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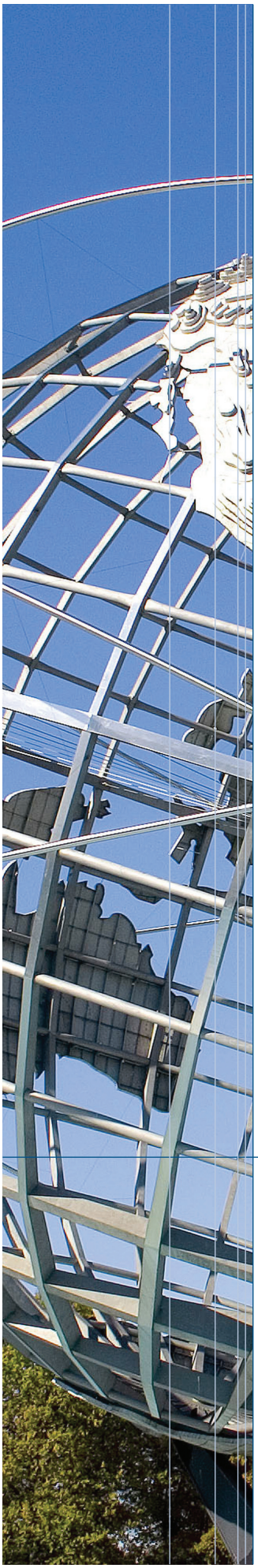
# HARVARD UNDERGRADUATE LAW REVIEW



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# LETTER *from the President*

Dear Members of the Harvard Community,

On behalf of the members of the Harvard College Law Society, it is with great honor and enthusiasm that I announce the publication of the inaugural issue of the Harvard Undergraduate Law Review. The Harvard College Law Society is a student-run organization at Harvard College that is dedicated to providing Harvard College undergraduates with an opportunity to learn about the field of law and the academic and career options it provides. We seek to promote greater awareness and understanding of these opportunities within the field of law by appropriate means such as speaker events and seminars, as well as other educational events and publications such as this one. By working with other law-related student organizations on campus and at universities around Boston, as well as with the Harvard Office of Career Services, we hope to continue to establish a support infrastructure for pre-law students at Harvard College.

The publication of the Harvard Undergraduate Law Review marks a milestone in the Law Society's outreach efforts to the Harvard community and beyond. Through analysis of current events, commentary on court decisions and legal proceedings, reviews of academic publications, and the provision of information about the law school admissions process, the Undergraduate Law Review staff and the members of the Law Society hope to establish a more comprehensive understanding for undergraduates of what it means to be a member of the legal community today. With this, we hope to expand the reach of the Harvard undergraduate pre-law community as a whole. Importantly, the Undergraduate Law Review fundamentally seeks to provide a forum for undergraduate students to undertake scholarly legal pursuits and practice their writing and editing skills prior to their graduate studies.

The Undergraduate Law Review aims to stimulate dialogue among Harvard undergraduate students interested in pursuing law after college by exposure to the field at an early level. With this in mind, this publication has been produced entirely by student members of the Harvard College Law Society without any assistance from faculty members or advisors. Accordingly, this publication reflects the skills and interests of our undergraduate student body and does not attempt to match the academic output provided by graduate level publications in its writing style or citation formatting.

I would like to thank the members of our executive board who made this effort possible, as well as the over seven-hundred current members of the Law Society who in many different ways have all contributed to the success of our organization and the publication of the Undergraduate Law Review. I would like to especially acknowledge the efforts of the 2009 and 2010 comp classes, without whom this publication would not have been possible.

Sincerely,

Charles Hernandez
President, Harvard College Law Society

# TABLE OF CONTENTS

# LETTER *from the Editor*

Welcome to the Inaugural Issue of the Harvard Undergraduate Law Review!

Harvard's campus boasts a multitude of publications on a wide variety of topics, and we are excited to enter into that sector of academia through the introduction of Harvard's only undergraduate pre-law publication. This issue, which is the culmination of students' hard work over a two-semester period, is comprised of many articles covering a wide variety of topics.

As the largest pre-professional society on campus, with an ever-growing staff, we look forward to a number of promising partnerships with both established and nascent undergraduate publications. Thus far, we have also begun to build connections with other pre-law organizations at prestigious undergraduate colleges in the Boston area. Through our biweekly speaker series that began under our new Board, we have helped to provide all of our members with the opportunity to learn about many career choices, meet amazing contacts, and importantly, prepare for their LSAT and other important law school assessments.

In summation, this magazine is the culmination of months of planning, writing, and editing, and is hopefully the beginning of a new and important tradition on Harvard's campus!

Readers Enjoy!

Caitlin M. Hyduke

Director of Publications '09-'10

and

Christopher Ballesteros

Christopher Ballesteros

Director of Publications '08-'09

# A Particular Kind of Choice

## *The Impact of* Parents Involved *and* Meredith *on the Boston Metco Program*

BY SUSAN YAO

In 2007, the Supreme Court decided against two race-based school assignment programs in Parents Involved in Community Schools v. Seattle School District and Meredith v. Jefferson County Board of Education. The Court ruled that classifying students solely based on race violated the Equal Protection Clause of the 14th Amendment, applying strict scrutiny in evaluating the Seattle and Louisville programs. The Court was divided 4-1-4 in the decision:

Plurality: Justices Roberts, Scalia, Thomas, Alito

Concurring: Justice Kennedy

Dissenting: Justices Breyer, Stevens, Souter, Ginsburg

The key question, as they phrased it, was "whether a public school that had not operated legally segregated schools or has been found to be unitary may choose to classify students by race and rely upon that classification in making school assignments." In the opinions, Justices discussed under what conditions race could or could not be used in school assignment, and what was constitutionally required to justify such usage.

This paper investigates the effects of these two court cases on the Boston Metco Program, an inter-district desegregation program established in 1966. Each year, Metco busses 3,300 urban youth of color into 33 predominantly White suburban school districts in the Boston and Springfield metro area. Metco's mission statement is as follows:

The purpose of the state-funded Metco Program is to promote desegregation in the Boston and Springfield Public Schools, increase diversity in Metco receiving districts, and enhance educational opportunity and academic achievement for Metco students.

As a race-based program, and one that is explicitly so, it seems to come under direct threat from the decisions.

In analyzing the (plurality's) held opinion of the court in the Seattle and Louisville decisions, I identify the key points that the decision turned on. These arguments can be grouped into two broad categories: (I) objections to race as a school assignment criterion on theoretical grounds and (II) specific objections to the way the Seattle and Louisville programs were designed. Metco is found indefensible against the first since it is a race-based program, while details of the program design can be made into a defense of Metco.

*"This paper investigates the effects of these two court cases on the Boston Metco Program, an inter-district desegregation program established in 1966."*

Ultimately, this paper is a discussion of how a case against Metco would play out. Perception of the Supreme Court decisions and the politics of Metco are important components of my scenario.

**I. Race as the Sole Criterion of School Assignment**

*The Decisions*

The opinion of the court rested largely on theoretical oppositions to using race as the sole criterion by which students were placed. A key characteristic of the Seattle and Louisville plans was the fact that decisions came down to race alone:

The districts argue that other factors, such as student preferences, affect assignment decisions under their plans, but under each plan when race comes into play, it is decisive by itself. It is not simply one factor weighed with others in reaching a decision, as in Grutter; it is the factor.

Race being "the factor" was a serious problem for the Supreme Court. This notion of diversity is too limited—the plurality cites Grutter v. Bollinger (2003), which allowed race to be used as one of several criteria, but not the sole criterion, in college admissions. Any race-based school assignment plan would need to try and prove that factors outside of race are considered, or the school would have to work hard to justify a plan based only on race. Strict scrutiny is required whenever racial classifications are used, as race is a suspect class. Seattle and Louisville failed.

Because of the potential negative effects of classifying students by race, and in order to do so constitutionally, schools have the burden of proof in justifying the "extreme means" they are using. De facto segregation, the plurality argues, requires different remedies than past intentional discrimination—including de jure segregation, which can justify such measures. However, de jure segregation never existed in Seattle, and the Jefferson County desegregation decree was no longer required at the time of the trial.

In Seattle and Louisville, the remedy was not narrowly tailored to the problem. They were creating racial diverse student bodies, but this method was not direct enough in relation to their ultimate goals:

It is clear that the racial classifications employed by the districts are not narrowly tailored to the goal of achieving the educational and social benefits asserted to flow from racial diversity. In design and operation, the plans are directed only to racial balance, an objective this Court has repeatedly condemned as illegitimate.

It does not seem like any school assignment program where race was the sole criterion would pass constitutional muster. The Court does not recognize "racial balance" as a legitimate state interest that merits racial classifications. In other words, a school should not want diversity for the sake of diversity. Schools may want

diverse student bodies for reasons such as building tolerance, or positive peer effects from integrated environments, but a racially mixed school does not necessarily achieve that, and so integrating schools is not necessarily a narrowly tailored solution. Until those benefits of diversity can be proven concretely to result from a given race-based program, a school assignment plan that uses race as the only factor would not pass this Supreme Court.

*Metco: Race is the primary factor*

It cannot be defended that Metco is about more than race. In this respect, the Seattle and Louisville decisions pose a serious threat to the program. It is, very explicitly, a racial desegregation program. The home page of the Metco website states its goals as such: "expand educational opportunities, increase diversity, and reduce racial isolation." The racial aspect of the program is very explicit in its presentation and in the actions of Metco affiliates. The program demographics confirm the racial desegregation goal: urban students are 75% Black, 17% Hispanic, 3% Asian, and 5% Other; while over half of the receiving districts are more than 90% White, with only two less than 70% White. The Metco website lists a number of criteria by which students are selected for Metco, but race is virtually the only significant factor:

* completion of the Metco application packet;
* submission of all school records;
* date of registration;
* district grade and seat availability;
* presence of siblings on the waiting list;
* special education status;
* race

"Completion of the Metco application packet" is not much of a deciding factor, and presence of multiple criteria on the list does not mean anything. The racial aspect of placement is at the heart of the program, since it is meant to be a form of desegregation.

One might argue that by only allowing Boston residents to apply, class and geography become an implicit criteria for Metco as well. However, the actions of Metco affiliates demonstrate that this is not the case. The Scituate Metco Program website clarifies the question of socioeconomic status on their Frequently Asked Questions page:

Q: Isn't METCO for students of low-income families?

A: Family income is not a determining factor in applying for METCO. The widely assumed misconception that METCO students are from low-income families often stems from the stereotypical generalization that minority families who choose to live in inner city areas are poor. METCO families encompass a broad range of income levels and lifestyles.

Here, official Metco material explicitly states that socioeconomic status is not a deciding factor in selecting students, and that they embrace a diversity of SES levels. Any belief that Metco primarily serves low-income families is a "misconception." Trying to bring diversity to suburban schools in this regard is not a goal of the program.

*"Admitting white students could mean the end of Metco, despite the geographic diversity they would bring, and the increased educational opportunity..."*

Increasing geographical diversity may be the only ground Metco defenders would have for an assignment system where race is not the only deciding factor. In an interview with Metco President Kahris McLaughlin, there seemed to be a focus on the urban-suburban nature of Metco. For example, when asked when the Metco program might theoretically end, after having achieved its goals, she responded,

When there is no longer a need for children from urban areas to go to school in the suburbs. Like parochial and charter schools, Metco offers a particular choice.

The urban-suburban diversity that Metco brings to suburban schools is clear, since participation in the program is limited by residence. In this way, Metco could be painted as a school choice program rather than a desegregation one. Yet apprehension about the possibility of admitting White students makes it clear that Metco is fundamentally about race, since a supposed urban-suburban transfer program could still be successful with White urban youth. On July 26, 2007, the Boston Globe published an article entitled, "Metco Fears for Its Future," which discussed sentiment around the possibility of admitting White students to the program, in light of the Supreme Court decisions.

"If the issue gets down to, 'You cannot assign students by race,' Metco could end," said Jean McGuire, executive director of Metco. "We have to figure out what might happen. The superintendents are worried that somebody's going to tell them they have to put white kids in Metco and their towns won't buy it."

Admitting white students could mean the end of Metco, despite the geographic diversity they would continue to bring, and the increased educational opportunities Boston residents would continue to have. According to this article, suburban schools and communities are the ones who would pull out from the program, and they are the ones who decide how many Metco students to take. While these politics will be discussed later, it is clearly understood that admitting White urban youth would change the nature of the program, because Metco is fundamentally about race.

**II. Program Design**

*The Decisions*

The specific program design of the Seattle and Louisville school assignment plans also contributed significantly to the plurality's opposition to them. Design may be where the Metco program can distinguish itself. The main critiques in the opinion of the court are as follows:

* Few students were actually affected, suggesting that the districts could have used other means of school assignment to achieve the same goals, but they did not provide evidence that they considered race-neutral alternatives.

* Binary white vs. nonwhite classifications are too simplistic.

* Racial composition goals "are tied to each district's specific racial demographics, rather than to any pedagogic concept of the level of diversity needed to obtain

the asserted educational benefits." They are backward-looking in this regard, which is not justifiable. If diversity brings educational benefits, then schools must design programs to meet these goals, rather than simply attain proportionality in all their schools. (This echoes the point about "racial balance.")

* Seattle and Louisville residents had no choice in the program, but they have "an interest in not being forced to compete in a race-based system that might prejudice its members' children."

In Seattle and Louisville, specific programs were struck down as unconstitutional. It mattered that students were being assigned to different schools, that schools had to have certain racial demographics, and that not all students could attend the school of their choice. Because these factors are all specific to program design, other school districts could design their program to distinguish themselves from the ones struck down by the decisions. Metco is especially defensible against these points, as the voluntary nature of the program is the strongest.

*Metco: A voluntary program*

Metco differs significantly from the Seattle and Louisville plans in its design because it is distinctly a completely voluntary program. Families choose to participate in the program, and suburban schools choose to take students from Boston. A student may leave the Metco program at any time, just as a school can end its relationship with the program. No one is "forced to compete in a race-based program," as was the case in Seattle and Louisville.

In addition, nobody is losing with Metco—it is not designed around the notion of a limited number of seats being distributed between two groups. Boston students are being bussed into suburbs, but the exchange is only one-way, so it is not a redistribution of students as with the Seattle and Louisville programs. Target numbers for the program are certainly not based on current Boston demographics or a critical mass of diversity. It depends on the maximum seat allocation number that each suburban school district sets for itself. In fact, the Metco program is very limited in size. There might be 60 students in the entire school district, as is the case in Scituate and Swampscott, while Wakefield has only 29 Metco students in a district of 3,492 students. Only a few school districts receive over 100 students. Even then, suburban residents are not being redistributed to other schools because of the Metco population.

*"Even though Metco is legally under threat-defensible or not-it will not likely come under threat in the near future because of its political strength."*

What this means is that a White suburban student could not sue the Metco program because he was denied a seat in a conveniently located, quality school. A lawsuit must be based on injuries to a party. In Seattle and Louisville, students in the public school system were forced to be part of the race-based assignment plan, and plaintiffs who were unable to get into their school of choice due to race came forward with injuries. Metco does not push anyone out of suburban schools. In addition, a suburban student could not make a strong argument for declining quality of learning either. Since Metco funding is provided per student, schools would be able to accommodate an increase in population and quality would not conceivably be affected. If that were an issue, it would be the school district's fault for taking so many students or not increasing capacity in response to the Metco program. In which case, Metco would not be the party at fault. In general, Metco programs are simply not large enough to change the composition of the receiving school in any significant way.

The Metco program design differs enough from the Seattle and Louisville school assignment programs that re-litigation would be required to determine its constitutionality. In short, the key differences are: being voluntary for Boston as well as suburban residents, the one-way nature of the exchange, and the limited size of the program. So, while Metco is threatened by the Supreme Court decisions because race is the sole criterion for school assignment, its design is different enough to avoid falling completely under the decisions.

*A Stronger Defense? The Politics of Metco*

Even though Metco is legally under threat—defensible or not—it will not likely come under threat in the near future because of its political strength. According to Susan Eaton, author of The Other Boston Busing Story, one of the successes of Metco is that suburban residents are among its strongest defenders. It has become an integral part of these suburban schools, and it would be difficult to uproot, despite being threatened by the Seattle and Louisville decisions. For example, Newton superintendent Jeff Young was vocal about supporting Metco in an NPR article about the decisions:

Young says that if the Metco system were to be challenged, he believes it could withstand court scrutiny because of the benefits. He says it greatly increases the chance that a student in his school system will share a science lab with a child of color or act in a play with a minority student.

This passage highlights one of the main reasons why suburban support is so strong: they think of themselves as benefiting disadvantaged students without any cost to them, while increasing diversity in their school. According to Eaton, "A small program, Metco operates on terms that suburbanites can accept. It does not greatly alter the status quo of either suburbia's schools or their larger communities." In short, Metco is not threatening. When students of color are 1% of the population, schools do not have to make significant accommodations. And the program seems to produce results—such as sending 86% of Metco graduates to four-year colleges—so suburbanites can feel good about themselves without bearing much cost. While this may be a policy challenge for the program, politically speaking, it makes Metco very strong.

This political strength is reflected on the practical side.

President McLaughlin reacted to the decisions:

It was absolutely about programs that are affirmative action in nature and provide opportunities to children who would not otherwise have those opportunities… We've reacted with a sense of sadness and even a sense of fear. The work we have done, which we do believe has been beneficial to our students, has been attacked.

Despite recognizing the threat of the decisions to Metco, and the widespread "sense of sadness and even a sense of fear," no major changes have yet been made to Metco, besides more interaction with the Attorney General's office as a precautionary measure.

They do not have much reason to be worried. A lawsuit against a race-based program has yet to come forward in Massachusetts. Following the Supreme Court decisions, there was a motion to reopen the Comfort v. Lynn School Committee case (1999), but the motion was denied, primarily for procedural reasons, to reopen a closed case "except in certain narrow circumstances not applicable here." Comfort v. Lynn had upheld a voluntary desegregation plan in Lynn, Massachusetts. The Lynn Plan used race as a factor in school assignment when students requested transfers to encourage racial integration. The First Circuit had found it constitutional, even under strict scrutiny, because racial integration to counter de facto segregation was a compelling state interest. To reopen the case, plaintiffs in the original case argued that the recent Supreme Court decisions interpreted the Equal Protection Clause in their favor, and re-litigation could lead to a different outcome for the Lynn Plan. However, since the motion failed, a new plaintiff would have to come forward to challenge the Lynn Plan.

The political climate in Massachusetts tends to be favorable to race-based programs. In a consistently liberal state, the 2007 decisions are seen as "the latest in a string of 5-to-4 victories for conservatives following the arrival of President Bush's two nominees to the bench." While political slant did not necessarily decide what would happen, this type of antagonism is important to public perception of what the decisions mean. Following the Seattle and Louisville decisions, many Massachusetts leaders have openly expressed opposition to the rulings. They include the following:

* Governor Deval Patrick: "Today's Supreme Court decision is a step backward in our national journey towards equal educational opportunities for all children…It is particularly disappointing that four members of the court fail to acknowledge the essential educational value - to children of all races - of integrated classrooms."

* Both US Senators John Kerry and Edward Kennedy

* Attorney General Martha Coakley

* National Association for the Advancement of Colored People

* William C. Newman, director of the American Civil Liberties Union's Western Massachusetts office

* Education Commissioner David P. Driscoll

The stakes are high for Massachusetts. Roughly 20 school districts have state-approved race-based school assignment plans. This does not include the 33 Metco receiving districts. While there is great concern over the consequences of the 2007 rulings, there are many who will fight threats to race-based programs, and Metco is particularly strong politically.

*Doe v. Metco (20xx)*

The best way to synthesize the analysis put forth in this paper is to simulate a lawsuit against Metco: what it would actually look like—including all the aforementioned political forces—and how the case would play out in the courts. This scenario outlines only what would be necessary for Metco to be ruled against in a court—at each step it becomes more and more unlikely that the case will proceed to the next step, so this does not represent what is likely to actually happen in the future.

*Stage 1. A plaintiff files a lawsuit against Metco.*

The key challenge in this step is finding a plaintiff. Due to the political strength of the program, and the difficulty of finding the right plaintiff, this would not happen for at least a few years. However, one year, John Doe, a low-income, White student from Boston, applies to the Metco program, but does not get in, and becomes the ideal plaintiff. Once identified, there are enough opponents of race-based programs to bring up a case like this. Chester Darling in particular is likely to take this on. The plaintiff's attorney in Comfort v. Lynn and other cases fighting desegregation, Darling has even said of race-based school assignment plans, "I would go after every single one of them."

The plaintiff will argue that he should be able to vie for a spot at a quality suburban school, and race should not be used as the sole criterion against him. Though a Metco applicant does not have to be low-income, this will make a stronger case because Doe's school choices and general access to resources would be more limited. Metco will try to justify why the student did not get off the waiting list, for reasons other than race. This will be investigated in court.

*Stage 2. The case goes to trial.*

The arguments that would be made in court for and against Metco fall along the two categories that were outlined earlier, which will be briefly rehashed here: (I) theoretical arguments against race as the sole criterion and (II) specific objections to the Seattle and Louisville plans. Both sides would refer to Parents Involved and Meredith as precedents.

*Plaintiff: Arguments against Metco*

* Parents Involved and Meredith: interpretation of the Equal Protection Clause is in this side's favor

  o "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."

  o Race cannot be "decisive by itself" in school assignment

* Race is the sole factor in Metco, so it falls under this precedent.

  o It is explicitly stated that class is not

*"They do not have much reason to be worried. A lawsuite against a race-based program has yet to come forward in Massachusetts."*

falls under this precedent.

o It is explicitly stated that class is not a factor.

o If geography is a criterion, then White urban students should be allowed in the program.

o Using race only is especially unjustified in Boston, which is one of the only major cities with historically concentrated, low-income, White neighborhoods.

o Racial diversity for the sake of diversity is not justifiable, voluntary or not.

+ Freeman: "[r]acial balance is not to be achieved for its own sake."

* The precedents cited will be similar to the ones cited in the opinion of the court in the 2007 decisions, including the following:

o Brown v. Board of Education: "prevents states from according differential treatment to American children on the basis of their color or race"

o Milliken v. Bradley: "the Constitution is not violated by racial imbalance in the schools, without more."

o Race is a suspect class

*Defendant: Arguments for Metco*

* Parents Involved and Meredith decisions do not apply

o Metco is a voluntary program and students are not losing because of it.

o Parents should be able to choose a racial integration program, even if they believe in diversity for the sake of diversity; Metco does not force anyone to segregate or desegregate.

o Metco's design differs from the Seattle and Louisville programs.

* Attending a suburban school is not a right, so it is not necessary that all Boston students can lottery in.

* The program is narrowly tailored to its goals

o Its size is limited, and set by suburban school districts.

+ The program is not an "extreme measure."

o There are no target numbers based on neighborhood racial demographics.

o The success of the program demonstrates that Metco is meeting its goals

+ Statistics about alumni being successful

* A compelling state interest exists

o There continue to be great racial disparities in achievement.

o Massachusetts residential segregation is dramatic.

o It is important for both Metco and suburban students to learn how to be in integrated environments.

Due to the politics of Massachusetts, local courts and the Supreme Judiciary Court would rule in favor of Metco according to the arguments outlined.

*Stage 3. The decision is appealed to the US Supreme Court.*

The US Supreme Court may grant certiorari in order to expand the scope of the 2007 decisions to incorporate voluntary desegregation programs. If the same 9 Justices are on the Court, the Seattle and Louisville sides can be expected to remain unchanged for the most part. However, Justice Kennedy may be a swing voter, and become a dissent in this case. Legally speaking, the design of the program in Metco might be different enough to address the concerns raised in his 2007 concurring opinion. The list of suggested ways schools could constitutionally consider race could be cited by the defense.

School boards may pursue the goal of bringing together students of diverse backgrounds and races through other means, including strategic site selection of new schools; drawing attendance zones with general recognition of neighborhood demographics; allocating resources for special programs; recruiting students and faculty in a targeted fashion; and tracking enrollments, performance, and other statistics by race.

Going off of these suggestions, Metco could be considered a "special program" that affects few students, but is conscious of race and has diversity as a goal. More generally, Metco is an example of a program that could address his concern that the plurality was too extreme in denying racial diversity as a compelling state interest, and could give him the chance to establish his more moderate point of view.

It is not unlikely that Justice Kennedy would change his vote. However, for the purposes of this scenario, we are trying to consider what is necessary to legally threaten the Metco program. So, let's say that, because of stare decisis, Metco being a voluntary program still does not justify the fact that is uses race as the sole criterion for assigning students to schools. It is unconstitutional under the Equal Protection Clause, 5-4.

*Stage 4. Aftermath of a Supreme Court ruling against Metco.*

Were Metco ever to be ruled against in court, there would be tremendous political backlash in Massachusetts, coming from government heads, Metco affiliates, and most Massachusetts residents as a whole. The decision would mean that Metco would be forced to accept White students, but a majority of students in the program would still be students of color. Selection criteria may need to be revised to include, for example, socioeconomic factors so that program demographics can justifiably remain similar. The 15,000-person waiting list will grow longer. Antagonism may form around the newly accepted White students in the program. In the long run, however, most suburban schools are likely to stay in the program as long as most Metco students are of color, and Metco will be portrayed as a successful, urban-suburban school choice program.

*Summary*

It is not unlikely that a plaintiff will come forward to challenge Metco in the near future, though other race-based programs in Massachusetts are easier to target. However, if Metco were threatened by a lawsuit, a court outside of Massachusetts would have to hear it. The case would have to be very strong, and make it all the way to the Supreme Court, where the program would likely be ruled against.

*Doors Are Open: Getting Around the Decisions*

*"Were Metco ever to be ruled against in court, there would be tremendous political backlash in Massachusetts."*

Stage 4 can also be expanded by considering creative ways that a race-based program could avoid legal problems. The Seattle and Louisville decisions did leave some doors open for race-based school assignment, most notably in Justice Kennedy's concurring opinion. The key point is that student assignment cannot rest solely on a student's race. Schools can implement more comprehensive assignment plans to take a number of factors into account, or devise proxy systems for race.

The Kirwan Institute for the Study of Race and Ethnicity, led by John Powell, proposes a more sophisticated proxy for race that avoids legal problems by identifying "Communities of Opportunity." Lower and higher-opportunity neighborhoods can be identified through "opportunity mapping," which incorporates multiple variables related to opportunity, including incarceration rate, sustainable employment, school quality, health care, and public transportation. The use of these variables may allow us to reach marginalized communities even more than programs that are based on race. What we see is that many communities of low-opportunity are neighborhoods that are predominantly Black.

Proxy systems tend to be seen defensively by schools, when a lawsuit threatens one of their race-based programs. In Louisville, as a result of the Meredith, a new plan is under way that uses neighborhood socioeconomic status (income level and educational attainment) as a simple proxy for race. Under the new program, the Jefferson County School District is divided into two regions, A and B, which are almost exactly the same as the old neighborhood categories, except for one neighborhood. This is a relatively uncreative way to maintain the status quo in schools in light of a lawsuit, although schools could proactively implement systems that are not based on race as the sole or principal variable. It could allow us to distribute educational resources to those who need it the most more accurately.

*Conclusion*

The purpose of this paper has been to outline the ways in which Metco is threatened by the 2007 Supreme Court decisions against race-based school assignment in Seattle and Louisville, as well as the ways in which Metco could be defended in a lawsuit using Parents Involved and Meredith as legal precedent. A scenario laid out what steps would be needed for Metco to be ruled against in court, from the plaintiff to the legal arguments to the politics.

*"Even in the unlikely event of a ruling against Metco, the program could still survive largely unchanged. We just might have to get creative."*

What this has shown us is that Metco is strong legally, but especially politically. The actual impact of the 2007 decisions may have been overstated, even as they pose a real threat to race-based programs. While announcing the decisions, Justice Breyer made an emotional statement, saying that "it is not often in the law that so few have so quickly changed so much." He feared for the wide-reaching impact of the case, which could limit what schools could do to create racially integrated environments for their students in a still-segregated America. At least in the case of Metco, there is no reason to be too worried yet. The program could probably withstand a lawsuit due to its political strength, even if a plaintiff were found in the next few years. We cannot underestimate the political support that is necessary for a case to even reach the courts, and eventually for the decision to be implemented.

While the Seattle and Louisville decisions do pose some serious challenges to a race-based program like Metco, it is possible to defend. Even in the unlikely event of a ruling against Metco, the program could still survive largely unchanged. We just might have to get creative.

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# Voluntary Repression

*A Hobbesian Perspective on Freedom*

BY HARRY DOUGLAS

From where do laws derive their legitimacy? Why should citizens decide to follow the law? While these may seem like irrelevant questions in a society with a strongly institutionalized legal tradition, these questions strike to the core of effective and enforceable legislature. Understanding the origin and legitimacy of law is critical to understanding its application and consequences. The legitimacy of governments has long been an obsession of political theorists. One of the earliest and most influential was Thomas Hobbes. He bases the legitimacy of law on the assumption that surrendering specific, personal rights yields previously unimagined levels of freedom. More specifically, if every citizen relinquishes his or her right to self-preservation by their own means, and integrates into a collective society under the rule of a more powerful sovereign, then citizens will be free to pursue interests that are more closely aligned with their specific talents and interests.

Hobbes explains this theory by contrasting the life of man in society with man outside of the rule of law, in the hypothetical state of nature. He asserts in "Leviathan" that, in the state of nature, the life of man is rendered "solitary, poor, nasty, brutish, and short." Man in the state of nature is disposed simply to fear and aggression, both of which are binding emotions—both mentally and physically—in that they constantly distract the mind and require constant physical alertness. Hobbes calls this the state of war. Fear and aggression are binding in the sense that in the state of war, man must be completely obsessed with his self-defense; especially if others are prepared to make preemptive attacks in their own defense, which Hobbes posits would be natural and necessary. One instance of complacency can prove fatal for a man in Hobbes' state of nature. He must constantly protect himself and his possessions. For this reason, a sovereign power is necessary to govern the actions of men and provide for their security.

However, to be assured this level of security, one must make a trade-off. In order to be assured the protection of the sovereign, one must also relinquish certain natural rights, such as the right to satisfy any selfish whim. Hobbes views this as an investment; that sacrificing these rights ultimately leads to a greater overall level of freedom.

According to Hobbes, the state of war is problematic because all men are essentially equal, at least in a physical sense. There is no real defense a man can prepare from the advances of another. Hobbes explains that "to the strength of body, the weakest has strength enough to kill the strongest, either by secret machination, or by confederacy with others that are in the same danger with himself." This is, in essence, the reason that we are not free in the state of nature. Hobbes defines a free man as "he that is in those things which by his strength and wit he is able to do is not hindered to do what he has a will to do." Being among his equals, no man himself has power enough to do that which he actually wants to do since he is too worried about protecting himself. In other words, the state of nature is highly inefficient. Men must first take measures to ensure their own self-defense before focusing on any other task or goal, and even once secure, interactions would always be tentative, conditional, and cynical.

The freedom of man in the state of nature to pursue anything that so pleases him causes a continual state of war and conflict. Thus, according to Hobbes, freedom outside a sovereign power is limiting. Every person must be skeptical of one another, making life egregiously difficult and restricted. Thus, life in the state of nature is not truly free.

One may argue that people are able to live harmoniously in the state of nature with one another based on the premise that even though people are selfish, they are also reasonable. As a matter of efficiency, individuals can come to some agreement which would help to provide for the common good. As reasonable thinkers, they will strive to find peace themselves, and seek to find compromise knowing that it is in their best interests to do so. However, Hobbes would argue that certain freedoms will inherently cause contention between individuals for something that is desirable between multiple parties. He writes that

*"According to Hobbes, the state of war is problematic because all men are essentially equal, at least in a physical sense."*

"if any two men desire the same thing, which nevertheless they cannot both enjoy, they become enemies." There is a restless desire within many people for power and prestige. Competition is a natural element of the human makeup. Compromise, in many situations, is not realistic since individuals are often irrational, unreasonable, or motivated by more malicious or ambitious motives.

In order to obtain a level of stability, security, and ultimately freedom, man must enter into society under a common rule. It is necessary to give up some natural rights if one wishes to become a member of society. For example, in modern times, one must relinquish his

or her right to drive a car 130 miles per hour on the interstate if he or she wishes to reap the benefits of living in a modern society.

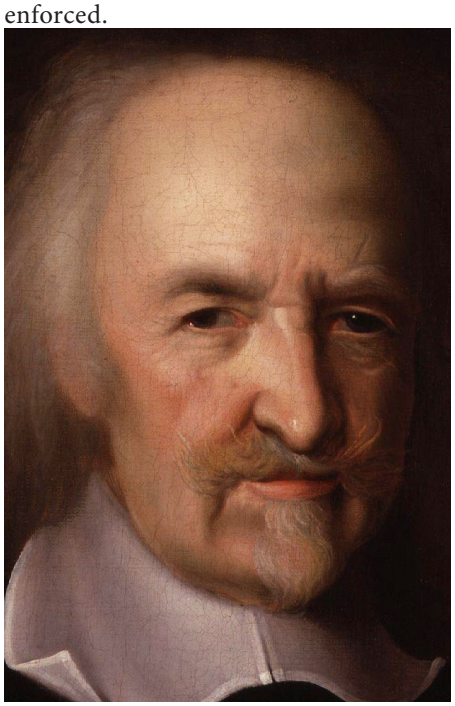
However, Hobbes argues that man is required to give up a more fundamental right. He requires individuals to surrender the Right of Nature which, he writes, is "the liberty each man hath to use his own power, as he will himself, for the preservation of his own nature, that is to say, of his own life, and consequently of doing anything which, in his own judgment and reason, he shall conceive to be the aptest means thereunto." While this may be difficult to convince an individual to do, it becomes easier when coupled with a level of trust. As such, even though a person is obligated to renounce a fundamental right—such as the Right of Nature—his fellow citizens are all obligated to do so as well. Therefore, there is no need to uphold the Right of Nature, since it becomes useless anyway. Essentially, joining society negates the original purpose of the Right of Nature, since it is based on the trust that all other members of society will surrender this right as well. This responsibility to enforce this trust is delegated to a sovereign. It is in this state that people can pursue personal interests freely, making society much more efficient and enjoyable. However, Hobbes points out, it is important that man not give up all of his rights. According to Hobbes, entering society is in one's interest, and giving up the Right of Nature is as well. Man should be interested in what serves his own interest. If all rights are given up, there is no point in entering society since it is not in one's best interest. Hobbes says that it is "necessary, for man's life, to retain some [rights] (as, right to govern their own bodies…and all things else without which man cannot live, or not live well)." Once certain natural rights are given up (i.e. the Right of Nature), other rights can be augmented and strengthened (i.e. the rights to property, rights to life, etc.). The state is responsible for protecting the rights of its citizens, and this permits individuals to pursue other interests of higher desirability while having the assurance of peace.

Of course, while a ruler may provide stability, one may reasonably point out that a ruler may become oppressive. Nevertheless, according to Hobbes, an oppressive ruler is justified if he is able to stay in power. He writes that "every particular man is author of all the sovereign doth; and consequently he that complaineth of injury from his sovereign complaineth of that whereof he himself is author, and therefore ought not to accuse any man but himself." Hobbes argues that people voluntarily become subjects of a sovereign. If it is not explicit, one expresses his will to live under a sovereign tacitly, simply by continuing to enjoy the particular benefits that sovereign may provide, if any at all. Therefore, every citizen voluntarily gives the sovereign explicit or tacit authority to act in any manner such as the sovereign so chooses. In other words, if a citizen finds his ruler to be overbearing, then he should forfeit the benefits of living under rule and leave society.

Upon submitting oneself to the rule of law, man achieves a higher level of freedom. According to Hobbes, outside of society, "there is no place for industry, because the fruit thereof is uncertain, and consequently, [there can be] no culture of the earth, no navigation…,no knowledge of the face of the earth, no account of time, no arts, no letters, no society."

When one submits to the rule of another, the problem of equality is eliminated. The sovereign has more power and authority, and thus has the capabilities and capacity to enforce justice. Society remains relatively stable and peaceful for fear of the consequences of breaking the law and the penalties imposed by the sovereign. Hobbes offers that "there must be some coercive power to compel men equally to the performance of their covenants, by terror of some punishment greater than the benefit they expect by the breach of their covenant." Outside of society, no such punishment can be enforced.

*"The state is responsible for protecting the rights of its citizens, and this permits individuals to pursue other interests of higher desirability while having the assurance of peace"*



As one can see, Hobbes' conception of freedom necessitates submission to a more powerful ruler. The voluntary nature of this submission provides the sovereign with legitimacy. If a citizen wishes to enjoy the benefits of living in society, he or she must also abide by the rules. In the state of nature, there are no such rules, and men must fend for themselves. In essence, man must be contained before man can enjoy true freedom.

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# The Inflation Debate – Past and Present

*The Dichotomy in Perspective between Economists and the Public*

BY STEPHEN PAUZER

Inflation is always and everywhere a monetary phenomenon," wrote Milton Friedman, the great economist who won the Nobel Prize in economics in 1976. Recently, this quote seems to hold much more weight as the Federal Reserve continues its attempt to bolster the economy through its expansionary monetary policy. As of yesterday, I came across an article in the Economist warning Americans of looming inflation, pointing to the recent rise in long-term bond yields as yet another indication of problems ahead. Unfortunately, this is not the first time that fear of the "i word" has been circulating. With the Federal Reserve's decisions to keep the federal funds rate near zero and to flood the financial system with credit, fear of a future inflation is not a new concept in today's economy. In fact, fear of rising prices has left Americans disgruntled for more than a hundred years. So what is our infatuation with inflation? It is perhaps best to take a closer look at the origins of the U.S inflation debate (and the protest that followed in the late 19th century) to prove that inflation has always been a prominent problem for the American people. I am referring to none other than the formation of the Populist Party in 1892.

While the formation of the Populist Party spawned from the notion of "restor[ing] the government of the Republic back into the hands" of the "plain people," the backbone of the initiative centered on raising commodity farm prices through an expansion of the money supply (Populist Platform, 2). In the Populist Party Platform of 1892, the concerns over raising the money supply were manifested in the coinage of silver. In their proposal, the Populists claimed that "the supply of currency is purposely limited to fatten creditors," and the only way to combat this injustice is through "the unlimited coinage of silver" (Populist Platform, 2). From an economic standpoint, the Populists were correct in hypothesizing that the coining of silver would indeed "speedily increase the amount of circulating medium" and ultimately drive commodity prices up by means of inflation (Populist Platform, 4). Unfortunately, this view in monetary policy was not universally accepted at the time. James Laughlin, a professor of political economy at the University of Chicago in 1895, was one of the staunchest critics of free silver. It is through his debate with Populist Party spokesman W. H. Harvey on the coinage of silver that I am most reminded of how eerily similar the debate on inflation is today in 2010.

Laughlin's main argument against the coining of silver was that "the greater the quantity of money there is roaming about in circulation" does not mean that any one group will get more of it (Laughlin, 37). In essence, wealth is a relative term that is defined by the purchasing power of money. Laughlin argued that if prices on the "aggregate were to appreciate, then the real purchasing power remains unchanged and the problem remains unsolved" (Laughlin, 38). Sarah Emery, in her Seven Financial Conspiracies, took the opposing view and echoed the statements of the Populists in her lobbying for a gold and silver standard. Her beliefs stemmed from her basic understanding of the money supply. She maintained that whoever was "controlling it, could inflate or depress the business of the country at pleasure, could send it warm life current through the channel of trade, dispensing peace, happiness and prosperity, or could even check its flow, and completely paralyze the industries of the countries" (Emery, 9). What she had failed to realize at the time was the classical dichotomization of nominal and real variables (more accurately, the difference between money and purchasing power) that had recently emerged in the field of economics.

A second point that Laughlin illuminated in his debate was the macroeconomic, or aggregate, consequences of rising prices. He stated, "As free coinage of silver would inevitably result in a rise of prices, it would immediately result in the fall of wages. Its first effect would be to diminish the purchasing power of all our wages" (Laughlin, 41). This would ultimately create a contradiction between farmers and industrial workers; although both groups were of equal class, their divergent opinions would ultimately create tension. This separation is perhaps the most monumental in that it hindered organization and participation amongst perspective members of the Populist Party. Without a large following in Northern industrial cities (where most wage earners lived), the Populist Party was bound to fall short of its potential in gaining the maximum amount of public attention and following. What did Emery believe would happen when prices eventually rose as a result of excess printing? She maintained that "… the wage worker would not be affected because he would receive a higher wage even though he would still be working the same amount of days, months, or years" (Emery, 11). As evidenced by both parties, the difference in opinion about a rising price level lead to an equally different view on how wages were affected.

Fortunately, present-day economists possess significantly more knowledge and tools to address monetary issues than ever before. Yet the same question remains - is inflation a bad thing? Aside from the social costs of expected and unexpected inflation, most people would be surprised to hear that some economists argue that the costs of inflation are small, given the moderate rates of inflation that most countries have experienced in recent years. This statement is in direct contrast to the negative outlook that people maintain when asked about inflation. So who is right in this situation? For now, we will just have to wait and see.

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# Bollenbach v Board of Education

*A Positive View on Government Religious Intervention*

BY TYMOTEUSZ LEWTAK

It is arguable that the separation of church and state has a limited feasibility within a national scope, especially when viewed historically – the United States was formed to a great extent for purposes of religious freedom from government intervention. Religious rights are often linked synonymously to people's interpretations of personal freedoms as granted by the first amendment. On a larger scale, the case of Bollenbach vs. the Board of Education questions the legitimacy behind a school district's choice of religion-based accommodations with a school bus service. As it has been stated in McConnell's Religious Participation in Public Programs, "any serious interpretation of the religion clauses must explain the relation between the two constituent parts, the Free Exercise Clause and the Establishment Clause." Tension arises from the fact that "congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof."[1] Through a discussion of the legal circumstances involved, we will see how the District Court was correct in its decision to criticize the school districts choice of actions.

The case revolves around a group of female bus drivers working for the Monroe-Woodbury School District accusing the District ("the District") of sex-based discrimination. More specifically, the District belongs to a public school system, which, according to New York State Education law 3635, all school children located within 2-15 miles are by law granted the right to public transportation to their school grounds (with the exception of children located beyond 15 miles from their school). Certain legal caveats are put in place for children attending private schools, such as a communal pickup spot for a group of a few children living in the same general area.[2] The school to which the female bus drivers were driving students to was a private boys school intended for students of the United Talmudic Academy (UTA), a private academy that is geared specifically for schooling Hasidic Jews. The significance behind this particular type of student is that from a very early age, Hasidic Jews, a branch of Orthodox Jews, are raised to be sexually separated for nearly their entire school lives until they enter an arranged marriage at an age of about twenty.[3] Furthermore, not only is sexually separated education an important factor in the lives of Hasidic Jews, throughout childhood they are forbidden to come in contact with members of the opposing sex – regardless of age. Perhaps one of the most interesting aspects of the case deals with the origin of the bussing service, a public district service that was offered to the private UTA. Herein lied the problem – because the district school bus driver was a woman, no student going to the UTA would agree to get onboard the bus for fear of contact with a woman.

In response to this visible protest, the school district swapped drivers on the particular UTA routes with less qualified male drivers from within the school district's employment scale. This created a negative sentiment within the women bus driver community at the district, leading them to file suit against sexual based discrimination – as they felt that since they were more qualified and fit for the position, there should have been no reason why they should not be allowed to continue driving the students. After all, the women were working for a public school district, though it just happened that they were driving the students to a private all boys school.

In order to further understand this case it is important to first explain the legal basis that deals with the issue at hand. Two topics central to the case are the free exercise clause and the establishment clause, both linked directly to the first amendments protection of personal freedoms such as speech, press, petition, and assembly. "The free exercise clause forbids congress to discriminate against religion, and may require affirmative accommodation of free exercise in some contexts. The establishment clause, however, has been interpreted to forbid the government to aid or advance religion."[4] It is often that because the two deal with a similar topic and are legal rights to everyone, at times the two will offer contradicting advice for a given topic.

*"Through a discussion of the legal circumstances involved, we see that the District Court was correct in its decision to criticize the school districts choice of actions."*

When looking at the issue from the view of the free exercise clause, what the school district did could be viewed two possible ways. The first is rather unconstitutional – as according to definition the district never asked congress for the right to have more qualified women step down from a position and have that job be consequently offered to a male of lesser authority. The second is constitutional, as eventually courts came into play and within boundary of the free exercise clause, appropriate "affirmative accommodation of free exercise" came into effect with concessions made by both the district and the woman drivers.

From an establishment clause perspective, however, mixed emotions can certainly be accounted for. The court found that altering the assignment of routes was a violation of the establishment clause of the first amendment because it transformed a neutral service into a means for promoting the Hasidic tenet that boys must not be in contact with women. Because the other two main findings somewhat contradict each other, I claim superiority to the establishment clause. A form of arbitration between the two parties was made essential. The

district was found to have violated a civil rights act by denying its women drivers a job solely based on their sex. However, because the district claimed to place high value on the New York State law requiring students to have a means of transportation to and from school, these two aspects of the case were in direct contrast with each other's purpose. Yet had the school not provided a transportation service that was up to the Hasidic standards, this would not have been a violation of their religious rights, as, this service was a public service that in essence had nothing to do with their religious rights. The children and the parents did not necessarily have to agree to place their children on these buses had they not wanted to, but in no way were the families denied the New York State right to accessible school transportation. The district was only performing its legal job to provide a means of transit for the students, regardless of who the students were and what their religious beliefs entailed.[5]

There should be little doubt given to the fact that the establishment clause should have been taken more into account while making the decision to switch bus drivers, as the separation of church and state has historically always been a touchy subject. Perhaps before the decision was made, Stephen Macedo's opinion should have been taken more into account that "it is certainly possible to conceive of far more demanding forms of neutrality or fairness. One might argue that public policies should have neutral effects on the (major?) religions of society, insofar as is possible."[6] In reference to the New York State laws, the law about a means for public transportation for school children likely affects very few students from "majority religions" in a negative way. I find it difficult to believe that many parents are upset that they need not drive their children to and from school. In my experience, when parents don't agree with a particular method of teaching through the public school system, they will attempt to home school their kids for as long as they feel necessary. In this particular case, it seemed as though nearly all of the children came from the town of Kiryas Joel, which was entirely populated by Hasidic Jews.[7] Considering that the school was apparently located outside the village and the town children's legal transportation needs were being met sufficiently as viewed by the state and the districts school buses – perhaps a reasonable option would have been to relocate the school to somewhere where all children within the village could walk to school on their own. In this situation, the Hasidic Jews would have been rejecting their legal right to transportation, but it would have also avoided controversy over the state aiding a particular religion – regardless of its size or popularity. While the initial confrontation by the school district would have been difficult at best, arguably it would have provided an option that would have required fewer legal actions to be taken.

In the Bollenbach vs. the Board of Education case where a woman is suing for sex-based discrimination at her workplace, one must review the basic legal rights offered through the first amendment. While state and federal laws are ultimately the deciding factors in this case, the women were fighting so as not to be excluded from their workplace in terms of equality, while the village people were fighting so as not to be excluded from their religious rights. In the end no religious rights were being taken away from the village people, as they could continue to worship as they had in previous years, and they willingly were denying their right to transportation. The women were unfairly caught in this situation, as the district made the decision to switch them for lower qualified male drivers – preventing the women from having their jobs, excluding them from the workplace. Considering the factors on hand, it was appropriate for the court to rule as they did, denying multiple allegations by the village people and stating that in terms of the village people, everything was in accordance to all state and federal laws. Furthermore, through the evidence in reference to the women being denied work based solely on sex, the courts were on point with ruling that the district unjustly took away their jobs because of who they were.[8] Unfortunately for the public, often times there is no quick fix with cases that deal with the separation of church and state. However, fortunate for all of us living in the United States, we have a legal system that will justly allow us all to enjoy as many freedoms as we all can with the full support of the law.

> *"The children and the parents did not have to agree to place their children on these buses, but in no way were the families denied the New York State right to accessible school transportation."*

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# Constitutionality in the United States

*The Intersection of Politics and Law*

BY GRAEME CREWS

Politics and law often have a symbiotic relationship—in the mode of thinking, in the revolving door of membership between the fields, and in the issues discussed by the fields. One particular intersection of these fields is evident in the calls immediately following the passage of the individual mandate in health care reform. Virginia Attorney General announced his plans in a tweet to file suit in court challenging the constitutionality.[1] Thirteen other attorney generals have announced similar plans.[2] This political move to utilize the legal system to quash legislation they see unfavorably will likely fall by the wayside; the Patient Protection and Affordable Care Act of 2010 will not likely be thrown by the wayside by the legal system.

There are multiple avenues to challenge the bill on a legal front. First, while not necessarily challenging the bill's constitutionality, some states are considering methods to exempt residents from the mandate that requires them to purchase health care. However, these actions would not have any effect on the legislation's constitutionality; rather, they themselves would be unconstitutional. Nullification of federal laws has long been deemed unconstitutional. If Congress enacts a law pursuant to the "powers...delegated to the United States by the Constitution", then states may not challenge this.[3]

Second, people have critiqued the packages certain states received to ensure their vote. Critics argue that the bill does not promote the "general welfare" and therefore is unconstitutional. Unfortunately, this completely misses the mark. Congress earmarks money for projects specific to certain areas in bills all the time that do not necessarily benefit the country at large.

Third, lawyers might put forth arguments that the deem-and-pass method of passing the legislation is constitutional.

*"The Patient Protection and Affordable Care Act of 2010 will not likely be thrown by the wayside by the legal system."*

Essentially, deem-and-pass was a tactic to bypass voting on the Senate bill that emerged (which some House Democrats found fault with) and instead only vote on the reconciliation bill.[4] Ultimately, this method of passage was not used,[5] but even if it had been, Marshall Field & Co. v. Clark found that once a bill is signed by the Speaker of the House and the presiding officer of the Senate and sent to the President, courts will not inquire as to whether differences exist between the bills from the Senate and House of Representatives.[6]

Fourth, and most significantly, lawyers might challenge the constitutionality of the bill, using the argument that its individual mandate to purchase health care is out of the scope of the powers delegated to Congress. Florida's attorney general argues that if you are not engaged in commerce, the federal government cannot regulate this inaction. He forgets three things: first, and most importantly, the mandate is in the form of a tax, and generally speaking, Congress has the ability to tax and spend for the general welfare.[7] Second, from cases like Gonzales v. Raich, in which the conservative Justice Scalia wrote the majority, Congress has can regulate non-economic activities if it believes that it is necessary to make interstate commerce effective. Health care, as a component of economic productivity (after all, it is difficult to work when one is sick), is inherently tied with commerce.[8] Third, the elasticity of Congress's power to legislate commerce is significant and able to be expanded if one is not a literalist. During the Warren Court era, Katzenbach v. McClung and Heart of Atlanta Motel v. United States found that discrimination against African Americans seeking a meal or lodging affected interstate commerce enough that the discrimination could be outlawed.[9]

Whatever legal measure those who are disenchanted with the legislation take, they will likely be met with a roadblock. The bill is constitutional, and only if Republicans take back the House and Senate and push through rollbacks or if three fourths of states pass a constitutional amendment can it be removed from the books.

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# Citizens United v. Federal Election Committee

*The Battle between the Private and the Public*

BY NATALIE LI

Supreme Court of the United States
Argued March 24, 2009
Reargued September 9, 2009
Decided January 21, 2010

In the 2010 State of the Union address, President Barack Obama stated, "The Supreme Court reversed a century of law to open the floodgates for special interests…to spend without limit in our elections." He was referring to the Supreme Court's 5-4 decision, in Citizens United v. Federal Election Committee (FEC), which ruled that the First Amendment protects corporate funding of independent political broadcasts, in elections under the clause of freedom of speech.

Citizens United, the conservative company, sought to advertise and release Hillary: The Movie on DirecTV and argued that it was a nonpartisan documentary. However, in January 2008, the United States District Court of the District of Columbia ruled that the advertisement violated 2 U.S.C. § 441(b)'s in the Bipartisan Campaign Reform Act of 2002, or the McCain-Feingold Act, which restricted such, "electioneering communications" thirty days before primaries. An "electioneering communication" is defined as a publically distributed communication, such as radio or television, that directly refers to a specific candidate, and distribution is restricted to before thirty days prior to a primary and sixty days prior to a general election. McCain-Feingold essentially aimed to limit corporations and unions from investing in independent expenditures that either advocate support or defeat for a candidate in a political election.

However, on January 21, 2010, the Supreme Court overruled the 2008 decision, invalidating 2 U.S.C. § 441(b) of McCain-Feingold. Justice Kennedy delivered the majority opinion, stating that such a prohibition of corporate expenditure should then allow the restriction of political speech in other forms of media, and as such, opinions in books, television and blogs could then be limited. Hence, a contention of the decision lies in the blurred line between media and corporations.

There is also the matter of constitutional interpretation and original intent. Judicial restraint asserts a strict reading of the constitution, and a judicial decision should adhere to precedents and should overturn laws that clearly strayed from the Constitution. According to Justice Scalia, the First Amendment was written "in terms of speech, not speakers." On the other hand, judicial activism, commonly referred to as the antonym of restraint, is a belief that the elastic clause of the Constitution allows for legislative adjustment in conjunction with changing times.

Dissenters believe that the decision will allow corporate capital to flow into the political sphere and lead to corruption within our democracy. Justice Ginsberg delivered a dissenting opinion expressing this concern, that the court's ruling will inherently poison the honest dynamics of the institution.

David Kirkpatrick of The New York Times stated, "A lobbyist can now tell any elected official: if you vote wrong, my company, labor union or interest group will spend unlimited sums explicitly advertising against your re-election." The heavy criticism and assertions for both sides of the legal issue continues to be expressed as the battle between the private and public ensues in society. The federal ruling currently affects twenty-four state laws that prohibit independent expenditures by corporations and unions, and in turn, affect impending trials under these laws.

*"A judicial decision should adhere to precedents and should overturn laws that clearly strayed from the constitution."*

# Osborne v. District Attorney's Office

*Preserving the Integrity of Legal Values when Confronted with Evolving Science*

BY SANDRA LYNNE FRYHOFER

*Background of the Case*

In Anchorage, Alaska, on the night of March 22, 1993, two men solicited sex from a prostitute and then violently assaulted her. They choked her, beat her with an axe handle, fired a shot at her head, and left her under the snow for dead.[i] In 1994, William Osborne was convicted of these crimes. Evidence used at the trial included eyewitness evidence given by the prostitute (who miraculously survived the assault as the bullet only barely grazed her head), shell casings found at the scene matching a gun in the men's car, as well as DQ Alpha testing (a type of DNA testing) on sperm found in the condom from the crime scene.[ii] Osborne was charged with kidnapping and sexual assault and sentenced to 26 years in prison.[iii] He then brought a habeas corpus petition against state officials in federal court on the grounds that he was unconstitutionally denied access to DNA evidence that could have exonerated him. In District Attorney's Office v Osborne, however, the Supreme Court ultimately ruled against Osborne. The Court held that the Constitution's due process clause does not require states to facilitate DNA testing for those convicted of crimes.

*Evaluating Evidence*

The District Court concluded that Osborne had a limited constitutional right to new DNA testing under the unique facts presented in the case, namely that such testing had not been available at trial, that it could be done at almost no financial cost to the state, and that the results would prove useful.[iv] The Supreme Court, however, overruled this decision. Upon first reading, the Supreme Court decision appears to fly in the face of conventional thinking, seemingly violating constitutional rights and due process. Individual rights organizations as well as the Federal Bureau of Investigation criticized the holding. Peter Neufeld, director of the Innocence Project, an organization dedicated to using DNA evidence to exonerate those wrongly convicted, was also outraged by the case. He voiced concerns over its potentially tragic implications—"It's unquestionable that some people in some states who are factually innocent will not get DNA testing and will languish in prison. Some of them will die in prison."[v]

*"Interest groups should be rightly critical of the extent to which courts deny certain avenues for judicial redress because such hindrances can have grave implications."*

Interest groups should be rightly critical of the extent to which courts deny certain avenues for judicial redress because such hindrances can have grave implications for the criminal justice system. But an equally important concern is setting a clear standard for managing scientific evidence in the legal process. While Roberts' approach is far from perfect—the Harvard Law Review cites many inconsistencies in the case[vi] —it is a step in the right direction. A close examination of this case illustrates the foresight of the Court in its nuanced approach to fitting scientific "facts" into the legal system, setting an important precedent for federal law.

*Science as Fool-Proof?*

Justice Stevens, in the opening paragraph of his dissenting opinion, states, "The DNA test that Osborne seeks is a simple one… and its results uniquely precise."[vii] Justice Stevens, like much of the general public, has been trained to think of science as a foolproof mechanism and a golden standard for establishing truths in the legal system. But this perspective needs to be corrected. Sheila Jasanoff, Pforzheimer Professor of Science and Technology Studies at Harvard's Kennedy School of Government, explains that the trustworthiness of science results in part from the confidence in science as a peer-critiqued system of research. Ideas are tossed around, debated, and reviewed extensively before they are accepted in the scientific community—this "weeding out" process makes science a relatively reliable source of knowledge. Nevertheless, she shows that what sociologists have called organized skepticism in the field of science does not extend to the courtroom.[viii] Outside of a major, high-profile trial, scientific evidence is often not peer reviewed or double checked by the analyses of others. Science as applied to law is not as "fool-proof" as it may at first seem. Two main reasons for this are (1) results of DNA analysis are not always 100% correct—DNA analysis, like many other tests, is not perfectly discriminatory and its results are not

entirely isolated from human error—and (2) the constantly evolving nature of technology and innovation is in tension with the stability of law, making the application of one to the other often fall short of optimal results.

*Matches and Mismatches*

An important aspect of the Osborne case was the issue of "discriminatory evidence"—how well does the DNA test isolate the culprit in order to establish a match? When thinking about DNA, the reliability of results is often overestimated by the general public, because the public tends to view science with a very accepting, rather than a critical, eye. With the rise of efforts like the Innocence Project, who make their life's work asserting the immutability of DNA evidence and its ability to exonerate, the potential unreliability of DNA analysis has often been overlooked. The "truth" is that DNA testing, despite our hopes, is not always entirely determinative. As Justice Alito notes in his concurring opinion, "DNA testing—even when performed with modern STR technology, and even when performed in perfect accordance with protocols—often fails to provide 'absolute proof' of anything."[ix]

After his conviction, Osborne sued the state for access to his DNA evidence, claiming that a new, more effective form of DNA testing--STR and mtDNA analysis, not available at the time of his case--could be used to prove his innocence. While this technology is no doubt more advanced than that available in 1993, more advanced does not mean perfect. Even this new testing system is flawed: "STR DNA tests sometimes produce inconclusive results when the sample size is small or when there is a mixture of DNA, such as that of the rape victim and the rapist. New technologies are being developed to circumvent those problems."[x]

The Osborne case also provides an interesting example of how the uncertainty of "matches" can be used to "game" the system. During the 1993 trial, Osborne's attorney relied on DQ Alpha testing to analyze blood found at the crime scene. The testing found that the DNA sample and Osborne's sample shared a genotype in common, but that this genotype was shared by approximately 16% of black individuals.[xi] In spite of this test result's lack of specificity, Osborne's attorney, with his consent, chose not to pursue another, more accurate form of testing that was available. The reason? Osborne's attorney, believing Osborne to be guilty, feared that "insisting on a more advanced…DNA test would have served to prove that Osborne had committed the alleged crimes."[xii] After the jury rendered its verdict of guilt, and Osborne found himself in an unsatisfactory situation, Osborne swiftly changed his tune. He sued the state, claiming a constitutional right to have more innovative DNA analysis performed. As Justice Alito explains, in this manner, Osborne and his attorney tried to use the unreliability of DNA testing to "game" the criminal justice system.[xiii] Alito warns against the pattern that such subversion could take: "Then after conviction, with nothing to lose, the defendant could demand DNA testing in the hope that some happy accident—for example, degradation or contamination of evidence—would provide the basis for seeking postconviction relief."[xiv]

*Human Error*

As Alito mentions in his concurring opinion, another concern with DNA evidence is accidental contamination. Though many believe DNA evidence is isolated from human error, in actuality, that is not entirely true. Jasanoff describes well this reality: "The hope is that technology, through its mechanical reproducibility, will be impervious to context and will provide unbiased and reliable evidence about the facts of the matter. Human actions, however, can never be entirely ruled out of the picture in the production of evidence."[xv] Institutional or time pressures may lead to errors or even conscious fraud. The New York State Police Troop C represents one such "pressure-cooker," in which misconduct occurred. Officer David L. Harding, stressed by institutional pressures to solve cases quickly, fabricated evidence in the 1989 murders of the Harris family in Ithaca, New York.[xvi]

*"Although many believe DNA evidence is isolated from human error, in actuality, this is not entirely true."*

Human error also enters the process through which the mathematical results of scientific testing are interpreted into words to be used as evidence. Joseph Dumit describes this difficulty with respect to brain scans: "In my book….I try to make clear that the problem is that the results of tests 'look' much clearer (and often absolutely clear-cut), when they are often quite ambiguous. The effect of graphics (or a threshold) turns a statistical result into an 'answer.'"[xvii] Turning to DNA evidence specifically, the seminal paper in the field, which was cited in the Osborne decision, established that "DNA typing—done perfectly and precisely according to protocol—still often entails making discretionary calls and choices."[xviii]

*Innovation and the Cure? Constitutional Rights*

Some hope that through innovation the problems of imperfect results and human error can be overcome, but innovation is not a fix-all. Rather, innovation itself brings a host of other issues. Osborne makes a plea for a constitutional "right of access," so to speak, which would allow him to retest the DNA evidence from trial through a more advanced technology now available. Providing Osborne the constitutional right of access to his DNA for this new form of testing, however, has grave implications, involving the court in a "myriad of other issues."[xix] Granting access in Osborne might have amounted to creating a "right to innovation," which in turn would require lie detector testing, brain imaging, and other exonerating technologies to be provided and assured by the Constitution. Providing such a "right" could, first, destabilize the law enforcement system, by constantly reopening old decisions as technology shifts, and, second, delegitimize the role of counsel. Society values law for its predictability and stability. Reading an evolving science into the Constitution would mean that the most hallowed document of our nation is constantly subject to change. With respect to counsel, Justice Stevens implies that, when compared to each other, DNA evidence is a much more effective and reliable tool than lawyering: "the strength of the prosecution's original case….carries little weight when balanced against evidence as powerfully dispositive as an exculpatory DNA test."[xx] This assumption, however, undermines one of the most important relationships in our legal system—the relationship between client and counsel. While DNA can be a powerful tool of persuasion in the legal system, it is certainly not the only, nor the most important, one.

*"An equally important element of the decision lies in recognizing that these benefits can only be achieved when technology is managed effectively and consistently within the values of the legal sphere."*

*Conclusion*

In light of the many scientific problems in using DNA evidence and the broader difficulties of "constitutionalizing" Osborne's claimed "right," the Court came to the proper conclusion in siding with the state. The Court's decision did not disregard due process, but instead reflected an effort to protect the integrity of legal judgments despite changes in science. While Justice Roberts in the majority opinion acknowledges the "unparalleled ability" of technology, specifically DNA testing, to assist in the courtroom, an equally important element of the decision lies in recognizing that these benefits can only be achieved when technology is managed effectively and consistently with the values of the legal sphere. And it does not appear this ruling will be changed as a result of the composition of the Court. When asked about the Osborne decision and the impact of new technologies on the criminal justice system, soon to be Justice Sonia Sotomayor agreed with Chief Justice Rogers in finding it "primarily" a "task" of the legislative branch to balance the availability of new technologies powerful enough to exonerate individuals with upholding the integrity and stability of the "established system of criminal justice."[xxi]

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# Is Freedom of Speech in Jeopardy?

*The Potentially Slippery Slope in Snyder v. Phelps*

BY ANDREW IRVINE

God Hates Fags," "Thank God for dead soldiers" and "America is Doomed" are all slogans that have appeared time and time again in the news, courtesy of Fred Phelps and his cohort of family members from the Westboro Baptist Church protesting American "tolerance of homosexuals" at soldiers' funerals. In early March of this year, the US Supreme Court decided to review a case involving the Phelps clan that will decide whether or not such offensive phrases can still be uttered or displayed during events like funerals. The implications of the case could conceivably involve the death of free speech as we know it, and the Supreme Court would tread a slippery slope in ruling against the Phelps protestors.

The case up for review, Snyder v. Phelps, was originally ruled on in a Maryland district court that awarded Mr. Snyder, the father of the deceased soldier, $5 million for emotional trauma and distress caused by Phelps. After the Phelps family appealed the decision, the United States Court of Appeals, 4th Circuit overturned the Maryland court's decision, instead ruling that Phelps had a right to free speech under the First Amendment of the Constitution. As Judge King wrote in his opinion for the court, "Notwithstanding the distasteful and repugnant nature of the words being challenged in these proceedings, we are constrained to conclude that the Defendants' [Phelps's] signs and Epic are constitutionally protected" under the First Amendment.

Understandably, this ruling upset many who view a funeral as a sacred event that should not be picketed by a bunch of strangers and then drawn out on the internet and the evening news.

> *"What he said, however, is far less important than what could happen if he is not allowed to say it."*

In this case, Mr. Snyder admitted that he had not seen the signs until after the funeral, and it was established that the Phelps protestors had "complied with local ordinances and police directions with respect to being a certain distance from the church." But were the Phelpses allowed to tarnish such a religious event with their presence, using their freedom of speech to impinge upon the soldier's family's religious rights?

According to the American Civil Liberties Union, the answer is "yes." Acting as one of the amici supporting Phelps in the Court of Appeals case, the ACLU (among others) fought for the freedom to say and write such things as the Phelpses did, even if they were repulsive to most of us. As they often laudably do, the ACLU took the unpopular position of protecting free speech (no matter how offensive) in the United States, a role that will hopefully be reprised in the upcoming Supreme Court hearings on Snyder v. Phelps.

Many reading this article will probably question how we can defend Phelps after he has so obviously gone to incredible lengths to voice his, at the least controversial, opinions while knowingly disturbing and upsetting the family members of our fallen heroes. While Phelps's actions are intolerant and intolerable, they are far preferable to a political landscape in which people cannot voice their opinions freely. The First Amendment was designed to protect our ability to protest and say what we believe without fear of the federal government imprisoning us; if we abridge that right in one instance (say, for a funeral), where else could our rights be overrun? Who is to say that a funeral is any more important than any other event that might conceivably (and justifiably) be protested? If the Supreme Court decides in favor of Mr. Snyder, and Phelps is not allowed free speech, what happens next? Perhaps we would not be able to protest a decision made by our leaders, or maybe we would be in jeopardy of imprisonment for writing an article in an undergraduate law journal defending free speech.

It is completely understandable for the American people to be angry at Phelps for what he has said and done. What he said, however, is far less important than what could happen if he is not allowed to say it. The Supreme Court faces an extremely slippery slope in Snyder v. Phelps, one that threatens to lead us to the brink of tyranny. Let us hope that they do not take the plunge.

# Rethinking Guzman's Three R's

*An Examination of Coercive Agreements in International Law*

BY VIJAY KEDAR

Integral to the practice of international law is the notion of compliance—nations adhering to previously established agreements in the form of bi-lateral and multi-lateral treaties and declarations. While many scholars and legal theorists have questioned the validity of international law because of the inability to enforce such compliance, UC Berkeley Law Professor, Andrew Guzman, defends the field by explaining states incentives to comply in the form of three R's: reputation, reciprocity, and retaliation. Serving as a formative theory in the field of international law, Guzman's explanation is rather straightforward given the assumption that states are relatively equal in influence within the international community. However, it becomes complicated when one examines the phenomenon of coercion between states. By exploring cases of coercion, one can understand the way in which the tilted gradient of power among states often requires a different understanding of reputation, reciprocity, and retaliation. Through this exploration, one examines a fundamental tenet of international law and the way in which the field is being redefined as superpower entities shift the fragile balance of international legal relations.

As Guzman describes, coercive agreements are those which improve the welfare of the coercive state, often at the expense of its counterpart. These agreements are accepted by the coerced states because of a choice to avoid a cost or threat levied by the coercing party. In regards to the welfare impacts of these agreements, Guzman states,

Coercive agreements (defined as those that do not offer the option of retaining the status quo) are more problematic from a welfare perspective than are consensual ones. Indeed a coercive agreement need not even lead to an improvement in total welfare…It is entirely possible that the gains to one side will be outweighed by the losses to the other, meaning that the agreement destroys value, rather than creating it.[1]

*"As a state's reputation in treaty agreements and other facets of international cooperation is the best indicator of its future actions, each state must build its individual trustworthiness over time."*

Given these potentially detrimental consequences, one questions why states create and comply with such agreements. In regards to the former, the first and most basic reason for a coercive agreement to arise is because of a distinct power gradient. If one state is wields considerable power over another due to differences in economic, political, or military stature, it maintains the ability to threaten or force that state to act in a manner that is beneficial to the coercer. A prime example of this is the 1919 Treaty of Versailles in which the United States and the Allied Powers forced Germany to surrender after World War I. According to Guzman, "there is no sense in which that agreement can be described as being entered into voluntarily by the German government, nor could Germany choose the status quo rather than the proffered agreement. Agreement was achieved at gunpoint."[2] In this example, the Allied Powers demonstrated considerable military power over Germany. To continue its existence as a nation, Germany had no choice but to surrender.

Having demonstrated why states initially agree to coercive agreement, one must next examine why they choose to comply with such agreements in the future. For this, we turn to Guzman's three R's. In regards to reputation, Guzman states that, "whether the agreement is a coercive one or a consensual one, refusal to comply may provoke reputational sanctions."[3] As a state's reputation in treaty agreements and other facets of international cooperation is the best indicator of its future actions, each state must build its individual trustworthiness over time. Unless it is able to prove that it was coerced—a difficult task especially after the

*"In this manner,, the United States' cost-benefit analysis of the agreement was greatly influenced by its position of power in the world."*

fact—the state's reputation is affected by its compliance or violation of the agreement. One may then question why the enforcing state does not consider its own reputation in conducting the coercion. This is perhaps one instance in which the traditional view of international law becomes complicated. Because certain international players have greater economic or military power at particular points in time, they are able to sacrifice reputation for economic or political gain. A modern example of this is the agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), signed by all WTO member states in 1994. Although many developing countries were negatively affected by this agreement, they were threatened with removal of access to the markets of developed countries, in particular the United Sates.[4] Although the US may have furthered its international reputation as a "bully", its dominant superpower status allowed it to choose significant economic gain despite the detriment to its reputation. In this manner, the United States' cost-benefit analysis of the agreement was greatly influenced by its position of power in the world.

In regards to the notion of reciprocity, the proposed threat of defection by one state does not tend to enforce compliance in coercive agreements. Because one party primarily orchestrates the agreement, the threat removal of the coercer's compliance with the agreement is not sufficient to maintain the compliance of the coerced. Rather, in these cases, the notion of reciprocity is overtaken by the threat of retaliation. Coercive states will threaten the use of sanctions against the coerced state if it does not comply. As Guzman states, "presumably this threat would resemble the one that led to the agreement in the first place."[5] Hence, while the notion of reciprocity is not always a factor in coercive agreements, the threat of retaliation often forces coerced states into compliance.

Hence, by exploring the nature of coercive agreements as well as particular examples of such agreements, it becomes evident that coercion in international law requires a revised examination of Guzman's three R's. Because of the tilted gradient of power and influence among states in the international community, the cost-benefit analyses of such agreements demonstrate the constantly shifting roles of reputation, reciprocity, and retaliation in enforcing compliance between states.

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# Realism and the Rational Institutional Design Thesis

## *Considering the ICJ and UNSC*

BY NAFEES SYED

The rational institutional design thesis explains the design of the United Nations Security Council and the International Court of Justice in terms of states' self-interest; states rationally design those international organizations to achieve individual and joint objectives in terms of absolute gains, in which each nation is concerned with its overall gain in benefits, not a relative gain in benefits. Indeed, the design of the institutions follows a rational functionalist explanation of the framers' intentions. However, realism explains how the Security Council and the ICJ have failed and are, like other international institutions, "little more than ciphers for state power," granting little legitimacy to the rational institutional design thesis.

*Options, Goals and Design*

According to the UN Charter, the goal of the Security Council as a UN organ is "to maintain international peace and security." Rational functionalism would explain this goal in terms of a cost-benefit analysis; a state will give up certain powers order to gain a greater long-term benefit such as safety granted by international security. Technically, the UNSC has jurisdiction over any situation that could lead to "international friction," so in addition to regulation of armaments, the UNSC covers humanitarian and other potential security concerns. The framers then decided that the UNSC would cover non-justiciable, political issues based upon a foundation of international law; therefore, it cannot make legislation, which rational functionalism would explain as prudent since states would face less legal restrictions and costs in accepting the decisions of the Security Council and would therefore be more likely to enter. However, the UNSC can determine the legality of the use of force under Article 39 of the UN Charter to help it determine whether a situation necessitates a response from the Security Council.

The framers were aware that UNSC's goal of international stability and scope was similar to that of the League of Nations, which during World War II proved to be a failure. However, they tried to create a strong method of enforcement by making the decisions of the UNSC binding. To enforce those decisions the UNSC was designed to have a standing army (Article 43 of the UN Charter), the authority to establish peacekeeping operations, sanctions, and authorize military actions. The powers of enforcement were designed to come from the members themselves, so the Security Council would represent collective, international action. A rational functionalist would explain the immediate individual costs of contribution as offset by the gain in long-term security.

In terms of membership, the framers had multiple options to choose from, including representing all of the members of the UN (as in the General Assembly), but instead they created the UNSC as a small, centralized group of fifteen member-states so that the enforcement mechanisms aforementioned would be efficiently executed. The Security Council now consists of five permanent members and ten rotating members, representing multiple regions of the world. The five permanent members have veto power as well, and as rational functionalist Voeten explains, this creates an elite pact that "seeks to neutralize threats to stability by institutionalizing nonmajoritarian mechanisms for conflict resolution." This pact is designed to enhance enforcement since it creates an equilibrium behavior; if any of the superpowers and their allies are threatened, the offending country is punished, and if a superpower flouts Security Council authority, other countries "reduce cooperation elsewhere." "SC approval provides a green light for states to cooperate, whereas its absence triggers a coordinated response that imposes costs on violators," so the UNSC maximizes security benefits while minimizing costs.

*"The framers were aware that UNSC's goal of international stability and scope were similar to that of the League of Nations, which during World War II proved to be a failure."*

In forming the ICJ, the framers gave it "organ" status to avoid the failure of the PCIJ. Unlike the UNSC, the ICJ is justiciable and its function is to adjudicate. Like the UNSC, the purpose of the ICJ is the peaceful settlement of disputes and international stability, but it covers a broader range of justiciable issues including maritime, territorial, and foreign investment issues. Rational functionalism would explain the design of the ICJ as reducing information imperfections and increasing liability for actions by providing a legal framework. This maximizes benefits for a peaceful settlement and reduces the costs of conflict. Furthermore, the scope of the ICJ is larger because "when the incentives on an issue are insufficient for decentralized enforcement, linkage

for decentralized enforcement, linkage to other issues can provide enforcement." Since the ICJ cannot enforce decisions on its own (only through the UNSC: see below), the framers designed it to cover broad issues that can be linked to provide incentives for states to comply.

The Statute of the ICJ is designed so that all members of the UN must be parties to it. However, its decisions are binding on those who agree be under the jurisdiction of the ICJ, a rule that was designed to maximize compliance. Since the ICJ was designed to be a purely judicial organ, it does not enforce compliance itself. Instead, this power is vested in the UNSC. This linkage between the justiciable and non-justiciable organ of the UN is designed to uphold the norms of international law while providing states a similar incentive to comply as under the UNSC. The ICJ also gives advisory opinions on legal questions to UN organs or specialized agencies, a function that was not designed to enforce compliance through the UNSC. Unlike the UNSC, the ICJ is made up of fifteen judges who are "elected regardless of their nationality among persons of high moral character" by the UNGA and the UNSC. This election includes all UN member states and was designed to increase the plurality of the ICJ and therefore encourage nations worldwide, including developing ones, to submit their cases.

While rational functionalism explains how the framers designed the Security Council and the ICJ to promote international peace and stability, it can explain other aims of the framers such as economic objectives. The UNSC deals with such a broad range of issues, including development and the enforcement of sanctions, to enhance economic benefits for states. Moreover, the elite pact in the UNSC creates "substantial potential gains from cooperation between the superpower and other states on economic issues such as trade and financial stability," so the rational functionalist explains the institutional design of the UNSC in terms of economic benefits as well as security gains of international stability. Furthermore, the lack of punitive measures in the ICJ (it relies on the UNSC) suggests that the framers had aims of economic benefits in mind; as Simmons empirically proves, "the economic opportunity costs of festering territorial conflicts can be significant." Furthermore, it is more beneficial for a state to concede to the ICJ than to an enemy, a move which "bolsters a positive reputation that can be valuable in future interactions" as a rational functionalist would explain. Therefore, the ICJ was designed to be more than a forum for dispute settlement; it is also a forum for states to bolster their reputations and gain ensuing long-term benefits.

*"In certain instances, the ICJ and the UNSC have been successful in achieving their mutual goal to mitigate conflicts and to preserve international stability."*

Performance of the Security Council and ICJ

In certain instances, the ICJ and the UNSC have been successful in achieving their mutual goal to mitigate conflicts and to preserve international stability. The UNSC played a key role in the Gulf War, passing Resolution 678 to authorize the use of force against Iraq. It has established criminal tribunals for the former Yugoslavia and Rwanda. Also, the UNSC is the first international organization to administer sovereign territory, as it did in East Timor and Kosovo. Johnstone argues that the UNSC has served as a forum for justificatory discourse because many nations value their reputation in the UNSC, and its design to require the backing of five major superpowers assists in this forum. Similarly, the ICJ has had success especially in terms of border disputes.

However, the failures of the two UN organs far outweigh their successes. There are several flaws in the design of their enforcement mechanisms and membership that hinder success in promoting stability. For example, Article 43 authorizing a standing army has been ineffective since it is contingent upon whether member states will contribute. The elite pact design has impeded decision-making since the veto of just one power can prevent action; for example, "since 1982, the US has vetoed 32 Security Council resolutions critical of Israel, more than the total number of vetoes cast by all the other Security Council members." There is debate about making the UNSC more representative and vesting less power in the five permanent members. Also, the US unilateralist stance for the War in Iraq has harmed the reputation of the UNSC. Similarly, the ICJ has weak enforcement because its jurisdiction is based on consent of the states involved in the disputes, and it lacks a punitive system to facilitate compliance. It is also a trial court and lacks the power of judicial review, meaning it cannot check the actions of the UNSC. The cases of Libyan Arab Jamahiriya v. United States of America and the United Kingdom and Nicaragua v. the United States exemplify the failure in the design of the UNSC and the ICJ.

The Nicaragua v. the United States identified a jurisdictional dilemma of the ICJ. Nicaragua accused the US of breaching international law by supporting guerrilla Contras and mining Nicaraguan harbors. The US defended its actions and claimed that the ICJ did not even have jurisdiction over the case since Nicaragua had not formally ratified the court's jurisdiction, and the US had a multilateral treaty reservation that all parties of the treaty it was accused of violating must be present. Furthermore, the US claimed that since this case involved

claimed that since this case involved the use of force, the legality of which the UNSC determines, the UNSC, not the ICJ, had jurisdiction over the case. The ICJ ruled in favor of Nicaragua on these and other matters, declaring that the US was "transfer[ring] municipal law concepts…to the international plane" by claiming that the UNSC had jurisdiction in this case. Embarrassingly for the ICJ, the US withdrew from the court proceedings. The ICJ still decided that it could give a decision, respecting Article 53 of the Statute, which guides situations in which one party does not appear. The court was designed to facilitate information gathering and a forum for resolution, but as this case shows lack of cooperation of just one of the parties involved can turn ICJ decision making into a debacle. This case also highlights the sometimes-conflicting jurisdiction of the UNSC and the ICJ. Furthermore, it points out the flaws of the UNSC veto system; the US used its veto five times regarding resolutions on the Nicaragua issue within three years, and in 1986 it made a final veto of a resolution requiring compliance with the ICJ's decision.

The Lockerbie situation with Libya also showed the impotence of the ICJ and the UNSC. The UNSC imposed sanctions on Libya in 1992, but Libya still refused to turn over the two suspects for the bombing of a US airline in Lockerbie. Instead, Libya brought a case to the ICJ against the US and the UK under the Montreal Convention. The US and the UK asserted that the ICJ did not have jurisdiction over this case, but the ICJ ruled that it did. Like the Nicaragua case, the Lockerbie case points to a serious flaw in design since the jurisdiction and power of the UNSC and ICJ clash and are ineffective when not in accordance with the immediate interests of the states involved. Although the ICJ ruled that Libya turn over the suspects, it had no prison system or method of enforcement. After Libya turned over the bombing suspects, there was conflict within the UNSC among veto members about lifting sanctions. So although Libya ultimately complied, during the process the power of the UNSC and the ICJ and the relationship between them were tested. Also in this case, as in the Nicaragua case, the US judge of the ICJ was one of the only judges to support the US in these cases, suggesting that the membership of the ICJ reflects power politics like the Security Council.

*Failure of the Rational Institutional Design Thesis*

As the above failures prove, the rational institutional design thesis is false, as the goals of the framers to promote peace, stability, and mutual gains were not met by the rational design of the UNSC or the ICJ. The jurisdiction over the scope of issues covered by the ICJ and the UNSC conflict, enforcement is weak and ineffective, and membership in both UN organs reflects the balance of power in the world today. Realism explains the failures of the UNSC and the ICJ, undermining the rational institutional design thesis. Although these organs have been effective at times, it is only when states cooperate if they believe they will win immediate and relative gains, not absolute or long-term gains, as the many failures prove.

*"To enforce economic or military sanctions, to create a standing army, or to do anything at all the Council must depend on member support..."*

As Morgenthau points out, three key failures in design, explained in terms of realism, undermine the UNSC. First of all, although the purpose of the UNSC is to create a centralized organ of enforcement, it is in fact decentralized. To enforce economic or military sanctions, to create a standing army, or to do anything at all the Council must depend on member support, and members are only willing to give as much as is immediately in their national interests. This explains why no standing army has been created. Furthermore, the UNSC provisions for self-defense are inconsequential; it requires nations to immediately inform the Council of the use of force, so the UNSC cannot prevent these acts, and the belligerent states will still be fighting for their own immediate interests and whatever actions the UNSC takes will be subordinate.

Most importantly, the veto system of the UNSC can most effectively be explained by realism since the dominant permanent members will only use it to their immediate advantage and will pressure less powerful nations to agree. The veto system prevents enforcement of measures against the permanent members or member states that the permanent members have an interest in protecting. As the aforementioned cases mentioned, US veto power prevented the UNSC from enforcing US compliance with the ICJ, and conflicts among member states prevented a unified decision regarding sanctions against Libya after its release of the suspects. Furthermore, US defiance of the UNSC in the War in Iraq proves that a country will only use the UNSC as is convenient. Even weaker nations, such as Libya, have resisted the UNSC, explained by realists as concern for national sovereignty and immediate security benefits. Since the UNSC is supposed to enforce ICJ decisions, the weaknesses of the UNSC apply to the ICJ as well. Furthermore, the ICJ's need for state consent for jurisdiction is defective because states will only allow the ICJ to have jurisdiction if convenient; the ICJ has only as much power as the party states allow. Otherwise, the UNSC can enforce ICJ decisions, but this leads to a similar roadblock as in the UNSC; strong powers are immune

*"Altogether, the rational institutional design thesis is proven false in light of the many failures of the UNSC and the ICJ."*

as well as nations whom the strong powers are interested in protecting, or not interested in creating hostilities with. Also, countries can claim that the UNSC has jurisdiction over a case brought to the ICJ if it is in its best interests, as the US did. Furthermore, "according to the ICJ, the General Assembly and the Security Council have sought to represent different regions and legal traditions on the Court, but other sources make clear that powerful countries control individual seats; the United States, for example, has always had a judge of its nationality on the Court." A realist would explain the ICJ as reflecting the interests of the superpowers, as in the UNSC. Also, the ICJ is weak in cases of ad hoc jurisdiction; its power depends on whether countries bring forth cases, and "to maintain its relevance and power, the ICJ must resolve these disputes in a manner consistent with the interests of the disputing parties." The ICJ has faced several issues of noncompliance, as countries only obey when it is in their best immediate interests, which again explains the few successes of the UNSC and the ICJ. For example, a realist would explain the "success" of Resolution 678 as due to the fact that the US was planning on using force in Iraq anyway.

Altogether, the rational institutional design thesis is proven false in light of the many failures of the UNSC and the ICJ. The design of these institutions, as explained by rational functionalism, contains flaws that prevent the aims from being fulfilled. Realism explains the inherent flaws in the systems, flaws that are supported by evidence from the organizations' histories. A change in their design might increase successes, but it will not change the veracity of the realist explanation in terms of states' immediate self-interests, which lead to the ineffectiveness of the ICJ and the UNSC.

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# Inaction is Just as Unjust

*Chad's Hissène Habré Must be Brought to Justice*

BY LAYLA AMJADI

For the last seventeen years, Senegal's inactivity has blocked the efforts of the Chadian Association of Victims of Political Repression and Crime (AVCRP) and international community in bringing Hissène Habré, the former ruler of Chad, to justice for his crimes against humanity, and systematic torture. Habré had fled from Chad to Senegal on self-imposed exile, where he enjoyed his retirement until January 2000, when the victims of his 1982-1990 regime provided the Senegalese court with cases of torture, murder, and disappearance (The Chronology).

Nicknamed "Africa's Pinochet," Habré's prosecution could be a landmark case for all African nations, the way Pinochet's case was for Latin American countries. Augosto Pinochet's trial was the catalyst for the current domino effect of prosecuting human rights violators in Latin America (After). The citizens of African countries are due a paralleled pivotal moment in their long and heinous history of human rights abuses. Senegal must do its part in setting the precedence for the accountability of African dictators accused of such atrocities.

Senegal seems internally conflicted over their role in bringing Habré to persecution. However, thanks to the Pinochet Case, the debates over jurisdiction and immunity that have been plagued Dakar's Court of Appeals are actually superfluous. The decisions made in Great Britain over these two areas should have made for a quick prosecution of the accused. Instead, the UN, the Committee against Torture, the AVCRP, and other actors are held over by President Wade's empty promises. "Time is running out. Unless Senegal takes action soon, there won't be any victims left at the trial," (UN Gives).

In 2000, Senegal's highest court took a realist's approach in ruling that Habré could not stand trial because his crimes were not committed in Senegal (Chronology). The court's "old" Westphalian view showed their dependence on the usage of the territorial principle, "that the state's jurisdictional authority is derived from the location of the defendant's act," (Slomanson 238). However, Senegal must realize that the world is increasingly in an "age of justice without borders," (Long). Dakar should detach itself from the Westphalian principle and "strict legal spatiality" of the 19th century" by inaugurating itself into the 21st century as a defender and follower of universal jurisdiction and justice (Raustiala 15).

Universal Jurisdiction, a growing custom of international law, came into existence after WWII, and was offered as one of the justifications of the Nuremberg Trials. The aftermath of the war saw a flood of deposed dictators, which without this principle would have been able to attain immunity within their jurisdiction. In cases such as Habré's, in which the crimes committed are so heinous that they are seen as a crime against the entire community of nations, the perpetrators are deemed to be enemies of all mankind. This principle regarding criminal jurisdiction is "based on the nature of the crime, without regard to where the crime was committed," (Slomanson 245). Since Habré is subject to universal jurisdiction, Senegal has the right and obligation to prosecute his crimes.

If moral duty has not been able to convince Dakar's courts to take action, perhaps the precedence set by the Pinochet Case will. In Great Britain, the courts cited the principle of universal justice as well as the 1984 Torture Convention, which is known as "one of the most successful human rights treaties," (Oona 199). CAT, a hard law, spells out clear, legally binding obligations, and lists no conditions under which torture is permissible. Arising out of the end of WWII, this "symbol of triumph of human rights over sovereign privilege," was a contemporary of universal jurisdiction.

In 2000, Senegal may have had an excuse to dismiss universal jurisdiction, for at the time it did not have the proper domestic legislation in place to self-enforce the Torture Convention. However since earlier this year, the "Senegalese National Assembly adopted a new law which would allow the courts to prosecute genocide, crimes against humanity, and torture," (The Chronology). The obstacles to Habré's trial in Senegal have been lifted, yet still there is no progress towards justice.

The second gray area in the case of Habré for Senegalese courts has been the status of the former ruler's immunity. In the Pinochet Case, "Britain's high court overturned a lower court decision that Pinochet, as a former head of state, had absolute immunity from arrest for actions made while carrying out the functions of office," (The Pinochet). By looking to foreign courts and the writing of legal scholars as sources of international law, the British court came to the conclusion that murder, torture, and hostage taking are not the functions of a head of state and so the head of state does not enjoy immunity from prosecution. This decision made a significant contribution to toppling the centuries old immunity accorded to heads of states (Slomanson 95).

The basis of the debate over Pinochet's immunity had been derived from the fact that the new "democratic and legitimate" Chilean government granted their senator and former general immunity. However, in the case of Habré, no such complications exist. In fact Chad waived the immunity of its former ruler. On October 7, 2002, Chad's Minister of Justice stated, "Mr. Hisnesse Habre can not claim to enjoy any form of immunity from the Chadian Authorities, " (Chronology).

Another country, unlike Senegal, is utilizing the principle of universal jurisdiction and Habré's official loss of immunity in an attempt to bring an end to the impunity. Belgium, in 2000 announced that they would seek Habré's extradition. Although Belgium no longer has a law of universal jurisdiction, it still has reasons to prosecute Habré: three of the victims are Belgian and the AVCRP has directly asked for help. But in 2005, Dakar's Court of Appeals ruled that it does not have the competency to rule on the extradition request. Although Senegal does not have a bilateral extradition treaty with Belgium, it would still not hinder Senegal from extraditing a suspect.

Senegal's refusal to extradite Habré has proven to be a costly political decision. UNCAT ruled that Senegal has violated the convention by failing to prosecute or extradite (Chronology). Also, Belgium has threatened

to invoke Article 30 of the convention against torture, which could bring Senegal before the ICJ (Chronology). Senegal's reputation in the international world is at risk.

In 2006, the AU asked Senegal to prosecute Habré "on behalf of Africa," and President Wade agreed to this request (Thomson). Yet in 2007, there has been little progress with the appellate court that is supposed to hold Habré's trial. The stall is partly due to the election process earlier this year that distracted several officials, including Wade, from focusing fulfilling their word (Thomson).

Senegal must make a decision one-way or the other, for its image and credibility in the international community have been damaged. In failing to uphold pacta sun servanda, Senegal is sending a message to the international community that it cannot be trusted in upholding its end of agreements. It seems as though the country did not anticipate enforcement costs or self-enforcing legislation when it signed onto the Committee Against Torture. Dakar is proving that those countries that sign onto CAT, are more likely to fail to uphold their agreement, and only agree to the convention in order to boost their reputations (Oona 206).

In the case of Habré, Senegal must pursue an unwavering plan of action before it loses any more face in the world. There are two options: hold the trial in Senegal or somewhere else. But either way, a trial must be held, and soon, before the message of impunity is spread to the former, current, and potential dictators in Africa.

In 2006, the AU asked Senegal to prosecute Habré "on behalf of Africa," fulfilling their realist mantra of finding "African solutions to African problems" (Sriram). Habré's prosecution could serve as a defining moment in the history of Africa. Bringing one former human rights abuser to justice would serve as a lesson to African leaders, all leaders, that they will be held accountable for their actions. Yet, Senegal has been slow to act, which dampens this option as a viable possibility. The lack of political will and funds does not seem friendly to a successful investigation and trial.

The second option is to hold the trial somewhere other than Senegal. "If Senegal will not put Habré on trial for his atrocities, it must at least consider handing him over to a country that will" (UN). For example, Dakar could allow for the extradition of Habré to Belgium. Although Article 27 of the Rome Statue would allow for Habré's prosecution in the ICC, the ICC would rather that the case be tried in a national court first (Slomanson 95). While President Wade has expressed no objections to a trial in Belgium, holding the trial anywhere outside of Africa would contradict the AU's jurisdiction and want for an "African solution" (Sriram).

Currently the AU, and subsequently the country of Senegal, is stuck in a very realist approach to the international topic of the Hissène Habré's prosecution. In an attempt to "preserve" itself, and serve the "the national interest," Senegal has failed to even respond to Switzerland and France's offerings of financial and investigational assistance with trial, which was supposed to be held in November 2007 (Thomson). But, the AU's fear of neocolonialism should not deter Senegal for seeking assistance for such a complicated case.

Senegal and the AU must realize that by sticking to the realist's view of international law, they are actually threatening their self-preservation. The reputations of both bodies are in danger. Currently, the best approach to the situation would be to adopt a rational functionalist view of international co-operation to secure a future stream of welfare from the international community in the form of positive reputation, favorable future treaties, and investments.

Although the functionalist approach does not apply to human rights treaties, the situation is no longer a human rights issue. For Senegal, the case of Habré has turned into a threat to their reputation. Senegal must take this opportunity to foster a positive international impression; otherwise, the short-term political risks of putting the ex-dictator on trial could be increased into long-term risks.

The best solution for Senegal would be to pursue a hybrid criminal tribunal similar to those created for East Timor and Cambodia. In both these cases, the trials received international sponsorship, but were locally administered using local judges. Senegal should accept France and Switzerland's offerings of assistance to receive international sponsorship for its trial. Finally, in the creation of its special court, Senegal should also seek collaboration with the Chadian authorities in order to create a court with wider African jurisdiction (Sriram). This solution would not only satisfy the AU's mantra, but it would also show the international world that Senegal is a part of the solution to an endemic African problem – the immunity of sitting and former leaders. This rational functionalist approach for international co-operation would surely spark a domino effect of justice in Africa, the way the Pinochet Case did for its corner of the international arena. From Pinochet to Habré, "the arm of the law is growing longer and the world smaller for national leaders accused of atrocities," (Long).

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# The New Frontier of Colonialism

*Genetic Research, Ethics, and Indigenous Populations*

BY MICHELLE KELLAWAY

Since European settlers first stepped foot onto Native lands, the clash between Western and indigenous worldviews has created ethical questions that persist to today. With the introduction of biotechnology in the 20th century, the questions became even more complex, as issues of consent, group rights, property, privacy, sacredness and cultural rights now reach down to the molecular level. Today's world is one in which Western scientists have "mapped" the human genome, and now seek to trace the origins of humanity back to its original migrations.

For indigenous peoples, historical narrative is again replaying itself as, armed with these new goals, Enlightenment-inspired scientists treat body parts as property and "objective" understanding as the ultimate goal. In order to procure the "new gold"1 of chromosomally-diverse DNA and complete their genomic "conquest," the West turns its eyes once more to indigenous populations – whose DNA, because of its diverse properties, has been deemed most valuable in genetic research. To many Native peoples, the approaching reality of the age of "biocolonialism"2 – marked this time by the theft of sacred body parts, rather than sacred land and property – represents the new frontier of the Western imperialism that has not ceased since the 17th century.

The year the Human Genome Project was founded – 1990 – marked the burgeoning precedent for the nature of genomic studies in the United States, particularly in terms of their relation to non-Western cultures.3 The U.S. Department of Energy and the National Institutes of Health's 13-year project sought to "map" the human genome – thereby setting an "average"4 standard of what a "human" looks like at the chromosomal level. In so doing, the American federal government and scientific community forged a new genetic zone of "normalcy" that was largely based upon Euro-American genes. What has resulted from this is a scientific reification of those ethnicities furthest from the average. Many tribes, because of their relative isolation from admixture with other ethnicities, form "mega-diversity zones"5 – meaning that their genes show greater DNA variation than the more generic "melting pots" that peoples of other races have become over centuries of cultural interaction. Setting a norm has effectively "Othered" indigenous peoples, carrying on the Western tradition of exoticization down to the very fabric of corporeal existence. Further, in the United States (the country which this paper is most relevant to), American Indian tribes are the only peoples to have their own self-government outside of the federal government. Through their ongoing articulations of sovereignty, American Indian nations have continually clashed with the U.S. government in terms of rights, morals, and worldview. Biotechnology has added a new valence to ethical issues that have deep roots in history.

In terms of bioethics, arguably the greatest controversy has arisen around what Northern Paiute activist Debra Harry has termed "genetic theft" (or, alternately, "biopiracy")6 – the misuse of indigenous genetic materials for research different from that which it was originally extracted for. The issue gained national attention in 2007 when the Havasupai Tribe sued Arizona State University for misuse of its members' genetic material.7 The tribe, which has been subject to a diabetes epidemic for several decades, was first approached by University scientists who claimed they would use the DNA to benefit the tribe by conducting diabetes research. Once the diabetes research was conducted, however, the scientists kept the Havasupai DNA to continue conducting research on schizophrenia and "inbreeding" among the Havasupai, and ultimately sent the tribe's cell lines to other researchers all over the world. The secondary research, performed without the Havasupai's informed consent, stigmatized the tribe to outsiders and violated their sense of privacy. The Havasupai case will serve as an excellent example in a close discussion of one of the most contentious concepts when considering ethical genetic research on indigenous peoples: informed consent.

*"In order to procure the 'new gold' of chromosomally-diverse DNA and complete their genomic 'conquest,' the West turns its eyes once more to indigenous populations."*

Informed consent, according to the Council for International Organizations of Medical Science (CIOMS)'s 1993 "International Ethical Guidelines for Biomedical Research Involving Human Subjects," "informed consent" is when a subject gives permission after being briefed of "any and all information that a reasonable person would consider material to making a decision about whether to consent."8 Through CIOMS, an ethical threshold is created, based on a minimum: what is the least information a scientist has

is created, based on a minimum: what is the least information a scientist has to give a subject and still have them be "informed"? It is possible to hear this directive not as a positive statement encouraging scientists to share all possible knowledge they have for the benefit of the subject, but as an onerous task a scientist must undertake, among many, to reach their own ends. Further, these assumptions are made upon a subjective Western conception of a "reasonable person" – a conception which likely does not fully consider non-Western worldviews. Overall, the definition of "informed consent" has never been clear, and the lines become further blurred when these concepts – "informed," "consent," and "reasonable person" – are defined differently by the scientists' culture and the subjects' culture.

In general, there exists major disparities between how Western cultures and indigenous cultures view the world – and, in particular, how they view genetic research. Though neither Western cultures nor indigenous cultures are monolithic in how they approach such issues, broad statements can be made that often characterize the two as polar opposites. Objectivism and, to a certain extent, capitalist commercialism have defined the West's conceptions of the body. Once the body has been conceptualized as an object, it thereby becomes property, and property is always alienable within the American economic and legal structure. According to Yaqui law scholar Rebecca Tsosie, once a body part is removed, it becomes, according to the U.S. government a "tangible resource" attached to a "bundle of sticks" (each an individual right), including the rights to include, exclude, use, sell, transfer, purchase, and encumber.9 In short, once genes are removed from a person's body, they are no longer considered a part of a living being, but are rather a separate commodity. This fact, combined with the acquisitive, goal-oriented nature of Western science, can be a powerful justification to "further science" through the use of indigenous DNA as an object – and, in particular, an object Western scientists may feel they are entitled to because of their assumed greater understanding of molecular biology and their societal appointment as definers of knowledge.

Western bioethics views encounters between scientist and subject more as commercial transactions than as a chance to enhance mutual learning and understanding. Therefore, the most powerful analytical tool that has been used to place a value on these encounters is the cost-benefit ratio. In the Western system, a scientific study can only be conducted if the cost is equal to the benefit – in other words, if what the scientist contributes to the subject's life, community, or society is deemed equal to the cost of what he or she takes away from the subject.10 This vision of fairness is reflected in the Human Genome Diversity 11 Project's "Model Ethical Protocol," (1992) which aims to envision an ethical way in which ethnic DNA could be stored for (Western) scientific use.12 However, the HGDP has ground to halt for several reasons, one of which is the ambiguity surrounding "benefits." A question of agency, which was brought up in the discussion of how indigenous genetic material is used, is again brought up in a new question: who gets to decide who benefits from the research? As Debra Harry and Le'a Malia Kanehe of the Indigenous Peoples Council on Biocolonialism argue, indigenous peoples are automatically and lastingly disadvantaged by "being dependent solely on the researcher for information explaining the benefits and risks of research."13 With a researcher defining what he or she qualifies as the important effects of research done with other's body parts, it is easy to see how many research groups (e.g. Harvard University, Boerhringer Institute, Sequana Therapeutics, Inc.)14 have not maintained an equal cost-benefit ratio in the eyes of indigenous nations.

*"Such questions surrounding community-based ethics point to a disparity in how Western and indigenous cultures view their rights."*

However, moving away from an ethics based on economics, a community-based ethics uses cost-benefit analysis in a much different manner, viewing benefits for the subject as the primary purpose of subject-based research. As Harry and Kanehe go on to argue in "Genetic Research: Collecting Blood to Preserve Culture?", "unless the risk-benefit ratio favors the populations to be studied, the research protocol is not ready for ethical review."15 This statement presumes that the interests of both subject and researcher must be equal before any research is conducted – a method that, at the very least, would require a deep understanding and interaction with the indigenous community on the part of the researcher. It may, ultimately, preclude non-indigenous researchers from conducting research on indigenous populations, for such a standard may be too costly for those scientists who have not lived years with a tribe (and who, therefore, may never be able to grasp their unique worldview).

Such questions surrounding community-based ethics point to a disparity in how Western and indigenous cultures view rights. Whereas, on the one hand, American law is focused upon individual rights, tribal law and culture reflects a greater focus on group rights. As CIOMS dictates, informed consent is to be attained by the individual, who is understood to be the sole proprietor of their body parts. Therefore, it would be considered unethical for scientists to approach a larger community body to seek consent over a member's body. It would also probably prove more difficult to gain consent at several levels

instead of just one, making individual consent more cost-effective for a scientific study. Further, according to law scholar Karen Eltis, there exists an underlying "oft-presumed intersection of interests between a minority group member and her community that the law seems to take for granted" – an assumption that does not account for the fact that though a subject may want to participate in a genetic study, that their community (who will be affected by the results) may decide it is harmful to the group. While Eltis focuses more on the negative stereotypes produced about minorities as a result of consensual genetic studies, this fact can also clearly pertain to cases of "genetic theft," such as the Havasupai case. While individual tribe members gave consent to have their DNA used in medical research, once it was used for "inbreeding" research, the DNA became a means to stigmatize an already disadvantaged minority. While some may argue that understanding human genetic patterns will erase the scientific basis for such ethnicity-based discirimination with the discovery that we are all only approximately 1% different from peopels of other races16, it often serves as a stronger tool for societal marginzalization.

Utilizing "group rights" as a paradigm for ethical assessment of genetic research with ethnic groups creates much higher ethical standards for informed consent. Group rights are closely associated with tribal beliefs. In many indigenous cultures, "a gene and combinations of genes are not the sole property of individuals. They are part of the heritage of families, communities, clans, tribes, and entire indigenous nations."17 Therefore, should a scientist be seeking to use an indigenous subject based on their membership to any of these groups, it would be ethical to receive the group consent as well,18 often through the consent of tribal leaders. Issues surrounding group consent become complex when a scientist must determine the level of group authority from which they must gain consent. As the Human Genome Diversity Project's Model Ethical Protocol points out, to ensure that research is mutually beneficial, consent from cultural leaders must be obtained far in advance, and the time and expense for this should be considered in any study on an ethnic group. In approaching cultural leaders, the larger body to which a researcher must appeal to for consent should be defined by the population themselves,18 in order to ensure that all parties who will be affected by the study are in agreement. This does become more complicated, as biocolonialism activist Brett Shelton points out, when cultural leaders do not have the best interests of their people in mind or have not been directly chosen by their people.19 However, in general, an individual who belongs to an indigenous group does not have the right to make a decision that will effect the entire tribe.

This vision of "group rights" partly emerges out of indigenous peoples' beliefs concerning the sacredness of the human body as a holistic part of its ecosystem – a worldview that conspicuously clashes with the Western view of individual body-parts-as-property. As Maori activist Aroha Te Pareake Mead writes, most indigenous cultures consider body parts that contain DNA – such as hair, blood, and mucus – as sacred. He relates that:

> Because of our respect for our ancestors [...] we regard the descendants of our ancestors, all of nature, as sacred. [...] Indigenous peoples are not advocating one value for human genes and another value for all others. The call is the same – nature and living things, tangible, and intangible, all are sacred. They are not objects, they are not property, they cannot be owned.20

*"This vision of 'group rights' partly emerges out of indigenous peoples' beliefs concerning the sacredness of the human body as a holistic part of its ecosystem."*

A profound respect for ancestors, nature, and human's place within a larger system means that many indigenous belief system consider all parts of the body – from the entire being down to the smallest chromosome – to be imbued with the same value of life. This differs from the Western view, which places an order of value on certain body parts, usually in relation to size – for example, an entire body cannot be considered property, but a cell line can (and even be patented as "intellectual property"). The value of different body parts also fluctuates according to a certain research "market," whose focus shifts according to medical issues of the time. Though the vision of value that Mead articulates is largely spiritual, it has practical applications when considering group rights and the concept of "cultural harm."

In "Cultural Challenges to Biotechnology: Native American Genetic Resources and the Concept of Cultural Harm," Rebecca Tsosie argues that genetic rights form a larger part of a system that undercuts indigenous people's right to culture – a human right guaranteeing the "material, spiritual, and artistic expression of a group that defines itself as a distinct entity."21 The need of "cultural survival" for American Indian nations is particularly strong, because of the U.S.'s legacy of brutal forced assimilation, as well as their status as "domestic, dependent nations" within a larger country 22 This status has left the tribes, in many ways, in a state of vulnerability that necessitates careful attention to the implications of genetics research. Aside from its invasive resonances with the U.S. government's former eugenics campaign23, the results of genetic studies can easily produce what Tsosie refers to as cultural harm: "when actions by members of the dominant society – individuals, corporations, institutions, or the government itself – harm Native cultures and thus, give rise to legal duties to protect Native cultures and repair the harms that have been caused."24 Tsosie's assertions bring up an important ethical question concerning Western interactions with Native tribes: because of the damage that the American government and citizens have caused to American Indian people since they first entered Native land, do they have a responsibility to create policy to redress the harm they have caused – or, at the very least, refrain from further interference with tribal matters and members?

This question perennially emerges in regards to American Indian sovereignty, and can be applied to a number of issues, including genetic research. While the answers to it far exceed the limitations of this paper, it is useful to briefly analyze how genetic research produces cultural harm within the tribes,

interest in helping [indigenous] people to survive, or in addressing the social, the economical, the political, and the exploitation issues that endanger these indigenous groups of people."26 When science view bodies as objects, it values the physical being over the entire being in its situated context. Ultimately, this is one of the reasons that the HGDP was forced to go on hiatus,27 and why such projects will continue to face opposition from indigenous rights organizations.

Further, the use of indigenous genetics for human migrational studies, such as National Geographic's "Genographic Project"28 may privilege the Western goal – to better understand human origins – over the beliefs of the peoples whose DNA it utilizes. One major concern with the Genographic Project – which has now, with the halting of the HGDP, been the focus of the majority of criticism from biocolonialism activists – is that in providing scientific support of the "Bering Straight Theory," indigenous DNA will be used to counteract indigenous spiritual beliefs. Because tribal nations believe they are "First Peoples," a theory that portrays Native Americans as migrants to their sacred land would contradict their worldview, as well as undercut claims to tribal rights based on the fact that Native peoples were the original inhabitors of U.S. land before it was stolen by European.29 However, without informed consent of the implications of such research or understanding on the part of Western scientists for alternate worldviews, many indigenous peoples have already offered their DNA for use. Many activists have called for the elimination of cultural harm through the halting of the Genographic Project; however, because it is privately funded (rather than publicly funded, like the HGDP)30, more complex discussions of privacy rights must come into play – and none have succeeded yet in stopping the
projected

Overall, the ethical issues that surround genetic research on indigenous peoples are multi-faceted and strike at the core of the contention between American Indians and the West that has existed in various forms since the Colonial Period. Conflicts are largely based around the nature of the two cultures' different ethical approaches – the individualism of the West vs. collective rights of indigenous peoples. While the individualist approach tends to view body parts as objects in a "market" of biotechnology, the group approach views the body as part of a sacred whole, including its larger community. Because of this membership in a larger community, it is expected that the individual consider the effect of scientific testing on the entire group, and that researchers gain consent from the community. The group approach views science as a means to directly benefit its subjects – an unequal cost-benefit ratio that Western ethico-legal frameworks do not consider. In other words, the two cultures come to different conclusions while using the same tools of ethical analysis. Indigenous activists have fought for greater sensitvity on the part of Western scientists, who are perceived to have the "upper hand" because of their access to genetic knowledge – or, ultimately, to eliminate genetic testing outside of indigenous communities altogether. The future of genetic research and U.S.-Native relations is poised at the balancing of these two ethical viewpoints, and only time will tell whether they can reconcile.

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Note: Inspiration for this paper was originally derived from Kimberly TallBear's unpublished draft of "The Genetic Articulation of Indigeneity," which was first presented at the "Keywords in Native American Studies" Workshop, University of Michigan, January 11-13, 2008.

# The Theoretical Implications of The Rivonia Trial

*A New Hope for Legalism*

BY ALYSSA BLAIZE

On July eleventh, 1963 the police executed a raid on Lilliesleaf Farm in rural South Africa. What the police found on that summer day surpassed all of their expectations. Aware that the African National Congress[1] was still at large and underground even though the government had banned the group in 1960,[2] the South African Police force made capturing ANC leaders its priority. Acting on a tip and expecting to capture only Walter Sisulu, a prominent member of the African National Congress, the police stumbled upon six other ANC leaders. They had unknowingly executed the raid at the same time as an important group meeting concerning the direction the ANC should take in the coming months.[3] And so, those six leaders were added to the group of arrests already made. In the end, Nelson Mandela, along with Walter Sisulu, Gvan Mbkei, Raymond Mhlaba, Elias Mostsoaledi, Denis Goldberg, Andrew Mlangeni, Billy Nair, Wilton Mkwayi, Lionel Bernstein, Harold Wolpe, and James Kantor were convicted for conspiracy against the South African government in a case that though it is technically named the State vs. Mandela and Others, has come to be known as the Rivonia Trial.

Analyzing this trial in the light of political scientist Judith Shklar's book, Legalism: Law, Morals, and Political Trials elucidates its greater implications. Shklar refers to legalism as the "individual code of conduct"[4] that is often not articulated, but "consistently followed"[5] and provides "the standards of organization and operative ideals for a vast number or social groups."[6] Regardless of this unwritten rule, – this supposedly unspoken universal consensus of an "individual code of conduct,"[7] – law is often characterized as both a shield and a sword as it has the ability to both protect and oppress. This quality of irony allows one to really question the universal consensus: Is law a language that everyone speaks? Can legalistic views be widely accepted across incredibly different cultures?

> *"When law is so blatantly abused, when one's natural rights are so transparently violated, it does not take much to expose its illegitimacy."*

The Rivonia Trial is a prime example of law being used as a tool of oppression since the accused were sentenced to life in prison even though they gave flawless and widely accepted moral arguments for their actions. However, this trial also exposes the restorative nature of law, its quality of self-preservation. Ironically, it is the irony inherent in law that allows it to possess this restorative quality.

This trial was meant to be the trial that solidified apartheid rule, a trial to demonstrate the legitimacy of the apartheid regime: Yutar, according to Davis and Le Roux "tailored his opening address, not only to the judge, but to the white electorate"[8] and the court, according to Joffe, gave advance copies of the indictment to the newspapers.[9] The state's intentions were absolutely clear: to finally quell all opposition and emerge legitimate and uncontested. But, it was law's restorative quality that prevented those pre-determined results from manifesting. Through their use of moral reason, the accused were able to show the public that the "individual code of conduct"[10] Judith Shklar discusses had been broken because the law had been so severely perverted. The law was no longer serving its purpose: it was no longer protecting its people, but antagonizing them. When law is so blatantly abused, when one's natural rights are so transparently violated, it does not take much to expose its illegitimacy. That that law is written on a paper or was passed by a governing body cannot preserve its "legitimacy" for long. Testaments to this law's restorative quality are Joffe's remarks on the public reception of the trial. He reveals:

"when the case opened in a dreadful atmosphere of hostility towards the accused, in a country whipped up in hysteria against the accused, their prospects were ominous and heavy

with danger. Gradually as the case went on, the atmosphere changed. Partly, no doubt, this was due to the bearing and behaviours of the accused themselves."[11]

The Rivonia Trial is truly a tribute to law's endurance. The accused's argument is one that operates in the parameters of law – the accused do not argue for complete anarchy, just a re-evaluation of the current law in place. Law changes to reflect society's values. Assuming that society is progressive – that it is always changing for the better – law is also evolving in a positive direction. That the accused of the Rivonia Trial were able to combat injustice grounded in law with law reaffirms society's hope in legalism.

*Footnotes*

[1] The African National Congress is South Africa's current governing party. It was founded in 1912 to increase the rights of black South Africans though peaceful protest that will eventually lead to a change in legislation. Its military wing, Umkhonto we Sizwe, was formed in 1961 because some ANC leaders felt that violence was necessary to achieve their objectives as the South African government had begun to respond to their peaceful protests with force.

*"The Rivonia Trial is a prime example of law being used as a tool of oppression."*

[2] This banning was a result of the Sharpeville Massacre. Five thousand to seven thousand protesters gathered and marched to the municipal offices in Sharpeville. The participants were protesting the new pass laws [to be described in a subsequent footnote]. The police opened fire on the peaceful protest. The event yielded sixty-nine casualties and one-hundred and eighty wounded. The event lead to the formation of Umkhonto we Sizwe, the military wing of the ANC with the philosophy that peaceful protest was no longer going to be effective to achieve the organizations objectives.

[3] On that day at Lilliesleaf Farm, the group had planned to discuss the merits of Operation Mayibuye, a proposal for guerilla war, executed by Umkhonto we Sizwe, the military wing of the ANC.

[4] Judith Shklar, Legalism: Law, Morals, and Political Trials, (Cambridge, Massachusetts: Harvard University Press, 1986), p. 1

5 Ibid, p. 1

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# Policy in a State of Anarchy

*Copenhagen and the obstacles to international environmental law*

BY TAREK AUSTIN

The UN Climate Change Conference, lasting from the 6th to the 18th of December 2009, gathered representatives from 192 countries with the aim of mapping out a plan for combating climate change.

Hopes of a breakthrough that would unlock a new treaty on climate change (to take effect in 2012 - when the Kyoto protocol pledge expires) were disappointed, as no binding legal agreement was established.

In the words of the head of the United Nations' climate convention, De Boer, "Copenhagen did not provide us with a clear agreement in legal terms". A non-binding general agreement, the "Copenhagen Accord", would limit warming to 2 degrees Celsius (3.6 degrees Fahrenheit), but does not spell out the means for achieving this goal, and the pledges made under it are only voluntary.

Widely regarded as a failure, the environmental summit points to the deeply rooted obstacles that undermine attempts at passing international environmental legislation. It is a now common view that wide-reaching restrictions on fossil fuel consumption will curb economic growth and thus endanger the competitiveness of modern national economies revolving around fossil fuel as an engine for growth.

In light of the understanding that radical improvement in environmentally friendly practices in the industrial sector will come only at the cost of economic competitiveness, individual countries are weary of weakening their most powerful and fundamental businesses through strong environmental regulations. If they were to do so while other countries do not follow suit, their home businesses would find themselves at an economic disadvantage: they would be subjected to more dangerous competition from other international companies not subject to the same regulations as they are.

When each actor is reluctant to step up first and commit to regulations before others, a problem of collective action is created. This is the case with environmental law today.

The problem has come to oppose leading developed countries such as the USA, and emerging economic powers still considered as developing, such as China. While the former argues that the emerging countries have the worst fossil fuel records, and are making no attempt to change practices, the latter responds that it is up to the most developed countries to show leadership by both engaging first in environmental regulations and assisting developing countries with financial support and technological aid.

*"The problem with fossil fuel control is precisely the economic cost that is associated with environmental regulation."*

"If the talks have encountered some difficulties and made slow progress, the main reason is that the developed countries have moved backward on the key issues of funding and technology," said Chinese Foreign Ministry spokeswoman Jiang Yu.

From a perspective of pure law, the international state of anarchy is the clear culprit in accounting for the failure of so many summits like Copenhagen, and even the limited impact of the Kyoto protocol itself.

Within the scope of a single state, where the executive body monopolizes the legitimate use of force while acting in conjunction with the legislative body and judiciary, there is a direct availability of coercive means to ensure the implementation of any law. In the international system, however, there is no such overarching power attached to the voluntary decisions made at international summits. For this reason, one speaks of voluntary engagement and commitment, rather than obedience to an imposed directive sanctioned by law.

Some legislation has, one might point out, been successively carried out in the past, despite this international system of anarchy. One recalls, for example, the Montreal Protocol of 1987, spearheaded by the US, and the London Amendment, which effectively brought to null CFC production worldwide.

Why was reciprocity then so easily ensured, as the countries of the Triad signed onto the protocol and banned trade of CFCs with developing countries? Curbing CFC production came at a minimal economic sacrifice: CFC production accounted for only 2% of revenues from major companies. Also, enormous health benefits and reduced medical costs were associated with the anticipated human health protection - benefits that would far outweigh the initial economic costs.

The problem of fossil fuel control is precisely the economic cost that is associated with environmental regulation, as perceived through the eyes of industrials and entrepreneurs. As long as we remain in a state of international anarchy, where international commitments will have to separately benefit all countries involved, attention must be put on convincing ourselves that environmentally friendly industrial activity is a valuable business in and of itself. Finding usages for renewable energies that will adequately substitute for fossil fuels at the same price, will be the only path to tackling - in a fragmented international playing field - the threat of global warming.

# What is International Law?

*An Overview of the Field*

BY CHRISTINA GUO

According to the Legal Information Institute, international law is defined as the rules regulating the relations between nations. International law can be divided into three general subcategories, which are public international law and private international law.

**Public International Law:**

Public international law deals with the transnational rights between nations, citizens, or a combination of the two. Mainly, the twenty-first century has witnessed developments of public international law in the fields of trade, environmental issues, as well as human rights, according to the same source. Vicenç Feliú, of the Hauser Global Law School Program, states that the primary players in the realm of public international law include not only the heads of state, such as President Obama or Prime Minister Gordon Brown. Rather, any bureaucratic body engaged in foreign policy could also qualify for the role, such as State Departments, Inter-Governmental Organizations, and Foreign ministries. Categories of public international law include treaty law, law of sea, international criminal law and the international humanitarian law.

Of these, treaty law has become the most important aspect of public international law, according to the Columbia Law School. This aspect focuses on of process of negotiation, ratification, and implementation of treaties. The two main components of treaties are bilateral and multilateral, with the former involving only two countries in taxation and extradition determining processes, and the later including both the solution to worldwide or local issues or establishment of global or regional regulating organizations.

**Private International Law:**

A visit to the US Department of State website would reveal that private international law consists of five distinct categories: Commercial Law, Judicial Assistance, Arbitration and Judgments, Family Law, and Wills, Trusts and Estates. As defined by the Cornell University Law School, private international law primarily concerns itself with conflicts between people when multiple nations are involved. Synonymous with "conflict of laws", private international law addresses concerns regarding to which jurisdiction the case may apply and the laws of those jurisdiction.

Conflict of laws, according to the Cornell University Law School, refers to the disparity between multiple jurisdictions, and to what extent the law of each jurisdiction will apply to the case at hand. The determination of the answer, involving a process called "characterization" or "classification", is decided in agreement with the law of the forum.

**International Law Schools:**

Because international law is vastly related to other forms of law, the study of international law in college often requires a simultaneous study of various other related subjects. For example, courses in US law, legal research, immigration law, and a writing intensive curriculum are often emphasized. In addition, some students will pursue combined degrees, which create a deeper understanding in the field of interest and opens up opportunities in the world of law.

**Careers in International Law:**

According to the Loyola University Chicago School of Law, many international lawyers work with law firms that specialize in international trade or international finance. Others work for corporations, accounting and consulting firms, financial institutions, government agencies, and non-governmental organizations.

# Harvard College Law Review Interview: Dean Joshua Rubenstein

*HULR Correspondent Charles Hernandez interviews the Harvard Law School Assistant Dean for Admissions*

*Harvard Law School is a place for people who love ideas because ideas make a difference in the world; who want to think about the law's interaction with public policy, business, information and biomedical technologies, and human needs and perceptions; who are fascinated by the power of institutions and rules while mindful of the unintended consequences of policy reforms; and who pursue the legal profession's service to society (Dean Martha Minow, qtd. in Dean's Welcome on http://www.law.harvard.edu/)*

*Harvard Law School is located in Cambridge, Massachusetts, and is currently ranked 2nd by the U.S. News and World Report. This interview is the second installment of our Admissions Series, focusing on various law schools' admissions processes. These questions and statements were made in the context of Harvard Law School's admissions process.*

CAMBRIDGE: The following is an edited version of an interview that took place on May 5th, 2010.

CHARLES HERNANDEZ: Thank you for taking the time to interview with the Harvard Undergraduate Law Review today. Since the Harvard College Law Society is an undergraduate organization, I'd like to start by asking your opinion on undergraduate academic tracks. Many undergraduates have trouble deciding which courses and academic interests they should pursue in preparation for law school. As someone considering business school, one would pursue economics; likewise, as someone considering medical school, one would pursue a pre-med track. Yet, there is no set "pre-law" track. That in mind, what would you consider a good academic route for an undergraduate "pre-law" student? Are there certain majors that are viewed more favorably in admissions, or are simply more common amongst law students?

JOSHUA RUBENSTEIN: There is not really any defined trajectory towards law school; I think you can do virtually anything as an undergrad and put yourself in a good position if you want to go to law school. We accept people from a wide variety of concentrations - there is no one specific thing that you need to do. I'd strongly encourage people to go out and explore what they're passionate about. Those are the people we're looking for, people who have found something they're interested in, and through classroom, extracurricular, and work experience, show some dedication to that, as well as a natural trajectory to why law makes sense. There are a lot of reasons why to go to law school, especially at a place like HLS that is not strictly about law, but about leadership, creating change, and managing organizations, as well. You shouldn't go into a particular field because you think it will look good for law school. Making yourself prepared for law school and making yourself look good to an admissions committee involves picking something you're really interested in and getting really involved with that, both in and outside the classroom, and getting to the point where law is the logical next step.

*"There are a lot of reasons why to go to law school, especially at a place like HLS that is not strictly about law, but about leadership, creating change, and managing organizations as well."*

HERNANDEZ: That in mind, what would you say are the skills or attributes that are important to develop for a successful law school career?

RUBENSTEIN: We primarily look for two things: we want to know that you're going to be successful academically and that you have the ability and desire to have an impact in the world. We measure these things in a variety of ways. We assess your academic potential by looking at your prior performance in academic environments, your academic recommendations, your personal statement, and your LSAT score. No one factor is determinative here, it's more about what we can ascertain from all the information we have available. Regarding your ability and desire to have an impact, there are also a number of ways that we can gauge this. What we're really looking for is evidence that you've begun to develop strong areas of interest and that you've both taken on meaningful roles within those interest areas and created some positive change. You can demonstrate this through work experience and through extracurricular activities, as well as in the classroom. There's no right answer on this one.

HERNANDEZ: I've heard from undergraduate pre-law advisors that there has been a recent increase in admission of students who have had at least one year of work experience. First, would you agree that there is indeed a trend towards accepting older students with more work experience? Would you say there is a particular type of work experience common to most accepted student profiles?

RUBENSTEIN: We are increasingly taking a look at students who have had substantial work or graduate school experience following their undergraduate studies. While there is no particular type of experience we are looking for, I think there are a few reasons that we've recently taken a harder look at students in this group. First, students who have had some experience have had more opportunities to demonstrate an ability to have an impact; given our interest in this type of student, a shift to a more experienced student body only makes sense.

Second, we think that experienced students increase the diversity of perspective on campus. You get a lot of experience in college, but by doing things like getting a graduate degree or being part of the workforce you gain another perspective that enables you to contribute to the law school conversation in a different way.

Lastly, we've found that while virtually all of our students get great jobs upon graduating, prior experience can provide students with a leg up in getting the job of their dreams. Experience can help students develop a professional network before starting school, and employers like people who have some sort of

work experience on their résumé. That said we also love passionate, talented people who are coming straight from college. Thinking of who we've already admitted thus far this year, we have probably trended towards applicants with work experience a little bit more than we have in the past, but there are still a good number of students coming to HLS straight from college.

HERNANDEZ: Would you say there is any truth to the idea that an undergraduate 'must' write a thesis in order to be accepted into law school?

RUBENSTEIN: It's not true. There is no checkbox as to "did this person write a thesis." Again it gets to this ability to succeed academically and demonstrate the passion, desire and capability to create change. A lot of times a thesis will help you do those things: if you're doing very well in a particular subject matter often times the logical next step is to write a thesis, to get very involved in an area, to do the hard work and research and show the initiative to get involved in something where you can make a change. But it's by no means a requirement.

HERNANDEZ: Harvard's application season runs from September to February 1st. Would you say there are any advantages to submitting an application earlier rather than later during that timeframe, or vice versa?

RUBENSTEIN: It is rolling admissions, but we try to keep the bar as level as possible throughout the process. That being said I think there is an advantage to being earlier in the process. There are simply more spots available earlier in the application cycle; as we get further into the season (e.g. January & February) the number of spots available is much lower and oftentimes many talented applicants remain, so it can get somewhat more competitive. Again, we try to keep the bar level by holding spots in the class for later applicants, but at the margin it's probably better to be early.

HERNANDEZ: What factors influenced your decision to return to HLS and get involved in the admissions process just several years after graduation?

RUBENSTEIN: A big part of the reason I came back is because I really enjoyed my time here, and in this job you have the unique opportunity of serving as a connector between everything wonderful that's going on at this school and the very talented people that are coming here. I view my job as putting those people in touch -knowing everything that's going on here, talking to the admitted student, getting a sense of what they're interested in, and making sure they get in touch with the correct, for example, four faculty members and six students and two student organizations, etc. I really think HLS is an incredible place to go to law school and it's extremely enjoyable to get to show this place off to prospective students.

HERNANDEZ: One thing that I have heard repeatedly as being a reason for the lasting impression of HLS as such an incredible place is the diversity one finds here. Given the diverse backgrounds of all the students that attend HLS, in what ways would you say the school is maintaining a global focus in the way it educates its students? Are there any programs in particular that maintain a connection between HLS and other parts of the world?

RUBENSTEIN: There is a tremendous international focus at the law school. To start, as part of our new 1L curriculum, everyone now takes a course on international or comparative law. That's fairly unique – I don't know many other schools in the country that do this. We have sixteen faculty members who teach International or Comparative Law and many others who incorporate an International or Comparative perspective into their teaching. We have many study abroad options: we have seven formal programs, as well as programs where you can do an independent study abroad at any accredited law school. Every January during the J-term, ~100 students go abroad and do clinical work, during which time they actually work as practicing attorneys in countries around the world. Many of our clinics have an international component as well; our human rights clinic currently has students working in Brazil and China this semester. Our negotiation clinic is doing a project in Ireland right now, and has done projects in China and Nigeria in the past. Layer on top of that the LLM program we have for young practicing attorneys from foreign countries who want to come here and do a one year masters in U.S. law, after which many of them then return to their countries and continue to practice. It's an incredibly competitive program, much more so than the JD program even. This year there are 165 of them I believe, from 73 different countries: it's this huge body of international knowledge compiled right here.
In a conversation I recently had with Bill Alford, who is the Vice Dean for International Studies, he told me that a certain student came to him and said, "I want to work in Brazil." Now, Bill has been doing this forever and knows everybody there, so when a student goes to work there, he is able to find the, for example, 4 LLM students who are practicing attorneys in Brazil and set up a lunch for you with them. This enables you to talk to four leading young lawyers in Brazil who are then going to put you in touch with their respective networks. There's a tremendous opportunity there to meet people and to learn from others while you're here. He'll also put you in touch with the students one or two years ahead of you who have focused on that area or spent time there. So the people here are an incredible resource in this regard.
The other big international piece is that over 100 people here spend their summers abroad, generally fully funded if you're doing public interest work. This means that we'll help you find a job doing something anywhere in the world, and Harvard will pay you for it. There really is an international vibe to this place, in a way that I think would be hard to find at a smaller place, due to its scope. We also do a phone interview that allows for this conversation to happen one on one.

HERNANDEZ: Is the phone interview more with regards to an evaluative admissions process or for students to get their questions answered about the school?

RUBENSTEIN: I think it's both; it's evaluative, certainly. This year we asked three basic questions: why you're interested in law school, what you might want to do as a lawyer, and why you are interested in Harvard specifically. Part of this is to get a sense that you've thought these things through, and part of this is to be helpful to the candidate. Law school is an expensive investment and we want to make sure students have really thought through their decision to attend. The interview is also an opportunity to demonstrate that you can do a little homework, and that you can clearly and concisely communicate why you want to be here and what you might do with your degree. It's nice to see that people have done a little bit of research and have a sense about what makes this place so special and different from other law schools. Another purpose of the interview is to answer questions that candidates have. For example, many students are initially uncertain how to think about Harvard's relatively large size (although with only 550 students/class, we're still pretty small!). The size question is interesting because if you poke at that answer a little bit, and really question "what is it that worries you about size," you find that it has been really drilled into people's heads that Harvard is big, and you should be worried about that, when really, there is a low faculty to student ratio, over 150

small classes, small first year sections, and plenty of opportunities to carve out niches. So once you have this conversation and take apart these questions, it can really be useful in alleviating student's concerns.

HERNANDEZ: That brings me to my next question. Historically, there has been a criticism of Harvard class size as too big in comparison to other law schools, such as Yale. It seems to me that given a similar student-faculty ratio, a bigger class size would only be beneficial in that it would increase diversity. Are there any programs or statistics that you feel demonstrate the positive aspects of bigger class sizes?

RUBENSTEIN: We see our size as a big advantage. Harvard's size allows us to offer more opportunities than anywhere else: over 350 courses (over 150 with fewer than 25 students), 29 in-house clinics [clinics are opportunities to practice law in a given area under supervision from fulltime practicing attorneys], 16 student-edited journals, over 100 student organizations, and 18 research centers. In any area of law, there's a tremendous amount going on here and I think that really enhances our students' experiences. Elena Kagan, our former dean and now Solicitor General (at the time this interview took place, Elena Kagan had not yet been nominated for appointment to the Supreme Court), had a great metaphor where she described Harvard as the New York City of law schools. What she meant is that while you can do anything here, in virtually any area of law, most people actually carve out space in their own "neighborhood." For some students it's the Human Rights Program, for others it might be the Federalist Society or the American Constitution Society. Whatever your interest you are likely to find a niche, a group of 20-30 students with similar interests, and it is this group that will define your experience here. In this way, you get the benefits of small with the resources of big. You can come to Harvard and really have a small school experience day-to-day, while still having access to the most resources of any law school in the world. Interestingly the corollary isn't true – it's hard to make a small school bigger in terms of resources and opportunities.

HERNANDEZ: I think that's a very important thing to keep in mind as students weigh the benefits of varying class sizes, especially keeping in mind the actual differences in size between schools, something that is often misconstrued. It's not entirely accurate to even say that bigger is better, though in this case it definitely seems to be, because at 550 students per class, HLS is not even that much bigger. I'd like to take this chance to laud HLS a bit: it is no secret that it is an institution providing legal education to both today and tomorrow's most influential members of society. This said, I would imagine that HLS must have a clear-cut mission or goal of bringing about justice in the truest sense of the word. Are there any programs in particular that hope to further this mission of justice?

RUBENSTEIN: Dean Minow actually just gave a lecture on this topic, called Law School: the Past, Present, and Future of Legal Education. I'd highly encourage you to check that out. Briefly, there are many ways in which Harvard undertakes a justice mission. One clear example is through our 29 Clinical Programs, which span the widest possible range of practice areas. Our faculty and students are also extremely involved in working in the government. Right now, seven faculty members are on leave to work in the Administration down in DC, although many are soon returning. Many of our faculty members who are here full time also have connections to DC. Elizabeth Warren, for example, chairs the Congressional Oversight Panel, monitoring bailout funds. Inevitably, these faculty members bring in students to help, creating another opportunity for students to get involved in the big, front-page issues that are going on in the world right now.
We do believe here that it's a part of every lawyer's career to work in the public interest. One way this is expressed is through our 40-hour pro-bono requirement – interestingly, students tend to go far above the requirement with the average graduating student in 2009 performing over 500 hours of pro bono service during their time at HLS.

HERNANDEZ: One final thing I'd like to bring up is that although my impression has been that HLS has historically been very focused on legal theory and conceptual analysis, but I have recently been hearing a lot about programs that focus more on practical lawyering tools. I've heard great things about the 1L's winter class called problem solving, about the Legal Research and Writing Section, and even that you're bringing in actors to play out divorce arbitrations. Is this change from theoretical to practical aspects of what it's like to be a lawyer something that the administration has actively been focused on changing?

RUBENSTEIN: HLS has always been a place that has been focused not only on the theoretical aspects of law, but also the practical ones. There's a long history of HLS faculty working to practically apply their research – this dates all the way back to someone like Joseph Story who I believe was a Supreme Court Justice at the same time that he was Dean of the Harvard Law School. Recently, we've expanded the practice oriented aspect of our curriculum through our new Problem Solving Workshop. The idea here is that while much of law school is focused on Appellate Law, in practice cases don't come bundled up in nice little records where you can say, "these are the facts and let's argue about them," but rather they come to you as actually clients with actual problems. They don't say, "this is a property case," they say, "this is the problem, this is what happened, what should I do?" It's about taking a wider view outside of the classroom and looking at being a lawyer as being a problem solver.
For example, one of the exercises people found really engaging this year was writing a press release, where there's a product recall and you're representing the client throughout the recall. In order to cover the client legally, inevitably the lawyer is going to be involved in writing this press release. At this point in their legal careers, most people in this course have never drafted a press release. It's not necessarily a skill people would pick up in law school, so people love it. We also brought in a lot of practicing lawyers from the Boston area to get involved and talk about their experience and critique the efforts of the students.

HERNANDEZ: It's great to see that there are such strong connections between what the students are doing on a day-to-day basis and what they will be doing professionally once they graduate. It must create a real sense of community for HLS students once they go back out into the legal world. Dean Rubenstein, thank you again for taking the time to speak with us today. I have no doubt our readers will find this information extremely interesting and helpful. Hopefully some of them will be joining you at HLS in a few years!

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# Harvard College Law Review Interview: Karman Hsu

*HULR Correspondent Charles Hernandez interviews the UCLA Law School Director of Admissions*

*With its diverse academic programs, world-renowned faculty and innovative approach, UCLA School of Law is acclaimed as one of the nation's finest institutions. Focusing on an array of both established and more progressive fields, including tribal law, real estate law, sexual orientation law, business law, environmental law and policy, criminal law, international law, and intellectual property, the faculty provides an interdisciplinary legal education that uniquely prepares students for the challenges and excitement of a career in law. (www.law.ucla.edu).*
*UCLA School of Law is located in Westwood, California, and is ranked 15th by the U.S. News and World Report.*

LOS ANGELES – CHARLES HERNANDEZ: The following is an edited version of an interview that took place on August 11th, 2009. Ms. Hsu's statements were made with specific regard to the UCLA School of Law and all questions regarding other schools should be addressed to their respective admissions officers.

CHARLES HERNANDEZ: Considering that UCLA School of Law is less than sixty years old, what would you consider to be the factors that have most strongly influenced its success over such a brief relative period of time?

KARMAN HSU: The pioneering faculty, administrators and students helped springboard UCLA Law into the upper echelon of law schools. UCLA Law has a tradition of innovation. The Law School offers courses, programs, and specializations that deal with both traditional and contemporary issues. There are programs in Business Law and Policy, Public Interest Law and Policy, Entertainment and Media Law and Policy, and Environmental Law. At the same time, students can choose to participate in programs in Critical Race Studies, International Human Rights, or Law and Philosophy or research sexual orientation law and public policy through the Williams Institute.

> *«Part of the school's success is that it is cutting edge: UCLA Law is not afraid to be a pioneer.»*

Part of the school's success is that it is cutting edge: UCLA Law is not afraid to be a pioneer. For example, UCLA Law was one of the law schools to begin clinical programs. Some UCLA Law faculty are authors to books used in other law school clinical programs across the country. The School of Law has over 30 clinical programs. These programs offer training in practical/transferable skills with a focus on hands-on experience. This is accomplished through on the job, real world training in clinics that work with both simulated clients and live clients. In addition, what differentiates us is that we have skills based clinics such as our Deposition and Discovery in Complex Litigation Clinic or Mediation Clinic, in addition to specialization-based clinics. Some examples of our clinics are our Capital Punishment Clinic, Immigration Clinic, Jenkins International Justice Clinic, and our Environmental Law and Sports and the Law Clinic.

HERNANDEZ: How have the economic problems regarding the California state's budget affected the law school, and how will this impact both current students and prospective applicants?

HSU: UCLA Law is maintaining and exceeding current expectations. The Law School has hired new faculty, increased the number of classes, and added new curricular items to increase the student-faculty dynamic. An example of this would be the three small classes for the first year and new upper-level courses that meet at professors' homes. Courses such as these decrease the student-faculty ratio, which helps quell fear of attending a large school.

People who come from a large public institution as an undergraduate have a more intimate experience at this law school.

Last year, we saw a 23% increase in applications. We had 8,009 applications, an increase from 6,499 in fall 2007. This year, we received 8,255, the largest number of applications received in UCLA Law history.

HERNANDEZ: Do college graduates usually enter law school directly after graduation, or work first instead?

HSU: The average entering age of our matriculants is 25. Most of our students do take one to three years off between earning their Bachelor's degree and entering law school. However, from an admissions standpoint, we want students to apply to law school when they feel they are ready. We do not have a preference towards either an applicant who applies straight out of undergraduate school or after taking time off.

HERNANDEZ: Would you recommend

that students considering both law and business careers pursue a J.D.M.B.A degree?

HSU: This would be a question for the Career Services Office. One variable will be the type of work and employer the job seeker is looking for. Different employers may value professional degrees differently.

HERNANDEZ: Students who want to become doctors are pre-med and take science classes. Students who want to enter business are economics majors and take economics classes. What would you consider a good route for an undergraduate "pre-law" student?

HSU: We do not have a preference for any particular undergraduate major when evaluating applications. That being said, we do think it is important to take classes that focus on writing, critical and analytical thinking, research, communication skills, skills that are important in law school and the legal profession.

*"We are interested in admitting a diverse student body, diverse in viewpoints and perspectives and experiences."*

If you enjoy and plan to choose a major that doesn't necessarily stress these skills, then just be sure you use your elective choices to choose classes that do. Thus, we hope that you choose a major you will enjoy studying and not choose a major based on what you think a law school admissions counselor wants to see.

HERNANDEZ: Are certain majors viewed more highly by law school application committees than others?

HSU: As I said, there is no specific major we give preference to when evaluating files. What is more important are the specific classes you take. Traditionally, most of our applicants major in areas such as Political Science, History, English, Social Science. But again, we do not have a preference.

HERNANDEZ: What type of GPA and LSAT scores will an accepted applicant have?

HSU: Our accepted applicants have a wide range of GPA and LSAT scores. Because we take into consideration a broad range of factors aside from the academic numerical credentials, our 25th to 75th LSAT and GPA range is varied, which is 164 to 169 and 3.57 to a 3.88 respectively. Keep in mind we do admit those outside of this range as well.

HERNANDEZ: When do you recommend students take the LSAT, and how long would you recommend studying for it?

HSU: You should take the LSAT when there are minimal distractions in your life and you feel you have prepared as much as you can. You should always go into this exam assuming you will do the best you can and you are only going to take it one time. So take it when you have had enough time to study for it. Ideally, you would take it early enough such that if you were displeased with your score, you have the opportunity to retake it prior to applying to law schools.

How long you study for the LSAT is really up to you and should be determined by how you study best. Some people need to take a year to study for the exam, others will take much less time and feel just as prepared. You know best what will optimize your chances of doing well so listen to yourself.

HERNANDEZ: All GPA and LSAT statistics being equal, what factors would make an applicant more appealing to the admissions board? Would it be work experience, community service, on-campus extra-curriculars, and what would be some examples?

HSU: As mentioned, we do take non-numerical factors into consideration as well which is one reason why our 25th and 75th percentile range is so broad. We are interested in admitting a diverse student body, diverse in viewpoints and perspectives and experiences. Thus, we take into consideration other factors such as leadership abilities, community service, work experience, volunteer work, life experiences, programmatic contributions, to name a few. Keep in mind that a large number of our applicants fall within a similar GPA/LSAT range with similar majors from similar institutions. We are really looking for factors that make someone outstanding and unique. One example is someone who has held a leadership position such as student body president at their college. We would be interested in hearing about what their responsibilities were and what they accomplished in this position compared to someone who was an inactive member of a student organization at their college.

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# Harvard Freshmen Consider Their Futures in Law

*The Uncertain First Steps*

BY FABIOLA VEGA

One warm afternoon this past winter while sitting on a train going from Los Angeles to Orange County, I found myself eavesdropping on the conversation of three middle-aged lawyers sitting across from me. They talked candidly on several matters related to their firms, but kept coming back to one puzzling question: why do so many people go into law school without fully knowing their motivations for doing so? All three seemed to agree that young people go to law school without knowing exactly why they want to and as a result, they oftentimes find themselves hating it.

I sat silently in my seat, listening with rapt attention to every word they said. They did not pay any attention to me at all and in my old worn-out shoes and plain t-shirt they never could have predicted how interesting their conversation was to a young Harvard College freshman with aspirations to attend law school. I found myself asking: what does motivate students to attend law school or even consider attending law school?

As I discovered, very few students want "to be a lawyer." Rather, motivations for considering law school vary widely. Moreover, most freshmen are still only tentatively considering law school as they explore other options. For instance, Ivana Zecevic '13 is "feasibly sure" she wants to attend law school in the future, but she is still looking into potentially following a pre-med course. If she does attend, she says she wants to study law relating to human rights in order to positively impact peoples' lives. However, she would be open to other types of law if she finds something she is more interested in.

"I feel like it would enable me to make an actual change in the world policy-wise," she said about earning a law degree.

Similarly, Nicandro Iannacci '13 has considered law school, though he sees it as possible path to the government and political science fields.

"As someone who for a long time has had a passion for government and political science, law school seems like a logical step forward," he said.

He says he is excited at the prospect of learning both the philosophical and technical aspects of law. Although he emphasizes that he is not positive about law school, he is interested in constitutional law. He says that regardless of what career he ultimately chooses, he will always be subject to the law.

"The way I see it, the knowledge I would acquire in law school is useful to any citizen," he said.

While Zecevic and Iannacci consider law school in the hopes of working more in the public sector, Dona Ho'13 plans to major in economics and wants to do something related to business. Like the others, she too is not positive about law school; she says she is considering corporate law in case her plans in business do not work out.

On another spectrum, freshman Frankie Maldonado and Elston He are more positive about their future plans. Maldonado is "90% confident" that he will attend law school in order to help his community negotiate with the law. He says that dealing with the bureaucracy was the "biggest struggle" for him and his family when he was a child and that focusing on legal services would "marry" his public service with the practice of law.

"If I can help one person work through the law, then that's good enough for me," he said.

Elston He '13, unlike other students interviewed, says he is "100 to 105%" certain he wants to attend law school. He, who is positive he will concentrate in philosophy, plans to focus on constitutional free speech law, specifically related to First Amendment rights issues. He feels this is important because "free expression is the essential principle of an open society."

Clearly, most freshmen are still looking at different fields of study and possible future careers. Those who are considering law school offer their own compelling reasons for doing so. At this point, most students realize that there's more to attending law school than just emerging as a fierce lawyer ready to argue in the courtroom. Instead, it seems that students are realistically considering law school in order to focus on aspects of law that truly interest them.

*"I found myself asking: what does motivate students to attend law school or even consider attending law school?"*

# The Law School Admissions Process

*Tough Economic Times Lead to a Spike in Law School Applications*

BY MARC STEINBERG

In the summer of 2007, the United States was struck by the most devastating economic downturn in recent history. As the housing market collapsed and the financial sector tumbled, a sweeping tide of unemployment struck the country. With large corporations and small business alike being forced to close their doors, millions of Americans quickly found themselves without jobs and today the national unemployment rate has even reached double digits. This skyrocketing unemployment and devastated job market led many undergraduate students, professional employees, and laid off workers to pursue graduate degrees. In particular, law schools all across the country have experienced an unprecedented rise in the number of applications in the past two years.

The number of people taking the Law School Admissions Tests (LSAT) increased by as much as 20% at time during 2009. For example, in October of 2009, the LSAT reached an all-time high in terms of the number of test takers with a total of 60,746, representing a 19.8% increase in the year-over-year number of LSAT exams administered in October.

Increasing even more rapidly than the number of students taking the LSAT, however, is the number of law school applications being submitted. Some law schools have experienced enormous increases in the overall number of applicants such as Cornell University's Law School which saw the number of applications it received increase by over 44% in 2009. Although most people envisioned an upturn in the number of applicants to law and other graduate schools, few ever anticipated increases as substantial as this. Cornell University's Law School Dean of Admissions Richard Geiger recently stated in a New York Times article, "I'm a little thrown off by the fact that our increase is much bigger than expected. There's nothing big we're doing to explain that kind of increase."

Although not experiencing as drastic of an increase in the number of applicants as many of their peer institutions, Harvard Law School still witnessed a nearly 6% rise in application volume while Yale Law School saw a 2% increase in applicants.

> *"The number of people taking the Law School Admissions Tests (LSAT) increased by as much as 20% at time during 2009."*

These sharp increases in the number of people turning to law school represent a dramatic increase in the competitiveness of the job market. As more Americans are laid off, the number of qualified professionals competing for the ever-dwindling number of vacant opportunities increases, thereby leading to a greater level of competitiveness for employment opportunities. Consequently, many recent law school applicants have cited the desire to set themselves apart amongst an increasing pool of job applicants as their primary reason for returning to law school. Alternatively, many undergraduate students have turned to graduate school instead of seeking immediate employment with the hopes that in three years, the nation's job market will have improved greatly.

Even though many view law school as a safe haven from today's grim job market and an opportunity to enhance one's chances of eventually finding successful employment, some academics are cautioning students against rushing into a law degree. Vanderbilt University Professor Herbert Schlunk, for example, argues that attending law school often hurls students into a financial deficit from which they are unlikely to extricate themselves. Moreover, his research comparing law school graduates to their high-performing undergraduate counterparts indicates that only the most successful undergraduates who attend top-notch law schools have made an "acceptable investment" in his eyes.

Whether or not the decision to attend law school during the current recession turns out to be a profitable investment of time and money remains to be seen. What is certain, however, is that the current condition of the economy has induced a tremendous spike in the number of law school applicants which will likely continue for several years even after the economy begins to recover.

> *"These sharp increases in the number of people turning to law school represent a dramatic increase in the competitiveness of the job market."*

# On Compassion and Justice

*Less Emphasis Must be Placed on Incarceration in the Criminal Justice System*

BY SARAH MOLINOFF

An inmate at the State Correctional Institution (SCI) in Dallas, PA recently killed himself. Pennsylvania's Department of Corrections reported that a corrections officer found the body of Matthew Bullock, 32, at 6:15pm on August 24th. The press release did not mention that this death treads a fine line between suicide and assisted suicide, which is prohibited under Pennsylvania's homicide laws.

Just a few days after the death, disturbing letters began to arrive at Pittsburgh's Human Rights Coalition from other inmates at the prison, containing several allegations. These include that the guards had been encouraging Bullock to kill himself for several days, even though they knew that he was mentally unstable). Second, Bullock told the guards on morning duty that he was going to kill himself, and yet they still chose to move him that afternoon from a cell with a security camera to a cell without one. Third, the guards on the 2pm-10pm shift did not make rounds until around 6pm, when they found his dead body.

But why, should we trust inmates to provide accurate information about their guards? It is true that inmates who write such letters are generally those who have been failed most dramatically by the corrections system. Every week they speak out about assaults, intimidation, racism, and denial of medical and psychiatric care. Of course, some letters are suspicious, but most are simple reports of incidents or observations; being a criminal does not automatically induce pathological dishonesty. Often, prisoners simply want their voice to be heard. The Human Rights Coalition believed the letters about Bullock's so-called suicide because there were so many of them, and because they don't make wild claims about conspiracies. The letters were also not entirely shocking: not all prisons are as hellish as Matthew Bullock's, but considering the stories told by inmates, what is surprising is that so few people commit suicide successfully (many try swallowing razors or refusing food). Consider that Charles Graner, who was later convicted for his role in the Abu Ghraib torture scandal, had worked as a prison guard at SCI-Greene in southwestern Pennsylvania before his deployment to Iraq.

Why care at all about murderers who are provoked into killing themselves? Bullock was serving 20 to 60 years in SCI-Dallas for the third-degree murder of his pregnant wife, but there is nothing just, or American, about the guards' vigilante justice, no matter how much Rambo captures our imagination. There is nothing democratic about kicking someone while they are down. Justice is founded on the idea that we cannot do whatever we like with people, even if they are criminals. Human rights do not vanish at the prison gates.

Two consequences result from such abhorrent vigilantism. First, stories on prisoner abuse erode the community's trust in the system. Second, abuse in prison only causes re-incarceration. Within 3 years of release, about 7 in 10 males are back in prison, perpetuating a cycle of overcrowding, depleted resources, and substandard care. What prisoners need, instead, are vocational training, addiction programs, and humane treatment. It is far more desirable to teach an inmate a trade so that he can work and stay out of trouble when released, than to make him bitter and ready to re-offend through abuse and solitary confinement. This view is not incommensurate with the claim that prisons are also places of punishment, and that certain members of society must be kept away from others, but instead suggests that prisons should also be a place of second chances.

America has become unhealthily fixated on the imprisonment part of punishment. Being tough on crime has become a prerequisite to getting elected and prisoners are reduced to constituting the human price of the politician. Putting a price on human life, coupled with the racial disparity in incarceration, sends the message that we have returned to a 3/5 land. Ironic, then, that 5.3 million Americans can no longer vote, the equivalent of about 10 electoral votes. A full 13% of black men cannot vote. (This despite research that says participation in democracy leads to reduced levels of recidivism. Felons should be required to vote.) The problem, in other words, touches all levels of how society functions.

*"Being tough on crime has become a prerequisite to getting elected and prisoners are reduced to constituting the human price of the politician."*

Much-needed prison reform will come too late for Bullock, but it will come soon. Financial problems are now forcing corrections systems around America to change, so this is the time to push for the right kinds of changes. We need inmates to become contributing members of society through drug and alcohol treatment programs, vocational education, and the retention of human dignity. One should not have to scream to have a voice.

# Seeking Expertise

*How a Lawyer Can Win a Case with the Right Experts*

BY EMILY RUTTER

With the overflow of lawyers in today's job market, it is practical to have something that sets you apart from the rest: something that will make people in need of an attorney come to you. After attending a class at the University of Buffalo Law School, I learned how Michael Taheri, defense attorney and professor, uses experts to strengthen his cases. A panel of a retired policeman (now private investigator), psychologist, and forensic accountant joined Taheri to explain the importance of experts to piece together a case.

A team of experts is really ideal: when approaching different areas of a case, there will be fresh eyes and a new perspective on the case. The team of experts enhances the strength, accountability, and perceived validity of the argument. Experts are becoming increasingly more common in legal cases, especially because prosecution has several resources for experts to make their case. If defense attorneys fail to incorporate experts into their investigations, planning, and defense work, they will be at a disadvantage. As long as the experts involved are credible and skilled, there is no reason to not employ them in a legal case. The importance of the use of experts for legal cases also exposes the amount of preparation that goes into a case, especially before court. Taheri, who handles white-collar crime, often takes on clients that are not very honest. In the face of this dishonesty, lawyers must rely on help to try to find the truth, or a way to defend the client. Experts can serve several purposes. While experts can testify in court, they also can help gather information about the client and the situation, give expert opinions, and give a set of questions to cross the opposing experts with. Experts help the lawyer investigate the surrounding facts of the case, such as interviewing family members, coworkers, other suspects, and any other people that would contribute to piecing together the facts. All three experts that work as part of Taheri's team talked about their contributions to his cases and spoke about how interesting it is to work together but approach a case from several different disciplines. Private investigators, especially retired cops like the man I saw, have several connections within and outside police forces; they know the law and proper procedures of police investigations. They are also usually skilled in doing interviews and background work. Psychologists are very valuable for defense teams because insanity is a type of defense. Psychologists help the lawyer and the court understand the client's background and perhaps find reasons for the client's behaviors, as well as a safe course of investigation, trial, and consequences. Forensic accountants help white-collar criminal defense attorneys significantly: their years of education have given them knowledge to investigate bank statements and accounts, which the lawyers probably do not understand themselves.

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Taheri described how everybody's opinion on his team is valued. He simplified the process of formulating a case with experts' help for his class: "You need to get everybody's input- what to think, what to do. Hear everybody's situation and then start to pull it back to the elements to see how it best fits. Don't disagree with the experts' findings…Plug it into the elements of your case." Taheri emphasized how each person from the team has a unique perspective of the case at hand. Together, hopefully, lawyers find something from their collaborations that they can incorporate into their cases and trial work.

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# Little Pink House

*A Review of the Work by Jeff Benedict*

BY SARAH MOLINOFF

Author Jeff Benedict seems fond of the kind of history that approximates the dramas of John Grisham. His previous books include Out of Bounds: Inside the NBA's Culture of Rape, Violence, and Crime; Pros and Cons: The Criminals Who Play in the NFL; and Public Heroes, Private Felons: Athletes and Crimes Against Women. The R-rated titles are enough to make one pause, but his exploitative sensationalism soon becomes tiresome in the actual text. At least, that is what happens in his new book, Little Pink House: A True Story of Defiance and Courage.

The book recounts the 2005 Supreme Court eminent domain case of Kelo v. City of New London. The story begins in 1997, when Susette Kelo, a plucky red-haired woman who has not had the best luck in life, leaves her second husband to buy a little waterfront cottage that has fallen into such a state of disrepair that no sane person would ever buy it. She throws herself into rehabilitating the cottage, and through her labor comes to love her new home, an obvious symbol of her self-reliance and independence.

All is well and good until Dr. Claire Gaudiani, president of both Connecticut College and the recently revitalized New London Development Corporation (NLDC), decides that the city and state will benefit from selling a vacant, environmentally hazardous piece of waterfront land to the pharmaceutical company Pfizer. But Pfizer needs more land and the various parties involved – NLDC, City Hall insiders, and Governor Rowland – fight either directly or through various channels to obtain and raze the houses that stand in their way, including Kelo's pink cottage. Kelo loses the long battle after the Supreme Court decides that the fifth amendment, which reads "nor shall private property be taken for public use, without just compensation," did not protect her house because having Pfizer in the neighborhood would bring significant tax revenue to the poor city, and the revenue counted as public use.

The story is framed as a fight of opposites: the big and bad (Pfizer and NLDC) versus the downtrodden but courageous (Kelo and her community), a new development versus a historic pink cottage. Everyone plays his or her role perfectly. The reader is even encouraged to think of the story in Hollywood terms; before the introduction, Benedict provides a handy "Cast of Characters" section with all the important players grouped into "The Principals" or "Supporting Cast."
Speaking of roles, Susette's hair deserves mention as a supporting cast member. In the middle of describing her work as an EMT, Benedict writes, "Susette had her long red hair pinned up in a French twist. Her form-fitting, navy blue uniform stuck to her tall, slender figure as she grabbed an oxygen bag, a heart monitor, and the drug box from the truck." Susette's first marriage, Benedict implies, resulted from her pregnancy at age 16, and disintegrated after 5 kids. Leading up to her second marriage, he writes, "At thirty-one, Susette had a body that defied the fact that she had delivered five children. Her fiery red hair ran all the way down to her waist." Such irrelevant details spice up the story but do not make for convincing legal history.

A more serious problem comes from framing the story in absolute terms of good and bad. Kelo enlisted the help of community activists whose outrage grows proportionally to the severity of Claire Gaudiani's stubbornness and the frequency of NDLCs intimidation tactics. One of them, Kathleen Mitchell, "vowed to take a street fighter's approach to the NLDC," and used her weekly show on New London's public-access station to try to blacken Gaudiani's reputation, at one point calling her a transsexual. She refused to apologize for the remark. Later, another community activist calls Gaudiani a "ho," and a resident calls one of the excavators a Nazi. It was recently reported that Kelo and Mitchell sent bizarrely vindictive 2009 Christmas cards to all their old adversaries, so the childish name-calling apparently continues. (The poem inside each card features such lines as I curse you all / May you rot in hell / To each of you / I send this spell / For the rest of your lives / I wish you ill. A bit steep.)

It is easy to understand why the city's attorney, Londregan, resented Kelo's lawyer Scott Bullock for trying to fight in the public arena instead of in the courts. Bullock knew his only chance was to educate the public on the consequences of eminent domain abuse, and he and his colleagues at the Institute for Justice did an incredible job. His efforts resulted in post-trial campaigns (such as the Institute for Justice's "Hands Off My Home") in many states to limit eminent domain, and forty states passed laws making it tougher for companies to seize private property. This is perhaps the greatest lesson of the book: the Court's decision was only a midpoint in the fight, which continues to this day.

In spite of the book's obvious intentions, I occasionally found the name-calling tactics and Kelo's poor choices (who would buy such a house?) frustrating enough to switch allegiances and root for Pfizer and Claire Gaudiani, who is portrayed as a heartless socialite/developer. These are certainly not the reasons the Court had for deciding in favor of the city, but it is unclear if the author, who seems to think the Courts should just always vote in favor of the good guys or the underdog, considered this. The bias towards Kelo and the other good citizens is so pervasive that after reading the book it's almost hard to believe that justices make their decisions based on their interpretations of the Constitution.

At any rate, the decision was met with uproar. Unlike Roe v. Wade, which revealed a division between those who were pro-life and those who were pro-choice, Kelo v. City of New London inspired "universal outrage" and "galvanized almost unanimous anger toward the Court." In her dissenting opinion, O'Connor's writes,

"Any property may now be taken for the benefit of another private party. But the fallout from this decision will not be random. The beneficiaries are likely to be those citizens with disproportionate influence and power in the political process, including large corporations and development firms. As for the victims, the government now has license to transfer property from those with fewer resources to those with more."
O'Connor also takes an example straight from Bullock's brief. "The specter of condemnation hangs over all property. Nothing is to prevent the state from replacing any Motel 6 with a Ritz-Carlton, any home with a shopping mall or any farm with a factory."

I do not wish to misrepresent the book. It is not packaged like a serious legal history, but a comprehensive blockbuster. For those who appreciate human interest stories, it gets the job done though the summary of the Supreme Court decision deserves more than a scant half-chapter. And there is something reassuring about finding a human narrative in such a complicated case. As Publisher's Weekly said in its review, it is a "page-turner with a conscience." Running through the book is a sense of urgency about the outcome of the case and what it means for today's homeowners. At the same time, the problem is an old one, and in the introduction the author quotes Sir Edward Coke, who wrote, "A man's house is his castle – et domus sua cuique est tutissimum refugium." Benedict gives a translation of the less famous second part, which reads, "and where shall a man be safe if it be not in his own house?" Where, indeed.

An absurd postscript to the story: In November, 2009, Pfizer announced that it is leaving its New London, CT headquarters, and will be moving most of the employees to nearby Groton. The headquarter buildings are beautiful but nearby is the desolate wasteland that was once the historic Fort Trumbull neighborhood where Kelo lived. Almost ten years of fighting, and nothing was ever built on the land.

# Pre-Law Advice

*Benny Belvin*

March 6, 2010

On March 6, 2010, Benny Belvin shared with Harvard undergraduates some insight about law school and law school admissions. Currently a pre-law advisor from the Office of Career Services, Belvin has worked at several other locations but appreciates how Harvard has so many resources for students who are interested in attending law school. These include workshops, online resources, advising, entrance statistics, and of course much more.

Belvin advised prospective law students to maintain a high GPA, achieve a good LSAT score, and write a strong personal essay. Although extracurricular activities are secondary to these elements, it is important to have leadership and public service experience. In terms of course work, one should take classes that develop logic skills and reading comprehension. Talking to those who currently work in the field of law would also be helpful in determining whether or not law is right for you. For more information on law school admissions, you can visit the Office of Career Services at 54 Dunster Street.

# A Unique Path

*Essence Mcgill Arzu*

March 31, 2010

The Harvard College Law Society had the pleasure of hosting Essence Mcgill Arzu, Harvard College graduate and Columbia Law School graduate, to the ongoing Speakers Series on March 31, 2010. Mrs. Arzu detailed her experience with law school and her experience in corporate law, all the while providing nuggets of helpful advice. Bemoaning that an astronomical percentage of law school students do not end up practicing law, Mrs. Arzu told students about her journey to law, inspired by her work in a law firm in New Jersey after college working on environmental issues, and how students should learn all they can before deciding on law as a career path. She suggested shadowing, internships, and participating in organizations like HCLS as ways to gauge one's interest in law.

After law school, where she focused on international and corporate work and where she was a completely new way to look at the world, she worked in a mid-sized law firm in New York City and was sent to Moscow to work. She relayed that she was able to combine her love of the law and Slavic languages (her major at Harvard College). Now, she is a partner in a Boston law firm, focusing on merchant acquisitions, debt financing, and work with non-profits. She advocated finding a sector of law that fits with one's personality: her personality is not strategic and adversarial, one compatible with litigation, but it is rather compromising and thus she selected corporate law.

She ended by expressing the unifying themes of all lawyers and expressed why HCLS compers are interested in law. Lawyers analyze legislatures' laws, weigh costs and benefits, express findings to other parties, and ultimately help people.


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# barely legal?


**introductory meeting**
**wednesday**
**September 15, 2010**
**time: 9:00pm**
**location: ticknor lounge, boylston hall**

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