter-tension straining at the other end of our normative tug of war: the dangers of cultural, ideological, and value imperialism. Malley, Manas, and Nix attempt to address this objection in their discussion of the critique they term “[i]mperialism in [d]isguise.”³²¹ Their answers, however, do not resolve the conundrum of universalism.³²² First, they counter-argue that “recognition of alternative solidarities does not imply disregard for national ties.”³²³ Their second counter-argument is that:

normative orders do not coincide strictly with national entities; rather, they cut through national boundaries. Within the framework suggested here, then, norms are imposed neither *by* nor *on* nations, but by certain transnational groups on others. Hence, *all* jurisdictional resolutions encroach upon the normative order of *some* transnational group. This is as true of assertions of jurisdiction as it is of denials of jurisdiction.³²⁴

320. See, e.g., *Boureslan v. Aramco*, 857 F.2d 1014 (5th Cir. 1988); *Natural Res. Def. Council, Inc. v. Nuclear Regulatory Comm’n*, 647 F.2d 1345 (D.C. Cir. 1981).

321. *State Extraterritorially*, *supra* note 244, at 1301.

322. *Id.*

323. *Id.*

324. *Id.*

With respect to the first argument, there are situations where using an alternative discourse *does not necessarily* mean disregarding national ties.³²⁵ Take for instance, the Cuna and Choco Indians' interest in *Sierra Club v. Coleman*.³²⁶ But, of course, the use of an alternative discourse in other cases *may* mean that one set of laws is being privileged over another, namely in those situations of concurrent jurisdiction where a conflict exists.³²⁷ In such cases, section 403 mandates application of a "reasonableness" test, to balance certain factors, and to ensure that the outcome is fair to all parties.³²⁸ But the problem with this is that the actor doing the balancing is in most cases a judge who is operating under his own underlying assumptions, with his own biases, cultural presuppositions, values, and indoctrinated societal goals. These goals and values may be at odds with the laws and practices of people in another nation.

With respect to the second response, that "normative orders do not coincide strictly with national entities," while this is true in some cases, it does not assist us in answering the paradox of universalism.³²⁹ As the authors correctly observe, "[w]ithin the framework suggested here, then, norms are imposed neither by nor on nations, but by certain transnational groups on others."³³⁰ While I agree, the conundrum in which we find ourselves in with respect to the purported dangers of imperialism on the one hand and universal values on the other is not resolved by renegotiating and re-labeling the group doing the imposing as a "transnational group" as opposed to a "nation" within the context of specific cases.³³¹ The salient and important point made by the authors is that over-reliance on notions of sovereignty and self-determination can "take on an ironic, even hollow quality" in specific cases in light of the fact that our cultural values (and those of many other nations) appear to dictate a different outcome.³³² I agree. However, while this may be true, my point is that the "hollowness" which rings in our ears may not be the same ring heard in other persons' ears, especially those on the other side

325. See *Sierra Club v. Coleman*, 421 F. Supp. 63 (D.D.C. 1976).

326. *Id.* at 63. This example is used by the authors in their article. *State Extraterritorially*, *supra* note 244, at 1284.

327. See, e.g., *Hartford Fire Ins. Co. v. California*, 509 U.S. 764 (1993).

328. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 403 (1987).

329. *State Extraterritorially*, *supra* note 244, at 1301.

330. *Id.*

331. See *id.* at 1275.

332. *Id.* at 1303. I refer here to the author's use of *Martin v. Republic of South Africa*, 836 F.2d 91 (2d Cir. 1987), as an example of a case where "sovereignty" and "self-determination" rang "hollow" due to the fact that the discriminatory conduct in that case—leaving a black man at the scene of an accident—was violative of a fundamental norm. *Id.* at 1302–03.

of the case arguing for the preservation of their transnational groups' values and interests—or what we may consider as their biases and prejudices.

I am thinking here of one of the prime examples of conflict between local laws and Western liberal values: women's rights and the host of issues surrounding this contentious subject. In cases such as these, the conflict between cultural imperialism and respect for sovereignty or self-determination is *not* resolved by the use of an alternative discourse. Part III of this paper will return to this thorny subject, in its discussion of a proposal for dealing with the theoretical and practical implications of diverse viewpoints in an increasingly interconnected, interactive, and interdependent world.

C. *State Responsibility*

This section examines the international legal discourses revolving around the evolving concept of “state responsibility,” and the built-in biases, prejudgments, and prejudices surrounding this term. As the name itself suggests, there is great emphasis placed upon the “state,” along with certain assumptions in the discourse about state power, attribution, and how liability attaches (or does not attach) to individuals within the state structure. The International Law Commission's (ILC) recent efforts to articulate and give substance to the rules surrounding state responsibility through their Draft Articles will be discussed. Especially important to this inquiry is the impact and effect of these articles on the future of international law. As some scholars have concluded, the Articles may do more harm than good, and may represent a counter-productive and even dangerous path, which does a disservice to the deeper and more long-lasting goals of international society.³³³

One of the first discussions of state responsibility in the modern discourse is found in the *Corfu Channel* case, discussed in Part II.A of this article.³³⁴ In the International Court of Justice's principal judgment on the merits of April 9, 1949, the first of two issues articulated by the court related to state responsibility and was as follows: “[I]s Albania responsible under international law for the explosions which occurred on the 22nd October 1946 in Albanian waters and for the damage and loss of human life which resulted from them and is there any duty to pay compensation?”³³⁵

The second issue concerned whether the United Kingdom had breached Albanian sovereignty by the actions of the Royal Navy.³³⁶ In the court's opinion, “[f]rom all the facts and observations [set forth previously in the

333. See Allott, *supra* note 19.

334. *Corfu Channel* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

335. *Id.* at 6.

336. *Id.*

opinion] . . . the Court draws the conclusion that the laying of the minefield which caused the explosions . . . could not have been accomplished without the knowledge of the Albanian Government.”³³⁷

What is interesting is that, as the court reported, “[t]he obligations resulting for Albania from this knowledge [were] not disputed between the Parties.”³³⁸ Thus, even at this early date in the development of the state responsibility discourse, there remained a general consensus and acceptance by the states themselves of certain principles, which entailed certain responsibilities flowing to states based on “their knowledge” of a particular state of affairs.³³⁹ It is, however, unclear and not directly addressed in the opinion what it would mean exactly for a “state” to “know” something, in other words, what level and how many individuals, within the state or “behind” the state, would satisfy this knowledge requirement.³⁴⁰ Assuming, as the court found, this knowledge existed, then the Albanian “state” had a duty to notify shipping in the area of the minefield.³⁴¹ This duty did not arise from the Hague Convention of 1907,

which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State’s obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.³⁴²

The other important outcome for the state in *Corfu Channel* is that it may be held liable not just for its acts, but—just as persons in some contexts under municipal law—also for its omissions, or its failure to act.³⁴³ In the words of the court: “In fact nothing was attempted by the Albanian authorities to prevent the disaster. These *grave omissions* involve the international responsibility of Albania.”³⁴⁴ Counterbalanced against this finding against Albania, however, is the court’s further determination with respect to the second issue, regarding Albanian sovereignty, that “the United Kingdom violated the sovereignty of the People’s Republic of Albania, and that this

337. *Id.* at 22.

338. *Id.*

339. *Corfu Channel*, 1949 I.C.J. at 22.

340. *Id.*

341. *Id.*

342. *Id.*

343. *Id.*

344. *Corfu Channel*, 1949 I.C.J. at 23 (emphasis added).

declaration by the Court constitutes in itself appropriate satisfaction.”³⁴⁵ Interestingly, the sovereignty issue gets subsumed or overshadowed to an extent under the importance of the state responsibility issue.³⁴⁶ This is apparent in light of the court’s acknowledgment that money damages are available in favor of the United Kingdom for the explosions and loss of life, but the Albanian state gets nothing but a declaration for its loss of sovereignty.³⁴⁷

The explanation for this imbalance, in terms of the disparate remedies available to each side of the dispute, is illuminated by Judge Alvarez’s separate concurring opinion.³⁴⁸ There, he provided a more sophisticated and nuanced view of state responsibility.³⁴⁹ For Alvarez, state responsibility may be claimed with respect to a variety of acts or omissions with different character and level of severity, consisting of three general categories: “*international delinquencies, prejudicial acts, and unlawful acts.*”³⁵⁰ One example of an international delinquency is the very inaction complained of in the instant case: “acts contrary to the sentiments of humanity committed by a State in its territory, even with the object of defending its security and its vital interests; for instance, the laying of submarine mines without notifying the countries concerned.”³⁵¹ For Alvarez, “[a] *prejudicial act* is one which causes prejudice to a State or to its nationals, but which does so by means of acts not constituting an international delinquency, e.g., as a consequence of an insurrection, civil war, etc.”³⁵² Finally, an “*unlawful act*”—i.e., the one committed by the United Kingdom in violating Albanian sovereignty—is “one which disregards or violates the rights of a State, or which is contrary to international law *The responsibility of the State which committed it varies according to the nature of the act.*”³⁵³ This sliding scale of responsibility with respect to unlawful acts explains why the acts of the United Kingdom, although unlawful, did not rise to the level of condemnation and seriousness triggered by Albania’s omissions.³⁵⁴

Taking a step back from *Corfu Channel* for a moment, it becomes clear that *both* sides were acting—in accordance with their own understanding, conception, and view of the situation—under the impression that each was exercising a legitimate and valid right: for Albania, the right to self-

345. *Id.* at 36.

346. *Id.*

347. *Id.* at 22–23.

348. *Id.* at 43–46.

349. See *Corfu Channel*, 1949 I.C.J. at 43–46.

350. *Id.* at 45.

351. *Id.* (emphasis added).

352. *Id.*

353. *Id.* (emphasis added).

354. See *Corfu Channel*, 1949 I.C.J. at 45–46.

protection, preservation, and territorial integrity; for the United Kingdom, the right of free passage through an international strait in time of peace.³⁵⁵ For both sides, however, their actions represented a “misuse of right.”³⁵⁶ This limitation on the exercise of rights, as articulated by Alvarez, provides another lens from which to view the case and prevents states from gaining immunity just because they believed they acted within their rights.³⁵⁷ The problem, as discussed *supra*, becomes one of line-drawing, where does the legitimate right end and the “misuse” or “abuse” of the right begin.³⁵⁸

The decision in *Corfu Channel*³⁵⁹ may be compared with another more recent one involving a finding of state responsibility, the *Case Concerning United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*³⁶⁰ (“*United States Hostages Case*”).³⁶¹ In the *United States Hostages Case*, the court characterized the initial facts leading up to the hostage-taking as follows:

At approximately 10.30 a.m. on 4 November 1979, during the course of a demonstration of approximately 3,000 persons, the United States Embassy compound in Tehran was overrun by a strong armed group of several hundred people. The Iranian security personnel are reported to have simply disappeared from the scene; at all events it is established that they made no apparent effort to deter or prevent the demonstrators from seizing the Embassy’s premises.³⁶²

The facts thus immediately set up a situation, analogous to *Corfu Channel*, where *at least* a state may be liable not just for its positive acts—mine-laying or hostage-taking—but also for its omissions or failure to act—failure to notify interested countries of the danger from the mines or failure to protect the safety of foreign diplomatic personnel.³⁶³

It is significant that Iran did not appear before the court in order to fully present its case and proffer arguments in support of its position.³⁶⁴ However,

355. *See id.*

356. *Id.* at 47–48. See Alvarez’s opinion, arguing that “in virtue of the law of social interdependence this condemnation of the misuse of a right should be transported into international law.” *Id.* at 48.

357. *See id.*

358. *Corfu Channel*, 1949 I.C.J. at 47–48.

359. *Id.*

360. 1980 I.C.J. 3 (May 24).

361. *Id.*

362. *See id.* ¶ 17, at 12.

363. *See id.* ¶ 63, at 31.

364. *Id.* ¶ 33, at 18.

the ICJ did examine the initial question of admissibility (or jurisdiction) of the United States' claim and Iran's objections thereto contained in the letter of 9 December 1979.³⁶⁵ In the manner of Albania's assertions, the Iranian position centered around its own somewhat loosely conceived notions of sovereignty:

The Iranian Government in its letter . . . drew attention to what it referred to as the "deep rootedness and the essential character of the Islamic Revolution of Iran, a revolution of a whole oppressed nation against its oppressors and their masters." The examination of the "numerous repercussions" of the revolution, it added, is "a matter essentially and directly within the national sovereignty of Iran."³⁶⁶

In the 9 December 1979 letter, Iran further argued that the ICJ could not exercise jurisdiction over the matter because:

[the U.S. hostages] question only represents a marginal and secondary aspect of an overall problem, one such that it cannot be studied separately, and which involves, *inter alia*, more than 25 years of continual interference by the United States in the internal affairs of Iran, the shameless exploitation of our country, and numerous crimes perpetrated against the Iranian people, contrary to and in conflict with all international and humanitarian norms.³⁶⁷

According to Iran, therefore, "the Court cannot examine the American Application divorced from its proper context, namely the whole political dossier of the relations between Iran and the United States over the last 25 years."³⁶⁸ The court rejected Iran's claims of lack of admissibility and found that the general reliance on such historical circumstances, without further explanation, was not sufficient to divest the court of jurisdiction.³⁶⁹

365. *Iran*, 1980 I.C.J. ¶¶ 33–34, at 18.

366. *Id.* ¶ 34, at 18.

367. *Id.* ¶ 35, at 19.

368. *Id.*

369. *Id.* ¶ 37, at 20. Additionally, in paragraph 81, the court further addressed this argument based on the "more than 25 years of continual interference by the United States in the internal affairs of Iran" by again emphasizing that "it was open to Iran to present its own case regarding those activities to the Court by way of defense to the United States' claims. The Iranian Government, however, did not appear before the Court." *Iran*, 1980 I.C.J. ¶¶ 81–82, at 37–38.

With respect to the merits of the case, the court directly addressed the responsibility of Iran for the attacks on the embassies and subsequent hostage-taking:

[t]he first phase, here under examination, of the events complained of also includes the attacks on the United States Consulates at Tabriz and Shiraz. Like the attack on the Embassy, they appear to have been executed by militants *not having an official character*, and successful because of lack of sufficient protection.³⁷⁰

However, this fact did not absolve Iran of responsibility.³⁷¹ Even though the attacks were not directly imputable to the actions of the state, this “does not mean that Iran is, in consequence, free of any responsibility in regard to those attacks; for its own conduct was in conflict with its international obligations.”³⁷² As in *Corfu Channel*, the state was found liable due to its omissions, i.e., the government’s failure to act to protect the embassies and diplomatic personnel in contravention of the Vienna Conventions of 1961 and 1963.³⁷³

Another important stream of discourse part and parcel of the state responsibility inquiry in the *United States Hostages Case* concerned the legitimacy and appropriateness of counter-measures taken by the United States subsequent to the hostage-taking.³⁷⁴ The ICJ noted that the United States had acted unilaterally *after* instituting its action before the court and *after* provisional measures had been ordered.³⁷⁵ The United States imposed economic sanctions, began freezing assets of Iranian nationals, and conducted an aborted military rescue attempt which included invading Iranian territory.³⁷⁶ The court did not condone these attempts at “self-help,” but instead “expressed its concern” in the following manner:

[b]efore drawing the appropriate conclusions from its findings on the merits in this case, the Court considers that it cannot let pass without comment the incursion into the territory of Iran made by United States military units No doubt the United States Government may have had understandable preoccupations with respect to the well-being of its nationals held hostage in its Embassy for

370. *Id.* ¶ 60, at 30 (emphasis added).

371. *Id.* ¶ 61, at 30.

372. *Id.* ¶ 61–62, at 30.

373. *Id.* ¶ 61, at 30.

374. *Iran*, 1980 I.C.J. ¶ 30, at 16.

375. *Id.*

376. *Id.* ¶¶ 31–32, at 17.

over five months. No doubt also the United States Government may have had understandable feelings of frustration at Iran's long-continued detention of the hostages, notwithstanding two resolutions of the Security Council as well as the Court's own Order of 15 December 1979 calling expressly for their immediate release. Nevertheless, in the circumstances of the present proceedings, the Court cannot fail to express its concern in regard to the United States' incursion into Iran. When, as previously recalled, this case had become ready for hearing on 19 February 1980, the United States Agent requested the Court, owing to the delicate stage of certain negotiations, to defer setting a date for the hearings. Subsequently, on 11 March, the Agent informed the Court of the United States Government's anxiety to obtain an early judgment on the merits of the case. The hearings were accordingly held on 18, 19 and 20 March, and the Court was in course of preparing the present judgment adjudicating upon the claims of the United States against Iran when the operation of 24 April 1980 took place. The Court therefore feels bound to observe that an operation undertaken in those circumstances, from whatever motive, is of a kind calculated to undermine respect for the judicial process in international relations; and to recall that in paragraph 47, 1 B, of its Order of 15 December 1979 the Court had indicated that no action was to be taken by either party which might aggravate the tension between the two countries.³⁷⁷

The dissenting opinion of Judge Morozov was even more condemnatory of the United States counter-measures and would have denied reparations to the United States.

[T]aking into account the extraordinary circumstances which occurred during the period of judicial deliberation on the case, when the Applicant itself committed many actions which caused enormous damage to the Islamic Republic of Iran, the Applicant has forfeited the legal right as well as the moral right to expect the Court to uphold any claim for reparation.³⁷⁸

The doctrine of state responsibility, as expressed in these two cases, is interestingly devoid of any real substance, bright-lines, or any clear indication where exactly the right stops and the abuse of right begins.³⁷⁹ For the

377. *Id.* ¶ 93, at 43.

378. *Id.* ¶ 5, at 53 (Morozov, J., dissenting).

379. See *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9); *Case Concerning United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24).

majority in *United States Hostages Case*, the court condemned the American counter-measures but stops short of holding that such actions will preclude reparations for Iranian breaches.³⁸⁰ The court makes its condemnation in the softest voice possible—by expressing its “concern” and recalling that it had formerly ordered the parties not to “aggravate the tension.”³⁸¹ Judge Morozov attacked the majority’s characterization of these counter-measures as well as the depiction of the facts themselves by the majority:

[s]ome parts of *the reasoning* of the Judgment described the circumstances of the case in what I find to be *an incorrect or one-sided way* I was unable to accept paragraphs 32, 93, and 94. The language used by the Court in those paragraphs does not give a full and correct description of the actions of the United States which took place on the territory of the Islamic Republic of Iran on 24-25 April 1980. Some of the wording used by the Court for its description of the events follows uncritically the terminology used in the statement made by the President of the United States on 25 April 1980, in which various attempts were made to justify, from the point of view of international law, the so-called rescue operation. But even when the President’s statement is quoted, some parts thereof, which are important for a correct assessment of those events, are omitted.³⁸²

This alternative interpretation of the facts and the different ramifications for the United States’ alleged violations of international law shows that there is no clear line: no *a priori* legal (although good political) reasons for the majority to treat American counter-measures as frowned upon, yet tolerable and tolerated.³⁸³

This inherent lack of bright-line rules in the state responsibility discourse brings us to the quest for substance and codification pursued by the ILC in the form of its Draft Articles.³⁸⁴ These articles have become greatly influential, not as “hard” but as “soft” law, in spite of the fact that they are only provisional and have not been ratified by states as parties to any formal treaty.³⁸⁵ The ICJ has considered “certain aspects of the Draft Articles as reflecting the customary international law of state responsibility.”³⁸⁶ Other

380. *Iran*, 1980 I.C.J. ¶ 93, at 43.

381. *Id.*

382. *Id.* ¶¶ 7–8, at 55 (Morozov, J., dissenting) (emphasis added).

383. *Id.*

384. See DAMROSCH, *supra* note 4, at 686.

385. *Id.*

386. *Id.* (citing Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, ¶¶ 47–52, at 34–36 (Sept. 25)).

tribunals, such as the International Criminal Tribunal for the Former Yugoslavia, “have likewise considered various parts of the Draft Articles and the ILC’s commentary as authoritative expressions of customary law.”³⁸⁷ As noted in the leading textbook, some aspects of the articles have also been strenuously objected to by states, especially those articles dealing with international crimes and counter-measures.³⁸⁸

The Draft Articles begin with the statement that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”³⁸⁹ Phillip Allott has written that the notion of “state responsibility” is a “dangerous fiction” which in effect creates more harm than good.³⁹⁰ His first point is that “it consecrates the idea that wrongdoing is the behavior of a general category known as ‘states’ and is not the behavior of morally responsible human beings.”³⁹¹ His second point is that:

[i]f responsibility exists as a legal category, it must be given legal substance . . . general conditions of responsibility have to be created which are then applicable to all rights and duties. The net result is that the deterrent effect of imposition of responsibility is seriously compromised . . . by leaving room for argument in every conceivable case.³⁹²

At a basic level, Allott is concerned with the “nefarious effects” of interposing the concept of responsibility between wrongdoing and liability.³⁹³

The first critique is reminiscent of the point made in the context of the sovereignty and jurisdictional discourses concerning the idiosyncratic and outmoded conception of the state and state power.³⁹⁴ As discussed, the reification of the state can result in certain viewpoints being privileged over others, namely those with nationalistic ties and those allied with narrowly-defined national interests.³⁹⁵ Alternative discourses get discounted or left

387. *Id.* (citing *Blaskic*, Case No. IT-95-14-AR108bis (Judgment of Appeals Chamber, Oct. 29, 1997), ¶ 26, at n.34).

388. *Id.*

389. *ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts*, International Law Comm., 53rd sess., Supp. No 10, at 43, U.N. Doc. A/56/10 (2001), http://www.un.org/law/ilc/texts/state_responsibility/responsibilityfra.htm

390. See Philip Allott, *State Responsibility and the Unmaking of International Law*, 29 HARV. INT’L L.J. 1, 13 (1988).

391. *Id.* at 13–14.

392. *Id.* at 14.

393. See generally *id.* at 15–16.

394. *Id.* at 14–15.

395. See *State Extraterritorially*, *supra* note 244, at 1293.

out, especially those based on the interests of transnational groups.³⁹⁶ A similar phenomenon occurs in the context of state responsibility.³⁹⁷ The result in this context, as Allott makes clear, “is that those human beings who implement the law’s rights and duties are able to perceive themselves, on the one hand, as entitled to implement the state’s rights and duties and, on the other hand, as bringing about responsibility in the state if they implement them unlawfully.”³⁹⁸ For Allott, “it is not surprising that states behave badly” under such circumstances.³⁹⁹ In effect, the state acts as a shield (and sword) for individuals to hide (or fight) behind: “[t]he moral effect of the law is vastly reduced if the human agents involved are able to separate themselves personally both from the duties the law imposes and from the responsibility which it entails.”⁴⁰⁰

With respect to the second critique, Allott focuses on those articles concerning “circumstances precluding wrongfulness,” which by defining the limits of responsibility also thereby provide copious arguments to states and their lawyers to justify otherwise unlawful behavior.⁴⁰¹ These articles define six circumstances precluding wrongfulness: “consent, countermeasures in respect of an internationally wrongful act, *force majeure* and fortuitous event, distress, state of necessity, and self-defense.”⁴⁰² As we saw, with respect to the *United States Hostages Case*, the use of counter-measures by the United States was not approved by the court, although no negative repercussions were imposed beyond the rather mild language of disapprobation found in the majority’s opinion.⁴⁰³ Allott identifies the self-defense exception and its close relation—counter-measures—as akin to “self-help”.⁴⁰⁴ Allott takes a hard stance with respect to self-help, commenting that it is “indistinguishable from anarchy in practice if it is regarded by the subjects of the law as the normal sanction of the law.”⁴⁰⁵

Allott’s viewpoint and interpretation of the state responsibility concept is one which sees through the discourse to something deeper, hidden, and even pernicious lying beneath its surface.⁴⁰⁶ His conception and evaluation

396. *Id.*

397. *See generally* Allott, *supra* note 390.

398. *Id.* at 14.

399. *Id.*

400. *Id.*

401. *Id.* at 17.

402. Allott, *supra* note 390, at 17.

403. *See Case Concerning United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. ¶ 93, at 43 (May 24).

404. Allott, *supra* note 390, at 21.

405. *Id.*

406. *See generally* Allott, *supra* note 390.

of state responsibility is an important one, which forces us to question the perceived wisdom and surface structures of the doctrine.⁴⁰⁷ Out of the three discourses explored in the present paper, state responsibility appears to be—on its surface level and at first glance—the most beneficial and helpful in protecting the state and preserving international society.⁴⁰⁸ A doctrine which professes to “impose responsibility” on rogue nations, could also simultaneously and perhaps in a greater number of instances, function to do just the opposite—to allow states to escape responsibility—is an apparent paradox and a chimera for international law and the international lawyer.⁴⁰⁹ Allott’s perspective also recognizes the dangers surrounding the bureaucratization of international law and society, which in a Weberian sense, “involves not only the dominance of a certain social group but also the dominance of a certain mentality.”⁴¹⁰

From a sociological perspective, bureaucratization “is no longer precisely the spirit of autocracy or oppression characteristic of old regimes.”⁴¹¹ Rather, it is a spirit, “which seeks to get the job done with the minimum of spiritual commitment and the maximum of personal security.”⁴¹² For Allott, this spirit is especially sympathetic to the state and to state power.⁴¹³ It is a system, which supports and sustains the state structure, and is especially detrimental to—what for Allott is the proper focus and concern of international law—the people who exist within the state.⁴¹⁴ Allott’s view has its own particular perspective (and some may say bias), one that envisions the role of the international lawyer as serving not just governments, but “international society” as a whole: “[a]s lawyers they are servants not of power but of justice.”⁴¹⁵

This utopian view imbues law with special, almost supernatural powers, as the overseer and restrainer of state power. For Allott, law functions (ideally) as a great mediator—allowing the relationship between the people and the state to be one of growth, prosperity, and stewardship, not subjugation.⁴¹⁶ At the same time, law’s articulations, especially as manifested in the work of the ILC, the codifiers and bureaucrats, tend to devalue and erode the very legitimacy of law itself. The view of law as a great social phenomenon, as

407. *See generally id.*

408. *Id.* at 25.

409. *Id.* at 14.

410. *Id.* at 9.

411. Allot, *supra* note 390, at 10.

412. *Id.*

413. *See id.*

414. *See id.* at 14–16.

415. *Id.* at 24.

416. *See Allot, supra* note 390, at 24.

an experiment for the future and a promise for mankind's well-being and happiness, is life-affirming and positive. As Allott points out, though, this is a view which is yet to be realized, because international law is trapped—to varying degrees, as this paper seeks to show—in the pre-revolutionary and antiquated discourses of the eighteenth, nineteenth, and twentieth centuries.⁴¹⁷

III. EXAMINING THE STRUCTURE OF FAIRNESS DISCOURSE AND ITS NECESSARY PRESUPPOSITIONS

The previous section, Part II, had as its concern the discourses surrounding the various procedural and structural aspects of contemporary international law, specifically sovereignty, jurisdiction, and state responsibility. These discourses were singled out, both for their representative capacity to highlight certain trends running like threads through the fabric of international law, and for their strong similarities, the inter-relationships between the various discourses, revealing their interconnectedness, and interdependence. In Part III, below, I examine another discourse; the one surrounding fairness. “Fairness” has become, for many, a round-trip ticket on the “universal express.” It may be thought of as a vehicle, which (for its proponents at least) enables the transplantation of western, liberal values to other parts of the world. It is also, according to its adherents, able to function to allow those values to be legitimized, i.e., to avoid the imperialism critique, to conquer charges of ethnocentrism, culture-centrism, and—most important for our purposes—to defeat the challenge of bias launched by those who reject the universalist stance.

Thomas Franck analyzed the notion of fairness and finds it the most important basis behind the creation of modern international legal norms.⁴¹⁸ For Franck, international law has reached a new level of maturity and complexity.⁴¹⁹ It is now in its post-ontological stage, meaning that the question “whether international law is law” no longer needs to be asked, proved, defended, or fought over; rather, now the issue turns to the content of the new international law.⁴²⁰ The new questions, which must be asked include those such as: “is international law effective? Is it enforceable? Is it understood? And, the most important question: Is international law fair?”⁴²¹ Fairness,

417. *See id.* at 25.

418. *See* THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* (1995) [hereinafter *FRANCK I*].

419. *Id.* at 4–6.

420. *See id.* at 3–9.

421. *Id.* at 6.

therefore, has become *the* meta-discourse, which rises above and preserves the other internal discourses, providing legitimacy, acceptance, and stability to the system of international law.⁴²²

The importance of fairness to international law's self-conscious justification of itself cannot be overstated. If it is fair to impose our cultural values universally throughout the world—on all other societies—then on what basis do recipient societies have to object? Does fairness solve all our problems? My answer is that while it may seem like a panacea and a way out of the paradox of universalism, we need to dig a little deeper to determine on what fairness is based. At the bottom, if the discourse fails to give us something to stand on, to provide justifications for the transplantation of legal values, or if the presuppositions of fairness discourse are unsatisfactory, then we must look elsewhere for alternative discourses or better ways to resolve the critique of cultural imperialism.

Franck identifies two presuppositions of modern fairness discourse: moderate scarcity and community.⁴²³ The condition of moderate scarcity, as Franck says citing Rawls, presents an optimal opportunity for fairness discourse to be productive: “[it] is most likely to be productive when the allocation of rights and duties occurs in circumstances which make allocation both necessary and possible.”⁴²⁴ The implication is that for a discourse to be productive it must be able to convince others (i.e., the less fortunate) of the distributional justness of their assigned allocations.⁴²⁵ Just as state responsibility discourse was most likely to be productive, effective, or efficient in situations where the most powerful had been wronged and needed a remedy against a less powerful adversary, and even *in spite of* the technical wrongs committed by the more powerful, as we saw for example in the *Corfu Channel* and *United States Hostages* cases.⁴²⁶ In other words, fairness discourse would not be “productive” if it failed to pacify and assuage the discontent felt by those less well-off.⁴²⁷

With respect to the second structural presupposition of fairness, Franck argues that a community is “based, first, on a common, conscious system of reciprocity between its constituents.”⁴²⁸ The community, Franck emphasizes, is not just about shared rights and rules, but about “shared moral imperatives

422. *Id.* at 7.

423. FRANCK I, *supra* note 418, at 9–10.

424. *Id.* at 9.

425. *Id.* at 10.

426. See *United States Diplomatic & Consular Staff in Tehran (U.S. v. Iran)* 1980 I.C.J. 3 (May 24); *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9).

427. See FRANCK I, *supra* note 418, at 7–9.

428. *Id.* at 10.

and values.”⁴²⁹ This point echoes Slaughter’s distinction raised in Part II between liberal and non-liberal states, where the so-called liberal states constitute the community.⁴³⁰ If we look at who is defining liberal, and who is defining the community, it becomes painfully obvious that there is something deeply tautological and circular here. *We* define who is able to join the community and who gets excluded. So it is no wonder that fairness can thrive in this limited context.

The concern raised above regarding the exclusivity of the community of states and the apparent bias emanating from its self-defined nature may be dealt with, as Franck does, by stressing the global nature of contemporary problems, issues, media, and culture. For example, he says:

[a]s we enter the third millennium, there is much evidence of a global community, emerging out of a growing awareness of irrefutable interdependence, its imperatives and exigencies. It may be tempting to speak of emerging ‘global communities’: of trade, of environmental concerns, of security, of health measures, et cetera. It would, however, be inaccurate because these regimes are linked. A state’s conformity with environmental policy will have an effect on its credit-worthiness in borrowing from the World Bank; most favored nation trade benefits may be linked to a state’s human rights record, and so forth. These multiple linkages, making different regimes interdependent, are evidence of community.⁴³¹

The trend of globalization certainly points toward a more interactive relationship between states, toward a larger and larger encompassing community. But we are not completely there yet. There are many states and people living within states, which do not share a sense that they belong in any real sense to the global community.

At this point, there is the urge to ask, “so what?” What does it matter that a few or minority of rogue nations do not (or do not choose) to participate in a larger community of states? Let them alone or just inflict measures to force their compliance if they do not feel the voluntary obligations of the “liberal” states.⁴³² Indeed, some sort of discord, disarray, and indeterminacy is a necessary part of the fairness discourse.⁴³³ As Franck acknowledges, regarding the subjectivity of the concept:

429. *Id.*

430. See Slaughter, *supra* note 20, at 509–11.

431. FRANCK I, *supra* note 418, at 12.

432. See FERNANDO R. TESÓN, A PHILOSOPHY OF INTERNATIONAL LAW (1998).

433. See FRANCK I, *supra* note 418, at 14.

[e]ven if ‘everyone’ were to agree, at least in theory, that fairness is a necessary condition of allocational rules, this unfortunately would not assure that everyone shared the same sense of fairness or agreed on a fixed meaning. Fairness is not ‘out there’ waiting to be discovered, it is a product of social context and history . . . What is considered allocationally fair has varied across time, and still varies across cultures.⁴³⁴

What this tells us, however, can be easily misrepresented.

It does not tell us that the search for allocational fairness is the pursuit of a chimera. What the deep contextuality of all notions of fairness does tell us is that fairness is relative and subjective . . . a human, subjective, contingent quality which merely captures in one word a *process*, . . . *reasoning*, and [a] *negotiation* leading, if successful, [on] an agreed formula.⁴³⁵

What this quotation shows is that Franck is, of course, aware of the subjective and viewpoint-laden nature of the fairness discourse.⁴³⁶ Any one conception of fairness *may* (paradoxically) be biased from someone else’s perspective.⁴³⁷ To be fair means to be unfair to someone, some of the time. One person’s freedom fighter *may be* another’s terrorist. One person’s liberation, is another’s subjugation. One person’s sacred values, is another’s outlawed taboos.

Given this admittedly subjective nature of fairness, the question still remains, what to do with rogue or non-compliant nations? One way the fairness discourse deals with this question is by subdividing fairness, so that it can function on different levels, for different parties, simultaneously. This subdivision move is encapsulated in what Franck calls his caveat to the fairness discourse.⁴³⁸ It distinguishes between “legitimacy as process fairness” and “distributive justice as moral fairness.”⁴³⁹ The important point here is that these conceptions can (and do) conflict and clash, although there is much

434. *Id.*

435. *Id.*

436. *See id.*

437. *See id.* at 14–15. I don’t say “is” but “may” instead, because I acknowledge the logical possibility of a universally fair rule, i.e., in theory, there is a possible state of affairs where a rule could be devised which everyone would be convinced produced a fair result. For example, if our entire community consisted of a small group of people, or perhaps a large group with homogenous interests, and no other people in the universe were in existence, then a rule could be devised that everyone would consider fair.

438. *See FRANCK I, supra* note 418, at 22–24.

439. *Id.* at 22.

overlap between legitimacy and justice.⁴⁴⁰ Just as sovereignty had state sovereignty and people's sovereignty, fairness has legitimacy and justice.⁴⁴¹ Both are viable options in the discourse.⁴⁴² Franck says,

[t]he notion of 'fairness' encompasses two different and potentially adversary components: legitimacy and distributive justice. These components are indicators of law's, and especially *fair* law's, primary objective: to achieve a negotiated balance between the need for order and the need for change . . . What matters is how this tension is managed discursively through what Koskeniemi calls 'the social conception' of the legal system. This 'social conception' manifests itself in the discursive pursuit of fairness.⁴⁴³

Thus, for example, there were fairness arguments made on both sides of the United States's intervention in 1990 against Iraq after it had invaded Kuwait.⁴⁴⁴ Supporters of the United States argued legitimacy-as-fairness, i.e., that concepts such as "*uti possidetis*" and "territorial integrity" gave legitimacy to Kuwait's claim of sovereignty and to be free from invasion.⁴⁴⁵ The other side argued justice-as-fairness, maintaining that there was gross unjust resource allocation and that the people of Kuwait and Iraq had been artificially and unjustly divided by colonial intervention.⁴⁴⁶

This nuanced view of fairness captures some of the depth and flexibility of the fairness discourse and goes a long way in meeting the charge that "fairness" does not take into account alternative views and cultures. But the charge of ethnocentrism is still not answered, because one could imagine a situation where both "legitimacy-as-fairness" and "justice-as-fairness" operated in tandem and synchronously *within* one community, but *not between* different communities. (An example here might be specific family law or divorce rules operating in different cultures, where in one culture they may be viewed as completely legitimate and distributionally just, but imagined in another context (such as in the United States) they would be viewed as sexist, unfair, and degrading to women).

440. *Id.* at 22–23.

441. *Id.*

442. *See id.* at 22–24.

443. FRANCK I, *supra* note 418, at 23.

444. *Id.*

445. *Id.* (emphasis added).

446. *Id.*

John Tasioulas has written a paper directly critiquing Franck's discussion of fairness.⁴⁴⁷ Tasioulas criticizes Franck for, among other things, his failure to deal adequately with the problem of ethnocentrism.⁴⁴⁸ Tasioulas acknowledges that Franck does not accept the objectivist basis of fairness, but instead, as we have seen, embraces an inter-subjective, indeterminate, and flexible conception.⁴⁴⁹ In order to highlight the importance of culture and the imperialist dilemma that is not rectified merely because of one community's inter-subjective conception of fairness, Tasioulas relies on the work of Italian political philosopher Daniel Zolo.⁴⁵⁰ Zolo attacks the liberal enterprise of universalism by first asserting:

[t]he incompatibility of the values expressed in human rights norms with 'the dominant ethos in countries like China, Pakistan, Saudi Arabia, the Sudan or Nigeria.' Second, he insists that the lack of objective foundations for such norms renders their invocation 'a perfect continuation of the missionary, colonizing tradition of the Western powers.'⁴⁵¹

Tasioulas suggests that "[n]othing in Fairness [in International Law and Institutions] . . . really dispels the threat of ethnocentrism."⁴⁵² He does, however, acknowledge that elsewhere Franck argues that "personal freedom is not a parochial, specifically Western value and hence not an ethnocentric imposition on non-Western cultures."⁴⁵³ As Franck says in that other context:

[t]here is no reason to believe that these underlying emancipatory forces [e.g., developments in industrialization, urbanization, scientific and technological discoveries, transportation, communication, information processing and education] . . . are indigenous to Western society and cannot affect other societies as they have affected our own. On the contrary, one must assume them to be independent variables, which, when they come to the fore anywhere under

447. John Tasioulas, *International Law and the Limits of Fairness*, 13 EUR. J. INT'L L. 993 (2002), WL 13 EURJIL 993.

448. *Id.* at *995.

449. *See, e.g., id.* at *996.

450. *Id.* at *996.

451. *Id.* (quoting Danilo Zolo, COSMOPOLIS: PROSPECTS FOR WORLD GOVERNMENT 118-19 (1997)).

452. Tasioulas, *supra* note 447, at 1000.

453. *Id.* (referring to THOMAS FRANCK, *Is Personal Freedom a Western Value?* 91 AM. J. INT'L L. 593 (1997) [hereinafter FRANCK II] substantially reprinted as chapter 6 of THOMAS FRANCK, *THE EMPOWERED SELF: LAW AND SOCIETY IN THE AGE OF INDIVIDUALISM* (1999)).

the right conjunction of circumstances, can tilt the balance in favor of more personal autonomy.⁴⁵⁴

In addition, Franck presents another argument which speaks to the non-parochial character of liberal values and ideas.⁴⁵⁵ This occurs in his discussion of democracy, as Tasioulas correctly notes:

[t]his almost complete triumph of . . . notions of democracy (in Latin America, Africa, Eastern Europe, and to a lesser extent Asia) may well prove to be the most profound event of the twentieth century, and will in all likelihood create the fulcrum on which future development of global society will turn. It is the unanswerable response to claims that free, open, multiparty, electoral parliamentary democracy is neither desired nor desirable outside a small enclave of Western industrial states.⁴⁵⁶

For Tasioulas, these arguments are a “valuable corrective to the tendency to reify cultures and ascribe to them an historically invariant essence.”⁴⁵⁷

Despite the attractiveness of the “independent variable” argument and the “empirical democracy” claim, this still does not adequately answer why certain states are left out of the community of states, why some cultures are privileged over others, nor does it provide a prescriptive, normative explanation for the universal nature of liberal values.⁴⁵⁸ As Tasioulas notes, “it is unlikely that such empirical considerations, pertaining to modernity . . . can blunt the real force of the ethnocentric challenge.”⁴⁵⁹ Indeed, while it provides a sociological or descriptive explanation for the *fact* of the permeation and instantiation of liberal values throughout the world, it does little to explain why these values *should* be predominant, preemptive, and prevailing.⁴⁶⁰

I reside with Tasioulas in my skepticism of Franck’s utopian vision of the fairness discourse as really having all the justificatory and explanatory power, which it is advertised to have.⁴⁶¹ But, at the same time, I am in agreement with Franck that there is no objective fairness, no fairness “out there” which we can tap into in order to assuage the rumblings of “the natives” and the malcontents.⁴⁶² Fairness discourse suffers from the kind of blind adher-

454. *Id.* at 1001. (quoting FRANCK II, *supra* note 453, at 608) (alterations in original).

455. *Id.*

456. *Id.* (quoting FRANCK I, *supra* note 418, at 88) (alterations in original).

457. Tasioulas, *supra* note 447, at 1001.

458. *See id.* at 1002.

459. *Id.*

460. *See id.*

461. *Id.*

462. FRANCK I, *supra* note 418, at 17.

ence, which Wittgenstein discussed in *On Certainty*, and Tasioulas aptly cites: “Men have judged that a king can make rain; we say this contradicts all experience. Today they judge that aeroplanes and the radio etc. are means for the closer contact of peoples and the spread of culture.”⁴⁶³ This statement is made in connection with Wittgenstein’s general discussion of how we come to know (and believe) things about the world.⁴⁶⁴ A brief discussion of Wittgenstein’s philosophical ruminations on the nature of experience and judging will follow and will then be applied to help analyze the fairness discourses at the heart of contemporary international law.

One of Wittgenstein’s main points in *On Certainty* is that it is a fallacy to think that incremental *experience* in individual cases teaches us how to *judge* the world.⁴⁶⁵ For Wittgenstein, “experience is not the ground for our game of judging. Nor is it its outstanding success.”⁴⁶⁶ This should not be confused with an objectivist stance. Wittgenstein is not saying, like Kant, that judging is dependent on *a priori* structures common to all mankind through reason.⁴⁶⁷ Instead, Wittgenstein has in mind an inter-subjectivist idea, an organically arising structure of propositions mutually dependent and mutually reinforcing.⁴⁶⁸ This is elucidated by Wittgenstein’s further insight that “[w]hen we first begin to *believe* anything, what we believe is not a single proposition, it is a whole system of propositions. (Light dawns gradually over the whole.)”⁴⁶⁹ “We do not learn the practice of making empirical judgments by learning rules: we are taught *judgments* and their [connection] with other judgments. *A totality* of judgments is made plausible to us.”⁴⁷⁰ For Wittgenstein, “[i]t is not single axioms that strike me as obvious, it is a system in which consequences and premises give one another *mutual support*.”⁴⁷¹

These insights help to understand both the limitations and the power of fairness discourse.⁴⁷² Fairness is a “language-game” which we all speak in the Western liberal world. It has been learned and has come to be seen as the primary mode upon which we judge other propositions, arrangements, and

463. Tasioulas, *supra* note 447, at 1003 (quoting LUDWIG WITTGENSTEIN, *ON CERTAINTY* ¶ 132, at 19e (G.E.M. Anscombe & G.H. von Wright eds., 1969)).

464. *See id.*

465. LUDWIG WITTGENSTEIN, *ON CERTAINTY* ¶ 131, at 19e (G.E.M. Anscombe & G.H. von Wright eds., 1969) [hereinafter WITTGENSTEIN II].

466. *Id.*

467. *See id.* ¶ 143, at 21e.

468. *See id.* ¶¶ 140–42, at 21e.

469. *Id.* ¶ 141, at 21e.

470. WITTGENSTEIN II, *supra* note 465, ¶ 140, at 21e.

471. *Id.* ¶ 142, at 21e.

472. *See id.* ¶¶ 140–142, at 21e.

institutions, as well as the extraterritorial application and transplantation of our laws on other nations and peoples.⁴⁷³ But Wittgenstein reminds us that “fairness”—like any other judgment—is only one facet in a web of interconnecting concepts which all hang together in a certain conceptual structure.⁴⁷⁴ The strength of the fairness discourse derives not from its individual “rightness” or “wrongness,” but rather from its co-existence and co-dependence with other concepts in the Western liberal vocabulary: for example, legitimacy, equity, freedom, and justice. Each of these terms gains credibility, and is defined by, and with reference to, fairness and vice-a-versa.

This point may be seen more clearly in an example Wittgenstein provides regarding how we *know* that the earth existed before our birth.⁴⁷⁵ In Wittgenstein’s parlance, “everything speaks for . . . and nothing against” this proposition.⁴⁷⁶ The following discussion in *On Certainty* shows the progression of Wittgenstein’s thoughts toward this conclusion:

“[i]t is certain that we didn’t arrive on this planet from another one a hundred years ago.” Well, it’s as certain as such things *are*.

It would strike me as ridiculous to want to doubt the existence of Napoleon; but if someone doubted the existence of the earth 150 years ago, perhaps I should be more willing to listen, for now he is doubting our whole system of evidence. *It does not strike me as if this system were more certain than a certainty within it.*⁴⁷⁷

“I might suppose that Napoleon never existed and is a fable, but not that the *earth* did not exist 150 years ago.”

“Do you *know* that the earth existed then?”—“Of course I know that. I have it from someone who certainly knows all about it.” [I think Wittgenstein is being humorous here].

It strikes me as if someone who doubts the existence of the earth at that time is impugning the nature of all historical evidence. And I cannot say of this latter that it is definitely *correct*.

At some point one has to pass from explanation to mere description.

473. Think of the reasonableness balancing conducted under Restatement Section 403. RESTATEMENT (THIRD) OF FOREIGN RELATIONS § 403 (1987).

474. WITTGENSTEIN II, *supra* note 465, ¶¶ 140–42, at 21e.

475. *Id.* ¶ 190, at 26e.

476. *Id.* ¶ 191, at 27e.

477. *Id.* ¶¶ 184–85, at 26e (emphasis added).

What we call historical evidence points to the existence of the earth a long time before my birth;—the opposite hypothesis has *nothing* on its side.

Well, if everything speaks for an hypothesis and nothing against it—is it then certainly true? One may designate it as such—But does it certainly agree with reality, with the facts?—With this question you are already going around in a circle.

To be sure there is justification; but justification comes to an end.⁴⁷⁸

These thoughts regarding the empirical certainty of such bedrock principles as the earth's existence can be applied to the question of our *moral* "certainty" of applying such bedrock principles as "fairness" (and other liberal values) across cultures.⁴⁷⁹

In keeping with Wittgenstein's thinking on the certainty of "bedrock principles," it is apparent that we might have the same reaction to someone who doubted the moral certainty of fairness or the use of justice as one of the aspirational goals for a society.⁴⁸⁰ We might look at such a person in a new light, as crazy or confused. Perhaps we would think that they must not understand what we mean by "fairness," "justice," or that they were not able to speak our language correctly. Wittgenstein makes this point in reverse when he says, "Even if I came to a country where they believed that people were taken to the moon in dreams, I couldn't say to them: 'I have never been to the moon—Of course I may be mistaken.'"⁴⁸¹ What Wittgenstein teaches us is that at some level our certainty—moral, empirical, philosophical—is dependent on a certain set of foundational assumptions about the world, how it operates, and what objects, institutions, and structures reside within it.⁴⁸²

In *Culture and Value*, another collection of writings published posthumously collecting the late Wittgenstein's thoughts, he remarks that:

[n]othing we do can be defended absolutely and finally. But only by reference to something else that is not questioned[,] [i.e. no reason can be given why you should act (or should have acted) *like this*, except that by

478. *Id.* ¶¶ 186–192, at 26–7e.

479. *See* WITTGENSTEIN II, *supra* note 465, ¶¶ 184–192, at 26–27e.

480. *See id.* ¶¶ 184–92, at 26e–27e.

481. *Id.* ¶ 667, at 88e.

482. *See id.* ¶¶ 184–192, at 26e–27e; ¶ 667, at 88e.

doing so you bring about such and such a situation, which again has to be an aim that you *accept*.⁴⁸³

This thought is really another way of making the point that at a certain level justification and explanation must stop; at bottom, at some fixed point there is no further reason for our actions which can be given or articulated outside the confines of our language-game; i.e., from outside our way of seeing the world. The second Gulf War comes to mind. Just as Franck commented, with regard to the first Gulf War, there was no absolute and final justification for American intervention just as there was no absolute and final justification for Iraq's position.⁴⁸⁴ At the end of the day, each side had to rely on the bed-rock principles which were justified ultimately not by further concepts, but instead by the bringing about of "such and such a situation," a new reality, the legitimacy of which the majority of the rest of the world by consensus would either accept or reject.⁴⁸⁵

In one sense, Wittgenstein's insight regarding certainty does not resolve the charge of ethnocentrism raised against fairness discourse.⁴⁸⁶ In a very real sense, it actually *strengthens* this charge by acknowledging that our concepts derive their meaning and their commitment from the socially accepted complex structure of interconnecting principles, which we have learned as part of our own language, culture, upbringing, and development as members in a particular society.⁴⁸⁷ But, in another (and I propose more important and) wider sense, Wittgenstein's philosophy provides a solution to the charge by acknowledging that the notion of *certainty* is a function of an inter-subjective commitment reached by persons operating within and as part of a functioning community.⁴⁸⁸ Because each system (or each culture) operates within its own conceptual structures and language, it is true that no one system has any *a priori* claim of primacy or priority. But, it is also true that *under the real-world state of affairs* as they exist presently and increasingly in the future, a new community is emerging and its values will gain primacy and priority because of globalization, modernization, and the sheer number of its participants.

483. WITTGENSTEIN I, *supra* note 3, at 16e.

484. See THOMAS M. FRANCK, *What Happens Now? The United Nations After Iraq*, 97 AM. J. INT'L L. 607 (2003).

485. See WITTGENSTEIN I, *supra* note 3, at 16e.

486. See *id.*

487. See *id.*

488. WITTGENSTEIN II, *supra* note 465, ¶ 194, at 27e.

IV. CONCLUSION

This is the case in the world today: because we are faced with the problems (and blessings) of globalization, we *must* operate as a society of states, transnational groups, peoples, individuals, and other entities. We have no choice if we are to survive, as a planet, as a species. I find myself in agreement and in sympathy with Phillip Allott's view: that "[l]aw forms part of the *self-constituting* of a society," and that "[l]aw is a *universalizing* system, reconceiving the infinite particularity of human willing and acting, in the light of the common interest of society."⁴⁸⁹ From the abstract heights of Allott's almost Hegelian project of law realizing itself, I am drawn to the recognition that there may not be any ethical justification for cultural imperialism which can be articulated *outside* the language of our own idiosyncratic cultural context.⁴⁹⁰ However, that fact, although it may be hard to accept, does not require abandonment of the project of international society, international law, and liberal values. Instead, it requires that we accept a commitment to take a hard look at our biases and assumptions. Once that is accomplished, only then can we begin the process of constituting an international society for all humankind, only then can we honestly forge a new and better reality for the future.

489. Philip Allott, *The Concept of International Law*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS: ESSAYS IN INTERNATIONAL RELATIONS AND INTERNATIONAL LAW* 3.1, 3.4, at 69 (Michael Byers ed. 2000).

490. *See id.* at 69–89.

TRAVELING TO CUBA? SORRY, IT'S CLOSED

IGNACIO M. SARMIENTO*

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I. INTRODUCTION

In 1502, when Christopher Columbus landed in Cuba, he called it “the most beautiful land human eyes have ever seen.”¹ Since then, this phrase has been repeated many times by exiled Cubans, tourists, and writers in describing Cuba’s scenery.² With thousands of miles of coastline, Cuba is home to beautiful beaches, towering mountains, rolling hills, and colorful coral reefs.³ Approximately 11,308,764 people currently reside in Cuba.⁴ However, unlike other islands in the Caribbean, Cuba is currently the only communist nation in the Americas.⁵

Due to its communist state, the United States government severely restricts travel to the island of Cuba.⁶ The Trading with the Enemy Act⁷ prohibits travel to Cuba unless the individual is licensed.⁸ A violation of this restriction involves criminal sanctions, including up to ten years in prison and civil penalties of up to \$50,000 per person.⁹ Despite the impending possibility of criminal prosecution, it is estimated that 200,000 Americans successfully visited Cuba in 2003.¹⁰ Americans are able to circumvent the law, which is less than copiously enforced by United States officials, by first traveling to Canada or Mexico and then flying into Cuba.¹¹

Part II of this article provides a brief background on the history of Cuba by focusing on Fidel Castro’s takeover of Cuba and its effect on tourism. Part III discusses restrictions President Kennedy imposed on travel to Cuba and the Cuban Democracy Act.¹² Part IV briefly discusses the Office of For-

1. Daniel J. Whittle et al., *International Tourism and Protection of Cuba’s Coastal and Marine Environments*, 16 TUL. ENVTL. L.J. 533, 537 (2003).

2. *Id.*

3. *Id.* at 537–38.

4. K. Lynn Stoner, *Cuba*, in MICROSOFT ENCARTE ONLINE ENCYCLOPEDIA 1 (2004), at http://encarta.msn.com/encyclopedia_761569844/Cuba.html (last visited Jan. 8, 2005).

5. *See id.*

6. OFFICE OF FOREIGN ASSETS CONTROL, U.S. DEPARTMENT OF THE TREASURY, CUBA: WHAT YOU NEED TO KNOW ABOUT THE U.S. EMBARGO 1, available at <http://www.treas.gov/offices/enforcement/ofac/sanctions/+11cuba.pdf> (last visited Jan. 8, 2005) [hereinafter OFAC CUBA].

7. 50 U.S.C. app. § 5(b)(1) (2000).

8. OFAC CUBA, *supra* note 6, at 2.

9. 50 U.S.C. app. § 16 (2000).

10. Bruce Schimmel, *Closing Cuba*, Philadelphiacitypaper.net, Oct. 16–22, 2003, at <http://citypaper.net/articles/2003-10-16/canon.shtml> (last visited Jan. 8, 2005).

11. International Information Programs, U.S. Department of State, *Enforcement of U.S. Travel Restrictions to Cuba to be Enhanced*, at <http://usinfo.state.gov/gi/Archive/2003/Oct/15-270865.html> (last visited Jan. 8, 2005) [hereinafter International Informational Programs].

12. 22 U.S.C. §§ 6001-10 (2000).

Foreign Assets Control's role in the American government's effort to restrict travel to Cuba. Part V details travel restrictions to Cuba as they existed before June 30, 2004. Part VI analyzes two major United States Supreme Court cases which upheld the validity of restricting travel to Cuba. Part VII details the new regulations that took effect on June 30, 2004, which further restrict travel to Cuba. Part VIII discusses a recent case as an example of how serious the United States government is about the new restrictions. Part IX stresses the importance of continuing to restrict travel to Cuba in an effort to oppress Fidel Castro's government and prevent American dollars from further fueling his economy. Finally, Part X concludes by explaining how enforcing the stringent travel restrictions is instrumental in eliminating Fidel Castro's communist regime.

II. BRIEF HISTORY OF THE ISLAND OF CUBA

A. *Fidel Castro Takes Power*

For over 400 years, Cuba was under the control of Spain.¹³ In 1898, with the assistance of the United States, Cuba successfully fought for its independence from Spain and was declared an independent nation under the protection of the United States.¹⁴ Around 1902, Cuba began to lessen the United States' influence and began to function under its own government for the first half of the twentieth century.¹⁵ In 1934, Fulgencio Batista took over the country as president and military dictator.¹⁶ Under Batista, the Cuban government became corrupt, its citizens revolted against Batista, and the infamous "Cuban Revolution" began.¹⁷

On January 1, 1959, the Cuban revolution successfully brought down Batista's government.¹⁸ One month later, in February of 1959, Fidel Castro proclaimed himself "el commandante" ("the commander") of Cuba's new revolutionary government.¹⁹ In his first year as Cuba's new leader, Castro passed over 1500 new laws supposedly aimed at distributing wealth to the citizens of Cuba and securing investments from foreign non-capitalist countries.²⁰ Castro gained the support of the Cuban people by riding in tanks

13. Stoner, *supra* note 4, at 1.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. Stoner, *supra* note 4, at 1.

19. *Id.*

20. *Id.*

through the streets preaching how he had liberated the citizens from the Batista government and profoundly promising to uphold Cuba's constitution.²¹ To ensure he had the support of his people, Castro refused to lay down all arms until all other revolutionary groups accepted him as Cuba's new leader.²² Finally, in 1961, the revolutionary Cuban Communist Party was formed and still remains in power today.²³

B. *Tourism in Cuba*

For more than 150 years, Cuba has been a particularly favorite vacation spot for many Americans.²⁴ Even today, Cuba's charm and picturesque scenery continues to be a beloved location for United States travelers.²⁵ Despite the country's government turmoil over the last forty-five years, American interest in the island has yet to be curtailed.²⁶ This interest is evidenced by the continued growth of American tourism in Cuba.²⁷ Tourism significantly contributes to the Cuban economy and has been the only sector with continued growth in the Castro era.²⁸ It is estimated that in 1990, \$243 million were injected into the Cuban economy from tourism.²⁹ That figure has increased by 500%, and travel to Cuba contributed more than \$1.6 billion in the year 2002.³⁰

The Castro government continuously assures the people of Cuba they will have a share in the country's national goods.³¹ Despite these promises, Cubans are strictly banned from all tourist areas, including the beautiful beaches and hotels.³² For example, shopping in luxury stores and eating in fine restaurants is reserved only for foreigners.³³ Castro does so to prevent Cuban citizens from gaining access to valuable foreign currency.³⁴ These restrictions are forcing Cubans to resort to desperate measures in an effort to

21. *Id.*

22. *Id.*

23. Stoner, *supra* note 4, at 4. Interestingly, despite the reigning power, to date, the Cuban Constitution has yet to be upheld. *Id.*

24. Whittle et al., *supra* note 1, at 553.

25. *Id.*

26. *Id.*

27. *Id.* In fact, the regulations appear to make people want to visit it all the more. *Id.*

28. Stoner, *supra* note 4, at 3.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. Stoner, *supra* note 4, at 3.

34. *Id.*

gain access to United States dollars on the island.³⁵ Highly educated males and females are abandoning their traditional jobs, opting for other extreme career paths.³⁶ For example, males are beginning to drive cabs and females have resorted to prostitution (now at an all time high) just to make ends meet.³⁷

III. TRAVEL TO CUBA BECOMES HIGHLY RESTRICTED

A. *President Kennedy Restricts Travel to Cuba*

On February 3, 1962, through Presidential Proclamation No. 3447, President John F. Kennedy imposed an embargo on all transactions with Cuba.³⁸ President Kennedy cited to section 2370 of the Foreign Assistance Act of 1961,³⁹ which granted him the authority to impose such restrictions.⁴⁰ Section 2370(a)(1)-(2) provides that:

(1) No assistance shall be furnished under this chapter to the present government of Cuba. As an additional means of implementing and carrying into effect the policy of the preceding sentence, the President is authorized to establish and maintain a total embargo upon all trade between the United States and Cuba.

(2) Except as may be deemed necessary by the President in the interest of the United States, no assistance shall be furnished under this chapter to any government of Cuba, nor shall Cuba be entitled to receive any quota authorizing the importation . . . or to receive any other benefit under any law of the United States, until the President determines that such government has taken appropriate steps according to international law standards to return to United States citizens . . . or to provide equitable compensation to such citizens and entities for property taken from such citizens and entities on or after January 1, 1959, by the Government of Cuba.⁴¹

Because section 2370(a)(2) makes returning property taken from United States citizens a condition precedent to receiving a "benefit," any attempt to

35. *See id.*

36. *Id.*

37. *Id.*

38. Maria L. Pagan, *U.S. Legal Requirements Affecting Trade with Cuba*, 7 PACE INT'L L. REV. 485, 488 (1995).

39. 22 U.S.C. § 2370 (2000).

40. Pagan, *supra* note 38, at 487.

41. § 2370(a)(1)-(2).

ease the restrictions against Cuba would have to essentially repeal this law, unless, of course, the Cuban government chooses to return all property.⁴² Further, there is no statutory language indicating specific time restrictions on the expiration of the embargo or guidance on when, or how, it may end.⁴³ Although the current President could always terminate the embargo by exercising his foreign powers, the regulations would still exist in the texts.⁴⁴

B. *The Cuban Democracy Act*

In 1992, thirty years after President Kennedy implemented the Cuban embargo, Congress passed the Cuban Democracy Act ("CDA").⁴⁵ "The CDA contains a Congressional finding that the [Cuban] government continues to disregard human rights, continues to support subversive activities around the world, has decreased the well-being of the Cuban people, and shows no signs of change despite the collapse of Communism around the world."⁴⁶ The purpose of the CDA is to provide for a smooth transition for the communist government of Cuba to become a democratic one.⁴⁷ Additionally, it punishes the Cuban government while assisting the people of Cuba.⁴⁸

In order to persuade other countries to support the United States' position, the CDA contains provisions encouraging other countries to adopt the Cuban Embargo while punishing those who do not.⁴⁹ Sanctions include denying countries eligibility for assistance under the Foreign Assistance Act of 1961 or sales under the Arms Export Control Act.⁵⁰ Additionally, countries that do not follow the United States' policy towards Cuba are not eligible for a reduction of any debt owed to the American government.⁵¹ Under the CDA, the President of the United States has the power to waive the restrictions if he determines that Cuba has: 1) held democratic elections; 2) allowed other parties to campaign for such elections and allowed the media full access to the candidates; 3) shown respect to the citizens of Cuba by

42. Pagan, *supra* note 38, at 487.

43. *Id.* at 488.

44. *Id.*

45. Christine Zack, Comment, *Globalization's Unlikely Opportunist: Castro's Cuba Shapes the Paradigm for Economic and Political Stability in Latin America*, 11 TUL. J. INT'L & COMP. L. 355, 360 (2003).

46. Pagan, *supra* note 38, at 499.

47. 22 U.S.C. § 6002(1) (2000).

48. Pagan, *supra*, note 38, at 499.

49. See 22 U.S.C. § 6003 (2000).

50. *Id.*

51. § 6003(b)(1)(B).

respecting their “civil liberties and human rights;” and 4) has committed itself to Cuba’s constitutional change.⁵² Although a delineated power, the above conditions appear very subjective and their interpretation will most likely depend on the political affiliation of the President of the United States at the time.

Finally, the CDA provides relief to the Cuban community in a number of ways.⁵³ First, it allows exportation of food and medicine to Cuba within certain restrictions.⁵⁴ For example, there is a prohibition on exporting medicine if the likelihood exists that the medicine’s purpose is for torture or other forms of human rights abuse.⁵⁵ Secondly, the CDA permits telecommunication services between the United States and Cuba, but only to the extent necessary to provide “efficient and adequate telecommunications.”⁵⁶ Further, the CDA allows these transactions with Cuba only if they benefit the Cuban people and not the Cuban government.⁵⁷

IV. THE OFFICE OF FOREIGN ASSETS CONTROL

The Office of Foreign Assets Control (“OFAC”) operates under the United States Treasury Department.⁵⁸ In an effort to preserve United States’ foreign policy, OFAC’s principal task is enforcing embargoes and economic sanctions against foreign countries.⁵⁹ OFAC is the successor of the former Office of Foreign Funds Control (“OFFC”), which was established at the commencement of World War II.⁶⁰ OFFC’s principle purpose was to act under the Trading with the Enemy Act (“TWEA”) and to prevent dealings with the Nazis.⁶¹ As the years progressed, OFFC expanded and began regulating more countries.⁶² In December, 1950, President Truman formally created OFAC, and declared a national emergency under TWEA after blocking assets, subject to United States jurisdiction, from China and North Korea.⁶³

52. 22 U.S.C. § 6007(a) (2000).

53. 22 U.S.C. § 6004 (2000).

54. § 6004(b)-(c).

55. § 6004(c)(2)-(3).

56. § 6004(e)(1)-(2).

57. 22 U.S.C. § 6009(a) (2000).

58. R. Richard Newcomb, *Office of Foreign Assets Control*, 705 PRAC. L. INST. 397, 401 (1994).

59. *Id.*

60. United States Dep’t of the Treasury, *Office of Foreign Assets Control: Frequently Asked Questions*, at <http://www.treas.gov/offices/enforcement/ofac/faq/index.html> (last visited Jan. 8, 2005) [hereinafter OFAC FAQ].

61. *Id.*

62. Newcomb, *supra* note 58, at 401.

63. *Id.* at 444.

Currently, OFAC is the lead agency enforcing restrictions against Cuba, including travel restrictions.⁶⁴ The International Emergency Economic Powers Act⁶⁵ (“IEEPA”) grants OFAC the authority to oversee restrictions on Cuba.⁶⁶ OFAC, combined with the President’s wartime and national emergency powers, is the means by which the American government regulates transactions with foreign countries.⁶⁷

V. TRAVEL RESTRICTIONS TO CUBA BEFORE JUNE 30, 2004

A. Fully Hosted Travelers

One of the most popular methods for American travel to Cuba was under the “fully hosted travel” provision.⁶⁸ The “fully hosted travel” provision meant that an American could legally travel to Cuba if the trip, and all associated costs, were paid by a person outside of the United States, and United States’ jurisdiction.⁶⁹ All travel which fell into this category was deemed “authorized” travel.⁷⁰

B. Returning Goods to the United States

While in Cuba, Americans were permitted to purchase merchandise and take it home to the United States.⁷¹ The only limitations were that the merchandise must cost under \$100 in value and the item must be for the traveler’s personal use.⁷² Alternatively, visitors were free to return an unlimited amount of informational materials, such as books and magazines, back to the United States.⁷³

64. *Id.* at 401.

65. 50 U.S.C. § 1701 (2000).

66. Newcomb, *supra* note 58, at 401–02.

67. *Id.*

68. Cuban Assets Control Regulations, 69 Fed. Reg. 33,768 (June 16, 2004) (to be codified at 31 C.F.R. pt. 515).

69. Cuban Assets Control Regulations, 31 C.F.R. § 515.420 (2003).

70. *Id.*

71. § 515.560(c)(3).

72. *Id.*

73. *Id.*

C. *Visiting Family*

Travel restrictions to Cuba were lenient for those who had family members on the island.⁷⁴ A person with a “close relative,” including second cousins, could visit their family once every twelve months, provided they obtained a general license from OFAC.⁷⁵ The traveler could stay indefinitely, since there was no limitation placed on the length of stay.⁷⁶ Additional visits within the same twelve-month period were also permitted.⁷⁷ Further, while visiting their family, the traveler was allowed to spend up to the State Department’s then \$167 per diem allowance.⁷⁸

D. *Educational Activities*

A large part of travel to Cuba is comprised of college students and faculty engaged in educational programs.⁷⁹ OFAC issues specific licenses to academic institutions that are accredited by a national or regional accreditation association that permits travel to Cuba.⁸⁰ However, these licenses must be renewed every two years.⁸¹ Once the institution has applied and is granted a license, its students and faculty may travel to Cuba without further intervention by OFAC, provided that they fall into one of the following five categories.⁸² The first category encompasses undergraduate or graduate students participating in a “structured educational program . . . as part of a course offered at [their] accredited U.S. college or university.”⁸³ Students traveling “must carry a letter” from their school confirming: the student’s enrollment at all times, the institution’s license number, and that the travel is part of their educational program.⁸⁴ The second category involves individuals engaging in “[n]on-commercial academic research” for the purpose of securing

74. *See* § 515.561.

75. Cuban Assets Control Regulations, 69 Fed. Reg. 33,769 (June 16, 2004) (to be codified at 31 C.F.R. pt. 515).

76. *Id.*

77. *Id.* A specific license, usually granted, was also needed for an additional visit occurring within the same twelve month period. *Id.*

78. *Id.* However, a visitor could spend more than the per diem on unexpected expenses that arose while in Cuba. Cuban Assets Control Regulations, 69 Fed. Reg. at 33,769.

79. DeWayne Wickham, *Powell Prescribes Cuba Travel Waiver for U.S. Medical Students*, USA TODAY, July 7, 2004, at A11.

80. Cuban Assets Control Regulations, 31 C.F.R. § 515.565(a)(1) (2003).

81. § 515.565(a)(1).

82. § 515.565(a)(2).

83. § 515.565(a)(2)(i).

84. *Id.*

a professional degree.⁸⁵ Persons who travel under this category must also have a letter from their institution confirming that the travel is not only part of the researcher's educational program, but also that the course work will be accepted for credit in the United States.⁸⁶ The third category is for students who are enrolled in an accredited undergraduate/graduate course of study at a "Cuban academic institution."⁸⁷ Fourth, a person regularly employed at an accredited learning institution who is planning to teach at a "Cuban academic institution" may also travel to Cuba.⁸⁸ Finally, full-time employees of a licensed institution who are coordinating the above named activities may also travel.⁸⁹ As all other categories of education-based visitors, these individuals must also carry a letter stating they are employed activities coordinators and include their employer's OFAC license number.⁹⁰

E. *Remittances*

American citizens were permitted to send Cuban nationals \$300 once every four months.⁹¹ When traveling to Cuba, the authorized amount of money a traveler could carry was \$3000.⁹² Banks, or other forms of depository institutions within the United States jurisdiction, could act as forwarders for remittances from Americans to Cuban nationals.⁹³ These forwarders were not required to obtain any kind of license from OFAC before engaging in such activities.⁹⁴

VI. CHALLENGES TO THE VALIDITY OF TRAVEL RESTRICTIONS TO CUBA

A. *Zemel v. Rusk*

Prior to the United States breaking diplomatic relations with Cuba in 1961, passports were not required for travel within the Western Hemi-

85. § 515.565(a)(2)(ii).

86. *Id.*

87. § 515.565(a)(2)(iii). This category of students may also travel, provided they meet the same three requirements as the students in the "structured educational program" category. *See id.*

88. § 515.565(a)(2)(iv). Once again, these individuals must carry a letter at all times stating that they are employees of an American institution and the appropriate license number. *Id.*

89. § 515.565(a)(2)(vii).

90. *Id.*

91. § 515.570(a).

92. § 515.560(c)(4)(i).

93. § 515.572(a)(3).

94. *Id.*

sphere.⁹⁵ On January 16, 1961, the United States Department of State removed Cuba from the list of countries in which a passport was not required for travel.⁹⁶ In a landmark case, *Zemel v. Rusk*,⁹⁷ Zemel applied to have his passport validated for travel to Cuba “to satisfy [his] curiosity . . . and to make [him] a better informed citizen.”⁹⁸ Because of the change in law, Zemel’s application was rejected and he subsequently filed suit in federal district court based on three counts: 1) “that he was entitled [to travel] under the [United States] Constitution . . . and to have his passport validated;” 2) “that the Secretary’s restrictions upon travel to Cuba were invalid;” and 3) “that the Passport Act of 1926 and [section] 215 of the Immigration and Nationality Act of 1952 were unconstitutional.”⁹⁹ In addition, Zemel prayed that Rusk, the Secretary of State, and the Attorney General “be enjoined from interfering with such travel.”¹⁰⁰ The United States District Court for the District of Connecticut “granted the Secretary of State’s motion for summary judgment and dismissed the action against the Attorney General.”¹⁰¹ Following dismissal, Zemel made a direct appeal to the United States Supreme Court pursuant to federal statute.¹⁰²

The Supreme Court found that the Passport Act granted the Executive Branch the authority to refuse validation of passports for travel to Cuba.¹⁰³ The Court reasoned that the continuous interpretation that the Department of State possesses authority to impose restrictions to certain countries must be considered in construing the Passport Act.¹⁰⁴ Chief Justice Warren noted that in 1952, Congress enacted legislation relating to passports, but despite the many executive impositions of area restrictions, it left “untouched the broad rule-making authority granted in the earlier [Passport] Act.”¹⁰⁵ Unlike the applicant in *Kent v. Dulles*,¹⁰⁶ where Mr. Kent was denied a passport based

95. *Zemel v. Rusk*, 381 U.S. 1, 3 (1965).

96. *Id.*

97. *Id.* at 1.

98. *Id.* at 4.

99. *Id.*

100. *Zemel*, 381 U.S. at 4.

101. *Id.* at 5.

102. *Id.* at 4–5. A direct appeal to the Supreme Court from a district court can be made pursuant to 28 U.S.C. § 1253. *Id.* at 5.

103. *Id.* at 7.

104. *Zemel*, 381 U.S. at 8–11.

105. *Id.* at 12.

106. 357 U.S. 116 (1958). The two plaintiffs in *Kent* were denied validation of their passports because of their refusal to file an affidavit concerning their membership in the Communist Party. *Id.*

on his political beliefs or associations, the restrictions in *Zemel* applied to everyone regardless of beliefs and were therefore constitutionally upheld.¹⁰⁷

Travel restrictions to specific countries are nothing new, and in fact they have become quite common since World War II.¹⁰⁸ For example, in the late 1940's, "[t]ravel to Yugoslavia was restricted ... [due to] a series of incidents involving American citizens" within Yugoslavia.¹⁰⁹ Like Yugoslavia, "[t]ravel to Hungary was [also] restricted between December 1949 and May 1951," and once again after 1951.¹¹⁰ In an action similar to the new travel restrictions to Cuba, the Department of State began to stamp passports to Czechoslovakia "not valid for travel" and "declared that all passports outstanding" were also "not valid for such travel."¹¹¹ Using these past restrictions as a basis, the Supreme Court found *Zemel*'s constitutional rights were not being abridged by area restrictions prohibiting travel to Cuba.¹¹² Additionally, the Court noted that a liberty cannot be inhibited without due process of law does not mean that it can under no circumstances be inhibited and found these restrictions to be justified by the "weightiest considerations of national security."¹¹³ The failure to validate *Zemel*'s passport resulted in a certain action being prevented and is not a violation of an individual's First Amendment right.¹¹⁴ "The right to speak and publish does not carry with it the unrestrained right to gather information" in order to make one a more informed citizen.¹¹⁵ Finally, the Passport Act does not grant Congress complete unfettered freedom to act as they wish and the only restrictions authorized are those that are proper in light of Congress's prior administrative practices.¹¹⁶

B. *Regan v. Wald*

In 1977, regulation 560¹¹⁷ was added to the Cuban Assets Control Regulations.¹¹⁸ This added provision permitted almost all travel-related transac-

107. *Zemel*, 381 U.S. at 13.

108. *Id.* at 10.

109. *Id.*

110. *Id.* (citing 22 Dept. State Bull. 399).

111. *Id.*

112. *See generally* 381 U.S. at 13–18.

113. *Id.* at 14–16.

114. *Id.* at 16–17.

115. *Id.* at 17.

116. *Id.* at 17–18.

117. Cuban Assets Control Regulations, 31 C.F.R. § 515.560 (2003).

118. *Regan v. Wald*, 468 U.S. 222, 223 (1984).

tions to Cuba, thus creating an exception to regulation 201(b)'s¹¹⁹ prohibition on such transactions.¹²⁰ Simultaneous to the amendment of regulation 560, the International Emergency Economic Powers Act was enacted in order to allow the President to exercise his emergency economic powers.¹²¹ At first glance, it appeared the President had been given authority which he already had under section 5(b) of TWEA, but there was one significant difference.¹²² Instead of the President having to declare a new national emergency to continue the Cuban embargo, Congress included a "grandfather clause."¹²³ Under the grandfather clause, despite the changes to the TWEA, "'authorities conferred upon the President by section 5(b) . . . which were being exercised with respect to a country on July 1, 1977, as a result of a national emergency declared by the President before such date, may continue to be exercised.'"¹²⁴

In 1982, regulation 560 was amended to include a restriction on the various types of American travel related activities in Cuba.¹²⁵ These restrictions eliminated travel to Cuba for tourist and non-governmental business purposes.¹²⁶ The new regulation 560 permitted travel only for visiting "close relatives," gathering news, and other "official" visits.¹²⁷ However, not all Americans were satisfied with the new regulation.¹²⁸ In *Wald*, the plaintiffs challenged the United States imposed travel restrictions to Cuba pursuant to an amendment under the grandfather clause of section 5(b) of the TWEA.¹²⁹ According to these authorities, the President may regulate transactions involving any property in which any foreign country or any national thereof has an interest.¹³⁰ This was the precise restriction *Wald* challenged on the basis that the grandfather clause required the President to declare a national emergency in order to continue the same economic hardships that previously existed under TWEA.¹³¹ The Supreme Court overruled the Court of Appeals for the First Circuit in a 5-4 decision, and found that the grandfather clause, together with the language in section 5(b), granted the authority to regulate all travel-related transactions with Cuba since they were being exercised on

119. § 515.201(b).

120. *Wald*, 468 U.S. at 222.

121. *Id.*

122. *Id.* at 228.

123. *Id.* at 228-29.

124. *Id.* at 228-29 (quoting 91 Stat. 1625 (1977)).

125. *Wald*, 468 U.S. at 229.

126. *Id.* at 229-30.

127. *Id.* at 229.

128. *Id.*

129. *Id.* at 229.

130. 50 U.S.C. app. § 5(b)(1) (2000).

131. *Wald*, 468 U.S. at 228.

July 1, 1977.¹³² The Court further reasoned that “[it] follow[ed] from a natural reading of the grandfather clause.”¹³³ Additionally, the Court explained that nothing in the legislative history of the grandfather clause supported the contention that Congress meant only to apply grandfather restrictions “in place on July 1, 1977.”¹³⁴ Further, if the Court was to eliminate the President’s authority to alter travel restrictions, it would have created the situation which the grandfather clause was intended to avoid.¹³⁵ Finally, the Court relied on the strong deference to executive decisions in matters of foreign policy and found restricting travel to Cuba in order to prevent the flow of “hard currency” into Cuba was an adequate means to achieve that goal.¹³⁶

VII. TRAVEL RESTRICTIONS TO CUBA AFTER JUNE 30, 2004

A. *Generally*

On October 10, 2003, President George W. Bush “announced the establishment of The Commission for Assistance to a Free Cuba (“the Commission”).”¹³⁷ The Commission’s primary function is to assist Cuba in the transition from a communist country to a free and democratic society.¹³⁸ The Commission provided a report to the President on May 1, 2004, proposing a number of changes to the current United States policy towards Cuba.¹³⁹ Following the Commission’s suggestions, the President implemented the new policy considerations, effective June 30, 2004.¹⁴⁰ Since the outset of his presidency, President Bush has vigorously upheld restrictions on Cuba, while preserving the rights of Cuban citizens.¹⁴¹ In a speech given on Cuba’s Independence Day, President Bush stated:

[T]he sanctions the United States enforces against the Castro regime are not just a policy tool, but a moral statement. It is wrong to prop up a regime that routinely stifles all the freedoms that make us human. The United States stands opposed to such tyr-

132. *Id.* at 223, 232.

133. *Id.* at 235.

134. *Id.* at 238.

135. *Id.* at 258.

136. *Wald*, 486 U.S. at 243.

137. Cuban Assets Control Regulations, 69 Fed. Reg. 33,768 (June 16, 2004) (to be codified at 31 C.F.R. pt. 515).

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

anny and will oppose any attempt to weaken sanctions against the Castro regime until it respects the basic human rights of its citizens, frees political prisoners, holds democratic free elections, and allows free speech.¹⁴²

B. *Fully Hosted Travelers*

The new rules eliminate the “fully hosted travel[er]” provision, and licenses will no longer be extended under this provision.¹⁴³ Unfortunately, from the time of the provision’s original inception in 1999, travelers who claimed their travel was “fully hosted” took advantage of the program by engaging in prohibited monetary transactions in Cuba.¹⁴⁴ For example, these transactions included payments to Cuban authorities for docking fees in and out of Cuba.¹⁴⁵ Further, Americans in Cuba were receiving complimentary goods and services as a way to circumvent the law.¹⁴⁶ By eliminating this provision, OFAC is ensuring that Americans are not dealing in property in which Cubans or Cuban nationals might have an interest.¹⁴⁷ The amended rule now states that property received in Cuba, regardless of who it comes from and whether it is provided free of charge, is unauthorized unless it comes under a specific OFAC license.¹⁴⁸

C. *Mode of Travel and Returning Goods to the United States*

Changes have not only been made to define who can travel to Cuba and when a person may do so, but changes have also been made to the mode of travel.¹⁴⁹ Payment for air travel to Cuba via a carrier from a third country involving property in which Cuba has an interest, is now prohibited since the carrier is likely to pass on a portion of the payment to a Cuban entity.¹⁵⁰ Purchasing merchandise and returning it to the United States is now prohibited, regardless of value or how it came into the possession of the traveler.¹⁵¹

142. *Bush Announces Strengthening of Measures Dealing with Cuba*, International Information Programs, July 13, 2001, available at <http://usinfo.state.gov/regional/ar/us-cuba/bush13.htm> (last visited Jan. 8, 2005).

143. Cuban Assets Control Regulations, 69 Fed. Reg. 33,768 (June 16, 2004) (to be codified at 31 C.F.R. pt. 515).

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

148. Cuban Assets Control Regulations, 69 Fed. Reg. at 33,771.

149. *Id.*

150. *Id.*

151. *Id.* at 33,769.

However, the exception for informational materials remains unchanged, and licensed travelers are welcome to bring back an unlimited amount of such material.¹⁵² Additionally, regulations which governed the carrying of currency to Cuba have been repealed since it is now forbidden to spend American dollars in Cuba.¹⁵³ In its place is a new regulation restricting the amount of luggage that may be taken pursuant to licensed travel.¹⁵⁴ More specifically, the total amount of luggage Americans may take with them may not exceed forty-four pounds.¹⁵⁵

D. *Visiting Family*

The rules regulating who may visit and how often a person may be visited in Cuba have also been amended and made stricter.¹⁵⁶ The definition of "close relative" has been modified and now only includes a "member of the person's immediate family."¹⁵⁷ "Immediate family" consists of the traveler's spouse, child, grandchild, parent, grandparent or sibling.¹⁵⁸ Additionally, provisions which previously allowed members of the traveler's household to visit have been modified.¹⁵⁹ Now, the traveler's co-habitants are only allowed to accompany the traveler if they too are related to the person being visited in Cuba.¹⁶⁰ Additionally, the provision providing that a person may visit a relative once every twelve months for an unlimited time period has been eliminated.¹⁶¹ Now, the traveler can only visit family once every three years and for no longer than fourteen days at a time.¹⁶² The three year period in which they may return will be calculated from the day they arrived in the United States.¹⁶³ For everyone else, the day of departure from the United States on their last trip to Cuba will serve as the basis for calculation.¹⁶⁴ Additional visits on request to OFAC before the three year waiting period has lapsed also will not be allowed.¹⁶⁵

152. *Id.* at 33,771.

153. Cuban Assets Control Regulations, 69 Fed. Reg. at 33,769.

154. *Id.* at 33,771.

155. *Id.*

156. *Id.* at 33,769.

157. *Id.*

158. Cuban Assets Control Regulations, 69 Fed. Reg. at 33,772.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

163. Cuban Assets Control Regulations, 69 Fed. Reg. at 33,769.

164. *Id.*

165. *Id.*

E. *Visiting Non-Cuban Nationals*

Regulations dealing with visits to family members who are not Cuban nationals, but are instead in Cuba for different reasons, such as an American studying in Cuba, have also been modified.¹⁶⁶ In order to visit a non-Cuban national in Cuba, “exigent circumstances” must exist.¹⁶⁷ The individual in Cuba will now have to demonstrate the exigency of the situation to the United States Interests Section in Havana in order to secure a license from OFAC.¹⁶⁸ For example, a license may be issued if the individual in Cuba is severely ill combined with an inability to travel.¹⁶⁹

While in Cuba, Americans may now only spend a total of fifty dollars per day and an additional fifty dollars per trip to pay for transportation expenses.¹⁷⁰ For example, a traveler who is on a seven day trip may spend an additional fifty dollars on bus or train fare to travel from city A to city B, if the travel requires transportation between the two cities.¹⁷¹ However, the additional fifty dollars may only be spent on transportation costs.¹⁷²

F. *Educational Activities*

The regulations concerning American students in Cuba have also changed.¹⁷³ For example, institutional licenses are now only valid for one year instead of two.¹⁷⁴ Additionally, students who travel to Cuba under a learning institution’s license must be enrolled for credit at that specific institution’s undergraduate or graduate program.¹⁷⁵ Students will no longer be able to travel under the educational licenses of institutions other than their own, even if the licensed institution program offers them credit towards their degree at their own institution.¹⁷⁶ Furthermore, employees of the licensed institution must now be full-time employees in order to travel to Cuba.¹⁷⁷ Part-time staff and contractors no longer qualify for travel under an institu-

166. *Id.* at 33,772.

167. *Id.* at 33,769.

168. Cuban Assets Control Regulations, 69 Fed. Reg. at 33,769.

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. Cuban Assets Control Regulations, 69 Fed. Reg. at 33,772.

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

tion's license.¹⁷⁸ Also, certain educational activities must last a minimum of ten weeks.¹⁷⁹ Activities which must adhere to this requirement are "structured educational program[s] ... as part of a course offered at a licensed institution;"¹⁸⁰ "formal course[s] of study at a Cuban academic institution;"¹⁸¹ and "[t]eaching at a Cuban academic institution."¹⁸²

G. *Remittances*

Regulations regarding quarterly remittances which were allowed to any household of a national in Cuba have been amended.¹⁸³ Now, quarterly remittances can only be sent to members of the sender's "immediate family."¹⁸⁴ "Immediate family" member is defined to include only a "spouse, child, grandchild, parent, grandparent, . . . as well as any spouse [or] widow," of the aforementioned.¹⁸⁵ Additionally, a specific notation has been included to indicate that these remittances are excluded if they are for the benefit of governmental officials or members of the "Cuban Communist Party."¹⁸⁶ Banks and other depository institutions are now required to receive a specific license from OFAC before engaging in forwarding services.¹⁸⁷

VIII. ENFORCING REGULATIONS

A. *Generally*

The Department of State has already warned that "Cuban-Americans who have been visiting relatives in Cuba" are no longer able to rely on poor enforcement of restrictions by United States officials.¹⁸⁸ Since the President's initiative to strengthen enforcement over Cuba on October 10, 2003, OFAC has significantly increased enforcement of travel restrictions to

178. Cuban Assets Control Regulations, 69 Fed. Reg. at 33,772.

179. *Id.*

180. *Id.*

181. *Id.*

182. *Id.*

183. Cuban Assets Control Regulations, 69 Fed. Reg. at 33,773.

184. *Id.*

185. *Id.*

186. *Id.*

187. *Id.*

188. *Cuba Travel Restrictions to be Enforced*, WASH. TIMES (UPI), June 7, 2004, available at <http://washingtontimes.com/upi-breaking/20040607-100419-5455r.htm>.

Cuba.¹⁸⁹ In a speech to a group of Cuban-Americans in Miami, Florida, Treasury Secretary John Snow stated: “[w]e’re cracking down. We mean business.”¹⁹⁰ OFAC has increased inspections of travelers and shipments to and from Cuba and is specifically targeting Americans who attempt to circumvent the law by traveling through third countries on private vessels.¹⁹¹ With the assistance of the Department of Homeland Security (“DHS”), OFAC has already implemented specific programs and increased staff at the three airports where the most activity to and from Cuba takes place: Miami International Airport, New York’s John F. Kennedy Airport, and Los Angeles International Airport.¹⁹² DHS plans to use “intelligence and investigative resources” in order to identify individuals who are traveling via third countries to circumvent the travel restrictions.¹⁹³ From October 10, 2003 to February 9, 2004, the OFAC has posted staggering numbers proving how serious it is about enforcing travel restrictions.¹⁹⁴ In that four month period,

569 aircraft with passengers destined for Cuba, mostly direct charter flights, were targeted for outbound inspection. Over **44,000** passengers were screened as they departed the United States for Cuba and over **50,915** passengers were screened on their return to the United States on charter flights.

275 travelers were denied travel on charter flights after examination revealed they did not qualify under any OFAC license category.

1007 aircraft with passengers returning to the United States from Cuba were targeted for inbound inspections. This number includes returning charter flights and other flights arriving in the United States from third countries. Over **50,915** passengers and crew were subjected to extensive examination.

376 OFAC-related seizures were accomplished, most of which related to the unlicensed importation of Cuban cigars and alcohol.

189. Press Release, Office of Public Affairs, Office of Foreign Assets Control Status Report on Implementation of Enhanced Cuba Travel Enforcement (Feb. 9, 2004), at <http://www.ustreas.gov/press/releases/js1161.htm> [hereinafter Press Release].

190. Tom Carter, *U.S. Bans Cuba-linked Firms; Crackdown on 10 Foreign Companies*, WASH. TIMES, Feb. 10, 2004, at A15 (internal quotations omitted).

191. Press Release, *supra* note 189.

192. *Id.*

193. International Informational Programs, *supra* note 11.

194. See Press Release, *supra* note 189.

- **264** cases have been opened to date by OFAC's Enforcement Division for investigation of alleged post October 10, 2003 travel to Cuba
- **3** cases have been referred for criminal investigation by OFAC Enforcement directly to federal law enforcement agencies, primarily the Bureau of Immigration and Customs Enforcement. OFAC is working with special agents and Assistant U.S. Attorneys on a number of potential criminal cases.¹⁹⁵

B. *Uritsky v. Newcomb*

Readiness to enforce the President's initiative in further restricting travel to Cuba is exemplified in the threshold case *Uritsky v. Newcomb*.¹⁹⁶ In *Uritsky*, Mr. Uritsky departed from Montreal, Canada aboard a Cuban national airliner for a one-week vacation in Cuba.¹⁹⁷ "[H]e re-entered the United States through Highgate Springs, Vermont carrying a bottle of rum purchased in Cuba, and was questioned by U.S. Customs officials."¹⁹⁸ Uritsky admitted that he did not travel to Cuba under a valid OFAC license and stated that he paid a Canadian travel agency \$822.81 for the trip using his credit card.¹⁹⁹

More than one year later, OFAC sent a pre-penalty notice to Uritsky, notifying him that the director of OFAC had reason to believe that Uritsky engaged in "unlicensed travel-related transactions by vacationing in Cuba and that OFAC intended to impose a ... fine ... of \$7,510."²⁰⁰ The fine included \$7,500 for the unlicensed travel and ten dollars for importing the bottle of rum.²⁰¹ On March 28, 2003, Uritsky filed suit seeking review of the final agency action imposing the monetary fine.²⁰² Uritsky's defense was that he qualified as a "fully-hosted traveler."²⁰³ Uritsky claimed that his father, a Russian citizen, paid for all of Uritsky's travel-related transactions to Cuba and provided an affidavit in support thereof.²⁰⁴ Since Uritsky's father

195. *Id.*

196. No. CIV.A.03-10569-PBS, 2004 WL 1125203, at *1 (D. Mass. May 19, 2004).

197. *Id.* This case was decided just one month before the notice was published in the Federal Register stating that travel restrictions to Cuba will become stricter and enforcement of these regulations will become a top priority. *Id.*

198. *Id.*

199. *Id.*

200. *Uritsky*, 2004 WL 1125203, at *1.

201. *Id.*

202. *Id.* at *2.

203. *Id.*

204. *Id.*

was not under the jurisdiction of the United States, this could have made Uritsky's travel lawful.²⁰⁵

Upon investigation by OFAC, it was learned that Uritsky himself had actually paid for the trip and that his father had later refunded him the money.²⁰⁶ The District Court upheld OFAC's decision and found that because Uritsky charged the cost on his credit card, these actions constituted payment by him for the travel expense to Cuba.²⁰⁷ Even if Uritsky's father refunded him the money, the transaction was still paid for by Uritsky and did not qualify as a "fully-hosted travel," regardless of "after-the-fact reimbursement."²⁰⁸

IX. THE IMPORTANCE OF CONTINUING RESTRICTIONS ON TRAVEL TO CUBA

The embargo against Cuba has been in place for more than forty years, and now, more than ever, the United States must continue its enforcement. One of the primary reasons travel restrictions have become stricter is to further curtail the entry of American dollars into the Cuban economy under Castro. It now appears that the Castro regime is out of money mostly due to the collapse of the Soviet Union, which resulted in the end of generous funding to the communist government.²⁰⁹ Moreover, Cuba currently owes Russia over twenty billion dollars.²¹⁰

What the United States is asking of Cuba in order to allow travel and lift the embargo as a whole is extremely feasible and can be achieved through pressure from the United States and other countries.²¹¹ These prerequisites include liberating all political prisoners, allowing other political parties to form, and allowing free democratic elections.²¹² These are the same types of conditions that influenced democratic change over the last four decades in Portugal, Chile, and the Dominican Republic—just to name a few.²¹³ In con-

205. *Uritsky*, 2004 WL 1125203, at *2.

206. *See id.*

207. *Id.* at *3–*4.

208. *Id.* at *3.

209. *See* Maya Bell, *Bridging the Gulf; Younger Cuban-Americans Challenge Hard-Liners' Approach, Reach Out to Island*, ORLANDO SENTINEL, June 13, 2004, at A1, 2004 WL 82425353.

210. *Cuban GDP Grew 3 PCT in 2001, Recovery Slows*, REUTERS NEWS SERV. (Havana), July 6, 2002, <http://www.futurodecuba.org/notic-02-7-602eng.htm> [hereinafter GDP].

211. *See* Lincoln Diaz-Balart, *Cuba is not China*, USA TODAY, June 6, 2000, at 14A, LEXIS, News Library, USA Today File.

212. *Id.*

213. 145 CONG. REC. H2351, H2352 (1999).

trast, where there has been no external pressure and trade has been allowed, there has been no change to communist regimes.²¹⁴

In upholding restrictions, the United States will also be taking a step toward preserving human rights. In Cuba, individuals are incarcerated for expressing their thoughts on a regular basis.²¹⁵ The Castro government does not disclose figures relating to how many individuals are currently in jail as political prisoners,²¹⁶ but the figure is estimated to be between 2000 and 5000 prisoners.²¹⁷ The political prisoners can be left in jail anywhere from a couple of days to over thirty years.²¹⁸ Since the judicial system is controlled by the communist party and the right to legal representation is not guaranteed, political prisoners are commonly detained for years without being charged or much less tried.²¹⁹

Political prisoners are generally treated the worst of all prisoners.²²⁰ They have unsanitary facilities, are not provided with blankets, and are afforded no legal protection.²²¹ Additionally, medical care is refused to political prisoners on a regular basis.²²² For example, Jorge Antunez, a thirty-three year old male, was incarcerated for eighteen years as a political prisoner.²²³ While in jail, Antunez was beaten unconscious by prison guards.²²⁴ When his sister questioned the beating, she was told that prison officials were authorized to beat inmates at their discretion.²²⁵ At the time of the beating, Antunez was suffering kidney failure and hypoglycemia, and was denied medication.²²⁶ Another example of a human rights violation was the Cuban government's attack on a tugboat carrying more than forty people (twenty were children) during which all of the passengers were killed for attempting to flee the island.²²⁷

214. Diaz-Balart, *supra* note 211. An example of such a regime is China. *Id.*

215. 145 CONG. REC. H2351, 2352 (1999).

216. See Wm. Garth Snider, *Banishment: The History of Its Use and a Proposal for Its Abolition Under the First Amendment*, 24 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 455, 501 n.241 (1998). Political prisoners are individuals incarcerated simply for expressing any kind of disagreement for anything the government has done or might do in the future. *Id.*

217. 145 CONG. REC. H2351, H2353 (1999).

218. *Id.* at H2352.

219. *Id.*

220. *Id.* at H2353.

221. *Id.*

222. 145 CONG. REC. H2351, H2353 (1999).

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. 145 CONG. REC. H2351, H2352 (1999).

Recently, individuals opposing the restrictions on Cuba have compared such restrictions to the situation in China where private investment is being made; thus the question arises, why China and not Cuba?²²⁸ The answer is simple; the situation in Cuba is completely different from that in China. Although it appears that investing in China is helping create a flourishing democracy, in reality it is not.²²⁹ For example, the Chinese government is still trying to control all activity in its country.²³⁰ Currently, the Chinese government has placed stringent controls on the use of the internet and has declared that “party cells” will be imposed on all private organizations doing business in China.²³¹

Additionally, unlike China, Cuba has not taken any steps towards reform.²³² For example, in Cuba there is neither private property, nor any persons available to do business with except for the government itself. Clearly, this policy is attributable to Castro’s control over all aspects of life in Cuba.²³³ Under Castro’s government, it is illegal for anyone to do business except for the government.²³⁴ This means that even if the United States allowed businesses to establish themselves in Cuba, the business owners would not be able to independently run the business or hire employees.²³⁵ The Cuban government would control the company and assign the workers they feel should be employed by the company.²³⁶ For example, the largest foreign investor in Cuba is Sheritt International of Canada (“Sheritt”).²³⁷ Sheritt operates a mine in Cuba that employs about 1500 individuals and pays Castro about \$10,000 a year per worker.²³⁸ Castro, in turn, pays the workers eight-

228. Jesse Helms, *On Trade, Cuba is not China*, N.Y. TIMES, June 24, 2000, at A15, LEXIS, News Library, NY Times File [hereinafter Helms].

229. *Id.*

230. *Id.*

231. *Id.* Party cells refer to individuals assigned by the government to oversee the private company’s affairs to make sure that they are operating to the liking of the communist government. *Id.*

232. Helms, *supra* note 226.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. Susan Candiotti, *Chretien Shakes Hands with Castro: Canadian Leader Begins Whirlwind Cuban Visit*, CNN.com, Apr. 26, 1998, at <http://www.cnn.com/WORLD/americas/9804/26/cuba.chretien.update> [hereinafter Candiotti]. Sheritt executives are forbidden from traveling to the United States under the Helms Burton Act, 22 U.S.C. § 6021–081 (1994), because the company uses a mine that was taken from an American company by Fidel Castro when he took power. *Id.*

238. Helms, *supra* note 226.

een dollars a month and retains the difference for himself.²³⁹ This is the type of money that the United States needs to prevent the Cuban government from acquiring. One way of accomplishing this goal is through the embargo and, more specifically, through travel restrictions that prevent the flow of American dollars into Cuba.

Looking back, the past forty-four years of the embargo have cost the Castro government more than seventy-two billion dollars.²⁴⁰ However, it is estimated that one billion dollars annually is contributed to communist Cuba via travel to the island or Americans sending money to their family members.²⁴¹ This constant influx of American dollars is what currently drives the Cuban government and consequentially, is precisely what must stop.

X. CONCLUSION

Castro continues to restrict access to food, education, health care, and work.²⁴² "This permits Castro to stifle any and all dissent. Any Cuban daring to say the wrong thing, by Castro's standards, loses his or her job. Anyone refusing to spy on a neighbor is denied a university education. Anyone daring to organize an opposition group goes to jail."²⁴³ The American government is trying to prevent these exact actions by restricting travel to Cuba and by not allowing American dollars to further help fuel the fire of the communist government. Travel restrictions are by no means going to shut down Castro's government, but it will significantly contribute to the overall effort and is more than a step in the right direction.

If the United States preserves the current sanctions against Cuba, it will be more difficult for Castro's successors to mimic the same form of government.²⁴⁴ Because of lack of money, his successors will have no choice but to comply with United States' mandate, thereby, freeing political prisoners, allowing opposing political activity, permitting free press, encouraging the formation of labor unions, and most importantly, permitting democratic elections.²⁴⁵ If the United States backs out now, oppression and a communist dictatorship for the Cuban people will be effervescent in decades to come even after Fidel Castro is long gone.²⁴⁶

239. *Id.*

240. *Argentina Determined to Have Cuba in Mercosur*, CUBANET, Nov. 5, 2003, at <http://www.cubanet.org/CNews/y03/nov03/05e4.htm> (last visited Jan. 8, 2005).

241. *Id.*

242. *See Helms, supra* note 226.

243. *Id.*

244. *Diaz-Balart, supra* note 211.

245. *Id.*

246. *Id.*

A NOT SO SPECIAL RATE: A LOOK AT THE UNEQUAL MEDICARE REIMBURSEMENT RATES BETWEEN THE UNITED STATES AND THE COMMONWEALTH OF PUERTO RICO

MICHAEL L. TORRES*

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I. INTRODUCTION

The intended purpose of the Medicare system is to provide the elderly and disabled with adequate health care in order to create a healthier, more financially secure society.¹ As a Commonwealth of the United States, Puerto Rico is privy to the benefits of the Medicare program and is also subject to the regulations set out under the program.² As such, Puerto Rico contributes to the Medicare fund based on the same rates as all other Medicare participants, but Puerto Rico only gets reimbursed a portion of the benefits that the

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1. See 42 U.S.C. § 1395c (2000); PETER A. CORNING, *THE EVOLUTION OF MEDICARE . . . FROM IDEA TO LAW* 30–32 (1969).

2. See 42 U.S.C. § 1395ww(d)(9) (2000), amended by Pub. L. No. 108-173, 117 Stat 2066 (to be codified at 42 U.S.C. § 1395ww(d)(9)(E)); *Hosp. San Rafael, Inc. v. Sullivan*, 784 F. Supp. 927, 930 (D.P.R. 1991); Omnibus Budget Reconciliation Act of 1986, 42 C.F.R. §§ 412.200-.220 (2003).

states receive.³ Since 1987, Puerto Rico's hospitals have been subject to a special Medicare reimbursement rate based on just a portion of the national rate utilized by all other hospitals in the states.⁴ The special rate results in lower payment levels for the participating hospitals on the island, which in turn makes it more difficult for the elderly and disabled on the island to receive the medical care they need.⁵ Since the incorporation of the unequal rates, significant improvements have been developed; however, there is still much ground to make before Puerto Rico reaches the parity it seeks to obtain.⁶ This article will discuss the purpose and effect of the Medicare program and how the program is unequally applied to Puerto Rico.

Part II of this article will track the history and reasons behind the creation of the Medicare program. Part III will discuss the reforms that the system has undergone since its creation in 1965, and the social and economical impact it has had on the citizens of the United States. Part IV will discuss the Medicare program as applied to the Commonwealth of Puerto Rico, with a focus on the special reimbursement rate imposed on Puerto Rico. Part V will conclude with a brief analysis of the facts and how they support eliminating the unequal reimbursement rate.

II. THE LONG JOURNEY OF MEDICARE

In the United States, the concept that the government should contribute to the health care of its citizens started long before Lyndon B. Johnson signed Medicare into law.⁷ Early in the twentieth century, with the beginning of the Industrial Revolution, labor practices heightened the focus on welfare matters.⁸ Organizations such as the American Association for Labor Legislation ("AALL") began making a push toward health care legislation that protected workers.⁹ However, in the early 1900s health care issues were

3. See 42 C.F.R. §§ 412.200-.220; § 1395ww(d)(9); *Sullivan*, 784 F. Supp. at 930.

4. *Sullivan*, 784 F. Supp. at 930.

5. See *Congressional Committees Move to Increase Puerto Rico Medicare — Why . . . New Territories Staffers in Committees*, P.R. HERALD, June 13, 2003, at <http://www.puertorico-herald.org/issues/2003/vol7n24/WashUpdate0724-en.shtml> [hereinafter *Move to Increase Puerto Rico Medicare*]; Noticias, Aníbal Acevedo Vilá, Presidente Bush Convierte en Ley Reforma al Medicare: Significativo el Impacto Sobre Puerto Rico (Dec. 7, 2003) (copy on file with author) [hereinafter *Significativo el Impacto*].

6. See § 1395ww(d)(9); *Sullivan*, 784 F. Supp. at 930; *Move to Increase Puerto Rico Medicare*, *supra* note 5.

7. CORNING, *supra* note 1, at 120.

8. *Id.*

9. *Id.* at 6-7. The organization led a campaign requiring employers to insure their workers against industrial accidents and they created a Social Insurance Committee in order to spot issues and come up with solutions. *Id.* By 1915, the AALL managed to influence thirty

mainly handled within the states; this made it particularly difficult to implement any national welfare proposal since implementation had to be done on a state-by-state basis.¹⁰ In the early part of the twentieth century, Americans had the attitude that less government intervention was best for state issues such as health care.¹¹ Despite the majority philosophy, Theodore Roosevelt based his 1912 campaign on the “New Nationalism,” which contained ideas for a number of social welfare programs, including government health insurance.¹² Not surprisingly, Roosevelt was heavily criticized.¹³ The obvious lack of support brought the idea of government health insurance to an early halt and foreshadowed the difficulties to come.¹⁴

The United States was fond of private enterprise and independence, which acted as a large blockade to mandatory nation-wide health insurance.¹⁵ Furthermore, states were reluctant in adopting mandatory social welfare legislation fearing that such legislation would place them at a disadvantage on the national economic level.¹⁶ Despite the unfavorable positions presented on both the state and national level, implementation of a broad social welfare system would best be achieved on the federal level.¹⁷ The Great Depression of the 1930s created a vast sense of vulnerability amongst the United States citizens and provided an opportune moment to push for a nation-wide health care program.¹⁸

In 1932, Franklin Roosevelt, the newly elected president, came into office with change in mind.¹⁹ Roosevelt, through his “Fireside Chats” and proposed “New Deal,” provided great comfort to Americans during a time of economic struggle.²⁰ At this time, his inter-dependence ideas were widely accepted.²¹ The birth of the Social Security Act sprouted out of the many federal organizations and administrations established under the Roosevelt administration.²² In 1934, Roosevelt assembled the Committee on Economic

states to implement laws mandating employers to insure their workers against industrial accidents. *Id.*

10. CORNING, *supra* note 1, at 120.

11. *Id.* at 11–12.

12. *Id.*

13. *Id.* at 9, 11.

14. *See id.*

15. CORNING, *supra* note 1, at 11–12.

16. *Id.* at 12–13.

17. *Id.*

18. *Id.* at 29.

19. *Id.*

20. CORNING, *supra* note 1, at 29.

21. *Id.* at 30.

22. Michele Estrin Gilman, *Legal Accountability in an Era of Privatized Welfare*, 89 CAL. L. REV. 569, 585 (2001); CORNING, *supra* note 1, at 30. Among the many agencies

Security to investigate what issues were creating the most problems for economic security of individuals, to investigate all forms of social insurances, and to formulate possible solutions to the problem.²³ The results of the committee study were not definitive; however, health insurance and unemployment insurance were the leading concerns.²⁴ Roosevelt's strong push for nation-wide health care slowly died down as opposition grew from conservatives in Congress²⁵ and as pressure grew from the American Medical Association ("AMA").²⁶ The AMA represented the voice of American physicians who strongly opposed the idea of any national health care system because of fear that it would open the door to excessive government intrusion.²⁷ In spite of the AMA's strong opposition and Roosevelt's passiveness, the Social Security Act survived heavy scrutiny and was signed on August 14, 1935.²⁸ The signing of the Social Security Act was a tremendous accomplishment and paved the road for Medicare.²⁹

The outlook of the national health care system was particularly inconsistent throughout the 1930s and 1940s.³⁰ In the late 1930s a strong wave of pro-national health insurance arose, only to be dissolved by the preoccupation of the start of World War II and the death of President Roosevelt.³¹ In

established by the Roosevelt administration in an attempt to remedy the country's economic struggle were the: Civil Works Administration (CWA); Civilian Conservation Corps (CCC); Federal Emergency Relief Administration (FERA); National Recovery Administration (NRA); and Public Works Administration (PWA). CORNING, *supra* note 1, at 30.

23. William E. Forbath, *The New Deal Constitution in Exile*, 51 DUKE L.J. 165, 207 (2001); CORNING, *supra* note 1, at 30–31. The report was given a deadline of December 1, 1934, and the list of possible programs that would assist the economic state of the country ranged from accident insurance and unemployment insurance to retirement annuities and health insurance. CORNING, *supra* note 1, at 30–31.

24. CORNING, *supra* note 1, at 30–31.

25. Theodore R. Marmor & Gary J. McKissick, *Medicare's Future: Fact, Fiction and Folly*, 26 AM. J.L. & MED. 225, 227 (2000); CORNING, *supra* note 1, at 41.

26. Emily Friedman, *The Compromise and the Afterthought: Medicare and Medicaid After 30 Years*, 274 J. AM. MED. ASS'N 278, 279 (1995).

27. See CORNING, *supra* note 1, at 16.

28. *Id.* at 41.

29. See *id.* After the signing of the Social Security Act, the Social Security Board was created under section 702 of the Social Security Act. *Id.*

30. See *id.*

31. CORNING, *supra* note 1, at 51–52. The National Health Conference, held in July of 1938, created a lot of great publicity for a national health plan and placed pressure on the leading opposition (AMA) to take a public stance as to the health care issue in the country. *Id.* In February of 1939, the "Wagner Bill," featuring improvements to the Social Security program, was proposed. *Id.* The bill was unsuccessful due to the combination of AMA's strong campaigning against the bill and the President's inability to support the bill due to his preoccupation with the start of WWII. *Id.* Roosevelt's death in 1945 also posed as another gloomy

the 1940s Harry S. Truman was another pro-national health insurance president.³² He also made a push for health insurance but was interrupted with the rise of domestic anti-communism and an economic plummet.³³ By 1949, the polls indicated that favoritism toward government health plummeted to 51 percent and that private insurance coverage amongst the population more than doubled since 1946.³⁴

In an attempt to place a more appealing spin on an openly dissatisfying proposal, Merrill G. Murray, an official of the Social Security Administration, introduced an idea that originated during the Truman administration.³⁵ Murray suggested that “[g]overnment health insurance be limited (at least at first) to social security beneficiaries.”³⁶ Limiting government health insurance was appealing to the Social Security Administration.³⁷ The idea was particularly appealing because limiting the beneficiary class to the elderly citizens addressed an already existing objective, namely, to “protect against the greatest single cause of economic dependency in old age—the high cost of medical care.”³⁸ A 1950 census showed that the population of elderly people was growing rapidly and that two-thirds of them made less than \$1000 per year.³⁹ The numbers clearly exemplified the necessity elderly people had for health insurance.⁴⁰ Murray’s suggestion of limiting medical care to the elderly provided an attractive twist to an old issue.⁴¹

event for a national health care system. Friedman, *supra* note 26, at 279. However, Truman picked up where Roosevelt left off with the introduction of the “Fair Deal.” *Id.*

32. Daniel R. Berg, M.D., *A History of Health Care for the Indigent in St. Louis: 1904–2001*, 48 ST. LOUIS U. L.J. 191, 203 (2003).

33. CORNING, *supra* note 1, at 58.

34. *Id.* at 67; see also AMY E. RADICH, M.S. IV, A BRIEF HISTORY OF THE HEALTHCARE INDUSTRY IN AMERICA <http://www.ooanet.org/pdf/OUCOMManagedcare.pdf> (last visited Feb. 2, 2005). By 1950, about 60 percent of the population had at least hospitalization coverage through private insurance, which was more than double the amount in 1946, when only about 25 percent of the population had private coverage of any kind. CORNING, *supra* note 1, at 67.

35. CORNING, *supra* note 1, at 71. The idea of limiting government health insurance to social security beneficiaries was first suggested by Dr. Thomas Parran of the Public Health Service, in 1937. *Id.* The idea was never pursued and was forgotten until Murray suggested it again in 1944. *Id.*

36. *Id.*

37. *Id.* at 72.

38. CORNING, *supra*, note 1, at 72.

39. *Id.* Corning mentioned that “[t]he 1950 census showed that the aged population had grown from 3 million in 1900 to 12 million in 1950, or from 4 to 8 percent of the total population. Two-thirds of these people had income of less than \$1,000 annually, and only 1 in 8 had health insurance.” *Id.*

40. *Id.* at 72–73. Despite the necessity that the elderly had for health insurance, private insurance coverage was not always the answer. See *id.* The older generation presented a higher risk for the private insurance companies; thus, the private insurance companies would

The initial step of implementing universal medical care for the elderly began in 1950, when the federal government enacted a program that provided “direct payments to ‘medical vendors’ for the treatment of welfare clients, including the elderly.”⁴² The “medical vendors” program was a precursor to national health insurance; however, support for the highly debated topic declined in the early to mid-1950s.⁴³ The decline in popularity of national health insurance during the mid-1950s was mainly attributed to President Eisenhower’s administration and its support for private insurance coverage.⁴⁴

The national health insurance issue did not quiet down for long.⁴⁵ The activities in Congress soon rallied talks again.⁴⁶ By 1957, the government health insurance proposal received much needed support when the Labor Federations and the American Hospital Association (“AHA”) got involved.⁴⁷ Ironically, hospitals, unlike physicians, favored nationwide health insurance.⁴⁸ Because hospitals, much like the elderly, faced economic difficulties concerning health care expenses, it was no wonder that hospitals favored a government insurance system.⁴⁹ As usual, the AMA did not miss a beat in the government health insurance system debate, but this time the AMA was willing to compromise.⁵⁰ In an effort to address the obvious economic prob-

increase their premiums or choose not to cover them at all. CORNING, *supra* note 1, at 72–73; *see also* RADICH, *supra* note 34.

41. *See* CORNING, *supra* note 1, at 72–73.

42. *Id.* at 73.

43. *See id.* at 74–75.

44. Friedman, *supra* note 26, at 279.

45. *See* CORNING, *supra* note 1, at 74–76.

46. *Id.* Four events during the 1956 session of Congress helped rally the issue of government health insurance: 1) the enactment of a Military Medicare Program, which gave government health protection to dependents of servicemen; 2) an expansion of payments to medical vendors in order to provide more medical care for welfare clients; 3) the approval, by Congress, of a \$30,000 study focusing on problems of the aged (the study resulted in a Senate sub-committee that ultimately became a forum for national health care talks); and 4) the struggle to add totally and permanently disabled persons aged fifty and older to the list of social security cash beneficiaries. *Id.* Many physicians opposed this last measure because of fear that the government would be able to manipulate medical practice, even though the bill specifically required that physicians make the determinations themselves. *Id.*

47. *Id.* at 78.

48. Friedman, *supra* note 26, at 278–79.

49. CORNING, *supra* note 1, at 78. The burden on the hospitals was so heavy that “[m]any hospital officials viewed this growing problem as a threat to the very existence of the private hospital system.” *Id.*

50. *Id.* at 80.

lems faced by the elderly, the AMA advocated for doctors to cut medical fees for elderly people.⁵¹

Once again things settled down for a while in the late 1950s.⁵² There were a number of proposed bills and suggestions that were mostly unsuccessful.⁵³ Then came the “Mills Bill” of 1960, which provided the largest break in universal health care since the creation of the “medical vendors” payment plan in 1950.⁵⁴ With the cooperation of the AMA, Chairman Mills devised a plan that intended to expand the state run medical vendor program.⁵⁵ The expansion involved the creation of a new assistance category called “medical indigency,” which was intended for elderly citizens who needed assistance with their medical expenses but did not qualify for welfare benefits.⁵⁶ The “Mills Bill” presented a number of features that were appealing to both national health partisans and non-partisans.⁵⁷ In summary,

[The Bill] was more modest in cost and scope than either the Forand bill or the Republican “subsidy” plan; from a technical standpoint it was a logical first step; it was a “Democratic bill” in a Democratic Congress and was sponsored by the respected Ways and Means Committee chairman; and, not least, it had the backing of the AMA.⁵⁸

The Mills proposal (H.R. 12580) received immediate approval and swept right through the Ways and Means Committee, House Rules Committee, and the House of Representatives.⁵⁹ The proposal was modified and amended once it reached the Senate, but the “Mills Bill,” later re-named the “Kerr-Mills Bill,” was finally signed into law (Public Law 86–778) on Sep-

51. *Id.* The AMA preferred that physicians and hospitals address the issue on their own, rather than promoting government intervention. *Id.*

52. Friedman, *supra* note 26, at 279.

53. Will Mallon, *What is Medicare?*, CTR. FOR HISTORY GEO. MASON, July 21, 2003, at <http://www.historynewsnetwork.com/articles/1583.html>; see also CORNING, *supra* note 1, at 83–85. The “Flemming Bill,” which was proposed to assist states in subsidizing private health insurance premiums for low income elderly by providing federal grants, was just one proposal that arose and was quietly put to rest during the Eisenhower administration. CORNING, *supra* note 1, at 83. The “Forand Bill” was yet another casualty of the times. *Id.* at 83–85.

54. CORNING, *supra* note 1, at 83–85.

55. *Id.*

56. *Id.* at 85.

57. CORNING, *supra* note 1, at 85.

58. *Id.*

59. *Id.*

tember 13, 1960.⁶⁰ The “Kerr-Mills Bill” marked the first time that a prospective health insurance proposal obtained a floor vote in the United States Senate and was approved.⁶¹ Although government health insurance advocates were not fully satisfied with the bill, it served as a significant building block.⁶²

Despite the now newly enacted Kerr-Mills Act, the pressure for national health insurance for the elderly persisted.⁶³ Senator John F. Kennedy based his campaign for presidency on a pro-Medicare stance and won the election.⁶⁴ The beginning of President Kennedy’s term was preoccupied with a mild recession, but nonetheless, Kennedy eventually brought the focus back to his proposed Medicare plan.⁶⁵ The push for Medicare was propelled by the inadequacy of the Kerr-Mills Act.⁶⁶ Through the first eighteen months of the Act’s implementation, reports showed that only 88,000 elderly citizens, spread mainly throughout only four states, benefited from the Act.⁶⁷ The inability for the elderly to cover medical expenses began to weigh heavily on private insurance companies because medical treating facilities began to offset their losses by increasing costs of medical services across the board.⁶⁸ Furthermore, the elderly population continued to grow while the average cost for hospital care increased at a rate of 6.7 percent per year.⁶⁹

As a result of the disappointing numbers for the Kerr-Mills Act, the predominant number of Democrats both in the House and in the Senate, and Kennedy as President, the stage was set for Medicare to prevail.⁷⁰ However, the moment was cut short when President Kennedy was assassinated in

60. *Id.* at 85–86. The Democrats favored the government health insurance embodied in the bill, while the Republicans modified the bill with a “subsidy” plan. *Id.* at 86. Both suggestions were defeated and the differences between the parties were resolved in a Senate-House conference, which eventually led to the signing of the bill into law. CORNING, *supra* note 1, at 86.

61. *Id.* at 86–87.

62. See Donald R. Wolfensberger, *Federal Involvement in Healthcare: An Historic Perspective, An Introductory Essay for the Congress Project Seminar on Congress and Healthcare Policy*, Sept. 13, 2004, <http://wwics.si.edu/events/docs/hlthcare-essay.pdf>.

63. See CORNING, *supra* note 1, at 87.

64. *Id.*

65. *Id.* at 88–89.

66. HOUGHTON MIFFLIN COMPANY, MEDICARE, at http://college.hmco.com/history/readercomp/rcah/html/ah_058600_medicare.htm (last visited Feb. 2, 2005) [hereinafter MEDICARE].

67. CORNING, *supra* note 1, at 93–98.

68. *Id.* at 102–03. Only fifty percent of the elderly population was privately covered in 1963. *Id.*

69. *Id.* at 101–02. The elderly population grew from 12 million, or 8.1 percent of the total population, in 1950 to 17.5 million, or 9.4 percent of the total population, by 1963. *Id.*

70. See CORNING, *supra* note 1, at 104.

1963.⁷¹ Lyndon B. Johnson became President and immediately picked up where Kennedy left off.⁷² President Johnson managed to utilize the public sentiment to get many Kennedy endorsed bills to be passed, but the Medicare bill was not one of the successfully passed bills.⁷³

It was not until the introduction of the King-Anderson bill that Medicare made its final break-through.⁷⁴ Initially, the King-Anderson bill was denied by the Ways and Means Committee, but the bill managed to linger around long enough to obtain Senate approval.⁷⁵ The bill underwent a number of revisions and by spring of 1965, it was introduced on the House floor as the "Mills Bill" (H.R. 6675).⁷⁶ On April 8, 1965, the Mills Bill was approved by the House of Representatives.⁷⁷ It took four additional months of revisions, debates, and amendments before the final version of the bill was completed and approved by the House and the Senate.⁷⁸ On July 30, 1965, in Independence, Missouri, President Johnson signed Medicare into law and the United States finally had a national health care plan for its elderly.⁷⁹

III. THE MODERN MEDICARE PROGRAM IN THE UNITED STATES

A. *The Evolving Medicare Program*

The concept of Medicare began as a national health plan, which was to subsidize medical coverage for the elderly. By 1972, the program expanded to include coverage for disabled people and those patients with end-stage renal disease.⁸⁰ Medicare was an optimistic program, providing health care

71. THE WHITE HOUSE: LYNDON B. JOHNSON, at <http://www.whitehouse.gov/history/presidents/lj36.html> (last visited Feb. 4, 2005).

72. CORNING, *supra* note 1, at 106.

73. *Id.* at 106–07.

74. *See id.* at 107–09.

75. Wolfensberger, *supra* note 62, at 5–7. The King-Anderson bill actually failed twice. CORNING, *supra* note 1, at 108. However, on its second turn around, there were enough votes on the floor for the bill to attach to H.R. 11865 as an amendment, even without committee approval. *Id.*

76. CORNING, *supra* note 1, at 113. Chairman Mills finally sided with Medicare and took it upon himself to revise the King-Anderson bill into its final form, which was then renamed as the "Mills Bill" (not to be confused with the bill Chairman Mills introduced in 1960). *Id.* By the time the bill was approved by the Senate and the House in July of 1965, the bill underwent a total of 513 revisions or amendments. *Id.*

77. Wolfensberger, *supra* note 62, at 7.

78. CORNING, *supra* note 1, at 113–15.

79. *Id.* at 120.

80. Friedman, *supra* note 26, at 280.

security to those in need of assistance.⁸¹ However, it did not take long before the negative effects of the program started to shine through.⁸² Within the first couple months after the program began, there were significant increases in medical expenses across the nation.⁸³ The increase was attributable to the following: increased spending on services provided to beneficiaries, an unexpected increase in the number of Medicare beneficiaries,⁸⁴ and the hike in medical services charges.⁸⁵ Hospitals and physicians began to take advantage of the favorable payment system in place.⁸⁶ “Between the years of 1967 and 1971, the daily charges of American hospitals ‘increased at’ an average of thirteen percent per year.”⁸⁷

Creating reforms to impede the inflation of Medicare expenditure became a huge focus during the 1970s.⁸⁸ Congress attempted to freeze the rise in spending by developing a number of reform measures, such as: generating different reimbursement techniques, creating professional review organizations (to implement national cost controls over hospitals),⁸⁹ and creating a new administration called the Health Care Financing Administration (separating Medicare from Social Security).⁹⁰ One of the reimbursement techniques that temporarily froze the climbing increase in medical expenses during the 1970s was the concept of basing the reimbursement rates on a Medicare Economic Index (“MEI”).⁹¹ Despite the implementation of the MEI and other techniques, the national health expenditure continued to increase at a steadfast pace.⁹²

81. See 42 U.S.C. § 1395a (2000).

82. See Friedman, *supra* note 26, at 280–81.

83. *Physician Payments: Hearing on H.L. 12 Before the House Comm. on Ways and Means*, 107th Cong. (2002) (statement of Dan L. Crippen, Director, Congressional Budget Office) <http://www.waysandmeans.house.gov/legacy/health/107Cong/2-28-02/2-28crip.htm> [hereinafter *Physician Payments*].

84. Friedman, *supra* note 26, at 280.

85. *Physician Payments*, *supra* note 83.

86. Theodore R. Marmor & Gary J. McKissick, *Medicare's Future: Fact, Fiction, and Folly*, 26 AM. J.L. & MED. 225, 230 (2000). When hospitals were reimbursed their “reasonable costs” and physicians were reimbursed their “customary charge,” hospitals and physicians began to exploit the system. *Id.*

87. *Id.* at 231. The total expenditure for Medicare went up to \$7.9 billion in 1971 from \$4.6 billion in 1967. *Id.* During the spending increase, the total number of Medicare beneficiaries only rose by six percent. *Id.*

88. *Physician Payments*, *supra* note 83.

89. Friedman, *supra* note 26, at 280.

90. Marmor & McKissick, *supra* note 86, at 231–32.

91. *Physician Payments*, *supra* note 83.

92. Marmor & McKissick, *supra* note 86, at 232.

In the 1980s Congress decided to take a more aggressive stance by creating a completely new reimbursement rate.⁹³ The new plan was to incorporate a Prospective Payment System (“PPS”), which established a method of reimbursing hospitals on a fixed rate for each patient discharged no matter the costs incurred by the hospitals.⁹⁴ The PPS reimbursement rate continues to be utilized today.⁹⁵ The main incentive behind PPS was to promote cost efficiency by discouraging hospitals from spending unnecessary time and resources.⁹⁶ The reimbursement formula is composed of a three-pronged system.⁹⁷ First, the Secretary of the Department of Health and Human Services (the “Secretary”) must establish a predetermined national rate for all patient discharge costs,⁹⁸ which is done as follows:

PPS is based on a standardized amount that is multiplied by a weighing factor. 42 U.S.C. § 1395ww(d)(2)(G), (3)(D). The standardized amount is a base amount that equals the average Medicare allowable costs per discharge for all hospitals participating in the Medicare program in a base year, which is adjusted according to regional wage variations, indirect medical education costs, and hospital case mix. 42 U.S.C. § 1395ww(d)(2). The weighing factor is a multiplier based on the diagnosis related group (“DRG”) in which the discharged patient’s illness falls. The Secretary has created 470 DRGs, each with a weight derived from the relative cost to treat a patient in that DRG. 42 U.S.C. § 1395ww(d)(4).⁹⁹

Once the predetermined national rate for all patient discharges is determined, the next step is to determine the amount of reimbursement per Medicare patient discharge.¹⁰⁰ At this point, the Secretary must place each participating hospital in one of three geographical areas, which are categorized as “large urban,” “other urban,” or “rural.”¹⁰¹ The area in which a hospital is categorized will “determine the hospital’s ‘average standardized amount per discharge’ payment and the applicable area wage index, and are the organ-

93. *Id.* at 233.

94. *Alvarado Cmty. Hosp. v. Shalala*, 155 F.3d 1115, 1119 (9th Cir. 1998) (citing 42 U.S.C. § 1395ww(d)(1)).

95. *See* 42 U.S.C. § 1395ww (Supp. 2000).

96. *Alvarado Cmty. Hosp.*, 155 F.3d at 1119.

97. *See Coalition For Reclassification v. Sullivan*, No. 1:92CV242-B-O, 1992 WL 443455, at *1–2 (N.D. Miss. Jan. 25, 1992); *Alvarado Cmty. Hosp.*, 155 F.3d at 1119.

98. *Alvarado Cmty. Hosp.*, 155 F.3d at 1119.

99. *Id.*

100. *Coalition For Reclassification*, 1992 WL 443455, at *1.

101. *Id.*

izational basis for reimbursement under the [PPS].”¹⁰² Lastly, the system accounts for “outlier” cases, which are those cases that result in longer and more expensive treatments than are usually the case for the designated DRG.¹⁰³

The PPS reimbursement rate was first put into practice on October 1, 1983, and it took over four years before the system was applied to all hospitals.¹⁰⁴ The implementation of PPS considerably slowed down medical expenditures, but it did not provide for a permanent fix.¹⁰⁵ There have been some payment adjustment programs added to PPS since its inception.¹⁰⁶ One of the added programs was the Medicare Disproportionate Share (“DSH”) Payments.¹⁰⁷ It provides extra financial assistance to hospitals that treat a larger number of low-income patients.¹⁰⁸ Although there have been some

102. *Id.*

103. *Alvarado Cmty. Hosp.*, 155 F.3d at 1119. The outliers were calculated as follows: “Day outliers” occur when a patient’s length of stay (“LOS”), measured in days, exceeds the mean LOS for a particular DRG by a fixed number of days or standard deviations. 42 U.S.C. § 1395ww(d)(5)(A)(i). “Cost outliers” occur when the cost exceeds a fixed multiple of a particular DRG’s payment rate or when it exceeds the rate by a fixed dollar amount. 42 U.S.C. § 1395ww(d)(5)(A)(ii). The amount for additional payments for these cases “shall be determined by the Secretary and shall approximate the marginal cost of care” beyond the applicable cut-off point. 42 U.S.C. § 1395ww(d)(5)(A)(iii). Finally, the statute provides that [t]he total amount of the additional payments made under this subparagraph for discharges in a fiscal year may not be less than 5 percent nor more than 6 percent of the total payments projected or estimated to be made based on DRG prospective payment rates for discharge in that year. 42 U.S.C. § 1395ww(d)(5)(A)(iv) (“Clause (iv)”) (emphasis added).

Id.

104. *Id.* (citing 42 U.S.C. § 1395(d)(1)(A)(i)). During the years that the PPS was being incorporated nationwide, the Secretary performed a two-portion reimbursement method that consisted of a “hospital specific portion” and a “federal rate.” *Id.* The court in *Alvarado Community Hospital* explained it as follows:

The “hospital specific portion” was calculated under the prior system, based on the hospital’s actual costs. 42 U.S.C. § 1395ww(d)(1)(A), (C). The other portion, the “federal rate,” was determined under PPS. The hospital specific portion of the reimbursements was 75% in FY 1984, 50% in FY 1985, 45% in 1986, and 25% in 1987, while the federal rate increased correspondingly. 42 U.S.C. § 1395ww(d)(1)(C). Thereafter, all reimbursements were calculated under PPS.

Id. (citation omitted).

105. Marmor & McKissick, *supra* note 86, at 233.

106. See Association of American Medical Colleges, *Medicare Disproportionate Share (DSH) Payments*, at <http://www.aamc.org/advocacy/library/teachhosp/hosp0003.htm> (last visited Feb. 2, 2005) [hereinafter *DSH Payments*].

107. *Id.*

108. *Id.* “Low income Medicare patients tend to be sicker and more costly to treat than other Medicare patients with the same diagnosis.” *Id.*

additions and proposed reforms to PPS, it has gone largely untouched and continues to be the reimbursement rate used today.¹⁰⁹

B. *The Social and Economical Effects of Medicare in the United States*

The citizens of the United States have had, and continue to have, serious concerns about their medical health care coverage because having health care coverage means having a bit of economic security.¹¹⁰ The poor and the elderly have historically been, and continue to be, the groups that would benefit the most from a national health coverage plan. Hence, the creation of programs that assist the neediest people first would be the most logical approach.¹¹¹ Medicare was one of those programs.¹¹² The program has provided, and continues to provide, millions of beneficiaries with the medical coverage they need and a taste of the economic security they seek.¹¹³

According to the statistics provided by the Health Care Financing Administration (“HCFA”), Medicare has helped keep millions out of poverty “[b]y [simply] reducing the amount of money the elderly had to pay for health care.”¹¹⁴ The statistics showed that before Medicare was implemented, an average of one in every three senior citizens was living at or below poverty level.¹¹⁵ Senior citizens who were living off of social security were forced to pay for over fifty-three percent of their health care costs out of pocket, which generally consumed about twenty-four percent of their social security checks per month.¹¹⁶ In 1997, HCFA statistics showed that on average, the elderly were paying for only eighteen percent of their medical expenses out of pocket and that the amount of senior citizens living at or below poverty level dropped to one in every ten.¹¹⁷

In addition to the financial assistance provided to the elderly, Medicare has also improved the quality of life and life expectancy amongst Americans

109. See 42 U.S.C. § 1395ww.

110. See CORNING, *supra* note 1; International Association of Machinists and Aerospace Workers, *Social Security/Medicare*, at <http://www.iamaw.org/politics.asp?n=2&c=857> (last visited Feb. 2, 2005) [hereinafter IMAAW].

111. See CORNING, *supra* note 1; Friedman, *supra* note 26, at 280. Statistically, the poor get sicker more often and stay sicker longer than the rich. See *DSH Payments*, *supra* note 106.

112. See Friedman, *supra* note 26, at 280.

113. See *id.*

114. *Id.*; see HEALTH CARE FINANCING ADMINISTRATION, *MEDICARE: A PROFILE 33 (2000)* <http://www.cms.hhs.gov/statistics/35chartbk.pdf> [hereinafter PROFILE OF MEDICARE BENEFICIARIES].

115. PROFILE OF MEDICARE BENEFICIARIES, *supra* note 114, at 33.

116. *Id.* at 33–34.

117. *Id.* at 33.

in general.¹¹⁸ The survey conducted by HCFA in 1999 showed that there has been a dramatic increase in access to medical care and medical coverage amongst Americans since the inception of Medicare in 1965.¹¹⁹ The improved health care system has led to a twenty percent increase in the life expectancy of the average sixty-five year old American.¹²⁰ Lastly, Medicare has improved access to medical care for minority and disabled Americans.¹²¹ In order for hospitals and physicians to participate in the program, the government implemented a non-discrimination policy as a condition to obtain the federal funds provided from Medicare.¹²²

Despite all the positive contributions Medicare has imparted thus far, there continues to be serious issues about the inadequate funding given to health care.¹²³ The cost of medical health care continually rises on a yearly basis due to the constant improvements in medical technology and its infrastructure, which also results in an increase in Medicare expenditures.¹²⁴ Even with estimated benefit payments that exceed \$234,970,769,877, as reported in the fiscal year of 2001,¹²⁵ there continues to be a need for more funding because too many Americans are still going without adequate health care services.¹²⁶

118. *Id.*

119. *Id.* The numbers provided by HCFA, in their 2000 profile, were as follows: “[h]ospital discharges averaged 190 per 1,000 elderly in 1964 and 350 per 1,000 by 1973; the proportion of elderly using physician services jumped from 68 to 76 percent between 1963 and 1970. [In 1999], more than 94 percent of elderly beneficiaries receive a health care service paid for by Medicare.” PROFILE OF MEDICARE BENEFICIARIES, *supra* note 114, at 33.

120. *Id.*

121. *Id.* at 34.

122. 42 U.S.C. § 608(d) (2000); *see also* PROFILE OF MEDICARE BENEFICIARIES, *supra* note 114, at 34.

123. *See* Friedman, *supra* note 26, at 280; IAMA, *supra* note 110; Reed Abelson, *Hospitals Say They're Penalized by Medicare for Improving Care*, N.Y. TIMES, Dec. 5, 2003, at A1.

124. RANDALL HAUGHT ET AL., FINANCIAL IMPACT OF IMPROVED MEDICARE REIMBURSEMENT FOR RURAL HOSPITALS 1-2 (2003), <http://www.nrharural.org/blasts/Lewin-Reach.pdf>.

125. CENTERS FOR MEDICARE & MEDICAID SERVICES, MEDICARE ESTIMATED BENEFIT PAYMENTS BY STATE FISCAL YEAR 2001 <http://www.cms.hhs.gov/researchers/pubs/datacomp-ndium/2003/03pg71.pdf> (last visited Feb. 2, 2005).

126. *See* David Demko, *Empty Wallet New Cause of Elder Death*, SENIOR WORLD ONLINE, at <http://www.seniorworld.com/articles/a20000330192223.html> (last modified Mar. 30, 2000); Patricia Barry, *Chasing Drugs: Many Readers Take Drastic Steps to Get Prescription Medicine*, AARP BULLETIN ONLINE, Oct. 2003, at http://www.aarp.org/bulletin/prescription/Articles/a2003-09-29-chasing_drugs.html.

There are hospitals that are taking significant financial losses each year simply because they do not receive adequate reimbursements from the Medicare program.¹²⁷ Low reimbursement rates impact more than just hospitals; they also affect the social and economic status of the United States.¹²⁸ Generally, the elderly and the poor are most affected by reductions in government programs because they are in the most need for such assistance.¹²⁹ However, low Medicare reimbursement rates also affect the middle and upper classes due to medical providers' "balance billing" techniques, also known as "cost shifting."¹³⁰ "Cost shifting" is the method in which hospitals make up for their financial losses.¹³¹ The costs that hospitals incur from treating the poor who are not adequately covered by Medicare reimbursements or other such programs are passed onto the rest of the nation through cost increases.¹³² Furthermore, the financial dilemmas that many elderly Americans are facing today, create the very same nationwide insecurities that were suppose to be overcome with the creation of Medicare.¹³³ Clearly, the Medicare program has provided some financial relief to an extremely needy health care system, but the system is still in terrible need of more financial support.

IV. MEDICARE AS APPLIED TO PUERTO RICO

A. *Puerto Rico and Its Integration into the Program*

Puerto Rico was originally a Spanish colony from the year 1493 until 1898, the year the Spanish-American War ended and Spain was forced to surrender the island by virtue of defeat.¹³⁴ The island was officially ceded to

127. See Abelson, *supra* note 123; Press Release, Schumer Unveils Plan to Reverse Impact of Medicare Cuts that Began on October 1 (Oct. 22, 2002), at http://schumer.senate.gov/SchumerWebsite/pressroom/press_releases/PR01264.html [hereinafter *Schumer Unveils Plan*].

128. See HAUGHT, *supra* note 124, at 1–2; Abelson, *supra* note 123; CORNING, *supra* note 1, at 78, 102; Friedman, *supra* note 26, at 280; Marmor & McKissick, *supra* note 86, at 231.

129. See IAMAW, *supra* note 110.

130. *Physicians Payments*, *supra* note 83. See also CORNING, *supra* note 1, at 78, 102; FRIEDMAN, *supra* note 26, at 280.

131. FRIEDMAN, *supra* note 26, at 280.

132. *Id.*

133. See IAMAW, *supra* note 110; CORNING, *supra* note 1, at 28–33; Demko, *supra* note 126; Barry, *supra* note 126.

134. Puerto Rico Industrial Development Company of the Commonwealth of Puerto Rico, *The Commonwealth Relationship*, at http://www.pridco.com/english/overview/2.2pr_overview_commonwealth.html (last visited Feb. 4, 2005) [hereinafter *The Commonwealth Relationship*].

the United States in the Treaty of Paris in 1898.¹³⁵ By 1900, the United States Congress passed the Foraker Act, which set up a United States government system in Puerto Rico with a United States governor, an upper legislative chamber, an elected house of delegates, and “Congress was given the right to review all legislation.”¹³⁶

The island slowly obtained more and more autonomy as the years passed.¹³⁷ For instance, the people of Puerto Rico were granted United States citizenship in 1917 under the Jones Act, and by 1948, the governor of Puerto Rico was no longer appointed by the United States President; the Puerto Rican people were given the right to have a popular election in order to elect their own governor.¹³⁸ Finally, the island was proclaimed a Commonwealth in 1952 through operation of Law 600 of 1952, which continues to be its status today.¹³⁹ As a Commonwealth of the United States, the island operates under both its own laws and Constitution and the laws and Constitution of the United States.¹⁴⁰ The Commonwealth is not allowed to vote in the general elections,¹⁴¹ nor does it have a vote in Congress.¹⁴² However, its people are allowed to vote in the presidential primaries, have a non-voting seat in the United States House of Representatives, and are represented in Congress by an elected Resident Commissioner.¹⁴³

The residents of Puerto Rico are subject to many United States laws.¹⁴⁴ As participants in the United States Medicare System, the residents of Puerto Rico are particularly subject to the Medicare legislation set out by Congress.¹⁴⁵ The residents of Puerto Rico contribute to the Medicare fund and in return, they are entitled to benefits.¹⁴⁶ Prior to 1983, Medicare reimburse-

135. COLUMBIA ENCYCLOPEDIA, ENCYCLOPEDIA .COM, PUERTO RICO, at http://www.encyclopedia.com/html/section/puertori_history.asp (last visited Feb. 4, 2005).

136. *Id.*

137. *The Commonwealth Relationship*, *supra* note 134; COLUMBIA ENCYCLOPEDIA, *supra* note 135.

138. COLUMBIA ENCYCLOPEDIA, *supra* note 135.

139. *Commonwealth Relationship*, *supra* note 134.

140. *Id.*

141. *Id.*

142. Jamin Raskin, *A Right-to-Vote Amendment for the U.S. Constitution: Confronting America's Structural Democracy Deficit*, 3 ELECTION L.J. 559, 565 (2004).

143. *Commonwealth Relationship*, *supra* note 134.

144. *Id.*

145. *See Hosp. San Rafael, Inc. v. Sullivan*, 784 F. Supp. 927, 930 (D.P.R. 1991).

146. INTERNAL REVENUE SERVICE, TEMA 903 - IMPUESTOS PATRONALES (FEDERALES) EN PUERTO RICO, at <http://www.irs.gov/taxtopics/tc903.html> [hereinafter TEMA 903]. Puerto Rico and the rest of the United States are taxed 6.2% of their first eighty-seven thousand dollars earned in a year in order to fund social security and 1.45% of their entire yearly wages in order to fund Medicare. *Id.*

ments to all qualified participants were based on the same cost-based system, where the health care providers were reimbursed based on their actual costs.¹⁴⁷ However, since the implementation of PPS in 1983, the reimbursement rates for Puerto Rico qualified Medicare providers has been much lower than the rates given to the providers located in the states.¹⁴⁸

The integration of PPS, among the mainland states, began in 1983 and it took four years before the system was fully implemented across all Medicare participating hospitals.¹⁴⁹ The Omnibus Budget Reconciliation Act of 1986 (“OBRA”) initiated PPS in Puerto Rico, but it was not actually implemented until September of 1987.¹⁵⁰ PPS was made applicable to Puerto Rico in a different manner than it was applied in the mainland states.¹⁵¹ OBRA presented a seven-step process that was to be applied in order to determine the PPS rate for Puerto Rican Medicare providers.¹⁵² The system was adequately summarized in *Hospital San Rafael v. Sullivan*¹⁵³ as follows:

(1) *Determination of Target Amounts*

The Secretary first determines the “target amount” for each participating Puerto Rico Hospital. 42 U.S.C. § 1395ww(b)(3)(A). The target amount represents the actual costs borne by each hospital in a base year. The use of these target amounts as the basis for determining PPS rates is meant to insure that payment under PPS will closely approximate the actual economic experiences of Puerto Rico hospitals.

(2) *Updating the Target Amounts*

The target amounts are then updated for inflation to mid-fiscal year 1988 levels by prorating the applicable percentage increase for fiscal year 1988. See 42 U.S.C. § 1395ww(b)(3)(B).

(3) *Standardizing the Target Amounts*

After arriving at updated target amounts . . . the Secretary [is] to remove distorting effects stemming from several sources, in-

147. *Sullivan*, 784 F. Supp. at 929 (D.P.R. 1991) (referencing Title XVIII of the Social Security Act, 79 Stat. 291, amended by, 42 U.S.C. § 1395 et seq.).

148. See *id.* at 929–32.

149. *Id.* at 930.

150. *Id.*

151. *Id.*

152. *Sullivan*, 784 F. Supp. at 930–32.

153. *Id.* at 927.

cluding variations in area wage levels. 42 U.S.C. §§ 1395ww(d)(2)(C)(ii), 1395ww(d)(9)(B)(ii); *See generally* 52 Fed. Reg. 33,034, 33,066 (Sept. 1, 1987) . . .

(4) *Determination of the Discharge-Weighted Average*

Following the standardizing of the target amounts, the Secretary determines the average standardized amount per discharge in urban and rural settings for Puerto Rico. 42 U.S.C. § 1395ww(d)(9)(B)(iii). These amounts are arrived at by first determining the total labor-related and nonlabor-related standardized costs for urban and rural areas of Puerto Rico. This is reached by adding the target amounts for each hospital in each area. The four total costs are divided by the total number of discharges in urban and rural areas, respectively. This process yields four standardized average amounts per discharge: two for labor and nonlabor costs in Puerto Rico's urban areas; and two for labor and nonlabor costs in Puerto Rico's rural areas. *See* 52 Fed. Reg. at 33,062, 33,070, Table 1c.

(5) *Adjustment for Outlier Payments*

The Secretary is . . . to adjust the average standardized amounts to account for [outlier] payments by estimating the degree to which outlier payments will be made in each urban and rural area. The average standardized amounts are then reduced proportionally.

(6) *Adjustment for Differences in Area Wage Levels*

The Secretary reemploys the wage index to adjust the average urban and rural standardized amounts, arrived at in steps one through five, to account for variations in area wage levels. 42 U.S.C. § 1395ww(d)(9)(B)(vi). This is done by multiplying the labor-related portion of the average standardized amounts by the "appropriate wage index for the area in which the hospital is located." 52 Fed. Reg. at 33,065. The use of the wage index here differs from the use of the wage index to adjust for variations in area wages discussed in the context of step three Here, the discharge-weighted average standardized amounts are multiplied by the appropriate wage index.

(7) *Determination of Payment Rates Per DRG*

The final step in determining PPS rates for Puerto Rico hospitals involves the addition of the average adjusted standardized

labor-related amount for urban areas, arrived at in step six, to the nonlabor-related average standardized amount for urban areas. The average standardized amounts for rural areas are similarly added. The total adjusted average standardized urban amount per discharge is then multiplied by the predetermined weighting factor corresponding to a particular DRG. This product determines the payment rate for that ailment rendered at a hospital in either an urban or rural area. Since Congress has specified that the overall PPS payment rate for Puerto Rico providers is to consist of a blend of seventy-five percent of a Puerto Rico adjusted rate and twenty-five percent of the national rate, 42 U.S.C. §§ 1395ww(d)(9)(A); 42 C.F.R. section 412.204, seventy-five percent of this figure is added to twenty-five percent of the national rate for the same DRG to reach the overall amount to be paid to the Puerto Rico hospital.¹⁵⁴

Since *Sullivan*, the reimbursement rate has undergone some reform in regards to how it applies to Puerto Rico.¹⁵⁵ Originally, the PPS payment rate for Puerto Rico consisted of a blend of seventy-five percent based on the Puerto Rico adjusted rate and twenty-five percent based on the national adjusted rate.¹⁵⁶ From the inception of PPS, the people of Puerto Rico would have preferred a reimbursement rate solely based on national rates, just like the one applied to the mainland states, but unfortunately, that was not the case.¹⁵⁷ The special PPS rate resulted in lower federal funds being supplied to Puerto Rico, which was appealing to many because it helped keep Medicare costs down.¹⁵⁸ The Commonwealth also had to contend with the fact that it did not have any voting representation in Congress, which made it

154. *Id.* (internal footnotes omitted). The court went on to explain how wages were also taken into consideration in order to better standardize the target amounts:

To effect this standardization for the cost variation at issue in this action—differences in area wage levels—the Secretary first divides the target amounts into labor and nonlabor components derived from the national hospital market basket. This division is necessary since wages correspond only to the labor-related costs of a hospital. The labor component is 74.39% of each hospital's updated target amount. 52 Fed. Reg. at 33,044. In order to remove the effect of disparate wages, this labor component is divided by a wage index for the geographic area in which each hospital is located. This yields a standardized target amount taking into account variations in area wage levels.

Sullivan, 784 F. Supp. at 930–31. The hospital market basket is a price index compiled from prices of various categories of goods and services purchased by hospitals across the nation, including Puerto Rico. *Id.* at 930 n.4.

155. See *Move to Increase Puerto Rico Medicare*, *supra* note 5.

156. See *Sullivan*, 784 F. Supp. at 932; *Move to Increase Puerto Rico Medicare*, *supra* note 5.

157. *Move to Increase Puerto Rico Medicare*, *supra* note 5.

158. *Id.*

virtually impossible for the Commonwealth to obtain the reimbursement rate its people wanted.¹⁵⁹ Ultimately, the implementation of the special formula was justified at the time by the fact that costs in Puerto Rico were drastically lower than the rest of the nation; thus, this resulted in the need to provide the island with more financial backing was not pressing.¹⁶⁰

By 1997, due to a strong lobbying effort from the Resident Commissioner of Puerto Rico, assistance from democratic representatives in Congress, and a strong push from the Clinton Administration, the Puerto Rico reimbursement rate was amended.¹⁶¹ The newly amended rate was now based on fifty percent of the Puerto Rico adjusted rate and fifty percent of the national rate.¹⁶² The rate change made an immediate and apparent contribution within the first year of its implementation, when it provided the island hospitals an additional \$44 million in health care assistance.¹⁶³ The Clinton Administration attempted to achieve another amendment to the reimbursement rate in 2000 by proposing that the rate be based on seventy-five percent of the national adjustment rate and only twenty-five percent on the Puerto Rico rate.¹⁶⁴ This proposal was heavily opposed in Congress and was ultimately denied.¹⁶⁵

The “fifty-fifty” reimbursement rate remained in place until its amendment under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 (“Modernization Act”).¹⁶⁶ Initially presented under the Medicare Puerto Rico Hospital Payment Parity Act of 2003 (“the Parity Act”), the proposed amendment presented itself as a second chance at changing the Puerto Rico rate from “fifty-fifty” to seventy-five percent national adjustment rates and twenty-five percent Puerto Rico rates.¹⁶⁷ On December 8, 2003, the amendment was included within the newly approved Moderniza-

159. *Id.*

160. *Id.*

161. *Id.* Leading the lobby for equality in the reimbursement rates was then-Resident Commissioner of Puerto Rico, Carlos Romero-Barcelo and then-Governor of Puerto Rico, Pedro Rossello. *Move to Increase Puerto Rico Medicare*, *supra* note 5. Other politicians and organizations that provided much needed support was then-House Hispanic Caucus Chair Xavier Becerra (D-CA), Senator Bob Graham (D-FL), the Puerto Rican Hospital Association, the New York Hospital Association, and Puerto Rico’s Association’s Lobbyists. *Id.*

162. *Id.*

163. *Id.* The additional funding range estimated at the time anticipated an increase in funds from \$50 million to \$75 million a year. *Id.*

164. *Move to Increase Puerto Rico Medicare*, *supra* note 5.

165. *Id.*

166. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 504, 117 Stat. 2066, 2292-93 (2003).

167. Medicare Puerto Rico Hospital Payment Parity Act of 2003, S. 653, 108th Cong. § 2 (2003).

tion Act signed by President George W. Bush.¹⁶⁸ Although the amendment went against President Bush's objective of luring "people away from a reliance on Medicare to private insurance plans to reduce costs," a compromise was reached and the amendment went forward.¹⁶⁹

The amendment to the Modernization Act proposes a gradual change toward the new percentages. Starting April 1, 2004, through October 1, 2004, "the applicable Puerto Rico percentage [will be] 37.5 percent and the applicable federal percentage [will be] 62.5 percent."¹⁷⁰ The percentages will then take final form starting and continuing on from October 1, 2004, at the rate of twenty-five percent based on the applicable Puerto Rico percentage, and seventy-five percent based on the federal percentage.¹⁷¹ The Resident Commissioner of Puerto Rico, Anibal Acevedo Vila, anticipates that the amended rates will provide the health care system in Puerto Rico with an average of \$300 million per year over the next decade.¹⁷² Vila also claims that the amendment will provide prescription drug coverage for an additional 250,000 Medicare enrollees on the island that were presently not receiving any such coverage.¹⁷³ The amendment has significantly advanced Puerto Rico's pursuit toward equalizing the reimbursement rates, but there is still much room for progress.¹⁷⁴

B. *A Closer Look at the Special Reimbursement Rate*

Currently, and in years prior, Puerto Ricans have been subject to the same Social Security and Medicare taxes as any other U.S. citizen.¹⁷⁵ In order to fund Social Security, the first \$87,000 made each year, by all employ-

168. See Medicare Prescription Drug, Improvement, and Modernization Act of 2003 § 504; *Move to Increase Puerto Rico Medicare*, *supra* note 5.

169. *Move to Increase Puerto Rico Medicare*, *supra* note 5. President Bush attempted to lure people away from Medicare by creating outpatient prescription drug benefits that would provide incentives for people to move toward more of a private insurance plan basis. *Id.* Ultimately, the compromise was that the new "legislation would provide equal prescription drug subsidies under both Medicare and private insurance plans." *Id.*

170. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 504, 117 Stat. 2066, 2292-93 (2003).

171. *Id.*

172. Significativo el Impacto, *supra* note 5.

173. *Id.*

174. See Medicare Prescription Drug, Improvement, and Modernization Act of 2003 § 504; Significativo el Impacto, *supra* note 5.

175. TEMA 903, *supra* note 146; see also SOCIAL SECURITY ONLINE, SOCIAL SECURITY & MEDICARE TAX RATES, at <http://www.ssa.gov/OACT/ProgData/taxRates.html> (last visited Feb. 3, 2005).

ees in the United States and in Puerto Rico, are subject to a 6.2 percent tax.¹⁷⁶ Likewise, Medicare is funded by imposing a 1.45 percent tax on all income made by employees in a year.¹⁷⁷ Despite being subject to the same Medicare and Social Security taxes, participating hospitals on the island are subject to special reimbursement rates, which result in lesser payment levels.¹⁷⁸ According to Centers for Medicare & Medicaid Services, 560,725 Puerto Ricans were enrolled in the Medicare program in 2002,¹⁷⁹ and the Medicare participating hospitals on the island received an average reimbursement of \$2842 per patient, while the participating hospitals within the fifty states received an average reimbursement of \$3780 per patient.¹⁸⁰

Providing adequate medical care is already an extremely difficult task without the added disadvantage of smaller reimbursement rates.¹⁸¹ For instance, United States hospitals continue to face serious funding issues despite the fact that they receive reimbursements based on the more favorable national rate.¹⁸² As previously discussed, state hospitals claim that the threat of the slightest reduction in reimbursement rates would cause a loss of millions of dollars in funding and would lead to hospitals taking even more losses each time they treat a patient.¹⁸³ There are also numerous stories about elderly people in the United States dying more frequently from the inability to afford adequate health care than from old age itself.¹⁸⁴ All these events are taking place in the richest country in the world, where according to the United States Census Bureau calculations of 2000, the median family income in the United States was \$50,046.¹⁸⁵ Puerto Rico, on the other hand, had a

176. TEMA 903, *supra* note 146.

177. *Id.*

178. See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 504, § 1886(d)(9), 117 Stat. 2066, 2292-93 (2003); *Hosp. San Rafael, Inc. v. Sullivan*, 784 F. Supp. 927, 930-32 (D.P.R. 1991); *Move to Increase Puerto Rico Medicare*, *supra* note 5.

179. CENTERS FOR MEDICARE & MEDICAID SERVICES, MEDICARE ENROLLMENT BY STATE 2002, <http://www.cms.hhs.gov/researchers/pubs/datacompendium/2003/03pg74.pdf> (Nov. 2003).

180. CENTERS FOR MEDICARE & MEDICAID SERVICES, MEDICARE HOME HEALTH AGENCY UTILIZATION BY STATE CALENDAR YEAR 2002, <http://www.cms.hhs.gov/statistics/feeforservice/HHAUtil02.pdf> (last visited Feb. 4, 2005).

181. See generally Barry, *supra* note 126; Schumer Unveils Plan, *supra* note 127; Demko, *supra* note 126.

182. See generally Schumer Unveils Plan, *supra* note 127; Demko, *supra* note 126.

183. See Schumer Unveils Plan, *supra* note 127; Barry, *supra* note 126.

184. Demko, *supra* note 126.

185. *Id.*; U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2003 826, <http://www.census.gov/prod/2004pubs/03statab/outlying.pdf> (last visited Feb. 4, 2005) [hereinafter STATISTICAL ABSTRACT].

median family income of \$16,543 in 2000,¹⁸⁶ which means that in addition to coping with the constant increases in medical technology and costs, the island's hospitals also deal with the added financial pressures of treating low-income patients.¹⁸⁷ Despite all these factors, Puerto Rico is still reimbursed at a lower rate than the fifty states.¹⁸⁸

The reimbursement rates given to Puerto Rico have been judicially challenged in the past.¹⁸⁹ In *Sullivan*, a number of Puerto Rican hospitals raised a direct challenge to the implementation of PPS for Medicare rates for hospitals in Puerto Rico.¹⁹⁰ In their complaint, the plaintiffs alleged that the wage index was determined arbitrarily, the reliance on the national hospital market basket to calculate the wage index was contrary to law because the data is not exclusively based on Puerto Rico numbers, and that the "Puerto Rico PPS statute violates the Equal Protection clause of the United States Constitution because it results in a lower level of payment to Puerto Rico hospitals, which are owned, operated, and staffed predominately by Hispanic persons."¹⁹¹ The court rejected each of the plaintiffs' challenges.¹⁹² Under the wage index claim, the plaintiffs argued that the Commonwealth hospitals, which are not subject to minimum wage regulations, and federal hospitals, whose pay scales are higher than the national norm, equally distort wage indices; hence, both should be excluded from the wage index calculation.¹⁹³

According to the Secretary of the Department of Health and Human Services (the "Secretary"), the federal hospitals were excluded from the calculations because they did not participate in the Medicare program, while the Commonwealth hospitals were included because they generally did participate in the program.¹⁹⁴ The court stated that their job was not to determine the reasonableness of the calculations, but rather they were to look at the explanation of the methodology to determine if the calculations were arbitrary or capricious.¹⁹⁵ They then concluded that the calculations were not arbitrary or capricious because the methodology used was logically related to

186. STATISTICAL ABSTRACT, *supra* note 185, at 827.

187. See *DSH Payments*, *supra* note 106.

188. See Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 504, 117 Stat. 2006, 2292-93 (2003).

189. See *Hosp. San Rafael, Inc. v. Sullivan*, 784 F. Supp. 927 (D.P.R. 1991); *Harris v. Rosario*, 446 U.S. 651 (1980).

190. *Sullivan*, 784 F. Supp. at 929.

191. *Id.* at 932-33.

192. *Id.* at 940.

193. *Id.* at 934-35.

194. *Id.* at 935.

195. *Sullivan*, 784 F. Supp. at 936.

the means used and the purpose achieved.¹⁹⁶ Next, the court rejected the argument that the use of the national market basket was contrary to law.¹⁹⁷ The plaintiffs argued that the statute requires that “a Puerto Rico adjusted DRG prospective payment rate” be established in order to determine the applicable wage index; thus, the use of separate labor and non-labor rates specific to Puerto Rico must be used.¹⁹⁸ It was conceded that the Puerto Rico labor costs were lower than the national labor costs and that such a factor does alter the results.¹⁹⁹ However, the court held that incorporating the percentage difference would be so trifling that it did not warrant interfering with the methodology currently in place.²⁰⁰

Lastly, the plaintiffs argued that Congress violated the Equal Protection clause of the United States Constitution when it created a method to determine Puerto Rico’s PPS rates that was different than that utilized by the rest of the nation.²⁰¹ In denying the equal protection claim, the court first reasoned that entitlement to Medicare reimbursements is not a fundamental right guaranteed by the Constitution.²⁰² However, creating a burden on a suspect class, such as Hispanics, deserves strict scrutiny.²⁰³ The court ultimately decided that the statute did not appear to be racially based and that the plaintiffs’ claim that the different methodology result in less reimbursement payments to Puerto Rico, lacked factual support.²⁰⁴ The court further supported their denial of the equal protection claim by holding that the Territory Clause of the Constitution gave Congress “the power to treat Puerto Rico differently from States if there is a rational basis for doing so.”²⁰⁵ The Court, making reference to the Supreme Court decision of *Harris v. Rosario*,²⁰⁶ then laid out the rational basis factors that justified Congress’ actions in treating Puerto Rico differently when allotting funds:

- (1) Puerto Ricans do not contribute to the federal treasury; (2) high costs of treating Puerto Rico as a state for purposes of the statute; (3) the possibility that greater benefits might disrupt the economy of Puerto Rico. *Rosario*, 446 U.S. at 652, 100 S.Ct. at 1930. These

196. *Id.*

197. *Id.* at 937.

198. *Id.* at 936 (quoting 42 U.S.C. § 1395ww(d)(9)(B) (2004)).

199. *Id.* at 937.

200. *Sullivan*, 784 F. Supp. at 937.

201. *Id.* at 939.

202. *Id.*

203. *Id.*

204. *Id.* at 939–40.

205. *Sullivan*, 784 F. Supp. at 940.

206. 446 U.S. 651 (1980).

factors, as well as the unique economic circumstances attributable to Puerto Rico, support Congress' decision to prescribe a separate PPS rate for Puerto Rico.²⁰⁷

The arguments made by the Secretary, and the reasons provided by the *Sullivan* court for its ruling, were contradictory to the facts and lacked adequate support.²⁰⁸ In *Sullivan*, the Secretary made it a point to account for all Medicare participants equally, which is why all participating Commonwealth hospitals, even those without minimum wage regulations, were included in the national market basket to calculate applicable wage indices.²⁰⁹ Apparently, the parity that exists when calculating overall PPS rates does not apply when it comes time to make actual PPS payments.²¹⁰ At the beginning of the PPS process, Puerto Rico is treated like any other Medicare participant.²¹¹ "Puerto Ricans are expected to pay" the same tax rate to fund the Medicare program, and no special treatments are rendered while the majority of the PPS rate is being determined; that is, until it is time to actually distribute payments.²¹² At the point of distribution, a Puerto Rico specific rate is blended in with the national rate in order to determine the Puerto Rico payment, which ultimately results in lower levels of payments for Puerto Rico hospitals.²¹³

In justifying the special treatment, the court in *Sullivan*, citing to the Constitution and *Rosario*, stated that Congress has the power to treat Puerto Rico differently from the states, under the Territory Clause, so long as there is a rational basis for doing so.²¹⁴ The exact wording under the Territory Clause is as follows: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State."²¹⁵ On its face the clause does not contain any wording that allows Congress to "treat Puerto Rico differently from States if there is a

207. *Sullivan*, 784 F. Supp. at 940.

208. *See id.*

209. *Id.* at 935.

210. Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 504, 117 Stat. 2066, 2292-93 (2003); *see also* *Hosp. San Rafael, Inc. v. Sullivan*, 784 F. Supp. 927, 935 (D.P.R. 1991).

211. *See* 42 U.S.C. § 1395ww (2000); TEMA 903, *supra* note 146.

212. *See* TEMA 903, *supra* note 146.

213. 42 U.S.C. § 1395ww(d)(9)(E) (2000 & Supp. 2004).

214. *Sullivan*, 784 F. Supp. at 940 (citing U.S. CONST. art. IV, § 3; *Harris v. Rosario*, 446 U.S. 651, 651-52 (1980) (Marshall, J. dissenting), *reh'g denied*, 448 U.S. 912 (1980)).

215. U.S. CONST. art. IV, § 3.

rational basis for doing so.”²¹⁶ Furthermore, the dissenting opinion in *Rosario* accurately pointed out that the majority did not cite any authority for the proposition, and that the statement made by the majority was overbroad and unsupported.²¹⁷ The dissenting opinion went on to say that the United States must be careful as to how differently it treats Puerto Rico because Puerto Ricans are United States citizens who are entitled to many constitutional rights, such as the Due Process and Equal Protection clauses of the Fifth and Fourteenth Amendments.²¹⁸

The rational basis factors provided by the *Sullivan* court, in support of the statute enacted by Congress, also lacked support.²¹⁹ First, the rationale that Puerto Rico does not contribute to the Federal Treasury was not applicable with regards to the Medicare program in Puerto Rico, because Puerto Rico contributes to the Medicare fund in the same manner as all other Medicare participants.²²⁰ Likewise, treating Puerto Rico as a state when it comes to the PPS payments is no more costly than when it is treated as a state for Medicare taxing purposes.²²¹ Puerto Rico contributes to the Medicare program at the same tax rate as all other states;²²² hence, it should be reimbursed in the same manner as all other states. Next, the rationale that greater benefits might disrupt the Puerto Rican economy was viewed as having “troubling overtones” by the dissent in *Rosario*, and it appears to have the same defect in *Sullivan*.²²³ The dissent in *Rosario* stated that the rationale suggests that programs designed to help the poor should be scarcely applied in areas where the need is greater because such aid will disrupt the poverty levels in those areas.²²⁴ Moreover, the dissenting opinion stated that the theory suggests that those areas of the country that are the most economically sound would receive the most funding because that is where the aid will cause the least amount of disruption.²²⁵ The anticipated economic effects and so called “unique economic circumstances attributable to Puerto Rico,” that supposedly justify the special Puerto Rico PPS rate, are irrational and lack any evidence to support said rationales.²²⁶

216. *Sullivan*, 784 F. Supp. at 940.

217. *Rosario*, 446 U.S. at 653.

218. *Id.*

219. *Sullivan*, 784 F. Supp. at 940.

220. TEMA 903, *supra* note 146.

221. *Id.*

222. *Id.*

223. *Rosario*, 446 U.S. at 655; *see also Sullivan*, 784 F. Supp. at 940.

224. *Rosario*, 446 U.S. at 655–56.

225. *Id.* at 656.

226. *See id.* at 652–56; *Sullivan*, 784 F. Supp. at 940.

V. CONCLUSION

Puerto Rico is not a state, thus treating it with full statehood privileges may not be justified.²²⁷ Yet, there are compelling reasons for providing equality in the administration of a government program such as Medicare. Puerto Rico, as well as the United States, will benefit from a healthier Puerto Rico.²²⁸ Puerto Ricans are United States citizens, therefore, the well-being of Puerto Rico residents would improve the well-being and economic status of United States citizens overall.²²⁹ Furthermore, Puerto Ricans should also be entitled to the full benefits of the program, since they are subject to the same contribution rates that all other participants are mandated to pay.²³⁰ Anything less than equal treatment under such circumstances is unjustifiable.

In the Emily Friedman article, *The Compromise and the Afterthought: Medicare and Medicaid After 30 Years*, she quotes, "It is both a flaw and a strength of human nature that one tends to forget the circumstances that surrounded the need for and that shaped certain decisions and actions."²³¹ In the instant case, it is flaw for the United States to forget the circumstances that led us to the formation of Medicare.²³² The program was designed to provide the needy, predominantly the elderly, with adequate health care so as to avoid the economic insecurities that loom over an unhealthy society.²³³ Today, in a time where the improvements in medical technology and medications are increasingly costly, the need for medical funding assistance contin-

227. See *Rosario*, 446 U.S. at 652; *Sullivan*, 784 F. Supp. at 940; *The Commonwealth Relationship*, *supra* note 134.

228. See *Rosario*, 446 U.S. at 653; THE COUNCIL OF STATE GOVERNMENTS EASTERN REGIONAL CONFERENCE, PROMOTING FEDERAL ECONOMIC INCENTIVES FOR PUERTO RICO (2002), at <http://www.csgeast.org/page.asp?id=2002puertoricores> [hereinafter PROMOTING FEDERAL ECONOMIC INCENTIVES]. The United States benefits from a prosperous Puerto Rico because Puerto Rico is the tenth largest trading partner of the United States. *Id.* Puerto Rico purchases over \$16 billion worth of goods from the United States every year, which results in over 180,000 jobs. *Id.* Furthermore, a prosperous Puerto Rico also creates more jobs on the island, thus resulting in "less welfare in Puerto Rico, which leads to more Social Security, Medicare and federal payroll taxes for the United States." *Id.* For instance, in 2001 Puerto Rico contributed \$20.90 billion in Medicare taxable earnings and \$19.14 billion in Social Security taxable earnings. SOCIAL SECURITY ADMINISTRATION, STATE STATISTICS, DECEMBER 2002-PUERTO RICO (2002), at http://www.ssa.gov/policy/docs/quickfacts/state_stats/pr.html [hereinafter STATE STATISTICS].

229. See *Rosario*, 446 U.S. at 653.

230. TEMA 903, *supra* note 146.

231. Friedman, *supra* note 26, at 280.

232. See generally CORNING, *supra* note 1.

233. See generally 42 U.S.C. § 1395c (2000); CORNING, *supra* note 1.

ues to grow.²³⁴ Puerto Rico is no exception to the trend.²³⁵ As an island with approximately half of its population living below the poverty line, Puerto Ricans are prime candidates for a national health care program such as Medicare and all the benefits it has to offer.²³⁶ Currently Puerto Rico is receiving assistance, and its situation has gotten progressively better.²³⁷ This does not necessarily mean that the system currently in place is adequate.²³⁸ In order for Puerto Rico to achieve the parity it deserves, the Medicare program will need to undergo further reform with a focus on achieving equality on the issue of reimbursement once and for all.

234. HAUGHT ET AL., *supra* note 124, at 1–2. *See also* Demko, *supra* note 126; Barry, *supra* note 126.

235. *See Move to Increase Puerto Rico Medicare, supra* note 5; Significativo el Impacto, *supra* note 5.

236. PROMOTING FEDERAL ECONOMIC INCENTIVES, *supra* note 228.

237. *See* 42 U.S.C. § 1395ww(d)(9) (2000 & Supp. 2004); Medicare Prescription Drug, Improvement, and Modernization Act of 2003, Pub. L. No. 108-173, § 504, 117 Stat. 2066, 2292-93 (2003).

238. *See Move to Increase Puerto Rico Medicare, supra* note 5; Significativo el Impacto, *supra* note 5.

LICENSING AND DISCIPLINE OF FISCAL PROFESSIONALS IN THE STATE OF FLORIDA: ATTORNEYS, CERTIFIED PUBLIC ACCOUNTANTS, AND REAL ESTATE PROFESSIONALS

DEBRA MOSS CURTIS*

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I. INTRODUCTION AND PURPOSE

The purpose of this article is to compare the regulation of several professions within the state of Florida. In Florida, attorneys are self-regulated through The Florida Bar. As a branch of the Supreme Court of Florida, The Florida Bar serves as the licensing agency of attorneys within the state.¹ Two other professions—real estate professionals and certified public accountants—in which the public also places fiscal trust and responsibility, are regulated through a different agency, the Department of Business and Professional Regulation (DBPR).² This article seeks to examine and explain the different methods of licensing and regulation between these professional groups and looks at empirical data regarding the discipline of such members.

The idea for this statistical review arose in 2004 following an analysis, done by this author in conjunction with another legal professional, on the public's view of Florida attorney discipline.³ That article dealt with the discipline of Florida attorneys and featured statistics gathered from public sources. After publication of that article original information was received from The Florida Bar regarding the specifics of attorney discipline during a certain time period. At that time we came across data comparing attorneys with other professions, prompting a more detailed comparison of the differences in these state professional systems.

II. FISCAL PROFESSIONALS: THE RELATIONSHIP BETWEEN ATTORNEYS, CERTIFIED PUBLIC ACCOUNTANTS, AND REAL ESTATE PROFESSIONALS IN FLORIDA

The mission of the Department of Business and Professional Regulation (DBPR) is to ensure that professionals provide quality services to the public.⁴ In addition, The Florida Bar lists as its ultimate goal “to provide more effective delivery of legal services.”⁵ Both of these professional membership and

1. See FLA. BAR ADMISS. R. 1-12 (2004).

2. Department of Business and Professional Regulation, *Home Page*, at <http://www.myflorida.com/dbpr/index.shtml> (last visited Feb. 7, 2005) [hereinafter *DBPR Home Page*].

3. Debra Moss Curtis & Billie Jo Kaufman, *A Public View of Attorney Discipline in Florida: Statistics, Commentary, and Analysis of Disciplinary Actions Against Licensed Attorneys in the State of Florida from 1988-2002*, 28 NOVA L. REV. 669 (2004).

4. *DBPR Home Page*, *supra* note 2.

5. The Florida Bar, *Member Services*, at <http://www.flabar.org/tfb/TFBMember.nsf/ED6E4BCB92A8FE1B852567090069F3C2/751B0D34A09978C685256B2F006CD81E?OpenDocument> (last visited Feb. 7, 2005).

regulation organizations deal with various occupations. However, the three occupations that overlap frequently either in licensing or in their fiscal responsibilities to the public are attorneys, certified public accountants, and real estate professionals.

In reality, many of these three professional groups are cross-trained; in other words, an attorney also may be a certified public accountant or a real estate broker.⁶ A New York State Bar Ethics opinion was issued to assist New York attorneys in sorting out the conflicts of interest in acting as part of a law firm engaged in real estate matters.⁷ In that opinion, the State Bar Ethics Committee reiterated that it was not improper for lawyers to engage in other businesses such as dually working as either real estate brokers or certified public accountants.⁸ Lawyers, however, must overcome the presumption in many rules of professional conduct that their work in any non-legal field is subject to the rules of professional conduct of lawyering.⁹ They also must make it clear to clients that simply being qualified in more than one field is not directly related to the work to be done.¹⁰ Attorneys also must be aware of conflicts of interest in their roles in any dual transaction.¹¹

Attorneys have also become acutely aware of the interaction between professions, as well as the cross-purpose in the examination of whether legal

6. See Arash Mostafavipour, *Law Firms: Should They Mind Their Own Business?*, 11 GEO. J. LEGAL ETHICS 435, 453 (1998). In fact, real estate licensing rules for sales associates are tailored to allow already licensed attorneys to waive several requirements. FLA. ADMIN. CODE R. 61J2-3.008(8) (2004). In Texas, for example, when a Texas Civil Statute regulated who may perform property tax consulting services without registering with the Department of Licensing, attorneys, certified public accountants, and certain real estate brokers were specifically grouped together and exempt from the requirement. Cynthia M. Ohlenforst & Jeff W. Dorrill, *Annual Survey of Texas Law Part II, Taxation*, 45 SW. L.J. 2093, 2122 (1992). However, demand for dual-licensed attorney-accountants may even be greater than the current supply. See Corby Brooks, *A Double-Edged Sword Cuts Both Ways: How Clients of Dual Capacity Legal Practitioners Often Lose Their Evidentiary Privileges*, 35 TEX. TECH. L. REV. 1069, 1079 (2004). The American Association of Attorney-Certified Public Accountants (AAA-CPA) professional organization website claims that of the approximately one million lawyers and approximately 450,000 CPAs in the United States, only about three percent are dually qualified. American Association of Attorney-Certified Public Accountants, *An Uncommon Organization for Uncommon Professionals*, at <http://www.attorney-cpa.com/i4a/pages/index.cfm?page id=3295> (last visited Feb. 7, 2005) [hereinafter *Uncommon Organization*]. A chapter of the AAA-CPA has been established in Florida. *Id.*

7. N.Y. St. Bar Assn. Comm. on Prof. Ethics Op. 595 (1989).

8. *Id.*

9. Mostafavipour, *supra* note 6, at 453.

10. *Id.* In addition, an attorney who is dual-licensed may alter the evidentiary privilege rule of communication with attorneys due to his or her dual-status. See Brooks, *supra* note 6, at 1071.

11. Ethics Op. 595, *supra* note 7.

services should be permitted in the structure of organizations other than traditional law firms.¹² The American Bar Association has been considering the thorny issue of whether lawyers should be allowed to join with other professionals to offer services under one single practice, and how that new structure may affect attorneys' abilities to serve the public and financial outcome.¹³ The Florida Bar Ethics hotline reported in 2002 that it had received inquiries about attorneys regarding combining their businesses with others, among them accountants.¹⁴ And clients are increasingly more interested in engaging attorney professionals that may provide the benefits of expertise in accounting matters as well.¹⁵

These three groups of professions occasionally have overlapping responsibilities. Real estate brokers often are authorized by state law to draft or complete specific legal documents or to conduct closing and settlement proceedings in certain real estate transactions.¹⁶ Some states also allow certified public accountants to perform some activities otherwise considered "legal services," such as appearances before certain tax adjudicatory bodies.¹⁷

Ultimately, citizens of Florida rely upon members of these three professions to responsibly handle their money and property. While other service professions regulated by the DBPR deal in property and money, those professions are not based on fiscal responsibility.¹⁸ You may pay a contractor, and trust that person with important property, but you are seeking a tangible, physical service from the contractor. The same goes for architects, electrical contractors, barbers, and funeral directors—all occupations regulated by the DBPR.¹⁹ However, accountants and real estate professionals provide basic services that involve holding, accounting for, and transferring money.

Other professions in Florida also have high levels of trust and are not regulated by the DBPR. A key example is physicians, who are regulated by the Florida Board of Medicine.²⁰ However, while doctors certainly are paid

12. Burnele Powell, *Flight from the Center: Is It Just or Just About Money?*, 84 MINN. L. REV. 1439, 1443 (2000).

13. See Amendments to Rules Regulating the Fla. Bar, 820 So. 2d 210, 213 (Fla. 2002).

14. *Id.*

15. See Brooks, *supra* note 6, at 1071. Brooks asserts that "dual capacity practitioners" benefit consumers by providing a "higher quality product at a lower cost." *Id.* at 1076.

16. Quintin Johnstone, *Connecticut Unauthorized Practice Laws and Some Options for Their Reform*, 36 CONN. L. REV. 303, 337 (2004).

17. *Id.* at 338.

18. See DBPR Home Page, *supra* note 2.

19. See *id.*

20. See Florida Board of Medicine, *Board Overview*, at http://www.doh.state.fl.us/mqa/medical/me_home.html (last visited Feb. 7, 2005). There are several divisions by medical specialty. *Id.*

for their services, their basic purpose is not related to any fiduciary duty, but rather to the patient's health. Attorneys assist clients through the legal system. All attorneys are required under self-regulation rules to be fiscally responsible to their clients when dealing with their money. However, many fields of law have built into them the primary task of fiscal responsibility, such as estate planning and guardianships. Because this fiscal responsibility, like that of accountants and real estate professionals, often takes center stage in the service to clients, these three professions were chosen for comparison.²¹

III. LICENSING OF PROFESSIONALS

A. Attorney Licensing

Most consumers in the public are familiar with the concept that an attorney must "pass the bar" in order to become licensed in a particular state. What many consumers do not understand is that the "Bar Exam," and in fact, the entire regulation of attorneys in the state of Florida, is handled solely through the judicial system of the state; the same system in which attorneys ultimately conduct most of their business.²² The Supreme Court of Florida, which is the highest court in the state, handles bar admissions through its administrative arm, the Florida Board of Bar Examiners.²³

A task of the Florida Board of Bar Examiners is to be gatekeeper for admission to the professional organization known as The Florida Bar,²⁴ and it is known to be a powerful force. For many years, there has been a growing movement to deregulate the legal profession and allow lay practitioners to practice law.²⁵ However, the requirements for admission to the bar remain

21. See Robert B. Hale, Comment, *Auditor Liability Under the DTPA: Can It Get Any Worse for Accountants?*, 44 BAYLOR L. REV. 313, 320 (1992) (noting that services of a professional are similar in that they require application of professional judgment and rendering of an opinion, and specifically lists real estate agents, attorneys, and accountants as examples in this category).

22. FLA. BAR ADMISS. R. 1-11 (2004).

23. FLA. BAR ADMISS. R. 1-12. "The Florida Board of Bar Examiners consists of twelve members of The Florida Bar and three members of the general public who are not lawyers." FLA. BAR ADMISS. R. 1-21.

24. See Florida Board of Bar Examiners, *Home Page*, at <http://www.floridabarexam.org> (last visited Feb. 7, 2005). The fee for filing an application to the Bar and sitting for the exam can be as high as \$2500. Florida Board of Bar Examiners, *Frequently Asked Questions*, at <http://floridabarexam.org/public/main.nsf/faq.html> (last visited Feb. 7, 2005) [hereinafter *FBBE FAQs*]. No one may gain "reciprocity" through admittance from another state. *Id.*

25. Meredith Ann Munro, Note, *Deregulation of the Practice of Law: Panacea or Placebo?*, 42 HASTINGS L.J. 203 (1990).

stringent. Admission to the bar exam begins with an application.²⁶ The application itself has a three-page checklist that is so detailed that the first step of the “Checklist to File a Bar Application” is instructions to the reader to “[p]rint this [c]hecklist” and “[c]heck each item when completed” in order to ensure all parts of the application are completed.²⁷ The second step, which requires gathering informational materials, contains fifteen individual items that may be needed depending on responses to some inquiries, including employment information for the past ten years (or since the applicant’s sixteenth birthday, whichever is shorter), as well as financial information, information regarding arrests, charges or accusations, and specifics on traffic violations.²⁸ The third part lists thirteen steps to properly complete the application.²⁹ Part four contains information on “packaging” the application complete with fingerprint card, photograph, and other supporting documents.³⁰

Applicants who wish to sit for the bar exam must have graduated from a law school accredited by the American Bar Association.³¹ The costs for a typical six-semester curriculum to complete law school can exceed \$100,000 including living expenses.³² Only after satisfactory completion of law school requirements can students be “certified” by their deans to proceed with The Florida Bar Examination.³³

Actual admission to The Florida Bar is divided into two general categories. The first requirement is the taking and passing of The Florida Bar Exam, which is administered on the last Tuesday and Wednesday of February and July each year in one central location in the state.³⁴ In addition, the admissions process also requires the passing of the Multistate Professional Responsibility Exam (MPRE), given three times yearly, and administered by

26. FBBE FAQs, *supra* note 24.

27. Florida Board of Bar Examiners, *Checklist to File a Bar Application*, at <http://www.floridabarexam.org/public/main.nsf/checklistnreg.html> (last visited Feb. 7, 2005).

28. *Id.*

29. *Id.*

30. *Id.*

31. Jennifer Kucklick Watson, *Protecting the Public Through the Legal Licensing System*, 1 FLA. COASTAL L.J. 547, 549 (2000).

32. *Id.* at 550.

33. NOVA SOUTHEASTERN UNIVERSITY SHEPARD BROAD LAW CENTER, LAW STUDENT HANDBOOK, available at <http://www.nsulaw.nova.edu/students/documents/studenthandbook.pdf> (last visited Feb. 7, 2005) [hereinafter STUDENT HANDBOOK].

34. FBBE FAQs, *supra* note 24. The past several years, this sole location has been in Tampa, Florida, at that city’s convention center. Florida Board of Bar Examiners, *Florida Bar Examination and Filing Deadlines*, at [http://www.floridabarexam.org/public/main.nsf/FLABarExamDates.PDF/\\$file/FLABarExamDates.PDF](http://www.floridabarexam.org/public/main.nsf/FLABarExamDates.PDF/$file/FLABarExamDates.PDF) (last visited Feb. 7, 2005) [hereinafter *Bar Schedule*].

the National Conference of Bar Examiners, rather than the state itself.³⁵ Although applicants must be present in the state of Florida (although not a resident) to sit for the two-day Florida Bar Exam in February or July, applicants to Bar admission in Florida may physically be present in any state administering the MPRE and then have those scores forwarded to the Florida Board of Bar Examiners.³⁶

The two-day Florida Bar examination contains two portions. Part A is the "Florida-prepared" portion, generally containing three hours of essays followed by three hours of multiple-choice questions, and including subjects chosen from: Florida Constitutional Law, Florida Rules of Civil and Criminal Procedure, Florida Rules of Judicial Administration, Federal Constitutional Law, Chapters 4 and 5 of the Rules Regulating The Florida Bar, Corporations, Partnerships, Wills, Administration of Estates, Contracts, Criminal Law, Criminal Procedure, Evidence, Family Law, Real Property, Torts, and Trusts.³⁷ Part B of the two-day exam is titled "Multistate Bar Examination," and it is created by the National Conference of Bar Examiners.³⁸ This portion of the exam is six hours, two hundred questions, and deals exclusively with the non-state specific subjects of Contracts, Torts, Constitutional Law, Criminal Law, Real Property, and Evidence.³⁹ The exam is given primarily in paper format, although examinees are permitted to take the essay portion of the exam using laptop computers under certain conditions.⁴⁰

The separate MPRE is a fifty question, two hour, multiple-choice examination, exclusively testing a lawyer's professional conduct as governed by the American Bar Association's *Model Rules of Professional Conduct*, *Model Code of Judicial Conduct*, and other evidentiary and substantive laws

35. FLA. BAR ADMISS. R. 4-30, at <http://www.floridabarexam.org/public/main.nsf/rules.html> (last visited Feb. 7, 2005). Rule 4 of the *Rules of the Supreme Court Relating to Bar Admissions* details the requirements of the examinations and standards for passing. *Id.*

36. *Bar Schedule*, *supra* note 34, at 2.

37. *Id.* at 1. Most, if not all, of these subjects are available in a typical law school curriculum. See STUDENT HANDBOOK, *supra* note 33, at 3-4.

38. National Conference of Bar Examiners, *Multistate Tests*, at <http://www.ncbex.org/tests.htm> (last visited Feb. 7, 2005) [hereinafter *Tests*].

39. *Id.* These courses, with the exception of evidence, which at some schools is a required upper-level course, are generally mandatory courses given in the first year of law school. STUDENT HANDBOOK, *supra* note 33, at 3-4.

40. Florida Board of Bar Examiners, *Laptop Program*, at <http://www.floridabarexam.org/public/main.nsf/laptop.html> (last visited Feb. 7, 2005). Examinees must load a particular software program onto the laptop and be prepared to continue with the exam in paper-based format in the event of malfunction. *Id.*

to emerge from those bodies.⁴¹ However, despite its universal-sounding name, the “American Bar Association” (ABA) is a voluntary organization for attorneys, not a licensing agency.⁴² Each state individually creates and approves its own ethical codes and rules for attorneys to follow, to which they are individually bound.⁴³ Although many states base their own rules on the ABA rules, attorneys required to sit for this exam, and be tested on these rules, ultimately are not bound by those exact rules, particularly if their state has made substantive changes.⁴⁴

The MPRE is graded with both a raw score, calculated from the number of test questions answered correctly, and a scaled score, calculated with a statistical process adjusting for variations in the difficulty of the test from year to year.⁴⁵ Raw scores run from zero to fifty, while scaled scores run from fifty to one hundred fifty.⁴⁶ The Supreme Court of Florida fixed the passing rate for bar admittance at a scaled score of eighty or better, which must be attained within twenty-five months of passing other parts of The Florida Bar Exam.⁴⁷

The second requirement for admittance to The Florida Bar, apart from passing these two examinations, is the passing of a character and fitness screening.⁴⁸ The Supreme Court of Florida holds a “good moral character” requirement emphasizing an inquiry into the applicant’s “honesty, fairness, and respect for the rights of others.”⁴⁹ In considering the character and conduct of an applicant, the court recognized that the character and conduct “must have a rational connection to the applicant’s fitness to practice law.”⁵⁰

41. *Tests, supra* note 38. Most Florida law schools require such a course entitled Professional Responsibility covering the material tested on this exam. STUDENT HANDBOOK, *supra* note 33, at 3–4.

42. American Bar Association, *About the ABA*, at <http://www.abanet.org/about/home.html> (last visited Feb. 7, 2005).

43. American Bar Association Center for Professional Responsibility, *Lawyer Regulation for a New Century: Report of the Commission on the Evaluation of Disciplinary Enforcement*, at http://www.abanet.org/cpr/mckay_report.html (last visited Feb. 7, 2005).

44. *Id.* Several of Florida’s professional responsibility rules are different from ABA rules, and in fact, portions of them are among the subjects included in Part A of the twoday Florida Bar Exam. *Id.*

45. National Conference of Bar Examiners, *MPRE Score Reports*, at <http://www.ncbex.org/tests/mpre/report.htm> (last visited Feb. 7, 2005).

46. *Id.*

47. FLA. BAR ADMISS. R. 4-18, 4-33.2 (2004).

48. FLA. BAR ADMISS. R. 2-12. The Bar requires applicants to possess “good moral character.” *Id.* Rule 2-12 of the *Rules of the Florida Supreme Court Relating to Admission of the Bar* requires that all applicants seeking admission to the Bar shall “produce satisfactory evidence of good moral character.” *Id.*

49. Florida Bd. of Bar Exam’rs v. G.W.L., 364 So. 2d 454, 458 (Fla. 1978).

50. *Id.*

To determine this character and conduct, Supreme Court of Florida rules allow for intensive background investigations into the applicant.⁵¹ The rule seeks to ensure that attorneys have a record showing core knowledge; “ability to reason;” likelihood of complying with deadlines; ability to “[c]ommunicate candidly and civilly with clients, attorneys, courts and others;” ability to “[c]onduct financial dealings in a responsible, honest, and trustworthy manner;” capability to “[a]void acts that are illegal, dishonest, fraudulent, or deceitful; and ability to [c]onduct oneself in accordance with the . . . laws . . . and the Rules of Professional Conduct.”⁵² The rules also delineate “disqualifying conduct” of attorneys, which includes “[a] record manifesting a deficiency in the honesty, trustworthiness, diligence, or reliability.”⁵³

Ultimately, an applicant who has complied with the rules for admission, passed the requisite examinations, and met character and fitness standards, will be recommended for admission to The Florida Bar by the Board of Bar Examiners.⁵⁴ The Supreme Court of Florida, upon satisfaction of this recommendation, will enter an order of admission.⁵⁵ Once an attorney swears the requisite Oath of Attorney, the applicants then become subject to the administration of The Florida Bar and thus the discipline system of The Florida Bar.⁵⁶

Florida attorneys are required to continue their legal education by completing thirty hours of further education over a period of three years, including five hours in the area of ethics.⁵⁷ Members must report hours earned in a three-year cycle, although they are required to renew their bar memberships annually, which includes an annual membership fee starting from \$265.⁵⁸

51. FLA. BAR ADMISS. R. 3.

52. FLA. BAR ADMISS. R. 3-10.

53. FLA. BAR ADMISS. R. 3-11.

54. FLA. BAR ADMISS. R. 5-10.

55. FLA. BAR ADMISS. R. 5-11.

56. FLA. BAR ADMISS. R. 5-15.

57. R. REGULATING FLA. BAR 6-10.3(b).

58. *Id.*; see also Florida Board of Bar Examiners, *Bar Application*, at <http://www.florida-bar-exam.org> (last visited Feb. 7, 2005). Should attorneys wish to participate in voluntary “sections” of The Florida Bar, there are organizations arranged by area of practice for networking and education purposes. The Florida Bar, *Organization*, at <http://www.flabar.org/tfb/TFBOgan.nsf/2FC809811C0105238525671100692F1C/95FD890BE127C05E85256B2F006CD832?OpenDocument> (last visited Feb. 11, 2005). An additional fee applies for each section joined, which varies per section. See generally The Florida Bar, *Sections and Divisions*, at <http://www.flabar.org/names.nsf/Sections?OpenForm> (last visited Feb. 11, 2005) (linking to each section’s website).

The Florida Bar has no reciprocity with licensed attorneys from other jurisdictions.⁵⁹ Any candidate wishing to obtain a Florida Bar license must submit to The Florida Bar Examination.⁶⁰

B. *Real Estate Professionals*

In every state, as well as in the District of Columbia, real estate brokers and sales agents must be licensed to conduct real property business dealings.⁶¹ Real estate professionals may be divided into two categories: real estate agents (also called sales associates) and real estate brokers.⁶²

The real estate profession in Florida is governed by the DBPR, specifically, the Florida Real Estate Commission.⁶³ The DBPR is a Florida state agency that issues licenses and ensures the quality of services provided by its licensees.⁶⁴ It regulates some two hundred classes of licensed professions and occupations and is required under the *Florida Statutes* to submit an annual report on the professions that it regulates.⁶⁵

The Division of Real Estate regulates real estate licenses through education, regulation, and compliance.⁶⁶ It provides administrative support to the Florida Real Estate Commission, which consists of seven members appointed by the Governor and confirmed by the Senate.⁶⁷

59. FBBE FAQs, *supra* note 24.

60. *Id.*

61. Career Webschool, *Florida Real Estate School-Career*, at <http://www.careerwebschool.com/Florida-Real-Estate/florida-real-estate-education-career-info.html> (last visited Feb. 7, 2005) [hereinafter *Career*].

62. Career Webschool, *Florida Real Estate School-State Requirements*, at <http://www.careerwebschool.com/Florida-Real-Estate/florida-real-estate-state-requirements.html> (last visited Feb. 7, 2005) [hereinafter *Real Estate Requirements*]. Real Estate Appraisers are also considered professionals under the DBPR and *Florida Statutes*; however, their roles in relation to the public are dissimilar to attorneys and CPAs and thus have been excluded for purposes of this article. FLA. STAT. § 475.610 (2003); Division of Real Estate, *Florida Real Estate Appraisal Board*, at http://www.state.fl.us/dbpr/re/freab_welcome.shtml (last visited Feb. 7, 2005) [hereinafter *Real Estate Appraisal*].

63. § 475.02(1).

64. DBPR Home Page, *supra* note 2.

65. *Id.*

66. Division of Real Estate, *Home Page*, at <http://www.myflorida.com/dbpr/re/index.shtml> (last visited Feb. 7, 2005).

67. § 475.02(1). Four members must be brokers having held active licenses for a five-year period. *Id.* One member is a licensed broker or sales associate for two years, and two members are members of the public who have never been licensed real estate professionals. *Id.* Members hold their positions for four year terms, may be removed for cause, and one member of the commission must be at least sixty years of age. § 475.02(1)-(2).

In Florida, real estate sales associates generally are independent salespeople who work for licensed real estate brokers in exchange for a portion of a commission earned from the sale of a property.⁶⁸ Real estate brokers, by contrast, generally own their independent businesses and supervise the work of associates in their employ.⁶⁹ These two categories have different licensing requirements.⁷⁰

An applicant for a real estate associate license must be at least eighteen years old and have a high school diploma or its equivalent.⁷¹ In addition, an applicant must be “honest, truthful, trustworthy, and of good character” as well as “have a good reputation for fair dealing.”⁷² An applicant must be “competent and qualified to make real estate transactions,” and if a previous license has been denied or revoked, the applicant will not be licensed unless they have rehabilitated themselves through subsequent behavior.⁷³ Real estate associates must complete a pre-licensing course, approved by the real estate commission, of sixty-three classroom hours, which is valid for two years after completion.⁷⁴ The course covers a wide range of important topics for real estate sales associates, from real estate brokerage, including property management, appraising, financing, and counseling, to development and construction, the roles of different levels of government, and professional associations.⁷⁵ There are also additional sessions specifically on real estate license law, federal and state laws pertaining to real estate, titles, deeds, legal descriptions, real estate financing, taxes, and zoning.⁷⁶

In addition, applicants must complete an application, fingerprint card, submit an initial fee of \$152, and then sit for the Florida Real Estate Sales

68. *Career*, *supra* note 61.

69. *Id.* A broker is defined under *Florida Statutes* as a person who “appraises, auctions, sells, exchanges, buys, rents, or offers, attempts or agrees to appraise, auction, or negotiate the sale, exchange, purchase, or rental of business enterprises or business opportunities or any real property.” § 475.01(1)(a).

70. *Real Estate Requirements*, *supra* note 62.

71. § 475.17(1)(a). Florida Licensing Requirements for Real Estate are readily accessible on the “myflorida.com” webpage, listed under the DBPR. Division of Real Estate, *Florida Licensing Requirements for Real Estate*, at http://www.myflorida.com/dbpr/re/frec_licensing_requirements.shtml (last visited Feb. 7, 2005) [hereinafter *Licensing Requirements for Real Estate*]. In addition, further detailed information clarifying these statutes appears in the *Florida Administrative Code*. See generally FLA. ADMIN. CODE R. 61J2 (2004).

72. § 475.17(1)(a).

73. *Id.*

74. *Real Estate Requirements*, *supra* note 62.

75. The Florida Real Estate Commission, SALES PERSON COURSE SYLLABUS (2001), at http://www.state.fl.us/dbpr/re/publications/frec/frec_syllabus.pdf (last visited Feb. 7, 2005) [hereinafter SALES PERSON COURSE SYLLABUS].

76. *Id.*

Associate Exam.⁷⁷ Finally, applicants must complete the administrative step of activating their licenses and completing forty-five classroom hours of post-licensing instruction before biennial license expiration.⁷⁸ Currently, neither licensed Florida attorneys nor applicants with a four-year-degree are required to submit to these real estate requirements.⁷⁹

By contrast, those seeking to become real estate brokers must already hold an active real estate sales associate license and then complete twelve months of real estate experience during a period of five years before seeking to become a broker.⁸⁰ A broker must take an additional pre-licensing course, approved by the Florida Real Estate Commission, consisting of seventy-two classroom hours, which also is valid for two years after the course completion date.⁸¹ This course focuses more specifically on advanced skills for this higher level of licensing, such as opening, owning, managing, and supervising a real estate office, including escrow management, valuing real property, listing and selling real property, and several specialty areas including environmental issues that affect real estate transactions.⁸² Such information includes understanding policies and law relating to leasing real property and employing sales associates.⁸³

All other requirements for brokers are similar to sales associates, such as the application, fingerprinting, paying a fee, and the successful passing of the real estate broker examination.⁸⁴ Real estate brokers also must complete administrative requirements in order to activate their licenses and complete at least sixty hours of post-licensing course work prior to license expiration.⁸⁵

77. *Licensing Requirements for Real Estate*, *supra* note 71. A passing grade on this exam is a seventy-five. *Id.* In addition, applicants may sit for the Florida Real Estate Law Examination, of which a passing score of at least thirty is required. *Id.* In addition, Florida has “mutual recognition” of licensing with ten states. SALESPERSON COURSE SYLLABUS, *supra* note 75.

78. *Real Estate Requirements*, *supra* note 62. Real estate applications may be submitted partially online. *Id.*

79. IFREC Real Estate Schools, *Frequently Asked Questions*, at <http://www.ifrec.com/faq.htm> (last visited Feb. 7, 2005) [hereinafter IFREC FAQs].

80. *Real Estate Requirements*, *supra* note 62.

81. *Id.*

82. FLORIDA REAL ESTATE COMMISSION, BROKER COURSE SYLLABUS (1999), at http://www.state.fl.us/dbpr/re/publications/frec/frec2_syllabus.pdf (last visited Feb. 7, 2005).

83. *Id.*

84. *Real Estate Requirements*, *supra* note 62.

85. *Id.* Fees for Real Estate Brokers are initially \$162 with a renewal fee of \$72.50 per license; licensees must complete fourteen hours of continuing education every two years. *Id.*; Division of Real Estate, *Fees*, at <http://www.myflorida.com/dbpr/re/fees.shtml> (last visited Feb. 7, 2005) [hereinafter *Fees*].

The real estate exam is given by a private vendor at various testing centers throughout Florida. It is a multiple-choice exam that is administered electronically through a touch-screen format, with instant notification of success or failure at the test site.⁸⁶ The examination is graded on a basis of one hundred points, and successful completion is a grade of seventy-five points or higher.⁸⁷ The sales associate examination is based on “real estate principles and practices, real estate law, and real estate mathematics.”⁸⁸ Generally, forty-five points are based on law, forty-five points on principles and practices, and ten points on real estate mathematics.⁸⁹ The broker exam is also based on real estate law principles and practices, including appraising, finance, investment and brokerage management, and real estate mathematics.⁹⁰ This exam is generally broken down by forty-five points on law, forty points on principles and practices, and fifteen points on mathematics.⁹¹

Applicants without Florida residency may become licensed, non-resident real estate professionals in Florida. However, those licenses are specially governed and have additional rules that are particular to them. A written exam consisting of forty questions is administered to all non-resident applicants, who must answer thirty or more questions correctly to pass the test.⁹² In addition, the code specifically defines residency for real estate licensing purposes and details post-license and continuing education requirements for non-resident licensees.⁹³

Real estate schools are heavily regulated by the *Florida Administrative Code*, and a list of approved real estate schools is available on the DBPR website.⁹⁴ Although many schools are listed as branches with different physical locations, the list contains 1131 schools, some of which have out-of-state addresses.⁹⁵ Minimum standards for pre-licensing study, including use of guest lecturers, instructor requirements, and renewal are all state-regulated.⁹⁶

86. IFREC *FAQs*, *supra* note 79. Applicants who fail must wait at least thirty days to take the exam again. *Id.*

87. FLA. ADMIN. CODE R. 61J2-2.029 (2004).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. FLA. ADMIN. CODE R. 61J2-26.001 (2004).

93. FLA. ADMIN. CODE R. 61HJ2-26.

94. Department of Business and Professional Regulation, *Real Estate Schools*, at http://www.myflorida.com/dbpr/re/publications/re_schools.pdf (last visited Feb. 7, 2005).

95. *Id.* The list appears to contain a few repetitions of schools and addresses. *See id.*

96. *See* FLA. ADMIN. CODE R. 61J2-3.008.

The initial and continuing education courses necessary for real estate professionals are regulated by the DBPR.⁹⁷ All of the details of the specific classroom requirements within each school, including the requirements for successful course completion, as well as regulations on advertising, are specified.⁹⁸

All active licensees must also complete a minimum of fourteen hours of continuing education during each biannual license renewal period, except for the first license period.⁹⁹ During the first licensing period, all brokers and sales associates must complete a specified post-licensing course prior to the first renewal.¹⁰⁰ For sales associates, this course requirement is not more than forty-five hours (including exam) in subjects including “property management, appraisal, real estate finance, the economics of real estate management, marketing, technology, sales and listing of properties, business office management . . . practical real estate application skills, development of business plans, marketing of property, and time management.”¹⁰¹ By contrast, the post-licensing course for brokers includes instruction in the same subjects for up to sixty hours prior to the first license period.¹⁰² Sales associates must pay a \$65 renewal fee, while brokers pay a renewal fee of \$72.50.¹⁰³

The Florida Division of Real Estate has “mutual recognition” with ten states, in which both brokers and sales associates can qualify for an equivalent-type license in Florida if they are eighteen years of age, hold a high school diploma or equivalent, and are not a resident of Florida at the time of application.¹⁰⁴

97. Law schools may be accredited by states for graduates to sit for only that state’s bar exam; however, the American Bar Association also nationally accredits law schools, permitting ABA-accredited school graduates to apply for the bar examination in any state. American Bar Association, *The ABA Role in General*, at <http://www.abanet.org/legaled/accreditation/abarole.html> (last visited Feb. 7, 2005).

98. See FLA. ADMIN. CODE R. 61J2-3.008.

99. FLA. STAT. § 475.182(1) (2004).

100. FLA. ADMIN. CODE R. 61J2-3.020.

101. § 475.17(3)(a). These courses must be given by an accredited college, registered real estate school, or other approved center. *Id.*

102. FLA. ADMIN. CODE R. 61J2-3.020(1)(b).

103. *Fees*, *supra* note 85.

104. SALESPERSON COURSE SYLLABUS, *supra* note 75. The ten states are Alabama, Arkansas, Colorado, Georgia, Indiana, Kentucky, Mississippi, Nebraska, Oklahoma, and Tennessee. *Id.* There are other requirements for certain states, and if applicants have received their licenses in these ten states by reciprocity, they may not claim mutual recognition in Florida. *Id.*

C. Certified Public Accountants

A certified public accountant (CPA) is defined as a person who holds a license from the State of Florida to practice public accounting.¹⁰⁵ A person practicing public accountancy performs various services for the public involving financial statements, presentations of financial information, and various types of services using accounting skills.¹⁰⁶ Any person who wishes to be licensed as a certified public accountant in Florida must apply for such a license to the Department of Business and Professional Regulation Board of Accountancy.¹⁰⁷

To sit for the examination to become a licensed CPA, an applicant must be a graduate of a four-year baccalaureate degree program, with a major in accounting, as well as other credit hours concentrating in the field of accounting.¹⁰⁸ In addition, the applicant must be considered of "good moral character."¹⁰⁹ Good moral character is defined as a "personal history of honesty, fairness, and respect" both for the rights of others and for the law.¹¹⁰ A finding of lack of such character must be supported by competent substantial evidence.¹¹¹ There is neither a requirement of residence or employment in the state of Florida for applicants, nor of any experience in the field.¹¹²

Potential licensees must pass the CPA exam, a national exam given under the approval of the Florida Board of Accountancy.¹¹³ The Board is a division of the Department of Business and Professional Regulation, focusing on the regulation of CPAs.¹¹⁴ The board determines the passing grade for

105. § 473.302(4).

106. § 473.302(7)(a)-(c). A detailed list of public accounting duties is included in this statute. *Id.*

107. Division of Certified Public Accounting, *Florida Board of Accountancy*, at <http://www.myflorida.com/dbpr/cpa/index.shtml> (last visited Feb. 7, 2005) [hereinafter *Board of Accountancy*]. The Florida Board of Accountancy is located in Gainesville, Florida. *Id.*

108. § 473.306(2)(b); FLA. ADMIN. CODE R. § 61H1-27.002 (2003). The other hours must equal at least thirty semester hours or forty-five quarter hours in excess of those required for the baccalaureate degree, including a program concentrating on accounting as defined in the administrative code. § 473.306(2)(b).

109. § 473.306(2)(a).

110. § 473.306(4)(a).

111. § 473.306(4)(b). In addition, an applicant who is rejected for a license based on character must be furnished with a complete record of such evidence upon which the determination was based. FLA. STAT. § 473.306(4)(c) (2004).

112. Division of Certified Public Accounting, *Licensure and Examination*, at http://www.myflorida.com/dbpr/cpa/business/licensing_pages/licensure_examination.shtml (last visited Feb. 7, 2005) [hereinafter *CPA Licensure*].

113. *See id.*

114. *Board of Accountancy*, *supra* note 107.

each subject of the exam for Florida applicants, but does not administer a Florida-specific examination.¹¹⁵ The exam is actually prepared by the Board of Examiners of the American Institute of Certified Public Accountants (AICPA).¹¹⁶ The Board of Examiners of the AICPA is responsible for both preparing and grading the Uniform CPA exam.¹¹⁷ All fifty states—as well as the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands—use this exam.¹¹⁸ The National Association of State Boards of Accountancy (NASBA) assists the boards of accountancy in processing the exam grades and providing statistical information arising from the exam.¹¹⁹

In 2003, the DBPR approved the final administration of a paper-based CPA examination for Florida test-takers.¹²⁰ Beginning on April 5, 2004, all of the testing for the CPA examination in Florida is only computer-based.¹²¹ The Board offers four testing “windows” for examinees to take the exam.¹²² An exam “window” is a three-month period, during which the exam is actually available for testing for only two of the months; for one month the exam is not offered for “routine maintenance” of the system.¹²³

The newer computer-based examination consists of the same number of parts as the previous paper-based examination, although they have been re-named.¹²⁴ The four sections of the exam are: 1) Auditing and Attestation; 2)

115. § 473.306(3)(a); *see also* American Institute of Certified Public Accountants, THE UNIFORM CPA EXAMINATION CANDIDATE BULLETIN (2004), <http://www.cpa-examorg/cpa/bulletin.html> (last visited Feb. 7, 2005) [hereinafter CPA CANDIDATE BULLETIN]. The Board of Examiners makes recommendations to each individual board of accountancy regarding standards. *Id.*

116. CPA CANDIDATE BULLETIN, *supra* note 115, at 1. The AICPA is the largest national professional organization for CPAs, and its mission is to serve its members in a way to enable them to provide valuable services. *Id.*

117. *Id.*

118. *See id.* at 1, 4.

119. *Id.* at 1.

120. Division of Certified Public Accounting, *Computer-Based CPA Exam Information*, http://www.myflorida.com/dbpr/cpa/CBT_for_web_page.pdf (last visited Feb. 7, 2005).

121. CPA *Licensure*, *supra* note 112.

122. *Id.*

123. *Id.*

124. CPA Ready, *Computerized CPA Exam Information*, at <http://www.cpaexam.com/content/examinfo.asp> (last visited Feb. 7, 2005) [hereinafter *CPA Exam Info*]. These sections correspond in order to the old paper-based examination sections of 1) Auditing; 2) Financial Accounting and Reporting; 3) Accounting and Reporting; and 4) Business Law and Professional Responsibilities. *Id.* Applicants who are currently in their eighteen-month period of accumulating credits may use old paper-based section credits combined with newer, computer-based passed sections during the transition period of the computer-based testing. *Id.* The specific descriptions of each section are available in the Uniform CPA Examination Candidate Bulletin, June 1, 2004. CPA CANDIDATES BULLETIN, *supra* note 115.

Financial Accounting & Reporting; 3) Regulation; and 4) Business Environment and Concepts.¹²⁵ The cost for taking each of these sections, which does not include the \$50 application fee and is paid directly to the Division of CPA, ranges from \$100.50 to \$134.50 for each section.¹²⁶ The estimated total cost for first-time exam candidates may be up to \$800.¹²⁷

Candidates for licensing may take different sections of the exam individually and in any order.¹²⁸ Once taken, the examinee earns credit for each section of the exam passed for a period of eighteen months.¹²⁹ Candidates must pass all four sections within that eighteen-month period and may not retake a failed section within the same examination window.¹³⁰

Information about the CPA exam, including access to sample exams, is available on a national website.¹³¹ In Florida, applicants contact the national examination services directly to set up exam testing.¹³² There is generally no application deadline; rather, the new computer-based examination is intended to allow candidates to apply on a rolling basis for an examination window.¹³³ Once a test appointment is scheduled, candidates may reschedule an appointment if there is a conflict.¹³⁴ Applicants do not have to be physically located within their respective jurisdictions to take the exam, but may take it at any site approved by the company administering the exam.¹³⁵ There are

125. *Id.*

126. CPA *Licensure*, *supra* note 112. Florida Administrative Code Rule 61H1-31.001, subsection one, lists the costs for taking the paper-based portion of the exam. FLA. ADMIN. CODE R. 61H1-031.001(1) (2003).

127. American Institute of Certified Public Accountants, *CPA Computer-Based Examination FAQs*, at http://www.cpa-exam.org/cpa/computer_faqs.html (last visited Feb. 7, 2005) [hereinafter *CPA FAQs*]. Each section of the exam carries a different cost. CPA *Licensure*, *supra* note 112. The total cost may include other fees associated with the testing. *Id.*

128. American Institute of Certified Public Accountants, *The CPA Exam: An Update*, at <http://www.aicpa.org/pubs/cpaltr/may2002/supps/edu1.htm> (last visited Feb. 7, 2005).

129. *CPA Exam Info*, *supra* note 124.

130. *Id.*

131. *CPA FAQs*, *supra* note 127.

132. CPA CANDIDATE BULLETIN, *supra* note 115. The telephone number is 1-800-CPA-EXAM (1-800-272-3926). American Institute of Certified Public Accountants, *Steps to Become a CPA*, http://www.cpa-exam.org/get_started/steps.html (last visited Feb. 7, 2005). In other states, applicants may have to contact their Board of Accountancy directly or another service. *Id.*

133. *See id.* at 8.

134. Applicants may reschedule at no charge if they are rescheduling more than thirty days in advance. *Id.* at 12. Rescheduling between five and twenty-nine days results in a charge of approximately \$35; however, rescheduling within five days requires full forfeiture of the fee for the section that was scheduled. CPA CANDIDATE BULLETIN, *supra* note 115; *CPA FAQs*, *supra* note 127.

135. CPA CANDIDATE BULLETIN, *supra* note 115; *CPA FAQs*, *supra* note 127.

test centers throughout the United States, but applicants may not sit for the exam outside of the United States.¹³⁶ As of this writing, there were twelve testing centers in Florida, located in Coral Springs, Ft. Myers, Gainesville, Jacksonville, Miami, Davie, Orlando, Sarasota, Tallahassee, and Tampa.¹³⁷

The substance of each exam consists of both simulation tests and multiple-choice questions.¹³⁸ The length of each section ranges from two hours and thirty minutes to four hours and thirty minutes, and the test is a total of fourteen hours in four separately tested sections.¹³⁹ Each section consists of “testlets” which contain either multiple-choice questions or a case study (simulation).¹⁴⁰

There is no immediate feedback of results. A minimum of two to four weeks is generally required to process all scores, and an additional delay is likely as the transition to computer-based examinations is completed.¹⁴¹ A passing grade is eighty.¹⁴²

Licensed CPAs are required to complete continuing professional education programs prior to biennial license renewal.¹⁴³ The DBPR brings all licensees into a concurrent reporting system by ending at the end of the DBPR reporting year, which is June 30th. CPA’s must complete at least eighty total hours of continuing education during a two-year period, including at least twenty hours in accounting and auditing subjects, and no more than twenty hours in behavioral subjects.¹⁴⁴ The hours must be taken during the period of the current license, and while hours do not carry over, extensions are avail-

136. *Id.* Applicants must bring a document entitled “Notice to Schedule” to the center, and without it, will not be allowed to sit for the exam. CPA CANDIDATE BULLETIN, *supra* note 115, at 14. Applicants must also bring photo identification, on which the name must exactly match the notice. *Id.* at 7.

137. Thompson Prometric, *TCL Test Centers*, at <http://www.2test.com/registrationgate way?ccode=USA&st=FL&cid=CPA> (last visited Feb. 7, 2005) [hereinafter *TCL Centers*]. In the past, when paper-based exams were administered, more than 55,000 applicants took the exam as given twice a year. American Institute of Certified Public Accountants, *The New CPA Exam Meeting Today’s Challenges*, at <http://www.aicpa.org/pubs/cpaltr/may2002/supps/edul.htm> (last visited Feb. 7, 2005). These exams were administered in large rooms to accommodate hundreds or more applicants simultaneously. *Id.* The new computer-based format allows more examination windows, more flexibility to applicants on which section to take at what time, and more options in scheduling and location, as well as private exam carrels. *Id.* CPA CANDIDATE BULLETIN, *supra* note 115, at 8–11, 15–16.

138. CPA CANDIDATE BULLETIN, *supra* note 115, at 22.

139. *CPA Exam Info*, *supra* note 124.

140. CPA CANDIDATE BULLETIN, *supra* note 115.

141. *CPA FAQs*, *supra* note 127.

142. FLA. ADMIN. CODE R. 61H1-33.001(1) (2004).

143. *Id.*

144. FLA. ADMIN. CODE R. 61H1-33.003.

able subject to additional hours taken.¹⁴⁵ License renewal may be administratively accomplished through the “myflorida.com” secure website and must be renewed every two years.¹⁴⁶ In addition to the continuing education courses, current licensees must also pass an exam on Florida Accountancy Law and Rules.¹⁴⁷ This open-book exam is administered either via the Internet or via hard copy upon request.¹⁴⁸ The total biennial cost to renew the CPA license is \$95.¹⁴⁹

The accountancy system provides that applicants who have passed the CPA examination in another state may become licensed in Florida. First, if the applicant has passed all parts of the nationally administered exam, in conformance with Florida’s rules for sitting for the exam, but not yet applied to be licensed in another state, the examinee may apply to transfer credit of the uniform exam to Florida.¹⁵⁰ In contrast, if the applicant has already been licensed or applied for licensing in another jurisdiction, a process known as endorsement must be undergone, requiring a ten-page application with a fee, five years of governmental accounting after licensure, and compliance with specific rules regarding educational experiences and accreditation.¹⁵¹

D. *Comparing and Contrasting Fiscal Professional Licensing*

The first difference between the fiscal professionals examined in the state of Florida is their educational requirements. Real estate professionals are not required to hold any particular traditional degree,¹⁵² while CPAs are required to complete a baccalaureate degree,¹⁵³ and attorneys are required to complete a post-graduate degree.¹⁵⁴ However, real estate professionals must take a certain number of credit hours of training specifically in that field;¹⁵⁵

145. *Id.*

146. Division of Certified Public Accounting, *Laws and Rules Exam Reminder*, at http://www.myflorida.com/dbpr/cpa/laws_rules_reminder_notice_2004.pdf (last visited Feb. 7, 2005) [hereinafter *CPA Exam Reminder*].

147. *Id.*

148. *Id.*

149. *Id.*

150. Division of Certified Public Accountants, *Instructions For Completing Application For Licensure by Endorsement Transferring Examination Grades DBPR CPA 5002-1*, at http://www.myflorida.com/dbpr/cpa/forms/endorsement_application_package.pdf (last visited Feb. 7, 2005) [hereinafter *Instructions*].

151. FLA. STAT. § 473.308(4) (2004); FLA. ADMIN. CODE R. 61H1-29.003; *Instructions*, *supra* note 150.

152. FLA. STAT. § 475.17(1)(a).

153. FLA. STAT. § 473.306(2)(b)(1).

154. FLA. BAR ADMISS. 4-13.1(a) (2004).

155. § 475.17(3)(a).

similarly, CPAs must have majored specifically in accounting and then taken additional specific accounting courses.¹⁵⁶ In contrast, the attorney, who has completed a minimum of seven years of post-high school education, is not required to take course training specific to the vocation.¹⁵⁷ Law school courses often are said to teach students to think like lawyers and to teach the law, but they do not necessarily cover the specific every day business requirements of being an attorney.¹⁵⁸ One of the results of these requirements is a discrepancy in ages of the fiscal professionals. A real estate professional could be as young as eighteen (as per licensing requirements),¹⁵⁹ while the requirement of a bachelor's degree makes an accounting licensee unlikely to be that young (although no age requirement is specified in the licensing),¹⁶⁰ and certainly attorneys are expected to be even older, with the necessity of three additional years of education over accountant licensees.¹⁶¹

A second level of comparison is the examination process. Real estate professionals are required to take an exam that is crafted and administered by the State of Florida.¹⁶² The real estate exam is given by private testing centers and is in computer format with immediate feedback.¹⁶³ The accountancy exam, by contrast, is administered by a national organization and has recently switched to an internet format at an approved testing site. Additionally, feedback is not immediate, as the written portion of the exams requires careful evaluation. Attorney examinations differ from both real estate and accounting exams. Attorney examinations are a combination of Florida law and national law, and the Florida Board of Bar Examiners works to administer this combination test with the National Conference of Bar Examiners.¹⁶⁴ While the Bar has recently begun allowing examinees to use laptop computers in the writing of the exam, it is a paper-based exam given only on two specific dates a year in one central location.¹⁶⁵ Feedback as to a passing score generally comes after a delay of several months. Such a difference in examination methods certainly sets a different tone and level of accessibility to the future professionals. This difference regulates the rate at which the stream of professionals is increased in each profession, requiring careful planning by employers and future licensees alike.

156. § 473.306(2)(b)(1), (2).

157. FLA. BAR ADMISS. R. 14-13.1(a).

158. *See generally*, STUDENT HANDBOOK, *supra* note 33.

159. § 475.17(1)(a).

160. FLA. ADMIN. CODE R. 61H1-27.002.

161. FLA. BAR ADMISS. R. 4-13.1(a).

162. FLA. ADMIN. CODE R. 61J2-3.008 (2004).

163. *Id.*; IFREC FAQs, *supra* note 79.

164. FLA. BAR ADMISS. R. 4-11.

165. FLA. BAR ADMISS. R. 4-14, 4-15.

The third level of difference between the licensure systems is the manner in which they treat potential licensees who are licensed in other jurisdictions. On one end of the spectrum is the attorney system in Florida, forbidding any reciprocity of other licensed attorneys. On the other end, for our purposes, is the real estate system, which has set up a mutual recognition system with twenty percent of the licensing states, once additional minimum standards are met.¹⁶⁶ A far more complicated system is the accountant endorsement system, which designates minimum requirements, work experience, and the potential of additional continuing education.¹⁶⁷

The final level of comparison between the professions is in the administrative requirements. All three fiscal professional categories require some type of post-licensing continuing credit. Real estate professionals are required to carry a heavy load during the first renewal period, followed by a comparatively lighter educational requirement—half of an attorney's requirements in two-thirds the time period.¹⁶⁸ By contrast, accountants are required to complete more than twice the number of hours in a period one-third shorter in length than attorneys. All three fiscal professional categories are also required to renew their licenses and pay a fee. Both real estate professionals and accountants have two-year renewal periods,¹⁶⁹ brought into time concurrence according to the DBPR annual report year, with a fee of less than \$100; meanwhile, attorneys have a three-year renewal period,¹⁷⁰ staggered as to actual admittance date to the Florida Bar, with a maximum fee of \$265 annually.¹⁷¹

IV. THE DISCIPLINE SYSTEMS

A. Attorneys

The Supreme Court of Florida establishes the responsibilities of its member attorneys through the *Rules Regulating the Florida Bar*.¹⁷² The Su-

166. Division of Real Estate, *Mutual Recognition Information*, at http://www.myflorida.com/dbpr/re/mut_rec.shtml (last visited Feb. 7, 2005).

167. FLA. ADMIN. CODE R. 61H1-29.003.

168. FLA. ADMIN. CODE R. 61J2-3.020.

169. FLA. ADMIN. CODE R. 6141-031.001(1); see *CPA Exam Reminder*, *supra* note 146.

170. R. REGULATING FLA. BAR 6-10.3(b) (2004).

171. R. REGULATING FLA. BAR 1-7.3. Although The Florida Bar Exam is administered only twice per year, the actual admittance date of the applicant may depend on the completion of the full processing of any individual application. FLA. BAR. ADMISS. R. 2.

172. R. REGULATING FLA. BAR 1-4.2. The Supreme Court of Florida has the power under the Florida Constitution to regulate the admission of the members of the Bar with the right to practice law, and thus set the ethical standards for those members. See *id.* The current *Rules*

preme Court of Florida sets the standards of actions for attorneys and determines what constitutes discipline.¹⁷³ The Supreme Court of Florida also is ultimately responsible for disciplining Florida attorneys.¹⁷⁴ The professional regulation of lawyers in Florida is not the same as a civil lawsuit for malpractice.¹⁷⁵

The grievance process against an attorney generally begins with a complaint from a client.¹⁷⁶ Clients are encouraged, before the filing of a complaint, to first contact the Attorney Consumer Assistance Program (ACAP), launched by The Florida Bar in March 2001.¹⁷⁷ A client who contacts ACAP before filing a grievance will first discuss the behavior of the subject attorney with non-lawyer personnel and then with ACAP attorney personnel, who will by then have reviewed the information.¹⁷⁸ The ACAP attorney's role is to help determine if a potentially actionable grievance exists against an attorney and to guide the client through the filing of such a complaint.¹⁷⁹

of Professional Conduct were adopted in the late 1980s and are based on the *ABA Model Rules of Professional Conduct*. See Timothy P. Chinaris, *A Brief Overview of Lawyer Regulation in Florida*, at <http://www.sunethics.com/lawregoverview.htm> (last visited Feb. 7, 2005).

173. R. REGULATING FLA. BAR 3-1.2.

174. *Id.*

175. R. REGULATING FLA. BAR 3-1.1. A civil lawsuit for malpractice occurs when attorneys are sued in the civil court system of the judicial circuit having jurisdiction over that attorney's actions, proceeding according to the court and substantive rules and laws of the jurisdiction. FLA. STAT. § 95.11 (2003). Such malpractice lawsuits are subject to a statute of limitations, as set by section 95.11, *Florida Statutes*. *Id.* In a lawsuit for malpractice, the court usually is asked to award monetary compensation to the plaintiff. *Id.* In professional regulation grievance matters, only the status of the attorney's license is at stake. R. REGULATING FLA. BAR 3-5.1. There is no monetary compensation ordered. *Id.*

176. See The Florida Bar, *Complaint Against a Florida Lawyer*, at <http://www.flabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9/c5b7d247a0c9c45a85256b2f006c6186?OpenDocument> (last visited Feb. 7, 2005).

177. The Attorney Consumer Assistance Program (ACAP) was created by The Florida Bar to investigate charges of unethical conduct against lawyers practicing in Florida and assist clients in resolving problems prior to filing a complaint. Jan Pudlow, *Disciplinary Details*, FLA. B. NEWS, Mar. 15, 2001, available at <http://www.flabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8fabd49d85256b5900678f6c/5cb1a95d473c0a5585256b0a007269c0?OpenDocument> (last visited Feb. 7, 2005).

178. *Complaint Against a Florida Lawyer*, *supra* note 176. One reason that this program was created was to reduce the number of complaints filed on matters not under the jurisdiction of The Florida Bar for which to give discipline. Pudlow, *supra* note 177. Generally, The Florida Bar has the authority to investigate lawyers' behavior regarding fiscal responsibilities, conflicts of interests, lying, and failure to follow through with matters. See generally R. REGULATING FLA. BAR 5-1.1, 4-1.1, 4-1.7, 4-8.4.

179. *New Bar Program to Assist Lawyers and Their Clients*, 28 FLA. BAR NEWS 1, Apr. 15, 2001, available at <http://www.flabar.org/DIVCOM/JN/JNNews01.nsf/cb53c80c8fabd49d85256b5900678f6c/faaf2e8e8a622b1685256aea0062f7f1?OpenDocument> (last visited Feb. 7, 2005) [hereinafter *New Bar Program*]. The ACAP program is apparently successful in

A complaint filed against an attorney must always be in writing and signed under oath.¹⁸⁰ The official one-page complaint form is available on The Florida Bar website, and additional information may be attached.¹⁸¹ Complainants must be aware that the name, address, and telephone number of the person making the complaint (technically called an “inquiry” at this stage),¹⁸² not only becomes public record, but also is affirmatively disclosed to the attorney who is the subject of the complaint.¹⁸³

The Florida Bar creates a file on each grievance received, which is assigned to a Florida Bar disciplinary staff attorney in order to determine whether The Florida Bar has jurisdiction to investigate the inquiry.¹⁸⁴ If the Bar determines that it does not have jurisdiction over either the attorney or the actions, the file is closed.¹⁸⁵

If the Bar does have jurisdiction, the matter then becomes technically known as a “complaint,” and the Bar begins the formal investigative process by writing a letter to the lawyer who is the subject of the complaint.¹⁸⁶ The accused lawyer is required to answer this request in writing, generally within twenty days.¹⁸⁷ The individual who filed the complaint may then respond to rebut information provided in the attorney’s response.¹⁸⁸

The Florida Bar disciplinary counsel then conducts a review to determine whether the case should move on to the next stage of the disciplinary process.¹⁸⁹ If counsel makes a determination of complaint substance, the case is taken to the next step and heard by a Florida Bar grievance committee.¹⁹⁰ A grievance committee is comprised of panels of volunteers, at least

reducing the number of grievances filed against attorneys and satisfying clients as well. *Id.* Complaints to the grievance system of The Florida Bar have dropped eight percent since 2001, when ACAP was instituted. *Id.*

180. R. REGULATING FLA. BAR 3-7.3(c).

181. The Florida Bar Inquiry, *Complaint Form*, available at [http://www.flabar.org/TFB/TFBResources.nsf/Attachments/AB230E7DCCC3B75385256B29004BD6DC/\\$FILE/ac-ap-form-web04.pdf?OpenElement](http://www.flabar.org/TFB/TFBResources.nsf/Attachments/AB230E7DCCC3B75385256B29004BD6DC/$FILE/ac-ap-form-web04.pdf?OpenElement) (last visited Feb. 7, 2005).

182. R. REGULATING FLA. BAR 3-7.3(a).

183. *Complaint Against a Florida Lawyer*, *supra* note 176.

184. *Id.*

185. *Id.* At this point, the complaint is initially labeled as an “inquiry.” *Id.* One reason, for example, that the Bar may not be able to handle a complaint is if the attorney is not licensed in the state of Florida by The Florida Bar. See R. REGULATING FLA. BAR 1-3.1.

186. *Complaint Against a Florida Lawyer*, *supra* note 176. Attorneys may not know if their behavior was discussed with ACAP when no complaint was filed. *Id.*

187. R. REGULATING FLA. BAR 3-7.6(h)(2). Extensions are generally liberally granted for attorneys engaged in the active practice of law. Curtis & Kaufman, *supra* note 3, at 679.

188. R. REGULATING FLA. BAR 3-7.6(h)(2).

189. R. REGULATING FLA. BAR 3-7.3(a).

190. R. REGULATING FLA. BAR 3-7.3(f).

one-third of whom may not be lawyers.¹⁹¹ The committee serves to hear cases within its jurisdiction to determine if there is “probable cause” in the matter, determined by a majority vote of those committee members present.¹⁹² Grievance committees may only hear complaints if a quorum, consisting of a minimum of three members, two of whom must be lawyers, is present.¹⁹³

If a grievance committee finds probable cause in a matter, bar counsel files a formal complaint against the accused attorney with the Supreme Court of Florida.¹⁹⁴ If that complaint is contested by the subject attorney, the matter is sent to a circuit or county court judge appointed for that purpose for a trial.¹⁹⁵ The judge, known in this contest as a “referee,” hears evidence, makes a finding of fact, and recommends discipline to the Supreme Court of Florida, which has the final authority to decide the discipline of any Florida attorney.¹⁹⁶

The *Rules Regulating the Florida Bar* enumerate the disciplines which the Supreme Court of Florida may impose.¹⁹⁷ First are specific rules for what is considered “minor misconduct.”¹⁹⁸ Although defined in the rules only as what is *not* minor misconduct, rather than an affirmative statement of what *is* minor misconduct, generally, the appropriate discipline for such action is “admonishment” of the attorney.¹⁹⁹ Admonishment of an attorney declares

191. R. REGULATING FLA. BAR 3-7.4(g)(2).

192. *Complaint Against A Florida Lawyer*, *supra* note 176. The Florida grievance committees are assigned by judicial circuit. *Id.* Florida’s courts are divided into twenty numbered judicial circuits divided by geography. Florida State Courts, *Circuit Courts*, at <http://www.flcourts.org/courts/circuit/circuit.shtml> (last visited Feb. 11, 2005). Some counties comprise an entire judicial circuit, while other small counties may combine to form one single judicial circuit. *Id.* All members of the grievance committee are appointed by The Florida Bar Board of Governors. R. REGULATING FLA. BAR. 1-4.3.

193. R. REGULATING FLA. BAR 3-7.4(g)(1).

194. R. REGULATING FLA. BAR 3-7.4(p); *see* CONSUMER PAMPHLET “ATTORNEY CONSUMER ASSISTANCE PROGRAM,” <http://www.flabar.org/tfb/TFBConsum.nsf/48e76203493b82ad852567090070c9b9/90dad2cf7a8f877b85256b2f006c61bd?OpenDocument> (last visited Feb. 7, 2005).

195. R. REGULATING FLA. BAR 3-7.6(a). Cases may also be settled without a trial. *Id.*

196. R. REGULATING FLA. BAR 3-7.7.

197. R. REGULATING FLA. BAR 3-5.1. In addition, the Standards for Imposing Lawyer Sanctions, Part B describes the levels of discipline and reasons why each may be assessed. FLA. STDS. IMPOSING LAW. SANCS. 2.1-10 (2004).

198. R. REGULATING FLA. BAR R. 3-5.1(b).

199. R. REGULATING FLA. BAR R. 3-5.1(b)(1). This rule enumerates six conditions in which misconduct will not be regarded as minor: misappropriation of a client’s funds or property; behavior likely to result in actual prejudice to a client; improper behavior by an attorney who has been publicly disciplined in the past three years; misconduct of the same nature for which the subject attorney has been disciplined in the past five years; misconduct

that the conduct of the attorney was not proper, but it does not limit that attorney's right to practice law within the state of Florida.²⁰⁰

Attorneys also may have their minor misconduct declared improper in a more public fashion, but still without limiting their right to practice law.²⁰¹ This may be appropriate where injury or potential injury is caused by the attorney's actions, but where the behavior is generally categorized as negligent rather than knowing or intentional.²⁰² Such a judgment of a "public reprimand" is published in the law reporters for Florida cases.²⁰³

If an attorney's misbehavior is not considered "minor" under the *Rules Regulating the Florida Bar*, there are three levels of discipline potentially available to the court.²⁰⁴ The discipline is public, and in some way, restricts or alters the attorney's right to practice law.²⁰⁵

The least intrusive discipline which alters an attorney's right to practice is being placed on probation.²⁰⁶ Attorneys may be placed on probation for a time period generally between six months and three years. They also may be required to complete continuing education programs or to be supervised by licensed attorneys.²⁰⁷

Alternatively, attorneys may be suspended from practice either after a hearing or on an emergency basis.²⁰⁸ Suspensions are generally imposed for either ninety days or less, which do not require proof of rehabilitation or passage of the bar examination, or between ninety days and three years, which do require rehabilitation and may also require passage of all or part of the bar exam.²⁰⁹ An attorney's license may be suspended for violations regarding

which includes dishonesty, misrepresentation, deceit, or fraud by the subject attorney; and behavior constituting a felony. *Id.*

200. FLA. STDS. IMPOSING LAW. SANCS. 2.6. An admonishment generally consists of a memorandum documenting the behavior and directing the attorney to appear before either the grievance committee or The Florida Bar Board of Governors for a discussion of the behavior. R. REGULATING FLA. BAR R. 3-5.1(a).

201. FLA. STDS. IMPOSING LAW. SANCS. 2.5.

202. FLA. STDS. IMPOSING LAW. SANCS. 4.13, 4.23, 4.43, 4.63, 5.13, 5.23, 6.13, 6.23, 6.33, 7.3, 8.3; *see also* Fla. Bar v. Kelner, 670 So. 2d 62, 63 (Fla. 1996); Fla. Bar v. Lumley, 517 So. 2d 13, 14 (Fla. 1987).

203. R. REGULATING FLA. BAR 3-5.1(d) (2004). Florida cases are published solely in the *Southern Reporter, Second Series*. *Id.*

204. R. REGULATING FLA. BAR 3-5.1(d)-(f).

205. R. REGULATING FLA. BAR 3-5.1(c). The referee's recommendation is not binding on the Supreme Court of Florida, however it is given weight. R. REGULATING FLA. BAR 3-7.7(2).

206. R. REGULATING FLA. BAR 3-5.1(c).

207. *Id.*

208. R. REGULATING FLA. BAR 3-5.1(e); *see also* FLA. STDS. IMPOSING LAW. SANCS. 2.3, 2.4 (2004).

209. R. REGULATING FLA. BAR 3-5.1(e).

improper dealing with client property causing injury, revealing confidential information of a client, knowing of conflicts of interest without disclosing them to clients, knowingly failing to perform services for a client, knowingly lacking competence causing injury, or knowingly deceiving a client, causing injury or potential injury.²¹⁰

The court also may order an emergency suspension of the license of an attorney without the full grievance proceeding when an attorney has been convicted of a serious crime, or if an attorney's conduct will, or is likely to, cause immediate or serious injury to a client or the public.²¹¹

The most severe of the disciplines against attorneys is disbarment.²¹² Attorneys who are disbarred lose both the privilege of practicing law and their status as members of the Bar.²¹³ Attorneys may be permanently disbarred or disbarred with leave to apply for readmission.²¹⁴

There is no explicit list of violations published for attorneys that will result in disbarment. However, disbarment may be recognized as an appropriate punishment in a variety of grave injuries or potential injuries to a client, or being convicted of a felony, engaging in the sale of drugs, fraud, or for deceitful behavior.²¹⁵

210. FLA. STDS. IMPOSING LAW. SANCS. 4.12, 4.22, 4.32, 4.42, 4.52, 4.62. In addition, a license suspension may be the appropriate sanction for an attorney who engages in certain kinds of criminal conduct or other activities, including causing intentional injury or potential injury to a client, the public, or the legal system. FLA. STDS. IMPOSING LAW. SANCS. 8.2. The Supreme Court of Florida may also find it appropriate to suspend an attorney's license to practice law if the attorney already has been publicly reprimanded for the same or similar conduct, and subsequently has another violation of a similar type. *Id.*

211. FLA. STDS. IMPOSING LAW. SANCS. 2.4. The Florida Bar is required to file a formal complaint of discipline within sixty days of an order of emergency suspension. R. REGULATING FLA. BAR 3-5.2(d) (2004). Such a case then proceeds directly to trial, skipping the need for a probable cause hearing before a grievance committee. *Id.* Attorneys may move to have the emergency order dissolved. R. REGULATING FLA. BAR 3-5.2(e)(1).

212. R. REGULATING FLA. BAR 3-5.1(f).

213. *Id.*

214. *Id.*; see *In re Hipsh*, 586 So. 2d 311 (Fla. 1991); see also *Fla. Bar v. Ryder*, 540 So. 2d 121 (Fla. 1989). The disbarred attorney must show, in a petition supported by clear and convincing evidence, that he or she both has completed the bar examination and is rehabilitated, once again fit to practice law. FLA. STDS. IMPOSING LAW. SANCS. 2.2 (2004). The disbarred attorney must also wait a minimum of five years before reapplying. *Id.*

215. FLA. STDS. IMPOSING LAW. SANCS. 4.11, 4.21, 4.31, 4.41, 4.51, 5.21, 6.31, 7.1. This rule also applies when an attorney intentionally reveals information regarding a client's matter, with the intent to benefit a third person, and the disclosure, which would not otherwise be permitted, causes potential or real injury to the client. FLA. STDS. IMPOSING LAW. SANCS. 4.61. If an attorney knowingly or intentionally deceives a client, disbarment may be appropriate regardless of injury. *Id.* When an attorney is found guilty of theft from monies held by that lawyer in a fiduciary relationship, The Florida Bar rules provide for a rebuttable presumption of disbarment. FLA. STDS. IMPOSING LAW. SANCS. 4.11; see also *Fla. Bar v. Mart*, 550 So. 2d

The *Florida Standard for Imposing Lawyer Sanctions* states that a court should consider the following factors in imposing a discipline order on an attorney: the duty violated by the attorney, the mental state of the attorney, the potential *or* actual injury caused by the misconduct, and whether any mitigating or aggravating factors existed in the matter.²¹⁶ Aggravating factors may justify an increase in the discipline level imposed on an attorney, and by contrast, mitigating factors may justify a reduction in the discipline imposed.²¹⁷

The public has some access to this discipline information, although not in a single format with both an organized report and detailed information. The Florida Bar publishes a summary chart for its past fiscal year overviewing the years 1996-97 to the present, regarding bar population and final orders by category and the total number of files opened.²¹⁸ Also, the public may access specific information about attorney conduct and discipline in a number of ways. The first is through a listing of orders by the Supreme Court of Florida (detailing the attorney's name, city, specific conduct, and discipline received) dating back approximately a year.²¹⁹ In addition, these paragraphs are published in the Florida attorney trade newspaper, *The Florida Bar News*, on a biweekly basis. It is available at law libraries open to the public, although many non-lawyers may not be aware of this publication or its availability. Last, an individual concerned about a specific attorney may contact The Florida Bar directly to inquire about his/her discipline history.²²⁰

464 (Fla. 1989). Standard 5.1 called it failure to maintain personal integrity. FLA. STDS. IMPOSING LAW. SANCS. 5.1. Other reasons for the disbarment sanction may include intentionally deceiving the court, abusing the legal process, or intentionally violating the terms of a prior disciplinary order. *E.g.*, FLA. STDS. IMPOSING LAW. SANCS. 6.11, 6.21, 8.1.

216. FLA. STDS. IMPOSING LAW. SANCS. 3.0.

217. FLA. STDS. IMPOSING LAW. SANCS. 9.21, 9.31. Facts which may be considered aggravating include prior disciplinary offenses, experience level, patterns of misconduct or vulnerability of the victim of the offense. FLA. STDS. IMPOSING LAW. SANCS. 9.22. Mitigating factors may include absence of prior records or dishonest motive, personal problems or situations, good faith efforts to rectify consequences, impairments, and overall character. FLA. STDS. IMPOSING LAW. SANCS. 9.32.

218. The Florida Bar, *Regulation of Lawyer Conduct: The Florida Bar Disciplinary Statistics*, at <http://www.flabar.org/tfb/TFBLawReg.nsf/basicview/F4AB3FF7CB9A5AFA85256B2F006C9F09?OpenDocument> (last visited Feb. 7, 2005) [hereinafter *Bar Disciplinary Statistics*].

219. The Florida Bar, *News Releases*, at <http://www.flabar.org/tfb/TFBPublic.nsf/wNewsReleases?OpenView> (last visited Feb. 7, 2005) [hereinafter Fla. Bar *News Releases*].

220. *Id.*

B. Real Estate Professionals

The Department of Business and Professional Regulation provides a centralized electronic format for both licensees and the public to gather information about the regulation of many professions.²²¹ The site may be searched according to occupation.²²²

Complaints against real estate associates, brokers, or unlicensed persons practicing in the field must be in writing and signed.²²³ A complaint form is available on the DBPR website for consumers, or the complainant may write a letter including details of the complaint along with copies of all pertinent documents.²²⁴

The Division of Real Estate's "Complaint Section" will forward a complaint to a complaint analyst when received for a determination of legal sufficiency.²²⁵ If sufficient information does not exist to support a violation, a letter will be sent to the complainant explaining that a case will not be opened.²²⁶

A probable cause panel, consisting of two members of the Florida Real Estate Commission, determines if probable cause exists that a licensee or subject of an investigation violated the *Florida Statutes* pertaining to real estate.²²⁷ The main office of the Real Estate Commission is in Orlando, Florida.²²⁸ Members, including those serving on probable cause panels, may be compensated \$50 per day for attendance at meetings or the conducting of "official" business of the Commission, as defined in the code.²²⁹

221. Department of Business and Professional Regulation, *Division of Regulation*, at <http://www.myflorida.com/dbpr/reg/index.shtml> (last visited Feb. 7, 2005).

222. *Id.*

223. Division of Real Estate, *Frequently Asked Questions*, at http://www.myflorida.com/dbpr/re/faq_enf_new.shtml (last visited Feb. 7, 2005) [hereinafter *Real Estate FAQs*]. The complaint form itself asks the complainant to properly categorize the problem as either unlicensed activity, escrow deposit, property management, appraisal, or other. Department of Business and Professional Regulation, *Uniform Complaint Form*, at http://www.myflorida.com/dbpr/dbpr/le_portal/dbpr-0070-1.pdf (last visited Feb. 7, 2005) [hereinafter *Uniform Complaint Form*]. It also asks to list private attorney information if available. *Id.*

224. *Real Estate FAQs*, *supra* note 223.

225. *Id.*

226. *Id.* The confidential complaint is retained by the Division of Real Estate. *Id.*

227. FLA. ADMIN. CODE R. 61J2-20.009 (2004). The members of the panel are appointed by the chairperson of the Commission, and one panel member may be a former member, rather than a current member, of the Commission. *Id.* If a former member, that person must hold an active real estate license. *Id.*

228. FLA. ADMIN. CODE R. 61J2-20.048.

229. FLA. ADMIN. CODE R. 61J2-20.049.

When an investigation of a complaint is undertaken, the DBPR is required to furnish to the subject a copy of that complaint, and the subject has twenty days in which to submit a written response to that complaint.²³⁰ The panel must consider the response by the subject, but regardless of it, may still have the power to issue an emergency order if warranted in order to protect the public.²³¹ The complaint will be further investigated by the DBPR and its report submitted to the probable cause panel, including findings and recommendations as to the existence of probable cause.²³² The department may also dismiss a case at any point in the proceedings for insufficient evidence.²³³

As an alternative to the complaint being heard by the probable cause panel, the DBPR may give a licensee, who is the subject of a complaint, a “notice of noncompliance for an initial offense of a minor violation.”²³⁴ A minor violation is defined as one that “does not demonstrate a serious inability to practice the profession, result in economic or physical harm to a person, or adversely affect the public health, safety, or welfare or create a significant threat of such harm.”²³⁵

There are twenty such behaviors listed which carry no other penalty, including improper use of a guest lecturer in a course or failure to maintain an office entrance sign.²³⁶ The notice identifies the statute and rule violated, and provides information on how to comply.²³⁷ The subject is given fifteen days from the time of receipt of notice in order to be in compliance; failure to comply may result in a citation.²³⁸ The law requires the DBPR to keep the complainant updated as to probable cause and any other proceedings or appeals.²³⁹

If there are violations which the Division will hear, and the documentation supports these violations, a case is opened and forwarded to a local Investigative Field Office.²⁴⁰ Complaints are confidential until the subject of

230. FLA. STAT. § 455.225(1)(b) (2003). These guidelines are not specific to the real estate profession only, rather this applies to the entire Department of Business and Professional Regulation. *See id.* Compare with section 454.021 of the *Florida Statutes*, which delegates the regulation of attorneys to the Supreme Court of Florida. § 454.021.

231. § 455.225(1)(b).

232. § 455.225(2).

233. *Id.* A dismissal may come even after a finding of legal sufficiency. *Id.*

234. § 455.225(3)(a).

235. *Id.*

236. FLA. ADMIN. CODE R. 61J2-24.003(1) (2003).

237. FLA. ADMIN. CODE R. 61J2-24.003(2).

238. *Id.*

239. § 455.225(9).

240. Real Estate *FAQs*, *supra* note 223.

the investigation waives the privilege of confidentiality or ten days after a disciplinary action finding of probable cause.²⁴¹

In cases going to the probable cause panel, a determination as to the existence of probable cause is made by a majority vote.²⁴² Generally, a panel that requests additional investigative information must make that request within fifteen days of the receipt of the initial report and make its determination within thirty days of that date.²⁴³

In a situation of a disputed issue of material fact, a formal hearing on the complaint may be heard by an administrative law judge, who issues a recommended order.²⁴⁴ In addition, the DBPR may have such a judge review any final order by the Board.²⁴⁵ Mediation may be used to assist the processing of a complaint.²⁴⁶ Such judicial reviews have recently included appeals from decisions of the Florida Real Estate Commission by brokers having licenses revoked or having been found guilty.²⁴⁷

A person operating as a broker or sales associate without a valid active license commits a third degree felony under Florida law, and the Division of Real Estate may refer such situations to the State Attorney.²⁴⁸ The Florida Real Estate Commission, as a licensing body, may impose various disciplines against its licensees for wrongdoing.²⁴⁹ It may choose to fine, suspend, revoke licenses, place on probation, or simply reprimand its licensees.²⁵⁰ The *Florida Statutes* and the *Florida Administrative Code* detail a range of disciplinary guidelines for violations under chapter 475 of the *Flor-*

241. *Id.* The outcome of any action taken against a licensee may be discovered by contacting the DBPR with the correct spelling of the licensee's name. *Id.*

242. § 455.225(4). The *Florida Administrative Code* specifically stated there were two members (not at least two) of a probable cause panel for real estate hearings, which then appears to require a unanimous vote. FLA. ADMIN. CODE R. 61J2-20.009.

243. § 455.225(4). However, extensions may be granted. *Id.*

244. § 455.225(5).

245. § 455.225(7).

246. FLA. ADMIN. CODE R. 61J2-24.004.

247. *Jones v. Dep't of Bus. & Prof'l Regulation*, 873 So. 2d 1266 (Fla. 5th Dist. Ct. App. 2004) (holding that there was no "dishonest dealing by trick, scheme or device" and reversing in part); *Djokic v. Dep't of Bus. & Prof'l Regulation*, Div. of Real Estate, 875 So. 2d 693, 695 (Fla. 4th Dist. Ct. App. 2004) (holding that the Florida Real Estate Commission could not reverse an administrative law judge's finding of not guilty and no violation of statute, reversing the previous finding).

248. § 475.42(1)(a).

249. See Real Estate *FAQs*, *supra* note 223.

250. *Id.* Restitution to the complainant is not within the power of the board. *Id.* Licensees operating outside of their licensing or employing those who do so may also be punishable. *Id.*

ida Statutes.²⁵¹ Violations are specifically listed with a recommended range of penalty for each behavior.²⁵²

The purpose of the specific list of violations, along with their penalties, is to give notice to licensees regarding potential violations.²⁵³ The general “order of penalties, ranging from lowest to highest: is reprimand, fine, probation, suspension, and revocation or denial.”²⁵⁴ In addition to other penalties (combinations are permitted), the commission may place a licensee on probation. Such conditions may include attending or completing a pre-licensure course, attending or completing post-licensure courses, attending continuing education courses, and re-taking the state-issued exam.²⁵⁵ Other conditions may include periodic inspections, interviews, filing reports, or the changing of a license from broker to broker-salesperson status.²⁵⁶

There are thirty-nine separate violations and corresponding penalties listed with their statutory authority, ranging from: failing to properly maintain an office and sign; to have false, deceptive, or misleading advertising; or to be convicted or found guilty of a crime related to real estate.²⁵⁷ Disciplines may include: 1) suspensions (generally either up to ninety days, ninety days to two years, three to five years, or five years); 2) revocation; and 3) fines of either \$500 or \$1000.²⁵⁸

There are additional violations which the Commission can discharge with only a citation, generally consisting of a fine between \$100 to \$500, and possibly including education requirements.²⁵⁹ There are forty-one such separate citation violations, including: failure to maintain a proper office sign; failure to timely deposit trust funds (if not more than three days late); failure to properly report education to the DBPR; and improper handling of financial matters for clients, such as failing to secure permission of parties before placing trust funds in an interest-bearing account.²⁶⁰

Aggravating or mitigating circumstances may change the discipline given, and may include factors such as “[t]he degree of harm to the consumer or public,” “[t]he disciplinary history of the [subject],” and the degree of hardship a penalty may have on the subject, among others.²⁶¹

251. § 475.42; FLA. ADMIN. CODE R. 61J2-24.001.

252. FLA. ADMIN. CODE R. 61J2-24.001(3).

253. FLA. ADMIN. CODE R. 61J2-24.001(1).

254. *Id.*

255. FLA. ADMIN. CODE R. 61J2-24.001(2).

256. *Id.*

257. FLA. ADMIN. CODE R. 61J2-24.001(1)(a), (d), (g) (2003).

258. FLA. ADMIN. CODE R. 61J2-24.001(3).

259. FLA. ADMIN. CODE R. 61J2-24.002(2).

260. *Id.*

261. FLA. ADMIN. CODE R. 61J2-24.001(4)(b).

The harshest penalty imposed on a licensee is revocation.²⁶² Revocation of a licensee is generally permanent, except in certain unusual circumstances.²⁶³

The disciplines themselves are reported on the DBPR public access websites.²⁶⁴ By following a link entitled “Disciplinary Action,” members of the public may access fully compiled reports by year—dating back to the DBPR year 2000—of discipline information sorted by city, including “name of disciplined professional and a full description of the behavior involved.”²⁶⁵ In addition, the DBPR produces an annual report summarizing the licensee numbers, complaints received, and dispositions of various professions, including real estate.²⁶⁶ Last, the public may search individual licenses online by name and learn the status of their licenses—including whether they have had their license revoked, or had other discipline imposed on them.²⁶⁷

C. *Certified Public Accountants*

The discipline process of certified public accountants (CPA) generally begins with a complaint against a Florida CPA. A uniform complaint form is available on line at www.myfloridalicense.com, and contains a contact number at the DBPR Customer Contact Center for assistance in completing the form.²⁶⁸ The form itself, found through the general licensing pages, rather than at the specific Division of Accountancy page, asks complainants for personal information such as name, company, address, contact information, and a specific question regarding whether this is a complaint regarding unli-

262. *See id.*

263. FLA. ADMIN. CODE R. 61J2-24.005(1).

264. DBPR *Home Page*, *supra* note 2. Certain aspects of the DBPR website are password protected. *See id.* They are generally specific sites related to license maintenance, renewal and personal information. *Id.*

265. Division of Real Estate, Florida Real Estate Commission: *Disciplinary Activity Reports*, at http://www.myflorida.com/dbpr/re/freab_dar.shtml (last visited Feb. 7, 2005) [hereinafter *FREC Disc.*].

266. *Real Estate Appraisal*, *supra* note 62.

267. Department of Business and Professional Regulation, *Licensing Portal-Licensee Search by Name*, at <https://www.myfloridalicense.com/licensing/w111.jsp?SID=> (last visited Feb. 7, 2005) [hereinafter *Search by Name*].

268. Department of Business and Professional Regulation, *Complaint Filing*, at <https://www.myfloridalicense.com/entercomplaint.asp?SID=> (last visited Feb. 7, 2005).

censed activity.²⁶⁹ Last, the form allows for the inclusion of a 5000 character complaint description.²⁷⁰ It may be mailed or submitted online.²⁷¹

The Florida Board of Accountancy is responsible for appointing a probable cause panel to determine whether probable cause exists for a violation of the *Florida Statutes* regarding rules of accountancy.²⁷² The Florida Accountancy Board consists of nine members, seven of whom are CPAs and two of whom are consumer members.²⁷³

The Board-appointed probable cause panel is composed of at least three members.²⁷⁴ One member must be a current Board member and another must be a present or former Board member who must hold an active and valid CPA license.²⁷⁵ The panel also must contain a former or present consumer member, if available.²⁷⁶ Any determination of probable cause must be made by a majority vote of the probable cause panel.²⁷⁷ The Chairman of the Board selects the probable cause panel, and one panelist is selected as presiding officer, who determines the meeting times of the panel.²⁷⁸ The process of finding probable cause is similar to that of the process for real estate professionals, described above, as they are both under the jurisdiction of the DBPR.²⁷⁹

The Board of Accountancy has set forth specific penalty ranges that correspond with specific behavior violating the *Florida Statutes*.²⁸⁰ Rule 61H1-36.004(2) of the *Florida Administrative Code* lists multiple categories

269. *Uniform Complaint Form*, *supra* note 223. Compare to attorney regulation, which has a different department of the Bar that handles unlicensed practice of law matters. R. REGULATING FLA. BAR 4-5.5 (2004).

270. *Uniform Complaint Form*, *supra* note 223.

271. *Id.*

272. FLA. ADMIN. CODE R. 61H1-19.007 (2003). To be a member of the Florida Board of Accountancy, board members must attend all regularly scheduled meetings (approximately ten per year) and may not be absent without excuse from three consecutive meetings. FLA. ADMIN. CODE R. 61H1-19.006. Excused absences are specifically defined as "illness of the Board member or member of the Board member's family, death of a member of the Board member's immediate family, or natural disaster." FLA. ADMIN. CODE R. 61H1-19.006(1). The terms "family" and "immediate family" are also defined. FLA. ADMIN. CODE R. 61H1-19.006(3)-(4).

273. FLA. STAT. § 473.303(1) (2003).

274. FLA. ADMIN. CODE R. 61H1-19.007(2).

275. *Id.*

276. *Id.*

277. FLA. ADMIN. CODE R. 61H1-19.007(1).

278. FLA. ADMIN. CODE R. 61H1-19.007(3).

279. § 455.225(4).

280. §§ 473.322, .323.

of violations.²⁸¹ The following table summarizes the Code's information regarding violations:²⁸²

Table 1: Disciplining Accountants

Violation	Source (FLA. STAT. or FLA. ADMIN. CODE)	Minimum Penalty	Maximum Penalty
Attempting to procure license by bribery or fraudulent misrepresentation	§ 473.323(1)(b); FLA. ADMIN. CODE R. 61H1-36.004(2)(a).	Revocation and \$5000 fine if licensed; denial of license and refer to State Attorney if not licensed	Not applicable
CPA License disciplined by another jurisdiction	§ 473.323(1)(c); FLA. ADMIN. CODE R. 61H1-36.004(2)(b).	Same penalty as imposed in other jurisdiction or same range of penalties for same violation	Not applicable
Misdemeanor criminal conviction relating to accountancy	§ 473.323(1)(d); FLA. ADMIN. CODE R. 61H1-36.004(2)(c).	Reprimand	Reprimand; \$5000 fine; one (1) year suspension and two (2) years probation
Felony criminal conviction relating to accountancy	§ 473.323(1)(d); FLA. ADMIN. CODE R. 61H1-36.004(2)(c).	One (1) year suspension; two (2) years probation; \$5000 fine	Revocation and \$5000 fine

281. FLA. ADMIN. CODE R. 61H1-36.004(2) (1999). Two recent cases in which the Board of Accountancy was a party were either affirmed without decision or declined to be heard by the Florida appellate courts, and no further information is available on these matters. *Jarkow v. State*, 847 So. 2d 483 (Fla. 4th Dist. Ct. App. 2003) (unpublished table decision); *Buchman v. Dep't of Bus. & Prof'l Regulation*, 819 So. 2d 754 (Fla. 1st Dist. Ct. App. 2002) (unpublished table decision). In previous years, particularly in 1993 and 1994, most published cases regarding the Board of Accountancy dealt with accountant's ability to advertise. *See Ibanez v. State*, 621 So. 2d 435 (Fla. 1st Dist. Ct. App. 1993), *rev'd by Ibanez v. Florida Dept. of Prof'l Regulation*, 512 U.S. 136 (1994); *see also Dep't of Bus. & Prof'l Regulation v. Rampell*, 621 So. 2d 426 (Fla. 1993).

282. FLA. ADMIN. CODE R. 61H1-36.004(2).

Violation	Source (FLA. STAT. or FLA. ADMIN. CODE)	Minimum Penalty	Maximum Penalty
Knowingly making or filing false report	§ 473.323(1)(e); FLA. ADMIN. CODE R. 61H1-36.004(2)(d).	Reprimand; one (1) year probation	Revocation; \$5000 fine
Fraudulent, false, deceptive or misleading advertising	§ 473.323(1)(f); FLA. ADMIN. CODE R. 61H1-36.004(2)(e).	Letter of guidance	Reprimand; one (1) year probation and \$5000 fine
Incompetence (impairment)	§ 473.323(1)(g); FLA. ADMIN. CODE R. 61H1-36.004(2)(f).	Suspension until ability to practice proved followed by probation	Not applicable
Fraud or deceit	§ 473.323 (1)(g), (k); FLA. ADMIN. CODE R. 61H1-36.004(2)(g).	Reprimand; one (1) year suspension; two (2) year probation and \$5000 fine	\$5000 fine and revocation
Negligence or misconduct: technical standards	§ 473.315; FLA. ADMIN. CODE R. 61H1-36.004(2)(h)(1).	Letter of Guidance	Reprimand; one (1) year probation, continuing education, and review of practice at licensee's expense and limited area of practice
Negligence or misconduct: lack of independence	§ 473.315; FLA. ADMIN. CODE R. 61H1-36.004(2)(h)(2).	Reprimand; one (1) year probation with review of practice and continuing education	Reprimand; one (1) year suspension; two (2) year probation and review of practice and continuing education
Negligence or misconduct: commissions and contingent fees	FLA. ADMIN. CODE R. 61H1-21.003, .005; FLA. ADMIN. CODE R. 61H1-36.004(2)(h)(3).	Reprimand	One (1) year suspension; two (2) years probation; \$5000 fine

Violation	Source (FLA. STAT. or FLA. ADMIN. CODE)	Minimum Penalty	Maximum Penalty
Negligence or misconduct: client records disposition	FLA. ADMIN. CODE R. 61H1-23.002; FLA. ADMIN. CODE R. 61H1-36.004(2)(h)(4).	Letter of guidance	Suspension until records are returned
Solicitation	§ 473.323(1)(i); FLA. ADMIN. CODE R. 61H1-36.004(2)(l).	Letter of guidance	Reprimand; one (1) year probation; \$5000 fine; and one (1) year suspension
Practicing on suspended or revoked license	§ 473.323(1)(l); FLA. ADMIN. CODE R. 61H1-36.004(2)(j).	Revoke if previously suspended, refer to State Attorney if previously revoked	Not applicable
Practicing on inactive license	§ 473.323(1)(l); FLA. ADMIN. CODE R. 61H1-36.004(2)(k).	Reprimand and fine based on length of time in practice while inactive; \$100 per month or \$5000 maximum (will require licensure or cease practice)	Not applicable
Licensees practicing in an unlicensed firm	§ 473.309; § 473.3101; § 473.323(1)(g); FLA. ADMIN. CODE R. 61H1-36.004(2)(l).	Reprimand and \$100 per month fine to maximum of \$5000 and suspension of right to practice until corrected	Not applicable
Suspension of right to practice in front of any state or federal agency	§ 473.323(1)(j); FLA. ADMIN. CODE R. 61H1-36.004(2)(m).	Same penalty as imposed by agency or imposition of same range as those set forth in those rules for type of violation	Not applicable
Lack of good moral character	§ 473.323(1)(l); FLA. ADMIN. CODE R. 61H1-36.004(2)(n).	Reprimand and one (1) year probation	Revocation

Violation	Source (FLA. STAT. or FLA. ADMIN. CODE)	Minimum Penalty	Maximum Penalty
Failure to pay fines or administrative costs imposed by final order or citations	§ 473.323(1)(l), (m); FLA. ADMIN. CODE R. 61H1-36.004(2)(o).	\$100 per month late fee for every month licensee is late to max of \$5000	Revocation

Once these penalties have been assessed by the Board, the public is able to access information about them. One way is through the exact same annual report, which summarizes the real estate profession, created by the DBPR annually in accordance with its fiscal year ending June 30.²⁸³ A second way is to search individually for a particular licensee by name to determine that person's discipline status and history.²⁸⁴

D. *Comparing and Contrasting Fiscal Professional Discipline*

The first major difference in the discipline of these fiscal professionals in Florida is in the certainty of discipline for a particular action. The rules governing attorney behavior include broad categories of actions, with room for interpretation for particular circumstances. In contrast, both real estate professionals and certified public accountants are pre-noticed with a specific list of behaviors and specific penalties imposed for those behaviors.²⁸⁵ The difference is two-fold—first in the notice to a potential violator and second in the amount of discretion given to a particular body imposing discipline. All three systems involve initial boards, made up of diverse members and non-members of the profession initially reviewing a behavior for discipline, and do allow for mitigating circumstances that may ultimately affect the final disposition.²⁸⁶

283. Department of Business and Professional Regulation, *Annual Reports & Long Range Program Plan*, at <http://www.myflorida.com/dbpr/os/ospubs/index.shtml> (last visited Feb. 7, 2005) (linking to individual reports) [hereinafter *Long Range Program Plan*].

284. *Search by Name*, *supra* note 267.

285. FLA. ADMIN. CODE R. 61J2-24.001(1) (2000); FLA. ADMIN. CODE R. 61H1-36.004(1) (2003).

286. R. REGULATING FLA. BAR. 3-3.4(c) (2004); FLA. STDS. IMPOSING LAW. SANCS. 9.31 (2004).

A second difference in evaluating these three systems of discipline is the ultimate manner in which the discipline is finalized. In professions regulated by the DBPR, disciplines are generally decided by a board, with an administrative law judge either recommending an order or reviewing a final order. By contrast, judges in attorney cases serve as initial “referees” recommending discipline,²⁸⁷ with ultimate discipline being ordered by the highest court of the state, and thus becoming part of the legal system in which the attorney operates.²⁸⁸

A third difference is a program that attorneys have put into place to “pre-handle” potential attorney grievances.²⁸⁹ In an effort to reduce the number of improper grievances brought before the Bar, a consumer assistance program was put into place three years ago to assist consumers with complaints.²⁹⁰ While the real estate and certified public accountant professions are under the umbrella of the already consumer-friendly DBPR, with help lines available, no such specific program has been deemed necessary to assist the consumer in properly resolving problems with these professions. Statistics discussed in Part IV of this article may illuminate the Bar’s need for such a program.

A fourth difference is the manner in which unauthorized practice claims are handled. The same disciplinary body which deals with license violations also handles complaints of unlicensed activity for DBPR, treating unlicensed activity as a consumer fraud issue.²⁹¹ The real estate complaint form even specifically provides for a place to indicate that complaint subject.²⁹² The public on-line information for DBPR even allows for searches of complaints against persons or organizations that were not DBPR-licensed.²⁹³ By contrast, the information about the “unlicensed practice of law” appears in the “regulation” section of The Florida Bar website, rather than the consumer services information, and has a separate complaint sent to a department created to monitor this problem specifically.²⁹⁴

287. R. REGULATING FLA. BAR 3-7.6.

288. See R. REGULATING FLA. BAR 3-7.7.

289. *New Bar Program supra* note 179.

290. *Id.*

291. Department of Business and Professional Regulation, *Don't Be a Victim of Unlicensed Activity*, at http://www.state.fl.us/dbpr/os/communications_office/unlicensed_activity/dont_be_a_victim.doc (last visited Feb. 7, 2005) [hereinafter *Don't Be a Victim*].

292. *Uniform Complaint Form, supra* note 223.

293. *Don't Be a Victim, supra* note 291.

294. The Florida Bar, *Law Practice Regulation*, at <http://www.flabar.org/tfb/TFBLawReg.nsf/e0f40af2c23904c785256709006a3713/12e6c80e88ba08fd85256b2f006c9d15?OpenDocument> (last visited Feb. 7, 2005).

A fifth comparison may be made in the diversion from the probable cause panel provided for in the real estate complaint system. Certain violations by real estate professionals are considered so technical that an administrative notice and order to comply may be directly issued rather than the violation being heard for substance. In contrast, the attorney system provides for a minor misconduct result but not process,²⁹⁵ while the accountant system focuses on more major penalties.²⁹⁶

One sharp difference between the professions regulated by the DBPR and the self-regulated attorney system is the ability to fine the licensed professional for violations. Both the real estate and accountant professions provide specifically for fines, in some cases up to \$5000 for some accountancy violations to be paid by the disciplined professional as part of the discipline imposed.²⁹⁷ By contrast, fines are not regularly part of the attorney discipline process.²⁹⁸

A final distinction among the professions is the public's access to information. The real estate profession, through the DBPR, has been most forthcoming with information, including both an annual detailed report as well as a searchable index for licensed professionals. To learn about discipline regarding a certified public accountant, only general information regarding totals may be gleaned from the annual report, but an individual may be searched, showing the DBPR does not require the same information among different regulated professions. Those interested in attorney discipline also may search individual names or look at a numerical report, but also may peruse individual information about attorneys and their disciplines, although sorted by date and not by name or location.

V. STATISTICS REGARDING LICENSING, COMPLAINTS, AND DISCIPLINE IN THE ACCOUNTANCY, ATTORNEY, AND REAL ESTATE PROFESSIONS

The following information is gathered from two different kinds of sources.²⁹⁹ The first source is the official reports released by the governing

295. R. REGULATING FLA. BAR 3-5.1(b).

296. FLA. ADMIN. CODE R. 61H1-36.004 (2003).

297. See generally FLA. ADMIN. CODE R. 61J2-24.001(1); FLA. ADMIN. CODE R. 61H1-36.004(1).

298. *Complaint Against a Florida Lawyer*, supra note 176. There are some instances where attorneys may be required to pay restitution for specific misdeeds, and a client recovery fund is available under The Florida Bar to assist in certain client compensation situations. *Id.* See also FLA. STDS. IMPOSING LAW. SANCS. 2.1-.8 (2004).

299. The author is not a trained statistician; all information was hand-tabulated and percentages rounded on a traditional +/- .5 basis.

body, either the DBPR³⁰⁰ or The Florida Bar.³⁰¹ Each regulatory body has produced certain kinds of office information available to the public for the past several years; however, the information type has not been consistent through the years, even from the same organization. This information is presented in accord with the agency's fiscal year, which is a July 1 to June 30 year for both the DBPR and The Florida Bar.³⁰² The second type of information used is compiled from general public records published regarding the discipline of each professional where available.³⁰³ The information gathered from these sources does not come from an official report of the agency, but rather was tabulated from various reports listing, and/or describing, disciplines throughout a year.³⁰⁴ Information about the nature of those disciplines was extrapolated from the published reports.³⁰⁵ Each table or set of tables will indicate from which source the information was procured.

A. *Licensees in Florida*

The published annual reports of both the Department of Business and Professional Regulation and The Florida Bar list the total number of licensees being regulated in Florida.³⁰⁶

Table 2: Total Licensees

Profession	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003
Accountancy (includes firms) ³⁰⁷	25,392 ₃₀₈	25,872 ₃₀₉	32,119 ₃₁₀	33,024 ₃₁₁	31,471 ₃₁₂	32,336 ₃₁₃	35,016 ₃₁₄

300. See *Long Range Program Plan*, *supra* note 283.

301. *Bar Disciplinary Statistics*, *supra* note 218.

302. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

303. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

304. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

305. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

306. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

Profession	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003
Attorneys ³¹⁵	56,379	58,108	59,741	61,014	62,722	62,999	72,933 ³¹⁶

307. See *Long Range Program Plan*, *supra* note 283. The DBPR annual report included all accountant licensees through 1996-97; starting in 1997-98 active licensees were designated.

308. FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 1996-1997 ANNUAL REPORT 60, <http://www.myflorida.com/dbpr/os/ospubs/ar9697.pdf> (last visited Feb. 7, 2005) [hereinafter 1996-1997 REPORT]. This number shown represents the number of active licenses.

309. FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 1997-1998 ANNUAL REPORT 60, <http://www.myflorida.com/dbpr/os/ospubs/ar9798.pdf> (last visited Feb. 7, 2005) [hereinafter 1997-1998 REPORT]. This number shown represents licenses.

310. FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, INSIDE DBPR FISCAL YEAR 1998-1999 22, <http://www.myflorida.com/dbpr/os/ospubs/ar9899.pdf> (last visited Feb. 7, 2005) [hereinafter 1998-1999 REPORT]. This number shown represents total accountability.

311. FLORIDA DEPARTMENT OF BUSINESS AND PROFESSIONAL REGULATION, 1999-2000 ANNUAL REPORT 22, <http://www.myflorida.com/dbpr/os/ospubs/ar9900.pdf> (last visited Feb. 7, 2005) [hereinafter 1999-2000 REPORT].

312. DIVISION OF PROFESSIONS, REAL ESTATE AND CERTIFIED ACCOUNTANCY, 2000-2001 ANNUAL REPORT 7, <http://www.myflorida.com/dbpr/os/ospubs/ar0001.pdf> (last visited Feb. 7, 2005) [hereinafter 2000-2001 REPORT]. This number shown represents total accountability.

313. DIVISION OF PROFESSIONS, REAL ESTATE AND CERTIFIED ACCOUNTANCY, 2001-2002 ANNUAL REPORT 7, <http://www.myflorida.com/dbpr/os/ospubs/ar0102.pdf> (last visited Feb. 7, 2005) [hereinafter 2001-2002 REPORT].

314. DIVISION OF PROFESSIONS, REAL ESTATE AND CERTIFIED ACCOUNTANCY, 2002-2003 ANNUAL REPORT 7, http://www.myflorida.com/dbpr/os/ospubs/ar_0203.pdf (last visited Feb. 7, 2005) [hereinafter 2002-2003 REPORT].

315. *Bar Disciplinary Statistics*, *supra* note 218. The Florida Bar information indicates that the membership figure for The Florida Bar began including inactive status beginning in 2002-2003.

316. The Florida Bar information indicates that the membership figure now includes total migs (members in good standing) and inactive status.

Profession	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003
Real Estate Commission (includes corporations, schools) ³¹⁷	B: 49,135 318	B: 56,023 319	267,006 320	266,382 321	215,287 322	227,015 323	249,871 324
	S: 100,651 325	S: 141,022 326					

First, the numbers of those being regulated under the Real Estate Commission is far greater than those of accountancy or attorneys, as all corporations, organizations, and schools involved in the real estate profession are reported together under one figure in the DBPR annual report.³²⁷ It is not possible to extrapolate only the number of sales associates and/or broker licensees, and thus it is difficult to examine the comparative effect that these licensing agencies have on individuals.

Second, the manner in which licensees are reported has shifted through the years.³²⁸ A consumer of these professional services, keeping a watch on

317. See *Long Range Program Plan*, *supra* note 283. The DBPR included all real estate licensees regardless of status but distinguished between brokers (B) and sales associates (S) in its annual report through the 1997-98 year. After that, only active real estate licensees were designated without distinction of the category.

318. 1996-1997 REPORT, *supra* note 308, at 62. This number shown represents the number of active licenses.

319. 1997-1998 REPORT, *supra* note 309, at 62. This number shown represents licenses.

320. 1998-1999 REPORT, *supra* note 310, at 22. This number shown represents total real estate commission.

321. 1999-2000 REPORT, *supra* note 311, at 22. This number shown represents total real estate commission.

322. 2000-2001 REPORT, *supra* note 312, at 7. This number shown represents total real estate commission.

323. 2001-2002 REPORT, *supra* note 313, at 8. This number shown represents total real estate commission.

324. 2002-2003 REPORT, *supra* note 314, at 6. This number shown represents total real estate commission.

325. 1996-1997 REPORT, *supra* note 308, at 62. This number shown represents the number of active licenses.

326. 1997-1998 REPORT, *supra* note 309, at 62. This number shown represents licenses.

327. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

328. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

licensees, would have to carefully note the differences in what was reported—active licensees only or all licensees, individuals or individuals and companies. No explanations are given in any of the reports as to why the reporting methods have changed.³²⁹

B. *Complaints Against Licensees Received/Probable Cause Found*

Each agency has produced an annual report detailing the number of complaints received (from The Florida Bar, files opened) by that regulatory body.³³⁰ In addition, the DBPR also includes within its annual report the number of these complaints in which probable cause was found through its regulation system.³³¹

**Table 3: Total Complaints Received Against Licensed Professionals
(Files Opened for Attorneys/Probable Cause Found)
(not available for Attorneys)³³²**

Profession	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003
Accountancy	249 ³³³ / 199 ³³⁴	299 ³³⁵ / 298 ³³⁶	290 ³³⁷ / 56 ³³⁸	216 ³³⁹ / /53 ³⁴⁰	279 ³⁴¹ / 108 ³⁴²	234 ³⁴³ / 92 ³⁴⁴	249 ³⁴⁵ / 59 ³⁴⁶

329. *Bar Disciplinary Statistics, supra* note 218. See *Long Range Program Plan, supra* note 283.

330. *Bar Disciplinary Statistics, supra* note 218. See *Long Range Program Plan, supra* note 283.

331. See *Long Range Program Plan, supra* note 283.

332. The data for Accountancy and Real Estate Commission from 1996 to 1998 references total complaints received and legally sufficient complaints. After 1998 data for Accountancy and Real Estate Commission references total complaints received and complaints for which probable cause was found. The data for Attorneys references complaint files opened.

333. 1996-1997 REPORT, *supra* note 308, at 64.

334. *Id.*

335. 1997-1998 REPORT, *supra* note 309, at 64.

336. *Id.*

337. 1998-1999 REPORT, *supra* note 310, at 13.

338. *Id.* at 14.

339. 1999-2000 REPORT, *supra* note 311, at 22.

340. *Id.*

341. 2000-2001 REPORT, *supra* note 312, at 8.

342. *Id.* at 9.

343. 2001-2002 REPORT, *supra* note 313, at 9.

344. *Id.* at 10.

345. 2002-2003 REPORT, *supra* note 314, at 7.

346. *Id.* at 8.

Profession	1996-1997	1997-1998	1998-1999	1999-2000	2000-2001	2001-2002	2002-2003
Attorneys ³⁴⁷	9,436	9,317	9,101	9,491	9,280	8,691	8,671
Real Estate-Commission ³⁴⁸ (includes corporations, schools)	B: 5,403 ^{349/} 4,226 ³⁵⁰	B: 6,358 ^{351/} 5,117 ³⁵²	7,611 ^{353/} 4,699 ³⁵⁴	4,918 ^{355/} 5,933 ³⁵⁶	5,123 ^{357/} 490 ³⁵⁸	4,246 ^{359/} 316 ³⁶⁰	4,826 ^{361/} 360 ³⁶²

The first notable figure is the number of accountancy complaints versus the number of complaints against attorneys. Approximately twice the number of attorney licenses have been issued, yet more than *thirty* times the number of complaints have been filed.³⁶³ Although the overall number of complaints against attorneys is decreasing, the number is still far greater than in either of the other fields.³⁶⁴

A second figure to look at is the number of files in which probable cause was found compared to the total number filed. In accountancy, the number of files with probable cause have been steadily decreasing from approximately a little more than one-third of the grievances filed down to one-fourth.³⁶⁵ In some years, only one complaint was not found to have probable cause, while by comparison, the real estate complaints with probable cause are a small fraction of the total number of complaints filed. The reasons for

347. *Bar Disciplinary Statistics*, *supra* note 218.

348. See *Long Range Program Plan*, *supra* note 283. The DBPR distinguished between brokers and sales associates in their annual report through the 1997-98 report. *Id.*

349. 1996-1997 REPORT, *supra* note 308, at 66.

350. *Id.*

351. 1997-1998 REPORT, *supra* note 309, at 66.

352. *Id.*

353. 1998-1999 REPORT, *supra* note 310, at 13.

354. *Id.* at 14.

355. 1999-2000 REPORT, *supra* note 311, at 20.

356. *Id.*

357. 2000-2001 REPORT, *supra* note 312, at 8.

358. *Id.* at 9.

359. 2001-2002 REPORT, *supra* note 313, at 9.

360. *Id.* at 10.

361. 2002-2003 REPORT, *supra* note 314, at 7.

362. *Id.* at 8.

363. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

364. *Bar Disciplinary Statistics*, *supra* note 218.

365. See *Long Range Program Plan*, *supra* note 283.

this discrepancy are unknown. It is possible this gap is due to the actual number of clients these respective professions typically handle. Accountants tend to work with fewer large projects or with fewer individual clients with sophisticated fiscal needs. In contrast, real estate professionals often deal with numerous individuals in many transactions.³⁶⁶

C. Dispositions of Disciplinary Files

Beginning in 1998, the DBPR began reporting the numbers of dispositions that each board accomplished in that fiscal year.³⁶⁷ In the DBPR reports, a disposition only means that a file was closed, not that a particular discipline, if any, was imposed.³⁶⁸ Attorney final orders connote a discipline ordered.³⁶⁹

**Table 4: Dispositions of Disciplinary Files
(Final Orders of Discipline for Attorneys)**

Profession	1998-1999 ³⁷⁰	1999-2000 ³⁷¹	2000-2001 ³⁷²	2001-2002 ³⁷³	2002-2003 ³⁷⁴
Accountancy	38	17	40	35	65
Attorneys	403	391	472	414	384
Real Estate Commission (includes corporations, schools)	1229	687	297	384	416

D. Gender and Disciplines Ordered

On the public websites for both the DBPR and The Florida Bar, the public may read individual descriptions of disciplines meted out by the re-

366. Career Web School, *Significant Points*, at <http://www.careerwebschool.com/Florida-real-estate/florida-real-estate-education-career-info.html> (last visited Feb. 7, 2005) [hereinafter *Significant Points*].

367. *See id.*

368. *See id.*

369. *Bar Disciplinary Statistics*, *supra* note 218.

370. 1998-1999 REPORT, *supra* note 310, at 13; *Bar Disciplinary Statistics*, *supra* note 218.

371. 1999-2000 REPORT, *supra* note 311, at 20; *Bar Disciplinary Statistics*, *supra* note 218.

372. 2000-2001 REPORT, *supra* note 312, at 8; *Bar Disciplinary Statistics*, *supra* note 218.

373. 2001-2002 REPORT, *supra* note 313, at 9; *Bar Disciplinary Statistics*, *supra* note 218.

374. 2002-2003 REPORT, *supra* note 314, at 7; *Bar Disciplinary Statistics*, *supra* note 218.

spective disciplinary bodies.³⁷⁵ The Florida Bar publishes a paragraph-long narrative about each final order of discipline from the Supreme Court of Florida.³⁷⁶ The Division of Real Estate has a direct link to a calendar year-long compilation of descriptive narratives regarding discipline, sorted by city of the licensee, licensee name, and a full description of the discipline ordered.³⁷⁷ Through reading these individual narratives, Table 5 was compiled for the three years available in full to the public.

Table 5: Total Disciplines Designated by Gender/Percentage of Disciplined Licensees by Gender for Years 2000-2002.³⁷⁸

Year: 2000

Professions	Disciplines in Report	Male/Female ³⁷⁹	Percentage Male/Female
Attorneys	250	221/29	88%/12%
Real Estate	271	170/85	63%/31%

Year: 2001

Professions	Disciplines in Report	Male/Female	Percentage Male/Female
Attorneys	281	242/39	86%/14%
Real Estate	221	145/60	66%/27%

Year: 2002

Professions	Disciplines in Report	Male/Female	Percentage Male/Female
Attorneys	217	188/24	87%/11%

375. FREC *Disc.*, *supra* note 265; Fla. Bar *News Releases*, *supra* note 219.

376. Fla. Bar *News Releases*, *supra* note 219.

377. FREC *Disc.*, *supra* note 265.

378. Florida Real Estate Commission, *2002 Disciplinary Activity Reports*, available at http://www.state.fl.us/dbpr/re/publications/frec/DARs/2002/frec_dar_2002.pdf (last visited Feb. 7, 2005); Florida Real Estate Commission, *2001 Disciplinary Activity Reports*, available at http://www.state.fl.us/dbpr/re/publications/frec/DARs/2001/frec_dar_2001.pdf (last visited Feb. 7, 2005); Florida Real Estate Commission, *2000 Disciplinary Activity Reports*, available at http://www.state.fl.us/dbpr/re/publications/frec/DARs/2000/frec_dar_2000.pdf (last visited Feb. 7, 2005). There are no published reports available to the public to read individual accountancy disciplines by name.

379. For Table 5, years 2000 through 2002, any discrepancy in gender split against total results from the inability to determine a certain person's gender.

Professions	Disciplines in Report	Male/Female	Percentage Male/Female
Real Estate	235	157/56	67%/24%

There is a clear difference in the numbers of men and women being disciplined in these two professions. It is clear that in the legal field in Florida, men are being disciplined at a far greater rate than women.³⁸⁰ It was posited previously in regard to this data that the source of this discrepancy can be linked to data indicating that more disciplines also are ordered on attorneys with more than ten or even twenty years of experience.³⁸¹ In addition, with women having entered the legal profession in small numbers over many years, a critical mass of women has not yet reached the level of responsibility in which most attorneys are at risk for discipline.³⁸²

By contrast, due to different levels of education required for licensing, combined with the lifestyle flexibility available to those in the real estate profession, it is likely that large numbers of women have been a part of the real estate business for many years, thus increasing the overall likelihood that women will be involved in business.³⁸³ Second, the real estate business is not structured in terms of levels of responsibility in the same manner as law firms.³⁸⁴ While a new attorney in certain legal structures may work under the guidance and supervision of more senior attorneys for many years without dealing directly with clients (and thus unlikely to be the subject of a complaint),³⁸⁵ real estate sales associates, due to the nature of their work, deal directly with individual clients right away.³⁸⁶ Although they work under the structure of real estate brokers, different responsibilities fall to each licensed group, and each licensed group is subject to complaints related to the work associated with that licensee's responsibility.³⁸⁷ Therefore, due to the nature of this work, no person working in the real estate profession is immune from complaints.

380. Curtis & Kaufman, *supra* note 3, at 691–95.

381. *Id.*

382. *Id.* In this article, it was clear from a longer range view of the data that the percentage of women being disciplined is rising in Florida. *Id.*

383. *See Significant Points, supra* note 366.

384. *Id.*

385. Curtis & Kaufman, *supra* note 3, at 693 n.151.

386. *Id.*

387. *Id.*

E. *Categories of Discipline Ordered*

In examining which types of discipline were ordered within each professional regulatory organization, the quirk of information being presented for some period of time and then no longer being presented in the annual report was particularly noticeable.³⁸⁸ Table 6 looks in detail at some of the different kinds of discipline ordered by each regulatory body from official annual reports, from 1997 through 2000.³⁸⁹ Once that format changed and the information was no longer presented in summary form, the information in Table 7 became available: a composition of extrapolated data from the individual descriptions of the disciplines ordered on the same subject.³⁹⁰ It also is important to note that from reviewing individual reports of real estate licensee discipline, those under the real estate system may be given more than one category of discipline at a time, so that one behavior can generate numbers in multiple categories.³⁹¹ By contrast, the categories of discipline are generally exclusive in the attorney system, which results in a total count in each category of discipline equaling, but not exceeding, the total number of disciplines in real estate.³⁹²

388. See *Long Range Program Plan*, *supra* note 283.

389. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

390. *Bar Disciplinary Statistics*, *supra* note 218. See *Long Range Program Plan*, *supra* note 283.

391. See *Long Range Program Plan*, *supra* note 283.

392. *Bar Disciplinary Statistics*, *supra* note 218.

**Table 6: Annual Report Summaries of Selected Disciplines
Ordered 1997-2000**

Year: 1997-1998

Profession	Total Disciplines Given ³⁹³	Disbar/ Revoke	Suspend	Probation	Voluntary Surrender /Resign ³⁹⁴
Accountant	40	6	6	14	N/a
Attorney ³⁹⁵	417	32	150	73	38
Real Estate	977	105	36	54	N/a

Year: 1998-1999

Profession	Total Disciplines Given	Disbar/ Revoke	Suspend	Probation	Voluntary Surrender /Resign
Accountant	29	0	6	3	3
Attorney	403	29	144	71	44
Real Estate	1024	109	37	68	55

Year: 1999-2000

Profession	Total Disciplines Given	Disbar/ Revoke	Suspend	Probation	Voluntary Surrender /Resign
Accountant	16	2	2	5	0
Attorney	391	35	132	93	30
Real Estate	521	52	45	89	18

393. Even when the format of the report remained constant, certain information was not presented in certain years. Some figures were not explicit within the annual report, but calculated from other information within it.

394. The DBPR titles this category as "Voluntary Relinquishment" while The Florida Bar titles them "Disciplinary Resignations."

395. The Florida Bar presents this information through the present in official report form. However, for comparison purposes with the other professions, extrapolated data is used post-2000.

Table 7: Data Assembled from Individual Reports Regarding Selected Disciplines Ordered 2000-2002**Year: 2000**

Profession³⁹⁶	Total Disciplines Given	Disbar/ Revoke	Suspend	Probation	Voluntary Surrender /Resign
Attorney	250	38	129	11	25
Real Estate	271	41	54	95	37

Year: 2001

Profession	Total Disciplines Given	Disbar/ Revoke	Suspend	Probation	Voluntary Surrender /Resign
Attorney	281	29	148	10	31
Real Estate	221	21	68	56	38

Year: 2002

Profession	Total Disciplines Given	Disbar/ Revoke	Suspend	Probation	Voluntary Surrender /Resign
Attorney	217	31	101	4	29
Real Estate	284	38	57	119	25

396. There are two sources of information on attorney discipline available from The Florida Bar. The first source is a statistical chart based on fiscal year totals of the numbers of disciplines, totaled by year and category and cost of discipline, available at www.floridabar.org. However, The Florida Bar also publishes individual reports, in paragraph form, on each discipline, which are available either on the same website, or in print through *The Florida Bar News*. Information about the discipline of real estate professionals is also available through an organized statistical chart published by the Department of Business and Professional Regulation, as well as through a report compiling the individual reports, in paragraph form, on each discipline in this profession. As the statistical charts created by each licensing agency do not provide clear correlating information, Table 7 was created by researching the individual paragraphs on attorney discipline for these calendar years (not published in compilation by The Florida Bar), and comparing those figures with the individual paragraphs as published in compilation form by the Department of Business and Professional Regulation. The individual attorney reports, however, do not explicitly match the statistical chart published on The Florida Bar website (due to time period differences and gaps between the total disciplines from that statistical chart) with those actually published in detailed form. Therefore, the figures for attorney discipline represent what a member of the public would extrapolate from reading only individual reports of attorneys, as well as reading individual reports about Real Estate professionals, but not necessarily the exact figures as published by The Florida Bar.

While the low total number of accountancy disciplines yields no unusual breakdown as among disciplines, an interesting contrast is seen between the attorney system and real estate system. Despite the higher number of total disciplines given in the real estate system, the number of those with certain categories of disciplines is not always higher, or in proportion to the greater number of total disciplines.³⁹⁷ In the years examined, attorneys who were disciplined were far more likely to be suspended than real estate licensees.³⁹⁸ In all years, the total numbers of licensees in each group who were disbarred or had their license(s) revoked were in closer proportion to the total disciplines given.³⁹⁹ The number of licensees who received probation is very close between professions, despite the discrepancies in total disciplines for the first three years, with the numbers of attorneys on probation decreasing and the number of real estate professionals on probation increasing.⁴⁰⁰ Although disciplines are given similar names and effect among these professions, the discipline systems order them in different quantities.

The difference between the end results of discipline may be related to the structure of how disciplines may be ordered. The real estate system, working from the DBPR, provides a specific list of violations with penalties—so within a factual interpretation of the situation, the discipline category has been predetermined.⁴⁰¹ By contrast, the attorney rules are written more open-ended, allowing discipline categories to be determined in each specific factual situation.⁴⁰² Second, the real estate system allows more than one discipline to be imposed, the most common example being probation and suspension being ordered together, along with a fine.⁴⁰³ By contrast, the judge acting as referee in examining a lawyer's factual circumstances must choose to recommend only one discipline category.⁴⁰⁴

The number of professionals on probation presented the most striking changes through the years examined.⁴⁰⁵ One explanation for the rising number of real estate professionals on probation simultaneous to the sinking number of attorneys on probation is the real world consequence of the discipline ordered. When a real estate professional is put on probation, a probation may be ordered to follow a suspension, and is usually accompanied by a

397. See Tables 6 & 7.

398. *Id.*

399. *Id.*

400. *Id.*

401. FLA. STAT. § 475.25 (2003).

402. See FLA. STDS. IMPOSING LAW. SANCS. 3.0 (2004).

403. § 475.25(1).

404. See FLA. STDS. IMPOSING LAW. SANCS. preface.

405. See *id.*; Table 7.

fine as well as an additional educational requirement.⁴⁰⁶ By contrast, attorneys put on probation are subject to no other levels of discipline, other than potentially being ordered to complete additional educational requirements.⁴⁰⁷ In short, because of the “one discipline” nature of the system, an attorney on probation suffers little professional consequence, and thus the “punishment” may be falling out of favor within the disciplinary body.

F. *Discipline by Geographic Location*

Table 8 examines certain selected counties within Florida for the total number of disciplines ordered. This geographic information was extrapolated from the individual listing, which the DBPR emphasizes, as it sorts the individual discipline listings first by year and then by city.⁴⁰⁸ The counties examined were selected as some of the major population centers, though certainly not all of them, within Florida.

Table 8: Disciplines Ordered by Florida County (Selected)

Year: 2000

Profession	Broward	Hills-boro	Leon	Miami-Dade	Orange	Palm Beach	Pinellas
Attorney	27	13	6	64	13	19	22
Real Estate	21	10	1	53	28	21	8

Year: 2001

Profession	Broward	Hills-boro	Leon	Miami-Dade	Orange	Palm Beach	Pinellas
Attorney	40	21	5	72	10	1	21
Real Estate	32	11	1	31	14	26	13

Year: 2002

Profession	Broward	Hills-boro	Leon	Miami-Dade	Orange	Palm Beach	Pinellas
Attorney	24	8	7	52	11	23	9
Real Estate	39	9	3	45	15	26	12

406. See § 475.25(1).

407. FLA. STDS. IMPOSING LAW. SANCS. 2.7.

408. See FREC *Disc.*, *supra* note 265.

In counties with a high population, there are higher numbers of disciplines in both the attorney and real estate professions.⁴⁰⁹ The South Florida tri-county area of Broward County, Miami-Dade County and Palm Beach County contain high levels of the general population and is likely to employ high numbers of service professionals as well.⁴¹⁰ However, the other counties examined show no pattern of connecting disciplined professionals with geographic location. For example, Hillsborough County, in which Tampa is located, in one year examined has slightly more attorneys disciplined than real estate professionals.⁴¹¹ In a second year examined, the number of attorneys disciplined was approximately two times that of real estate professionals.⁴¹² In the third year, the numbers were nearly equal.⁴¹³

G. Overall Licensees Disciplined

One last look at the accountant, attorney, and real estate professions is an evaluation of the overall profession and how many disciplines are being ordered in each. Table 9 examines the total licensees and total disciplines in each year as reported in the agency's annual reports, and calculated the percentage of disciplines as to licensees. There are two important notes to these figures. The first is that while throughout this entire table, the total licensees of the two DBPR professions is calculated on the total licensees, active and inactive.⁴¹⁴ However, The Florida Bar, as noted in Table 2, only reported *active* licensees up until the 2002-2003 year.⁴¹⁵ As a result, comparison percentages are affected. The second point of data is that in the real estate profession, more than one discipline may be ordered to one licensee—thus, the column reflecting the total disciplines is actually the number of disciplines, not exactly the number of licensees.

409. Curtis & Kaufman, *supra* note 3, at 694.

410. *See id.* at 699–701.

411. Curtis & Kaufman, *supra* note 3, at 697; *see* FREC *Disc.*, *supra* note 265.

412. *Id.*; *see* FREC *Disc.*, *supra* note 265.

413. *Id.*; *see* FREC *Disc.*, *supra* note 265.

414. *See Long Range Program Plan*, *supra* note 283.

415. *Bar Disciplinary Statistics*, *supra* note 218.

Table 9: Total Licensees, Disciplines and Percentages of Discipline**Year: 1997-1998**

Professions	Total Licensees	Total Disciplines ⁴¹⁶	Percentage of Disciplines
Accountancy	25,392	40	.16%
Attorneys	58,108	417	.72%
Real Estate	197,045	977	.50%

Year: 1998-1999

Professions	Total Licensees	Total Disciplines	Percentage of Disciplines
Accountancy	28,687	29	.10%
Attorneys	59,741	403	.67%
Real Estate	165,585	1024	.62%

Year: 1999-2000

Professions	Total Licensees	Total Disciplines	Percentage of Disciplines
Accountancy	28,607	16	.06%
Attorneys	61,014	391	.64%
Real Estate	168,244	521	.31%

Year: 2000-2001

Professions	Total Licensees	Total Disciplines ⁴¹⁷	Percentage of Disciplines
Accountancy	31,471	40	.13%
Attorneys	62,722	472	.75%
Real Estate	215,287	297	.14%

416. The 1997-1998 annual report by the DBPR does not explicitly state the total disciplines, however this number was extrapolated from other information given.

417. The annual report format of the DBPR changed beginning in 2000. Rather than reporting the "total disciplines," the report states "Disposition of Disciplinary Actions" and compares with "Disposition of Non-Disciplinary Actions." See *Long Range Program Plan*, *supra* note 283. This number appears to reflect the total disciplines ordered in that year. This category appears in all annual reports forward from this date.

Year: 2001-2002

Professions	Total Licensees	Total Disciplines ⁴¹⁸	Percentage of Disciplines
Accountancy	32,336	35	.11%
Attorneys	62,999	414	.66%
Real Estate	227,015	384	.17%

Year: 2002-2003

Professions	Total Licensees	Total Disciplines ⁴¹⁹	Percentage of Disciplines
Accountancy	35,016	65	.19%
Attorneys ⁴²⁰	72,933	384	.53%
Real Estate	249,871	416	.17%

Year: 2003-2004 (DBPR information not yet available)

Professions	Total Licensees	Total Disciplines ⁴²¹	Percentage of Disciplines
Attorneys	74,874	331	.44%

The first notable conclusion from Table 9 is that despite the time and money that each profession dedicates to the discipline system, in each profession in each year, less than one percent of licensees receive final orders of discipline, when total disciplines given is compared to total licensees. From a consumer standpoint, this result may be viewed in either of two ways: (1) consumers of professional services in Florida can be confident that the professional that they have hired will not act in a way commensurate with discipline within that profession, as more than ninety-nine percent of professionals are not subject to a discipline order in any given year, or (2) the extraordinary low percentages of disciplines could also make some consumers suspect of professions that are either self-regulated (such as attorneys), or regulated using fellow professionals. Some consumers may see the low number and percentage of disciplines not as a triumph of the ethics of these profes-

418. *Id.*419. *Id.*

420. This year marks the first that attorney license numbers included both active and inactive licensees.

421. See *Long Range Program Plan*, *supra* note 283.

sionals, but as a weakness in the system that potentially does not catch enough licensees.

The accounting profession has the second lowest ratio of the three professions examined, and as discussed above in conjunction with Table 3, may be attributed to the profession's clients, and the overall low number of complaints.⁴²²

The attorney profession has clearly been working to reduce the number of licensees disciplined. As discussed earlier, the ACAP program by the Florida Bar has clearly produced results.⁴²³ In the years since the ACAP program was introduced, the ratio of disciplines to licensees has decreased by a full one-third.⁴²⁴

The real estate profession demonstrates the greatest reduction in total disciplines compared with total licensees; from a high of .62% in 1998-99,⁴²⁵ down to the most recent figure of .17% in 2002-03.⁴²⁶ The total number of licensees is growing tremendously in recent years, while the total number of disciplines is shrinking.⁴²⁷ The reasons for these dramatic changes may be many. First, the real estate profession may simply be experiencing fewer disciplinary problems within its system, due to education, licensing requirements or ethical qualities of professionals, or any combination of factors. Alternatively, fewer disciplines may have been ordered due to changes in the way the system is being administered—individual probable cause panels may be viewing behaviors differently, or more citations warning real estate professionals of potential violations may be doing the job of diverting potentially problematic behavior before it reaches the complaint stage. Finally, the changes in the annual report (not clearly labeling the total disciplines in a year) may be altering the appearance of the statistics, resulting in altered data.

VI. CONCLUSION

Although the public may place the same fiscal trust in attorneys, real estate professionals, and certified public accountants within Florida, these professions are not treated the same by their licensing bodies. With different educational requirements, testing, and renewal requirements, each of these fiscal professionals are presented to the consumer with different back-

422. *Id.*

423. *Id.*

424. *Id.*

425. 1998-1999 REPORT, *supra* note 310.

426. See *Long Range Program Plan*, *supra* note 283.

427. *Id.*

grounds. With different discipline systems, each consumer also may encounter a different process or result in case of a problem with that professional.

While any professional clearly operating under more than one license will be subject to the licensing and discipline of the profession under which they are specifically acting, the lines are not always clear as to what fiscal activity falls under which profession. When realtors complete legal forms, attorneys escrow money, accountants give financial advice with legal consequences, and realtors counsel individuals, the lines are blurred in the everyday, proper activities of these professionals in Florida. Consumers must be aware of which fiscal professionals they are dealing with and learn as much as possible about each system of licensing and discipline before engaging a professional in which the consumer will place his or her fiscal trust.

2004 SURVEY OF FLORIDA JUVENILE LAW

MICHAEL J. DALE*

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I. INTRODUCTION

The Supreme Court of Florida was active this year, ruling on two very important cases in the child welfare field. In the area of termination of parental rights, it held that Florida's termination statute, providing that parental rights of a child may be terminated when the rights to a sibling have already been terminated,¹ does not create a rebuttable presumption that the parent must overcome to avoid transmission.² In other words, the burden of proof is not shifted to the parent. The State must prove a substantial risk of significant harm to the current child and do so by clear and convincing evidence.³ In a second case, *S.B. v. Department of Children and Families*,⁴ the Supreme Court of Florida ruled that where a parent's right to counsel in a dependency

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1. FLA. STAT. § 39.806(1)(i) (2004).

2. Fla. Dep't of Children & Families v. F.L., 880 So. 2d 602, 609 (Fla. 2004).

3. *Id.* at 609–10.

4. 851 So. 2d 689 (Fla. 2003).

proceeding arises solely from statute,⁵ the parent may not raise ineffective assistance of counsel in a collateral proceeding by writ of habeas corpus.⁶

At the intermediate appellate court level, the courts spent a substantial period of time dealing with a number of child welfare issues involving both dependency and termination of parental rights. The appellate courts applied the so-called “nexus” test, holding that in finding for termination, the trial court must tie harmful behavior by the parent to the particular child who is the subject of the proceeding.⁷ The appellate courts also dealt with cases involving incarcerated parents⁸ and the obligations of the trial court to properly handle situations where a parent fails to appear.⁹

Florida’s intermediate appellate courts were less active in the delinquency area, with one major exception: *Tate v. State*.¹⁰ *Tate* is the highly publicized ruling from the Fourth District Court of Appeal on the court’s role in determining competency of a juvenile to stand trial.¹¹ In addition, the appellate courts ruled on several cases involving delinquency issues arising in the school setting.¹²

II. JUVENILE DELINQUENCY

A. Adjudicatory Issues

Tate, the competency case which drew national attention, involved the death of a six-year old playmate at the hands of a twelve-year old boy.¹³ The case initially resulted in a conviction in adult court and a life sentence for the

5. See § 39.013(1). The court previously held that a parent has a constitutional, as opposed to statutory, right to counsel in a dependency proceeding only when the proceeding could result in termination of parental rights or if a parent could potentially be charged with child abuse. *In re D.B.*, 385 So. 2d 83 (Fla. 1980).

6. *S.B.*, 851 So. 2d at 691.

7. *J.F. v. Dep’t of Children & Families*, 866 So. 2d 81, 87 (Fla. 4th Dist. Ct. App. 2004); *N.S. v. Dep’t of Children & Families*, 857 So. 2d 1000, 1001 (Fla. 5th Dist. Ct. App. 2003).

8. *In re A.D.C.*, 854 So. 2d 720 (Fla. 2d Dist. Ct. App. 2003); *C.B. v. Dep’t of Children & Families*, 874 So. 2d 1246 (Fla. 4th Dist. Ct. App. 2004).

9. *R.P. v. Dep’t of Children & Families*, 835 So. 2d 1212 (Fla. 4th Dist. Ct. App. 2003); *R.H. v. Dep’t of Children & Family Servs.*, 860 So. 2d 986 (Fla. 3d Dist. Ct. App. 2003); *In re I.A.*, 857 So. 2d 310 (Fla. 2d Dist. Ct. App. 2003); *In re B.B.*, 858 So. 2d 1184 (Fla. 2d Dist. Ct. App. 2003); *In re C.D.*, 867 So. 2d 405 (Fla. 2d Dist. Ct. App. 2003); *A.M. v. Dep’t of Children & Families*, 853 So. 2d 1084 (Fla. 4th Dist. Ct. App. 2003).

10. 864 So. 2d 44 (Fla. 4th Dist. Ct. App. 2003).

11. *Id.* at 47.

12. *State v. J.T.D.*, 851 So. 2d 793 (Fla. 2d Dist. Ct. App. 2003); *M.H. v. State*, 851 So. 2d 233 (Fla. 4th Dist. Ct. App. 2003).

13. *Tate*, 864 So. 2d at 47.

defendant, Lionel Tate.¹⁴ The appellate opinion established a procedural approach to the evaluation of competency for the young defendant in Florida's juvenile and adult criminal justice systems.¹⁵ The *Tate* case was also the impetus for a special issue of the NOVA LAW REVIEW entitled *The Aftermath of the Lionel Tate Case*.¹⁶

Competence recently came up again in *Department of Children and Families v. C.R.C.*,¹⁷ involving the issue of proper placement of a child who was previously determined incompetent to stand trial due to mental illness. Florida law provides that when a child is found incompetent based on mental illness or retardation, the child may be committed to the Department of Children and Families (DCF) for restoration of competency, treatment, and training.¹⁸ If a child is adjudicated incompetent to proceed solely because of age or immaturity, the child must not be committed to DCF.¹⁹ In *C.R.C.*, the trial court received two reports from examining psychologists concluding that the child was not competent to stand trial on the basis of the child's age and understanding.²⁰ Neither expert found incompetency on mental illness or retardation grounds.²¹ However, the court made such a finding and ordered the child placed with DCF.²² The appellate court reversed, holding quite simply that the trial court's order departed from the requirements of Chapter 985,²³ because its findings were not supported by the written reports of the examiners.²⁴

Delinquency charges based upon school-related activities often come before the Florida courts. In these cases, a common issue is the legality of a search conducted in the school. The leading case is the 1985 United States Supreme Court opinion in *New Jersey v. T.L.O.*,²⁵ in which the high Court ruled that school officials must have reasonable grounds to suspect that the search would produce evidence that the student violated either school rules or the law.²⁶ *T.L.O.* related cases have been the subject of analysis in this

14. *Id.* at 46.

15. *Id.* at 48.

16. See generally 28 NOVA L. REV. p. 467-603 (2004).

17. 867 So. 2d 592 (Fla. 5th Dist. Ct. App. 2004).

18. FLA. STAT. § 985.223(2) (2004).

19. *Id.*

20. *C.R.C.*, 867 So. 2d at 593.

21. *Id.* at 593-94.

22. *Id.* at 594.

23. FLA. STAT. ch. 985 (2004).

24. *Id.*

25. 469 U.S. 325 (1985).

26. *Id.* at 341.

review in the past.²⁷ In *State v. J.T.D.*,²⁸ the Second District Court of Appeal reversed the trial court's suppression of a child's confession in a delinquency case arising out of a petition charging a middle schooler with lewd and lascivious molestation of another student.²⁹ The school investigation of the child involved both a St. Petersburg police officer and the school's resource officer.³⁰ The court held that the school official was not acting as an enforcement agent, and therefore, the necessity for *Miranda* warnings did not exist.³¹ The court found that the police officer was merely present during the interview, although in and out of the room, and asked no questions.³² The opinion also states that the officer heard the admission, and that after the admission, the school official turned the questioning over to the police official.³³ The officer started to read the child *Miranda* warnings but, because another problem arose, he left and never completed them.³⁴ The appellate court held that under the facts, *Miranda* warnings were not necessary as the police officer's mere presence did not transform the school official's interview of the child into a custodial interrogation.³⁵ The court did not view the setting as traditional custody as understood under *Miranda*.³⁶ While the child could not leave the principal's room, the court held that it was not determinative of whether it was a custodial interrogation that had to be preceded by *Miranda* warnings.³⁷ The court came to this conclusion based upon the principle that children's liberty interests are lessened in the school setting.³⁸ As the appellate court put it, "[e]stablishing a blanket rule that excludes the presence of a police officer whenever a school administrator questions a student unless *Miranda* warnings are given turns a blind eye to the threatening world surrounding our schools."³⁹

A second school suspension delinquency case is *M.H. v. State*.⁴⁰ In this case the child moved to suppress statements made to a school official in the presence of a law enforcement officer who was employed as a school re-

27. See Michael J. Dale, *2003 Survey of Juvenile Law*, 28 NOVA L. REV. 543, 567 (2004) [hereinafter Dale 2003].

28. 851 So. 2d 793 (Fla. 2d Dist. Ct. App. 2003).

29. *Id.* at 794, 797.

30. *Id.* at 794.

31. *Id.* at 797.

32. *Id.* at 795-96.

33. *J.T.D.*, 851 So. 2d at 795.

34. *Id.*

35. *Id.* at 797.

36. *Id.* at 796.

37. *Id.*

38. *J.T.D.*, 851 So. 2d at 797.

39. *Id.*

40. 851 So. 2d 233 (Fla. 4th Dist. Ct. App. 2003).

source officer.⁴¹ Charges arose out of an altercation with another student in the middle school.⁴² The school official questioned the child in the presence of the resource officer.⁴³ The court noted that “[a]ll questioning was done by the school official except that the resource officer asked one question at the end.”⁴⁴ Without any analysis, the court held that “[t]he mere presence of a law enforcement officer, when a student is being questioned by a school official, does not amount to a custodial interrogation requiring *Miranda* warnings.”⁴⁵

As in the school setting, the issue of proper *Miranda* warning cases are reported in the appellate court case literature in Florida. *Frances v. State*⁴⁶ involved a challenge to the voluntariness of a juvenile confession.⁴⁷ The child, who was sixteen at the time of the confession, claimed on appeal that the confession was involuntary because he was not afforded an opportunity to speak with his mother prior to the questioning.⁴⁸ Florida courts have held that there is no constitutional requirement that police notify a juvenile’s parents prior to questioning.⁴⁹ Although section 985.207(2) of the *Florida Statutes*⁵⁰ requires police officers to attempt to notify a juvenile’s parents when taking the child into custody, failure to do so does not per se make a confession involuntary.⁵¹ Other states do provide by statute for such protection in the form of required notification of parents.⁵² In *Frances*, the court did note that had the child said he did not wish to talk to police until he had an opportunity to speak with his parents, the questioning would have ceased.⁵³ Applying a totality of the circumstances test,⁵⁴ the court held there was no basis to conclude that the confession was in any way coerced or involuntary.⁵⁵

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.*

45. *M.H.*, 851 So. 2d at 233–34.

46. 857 So. 2d 1002 (Fla. 5th Dist. Ct. App. 2003).

47. *Id.* at 1003.

48. *Id.*

49. *Id.* See *Brancaccio v. State*, 773 So. 2d 582, 583–84 (Fla. 4th Dist. Ct. App. 2000).

50. FLA. STAT. § 985.207(2) (2004).

51. *Frances*, 857 So. 2d at 1004 (citing *Ramirez v. State*, 739 So. 2d 568 (Fla. 1999)).

52. See Michael J. Dale, *Representing the Child Client*, 5.03[7] (Matthew Bender & Co. 2004) (summarizing the case law around the country showing different approaches).

53. *Frances*, 857 So. 2d at 1004. See *B.P. v. State*, 815 So. 2d 728 (Fla. 5th Dist. Ct. App. 2002).

54. See *Ramirez*, 739 So. 2d at 568 (describing the totality of the circumstances test).

55. *Frances*, 857 So. 2d at 1004.

In Florida delinquency cases, pretrial practice and discovery issues do not appear often in appellate case law. However, in *F.R. v. State*,⁵⁶ a child appealed from an adjudication of delinquency on a charge of trespass on the grounds that the trial court, as a sanction for untimely disclosure of that witness, excluded a defense witness and denied a motion for continuance.⁵⁷ Two days prior to the trial the defense filed a witness list, which the state claimed was untimely.⁵⁸ The state asked the court to exclude the witness on prejudice grounds, because it could not depose the witness.⁵⁹ The defense position was that counsel only became aware of the witness ten days before the trial and did not disclose the witness until after he had the ability to interview the individual.⁶⁰ The question on appeal was whether the trial court abused its discretion in excluding the witness as a sanction for the untimely disclosure.⁶¹ The appellate court found that the testimony of the excluded witness was highly relevant, juvenile proceedings operated under an expedited time frame, and the sanction of exclusion is severe and a last resort only to be used in extreme or compelling circumstances.⁶² The court concluded that this was an uncomplicated case, the defense gave a reasonable explanation, and other less severe methods existed to overcome the prejudice.⁶³ The appellate court found an abuse of discretion and remanded for a new trial.⁶⁴

The Florida rules governing speedy trial in juvenile delinquency cases provide that a child shall have an adjudicatory hearing within ninety days, without demand, following the earlier of either the date the child was taken into custody or the date the petition was filed.⁶⁵ The Florida appellate courts regularly review cases concerning affirmation of this rule.⁶⁶ In *Alvarez v. State*,⁶⁷ a juvenile petitioned for issuance of a writ of prohibition directing the trial court to dismiss an information charging him as an adult.⁶⁸ The child

56. 860 So. 2d 501 (Fla. 4th Dist. Ct. App. 2003).

57. *Id.*

58. *Id.* at 502.

59. *Id.*

60. *Id.*

61. *F.R.*, 860 So. 2d at 502.

62. *Id.*

63. *Id.* at 503.

64. *Id.*

65. See FLA. R. JUV. P. 8.90(a).

66. See Michael J. Dale, *2002 Survey of Florida Juvenile Law*, 28 NOVA L. REV. 1, 5 (2003) [hereinafter Dale 2002]; Michael J. Dale, *Juvenile Law Issues in Florida in 1998*, 23 NOVA L. REV. 819, 834–35 (1999) [hereinafter Dale 1998].

67. 849 So. 2d 1089 (Fla. 3d Dist. Ct. App. 2003).

68. *Id.* at 1090.

was initially charged in a delinquency petition with one count of battery.⁶⁹ The state entered a nolle prosequi because it was considering direct filing against the child in the adult criminal division.⁷⁰ The defendant argued that the ninety-day juvenile speedy trial rule was triggered by the delinquency petition, applied to the adult charges, and had run.⁷¹ The appeals court denied the petition finding that the juvenile rules did not apply to the adult charges filed, because by virtue of the nolle prosequi, nothing was pending against the child in the juvenile court at the time the information was filed in the adult court.⁷² The court relied on the Supreme Court of Florida opinion in *State v. Olivo*,⁷³ which held that while juvenile speedy trial rights are triggered upon filing of delinquency petitions, the rules apply only while something is pending in the juvenile court.⁷⁴ As nothing was pending in the case at bar, the juvenile speedy trial rule did not apply.⁷⁵

Under Florida law, parents or guardians of a child who is detained during delinquency proceedings may be required to pay fees to the state for the cost of the child's subsistence.⁷⁶ In *B.S. v. State*,⁷⁷ the child was taken into police custody, subsequently ordered to home detention, and released to her parents.⁷⁸ While the matter was pending, the court ordered the parents to pay twenty dollars a day for the cost of the child's care.⁷⁹ The State subsequently filed a nolle prosequi petition in the case, and the child then filed a pro se motion to rescind the cost order.⁸⁰ The child argued that the parents should not be required to pay, because the State decided not to prosecute, and the defendant was at home.⁸¹ Based upon the mandatory language of the statute,⁸² the juvenile court denied the motion.⁸³ The child then brought a constitutional challenge on both equal protection and substantive due process

69. *Id.*

70. *Id.*

71. *Id.*

72. *Alvarez*, 849 So. 2d at 1091.

73. 759 So. 2d 647 (Fla. 2000).

74. *Id.* at 649.

75. *Alvarez*, 849 So. 2d at 1091.

76. FLA. STAT. § 985.215(b) (2004).

77. 862 So. 2d 15 (Fla. 2d Dist. Ct. App. 2003).

78. *Id.* at 17.

79. *Id.*

80. *Id.*

81. *Id.*

82. FLA. STAT. § 985.215(6) (2004). This statute provides "[w]hen any child is placed into secure or home detention care . . . the court shall order the parents . . . to pay to the Department of Juvenile Justice fees as provided under s. 985.2311." *Id.*

83. *B. S.*, 862 So. 2d at 17.

grounds.⁸⁴ The child argued that the statute violated equal protection by treating exonerated juveniles differently than exonerated adults.⁸⁵ In addition, the child argued that the statute violated substantive due process by requiring “payment of subsistence costs for a child’s detention at home.”⁸⁶ The appellate court accepted both of the child’s arguments.⁸⁷ Applying an ordinary scrutiny equal protection standard under Florida law,⁸⁸ the court could find no legitimate state objective to justify discriminating between adults and juveniles in this context.⁸⁹ The court also applied ordinary scrutiny to the due process question, concluding that requiring payment for home detention bore no rational relationship to the permissible legislative objective of alleviating the state’s financial burden.⁹⁰ The court further held that requiring a parent to pay both to support her child at home and to reimburse the state for unexpended costs was arbitrary and oppressive.⁹¹

B. *Dispositional Issues*

Florida statutes provide the juvenile court with a variety of dispositional powers, including probation, restitution, community service, curfew, revocation or suspension of driver’s license, placement in a consequence unit, placement in home detention, commitment to a licensed child care agency, and commitment to the Department of Juvenile Justice (DJJ) at a residential commitment level (a level of security provided by programs that supervise and care for the child).⁹² The issue in *B.A.B. v. State*⁹³ was whether a juvenile disposition order “should be reversed because the trial court failed to order and consider a predisposition report, (‘PDR’), before making its final disposition.”⁹⁴ Under Florida law, “a predisposition report shall be ordered for any child for whom a residential commitment disposition is anticipated or recommended by an officer of the court or by the [D]epartment [of Juvenile Justice].”⁹⁵ In denying the child’s motion to correct the order, the trial court

84. *Id.* at 16.

85. *Id.*

86. *Id.* at 16–17.

87. *Id.* at 20.

88. *B.S.*, 862 So. 2d at 18 (citing *D.P. v. State*, 705 So. 2d 593, 597 (Fla. 3d Dist. Ct. App. 1997)).

89. *Id.* at 19.

90. *Id.*

91. *Id.* at 19–20.

92. *See* §§ FLA. STAT. 985.231, .03 (2004).

93. 853 So. 2d 554 (Fla. 1st Dist. Ct. App. 2003).

94. *Id.* at 554–55.

95. § 985.229(1).

stated it did not order a PDR because the court had previously seen the child on multiple occasions for prior offenses and commitment.⁹⁶ The trial court held that redundant investigations were unnecessary where the court already had knowledge of the relevant information.⁹⁷ The appellate court held that the statute's requirements are mandatory.⁹⁸ A predisposition report is required, the court shall consider it, and it shall be made available to the child and counsel among others.⁹⁹ It then concluded that there was no authority to support the proposition that the court could, if it had knowledge of the child's prior record, forego the statutory requirements.¹⁰⁰ It added that the trial court effectively "created an exception to the applicable statutes and rules that does not exist."¹⁰¹ More importantly and significantly, the trial court deprived the child of an opportunity to review a PDR prior to his dispositional hearing as required by state law by relying upon its knowledge of the child.¹⁰² Therefore, the court reversed and remanded.¹⁰³

Issues concerning proper application of the restitution provisions of the dispositional law in delinquency cases come regularly before the appellate courts.¹⁰⁴ *J.D. v. State*¹⁰⁵ involved a restitution jurisdictional issue where the trial court terminated probation without reserving jurisdiction for purposes of restitution.¹⁰⁶ In failing to reserve jurisdiction, the trial court relied upon a DJJ recommendation that probation be terminated, but DJJ overlooked the fact that restitution had not been completed.¹⁰⁷ When it became known that restitution had not been completed, the court accepted the State's reliance on the ground of a "scrivener's error," and vacated its order to reinstitute jurisdiction.¹⁰⁸ The Fourth District Court of Appeal reversed the decision.¹⁰⁹ It found that the mistake was not a "scrivener's error," but concluded that the court had authority to vacate its order on grounds of mistake under the *Florida Rules of Juvenile Procedure*.¹¹⁰ However, despite the ability to vacate an

96. *B.A.B.*, 853 So. 2d at 555.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 556.

101. *B.A.B.*, 853 So. 2d at 556.

102. *Id.*

103. *Id.*

104. Dale 2003, *supra* note 27, at 569; Dale 2002, *supra* note 66, at 8; Dale 1998, *supra* note 66, at 839.

105. 849 So. 2d 458 (Fla. 4th Dist. Ct. App. 2003).

106. *Id.* at 459.

107. *Id.*

108. *Id.*

109. *Id.* at 461.

110. *J.D.*, 849 So. 2d at 459 (citing FLA. R. JUV. P. 8.140).

order on the grounds of mistake, the court had to “have jurisdiction over a juvenile to enter an order.”¹¹¹ In the case at bar, the court lacked jurisdiction because it failed to enter a restitution order before the child’s nineteenth birthday, the time jurisdiction would otherwise end.¹¹² Instead, the new order “merely reserved jurisdiction for restitution purposes.”¹¹³ There being no proper restitution order in effect prior to the respondent’s nineteenth birthday, the court lacked jurisdiction to subsequently enter the order setting the restitution amount.¹¹⁴

C. *Appellate Issues*

The First District Court of Appeal dealt with a very important issue regarding application of what is commonly known as an *Anders* appeal in *A.F.E. v. State*.¹¹⁵ In *Anders v. California*,¹¹⁶ the United States Supreme Court held that a defendant’s Sixth Amendment right to assistance of counsel in criminal cases is not satisfied when an appointed appellate lawyer merely reports by letter that there is no meritorious issue presented on appeal.¹¹⁷ Pursuant to its ruling implementing *Anders*, the Supreme Court of Florida held that the appellate court must then undertake “a full and independent review of the record to discover any arguable issues apparent on the face of the record.”¹¹⁸ The problem that arose in *A.F.E.* involved a legitimate catch-22 situation.¹¹⁹ The defendant and several other juveniles were charged after a note containing a bomb threat was found in their high school, and the appellant didn’t contest the charge.¹²⁰ At the dispositional stage, DJJ recommended probation with the alternative of commitment at a moderate risk facility.¹²¹ The trial court rejected these alternatives and committed the child to a high risk residential commitment facility.¹²² However, in its independent review of the record, the appellate court found that the trial court’s departure did “not appear to be supported by competent substantial evidence in the

111. *Id.* at 460.

112. *Id.* See FLA. STAT. § 985.201(4)(a) (2004).

113. *J.D.*, 849 So. 2d at 460.

114. *Id.*

115. 853 So. 2d 1091 (Fla. 1st Dist. Ct. App. 2003).

116. 386 U.S. 738 (1967).

117. *Id.* at 744.

118. *In re Anders Briefs*, 581 So. 2d 149, 151 (Fla. 1991).

119. See *A.F.E.*, 853 So. 2d at 1091.

120. *Id.* at 1092.

121. *Id.*

122. *Id.*

record” as required by state law,¹²³ but the child’s counsel failed to preserve the issue for appeal.¹²⁴ Because the child’s lawyer neither objected at the time the trial court entered its disposition nor filed a motion to correct the disposition order pursuant rule 8.135(b)(2) of the *Florida Rules of Juvenile Procedure*, the appellate court could not act.¹²⁵ All that remained was a claim of ineffective assistance of counsel.¹²⁶ However, as the appellate court pointed out, a claim of ineffective assistance of counsel “is of little practical assistance in juvenile cases, where the sentence imposed may be completed before any relief is granted.”¹²⁷ Describing the problem as a dilemma, the appellate court affirmed, but certified as a question of public importance whether an appellate court can correct a sentencing error in an *Anders* case that was not preserved pursuant to the applicable rules of procedure, and if not, what steps should the appellate court follow to carry out the mandate of *Anders*?¹²⁸

III. DEPENDENCY

Dependency court jurisdictional issues do not come up regularly in Florida. An exception is *J.M. v. Department of Children and Family Services*.¹²⁹ The case involved adjudication of an infant as dependent where the child was absent from the State of Florida and where DCF had claimed that there was a risk of harm to the child being “with his mother, who herself was a minor and had been adjudicated dependent, but was on runaway status.”¹³⁰ The facts are significant. The trial court issued an ex parte order to take the mother and the child into custody.¹³¹ At no time had the infant been declared dependent prior to the filing of the petition.¹³² The court held an arraignment hearing, and ultimately entered a consent on behalf of the parent by default after the court determined that there had been a diligent search to find her.¹³³ An attorney ad litem was present for the mother and objected to the adjudica-

123. *Id.* at 1093.

124. *A.F.E.*, 853 So. 2d at 1093.

125. *Id.* at 1093, 1095.

126. *Id.* at 1094.

127. *Id.* at 1093.

128. *Id.* at 1095. *See also* The Honorable Martha C. Warner, *Anders in the Fifty States: Some Appellants’ Equal Protection Is More Equal than Others*, 23 FLA. ST. U. L. REV. 625 (1996).

129. 851 So. 2d 303 (Fla. 4th Dist. Ct. App. 2003).

130. *Id.* at 304.

131. *Id.*

132. *Id.*

133. *Id.* at 305.

tion.¹³⁴ The court took hearsay evidence presented by DCF regarding the mother's circumstances and adjudicated the infant child dependent.¹³⁵ Thereafter, the court held a dispositional hearing and established a reunification case plan, which the mother ultimately signed when her whereabouts became known.¹³⁶ The appellate court reversed the trial court order, finding that the court lacked jurisdiction over the infant because DCF never had custody of the infant child, and the mother was never given notice or the opportunity to be heard.¹³⁷ Furthermore, the court order adjudicating the infant dependent, where both mother and child were outside the jurisdiction, constituted a deprivation of the mother's due process rights.¹³⁸

A more troubling jurisdictional case involving dependency is *In re D.N.*¹³⁹ The case concerned two children as to whom a Hawaii court entered an order of protection giving the father both legal and physical custody with supervised visitations for the mother.¹⁴⁰ While proceedings were pending in Hawaii, the mother took the children out of the state and was subsequently arrested in Florida.¹⁴¹ As a result, DCF filed a petition for dependency of the two children against the mother only, never filing against the father.¹⁴² Relying upon the Uniform Child Custody Jurisdiction Act (UCCJA), which was in effect in Florida,¹⁴³ the father quickly filed a motion to have the children returned to him in Hawaii based upon the Hawaii custody order.¹⁴⁴ Despite the existence of the Hawaii order and the relevant statutory mandate, the trial court denied the motion to have the two children returned.¹⁴⁵ DCF filed a case plan defining tasks to the father for reunification, but never sought to have the children adjudicated dependent as to the father.¹⁴⁶ Despite no finding of dependency as to the father, the court approved the case plan.¹⁴⁷ For a year and a half the father continued to seek to have the Hawaii custody order enforced.¹⁴⁸ The trial court held an evidentiary hearing concerning return of the children to the father, and DCF never raised issues of compliance with

134. *J.M.*, 851 So. 2d at 305.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.*

139. 858 So. 2d 1087 (Fla. 2d Dist. Ct. App. 2003).

140. *Id.* at 1088.

141. *Id.*

142. *Id.*

143. FLA. STAT. §§ 61.501-.542 (2004).

144. *D.N.*, 858 So. 2d at 1088.

145. *Id.* at 1089.

146. *Id.*

147. *Id.*

148. *Id.*

the Interstate Compact on the Placement of Children (ICPC).¹⁴⁹ At the end of the hearing, the trial court ordered the children returned to the father, and despite that order, DCF refused to transfer the children to Hawaii.¹⁵⁰ The father sought to enforce the court order, and at this late stage, DCF argued that the Hawaii ICPC administrator had not approved the placement.¹⁵¹ The court ordered the children placed with their father, and then DCF appealed, even seeking a stay.¹⁵² In the absence of a stay, the children were reunited with their father while the case was pending on appeal.¹⁵³ In a detailed opinion, the appellate court laid out what would have been obvious to any lawyer in the field—the application of the UCCJA and the Parental Kidnapping Prevention Act (PKPA).¹⁵⁴ In what could only be described as a significant understatement, the court concluded as follows:

Finally, we note that the Department has come under increased public scrutiny during the past year concerning the way it has handled, or mishandled, certain cases. Given that scrutiny, we fail to understand why the Department chose to focus its efforts in this case on keeping the two children from a father who clearly wants them and who has a valid court order awarding him custody. Further, we fail to understand why the Department chose not to bring the controlling provisions of the UCCJA and the PKPA to either the trial court's or this court's attention. In making these choices, the Department strayed from its legislatively mandated objectives, and its attorneys strayed from their duty to bring controlling authority to the court's attention.¹⁵⁵

The initial court proceeding in a dependency case is often the hearing on a shelter petition.¹⁵⁶ This hearing takes place when “a child has been or is to be removed from the home and maintained in an out-of-home placement for a period longer than 24 hours.”¹⁵⁷ The issue *In re J.P.*,¹⁵⁸ was whether the father was “denied the statutorily afforded opportunity to be heard and to present evidence at the shelter hearing.”¹⁵⁹ The Pasco County Sheriff's Office filed a petition for placement in shelter of three children based upon fac-

149. *D.N.*, 858 So. 2d at 1089; FLA. STAT. § 409.401 (2004).

150. *D.N.*, 858 So. 2d at 1089.

151. *Id.*

152. *Id.* at 1094.

153. *Id.*

154. 20 U.S.C. § 1738(A) (2003).

155. *D.N.*, 858 So. 2d at 1094.

156. See FLA. STAT. § 39.402 (2004).

157. FLA. R. JUV. P. 8.305(a).

158. 875 So. 2d 715 (Fla. 2d Dist. Ct. App. 2004).

159. *Id.* at 716.

tual allegations of domestic violence, the father's prior drug conviction, and his current drug use.¹⁶⁰ At the shelter hearing, where both parents were represented by counsel, the mother's lawyer sought an opportunity to present evidence.¹⁶¹ The trial court decided that the hearing sought was discretionary, and since the court never did "three-hour shelter hearings,"¹⁶² it refused to start conducting them.¹⁶³ It ruled that probable cause could be found on the four corners of the affidavit.¹⁶⁴ The Second District Court of Appeal reversed, holding that Florida law provides parents with due process rights in judicial proceedings involving temporary removal from the home.¹⁶⁵ Specifically, section 39.402 of the *Florida Statutes* provides that parents shall be given "an opportunity to be heard and to present evidence at shelter hearings."¹⁶⁶ Further, the *Florida Rules of Juvenile Procedure* provide that persons shall be given an opportunity to be heard and present evidence on the criteria for placement under the law.¹⁶⁷ The appellate court concluded that the judge below incorrectly held that the written submissions alone constituted probable cause despite the fact that the clear statutory and rule authority afforded the parents the right to be heard and to present evidence at the shelter hearing.¹⁶⁸

The interplay of child custody issues in dependency proceedings and domestic relations proceedings comes up often in Florida appellate case law.¹⁶⁹ In *King v. Jordan*,¹⁷⁰ the trial court initially entered an order granting custody of the parties' daughter to the father during the course of a dependency proceeding under Chapter 39.¹⁷¹ In exercising its continuing jurisdiction as provided by statute,¹⁷² the court subsequently reopened the dependency proceeding, restored all of the mother's rights and obligations, and granted her liberal visitation, while continuing the father's primary residential responsibility for the child.¹⁷³ At the close of the proceeding, the court ruled that custodial and visitation rights were granted without prejudice to

160. *Id.* at 716–17.

161. *Id.* at 717.

162. *Id.*

163. *J.P.*, 875 So. 2d at 717.

164. *Id.*

165. *Id.* at 718–19.

166. *Id.*

167. FLA. R. JUV. P. 8.305(b)(4).

168. *J.P.*, 875 So. 2d at 718.

169. See Michael J. Dale, *Juvenile Law: 2000 Survey of Florida Law*, 25 NOVA L. REV. 91, 100 (2000) [hereinafter Dale 2000].

170. 850 So. 2d 645 (Fla. 2d Dist. Ct. App. 2003).

171. *Id.*; FLA. STAT. ch. 39 (2004).

172. § 39.013(2).

173. *King*, 850 So. 2d at 646.

the right of either parent to seek further relief under Chapter 61,¹⁷⁴ Florida's domestic relations child custody statute.¹⁷⁵ Thereafter, the mother petitioned for primary residential custody pursuant to the dependency court's prior order preserving her right to seek relief under Chapter 61. The court rejected her claim,¹⁷⁶ citing *Gibbs v. Gibbs*,¹⁷⁷ a case from the Second District Court of Appeal, holding "that a party seeking to modify a custody decree must establish a substantial change in circumstances since the final judgment and that such a change justifies imposing a change in custody."¹⁷⁸ The appellate court reversed, holding that the domestic relations standard applied in *Gibbs*, relating to a modification of a custody decree after an initial Chapter 61 determination, does not apply here, where the custody determination was made in a Chapter 39 dependency proceeding.¹⁷⁹ The appellate court held that when a custody arrangement is ordered in a dependency case, all the court is doing is making a decision to place the child with a responsible adult, preferably a parent.¹⁸⁰ Such a decision does not consider all of the elements of the dissolution statute "concerning a determination of the primary residential parent based on the best interests of the child."¹⁸¹ The court concluded that the extraordinary circumstances test applied to modification under Chapter 61 is not applicable when the initial custody determination was made in a dependency case as opposed to a dissolution proceeding.¹⁸² Unlike a dissolution or paternity custody order arising under Chapter 61, a custody order arising from a Chapter 39 dependency proceeding is not a determination of the best interest of the child for purposes of determining primary residential custody.¹⁸³

A second case involving custodial placement in the dependency context is *S.L. v. Department of Children and Families*.¹⁸⁴ During the course of a dependency proceeding against both parents arising out of severe violence between the mother and the father in the presence of the children, the court initially placed the children with their maternal uncle.¹⁸⁵ Thereafter, the court placed the children jointly with the mother and the maternal grandpar-

174. *Id.*

175. FLA. STAT. ch. 61 (2004).

176. *King*, 850 So. 2d at 645.

177. 686 So. 2d 639 (Fla. 2d Dist. Ct. App. 1996).

178. *King*, 850 So. 2d at 646 (citing *Gibbs*, 686 So. 2d at 639).

179. *Id.* at 647.

180. *Id.*

181. *Id.* (citing § 61.13).

182. *Id.*

183. *King*, 850 So. 2d at 647.

184. 852 So. 2d 372 (Fla. 5th Dist. Ct. App. 2003).

185. *Id.* at 373.

ent with unsupervised visitations for the father.¹⁸⁶ The father appealed, claiming he was entitled to custody of the children because a parent is preferred over more distant relatives.¹⁸⁷ He relied upon *Hammond v. Howard*,¹⁸⁸ a case arising out of the Fifth District. The appellate court rejected the application of *Hammond* to a dependency proceeding because *Hammond* was a domestic relations custody case arising under Chapter 61, which is unrelated to dependency.¹⁸⁹ In a dependency case, the issue is whether the child should be reunited with the parent.¹⁹⁰ Furthermore, the court must determine whether the parents substantially complied with the terms of the case plan as well as considering the well-being and safety of the child.¹⁹¹ Finally, the *S.L.* court opined that the court below had substantial flexibility in the dependency proceeding because of the statutory obligation to include protective supervision by DCF at the home of either or both parents.¹⁹² The appellate court thus affirmed.¹⁹³

The question of application of speedy trial rules in a dependency case was before the Fourth District in *D.D. v. Department of Children and Families*.¹⁹⁴ The father appealed the denial of a motion to dismiss because the state failed to hold a dependency trial within thirty days as provided by Florida law.¹⁹⁵ The father argued that the Supreme Court of Florida case, which held the thirty-day time frame applicable to involuntary commitment procedures, should apply to dependency cases.¹⁹⁶ The appellate court rejected this argument.¹⁹⁷ It found that the juvenile rule governing speedy trials applies only in delinquency cases.¹⁹⁸ According to the Fourth District, while the Florida dependency statute does speak of a thirty-day period, it is not mandatory.¹⁹⁹ Rather, it concluded that the thirty-day rule is discretionary, given the nature of the proceedings and the state's interest in protecting a child's welfare, which is paramount to the parents' interests.²⁰⁰

186. *Id.*

187. *Id.* at 373–74.

188. 828 So. 2d 476 (Fla. 5th Dist. Ct. App. 2002).

189. *S.L.*, 852 So. 2d at 374.

190. *Id.*

191. *Id.*

192. *Id.* (citing FLA. STAT. § 39.521(1)(b)(3) (2004)).

193. *Id.*

194. 849 So. 2d 473 (Fla. 4th Dist. Ct. App. 2003).

195. § 39.507(1)(a).

196. *D.D.*, 849 So. 2d at 475, (citing § 39.507(1)(a)); *State v. Goode*, 830 So. 2d 817, 825–26 (Fla. 2002)).

197. *D.D.*, 849 So. 2d at 476.

198. *Id.* at 475.

199. *Id.* at 476; *see* § 39.507(1)(a).

200. *D.D.*, 849 So. 2d at 476.

A case involving “default” or, more appropriately, “consent” to adjudication in the dependency in context²⁰¹ is *R.P. v. Department of Children and Families*.²⁰² The consent occurred when a father, through counsel, advised the court that due to the fault of the lawyer’s office, the father was not told until 5:45 p.m. the previous day that it was necessary for him to be at the hearing.²⁰³ The father lived two hundred miles away and did not have a vehicle.²⁰⁴ The father’s counsel then asked for a brief continuance.²⁰⁵ When the father did not appear in the afternoon, the attorney requested another continuance until the father’s arrival, which the court denied and entered a default.²⁰⁶ On appeal, the Fourth District reversed, stressing the importance of the parent-child relationship and warning the lower courts not to disrupt this relationship on procedural grounds unless harm will befall the child.²⁰⁷

IV. PROSPECTIVE ABUSE AND NEGLECT

On July 8, 2004, just beyond the usual annual survey period for this article, the Supreme Court of Florida decided *Department of Children and Families v. F.L.*²⁰⁸ This important opinion clarifies the application of prospective abuse and neglect in both dependency and termination of parental rights (TPR) cases, which was first addressed by the Supreme Court of Florida in 1991 in *Padgett v. Department of Health and Rehabilitative Services*.²⁰⁹ Prospective abuse or neglect was the subject of a lengthy discussion of the intermediate appellate cases in last year’s survey article.²¹⁰ In that case, the court ruled that permanent termination of parental rights to one child on the basis of abuse and neglect may be sufficient grounds for termination of the parental rights to another child.²¹¹ However, the court held that constitutional liberty interests required that the state “show by clear and convincing evidence that the reunification with the parent poses a substantial risk of significant harm to the child.”²¹² In addition, the court held that the

201. See *infra* pp. 413–19 for a discussion of consent in the termination of parental rights context.

202. 835 So. 2d 1212 (Fla. 4th Dist. Ct. App. 2003).

203. *Id.* at 1213.

204. *Id.*

205. *Id.*

206. *Id.*

207. *R.P.*, 835 So. 2d at 1213–14.

208. 880 So. 2d 602 (Fla. 2004).

209. 577 So. 2d 565 (Fla. 1991).

210. Dale 2003, *supra* note 27, at 559–64.

211. *Padgett*, 577 So. 2d at 571.

212. *Id.*

State must prove that termination is the least restrictive means of protecting the child from harm by the parent.²¹³

F.L. specifically dealt with the issue of which party has the burden of proof to show substantial risk of harm, or lack thereof, to a current child based upon harm perpetrated upon another child.²¹⁴ Since *Padgett*, a substantial number of appellate cases have interpreted it, both in the dependency and termination of parental rights contexts.²¹⁵ The courts were in disagreement as to the proper interpretation of section 39.806(1)(i) of the *Florida Statutes*, dealing with the test for terminating parental rights when the parental rights to a sibling have been involuntarily terminated.²¹⁶ A quartet of appellate cases in the intermediate appellate courts were at odds as to the appropriate burden of proof.²¹⁷ In *A.B. v. Department of Children and Families*,²¹⁸ *T.P. v. Dep't of Children and Families*,²¹⁹ and *In re T.S.*²²⁰ the courts held that the statute validly created a rebuttable presumption of termination of parental rights, which the parent could rebut.²²¹ On the other hand, in *C.W. v. Department of Children and Families*,²²² Judge Erwin wrote a concurring opinion taking the view that the statute could not be used to terminate parental rights solely on the basis of the parents' conduct.²²³ Likewise in *F.L.*, at the appellate court level, the court held that the section "unconstitutionally shifts the burden to the parent to prove reunification would not be harmful to the child."²²⁴ The Supreme Court of Florida affirmed this opinion.²²⁵ Applying *Padgett*, the court held that the statute may not constitutionally be viewed to permit a termination of parental rights without proof of substantial risk to the child.²²⁶ A rebuttable presumption would relieve DCF

213. *Id.*

214. *F.L.*, 880 So. 2d at 606–07.

215. Dale 2003, *supra* note 27, at 546–48, 559–64; Dale 2002, *supra* note 66, at 13–14, 18–19.

216. Dale 2003, *supra* note 27, at 546–48, 559–64; Dale 2002, *supra* note 66, at 13–14, 18–19.

217. Dale 2003, *supra* note 27, at 546–48, 559–64; Dale 2002, *supra* note 66, at 13–14, 18–19.

218. 816 So. 2d 684 (Fla. 5th Dist. Ct. App. 2002); *see contra* Dale 2003, *supra* note 27, at 560.

219. 860 So. 2d 1084 (Fla. 5th Dist. Ct. App. 2003).

220. 855 So. 2d 679 (Fla. 2d Dist. Ct. App. 2003).

221. *A.B.*, 816 So. 2d at 684; *T.P.*, 819 So. 2d at 271; *T.S.*, 855 So. 2d at 680.

222. 814 So. 2d 488 (Fla. 1st Dist. Ct. App. 2002).

223. *Id.* at 493–98 (Erwin, J., concurring).

224. *F.L. v. Dep't of Children & Families*, 849 So. 2d 1114, 1116 (Fla. 4th Dist. Ct. App. 2003).

225. *Fla. Dep't of Children & Families v. F.L.*, 880 So. 2d 602, 609 (Fla. 2004).

226. *Id.*

of its burden of proof and would, according to the high court, violate the constitutional requirements articulated in *Padgett*.²²⁷ The court held explicitly that the state must prove both the prior involuntary termination of parental rights to a sibling and a substantial risk of significant harm to the child who is before the court.²²⁸ In addition, DCF must prove that termination of parental rights is the least restrictive alternative for protecting the child from harm.²²⁹ The court gave the trial courts guidance on how to apply the section, explaining that the circumstances leading to the prior termination are highly relevant to the issue before the court concerning risk to the other child.²³⁰ The parents' conduct which led to the involuntary termination may tend to indicate a greater risk of harm to the current child.²³¹ The courts should take into account the amount of time that passes between the two events, and evidence of a change of circumstances since the prior involuntary termination will be significant to the determination of risk.²³² Finally, the court explained that past conduct has some predictive value as to likely future conduct, which can be changed by positive life changes.²³³ The court emphasized that the parent is not obligated to show evidence of changed circumstances to avoid the termination of parental rights.²³⁴ The court held that DCF must prove by clear and convincing evidence²³⁵ that the rights of the prior child were terminated involuntarily, that the child now before the court is at a substantial risk of significant harm, and that termination of parental rights is the least restrictive alternative for the protection of the child.²³⁶ The court then concluded that, so interpreted, the statute would be constitutional.²³⁷

In two concurring opinions, Justices Pariente and Cantero were at odds over an additional question—whether a manifest best interest determination is the equivalent of an obligation of the State to prove substantial risk of

227. *Id.*

228. *Id.*

229. *Id.* at 610.

230. *F.L.*, 880 So. 2d at 610.

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

235. *See generally*, *Santosky v. Kramer*, 455 U.S. 745 (1982) (holding the standard of proof in termination of parental rights cases must be at least clear and convincing evidence to comport with due process rights).

236. *F.L.*, 880 So. 2d at 611.

237. *Id.*

harm to the child under one of the statutory grounds for termination.²³⁸ Justice Pariente said no,²³⁹ and Justice Cantero said yes.²⁴⁰

A separate ground for termination of parental rights involving prospective abuse or neglect is the situation where the parent has committed murder or voluntary manslaughter of another child or a felony assault that results in serious bodily injury to another child.²⁴¹ A number of courts have held that a nexus must be shown between the acts described in the subsection and the potential for future abuse.²⁴² The issue of nexus arose in *J.F. v. Department of Children and Families*²⁴³ where the mother's stepchild was physically abused and died while in her care as a result of blunt trauma to the stomach.²⁴⁴ She was ultimately convicted of manslaughter and child abuse.²⁴⁵ On appeal, the Fourth District reversed the trial court's termination of parental rights, *inter alia*, rejecting DCF's position that no nexus need be shown.²⁴⁶ In so doing, the court noted that "[f]ailure to give the statutory scheme a narrow construction requiring the State to prove a nexus between the past conduct and the continuing substantial risk of harm to the current child could render the statute constitutionally infirm."²⁴⁷ DCF argued that the mother's failure to take responsibility for the first child's death constituted the nexus of danger necessary to the second child.²⁴⁸ The court held this argument insufficient to support a finding that the mother posed a threat to her other children.²⁴⁹

A second nexus case, this one occurring at the dependency stage, is *N.S. v. Department of Children and Families*.²⁵⁰ In *N.S.*, DCF commenced a dependency proceeding alleging that the neglect of an older child was grounds to find abuse and neglect of the younger children. The dependency proceeding was commenced despite the fact that there were no allegations in the petition that the parents had in fact abused and neglected any of the younger children or that the children might be abused in the future.²⁵¹ There was nei-

238. See *id.* at 611–13 (Pariente, J., concurring); *id.* at 613–615 (Cantero, J., concurring).

239. *F.L.*, 880 So. 2d at 611.

240. *Id.* at 615.

241. FLA. STAT. § 39.806(1)(h) (2004).

242. See Dale 2003, *supra* note 27, at 562–63.

243. 866 So. 2d 81 (Fla. 4th Dist. Ct. App. 2004).

244. *Id.* at 82.

245. *Id.* at 83.

246. *Id.* at 88–89.

247. *Id.* at 88.

248. *J.F.*, 866 So. 2d at 88.

249. *Id.*

250. 857 So. 2d 1000 (Fla. 5th Dist. Ct. App. 2003).

251. *Id.* at 1000–01.

ther testimony that the younger children were abused nor any evidence presented to support a conclusion that the younger children were at risk.²⁵² Citing earlier case law, the appellate court reversed,²⁵³ concluding that the trial court made no findings to draw a connection between the treatment of the older child and the probable treatment of the younger children in the future.²⁵⁴

V. TERMINATION OF PARENTAL RIGHTS

A. Adjudicatory Issues

Appellate opinions continue to appear relating to “defaults”, or as noted earlier, “consents” to terminations of parental rights or dependency based upon non-appearance of the parent as often occurs in the dependency setting.²⁵⁵ In *R.H. v. Department of Children and Family Services*,²⁵⁶ the father failed to appear on the trial date, and the court entered a default against him.²⁵⁷ The father was advised of the trial date at the advisory hearing and also through a letter from counsel.²⁵⁸ However, the trial date was changed.²⁵⁹ The court sent written notice to the father’s counsel who then sent a second letter to the father “mimick[ing]” the first, but with the new trial date.²⁶⁰ The father argued that he did not appear on the continued date, which in fact was earlier in time, because he thought the second letter was simply a duplicate of the first.²⁶¹ The father filed a timely motion to vacate the default, attaching the letters from counsel as well as a letter demonstrating completion of an outpatient substance abuse program.²⁶² The father claimed excusable neglect and a meritorious defense.²⁶³ The trial court held a hearing and denied the motion based upon the best interests of the child, finding no excusable neglect.²⁶⁴ The appellate court held that the failure of the trial court to accept

252. *Id.* at 1001–02.

253. *Id.* See also *M.S. v. Dep’t of Children & Families*, 765 So. 2d 152 (Fla. 1st Dist. Ct. App. 2000); *M.N. v. Dep’t of Children & Families*, 826 So. 2d 445 (Fla. 5th Dist. Ct. App. 2002).

254. *N.S.*, 857 So. 2d at 1001.

255. See FLA. STAT. § 39.506(3) (2004).

256. 860 So. 2d 986 (Fla. 3d Dist. Ct. App. 2003).

257. *Id.* at 987.

258. *Id.*

259. *Id.*

260. *Id.*

261. *R.H.*, 860 So. 2d at 987.

262. *Id.*

263. *Id.* See also FLA. R. CIV. P. 1.540(b)(1).

264. *R.H.*, 860 So. 2d at 987–88.

the father's uncontroverted confusion was an abuse of discretion.²⁶⁵ The appellate court also found that the second element of the grounds for release from judgment is not the best interest of the child, but rather whether there is a meritorious defense.²⁶⁶ Finally, the court reversed because the trial court terminated the father's parental rights without taking any evidence in support of the termination, even assuming there was a default.²⁶⁷ Referring to the United States Supreme Court case, *Santosky v. Kramer*,²⁶⁸ as well as other Florida intermediate appellate court cases,²⁶⁹ the court held that even in a default situation, evidence must be taken to determine the need for termination of parental rights.²⁷⁰

The issue of default also arose in a group of Second District cases, involving both termination of parental rights and dependency. In *In re I.A.*,²⁷¹ a dependency case, the parent was in the restroom when the case was called.²⁷² When the parent entered the courtroom, the trial court stated the following: "Well, that's too late. You can just appeal if you need to. The record reflects it's 20 minutes to 10:00. This thing was set for 9:00."²⁷³ The appellate court held that the trial court abused its discretion in finding that the parent consented to the adjudication of dependency.²⁷⁴ The court held there was no showing that a short continuance would have had adverse consequences to the child.²⁷⁵ Relying on an earlier opinion from the Fourth District,²⁷⁶ the appellate court found that there was no single valid reason to refuse the continuance, but rather good ones to grant it.²⁷⁷

In *In re B.B.*,²⁷⁸ at a dependency arraignment hearing, the parent was unrepresented by counsel and not present when the case was called, but had used his cell phone to contact the DCF employee in the courtroom directly.²⁷⁹

265. *Id.* at 988.

266. *Id.*

267. *Id.* at 988–89.

268. 455 U.S. 745 (1982) (recognizing the need for due process protections and the significance of the parental interest at stake).

269. See *M.A. v. Fla. Dep't of Children & Family Servs.*, 760 So. 2d 249 (Fla. 3d Dist. Ct. App. 2000); *M.E. v. Fla. Dep't of Children & Family Servs.*, 728 So. 2d 367 (Fla. 3d Dist. Ct. App. 1999).

270. *R.H.*, 860 So. 2d at 988–90.

271. 857 So. 2d 310 (Fla. 2d Dist. Ct. App. 2003).

272. *Id.* at 311.

273. *Id.*

274. *Id.* at 312.

275. *Id.*

276. *R.P. v. Dep't of Children & Families*, 835 So. 2d 1212 (Fla. 4th Dist. Ct. App. 2003).

277. *I.A.*, 857 So. 2d at 312–13.

278. 858 So. 2d 1184 (Fla. 2d Dist. Ct. App. 2003).

279. *Id.* at 1185.

The court apparently learned this information, confirmed that the parent had been served, and requested that DCF move for a default, which they did.²⁸⁰ The court did not appoint a lawyer for another five months, whereupon the lawyer filed a motion to set aside the default.²⁸¹ When the lawyer attempted to argue the default should be set aside, the court cut off counsel's argument and summarily denied the motion even though the parent was anxious to testify and explain why he had arrived five minutes late for the hearing.²⁸² The appellate court recognized that the trial court has lengthy dockets and needs to manage them.²⁸³ However, as the appellate court said, "dependency arraignment hearings where many parties are unrepresented and all parties have already demonstrated that they have difficulty coping with life's normal burdens are an especially questionable place to rigidly impose 'defaults' as a method of case management."²⁸⁴ Furthermore, the appellate court held that the *Florida Rules of Juvenile Procedure* provide that when a consent is entered to dependency, there must be a disposition hearing within fifteen days.²⁸⁵ The trial court did none of these things in *B.B.*²⁸⁶ In addition, under the rules, a party has a right to seek to withdraw a consent for good cause prior to the beginning of the disposition hearing.²⁸⁷

*In re C.D.*²⁸⁸ was a termination of parental rights case in which the father was "three minutes late for the initial advisory hearing."²⁸⁹ According to appellate court, he waited outside the courtroom in the waiting area for forty-five minutes until he was told where the proper courtroom was located.²⁹⁰ Because he wasn't in the courtroom when the case was called, the father was "defaulted."²⁹¹ In addition, he was unrepresented by counsel at the termination hearing.²⁹² Within ten days of the entry of the default, the father sent a letter to the trial court explaining why he was late.²⁹³ The appellate court concluded that although the trial court should have regarded the letter as a motion for rehearing, it made no ruling and instead terminated the father's

280. *Id.*281. *Id.*282. *Id.*283. *B.B.*, 858 So. 2d at 1185-86.284. *Id.* at 1186.285. *Id.* See FLA. STAT. § 39.506(5) (2004); FLA. R. JUV. P. 8.315(a).286. *B.B.*, 858 So. 2d at 1186.287. *Id.* See FLA. R. JUV. P. 8.315(b).

288. 867 So. 2d 405 (Fla. 2d Dist. Ct. App. 2003).

289. *Id.*290. *Id.* at 405-06.291. *Id.* at 406.292. *Id.*293. *C.D.*, 867 So. 2d at 406.

parental rights.²⁹⁴ One month after the termination, counsel was appointed to represent the father.²⁹⁵ After reversing and remanding, the appellate court, in a dramatic understatement, said that the trial court “must review these issues and make a lawful decision as soon as possible following issuance of our mandate.”²⁹⁶

The same problem occurred in the Fourth District. In *A.M. v. Department of Children and Families*,²⁹⁷ a termination of parental rights case, the trial court entered a default against parents who were late for a hearing.²⁹⁸ According to the appellate court, the parents were mistaken about the public transportation schedule, arriving one hour after the hearing was to begin.²⁹⁹ A consent to the termination of parental rights was thus entered.³⁰⁰ The trial court subsequently held a hearing on the parents’ motion to set aside default and denied it.³⁰¹ Citing its prior holdings interpreting section 39.801(3)(d) of the *Florida Statutes*,³⁰² the Fourth District vacated the default as an abuse of discretion, holding that the trial court should ordinarily refrain from deciding termination of parental rights cases by default where there was a reasonable effort to be present by the parents.³⁰³

The trial court also has an obligation to carefully weigh a parent’s motion for continuance in a termination of parental rights case. *In re D.S.*³⁰⁴ arose out of a dispute between a mother and DCF about an alleged agreement that DCF would not seek to terminate the parental rights as to her oldest child so long as she relinquished parental rights as to her three other children.³⁰⁵ The oldest child was in the custody of the father in Puerto Rico.³⁰⁶ The existence of the agreement came into dispute when a lawyer merely associated with the parent’s counsel appeared on the day of trial to deliver consents regarding the other children.³⁰⁷ The associated lawyer was under the impression that there had been an agreement as to the consents, although

294. *Id.*

295. *Id.*

296. *Id.*

297. 853 So. 2d 1084 (Fla. 4th Dist. Ct. App. 2003).

298. *Id.* at 1084–85.

299. *Id.* at 1084.

300. *Id.* at 1085.

301. *Id.*

302. FLA. STAT. § 39.801(3)(d) (2004).

303. *A.M.*, 853 So. 2d at 1085 (citing *A.J. v. Dep’t of Children & Families*, 845 So. 2d 973 (Fla. 4th Dist. Ct. App. 2003) and *R.P. v. Dep’t of Children & Families*, 835 So. 2d 1212 (Fla. 4th Dist. Ct. App. 2003)).

304. 849 So. 2d 411 (Fla. 2d Dist. Ct. App. 2003).

305. *Id.* at 412.

306. *Id.*

307. *Id.*

DCF strenuously denied that there was one.³⁰⁸ When the lawyer requested a continuance of the trial on the ground that he had understood there was an agreement and was not prepared to try the case, the trial court denied the request and proceeded with the trial.³⁰⁹ Despite the fact that trial courts have broad discretion in granting or denying continuances, the appellate court held that the trial court abused its discretion, and that the denial of a continuance created an injustice to the mother based upon the fundamental liberty interests recognized by the United States Supreme Court in *Santosky*.³¹⁰

Discovery issues occasionally are the subject of reported opinions in termination of parental rights cases. In *A.A. v. Department of Children and Families*,³¹¹ the court held that the parent's lawyer did not have a right to the release of the names and addresses of the two younger children's foster parents.³¹² In a pretrial motion, the father's counsel argued that DCF's witnesses would testify that the children were in good homes with good foster parents and the only way to challenge that testimony was by means of discovery as to the foster parents.³¹³ The appellate court affirmed the trial court ruling that DCF did not have to reveal the names and addresses of the foster parents for several reasons.³¹⁴ First, it found that the termination statute did not allow the court, in considering the manifest best interests of the child, to compare the attributes of the parents to those providing present or future placement for the child.³¹⁵ Thus, an evaluation of a foster parent's quality was not material to the termination proceedings.³¹⁶ Furthermore, as a matter of public policy, the court held that there is a need to protect caretakers against intimidation and harassment.³¹⁷

Under Florida law, there are nine separate grounds for termination of parental rights,³¹⁸ one of which is incarceration of the parent.³¹⁹ Two cases dealt with this standard during the past survey period. In *In re A.D.C.*,³²⁰ a parent appealed from an order terminating his parental rights to a child who was one and a half years old at the time of the termination, *inter alia*, on the

308. *Id.* at 412–13.

309. *D.S.*, 849 So. 2d at 413.

310. *Id.*; 455 U.S. 745 (1982).

311. 852 So. 2d 318 (Fla. 4th Dist. Ct. App. 2003).

312. *Id.* at 320.

313. *Id.* at 319.

314. *Id.* at 320.

315. *Id.* at 320–21 (citing FLA. STAT. § 39.810 (2004)).

316. *A.A.*, 852 So. 2d at 321.

317. *Id.*

318. § 39.806(1)(A)-(I).

319. § 39.806(1)(D).

320. 854 So. 2d 720 (Fla. 2d Dist. Ct. App. 2003).

ground that the parent's incarceration in a correctional institution would be for a substantial portion of the time before the child obtained the age of eighteen as required by statute.³²¹ Under the facts of the case, the child would be five years old at the time of the parent's release.³²² The appellate court held, simply, that the time period in the case could not be described as substantial, citing to other cases of limited incarceration time.³²³

In *C.B. v. Department of Children and Families*,³²⁴ the issue was whether incarceration alone was enough to constitute grounds for termination of parental rights when the specific ground for termination was abandonment.³²⁵ The appellate court held that incarceration is a factor in considering termination based upon abandonment, but incarceration alone is not sufficient.³²⁶ In the case at bar, the court found that the mother kept in touch with family members and constantly asked her sister, the child's aunt, about the child.³²⁷ In turn, the aunt kept in communication with DCF.³²⁸ The child's aunt also sent the mother pictures and kept the mother informed about the child.³²⁹ The court reversed on the ground that the incarceration alone was insufficient to justify termination.³³⁰ The court relied upon other cases reversing trial court decisions to terminate parental rights when an incarcerated parent had not demonstrated a failure to make efforts to provide for the child or carry out a case plan.³³¹ Furthermore, the court made special mention that DCF failed to provide the mother with the services necessary to complete a case plan while incarcerated.³³²

In *C.B.*, the court also dealt with egregious conduct as grounds for termination of parental rights.³³³ As defined by Florida statute, egregious conduct involves behavior that is "outrageous by normal standards of con-

321. *Id.* at 721.

322. *Id.*

323. *Id.* (citing *W.W. v. Dep't of Children & Families*, 811 So. 2d 791 (Fla. 4th Dist. Ct. App. 2002) (holding that fifty-four months is not a substantial period)); *see also In re A.W.*, 816 So. 2d 1261 (Fla. 2d Dist. Ct. App. 2002)).

324. 874 So. 2d 1246 (Fla. 4th Dist. Ct. App. 2004).

325. *Id.* at 1248 (citing § 39.01 (defining abandonment)).

326. *Id.* at 1249 (citing *In re T.B.*, 819 So. 2d 270 (Fla. 2d Dist. Ct. App. 2002)).

327. *Id.*

328. *Id.*

329. *C.B.*, 874 So. 2d at 1249–50.

330. *Id.* at 1250.

331. *Id.* at 1249 (citing *T.B.*, 819 So. 2d at 270; *C.A.H. v. Dep't. of Children & Families*, 830 So. 2d 939 (Fla. 4th Dist. Ct. App. 2002); *In re T.C.S.*, 647 So. 2d 1025 (Fla. 4th Dist. Ct. App. 1994)).

332. *Id.* at 1252.

333. *Id.* at 1253–55. *See* FLA. STAT. § 39.806(1)(f)(2004).

duct”³³⁴ In *C.B.*, the trial court found that while the mother was incarcerated her first child was adjudicated dependent.³³⁵ Thereafter, she was medically furloughed from prison and got pregnant with another child who was the subject of the instant proceeding.³³⁶ The trial court found it was outrageous for the mother to get pregnant while furloughed with a child she could not care for.³³⁷ The appeals court held that there must be a nexus between the behavior and the abuse, neglect, or other specific harm to the child in order to serve as grounds for termination based upon egregious conduct.³³⁸ In addition, the court pointed out that in the context of prospective abuse, DCF must also prove a nexus between the prior act of abuse or neglect and any prospective abuse or neglect, a topic discussed elsewhere in this survey.³³⁹

B. Appellate Issues

In one of its two major decisions involving children and families, the Supreme Court of Florida, in *S.B. v. Department of Children and Families*,³⁴⁰ held that there is no right to pursue a collateral proceeding challenging the competency of court-appointed counsel³⁴¹—the commonly-understood ineffective assistance of counsel argument—in civil dependency proceedings not involving the possibility of criminal charges against the parent or permanent termination of parental rights.³⁴² The court agreed to hear *S.B.* because of a conflict in lower court opinions.³⁴³ The Supreme Court of Florida first found that in dependency proceedings, which are civil in nature, parents must be informed of the right to counsel at all stages and, if indigent, to have counsel

334. *C.B.*, 874 So. 2d at 1254 (quoting § 39.806(f)(2)).

335. *Id.* at 1248.

336. *Id.*

337. *Id.* at 1254.

338. *Id.*; see also *P.S. v. Dep’t of Children & Family Servs.*, 863 So. 2d 392, 394 (Fla. 3d Dist. Ct. App. 2003) (holding that there must be a connection between the activity or conduct involved and abuse or neglect or specific harm to the child).

339. *Id.* at 1254 (citing *J.F. v. Dep’t of Children & Families*, 866 So. 2d 81 (Fla. 4th Dist. Ct. App. 2004)).

340. 851 So. 2d 689 (Fla. 2003). For a detailed critical discussion of the case, see Michele Forte, Note, *Making the Case for Effective Assistance of Counsel in Termination of Parental Rights Proceedings*, 28 NOVA L. REV. 196 (2003).

341. *S.B.*, 851 So. 2d at 690.

342. *Id.*

343. *Id.* at 691 (citing *S.B. v. Dep’t of Children & Families*, 825 So. 2d 1057 (Fla. 4th Dist. Ct. App. 2002); *L.W. v. Dep’t of Children & Families*, 812 So. 2d 551 (Fla. 1st Dist. Ct. App. 2002)).

appointed because state law so requires.³⁴⁴ The court then referred to *In re D.B.*,³⁴⁵ a case in which the court previously held that a constitutional right to counsel existed in dependency proceedings only in two cases: first, if the proceedings would result in permanent termination of parental rights, and second, when a parent might be charged with criminal child abuse.³⁴⁶ Because the parents in *S.B.* were not criminally charged, and there was nothing to indicate that DCF was intending to bring a termination of parental rights proceeding, there was no constitutional right to counsel in the case.³⁴⁷ There being no constitutional right to counsel, but only a statutory right, the court held that there is no right to collaterally challenge the effectiveness of counsel.³⁴⁸

VI. CHILD WELFARE CASES AND ADOPTION

The role of foster parents and grandparents in child welfare cases that move to the adoption stage, as well as the extent of the trial court's authority at the adoption stage, have been the subject of a number of reported cases in Florida including two that are illustrative of problems in this area. In *I.B. v. Department of Children and Families*,³⁴⁹ foster parents appealed from an order dismissing a petition to adopt a child, removing the child from their home, and placing the child with a relative in Tennessee.³⁵⁰ The foster parents, among other things, "moved to reappoint a guardian ad litem, intervene in the dependency action, consolidate the dependency action with their adoption case and place the case on the trial docket."³⁵¹ As to the guardian ad litem program which had been very active in the case earlier on, the appellate court stated, "[u]nfortunately, the Program responded they had no available guardians and so were discharged from the appointment."³⁵² Ultimately, the

344. *Id.* at 691.

345. 385 So. 2d 83 (Fla. 1980).

346. *S.B.*, 851 So. 2d at 692 (citing *D.B.*, 385 So. 2d at 87, 90).

347. *Id.* at 693.

348. *Id.* at 693-94.

349. 876 So. 2d 581 (Fla. 5th Dist. Ct. App. 2004).

350. *Id.* at 582.

351. *Id.* at 583.

352. *Id.* For a detailed discussion on the subject of adequate representation of children in child welfare proceedings, including issues related to the voluntary nature of the program and the state court's attitudes toward it, see Michael J. Dale, *Providing Counsel for Children in Dependency Proceedings in Florida*, 25 NOVA L. REV. 769 (2000). See also *Guardian Ad Litem: The Voice For Florida's Abused and Neglected Children*, 2004 Progress Report (stating that approximately half of the 42,565 children in the system had a guardian ad litem on June 30, 2004).

court held a hearing, but took no evidence.³⁵³ Instead, it ruled that as a matter of law the decision to select the appropriate adoptive parents was one for DCF and not for the judiciary, and that the foster parents lacked standing to challenge DCF's decision.³⁵⁴ The appellate court reversed and remanded.³⁵⁵ First, it found, as had other courts, that foster parents have standing to intervene³⁵⁶ and are proper participants under the *Florida Rules of Juvenile Procedure*, even if not proper intervenors.³⁵⁷ The appellate court then concluded that the trial court erred "by refusing to consider the child's best interests before changing placement from the foster parents to the relatives."³⁵⁸ Under the relevant provisions of both the dependency and adoption statutes,³⁵⁹ the appeals court held that the authority and discretion of DCF regarding adoptive placement is not absolute.³⁶⁰ The appellate court also held that the trial court had "inherent and continuing jurisdiction to entertain matters pertaining to child custody and to enter any order appropriate to a child's welfare."³⁶¹

The foster parents attempted to challenge the Chapter 39 proceedings as facially violative of equal protection because, while Chapter 63 refers to a best interest test governing adoption of a child, according to the foster parents, DCF had unfettered discretion in adoption under Chapter 39.³⁶² The appellate court held that the best interest standard applies in both instances.³⁶³

In *B.B. v. Department of Children and Families*,³⁶⁴ a grandmother appealed from a final order denying her motion to intervene in a dependency proceeding related to twin grandchildren as well as the denial of her petition for adoption.³⁶⁵ The trial court refused to address the adoption petition on the merits.³⁶⁶ During the course of the dependency proceedings, the two children were transferred to the appellant as the children's relative custodian where they resided for a period of time.³⁶⁷ After the appellant's son, whom DCF

353. *I.B.*, 876 So. 2d at 583.

354. *Id.* at 584.

355. *Id.* at 588.

356. *Id.* at 584 (citing *Sullivan v. Sapp*, 866 So. 2d 28, 33 (Fla. 2004); FLA. R. CIV. P. 1.230).

357. *I.B.*, 876 So. 2d at 584 (citing FLA. R. JUV. P. 8.210(b)).

358. *Id.* at 586.

359. FLA. STAT. §§ 39.812(4), (5), 63.022(2).

360. *Id.*

361. *Id.*; see also *Dep't of Children & Family Servs. v. J.C.*, 847 So. 2d 487 (Fla. 3d Dist. Ct. App. 2002).

362. *I.B.*, 876 So. 2d at 586.

363. *Id.*

364. 854 So. 2d 822 (Fla. 1st Dist. Ct. App. 2003).

365. *Id.* at 823.

366. *Id.*

367. *Id.* at 824.

advised could no longer reside in the appellant's home if the children were to remain, failed to move out within twenty-four hours, DCF removed the children from her home.³⁶⁸ However, DCF did leave five of appellant's minor nieces and nephews in her home.³⁶⁹ At the termination of parental rights trial, DCF was considering a cousin as a suitable adoptive home.³⁷⁰ The cousin ultimately was unable or unwilling to adopt, and DCF took no steps to assist the appellant to obtain custody, and in fact reduced her visitation rights.³⁷¹ The grandmother then filed a motion to intervene in the ongoing dependency proceeding and to enforce an earlier court order that she be considered for adoption in the event the cousin could not adopt.³⁷² The trial court ruled that it lacked jurisdiction until an adoption petition was filed under Chapter 63.³⁷³ The grandmother filed a petition, and the trial court denied it.³⁷⁴ The trial court held that it: "lacked jurisdiction, because the dependency court [under Chapter 39] has ongoing reviews and jurisdiction until the children are adopted; that DCF had identified another adoptive home for the twins; that DCF did not consent to Appellant's adoption of the twins and, absent DCF's consent, an adoption petition must be denied."³⁷⁵ The appellant was also denied intervener status.³⁷⁶

The appellate court held, first, that the trial court was in error in stating that it lacked jurisdiction.³⁷⁷ It held that the dependency court has jurisdiction after a TPR trial despite the fact that there may be a subsequent adoption proceeding under Chapter 63.³⁷⁸ In fact, according to the appellate court, the statutes prescribe jurisdiction.³⁷⁹ As in *I.B.*,³⁸⁰ DCF argued that the court must give "unqualified deference to [their] placement decision."³⁸¹ The appellate court disagreed, finding that the agency's "authority and discretion are not absolute."³⁸² The court gave examples such as the court's ability to place conditions on the exercise of DCF discretion concerning the children and the court's ability to refuse to grant the adoption petition of a non-

368. *Id.*

369. *B.B.*, 854 So. 2d at 824.

370. *Id.*

371. *Id.* at 825.

372. *Id.*

373. *Id.*

374. *B.B.*, 854 So. 2d at 825.

375. *Id.*

376. *Id.*

377. *Id.*

378. *Id.*

379. *B.B.*, 854 So. 2d at 825 (citing FLA. STAT. §§ 39.812(4), -.813 (2003)).

380. 876 So. 2d 581 (Fla. 5th Dist. Ct. App. 2004).

381. *B.B.*, 854 So. 2d at 826.

382. *Id.*

relative.³⁸³ Relying on an earlier opinion from the Fourth District Court of Appeal in *Florida Department of Children and Families v. Adoption of B.G.J.*,³⁸⁴ the court held that non-interference by the court would exist so long as the selection was appropriate and in compliance with policies made in an expeditious manner.³⁸⁵ Thus, the appellate court concluded that the trial court has an obligation to “ensure that DCF’s selection is *appropriate* and *consonant* with DCF’s policy.”³⁸⁶ Given the statutory and case law preference for grandparents in the adoption process, the grandparent had priority, and failure to consider the individual with such priority was neither appropriate under the facts of the case nor consistent with DCF policies and Florida law governing relative placement.³⁸⁷

VII. STATUTORY CHANGES

The Florida Legislature made a number of statutory changes in the past year in the delinquency area, including a change regarding the obligation of families to pay for the cost of supervision of children in delinquency care.³⁸⁸ The new law requires the court to order a parent of a child who is in home detention, on probation, or other supervised status or placement, secure detention or committed to DJJ to pay a daily fee for costs of supervision and care.³⁸⁹ Under certain circumstances, the court can reduce the fees.³⁹⁰

On the dependency side, the legislature passed a statute governing education of abused, neglected, and abandoned children.³⁹¹ As is typical in Florida, the legislation fails to provide any rights or a cause of action.³⁹² Furthermore, the legislation does not require an expenditure of funds.³⁹³ However, it does obligate DCF to enter into an agreement with the Department of Education concerning the education and related services of children known to them.³⁹⁴ It also requires DCF to enter into agreements with school boards and other entities regarding children known to them,³⁹⁵ including enrollment

383. *Id.*

384. 819 So. 2d 984 (Fla. 4th Dist. Ct. App. 2002).

385. *B.B.*, 854 So. 2d at 826 (citing *Adoption of B.G.J.*, 819 So. 2d at 986).

386. *Id.* at 827.

387. *Id.*

388. FLA. STAT. § 985.2311 (2004).

389. § 985.2311(1)(a)-(b).

390. § 985.2311(3)-(4).

391. § 39.0016.

392. *See* § 39.0016.

393. *Id.*

394. § 39.0016(3).

395. § 39.0016(4).

in school, notification of the name and phone number of the child, establishing a protocol to share information, and notification of DCF's case planning.³⁹⁶ In return, the school district will provide DCF with a listing of its services, identify services which are needed for children known to DCF, determine whether transportation is available, continue enrollment in the same school throughout the time the child is known to DCF, provide individualized student intervention when necessary, cooperate in assessment of services and support needed for the children, and appoint a surrogate parent under the Individuals with Disabilities Education Act.³⁹⁷

The legislature also passed a statute setting up a procedure for release of confidential information contained in the records of DCF pertaining to "investigations of alleged abuse, abandonment, or neglect of the child."³⁹⁸ The statute provides a test for release based upon good cause for public access found to be in the best interest of the child who is the focus of the proceeding.³⁹⁹

The legislature passed a judicial review procedure for children aging out of the dependency system.⁴⁰⁰ It provides for a mandatory judicial review hearing within ninety days after a child's seventeenth birthday and hearings thereafter to review the status of the child concerning a series of matters related to the child's movement toward independent living.⁴⁰¹ Included is the power of the court, when it concludes that DCF has not complied with its obligation as articulated in the written case plan for the child or the provision for independent living services as otherwise provided by Florida law, to issue an order to show cause, give DCF thirty days to comply, and ultimately to hold DCF in contempt.⁴⁰² The same statute also requires DCF to continue to include independent living and life skills information in its report to courts on the status of thirteen to eighteen year olds.⁴⁰³

The legislature also made a very specific change to the post disposition provisions of Chapter 39 regarding petitions for adoption and the involvement of licensed foster parents or court-ordered custodians.⁴⁰⁴ It changed Chapter 39 to provide that when a foster parent or custodian is not granted an application to adopt, DCF cannot move the child from the foster home absent

396. § 39.0016(4)(a)(1)-(4).

397. § 39.0016(4)(b)(1)-(4), (c)(5); 20 U.S.C. § 1401 (2000).

398. FLA. STAT. § 39.2021(1) (2004).

399. *Id.*

400. § 39.701.

401. § 39.701(6).

402. § 39.701(6)(a)-(c).

403. § 39.701(7)(a)(10).

404. *See* § 39.812.

a prior court order.⁴⁰⁵ The exceptions to this section are if there is danger of abuse and neglect, the foster parent agrees, or most significantly, thirty days have expired following a written notice to the foster parent, and there has been no formal challenge to the agency decision.⁴⁰⁶

Finally, the legislature allowed DCF to enter into agreements “with a private provider to finance, design, and construct a [mental health] treatment facility . . . of at least 200 beds and to operate all aspects” of that facility.⁴⁰⁷ The agreements cannot exceed twenty years.⁴⁰⁸

VIII. CONCLUSION

The Supreme Court of Florida decided two significant cases in this past reporting year. They deal with the question of ineffective assistance of counsel in dependency cases⁴⁰⁹ and the burden of proof in a termination case where the parental rights to another child in the family have already been terminated.⁴¹⁰ At the appellate level, the intermediate appellate courts have been very active in both the dependency and the termination of parental rights areas, ruling on a number of issues including how the courts should handle proceedings where the parents miss their appearance⁴¹¹ and in delinquency cases involving school settings.⁴¹²

405. § 39.812(4).

406. § 39.812(4)(a)-(c).

407. § 287.057(14)(b).

408. *Id.*

409. *See* S.B. v. Dep’t of Children & Families, 851 So. 2d 689 (Fla. 2003).

410. *See* Fla. Dep’t of Children & Families v. F.L., 880 So. 2d 602 (Fla. 2004).

411. *See* R.H. v. Dep’t of Children & Family Servs., 860 So. 2d 986 (Fla. 3d Dist. Ct. App. 2003); *In re* I.A., 857 So. 2d 310 (Fla. 2d Dist. Ct. App. 2003); *In re* B.B., 858 So. 2d 1184 (Fla. 2d Dist. Ct. App. 2003); *In re* C.D., 867 So. 2d 405 (Fla. 2d Dist. Ct. App. 2003); A.M. v. Dep’t of Children & Families, 853 So. 2d 1084 (Fla. 4th Dist. Ct. App. 2003).

412. *See* State v. J.T.D., 851 So. 2d 793 (Fla. 2d Dist. Ct. App. 2003); M.H. v. State, 851 So. 2d 233 (Fla. 4th Dist. Ct. App. 2003).